No. DA 24-57

IN THE SUPREME COURT OF THE STATE OF MONTANA

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JACE CADE ZEILER,

Petitioner/Appellant,

vs.

STATE OF MONTANA,

Respondent/Appellee.

* * * * * * * * * * * * *

APPELLANT'S OPENING BRIEF

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On Appeal from the Thirteenth Judicial Court of the State of Montana, County of Yellowstone, Honorable Mary Jane Knisely, DV-56-2021-0432

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE ISSUES

I. The Petition should be granted for violation of due process.

II. The State of Montana defaulted and the Petition should be granted under the Rules of Civil Procedure.

III. The Petition should be granted for ineffective assistance of counsel.

1. Jace Zeiler was never informed of his right to request a substitution of judge.
2. Counsel completed an omnibus form, relinquishing all defenses to his most serious charges, without ever meeting with Mr. Zeiler or providing him with any discovery.
3. The waiver of rights and plea agreement were presented to Mr. Zeiler for the first time in court. Counsel asserted that there were no lesser included offenses in the form and failed to discuss the matter with the defendant beforehand.
4. Despite the plea agreement, the Court consistently referenced the Presentence Investigation (PSI) and imposed a harsher sentence on the defendant. Mr. Zeiler never had the opportunity to review or discuss the PSI with his counsel.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND DISPOSITION BELOW

This is an appeal from an adverse decision in the Thirteenth Judicial District Court in a filing for Post Conviction Relief pursuant to § 46–21–101, MCA (2019). The Honorable Judge Mary Jane Knisely dismissed the Petition.

II. STATEMENT OF THE FACTS

Jace Zeiler was initially charged in cause number DC 19-393 with multiple offenses, including kidnapping, stalking, violation of protective orders, and misdemeanor counts related to privacy in communication with his girlfriend, the alleged victim. He made his appearance on April 9, 2019, in relation to this information (App. P. 76).

Subsequently, on July 12, 2019, Mr. Zeiler was served and pleaded to a new information in DC 19-820. This new charge included violation of a protective order, tampering with a witness, and misdemeanor criminal contempt (App. P. 82).

A change of plea hearing was set for November 4, 2019. (App. P. 48). A special sentencing was set for February 18, 2020. (App. P. 62). The court sentenced him to 15 years imprisonment, by running a second 10 year sentence

with five suspended consecutive instead of concurrent as called for in the plea agreement. (App. P. 76 - Judgments).

This Petition for Post Conviction Relief was submitted on April 12, 2021 (Docket 1). Jace Zeiler concurrently filed a statement expressing inability to cover filing fees and other associated costs on the same date (Docket 2), with the court granting this order on April 30, 2021 (Docket 3). However, the court remained inactive regarding the petition, failing to either dismiss it or call for a response as mandated by statutes. Subsequently, on September 17, 2021, five months later, Mr. Zeiler filed a motion requesting the appointment of counsel (Docket 4). Once more, the court took no action on either the petition or the motion for legal representation. The situation persisted until present counsel intervened and submitted a First Amended Petition for Postconviction Relief along with a Brief in Support of the Amended Petition on August 1, 2022 (Docket 6, 7). Despite these actions, the court once again failed to take any measures, leaving the matter unresolved without a ruling on the petition or a mandate for a response.

On October 12, 2022 Mr. Zeiler filed a Motion for Court Order Requiring Response. (Docket 8). On December 8, 2022, 3 months later the court ordered a response be filed by the state. (Docket 9).

Despite the court's directive to file a response to the petition, none was submitted. Following repeated requests from Mr. Zeiler, the court scheduled a conference by order dated February 7, 2023 (Docket 10), with the hearing scheduled for February 14, 2023. Subsequent to this hearing, the court issued a scheduling order, stipulating that the state would file a response to the amended petition for postconviction relief by March 27, 2023 (109 days after the December 8, 2022 order mandating a response), and Mr. Zeiler would have until April 10, 2020, to submit a response to any filings by the State. Additionally, a hearing was scheduled for May 12, 2023 (Docket 13). By March 27, 2023 nothing had been filed on behalf of the State. Mr. Zeiler filed a motion and brief to grant the petition on April 19, 2023. (Docket 14). The next day the state filed a motion for extension of time (docket 15), and the Court granted the motion for extension of time without discussion or hearing. (Docket 16). The court granted the State until May 4, 2023 to file affidavits by the petitioner's attorneys and granted the state until May 18, 2023 to file a response, six days after the hearing set for May 12, 2023. The order did not grant any time for Mr. Zeiler to file any type of reply to the response or move the hearing.

