IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0021

GREGG ALLEN ZINDELL,

PETITIONER

V.

STATE OF MONTANA,

RESPONDANT

RESPONSE TO STATES BRIEF

On Appeal from the Montana Eighth Judicial District Court, Cascade County, The Honorable John A. Kutzman

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

MONTANA CODE ANNOTATED

MONTANA RULES OF EVIDENCE

REPLY TO APPELLE BRIEF

The Attorney General has made sum mistakes in their brief I,Gregg Zindell, would like to clarify these issues.

ZINDELL FILLINGS

Zindell never filed any motion or petition in any courts until Meghan Lulf-Sutton terminated her representation of Zindell. Febraary 09, 2015 is a letter from Lulf-Sutton (2nd PCR ex.A)

When Zindell filed his appeal from the first PCR the Honorable Judge explained that any affidavits or documents had to be presented to the distict court prior to the Appellate court. Zindell had to wait until his appeal was done before he could petition the district court.

The 2nd PCR was sent to the Cascade County Prosecutors office. Matter of fact it was a topic brought up by the BOPP. During Zindells hearing the prosecution still did not address the 2nd PCR.

JENSENS IAC

Jensen interviewed C.D., but never submitted his notes or findings. C.D. said she the note "to come over to her house" on Thursday Feb. 8,2011, not on Feb.9,2011. In latter interviews C.D. claims not be at Zindells home until Feb. 9,2011. This and these other claims are what Lulf-Sutton and Bradley Jones should have done a "Direct Appeal" on:

[2]. Judge Neill did not let Zindell have a defense that was legall(45-5-511(2)). Zindell was sentenced harsher.

[4]. Jensen did not interview multiple witness that took the stand. How could Jensen challenge the state or witness if he did not properly depose the witness?

[7]. Jensen was paid to procure an expert witness, not depict fictional characters like Batman or cat women.

[8]. If a expert witness would have been consulted with, Zindell would have never testified. The evidence contradicted itself in the S.A.N.E. exam.

[9]. Zindell was highly depressed after the death of Shelby Mckorkle, Troy Zindells sucide, and other deaths that ocurred in 2012. Zindell fully relied on all his paid attorneys.

[11]. The complaint against the jury would not be hearsay if there would have been an evidentary hearing. Christine Beatty would probelly diclose that she and Amanda Fry did discuss trial.

[12]. There is no room for Batman,ect. in the courts.

[14]. Jensen knowingly lied to Judge Neills while he was sworn and on the stand.

Zindells 2nd PCR was filed three years after sentencing. Lulf-Sutton filed the 1st PCR. The state motioned for a "Gillham" order. The evidentary hearing was changed multiple times. Judge Neill took several months to make a decision on the PCR. Lulf-Sutton decided not to represent Zindell after Judge Neills denial.

Zindells first Pro Se filing was when he put a "notice of appeal". Zindell and the Attorney Generals office made multiple motions for extensions. September 6,2016 the Montana Supreme Court made a decision. Zindell filed a 2nd PCR on May 30,2017. A copy was sent to the Cascade County Prosecuted office, the Attorney General office, and the Clerk of Court of Cascade County. The PCR was filed nine months after the denial of Zindells 1st PCR, well under the one year barment. It was not until Zindell was made to do his own appeal, that all the errors become apparent.

Zindell could not a "PCR" on Lulf-Sutton and Jones while there was a "PCR" on Jensen. 46-21-105 (b) "unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition" . Zindell could not have done a Direct Appeal or a PCR without consulting with Lulf-Sutton or Jones.

St. v. Whitlow 2001 Mt. 208, 306 M 339, 22 877(2011)

Following coviction on numerous felony charges, Whitlow appealed his conviction and sentence, but did not raise concerns about IAC in the appeal. The conviction and sentence were upheld by the Montana Supreme Court, and Whitlow subsequently petitioned for PCR. Claiming that he was denied the right to effective assistance of counsel when the trial counsel failed to ask follow up questions during voir dire. The district court held that the petitioner was timed-barred by the 1-year statue of limitations in this section, because it was filed over 1 year after the conviction was affirmed and a request for a rehearing was denied by the Montana Supreme Court. Whitlow appealed and the Montana Supreme Court reversed. Under subsection (1) (b) of this section, if an appeal of a conviction is taken to the Montana Supreme Court, the conviction does not become final for purposes of the statue of limitations on PCR petitions until the time for petitioning for review by the U.S. Supreme Court has expired. In this case, that the time limit for petitioning the federal court occured less than 1 year before Whitlow filed his petition for post conviction relief so dimissal of the petition on grounds that it was time-barred was erroneous.

