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 APPELLEE

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. Is Appellant's claim, raised for the first time on appeal, that his sentence for deliberate homicide is facially invalid properly before this Court when Appellant entered a voluntary *Alford*[1] plea to deliberate homicide in 1988 pursuant to an advantageous plea agreement, thereby waiving the statutory interpretation claim that he raises for the first time here because he did not file a direct appeal back in 1988?

2. Did the district court properly exercise its discretion when it denied Appellant an evidentiary hearing on his motion to withdraw his guilty plea, filed decades after he entered his plea, when Appellant had already challenged the knowing and voluntary nature of his plea in federal district court, where, after an evidentiary hearing in 2004, the federal district court denied him relief, and the record overwhelmingly establishes the voluntariness of Appellant's *Alford* plea?

STATEMENT OF THE CASE

I. The criminal case/No. DC-87-72

On September 17, 1987, the State charged Appellant Robert Hornback (Hornback) with alternative counts of Aggravated Kidnapping, Deviate Sexual Conduct Without Consent, and alternative counts of Deliberate Homicide.

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

(D.C. Doc. 3, attached as App. A.) On March 7, 1988, Hornback filed an Acknowledgement of Waiver of Rights by Plea of Guilty with the state district court. (D.C. Doc. 117, attached as App. B.) The Acknowledgment set forth all the rights Hornback would waive by pleading guilty. (*Id*.)

The Acknowledgment also set forth the plea agreement between the State and Hornback, whereby Hornback agreed to enter an *Alford* plea to Deliberate Homicide, and the State agreed to move to dismiss the charges of Aggravated Kidnapping and Deviate Sexual Conduct Without Consent.[2] The parties agreed that Hornback would receive a 100-year sentence for Deliberate Homicide and an additional 100-year sentence as a persistent felony offender. (*Id*., Attach. 1)

The Acknowledgment provided that Hornback would not be eligible for parole on either sentence for 17 1/2 years, and each sentence, including time for parole eligibility, would run consecutively. Hornback specifically acknowledged that he would not be parole-eligible for 35 years. (*Id*.)

Attached to the Acknowledgment is a recitation of the evidence the State would have introduced at trial. (*Id*., Attach. 2.) The attachment contains 29 paragraphs, each of which Hornback initialed. (*Id*.) A third attachment to the Acknowledgment is Hornback's declaration that he was satisfied with the services

[2] The legislature has since repealed the criminal offense of Deviate Sexual Conduct.

of his attorney, David Harman. (*Id*., Attach. 3.) Hornback acknowledged that Harman had: spent about 50 hours at the jail discussing Hornback's case with him; explained legal information, including the persistent felony offender statutes and the death penalty; discussed the strengths and weaknesses of the State's case and possible defenses; interviewed witnesses; conducted an independent investigation, including talking to witnesses unknown to the State; filed appropriate pretrial motions; and consulted with appropriate experts. (*Id*., Attach. 3.)

On March 7, 1988, Hornback appeared in state district court and entered an *Alford* plea of guilty to Deliberate Homicide in connection with the abduction, rape, and murder of an eight-year-old boy from Libby, Montana. (3/7/1988 Transcript of Change of Plea and Sentencing (Plea Change Tr.) attached as App. C.)

After accepting Hornback's guilty plea to Deliberate Homicide, the State moved to dismiss the remaining charges, the trial court found Hornback to be a persistent felony offender, and the trial court sentenced Hornback in accordance with the plea agreement. (App. C at 11; D.C. Doc. 119, attached as App. D.) The trial court specifically stated at sentencing, "You are not to be released on parole under any condition in less than 35 years." (App. C at 13.)

On March 14, 1988, Hornback filed a document in state district court in which he claimed he had been pressured into pleading guilty because Harman had

told him there was no way he could be ready for trial until April 1988. (D.C. Doc. 127 at 2.) Hornback claimed Harman "sweet talked" him into pleading guilty because he was easily persuaded. (D.C. Doc. 127 at 2-4.) Finally, Hornback stated that he believed Harman never intended to effectively represent him, but was merely interested in negotiating a plea agreement. (*Id*. at 4.)

Hornback did not appeal his conviction or sentence, but he filed other pleadings in the Montana Supreme Court. The Court denied Hornback relief. *State v. Hornback*, No. 88-615 (Feb. 1, 1989); *In re Petition of Robert George Hornback*, No. 90-513 (Dec. 13, 1990).

On March 14, 1991, Hornback filed a pro se Petition for Writ of Habeas Corpus in federal district court. Hornback alleged, in part, that his trial counsel was ineffective and that he did not knowingly, intelligently, and voluntarily enter his guilty plea. (Cause No. CV 91-99-M-RWA 6/21/04 Order, attached as App. G.) Magistrate Judge Anderson appointed Hornback counsel and permitted limited discovery, including a deposition of Hornback. (2/3/04 Hornback Deposition, attached as App. E.) On March 10, 2004, Magistrate Judge Anderson conducted an evidentiary hearing. (3/10/04 Transcript of Evid. Hearing, attached as App. F.)

On June 21, 2004, Magistrate Judge Anderson denied Hornback's Petition for Writ of Habeas Corpus. (App. G.) Magistrate Judge Anderson denied Hornback's ineffective assistance of counsel claim after finding that Harman's

representation of Hornback was "competent, even admirable." (App. G at 15.) Magistrate Judge Anderson further concluded that Hornback had failed to show that he was in any way prejudiced by Harman's alleged failures. (*Id*. at 16.)

Magistrate Judge Anderson concluded that Hornback's allegation that he was coerced into pleading guilty was not supported by the evidence and was contradicted by the testimony of other witnesses, including his own mother. (App. G at 20.) Although Hornback raised three other claims in his Petition, Magistrate Anderson concluded that, since Hornback had entered a voluntary guilty plea, he had waived those claims. (App. G at 21-22.) In a memorandum opinion, the Ninth Circuit Court of Appeals affirmed the federal district court in all regards. *Hornback v. McCormick*, 133 F. App'x 378 (9th Cir. 2005).

