DATE FILED: May 17, 2018 2:25 PM
FILING ID: EB49FC39800E2
CASE NUMBER: 2016CA2147

COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

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

Plaintiff-Appellee,

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant-Appellant,

ERIC CHANCE MANLY.

▲ **COURT USE ONLY** ▲

Case No. 16CA2147

CYNTHIA H. COFFMAN, Attorney General
JOSEPH G. MICHAELS, Senior Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203
Telephone: 720.508.6000
E-Mail: joseph.michaels@coag.gov
Registration Number: 40403
*Counsel of Record

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

Choose one:

☒It contains 8,957 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Joseph G. Michaels

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

STATUTES

RULES

STATEMENT OF THE CASE AND OF THE FACTS

Eric Manly shot and killed Jack Smith at a party at Manly's house. (Supr., pp. 1-2.) After a fight began, Manly went inside to retrieve his gun—despite the victim's friend telling Manly they were leaving. (*Id*.) Manly came back outside and pointed the gun squarely at the victim, who pleaded with Manly not to shoot. (Supr., p. 2.) Manly fired a round at the victim's feet, and he pleaded more. (*Id*.) Manly then shot the victim point blank in the chest. (*Id*.) As the dying victim fell to the ground, Manly's friend punched and kicked him in the head. (*Id*.)

The prosecution direct-filed charges against Manly of second-degree murder, attempted second-degree murder, two counts of menacing, two counts of prohibited use of a weapon, and one count of possession of a handgun by a juvenile. (CF, pp. 1-2.) In exchange for dismissing these charges, Manly pleaded guilty to second-degree murder – heat of passion. (CF, pp. 18-26.)

The Plea Agreement

The plea paperwork recited that *if* Manly was sentenced to the Department of Corrections ("DOC"), his maximum sentence would be 25 years in prison. (CF, p. 19 ¶ 7.) It next recited that *if* he was sentenced to the youthful offender system ("YOS"), the sentence would be a stipulated six-year sentence and include a "suspended sentence to the [DOC]" of 10-32 years. (*Id.*) Both sentencing options explicitly conditioned their application on "if sentenced" to the respective option. (*Id.*) The agreement recited that the court was not bound by any sentencing representation not expressly included in the written document. (CF, p. 21 ¶ 15.)

The plea agreement recited Manly's age, mental health, and understanding of the agreement as satisfactory, that he had consulted with his lawyers and was "satisfied with what [his] lawyer[s] ha[d] done," and that he understood the rights he was giving up. (CF, pp. 19-20, ¶¶ 9-11.) Manly initialed each page. (CF, pp. 18-23.) Finally, the plea agreement stated that he had "discussed the document and [his]

plea fully with [his] lawyer," and that he "read and underst[oo]d this entire document." (CF, p. 24 ¶¶ 27-28.)

Defense counsel attested that:

●They had discussed the allegations, facts, and applicable law with Manly, including "possible defenses" and "possible penalties." (CF, p. 25 ¶ 1.)

●Manly was "mentally competent" and had "no mental or physical condition" that affected his ability to understand or make an informed decision. (CF, p. 25 ¶ 4.)

●Counsel "explain[ed] in detail" all matters pertaining to the plea agreement, including sentencing options. (CF, p. 25 ¶¶ 1, 3.)

●Manly "enter[ed] into this plea agreement freely and voluntarily and with full understanding of his [] legal rights" as well as of the legal issues and the consequences of his decision. (CF, p. 25 ¶ 6.)

The Plea Hearing

At the plea hearing, Manly's mother was present. (TR 7/13/11, p. 3:14-16.) When the court asked him, Manly agreed to waive his preliminary hearing and plead guilty. (*Id.* at 3:18-25.) Manly told the

court that he had read the agreement and was not under the influence of drugs or alcohol, and he affirmed that he had been paying attention, discussed the agreement with defense counsel, and was satisfied with their advice. (*Id*. at 4:2-21.) Defense counsel affirmed they had discussed all applicable law and facts, including possible defenses and penalties, and that Manly was pleading guilty with full understanding of his legal rights and the consequences of his plea. (*Id*. at 4:22-24; CF, p. 25.)

The court orally reviewed Manly's legal rights, and Manly affirmed his understanding. (TR 7/13/11, pp. 5-7.) The court asked Manly to explain those rights back to it, which Manly did—accurately and concisely. (*Id*. at 6:10-16.) Manly confirmed that he had no questions. (*Id*. at 7:15-17.)

Manly affirmed that it was his decision to plead guilty and nobody was forcing him to do so. (*Id*. at 7:18-22.) He affirmed that he had read the charge; the court then went over the plea with a copy of it before Manly. (*Id*. at 7:23-25 to 8:1-4.) The court reviewed the "legal

language" in minutiae to ensure Manly understood, which he again affirmed he did. (*Id.* at 8:9-25 to 9:2, 13-25 to 10:1.)

The court discussed sentencing in detail. (*Id.* at 10- 12.) It explained, with the prosecution emphasizing, that YOS was a "*possibility*" but that there were *two* options: that Manly could "be sentenced *either* to the Department of Corrections" as "one option" *or* "[t]he other option is … [to] be sentenced to the Youthful Offender System program" with a prison sentence suspended. (*Id.* at 10:16-25 to 11:1-10) (emphasis added). The court asked if Manly understood these options, and Manly affirmed that he did. (*Id.* at 11:16-17.)

Manly repeatedly affirmed that no other promises or assurances had been made to him. (*Id.* at 11:18-20, 22-24; at 12:1-5.) Manly then explained how he shot and killed the victim. (*Id.* at 12:16-26 to 14:8.)

The court determined that Manly was "represented by competent counsel," that he "had the opportunity to discuss the plea agreement with [his] attorneys, and that [he did] so." (*Id.* at 16:5-8.) It found that Manly "underst[oo]d the nature of the charges," was not under any

"influence or coercion," that he "underst[oo]d the consequences of [his] plea," and that "the plea is knowing and voluntary." (*Id.* at 16:10-13.)

The sentencing hearing was extensive. (*See* TR 9/21/11.) The court reviewed mitigating and aggravating factors, the seriousness of the offense, and general sentencing considerations. (*Id.* at 234-38.) It noted that the "fight was over" when Manly "pursu[ed] the victim approximately 160 feet away from his front yard" to shoot him "squarely" in the chest.[1] (*Id.* at 237:9-14.) Crediting the seriousness of the offense, the court determined that YOS was inappropriate. (*Id.* at 237-38.) It sentenced Manly to 22 years in prison. (*Id.* at 238.)

