IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0454

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GEORGE ISAAC CARLON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael F. McMahon, Presiding

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STATEMENT OF THE ISSUES

Did the district court abuse its discretion by denying Appellant's motion to withdraw his guilty plea?

STATEMENT OF THE CASE

On March 3, 2019, the Appellant, George Isaac Carlon (Carlon), assaulted his then-boyfriend D.L. by biting him in the chest during a physical altercation at D.L.'s home. (D.C. Doc. 3.) D.L. suffered a bite wound to his body. (D.C. Doc. 1.) On March 27, 2019, Carlon appeared in the district court for Lewis and Clark County and entered a plea of not guilty to one count of partner or family member assault (PFMA), third offense, a felony, in violation of Mont. Code Ann. § 45-5-206(1)(a). (D.C. Docs. 4, 8.) The Montana Public Defender's Office represented Carlon at every necessary court proceeding through trial; Assistant Public Defender Jania Hatfield (Ms. Hatfield) represented Carlon from his arraignment through his partial trial and change of plea hearing. (D.C. Docs. 7-22.) The Honorable Michael F. McMahon, presiding, originally set trial for October 15, 2019, then finally continued it until October 21, 2019. (D.C. Docs. 8, 16, 21.)

On October 7, 2019, Carlon filed an application for a temporary order of protection in Helena Municipal Court against D.L. (10/21/19 Tr. at 143.) After the close of evidence but before the case was given to the jury, Carlon pled guilty to

PFMA (3rd offense), as set forth in the Information. (D.C. Doc. 45.) The court accepted his plea, ordered a presentence investigation report, and set sentencing for December 4, 2019. (*Id.)*

On November 25, 2019, attorney Scott A. Albers filed his Entry of Appearance by Substitution. (D.C. Doc. 46.) Carlon also filed a Motion to Continue Sentencing, advising the court he had retained Mr. Albers for the purpose of filing a motion to withdraw his guilty plea. (D.C. Doc. 47.) The court vacated the December 4, 2019 sentencing hearing and subsequently set a motion hearing for March 5, 2020. (D.C. Doc. 55.)

On January 27, 2020, Carlon filed Defendant's Motion to Withdraw Plea and Brief in Support. (D.C. Docs. 56-57.) Pertinent to this appeal, Carlon argued that his guilty plea resulted from his mistaken belief that if he refused to immediately plead guilty, the court would add a count of perjury for the jury to consider during his trial for PFMA. (Doc. 56 at 1-2.) Carlon argued that the district court was suspicious of Carlon's trial testimony and was likely to convict him of perjury. (*Id.* at 2.) Carlon posits that due to his mistaken belief, his guilty plea was not freely, knowingly, voluntarily, or intelligently entered. (*Id*.) Carlon explained that part of his confusion stemmed from the State's threat to charge Carlon with perjury, which it was not entitled to do mid-trial. (*Id.* at 2.) Carlon explained his mistaken belief was not addressed during the colloquy because the district court was not made aware of the

problem. (*Id.* at 3.) Carlon filed his own affidavit (Doc. 57 at 9-16); an affidavit from his mother, Catalina R. Carlon (Doc. 57 at 17-19); an affidavit from his friend, Kelly Elder (Doc. 57 at 20-24); and an affidavit from his sister, Lisa Lue Carlon (Doc. 57 at 25-27).

The State responded in opposition. (D.C. Doc. 59.) Carlon replied. (D.C. Doc. 60.) The court held a hearing on the motion on March 5, 2020. (D.C. Doc. 61.) On March 9, 2020, the court issued its Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Withdraw Guilty Plea. (D.C. Doc. 62.)

The court continued the sentencing hearing several times due to health concerns associated with the COVID-19 pandemic. (D.C. Docs. 63-69.) The court finally held the sentencing hearing on June 3, 2020. (D.C. Docs. 74-75, 82.) The court sentenced Carlon to the Montana State Prison for a period of five years with three years suspended, to run consecutively to his Missoula County sentence in DC-2012-258. (*Id.*) The court also ordered Carlon to register as a violent offender, pursuant to Mont. Code Ann. § 46-18-202. (D.C. Doc. 82 at 2.)

STATEMENT OF THE FACTS

I. Facts underlying the offense

On March 3, 2019, Carlon accused his then-partner, D.L., of cheating on him, which spurred an argument between the two men. (10/21/19 Tr. at 42-43.)

