IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0729

CHRISTOPHER WAGNER,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Rienne H. McElyea, Presiding

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
cfowler@mt.gov

MARTY LAMBERT
Gallatin County Attorney
1709 West College
Bozeman, MT 59715

ATTORNEYS FOR RESPONDENT
AND APPELLEE

PENELOPE S. STRONG
2517 Montana Ave.
Billings, MT 59101

ATTORNEY FOR PETITIONER
AND APPELLANT

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STATEMENT OF THE ISSUES

Whether the trial court properly dismissed Wagner's postconviction relief (PCR) petition.

STATEMENT OF THE CASE

Appellant Christopher Wagner (Wagner) appeals his summarily dismissed PCR petition in the Gallatin County District Court, the Honorable Rienne H. McElyea, presiding.

Wagner's contentions on appeal largely present issues of law and procedure. The underlying criminal proceedings against Wagner in Gallatin County District Court are stated below for reference. After a second trial, a jury in 2010 again convicted Wagner of attempted deliberate homicide with a weapon. This Court affirmed his conviction. *State v. Wagner*, 2013 MT 47, ¶ 1, 369 Mont. 139, 296 P.3d 1142 (affirming conviction following second trial); *see also State v. Wagner*, 2009 MT 256, ¶ 2, 352 Mont. 1, 215 P.3d 20 (following first trial, vacating conviction based on plain error review).

On April 25, 2014, Wagner, acting *pro se*, timely filed a 75-page PCR petition. (D.C. Docs. 3-4.) The district court initially ordered the State to respond (D.C. Doc. 6.), but later the court appointed Wagner counsel and set a new scheduling order for responses from both Wagner and the State. (D.C. Doc. 9.) The

court expressly ordered that upon the completion of briefing, Wagner's counsel must move the court to set a scheduling conference for preliminary matters and the setting of a hearing date.

On August 6, 2014, Wagner's appointed attorney, Joseph Howard, filed an unopposed motion to vacate the briefing schedule. (D.C. Doc. 15.) Howard stated he needed time to collect files, review the record, and that he later would propose a scheduling conference to request further proceedings. *Id*. Without objection from the State, on August 11, 2014, the court vacated the prior briefing schedule and expressly ordered Wagner to "request a scheduling and/or status conference to establish a new scheduling order once counsel has completed his review of [Wagner]'s file. (D.C. Doc. 17.)

The pleading record shows no activity in the succeeding four years and three months. Wagner's attorney made no request for a scheduling or status conference and took no other action. The inactivity ended on November 16, 2018, when the Honorable Judge Rienne McElyea, who took over the case in 2014 after the prior judge retired, entered a Notice for Failure to Prosecute pursuant to Mont. Code Ann. § 25-1-104. (D.C. Doc. 18.) The order stated Wagner must file a pleading or other document within 60 days or the proceeding would be dismissed and the case closed. *Id*.

On the 59th day, Howard filed a "Notice to Court." (D.C. Doc. 19, 1/14/19.) Howard's notice explained that he is a solo practitioner with a significant caseload who conducts his legal practice on a "first-in, first-out" basis excepting only "immediate exigencies and matters of statutory priority." *Id*. Howard stated he "anticipate[d] filing Petitioner's amended petition for postconviction relief on or before June 1, 2019." *Id*.

Howard filed Wagner's amended petition on May 31, 2019. (D.C. Doc. 20.) On June 24, 2019, the PCR court ordered the State to file a written response to the amended petition. (D.C. Doc. 22.) The State filed a timely response on July 9, 2019. The State cited the four-factor test applicable under Mont. R. Civ. P. 41(b) to dismiss the proceeding due to Wagner's inexcusable delay. (D.C. Doc. 23.) Wagner responded, arguing no deadline was ever set to file the amended petition, and no authority existed to apply Rule 41(b) to PCR proceedings. (D.C. Doc. 24.)

On October 30, 2019, the court dismissed the proceeding and ruled, among other things, that Wagner's inaction and unjustifiable workload excuse warranted dismissal under Rule 41(b). (D.C. Doc. 25.) Additionally, the lower court found that the almost five-year delay prejudiced the State. Wagner moved the court to reconsider and the court denied that motion on December 20, 2019. (D.C. Doc. 25 at 6.)

STATEMENT OF THE FACTS

The State originally charged Wagner with the Attempted Deliberate Homicide of Michael Peters in April 2007, based on a gunfight in a southeast Bozeman neighborhood on January 17, 2007. On that date, Wagner shot Michael Peters, who survived but sustained permanent injuries. Wagner went to Peters' house and as Peters was leaving in his truck, Wagner flagged him down. (12/7/10 Trial Tr. at 45.)[1] Wagner stopped him as he was driving away to ask about a missing dog. (*Id.* at 32.) Wagner pointed a gun at Peters and told him to scoot over.

Peters had his own gun because he was afraid of Wagner from prior information that Wagner was looking for him. (*Id.* at 32-33.) Peters knew Wagner had a history of violence, of sending his girlfriend to the hospital after a previous assault. (*Id.* at 23.) Wagner first brandished a gun and that is why Peters shot Wagner in the torso. (*Id.* at 35-36.) Wagner then shot Peters three times as Peters attempted to flee in his truck. (*Id.* at 37.)

[1] The State notes Wagner omitted from the appellate record the underlying criminal court record for review of his PCR appeal. *See* Mont. R. App. P. 8(2) ("The appellant . . . [has] the duty to present the supreme court with a record sufficient to enable it to rule upon the issues raised"). Wagner's omission is of no consequence. A Montana court, including this one, may take judicial notice of the records of any court of this state, whether requested by a party or not, and shall take judicial notice of such records when requested by a party. Mont. R. Evid. 202(b)(6), (c), (d)(2). To the extent this Court deems a review of Wagner's direct appeal records necessary, the State requests this Court take judicial notice of the records in Wagner's underlying criminal matter for purposes of this appeal.

While Peters and Wagner were both wounded, Wagner did not seek any medical attention. Melody Lark testified she had emailed a picture of Wagner to Peters before the shooting, after Peters discovered that Wagner was in Bozeman asking about him. (12/6/10 Trial Tr. at 210.) Lark said she had become fearful of Wagner after he assaulted her, leaving her with a traumatic brain injury and skull fracture, then removed his GPS monitoring bracelet in Colorado. (*Id.* at 196-202.)

