No. 19-

IN THE

Supreme Court of the United States

KYLE BROOKS,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Due process requires that a guilty plea be voluntary, knowing, and intelligent. Here, the charging document omitted an essential element of the crime. At the plea hearing, the trial judge misinformed the defendant by omitting the same element in his summary of the crime, neither the prosecutor nor defense counsel corrected the judge, there was no allocution, and defense counsel has never said she informed the defendant privately about the missing element. Was the plea valid?

RULE 14(B) STATEMENT

The parties in the Colorado Supreme Court were Kyle Brooks and the State of Colorado. The following is a list of all directly related proceedings:

- Brooks v. People, No. 17SC614 (Colo.) (opinion issued and judgment entered Sept. 9, 2019; modified on denial of rehearing Sept. 23, 2019).

- People v. Brooks, No. 13CA1750 (Colo. App.) (judgment entered June 15, 2017; application for rehearing denied Aug. 3, 2017).

- People v. Brooks, No. 11CR1849 (Boulder Cty. Dist. Ct.) (judgment entered Aug. 8, 2013).

- People v. Brooks, No. 09CR72 (Boulder Cty. Dist. Ct.) (judgment entered July 23, 2010).

- People v. Brooks, No. 10CR716 (Boulder Cty. Dist. Ct.) (judgment entered July 23, 2010).

- People v. Brooks, No. 10CR760 (Boulder Cty. Dist. Ct.) (judgment entered July 23, 2010).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kyle Brooks respectfully submits this petition for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The decision of the Colorado Supreme Court is reported at 448 P.3d 310 (Colo. 2019) and is reproduced at Pet. App. 1a–11a. The decision of the Court of Appeals is reported at 454 P.3d 270 (Colo. App. 2017) and is reproduced at Pet. App. 12a–35a. The transcript of the oral decision of the district court is reproduced at Pet. App. 36a–40a.

JURISDICTION

The Colorado Supreme Court entered its judgment on September 9, 2019 (Pet. App. 1a) and denied the Petitioner's timely application for rehearing on September 23, 2019 *(Id.)*. Justice Sotomayor granted the Petitioner's timely application for an extension of time to file this petition to February 20, 2020. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The Colorado theft statute, Colorado Revised Statutes, Section 18-4-401(1), is reproduced at Pet. App. 59a-64a.

STATEMENT OF THE CASE

The decision below arises from a habitual criminal proceeding in which Brooks received an enhanced sentence based on prior convictions. At that proceeding, Brooks contested the validity of one of those prior convictions, asserting that his guilty plea resulting in that earlier conviction did not satisfy due process. Colorado law permits Brooks to challenge the validity of his guilty plea in this manner.

The essential facts and issue presented by the guilty plea at issue are clear-cut and striking. Brooks pleaded guilty to the crime of theft as part of his plea agreement. The document charging Brooks with theft omitted an essential element of the crime. The trial judge omitted the same element in his summary of the charge at Brooks's plea hearing, and neither defense counsel nor the prosecutor corrected the omission. Nothing in the record affirmatively shows that Brooks was ever advised of the missing element. The issue presented is whether, on those facts, Brooks's guilty plea satisfied the due process requirement of being voluntary, knowing, and intelligent.

1. On April 17, 2010, the State of Colorado filed a criminal complaint (the "Information") charging Brooks with the crime of robbery. Pet. App. 89a. Brooks thereafter entered into an agreement to plead guilty to the lesser crime of theft in exchange for a sentence of probation.[1] Pet. App. 65a.

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1. The Plea Agreement listed the minimum presumptive range for this offense as one year with a maximum of six years under exceptional circumstances. Pet. App. 79a.

This agreement was implemented within a 24-hour period. On June 17, 2010, the State filed a motion to dismiss the robbery charge and a motion to amend the Information to add a charge of theft, in violation of Colorado Revised Statutes Section 18-4-401(1). Pet. App. 84a–87a. The next day, June 18, 2010, Brooks signed a document entitled "Plea Agreement, Advisement Pursuant to Criminal Procedure Rule 11 and Plea of Guilty" (the "Plea Agreement"), and Brooks's attorney signed a form document entitled "Attorney Certificate to the Court." Pet. App. 82a–83a. That same day, the court held a plea hearing at which it accepted the guilty plea (the "Plea Hearing"). Pet. App. 46a–54a.

Section 18-4-401(1) includes two distinct elements. Specifically, the first element of the crime is that the defendant "knowingly obtains . . . control over anything of value of another without authorization or by threat or deception." In addition, the defendant must commit one of five alternative second elements of the crime:

> (a) Intends to deprive the other person permanently of the use or benefit of the thing of value;
>
> (b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit;
>
> (c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use or benefit;

> (d) Demands any consideration to which he or she is not legally entitled as a condition of restoring the thing of value to the other person; or
>
> (e) Knowingly retains the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement.

COLO. REV. STAT. § 18-4-401(1).

Here, the Information did not notify Brooks which of the alternative second elements of the crime he allegedly committed. The relevant charge stated in full:

> That on or about April 17, 2010 in, or triable in, the County of Boulder, State of Colorado KYLE CHANCE BROOKS unlawfully, feloniously, and knowingly took a thing of value, namely: a purse, from the person of Whitney Sasha Weis; in violation of section 18-4-401(1),(5), C.R.S.[2]

Pet. App. 88a. The Information thus alleged that Brooks *knowingly* obtained control over a thing of value of another without permission, but it did not allege which of the five alternative second elements of the crime he allegedly committed. In fact, the Information did not even disclose that there was a second element of the crime that the State would be required to prove.

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2. Colorado Revised Statutes Section 18-4-401(5) states that "[t]heft from the person of another by means other than the use of force, threat, or intimidation is a class 5 felony without regard to the value of the thing taken." COLO. REV. STAT. § 18-4-401(5).

This omission of an element of the crime charged from the Information was authorized by Section 18-4-401(6) of the Colorado Revised Statutes, which provides that in an information:

> [I]t shall be sufficient to allege that, on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment or information. The prosecuting attorney shall at the request of the defendant provide a bill of particulars.

Colo. Rev. Stat. § 18-4-401(6). Counsel for Brooks never made such a request and the State never provided any bill of particulars.

Section 18-4-401(6) does not purport to address what information a defendant must be provided before the defendant can enter a voluntary, knowing, and intelligent guilty plea. Here, the statute contributed to the fundamental defects in Brooks's guilty plea by permitting the prosecutor to dispense with the usual practice of identifying all of the elements of the crime in the charging documents.

Brooks's Plea Agreement likewise failed to identify the missing element of the alleged crime. In particular, the Plea Agreement did not specify which of the five alternative second elements of Section 18-4-401(1) Brooks allegedly committed, nor did it disclose that proof of a second element was required. Pet. App. 65a–83a.

Before the Plea Hearing, defense counsel signed a standard, generic form stating that she had "discussed the facts and law applicable to this matter with the Defendant including the necessary culpable mental state[.]" Pet. App. 82a. But defense counsel has never stated that she identified for Brooks the element missing from the Information, and neither she nor the prosecutor ever put anything on the record identifying the missing element. In fact, there is not a word in the record reflecting that there was in fact a second element of the crime. Defense counsel has never said that she explained to Brooks in a private conversation that the Information omitted an essential element of the crime to which he was pleading guilty or that she advised him of the true elements of the crime.[3]

Nor did the trial judge advise Brooks of the second essential element of theft. To the contrary, in explaining to Brooks the elements of the crime charged, the trial judge read from the Information and thereby *misinformed* Brooks of the elements of the crime charged by omitting any reference to the second element. Pet. App. 52a. Neither defense counsel nor the prosecutor said anything about the element missing from the Information and from the trial judge's summary. Instead, the Plea Hearing continued with Brooks pleading guilty without a word in the record about there even being a second element of the crime. Pet. App. 52a–53a.

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3. Notably, the State represented in proceedings below that it intended to call defense counsel as a witness at the hearing as to the validity of Brooks's guilty plea, but did not do so. Pet. App. 42a. This was despite the fact that the courts below held that Brooks had made a prima facie case that his plea was constitutionally invalid, which put the burden of proof on the State to overcome that prima facie showing by proving that Brooks's guilty plea was nonetheless voluntary, knowing, and intelligent. Pet. App. 24a-25a.

We now know, from the briefing in this subsequent habitual criminal proceeding, that the State contends that the missing second element is that Brooks "intend[ed] to deprive the other person permanently of the use or benefit of the thing of value . . . ." However, the record in the case in which Brooks pleaded guilty is silent as to which necessary second element the State was charging, let alone that Brooks was informed of that missing element.

The Plea Agreement exacerbated the problems arising from the omissions in the Information and at the Plea Hearing. The Plea Agreement included an entire section about "culpability and accountability" that informed Brooks that "[a] crime is committed when a defendant has committed a voluntary act . . . accompanied by a culpable mental state." Pet. App. 66a. It then listed what it described as four distinct culpable mental states and detailed the difference between the culpable mental state required for his crime—"intentionally"—and the one it listed on his charging documents—"knowingly." Pet. App. 66a–67a. By highlighting the differences between "knowingly" and "intentionally," the Plea Agreement reinforced the false impression that the State needed to prove only that Brooks knew he was taking something of value and did not need also to establish that he intended to deprive the other person permanently of that thing.

2. In 2013, Brooks was convicted of witness tampering in Colorado state court. Pet. App. 13a–14a. At sentencing, the State sought to adjudicate Brooks as a habitual criminal based on his three prior felony convictions—a classification that would result in a mandatory minimum sentence of twenty-four years of imprisonment. Colo. Rev. Stat. § 18-1.3-801(2)(a)(I). One of the felony convictions on which the State relied was the conviction for theft pursuant to the 2010 guilty plea.

As permitted by Colorado law, *see Lacy v. Colorado*, 775 P.2d 1, 3–4 (Colo. 1989) ("A prior conviction obtained in a constitutionally invalid manner cannot be used against an accused in a subsequent criminal proceeding . . . to increase punishment."), Brooks challenged the reliance on his 2010 conviction for theft, contending that the conviction was constitutionally invalid. He argued that his guilty plea was not made voluntarily, knowingly, and intelligently because he had not been informed of the requisite element of "intent to deprive permanently."

The district court rejected this argument. The court acknowledged that Brooks had not been advised of the "intent to deprive permanently" requirement. It confirmed that the Information misstated the elements of theft by failing to include that element. Pet. App. 52a. The district court also agreed that the judge who took the 2010 plea had misadvised Brooks of the elements of theft. Pet. App. 37a. Nevertheless, the court held that Brooks must have known of the "intent to deprive permanently" requirement because he had pleaded guilty to theft "just a year before" and that "the very nature" of the allegations against Brooks "would advise Brooks that this theft was one that involved an intent to permanently deprive." Pet. App. 40a.

The Colorado Court of Appeals affirmed. *People v. Brooks*, 454 P.3d 270 (Colo. App. 2017). Pet. App. 12a–35a. It acknowledged that both the Information and the trial judge's summary omitted an essential element of the crime charged. Pet. App. 24a–25a. Nevertheless, the Court of Appeals concluded that Brooks's plea to the crime of theft was voluntary, knowing, and intelligent, agreeing with the trial court that "the very nature" of the allegations

"advise[d] Brooks . . . that this theft was one that involved an intent to permanently deprive." Pet. App. 25a.

The Colorado Supreme Court affirmed. It agreed that the Information was deficient because it omitted the "intent to deprive permanently" requirement. Pet. App. 9a. That court also recognized that the judge misstated the elements of the offense at the Plea Hearing. *Id.* And it held that Brooks had made a prima facie case that his plea was constitutionally invalid. Pet. App. 11a. Nevertheless, the court concluded that the State had met its burden of showing that Brooks's guilty plea was voluntary, knowing, and intelligent. *Id.*

Unlike the trial court and the Court of Appeals, the Colorado Supreme Court did not rely on the nature of the allegations to conclude that Brooks must have known of the intent requirement for theft. Instead, the court pointed to three other considerations.

First, it stated that "theft is not an abstract concept" and that its relative lack of complexity lowered the "level of explanation required to demonstrate that Brooks understood" the elements involved. Pet. App. 7a–8a.

Second, it concluded that Brooks must have known of the intent requirement because he had pleaded guilty in 2009 to a separate charge of the different offense of misdemeanor theft. Pet. App. 10a. Although acknowledging that the plea was to a different crime than the one charged in 2010, the court stated the 2009 charge had the "same specific intent to permanently deprive element" as the theft charged in 2010. *Id.*

Third, the Colorado Supreme Court pointed to the standard, generic form signed by defense counsel stating that she had "discussed the facts and law applicable to this matter with the Defendant including the necessary culpable mental state[.]" Pet. App. 10a. According to the court, despite the omission of a necessary element from the Information and from the trial court's summary of the crime at the Plea Hearing, this form (signed before the Plea Hearing) provided "written assurance . . . that Brooks understood what he was pleading guilty to." *Id.*

The Colorado Supreme Court reached this conclusion notwithstanding that the form is a generic one, that defense counsel never requested a bill of particulars, that the State never identified on the record which of the five alternative second elements it was alleging had been committed, that defense counsel never stated that she had corrected the omission from the Information, that defense counsel and the prosecutor remained silent when the trial judge *misinformed* Brooks as to the elements of the crime charged, and that the State did not call defense counsel as a witness at the hearing in the trial court regarding the validity of Brooks's guilty plea (contrary to its prior representation that it would do so).[4]

4. Under the rationale of the Colorado Supreme Court's decision, a plea hearing would not be necessary at all, at least for any defendant with a prior record charged with a purportedly simple crime. The plea hearing did nothing whatsoever to support the conclusion that Brooks received sufficient notice of the crime charged to enter a valid guilty plea, and in fact did the opposite. Brooks was given incomplete information and there was no allocution.

Brooks filed a petition for rehearing. The Colorado Supreme Court denied the petition. Belying its conclusion that theft is "easily understandable to a layperson," the Colorado Supreme Court acknowledged in its denial of rehearing that it had misstated the elements of theft in its original opinion by omitting the first mens rea requirement of the crime. It accordingly issued a modified opinion correcting its error. Pet. App. 55-56a.

REASONS FOR GRANTING THE PETITION

I. The Colorado Supreme Court's decision conflicts with decisions of this Court.

For a guilty plea to comport with due process, it must be "voluntary" and constitute an "intelligent admission" that the defendant committed the offense. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *see also, e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("A guilty plea . . . is valid only if done voluntarily, knowingly, and intelligently"); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) ("[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary'"); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). And, if a guilty plea is not "voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

This Court has repeatedly stressed that a guilty plea is knowing and intelligent only if the defendant receives "real notice of the true nature of the charge against him." *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983); *accord Smith v. O'Grady*, 312 U.S. 329, 334 (1941). Providing this notice is "the first and most universally recognized requirement of due process." *Marshall*, 459 U.S. at 436.

This Court has held that adequate notice requires that the defendant be made aware of "the *elements* of the . . . charge to which he pleaded guilty." *Bradshaw*, 545 U.S. at 182–83 (emphasis added); *see also Henderson*, 426 U.S. at 645 (invalidating a plea because the defendant had not been informed of the "elements of the offense"). "Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid." *Bradshaw*, 545 U.S. at 183.

