IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0059

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD LAMAR RUTLEDGE,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, the Honorable David Cybulski, Presiding

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INTRODUCTION

The State does not dispute that: (1) a pre-sentencing motion to withdraw a guilty plea is a critical stage of criminal proceedings at which a defendant has the right to counsel; (2) the constitutional right to counsel is a right to conflict-free counsel; and (3) Richard Rutledge's allegations of attorney misconduct raised inevitable conflicts of interest between him and his then-counsel concerning whether to withdraw his guilty pleas.

Instead, the State contends that Richard's seven-page letter alleging dishonesty and disloyalty by his attorneys and begging the district court for intervention, together with his thwarted attempts to explain his concerns in open court, were insufficient to preserve his claims on appeal. In the State's view, a truck driver with a high school education—not the judge or the lawyers in the room—bore ultimate responsibility for making *additional* legal objections and openly defying the court when it ordered him to continue working with conflicted counsel. The Court should decline to adopt the State's distorted caricature of the waiver rule.

This Court should likewise decline to hold that the district court made an implied finding that Richard's complaints about counsel were not "seemingly substantial." No such finding can be inferred from the district court's failure to conduct any meaningful inquiry into those complaints or to even rule on them.

ARGUMENT

I. Richard did not waive his right to assistance of conflict-free counsel to advise him on whether to withdraw his guilty pleas; nor did he waive appellate review of that issue.

A. The State does not substantively contest the merits of Richard's claim he was denied his right to conflict-free counsel.

The State does not dispute that Richard had the right to conflict-free counsel to advise him regarding whether to withdraw his guilty pleas. (*See* Appellant's Br. 16–20; *see generally* Appellee's Br.) Nor does the State argue that Richard's allegations of misconduct did not raise apparent conflicts of interest between him and his then-current counsel, beyond a bare assertion of no conflict. (*See* Appellant's Br. 20–25; Appellee's Br. at 26.) The State offers no legal argument that would enable this Court to conclude that there was not a conflict of interest necessitating appointment of substitute counsel or that the conflicts

were not sufficiently apparent to trigger the district court's duty to inquire further. (*See* Appellant's Br. 20–25; *see generally* Appellee's Br.)

The closest the State comes to addressing Richard's right to conflict-free counsel is by citing to precedent holding that substitute counsel is not required for the "initial inquiry" stage of a *Gallagher I*[1] proceeding. (Appellee's Br. 20–21.) But Richard did not, and does not, argue that he had the right to substitute counsel for that purpose. (*See* Appellant's Br. 16–20.) Rather, he had the right to substitute counsel for the purpose of advising him regarding whether to withdraw his guilty pleas, because substantial potential prejudice was inherent in that decision. (Appellant's Br. 16–20.)

Moreover, the State's contention that *Gazda* forecloses Richard's argument is unpersuasive. In *Gazda*, this Court recognized that if a court proceeds from the initial *Gallagher I* inquiry to a hearing on the merits of a defendant's complaints about counsel, that merits hearing is a "critical stage" of the proceeding, and substitute conflict-free counsel

[1] *State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371 (describing initial hearing at which court compares defendant's complaints about attorney with attorney's responses and determines whether complaints are "seemingly substantial," warranting further hearing).

is required. *State v. Gazda*, 2003 MT 350, ¶¶ 29, 32, 318 Mont. 516, 82 P.3d 20. By extension, substitute conflict-free counsel would also be required for a defendant's pre-sentencing decision whether to withdraw a plea of guilty that he alleges was fraudulently induced by his current counsel. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights [via guilty plea] not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

The State's primary response to Richard's arguments is to contend his pursuit of his right to conflict-free counsel was not dogged enough to earn this Court's review. (Appellee's Br. 17–19, 27–28.) The State is wrong.

B. Richard did not affirmatively waive his right to conflict-free counsel.

The State briefly suggests Richard affirmatively waived his *right* to conflict-free counsel, not just appellate review of the issue. (*See* Appellee's Br. 1, 19.) That suggestion should be ignored because the State fails to supply any argument or authority in support of it. *State v. Gunderson*, 2010 MT 166, ¶ 12, 357 Mont. 142, 237 P.3d 74. But more importantly, it is wrong on the merits.