On May 9, 2020, despite the expiration of the May 4, 2020 deadline, the State once again filed a motion for an extension of time (Docket 18). This marked

the second instance where such motions were filed after the deadlines had lapsed. Mr. Zeiler, in response, reiterated his request for the motion to be denied, urging the court to grant the petition due to the State's failure to adhere to the court's schedule (Docket 19, 20). Nevertheless, the court, without a hearing or discussion, granted the motion for an extension of time and established new response deadlines (Docket 21). These deadlines were set for May 18, 2023, for the filing of affidavits, and May 25, 2023, for the State's response to the Amended Petition for Postconviction Relief. However, the court once again failed to schedule a reply date or reset the hearing from the original schedule. As a result, over two years have now elapsed without a ruling from the court or a response from the State.

Following the submission of the affidavits and the Response to Amended Petition for Postconviction Relief (Doc 22, 23, 24), the court remained inactive. By this point, the scheduled hearing date had passed. Subsequently, on June 1, 2023, Mr. Zeiler filed a motion to reset the response time and to reschedule a hearing (Docket 25). Eventually, the hearing was set for August 1, 2023, and was conducted on that date (Transcript).

During the hearing, Mr. Zeiler provided testimony concerning his interactions with the public defender's office. He indicated that he was arrested in April 2019 regarding the charges in DC 19-0393 (TR. P. 7). Despite requesting a

public defender and appearing for his initial appearance, during which he pled not guilty, Mr. Zeiler had no interactions with the public defender's office, except for someone accompanying him from the office during his plea (TR. P. 8-9). Notably, nobody from the public defender's office met with him during the initial ten days, nor did they discuss his rights regarding the selection and substitution of a judge within ten days (TR. P. L24, p8- L1, p9). His first encounter with a public defender, Megan Benson, occurred in August 2019, after the filing of the second set of charges in DC 19-0820, for which he appeared for plea entry on July 12, 2019 (App. P. 82).

An omnibus hearing on his initial charges, including the charge of kidnapping in DC 19-393, was held on June 10, 2019 (App. P. 88 - omnibus form). At the time of this hearing, Mr. Zeiler had never met the public defender who signed the omnibus form, George Isham (Id. P 9, 122). He did not receive discovery until after Megan Benson was appointed to him in August 2019. All defenses were waived during this omnibus (App. P. 88). Notably, the public defender waived a hearing on the omnibus without providing the discovery to Mr. Zeiler or meeting with him (App. P. 92).

Megan Benson was the first public defender Mr. Zeiler met while incarcerated after being assigned to him in August 2019 (TR. P. 90-91). According

to Ms. Benson, during their initial meeting, which served as his first contact with the public defender's office, he had not yet received any discovery, and their discussion solely focused on the basics of the charges (TR. P. 121). Ms. Benson testified that she did not have the discovery at that time. Subsequently, after receiving the discovery, both Megan Benson and Clark Ramsey met with Mr. Zeiler to discuss it (TR. P. 19). There was one other occasion on which Mr. Zeiler met with Megan Benson subsequent to this initial meeting (TR. P. 18-19).

An omnibus was held on the second information on September 16, 2019. This time, Megan Benson signed the omnibus form (Exhibit 10). All defenses were waived during this omnibus as well, with Ms. Benson waiving a hearing on behalf of the defendant (Exhibit 10, P5).

The third time Mr. Zeiler met with the public defender’s office was with Megan Benson to discuss a plea agreement, in which he was to receive a 10-year sentence. However, he refused to admit any guilt as to the kidnapping charge (TR. P. 19). Ms. Benson indicated her opinion that he would be found guilty at trial of the kidnapping charge and suggested he plead to it since he had no defense (TR. P. 19). She did not discuss any witnesses or defenses he might have had to the kidnapping charges (TR. P. 19). Ms. Benson indicated she would draft up a plea agreement. However, Mr. Zeiler caught her visiting a different client and asked her

if she was drafting the plea agreement and would come down and go over it with him. She indicated she would, but she never showed up (TR. P. 20).

According to the testimony of Megan Benson and Mr. Zeiler, the first opportunity Mr. Zeiler had to review the plea agreement was after being transported to court for his change of plea (TR. P. 21, P. 127). Mr. Zeiler testified that he was shown a written waiver of rights and plea agreement and was told to sign it right away because it had to be filed. Nobody read it to him, nor did he have an opportunity to read it (TR. P. 21).

The plea agreement did not list any lesser included offenses for any of the charges (App. P. 44, ¶4). During the change of plea hearing, the court did not discuss with Mr. Zeiler any issues of lesser included offenses or request any such information regarding the kidnapping charge or any other charges (App. P. 48, change of plea transcript). At this change of plea hearing, a no contest plea was entered to the kidnapping, and offer of proof was made as to the facts (App. P. 58). It is evident from these facts that there are numerous potential lesser included offenses.

