
STATE OF MONTANA,

Plaintiff and Appellee,

v.

COLTER HELTON HENRY,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, the Honorable Jennifer B. Lint, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that Appellant, Colter Helton Henry, has no non-frivolous basis for an appeal of his convictions of 1) burglary, and 2) criminal mischief. Undersigned counsel, therefore, moves this Court to allow counsel to withdraw from representing Appellant in this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967). If this Court deems there to be issues meriting briefing, counsel requests this Court specify the issues to be briefed and deny the motion without discharging undersigned counsel.

STATEMENT OF THE ISSUE

Should undersigned counsel and ADD be permitted to withdraw from representing Mr. Henry in accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE CASE

On August 11, 2021, a Ravalli Deputy County Attorney filed an Information charging Mr. Henry with burglary, a felony, in violation of Mont. Code Ann. § 45-6-204(1)(b); and with criminal mischief, a misdemeanor, in violation of Mont. Code Ann. § 45-6-101(1)(a) (D.C.

Doc. 4), based on allegations he unlawfully entered a property on July 29, 2021 from which he had recently been evicted, caused damage to the building when entering, and caused damage to drywall on the ceiling while inside. (D.C. Doc. 1 at 1-3.) Mr. Henry pleaded not guilty to both charges at arraignment (D.C. Doc. 9.20.)

Mr. Henry's jury trial was delayed on January 6, 2022 (D.C. Docs 17.20, 18, 19) and March 10, 2022 (D.C. Docs 32-35) because of his decompensating mental health and failure to comply with the conditions of his release. On August 4, 2022, defense counsel informed the District Court that a plea agreement had been signed and requested that a change of plea hearing be set (D.C. Doc. 43.10). On August 11, 2022, Mr. Henry pled guilty to both charges. (D.C. Doc. 44.10.) (See Judgment (D.C. Doc. 55; attached as App. A).

The District Court sentenced Mr. Henry on September 29, 2022 as follows. As to Charge I, felony burglary: six years deferred, conditioned upon completion of NEXUS or another inpatient treatment program designated by the Department of Corrections and subsequent completion of the Veteran's Treatment Court Program in Great Falls. (*Sentencing Hearing Transcript, Tr. 09/29/2022*, p. 7; attached as App.

B.) The District Court also imposed restitution, surcharges, and 141 days of jail time with credit for 81 days served (*Tr. 09/29/2022*, p. 7). As to Charge II, criminal mischief, a misdemeanor: commitment to the Ravalli County Detention Center for 25 days, to run consecutive with Charge I, with credit for 25 days served. (*Tr. 09/29/2022*, p. 8.) The District Court did not impose a fine for either charge. The District Court imposed the conditions as set forth in the Plea Agreement and Pre-Sentence Investigation (PSI) Report. (*Tr. 09/29/2022*, pp. 8-9.)

Mr. Henry filed an out-of-time appeal *pro se* with this Court, which was granted, on the grounds that he was unable to communicate with his attorney and that he was unaware of his rights.

STATEMENT OF THE FACTS

Mr. Henry suffers from Post-Traumatic Stress Disorder and anxiety and is prescribed medication for his anxiety. (D.C. Doc. 46 at 5.) Moreover, he struggles with addiction. (*Tr. 09/29/2022*, p. 5.) Mr. Henry has had some mental health issues while staying long term in detention before. (*Tr. 09/29/2022*, p. 9.)

According to the charging documents, on July 29, 2021, Mr. Henry was observed at a property from which he had recently been evicted by

the property owner. (D.C. Doc. 1 at 2.) The property owner informed the property manager, who reported the trespass in progress to law enforcement. (D.C. Doc. 1 at 2.) The property owner confronted Mr. Henry and asked how he got into the garage. (D.C. Doc. 1 at 2.) She said he told her he crawled through the attic space from the door on the outside of the building. (D.C. Doc. 1 at 2.)