During the trial, Wagner's counsel claimed Wagner acted in self-defense when he shot Peters three times. (12/6/10 Trial Tr. at 181.) Wagner's defense attorneys, Ryan McCarty and Peter Ohman, tried to discredit the police investigation, saying Peters' father tainted the crime scene when he made two trips from the home he shared with his son to the truck that had been left in the middle of the road after the shooting. On December 9, 2010, after a four-day jury trial, the jury found Wagner guilty of attempted deliberate homicide. The court sentenced Wagner to 50 years for attempted deliberate homicide, with an additional 10 years for the use of a weapon. (2/25/11 Sent. Hr'g Tr. at 62.) The State will discuss additional record facts in the arguments that follow.

SUMMARY OF THE ARGUMENT

When Wagner failed to timely prosecute his amended PCR petition, the PCR court gave fair and adequate notice that his entire proceeding could be dismissed

because of his delay. Wagner delayed his amended petition further, and the PCR court duly dismissed the entire proceeding. Wagner's claims of error are not supported by the record facts or law, and his requested remedy seeking another chance to prosecute his delayed proceeding is built on his misunderstanding of Montana's Postconviction Act.

The failure to prosecute statute at Mont. Code Ann. § 25-1-104 and involuntary dismissal Rule 41(b) especially apply to PCR proceedings. The reasons Wagner gives to argue those provisions do not apply, focusing on the severity of PCR procedures constitutes the very reasons demonstrating their unique consistency and continuity with the PCR statutes. Wagner overlooks that he is a duly convicted and therefore presumptively guilty criminal defendant whose conviction carries a presumption of correctness. He thus does not stand in the same relation as other civil plaintiffs. The district court here in 2014 announced its intention to orderly and efficiently administer Wagner's proceedings, and informed Wagner's counsel of its intent to schedule a hearing in an orderly manner after all briefing had been completed. Wagner's counsel was acutely unresponsive and delayed this matter for nearly five years. As a consequence, the district court conscientiously exercised its discretion in granting the State's motion to dismiss. Wagner has neither briefed nor demonstrated any statutory or constitutional right to PCR counsel on which to base a valid assertion warranting reversible error.

ARGUMENT

The PCR court properly dismissed Wagner's PCR proceeding.

A. Standard of review and applicable law

1. Standard of review

This Court reviews a district court's denial of a petition for PCR to determine whether the court's findings of fact were clearly erroneous and whether its conclusions of law were correct. *Robinson v. State*, 2010 MT 108, ¶ 10, 356 Mont. 282, 232 P.3d 403.

A petitioner seeking to reverse a district court's denial of a PCR petition "bears a heavy burden." *Garrett v. State*, 2005 MT 197, ¶ 10, 328 Mont. 165, 119 P.3d 55 (quoting *State v. Cobell*, 2004 MT 46, ¶ 14, 320 Mont. 122, 86 P.3d 20). Lower court decisions in Montana are presumed to be correct. *State v. Aakre*, 2002 MT 101, ¶ 43, 309 Mont. 403, 46 P.3d 648.

2. Pleading requirements for PCR petitions

As Wagner correctly observes, the PCR statutes are demanding in their pleading requirements. *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. A PCR petition must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c). The petition must also "be accompanied by a supporting memorandum,

including appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2).

A district court may dismiss a PCR petition without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. Additionally, a district court may dismiss a PCR petition without ordering a response if the petition, files, and records "conclusively show that the petitioner is not entitled to relief." Mont. Code Ann. § 46-21-201(1)(a). Alternatively, the 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.*; *Hamilton*, ¶ 12.

3. The applicable law relied upon by the PCR court

The two laws petitioned in this appeal are Mont. Code Ann. § 25-1-104 (dismissal for failure to prosecute) and Mont. R. Civ. P. 41(b) (involuntary dismissal of actions). Mont. Code Ann. § 25-1-104 states in whole:

> In a district court action in which it appears on the face of the record that activity by filing of pleadings, order of court, or otherwise has not occurred for a period of 2 years and no stay has been issued or approved by the court, the court or, if the court does not act, the clerk of court shall serve notice of lack of prosecution to each party at the party's last-known address. If a pleading, order, or other activity does not occur within the 60-day period following the service of the notice and if a stay is not issued or approved during the 60-day period, the court shall, on its own motion and without further notice or hearing, dismiss the action without prejudice.

Mont. R. Civ. P. 41(b) states in whole:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

A district court has broad discretion in ruling on a Rule 41(b) motion, and its discretion will be overturned only if it has abused that discretion. *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 272 Mont. 37, 40, 899 P.2d 531, 533 (1995). Four factors are considered in determining whether a district court abused its discretion in dismissing an action under Rule 41(b): (1) the plaintiff's diligence in prosecuting the claim; (2) prejudice to the defense caused by the plaintiff's delay; (3) availability of alternate sanctions; and (4) existence of a warning that the case is in danger of dismissal. *Hobble-Diamond*, 899 P.2d at 533-34; *see also Pool v. Butte Pre-Release Ctr.*, 283 Mont. 287, 289-90, 939 P.2d 1011, 1012-13 (1997).

4. Contrary to what Wagner asserts, this appeal presents no issue of first impression, as clear and unambiguous statutes are primary sources of law regardless of whether this Court has ever been called to construe them.

This Court has stated that civil procedure rules apply to PCR petitions only if they are *not inconsistent* with the specific provisions of the PCR statutes. Mont. Code Ann. § 46-21-201(1)(c) ("[t]o the extent that they are applicable and are not inconsistent with this chapter, the rules of procedure governing civil

proceedings apply to the proceeding."); *Kills On Top (Vernon) v. State*, 279 Mont. 384, 928 P.2d 182, 187 (1996) (the rules of civil procedure apply unless they are inconsistent with the specific provisions of the PCR statutes); *State v. Garner*, 1999 MT 295, ¶ 27, 297 Mont. 89, 990 P.2d 175 (Mont. R. Civ. P. 77(d) has no application in PCR proceedings because the PCR statutes provide a specific requirement, § 46-21-203, which is not consistent with Rule 77(d)); *State v. Wright*, 2001 MT 282, ¶ 25, 307 Mont. 349, 42 P.3d 753, 758 (the witness's deposition was properly considered by the district court even though it was not taken in conformity with the Montana Rules of Civil Procedure because the district courts are not strictly bound by the Rules, especially where a specific provision in the PCR statutes touches upon the subject, in this case § 46-21-201(5)).