Because of the serious consequences of a guilty plea, this Court has instructed that courts cannot presume that a defendant enters a plea voluntarily, knowingly, and intelligently. *Boykin*, 395 U.S. at 242. Instead, the record must include "an affirmative showing that [the plea] was intelligent and voluntary." *Id.* Accordingly, a plea may be valid if it is accompanied by "an explanation of the charge by the trial judge," *Henderson*, 426 U.S. at 647, or if "the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel," *Bradshaw*, 545 U.S. at 183. Likewise, this Court has suggested that a plea may be voluntary and intelligent if the defendant affirmatively expresses an understanding of the elements of the charge at sentencing. *See Henderson*, 426 U.S. at 646. But if the record does not establish affirmatively that the defendant was aware of and understood the elements of the offense, the plea is invalid.

Applying these doctrines in *Henderson v. Morgan*, this Court invalidated a guilty plea because the defendant had not been made aware of the elements of the offense to which he pleaded guilty. There, a defendant pleaded guilty to second-degree murder "on the advice of his attorneys."

Id. at 642. Although one of the elements of the offense was an intent to cause the death of the victim, the indictment did not include that element of intent. *Id.* Moreover, neither "direct colloquy" with the presiding judge nor earlier discussions with defendant's lawyers referenced "the requirement of intent to cause the death of the victim." *Id.* at 642–43. Nor was there a "factual statement or admission" by the defendant "necessarily implying" that he had the relevant intent. *Id.* at 646. Given these failures to notify the defendant of the critical element of intent, this Court held that the defendant's guilty plea was not voluntary and intelligent. *Id.*

The decision below in this case conflicts with these precedents. Brooks pleaded guilty to the crime of theft. As explained above, the Information charging Brooks with theft did not specify which of the five alternative second elements of the crime was being charged. Moreover, the trial judge *misinformed* Brooks of the elements of the crime charged by also omitting any reference to a second element when she summarized the elements of the crime at Brooks's Plea Hearing. Pet. App. 37a. Neither the prosecutor nor defense counsel corrected the omission. Pet. App. 37a–40a. Instead they remained silent, thereby appearing to confirm the trial judge's erroneous statement of the elements of the crime to which Brooks was pleading guilty.

Nor is there anything in the record showing that Brooks was informed of the particular provision— intent to deprive the victim permanently of the stolen item—that the State subsequently contended that Brooks violated. Indeed, nothing in the record of the case in which Brooks pleaded guilty makes any mention even of the existence of a second element of the crime.

In other words, the record utterly fails to show that Brooks was informed that there was an essential second element of the crime to which he pleaded guilty, let alone the specifics of that element. Thus, in this case, as in *Henderson v. Morgan*, 426 U.S. 637 (1976), the defendant was never advised of "an essential element of the offense." *People v. Archuleta*, 180 Colo. 156, 160, 503 P.2d 346, 347 (1972).

Nevertheless, the Colorado Supreme Court held that Brooks must have been aware of the intent requirement because theft is a "simple" crime and Brooks had been previously convicted for theft. That inference is directly contrary to this Court's directive that the record must contain "an affirmative showing" that the defendant understands the offense to which he pleads, including that the defendant has been advised of the elements of the crime. *Boykin*, 395 U.S. at 242. And a crime can hardly be said to be "simple" where the statute defining it includes five alternative second elements. Indeed, as noted above, the Colorado Supreme Court itself misstated the elements of the crime in its original opinion in this case. Pet. App. 4a, 56a.

The Colorado Supreme Court also inferred that Brooks was aware of the intent requirement because defense counsel signed a standard, generic form document stating that she "discussed the facts and law applicable to this matter with [Brooks] including the necessary culpable mental state[.]" Pet. App. 10a. Defense counsel signed this standard form before the Plea Hearing. At that subsequent hearing, neither she nor the prosecutor corrected the omission of an essential element of the crime in both the charging document and the trial judge's summary of the crime charged. Defense counsel has never stated that she

corrected in some private conversation with Brooks the omissions in the charging document and in the judge's summary, and the State chose not to call defense counsel as a witness at the hearing as to the validity of Brooks's guilty plea (contrary to its stated intent).

To be sure, this Court has suggested that a plea may be valid if defense counsel informs the defendant of the elements of the offense, and that it "may" even "be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Henderson*, 426 U.S. at 647. Here, however, the record establishes that Brooks was affirmatively *misinformed* as to the elements of the crimes to which he was pleading guilty. This Court has never suggested that a statement by the judge at a plea hearing *misinforming* a defendant as to the elements of the crime charged may be disregarded based on the assumption that defense counsel's signature on a standard form document must mean that she told the defendant something different *outside* of court than he had been told *in court proceedings* during which defense counsel remained silent.

In short, the Colorado Court's conclusion that petitioner's plea was constitutionally valid conflicts with this Court's precedents requiring that the record affirmatively show that the defendant understood the elements of the offense.

II. The decision below conflicts with decisions by federal courts of appeals and other state courts.

This Court should also grant review because the decision below conflicts with decisions of federal circuit courts and other state supreme courts in two important respects. First, the Colorado Supreme Court's conclusion that, even when the charging document and trial court do not inform the defendant of the elements of an offense, out-of-court information provided by defense counsel suffices to make a plea knowing and voluntary conflicts with decisions of the Second and Eighth Circuits and of the Utah Supreme Court.

Second, the Colorado Supreme Court's holding that a court may presume from defense counsel's attestation of consultation with the defendant that the defendant was adequately informed as to the elements of the crime charged, notwithstanding that the charging document and trial court misstated the elements of the offense, conflicts with a decision of the Connecticut Supreme Court.

A. The decision below conflicts with decisions of the Second and Eighth Circuits and of the Utah Supreme Court holding that a plea is invalid where the trial court fails to assure itself that the defendant understands the elements of the crime charged, notwithstanding that defense counsel discussed the charge with the defendant.

The Second and Eighth Circuits and the Utah Supreme Court have held that a guilty plea does not satisfy the due process requirement that it be voluntary, knowing,

and intelligent if the trial court itself fails to assure that the defendant understands the elements of the offense to which the defendant pleaded. According to those courts, such a plea is invalid even if defense counsel discusses the charges with the defendant. If Brooks had challenged his plea in those courts, his plea would have been vacated.

In *United States v. Blackwell*, 199 F.3d 623 (2d Cir. 1999), the Second Circuit overturned a guilty plea to conspiracy as not voluntary and intelligent because the district court failed to ensure that the defendant understood the elements of the offense. The Second Circuit stated that the district court "did not itself explain the elements of the conspiracy to [the defendant], nor did it read the indictment to him[,]" and it "never asked [the defendant] whether he understood the nature of the offense to which he was entering a guilty plea." *Id.* at 626. It also noted that the district court "did not ask the defendant to describe his participation in the offense." *Id.* Although defense counsel informed the trial court that he had explained the indictment to the defendant, the Second Circuit stated that this representation was not sufficient. *Id.* ("[Although the judge] was informed by [defendant's] attorney that he had explained the plea agreement and the indictment[,] . . . . an attorney's representation that he explained a charge to the defendant is not enough to demonstrate that the defendant understands the nature of that charge."). Therefore, the Second Circuit concluded, the defendant's plea was not "knowing, intelligent and voluntary."[5] *Id.*

5. Although the Second Circuit also held that the district court failed to satisfy Federal Rule of Criminal Procedure 11 in taking the plea, it also concluded that the plea was invalid because

Similarly, in *Ivy v. Caspari*, 173 F.3d 1136 (8th Cir. 1999), the defendant pleaded guilty to felony murder resulting from a death caused in the course of the defendant's perpetration of the felony of unlawful use of a weapon. The Eighth Circuit held that the plea was not valid because the trial court did not advise the defendant of the requirement of intent to commit the underlying felony and the defense counsel did not correct the oversight at the plea hearing. *Id.* at 1143 ("Although the trial court correctly stated that the law did not require the State to prove that Ivy intended to kill his stepsister, it did not advise Ivy that the State was required to prove that Ivy intended to commit the underlying felony."). In so holding, the court did not inquire whether defense counsel explained the elements to the defendant outside of court; nor did it presume that defense counsel did so. Instead, the Eighth Circuit stated that, because of the trial court's and counsel's failure to advise the defendant of the intent requirement, the plea "could not have been voluntarily entered." *Id.*

Under the approach of the Second and Eighth Circuits, Brooks's plea was was not voluntary, knowing and intelligent.[6] Like the trial courts in *Blackwell* and

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it failed the *constitutional* requirement of being "knowing, intelligent and voluntary." *Blackwell*, 199 F.3d at 626.

6. There is also direct tension between the decision below and the Third Circuit's decision in *United States v. Repella*, 359 F. App'x 294, 296 (3d Cir. 2009), which was decided based on Rule 11, but which nonetheless evaluated whether a guilty plea was voluntary, knowing, and intelligent. There, the court overturned a guilty plea to defrauding a bank because the record did not establish that the defendant understood that the crime required "intent to defraud a bank." *Id.* In so holding, the Court did not

Ivy, which failed to explain the elements of the crime to which the defendants in those cases were pleading guilty, the trial court here did not explain the elements of theft to Brooks or otherwise ensure that Brooks understood the elements of theft. Under *Blackwell* and *Ivy*, any auxiliary discussions that Brooks might have had with his counsel would not suffice to render his plea voluntary.

The decision below similarly conflicts with the Utah Supreme Court's decision in *Utah v. Alexander*, 279 P.3d 371 (Utah 2012). There, the defendant pleaded guilty to burglary with intent to commit sexual battery. Although the charging document alleged that the defendant had "the intent to commit a sexual battery," the Utah Supreme Court concluded that the plea failed to satisfy due process standards because the trial court did not discuss at the plea hearing the element of "intent to commit sexual battery." *Id.* at 382–83. The court rejected the argument that the defense counsel's statement—that he reviewed the charge with the defendant—adequately informed the defendant of the intent requirement. *Id.* at 381. According to the Utah Supreme Court, this statement established only that defense counsel reviewed the allegations against the defendant and "did not affirm on the record" that he had explained the element of "intent to commit sexual battery." *Id.*

Like the trial court in *Alexander*, which did not explain the intent element of the crime in that case, the

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consider whether defense counsel discussed the elements outside of court. It noted only that there was no evidence of a discussion of the "intent to defraud a bank" in the indictment, plea-colloquy transcript, or the pre-sentence report. *Id.*

trial court here did not explain the elements of theft to Brooks or otherwise ensure that Brooks understood the elements of theft. Nor did Brooks's defense counsel affirm on the record that she explained to Brooks the missing second element of the crime charged.

Brooks's defense counsel signed a standard, generic form stating that she "discussed the facts and law applicable to this matter with the Defendant including the necessary culpable mental state[.]" Pet. App. 82a. But nothing in that form states that defense counsel explained to Brooks that the Information omitted a second essential element of the crime, what that element was, and that the State would be required also to prove the missing second element beyond a reasonable doubt. And defense counsel did not correct the trial judge when the judge *misinformed* Brooks of the elements of the crime. The record thus points strongly toward the conclusion that Brooks was never told of the missing element.

Thus, the Colorado Supreme Court's decision here directly conflicts with the Utah Supreme Court's decision in *Alexander*.

B. The decision below conflicts with a decision of the Connecticut Supreme Court holding that a court may not presume that defense counsel adequately informed the defendant as to the elements of the crime charged where the charging document and trial court misstated the elements of the offense.

The decision below also conflicts with a decision of the Connecticut Supreme Court, which has held that, if a charging document misstates the law and the court does

not correct the misstatement, a court cannot presume from an attestation that defense counsel discussed the charge with the defendant that defense counsel corrected that misstatement out of court.

In *Connecticut v. Childree*, 454 A.2d 1274 (Conn. 1983), the defendant pleaded guilty to larceny through extortion, which makes it illegal to obtain property from another through a threat to "[c]ause physical injury to some person in the future[.]" *Id.* at 1279 (quoting CONN. GEN. STAT. § 53a-119(5)). During the plea hearing, the trial court described the offense by stating that it consists of forcing someone to give up property by "instilling in him a fear that, if the property is not delivered, that you will cause him physical injury." *Id.* at 1277.

The Connecticut Supreme Court concluded that this description was inaccurate, because the phrase "will cause him physical injury" could be interpreted to mean certainty of causing physical harm, instead of possibly causing physical harm in the future. *Id.* at 1279. Moreover, the court stated that, because of the misstatement by the trial court, it would be inappropriate to presume that defense counsel adequately explained the charge to the defendant outside of court. *Id.* at 1280. The court also noted that the defendant did not make "any factual statement or admission necessarily implying" that he understood the element of the crime the trial court had inaccurately described. Therefore, the Connecticut Supreme Court concluded, the plea was not knowing and voluntary.[7] *Id.* at 1281.

7. The Connecticut Supreme Court also noted that the defendant had raised a claim of ineffective assistance of counsel, but expressly stated that it was not attempting to make "any

Like the trial court in *Childree*, which misstated the elements of larceny by providing an inaccurate description of the crime, the trial court here misstated the elements of theft by omitting in its summary of the charge that there was a second element that had been omitted from the Information. At no time during the Plea Hearing did the judge, defense counsel, or the prosecutor correct the omission. And, like the defendant in *Childree*, Brooks made no factual statement or admission showing that he was aware of and understood the actual elements of the crime.

In holding that Brooks's plea was nevertheless voluntary, knowing, and intelligent, the Colorado Supreme Court did exactly what the Connecticut Supreme Court held in *Childree* to be a violation of due process: namely, it presumed from the form signed by defense counsel that defense counsel adequately explained to Brooks outside of court the correct elements of the offense, notwithstanding that in court, the trial judge misinformed Brooks as to the elements. As noted above, nothing in that form shows that defense counsel explained to Brooks that the Information left out an essential element of the crime charged and that, in pleading guilty, he would be admitting to doing something different from what the Information told him were the elements of the crime charged. Moreover, defense counsel's subsequent failure to correct the same omission at the plea hearing when the trial judge *misinformed* Brooks as to the elements of the crime to which he was pleading guilty vitiates any explanation that defense counsel may have given beforehand.

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judgment on the propriety of [that] claim . . . ." *Childree,* 454 A.2d at 1280.

This Court should grant review to resolve these conflicts between the decision of the Colorado Supreme Court and decisions of other appellate courts. by clarifying the circumstances under which out-of-court discussions with defense counsel can render an otherwise unconstitutional guilty plea valid.

III. The Colorado Supreme Court erred in concluding that Brooks's guilty plea was valid.

Review by this Court is also necessary to correct the Colorado Supreme Court's erroneous conclusion that Brooks voluntarily, knowingly, and intelligently pleaded guilty to theft in 2010.

A guilty plea results in the waiver of many important constitutional rights, including the right against compulsory self-incrimination; the right to a speedy, public trial by jury; the right to have guilt proven beyond a reasonable doubt; the right to call witnesses; and the right to confront adverse witnesses. *Boykin*, 395 U.S. at 243.

Particularly important among these rights that are waived is the right to a trial by jury. As a plurality of this Court recently observed:

> Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977).

> Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution § 1779, pp. 540-541 (4th ed. 1873).

United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2375, (2019).

Because of the critical importance of the rights being waived by a guilty plea, courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights" and should "not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted); *see also Hodges v. Easton*, 106 U.S. 408, 412 (1882) ("It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."). Thus, waivers of rights are invalid unless they are made in a voluntary, knowing, and intelligent way. *Boykin*, 395 U.S. at 242–44 ("[A] plea of guilty is more than an admission of conduct; it is a conviction . . . . What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable."); *see also Bradshaw*, 545 U.S. at 183 ("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with

sufficient awareness of the relevant circumstances and likely consequences.") (internal quotation marks omitted).