Manly moved for sentence reconsideration but, tellingly, did not contend he misunderstood the sentencing options. (CF, pp. 47-49.) Instead, he acknowledged that he was "also eligible" for a YOS sentence. (CF, p. 47 ¶ 1.) The court denied Manly's motion. (CF, p. 64.)

[1] The victim's "hands [were] up" in surrender when Manly shot him. (TR 9/21/11, p. 25:13.) Manly told the victim he was going to kill him. (*Id.* at 26:3.)

The Postconviction Pleadings

Manly subsequently filed a pro se Crim. P. 35(c) motion. (CF, pp. 121-34.) Citing section 19-1-111, C.R.S., Manly argued that the court had been required to appoint a guardian ad litem ("GAL").[2] (CF, p. 128.) He argued that his mother was required to attend court, citing section 19-2-113.[3] As a result, Manly alleged that plea counsel was constitutionally ineffective and that his guilty plea was not knowing, voluntary, and intelligent. (CF, pp. 128-29.)

Manly alleged that counsel did not explain the potential sentences he could face. (CF, p. 130.) Finally, Manly contended plea counsel was ineffective because they should have pursued an insanity defense or a

---

[2] *But see* § 19-2-517(8) (vesting discretion in, but not requiring, court to provide GALs for juveniles direct filed).

[3] Section 19-2-113 only addresses parental responsibility and allows the court to incentivize parental involvement. Its chief purpose is to authorize—but not require—trial courts to impose contempt sanctions against parents or guardians who fail to attend. It does not provide a positive right *to the juvenile* to have parental involvement, and it does not say a parent's or guardian's presence is necessary for any proceeding in open court to be valid—including entry of a guilty plea. Regardless, Manly's complaint is not well-taken: his mother *did* attend court. (TR 7/13/11, p. 3:14-16.)

self-defense affirmative defense. (CF, pp. 131-32.) Defense counsel supplemented Manly's Crim. P. 35(c) motion, alleging that plea counsel had verbally told Manly he would be sent to YOS, not to DOC.[4] (CF, pp. 148-49.)

The prosecution responded. (CF, pp. 153-59.) As to the first claim, it explained that there was no constitutional right to have Manly's mother present. (*Id.*) As to the second, it explained how Manly's own statements confirmed that the decision to plead guilty was his own. (*Id.* at 156.) The prosecution highlighted how the court's advisement would have cured any misunderstanding about the possible alternate sentencing options. (*Id.* at 157-58.) Finally, the prosecution addressed Manly's claim that defense counsel failed to pursue defenses, noting that Manly made no suggestion that he would have prevailed by pursuing such defenses at trial. (*Id.* at 158-59.)

The court acknowledged that Manly's chief claim that defense counsel misled him about the sentencing options was refuted on its face

[4] Despite Manly having expressly agreed that no other promises or assurances outside the scope of the written plea agreement had been made. (*See* TR 7/13/11, pp. 11:18-25 to 12:1-5.)

by the plea hearing; nevertheless, the court ordered a hearing. (CF, p. 192.) Manly supplemented his postconviction motion, noting that some claims had been withdrawn,[5] and adding that his 22-year sentence violated *Graham v. Florida*, 560 U.S. 48 (2010). (CF, pp. 225-31.)

The Postconviction Hearings

Hearings occurred over three days.

Defense counsel Hostetler testified that it was "clearly a case where the defense was self-defense," which was a "prevalent theme" in their discussions. (TR 7/26/16, p. 7:5-13, 19-22; p. 22:19-22.) Manly understood the evidence and the concept of self-defense, and counsel had no concerns about his comprehension. (*Id*. at 12:5-22.) Manly took extra time to read the reports, understood them, and was "not special needs." (*Id*. at 12-13.)

Hostetler met with Manly's mother at least four times. (*Id*. at 8-9, 26-27.) Manly's mother's responses were "typical" of a parent whose

---

[5] This refers to the claim addressing unpursued defenses—i.e., self-defense. (CF, p. 209; *accord* TR 10/6/16, p. 22:3-5, 11-14 (recognizing that plea counsel properly investigated self-defense). Postconviction counsel did not pursue the "insanity" defense deficiency allegation.

child was charged with a serious crime. (*Id*. at 10:16-17.) She never considered a GAL necessary, but knew it was an option. (*Id*. at 13:8-17; at 32:4-15.) Hostetler was unsure if Manly's mother was capable of making the best decisions for Manly. (*Id*. at 28.) Hostetler would have emphasized that Manly "needed to strongly consider th[e] offer," since the alternative was essentially prison for life. (*Id*. at 15:6, 10-11.)

Hostetler never had competency concerns and Manly understood two prior juvenile proceedings against him. (*Id*. at 17-19.) She spent a lot of time with Manly on the homicide case. (*Id*. at 19-20.) They had multiple conversations about the risks of trial. (*Id*. at 21:19-20.) She read him discovery, and they reviewed it together. (*Id*. at 24-25.) Hostetler and co-counsel took time to make sure he understood the plea paperwork. (*Id*. at 28-29.) They never promised Manly that he would go to YOS. (*Id*. at 29:1-14.) Manly was not pleased that DOC was an option, too. (*Id*. at 29:16-24.) There was no "animosity" or pressure to sign the plea agreement. (*Id*. at 31:12-23.) Having Manly's mother involved would not have changed their advice to plead

guilty. (*Id*. at 32-33.) Nothing suggested Manly did not understand the plea bargain or that procedure. (*Id*. at 34-35.)

Defense counsel Philipps testified that her relationship with Manly was generally good, if stressful given the circumstances. (TR 7/25/16, p. 45:5-9.) She could not always tell him what he wanted to hear. (*Id*. at 45:17-18.) She got to know him personally. (*Id*. at 45-46.) He was frustrated when she could not guarantee that he would not go to prison. (*Id*. at 46:18-19.) She met with him to relay messages and review discovery—to be "confident he understood." (*Id*. at 48-49.) They had "a lot of conversations" about pleading versus going to trial. (*Id*. at 49:19-25.) She acknowledged there were a lot of "good facts" for Manly, but "the bad facts outweighed the good" and Manly was "at high risk of being convicted." (*Id*. at 53:17-18; 105-06.)

