IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0662

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LLOYD MORTIER BARRUS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Broadwater County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court's decision that Appellant failed to meet his burden to show entitlement to a DPHHS placement instead of a prison sentence under Mont. Code Ann. §§ 46-14-311 and -312 is supported by the record.

2. Whether this Court should further define the term "appreciate" in Mont. Code Ann. § 46-14-311.

STATEMENT OF THE CASE

The State charged Lloyd Mortier Barrus with one count of deliberate homicide by accountability and two counts of attempted deliberate homicide by accountability for Barrus's actions on May 16, 2017, aiding his son Marshall Barrus in: (1) the initial shooting during a police highway pursuit and subsequent return to the scene and shooting execution of Broadwater County Deputy Sheriff Mason Moore, and; (2) during a subsequent 100-mile police pursuit and resulting shootout, the attempted murder of numerous peace officers. (Doc. 456, 2nd Am. Inf.)[1]

Barrus filed a notice under Mont. Code Ann. § 46-14-311 asserting that he was "unable to appreciate his criminality of his behavior or to conform his behavior to the requirements of law" at the time of the offense, which he acknowledged

[1] An assault on a peace officer charge was dismissed via stipulation at trial. (Trial Tr. at 1577-83.)

"goes to sentencing factors[.]" (Doc. 86; Doc. 152 at 8.) He would not otherwise notice or raise a mental disease or defect (MDD) defense for trial.

Barrus moved for a fitness evaluation, which was granted. (Docs. 28, 30.) On May 11, 2018, Montana State Hospital (MSH) staff psychiatrists Dr. Virgina Hill and Dr. Timothy Casey diagnosed Barrus with delusional disorder and opined he was unfit to proceed. (Doc. 87.1, Report at 14-15.) They recommended administration of psychotropic medication. (Doc. 87.1, Report at 14.) Barrus refused and argued such action was unconstitutional. (Doc. 99 at 2; Doc. 103.)

A five-day involuntary medication hearing was held under *Sell v. United States*, 539 U.S. 166 (2003). Dr. C. Robert Cloninger testified for the defense, Dr. Alan Newman testified for the State, and Dr. Hill testified about her proposed treatment plan at MSH involving antipsychotic medication. All experts submitted reports. (Doc. 237, FOF; Doc. 178 (Hill report); Doc. 179 (Cloniger Report); Doc. 192 (Newman report[2]).) The district court ordered involuntary antipsychotic medication under *Sell*. (Doc. 237 at 28.) In 2020, after Barrus petitioned this Court for supervisory control, this Court affirmed. *Barrus v. Mont. First Jud. Dist. Ct*., 2020 MT 14, 398 Mont. 353, 456 P.3d 577.

[2] While Barrus participated in interviews with all other medical professionals, he did not allow Dr. Newman to interview him at that time.

After a few months of psychotropic medication, Dr. Hill opined that Barrus was fit to proceed. (Doc. 319.) No party objected. (Docs. 328, 331.) The district court held that Barrus was fit to proceed and resumed the criminal proceeding. (Doc. 332 at 5-6.) Barrus remained at the Galen Forensic Mental Health Facility under Dr. Hill's treatment. (*Id*.)

Trial occurred from September 7 to September 21, 2021. After nine days, the State rested. (Trial Tr. at 2049.) Barrus called no witnesses and rested. (*Id*. at 2050.) Barrus theorized he was a "mere spectator" and relied upon a general denial. (8/17/21 Tr. at 153; Trial Tr. at 21.) After a two-hour deliberation, the jury found Barrus guilty of all counts. (Doc. 474; Trial Tr. at 2418-19.)

Relevant here, the district court next held a two-day hearing and received testimony from Dr. Hill and Dr. Newman to consider whether Barrus met his burden under Mont. Code Ann. §§ 46-14-311 and -312 to entitle him to a DPHHS placement rather than a prison placement. Prior to the hearing, Dr. Newman interviewed Barrus on his perspective of the offenses. (Doc. 499.) Both doctors submitted reports agreeing on the diagnosis of delusional disorder but otherwise disagreeing on Barrus's ability to appreciate the criminality of his behavior and to conform his behavior to the law. (Doc. 499.1 (Newman); Doc. 504, PSI (Hill).) After considering the testimony, evidence, expert reports, and the trial record, the district court credited Dr. Newman's opinion and held that Barrus failed to

meet his burden under Mont. Code Ann. § 46-14-311. (Doc. 507, *see* Appellant's App. A.)

At a later sentencing hearing, the court sentenced Barrus to the Montana State Prison for three concurrent life-without-parole sentences. (Doc. 518 at 3; 4/22/22 Tr. at 78-79.)

STATEMENT OF THE FACTS[3]

I. The offense

A. The background

Tara Gallagher is Marshall Barrus's on-and-off partner. They have five kids, including Jonathan, Tiera, Dezirae, Marshall, and Tyson. (Trial Tr. at 392, 450.) In 2016, Tara and Marshall reunited and moved from Minnesota to Belgrade, Montana, with Marshall thinking he could get a job there. (*Id*. at 39-96, 398, 450.)

In May 2017, Barrus drove up from his home in California to Montana to help Marshall find work. (Trial Tr. at 396-97.) Tara, Marshall, Barrus, and the kids went camping at the Confederate Campground near Canyon Ferry for around a week. (*Id*. at 399, 492, 512.) Tara's family slept in a big tent, while Barrus slept

[3] All referenced exhibits are the State's exhibits offered, admitted, and published at trial.

in his white Suburban. (*Id*. at 400.) During this time, Barrus started helping Marshall by obtaining business insurance. (*Id*. at 452-53.)

Tara noticed Marshall's behavior had changed. (Trial Tr. at 418.) Marshall and Barrus would frequently sit in the Suburban and listen to "antigovernment talk shows." (*Id*. at 400.) And while Marshall had previously had NA beer, he started drinking alcoholic drinks. (*Id*. at 405.)

On Monday, May 15, 2017, Tara texted Marshall while he and Barrus were out, asking for a four-pack of mini bottles of wine. (Trial Tr. at 402.) When they returned, Barrus brought out a "big bottle of wine," poured half of it into a glass, handed it to Tara, and said, "[D]on't get drunk." (*Id*. at 403.) Marshall and Barrus had their own alcohol and Tara noted they were both "pretty intoxicated[.]" (*Id*. at 404.) Tara asked Marshall about his "SCRAM" unit that detects alcohol, which was related to Marshall's pending charges, but Marshall did "not care about it." (*Id*.) Barrus and Marshall did not eat Tara's prepared dinner. Instead, they went back into the Suburban and continued listening to talk shows. (*Id*.)

Marshall drank the "whole" bottle of wine. (Trial Tr. at 413.) So Marshall and Tara went to the store to get Marshall more alcohol. (*Id*. at 414.) Meanwhile, back at camp, Barrus talked with his granddaughter Desirae, who had never met him before. (*Id*. at 491, 493.) Barrus said she was "born into the militia and that there was no way out of it[.]" (*Id*. at 500, 510-11.) He noted she would "make a

great lady sniper," and that "all police should be hung." (*Id*. at 500, 529.) Barrus encouraged her to skip school, claiming teachers were "brainwashing" her. (*Id*. at 511.)

Upon their return, Marshall and Tara remained in the car. Marshall was playing "love music[]"which was strange because Marshall "never talked about how he felt" to Tara and he would never play songs like that. (Trial Tr. at 413.) Tara would later realize he was saying "his goodbyes[.]" (*Id*. at 481-82.) Marshall also discussed how upset he was about his pending burglary charge because his associates wouldn't tell the truth. (*Id*. at 482.)