During sentencing, the court frequently referred to the presentence investigation, repeatedly asserting that Mr. Zeiler possessed no redeeming values according to the presentence investigation (App. P. 62). However, Mr. Zeiler

neither saw nor was shown the presentence report (TR. P. 25). Additionally, nobody discussed the contents of the presentence report with him, and despite having supporters present in the courtroom, no witnesses were called to challenge any of the findings by the presentence author. At no point did the court inquire whether Mr. Zeiler had received a copy of the presentence investigation or whether his counsel had discussed it with him (App. P. 62, sentencing transcript). There is no record indicating that Mr. Zeiler acknowledged receiving a copy of the presentence investigation. In fact, he specifically testified that he did not (TR. P. 25)

.ARGUMENT

SUMMARY OF ARGUMENT

Mr. Zeiler filed a Petition for Post Conviction Relief and the court took no action at all for 20 months in violation of Article II, Section 17 of the Montana Constitution. The State failed to respond by court ordered dates and the petition should have been granted pursuant to Rule 55(b)(2) Mt Rules of Civil Procedure. The defendant received ineffective assistance of counsel. *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.

STANDARD OF REVIEW

Whether a person has been denied his or her right to due process is a question of constitutional law. A review of questions of constitutional law is plenary. Crismore v. Mont. Bd. of Outfitters, 2005 MT 109, ¶19 327 Mont. 71, 111 P.3d 681, citing In re A.S., 2004 MT 62, ¶9, 320 Mont. 268, ¶9, 87 P.3d 408, ¶9.

This Court reviews a district court's denial of a postconviction relief petition to determine whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Hartinger v. State,* 2007 MT 141, ¶ 19, 337 Mont. 432, ¶ 19, 162 P.3d 95, ¶ 19. Ineffective assistance of counsel claims, however, constitute mixed questions of law and fact for which the review is de novo. *State v. Racz,* 2007 MT 244, ¶ 13, 339 Mont. 218, ¶ 13, 168 P.3d 685, ¶ 13.

I. THE COURT'S LETTING THE PETITION LANGUISH VIOLATED DUE PROCESS.

As the docket report shows in this case, Mr. Zeiler filed this Petition for Postconviction Relief on April 12, 2021. At that same time he made a motion to proceed without paying filing fees or costs. The court was obviously aware of the petition because that motion was granted by the court on April 30, 2021. (Dockets 1-3) The petition for postconviction relief sat in limbo until the court ordered the state to file a response on December 8, 2022. In between April 12, 2021 and

December 8, 2022 a total of almost 20 months had expired. In between that time, namely on September 17, 2021 Mr. Zeiler requested appointment of counsel, without response. (Docket 4). On August 1, 2022 counsel appeared and filed a First Amended Petition And A Brief In Support. (Docket 6, 7). Again the court took no action under the statute to dismiss the petition or require a response. There is no procedure in the statute for Mr. Zeiler to take any further action.

The Post Conviction Relief statutes, as applied to this case, are deemed unconstitutional due to the absence of a specific timeframe within which the Court must take action. Allowing the Court to effectively dismiss a Petition by refusing to act is contrary to principles of due process and fairness.

> Questions of constitutional law are subject to plenary review by this Court. *State v. Webb,* 2005 MT 5, ¶ 9, 325 Mont. 317, ¶ 9, 106 P.3d 521, ¶ 9. All statutes are presumed to be constitutional, and we will construe a statute so as to avoid an unconstitutional interpretation whenever possible. *Hernandez v. Bd. of Cty. Commrs.,* 2008 MT 251, ¶ 15, 345 Mont. 1, ¶ 15, 189 P.3d 638, ¶ 15. A statute may be held unconstitutionally vague in violation of due process if it is void on its face or if it is unconstitutional "as-applied" to the situation at hand. *State v. Knudson,* 2007 MT 324, ¶ 16, 340 Mont. 167, ¶ 16, 174 P.3d 469, ¶ 16.
>
> *State v. Samples*, 2008 MT 416, ¶ 14, 347 Mont. 292, 295, 198 P.3d 803, 806

The right to due process of law guaranteed by Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States

Constitution "is flexible and calls for such procedural protections as the particular situation demands." *State v. West*, 2008 MT 338, ¶ 32, 346 Mont. 244, 194 P.3d 683 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

"[D]ue process is ultimately measured by the fundamental fairness of the proceeding." *State v. Edmundson*, 2014 MT 12, ¶ 17, 373 Mont. 338, 317 P.3d 169 (citing *West*, ¶ 23). This Court will determine whether due process was denied by considering "the totality of facts in a given case." *West*, ¶ 32 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *West*, ¶ 32 (quoting *Lewis*, 523 U.S. at 850, 118 S.Ct. 1708).

