No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In Re.,
BRIAN D. SMITH, -- PETITIONER,

v.

STATE OF MONTANA, -- RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS

28 U.S.C. §§ 2254, 2241

Brian D. Smith
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722
Self-Represented

Austin Knudsen/Atty General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401
Attorney for Respondent

QUESTIONS PRESENTED

1. Is Smith's plea of guilty invalid because he was not informed of the true nature of his crime and was misled and misinformed by his court-appointed public defenders Katie Green and Ed Sheehy about available affirmative defenses and the right to appeal?
2. Is Smith's plea of guilty invalid because the state district court judge should have recused after accusing Smith of the same accusations he wanted to go to trial on right before his sentencing?
3. Was Smith denied effective trial counsel and effective appellate counsel in violation of U.S. Const. Amendments VI and XIV?
4. Was Smith unconstitutionally denied state and federal review of reversible errors due to state-created-impediments that cannot be fairly attributed to Smith and should have be imputed to State?

28 U.S.C. §§ 2403(a) and 2403(b) may apply to the questions below:

5. Has Smith been denied access to the courts in violation of the U.S. Constitution Amendments I,V,XIV due to an unconstitutional state statute, Montana Code Annotated (MCA) § 46-22-101(2)?
6. Has Smith been denied access to the courts in violation of the U.S. Constitution Amendments I,V,XIV due to an unconstitutional Act of Congress? (The Anti-Terrorism and Effective Death Penalty Act of 1996)
7. Are the Anti-Terrorism and Effective Death Penalty Act amendments to habeas corpus review/relief prohibited by the First Amendment?
8. Does the AEDPA of 1996 unconstitutionally alter the U.S. Constitution and unconstitutionally overrule U.S. Supreme Court precedent case-law that have created Constitutional Law?

LIST OF PARTIES

Parties that do not appear in the caption on the cover page are:

James Salmonson (Warden)
Montana State Prison
400 Conley Lake Road
Deer Lodge, MT 59722

Montana Department of
Corrections, P.O. Box 201301
5 South last Chance Gulch
Helena, MT 59620-1301

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JURISDICTION

This Court has jurisdiction of the Petitioner's original state court conviction, State v. Smith, No. DC-11-161, entered May 21, 2012 and the above Opinions under U.S. Constitution Article III, Article VI, Clause II, 28 U.S.C. §§ 1251, 1651, 2241, 2254(d)(1) and 2254(d)(2). Exceptional circumstances exist that effect the entire U.S.A. and adequate relief cannot be obtained in any other court. S.Ct.Rule 20(4)(a). 28 U.S.C. § 2403 may apply and Notice under 29(b)-29(c) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the State of Montana, Article II, Sections, 3,4,6,16,17,19,20,24 and 26.

Montana Code Annotated (MCA) §§ 46-8-103, 46-16-105, 46-21-101, 46-21-104, 46-21-105, 46-21-201, 46-22-101, 53-21-102(7)(a), 53-21-129.

United States Constitution, Article III, Article VI.
United States Constitution, Amendments I, V, VI, XIII and XIV.
28 U.S.C. §§ 1251, 1651, 2403, 2241, 2244 and 2254, 42 U.S.C. § 1395dd.
AEDPA, Pub. L. 104-132, 110 Stat. 1214 (effective April 24, 1996)
***The verbatim text is appended as APPENDIX B

STATEMENT OF THE CASE

This is a case where a horrific attack/assault took place after an attempted suicide by drug overdose. Petitioner, (Smith) brutally assaulted his girlfriend with a hammer less than eight hours after he was discharged (against his doctor's wishes) from Community Medical Center, (CMC) in Missoula Montana. Smith loved his girlfriend and has never intentially harmed a woman until this event. Smith asserts that this assault would not have happened if CMC had not released him on that day without proper care and treatment and that the medical records substantiate this assertion. (As well as appended letter in Exhibit F)

This is also a case where Smith was appointed a public defender Scott Spencer, who had Smith's best interest in mind was replaced with Katie Green who had the county attorney's best interest in mind,

Smith asserts that this conflict of interest was intentional and should qualify as a "state-created-impediment" that resulted in the "QUESTIONS PRESENTED" presently before This Court. Every attempt at relief in both state and federal courts were procedurally defaulted due to "some factor that is not fairly attributable to the applicant" (state-created-impediment) attorney-client conflict of interest.

The first instance of the above was in State v. Smith, DC-11-161 where Smith pleaded guilty after being misled and misinformed by his second court-appointed attorney Katie Green. (Green). Smith was told that if he pleaded guilty to Count I Aggravated Assault, MCA § 45-5-202 the state would dismiss Count II Assault with a Weapon MCA § 45-5-213. Smith was sentenced based on the allegations contained in Count II. He filed a MOTION TO WITHDRAW A PLEA OF GUILTY under MCA § 46-16-105 on advice of his conflicted attorney. State v. Smith, DC-11-161 Doc. #51. State district court judge Ed McLane denied the Motion stating:

> "Had the Defendant wanted to challenge the truthfulness of the testimony of the witnesses against him, he should have proceeded to trial." Doc.#52.

The Order denying Smith's Motion was sent to Green, (even though it was filed pro se) and the Montana Supreme Court (Mt.S.Ct.) denied his Petition to File an Out-Of-Time Appeal. State v. Smith, 2013 Mont. LEXIS 605. The Mt.S.Ct. ignored Smith's claim of being sentenced on false information (which is record based) to an Ineffective Assistance of Trial Counsel (IATC) only claim and faulted Smith for "some factor not fairly attributable to the applicant". (Bill Clinton, April 24, 1996).

Smith filed for habeas corpus relief in the Mt.S.Ct. based on the above, Smith v. Frink, 311 P.3d 444 (citations omitted) and federal habeas corpus relief and was unaware that Green ignored the Order,

dated January 18, 2013 from state district court judge Ed McLean for public defender Green to assist Smith with postconviction relief.

Smith was arrested at Community Medical Center (CMC) in Missoula, Montana on April 3rd, 2011 for aggravated assault. An Information was filed on April 18, 2011, and the state Office of the Public Defender (OPD) appointed Mr. Scott Spencer to represent Smith. After telling Mr. Spencer that he remembered very little about the events that led up to Smith's assaulting his girlfriend Lori Taylor after being released from CMC, Spencer explained that he would tell the County Attorney Susan Boylan that he intended to present the affirmative defense of diminished capacity. Smith never saw or spoke to Mr. Spencer again and on April 25th, 2011, Ms. Katie Green (Green) from the OPD met with Smith at the county jail. Smith told Green about his conversation with Mr. Spencer and that they discussed the diminished capacity defense. Green told Smith that she would request the funding from the OPD to have Smith forensically evaluated and had him sign release forms for the medical records from CMC regarding Smith's attempted suicide via drug overdose.

On May 10, 2011, Smith was arraigned on an amended Information with the additional charge of assault with a weapon. Green told Smith that he could not use the affirmative defense of diminished capacity due to fact that he "voluntarily ingested" the drugs and alcohol to overdose and as a result "voluntary intoxication" is not a defense. Green also told Smith that the OPD denied her request for a forensic mental health evaluation, and would only approve the funding for a general mental health evaluation. Everything that Green told Smith was untrue. He did not find this out until after the time limits for state and federal review had expired. This claim has never been addressed as a result.

REASONS FOR GRANTING THE WRIT

Smith's motion to WDGP is invalid because he was not aware that his court-appointed attorney Katie Green misinformed him about the availability of affirmative defenses at the time he entered his plea. Smith was also not aware that he was misinformed about the OPD denying funding to have a "forensic" evaluation done at the time that he entered his plea of guilty. Green later admitted (PCR 1) that the OPD approved her request for funding. Green performed no investigation into Smith's past or into his mental health history. In 2009, Smith discovered that his wife was having an affair with one of his co-workers. At that time, Smith had been married (and loyal) to his wife for 16 years, had a job that he loved, four beautiful children and a beautiful six bedroom home in Missoula, Montana. Smith had a troubled chilhood and suffered from depression. He began abusing drugs and alcohol at a young age and continued until getting married and having children in 1993. Smith gave up alcohol and drugs and shortly after being clean and sober he became seriously depressed. He sought professional help and was diagnosed as being Bipolar. Smith asked his doctor why it took until he was 30-years old to be diagnosed with bipolar depression. He was informed that the drugs and alcohol had masked the severe depression.

