

HABEAS CORPUS AND POST CONVICTION IN MONTANA

**Michael Donahoe, Esq.
Senior Litigator
Federal Defenders of Montana
West Yellowstone, Montana
October 21, 2010**

GOALS OF THIS PRESENTATION

- **TO EDUCATE**
- **TO CHALLENGE**
- **TO INSPIRE**

This is what you shall do: Love the earth and sun and the animals, despise riches, give alms to every one that asks, *stand up for the stupid and crazy*, devote your income and labor to others, hate tyrants, argue not concerning God, have patience and indulgence toward the people, take off your hat to nothing known or unknown or to any man or number of men . . . re-examine all you have been told at school or church or in any book, dismiss whatever insults your own soul, and your very flesh shall be a great poem.

Walt Whitman, Preface to *Leaves of Grass* 1855 (Emphasis added)

PART ONE: CONVICTION AND FINALITY

I. WHAT IS POST CONVICTION?

- (A) A point in time.
- (B) Conclusion of a process.
- (C) Finality.

II. WHAT IS A CONVICTION?

For constitutional purposes it is probably best to define a final “conviction” as a system created for finally adjudicating the guilt or innocence of the accused.

See e.g. Griffin v. Illinois, 351 U.S. 12, 18 (1956): “[I]f a State has created appellate courts as an integral part of . . . the system for finally adjudicating the guilt or innocence of the defendant” the procedures used in those appeals must comport with the Due Process and Equal Protection Clauses of the United States Constitution. *Cf. Evitts v. Lucey*, 469 U.S. 387 (1985) (6th Amendment right to effective counsel applies to first appeal as of right).

Coleman v. Thompson, 501 U.S. 722 (1991) (State post conviction petitioner who filed State post conviction paper 3 days late could not excuse that default because there is no right of counsel in State post conviction proceeding).

III. WHAT MAKES THE CONVICTION FINAL?

- (A) “Final” means a case where judgment of conviction has been rendered, appeal has been exhausted and the time for a petition for certiorari to the United States Supreme Court has either elapsed or such petition is filed and denied. *United States v. Johnson*, 457 U.S. 537, 542 n. 8.

**PART TWO:
PURPOSES OF POST CONVICTION AND *HABEAS CORPUS***

I. INTRODUCTION.

(A) Recognizing what a “conviction” is from the last section we now consider what post conviction and/or federal *habeas corpus* are in relation to that system created for the adjudication of the defendant’s guilt or innocence? In point of fact the answer here is obvious: Post conviction and *habeas corpus* are procedural systems aimed at critiquing the soundness of a conviction in the constitutional sense. Thus, with some exceptions, in order to prevail on a federal *habeas corpus* petition the litigant must be prepared to show that s/he was denied a clearly established protection afforded under the United States Constitution and recognized by the Supreme Court of the United States:

§ 2254. State custody; remedies in Federal courts

. . . .

- (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 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.

28 U.S.C. §2254(d)(1) and (2)

(B) Timing.

Under 28 U.S.C. §2244(d)(1) *habeas* petitions in federal court must be filed within one year.

§ 2244. Finality of determination

.....

(d) (1) A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(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;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d)(1) and (2)

Jimenez v. Quaterman, 129 S.Ct. 681 (2009) (State court’s grant of right to file out of time direct appeal resets the date when conviction becomes final under §2244(d)).

(C) Tolling.

Artuz v. Bennett, 531 U.S. 4, 121 S.Ct. 361 (2000). The provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which limits the time within which federal habeas corpus can be pursued following a state conviction for some offenses, is subject to the tolling provisions of 28 U.S.C. §2244(d)(2). The tolling provisions apply to the period beginning with the “proper filing” of an application for state post-conviction relief and ending with the disposition of the application. The Court concluded that such an application is properly filed when its delivery and acceptance is in compliance with applicable state rules, regardless of whether the claims in the application are meritorious or subject to a procedural bar.

Lawrence .v Florida, 49 U.S. 327, 127 S.Ct. 1079 (2007). Lawrence was convicted of capital murder and sentenced to death. His *habeas corpus* petition was denied as untimely and the Supreme Court affirmed. The majority held that the one-year statute of limitations for *habeas* relief was not tolled by the pendency of a petition for certiorari to the United States Supreme Court seeking review of the denial of post-conviction relief and that the petitioner failed to establish the extraordinary circumstances to support equitable tolling.

PART THREE: EXHAUSTION AND PROCEDURAL DEFAULT

I. WHERE TO EXHAUST?

- (1) Trial Court. (*Menefield v. Borg*, 881 F.2d 696, 699 (1989) (motion for new trial critical stage of prosecution under State law)).
- (2) Direct Appeal.
- (3) Post conviction or other collateral review.

II. HOW TO EXHAUST?

- (A) *Dye v. Hoffbauer*, 546 U.S. 1, 126 S.Ct. 5 (2005). In determining whether a petitioner has properly exhausted his remedies in state forums, a federal *habeas* court must look beyond the reasoning given in a state court opinion. A federal court must, if presented with the opportunity, examine the briefs in the state proceedings to determine whether such claims were in fact presented. This holding basically follows the Court's decision in *Smith v. Digmon*, 434 U.S. 332, 98 S.Ct. 597 (1978).
- (B) *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038 (1989). Rule of *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1943), requiring a "plain statement" that a state decision rests on state grounds in order to bar consideration of the issue on direct review, also applies to *habeas corpus* review. Statement in collateral state proceeding that defendant's ineffective assistance of counsel claim "could have been raised on direct appeal" followed by consideration of the claim on the merits falls short of an explicit reliance on a state law waiver ground, so as to bar *habeas corpus* absent a showing of "cause and prejudice" under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977).

III. REFERENCE MATERIALS

- (A) ***GRIMES CRIMINAL LAW OUTLINE –
Supreme Court Term 2007-2008***

[SEE HANDOUT – ATTACHED]

- (B) ***FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE,
Fifth Edition, Randy Hertz and James S. Liebman***

IV. PROCEDURAL DEFAULT

- (A) *Coleman v. Thompson* 501 U.S. 722 (1991) *Fay v. Noia*, 372 U.S. 391 (1963), deliberate bypass rule on failure to appeal now subject to cause and prejudice rule of *Wainwright v. Sykes* 433 U.S. 72, 97 S.Ct. 2497 (1977). Grant of motion to dismiss appeal of state *habeas* ruling because three days late without statement of reason held to be based on independent state ground. There can be no cause for failure based on ineffective assistance of counsel because no right to counsel in state post conviction proceedings and no right beyond the first appeal of right.

PART FOUR: THE PETITION

I. INTRODUCTION

As with any legal endeavor thorough investigation is the key to discover meritorious federal claims in post conviction. Up until now we have been talking in generalities and for the most part have been focused on claims that are somewhat evident in the trial or direct appeal record. But any *habeas* practitioner worth her salt recognizes that the most blatant injustices ultimately revealed by *habeas corpus* cases are often the most difficult to discover. It is precisely “where the record is unclear or errors are hidden” that the most compelling need for zealous advocacy arises. *Douglas v. California*, 372 U.S. 353, 358 (1963).

McCleskey v. Zant, 499 U.S. 467 (1991) illustrates the critical importance of early discovery of the facts supporting constitutional claims. The district court had granted relief based upon a new-claim successive petition, finding that the state, before trial, had surreptitiously planted an informant in a cell

next to the petitioner's, thereby securing inculpatory statements that were introduced against the petitioner at trial in violation of the petitioner's 6th Amendment right not to be interrogated by agents of the state in the absence of counsel. Although the petitioner had suspected that the witness against him at trial was a police agent, and had so alleged in his state post conviction petition, his interviews of the responsible assistant district attorney, various jailers, and other government officials responsible for the informant's confinement produced a series of deceitful denials. Moreover, purporting to have turned over "a complete copy of the prosecutor's file" in the case during state postconviction proceedings, the state in fact withheld from the produced materials a 21-page statement by the informant documenting his surreptitious use as an agent of the prosecution. Having discovered no proof of a violation, the petitioner dropped the jailhouse-informant claim when he filed his first federal habeas corpus petition. Thereafter, a change in the state's open-records act permitted the petitioner for the first time to discover the informant's statement, which also contained the name of a jailer who, upon being interviewed by the petitioner's counsel, admitted that he had assisted in planting the informant in the petitioner's cell. Petitioner thereupon filed a second federal petition based upon the newly discovered evidence, and the district court held that there was no successive petition bar because "this is not a case where the petitioner has reserved his proof or deliberately withheld his claim for a second petition." *McCleskey v. Zant*, Civil Action No. C-87-1517A (N.D. Ga. Dec. 13, 1987), slip op. at 24, *rev'd*, 890 F.2d 342 (11th Cir. 1989), *aff'd*, 499 U.S. 467 (1991). The 11th Circuit reversed the district court's grant of relief, holding that a successive-petition bar existed because the investigation that the petitioner conducted before filing his first federal petition was "lacking" inasmuch as a diligent search at that time might have led to discovery of the jailer, among the scores of other law enforcement officials who came into contact with the petitioner. *McCleskey v. Zant*, 890 F.2d 342, 349-50 (11th Cir. 1989), *aff'd*, 499 U.S. 467 (1991). The Supreme Court agreed with the 11th Circuit. 499 U.S. at 497-503. *See also, Strickler v. Greene*, 527 U.S. 2663, 287-88 & pp. 33-34 (1999) (distinguishing *McCleskey v. Zant* on ground that McCleskey "was previously aware of the factual basis for his claim but failed to raise it" and finding cause for Strickler's failure to raise claim at trial or in state post conviction proceedings notwithstanding knowledge of facts that might have alerted counsel to possibility of a claim, because "[m]ere speculation . . . [and] suspicion [do not] suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support."

II. MORE EXAMPLES

- *Smiley v. Thurmer*, 542 F.3d 574 (7th Cir. 2008) (state courts misapplied Supreme Court doctrines on “interrogation” to admit statement taken without *Miranda* warnings).
- *Anderson v. Terhune*, 516 F.3d 781 (9th Cir.) (*en banc*), *cert. denied*, 129 S.Ct. 344 (2008) (confession should have been suppressed: state courts unreasonably treated petitioner’s statement “I plead the Fifth” as ambiguous and unreasonably concluded that petitioner waived right to remain silent by responding to police officers’ continued questioning).
- *Arnold v. Runnels*, 421 F.3d 859 (9th Cir. 2005) (police violated *Miranda* by tape-recording interrogation after defendant, who had waived *Miranda* rights, unequivocally objected to tape recording).
- *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) (*per curiam*) (prosecutor elicited testimony from complainant denying any benefits in exchange for testimony, and prosecutor extensively argued in closing, that complainant had neither requested nor received benefits for testifying, even though complainant had initially declined to testify without benefits and prosecutor intervened on complainant’s behalf with parole board on day after petitioner’s trial concluded and continued to assist complainant with other charges thereafter).
- *Drake v. Portuondo*, 553 F.3d 230 (2d Cir. 2009) (prosecutor, who presented medical expert to testify about a “fictional syndrome” to explain motive for commission of crime, “knew that . . . portion of [expert’s] testimony [about circumstances under which expert reached conclusion] was false” and “knew that [expert’s] testimony about his scholarship was intentionally misleading”).

