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POST-CONVICTION RELIEF IN MONTANA

Jeffrey T. Renz*

I. INTRODUCTION

One commonly hears complaints about endless criminal appeals. Duncan McKenzie has been on Montana's death row since 1975. His direct and post-conviction appeals take up thirteen entries in the Montana Digest, and these are only a partial listing. When I attended the NAACP Legal Defense Fund conference on capital litigation in 1991, I commented that while Montana had added some prisoners to death row, the Ninth Circuit Court of Appeals seems to treat its cases as if they arrived with a presumption of error. A former law clerk from the Ninth Circuit told me after the meeting that my analysis was accurate.

McKenzie and other capital and non-capital prisoners are entitled to seek relief in Montana state courts by means of the Montana Post-Conviction Hearing Act (MPCHA). Since 1967, Montana has developed a substantial body of case law interpreting and applying the MPCHA. No one has compiled this body of law into a coherent description of the rules applied in post-conviction cases. Moreover, I do not intend to engage in an in-depth analysis of post-conviction relief for death row prisoners. Capital litigation is as rare and specialized as antitrust litigation. Rather, I intend to review and describe Montana's post-conviction jurisprudence. However, this Article will reveal some of the reasons why Montana's capital prisoners seem to enjoy endless appeals.

Once convicted, prisoners' litigation does not necessarily end with their first, direct appeal. They may exercise both federal and state post-conviction remedies. The criminal defense bar must understand the scope of these remedies, how they interrelate, and how actions at the trial level and on direct appeal will affect resort to post-conviction remedies. This Article reviews the history and background of the MPCHA. It then discusses the procedural rules found in the MPCHA and in the case law interpreting it. The Article briefly discusses the relationship between state post-conviction relief and federal habeas corpus and the federal doctrines of ex-

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haustion and procedural default based on independent and adequate state grounds. After reviewing Montana's treatment of claims of waiver, the Article suggests that because Montana does not apply a consistent waiver rule, federal courts are unlikely to apply the doctrine of independent and adequate state grounds when that defense is raised to a petition for writ of habeas corpus. The Article reaches the same conclusion with respect to Montana's application of the MPCHA's statute of limitations. Finally, the Article discusses the current status of the writ of habeas corpus in Montana.2

II. A Brief History of Post-Conviction Relief

Prior to 1967, post-conviction relief was available through various common law writs, including the writ of habeas corpus and the writ of error coram nobis. For nearly a century, the Territorial Supreme Court and the Montana Supreme Court limited the writ of habeas corpus largely to its usage at common law. This circumstance continued until the 1950s and 1960s when post-conviction litigation increased exponentially.3 The Montana Supreme Court began to expand the scope of the common law writs to accommodate the demand,4 even accepting writs unknown at common law.5

The writ of error coram nobis became the preeminent means of presenting post-conviction issues to the court, as it continued efforts to limit the writ of habeas corpus to its common law uses.6 The writ of error coram nobis was employed to bring to the court's attention a fact, unknown to the court, that, if it had been known, would have warranted a different result.7 Among the various states,
the writ was used after conviction where mob violence or other means had induced an involuntary guilty plea, the prosecution had purposely used perjured testimony, the defendant was insane at the time of trial or plea if the issue was not before the court at the time, the prosecution had withheld mitigating or exculpatory evidence, the court had not been apprised of the defendant's young age (where it would have deprived the court of jurisdiction), the accused had been denied counsel, and improprieties had occurred in jury selection (such as exclusion of jurors on the basis of race).

The Montana Supreme Court accepted writs of error coram nobis reluctantly, complainig that inmates were too eager to employ them. Nevertheless, the Montana Supreme Court accepted cases that raised issues that normally would have been addressed on appeal, although inmates had failed to seek a direct appeal in their case. Soon an inconsistent body of law began to develop in which the court would address the merits in one case and dismiss another on procedural grounds, notwithstanding the absence of procedural differences between them. As early as 1956, Professor Edwin Briggs noted that both the writ of habeas corpus and the writ of error coram nobis were poor ways to present questions of constitutional error.

731 (9th Cir. 1968); Larry W. Yackle, Postconviction Remedies § 8 (1981).
8. Kansas v. Calhoun, 32 P. 38 (Kan. 1893); Sanders v. Indiana, 85 Ind. 318 (1883).
10. In re Adler, 35 Ark. 517 (1880).
11. Id.
14. Fondren v. Mississippi, 199 So. 2d 625 (Miss. 1967).
16. Bubnash v. State, 139 Mont. 639, 366 P.2d 867 (1961) (hearing on merits claims of prejudiced judge, malfeasance by bailiff, illegal arrest, interference with jury, denial of bail, unprepared attorney); Davis I, 141 Mont. 565, 380 P.2d 880; In re Lowery, 142 Mont. 616, 386 P.2d 76 (1963) (per curiam) (addressing multiple claims of denial of rights and concluding that they must lack merit solely because the defendant had counsel); In re McGrath, 143 Mont. 397, 390 P.2d 452 (1964) (per curiam) (hearing claims of illegal search, involuntary plea, denial of right to subpoena witnesses, and others on merits although the defendant had pleaded guilty).
17. Compare the cases cited supra note 16 with, for example, Alden, 143 Mont. 457, 391 P.2d 701 (deeming waived claims of illegal arrest, but hearing claims of trial errors); In re Brown, 142 Mont. 620, 386 P.2d 73 (1963) (denying petition due to passage of three-and-one-half years since conviction); In re Jones, 142 Mont. 619, 386 P.2d 74 (1963) (per curiam) (dismissing claims of illiteracy, illegal search, and new alibi evidence because they had not been raised by motion for new trial).
18. Edwin Briggs, "Coram Nobis"—Is It Either an Available or the Most Satisfactory
Montana was not the only state to recognize these difficulties. Other states were wrestling with the same issues. In 1949, Illinois decided to write a post-conviction hearing act from scratch. Following adoption of post-conviction hearing acts by Illinois, North Carolina, and the United States, the National Conference of Commissioners on Uniform State Laws met and adopted a uniform act to provide for post-conviction relief. The Uniform Post-Conviction Procedure Act (UPCPA) was designed to combat shortcomings in post-conviction procedures. The Commissioners recognized that a multiplicity of common law writs, together with varying rules for their use, tended to defeat prisoners' efforts to correct convictions and sentences obtained in violation of state and federal law. The Commission was aware that many petitions for post-conviction relief were frivolous or otherwise lacked merit. The Commission intended the UPCPA to address both shortcomings.

Drawing on the federal post-conviction procedure act, 28 U.S.C. § 2255, and the Illinois and North Carolina acts, the UPCPA consolidated the writs of error coram nobis and habeas corpus into one readily accessible statutory remedy. The Commissioners sought to reduce the burden on the courts by providing for summary dismissal of meritless petitions. Recognizing that many petitions would be filed without the assistance of counsel, the UPCPA relaxed pleading requirements. The UPCPA made it clear that its remedy would supplant neither a motion for a new trial nor a direct appeal. While the UPCPA would supplant other

20. ILL. REV. STAT. ch. 38, paras. 826-32 (1953); see also Jenner, supra note 19.
25. UNIF. POST CONVICTION PROCEDURE ACT, 11 U.L.A. 479-83 (1978) (discussing the commissioners' prefatory notes) [hereinafter UPCPA]; see In re Rothrock, 92 P.2d 634, 635 (Cal. 1939) (seeking relief under more than nine common-law writs and processes).
28. UPCPA § 6(b).
29. UPCPA § 6.
30. UPCPA §§ 3-4.
31. UPCPA § 1(b).
statutory remedies, the Commission did not intend the UPCPA to abolish the common law writs.