After finding out that his wife was having an affair in 2009, Smith divorced his wife, and began abusing drugs and alcohol again. December 2010, Smith was convicted for driving under the influence and lost the job he loved. No longer having medical insurance, Smith was only able to pay for his medications until mid February, 2011. On March 31, 2011, he attempted suicide by swallowing a lethal amount of drugs. Smith was misdiagnosed and not properly treated and released from the hospital on April 2, assaulted his girlfriend, attempted suicide that night.

After having a general mental health evaluation done and being misinformed about the availability of any affirmative defenses, Smith pleaded guilty to the charge of aggravated assault and the state agreed to dismiss the additional charge of assualt with a weapon. Doc. #37,38, Jan. 25, 2012, DC-11-161.

At the sentencing hearing, May 09, 2012, Smith was sentenced based on the allegations contained in count 2 assault with a weapon that was dismissed. The sentencing judge Hon. Ed Mclean, told Smith at the hearing that he not only hurt Ms. Taylor, he tried to kill her. Ms. Green said or did nothing, and when Smith stood up to clear up the misunderstanding, he was told, "sit down this isn't a trial" by Ms. Green.

Smith wasn't able to talk with Green after the sentencing hearing was over, so he wrote a letter to her on May 09, 2012 and had the jail staff give it to her. Smith wrote that he wanted to immediately withdraw his plea of guilty and go to trial. Green wrote back on May 10, 2012, telling Smith that her job with him was done and included the state statute that may be used to withdraw his guilty plea. Smith later found outhe was lied to in a petition for state habeas corpus in 2018, that instead of filing a motion to withdraw Smith's guilty plea, he should have raised the issues on direct-appeal. Smith v. McTighe, 2018 Mont. LEXIS 332, 393 Mont. 542 (OP-18-0532) stating:

> "An appeal would have been the better and more appropriate proceeding to raise these many issues relating to his criminal charges, the record, his mental health, the PSI, and the sentencing hearing. By not appealing within the sixty-day timeframe from the 2012 judgment, Smith has exhausted the remedy of appeal and he is thus barred from raising these issues in a petition for habeas corpus relief. Section 46-22-101(1), MCA, Lott, ¶¶ 4, 19.

Smith's Plea of guilty is invalid due to conflict of interest. Please consider the following from MCA § 46-21-201(3)(c):

> "The office of state public defender may not assign counsel who has previously represented the person at any stage in the case unless the person and the counsel expressly agree to the assignment."

District court judge Ed McLean should and likely did know about the above statute. The court was aware that Smith was complaining about Green, therefore, it would appear that the conlict of interest was intentional. Please consider the OPINION AND ORDER, Cause No. DC-11-161 Docket # 52 filed July 26, 2012:

> "Pending before the Court, is Defendant's Motion to Withdraw a Plea of Guilty Under Mont. Code Ann. § 46-16-105 based on the allegation that his public defender misled him by promising him he would be able to cross-examine the witnesses at his sentencing hearing to challenge untrue testimony, and had he known he would not be allowed to cross-examine the witnesses, he would never have agreed to plead guilty. Defendant has failed to cite to or provide any evidence to support that any of the witness impact statements made at the sentencing hearing were untruthful, and such untruths had a significant impact on the mandatory sentence he received of 20 years without the possibility of parole. Had the Defendant wanted to challenge the truthfulness of the testimony of the witnesses against him, he should have proceeded to trial. Instead, Defendant clearly acknowledged at both the change of plea hearing and the sentencing hearing that no promises were made to entice him to change his plea to guilty and that he was satisfied with the services of his attorney."

*Please see motion to WDGP and above Order (Appended, Exhibit B). Smith did not say "that he was satisfied with the services of his attorney" at the sentencing hearing, and he couldn't have cross-examined and/or "challenge untrue testimony" because it was the district court judge Ed McLean's statements that the "Defendant wanted to challenge the truthfulness of..." He told Smith as the court that Smith "tried to kill her". Attempted murder is not an element of aggravated assault. MCA § 45-2-202.

On page three of Smith's motion to WDGP it states:

> "I was misled by my public defender Katie Green. I wanted to go to trial so that we could address untrue statements that were not backed by evidence vs. statements that were backed by evidence. Katie Green pursuaded m[e] to not have a trial. I asked her that if I entered a guilty plea (open plea) if I (we) would still be able to cross-examine witnesses before or at sentencing. She told me yes, we would. This was not so." (Doc.#51, DC-11-161)(2012)

On page five of Smith's motion to WDGP it quotes the Mt.S.Ct.:

> "If there is any doubt that a guilty plea was not voluntarily or intelligentl made, the doubt must be resolved in favor of the defendant." State v. Melone, 2000 MT 118, ¶14, 299 Mont. 442, ¶14, 2 P.3d. 442, ¶14; see also State v. Keys, 1999 MT 10, ¶12, 293 Mont. 81, ¶12, 973 P.2d. 812, ¶12 (1999) "The requirement that a guilty plea be entered voluntarily has long been a requirement in Montana. As far back as State ex rel. Foot v. District Court, 81 Mont. 495, 263 P. 979, 982 (1928), the Court emphasized that "[a] plea of guilty should be entirely voluntary, by one competent to know the consequences, and should not be induced by fear, persuasion, promise, or ignorance."

According to the above, Smith should have been able to withdraw his plea and been allowed to proceed to trial. Instead, Smith was sentenced based on testimony that was false, elements of crimes that he was not charged with and a charge that was dismissed. Smith's plea is invalid, yet he was told by both of his court-appointed public defenders that all that he could do is sentence review, and he was on his own.

Please consider the 9th Circuit Court of Appeals:

> "The court vacated the order denying appellant's habeas corpus petition without a hearing because a determination needed to be made on the issues of ineffectiveness of his counsel's representation and whether his plea was intelligent as based on an explanation of the charges and defenses outside the courtroom." Sober v. Crist, 644 F.2d 807 (1981)

Based on the above, Smith's 14th Amendment due process and equal protection rights were violated.

Smith's motion to WDGP was denied on 7/26/2012 (Doc. #52 DC-11-161) although since Green did not get permission to withdraw as required, the Order was sent to her not Smith. In November of 2012, Smith wrote to the clerk of court asking about his motion to WDGP and the clerk responded on November 26, 2012 and sent him a copy of the Order. Smith then attempted to obtain the transcripts from the sentencing hearing so that he could appeal the denial of his motion to WDGP by again writing the district court. The letter was given to the judge but not filed. The district court Ordered public defender Green to assist Smith and denied his request for the transcripts stating:

> "Defendant, Brian D. Smith, has requested this Court's assistance in obtaining a full transcript of the sentencing. Mr. Smith has made no showing of why a full transcript is necessary and has already been furnished a copy of the transcript [7 pages out of 39] listing the reasons for his sentence. The request for a full transcript of the sentencing hearing is DENIED."
>
> "Defendant Smith's next request is for this Court's assistance in obtaining the services of the Appellate Public Defender's office. That request is also DENIED. There has been no notice of appeal filed and no notice of appeal filed and no showing to this Court that such a request of the Appellate Public Defender's office has been made. Ms. Katie Green is the Public Defender appointed to represent Defendant Brian D. Smith and that appointment includes post-conviction relief. It is the attorney who requests transcripts from the Court, not the Defendant."

Green ignored the Order, and Smith had no idea it existed as the Order was sent to Green, not Smith. It wasn't until 2019 that Smith first saw the Order when, with the help of his sister and the clerk of court, he was able to obtain the records. (see attached Exhibit A and Doc. #56 DC-11-161). The state to this day refuses to turn over records that Smith needs to substantiate his ineffective assistance of counsel, invalid plea and other claims. See Smith v. State, 2020 Mont.LEXIS 913.