In Montana, due process encompasses the fundamental right to be heard. The court's inaction on the petition for a duration of 20 months, and its subsequent response only after motions and proposed orders by Jace Zeiler, represent a departure from the procedural safeguards intended by the post-conviction relief statutes. This constitutes a clear violation of due process as applied in this case.

Therefore, it is imperative for this Court to establish a precedent that recognizes a period exceeding 60 days without action as a violation of due process rights.

II. THE COURT SHOULD HAVE DEFAULTED THE STATE AND GRANTED THE PETITION FOR MISSING COURT ORDERED DEADLINES

Finally, on October 12, 2022 counsel moved the court to order the state to respond. Again the matter sat. Finally the court, on December 8, 2022 ordered the state to respond to the petition. (Docket 9).

The postconviction relief statutes lack a specific timeframe for the state to respond once ordered to do so. It is our contention that when the court mandates a response to a petition, the Rules of Civil Procedure should stipulate a response deadline of 42 days, as per Rule 12(2) of the Montana Rules of Civil Procedure. However, the government failed to respond altogether. Therefore, we assert that this court need not proceed further in determining that the Petition for Postconviction Relief should have been granted, in accordance with Rule 55(b)(2) of the Montana Rules of Civil Procedure, due to the government's violation of Rule 12(2).

The issue of whether or not the Rules of Civil Procedure govern this civil action has been discussed in certain contexts by this court. *Herman v. State*, 2006 MT 7, 330 Mont. 267, 278–79, 127 P.3d 422, 430. In that case the lower Court

dismissed a petition after requiring the state to respond and determining the petition was insufficient under the statute after the response. The statute reads as follows:

> (1)(a) Unless the petition and the files and records of the case conclusively show that Mr. Zeiler is not entitled to relief, the court shall cause notice of the petition to be sent to the county attorney in the county in which the conviction took place and to the attorney general and order that a responsive pleading be filed. The attorney general shall determine whether the attorney general will respond to the petition and, if so, whether the attorney general will respond in addition to or in place of the county attorney. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue.
>
> Mont. Code Ann. § 46-21-201 (2023).

The Petitioner in the *Herman* case argued that a petition should not be dismissed unless the court considers the petition under the guidelines of rule 12 of the Montana rules of civil procedure, specifically that all pleadings must be assumed true and that it can only be dismissed if there is no set of facts that would allow it to proceed. This Court clearly pointed out the difference between the Post Conviction Relief statutes requirements of very specific pleadings and memorandum in support versus the notice pleadings required by the Rules of Civil Procedure. However, the court pointed out:

> He correctly notes that burden of proof applies in both traditional civil cases and postconviction proceedings. **Indeed, there may be other instances in which the rules of civil procedure are not inconsistent with the statutes controlling postconviction proceedings**. Our reasoning in *Ellenburg*, however, was that the express statutory requirements set forth in § 46–21–104, MCA, significantly exceed—and are inconsistent with—the mere notice pleading requirements for an ordinary complaint *279 in a civil action. See Rule 8(a), M.R.Civ.P.; *Kunst v. Pass*, 1998 MT 71, ¶ 35, 288 Mont. 264, ¶ 35, 957 P.2d 1, ¶ 35 (citations omitted).
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> *Herman v. State*, 2006 MT 7, ¶ 44, 330 Mont. 267, 278–79, 127 P.3d 422, 430 (emphasis added).

The Postconviction Relief statutes provide no time frames for the court to rule on the petition or order the state to respond. They provide no time limit for the State when the court orders them to respond. Mr. Zeiler is incarcerated in Montana State prison. The time frames in the Rules of Civil Procedure must apply to these cases.

Mr. Zeiler requests this court to rule that the Rules Of Civil Procedure should be followed in these cases. The state must file a response when ordered to do so by the court within the 42 days accorded by Rule 12(2), Mt Rules of Civ. Pro., just as it would being served with any complaint.

The state did not respond within 42 days of the December 8, 2022 order. It should have been defaulted at that time. Finally, informally, counsel got a hold of the court and the court finally decided to issue a scheduling conference. This was

done on February 7, 2023, 60 days after having ordered a response filed. But it gets worse. The court held that scheduling conference and issued an order setting deadlines for the state to respond. (Docket 13). In fact, after the scheduling conference the state filed a Motion for Gillam Order. (Docket 11). The court granted that and set a hearing on the petition and deadlines (Docket 13). The court order required the state to file its response by March 27, 2023 any reply by the Mr. Zeiler on April 10, 2023 and a hearing date of May 12, 2023. The state filed nothing by March 27, 2023.

