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COURT OF APPEALS, STATE OF COLORADO

2 E. 14th Avenue
Denver, CO 80203

El Paso County District Court
Honorable David Lee Shakes, Judge
Case No. 11CR1232

PLAINTIFF-APPELLEE:
PEOPLE OF THE STATE OF COLORADO

DEFENDANT-APPELLANT:
ERIC MANLY

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Case No. 16CA2147

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with the applicable word limit set forth in C.A.R. 28(g). It contains 5,514 words.

2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Tara Jorfald

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II. Whether the district court erred in finding that Mr. Manly knowingly, voluntarily, and intelligently pleaded guilty.

STATEMENT OF THE CASE AND FACTS

Mr. Manly was charged by a direct-filed complaint with second-degree murder, attempted second-degree murder, two counts of menacing, possession of hand gun by a juvenile, and two counts of prohibited use by a juvenile. (R. CF, pp. 1-2.)

The charges arose out of an incident where Mr. Manly shot Jack Smith after a fight broke out during a party outside Mr. Manly's home. (R. Tr. 8/3/16, p. 38:17-22; R. Suppressed, p. 4.) During the fight, Mr. Manly was punched in the jaw and lost several of his teeth. (R. Tr. 8/3/16, p. 38:17-22; R. Suppressed, p. 4.) As the fight continued, Mr. Manly escaped into his home and retrieved a gun. (R. Tr. 8/3/16, p. 39:13-19; R. Suppressed, p. 4.) He returned outside, and as his friends were still being attacked, he raised the gun and asked Mr. Smith and Mr. Smith's friends to leave. (R. Tr. 8/3/16, p. 39:13-19; R. Suppressed, p. 4.) When

Mr. Smith started approaching him and did not retreat, Mr. Manly shot and killed him. (R. Tr. 8/3/16, p. 39:13-19; R. Suppressed p. 4.)

Mr. Manly was sixteen years old. (R. CF, pp. 1, p. 100.)

On the advice of counsel, Mr. Manly pleaded guilty to second-degree murder (heat of passion) and, in exchange for the guilty plea, the rest of the charges were dismissed. (R. Tr. 7/13/11, pp. 4:16-23, p. 16:4.)

The plea agreement specified that if the court imposed a sentence to the department of corrections (DOC), it would be within a range of ten to twenty-five years with five years of mandatory parole, and if the court imposed a sentence to the department of youth corrections that there would be a stipulated six-year sentence to the youthful offender system (YOS) with a suspended DOC sentence of between ten and thirty-two years. (R. Tr. 7/13/11, p. 10:12-16.)

Mr. Manly understood the offer to mean that if his sentence to YOS was revoked he would be resentenced to the DOC. (R. Tr. 8/3/16, p. 24:17-23.) He did not understand that the court could initially sentence him to the DOC. (R. Tr. 8/3/5, pp. 16:1-24, 24: 17-24.)

The court sentenced Mr. Manly to the DOC for twenty-two years with five years of mandatory parole. (R. Tr. 9/21/11, p. 238:13-17.)

Mr. Manly then filed a timely petition for postconviction relief, which was

supplemented by counsel. (R. CF, pp. 121-135, 141-146, 225-231.)

In relevant part, Mr. Manly asserted that, considering his age and mental functional capacity, defense counsel was ineffective for not ensuring that he fully understood and could assess the seriousness of the legal proceedings, and without this understanding could not make a meaningful decision on whether to accept or reject the plea offer. (R. CF. pp. 226-229.) Specifically, defense counsel failed to ensure that Mr. Manly understood that he was risking a sentence in the DOC if accepted this plea if the court so chose. (R. CF, p. 230.)

Mr. Manly, further asserted that—for the same reason as above—his plea was not knowingly, voluntarily, or intelligently entered. (R. CF, p. 130).

After an evidentiary hearing, the court denied Mr. Manly postconviction relief. (R. CF, pp. 354-359.)

Mr. Manly appeals the district court's denial of postconviction relief.