D.L. testified at trial that he broke up with Carlon during that argument and begged Carlon to leave his house. (*Id.* at 43-44.) D.L. repeatedly asked Carlon to leave while returning to Carlon all of his things that were at D.L.'s house. (*Id.* at 44.) D.L. testified that Carlon refused to leave his house and begged D.L. to not break up with him. (*Id.*) D.L. then called a friend because he "wanted someone to come out to the house . . . a mediator." (*Id.* at 46.)

D.L. stated that Carlon then went outside on the porch and made a phone call. (*Id.* at 46, 70.) D.L. testified that he heard Carlon say D.L. was preventing Carlon from leaving, so D.L. yelled "I'm begging you to leave." (*Id.* at 46.) D.L. tried to lock his sliding glass door to prevent Carlon from re-entering, but Carlon grabbed the door and forced his way back into the house. (*Id.*) D.L. then stood in the middle of his hallway to block Carlon from going farther inside his home. (*Id.* at 47, 71-72.) D.L. testified that Carlon grabbed D.L.'s arms and squeezed them, then bent down and bit D.L.'s chest (right pectoral muscle), leaving bruises. (*Id.* at 47-48, 72.) After Carlon bit D.L., Carlon abruptly left. (*Id.* at 48.)

D.L. grabbed his cell phone and realized he had inadvertently initiated a phone call to his friend Shannon. (*Id.* at 29-30, 48.) Shannon testified at trial that while on the call with D.L., she overheard D.L. ask Carlon to leave and to stop biting him. (*Id.* at 30.) After D.L. realized Shannon was on the line and spoke to her, Shannon told him that their mutual friend had called law enforcement to report

the situation she had overheard while on the phone. (*Id.* at 48.) Three Lewis and Clark County Sheriff's Office deputies responded to D.L.'s house. (*Id.* at 51.) D.L. declined to answer the officers' questions about the incident and was otherwise uncooperative with their investigation. (*Id.* at 51-52; 102.) The officers observed a fresh, bruised bite wound on D.L.'s chest. (*Id.* at 97-99; State's Exs. 1-3.) The officers ultimately arrested Carlon for PFMA (3rd offense), a felony, in violation of Mont. Code Ann. § 45-5-206(1)(a). (Doc. 3 at 4.)

II. Carlon's testimony at trial

At trial, Carlon testified that D.L. punched him in the face during their argument, breaking one of his teeth. (10/21/19 Tr. at 130.) Carlon did *not* testify during trial that D.L. bit him; instead Carlon denied that D.L. bit him both times the prosecutor asked him about it directly. (*Id.* at 136, 144.) Carlon stated that he and D.L. got in a tug-of-war with a coat, which ended up with D.L. on top of him. (*Id*. at 131.) Carlon testified, "we had the scuffle, and I get tired of it, and I bite him on the lower chest." (*Id*.) Carlon said he was acting in self-defense. (*Id*.)

During cross-examination, the State impeached Carlon with his sworn statement in his petition for a protective order that he had filed in Helena Municipal Court approximately two weeks before trial. (10/21/19 Tr. at 143-44; D.C. Doc. 62 at 2.) Also, during cross-examination, Carlon confirmed he

understood that providing false information in his sworn petition was a crime. (10/21/19 Tr. at 143.) Carlon admitted he claimed under oath or affirmation that "As I broke up with [D.L.], he began to get physical. He bit [me] and punched out one of my teeth." (*Id*. at 144.) Carlon then explained that his statements in his sworn petition (D.L. bit him) were inaccurate:

> [Prosecutor]: So you swore under oath to the municipal court judge here in Helena that he did bite you during that argument, did you not?
>
> [Carlon]: Correct.
>
> [Prosecutor]: And now you are telling us under oath that he did not bite you?
>
> [Carlon]: Correct.
>
> . . . .
>
> [Prosecutor]: Okay. So when you just answered my question two different times that he didn't bite you, that was not accurate. Is that what you are saying?
>
> [Carlon]: Correct.
>
> [Prosecutor]: And that you knew when you said it it wasn't accurate?
>
> [Carlon]: Correct.
>
> [Prosecutor]: In your application for a temporary order of protection, did you disclose to the Court that you had also bit D.L. during the argument?
>
> [Carlon]: I don't believe so.