A plea can satisfy this voluntary, knowing, and intelligent standard only if the defendant knows and comprehends the charges against him. A plea cannot be voluntary and intelligent if the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson*, 426 U.S. at 645 n.13. A plea accordingly can be valid only if the defendant receives "adequate notice of the nature of the charge against him" or there is "proof that he in fact understood the charge" against him. *Id.*; *see also Smith*, 312 U.S. at 334 (stating that providing "real notice of the true nature of the charge" is "the first and most universally recognized requirement of due process").

Under these principles, Brooks's plea does not come close to meeting the standard for being voluntary, knowing, and intelligent. Notice of the elements of the crime charged is the starting point for a defendant's ability to determine whether to plead guilty. As explained above, the Information omitted the second essential element of the crime charged, the State never specified which of five alternative second elements of the crime it was charging, the trial judge omitted the second element of the crime in his summary at the Plea Hearing, neither defense counsel nor the prosecutor corrected the trial judge's omission, and there was no allocution or other statement by Brooks showing that he understood both elements of the crime charged.

As detailed above, defense counsel also did not state in the generic form she signed (or anywhere else in the

record) that she recognized that the Information omitted an essential element, let alone that she privately informed Brooks that the crime charged included an additional element not included in the Information, and that by pleading guilty, he would be admitting to that additional element. Nor did defense counsel do anything to correct the record by pointing out the omission in the Information.

Moreover, after signing the form, defense counsel participated in the Plea Hearing at which the trial judge repeated the error in the Information by omitting the "intent to deprive permanently" element in his summary of the crime charged. Neither defense counsel nor the prosecutor corrected the omission on the record. Instead, Brooks proceeded to plead guilty without a word on the record regarding one essential element of the crime.

A generic form such as the one defense counsel signed here might carry some weight in the context of a record reflecting a legally correct charging instrument and a plea hearing at which the elements of the crime charged were not affirmatively misstated. Here, however, it is a woefully inadequate basis on which to conclude that Brooks was advised of the elements of the crime with which he was charged and voluntarily, knowingly, and intelligently pleaded guilty.

To reach that conclusion, one would have to assume that defense counsel identified the omission in the Information, consulted with the prosecutor to confirm which of the five alternative second elements was being charged (notwithstanding not serving a formal request for a bill of particulars), informed Brooks before the Plea Hearing that the Information omitted an essential

element of the crime, and explained the missing element to Brooks before the Plea Hearing. One would then need further to assume that defense counsel nonetheless did not put the second element on the record, participated in a subsequent Plea Hearing at which the trial judge repeated the omission in the Information, and, knowing the judge had made a mistake by omitting an element of the crime, remained silent.

Thus, the inference on which the Colorado Supreme Court based its decision requires extremely counterintuitive speculation about what happened entirely off the record. It is hardly sufficient to satisfy the requisite affirmative showing on the record that Brooks was informed of the elements of the crime to which he was pleading guilty.

Moreover, even assuming against all odds that counsel privately informed Brooks of the missing element before the Plea Hearing, that private advice (nowhere confirmed in the record) could not salvage the plea here. The trial judge herself directly contradicted any such advice by *misinforming* Brooks as to the elements of crime charged at the Plea Hearing, with defense counsel (and the prosecutor) remaining silent. Regardless of what defense counsel may have said to her client privately, it simply cannot be that a plea can be found to be valid where the record in the case shows that the defendant was *misinformed* as to the elements of the crime charged both in the charging document and by the trial judge, all with neither defense counsel nor the prosecutor correcting the record.

In concluding that Brooks's plea was valid, the Colorado Supreme Court also reasoned that Brooks *must*

have known the mens rea requirement because it is obvious from the "simple" nature of the offense. Pet. App. 7a–8a.[8] This reasoning turns the law of waiver on its head. Courts should not assume that a defendant has waived his rights. To the contrary, courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson*, 304 U.S. at 464. A plea is valid only if evidence in the record affirmatively establishes that the defendant was informed of, or understood, the elements of the offense. *Henderson*, 426 U.S. at 645–46.

Assuming the defendant knows about and understands the mens rea requirement of a crime, as the Colorado Supreme Court did, is particularly inappropriate. As this Court has recognized, mens rea is the crucial feature that distinguishes many lawful acts from unlawful acts. *Morissette v. United States*, 342 U.S. 246, 251 (1952). Permitting the government to assume mens rea would provide an avenue for the government impermissibly to shift the burden onto the defendant to prove his innocence. Consistent with this understanding, in *Henderson*, this Court held that the failure to inform the defendant of the mens rea of intent to establish second-degree murder rendered the plea to that offense invalid. 426 U.S. at 647 n.18.

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8. This Court has said it will not second-guess credibility determinations about whether defense counsel informed defendant of the elements of a charge. *Marshall*, 459 U.S. at 435. But the Colorado Supreme Court did not make any credibility determinations. Indeed, it could not make any credibility determination because the State did not call defense counsel as a witness after representing that it would do so. Instead, the Colorado Supreme Court held that it would assume Brooks understood the elements, even if defense counsel did not discuss them with him. Pet. App. 10a–11a.

The Colorado Supreme Court erred in holding that a guilty plea can be voluntary, knowing, and intelligent where the record does not include the actual elements of the crime charged and there is no clear statement by defense counsel that she corrected the omission. Review is warranted to correct this critically important error.

IV. The question presented is of exceptional importance.

This Court should also grant review because the question in this case frequently arises and has a significant effect on the outcome of criminal cases. In 2018, nearly 80,000 people were defendants in federal criminal cases. U.S. Courts, *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2018*, https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf. Of those cases, 71,550, or almost 90%, resulted in guilty pleas. *Id.*[9] And while this Court has long noted the predominance of pleas in the criminal justice system, *see, e.g.*, *McCarthy*, 394 U.S. at 463 n.7 (1969) (citing statistics that 86% of all convictions in the U.S. district courts in 1968 were the result of either a guilty or nolo contendere plea), the rate at which defendants choose to go to trial continues to decline. From 1998 to 2018, the number of federal criminal trials fell by more than half. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Research Center (June 11, 2019), https://

9. This number actually understates the proportion of guilty pleas. The vast majority of cases—6,275, to be precise—that did not result in guilty pleas were dismissed by the prosecutor. Thus, of the cases in which the prosecutor decided to proceed, 97% resulted in guilty pleas.

www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/. Of the 79,704 federal criminal cases in 2018, only 1,879, or just over 2%, went to trial. *Id.*

These federal guilty pleas are but a small sliver of the total guilty pleas entered each year. State courts handle considerably more criminal cases than the federal system. In 2006, for example, an estimated 1,132,290 felony convictions took place in state courts—compared to an estimated 72,983 in federal courts that year. Department of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 – Statistical Tables 9 (Dec. 2009), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf. Although aggregate metrics are not readily available, courts in many states proceed to trial at rates lower than or at least similar to that of the federal courts. In 2017, the jury trial rate across 22 states for which data was available was lower than 3%. Gramlich, https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/. These jurisdictions include Texas (only 0.86% went to trial), Pennsylvania (1.11%), California (1.25%), Ohio (1.27%), Florida (1.53%), North Carolina (1.66%), Michigan (2.12%), and New York (2.91%). *Id.*

In light of these statistics, it is not a stretch to say that state courts may take over one million guilty pleas each year.

The sheer volume of criminal cases demands that prosecutors, defense attorneys, and courts resolve cases quickly. It is for this reason that states have adopted

standardized forms and other procedures to secure guilty pleas expeditiously. But the pressure to resolve criminal cases quickly inevitably results in errors of the sort Brooks faced in this case. Despite their best efforts, many judges and attorneys occasionally err in describing the charges to defendants, and those defendants enter guilty pleas without knowing precisely to what charges they are pleading guilty.

It is therefore critical for this Court to clarify the minimal procedures necessary to ensure that a guilty plea is voluntary, knowing, and intelligent, and, in particular, when errors in charging instruments and in plea colloquies render a plea constitutionally invalid.

CONCLUSION

The decision below held that Brooks's guilty plea was voluntary, knowing, and intelligent based on inferences and speculation as to what Brooks must have known outside of the record. That decision conflicts with the core due process principles articulated in decisions of this Court, conflicts with decisions of federal courts of appeals and other state supreme courts, is erroneous, and presents an issue of exceptional importance.

Due process requires, at a minimum, that the record reflect somewhere that all the elements of the crime charged were identified and explained to the defendant. The principles articulated by this Court demand a bright line rule: a guilty plea cannot stand where the record nowhere identifies the elements of the crime charged, no matter how simple the crime and no matter how easy it may be to speculate that the defendant "must have" known the elements because the crime charged is a simple one.

A different rule would get it exactly backwards. One of the core values of the Due Process Clause is to protect against unjust imprisonment by assuring that a defendant has notice of the charges against him, and understands those charges, before the defendant waives important constitutional rights by pleading guilty. Permitting guilty pleas based on "must have known" inferences is a slippery slope, especially in the context of the pressures of a modern-day criminal justice system to make "quick and dirty" plea deals the norm. It asks little of the government and the courts to assure that the record affirmatively show the elements of the crime charged and that the defendant received notice of the elements and understood them.

This case presents an ideal vehicle for the Court to clarify what due process requires, at a minimum, to assure that guilty pleas are in fact voluntary, knowing, and intelligent.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 2020

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF COLORADO, DATED SEPTEMBER 9, 2019, AS MODIFIED SEPTEMBER 23, 2019

THE SUPREME COURT
OF THE STATE OF COLORADO
2 East 14th Avenue,
Denver, Colorado 80203

2019 CO 75M

Supreme Court Case No. 17SC614

Certiorari to the Colorado Court of Appeals

Court of Appeals Case No. 13CA1750

KYLE BROOKS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Judgment Affirmed
en banc
September 9, 2019

Opinion modified, and as modified, petition for rehearing DENIED. EN BANC.

September 23, 2019

Appendix A

JUSTICE BOATRIGHT delivered the Opinion of the Court.

After a jury found Kyle Brooks guilty of two felonies, the trial court adjudicated him to be a habitual criminal based on his prior felony convictions, including his guilty plea to theft from a person. As a result, the court sentenced him to twenty-four years in prison. Brooks now claims that his prior theft from a person conviction is constitutionally invalid. Therefore, we must determine if the record establishes by a preponderance of the evidence whether Brooks understood the elements of theft from a person when he previously pleaded guilty. We conclude that it does. Accordingly, we hold that Brooks's prior guilty plea to theft from a person was constitutionally valid, and we affirm the judgment of the court of appeals on different grounds.

I. Facts and Procedural History

Brooks was convicted of two class 4 felony counts for victim tampering. The prosecution also sought to adjudicate Brooks a habitual criminal under section 18-1.3-801, C.R.S. (2019), based on Brooks's three prior felony convictions. Brooks, however, asserts that one of those convictions, a 2010 theft conviction obtained through a guilty plea, is constitutionally invalid. Therefore, we need to examine the circumstances surrounding his guilty plea in that case.

In the 2010 case, the People charged Brooks with theft from a person after he and an accomplice stole a purse;

Brooks distracted the victim while his accomplice grabbed the purse. Brooks pleaded guilty and waived a factual basis for the crime. But both the charging document and the Rule 11 Advisement form failed to include the requisite mens rea for theft from a person: the intent to permanently deprive the victim of property. Additionally, the trial court did not mention the specific intent element when accepting Brooks's plea. The Rule 11 form, however, did include defense counsel's signed certification to the court that she had "discussed the facts and law applicable to this matter with [Brooks] *including the necessary culpable mental state*, possible defense(s), and potential penalties." (Emphasis added.)

During the habitual criminal hearing in the present case, Brooks argued that his 2010 theft conviction was constitutionally invalid and it could not serve as a predicate felony for his habitual criminal adjudication. Specifically, he argued that at the time he entered his guilty plea, he had not been informed that theft from a person requires the specific intent to permanently deprive the victim of property. The trial court here disagreed and instead found that Brooks understood what he was pleading guilty to in the 2010 case based on the following: (1) he was represented by competent counsel; (2) he asserted that he understood what he was pleading guilty to; (3) he had previously pleaded guilty to misdemeanor theft; and (4) the nature of the crime itself.

The court of appeals affirmed Brooks's habitual criminal sentence, concluding that the facts of the crime as alleged would have informed Brooks that the

particular theft in question was one where he intended to permanently deprive the victim of property. *People v. Brooks*, 2017 COA 80, ¶ 40, __ P.3d __. Brooks then filed a petition for certiorari review, and we granted review of three issues.[1]

II. Standard of Review

The constitutional validity of a guilty plea is a question of law that we review de novo. *Sanchez-Martinez v. People*, 250 P.3d 1248, 1254 (Colo. 2011). But we defer to a trial court's findings of fact unless they are unsupported by the record. *Id.*

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1. We granted certiorari to review the following issues:

   1. Whether a defendant enters a constitutionally valid guilty plea where the charging document omits the specific intent element of the crime, the trial court recites the defective charging document during its elemental advisement, and defense counsel never advised the defendant of the mens rea element.

   2. Whether, when the trial court fails to advise the defendant of a critical element of the crime to which he pleads guilty, knowledge of the omitted element may be imputed to the defendant based on [the] "nature of the underlying crime."

   3. Whether, when the trial court fails to advise the defendant of the specific intent element of the charge to which he pleads guilty, the error is susceptible to review under the constitutional harmless error standard.

III. Analysis

To determine whether Brooks's guilty plea was valid, we first discuss the requirements of a constitutionally valid guilty plea, including the need to establish that the defendant understood the crime to which he pleaded guilty. Next, we clarify that, to ensure a defendant understands what he is pleading guilty to, a trial court should explain the crime to a degree commensurate with the nature and complexity of that crime. Then, we examine the record to determine if it demonstrates by a preponderance of the evidence that Brooks understood the charge of theft from a person when he pleaded guilty, and we conclude that it does. Therefore, we hold that Brooks's prior guilty plea for theft from a person was constitutionally valid.

A. Law

A guilty plea is constitutionally valid when it has been made "voluntarily, knowingly, and intelligently." *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005) (citing *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)). To demonstrate that a plea is constitutionally valid, "the record [must] affirmatively show the defendant's understanding of the critical elements of the crime to which the plea is tendered." *Watkins v. People*, 655 P.2d 834, 837 (Colo. 1982). The relevant mens rea is a critical element of the crime. *See id.* at 838 (listing specific intent as a critical element). If a defendant wishes to challenge the constitutional validity of a guilty plea, he "must make a prima facie showing that the guilty plea was

unconstitutionally obtained." *Lacy v. People*, 775 P.2d 1, 6 (Colo. 1989). If the defense makes this prima facie showing, then the prosecution can rebut it by establishing "by a preponderance of the evidence that the conviction was obtained" constitutionally. *Id.* at 6-7.

When evaluating whether a conviction was constitutionally obtained, we note that "no particular litany need be followed in accepting a tendered plea of guilty" and that "the degree of explanation that a court should provide depends on the nature and complexity of the crime." *Id.* at 6. We have previously provided guidance on which types of crimes are relatively complex and which are relatively easy to understand. *See id.* (explaining that aggravated robbery and second-degree murder are "understandable by persons of ordinary intelligence," whereas crimes such as conspiracy to commit burglary "require a greater showing of the defendant's understanding"). Therefore, what is necessary to establish a defendant's understanding of the charge against him depends on the crime's complexity.

