IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 21-0310

GALEN LEWIS HAWK,

Defendant And Appellant,

v.

STATE OF MONTANA,

Plaintiff And Appellee.

APPELLANT'S REPLY BRIEF

On Appeal from Montana's Fourth Judicial District Court,
Missoula County, The Honorable Shane Vannatta Presiding

APPEARANCES:

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APPELLANT'S REPLY

Defendant And Appellant Galen Lewis Hawk affirms the arguments set forth in Appellant's Opening Brief and offers this Reply to the arguments set forth in the Appellee's Response.

STATEMENT OF THE CASE

Appellee does not dispute Appellant's assertions regarding the law in this case. The outcome of this appeal rests largely on which interpretation of the record from below the Court finds most plausible. Appellant has tried to present an objective summary of the case, "warts and all." By contrast, Appellee has presented a more limited view of the case, favoring advocacy over objectivity.

Appellee concedes, for example, that Mr. Hawk "formally sought to withdraw his no contest plea," but fails to note that Mr. Hawk made his request immediately and repeatedly before the district court. This information is relevant to deciding whether Mr. Hawk's request to withdraw his plea was reasonable. Also relevant – but overlooked by Appellee - are the facts that Mr. Hawk did not make the request to delay the proceedings, did not seek withdraw the plea after enjoying the benefit of the agreement and, to the best of his limited ability, articulated legitimate reasons for his request.

Appellee states that, though Mr. Hawk's request to withdraw his plea was "based, in part, on deficient counsel," the district court "concluded that Mr. Hawk

did not raise any concerns of ineffective assistance of counsel." Appellee appears to ignore the February 18, 2020 hearing at which the district court explicitly inquired into exactly those concerns. (DC19)

Appellee's recitation of the "facts of the case" are equally biased. The only objective evidence in the record is the affidavit filed in support of the State's Information charging Mr. Hawk. That affidavit consists of allegations, most of which were never proven by evidence or sworn testimony and many of which were contradicted by other witnesses.

The most incriminating statement was made by Daniel Cartwright who – according to the affidavit – told law enforcement Mr. Hawk started walking toward him, removed knife from a sheath at his side, and lunged at him with the knife fully extended. (DC01) Appellee summarizes the statements of the other two witnesses by stating that they "both described the event the same as Cartwright." They did not.

A reading of the affidavit tells a different story. The only unbiased witness – a neighbor – told law enforcement that she saw Mr. Hawk slashing tires and "leaning with a knife" when Mr. Cartwright approached "yelling at" him. (DC01) According to the neighbor, she then saw Mr. Hawk "grab the knife and slash at Cartwright." (*Id.*)

The third witness was Mr. Cartwright's wife, who told law enforcement she saw Mr. Cartwright slashing car tires with a knife, saw "the exchange between Cartwright and the Defendant," and "reported that the Defendant had lunged at Cartwright 'with all his force'" when Mr. Cartwright was within 2-3 feet of Mr. Hawk. (DC01)

Contrary to Appellee's assertion, there are numerous inconsistencies in the witness statements that merit further inquiry by defense counsel. Did Mr. Hawk rise and go to meet Mr. Cartwright, or did Mr. Cartwright advance upon Mr. Hawk while he was slashing tires? Could Mr. Hawk have perceived Mr. Cartwright's approach as aggressive, or a threat? Did Mr. Hawk draw the knife from a sheath, pick it up from the ground, or was it already in his hand? Did Mr. Hawk slash with the knife in a defensive manner, or did he lunge with the knife in an offensive manner? Based on Appellee's recitation of the facts, none of these questions arise. Based, however on the record itself, they should have been apparent to any competent defense attorney and – in light of the fact that Mr. Hawk immediately dropped the knife and withdrew after putting Mr. Cartwright at bay – should have prompted follow up interviews to determine whether there sufficient evidence to credibly establish Mr. Hawk was exercising a justifiable use of force.