SUMMARY OF THE ARGUMENT

The district court erred in finding that defense counsel was not ineffective for failing to ensure that Mr. Manly understood the consequences of pleading guilty.

Mr. Manly was sixteen years old when he pleaded guilty to second-degree murder. For various reasons, Mr. Manly's mother was unable to assist him in

understanding the plea agreement or help him decided whether to accept a plea offer. Defense counsel was deficient for allowing Mr. Manly to plead guilty without the assistance of a parent or guardian-ad-litem who could look after his best interests and ensure that he understood the plea offer.

Counsel's attempts to help Mr. Manly understand the plea offer, while appropriate, were not adequate to ensure that he was able to make an informed, meaningful decision on whether or not to enter the guilty plea. The role of a parent or guardian-ad-litem cannot be replaced by defense counsel.

There is a reasonable probability that, but for counsel's deficient performance, Mr. Manly would not have entered his guilty plea. There is objective corroborative evidence that Mr. Manly would not have accepted the prosecution's plea offer if he had properly understood it. Specifically, Mr. Manly made multiple requests for a parent to help him understand the plea offer, advised counsel he needed help understanding the plea, and made multiple requests to withdraw his plea.

The district court also erred in denying Mr. Manly's claim that his plea was not knowingly, voluntarily, or intelligently entered. Given the lack of guardian or parent to assist Mr. Manly in understanding the plea offer and Mr. Manly's developmental immaturity and cognitive deficiencies, it was unlikely that Mr.

Manly understood the plea agreement or advice provided to him during the providency hearing.

ARGUMENT

I. The district court erred in finding that defense counsel was not ineffective for failing to ensure that Mr. Manly understood the consequences of pleading guilty

A. Standard of review.

A claim of ineffective assistance of counsel presents mixed questions of law and fact. *Dunlap v. People*, 173 P.3d 1054, 1063 (Colo. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). When reviewing a district court's findings on a mixed question of law and fact, an appellate court defers to the district court's findings of fact if they are supported by the record but reviews legal conclusions de novo. *Id.*

This issue was preserved for appeal. In his pro se and supplemental petitions for postconviction relief, Mr. Manly asserted that he was denied effective assistance of counsel by his attorney's failure to adequately ensure he understood the consequences of pleading guilty. (R. CF., pp. 128-135, p. 141-146, and pp. 225-231.) After an evidentiary hearing the court denied his claim. (R. CF., pp. 354-359.)

B. Discussion.

A criminal defendant is constitutionally entitled to effective assistance of counsel. *Strickland*, 466 U.S. at 668. To succeed on a claim of ineffective assistance of counsel, a defendant must show the attorney's performance was deficient, and that he was prejudiced as a result of this deficient performance. *Id*.

Defense counsel's performance was deficient for failing to request appointment of a guardian ad litem to ensure that Mr. Manly understood the consequences of pleading guilty. Had counsel made the request and Mr. Manly understood the consequences of pleading guilty, he would have rejected the plea offer.

(1) Defense counsel's performance was deficient.

At the evidentiary hearing, defense counsel testified that Mr. Manly had trouble understanding the proceedings and the advice they were giving. (R. Tr. 7/25/17, pp. 59:22-60:4.) At the time counsel represented him, Mr. Manly was reading and writing at a sixth-grade level. (R. Tr. 7/25/16, p. 131:4-11.) Mr. Manly would take an extreme amount of time to read reports because he could not read or process them quickly. (R. Tr. 7/25/16, pp. 12:23-13:4.)

There was not a lot of verbal communication coming from Mr. Manly. (R. Tr. 7/25/16, p. 36:1-4.) He had a hard time sharing what he was thinking and

feeling. (R. Tr. 7/25/16, p. 74:3-4.) Counsel could not always rely on him to determine whether he understood what they were saying. (R. Tr. 7/25/16, pp. 36:1-4, 97:19-98:20.)

Often counsel had doubts as to whether Mr. Manly was understanding their advice, and got the sense that sometimes he was not asking the questions he needed to ask. (R. Tr. 7/25/16, p. 59:6-24.)

