IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0511

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEITH SCOTT STRECKER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Third Judicial District Court,
Powell County, The Honorable Ray J. Dayton, Presiding

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STATEMENT OF THE ISSUES

Whether the district court erred when it denied Appellant's motion to withdraw his *nolo contendere* plea.

Whether the Appellant can establish he would not have pled *nolo contendere* but for his original counsel's alleged deficient performance.

Whether Appellant's allegations of ineffective assistance of counsel against his second attorney may be reviewed on direct appeal and, if so, whether Strecker can establish he would have been permitted to withdraw his plea but for counsel's alleged deficient performance.

STATEMENT OF THE CASE

After assaulting Montana State Prison Correctional Officer Joel Scheett (CO Scheett) by punching him twice in the face and resisting the attempts to restrain him, Keith Scott Strecker (Strecker) was charged with a single count of Assault on Peace Officer or Judicial Officer. (Docs. 1, 3, 4.)

The parties submitted a Pre-Trial Agreement (PTA) signed by Strecker and his counsel, Sean Peterson (Peterson). (Doc. 19.) Following a thorough colloquy with the district court, Strecker pled "nolo contendere" and was adjudicated as guilty of Assault on Peace Officer or Judicial Officer. (6/12/18 Tr. at 12; Doc. 57.)

Prior to the sentencing hearing, and upon Strecker's request, he was appointed new counsel, Andrew Jenks (Jenks). (Docs. 25.5, 28; 9/4/18 Tr. at 8-11.) Strecker filed a motion to withdraw his *nolo contendere* plea. (Doc. 30.) The State filed a response and included an affidavit from Peterson that was missing the notary block. (Doc. 34.) Strecker testified on his own behalf at the evidentiary hearing and no objection was made to any of the affidavits. (04/16/19 Tr.). The district court denied the motion to withdraw, finding Strecker's allegations meritless. (*Id*. at 24-26.)

The district court sentenced Strecker to a prison to be selected by the Department of Corrections for a term of five years with two of those years suspended, running consecutively to his underlying sentence. (Doc. 57.)

STATEMENT OF THE FACTS

I. Facts of offense[1] and *nolo contendere* plea

Strecker was an inmate at Montana State Prison on April 3, 2017, and housed in High Side Unit 1, Lower B Block, cell LB6. While Montana State Prison (MSP) cameras record events in the day room outside Strecker's cell, they only have a partial angle to show events in Strecker's cell.

[1]Facts are taken from the Affidavit in Support and Motion to File Information Direct. (Doc. 1.)

On that date, CO Scheett was distributing laundry items to inmates in Strecker's unit. Strecker became angry at CO Scheett and threw a laundry loop at him as he walked away. CO Scheett turned around and instructed Strecker to comply with being handcuffed.

When CO Scheett entered Strecker's cell to handcuff him, Strecker punched CO Scheett twice in the face. CO Scheett pushed Strecker back and repeatedly instructed him to stop resisting. Strecker did not comply and instead grabbed CO Scheet by the shirt and refused to let go. The two struggled and fell to the floor. Additional correctional staff were required to assist in subduing Strecker.

CO Scheet was evaluated by prison medical staff. He had long scratches on the back of his head and neck and minor abrasions from the two punches.

The two inmates who observed the incident described the events just as CO Scheet reported and the video from the day room also corroborated CO Scheet's narrative of events.

On June 8, 2018, Strecker executed the PTA wherein he agreed to plead *nolo contendere* to Assault on a Peace Officer or Judicial Officer. (Doc. 19.) The PTA states Strecker admitted he "thoroughly discussed his case" including the "law" and "facts" with his attorney and was satisfied with his attorney's assistance. (*Id.)* The PTA further states he understood he could persist in his plea of not guilty. (*Id.)*

The PTA has an allocution section—in that space is written "no contest." (*Id.)* Strecker signed the document on June 6, 2018. (*Id.*; 6/12/18 Tr. at 5.)

The PTA contains an affirmation signed by Peterson, in which he affirms he explained the charge and penalties to his client and his client was "sufficiently advised to knowingly proceed with the entry of the nolo contendere plea." (*Id.)*

A change of plea hearing was held on June 12, 2018, where Strecker engaged in a colloquy with the district court. (06/12/18 Tr.) Strecker affirmed he had signed the PTA, understood pleading nolo contendere "will be a conviction just like if you pled guilty[,]" and denied he entered into the PTA through force or threats. (*Id*. at 5-12.) Strecker responded in a well-thought out manner to each question, including complex ones showing his grasp of the questions asked of him. (*Id.)*

When the district court inquired, "Okay. Are you suffering from any mental, physical or emotional disability or are you under the influence of any alcohol, drugs or medications that might make it hard for you to decide how to plead," Strecker responded: "I'm under some medication, yes." (06/12/18 Tr. at 7.) Strecker did not indicate he had any mental disability. (*Id.*) When asked if Strecker was influenced by medications he was prescribed, he responded "I have no idea"—the district court inquired whether Strecker was capable of understanding the charges and consequences of his plea; he answered affirmatively. (*Id.* at 7-8.)

The State provided a lengthy allocution of the evidence available in the case and Strecker affirmed that this was the basis for his plea. (06/12/18 Tr. at 10-12.) When the Court asked Strecker his plea, he responded, without prompting as to the correct wording from counsel: "Nolo contendere." (*Id.* at 12.)