Moreover, in the PCR context, this Court observes the well-known statutory construction rule that a particular legislative intent will control over a general one that is inconsistent with it. *See State v. Placzkiewicz*, 2001 MT 254, ¶¶ 18-19, 307 Mont. 189, 36 P.3d 934, 937 (citing Mont. Code Ann. § 1-2-102 and holding the tolling provisions of § 27-2-401(1) do not apply to PCR proceedings because the specific statute of limitations provided in Title 46, chapter 21, controls).

The State is compelled to correct misapprehensions by Wagner on several points of law. Wagner is apparently turned around about how non-PCR statutes apply to PCR proceedings. He asserts that other civil procedure rules and statutes

apply to PCR proceedings *only if* they are consistent with the PCR statutes. (Opening Br. at 18-20.) From this mistaken premise, he basically asserts that since this Court has never construed the consistency of Mont. Code Ann. § 25-1-104 and Rule 41(b) to PCR proceedings, there is no governing case precedent controlling their applicability. (Opening Br. at 19.) Wagner's interpretation construes that no civil procedure rule can apply until and if it is first found to be consistent.

The operative language of Mont. Code Ann. § 46-21-201(1)(c) that Wagner misconstrues is critical. Section § 46-21-201(1)(c) mandates that all civil procedure rules already apply *unless* they are inconsistent. Thus, Wagner erroneously asserts that application to PCR of the failure to prosecute statute at Mont. Code Ann. § 25-1-104 and involuntary dismissal Rule 41(b) has never been authoritatively established. He proceeds from this false premise in his brief to variously suggest unfairness and that his PCR counsel did not have sufficient pre-dismissal notice.

Statutes, along with Montana's Constitution, are first-ranking sources of law. Mont. Code Ann. §§ 1-1-101, -102, -105. Where the language of a statute is plain, unambiguous, direct, and certain, a statute speaks for itself and there is nothing for this or any court to construe. *Mackin v. State*, 190 Mont. 363, 370, 621 P.2d 477, 482 (1980). Nowhere has Wagner ever argued any statute or rule in this proceeding and appeal are ambiguous, confusing, or uncertain. He cannot now retreat from this position nor be permitted to contradict this stance in a reply brief.

See, e.g., State v. James, 2010 MT 175, ¶ 26 n.3, 357 Mont. 193, 237 P.3d 672 (noting that appellant in his reply brief argued the reason for striking the juror was not race-neutral, without acknowledging or distinguishing the concession made in the opening brief that the prosecution provided a race-neutral reason. "This . . . is unacceptable appellate practice and a violation of briefing obligations under M. R. App. P. 12. We hold [the appellant] to the concession made in his opening brief."); *see also generally Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996) (discussing judicial estoppel doctrine that precludes a party from gaining an advantage by asserting one position and then later seeking an advantage by taking a clearly inconsistent position).

Section 46-21-201(1)(c) is clear in mandating that all civil procedure rules at the threshold apply to PCR proceedings. Wagner may argue that the failure to prosecute statute at Mont. Code Ann. § 25-1-104 and involuntary dismissal Rule 41(b) are not consistent with PCR statutes, as he attempts in his opening brief, but he cannot argue those rules require authoritative judicial interpretation before they can have the force of law and apply to PCR proceedings.

The State opposes Wagner's request that this Court schedule oral argument. (Opening Br., cover page.) This case is not one of first impression, as Wagner asserts. (Opening Br. at 20.) An issue of first impression exists in Montana when no statutory provisions or case law addressing a matter exist. *E.g.*, *State v. Anyan*,

2004 MT 395, ¶ 20, 325 Mont. 245, 104 P.3d 511 (declaring the knock and announce rule an issue of first impression since Montana has no statutory provisions or case law addressing it). Here, Montana statutes and case law addressing Wagner's matter exist aplenty. Foremost are the clear texts of § 25-1-104, § 46-21-201(1)(c), and Rule 41(b). Secondarily, there are manifold opinions of this Court construing how civil procedure rules at the threshold apply to PCR proceedings unless inconsistent. *See Kills On Top*, *supra*, *Garner*, *supra*, *Wright*, *supra*, and *Placzkiewicz*, *supra*. The possibility that this case may present the first instance that a failure to prosecute provision has been applied in PCR proceedings does not make the appeal issue here one of first impression.

B. As Mont. Code Ann. § 25-1-104 and Rule 41(b) apply in PCR proceedings, the district court correctly applied them to Wagner's PCR proceeding.

1. The statute and civil rule at bar are not inconsistent with PCR statutes.

Montana's PCR statutes in Mont. Code Ann. § 46-21-101, et seq., do not explicitly define procedures to administer when a petitioner lets their PCR proceeding languish. The PCR statutes' timeliness provisions relate only to when a petition must be filed and when a PCR appeal must be taken. *See* Mont. Code Ann. § 46-21-101 (when validity of sentence may be challenged); *id*. § 46-21-102 (when petition may be filed); *id*. § 46-21-203 (when an appeal must be commenced).

Fortunately, other tools exist to address dilatory conduct in PCR litigation by parties and their attorneys.

The dismissal provisions of Mont. Code Ann. § 25-1-104 and Rule 41(b) strike a balance between judicial efficiency and a party's right to meaningful access to the judicial system. The Montana legislature, in enacting Mont. Code Ann. § 25-1-104 and Rule 41(b), plainly intended to address a trial court's need to control its docket and the general policy that favors prompt disposition of lawsuits. *See Becky v. Norwest Bank Dillon, N.A.*, 245 Mont. 1, 6-7, 798 P.2d 1011, 1014-15 (1990) (discussing the concerns embodied in Rule 41(b)); *Chemrock Corp. v. Tampa Elec. Co.*, 23 So. 3d 759, 760-61 (Fla. Dist. Ct. App. 2009) (discussing history, purpose, and meaning of Fla. R. Civ. P. 1.420(e) (Failure to Prosecute), containing language very similar to Mont. Code Ann. § 25-1-104). Montana Code Annotated § 25-1-104 and Rule 41(b) are necessary tools for a district court to employ and neither § 25-1-104 nor Rule 41(b) can possibly be inconsistent or contravene specific provisions of the PCR statute. In fact, as the State has advised, no provisions, specific or general, exist that affect dilatory PCR petitioners.