II. Petition for Writ of Habeas Corpus/No. DV-18-2

On January 2, 2018, Hornback filed a Petition for Writ of Habeas Corpus or Other Appropriate Writ. (D.C. Doc. 1.) Hornback argued that the sentence the district court imposed in 1988 was facially invalid because the court sentenced him for both the deliberate homicide and as a persistent felony offender. (*Id*.) Hornback requested that his sentence be vacated and that the court conduct a new sentencing hearing. (*Id*.) The State filed a response. (D.C. Doc. 5.) Hornback replied to the State's response and requested that the court appoint him counsel. (D.C. Docs,

8- 9.) The court granted Hornback's motion for court-appointed counsel. (D.C. Doc. 10.)

Hornback's attorney filed a sur-reply in support of Hornback's Petition, objecting to the State's request that the district court strike the PFO enhancement and sentence Hornback to 100 years in prison with a 35-year parole restriction. Hornback's counsel argued for a new sentencing hearing. (D.C. Doc. 15.) Hornback's counsel additionally argued that Hornback should be allowed to withdraw his *Alford* plea and enter a not guilty plea. (*Id*. at 4-7.) Counsel argued Hornback's plea was not voluntarily entered because Hornback believed that forensic scientist Arnold Melnikoff (Melnikoff) had matched hairs found on the bloody shirt covering the victim's head to Hornback's. (*Id*. at 5.) Because in later cases Melnikoff's techniques were discredited, counsel posited that Hornback had established good cause to withdraw his *Alford* plea. (*Id*. at 6.) In an amended sur-reply, counsel additionally argued that Hornback's plea colloquy was inadequate and "information that has come to light since his conviction casts serious doubt on the reliability of key evidence the State used to secure the plea agreement." (D.C. Doc. 17 at 5.)

The State responded to Hornback's motion for a new sentencing hearing and his motion to withdraw his *Alford* plea. (D.C. Docs. 23-24.) The State included as exhibits a transcript of Hornback's March 7, 1988 change of plea hearing and a

transcript of Hornback's March 10, 2004 evidentiary hearing in federal district court. (D.C. Doc. 24, Exs. 2, 6.)[3]

The district court held a resentencing hearing on December 3, 2019. (12/3/19 Transcript of Sentencing Hearing [Tr.].) The district court resentenced Hornback to 100 years in prison with a 35-year parole restriction. (DC-87-72 Doc. 174, attached to Appellant's Br. as App. B; Tr. at 31.)

The district court denied Hornback's motion to withdraw his *Alford* plea after it found that Hornback had voluntarily entered his plea and failed to establish good cause for withdrawing his plea. (D.C. Doc. 26, attached to Appellant's Br. as App. D at 8.) The district court further concluded that Hornback had failed to demonstrate the existence of newly discovered evidence. (*Id*. at 9.)

Hornback appeals, raising a claim that he did not raise below—that his sentence is facially invalid because he pled guilty to alleged facts that did not constitute felony murder. Hornback also argues that he was entitled to an evidentiary hearing on his motion to withdraw his *Alford* plea.

[3] Hornback notes that several pages of transcript of the federal district court evidentiary hearing were missing from the State's Ex. 6 attached to D.C. Doc. 24, but here the State has attached the transcript in its entirety as App. F.

STATEMENT OF THE FACTS[4]

I. The crimes and the investigation[5]

In 1984 Hornback confronted two young boys playing near Flower Creek in Libby, Montana. Hornback forced them into an isolated wooded area where he sexually abused one of the boys by forcing his penis into the boy's rectum. Hornback pled guilty to sexual assault. In May 1987, Hornback was released from prison after serving a three-year sentence. (DC-87-72 Doc. 1 at 4; App. B, Attach. 2 at 7.) On August 26, 1987, Hornback moved in with Joe and Linda Saunders at 1021 Dakota Avenue in Libby, Montana. In exchange for a place to live, Hornback assisted the Saunders in tearing down a house on Idaho Avenue in Libby, Montana. (App. B, Attach. 2 at 1.)

On August 30 through August 31, 1987, Lieutenant Bernall of the Lincoln County Sheriff's Office attended an out-of-town meeting. On the evening of August 30, Hornback began calling Bernall's wife and demanding to speak with

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[4] Hornback argues that none of the facts from his original change of plea hearing or his 2004 evidentiary hearing in federal district court, during which Hornback challenged the voluntary nature of his *Alford* plea, are relevant to any issue he has raised on appeal. (Appellant's Br. at 7.) The State disagrees. No matter how Hornback has couched the issue on appeal, he is really asking this Court to nullify his 1988 conviction.

[5] Since Hornback entered an *Alford* plea, these facts are primarily taken from the Acknowledgment of Rights (App. B, Attach. 2.) Hornback initialed each of these factual assertions as facts the State would prove at trial. Some of the facts were established at the 2004 evidentiary hearing in federal district court. (App. F.)

Bernall. Hornback called repeatedly from August 30 through September 1, made strange statements, and upset Bernall's wife. (App. F at 83-84.)

On August 31, 1987, Hornback remained at the Saunders' residence until a little before 1:00 p.m., when he left with the Saunders for the job site on Idaho Avenue. Hornback immediately left the job site for the welfare office, about six blocks away and west of Flower Creek. Welfare office employees Jill Elliot and Theresa West verified that Hornback was at their office from shortly after 1:00 p.m. until not later than 1:17 p.m. when West left the office for a doctor's appointment. (App. B, Attach. 2 at 1-2.)

During the late morning of August 31, 1987, eight-year-old Ryan Van Luchene left his family home with his dog and a minnow net and headed for Flower Creek. Ryan's home abutted Flower Creek and was near the Libby Cemetery. In August of each year, Flower Creek consists mostly of small pools of water from which Ryan enjoyed catching minnows. At about 2:30 that afternoon, Ryan's dog returned home alone. That evening, the Lincoln County Search and Rescue Team and community volunteers began searching for Ryan. (App. B, Attach. 2 at 1.)

At approximately 3:00 p.m. on August 31, 1987, Joe and Linda Saunders were standing outside their residence when they saw Hornback turn south onto Dakota Avenue. As he did so, he stripped off his shirt and balled it up against his

stomach. Hornback's pant legs were wet, and his pant knees were muddy. He appeared hot and flushed. Hornback said two guys in a blue truck had jumped him and beat him up. Hornback said he got wet because the two guys chased him through Flower Creek near the welfare office. Hornback did not have any injuries. (App. B, Attach. 2 at 2.)

Hornback went directly inside to the bathroom area and shut the door. The Saunders could hear water running, and it sounded like Hornback was washing something. Hornback changed clothes and immediately took his laundry next door, requesting that a neighbor wash it. (DC-87-72 Doc. 1 at 2-3.) Hornback was nervous and agitated the rest of that evening. The next day, when Hornback saw a search and rescue vehicle at a local gas station, he claimed the police were persecuting him. (App. B, Attach. 2 at 2.)