- ***Mahler v. Kaylo***, 537 F.3d 494 (5th Cir. 2008) (prosecution failed to disclose prior statements by prosecution witnesses that supported petitioner’s claim of self-defense and “directly undermined] the prosecution witnesses’ testimony that the struggle had ended” before petitioner fired fatal shot).
- ***D’Ambrosio v. Bagley***, 527 F.3d 489 (6th Cir. 2008) (prosecution failed to disclose evidence that “would have contradicted or weakened the testimony of the prosecution’s only eyewitness to the murder” and that “demonstrate[d] a motive on the part of another individual” to kill victim).
- ***Jackson v. Brown***, 513 F.3d 1057 (9th Cir. 2008) (prosecutor violated *Brady v. Maryland* by failing to disclose benefits promised to prosecution witnesses to induce them to testify, and prosecutor also violated *Napue v. Illinois* by failing to correct witnesses’ testimony, denying promises of benefits for cooperation).
- ***Trammell v. McKune***, 485 F.3d 546 (10th Cir. 2007) (prosecution failed to disclose physical evidence supporting defense’s theory that key prosecution witness was actual perpetrator).
- ***Graves v. Dretke***, 442 F.3d 334 (5th Cir.), *cert. denied*, 549 U.S. 943 (2006) (prosecutor suppressed pretrial statements by key prosecution witness who, although testifying at trial that he committed murders with petitioner, had said in one pretrial statement that he acted alone and said in another pretrial statement that his accomplice was his own wife).
- ***Green v. LaMarque***, 532 F.3d 1028 (9th Cir. 2008) (prosecutor, who “used peremptory challenges to exclude from the jury all six African-Americans on the jury panel,” “offered race-neutral reasons” but court of appeals concludes that same reasons “also applied to unchallenged “white jurors” and “[t]his disparity in treatment convinces us the non-racial reasons claimed by the prosecutor were pretexts”; granting writ “[b]ecause the elimination of even a single juror due to race taints the trial.”

- ***Wilson v. Beard***, 426 F.3d 653 (3d Cir. 2005) (“relevant evidence” bearing on prosecutor’s use of peremptory challenges to strike nine African American venire persons makes it “virtually impossible to conclude that [prosecutor] did not strike at least one of the jurors for an impermissible reason”).
- ***Hicks v. Franklin***, 546 F.3d 1279 (10th Cir. 2008) (guilty plea was constitutionally inadequate because petitioner “did not receive true notice” of essential element of crime and “in fact received misleading instruction from the court”).
- ***Jamison v. Klem***, 544 F.3d 266 (3d Cir. 2008) (guilty plea was not adequately knowing and intelligent because accused was never advised of mandatory minimum sentence).
- ***Holley v. Yarborough*** 568 F.3d 1091 (9th Cir. 2009) (trial court violated Confrontation Clause in sex offense trial by “preclud[ing] the introduction of impeachment evidence and prevent[ing] . . . [defense counsel’s] cross-examination of the alleged victim about her prior statements, including statements about sex and indications that others had made sexual advances toward her”).
- ***Slovik v. Yates***, 556 F.3d 747 (9th Cir. 2009) (trial court violated Confrontation Clause by preventing defense counsel from impeaching prosecution witness with extrinsic evidence refuting witness’ denial that “he was currently on probation”).
- ***Brinson v. Walker***, 547 F.3d 387 2nd Cir. 2008) (trial judge violated Confrontation Clause by precluding defense cross-examination of complainant with prior bad act that defense counsel sought to elicit to show complainant’s racial animus and to support defense theory that complainant fabricated charges against accused).
- ***Taylor v. Cain***, 545 F.3d 327 (5th Cir. 2008) (trial court violated Confrontation Clause by permitting prosecution to elicit from detective that “unidentified, nontestifying witness identified the defendant as “the perpetrator”).

- ***Barbe v. McBride***, 521 F.3d 443 (4th Cir. 2008) (“Sixth Amendment confrontation [clause] . . . was indisputably contravened . . . by the state circuit court’s application of a per se rule restricting cross-examination of the prosecution’s expert [licensed clinical counselor who had met with victim on several occasions] under the state rape shield law”).
- ***Girts v. Lanai***, 501 F.3d 743 (6th Cir. 2007), *cert. denied*, 129 S.Ct. 92 91009) (prosecutor’s closing argument, which referred three times to accused’s constitutionally protected silence constituted “flagrant prosecutorial misconduct”).
- ***Winzer v. Hall***, 494 F.3d 1192 (9th Cir. 2007) (trial court violated Confrontation Clause by “finding that [alleged victim’s] report [to police officer] was [admissible as] a spontaneous declaration of excited utterance”).
- ***Lyell v. Renico***, 470 F.3d 1177 (6th Cir. 2006) (trial judge “made a fair trial impossible” by “*sua sponte* interrupt[ing] the prosecution to assist it, *sua sponte* interrupt[ing] [defense counsel’s] questioning in a way that undermined his presentation of the case (frequently during the cross-examination of the central witness in the case), fabling] to interrupt in a like manner during the prosecution’s questioning (at least in a way that *undermined* is case), start[ing] or impl[y]ing her disapproval of [petitioner’s] theory of the case[,] . . . and ma[king] clear her disapproval of defense counsel . . . [and] issu[ing] a contempt order against Lyell’s counsel in front of the jury”).
- ***Gaston v. Brigano***, 208 Fed. Appx. 376, 2006 U.S. App. LEXIS 30219 (6th Cir. Dec. 7, 2006) (admission of audiotape of child witness’s statements violated Confrontation Clause).
- ***Chambers v. McDaniel***, 549 F.3d 1191 (9th Cir. 2008) (instructions “permitted the jury to convict [petitioner] without finding of the essential element of deliberation”).

- ***Medley v. Runnels***, 506 F.3d 857 (9th Cir. 2007) (*en banc*), *cert. denied*, 128 S.Ct. 1878 (2008) (“state trial court violated . . . due process by instructing the jury that a flare gun is a firearm, thus taking from the jury the determination of an element of the offense”).
- ***Polk v. Sandoval***, 503 F.3d 903 (9th Cir. 2007) (jury instruction in first-degree murder case violated due process by dictating finding of deliberateness if jury found premeditation).
- ***Stark v. Hickman***, 455 F.3d 1070 99th Cir. 2006) (“trial court’s instruction during the guilt phase of the trial that the jury was to conclusively presume petitioner was sane” unconstitutionally “shifted the burden of proof to the defendant”).
- ***Taylor v. Workman***, 554 F.3d 879 (10th Cir. 2009) (denial of jury instruction on lesser included noncapital offense violated Due Process Clause).
- ***Harris v. Alexander***, 548 F.3d 200 (2d Cir. 2008) (trial court violated due process by refusing to instruct jury on accused’s theory of case).
- ***Clark v. Brown***, 450 F.3d 898 (9th Cir.), *cert. denied*, 549 U.S. 1027 (2006) (“state trial court’s failure to give a felony-murder special circumstance jury instruction . . . violated Clark’s due process right to present a complete defense”).
- ***Laird v. Horn***, 414 F.3d 419 (3d Cir. 2005), *cert. denied*, 546 U.S. 1146 (2006) (jury instruction on accomplice liability violated Due Process Clause by relieving prosecution of burden of establishing that petitioner had specific intent to kill).
- ***Newman v. Metrish***, 543 F.3d 793 (6th Cir. 2008) (circumstantial evidence presented by prosecution at trial did not satisfy constitutional standard of sufficiency).

- ***Perez v. Cain***, 529 F.3d 588 (5th Cir.), *cert. denied*, 129 S.Ct. 496 (2008) (accused “established at trial that he was insane at the time of the offense and that no rational juror could have found otherwise”).
- ***Smith v. Patrick***, 508 F.3d 1256 (9th Cir. 2007) (*per curiam*) (“opinion of the prosecution experts that [petitioner’s] shaking of infant had caused death was wholly unsupported by the physical evidence” and thus “evidence did not meet the standard of *Jackson v. Virginia*”).
- ***Weaver. Bowersox***, 438 F.3d 832 (8th Cir. 2006), *cert. dismissed*, 550 U.S. 598 (2007) (prosecutor’s penalty-phase closing argument contained improper and inflammatory statements analogizing jurors to soldiers with duty, expressing prosecutor’s personal belief in death penalty and invoking prosecutor’s exercise of professional judgment in seeking death penalty, and urging jury to return death verdict to send message for future cases).
- ***Gonzales v. Duncan***, 551 F.3d 875 (9th Cir. 2008) (imposition of “three strikes” sentence of 28 years to life for “regulatory offense” of “failing to update . . . annual sex offender registration within five days of [one’s] birthday” violated 8th Amendment).
- ***Gault v. Lewis***, 489 F.3d 993 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 1477 (2008) (petitioner’s “constitutional due process right to be informed of the charges against him was violated when he was charged with a sentencing enhancement under one statute . . . of the California Penal Code . . . but had his sentence enhanced under a second, different statute”).
- ***Stokes v. Schriro***, 465 F.3d 397 (9th Cir. 2006) (five-year sentencing enhancement, based upon aggravating circumstances involving “judicial factfinding,” violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

- ***Williams v. Roe***, 421 F.3d 883 (9th Cir. 2005) (trial court violated Ex Post Facto Clause at re-sentencing by applying “amended statute [that] eliminated judicial discretion to impose a lower sentence afforded by the version in place at the time of Williams’ offense).
- ***Clark v. Brown***, 450 F.3d 898 (9th Cir.), *cert. denied*, 549 U.S. 1027 (2006) (“California Supreme Court’s retroactive application of a new interpretation of [prior state supreme court decision] and of the felony-murder special circumstances statute, on direct review violated Clark’s due process right to fair warning that his conduct made him death-eligible”).
- ***Smith v. Grams***, 565 F.3d 1037 (7th Cir. 2009) (trial court improperly treated accused’s “election to proceed to trial” without counsel, when confronted with “Hobson’s choice” of doing so or “adjoining the proceedings and waiving his right to a speedy trial,” as “knowing and voluntary waiver” of right to counsel).
- ***Carlson v. Jess***, 526 F.3d 1018 (7th Cir. 2008) (“trial court’s denial of [petitioner’s] motion for substitution [of new counsel for previous retained counsel] and a continuance [to afford new counsel time to prepare for trial] was arbitrary and in violation of the Sixth and Fourteenth Amendments”).
- ***Bradley v. Henry***, 510 F.3d 1093 (9th Cir. 2007) (*en banc*) (trial court deprived petitioner of right to counsel of choice by refusing to substitute retained counsel for court-appointed counsel because of concerns about possible financial problems or delay without conducting adequate inquiry about these concerns or considering alternatives).

