

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0310

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

GALEN LEWIS HAWK,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Fourth Judicial District Court,  
Missoula County, The Honorable Shane Vannatta, Presiding

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## **STATEMENT OF THE ISSUE**

Whether the district court erred when it denied Appellant's motion to withdraw his no contest plea.

## **STATEMENT OF THE CASE**

On June 30, 2020, the State of Montana charged Appellant, Galen Lewis Hawk, by Information, with assault with a weapon in violation of Mont. Code Ann. § 45-5-213. (Doc. 4.) After pleading no contest on December 16, 2020, Hawk formally sought to withdraw his no contest plea based, in part, on deficient counsel on March 5, 2021. (12/16/20 Tr.; Doc. 21.) Hawk appeals the district court's denial of his motion to withdraw his no contest plea after the district court concluded that Hawk did not raise any concerns of ineffective assistance of counsel. (Doc. 24.)

## **STATEMENT OF THE FACTS**

On June 20, 2020, alerted by his screaming children, Daniel Cartwright observed Hawk slashing the tires of a family member's vehicle across the street from Cartwright's residence. (Doc. 1 at 2; 4/5/21 Tr. at 16.) Cartwright yelled at Hawk to leave the neighborhood. (*Id.*) Instead, Hawk, who appeared intoxicated, walked towards Cartwright while unsheathing his knife from his side. (*Id.*) Hawk lunged at Cartwright with his knife in hand. (*Id.*) Cartwright had to lean back to avoid being stabbed in the chest by Hawk. (*Id.* at 3.) Cartwright's wife,

Crystal Davis, and his neighbor (Neighbor), both described the event the same as Cartwright. (*Id.* at 2-4.)

Hawk was arraigned on July 9, 2020, at which point, he was advised of his rights. (Docs. 9, 10.) Hawk’s counsel filed a motion to set a change of plea hearing, which was set for December 16, 2020. (Docs. 13, 14.) On Hawk’s behalf, Hawk’s counsel signed and filed a plea agreement in advance of the change of plea hearing. (Docs. 12.1, 15, 16.)<sup>1</sup> Even though Hawk’s attorney had discussed “the main provisions about when one pleads guilty . . . one waives his or her right to a trial, to appeal, to subpoena witnesses, to challenge the State’s evidence, and also gives up the right not to incriminate his or herself” with Hawk, his attorney was unable to “have a signed guilty plea and waiver of rights” filed before the change of plea hearing. (12/16/20 Tr. at 6.) Hawk’s attorney stated that he could, with Hawk’s consent, sign the form on Hawk’s behalf and file it after the change of plea hearing. (*Id.*) The district court stated it “would appreciate it if Mr. Hawk, in the intervening days, does review and file a waiver of rights” in addition to the oral record regarding Hawk’s waiver of his rights that was being made at the time of the hearing. (*Id.*) Hawk did not object. (*Id.* at 7.)<sup>2</sup>

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<sup>1</sup>Although Judge Shane Vannatta was assigned to preside over Hawk’s case, due to scheduling, the parties agreed to have the change of plea hearing held before Judge Leslie Halligan.

<sup>2</sup>On Hawk’s behalf, defense counsel signed and filed Hawk’s Plea of Guilty and Waiver of Rights form on December 22, 2020. (Doc. 18.)

In response to the district court's questions, Hawk informed the district court that he wasn't under the influence of any substances, he was satisfied with counsel's representation of him, and he had adequate time to review his rights with his attorney. (*Id.*) No one had compelled him or threatened him to plead guilty. (*Id.* at 8.) Hawk further represented that he understood that, by pleading guilty, he would be waiving his right to a jury trial and his right to challenge the State's evidence among the other rights previously stated by Hawk's attorney. (*Id.*) Hawk represented that he had no questions about his rights and that he was comfortable waiving those rights. (*Id.*)

Hawk entered a plea of guilty in response to the district court reading a summary of the factual basis supporting the offense alleged in the Information. (*Id.* at 10.) When the district court asked Hawk to explain what happened at the time of the alleged offense, Hawk's counsel represented that the State agreed to allow Hawk to enter a no-contest plea, prompting the district court to explain that "by entering the no-contest plea, you are effectively agreeing that if the State brought this matter before trial, that they could prove beyond a reasonable doubt to a jury that you engaged in" the conduct alleged. (*Id.* at 10.) Hawk confirmed his "desire to enter a no-contest plea." (*Id.*)