Montana could benefit from the unhappy experiences of its sister states, whose inconsistent use of common law writs had led to criticism by the United States Supreme Court. The United States Supreme Court also had suggested that it soon would require the states to provide some kind of post-conviction process to permit state review of those federal constitutional issues that could not be addressed on appeal. Against this background, Montana adopted a Post-Conviction Procedure Act as part of its 1967 revisions to the Code of Criminal Procedure.

III. THE MONTANA POST-CONVICTION HEARING ACT

In 1963, the Montana Criminal Law Commission undertook the massive task of drafting a series of acts governing criminal procedure (Code). It completed its preliminary work in August of 1966 and forwarded several proposals to the 40th Legislative Assembly, which met the following year. The Code included a Post-Conviction Hearing Act (MPCHA) and revised Montana's statutes governing the writ of habeas corpus.

The MPCHA was an amalgam of the UPCPA and the 1963 Illinois Post-Conviction Hearing Act. Sections 95-2601, -2605, and -2607 of the MPCHA were drawn from sections 1, 7, and 8 of the UPCPA. These provisions established jurisdiction in the district courts, provided for the procedures for hearing post-conviction petitions, and limited successor petitions. Sections 95-2602 and -

32. See Marino v. Ragen, 332 U.S. 561, 570 (1947); Jenner, supra note 19, at 348-57; Briggs, supra note 18, at 184-86.
33. Mooney v. Holohan, 294 U.S. 103, 115 (1934); Young v. Ragen, 337 U.S. 235, 239-40 (1949) (stating that the Due Process Clause requires that a process be provided to a state prisoner to raise federal questions in connection with his confinement). In Case v. Nebraska, 381 U.S. 336, 337 (1965), the Court granted certiorari to answer the question of whether the Due Process Clause requires the states to provide some kind of post-conviction process. See also Donald E. Wilkes, Jr., Federal and State Postconviction Remedies and Relief 216 (1983) (suggesting that the Court's urging in Case and other opinions led to the adoption of the UPCPA in 46 states).
were based on the 1963 Illinois Post-Conviction Hearing Act and established filing requirements.

The legislature has amended the MPCHA several times since 1967. A series of 1981 amendments sought to limit a prisoner's access to a post-conviction remedy. The legislature amended section 46-21-102 to establish a five-year limitations period from the date of conviction. The legislature amended section 46-21-105 to delete the former provision which permitted petitioners to raise new constitutional grounds for relief, notwithstanding their filing of an earlier petition. The legislature also provided that failure to raise issues that could be raised on direct appeal barred consideration of those issues on post-conviction relief. Finally, the legislature reduced the time to appeal from a decision on post-conviction relief from six months to sixty days. As we shall see, the legislature's efforts were largely for naught.

Since its enactment, the MPCHA has been the subject of a large amount of litigation, largely on pro se petitions filed by inmates. This litigation created the body of jurisprudence to which this Article now turns.

IV. Procedure

The Commission intended the MPCHA to provide a procedure to address claims that would have been raised by means of a petition for writ of habeas corpus or a petition for writ of error coram nobis. Its procedure successfully has eliminated confusion over the forms available for relief, partly because the Montana Supreme Court has applied liberally the MPCHA's relaxed pleading rule. The court has treated most post-conviction motions as petitions for post-conviction relief, even though they were not denominated as such. Under the MPCHA, a person "adjudged guilty" may

40. Mont. Code Ann. § 46-21-203 (1993). The Code Commissioner's comments to this provision suggest that the 60-day period was adopted to provide additional time to a confined, unrepresented petitioner. However, the time to appeal is the same for a direct appeal. Mont. R. App. P. 5(b). The Uniform Code Commissioners had proposed that a six-month period be adopted with the prisoner's disabilities in mind. Handbook, supra note 23, at 214; UPCPA, supra note 24, at 535.
seek post-conviction relief if he claims that his sentence was imposed in violation of state or federal law, that the court lacked jurisdiction, that a suspended or deferred sentence was improperly revoked, that the sentence exceeded that permitted by law, or that the sentence is subject to collateral attack for any other reason that might be raised by any other remedy. Typical grounds have included: challenges to pretrial proceedings and sentencing where the accused has been convicted as a result of a guilty plea, claims of ineffective assistance of counsel, challenges to the sentence itself, and claims of new evidence. Petitioner need not be confined in order to obtain relief. Post-conviction relief is available to death row inmates even though they are not serving a sentence of confinement. Although the MPCHA refers to a “sentence imposed in violation of the constitution,” it is clear from its remaining provisions that the conviction underlying the sentence may be collaterally attacked. Section 46-21-201(5) directs that the court, if it finds for the petitioner, to “enter an appropriate order with respect to the judgment or sentence.”

The venue for a petition for post-conviction relief is the county in which the sentencing court sat, and the petition is to be addressed to the court that imposed sentence. However, the dis-

44. DiGiallonardo v. Betzer, 163 Mont. 104, 105, 515 P.2d 705, 705-06 (1973) (per curiam); In re Evans, 158 Mont. 76, 77, 488 P.2d 906, 907 (1971) (hearing on merits claim that he should have received new counsel when a conflict developed between him and his co-defendant); In re Peterson, 155 Mont. 239, 239, 467 P.2d 281, 281 (1970).
45. In re LeDesma, 171 Mont. 54, 554 P.2d 751 (1976) (granting credit for time served as part of suspended sentence); In re Hanson, 169 Mont. 80, 83, 544 P.2d 816, 817 (1976); Spinler v. State, 152 Mont. 69, 71-72, 446 P.2d 429, 429-30 (1968) (following revocation of a deferred sentence, petitioner was sentenced to prison and fined $3,000, to be worked off at $2 per day; finding an equal protection violation, the court vacated the fine and set petitioner free).
district court has jurisdiction over petitions for post-conviction relief from sentences imposed by courts of limited jurisdiction.\textsuperscript{51} Furthermore, one may petition directly to the supreme court if he is in custody.\textsuperscript{52}

Indigent petitioners are entitled to a transcript of the relevant portions of their trial or pretrial proceedings at no cost.\textsuperscript{53} However, the transcript is not automatically available on request. Petitioners must show a need for the particular portion of the transcript they seek.\textsuperscript{54}

