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IN THE SUPREME COURT OF THE STATE OF MONTANA

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

No. DA 19-0089

Case Number: DA 19-0089

BILLY JOE WATTS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

FILED

JUN 21 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, the Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES

Did the district court err in a) failing to address allegations or hold a hearing on ineffective assistance of counsel; b) failing to find ineffective assistance of counsel, thus warranting relief; c) applying severance to a criminal statute retroactively?

STATEMENT OF THE CASE

Billy Joe Watts was convicted of Felony PFMA in two district court proceedings; BDC-2014-280 and CDC-2012-1025. Watts entered a guilty plea in BDC-2014-280 on December 18, 2014, and admissions to the Petition to Revoke in CDC-2012-215 on the same day. After Watts had entered a guilty plea and an admission, in both cases, through the same counsel, he filed motions collaterally attacking the constitutionality of the PFMA statute and his prior convictions of that offense.

On July 28, 2015, Watts was sentenced to 5 years MSP on BDC-2014-280 to run consecutively to the sentence in CDC-2012-215. In CDC-2012-215, the Court revoked Watts' suspended 5 year DOC sentence and sentenced him to 5 years MSP.

Both convictions were appealed to the Montana Supreme Court. DA 15-0628 (CDC-2012-215) was dismissed by stipulation of the parties on January 5, 2017. In DA 15-0645 (BDC-2014-280) the Montana Supreme Court affirmed his conviction. State v. Watts, 2016 MT 331, 386 Mont. 8, 385 P.3d 960.

On March 2, 2018, Watts filed a Petition for Post-conviction Relief, alleging ineffective assistance of counsel (IAC). This petition was drafted with the assistance of counsel acting under a limited scope representation pursuant to Mont. R. Prof. C. 1.2(c). The DC Case No. is CDV-2018-171, Petition is Doc. 1.

The State of Montana responded on August 17, 2018 (CDV-2018-171, Doc. 9). As a pro se litigant, Watts was unaware of procedure or his ability to file a response and did not do so.

On January 28, 2019, the Court issued its Order on Petition for Post-conviction Relief, denying all relief. (See Appendix A) From that decision Petitioner now appeals.

STATEMENT OF THE FACTS

Watts was arrested on June 23, 2014 and charged with Partner or Family Member Assault (5th), a felony. At the time of his arrest, Watts was on supervision by the Department of Corrections for a 2012 PFMA, for which he was sentenced to five (5) years DOC, all suspended.

Watts was appointed counsel and was represented by Mariah A. Eastman (Eastman), acting as a contract attorney for the Montana Office of the Public Defender.

Eastman advised Watts to enter a plea of guilty on the new charge and to "admit" to the violations alleged in his petition to revoke in exchange for an "Open plea deal" in which the State would drop the persistent felony offender (PFO) designation and the parties could argue their sentencing recommendations to the Court. This plea agreement was filed on December 18, 2014.

On February 23, 2015, Watts was shown several documents by another inmate at the county jail including the Montana Law Review article "Examining Montana's Right to Attack

Unconstitutional Prior Convictions at Sentencing; State v. Maine", 74 Mont. L. Rev. 183 (2013), and an order out of the Montana Nineteenth Judicial District Court case DC-12-63 (State v. Dale Miller), in which Judge Wheelis determined the pre-2013 PFMA statute to be unconstitutional.

Watts' sentencing hearing was scheduled for the next day, February 24, 2015. Watts informed Eastman of what he had found and provided her with copies of the documents. Sentencing was continued so the parties could "brief" the issue. Eastman filed a motion to dismiss the unconstitutional prior conviction in BDC-2012-215 and to reduce the current charge in CDC-2014-280 to a misdemeanor.

The motion was denied and Watts was subsequently sentenced to a total of ten (10) years in prison.