Smith asserts that This Court will observe unequal treatment in every step of his pro se attempts at direct-appeal, first as-of-right appeal (refusal to appoint counsel) based on the following from the sentencing hearing in DC-11-161 (doc.#46) May 09, 2012:

> "The Court hopes that he is detained until he's of such an age that he's too much of an invalid to take out his violence against someone else."

Smith asserts that this statement is to other state courts that may review his conviction. An inference can be made by the complete disregard for Smith's constitutional rights in subsequent rulings. Smith knows that what he did to his girfriend was horrible. Everyone that had any involvement in his case is aware that the assault was an anomaly. Please see letter from Shandor Baddarudin to Smith (Exhibit F). The assault would never have happened if the hospital hadn't misdiagnosed Smith, given him pain medication and sedatives without his knowledge or consent and not release him before he was stabilized.

Please consider the following from 18 F.3d 778 at 784:

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client....Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is particuliary abhorrent." Frazer v. United States, 18 F.3d 778,784, 1994 U.S.App. LEXIS 4173.

The conflicted interests of court-appointed public defender Katie Green are obvious and Smith has been procedurally defaulted by the actions and omissions of his attorney in every attempt at relief.

*See MCA §§ 53-21-102(7)(a), 53-21-129, 42 U.S.C. § 1395dd et. seq. Had the hospital, Community Medical Center (CMC) followed the law, there would have been no assault. Smith loved his girlfriend and was intending to spend the rest of his life with her. Unfortunately, because of the ineffectiveness of his trial counsel Katie Green, he discovered the fact that CMC violated state and federal law too late. Also, unfortunately for Smith Montana law is also concerned with actual as compared to legal innocence. MCA § 46-21-102(2), Smith v. State, 2018 MT 115N. 392 Mont. 553, 416 P.3d 1054, DA-17-046, DV-16-698. Smith, through no fault of his own became aware of the above facts, after his first federal habeas petition, and even though he could prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" he was barred by the unconstitutional statute § 2244(b)(2)(B)(ii). 2019 U.S. App. LEXIS 17852. *See also Smith v. Anderson, 2016 MT 192N, 385 Mont. 539, 2016 Mont. LEXIS 521(cert. denied, Smith v. Anderson, 197 L.Ed. 2d 200, 2017 U.S. LEXIS 1260).

Smith was lied to by his public defender Katie Green and relied on what he was told when deciding to enter a plea of guilty. Unfortunately, the prosecutor Susan Boylan and Green were able to conceal the lies until after he had filed his first habeas petition. As a result, Smith was denied his 6th amendment right to a trial (with a meritorious defense), right to counsel, right to appeal, right to postconviction relief and right to federal habeas corpus relief. Smith prays that This Court will revisit the AEDPA and see how the Act has changed the value of freedom and the Rights that were "endowed by their creator".

The Montana Supreme Court decision in State v. Smith, 2013 Mont. LEXIS 605, DA-13-0399, denying Smith's Petition for Out-Time-Appeal was unreasonable under § 2254(d)(2). On page one it states:

¶2 "Consequently, Smith claims that he was sentenced based upon false accusations and statements."

As an appellate court, the court should have looked at the district court record. The Mt.S.Ct. either neglected to look at the trial court record or ignored it. The Case Register Report for DC-11-161 (Exhibit D), dated 2/7/2013, which happens to be the same day Smith filed a Notice of Appeal, (pro se), shows Katie Green was still listed as (Primary attorney) "Send Notices" on Page 1 of 3. The above quote acknowledges that his Motion To Withdraw A Plea Of Guilty was based in part on him being "sentenced based upon false accusations and statements" which is a record-based claim that could be proven with the sentencing transcript. Based soley on the above, the Mt.S.Ct. knew, or should have known that Smith filed his motion to withdraw his plea while still represented by trial counsel by law (MCA § 46-8-103) and no "Anders" brief was filed. Case register Doc #53 is a letter from Smith attempting to obtain the sentencing transcripts. Again, pro se while still represented by Katie Green. Doc #54 is an Order granting the request for transcripts. Smith was sent 7 out of the 39 pages from the sentencing hearing. Doc #55. Smith requested the full set of sentencing transcripts, but this time the request was not filed into the record. (Exhibit A). The request was denied, (Doc.#56) but the Order was sent to Green not Smith. See attached legal mail log (Exhibit E) page 8 of 8 that shows the request sent on 1/10/2013 and that the Order was not received by Smith. See Order denying sentencing transcripts. Doc #56 dated 1/18/13 (Exhibit A).

Even though Smith was not sent a copy of the state district court Order dated January 18, 2013, (Doc. #56,DC-11-161) the Mt.S.Ct. could and/or should have seen it. The trial court record showed that Smith's request for a full copy of his sentencing hearing transcripts was denied not once, but two times. Then, the Mt.S.Ct.'s reason for denying permission to file an out-of-time appeal was:

> "Smith has not demonstrated that there is a record that would permit adjudication of ineffectiveness claims on appeal. He may be able to raise these claims in a postconviction proceeding."
> State v. Smith, DA 13-0399, P.2

The reason for the above quote will become very obvious to This Court in the pages that follow and the quotes below:

> "The irony of this situation is evident. When a record-based IATC claim presented on direct appeal lacks merit, the Montana Supreme Court denies it, and that is that. Only when the claim is not clearly meritless does the Montana Supreme refer the appellant to postconviction proceedings. Consequently, only POTENTIALLY MERITORIOUS IATC claims are deferred from direct appeal, where there is a right to effective counsel, to a postconviction proceeding where there is none. Because the manner in which Montana law operates means a petitioner with a potentially meritorious IATC claim loses the right to effective counsel at the very first stage where she can develop the factual basis of the claim and obtain a full and fair hearing on the merits, it is hard to see why Montana should be exempt from the rule of Martinez." Miller v. Kirkegard, 2015 U.S. Dist. LEXIS 176693 (caps substituted for italics)

The record-based claims that Smith wanted to appeal, but was told that he could not and was denied the records to, were later barred:

> "An appeal would have been the better and more appropriate proceeding to raise these many issues relating to his criminal charges, the record, his mental health, the PSI, and the sentencing hearing. By not appealing within the sixty-day timeframe from the 2012 judgment, Smith has exhausted the remedy of appeal and he is thus barred from raising these issues in a petition for habeas corpus relief." Smith v. McTighe, 393 Mont. 542

Unkowingly, Smith was denied both trial and appellate counsel.

On page one of the Mt.S.Ct. Order, DA-13-0399, it states:

> "Smith asserts he did not immediately receive a copy of this Order, [DC-11-161 doc. 52] but admits he received it by late November, 2012."

The Mt.S.Ct. in State v. Garner, 1999 MT 295, states:

> [*P 10] "An "out-of-time appeal" is a remedy that may be available to a defendant involved in criminal proceedings who, through no fault of his own, misses a deadline for filing an appeal. Typically, the missed deadline is due to ineffective assistance of counsel." See generally State v. Bromgard, (1995), 273 Mont. 20, 22, 901 P.2d 611, 613; Hans v. State, (1997), 283 Mont. 379, 408-10, 942 P.2d 674, 691-93.

Orders for DC-11-161 were not being sent to Smith, but rather to his court-appointed public defender Katie Green, therefore, "through no fault of his own"..."the missed deadline is due to ineffective assistance of counsel." Smith was not entitled to the "remedy" above, as in the opinion of the Mt.S.Ct., despite ineffectiveness of counsel, and denial of counsel altogether, "Smith has failed to present "extraordinary circumstances amounting to a gross miscarriage of justice... we conclude that the petition lacks merit." Please consider:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws." "Though the law itself be fair on its face and impartial in appearance, yet, if it is administered by public authority with an evil eye and an unequal [*374] hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 369, 373-74, 6 S.Ct. 1064, 30 L.Ed 220 (1866).

The Mt.S.Ct.'s decision in State v. Smith, 2013 Mont. LEXIS 605, DA-13-0399 is unreasonable for purposes of § 2254(d)(2), and violates the due process and equal protection clauses of Amendment Fourteen.

