

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA,

Plaintiff,

CAUSE NO. DC 17-1461

vs.

JUDGE GREGORY R. TODD

DONALD RAY CHERRY,

Defendant.

**ACKNOWLEDGMENT AND WAIVER OF
RIGHTS BY PLEA OF NO CONTEST AND
PLEA AGREEMENT**ACKNOWLEDGMENT OF RIGHTS

I, DONALD RAY CHERRY, the Defendant in the above-entitled matter, have had an opportunity to examine the charges brought against me, including the investigative file, and after consultation with my attorney and being fully advised, acknowledge my rights, and agree to plead No Contest as hereinafter set forth.

I acknowledge that my attorneys have explained to me and advised me of the following and I fully understand that: (initial each)

DC

1. I am charged with the offense of:

Count I: Deliberate Homicide (Felony) with a weapons enhancement, all as specified in Mont. Code Ann. §§ 45-5-102(1)(b) and 46-18-221.

Count II: Tampering with Witnesses and Informants (Felony) as specified in Mont. Code Ann. § 45-7-206(1)(a).

In the alternative to Count II, the offense of Count III: Tampering with Witnesses and Informants (Felony) as specified in Mont. Code Ann. § 45-7-206(1)(b).

Count IV: Intimidation (Felony), as specified in Mont. Code Ann. § 45-5-203(1)(a).

Count V: Tampering with or Fabricating Physical Evidence (Felony), as specified in Mont. Code Ann. § 45-7-207(1)(a).

DC

2. I understand the maximum possible penalties are as follows:

Count I: Life imprisonment, or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years, plus a consecutive sentence of 2 to 10 years for use of a dangerous weapon.

Count II: Imprisonment in the state prison for a term of not more than 10 years and/or a fine not to exceed \$50,000.

Count III: Imprisonment in the state prison for a term of not more than 10 years and/or a fine not to exceed \$50,000.

Count IV: Imprisonment in the state prison for a term of not more than 10 years and/or a fine not to exceed \$50,000.

Count V: Imprisonment in the state prison for a term of not more than 10 years and/or a fine not to exceed \$50,000.

DC

3. I have the right to plead Not Guilty, or to persist in that plea if it has already been made and thereby place the burden of proving my guilt on the prosecution which must prove my guilt beyond a reasonable doubt.

DC

4. I have the right to challenge the sufficiency of the information and the affidavit supporting it.

DC

5. I have the right to object to any evidence that may have been obtained in violation of the United States Constitution, the Montana Constitution, and/or prevailing law.

DC

6. I have the right to be represented by counsel at every stage of the proceeding.

DC

7. I have the right to a speedy and public trial by jury or judge and at that trial I have the following rights:

- a. The right to effective assistance of counsel.
- b. The right to confront and cross-examine witnesses against me.
- c. The right to testify.
- d. The right to call and have witnesses testify on my behalf.
- e. The right not to be compelled to incriminate myself.
- f. The right to have the charges proven beyond a reasonable doubt and to appeal a finding of Guilty.
- g. The right to argue for any lesser included offense(s).

- 1 DC 8. As a part of this agreement to plead No Contest, I reserve my right to appeal any
2 adverse pre-trial rulings.
- 3 DC 9. I understand that I have the right to apply for sentence review if the Court imposes an
4 incarceration sentence of one year or more.
- 5 DC 10. I have had ample time and opportunity to discuss this case with my attorneys to
6 prepare a defense and I have received the full benefit of my attorneys' advice and the
7 possible outcome of a trial. I am satisfied with the services of my attorneys, and my
8 attorneys have been fair to me and have represented me properly.
- 9 DC 11. I am not suffering from any mental disease or defect or any emotional disability, nor
10 am I acting under the influence of alcohol, drugs, or prescription medicine. I fully
11 understand the consequences of signing this Agreement.
- 12 DC 12. I have not been threatened, coerced, forced, intimidated, or influenced in any way.
- 13 DC 13. I have entered into this Agreement freely and voluntarily and with full knowledge of
14 its terms and conditions.
- 15 DC 14. I understand that a plea agreement is an agreement between a Defendant and a
16 Prosecutor that in exchange for a particular plea, the prosecutor will recommend a
17 particular sentence and/or dismissal of certain charges.
- 18 DC 15. I understand that except for pre-approving the parties to proceed with this plea as a
19 modified Mont. Code Ann. § 46-12-211(1)(b) agreement, the Court may not
20 otherwise participate in the making of this plea agreement.
- 21 DC 16. I understand that pursuant to Mont. Code Ann. § 46-12-211(1)(b), at the time of
22 sentencing, if the Judge accepts the plea, the Judge is bound by the terms of this
23 agreement. I also understand pursuant to Mont. Code Ann. § 46-12-211(1)(b), at
24 sentencing the Judge may reject the plea, and in that event that I understand I will be
25 allowed to withdraw my plea.
- DC 17. I understand that if the Court intends to impose a sentence that exceeds the joint
recommendation, the Court is required to allow me to withdraw my plea of No
Contest pursuant to Mont. Code Ann. § 46-12-211(1)(b).
- DC 18. I understand that at the sentencing hearing the victim's family of the offense has a
statutory right that the State must honor and is not an attempt by the State to solicit
testimony to undercut this Agreement. I understand and agree that if the victim's
family chooses to exercise this right that such testimony will not be a basis to
withdraw my plea.
- DC 19. I understand that a presentence investigation report will be prepared.