Philipps thought a plea agreement would be "significantly better." (*Id*. at 53:22-24.) She recognized self-defense and that Manly was not the initial aggressor. (*Id*. at 54-55.) But Manly re-initiated the confrontation, after he retrieved his gun; the "lapse in time" "really bothered" her; and it felt like a "revenge case" about hurt feelings and

pride. (*Id*. at 55-56.) She advised Manly about self-defense. (*Id*. at 56-57.) She recognized that Manly "struggled" in school and had concerns about his ability to understand, but only based on his age. (*Id*. at 57-58.) Consequently, she explained things in detail and repeated them to ensure he understood. (*Id*. at 58-59.) Philipps had no concerns about Manly not being able to understand or about him having any disability. (*Id*.)

Philipps met with Manly's mother "a number of times." (*Id*. at 60:9-11.) She was "very, very concerned" about Manly and glad he had a lawyer. (*Id*. at 60:18.) Manly's mother was upset when defense counsel promoted the plea instead of trial because she believed Manly would not be convicted. (*Id*. at 60-61.) Later, Philipps became concerned about Manly's mother potentially being "self-interested" because she might be exposed to criminal liability, but Philipps recognized that Manly's mother believed Manly did no wrong and would win at trial. (*Id*. at 62-63, 84-85.) Nevertheless, Manly's relationship with his mother was good, and she cared deeply for him. (*Id*. at 63-64.)

The prosecution did not charge Manly with first-degree murder based partly because of mitigation defense counsel provided. (*Id*. at 65-66.) Manly vacillated about taking the plea. (*Id*. at 66.) Philipps advised him he could be sent to DOC, or, the "other option" was YOS. (*Id*. at 67-68) She would have discussed the differences and talked about "every detail." (*Id*. at 68-69.) She would have emphasized the crime's seriousness and that there was "certainly a risk" of a prison sentence. (*Id*. at 69-70.) When she emphasized that pleading guilty was the best choice, Manly got frustrated and left the room. (*Id*. at 71-72.) She would have reviewed the plea paperwork "more than once." (*Id*. at 75.) They hired an expert for sentencing to discuss adolescence, brain development, and impulse control. (*Id*. at 75-77.) She thought it would have been an "uphill battle" to introduce such testimony at trial, although they considered it. (*Id*. at 77-78.)

Philipps did not believe a GAL was necessary or a good idea or that Manly's mother was in any way "sabotaging" the case. (*Id*. at 80-81.) Manly's mother was very involved. (*Id*. at 82-84.) She got permission from Manly to have his mother involved, although he never

requested her presence at meetings or to speak with her prior to pleading guilty; nor did counsel reject any request by Manly to have her present. (*Id*. at 86-87.) Manly spoke with his mother before pleading guilty, despite counsel believing that was not the best idea. (*Id*. at 87:1-5.)

Philipps took extra time explaining Manly's rights to him, to ensure he understood. (*Id*. at 95-96, 106.) He understood the court system and the plea paperwork. (*Id*. at 97:5-24.) She acknowledged that she "strongly advised" Manly to take the plea, but she never threatened or forced him to take it. (*Id*. at 99, 116-17.) Her practice was to never make "promises" or "guarantees." (*Id*. at 101:20-22.) She reviewed the alternate sentencing options of either DOC or YOS. (*Id*. at 103-04.) She never promised or guaranteed a YOS sentence. (*Id*. at 116:15-16.)

She never had concerns about Manly not understanding. (*Id*. at 106.) She and Manly had ongoing discussions about aspects of different plea bargains, including years offered for prison sentences. (*Id*. at 110-12.) She "certainly would have made sure that [Manly[understood" the

plea paperwork and details—particularly the "possible penalties." (*Id*. at 113:8-11.) Even when Manly did not directly communicate or express his feelings, his actions reflected understanding the agreement and its implications. (*Id*. at 115-16.)

Phillips reaffirmed at a subsequent hearing that she never told Manly he was only getting YOS. (TR 10/6/16, pp. 6-7.) Nor did Manly ever express confusion about why he had not been sentenced to YOS or that he did not understand his plea agreement. (*Id*. at 7:12-20.)

Manly's mother met frequently both with defense counsel and Manly. (*Id*. at 199-202, 218-19.) She disagreed about pursuing a plea deal. (*Id*. at 201-02.) She knew the plea agreement was either a DOC or a YOS sentence. (*Id*. at 205.) She testified that Manly thought he would get seven years of YOS. (*Id*. at 206:5.) She admitted that defense counsel told her Manly's destination was "up to the judge" and YOS was "not a guarantee." (*Id*. at 206:12, 18-19.) She acknowledged that Manly carried adult responsibilities for their household. (*Id*. at 213:12-18.) She denied having self-interest that prevented her from acting in Manly's best interest. (TR 8/3/16, p. 7:1-8.)

Manly's linguistic expert testified that she reviewed the plea hearing and documents related to Manly's case, and she determined his reading and educational level was not advanced. (TR 7/25/16, pp. 129-31.) She acknowledged his scores were "not very low." (*Id*. at 132:11.) She testified that the plea agreement was above Manly's reading level. (*Id*. at 133-34.) She indicated the court advised Manly in sentences more complex than he could recognize, but she could not conclude one way or the other whether he understood. (*Id*. at 135-39.) She admitted there was "no way to know what his language comprehension" was at the time. (*Id*. at 140:8-9.) She further admitted testing was difficult and she never met with or spoke to Manly, but rather only had access to select materials. (*Id*. at 143-45.)

She agreed that:

●Manly was of "average intelligence" with a 3.4 GPA and "above average achievement." (*Id*. at 145:23-24; 146:1-8.)

●Manly understood language "within normal limits" and did not have any underlying disability or impairment. (*Id*. at 154:13-18.)

●Her information did not indicate lack of comprehension. (*Id*. at 159:12-14.)

●Manly could have understood. (*Id*. at 160:1-6; 164:21-25.)

She acknowledged that she did not know how defense counsel relayed the substance of the plea agreement, including breaking it down into plain terms. (*Id*. at 147-48.) She opined that Manly could not have understood the language of his plea agreement. (CF, p. 216.) But she could not demonstrate that Manly did not understand the court's explanations of the plea agreement at advisement—thus there was "no conclusive evidence" that Manly did not understand his guilty plea. (*Id*.)

Finally, ***Manly testified*** that he "didn't understand" the court proceedings. (TR 8/3/16, p. 13:2-11.) He claimed counsel did not discuss self-defense with him, although admitted they correctly discussed sentencing ranges. (*Id*. at 16-18.) He acknowledged receiving three plea offers before accepting the third. (*Id*. at 20-21.) He acknowledged that his mom advised him to go to trial and had his "best interest at

heart." (*Id*. at 20-23.) He did not believe his mother was taking drugs while visiting him or giving advice. (*Id*. at 64-65.)

