Brian D. Smith
AO# 3009410
700 Conley Lake Rd.
Deer Lodge, MT 59722
Petitioner/Appellant
DV-16-698/DA-20-102

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA-20-102

BRIAN D. SMITH,

Petitioner/Appellant,
Pro se,

v.

STATE OF MONTANA,

Respondent/Appellee.

APPELLANT'S BRIEF

On appeal from the Montana Fourth Judicial District Court,
County of Missoula
Cause No. DV-16-698
Honorable Leslie Halligan Presiding

Appearances:

Brian D. Smith
AO# 3009410
700 Conley Lake Rd.
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Pro Se, for Appellant

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Attorney for Appellee.

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STATEMENT OF THE CASE AND FACTS

This case began April 3, 2011, when Smith was arrested for an aggravated assault charge, less that eight hours after being released from Community Medical Center in Missoula, MT. Smith was mis-diagnosed as being "positive for alcohol only", after an attempted drug overdose. Smith did not discover being mis-diagnosed until after the one year limitation for filing a petition for post-conviction relief expired.

An Information was filed on April 18, 2011, and public defender Scott Spencer was appointed to represent Mr. Smith. After telling Mr. Spencer about Smith's attempted suicide by drug overdose, and being in a "dream-like" state and hardly remembering what had happened, Spencer told Smith that he would let his boss know that he intended to use the

affirmative defense of "diminished capacity". That was the last time Smith ever saw or spoke with Scott Spencer from the OPD.

On April 25, 2011, Katie Green from the OPD met with Mr. Smith at the Missoula County Detention Center. Smith told Ms. green what Mr. Spencer had discussed with him, and she he informed him that in order to use the defense, an expert would have have to look at his medical records and determine that Smith "could not have formulated the required mental state" and had Smith sign release forms so that she could get Smith's medical records and arrange for him to be forensically evaluated. Ms. Green never did obtain Smith's medical records and told Smith that her request for a forensic evaluation was denied and would only pay for a "general" mental health evaluation. Ms. Green later stated that the OPD did approve her request to have Smith forensically evaluated, in her affidavit, where she also admiitted that she never utilized the release forms to obtain Smith's medical records. Mr. Smith only then learned about being lied to by attorney Green. (state's response to First Verified Petition For Post-Conviction Relief Exhibit N) (1/9/2017)

On January 25, 2012, after being told by attorney Green that he did not have any possible affirmative defenses, Smith pleaded guilty to felony aggravated assault in exchange for the prosecution's agreement to dismiss the amended information filed May 10, 2011 at the Omnibus hearing. There was no formal plea agreement between Smith and the state.

On May 9, 2012 the district court sentenced Smith to twenty years with no eligibility for parole. Smith wanted to withdraw his guilty plea, but was told by attorney Green that he had to do that himself.

Smith filed a pro se motion to withdraw his plea on June 1, 2012, and it was denied on July 25, 2012. Smith was not sent a copy of the denial, as attorney Green was still "attorney of record" and did not forward a copy to Smith.

Smith filed a motion for leave to file an out-of-time appeal, explaining that he did not receive notice that his motion to withdraw his guilty plea had been denied until November 26, 2012 after writing the Clerk of Court in Missoula. This Court denied the petition for an out-of-time appeal. State v. Smith, DA 13-0399, July 10, 2013.

Smith filed a petition for a writ of habeas corpus that was denied by This Court June 4, 2013, stating Smith had exhausted his appeal, and could not use habeas corpus to attack the validity of his conviction. Smith v. Frink, 311 P.3d 444. Smith was unaware of the district court Order dated January 18, 2012 stating that attorney Green was supposed to help Smith with post-conviction, as the Order was never sent to him. Smith first learned of its existence in late 2019.

Smith ~~file~~ another petition for habeas relief in 2016, claiming his conviction was void for denying Smith his right to a preliminary hearing. That petition was denied April 12, 2016. (OP 16-0205)

Smith then filed his [First] Verified Petition for Post-Conviction Relief in August, 2016, after reviewing his medical records for a medical malpractice claim against Community Medical Center, and finding that he had been misdiagnosed and prematurely being released. Mr. Smith suspected that Dr. Moomaw had not seen those records, and likely he would not have told attorney Green that "in his opinion, Mr. Smith did not lack the requisite mental state" had he been given the med records. That First PCR petition was denied stating that Smith could have obtained those medical records sooner because he knew of their existence, and that they did not prove actual innocence. DV-16-698

Smith also filed another motion to withdraw his guilty plea, based on this newly discovered evidence. It was denied, but Smith did not go through with an appeal to This Court, as the claim was addressed in the First PCR petition, which was appealed and denied. 2018 MT 115N.

In 2018, Smith filed another habeas corpus petition, based on an facially invalid sentence, as the reasons that none of the exceptions in MCA § 46-18-222 applied were in the transcripts for the § 46-18-223 hearing that was held on May 9, 2012. It was denied by This Court stating that "Section 46-18-223, MCA, deals with a hearing on an application to exceptions for mandatory minimum sentences." It seems that This Court was under the impression that Smith did not have a hearing on the exceptions, which is not true. That hearing is exactly what Smith was talking about and it did happen. It is listed in the case register report. This ruling is also the first time Smith was made aware that hid did indeed have appealable issues, after being told by his attorneys that he did not. This led to further investigation, and Smith then discovered that documents and facts were concealed from him.