When Bernall returned to Libby, he learned that Hornback had been calling his home and harassing his wife, and that Ryan was missing. On September 1, 1987, after Hornback called Bernall's home again and frightened Bernall's wife, Bernall and Detective Johnson went to the Saunders' residence to ask Hornback what he wanted and to request that he stop calling Bernall's wife. (App. B, Attach. 2 at 2; App. F. at 83-84.) When the officers located Hornback sitting on the floor of a shed behind the house, Hornback immediately became agitated and nervous. He was visibly shaking. (App. F at 83-84.)

Joe Saunders told Bernall that Hornback had been missing from work for several hours the previous day and had exhibited bizarre behaviors the rest of the day. (App. B, Attach. 2 at 2.) Bernall became suspicious that Hornback had been involved in Ryan's disappearance. He then arranged a shoulder-to-shoulder search of the Flower Creek area from the Van Luchene residence north along Flower Creek. This is the same area where Hornback had sexually assaulted the young boy back in 1984. (App. B, Attach. 2 at 3; App. F at 86-87.)

Hornback agreed to speak with Bernall and another detective. Hornback stated that he had been at work the entire afternoon of Ryan's disappearance. Bernall advised Hornback that the Saunders had already reported that he had left the job site at 1 p.m. and had been missing until 3 p.m. when he showed up at their house. Hornback suggested they go to the job site to verify his whereabouts on the previous day. (App. B, Attach. 2 at 3.)

When the Saunders could not verify Hornback's whereabouts, Hornback claimed he had been at the welfare office during the time in question. Hornback said that when he left the welfare office two unknown individuals had chased him through Flower Creek. When Bernall informed Hornback that the area of Flower Creek he had described was dry, Hornback took the officers to the described location. The creek bed was completely dry. (App. B, Attach. 2 at 4; App. F at 89.) Hornback next suggested that they visit the welfare office, but the employees could

only verify that Hornback had been there the previous afternoon from about 1 p.m. until about 1:17 p.m. (App. B, Attach. 2 at 4.)

Hornback informed the detectives that he maintained a log of his activities and suggested they go to the Saunders' house to retrieve it. After entering the residence, Hornback retrieved a single piece of paper from a duffle bag. The sheet of paper had a detailed recording of his activities from the previous day. Hornback did not have an activity log for any other day, only the day of Ryan's disappearance. (App. B, Attach. 2 at 5.)

Since the officers had already proved that Hornback did not get wet and muddy from the portion of Flower Creek where he claimed to have been, Hornback next offered that he got wet washing the blood off his face with a hose from someone's yard after being beaten up by the two unknown individuals. (App. B, Attach. 2 at 5; App. F at 90.)

At about 8 p.m. on September 1, 1987, a searcher found Ryan's body in a thicket of brush located east of Flower Creek. Ryan was lying on his stomach with his swim trunks on. His shirt covered his head, and his waist and posterior were raised in the air. Officers observed portions of Ryan's skull and brain scattered around the area of his body and found blood spatters on the branches of the bushes and trees in an arc to the north within several feet of Ryan's body. Ryan had

scrapes and bruises on his chest, arms, ears, and knees and appeared to have finger strangulation marks on his neck. (App. B, Attach. 2 at 6.)

At the time of Ryan's homicide, the population of Libby was around 4,000 people. (App. F at 41.) Law enforcement officers experienced an outpouring of support during their investigation. Anyone with potentially useful information promptly and willingly shared it with law enforcement. Investigators went door-to-door in the neighborhood surrounding the crime scene. Officers learned only that Hornback had been in the crime scene area a day or two prior to Ryan's homicide. (App. F at 92.)

Ryan died from a blow that destroyed approximately one third of the left side of his head. Ryan had been anally assaulted with a round, smooth object. A forensic scientist examined and tested stains on Ryan's swim trunks. One stain, near Ryan's anal area, contained spermatozoa, which Ryan was too young to produce. The forensic scientist could not specifically identify the source of the fluid stain, but the fluid stain was of a type possessed by 35 percent of the population in the United States, including Hornback and excluding Ryan. (App. B, Attach. 2 at 6-7.)

Forensic scientists compared several hairs found on Ryan's shirt to known samples from Ryan and Hornback. One hair matched Hornback's head hairs in all respects, including width; two hairs matched as to all characteristics except width.

Experts identified numerous dog hairs on Ryan's shirt and on Hornback's clothes and belt. (App. B, Attach. 2 at 7.)

Investigators recovered a pair of Hornback's pants that had soil in the left cuff. An expert conducted soil tests of soil taken from different areas along Flower Creek and concluded the most likely location for the origin of the soil in Hornback's pant cuff was a location hear Ryan's body. (App. B, Attach. 2 at 7.)

When Bernall arrested Hornback and read him his rights, Hornback immediately requested an attorney and to speak with his mother. Hornback told his mother that he would plead nolo contendere or would claim that he was insane. (App. B, Attach. 2 at 6.) Attorney David Harman was immediately appointed to represent Hornback. (DC-97-72 Doc. 4.)

II. The change of plea hearing

At the March 7, 1988 plea change hearing, the district court advised Hornback of the penalty for deliberate homicide. (App. C at 1-2.) The court questioned Hornback on whether he had reviewed the document entitled Acknowledgment of Rights by Plea of Guilty and all of the attached documents with his attorney. (App. C at 2.) Hornback answered in the affirmative. (*Id*.)

The following exchange occurred between the district court and Hornback:

THE COURT: Have you discussed, with your lawyer, each and every one of the rights that are listed in the document and the fact that you will be waiving these rights by pleading guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied with the services of your lawyer?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has your lawyer done everything you've asked him to do?

THE DEFENDANT: Yes, Your Honor.

(App. C at 3.) Hornback acknowledged that he had read every paragraph of Attachment 3, which described the services that Harman had provided, and he signed the bottom of Attachment 3. In that attachment, Hornback claimed he was satisfied with the services of his lawyer and that he was not aware of anything more Harman could have done for him. (App. B, Attach. 3, ¶ F.)