2. The statute and civil rule at bar correspond with the policy and purpose of the PCR statutes.

PCR litigation is dissimilar from a traditional cause of action between private parties. A PCR petitioner and the State do not stand in the same relation to each other as between an unconvicted defendant and the prosecutor in an original

criminal proceeding. Following the entry of a judgment of conviction, a defendant is presumptively guilty and faces higher burdens as a litigating party. *See, e.g., Marble v. State*, 2015 MT 242, ¶ 29, 380 Mont. 366, ¶ 29, 355 P.3d 742, (stating because the PCR petitioner is presumed guilty following the entry of a judgment of conviction, his burden when seeking PCR based upon newly discovered evidence should be greater than that imposed upon a petitioner seeking a new trial).

While PCR is a unique cause of action resulting in the overturning of a criminal conviction, a PCR petition does not provide a petitioner a second opportunity to litigate his or her conviction. *See, e.g.*, *Beach v. State*, 2015 MT 118, ¶ 6, 379 Mont. 74, 348 P.3d 629 (citing Mont. Code Ann. § 46-21-101(1) and stating an offender who has been found guilty *collaterally* attacks his conviction or sentence). Rather, postconviction relief is a means by which a petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. But PCR is not itself a constitutional right; more accurately, it is a narrow remedy that affords a petitioner no rights beyond those granted by statute. It is the foregoing context that makes it reasonable and understandable that, unlike civil complaints, the PCR statutes are necessarily more demanding in their pleading requirements. As Wagner in his opening brief more thoroughly and correctly observes, PCR procedures are hard.

Unlike other civil claims, PCR claims are subject to more stringent testing, both in their initial submission to the court and in the assessment of whether the claim may proceed. *See, e.g.*, Mont. Code Ann. § 46-21-104(1)(c) (mandates a PCR petition must identify all facts supporting the grounds for relief and have attached affidavits, records, or other evidence establishing the existence of those facts); *see also, e.g.*, *Kills On Top (Vernon) v. State*, 928 P.2d at 189-90, citing *Eiler v. State*, 254 Mont. 39, 833 P.2d 1124, 1127 (1992) (allegations in a PCR petition are not evidence). PCR claims are not evaluated by the lesser standard afforded by Mont. R. Civ. P. 12(b)(6), where presenting nonfrivolous claims, if proven true, might warrant relief and survive summary dismissal. *See Herman v. State*, 2006 MT 7, 41-45, 330 Mont. 267, 127 P.3d 422 (indicating that for purposes of Mont. Code Ann. § 46-21-201(1)(c), Mont. R. Civ. P. 12(b)(6) is inconsistent with statutory procedure). The State observes generally that PCR procedures get more demanding the longer a petitioner waits. *See, e.g., Garding v. State*, 2020 MT 163, ¶ 39, 400 Mont. 296, 466 P.3d 501 (clarifying that separate standards exist for PCR petitioners proposing newly discovered evidence for collaterally challenging their convictions; a more rigorous actual-innocence threshold is applied to untimely petitions by contrast to timely-filed petitions alleging newly discovered evidence).

These and other PCR statutory requirements make sense because a PCR petitioner has already had a trial and a direct appeal to which the presumption of regularity attaches. *See State v. Ailport*, 1998 MT 315, ¶ 7, 970 P.2d 1044; *State v. Okland*, 283 Mont. 10, 941 P.2d 431, 436 (1997) (prior convictions are presumptively valid, and a defendant who challenges the validity of his prior conviction during a collateral attack has the burden of producing direct evidence of its invalidity). Thus, by its nature, PCR procedure should put a petitioner's claims in the light most favorable to upholding the conviction.

Wagner's arguments for inapplicability rest on a lengthy non sequitur of disconnected beliefs about leniency. Wagner's argument boils down to this: if the balance of PCR procedures is severe, then dilatory PCR petitioners must be afforded leniency, and therefore failure to prosecute rules cannot apply. Adopting Wagner's belief would have this Court stand PCR procedure on its head by shifting such favorable treatment to the petitioner. Rather, the many arguments Wagner advances regarding the rigorous nature of PCR procedure compel the conclusion that equally rigorous standards must apply to a PCR petitioner who has not exercised due diligence in bringing his case to a conclusion. The necessity of such a standard, wholly consistent with Montana's demanding PCR statutes, is most especially demonstrated by the need for finality of criminal convictions.

3. Given the underlying policy and purpose of PCR standards, taken with the legitimate need to assure finality of criminal convictions, Mont. Code Ann. § 25-1-104 and Rule 41(b) are not only consistent with, but are particularly apposite to, Montana's PCR procedure.

The United States Supreme Court has considered the significant burdens placed upon convicted persons collaterally attacking their convictions as justified both because in the eyes of the law they have already been duly convicted and because the State has a strong interest in the finality of state criminal court judgments. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("[I]n the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law of [a] brutal murder[]."); *see also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (remarking that postponement and delays in federal collateral attack proceedings frustrate the assurance of finality of convictions to which a state is entitled); *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001) (stating one goal of federal habeas corpus statute of limitations serves "the well-recognized interest in the finality of state court judgments"). Thus, "procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." *Daniels v. United States*, 532 U.S. 374, 381 (2001).

In *Daniels*, the Court noted, "'No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Daniels* at 381, quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944). The policies underlying Montana's rigorous PCR procedure, coupled with the assurance of finality of convictions to which the State is entitled, establish that Mont. Code Ann. § 25-1-104 and Rule 41(b) are not merely consistent, but are compellingly applicable.

C. The district court conscientiously exercised its discretion in applying Mont. Code Ann. § 25-1-104 and Rule 41(b) and dismissing Wagner's PCR proceeding.

Rule 41(b) allows a district court to dismiss an action for failure to prosecute upon the defendant's motion. In deciding whether a district court has abused its discretion in dismissing an action for failure to prosecute, this Court considers the following four factors from *Becky*, 245 Mont. at 8, 798 P.2d at 1015 (1990) (*Becky* factors):

> 1) the plaintiff's diligence in prosecuting his claims;
> 2) the prejudice to the defense caused by the plaintiff's delay;
> 3) the availability of alternate sanctions; and
> 4) the existence of a warning to plaintiff that his case is in danger of dismissal.