Barrus was angry that Marshall and Tara were listening to music in the car. (Trial Tr. at 459.) He brushed Tara's prepared dinner off his tailgate. (*Id*. at 418.) Marshall laughed. (*Id*. at 419.) Marshall and Barrus returned to the Suburban to listen to talk shows, while the kids went to bed. (*Id*.)

Later, Marshall told Tara that he and Barrus were going to California and asked if she wanted to come. (Trial Tr. at 420.) Tara said no, told Marshall he was drunk, and advised him to go to bed. (*Id*.) Marshall went into the tent and asked his children if they wanted to come, and they all responded "no." (*Id*. at 512.) Marshall told the kids, "Bye, I love you." (*Id*.) Barrus said, "[W]ell, let's just leave, then." (*Id*. at 420.)

Before leaving, Barrus examined Tara's phone and said her texts messages were "incriminating" and advised her to "delete all" of them. (Trial Tr. at 421.) Tara complied, but she "didn't understand why[.]" (*Id*.) While rolling a cigarette in the driver seat, Barrus picked up a 9 mm Glock, shook it, laughed, and said, "[L]ook what I have." (*Id*. at 422-23.) Tara knew this was Marshall's Glock that had been brought on the camping trip along with a shotgun and a M1A assault rifle. (*Id*. at 423.) Barrus laughed and said, "[I]t's a suicide mission[.]" (*Id*.) He continued, "You know, [Tara], if you go with us, you'll get killed." (*Id*. at 424.) Marshall cut off his SCRAM unit and handed it to Tara, exclaiming, "[G]o tell those ass-fucking motherfuckers . . ." and then something else that Tara did not remember. (*Id*.) Barrus gave Tara a signed and dated manifesto he wrote previously entitled "We the People or Them the Government." (Trial Tr. at 426, 430-31, 664-65; Ex.'s 661-64.) Barrus and Marshall left, with Barrus driving the Suburban.[4] (Trial Tr. at 426.)

Tara texted Marshall: "Your dad said" that "if we go, we die. What the fuck? I trusted you and gave you every bit of me and this is what you do?" She criticized Marshall for abandoning the family. (Trial Tr. at 429; Ex. 679.) She was "scared" and moved the kids into her vehicle. (Trial Tr. at 431-32.)

[4] It was undisputed that Barrus remained the driver throughout the incident and Marshall was the passenger.

At around midnight, Marshall went inside the Townsend Town Pump and purchased beer, while Barrus filled up a gas can. (Exs. 143, 143-A; Trial Tr. at 671-72.) At 1:17 a.m., after they had forgotten to reload the gas can, they returned to the Town Pump and picked it up. (Ex. 143-C; Trial Tr. at 672-73.)

At around 2 a.m., Barrus and Marshall returned to the camp. (Trial Tr. at 432, 461.) Unable to find Tara, Marshall fired three rounds from his gun into the firepit. (*Id*. at 483-84.) Barrus said, "[T]hey are in the car." (*Id*. at 433.) Barrus asked Tara to come out and talk, but she refused. (*Id*. at 434.) Marshall gathered his personal items—such as his duffle bag containing extra ammunition—out of the tent and loaded them into Barrus's Suburban. (*Id*. at 435, 437, 472, 448.) Barrus retrieved a hatchet and approached Tara's car door, exclaiming "[H]ey, [Tara], what do you think of this?" (*Id*. at 435-36, 513.) Tara screamed and said, "[Y]ou're freaking me out. Get away from me." (*Id*. at 436.)

Next, Marshall attempted to open the locked back door of Tara's car, but he was unsuccessful, so he busted the window open with his elbow. He struck his son Tyson's head, as Tyson had been leaning against the window. (Trial Tr. at 436, 513.) Tyson started crying. (*Id*. at 513.) Marshall asked everyone if they wanted to go to California, to which they responded "no." (*Id*. at 514.) Marshall called them "a bunch of pussies" and said, "Let's go, [Barrus]." (*Id*.)

Tara did not want to be at the camp if they returned. (Trial Tr. at 438.) She saw them head towards Townsend, so she went the opposite way toward Helena. (*Id*.) She stopped at a gas station and instructed the kids to get out of the car so they could be seen on camera, in case Barrus would later find them. (*Id*.) She turned off her phone because Barrus had earlier obtained access to her location services. (*Id*. at 439.) They slept in the vehicle in the Wal-Mart parking lot, where there were surveillance cameras. (*Id*. at 440.)

B. The murder of Deputy Moore

At 2:13 a.m., Barrus and Marshall returned to the Townsend Town Pump, stopped for only a few seconds, then continued driving out of the gas station. (Ex. 143-D.) At 2:30 a.m., Deputy Moore was on patrol and his vehicle was captured on surveillance video from Rocky Mountain Supplies traveling south toward Three Forks. (Trial Tr. at 674-76; Ex. 890.) Six minutes later, the same surveillance system captured Barrus's vehicle heading the same way. (Ex. 890B; Trial Tr. at 676.)

Next, as shown on Deputy Moore's dashcam video, and with no other traffic on the highway, Barrus's Suburban quickly passed Deputy Moore's patrol vehicle. (Ex. 144 at 0:03-0:09.) Deputy Moore activated his lights and sirens and pursued. (*Id*. at 1:00-1:24.) Barrus did not slow down but gradually weaved in and out of the slow and fast lanes. (*Id*. at 1:25-3:00.) Deputy Moore informed dispatch that

he was pursuing a vehicle at 100-mph speeds. (Ex. 149E at 0:30-1:20.) Soon after passing Wheat Montana heading Southbound, Barrus slammed on his brakes, forcing Deputy Moore to brake and move evasively. (Ex. 144 at 5:20-5:30.) Barrus sped up and the pursuit continued. (*Id*. at 5:30-6:00.)

Seconds later, numerous quick-succession shots rang out while .308 bullets riddled through Deputy Moore's patrol vehicle and front windshield. Deputy Moore cried out as he received at least one gunshot injury to the face. His dashcam was also struck by a bullet and partially dislodged from its position. (Ex. 145 at 0:05-0:19; Exs. 756, 759, 820; Trial Tr. at 775, 986, 1023.) His patrol vehicle lost control, passed the centerline, crossed the opposing lane of traffic, careened left off the highway, and rolled to a stop. (Ex. 145 at 0:05-0:19; Exs. 1-12, 78, 109, 121, 122.) Deputy Moore's labored breathing can be heard on the video for around three minutes. (Ex. 145 at 0:20-3:30; Trial Tr. at 922-23.) The dislodged dashcam shook, indicating possibly his movement. (Trial Tr. at 650-51, 993-94; Ex. 145 at 0:20-3:30.) A chime activated as Deputy Moore attempted to open his driver side door with the key in the ignition after removing his seatbelt. (Trial Tr. at 597, 653, 923; Exs. 78, 115, 145 at 3:35, 869.)[5]

[5] As the medical examiner testified, the initial gunshots to the face were not immediately fatal because they did not strike a vital structure, and Deputy Moore had a "lucid interval" where he could open his door. Possibly, this first injury could have been survivable if quick medical transport had occurred. (Trial Tr. at 920-28, 933.)