At his sentencing hearing, Hawk orally requested to withdraw his no contest plea based on his counsel not informing him that he was pleading no contest, rather

than pleading guilty, until the time he entered his no contest plea. (Doc. 18.1; 2/4/21 Tr. at 4.) Expressing its confusion regarding Hawk's request, the district court asked Hawk if he had not intended to change his plea to assault with a weapon. (2/4/21 Tr. at 4.) Hawk responded: "No. I was pleading guilty, but then my attorney, out of nowhere, just said that him and the prosecutor agreed on a no contest when I wasn't even aware of that." (*Id.* at 4-5.) Just as Judge Halligan had explained to Hawk at his change of plea hearing, Judge Vannatta also explained to Hawk "that no contest is something less than . . . a plea of guilty" because pleading no contest means that you are essentially saying that "you don't necessarily believe you are guilty of the charges, but you believe that the prosecutor is likely able to convince a jury that, beyond a reasonable doubt, you are guilty of the charge as alleged." (*Id.* at 5.) Hawk responded that he understood what a no contest plea was. (*Id.*)

The district court continued to express its confusion at Hawk's request to withdraw his no contest plea, then, based only on Hawk thinking that he was pleading guilty, instead of pleading no contest. (*Id.*) When Hawk was asked what he wished to change his no contest plea to, he stated that he wanted to withdraw his no contest plea "[b]ecause [he] didn't sign a plea bargain yet, not in person." (*Id.*)

The district court revisited Hawk's request to withdraw his no contest plea at the status conference held on February 18, 2021. (Doc. 20; 2/18/21 Tr. at 3.) After reviewing Hawk's change of plea hearing, the district court remarked that "there

was no question” Hawk was “clear headed” and had “reviewed [his] rights” at the change of plea hearing. (2/18/21 Tr. at 3.) Again, the district court inquired with Hawk as to the basis of his request to withdraw his no contest plea. (*Id.* at 4.) Hawk responded that first, “[he] thought [he] didn’t have a chance of going to trial, but then [he found] out that [his] attorney had [a] conflict with different inmates.” (*Id.*) Hawk further felt his counsel had not adequately assisted Hawk with his defense because the only discovery Hawk alleged he had received was the police report. (*Id.*) Hawk also explained that his attorney had not interviewed any witnesses and had “straight-out told [him] that he didn’t have [a] defense for [him] and asked [him] what [his] defense was.” (*Id.*)

At the district court’s request, Hawk’s counsel filed a *Notice in Support of Defendant’s Motion to Withdraw No Contest Plea* (Notice) on March 5, 2021. (Doc. 21; 2/18/21 Tr. at 9.) In the *Notice*, Hawk expounded on the concerns he raised at the February 18, 2021 hearing. First, Hawk alleged “although he was initially pleased with counsel, he spoke with fellow inmates in his pod and learned that many of them were getting better offers than he was.” (Doc. 21 at 1.) Second, Hawk alleged that “he did not receive all the discovery in his case.” (*Id.*) Third, Hawk alleged that because his attorney “did not believe they had a viable defense,” counsel was deficient. (*Id.* at 2.) Fourth, Hawk was concerned that he was instructed to plead no contest when he had intended to plead guilty. (*Id.*)

On March 19, 2021, Hawk confirmed the district court’s summary of Hawk’s concerns set forth in the *Notice*. (3/19/21 Tr. at 5-7.) The State remarked that, from its perspective, Hawk had “receive[d] good and competent counsel” and that Hawk’s complaints seemed to stem more from his “communications with fellow inmates, as opposed to a dissatisfaction with [his counsel].” (*Id.* at 8-9.) Hawk, again, reiterated that it was “confusing at the beginning, because [he] wasn’t notified about the no contest, or how it was going to go. And [his attorney], out of the blue, surprised [Hawk] with that.” (*Id.* at 7.)