Hornback further acknowledged that he had individually initialed the 29 paragraphs in Attachment 2, which established the evidence the State intended to present at a trial. (App. C at 3-4.) Hornback expressed his belief that if he had proceeded to trial, the State would have presented all the evidence included in Attachment 2. (App. C at 4.) Hornback understood that he had a right to proceed to trial and present his own evidence, and that the burden was on the State to prove

his guilt beyond a reasonable doubt. (App. C at 4-5.) Hornback believed the plea agreement was advantageous to him. (App. C at 5.)

III. March 10, 2004 evidentiary hearing in federal district court

Harman had a typical small-town practice in Libby and had the public defender contract with the county. He had worked in criminal law for about 17 years. When Harman was appointed to Hornback's case, he already had a relationship with Hornback because he had represented Hornback on his 1984 sexual assault charge. (App. F at 36-38, 40.) In this case, Harman spent a lot of time with Hornback, knew him very well, had a good relationship with Hornback, and felt a great deal of compassion for Hornback because of Hornback's abusive background. (App. F at 42-43.)

Hornback's crimes made him eligible for the death penalty, which the State intended to seek. Harman promptly ordered the California Public Defender Death Penalty Manual and, where appropriate, followed the manual's recommendations. (App. F at 50.) Harman filed 21 pretrial motions. (*See* DC-87-72 Docs. 9, 16, 35-37, 41-49, 51, 68-69, 76, 80-82, 97, 101.) Harman succeeded on important issues such as changing the trial venue, limiting the use of other crimes' evidence, and prohibiting the State from eliciting testimony from Hornback's sexual offender

therapists at the prison, who could have provided damaging testimony. (*See* DC-87-72 Docs. 35-37, 45, 101, 108.)

The prosecutor, Scott Spencer, viewed the State's case as a very strong circumstantial evidence case and, if Spencer prevailed, he intended to seek the death penalty. The only weakness Spencer perceived in the State's case was an inability to definitively place Hornback at the crime scene through physical evidence. (App. F at 72-73, 75.) Spencer believed that Hornback's only viable defense was to say that he did not do it because he was not there. Spencer did not view this defense as particularly strong. (App. F at 74.) There were no other viable suspects. (App. F at 71.) And if Hornback had taken the stand and denied the charges or presented the defense of alibi, the State would have presented testimony from a jailer that Hornback had volunteered to him that he had been at the crime scene before the police and knew that whoever did the crime would have had blood on them because there was blood everywhere. (*See* App. B, Attach. 2 at 7.)

Spencer knew that Harman had a strong work ethic and was willing to take cases to trial. If Harman told Spencer he was prepared to take a case to trial, Spencer had no reason to doubt him. (App. F at 71.) Further, even though the community was outraged at Hornback, community outrage had never affected Harman's ability to adequately represent his clients. Spencer would never expect Harman's decisions to be driven by public sentiment. (App. F at 75.)

Harman considered the strengths and weaknesses in the State's case. (App. F at 47-48.) He thoroughly reviewed all the evidence himself and with Hornback, completed an investigation independent of the State's investigation and consulted with experts, including a hair expert who he believed would completely neutralize evidence from the State's hair expert. (App. F at 46, 49-50.) Harman had many frank discussions with Hornback about the evidence the State would likely be able to present to a jury, Hornback's likelihood of success if he proceeded to trial, and the potential imposition of the death penalty. (App. F at 52-53.)

Hornback's mother, Patti Alsup Morkeberg believed that if her son had proceeded to a trial he would have been convicted and he would have received the death penalty. (App. F at 9-10, 33.) Patti knew that her son could not account for his time at Ryan's time of death, and she also knew that he had repeatedly made inconsistent statements about his whereabouts. (App. F at 26.) Harman maintained regular contact with her son. (App. F at 28.) Patti recalled that the only complaint Robert ever made about Harman was that he did not think Harman was doing enough to find witnesses, but her son gave Harman only vague and scattered information. Harman did the best he could with the information Hornback provided. (App. F at 10-11, 18, 31.)

Hornback's jury trial was scheduled for March 8, 1988. (DC 87-72 Doc. 89.) Harman entered plea negotiations with Spencer because he believed Hornback

would likely be convicted if he went to trial, and he believed that Judge Harkin would seriously consider imposing the death penalty. (App. F at 46, 54.) According to Spencer, during the plea negotiation process, Harman advocated persuasively for Hornback. Harman negotiated the absolute best plea agreement Spencer was willing to enter. (App. F at 76.)

On March 3, 1988, Harman met with Hornback to review all the State's evidence, including crime scene photographs, the likelihood of success if they proceeded to trial, and the plea agreement the State was willing to enter with Hornback, including Spencer's willingness to allow Hornback to enter an *Alford* plea. (App. F at 12-15, 52-53.) Patti participated in the meeting. (App. F at 11.) According to Patti, Harman fulfilled his duty to her son by explaining the evidence against him so Hornback could make an informed decision on how to proceed. (App. F at 27-28.) Harman explained to Hornback that he could enter an *Alford* plea. Harman also discussed the realistic possibility of Hornback receiving the death penalty if he proceeded to trial. (App. F at 13, 15.) Hornback did not want to hear about the predicament he was facing. (App. F at 29.)

Hornback, on the other hand, denied that Harman had reviewed the documents with him and discussed the pros and cons of entering a plea agreement versus going to trial. According to Hornback, Harman, through manipulation and coercion, made him sign the plea agreement when Hornback did not understand the

consequences of his actions. Hornback acknowledged that Harman had never said he could not be ready for trial. (App. E at 13-15, 23.) Hornback claimed to be terrified during the meeting because the "whole thing was highly coercive." (App. E at 15.) Patti, on the other hand, said her son was not ever afraid of Harman and showed no fear of Harman at the March 3, 1988 meeting. (App. F at 18.) Patti believed that facing the death penalty scared her son (App. F at 20), but Hornback claimed that he did not plead guilty to save himself from the death penalty. (App. E at 26.)

Harman recommended that Hornback accept the plea agreement, but his recommendation was not particularly strong. (App. F at 67.) Hornback had a constitutional right to a jury trial and it was Hornback's decision to make, but only if he was fully apprised of the facts, law, and options. (App. F at 39.) At the conclusion of the meeting, Hornback decided to accept the plea agreement and executed the Acknowledgment of Waiver of Rights and its three attachments. (App. B, Attachs. 1-3.) Hornback later claimed that he never reviewed the documents until he was in prison (App. E at 29), that he did not understand the documents, and that he was coerced into signing them. (App. E at 9, 25-26.) Hornback accused that when Harman forced him to review the State's evidence against him, including crime scene photographs, he lost free will and was under the power of Harman. (App. E at

15, 25.) Hornback further claimed that Harman used his mother to get him to sign the documents. (App. E at 10.)