Watts appealed both cases and was appointed Moses Okeyo of the State Office of the Appellate Defender. On appeal Okeyo argued that the pre-2013 PFMA statute was unconstitutional, although Watts had already waived the right to challenge the defect as a condition of his plea agreement. The Montana Supreme Court affirmed the conviction on the grounds that Watts had waived the right to challenge the constitutionality of the statute as Okeyo had done. State v. Watts, 2016 MT 331.

STANDARDS OF REVIEW

The following standards of review apply in this case:

"We review a district court's denial of a Petition for Post-conviction Relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct." Jordan v. State, 2007 MT 165, ¶5, 338 Mont.

113, 162 P.3d 863. "Discretionary rulings in postconviction relief proceedings, including rulings relating to whether to hold an evidentiary hearing, are reviewed for abuse of discretion." State v. Sullivan, 285 Mont. 235, 239, 948 P.2d 215, 218 (1997); Heath v. State, 2009 MT 7, 348 Mont. 361, 202 P.3d 118; and Beach v. State, 2009 MT 398, 353 Mont. 411, 220 P.3d 667. "Ineffective assistance of counsel claims, however, constitute mixed questions of law and fact for which our review is de novo." Weaver v. State, 2005 MT 158, 327 Mont. 441, 114 P.3d 1039; Whitlow v. State, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it failed to address Petitioner's IAC claims, and when it failed to hold a hearing on the issues raised. The court erred when it failed to grant petitioner relief or allow him to withdraw his plea based on IAC. The court's findings were clearly erroneous and unsupported by the record. The court incorrectly applied controlling law and failed to adhere to precedent as set forth by the Montana Supreme Court. While this matter should be remanded with instructions to apply the controlling law, the record clearly establishes, and the principle of judicial economy dictates, that relief is warranted.

ARGUMENT

- I. The district court abused its discretion when it failed to address and/or inadequately addressed Petitioner's claims of ineffective assistance of counsel.

It is error for a district court to fail to address claims

of inadequate assistance of counsel. In Heath v. Montana, the Montana Supreme Court stated, "The District Court also failed to address a number of Heath's claims of inadequate assistance of counsel. We remanded for an evidentiary hearing in Williams v. State, 2002 MT 189, 311 Mont. 108, 53 P.3d 864, where the district court's order failed to address all of the petitioner's inadequate assistance claims. We stated that it was "unclear," based on the district court's order, whether the court "even considered Williams' additional claims." Williams, ¶26. Heath likewise is entitled to have his additional issues "independently considered." Williams, ¶27." Heath, ¶26. As set forth below, the district court in this matter failed to address multiple claims of inadequate assistance of counsel.

The district court erred when it failed to address numerous examples of ineffective assistance presented through the Petition for Post-conviction Relief.

The district court restates the specific allegations of IAC as follows, but fails to address any of them:

1. Eastman was ineffective for not preserving his right to challenge the constitutionality of the prior PFMA statutes; (PCR Petition, CDV-2018-171, Doc. 1, ¶12, ¶26-52)
2. Eastman was ineffective in allowing him to plead guilty before investigating the applicable law and challenging the PFMA statute; ('' ¶12, ¶26-52)
3. Eastman was ineffective in failing to include a request that Watts be allowed to withdraw his guilty plea (because of the infirmity of his earlier convictions); ('' ¶13, ¶26-52)
4. Okeyo was ineffective in failing to raise a record-based claim of ineffective assistance of counsel and to challenge Petitioner's plea; ('' ¶14, ¶53-90)

5. Okeyo was ineffective in failing to challenge the denial of Watts' motion to dismiss, specifically the conclusion regarding severance of the unconstitutional language within the PFMA statute; and ('' ¶15, ¶53-90)
6. Okeyo was ineffective in failing to anticipate and raise the issue that Watts had waived his right to appeal due to Eastman not moving to withdraw his guilty plea. (¶16, ¶53-90)
- *7. Okeyo was ineffective for failing to challenge the voluntariness of Petitioner's guilty plea and admission to the petition to revoke. ('' ¶54(b), ¶53-90)
(*This allegation was not restated or addressed)

None of the IAC allegations set forth above were considered or addressed by the district court in this matter. This is clear error under Heath, Williams, and Beach, cited above. At the very least this matter should be remanded to the district court so that Petitioner's lengthy and detailed IAC allegations can be heard. As addressed below, however, the Montana Supreme Court has the authority, in its de novo review of the matter, to simply find that defense counsel was ineffective as a matter of law and order a new trial. Judicial economy suggests that this would be the most appropriate course.

