
STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN JAYCOB FISHBAUGH,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Rod E. Souza, Presiding

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STATEMENT OF THE ISSUES

Was the district court's denial of Fishbaugh's motion to withdraw his guilty plea clearly erroneous? Was the complete breakdown in communication before the change of plea hearing "good cause" for withdrawing a guilty plea?

STATEMENT OF THE CASE

Appellant John Jaycob Fishbaugh appeals from the judgment of the Montana Thirteenth Judicial District Court, Yellowstone County, following his guilty plea for felony sexual assault and for indecent exposure against a nine-year old girl, S.H. (*See* 7/10/18 Tr. at 4.)

In the Yellowstone County District Court, Fishbaugh was charged by Information of three felony counts: sexual intercourse without consent; sexual abuse of a child; and sexual assault. (D.C. Doc. 3 at 1–2.)

The parties entered into a plea agreement pursuant to Mont. Code Ann. § 46-12-211(1)(c), under which the State amended the Information to reduce the charges to two counts: sexual assault and indecent exposure. (*See* 10/16/17 Tr. at 8; *see* 7/10/18 Tr. at 4.) The parties also agreed to jointly recommend two concurrent 25-year imprisonments at Montana State Prison (MSP), each followed by a 10-year suspended

sentence. (*See* 10/16/18 Tr. at 8.) During the change of plea hearing (COP) on October 16, 2017, Fishbaugh entered a guilty plea. (*See* 7/10/18 Tr. at 4.)

On January 31, 2018, Fishbaugh appeared for a status hearing represented by Ashley Harada and Alexander Roth. Attorneys and client both informed the trial court the attorney-client relationship, which had deteriorated as early as May 2016, had finally reached a complete breakdown. (*See* 01/31/18 Tr.) The trial court removed counsel and ordered the Office of State Public Defender (OPD) to appoint new counsel. (*See* 01/31/18 Tr. at 15.)

On February 9, 2018, OPD re-assigned this case to Daniel Ball. (D.C. Doc. 93.) Ball worked part-time because of medical issues. (D.C. Doc. 93.) This case was continued until April 4, 2018, to accommodate Ball's scheduled medical procedure. (*See* D.C. Doc. 94.)

Subsequently, On May 4, 2018, Ball moved to withdraw Fishbaugh's guilty plea. (*See* D.C. Doc. 95–97.) A hearing on this motion was held on July 10, 2018. (7/10/18 Tr.) Fishbaugh testified that his previous attorney had coerced and pressured him to plead guilty—Harada threatened to walk out on him if he did not sign the

plea agreement. (7/10/18 Tr. at 7–8.) The State opposed this motion to withdraw. The State indicated that if Fishbaugh was allowed to withdraw his plea then it would be reinstating the original charges—along with seeking the mandatory minimum sentence of 25 to 100 years for each charge. (See 4/4/18 Tr. at 4, 5.) The district court denied the motion and concluded Fishbaugh had not shown good cause for withdrawing his plea. (D.C. Doc. 104 at 4, 9.)

At sentencing, on December 12, 2018, Fishbaugh received a 25-year MSP sentence with ten years suspended for each of the two counts—both sentences running concurrently. (Sentencing Tr. at 43.)

Fishbaugh filed a timely appeal. (D.C. Doc. 118.)

STATEMENT OF THE FACTS

Initially, the State brought charges simultaneously against Fishbaugh in both the Missoula County and Yellowstone County district courts.¹ Fishbaugh was first charged in Missoula by Information with two felony counts: sexual intercourse without consent and sexual abuse of a child. (DC-15-530, Information (attached as App.

¹ A court may take judicial notice of the records of any court of this state. Mont. R. Evid. 202(b)(6).

C) at 1–2.) The Missoula District Court allowed the State to amend its Information and increase Fishbaugh’s charges to three felony counts each carrying a life sentence: sexual intercourse without consent; sexual abuse of a child; and sexual assault. (DC-15-530, Amended Information (attached as App. D) at 1–2.) Fishbaugh was appointed counsel from the Missoula Office of State Public Defender (OPD). (*See* D.C. Doc. 15 at 2.) The Missoula Sheriff’s department recorded a forensic interview of S.H. that was conducted at Missoula’s First Step Program. (D.C. Doc. 15 at 1–2.) The State asserted that an investigator from Missoula OPD had interviewed S.H. and provided copies of the recorded interview to the Missoula County Attorney’s office. (*See* D.C. Doc 15 at 2.)

The Missoula prosecutors dismissed their case against Fishbaugh to allow for a single prosecution to go forward in Yellowstone County. (*See* D.C. Doc. 15 at 2.)

Fishbaugh was then charged in Yellowstone County of three felony counts against S.H.: sexual intercourse without consent; sexual abuse of a child; and sexual assault. (D.C. Doc. 3 at 1–2.) The parties entered into a plea agreement pursuant to Mont. Code Ann. § 46-12-

211(1)(c), under which the State filed an Amended Information reducing Fishbaugh's charge to two counts: sexual assault and indecent exposure. (*See* 10/16/17 Tr. at 8; *see* 7/10/18 Tr. at 4.)

Before trial, S.H.'s family objected to another investigator and/or Fishbaugh's attorney subjecting S.H. to yet another interview. (D.C. Doc. 15 at 2.) The State moved the trial court to preclude the defense from "re-interviewing" S.H. unless it could show that the new interview would elicit new information. (D.C. Doc. 74 at 1.) The trial court precluded the defense from interviewing S.H. on the ground that Fishbaugh had not shown a substantial need to necessitate another interview. (D.C. Doc. 74 at 1–2.)

As early as May 17, 2016, communication between Fishbaugh and his defense counsel, Harada, was completely broken, and the attorney-client relationship had turned adverse. (*See* D.C. Doc. 5; *see* 1/31/18 Tr. at 8–11 (Harada acknowledging that she requested OPD for a male co-counsel to back her up in communicating with Fishbaugh because she believed Fishbaugh had issues with females in positions of power or control.)) The atmosphere of mutual mistrust and misgivings between attorney and client was there from day one. (*See* 1/31/18 Tr. at 12–13

(Harada using confidences and secrets offensively against Fishbaugh to suggest someone else wrote the letter complaining about her representation because he was analphabetic and “incapable” of writing such well-formed prose.) On May 17, 2016, at Harada’s request, OPD brought in Alexander Roth to assist her. (*See* D.C. Doc. 5; *see* 1/31/18 Tr. at 8–11.) There was mistrust between Harada and Fishbaugh—this is why she made sure Roth was present for all her dealings and interactions with Fishbaugh. (*See* D.C. Doc. 5; *see* 1/31/18 Tr. at 8–11.)

