IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0009

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT GEORGE HORNBACK,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUES

1. Mr. Hornback was sentenced for felony murder based upon the underlying predicate felony of deviate sexual conduct. However, the statutory offense of deviate sexual conduct did not involve the use or threat of force as required for felony murder. Where what Mr. Hornback was charged and convicted of was, facially, not felony murder, is his felony-murder sentence illegal?

2. Mr. Hornback moved to withdraw his guilty plea and requested an evidentiary hearing. Rather than conducting an evidentiary hearing, the district court denied Mr. Hornback's motion based upon a transcript from a federal court proceeding 15 years earlier. Did the district court err by relying upon testimony in another court and denying Mr. Hornback's request for an evidentiary hearing to prove his allegations in state court?

STATEMENT OF THE CASE

2019 sentence

In 2019, under DC-87-2, the district court sentenced Mr. Hornback as a persistent felony offender (PFO) to 100 years in prison

for the offense of deliberate homicide.[1] (12/3/2019 Tr. at 31 (attached as App. A); DC Doc. 174 (attached as App. B).) The Amended Information to which Mr. Hornback had pled[2] charged a single count of deliberate homicide under Mont. Code Ann. § 45-5-102(1)(b)[3] for causing the death of an eight-year-old male while committing or attempting to commit "the offense of deviate sexual conduct." (DC Docs. 116 at 1 (attached as App. C), 117, 122.)

Mr. Hornback filed a timely notice of appeal from the district court's 2019 written judgment. (DC Doc. 177.)

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[1] This sentencing arose from a determination in Mr. Hornback's habeas proceeding, DV-18-2, that the district court's original imposition of separate, consecutive 100-year sentences for the deliberate homicide and for the PFO designation in DC-87-2 was illegal. (DV Doc. 26 at 6–8 (citing *State v. Gunderson*, 2010 MT 166, ¶ 54, 357 Mont. 142, 237 P.3d 74).) From 1992 until the State's concession in 2018 (DV Doc. 5 at 2), the State had repeatedly resisted remedying this illegality. (DC Docs. 143, 146, 156, 161.)

[2] Mr. Hornback pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and has always maintained his factual innocence. (DC Doc. 117 at 1.)

[3] This -102(1)(b) version of deliberate homicide is commonly referred to as "felony murder." *E.g.*, *State v. Weinberger*, 206 Mont. 110, 112–14, 671 P.2d 567, 568–69 (1983).

Motion to withdraw plea

While imposing the 2019 sentence in DC-87-2, the district court noted that it had recently refused to allow Mr. Hornback to withdraw his guilty plea. (12/3/2019 Tr. at 31.) That plea withdrawal request and the district court's denial order were filed in DV-18-2, the habeas proceeding then-pending before the same district court. (DV Docs. 17–18, 26.)

Mr. Hornback asserted statutory "good cause" existed to withdraw his guilty plea under Mont. Code Ann. § 46-16-105(2) (1987). (DV Doc. 17 at 4–6, 18 at 2–6.) Mr. Hornback argued that his conviction was predicated upon false evidence. He alleged that he pled guilty under the belief Arnold Melnikoff (then the Director of the Montana State Crime Lab) "had 'matched' hairs" found on the victim to Mr. Hornback and that this hair analysis was the only direct, definitive evidence linking him to the victim. (DV Docs. 17 at 5, 18 at 3–6.) Mr. Hornback argued that three other Montana defendants[4] whose hair Melnikoff had also "matched" had later been exonerated and alleged that following an

[4] Paul Kordonowy, Chester Bauer, and Jimmy Bromgard.

internal audit, Melnikoff had been terminated from his subsequent employment at the Washington State Crime Lab. (DV Doc. 18 at 5–6.)