This Court considers these factors in light of public policy considerations that favor a plaintiff's right to a hearing on the merits, balanced against the trial

court's need to manage its docket and the general policy of encouraging prompt disposition of lawsuits. *ECI Credit, Ltd. Liab. Co. v. Diamond S Inc.*, 2018 MT 183, ¶ 16, 392 Mont. 178, 422 P.3d 691.

1. *Becky* Factor 1: Wagner proved his lack of diligence by violating the court's order to request a scheduling order or other pleading that would demonstrate responsible regard.

Wagner, through his counsel, filed an Unopposed Motion to Vacate Briefing Schedule on August 6, 2014, asserting counsel's "significant caseload," representing he needed additional time to review and investigate Wagner's file, and stating he anticipated filing an amended petition. Wagner's counsel promised he would "work diligently to complete" the matter and would request a scheduling conference to schedule any future deadlines once he completed his review of Wagner's file. In granting Wagner's request, the court ordered Wagner's counsel to "request a scheduling and/or status conference to establish a new scheduling order once counsel has completed his review of [Wagner]'s file." (D.C. Doc. 17.) Wagner never made such a request.

Instead, Wagner allowed four years to elapse, during which time he did not file an amended petition, provide any status notice, request a case schedule as ordered, file another pleading, or take any other action in the case. Even after being given statutory notice that the proceeding was subject to dismissal, Wagner did not file his amended petition or follow the court's order to request a scheduling/status

conference, but instead filed his own notice reiterating, verbatim, the same excuse he provided to the court in 2014—he was busy. These substantial facts more than sufficiently support the court's finding that Wagner was not diligent.

Wagner, nevertheless, insists that the district court abused its discretion in finding that he had been dilatory in pursuing his case because, he suggests, that he and his attorney had been diligently working on researching and drafting an amended petition. (Opening Br. at 27, 34.) However, the district court found that between 2014 and 2018 Wagner did not file anything with the court. He failed to take any formal action to prosecute his claim or amend his petition until the last day of May 2019.

Wagner's belief that he was continuing to work on the case with his attorney was insufficient to constitute diligent prosecution of his case when he made no effort to stay in touch with either the State or the court. *Cf. Cheek v. Clay Bulloch Constr., Inc.*, 269 P.3d 964, ¶¶ 2, 14-15 (Utah App. Ct. 2011) (finding it relevant in a PCR proceeding that although "very little progress" was documented in the court's file for nearly five years, the parties themselves had "consistent," if "infrequent," contact throughout that time, and observing that had the plaintiff "failed entirely to communicate with either [the other party] or the court for an extensive period immediately prior to [the defendant's] motion [to dismiss], the court would . . . have been more justified in dismissing").

Wagner cannot rebut the finding of his lack of diligence by insisting his intentions in filing an amended petition were sincere and sound and that his counsel re-explained his desire for more time. These assertions cannot show the court abused its discretion. *See Bevil v. Johnson*, 307 S.W.2d 85, 88 (Tex. 1957) (stating the fact that respondents had no intention to abandon to their suit, or that their attorney had hopes of settling the case, cannot be made a ground for charging an abuse of discretion by the trial court). Accordingly, it was not an abuse of discretion for the district court to conclude that the first *Becky* factor weighed against Wagner.

2. *Becky* Factor 2: Wagner's unjustified delay prejudiced the State.

Wagner next asserts that in analyzing the second *Becky* factor, the State neither alleged nor proved any actual prejudice, and what difficulty or prejudice to the State there was, the district court gave undue weight to that prejudice to the State. (Opening Br. at 15-16.)

The State, in its motion to dismiss, alleged prejudice but argued, based on this Court's precedent, that, as the aggrieved party, the State could assert presumptive prejudice and essentially argue it was not required to show actual prejudice. (*See* D.C. Doc. 23 at 3, stating State was not required to demonstrate that its ability to defend had been impaired.) The State correctly relied on sound precedent, particularly *ECI Credit, Ltd. Liab. Co.*, 2018 MT 183, ¶ 28 (stating an

unreasonable delay raises a presumption of prejudice and shifts the burden to the plaintiff to show good cause or a reasonable excuse for inaction, and plaintiff not cannot meet his burden to show good cause or a reasonable excuse for inaction when plaintiff offers no reason for his inaction).

As for the second *Becky* factor, prejudice to the defense, the district court concluded correctly that the State was presumptively prejudiced by the inordinate nearly 5-year delay and therefore was not required to demonstrate that its ability to defend had been impaired. Wagner offered no reasons for not asking for a scheduling order as demanded in 2014 by the district court. His other repeated excuses that he simply needed time were patently insufficient. Wagner offers no argument or precedent showing the State or the court misrelied on authorities precedent in establishing presumptive prejudice.

The State, for argument's sake, and without forfeiting its argument about presumptive prejudice, addresses Wagner's implied assertion that the district court should have favored him because the "litigation is one's freedom, and not only monetary recovery." (Opening Br. at 29.) Wagner is wrong, and he mischaracterizes PCR litigation. It is well-settled that a petitioner in a PCR proceeding is not engaging in a second trial to litigate his guilt or innocence. Trial and PCR procedures are significantly different because their purposes are significantly different. The purpose of a trial is to determine the guilt or innocence

of the defendant. The purpose of a PCR hearing for a new trial is, as its name suggests, an action to determine whether there should be such a trial. It is a preliminary, not a final, procedure. The defendant has been found guilty and remains presumptively guilty. Thus, even if Wagner's petition for PCR relief was ultimately granted, and even if his conviction was ultimately overturned, he would not be released from prison by reason thereof, but face the same pre-trial incarceration as he experienced before each of those two prior trials.

In any event, it is not his continued incarceration versus his liberty at stake, but his burden, which is his alone, to establish the right to prove a constitutional claim. Wagner is primarily responsible for failing to move his petition forward. A PCR proceeding is ultimately civil in nature and does not implicate the same constitutional protections as do criminal prosecutions. Due to the delay in PCR proceedings, the State would be prejudiced in retrying the criminal case, caused for example by missing evidence and faded witness memories.