ARGUMENT

1. Mr. Hawk's plea agreement was not a valid, enforceable contract.

Appellee does not disagree that Mr. Hawk's plea agreement was a contract, or that Mr. Hawk entered the courtroom believing he was entering a guilty plea. The question the Court must answer is whether it is a breach of that contract for defense counsel to change that plea without first advising Mr. Hawk. Appellee argues that a no contest plea is not materially different from a guilty plea, but "merely transferred the obligation to provide the factual basis in support of Hawk's plea from Hawk to the State." This statement – though incorrect – encapsulates the thrust of Appellee' argument. Contrary to Appellee's assertion, review of the transcript from the hearing makes it clear Mr. Hawk was not informed in advance that his plea was being changed. The question for the Court is whether the nature of the plea is a material term of the plea agreement and, if so whether changing that plea without advising and obtaining the consent of the defendant renders the plea agreement invalid.

Appellee's contention that, "Hawk's attorney stated that he would sign on Hawk's behalf, with Hawk's consent, the plea of guilty and waiver of rights form," seriously misstates the record and overlooks a critical concern. The statement of defense counsel is irrelevant. After defense counsel told the district court he had "discussed the main provisions" of a guilty plea with Mr. Hawk, the court gave counsel explicit instructions to have Mr. Hawk review and file a written waiver of rights and gave Mr. Hawk specific instruction to sign the guilty plea and waiver of

rights form. (12/16/2020 Hrg. Tr. 6:18-25) Appellee's statement that Mr. Hawk did not object to having defense counsel sign the form on his behalf is not supported by the record.

It is undisputed that the Plea and Waiver of Rights subsequently filed by defense counsel was *completely blank*, and that – contrary to the specific instruction of the district court – it was executed by defense counsel "on behalf of" Mr. Hawk. (DC18) Neither does Appellee dispute that the district court, in reviewing Mr. Hawk's subsequent request to withdraw his plea, erroneously found – as a matter of fact – that "we talked about the fact that you had signed, through counsel, your… a form called Plea of Guilty and Waiver of Rights, and we discussed that you had had an opportunity to review that and had authorized your attorney to sign that on your behalf." (2/4/2021 Hrg. Tr. 5:25-6:5)

Appellee argues that a guilty plea and waiver of rights form, executed by counsel contrary to the district court's instruction, and without Mr. Hawk's consent, is acceptable and enforceable. This Court cannot ignore the fact that Mr. Hawk did not sign the written plea agreement, did not sign the plea entry, and – based on the record from below – was not advised or consulted with regarding the terms of the underlying plea. These facts, taken in conjunction with Mr. Hawk's immediate, unequivocal and persistent request to withdraw the plea are sufficient to determine the contract was invalid.

2. Mr. Hawk's plea of no-contest was not entered voluntarily, knowingly and intelligently.

Appellee does not dispute the legal principal that a plea of guilty or no contest "must be a voluntary, knowing and intelligent choice among alternative courses of action open to the defendant." *State v. Humphrey*, 2008 MT 328, ¶14, 346 Mont. 150, 194 P.3d 643 (citations omitted). Nor does Appellee contest that, where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *State v. McFarlane*, 2008 MT 18, ¶11, 341 Mont. 166. Appellee improperly reduces Mr. Hawk's arguments regarding whether defense counsel's performance was deficient to whether counsel adequately advised him regarding his plea entry and waiver of rights and, counsel's failure to reasonably investigate the conflicting witness statements set forth in the affidavit in support of the Information.

Appellee focusing only on the early difficulties in communication due to Covid-19 is misplaced and disregards the fact that defense counsel did not subsequently ensure that Mr. Hawk read and signed the Plea of Guilty and Waiver of Rights form, despite the district court's specific instructions to do so. Moreover, Appellee does not address whether defense counsel's broad statement that he and

Mr. Hawk had "discussed the main provisions when one pleads guilty" meets the requirement that a defendant must be competently advised of his rights and of every "intelligent choice among the alternative courses of action open to him." *State v. Humphrey*, 2008 MT 328, ¶14, 346 Mont. 150. If this Court determines that defense counsel did not meet this requirement, it must find defense counsel's performance to be deficient and Mr. Hawk's consent to be invalid.