Lead counsel admitted that Mr. Manly's lack of understanding and his general situation led to him being frustrated with her. (R. Tr. 7/25/16, p. 46:13-27.) She was also frustrated with him for refusing to consider the prosecution's first two plea offers because she thought he was making a bad decision. (R. Tr. 7/25/16, pp. 99:17-110:13.)

When lead counsel relayed a third offer, she used "a pretty assertive tone"—one she had been criticized for by clients and their families. (R. Tr. 7/25/16, p. 102:7-10.) After giving this advice, Mr. Manly stormed out of the room. (R. Tr. 7/25/16, p. 71:20-25.) He returned, but sat and sulked, unable to verbalize why he was angry. (R. Tr. 7/25/16, p. 74:10-16.) Nonetheless, he advised counsel that he would accept the plea offer. (R. Tr. 7/25/16, pp. 97:19-98:20.)

When co-counsel was asked by the court whether Mr. Manly understood the advice, she responded:

> My problem is that I—I, I just can't say one way or the other. There was nothing about the experience that made me—that alarm bells were ringing saying, here's a huge problem, he doesn't understand this… But there wasn't anything else that I could say definitively, this assured me that he understood what was going on. I think, as I said before, Eric just wasn't very talkative. You didn't get a lot of responses from him. Many of his responses were nonverbal. They were shrugs. They were head nods. So no alarm bells but nothing to say for sure that he understood everything.

(R. Tr. 7/25/16, p. 34:19-22.)

Lead counsel could not recall going over the plea agreement with Mr. Manly but believed she would have gone over the paperwork thoroughly enough to ensure that he understood the paperwork, she claimed that she took extra steps to ensure that he understood everything going on—considering his age and trouble understanding. (R. Tr. 7/25/16, pp. 65:1, 67:17, 70:10, 97:19-98:20, 106:7-20, 113:16-11.)

While discussing the final offer, Mr. Manly asked to discuss the offer with his mother. (R. Tr. 7/25/16, p. 65:24.) Lead counsel advised that his mother was not in the position to give legal advice. (R. Tr. 7/25/16, p. 64:16-24.)

Counsel were concerned that Mr. Manly's mother was not capable of helping him make good decisions. (R. Tr. 7/25/16, pp. 10:7-17, 11:19-21.)

Mr. Manly's mother was highly emotional. (R. Tr. 7/25/16, pp. 10:7-17,

11:19-21.) She was drinking heavily and using drugs. (R. Tr. 7/25/16, pp. 63:8-9, 198:3-199:1.) She did not fully understand what was going on and did not have the cognitive resources to deal with the gravity of the situation. (R. Tr. 7/25/16, pp. 10:7-17, 11:19-21, 62:4-63:3.) She had a conflict because she was at home at the time of the shooting and the gun belonged to her boyfriend. (R. Tr. 7/25/16, pp. 10:20-24, 62:4-63.) There were "rumblings" at the district attorney's office that she could potentially be charged with a felony. (R. Tr. 7/25/16, pp. 62:4-63:3.)

Mr. Manly's mother was the only parental figure in his life and her advice weighed heavily with him. (R. Tr. 7/25/16, p. 33:2-4.)

When his mother understood that he might take a plea offer, and it was going to make her look guilty, she started pushing Mr. Manly to go to trial. (R. Tr. 7/25/16, pp. 62:22-25, 65:1, 67:17, 70:10.)

Despite the recognized parental conflict and concerns about Mr. Manly's ability to understand, counsel did not consider requesting appointment of a guardian ad litem. (R. Tr. 7/25/16, pp. 13:10, 61:9-16.) Lead counsel did not like the idea of someone else talking to Mr. Manly about the case. (R. Tr. 7/25/16, p. 61:9-16.)

After pleading guilty, but prior to sentencing, Mr. Manly advised counsel

that he wanted to withdraw his plea. (R. CF, p. 258; R. Exhibits, p. 23.)