At the October 16, 2017 COP, Fishbaugh was represented by Harada and Roth. The district court informed Fishbaugh that he was pleading guilty pursuant to Mont. Code Ann. § 46-12-211(1)(c)—the district court emphasized it was not bound by the terms of the plea. (10/16/17 Tr. at 8.) It advised Fishbaugh that if it were to give him a sentence in excess of the sentence jointly recommended by the parties then he would be entitled to withdraw his guilty plea. (10/16/17 Tr. at 8.) Fishbaugh acknowledged that he understood his constitutional rights and said he was willing to waive his rights to trial and all rights associated with trial. (10/16/17 Tr. at 10.) He acknowledged that the guilty plea was the best possible choice based on the alternatives in

front of him. (10/16/17 Tr. at 10.) Fishbaugh expressed hesitation, anxiety, confusion, and uncertainty. (See 10/16/17 Tr. at 10.) The district court questioned Fishbaugh:

THE COURT: I would note that you appear to be sober and are tracking my questions. Has anyone threatened you or coerced you into entering this agreement and pleading guilty?

[FISHBAUGH]: (Pause.) I feel like they coerced me into this, but other than that, I -- I still have to... (Discussion off the record between counsel and Fishbaugh.)

THE COURT: Well, I'll ask you again, has anyone threatened you or coerced you into entering this agreement and pleading guilty?

[FISHBAUGH]: No.

THE COURT: No?

(10/16/17 Tr. at 11.)

When asked whether Fishbaugh was threatened or coerced into pleading guilty, he responded that he felt he was being coerced by his defense counsel into taking the plea. (See 10/16/17 Tr. at 11.) The district court paused the proceedings. Off record, defense counsel talked down Fishbaugh. (10/16/17 Tr. at 11.) The court came back in session and Fishbaugh now said he was not threatened nor coerced into pleading guilty. (10/16/17 Tr. at 11.) The district court again explained to Fishbaugh he had a right to be tried on the original charges if he opted for a trial—the State would reinstate the original charges.

(10/16/17 Tr. at 12.) The trial court explained the entire trial process including voir dire, opening statements, reading jury instructions, the presentation of the State's case-in-chief, a defense motion to dismiss for insufficiency of evidence, the presentation of the defense's case-in-chief, instructing the jury on the burden of proof beyond a reasonable doubt, closing arguments, and jury verdict. (10/16/17 Tr. at 12–16.)

The district court informed Fishbaugh he was required to make a “voluntary choice” between going to trial on the three charges in the original Information or a guilty plea on the reduced charges in the Amended Information. (See 10/16/17 Tr. at 17.) When asked if he was ready to proceed, Fishbaugh lamented his lack of a choice, even as both of his attorney's ganged up to cross-examine him to discredit his feelings of coercion:

THE COURT: You want to proceed?

[FISHBAUGH]: I really don't have a choice, but to --

THE COURT: Well --

[FISHBAUGH]: -- because I can't --

THE COURT: -- but you do, you do have a choice, you have a choice to go to trial.

[FISHBAUGH]: I know I have a choice, but when you're standing in my shoes, I have no choice.

MR. ROTH: So, Mr. Fishbaugh, you do understand that you have a choice between going to trial and taking the plea?

[FISHBAUGH]: Yeah, when I look at the evidence and what I've been told --

MR. ROTH: So you believe it's your best choice?

[FISHBAUGH]: My best choice --

MR. ROTH: -- based on --

[FISHBAUGH]: -- you told me this.

MR. ROTH: Your best choice is to take this plea; is that correct?

[FISHBAUGH]: That's correct. That's about the only choice I really have. Because what they tell me and what's here, I have to take this.

MS. HARADA: You don't have to do anything, Mr. Fishbaugh. We could --

[FISHBAUGH]: If I don't want to spend the rest of my life in prison, I have to take this.

MR. ROTH: Mr. Fishbaugh, you always have the choice to go to trial. And it may not be a good choice, this may be a better choice --

[FISHBAUGH]: I go to trial and lose and then what happens?

MS. HARADA: We've gone over this, Mr. Fishbaugh.

MR. ROTH: We've explained that.

[FISHBAUGH]: Yeah, I spend the rest of my life in prison. I don't want to spend the rest of my life in prison, so I have to take this. Because from basing it on your information, and you're counsel, this is what I got to go with.

THE COURT: Okay. I want to make it clear, though, you don't have to do anything. You have the right to a trial. And I'm sure you have had extensive consultations with your attorneys, who are both well versed in criminal law, based on the evidence, and they can give you advice, but this has to be your choice and it has to be one that you do -- you make knowingly and voluntarily.

(Pause.)

[FISHBAUGH]: I have to take the deal.

THE COURT: So you want to plead guilty?

[FISHBAUGH]: Don't want to, but I have to.

THE COURT: It is your decision to plead guilty?

(Discussion off the record between counsel and the Defendant.)

MR. ROTH: Mr. Fishbaugh, the hold up we're having here, because I know you feel that you only have the one option because the other option is bad, the Court needs to be certain you understand that there still is another option and you're choosing this of your own freewill. And that's not because -- no one here has told you that you cannot go to trial. We've told you all along it's your choice to go to trial. We've represented strategies of trial, what would proceed at trial, we've advised you of these recommendations, but the decision is yours. And because you have a choice now, you don't have to take one choice over the other. But if you follow our advice, we recommend one of the choices over the other, you've had a chance to review both of the choices, and having reviewed that, are you choosing to take the Plea Agreement?

[FISHBAUGH]: Yes. I need to take the Plea Agreement.

THE COURT: Okay. And no one has threatened you or coerced you into entering this agreement and pleading guilty?

[FISHBAUGH]: No.

THE COURT: Are you satisfied with the services of your attorneys?

[FISHBAUGH]: Yeah.

(10/16/17 Tr. at 17–20.)

Fishbaugh then pled guilty to both counts and the district court accepted his plea as “voluntarily” made. (*See* 10/16/17 Tr. at 22.)

During the first or second week of January 2018, Fishbaugh sent a letter to the trial court requesting that it order OPD to substitute Harada as defense counsel. (App. E.) Fishbaugh wrote to the trial

court detailing that the attorney-client relationship got derailed from the get-go and had turned adverse:

The Attorney I was assigned there, Ashley Ann Harada, from day one presumed I was guilty, there was no investigation done by her, nor would she take anything I said into consideration. Ms. Harada stated that anything people whom saw the alleged victim before, during, and after the alleged time frame had nothing to say that could help me.

Ms. Harada stated multiple times I need to quit lying and just admit that I had committed this crime, at no time did she even go over the paperwork forwarded from Scott Spencer. When I would ask about something in evidence from him, she would state she never saw said paperwork and needed to go back over it, or never received any paperwork. Never would said Ms. Harada let me bring up the subject again threatening to quit if I continued to bring it up.

I was time and time again denied the right to obtain an interview with the alleged victim.

She stated to me that paperwork would be file with a higher court on my behalf as I was being denied due process of law, At no time was this paperwork filed.

Other than the investigation done in Missoula by Scott Spencer, (which was disregarded by present Attorney) there was no investigation into the allegations whatsoever except for what the prosecutor presented to Ms. Harada.

