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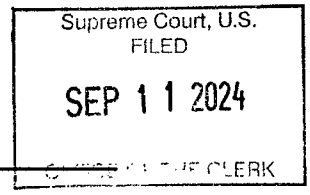

IN THE

SUPREME COURT OF THE UNITED STATES

In Re DAVID W. NELSON, PETITIONER,

VS.

JAMES SALMONSEN, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS

28 U.S.C. §§ 2241, 2242, 2254

David Wayne Nelson

Montana State Prison

700 Conley Lake Road

Deer Lodge, MT 59722

Petitioner, Pro Se

Prisoner I.D. # 17872

QUESTIONS PRESENTED

In the Court's Holding that prejudice is presumed regardless of an appeal waiver in a state criminal case, Garza v. Idaho, 586 U.S. 232 (2019) also mean that prejudice is presumed when the court-appointed attorney fails to follow the State's "adoption" of the Anders procedure to protect an indigent defendant's right to an "as of right appeal"? Consult the indigent defendant?

Can an indigent defendant be faulted for not filing a direct-review appeal and thus barred from review of record-based claims?

Can a State's highest court align itself with the minority in a 8-10 majority of Circuit Court's of Appeals that have applied the presumed prejudice in the Holding of Garza v. Idaho, 586 U.S. 232, footnote # 3?

Does the failure to consult an indigent defendant about possible appealable issues and fail to follow the State's statutory procedure designed to protect an indigent defendant's right to appeal and right to counsel on appeal violate the United States Constitution Amendment Six and Fourteen?

*Petitioner cannot get relief from any other court based on the above question/issues.

LIST OF PARTIES

*All parties appear in the caption of the case on the cover page. James Salmonsen is the Warden at the Montana State Prison

RELATED CASES

Nelson v. Salmonsen, No. 23-6868 Supreme Court of the United States Judgment entered March 25, 2024.

Nelson v. Salmonsen, No. 23-35031 United States Court of Appeals for the Ninth Circuit Judgment entered November 20, 2023.

Nelson v. Salmonsen, No. 23-35031 United States Court of Appeals for the Ninth Circuit Judgment entered October 24, 2023.

Nelson v. Salmonsen, No. CV 22-5-H-BMM United States District Court for the District of Montana, Helena Division Judgment entered November 14, 2022.

Nelson v. State, No. DA 19-0057 Supreme Court of Montana Judgment entered November 12, 2020.

Nelson v. State, No. DV-18-15 District Court of the Third Judicial District, County of Powell, Montana Judgment entered 1/4/2019.

State v. Nelson, No. DC 15-93 Montana Third Judicial District Court, Powell County Amended Judgment entered August 14, 2017.

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CONSTITUTIONAL

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Nelson v. State, 403 Mont. 547 (Table), 481 P.3d 846 (Table) Appended as Appendix A.

Nelson v. State, DV-18-15 (Unpublished) State Trial Court decision denying postconviction relief. Appended as Appendix B.

JURISDICTION

This Court has Jurisdiction to grant review and relief for the Writ under 28 U.S.C. § 1651(a), § 2241, § 2242 and § 2254(a).

CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

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 commited, 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 defense.

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.

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.

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 was 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 19;

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

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 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 § 46-21- 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 con-

stitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deffered 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 asside, or correct the sentence or revocation order.

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.

MCA § 46-21-105 Amendments of petition--waiver of grounds for relief;

(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 § 46-22-101 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 adgudged 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.

28 U.S.C. § 1651(a);

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2241 Power to grant writ;

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(B)(ii) the circumstances exist that render such process ineffective to protect the rights of the applicant.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with any respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This is a case where Mr. Nelson is asking the Court to answer unresolved questions regarding whether or not a court-appointed attorney has a constitutionally imposed duty to consult his/her client about possible appealable issues when the defendant has entered a plea agreement and has signed a waiver and where the State has "adopted" and "codified" the procedure in Anders v. California to "safeguard" a defendant's right to appeal. This Court has stated in precedent case law, that the Court has to "evaluate state procedures one at a time, as they come before us." 528 U.S. 259,275. Nelson is now requesting that the Court "evaluate" the state procedure used in Montana that has now "come before [the Court]."