Wilkes v. St. 2015 Mt. 243, 380 Mont. 388,355

The district court failed to adequately address the defendants newly discovered evidence claim when it made no specific conclusions regarding the claim and did not identify the legal standard required for the defendant to succeed on the claim. Therefore, on appeal, the Supreme Court remaned the defendants newly discovered evidence claim to the district court to apply the standard stated in 46-21-102 and independently consider and rule on the claim.

Collier v. Montana, 2019 U.S. Dist.

The one-year limitations period is subject to Statutory Tolling during the time in which a "properly filed" application for PCR or other collateral relief is pending in the state court. 28 U.S.C. §2244 (d) (2); Nino v. Galaza, 183 F.3d 1003,1006 (9th cir.1999) Collier filed his petition for habeas relief Montana Supreme Court on December [*13] 23, 2004. See (Doc.11-24). Between Colliers judgement becoming final and the filing of his state habeas petition 178 days had elasped on Colliers federal filing time clock. The filing of the state petition tolled the federal limitations statue. As set forth above, the Montana Supreme Court denied Colliers habeas petition, but directed that the document be filed in the states district court as a postconviction petition(Doc. 11-28). Further the court advised the district court to treat the petition as if it had been filed on December 23, 2004.

In most of the cases that the attorney general uses the indivuals did not present their cases. Zindell has been in either district court or supreme court. Zindell never violated the 1-year barment.

Zindell could not include all trial errors or IAC during the 1st PCR because Lulf-Sutton and Jones would not follow Zindells directions. Letters sent to Lulf-Sutton (2nd PCR ex.B)

EXCULPATORY MEDICAL EVIDENCE

Oliphant did not timely challenge his conviction through an appeal. Zindell has been, with only taking 9 months to learn law and present a motion. Before trial Jensen motioned for an expert witness.

Oliphant had multiple medical experts from different qualifications Unlike Zindells where the nurses and doctors contadict each other.

Chris Christensens affidavit is demonstration of what Zindell should of had at trial. The jury requested the S.A.N.E. exam and was not able to examined it.

Thompson v. Thompson,2010 U.S.Dist. Lexis 38456

State [habeas] court erred in its [*2] decision when it denied claim of IAC of appellate counsel in violation of petitioners 6th Amendment right to the United States Cont. Appellate counsel fail to properly and effectively raise issue regarding medical evidence of B.Stewart in the context of ineffective assistance of trial counsel He failed to properly establish a factual basis and present evidence supporting trials counsel ineffectiveness claim for not presenting exculpatory medical evidence at a motion for new trial hearing/direct appeal. This evidence would have directly contradicted the states witnesses testimonies in which the states case centrally rested on and would have supported the defenses theory.

Spurman v. Edwards, 26 F. Supp. 2d. 450

HN14 Many courts have found that the failure to introduce favorable medical testimony can constitute [**37] ineffectiv assistance of counsel. For example, on facts similiar to the case at bar, an Illinois district court in William v. Washington 863 F. supp 697,704(N.D.Ill. 1994),aff d 59 F.3d 673(7th cir.1995) , granted a habeas corpus petition. In Williams, the petitioner was convicted of indecent liberties with her adopted daughter. The conviction stemmed from the victims June 1985 allegation that petitioner and her husband had sexually molested her in April 1984. Id at 700. Aside from not representing evidence that no one heard an out cry despite the fact that several other people lived in petitioners home and that the alleged victim had several inconsistances in her story, defense counsel failed to present

medical records indicating that no rape occurred Id at 705-07. Based on these and other failures, the distict court granted the petition on IAC. See also Foster v. Lockhart 9 F.3d 722, 726-27 (8th Cir. 1993). (failure of defense counsel to investigate, develop and present strong defense of impotency amounted to IAC) Loyd v. Whitley, 977 F.2d 149,158,(5th cir. 1992)(failure of counsel [**38] to pursue independent psychological evaluation of defendant constituted IAC), cert. denied 508 U.S. 911,124 L.ed 2d 253 113 S.Ct. 2343 (1993).