Mr. Hornback's plea withdrawal requests also invoked additional allegations of misconduct "set forth in previous pleadings." (DV Docs. 17 at 6, 18 at 6.) Within his previous pro se filings in the habeas and criminal causes, Mr. Hornback alleged that a local man name Arnold Griner had observed a "crazy" transient around the time and location of the victim's murder and that Mr. Griner had repeatedly reported this suspect to law enforcement. (*E.g.*, DC Doc. 170 at 1–3; DV Docs. 8 at 3–4.) Mr. Hornback avowed that Mr. Griner's description fit Mr. Hornback's own account of the actual murderer and that the State had not disclosed Mr. Griner's reports or this alternative suspect to the defense. (DC Doc. 170 at 2–3; DV Doc. 8 at 2–4.) Mr. Hornback alleged that Melnikoff, the disgraced crime lab director, had "criminally colluded to erase evidence" and asked the district court and State to consider Melnikoff and the State's "numerous Brady Violations and out right illegal activities." (DV Doc. 8 at 3–4.) Mr. Hornback detailed these and other misrepresentations and misconduct by State actors as well as his own account of the transient who actually committed the

murder. (DV Docs. 8, Ex. A, 9 at 4–20.) He further alleged, "Medical records will prove that Robert Hornback was taken to a local doctors clinic to close a head injury that resulted from Detective Bernall and William Douglass assaulting him and telling him to accept the plea." (DV Doc. 9 at 2.)

Mr. Hornback requested an evidentiary hearing to present testimony proving his allegations of good cause to withdraw his plea. (DV Doc. 17 at 6; *see also* DV Doc. 26 at 5 (district court acknowledging the hearing request).) Appointed counsel represented that at such an evidentiary hearing, "[w]ith the aid of Counsel, Petitioner could likely provide further support for the new evidence alleged in Petitioner's Response." (DV Doc. 17 at 6.)

The State objected that Mr. Hornback's plea withdrawal motion "should have been filed under the original criminal case cause number, DC-87-72," not in the habeas proceeding, but the State nevertheless addressed the merits of Mr. Hornback's motion as if it had been properly filed. (DV Doc. 24 at 18–19.) The State also conceded there was no time bar to Mr. Hornback's plea withdrawal motion under "the

controlling statute in this case, Mont. Code Ann. § 46-16-105(2) (1987)." (DV Doc. 24 at 14.)

In opposing the factual merits of Mr. Hornback's request to withdraw his plea, the State relied extensively upon a transcript of a 2004 evidentiary hearing in federal court. (*See* DV Doc. 24 at 6–14, 30–31.) The State attached a partial[5] copy of this transcript to its response. (DV Doc. 24, Ex. 6.) The district court, in turn, relied upon this federal court testimony when it issued a written order on September 23, 2019, denying Mr. Hornback's motion to withdraw his plea. (DV Doc. 26 at 9–10 (attached as App. D).) The district court denied Mr. Hornback's motion without affording Mr. Hornback the evidentiary hearing he had requested. (*See* DV Doc. 26 at 10.)

Noting "the interconnected nature of these matters," this Court subsequently granted Mr. Hornback permission to file an out-of-time appeal from the September 23, 2019, plea withdrawal denial order entered in DV-18-02. (DA 20-0125, Order (March 10, 2020).) The Court

[5] Without explanation, the State's exhibit is missing pages 92–94 and 96–97. From the surrounding pages, the missing sections appear to discuss information gathered by law enforcement during the case's investigation as well as the officers' interactions with Mr. Hornback. (*See* DV Doc. 24, Ex. 6 at 91, 95, 98.)

consolidated Mr. Hornback's two appeals under DA 20-0009. (DA 20-0009, Order (March 13, 2020).)

STATEMENT OF THE FACTS

Montana Rule of Appellate Procedure 12(1)(d) directs an appellant's brief to include "[a] statement of the facts relevant to the issues presented for review, with references to the pages or the parts of the record at which material facts appear."

The only facts relevant to the issue of whether Mr. Hornback's sentence is facially illegal are that Mr. Hornback was sentenced to 100 years and that the Amended Information to which he pled charged him with felony murder based on the underlying felony of deviate sexual conduct committed on August 31, 1987. (DC Docs. 116 at 1, 117 at 1, 171 at 1.)

As to Mr. Hornback's alternative claim for remand for a plea withdraw hearing, the district court's denial of an evidentiary hearing regarding Mr. Hornback's allegations of good cause to withdraw his plea has left the factual record underlying those allegations undeveloped. Without an evidentiary hearing, Mr. Hornback is unable to provide the Court with references to the record pages at which the material facts

proving his allegations would appear. Mr. Hornback's allegations themselves appear in the record at DC Doc. 170, pages 1–4 and attached Exhibit 1; DV Doc. 8, pages 2–4 and attached Exhibit A; DV Doc 9, pages 2–20; DV Doc. 17, pages 5–6; and DV Doc. 18, pages 2–6, and were summarized in the preceding Statement of the Case.