Neither does Appellee address Mr. Hawk's uncontested statement that defense counsel, "straight-out told me that he didn't have no defense for me and asked me what my defense was…. He just told me about my plea agreement, and he didn't really tell me options. He just said if I took it to trial, I would get a large sentence." (2/18/2021 Hrg. Tr. 4:20-5:3) The Court should find this statement to be particularly disturbing. It is counsel's job to identify possible defenses and to fully inform the client of "alterative courses of action open to him." To challenge the defendant, an incarcerated lay person with no apparent legal experience, to make such a determination is incredibly callous and falls short of professional courtesy as well as proficiency.

Appellee implicitly objects that, only upon appeal, does Mr. Hawk raise the question of whether defense counsel's failure to investigate the legitimate defense of justifiable use of force. Appellee denies there were inconsistencies in the witness statements. Mr. Hawk disagrees and has done so throughout the case.

Appellee concedes that Mr. Hawk repeatedly raised concerns that his attorney had not interviewed the neighbor, who was the single objective witness to the encounter.

Appellee cites defense counsel's statement to the district court that the recorded interview with the neighbor "mirrored her statements made at the time of the report and also corroborated Cartwright's and his wife's statements." The record does not support counsel's statement to the court. As detailed above, the neighbor's statements in the affidavit do not corroborate the statements of Mr. Cartwright and his wife. Even Mr. Hawk noted the inconsistency. Without even knowing what it was, Mr. Hawk found sufficient evidence in the record to raise the issue of justifiable use of force. :

> I was reading the police report saying she witnessed the victim coming towards me yelling before I even pulled a knife on him. And then she would have been able to, uhm, let them know, if they interviewed her, that he was provoking me and instigating the problem when I dropped the knife and walked away….

(4/4/2021 Hrg. Tr. 15:1-16:10)

Contrary to defense counsel's statement to the district court, either the neighbor's recorded interview mirrored her previous statements, or it corroborated the statements of Mr. Cartwright and his wife. It cannot have done both.

This is not a matter of counsel exercising his judgment or making a tactical decision. Mr. Hawk's statement to the district court was practically chapter and

verse of the criteria set forth in Montana law, which provides for the affirmative defense of justifiable use of force in the defense of self or others wherein, "If a person reasonably believes that the person or another person is threatened with bodily harm, the person may warn or threaten the use of force, including deadly force, against the aggressor, including drawing or presenting a weapon." Mont. Code Ann. §45-3-11. Any evidence of justifiable use of force – even if it is only Mr. Hawk's testimony – shifts the burden to the State to prove beyond a reasonable doubt that his actions weren't justified. *State v. Lau*, 2018 MT 93, ¶10, 391 Mont. 204.

The clear inconsistencies in the witness statements – Mr. Cartwright's loud and aggressive approach, the reflexive nature of Mr. Hawk's initial response, and Mr. Hawk's immediate abandonment of his knife and withdrawal as soon as Mr. Cartwright halted his aggressive approach – are directly in line with Mont. Code Ann. §45-3-11. It was defense counsel's duty to investigate whether Mr. Hawk exercised a justifiable use of force. Relying on an interview conducted by the State or by law enforcement is not sufficient. Neither of those agencies has an inclination – or an obligation – to challenge inconsistencies in a witness statement or delve for exculpatory evidence. That is the duty of defense counsel.

Defense counsel, by failing to make any effort to resolve the inconsistencies in the witness statements that raised the issue of justifiable use of force, and by

instead challenging Mr. Hawk to identify his own defense without even apprising him of possible defenses to the charge against him, was deficient in performance of his duty to advocate on Mr. Hawk's behalf and to hold the State to its burden of proof.

