

IN THE MONTANA SUPREME COURT

No. DA 22-0167

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STATE OF MONTANA,  
Plaintiff and Appellee,  
vs.

SARAH RAE McKNIGHT,  
Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Fourth Judicial District Court,  
Missoula County, the Honorable Robert Deschamps Presiding

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## ISSUES PRESENTED

1. After construing defendant's *pro se* post-sentencing motion as a petition for post-conviction relief, appointing counsel on this petition, and setting a hearing, did the district court abuse its discretion when, four years and ten months later, having received nothing from appointed counsel, it dismissed the petition on its merits without a hearing, instead of issuing an order to defendant and her counsel to appear and show cause why the petition should not be dismissed for non-prosecution?

2. Should the trial court's dismissal of the above-described petition be reversed because each of defendant's two court-appointed attorneys rendered *per se* deficient representation on the petition?

## STATEMENT OF THE CASE

On January 12, 2016, an Information was filed charging Sarah McKnight with five serious felonies, including deliberate homicide, attempted deliberate homicide, and aggravated kidnaping, CR 3. On January 19, 2016, she appeared for arraignment with her appointed attorney, Lisa Kaufmann, CR 11. Four months later, on May 17, 2016,

she appeared with her attorney and changed her pleas to guilty on all counts—with open pleas in each case, CR 17. On December 12, 2016, a sentencing hearing was held, and by Judgment entered February 23, 2017, Ms. McKnight was sentenced to two consecutive life sentences, together with three concurrent sentences of varying lengths, CR 21, 22.

On March 29, 2017, in the same cause number (DC-16-16), Ms. McKnight filed, *pro se*, a “motion for ineffective assistance” CR 30. On April 5, 2017, the court ordered that the motion be considered a petition for post-conviction relief, and directed the State to file a response, CR 31. The State did so, requesting that the court appoint post-conviction counsel for Ms. McKnight, and set a hearing, both of which the court did on April 12, 2017, CR 33. On May 10, 2017, Ms Briana Kottke noticed her appearance as appointed counsel for Ms. McKnight, and on May 12, 2017, Ms. Kottke requested that the hearing previously set be vacated, as she intended to amend the Petition and thereafter consult with her client and prepare for a comprehensive evidentiary hearing, CR 35. The court accordingly vacated the hearing, CR 36 (May 15, 2017).

The next relevant record entry occurs 27 months later, August 12,

2019: it is a substitution of Colin Stephens in place of Briana Kottke as appointed counsel for defendant-petitioner. The notice states that Mr. Stephens intends to amend the petition and request a hearing when ready to present Ms. McKnight's case, CR 38.

On February 18, 2022, two and one-half years later, the next record entry appears: it is an Order dismissing Ms. McKnight's petition on the merits. The Order notes that no amendment to the petition has ever been filed and no hearing requested, and determines that the *pro se* petition's allegations of ineffectiveness of counsel are either unsupported or false. It does note that one of the allegations suggests that Lisa Kaufmann, Ms McKnight's appointed trial counsel, suffered from a potential personal conflict of interest on account of Ms. McKnight's swastika tattoos and acknowledged involvement with white supremacist males (including, especially, her co-defendant on the murder and attempted murder charges). But it concludes, without analysis, that this "establishes no basis for post-conviction relief." CR 39; set out in this Brief, Appendix, p.11.

A timely Notice of Appeal was filed subsequent to the entry of the dismissal order, CR 41.

## STATEMENT OF FACTS

1. The *pro se* pleadings filed by Ms. McKnight subsequent to her sentencing (and never amended by either of her appointed counsel) consist of a “letter” CR 24, dated February 23, 2017 (and not considered a formal pleading by the court, CR 25); and three handwritten motions in which Ms. McKnight alleges her trial counsel Ms Kaufmann was ineffective because she conducted no investigation of the case, misled Ms. McKnight as to the likely outcome of proceeding on open pleas, and was handicapped in her representation by a conflict of interest, in that Ms. Kaufmann was Jewish and her client exhibited Nazi insignia (swastika tattoos) on her person and was admittedly closely associated with various white-supremacist-oriented males, including her co-defendant Scott Price (the individual who actually committed the attempted murder assault and the murder, with a knife). CR 30.