- ***Richards v. Quaterman***, 566 F.3d 553 (5th Cir. 2009) (counsel “rendered ineffective assistance of counsel by failing to present – and, through hearsay objections, preventing the prosecution from presenting — crucial exculpatory evidence” and by failing to request instruction on lesser included offense, failing to make use of client’s medial records, and failing to interview important witnesses before trial).
- ***Hummel v. Rosemeyer***, 564 F.3d 290 (3d Cir. 2009) (counsel was ineffective in stipulating to accused’s competency and failing to utilize state procedures for ascertaining competency).
- ***Awkal v. Mitchell***, 559 F.3d 456 (6th Cir. 2009) (counsel undermined client’s insanity defense by presenting testimony of psychiatrist who had found petitioner to be sane at time of crime).
- ***Brown v. Smith***, 551 F.3d 424 (6th Cir. 2008) (counsel was ineffective in failing to investigate and obtain counseling records that could have been used to impeach complainant).
- ***Avery v. Prelesnik***, 548 F.3d 434 (6th Cir. 2008) (counsel “failed to investigate and interview potential alibi witnesses).
- ***Bell v. Miller***, 500 F.3d 149 2d Cir. 2007) (trial counsel was ineffective in failing to “consult with a medical expert” to “ascertain the possible effects of trauma and pharmaceuticals” on “key prosecution witness” whose memory was “obviously impacted by medical trauma and prolonged impairment of consciousness” and whose “all-important identification . . . [was] unaccountably altered after the administration of medical drugs”).
- ***Richey v. Bradshaw***, 498 F.3d 344 (6th Cir. 2007) (trial counsel was ineffective in relying on defense expert’s opinion to forego defense “without “consult[ing] with that expert to make an informed decision about whether . . . [the] particular defense . . . [was] viable”).

- ***Ramonez v. Berghuis***, 490 F.3d 482 (6th Cir. 2007) (trial counsel’s “decision to limit (or more accurately not to pursue at all until it was too late) any investigation regarding . . . three potential [defense] witnesses was objectively unreasonable, leading to an uninformed and therefore unreasonable decision not to call those witnesses at trial”).
- ***Higgins v. Renico***, 470 F.3d 624 (6th Cir. 2006) (counsel was ineffective in forgoing cross-examination of key prosecution witness; state’s claim of tactical judgement is rejected as “too implausible to accept”; there simply was no conceivable tactical justification for . . . fabling] to cross-examine *the* key witness in the case:”).
- ***Goodman v. Bertrand***, 467 F.3d 1022 (7th Cir. 2006) (counsel’s failure to subpoena witness, along with inadequate objections and actions to preserve record, and opening of door to admission of petitioner’s prior convictions constituted “pattern of . . . deficiencies” that were prejudicial when “considered in their totality”).
- ***Reynoso v. Giurbino***, 462 F.3d 1099 (9th Cir. 2006) (counsel was ineffective in failing to conduct investigative interviews of two alleged eyewitnesses and failing to cross-examine these witnesses: “Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision”).
- ***Adams v. Bertrand***, 453 F.3d 428 (7th Cir. 2006) (counsel failed to find and present “pivotal witness” because counsel “committed to a predetermined strategy without a reasonable investigation”).

- ***Gersten v. Senkowski*** 426 F.3d 588 (2d Cir. 2005), *cert. denied*, 547 U.S. 1191 (2006) (counsel was ineffective in failing to investigate medical and psychological evidence that would have supported “strong affirmative case that the charged crime [of sexual abuse and endangering welfare of child] did not occur and [that] the alleged victim’s story was incredible in its entirety”; state’s claim of “strategic decision on the part of defense counsel” is rejected because “[d]efense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would have yielded exculpatory evidence”).
- ***Hodge v. Hurley***, 426 F.3d 368 (6th Cir. 2005) (“trial counsel’s failure to object to any aspect of the prosecutor’s egregiously improper closing argument was objectively unreasonable”).
- ***Dando v. Yukins***, 461 F.3d 791 (6th Cir. 2006) (counsel was ineffective in advising petitioner to plead “no contest” without first consulting mental health expert to assess availability of evidence for duress defense based on Battered Woman Syndrome).
- ***Satterlee v. Wolfenbarger***, 453 F.3d 362 (6th Cir. 2006), *cert. denied*, 549 U.S. 1281 (2007) (counsel failed to inform petitioner of day-of-trial plea offer and petitioner consequently proceeded to trial and received sentence that was high than plea offer).
- ***Maples v. Steagall***, 427 F.3d 1020(6th Cir. 2005) (counsel was ineffective in erroneously advising petitioner that guilty plea preserved speedy trial claim for appeal).
- ***Burt v. Uchtman***, 422 F.3d 557 (7th Cir. 2005) (counsel was ineffective in failing to request renewed competency examination when client, who was of below-average intelligence and had “history of psychological problems” and was taking “large doses of psychotropic medications,” abruptly decided mid-trial to take guilty plea against advice of counsel).

- ***Mason v. Mitchell***, 543 F.3d 766 (6th Cir. 2008) (“trial counsel provided ineffective assistance by failing to interview Mason’s family members and investigate the obvious red flags contained in state records suggesting that Mason’s childhood was pervaded by violence and exposure to drugs in the home from an early age”).
- ***Summerlin v. Schriro***, 427 F.3d 623 (9th Cir. 2005), *cert. denied*, 547 U.S. 1097 (2006) (counsel was ineffective in failing to investigate and present available mitigating evidence regarding abuse that petitioner suffered as child and petitioner’s functional mental retardation and previous diagnosis of paranoid schizophrenia).
- ***Moore v. Haviland***, 531 F.3d 393 (6th Cir. 2008) (trial court violated *Faretta v. California* by rejecting accused’s mid-trial requests to proceed *pro se* without engaging in “*Faretta*-compliant colloquy”).
- ***Hirschfield v. Payne***, 420 F.3d 922 (9th Cir. 2005) (trial court improperly denied “request for self-representation on the ground that the defendant lacks sufficient knowledge of legal procedure”).

PART FIVE: ACTUAL INNOCENCE

As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of “actual innocence.” Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. *House*, 547 U.S., at 554-555, 126 S.Ct. 2064; *Herrera*, 506 U.S., at 398-417, 113 S.Ct. 853; see also *id.*, at 419-421, 113 S.Ct. 853 (O'Connor, J., concurring); *id.*, at 427-428, 113 S.Ct. 853 (SCALIA, J., concurring); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L.Rev. 142, 159, n. 87 (1970). In this case too we can assume without deciding that such a claim exists, because even if so there is no due process problem. Osborne does not dispute that a federal actual innocence claim (as opposed to a DNA access claim) would be brought in habeas. Brief for Respondent 22-24. If such a habeas claim is viable, federal procedural rules permit discovery “for good cause.” 28 U.S.C. § 2254 Rule 6; *Bracy v. Gramley*, 520 U.S. 899, 908-909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Just as with state law, Osborne cannot show that available discovery is facially inadequate, and cannot show that it would be arbitrarily denied to him.

District Attorney's Office for the Third Judicial District, et al, v. Osborne,
129 S.Ct. 2308, 2321 (2009)

PART SIX: APPLICATION EXERCISES

HYPOTHETICAL #1

Ben Franklin testified that, on March 27, 2010, at approximately 10:00 p.m., he stopped at the Jade Garden Restaurant, along with his fiancée Betsy Ross and 12-year-old daughter, Betty Ford. Franklin parked his Lincoln Navigator. He and his daughter went into the restaurant to get food and Ross remained in the vehicle. After waiting for approximately ten minutes, Franklin got his food and left the restaurant. As he was leaving, he saw Petitioner enter the restaurant.

Franklin testified that Ford sat in the backseat of the vehicle and he got into the driver's seat. As he closed his door, Robby Robber approached the vehicle and ordered Franklin to exit the vehicle. Robber pointed a .9-mm weapon at Franklin and again ordered him out of the vehicle. Franklin, Ford and Ross exited the vehicle. Robber drove the vehicle to the front of the restaurant. Petitioner exited the restaurant and got into the passenger seat of the Navigator. The Navigator was then driven from the parking lot.

Franklin's vehicle was located approximately two hours later. Franklin later identified Robber as the man with the gun and Petitioner as the person he saw inside the restaurant.

Ross testified that she waited in the Navigator while Franklin and Ford went into the restaurant. She observed a gray Chevrolet Cavalier enter the parking lot. She saw someone exit the vehicle and enter the restaurant. When Franklin and Ford returned to the car, Ross heard someone cock a gun and demand that they exit the vehicle. They all exited the car. She testified that Petitioner then exited the restaurant and got into the passenger side of the vehicle.

Betty Ford testified that, as she and her father were waiting for their food, Petitioner entered the restaurant and asked for a glass of water. She identified Robber as the man who forced them out of their vehicle at gunpoint, and identified Petitioner as the man who entered the vehicle before it drove away.

Police Officer Scott of the Helena Police Department testified he and his partner responded to a call that someone had observed men stripping a Navigator on Novara Street in Helena. Officer Scott testified that he and his partner approached a garage located behind a vacant home. A man who the officers believed to be a lookout yelled something into the garage and fled. Officer Scott saw a second person run from the garage. He gave chase and apprehended Robby Robber. Officer Scott's partner arrested Petitioner inside the garage. The key to the Navigator was found in Robber's pocket.

Robber pled guilty in connection with the carjacking of Franklin. Petitioner was initially charged with armed robbery and carjacking, to which he pled not guilty and was appointed counsel, Tom Seenoissues. The State of Montana tried Petitioner for the carjacking under an aiding and abetting theory.

The Information was amended after the close of evidence to include a count of receiving and concealing stolen property valued over \$20,000.00. The jury returned a verdict finding Petitioner not guilty of armed robbery but convicting him of carjacking and receiving and concealing stolen property valued over \$20,000.00.

Petitioner was appointed new counsel following his conviction. He then moved the trial court for dismissal on two grounds: (1) the evidence presented at trial was insufficient to support a conviction for aiding and abetting a carjacking and (2) Tom Seeno issues had been constitutionally ineffective due to his inadequate preparation and consultation with Petitioner prior to trial and due to his refusal to call Robby Robber as a witness.

The state trial court denied Petitioner's motion for dismissal. Taking the evidence in a light most favorable to the prosecution, the court concluded the evidence was sufficient to find Petitioner aided and abetted the carjacking. The court found the evidence showed Petitioner "arrived in the same car with the perpetrator, went into the restaurant and only ordered a cup of water while another man took the car at gunpoint," then "immediately got into the stolen vehicle and two and half hours later was found dismantling it." From this, the court concluded it was a "reasonable inference" that Petitioner "preplanned his role in the carjacking thereby satisfying the intent element of aiding and abetting a carjacking." The court also rejected Petitioner's claim of ineffective assistance of counsel, concluding that Petitioner "has not shown that the failure to call Robby Robber who pled guilty to the carjacking was prejudicial to the extent that but for that deficiency, [Petitioner] would have had a more positive outcome at trial."

