

APPENDIX A

INDEX

EXHIBIT A: State district court order Filed 1/18/2012 in DC-11-161
Letter from Smith to state district court that was not
filed until 2019 and back-dated to 1/11/2013.

EXHIBIT B: Motion to withdraw guilty plea filed 6/01/2012 (pro se).
State district court order denying above motion. 6/26/2012.
Letter from state district court clerk to Smith in res-
ponse to his letter inquiring about the status of his
motion, as allrecords were sent to public defender Green.
Notice of Appeal (pro se) returned as time-barred.
Mt.S.Ct. Order denying Smith's petition to file an out-
of-time appeal filed 6/10/2013.

EXHIBIT C: Letters from public defenders Katie Green and Ed Sheehy.

EXHIBIT D: Case register report DC-11-161 dated 2/7/2013, and ROA.

EXHIBIT E: Legal mail logs to show Smith was dilligently seeking
relief and to substantiate fact that Smith was not re-
ceiving orders from court.

EXHIBIT F: Letter from Smith's girlfriend's attorney Shandor Bada-
ruddin requesting another release of medical records and
"alleging that be releasing you [Smith] without adequate
treatment, the hospital caused harm to Lori." (victim).
Screenshot of revising Smith's records after misdiagnosed
as "alcohol only" two days after CMC released Smith and
assaulting girlfriend. Pg. 3 of Smith's psych-eval.

EXHIBIT G: Page 6 of Omnibus Hearing Memorandum DC-11-161.

EXHIBIT H: Miscellaneous letters substantiating dificulties with
obtaining necessary court records.

EXHIBIT I: Miscellaneous court orders referred to in petition.

1 Ed McLean, District Court Judge
2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
5 Missoula, Montana 59802
6 Telephone: (406) 258-4780

FILED JAN 18 2013

SHIRLEY E. FAUST, CLERK
By _____ Deputy

4 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA
5 COUNTY

6 STATE OF MONTANA,
7 Plaintiff,
8 vs.
9 BRIAN DOUGLAS SMITH,
10 Defendant.

Dept. No. 1

Cause No. DC-11-161

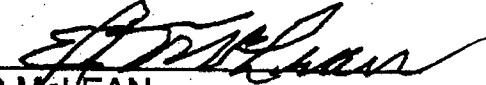
ORDER

11 Defendant, Brian D. Smith, has requested this Court's assistance
12 in obtaining a full transcript of the sentencing. Mr. Smith has made no
13 showing of why a full transcript is necessary and has already been
14 furnished a copy of the transcript listing the reasons for his sentence.
15 The request for a full transcript of the sentencing proceeding is
16 **DENIED**.

17 Defendant Smith's next request is for this Court's assistance in
18 obtaining the services of the Appellate Public Defender's office. That
19 request is also **DENIED**. There has been no notice of appeal filed and
20 no showing to this Court that such a request of the Appellate Public

1 Defender's office has been made. Ms. Katie Green is the Public
2 Defender appointed to represent Defendant Brian D. Smith and that
3 appointment includes post-conviction relief. It is the attorney who
4 requests transcripts from the Court, not the Defendant.

5 DATED this 17 day of January, 2013.

6
7 
8 ED McLEAN.
9 DISTRICT JUDGE

10
11 c: Suzy Boylan, Esq.
12 Katie Green, Esq.
13 Brian Douglas Smith, #3009410, Cross Roads Correctional
14 Center, 50 Cross Roads Dr., Shelby, MT 59474
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1 Ed McLean, District Judge
2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
5 Missoula, Montana 59802
6 Telephone: (406) 258-4771

7 FILED JUL 26 2012

8 SHIRLEY E. FAUST, CLERK
9 By Casey French
10 Deputy

11 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

12 STATE OF MONTANA,

13) DEPT. 1

14 Plaintiff,

15) CAUSE NO. DC-11-161

16 -vs-

17) OPINION AND ORDER

18 BRIAN DOUGLAS SMITH,

19)

20 Defendant.

21)

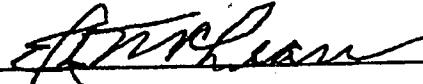
22 Pending before the Court, is Defendant's Motion to Withdraw a Plea of
23 Guilty Under Mont. Code. Ann. § 46-16-105 based on the allegation that his
24 public defender mislead him by promising him he would be able to cross-
25 exam the witnesses at his sentencing hearing to challenge untrue testimony,
26 and had he known he would not be allowed to cross-exam the witnesses, he
 would never have agreed to plead guilty.