Finally, Appellee argues that "Even if the Court finds Hawk satisfied prong one of the Strickland analysis, Hawk cannot establish that but for counsel's deficient advice, he would not have pleaded guilty or no contest." This statement flies directly in the face of Mr. Hawk's actions and statements to the district court and misstates the burden of proof. Mr. Hawk does not need to prove that he would not have entered a guilty plea, he need only show that it is reasonably probable he would not have done so. The record unequivocally supports such a conclusion.

Mr. Hawk immediately and consistently asked to withdraw his plea from his next appearance all the way to sentencing. As detailed above he even articulated the factual basis for a defense against the charge that shifted the burden to the State to prove his actions were unjustified. Contrary to what he was told by defense counsel, Mr. Hawk not only had a defense against the charge, he had a very good defense, *if it was supported by further witness interviews*. If Mr. Hawk had asserted justifiable use of force – even without corroborating witness testimony – it would shift the burden to the State to show that his actions – taken in their entirety – were not justifiable. Given the benefit of counsel willing to investigate and

advocate on his behalf, it is more than reasonably probable Mr. Hawk would not have pled guilty to the charge against him.

3. Other case-specific considerations show Mr. Hawk had good cause to withdraw his plea of no-contest.

Appellee does not dispute the legal basis of Mr. Hawk's argument that a plea – even if entered knowingly and intelligently – can be withdrawn upon a show of good cause based on case-specific considerations. see, e.g. *State v. Lone Elk*, 2005 MT 56, ¶23, 326 Mont. 214. The record must be examined as a whole to determine whether the plea was voluntary. *State v. Hendrickson*, 2014 MT 132, ¶24, 375 Mont. 136, . Factors taken into consideration by the Court include but are not limited to: an inadequate colloquy; newly discovered evidence; intervening circumstances; or any other reason for withdrawing a guilty plea that did not exist when the defendant pleaded guilty. *State v. Terronez*, 2017 MT 296, ¶32, 389 Mont. 421.

a. Mr. Hawk's petition was timely, commencing immediately after the change of plea hearing and persisting through sentencing.

Appellee does not dispute that Mr. Hawk immediately and consistently asked the district court to allow him to withdraw his plea.

b. The district court's soliloquy did not meet the requirements of Mont. Code Ann. §46-12-210 or relevant precedent.

Appellee concedes that Montana law requires that, before accepting a guilty plea, the district court must ensure a criminal defendant understands the nature of

the charge against him or her, the penalties for the offense, any applicable restitution, and that the defendant knows he or she has the right:

> (a) to plead not guilty or to persist in that plea if it has already been made;
>
> (b) to be tried by a jury and at the trial has the right to the assistance of counsel;
>
> (c) to confront and cross-examine witnesses against the defendant; and
>
> (d) not to be compelled to reveal personally incriminating information;
>
> ….

Mont Code Ann. §46-12-210 (3)

Appellee fails to explain how the requirements of 46-12-210 were met in this case. The record shows defense counsel told the district court he had provided a plea of guilty and waiver of rights form to Mr. Hawk, and they had "discussed the main provisions" of a guilty plea. This statement does not satisfy the legal requirements of Mont. Code Ann. §46-12-210(3).

The district court gave counsel explicit instructions to have Mr. Hawk review and file a written waiver of rights and gave Mr. Hawk specific instruction to sign the guilty plea and waiver of rights form. (12/16/2020 Hrg. Tr. 6:18-25) The Plea and Waiver of Rights subsequently filed by defense counsel was *completely blank*, and – contrary to the specific instruction of the district court –

was executed by defense counsel "on behalf of" Mr. Hawk. This filing does not satisfy the legal requirements of Mont. Code Ann. §46-12-210(3).

At the hearing on December 16, 2020, the district court advised Mr. Hawk as follows:

> THE COURT: And you understand today that if you make a decision to change your plea from not guilty to guilty with regard to any of the charges filed by the State, that effectively you will be giving up many of your legal rights, including the rights identified by Mr. Mandelko: the right to a jury trial, the right to challenge the State's evidence, all of those rights. Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.

(12/16/2020 Hrg. Tr. 7:17, et seq.)