- II. The district court abused its discretion when it failed to hold a hearing on Petitioner's claims of ineffective assistance of counsel.

The Court reviews "discretionary rulings in post-conviction relief proceedings, including rulings related to whether to hold and evidentiary hearing, for an abuse of discretion." Heath, ¶13. "A court may dismiss a petition for post-conviction relief without ordering a response if the petition, files and records 'conclusively show that the petitioner is not entitled to relief.' Alternatively, a district court may order a response and, after reviewing the response, 'dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue." Id., ¶16 (citing Mont.

Code Ann. § 46-21-201(1)(a); Herman v. State, 2006 MT 7, ¶15, 330 Mont. 267, 127 P.3d 422). Additionally, the Court has remanded for an evidentiary hearing in cases where the Court is "unable to glean from the District Court's skeletal order its legal conclusions and the facts on which it based those legal conclusions that lead to deny [Petitioner's] petition for post-conviction relief." Beach, ¶51.

As set forth below, the district court's failure to hold a hearing in this matter constituted an abuse of discretion.

This Court has remanded for an evidentiary hearing in cases "where the district court's order failed to address all of the petitioner's inadequate assistance claims" or when, "it was 'unclear,' based on the district court's order, whether the court 'even considered [Petitioner's] claims.'" Heath, ¶26; see also Williams, ¶¶24-26.

Here, the district court's Order on Petition for Post-conviction Relief does not address any of the allegations of IAC made by the Petitioner. The district court makes the conclusory claim that "Here, there is no probability that, but for the errors claimed by Watts, the results of the proceeding would have been different.", and provides no analysis. The Court simply restates the findings in State v. Theeler, 2016 MT 318, 385 MT. 471, 385 P.3d 551, applies them retroactively to Watts' prior convictions, and states the retroactive application of Theeler as the rationale for denying Watts' petition.

There are no affidavits from Eastman or Okeyo to shed light on the many areas in which their performance as counsel is

challenged. Therefore, an evidentiary hearing is necessary to establish why Eastman did not preserve Watts' right to challenge the constitutionality of the pre-2013 PFMA statute in the context of State v. Maine, 2011 MT 90, 360 Mont. 182, 255 P.3d 1078, to Watts' prior convictions. Preservation of this right would have allowed it to be addressed on direct appeal. An evidentiary hearing would establish why Eastman did not move to withdraw Watts' plea of guilty immediately after learning that the prior convictions were subject to collateral attack and likely constitutionally infirm. A hearing in this matter would establish whether or not Eastman was aware that the PFMA statute was amended in 2013 because it contained an unconstitutional definition of "partner". (See CDV-2018-171, Doc. 1, ¶¶36-41) A hearing would establish why Okeyo, on direct appeal, did not raise ineffective assistance of trial counsel, the only argument Watts had not waived as a consequence of his plea agreement.

III. The district court erred when it failed to grant Petitioner relief, or let him withdraw his guilty plea based on ineffective assistance of counsel.

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. This Court has adopted the two-prong approach set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), when deciding IAC claims. State v. Harris, 2001 MT 231, ¶18, 306 Mont. 525, ¶18, 36 P.3d 372, ¶18. Under the Strickland test, a claimant must show trial counsel's performance was prejudicial. See State v. White, 2001 MT 149, ¶11, 306 Mont. 58, ¶11, 30 P.3d

340, ¶11. The Strickland test is a two-part test. "A defendant must satisfy both prongs of this test in order to prevail on an ineffective assistance of counsel claim." Adams v. State, 2007 MT 35, ¶22, 336 Mont. 63, 153 P.3d 601, ¶22.