2. Aside from her motion to vacate the post-conviction hearing and a related letter to the Sentence Review Division withdrawing her client’s SR application(CR 37), there is no pleading or document in the record filed by Ms. Kottke, and, except for a suggestion in the court’s February 18, 2022 dismissal order that Ms. Kottke may at some

point have ordered a transcript of the change-of-plea hearing (CR 39; Appendix, p. 6), there is no indication in the record of any work done on the case by Ms. Kottke, or of any communication by her to the prosecutor, the court, her client, or anyone else.

3. Aside from the substitution-of-counsel notice filed by Mr. Stephens, there is no pleading or document authored by him in the record, nor is there any indication in the record of his communicating with the court, the prosecutor, his client, or anyone else concerning his representation of Ms. McKnight, or his work on the case.

4. Both the initial pleading filed by Ms. Kottke, and the initial (and sole) pleading filed by Mr. Stephens, include a statement of intention to file an Amended Petition for Post-Conviction Relief. These statements manifest their recognition that Ms. McKnight's handwritten *pro se* pleadings do not satisfy the requirements of Section 46-21-104 (1) and (2) MCA, with regard to the specification of claims and the submission of evidence and legal authority in support of such claims.

5. The dismissal Order recognizes that not only is there a claim contained in Ms. McKnight's pleadings concerning what would amount to a conflict-of-interest infecting Ms. Kaufmann's representation of her

in the murder case, but also that there is at least some factual basis for such a claim (CR 39; Appendix, p.11). As the court states:

“It is understandable why an attorney with a Jewish name would have a conversation with her client wearing visible Nazi insignia about whether their backgrounds or beliefs would create any obstacles in their attorney client relationship.”

In this part of the dismissal Order, the court also makes reference to the parties’ memoranda “submitted to the court” prior to the December 12, 2016, sentencing hearing concerning the defendant’s swastika tattoos and her involvement with white-supremacy-oriented individuals and groups ( Appendix p.10-11). However, there are no such memoranda in the court record (CR, entire).

6. The presentence investigation report in this case includes a very lengthy psychological evaluation of Ms. McKnight conducted by Laura Kirsch, Ph.D., as well as a chemical dependency evaluation conducted by Shari Rigg, LAC (Sealed Electronic Documents, Doc. #1, pages 18-19, plus 18-page attachment). These evaluations reveal that Ms. McKnight suffered from multiple psychiatric disorders, as well as very severe, lifelong chemical dependency issues. They also document a history of non-violence, but also a history of extreme dependent-

personality disorder which caused her to be likely to endorse and support the behavior of whatever male she was closely associated with at any particular time. It seems apparent from the utterly dis-integrated personality described in these reports that Ms. McKnight would not have the capacity to conduct meaningful legal proceedings on her own behalf without the assistance of counsel.

### STANDARD OF REVIEW

This Supreme Court reviews discretionary rulings in post-conviction proceedings, including ones related to whether or not to hold an evidentiary hearing, for abuse of discretion. *Heath v. State*, 2009 MT 7, ¶13, 348 Mont 361, 202 P3d 118. It reviews *de novo* the mixed questions of fact and law presented by claims of ineffective assistance of counsel. *Heath, ibid.*

### SUMMARY OF ARGUMENT

1. There having been no visible action taken by appointed counsel on Ms. McKnight's post-conviction petition for a period of four and three-quarter years, it was reasonable for the court to formally inquire

as to its status. It was not reasonable for the court to assume from the inaction that the petition was unmeritorious and dismiss it summarily without a hearing.

2. There is no plausible justification for appointed counsel neither prosecuting Ms. McKnight's case nor resigning, and counsel's abandonment of her case without notice to the court constitutes a degree of deficient representation mandating reversal.