The state of Montana has "adopted" and "codified" the procedure from Anders v. California, 386 U.S. 738. (MCA § 46-8-103(2)). The problem is that it's use is arbitrary and allows counsel to end their services at the close of the sentencing hearing, leaving the newly convicted and sentenced person without any attorney at all during the critical stage of the first as of right appeal. The Office of the Public Defender (OPD) closes the case before the judgment (written) is entered and there is no way to contact the OPD or the Office of the Appellate Defender (OAD). The newly convicted is shipped to the Montana State Prison (MSP) where he/she is locked

in a cell for 23 hours a day during the time limitations period to file a direct appeal and is subsequently faulted for not appealing, and barred from further review. MCA §§ 46-21-105 & 46-22-101(2). Nelson will show that he was abandoned by his court-appointed attorney, and then faulted for not requesting that counsel "attempt an appeal" when Nelson had no way of contacting his attorney after the sentencing hearing. 28 U.S.C. §§ 2254(b)(1)(B)(ii), 2254(d)(1) & (2)

Nelson will also show the Court that the state's highest court used the wrong standard of review when it denied his appeal of the state district court denial of his petition for postconviction relief (PPR) and the court's ruling that is contrary to this Court's prior decisions by faulting Nelson for not demonstrating "any likelihood of success had he pursued such an appeal,..." 28 U.S.C. § 2254(d)(1)

Finally, Nelson will show that state court procedure to "safeguard" the right to appeal (when actually used) creates a conflict of interest by allowing trial counsel decide whether or not a plea was knowingly and intelligently made or "would have contemporaneously sought to withdraw his plea but for the alleged deficient performance of counsel." 28 U.S.C. §§ 2254(b)(1)(B)(ii) 2254(d)(1) & (2).

REASONS FOR GRANTING THE PETITION

The state district court and the state's highest court, Supreme Court of Montana, (S.Ct.Mt.) are of the belief that an appeal waiver that is signed when a defendant enters a plea, completely bars the first as of right appeal. The record in Nelson's case shows this to unambiguously be true, which is clearly contrary to precedent U.S. Supreme Court case-law. e.g. Garza v. Idaho, 586 U.S. 232 (2019)

The S.Ct.Mt. stated in Nelson v. State, 2021 MT 61N:

> [*P13] "We hold that the District Court correctly rejected the IAC claim regarding the right to appeal."

The state district court dismissed Nelson's IAC claim in Nelson v. State, No. DV-18-15 (Appended as Appendix B), by stating:

> P.2 "At the change of plea hearing, the Court determined that Nelson was entering his guilty pleas knowingly, voluntarily, and intelligently; that Nelson was aware of the constitutional and statutory rights he would waive by entering a plea of guilty, including the right to appeal; that Nelson's change of plea was not the the result of coercion; and that Nelson was satisfied with his attorneys."
>
> P.4 "Nelson asserts that he received ineffective assistance of counsel (IAC) because he would have withdrawn his quilty plea if he had understood the parole restriction aspect of his sentence. Nelson's counsel discussed with him that the Court was not bound to the plea agreement and that the Court may impose a parole restriction. Nelson did not indicate that he wanted to withdraw his guilty plea. Nelson's assertion that he is received IAC is unpersuasive."

Nelson understood that his life sentence would mean that he would not be eligible for parole for 30 years. What he did not know is what was done at his sentencing hearing. The majority of the time at the sentencing hearing was devoted to the "Express parole restriction" and the district court was creating a record of that it was the court's intention (as well as the Sheriff and victim's advocate) that "Nelson leave the prison in a casket." The district court declared that Nelson's sentence run CONSECUTIVE to his other sentence from Ravali County, when he was informed as well as the plea agreement stated that his sentences would run CONCURRENT. Due to the fact that Nelson's attorney "spun on his heels" right

after the sentencing hearing without saying a word and made no further contact with him, Nelson asserts that he was denied his right to appeal, right to counsel on appeal, and denied the right to effective trial counsel due to attorney abandonment.

This Court has Held, in Smith v. Robbins, 528 U.S. 259 (2000);

> "The Anders procedure is only one method of satisfying the Constitution's requirements for indigent criminal appeals; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel." 120 S. Ct. 746, 145 L.Ed. 2d 756 (citations omitted).

The State of Montana, in MCA § 46-8-103 Duration of Assignment, the Commission Comments 1991 Comment states as follows:

> "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 to withdraw after verdict and before initial appeal. These requirements are imposed to ensure that all defendants have "the same rights and opportunities on appeal as nearly as is practicable...". See Anders v. Calif., 386 US 738, 744, 745 (1967)"

This Court has Held, in Garza v. Idaho, 586 U.S. 232 (2019):

> "The presumption of prejudice recognized in Roe v. Flores-Ortega, 528 U.S. 470 (2000), applied regardless of whether a defendant had signed an appeal waiver. This ruling followed squarely from Flores-Ortega and from the fact that even the broadest appeal waiver did not deprive a defendant of all appellate claims." 139 S. Ct. 738, 740.