STANDARDS OF REVIEW

The Court reviews criminal sentences de novo for legality. *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15.

The Court reviews the denial of an evidentiary hearing for an abuse of discretion. *State v. Schulke*, 2005 MT 77, ¶ 10, 326 Mont. 390, 109 P.3d 744. The Court also generally reviews evidentiary rulings for an abuse of discretion; however, "to the extent the court's ruling is based on an interpretation of an evidentiary rule or statute, [this Court's] review is de novo." *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811.

SUMMARY OF THE ARGUMENT

A sentence not authorized by statute is illegal. This Court reviews such illegal sentences for the first time on appeal. The district court here purported to sentence Mr. Hornback under the authority of the

felony-murder statute. The applicable 1985-version of that statute defined felony murder as a homicide committed while engaging in or attempting to commit "any other felony which involves the use or threat of physical force or violence against any individual." The State charged Mr. Hornback with felony murder for having caused a death while committing or attempting to commit "the offense of deviate sexual conduct." However, the statutory offense deviate sexual conduct was not defined to involve the use or threat of force as required to establish felony murder. Because what Mr. Hornback was charged and convicted of was, facially, not felony murder, his felony-murder sentence is illegal and must be vacated.

Alternatively, this Court must remand for the district court to conduct an evidentiary hearing at which Mr. Hornback has the opportunity to prove his allegations of good cause to withdraw his plea. Mr. Hornback requested such an evidentiary hearing, but rather than affording Mr. Hornback a hearing, the district court denied Mr. Hornback's plea withdraw motion based upon a partial transcript from a federal court proceeding 15 years earlier. The facts underlying Mr. Hornback's allegations are disputed by the parties, and the district

court had no authority to rely upon testimony from another court system to make its dispositive factual findings here. The matter must be remanded for the district court to conduct its own evidentiary hearing and create a factual record regarding the allegations of Mr. Hornback's plea withdrawal request.

ARGUMENT

I. Mr. Hornback's sentence for felony murder was facially illegal because what Mr. Hornback was convicted of was, by statutory definition, not felony murder.

Sentencing authority in Montana is "defined and constrained by statute." *State v. Nelson*, 1998 MT 227, ¶ 24, 291 Mont. 15, 966 P.2d 133. "[A] district court has no power to impose a sentence in the absence of specific statutory authority." *Nelson*, ¶ 24 (quotation omitted). "A sentence not based on statutory authority is an illegal sentence." *State v. Ruiz*, 2005 MT 117, ¶ 12, 327 Mont. 109, 112 P.3d 1001. A sentence imposed upon an invalid plea exceeds the court's sentencing authority and is illegal. *State v. Hansen*, 2017 MT 280, ¶ 10, 389 Mont. 299, 405 P.3d 625. This Court will review such an illegal sentence for the first time on appeal pursuant to the *Lenihan* exception. *Hansen*, ¶ 12.

In determining a statute's meaning, the courts' role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. "Where the statutory language is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe." *State v. Running Wolf*, 2020 MT 24, ¶ 15, 398 Mont. 403, 457 P.3d 218 (quotations omitted). In assessing a statute's plain language, courts "must reasonably and logically interpret that language, giving words their usual and ordinary meaning." *Running Wolf*, ¶ 15 (quotation omitted).

The applicable statutes for sentencing authority are those in effect at the time of the alleged offense. *State v. Tracy*, 2005 MT 128, ¶ 16, 327 Mont. 220, 113 P.3d 297. The State alleged an offense date of August 31, 1987. (DC Doc. 116 at 1.) While the 1987 Legislature adopted several amendments to the statutes here, those amendments did not specify special effective dates and, thus, did not take effect until the default date of October 1, 1987. *See* Mont. Code Ann. § 1-2-201(1) (1985); 1987 Mont. Laws, chs. 322, 610. The sentence here is governed by the 1985 version of the Montana Code Annotated.