In August of 2019, Smith filed for habeas relief based on what he had discovered, which was denied by This Court, based on the "Law of the case doctrine". These new issues have never been ruled on, so it is presumed that the law of the case doctrine ruling is based on This Court's earlier determination that habeas corpus cannot be used to attack the validity of a conviction. The District Court had not had the opportunity to rule on these issues, as they were unknown at the time of the filing of the First PCR petition, and it was decided that Smith could and should have raised the issues in the First Petition. That is the reason for the current appeal before This Court.

SUMMARY OF THE ARGUMENT

Smith has provided documented evidence that he was lied to by both his trial counsel and sentence review counsel. He was abandoned by public defender Katie Green, BEFORE the written Judgment was entered. The fact that he did not discover these claims sooner is due to exra-

ordinary circumstances beyond his control, including being denied access to necessary records in possession of the public defender's office, (which they refuse to give), as well as mistakes made by the Clerk of Court, e.g., where Smith was listed on the Certificate of Service, yet the Clerk admits that they were sending documents to public defender Katie Green, assuming that he was getting copies. Ms. Green ignored an Order to assist Smith with post-conviction, and allow him access to records in her possession (sentencing transcripts), and Smith being misinformed as to the law, and the right to appeal and/or waiver of the right.

The District Court is refusing to follow well settled law, as it it explained in controlling precedent case-law, and although it's true court's in Montana refuse to "march lock-step" with the United States Supreme Court in determining the protections of the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution requires that states apply the state law equally to those similarly situated. Smith asserts that this is not happening, creating a manifest miscarriage of justice.

STANDARD OF REVIEW

"In postconviction relief proceedings, we review a district court's findings of fact to determine if they are clearly erroneous and its conclusions of law to determine if they are correct. Ineffective assistance of counsel claims present mixed questions of law and fact that the Court reviews de novo." Rogers v. State, 2011 MT 105, ¶ 12, 360 Mont. 334, 253 P.3d 889.

ARGUMENT

ISSUE # 1. Did the District Court err in interpreting the significance of the newly presented evidence that was not filed with the court when it should have been filed back in January, 2013?

On page 2 of the denial on appeal, judge Halligan states in lines 4-6, "In that Order, the Court (Hon. Ed McLean) answered a letter from Smith asking for additional pages of the transcript from the sentencing hearing." The District Court was provided a letter from the Clerk of Court in Missoula dated 8/02/2019, attached to the 2nd PCR petition, as Exhibit B, that substantiates that for some mysterious reason, the letter was never filed in 2013 with the corrsponding Order. That letter was not part of the case-registry and filed until 9/19/2019 @ 1:31 PM, (Please see attached Exhibit A) and backdated to reflect the "Filed Date" as 01/11/2013. (per judge Halligan) The District Court, in the denial Order on appeal now, makes no mention of the second request in that letter from Smith (now dated 1/11/2013), filed on 9/19/2019:

> "Second. Could you please tell me what I need to do have a public defender help me with my motions? My public defender Katie Green told me that she would help me but has not replied to any of my letters. My motion to withdraw guilty plea was denied for the reason of not citing case law or providing evidence. The reason for that is my appellate defender & public defender will not help me"..."I am requesting the court to order the public defenders office and appellate defenders office to stop ignoring my requests and assist me with my legal needs."

That letter, (Please see Exhibit B) attached to this brief was used in the 2nd PCR petition as evidence supporting both equitable tolling/estoppel and attorney abandonment, yet judge Halligan states in her Order, has nothing to do with Smith's ability to appeal, has no merit, and could have been raised in Smith's First Verified PCR petition. Smith asserts that those conclusions are in error, and an evidentiary hearing was necessary, before making those conclusions.

Also just recently discovered by Smith, is the District Court Order dated 1/18/2013, (also attached Exhibit B). Mr. Smith is listed on the Certificate of Service, but was not sent a copy. This fact has been substantiated with prison mail logs, and a letter from the Clerk of Court in Missoula. That Order states on pg two: "Ms. Katie Green is the Public Defender appointed to represent Defendant Brian D. Smith and that appointment includes post-conviction relief." Why Ms. Green ignored that Order remains unknown and an evidentiary hearing is necessary. The fact that this Order was only discovered in 2019, would have made it impossible to raise an ineefective assistance of counsel claim based on this fact in Smith's first PCR petition. That 1/18/2013 Order also states:"It is the attorney who requests transcripts from the Court, not the Defendant." Why then, did the District Court deny Smith's Motion to Withdraw Guilty Plea for not providing the transcripts? Why did This Court deny Smith's Motion for Leave to File an Out-Of-Time Appeal for not demonstrating there is a record? (see Exhibit F & V, state's response DV-16-698 filed 1/09/2017).

These recent discoveries are of great significance, and at the very least should require an evidentiary hearing. Please consider page 5 of the 2nd PCR petition filed 1/02/2020 and the following:

> "a client cannot be charged with the acts or omissions of an attorney who abandons him. An attorney's failure to communicate about a key development in his client's case can, therefore, amount to attorney abandonment and thereby constitute an extraordinary circumstance." Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 923-24.

The District Court's determination that these facts had nothing to do with Smith's ability to appeal and have no merit, is erroneous and should be reversed and remanded for further proceedings.

ISSUE # 2. Did the District Court err in interpreting the significance of the Order dated 01/18/2013, that was never sent to Mr. Smith, due to Katie Green's failure to withdraw as counsel and failure to notify Mr. Smith?