After sentencing, Mr. Manly wrote to lead counsel and her office stating that he felt pressured into taking the offer, he wanted to fire counsel, withdraw his plea, and go to trial. (R. Exhibits, pp. 20, 22.) He further asked lead counsel to speak with his mother so that his mother could help explain to him what was going on. (R. Exhibits, p. 22.)

Counsel had no recollections of addressing Mr. Manly's concerns about withdrawing his plea. (R. CF, p. 258; R. Tr. 10/6/16, pp. 15-16.)

At the evidentiary hearing, postconviction counsel argued that the following evidence demonstrated that Mr. Manly's attorneys were deficient for not requesting appointment of a guardian ad litem because:

> Mr. Manly and counsel were frustrated with each other.
>
> Mr. Manly's mother had a conflict and was unable to help her son.
>
> Mr. Manly was only sixteen and was reading and writing at a sixth-grade level.
>
> Counsel had observed that he was having a hard time understanding.
>
> Mr. Manly requested help from his mother.
>
> Mr. Manly requested that counsel consult with his mother so that she could have her explain things to him.

> Mr. Manly requested to withdraw his plea prior to and after sentencing.

(R. Tr. 10/6/16, pp. 13:17-14:25.)

In finding no deficient performance, the court ruled that Mr. Manly "presented no expert testimony or other persuasive evidence that the failure to request a guardian ad litem fell below the standard expected of effective defense counsel at the time." (R. CF, p. 339.)

The court additionally found:

> Counsel did not prevent Mr. Manly from discussing the case with his mother.
>
> Counsel did not find it necessary to appoint a guardian.
>
> Counsel took extra time and attention to explain the case to him in light of his age and immaturity.
>
> Counsel "were clear in their testimony" that Mr. Manly understood the plea offer.

(R. CF, pp. 336, 339.)

First, the trial court erred in finding that counsel testified that Mr. Manly clearly understood the advice. As co-counsel testified, she could not be sure that Mr. Manly understood their advice. (R. Tr. 7/25/16, p. 34:19-22.)

Moreover, while lead counsel testified that she did everything she could to ensure that Mr. Manly understood the advice, she could not recall specifically

those discussions. (R. Tr. 7/25/16, pp. 65:1, 67:17, 70:10, 97:19-98:20.)

Second, the trial court erred in finding that counsel's extra review with Mr. Manly was sufficient to ensure he understood the plea offer. Given the conflict with his mother, a guardian was needed to ensure that Mr. Manly understood what he was doing.

Sufficient legal authority supports that in cases like this—where there is a conflict with the parent, the client is a juvenile, and has trouble understanding that defense counsel is required to ask for appointment of a guardian prior to having that client accept or reject a plea offer. An expert was not necessary to show that counsel was deficient for not appointing a guardian.

Defendants are entitled to effective assistance of counsel during plea negotiations so that they can make voluntary and intelligent decisions. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Counsel must ensure the defendant is able to make an informed, meaningful decision on whether or not to enter a guilty plea. *Carmichael v. People*, 206 P.3d 800, 806 (Colo. 2009).

An attorney's performance is deficient when it distorts the defendant's decision-making process, as it deprives the defendant of the right to make certain fundamental decisions about whether to plead guilty. *Jones v. Barnes*, 463 U.S.

745, 751 (1983).

A defendant's juvenile status warrants unique considerations and protections due to their diminished capacity. *See, e.g.*, *In J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2397 (2011). Juveniles are at a significant disadvantage in criminal proceedings. *Graham v. Florida*, 560 U.S. 48, 78 (2010). They have limited understandings of the criminal justice system and the roles of the institutional actors within it. *Id.* Moreover, juveniles during adolescence often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). Accordingly, juveniles need assistance in the making of important, affirmative choices with potentially serious consequences. *Id.*

Both counsel and the court have a stringent duty to make sure a juvenile considering his age, intelligence, and lack of experience understand the charges and consequences of plea. *See, e.g.*, *Rinehart v. Brewer*, 561 F.2d 126, 130 (8th Cir. 1977). "Regardless of whether defense counsel informed the defendant of the sentence, counsel [are] ineffective where [they do] not adequately follow up to ascertain whether the defendant and his parents fully understood those possibilities." *Id.*