The district court concluded that “after this initial inquiry . . . there [are] some seemingly substantial concerns,” warranting further exploration and issued a *Gilham* order. (3/19/21 Tr. at 9; Doc. 23.) At the April 5, 2021 *Gallagher* hearing, the district court again confirmed that Hawk had reviewed the *Notice* filed on his behalf. (4/5/21 Tr. at 5.) First, the district court addressed Hawk’s concern that other inmates, who were believed to have similar charges, had received better offers, including offers in which their charges had been reduced. (*Id.* at 7.) Hawk’s counsel responded that he has never really investigated whether inmates facing the same charge as Hawk had received better plea offers because “each case has its own facts and its own evidence, and each defendant has their own prior history that affects those offers.” (*Id.* at 8.) In this case, Hawk’s counsel represented that the State had rejected Hawk’s initial offer and that Hawk’s counsel had “advised him that it would

be wise to accept [the proposed plea offer] given the strength of their case” and his criminal history. (*Id.* at 9.)<sup>3</sup> Ultimately, Hawk agreed that it was his “decision as to whether [he] take[s] the plea agreement or decide[s] to go to trial.” (*Id.*)

Regarding Hawk’s second concern, his counsel explained that Hawk’s recollection that he only received the police report is inaccurate. (*Id.* at 11.) Hawk’s attorney “personally went to the jail and met with Mr. Hawk in Attorney Visiting Room Number 1 with [his] laptop and played whatever portions of all of the audio and video discovery that [they] had in the case.” (*Id.*) The only item of discovery that Hawk’s counsel was not sure if he had provided Hawk was a transcript of Hawk’s phone call with his sister that was recorded by the jail. (*Id.* at 12.) At the hearing, Hawk admitted he remembered the phone call with his sister and meeting with his counsel to review audio on his attorney’s laptop. (*Id.* at 13.)

The district court then addressed Hawk’s third complaint: that his attorneys did not adequately prepare for trial because they did not interview all parties noted in the discovery. (*Id.* at 14.) Hawk’s counsel admitted that he only spoke with Hawk’s sister and did not interview anyone else, expressing that perhaps he did not

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<sup>3</sup>Hawk’s Presentence Investigation Report (PSI) contradicts Hawk’s assertion that he does not “really have a criminal record.” (4/5/21 Tr. at 10; Doc. 19.) Since 2006, Hawk has obtained 21 misdemeanor convictions, a felony Driving Under the Influence conviction, and Negligent Homicide conviction. Hawk’s plea agreement recommended his sentence run consecutive to any sentences imposed on Hawk’s two felony convictions. (Doc. 15 at 2.)

adequately explain to Hawk that counsel would only interview the witnesses if they felt it was necessary. (*Id.*) Hawk admitted that Neighbor was the only witness whose testimony might have resulted in Hawk receiving a lesser charge. (*Id.* at 15-16.) Based on Hawk’s review of the police report, Hawk believed that Neighbor would have testified that she saw Cartwright provoke Hawk before Hawk even pulled a knife on Cartwright. (*Id.*) Hawk’s counsel, however, responded that, in her video-recorded interview, Neighbor mirrored her previous statement to law enforcement, which also corroborated Cartwright’s and his wife’s accounts of what occurred on June 20, 2020. (*Id.* at 17.)

Lastly, the district court addressed Hawk’s concern regarding the change from guilty plea to a plea of no contest at the change of plea hearing. (*Id.*) Hawk’s counsel explained that once the parties arrived at a sentencing recommendation that “Hawk was willing to accept . . . it became apparent to [him] that Mr. Hawk would not be able to adequately lay the factual basis for a guilty plea.” (*Id.* at 18.) Hawk’s attorney stated that he “tried to explain to [Hawk] the use of a no contest plea.” (*Id.*) And, in response to the district court’s explanation of what a no contest plea means, Hawk stated that “[he] was never . . . aware that they were going to do a no contest. Because [he had] seen the videos and everything, and [he] might as well have said guilty.” (*Id.* at 20.)