While there is no Sixth Amendment right to counsel in a post-conviction proceeding,\textsuperscript{55} the statute requires appointment of counsel if a hearing will be necessary.\textsuperscript{56} In complex cases or in those that require the development of facts through witness testimony, section 16 of the Montana Declaration of Rights, article II, section 16 of the Montana Constitution, and the First Amendment to the United States Constitution appear to compel the district court to appoint counsel to provide an indigent prisoner access to the courts. In \textit{State v. Lance}\textsuperscript{57} and \textit{State v. Perry},\textsuperscript{58} counsel were appointed to assist inmates in their pre- and post-conviction habeas corpus proceedings. In \textit{State v. Hintz},\textsuperscript{59} counsel was appointed to assist in proceedings on a petition for post-conviction relief. In \textit{In re Martin},\textsuperscript{60} the supreme court held that counsel was properly denied in a post-conviction proceeding where the issues raised by Martin could be easily determined on the record.\textsuperscript{61} In similar cases, federal courts have held that fundamental fairness requires the assistance of counsel and other financial assistance in factually or le-

\begin{itemize}
  \item \textsuperscript{51} MONT. CODE ANN. § 46-21-101(2) (1993); see \textit{State v. Christensen}, No. 92-537 (Mont.) (appeal filed).
  \item \textsuperscript{52} MONT. CODE ANN. § 46-21-101(3) (1993).
  \item \textsuperscript{53} In re O'Rourke, 148 Mont. 93, 94-95, 417 P.2d 226, 226 (1966).
  \item \textsuperscript{54} In re Parker, 162 Mont. 330, 332, 511 P.2d 973, 974 (1973); In re Harvey, 153 Mont. 480, 481-82, 466 P.2d 93, 93 (1969).
  \item \textsuperscript{56} MONT. CODE ANN. § 46-21-201(2) (1993).
  \item \textsuperscript{57} 222 Mont. 92, 106, 721 P.2d 1258, 1268 (1986).
  \item \textsuperscript{58} 232 Mont. 455, 460-61, 758 P.2d 268, 271 (1988).
  \item \textsuperscript{59} 213 Mont. 364, 366, 691 P.2d 814, 815 (1984).
  \item \textsuperscript{60} 240 Mont. 419, 422-23, 787 P.2d 746, 748 (1989).
  \item \textsuperscript{61} Compare Merchants Ass'n v. Conger, 185 Mont. 552, 554, 606 P.2d 125, 126 (1979) (requiring an indigent to pay an undertaking in an amount twice the judgment in justice court, as a condition to a de novo appeal of a civil case, violated Article II, § 16 of the Montana Constitution); Sullivan v. Silver Bow Bd. of County Comm., 124 Mont. 364, 369, 224 P.2d 135, 136 (1950) (the predecessor of § 16 required the provision of a transcript at no charge to an indigent appellant); State \textit{ex rel. Parmenter} v. District Court, 111 Mont. 453, 455, 110 P.2d 971, 971 (1941) (indigent prisoner's right to free transcript based on right of access to courts).
\end{itemize}
The petition must be verified. It must identify the matter in which and the crime for which the petitioner was convicted, state the date of final judgment, identify any prior proceedings for relief from the conviction (appeals, post-conviction petitions, and other remedies), and affidavits and other evidence supporting the allegations of the petition must be attached (or include an explanation of why none are attached). The statute requires an accompanying legal memorandum.

Post-conviction petitions are subject to rule 12(b)(6) motions to dismiss for failure to state a claim. The Montana Supreme Court has held: "It is not error to deny an application for post-conviction relief without an evidentiary hearing if the allegations are without merit or would otherwise not entitle the petitioner to relief." Moreover, the statute makes it clear that the court may dismiss the petition sua sponte, before service is made on the State. If a meritorious petition withstands a motion to dismiss, the court may decide the case on the merits, as presented by the pleadings or on the basis of evidence introduced at hearing. In either event, the court must make findings of fact and conclusions of law.

At hearing, the statute relaxes some of the rules of evi-
dence. Discovery is available with leave of court;\(^7^0\) and at the hearing, the parties may submit evidence by means of affidavit, deposition, or oral testimony. The prisoner may attend the hearing, in the court’s discretion.\(^7^1\) Although release was the typical remedy under habeas corpus, if a prisoner prevails on post-conviction relief, the court may fashion such relief as it deems necessary.\(^7^2\)

While a petition for post-conviction relief is denominated a civil remedy, the district courts are not bound by the Montana Rules of Civil Procedure when they conduct a hearing.\(^7^3\) Unfortunately, the supreme court has not determined which rules, if any, should apply. It would appear then that the district court’s application of or refusal to apply or follow any rule of civil procedure is reviewable as an abuse of discretion, rather than as an error of law. On the other hand, the Rules of Appellate Procedure apparently apply to appeals under the MPCHA.\(^7^4\)

Since post-conviction relief is a civil action, the burden of proof, which is on the petitioner, is preponderance of the evidence.\(^7^5\) On appeal, the supreme court applies the substantial evidence rule to findings of fact by the district court.\(^7^6\) The decision to grant or deny an application for post-conviction relief is discretionary and will not be disturbed by the appellate court absent a clear abuse of discretion.\(^7^7\)

Petitioners have little interest in bringing their claims before the judges who sentenced them and who likely presided at their trials. Even though post-conviction relief is a civil action, the supreme court holds that the automatic disqualification provisions of section 3-1-803 of the Montana Code do not apply.\(^7^8\) A judge may be disqualified for cause, pursuant to section 3-1-805,\(^7^9\) but the court will not permit disqualification of judges on grounds that they are witnesses unless the petitioner shows that “specific and compelling evidence” is to be elicited from them and cannot be

\(^{76}\) Yother, 182 Mont. at 355, 597 P.2d at 82; In re Jones, 176 Mont. at 415, 578 P.2d at 1152.
\(^{78}\) Coleman, 194 Mont. at 432-33, 633 P.2d at 627.
obtained elsewhere.  However, judges must recuse themselves if they acted as defense counsel in the case.

A petition for post-conviction relief is not necessarily moot because the sentence has been served.  However, the petition may be deemed moot if it attacks only the validity of a discharged sentence.  Other courts have deemed post-conviction petitions to be moot where the prisoner has died, escaped, been pardoned, or received relief through other avenues.

V. THE RELATIONSHIP BETWEEN POST-CONVICTION RELIEF AND THE FEDERAL WRIT OF HABEAS CORPUS

A defendant's actions at the trial level and on direct appeal can result in denial of a federal writ of habeas corpus on procedural grounds.  The same is true for actions taken on post-conviction relief.  Before federal courts will hear a petition for a writ of habeas corpus filed by a prisoner in state custody, they must be satisfied that the prisoner has brought the issues before the state's highest court of appeals.  This is a rule of comity, and federal courts routinely dismiss habeas petitions that contain unexhausted claims.

Federal courts also will dismiss on motion petitions from state court decisions that are based on independent and adequate state grounds. In Coleman v. Thompson, the United States Supreme Court explained this doctrine:

In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run

80. Coleman, 194 Mont. at 435, 633 P.2d at 628.
84. Hann v. Hawk, 205 F.2d 839, 840 (8th Cir. 1953).
86. Tornello v. Hudspeth, 318 U.S. 792 (1943) (pardon); Belton v. United States, 259 F.2d 811 (D.C. Cir. 1958) (other relief).
87. See Selvage v. Collins, 494 U.S. 108 (1990) (per curiam) (remanding case to state court to determine whether petitioner's failure to raise the claim that his capital sentencing jury was precluded from considering his mental retardation was procedurally barred).
around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.\textsuperscript{91}

Federal courts hold that where a state court denies a claim on such procedural grounds as waiver or failure to timely file, this constitutes an independent and adequate state ground for decision.\textsuperscript{92}

However, whether a state court decision rests on independent and adequate state grounds is a federal question.\textsuperscript{93} The United States Supreme Court holds that a state court decision rests on independent and adequate state grounds if: (1) the decision rests solely on state law grounds; (2) the state court makes clear by a statement in the opinion that it has relied on federal cases as persuasive in its interpretation of state law; or (3) the state court decision otherwise indicates clearly and expressly that it is alternatively based on bona fide, separate, and independent state grounds.\textsuperscript{94} The mere existence of a possible state ground for decision, however, does not resolve the issue.