The National Juvenile Defense Standards require that counsel take extra

steps to deal with the dismissed capacity of a juvenile client. *See* National Juvenile Defender Center, National Juvenile Defense Standards (2013) std. 2.6, commentary, p. 46 ("Counsel must be attuned and sensitive to the strengths and weaknesses of their clients. Even when the client has the competence to proceed with trial, counsel should be wary of developmental immaturity [and] developmental/intellectual disabilities that may inhibit the client's ability to communicate with counsel. Counsel must be conscious of how the special developmental stages and attributes of youth may affect a client's reasoning and decision-making.").

This includes consulting with experts or other third parties when necessary to ensure the client has fully understood the communication. See National Juvenile Defender Center, National Juvenile Defense Standards (2013) std. 2.6, p. 45 ("Counsel must take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication or counsel's ability to ascertain the client's expressed interests. Counsel must work to overcome barriers to effective communication by being sensitive to differences, communicating in a developmentally appropriate manner, enlisting the help of outside experts or other third parties when necessary, and taking time to ensure the client has fully understood the communication.").

Although these standards were issued in 2013, they were based on a solid foundation laid over the decades by legal scholars, social scientists, ethicists, commentators, and practitioners, and reforms already on their way in Colorado. National Juvenile Defender Center, National Juvenile Defense Standards (2013), p.3 and p. 8. This was acknowledged in large part by a division of this court in 2001. *See People v. Simpson*, 51 P.3d 1022, 1027 (Colo. App. 2001), *rev'd*, 69 P.3d 79 (Colo. 2003).

In cases of diminished capacity, where the defendant is at substantial risk of not understanding counsel's advice, counsel must take reasonable action, including seeking the appointment of a guardian ad litem to ensure that the defendant is adequately able to understand and assess a plea offer. *See* Colo. RPC 1.14(b) (Client with Diminished Capacity).

In Colorado, when a juvenile is charged by direct filing of an information in the district court, the court in its discretion may appoint a guardian ad litem. § 19-2-517 (8), C.R.S. 2016. The purpose of a guardian ad litem is to "act in the best interests" of the juvenile they are appointed to represent. § 19-1-103(59), C.R.S., 2016. In juvenile proceedings, guardians ad litem may be appointed when the juvenile does not have a parent or guardian, when there is a conflict of interest between the parent and the juvenile, or when the court finds appointment of a

guardian is "necessary to serve the best interests of the child." § 19-1-119(2)(a), C.R.S. 2016.

This presence is intended to protect the juvenile, especially in proceedings where a juvenile may be able to waive a fundamental right. For example, parental presence is required by section 19-2-511(1) for all police interrogations of juveniles. § 19-2-511(1), C.R.S. 2016; *People v. White*, 64P.3d 864, 873 (Colo. App. 2002). To satisfy the intent of section 19-2-511(1), parents must be able to provide "effective guidance and advice" by freely giving advice to their child. *People in Interest of L.B.*, 513 P.2d 1069 (Colo. App. 1973). If parents are prevented from giving effective guidance by reason of a conflict of interest against the juvenile, the juvenile receives little protection provided by the presence of their parent, and the juvenile's statements cannot be considered to have been given voluntarily, knowingly, or intelligently. See *People v. Legler*, 969 P.2d 691, 691 (Colo. 1998).

Likewise, a guardian ad litem, acting in the juvenile's best interest, is able to assist and alert defense counsel and, when necessary, the court, to any issues impacting the validity of any plea made by the juvenile. *See*, *e.g.*, *Legler*, 969 P.2d at 691; Colo. R. Crim. P. 11(b) (setting forth findings the court must make prior to accepting a plea of guilty).