The district court found Strecker was acting under the advice of counsel, he understood his rights and the potential consequences, was not suffering from a mental disability or under the influence of drugs, was competent to aid in his defense, and entered the plea voluntarily. (06/12/18 Tr.) A sentencing hearing was set for July 10, 2018. (*Id*.)

II. Motion to withdraw plea

Strecker indicated he wished to withdraw his plea. (07/10/18 Tr. at 17-18.) A handwritten document by Strecker was lodged with the district court wherein Strecker asked for new counsel. (Doc. 25.5. 9/4/18 Tr. at 8-11.) At the status hearing on September 4, 2018, the district court ordered new counsel be appointed by the Office of Public Defender. (9/4/18 Tr. at 11-12.) Andrew Jenks was appointed to represent Strecker. (Doc. 28.)

On November 30, 2018, Strecker filed a motion to withdraw his *nolo contendere* plea alleging the district court erred in failing to determine whether the medication impacted his voluntariness. (Doc. 30 at 5.) The motion further alleged

the court failed to follow up on its question of whether Strecker suffered from mental disabilities. (*Id.* at 6.) In support of the proposition that his voluntariness was impacted by mental disabilities, Strecker submitted a psychological evaluation from 1991. (Doc. 30, Ex. D.) The evaluation stated Strecker was a slow learner reading at about a fifth-grade level but that he had graduated high school. (*Id.* at 30.) However, the 1991 document stated "Since his measured Verbal IQ shows consistency on various subtexts, there is little indication that this low skill level is the result of a learning disability. Consequently it could be expected this man could improve his reading skills through class work . . . ." (*Id.* at 37.) Strecker's IQ was rated as Low Average. (*Id.* at 36). The evaluator summarized Strecker's cognitive abilities as follows:

> Tendencies toward a slow learning diagnosis. This diagnosis in school is termed Educably Mentally Retarded. This is a category for students who have difficulty in profiting from regular classes. Verbally, Mr. Strecker is right on the edge of this level of learning difficulty. No formal diagnosis is offered in this examination with regard to his low Verbal IQ.

(*Id.* at 40.)

In his motion to withdraw, Strecker also argued Peterson failed to advise him that *nolo contendere* had the same legal effect as a guilty plea. (Doc. 30 at 7.) In support, Strecker submitted an affidavit stating Peterson "lied" to him when describing the effect of a *nolo contendere* plea. (*Id.* at 25).

On December 18, 2018, the court ordered Peterson to "respond within 30 days, by affidavit or other sworn testimony to the allegations of ineffective assistance of counsel . . . ." (Doc. 34.) A signed, but not notarized, affidavit was filed with the district court as Exhibit 1 to the State's response to the motion to withdraw the plea. (Doc. 37 at 11.) Peterson described multiple meetings with Strecker and the negotiation with the State that led to the *nolo contendere* plea. (*Id*.) He indicated he spoke with Strecker for two hours to ensure he understood the effect of the plea and the rights given up. (*Id.* at 13-14.) Peterson explained:

> Specifically, I insured that Mr. Strecker was able to understand that a nolo contendere plea had the same effect as a guilty plea, but highlighted the benefit that he would not have to admit to the crime Defendant stated that he understood the plea offer and wanted to pursue it. Mr. Strecker explored the costs and benefits of accepting the plea, and never expressed dissatisfaction, prior to the change of plea, with my explanations of the plea nor that he was unwilling to accept the plea as presented. There is no doubt in my mind that Defendant understood the effects of the Pre-Trial Agreement.

(*Id.* at 14). Peterson stated Strecker was "diligent in inquiring about issues he did not understand and was able to repeat information back to me on a regular basis." (*Id.)* Peterson made clear it would be up to Strecker to determine to proceed to trial. (*Id.* at 14-15.) Peterson was adamant Strecker was cogent and understanding of what was happening in their meetings and the hearing. (*Id.* at 16.)

III. Evidentiary hearing

Strecker testified in support of his motion at an evidentiary hearing on April 16, 2019. (04/16/19 Tr.) He abandoned his position that Peterson had lied to him regarding the nature of the *nolo contendere* plea and instead alleged Peterson failed to explain it altogether. (*Id.* at 6.) He admitted Peterson had visited him in prison three to four times to discuss the case and where they reviewed the plea offer. (*Id.* at 7.) He persisted he did not know whether his medications affected his ability to enter a plea. (*Id.* at 6-7).

Strecker testified he was capable of learning both through reading and through conversation:

Jenks:	And do you suffer from any mental or learning disabilities?
Strecker:	Yes.
Jenks:	And does that affect your ability to understand what's happening?
Strecker:	Yes.
Jenks:	Do you understand what is happening now?
Strecker:	Yes.
Jenks:	Do you know what this hearing's about?
Strecker:	Yes.
Jenks:	And what is this hearing about?
Strecker:	To get the ugh, nolo contendere dismissed.

Jenks: And how do you know that?'

Strecker: I've read it.

Jenks: And have I discussed that with you as well?

Strecker: Yes.

(04/16/19 Tr. at 7-8.)

Hixon: . . . did you look up what a nolo contendere plea meant, is that what you were testifying to?