The district court concluded that none of Hawk’s complaints raised concerns of ineffective assistance of counsel and thus denied his motion to withdraw his no contest plea. (4/5/21 Tr. at 22-24.) First, the district court “recognize[d] that such plea offers are highly dependent on the facts, are truly framed by the prosecuting attorney with some minimal input from defense, and negotiation by the defense.” (*Id.* at 22.) The district court also emphasized that Hawk, alone, was responsible for determining whether the plea agreement offered presented a good enough deal. (*Id.*) Second, the district court noted Hawk’s admission that he had the “opportunity to review things like the video and the police report, [was] aware of the transcript with [his] sister, and, again, had met personally with Mr. Mandelko about all of those things.” (*Id.* at 23.) Third, testimony of Hawk’s counsel established that the witness Hawk wanted his counsel to interview, her video interview corroborated the other witnesses’ reports of what occurred. (*Id.*) Fourth, the district court found that it was reasonable for Hawk’s attorneys, “even if it was last moment, [to] advise[] you to enter a no contest plea.” (*Id.* at 24.)

At the April 9, 2021 sentencing hearing, Hawk, again, indicated that he wanted to withdraw his no contest plea. (4/9/21 Tr. at 4.) This time, Hawk’s request was based on “an implicit lack of knowing based on changes in his medication that he said he experienced at the time that he entered his no contest plea.” (*Id.*) The district court remarked that Hawk’s “plea of guilty or no contest

ha[d] gone through a rather tortured process.” (*Id.* at 5.) The district court, however, provided Hawk with one week to file a formal motion raising any new basis for Hawk to withdraw his no contest plea. (*Id.* at 6.) A notice that no motion to withdraw Hawk’s no contest plea was filed on April 14, 2021. (Doc. 26.)

At the sentencing hearing held on April 23, 2021, Hawk’s counsel informed the district court that Hawk may not be prepared to proceed. (4/23/21 Tr. at 3.) Hawk stated he was “trying to figure out certain things for . . . how to withdraw my plea, and then trying to figure out about my meds and stuff.” (*Id.* at 3-4.) The district court reiterated that it had previously heard the bases for Hawk’s motion to withdraw his plea and had denied his request. (*Id.* 4-5.) Finding no reason to continue sentencing, the district court proceeded with the hearing and sentenced Hawk pursuant to the plea agreement: commitment to the Montana State Prison for a term of 15 years, with 10 years suspended, to run consecutive with Lake County Cause Numbers DC 13-20 and DC 14-170. (*Id.* at 7; Doc. 27.)

### **SUMMARY OF THE ARGUMENT**

The record supports that Hawk knowingly, intelligently, and voluntarily pleaded no contest. First, Hawk entering a plea of no contest, as orally agreed to by Hawk and the State at the change of plea hearing, did not invalidate the plea agreement that Hawk consented to that required Hawk to plead guilty in exchange

for the State recommending a specific sentence. Nor did Hawk's attorney signing Hawk's plea of guilty and waiver of rights form or his plea agreement on Hawk's behalf invalidate Hawk's plea agreement because Hawk did not object.

Second, Hawk cannot establish that his counsel's performance was deficient or that but for counsel's deficient performance, Hawk would have continued with his plea of not guilty when the record supports that Hawk intended to plead guilty to the offense alleged both right before and then following the change of plea hearing. And, third, the record supports that Hawk was advised of the charge alleged against him, the penalties for that charge, and that he would be pleading no contest to the charge as stated in the Information. The district court did not err when it concluded that Hawk had not established that good cause existed to withdraw his no contest plea.

Lastly, at the time Hawk's counsel inquired with the district court about conflict counsel being appointed, Hawk had not yet established any concerns of ineffective assistance of counsel. And, after the *Gallagher* hearing, the district court ultimately concluded that statements presented, including Hawk's statements undermining his concerns, supported that Hawk's counsel had not been ineffective in assisting Hawk with his case. The district court accordingly did not err when it did not appoint counsel to file Hawk's motion to withdraw his guilty plea.

## ARGUMENT

### **I. Standard of review**

The question of whether a defendant voluntarily pleaded no contest is a mixed question of law and fact reviewed *de novo*. *State v. Garner*, 2014 MT 312, ¶ 21, 377 Mont. 173, 339 P.3d 1. This Court reviews for clear error a district court’s underlying findings of fact. *Id.* A district court’s findings of fact prove “clearly erroneous if they are unsupported by substantial evidence, the court misapprehended the effect of the evidence, or review of the record convinces us that a mistake has been made.” *State v. McFarlane*, 2008 MT 18, ¶ 8, 342 Mont. 166, 176 P.3d 1057. This Court reviews for correctness a district court’s underlying conclusions of law. *Garner*, ¶ 14.