1 DC

2 20. I understand that the Court, after a separate hearing or at sentencing has the ability to
3 award restitution to the victim's estate or family in this matter, which I may be
4 required to pay as part of the sentence imposed by the Court.

5 DC

6 21. I have considered the most severe sentence that could be imposed and understand that
7 there are many indirect or collateral consequences of a plea, some of which include
8 but may not directly apply to this offense, loss of freedom of association, registration
9 as a violent offender, loss of driving privileges, the right to hold public office,
10 difficulty in obtaining employment, loss of the right to possess a weapon and that this
11 conviction may be used against me in a subsequent case.

12 DC

13 22. I acknowledge that I have reviewed a full copy of the investigative file with my
14 attorneys and/or their investigator. I have been advised about exculpatory evidence
15 and inculpatory evidence.

16 DC

17 23. I state without hesitation that my attorneys have exhaustively explained to me every
18 aspect of the case. In those discussions we went over my testimony and the testimony
19 of all witnesses expected to testify on behalf of the State and on behalf of the Defense.
20 My attorneys explained to me what the State's theory of prosecution would be in the
21 event this case went to trial. My attorneys explained to me what all the physical and
22 expert evidence would be. My attorneys carefully advised me that if this case were to
23 proceed to trial, based on the evidence, the jury could find me Not Guilty of any or all
24 charges, Guilty of any or all charges, or the jury could possibly not reach a verdict
25 which would result in a mistrial.

DC

24. My attorneys also discussed any potential lesser included offenses, which include:

While the State does not concur, depending on the presentation of facts and legal theories presented to a jury, it is possible the Defendant may argue to the Court that any/all of the following are lesser included offenses of Count I: Deliberate Homicide. The Court would then determine whether any or all of the following are lesser included offenses.

Robbery, as defined in Mont. Code Ann. § 45-5-401, punishable by imprisonment for not less than two years nor more than 40 years and/or a fine not to exceed \$50,000, and/or

Aggravated Assault, as defined in Mont. Code Ann. § 45-5-202, punishable by imprisonment for not more than 20 years and/or a fine not to exceed \$50,000, and/or

Assault with a Weapon, as defined in Mont. Code Ann. § 45-5-213, punishable by imprisonment for not more than 20 years and/or a fine not to exceed \$50,000

DC

25. My attorneys have also informed me of all offers provided by the Yellowstone County Attorney's Office.

DC

26. My attorneys left the decision totally to me advising only of the consequences of going to trial.

1 DC 27. I understand by a plea of No Contest that the plea is still considered a conviction, and
2 by pleading No Contest I am acknowledging that there are sufficient facts to be
3 presented by the State by which a jury would likely convict me. I believe it is in my
best interest to plead No Contest.

4 DC 28. I understand that this Agreement is limited to the Yellowstone County Attorney's
5 Office and cannot bind other state, local, or federal prosecuting authorities.

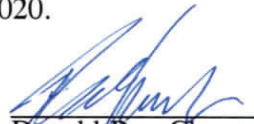
6 DC 29. This Agreement encompasses all of the understandings of the parties. No other
promises have been made to me other than those specified in this Agreement.

7 DC 30. I acknowledge receiving a copy of this Agreement.

8
9 DC 31. The State's allocution of the facts and circumstances of the offense(s) is:

10 On or about October 26-27, 2017, in Yellowstone County, Montana, the Defendant
11 participated (with Co-Defendant Jeffrey Haverty) in committing a Robbery of M.K., and
12 in the course of that Robbery, the combined conduct of the Defendant and Co-Defendant
13 caused the death of M.K.