@ 747 "Because there is no doubt that Garza wished to appeal,."

fn. 9 "We leave undisturbed today Flores-Ortega's separate discussion of how to approach situations in which the defendant's wishes are less clear."

Montana's position that the statutory "Anders" procedure does not apply to Nelson because he signed a waiver of the right to appeal is unquestionably contrary to the above precedent case-law. Nelson respectfully requests that the Court address what was left "undisturbed" in fn.9 of Garza, when "the defendant's wishes are less clear." Nelson remembers talking to his court-appointed attorney about an appeal and was told "this isn't a case that can be appealed." Nelson does not remember the exact time or point of the proceedings that his attorney told him that. However, the S.Ct.Mt. incorrectly concluded in Nelson v. State, 2021 MT 61N, [*P13]:

> "As to prejudice, it is further beyond genuine material dispute that Nelson at no time requested that counsel attempt an appeal."

The S.Ct.Mt. never addresses Nelson's claim of attorney abandonment or whether or not Nelson was correct in his claim that his right to appellate counsel was violated by counsel's failure to consult him about an appeal nor followed the"Constitution's requirements for indigent appeals;" Smith v. Robbins, 528 U.S. 259 (2000) supra. The State's Response to Nelson's PPR (DV-18-15) page 1 states:

> "The trial attorneys for the Defendant have filed their response to his claims for ineffective assistance of Counsel and the State will not address those issues directly."

Nelson's attorney's "Response to the claim of ineffective assistance of counsel" Filed July 27, 2018 DV-18-15 states;

> P.2 "Nelson also at no time informed his attorneys that he wanted to withdraw his plea or appeal his sentence."

Isn't the above the reason and purpose of the "codified" Anders procedure "adopted" by Montana in MCA § 46-8-103(2)?

How can Nelson be faulted for not informing his attorneys that he wanted to appeal his sentence when he was told that he waived his right to appeal his conviction or sentence and his attorneys "spun on his heels" right after the sentencing hearing? According to this Court, the S.Ct.Mt.'s conclusion that Nelson was at fault is contrary to Maples v. Thomas, 565 U.S. 266 (2012):

> @281 "A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative."..."His acts or omissions therefore "cannot fairly be attributed to [the client]." Coleman, 501 U.S., at 753, 111 S. Ct. 2546, 115 L.Ed. 2d 640. See, e.g., Jamison v. Lockhart, 975 F.2d 1377, 1380 (CA8 1992) (attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney "ceased to be [petitioner's] agent");" (citations omitted).

Montana's failure to enforce the "Anders" procedure allows counsel to "cease[] to be [defendant's] agent" due to a conflict of interest. Nelson's claim of attorney abandonment is not an isolated incident. It is/was common practice. See 2003 MT 375N:

> "Unbeknownst to defendant, on the same day he was sentenced, the Missoula County Public Defender's Office closed his file a full week before the trial court entered its written judgment."..."The appellate court held that it was apparent that the public defender and his office completely abrogated their responsibilities to continue defendant's defense by way of appeal or protect his right of appeal." Patton v. State, 2003 Mont. LEXIS 944

This is exactly the same process Nelson was given, except that it was Nelson's fault, not the public defender and his office. Even though his public defenders "abrogated their responsibilities to

continue defendant's defense by way of appeal or protect his right to appeal", the state district and highest court treated his claim contrary to clearly established Federal law, as determined by the Supreme Court of the United States and thus, Nelson is entitled to relief under 28 U.S.C. § 2254(d)(1) and (2).

Nelson asserts that his attorney abandonment claim meets all three categories in which prejudice is presumed in the Holding in Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 145 L.Ed. 2d 756:

> 3. "...three categories of cases in which prejudice is presumed"..."involve the complete denial of counsel on appeal, state interference with counsel's assistance, or an actual conflict of interest on his counsel's part." (citing Strickland v. Washington, 466 U.S. 668, 692,694, 80 L.Ed. 2d 674, 104 S. Ct. 2052. Pp. 22-27).