Patti denied that she and Harman in any way conspired to get her son to plead guilty. (App. F at 27.) Patti attended the March 3, 1988 meeting because she was concerned for her son and wanted to understand the State's evidence against him. (App. F at 11, 25.) Patti believed that her son benefited from the plea agreement. She recommended that he take the plea agreement because she wanted him to be spared the death penalty. (App. F at 17, 29.) Patti treated her son lovingly and did her best to support him. (App. F at 32.) Hornback claimed he was unable to make his own decisions and depended upon his mom to make decisions for him. (App. E at 12.) Patti, on the other hand, said Hornback did not rely upon her to make decisions, but rather usually did what he wanted and was not easily persuaded. (App. F at 17, 21.) Robert had an independent life, he did not live with his mother, he did not rely upon her, and he pled guilty because it benefitted him to plead guilty. (App. F at 21, 32.)

Harman adamantly denied that he threatened or coerced Hornback to enter into the plea agreement. (App. F at 54, 66.) Harman had fulfilled his duty to Hornback by making certain he knew what he was facing and that the stakes were high. Harman believed it was very significant that the plea agreement spared Hornback's life and gave him the opportunity to rejoin society later in his life.

(App. F at 54.) Harman believed it would have been emotionally easier for him to try the case. (App. F at 54-55.) Harman denied that either he or his family received threats from members of the community to not take Hornback's case to trial. (App. F at 64.) If anyone questioned his representation of Hornback, Harman explained that every person has a right to an attorney and a right to a fair trial. (*Id*.)

Harman reviewed the Acknowledgment and attachments with Hornback more than once. He was shocked to later learn that Hornback claimed he did not read the documents until he was in prison. (App. F. at 55-56.) In Spencer's assessment, Hornback's change-of-plea hearing went very well. Hornback was coherent, behaved normally, paid attention, and responded appropriately to the judge without prompting from Harman. Hornback appeared to understand the dialogue between himself and the judge and seemed to be acting of his own free will. If Spencer had any concerns about the knowing and voluntary nature of the plea, he would have acted affirmatively by requesting a recess or a new trial date. (App. F at 77-79.) Harman similarly had no reason to believe that Hornback was not entering a knowing, voluntary, and intelligent guilty plea. If Harman had doubts or concerns about the plea, he would have talked with Hornback in private. If Hornback had had a change of heart, Harman would not have allowed Hornback to enter the *Alford* plea. (App. F at 56-57.)

Hornback claimed to have shared his concerns about Harman with a jailer, Allen Nelson, and even showed Nelson notes he was keeping. (D.C. Doc. 127.) At his deposition, Hornback further said that he had confided in Nelson about his concerns and Nelson had advised him to get a new attorney. (App. E at 31.) At the evidentiary hearing, Nelson denied these claims. (App. F. at 95-98.)

To support his claim in federal court that he involuntarily entered his guilty plea, Hornback testified at his deposition that he had witnessed Ryan's murder from 100 yards away. (App. E at 49.) He admitted being at the crime scene with Ryan and a man named Cecil he had met the previous day. (App. E at 46-49.) Cecil was 6-feet-5-inches tall and weighed about 250 pounds. (App. E at 51.) Hornback was about 5-feet-3-inches tall and weighed about 115 pounds. (App. F at 93.) Hornback said he watched Cecil molest Ryan and heard Ryan scream. (App. E at 49.) Cecil then murdered Ryan and went to see if there were witnesses. While he was gone, Hornback stated, he attempted to perform CPR upon Ryan. Cecil returned, was angry, and attacked him with a whiskey bottle. Hornback said Cecil and he struggled, and Cecil struck him on the back of his head and on his right cheekbone with the bottle, but he managed to get away. Cecil chased him out into the open near a grocery store. Hornback yelled at Cecil to leave him alone and that he was a murderer. (App. E at 49-51.) Hornback claimed two young boys and a man with Down syndrome also witnessed all these events and a local deliveryman

watched Cecil chasing him. (App. E at 50.) He said he did not tell law enforcement about Cecil killing Ryan because he was afraid and did not know if he could trust them. He could not recall if he told his mother, whom he did trust. (App. E at 53.)

According to Spencer and Bernall, there was never a suspect named Cecil. (App. F at 80, 94.) If there had been a 6-foot-5-inch, 250-pound drifter in Libby at the time of the homicide, Bernall would have known about it. Further, it was unfathomable to Bernall that there were eyewitnesses to the homicide that had gone undetected. (App. F at 94.) Bernall conducted a body search warrant of Hornback, and he found no physical injuries. (App. F at 93.) Finally, Hornback's claim that he could have witnessed the crimes from 100 yards away was a physical impossibility because of the density of brush at the crime scene. According to Bernall, the visibility was probably 10 to 15 feet from the crime scene. (App. F at 91.)

At the December 19, 2019 resentencing hearing, Hornback admitted that he was present when Ryan was murdered, but claimed he was not the person who murdered Ryan. (Tr. at 29-30.)

SUMMARY OF THE ARGUMENT

For the first time on an appeal filed over 30 years after his conviction became final, Hornback uses this Court's holding in *State v. Hansen*, 2017 MT

280, 389 Mont. 299, 405 P.3d 625, to argue that his 100-year sentence for the offense of Deliberate Homicide is facially invalid and illegal. Decades after entering his *Alford* plea, which Hornback never challenged on direct appeal, Hornback asserts the district court did not have the authority to accept Hornback's *Alford* plea to Deliberate Homicide (felony murder) because, under Hornback's statutory interpretation, the offense to which he entered his *Alford* plea was not felony murder based upon the predicate offense relied upon. Hornback's argument exposes flaws in the Court's holding in *Hansen*, which Hornback uses to argue that a convicted murderer of an 8-year-old boy, who pled guilty over 30 years ago, can avoid all the time limits and procedural bars lawfully barring him from relief by using the guise of a facially invalid sentence to nullify his conviction. Hornback is not entitled to relief because he waived his statutory interpretation argument by voluntarily pleading guilty after receiving effective assistance of counsel. To hold otherwise would fly in the face of bedrock criminal justice principles and would send a clear message to crime victims that they can never achieve the peace of mind that comes with the finality of convictions—not even 30 years after judgment has been imposed. To the extent that *Hansen* allows such an outcome, this Court should overrule it or at least clearly limit its application.