Petitioner appealed to the Montana Supreme Court on the same grounds after the trial court's denial of his motion for dismissal. Petitioner's appeal was denied as unmeritorious in a one-sentence order with no supporting reasoning. Petitioner sought rehearing on the same grounds. This request was also denied by the Montana Supreme Court in a one-sentence order without supporting reasoning.

Petitioner then filed a habeas petition under 28 U.S.C. § 2254 challenging his conviction on the same grounds raised before the state court: insufficiency of evidence and ineffective assistance of counsel. On October 22, 2010 the federal district court issued an opinion and order denying the petition. Petitioner now appeals this denial.

HYPOTHETICAL #2

On May 23, 2002, Petitioner was convicted by a federal jury on one count of bank extortion involving the use of a dangerous weapon, in violation of 18 U.S.C. § 2113(d), and one count of bank extortion involving forcing a victim to accompany a robber, in violation of 18 U.S.C. § 2113(e). The Guidelines range recommended in the Presentence Report (“PSR”) included enhancements for taking the property of a financial institution, the amount of loss, use of a firearm, abduction of a victim, vulnerability of a victim, and use of a child in the course of the offense, in addition to a base offense level of twenty, for a total offense level of forty. Combining Petitioner's total offense level of forty with his criminal history category of IV, the recommended Guidelines range in the PSR was 360 months to life in prison. In a sentencing memorandum filed October 2, 2002, Petitioner objected to each of the recommended sentencing enhancements as unwarranted in his case and argued for a downward departure from the applicable Guidelines range. The district court adopted the Guidelines range as calculated in the PSR and, on October 11, 2002, sentenced Petitioner to 405 months in prison, five years of supervised release, and restitution in the amount of \$851,000.

Petitioner appealed neither his conviction nor his sentence.

On March 22, 2005, Petitioner filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255, arguing that his counsel was ineffective for failing to challenge the indictment against him and for failing to argue that the enhancements to his then-mandatory Guidelines range violated the Sixth Amendment, as was later decided by the Supreme Court in *Booker* (January 12, 2005). The district court dismissed Petitioner's motion, concluding that the indictment was not deficient and that *Booker* did not apply retroactively on collateral review. The district court denied Petitioner a certificate of appealability on both issues, but a judge of the circuit court granted Petitioner a certificate of appealability on the sentencing issue. How should the appeal be resolved?

HYPOTHETICAL #3

Petitioner and Cindy had been married for eight years at the time of her death in April 1993. In March 1993, Cindy separated from Petitioner and sought the counsel of an attorney. Cindy's attorney estimated that Petitioner would owe her substantial alimony if they divorced. On April 1, 1993, Cindy served Petitioner with divorce papers.

On April 16, 1993, Cindy took their two children, aged four and eight, to Petitioner's house, where the children spent the night. The next morning, Cindy arrived to pick up the children and brought with her a stack of typed papers. Cindy was upstairs with Petitioner when their son, downstairs, heard a shot. Cindy, crying, walked down the stairs before collapsing. Petitioner descended the stairs behind her and took their son outside. Petitioner reentered the house and called 911. An ambulance arrived and took Cindy to the hospital, where she died from a single bullet wound to the chest.

Investigation showed that the shot was fired from a distance of one to six inches. The bullet entered Cindy's chest from left to right, front to back, at a 35- to 40-degree downward angle. Cindy's face and scalp had abrasions and bruises apparently suffered before her death.

Petitioner testified that when Cindy arrived at his house on the day of the incident, Cindy expressed concern over possible rioting following the pending verdict in the second Rodney King trial which was then in progress. Petitioner told Cindy that he would let her borrow his firearm and show her how to operate it. According to petitioner he stood in front of Cindy and attempted, with difficulty, to load a round into the firearm. Petitioner testified that as he lowered the firearm to inspect it, it accidentally discharged.

Police arrived at Petitioner's house and found him sitting motionless near the front entrance, next to Cindy. Police took Petitioner into custody and informed him of his *Miranda* rights. Petitioner expressed his willingness to talk without an attorney present, so Detective Pressure began questioning him.

After Petitioner recounted his version of the facts, Pressure asked Petitioner to submit to a polygraph examination. Pressure assured Petitioner that, if the polygraph showed that Petitioner was being truthful, the police department would end its investigation of him. Petitioner declined to undergo the polygraph exam explaining that he believed them to be unreliable. Pressure replied, "I think you don't want to take one because you murdered your wife." Pressure then repeatedly suggested that Petitioner take a polygraph. Petitioner maintained that he would not.

Detective Pressure next asked Petitioner to demonstrate how the shooting occurred. Petitioner refused to reenact the shooting. Pressure continued to question Petitioner about the chain of events and again asked Petitioner to demonstrate. When Petitioner declined, Pressure suggested that Petitioner either take a polygraph or demonstrate what happened. Petitioner refused, and Pressure suggested that Petitioner would go to jail for being uncooperative. Pressure's supervisor, Detective Coercion, entered the room and explained that the County Attorney would not think much of Petitioner's refusals to cooperate.

Pressure and Coercion continued to ask Petitioner to demonstrate how the shooting took place, and Petitioner continued to refuse. The detectives suggested that a judge and jury would find his lack of cooperation unreasonable. Through the remainder of the questioning, Coercion and Pressure asked for a reenactment several more times, with Petitioner refusing each time.

Before trial, Petitioner moved to suppress statements made at his interrogation as involuntary based on the investigating detectives' multiple false promises of leniency for cooperation, false assurances, and coercive statements. Petitioner argued that the voluntariness of the interrogation ended when Pressure threatened to jail Petitioner if he refused to submit to a polygraph examination. Petitioner further argued that his repeated refusals to submit to a polygraph or reenact the shooting were invocations of his constitutional right to remain silent and that his responses to that line of questioning were therefore inadmissible. The trial court denied Petitioner's motion, concluding that Petitioner did not effectively invoke the protections of the Fifth Amendment because he offered responses and explanations instead of flat refusals. Throughout Petitioner's trial, the prosecution referred to Petitioner's refusal to reenact the shooting as affirmative evidence of his guilt. In his opening statement, the prosecutor played the tape of Petitioner's

interrogation and counted the number of times he refused to demonstrate the shooting. The prosecutor referred to Petitioner's refusals again while presenting his case-in-chief and during his closing argument.

PART SEVEN: CONCLUSION

In 2008, in a decision applying the Suspension Clause to strike down a statute that had stripped the federal courts of jurisdiction to consider federal habeas corpus petition filed by aliens designated as “enemy combatants” and detained at the U.S. Naval Station at Guantanamo Bay, the Court again described the vital functions of the writ of habeas corpus throughout English and U.S. history and reflected on the crucial role the writ continues to play in the modern era:

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system. . . .

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Art. I, § 9, cl. 2; see Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1509, n. 329 (1987) (“[T]he non-suspension clause is the original

Constitution's most explicit reference to remedies”). . . .

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. See *Hamdi [v. Rumsfeld]*, 542 U.S. [507], at 536 [2004] (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. . . .

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

Boumediene v. Bush, 128 S.Ct. 2229, 2244, 2246, 2247, 2277 (2008)

Thanks for attending and good luck!

35th Edition



THE NATIONAL
JUDICIAL COLLEGE

Grimes Criminal Law Outline

Supreme Court Term
2007-2008

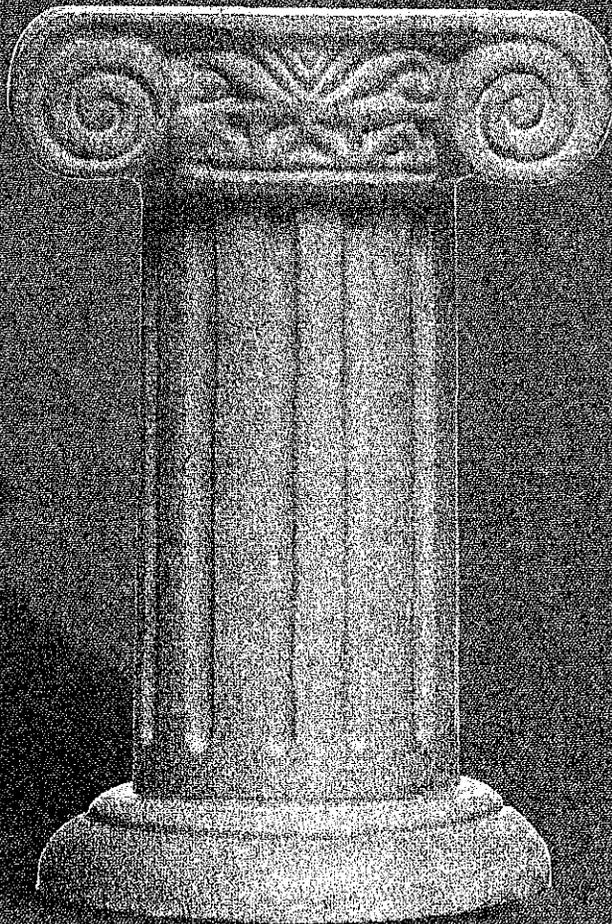


TABLE OF CONTENTS

THE FOURTH AMENDMENT.....	1
Search and Seizure.....	1
The exclusionary rule.	1
Only unreasonable searches and seizures are prohibited, but unreasonableness cannot be stated in rigid and absolute terms.....	3
Scope of the exclusionary rule.....	3
Derivative evidence.....	3
Independent source and inevitable discovery.....	4
Admissible for impeachment of defendant.....	5
But the foundation cannot be laid in cross-examination.....	5
Burden of proof on motion to suppress.....	5
Standing to complain.....	6
Fourth Amendment is a restriction against government action only.....	9
Fruits of Police Activities: Fourth Amendment Violation.....	10
Reasonable expectation of privacy: Fourth Amendment protects people and not simply places.....	11
Protection extends to seizures as well as searches and protects property as well as privacy.....	16
Protection extends to administrative searches and seizures.....	16
Protection extends to both houses and effects, and includes verbal evidence.....	18
Protection does not extend to open fields or to abandoned effects.....	18
Protection limits.....	20
Constitutional requirements of probable cause.....	20
Probable cause objective test as applied in various situations.....	24
Arrest.....	24
Search.....	25
Stop and frisk.....	25
Electronic searches.....	25
Administrative searches.....	26
Probable cause hearing on restraint following arrest without warrant.....	26
Informers.....	27
Reason for warrant, even if there is probable cause, is to guard rights under Fourth Amendment by a neutral and detached magistrate.....	28
Against whom may a warrant issue?.....	29
Requirements of specificity.....	29
Attack on warrants.....	30
Bodily invasion.....	30
Border searches.....	31
Bookkeeping and reporting requirements for banks.....	32
Electronic eavesdropping.....	32
General exploratory searches are forbidden.....	35
Use of searchlights, field glasses, and dogs.....	35
Intensity and scope: A search which is reasonable at inception may violate Fourth Amendment by its intensity and scope.....	36