Mr. Hornback was charged and pled to deliberate homicide under Mont. Code Ann. § 45-5-102(1)(b)'s felony-murder rule. (DC Docs. 116 at 1, 117 at 1.) Montana Code Annotated § 45-5-102(2) (1985) authorized a sentence for "the offense of deliberate homicide" that included a term of imprisonment of not more than 100 years. Montana Code Annotated § 45-5-102(1)(b) (1985) required as an essential element that "the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual." "Felony" means an "offense" with a sentence exceeding one year, and an "offense" is "a crime for which a sentence of death or of imprisonment or a fine is authorized." Mont. Code Ann. § 45-2-101(21), (42) (1985).

Montana defines offenses by their statutory elements, not by their individual factual circumstances. *E.g.*, *State v. Williams*, 2010 MT 58, ¶ 21, 355 Mont. 354, 228 P.3d 1127 (observing that included offenses are determined by the statutory elements of offenses, not by "the facts

of an individual case"); *State v. Keith*, 2000 MT 23, ¶¶ 37–39, 298 Mont. 165, 995 P.2d 966 (holding that even though the defendant's particular criminal endangerment was her use of a weapon, "the offense of criminal endangerment" does not require a weapon because the statute defining criminal endangerment does not require a weapon).

Montana Code Annotated § 45-5-102(1)(b) (1985) required a "felony which involves the use or threat of physical force." It did not say a felony which *may sometimes involve* force. Nor did it authorize felony murder for *conduct* that involves the use of force. Montana Code Annotated § 45-5-102(1)(b) (1985) demanded a felony offense whose statutory elements included the use of force. *See Perkins v. State*, 576 So. 2d 1310, 1313 (Fla. 1991) (holding that this same "'*involves* the use or threat of physical force'" language in a Florida statute "can only mean that the statutory elements of the crime itself must include or encompass conduct of the type described"). The State must identify the predicate felony offense. That underlying offense then becomes an element of the felony murder, and the jury is instructed that the State must prove that specific, identified, underlying offense to prove felony murder. *State v. Russell*, 2008 MT 417, ¶¶ 23–24, 42, 347 Mont. 301,

198 P.3d 271. "[I]f the proof of the commission of the underlying felony fails, the purported offender is not guilty of felony-murder." *Weinberger*, 206 Mont. at 114, 671 P.2d at 569.

Here, the sole underlying felony charged by the State was "the offense of deviate sexual conduct." (DC Doc. 116 at 1.) Deviate sexual conduct was not one of the six felonies specifically enumerated by Mont. Code Ann. § 45-5-102(1)(b) (1985). Nor was deviate sexual conduct an offense that "involves the use or threat of physical force or violence."

Deviate sexual conduct was defined by Mont. Code Ann. § 45-5-505 (1985): "A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct." "Deviate sexual relations" were in turn defined as "sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal." Mont. Code Ann. § 45-2-101(20) (1985). "Sexual contact" was "any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party." Mont. Code Ann. § 45-2-101(60) (1985). "Sexual intercourse" was "penetration of the vulva, anus, or mouth of one person

by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient." Mont. Code Ann. § 45-2-101(61) (1985). Thus, deviate sexual conduct was touching or penetrating the sexual parts of a person of the same sex to arouse or sexually gratify either party. Use of force or threat of force was not part of the offense's statutory definition.

By these plain, unambiguous definitions, causing a death while committing deviate sexual conduct was not felony murder under Mont. Code Ann. § 45-5-101(1)(b) (1985) because under Montana's 1985 statutes, deviate sexual conduct was not a felony involving the use or threat of force or violence. Sentencing authority is "defined and constrained by statute." *Nelson*, ¶ 24. The district court had no power to impose a 100-year sentence under Mont. Code Ann. § 45-5-102(2) (1985) for felony murder when what Mr. Hornback pled to and was convicted of was, facially, not felony murder. Lacking statutory authorization, Mr. Hornback's sentence was and is illegal.

As in *Hansen*, ¶¶ 10–12, where the district court lacked statutory authority to enter a no contest plea to Sexual Assault, Mr. Hornback's resulting illegal sentence is subject to review for the first time on appeal under *Lenihan*. The proper remedy is to vacate the illegal sentence and remand to the district court for further plea or trial proceedings. *Hansen*, ¶¶ 13–14.

II. In the alternative, this Court must remand for an evidentiary hearing regarding Mr. Hornback's motion to withdraw his prior plea.