After a few minutes, a light appeared on the dashcam video. (Ex. 145 at 3:38; Trial Tr. at 594.) Soon thereafter, numerous quick-succession .308 bullets rang out again and riddled through Deputy Moore's vehicle, as grass was kicked up on the windshield and smoke started emanating from the vehicle. A voice yelled, "Go go go go go go!" (Ex. 145 at 4:12-4:22; Trial Tr. at 598, 836, 1023.)

After dispatch lost contact with Deputy Moore, an alert was issued. Another trooper discovered his patrol vehicle at mile marker 109, with brake lights on and the door open. (Trial. Tr. at 559-61.) He approached, yelled out, and ran back to his vehicle, radioing: "I need medical, send backup units! Deputy down, looks like he's been shot! He's missing part of his head." (State's Ex. 146, 1:00-1:17; Trial Tr. at 563.) He found arched tire tracks and many .308 caliber casings grouped together. (Trial Tr. at 572-74.)

More officers arrived, and Deputy Moore's body was covered with a blanket. (Trial Tr. at 574.) Deputy Moore left behind a wife, two 13-year-old boys and a 7-year-old daughter. (*Id*. at 389.)

C. The pursuit and shootout

After Barrus's vehicle went on a wild deviation, went airborne, and destroyed various fenceposts on private property down a dead-end gravel road on Irvine Lane off Highway 2, Barrus continued back onto the highway. (Trial Tr. at 1029-36, 1061-64, 1073-76; Ex.'s 636-37, 639, 655-56, 901.)

The Suburban was spotted going over 100 mph near Butte, heading westbound. Two Butte police officers pursued in their respective vehicles, with lights and sirens activated. (Ex. 894 at 8:00-8:32; Trial Tr. at 1095-97, 1100-03, 1132, 1412.) The pursuit continued through Anaconda-Deer Lodge County, Powell County, and Granite County. (Trial Tr. at 1099, 1103.) More officers from various jurisdictions joined the pursuit. (*Id*. at 1413-14.) Barrus continued to weave in and out of the slow and fast lane, and would periodically turn on his hazard lights, while Marshall was frequently moving around in the passenger seat. There were no signs of conflict between them. (*Id*. at 1101-02, 1132-33.)

Stop sticks were successfully deployed near Drummond, but Barrus continued driving at 65 to 70 miles per hour, with heavy sparks emanating from the vehicle as he ran through the tires to the wheel rims. (Trial Tr. at 1104, 1134, 1162; Ex. 280A.) With spotlights trained, police saw Marshall climbing into the back, taking up a shooting position. (Trial Tr. at 1105-06, 1123-24.) The leading Butte officers prepared their own AR-15s to shoot back through the windshield while driving if necessary. (Trial Tr. at 1106, 1148, 1156, 1412-13; Ex. 280 at 0:05-0:30.) The officers knew the Suburban "was going to stop, whether they wanted to or not" because of the stop sticks, and "if they were desperate, they were going to start shooting." (Trial Tr. at 1161.)

Suddenly, Marshall began firing numerous .308 rounds from his M1A assault rifle at the leading officers in the Butte vehicles, which were both quickly disabled and careened off the road. (Trial Tr. at 1106-07, 1150, 1414-15; Ex.'s 280A and 282A.) A bullet also went through the windshield of one of the vehicles, but both officers were unharmed. (Trial Tr. at 1106; Ex. 280 at 6:45-7:10.)

Other police vehicles took the lead, while Barrus continued driving on the Suburban's rims at 60 to 70 miles per hour—even 13 miles after the stop stick's deployment. (Trial Tr. at 1183-84, 1218-19.) Barrus kept a smooth and steady driving line so that Marshall could have a good platform to shoot at the officers. (*Id*. at 1116-20, 1139, 1150-51, 1196.) Marshall continued shooting, hitting several pursuing vehicles. (*Id*. at 1185, 1415.) The officers were disadvantaged because Barrus and Marshall were working together and splitting tasks, while the officers were mostly driving alone and it was difficult to shoot while driving, and the front windshield provided no ballistic protection. (*Id*. at 1194-95, 1411.)

As Barrus pulled over and rolled the Suburban to a stop, Marshall rapidly jumped out of the passenger side and continued firing the M1A assault rifle. (Trial Tr. at 1185, 1557; *Id*. at 1430, 1814, Exs. 412, 504 (M1A rifle near body.) As the officers bailed out to return fire, bullets riddled their respective vehicles, including a windshield and side mirror, and zipped over their heads. (Trial Tr. at 1185, 1190, 1420, 1512.) Two officers saw muzzle flashes from *both* the driver

and passenger side of the Suburban and returned fire toward both areas. (*Id*. at 1421-22, 1436-37, 1512-14.) A "lot of rounds" were exchanged. (Trial Tr. at 1187; Ex. 147 at 1:33-2:02.) The officers huddled behind one patrol car, shooting back. (Ex. 891A.)

While Marshall fired the M1A assault rifle from the passenger side, Barrus shot the Glock from the driver side, firing a whole magazine. (Trial Tr. at 1439-40, 1446, 1691-92, 1708-12, 1715, 1803-04; Exs. 210, 416, 422-23, 474-97 (empty magazine, spent cartridges near driver door, Glock).) Returning fire hit the Glock's handle, causing damage and causing the magazine to fall out, and further resulting in a gun jam. (Trial Tr. at 1723, 1781, 1999-20; Ex. 523.)

Then, it "got quiet" as Barrus emerged from the driver side. (Trial Tr. at 1187, 1207, 1423; Ex 147 at 2:42.) He threw the Glock on the ground nearby. (Trial Tr. at 1425, 1440.) While officers ordered Barrus to show his hands, he ignored them and walked over to the passenger side where Marshall was lying on the ground (Police would soon thereafter discover that Marshall was dying from a gunshot headwound). Barrus bent down, but he stood up and walked back to the driver side. (Trial Tr. at 1187, 1425, 1469, 1530; Ex. 503 at 2:55-3:00; Ex. 147 at 3:04-3:32.) He then began complying with the officers' directions and walked backwards towards them with his hands up. Officers approached Barrus from behind and tackled him and cuffed him. (Trial Tr. at 1187-88, 1592; Ex. 147 at

3:42-5:20.) Other officers began rendering first aid to Marshall. (Trial Tr. at 1533.)

D. Barrus's unprompted statements to authorities

Upon his arrest, Barrus, unprompted, said, "Yeah, I'm just fucking evil militia." Sergeant Tyler Deeks responded, "Yeah, I don't know, man." Barrus replied, "Yeah, I am." (Ex. 892 at 0:45-0:50; Trial Tr. at 1599.) Barrus said it was "over," and he had been "captured[.]" (Trial Tr. at 1600; Ex. 892 at 0:56-1:00, 1:52-1:53.) He said, "Can you guy[s] fucking please execute me instead of taking me to jail" then referenced a "vigilante" and expressed wanting to be hung. (Ex. 892 at 3:45-4:02; Trial Tr. at 1596.)

As Sergeant Deeks explained the patdown, Barrus said, "Go right ahead, you guys are good." (Ex. 892 at 3:19-2:22.) He appeared calm. (Trial Tr. at 1594, 1611.) A fully loaded 9mm Glock magazine was found in his pocket. (Trial Tr. at 1634-36, 38; Ex. 895.)