The responding deputy spoke with the property manager, who informed him that all doors and windows in the garage were previously locked and that there was damage to the drywall on the ceiling of the garage. (D.C. Doc. 1 at 2.) The deputy spoke with Mr. Henry, who admitted being on the property but denied being in the garage. (D.C. Doc. 1 at 2.) The deputy reported Mr. Henry damaged two window screens to the garage, loosened screws to the attic door, and determined Mr. Henry unlawfully entered the garage attic space, damaging the drywall on the ceiling while in the attic when entering the main portion of the garage. (D.C. Doc. 1 at 2-3.)

In the time between the offense in this case and the entry of Mr. Henry's guilty pleas, Mr. Henry had a pending felony theft in Missoula County that "...[was] somewhat similar in fact pattern to Mr. Henry's

pending Ravalli County felony and exhibits that Mr. Henry’s ‘thinking’ about where he lives and what he owns may not always be based in reality.” (D.C. Doc. 25, *Motion for Release on Own Recognizance with Conditions*, 01/26/2022, p. 4.) Multiple hearings were held in Mr. Henry’s Ravalli County case. The issue of his mental health was raised and the following excerpts taken from status hearings and a revocation of bail hearing reflect, to some extent, Mr. Henry’s mental state as may be relevant to this Court’s determination of whether any non-frivolous basis for an appeal of his convictions exists.

Status Hearings

During a status hearing that occurred on February 17, 2022, the Court, the State, and defense counsel discussed Mr. Henry’s mental illness:

Defense counsel: “As Your Honor will recall in my motion to OR him two weeks ago, Mr. Henry is a very well acknowledged service-connected mentally ill young man. Mr. Lakin and I have been working with the Missoula County attorney as well as his attorney in Missoula. I’m trying to get him into veterans (sic) treatment court there.” (*Status Hearing Transcript, Tr. 02/17/22*, p. 3; attached as App. C.)

Defense counsel: “Colter is supposed to have his long-awaited mental health evaluation tomorrow at the veterans

(sic) center in Missoula. I understand now Colter is homeless because the hotel voucher wasn't able to maintain his stay because he called law enforcement in Missoula on his own because he continued to believe that there were people in his room.” (*Tr. 02/17/22*, p. 4.)

The State: “[...] It appears that Mr. Henry has somewhat gone off the rails. I don't think it's entirely of his own making. In these types of mental health situations, I'm sure that Your Honor is aware and cognizant of the fact that mental health care is sometimes best provided from a custodial perspective. If Mr. Henry is sort of wandering about and we don't know where he is, the likelihood of him showing up for appointments is slim to none. If we at least get him back in the detention center, we know where he is and we can probably -- I thought that's what Ms. Hill and I had discussed and why we set it the way we did today, to get him back in a custodial status so that would perhaps expedite him proceeding down this path more towards treatment. I'm not optimistic this is going to occur with him out of custody.” (*Tr. 02/17/22*, pp. 4-5.)

The Court: “Okay. So I don't disagree that we need to get Mr. Henry on services, but I am going to disagree with Mr. Lakin that sometimes the best place for folks is detention. I had a very informative mental commitment case with a combat related veteran, and he was able to articulate just exactly how damaging being incarcerated is. I am concerned that Mr. Henry doesn't seem to be law abiding when he's out and about. I'm going to hold off on that warrant. Mr. Carter, if I could just ask you to do what you can -- see what you can do to try to get ahold of Mr. Henry, but he will need to be here next week, and if he's not, then we will issue that warrant.” (*Tr. 02/17/22*, p. 6.)

At the status hearing a week later on February 24, 2022, defense counsel informed the Court “that Colter did admit himself voluntarily

for some psychiatric help last week. That is good news, that he's seeking help when he needs it.” (*Status Hearing Transcript, 02/24/22*, p. 4; attached as App. D.) “So at this point we do need some court ordered conditions to help move us forward for him to get admission to treatment court.” (*Tr. 02/24/22*, p. 8.)

