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STATE OF MONTANA
Case Number: DA 22-0211

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0211

STATE OF MONTANA

Plaintiff and Appellee,

v.

BRANDEN CONRAD MIESMER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman Presiding

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STATEMENT OF THE ISSUES

Did the District Court err when it concluded the Appellant's guilty plea was voluntary, knowing, and intelligent?

Did the District Court's imposition of the parole eligibility restriction violate the Appellant's federal and state constitutional and statutory rights to jury trial and due process?

STATEMENT OF THE CASE

The Appellant pled guilty to Deliberate Homicide and subsequently moved to withdraw his plea before and after sentencing because he did not enter it knowingly, voluntarily or intelligently. The District Court denied his motion. The Appellant appeals the denial.

After a contested sentencing hearing, the District Court sentenced the Appellant to 100 years in prison with no parole opportunity. The Appellant appeals the sentence as it violates Montana's sentencing principles and policies.

STATEMENT OF THE FACTS

On September 24, 2015, Branden Conrad Miesmer (the "Appellant" appeared before the Cascade County, Montana, District Court ("District Court") and pled Not Guilty to Deliberate Homicide. (Electronic Document (hereafter "Doc.") 8.) The State of Montana (hereafter "State") alleged that the Appellant had shot and killed Cody Bruyere in Great Falls, Montana on September 7, 2015. (Doc. 1 at 1.)

On January 6, 2016, the Appellant filed a notice of affirmative defense, declaring that he might rely on justifiable use of force and/or duress at trial. (Doc. 27.)

On January 13, 2016, the Appellant filed a motion to suppress and supporting brief to exclude any statements he made because law enforcement officers did not properly advise him of his right to remain silent under *Miranda*. (Doc. 27 & Doc. 28 at 3.)

On February 9, 2016, the Appellant filed proposed jury instructions: Instruction 10 regarding mitigated deliberate homicide as a lesser included offense, and another, Instruction 11, regarding the use of force in defense of a person. (Doc. 32.)

On February 12, 2016, the State filed its response to the Appellant's suppression motion. (Doc. 37.)

On February 25, 2016, the Appellant filed his answer brief for his suppression motion. (Doc. 38.)

On March 1, 2016, the Appellant filed a request for a change of plea hearing and transport. (Doc. 40)

On March 10, 2016, the District Court set a March 18, 2016 change of plea hearing. (Doc. 41.)

On March 17, 2016, the Appellant filed a motion to vacate his March 18, 2016 change of plea because the Appellant's lead counsel

would be out of town, and the Appellant was "reconsidering plea negotiations and strategy." (Doc. 42.)

On March 18, 2016, the District Court set a status hearing for March 25, 2016. (Doc. 43.)

On March 25, 2016, the Appellant pled guilty to Deliberate Homicide at the status hearing. (Doc. 44.) The State made two documents available for the Appellant to sign: (1) an acknowledgement of rights and plea of guilty (Doc. 45.) and (2) a notice of intent to make an open plea. (Doc. 46.) Neither mentioned a written, specific plea agreement between the Appellant and the State nor the possibility that the District Court could sentence Appellant to one hundred years in prison without any chance of parole as a "dangerous offender." Neither mentioned what lesser included offense(s) the Appellant could have offered at trial nor the Appellant's pending suppression motion.

While the Appellant agreed that he would be giving up the "right to have the jury consider a lesser-included instruction," nobody at the plea change mentioned specifically what alternative charge(s) the lesser included instructions might involve. (3/25/16 Plea Change Trans. at 9.)

While the Appellant acknowledged that he would "have to tell the Court, on the record, the facts that happened that make you guilty," nobody at the hearing asked him about his suppression motion or whether he wanted to reserve his right to pursue that motion to its resolution. (3/25/16 Plea Change Trans. at 9.)

The Appellant admitted at the plea change that, after having made admissions to law enforcement, he admitted the offense "many times to other inmates and other people." (3/25/16 Plea Change Trans. at 11.)

The District Court's colloquy with the Appellant was limited to:

> THE COURT: Mr. Miesmer, I've got a couple. Are you under the influence of alcohol or drugs or prescription medication that would keep you from understanding what you're doing today?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Are you suffering from any emotional or mental disease or defect that would keep you from understanding what's happening this morning?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: You're making this guilty plea, that's under consideration here, freely and voluntarily?
>
> THE DEFENDANT: Yes, Your Honor.

> THE COURT: All right. You can step down, and I'll take your plea.
>
> THE DEFENDANT: Thanks, Your Honor. (3/25/16 Plea Change Trans. at 12.)

On March 25, 2016, the District Court set sentencing for June 3, 2016. (Doc. 47.)

On May 2, 2016, the Appellant sent a form for prisoners, a “kite,” to the District Court, asking to withdraw his guilty plea and for a second opinion on a psychological evaluation. (Doc. 48.)

On May 6, 2016, the Appellant filed a *pro* se complaint with the District Court reiterating his wish to withdraw his guilty plea due to ineffective assistance of counsel; Post-Traumatic Stress Disorder (PTSD) from his military service in Afghanistan; and malicious prosecution. (Doc. 52.)

On June 22, 2016, counsel for the Appellant filed a motion to withdraw his guilty plea and request a hearing, claiming that he did not enter his plea change plea knowingly, voluntarily or intelligently due to an insufficient colloquy. (Doc. 66.)

On July 7, 2016, the State filed its response to the Appellant's motion to withdraw his guilty plea, claiming that he had changed his plea knowingly, voluntarily, and intelligently. (Doc. 70.) The State argued that the District Court and defense counsel questioned the Appellant "comprehensively regarding his understanding of his Constitutional rights." (Doc. 70 at 5.) However, the State did not provide evidence that anyone had informed the Appellant at his plea change that (1) the District Court could sentence him to prison for 100 years without any parole possibility; (2) he gave up the right to have the jury consider specific lesser included charge(s); or (3) he had a pending suppression motion.

July 27, 2016, after the Appellant had twice attempted to commit suicide, the District Court committed the Appellant to the Montana State Hospital for up to 90 days in case CDI-16-22. (Doc. 72; 7/27/16 Fitness to Proceed Hearing Trans. at 8.)