In explaining the first prong, the Supreme Court stated that "[when] a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." -Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064. Further, "in any case presenting an ineffectiveness claim, the performance inquiry must be 'whether counsel's assistance was reasonable considering all circumstances'." Whitlow, 2008 MT 140, ¶14, 343 Mont. 90, 183 P.3d 861 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2064-65). The Supreme Court in Strickland also stated: "Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgment support the limitations on the investigation. In other words, counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." Strickland at 690-91. Further, Strickland created a standard by which a court reviewing an IAC claim "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance," and the defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. This Court in Whitlow clarified this portion of Strickland, which imposed a presumption that a challenged action might be considered sound trial strategy. "The question is not merely whether counsel's conduct flowed from strategic decisions and trial tactics, but, rather, whether it was based on 'reasonable' or 'sound' professional judgment." Whitlow, 2008 MT 140 at ¶19. "Furthermore, the fact that counsel's challenged conduct may be categorized as 'strategic' or 'tactical' does not necessarily mean that the conduct was objectively reasonable." Id. at ¶18. The second prong of the Strickland test addresses the prejudicial impact of counsel's errors, and the defendant must demonstrate the existence of a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome. When a defendant challenges a conviction, the defendant must show the fact finder's reasonable doubt respecting guilt could have been routed by the unprofessional errors of counsel. In making this determination, a court must consider the totality of the evidence before the judge or jury." Harris at ¶19.

When a petitioner "has established both error and prejudice under the Strickland test for ineffective assistance of counsel," the Court has reversed the petitioner's conviction and remanded for a new trial. State v. Rogers, 2001 MT 165, ¶23, 306 Mont. 130, 32 P.3d 724 (overruled on other grounds by Whitlow, ¶13).

The record in this matter clearly establishes that counsel for the Petitioner did not provide adequate assistance in numerous instances, and it was error for the district court to find otherwise.

A. The district court's findings are clearly erroneous.

A district court's findings are clearly erroneous if (1) the findings are not supported by substantial evidence; (2) the findings are supported by substantial evidence, but the trial court misapprehended the evidence; or (3) "a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. Dawson v. State, 2000 MT 219, ¶18, 301 Mont. 135, 10 P.3d 49. Here, the district court made numerous errors.

1. The district court makes precisely one finding of fact, unsupported by evidence.

On page 2, ¶2, of the Court's order, it states "here, there is no probability that, but for the errors claimed by Watts, the results of the proceeding would have been different." (See Appendix A)

The Court does not say which proceeding, but goes on to cite Theeler. This Court held in Theeler that the "unconstitutional provision" was unnecessary "for the integrity of the law." and could be severed so as to construe the statute "in a manner that avoids unconstitutional interpretation." Theeler, ¶14.

The district court cites the actions by the Montana Supreme Court in Theeler's direct appeal as applicable to Watts' prior

convictions.

Theeler and Watts are distinct in that Theeler challenged the unconstitutional PFMA statute on direct appeal whereas Watts was unable to challenge the effect of his constitutionally infirm prior convictions due to ineffective assistance of counsel.

Had Eastman preserved Watts' right to challenge the priors, Okeyo could have done so. Eastman however, did not preserve that right, so Okeyo's only recourse was to claim ineffective assistance of trial counsel, but he failed to do so. Instead, he chose to make the constitutional challenge that Eastman had precluded him from making.

It is therefore impossible for the district court to predict the outcome of the proceedings had Eastman preserved Watts' right to challenge the constitutionality of the prior PFMA convictions. It is likewise impossible to predict what could have happened had Okeyo claimed that Eastman was ineffective for failing to preserve Watts' right to challenge the priors.

The distinctions between Watts and Theeler are enough to establish a "reasonable probability" that the outcomes would have been different had it not been for the errors claimed by Watts in his postconviction petition.