Revocation of Bail Hearing

The District Court held a hearing on revocation of bail on March 24, 2022. The transcript of that proceeding further demonstrates Mr. Henry’s deteriorated mental health condition while he was awaiting trial—or, as it turned out, in the lead up to his change of plea:¹

Mr. Henry: “I don't see -- And I don't see why there was a warrant out for my arrest anyway. Last time they said there was a release on my own recognizance.”

The Court: “Yes, and you were supposed to—”

Mr. Henry: “I was released on my own recognizance.”

The Court: “You were supposed to—”

Mr. Henry: “Your Honor, I posted bail.”

¹ E.g., “[t]hrowing me away is just absolutely absurd, honestly. I'm trying as hard as I possibly can, and then I just get thrown away. I wasn't even released on my own recognizance last time, Your Honor. I posted bail with my father. My father came and posted bail. And then I get released on my own recognizance for these types of stipulations that I have to abide by on my own recognizance. That doesn't make sense.” (*Tr. 03/24/22*, p. 8.)

The Court: “Mr. Henry, you were supposed to have done certain things, which included providing the name of—”

Mr. Henry: “I don't understand.”

The Court: “--the provider that you were going to have your evaluation, and that didn't get done. So what I'm going to suggest is that you visit with Ms.—”

Mr. Henry: “I did do that, Your Honor. I've done all of these things.”

[Defense counsel]: “Colter, you've got to let the judge talk, and I promise if you call me over the lunch hour we can talk more. Okay?[...]”

(Revocation of Bail Hearing Transcript, Tr. 03/24/22, pp. 7-8; attached as App. E).

Change of Plea Hearing

At the change of plea hearing on August 11, 2022, the Court noted that the Plea Agreement had been filed and asked defense counsel whether a guilty plea and waiver of rights form would also be filed.

(Change of Plea Hearing Transcript, Tr. 08/11/22, p. 3; attached as App. F.) Mr. Henry was present and indicated he had signed it “and turned it in.” *(Tr. 08/11/22, p. 3.)* The Court then inquired of Mr.

Henry: “So that sets forth the rights that you're waiving with your anticipated change of plea today. Do you have any questions on those

rights?” To which Mr. Henry responded, “No, Your Honor.” (*Tr. 08/11/22*, p. 3.)

The State then laid out the substance of the plea agreement and defense counsel agreed with the State’s summarization. (*Tr. 08/11/22*, pp. 3-5.) The Court explained to Mr. Henry that it was going to identify the charges against him and ask him to enter his plea. (*Tr. 08/11/22*, p. 5.) Mr. Henry pleaded guilty to both charges and defense counsel established a factual basis for the record. (*Tr. 08/11/22*, pp. 5-6.) The district court accepted the plea, ordered Probation and Parole to complete a PSI and to prescreen Mr. Henry for any mental health or drug treatment placements, and set sentencing for September 22, 2022. (*Tr. 08/11/22*, pp. 7, 9.) However, the guilty plea and waiver of rights form referred to in that hearing was never filed.

STANDARDS OF REVIEW

When the voluntariness of the plea is at issue, this Court reviews that ultimate mixed question of law and fact *de novo* to determine if the trial court was correct in holding that the plea was voluntary. *State v. Warclub*, 2005 MT 149, ¶24, 327 Mont. 352, 356-359, 114 P.3d 254, 258. This Court will generally not entertain arguments regarding the

voluntariness of the plea and request to withdraw it for the first time on appeal. *State v. Hoots*, 2005 MT 346, ¶¶ 25, 28, 330 Mont. 144, 149–50, 127 P.3d 369, 373.

Claims of ineffective assistance of counsel present mixed issues of fact and law that this Court reviews *de novo*. *State v. Ward*, 2020 MT 36, ¶15, 399 Mont. 16, 457 P.3d 955 (citations omitted). This Court will consider ineffective assistance of counsel claims on direct appeal if the claims are based solely on the record. *Ward*, ¶15 (citations omitted).