On November 4, 2016, the District Court sentenced the Appellant to 100 years in Montana State Prison with no time suspended or any parole eligibility. (Doc. 79 at 2.) The Appellant withdrew his motion to withdraw his guilty plea. (11/4/16 Sentencing Trans. at 5.)

The Appellant had sought a sentence of 100 years with 40 years suspended, credit for time served of 422 days, no parole restrictions, and agreed to restitution of $6,817.52. (11/4/16 Sentencing Trans. at 49.) The State sought a life sentence without parole. (11/4/16 Sentencing. Trans. at 43.)

Counsel for the Appellant argued that the Appellant had taken responsibility for his actions by saving the Court and State a lot of time for a trial, and the Appellant did not put the victim's family through a trial. (11/14/16 Sentencing Trans. at 39.)

Counsel for the Appellant also said the Appellant tried to improve himself by attending 24 months of college and had received an honorable discharge from the Army, having served for 3.5 years. (11/14/16 Sentencing Trans. at 41.) Counsel elaborated that the Appellant served in Egypt, Haiti (for hurricane cleanup that exposed him to all sorts of dead people), and Afghanistan, doing patrols and convoys in the war on terrorism. (11/14/16 Sentencing Trans. at 41.)

Counsel for the Appellant also argued that the Pre-Sentence Investigative Report (PSI) (Doc. 69.) glossed over the Appellant's military record that included the Army Achievement medal (twice); an

overseas service ribbon (three times); a ribbon for the Global War on Terrorism; an Army service medal for enlisting during wartime; an Airborne Paratrooper Badge for 46 jumps; an Expert Infantryman medal for mastering military skills; a joint NATO Ribbon for serving in Egypt with NATO forces. (Doc. 80; 11/14/16 Sentencing Trans. at 41.)

He also received a humanitarian aid medal for his service in Haiti.

Counsel for the Appellant further argued, citing the PSI, that the Appellant had a troubled youth without a good home, was always at risk, and ended up at Pine Hills and in Youth Challenge (11/14/16 Sentencing Trans. at 42.)

The PSI reported that the Appellant had three prior misdemeanor convictions: Criminal Mischief, Criminal Trespass, and Obstructing a Peace Officer. (Doc. 69 at 2.) It also reported that his income was $130 a month for a military disability. (Doc. 69 at 4.)

The District Court then explained:

> The first of the several statutory factors of the sentencing policy requires me to impose a sentence that punishes each offender commensurate with the nature and degree of harm caused by the offense and to hold the offender accountable. (11/4/2016 Sentencing Trans. at 55.)

The District Court referred to *State v. Garrymore*:

> When we took our break, I did a little legal research into parole eligibility restrictions and found a case called State vs. Gary Moore [*sic*], which is reported at 2006 MT 245. And in that case the sentencing judge imposed life without parole without reference to Section 219, which was the statute I was worried about. (11/4/16 Sentencing Trans. at 57.)

The record does not reflect whether the District Court reviewed sentences from other cases of Deliberate Homicide to aid in determining its sentence.

The District Court elaborated:

> My reasons for the sentence about to be announced are as follows: Considering the factors contained in the correctional policy. I consider the crime committed, which was deliberate homicide. The circumstances under which you committed the crime at issue were that while using methamphetamine intravenously for the first time you fatally shot Cody Bruyere in the face. You then carjacked your way to Helena, and on arriving there, carjacked a second car with innocent strangers in it. And you forced those people to take you to Hauser Lake where you led most of the Lewis & Clark law enforcement community on a multi-day manhunt. You admitted your involvement at the beginning of your first post-arrest interview, and we're here today because you pled guilty. When you did that, you did that without the benefit of any plea agreement between yourself and the State that would entitle you to the benefit of any particular sentencing recommendation by the State. And consequently they're recommending life without parole.
>
> Your criminal history is three misdemeanor convictions. But then when I consider what went on here

> and what led up to it, I have to say that I think that the prospects of rehabilitating you are remote. (11/4/16 Sentencing Trans. at 55-56.)

The District Court then imposed its sentence:

> The appropriate penalty for a case like this where the statutory range is from ten to a hundred years or life imprisonment is a sentence of 100 years with none of it suspended. And I am further ordering under the authority of Montana Code Annotated § 46-18-202(2), that you will be ineligible for parole. (11/4/16 Sentencing Trans. at 57.)

The District Court then attempted to fulfill the mandate of Mont. Code Ann. § 46-18-202(2):

> That statute requires me to state in this judgment the reasons for that parole eligibility restriction, and my reasons for that are that the presentence investigation report and the testimony here today establish that you've been heading to this point for a long time, but this was not a surprising event out of left field. Your lack of remorse when you were discussing the situation with the detective and the Lewis & Clark County deputies immediately after your apprehension, your statement to them that you perceived Mr. Bruyere to be an informant, and your statement to them that you perceived him to be the cause of all your problems, that just signals to me that you're not safe and that you can't ever be safe. (11/4/16 Sentencing Trans. at 58.)

On November 23, 2016, the District Court filed its written sentence in lieu of a judgment that reaffirmed the sentence it had orally imposed. (Doc. 86; App. B.)

On March 13, 2017, the Appellant filed a *pro se* motion to withdraw his guilty plea, arguing that he was "mentally incompetent" when he withdrew guilty plea, as he had been transferred to Warm Springs for PTSD for suicide attempts and was thus taking medications; had been promised a sentence of 40-60 years; and new evidence had come to light. (Doc. 89.)

On April 4, 2017, the State filed a response to the Appellant's second withdrawal motion. (Doc. 90.) It argued that the Appellant changed his plea with the assistance of counsel; was aware of the maximum penalties and the lesser-included charges; was asked about what rights he was giving up by pleading guilty; and was dissatisfied with his sentence. (Doc. 90 at 5.) The State's response did not mention whether the District Court, prior to his plea, had (1) informed the Appellant that it could sentence him to 100 years in prison without parole; (2) reminded him of the specific lesser included charges the Appellant could employ; or (3) reminded him of his then-pending suppression motion.

On April 5, 2017, the Appellant filed his first notice of appeal in this case. (Doc. 91.)

On April 24, 2017, the District Court issued a notice of its intent to not rule on the Appellant's withdrawal motion, citing a lack of jurisdiction to do so based on the Appellant's appeal. (Doc. 94.)