> [Prosecutor]: You didn't think that would be important information for the Court to know before making a decision?
>
> [Carlon]: I don't believe so.

(*Id.* at 144-45.)

The State then played video footage from Lewis and Clark County Sheriff's Deputy Rivera's body camera as rebuttal evidence. (*Id.* at 147; State's Ex. A.) The video captured law enforcement's interview with Carlon, which occurred approximately one hour after the altercation. (10/21/19 Tr. at 147.) During that interview, Carlon denied that anything physical had occurred between himself and D.L. (*Id.* at 142.) Although Carlon testified at trial that D.L. had punched him hard enough to knock his tooth out, Deputy Rivera explained that there was no sign of injury to Carlon's face when he interviewed him immediately following the incident. (*Id.* at 124.)

The court then excused the jury for the day and ordered them to return the next morning. (*Id.* at 148.)

III. The district court's comment and Carlon's entry of guilty plea

The next morning, on October 22, 2019, the parties and the court reconvened to settle jury instructions and the single PFMA count verdict form. (10/21/19 Tr. at 153-65; D.C. Doc. 62 at 2.) There were no settled jury instructions including or relating to a perjury count. (10/21/19 Tr. at 149-65; D.C. Doc. 62 at 3.) Before the

court recessed to finalize the settled jury instructions, it stated to the parties, "I would remind counsel that you are still able to try to resolve this case before the jury returns a verdict. And personally, after yesterday, I would make those attempts, okay?" (10/21/19 Tr. at 166; D.C. Doc. 62 at 3.) The court then took a 40-minute recess to prepare copies of the final instructions. (10/21/19 Tr. at 166.)

When the parties returned to the courtroom after the recess, defense counsel advised, "Your Honor, my client would like to make an open plea at this time." (Tr. at 166; D.C. Doc. 3.) The court engaged in a colloquy with Carlon, telling him that "the Court's comments about—this morning about resolution of the matter were not intended to dissuade you from exercising your right to continue with your jury trial. Do you understand that, sir?" (10/21/19 Tr. at 167.) Carlon affirmed he understood and that he did not wish to continue with his jury trial. (*Id*.) Carlon told the court he was aware of the maximum possible penalty he faced if he pled guilty to felony partner/family member assault. (*Id.*) The court advised Carlon of each of his rights and confirmed that Carlon understood he was waiving them by pleading guilty. (*Id*. at 169.) The court emphasized, "[Y]ou are almost to the finish line here with this jury. All we have to do is do final instructions and closing arguments and let them deliberate. Are you . . . willing to waive all of those rights, sir, and plead guilty to . . . partner/family member assault?" (*Id*.) Carlon responded, "Yes, Your Honor." (*Id.*)

The court further confirmed that Carlon was satisfied with his attorney, that he was not under the influence of substances, and that he understood it was an important decision to plead guilty. (*Id.* at 170.) Carlon denied that he had been coerced, threatened, or promised any benefit if he pled guilty. (*Id.*) The State told the court that there was no sentencing agreement between the parties, and the only concession the State offered was to decline charging Carlon with perjury if he pled guilty in an open plea. (*Id.*) The court again asked if Carlon had been coerced or threatened into pleading guilty and promised nothing other than that the State would not charge him with perjury. (*Id.* at 171.) Carlon conferred with his attorney, and then told the court, "Yes that he [the prosecutor] was going to file another charge, and so I figured it would be better to plead out than to be up against two charges." (*Id.*) The court accepted Carlon's guilty plea and found it was entered knowingly, voluntarily, and intelligently. (*Id.* at 174.)

IV. Carlon's motion to withdraw his guilty plea and hearing

Carlon filed a motion to withdraw his guilty plea, arguing that he pled guilty only because he mistakenly believed that if he did not, the State would add a perjury charge to the immediate PFMA case. (3/5/20 Tr. at 40.; Carlon Aff. ¶¶ 6-8.) Carlon argued that due to his mistaken belief, his guilty plea was not freely, knowingly, voluntarily, or intelligently entered. (10/21/19 Tr. at 174;

Doc. 56 at 1-2.) At the motion hearing, Carlon testified that based upon his subjective belief, he thought it better to avoid two felony charges and plead guilty to the PFMA. (3/5/20 Tr. at 40.) Carlon testified that he felt threatened or coerced when he pled guilty because "I just didn't want the jury to have to try me on this perjury charge. That was my biggest deal, is the perjury charge. . . I figured it would be best to, you know, go up against just this one charge versus just two charges, you know?" (3/5/20 Tr. at 41.) Carlon claimed that his lawyer "was very vague in light of the perjury charge and the current charge [and] the focus was based upon 'we're running out of time. We need to make a decision' versus 'this is kind of the breakdown of what's going to happen.'" (*Id.* at 42.)