An abuse of discretion occurs when a court acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice. *State v. Nelson*, 2008 MT 359, ¶ 20, 346 Mont. 366, 373, 195 P.3d 826, 830 (citing to *Schuff v. Jackson*, 2008 MT 81, ¶ 15, 342 Mont. 156, 179 P.3d 1169).

With two narrow exceptions, this Court reviews criminal sentences for legality only. Under the first exception, if a defendant is sentenced to serve less than one year of actual incarceration, this Court reviews the sentence both for legality and for abuse of discretion. *City of*

Bozeman v. Cantu, 2013 MT 40, ¶ 11, 369 Mont. 81, 296 P.3d 461

(citations omitted).

DISCUSSION

I. The undersigned counsel should be permitted to withdraw from Mr. Henry’s appeal in accord with *Anders*.

As set forth in *Anders*, if counsel on appeal “finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” *Anders*, 386 U.S. at 744. The request to withdraw must be “accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744. The attorney must give a copy of the brief to the client, who must be afforded time to raise any point he chooses. Mont. Code Ann. § 46-8-103(2) (codifying the *Anders* requirements). “[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.” *Anders*, 386 U.S. at 744.

Here, the undersigned is compelled by her duty of candor before the Court in accord with *Anders* to provide this Court with notice that, after a review of the entire record and diligent research of the applicable statutes, case law, and rules, there are no non-frivolous

issues in this appeal. Without arguing against her client, counsel submits this brief which, in accord with *Anders* and Mont. Code Ann. § 46-8-103(2), discusses any issues that might arguably support an appeal. If this Court deems there are issues that merit briefing, counsel requests this Court specify the issues to be briefed.

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel has advised Mr. Henry of her decision regarding the merits of this appeal and informed him that he will have the right to file a response to this motion directly with the Court. Counsel also sent him a draft of this *Anders* brief in advance of filing.

II. Waiver of Claims by Guilty Plea.

Mr. Henry did not file a motion to withdraw his guilty plea with the district court, nor does the record contain any mention of Mr. Henry's dissatisfaction with his trial attorney. Mr. Henry did state the following, however, in his Petition for Out of Time Appeal:

“I have attempted to contact my attorney, [] during the times prompted and requested by her and haven't received any response or answer while incarcerated pre and post sentencing. I was not aware of my rights. During the entire time of council (sic), I had less than three minutes of phone time with her and she would not answer nor respond at all after sentencing.”

(*Petition for Out of Time Appeal*, p. 2.) Mr. Henry believes the District Court violated his rights in obtaining his conviction on the grounds that he was not aware of his rights when he entered his guilty plea—more specifically, he alleges that his guilty plea was not made knowingly, voluntarily, or intelligently, and that his trial attorney and the District Court failed to inform him of the rights he was waiving by entering a guilty plea. Because the Plea Agreement and Acknowledgement of Rights were separate forms (D.C. Doc. 44, p.3), Mr. Henry could have been confused in the video interaction with the judge in one location and his attorney in another location about what rights he was waiving when he pled guilty.

- A. The record might arguably support a claim that the District Court abused its discretion by accepting Mr. Henry’s guilty plea without ensuring he was informed of the rights he was waiving, whether he understood those rights, and whether he was satisfied with his counsel.**

A guilty plea is voluntary only when the defendant is “fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel[...].” *Brady v. United States*, 397 U.S. 742, 755, 90 S. Ct. 1463,

1472, 25 L. Ed. 2d 747 (1970) (quoting *Shelton v. U.S.* (5th Cir. 1957), 246 F.2d 571, 572 n. 2 (en banc), rev'd on other grounds, 356 U.S. 26, 78 S.Ct. 563, 2 L.Ed.2d 579 (1958) (quotations omitted). When determining if a defendant entered a plea voluntarily, this Court examines case-specific considerations, including but not limited to the adequacy of the district court's interrogation, the benefits obtained from the plea bargain, and other considerations that may affect the credibility of the claims presented. *State v. Muhammad*, 2005 MT 234, ¶¶ 14, 24, 121 P.3d 521 (citations omitted).