B. Application

Brooks contends that he did not understand that he needed to have the specific intent to permanently deprive the victim of her property when it was taken. Brooks asserts that, without that understanding, his plea is constitutionally invalid. To determine Brooks's understanding of the charges against him, we look at the record as a whole and focus on five aspects. First, we consider the nature of the offense to which he pleaded

guilty to see how difficult it is to understand the elements of the crime charged. Second, we review the charging document to see if it properly advised Brooks of the charge he was facing. Third, we examine how the court advised Brooks during the plea hearing. Fourth, we consider Brooks's prior experience with the criminal justice system. *Parke v. Raley*, 506 U.S. 20, 36-37, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). Finally, because Brooks was represented by competent counsel, we factor in defense counsel's "assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Bradshaw*, 545 U.S. at 183.

First, theft is not an abstract concept. People steal property because they want to keep, use, or sell it. Thus, the intent to permanently deprive the victim of property is not difficult to understand because keeping the stolen property serves as the motivation for taking the item in the first place. We have previously concluded that crimes such as second-degree murder and aggravated robbery are easily understandable by a layperson, *see Lacy*, 775 P.2d at 6, and require less of a showing to establish that the defendant understood the charge to which he pleaded guilty. Certainly, theft falls safely within the sphere of those crimes, and can be readily contrasted with more complicated crimes like conspiracy to commit burglary.[2]

2. As an illustration, consider the elements of theft and the elements of conspiracy to commit burglary, side by side. Upon doing so, it is clear that the elements of theft are relatively simple, whereas the elements of conspiracy to commit burglary are more complicated and, in addition, also require a defendant to understand the elements of burglary itself:

Because we conclude that the crime of theft from a person is relatively simple, the level of explanation required to demonstrate that Brooks understood what he was pleading guilty to is relatively low.

Second, the charging document in this case was deficient because it omitted the specific intent element of theft from a person:

Theft	**Conspiracy to Commit Burglary**
1. That the defendant,	1. That the defendant,
2. In the State of Colorado, at or about the date and place charged,	2. In the State of Colorado, at or about the date and place charged,
3. Knowingly,	3. With the intent to promote or facilitate the commission of the crime of burglary,
4. Obtained, retained, or exercised control over anything of value of another,	4. Agreed with another person or persons that they, or one or more of them, would engage in conduct which constituted the crime of burglary or an attempt to commit the crime of burglary, and
5. Without authorization or by threat or deception, and	5. The defendant, or a co-conspirator, performed an overt act to pursue the conspiracy. COLJI-Crim. G2:05 (2018).
6. Intended to deprive the other person permanently of the use or benefit of the thing of value. COLJI-Crim. 4-4:01 (2018).	

Appendix A

COUNT 2-THEFT FROM A PERSON (F5)

> That on or about April 17, 2010 in, or triable in, the County of Boulder, State of Colorado KYLE CHANCE BROOKS unlawfully, feloniously, and knowingly took a thing of value, namely: a purse, from the person of [the victim]; in violation of section 18-4-401(1), (5), C.R.S.

Because of the lack of the specific intent element, we find that the charging document failed to properly inform Brooks of all critical elements of the charge.

Third, the trial court advised Brooks in the same manner as the charging document and did not mention the specific intent element. During the plea hearing, the trial court read the charge verbatim from the charging document:

> How do you plead with respect to that added Count 2 which charges on or about April 17, 2010, in or triable in the county of Boulder, state of Colorado, you unlawfully, feloniously, and knowingly took a thing of value, namely a purse, from the person of [the victim] in violation of section 18-4-401(1), (5), C.R.S.?

Because the court's advisement suffered from the same flaw as the charging document, we find that it too failed to inform Brooks of the critical element of specific intent to permanently deprive the victim of property.

Fourth, we rely on Brooks's prior experiences with the criminal justice system to evaluate his understanding of his guilty plea to theft from a person; in particular, we consider his previous guilty plea for misdemeanor theft. The trial court found that Brooks pleaded guilty to theft just a year before his 2010 guilty plea, and even though that theft was a misdemeanor, it had the same "specific intent to permanently deprive" element as theft from a person. *See* § 18-4-401(1)(a), (5), C.R.S. (2019). At the time he entered that guilty plea, Brooks was properly advised—and he acknowledged that he understood—that he needed to have the specific intent to permanently deprive the victim of the property taken to be guilty of misdemeanor theft. He did not express any confusion or challenge that he had the specific intent to permanently deprive the victim of property in the 2009 guilty plea.

Finally, the trial court here expressly found that Brooks was represented by competent counsel in the 2010 case, and Brooks stated on the record in 2010 that defense counsel discussed the Rule 11 advisement form with him, and that he understood the charge to which he pleaded guilty. That form, which Brooks and defense counsel both signed, stated that defense counsel "discussed the facts and law applicable to this matter with [Brooks] *including the necessary culpable mental state*, possible defense(s), and potential penalties." (Emphasis added.) Because we have written assurance from competent counsel that Brooks understood what he was pleading guilty to, we rely on it in determining whether Brooks made a knowing, intelligent, and voluntary plea in accordance with constitutional principles.

In considering the record as a whole, we agree with Brooks that he made a prima facie showing that his theft from a person charge was constitutionally invalid, but we conclude by a preponderance of the evidence that Brooks understood the elements of the crime to which he pleaded guilty. When taken together, the relatively simple nature of the crime of theft from a person, Brooks's guilty plea to misdemeanor theft just a year earlier, and defense counsel's written assurance that she explained to him the mens rea required to commit the offense, convince us that Brooks understood what he was pleading guilty to at the time he entered his plea. Accordingly, we hold that Brooks's prior guilty plea for theft from a person was constitutionally valid.

IV. Conclusion

We vacate the opinion of the court of appeals and affirm the judgment on different grounds.

APPENDIX B — OPINION OF THE COLORADO COURT OF APPEALS, DIVISION TWO DECIDED JUNE 15, 2017

COLORADO COURT OF APPEALS,
DIVISION TWO

Court of Appeals
No. 13CA1750

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

KYLE BROOKS,

Defendant-Appellant.

Opinion by JUDGE BERGER.
Dailey and J. Jones, JJ., concur.

June 15, 2017, Decided

JUDGMENT AND SENTENCE AFFIRMED

A jury convicted defendant, Kyle Brooks, of eight substantive offenses, including two counts of tampering with a witness or victim. The district court adjudicated Brooks a habitual criminal under section 18-1.3-801(2), C.R.S. 2016, and imposed a statutorily mandated sentence of twenty-four years' imprisonment.

Appendix B

Brooks appeals, claiming that (1) there was insufficient evidence to support one of his convictions of tampering with a witness or victim; (2) in adjudicating him a habitual criminal, the district court improperly took judicial notice of material in court files; (3) his guilty plea in one of the underlying convictions on the habitual criminal charges was constitutionally invalid, thus voiding his habitual criminal conviction; and (4) the court erred in concluding that his sentence was not disproportionate and in failing to conduct an extended proportionality review of his sentence. Because we hold as a matter of first impression that the tampering with a witness or victim statute does not require that the "attempt" to tamper actually be communicated to the victim or witness, we reject Brooks' sufficiency argument. We also reject his other contentions and affirm the judgment and sentence.

I. Relevant Facts and Procedural History

Brooks discovered that his girlfriend was pregnant with another man's child, argued with her, and then assaulted her. A bystander called the police. Before the police arrived, Brooks fled.

The police planned to arrest Brooks when he appeared for an unrelated court appearance. When officers contacted Brooks at the courthouse, he resisted arrest and struggled with them. The officers restrained and arrested him.

While in jail, Brooks repeatedly telephoned his girlfriend (the victim) and others in an attempt to

persuade them not to testify against him on the domestic violence charge or to testify falsely. The jail recorded these conversations and turned them over to the prosecution. These telephone calls were the basis for Brooks' first conviction for tampering with a witness or victim, a class 4 felony. Brooks does not appeal that conviction.

After the jail officers learned of these telephone calls, Brooks' telephone privileges were discontinued, but that did not stop him from further trying to tamper with the victim. Instead of phone calls, he wrote letters to the victim to persuade her either not to testify or to testify falsely on his behalf. Because he knew that if he attempted to mail the letters to the victim they would be intercepted by the jail, he hid them in an issue of Westword magazine and asked his cellmate to deliver them to the victim after the cellmate was released from jail. His cellmate refused to participate and instead gave the letters to a jail officer. As a result of this interception, the victim never received the letters. These letters formed the basis of the prosecution's second count of tampering with a witness or victim.

The jury acquitted Brooks of assault in the second degree (either a class 4 or class 6 felony) and two counts of disarming a peace officer (a class 5 felony), but the jury convicted him of two counts of assault in the third degree against the victim (a class 1 misdemeanor), two counts of assault in the third degree against a peace officer (a class 1 misdemeanor), resisting arrest (a class 2 misdemeanor), violation of a protection order (a class 1 misdemeanor), and the two counts of tampering with a witness or victim (both class 4 felonies) discussed above.

After the jury returned its verdicts, the district court held a trial on the habitual criminal count and adjudicated Brooks a habitual criminal. The court imposed a twenty-four-year sentence of imprisonment, as mandated by the habitual criminal statute.

Brooks requested and received an abbreviated proportionality review of the mandatory sentence. At the conclusion of that hearing, the district court concluded that Brooks' sentence was not disproportionate to his offenses and denied him an extended proportionality review.

II. There Was Sufficient Evidence to Support Brooks' Conviction For Tampering With a Witness or Victim

Brooks argues that there was insufficient evidence to convict him of the second count of tampering with a witness or victim based on the letters because the victim never received them.[1] Because this argument relies on an unwarranted reading of the tampering statute, we reject it.

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1. Contrary to the Attorney General's claim, Brooks did not waive this argument. Brooks conceded there was sufficient evidence to convict him of the supposed inchoate crime of attempt to tamper with a witness or victim, but he did not concede there was sufficient evidence to convict him of the substantive crime of tampering with a witness or victim. Because Brooks contended the inchoate crime and the substantive crime were substantially different, his concession that there was sufficient evidence to convict him of the uncharged inchoate crime did not waive his sufficiency of the evidence claim regarding the substantive crime of which he was convicted.

Appendix B

The statute provides as follows:

> A person commits tampering with a witness or victim if he *intentionally attempts* without bribery or threats to induce a witness or victim or a person he believes is to be called to testify as a witness or victim in any official proceeding or who may be called to testify as a witness to or victim of any crime to:
>
> (a) Testify falsely or unlawfully withhold any testimony; or
>
> (b) Absent himself from any official proceeding to which he has been legally summoned; or
>
> (c) Avoid legal process summoning him to testify.

§ 18-8-707(1), C.R.S. 2016 (emphasis added).

Statutory interpretation is a question of law that we review de novo. *Marsh v. People*, 389 P.3d 100, 2017 CO 10M, ¶ 19; *Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559, 563 (Colo. 2009). We begin by applying two principles to the words and phrases at issue in the statute. First, we give the words and phrases their plain and ordinary meaning according to the rules of grammar and common usage. *People v. Voth*, 312 P.3d 144, 2013 CO 61, ¶ 21, *Sidman v. Sidman*, 2016 COA 44, ¶ 13; § 2-4-101, C.R.S. 2016. Second, we consider the words or phrases both in the context of the statute and in the context of any

comprehensive statutory scheme of which the statute is a part. *Doubleday v. People*, 364 P.3d 193, 2016 CO 3, ¶ 20; *Jefferson Cty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). By applying these principles, we attempt to determine the General Assembly's intended meaning of the words or phrases, and harmonize that meaning with the comprehensive statutory scheme. *Id.* If the statutory language is not susceptible of more than one reasonable meaning, we enforce it as written and do not resort to other rules of statutory construction. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1036 (Colo. 2004); *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986).

Brooks argues that while an attempt to tamper need not be successful, the statute nevertheless requires that the attempt to tamper must at least reach the victim or witness.[2] Because it is undisputed that the letters did not reach the victim, Brooks claims that there was insufficient evidence to support his conviction. He concedes that he is guilty of a criminal attempt, as defined in section 18-2-101(1), C.R.S. 2016, to tamper with a witness or victim, but notes that he was not charged with this crime (a crime that, as we discuss below, does not exist).

We reject this argument because the concept of attempt is built into the tampering statute — the crime is completed when a defendant "intentionally attempts" to tamper with a victim or witness. § 18-8-707(1). If there

2. Brooks did not waive this argument either. He acquiesced in the trial court's elemental instruction on tampering with a witness or victim but did not waive his argument that, to sustain a conviction, the tampering had to actually be communicated to the victim.

were such a crime as attempted tampering with a witness or victim, it would be defined as "engaging in conduct constituting a substantial step toward the commission of the offense" of "intentionally attempt[ing]" to tamper with a witness or victim. *See* § § 18-2-101(1), 18-8-707. We conclude that no such crime exists because it would be illogical to recognize a crime premised on an attempt to attempt, and "[a] statutory interpretation leading to an illogical or absurd result will not be followed." *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004).

People v. Yascavage, 101 P.3d 1090 (Colo. 2004), does not require a different result. In *Yascavage*, the Colorado Supreme Court held that there was insufficient evidence to support the defendant's conviction for solicitation to tamper with a witness or victim. *Id.* at 1096. Brooks argues that the court's recognition of the crime of solicitation to tamper with a witness or victim necessitates the recognition of the crime of attempting to tamper with a witness or victim. Brooks cites no authority, and we have found none, for the proposition that the existence of one inchoate form of an offense requires the existence of other inchoate forms of the offense.

We also observe that the *Yascavage* court held that "[t]he purpose of the [tampering with a witness or victim statute] was to punish *any attempt* to induce another to testify falsely or otherwise to subvert the administration of justice." *Id.* at 1092 (emphasis added). Thus, *Yascavage* provides no support for Brooks' contention that there is a crime of attempt to attempt to tamper with a witness or victim.

Neither does *People v. Scialabba*, 55 P.3d 207 (Colo. App. 2002), in which the division held that the defendant, who was charged with witness tampering, was not entitled to an instruction on the affirmative defense of abandonment. The defendant sent a letter to the victim trying to convince her not to appear in court and also asked his mother to tell the victim not to appear in court. *Id.* at 210. Because the defendant had completed the crime when he sent the letter and asked his mother to dissuade the victim from testifying, the division held that he was not entitled to an abandonment instruction. *Id.* at 210-11. Contrary to Brooks' contention, the division did not hold that attempted but unaccomplished communication with the victim or witness could not support a conviction under the statute.

Nothing in the plain language of the statute requires that the defendant actually contact a witness or victim either. Rather, an attempt by the defendant to do so is all the statute requires in this respect. The trial court instructed the jury that "attempt" in the tampering with a witness or victim statute means, "intentionally engaging in conduct constituting a substantial step toward the commission of the crime of Tampering with a Witness."[3]

---

3. Brooks makes a perfunctory argument that the trial court erred when it defined the word "attempt" by utilizing the definition contained in the criminal attempt statute, section 18-2-101, C.R.S. 2016. Brooks contends that the common dictionary definition of "attempt" should have been used instead. The common meaning of the word attempt is "to make an effort to do, accomplish, solve, or effect." Webster's Third New International Dictionary 140 (2002). But the use of the statutory definition of criminal attempt was more

The jury was entitled to find that Brooks did everything within his power to attempt to unlawfully influence the victim. He wrote the letters, concealed them from the jail staff, and asked another inmate to deliver them to the victim. The fact that Brooks' scheme failed provides him no defense.

For these reasons, we conclude that there was sufficient evidence to support Brooks' second conviction for tampering with a witness or victim.

III. The District Court Did Not Abuse Its Discretion in Taking Judicial Notice of Court Files in the Habitual Criminal Adjudication, and Sufficient Evidence Supported the Habitual Criminal Adjudication

Brooks argues that the district court abused its discretion in taking judicial notice of the complete case files of his prior felony convictions and that without such improper judicial notice there was insufficient evidence to support the habitual criminal adjudication.