Due to the fact that Smith was told that he could not appeal and he could only apply for sentence review by both Katie Green and Ed Sheehy, (See letters, Exhibit C) Smith filed a petition for habeas corpus in the Mt.S.Ct. MCA § 46-22-101. Smith was told that he could file for postconviction relief by Ed Sheehy. Smith was unaware that that state district court judge Ed Mclean had Ordered Katie Green to assist Smith with postconviction as he never received the Order dated January 18, 2013. The postconviction statute MCA § 46-21-104(1)(c) requires that the PCR petition "have attached affidavits, records, or other evidence establishing those facts." Smith needed a full copy of his sentencing transcripts and a copy of the PSI to prove his plea and sentence were illegal, but could not get them from the court. Even if he would have been given the records, a PCR petition would have been denied by MCA § 46-21-105(2) "...grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter."

Smith filed for state habeas relief because since he was told that he could not file a direct-appeal, he didn't believe that he could have been considered to have "exhausted the remedy of appeal." § 46-22-101(2) Also, Smith thought that because he was alleging the state district court was biased toward him they would have to take a look at the trial court record. Surely they would see that judge McLean told Smith that he "hopes that he is detained until he's of such an age that he's too much of an invalid to take out his violence against someone else." Why would a judge grant, or even rule on Smith's motion to WDGP after what he said. The Mt.S.Ct. was unreasonable in it's determination of the facts under § 2254(d)(2) in Smith v. Frink, 2013 Mont. LEXIS 282.

The Mt.S.Ct decision in Smith v. Frink, 311 P.3d. 444, OP 13-0278 is both an unreasonable determination of the facts § 2254(d)(2) and contrary to clearly established Federal law, § 2254(d)(1). Smith and other inmates were made aware of this constitutional violation where an inmate had read in a book from the prison library titled "Montana, from Wilderness to Statehood". In reading about the history of Montana he discovered that the State Legislature did not have a copy of the verbatim text from the Montana Constitutional Convention that revealed the intent of the Framer's of the Montana Constitution. The transcripts of the proceedings and debates from the Convention of 1889, according to a law professor from the College of Montana (now the University of Montana), explained that the Convention Notes "mysteriously dissappeared" after the Convention and then "mysteriosly" reappeared in 1921. The intent of the Framer's of the Montana Constitution was to replace the use of the Grand Jury with the Filing of an Information. The Framer's intent was to follow the California Constitution's procedure exactly. This did not happen, and to this day, Montana's procedure in both the filing of the Information § 46-11-201 and Preliminary Hearing § 46-10-105 does not follow the intent of the Framer's of the Montana Constitution.

Smith's case, DC-11-161 is the perfect example of what was the intention of the Framer's to avoid by adopting California's procedures. The state district court judge Ed Mclean did not conduct a preliminary examination nor did the Magistrate as required. Smith was prejudiced because the state was allowed to file an additional charge to attempt to avoid a trial by doubling the prison time that Smith faced. Had Smith been given a public defender that had Smith's best interest

in mind, he could have challenged the State's additional charge, as the evidence supported Smith's recollection of the events in question. The detective that investigated the crime scene told Smith's attorney Green that he was willing to testify on Smith's behalf. This claim (Preliminary examination) was raised in subsequent pleadings after himself and other inmates finally obtained the Convention Notes from 1889.

Smith's conviction (DC-11-161) was also the perfect example of what the Framer's of the Montana Constitution intended to avoid as well as California, "[a] judge who 'cannot be, in the very nature of things, wholey disinterested in the conviction or acquital of the accused.'" Smith v. Frink, 311 P.3d. 444 (OP 13-0278 p.2) citing, Chester v. California, 355 F.2d. 778, 786 (9th Cir. 1966); In re. Murchison, 349 U.S. 133, 137, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The state district court judge Ed McLean, when considering the filing of the amended Information, Count II Assault with a weapon alleging that Smith tried to slice the victim's throat and "left her for dead" not only found Smith "probably" guilty, he sentenced Smith based on those allegations. Judge McLean's statements at the sentencing hearing weren't just the appearance of bias, the statements showed actual bias. He definitely should not have ruled on Smith's motion to WDGP after saying what he did. Smith's guilty plea was his conviction, and his motion to WDGP was his acquital and judge McLean was the total opposite of "wholey disinterested in the conviction or acquital of the accused". Smith was unable to rebut the accusations that he tried "to kill" his girlfriend and did not plead guilty to that.

Please compare the above with This Court in Henderson:

> "...respondent testified that he would not have pleaded guilty if he had known that an intent to cause the death of his victim was an element of the offense of..." Henderson v. Morgan, 426 U.S. 637,643-634, 96 S.Ct. 2253, 49 L.Ed. 2d 108 (1976).

Again, the Mt.S.Ct. either did not look at the trial records or ignored the "pertinent portions" where the state district court judge Ed Mclean ACCUSES Smith of attempted deliberate homicide, during the sentencing hearing where he only pleaded guilty to aggravated assault. Count II that had that accusation was dismissed, as Smith told attorney green that he wanted to challenge those accusations in a jury trial. Smith immediately filed a motion to WDGP due to being ACCUSED and sentenced on false information. He was not afforded the Fourteenth Amendment protections required by this Court in Murchison, 349 U.S. 133:

> "We held that before such a conviction could stand, due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges against him, call witnesses on his own behalf, and be represented by counsel." Id at 134.

Smith was denied the above rights. Public defender Katie Green said not a word while Smith was accused in open court by judge McLean of trying "to kill" his girlfriend. Green also said nothing while the state's witnesses accused Smith of trying "to kill" Lori and "left her for dead". These were the accusations Smith wanted to go to trial on. This claim was raised in Smith's first federal habeas corpus, Smith v. Frink, 2014 U.S. Dist. LEXIS 68520. U.S. Magistrate Judge Jerimiah Lynch changed Smith's claim of a "one man grand jury" directly accusing Smith and then proceeding to sentence and enter judgment to Judge Lynch's conclusion that "The judge did not initiate an investigation or charge, or file any paper, but merely answered an independent legal question as one step in the arrest process." Again, had the court looked at the trial records, there would have been a diferent outcome. This claim has been procedurally barred in subsequent pleadings and has not been properly addressed. See also Smith v. Frink, 2020 U.S. Dist. LEXIS 212815.

Trial counsel Green was ineffective for not obtaining Smith's medical records regarding his attempted suicide by drug overdose from CMC for the dates of 3/31/2011-4/02/2011. Those records show that Smith was given pain medications (Norco) and was administered sedatives (Lorazepam) without his knowledge or consent. Smith was misdiagnosed as arriving at CMC as "alcohol only" because his original blood test did not reveal any of the drugs he ingested in the initial testing. The records show that even after later testing revealed "poisonous" levels of Benzodiazepines, they continued the Lorazepam (for "agitation") through his IV until discharge. Green told Smith that she would obtain the medical records and had Smith sign release forms. Smith was also led to believe that Dr. Moomaw, who'd given Smith a psych-eval, had based his conclusions that he did not believe Smith had an affirmative defense and could control his actions after reviewing the CMC records. Smith was not aware that Green did not obtain and/or give them to Dr. Moomaw until after the expiration of the time limitations for state postconviction and after Smith had filed his first federal habeas corpus petition. This claim was raised in his first petition for PCR, DV 16-698 as newly discovered evidence showing actual innocence. (Ground 2, pp.11-20, Memorandum pp.6-9) The state district court judge Leslie Halligan denied the claim of IATC based on the above, denied the PCR 1 petition and the Mt.S.Ct. affirmed in DA 17-0146 [*P8]

> "The record that he alleges is new pertains to his own medical treatment and evaluation; he would have known of its existence prior to the date he made his guilty plea. The fact that Smith was unaware that his attorney never saw all 275 pages of the medical report does not constitutue newly-discovered evidence. The information contained in the medical report was known to Smith."

The above quote should qualify for both §§ 2254(d)(1) and 2254(d)(2).

The Mt.S.Ct. ruling in Smith v. State, DA 17-0146, 2018 MT 115N is contrary to federal law as determined by This Court in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53:

> [*70] "The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question."