I did not realize this [plea agreement Harada prepared] was wrong until such time as my meeting with the Probation and Parole told me that it was wrong.

As I still claim innocence in this matter, but felt forced into a plea as there was no defense whatsoever to go in front of a Jury with. I had to make the choice between the plea, and life in prison:

I have filed to obtain a new Attorney but was denied. When I asked the reason why I was refused an answer. I was told the next step was to send a letter to the Judge presiding over my case.

(App. E at 1–2.)

On January 31, 2018, the court held a status conference on Fishbaugh’s substitution request. (1/31/18 Tr.) Because the issue to be raised implicated confidential communication between Fishbaugh and his counsel, the trial court excused the prosecution from the court room. (1/31/18 Tr. at 2.) Fishbaugh then testified that from the beginning of the case there was a breakdown in communication—it was “big shambles” on “everybody’s part.” (See 1/31/18 Tr. at 4.) Whenever Fishbaugh tried to talk about something in the case, he would get “shut down” by counsel and told everything he thought the jury would want to hear was “irrelevant” to the case. (1/31/18 Tr. at 4.) Every suggestion he made was “shut down.” (1/31/18 Tr. at 4.) Fishbaugh said he felt “accused” of the crime by his own attorney. (See 1/31/18 Tr. at 4.) Specifically, Fishbaugh explained that defense counsel refused to

conduct a thorough investigation—refused to interview witnesses such as S.H.’s aunt who saw S.H. during and at the time of the alleged incident. (1/31/18 Tr. at 5.) Other than the investigation done in Missoula by Scott Spencer (which Harada disregarded), there was no other investigation. (1/31/18 Tr. at 5.) In addition, she never held a “sit down” with him to go over the evidence from start to finish. (1/31/18 Tr. at 5.) Fishbaugh boiled it down:

I feel that I’ve been very much coerced into this Plea Agreement. I’ve also had Ashley [Harada] walk out of the room on me a few times. She’d get mad and leave the room and throw up her hands and say, I’m finished with this. And Alex [Roth] and I would have to sit there and talk. The communication was just not there. She talks on one level of communication and I’m not even close to that communication, that level.

(1/31/18 Tr. at 6.)

The district court summarized Fishbaugh’s complaint against counsel:

Okay. So what I have is, you wanted a more thorough investigation, so this is the time to give me specifics. At this point you told me the aunt should have been interviewed that you visited while you stopped, and that the alleged victim’s claims on where they stopped, that was not thoroughly investigated by defense. You’re also stating that counsel did not go over the evidence with you, and the discovery and testimony and explain to you how that would be presented; you were coerced into your Plea Agreement;

that Ms. Harada walked out of a meeting; and that your attorneys accused you of committing this offense.
Is that a fair statement –

(01/31/18 Tr. at 8.)

Harada countered, waving a letter in hand which she claimed to be OPD's letter denying Fishbaugh's request to substitute her from the case. (*See* 1/31/18 Tr. at 13.) She admitted she did not send nor share with Fishbaugh that denial letter. (*See* 1/31/18 Tr. at 13.) She admitted not discussing the letter with Fishbaugh. In her defense, she explained that she assumed that the Billings OPD administrator had Fishbaugh's mailing address and must have mailed it to him. (*See* 1/31/18 Tr. at 13.) Harada alluded to difficulty in communication that started as early as May 2016 when she requested OPD for a male co-counsel to assist in communicating with Fishbaugh. (*See* 1/31/18 Tr. at 8–9.) She made sure her male co-counsel was present for any and all discussions with Fishbaugh. (*See* 1/31/18 Tr. at 8–9.) She purposefully insisted on a male co-counsel to back her up against Fishbaugh. She misrepresented to the trial court that Fishbaugh's psychosexual evaluation said he was not "comfortable" with females in positions of power or control. (*See* 1/31/18 Tr. at 8–11.) Harada pointed out that

although Roth was co-counsel and was present for every interaction, Fishbaugh only complained about her performance and not that of her male counterpart. (*See* 1/31/18 Tr. at 8.)

Harada admitted that she angrily stormed out of the room several times to make Fishbaugh “feel comfortable”:

With regard to me leaving the room, in Mr. Fishbaugh’s psychosexual evaluation, which the Court has, there’s an indication that he is not comfortable with females in positions of power or control.² And so if I left the room, it was only in an attempt to hopefully diffuse a situation and make him more comfortable. It was never my intention to neglect him or leave questions unanswered. And so I think the Court needs to understand that.

(1/31/18 Tr. at 10–11.)

Harada acknowledged she received very little information from Scott Spencer, Fishbaugh’s attorney for the Missoula case. (1/31/18 Tr. at 11.) Yet she was against conducting any additional investigation. Fishbaugh was under the impression Harada would file a writ of supervisory control on the trial court’s decision to preclude the defense from interviewing S.H. (1/31/18 Tr. at 11–12.) Harada told the judge

² Undersigned counsel reviewed the psychosexual evaluation and did not encounter a single statement in it indicating or even suggesting Fishbaugh was not “comfortable” with females in positions of power or control.

she researched whether to file the writ, consulted with Roth, and decided against it. (1/31/18 Tr. at 11–12.) Ostensibly, her explanation in court was the first time Fishbaugh became aware a writ would not be filed on his behalf.

When asked if she coerced or pressured Fishbaugh to plead guilty, Harada explained she was “not sure” why he felt coerced. (1/31/18 Tr. at 12.) She reminded the trial court that the COP was over three hours long during which the trial court took three breaks. (1/31/18 Tr. at 12.) At those breaks, Fishbaugh was advised three times that he did not have to take the plea if he wanted to proceed to trial. (1/31/18 Tr. at 12.) She asserted that there was a complete breakdown in communication with Fishbaugh and it was impossible to repair their attorney-client relationship. (1/31/18 Tr. at 13, 14.) Fishbaugh’s accusations were outrageous: “And I think that this just demonstrates that he is at a level where he’s desperate for new counsel. And if he’s going to continue to represent things to the Court that aren’t true, I’m not comfortable moving forward as his counsel.” (1/31/18 Tr. at 14.) Roth added that he “strongly disagreed” with almost everything written in Fishbaugh’s letter and could argue against each point. (1/31/18 Tr.

at 12.) Most of what was said in the letter was not an accurate representation of the reality of the situation. (1/31/18 Tr. at 14.)

Attorneys and client were in unison that communication between them totally broke down and the relationship could not be repaired. (See 1/31/18 Tr. at 11–15.)

The trial court concluded that based on the representations of Harada and Roth, there had been a complete breakdown in communication between attorney and client and ordered OPD to appoint Fishbaugh new counsel. (D.C. Doc. 91 at 1; see 01/31/18 Tr. at 15.) Before adjourning, it set a hearing on Fishbaugh's motion to withdraw his guilty plea. (1/31/18 Tr. at 15.)