Mr. Henry might wish to argue that his guilty plea was involuntarily made because the District Court's interrogation was inadequate. Montana law describes what rights a judge must advise a defendant of before accepting their guilty plea. Mont. Code Ann. § 46-12-210. "The statutory requirements apply to the proceeding at which a guilty plea is to be accepted[.]" *State v. Enoch*, 269 Mont. 8, 16, 887 P.2d 175, 180 (1994). This Court has determined that a judge's interrogation on a change of plea is adequate where the judge: "...examines the defendant, finds him to be competent, and determines from him that his plea of guilty is voluntary, he understands the charge and his possible

punishment, he is not acting under the influence of drugs or alcohol, he admits his counsel is competent and he has been well advised, and he declares in open court the fact upon which his guilt is based.” *State v. Mahoney*, 264 Mont. 89, 94-95, 870 P.2d 65, 69 (1994) (citations omitted).²

Mr. Henry may assert that the District Court made no effort to interrogate him at the pre-sentencing hearing where the oral plea deal was announced other than to confirm that he had completed the waiver of rights form and ask whether he had any questions about the rights he was waiving by entering a guilty plea (*Change of Plea Hearing Transcript, 08/11/2022*, p. 3); and that the Court’s interrogation was consequently inadequate as a matter of law rendering his guilty plea facially involuntary.

The statutorily required advisement may be accomplished by the defendant filing a written acknowledgment. Mont. Code Ann. § 46-12-210(2). Here, during the District Court’s advisement of rights before Mr. Henry’s plea, the Judge asked Mr. Henry whether he had any questions

² *Mahoney* citing to *State v. Walker*, 220 Mont. 70, 72, 712 P.2d 1348, 1350, which cites to *State v. Lewis*, 177 Mont. 474, 485, 582 P.2d 346, 352—which is abrogated by *Fjelsted v. State Through Dept. of Highways*, 267 Mont. 211, 220, 883 P.2d 106, 111 (1994) on other grounds.

about the rights he would be waiving with his anticipated change of plea. (*Tr. 08/11/22*, p. 3.) The Judge believed Mr. Henry had been advised of his rights per the requirements of Mont. Code Ann. § 46-12-210(1) via 46-12-210(2) but the waiver of rights form was never filed. Thus, the record fails to show whether Mr. Henry was in fact sufficiently advised of his rights before entering a guilty plea. Mr. Henry did not testify that he understood the charges against him and possible punishments, that he was pleading voluntarily, was not under the influence of drugs or alcohol, or that he was satisfied with the assistance of his counsel. As a result, Mr. Henry pled guilty to a felony burglary charge based on the intent to commit criminal mischief when the damage to the drywall appears to have occurred when he legitimately rented the storage unit and before he broke back into it. (*Statement of Linda Fickett*, D.C. Doc. 54.) Without the specific intent to commit criminal mischief—i.e., to damage the property of another—Mr. Henry would have only been guilty of a misdemeanor trespass.

Mr. Henry might also wish to argue that, in light of the information available to the District Court about his mental health, the District Court erred in failing to further inquire about his mental state

and capacity to enter a knowing and voluntary plea. Requiring Mr. Henry to complete a mental health evaluation before allowing him to enter a guilty plea would have resulted in assurances his plea was voluntarily made.

If Mr. Henry could demonstrate that his mental health was compromised at the time he entered his guilty plea, that fact would be a case-specific consideration that might bolster the credibility of a claim that the District Court's interrogation was inadequate, that the Court failed to inquire into Mr. Henry's satisfaction with his counsel, and that his guilty plea was involuntarily made.