Strecker: Uh, other individuals pointed out to me and I looked it up in the Black's Law Dictionary.

(*Id.* at 9.)

Strecker alleged Peterson told him he had to "say yes to everything" or he would not receive the plea bargain. (04/16/19 Tr. at 11.) He denied having any memory of having engaged in the colloquy with the district court. (*Id.* at 10-12.) Strecker claimed he did not go over the evidence with Peterson, but then reversed course and admitted to watching video evidence with his attorney. (*Id.* at 14-15.)

Montana State Prison medical personnel testified the medications Strecker was prescribed at the time he entered his plea would not have affected his mental state. (04/16/19 Tr. at 15-21.) They further testified Strecker was able to intelligently discuss his medications. (*Id*.)

At the close of the evidentiary ruling, the district court denied the motion to withdraw the plea. (04/16/19 Tr. at 24-26.) The district court determined Strecker was not credible. (*Id.*) The district court relied upon the colloquy engaged with

Strecker prior to the entry of the plea. (*Id.* at 24.) The district court further found Peterson's Affidavit to be credible. (*Id.* at 25.) The Court additionally relied upon Strecker's inconsistent statements at the evidentiary hearing. (*Id.*) The district court found Strecker failed to meet his burden in showing his plea was involuntary. (*Id.* at 26.)

STANDARD OF REVIEW

The question of whether a plea is voluntary is a mixed question of law and fact. *State v. Newbary*, 2020 MT 148, ¶ 5, 400 Mont. 210, 464 P.3d 999. The review of the court's denial of the motion is reviewed *de novo*. *State v. Prindle*, 2013 MT 173, ¶ 16, 30 Mont. 478, 304 P.3d 712 (citing *State v. Brinson*, 2009 MT 200, ¶ 10, 351 Mont. 136, 210 P.3d 164). However, the factual determinations regarding the voluntariness of the plea are reviewed for clear error. *State v. Warclub*, 2005 MT 149, ¶ 24, 327 Mont. 352, 114 P.3d 254. "Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court has misapprehended the effect of the evidence, or our review of the record convinces us that a mistake has been made." *Warclub*, ¶ 23.

Ineffective assistance of counsel claims (IAC) are mixed questions of fact and law that are reviewed *de novo*. *State v. Ward*, 2020 MT 36, ¶ 15, 399 Mont.

16, 457 P.3d 955 (internal citations omitted). This Court "review[s] IAC claims on direct appeal if the claims are based solely on the record." *Ward*, ¶ 15.

SUMMARY OF THE ARGUMENT

The district court correctly denied Strecker's motion to withdraw his plea and its findings of fact were not clearly erroneous. The district court's colloquy with Strecker was appropriate and established Strecker was of sound mind when entering his *nolo contendere* plea. When the district court inquired whether Strecker suffered mental disabilities or medical challenges, Strecker only responded affirmatively to medical issues but gave no indication he had any mental disabilities. The district court had no duty to ask whether he suffered mental disabilities a second time.

Even if this Court determines the district court should have inquired further, the err was harmless. There was no indication Strecker struggled to comprehend the proceeding; no follow up was required. Nevertheless, the district court did ask additional questions to confirm his comprehension and voluntary plea given Strecker's use of medication.

Moreover, Strecker failed to provide objective, credible proof he suffered from mental disabilities that inhibited his comprehension. The record is replete with contrary evidence. Strecker testified he could read, research, learn through

dialogue, inquire when confused, and learn through discussion with his counsel. His testimony that he did not understand the plea and reference to a 30-year-old psychological evaluation that merely highlighted he was of below average intelligence were insufficient objective proof. Based on observations of Strecker throughout the proceedings, the district court rightly noted his inconsistent statements, relied upon the record, and determined Strecker understood his plea and the consequences thereof at the time of the change of plea hearing.

Strecker's IAC claim against Peterson is insufficient and unsupported. The district court engaged in a careful analysis of Strecker's and Peterson's initial representations to the district court during the change of plea hearing. The court also thoroughly considered Peterson's affidavit and Strecker's testimony at the hearing. The district court did not misapprehend the evidence and was in the best position to evaluate their divergent version of events. Its determination that Peterson's recitation was credible while Strecker's lacked credibility should not be disturbed. The court's findings of fact were supported by substantial evidence and it correctly concluded Peterson's performance was not deficient.

Strecker's IAC claim against Jenks should be denied for two reasons. First, because Jenks' failure to object to Peterson's affidavit, or the lack of the notary on the affidavit, are not apparent in the record, this issue is inappropriate for direct appeal. It is entirely possible Jenks consciously chose to not subpoena Peterson

because his testimony would be more damaging to his client's position than what was in the affidavit. Moreover, Jenks was asking the court to believe Strecker over Peterson and an impersonal affidavit could improve his chances. Since there are plausible explanations for Jenks' actions, this IAC claim is better suited for postconviction and this Court should deny his claim.

Further, this claim may also be denied for lack of merit. Strecker failed to establish Jenks' conduct fell below professional standards and that as a result he suffered prejudice. Strecker cannot meet either prong. Jenks' performance was not deficient. Affidavits are often used in IAC postconviction relief claims and have been permitted in motion to withdraw plea IAC claims. They have unique circumstances of trustworthiness when coming from an attorney in good standing. The affidavit was admissible. The fact the affidavit lacked a notary stamp does not change the outcome. Strecker does not assert that if the affidavit included a notary block that Peterson would have averred different sets of facts. The facts in his affidavit were corroborated by the change of plea hearing and the court's own observations.