Barrus said a bullet hit his finger. (Trial Tr. at 1595; Ex. 892 at 0:05:0:43.) While being treated, Barrus said, "[W]e're just fucking evil old outlaws, you know." (Ex. 914 at 1:43-46; Trial Tr. at 1632-33.) When a medic explained something might hurt, Barrus responded, "I don't care about that. When I go to the dentist they don't even need to give me a shot. Don't worry about me." (Ex. 914 at 3:05-3:23.) The medic responded they were just "looking after your wellbeing,

all right?" Barrus replied, "I can tell that." (*Id*. at 3:23-3:31.) Barrus said, "Listen, there's nobody gonna be saying anything, because I got shot in the finger, I don't give a fuck. You guys did good." (*Id*. at 4:00-4:11.)

While officers made sure his cuffs were comfortable, Barrus next said, "You're doing good. Don't worry about me, you done good. I've never met nicer cops in my whole life." (*Id*. at 7:13-7:23.) While switching out cuffs, Barrus said, "Do everything you have to do, I don't care. I'm not too fussy." (*Id*. at 8:32-8:40.) Barrus continued engaging in small talk, telling police about his dad living in Forsyth. (*Id*. at 10:07-10:14.)

During Barrus's transport to the hospital in Deputy Travis Wafstet's vehicle, Barrus continued to talk. (Ex. 893; Trial Tr. at 1645, 1639.) Barrus said "It's an honor to be arrested by a fucking, Montana fucking, are you a Sheriff or Deputy?" Deputy Wafstet responded Deputy. (Ex. 914 at 14:30-14:53.) Barrus continued, "I figured that. We're just evil construction workers, you know." (*Id*. at 14:57-15:05.) Barrus next said he was "proud to meet ya" and explained his family background, his dad's military history, and asked Deputy Wafstet about his own background. (*Id*. at 15:15-17:00.) He asked about details about various Montana cities. He next said, "You think they can hang me in this state or not . . . I don't believe in getting locked up . . . I hope you can hang me like the old vigilantes[.]" (Ex. 893 at 3:20-3:37.) Deputy Wafstet was unsure. Barrus said, "Goddamn it,

you know. I thought you guys were supposed to like fucking blast me to pieces or something." (Ex. 893 at 3:37-3:59; Trial Tr. at 1640.) Barrus continued talking about his preference for "old cars[.]" Deputy Wafstet responded, "They don't make them like they used to." Barrus replied, "No, they don't." (Ex. 914 at 19:53-20:04.)

At the hospital, Barrus said that he was "intending a suicide-by-cop situation," and he wanted to "go out at the end of a gun." (Trial Tr. at 1648.) On the way to jail, Barrus continued:

> **BARRUS**: God, I was hoping you guys was just gonna shoot me out there. Why don't you guys shoot people anymore? Have you ever heard about like death before dishonor Travis?
>
> **DEPUTY WAFSTET**: I've heard of it.
>
> **BARRUS**: Huh?
>
> **DEPUTY WAFSTET**: Yeah, I've heard of it.
>
> **BARRUS**: All right. This is very disgusting, now I've got to go hang around a bunch of goddamn criminals. They're probably dopers and shit. I would accept death, I wish you could just take me out to a tree and hang me. I'd accept it. I'd sign that. I don't like, I don't like fucking common criminals.

(Ex. 893A at 1:38-2:38; Trial Tr. at 1653, 1665.)

II. Facts related to the Mont. Code Ann. § 46-14-311 decision.

A. The interview

Dr. Newman, the State's expert, interviewed Barrus prior to the Mont. Code Ann. § 46-14-311 hearing. (Doc. 499.) Several times, Barrus claimed it was Marshall who was paranoid and delusional historically and on the night of the incident. (*Id*. at 25-27, 33-34, 77.) Barrus explained he came to Montana after Marshall was laid off "just to come over and help Marshall, try to get him calmed down[]" and to set up work and get Marshall "a contractor's license" so he wouldn't be beholden to an employer. (*Id*. at 127.)

Barrus described Marshall as "paranoid" that night about his pending burglary charge. (*Id*. at 43.) Barrus recalled, "[O]f course, I'm thinking, you know . . . he's already got this charge. . . He's cutting off his ankle monitor. He's heavily armed. He does not want to go to jail again." (*Id*.) Barrus admitted he purchased a six-pack of "Rainer Beer" that night to try Rainer for the first time but he did not remember how much of it he drank. (*Id*. at 41.)

As he was driving, Barrus explained he was worried about the ankle monitor situation and the fact that Marshall "doesn't want to go to jail for nothing because he can't even smoke a cigarette." (*Id*. at 50.) Barrus admitted to possibly speeding while passing Deputy Moore. (*Id*. at 49.) He knew it was a "deputy sheriff" vehicle, but he kept speeding. (*Id*. at 50-51.) Marshall said, "Dad, now they're

shooting at us." Barrus responded, "[A]re you sure?" but Marshall did not respond. (*Id*. at 51.) Marshall started shooting at Deputy Moore. (*Id*.) Barrus was "just driving[]" and continued "going as fast as I can go." (*Id*. at 52.) Next, Barrus explained:

> **BARRUS**: Right. And then I just keep on driving fast. Then he says, Dad, go back there. And I says for what. And he says, I don't want to get charged with attempted murder. So I just keep on going. He says, yeah, Dad, go back there. He says it two or three times. So finally I pull over, turn around and go back. I don't know if I do a U-turn, a two-point turn or what. But, anyway, I go back there. Then—and, also, we're all, we're not back there for like three minutes or nothing like that. We're back there for –as soon as I go back there, he jumps out of the car and starts shooting right away.
>
> **DR. NEWMAN**: Marshall? Marshall?
>
> **BARRUS**: Yeah, Marshal does. And I think he shoots Officer Moore about 20 times right then.

(*Id*. at 53.) Marshall said, "Go go go go" and Barrus kept driving. (*Id*. at 54.)

Barrus realized they were "doomed" and he thought they would "for sure get killed." (*Id*. at 56.) After the spike strips, he tried to "maintain" on the road. (*Id*. at 58.)

Once they stopped and got out, Marshall and Barrus both started shooting, although Barrus demurred that he wasn't "really trying to kill cops[.]" (*Id*. at 60.) He explained his gun ultimately got shot and the mechanism jammed and he couldn't clear it. (*Id*. at 61.) He threw it nearby. (*Id*. at 64.) While he did not

consider suicide, when he walked over to Marshall, he "[t]hought about grabbing that M1A up[]" but decided against it. (*Id*.)

Barrus was impressed with the police and was surprised he wasn't killed, and he knew they were "just trying to gain control of the situation." (*Id*. at 67-68.) He explained that "[t]he whole time I've been arrested, the cops have treated me fine. I haven't run into one bad cop yet." (*Id*. at 68.)

Barrus regretted that he didn't "just stay in [California]," and because they brought guns and passed Deputy Moore. (*Id*. at 70.) He also regretted "lett[ing] down" Marshall and wanted to go back in time and "do things differently." (*Id*. at 129.)

B. Dr. Newman's opinion

1. The report

Dr. Newman is board certified in General Psychiatry and in Forensic Psychiatry. He has extensive experience in maximum security, inpatient forensic facilities, and in prisons. He is the chair of the California Pacific Medical Center Department of Psychiatry, as well as the Director of the same organization's Psychiatry Residency Training Program and Undergraduate Medical Education program. He has extensive experience evaluating and treating patients and supervision of a psychiatry residence, and he has published multiple articles. (Appellant's App. A, FOF at ¶ 11; Doc. 237 at 4.) The opposing expert, Dr. Hill,

expressed respect for Dr. Newman and stated he is "one of the most astute forensic psychiatrists nationally." (1/21/22 Tr. at 77.)