27 Defendant has failed to cite to or provide any evidence to support that
28 any of the witness impact statements made at the sentencing hearing were
29 untruthful, and such untruths had a significant impact on the mandatory
30 sentence he received of 20 years without the possibility of parole. Had the

1 Defendant wanted to challenge the truthfulness of the testimony of the
2 witnesses against him, he should have proceeded to trial. Instead, Defendant
3 clearly acknowledged at both the change of plea hearing and the sentencing
4 hearing that no promises were made to entice him to change his plea to guilty
5 and that he was satisfied with the services of his attorney.

6 **IT IS HEREBY ORDERED** that Defendant's Motion to Withdraw a Plea
7
8 of Guilty Under Mont. Code. Ann. § 46-16-105 is DENIED.

9 SO ORDERED and DATED this 25 day of July, 2012.

10
11 
12
13 ED McLEAN, District Judge

14 cc: Brian Douglas Smith
15 Susan Boylan, Esq.
16 Katie Green, Esq.

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 13-0399

FILED

JUL 10 2013

STATE OF MONTANA,

Plaintiff and Appellee,

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

v.

ORDER

BRIAN D. SMITH,

Defendant and Appellant.

Brian D. Smith (Smith) has filed a Petition for an Out-of-Time Appeal and a Motion for Appointment of Counsel on appeal. Smith was convicted of aggravated assault upon a guilty plea in May of 2012 in Missoula County District Court. He subsequently filed a motion to withdraw his plea that was denied by the District Court on July 25, 2012. Smith asserts he did not immediately receive a copy of this order, but admits he received it by late November, 2012. He now seeks to appeal from this order and asserts he made numerous requests to his counsel to file an appeal.

Regarding the merits of his claim, Smith alleges that he was not allowed to challenge untrue statements made by the prosecutor, Judge, and witnesses during his sentencing hearing. He asserts that his public defender informed him that she would cross-examine witnesses if they gave untrue testimony, but that she failed to do so. Consequently, Smith claims that he was sentenced based upon false accusations and statements.

Smith's appeal of the denial of his motion to withdraw is essentially premised upon ineffective assistance of his counsel during sentencing. However, a record establishing the reasons for action or inaction by counsel is necessary before such claims can be adjudicated on appeal. *State v. Jay*, 2013 MT 79, ¶ 36, 369 Mont. 332, 298 P.3d 396 ("This Court may review a claim of ineffective assistance of counsel on direct appeal

only when the record ‘fully explains why counsel took, or failed to take, action in providing a defense for the accused.’”) (citation omitted). Smith has not demonstrated that there is a record that would permit adjudication of ineffectiveness claims on appeal. He may be able to raise his claims in a postconviction proceeding. His request to appeal here is very untimely.

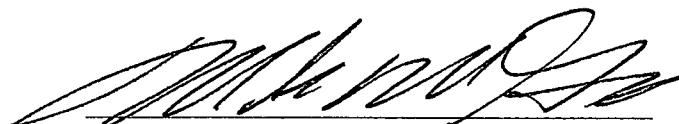
Having determined that Smith has failed to present “extraordinary circumstances amounting to a gross miscarriage of justice,” M. R. App. P. 4(6), we conclude that the petition lacks merit.

IT IS ORDERED that the Petition for an Out-of-Time Appeal is DENIED.

IT IS FURTHER ORDERED that the Motion for Appointment of Counsel on appeal is DENIED.

The Clerk is directed to provide a copy hereof to counsel of record and to Brian D. Smith.