The impossibility of predicting the outcome of the proceedings had Eastman and Okeyo not committed the errors complained of by Watts is enough to establish a "reasonable probability" that the outcomes would have been different.

The district court's use of Theeler in this context is tenuous at best.

B. The district court incorrectly applied controlling law.

In order to succeed on a claim of IAC, Petitioner must show "that counsel's performance was deficient," and "that the deficient performance prejudiced the defense." Whitlow v. State, citing Strickland v. Washington, citations above. "[T]he measure of attorney performance remains simply reasonableness under prevailing professional norms." Whitlow, ¶14. In order to show prejudice, Petitioner must show that "a reasonable probability exists that the result of the proceeding would have been different had counsel not performed ineffectively. A reasonable probability means a probability sufficient to undermine confidence in the outcome, but does not require that a defendant demonstrate [he] would have been acquitted." State v. Elliot, 2005 MT 10, ¶8, 325 Mont. 345, 106 P.3d 517. "[T]he appropriate standard of prejudice should be somewhat lower" for IAC claims than for newly discovered evidence claims. Strickland, at 694. Here the district court incorrectly applied controlling law.

1. The district court erred when it applied State v. Theeler.

As stated above, Theeler challenged the unconstitutional provision of the statute he was convicted under on direct appeal of that conviction. This is a much different circumstance than in Watts. Watts' appellate counsel attempted to challenge the state's use of Watts' prior convictions obtained under the same statute, used to enhance the conviction he was appealing.

Also, significantly, Watts' appellate counsel was precluded from effectively making that challenge as the direct result of the actions and omissions of Watts' trial counsel.

The district court's failure to recognize the above distinction is error.

2. Under the standards established by *Strickland v. Washington*, defense counsel failed to provide Petitioner with adequate and reasonable representation at every level of the proceedings.

Adequate representation under the U.S. Constitution cannot mean merely presenting your client with a plea agreement.

When Eastman failed to preserve Watts' right to challenge the constitutionality of the prior PFMA convictions, or when she failed to request Watts be allowed to withdraw his plea, she could not be said to be employing "strategy" or to be acting in the best interest of her client because neither of these omissions, on their face, are strategic or beneficial.

When Okeyo failed to recognize the only argument available to him; ineffective assistance of trial counsel, his representation ceased to be reasonable or adequate. He pushed on arguing defects that had already been waived.

The district court failed to address these or any other allegations of ineffective assistance in Watts' postconviction petition.

IV. The district court erred when it applied the severance used in *Theeler* retroactively to avoid reaching the merits of Watts' IAC claims.

- A. The district court's retroactive application of severance violates this Court's holding in *State v. Maine*.

In Montana, it is "well established" that the state cannot use a constitutionally infirm conviction to support an enhanced punishment. *State v. Haas*, 2011 MT 296, ¶14, 363 Mont. 8, 265 P.3d 1221 (Citing *Maine*, ¶28)

In citing Theeler, the district court implicitly agrees with the rationale set forth by the Montana Supreme Court that the "opposite sex" provision was unconstitutional and must be stricken.

The use of a constitutionally infirm conviction to enhance a sentence amounts to sentencing based on misinformation, which is prohibited by the Due Process Clauses of Article II, §17 of the Montana Constitution. Haas, ¶14 (Citing Maine, ¶28). This Court has previously vacated a felony DUI sentence based on constitutionally infirm prior convictions. Haas, ¶30. An infirm conviction invalidates the entire sentence. Bingham v. State, 2005 MT 272, ¶12, 329 Mont. 151, 122 P.3d 1235.

"Affirmative evidence" is defined as evidence "demonstrating that certain facts actually ... existed at some point in the past." Haas, ¶16.

This Court's severance of the unconstitutional provision in Theeler is affirmative evidence that the statute used to convict Watts of his prior PFMA offenses was indeed unconstitutional.