On February 9, 2018, OPD reassigned Fishbaugh's case to Daniel Ball—who was having medical issues and had been working on a part-time basis. (D.C. Doc. 93.) Ball moved the trial court to continue the status hearing until April 4, 2018, to allow time for a medical procedure. (See D.C. Doc. 94.) On May 4, 2018, Ball filed a motion to withdraw Fishbaugh's guilty plea. (See D.C. Doc. 95–97.)

On July 10, 2018, the trial court held a hearing on Fishbaugh's motion to withdraw his guilty plea. Fishbaugh testified that his

previous attorney, Harada, coerced and pressured him to plead guilty—she threatened to walk out on him if he did not sign the plea agreement. (7/10/18 Tr. at 7–8.) Harada urged him to accept the plea agreement or she would stop representing him. (7/10/18 Tr. at 8.) Fishbaugh understood that if he did not sign the plea agreement, then his defense counsel would not fully advocate for him. (7/10/18 Tr. at 9.) Fishbaugh reminded the trial court that during the COP he voiced his concern about his attorney pressuring him to sign the plea agreement. (7/10/18 Tr. at 10.) He told the trial court that he did not trust defense counsel. (See 1/31/18 Tr. at 8–9.) His COP should have been postponed and the hearing should have addressed his lack of confidence in counsel, or held a separate hearing on whether his guilty plea was knowing or voluntary. (See 7/10/18 Tr. at 10.) On cross-examination, Fishbaugh acknowledged that the plea agreement he signed was a counteroffer prepared by his defense counsel and it contained amended charges reducing the original charges. (See 7/10/18 Tr. at 12.) Harada had not gone over with Fishbaugh the version of the plea he was to sign at the end of the COP. (See 7/10/18 Tr. at 12.) And the plea terms kept changing even during the COP. Fishbaugh acknowledged that in the

Amended Information, the State was not seeking the 25-year mandatory sentence for each charge as it did originally. (7/10/18 Tr. at 12; *see* D.C. Doc 97.) Fishbaugh understood that the plea agreement offered 25 years of imprisonment followed by a 10-year suspended sentence to run concurrently for both charges. (7/10/18 Tr. at 15.) Fishbaugh acknowledged he signed the acknowledgement and waiver of rights form. (7/10/18 Tr. at 17; D.C. Doc 85.) However, he insisted he felt he lacked a reasonable choice due to the concern that his attorney would walk out on him if he did not sign the plea. (7/10/18 Tr. at 20–21.) Fishbaugh acknowledged that if he was found guilty at trial, his potential sentence could be worse than that in the plea. (7/10/18 Tr. at 18.) He had no idea that at his COP he could disclose the difficulties in communication between attorney and client—bring to the trial court’s attention that his defense counsel was threatening to walk out on him if he did not sign the plea agreement. (7/10/18 Tr. at 18.)

The district court denied Fishbaugh’s motion to withdraw. (D.C. Doc. 104.) It concluded that Fishbaugh was not threatened, pressured, or coerced into pleading guilty. (D.C. Doc. 104 at 9.) It reasoned that at his COP it had ensured the guilty plea was voluntary by thoroughly

explaining to Fishbaugh all the stages of trial and repeatedly informing him of his right to a trial. (D.C. Doc. 104 at 5.) Fishbaugh was given various opportunities to stop his COP and go to trial. (D.C. Doc. 104 at 5.) It acknowledged that early in the COP, Fishbaugh said he felt pressured by counsel to sign the plea. (D.C. Doc. 104 at 5.) It paused proceedings several times for Fishbaugh to consult with counsel. (D.C. Doc. 104 at 5.) When the COP resumed, the court asked Fishbaugh if the issues had been resolved and he answered: “Yes, Your Honor.” (D.C. Doc. 104 at 5.) The trial court told Fishbaugh it wanted to make sure that his plea was voluntary. (D.C. Doc. 104 at 6.) Fishbaugh for the third time said he felt he was being coerced into pleading guilty. (D.C. Doc. 104 at 6.) The trial court took another recess so Fishbaugh could confer with counsel. (D.C. Doc. 104 at 6.) After this recess, this time it asked Fishbaugh if anyone was coercing or threatening him into pleading guilty and he said “No.” (D.C. Doc. 104 at 6.) The trial court pointed out that during the COP it took *three* lengthy breaks and offered to take a *fourth* break for Fishbaugh to keep conferring with the same attorney he complained was coercing him. (See D.C. Doc. 104 at 8.) The trial court concluded Fishbaugh’s plea was voluntary because

the defense counsel told Fishbaugh several times that he had the choice to go to trial, and the COP colloquy was very thorough. (D.C. Doc. 104 at 15.)

Both defense attorneys, Harada and Roth, were in unison cross-examining Fishbaugh to undercut his position. (*See* 10/16/17 Tr. at 17–20.) The trial court credited Harada’s and Roth’s version of events and discredited Fishbaugh’s assertions. (D.C. Doc. 104 at 10 (The trial court reasoning that “Fourth, the statements of Attorneys Harada and Roth during the COP discredit Fishbaugh’s claim of coercion and the claim on page 5 of Fishbaugh’s motion that his relationship with his attorneys became adverse.”).) The trial court misapprehended the import of Fishbaugh’s claim that the attorney-client relationship had become adverse. (*See* D.C. Doc. 104 at 10.) The district court credited Harada and Roth over Fishbaugh reasoning they have a duty of candor³ to Fishbaugh and the tribunal. (D.C. Doc. 104 at 11 citing Mont. R. Prof. Conduct 1.4, 3.3.)

³ Candor. Don’t forget it, keep it in mind. It is the key. *See* Mark Twain, *Letters From the Earth, Letter VI*.

STANDARDS OF REVIEW

The Court reviews a district court's denial of a motion to withdraw a guilty plea de novo, *State v. McFarlane*, 2008 MT 18, ¶ 8, 341 Mont. 166, 176 P.3d 1057 *citing State v. Warclub*, 2005 MT 149, ¶ 17, 327 Mont. 352, 114 P.3d 254, as the issue of whether a plea was entered voluntarily is a mixed question of law and fact. *McFarlane*, ¶ 8 *citing Warclub*, ¶ 17. When reviewing a district court's findings of fact, this Court determines if they are clearly erroneous. *Warclub*, ¶ 16. Findings of fact are clearly erroneous if they are not supported by substantial evidence, or if the district court has misapprehended the evidence, or appellate review of the record convinces this Court the district court made a mistake. *Warclub*, ¶ 16.