The fact that an independent and adequate state ground was available to the state court does not bar the federal court from hearing a habeas petition. The United States Supreme Court holds that "the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case."\textsuperscript{95} In \textit{Caldwell v. Mississippi}, the Supreme Court also questioned whether Mississippi consistently applied a waiver rule in capital cases.\textsuperscript{96} As \textit{Caldwell} intimates, if the state policy on waiver is not clearly established, federal courts should not consider it an independent and adequate state ground for decision.\textsuperscript{97} More important for Montana, if state courts do not consistently adhere to the waiver doctrine, federal courts will not treat it as an independent and adequate state ground that bars federal relief.\textsuperscript{98} Federal courts

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  \item \textsuperscript{91} Coleman, 501 U.S. at ___.
  \item \textsuperscript{92} Kellostat v. Cupp, 719 F.2d 1027 (9th Cir. 1983) (finding failure to raise claim at trial or on direct appeal can result in denial on independent state grounds).
  \item \textsuperscript{93} Harris v. Reed, 489 U.S. 255, 260-61 (1989).
  \item \textsuperscript{94} Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).
  \item \textsuperscript{95} Caldwell v. Mississippi, 472 U.S. 320, 327 (1985).
  \item \textsuperscript{96} Caldwell, 472 U.S. at 328.
  \item \textsuperscript{97} Ulster County Court v. Allen, 442 U.S. 140, 150 (1979) (declining to find independent and adequate state ground where New York had no clear contemporaneous-objection rule and the state court did not expressly rule that the failure to object earlier constituted a waiver).
  \item \textsuperscript{98} Ford v. Georgia, 498 U.S. 411, 422-25 (1991) (Georgia's rule requiring that a \textit{Batson} claim be raised prior to the time jurors are selected would not foreclose federal review of the issue because the Georgia courts had not applied the procedural rule in another case decided two years after petitioner's conviction—when it announced it prospectively); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (where state supreme court inconsistently applied procedural bar rule, United States Supreme Court would not be precluded from
\end{itemize}
also will not treat the state procedural decision as an independent and adequate state ground where the rule was announced or applied for the first time in the prisoner’s case or where the prisoner otherwise had no notice of it.99

Thus, if the Montana Supreme Court finds that a post-conviction petitioner has waived an issue by failing to raise it in the trial court or on appeal, under current federal decisions this may not bar review by federal courts. As we now see, the Montana Supreme Court sometimes applies a waiver rule and sometimes it does not. Under the current state of the law in Montana, if either a state district court or the Montana Supreme Court holds that a petitioner waived grounds for relief by failing to raise it earlier, this should not bar consideration of the issue by federal courts on habeas corpus.

VI. WAIVER, DEFAULT, AND RES JUDICATA

When prisoners seek post-conviction relief on grounds that were not raised in the trial court or that were omitted on direct appeal, the question of whether they have waived or defaulted the claim often arises. Where they have previously raised a claim on appeal or in another post-conviction proceeding, the question of whether the earlier ruling on that claim is res judicata emerges. These issues have significance in determining whether prisoners’ claims will be heard by the state court. Should they seek a writ of habeas corpus from federal courts, these issues then form the basis for the State’s argument that the cases were decided on independent and adequate state grounds and that comity should bar consideration of the federal petition.

The lower courts’ and the Montana Supreme Court’s treatment of issues of waiver and res judicata contribute to the lengthy appeal process enjoyed by inmates. The supreme court has been highly inconsistent in applying both doctrines.

Prior to the 1981 amendments to the MPCHA, the Montana Supreme Court had applied the doctrine of res judicata to deny petitions for post-conviction relief when issues were previously raised and decided on direct appeal.100 Likewise, the court dis-

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100. In re Williams, 155 Mont. 226, 466 P.2d 90 (1970) (per curiam) (dismissing peti-
missed petitions on grounds of waiver where the prisoner failed to raise the issues in the trial court, on appeal, or in an earlier petition.\textsuperscript{101} On the other hand, the Montana Supreme Court regularly heard claims that could have been raised on appeal and that it could have deemed waived. For example, in \textit{State v. Perkins}, the petitioner's appeal from his 1967 conviction was dismissed as untimely.\textsuperscript{102} Nevertheless, and over the State's argument that his claims had been waived, the court permitted Perkins to file for post-conviction relief. The court stated: "We agree that this should be the rule but in view of the change in counsel and the fact that a post-conviction proceeding is involved, we will in this instance consider the various contentions of the defendant."\textsuperscript{103} The court went on to consider the merits of all claims that would have been raised on direct appeal.

The following year, the court again addressed the merits of claims that the petitioner had failed to raise in his direct appeal. In \textit{State v. Porter}, the defendant petitioned for rehearing following the court's affirmance of his conviction.\textsuperscript{104} He raised new claims—that he was illegally imprisoned as a prior felon and that impeachment questions asked of him at trial were improper—that were not included in his appeal. The court held:

As these issues were not raised in the trial court nor before this Court upon appeal, and therefore under normal appellate rules the merits would not be reached since no objections were made, no record or exceptions preserved. However, since substantial rights are affected that would be reviewable under our new rules [MPCHA], we shall treat defendant's 'Petition for Rehearing' as an application for post-conviction relief in order to reach the merits.\textsuperscript{105}

The court then reversed the conviction, finding that petitioner was entitled to a jury determination as to the fact of his prior felony.\textsuperscript{106}

In \textit{State v. Brecht},\textsuperscript{107} known for its announcement of the right to privacy in the criminal sphere and its application of the exclu-
sionary rule to invasions of that right by private citizens, the petitioner had decided not to appeal. Nevertheless, the court heard Brecht's privacy claims on their merits and announced two sweeping constitutional rules establishing and applying a right to privacy in criminal cases.

In Fitzpatrick v. Crist, the petitioner was tried and convicted of committing a homicide while imprisoned. He had appealed, and the supreme court had affirmed his conviction. He later brought a post-conviction proceeding directly to the supreme court, claiming that the district court was slow to appoint counsel, that his arraignment was delayed, and that he was denied speedy trial—all claims that could have been raised on direct appeal. With respect to this issue, the court stated:

At the outset it should be observed that we are proceeding on the assumption petitioner has not waived these issues, despite his failure to raise them earlier. We do not reject the general proposition that such questions should be interposed as promptly as possible, but only say that the unusual facts of this case make a clear cut determination of waiver difficult. Unless there is substantial evidence of waiver, constitutional claims must be heard on their merits.

This holding becomes more significant when one reads the court's discussion of the facts of Fitzpatrick's claim. Throughout the pre-trial proceedings, Fitzpatrick complained that he had not been appointed counsel and that he had not been arraigned. He demanded a speedy trial. In other words, he was aware of these claims before he appealed. Nevertheless, the court heard these claims on their merits and reversed his conviction.