Wagner wrongly casts blame on the State and the district court for not taking action to move the case along. The *Becky* factors do not consider what the parties each did to prosecute the case, only what the delaying party did or did not do. The plaintiff, as the party initiating the lawsuit, has the primary responsibility to move the case forward, while the responsibilities of the State in a PCR proceeding are limited to timely responding to the action, expeditiously attending to discovery,

and moving any asserted defenses along. Thus, inaction by the State to move the PCR petitioner's claim along is irrelevant unless that inaction constitutes some actual hindrance, i.e., where the petitioner can show that the State's inaction contributed to the petitioner's own delays.

Here, neither the State nor the court did anything to hinder Wagner from acting. The court expressly told—in fact, ordered—Wagner to proceed with his cause by requesting a scheduling order once his counsel's review of the case files was completed. In sum, the State's and the court's actions do not appear to have affected Wagner's ability to pursue his case.

3. *Becky* Factor 3: Wagner concedes the unavailability of alternate sanctions.

Regarding the availability of alternate sanctions, Wagner's counsel acknowledged there were few alternatives for the court to consider. (D.C. Doc. 24 at 8.) Wagner offered no alternative remedy and, as an apparent consequence, the district court found none. (D.C. Doc. .) Wagner apparently concedes that no alternate remedies were available. (Opening Br. at 8.) Strangely, he argues his failure below to suggest alternative sanctions justifies declaring the entire *Becky* four-factor test inapplicable to all PCR cases. This argument borders on the absurd. Merely because Wagner cannot think of alternative remedies that might apply to a PCR proceeding does not justify jettisoning the one remedy that *is* available, which is dismissal after fair and reasonable notice.

The third *Becky* factor points to the district court's need to inquire reasonably about whether less harsh remedies exist and can be used before choosing the remedy of dismissal. Wagner argues essentially that, absent alternative remedies, dismissal can never be a remedy. This Court should reject Wagner's choplogic. The takeaway from Wagner's ill-conceived argument is that he concedes the district court had no choice but to dismiss.

4. *Becky* Factor 4: The court gave Wagner a pre-dismissal warning.

Finally, Wagner asserts that the district court failed to give proper warning and that Wagner's filing, a Notice to the Court, "met the lower court's baseline requirement to file a pleading or 'other document.'" (*See* Opening Br. at 31.)

The assessment under *Becky*'s fourth factor concerning a pre-dismissal warning does not rest on whether the plaintiff met some alleged baseline response, which Wagner here in any event did not. Wagner simply submitted "notice" of the same excuses that caused almost a five-year delay. Fulfilling the district court's baseline would be to comply with the court's express order to ask for a case schedule, which Wagner entirely failed to do.

Pre-dismissal warning is just a factor the district court must thoroughly consider in making its decision; no particular factor is determinative; all the factors must be weighed in the light of the facts and circumstances of the case. *See ECI Credit, Ltd. Liab. Co.*, ¶ 55. This Court has previously held that a warning is not a

prerequisite to dismissal under Rule 41(b). *ECI Credit, Ltd. Liab. Co.*, ¶ 39. Here, the fact that the district court did provide a warning, even though it was within the court's broad discretion not to provide one, *see id.*, shows the court reasonably exercised its discretion.

5. Finally, the balance of public policy considerations weigh against a PCR petitioner's unjustified and inexcusable failure to prosecute his case.

Wagner essentially argues that criminal defendants seeking PCR relief should be insulated from motions related to timeliness due to the need for leniency given the difficultly of PCR procedures. While the State agrees PCR procedures are difficult, as the State fully discuses above in this brief, this is because PCR procedures are meant to be difficult. The State also agrees that PCR courts should not disregard the importance of a defendant's individual rights in ruling on a motion to dismiss for failure to prosecute. However, the usual public policy that favors a plaintiff's right to a hearing on the merits is diminished in a PCR proceeding. An evidentiary hearing on a PCR petition is discretionary, required only in "unique circumstances." *Heath v. State*, 2009 MT 7, ¶¶ 21-24, 348 Mont. 361, 202 P.3d 118.

Wagner apparently complied with the standard showing unique circumstances for a PCR hearing when the district court in 2014 decided to appoint him counsel and require that a hearing should be conducted in Wagner's claims.

(D.C. Doc. 9 at 3, ruling "a hearing on the Petition is required.") However, the district court in the same order gave clear notice to Wagner that juridical efficiency demanded his prompt persecution of the case. The district court warned:

> [A] hearing cannot be held until after the State files its Response following further investigation into Petitioner's claims of ineffective assistance of counsel. Although the Court recognizes that the State has not filed a complete Response to the Petition, *the Court concludes that to avoid any unnecessary delay in this proceeding, Petitioner should have counsel at this stage of the proceeding to prevent a miscarriage of justice* . . . . However, *any hearing should not be set until after the briefing schedule set forth in this Order is completed*.
>
> (D.C. Doc. 9 at 3-4.) (Emphasis added.)

Montana case authority recognizes that dismissal is a harsh remedy, but that such sanction is appropriate where a party or that party's counsel displays an attitude of unresponsiveness to the judicial process. *Nystrom v. Melcher*, 262 Mont. 151, 154-59, 864 P.2d 754 (1993). Such unresponsiveness is shown here. Wagner's counsel was on notice in 2014 that, while Wagner had achieved the discretionary hearing, the hearing was contingent upon the warning that unnecessary delay in the proceeding should be avoided, particularly because of the fact Wagner had been appointed counsel.

The State is not arguing that its legitimate interest in the finality of criminal judgments overcomes every instance that a petitioner seeks PCR redress of significant constitutional error. Here, however, in light of the attitude of unresponsiveness shown by Wagner's counsel, prudential considerations of finality

in this case support the district court's decision to dismiss Wagner's petition due to the unwarranted nearly 5-year delay. *See Shakur v. United States*, 44 F. Supp. 3d 466, 474 n.10 (S.D.N.Y. 2014) ("Prudential considerations" may support a district court's exercise of discretion "not to review the sentence in light of the passage of time."); *United States v. Rivera*, 376 F.3d 86, 92 (2d Cir. 2004) ("A defendant has no due process right to continue to challenge his conviction in perpetuity."); *cf. Herrera*, 506 U.S. at 426 (O'Connor, J., concurring) ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation."). In this case, that point was well short of nearly five years.

Given the trial court's stated need to manage Wagner's PCR proceeding in an orderly and efficient manner, the need to assure the finality of state criminal judgments, and the general policy of encouraging prompt disposition of lawsuits, the balance of policy considerations weigh against Wagner and his argument that the district court exceeded its discretion by granting the State's motion to dismiss for failure to prosecute. The court's decision, coupled with its prior 2014 warning to avoid unnecessary delay, meets both interests of judicial economy and trying a case on its merits. While dismissal is a severe sanction, the State believes it is appropriate in this case.