Even if Jenks should have pointed out the lack of notary block or subpoenaed Peterson, Strecker cannot show the objection to the affidavit would have changed the outcome of the case. The district court relied on the record

outside of the affidavit specifically highlighting Strecker's divergent statements and the thorough colloquy.

ARGUMENT

I. Strecker did not establish good cause to withdraw his plea and the district court's colloquy was proper and sufficient.

When accepting a plea, the court must ensure the defendant understands the nature of the offense he is pleading guilty to, the maximum and minimum penalties for that offense, as well as the rights he is forgoing should he plead guilty (*i.e.*, right to remain silent, right to jury trial, right to confront witnesses, etc.). Mont. Code Ann. § 46-12-210(1). A defendant may be allowed to withdraw his guilty plea if he establishes "good cause." Mont. Code Ann. § 46-16-105(2). Good cause includes involuntariness. *Warclub*, ¶ 16. Voluntariness is determined through the following analysis found in *Brady v. United States*:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper to the prosecutor's business (e.g. bribes).

Warclub, ¶ 18 (citing *Brady v. United States*, 397 U.S. 742, 748 (1970).

The burden proving involuntariness rests upon the defendant. *State. v. Terronez*, 2017 MT 296, ¶ 27, 389 Mont. 421, 406 P.3d 947 (citing *State v.*

Robinson, 2009 MT 170, ¶¶ 17-18, 350 Mont. 493, 208 P.3d 851). "While voluntariness is a legal conclusion not entitled to a presumption of correctness, the underlying facts that no threats, misrepresentations, or improper promises occurred are facts entitled to a presumption of correctness." *Warclub*, ¶ 32 (citing *Lambert v. Blodgett*, 393 F.3d 943, 976 (9th Cir. 2004)). A plea will not be overturned unless the defendant was not "aware of the direct consequences of such a plea, and if his plea was not induced by threats, misrepresentation, or an improper promise such as a bribe." *Id.* (citing *Brady*, 397 U.S. at 755).

To prove a plea was involuntary, the appellant must point to objective proof in the record. *State v. Hendrickson*, 2014 MT 132, ¶ 14, 375 Mont. 13, 325 P.3d 694. "If any doubt exists on the basis of the evidence presented regarding whether a guilty plea was voluntarily and intelligently made, the doubt must be resolved in favor of the defendant." *Id.* (citing *State v. Melone*, 2000 MT 118, ¶ 14, 299 Mont. 442, 2 P.3d 233). "But a plea is not necessarily 'vulnerable to later attack if the defendant did not correctly assess every relevant factor in entering into his decision.'" *Newbary*, ¶ 8 (citing *State v. Lone Elk*, 2005 MT 56, ¶ 26, 326 Mont. 214, 108 P.3d 500, *overruled in part on other grounds by Brinson*, ¶ 9, in turn quoting *Brady*, 397 U.S. at 757). "Whether a motion to withdraw a plea should be granted is a fact intensive determination." *State v. Holt*, 2006 MT 151, ¶ 42, 332 Mont. 426, 139 P.3d 819 (internal citation omitted).

The adequacy of a district court's colloquy can be relevant to determining voluntariness; failure to follow up on indications that the plea may not be voluntary, knowing, and intelligent could result in permitting the withdrawal of the plea. *See State v. Enoch*, 269 Mont. 8, 887 P.2d 175 (1994). In *Enoch*, during the colloquy with the district court the defendant waffled as to whether he wanted to plead guilty, required his counsel to answer for him, and answered he was on medication. *Id.*, 269 Mont. at 17-18, 887 P.2d at 181. The district court failed to follow up on Enoch's medication to determine if it impacted his ability to enter a plea in light of his "stated [] desire to go to trial only a short time before." *Id.* In juxtaposition, the *Bowley* district court's failure to inquire whether Bowley was under the influence of alcohol or drugs was harmless error as nothing indicated Bowley was prevented from understanding the hearing. *State v. Bowley*, 282 Mont. 298, 306, 938 P.2d 592, 596-97 (1997). Similarly, in *Warclub*, despite failing to inquire as to whether Warclub was satisfied with his representation, the missing inquiry was a harmless err as there was no indication Warclub was unsatisfied—the district court properly relied upon his having indicated his satisfaction in a plea agreement. *Warclub*, ¶¶ 32-34.

Strecker asks this Court to rely upon inappropriate standards and factors when reviewing his motion to withdraw his plea. (*See* Opening Brief (Br.) at 10-11, citing the factors enumerated in *State v. Huttinger*, 182 Mont. 50, 54, 595 P.2d 363, 366

(1979), and citing the standard found in *State v. Miller*, 248 Mont. 194, 197, 810 P.2d 307, 310 (1991)).[2] Strecker's reliance upon the analytical structure of cases utilizing the *Miller* standard or *Huttinger* factors is in error. In *Warclub*, after relying upon the *Brady* standard, this Court rejected the *Miller* standard and the exclusive use of *Huttinger* factors but noted the first and third factor could be relevant. *Warclub*, ¶ 19.