109. Id. at 270-72, 485 P.2d at 50-51.
112. Fitzpatrick v. Crist, 165 Mont. at 383, 528 P.2d at 1323.
113. Id. at 386, 528 P.2d at 1324-25.
114. Id. at 385, 528 P.2d at 1324.
115. Id. at 390, 528 P.2d at 1326; see also Coleman, 194 Mont. at 440, 633 P.2d at 631 (stating: “Because the post-conviction procedure is a new civil remedy, the failure to present claims in earlier proceedings would not bar them from presentation at this time. However, we have reviewed the claims and find the same to be unmeritorious.”); Parker v. Crist, 190 Mont. 376, 621 P.2d 484 (1980) (addressing and rejecting on the merits some claims of pre-trial and trial errors raised seven years after the petitioner's appeal had been decided); Murphy v. State, 181 Mont. 157, 592 P.2d 935 (1979) (granting relief where the petitioner argued that a letter from a probation officer constituted an improper pre-sentence report); State v. Jensen, 153 Mont. 489, 458 P.2d 782 (1969) (addressing merits of petitioner's claims that the statute under which he was charged and sentenced was unconstitutional, but holding petitioner waived his claim of prosecutorial misconduct, although he had raised neither on di-
While the court has said that it will not allow relitigation of issues determined on direct appeal because these are governed by the rule of res judicata, it has done so on a regular basis, even in those cases where the court has articulated the rule. It has often summarily addressed the merits of claims that were previously decided on direct appeal.

In *Coleman v. State*, the supreme court decided against applying a strict res judicata rule. The court announced that it would apply the rule of *Sanders v. United States* to claims that any ground is barred by res judicata. *Sanders*, a federal post-conviction proceeding brought pursuant to 28 U.S.C. § 2255, permits the court to give controlling weight to a prior decision only if: "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." This last element would give the trial court a safe harbor to hear petitions that it thought had merit, notwithstanding a prior adjudication.

On occasion, the supreme court has readjudicated facts. In *Yother v. State*, the petitioner claimed that he had been subjected to double jeopardy by a trial that followed a misdemeanor conviction in justice court. He had raised the issue in a petition for habeas corpus prior to his district court trial. The district court found facts against him and refused to issue the writ. After losing on that issue, he pleaded guilty. He neither sought habeas relief from the supreme court nor appealed his conviction. However, he sought post-conviction relief. The district court dismissed his post-conviction petition, finding, as a matter of fact, that he

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120. *Coleman*, 194 Mont. at 438, 633 P.2d at 631.

121. *Sanders*, 373 U.S. at 15; see *Coleman*, 194 Mont. at 438, 633 P.2d at 630.


123. Id. at 353, 597 P.2d at 80.

124. Id. at 353, 597 P.2d at 81.

125. Id. at 354, 597 P.2d at 81.

126. Id.
POST-CONVICTION RELIEF

had entered a voluntary guilty plea. On appeal, the supreme court reweighed the evidence and found in petitioner's favor. Thus, during the period prior to the 1981 session of the legislature, the court routinely heard post-conviction claims over objections that they had been waived or that they were barred by res judicata.

The legislature codified the waiver rule in 1981. Yet even after codification, the court continued to hear grounds that could have been raised on appeal. The court decided *Fitzpatrick v. State* two years after the amendment to section 46-21-105. Notwithstanding the change in the statute, the court stated:

Because the post-conviction procedure is a civil remedy, the failure to present claims in earlier proceedings will not bar them from presentation at this time. Nevertheless, the fact that an issue is not raised at a pre-trial hearing, during trial or on direct appeal will be considered by this Court as an element bearing on the merits of that particular claim.

The court then announced a new standard, that of deliberate withholding of grounds, to determine if a claim was waived by failure to raise it in the trial court or on direct appeal:

It is clearly an abuse of the relief procedure to withhold issues which could and should have properly been raised on appeal, or to manufacture issues years later, in an attempt to manipulate and obstruct the criminal justice process.

... [T]he statute was intended to prevent the miscarriage of justice, not to provide an opportunity to manipulate and obstruct justice.

The court applied this standard in *State v. Henricks*. Noting that the issues raised by the petitioner could have been raised in his direct appeal, the court nevertheless addressed their merits,

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127. *Id.* at 355, 597 P.2d at 81.
128. *Id.* at 355, 597 P.2d at 82.
129. Section 46-21-105 of the Montana Code provides:

(1) All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended petition. Those grounds for relief not raised are waived unless the court on hearing a subsequent petition finds grounds for relief that could not reasonably have been raised in the original or amended petition.

(2) When a petitioner has been afforded a direct appeal of the petitioner's conviction, grounds for relief that could reasonably have been raised on direct appeal may not be raised in the original or amended petition.

131. *Id.* at 210, 671 P.2d at 3.
132. *Id.* at 211, 671 P.2d at 4.
Secondly, as we noted recently in *Fitzpatrick v. State*, we observe that all of the issues presented here could have been brought at the time of Henricks's original appeal of his conviction. While we may consider these issues at this time, we will also take into consideration the fact that these issues, if valid, could and should have been raised at the time of appeal of the conviction. It is clearly an abuse of the postconviction relief statute to raise or manufacture issues long after the proper time for presentation of such issues. With the above two factors in mind, we now proceed to the discussion of the issues presented.\(^{134}\)

Following *Fitzpatrick* and *Henricks*, the court continued to address the merits of grounds that could have been raised on appeal. For example, in *In re Arledge*, the court addressed the merits of petitioner's claims that the district court lacked authority to designate petitioner a dangerous offender at petitioner's revocation hearing, that petitioner's sentences should have run concurrently "in the interests of justice," and that the trial court's denial of access to parole was contrary to the interests of society.\(^{135}\) Although the last two claims were equitable claims that could have been raised before the Sentence Review Division of the Montana Supreme Court, the court, without discussing the issue of waiver, addressed their merits.\(^{136}\)

In *Brodniak v. State*, the supreme court earlier had found harmless error in the claims that petitioner raised on direct appeal.\(^{137}\) Brodniak then brought a petition for post-conviction relief claiming that the court should have used a federal test for harmless error.\(^{138}\) It is not clear if Brodniak argued for the federal test on his direct appeal. If he had raised the issue, the supreme court's decision would have been res judicata. If he did not raise the issue in his appellate briefs or in a motion for rehearing, his failure arguably amounted to a waiver of the issue under the language of section 46-21-105. Nevertheless, the court addressed the merits of Brodniak's claims and reconsidered and reaffirmed the merits of its earlier harmless error analysis. The court did not discuss the *Fitzpatrick* standard.

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134. *State v. Henricks*, 206 Mont. at 474, 672 P.2d at 23 (citation omitted). *Fitzpatrick* could be considered a pre-1981 amendment case, since the underlying crime occurred and Fitzpatrick filed his post-conviction petition prior to March 28, 1981, the effective date of the amendments to § 46-21-105. *Henricks* is not amenable to that criticism.


136. *See id.*


138. *Id.*
Fitzpatrick and Henricks bar consideration of grounds petitioner or counsel deliberately withheld. Although this would appear to be a workable, reasonable standard, the court has not always applied it. In In re Martin, the court held that petitioner waived claims of prosecutorial and judicial misconduct by failing to raise them on direct appeal.\(^{139}\) The court did not mention the Fitzpatrick/Henricks standard.