On cross-examination, the prosecutor asked why he wanted to go back to trial if it meant facing both the PFMA and perjury charges. (3/5/20 Tr. at 47.) Carlon explained:

> Because, honestly, I want my story heard. I want the truth out. I want a fair shake, first of all. Second of all is if I had understood that the perjury wasn't going to be included in the jury trial that we are currently in, I wouldn't have taken the deal. And especially with what happened that day, earlier that day, and it was quite obvious to everybody in the courtroom, that the day prior there was a problem on the stand. So that was made, like, clear by everyone the next morning when we got there, and so that was my biggest concern is I did not want that perjury in front of that jury. I did not want to go in front of that jury with two felony charges, and that's why I took the plea deal. I took it based upon fear and acting out of emotion, and I didn't honestly understand the situation to its full gravity.

(3/5/20 Tr. at 47-48.)

SUMMARY OF THE ARGUMENT

The district court properly denied Carlon's motion to withdraw his guilty plea. Carlon cannot provide objective evidence to support his contention that he had a reasonable, subjective belief that rendered his guilty plea involuntary. The district court's comment that the parties should attempt to settle the matter before it went to the jury for deliberation did not constitute impermissible participation in plea negotiations. The Montana Legislature has expressly declined to adopt the federal prohibition against judicial participation in plea negotiations, so Carlon's arguments under federal case law are inapplicable.

The court properly advised Carlon of his rights pursuant to Mont. Code Ann. § 46-12-210(1) and emphasized that its comments about settling were not to dissuade Carlon from proceeding with the trial. Carlon has failed to provide any objective evidence reasonably demonstrating that his state of mind caused him to plead guilty. The district court's oral interrogation satisfied the requirements of both case and statutory law and show that Carlon pled guilty knowingly, intelligently, or voluntarily. Further, the record is replete with objective evidence that Carlon chose to plead guilty to avoid additional jeopardy he created by admitting to making untrue statements while under oath.

Carlon did not raise a standalone ineffective assistance of counsel (IAC) claim as a basis for withdrawal of his guilty plea in the court below. His IAC claim

on appeal is untimely and should not be considered. Because a record was not developed in a postconviction proceeding, defense counsel's advice to Carlon remains unknown. To the extent that Carlon may have an IAC claim, it is record-based and appropriate for a postconviction proceeding where the record can be developed. The rare "no plausible explanation" does not apply because the record demonstrates there were multiple reasons counsel did not object to the court's comments about settling the case. Also, Carlon received a significant benefit of avoiding another felony charge by pleading guilty to the PFMA.

Even if this Court addresses the merits of Carlon's IAC claim, Carlon cannot demonstrate the two prongs of the *Strickland* test. Defense counsel's failure to object when there was no legal basis to do so did not render her performance deficient, given the strong presumption that counsel's acts were reasonable. Further, Carlon has not demonstrated a reasonable probability that the outcome would have been different if counsel had objected. He has, therefore, failed to demonstrate that his counsel was ineffective.

ARGUMENT

I. Standard of review

This Court reviews a district court's denial of a motion to withdraw a guilty plea de novo. *State v. Warclub*, 2005 MT 149, ¶ 17, 327 Mont. 352, 114 P.3d 254.

The question of whether a plea was entered voluntarily is a mixed question of law and fact, which is reviewed de novo. *State v. McFarlane*, 2008 MT 18, ¶ 18, 341 Mont. 166, 176 P.3d 1057.