While the first and the third factor can be relevant to analysis for voluntariness, the promptness in which Strecker withdrew his plea should play no role in this Court's decision. The first factor is directly at issue and is analyzed in this section of the response brief. The third factor—whether a charge was dismissed—is relatively minor to this analysis and focuses on possible benefit to Strecker. Although no charge was dismissed, the State agreed to allow him to plead *nolo contendere* in exchange for the State's recommendation for a minimal sentence (three years; with the minimum being two years, the maximum being ten, and Mont. Code Ann. § 46-23-217 mandating a consecutive sentence). Having the State recommend a sentence on the lower end of the range is an undeniable benefit.

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[2]The *Huttinger* factors to determine voluntariness are: (1) the adequacy of the interrogation by the district court of the defendant's understanding of the consequence of his plea; (2) the promptness with which the defendant attempts to withdraw the previous plea; and (3) the fact that the plea was the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge. The *Miller* standard stated pleas were involuntary where it appeared the defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that he may have to plead guilty to a crime he is innocent of having committed.)

However, this factor provides minimal insight into the voluntariness of Strecker's plea. As with any criminal case, there are risks and rewards for going to trial; Strecker took advantage of a plea that could potentially allow him to withdraw it if new evidence surfaced, permitted him to avoid a guilty plea, and recommended a low sentence.

Here, Strecker argues the district court failed to properly inquire into his cognitive functions and he suffered from a mental disability rendering him incapable of understanding the hearing. Neither propositions are supported by law or objective proof in the record. Nonetheless, even if the district court's colloquy was lacking or insufficient, it was harmless.

A. The court's colloquy into Strecker's mental health indicated he comprehended the proceeding; further inquiry was not required.

Strecker's first proposition, that the district court failed to properly inquire into the medical/mental disability section of the colloquy, argues the district court's compound question was an error. He argues the district court should have re-asked the question to be cautious. This is unnecessarily duplicative. The district court inquired whether one or both types of cognitive issues applied to Strecker. In plain English, Strecker responded "yes" to one, but responded "no" by omission to the other.

Strecker's argument is inconsistent with the law. *Enoch*, *Bowley*, and *Warclub* stand for the proposition that a district court errs when it fails to follow up on potential issues raised by a defendant that would affect voluntariness. Here, the only issue raised by Strecker was his medication. While the district court did not demand the intimate details of Strecker's medications, it was satisfied through interrogatories that Strecker understood the nature of the proceeding. (*Id.*) The medical testimony was uncontroverted in establishing the medication did not affect his reasoning. (4/16/19 Tr. 15-21.) Inapposite to *Enoch*, where the defendant waffled on his willingness to plead and needed assistance to respond through the proceeding, there were no indications by Strecker in any of the proceedings to even hint at the suspicion he was not fully aware, that he was not competent, or that he was unwilling to proceed. Quite the opposite, when asked his plea, Strecker was able to articulate it was "*nolo contendere*" not the "yes" he was allegedly required to articulate. (*Id.* at 12.)

In practical terms, Strecker's argument is that the district court should ask the same question twice. This is not a requirement found anywhere under statute or case law. The court asked a two-part question and got an affirmative response only on the medication issue. There was no error in the district court's colloquy. As there was no error, this Court need not consider whether Strecker provided a sufficient factual record to prove his plea was involuntary or to determine if the

district court's colloquy was a harmless error. Nonetheless, the record establishes the court did not misapprehend the evidence when it concluded Strecker voluntarily entered his plea.

B. There is insufficient proof in the record to support Strecker's alleged mental disability impacting his comprehension.

For proof of his alleged mental disability, Strecker relied upon his own testimony and a psychological evaluation from a three-decade-old evaluation. This evaluation does not demonstrate Strecker was incapable of understanding the issues before him or from engaging with his counsel. To the contrary, it states Strecker does *not* have a diagnosed learning disability. The evaluation differentiates between having a learning disability and being slow of learning. He has a slow learning diagnosis, but the specifics of Strecker's challenges, 30 years after this diagnosis, must be viewed in light of the record.

Strecker's testimony on the issue is bald of facts. It consists of the sole allegation he suffers mental or learning disabilities, but does not allege what they are or describe their impact beyond his assertion that he was prevented from understanding the meaning of a *nolo contendere* plea or remembering the change of plea hearing. Why he could understand all other questions posed to him under every other scenario was left for all parties to speculate.

The record is replete with Strecker repetitively demonstrating he was capable of comprehension and meaningfully engaging with subject matter. His own testimony and actions establish he is fully capable of following complex issues and hearings; going so far as to inform the district court when he did not know answers to questions; research issues; write the district court; learn about issues through discourse; and engage in significant colloquies with the district court and attorneys. Strecker testified he researched *nolo contendere* in the Black's Law Dictionary, and though still claiming not to understand it, exclaiming his disapproval of it having the same effect as a guilty plea. (04/16/19 Tr. at 8.) The district court had the benefit of observing Strecker on multiple occasions and was able to evaluate his demeanor and apparent understanding at all times.

Strecker showed he was not "going through the motions" or responding "yes" to everything while being questioned on multiple occasions. As discussed above, he stopped the district court's colloquy when he responded he did not know the effects of his medication. Similarly, in the evidentiary hearing, Strecker stated he was confused by the State's questioning when it became convoluted and poorly worded. (04/16/19 Tr. at 11:15-25; 12:1-2).

