



ORIGINAL

RECEIVED

FEB 25 2022

Bowen Greenwood
Clerk of Supreme Court
State of Montana

FILED

02/25/2022

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 20-0606

Christopher I. Toulouse
AO# 42741
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. _____

CHRISTOPHER I. TOULOUSE,
Petitioner,

V.

STATE OF MONTANA,
Respondent.

)
)
)
)
)
)

No. DA - 0606

REPLY TO APPELLATE DEFENDER'S
ANDERS BRIEF AND MOTION TO
WITHDRAW AS COUNSEL

COMES NOW, Petitioner, Christopher I. Toulouse, submits a Pro se reply to the Appellate Defender's Motion To Withdraw as Counsel, and Anders Brief in the matter of Appeal from the Montana Fourth Judicial District Court, Missoula County.

A. The Motion To Withdraw as Counsel And Anders Brief
Should Be Denied.

Petitioner is well aware that after reviewing the entire record and researching applicable statutes, case law, and rules, Counsel has determined that an Appeal would be frivolous or wholly without merit. Nonetheless, Mr. Toulouse stands firmly by his right to further representation by the Appellate Defenders Office, and a Direct Appeal pursuant to Mont. Code Ann. § 46-8-103. In support: *State v. Strizich*, 2021 MT 306 "To invoke plain-error review," we still require the assertion of plain error to be raised and argued on appeal." In re B.H., 2018 MT 282, ¶ 15, 393 Mont. 352, 430 P.3d 1006 (Quoting in re B.O.T., 2015 MT 40 ¶ 22, 378 Mont. 198, 342 P.3d 981). We have refused to invoke the common-law doctrine of plain-error review when a party raises such a request for the first time in a reply brief. See, e.g., *Fleming*, ¶ 40; *State v. Johnson*, 2010

MT 288, ¶ 13, 359 Mont. 15, 245 P.3d 1113; *State v. Raugust*, 2000 MT 146, ¶ 19, 300 Mont. 54, 3 P.3d 115; *State v. Hagen*, 283 Mont. 156, 159, 939, P.2d 994, 996 (1997).

B. That Relief Be Granted To Mr. Toulouse In The Form of
A New Trial With Competent Counsel

In addition to arguable issues and case law presented by the Appellate Defenders Office in the Anders Brief, Mr. Toulouse presents case law as follows in support of his Right to be granted a new trial with competent Counsel.

1. (See Anders Brief Issue I.) In support: *State v. Tellegen*, 2013 MT 337 ¶ 26, counsel's failure to make a valid objection based on the statutory prohibition on multiple charges constitutes deficient performance under the first prong of *Strickland*. *State v. Becher*, 2005 MT 75, ¶ 20, 326 Mont. 364, 110 P.3d 1. Failure to make a valid objection to vacate a conviction prejudices the Defendant by affecting the outcome of the case, even if the conviction is set to run concurrently with valid convictions in the case. *State v. Williams*, 2010 MT 58, ¶¶ 27-30, 355 Mont. 354, 228 P.3d 1127; *Ball v. United States*, 470 U.S. 856, 864-65, 105 S. Ct. 1668, 1673, 84 L.Ed.2d 740 (1985). ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence.") *Tellegen's* attorney failed to object to the theft conviction, for which *Tellegen* was sentenced to a concurrent prison term and charged additional fees, costs, and fines. The absence of objection and the subsequent sentences satisfy both prongs of *Strickland*.

2. (See Anders Brief Issue II) In support: *State v. Johnston*, 2019 MT 34 ¶ 21,*Cheetham*, ¶ 20; *State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371 (*Gallagher I*); see also *Smith*, 640 F.3d at 594 (explaining that "the judge has an obligation to inquire thoroughly into the factual basis of Defendant's dissatisfaction" with counsel (internal quotations and citations omitted)). A district court's inquiry is inadequate if the court fails to conduct

"even a cursory inquiry into the defendant's complaints," in which case we remand for further proceedings. Gallagher 2, ¶ 15 (internal quotations omitted).

3. Mr. Toulouse received ineffective assistance of counsel when his attorney failed to make a valid objection based on statutory prohibition on multiple charges. In support: State v. Brandt 2020 MT 79 ¶ 29 We analyze claims of ineffective assistance of counsel using a two part test enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ellison, ¶ 24. The defendant must show first that counsel's performance was deficient and second, that counsel's deficient performance prejudiced the defendant. Ellison ¶ 24. Defense counsel's failure to make a valid objection based on the statutory prohibition on multiple charges constitutes deficient performance. Ellison ¶ 25 (citing State v. Becker, 2005 MT 75, ¶ 20, 326 Mont. 364, 110 P.3d 1). Such deficient performance is prejudicial because the defendant "would have been sentenced to a lesser term had counsel made the appropriate argument." Ellison ¶ 25 (quoting Becker ¶ 21)(internal quotations omitted).

CONCLUSION

Mr. Toulouse has identified issues for direct appeal and prays this court grant relief in the form of a new trial with competent counsel or deny counsel's motion to withdraw and require counsel to address the issues in the Anders brief for a Direct Appeal. Mr. Toulouse wishes to invoke his right to direct appeal rather than have these issues addressed in an Anders brief.

Respectfully submitted this 22 day of February, 2022.


Signature of Petitioner

Christopher I. Toulouse

CERTIFICATE OF SERVICE

I, Christopher I. Toulouse, hereby certify that I have mailed a true and accurate copy of the foregoing response to Anders Brief, and Motion to Withdraw as Counsel to the following:

Kristina Neal
Office of the Appellate Defender
555 Fuller Avenue
Helena, MT 59620

Kirsten H. Pabst
Missoula County Attorney
200 W. Broadway
Missoula, MT 59802

Austin Miles Knudsen
Montana Attorney General
215 N. Sanders
Helena, MT 59620

Montana Supreme Court
Attn: Clerk of the Montana Supreme Court
P.O. Box 203003
Helena, MT 59620