On page 2 of the Order of Denial filed 1/13/2020, which is the Order currently on appeal, judge Halligan states in lines 11-15:

> "The Petition argues that Smith's failure to receive that Order frustrated his ability to appeal his conviction and is evidence of his attorney's malfeasance or negligence that also frustrated his ability to appeal his conviction. Both of these arguments lack merit."

The Order (and letter) referred to, (attached as Exhibit B), are proof that attorney Green abandoned Smith when he wanted to appeal, also prove that the Order filed by Hon. Ed McLean on July 26, 2012, denying Smith's motion to withdraw guilty plea was in error. Judge McLean denied the necessary transcripts, and denied the motion to withdraw guilty plea for not attaching the necessary transcripts that show that Mr. Smith was misled by attorney Green and was misled about the nature of the charge that Smith pleaded guilty to. The evidence was sufficient to file a "record-based" appeal of the voluntariness of the plea, but due to attorney abandonment, Smith was not able to get those transcripts from the court reporter until 2014, too late to file either an appeal or post-conviction. Judge Halligan's claim that these arguments "lack merit" are directly contradicted by Montana Supreme Court precedent case-law, as well as Montana Constitution Law, Ninth Circuit Law, and United States Supreme Court precedent case-law and United States Constitution Law. Please consider the following:

> "Finally, House contends that his counsel was ineffective for not filing a notice of appeal. Defense counsel is deficient when he or she fails to preserve a defendant's right to appeal after the defendant has requested notice to be filed." Woeppel v. City of Billings, 2006 MT 283 ¶ 10, 334 Mont. 306, 146 P.3d 789(citing Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct 1029, 145 L.Ed 2d 985(2000). House v. State, 2015 MT 304N

The district court stating on page 2, "The Petition argues that Smith's failure to receive that Order frustrated his ability to appeal his conviction...", shows that the letter an accompanying Order proves that the court misinterpreted the significance of the evidence in that it was intended to demonstrate Smith's desire to appeal, and that his requests for assistance filing an appeal were being ignored. Nearly every pleading filed by Smith was denied by this court, by stating, "He did not appeal", "He did not timely appeal", "Smith has exhausted the remedy of appeal". This Court was provided the same evidence that shows that Smith did everything he could to have his court-appointed attorney Katie Green "timely appeal" in that letter to the district court (that was not filed until 2019), yet refuses to acknowledge that fact and continue to state, "He did not appeal", and "Smith did not seek a timely appeal with this Court". (see page 1 ¶¶ 3-4 OP 19-0503). These statements are false, the Courts have direct evidence that they are false, but insist on standing by them in order to deny review/relief, creating yet another additional "miscarriage of justice".

In 2018, this Court stated in it's denial of OP-18-0532, "His supporting documents reference an intention to file an appeal which he did not seek. An appeal would have been the better and more approprate proceeding to raise these many issues relating to his criminal charges, the record, his mental health, the PSI, and the sentencing hearing." Had the constitutional and statutory duty mandated by MCA § 46-8-103(2) not been violated by court-appointed attorney Katie Green, the issues mentioned by this Court could have been raised on appeal. This Court, in making those statements proves the importance of strictly following the "Anders" procedure adopted and codified in statute as a safegard.

> "Counsel must consult with a defendant about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example there are non-frivolous grounds for appeal), or (2) that [the] defendant reasonably demonstrated to counsel that he was interested in appealing."" Roe, 528 U.S. at 480, 120 S.Ct. at 1036. House v. State, 2015 MT 304N *P.11

Smith has presented the District Court with documented evidence in the present PCR petition on appeal, that he was both interested in appealing, and had non-frivolous grounds for appeal. Smith also provided the District Court with letters to and from the Clerk of the District Court in Missoula that substantiate that he had never been sent copies of both the Order dated 1/18/2013, and the Order denying Smith's Motion to Withdraw Guilty Plea, dated July 26, (2012) which led to a subsequent denial of a Motion for Leave to File an Out-Of-Time Appeal, by This Court, all of which were while Smith was still assigned Katie Green to assist him! The District Court's conclusion that "these arguments lack merit" has to be considered clearly erroneous. Please also consider the following:

> The United States Supreme Court stated in Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 923-24, (2012), "a client cannot be charged with the acts or omissions of an attorney who abandons him." Id. at 924. "An attorney's failure to communicate about a key development in his client's case can, therefore, amount to attorney abandonment and therefore constitute an extraordinary circumstance." Maples at 923-24. See also Towery v. Ryan, 673 F.3d 933, 942-43 (9th Cir. 2012)

The District Court's Order denying Smith's current PCR petition based on judge Halligan's opinion that "these arguments lack merit", (page 2), must be reversed based on the following:

> "The Supreme Court has noted that because a violation of Anders leaves a defendant completely without counsel the error is structural and cannot be reviewed under a prejudice or harmeless error analysis." Penson v. Ohio, 488 U.S. 75, 88-89, 109 S.Ct. 346, 102 L.Ed 2d 300 (1988)

The District Court's decision is contrary to clearly established Federal Law and is per se reversible error.

ISSUE # 3. Did the District Court err in suggesting that an indigent criminal defendant had the duty to an appeal, Pro Se, while still represented by court-appointed counsel?