However, not only fruits or implements of the crime, weapons and property, the possession of which is itself a crime, may be seized. Mere evidence can be seized provided there is probable cause to believe the evidence sought will aid in a particular apprehension or conviction..... 37

A search cannot be justified by what it produces nor an arrest justified by the fruit of an illegal search..... 37

Interplay between Fourth and Fifth Amendments..... 38

Mail, detention of..... 39

Home Detention of Premises..... 39

Method of entry..... 39

Time of entry..... 40

Personal liability of officers..... 40

Subpoenas..... 41

Plain View Doctrine..... 41

Plain view as probable cause..... 44

Exceptions to the Requirement of a Search Warrant..... 44

1. Consent to search without a warrant..... 45

 Consent must be voluntary—under the totality of circumstances..... 45

 Knowledge need not be shown—different from waiver of counsel..... 45

 Mere submission to authority is insufficient..... 45

 Invalid if obtained by fraud..... 46

 Invalid if obtained during illegal detention. *See cases under "stop and frisk" infra page 72*..... 46

 Scope..... 46

 Who can consent?..... 46

 If accused has less than ownership or possessory interest, the owner can consent and bind the other. But the accused can contest validity of consent..... 47

2. Search incident to a lawful arrest may be made without a warrant..... 48

 But if there is no probable cause for the arrest, the search is invalid..... 49

 If the search is not contemporaneous with the arrest, or if it goes beyond what is under the immediate control of the defendant, it is not valid..... 49

 A limited search may be made, even if no arrest has been made, when there is probable cause to make an arrest and there is reason to believe the evidence will be destroyed..... 53

 Intensity of search incident to valid arrest does not permit search below body surface..... 53

 Arrest warrant..... 53

 When does a seizure of a person take place?..... 54

 Warrantless arrests, when valid..... 56

 First Amendment material, can it be seized incident to a lawful arrest?..... 58

 Evidence obtained during unlawful detention..... 58

3. Exigent circumstances plus probable cause may justify a search without warrant..... 61

 Rule: Negative and positive statements of the rule..... 61

 Automobile searches and stops..... 67

 Blood, urine, drug testing..... 71

4. Hot pursuit..... 72

5. Stop and frisk..... 72

6.	Inventory searches.....	79
	Historical development and rationale.....	79
	The reasoning was that an automobile taken lawfully into police custody may be searched in good faith for noncriminal purposes such as to protect the public, the police, the owner's possessions, etc., and that criminal evidence falling into plain view may be seized.	79
	Rationale applied in inventory situations.....	80
7.	Other warrantless searches.....	80
	Schools.....	80
	Question if this would apply to all students or just athletes.....	81
	Government offices: Work-related searches.....	81
	Probationers and Parolees.....	82
	Deadly force and excessive force.....	82
	 THE FIFTH AMENDMENT	 83
	Privilege Against Self-Incrimination	83
	Applicable to the states.....	83
	Scope.....	84
	Not violated unless there is compulsion.....	87
	Applicable to juvenile cases, forfeiture proceedings, and grand jury proceedings.....	88
	No comment on failure to testify.....	89
	Witness claiming privilege before jury.....	90
	Withdrawal of waiver.....	90
	Can exercise of right be penalized?	90
	Waiver required for valid confession.....	92
	Waived by valid guilty plea.....	94
	Does not include:	94
	Blood test (non-testimonial evidence).....	94
	Handwriting, voice, or body exemplars.....	94
	Some discovery against defendant.....	95
	Use of undercover agent or informer to obtain inculpatory statements.....	95
	Immunity.....	96
	Other immunities: Other than related to the Fifth Amendment.....	99
	Congressional immunity.....	99
	Public official immunity.....	99
	Confessions.....	101
	Procedure for determining voluntariness.....	101
	Burden of proof.....	102
	Federal constitutional criteria of voluntariness applicable to the states.....	102
	Truth is not to be considered.....	102
	Activities following the attachment of the Sixth Amendment Right to Counsel	103
	Denial of counsel.....	106
	Waiver of Fifth Amendment privilege and right to counsel required.....	110
	Specification of warnings required. Focus defined, etc.....	110
	Not retroactive.....	113
	Not applicable to retrials of cases tried before <i>Miranda</i>	113
	Use of confessions obtained without <i>Miranda</i> warnings or by other improper means.....	113

Cross-examination.....	113
Warrants.....	114
Derivative evidence.....	114
When in custody?.....	115
Confessions during an unlawful arrest, unlawful entry, or unlawful seizure.....	116
Confessions during prolonged detention.....	118
The following cases, all excluding confessions merely because of delay in taking defendant before a magistrate, are not binding on the states	118
Other confession cases.....	119
Silence.....	122
Guilty Pleas	123
Disclosure required at time of guilty plea.....	127
Examples of questions to be asked before accepting a guilty plea.....	127
Double Jeopardy	128
Fifth Amendment provision against double jeopardy is binding on states, and federal standards apply.....	128
What is double jeopardy?	128
When jeopardy attaches.....	137
When government may appeal.....	137
Waiver.....	138
Retrial may be barred even if crimes are not the same.....	139
Restrictions on resentencing.....	140
Mistrials.....	141
Dual sovereignty problems.....	142
 THE SIXTH AMENDMENT	 143
The Right to Present A Complete Defense	143
Confrontation.....	144
Applicable to the states.....	144
Right to be present, participate in proceedings, and confront witnesses	144
Former Testimony and Prior Statements of Non-Testifying Persons.....	145
Hearsay.....	149
General.....	153
Waiver.....	153
Compulsory Process	153
Applicable to the states.....	153
Sixth Amendment Right to Counsel	154
When does the Sixth Amendment Right to Counsel attach?.....	154
Not at preindictment taking of handwriting exemplars.....	154
At lineup after initiation of adversarial criminal proceedings.....	154
At probable cause hearing required by Fourth Amendment after warrantless arrest.....	155
At grand jury.....	155
At preliminary hearing.....	155
At trial.....	156
Retroactive.....	157
On appeal.....	157
Juvenile proceedings.....	159
At sentence and probation violation hearing.....	159
In prison.....	160
Standard of indigency.....	160

Extent of inquiry as to financial ability.....	160
Requiring reimbursement for counsel.....	160
The Right of An Accused to Proceed <i>Pro Se</i>	160
Standby counsel.....	161
Importance of a record of arraignment.....	162
Right to counsel does not depend on request.....	162
Competency to waive counsel.....	162
Extent of inquiry before accepting waiver of counsel.....	162
Waiver must be intelligently and understandingly made and will not be presumed from a silent record.....	163
Right to effective counsel.....	163
Conflict of interest.....	169
Informer in conference.....	171
Interference with right.....	171
Speedy Trial.....	171
Interstate agreement on detainees.....	174
Public Trial.....	174
Right to Jury Trial in Criminal Cases.....	176
Applicable to states.....	176
Not applicable to petty offenses.....	176
Applied if authorized penalty exceeds six months.....	177
The right to a jury trial extends to any fact that increases the maximum sentence which may be given for a particular offense.....	177
No constitutional right <i>not</i> to be tried by jury except where fair trial impossible or unlikely.....	179
Twelve-person juries not required.....	179
Unanimity of twelve not required by Federal Constitution in state cases but may be in federal cases.....	179
Unanimity of six-person jury required.....	179
Composition of jury (petite and grand).....	180
Selection of Jury.....	188
Due process and jurors with opinions: Fair trial.....	188
Prejudicial Conduct Before A Jury.....	189
Coercion of jury.....	190
Sheriff was a witness and in charge of jury. Convictions reversed.....	190
Jury Instructions.....	190
Impeaching verdict.....	194
Contempt cases (criminal).....	194
Juvenile cases.....	195
Obscenity.....	195
Military personnel.....	195
Sentence by jury.....	196
 THE EIGHTH AMENDMENT.....	 196
 Cruel and Unusual Punishment and Excessive Fines.....	 196
 DEATH PENALTY.....	 202
 Death Penalty, Manner of Execution, Addressable Under the Federal Civil Rights Act, (42 U.S.C Section 1983).....	 222

International Conventions and Treaties, Applicability to State Criminal Proceedings	223
When Ratified by the United States, Conventions and Treaties are Federal Law and applicable to the States	223
A Violation of An International Convention or Treaty Does Not Require Suppression of Evidence of Statements That May Subsequently Be Given.....	223
Holdings of the International Court of Justice Are Not Binding on Courts of the United States	223
Miscellaneous Federal-State and Due Process Problems	224
Abortion.....	225
The Crime of Conspiracy: Necessary Elements	230
First Amendment and Criminal Prosecutions.....	230
The State has a substantial interest in protecting the reputation of the bar, the regulation advances that interest and is narrowly drawn	241
There are six separate opinions leaving First Amendment law relating to content based restriction in confusion. A majority, however, would adhere to the compelling interest standard while a minority would, in the case of cable television at least, apply a more flexible balancing test and uses words such as close scrutiny and extremely important problem and extraordinary problem instead of compelling interest	242
Obscenity.....	244
Search and seizure, warrants for.....	249
Prior restraint.....	250
Lack of a substantial federal question.....	250
Vagueness and overbreadth.....	250
First Amendment Issues Right To Judicial Review	255
Pretrial.....	256
Bail.....	256
Charge requirements.....	257
Lesser included offense.	258
Detainers.....	259
Discovery.....	260
State's failure to disclose evidence likely to affect outcome of a case violates due process.....	260
Once this is found, there is no need for harmless error review because the test is the same. Also the suppressed evidence is not to be considered item by item but collectively. Prosecutors should resolve doubtful questions in favor of disclosure.....	262
Due Process violation for failure to grant discovery of confession, suggested.....	263
Discovery from defendant.....	263
Discovery from third party.....	264
Miscellaneous discovery cases.....	264
Extradition.....	265
Forfeiture.....	266
Identification procedures	269

Grand jury.....	270
Waiver of constitutional rights by defendant or his/her attorney.....	272
No waiver in some cases unless defendant participated in the decision. Duty of trial judge.....	272
Trial.....	274
Argument.....	274
Competency.....	275
To stand trial.....	275
Test—burden of proof.....	276
To waive counsel.....	276
Defenses.....	276
Entrapment.....	276
Necessity as a defense.....	277
Self-defense.....	277
Duress.....	277
Disruption of trial and contempt.....	278
Evidence.....	279
Burden of proof.....	281
Alibi.....	281
Reasonable doubt rule.....	281
False-knowing use of false evidence, or allowing it to go uncorrected after knowledge denies due process.....	285
Insanity proof.....	285
Preservation of evidence.....	286
Presumptions.....	287
Evidence of prior convictions.....	289
Privilege.....	290
Adverse spousal privilege.....	291
Sufficiency of evidence to support conviction.....	291
Expert, right to.....	292
Federal Pre-emption.....	292
Congressional Acts.....	292
Federal courts.....	293
Restraint of state prosecutions by federal courts. Abstention.....	293
Removal to federal court.....	296
Joint Trials.....	296
Composition of jury (<i>petite</i> and grand).....	297
Juvenile.....	297
Impartial judge - Independent judge - Non-lawyer judge.....	298
Inconsistent verdicts.....	298
Lesser included offenses.....	299
Publicity: Effect of pretrial and trial publicity.....	299
Sufficiency of evidence to support conviction.....	300
Venue, change of.....	300
Waiver of constitutional rights by defendant or his/her attorney.....	300
No waiver in some cases unless defendant participated in the decision. Duty of trial judge.....	300
Post-trial.....	301
Rights of accused on appeal.....	301
Free transcript for indigent on appeal or retrial.....	301
Counsel.....	302