The court revisited the Fitzpatrick/Henricks standard in State v. Gorder.\(^{140}\) There, the petitioner filed a direct appeal, but asked that it be construed as a petition for post-conviction relief. In dicta discussing section 46-21-105, the court said: “Abuse of process occurs where an applicant raises in post-conviction proceedings a factual or legal contention which the petitioner deliberately or inexcusably failed to raise in the proceedings leading to conviction, or having raised the contention in the court, failed to pursue the matter on appeal.”\(^{141}\)

The court also has found an absence of waiver in some predictable cases, such as claims of ineffective assistance of counsel. In State v. Albrecht, for example, petitioner filed a timely notice of appeal, but it was never docketed.\(^{142}\) The State conceded that petitioner had not received proper representation on appeal, since counsel had failed to follow up.\(^{143}\) The court decided the claims on their merits, as if they had been presented on appeal.\(^{144}\)

In Albrecht, Martin, and Tecca v. McCormick, the court used for the first time terms like “procedurally barred” and “default”.\(^{145}\) However, the court has never overruled the Fitzpatrick/Henricks standard. In 1990, the court again reviewed grounds not raised on appeal in Hawkins v. State.\(^{146}\) In Hawkins the court found, with little comment, that some claims had been addressed on appeal and were barred by res judicata. Hawkins had raised new arguments about these claims.\(^{147}\) Nevertheless, the court addressed the

\(^{139}\) In re Martin, 240 Mont. 419, 421, 787 P.2d 746, 748 (1989).
\(^{140}\) 243 Mont. 333, 792 P.2d 370 (1990).
\(^{141}\) State v. Gorder, 243 Mont. at 335, 792 P.2d at 371 (quoting McKenzie v. Osborne, 195 Mont. 26, 34, 640 P.2d 368, 373 (1981)).
\(^{143}\) Id.
\(^{144}\) Cf. Walker v. State, 261 Mont. 1, 9, 862 P.2d 1, 6 (1993) (holding that unexplained failure to appeal constituted waiver of all claims except ineffective assistance of counsel).
\(^{146}\) 242 Mont. 348, 790 P.2d 990 (1990).
\(^{147}\) Hawkins, 242 Mont. at 351, 790 P.2d at 992.
merits of Hawkins’ claim that *State v. Burke* should not have been applied retroactively to his case, although this argument could also have been barred by res judicata; that there was a fatal defect in the information—a claim that could have been deemed waived for Hawkins’ failure to raise it in the district court and on direct appeal; and that the prosecutor’s opening statement had denied him a fair trial, which was an issue also not raised on appeal. In deciding *Hawkins*, the court did not mention the *Fitzpatrick/Henricks* standard.

On the other hand, the court applied section 46-21-105 in *Duncan v. State*, *State v. McColley*, and *Eiler v. State*. In none of these three cases did the court mention the *Fitzpatrick/Henricks* standard. In 1993, one year after *Eiler* was decided, the court declined to apply section 46-21-105 in *State v. Barker*. Barker had pleaded guilty to several felonies but had violated his probation. The information in Barker’s prosecution had incorrectly listed methamphetamine as a Schedule I drug. Because methamphetamine was found in some over-the-counter nasal sprays, Barker argued that it was legal. He did not raise this claim in the trial court. The supreme court addressed this ground on its merits.

The MPCHA also provides that issues raised in a second petition for post-conviction relief are deemed waived unless the court finds that the claim could not reasonably have been raised in an earlier petition or by amendment to an earlier petition. As with the rule of waiver by reason of failure to raise the issue in the trial court or on appeal, the supreme court has not followed this rule.

A guilty plea does not waive the right to petition for post-conviction relief when petitioners attack the entry of their plea or the

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149. *Hawkins*, 242 Mont. at 352, 790 P.2d at 992-93.
150. *Id.* at 353, 790 P.2d at 993.
155. *Barker*, 257 Mont. at 33, 847 P.2d at 302.
156. *Id.* at 33, 847 P.2d at 301.
157. *Id.* at 36, 847 P.2d at 303.
158. *Id.* at 36-37, 847 P.2d at 303-04.
legality of their sentence.\textsuperscript{161} This is especially true where petitioners claim that their plea was not made knowingly or voluntarily.\textsuperscript{162} However, the court may find a waiver if the accused did not make an objection during proceedings in the trial court.\textsuperscript{163}

Nevertheless, in \textit{Tecca}, a decision squarely out of line with this precedent and unquestionably lacking in equity, the court held that a petitioner had waived his right to bring forth claims of new evidence because he failed to appeal.\textsuperscript{164} Although the decision is based in part on the petitioner's failure to identify the new evidence, its grounding on the procedural rule is ill-advised. The only way that a defendant may bring claims of new evidence before the court without resorting to the common-law writs is by means of a petition for post-conviction relief. It appears that the court set out in \textit{Tecca} to preclude a federal habeas remedy. The court stated in the last paragraph of its opinion:

\begin{quote}
We note that it has long been the rule that federal courts will decline review of State court decisions based upon independent and adequate State grounds, which include procedural bars. The United States Supreme Court has made it clear that State appellate decisions clearly state, as we have here, the procedural basis for dismissing post-conviction relief claims in order to preclude later review by federal courts on the merits.\textsuperscript{165}
\end{quote}

Montana does not have a clearly established rule of waiver. While the Montana Supreme Court adopted a useable standard in \textit{Fitzpatrick} and \textit{Henricks}, the rule only occasionally is followed and has never been overruled. It appears that when the State raises a claim of waiver, the supreme court's decision is driven primarily by its view of the merits of the prisoner's claim. The same

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\textsuperscript{161} State v. Wilson, 198 Mont. 305, 645 P.2d 958 (1982) (considering claim of incompetence at time of entry of plea); State v. Brown, 193 Mont. 15, 629 P.2d 777 (1981) (complaining that trial judge failed to honor plea bargain); State v. Haynie, 186 Mont. 374, 607 P.2d 1128 (1980) (considering claims that petitioner did not have assistance of counsel and was not informed of maximum penalty when entering guilty plea); State v. Maldonado, 176 Mont. 322, 578 P.2d 296 (1978) (following plea, raising claims of selective prosecution, ex post facto application of the persistent offender statute, and lack of probable cause to charge); Spinler v. State, 152 Mont. 69, 446 P.2d 429 (1968) (finding erroneous discharge of defendant from custody absent a formal hearing on habeas corpus petition); Morigeau v. State, 149 Mont. 85, 423 P.2d 60 (1967) (addressing claim that sentence should run concurrently on merits). \textit{But see} Hagan v. State, \textsuperscript{162} Mont. \textsuperscript{163} P.2d \textsuperscript{164} P.2d \textsuperscript{165} 51 St. Rep. 230 (1994) (entry of plea constituted waiver of all non-jurisdictional claims, including claims of violations of constitutional rights, that arose prior to the entry of the plea).
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\textsuperscript{162} State v. Cavanaugh, 207 Mont. 237, 673 P.2d 482 (1983).
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\textsuperscript{163} State v. Hintz, 213 Mont. 364, 691 P.2d 814 (1984) (addressing on merits claim that pre-sentence report should have been prepared, but finding waiver by failure to object).
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\textsuperscript{165} \textit{Id.} at 319, 806 P.2d at 12 (citations omitted).
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may be said about claims that prisoners waive their rights to post-conviction relief when they enter guilty pleas. These decisions also appear to be driven by the court’s view of the merits.

VII. SHOULD THE MONTANA COURTS FOLLOW FITZPATRICK OR STRICTLY APPLY SECTION 46-21-105?

The holdings in Fitzpatrick/Henricks and section 46-21-105 appear to conflict. However, the conflict is not irreconcilable. A narrow reading of section 46-21-105 would be consistent with the Fitzpatrick/Henricks standard.