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favorable to Brooks than the dictionary definition because it imposed a greater proof burden on the prosecution. Therefore, any error in this respect could not have harmed Brooks. This conclusion also makes it unnecessary for us to determine in this case what meaning should be given to the word "attempt" in the tampering statute. "[I]f it is not necessary to decide more, it is necessary not to decide more[.]" *PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

Appendix B

A conviction under the habitual criminal statute at issue requires the prosecution to prove beyond a reasonable doubt that a defendant has three prior felony convictions arising out of separate and distinct criminal episodes. § 18-1.3-801(2)(a)(I)(A).

Brooks contends that only by taking judicial notice of documents that were not properly subject to judicial notice could the court have found that his prior convictions for criminal trespass of a dwelling and theft from a person "relate to different criminal conduct on separate dates and that the People have separately brought and tried those offenses." Because the predicate of his argument is wrong, we reject it.

Brooks concedes (for good reason) that the district court was entitled to take judicial notice of the registers of actions contained in the Integrated Colorado Online Network in the underlying cases. *See, e.g., People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004) ("A court may take judicial notice of the contents of court records in a related proceeding."). But he argues that the registers of actions themselves were insufficient to make a prima facie case that two of his three prior felonies related to different criminal conduct on separate dates and were separately brought and tried.

The registers of actions for these felony convictions establish the following:

- In Boulder District Court case number 10CR716, Brooks pleaded guilty to first degree trespass of a

dwelling on June 18, 2010, with an offense date of February 5, 2010.

- In Boulder District Court case number 10CR760, Brooks pleaded guilty to theft from a person June 18, 2010, with an offense date of April 17, 2010.

The information contained in the registers of actions made a prima facie showing that these cases addressed different criminal conduct that occurred on different dates.

But because Brooks entered guilty pleas in both cases on the same date and in the same court, whether the prosecution separately brought and tried these cases is a closer question. The proof required to establish whether two guilty pleas entered on the same date would have been separately tried is whether — under the mandatory joinder statute — they arose out of separate and distinct criminal episodes. *People v. Jones*, 967 P.2d 166, 169 (Colo. App. 1997). Information such as the dates on which the crimes were committed and the types of crimes committed may prove that the crimes were separate and distinct criminal episodes. *People v. Copeland*, 976 P.2d 334, 342 (Colo. App. 1998), *aff'd*, 2 P.3d 1283 (Colo. 2000).

In *People v. Jones*, 967 P.2d 166, 170 (Colo. App. 1997), it was plausible that two crimes, which were both burglaries, committed on consecutive dates, and in the same area, could have arisen from a single criminal episode. Therefore, without additional evidence about the underlying convictions, the division concluded that there was insufficient proof that the defendant's convictions arose from separate and distinct criminal episodes. *Id.*

However, unlike in *Jones*, the registers of actions relevant to this case showed that the two prior felony convictions were for distinct criminal offenses that occurred months apart. Thus, even though Brooks pleaded guilty on the same day and in the same court, the registers of actions made a prima facie case that his criminal trespassing of a dwelling and theft from a person convictions arose "from charges which, had they not been adjudicated through the entry of guilty pleas, would have been tried separately." *Gimmy v. People*, 645 P.2d 262, 267 (Colo. 1982). Both cases were "separately 'brought' — i.e., in separate informations, with separate docket numbers, arising out of separate criminal incidents." *Id.*

While Brooks was free to attempt to disprove these facts, he chose not to do so. It follows that sufficient evidence supported Brooks' habitual criminal conviction.

IV. Brooks' Guilty Plea to Felony Theft Was Valid

Brooks argues that his plea of guilty to felony theft from a person — his third underlying felony conviction — was constitutionally invalid and thus could not support his habitual criminal conviction.

"A prior conviction obtained in a constitutionally invalid manner cannot be used against an accused in a subsequent criminal proceeding to support guilt or to increase punishment." *Lacy v. People*, 775 P.2d 1, 4 (Colo. 1989).

To attack the constitutional validity of his prior conviction, a defendant must make a prima facie showing

that the challenged conviction was unconstitutionally obtained. *Watkins v. People*, 655 P.2d 834, 837 (Colo. 1982). "A prima facie showing in the context of this case means evidence which, when considered in a light most favorable to the defendant with all reasonable inferences drawn in his favor, will permit the court to conclude that the defendant's plea of guilty was not understandingly made." *Id.*

Brooks arguably made such a prima facie case by demonstrating that the plea court did not advise him of all the "critical elements" of felony theft, section 18-4-401(5), C.R.S. 2016. During the providency hearing, the court had the following exchange with Brooks:

> Court: How do you plead with respect to that added Count 2 which charges on or about April 17, 2010, in or triable in the County of Boulder, State of Colorado, you unlawfully, feloniously and knowingly took a thing of value, namely a purse, from the person of [female victim], in violation of Section 18-4-401, sub 1, sub 5, CRS?
>
> . . . Mr. Brooks, how do you plead with respect to added Count 2?
>
> Brooks: I wish to plead guilty, Your Honor.

The court's advisement and the charging document (which mirrored the court's advisement) did not advise Brooks of the specific intent element of the crime: a defendant must "[i]ntend[] to deprive the other person permanently of the

use or benefit of the thing of value." § 18-4-401(1)(a). Thus, for present purposes we assume that Brooks' conviction was constitutionally invalid unless the prosecution established by a preponderance of the evidence that Brooks' plea met constitutional requirements. *Watkins*, 655 P.2d at 837.

A plea is constitutionally valid when the defendant enters it voluntarily and knowingly. *Lacy*, 775 P.2d at 4. Colorado cases "have recognized that the degree of explanation that a court should provide depends on the nature and complexity of the crime and that no particular litany need be followed in accepting a tendered plea of guilty." *Id.* at 6. The record as a whole must demonstrate that the defendant understood the critical elements of the crime and the possible penalty or penalties. *Id.* at 4-5.

Based on the record as a whole, the district court found that Brooks' plea to the theft charge was voluntary and that Brooks understood the elements of the crime to which he pleaded guilty. The court found that the facts of the underlying crime were that Brooks distracted a woman so that another man could steal her purse. Considering these facts, the court held that "the very nature of the underlying crime would advise Mr. Brooks . . . that this theft was one that involved an intent to permanently deprive." We agree.

If the law were as Brooks contends — that the defendant must always be advised expressly of every element of the crime to validate the conviction under the habitual criminal statute — we would agree with him. But the law is otherwise.

Brooks relies on two Colorado Supreme Court cases, *People v. Colosacco*, 177 Colo. 219, 493 P.2d 650 (1972), and *Lacy*, 775 P.2d 1, where the trial court's failure to include a meaningful explanation of the specific intent element of the crime was fatal to the validity of the conviction. But *Colosacco* and *Lacy* are factually distinguishable because in those cases, unlike this one, the underlying nature of the crime required the court to inform the defendant of the crime's specific intent element.

In *Colosacco*, the defendant pleaded guilty to possession of counterfeit checks after the judge advised him that the nature of the charge was "possession of the forged or counterfeit [checks] with knowledge that they were counterfeit." 177 Colo. at 221, 493 P.2d at 650. Under the facts presented, the defendant could have reasonably believed that he was guilty of the crime simply by possessing checks, irrespective of whether he intended to pass them with the intent to defraud. Thus, because the judge "failed . . . to advise the defendant that the intent to utter and pass the notes with intent to defraud was an essential element of the charge," the supreme court concluded that the defendant's guilty plea was invalid. *Id.* at 221-22, 493 P.2d at 650-51.

In *Lacy*, the Colorado Supreme Court considered a guilty plea to theft of a car. 775 P.2d at 8. The victim testified that she had loaned the car to the defendant on past occasions but that she had not given him permission to use it on the occasion that gave rise to the theft charge. *Id.* Therefore, without an explanation of the specific intent element, the defendant could have reasonably believed

that he was guilty of theft for borrowing the victim's car, even if he did not intend to permanently deprive her of it. Because the providency hearing was "entirely devoid of any accurate or understandable explanation of the charge," the defendant's plea was invalid. *Id.* at 9.

The facts and crimes in *Colosacco* and *Lacy* are distinguishable from Brooks' theft of a purse from a person whom he did not know. We agree with the district court that it is inconceivable that forcibly grabbing a stranger's purse would be for any purpose other than to permanently deprive the owner of her property.

Several out-of-state cases further support this analysis.

In *State v. Gabert*, 152 Vt. 83, 564 A.2d 1356, 1358 (Vt. 1989), the defendant pleaded guilty to lewd and lascivious conduct. He conceded that he understood the charge, but he argued that his plea was invalid because of "the court's failure to explain that the crime involves acts intentionally done 'with a view to excite unchaste feelings and passions.'" *Id.* (citation omitted). The Vermont Supreme Court rejected this argument, concluding that the plea was valid because "under the circumstances here further inquiry about intent was unnecessary. The alleged acts could hardly give rise to an equivocal motivation . . . ." *Id.*

In *State v. Brooks*, 120 Ariz. 458, 586 P.2d 1270, 1271 (Ariz. 1978), the defendant challenged the validity of his guilty plea to child molestation. He argued there was no evidence that he understood intent to be an essential

element of the crime. *Id.* Under Arizona law, "[a]n essential element of the offense of child molestation . . . is that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *Id.* at 1272 (citation omitted). But "[a]t no time during [the court's] questioning of defendant prior to [the court's] acceptance of his guilty plea did [the court] inquire into his motivation for the offense." *Id.* The Arizona Supreme Court rejected the defendant's argument because the "defendant's acts by their very nature manifest that he was motivated by an unnatural or abnormal sexual interest or intent with respect to children." *Id.* at 1273.

By contrast, in *Patton v. State*, 810 N.E.2d 690, 691 (Ind. 2004), the defendant pleaded "guilty to attempted murder without knowing that specific intent to kill was an element of that offense." The Indiana Supreme Court found the defendant's plea was invalid because the evidence did not demonstrate specific intent beyond a reasonable doubt. *Id.* at 698-99. But the court also held that "failure of notice that specific intent is an element of attempted murder will constitute harmless error . . . where during the course of the guilty plea or sentencing proceedings, the defendant unambiguously admits to, or there is other evidence of, facts that demonstrate specific intent beyond a reasonable doubt." *Id.* at 696-97.

For all of these reasons, we conclude that the felony theft conviction was constitutionally valid and that the district court properly found it to be a predicate felony conviction for Brooks' habitual criminal adjudication.

Brooks also argues that, in addition to the specific intent element of theft, the court should have explained the elements of complicity to him, as was required in *People v. Martin*, 791 P.2d 1159, 1161-62 (Colo. App. 1989).

In *Martin*, a division of this court held that a defendant's guilty plea was constitutionally defective because the court did not explain the elements of complicity to him. *Id.* Defense counsel explained to the court that the defendant had accepted the fruits of a burglary and only pleaded guilty to burglary based on a theory of complicity. *Id.* at 1161.

However, *Martin* is different from the present case for three reasons. First, Brooks was more directly involved in the theft than the defendant in *Martin* was in the burglary. Second, Brooks pleaded guilty as a principal and not, like the defendant in *Martin*, as a complicitor. Finally, complicity liability in a burglary by after-the-fact involvement is more complex than Brooks' immediate involvement in the crime of theft. Thus, unlike in *Martin*, the court did not render Brooks' plea unconstitutional by failing to explain the elements of complicity.

For these reasons, we conclude that Brooks made his plea voluntarily and knowingly and that the district court did not err in finding that it was a valid prior felony conviction under the habitual criminal statute.[4]

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4. Although we conclude that Brooks' plea was voluntary and knowing, we do not agree with the Attorney General that this is so solely because Brooks conferred with his counsel. "[A] showing that defense counsel gave some explanation to his client of the charge

V. Brooks' Habitual Criminal Sentence Was Not Grossly Disproportionate to His Crimes

A habitual criminal sentence violates the Eighth Amendment if it is grossly disproportionate to the defendant's crimes. *See People v. Deroulet*, 48 P.3d 520, 523-24 (Colo. 2002). Brooks argues that the district court erred in concluding that his sentence was not grossly disproportionate to his crimes and in not granting him an extended proportionality review. We reject his argument.

If a defendant challenges the proportionality of a habitual criminal sentence, the defendant "is entitled to an abbreviated proportionality review of his or her sentence under the habitual criminal statute." *People v. Cooper*, 205 P.3d 475, 479 (Colo. App. 2008), *abrogated on other grounds as recognized by Scott v. People*, 390 P.3d 832, 2017 CO 16. When conducting an abbreviated proportionality review, a reviewing court scrutinizes the triggering and predicate offenses in question to determine "'whether in combination they are so lacking in gravity or seriousness' so as to suggest that the sentence is grossly disproportionate." *Deroulet*, 48 P.3d at 524-25 (citation omitted).

Colorado courts have held that certain crimes are per se grave or serious. *People v. Gaskins*, 825 P.2d 30, 37 (Colo. 1992). These crimes are grave or serious "by their

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to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered." *Lacy v. People*, 775 P.2d 1, 6 (Colo. 1989).

very nature." *Id.* For other crimes, "the determination of whether the crime is grave or serious depends on the facts and circumstances underlying the offense." *People v. Hargrove*, 338 P.3d 413, 2013 COA 165, ¶ 12. Specifically, courts look to "whether the crime involves violence, and the absolute magnitude of the crime" and compare that to the culpability and motive of the defendant. *Gaskins*, 825 P.2d at 36-37.

"If, and only if, that abbreviated proportionality review gives rise to an inference of gross disproportionality does a . . . court need to engage in an extended proportionality review," in which it compares the sentence at issue to sentences for the same offense in the same jurisdiction and other jurisdictions. *Close v. People*, 48 P.3d 528, 536 (Colo. 2002). If the abbreviated proportionality review yields no inference of gross disproportionality, the district court must impose the sentence mandated by the habitual criminal statute. *Hargrove*, ¶ 14.

Whether an abbreviated proportionality review yields an inference of gross disproportionality is a question of law that we review de novo. *People v. McNally*, 143 P.3d 1062, 1064 (Colo. App. 2005).

A. Triggering Offenses

Tampering with a witness or victim is not a per se "grave or serious" offense. However, we agree with the district court that the facts underlying these crimes were grave or serious.

The district court explained that Brooks' attempts to tamper with the victim constituted "an extensive and extreme scheme to tamper with the witness; in fact, I have never seen anything like it."

The prosecution identified at least 250 phone conversations in which Brooks attempted to tamper with a witness or victim. Further, as noted above, even after his conduct came to light, his phone privileges were suspended, and he was charged with the first count of tampering, Brooks continued his attempts to tamper with the victim.[5] For these reasons, we conclude that his conduct demonstrated a blatant disregard for the law and thus constituted a grave or serious offense.

B. Predicate Offenses

We agree with Brooks that his predicate offenses of criminal trespass of a motor vehicle, criminal trespass of a dwelling, and theft from a person were not per se grave or serious. None of these offenses fall within the list of offenses designated as per se grave or serious by Colorado courts. *See Deroulet*, 48 P.3d at 524. But, as we have explained above, that does not end the inquiry. We must also consider the particular facts of these offenses to determine if they were grave or serious. *Hargrove*, ¶ 12.

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5. To the extent that Brooks argues that his alcohol and drug problems mitigated the seriousness of his conduct regarding tampering with a witness or victim, we reject the argument because we assume that he was not under the influence of drugs or alcohol while he was in jail pending trial.