On January 22, 2018, the Court dismissed the Appellant's first appeal based on the Appellant's motion. (Doc. 96.)

On February 20, 2018, the Appellant filed *pro se* a supplemental brief in support of withdrawing his guilty plea. (Doc. 99.) The Appellant argued that his counsel had promised and insisted that he would serve only 60 years of a 100-year sentence or 25 percent of the sentence. (Doc. 99 at 2.) The Appellant claimed that he only realized that he "had been duped and completely misled" by counsel when the District Court sentenced him to 100 years in prison without "benefit of parole or any of his sentence being suspended." (Doc. 99 at 3.) Along with the supplemental brief, the Appellant filed as an exhibit his DD-214 military service record. (Doc. 80.)

On March 29, 2018, the Appellant filed a *pro se* addendum to his supplemental brief. (Doc. 101.) The Appellant argued that the record showed that he was "indecisive and at odds with his choices." (Doc. 101 at 3.) The Appellant claimed that he was "heavily medicated" while at

the Montana State Hospital and during his sentencing. (Doc. 101 at 3-4.) The Appellant claimed that, in January, 2018, Dr. Dale Watson had done a psychological evaluation and found that the Appellant "had left hemisphere brain dysfunction, a thought disorder marked by exceedingly poor reality testing and distorted thought processes." (Doc. 101 at 5.) The evaluation also found that the Appellant suffered from Post Traumatic Stress Disorder (PTSD) due to his being abused as a child and his military experiences in Afghanistan and Haiti. (Doc. 101 at 5.) The Appellant concluded that the District Court erred in sentencing him without having a hearing on his earlier withdrawal motion.

On June 5, 2018, the State responded to the Appellant's addendum. (Doc. 103.) It argued that the Appellant had knowingly, voluntarily, and intelligently entered his plea change, based on the "extensive" questioning of the Appellant when he entered his change of plea. (Doc. 103 at 5.) However State did not point to anywhere in the record wherein the District Court, prior to accepting his plea, had (1) informed the Appellant that it could sentence him to 100 years in prison

without parole; (2) that he could still go to trial and use specific, lesser-included offenses; or (3) that the he had a pending motion to suppress.

On June 19, 2018, the Appellant responded *pro se* to the State, reiterating that his change of plea was due to of ineffective assistance of counsel (as he did not receive any benefit from pleading guilty), and that the Court did not inquire at sentencing regarding why he was withdrawing his earlier withdrawal motion.(Doc. 104 at 2-3.)

On December 11 and 14, 2020, the District Court conducted a hearing on the Appellant's motion to withdraw his guilty plea. (Doc. 131; Doc. 134.)

At the hearing, the Appellant testified in response to a question from the District Court, "We never talked about -- never broke that thing down. They never talked about a parole restriction." (12/14/20 Withdrawal Hearing Trans. at 38.)

An exchange occurred between the District Court and the State at the hearing:

> THE COURT: Do you think Mr. Frisbie discussed the possibility of a parole restriction with Mr. Miesmer during that colloquy?
>
> MR. [Ryan] BALL: No, not during that colloquy.

> THE COURT: But do you think Mr. Parker brought up the possibility of the parole restriction during that colloquy?
>
> MR. BALL: No, Your Honor.
>
> THE COURT: Did I cover the possibility of a parole restriction during that colloquy?
>
> MR. BALL: I don't believe -- not specifically, Your Honor. (12/14/20 Withdrawal Hearing Trans. at 71.)

The District Court offered its explanation of the Appellant's withdrawal motion:

> You know, to get back to your question of what are these tyrants in Great Falls doing? Why won't they just let the guy withdraw his plea because he wants to? Well, the answer is: He found out what the sentence was. He found out what the sentence was, and he doesn't like it. So now he wants to withdraw it. That's why we push back on that, or at least, that's why I'm pushing back on that. Because it cannot be a situation that you plead guilty, and you're told you don't have any control over what the judge is going to do, and then you hear the sentence and you say, Oh, I don't like that; that's too harsh; I want to withdraw my guilty plea, that grinds the whole system to a halt. (12/14/20 Withdrawal Hearing Trans. at 62-63.)

On March 2, 2022, the District Court denied the Appellant's motion to withdraw his guilty plea. (Doc. 137.) In its order denying the motion, the District Court characterized the Appellant as "an Unreliable Historian." (Doc. 137. ¶ 185 at 53.) It based its

characterization on the disagreement between Appellant and his attorneys over several facts; how a witness who is entitled to full credit is sufficient proof of any fact; and its inference that the Appellant was not entitled to full credit. (Doc. 137, ¶¶ 185-86 at 53-54.) It added, "Without finding that Mr. Miesmer is intentionally lying, the Court simply concluded that his plea withdrawal testimony is too unreliable to establish critical disputed facts." (Doc. 137, ¶ 192, at 55.)

Neither the District Court's findings of fact nor conclusions of law found that the Appellant, before he entered his guilty plea, was fully aware of that (1) the District Court could sentence him to 100 years in prison with no chance of parole; (2) he could offer jury instructions for specific lesser-included charges; and (3) he would be waiving any hearing on his suppression motion. (Doc. 137, ¶¶ 60-88 at 17-24.)

The District Court admitted:

> Without question, if confronted with a proposed Deliberate Homicide plea today this Court would insist on a longer and more detailed change of plea colloquy than what occurred on March 25, 2016. But acknowledging that the Court would do it differently today does not establish that the 2016 colloquy was inadequate to support Mr. Miesmer's sworn testimony that day that he knew, understood, and appreciated the consequences of pleading guilty. (Doc. 137 ¶ 198 at 57.)

It concluded, "He [the Appellant] knowingly, voluntarily, and intelligently took the risk, does not like the result, and wants to start over. The law does not require this, and the Court declines to permit it." (Doc. 137 ¶ 239 at 72.)

On April 28, 2022, the Appellant filed his timely notice of appeal. (Doc. 138.)