A division of this court has recognized parental or guardian involvement is integral to helping a juvenile understand the nature of his rights and the consequences of waiving those rights. *See Simpson*, 51 P.3d at 1027 (citing *Model Rules for Juvenile Courts*, Rule 39 (1969) (advocating that waiver of right to counsel be made in the presence of parent, guardian or custodian)); *see also* Institute of Judicial Administration—American Bar Association, *Juvenile Justice Standards Annotated*, §§ 3.6, 3.7, 5.1, 6.1, 6.2 (Robert E. Shepard, Jr. ed., 1996) (recommending that the right to counsel not be waivable, that only mature juveniles may waive other rights after consultation with both counsel and parent, and that a juvenile court not accept a guilty plea unless juvenile has been given effective assistance of counsel and court inquires from parents who are present in court whether they concur in the plea decision); *Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System: Trial Report January 1994*, 20 Wm. Mitchell L.Rev. 595, 605–06 (1994) (recommending mandatory counseling for juveniles charged with felonies prior to waiver of counsel or entry of plea and procedures to promote parent's or guardian's participation in these decisions)).

A question on certiorari currently before our supreme court is whether a child charged as an adult with first-degree murder, whose parent had a conflict,

was entitled to a guardian-ad-litem to assist with his defense and to advise him regarding the waiver of his constitutional trial rights. *Ybanez v. People*, No. 14SC190, 2015 WL 929996 (Colo. Mar. 2, 2015).

Mr. Manly had to navigate the legal process without an adult acting in his best interest. Considering, Mr. Manly was only sixteen years old while facing second-degree murder charges, he had cognitive deficiencies—reading and writing at sixth grade education, showed signs of not understanding and had trouble communing with counsel, was frustrated with counsel, and told counsel that he needed a parental figure to help him understand the legal process, counsel's failure to appoint a guardian deprived Mr. Manly of a meaningful opportunity to evaluate the plea the offer that he ultimately accepted. Under these circumstances counsel's failure to request a guardian-ad-litem was deficient.

(2) Mr. Manly was prejudiced by his attorney's deficient performance.

At the evidentiary hearing, Mr. Manly testified that based on his recollections of his conversations with counsel that he did not understand that he could assert self-defense or defense of others at trial. (R. Tr. 8/3/16, pp. 16:5-18:6.)

During the hearing, Mr. Manly further described the fight and killing, and testified that he believed that based on his newly learned understanding of self-

defense/defense of others, that he could have been successful at trial. (R. Tr. 8/3/16, pp. 32:24-44:15.) He testified that if he would have properly understood that he could be sentenced to YOS or DOC that he would have risked going to trial despite risking approximately eighty years in prison—if he were convicted and the sentences were consecutive. (R. Tr. 8/3/16, pp. 45:23-46:8.)

Counsel testified that from a defense prospective that this was clearly a case where the defense was self-defense and there were a lot of good facts in favor of Mr. Manly, but that there was also a high risk of conviction at trial. (R. Tr. 7/25/16, pp. 7:6-7, 53:9-24.)

The trial court did not make any finding as to whether Mr. Manly was prejudiced by defense counsel's failure to request appointment of a guardian ad litem.

"[I]n order to satisfy the [*Strickland*] prejudice requirement, the defendant must show that there is some reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *People v. Pozo*, 746 P.2d 523, 529 n.8 (Colo. 1987). This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland*, 466 U.S. at 694.

In the context of a guilty plea, a defendant must demonstrate there is a

reasonable probability that, but for counsel's errors, he would not have entered his guilty plea. *People v. Morones-Quinonez*, 2015 COA 161, ¶ 7. Objective corroborating evidence that a defendant relied on defense counsel's misrepresentations when deciding whether to plead guilty is sufficient to establish prejudice. *Carmichael*, 206 P.3d at 807.

Here, Mr. Manly asserted that he would not have accepted the plea if he had properly understood the plea offer. (R. Tr. 8/3/16, pp. 45:23-46:8.)

His actions support that he would not have accepted the plea but for counsel's deficient performance. Mr. Manly rejected two prior plea offers despite being aware of the serious consequences of being convicted at trial. (R. Tr. 7/25/16, p. 40:24.)