DATED this 9th day of July, 2013.


Chief Justice

Justice O'Connor
Justice Cotter

Justices

VIII MOTIONS BY THE STATE

2 The State has pretrial motions: () Yes () No If yes: These motions are:

3 (a) _____

4 (b) _____

5 _____

The State's brief filed by: _____

The Defendant's brief filed by: _____

The State's reply brief filed by: _____

(NOTE: The motions will be deemed submitted without a hearing unless a Request for Hearing is submitted prior to the end of the briefing period.)

IX. MOTIONS BY THE DEFENDANT

The Defendant has pretrial motions: ()Yes ()No If yes:

Unsure, as discovery is not complete (need A's statement; photos, videos)

These motions are: _____

The Defendant's brief filed by: _____

State's response filed by: _____

The Defendant's reply brief filed by: _____

(NOTE: The motions will be deemed submitted without a hearing unless a request for Hearing is submitted prior to the end of the briefing period.)

X. PERSISTENT FELONY OFFENDER

Pursuant to MCA 46-13-108, the State hereby gives notice to the Defendant that the State seeks to have the Defendant sentenced as a Persistent Felony Offender because of the following convictions:

(a) $\sqrt{4}$

(b)

XI. TRIAL PROCEDURE

1. Expected length of trial is. 3 days.

2. The Court will draw a panel consisting of 60 prospective jurors.

The State waives any right to be present at the drawing: Yes No
Defendant waives any right to be present at the drawing: Yes No

3. All motions in limine shall be filed not later than _____ days prior to trial unless upon good cause shown (or at the time of the final pre-trial, whichever is earlier).

4. All standard jury instructions shall be filed prior to voir dire. Additional instructions will be submitted on a showing of good cause.

5. Appropriate Disposition Date: 4/15/11

(Note: After this date no plea bargains will be accepted by the Court, nor will any pleas bargains be allowed to be filed after this date.

XII. APPOINTMENT OF COUNSEL

As the court-appointed counsel for the Defendant, I acknowledge that this appointment includes the trial of this matter in 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.

Dated: 5-11-12

~~Attorney for State of Montana~~

Katie Green 5/10/11

Attorney for Defendant

SO ORDERED:

John W. Johnson
DISTRICT JUDGE

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 21 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN DOUGLAS SMITH,

No. 20-36099

Petitioner-Appellant,

D.C. No. 9:14-cv-00083-DLC

v.

District of Montana,
Missoula

MARTIN FRINK; TIM FOX,

ORDER

Respondents-Appellees.

Before: CANBY and TALLMAN, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 6) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 13-0278

FILED

BRIAN D. SMITH,

JUN 05 2013

Petitioner,

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

v.

ORDER

WARDEN MARTIN FRINK; (CCC SHELBY),
STATE OF MONTANA,

Respondent.

By way of a Petition for a Writ of Habeas Corpus, Brian D. Smith (Smith) challenges the validity of his change of plea proceeding. He also seeks leave to proceed without paying the filing fee.

Smith claims that he was deprived of an impartial tribunal when he changed his plea to "guilty" before Hon. Ed McLean. Based upon the guilty plea, Smith was convicted of Aggravated Assault in May 2012. Smith claims that Judge McLean was obligated to recuse himself from further participation in the case after he granted leave to file the information. Smith reasons that the District Court lacked subject matter jurisdiction to preside over the ensuing prosecution.

As a result, Smith claims that the subsequent proceedings against him are "void," for deprivation of his due process rights and right to a fair hearing. Smith contends that he may raise this issue at any time. Based upon the allegedly void conviction and sentence, Smith claims that he is incarcerated illegally. Smith claims entitlement to his release from confinement.

Montana statutes allow commencement of a prosecution in district court upon an indictment by a grand jury. Sections 46-11-301 through -332, MCA. A prosecutor also may apply directly to the district court for permission to file an information. Section 46-11-201,

MCA. The prosecutor's application and affidavit must identify supporting evidence that demonstrates probable cause to believe that the named defendant has committed an offense. The order granting leave to file the information determines probable cause and triggers the commencement of the prosecution. Sections 46-11-101(3) and -201, MCA.