This Court reviews the district court's underlying factual findings to determine if they are clearly erroneous. *Warclub*, ¶ 23. "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." *Id.* This Court reviews the district court's interpretation of the law, and application of the law to the facts, for correctness. *Id.*

II. The district court did not err when it determined Carlon lacked good cause to withdraw his guilty plea.

A. Law governing withdrawal of a guilty plea

Montana law permits a defendant to withdraw his guilty plea within one year of final judgment for "good cause." Mont. Code Ann. § 46-16-105(2). This Court analyzes case-specific considerations to determine whether good cause is shown to withdraw a guilty plea, including an inadequate colloquy or ineffective assistance of counsel. *State v. Newbary*, 2020 MT 148, ¶ 9, 400 Mont. 210, 464 P.3d 999; *McFarlane*, ¶ 11; *see* also *Warclub*, ¶ 16 ("'Good cause' includes the involuntariness of the plea, but it may include other criteria.").

Entry of a guilty plea "is not involuntary simply because it was entered to avoid a greater punishment." *State v. Turner*, 2000 MT 270, ¶¶ 52-54, 302 Mont. 69, 12 P.3d 934 (citing *Milinovich*, 269 Mont. at 71.). Further, "[t]he fundamental purpose of allowing a defendant to withdraw a guilty plea is to prevent the possibility of convicting an innocent man." *Turner*, ¶ 52 (internal citations omitted).

B. Carlon cannot meet his burden to provide objective evidence supporting his contention that his misconceptions rendered his guilty plea involuntary.

"Because the process of pleading guilty to a criminal charge involves a waiver of numerous constitutional rights and protections, a guilty plea must be a voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant." *State v. Humphrey*, 2008 MT 328, ¶ 14, 346 Mont. 150, 194 P.3d 643; *Newbary*, ¶ 8 ("A plea must be voluntary because the defendant is waiving his constitutional rights to not incriminate himself and to a trial by jury."). To determine the voluntariness of a guilty plea, this Court applies the standard set forth in *Brady v. United States*, 397 U.S. 742, 755 (1970):

> [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 as having no proper relationship to the prosecutor's business (e.g. bribes).

Humphrey, ¶ 15; *Newbary*, ¶ 8. Thus, this Court "will not overturn a district court's denial of a motion to withdraw a guilty plea if the defendant was aware of the direct consequences of such a plea, and if [the] plea was not induced by threats, misrepresentation, or an improper promise such as a bribe." *McFarlane*, ¶ 17; *Warclub*, ¶ 32. "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.

"[T]he defendant has the burden to show the plea was involuntary." *Newbary*, ¶ 8; *State v. Terronez*, 2017 MT 296, ¶ 27, 389 Mont. 421, 406 P.3d 947. "[W]hile a defendant's subjective perceptions shed light on his state of mind, which in turn bears on the voluntariness of his plea, allegations of having had certain mental impressions at the time of the plea must be supported by objective proof in the record." *Humphrey*, ¶ 23 (citations omitted). "It is the defendant's obligation to provide such proof." *State v. Hendrickson*, 2014 MT 132, ¶ 14, 375 Mont. 136, 325 P.3d 694. "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." *Newbary*, ¶ 8; *Terronez*, ¶ 27. "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; *Brady*, 397 U.S. at 757.

Montana law provides that a district court must ensure that the defendant understands certain considerations before accepting a plea of guilty, including the nature of the charge for which the plea is offered, the minimum and maximum penalties provided by law, and that the defendant has the right to go to trial with the assistance of counsel. *See* Mont. Code Ann. § 46-12-210(1); *Humphrey*, ¶ 14. At the change of plea hearing, the district court specifically questioned Carlon about these matters, including that by pleading guilty to partner/family member assault, he was "waiving all of these rights[]" even though Carlon was "almost to the finish line here with this jury." (10/21/19 Tr. at 167-69.) Carlon now contends that "but for the court's impermissible participation, Carlon would have proceeded to instructions, closing argument and verdict." (*See* Appellant's Br. at 15.)

1. The district court did not impermissibly participate in Carlon's plea negotiations.

Montana law does not prohibit judicial participation in plea negotiations. *State v. Milinovich*, 269 Mont. 68, 72, 887 P.2d 214, 216 (1994); *see* Commission Comments to Mont. Code Ann. § 46-12-211 (2007) ("The Commission believe[s] that circumstances sometimes warrant judicial participation in such discussions."). Though this statute was modeled after Rule 11(e) of the Federal Rules of Criminal Procedure, the Montana legislature did not adopt the federal prohibition against

court participation in plea discussions. *Id.* at 72. Further, because the Legislature "did not identify limits of court participation in the plea agreement process . . . [this Court] must, therefore, consider on the record here, whether the court's participation in the plea agreement process was impermissible." *Id.*