He testified he believed the plea agreement was a YOS sentence with DOC suspended. (*Id*. at 24-25, 27.) He admitted he spoke with his mother about the plea agreement. (*Id*. at 28:6-23.) He acknowledged doing well in school at the time of the killing and carrying extra adult responsibilities. (*Id*. at 52-53.) He agreed he asked many questions of Hostetler, but did not ask about the plea agreement; he "understood the plea agreement." (*Id*. at 55-56.) He then claimed he "did not read it." (*Id*. at 64:7.)

He conceded that defense counsel always left trial as an option on the table. (*Id*. at 68-69.) He admitted his efforts to revoke his plea agreement were due to not being comfortable with it—i.e., buyer's remorse, not lack of understanding. (*Id*. at 69-70.) Critically, he admitted he understood the judge's advisement at the plea hearing. (*Id*. at 79-82.) Finally, Manly admitted hearing the advisement about the alternate sentencing options: one option to YOS with DOC suspended, the other option directly to DOC; he also agreed there were no outside

promises to YOS not otherwise memorialized by the plea agreement. (*Id*. at 88-90.)

In closing argument, postconviction counsel reaffirmed that they had withdrawn claims[6] and that the focus was on whether a GAL had been necessary, whether the plea was knowing, voluntary, and intelligent, and whether *Graham* applied. (TR 10/6/16, pp. 12:9-10; pp. 12-13.) Postconviction counsel conceded that defense counsel's advice was nowhere "substantively defective." (*Id*. at 21:10-12.) Postconviction counsel agreed that plea counsel properly considered self-defense; the question was whether defense counsel sufficiently explained it to Manly. (*Id*. at 22:3-5, 11-14.)

The Court's Ruling

The court denied Manly's postconviction claims. (CF, pp. 335-40.) It found the following.

●Manly and defense counsel met multiple times to negotiate plea agreements and submit counter-offers, and counsel "took extra time and

[6] The "failure-to-investigate" self-defense claim. (CF, p. 209.)

attention to explain the case, investigation and plea agreement to [Manly] in light of his age and immaturity." (CF, p. 336 ¶ 4.)

●Manly consulted with his mother "on several occasions"—approximately "three times a week"—prior to pleading guilty. (CF, p. 336 ¶ 5.) Both Manly and his mother denied that the mother was not acting in Manly's best interest. (*Id.*) Defense counsel discussed the case with Manly's mother multiple times. (*Id.*) Defense counsel did not prevent any discussions between Manly and his mother. (CF, p. 336 ¶ 6.) Thus, a GAL was unnecessary. (CF, p. 336 ¶ 7.)

●Defense counsel investigated self-defense and advised that it was unlikely to prevail. (CF, p. 336 ¶ 8.)

●Manly "actively participated" in plea negotiations. (CF, p. 336 ¶ 9.) While counsel's relationship with Manly was at times contentious, this was because Manly was unhappy with the pleas offered. (*Id.*)

●Both the plea agreement and the court explicitly advised Manly that the court could sentence him either to DOC or could suspend a DOC sentence and sentence him to YOS. (CF, pp. 336-37, ¶¶ 10-11,

13.) Manly expressed no confusion at the plea hearing, and the court found his plea knowing and voluntary. (CF, p. 37 ¶ 13.)

●The court considered a post-sentencing letter from Manly suggesting counsel had promised he would be sentenced to YOS and the linguistic expert's testimony, ultimately finding "more persuasive the testimony of the trial defense counsel." (CF, p. 337 ¶¶ 15-16.) The court found that defense counsel "were careful to fully explain the proceedings and plea agreement" and were best situated to gauge Manly's understanding through their interaction with him. (CF, p. 337 ¶ 16.)

The court ruled that no credible evidence established that defense counsel had promised that Manly would be sentenced to YOS or that counsel failed to investigate self-defense. (CF, p. 339.) It credited defense counsels' testimony and determined Manly met with defense counsel over "numerous conferences and rounds of plea negotiations in which [Manly] was an active participant." (*Id.*) It ruled that the "great weight" of the evidence—including both the court's advisement and the

agreement itself—affirmed that Manly was aware of the alternate sentencing options. (*Id.*)

Regarding the GAL claim, the court found that counsel correctly determined that a GAL was unnecessary. (CF, p 339.) First, it recognized that postconviction counsel provided no expert testimony or "other persuasive evidence" that failure to request a GAL fell below the expected legal standard for defense counsel—thereby failing the first *Strickland* prong. (*Id.*) It further found that Manly's mother was involved, Manly consulted with her, and her interests were not adverse to Manly's. (*Id.*)

Finally, the court found that Manly's 22-year sentence was not cruel and unusual under the Eighth Amendment or *Graham*.[7] (CF, p. 340.)

---

[7] Manly does not re-assert this claim on appeal. Thus, it is abandoned. *See People v. Villarreal*, 231 P.3d 29, 32 n.1 (Colo. App. 2009); *cf. Lucero v. People*, 2017 CO 49, ¶¶ 4, 11, 13, 19-20 (*Graham* only applies "where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense.").

SUMMARY OF THE ARGUMENT

Manly's guilty plea was knowing, voluntary, and intelligent, and he did not receive ineffective assistance of counsel. The plea agreement unambiguously conveyed the sentencing possibilities Manly faced. Between the plain language of the written agreement and the trial court's oral advisement, the nature of the sentencing options was expressly and cleanly conveyed. Even Manly's motion to reconsider his sentence reflected this understanding. And the plea agreement reflected that defense counsel discussed all legal options available to Manly.

Manly was never entitled to a GAL for purposes of entering his plea agreement. The juvenile direct-file statute, section 19-2-517(8), C.R.S. (2017), makes clear that appointing a GAL is discretionary upon the trial court. And the supreme court has approved this language.

ARGUMENT

I. The postconviction court correctly determined that Manly understood the consequences of his plea and did not receive ineffective assistance of plea counsel.

A. Standard of Review

Where, as here, the defendant enjoyed a hearing, appellate courts review a trial court's determination of ineffective assistance of counsel as a mixed question of law and fact, deferring to the trial court's findings of fact and reviewing its legal conclusions de novo. *People v. Garcia*, 11 P.3d 449, 453 (Colo. 2000). This Court can affirm the postconviction court's denial on any grounds. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006); *People v. Vondra*, 240 P.3d 493, 494 (Colo. App. 2010).