This process contrasts with proceedings in jurisdictions that rely upon a grand jury indictment to determine whether sufficient evidence exists to charge a potential defendant with a specific criminal act. In those jurisdictions, the grand jury proceedings and criminal prosecution constitute entirely separate processes before different courts. Consequently, none of the citations that Smith has provided here is instructive or applicable.

"The writ of habeas corpus 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." Section 46-22-101(2), MCA. Smith has exhausted his appeal rights. This procedural bar applies to the present petition. The filing of the information is only a determination of probable cause, not a determination of guilt. Smith was convicted on his plea of guilty and cannot show that the judgment of the District Court on that plea "constituted a violation, deprivation, infringement, or denial of his constitutional, statutory, or legal rights." *Miller v. Eleventh Jud. Dist. Ct.*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186. Nor can he demonstrate that he is serving a facially invalid sentence. *Cf. Lott v. State*, 2006 MT 279, ¶ 22, 334 Mont. 270, 150 P.3d 337

IT IS THEREFORE ORDERED that leave to proceed without paying the filing fee is GRANTED.

IT IS FURTHER ORDERED that the Petition for a Writ of Habeas Corpus is DENIED.

The Clerk is directed to provide a copy hereof to counsel of record and to Brian D. Smith.

DATED this 4 day of June, 2013.

Set 2 Lb

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

BRIAN D. SMITH,

Petitioner,

vs.

MARTIN FRINK; ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

CV 14-83-M-DLC-JCL

ORDER

FILED

MAY 19 2014

Clerk, U.S. District Court
District Of Montana
Missoula

United States Magistrate Judge Jeremiah C. Lynch issued findings and recommendations denying Petitioner Brian D. Smith's petition for writ of habeas corpus and motion to proceed in forma pauperis on March 31, 2014. Smith timely filed objections and is therefore entitled to *de novo* review of the specified findings and recommendations to which he objects. 28 U.S.C. § 636(b)(1). The portions of the findings and recommendations not specifically objected to will be reviewed for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). For the reasons stated below, the Court adopts Judge Lynch's findings and recommendations in full.

In his objections, Smith focuses on the same issue which formed the basis of

his original petition: that the judge in the state district court of his conviction was biased because of his participation at the information-filing stage and at later stages of the proceedings. Smith contends that this “incompatible dual role and the resultant issue of structural defect . . . resulted in a void conviction” and invalid sentence. (Doc. 5 at 4.)

Smith cites *Hurles v. Ryan*, 650 F.3d 1301, 1314-1322 (9th Cir. 2011), *withdrawn and superseded*, 706 F.3d 1021 (9th Cir. 2013), which in turn cites *In re Murchison*, 349 U.S. 133, 137-139, (1955), for the proposition that a judge may not preside at trial and sentencing “where she acts as part of the accusatory process.” In *Murchison*, a judge sitting as a one-man “judge-grand jury” pursuant to Michigan state law charged a police officer with contempt and subsequently presided over the officer’s trial. 349 U.S. at 133-135. In *Hurles*, a judge filed a responsive pleading, which contained commentary on the strength of the defendant’s case, in an action challenging her ruling on a pretrial motion to appoint co-counsel. 706 F.3d at 1027-1028. She then presided over the trial itself, as well as the first of the defendant’s two post-conviction relief actions. *Id.* at 1028-1029.

Smith’s circumstances are clearly distinguishable from the above cases. The extent of the state district court judge’s pretrial participation in Smith’s case

was to determine whether there was “probable cause to believe that an offense ha[d] been committed by the defendant.” Mont. Code Ann. § 46-11-201(2) (2013). The judge’s determination that probable cause existed to issue an arrest warrant in Smith’s case is qualitatively different from the judges’ involvement in *Hurles* and *Murchison*, and does not constitute participation to the same extent as in those cases. 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. As Judge Lynch noted, the judge’s statutory role in Smith’s case, indeed the entire system of prosecution by information, “has long been held consistent with the federal guarantee of due process.” (Doc. 4 at 2; citing *Hurtado v. California*, 110 U.S. 516, 538 (1884)).