Mr. Henry might wish to assert that the District Court abused its discretion by failing to inquire into the competency of his counsel at the change of plea hearing, and that the error was not harmless. In *Bowley*, this Court held that such an oversight was not harmless error (*see State v. Bowley* (1997), 282 Mont. 298, 307, 938 P.2d 592, 597). In that case, the court did not inquire into whether Bowley was satisfied with his counsel and the written acknowledgment of rights was not executed until two weeks after the change-of-plea hearing (and therefore after Bowley's oral request to withdraw his guilty plea during the change of

plea hearing). *Warclub* at ¶33 citing to *Bowley* at 301–02. This Court concluded that the written acknowledgment of rights did not satisfy the requirement that the trial court inquire into the defendant's satisfaction with his counsel specifically because the written acknowledgment was untimely. *Warclub*, ¶33 (citing to *Bowley* at 307).

In Mr. Henry's case below, the allegedly signed waiver of rights by guilty plea form was never filed and could similarly not satisfy the requirement that the trial court inquire into the defendant's satisfaction with his counsel. Mr. Henry might wish to argue that good cause exists to permit the withdrawal of his guilty plea because the District Court's interrogation was inadequate at the time he entered his guilty plea, and that his case should be remanded for the District Court to allow him to withdraw his guilty plea and proceed to trial on the charges.

B. Ineffective Assistance of Counsel.

Mr. Henry might wish to argue that defense counsel's failure to raise a mental health defense constitutes deficient performance and prejudiced the proceedings against him. Before reaching the merits of ineffective assistance of counsel claims, it is necessary to determine whether such claims are properly before the court or whether they are

procedurally barred by Mont. Code Ann. § 46-21-105(2). *See Hagen v. State*, 1999 MT 8, ¶ 11, 293 Mont. 60, 973 P.2d 233. The record might arguably support a claim that Mr. Henry's counsel was ineffective for failing to raise a mental health defense. The record demonstrates that Counsel failed to raise such a defense on his behalf, which is analogous to trial counsel failing to object on a defendant's behalf where doing so would have been appropriate; therefore, the claim would be record-based and appropriately raised on direct appeal. (*See, e.g., Hagen* at ¶20.) The Sixth and Fourteenth Amendments of the United States Constitution and Article II, §24 of the Montana Constitution guarantee the right to effective assistance of counsel. In considering ineffective assistance of counsel claims on direct appeal, this Court applies the two-pronged test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Hagen*, ¶ 10.

Strickland's two-part test requires that Mr. Henry show that his counsel's performance was deficient in not adequately raising a mental health defense and that this prejudiced him and deprived him of a fair proceeding. *See Strickland*, 466 U.S. at 687. Mr. Henry must

demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Here, defense counsel was aware of Mr. Henry’s considerable ongoing mental health issues during the period in which the offense occurred and could have raised the issue of Mr. Henry’s fitness to proceed.³ Mont. Code Ann. § 46-14-221(1) permits the issue of a defendant’s fitness to proceed to be raised by the court, the defendant, the defendant’s counsel, or by the prosecutor; when so raised, the issue must be determined by the court. If the court determines the defendant lacks fitness to proceed, the proceeding against the defendant must generally be suspended and the court shall commit the defendant to the custody of the director of the Department of Public Health and Human Services to be placed in an appropriate mental health facility or

³ See D.C. Doc 25, Motion for Release on Own Recognizance with Conditions (01/26/2022), p. 2-3: “Mr. Henry had been participating in the services offered through the Volunteers of America (Missoula office), however by his team’s observation, Mr. Henry has been cognitively declining for a number of years, relating to what appears to be a serious and now disabling mental illness.

Mr. Henry has routinely connected himself to appropriate services, including mental health/housing support in the Missoula area but then disengages, specifically choosing to physically leave Missoula, and go to “live in the mountains” outside of Ravalli County, where it is understood that Mr. Henry flees to find calmness or serenity from his mental health struggles, and thereafter he becomes completely disconnected and mentally ‘lost’.