B. Law and Analysis

As a preliminary matter, the People want to ensure that Manly understands that if he prevails and ultimately vacates his plea, he abrogates the terms of his agreement with the prosecution. *People v. Ivery*, 615 P.2d 80, 82 (Colo. App. 1980). As such, the People no longer would be bound by their plea concessions, could re-file all original

charges, and could seek any authorized penalty—including consecutive sentences where appropriate. *See People v. Colosacco*, 493 P.2d 650, 651 (Colo. 1972); *People v. Mason*, 491 P.2d 1383, 1384 (Colo. 1971). A conviction for all original charges would result in a sentence substantially exceeding the favorable sentence that he received.

The right to effective assistance of counsel at trial is based on the Sixth Amendment of the United States Constitution and article II, section 16 of the Colorado Constitution. *See People v. Davis*, 849 P.2d 857, 859-60 (Colo. App. 1992), *aff'd*, 871 P.2d 769, 772 (Colo. 1994).

To establish an ineffective assistance of counsel claim, Manly must establish both of the following: (1) counsel's performance fell outside the wide range of professionally competent assistance and (2) the defendant was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Manly must show that counsel made errors so egregious that counsel was not functioning as "counsel" as guaranteed under the Sixth Amendment. *Id.* at 687. "Failure to make the required showing of

either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

To prove the first prong, Manly must overcome a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* at 689. Review of counsel's performance "must be highly deferential, evaluate particular acts and omissions from counsel's perspective at the time, and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003).

"There are countless ways to provide effective assistance in any given case[,]" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Thus, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Strategic choices are presumed correct. *Id.*

Defense counsel's strategic decisions only may be found deficient where they were "completely unreasonable, not merely wrong, so [that

they] bore no relationship to a possible defense strategy." *Romano v. Gibson*, 278 F.3d 1145, 1153 (10th Cir. 2002); *accord Ardolino*, 69 P.3d at 76. Due process does not require errorless counsel. *People v. White*, 514 P.2d 69, 72 (Colo. 1973). Rather, counsel cannot be judged ineffective by hindsight, and not every mistake or oversight by counsel would result in prejudice or violation of a defendant's constitutional rights. *Id.*

To establish prejudice under the second prong, Manly must show there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *Strickland*, 466 U.S. at 694; *Davis*, 871 P.2d at 772 (A defendant must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different."). The "would have been different" standard requires a different outcome and provides a higher bar than a mere "reasonable possibility" formulation. *People v. Versteeg*, 165 P.3d 760, 765-66 (Colo. App. 2006).

A presumption of regularity and validity attaches to a guilty plea, and the burden is on Manly to overcome that presumption by a

preponderance of the evidence. *Patton v. People*, 35 P.3d 124, 131 (Colo. 2001); *People v. Naranjo*, 840 P.2d 319, 325 (Colo. 1992) (noting strong presumption that defense counsel provided constitutionally effective assistance); *accord People v. Duke*, 36 P.3d 149, 151 (Colo. App. 2001) (because counsel is presumed to have provided effective assistance, defendant bears burden of proving ineffectiveness).

This presumption of validity is particularly acute in the context of guilty pleas. Guilty pleas are highly significant legal acts based on a defendant's "solemn declarations in open court," *Blackledge v. Allison*, 431 U.S. 63, 74 (1977), not only that he committed "the discrete acts described in the indictment," but also that "he is admitting guilt of a substantive crime." *United States v. Broce*, 488 U.S. 563, 570 (1989). A guilty plea waives all non-jurisdictional objections, including fundamental Sixth Amendment constitutional rights. *People v. Isham*, 923 P.2d 190, 195 (Colo. App. 1995).

Claims of ineffective assistance of counsel in the plea bargain context are governed by *Strickland*'s two-prong test. *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012). Manly must prove each *Strickland* prong,

by a preponderance of the evidence, to obtain relief. *People v. Russell*, 36 P.3d 92, 95 (Colo. App. 2001). A court may resolve the claim solely on the basis that he failed to prove either prong. *People v. Garcia*, 815 P.2d 937, 941 (Colo. 1991).

Appellate court will affirm a finding of no *Strickland* prejudice where the defendant offers "only speculative proof of prejudice." *People v. Finney*, 12 COA 39, ¶ 66. In the guilty plea context, the ultimate question of *Strickland* prejudice is whether the defendant would have changed his plea, including whether a decision to proceed to trial would have been rational under the circumstances. *Id*. Here, it was not.

1. Defense counsel was not constitutionally ineffective for not requesting a GAL.

As an initial matter, it is worth noting that Manly called no expert witness to testify that defense counsel was both constitutionally ineffective *and* how any such ineffective representation could have prejudiced him for failing to request a GAL. Indeed, he did not even have a witness testify about prevailing standards of representation in with respect to GALs. Thus, it is difficult to understand how counsel's

performance could have been deficient, let alone prejudicially ineffective. *See People v. Gandiaga*, 70 P.3d 523, 526 (Colo. App. 2002) (where defense counsel failed to call a witness, no prejudice established where defendant did not allege witness's willingness to testify, nor make an offer of proof with respect to the substance, credibility, or admissibility of the anticipated testimony).

a. Manly had no constitutional or statutory entitlement to a GAL.

The crux of Manly's complaint is that because he was a juvenile, he was entitled to special procedures, including having his mother or a GAL present when counsel discussed the plea offer and its consequences. The Colorado Supreme Court has directly addressed and squarely rejected the authorities and arguments upon which Manly relies (none of which mandate appointing a GAL in cases such as this, let alone making it a meritorious ineffective assistance of counsel claim to not request one). In *Ybanez v. People*, 2018 CO 16, ¶¶ 2, 37, the court held that there was no constitutional right to a GAL and that the trial court had not abused its discretion in not appointing one, even where

the defendant was alleging abuse by his father who was paying the legal bills for the defendant's counsel.

Regarding the statutory authorization, a court is permitted, but not required, to appoint a GAL in delinquency proceedings upon any of three triggering conditions and "only upon the occurrence of one of these three triggering events": (1) where there is no parent functioning in the role of a parent on behalf of the juvenile-defendant; (2) where the court determines there is a conflict of interest between the child and parent; or (3) where the court makes "specific findings" that appointment of a GAL is necessary and in the best interests of the child. *Ybanez*, ¶¶ 38-41 (citing § 19-1-111(2)(a)(I)-(III), C.R.S. (2017)). Thus, a juvenile is not categorically entitled to a GAL, and absent any of those occurrences, the court is without discretion to appoint a GAL. *Ybanez*, ¶¶ 38-41.