STANDARDS OF REVIEW

The Court reviews findings of fact for clear error and conclusions of law for correctness. *State v. Garner*, 2014 MT 312, ¶ 21, 377 Mont. 173, 179, 339 P.3d 1, 5 (internal citations omitted).The ultimate issue of the voluntariness of a guilty plea is a mixed question of law and fact, which the Court reviews de novo. *Id.*

The Court reviews criminal sentences involving one year or more of actual incarceration to determine their legality. *State v. Garrymore*, 2006 MT 245, ¶ 9, 334 Mont. 1, 4, 145 P.3d 946, 948. [A] sentence is not illegal when it is within a statute's parameters. *Id.*

SUMMARY OF ARGUMENT

The Court should vacate the sentence and change of plea in this case and remand it back to the District Court for proceedings consistent

with the Court's ruling because the District Court erred in denying the Appellant's motion to withdraw his guilty plea and failed to follow the legal parameters of the State's sentencing policies in imposing its sentence.

ARGUMENT

I. The Court should vacate the change of plea in this case because the Appellant did not enter it knowingly, voluntarily, and intelligently.

A. The District Court's denial of the Appellant's motions to withdraw his guilty plea would be valid, if the Appellant had knowingly, voluntarily, and intelligently pled guilty to the charge in this case.

Mont. Code Ann. § 46-16-105(1)(b) mandates:

> Before or during trial, a plea of guilty must be accepted, and a plea of nolo contendere may be accepted with the consent of the court and the prosecutor, when:…the **court** has informed the defendant of the consequences of the plea and of the maximum penalty provided by law that may be imposed upon acceptance of the plea. (emphasis added)

Mont. Code Ann. § 46-12-204(2) mandates:

> The court may not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions

between the prosecutor and the defendant or the defendant's attorney.

Mont. Code Ann. § 46-12-210(1)(a)(iii) requires, "Before accepting a plea of guilty or nolo contendere, the **court** shall determine that the defendant understands …the effect of any penalty enhancement provision or **special parole restriction**." (emphases added)

The Court explains in *Garner:*

> A guilty plea is a waiver of constitutional rights, and must be a voluntary, knowing, and intelligent act. The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. ¶ 26 (citations omitted).

Mont. Code Ann. § 46-16-105(2) mandates:

> At any time before judgment or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment becomes final, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted.

The District Court ruled that the Appellant filed his motion to withdraw his guilty plea in a timely manner. (Doc. 137 ¶ 2 at 1.)

The Court in *Garner* held regarding plea withdrawals:

> A court may allow a guilty plea to be withdrawn 'for good cause shown.' Section 46-16-105(2), MCA. Good cause includes the involuntariness of the plea. In determining

> whether a plea was entered voluntarily, we examine case-specific considerations including the adequacy of the plea colloquy, the benefit the defendant obtained from the plea agreement, and the timing of the motion to withdraw.

¶ 26.

While "good cause" includes the voluntariness of the plea, it may include other criteria. *State v. Lone Elk*, 2005 MT 56, ¶19, 326 Mont. 214, ¶ 19, 326, 108 P.3d 500. In *Lone Elk*, the Court relied on *Brady v. United States* (1970), 397 U.S. 742, 90 S. Ct. 1463, wherein the United States Supreme Court examined a defendant's guilty plea to determine whether he had pled voluntarily, with part of the examination involving a determination of whether the defendant was "fully aware" of the effects of any plea change:

> 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).

Brady, 397 U.S. at 755, 90 S. Ct. at 1472.

In *Warclub*, the Court explained regarding how a defendant can withdraw his or her guilty plea: "Here, as the 'case-specific considerations' of this particular case demonstrate, the adequacy of the District Court's interrogation is a key issue under consideration here." *State v. Warclub*, 2005 MT 149, ¶ 19, 327 Mont. 352, 358, 114 P.3d 254, 258.

If the defendant was aware of the consequences of the plea, and if the plea was not induced by threats, misrepresentation, or improper promises, then the Court will not overturn a district court's denial of a motion to withdraw plea. *Garner,* ¶ 26.

One "case-specific consideration," in the sense of *Garner,* ¶ 26, is whether an appellant was "fully aware," in the sense of *Brady, supra*, that he or she was waiving the possibility of arguing for a lesser included sentence. In *Swensen,* the appellant:

> [E]ntered into a written plea agreement with the State in which he agreed to plead guilty to the aggravated assault charge in exchange for the State's dismissal of the aggravated kidnapping charge. Under the agreement, the State also agreed to waive any persistent felony offender designation and to recommend a sentence of 20 years, with 10 years suspended, to run concurrent to any other sentence being served. In addition to signing the written plea agreement, Swensen also signed an Acknowledgment and

> Waiver of Rights in which Swensen acknowledged the rights he was waiving by pleading guilty, including his right to submit an instruction to the jury regarding a lesser included offense.

State v. Swensen, 2009 MT 42, ¶ 5, 349 Mont. 268, 270, 203 P.3d 786, 788.

Mr. Swensen, however, took further action:

> On November 5, 2007, Swensen filed a motion to withdraw his guilty plea. Swensen alleged that he had 'good cause' to withdraw his guilty plea since the District Court did not specifically advise him about the lesser included offense of misdemeanor assault during the change of plea hearing. In response, the State argued that the written plea agreement and the waiver in conjunction with Swensen's plea colloquy at the change of plea hearing, were sufficient to demonstrate that Swensen's guilty plea was voluntary.

Swensen, ¶ 8, 349 Mont. at 271, 203 P.3d 786 at 789.

The Court resolved the issue of lesser included offences:

> In this case, Swensen's admissions on the record about the nature of the injuries he inflicted on Azure effectively eliminated the possibility that Swensen would be entitled to an instruction on the lesser included offense of misdemeanor assault. In fact, the District Court clarified during the hearing on the motion to withdraw Swensen's plea that it was very unlikely that a misdemeanor assault instruction would have been available to Swensen given the circumstances of the offense and Swensen's admissions at the change of plea hearing.

Swensen, ¶ 14, 349 Mont. at 274, 203 P.3d 786 at 789.

In denying Swensen's withdrawal motion, the Court argued:

> As the District Court pointed out, Swensen acknowledged in the plea agreement and during the change of plea hearing that he was pleading guilty to aggravated assault and was made aware of the maximum penalty for the offense. Swensen was also advised that he was charged with aggravated kidnapping and that a conviction for aggravated kidnapping would have a possible incarceration of two to 100 years with a fine of up to $ 50,000. In sum, it is clear that Swensen received the benefit of a very good bargain given the evidence in the record.