The district court's observations of Strecker's comprehension were confirmed by Peterson's acknowledgement in the PTA and in his affidavit. In both, Peterson makes it clear he worked with Strecker to ensure he understood what he

was pleading to and the impact it would have. Peterson had no doubt Strecker understood the plea and was aware of the consequences of his plea. The court found Peterson's explanation of events credible. In contrast, the district court rightly found Strecker's testimony regarding his comprehension was disingenuous.

To rebut this lengthy record and the district court's analysis, Strecker attempts to engage in burden shifting—accusing the State of failing to call the wrong witnesses to disprove his allegations. However, it was Strecker's burden to provide objective proof his plea was involuntary.

Strecker can point to no case law stating only people of average or above average intelligence are capable of voluntarily entering pleas. Instead, as this Court has repeatedly held, the relevant analysis is whether the person understood the plea and its effect. Regardless of his below average level of intelligence, Strecker demonstrated he was capable of learning through people speaking to him; he was capable of researching law and understanding its meaning; he was capable of writing detailed complaints to the district court; and he could meaningfully comprehend questions posed to him as demonstrated by his appropriate responses when questioned. The record lacks objective evidence that Strecker did not comprehend his plea. The district court did not "misapprehend the effect" of the substantial evidence supporting its finding Strecker entered his plea voluntarily.

See Warclub, ¶ 24. Nor does the record indicate a mistake was made when the court denied his motion. *Id*.

C. Even if the court's colloquy was insufficient, that error was harmless.

Even if this Court chooses to find the district court erred by failing to ask the same question twice, the questioning constitutes harmless error. *See* Mont. Code Ann. §§ 46-20-104, -701(1) ("A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial"), -701(2) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"); *Bowley*, 282 Mont. at 306, 938 P.2d at 596-97 (determining it was harmless error to not directly inquire as to whether medication impacted the defendant's ability to understand the plea absent indication of struggling).

This Court has concluded that prejudice is not presumed when error is shown, and it is for this Court to determine whether an error affects the substantial rights of the defendant. *State v. Allen*, 276 Mont. 298, 301, 916 P.2d 112, 114 (1996). This Court will not reverse a judgment for harmless error; determination of whether a particular error is harmful or harmless depends on the facts of the case under review. *Allen*, 276 Mont. at 301, 916 P.2d at 114 (citing Mont. Code Ann. § 46-20-701(2)).

As discussed in *Bowley*, and as found in *Warclub* as to the issue of satisfaction with counsel, where there is no indication by a defendant that he may not comprehend a proceeding or the questions asked, it is harmless error not to inquire as to whether the defendant has diminished mental capacity. The record was replete with evidence Strecker was acting with knowledge and deliberation. With nothing to hint at Strecker's alleged mental challenges, failing to ask the same question a second time was at most a harmless error.

However, this Court's analysis should not end on that note. It cannot be forgotten the district court *did* engage with Strecker to ensure his comprehension of the proceeding—this was not stirred by any apparent lack of comprehension from Strecker, but instead from his response that he was unaware if his medications affected his comprehension. To affirm his understanding the district court inquired: "Do you think you're able to proceed even though you might have some health problems, some medication problems?"; "Do you understand what you're charged with?"; "Do you understand that if you plead nolo contendere you could get up to ten years in person added onto your sentence?"; "And you understand that I'm not bound by the Plea Agreement. Uh, you could get any sentence up to that ten years. I'm not bound by the Plea Agreement, do you understand that?"—Strecker replied in the affirmative to all of these questions. (6/12/18 Tr. at 7-8.) The district court had the opportunity to observe and engage

with Strecker during this line of questioning and was satisfied Strecker understood the consequences of his actions.

Based upon the foregoing, the district court's order denying Strecker's motion to withdraw was properly entered. The only way Strecker would be entitled to relief is if he received ineffective assistance of either of his counsel.

II. Strecker did not receive ineffective assistance of counsel from Peterson.

"Ineffective assistance of counsel can constitute good cause to withdraw a guilty plea." *Terronez*, ¶ 28 (citing *State v. Valdez-Mendoze*, 2011 MT 214, ¶ 14, 361 Mont. 503, 260 P.3d 151). Montana uses the *Strickland* test to evaluate whether the involuntariness of the Defendant's plea resulted from counsel's ineffectiveness. *Id*. The test (1) evaluates whether "counsel's advice fell outside the range of competence demanded of a criminal attorney" and (2) "but for counsel's deficient performance, he would not have entered a guilty plea." *Id*. Counsel's conduct is "strongly presumed to be within professional norms." *Id.* ¶ 30.

Here, the district court faced two divergent and incompatible scenarios: (1) Strecker's version of events claiming Peterson failed to explain the effect of his plea and bullied Strecker into entering into the agreement—specifically ordering him to "answer yes to everything"; or (2) Peterson's description of events that he

spent hours with his client advising him of the charges, evidence, and effect of the plea offer and felt his client was capable of voluntarily entering a plea.