It has become very evident to Smith, (as it should This Court) why he was originally appointed public defender Scott Spencer, who told him that based upon what Smith had told him he intended to tell his boss and the county attorney the affirmative defense of "diminished capacity" would be presented was replaced with public defender Katie Green.

The Mt.S.Ct.'s ruling is also contrary to federal law as determined by This Court in Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed. 2d 807 (2012) at 282:

> "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."

Please consider Frazer v. United States, 18 F.3d 778, 782:

> "A defense attorney who abandons his duty of loyalty to his client effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "represents the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 821, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). "In fact, an attorney who is burdened by a conflict between his client's interests and his own sypathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." (9th Cir. 1994) 1994 U.S.App. LEXIS 4173.

Smith asserts that the record supports the conflict quoted above.

*See also motion to WDGP, Order of denial and letter to and from the clerk of court (Appended , Exhibit B), and Omnibus Hearing Memorandum pg. 6, (Appended Exhibit G)

MCA § 46-8-103 Commentary--Commission Comments states as follows:

> 1991 Comment: This statute reflects 1987 MCA 46-8-103. In fact, subsection (1) is a restatement of the 1987 code concerning the appointment of counsel. Subsection (2) contains the requirements imposed on the defendant's court-appointed counsel if the counsel seeks a withdrawal after verdict and before initial appeal. These requirements are imposed to ensure that all defendant's including indigent defendants, Have "the same rights and opportunities on appeal as nearly practicable....".See Anders v. Calif., 386 U.S. 738, 744, 745 (1967)

This Court stated in Coleman v. Thompson, 501 U.S. 722 at 754:

> "If the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State."..."In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of a petitioner's right to counsel, so that the error must be seen as an external factor, i.e., "imputed to the State." See also Evitts v. Lucey, 499 U.S. 387, 396, 83 L.Ed. 2d 821, 105 S. Ct. 830 (1985) ("The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law.").

Smith was prevented from learning of and vindicating his rights by his court-appointed attorneys through deception and abandonment, and the failure to raise these same claims that were concealed and misinformed of were imputed to Smith. He was not only denied the assistance of effective counsel, he was denied any assistance at all. Smith prays that This Court consider the above as a "state-created impediment" that the state of Montana faulted (imputed) to Smith. The actions of the state also caused Smith's IATC claim to not be "ripe" when he filed his first-in-time federal habeas corpus in 2014.

*See Smith v. Green, 2021 MT 42N, 403 Mont. 546, 480 P.3d 262, 2021 Mont. LEXIS 151; Smith v. Sheehy, 2021 MT 97N, 404 Mont. 552, 485 P. 3d. 2021 Mont. LEXIS 364. *See also letters from Smith to the clerk of court in Missoula (Appended, Exhibit H) and inmate legal mail log (Appended, Exhibit E).

Public defender Katie Green signed Document #15, DC-11-161 filed on May 11, 2011 Omnibus Hearing Memorandum pg. 6:

> XII. APPOINTMENT OF COUNSEL
>
> "As the court-appointed counsel for the Defendant, I acknowledge that this appointment includes the trial of this matter in the District Court, post-trial motions, sentencing and, absent specific permission to withdraw, an appeal to the Montana Supreme Court if the Defendant elects to appeal and I do not deem such an appeal to be frivolous. In the event the Defendant wishes to proceed with an appeal I believe has no merit, I will proceed pursuant to the provisions of MCA 46-8-103(2). If the Defendant elects not to appeal, the Defendant and I will sign a written notice of "Election Not to Appeal" and I will file the "Election Not to Appeal" with the court."
>
> XIII. STIPULATION OF ENTRY
>
> "Counsel for the State and for the Defendant have reviewed this Omnibus Hearing Memorandum and hereby stipulate to its entry by the Court."

This was dated 5/11/11 and signed by Suzy Boylan, Attorney for State of Montana, Katie Green (5/10/11) Attorney for Defendant and DISTRICT JUDGE Ed McLean This is important, because in later proceedings, the records that were finally obtained in 2019 by Smith and records in response to both of Smith's petitions for postconviction relief reveal fraud on the court by "Attorney for State of Montana" and "Attorney for Defendant". It is also important to note the DISTRICT JUDGE Ed McLean signed and was aware that Smith was complaining of being misinformed and misled by Green when he denied Smith's pro se motion to WDGP on July 26, 2012. (5 days after time to appeal expired)

Smith remains incarcerated in violation of the United States Constitution Amendments I,VI,XIII and XIV due to an unconstitutional state statute Montana Code Annotated (MCA) § 46-22-101(2).

Smith asserts that the Mt.S.Ct., who has already held that the statute is unconstitutional under Montana's constitution continues to use the statute as an option to dispose of meritorious claims of unconstitutional incarceration. As soon as the sixty-day limitation period for direct-appeal expires, habeas corpus relief in Montana is barred. This violates the state's constitution as well, and unlike this Court, no remedy beyond one year after the judgment becomes final is available. Also, habeas corpus relief is only available if it will not result in the petitioner's release as stated below and in the following explanation by the Mt.S.Ct. in Lott v. State, 2006 MT 279:

> [*P.23] "The petition for writ of habeas corpus is hereby granted. Since Lott has challenged his sentence and not the underlying conviction, he 'is not entitled to be released but only to be resentenced.'" Petition of Gray, 184 Mont. 363,365, 603 P.2d 230,231 (1979) Lott v. State, 2006 MT 279, 334 Mont. 270, 150 P.3d 337.
>
> MCA § 46-22-101 Who may prosecute writ.
>
> (1) Except as provided in subsection (2), every person imprisoned or otherwise restrained of his liberty, within this state may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.
>
> (2) Relief under this chapter is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal.

Whether "a person" has appealed or not, after the sixty-day limitation has expired, the "person...has exhausted the remedy of appeal." Also, a person can only use habeas corpus if he "is not entitled to be released but only to be resentenced." Lott, P.23 above.

Again, the Mt.S.Ct. in Lott v. State, 2006 MT 279:

> [*P.22] "In light of the writ's history and purposes, as well as Montana's constitutional guarantee in Article II, Section 19, that the writ of habeas corpus shall never be suspended, we conclude that as applied to a facially invalid sentence-- a sentence which, as a matter of law, the court had no authority to impose--the procedural bar created by § 46-22-101(2), MCA, unconstitutionally suspends the writ. We hold that incarceration of an individual pursuant to a facially invalid sentence represents a "grievous wrong," Brecht, 507 U.S. at 637, 113 S.Ct. at 1721, and a "miscarriage of justice," Perry, 232 Mont. at 462, 758 P.2d at 273, warranting habeas corpus relief. When the delegates ratified the 1972 Constitution, they intend, at a minimum, that an individual incarcerated pursuant to a facially invalid sentence--for example, a sentence which exceeds the statutory maximum for the crime charged or which violates the constitutional right to be free from double jeopardy-- have the ability to challenge its legality."

Smith had a facially invalid sentence because he was accused of something that he did not do by the state district court judge before pronouncing sentence and judgment, "which, as a matter of law, the court had no authority to impose" and was barred from state habeas corpus because he was told that he could not direct-appeal, thus "exhausted his remedy of appeal". Smith v. McTighe, 2018 Mont. LEXIS 332:

> "An appeal would have been the better and more appropriate proceeding to raise these many issues relating to his criminal charges, the record, his mental health, the PSI, and the sentencing hearing. By not appealing within the sixty-day time-frame from the 2012 judgment, Smith has exhausted the remedy of appeal and he is thus barred from raising these issues in a petition for habeas corpus relief. Section 46-22-101(1), MCA, Lott, ¶¶ 4,19."