## ARGUMENT

### I. THE COURT ABUSED ITS DISCRETION IN DISMISSING THE PETITION WITHOUT A HEARING.

In Montana, a district court is permitted to convert a *pro se* motion filed after sentencing to a petition for post-conviction relief. In *State v. Howard*, 282 Mont 522, 938 P2d 710 (1997), this court approved such a conversion where the defendant alleged trial counsel suffered from a conflict of interest. Presumably, once a pleading is considered a petition for post-conviction relief by the court, the statutes governing post-conviction procedure apply.

Section 46-21-201(1)(a) MCA provides that a district court may

summarily dismiss a petition if “the files and records of the case conclusively show the petitioner is not entitled to relief.” Absent such a finding, the court shall order the county attorney to file a responsive pleading. Following its review of the response, the court “may dismiss the petition as a matter of law for failure to state a claim, or it may proceed to determine the issue.” Here, the court ordered a response, and after reviewing the response, it appointed counsel for petitioner and set a hearing. By doing so, the court, at least implicitly, found that the petition stated a colorable claim.

Ultimately—after nearly five years—the court dismissed the petition without a hearing. Its stated rationale for doing so was that the petition contained only conclusory allegations unsupported by the evidentiary materials required by Section 46-21-104(1) MCA. In many instances, a district court is authorized to do this, *see, Griffin v. State*, 2003 MT 267 ¶12, 317 Mont 457, 77 P3d 545.

However, as stated in the leading case of *Heath v. State*, 2009 MT 7 ¶21-23, 348 Mont 361, 202 P3d 118, “in certain settings, especially those with unique circumstances,” such a dismissal will constitute an

abuse of discretion.

It is instructive to review the circumstances the *Heath* court found persuasive. In that case, Heath had filed a petition asserting his trial counsel was ineffective, and the State had requested the court order trial counsel to file a response. The court did order this, but before filing a response, trial counsel committed suicide. The district court then, over objection, dismissed the petition without a hearing, finding that all of trial counsel's questioned decisions and omissions were tactical, rather than unprofessionally mistaken or negligent. This Court reversed for abuse of discretion, stating: (1) the district court should not speculate, in the absence of evidence, on the reasons for counsel's performance (*Heath*, ¶25); (2) the district court should consider all the claims in the petition (*Heath*, ¶26); and (3) the court should "explore fully" at a hearing the reasons for counsel's action or inaction (*Heath*, ¶24).

In the present case, the district court in its opinion dismissing Ms. McKnight's petition *speculated* that the reason her two appointed counsel failed to amend her petition and failed to request a hearing was

that they judged all her claims were unmeritorious, CR 39; Appendix, p.6. The court also failed to consider two claims in the petition, CR 39, Appendix, p.5. The court also failed to “fully explore,” or explore at all, the conflict-of-interest claim, for which some evidence already existed, CR 39, Appendix, p.3, 10-11. In short, the court abused its discretion in each of the ways described by this Court in *Heath*.

Certainly, the circumstances of this case appear to be unique. It is highly unusual that two different court-appointed attorneys would let nearly five years elapse without amending the petition and requesting a hearing, or withdrawing, or informing the court that, *after appropriate investigation and research*, they’ve concluded the petition’s claims are without merit. It is also unusual that, so far as the record shows, there were no attorney-client communications, or lack of them, to report. The vast silence of counsel in all this is a mystery.

Certainly after nearly five years, the court would have been amply justified in issuing an order requiring counsel and petitioner to appear and show cause why the petition should not be dismissed for lack of

prosecution. If it had done this, all the questions left unanswered by its order of dismissal could have been answered, and the petition either dismissed or heard on the merits. In particular, clarity would have been gained concerning the most troubling allegation in the petition: that appointed trial counsel was laboring under a conflict of interest occasioned by her perception that her client harbored anti-semitic beliefs. Basic fairness, it would seem, would require such clarity, since if an actual conflict of interest affected her lawyer's performance, defendant would have received constitutionally inadequate representation, *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

One additional consideration reinforces the conclusion that the dismissal without hearing was an abuse of discretion. Although the district court makes light of Ms. McKnight's allegations concerning lack of investigation and also concerning her attorney's misleading her as to the likely outcome of the sentencing hearing, it *is* somewhat surprising to see a set of open pleas of guilty entered in respect to such serious charges less than four months following arraignment. While it is entirely conceivable that such an action was professionally

legitimate, whether it was or not should have been “fully explored” by means of sworn testimony at a hearing.

