

MONTANA HYMEL

NO. 20-KH-374

VERSUS

FIFTH CIRCUIT

LOCK5, L.L.C.

COURT OF APPEAL

STATE OF LOUISIANA

January 14, 2021

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Susan Buchholz  
First Deputy Clerk

IN RE MONTANA HYMEL

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**APPLYING FOR** SUPERVISORY WRIT FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT,  
PARISH OF ST JAMES, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE  
EMILE R. ST. PIERRE, DIVISION "C", NUMBER 16,7491

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Panel composed of Judges Fredericka Homberg Wicker,  
Stephen J. Windhorst, and Hans J. Liljeberg

### **GRANTED FOR LIMITED PURPOSE**

Defendant/relator, Montana Hymel, seeks review of the district court's September 21, 2020 denial of his timely-filed application for post-conviction relief in which he requested an out-of-time appeal.

On March 12, 2018, defendant pled guilty to vehicular homicide pursuant to a plea agreement in which defendant agreed that the trial court would determine his sentence after reviewing a pre-sentence investigation report. On July 9, 2018, the district court sentenced relator to fifteen years imprisonment at hard labor with five years of the sentence served without the benefit of parole, probation, or suspension of sentence. At sentencing, the district court informed defendant of the time period for filing an APCR but did not mention the time delays for filing a motion for appeal or the right to appeal his sentence. Relator did not file a motion for appeal.

Upon considering the circumstances of this case, particularly that defendant's plea agreement did not include a specific sentence and that defendant was not informed of his right to appeal his sentence or the time period for filing an appeal, we find that defendant should have a hearing under the rule of State v. Counterman, 475 So.2d 336 (La. 1985) to determine whether he is entitled to an out-of-time appeal. La. C.Cr.P. art. 881.2(A)(2) precludes a defendant from appealing a sentence imposed in conformity with a plea agreement and set forth in the record at the time of the plea. This limitation, however, does not apply when a specific sentence or sentencing range is not agreed to by both parties as part of a plea agreement. State v. Morales, 12-21 (La. App. 5 Cir. 10/30/12), 102 So.3d 1038, 1041. There is a constitutional right in Louisiana to an appeal. La. Const. art. 1, § 19; State v. Arceneaux, 07-692 (La. App. 5 Cir. 3/25/08), 983 So.2d 148, 150-51,

writ denied, 08-0892 (La. 11/10/08), 996 So.2d 1067. Only the defendant can waive this right and any waiver of right to appeal must be an informed one. Id.

Accordingly, we vacate the district court's September 21, 2020 judgment and grant this writ for the limited purpose of remanding this matter to the district court to hold a Counterman hearing at which it will determine whether relator is entitled to an out-of-time appeal.

Gretna, Louisiana, this 14th day of January, 2021.

**SJW**  
**FHW**  
**HJL**

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
STEPHEN J. WINDHORST  
HANS J. LILJEBERG  
JOHN J. MOLAISSON, JR.

JUDGES



FIFTH CIRCUIT

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CURTIS B. PURSELL  
CLERK OF COURT

NANCY F. VEGA  
CHIEF DEPUTY CLERK

SUSAN BUCHHOLZ  
FIRST DEPUTY CLERK

MELISSA C. LEDET  
DIRECTOR OF CENTRAL STAFF

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**NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **01/14/2021** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

**CURTIS B. PURSELL**  
CLERK OF COURT

**20-KH-374**

**E-NOTIFIED**

23rd Judicial District Court (Clerk)

Honorable Emile R. St. Pierre (DISTRICT JUDGE)

Grant L. Willis (Respondent)

Emily Posner (Relator)

Christopher N. Walters (Respondent)

J. Taylor Gray (Respondent)

**MAILED**

James E. Boren (Relator)

Attorney at Law

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Honorable Jeffrey M. Landry (Respondent)

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