The claims described by the Mt.S.Ct. above are the same claims that Smith was trying to get help from court-appointed public defender Katie Green and Ed Sheehy. Instead Smith was forced to file a motion to WDGP himself, despite the fact Katie Green was still legally obligated to assist him. See Smith v. Green, 2021 MT 42N (citations omitted)

Please consider the Mt.S.Ct. in State v. Jackson, 2007 MT 186:

> [*P10] "The restriction on habeas corpus contained in § 46-22-101(2), MCA, stands in tension with the constitutional provision in Article II, Section 19 of the Montana Constitution, that "the writ of habeas corpus shall never be suspended." We determined in Lott v. State, 2006 MT 279, P22, 334 Mont. 270, P22, 150 P.3d 337, P22, that the procedural bar created by § 46-22-101(2), MCA, unconstitutionally suspends the writ of habeas corpus. We further concluded that the incarceration of a person under a facially invalid sentence--including a sentence that exceeds the statutory maximum for the crime charged-- presented a "grievous wrong" that the court could address in a petition for writ of habeas corpus." Lott, P22.

A "sentence that exceeds the statutory maximun for the crime charged" is going to always be record-based. Therefore, Montana can fault the failure to preserve record-based claims to the defendant as follows:

> "The time to object was at his 2017 sentencing. Wood waived these conditions by failing to object in the District Court. Additionally, Wood cannot substitute a writ of habeas corpus for issues which should have or could have been raised in appeal." Wood v. Guyer, 2019 Mont. LEXIS 121, 395 Mont. 524, 437 P.3d 116.

Lott's sentence was record-based, Jackson's sentence is record-based, although they were able to "substitute a writ of habeas corpus for issues that...could have been raised on appeal", because it would be a "grievous wrong". Smith objected at his sentencing hearing and was told, "sit down this isn't a trial" by his public defender Katie Green. Mysteriously, the transcript states "inaudible". Also, isn't failure to object proof of ineffective assistance of counsel? Smith was barred by the Mt.S.Ct. in Smith v. McTighe, 2018 Mont. LEXIS 332 from raising record-based claims that would present a "grievous wrong" in a petition for a writ of habeas corpus, and was barred in 2013 from raising these the exact same claims because he "could not demonstrate that there is a record" after being denied the records twice. Is that a "grievous wrong"?

Please consider the following from the Honorable Magistrate Judge John Johnston, U.S. District Court, Great Falls, Montana:

> "[D]efendants pursuing first-tier review...are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error." Martinez, 132 S.Ct. at 1317 (quoting Halbert v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.Ed. 2d 552 (2005))(internal quotation marks omitted)..."Even with an appellate brief identifying an IATC claim, a postconviction petitioner left without effective counsel in the postconviction proceeding in the trial court may make a defective presentation of the claim and suffer its dismissal, or she may omit the claim, or she may fail to file a postconviction petition at all."
>
> "The irony of this situation is evident. When a record-based IATC claim presented on direct appeal lacks merit, The Montana Supreme Court denies it, and that is that. Only when the claim is not clearly meritless does the Montana Supreme Court refer the appellant to postconviction proceedings. Consequently, only POTENTIALLY MERITORIOUS IATC claims are deferred from direct appeal, where there is a right to effective counsel, to a postconviction proceeding, where there is none. Because the manner in which Montana law operates means that a petitioner with a potentially meritorious IATC claim loses the right to effective counsel at the very first stage where she can develop the factual basis of the claim and obtain a full and fair hearing of its merits, it is hard to see why Montana should be exempt from the rule of Martinez." Miller v. Kirkegard, 2015 U.S. Dist. LEXIS 176693(caps substituted for italics).

If a meritorious claim IATC claim is presented in a petition for postconviction relief, the district court uses one of the following:

> MCA § 46-21-104(1)(c) identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.
>
> § 46-21-105(2) When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffectiveness or incompetence of counsel in proceedings on an original petition under this part may not be raised in a second or subsequent petition under this part.

> "Under Mont. Code Ann. § 46-21-105(2), when a petitioner was afforded a direct appeal of a conviction, grounds for relief that could reasonably have been raised on direct appeal could not be raised in the original or amended petition." In re Manula, 263 Mont. 166 (1993)

The unfair practices in Montana are very obvious. "The irony of this situation is evident", (Magistrate Judge John Johnston) exists throughout Montana case-law. It is evident that the attempts by the state to assure that the newly convicted are BARRED FROM LEGAL RECOURSE, actually creates a never ending backlog of challenges to the unconstitutionally obtained convictions. Magistrate Johnston stated, "Consequently, only POTENTIALLY MERRITORIOUS IATC claims are deferred from direct appeal, where there is a right to effective counsel, to a postconviction proceeding where there is none." The conflict of interest created with trial counsel causes the beginning of a never-ending attempt of the unconstitutionally convicted to vindicate the many rights that have been denied. Please consider the following:

> "A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing those facts." Section 46-21-104(1)(c), MCA"

> "It [district court] determined all of Herman's ineffective assistance of counsel claims could have been raised on direct appeal; his factual allegations were not adequately supported by affidavits, records or other evidence." Herman v. State, 2006 MT 7 Pp.12,15.

Petitioner's (pro se) have no LEGAL RECOURSE in Montana, because the State has a procedural bar for any circumstance they may face, and whether a person has appealed, not appealed, or waived their appeal, or were abandoned on appeal by their court-appointed attorney, the defaults are "imputed to the appellant" not the state. The barring of habeas corpus has violated Montana's suspension clause, because unlike the U.S. Supreme Court there is no available remedy.

Montana's unconstitutional statute, MCA § 46-22-101(2) is used to deny review and/or relief based on the following plea convicted:

> "When a defendant has pleaded guilty, he can only attack the voluntariness and intelligent character of his guilty plea; all nonjurisdictional claims are waived." State v. Babb, 2003 MT 265N "Hence, the only issue we consider is the sentence imposed. ..." "We review a district court's criminal sentence for legality only, addressing whether the sentence imposed is within the parameters provided by the statute." Miller v. State, 2012 MT 131, P.5

also: "The pro se prisoner was not entitled to habeas corpus relief, Mont. Code Ann. § 46-22-101, because his alleged error was a defective plea and not an illegal sentence, and by failing to raise the alleged error in his conviction on direct appeal, he has waived his claim;"..."A challenge to the legality of a sentence can be raised on direct appeal"..."Gardipee argues that his sentence is illegal." [P4] "Because Gardipee's claims are an attack on his conviction and not his sentence [P5] and can no longer seek relief through a direct appeal or petition for post-conviction relief in the District Court." 46-21-105(2). Garpipee v. Salmonsen, 2021 MT 115; citing Hardin v. State, 2006 MT 272 (citations omitted)

also: "We decline to address Scoonover's contentions regarding post-plea events, including sentencing related issues and difficulties in obtaining a sentencing transcript, because those matters are not relevant to the circumstances leading up to his no contest pleas." [P15] "Schoonover next argues that his counsel had a conflict of interest ..." "While Mansch's representation included the time leading up to Schoonover's no contest pleas, Schoonover's assertions of compromised loyalty or bias relate to Mansch's actions and omissions during sentencing and appellate proceedings, after the no contest pleas. As discussed above, post-plea occurances are not relevant here. We decline to address the asserted conflict further." [P18] State v. Schoonover, 2007 MT 273N, 2007 Mont. LEXIS 509.

Plea convicted prisoners are told that they can't file a direct-appeal because they waived it and then are barred from all forms of relief.

> "Today, an individual incarcerated pursuant to an illegal sentence has one year from the date that his or her conviction becomes final...If an unconstitutionally incarcerated individual misses the time for appeal and the one-year deadline, HE OR SHE IS BARRED FROM LEGAL RECOURSE." Lott v. State, 2006 MT 279, 334 Mont. 270, 150 P.3d. 337 [*17]

Based on the above, MCA § 46-22-101(2) violates both state and U.S.Const.

The AEDPA restrictions on petitions for habeas corpus relief for prisoners in the United States are unconstitutional.

Please consider the following from U.S. Const. Amend. I:

> Congress shall make no law respectiong an establishment of religion, or prohibiting the free excersise thereof; or abridging the freedom of speech, or the press; or the right of the people peacably to assemble, and to petition the Government for the redress of grievances."

What started out as the "abuse of the writ" doctrine that had a specific purpose of preventing attorneys from "sandbagging" and preventing inmates from filing a claim "in his state habeas action, but omitted it from the first federal petition." (citations omitted). Today, cause and prejudice no longer is enough to excuse the AEDPA's abuse of the writ requirements in 28 U.S.C. § 2244(b). Unfortunately for us inmates, the late discovery of claims too late through no fault of our own, are now forever barred, thus denying us access to the courts. Amend. I.