Nelson's attorney's failure to consult him about any possible appeal and failure to comply with the Anders procedure amounts to the complete denial of counsel on appeal, the state's failure to enforce the "Constitution's requirements for indigent criminal appeals", Id., amounts to "state interference with counsel's assistance", and the "codified"procedure that the state "adopted" creates an "actual conflict of interest." See Manning v. Foster, 224 F.3d 1129:

> "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 the damage such an outcome would do to his professional reputation and 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." 224 F.3d at 1134, 2000 U.S. App. LEXIS 21109.

Montana's state district court explained the court's opinion of the waiver that Nelson signed when he entered his pleas at the Change of Plea Hearing, Cause No. DC-15-93, September 6, 2016:

THE COURT: "And you'd also be giving up your right to appeal because generally there is no appeal based up..., or appeal of a conviction based upon a guilty plea. Do you understand all of that?" [P.12](State's Response PPR Exhibit 3.)

Nelson: "Yes sir."

THE COURT: "One notable exception, I'm not saying it's the only exception, as frankly as I sit here right now the only exception that I can think of that there be no appeal from a conviction based upon a guilty plea. There is an exception where a Defendant alleges on appeal that he wasn't proceeding knowingly, voluntarily and intelligently. Having been deprived of that by virtue of ineffective assistance of his attorney. Now I'm being very careful here to be sure that that's not something that I need to worry about because you're acknowledging to me that you are able to voluntarily, knowingly and intelligently enter a plea and you are indicating that you have had effective assistance of your attorneys, am I correct in all of that?"

NELSON: "Yes sir." [P.12]

At this point, Nelson was unaware that the court was not going to follow the plea agreement and create a record that it was the state's intention that Nelson never be given parole and "that the only way he will leave the Montana State Prison system is in a casket." The same court denied Nelson's PPR, stating: "Nelson's assertion that he is received IAC is unpersuasive." The S.Ct.Mt. stated in it's denial of Nelson's appeal of the PPR's denial, Nelson v. State, 2021 MT 61N: "We hold that the District Court correctly rejected the IAC claim regarding the right to appeal." [*P.13]. This is clearly contrary to this Court and even acknowledged by the Court.

This Court stated in Garza v. Idaho, 586 U.S. 232, 236:

> "In ruling that Garza needed to show prejudice, the Idaho Supreme Court acknowledged that it was aligning itself with the minority position amoung courts. For 8 of the 10 Federal Courts of Appeals to have considered the question have applied Flores-Ortega's presumption of prejudice even when a defendant has signed an appeal waiver. 162 Idaho, at 795, 405 P.3d at 580."

Montana also is aligning itself with the minority position, despite the Court's Holding in Garza, and the Ninth Circuit in United States v. Sandoval-Lopez, 409 F.3d 1193, 1195-1199 (CA9 2005). This Court's footnote 3 in Garza states:

> "At least two state courts have declined to apply Flores-Ortega in the face of appeal waivers."See Buettner v. State, 2015 MT 348N, 382 Mont. 410 363 P.3d 1147 (2015).(Table);

Nelson asserts that Montana's refusing to follow the majority of Circuit Courts of Appeals (including the Ninth Circuit) as well as the Holding in Garza by this Court, violates his Constitutional Rights and requests that this Court vacate Nelson's conviction. The records in his case clearly show that he was abandoned by counsel, and that the state's highest court is aligning itself with the minority, contrary to "clearly established Federal law, as determined by the Supreme Court of the United States."28 U.S.C. § 2254(d)(1). Montana will continue to allow attorney abandonment claims continue to be rejected for those who sign an appeal waiver unless the Court grants review and relief. The Court has stated that review of the state procedure/s to "safeguard" the right to appeal with assistance of counsel must be addressed "state by state". Nelson respectfully requests the Court address the procedure used in Montana.

Nelson asserts that based on the foregoing, it is beyond any genuine dispute that "there is an absence of available State corrective process", and/or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. §§ 2254(b)(1)(B)(i) and 2254(b)(1)(B)(ii).

Also based on the foregoing facts and conclusions of law that this Court has Held in the Court's precedent case law, relief is warranted based on 28 U.S.C. §§ 2254(d)(1) and 2254(d)(2). Nelson's rights have been violated under the U.S. Constitution Amendment 6 and 14 due to the denial of the first as of right appeal, right to counsel on appeal and ineffective assistance of trial counsel.

CONCLUSION

Based on the above and 28 U.S.C. §2241(c)(3) the Court should grant both review and relief by reverse and remand.

UNSWORN DECLARATION

I, David Wayne Nelson, hereby Declares, under penalty of perjury that the contents of this Petition are true and correct.

Submitted this 6th day of September, 2024.

David W. Nelson
Petitioner, Pro se