Dr. Newman submitted a 166-page report opining with "reasonable medical certainty" that Barrus appreciated the criminality of his behavior and was able to conform his behavior to the law. (Doc. 499 at 66.) Dr. Newman explained the following nonpsychotic reasons for Barrus's actions: (1) Barrus "stated that his primary motive of entering the high-speed chase was to avoid capture, particularly to avoid his son Marshall from being arrested[]"; (2) Barrus knew he would receive a DUI if pulled over; (3) Barrus knew Marshall's removal of his ankle bracelet would lead to his arrest; (4) Barrus ultimately "surrendered to police" and he made statements acknowledging his understanding of why he was taken into custody; (5) Barrus "expressed a desire to be executed" which constituted an awareness and recognition of "some illegal behavior" and an acknowledgement that he had engaged in serious acts for which serious consequences could be contemplated. (*Id*. at 68-69.)

2. The testimony

At the hearing, Dr. Newman explained the "most compelling" reason Barrus appreciated the criminality of his conduct was Barrus's flight from the scene and police and his "desire to avoid capture" along with Barrus's knowledge of Marshall's reasons to avoid capture. (1/24/22 Tr. at 79-83.)

Another reason was Barrus's explanation for returning to kill Deputy Moore, that Marshall "did not want to be charged with attempted murder[,]" which is a "non-psychotic motive[]" because it pertains to the "elimination of a witness[,]" particularly here where Deputy Moore was "no longer a threat." (*Id*. at 81-82.) Moreover, it was not a delusion or a "voice" in Barrus's head, "it's a human being, his son, begging him to go back." (*Id*. at 122.) There was no evidence of Barrus having any contemporaneous hallucinations at all. (*Id*. at 86.) And Barrus's active deliberation of the situation was evident because he did not return to Deputy Moore's vehicle immediately. (*Id*. at 123.)

Finally, when Barrus was arrested, "he made a number of statements that suggested he was aware that the act was wrong, or it was a criminal act." (*Id*. at 83.) Additionally, he was "cooperative with the police, and he was aware that they were law enforcement." (*Id*.) He also made comments about being "evil," which suggests a knowledge of awareness of wrongdoing. (*Id*.) Barrus was also not confused as to why he was "being arrested." (*Id*.) He wasn't "mystified that the people pulling him over were actually police and not people driving an ice cream truck." (*Id*. at 84.)

Dr. Newman concluded that "putting all of this together, my impression was that despite whatever diagnosis Mr. Barrus had, he had a nonpsychotic motive to

flee law enforcement[]" and Barrus appreciated the criminality of his behavior.[6] (*Id*.)

C. Dr. Hill's opinion

1. The report

In a three-paragraph "Summary of Mental State at the Time of Crime," Dr. Hill opined that Barrus met the criteria under Mont. Code Ann. § 46-14-311 for a DPHHS placement because Barrus self-reported to her that he did nothing wrong that night except "night speeding." (Doc. 504, Eval. at 5.) Dr. Hill also explained Barrus believed his actions "necessary for self-defense, as Marshall said the officer was shooting at him." (*Id*.) Thus, Dr. Hill opined that Barrus was under persecutory delusions that night, "amplified by lifestyle stressors" and possible marijuana and alcohol use, which caused him to be unable to appreciate the criminality of his behavior or conform his behavior to the law. (*Id*.)

2. The testimony

While Dr. Hill acknowledged that Barrus "kn[ew] some of the behavior that night was criminal," she believed he did not "totally appreciate" his behavior due to his delusions. (1/21/22 Tr. at 87.) Dr. Hill explained that "her take on appreciating[]" was that it was "different to know[]" and it requires "more

[6] Because Barrus does not substantively address or challenge the district court's resolution of the "conforming" behavior prong, the State does not detail Dr. Newman's or the district court's conclusions on this prong.

emotional understanding." (*Id*. at 88.) Dr. Hill nonetheless recognized it was "pretty rare" for her to "actually testify about state of mind" like in this hearing. (*Id*. at 16.)

Regarding Barrus's decision to go back to Deputy Moore's patrol vehicle upon Marshall's request, Dr. Hill opined that Barrus needed to go back and eliminate Deputy Moore because "it was self-defense because they were going to kill them." (*Id*. at 81.) While, at that point, Deputy Moore was no longer pursuing them, Dr. Hill explained, "I think Mr. Barrus wants to neutralize this threat." (*Id*. At 156.) She argued that Barrus and Marshall didn't know Deputy Moore's vehicle was disabled. (*Id*. at 157.) After the State played the video showing Deputy Moore's vehicle going off the road, Dr. Hill equivocated that Barrus "may have" believed it was still operable, but she "didn't ask[]" him. (*Id*. at 158.)

Despite providing the self-defense reason, Dr. Hill acknowledged that Barrus had only ever "told me he went back because Marshall did not want to be charged with attempted homicide." (*Id*. at 212-13.) Barrus had given that reason "repeatedly" throughout his stay at Galen, whether medicated or not. (*Id*. at 215.) She conceded that Barrus did not have any hallucinations about Deputy Moore leaving his vehicle and trying to hurt them, nor did Barrus alternatively provide any fantastical statements for going back. (*Id*. at 213.) The State asked:

> **STATE**: So the reason that you've given for him going back are not anything that he has ever said, right?

DR. HILL: It's not that it's specifically said, no.

(*Id*. at 215.) Dr. Hill acknowledged—in line with Barrus's express explanation—that the reason Barrus went back "could be[]" to support Marshall because he did not want to be charged with attempted homicide and he was "very supportive of his son." (*Id*. at 189.)

Dr. Hill conceded that when Barrus was apprehended and placed in the patrol car, he did not seem concerned or horrified of law enforcement, nor did he profess any hatred toward law enforcement. (*Id*. at 188-89.) But she viewed this as a "coping" mechanism and she didn't expect him to "spew" his delusions immediately after the shootout. (*Id*. at 180, 183.) Dr. Hill acknowledged that Barrus at times said he had a good relationship with police and would vacillate with the concept. (*Id*. at 140.) She agreed that while Barrus was on parole on a prior offense in 2013-2016, he had no problems with police. (*Id*. at 141.)

While Dr. Hill discussed the concept of a "folie a deux" or a shared delusion between two people, (*id*. at 83), she could not offer an opinion on whether Marshall or Barrus was the dominant party (*id*. at 84).

She acknowledged that Barrus doesn't always tell the truth. (*Id*. at 103.) She said it was a "rough call" to ascertain whether to believe Barrus. (*Id*. at 118.) She admitted that Barrus "says sometimes he exaggerates, sometimes he's a bona fide liar." (*Id*. at 11.) And Barrus "absolutely" liked to toy with psychiatrists and

said he is a "master salesman[.]" (*Id*. at 123.) Barrus told her that he had previously angled for a guilty but mentally ill (GBMI) sentence and he would routinely read the Diagnostic Statistical Manual of Mental Disorder, Five Version (DSM-5). (*Id*. at 125.) Barrus had also vehemently refused oral antipsychotic medication numerous times and claimed he would fight to the death to prevent it, but after he had been told that oral medication would be necessary to stay at MSH on a GBMI sentence, he "start[ed] taking it." (*Id*. at 126-28.)