There being no clear error in Judge Lynch’s remaining findings and recommendations,

IT IS ORDERED that Judge Lynch’s Findings and Recommendation (Doc. 4) are **ADOPTED IN FULL**. The claims set forth in Smith’s Petition (Doc. 1) are **DENIED** on the merits. Smith’s motion to proceed in forma pauperis (Doc. 2) is also **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**. The Clerk of Court is directed to enter, by separate document, a judgment in

favor of Respondents and against Petitioner.

DATED this 19th day of May, 2014.


Dana L. Christensen
Dana L. Christensen, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FILED

MAR 31 2014

Clerk, U.S. District Court
District Of Montana
Missoula

BRIAN D. SMITH,

Cause No. CV 14-83-M-DLC-JOB

Petitioner,

vs.

MARTIN FRINK; ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

FINDINGS AND
RECOMMENDATION OF U.S.
MAGISTRATE JUDGE

On March 28, 2014, Petitioner Brian Smith moved to proceed in forma pauperis with this action under 28 U.S.C. § 2254. Smith is a state prisoner proceeding pro se.

Smith's application to proceed in forma pauperis is deficient. He states only that the Montana Supreme Court recently permitted him to proceed in forma pauperis. There is no reason, however, to let the deficiency delay disposition of this action.

Smith states that he is *not* challenging the standard state procedure of charging a criminal offense by Information. He contends that the trial court lost jurisdiction over his case because the same district judge who found probable cause to support the prosecutor's filing of the Information presided at later stages of the proceeding, and that judge could not be impartial because he had found

probable cause to proceed in the first place. He argues that he was deprived of due process, a fair trial, and effective assistance of counsel and claims the judge was unfairly biased and the prosecutor committed misconduct. He alleges the Thirteenth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment were violated. Pet. (Doc. 1), *passim*.

These claims are frivolous. A judge who finds probable cause does not take on an investigatory role and does not become aligned with the prosecution any more than does a judge who finds probable cause to issue a search or arrest warrant. For this reason, prosecution by Information has long been held consistent with the federal guarantee of due process. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

A certificate of appealability is denied because Smith does not make any showing that he was deprived of a constitutional right. 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, __ U.S. __, 132 S. Ct. 641, 648 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. The Petition (Doc. 1) should be DENIED on the merits.
2. The motion to proceed in forma pauperis (Doc. 2) should be DENIED.
3. The Clerk of Court should be directed to enter by separate document a

judgment in favor of Respondents and against Petitioner.

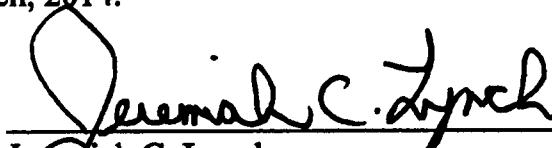
4. A certificate of appealability should be DENIED.

**NOTICE OF RIGHT TO OBJECT
TO FINDINGS & RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Smith may object to this Findings and Recommendation within 14 days.¹ 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

Smith must immediately notify the Court of any change in his mailing address by filing a "Notice of Change of Address." Failure to do so may result in denial of this action without notice to him.

DATED this 31st day of March, 2014.



Jeremiah C. Lynch
United States Magistrate Judge

¹ As this deadline allows a party to act within 14 days after the Findings and Recommendation is "served," Fed. R. Civ. P. 6(d) applies, and three days are added after the time would otherwise expire.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS (Verbatim Text)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES
U.S.S.Ct. Rule14(1)(f)

The Constitution of the State of Montana Art. II Section 4;

The dignity of the human being is inviolable. No person shall be denied the equal protection of laws. Neither the state or any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The Constitution of the State of Montana Art. II Section 16;

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.