Swensen, ¶ 15, 349 Mont. at 274, 203 P.3d 786 at 791.

In contrast to *Swensen,* in *Sanders,* the Court ruled on an appeal in which the appellant argued:

> [T]he court was not thorough enough in its inquiry to cure confusion created by the prosecutor and his own counsel as to whether there were any lesser included offenses of the charge to which he pled guilty. The failure of the court to identify any possible lesser included offenses unfairly forced him to understand the consequences of a complex legal issue in the abstract. Because he was not specifically informed that there were, in fact, lesser included offenses, his plea was not made intelligently.

State v. Sanders, 1999 MT 136,¶ 20, 294 Mont. 539, 545, 982 P.2d 1015, 1019 (overruled on other grounds).

Also, in *Sanders* the appellant:

> Argued that there were, in fact, lesser included offenses to the charge of threatening a public servant, including disorderly conduct, resisting arrest, and

> obstructing a peace officer. However, both his attorney and the prosecution had advised him that there were none. He further noted that the waiver of rights section in the plea agreement also stated that waiver of lesser included offenses was not applicable. The District Court denied Sanders' motion.

1999 MT 136, ¶ 7, 294 Mont. at 542, 982 P.2d at 1017.

The Court held:

> We agree with Sanders. The fact that the court informed Sanders that there may be lesser included offenses was insufficient. As we pointed out, it is a fundamental principle that a guilty plea must be an intelligent choice among the alternative courses of action open to the defendant. Additionally, this Court has stated that when a guilty plea is based upon a fundamental mistake or misunderstanding as to its consequences, the court may allow the defendant to withdraw the guilty plea.

Sanders, 1999 MT 136,¶ 5 294 Mont. 539, 545, 982 P.2d 1015, 1019 (citations omitted).

In addition to the need for a court to advise a defendant of specific, possible lesser included charges, the Court has held, "[A] a defendant waives the right to appeal all nonjurisdictional defects upon voluntarily and knowingly entering a guilty plea, including claims of constitutional violations which may have occurred prior to the plea." *State v. Violette*, 2009 MT 19, ¶ 16, 349 Mont. 81, 85, 201 P.3d 804, 808.

The Court in *Violette* addressed an appeal based on a motion to dismiss premised on an alleged violation of an appellant's speedy trial rights:

> Rather than seeking a continuance so the court could rule on the motion, he entered his plea without first obtaining an adverse ruling. We conclude that Violette's attempt enter a plea and preserve the speedy trial issue, whether treated as an appeal or a petition for a writ, falls outside the letter and spirit of the rules of criminal and appellate procedure.

¶ 16.

Violette's holding is relevant as it stands for the proposition that a defendant, by pleading guilty, waives his or her rights to pursue any suppression motion. As such, a defendant should be "fully aware," as mandated in *Brady, supra,* of the status of such possibly forgone opportunities when entering a change of plea for it to be voluntary.

B. The Appellant did not knowingly, intelligently and voluntarily plead guilty because the colloquy was inadequate, given the case-specific circumstances of the plea change.

1. The Court must resolve any doubts about the validity of the Appellant's plea in favor of the Appellant.

"If any doubt exists on the basis of the evidence presented regarding whether a guilty plea was voluntarily and intelligently made, the doubt must be resolved in favor of the defendant." *State v. Newbary,* 2020 MT 148, ¶ 8, 400 Mont. 210, 215, 464 P.3d 999, 1003.

What the District Court admitted in denying the Appellant's withdrawal motion makes *Newbary* especially relevant:"Without question, if confronted with a proposed Deliberate Homicide plea today this Court would insist on a longer and more detailed change of plea colloquy than what occurred on March 25, 2016." (Doc. 137 ¶ 198 at 57.)

The District Court's admission that it would have insisted on a "longer and more detailed change of plea colloquy" was more fraught than it apparently believed. The Appellant's "sworn testimony" when he changed his plea may have satisfied the demands of the District Court but not the law it was created and had sworn to uphold.

2. The record provides reasons to doubt the validity of the Appellant's change of plea.

a. The District Court did not inform the Appellant of its authority to deny him parole eligibility.

The District Court's colloquy with the Appellant shows why it did not to follow Mont. Code Ann. § 46-16-105(1)(b), regarding a defendant's awareness of the maximum possible sentence, and Mont. Code Ann. § 46-12-210(1)(a)(iii), regarding a defendant's awareness of any parole restrictions. (3/25/16 Plea Change Trans. at 12) The colloquy also failed to follow the holdings of *Sanders, supra* at 5, or *Brady, supra* that the Appellant be "fully aware of the direct consequences" of a guilty plea. Specifically, it failed to make the Appellant fully aware of the maximum sentence it could impose, 100 years with no parole in violation of Mont. Code Ann. § 46-12-210(1)(a)(iii) when the Appellant pled.

Granted, the Appellant understood that the maximum penalty for the charge is "a prison sentence of not less than ten years or not more than 100 years." (3/25/16 Plea Change at 6-7.) However, unmentioned during the plea change was the possibility that the Court could deny the Appellant the possibility of parole.

Moreover, neither document the Appellant signed shortly before he pled guilty affirmed: "Each party understands that the presiding District Court Judge can designate the Defendant as a dangerous

offender as well as limit his eligibility for parole of work release through furlough programs." (Doc. 45 & 46.)

Furthermore, in early February, 2016, the Appellant had authorized his attorneys to offer to the prosecution a sentence of 80 years in jail with 20 suspended. (Doc. 137 ¶ 35 at 11.) If the Appellant did not understand that this offer (or any other) might not be the actual sentence the District Court would impose, then this misunderstanding could have been avoided, had the District Court taken the time and explicitly informed him at the change of plea that such specific offers were neither binding on the prosecution nor the District Court.

Further evidence that the District Court failed to follow Mont. Code Ann. § 46-12-210(1)(a)(iii) is in its Order denying the Appellant's withdrawal motion: "Neither the defense lawyers nor this Court ever told Mr. Miesmer before the sentencing hearing that the Court could not restrict his parole." (Doc. 137 ¶ 179 at 51.)