Mr. Zeiler subsequently filed its Motion to Grant Petition and Brief (Docket 14) on April 19, 2023, three weeks beyond the deadline for the state's response. In response to this motion, the State filed a Motion For An Extension Of Time and proposed an Order, which the judge signed without ruling on the petitioner's motion or allowing any response to be filed to the Motion For Extension Of Time (Docket 15, 16). As a matter of law, the court erred in granting this extension and effectively denying the motion for default.

When a court order is specific and no response or Motion for Extension of Time or other motion is made **prior** to the deadline, the court should grant a Motion for Entry Of Default Pursuant to Rule 55(b)(2) and grant the Petition. Failure to monitor the litigation is never due diligence.

> NIFL's failure to monitor litigation not only distinguishes it from *Maulding*, but also renders relief from judgment under M.R. Civ. P. 60(b)(6) generally inapplicable. A successful Rule 60(b)(6) motion requires that the movant demonstrate each of the following elements: "(1) extraordinary circumstances; (2) the movant acted to set aside the judgment within a reasonable period of time; and (3) the movant was blameless." *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 25, 338 Mont. 423, ¶ 25, 166 P.3d 451, ¶ 25 (internal citations omitted). We refused to excuse NIFL's neglect because it had failed its affirmative duty to monitor the litigation. ¶ 45. We acknowledged by this determination that NIFL could not be blameless for the default judgment against it. *Essex Ins. Co.*, ¶ 25. The District Court properly dismissed NIFL's motion pursuant to M.R. Civ. P. 60(b)(6).
>
> Montana Pro. Sports, LLC v. Nat'l Indoor Football League, LLC, 2008 MT 98, ¶ 50, 342 Mont. 292, 304, 180 P.3d 1142, 1150

In this civil case, there is no more appropriate rule to invoke than Rule 55(b)(2) of the Montana Rules of Civil Procedure, which mandates the state to adhere to the court order and respond to the Petition. Failure to do so should result in granting the petition. It is certainly not exercising due diligence to avoid default by simply disregarding the court's order and allowing it to pass until Mr. Zeiler objects. The court should only grant a motion for extension of time if it is filed before the deadline. In this instance, the state waited three weeks past the deadline before filing a motion for extension, and only did so after a request for default judgment had been made.

Worse, they did it twice. The Court granted their motion and extended the deadline to respond and to provide Gilham affidavits on April 21, 2023. (Docket 16). The state proposed an order granting them until May 4, 2023 to file its affidavits and until May 18, 2023 to file their response to the petition. This is 24 months after the petition was filed and Mr. Zeiler remains incarcerated.

On May 9, 2023, five days **after** they were required to file their affidavits, the state again made a Motion for Extension of Time. (Docket 18). We objected and asked again for the court to default the State. (Docket 19). Again, the court granted the continuance and never even ruled on the first Motion for Default (Docket 14), nor the second Motion for Default. (Docket 20). It is not due diligence to file requests for more time after the date ordered to file an answer. Id. *Montana Pro. Sports, LLC v. Nat'l Indoor Football League, LLC.*

III. INEFFECTIVE ASSISTANCE OF COUNSEL

There is a myriad of different things that occurred in this matter which alone are ineffective assistance of counsel. In order to pare them down we'll discuss the following issues:

1. The defendant was never informed of his right to challenge a judge under 3-1-804(1)(a) MCA (2019), particularly crucial given the judge's propensity for issuing severe sentences in domestic cases. This failure occurred either because

legal counsel was not appointed or did not confer with Mr. Zeiler within the prescribed 10-day period.

2. Legal counsel completed an omnibus form and submitted it to the court, relinquishing all defenses to the most serious charges, despite never having met with Mr. Zeiler or providing him with any discovery materials.

3. Mr. Zeiler was not presented with a waiver of rights and plea agreement before the court session; instead, it was abruptly presented during the plea change, leaving no opportunity for thorough review or discussion. The waiver of rights and plea agreement stated there were no lesser included offenses and neither the court nor his attorney's discussed that part of the trial with the defendant.

4. In sentencing the defendant to a harsher penalty than outlined in the plea agreement, the court consistently referenced the Presentence Investigation. However, neither the court nor defense counsel confirmed whether the defendant had ever seen or reviewed the presentence investigation—a document that Mr. Zeiler himself has never laid eyes on.

A. STANDARDS USED IN DETERMINING WHETHER THERE HAS BEEN A VALID INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Mr. Zeiler must prove (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. *Whitlow v. State*,

2008 MT 140, ¶ 10, 343 Mont. 90, 93–94, 183 P.3d 861, 864. This is known as the Strickland test from the case of *Strickland v. Washington*, 466 U.S. 668 (1984).

