

# **Postconviction Relief in Montana**

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# **Statutory Provisions**

*Mont Code Ann.*

§ 46-21-101 through § 46-21-201



## Remedy

- ▶ Statutory, not constitutional, remedy designed to address any issues relating to conviction or sentence, that could not be raised on direct appeal, specifically including claims alleging ineffective assistance of counsel (IAC) at both trial and appellate levels.
- ▶ Postconviction relief (PCR) is not a substitute for direct appeal. *Hardin v. State*, 2006 MT 272, ¶ 16;

# **Pleading Requirements**

## **§ 46-21-104(1) & (2)**

- Must identify the proceeding in which the petitioner was convicted, give the date of final judgment, and clearly set forth the alleged violation or violations;
- Must identify any previous proceedings that the petitioner may have taken to secure relief from conviction (*i.e.*, direct appeal);
- Must identify all facts supporting the grounds for relief in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts



# **Pleading Requirements**

## **§ 46-21-104(1) & (2)**

- Must be accompanied by a supporting memorandum, including the appropriate legal arguments and citations and discussion of authorities;
- Must be verified: A petition is verified when the petitioner confirms or substantiates the allegation therein by oath or affidavit.

*State v. Hansen*, 1999 MT 226.

# Appointment of Counsel

- ▶ Petition must be filed before the court can appoint counsel. *OPD v. 13<sup>th</sup> Jud. Dist. Ct.*, 2007 MT 333, ¶ 3-4; *Davis v. State*, 2008 MT 226, ¶ 14;
- ▶ Appointment of counsel is not the norm in non-death penalty cases. *Dillard v. State*, 2006 MT 328;
- ▶ Mont. Code Ann. § 46-21-201(2): A petitioner is only entitled to appointed counsel if a hearing will be held or if the interests of justice require it. *Dillard*, ¶ 16 (explanation of when interests of justice require appointment);
- ▶ If the District Court holds a hearing without appointing counsel, it is reversible error. *Swearingen v. State*, 2001 MT 10.



# Appointment of Counsel

- ▶ If a petitioner is appointed counsel in PCR, petitioner does not have the right to file documents pro se. *State v. Harvey*, 219 Mont. 402, 713 P. 2d 517 (1986).
- ▶ Although there is no 6<sup>th</sup> Amendment right to counsel in PCR proceedings, and, therefore, no 6<sup>th</sup> Amendment claim of IAC arising from PCR, in federal habeas proceedings, if the petitioner did not have counsel appointed, or, if counsel was appointed and was ineffective, petitioner may be excused from a procedural default. *Martinez v. Ryan*, 566 U.S. 1 (2012).

# Discovery

## Mont. Code Ann. § 46-21-201(4)

- ▶ Requires leave of the court supported by good cause or agreement of the parties;
- ▶ Can only be used in the manner that the court has ordered or to which the parties have agreed;
- ▶ Postconviction proceedings are not a fishing expedition or discovery device in which a petitioner, through broad allegations in a verified petition, may establish his right to an evidentiary hearing. *Robinson v. State*, 2010 MT 108, ¶ 18.



# Evidentiary Hearing

## Mont. Code Ann. § 46-21-201(5)

- ▶ District Court has discretion whether to hold an evidentiary hearing;
- ▶ A hearing is only required if the petitioner has alleged facts that, if proven, would entitle him or her to relief and which cannot be decided on the basis of the record;  
*State v. Hanson*, 1999 MT 226;

# Evidentiary Hearing

## Mont. Code Ann. § 46-21-201(5)

- ▶ A petitioner does not have an absolute right to be present at an evidentiary hearing. Again, this is a matter for the District Court's discretion;
- ▶ The District Court may receive proof of facts through affidavits, depositions, oral testimony, or other evidence;
- ▶ Petitioner may not raise new claims at the evidentiary hearing.  
*Stevens v. State*, 2007 MT 137, ¶¶ 8-12.



# Initial Review of PCR Petition

*Identify which subsection petitioner is filing under*

▶ **Mont. Code Ann. § 46-21-102(1)**

Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final.

▶ **Mont. Code Ann. § 46-21-102(2)**

A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

## **Mont. Code Ann. § 46-21-102(1)**

### ▶ **Identify the Claims**

The petitioner has the burden of proving, by a preponderance of the evidence, that he or she is entitled to relief. *Herman v. State*, 2006 MT 7, ¶ 44.