A defendant cannot waive a constitutional right—including the right to conflict-free counsel—unless that waiver is specific, knowing, and voluntary. *Brady*, 397 U.S. at 748 & n.6; *State v. Howard*, 2002 MT 276, ¶ 12, 312 Mont. 359, 59 P.3d 1075; *see also State v. Finley*, 276 Mont. 126, 144, 915 P.2d 208, 219 (1996) (explaining constitutional right to counsel includes "right to counsel's undivided loyalty"), *abrogated on other grounds by State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817; Mont. R. Prof. Conduct 1.7(b)(4) (requiring client's written informed consent to representation by attorney with concurrent conflict of interest). A voluntary, knowing, and intelligent waiver of the right to counsel cannot occur without "any substantive inquiry" and record-supported findings by the trial court, *Halley v. State*, 2008 MT 193, ¶ 21, 344 Mont. 37, 186 P.3d 859; it certainly cannot be inferred from mere compliance with a trial court's directions. *Howard*, ¶ 14 ("[T]his Court has stated that it will indulge in every reasonable presumption against waiver of fundamental constitutional rights . . . [and] will not engage in inferences of any such waiver."). And, for the reasons explained below, Richard's statements to the

district court did not manifest intent to abandon his allegations against trial counsel, let alone his right to conflict-free counsel more broadly.

C. Richard did not waive this Court's review of his assertion of the right to conflict-free counsel.

The reason this Court "will not address an issue raised for the first time on appeal" "is that it is fundamentally unfair to fault the trial court for failing to rule on an issue *it was never given the opportunity to consider*." *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207 (emphasis added). But if a party raised an issue with the district court, and the district court accordingly "was given the opportunity to rule on the issue," "the fundamental unfairness the [waiver] rule seeks to prevent is not present[.]" *State v. Montgomery*, 2010 MT 193, ¶ 13, 357 Mont. 348, 239 P.3d 929.

Richard shared his allegations of attorney misconduct with the court via letter, and he attempted to explain his concerns in open court, but he was thwarted. (D.C. Doc. 232; App. B at 5–6, 11–12.) The court understood the issues presented were whether Richard would withdraw his guilty pleas and/or request new counsel. (App. B at 4–6, 12.) The State, too, recognized the issues at hand and drafted orders necessary for the court to take initial steps toward substituting Richard's counsel.

(App. B at 4, 12.) Richard demanded to have "every detail" of his plea agreement explained to him, and the district court correctly recognized that Richard needed to be "well informed" before making an ultimate decision about his guilty pleas or substitution of counsel. (App. B at 6–10, 12–13.) But the district court erred when it ordered Richard to consult his conflicted counsel for the legal advice he needed. (App. B at 4–6, 8.) The district court had ample opportunity to recognize and resolve the conflicts of interest and constitutional violations unfolding before it—or *at least* to conduct the inquiries required by binding precedent. *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (holding "*possibility* of a conflict of interest" was "sufficiently apparent" to "impose upon the court a duty to inquire further"); *Gallagher I*, ¶ 15. It is not unfair for this Court to review the district court's mishandling of the issues it confronted. *Montgomery*, ¶ 13.

The State contends Richard waived review of his claim because he "expressly agree[d] to the procedure the district court used to address" the allegations against his counsel. (Appellee's Br. 17–19.) Contrary to the State's assertion, Richard's respectful responses to the court's orders and direct questions did not constitute acquiescence in the

court's failure to follow the law or affirmative abandonment of his allegations against counsel. Richard was repeatedly *directed* by the district court to continue working with the attorneys he had just accused of misconduct, at *their* suggestion. (App. B at 3, 6–8.) Perhaps an especially daring defendant would refuse to comply with a judge's instructions, but the State's implication that such defiance was necessary to ensure this Court's review demands too much of a defendant who reasonably relied on the court for help in the wake of defense counsel's failures. (App. B at 4–5 (telling court, "[Y]ou know if [the proposed procedure] would work"); *cf.* D.C. Doc. 232 at 5 ("Your Honor my life is in Your Hands.").)