On pg. 2 of the District Court Order under appeal, judge Halligan states in lines 15-17, "Smith had until approximately July 21, 2012 to appeal his conviction and judgment." It appears that Smith's proving to the District Court that he made every attempt to obtain assistance in filing an appeal, was abandoned by his court-appointed attorney, who never withdrew, or was given permission to withdraw from representation, has absolutely no effect on the Court's decision. Apparently, the right to appeal, and the right to counsel on appeal are no longer recognized in Montana. This is contrary to every court in this country, including This Court. Please consider the following:

> "A defendant has the right to counsel on a first appeal. The right to counsel on appeal includes the right to effective counsel." "Presumption of prejudice from a failure to protect the client's right to appeal is widely recognized. prejudice is presumed when counsel abandons the appeal because the defendant is not merely deprived of effective assistance, he or she is deprived of any assistance of counsel." Hans v. State, 283 Mont. 379, followed by Patton v. State, 2003 MT 375N, and also Braulick v. State, 2019 MT 234N.

> "The Supreme Court of Montana has adopted the Roe Standards, which provide that (1) failure to preserve a defendant's right to appeal when he has requested notice to be filed is error; and (2) when, but for counsel's deficient performance, defendant would have appealed, such error is prejudicial." "If a defendant objectively indicated intent to appeal, he or she is not required to demonstrate the merits of the underlying claim and is entitled to a new appeal." Woeppel v. City of Billings, 2006 MT 283.

Also on pg. 2 of the District Court's denial states, "The Order that he complains of not receiving was not issued until January 18, 2013, approximately six months after that deadline. Because the deadline had long passed, his timely receipt of that Order would have made no difference in his ability to appeal." This suggests that the District

Court does not adhere to the statutory mandate of 46-8-103(2), the Anders procedure "as codified in statute and adopted in case law." Set forth by This Court in State v. Hall, 2003 MT 253; *P19:

> "Anders sets forth a standard for effective representation of counsel on appeal for indigent client's when counsel believes no meritorious issues exist. The Anders procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may--and, we are confident, will--craft procedures that, in terms of policy, are superior to, or at least as good as, that in Anders." Smith v. Robbins (2000), 528 U.S. 259, 276, 120 S.Ct. 746, 759, 145 L.Ed 2d 756, 774. "Montana adheres to Anders as codified in statute and adopted in case law." Section 46-8-103 MCA; State v. Swan (1982), 199 Mont. 459, 469, 649 P.2d 1297, 1302.
>
> "An appellant cannot be denied his right to appeal because of the errors of his counsel." Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990, 94 L.Ed 2d 539, 547. (1987)

The District Court erred in determining that, "...his attorney's malfeasance or negligence that also frustrated his ability to appeal... ...lacks merit." In Montana, the law prohibits an indigent defendant from filing any motions other than a motion to substitute counsel pro se, when he has court-appointed counsel, especially filing a pro se appeal, accordind to State v. Johnston, 2018 Mont. LEXIS 394:

> "Johnston refers to M.R.App.P. 10(1)(c), which does not apply here because the rule is procedural change in attorney for a party." See § 37-61-403 MCA. "We decline to entertain Johnston's motions. 'There is no constitutional right to self representation on the initial appeal as of right.' Martinez v. Ct. of Appeal, 528 U.S. 152, 155, 120 S.Ct. 684, 145 L.Ed 2d 597 (2000) (citation omitted): "the denial of self-representation at this level does not violate due process or equal protection guarantees." Martinez, 528 U.S. at 155, 120 S.Ct. at 687 (citation omitted). "While a defendant has a constitutional right to defend oneself at trial court level in Montana, we do not extend it to an appellant under the circumstances." State v. Browning, 2006 MT 190, ¶ 14, 333 Mont. 132, 142 P.3d 757, citing State v. Swan, 2000 MT 246, ¶¶ 16-17, 301 Mont. 439, P.3d 102. State v. Johnston, 2018 Mont. LEXIS 394.

Based on the above and the fact that facts were not discovered,

the district court should have ordered an evidentiary hearing to find out the reason why court-appointed Katie Green failed to mention the January 18,2013 Order in her sworn affidavit attached to the state's response, where Ms. Green defends her actions in chronological order. Smith asserts that this action/omission was deliberately concealed, to avoid the district court and Mr. Smith being made aware of ignoring the Order, and neglecting her duty to send a copy and/or inform Smith. Ms. Green never withdrew as attorney of record as required, and resulted in court Orders being sent to her, instead of Mr. Smith. Smith was not aware of that Order until late 2019. (see state's response Exhibit N, DV-16-698, filed January 09, 2017). An evidentiary hearing was needed to also find out why the Clerk did not mail a copy of the 1/18/2013 Order, when Mr. Smith was listed on the Certificate of Service. A copy of Smith's prison mail log was attached to the 2nd PCR petition, verifying that Smith did not receive that Order.

On page 2 of the district court's Order on appeal, judge Halligan states, "Smith had until approximately July 21, 2012 to appeal his conviction and judgment." No attorney has ever reviewed "the record" for appealable issues. Instead, attorney Green told Smith in her letter to him dated May 10, 2012, (Exhibit B state's response filed 1/09/2017), asking Smith to contact her about an appeal if he thought there was an appealable issue. This Court stated in State v. Adams, 2002 MT 202, ¶ 16, "...we believe this is too high a burden to place on someone unfamiliar with the nuances of appellate procedure. ¶ 17, "In short, Adam's attorney failed to comply with the requirements of § 46-8-103(2), MCA, and therefore, could not effect a valid withdraw." The same is true in the present appeal. (see also page 9, 2nd PCR petition)

Also in the letter from Ms. Green to Mr. Smith dated May 10, 2012, (one day after sentencing), she acknowledged Smith's desire to immediately withdraw his guilty plea. She tells Smith that she has enclosed a copy of MCA § 46-16-105, and explains that this should be done before the written judgment is entered. Why is a court-appointed attorney telling her client to file a pro se motion, which is not allowed, when she is still appointed by the court?