### **II. The district court did not err when it concluded that Hawk had not established that good cause existed to allow Hawk to withdraw his plea of no contest.**

Montana Code Annotated § 46-16-105(2) allows a criminal defendant to withdraw his guilty plea where good cause is shown. In determining whether a district court erred in denying a defendant’s request to withdraw his guilty plea, this Court will examine “case-specific considerations,” such as “the adequacy of the district court’s interrogation, the benefits obtained from a plea bargain, the withdrawal’s timeliness, and other considerations that may affect the credibility of the claims presented.” *McFarlane*, ¶ 17 (citation omitted). 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 his plea was not induced by threats, misrepresentation, or an improper promise such as a bribe." *Id.* (citation omitted). In other words, "[t]he ultimate test for withdrawal of a plea is voluntariness." *State v. Lone Elk*, 2005 MT 56, ¶ 14, 326 Mont. 214, 108 P.3d 500.

On appeal, Hawk contends that good cause existed for the district court to grant Hawk's timely request to withdraw his guilty plea because: (1) Hawk pleaded no contest pursuant to an invalid, unenforceable plea agreement; (2) Hawk's plea of no contest was not entered voluntarily, knowingly, and intelligently because his counsel's performance was deficient; and (3) the district court's colloquy did not satisfy Mont. Code Ann. § 46-12-210. (Appellant's Br. at 25-38.)

**A. Hawk entering a plea of no contest pursuant to a plea agreement signed by Hawk's counsel, on Hawk's behalf, did not invalidate the plea agreement Hawk consented to.**

Plea agreements constitute contracts between the State and the defendant and, are, therefore, "subject to contract law standards." *State v. Langley*, 2016 MT 67, ¶ 17, 383 Mont. 49, 369 P.3d 1005 (citations omitted). Because "[a] defendant waives fundamental constitutional rights in exchange for the State's assurances in a plea agreement[,] . . . plea bargaining must meet strict and meticulous standards of both promise and performance." *State v. Ellison*, 2017 MT 88, ¶ 14, 387 Mont. 243, 393 P.3d 192 (internal quotations and citations omitted).

Hawk contends that because he entered a no contest plea, rather than a guilty plea, that a mutual mistake of fact exists invalidating the plea agreement.

(Appellant’s Br. at 25-26.) Montana Code Annotated § 28-2-409 defines a mistake of fact as “a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in” either the “unconscious ignorance” of a past or present fact that is “material to the contract” or the “belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed.” Key to the mistake of fact analysis is whether the mistake involves a fact material to the contract. *See* Mont. Code Ann. § 28-2-409.

Here, Hawk’s plea agreement provides, in relevant part, that Hawk agreed to enter a guilty plea to assault with a weapon in exchange for a sentence of 15 years with 10 years suspended to run consecutive to sentences imposed in Lake County Cause Numbers DC-13-20 and DC-14-170. (Doc. 15 at 1-2.) In other words, the plea agreement required Hawk to not move forward with his plea of not guilty in exchange for the promise that the State would recommend a specific sentence. The type of plea—guilty or no contest—therefore did not materially impact the purpose of the plea agreement. *See generally State v. Spreadbury*, 2011 MT 176, ¶¶ 11-12, 361 Mont. 253, 257 P.3d 392. Rather, the switch to a no contest plea from a guilty plea merely transferred the obligation to provide the factual basis in support of

Hawk's plea from Hawk to the State. Hawk pleading no contest did not invalidate the plea agreement.

Nor can Hawk establish that he did not consent to pleading no contest. Hawk's counsel specifically informed the district court that he had informed Hawk of the no contest plea before the change of plea hearing. The district court then explained what a no contest plea entails to Hawk who agreed to plead no contest at the change of plea hearing. In sum, Hawk consented to pleading no contest after being advised twice of what a no contest plea entails. Furthermore, Hawk's attorney stated that he would sign on Hawk's behalf, with Hawk's consent, the plea of guilty and waiver of rights form at the change of plea hearing. Hawk did not object. Hawk was fully aware of the material elements of the plea agreement and Hawk's counsel's signature on his behalf did not constitute good cause to allow Hawk to withdraw his no contest plea.