The underlying facts of the criminal trespass of a motor vehicle conviction were that Brooks broke into a victim's car and stole some property. As for the criminal trespass of a dwelling conviction, the underlying facts were that Brooks took property from a house during a party to which he had been invited. The underlying facts of Brooks' theft from a person conviction were that he distracted a woman by asking for a cigarette, so that another man could steal her purse.

Even if we assume without deciding that the predicate offenses were not grave or serious, that too does not end the matter. Instead, we must consider the triggering and predicate offenses as a whole. *Deroulet*, 48 P.3d at 524-25.

C. Comparison of Gravity of Crimes to Severity of Punishment

We now compare the gravity of Brooks' offenses as a whole to the severity of his twenty-four-year habitual criminal sentence, giving great deference to the General Assembly's determinations of criminal penalties. *Id.* at 527.

While Brooks' predicate offenses were not per se grave or serious, Brooks' triggering offenses were grave or serious. As the district court explained, Brooks' tampering was a "persuasive and unrelenting campaign to manipulate the cooperation of the victim." The tampering offenses are notable not only for the number of times Brooks tried to influence the victim (the prosecution cited 250 phone calls in its first tampering charge) and the blatantly manipulative nature of the communications, but

also for the fact that Brooks could not be dissuaded from tampering with the victim. Brooks continued tampering with the victim after the prosecution charged him with the first count of tampering and his phone privileges were discontinued. As the district court noted, the nature of these offenses demonstrates that Brooks was "uncontrollable in the community and commits crimes and doesn't appear to be able to stop committing crimes."

Further, "it is appropriate for the court conducting the proportionality review to consider" aggravating or mitigating information about the defendant. *People v. Austin*, 799 P.2d 408, 413 (Colo. App. 1990). We recognize that Brooks was acquitted of several felony charges but also note that he was convicted of the lesser included misdemeanor offenses of two counts of assault in the third degree against his pregnant girlfriend, two counts of third degree assault against a peace officer, and resisting arrest. All of these crimes involved violence. Following *Austin*, we consider Brooks' conduct underlying these misdemeanor convictions in determining whether the sentence imposed was grossly disproportionate. Considering all of the convictions and the underlying circumstances as a whole, we agree with the district court that Brooks' twenty-four-year mandatory sentence was not grossly disproportionate.[6]

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6. In addition to the offenses discussed above, the district court considered Brooks' separate felony conviction for contributing to the delinquency of a minor, which was entered after his conviction under the habitual criminal statute. The contributing to the delinquency of a minor conviction was based on events that predated the triggering offenses, but the judgment of conviction was not entered

VI. Conclusion

The judgment of conviction and sentence are affirmed.

JUDGE DAILEY and JUDGE J. JONES concur.

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until Brooks was sentenced under the habitual criminal statute. Therefore, this conviction could not have served as a predicate offense (and indeed, it was not pleaded as such). *People v. Loyas*, 259 P.3d 505, 512 (Colo. App. 2010). Whether erroneous or not, the district court's consideration of this conviction does not alter our analysis or conclusion.

APPENDIX C — EXCERPT OF TRANSCRIPT OF THE DISTRICT COURT OF COLORADO, BOULDER COUNTY, DATED AUGUST 8, 2013

[1]DISTRICT COURT
BOULDER COUNTY
COLORADO
1777 6th Street
Boulder, CO 80302

Case No. 11CR90
Division 6

PEOPLE OF THE STATE OF COLORADO

Plaintiff,

v.

KYLE BROOKS

Defendant.

The matter came on for hearing on August 8th, 2013, before the **HONORABLE ROXANNE BAILIN,** Judge of the Boulder District Court, and the following proceedings were had.

* * *

[20]THE COURT: Mm-hmm. Okay. All right. So, one, it's clear that the charge of theft from the person requires that someone take a thing of value from the person of

someone as opposed to just theft outside of the presence of a person, and that's what makes it a more serious crime, and the charge itself does not have the language that is in a normal theft charge, which is with intent to permanently deprive. I think that it would be useful if it did have that language in it, but it does not. So the charge -- the charging document itself or the amended charge doesn't advise Mr. Brooks specifically of the intent to permanently deprive. And so when he's asked if he understands what the charge means -- let me just delete the beginning of that sentence because I'm not there yet.

So as I was saying, that the charge itself does not advise Mr. Brooks of the element of the intent to permanently deprive; however, at the time that he is pleading guilty he's represented by Ms. Ramsey and -- and certainly I can find that she is competent counsel. And the Court does ask Mr. Brooks, [21]Do you understand in 10 CR 760 that you are going to be pleading guilty to an added Count 2, the charge is theft from a person, also a Class 5 felony, and Mr. Brooks answers, Yes, Your Honor. And then the Court states, Do you understand the elements of the charge, and he says, Yes. So that's, one, that he is represented by counsel and he's affirmatively acknowledging that he understands the elements of the charge.

The Court ultimately reads the charge to him on page 9. And there's a colloquy with Ms. Ramsey in which she makes it clear to the Court that Mr. Brooks' position is that he -- that his co-defendant actually stole the purse, but that she explained to him under the complicity theory that there's a risk that the jury might find that he was involved in the stealing of the purse. And that's what this

plea is based on. And so Mr. Brooks hears that and then he chooses to plead guilty.

Another way to establish what Mr. Brooks knows is through the establishment by the People of the factual basis. However, Ms. Ramsey waives the establishment of the factual basis. So the question is -- I agree with Mr. Johnson, that the question is does Mr. Brooks at the time that he pleads guilty understand what he is pleading guilty to. First of all, I think that the *Marshall v. Lonberger* case does stand for the principle that the Court can take into consideration any previous pleas of guilty, whether the Defendant's [22]intelligence and experience with the criminal justice system would indicate that he understands statements made by the judge, and that the Court does not have to consider the four corners of the plea disposition.

The Court further finds that there is no case law that requires that if the Court is using -- in my position is using -- I'm sorry -- in the position of Judge Berkenkotter, is using a previous plea of guilty to support his knowledge of the elements of the offense that she specifically has to refer to in the dispositional hearing.

The Court further finds that on May 14th, 2009 that Mr. Brooks pled guilty in front of Judge Stavely in County Court to a misdemeanor theft, at which time on page 4 Judge Stavely says, again, under 18-4-401 it means that you unlawfully and knowingly obtained or exercised control over a thing of value that belonged to another person, the thing of value being under $500; you did so by

threat, deception or some other means with the intent to permanently deprive the owner of the thing of value. So in Mr. Brooks' criminal history in the previous year he pleads guilty to theft and is given a specific advisement that includes the intent to permanently deprive the owner of this thing of value.

Next, I think that there's a distinction between cases in which there is some suggestion that there wasn't an intent to permanently deprive. I recently within the last [23]couple of months was asked to evaluate whether a certain plea disposition was adequate and one of the charges was also a theft. The Court in that case had not advised of the intent to permanently deprive, and there was a significant question in that case whether the acts of the defendant could reasonably be construed as not intending to permanently deprive; in other words, just to take something briefly in order to annoy someone. And I think that's the same problem in *Lacey* is that the facts of that case would suggest that there was a sort of triable issue or at least a question about whether the defendant in that case really intended to take the car without consent and permanently deprive.

In this case the facts are that Mr. Brooks and Mr. Garcia are out on the streets of Boulder near downtown, they see a couple of young women walking presumably away from the Pearl Street mall. Mr. Brooks approaches them and asks for a cigarette, and in doing so he's trying to distract them so that Mr. Garcia can then run toward them and grab the purse and run off with it. And I think that when you're talking about a theft from a person in

that context, that the only reasonable conclusion that a defendant could reach is that part of the theft from a person was intending to permanently deprive. You know, it's nonsensical to think that when Mr. Garcia snatches this purse off the arm of the young woman and runs away with it, that his plan is -- is to just hang on [24]to it for a few minutes and then give it back. So the very nature of the underlying crime would advise Mr. Brooks that -- that this theft was one that involved an intent to permanently deprive.

So based on his full advisement of what "theft" means just the year before, and that this particular crime is not like the one I was dealing with a couple of months ago or like the *Lacey* case in which there's some reasonable basis to question about whether there was an intent to permanently deprive, leads me to the conclusion that Mr. Brooks understood what the charge meant and what was involved in that charge, and I will find that it was not unconstitutionally taken.

All right. So that then eliminates the discussion about whether the People have to elect, because that issue was only before the Court if I found that the plea in 760 was unconstitutionally taken. So then I think that we move onto the sentencing phase.

* * * *

APPENDIX D — MINUTE ORDER OF THE DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO, DATED JULY 8, 2013

DISTRICT COURT, BOULDER COUNTY,
STATE OF COLORADO
1777 Sixth Street, Boulder, Colorado 80302
(303) 441-3722

Case Numbers: 11CR1849, 11CR1850,
10CR760, 11CR90, 10CR716, 09CR72

Division 4 Courtroom L

PEOPLE OF THE STATE OF COLORADO,

vs.

KYLE BROOKS,

Defendant.

MINUTE ORDER RE: HABITUAL OFFENDER HEARING

On June 27, 2013, the following actions were taken in the above-captioned cases. The matter is before the Court for a habitual offender criminal hearing. The Court's findings of fact and conclusions of law stated in open court on the record are hereby incorporated. The Clerk is directed to enter these proceedings in the register of actions:

Appendix D

COURT REPORTER: Michelle Kirkpatrick

COURT ORDERS/ACTIONS:

Defense's Motion to Dismiss Count 9 of Amended Complaint in 11CR849

The Defense argues that the "Theft from the Person" conviction in 10CR760 is constitutionally defective, and therefore cannot be used against Defendant in a habitual criminal proceeding.

The People ask the Court for an opportunity to respond to the motion, request a hearing regarding the motion, and an opportunity to call witnesses. The People plan to call Curtis Ramsey, the Defendant's attorney at the time the plea was entered. The People maintain that the conviction in 2010CR760, "Theft from the Person", is critical to the ultimate determination of habitual offender; specifically, whether three times the maximum or four times the maximum presumptive applies in this case.

If necessary, the Court will address the "Theft from the Person" conviction in 10CR760 at the August 8, 2013 9:00 a.m. sentencing hearing.

Admissibility of People's Exhibits 1, 2, and 3: court documents that state the offense and the case numbers of which Kyle Brooks was sentenced to intensive supervision probation

Defense objects to admissibility of People's exhibits 1, 2, and 3. Pursuant to § 18-1.3-802 C.R.S. and 803(8) C.R.E,

the Court finds that the People's exhibits 1, 2, and 3 are admissible in a habitual offender trial and are admitted.

Admissibility of People's Exhibits 8, 9, and 10: stamped and certified sentencing orders

Defense objects to admissibility of People's exhibits 8, 9, and 10. Pursuant to § 18-1.3-802 C.R.S. and 803(8) C.R.E. the Court finds that the People's exhibits 8, 9, and 10 are admissible in a habitual offender trial and are admitted.

Judicial Notice

Pursuant to 201 C.R.S., the Court takes judicial notice of the fact that there are 3 court files, 2009CR72, 10CR716, and 10CR760, that all relate to different criminal conduct on separate dates, and that the People have separately brought and tried those offenses.

Underlying Science of Fingerprint Analysis

Defense argues that the underlying science for fingerprint analysis has not been demonstrated satisfactorily. The Court finds that fingerprint analysis has been established for decades as having an adequate scientific basis to be admitted in a court of law.

Qualification of Dane Cavins to Testify as an Expert Witness

Defense objects to qualifying Dane Cavins as an expert witness in fingerprint comparison and analysis. The Court finds that Dane Cavins has extensive, long-term training

and education in the field of fingerprint analysis and is qualified to testify as an expert witness in fingerprint comparison and analysis.

People's Exhibits 4, 5, and 6: certified fingerprint cards

Defense objects to admissibility of People's exhibits 4, 5, and 6 based on lack of foundation and grounds of confrontation. Pursuant to § 18-1.3-802 C.R.S. and 902 C.R.E., the Court admits exhibits 4, 5, and 6.

People's Exhibits 10 and 11: mug shots

Defense objects to admissibility of People's exhibits 10 and 11 based on lack of foundation and grounds of confrontation. Pursuant to § 18-1.3-802 C.R.S. and 902 C.R.E., the Court admits exhibits 10 and 11.

Curtis Advisement

The Court gave the Defendant a Curtis Advisement. The Court finds that Defendant understands he has a right to testify or not testify, and he chose to remain silent and did so freely, voluntarily, and knowingly.

Habitual Offender Findings

Subject to a later argument with regard to whether the plea in 10CR760 is constitutionally defective or not, the Court finds that the People have proven the habitual offender counts beyond a reasonable doubt.

Appendix D

THE COURT FINDS THAT THE PEOPLE HAVE PROVEN THE HABITUAL OFFENDER COUNTS BEYOND A REASONABLE DOUBT.

THIS MATTER IS SET FOR SENTENCING ON AUGUST 8, 2013 AT 9:00 AND FOR A HEARING, IF NECESSARY, ON THE ISSUE OF WHETHER THE PLEA IN 10CR760 IS CONSTITUTIONALLY DEFECTIVE. THE COURT WILL ALSO ENTERTAIN A PROPORTIONALITY REVIEW.

THE COURT ORDERED A PSI. THE COURT LIFTS THE NO TELEPHONE AND NO CONTACT ORDER AT THE JAIL. HOWEVER, THE JAIL IS PERMITTED TO USE NORMAL PROCEDURES TO REGULATE THE DEFENDANT'S CONDUCT.

Dated this 8th day of July, 2013, *nunc pro tunc,* June 27, 2013.

BY THE COURT

/s/_____
Roxanne Bailin
District Court Judge

APPENDIX E — EXCERPT OF TRANSCRIPT OF HEARING IN THE DISTRICT COURT OF COLORADO, BOULDER COUNTY, DATED JUNE 18, 2010

[1]DISTRICT COURT
BOULDER COUNTY
COLORADO
1777-6th Street
Boulder, CO 80302

Case No. 10CR760,
10CR716, 09CR72

PEOPLE OF THE STATE OF COLORADO

v.

KYLE CHANCE BROOKS

The matter came on for Hearing on June 18, 2010, before the **HONORABLE MARIA BERKENKOTTER,** Judge of the District Court.

* * *

[4]MS. RAMSEY: Yes, it is, Your Honor.

THE COURT: Mr. Brooks, I'm going to turn to you, and I guess everybody else in the courtroom that is going to enter into a disposition or a plea bargain in your case, I'm going to ask that you listen along while I advise Mr. Brooks. When it's your turn to have your case called, it will speed up or expedite the process.

Having said that, if for any reason you can't hear me or don't understand something I'm saying, I'm happy to go through it step by step with all of you.

With that said, I'm going to turn back to Mr. Brooks. As I said, there are a number of important rights you are going to be waiving and giving up in connection with your entering a guilty plea this morning and I want to make sure you understand the rights that you are going to be waiving and giving up. Those include the right to enter a plea of not guilty and have your cases set for trial; the right to be represented by counsel at trial and all events leading up to the trial and have the Court appoint counsel to represent you if you cannot afford to hire your own; the right to be presumed innocent and require the District Attorney to prove the charges against you beyond a reasonable doubt, the right to confront and cross examine the witnesses against you or to have your attorney do so, to call your own witnesses and have the Court issue [5] subpoenas to require your witnesses to appear; the right to remain silent, as well as the right to testify on your own behalf and the right to decide for yourself whether or not to testify.

You also have the right to have the Court instruct the jury that your silence could not be used against you, and finally, if you were convicted at trial, you would have the right to appeal that conviction to a higher court. Do you understand, Mr. Brooks, that you have all those rights?