At issue in this claim is whether the district court was in error for finding the second set of facts. Either both Peterson and Strecker were both dishonest at the change of plea hearing and in the PTA, or Strecker's recantation was disingenuous. Strecker's IAC claim is premised exclusively upon the first set of facts and ignores the careful consideration made by the district court in finding the second set of facts were accurate. If the district court properly determined the second set of facts, the first portion of the *Strickland* test has been satisfied and no ineffective assistance of counsel exists.

The district court rightly found Peterson's conduct was competent and fell within professional norms and accordingly did not proceed to the second portion of the *Strickland* test. The district court had three sources of evidence to reply upon for that determination: (1) the PTA and Affidavit by Sean Peterson; (2) the district court's interactions with Strecker at the change of plea hearing; and (3) Strecker's demeanor and statements in filings and during the evidentiary hearing. Each of these sources of evidence reinforced each other and should not be viewed in isolation.

The district court relied upon the PTA when Strecker's plea was accepted. It confirmed he signed the agreement voluntarily, was well represented, and

understood the agreement. (6/12/18 Tr. at 5-12.) It further contained an affirmation by Peterson that Strecker understood his rights and was capable of entering into the agreement. (Doc. 19.) Matching the agreement, Peterson's affidavit details his lengthy conversations with Strecker, Strecker's understanding of the agreement, and the fact that Strecker made the decision to enter the plea. (Doc. 37.)

The court engaged in a thorough colloquy covering the same issues as those in the PTA and the answers provided by Strecker matched. (6/12/18 Tr. at 5-12.) In spite of Strecker allegedly being told to say "yes to everything[,]" the transcript reveals Strecker failed to comply with his supposed marching orders. (4/16/19 Tr. at 11; 6/12/18 Tr. at 5-12.) Instead he gave appropriate responses that showed his understanding of what was being told and asked of him. When asked if his medication was affecting his ability to comprehend what was happening, he answered he did not know; but after a discussion with the district court, assuaged the district court he understood the hearing and the nature of his plea. (6/12/18 Tr. at 7-8.)

Strecker's affidavit attached to the motion to withdraw his plea further undermines his position; Strecker's affidavit alleged Peterson "lied to him regarding the nature of the *nolo contendere* plea." (Doc. 30 at 25.) At the evidentiary hearing, Strecker altered his allegation to claim Peterson failed to explain the nature of a *nolo contendere* plea. (4/16/19 Tr. at 6.) Similarly, Strecker

elected to argue he was denied access to evidence for the case, only to change his story under cross examination to admit he had watched surveillance video. (*Id.* at 7.)

These facts, when taken together, led the district court to properly find Peterson provided appropriate representation to his client. Moreover, the district court benefited from being able to personally observe Strecker through these various hearings to make its own determinations on the adequacy of his plea and the veracity of his statements under oath. Based on the foregoing, the district court's determination of facts was unimpeachable.

III. Strecker did not receive ineffective assistance of counsel from Jenks.

A. This matter is inappropriate for direct appeal.

When IAC is alleged on direct appeal, before reaching the merits of the argument, this Court must first determine if it is appropriate to consider the claim; that is, whether the claim is "record-based." *Ward*, ¶ 20 (citing *State v. Sawyer*, 2019 MT 93, ¶ 13, 395 Mont. 309, 439 P.3d 931); "[A] record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut" the strong presumption counsel's conduct falls within the wide range of reasonable professional conduct. *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032. If an IAC claim is "based on matters outside the

record, [this Court] will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding" where a record may be developed. *Ward*, ¶¶ 20, 22 (when Court could only speculate as to why trial counsel did not make an objection, IAC claim is not susceptible to review on direct appeal).

Jenks' alleged IAC is inappropriately raised in this appeal. The record is silent as to Jenks' decision to not call Peterson or object to the affidavit. The record is not developed to determine if it was an intentional act. Plausible explanations could exist for deciding not to object. For example, Jenks could have made the determination that direct testimony would be more damaging to his client than the impersonal affidavit by Peterson. Peterson's affidavit vociferously refuted Strecker's allegations and, as stated above, matched the record of the case. Objecting to the affidavit could only induce the State to subpoena Peterson to testify, thereby heightening the risk to Strecker's allegations. As noted in this brief, Strecker faced an uphill battle of credibility, it is possible Jenks perceived Peterson's testimony would have only made his case worse.

B. Strecker cannot establish Jenks' performance was deficient or that he suffered prejudice.

Attorneys are permitted to submit testimony in IAC claims, when they are filed as a postconviction relief claim, by affidavit. Mont. Code Ann. § 46-21-201(5); *In re Gillham*, 216 Mont. 279, 282, 704 P.2d 1019, 1021 (1985); *Marble v. State*,

2007 MT 98, ¶ 4, 337 Mont. 99, 169 P.3d 1148. A district court in a postconviction matter may decline to hear from the attorney accused of IAC if the petition's files and records, including the affidavit, show the petitioner is not entitled to relief. (Mont. Code Ann. § 46-21-201(1)(a); *Herman v. State*, 2006 MT 7, ¶ 15, 330 Mont. 267, 127 P.3d 422.)

As noted above, this Court applies the two-prong test adopted by the United States Supreme Court in *Strickland,* for evaluating IAC claims to determine whether counsel's performance was constitutionally deficient. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. To prevail in an IAC claim, the defendant must establish both *Strickland* prongs by showing that counsel's performance was deficient, and the deficient performance prejudiced the defense. *Whitlow*, ¶ 10.