Please consider the following from U.S. Const. Amend. XIII:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shal have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The above Amendment is no longer truthful. Unfortunately for us inmates, with the strict requirements the AEDPA has placed on our access to the courts, allows us to be incarcerated even when unduly convicted. Even though This Court is not restricted by the AEDPA on an original writ under 28 U.S.C. §§ 1651(a), 2241, or 2254(a), Supreme Court Rule 20(4)(a) states that "This writ is rarely granted." The Constitutional Rights that the Declaration of Independence affirmed to be unalienable are now discretionary in the States, without the protection of the Federal Government.

The following is from 2 Federal Habeas Corpus Practice and Procedure Scope, Appendix D, President's Statement Upon Signing The Anti-Terrorism And Effective Death Penalty Act Of 1996. (Bill Clinton):

> "There are three other portions of this bill that warrant comment. First, I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served. Some have expressed the concern that two provisions of this important bill could be interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary."
>
> "Section 104(3) provides that a Federal district court may not issue a writ of habeas corpus with respect to any claim adjudicated on the merits in State court unless the decision reached was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. Some have suggested that this provision will limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact that come before them on habeas corpus."
>
> "In the great 1803 case of Marbury v. Madison, Chief Justice John Marshall explained for the Supreme Court that "(i)t is emphatically the province and duty of the judicial department to say what the law is." Section 104(3) would be subject to serious constitutional challenge if it were read to preclude the Federal courts from making and independent determination about "what the law is" in cases within their jurisdiction. I expect that the courts, following their usual practice of construing ambiguous statutes to avoid problems, will read section 104 to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws."

"Section 104(4) limits evidentiary hearings in Federal habeas corpus cases where "the applicant has failed to develop the factual basis of claim in State court proceedings. If this provision were read to deny litigants a meaningful opportunity to prove the facts to vindicate Federal rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which "the applicant has failed to develop the factual basis" of his or her claim. Therefore, section 104(4) is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court."

"Preserving the Federal court's authority to hear evidence and decide questions of law has implications that go far beyond the issues of prisoner's rights. Our constitutional ideal of a limited government that must respect individual freedom has been a practical reality because independent Federal courts have the power "to say what the law is" and to apply the law to the cases before them. I have signed the bill on the understanding that the courts can and will interpret these provisions of section 104 in accordance with this ideal."

William J. Clinton
THE WHITE HOUSE
April 24, 1996

Our former President Bill Clinton's intention was that "section 104(4) is not triggered when some factor that is not fairly attributable to the applicant prevented..." Congress codified the "actual innocence" gateway to 28 U.S.C. § 2254(e)(2), but President Clinton's "intention" that it not be triggered under the above circumstances would also have to apply to section 105 § 2255 and section 106 § 2244's "actual innocence" gateways. The actual innocence requirement of § 2244(b) for second or successive petitions when "some factor that is not fairly attributable to the applicant" cannot be said to be constitutional, but rather a violation of the constitution. Can a habeas claim that was not discoverable (concealed) or "ripe" be "fairly attributable" to the applicant? Yes. § 2244(b)(2).

Based on former President Clinton's comments regarding section 104(4) "is not triggered when some factor that is not fairly attributal to the applicant prevented evidence from being developed in State court", Smith feels that his petition/application is the perfect example that the unintended consequences of the AEDPA have taken away the "litigants"..."meaningful opportunity to prove the facts to vindicate Federal [unalienable] rights".

This Court has realized that there are factors that are not fairly attributable to the applicant in Panetti v. Quarterman, 551 U.S. 930, on Ford incompetency claims that were not "ripe" in the earlier application. What about those of us that were prevented from filing claims that were concealed from us and therefore "unripe" at the time the first application? It is obvious that the Congress was aware that "state-created-impediments" exist in creating 28 U.S.C. § 2244(d)(1)(B):

> "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

This Court has commented on how 28 U.S.C. § 2244(b) "rewards prosecutors who successfully conceal their Brady and Napue violations until after an inmate has sought relief from his convictions on other grounds"... (Sotomayor, J., Bernard v. United States, 141 S. Ct. 504 (Dissenting), and "would produce troublesome results, create procedural anomalies, and close [the courthouse] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." (citations omitted), "Close [the courthouse] doors" violates Amend. I, access to the courts and allows "involuntary servitude" without being "duly convicted". Amend. XIII.

Associate Justice Sotomayor's statement in her dissent of the denial of certiorari in Bernard v. United States, 141 S. Ct. 504,506:

> "Panetti's reasoning applies with full force to Brady claims. As in Panetti, applying the bar on second-or-successive habeas petitions to Brady claims "would produce troublesome results, create procedural anomalies, and close [the courthouse] doors to a class of habeas petitioners seeking review without any clear indication that such was Cogress' intent."" 551 U.S., at 943 (citations omitted)

The above quote confirms the predictions below:

> "Judge Frank Eastbrook of the Seventh Circuit, speaking at U.S. Law Week's 1996 Constitutional Law Conference, summed up the new § 2244(b) this way: "'If the claim has ever been presented before, it has to be dismissed. If it has never been presented before, it has to be dismissed.' The Supreme Court hasn't made a new decision retroactive in many years and probably doesn't intend to, he noted. Furthermore, the number of people who can demonstrate they could not have shown the factual basis of the claim before--by clear and convincing evidence--is 'basically the null set.' As if that weren't hard enough, the new statute also requires that a person seeking to file a second or successive habeas petition get permission from the U.S. court of appeals, 'where there will be, of course, no record in which you can ever establish your innocence by clear and convincing evidence,' Eastbrook said." Constitutional Law Scholars Attempt To Distill Recent Supreme Court Term, 1996, 65 U.S.L.Wk. 2274, 2287.
> "I must say that I find these Byzantine rules and procedures for handling multiple petitions positively bizarre. They will work in one sense. In the end, they will force the dismissal of almost all successive applications for federal relief. But they will not limit the time and resources devoted to habeas litigation. Quite the contrary. They invite even more litigation over whether petitions fit their narrow standards and thus squander the very resources that habeas critics presumably want to conserve." Yackle, A Primer on the New Habeas Corpus Statute, 1996, 44 Buff.L.Rev. 381, 393 n. 41; § 4267 Successive Applications for Writ, 17B Fed. Prac. & Proc. Juris. § 4267 (3d. ed.)

"Persons" are now allowed to be incarcerated in violation of United States Constitution in the United States of America.

Smith asserts that the AEDPA statute barring second or successive petitions for habeas corpus relief 28 U.S.C. § 2244 violates the U.S. Constitution. The Congress exceeded Its constitutional power as stated:

> CONGRESS SHALL MAKE NO LAW...abridging...the right ...to petition the Government for a redress of grievances. First Amendment/Access to the Courts. Fourteenth Amendment/Due process.

Please consider the following from Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L.Ed. 2d 224 (1974):

> "The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights...Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Ex parte Hull, 312 U.S. 546 (1941). 416 U.S. at 419.

Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 118 S. Ct. 2168, 141 L.Ed. 2d 500, 1998 U.S. LEXIS 4211:

> "With respect to a statute that is asserted to be facially invalid under the Federal Constitution's First Amendment, reference to the statute's permissible applications is not alone sufficient to sustain the statute against the First Amendment challenge." "Held: Section...is valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles." Pp. 9-19.

In contrast to the above, Smith asserts that § 2244(b), for those that cannot be said to "abuse the writ" due to "some factor that cannot be fairly attributable" to the person, "unjustifiably obstruct[s] the availability...of the right of access to the courts..." Procunier, and "inherently interfers with First Amendment rights..." NEA v. Finly supra.

28 U.S.C. § 2244(b) also violates Amendment Thirteen, as it allows for "involuntary servitude" to "exist within the United States"... "whereof the party"...[has not]..."been duly convicted..." and the Sixth Amendment by being faulted for acts or omission of an attorney.