The State asks this Court to infer that Richard abandoned his allegations against his attorneys from ambiguous and out-of-context quotations from the September hearing, all of which came *after* Richard was ordered to work with his conflicted counsel. (*Compare* Appellee's Br. 18–19, 27–28, *with* App. B at 6, 8.) That inference would require this Court to ignore that Richard continued to express confusion about what counsel had *told* him about the plea agreement, as opposed to what he read in the written agreement once he regained his vision.

(COP Tr. at 3–4; App. B at 7–8.) Richard subsequently stated, "I want no more bull crap and to have the plea agreement" and "I mean as it stands right now your Honor, I am not going to withdraw my guilty plea. . . . And, and that will be that way *until I am explained every detail*." (App. B at 10, 12–13 (emphasis added).) It is not at all clear from these statements that he was declaring he wanted to move forward with the written plea agreement, as the State contends (Appellee's Br. 18, 24, 27–28), as opposed to wanting the deal that co-counsel previously *told* Richard he was agreeing to.

Likewise, the State reads too much into Richard's statements that he was "good to go" (App. B at 11, 13) by claiming he was disavowing any possibility of withdrawing his plea or substituting counsel (Appellee's Br. 18–19, 24, 27). His casual colloquialisms toward the end of the hearing just as likely meant he had no further requests of the court at that time. Finally, this Court should similarly reject the State's invitation to read Richard's statement, "It [sic] just a lack of communication with my lawyers" (App. B at 10) as a "clarification" of the much more detailed allegations in his letter. (Appellee's Br. 23–24,

27–28.) In context, the only thing Richard was clarifying was that he was not blaming the judge for his ongoing frustrations:

> THE COURT: And the second thing is I don't want you to end up in jail saying you were mistreated by me any.
>
> THE DEFENDANT: I don't think I have been mistreated by you. It [sic] just a lack of communication with my lawyers.

(App. B at 10.)

In the end, the State does not substantively dispute that Richard was constitutionally entitled to, but did not receive, assistance of conflict-free counsel with respect to his decision whether to withdraw his allegedly defective pleas. (Appellant's Br. 15–25.) Richard did not waive that right or appellate review of the violation of that right. Indeed, the district court agreed with Richard that he should be "well informed" before deciding how to proceed (App. B at 6, 8–10); the court simply erred when it directed Richard to confer with conflicted counsel instead of appointing substitute counsel for that task.

The State's waiver arguments demand legal knowledge, verbal precision, and willingness to challenge judicial authority that are unreasonable to ask of a functionally pro se defendant. In short, the State seeks an "unduly harsh application of the waiver rule."

Montgomery, ¶ 13 (internal quotation omitted). This Court should consider Richard's conflict-of-interest claims on their merits—which the State did not meaningfully dispute.

II. The district court failed to conduct an adequate initial inquiry into Richard's allegations of attorney misconduct.

A. There was no actual inquiry into Richard's complaints.

The State correctly acknowledges that the "adequate initial inquiry" required by this Court's precedent requires the district court to consider the defendant's factual complaints *together with* counsel's responses to those complaints. (Appellee's Br. 21–22.) Nevertheless, the State contends the district court conducted an adequate initial inquiry even though it questioned only defense counsel, because lead counsel "had clearly spoken to Rutledge, and Rutledge intended to proceed to sentencing." (Appellee's Br. 23.) The State offers no record citation for this assertion, which it made immediately after quoting language from lead counsel stating she would request a hearing if Richard wanted to withdraw his plea or substitute counsel—indicating Richard's intent was not yet certain. (Appellee's Br. 23.)

The State plucks other statements by Richard from their context and asserts they "established" for the district court "that Rutledge was

communicating effectively with his attorneys and that he wanted the benefits of his plea agreement[.]" (Appellee's Br. 23–24, 27–28.) For the reasons explained in Section I.C., *supra*, Richard's responses to the district court were not probative of his intentions because they were made after the court repeatedly directed him to continue working with conflicted counsel and because those statements were ambiguous at best.