For the sake of judicial efficiency and for the sake of kindness to the victim's family, this Court should hold that the district court did not abuse its

discretion in denying Hornback an evidentiary hearing on his motion to withdraw his guilty plea because the only ground that Hornback has for withdrawing his guilty plea is that his plea was involuntarily entered back in 1988. Hornback never raised such an issue on direct appeal. Also, Hornback has already unsuccessfully litigated that issue in federal district court through a petition for writ of habeas corpus, and he is not entitled to a second evidentiary hearing in state district court to relitigate the same issue.

To the extent that Hornback claims he now has "new" evidence of his innocence, such evidence cannot possibly be new because, even at his resentencing hearing in 2019, he admitted that he was present when Ryan was murdered. Thus, Hornback has always "possessed" the evidence that he now claims is new. The evidence is neither new, reliable, nor worthy of yet another evidentiary hearing. Hornback also asserts that he has new evidence concerning the hair analysis in his case. Again, this evidence is not new because he raised this issue at his evidentiary hearing in 2004.

The district court granted Hornback a new sentencing hearing, after which it imposed a legal sentence of 100 years for Hornback's deliberate homicide, with a lawful parole restriction of 35 years. This Court should affirm Hornback's sentence and deny him any other relief, allowing Ryan's family members the peace of mind they have deserved for years.

ARGUMENT

I. The standard of review

This Court reviews criminal sentences for legality—that is, whether a sentence is within statutory parameters. *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26.

The question of whether a plea is voluntarily made is a mixed question of law and fact, which this Court reviews de novo. *State v. Prindle*, 2013 MT 173, ¶ 16, 370 Mont. 478, 304 P.3d 712. This court reviews a lower court's denial of an evidentiary hearing for a motion to withdraw a guilty plea for a clear abuse of discretion. *State v. Schulke*, 2005 MT 77, ¶ 10, 326 Mont. 390, 109 P.3d 744. A court abuses its discretion if it acts arbitrarily, without the employment of conscientious judgment, or exceeds the bounds of reason, resulting in a substantial injustice. *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229.

II. Hornback's claim of a facially invalid sentence, raised for the first time on appeal, is not properly before this Court because Hornback is really challenging the validity of his conviction, a remedy that is no longer available to him.

A. Hornback's theory of the facial invalidity of his sentence, the original charges, and applicable statutes

In 1987, the State originally charged Hornback with alternative charges of kidnapping, alternative charges of deliberate homicide, and deviate sexual conduct

without consent. (App. A.) Hornback entered an *Alford* plea[6] to killing Ryan in the course of committing the crime of deviate sexual conduct without consent, which is commonly referenced as felony murder. (App. B.) In 1985[7], Mont. Code Ann. § 45-5-101 provided that a person commits criminal homicide "if he purposely, knowingly, or negligently causes the death of another human being." Criminal homicide is "deliberate homicide, mitigated deliberate homicide, or negligent homicide." Mont. Code Ann. § 45-5-101(2). Criminal homicide constitutes deliberate homicide if:

> (b) it is committed while 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.

Mont. Code Ann. § 45-5-102(1)(b).

Montana Code Annotated § 45-5-505 provided:

> (1) 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.
>
> . . . .

[6] *See Lawrence v. Guyer*, 2019 MT 74, ¶ 8, 395 Mont. 222, 440 P.3d 1 (in Montana, when a defendant enters an *Alford* plea, they still plead guilty).

[7] All criminal code sections referenced are from the 1985 Title 45 of the Montana Code Annotated.

> (3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000 or both.

Deviate sexual relations meant "sexual contact or sexual intercourse between two persons of the same sex. . . ." Mont. Code Ann. § 45-2-101(2). As used in Mont. Code Ann. § 45-5-505, "without consent" meant:

> (1) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or
> (2) the victim is incapable of consent because he is:
> (a) mentally defective or incapacitated;
> (b) physically helpless; or
> (c) less than 16 years old.

Mont. Code Ann. § 45-5-501.

In sum, Hornback argues, based upon his own statutory interpretation, that because deviate sexual conduct was the predicate felony for his felony murder plea, deviate conduct was not one of the offenses listed in the felony murder statute, and because deviate sexual conduct did not, based upon the elements of the statute, necessarily involve the use or threat of physical force or violence, Hornback could not have committed felony murder. Thus, he seemingly argues that the state district court had no "authority" to sentence him for felony murder, so his sentence is illegal and facially invalid.

As set forth below, there are several flaws in Hornback's argument.

B. *State v. Hansen* and Hornback's flawed reliance upon its holding

Citing to *State v. Hansen*, 2017 MT 280, ¶ 10, Hornback argues that, "A sentence imposed upon an invalid plea exceeds the court's sentencing authority and is illegal." (Appellant's Br. at 10.) Hornback argues that, because his sentence is "illegal" based on the invalidity of his plea, this Court can consider this issue raised for the first time on an appeal decades after his conviction became final. (*Id*.)

In *Hardin v. State*, 2006 MT 272, 334 Mont. 204, 146 P.3d 746, Hardin, in a postconviction proceeding, claimed that the district court lacked jurisdiction to accept his no contest plea to sexual intercourse without consent and impose sentence because Mont. Code Ann. § 46-12-204(4) prohibits the court from so doing. Because Hardin raised this claim as a jurisdictional issue, he argued that he could raise it for the first time in a postconviction proceeding. *Id*. ¶ 14. This Court rejected Hardin's argument, concluding that his claim was "more accurately characterized as a claim that his sentence was illegal as exceeding statutory authority." *Id*. ¶ 15. Since Hardin did not challenge the legality of his sentence on direct appeal, this Court held that his claim was procedurally barred. *Id*. ¶ 16.

In *Hansen*, defendant Hansen entered a no contest plea to sexual assault pursuant to a plea agreement. In a timely direct appeal, Hansen challenged the validity of his plea and sentence and argued that his counsel had performed

ineffectively by allowing him to enter a no contest plea when Mont. Code Ann. § 46-12-204(4) provides that a court may not accept a no contest plea to a sexual offense. *Id*. ¶¶ 1, 5. This Court framed the issue before it in *Hansen* to be whether the district court erred in accepting Hansen's no contest plea to a sexual assault and by imposing a sentence based upon that plea. *Id*. ¶ 7. Relying on *Hardin*, this Court held that, because of the statutory prohibition on the no contest plea, the *sentence* the court imposed was illegal for exceeding the district court's statutory authority. *Hansen*, ¶¶ 9-10.