14 DATED this 21 day of September, 2020.

15 
Donald Ray Cherry

16 AGREEMENT

17 1. I agree to enter a No Contest plea to the offense of:

18 Deliberate Homicide (Felony), as specified in Mont. Code Ann. § 45-5-102(1)(b). The State
19 agrees to not seek the weapons enhancement of Mont. Code Ann. § 46-18-221.

20 2. The parties jointly recommend that I receive the following sentence:

21 65 years Montana State Prison for the offense of Deliberate Homicide. The State will not
22 recommend or seek a parole restriction at the sentencing hearing in this matter.

23 The State will dismiss the remaining offenses.

24 The State will refrain from charges in unfiled matters BPD 17-36121 (alleging Robbery) and
25 BPD 16-81571 (alleging Criminal Possession of Dangerous Drugs), the investigative files of
which have been disclosed to the defense.

- 1 3. I agree to enter my plea pursuant to this Agreement and understand that if I fail to appear or
2 change my plea on the scheduled date that the State may withdraw from the Agreement and
3 a warrant may be issued for my arrest.
4 4. With this agreement, I reserve my right to appeal any adverse pre-trial rulings, including any
5 order granting the State's motion to allow the Co-Defendant to appear by video.
6 5. The State (and the Defendant) will recommend that the Court recommend the placement be at
7 the Montana State Prison in Deer Lodge for the purpose of obtaining the schooling, health
8 and programming available at that facility.

9 OTHER PROVISIONS

10 It is further understood and agreed that:

- 11 1. The Prosecutors will abide by the terms of the pretrial Agreement throughout all proceedings
12 relevant to the determination of sentence including sentence review and parole proceedings.
13 2. The Prosecutors shall not be bound to make the agreed-upon recommendation and may either
14 withdraw from the Agreement or make a different recommendation in the event that I
15 misrepresent material facts concerning my record, or a Court finds probable cause of
16 additional criminal conduct or violation of bail conditions by me prior to sentencing. If I
17 have already pled No Contest, I shall not be allowed to withdraw my plea.
18 3. In the event I have the opportunity to be released, I agree that should I abscond pending
19 sentencing, I will be responsible for the costs incurred by the State in transporting me back to
20 Yellowstone County.

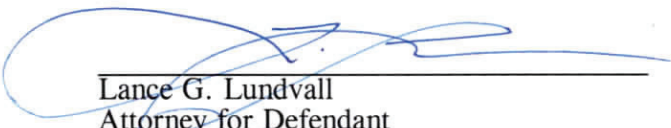
21 No additional promises, agreements, or conditions have been entered into other than those set
22 forth in this Agreement. In the event of withdrawal or termination of this Agreement, any
23 statements made herein shall not be admissible in any proceeding.

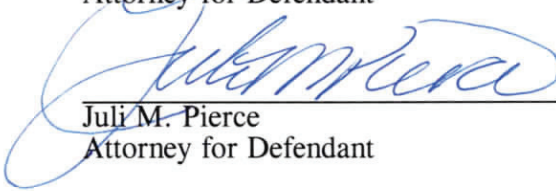
24 DATED this 21 day of September, 2020.

25 
Donald Ray Cherry


We certify that the Defendant has read the Agreement and we have advised the Defendant of the Agreement and explained it to him. We are satisfied that he understands all of his rights and that his plea of No Contest is being voluntarily made, that he understands he is waiving such rights by entry of said plea, and that he is not suffering from any physical, mental or emotional disability, and that he is not under the influence of any drugs or intoxicants, to the best of my knowledge and belief.


1 DATED this 21 day of September, 2020.

2
3 
4 Lance G. Lundvall
5 Attorney for Defendant

6 
7 Juli M. Pierce
8 Attorney for Defendant

9 Reviewed and accepted this 21st day of September, 2020.

10 
11 Brett D. Linneweber
12 Senior Deputy County Attorney
13 Yellowstone County, Montana

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15 Julie Mees
16 Senior Deputy County Attorney
17 Yellowstone County, Montana
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CERTIFICATE OF SERVICE

I, Juli Marie Pierce, hereby certify that I have served true and accurate copies of the foregoing Waiver - Waiver to the following on 09-21-2020:

Lance G. Lundvall (Attorney)
301 North 27th Street, Ste 310
Billings MT 59101
Representing: Donald Ray Cherry
Service Method: eService

Brett D. Linneweber (Prosecutor)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Julie Elaine Mees (Prosecutor)
PO Box 35025
Billings MT 59107
Service Method: eService
E-mail Address: jmees@co.yellowstone.mt.gov

Electronically Signed By: Juli Marie Pierce
Dated: 09-21-2020