The critical question is whether the district court conducted an adequate initial inquiry into Richard's complaints about his counsel. *Gallagher I*, ¶¶ 15–16. This Court has held that an inquiry is inadequate if the defendant is denied an opportunity to explain his complaints. *State v. Schowengerdt*, 2015 MT 133, ¶¶ 18–19, 379 Mont. 182, 348 P.3d 664. That is precisely what happened here. (Appellant's Br. 27–32.) As explained in Richard's opening brief, his complaints raised conflicts of interest and indicated a breakdown in communications, necessitating further inquiry. (Appellant's Br. 20–25, 27–32.) Instead, the district court ordered Richard to continue working with his counsel (App. B at 6, 8), and the court and the State did not permit Richard to explain his complaints (App. B at 5–6, 11–12).

Reversal is warranted so the proper inquiry can occur. *Wood*, 450 U.S. at 273–74; *City of Billings v. Smith*, 281 Mont. 133, 141, 932 P.2d 1058, 1063 (1997).

B. There was no express or implied finding that Richard did not raise seemingly substantial complaints.

The State correctly acknowledges that the district court did not make a finding that Richard's allegations were not seemingly substantial (Appellee's Br. 25), as required by precedent to avoid a merits hearing, *Gallagher I*, ¶ 15; *see also State v. Dethman*, 2010 MT 268, ¶ 16, 358 Mont. 384, 245 P.3d 30 (stating adequate inquiry requires "some sort of critical analysis of the complaint"). The State instead contrives an implied finding that Richard's complaints were not seemingly substantial. (Appellee's Br. 25–26.)

This Court should decline to apply the doctrine of implied findings where, as here, the district court failed to engage in even a minimal inquiry and did not make *any* findings with regard to Richard's complaints. The doctrine of implied findings applies only when there is a generally articulated finding that necessarily included other specific implied findings. *State v. Gable*, 2015 MT 200, ¶ 18, 380 Mont. 101, 354 P.3d 566 (concluding specific finding that particular assets could be

utilized to pay defendant's court-ordered costs was implicit in general finding that assets were available to defendant). In the absence of a general finding by the district court—*and* absence of the requisite inquiry to reach that general finding—the State asks this Court to infer something from nothing (*see* Appellee's Br. 25–26).

There was no generally articulated finding in this case that necessarily included a specific finding that Richard's complaints were not seemingly substantial. Rather, much like the process this Court found inadequate in *Schowengerdt*, the district court interrupted the defendant and heard equivocal statements about the attorney-client relationship only from defense counsel before moving on from the issue and ultimately failing to resolve it. (Appellant's Br. 30–31.) Applying the implied findings doctrine would be inappropriate on this record.

The closest thing to pertinent findings the State identifies to prop up its proffered implied finding are two quotes from the court's ultimate written judgment: a boilerplate statement about the voluntariness of Richard's plea and an excerpt of the court's reasons for its sentence relating to Richard's mental health. (Appellee's Br. at 25–26.) Neither suffices.

First, as noted in Richard's opening brief, the written judgment's discussion of the plea omits Richard's subsequent letter and the grave concerns it raised about the plea's validity. (Appellant's Br. 13; App. A at 1–2.) The court's refusal to acknowledge a contested issue is not a resolution of that issue.

Second, the district court mentioned Richard's mental health history for the specific purpose of restating the reasons for its sentence relating to placement and duration of treatment. (App. A at 5–6.) The State suggests that the district court's context-specific discussion should be extrapolated to an implied finding that Richard has a general propensity to lie, and extrapolated from there to an implied finding that he lied on a different specific occasion about his attorneys' conduct. (*See* Appellee's Br. 23–26.) This simply asks too much of a doctrine intended to fill gaps, not to build outward.

In sum, even if this Court disagrees that the conflicts of interest Richard's letter raised necessitated immediate appointment of substitute counsel to advise him regarding whether to withdraw his plea, at a minimum, additional inquiry was necessary. The district court failed to perform a minimally adequate initial inquiry. *Wood*, 450

U.S. at 272; *Schowengerdt*, ¶¶ 17–19. This Court should reverse and remand for that inquiry to occur.

CONCLUSION

This Court should reverse the judgment of the district court and remand with instructions to appoint Richard conflict-free substitute counsel to advise and represent him regarding his options regarding whether to withdraw his guilty pleas. Alternatively, this Court should reverse the district court's judgment and remand with instructions for the district court to conduct an adequate inquiry into Richard's complaints about his counsel.

Respectfully submitted this 26th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 for Windows is 3,155, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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