Miscellaneous	303
Filing fee.	304
Adequate state grounds.	304
State post-conviction remedies.....	308
Equal Protection applies to post-conviction proceedings.....	308
Duty of states to provide post-conviction remedy.....	308
State cannot bar prisoner from assistance in preparing application.	308
Right to transcript.	308
Waiver of Issues	309
Federal <i>habeas corpus</i>	309
Custody.....	333
Evidentiary hearings requirement.	334
Exhaustion of state remedies.	335
Scope of <i>habeas corpus</i>	338
Discovery.	339
Retroactivity.....	339
Forfeiture.....	343
Presentence report.....	343
Probation.....	344
Sentencing.	344
Sentencing-Limitations on Appellate Review	357
Collateral Effect of a Conviction.....	358
Deportation	358
Offender Registration Laws	359
Imprisonment.	359
Fines: Imprisonment for nonpayment of fine. Violation of equal protection to hold indigent for nonpayment of fine. No bar to imprisonment for willful refusal to pay fine.	359
Prisoners and prisoners' rights	360
Commitment to mental institutions, etc., due process and equal protection	370
Supermax Prisons.....	372
Parole	373
Harmless Error Rule.....	375
Harmless error on direct review.....	375
Harmless error on <i>habeas corpus</i>	379
Violations of some constitutional rights cannot be harmless	380
Miscellaneous Problems	381
Remedies For Claims Against Public Officials	381
Federal Civil Rights Act	382
Bills of attainder.....	385
Drugs	385
Equal Protection.....	386
Holding of fragmented court, how determined	389
American Indians	389
Knowledge	394
Privacy, right to.....	395
Statute providing for posting name as forbidden to purchase liquor is invalid without notice and hearing.....	395
RICO.....	395
Summary dismissal by U.S. Supreme Court, effect of	397
Unconstitutionality of statute calling for information is no defense to perjury	398

Vagrancy..... 398
Continuing Criminal Enterprise..... 398
Ex post facto 399
Die — Right to..... 401
Facial Challenge 401
Firearms 401
Intoxication..... 402
Subject Index..... 403

FORM TO BE USED BY PRISONERS FILING A
PETITION FOR POSTCONVICTION RELIEF
UNDER MONT. CODE ANN. § 46-21-101 et seq.

NAME _____

PRISON NUMBER _____

PLACE OF CONFINEMENT _____

CRIMINAL CAUSE NUMBER _____

_____, Petitioner,
(Full Name)

v.

STATE OF MONTANA, Respondent.

Instructions

1. The petition must be neatly handwritten or typed. You must tell the truth and sign the form. If you make a false statement of a material fact you may be prosecuted for perjury.
2. You must attach affidavits, records, or other evidence establishing the facts to support your claims. You may use the FORM AFFIDAVIT IN SUPPORT OF A PETITION FOR POSTCONVICTION RELIEF or other records or evidence. Attach any documents you have that would support your claim(s).
3. You must set forth all grounds for relief known to you at this time, along with the facts that support each ground. If you fail to set forth all the grounds in this petition you may be barred from presenting additional grounds at a later date. The most common grounds are (a) ineffective assistance of trial counsel; (b) ineffective assistance of appellate counsel and (c) the prosecutor withheld exculpatory evidence.

4. You must also file a written memorandum explaining the grounds for relief. You may use the FORM MEMORANDUM IN SUPPORT OF THE PETITION FOR POSTCONVICTION RELIEF or prepare your own.
5. You are not entitled to appointment of counsel in postconviction proceedings unless you are a poor person **and** the court determines that a hearing is necessary, or that the interests of justice require appointment of counsel. If, however, you are sentenced to death you are entitled to legal representation and should request the appointment of counsel.
6. The petition must be filed in the district court in the county where you were convicted. When you have completed the forms, mail them to the clerk of the district court in the county where you were convicted. Also, mail a copy of the petition to each person listed on the Certificate of Service.
7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge judgments entered by different courts (either in this state or in different states) you have to file separate petitions.
8. You must file for postconviction relief within one year of the date your conviction becomes final. Otherwise, the court has no authority to consider it. Use the following rules to determine when a conviction is final:
 - (a) If you appealed to the Montana Supreme Court, the conviction becomes final when the time for appealing to the U.S. Supreme Court expires. This is 90 days from the date the Montana Supreme Court's opinion was issued or, if a petition for rehearing was filed, 90 days from the date rehearing was denied.
 - (b) If you did not appeal to the Montana Supreme Court, the conviction becomes final when the time for appeal expires. This is 60 days from the date the written judgment is entered.
 - (c) If you appealed to the United States Supreme Court after an appeal to the Montana Supreme Court, the conviction becomes

final on the date that the U.S. Supreme Court issues its final order in the case.

9. The only exception to the one-year filing deadline is where you have newly discovered evidence that proves you did not commit the criminal conduct for which you were convicted (see paragraph 8). In that case, the petition must be filed within one year of the date the conviction becomes final, or within one year of the date when you discover the new evidence, whichever is later.
10. You may amend your petition only once. If you need to amend your original petition, you should do so as soon as you learn of the additional grounds for relief.

PETITION FOR POSTCONVICTION RELIEF

1. I was convicted of the following criminal offense(s): _____

2. Judgment on these offenses was entered on (date) _____.
3. I received the following sentence: _____

4. Check one: () I pled guilty to these offenses
() I pled not guilty to these offenses.

NOTE: If you are asking to withdraw your guilty plea you need to use the FORM FOR PRISONERS FILING A MOTION TO WITHDRAW PLEA OF GUILTY.

5. Check one: () I appealed to the Montana Supreme Court.
() I did not appeal to the Montana Supreme Court.
6. Other than a direct appeal from the judgment of conviction, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? () Yes () No.

7. If your answer to question 6 was yes, give the following information:

Name of Court: _____

Nature of Proceeding: _____

Grounds Raised: _____

Result: _____

8. I assert that I am entitled to postconviction relief upon the following claims:

GROUND ONE: _____

SUPPORTING FACTS:

GROUND TWO: _____

SUPPORTING FACTS:

GROUND THREE: _____

SUPPORTING FACTS:

(Additional grounds and supporting facts can be stated separately and attached to this petition).

9. I have the following newly discovered evidence that proves I did not commit the criminal conduct for which I was convicted (complete this paragraph only if you missed the one-year filing deadline and are claiming that you have newly discovered evidence that proves your innocence):

10. I discovered this new evidence on (date) _____.

11. I was represented by the following attorneys:

At trial: _____

At sentencing: _____

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Postconviction Relief, along with the Affidavit in Support of Petition for Postconviction Relief and Memorandum in Support of Petition for Postconviction Relief, were served by U.S. Mail upon the following:

Montana Attorney General
P.O. Box 201401
Helena, MT 59620

County Attorney

(address)

FORM MEMORANDUM TO BE USED BY PRISONERS FILING A
PETITION FOR POSTCONVICTION RELIEF

NAME _____

PRISON NUMBER _____

PLACE OF CONFINEMENT _____

CRIMINAL CAUSE NUMBER _____

_____, Petitioner,
(Full Name)

v.

STATE OF MONTANA, Respondent.

Instructions

1. All petitions for postconviction relief must be accompanied by a legal memorandum. Mont. Code Ann. § 46-21-104(2). You may use this memorandum or create your own.
2. Below are some common claims for postconviction relief. Check those that correspond to the grounds alleged in your petition.
3. If you have other grounds for relief alleged in your petition that are not covered here, you must include an additional memorandum addressing those grounds. Additional memorandum must be legibly handwritten or typed, with appropriate arguments and citations and discussion of authorities.

MEMORANDUM IN SUPPORT OF PETITION FOR
POSTCONVICTION RELIEF

[] INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL:

Criminal defendants are entitled the assistance of counsel at trial. This right exists under the Montana Constitution, Article II, section 24, as well as the Sixth Amendment of the United States Constitution. The Montana Supreme Court has recognized that the right to counsel under the Montana Constitution is broader than the right afforded by the United States Constitution. State v. Spang, 2002 MT 120, ¶22, 310 Mont. 52, ¶22, 48 P. 3d 727, ¶22 *citing* State v. Johnson, 221 Mont. 503, 514-515, 719 P. 2d 1248, 1255 (1986); *see also* State v. Garcia, 2003 MT 211, ¶37, 317 Mont. 73, ¶37, 75 P.3d 313, ¶37.

The right to counsel means the right to effective assistance of counsel. State v. Rogers, 2001 MT 165, ¶7, 306 Mont. 130, ¶7, 32 P. 3d 724, ¶7, *citing* Strickland v. Washington, 466 U.S. 668, 686 (1984). “The effective assistance of counsel is critical to our adversarial system of justice; a lack of effective counsel may impinge the fundamental fairness of the proceeding being challenged.” State v. Henderson, 2004 MT 173, ¶4, 322 Mont. 69, ¶4, 93 P. 3d 1231, ¶4. Whether counsel’s representation is constitutionally sound is analyzed under the two-part standard from Strickland v. Washington, *supra*.

Under the first prong, a criminal defendant is denied effective assistance of counsel if: (1) his counsel’s conduct falls short of the range reasonably demanded

in light of the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. State v. Jefferson, 2003 MT 90, ¶43, 315 Mont. 146, ¶43, 69 P.3d 641, ¶43. Under the second prong, the defendant must show a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Rogers, ¶14. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome', but it does not require that a defendant demonstrate that he would have been acquitted.'" Id. (citation omitted).

Generally, the defendant must establish both prongs of the Strickland standard to prevail. State v. Jones, 278 Mont. 121, 133, 923 P.2d 560, 567 (1996). However, in some cases counsel's performance is so deficient a presumption of ineffectiveness arises and proving the second prong becomes unnecessary. United States v. Cronin, 466 U.S. 648, 660 (1984) "[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." Cronin, 466 U.S. at 661. The Montana Supreme Court has recognized that an irreconcilable conflict between attorney and client constitutes the type of situation that gives rise to a presumption of prejudice. Wilson v. State, 1999 MT 271, ¶17, 296 Mont. 465, ¶17, 989 P.2d 813, ¶17

In situations in which a conflict of interest exists between counsel and the defendant, a third test applies. In conflict of interest cases a defendant must show: (1) that counsel actively represented conflicting interests, and (2) that an actual conflict of interest adversely affected counsel's performance. State v. Christenson, 250 Mont. 351, 355, 820 P.2d 1303, 1306 (1991) (*citing* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). Where an ineffective assistance of counsel claim is based on a conflict of interest, rather than lack of reasonable competence, prejudice is presumed if the defendant satisfies both prongs of the Cuyler test. Prejudice is presumed "since the harm may not consist solely of what counsel does, but of 'what the advocate finds himself compelled to refrain from doing.'" Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994), *quoting* Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978).