In United States v. Buenrostro, 638 F. 3d 720, the Ninth Circuit declined to extend Panetti to ineffective assistance of counsel at 725:

> "Buenrostro's ineffective assisitance of counsel claim does not suffer from the same infirmity as the Brady claim in Lopez...But we think that the words of 2255(h) indicate Congress' clear intent to prohibit us from certifying second-in-time claims, ripe at the time of a prisoner's first § 2255 proceeding [*726] but not discovered until afterward, unless such claims rely on a new rule of constitutional law or clearly and convincingly prove the prisoner's innocence." (citation omitted)

The Ninth Circuit also denied Smith's application for permission to file a second petition after he discovered that his court-appointed attorney Katie Green ignored an Order from the state district court to assist Smith with his postconviction petition. Smith also discovered that Ms. Green never obtained his medical records relating to a suicide attempt by overdose, just prior to his criminal charges. See Smith v. McTighe, 2019 U.S. App. LEXIS 17852. The state prosecutor and court-appointed counsel Katie Green concealed both exculpatory evidence and evidence of ineffective assistance of counsel.

Please consider Manning v. Foster, 224 F.3d 1129, at 1134:

> "The situation here, however, is quite different. Manning is not arguing that he was denied the right to counsel because his lawyer was conflicted; he is arguing that he was denied access to habeas proceedings because his lawyer interfered with his right to petition. We have never considered whether a conflict of interest, independent of a claim of ineffective assistance of counsel, should constitute cause where the conflict caused the attorney to interfere with the petitioner's right to pursue his habeas claim. We think that it must"..."In this case, there was a clear conflict between Manning's interest in presenting and prevailing in his ineffective assistance claim and Ryan's interest in protecting himself from exposure to potential malpractice liability or bar discipline. That an attorney would have great incentives to prevent a client from prevailing in an ineffective assistance claim is both self-evident and well documented in the case law."

Smith asserts that he is currently incarcerated in violation of the United States Constitution due to the unconstitutional Act of 1996. AEDPA's codification of the "Abuse of the Writ" doctrine in 28 U.S.C. 2244(b) does not allign with the views of This Court's interpretation of the "actual innocence" gateway by requiring "clear and convincing" evidence that the person is innocent of the Death Penalty. This would suggest that 2244(b)(2)(B)(ii) is intended for death penalty cases.

Smith filed an application for permission from the Ninth Circuit Court of Appeals to file a second petition for federal habeas corpus relief that was denied for not having "clear and convincing" evidence. Smith v. McTighe, 2019 U.S. App. LEXIS 17852. June 13, 2019. Smith's conviction is not a death penalty case and he was unconstitutionally denied permission. President Clinton described this very circumstance:

> "If this provision were read to deny litigants a meaningful opportunity to prove facts to vindicate Federal rights, it would raise serious constitutional questions..when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court."

How can it ever be said to be "constitutuional" to procedurally default an "applicant" for ANY "factor that is not fairly attributable to the applicant".? As This Court stated in Coleman v. Thompson, 501 U.S. 722:

> "If the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." 501 U.S. 722, 754, citing Murray v. Carrier, 477 U.S. at 488.

also: "A petitioner asserting actual innocence of the underlying crime must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." Schlup, 513 U.S. at 327. "A capital petitioner challenging his death sentence in particular must show "by clear and convincing evidence" that no juror would have found him eligible for the death penalty in light of the new evidence." Calderon v. Thompson, 523 U.S. 538,540, citing Sawyer, 505 at 348.

This Court, in Wong Doo v. United State, 265 U.S. 239,241, states:

> "The only ground on which the order of deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition;"..."To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abuse of the writ of habeas corpus." 44 S. Ct. 524, 68 L.Ed. 999 (1924)

Smith has provided documented proof that most of his claims were concealed by the state. He did not intentionally, "reserve the proof", but rather was led to believe that there was no proof available by a conflicted attorney. This situation fits into former President Clinton's "factor that is not fairly attributable to the applicant." This Court, over the years, has debated how the "abuse of the writ" doctrine should be considered in different circumstances. The common agreement (and common sense) seems to align with President Clinton's explanation that the restrictions on federal habeas corpus review and/or relief should not be "triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." The Ninth Circuit Court of Appeals has put up an unimpenetrateable wall as far as Schlup type claims are concerned. Sixth Amendment violations that should be "imputed to the state" that have "prevented evidence from being developed in State court" used to be intollerable. Now they are "imputed" to the "applicant". § 2244(b)(2)(b)(ii) defies common sense. This statute has changed the Constitution, has modified This Court's precedent case law, and rewards states, prosecutors and public defenders who have learned to run out the clock. Smith's plea of guilty is invalid, as a matter of law. His case is filled with structural errors, but due to unconstitutional state and federal statutes, it does not matter.

The due process clauses of the Fifth and Fourteenth Amendments start out with "No person shall..." are no longer truthful. The strict restrictions on habeas corpus have effectively changed the purpose of the Amendments. Today, the due process clause allows for the opening statement to be "No person shall"..."unless there is a state-created impediment".."be deprived of life, liberty. or property, without due process of law." Unfortunately, states like Montana use the AEDPA to protect the state from Federal courts learning of and correcting the "State action in violation of the Constitution or laws of the United States." Please consider the following:

> "It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and of TITLES OF NOBILITY, to which we have no corresponding provision in our Constitution, are perhaps greater securities of liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishments for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidible instruments of tyranny. The observations of the judicious Blackstone, (1) in reference to the latter, are well worthy of recital: "To bereave a man of life, (says he) or by violence confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less striking, and therefore a more dangerous engine of arbitrary government." And as a remedy for his fatal evil he is everywhere peculiarly emphatical in his enconinums on the habeas corpus act, which in one place he calls "the BULLWARK of the British Constitution." (2) FEDERALIST No. 84, Alexander Hamilton, John Jay, James Madison.

If a prisoner attempts to access the federal courts to seek the redress of grievances for the deprivation of his or her constitutional rights under 42 U.S.C. § 1983 and fails to properly state a claim for relief, may, pursuant to 28 U.S.C. § 1915(g), have the dismissal count as a "strike". Three strikes and you're out. If a prisoner fails to state a federal claim upon which relief may be granted attempting to petition the Government for redress for the deprivation of his or her Life and/or Liberty under 28 U.S.C. § 2254, ONE strike and you're out. Smith asserts that this is backwards. Is a GRIEVANCE for administrative policies more important than a GRIEVANCE for an unconstitutional deprivation of a person's Life or Liberty? Apparently so. Once convicted, an indigent prisoner must gain the knowledge of state criminal trial, appellate and civil law, be able to force a state to turn over records and evidence. If not strike one, you're out.

Both state and federal prisoners, who are too poor to hire a private attorney and rely on their court-appointed attorneys to identify and preserve all non-harmless errors are denied access to the courts by a "factor not fairly attributable to the applicant", in violation of the First, Fifth, Sixth and Fourteenth Amendments by § 2244.States have a strong incentive to hire public defenders who are sympathetic to the district/county attorney's positions in criminal cases and not the offender. State prisoners are often without the protection of the Federal Government, which, in times past was a "prized tradition" and now's given way to conservation of judicial resources. The Congress seems to have no problem with appropriations of tax-payers money to provide addition courts (judicial resources) for non-citizens, but not our own. What happened to equal justice and the purpose of Our Constitution?

CONCLUSION

The restriction on access to the state and federal courts over the years has led to exactly what the Founders of Our Country predicted nearly two and a half centuries ago. Tyranny and arbitrary government. The State of Montana has turned the unconstitutional deprivation of it's citizens liberty into a very lucrative business. No procedure in Smith's conviction comes close to meeting the Constitutional threshold. The lack of available quality mental health care has led decent people to do unconscionable acts in this country and the Federal Government appears to be satisfied with imprisoning those people.

Based on the foregoing matters of fact and law, Smith asserts that the State of Montana does not deserve the Comity and Federalism normally due fairly adjudicated cases, and is entitled to habeas corpus relief.

Respectfully submitted this 27th day of July, 2023.

Brian D. Smith
Petitioner, Pro Se