## II. MS. McKNIGHT RECEIVED INEFFECTIVE ASSISTANCE FROM HER POST-CONVICTION COURT-APPOINTED ATTORNEYS.

The record in this matter reveals that the two attorneys appointed to represent Ms McKnight on her post-conviction petition rendered ineffective assistance of counsel. The record shows they both realized her *pro se* petition needed to be amended in order properly to state a claim under Section 46-21-104(1) MCA, yet in the nearly five years they represented her, they failed to prepare and file such an amendment. The record shows they were both aware of the need to request a hearing when they were ready to present evidence, yet no hearing was ever requested. The record is devoid of any indication of any work done on the case: no discovery requests, no subpoenae, no filing of evidentiary documents, no briefs. The record also contains no requests for continuances, explanations for delay, or the like. The record provides unambiguous evidence of total abandonment of the case by Ms. McKnight’s counsel.

Based on the record, it is clear the appointed attorneys violated, at

a minimum, the following rules of professional conduct: Rule 1.3 (diligence); Rule 1.16 (c)(notice to tribunal of intent to withdraw); Rule 3.2 (expediting litigation). The record also demonstrates that the two appointed attorneys neither requested permission to withdraw, nor informed the court that they were unwilling or unable to prosecute the petition. Instead, they simply left the matter in limbo, knowing (as they had to know) that the result of that action could not be beneficial to their client.

This Court can find ineffective assistance of counsel on direct appeal if that finding can be based entirely on the record, or if there is no plausible basis for counsel's conduct, *State v. Frasure*, 2004 MT 305 ¶12, 323 Mont 479, 100 P3d 1013. Here, since abandoning the case could not even conceivably advance the client's interests, and since the record shows nothing but consistent neglect, the conclusion is inescapable: Ms. McKnight received ineffective assistance of counsel on her petition, which supports reversal of the order of dismissal.

There is one twist to this: the United States Supreme Court has held that there is no federal constitutional right to effective assistance in state post-conviction proceedings, *Coleman v. Thompson*, 501 U.S.

722, 752-757 (1991). State jurisprudence on the question of whether there is a state right to effective assistance in collateral proceedings is ambiguous and mixed. The best case on the subject, though, is *Jackson v. Weber*, 637 N.W.2d 19 (S.D. 2001), which holds that an independent right to effective assistance of counsel arises by statute in state post-conviction proceedings, *Jackson*, ¶16. This is because

“It would be absurd to have the right to appointed counsel who is not required to be competent...a position that a statutory right to counsel does not mean a right to effective assistance of counsel is at odds with commonsense...it is implicit that court appointment of counsel means competent counsel...

-*Jackson*, ¶14, 15, 18.

It appears that this Court has not spoken on this issue. However, Section 46-21-105(2) MCA bears at least partially on this question.

It provides, in pertinent part, that

“Ineffectiveness of or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part.”

This provision certainly limits the ability of a petitioner to obtain relief on account of incompetent counsel if the incompetence is not fully ascertainable from the record on appeal, and would require

a further evidentiary proceeding. The statute, however, does not, by its terms, preclude raising the issue on direct appeal—as is being done here. Thus, this Court is in a position to follow the South Dakota Supreme Court in viewing a court appointment of counsel as implicitly guaranteeing counsel who is at least diligent and loyal, and whose conduct comports with the most basic canons of professional ethics.

### CONCLUSION

Because the district court abused its discretion in dismissing this petition without the hearing it had initially ordered, and without inquiring into the apparent abandonment of the cause by counsel, and because that abandonment constituted *per se* deficient representation, the dismissal order, CR 39, must be reversed, and the matter remanded for a show-cause hearing and, potentially, a full hearing on the merits.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of March, 2023.

/s/ \_\_\_\_\_  
William Boggs

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 Perfect is 3,001 words.

/s/ \_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I, William Boggs, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-09-2023:

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