Petitioner asserts that counsel was ineffective. The facts in support of this claim are set forth in the Petition for Postconviction Relief and supporting affidavit.

[] INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

In Montana, the right to counsel on appeal includes the right to effective assistance of counsel.” Hans v. State 283 Mont. 379, 408, 942 P.2d 674, 692 (1997)(citing Anders v. California, 386 U.S. 738, (1967)). Failure to preserve a defendant's right to appeal when the defendant has requested notice be filed is error. State v. Rogers, 2001 MT 165, ¶24, 306 Mont. 130, ¶24, 32 P.3d 724, ¶24 (citing Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)). Moreover, when, but for counsel's deficient performance, a defendant would have appealed, such error is prejudicial. Rogers, ¶24 (citing Roe, 528 U.S. at 484).

The remedy for the abandonment of an appeal by counsel is a petition for postconviction relief. In the petition, the defendant is allowed to raise all claims that were foreclosed by the abandonment and all claims that are typically raised in a petition for postconviction relief. Petition of Hans, 1998 MT 7, ¶19, 288 Mont. 168, ¶19, 958 P.2d 1175 ¶19. When defense counsel failed to preserve the defendant's right to appeal, the interests of justice require that counsel be appointed to assist him throughout his postconviction proceedings. State v. Adams, 2002 MT 202, ¶20, 311 Mont. 202, ¶20, 54 P.3d 50, ¶20.

Petitioner asserts that appellate counsel was ineffective for failing to preserve the right of appeal. The facts in support of this claim are set forth in the Petition for Postconviction Relief and supporting affidavit.

[FAILURE OF THE PROSECUTOR TO DISCLOSE MATERIAL
EVIDENCE.

The State has several affirmative duties to disclose evidence to a defendant. Pursuant to the Due Process Clause of the United States Constitution, the prosecution must disclose all evidence favorable to the accused that is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 86-87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Second, Montana has adopted a statutory scheme that places affirmative duties on both the State and a defendant. State v. Stewart, 2000 MT 379, ¶21, 303 Mont. 507, ¶21, 16 P.3d 391, ¶21, *citing* §46-15-322, MCA.

Unlike Brady, Montana's statutory requirements do not hinge on whether the evidence is exculpatory or inculpatory. The plain language of §46-15-327, MCA, simply mandates that the State disclose all additional information or material within the State's possession. Stewart, ¶23. The duty to discover favorable evidence, even in possession of the police or other's acting on the government's behalf, rests with the prosecutor. "But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose in good faith or bad faith (citation omitted)) the prosecution's responsibility for failing to disclose

known, favorable evidence rising to a material level of importance is inescapable.”

Kyles v. Whitley, 514 U.S. 419, 437-38. (1995).

Evidence is material if there is a reasonable probability that the result would have been different had the evidence been disclosed to the defense. Strickler v. Greene, 527 U.S. 263, 289- 90 (1999). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " Kyles, 514 U.S. at 434. Thus, the prosecutorial duty to disclose favorable material evidence encompasses impeachment evidence. United States v. Bagley, 473 U.S. 667 (1985).

Petitioner alleges that the prosecutor failed to disclose material evidence, and that there is a reasonable probability that the result would have been different had the evidence been disclosed to the defendant. The facts in support of this claim are set forth in the Petition for Postconviction Relief and supporting affidavit.

CONCLUSION

Petitioner requests that this Court order a responsive pleading from the State responding to these allegations. Petitioner further requests that the Court appoint counsel, set an evidentiary hearing, and grant postconviction relief and any other relief to which Petitioner is entitled.

AFFIDAVIT TO BE USED BY PRISONERS FILING A
PETITION FOR POSTCONVICTION RELIEF
UNDER MONT. CODE ANN. § 46-21-101 et seq.

NAME _____

PRISON NUMBER _____

PLACE OF CONFINEMENT _____

_____, Petitioner,
(Full Name)

v.

STATE OF MONTANA, Respondent.

Instructions

1. Use this affidavit to comply with Mont. Code Ann. § 46-21-104(1)(c), which requires that petitions for postconviction relief be supported by affidavits, records, or other evidence.
2. The affidavit must be legibly handwritten or typed. You must tell the truth and sign the affidavit. If you make a false statement of a material fact you may be prosecuted for perjury.
3. Attach the affidavit to your postconviction petition and follow the mailing and service instructions in the PETITION FOR POSTCONVICTION RELIEF.

DATED this ____ day of _____, 20__.

SIGNATURE: _____

SUBSCRIBED AND SWORN to before me this ____ day of

_____, 200__.

Signature notary

(SEAL)

Name – typed, stamped or printed

Notary Public for the State of Montana

Residing at _____

My commission expires _____

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY
(Convicted Montana Prisoners Only)**

Division

(You must fill in this blank. See Instruction 8.)

In the United States District Court for the District of Montana

Name of Petitioner (include name under which convicted):	Name of Respondent (authorized person having custody of petitioner, i.e. warden of prison):	
vs.		
and the Attorney General of the State of Montana		
Prisoner No.:	Place of Confinement:	Case No. (to be filled in by Clerk):

Instructions – Read Carefully

1. Use this form if you intend to challenge a judgment of a Montana State court, a decision of the Parole Board, or a decision regarding good time. If you believe a different statutory section applies, you may make that point in a memorandum in support of your petition, but please use this form and answer its questions.
2. Your petition must be legibly handwritten or typed. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury. *Answer all the questions.* You are not necessarily required to answer “yes” to all questions in order to proceed.
3. Additional pages are not permitted except with respect to grounds for relief and the facts you rely on to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum in support of the petition. *Do not insert additional grounds for relief in the memorandum.*
4. A \$5.00 filing fee is required. If you cannot afford the filing fee, you may complete a Motion to Proceed In Forma Pauperis. If you pay the filing fee when you file your petition, you may move to proceed in forma pauperis at any stage of the case. *You must pay the Clerk for copies of your petition or other court records, even if you are proceeding in forma pauperis.*
5. Only judgments entered in one county may be challenged in this petition. If you seek to challenge judgments entered by different counties, you must file separate petitions as to each county.
6. The Court may determine your claims solely on the basis of what is in this petition. You must include in the petition all grounds for relief you want the Court to review and all facts supporting such grounds for relief. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date. See 28 USC § 2244(6). Additionally, you must ordinarily first exhaust (use up) your available state court

Petition for Writ of Habeas Corpus § 2254

Petitioner's Last Name _____

Page 1 of 6

remedies as to each ground on which you request action by the federal court. The one-year federal statute of limitations, *see* 28 U.S.C. § 2244(d), is tolled while you are challenging the judgment(s) underlying this petition in *state* court in compliance with state procedural law.

7. It is helpful, though not required, to include with your original petition *one* copy of the Montana Supreme Court's opinion(s) in your case and any briefs you, your counsel, or the State filed in that court.
8. You are not required to serve this petition on the State. When you complete your petition, mail the *original* and either the full \$5.00 filing fee or a Motion to Proceed In Forma Pauperis to the Clerk of the United States District Court. If you challenge a decision of the Parole Board, file in the Helena Division. If you challenge a decision regarding good time, file in the Division where you are incarcerated. Otherwise, file in the Division where your conviction(s) arose:

Billings Division: Clerk of U.S. District Court, 316 N. 26th, Room 5405, Billings, MT 59101
(Big Horn, Carbon, Carter, Custer, Dawson, Fallon, Garfield, Golden Valley, McCone, Musselshell, Park, Petroleum, Powder River, Prairie, Richland, Rosebud, Stillwater, Sweetgrass, Treasure, Wheatland, Wibaux or Yellowstone County)

Butte Division: Clerk of U.S. District Court, 400 N. Main St., Federal Bldg. Rm. 303, Butte, MT 59701
(Beaverhead, Deer Lodge, Gallatin, Madison, or Silver Bow County)

Great Falls Division: Clerk of U.S. District Court, 215 1st Ave. North, P.O. Box 2186, Great Falls, MT 59403
(Blaine, Cascade, Chouteau, Daniels, Fergus, Glacier, Hill, Judith Basin, Liberty, Phillips, Pondera, Roosevelt, Sheridan, Teton, Toole, or Valley County)

Helena Division: Clerk of U.S. District Court, Paul G. Hatfield Courthouse, 901 Front St., Ste 2100, Helena, MT 59626
(Broadwater, Jefferson, Lewis & Clark, Meagher, or Powell County)

Missoula Division: Clerk of the U.S. District Court, 201 E. Broadway, P.O. Box 8537, Missoula, MT 59807
(Flathead, Granite, Lake, Lincoln, Mineral, Missoula, Ravalli, or Sanders County)

PETITION

1. Name and location of the court that entered the judgment under attack:
2. Date of judgment:
3. What were you convicted of? (all counts):
4. What sentence was imposed?:
5. What was your plea?
 - (a) Not guilty
 - (b) Guilty
 - (c) Nolo contendere or *Alford*

Petitioner's Last Name _____

If you pleaded guilty, nolo contendere, or entered an *Alford* plea on all counts, or if you entered such a plea on one or more counts and all other counts were dismissed, go to Number 8. If you entered a guilty plea to one charge, and maintained a not guilty plea on another charge, give details:

6. If you pleaded not guilty, what kind of trial did you have?

Jury

Judge only

7. If you pleaded not guilty, did you testify at trial?

Yes

No

8. Did you appeal your conviction or sentence to the Montana Supreme Court?

Yes →Case Number and Date of Result: _____

No (please attach a copy of the decision)

9. Did you apply for relief to the Sentence Review Division?

Yes →Case Number and Date of Result: _____

No (please attach a copy of the decision)

10. Did you file a petition for certiorari in the United States Supreme Court?

Yes →Case Number and Date of Result: _____

No (please attach a copy of the decision)

11. Have you filed or had filed in state district court one or more petitions for postconviction relief?

Yes →Date of Filing _____

No

12. Did you appeal to the Montana Supreme Court from any adverse decision by the state district court on a petition for postconviction relief?

Yes →Case Number(s) and Date of Result(s): _____

No (please attach a copy of the decision(s))

13. If you did not appeal to the Montana Supreme Court from the state district court's adverse action on any of your petitions for postconviction relief, explain briefly why you did not:

14. Have you previously filed in the Montana Supreme Court one or more petitions for writ of habeas corpus?

Yes →Case Number(s) and Date of Result(s): _____

No (please attach a copy of the decision(s))

15. State *concisely* every ground on which you challenge the fact or duration of your confinement. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional facts and/or grounds for relief.