At the hearing on the Appellant's withdrawal motion, the following exchange also sheds light on what he knew and when he knew it regarding his parole possibilities:

> THE COURT: Do you think Mr. Frisbie discussed the possibility of a parole restriction with Mr. Miesmer during that colloquy?
>
> MR. [Ryan] BALL: No, not during that colloquy.
>
> THE COURT: But do you think Mr. Parker brought up the possibility of the parole restriction during that colloquy?
>
> MR. BALL: No, Your Honor.
>
> THE COURT: Did I cover the possibility of a parole restriction during that colloquy?
>
> MR. BALL: I don't believe -- not specifically, Your Honor. (12/14/20 Withdrawal Hearing Trans. at 71.)

At the same hearing, the Appellant said to the District Court about his counsel, "We never talked about -- never broke that thing down. They never talked about a parole restriction." (12/14/20 Withdrawal Hearing Trans. at 38.)

The District Court provided evidence that increases the likelihood that the Appellant was not "fully aware" of what he was doing when it explained at the hearing: "He found out what the sentence was, and he doesn't like it. So now he wants to withdraw it. That's why we push back on that, or at least, that's why I'm pushing back on that." (12/14/20 Withdrawal Hearing Trans. at 62-63.)

The District Court's explanation that the Appellant sought to withdraw his guilty plea because he did not like the sentence would be plausible, if the Appellant had filed motions to withdraw his guilty plea only **after** his sentencing, which occurred on November 4, 2016. (11/4/16 Sentencing Trans. at 57.)

However, this is not the case. The Appellant made the District Court aware of his desire to withdraw his guilty plea on April 28, 2016, **before** the sentencing. (Doc. 52.) The Appellant filed motions to withdraw his guilty plea on June 27, 2016, also before the sentencing. (Docs. 65 & 66.) Thus, the Appellant's motivations(s) for moving to withdraw his guilty plea had to have been due to some reason(s) other than his dislike of a sentence the District Court had not yet imposed.

Also, if the District Court's explanation were plausible, then an implicit premise of its explanation also supports the proposition that the Appellant was not "fully aware" of what his sentence **could** be **when** he entered his change of plea and that he only became aware of it at sentencing. Following the District Court's line of reasoning, if the Appellant knew when he made his change of plea that he could be subject to 100 years in prison without any chance of parole, then the

Appellant would **not** have entered the plea to begin with. As such, this is further evidence that the District Court violated *Brady, supra;* Mont. Code § 46-16-105(1)(b), as the District Court did not advise him of the maximum penalties in open court; and especially Mont. Code Ann. § 46-12-210(1)(a)(iii) as the District Court had failed to advise the Appellant of the possibility of any "special parole restriction" before he pled.

Further, in receiving a sentence of 100 years in prison without parole, the Appellant did not get any benefit from changing his plea, which, according to *Garner,* ¶ 26, is a "specific consideration" for the Court in determining whether his plea was voluntary.

The Appellant's sentence differs from that of *Swensen,* wherein the Court denied the appellant's motion to withdraw his guilty plea in part because the appellant received the benefit of a plea agreement, which the Appellant in this case did not. *Swensen,* ¶ 15.

Thus, the record supports the conclusion that the Appellant was not fully aware when he changed his plea that the District Court could sentence him to 100 years in prison with no chance of parole.

b. The District Court did not inform the Appellant of what lesser included charges he may have been waiving by pleading guilty.

The Appellant's counsel had offered jury instructions for Mitigated Deliberate Homicide (Doc. 32) and Justifiable Use of Force (Doc. 26). If the case had gone to trial, the Appellant possibly could have also offered a jury instruction for Negligent Homicide in violation of Mont. Code Ann. § 45-5-104(1).

While the Appellant's attorney asked the Appellant if he knew he would be waiving the right to pursue a lesser included charge by pleading guilty, his attorney did not make clear in open court at the change of plea what the specific, lesser included charge might be.

That said, this case is similar to that of *Sanders, supra* at ¶ 5*,* wherein the appellant's attorney and the prosecution had advised the Appellant that there were no lesser charges, and the waiver of rights section in the plea agreement also advised that any waiver of lesser included offenses was not applicable.

Based on the record of such "advice," the Court agreed with *Sanders* and remanded his case back to the district court because it had only informed Sanders that there may be lesser included offenses without **specifying** what they might be (as in this case), which the

Court found "insufficient" and thus in violation of the "fundamental principle" that a guilty plea must be an intelligent choice among the alternative courses of action open to the defendant." *Id.* at ¶ 5.

This case, however, differs from *Swensen, supra,* in which the Court held: "Swensen's admissions on the record about the nature of the injuries he inflicted on Azure effectively eliminated the possibility that Swensen would be entitled to an instruction on the lesser included offense of misdemeanor assault." *Id.* at 14.

In this case, the Appellant admitted to committing the homicide, which limited the possible lesser included charges for which his counsel could offer injury instructions to Mitigated Deliberate Homicide and even Negligent Homicide, as both offenses presuppose a homicide. Mont. Code Ann. §§ 45-5-103(2) & 104(1). The District Court failed to discuss these scenarios in open court at the plea change in this case, thus raising the probability that it had not "fully informed" the Appellant of what he was giving up by pleading guilty in the sense of *Brady, supra.*

Some may be tempted to call this failure "mere harmless error" because the Appellant and his counsel had ruled out offering a jury

instruction for the lesser included charge of Mitigated Deliberate Homicide prior to his guilty plea, as the Appellant may have had to testify in support of the lesser charge. (Doc. 137 ¶ 210 at 61.)

However, the Appellant's counsel had also told the Appellant that the lesser included offense instruction could be "revisited" in the future. (Doc. 137 ¶ 118 at 33.)

Based on *Brady's* "full awareness" standard and the Court's holding in *Newbary*, *supra* that the Court must resolve in favor of the defendant any doubt that a guilty plea was voluntarily and intelligently made, a fuller, more specific discussion of what lesser charges the Appellant still could have raised should have occurred at the change of plea. Still, it did not, creating a doubt the Court must resolve in favor of the Appellant.

c. The District Court did not make the Appellant fully aware of the status of his motion to suppress.

The Appellant had filed a motion to suppress statements he had made to law enforcement in violation of his *Miranda* rights on January 13, 2016. (Docs. 27 & 28.) The District Court later told the Appellant regarding the motion, "It wasn't ruled on, because the way this shook

out, you wound up pleading guilty. That's why it was never ruled on." (9/20/19 Motion Withdrawal Trans. at 36.)