### ▶ **Identify the Defenses**

- Timeliness
- Procedural Bars
- Failure to State a Claim
- Successive Petition
- Waiver by guilty plea



# Mont. Code Ann. § 46-21-102(1)

## Defenses:

- ▶ **Timeliness**
- ▶ **Procedural Bars**
- ▶ **Failure to State a Claim**
- ▶ **Successive Petition**
- ▶ **Waiver by guilty plea**

# Mont. Code Ann. § 46-21-102(1) Defenses: Timeliness

- ▶ One-Year Time Bar from date conviction becomes final.
  - Applies to persons convicted after April 24, 1997; *Wright v. State*, 2001 MT 247, ¶ 10.
  - If convicted prior to that date, the 5-year time bar applies; *Beach v. State*, 2009 MT 398, ¶¶ 22-23.



# **Mont. Code Ann. § 46-21-102(1)**

## **Defenses: Timeliness**

- ▶ Conviction becomes final for the purpose of PCR when:
  - The time for appeal to the Montana Supreme Court expires;
  - If an appeal is taken to the Montana Supreme Court, the time for petitioning the United States Supreme Court for review expires; or
  - If review is sought in the United States Supreme Court, on the date that that court issues its final order in the case.

# Mont. Code Ann. § 46-21-102(1)

## Defenses: Timeliness

### Calculating when the year time period begins:

- ▶ **Time for appeal to Montana Supreme Court**
  - 60 days from entry of judgment.  
Mont. R. App. P. 4(5)(b).
- ▶ **Time for Petitioning SCOTUS after MT S. CT Appeal**
  - 90 days from date opinion is issued, not when remittitur is issued. *Raugust v. State*, 2003 MT 367, ¶ 15.
  - If timely filed petition for rehearing, the 90-days runs from the date the petition is denied or, if granted, the date the subsequent opinion is issued. Sup. Ct. R. 13(3)
- ▶ **If appealed to SCOTUS**
  - 90 days runs from either date the Court denied petition for certiorari or date the Court issued its final opinion/order



# **Mont. Code Ann. § 46-21-102(1)**

## **Defenses: Timeliness**

### **Tolling the Time Period**

- ▶ The court can toll the time bar on narrow equitable grounds;
  - Fundamental Miscarriage of Justice

# Mont. Code Ann. § 46-21-102(1)

## Defenses:

- ▶ Timeliness
- ▶ **Procedural Bars**
- ▶ Failure to State a Claim
- ▶ Successive Petition
- ▶ Waiver by guilty plea



## **Mont. Code Ann. § 46-21-105(2)**

### **Defenses: Procedural Bars**

- ▶ Postconviction claims are barred if the issue was or reasonably could have been raised on direct appeal

## **Mont. Code Ann. § 46-21-105(2)**

### **Defenses: Procedural Bars**

- ▶ **Applicability:** When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered or decided in postconviction proceedings.
- ▶ **Grounds for relief include all legal and factual issues there were or could have been raised in the trial court or on appeal in support of the petitioner's claims for relief.**  
**Mont. Code Ann. § 46-21-105(3)**



## **Mont. Code Ann. § 46-21-105(2)**

### **Defenses: Procedural Bars**

- ▶ The procedural bar also applies to issues that were not properly preserved for appeal at the trial court level. *Adgerson v. State*, 2007 MT 336, ¶ 11 (overruled in part on other grounds by *Whitlow v. State*, 2008 MT 140, ¶ 18 n.4; *State v. Evert*, 2007 MT 30, ¶¶ 15-16.)
- ▶ Issues that actually were resolved on direct appeal may not be raised, considered, or decided in a postconviction action. Mont. Code Ann. § 46-21-105(2); *Beach v. Day*, 275 Mont. 370, 913 P.2d 622 (1996); *State v. Pendergrass*, 281 Mont. 129, 932 P.2d 1056 (1997); *But see, Kills on Top v. State*, 279 Mont. 384, 928 P.2d 182 (1996); *Byers v. Mahoney*, 279 Mont. 28, 929 P.2d 202 (1996)

# **Mont. Code Ann. § 46-21-102(1)**

## **Defenses:**

- ▶ **Timeliness**
- ▶ **Procedural Bars**
- ▶ **Failure to State a Claim**
- ▶ **Successive Petition**
- ▶ **Waiver by guilty plea**