However, under the direct-file provisions of section 19-2-517, C.R.S. (2017), the "spare provisions for [GALs] in section 517 must be similarly limited." *Ybanez*, ¶ 39. Specifically, under section 19-2-517(8), the "court *in its discretion may* appoint a GAL for any juvenile charged by the direct filing of an information in the district court or by

indictment pursuant to this section."[8] (Emphasis added.) Thus, even if the legislature had presumed that a GAL must be present for certain circumstances in *juvenile* proceedings under the children's code, it has clearly identified the opposite presumption when a juvenile—such as Manly—is direct-filed into adult court.

Further, because the legislature has spoken on the topic of GALs in direct-filed cases, its expression controls over Manly's speculation about whether he "should" have had a GAL. *See People v. Juvenile Court*, 915 P.2d 1274, 1277 (Colo. 1996) ("It is the legislature's prerogative to determine when the protections accorded juveniles are to be removed. The protections typically accorded to juveniles are lost when … the juvenile is held for criminal proceedings as an adult pursuant to a direct filing."). Indeed, a district court is "permitted to [appoint a GAL] only under specified circumstances." *Ybanez*, ¶ 40.

Finally, *Ybanez* expressly rejected an analogous situation to Manly's here: in *Ybanez*, ¶ 41, the "defendant's father was clearly

[8] The mandatory word "shall" "is distinguishable from the 'permissive' or 'discretionary' language of statutes." *United States v. Wilinson*, 686 P.2d 790, 792 (Colo. 1984).

present and actively supporting the defendant throughout, and neither the defendant nor anyone else made the court aware of a conflict … even if one had existed." Here, too, Manly's mother was present and active. Not only did Manly's mother attend the plea hearing, but she spoke repeatedly with Manly and defense counsel, and told Manly *not* to accept the plea bargain. In this respect, the postconviction court's factual determinations about Manly's mother not only were not clearly erroneous, but rather find significant record support.

To the extent Manly suggests his mother's interests were adverse to his thus necessitating a GAL, the record does not support such a determination. And it especially does not do so such that defense counsels' decision not to request a GAL fell below professional norms. Nor did anything occur to suggest findings were necessary to appoint a GAL. *Cf. id.*

b. Manly's counsel properly safeguarded his rights.

Manly attempts to alter his argument to suggest a court must appoint *both* an attorney *and* a GAL. But the legislature has neither

endorsed nor required such dual appointments. On the contrary, it has made appointment of the latter purely discretionary. And no case holds that the constitution *requires* a GAL for a facially competent juvenile who is represented by counsel. Indeed, defense counsel directly protects the juvenile's interests, and Manly's arguments that a GAL would provide *additional* protections was not raised below and is a matter best left to the legislature; it certainly cannot form the basis that defense counsel's performance fell below accepted limits.

Further, nothing suggests a parent's presence is *necessary* for any proceeding in open court—including entry of a guilty plea—in order for that proceeding to be valid and enforceable. In *People v. Simpson*, 51 P.3d 1022, 1024 (Colo. App. 2001) (*Simpson I*), a division addressed whether a juvenile-defendant's guilty plea in district court was constitutionally valid despite the absence of a parent, guardian, or GAL at the providency hearing. *Simpson* articulated that the same standard for waiving constitutional rights applies to both juveniles and adults: the waiver must be knowing, voluntary, and intelligent. *Id*. at 1024, 1026. In that respect, the presence of a parent, guardian, or GAL was

simply one consideration, along with age, background, maturity level, previous court experience, education, intelligence, capacity to understand, and the existence of meritorious defenses. *Id*. at 1027. Of course, the Colorado Supreme Court approved of *Simpson* in this respect. *See People v. Simpson*, 69 P.3d 79, 81 (Colo. 2003) (*Simpson II*).

Manly suggests the absence of a parent or guardian renders his plea invalid and counsel's failure to request a GAL was ineffective.[9] Putting aside that Manly's mother *was present*, Manly also omits one vital point: for a plea to be valid, a parent, guardian, *or lawyer* must be present. *Simpson I*, 51 P.3d at 1026. Manly unquestionably had both parent *and* lawyer(s).

---

[9] To the extent Manly cites *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), to suggest children are required to have a parent present in all adversarial situations, his suggestion is not well-taken. *J.D.B.* only applied to custodial interrogations and held that a child's age was relevant to the custody analysis. *Simpson I* explicitly rejected an analogous argument as having any bearing on whether the absence of a parent or GAL would have rendered a guilty plea made without counsel invalid. 51 P.3d at 1024. And *Ybanez* closed the door on that contention. *Ybanez*, ¶¶ 37-41.

Simpson I emphasized that while a trial court's advisement alone was insufficient, the presence of a "parent, guardian, *or an attorney*" would suffice. *Id.* (emphasis added); *accord id.* at 1027 (identifying it a "significant factor" whether juvenile "had the opportunity to consult with a parent, guardian, *or counsel* before entering a plea *or* whether such person *accompanied the juvenile to the plea hearing*") (emphasis added). Thus, the analysis is *not* whether a parent or guardian is present, but rather whether the guilty plea was constitutionally valid under the totality of the circumstances. *Id.* at 1026-27 (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) ("We discern no persuasive reasons why any other approach [other than totality of circumstances] is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.")). Here, it is uncontested that Manly "had the opportunity to consult with … counsel" *and* "[counsel] accompanied [Manly] to the plea hearing." *Id.* at 1027.

Thus, defense counsel could not have been ineffective on a constitutional level for not requesting a GAL—especially where

governing case law suggested counsel could represent a juvenile-defendant at a guilty plea and in guilty plea discussions without a GAL present, since such representation ensured the juvenile-defendant's understanding of the proceedings and protected that juvenile-defendant's interests. Moreover here, Manly's representations in court, in police interviews, and as represented by defense counsel's own certification on the guilty plea, all demonstrated Manly's understanding of the proceedings *and* that counsel was protecting his interests.

In short, nothing suggested that Manly could not understand or was otherwise unrepresented by a parent with Manly's best intentions such that the court should have used its discretion in, sua sponte, appointing a GAL. Even so, Manly's mother's presence was not necessary because he was represented by counsel at the plea hearing. And further, because Manly was represented by counsel, a GAL was unnecessary. Consequently, it cannot be said that the court's "failure" to appoint a GAL was an *abuse* of discretion. *See People v. Hynes*, 917 P.2d 328, 331 (Colo. App. 1996) (court did not abuse its discretion in not appointing GAL when record and respondent "failed to set forth any

specific reasons for such an appointment"). Because of this, and more importantly here, it cannot be said that defense counsel's "failure" to request a GAL amounted to constitutionally ineffective assistance of counsel. *See Ybanez*, ¶¶ 37-41.