A number of reasons favor use of the Fitzpatrick/Henricks standard. First, when accuseds unintentionally fail to raise grounds in the trial court or on appeal, and the grounds are deemed waived or barred by res judicata on post-conviction relief, they are forced to assert claims of ineffective assistance of counsel. This is the observation of the ABA Standards: “Narrowing access to postconviction relief on the ground of procedural default at an earlier stage in the proceedings is likely to add to the burgeoning claims for post-conviction relief on the ground of ineffective assistance of counsel.” 166 An ineffective assistance claim requires both a showing that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance or omission was sufficient to undermine confidence in the outcome. 167 Therefore, the district court must ultimately address the merits of a claim, albeit in the context of applying the standard of proof of an ineffective assistance claim. Since a strictly applied waiver rule ultimately converts the same issues to ineffective assistance claims, the burden imposed on the court is greater than it would have been if the court had tackled the merits head-on. The trial court will necessarily be forced first to address the question of waiver, second, the question of prejudice—whether counsel’s omission went to a meritorious issue, and finally, whether counsel’s performance fell below a standard of reasonableness.

A strict application of the waiver rule is inconsistent with ABA Standards for Post-Conviction Relief and with the recommendations of the Uniform Law Commissioners, who have adopted the ABA Standards. 168 The ABA agrees that “deliberately and

166. IV ABA STANDARDS FOR CRIMINAL JUSTICE 22-6S (Supp. 1986).
168. UPPCA § 3 cmts. (1993 Supp.); ABA STANDARDS FOR POST-CONVICTION REMEDIES § 6.1(b) (1968) ("[c]laims advanced in post-conviction applications should be decided on their merits, even though they might have been, but were not fully and finally litigated in the proceedings leading to judgment and conviction"); § 6.1(d) ("[b]ecause of the special
“knowingly” withholding issues should constitute a waiver, but suggests that even in those instances the courts should not deny relief in all cases.\textsuperscript{169}

In \textit{Tecca} the court appeared to attempt to foil the petitioner's opportunity to seek federal review of his claims. The court’s role is in meting out justice, not in defeating potential federal claims. Opinions such as \textit{Tecca} tend to portray the court as an arm of the prosecution.

Since federal courts that hear petitions for writs of habeas corpus are required to defer to state court findings of fact, it would be a better use of judicial resources, federal and state, to resolve arguably waived issues on their merits. In those cases, state courts, rather than federal, will determine the facts on which any federal habeas petition is decided. As we have seen, the Montana Supreme Court's inconsistent approach to the question of waiver ensures that federal district courts will engage in fact-finding on the merits.

\section*{VIII. Limitations and Delay}

Until 1981, the MPCHA provided that a post-conviction petition could be filed "at any time after conviction."\textsuperscript{170} The court applied this provision literally,\textsuperscript{171} but drew the line at long-in-the-tooth requests to revoke a plea.\textsuperscript{172}

The Montana Legislature amended section 46-21-102 of the Montana Code in 1981 and established a five-year statute of limitations.\textsuperscript{173} Notwithstanding this amendment, the court continued to hear late post-conviction petitions. In \textit{McGuinn v. Risley}, decided three years after the amendment was adopted, the court held: "We hold that this petition could be dismissed for failure to file the same within five years of the date of conviction, but we will..."
reach and dispose of the contentions on the merits in the exercise of our discretion.”

The supreme court’s decision in McGuinn is consistent with the ABA Standards, which observe that “[a] specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound.” As with the doctrines of waiver and res judicata, state courts’ application of a limitations period will be an independent and adequate state ground that will bar consideration of the case by federal courts. Since our courts also apply the statute of limitations inconsistently, federal courts are unlikely to consider it to be an independent and adequate state ground. Our courts have also avoided the limitations period by reverting to pre-MPCHA days and applying unnamed common-law remedies.

IX. THE WRIT OF HABEAS CORPUS AFTER ENACTMENT OF THE MPCHA

The MPCHA cannot be the exclusive remedy for post-conviction relief. Article VII, sections 2 and 4, of the Montana Constitution give the supreme court and the district courts the power to “issue all writs appropriate to [their] jurisdiction.” The legislature cannot curtail that power.

Nevertheless, it was the Criminal Law Commission’s express intent to “limit the scope of habeas corpus to its historical position in Montana.” Where a prisoner is barred from seeking post-conviction relief, for example, by the MPCHA statute of limitations, he should have resort to the writ of habeas corpus. The question then becomes: What is the scope of the writ or what was its historical position in Montana? In connection with this, we must also ask: What effect, if any, did the adoption of the 1972 Constitution have

177. The Commission stated: This chapter has been narrowed in an attempt to limit the scope of habeas corpus to its historical position in Montana. It is intended that most post conviction remedies will be provided by the post conviction hearing section. In any event, it must be noted that the scope of the writ is broader than it once was due to the federal decisions. Further habeas corpus is not controlled by statutory law, but rather by case development, thus making it necessary to have only a general outline available in the code.

Proposed Code, supra note 35, at § 95-2701 cmt.
on the writ?

Historically, the writ was granted where the court lacked subject matter jurisdiction over the case, lacked jurisdiction over the person, or lacked the power to render the pronounced judgment. Although the pre-1966 habeas cases were limited to the question of a court’s jurisdiction, the supreme court has since entertained petitions for writs of habeas corpus as petitions for some unnamed kind of relief, where their grounds fall outside those common to