A. Review of Mr. Hornback's motion to withdraw his guilty plea is not procedurally barred.

The State conceded below (DV Doc. 24 at 14) that Mr. Hornback's motion to withdraw plea is controlled by a prior version of the plea withdrawal statute. *See also Mallak v. State*, 2002 MT 35, ¶ 15, 308 Mont. 314, 42 P.3d 794; *State v. Kadoshnikov*, DA 17-0676, Order (May 1, 2018). Critically, the applicable statute does not contain the present statute's one-year time bar. Rather it provides, "*At any time before or after judgment* the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Mont.

Code Ann. § 46-16-105(2) (1987)[6] (emphasis added). As the State has acknowledged (DV Doc. 24 at 20), there is, thus, no procedural time bar to Mr. Hornback's plea withdrawal motion.

The State was also correct below (DV Doc. 24 at 18–19) that Mr. Hornback's plea withdrawal motion should properly have been filed under his original criminal cause number, rather than in the habeas cause. However, as this Court has long recognized, "the substance of a document controls, not its caption." *Mallak*, ¶ 15. Despite being captioned with the habeas proceeding's DV-18-2 cause number, Mr. Hornback's motion was in substance a motion under Mont. Code Ann. § 46-16-105(2) (1987) to withdraw his guilty plea in the DC-87-72 criminal cause. (DV Doc. 18 at 1.) Although they repeated the DV-18-2 cause number, both the State and district court addressed the motion on its merits. (DV Docs. 24 at 14, 19, 26 at 1, 8–10.) Having denied the motion to withdraw plea, the district court then sentenced Mr.

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[6] As discussed above with respect to Mr. Hornback illegal sentence, the August 31, 1987 offense-date makes the 1985 version of the Montana Code Annotated applicable. However, given that the 1985 and 1987 versions of Mont. Code Ann. § 46-16-105(2) are identical, Mr. Hornback adopts the State's concession and use of Mont. Code Ann. § 46-16-105(2) (1987).

Hornback and entered a final judgment in DC-87-72. (DC Doc. 174.) Noting "the interconnected nature of these matters," this Court subsequently granted Mr. Hornback's petition for an out-of-time appeal from the plea withdrawal denial order filed in DV-18-02. (DA 20-0125, Order (March 10, 2020).)

Mr. Hornback urges this Court to treat his plea withdrawal request and the district court's denial as, in substance, part of his criminal case and to review it in his appeal from DC-87-72's final judgment. During an appeal from a final judgment, this Court may review any error that "necessarily affects the judgment." Mont. Code Ann. § 46-20-104(2). The district court's authority to impose its final judgment and sentence upon Mr. Hornback necessarily depended upon it having denied Mr. Hornback's request to withdraw his guilty plea.

Mr. Hornback acknowledges that a district court's denial of a habeas petition "is not appealable to this Court." *Thomas v. Doe*, 2011 MT 283, ¶ 3, 362 Mont. 454, 266 P.3d 1255. If this Court is unwilling to consider Mr. Hornback's existing plea withdrawal request as being, in substance, part of his appeal of the criminal judgment, then Mr. Hornback would ask the Court to dismiss his appeal of DV-18-02

without prejudice to refiling the motion in district court in the proper DC-87-72 cause.

B. The district court erred in denying Mr. Hornback's plea withdrawal motion based upon testimony in a federal proceeding without affording Mr. Hornback an evidentiary hearing in state court.

The controlling statute, Mont. Code Ann. § 46-16-105(2) (1987), provides, "At any time before or after judgment the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." This "good cause" standard includes involuntariness, ineffective assistance of counsel, intervening circumstances, discovery of new evidence, and other case-specific considerations. *State v. Terronez*, 2017 MT 296, ¶ 32, 389 Mont. 421, 406 P.3d 947; *State v. Valdez-Mendoza*, 2011 MT 214, ¶ 14, 361 Mont. 503, 260 P.3d 151. "[A]ll doubts should be resolved in favor of a trial on the merits." *State v. Radi*, 250 Mont. 155, 159, 818 P.2d 1203, 1206 (1991) (quotation omitted).

Where the parties contest the factual contentions underlying a motion to withdraw a plea, an evidentiary hearing is ordinarily necessary. *Terronez*, ¶ 25; *cf. State v. Lawrence*, 2001 MT 299, ¶¶ 12–16, 307 Mont. 487, 38 P.3d 809 (remanding a petition for postconviction

relief proceeding for an evidentiary hearing regarding good cause to withdraw plea). Fundamental due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted).