D. The court's order

The district court expressly weighed the expert opinions and reports and concluded that Dr. Newman's opinion was "more persuasive, particularly when considered with the other evidence in this case." (App. A, COL at ¶ 12.) The court ruled that the totality of Barrus's behavior and statements made during the incident showed his ability to appreciate the criminality of his behavior and conform his behavior to the requirements of law.[7]

SUMMARY OF THE ARGUMENT

The district court's ruling shows it considered all the evidence presented and concluded that Barrus did not meet his burden of proving to the district court's satisfaction that he was suffering from a mental disease or disorder that rendered

[7] The court's specific conclusions are discussed herein.

him unable to appreciate the criminality of his behavior or to conform his behavior to the law. That decision is supported in the record by Dr. Newman's report and testimony and Barrus's statements and conduct during and immediately after the offense. Because the district court's decision was supported by the evidence in the record, the district court did not abuse its discretion when it sentenced Barrus to prison, and this Court should accordingly affirm.

This Court should otherwise reject Barrus's suggestion to further isolate and define "appreciate" to mean something more than knowledge of criminal conduct. As the United States Supreme Court has explained, whether a defendant could appreciate the criminality of his behavior is another way of saying whether the defendant could understand that his act was illegal. Adopting Barrus's suggestion to isolate and define the term "appreciate" would violate this Court's rules of statutory interpretation, because "appreciate" should be read in tandem with "criminality" and "behavior." Finally, given the context of the entire phrase, it is reasonable that neither this Court nor the legislature has identified a need to further define the term "appreciate."

STANDARD OF REVIEW

This Court reviews a district court's determination under Mont. Code Ann. § 46-14-311 to determine whether the district court abused its discretion. *State v.*

Gallmeier, 2009 MT 68, ¶ 11, 349 Mont. 424, 203 P.3d 852 (citation omitted). A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Gallmeier*, ¶ 11.

"A defendant has the burden of proving" mental disease or defect "at the time of the offense such that he was unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of law." *State v. Coburn*, 2018 MT 246, ¶ 19, 393 Mont. 73, 428 P.3d 243 (collecting cases).

APPLICABLE LAW

"Pursuant to § 46-14-311, MCA, a sentencing court must consider 'a defendant's mental condition whenever a defendant claims that [he] suffered from a mental disease[,] defect, [or disability] at the time of the commission of the offense such that he was unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of law.'" *Coburn*, ¶ 18 (citing *Gallmeier*, ¶ 13, *State v. Spell*, 2017 MT 266, ¶ 29, 389 Mont. 172, 404 P.3d 725, and Mont. Code Ann. § 46-14-311(1)-(2)).

The scope of the inquiry is confined to the plain language of the statute: "[A] sentencing court [must] consider" the defendant's mental condition "'at the time of the commission of the offense.'" *Gallmeier*, ¶ 13 (citing *State. v Rathbun*,

2003 MT 210, ¶ 10, 317 Mont. 66, 75 P.3d 334). This inquiry is also "relevant only at sentencing." *State v. Meckler*, 2008 MT 277, ¶ 13, 345 Mont. 302, 190 P.3d 1104 (citing Mont. Code Ann. § 46-14-311).

The defendant bears the burden of proving these facts "to the satisfaction of the sentencing court." *State v. Doney*, 194 Mont. 22, 35, 636 P.2d 1377, 1385 (1981). "If a defendant satisfies all the requirements of § 46-14-311, MCA, the sentencing court must sentence the defendant to DPHHS custody." *Coburn*, ¶ 19 (citing *State v. Raty*, 214 Mont. 114, 118-19, 692 P.2d 17, 19-20 (1984)). If the defendant fails to meet his burden, "normal criminal sentencing procedures are invoked." *State v. Korell*, 213 Mont. 316, 323, 690 P.2d 992, 996 (1984).

The sentencing court has a basic duty "to independently evaluate the defendant's mental condition" and the record "must reflect the deliberative process." *Korell*, 213 Mont. at 338-39, 690 P.2d at 1004. It must consider expert reports, the trial record, and "any relevant evidence that it considers necessary" in its appreciation of criminality and conformance to law analysis. Mont. Code Ann. § 46-14-311; *Coburn*, ¶ 18 (internal citations omitted).

ARGUMENT

I. The district court did not abuse its discretion when it ruled that Barrus failed to meet his burden under Mont. Code Ann. § 46-14-311.

A. The scope of this Court's review

This Court will affirm the district court's conclusion and analysis under Mont. Code Ann. § 46-14-311 unless that conclusion is unsupported in the record. *Gallmeier*, ¶ 20 (citing *State v. Pittman*, 2005 MT 70, ¶ 42, 326 Mont. 324, 109 P.3d 237). In reviewing the district court's Mont. Code Ann. § 46-14-311 decision, this Court will otherwise "not disturb a district court's resolution" of issues related to the "weight of the evidence and the credibility of witnesses," which are "within the province of the trier of fact[.]" *Meckler*, ¶ 15 (citation omitted). If the evidence conflicts, it is within the province of the trier of fact to determine which will prevail. *Barrus,* ¶ 13.

Of course, it is reversible error if the district court completely fails to address a defendant's request to consider Mont. Code Ann. § 46-14-311 or fails to fulfill its obligation to independently evaluate the defendant's mental condition. *See Raty*, 214 Mont. at 119, 692 P.2d at 20; *Korell*, 213 Mont. at 338-39, 690 P.2d at 1004. But as long as the district court "followed the proper procedures to investigate" the defendant's mental condition, and the court "independently evaluated" the defendant and "considered the evidence by both parties[]" and "set forth its rationale" for the sentence and "explained its deliberative process," this

Court will consider that evidence supported by the record and affirm. *See Coburn*, ¶¶ 24-25.

If competing experts come up with different conclusions, and the sentencing court relies upon the State's expert, this Court will find no error in that court's resolution of the opposing opinions, as long as record evidence exists to support the district court's conclusion. For example, in *State v. Collier*, 277 Mont. 46, 919 P.2d 376 (1996), this Court considered that some experts opined that Collier could appreciate the criminality of her conduct, but an expert who testified for Collier reached the opposite conclusion. *Collier*, 277 Mont. at 61, 919 P.2d at 386. After briefly summarizing the expert opinions, this Court held that the district court did not err in sentencing Collier to prison rather than DPHHS because:

> [W]hile there was some conflict in the evidence, that conflict was resolved by the trial court against Collier. We conclude that the record does support the District Court's determination . . . and, therefore, we hold that the District Court did not abuse its discretion[.]

Id. And in another case, *Pittman*, Dr. Peterson testified for Pittman that she was unable to conform her behavior to the requirements of law. Dr. Stratford, an expert for the State, found the opposite. *Pittman*, ¶¶ 41-42. This Court explained:

> Pittman essentially argues that the District Court should have accepted Peterson's opinion instead of Stratford's. The weight and credibility of evidence are within the province of the finder of fact, whose determination we will not disturb on appeal. Based on those factors, the District Court accepted Stratford's evaluation of Pittman and rejected Peterson's. Because the court's resolution of the conflict between the two opinions is supported by the record, we will not

> disturb it. We conclude the District Court did not abuse its discretion in sentencing Pittman to prison.

Pittman, ¶ 42 (internal citations omitted).