178. State ex rel. District Court, 35 Mont. 321, 89 P. 63 (1907); In re Downey, 31 Mont. 441, 78 P. 772 (1904) (questioning whether police court had jurisdiction); see In re Parks, 3 Mont. 426 (1880); United States v. Fox, 3 Mont. 512 (1880) (denial of speedy trial); Territory ex rel. McCann v. Sheriff, 6 Mont. 297, 12 P. 662 (1887) (a failure to follow statutory commitment procedures such that the commitment is rendered void); In re Shannon, 11 Mont. 67, 27 P. 352 (1891) (information or indictment insufficient on its face such as where the Court finds that the complaint could refer to acts of contempt against a different court; conduct privileged by the First Amendment); In re MacKnight, 11 Mont. 126, 27 P. 336 (1891) (newspaper article did not interfere with orderly administration of justice; conduct privileged under Montana Constitution and newspaper publication of account critical of district court was outside the scope of the criminal contempt statute); State ex rel. Northrup v. Conrow, 13 Mont. 552, 35 P. 240 (1893) (denial of speedy trial); State ex rel. Hendricks v. Seventh Judicial District Court, 14 Mont. 452, 37 P. 9 (1894) (per curiam) (punishment exceeded the statutory minimum); In re Ming, 15 Mont. 79, 38 P. 228 (1894) (granting writ where a string of egregious errors were committed); In re Ryan, 20 Mont. 64, 50 P. 129 (1897) (court lacked “geographical” jurisdiction); State ex rel. Donovan v. District Court, 26 Mont. 275, 67 P. 943 (1902) (evidence insufficient to establish probable cause); In re McCabe, 29 Mont. 28, 73 P. 1106 (1903) (conduct privileged under Montana constitution and newspaper publication of account critical of district court was outside the scope of the criminal contempt statute); In re Terrett, 34 Mont. 325, 86 P. 266 (1906) (statute unconstitutional on its face); State ex rel. Murray v. District Court, 35 Mont. 504, 90 P. 513 (1907) (excessive bail); In re Farrell, 36 Mont. 254, 92 P. 785 (1907) (facts were insufficient to allege an offense); In re Wisner, 36 Mont. 298, 92 P. 958 (1907) (alleged offense unknown to the criminal law); State ex rel. Browne v. Booher, 43 Mont. 569, 118 P. 271 (1911) (writ of prohibition does not lie to challenge constitutionality of statute; the remedy is either the writ of habeas corpus, or appeal); In re Jones, 46 Mont. 122, 126 P. 929 (1912) (evidence held to be sufficient); In re Collins, 51 Mont. 215, 152 P. 40 (1915) (trial court tried to avoid indeterminate sentencing statute by imposing sentence of not less than two years and not more than two years); In re Lewis, 51 Mont. 539, 154 P. 713 (1916) (trial court tried to avoid indeterminate sentencing statute by imposing sentence of not less than two years and not more than two years); In re Naegle, 70 Mont. 129, 224 P. 269 (1924) (banking statute having been repealed by implication, the indictment failed to state an offense); State ex rel. Foot v. District Court, 72 Mont. 374, 233 P. 957 (1925) (revocation of suspended sentence after term of sentence had expired; justice court lacked authority to revoke probation where statute conferred authority upon Board of Prison Commissioners); In re Klune, 74 Mont. 332, 240 P. 286 (1925); State ex rel. Foot v. District Court, 77 Mont. 290, 250 P. 973 (1926) (petitioner claimed that her marriage placed her outside the scope of the juvenile statute and sought release from a youth home); Ex parte Sheehan, 100 Mont. 244, 49 P.2d 438 (1935) (justice of peace lacked authority to revoke probation); Ex parte Anderson, 125 Mont. 331, 238 P.2d 910 (1950) (state White Slave Act is pre-empted by the Mann Act and is therefore unconstitutional; since unconstitutional law is void, a conviction under it is void, rather than erroneous); State ex rel. Wetzel v. Ellsworth, 143 Mont. 54, 387 P.2d 442 (1963) (per curiam) (where suspended sentence counted as time served, petitioner was confined beyond his release date).
the writ's historical position in Montana. The most notable example is the case of *State v. Perry*.179

Perry had been convicted of homicide and rape, largely on the testimony of Michael Stillings, who entered into a plea bargain in return for his testimony against Perry. Seventeen years later, Stillings recanted his testimony. Perry sought release, having always asserted his innocence. Although he denominated his petition as a motion for new trial or other relief, the State asserted that Perry's was in fact a petition for post-conviction relief and was therefore barred by the MPCHA's five-year statute of limitations. The court's response is significant enough to set out in full:

Although Perry could not have brought his claim until the recantation occurred in 1986, the State would have us find that Perry's only means of redress is a petition for post-conviction review and that the statutory clock on such petitions ran in 1978. We decline to do so. Under the interpretation urged by the State, a defendant held in violation of his constitutional rights would be deprived of a method of redress regardless of his diligence or the justness of his claim. We do not believe such a result to be the intent of the legislature nor consistent with our State Constitution. See 1972 Montana Constitution, Art. II, § 17 [the Due Process Clause of the Declaration of Rights].

The central function of the courts is the achievement of justice. However, like all endeavors of man, the search for justice is not without occasional flaws. From the time of the Magna Charta, the Great Writ of Habeas Corpus has been liberally employed as a means of guaranteeing that this judicial goal be accomplished and that a miscarriage of justice will be remedied. See 3 Blackstone Comm. at 129 et seq. For at its heart, the writ represents an acknowledgment of the principle that the rights of freedom of the individual are worthy of protection.

Whereas Perry's motion for a new trial cannot technically be denoted a petition for habeas corpus, nor do we treat it as such, the claim nevertheless sounds in the nature of a petition for habeas corpus. We determine that in this case, the single issue is whether Perry is entitled to a new trial based on the proferred evidence of another person doing the criminal act for which Perry was convicted.180

The claim "sounds in the nature of a petition for habeas corpus" but it "cannot technically be denoted a petition for writ of habeas corpus." Then what was it? We can safely say that the nature of Perry's motion was that of a petition for error coram nobis.

It could have been treated as such without expanding the scope of habeas corpus (which is what the court, in its tortured paragraphs, was trying to avoid) and without expanding the district court's jurisdiction.  

In any event, the conclusion to be drawn at this stage is that the writ of habeas corpus is now limited to its historical uses in Montana—those of challenging a court’s jurisdiction or of declaring a court’s judgment to be otherwise void.  

It does not appear that the adoption of the 1972 Constitution changes this conclusion. The constitutional convention only struck language from the 1889 Constitution that permitted the legislature to suspend the writ in times of “rebellion or invasion.” It made no other changes to the 1889 provision. Nothing in the convention’s discussion of this provision indicated an intent to expand the scope of the writ.

The case law on this subject leaves us with some abiding conclusions. First, the writ of habeas corpus is more limited in scope than it perhaps was in the 1950s and 1960s. Second, the courts will continue to hear post-conviction cases under a common-law theory if they deem them meritorious, notwithstanding the defenses the State might have raised under the MPCHA. Third, the writ of error coram nobis is alive and well.

X. Conclusion

The boundaries of the Montana Post-Conviction Hearing Act remain unclear after nearly thirty years of litigation under the Act. It is clear that the MPCHA has fulfilled its drafters’ dreams of establishing a simple, all-encompassing post-conviction remedy. However, it does not satisfy many interests in finality that one might assert. This is not the result of the formulation of the

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181. Perry discovered, when he filed his motion, that the prosecution had failed to divulge significant exculpatory information. Apparently, Stillings had been attempting to build an alibi for a period when Perry would have been absent. His efforts appeared in letters he wrote before his arrest and were inconsistent with Stillings’ testimony that Perry had committed the crime at a later time. Perry had also written a letter admitting guilt. This, too, was not produced to the defense. The Montana Supreme Court denied relief to Perry, whereupon he decamped to the United States Court of Appeals (via the United States District Court) and was ordered released. Perry v. Montana, 976 F.2d 737 (9th Cir. 1992).

182. See Remington v. Department of Corrections, 255 Mont. 480, 844 P.2d 50 (1992) (claim of imprisonment beyond release date); State v. Sor-Lokken, 247 Mont. 343, 805 P.2d 1367 (1991) (claim of excessive bail). But see Benjamin v. McCormick, 243 Mont. 252, 792 P.2d 7 (1990) (granting release on parole to prisoner who was told at sentencing that he would serve only one year).


MPCHA itself, but rather is a result of the Montana Supreme Court’s application and interpretation of the MPCHA. Nevertheless, as the case of *State v. Perry* illustrates, it serves the ends of justice to hear claims on their merits even when they are out of time or arguably are waived.

If the Montana Supreme Court is going to apply a strict rule of waiver, it will have to do so at the risk of passing over cases in which a prisoner has meritorious claims, even those cases such as *Perry* in which the prisoner is factually innocent. Otherwise, the court should interpret the MPCHA in a manner consistent with the ABA Standards. This will permit review of meritorious, but arguably waived, grounds for relief and permit denial of clearly abusive petitions. Until the court sets a clear course, federal courts are not likely to dismiss habeas claims of Montana’s prisoners on independent and adequate state grounds.

185. Here, “factually innocent” refers to those accuseds who did not commit a crime, as opposed to those accuseds who would not have been proven guilty but for the fact that their convictions were obtained in violation of law.