Moreover, Mr. Manly advised counsel that he wanted to withdraw his plea and go to trial prior to being sentenced and learning that he would be sentenced to the DOC. (R. CF, p. 258.)

Right after sentencing, he again told counsel he wanted to withdraw his plea. (R. Exhibits, p. 20 and p. 22.)

Defense counsel's testimony that he had a viable theory of self-defense or defense of others further corroborates that Mr. Manly probably would not have accepted the plea. (R. Tr. 8/3/16, pp. 7:6-7, 53:9-24.)

There is a reasonable probability that but for defense counsel's errors, Mr. Manly would not have pleaded guilty.

II. The district court erred in denying Mr. Manly's claim that his plea was not knowingly, voluntarily, or intelligently entered.

A. Standard of review.

Whether a guilty plea is entered knowingly, intelligently, and voluntarily is a mixed question of law and fact. *See People v. Kyler*, 991 P.2d 810, 818 (Colo. 1999). An appellate court defers to the trial court's findings of fact unless they are so clearly erroneous as to find no support in the record. *People ex rel. A.J.L.*, 243 P.3d 244, 250 (Colo. 2010). [what about de novo review for questions of law?]

This issue was preserved for appeal. In his pro se petition for postconviction relief, and incorporated by reference in his supplemental petitions, Mr. Manly asserted that his plea was not knowingly, voluntarily or intelligently entered. (R. CF, pp. 128-135, 141-146, 225-231.) After an evidentiary hearing the court denied his claim. (R. CF, pp. 354-359.)

B. Discussion.

Mr. Manly testified at the evidentiary hearing that he did not understand that the court could sentence him to the DOC. (R. Tr. 8/3/5, p. 24:17-24.) Mr. Manly explained that he understood the offer to mean that if his sentence to YOS were

revoked he would be resentenced to DOC. (R. Tr. 8/3/16, p. 24:17-23.)

An expert in juvenile language pathology also testified that that the plea agreement was written at a twelfth-grade reading level. (R. Tr. 7/25/16, p. 134:8.) Based on Mr. Manly's writing samples and school evaluations she concluded that it was doubtful that he would have been able to read it or find important information in it. (R. Tr. 7/25/16, p. 134:8-11.)

She further testified it was doubtful whether Mr. Manly fully understood the proceedings at the providency hearing. (R. Tr. 7/25/16, pp. 129:1-5, 137:7-9.)

The expert explained that juveniles are not able to process long sentences and long trains of thoughts like adults. (R. Tr. 7/25/16, p. 139:6-7.) The expert conceded that the language that the trial court used describing the two options of "ten to twenty-five, plus mandatory parole" or "the other option is if I decide you should be sentenced to the youthful offender system program, then you'll be sentenced to the maximum which is six years" was clear enough language for Mr. Manly to understand. (R. Tr. 7/25/16, p. 168:20). She explained, however, when taking this advice in context of the plea agreement it would not have been so easy for Mr. Manly to understand. (R. 7/25/16, pp. 176:6-10, 176:16-177:17) When the court was explaining the sentencing options, it was interrupted by defense counsel, which made the advisement muddled and confusing. (R. Tr.

7/25/16, pp. 176:16-19, 177:20.) Moreover, there were multiple messages in the plea agreement that were confusing. (R. 7/25/16, p. 175:6-26.) At one point, the court told Mr. Manly that if he were accepted to YOS he would be sentenced to YOS. (R. Tr. 7/25/16, p. 175:1-10). Later on, the court advised that it was ultimately up to the court whether Mr. Manly would be sentenced to YOS or DOC. (R. Tr. 7/25/16, p. 175:11-16.)

The expert explained that in this context—with the back and forth and multiple messages, and extremely stressful circumstance of being in court—it would have been difficult for Mr. Manly to understand and process the full message as it was a complex processing tasks that was beyond the ability of a juvenile's developing language system. (R. 7/25/16, pp. 139:21-24, 176:6-10, 176:16-177:17.) She explained that it would have been completely normal behavior, based on the way humans/juveniles process language, for Mr. Manly to understand/make a false assumption that the advisement meant he was going to be sentenced to YOS. (R. 7/25/16, pp. 139:21-24, 186:16-24.)