B. Discussion

While Barrus alternatively attempts to present an issue of statutory interpretation related to the term "appreciate," he has not otherwise argued that *any* of the district court's conclusions lack support in the record. (*See* Appellant's Br. at 29-40.) But whether the district court's conclusions were supported by the record is the only relevant inquiry before this Court. *Coburn*, ¶ 19; *Spell*, ¶ 34; *Gallmeier*, ¶ 20; *Pittman*, ¶ 42; *Collier*, 277 Mont. at 59, 919 P.2d at 384. The State will now provide the district court's conclusions in conjunction with record citations to: (1) the trial record; (2) Dr. Newman's report and opinion; and (3) Barrus's own contemporaneous statements upon his arrest, in his interview with Dr. Newman, and in his fitness reports. All these record sources comprehensively support each of the district court's conclusions that Barrus was aware that his conduct was criminal and he was able to conform his behavior to the law:

- He "was aware he was pursued by the law enforcement vehicle" when pursued by Deputy Moore and that Marshall had "violated the conditions of his release" and he would be arrested. (Doc. 499 at 43, 50-51; Doc. 260 at 5.)

- He turned the car around so that Marshall could kill Deputy Moore. He watched it happen and he fled with Marshall. (*Id*. at 53.)

- His "own statements" indicate they returned to kill Deputy Moore "because Marshall did not want to face criminal charges" and they wanted to eliminate a witness. (Doc. 499 at 53; Fitness reports: Doc. 260 at 5; Doc. 270 at 4; Doc. 289 at 7.)

- He "continued driving as fast as he could to escape law enforcement" during the subsequent pursuit. (Doc. 499 at 52-54, 56, 58; Trial Tr. at 1095-97, 1100-03, 1132, 1412; Ex. 894 at 8:00-8:32.)

- He surrendered and "made a rational choice to . . . begin to follow law enforcement commands" and "immediately complied upon arrest[]" and "made statements indicating he knew he had committed a crime." (Doc. 499 at 64; Trial Tr. at 1187-88, 1592. 1632-33; Ex. 147 at 3:42-5:20; Ex. 914 at 1:43-46.)

(Bullet points at App. A, district court's COL at 14-16.) The district court's conclusions are supported by this record.

Appellate courts will readily affirm a trial court's conclusion on criminality appreciation and conformance to law based on: (1) evidence that the defendant fled law enforcement to avoid apprehension; (2) evidence related to defendant's compliance with police requests; and (3) the defendant's demeanor near-in-time to the incident. *See Commonwealth v. Lawson*, 475 Mass. 806, 816, 62 N.E.3d 22 (2016) (Evidence of either prong [appreciating criminality or conforming conduct to law] may include: "[T]he inferences arising from the circumstances of the offense, including evidence that the defendant . . . acted on a rational motive[] [and] made rational decisions in committing the offense and in avoiding capture[.]"); *Myers v. State*, 27 N.E.3d 1069, 1078 (Ind. 2015) (Myers' rational reason of being shot sensibly explained his noncompliance with police request for

surrender and "Myers' demeanor after the incident at the hospital" showed he "was cognizant of the wrongfulness of his conduct."). And—as Dr. Newman reasoned and as adopted by the district court—all of Barrus's actions, unsolicited comments, and justifications at the time of the offense were nonpsychotic reasons showing that he understood his actions were criminal and he was able to conform his behavior to the law. (1/24/22 Tr. at 79-84, 147.)

Here, the district court fulfilled its obligation to independently evaluate Barrus by conducting a two-day hearing, receiving expert reports, and fully considering "the exhibits and the court record" in reaching its decision. (App. A at 1.) Additionally, the court's analysis deliberated the merits of the reports. (*Id*. at 11-12, 14.) In a 17-page order, the district court exhaustively incorporated the record evidence, expressly weighed the opinions from both experts,[8] and entered detailed findings of fact and conclusions of law. (*Id*.) Far from being an arbitrary decision without employment of conscientious judgment, the court's decision was careful and deliberative.

Accordingly, while Barrus does not substantively dispute this point, the district court's decision that Barrus "failed to meet [his] burden" to show that he "did not appreciate the criminality or that he was unable to conform his behavior to

[8] While the district court found Dr. Newman more credible than Dr. Hill and further gave more weight to Dr. Newman's opinion, this Court does not reweigh or review those decisions on appeal. *Meckler*, ¶ 15; *Pittman*, ¶ 42.

the requirements of the law[],” was not an abuse of discretion because it was supported by the record.

II. This Court should reject Barrus's suggestion to further define Mont. Code Ann. § 46-14-311.

Barrus argues that the district court erred in applying the term "appreciate" in the "appreciate the criminality of the defendant's behavior" prong of Mont. Code Ann. § 46-14-311. (Appellant's Br. at 31.) While Barrus acknowledges that the district court was "not required" to "explicitly endorse one version of the term over the other," Barrus argues that "appreciate" means more than knowledge of conduct. (*Id*. at 32.) Barrus faults Dr. Newman for focusing merely on his knowledge of his criminality. (*Id*.) He invites this Court to define the term. (*Id*.)

To support Barrus's proposed expansion, Barrus suggests that Montana's appreciation of criminality prong applies the old English *M'Naghten* rule. Barrus thus argues that the district court wrongly failed to consider and incorporate the two prongs of the *M'Naghten* rule, including: (1) the defendant's knowledge of the nature and quality of the act; and (2) the defendant's knowledge of wrongfulness. (*Id*.)

A. History of the statute

Montana Code Annotated § 46-14-311 was codified in 1979 after the Legislature enacted House Bill 877, which "abolished the traditional use of insanity

defense in Montana and substituted alternative procedures for considering a criminal defendant's mental condition." *Korell*, 213 Mont. at 322, 690 P.2d at 996. Thus, since 1979, Montana has had no affirmative insanity defense but allows consideration of a mental disease or defect at three discrete stages, including the Mont. Code Ann. § 46-14-311 determination at sentencing. *State v. Sandrock*, 2004 MT 195, ¶ 30, 322 Mont. 231, 95 P.3d 153.

Representative Keery sponsored HB 877 (1979) to "abolish the defense of mental disease or defect in criminal actions[.]" (State's App. 1, 3/19/79 *Minutes of Sen. Jud. Comm. H'rg* at 4.) HB 877 ultimately incorporated an amendment from SB 495 (1979), sponsored by Senator Towe, to augment the sentencing procedure to incorporate consideration of appreciation of the criminality of the defendant's conduct at sentencing. (*Id.,* 3/21/79 *Minutes of Sen. Jud. Comm. H'rg* at 4; App. 2; App. 3.) As Senator Towe explained, this new sentencing provision was for the following purpose:

> [Senator Towe] further stated that a person who did something wrong intended to do it, *but he may have thought what he did was not criminal*, and that they are going to take that into consideration when sentencing.

(App. 1 (emphasis added); 3/19/79 *Minutes of Sen. Jud. Comm. H'rg* at 5.)

B. Classification of the statute

There are "significant differences among" the various states' "approaches to insanity" with several "traditional strains variously combined to yield a diversity of

American standards." *Clark v. Arizona*, 548 U.S. 735, 749 (2006). A State's "insanity rule[] is substantially open to state choice." *Clark*, 548 U.S. at 752. Whatever the construction, "no particular formulation has evolved into a baseline for due process[.]" *Id*.