The PLEA OF GUILTY AND WAIVER OF RIGHTS (state's response DV-16-698) under A(4), "I waive or give up any chance to appeal a finding of guilty, and understand that any appeal would be limited to a determination on the voluntariness of my plea of guilty." Notice that it says "appeal", and not limited to a challenge, or "determination on the volunariness of my plea of guilty" under MCA § 46-16-105, "before the judgment comes out", without the assistance of counsel. Based on what that WAIVER OF RIGHTS says MCA § 46-16-105 must be considered "first-tier" review, and/or a defendant's first "of-right appeal" where the assistance of counsel is guaranteed by both the United States Constitution and the Montana Constitution, therefore mandating the protections of Anders. Penson v. Ohio, 488 U.S. 75, citing Douglas v. California, 372 U.S. 353 (1963).

In Summers v. Schriro, 481 F.3d 710, (9th Cir. 2007), stated; "In ordinary legal usage, the definition of "review" is broader than that of "appeal". Black's Law Dictionary (8th ed. 1999) defines "review" as [c]onsideration, inspection, or reexamination of a subject or thing," while "appeal" means "[a] proceeding undertaken to have a decision reconsidered by a higher authority;...Under these definitions, a re-examination by a court of it's own earlier decision can be a "review", even though it is not a "reconsideration by a higher authority." id at 714.

Based on the foregoing, Smith asserts that he was denied his right to appeal, and was denied his constitutional right to counsel on a first "of-right" appeal based on Penson v. Ohio, 488 U.S. 75, et.al. Also, MCA § 46-16-105 is located in Title 46, which is criminal procedure codified, in chapter 16, which is titled, "TRIAL", which would mean that Ms. Green's statement to Smith telling him he should file a 46-16-105 motion "before" the written judgment is entered, substantiates ineffective assistance of TRIAL counsel, a violation of the U.S. Constitution Amendment 6 right to counsel.

If the Court should find that a motion under 46-16-105 is not to be considered an "of-right" appeal, then the PLEA OF GUILTY AND WAIVER OF RIGHTS must be considered invalid, as it informs a defendant that he/she waives the right to appeal, other than the voluntariness of the plea, and then makes the defendant either use § 46-16-105, or § 46-21-102, where the constitutional right to counsel does not attach. However, if a motion under § 46-16-105 is filed before the judgment becomes final 60-days after the written judgment is entered, the constitutional guarantee of counsel is still present. This Court has stated in State v. Garner, 2001 MT 222, that a motion to withdraw guilty plea is not a "critical stage" which the courts in this country are split. Based on the above, it has to be considered a "critical stage" if the defendant has a court-appointed attorney, and it the attorneys duty to file the motion, not the defendants. The voluntariness of a plea of guilty will rarely, unlikely ever be record based, making even more important the need for counsel. (Please see state's response DV-16-698 filed 1/09/2017, Exhibit E & F) Petitioner's June 1, 2012 Motion to Withdraw Guilty Plea, and Court's Order Denying Motion to Withdraw Guilty Plea.

Please consider the following from 2019 U.S. Dist. LEXIS 132608:

> "But the Sixth Amendment right to the effective assistance applies to the first appeal of right in the courts. Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). See also Halbert v. Michigan, 545 U.S. 605, 125 S. Ct. 2582, 162 L.Ed.2d 552 (2005) ("the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review"). The Ninth Circuit has held that after a defendant pleads guilty, the first post-conviction proceeding is the functional equivalent of a direct appeal. Summers v. Schririo, 481 F.3d 710, 716-17 (9th Cir.2007) ("We therefore conclude that Arizona's Rule 32 of-right PCR proceeding for plea-convicted defendants is a form of direct review within the meaning of 28 U.S.C. § 2244(d)(1)(A).") If a defendant is entitled to counsel in the first of-right proceeding, then the defendant is also entitled to the protections Anders. See Pensylvania v. Finley, 481 U.S. 551, 554, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(Anders requirements extend to any case in which a constitutional right to counsel exists."); Pacheco v. Ryan, 2016 U.S. Dist. LEXIS 177400.

Please also consider what court-appointed attorney Katie Green says in her letter to Mr. Smith dated May 10, 2012. (Exhibit C, state's response DV-16-698, filed 1/9/2017):

> "You can file a Motion to Withdraw Guilty Plea, but you must have good cause to do this, and it should be done before the Judgment comes out."

The judgment did not come out for another 11 days on May 21, 2012. Sixty days from that was July 21, 2012. On May 10, 2012, Ms. Green is telling Mr. Smith that he is on his own. The District Court could not see any merit, or how any of this "frustrated his ability to appeal his conviction and is evidence of his attorney's malfeasance or negligence that also frustrated his ability to appeal his conviction." (Page 2 ORDER DENYING SECOND PETITION FOR POST-CONVICTION RELIEF, lines 11-16, filed 1/13/2020 DV-16-698) Ms. Green knew that Smith was not happy with Ms. Green's performance at the sentencing hearing, and therefore could not represent Mr. Smith, due to conflict of interest.