/ / /

D. Wagner's right to counsel arguments against summary dismissal of his proceeding are unavailing.

The State's research reveals only one case in which this Court has found a *post judgment* constitutional right to appointed counsel (other than on the first appeal of right): *Ranta v. State*, 1998 MT 95, 288 Mont. 391, 958 P.2d 670 (1998). There, this Court found that a defendant is entitled to appointed counsel on sentence review. *Ranta*, ¶ 32. This Court's reasoning is illuminating. The Court said: "[T]o the extent the review division has the power to impose any sentence that could have been imposed by the district court, including *increasing sentences*, we conclude . . . that sentence review is sufficiently a part of the sentencing procedure to render it a critical stage of the proceedings." *Ranta*, ¶ 29 (emphasis added).

In other words, this Court in *Ranta* found that sentence review was, in certain aspects, more akin to the original sentencing procedure than to a collateral attack on a final judgment. A PCR petition after judgment has been issued, unlike an application for sentence review, is clearly a collateral attack on a judgment, not part of the trial or sentencing procedure. As such, it does not create a "potential for substantial prejudice," and the right to counsel does not attach.

While this Court has not specifically ruled that effective assistance applies only to a direct appeal, this Court has provided some basis to test whether and to what extent the right of counsel might exist in posttrial proceedings. *Ranta*, ¶ 22.

"If facing the potential for further loss of liberty . . . does not constitute potential substantial prejudice, it would be difficult to ever find a circumstance that constitutes a critical stage of the proceedings pursuant to the Montana State Constitution." *Ranta*, ¶ 22.

Under this Court's right of counsel jurisprudence, filing a PCR petition would not implicate the type of potential substantial prejudice discussed in *Ranta*. *See id.* ¶ 26 (approvingly citing *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974), for the proposition that, at the trial stage, "the defendant's attorney acts as a shield to protect him against the State, whereas on appeal, the attorney acts as a sword to upset the determination of guilt").

Wagner exercised his "critical stage" first right of appeal, which culminated in the *Wagner* direct appeal disposition. Afterward, he faced no potential for further loss of his liberty. The failure of his PCR counsel to timely prosecute a PCR petition constituted a difference in how Wagner would use his PCR proceeding as sword against his prior determination of guilt. Wagner has not shown he can maintain a Montana right-to-PCR counsel claim with respect to his discretionary PCR petition.

Wagner's attempt to fabricate a new "right to PCR counsel" out of whole cloth fails. He argues that since the PCR statute permits appointment of PCR counsel, a statutory right to counsel necessarily implies counsel shall be effective;

Wagner goes on, without much discussion, that it would be best if this Court just adopted the holding of the Alaska Supreme Court in *Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003) (declaring that "the right to counsel in a first application for post-conviction relief is … required under the due process clause of the Alaska Constitution."). This type of one-paragraph argument might be sufficient if the *Grinols* decision clearly established Wagner had Montana right to court-appointed counsel during the litigation of his PCR petition. But that is not the case.

Rather, while the defendant in *Grinols* had filed a timely petition for PCR, no one disputed that he was entitled to the assistance of counsel when pursuing that petition. Instead, the issue litigated to the Alaska Supreme Court was whether Grinols' right to counsel derived solely from the governing statute, Alaska Stat. Ann. § 18.85.100(c), or whether his right to counsel was also constitutionally based. This issue was important, not to decide whether Grinols was entitled to legal representation during the PCR litigation, but rather to decide whether Grinols could later attack the competence of the legal representation he received.

Here, Wagner has failed to establish as an initial matter that he has any statutory right to counsel. As an indigent PCR petitioner, Wagner does not have a constitutional right to appointed counsel. *Off. of State Pub. Def. v. Mont. Eighteenth Judicial Dist. Court*, 2011 MT 97, ¶ 3, 360 Mont. 284, 255 P.3d 107. The right to appointment of counsel in a PCR proceeding is controlled by Mont.

Code Ann. § 46-21-201. *Off. of State Pub. Def.*, ¶¶ 3, 7. In non-death penalty cases, a petitioner is entitled to the appointment of counsel only if a hearing will be held or if the interests of justice require it. Mont. Code Ann. § 46-21-201(2). The Court has adopted the following criteria for appointment of counsel in PCR and other proceedings:

> We will appoint counsel where the defendant's, petitioner's or appellant's motion or petition demonstrates—by reference to specific facts and documents in the record (preferably attached as exhibits to the motion or petition), and by citation to specific jurisprudential, statutory or constitutional authority—that (a) a statute specifically mandates the appointment of counsel; (b) the defendant, petitioner or appellant is clearly entitled to counsel either under the United States Constitution or under Montana's Constitution; or (c) extraordinary circumstances exist that require the appointment of counsel to prevent a miscarriage of justice.

Dillard v. State, 2006 MT 328, ¶ 16, 335 Mont. 87, 153 P.3d 575. While failure to appoint counsel in the event of a hearing is reversible error, *Swearingen v. State*, 2001 MT 10, 304 Mont. 97, 18 P.3d 998, there is no constitutional right to counsel in a PCR proceeding and, therefore, no Sixth Amendment claim of ineffective assistance of counsel would arise from counsel's performance in PCR proceedings. *Coleman v. Thompson*, 501 U.S. 722 (1991).

The Alaska Supreme Court explained that the State's argument in *Grinols* was "that the right to counsel in a post-conviction relief proceeding is [solely] statutory and therefore not subject to the guarantee of effective assistance of counsel." *Grinols*, 74 P.3d at 892. The Alaska Supreme Court rejected that

argument and held that the Alaska Constitution also guaranteed the right to counsel in PCR litigation. *Id.* at 894.

As for Wagner's suggestion that this Court should just adopt a Montana constitutional right to PCR counsel, this Court has held that it is insufficient for a litigant to simply assert that heightened state constitutional protections are available. A litigant must affirmatively demonstrate what greater protections are provided beyond those federal protections afforded within the context of his or her specific case. *See State v. Rosling*, 2008 MT 62, ¶ 66, 342 Mont. 1, 180 P.3d 1102 (acknowledging that article II, sections 24 and 26, afford a greater jury trial right than does the Sixth Amendment, but concluding Rosling failed to explain what greater protection—i.e., what protection over and above the protection afforded by the Sixth and Fourteenth Amendments as interpreted in federal precedent—is afforded by article II, sections 17, 24, and 26, within the context of Rosling's case).