**B. The record supports that Hawk knowingly, voluntarily, and intelligently pleaded no contest to assault with a weapon.**

Hawk argues that his counsel's deficient performance induced Hawk to plead no contest. (Appellant's Br. at 28-34.) This Court applies the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), when a defendant alleges that his "counsel's ineffectiveness impacted the voluntariness of the defendant's plea." *State v. Hendrickson*, 2014 MT 132, ¶ 16, 375 Mont. 136, 325 P.3d 394 (citations omitted). *Strickland* requires a criminal

defendant to satisfy two prongs. First, that the defendant’s “counsel’s advice fell outside the range of competence demanded of a criminal attorney.” *McFarlane*, ¶ 11. And, second, that “but for counsel’s deficient performance, he would not have entered a guilty plea.” *Id.* This Court has long “recognized that the defendant bears a significant burden under *Strickland*; [this Court] may determine that counsel committed an error and still conclude that the defendant did not carry his burden to establish an error serious enough to allow him to withdraw his plea.” *Hendrickson*, ¶ 16 (citation omitted).

Hawk argues that his counsel’s advice fell outside the range of competence because his attorney had not adequately addressed the plea of guilty and waiver of rights. (Appellant’s Br. at 30-34.) In support, Hawk relies solely on his counsel’s statement that it had been difficult to exchange documents and communicate with Hawk while he was in jail, which prevented counsel from filing a signed plea of guilty and waiver of rights form in advance of the change of plea hearing. Hawk’s attorney, however, did discuss the plea agreement with Hawk and had met with Hawk at least four times throughout the case before the change of plea hearing. (2/18/21 Tr. at 5.) Hawk’s attorney also stated that he had discussed all the rights stated in the waiver of rights form with Hawk, which Hawk confirmed at the change of plea hearing. The district court further advised Hawk of the rights he was waiving by pleading guilty at the change of plea hearing.

At every turn, Hawk confirmed he understood his rights and that he would be waiving those rights by pleading guilty. Furthermore, Hawk did not object to his counsel's proposition that he could sign the waiver of rights form on Hawk's behalf with Hawk's consent. As a result, Hawk cannot establish that his counsel's performance was deficient because the document formalizing the rights that Hawk had been informed of twice had not been signed by Hawk.

Additionally, Hawk asserts, for the first time on appeal, that his counsel's performance was deficient because his counsel did not pursue a justifiable use of force defense. (Appellant's Br. at 32-33.) In support of his assertion, Hawk over-emphasizes his attorney's reported statement inquiring with Hawk as to what Hawk's defense was to his attorney's view of a seemingly difficult case to defend based on the State's evidence. (*Id.*) Hawk further contends that his assertion is supported by the fact that counsel did not interview Neighbor and Hawk's own recount of what occurred the night of the offense. (*Id.*)

As Hawk stated in his PSI, "[he] responded to a neighbor that approached [him] with an arrogant attitude, saying aggressive and hostile words while [he] was on some alcohol substances." (Doc. 19 at 3.) As set forth in the affidavit in support of the motion for leave to file an information, the State, however, alleged that Cartwright's wife reported that Hawk "had pulled a knife on her husband, then threw the knife to the ground and started walking towards Reserve Street." (Doc. 1

at 2.) Cartwright reported that he observed Hawk, who appeared angry and drunk, across the street. Cartwright told Hawk that he needed to leave. Hawk came towards Cartwright, unsheathed his knife, and then “lunged at Cartwright with the knife fully extended.” (*Id.*) Cartwright feared Hawk was going to stab him and lunged back to avoid being stabbed in the chest. Neighbor further reported that she observed Hawk slashing tires and then witnessed Hawk slash his knife at Cartwright after Cartwright was yelling at Hawk.