SUMMARY OF THE ARGUMENT

Pretty early on in their relationship, communication between Fishbaugh and his previous counsel had collapsed. Harada believed Fishbaugh did not respect women in authority. Harada did not like Fishbaugh. The feeling was mutual—no love lost between attorney and client. The relationship had turned adverse early on prompting Harada to request OPD for a male co-counsel to assist her in communicating with Fishbaugh. Harada made sure her male co-counsel was present

for all her consultations and dealings with Fishbaugh. The collapse of communication was evident as early as May 2016 when Harada requested a male co-counsel. In July 2016, Fishbaugh requested OPD to substitute counsel. OPD would not substitute her. At the July 2017 COP, four lawyers—the prosecution, two defense counsels, and the judge—in one accord were all putting pressure on Fishbaugh to accept the plea agreement against his wishes. No one was advocating for him. A few months after the COP, the trial court dismissed Harada and Roth as counsel after determining that there was a total breakdown in communication between attorney and client. The trial court concluded that this was a good cause to substitute counsel. Later Fishbaugh wanted to withdraw his plea agreement and mount a defense. Fishbaugh moved to withdraw his guilty plea on the ground that it was involuntary—the reason being that Harada coerced and pressured him into pleading guilty. Fishbaugh maintained that his previous attorney urged him to sign the plea agreement or else she would walk out on him. The district court erred in concluding that Fishbaugh did not demonstrate good cause for withdrawing his guilty plea. A complete

breakdown in communication or a complete collapse in attorney-client relationship was “good cause.”

ARGUMENT

I. The district court’s denial of the motion to withdraw his guilty plea was clearly erroneous. Regardless, the total lack of communication was itself “good cause” to withdraw the guilty plea.

While a defendant is not entitled to counsel of his choice or even to a meaningful relationship with counsel, he is constitutionally entitled to counsel with whom he may mount an adequate defense. *United States v. Cronin*, 466 U.S. 648, 656-57, 104 S. Ct. 2052 (1984); *see, e.g., State v. Colburn*, 2018 MT 141, ¶ 21, 391 Mont. 499, 419 P.3d 1196. “If the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant’s right to effective assistance of counsel.” *State v. Gallagher*, 2001 MT 39, ¶ 9, 304 Mont. 215, 19 P.3d 817 (*Gallagher II*) (*citing United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998)). When communication between counsel and defendant becomes so compromised that mounting a defense is impossible, the defendant is neither being heard by counsel nor receiving effective assistance. Accordingly, the defendant’s right to substitute counsel arises only when a breakdown of the attorney-client

relationship becomes so great that the principal purpose of the appointment—to provide the defendant with the effective assistance of counsel—is frustrated. In such instances, the defendant is constructively denied his constitutional right to effective assistance of counsel and the trial court must grant his request for substitute counsel. *See Daniels v. Woodford*, 428 F.3d 1181, 1196–98 (9th Cir. 2005) (explaining the constructive denial of counsel doctrine in the context of a defendant’s request for substitute counsel).

Because the defendant’s constitutional right to substitute counsel arises when his relationship with appointed counsel breaks down to the point where the appointment ceases to constitute the effective assistance of counsel, the Court must identify the circumstances in which the attorney-client relationship presumptively falls short of the one constitutionally required. *See Gallagher II*, ¶ 9 (recognizing that when conflict between attorney and defendant becomes so great as to result in a total lack of communication, the court’s refusal to substitute counsel violates the defendant’s right to effective assistance of counsel). Such an irreconcilable conflict between attorney and client carries a presumption that the attorney-client relationship fell short of

constitutional standards—the client was not receiving effective assistance of counsel. *See Gallagher II*, ¶ 8.

In *Brown v. Craven*, 424 F.2d 1166, 1169–70 (9th Cir. 1970), the Ninth Circuit Court of Appeals held that the refusal to allow the substitution of attorneys may result in denial of the constitutional right to effective assistance of counsel if the defendant and his attorney are embroiled in an “irreconcilable conflict.”

A guilty plea is constitutionally valid only to the extent that it is voluntary or intelligent and unequivocal. *State v. Lone Elk*, 2005 MT 56, ¶ 17, 326 Mont. 214, 108 P.3d 500. A defendant may withdraw a guilty plea upon showing good cause, which “exists when the defendant’s plea was involuntarily entered.” *State v. Prindle*, 2013 MT 173, ¶ 17, 370 Mont. 478, 304 P.3d 712. “The ultimate test for withdrawal of a plea is voluntariness.” *Lone Elk*, ¶ 14. This Court utilizes the standard articulated in *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468–69 (1970), which requires that, to make a voluntary plea, a criminal defendant must be fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel. *State v. Hendrickson*,

2014 MT 132, ¶ 15, 375 Mont. 136, 325 P.3d 694 (citations omitted). If any doubt exists on the basis of the evidence presented regarding whether a guilty plea was voluntarily or intelligently made, the doubt must be resolved in favor of the defendant. *Hendrickson*, ¶ 14.

Montana Code Annotated § 46-16-105(2), provides that the “court may for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn.” The test for determining the validity of a guilty plea is whether the defendant’s plea represents a “voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant.” *State v. Radi*, 250 Mont. 155, 159, 818 P.2d 1203, 1206 (1991). Put another way, the defendant’s plea of guilt must be unequivocal. A plea is deemed involuntary “when it appears that the defendant was laboring under such a strong inducement, fundamental mistake, or serious mental conditions that the possibility exists he may have pled guilty to a crime of which he is innocent.” *State v. Miller*, 248 Mont. 194, 197, 810 P.2d 308, 310 (1991). “An involuntary plea can constitute ‘good cause’ to withdraw the plea, but ‘good cause’ can be found for reasons other than voluntariness.” *Lone Elk*, ¶¶ 17–19. Reasons other than the involuntariness of the plea may constitute good

cause for the withdrawal of the plea under Mont. Code Ann. § 46-16-105(2). *McFarlane*, ¶ 11; *Warclub*, ¶ 16; *Lone Elk*, ¶ 19.

In *Lone Elk*, this Court adopted a new test to be applied in those cases in which a defendant has sought to set aside a guilty plea. The Court said it would determine whether the plea was entered voluntarily, and that, because determining whether the facts met the standard for voluntariness was a mixed question of law and fact, its review of the matter is *de novo*. *Lone Elk*, ¶ 10.

- A. The trial court misapprehended the effects of the evidence: it overlooked the total lack of communication between attorney and client and the atmosphere of mutual mistrust, contempt, and misgivings during the COP.**

There is no question in this case that there was a complete breakdown in the attorney-client relationship. The trial court concluded as much. However, the trial court completely misconceived the effect of that breakdown in communication between attorney and client. The trial court did not analyze the voluntariness of the plea agreement in light of that total lack of communication or complete collapse in relationship.