At the plea change in this case, neither the District Court, the Appellant's attorney, nor the State's attorney informed the Appellant that his motion was still pending and that he could continue the change of plea until the District Court had conducted a hearing on it.

This failure was thus contrary to the holding in *Violette, supra,* as the District Court did not make the Appellant fully aware that he was waiving "the right to appeal all nonjurisdictional defects upon voluntarily and knowingly entering a guilty plea, including claims of constitutional violations which may have occurred prior to the plea." That said, he was not "fully aware" (in the sense of *Brady*, *supra)* of "the consequences of the plea" (as mandated in Mont. Code Ann. § 46-16-105(1)(b), which should create doubt that the Appellant's change of plea was knowing and voluntary that the Court must resolve "in favor of the defendant," based on *Newbary, supra.*

Some may also be tempted to believe that the District Court's failure to review with the Appellant at his plea change the status of his motion to suppress was "mere plain error" because of admissions the

Appellant reportedly made to people other than law enforcement officers. (3/25/16 Plea Change Trans. at 11.)

Those considering whether to succumb to this temptation, however, should bear in mind that what is at issue in this appeal is not the validity of the Appellant's motion to suppress but whether he was "fully aware" at his change of plea that he would be waiving the right to have a hearing on his motion to suppress his statements. If he was not, based on *Brady, supra* this creates further doubt about the Appellant's plea, which should be resolved in the Appellant's favor, according to *Newbary, supra.*

C. The District Court thus erred when it denied the Appellant's motion to withdraw his guilty plea.

The District Court allowed the Appellant to change his plea in this case, even though he many not have been fully aware of (1) the possibility that the District Court could sentence him to 100 years in prison without any parole opportunity; (2) his possible lesser offenses; and/or (3) his right to pursue his suppression motion.

II. In the alternative, the Court should vacate the sentence in this case and remand it back to District Court for resentencing because the District Court did not have sufficient grounds to impose its parole limitation.

A. The District Court's denial of parole eligibility would have been valid, if it had grounds to impose it.

The sentence in this case is for a violation of Mont. Code Ann. § 45-5-102(1)(a), Deliberate Homicide. Mont. Code Ann. § 45-5-102(2) mandates:

> A person convicted of the offense of deliberate homicide shall be punished by death as provided in 46-18-301 through 46-18-310, unless the person is less than 18 years of age at the time of the commission of the offense, by life imprisonment, or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years.. except as provided in 46-18-219 and 46-18-222.

Mont. Code Ann. § 46-18-202(2) provides:

> Whenever the sentencing judge imposes a sentence of imprisonment in a state prison for a term exceeding 1 year, the sentencing judge may also impose the restriction that the offender is ineligible for parole and participation in the supervised release program while serving that term. If the restriction is to be imposed, the sentencing judge shall state the reasons for it in writing. If the sentencing judge finds that the restriction is necessary for the protection of society, the judge shall impose the restriction as part of the sentence. and the judgment must contain a statement of the reasons for the restriction.

In imposing sentences, district courts shall follow policies and procedures the Montana Legislature established that provide

"parameters" in the sense of *Garrymore, supra* ¶ 9. Mont. Code Ann. § 46-18-101(2) mandates:

> The correctional and sentencing policy of the state of Montana is to:
>
> (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;
>
> (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;
>
> (c) provide restitution, reparation, and restoration to the victim of the offense; and
>
> (d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

Mont. Code Ann. § 46-18-101(3) mandates:

> (a) Sentencing and punishment must be certain, timely, consistent, and understandable.
>
> (b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.
>
> (c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.
>
> (d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.
>
> (e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.
>
> (f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of assigned counsel, as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.

(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

Broad judicial discretion, however, is likely the ultimate sentence determinant when it comes to weighing the above polices, principles and "parameters." This is especially so as neither Mont. Code Ann. § 46-18-101(2) nor Mont. Code Ann. § 46-18-101(3) comes with rules regarding how sentencing courts should weigh those principles and policies in comparison with each other when imposing sentences:

> Instead, where it is conferred by a legislature, a judge can exercise 'broad discretion in imposing a sentence within a statutory range.' Thus, while a judge may not find facts which, once found, increase the defendant's exposure to punishment, a judge may find facts to support the exercise of discretion in imposing a sentence which falls within the statutory maximum.

Garrymore, ¶ 29, 334 Mont. at 12,145 P. 3d at 946 (citations omitted).

“A person convicted of a crime has a due process right to be sentenced based on correct information. *State v. Edmundson*, 2014 MT 12, ¶ 20, 373 Mont. 338, 343, 317 P.3d 169, 174 (citations omitted).

B. The District Court did not have grounds to limit parole eligibility based on *Garrymore* because of differences between the facts of this case and *Garrymore*.

In this case, the District Court imposed its sentence based on only one of the many other possible policies cited *supra,* that it “impose a sentence that punishes each offender commensurate with the nature and degree of harm caused by the offense and to hold the offender accountable.” (11/4/2016 Sentencing Trans. at 55.) It apparently relied on *Garrymore* for the sentence in this case based on the similarity between the charges, the decidedly divergent underlying facts of the two cases notwithstanding. (11/4/16 Sentencing Trans. at 57.)

In *Garrymoore,* the District Court argued in support of its sentence of life imprisonment without parole for deliberate homicide:

> This defendant has three convictions for domestic abuse and unlawful restraint. He was arrested on the same type of charges in Utah and California but moved out of their jurisdiction so the charges were dismissed. In addition, he was on probation when this offense was committed.

> Now, throughout the trial and these proceedings, contrary to the testimony, I have not seen any remorse from this defendant. And I'm going to adopt some of [probation officer] Mr. Sonju's reasons as my reasons. Mr. Sonju, quite candidly, said, I have been looking for all mitigating factors in this case. What is most disturbing is that I have been unable to find any.
>
> Further, I agree with Mr. Sonju, especially after viewing the photographs, that I do not believe Tylin's death was caused by a tragic culmination of accidents.
>
> Though he may not have actively planned this death, his behavior, sadistic or otherwise, certainly caused it. He has a record of being mean and abusive to women.
>
> As a result of his delay, the child died a violent, slow, painful death. She could have been taken to the hospital and possibly saved. He talked the mother out of that, and it appears that he would rather save his own neck from child abuse charges than save his two-year-old adopted daughter.
>
> Finally, in our society, and I think we all realize it, even total strangers rush to assist a child in distress. But you, her adoptive father, chose to abuse and, from the pictures, torture this little girl and let her die.