Petitioner's Last Name _____

A. Ground One: _____

(1) Supporting FACTS (do not argue or cite law): _____

(2) Did you raise this issue in the Montana Supreme Court on direct appeal from your conviction in state court?

- Yes
No

If Yes, what did the Montana Supreme Court decide (check one or both)?

- Dismissed issue on procedural grounds
Denied issue for lack of merit

(3) Did you raise this issue in the Montana Supreme Court in an appeal from the state district court's denial of postconviction relief or in a petition for writ of habeas corpus in the Montana Supreme Court?

- Yes → Case Number(s) and Date of Result(s): _____
No (please attach a copy of the decision(s))

If Yes, what did the Montana Supreme Court decide (check one or both)?

- Dismissed issue on procedural grounds
Denied issue for lack of merit

(4) Did you ask the Montana Supreme Court to consider federal law in its decision?

- Yes
No

(5) If your answer to any of (2), (3), or (4) is No, explain why you did not raise this issue in the Montana Supreme Court: _____

B. Ground Two: _____

(1) Supporting FACTS (do not argue or cite law): _____

Petitioner's Last Name _____

-
-
- (2) Did you raise this issue in the Montana Supreme Court on direct appeal from your conviction in state court?
Yes
No

If Yes, what did the Montana Supreme Court decide (check one or both)?

- Dismissed issue on procedural grounds
Denied issue for lack of merit

- (3) Did you raise this issue in the Montana Supreme Court in an appeal from the state district court's denial of postconviction relief or in a petition for writ of habeas corpus in the Montana Supreme Court?

Yes → Case Number(s) and Date of Result(s): _____
No (please attach a copy of the decision(s))

If Yes, what did the Montana Supreme Court decide (check one or both)?

- Dismissed issue on procedural grounds
Denied issue for lack of merit

- (4) Did you ask the Montana Supreme Court to consider federal law in its decision?

Yes
No

- (5) If your answer to any of (2), (3), or (4) is No, explain why you did not raise this issue in the Montana Supreme Court: _____

If you have additional grounds for relief, attach extra sheets. Set forth five subparagraphs for each additional ground for relief and answer each of questions (1) thru (5) for each additional ground for relief.

16. Do you have any action or appeal now pending in any court, state or federal, as to the judgment(s) or decision(s) you challenge in this Petition?

Yes → Case Number and Date of Filing: _____
No Name of Court: _____

If Yes, what issues do you raise in that case? _____

-
-
17. Give the name, and address if known, of each attorney who represented you in the following stages of any judgment(s) you challenge in this Petition:

(a) At change of plea hearing or at trial (whichever is applicable):

Petitioner's Last Name _____

(b) At sentencing:

(d) On appeal:

(e) In any post-conviction proceeding in state district court: Self-Represented

(f) On appeal from any adverse ruling in a post-conviction proceeding: Self-Represented

(g) In any state habeas proceeding: Self-Represented

18. Petitioner asks the Court to grant the following relief: _____

_____ and/or any other relief to which Petitioner may be entitled.

Signature of Attorney (if any)

Petitioner's Declaration

A. I understand that I must keep the Court informed of my current mailing address and that my failure to do so may result in dismissal of this Petition without actual notice to me.

B. I understand that submission of a false statement or answer to any question in this Petition may subject me to penalties for perjury. I, the Petitioner in this action, declare under penalty of perjury that I have read the above Petition and that the information I have set forth in it is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

C. This Petition was deposited in the prison system for legal mail, postage prepaid or paid by the prison, on _____, 20_____.

Signature of Petitioner

Date Signed

**MOTION UNDER 28 U.S.C. § 2255
FOR FEDERAL PRISONERS
(Persons Sentenced in the District of Montana Only)**

_____ **Division**¹

In the United States District Court for the District of Montana

Name: vs. United States of America	BOP No.:	Cause No. : CR _____
Place of Confinement and Mailing Address: 		

Instructions – Read Carefully

- (1) Use this form only if you intend to challenge a conviction or sentence entered in the United States District Court for the District of Montana. There is no filing fee. If you cannot pay certain costs of this motion, such as attorney fees, transcript costs, or any fee for filing an appeal, you may move to proceed in forma pauperis. You may do so at any stage of the proceedings. A form is available on request. **If you had court-appointed counsel in your criminal case, you do not need to reapply to proceed in forma pauperis in the District Court.**
- (2) Your motion must be typed or legibly handwritten. You must answer all the questions. You must tell the truth. You must sign the form under penalty of perjury or, if you are represented by counsel, counsel must sign the motion.
- (3) Additional pages are not permitted except with respect to grounds for relief and the facts you rely on to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted separately in the form of a brief in support of the motion. *Do not insert additional grounds for relief in your brief.*
- (4) Only judgments entered in one case or in consolidated cases may be challenged in a single motion. If you seek to challenge judgments entered in more than one case and those cases were not consolidated, you must file separate motions as to each case.
- (5) The Court may determine your claims solely on the basis of what is in the motion. Therefore, you must include

¹ You must fill in this blank. See Instruction No. 6.

Defendant-Movant's Last Name _____

in the motion all grounds for relief you want the Court to review and all facts supporting such grounds for relief.

(6) When you complete your motion, mail the original (no copies are required) to the Clerk of the United States District Court in the Division where your conviction(s) arose:

Billings Division: Clerk of U.S. District Court, 316 N. 26th, Room 5405, Billings, MT 59101

Butte Division: Clerk of U.S. District Court, 400 N. Main St., Federal Bldg. Rm. 303, Butte, MT 59701

Great Falls Division: Clerk of U.S. District Court, 215 1st Ave. North, P.O. Box 2186, Great Falls, MT 59403

Helena Division: Clerk of U.S. District Court, 901 Front St., Ste 2100, Helena, MT 59626

Missoula Division: Clerk of the U.S. District Court, 201 E. Broadway, P.O. Box 8537, Missoula, MT 59807

**Motion to Vacate, Set Aside, or Correct the Sentence
Under 28 U.S.C. § 2255**

1. Date written judgment was entered:

2. What sentence was imposed?

3. Nature of offense involved (all counts):

4. What was your plea?
 - (a) Not guilty
 - (b) Guilty
 - (c) Nolo contendere or *Alford*

If you pleaded guilty, nolo contendere, or entered an *Alford* plea on all counts, or if you entered such a plea on one or more counts and all other counts were dismissed, go to Number 7. If you entered a guilty plea to any count(s) and maintained a not guilty plea to any other count(s), give details:

5. If you pleaded not guilty, what kind of trial did you have?
Jury
Judge only
6. If you pleaded not guilty, did you testify at the trial?
Yes
No
7. Did you appeal to the Ninth Circuit Court of Appeals?
Yes
No (if No, go to Number 9)

Defendant-Movant's Last Name _____

(a) If Yes, grounds raised:

(b) Result, date of result, and citation if known:

(c) Were you represented by counsel?

Yes

No

(d) Did counsel file an *Anders* brief or tell the Court of Appeals that there was no non-frivolous issue to appeal?

Yes

No

8. Did you file a petition for certiorari in the United States Supreme Court?

Yes

No (if No, go to Number 9)

(a) If Yes, date filed:

(b) Result, date, and citation if known:

9. Have you previously filed or have you ever been deemed to have filed a motion under § 2255 in this case?

Yes

No (if No, go to Number 10)

(a) If Yes, have you received authorization from the Ninth Circuit Court of Appeals to file a second or successive motion?

Yes

No

(b) Date authorization received:

(c) Ninth Circuit case number:

Please attach a copy of the Ninth Circuit's order.

10. Have you previously filed in any federal court any petition for writ of habeas corpus relating to the sentence you challenge in this motion?

Yes

No (if No, go to Number 11)

(a) If Yes, date filed:

(b) Name of court where petition was filed and case number:

(c) Grounds raised in your petition:

(d) Court's decision and date:

11. Have you previously filed with the Bureau of Prisons any request related to the execution of the sentence you challenge in this motion?

Yes

No (if No, go to Number 12)

Defendant-Movant's Last Name _____

Motion Under 28 U.S.C. § 2255

Page 3 of 6

(a) If Yes, nature of your request:

(b) Grounds raised:

(c) Result, date of decision, and job title of the person who made the decision:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional facts and/or grounds for relief. CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date. Additionally, a one-year statute of limitations applies to your case. *See* 28 U.S.C. § 2255 para. 6.

A. Ground One: _____

(1) Supporting FACTS (state briefly without citing cases or law): _____

(2) Did you raise this ground for relief in your direct appeal?

Yes

No

If Yes, why should the Court of Appeals' decision not be followed by this Court? _____

If No, why didn't you raise this ground for relief in your direct appeal? _____

B. Ground Two: _____

(1) Supporting FACTS (state briefly without citing cases or law): _____

Defendant-Movant's Last Name _____

(2) Did you raise this ground for relief in your direct appeal?

- Yes
No

If Yes, why should the Court of Appeals' decision not be followed by this Court? _____

If No, why didn't you raise this ground for relief in your direct appeal? _____

If you have additional grounds for relief, attach extra pages. Set forth two subparagraphs for each additional ground for relief and answer each of questions (1) and (2) for each additional ground for relief.

13. **Timeliness of Motion.** Generally, you have one year from the date on which your conviction became final to file a motion under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255 para. 6. If your conviction became final more than one year ago, attach a page explaining why the statute of limitations should not bar your motion.

If you did not pursue a direct appeal, your conviction became final ten business days after the entry of written judgment. If you appealed but did not file a petition for *certiorari*, your conviction became final ninety calendar days after the Court of Appeals rendered its decision in your case. If you filed a petition for *certiorari*, your conviction became final on the date *certiorari* was denied or, if the Supreme Court heard your case, on the date it rendered its decision. *See generally Dodd v. United States*, 125 S.Ct. 2478 (2005); *Clay v. United States*, 537 U.S. 522 (2003). Your deadline for filing a motion under § 2255 is generally one year from the date your conviction became final. If that day is a weekend day or a holiday, you must file your motion on the next business day.

14. Give the name of each attorney who represented you in the following stages of the judgment(s) you challenge in this Motion:

(a) At change of plea hearing, if applicable:

(b) At trial, if applicable:

(c) At sentencing:

(d) On appeal:

Self-Represented

(e) In any proceeding commenced after your appeal was decided:

Self-Represented

Defendant-Movant's Last Name _____

WHEREFORE, Defendant-Movant prays that the Court grant relief to which s/he may be entitled in this proceeding.

Signature of Attorney (if any)

Movant's Declaration (if not represented by counsel)

- A. I understand that I must keep the Court informed of my current mailing address and that my failure to do so may result in dismissal of this Motion without actual notice to me.
- B. I understand that submission of a false statement or answer to any question in this Motion may subject me to penalties for perjury. I, the Movant in this action, declare under penalty of perjury that I have read the above Motion and that the information contained in the Motion is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.
- C. This Motion was deposited in the prison system for legal mail, postage prepaid or paid by the prison, on

_____ [date].

Signature of Movant

Date Signed

Rev'd April 2009

Defendant-Movant's Last Name _____