The first flaw in Hornback's argument on appeal is that this Court's characterization of Hardin's and Hansen's claims as claims that their sentences were illegal is manifestly wrong and should be overruled. *See Alford*, 400 U.S. 25 (reviewing whether the plea was valid, not whether the sentence was legal). Hardin's and Hansen's claims were claims about whether their *pleas* were valid, and, thus, were claims challenging their respective convictions. In *Hardin*, this Court cited *Pena v. State*, 2004 MT 293, ¶ 24, 323 Mont. 347, 100 P.3d 154, in which a defendant tried to characterize a claim about the length of his sentence as an issue of jurisdiction. This Court correctly concluded that Pena's claim was more accurately characterized as a claim that his sentence was illegal. *Pena*, ¶ 24. But neither *Hardin* nor *Hansen* involved claims about the length of the sentences. Thus, *Pena* had no applicability to Hardin's or Hansen's claims because both

Hardin and Hansen were challenging their underlying convictions based on the types of pleas they each had entered.

As Hornback's case illustrates, the characterization of a claim matters because this Court will always review a sentence for legality. Here, the sentence the district court imposed upon Hornback, a persistent felony offender, is 100 years, which is within statutory parameters and, thus, a legal sentence. *See* Mont. Code Ann. § 46-18-502; *State v. Martin*, 2019 MT 44, ¶ 12, 394 Mont. 351, 435 P.3d 753. Hornback cannot challenge his sentence through a writ of habeas corpus as facially invalid or illegal because it is not. The district court sentenced him within statutory parameters.

Decades after he entered his *Alford* plea, pursuant to an exceedingly favorable plea agreement, Hornback is really challenging the validity of his *Alford* plea based on his theory that the State relied upon a nonqualifying predicate felony. But Hornback waived this challenge when he failed to object at the change of plea hearing and entered the plea, waiving the right to appeal nonjurisdictional defects. "[A] plea of guilty which is voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional violations which occurred prior to the plea. Thereafter, the defendant may only attack the voluntary and intelligent character of his plea." *Hagan v. State*, 265 Mont. 31, 53, 873 P.2d 1385, 1387 (1994) (internal quotes and citations

removed); *Hardin*, ¶ 23. Jurisdictional claims are limited to those cases in which the district court could determine, at the time of accepting the guilty plea and from the face of the charging document or from the record, that the State lacked the power to bring the charges. *Hagan*, 265 Mont. at 26, 873 P2d at 1388, citing *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992). Hornback's alleged defect is not jurisdictional.

By entering a voluntary *Alford* plea, Hornback waived his right to appeal any nonjurisdictional defect, including his statutory interpretation claim that the conduct to which he entered an *Alford* plea did not constitute felony murder. "Montana's long standing jurisprudence holds that 'where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea.'" *State v. Watts*, 2016 MT 331, ¶ 9, 386 Mont. 8, 385 P.3d 960 (collecting cases). Here, the conduct the State alleged as the deviate sexual conduct without consent, and the facts that Hornback specifically acknowledged, *did* constitute felony murder. But even if *Hornback* believed that the facts did not constitute felony murder, he clearly understood the favorable terms of the plea agreement pursuant to which the State dismissed two serious felony offenses and forewent seeking the death penalty. Hornback voluntarily accepted the benefit of the plea agreement.

Hornback's argument exposes a problem with this Court treating an attack on a guilty plea as a challenge to the legality of the sentence. Decades after Hornback pled guilty to the murder of Ryan, he is relying on *Hansen* to overturn his conviction. Here, the only remedy that was available to Hornback is the one he has already unsuccessfully used—attacking the voluntariness of his plea.

In *Hansen*, the remedy this Court provided after concluding that the sentence the district court imposed exceeded its statutory authority was voiding the plea agreement and vacating the sentence imposed. *Hansen*, ¶ 13. The Court remanded Hansen's case to the district court to allow Hansen to "enter a legal plea to the original charges, enter a new plea agreement, or to proceed to trial." *Id*. Providing these remedies to Hornback decades later would lead to an unjust result.

Hornback, as a criminal defendant, is entitled to a just and fair process, but so is the State. Allowing Hornback to nullify his guilty plea decades later through the guise of an illegal sentence would be an unjust result because the ability of the State to retry Hornback has been compromised by the passage of time. As such, Hornback's motivation to renegotiate a plea agreement would be non-existent. Hornback would no longer be convicted for the murder of Ryan even though he waited over 30 years to raise a statutory interpretation argument that he clearly could have raised at the change of plea hearing or on direct appeal back in 1988. If Hornback had raised an objection at the change of plea hearing, even if the State

found the objection meritless, it could have changed the charge to which Hornback entered his plea to deliberate homicide rather than felony murder, or it could have changed the predicate felony for the felony murder to kidnapping or to sexual intercourse without consent. Hornback's claim, raised on appeal decades after his conviction became final, demonstrates why this Court's holdings in *Hardin* and *Hansen* are manifestly wrong.

But, even if this Court declines to conclude that the reasoning in *Hansen* and *Hardin* is manifestly wrong, it should clearly limit its holding of *Hansen* to violations of Mont. Code Ann. § 46-12-204(4). This statute is not at play here, and Hornback's claim fails. Also, Hornback cannot prevail because he did not raise this issue in a timely direct appeal following his conviction in 1988, let alone in a timely postconviction proceeding. *See Hardin*, ¶ 16. Hornback should be procedurally barred from raising this issue, for the first time on appeal, decades after his conviction became final.

Finally, even if this Court considers the merits of Hornback's argument, he still cannot prevail because the offense that the State charged, killing Ryan in the course of committing the offense of deviate sexual conduct without consent[8], and

[8] In the original information the State charged deviate sexual conduct without consent. (App. A.) In the Amended Information (DC 97-72, Doc. 116), the State did not include the without consent language but there is no argument that in this case the sexual contact was consensual.

the facts Hornback acknowledged that the State would have proven at trial, did include force or the threat of force. Without consent meant:

> (1) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or
> (2) the victim is incapable of consent because he is:
> (a) mentally defective or incapacitated;
> (b) physically helpless; or
> (c) less than 16 years old.