The relationship between counsel and client was one clouded by an atmosphere of mistrust, misgivings, and irreconcilable differences. On January 31, 2018, before Fishbaugh moved to withdraw his guilty plea, attorneys and client gave evidence that suggested the collapse of the attorney-client relationship started back in May 2016 before the COP. Back in May 2016, Harada requested a male co-counsel to assist her in communicating with Fishbaugh. From the inception of this attorney-client relationship, Fishbaugh complained he could not assist defense counsel with the preparation of his case. Counsel did not take on board his suggestions for potential witnesses to interview. Counsel would not let him be involved in the formulation of any of the bread-and-butter decisions that would have constituted the core of a successful defense. His counsel “shut down” his every suggestion and input. Early on even before his COP, when counsel refused to consider potential witnesses and refused to follow leads Fishbaugh provided her, Fishbaugh requested OPD to give him new counsel. OPD put him in a predicament. OPD denied his request and forced him to continue with Harada. Even before the COP, attorney and client had had a “few” serious arguments over Harada’s handling of the case. Several times,

Harada stormed out of the room after intense arguments with Fishbaugh. Harada explained that her way to “diffuse” the situation and to make Fishbaugh feel “more comfortable” was angrily storming off the room.

At the hearing on the motion to substitute counsel, Fishbaugh unschooled in law and argumentation told the trial court: (1) he felt very much coerced into the plea agreement, (2) Harada had stormed out of the room a “few” times—she would get mad and leave the room and throw up her hands saying: “I’m finished with this,” and (3) more importantly, the *communication* was just not there. (See 01/31/18 Tr. at 6.) Fishbaugh was also upset over Harada’s failure to investigate and her inadequate preparation for trial generally. Fishbaugh was enraged by Harada’s failure to keep him apprised of the plea-bargaining negotiations—Harada constantly amended the plea agreement without informing him. Fishbaugh was upset he did not get a chance to read the counteroffer Harada prepared before the COP. The plea agreement Fishbaugh finally signed was a counteroffer. Harada prepared the counteroffer, and did not schedule a meeting with Fishbaugh for him to read and discuss the counteroffer before the COP began. These were all

tell-tale signs that Fishbaugh could not cooperate in an active manner with his lawyer before and during the COP.

Harada did not contest Fishbaugh's assertion that "communication was just not there." Nor did Harada deny that a "few" times she angrily stormed out of the room. (*See* 1/31/18 Tr. at 10–11.) When it was her turn to explain, she quickly went on the offensive to embarrass and throw Fishbaugh under the proverbial bus. Harada highlighted the embarrassing information that Fishbaugh's reading and writing skills were somewhat "limited" and discredited him by saying: "[a]nd I don't even think he's capable of writing this letter, I'm not sure who wrote this letter." (1/31/18 Tr. at 12–13.) Harada misrepresented that the confidential psychosexual evaluation said Fishbaugh was not comfortable with females in positions of power and control. (*See* 1/31/18 Tr. at 10–11.) Harada used this confidential document offensively to suggest Fishbaugh was a misogynist who did not like her—a female in power and control. (*See* 1/31/18 Tr. at 10–11)

Harada minimized that her storming out of meetings was a technique for diffusing intense situations and making Fishbaugh "more comfortable." (1/31/18 Tr. at 10–11.) She implicitly conceded

Fishbaugh felt “neglected” but explained she never “intended” to “neglect” Fishbaugh or leave questions unanswered. (1/31/18 Tr. at 10–11.) Harada pointed out Fishbaugh did not appear dissatisfied with the performance of her male counterpart who was present for every interaction she had with Fishbaugh. (*See* 1/31/18 Tr. at 8.) Harada acknowledged the attorney-client relationship was so dysfunctional that as early as May 2016, she requested a male co-counsel to assist her in communicating with Fishbaugh—to bear witness to interactions or back her up in discussions. (*See* 1/31/18 Tr. at 8–9.)

Prior to the hearing on Fishbaugh’s motion to withdraw, after the January 2018 status hearing, the trial court had already concluded that there was good cause to substitute Harada and Roth as counsel based on a complete collapse in the attorney-client relationship.

At the hearing on Fishbaugh’s motion to withdraw his guilty plea, evidence presented on the record was as follows: Fishbaugh’s letter saying that his relationship with counsel had turned adverse. Harada’s testimony alluded to dysfunctional communication starting as early as May 2016—when she requested a male co-counsel to have her back in communicating with Fishbaugh. The trial court was able to examine

the dysfunctional interaction between Fishbaugh and both attorneys of record at the COP and at the status hearing. Harada used the confidential psychosexual evaluation to falsely paint Fishbaugh as a misogynist. Fishbaugh testified that he felt coerced by Harada to sign the plea, in Fishbaugh's own words: "communication was just not there" with counsel. (1/31/18 Tr. at 6). Harada communicated at one wavelength and Fishbaugh at another. Fishbaugh believed Harada presumed him guilty and would not take anything he said into consideration. (See App. E at 1–2.) Harada never contested most of these points. Harada suggested the complaint letter was invalid as it was written by someone else, not Fishbaugh—Harada knew Fishbaugh to be analphabetic and incapable of such writing. (See 1/31/18 Tr. at 12–13.) The apparent intention of such a comment was to weaken her client's interest in withdrawing his plea—a demonstration of Harada's conflict in loyalty. OPD would not substitute Harada although Fishbaugh was desperate to fire her.

It was also telling that Harada did not controvert the substance of Fishbaugh's testimony. Harada did not claim to have interviewed potential witnesses Fishbaugh identified. Nor did she labor to

controvert Fishbaugh's assertion that she did not have a "sit down" to go over the evidence against him. (1/31/18 Tr. at 5.) If anything, Harada's account appeared to confirm what Fishbaugh feared: she had not procured any evidence from the Missoula case despite asking her to do so. Harada had very little or no information to mount a defense. Curiously, Harada expressed no intention whatsoever to conduct any additional investigations. (*See* 1/31/18 Tr. at 11.) All Fishbaugh knew was that Harada failed to get permission from the trial court to interview the complaining witness.⁴ Additionally, Harada neglected to explain to Fishbaugh why she would not be filing a writ exerting his due process rights to interview the complaining witness. It is easy to see why such a pregnant atmosphere of mistrust and misgivings birthed a complete breakdown of communication. *See Woodford*, 428 F.3d at 1197.

Moreover, American Bar Association (ABA) model Rule 1.16(b) prohibits a lawyer from painting the client in a negative light (even if

⁴ The prosecution admitted on the record it did not record S.H.'s interview in Missoula and that no defense counsel had been allowed to question S.H.. Notwithstanding, the trial court precluded the defense from interviewing S.H. in preparation for trial. (*See* 7/21/17 Tr. at 5, 9–10.)

the information is technically true) and/or revealing intricacies of the attorney-client relationship as this could cause a material adverse effect on the client's interests. Further, this conduct may violate Rule 1.6 (Confidentiality of Information) which prohibits a lawyer from using a client's confidence or secrets to the client's disadvantage.

When questioned about the motion to substitute counsel in January 2018, Harada revealed some of the frustrating aspects of representing Fishbaugh. Harada suggested as early as May 2016 she had difficulty communicating with Fishbaugh. She asked OPD to bring in a male co-counsel to alleviate this dysfunctional communication and to back her up in communicating with Fishbaugh.⁵ And to illustrate her point, Harada misrepresented Fishbaugh's confidential psychosexual evaluation report as saying he was not comfortable with females in power or control. (1/31/18 Tr. at 10–11.)

