

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: _____

On appeal: _____
Petitioner prays that the court incorporate the criminal case file, appoint
counsel, order the State to respond, set an evidentiary hearing, and grant any other
relief to which Petitioner is entitled.

VERIFICATION

STATE OF MONTANA)
 : ss.
County of _____)

I, the petitioner above named, states as follows:

I have read the foregoing petition for postconviction relief and know the
contents thereof, and the same is true of my own knowledge, information and
belief.

DATED this _____ day of _____, 20____.

(Signature of Petitioner)

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 _____