The Constitution of the State of Montana Art. II Section 6;

The people shall have the right to assemble, petition for redress or peaceably protest governmental action.

The Constitution of the State of Montana Art. II Section 3;

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

The Constitution of the State of Montana Art. II Section 20;

(1) Criminal offenses within the jurisdiction of any court inferior to the district court shall be prosecuted by complaint. All criminal actions in district court, except those on appeal, shall be prosecuted either by information, after examination and commitment by a magistrate or after leave granted by the court, or by indictment without such examination, commitment or leave.

The Constitution of the State of Montana Art. II Section 17;

No person shall be deprived of life, liberty, or property without due process of law.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES
U.S.S.Ct. Rule 14(1)(f)

The Constitution of the State of Montana Art.II Section 19;

The privilege of the writ of habeas corpus shall never be suspended.

The Constitution of the State of Montana Art.II Section 24;

In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have the process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to right to have a change of venue for any of the causes for which the defendant may obtain the same.

The Constitution of the State of Montana Art.II Section 26;

The right of trial by jury is secured to all and remain inviolate. But upon default of appearance or by consent of the parties expressed in such a manner as the law may provide, all cases may be tried without a jury or before fewer than the number of jurors provided by law. In all civil actions, two-thirds of the jury may render a verdict, and verdict so rendered shall have the same force and effect as if all have concurred therin. In all criminal actions, the verdict shall be unanimous.

Montana Code Annotated (MCA) § 46-8-103(2)

If counsel determines that an appeal would be frivolous or wholly without merit, counsel shall file a motion with the court requesting permission to withdraw. The motion must attest that counsel has concluded that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching applicable statutes, case law, and rules and that the defendant has been advised of counsel's decision and of the defendant's right to file a response. The motion to withdraw must be accompanied by a memorandum discussing any issues that arguably support an appeal. The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, together with appropriate citations to the record and to pertinent statutes, case law, and procedural rules bearing upon

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES
U.S.S.Ct. Rule 14(1)(f)

each issues discussed in the memorandum. Upon filing the motion and memorandum with the court, counsel's certificate of mailing must certify that copies of each filing were mailed to the local county attorney, the attorney general's office, and the defendant. The defendant is entitled to file a response with the court.

MCA § 46-16-105 Plea of Guilty

(2) At any time before judgment or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment becomes final, the court may, for good cause shown, permit the plea of guilty or nolo contendre to be withdrawn and a plea of not guilty substituted. A judgment becomes final for purposes of this subsection (2):

- (a) when the time to appeal to the Montana supreme court expires;
- (b) if an appeal has been taken to the Montana supreme court, when the time for petitioning the United State Supreme Court for review expires; or
- (c) if review is sought in the United States Supreme Court, on the date that the court issues It's final order in the case.

MCA § 46-21-101 When the validity of sentence may be challenged

(1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and claims that a sentence was imposed in violation of the constitution or laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES
U.S.S.Ct. Rule 14(1)(f)

MCA § 46-21-104 Contents of petition

- (1) The petition for postconviction relief must:
 - (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.
- (2) When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or reasonably could have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffective assistance or incompetence of counsel in proceedings on an original or amended original petition under this part may not be raised in a second or subsequent petition under this part.

MCA § 46-21-201 Proceedings on petition

- (3)(c) The office of the state public defenders 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.

MCA § 46-22-101 Applicability of writ of habeas corpus
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) The writ of habeas corpus 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. The relief under this chapter is not available to attack the legality of an order revoking suspended or deferred sentence.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES
U.S.S.Ct. Rule 14(1)(f)

United States Constitution Amendment I Access to the Courts

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

United States Constitution Amendment VI Rights of the Accused

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution Amendment XIII Involuntary Servitude

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

United States Constitution Amendment XIV Due Process of Law

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)

Pub. L. 104-132, 110 Stat. 1214 (effective April 24, 1996)
28 United States Code §§ 2244(b) Second or Successive Petitions, 2254(b)(1) Exhaustion, 2254(e) Factual Predicate

**Additional material
from this filing is
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