Throughout hearings on his motion to withdraw his no contest plea, Hawk raised concerns that his attorney had not interviewed Neighbor. Although Hawk was doubtful Neighbor’s testimony would have resulted in dismissal of his charge, he believed it could have resulted in a lesser charge. Hawk’s counsel countered, stating that Neighbor had a video recorded interview after the offense occurred and the statements in the video mirrored her statements made at the time of the report, which also corroborated Cartwright’s and his wife’s statements.

Despite Hawk’s contention otherwise, Hawk’s attorney’s explanations to the district court during the April 5, 2021 hearing support that he had sufficiently investigated Hawk’s case, which would have included exploring viable defenses. The record further supports that justifiable use of force would not have been a viable defense. *See* Mont. Code Ann. § 45-3-102. Considering the State’s evidence, and the record in this case, Hawk cannot establish that counsel’s

performance or advice was deficient based on counsel strategically electing to not pursue a justifiable use of force defense. *See Strickland*, 466 U.S. at 690-91.

Even if this Court finds that Hawk satisfied prong one of the *Strickland* analysis, Hawk cannot establish that but for counsel's deficient advice, he would not have pleaded guilty or no contest. *See Hendrickson*, ¶ 16. Initially, Hawk stated that he wished to withdraw his no contest plea because he was not informed that he was pleading no contest when he thought he was pleading guilty. Hawk had a parole violation and "was just trying to get through it quick." (2/18/21 Tr. at 5.) Hawk further explained that, after his review of the discovery, "[he] might as well have said guilty" instead of pleading no contest. (4/5/21 Tr. at 20.) Hawk not understanding that pleading no contest did not change the fact he was pleading guilty does not establish that he was intending on continuing forward with his plea of not guilty. Rather, it shows the reverse: that he was intent on pleading guilty, which includes a plea of no contest. *See generally State v. Jackson*, 2013 MT 316, ¶¶ 11-12, 361 Mont. 253, 257 P.3d 392. Hawk cannot establish that but for his counsel's allegedly deficient advice, Hawk would not have proceeded to trial on the offense alleged in the Information. *See Hendrickson*, ¶ 16. The district court did not err when it found that Hawk raised no concerns of ineffective assistance of counsel that would justify Hawk withdrawing his no contest plea.

**C. The district court’s colloquy included all necessary elements and it properly denied Hawk’s motion to withdraw his no contest plea despite the fact it was timely filed on March 5, 2021.**

Hawk further asserts that the district court also could have found good cause existed for Hawk to withdraw his no contest plea because Hawk timely requested to withdraw his plea and the district court’s colloquy was insufficient. (Appellant’s Br. at 36-37.) Although the State agrees that Hawk timely requested to withdraw his guilty plea, considering the entire record, the district court did not err when it did not allow Hawk to withdraw his plea of no contest based solely on the timeliness of Hawk’s request.

For the first time on appeal, Hawk raises that the district court’s colloquy was insufficient. Montana Code Annotated § 46-12-210 requires the district court to determine whether the defendant understands the nature of the charge, the penalties for the offense, any applicable restitution, and that the defendant has the right to persist with his guilty plea, the right to a jury trial, the right to confront witnesses, and the right against self-incrimination before the district court can accept a defendant’s plea of no contest.

At the change of plea hearing, Hawk’s counsel represented that he had provided the plea of guilty and waiver of rights form to Hawk and spoke with Hawk about the form. Hawk’s counsel further informed the district court that he had “discussed the main provisions” of the plea agreement and that by pleading

guilty, Hawk was waiving his right to a trial, to appeal, to challenge the State's evidence, his right against self-incrimination, and the right to subpoena witnesses. Furthermore, Hawk did not object to his counsel signing the plea of guilty and waiver of rights form on Hawk's behalf and filing it after the change of plea hearing.

At the change of plea hearing, the district court reiterated the rights that Hawk's counsel had informed Hawk of, inquiring with Hawk if he understood that he was waiving his legal rights, such as the right to a jury trial and to challenge the State's evidence. Hawk answered in the affirmative to the district court's inquiry into whether Hawk had questions regarding his legal rights. Hawk was comfortable waiving his rights and proceeding with changing his plea. Hawk understood the provisions of the plea agreement. Hawk further was advised of the offense alleged in the Information, including the offense's penalties and the factual basis stated in support.