## **Mont. Code Ann. § 46-21-102(1) Defenses: Fail to State a Claim**

- ▶ **Pleading requirements.** Mont. Code Ann. § 46-21-104; “unlike civil complaints, the postconviction statutes are demanding in their pleading requirements.” *Kelly v. State*, 2013 MT 21, ¶ 9.
- ▶ **Conclusory allegations.** Mont. Code Ann. § 46-21-104(1)(c): “a petition for postconviction relief must be based on more than mere conclusory allegations.” *Kelly v. State*, 2013 MT 21, ¶ 9; *Griffin v. State*, 2003 MT 267, ¶ 11;
- ▶ **Statutory requirements.** Mont. Code Ann. 46-21-104(1) and (2)

# Mont. Code Ann. § 46-21-102(1)

## Defenses:

- ▶ Timeliness
- ▶ Procedural Bars
- ▶ Failure to State a Claim
- ▶ **Successive Petition**
- ▶ Waiver by guilty plea



## **Mont. Code Ann. § 46-21-102(1) Defenses: Successive Petitions**

- ▶ **§ 46-21-105(1)(a):** All grounds for relief must be raised in the original or amended original petition
- ▶ **§ 46-21-105(b):** The district court shall dismiss a second or subsequent petition by a person who has filed an original petition ***unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or amended original petition;***  
*Blaney v. Gamble*, 266 Mont. 51, 871 P.2d 51 (1994)

# Mont. Code Ann. § 46-21-102(1) Defenses: Successive Petitions

- ▶ *State v. Root*, 2003 MT 149, ¶ 14: The way is left open for a subsequent petition if the district court finds grounds for relief that could not reasonably have been raised in the original or original amended petition;
- ▶ A district court judge has the discretion to set a deadline for filing an amended petition: *Sellner v. State*, 2004 MT 205, ¶ 14; *Bullman v. State*, 2014 MT 78.



## **Mont. Code Ann. § 46-21-102(1)**

### **Defenses:**

- ▶ **Timeliness**
- ▶ **Procedural Bars**
- ▶ **Failure to State a Claim**
- ▶ **Successive Petition**
- ▶ **Waiver by guilty plea**

## **Mont. Code Ann. § 46-21-102(1) Defenses: Waiver (Guilty Plea)**

- ▶ When a criminal defendant voluntarily and knowingly enters a guilty plea, he waives the right to appeal all nonjurisdictional defects which occurred prior to entry of the plea, including claims of constitutional violations. After entering such a plea, the defendant can only challenge the voluntary character of his plea.

▶ *Hardin v. State*, 2006 MT 272, ¶ 23;  
*Slavin v. State*, 2006 MT 306; *Hagan v. State*, 265 Mont. 31, 873 P.2d 1385 (1994);



## **Mont. Code Ann. § 46-21-102(1) Defenses: Waiver (Guilty Plea)**

- ▶ A defendant may challenge the voluntariness of a guilty plea either in a postconviction relief petition or in a motion to withdraw a guilty plea. Both methods are subject to a one-year deadline.
- ▶ Mont. Code Ann. § 46-21-102(1) (PCR petition); Mont. Code Ann. 46-16-105(2) (motion to withdraw plea).

## **Mont. Code Ann. § 46-21-102(1)**

### **Options available to the district court:**

- ▶ Summarily dismiss petition
- ▶ Order the State to file a response
- ▶ Allow discovery
- ▶ Order an evidentiary hearing



# Mont. Code Ann. § 46-21-102(1)

## Exception to Defenses

### ▶ Exception to Time Bar:

Fundamental miscarriage of justice is based upon a claim of ACTUAL innocence, NOT legal innocence (See *Redcrow*, 1999 MT 95; *Beach v. State*, 2013 MT 130);

### ▶ Reasons:

- presumption of guilt after conviction
- societal interest in finality of convictions

### ▶ Forms of Actual Innocence Claim:

1. Procedural
2. Substantive

**Mont. Code Ann. § 46-21-102(1)**  
**Procedural Claim**  
**of Actual Innocence**

- ▶ *There was error in my trial and I now have new, reliable evidence to show that it would be a miscarriage of justice to leave my conviction in tact in light of the new evidence and a trial that was not free of constitutional error.*
  - *Schlup v. Delo, 513 U.S. 298 (1995),*  
Petitioner must show that, in light of the new evidence that no reasonable juror would have found him guilty;