Contrary to Hornback's assertion, without consent is an element of deviate sexual conduct, and the definition includes the wording of the felony murder statute of "any other felony which involves the use or threat of physical force or violence against any individual." Mont. Code Ann. § 45-5-102(1)(b).

III. This Court should hold that the district court did not abuse its discretion in denying Hornback an evidentiary hearing on his latest attempt to withdraw his 1988 *Alford* plea for the murder of an 8-year-old boy.

Hornback next argues that the district court abused its discretion when it did not grant him a hearing on his most recent motion to withdraw his guilty plea.[9] Hornback additionally argues that the district court inappropriately considered his

[9] For the sake of the victim's family and judicial economy, the State will not challenge the efficacy of Hornback filing his motion to withdraw his plea in the habeas case rather than in the criminal case, at least for purposes of this Court considering whether the district court abused its discretion in not granting an evidentiary hearing or relying upon Hornback's prior federal habeas proceeding.

prior proceeding in federal court in which he challenged the voluntariness of his plea. Hornback did not make any showing of good cause to withdraw his guilty plea that would have necessitated an evidentiary hearing, and Hornback previously unsuccessfully challenged the voluntariness of his guilty plea in a federal habeas corpus proceeding in which he was granted an evidentiary hearing. Thus, the district court did not abuse its discretion when it denied Hornback's request for an evidentiary hearing.

A. No evidentiary hearing was necessary.

Montana law permits a defendant to withdraw his guilty plea for good cause. Mont. Code Ann. § 46-16-105(2). Good cause for withdrawal of a guilty plea exists when a defendant's guilty plea was involuntarily entered. *Prindle*, 2013 MT 173, ¶ 17. This Court has adopted the standard articulated in *Brady v. United States*, 397 U.S. 742 (1970) to determine whether a plea is voluntary:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

State v. Warclub, 2005 MT 149, ¶ 18, 327 Mont. 352, 114 P.3d 254, citing *Brady*, 397 U.S. at 755. The burden is on the defendant to show his plea was involuntary. *State v. Robinson*, 2009 MT 170, ¶¶ 17-18, 350 Mont. 493, 208 P.3d 851.

It is unclear to the State under what theory Hornback believes he was entitled to an evidentiary hearing. In district court, Hornback seemed to argue that his plea was involuntarily entered because the plea change hearing was somehow deficient. The record, however, does not support his claim. Hornback's Acknowledgment of Rights and the plea change transcript wholly disprove Hornback's claimed deficiency. Also, Hornback has waived this claim because he never filed a direct appeal. Mont. Code Ann. § 46-21-105(2); *State v. Osborne*, 2005 MT 264, ¶ 14, 329 Mont. 95, 124 P.3d 1085.

Hornback also argued in the district court that his plea was involuntarily entered because he believed Melnikoff's expert hair testimony would have convicted him because it was the only physical evidence that would have placed him at the scene of the crime. But the state district court properly considered Hornback's prior unsuccessful attack on the voluntariness of his guilty plea through his federal Petition for a Writ of Habeas Corpus. At the 2004 evidentiary hearing, Harman testified that he had retained a hair expert who would have neutralized any of Melnikoff's testimony and Hornback knew that before he entered his guilty plea. (*See* App. F at 48-50.)

To the extent that Hornback claims that he has discovered "new" evidence of his innocence, his claim fails at the outset because, to the extent he is arguing that someone else murdered Ryan, even at his 2019 resentencing hearing, he

admitted to being at the murder scene, but denied that he committed Ryan's murder. Thus, even back in 1987, he would have known who allegedly did commit the murder, at least by physical description. And Hornback is relying upon the same "new" evidence he presented to the federal court back in 2004. (*See* App. E.)

The district court did not abuse its discretion by not conducting an evidentiary hearing on Hornback's latest motion to withdraw his guilty plea.

B. The district court properly relied on Hornback's federal habeas proceeding where he unsuccessfully attacked the voluntariness of his plea to conclude that Hornback's purported "new" evidence was not new.

Hornback finally argues that the district court inappropriately took judicial notice of his prior federal habeas proceeding during which he attacked the voluntariness of his guilty plea. Hornback misconstrues how the state district court used the transcript of the prior federal habeas proceeding. Hornback claimed that he had new evidence that, if he had proceeded to trial, could have discredited Melnikoff's trial testimony. The state court relied upon the transcript of the 2004 evidentiary hearing to conclude Hornback's "new" evidence concerning Melnikoff was not new. (Appellant's App. D at 9.) The district court stated:

> The fact that Mr. Harman testified that he neutralized the hair evidence was known to the defense prior to Petitioner's acceptance of the plea. The Court finds any additional discreditations of Mr. Melnikoff's analyses is not new evidence and any extra findings regarding the unreliability of the hair evidence are not material to Petitioner's conviction. As such, the Court finds that the existence of

> new evidence or the inadequacy of a plea colloquy do not create good cause to withdraw Petitioner's guilty plea.

(Appellant's App. D at 9-10.)

Although there are numerous problems with Hornback's judicial notice argument, it fails at the outset because the state district court merely relied on the transcript to conclude that Hornback's claimed new evidence was not new at all. As such, there was no need for the district court to grant Hornback a hearing.

Finally, since Hornback already raised the Melnikoff issue in federal court as grounds to withdraw his guilty plea, Hornback was represented by counsel in the federal habeas proceeding, and Hornback fully participated in all aspects of the proceeding, the doctrine of collateral estoppel or issue preclusion should preclude Hornback from relitigating that claim. *See State v. Huffine*, 2018 MT 175, ¶ 16, 392 Mont. 103, 422 P.3d 102. Collateral estoppel applies when:

> (1) both proceedings involved the same parties or their privies; (2) the same issue was at issue and conclusively decided on the merits in the prior litigation; (3) the prior proceeding afforded the party or privy against whom estoppel is asserted a full and fair opportunity to litigate the issue; and (4) the prior proceeding resulted in a final judgment.

Id. ¶ 16. Those elements are clearly present here.

CONCLUSION

The State requests that this Court deny Hornback relief on his claim that his sentence is facially invalid and conclude that the district court properly denied Hornback's motion to withdraw his guilty plea without an evidentiary hearing.

Respectfully submitted this 2nd day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 9,766 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

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.

APPENDICES

CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-02-2021:

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