In *Milinovich*, the defendant pled guilty to felony charges during trial. *Id.* at 69. Pursuant to the plea agreement, the State "dismissed the remaining homicide counts and made no sentencing recommendation . . . maintained the right to argue for persistent felony offender designation[,] [and] agreed not to resist Milinovich's attempts to be transferred to another state's prison." *Id.* at 70. After the State called 20 witnesses and the defendant called a single witness, but before entry of his guilty pleas, the defendant requested a conference with the court. *Id.* At that conference, the defendant expressed that "he did not agree with his counsel's defense strategy, stated he did not know what to do, and asked the judge for advice." *Id.* The judge told the defendant he was "being represented by "two first-rate lawyers" who had done as good a job as possible." *Id.* The defendant "expressed concern that the judge was not being impartial and was acting against him." *Id.* The court reassured the defendant he was neutral and described his record of fairness. *Id.* This Court held that the district court did not induce Milinovich to accept the plea agreement, but merely discussed some of his options. *Id.* at 71.

As in *Milinovich*, there is nothing in the record here to establish that the district court improperly inserted itself into the plea negotiations in a manner that induced Carlon to plead guilty under the erroneous notion that he would face a perjury charge in the instant trial if he did not plead guilty. Carlon unequivocally admitted that he made an untruthful statement under oath. (10/21/19 Tr. at 143-45 (Prosecutor: "So when you just answered my question two different times that he didn't bite you, that was not accurate. Is that what you're saying?") Carlon: "Correct.") When the court encouraged the parties to settle, it was recognizing the difficult spot in which Carlon had placed himself. Further, the district court emphasized to Carlon that its earlier comments "about resolution of the matter were not intended to dissuade you from exercising your right to continue with your jury trial." (*Id.* at 167.) Despite the court's reassurances, Carlon stated that he understood and confirmed that he wanted to change his plea. (*Id.*)

Like in *Milinovich*, "[t]he transcript here, as noted above, fails to indicate that the District Court Judge took any active role in the discussions and negotiations relative to the plea; nor did he offer or in any way indicate what the terms of the agreement should be." *Milinovich,* 269 Mont. at 72, 887 P.2d at 216. As Carlon admitted during the motion hearing, he pled guilty to avoid a perjury charge. (3/5/20 Tr. at 48.) The court's comments did not rise to the level of impermissible participation in the plea agreement process.

C. Carlon has failed to preserve an ineffective assistance of counsel claim on appeal.

On appeal, Carlon asserts Ms. Hatfield provided ineffective assistance of counsel "by failing to object to Hon. McMahon's improper participation in the plea negotiations." (Appellant's Br. at 30.) However, Carlon makes this argument for the first time on appeal. "On direct appeal, we will generally only address a claim of ineffective assistance of counsel if the claim is 'record-based.'" *State v. Herman*, 2008 MT 187, ¶¶ 15-16, 343 Mont. 494, 188 P.3d 978 (citing *State v. Bateman*, 2004 MT 281, ¶ 23, 323 Mont. 280, 99 P.3d 656). "A claim is record-based if the record fully explain[s] *why* counsel took the particular course of action." *Id.* (citing *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340.). "If a defendant's claim of ineffective assistance of counsel is not record-based, the defendant must raise the issue not on direct appeal, but in a post-conviction proceeding where she can more fully develop the record." *Id.* (internal citations omitted).

In the district court, Carlon argued that he proceeded under the misunderstanding that he would face perjury charges but makes no claim that his attorney provided deficient counsel in any way. Carlon did not raise a separate, stand-alone, ineffective assistance of counsel claim as a basis for withdrawal of his guilty plea in the court below (Mot. to Withdraw Guilty Plea, Doc. 57 and Reply Br., Doc. 60.), and the district court did not address the issue of alleged ineffective assistance of

counsel in its Order because it was not presented with that issue. (Doc. 62.) This Court has repeatedly held that it considers issues, arguments, or legal theories raised for the first time on appeal to be untimely and will not consider them. *McFarlane*, ¶¶ 12, 13. Carlon has forfeited his argument on appeal.

To the extent Carlon believes he has an IAC claim, he may raise it in a post-conviction proceeding.