Both ABA Rule 1.6 and Rule 1.16(b) prohibit the attorney from using a client's confidences or secrets gleaned in the course of representing that client to his disadvantage. In the course of

⁵ Roth was appointed on May 17, 2016. (See D.C. Doc. 5; see 1/31/18 Tr. at 8–11.)

representing Fishbaugh, Harada got the impression his reading and writing were “limited.” (*See* 1/31/18 Tr. at 12–13.) She used this “secret” against Fishbaugh to suggest he was lying to the tribunal by presenting to the trial court someone else’s complaining words in an eloquent letter. (*See* 1/31/18 Tr. at 12–13.) Harada also used the psychosexual evaluation and misrepresented what it said: that Fishbaugh was not “comfortable” with “females in power or control.” (*See* 1/31/18 Tr. at 8–11.) Now, falsely claiming the confidential psychosexual evaluation indicated the client’s misogyny is materially adverse to his interests in successfully mounting a defense against sexual offenses. *See, e.g. State v. Crider*, 2014 MT 139, ¶ 26, 375 Mont. 187, 196, 328 P.3d 612 (This Court allows evidence of a defendant’s prior bad acts to show his motive of exerting power and control—to strengthen the inference that he committed the sexual acts at issue.).

At the COP, Fishbaugh was anything but unequivocal. It took more than three hours and all the lawyers—the prosecutor, two defense counsels, and the judge—to coax him to sign the plea agreement. He oscillated back and forth—to sign or not to sign. When Fishbaugh indicated that he was feeling coerced and pressured by his previous

counsel (Harada) to sign the plea agreement, the trial paused proceedings three times. (See 01/31/18 Tr. at 12.) The trial court took three breaks to allow Fishbaugh to confer with counsel. According to Fishbaugh, at the three break-out sessions—each lasting 30 to 45 minutes—Harada was yelling, screaming, and hollering at him to cajole him to sign the plea. Roth sat silently. Each time the trial court sent Fishbaugh to confer with Harada, he was conferring with particular attorneys who presumed him guilty, who he did not trust, and who did not have his best interest at heart. (See 01/31/18 Tr. at 12.) The trial court erred in denying Fishbaugh’s motion to withdraw his guilty plea, given that the defense made it aware of the complete collapse in communication that started as early as May 2016. (See 01/31/18 Tr. at 11–17.)

If any doubt exists on the basis of the evidence presented regarding whether a guilty plea was voluntarily or intelligently made, the doubt must be resolved in favor of the defendant. *Hendrickson*, ¶ 14. Clearly there was doubt as to whether Fishbaugh’s plea was voluntary. See *State v. Frazier*, 2007 MT 40, ¶ 22, 336 Mont. 81, 86, 153 P.3d 18 (Since any doubts as to whether a plea was voluntary should be

resolved in favor of the defendant.). The trial court erred in not resolving doubt in Fishbaugh's favor.

As early as July 2016, before the COP, he had asked OPD to substitute Harada. OPD declined his request. Out of desperation, during the first or second week of January, Fishbaugh sent a letter to the trial court requesting that it order OPD to substitute Harada as defense counsel. (App. E.) In the letter, Fishbaugh first praised Scott Spencer, his Missoula attorney, for being "very positive" about the legal strategy, conducting an investigation, interviewing all the potential witnesses Fishbaugh suggested, listening to what he had to say, and getting his Missoula case dismissed. (*See App. E. at 1.*) He then contrasted that with the dysfunctional communication with Harada. (*See App. E at 1.*) He characterized the attorney-client relationship as "adverse": from "day one," he perceived that Harada presumed him guilty, urged him to confess, and would not take anything he said into consideration. (*See App. E at 1–2.*) Counsel "shut down" his every suggestion and would not interview any of the potential witnesses he knew were with the alleged victim at the time of the alleged offense. (*See App. E at 1–2.*) Fishbaugh wrote in his letter that Harada

threatened to quit whenever he brought up the lack of investigation or whenever he asked whether she requested or reviewed the evidence from Fishbaugh’s Missoula case that was dismissed. (See App. E at 1–2.) Repeatedly, Harada failed to get permission from the court to interview the alleged victim. (App. E at 1.)

Though the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The ABA recommends defense counsel “promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.” *ABA Standards for Criminal Justice, Pleas of Guilty* 14–3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years. See, e.g., *Davie v. State*, 381 S.C. 601, 608–609, 675 S.E.2d 416, 420 (2009); *Cottle v. State*, 733 So.2d 963, 965–966 (Fla.1999); *Becton v. Hun*, 205 W.Va. 139, 144, 516 S.E.2d 762, 767 (1999); *Lloyd v. State*, 258 Ga. 645, 648, 373 S.E.2d 1, 3 (1988); *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 752 (1st Cir. 1991) (per curiam). The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys. See, e.g., *Fla. Rule Regulating Bar*

4–1.4 (2008); Mass. Rule Prof. Conduct 1.4 (2011–2012); Mich. Rule Prof. Conduct 1.4 (2011); Ill. Rule Prof. Conduct 1.4 (2011); *Kan. Rule Prof. Conduct* 1.4 (2010).

Just before the COP, Harada had given Fishbaugh the “wrong” plea agreement and he only realized it when his probation officer pointed out some other client’s name on the documentation. (*See App. E at 1–2.*) When Fishbaugh informed Harada that he had not seen the latest version of the plea agreement, she stormed out of the room and did not ever come back to discuss the amended plea. Fishbaugh felt coerced to accept the plea because Harada told him she would not advocate for him further if he did not sign the plea. (*See App. E at 1–2.*) Fishbaugh informed the trial court that early on in their relationship, he tried in vain to substitute Harada as counsel. (*See App. E at 1–2.*) *No one* explained the reasons why his request to substitute Harada was denied. OPD told him he was free to request substitution directly from the judge. (*See App. E at 1–2.*)

Here, the trial court substituted Fishbaugh’s counsel, but later would not allow him to withdraw his guilty plea in pursuit of that “reasonable” defense.

The district court miscomprehended the effect of the evidence. (See D.C. Doc. 104 at 10 (the trial court discrediting Fishbaugh’s assertion that his relationship with his attorneys became adverse and his claim of coercion.)) In light of the irreconcilable conflict at the COP, Fishbaugh could not confer with his counsel about trial strategy or additional evidence nor could he even receive explanations of the proceedings. In Fishbaugh’s own words: “communication was just not there.” (1/31/18 Tr. at 6.)

In essence, Fishbaugh was alone at the COP against four seasoned lawyers—all working to resolve his case with a guilty plea.