Garrymore, 2006 MT 245, ¶ 29, 334 Mont. at 3-4, 145 P.3d at 947-48.

In imposing its sentence in this case, the District Court considered the crime committed; its relation to drug use; the ensuing carjackings; the subsequent multi-day manhunt; and the Appellant's immediate admission of involvement. (11/4/16 Sentencing Trans. at 55-56.)

Even though the Appellant had three misdemeanor convictions, District Court considered what happened in the case; what led up to it; and concluded that the Appellant's prospects of rehabilitation were "remote." (11/4/16 Sentencing Trans. at 55-56.)

However, in relying on *Garrymore* to impose its sentence, the District Court did not compare the facts of *Garrymoore* to those of this case. In *Garrymoore*, *supra,* the appellant had three convictions for domestic abuse and unlawful restraint; been arrested on the same type of charges in Utah and California that prosecutors dismissed when he left those states; was on probation when he committed his offense; had a record of being mean and abusive to women; and had subjected his adopted daughter to a violent, slow, painful death after talking her mother out of taking her to the hospital to avoid child abuse charges. ¶ 29.

In this case, the District Court did not say whether the Appellant's misdemeanors were similarly violent. Also, in contrast to *Garrymoore*, the Appellant was not on probation and had no history of abusive, violent behavior after his honorable discharge.

Therefore, while *Garrymoore* may have provided the District Court with, at best, a necessary condition to justify the District Court's denial of parole in this case, it did not provide a sufficient condition for the District Court to impose the parole limitation, due to the differences between this case and *Garrymoore.* Consequently, the District Court violated Mont. Code Ann. § 46-18-101(3)(b): "Sentences should be commensurate with the punishment imposed on other persons committing the same offenses."

Moreover, by not providing examples of sentences other courts imposed for Deliberate Homicide, the District Court made no other effort to prove that the sentence in this case was "commensurate" with **any** other cases, another failure to follow Mont. Code Ann. § 46-18-101(3)(b).

The District Court also disregarded Mont. Code Ann. § 46-18-101(3)(a): "Sentencing and punishment must be certain, timely, consistent, and understandable." The sentence is not "understandable" as the law mandates. The District Court said in denying the Appellant parole that "my reasons for that are that the presentence investigation report and the testimony here today establish that you've been heading

to this point for a long time, but this was not a surprising event out of left field." (11/4/16 Sentencing Trans. at 58.)

These would have been valid reasons, had the District Court offered evidence that the Appellant had been engaging in violent conduct since his honorable discharge from the military, which might have provided probative evidence that he had been "heading to this point for a long time." However, neither the District Court, the testimony from the sentencing, nor the PSI provided evidence that the Appellant had been engaging in violent conduct, other than that involving this case, since his honorable discharge.

The District Court further justified denying the Appellant the possibility of parole because he said to law enforcement that the victim was an informant and the source of his troubles, statements that led the District Court to tell the Appellant, "[Y]our not safe and that you can't even be safe." (11/4/16 Sentencing Trans. at 58.)

That said, the District Court does not sufficiently explain why a person with the Appellant's service record could not be safe or beyond rehabilitation. This was contrary to the mandate of Mont. Code. Ann. 46-18-101(2)(d): "The correctional and sentencing policy of the state of

Montana is to…encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community."

The District Court also imposed this sentence knowing that the Appellant had "endured a very chaotic and unhappy childhood, including but not limited to sexual abuse" and thus a had "longstanding and well-documented history of psychiatric problems and psychiatric treatment which were most likely linked to his unhappy childhood." (Doc. 137 ¶ 237 at 71.) Such a past possibly provides "mitigating circumstances." Mont. Code Ann. § 46-18-101(3)(d) mandates: "Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances."

While in the military, the Appellant presumably received training in the use of firearms, a possibly aggravating circumstance. Still, the District Court still could have weighed such training against his overall military record; what he endured while growing up; and his record after his honorable discharge, in order to be consistent with the demands of Montana law, especially given its denial of his parole opportunities.

C. The District Court's denial of parole was thus invalid.

The District Court's exclusive reliance on *Garrymore,* without citing sentences from other cases, was thus misplaced due to the differences between this case and those of *Garrymore.* It's exclusive reliance on the policy that courts should punish offenders commensurate with the nature and degree of harm caused by their offenses ignored other policy considerations.

CONCLUSION

The interrogation at the change of plea was too short, and the sentence the District Court imposed was too long. The Court should therefore vacate the Appellant's plea change and District Court's sentence in this case and remand it back to the District Court for proceedings consistent with the Court's ruling.

What the Appellant knew about the consequences of his plea change and **when** he knew it thus becomes the dispositive issue in this appeal. That said, the District Court did not ask the Appellant at his plea change whether he knew (1) that it could impose a sentence of 100 years without parole; (2) the specific lesser included offenses for which

he could be tried but would be waiving by pleading; and (3) of his right to have the District Court rule on his suppression motion.

If what the District Court declared at the hearing on the Appellant's withdrawal motion, is true and, the Appellant only moved to withdraw his guilty plea after the District Court had imposed its sentence, then the Appellant may not have known or even been "fully aware" of what his ultimate maximum sentence could be (including no parole) **when he changed his plea**. This alone should be enough to raise a doubt which, according to *Newbary,* the Court should resolve in the Appellant's favor.

Alternatively, the Court should vacate the sentence in this case and remand it back to the District Court for proceedings consistent with its ruling. The sentence was too long because the Appellant's background and the circumstances of this case are not sufficiently similar to *Garrymore.* Other "case-specific considerations," in the sense of *Garner*, including those of the PSI, do not support the claim that the Appellant is beyond rehabilitation, especially given his military record and his life since his honorable discharge.

Respectfully submitted this 29th day of October 2023,

/s/ James M. Siegman
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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 9,865 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

Oral Pronouncement of Sentence for DC 15-433……………………….App. A

Written Sentence for DC 15-433……………………………………………..App. B

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