D. Even if this Court reaches the merits of Carlon's IAC claim, Carlon has not demonstrated that his counsel was deficient or that he was prejudiced by counsel's performance, and rare exception of "no plausible justification" does not apply.

The Sixth and Fourteenth Amendments of the United States Constitution and article II, section 24 of the Montana Constitution guarantee the right to counsel in all criminal proceedings. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. In order to analyze IAC claims, this Court has adopted the two-part test the United States Supreme Court articulated in *Strickland v. Washington*, 466 U.S 668 (1984). *Id*. *Strickland* requires:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable.

Whitlow, ¶ 10 quoting *Strickland*, 466 U.S. at 687.

Ineffective assistance of counsel constitutes good cause for withdrawal of a guilty plea. *McFarlane*, ¶ 11 (internal citation omitted.) "Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *McFarlane*, ¶ 11, quoting *Hans*, 942 P.2d at 693 (internal quotations omitted).

In order to demonstrate good cause to withdraw his guilty plea, it was Carlon's burden to provide both prongs of *Strickland, State v. Williams*, 2010 MT 58, ¶ 35, 355 Mont. 354, 228 P.3d 1127, and show: (1) that Ms. Hatfield performed deficiently; and (2) but for Ms. Hatfield's deficient performance, Carlon would not have entered his guilty plea to felony PFMA. *McFarlane*, ¶ 11. Under *Strickland's* first prong, this Court examines whether counsel's conduct fell below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances. *McGarvey v. State*, 2014 MT 189, ¶ 25, 375 Mont. 495, 329 P.3d 576. Counsel's conduct is strongly presumed to be within professional norms, and a defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Whitlow*, ¶ 16 quoting *Strickland*, 466 U.S. at 690. Further, when evaluating counsel's performance, the reviewing court must make every effort to "eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Whitlow*, ¶ 31, quoting *Strickland*, 466 U.S. at 689.

Under *Strickland's* second prong, this Court examines whether there is a reasonable probability that counsel's lack of professional conduct renders proceedings unreliable or fundamentally unfair. *McGarvey*, ¶ 25. To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *State v. Dineen*, 2020 MT 193, ¶ 24, 400 Mont. 461, 469 P.3d 122 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011).)

Even if Ms. Hatfield's performance was deficient, Carlon cannot show a reasonable probability that, had Ms. Hatfield objected to the district court's statements and he proceeded to trial, the jury would not have convicted him of the PFMA offense. *See Strickland*, 466 U.S. at 694. This is a heavy burden indeed. "A defendant must do more than just show that the alleged errors of a trial counsel 'had some conceivable effect on the outcome of the proceeding.'" *State v. Peart*, 2012 MT 274, ¶ 23, 367 Mont. 153, 290 P.3d 706. "The benchmark for judging any claim

of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cheetham v. State*, 2019 MT 290, ¶ 9, 398 Mont. 131, 454 P.3d 693 (quoting *Strickland*, 466 U.S. at 686); *State v. Dineen*, ¶ 25.

Even if the Court determines to address this claim, it must be dismissed because Carlon has failed to sustain his burden to demonstrate both *Strickland* prongs. Carlon cannot show deficient performance because he cannot show how defense counsel's failure to object to the district court's comments was a significant factor in his decision to plead guilty. Further, even if Ms. Hatfield somehow advised Carlon that a perjury charge could be added to his PFMA trial, her advice to Carlon that he faced a perjury charge if he did not accept the plea agreement was correct. Thus, defense counsel's advice was within the range of competence demanded of attorneys in criminal cases.

In addition, by pleading guilty, Carlon received a benefit akin to dismissal of a charge—the State's promise not to charge him with perjury. This Court has considered agreements that provide benefits similar to the dismissal of a charge as indicative of voluntariness in the same manner as agreements to dismiss a charge. *See Hendrickson*, ¶¶ 15-16 (agreement not to amend information to pursue additional felony charges); *State v. Radi*, 250 Mont. 155, 162, 818 P.2d 1203 (1991) (agreement not to seek persistent felony offender designation). Carlon

received substantial benefit by pleading guilty to the PFMA and he was not prejudiced.

CONCLUSION

The State respectfully requests that this Court affirm the judgment of the district court denying the withdrawal of Carlon's guilty plea.

Respectfully submitted this 31st day of March, 2022.

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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 5,724 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-31-2022:

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