Although the Montana Supreme Court certainly can and does diverge from federal precedent when interpreting the Montana Constitution, a party must establish sound and articulable reasons why the Montana Constitution contains unique language, not found in its federal counterpart (or, by extension, a sister state's constitution), that dictates that this Court should recognize the enhanced protection. *See State v. Covington*, 2012 MT 31, ¶¶ 20-25, 364 Mont. 118, 272 P.3d 43.

This Court in *Covington* clarified that the mere mantra-like invocation of heightened state constitutional protections cannot establish the existence of a specific rule applicable to a litigant's circumstances. *See Covington*, ¶ 20; *Rosling*, ¶ 66. This Court will undertake a unique state constitutional analysis only when the appellant has satisfied the burden of proof that a unique aspect of the Montana Constitution, or the background material related to the provision, provides support for the greater protection that he seeks to invoke. *Covington*, ¶ 21.

Here, Wagner fails to satisfy his burden of proof that Montana's Constitution provides broader protections than the due process standards in the federal constitution or even the same standards adopted by Alaska in the Alaska Constitution. Wagner makes no attempt to explain why the circumstances of his case warrant a unique state constitutional analysis by this Court. Wagner cites no background materials to indicate that the delegates to Montana's Constitutional Convention contemplated some enhanced due process protections for PCR petitioners. As this Court will decline to consider arguments on appeal that are not adequately briefed and argued, *see State v. Cybulski*, 2009 MT 70, ¶¶ 13-15, 349 Mont. 429, 204 P.3d 7, the State submits it has no obligation to further discuss Wagner's complaint that he is entitled to effective assistance of PCR counsel. *See Chor v. Piper, Jaffray & Hopwood*, 261 Mont. 143, 149, 862 P.2d 26, 30 (1993) (concluding that since Chor did not address an issue in her brief to this Court, she

effectively conceded); *see also Emery v. Federated Foods*, 262 Mont. 83, 87, 863 P.2d 426, 429 (1993) (failing to brief issue on appeal results in waiver).

Without forfeiting this contention, the State for argument's sake addresses Wagner's other assertions regarding his PCR counsel. Wagner cites current provisions of Montana Rules of Professional Responsibility. However, he gives no reason why those provisions, enforceable by another body, are insufficient to protect a PCR petitioner's interest in adequate PCR representation. Wagner's references to the Rules of Professional Responsibility were not accompanied by any authority to the effect that he should have a new PCR proceeding, even if his PCR counsel strayed from the standard of ordinary care exercised by reasonable attorneys practicing in the difficult area of PCR practice.

If this Court adopts Wagner's view, then once any PCR attorney has undertaken to represent a defendant in a PCR action, all subsequent attorney action implementing the basic decision to provide PCR representation would be subject to case-by-case judicial review for IAC. This would be highly unworkable. It would follow that after the first PCR proceeding, a petitioner, such as Wagner, here, could attempt to claim IAC of PCR counsel on appeal in this Court. If the claim were nonrecord-based and therefore not suitable for resolution on appeal, then remand for additional PCR proceedings could follow. These procedures defy logic. *E.g., Coleman*, 501 U.S. at 756-57 ("Given that a criminal defendant has no right to

counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that [petitioner] had a right to counsel to appeal a state collateral determination of his claims of trial error."). PCR proceedings are not even constitutionally required. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (concluding that because petitioner had no constitutional right to counsel in pursuing state supreme court review, petitioner "could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely"); *Wilson v. United States*, 413 F.3d 685, 687 (7th Cir. 2005) ("Because the sixth amendment does not guarantee quality (or any) counsel in post-conviction proceedings, the doctrine of ineffective assistance does not apply and lawyers' errors do not support relief."); *Bucaram v. Chandler*, 566 F. Supp. 2d 755, 768 (N.D. Ill. 2007) ("As the Supreme Court has already ruled, because states have no obligation to provide post-conviction proceedings, litigants who choose to collaterally attack their conviction through post-conviction proceedings have no right to counsel during those proceedings.").

Under these circumstances, a PCR petitioner "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." *McMann v. Richardson*, 397 U.S. 759, 774 (1970). The same should hold especially true for PCR representation in Montana. Here, this Court cannot know the wisdom or efficacy of Wagner's attorney's belief in his stance about how best to advance

Wagner's cases because his attorney was not asked on the record why he pursued the risks he did on Wagner's behalf. Even if, for argument's sake, the belief was a miscalculation, ordinary attorney miscalculations have been held to be constructively attributable to the client. *See Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). That rationale plainly applies, regardless of whether the attorney error in question involves ordinary or gross negligence. *See Coleman*, 501 U.S. at 754 ("[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i.e., 'imputed to the State.'"); *id.* at 752 (rejecting the contention that "[t]he late filing was . . . the result of attorney error of sufficient magnitude to excuse the default in federal habeas").

Whatever the basis for his attorney's belief that he was managing Wagner's case diligently and competently, Wagner is bound by his counsel's action. Wagner is not immunized from the effect his counsel's beliefs had about when and how he should have filed the amended answer merely because they were the beliefs of counsel. *See State v. Nelson*, 251 Mont. 139, 141, 822 P.2d 1086, 1087 (1991) ("[W]hen [a party] appears by attorney, the latter, while acting as such, has control and management of the case, and his sayings and doings in the presence of the court concerning the cause are the same as though said and done by the party himself."). (Citation omitted.)

CONCLUSION

There being no showing of error in the record regarding the dismissal of Wagner's PCR petition, this Court should affirm the denial of Wagner's PCR proceeding.

Respectfully submitted this 21st day of October, 2020.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ C. Mark Fowler*
C. MARK FOWLER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,432 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

/s/ C. Mark Fowler
C. MARK FOWLER

CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-22-2020:

Penelope S. Strong (Attorney)
2517 Montana Ave.
Billings MT 59101
Representing: Christopher Wagner
Service Method: eService

Martin D. Lambert (Prosecutor)
1709 W. College
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Electronically signed by Janet Sanderson on behalf of C. Mark Fowler
Dated: 10-22-2020