2. The court correctly denied Manly's claims that counsel failed to investigate possible defenses.

a. Manly waived consideration of his allegation that defense counsel did not adequately investigate or convey self-defense.

As an initial matter, this Court should not review Manly's claim that defense counsel did not pursue all possible defenses for one simple reason: Manly withdrew that claim. (*See* CF, p. 209) ("PD's office[10] has withdrawn claim that counsel was ineffective due to failure to review all possible defenses."). Thus, its review on appeal is foreclosed. *Cf. People v. Rediger*, 2018 CO 32, ¶¶ 39-44 (waiver is the "intentional relinquishment" of a known right or privilege and thus "waiver

[10] The reference to "PD's office" clearly references ADC: counsel making this request at this hearing is the same counsel on appeal.

extinguishes … appellate review"); *accord People v. Smith*, 2018 CO 33, ¶ 17 (same). Not only did Manly withdraw it, but postconviction counsel fully conceded that defense counsel had properly investigated and considered it as an option. (TR 10/6/16, p. 22:3-5, 11-14.) To the extent the argument is that Manly did not *understand* the advice, that issue is addressed in section I.B.1.b, *supra*, and II.B, *infra*. In all other respects, this Court should not consider this claim.

b. Manly's claim fails on the record.

Nevertheless, the postconviction court properly recognized that overwhelming evidence supported the fact that defense counsel *had* investigated possible defenses—particularly self-defense. Both defense counsel testified that they addressed, researched, and discussed self-defense with Manly. To the extent Manly testified otherwise, the court determined he was simply not credible. This Court affords that factual determination deference.

A defendant is entitled to a pretrial investigation sufficient to reveal potential defenses and facts relevant to guilt or penalty; a less

than comprehensive investigation is reasonable only to the extent that reasonable professional judgment supports the limits of the investigation. *Davis*, 871 P.2d at 773. Strategic choices made after thorough investigation of the law and facts relevant to plausible defenses are virtually unchallengeable; strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. *People v. Rodriguez*, 914 P.2d 230, 298 (Colo. 1996).

Importantly, *not only* must a defendant identify what was not investigated, but also how such an investigation would have impacted his case; the bare allegation of deficient investigation, without identifying what was not investigated and how such investigation would have impacted the case, is not enough to support a claim of deficient investigation. *See, e.g.*, *Cummings v. Sirmons*, 506 F.3d 1211, 1228 (10th Cir. 2007); *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005). And, of course, failure to show prejudice also precludes this claim. *See, e.g.*, *Wade v. Calderon*, 29 F.3d 1312, 1317 (9th Cir. 1994).

As above, defense counsel seriously considered self-defense. But the facts were such that self-defense would not have been a viable defense, which defense counsel recognized. *See Bullock v. Carver*, 297 F.3d 1036, 1044 (10th Cir. 2002) ("we give considerable deference to an attorney's strategic decisions"); *Carter v. Holt*, 817 F.2d 699, 701 (11th Cir. 1987) (if strategic decision is "fairly debatable" and "not patently unreasonable" it is not ineffective).

Apart from general self-serving allegations, Manly has not established that he would have gone to trial and risked 80-plus years in prison. *Cf. Carmichael v. People*, 206 P.3d 800, 806-07 (Colo. 2009) (holding that a defendant's "self-serving" post-conviction testimony is "insufficient to establish prejudice"); *People v. Canody*, 166 P.3d 218, 220 (Colo. App. 2007) (holding that a court need not accept defendant's factual assertions as true if files and record demonstrate they are not); *accord Finney*, ¶ 66 (denying postconviction finding of no *Strickland* prejudice when defendant offered "only speculative proof of prejudice"). Here, proceeding to trial would simply not have been rational under the circumstances. *Finney*, ¶ 66.

Lead defense counsel was highly experienced, and both counsel immediately recognized and discussed self-defense. But ultimately, given the facts, counsel believed that it was not a fruitful defense. *Cf. Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999) ("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel." (internal quotation marks omitted)). Thus, there was no *Strickland* error, and it could not have yielded any different result. *Cf. People v. Chambers*, 900 P.2d 1249, 1252 (Colo. App. 1994) (unless such investigation would have uncovered substantial evidence that reasonably could have yielded a different result, no prejudicial deficiency in performance occurred). This is certainly so because Manly cannot establish prejudice.

Regardless, because it is well-established that guilty pleas waive all non-jurisdictional claims, and because the evidence established that counsel knew of and investigated the self-defense argument prior to Manly pleading guilty, there can be no showing of a jurisdictional claim or of deficient performance. *See Isham*, 923 P.2d at 195 (guilty plea

waives all non-jurisdictional objections, including those under fundamental constitutional rights).

Neither does the evidence establish that Manly's guilty plea was not knowing, voluntary, and intelligent on these grounds—he and counsel discussed and counsel investigated the self-defense issue. Because Manly and counsel were both aware of the possible defense prior to entering his guilty plea, there can be no legitimate contention of ineffective assistance of counsel in not pursuing that defense further. *Cf. McMann v. Richardson*, 397 U.S. 759, 774 (1970) (defendant who pleads guilty "assumes the risk of ordinary error in his or his attorney's assessment of the law and facts"). Of course, here, there was no error at all: counsel and Manly simply recognized that self-defense was not the best route.

The postconviction court properly determined that Manly was adequately represented *and* suffered no prejudice.

II. The court correctly determined that Manly's guilty plea was knowing, voluntary, and intelligent.

A. Standard of Review

As above, this Court reviews the postconviction court's factual findings with deference and its legal conclusions de novo. *Garcia*, 11 P.3d at 453. For purposes of assessing a defendant's efforts to withdraw a guilty plea, it is within the trial court's discretion to determine, on a case-by-case basis, whether a defendant has demonstrated "a fair and just reason" for doing so. *Crumb v. People*, 230 P.3d 726, 730 (Colo. 2010); *People v. Chippewa*, 751 P.2d 607 (Colo. 1988).