B. COUNSEL DID NOT COVER THE MOST BASIC ELEMENTS OF REPRESENTING A CRIMINAL DEFENDANT.

1. ADVISING A DEFENDANT HE HAS A RIGHT TO SUBSTITUTE A JUDGE.

This court reviewed the issues happening in the Thirteenth Judicial District Court with the State Public Defender's Office. *Lindquist v. Harris*, No. OP 22-0139, 2022 WL 2817538, (Mont. July 19, 2022). That opinion deals with the tenuous position of the Office of the State Public Defender. Yellowstone County is one of the worst areas for understaffed and overworked attorneys and staff. (Exhibit 1, P 10 – Transcript of Harris hearing). As of August 20, 2021 Yellowstone County had 8020 cases open and 562 not assigned counsel yet. They further had assigned capacity of 31.5 attorneys and 8 vacancies, meaning it had 23.5 attorneys for those 8020 cases. (Exhibit 1, P 9 – Transcript of Harris hearing)

This was substantiated by testimony during the hearing. Ms. Benson began her employment as an attorney at the Yellowstone County Public Defender's Office in February of 2018. It was her first job as an attorney. Her assignment to felony cases occurred around February of 2019. Clark Ramsey, who had no trial experience, was assigned to her due to his novice status (Tr. P 117-119). Ms.

Benson described an imperfect system where reaching "125 weights" allowed attorneys to consult with their supervisors (Tr. P 132). She also noted that the office was persistently understaffed (Tr. P 140).

Mr. Zeiler stated he met with his attorneys 3 times. Never with the original attorney, Mr. Isham. He did not discuss at any time the right to a substitution of judge. He was prejudiced as Judge Knisely did not follow the plea agreement. He had the right to these discussions about his Judge.

Judge Harris asserts that failure to assign counsel within three working days prejudices a defendant's right to effective assistance of counsel. He offers specific ways in which a defendant may be prejudiced if counsel is not immediately assigned:

> (1) to substitute a judge within ten calendar days of arraignment; (2) to a prompt bond hearing; (3) to conduct a prompt investigation and preserve evidence; (4) to file pretrial motions; (5) to meaningfully prepare for and participate in an omnibus hearing, typically conducted within 60 days of arraignment; (6) to a speedy trial, typically set within 120 days of arraignment; (7) to engage in early plea negotiations; and (8) to promptly engage in treatment and other rehabilitation programs.

Lindquist v. Harris, Id., at *4 (Mont. July 19, 2022).

In this case it is uncontroverted that the defendant never discussed his case with any public defender until August 2019. He was arrested in April 2019. An

omnibus was held in June 2019 waiving his right to a hearing on the omnibus. Clearly this is deficient performance and Mr. Zeiler was prejudiced by not having adequate representation. The judge did not follow the plea agreement. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 93–94, 183 P.3d 861, 864. *Strickland v. Washington*, 466 U.S. 668 (1984).

2. WAIVING OF ALL DEFENSES AT AN OMNIBUS WITHOUT GIVING THE DEFENDANT THE DISCOVERY OR DISCUSSING THE CASE

This issue stands out as particularly concerning. Proceeding to an omnibus hearing without providing the defendant with discovery, discussing the case, or having any contact with the defendant raises serious questions. It is troubling to waive all affirmative defenses and motions to suppress without fully understanding the defendant's position. Even Meghan Benson, the Petitioner's attorney, acknowledged that such actions would constitute ineffective assistance of counsel..

> Q. Would you agree that if the discovery had never even been received, it would be ineffective of counsel to just waive all defenses, all motions?
> A. Sure.
> (Tr. P. 123)

Mr. Zeiler was deeply prejudiced in this case. There was a lengthy record of continued requests by Mr. Zeiler to the victim requesting to meet and talk in violation of protective orders. There was a continual course of interaction by text

messages without any attempt to claim they were invited. They were not blocked and continually received without any attempt to simply block the phone number. It was prejudicial not to claim this contact was entrapment through inducement of continued contact. It was prejudicial not to claim any affirmative defenses to the kidnapping in particular. The victim induced this contact.

> Furthermore, just as a defendant is required to provide the State with written notice of defendant's intention to produce evidence at trial of the affirmative defenses **149 of compulsion, entrapment, and justifiable use of force under §§ 46–13–110 and 46–15–323, MCA, we require that in order to prevent surprise and to assist in orderly trial administration, an accused asserting an automatism defense must give written notice to the prosecution at or before the omnibus hearing of this defense and the witnesses to be called.
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> *City of Missoula v. Paffhausen*, 2012 MT 265, ¶ 38, 367 Mont. 80, 90, 289 P.3d 141, 148–49

> In a criminal trial, the defendant bears the burden of proving an affirmative defense. *State v. Reynolds*, 2004 MT 364, ¶ 9, 324 Mont. 495, 104 P.3d 1056. A court may determine whether an affirmative *315 defense exists as a matter of law. Reynolds, ¶ 9. We review a district court's conclusions of law for correctness. Reynolds, ¶ 8. However, if there are conflicting facts regarding the availability of an affirmative defense in a criminal trial, the issue is properly submitted to a jury. *Reynolds*, ¶ 9.
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> *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 314–15, 221 P.3d 648, 650

3. THE WAIVER OF RIGHTS AND PLEA AGREEMENT WAS PRESENTED AT THE TIME OF CHANGE OF PLEA AND THERE WAS NEVER A DISCUSSION OF LESSER INCLUDED OFFENSES.