She further explained that, after Mr. Manly was sentenced to the DOC, the courtroom environment would have likely prevented him or inhibited him from addressing his misunderstanding. (R. Tr. 7/25/16, p. 169:12-24.) Counsel agreed that it would have been unlikely for Mr. Manly to have addressed any of his

misunderstandings or confusion before the court. (R. Tr. 7/25/16, p. 35:10-16.)

In denying the claim, the court considered the expert testimony but found defense counsel's testimony more persuasive, considering counsel, unlike the expert, met on numerous occasions and were careful to explain the proceedings and plea agreement. (R. CF, p. 337.)

The court did not reject the expertise of the expert or the credibility of the science she relied on. Rather, considering the plea agreement and providency advisement, and counsel's testimony, the court presumed that Mr. Manly understood counsel and the court's advice. (R. CF, p. 337.)

When a defendant pleads guilty, he waives several important constitutional rights and therefore the plea must be entered knowingly, intelligently, and voluntarily. *See Kyler*, 991 P.2d at 816. To determine whether a plea was entered knowingly, intelligently, and voluntarily, the court accepting the plea must consider all of the relevant circumstances surrounding the entry of the plea. *Brady v. U.S.*, 397 U.S. 742, 749 (1970). The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). A presumption of regularity and validity attaches to a judgment of conviction based on a guilty plea and, accordingly, a

defendant who seeks to set aside a guilty plea must make a prima facie showing that the plea was unconstitutional. *Patton v. People*, 35 P.3d 124, 131-132 (Colo. 2001). Once this initial evidentiary requirement has been fulfilled, the prosecution must establish by a preponderance of the evidence that the guilty plea did not violate constitutional due process standards. *People v. Wade*, 708 P.2d 1366, 1368 (Colo. 1985).

On postconviction review, the content of a court's advisement, standing alone, does not conclusively establish whether a defendant's waiver of a constitutional right was or was not knowing, intelligent, and voluntary. *Moore v. People*, 318 P.3d 511, 519 (Colo. 2014). Postconviction courts are tasked with pursuing the more general inquiry of whether the defendant waived the right knowingly, intelligently, and voluntarily. *Id.*

First, as stated above, the court erred in finding that counsel clearly indicated that Mr. Manly understood their advice.

Second, the court's reliance on the transcript of the providency hearing in this case was erroneous considering that it was unlikely that Mr. Manly understood the advice within the plea agreement and the advice given at the hearing. *See Moore*, 318 P.3d at 519.

Third, even though the court did not find Mr. Manly credible, there was

sufficient object corroborative evidence that Mr. Manly did not understand the plea agreement. Specifically, counsel recalled that Mr. Manly advised her that he needed a parental figure (his mother) to help him decide on whether to accept the plea offer. (R. Tr. 7/25/16, p. 65:2-6.) Prior to sentencing and a motive to fabricate, Mr. Manly advised counsel that he wanted to withdraw his plea. (R. CF, p. 258.) Moreover, after he was sentenced he again told counsel that counsel needed to explain things to his mother so that she could help him understand what was going on and asked to withdraw his plea. (R. Exhibits, pp. 14, 19-20, 22.)

In other words, the evidence showed that Mr. Manly had advised counsel on multiple occasions that he needed help understanding what was going on, and was uncertain as to what he was agreeing to. Under these circumstances, the postconviction court erred in finding that Mr. Manly knowingly, intelligently, and voluntarily entered his guilty plea.

CONCLUSION

Defendant-Appellant Eric Manly therefore respectfully requests that this court reverse the order denying postconviction relief and reverse the judgment of conviction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June 2017, this **OPENING BRIEF** was served via Colorado Courts E-Filing on the Office of Attorney General.

s/ Tara Jorfald