Please consider: U.S. v. Lennox, 670 Fed.Appx. 483 (9th Cir. 2016)

> "When an attorney seeking post-conviction relief for his client is compelled to prove his services to the defendant were ineffective, he is burdened with a strong disincentive to engage vigorous argument and examination or to communicate candidly with his client. The conflict [is] not only actual, but likely to affect counsel's performance." United States v. Del Muro, 87 F.3d 1078, 1080, (9th Cir. 1996) "A district court that becomes aware of such conflict "should not be required to tolerate an inadequate representation of a defendant." Wheat v. United States, 486 U.S. 153, 162, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)(quoting United States v. Dolan, 570 F.2d 1177, 1184 (3rd Cir. 1978)) "Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but also is detrimental to the independant interest of the trial judge to be free from future attacks over... the fairness of the proceedings..." Id.at 1184.

Mr. Smith asserts that the District Court in DC-11-161, was not authorized to accept the pro se Motion to Withdraw Guilty Plea, (Exhibit E state's response filed 1/9/2017) while represented by court-appointed counsel Katie Green, and knowing that Smith claimed to be misled by Green, allowed her to remain counsel of record, should have appointed new counsel to assist Mr. Smith. (see also M.R.App.P. Rule 10(1)(c), and page 5 of this brief). The District Court allowed a conflict of interest to remain unresolved, forced Smith to challenge the voluntariness of his guilty plea pro se while represented by counsel, and then denied the motion for not providing evidence that Smith was not allowed to access, that was in Ms. Green's possession, and was later told that he could only access the records through Ms. Green, who no longer was willing to communicate with Smith, due to conflict of interest! Judge Halligan's opinion that none of these things could have "frustrated his ability to appeal" is erroneous, and, in the interest of justice, should reversed and remanded.

ISSUE # 4. Did the District Court err in interpreting the significance and/or relevance of the letter from Ed Sheehy dated July 10, 2012, in response to Mr. Smith's request for assistance in filing an appeal? (Exhibit E 2nd PCR petition)

Judge Halligan, on page 3 of the District Court's Order Denying Second Petition For Post-Conviction Relief, filed 1/13/2020, lines 3-12, states the following:

> "Further, the final piece of evidence on which he relies is a letter to him dated July 12, 2012 in which the Office of the State Public Defender explains his lack of appellate options. To the extent that this may support his theory of "attorney abandonment," his time to assert this theory as a basis of relief has long passed. Smith gives the Court no reason to conclude that he did not receive the letter at the time or that he only learned of it later. Thus, he could have raised this issue in his [First] Verified Petition for Post-Conviction Relief filed under this cause number. Pursuant to Mont. Code Ann. § 46-21-105(1)(b), the Court is therefore compelled to dismiss the present Petition."

That letter was intended to show WHY the issue of "attorney abandonment" was NOT raised in the First petition for PCR in 2016. (Explained in detail in ISSUE #5). That letter states:

> "With regard to what your public defender promised after your sentencing hearing, the only thing she could help you get done is a Sentence Review Application. As for an appeal, you could not appeal since your sentence was within the statutory term for aggravated assault. The Montana Supreme Court will not review a sentence if it is a legal one."

The District Court Order currently on appeal suggests, by the statement in lines 3-12 on page 3, that Smith should have realized right then, that he had a claim of attorney abandonment on appeal, after being told that he could not appeal. That makes no sense at all. Even though Ed Sheehy should have realized "attorney abandonment", and lied about not being able to appeal, Smith cannot be faulted for not raising an issue he was told does't exist. This Court said, in OP-18-0532, issues existed that were better suited for an appeal. (Further explained in ISSUE # 5)

That same letter from Ed Sheehy dated July 10, 2012, was within the time-limit for an appeal, yet Mr. Sheehy obviously never looked at the records for any appealable issues, never contacted the court-appointed attorney Katie Green or contacted the Appellate Defender's Office on Smith's behalf. This violated his constitutionally-imposed duty explained below and on page 8 of 2nd PCR filed 1/02/2020:

> "Counsel has a constitutionally-imposed duty to consult with defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, when there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).
>
> "an appellant cannot be denied his right to appeal because of the errors of his counsel." Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990, 94 L.Ed.2d 539, 547.

Mr. Smith's situation meets both prongs of the Roe standard, as he has provided evidence that (1) there are nonfrivolous grounds for appeal, and (2) he reasonably demonstrated to counsel that he was interested in appealing. The fact that he was told by Ed Sheehy and Katie Green that he had no appealable issues, and This Court told Mr. Smith his issues were based on IATC and could not be raised on appeal, there is no possible way Smith can be faulted for not identifying a claim for abandonment on appeal in his First PCR petition. Nor can he be faulted for not raising it in an amended petition, as deputy county attorney Susan Boylan told Smith in the state's response to the First PCR petition that he waived both his right to appeal and right to file for any post-conviction relief, as will be described in more detail in ISSUE # 5. The "Anders" requirement was not followed by either Katie Green or Ed Sheehy and should excuse the default the District Court was "compelled to dismiss" on. MCA § 46-21-105(1)(b).

ISSUE # 5. Did the District Court err in concluding that Mr. Smith could have raised the issue of "attorney abandonment" in his [First] Verified Petition for Post-Conviction Relief under this cause number?

As partially explained in ISSUE #4, that "final piece of evidence" (Letter from Ed Sheehy dated July 12, 2012), should show "cause and prejudice" to excuse a procedural default, not be the cause for the procedural default and "compell" the dismissal of the claim.