By citing Theeler and applying it retroactively, the district court implicitly acknowledges that Watts' prior convictions are constitutionally infirm.

If Watts' prior conviction were not infirm, there would be no need to sever the unconstitutional provision from the statute used to obtain the convictions.

The district court's reliance on Theeler to cure the constitutional infirmity of Watts' prior convictions violates this Court's holding that the state cannot use a constitutionally infirm conviction to support an enhanced punishment. Haas, ¶14, citing Maine, ¶28.

When the state is seeking sentence enhancements based upon infirm convictions, the proper remedy is for the lower court to exclude any constitutionally infirm convictions from consideration at sentencing. See State v. Okland, 283 Mont. 10, 15, 941 P.2d 431, 434 (1997) ("It is beyond dispute that the state may not use a constitutionally infirm conviction to support an enhanced punishment.") Striking language from a statute that is no longer in effect does not suffice, especially here, where the state sought to enhance punishment using prior convictions obtained pursuant to a demonstrably unconstitutional statute. It is illegal and impermissible for a district court to sever, or excise the offending language from an unconstitutional statute and then use the resultant, mutant law to establish whether a defendant would have been convicted of a crime.

The only remedy that would cure the equal protection violation in Watts' prior convictions is remanding the matter back to the district court with instructions to reduce the charge against Mr. Watts to a misdemeanor PFMA.

B. The district court erred by failing to reach the merits of Watts' IAC claims.

When the district court failed to address Watts' claims of ineffective assistance of counsel based on its unlawful retroactive application of Theeler, it violated Watts' right to due process and the prohibition against the application of ex-post-facto laws. (See Article II, §§ 17, 31, of the Montana Constitution and §1-2-109, MCA.)

Article II, §14 grants Mr. Watts the right to due process. Watts' due process right to have his IAC claims heard was denied when the district court applied Theeler retroactively.

In Theeler, the Montana Supreme Court severed the unconstitutional provision of the PFMA statute and applied it to the conviction that was on direct appeal.

In this case, the district court severed the unconstitutional provision of the PFMA statute to apply retroactively to Watts' prior convictions.

§1-2-209, MCA, states:

"No law contained in any of the statutes of Montana is retroactive unless expressly so declared."

In amending the pre-2013 PFMA statute by removing the unconstitutional language to make it identical to the 2013 statute, and then applying it retroactively, the district court violated §1-2-209, MCA, and in doing so, violated Watts' right to due process by denying his IAC claims based on that retroactive application of the amended law.

On these grounds, this case should be remanded back to the district court with instructions to consider the IAC claims in the light of State v. Maine.

CONCLUSION

Mr. Watts respectfully requests this Court reverse the denial of his Petition for Post-conviction Relief and remand to the district court with instructions that Watts' charge be reduced to a first PFMA offense, a misdemeanor, or in the alternative, to address the IAC under the correct applicable law as this Court sees fit.

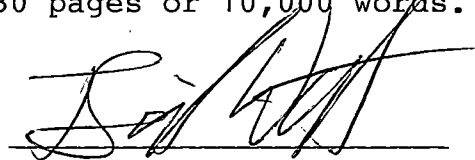
Respectfully submitted this 14th day of June, 2019.

By: 

Billy Joe Watts
Petitioner and Appellant

CERTIFICATE OF COMPLIANCE

____ Pursuant to rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is typewritten and does not exceed 30 pages or 10,000 words.

A handwritten signature in black ink, appearing to read "Billy Joe Watts", is written over a horizontal line.

Billy Joe Watts

APPENDIX

Order on Petition for Post-conviction ReliefApp. A

CERTIFICATE OF SERVICE

I, Billy Joe Watts, hereby certify that I have served true and correct copies of the foregoing BRIEF OF APPELANT on the parties via U.S. Mail by putting said copies in sealed, prepaid envelopes and placing them in the prison's outgoing mailbox addressed as below:

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Helena, MT 59601

By: 

Billy Joe Watts

Date: June 14, 2019