Chris Christensen criminal background does not disqualify his well documented experiance and qualifications. If someone wanted to introduce Christensen as a lay person, he would certainly pass the "Daubert test". If a person was to take away the name and bar code on C.D. exam, a person would say it was two different people.

Jensen,lulf-Sutton, and Jones never went over the S.A.N.E. exam with Zindell. Even if they had Zindell would not be able to decipher the all of the medical S.A.N.E. exam.

With the prosecution going over the S.A.N.E. exam with nurse Johnson on the stand Zindell would easily assume that the exam was put into evidence. Zindell was doing his due diligence in conferring with Jensens. The S.A.N.E. exam was used against Zindell over 35 times. Why didnt the prosecution enter the exam into evidence?

Kenfield v. State,2016 Mt. 197¶15 384 Mont. 322,377p.3d 1207

Regarding such analysis as newly discovered evidence would undermine the finally of convictions by awarding petitioners new trials for simply finding a second opinion of the same evidence disclosed at trial. (1) Zindell never had a expert witness to contest the S.A.N.E. exam. (2) The jury were not allowed to reviewthe exam even when they requested to do so.

Roe v.Flores-Ortega, 518 U.S. 470 L.ed. HN16 Rather, the [illegible] defendant,must demonstrate that,for counsels conduct,he would have appealed.

State v. Larry Adams 2002 Mt. 202; 311 Mont. 202; 54 P3d 50:2002 Mont. Lexis 390 No-01-312

P.22 In Petition of Hans,1998 Mt.7 Mont.168,958 P.2d 1175 Hans II In the future, defendant whose counsel has abandoned his or her appeal should raise in ONE petition for PCR, the claim that counsel was ineffective in abandoning the appeal.

During Sentencing Lulf-Sutton informs the court (Sent. Tr. 39 L.17) " I respectfully preserve my objection for appeal". Zindell retained Lulf-Sutton for sentencing and direct appeal. Zindell never heard of PCR until he was on MDIU. Zindell only followed the direction of his attorneys.

"NEW CLAIMS"

Zindell addresses "jury instructions" in the 2nd PCR on pages 33 and 34. These complaints were presented to the district court.

CONCLUSION

Zindell has demonstrated in this reply that the 2nd PCR is over the IAC claims against Lulfl-Sutton and Jones. Zindell used Jensens ineffectiveness to show what Lulf-Sutton and Jones had missed. If it wasnt for thier interference and advice, Zindell would have done a Direct Appeal. Powell v. Alabama, 287 US 45,77 L.ed 158,53 S Ct. 55, 84 ALR 527(1932).

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapaple,

generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevent to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He rquires the guiding hand of counsel at every step in the proceeding against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignnorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

I am not guilty of this crime. When C.D. left the note for me to come to her house or work that should have been enough not to be charged. (1) nobody leaves a note for their assailate to come to her house. (2) the handwriting is of a person who is calm. (3) C.D. writes "Thanks" thanks for hurting me? (4) More importantly C.D. trusted me when she left. There is no way she would leave the note on a dummy check that would give access to her bank account. Chris Chrisensen does qualify as an expert,under Rules 701 or 702. Statutory tolling applies to Zindell. The S.A.N.E. exam is NEW EVIDENCE because the jury requested to see the exculpatory evidence, but was denied. The jury has a right to view all the evidence. Why would the district court order the state to respond to the 2nd PCR if it was barred? The S.AN.E. exam warrants a new trial. Thank you for your time.

Respectfully submitted this 10 day of May, 2023

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By Gregg Zindell

GREGG ZINDELL
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 11(4)(b) of the Montana Rules of Appellate Procedure, I Certify that this Petition for Appeal is printed with a Mono-spaced type of no more than 10.5 characters per inch and is pages length, excluding Certicate of compliance.

CERTIFICATE OF SERVICE

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I. The undersigned, Hereby certify that on this 10 day of May, 2019. I served a true and correct copy of the foregoing above.

SINCERELY, GREGG ZINDEL

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