Hawk initially pleaded guilty to the offense. Upon inquiry by the district court as to the factual basis of Hawk's guilty plea, Hawk's counsel informed the district court that the parties agreed that Hawk could plead no contest. The district court then inquired with Hawk if he desired to plead no contest, to which Hawk responded yes. The district court then explained to Hawk that "by entering the no-contest plea, you are effectively agreeing that if the State brought this matter

before trial, that they could prove beyond a reasonable doubt to a jury that you engaged in this conduct.” (12/16/20 Tr. at 10.) Hawk again responded yes. Hawk further stated that he did not want to challenge any of the State’s evidence.

At no point during Hawk’s counsel’s exchange with the district court, did Hawk object or inform the district court that he did not understand the rights that Hawk was waiving by pleading guilty. At no point during the change of plea, did Hawk express confusion that he went from pleading guilty to pleading no contest. Nor did Hawk express any confusion as to what pleading no contest meant. The record supports that Hawk understood the plea agreement, the charge alleged, that he was pleading no contest, and the legal rights he was waiving by pleading guilty. Because the district court’s colloquy conformed with Mont. Code Ann. § 46-12-210’s requirements, the district court correctly determined that good cause did not exist for Hawk to withdraw his no contest plea.

**III. The district court did not commit reversible error when it did not appoint conflict counsel to represent Hawk on his request to withdraw his no contest plea.**

Hawk contends that the “district court committed plain error when it refused to appoint conflict counsel” to represent Hawk on his motion to withdraw his no contest plea. (Appellant’s Br. at 39-40.) This Court will sparingly invoke on a case-by-case basis the plain error doctrine to review “*unpreserved* claims alleging

violation of fundamental constitutional rights, under the common law.” *State v. Reim*, 2014 MT 108, ¶ 29, 374 Mont. 487, 323 P.3d 880 (emphasis added). The appellant bears the burden of convincing this Court that “failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *Id.*

Here, this Court should not invoke plain error to review Hawk’s claim as Hawk already raised the issue of whether conflict counsel should be appointed at the February 18, 2021 hearing. (*See* 2/18/21 Tr. at 11-12.) Furthermore, Hawk fails to explicitly argue that this Court should invoke plain error to review Hawk’s claim that conflict counsel should have been appointed to represent him following Hawk’s oral request to withdraw his no contest plea. This Court will not address claims void of legal analysis or discussion. *See* Mont. R. App. P. 12(1)(g).

The district court did not commit reversible error when it did not appoint Hawk conflict counsel after Hawk’s request to withdraw his no contest plea based on concerns of ineffective assistance of counsel. At the end of the February 18, 2021 hearing, the district court requested that Hawk, through his attorneys, submit a request to withdraw his no contest plea. (2/18/21 Tr. at 8.) Hawk’s attorney then inquired with the district court if he expected counsel to file a motion to withdraw based on Hawk’s attorneys alleged ineffective assistance. (2/8/21 Tr. at 9.) The

district court explained that he wanted a motion to set forth the basis for which Hawk wanted to withdraw his no contest plea and that if his counsel felt conflicted, then the district court could appoint special counsel to assist Hawk. (*Id.*) The district court, however, stated that, at this point, he did not believe that Hawk had raised any seemingly substantial concerns that would require the district court to appoint separate counsel to Hawk to file the request to withdraw his no contest plea. (*Id.* at 9-13.)

Hawk's counsel filed a motion to withdraw his no contest plea that included four bases in support of Hawk's request. Hawk twice confirmed that the bases alleged in the *Notice* were accurate. At the *Gallagher* hearing, Hawk was able to expound on the reasons why he wished to withdraw his guilty plea. In turn, his attorneys were allowed to respond to those reasons. At the hearing, the district court ultimately concluded that there had been no concerns of ineffective assistance of counsel. The district court accordingly did not err when it did not appoint conflict counsel to represent Hawk on his motion to withdraw his no contest plea.

**CONCLUSION**

The State respectfully requests that Hawk’s conviction and sentence be affirmed.

Respectfully submitted this 22nd day of September, 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 6,111 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Cori Losing  
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## CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-22-2022:

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