This soliloquy – even taken in conjunction with defense counsel's statement to the district court – does not satisfy the requirements of Mont. Code Ann. §46-12-210(3).

In this case, whether because of the difficulties posed by Covid-19, rotation of judges, counsel's willingness to disregard the district court's instructions, the court's confusion regarding its instructions, or other unknown factors, Mr. Hawk was never properly advised of the constitutional rights he was waiving when he entered his plea.

This Court has held that, "In addition to being statutory requirements, these are not minor or inconsequential matters…. Rights this fundamental cannot be addressed adequately by the district court's broad statement that [the defendant]

was 'giving up virtually all of his rights.'" *State v. Enoch* (1994), 269 Mont. 8, 13-15, 887 P.2d 175, 178-80, *see also State v. Ereth,* 1998 MT 197, ¶25, 290 Mont. 294.

Taken individually or collectively, defense counsel's vague assertion that he that he had discussed "most of" Mr. Hawk's rights, a blank Plea and Waiver of Rights form signed by counsel, and advice from the district court that Mr. Hawk would be giving up "many of your legal rights" by entering a plea of guilty do not meet the requirements of Mont. Code Ann. §46-12-210(3), do not satisfy the requirements for a voluntary entry of a plea, violate Mr. Hawk's right to due process of law, and constitute good cause for withdrawal of that plea.

c. The district court committed plain error when it refused to appoint conflict counsel.

Having reviewed Appellee's argument on this issue, Mr. Hawk renews his original argument that the district court's refusal to appoint conflict counsel under these circumstances was fundamentally unfair and compromised the integrity of the proceedings.

The request was made by defense counsel, which told the district court that Mr. Hawk's complaints about counsel created an inherent conflict. After the court refused to appoint conflict counsel, Mr. Hawk's defense counsel ceased advocating

on his behalf. Rather than file a brief in support of Mr. Hawk's concerns, counsel filed a "Notice" based on an interview with Mr. Hawk.

Appellee's assertion that the "Notice" constituted a motion on Mr. Hawk's behalf is belied by the very title of the document. Review of the document leaves no doubt that it was not advocative in nature, but merely a report of Mr. Hawk's concerns relayed through the filter of defense counsel's interpretation. It implicitly put Mr. Hawk in conflict with his defense counsel. The Gallagher hearing pitted Mr. Hawk – an incarcerated lay person with no apparent legal experience – against his putative counsel without the advice or representation of actual counsel. It is small wonder the district court determined Mr. Hawk's concerns did not merit further action.

Mr. Hawk has an unwaivable constitutional right to counsel at every stage of the proceedings. In this case, Mr. Hawk had no representation during a critical stage of the proceedings owing solely to the district court's refusal to appoint conflict counsel. Having denied Mr. Hawk conflict counsel, the district court left it to his attorneys to decide whether to file Mr. Hawk's petition to withdraw his plea. Again, Mr. Hawk was left without the assistance of counsel. Rather than advocate for Mr. Hawk's requested withdrawal of his plea, defense counsel subsequently filed a notice that *counsel* – not Mr. Hawk – did not intend to file a petition for withdrawal of Mr. Hawk's plea. Counsel's refusal to file the motion of Mr. Hawk's

behalf was not a judgment call or a tactical decision. It was a refusal to facilitate Mr. Hawk's right to file the motion. Having been denied representation of counsel on the matter, Mr. Hawk renewed his request to withdraw his plea at sentencing. The request was denied.

The court's decision to deny Mr. Hawk conflict counsel was fundamentally unfair, deprived Mr. Hawk of representation at all stages of the proceedings and undermined the integrity of the judicial process.

CONCLUSION

Defendant and Appellant Galen Hawk respectfully requests the Court remand this matter to district court with instructions to allow Mr. Hawk to withdraw his plea of no-contest and undertake further proceedings as the district court deems appropriate.

Respectfully submitted this October 28, 2022.

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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 not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Gregory D. Birdsong

CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-28-2022:

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