# Mont. Code Ann. § 46-21-102(1)

## Procedural Claim of Actual Innocence

- ▶ **The standard/burden of proof:**
  - ▶ Petitioner must show that assuming a constitutional violation and in light of the new, reliable evidence no reasonable juror would have found beyond a reasonable doubt that the petitioner was guilty;
- ▶ **If meet burden:** petitioner can litigate the underlying, untimely constitutional claim
- ▶ **Case examples:** *State v. Pope*; 2003 MT 330, *Beach v. State*, 2009 MT 398, *Beach v. State*, 2013 MT 130

**Mont. Code Ann. § 46-21-102(1)**  
**Substantive Claim**  
**of Actual Innocence**

- ▶ *There was no error in my trial but I have new evidence that establishes that I did not commit the offense.*
  - *Herrara v. Collins, 513 U.S. 298 (1995)*



# Mont. Code Ann. § 46-21-102(1)

## Substantive Claim of Actual Innocence

- ▶ **The Standard/Burden of Proof:**
  - ▶ Petitioner must show by clear and convincing evidence that no reasonable jury would have found him guilty of the offense.  
*Beach v. State*, 2009 MT 398, ¶ 44.
- ▶ **If meet burden:** Petitioner goes free

# Mont. Code Ann. § 46-21-102(1)

## Exceptions to Procedural Bar

- ▶ The petitioner shows that failure to review his claim will result in a fundamental miscarriage of justice
- ▶ The claim is not record based and could not have been raised on direct appeal:
  - ▶ Most ineffective assistance of counsel (IAC) claims See *State v. Upshaw*, 2006 MT 341, ¶ 33, 335 Mont. 162, 153 P.3d 579; *State v. White*, 2001 MT 149, 306 Mont. 58, 30 P.3d 340 for discussion on record based vs. non-record based claims
  - ▶ See *State v. Phillips*, 2007 MT 117, ¶ 15, 337 Mont. 248, 159 P.3d 1078 (procedural bar not applied where petitioner did not become aware that his tribal court considered by the sentencing court had been “illegally released” until after the time for appeal has lapsed.
- ▶ Issue raised on direct appeal but not decided



## **Mont. Code Ann. § 46-21-102(1) Exceptions to Procedural Bar**

- ▶ When non-record-based claims are improperly asserted on direct appeal, the MSC routinely defers such claims to a postconviction relief proceeding without procedurally barring them under Mont. Code Ann. § 46-21-105(2), the prohibits consideration of claims which were raised on direct appeal

# Mont. Code Ann. § 46-21-102(2)

## Subsection (2)

“A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.”

- ▶ **What does subsection (2) mean?**
  - ▶ Legislative history
  - ▶ *Beach v. State*, 2013 MT 130
  - ▶ *Marble v. State*, 2015 MT 242



## **Mont. Code Ann. § 46-21-102(2)**

**Important things to remember about a petitioner's claimed new evidence**

- ▶ The evidence must really be new:  
*Oatman v. State*, 2004 MT 360, ¶ 13;
- ▶ The evidence must be reliable;
- ▶ The evidence must be considered in light of the evidence presented at trial;
- ▶ The evidence must establish that the petitioner did not commit the offense of which he was convicted:  
*Marble v. State*, 2015 MT 242.

## **Mont. Code Ann. § 46-21-102(2)**

**Another important thing to remember about a petitioner's claimed new evidence**

- ▶ The petitioner must have filed his petition within **one year** of discovery of the new evidence or within one year of when he reasonably should have discovered the new evidence;
  - **If the petitioner fails to do so then presumably the petitioner must meet the fundamental miscarriage of justice exception under subsection (1) by producing new, reliable evidence of either procedural or substantive actual innocence**



# THOUGHTS TO CONSIDER

- ▶ Every aspect of the criminal justice system requires a balancing of rights
- ▶ The judiciary is charged with balancing those rights at every phase of the criminal justice system
- ▶ Our postconviction statutes reflect the balancing of finality of convictions and the ability to address the rare case of convicting a person who is actually innocent
- ▶ Finality of convictions is an important principle of our criminal justice system. Our present system values finality of convictions while still offering safety valves recognizing the possibility of convicting a person who is actually innocent
- ▶ The standard under Mont. Code Ann. 46-21-102(2) is warranted
- ▶ Obtaining a ruling for a new trial through a postconviction proceeding does not equate to being innocent
- ▶ It is often impossible to retry a person because of the passage of time
- ▶ The term exoneration has different meaning for different people and can result in confusion if the speaker and listener have different definitions
- ▶ The significance of DNA evidence varies from case to case – in some cases it can establish actual innocence in other cases it is inconsequential but can be used in a manner that is misleading