Mr. Henry does have a mental health diagnosis from the US Department of Veteran Affairs, however Mr. Henry is not currently able to be a good reporter for his own diagnosis, and his team strongly believes he is in need of a new evaluation and likely related medication.”

residential facility as defined in Mont. Code Ann. §53-21-102 for so long as the unfitness endures or until disposition of the defendant is made pursuant to Mont. Code Ann. § 46-14-221(2)(a), whichever occurs first. The facility would be required to develop an individualized treatment plan to assist the defendant to gain fitness to proceed per (2)(b), and the committing court would be required to review the defendant's fitness to proceed within 90 days of commitment per (3)(a). If the court determines that the defendant lacks fitness to proceed because of a mental disorder, the proceeding against the defendant must be dismissed and the prosecutor shall petition the court in the manner provided in Title 53, chapter 21, to determine the disposition of the defendant pursuant to those provisions. Mont. Code Ann. § 46-14-221(3)(b).

Moreover, Mr. Henry might want to bolster such a claim by asserting that defense counsel's failure to raise a mental health defense on his behalf before his change of plea ran afoul of an implied duty to advocate on his behalf per Montana Rule of Professional Conduct 1.14(b), which states that "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical,

financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." However, "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Montana Rules of Professional Conduct, Preamble; 21.

The record does not contain a mental health evaluation or an opinion of a mental health evaluator regarding fitness or the mental disease or defect defense despite that the Court and trial counsel did, on multiple occasions, confer about such an evaluation during proceedings while Mr. Henry was awaiting trial.

III. The record might arguably support a claim that the District Court abused its discretion in sentencing Mr. Henry, in violation of Montana's sentencing policy, because the sentence was unnecessary for his rehabilitation and does not make Montana safer.

To achieve the correctional and sentencing policies set forth in Mont. Code Ann. § 46-18-101, Montana district courts are granted

“judicial discretion to consider aggravating and mitigating circumstances.” Mont. Code Ann. § 46-18-101(3)(d). When imposing sentence, the court may also consider any relevant evidence relating to the nature and circumstances of the crime, the character of the defendant, his background, mental and physical condition, and any evidence the court considers having probative force. *State v. Morris*, 2010 MT 259, ¶ 17, 358 Mont. 307, 245 P.3d 512 (citations omitted). *See also* Mont. Code Ann. § 46-18-302. District courts are granted broad discretion to determine the appropriate punishment for a conviction. *State v. Alden*, 282 Mont. 45, 51, 934 P.2d 210, 214 (1997) (citations omitted). This Court has consistently recognized that a district court is in the best position to consider the evidence before it. *Morris*, ¶20.

Mr. Henry might wish to argue that his lengthy deferred sentence is a substantial injustice because he can be successfully treated, and his mental health and sobriety adequately monitored, in much less time and with less restrictive treatment options. Article II, § 28 of the Montana Constitution provides that laws for the punishment of a crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims. Although the sentence may be

within statutory parameters, it is not commensurate with the nature and degree of harm from Mr. Henry's offense and does not adequately consider his mental health and addiction struggles, or the physical and psychological hardship he suffered due to the arrest. Mr. Henry may wish to assert that the District Court did not adequately provide for mitigation given his mental health struggles, rendering his sentence excessively harsh in light of the circumstances, and that its sentence was therefore an abuse of discretion.

CONCLUSION

Undersigned counsel has concluded that this appeal presents no meritorious issues and therefore this Court should grant the undersigned's motion to withdraw as counsel on direct appeal. If the Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order and allow undersigned counsel to remain on the case and to proceed with briefing.

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Respectfully submitted this 18th day of June, 2024.

OFFICE OF STATE PUBLIC DEFENDER
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,280, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jennifer L. Penaherrera
JENNIFER L. PENAHERRERA

APPENDIX

Judgment, D.C. Doc. 55.....App. A

Sentencing Hearing Transcript, 09/29/22, pp. 5-9.....App. B

Status Hearing Transcript, 02/17/22, pp. 3-6.....App. C

Status Hearing Transcript, 02/24/22, pp. 4-8.....App. D

Revocation of Bail Hearing, 03/24/22, pp.7-8.....App. E

Change of Plea Hearing, 08/11/22, pp. 3-9.....App. F

CERTIFICATE OF SERVICE

I, Jennifer Lynn Penaherrera, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 06-18-2024:

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