B. Law and Analysis

To satisfy due process, the record as a whole must show that Manly entered his guilty plea knowingly, voluntarily, and in an intelligent manner. *Chae v. People*, 780 P.2d 481, 485 (Colo. 1989); *People v. Gresl*, 89 P.3d 499, 502 (Colo. App. 2003). "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). Prior to accepting a guilty plea, a trial court must ensure that the defendant was advised of the "direct consequences" of the plea. Crim. P. 11(b)(4); *People v. Corral*, 174 P.3d 837, 839 (Colo. App. 2007).

The voluntariness of a defendant's plea is determined by the totality of the circumstances. *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). The advisement does not require "any prescribed ritual or script." *Benavidez v. People*, 986 P.2d 943, 950 (Colo. 1999). The sufficiency of an advisement by a trial court varies from case to case, factoring in, inter alia, the complexity of the charges, "personal characteristics of the defendant, such as his age, education, intelligence … and whether he is represented by counsel." *People v. Drake*, 785 P.2d 1257, 1268 (Colo. 1990). For juveniles, age and representation by counsel are particularly relevant factors. *See Simpson I*, 51 P.3d at 1026-27.

A plea may be involuntary where the accused does not understand the charge against him or the constitutional protections he is waiving. *Henderson*, 426 U.S. at 645. To be deemed voluntary, a defendant must be given adequate notice of the nature of the charge against him or

proof must establish that he in fact understood the charge. *Id.* To the extent a defendant may not understand a portion of the plea or the advisement, it is the defendant's affirmative obligation to request clarification if his understanding of a plea agreement is different from the written documents or colloquy with the court. *See People v. DiGuglielmo*, 33 P.3d 1248, 1251 (Colo. App. 2001).

As above, this Court reviews whether Manly's plea was constitutionally valid under a totality of the circumstances test, with specific emphasis on whether he was able to consult with counsel and whether counsel accompanied him at the plea hearing. *Simpson I*, 51 P.3d at 1026-27. Finally, a postconviction court's "factual determination of whether he has voluntarily and knowingly waived any rights will be upheld if supported by the record." *People v. Thorpe*, 641 P.2d 935, 941 (Colo. 1982), *cited with approval in Simpson I*, 51 P.3d at 1027.

Here, the totality of the circumstances establishes that Manly's guilty plea was knowing, voluntary, and intelligent. Because Manly and counsel both were aware of the possible penalties, as well as the

elements of the offense, the charges to be dismissed, and the rights Manly was giving up, there can be no legitimate contention of ineffective assistance of counsel for failing to review the specifics of the plea agreement. Additionally, the plea agreement explicitly identified that the elements and the alternate sentencing options, resting the ultimate sentencing determination in the court's discretion.

Were this not enough, the court *unequivocally* advised Manly of the alternate sentencing options. Accounting for Manly's age, the court very carefully explained the elements and the possible sentences. Again accounting for Manly's age, the court very carefully examined whether Manly understood, whether he was under the influence of any drugs, whether counsel had explained the terms to Manly, whether any additional promises not memorialized in the plea agreement had been made, and whether the choice was Manly's own. The court also asked if Manly had any questions or was confused. In all respects, Manly affirmed his understanding. Defense counsel also testified that they reviewed the plea agreement and possible punishments with Manly and *explicitly* alerted him to the alternate penalties.

Clearly, Manly was faced with a difficult decision. And clearly now he suffers a form of buyer's remorse. But that is not sufficient to establish that his plea itself was not knowing, voluntary, and intelligent in the first instance or that counsel was ineffective in discussing the plea with him. *Cf. DiGuglielmo,* 33 P.3d at 1250 (denying motion to withdraw plea based only on defendant's "wish and hope" for a different outcome). Manly wholly understood the crime and punishment options to which he was pleading, as well as the rights he was giving up, which he clearly, unambiguously, and repeatedly affirmed both in open court and by initialing and signing the plea agreement. *Cf. Henderson*, 426 U.S. at 645 (plea may be involuntary where accused does not understand constitutional protections she is waiving).

To the extent Manly suggests defense counsel pressured him into accepting a guilty plea, the record fully refutes this allegation. Manly's mother indicated that she told Manly not to take the plea; thus, it is clear there was an opposing force on the matter. It is otherwise well established that using strong language in relaying competent advice does not constitute ineffective assistance. *Cf. People v. Adams*, 836 P.2d

1045, 1048 (Colo. App. 1986). Regardless, it was defense counsel's job to present the plea offer and emphasize that it provided a much better outcome than being convicted at trial, which counsel considered likely. Indeed, defense counsel has a duty to discuss the case with complete candor and offer a defendant her best estimate of the possible outcome. *Adams*, 836 P.2d at 1048. The use of strong language in relaying competent advice does not amount to a coercively involuntary plea. *Id.*

Finally, although Manly now suggests he had a sixth-grader's reading level at the time of his guilty plea, nothing at the time of his plea suggested any impairment. On the contrary, much suggested that he was quite self-aware and cognizant of his surroundings. For example, his statements are both articulate and reflective of the night's events, including the shooting and post-shooting recriminations. He also carried additional adult responsibilities throughout his life. The plea papers carefully laid out the terms of the agreement, and Manly initialed each page. He also had discussed and rejected previous plea offers with counsel. And, of course, defense counsel separately attested

that they explained all the terms of the plea *and* that Manly understood those terms.

The record establishes that Manly understood the court's advisements and responded appropriately. In short, the court engaged in an "informed consent dialogue" with Manly to ensure that he "in fact knowingly and voluntarily waiv[ed his] constitutional rights." *Simpson I*, 51 P.3d at 1025-26 (citations omitted). And indeed, both the "juvenile and his [] parent[were] fully advised by the court." *Id.* at 1026 (citations omitted). Nothing in the record suggests Manly's appearance, behavior, demeanor, or responses conveyed a *lack* of understanding; quite the opposite, Manly conveyed comprehension. *See Rice v. Hall*, 564 F.3d 523, 526 (1st Cir. 2009) (prejudice allegations are deficient when they rest on "mays" and "could haves"). And nothing more was required to ensure the validity of the plea—particularly given the presence and effective assistance of counsel. *See Simpson I*, 51 P.3d at 1026-27.

CONCLUSION

This Court should affirm the postconviction court's order denying Manly's allegation of ineffective assistance of counsel and that his guilty plea was constitutionally invalid.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

/s/ Joseph G. Michaels

JOSEPH G. MICHAELS, 40403*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for the People of the State of Colorado
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **TARA JORFALD** and all parties herein via Colorado Courts E-filing System (CCES) on May 17, 2018.

/s/ Tiffiny Kallina

MATTER ID: 4509