The total lack of communication was a herald of an inadequate defense at the COP. The trial court’s determination that it did not believe that the relationship between Fishbaugh and defense counsel had become adverse was clearly erroneous. (See D.C. Doc. 104 at 10.) Evidence of total collapse in communication tremors the entire structure. Remember, the district court acknowledged it broke the tie by crediting Harada and Roth over Fishbaugh by reasoning they have a duty of candor to Fishbaugh and the tribunal. (D.C. Doc. 104 at 11 *citing* Mont. R. Prof. Conduct 1.4, 3.3.) Candor is key. The decision to

deny Fishbaugh's motion to withdraw his guilty plea rests on this clearly erroneous misconception of the evidence.

B. The total lack of communication leading to a complete collapse in attorney-client relationship was itself a “good cause” for withdrawing a guilty plea.

Fishbaugh argued that his plea was not voluntary because he did not have counsel that he could trust to pursue his best interests and provide him with effective assistance—further exacerbating the involuntary nature of his guilty plea. (D.C. Doc. 97 at 4–5.) Fishbaugh asserted that his relationship with his attorneys had become so adverse before the COP that he was not receiving effective assistance of counsel when he appeared with counsel for his COP. (See D.C. Doc. 97 at 4–5.) Additionally, Fishbaugh argued the trial court should have stopped his COP and held a *Gallagher* hearing to determine whether he was being coerced by counsel and whether new counsel should be appointed before proceeding with the COP. (D.C. Doc. 97 at 4–5.) When Fishbaugh asserted that defense counsel coerced him into a guilty plea, it became improper for the trial court to keep sending him to confer with the same attorney he decried had forced his hand. (See D.C. Doc. 97 at 4–5.)

If a defendant's complaint about his relationship with counsel rises to the level of being seemingly substantial, the court should conduct a hearing to address the merits of the defendant's claims and request for new counsel. *State v. Gallagher*, 1998 MT 70, ¶ 14, 288 Mont. 180, 955 P.2d 1371.

In order for a court to substitute counsel, the defendant must present material facts showing that the attorney-client relationship has deteriorated to the point where the irreconcilable conflict or breakdown in communication prevents the mounting of an adequate defense. *State v. Johnson*, 2019 MT 34, ¶ 23, 394 Mont. 245, 435 P.3d 64.

“Even if a defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense.” *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000). A defendant's confidence in his lawyer is vital to his defense. *State v. Garcia*, 317 Mont. 73, 77, 75 P.3d 313, 316 (2003); *see also*, U.S. Const. Amends. VI, XIV; Mont. Const. Art. II, §24. A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses to call and trial strategies to pursue, discussing whether the defendant himself should testify, and

helping formulate other bread-and-butter decisions that can constitute the core of a successful defense. *United States v. Lott*, 310 F.3d 1231, 1250 (10th Cir. 2002).

The Ninth Circuit Court of Appeals explained, “[p]retrial investigation and preparation are the keys to effective representation of counsel. Courts have repeatedly stressed the importance of adequate consultation between attorney and client, the interviewing of important witnesses, and adequate investigation of potential defenses.” *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir.1983) (internal citations omitted). Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed. *ABA Standards for Criminal Justice, Pleas of Guilty* 14–3.2(b).

The Supreme Court has repeatedly held that a defendant’s Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his or her counsel during key trial preparation times. *See Riggins v. Nevada*, 504 U.S. 127, 144, 112 S.Ct. 1810 (1992) (“We have held that a defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his

lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.”) (internal citations omitted); *Cronic*, 466 U.S. at 659 n. 25 (“The [United States Supreme] Court has uniformly found constitutional error without any showing of prejudice when counsel was ... prevented from assisting the accused during a critical stage of the proceeding.”).

Pursuant to Mont. Code Ann. §46-16-105(2), a plea may be withdrawn for good cause any time before judgment or within one year of judgment. The good cause statute at Mont. Code Ann. § 46-16-105(2) works in tandem with Mont. Code Ann. § 46-12-212, the accuracy of the plea statute. If the lower court’s interrogation of a defendant was inadequate to determine whether there was a factual basis for the plea, then there is doubt as to whether the plea was voluntary. *Frazier*, ¶ 22. If voluntariness is the ultimate test of good cause in Montana, then an inadequate plea colloquy that implicates the voluntariness of a defendant’s plea constitutes good cause for a defendant to withdraw his plea.

“An involuntary plea can constitute ‘good cause’ to withdraw the plea, but ‘good cause’ can be found for reasons other than voluntariness.” *Lone Elk*, ¶¶ 17–19.

Undoubtedly, before his motion to withdraw his guilty plea, Fishbaugh had demonstrated good cause justifying the substitution of Harada as counsel. The district court agreed with Fishbaugh and counsel’s assessment that there was a complete breakdown in the attorney-client relationship, and it ordered OPD to replace his counsel. (See 1/31/18 Tr. at 15.) Based on *Johnson* ¶ 19, Fishbaugh must have convinced the trial court communication between attorney and client became so compromised that mounting a defense was impossible. This was good cause in and of itself to withdraw his guilty plea.

At his COP, Fishbaugh was coaxed into saying he was satisfied with his lawyer despite compelling contrary evidence of a complete lack of communication. The irreconcilable conflict between attorney and client was itself a “good cause” to allow Fishbaugh to withdraw his guilty plea—it vitiated the voluntariness of Fishbaugh’s guilty plea.

From at least May 16, 2016, Harada needed a male co-counsel to back her up in communicating with Fishbaugh. By July 2016,

Fishbaugh had begged OPD in vain to substitute Harada. The attorney-client relationship had turned adverse. At the hearing to withdraw the plea, the barely veiled undertones of mutual contempt, mistrust, and misgivings at the COP should have tipped off the trial court. Harada did not mince her words when she said Fishbaugh was analphabetic and incapable of writing such an eloquent complaint letter against her. Harada used the psychosexual evaluation as a sword to suggest Fishbaugh was a misogynist who was not “comfortable” with her a female in a position of power or control. (See 1/31/18 Tr. at 10–11)

The communication difficulties and dysfunctional interactions of attorneys and client at the COP and at the hearing on the motion to withdraw were all tell-tale signs. They demonstrated that Fishbaugh went to the COP with the assistance of a particular lawyer with whom he was dissatisfied, with whom he could not cooperate and with whom he would not in any manner whatsoever communicate. *See Craven*, 424 F.2d at 1169. The trial court should have appreciated that Fishbaugh was neither being heard by counsel nor receiving effective assistance at his COP. The Court must allow Fishbaugh to withdraw his guilty plea.

CONCLUSION

Fishbaugh respectfully requests the Court to remand with instructions to allow him to change his guilty plea and hold a trial on the merits.

Respectfully submitted this 11th day of May, 2020.

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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 9,989, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo

MOSES OKEYO

APPENDIX

Judgment.....App. A

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DC-15-530: Amended Information.....App. D

Fishbaugh’s Letter to District CourtApp. E

CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-11-2020:

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