Please consider Collier v. Montana, 2020 U.S.Dist. LEXIS 51103:

> "Thus to establish cause and prejudice in order to excuse the procedural default of his ineffective assistance of counsel claim, [a petitioner] must demonstrate the following: (1) post-conviction counsel performed deficiently; (2) "there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been diferent," Id.; and (3) the "underlying ineffective-assistance of counsel claim is a substantial one, which is to say that a prisoner must demonstrate that the claim has some merit." Martinez, 566 U.S. at 14, 132 S.Ct. 1309. Ramirez, 937 F.3d at 1242."
> "As discussed above, the first two requirements determine whether there is cause to excuse the procedural default. In this case, there is no question regarding the first requirement; Bohlman performed deficiently. He simply abandoned the claim without providing notice to the court, the state, or Collier. Collier was then essentially left without counsel after Bohlman's departure and the OPD's refusal to provide representation. Martinez applies either when a petitioner has no counsel or only ineffective counsel. The Ninth Circuit has found that "a petitioner who was not represented by post-conviction counsel in his initial-review collateral proceeding is not required to make any additional showing of prejudice over and above the requirement of showing a substantial trial-level IAC claim." Rodney v. Filson, 916 F.3d 1254, 1260 (9th Cir. 2019)(emphasis in original). "In other words, an unrepresented petitioner does not need to show a reasonable probability that the result of the post-conviction proceeding would have been different."

If a petitioner cannot be faulted for not properly raising an ineffective assistance of counsel in Federal Courts, and can be excused for the default, how can the same be the reason for the default? Smith has provided a substantial trial-level IAC claim, and therefore

should have been excused for not raising the claim, not procedurally defaulted compelling dismissal. The other evidence provided to the District Court in Smith's 2nd PCR petition, was the Order dated Jan. 18, 2013, that he was not aware of when the petition was filed in 2016. That Order stated: "Ms. Katie Green is the Public Defender appointed to represent Defendant Brian D. Smith and that appointment includes post-conviction relief." Smith was not aware of that Order until late 2019, and thus could not have been raised in 2016, nor any other claims that representation of effective counsel and an evidentiary hearing can reveal. Instead, the District Court relied on Katie Green's affidavit, where the Court's earlier 1/18/2013 Order to represent Smith through post-conviction was concealed. Smith was faulted for not raising an "attorney-abandonment" on appeal claim after being told by all that he could not appeal, and faulted for not properly raising trial-level IAC claims while being abandoned on post-conviction, in denial of a Court Order, and the Order currently on appeal states "these arguments lack merit." (lines 11-15 page 2 DV-16-698, filed 1/13/2020). This is contrary to clearly established law, both state and federal. If This Court wishes to uphold the District Court's denial, Smith asserts that affirmation would only be proper if This Court announces that it is overruling all prior decisions in favor of granting relief, for the same reasons previously presented in this brief. Smith's situation is nothing new and is nearly identical to precedent case-law. The only major difference is in Smith's case, his claims were concealed from him. Whether this was done intentionally should not matter. He cannot be faulted (procedurally-barred) for not raising claims he was told do not exist, and/or claims that were concealed, especially when the Order for assistance with PCR, prevented Smith from obtaining needed documents.

Please consider the following cases that are nearly identical to Mr. Smith's situation: Porter v. State, 2001 ML 2430:

> "Stenerson's stated assumption that Porter no longer "wanted" Stenerson to represent him was made without any communication with or verification by Porter, and in complete disregard of the law, the standards of professional conduct governing appointed counsel, and contractual agreements with Ravalli County governing his duties." Porter, ¶ 39. "Porter timely informed Stenerson of his wish to appeal by various means and on several occasions before the appeal time expired. Porter attempted to file his own pro se request for a trial transcript, which was sent by the Clerk of Court to Stenerson, who later acknowledged receiving it, but neglected to act upon it in a timely fashion, although he understood it to be an attempt to appeal the convictions. thus, Porter has demonstrated that, but for his attorney's errors, he would have appealed his conviction. Prejudice therefore is presumed under Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000) id ¶41

Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000):

> "We do not attribute an attorney's errors to the client where the attorney is acting only on his or her behalf, and does not actually represent the client." See Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994)(declining to attribute an attorney's unauthorized self-interest actions in post-conviction proceedings to the petitioner)."

Affirmed by, Manning v. Foster, 83 Fed.Appx. 988 (9th Cir 2003):

> "The district court properly concluded that Ryan's actions constituted cause excusing Manning's pro cedural default. As the district court pointed out, Ryan's actions taken together constitute objective factors that are external to Manning and that cannot be fairly attributed to him." See Coleman v. Thompson, 501 U.S. 722, 753, 115 L.Ed.2d 640, 111 S.Ct. 2546 (1991). "The record amply supports the district court conclusion that the cumulative effect of Ryan's improper actions was to effectively prevent Manning from learning of and vindicating his right to petiton for state post-conviction relief within one year of his conviction." (Affirming the district court granting habeas relief)

Smith asserts the same applies to his case, and that This Court take under consideration the above decisions.