To establish the *Strickland* prejudice prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S at 694. Prejudice is weighed against the totality of the evidence before the trier of fact. *Strickland,* 466 U.S at 695. Strong evidence reduces the likelihood of establishing prejudice. *Pizzuto v. Arave*, 280 F.3d 949, 955 (9th Cir. 2002).

Terronez, which dealt with an alleged IAC claim through a motion to withdraw a guilty plea, addressed the issue of relying upon affidavits. *Terronez*, ¶ 24. This Court determined that while an evidentiary hearing was preferable, rather than relying upon affidavits, it was unnecessary under the circumstances of the case. *Id.* (citing *State v. Schulke*, 2005 MT 77, ¶ 10, 326 Mont. 390, 109 P.3d 744 (district court's denial of an evidentiary hearing is reviewed for clear abuse of discretion)). Those circumstances included the district court not relying solely on the witness affidavits, but "on its own observations and its assessment" of the attorney and Terronez; the opportunity for both parties to present witness affidavits with both having done so; and, the State (appealing the district court's reliance upon affidavits) failing to request testimony through an evidentiary hearing. *Id.*

Here, Jenks' failure to object to the State's introduction of the Peterson affidavit or failing to call him to testify did not constitute deficient performance and was not prejudicial to Strecker.

Strecker challenges the reliance of the affidavit as he argues it would constitute inadmissible hearsay. Hearsay contains an exception for instances where there are "circumstantial guarantees of trustworthiness." Mont. R. Evid. 803(24). Ineffective assistance of counsel claims are regularly resolved by affidavits in postconviction relief cases. As sworn officers of their court, attorneys are bound to make truthful representations and carry the weight of their statements "virtually

made under oath." *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978). To further underscore the guarantees of trustworthiness by attorneys, Mont. R. Prof. Cond. 3.3(a)(3) bars Montana attorneys from offering evidence the lawyer knows to be false; attorneys doing so face disbarment as a possible sanction.

There is no reason to treat an IAC claim any differently between a postconviction relief claim and a motion to withdraw plea. Both scenarios possess the same stakes and standards for the defendant and the guarantees of trustworthiness from affidavits do not change between the hearings. This Court has even previously permitted factual records to be built by affidavits in plea withdrawal motions. Just as in *Terronez*, the district court permitted filing of affidavits from both parties, used its own observation and assessment, and received no objection to Peterson not testifying. The parties treated the IAC claim against Peterson like a postconviction relief hearing; this Court should find such a course was not in err, or at most find it was harmless error.

Even if this matter had not been treated like an IAC postconviction relief matter or if the affidavit was objected to, the outcome would not have changed. While the affidavit was regretfully unnotarized, the district court had the above-listed guarantees of trustworthiness; further, the district court and both parties could have subpoenaed Peterson were there any doubt in his statements. Moreover, the district court relied upon not only Peterson's affidavit, but also the

colloquy with Strecker, its own observations of him through the course of the proceedings, and Strecker's apparent dishonesty at the evidentiary hearing.

Even if Peterson's affidavit was discounted by the district court, the district court would have ruled against Strecker; it placed heavy emphasis on its colloquy with Strecker, stating as the first reason for the denial of the motion:

> Uh, I conducted the change of plea hearing. Uh, I would not have taken his nolo contendere plea if I wasn't satisfied that he knew what he was doing. I'm looking right into his eyes when I talk like I do every other Defendant. I don't let people plead guilty unless they admit they did it. I don't let people plead nolo contendere unless I'm satisfied at the change of plea hearing that they know that they're going to treated uh, as a convicted Defendant. Uh, uh, and my review of the colloquy that took place, the transcript, uh indicates that to me in this case as well.

(4/16/19 Tr. at 24.) As discussed in the prior section, Strecker's contradictory statements were not missed by the district court and undermined his credibility.

C. Should this Court find Jenks was ineffective, the matter should be remanded to the district court for review without the Peterson affidavit.

When a matter is reversed for IAC, it does not automatically require a new trial; instead cases are sent back to the point of the error. *See State v. Becker*, 2005 MT 75, ¶ 25, 326 Mont. 264, 110 P.3d 1 (In cases where a criminal defendant is convicted of two offenses in violation of double jeopardy is the reverse of the conviction of the lesser-included offense and remand for resentencing.); *State v.*

Rose, 2017 MT 238, ¶ 20, 389 Mont. 374, 406 P.3d 443 (citing *Lafler v. Cooper*, 566 U.S. 156, 171 (2012), citing that in circumstances where an ineffective counsel failed to present a plea offer to the defendant and the defendant was convicted of a more serious count at trial, the remedy is to require the prosecution to reoffer the plea proposal).

Here, Strecker alleges his counsel failed to appropriately represent him in the evidentiary hearing by failing to object to the Peterson affidavit. Should this Court find his argument has merit, the appropriate remedy is to remand this to the district court with instructions to strike the Peterson affidavit and consider it on the merits of the record.

CONCLUSION

The district court's order denying Strecker's motion to withdraw his plea should be affirmed.

Respectfully submitted this 4th day of September, 2020.

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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 7,903 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Patrick J. Moody, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-04-2020:

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