A defendant has a right, and defense counsel has an obligation, to make sure the defendant is informed of the charges and all possible alternatives at trial. This court has repeatedly held that failure to discuss the possibility of lesser included offenses with a defendant means his plea is not knowingly given. There is no dispute lesser included offenses were not in the Waiver and Plea Agreement (Exhibit 4). It reads: "I have been advised that there are no lesser included offenses" (Exhibit 4, P 3, ¶4). This is after listing all of the numerous offenses lumped together.

The District Court listened to the offer of proof on the nolo contender plea as follows:

> The State would call C.W. C.W. would testify That, on January 3rd, 2019, she was at her worksite when the defendant suddenly approached her at her vehicle, pushing her into the truck, and pinning her leg under the steering wheel and her body between him and the center console. C.W. would describe that she tried to call attention to the truck by honking the horn, and that she tried to fight the defendant off.
> C.W.'s testimony would reveal that the defendant used physical force to trap her in the vehicle and that he then drove her vehicle with her inside to his house. C.W. was unable to get away from the defendant while he transported her against her will to his home.
> C.W. would testify that, when they got to the

> defendant's home, she was able to get home -- get help from his neighbors. C.W. would testify that she was able to get her keys back and get into town where she was able to call law enforcement.
>
> (App. P. 60).

Certainly, the defendant could argue that she agreed to accompany him after entering the truck. Instructing the jury on Misdemeanor Assault under 45-5-201 MCA (2019) could be a viable option. Moreover, there exists the possibility of a lesser included offense, such as unauthorized use of a motor vehicle misdemeanor under 45-6-308 MCA (2019), which is a lesser included offense of theft of a motor vehicle, as established in *State v. Shults*, 1976, 169 Mont. 33, 544 P.2d 817. The facts could support various scenarios for other lesser included offenses, such as disorderly conduct, felony theft, among others. This discussion pertains only to this particular offense. Moreover, it can be argued that almost any stalking case could potentially be considered disorderly conduct as a lesser included offense.

> "Because of the misinformation in the plea agreement compounded by the incomplete information provided by the District Court when accepting his plea, it cannot be said that Rave entered a knowing, intelligent, and voluntary plea. To make an intelligent choice as to whether to plead guilty, a defendant is entitled to know the precise nature of his alternatives. *State v. Sanders*, 1999 MT 136, ¶ 22, 294 Mont. 539, ¶ 22, 982 P.2d 1015, ¶ 22 (overruled on other grounds by Lone Elk). The record leaves a doubt whether, at the time he entered his plea, Rave understood that if he went to trial he might be convicted of a lesser included offense for which the maximum punishment was six months in the county jail, and not the 30 years in

> Montana State Prison with 20 years suspended provided in the plea agreement. Any genuine doubt regarding whether a guilty plea was voluntarily or intelligently made must be resolved in favor of the defendant. See *Keys*, ¶ 12. Under these circumstances, Rave's motion to withdraw his plea of guilty should have been granted."
>
> *State v. Rave*, 2005 MT 78, ¶ 19, 326 Mont. 398, 402, 109 P.3d 753, 756.

This issue is not in dispute. He was never advised of the possibility of lesser included offenses in the document itself, nor by the court or counsel at the Change of Plea hearing. (Exhibit 5). Megan Benson never met with the defendant and discussed lesser included offenses. (TR. P. 128). She did not know about her obligation of discussing lesser included offenses.

> Q. And would you agree that Mr. Zeiler's rights were violated if he wasn't even asked about, or discussed with -- about lesser included offenses with you or the judge?
> A. I don't know the answer to that.
> (Tr. P 130).

This court has long held a defendant has a right to be told about lesser included offense instructions and counsel is obligated to discuss this with a defendant pleading guilty. Id., *State v. Rave.* Ms. Benson testified she did not discuss this with Mr. Zeiler. The transcript shows the judge did not either. (App. P. 62).

4. COUNSEL NEVER PROVIDED THE PRESENTENCE INVESTIGATION TO THE DEFENDANT NOR GAVE HIM THE OPPORTUNITY TO REVIEW AND REBUT IT.

This issue is not contested. Not one person testified Mr. Zeiler was given a copy of the presentence investigation prior to or even at the time of sentencing. The court did not even ask him if he had seen it.