There are five main strains of application of insanity principles. *Kahler v. Kansas*, 589 U.S. 271, 274-75 (2020). The first two, the "cognitive capacity" (whether the defendant could not "understand what he was doing") and "moral capacity" (whether the defendant's illness rendered him "unable to understand that his action [was] wrong") stem from the old English *M'Naghten* case. *Kahler*, 589 U.S. at 274-75 (citing *M'Naghten*, 10 Cl. & fin. 200, 8 Eng. Rep. 718 (H.L. 1843)). A third strain focuses on "volitional incapacity" or whether a defendant was unable to "control" his actions. *Id*. at 275. A fourth strain is the "product-of-mental-illness test[.]" *Id*.

Relevant here, there is also a fifth strain, the *M'Naghten* "spinoff[.]" *Id*. As the Supreme Court explained:

> *M'Naghten*'s "moral capacity" prong later produced a spinoff adopted in many States, that does not refer to morality at all. Instead of examining whether a mentally ill defendant could grasp that his act was *immoral*, some jurisdictions took to asking whether the defendant could understand that his act was *illegal*.

Id. The *Kahler* Court discussed Kansas's sentencing standard "in line with [the] *M'Naghten* spinoff" that the mental condition prevented the defendant from

"appreciat[ing] the [conduct's] criminality." *Id*. at 277. Accordingly, these jurisdictions ask "whether the defendant could understand that his act was illegal." *Id*. at 275.

Here, the "appreciate the criminality of the defendant's behavior" prong of Mont. Code Ann. § 46-14-311 is undoubtedly a *M'Naghten* spinoff based on: (1) the Supreme Court's explication in *Kahler* and the plain corresponding language from Montana's statute; (2) the legislative history of HB 877 (1979) as explained above; and (3) this Court's express rejection of the old *M'Naghten* rule, which occurred even well before Montana abolished the affirmative insanity defense.[9] Thus, Barrus is incorrect that the district court was required to apply the *M'Naghten* rule. And, unlike Montana, it should be no surprise that states that do apply *M'Naghten* tend to incorporate the language of the two-part *M'Naghten* test into their relevant statutes. *See* Mich. Comp. Laws § 768.21A; *Bennett v. Commonwealth*, 29 Va. App. 261, 277, 511 S.E.2d 439, 446-47 (1991).

C. Interpretation of the statute

This Court "interpret[s] a statute first by looking to its plain language." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. This

[9] *See State v. Watson*, 211 Mont. 401, 408, 686 P.2d 879, 883 (1984) (Montana rejected *M'Naghten* rule in 1967); *see also State ex rel. Krutzfeldt v. District Court*, 163 Mont. 164, 172, 515 P.2d 1312, 1316 (1973) (*M'Naghten* and "irresistible impulse" rules no longer have application in those terms.).

Court then "construe[s] a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature'. . . Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Id*. Instead, this Court's job is to "read and construe each statute as a whole" to "give effect to the purpose of the statute." *Id*.

A defendant must show his mental disease rendered him "unable to appreciate the criminality of the defendant's behavior[.]" Mont. Code Ann. § 46-14-311. Here, Barrus improperly attempts to "isolate specific terms from the context in which they are used by the Legislature," *Fox*, ¶ 18, by isolating the term "appreciate" from the rest of the phrase. Barrus's argument violates the very rules of statutory interpretation that this Court follows. "Appreciate" should be read in tandem with the words immediately after it, including "criminality" and "behavior." As explained by the United States Supreme Court, whether a defendant "appreciat[es] the [conduct's] criminality" can be understood as "whether the defendant could understand that his act was illegal." *Kahler*, 589 U.S. at 275.

The plain language of the terms read together dictate the resulting plain and unambiguous phrase in the statute. To otherwise adopt Dr. Hill's nebulous conjecture that appreciation means "emotional understanding" would be a fundamental misreading of the plain language of the statute and would lead to an absurd result. Then, the statute would effectively mean, "Was the defendant

unable to have an emotional understanding that his actions were criminal?" But knowledge of criminality does not require emotional understanding, nor could Montana's Legislature ever have intended to adopt such an unreasonable interpretation into a discrete term into the statute. This conclusion is based on the plain language of the statute and because the 1979 Legislature saw no need to define the term in the first place and the 1979 hearing minutes established the inquiry was merely the defendant's knowledge of whether his actions were "criminal." (State's App., 3/19/79 *Minutes of Sen. Jud. Comm. H'rg* at 4.)

Notably, Barrus does not identify *any* jurisdiction that has further defined the term "appreciate." Instead, Barrus relies upon a concurring opinion in the Hawaii Supreme Court in *State v. Uyesugi*, 100 Haw. 442, 60 P.3d 843 (2002). But the actual *Uyesugi* opinion summarized all the competing possibilities and interpretations of the term "appreciate" and held that "[d]espite the varying uses of the term "appreciate," none was improper[]" because "the ordinary meaning of the word is not precise." *Uyesugi*, 100 Haw. at 453, 60 P.3d at 854. The court continued:

> The thorough and extensive expert testimony gave the jury the tools necessary for it to determine whether Uyesugi could

> "appreciate" the wrongfulness of his conduct.[10] That testimony also brought forth the inherent subtleties of the term.

Id. The *Uyesugi* Court rejected an IAC and plain error claim and held that the defendant's "substantial rights were not affected" by the failure to further define the term "appreciate" for the jury. *Id*. at 449-50, 851.

Accordingly, after giving proper effect to the whole phrase of the statute, this Court should reject Barrus's invitation to further define the term "appreciate" because such an expansion would violate this Court's rules of statutory interpretation. The *M'Naghten* spinoff is a rejection from the moral capacity inquiry from *M'Naghten* and merely asks whether the defendant could "understand that his act was illegal[,]" (*see Kahler*, 589 U.S. at 275-76) or, put in the terms of the statute, whether the defendant was unable to appreciate the criminality of his behavior.

D. Application of the statute

Here, Dr. Newman committed no error in his analysis in line with the *M'Naghten* spinoff. He testified that when "you assess criminality, you look for

[10] Hawaii's statute is markedly different from Montana's statute because: (1) it is applied as an affirmative defense at trial; (2) it has adopted the "substantial capacity" test from the American Law Institute (ALI); and (3) it focuses on the "wrongfulness" of the defendant's behavior rather than Montana's term of "criminality." *See* HRS § 704-400; *Uyesugi*, 100 Haw. at 540, 60 P.3d at 851 (ALI discussion); 1/24/22 Tr. at 247 (Dr. Newman's explication that Montana uses the term "unable" rather than adopting the "substantial capacity" test from ALI.).

examples in their behavior that suggests an awareness that the act was illegal." (1/24/22 Tr. at 79.) He explained that the important question here is "was the person aware they were breaking the law of the State?" (*Id*. at 54.) He continued: "So that's the reason why most of these standards use the word "criminality" . . . because criminality suggests, really, does the person have awareness that they're breaking the law of the State? You know, rather than just their own internal code." (*Id*. at 52.)

Nor did the district court err in analyzing Barrus's statements and actions "at the time of the commission of the offense" in deciding whether Barrus's mental disease or defect "rendered the defendant unable to appreciate the criminality of the defendant's behavior[,]" Mont. Code Ann. § 46-14-311. The district court correctly applied the plain and unambiguous language of the statute and accurately concluded that Barrus "knew he had committed a crime." (App. A at 16.)

/ / /

CONCLUSION

This Court should affirm the district court's Mont. Code Ann. § 46-14-311 decision and reject Barrus's invitation to further define the term "appreciate."

Respectfully submitted this 5th day of March, 2025.

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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 9,985 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0662

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LLOYD MORTIER BARRUS,

Defendant and Appellant.

APPENDIX

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-05-2025:

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