THE DEFENDANT: Yes, ma'am, Your Honor.

THE COURT: Do you understand you are going to be waiving and giving up all those rights if you enter a plea of guilty in both of these cases?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I see you were given a written Rule 11 advisement form in both of these cases. Have you had a chance to go over that form and review it also with Ms. Ramsey?

THE DEFENDANT: Correct. Yes, I have.

THE COURT: Do you have any questions for me about any of the information in those forms?

THE DEFENDANT: No, ma'am.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: Yes, ma'am.

[6]THE COURT: Has anyone offered you anything I don't know about to get you to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: That is, has anyone threatened or coerced you to get you to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand I'm not bound by any promises that may be made concerning the sentence in this case and ultimately the issue of sentencing is up to me?

THE DEFENDANT: Yes, Your Honor.

THE COURT: How old are you?

THE DEFENDANT: Nineteen.

THE COURT: Where were you born?

THE DEFENDANT: Longmont, Colorado.

THE COURT: How far have you gone in school?

THE DEFENDANT: I recently obtained my GED in custody.

THE COURT: That's a good thing. Are you currently under the influence of any type of alcohol or drugs or medication?

THE DEFENDANT: No, Your Honor.

THE COURT: Is there any other reason why you might not be thinking clearly right now?

THE DEFENDANT: No ma'am.

THE COURT: I want to make sure you understand [7]what you're pleading guilty to. Do you understand

you are going to be pleading guilty in 10CR716 to Count 2 that charges first-degree criminal trespass, which is a Class 5 felony?

THE DEFENDANT: Correct.

THE COURT: Do you understand the elements of that charge?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that as a Class 5 felony you are facing a maximum sentence to the Department of Corrections of between one to three years followed by a mandatory two-year period of parole?

THE DEFENDANT: Yes.

MS. PIGNATIELLO: Actually, Judge, I believe it would be in the aggravated range since he was on a deferred at the time.

THE COURT: You would then be facing a sentence of between 30 months to four years. Is that correct, Ms. Pignatiello?

MS. PIGNATIELLO: Judge, I think it's two to six.

THE COURT: Two to six. This chart I'm looking at is awful. You would be facing a sentence in the range under these circumstances because you were on a deferred judgment and sentence. The maximum sentence you

would be facing instead of what I told you before would actually be a [8]maximum sentence to the Department of Corrections of between two to six years followed by a mandatory two-year period of parole. Do you understand that?

THE DEFENDANT: Correct.

THE COURT: Do you further understand in 10CR760 you are going to be pleading guilty to added Count 2 that charges theft from a person, also a Class 5 felony?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand the elements of that charge?

THE DEFENDANT: Yes.

THE COURT: Do you understand again that with a Class 5 felony under these circumstances, you would be facing a sentence in the range of two to six years followed by a mandatory two-year period of parole?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Brooks, before I ask how you plead, do you have any questions for me about anything that's been discussed here this morning?

THE DEFENDANT: No, ma'am.

Appendix E

THE COURT: How then do you plead in 10CR716 to Count 2 which charges on or about February 5, 2010 in or triable in the County of Boulder, State of Colorado, you unlawfully, feloniously and knowingly entered or remained in the dwelling of Thomas Brock located at 5115 Santa Clara [9]Place, number A, Thomas Brock's bedroom, Boulder, Colorado, in violation of Section 18-4-502?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: How do you plead -- the Court will grant the motion to amend in 10CR760. How do you plead with respect to that added Count 2 which charges on or about April 17, 2010 in or triable in the County of Boulder, State of Colorado, you unlawfully, feloniously and knowingly took a thing of value, namely a purse, from the person of Whitney Sasha Weis in violation of Section 18-4-401, sub 1, sub 5, CRS?

MS. RAMSEY: Your Honor, Mr. Brooks will be entering a plea in this case to take advantage of the plea bargain. Actually, factually, the co-defendant stole the purse, and I explained to him under the complicity theory there's a risk that a jury might find that he was involved in the stealing of the purse, but I want to be sure the Court knows he didn't take the purse in the case, the underlying case that this plea is based on.

THE COURT: Thank you, Ms. Ramsey.

Mr. Brooks, how do you plead with respect to added Count 2?

THE DEFENDANT: I wish to plead guilty, Your Honor.

THE COURT: Factual basis.

[10]MS. PIGNATIELLO: I think we will waive a factual basis because we are setting it over for a PSI.

MS. RAMSEY: We will waive.

THE COURT: The Court will find there's a waiver of factual basis. The Court will further find that Mr. Brooks understands the charges against him, the possible penalties, and is knowingly, intelligently and voluntarily entering his plea of guilty, in both of these cases.

The Court will further grant the motion to dismiss Count 1 in 10CR760 and a motion to dismiss Counts 1, 3 and 4 in 10CR716. Court will set the matter over for sentencing. Court will order a PSI. I'll get to the issue of bond in just a minute. I'm not sure the PSI can be done quickly enough, but I have July 23, and then the next date I have after that is August 20.

MS. RAMSEY: Could I do July 23, so we could --

MS. PIGNATIELLO: That's fine with me.

MS. RAMSEY: We can try and if the report isn't done, we can continue it.

THE COURT: Mr. Brooks, we will see you back here on July 23 at 10:30.

Appendix E

With respect -- I'm sorry -- to the 09CR72 case, I guess we should briefly talk about that case. It appears to me, Mr. Brooks, in that case there's a complaint that's been filed that alleges you violated the terms and conditions of [11]your deferred judgment and sentence. You have a number of rights with respect to that, including the right to have a hearing and to be presumed innocent, to require the prosecution to prove the charge in the complaint against you and be represented by counsel, also. Do you understand all those rights?

* * * *

APPENDIX F — DENIAL OF REHEARING OF THE COLORADO SUPREME COURT, DATED SEPTEMBER 23, 2019

COLORADO SUPREME COURT
CASE ANNOUNCEMENTS

PETITIONS FOR REHEARING

The Supreme Court of the State of Colorado
2 East 14th Avenue - Denver, Colorado 80203

2019 CO 75M

Supreme Court Case No. 17SC614
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 13CA1750

KYLE BROOKS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Opinion modified, and as modified, Petition for Rehearing DENIED. EN BANC.

The Opinion in the above referenced case announced on September 9, 2019, has been modified. Attached is page 8 showing the marked revisions. Please substitute the corrected page for the like page in the opinion.

Cheryl Stevens, Clerk
Colorado Supreme Court

simple, the level of explanation required to demonstrate that Brooks understood what he was pleading guilty to is relatively low.

¶12 Second, the charging document in this case was deficient because it omitted the specific intent element of theft from a person:

> COUNT 2- THEFT FROM A PERSON (F5)
>
> That on or about April 17, 2010 in, or triable in, the County of Boulder, State of Colorado KYLE CHANCE BROOKS unlawfully, feloniously,

---

are more complicated and, in addition, also require a defendant to understand the elements of burglary itself:

Theft

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

~~2.~~3. Knowingly,

~~3.~~4. Obtained, retained, or exercised control over anything of value of another,

~~4.~~5. Without authorization or by threat or deception, and

~~5.~~6. Intended to deprive the other person permanently of the use or benefit of the thing of value.

COLJI-Crim. 4-4:01 (2018)

Conspiracy to Commit Burglary

1. That the defendant,

2. In the State of Colorado, at or about the date and place charged,

3. With the intent to promote or facilitate the commission of the crime of burglary,

4. Agreed with another person or persons that they, or one or more of them, would engage in conduct which constituted the crime of burglary or an attempt to commit the crime of burglary, and

5. The defendant, or a coconspirator, performed an overt act to pursue the conspiracy.

COLJI-Crim. G2:05 (2018).

APPENDIX G — DENIAL OF REHEARING OF THE COLORADO COURT OF APPEALS, DATED AUGUST 3, 2017

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Boulder County
2011CR1850
Boulder County
2011CR1849

Court of Appeals Case Number:
2013CA1750

Plaintiff-Appellee:

The People of the State of Colorado,

v.

Defendant-Appellant:

Kyle Brooks.

August 3, 2017

ORDER DENYING PETITION FOR REHEARING

Appendix G

The **PETITION FOR REHEARING** filed in this appeal by:

Kyle Brooks, Defendant-Appellant

Jud A. Lohnes, Attorney

is **DENIED**.

Issuance of the Mandate is stayed until: September 1, 2017.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

BY THE COURT
Dailey, J.
J. Jones, J.
Berger, J.

APPENDIX H — RELEVANT COLORADO REVISED STATUTES

COLORADO REVISED STATUTES 2019

TITLE 18

CRIMINAL CODE

* * *

ARTICLE 1

Provisions Applicable to
Offenses Generally

* * *

PART 1

PURPOSE AND SCOPE OF CODE -
CLASSIFICATION OF OFFENSES

18-1-101. Citation of title 18. (1) This title shall be known and may be cited as the "Colorado Criminal Code"; within this title, the "Colorado Criminal Code" is sometimes referred to as "this code".

(2) The portion of any section, subsection, paragraph, or subparagraph contained in this code which precedes a list of examples, requirements, conditions, or other items may be referred to and cited as the "introductory portion" of the section, subsection, paragraph, or subparagraph.

* * *

Appendix H

PART 4

THEFT

* * *

18-4-401. Theft. (1) A person commits theft when he or she knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception; or receives, loans money by pawn or pledge on, or disposes of anything of value or belonging to another that he or she knows or believes to have been stolen, and:

(a) Intends to deprive the other person permanently of the use or benefit of the thing of value;

(b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit;

(c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use or benefit;

(d) Demands any consideration to which he or she is not legally entitled as a condition of restoring the thing of value to the other person; or

(e) Knowingly retains the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement.

(1.5) For the purposes of this section, a thing of value is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

(2) Theft is:

(a) (Deleted by amendment, L. 2007, p. 1690, § 3, effective July 1, 2007.)

(b) A class 1 petty offense if the value of the thing involved is less than fifty dollars;

(b.5) Repealed.

(c) A class 3 misdemeanor if the value of the thing involved is fifty dollars or more but less than three hundred dollars;

(d) A class 2 misdemeanor if the value of the thing involved is three hundred dollars or more but less than seven hundred fifty dollars;

(e) A class 1 misdemeanor if the value of the thing involved is seven hundred fifty dollars or more but less than two thousand dollars;

(f) A class 6 felony if the value of the thing involved is two thousand dollars or more but less than five thousand dollars;

(g) A class 5 felony if the value of the thing involved is five thousand dollars or more but less than twenty thousand dollars;

(h) A class 4 felony if the value of the thing involved is twenty thousand dollars or more but less than one hundred thousand dollars;

(i) A class 3 felony if the value of the thing involved is one hundred thousand dollars or more but less than one million dollars; and

(j) A class 2 felony if the value of the thing involved is one million dollars or more.

(3) and (3.1) Repealed.

(4) (a) When a person commits theft twice or more within a period of six months, two or more of the thefts may be aggregated and charged in a single count, in which event the thefts so aggregated and charged shall constitute a single offense, the penalty for which shall be based on the aggregate value of the things involved, pursuant to subsection (2) of this section.

(b) When a person commits theft twice or more against the same person pursuant to one scheme or course of conduct, the thefts may be aggregated and charged in a single count, in which event they shall constitute a single offense, the penalty for which shall be based on the aggregate value of the things involved, pursuant to subsection (2) of this section.

(5) Theft from the person of another by means other than the use of force, threat, or intimidation is a class 5 felony without regard to the value of the thing taken.

(6) In every indictment or information charging a violation of this section, it shall be sufficient to allege that, on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment or information. The prosecuting attorney shall at the request of the defendant provide a bill of particulars.

(7) Repealed.

(8) A municipality shall have concurrent power to prohibit theft, by ordinance, where the value of the thing involved is less than one thousand dollars.

(9) (a) If a person is convicted of or pleads guilty or nolo contendere to theft by deception and the underlying factual basis of the case involves the mortgage lending process, a minimum fine of the amount of pecuniary harm resulting from the theft shall be mandatory, in addition to any other penalty the court may impose.

(b) A court shall not accept a plea of guilty or nolo contendere to another offense from a person charged with a violation of this section that involves the mortgage lending process unless the plea agreement contains an order of restitution in accordance with part 6 of article 1.3 of this title that compensates the victim for any costs to the victim caused by the offense.

(c) The district attorneys and the attorney general have concurrent jurisdiction to investigate and prosecute a violation of this section that involves making false statements or filing or facilitating the use of a document

known to contain a false statement or material omission relied upon by another person in the mortgage lending process.

(d) Documents involved in the mortgage lending process include, but are not limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(e) For the purposes of this subsection (9):

(I) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

(II) "Residential mortgage loan" means a loan or agreement to extend credit, made to a person and secured by a mortgage or lien on residential real property, including, but not limited to, the refinancing or renewal of a loan secured by residential real property.

(III) "Residential real property" means real property used as a residence and containing no more than four families housed separately.

* * * *

APPENDIX I — PLEA AGREEMENT

COUNTY COURT, BOULDER
COUNTY, COLORADO
Boulder County Justice Center
1777 Sixth St
Boulder, Colorado 80302
(303) 441-3750

Case No: 10CR760
Division: 7

PEOPLE OF THE STATE OF COLORADO,

v

KYLE CHANCE BROOKS,

Defendant.

PLEA AGREEMENT, ADVISEMENT PURSUANT TO CRIMINAL PROCEDURE RULE 11 AND PLEA OF GUILTY

I. STATEMENT OF PLEA AGREEMENT

a. The Defendant will plead guilty to Count 2.

All remaining counts in this case will be dismissed. The sentence agreement for this case is:

> The Defendant will be sentenced in Count 2 to a period of **PROBATION**, the length and conditions of which will be determined by the Court. If the Defendant violates probation, all

> sentence options are available to the Court regardless of this agreement, and if a prison sentence is imposed, the Defendant will be sentenced to an additional MANDATORY period of parole as required by state law. If the Defendant violates any condition of release or bond prior to sentencing under this original agreement, this sentence stipulation becomes null and void and the Defendant may be sentenced at the **DISCRETION OF THE COURT.**

There are specific additional agreements regarding this disposition, which are agreed to by the Defendant and the People:

b. CULPABILITY AND ACCOUNTABILITY

A crime is committed when a defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state. Voluntary act means an act performed consciously as a result of effort or determination. Culpable mental state means (1) intentionally or with intent; (2) knowingly or willfully; (3) recklessly; or (4) with criminal negligence. Each criminal offense has a mental state that must be proved beyond a reasonable doubt at trial. The mental states are listed below.

> A person acts **"intentionally" or "with intent"** when his conscious objective is to cause the specific result prescribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.

A person acts **"knowingly" or "willfully"** with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly or **"willfully"** with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.

A person acts **"recklessly"** when he consciously disregards a substantial and unjustified risk that a result will occur or that a circumstance exists.

A person acts **"with criminal negligence"** when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists.