Please consider the following:

> "Stare decisis is of fundamental and central importance to the rule of law, which reflects our concerns for stability, predictability, and equal treatment." State v. Debrowski, 2016 MT 261, 385 Mont. 179, 382 P.3d 490, Mont. LEXIS 925.
>
> "Stare decisis means to abide by, or adhere to decided cases." Black's Law Dictionary 1406 (6th Ed. 1990)

The delay in Smith presenting these claims within the time-limit, and/or in prior petitions, can also be attributed to the following situations where Smith had been given faulty information:

> May 10, 2012, court-appointed attorney Katie Green tells Mr. Smith, "I do not think there is an appealable issue."
>
> July 10, 2012, Ed Sheehy from the OPD tells Mr. Smith, "AS for an appeal, you could not appeal since your sentence was within the statutory term for aggravated assault."
>
> August 01, 2012, Ed Sheehy from the OPD tells Mr. Smith, "As for your appeal, I thought I wrote you and told you that you have to file paperwork with the Supreme Court to seek permission to do an out of time appeal."
>
> July 10, 2013, This Court told Mr. Smith, "Smith's appeal of the denial of his motion to withdraw is essentially premised on ineffective counsel during sentencining. However, a record establishing the reasons for action or inaction by counsel is necessary before such claims can be adjudicated on appeal."
>
> June 04, 2013, This Court tells Mr. Smith, "Smith has exhausted his appeal rights." and "has exhausted the remedy of appeal."
>
> April 16, 2016, This Court told Smith, "He did not timely appeal."
>
> September 25, 2018, This Court said, "His supporting documents reference an intention to file an appeal, which he did not seek. An appeal would have been the better and more appropriate proceeding to raise these many issues relating to his criminal charges, the record, his mental health, the PSI, and the sentencing hearing. By not appealing within the sixty-day time-frame from the 2012 judgment, Smith has exhuasted the remedy of appeal and he is thus barred from raising these issues in a petition for habeas corpus relief."

> January 09, 2017, deputy county attorney Susan Boylan tells Mr. Smith, "The Montana Supreme Court has taken the position that when a defendant enters a guilty plea or admission and waives certain rights, his waiver of right to appeal will not be invalidated so long as his waiver of that right is done intelligently, voluntarily, and with the understanding of the consequences." Petition of Manula, 263 Mont. 166, 866 P.2d 1129 (1993) "When a petitioner waives his right to direct appeal, "it follows that his other claims for post-conviction relief are barred."" Id. 169
>
> "The only type of claims not barred by a waiver of rights are jurisdictional claims, or those cases in which the district court could determine that the government lacked the power to bring the indictment at the time of accepting the guilty plea from the face of the indictment or from the record."
>
> (State's response DV-16-698 filed Jan. 09, 2017)

Please consider the following:

> "An accused who pleads guilty or nolo contendre may still raise on appeal (1) federal constitutional defects that are irrelevant to the accused's factual guilt; (2) double jeopardy claims requiring no further factual record; (3) jurisdictional defects; (4) challenges to the sufficiency of the evidence at the preliminary examination; (5) preserved entrapment claims; (6) mental competency claims; (7) factual basis claims; (8) claims that the state had no right to proceed in the first place, including claims that the accused was charged under an inapplicable statute; and (9) claims of ineffective assistance of counsel. Halbert v. Michigan, 545 U.S. 605, 162 L.Ed.2d 552, 125 S.Ct. 2582 (2005)

The TRIAL rights and constitutional rights that occur BEFORE the guilty plea is entered, do not include constitutional rights that occur AFTER the guilty plea is entered. Nor does it include the above listed claims. Montana's plea colloquy described by MCA § 46-12-210, which advises the accused that the TRIAL rights that were agreed to be understood at the arraignment are the ones being waived, listed in the ACKNOWLEDGMENT OF RIGHTS form. Any rights not listed in that form, have to be specifically waived in a written plea agreement. (Please see 1991 Commission Comment 46-12-204 re: F.R.Crim.P. 11(c))

Please also consider the following:

> "A waiver of a right to trial with its attendant privileges is not a waiver of the privileges that exist beyond the confines of the trial." Mitchell v. United States, 526 U.S. 314. (see also page 10 2nd PCR petition).

As mentioned, the rights waived by plea of guilty or nolo contendre are all listed in the ACKNOWLEDGMENT OF RIGHTS and PLEA OF GUILTY AND WAIVER OF RIGHTS forms and they include PRE-CONVICTION rights and not POST-CONVICTION rights and/or first "of-right" appeals defined by the U.S. Supreme Court and the Ninth Circuit Court of Appeals case-law. The HOLDINGS of the United States Supreme Court are binding on the state, regardless of they're determination not being in "lock-step" with Montana Courts interpretation. Judges take an Oath to uphold the constitution. Not just the Montana constitution, but the United States constitution as well. So far, this is not always the case.

CONCLUSION

The District Court's Order denying Smith's second petition for post-conviction relief is contrary to established state and federal law and violates the Montana Constitution and United States Constitution and should be reversed. Smith in no way could have raised the issue of "attorney abandonment" due to being misinformed by the OPD, county attorney, the Clerk of the District Court in Missoula, and This Court, resulting in a manifest miscarriage of justice.

Respectfully submitted this 22nd day of May, 2019 Brian D. Smith

Brian D. Smith
Appellant/Pro Se

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellants opening brief is double-spaced except for quoted and indented material; and is within the 30 page limit, not including the cover page, table of contents and table of authorities, and attached exhibits.

Brian D. Smith

CERTIFICATE OF SERVICE

I, Brian D. Smith, hereby certify that a true copy of APPELLANT'S BRIEF has been mailed First-Class pre-paid U.S. postage, on May 22, 2020, to the following:

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IN THE SUPREME COURT OF THE STATE OF MONTANA

DA-20-0102

BRIAN D. SMITH,
Appellant,

v.

STATE OF MONTANA,
Appellee.

AMENDED
CERTIFICATE
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I, Brian D. Smith, hereby Certifies that a true and accurate copy of Appellant's opening Brief has been mailed to the following:

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A true an accurate copy of this AMENDED CERTIFICATE OF SERVICE, has been mailed to the following:

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