The only discussion was:

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THE COURT: Thank you. Ms. Benson, any corrections
or modifications to the PSI first?
MS. BENSON: I do not have any corrections or
modifications to the PSI, Your Honor.
THE COURT: Okay. Any issues with any of the
conditions listed in the PSI?
MS. BENSON: No, Your Honor.
THE COURT: Okay.

(Exhibit 6, P 7).
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Not one question was asked of Mr. Zeiler as to whether he'd seen the presentence report, reviewed it and had an opportunity to discuss it. He testified he had not, as of the hearing on August 1, 2023, ever seen the Presentence Investigation. (Tr. P. 25) His Attorney admitted she did not go to see him before sentencing (P 132-133). She did not know if he got a copy of the PSI. (Tr. P 132) She couldn't have discussed its findings with him if she wasn't aware whether he had ever received a copy..

It is hard to find case law saying this is ineffective assistance of counsel because counsel can't find a case where this has happened. The court has reviewed motions to strike the PSI for bias.

> Additionally, Bar–Jonah was provided a copy of the PSI before the sentencing hearing. The court provided him the opportunity to explain, argue and rebut the information contained therein. We conclude that Bar–Jonah has not proven Ms. Kicker was biased in her preparation of the PSI or that the sentencing court abused its *309 discretion in sentencing Bar–Jonah. Accordingly, Bar–Jonah is not entitled to be re-sentenced.
>
> *State v. Bar-Jonah*, 2004 MT 344, ¶ 121, 324 Mont. 278, 308–09, 102 P.3d 1229, 1250.

The court has talked about a defendant's due process rights and the court relying on a PSI.

> Due process requires that an offender be given an opportunity to explain, argue, and rebut any information, including pre-sentencing information, that may lead to a deprivation of life, liberty, or property. Mason, ¶ 21 (citing *State v. Allen*, 2001 MT 266, ¶ 18, 307 Mont. 253, ¶ 18, 37 P.3d 655, ¶ 18). However, "due process does not protect against all misinformation—rather, the inquiry turns on whether the sentence was premised on materially false information." *136 Mason, ¶ 21 (citing *Bauer*, ¶ 22). When a criminal defendant contests matters in a pre-sentence report, the defendant has an affirmative duty to present evidence establishing inaccuracies. *Mason*, ¶ 21 (citing *State v. Winkle*, 2002 MT 312, ¶ 19, 313 Mont. 111, ¶ 19, 60 P.3d 465, ¶ 19; *Bauer*, ¶ 22).
>
> *State v. Ferguson*, 2005 MT 343, ¶ 100, 330 Mont. 103, 135–36, 126 P.3d 463, 486

In this case the court relied extensively on the PSI though Mr. Zeiler was never given a copy or the opportunity to discuss its contents with counsel.

> THE COURT: Alright. Based upon a review of the Pre-Sentence Investigation, as well as the Plea Agreements in this case, the charging documents, and the Defendant's criminal history, I have a few things to say.
> Mr. Zeiler, you began with first Order of Protection violation 22 years ago. For 22 years, you have been disregarding Court orders. You've been making comments that Orders of Protection and pieces of paper don't matter, and you've demonstrated by your sustained attacks on this victim, disregarding Court orders. You've been making comments that Orders of Protection and pieces of paper don't matter, and you've demonstrated by your sustained attacks on this victim, that you don't quit.
> That you don't listen. That you think that you're above the law. That you think that you own people, and when they don't want to be owned, you take them against their will. When you're arrested and told you're still not allowed to speak with them, you continue to reach out to them to try to control what they have to tell the Court.
> . . ..
> Those are the reasons that a prison sentence is appropriate for you. **I cannot find anything in your entire Pre-Sentence Investigation** that is mitigating. Nothing.
> (Exhibit 6, Pp 10-11).

Mr. Zeiler does not know what was in the PSI. It was never discussed with him nor did counsel even know if he had received it. This can't be anything but ineffective assistance of counsel. *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861

CONCLUSION

We ask the court to grant the Petition. Mr. Zeiler requests to withdraw his no contest plea on the kidnapping charge and for resentencing on the other charges to which he plead guilty.

RESPECTFULLY SUBMITTED this 1st day of April, 2024.

/s/ *Brad L. Arndorfer*
BRAD L. ARNDORFER

CERTIFICATE OF COMPLIANCE

The Appellant Hereby gives notice pursuant to Rule 27(d) that this Brief complies with the rules in that:

1. The document is regularly spaced using 14 point times new roman font.

2. The document excluding table of contents and authorities contains 6909 Words by Microsoft Word count.

Dated this 1st day April, 2024.

/s/ *Brad L. Arndorfer*
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CERTIFICATE OF SERVICE

I, Brad L. Arndorfer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-01-2024:

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