Mr. Hornback requested such an evidentiary hearing. (DV Doc. 17 at 6.) But none was held. Instead, the district court relied upon testimony purportedly taken by a federal magistrate 15 years before the instant motion's filing. (DV Doc. 26 at 9–10.) The State had attached a partial transcript of this testimony to its response brief. (DV Doc. 24, attached Ex. 6.) The district court summarized this transcript as containing testimony that Mr. Hornback's original appointed counsel was aware of weaknesses in Mr. Melnikoff's hair comparison analysis and had hired a defense expert who "neutralized" the hair evidence's value to the State. (DV Doc. 26 at 9–10.) Based on this federal testimony, the district court found that "any additional discreditation of Mr. Melnikoff's analyses is not new evidence and any extra findings regarding the unreliability of the hair evidence are not material to [Mr. Hornback's] conviction." (DV Doc. 26 at 10.) Based on these findings, the district court concluded there was not good cause to withdraw Mr.

Hornback's guilty plea and denied his motion to do so. (DV Doc. 26 at 10.) The district court did not address Mr. Hornback's other allegations of misrepresentations and misconduct by State actors.

There is no legal basis for the district court to have relied upon the federal court testimony. For a Montana court to take judicial notice of a fact, Mont. R. Evid. 201(b) requires the fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Similarly, Rule 202's judicial notice of law enables a district court to take judicial notice of the existence of another court's proceedings but not of those proceedings' underlying, disputed facts. *See In re Marriage of Carter-Scanlon*, 2014 MT 97, ¶¶ 17–24, 374 Mont. 434, 322 P.3d 1033. "[A] court may not take judicial notice of fact from a prior proceeding when the fact is reasonably disputed . . . ." *Carter-Scanlon*, ¶ 23. Evidentiary hearings in different courts involving

the same witnesses can produce vastly different facts. *E.g.*, *State v. Burton*, 2020 MT 172N, ¶ 16, ___ Mont. ___, 465 P.3d 1181.[7]

The facts here are reasonably disputed and not subject to judicial notice. Mr. Hornback alleges that at the time he entered his *Alford* plea, he believed the State had forensic testimony from Mr. Melnikoff that "matched" hairs found on the victim to Mr. Hornback and that this hair match was the only direct, definitive evidence against him. (DV Doc. 18 at 5–6.) Mr. Hornback alleges that Mr. Melnikoff's hair analysis resulted in three other false convictions during the same period and that Mr. Melnikoff's employment was subsequently terminated following a laboratory audit. (DV Doc. 18 at 5–6.) Mr. Hornback further alleges that Mr. Melnikoff erased evidence linking a transient to the murder and that the State withheld a witness's report of this same suspicious transient's involvement in the murder. (DV Doc. 8 at 2–4; *see also* DV Doc. 18 at 6 (plea withdrawal motion referencing other evidence of good cause set forth in Mr. Hornback's previous pleading).)

[7] *Burton* is a memorandum opinion. Mr. Hornback cites it here not as binding legal precedent but merely as an empirical example of an evidentiary hearing in a Montana court producing different factual results than a prior hearing regarding the same topic in a federal court.

Mr. Hornback alleged that law enforcement officers physically assaulted him "telling him to accept the plea." (DV Doc. 9 at 2.)

This was not a situation in which the facts were uncontested or where the existing case record conclusively established that Mr. Hornback was not entitled to relief. The parties disagreed as to the impact Mr. Melnikoff's hair analysis and misrepresentations had on Mr. Hornback's decision to plead guilty, and the district court explicitly relied upon purported testimony from a federal proceeding beyond the existing record to deny Mr. Hornback's motion. Mr. Hornback's request to withdraw his plea requires remand for the district court to conduct its own evidentiary hearing and to create a record for this Court's appellate review.

CONCLUSION

Mr. Hornback asks this Court to vacate his illegal felony-murder sentence and remand for further plea or trial proceedings. In the alternative, Mr. Hornback requests the Court reverse the district court's denial of his plea withdrawal motion and remand for an evidentiary hearing at which Mr. Hornback can prove facts definitively establishing good cause to withdraw his plea.

Respectfully submitted this 11th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,692, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Koan Mercer
KOAN MERCER

APPENDIX

CERTIFICATE OF SERVICE

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