II. DECLARATIONS BY DEFENDANT

a. I acknowledge that I am the Defendant in this case and that my true name is as stated above.

b. I am 19 years old.

c. The highest level of education I completed is GED.

d. At this time, I am not under the influence of any drugs, intoxicants, medications, or have any mental condition that interferes with my ability to understand the advisement of rights and my plea of guilty.

e. I read, speak, and understand the English language: /s/_____**OR** this document has been translated to me by an interpreter, in _____, a language that I understand. _____.

f. I understand the nature of the charge(s) against me. I acknowledge that I have read and understand the elements of the offense(s), including the culpable mental state, and the penalty for the offense(s). I am entering a plea of guilty to the offense(s). I understand that the prosecution would have to prove each element of the offense(s) beyond a reasonable doubt before I could be convicted of the offense(s) in a trial.

g. I am entering my plea of guilty freely and voluntarily and not as a result of coercion or undue influence on the part of anyone. There have been no threats, force, or promises made to me to cause me to enter this plea.

h. I understand that the Court will not be bound by any representations made to me by anyone concerning the penalty to be imposed or the granting or denial of probation, unless such

representations are included in a formal plea agreement placed on the record and approved by the Court.

i. I acknowledge that there is a factual basis for this plea. If the plea is a result of a plea agreement, I waive the establishment of a factual basis for the charge, as I am pleading guilty to take advantage of the plea agreement.

j. I have signed this document and I thoroughly understand its contents.

k. I understand that if I am ever sentenced to prison following a plea of guilty to a felony that occurred on or after July 1, 1993, I will be ordered to serve **A MANDATORY PAROLE** period. This parole period is **IN ADDITION TO AND SERVED AFTER** any sentence to the Department of Corrections that I may receive from the judge and is in addition to any sentence imposed as part of the plea agreement I am entering into with the District Attorney. I understand that if there is a plea agreement in my case that involves an upper limit on the possible prison sentence or a stipulated prison sentence, the mandatory parole period will be imposed **IN ADDITION TO AND SERVED AFTER** any prison sentence imposed pursuant to the agreement. I understand that if I ever violate my parole, I can be sent back to prison, and that prison time imposed after

I am placed on parole is separate from any sentence agreements I have made with the prosecution at this time.

l. I understand that if I am not a citizen of the United States and I plead guilty or nolo contendere ("no contest") to a crime, my plea may result in deportation and/or exclusion from the United States or denial of naturalization in the United States.

m. I understand that if the Court accepts my guilty plea to a felony, I will stand convicted of a felony. I understand that this felony conviction may be used against me in any future proceeding under the habitual criminal laws. I also understand that my felony conviction may be used against me in a future proceeding to attack my credibility. If l have entered into a Stipulation of a Deferred Sentence and I have not yet completed the terms of that agreement, my guilty plea may be used against me in any future proceeding as stated above.

n. If I am entering into a stipulated prison sentence in this case, I understand that I am giving up my right to have the Court reconsider my sentence as allowed by Colorado law and the Rules of Criminal Procedure.

Signed: _____
(Signature of Defendant)

o. I understand if the judge sentences me to prison, the term of incarceration shall be from the minimum in the presumptive range to twice the maximum in the presumptive range if any of the following circumstances apply: (1) I was on bond in another case that resulted in a conviction of a felony crime; (2) I was on bond after having pled guilty to a lesser offense when the original charge was a felony; or (3) I was on a felony deferred judgment and sentence.

p. I understand if the judge sentences me to prison, the term of incarceration shall be from the midpoint of the presumptive range to twice the maximum in the presumptive range if any of the following circumstances apply: (1) The crime to which I am entering a guilty plea is a crime of violence; (2) I was on parole for a felony crime; (3) I was on probation or on bond while awaiting sentencing following revocation of felony probation; (4) I was an escapee from a previously imposed felony sentence.

q. I understand if the judge sentences me to probation, I could be required to serve up to ninety days' jail for each felony (sixty days for each misdemeanor) as a condition of probation or that I could be required to serve up to two years' jail on work or education release for each count.

r. By initialing in the space below, I admit there is proof beyond a reasonable doubt that when I committed the crime to which I am pleading guilty:

KCB I was on a felony deferred sentence.

_____ I was on bond in another case that resulted in a conviction of a felony.

____ I was on probation for a felony crime.

____ I was on parole for a felony crime.

____Other: _____

s. I understand that by pleading guilty and giving up my right to have a trial, I give up the right to have a jury determine, beyond a reasonable doubt, if there are aggravating facts or circumstances in my case. I specifically agree that a judge and not a jury can determine the existence of aggravating facts in my case that could be used by a judge to impose a sentence to prison that is greater than the presumptive prison sentence range for the offense(s) included within this plea agreement.

t. If I have specifically agreed to a sentence to imprisonment for a term or range of years that is greater than the presumptive range,

I agree to allow a judge to decide if there are aggravating facts to support that sentence, including but not limited to my status on felony deferred sentence, felony bond, felony probation or parole, as well as any other fact the judge may choose to consider in determining if there are extraordinary aggravating circumstances in my case.

III. STATEMENT OF RIGHTS WAIVED

a. I do not have to make any statement about this case and I understand that any statement I make may be used against me.

b. Any plea that I enter must be voluntary and not the result of undue influence or coercion on the part of anyone.

c. I have the right to have the court set bail and I can post that bail if bail can be granted for my offense.

d. In certain situations, I have the right to have a preliminary hearing to determine if probable cause exists to believe that I committed a crime.

e. I have the right to enter a plea of not guilty and have a speedy and public trial in this case either to the Court or to a jury

f. I have the right to be represented by an attorney at all critical stages through trial and for any appeal of right.

g. If I do not have the means to hire an attorney, I can ask the Court to appoint one for me without cost to me, and one will be appointed

h. I am presumed innocent of the charges pending against me, and the presumption of innocence will remain with me throughout the trial. The prosecution must present evidence that proves each and every element of the charge(s) beyond a reasonable doubt to find me guilty.

i. At the trial, I have the right to confront the witnesses called to testify against me, including the right to cross-examine those witnesses.

j. I have the right to present evidence in my own defense at the trial and to compel the attendance of witnesses by subpoenas issued by the Court.

k. I have the right to remain silent at the trial or testify in my defense as I choose. If I choose to remain silent, my silence cannot be used against me.

l. After the trial is over, I have the right to appeal to a higher court to review the judgments of the trial court.

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IV. I understand that the offense(s) to which I will plead guilty have the following possible fines, prison penalties, and periods of mandatory parole:

<table>
<tr><td></td><td colspan="3">FELONY OFFENSES</td></tr>
<tr><td></td><td rowspan="2">Class</td><td colspan="2">PRESUMPTIVE RANGE</td></tr>
<tr><td></td><td>Minimum</td><td>Maximum</td></tr>
<tr><td></td><td rowspan="11">F2</td><td>8 YEARS
$5000 FINE</td><td>24 YEARS
$1,000,000 FINE</td></tr>
<tr><td></td><td colspan="2">EXCEPTIONAL CIRCUMSTANCES</td></tr>
<tr><td></td><td>Minimum</td><td>Maximum</td></tr>
<tr><td></td><td>4 YEARS</td><td>48 YEARS</td></tr>
<tr><td></td><td colspan="2">PAROLE</td></tr>
<tr><td></td><td colspan="2">Mandatory Parole</td></tr>
<tr><td></td><td colspan="2">5 YEARS</td></tr>
<tr><td></td><td colspan="2">MANDATORY AGGRAVATION</td></tr>
<tr><td></td><td colspan="2">Midpoint of Presumptive Range</td></tr>
<tr><td></td><td colspan="2">16 YEARS</td></tr>
<tr><td></td><td rowspan="2">Class</td><td colspan="2">PRESUMPTIVE RANGE</td></tr>
<tr><td></td><td>Minimum</td><td>Maximum</td></tr>
</table>

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	F3ER	4 YEARS $3000 FINE	16 YEARS $750,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		2 YEARS	32 YEARS
		PAROLE	
		Mandatory Parole	
		5 YEARS	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		10 YEARS	
	Class	**PRESUMPTIVE RANGE**	
		Minimum	**Maximum**
	F3	4 YEARS $3000 FINE	12 YEARS $750,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		2 YEARS	24 YEARS

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	F3	**PAROLE**	
		Mandatory Parole	
		5 YEARS	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		8 YEARS	
	Class	**PRESUMPTIVE RANGE**	
		Minimum	**Maximum**
	F4ER	2 YEARS $2000 FINE	8 YEARS $500,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		1 YEAR	16 YEARS
		PAROLE	
		Mandatory Parole	
		3 YEARS	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		5 YEARS	

Appendix I

	Class	PRESUMPTIVE RANGE	
		Minimum	**Maximum**
	F4	2 YEARS $2000 FINE	6 YEARS $500,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		1 YEAR	12 YEARS
		PAROLE	
		Mandatory Parole	
		3 YEARS	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		4 YEARS	
	Class	**PRESUMPTIVE RANGE**	
		Minimum	**Maximum**
	F5ER	1 YEAR $1000 FINE	4 YEARS $100,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		6 MONTHS	8 YEARS

Appendix I

	F5ER	**PAROLE**	
		Mandatory Parole	
		2 YEARS	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		2.5 YEARS (30 MONTHS)	
	Class	**PRESUMPTIVE RANGE**	
		Minimum	**Maximum**
X	F5	1 YEAR $1000 FINE	3 YEARS $100,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		6 MONTHS	6 YEARS
		PAROLE	
		Mandatory Parole	
		2 YEARS	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		2 YEARS	

Appendix I

	Class	PRESUMPTIVE RANGE	
		Minimum	**Maximum**
	F6ER	1 YEAR $1000 FINE	2 YEARS $100,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		6 MONTHS	4 YEARS
		PAROLE	
		Mandatory Parole	
		1 YEAR	
		MANDATORY AGGRAVATION	
		Midpoint of Presumptive Range	
		1.5 YEARS (18 MONTHS)	
	Class	**PRESUMPTIVE RANGE**	
		Minimum	**Maximum**
	F6	1 YEAR $1000 FINE	18 MONTHS $100,000 FINE
		EXCEPTIONAL CIRCUMSTANCES	
		Minimum	**Maximum**
		6 MONTHS	3 YEARS

Appendix I

	F6	**PAROLE**
		Mandatory Parole
		1 YEAR
		MANDATORY AGGRAVATION
		Midpoint of Presumptive Range
		15 MONTHS

MISDEMEANOR OFFENSES			
		PRESUMPTIVE RANGE	
	Class	**Minimum**	**Maximum**
	M1ER	6 MONTHS $500 FINE	2 YEARS $5000 FINE
	M1	6 MONTHS $500 FINE	18 MONTHS $5000 FINE
	M2	3 MONTHS $250 FINE	12 MONTHS $1000 FINE
	M3	$50 FINE	6 MONTHS $750 FINE

V. I acknowledge that I have read and understand the plea agreement stated in Section I and the advisement of rights in Section III. I understand that by entering my plea of guilty I am waiving and giving up all the rights set forth in this document. I also acknowledge that I have read and understand the declarations in Section II and those declarations are true and correct.

Regarding the Attorney Certificate below, I waive any right to attorney-client confidentiality I have with respect to the statements made by my attorney in that section of this agreement.

X /s/	6/18/10
DEFENDANT'S SIGNATURE	**DATE**

ATTORNEY CERTIFICATE TO THE COURT

As attorney for the above Defendant, I approve this plea agreement and certify to the Court the following:

a. I have discussed the facts and law applicable to this matter with the Defendant including the necessary culpable mental state, possible defense(s), and potential penalties.

b. I have reviewed the contents of this plea agreement with the Defendant, including the sections enumerating the rights contained in Rules 5(a)(2) and 1 l(b) of the Colorado Rules of Criminal Procedure. To the best of my knowledge and belief, the statements and declarations made by the Defendant in Section 1 of this document are in all respects accurate and true.

c. The Defendant appears to be mentally competent and exhibits no physical or mental condition that would affect his/her understanding of court proceedings or his/her ability to make an informed decision.

d. It is my professional opinion that the Defendant is entering into this plea agreement freely and voluntarily and with a full understanding of his/her legal rights, the legal and factual issues of his/her case, and the consequences of his/her decision. I have informed the defendant that he/she must ultimately make his/her own decision to accept or reject this plea agreement.

X /s/ 6/18/10

ATTORNEY'S SIGNATURE **DATE**

APPENDIX J — MOTION TO THE COUNTY COURT, BOULDER COUNTY, COLORADO, FILED JUNE 17, 2010

COUNTY COURT, BOULDER COUNTY, COLORADO
Court Address: Boulder County Justice Center
1777 Sixth St
Boulder, Colorado 80302
Court Phone: (303) 441-3750

Case No: 10CR760

Division: 7

PEOPLE OF THE STATE OF COLORADO,

vs.

KYLE CHANCE BROOKS,

Defendant.

MOTION TO AMEND CRIMINAL COMPLAINT

The People, through District Attorney Stanley L. Garnett, respectfully move this Honorable Court to amend the Criminal Complaint filed herein to add Count 2 as shown in the attached amendment.

WHEREFORE, your Petitioner prays the Court for an Order to amend the Criminal Complaint.

Appendix J

Respectfully submitted, By:

/s/_____

STANLEY L. GARNETT
DISTRICT ATTORNEY

Anne Marie Pignatiello Reg. #31178
Deputy District Attorney
June 17, 2010

IT IS SO ORDERED. Done this 18th day of June, 2010.

/s/_____
Judge

APPENDIX K — MOTION TO THE COUNTY COURT, BOULDER COUNTY, COLORADO, FILED JUNE 17, 2010

COUNTY COURT, BOULDER COUNTY, COLORADO
Court Address: Boulder County Justice Center
1777 Sixth St
Boulder, Colorado 80302
Court Phone: (303) 441-3750

Case No: 10CR760

Division: 7

PEOPLE OF THE STATE OF COLORADO

vs.

KYLE CHANCE BROOKS,

Defendant.

MOTION TO DISMISS COUNTS

The People, through District Attorney Stanley L. Garnett, respectfully move and petition this Honorable Court to dismiss Count 1.

AND AS GROUNDS and reasons therefore, show unto the Court that the Defendant will plead guilty to Count 2.

Appendix K

Respectfully submitted, By:

/s/_____

STANLEY L. GARNETT
DISTRICT ATTORNEY

Anne Marie Pignatiello Reg. #31178
Deputy District Attorney
June 17, 2010

IT IS SO ORDERED. Done this 18th day of June, 2010.

/s/_____
Judge

APPENDIX L — AMENDED CRIMINAL INFORMATION, DATED JUNE 17, 2010

People v. KYLE CHANCE BROOKS **Case No.: 10CR760**

Stanley L. Garnett, District Attorney for the Twentieth Judicial District, of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the court of the following offenses committed, or triable, in the County of Boulder.

COUNT 2- THEFT FROM THE PERSON (F5)

That on or about April 17, 2010 in, or triable in, the County of Boulder, State of Colorado KYLE CHANCE BROOKS unlawfully, feloniously, and knowingly took a thing of value, namely: a purse, from the person of Whitney Sasha Weis; in violation of section 18-4-401(1),(5), C.R.S.

All offenses against the peace and dignity of the People of the State of Colorado.

Stanley L. Garnett
District Attorney

/s/_____

APPENDIX M — ORIGINAL CRIMINAL INFORMATION, DATED APRIL 17, 2010

People v. KYLE CHANCE BROOKS **Case No.: 10CR760**

Stanley L. Garnett, District Attorney for the Twentieth Judicial District, of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the court of the following offenses committed, or triable, in the County of Boulder.

COUNT 1- ROBBERY (F4)

That on or about April 17, 2010 in, or triable in, the County of Boulder, State of Colorado KYLE CHANCE BROOKS unlawfully, feloniously, and knowingly took a thing of value, namely: a purse, from the person or presence of Whitney Sasha Weis by the use of force, threats or intimidation; in violation of section 18-4-301(1), C.R.S.

All offenses against the peace and dignity of the People of the State of Colorado.

Stanley L. Garnett
District Attorney

By /s/_____ BOULDER POLICE DEPT
Deputy District Attorney 10-4773