APPENDIX

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APPENDIX A

Supreme Court of Colorado

Delano Marco MEDINA, Petitioner,

v.

The PEOPLE of the State of Colorado, Respondent.

Supreme Court Case No. 21SC765

September 11, 2023

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 19CA1196

Attorneys for Petitioner: Schelhaas Law LLC, Krista A. Schelhaas, Littleton, Colorado

Attorneys for Respondent: Philip J. Weiser, Attorney General, Grant R. Fevurly, Assistant Attorney General, Denver, Colorado

En Banc

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE HART, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 In *North Carolina v. Alford*, 400 U.S. 25, 39, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the United States Supreme Court upheld a defendant's guilty plea even though the defendant maintained his innocence while entering the plea. In so doing, the Court noted that such a scenario (now commonly known as an *Alford* plea) is functionally identical to a no-contest

plea when the defendant "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.* at 37, 91 S.Ct. 160.

¶2 Similarly, Delano Marco Medina pleaded guilty to felony menacing even though he maintained his innocence of that charge. He did so in exchange for the dismissal of several other criminal cases. The trial court found that Medina's plea was voluntary, knowing, and intelligent. But because Medina agreed to waive the establishment of a factual basis for menacing under Crim. P. 11(b)(6), the trial court did not make a finding as to whether strong evidence of Medina's actual guilt existed. Medina later moved to withdraw his plea as violative of due process, arguing that a defendant cannot waive proof of a factual basis when entering an *Alford* plea. The post-conviction court denied his motion, and a division of the court of appeals affirmed.

¶3 We must now determine whether an *Alford* plea requires that the trial court make a finding of strong evidence of actual guilt to pass constitutional muster. We conclude that there is no such requirement. Rather, we hold that a defendant may enter an *Alford* plea while nonetheless waiving the establishment of a factual basis for the charge under Crim. P. 11(b)(6), provided that the plea is voluntary, knowing, and intelligent. We therefore affirm the division's judgment, albeit on slightly different grounds.

I. Facts and Procedural History

¶4 Medina's wife reported that Medina had threatened her and held a knife to her throat during

an argument. The People charged Medina in Lake County with felony menacing (committed with the use of a real or simulated weapon), a class 5 felony. At the time, Medina faced prosecution in five other Lake County cases, as well as one Boulder County case. The court set a $10,000 cash or surety bond in the menacing case; bond amounts were also set in the other cases.

¶5 Medina later agreed to plead guilty to felony menacing in this case. In exchange, the People agreed to dismiss all charges in the five other Lake County cases.[1] The parties further agreed that after Medina received his Boulder County sentence, he would receive a consecutive one-year sentence for menacing. Medina signed a copy of the guilty plea, which stated both: "I acknowledge that there is factual basis for my guilty plea" and "I waive establishment of a factual basis for the charge."

¶6 Before the plea colloquy, Medina's attorney ("plea counsel") told the trial court that Medina "steadfastly maintains that the menacing would not be a provable case." Plea counsel added, however, that Medina "does not have a defense" to "other cases, in particular a bond violation." Accordingly, plea

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[1] The People agreed to dismiss Lake County cases 13CR53, 13CR63, 13T75, 13M130, and 13M131. While the record doesn't reflect the charges in these cases, we take judicial notice that they included ten felony counts (including class 4 felony identity theft, class 5 felony forgery, and four counts of class 6 felony violation of bond conditions). *See 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."). The cases also included a habitual criminal sentence enhancer, eleven misdemeanor counts, a misdemeanor traffic offense, and a traffic infraction.

counsel said that Medina was choosing to plead guilty to felony menacing, "even though in his heart of hearts he does not believe he's guilty of that," so Medina could "take advantage of the plea bargain." And "to that extent," plea counsel stated, Medina "would be waiving proof of a factual basis."

¶7 The trial court acknowledged that because Medina maintained his innocence, he was entering an *Alford* plea. The court asked Medina if he had read the plea agreement, understood everything he read, and signed it. Medina said that he had. The court warned Medina that he would be "giving up some serious rights" by pleading guilty, which the court then described in turn before asking if Medina understood that he would be waiving each right. Medina said that he understood. The trial court explained the elements of felony menacing and asked whether Medina understood that if he went to trial, the People would need to prove each element beyond a reasonable doubt. Medina said that he understood. The trial court asked if Medina understood that "[o]nce you plead guilty, this is a final decision. You cannot come back at another time, change your mind, plead not guilty and have a trial." Again, Medina said that he understood. At that point, the trial court asked Medina how he chose to plead, and Medina pleaded guilty.

¶8 Accordingly, the trial court found that Medina's plea was "freely, voluntarily, knowingly and intelligently given." The court also found that Medina had "waived the factual basis" for the menacing charge and understood that he was waiving his rights by pleading guilty. The trial court therefore accepted Medina's guilty plea and scheduled a sen-

tencing hearing. In accordance with the plea agreement, the court then dismissed the five other Lake County cases. With the other cases dismissed, Medina posted the $10,000 surety bond in this case and was released from custody.

¶9 Medina failed to appear at the sentencing hearing, and the court issued a warrant for his arrest. Almost a year later, Medina appeared in custody once again, represented by a new attorney ("sentencing counsel"). The People asked the court to enter the one-year sentence for felony menacing that Medina had agreed to previously. Sentencing counsel, however, sought to withdraw the plea, arguing that Medina had believed he could withdraw an *Alford* plea if he discovered new evidence and that new evidence had since come to light.[2] The trial court denied Medina's request to withdraw his plea, stating that "there's no evidence before me that [Medina's] plea was not freely, voluntarily, knowingly and intelligently done." And so, the court imposed the one-year sentence that Medina had stipulated to previously, and Medina was given 165 days of presentence confinement credit for a total sentence of 200 days of imprisonment, plus two years of mandatory parole.

¶10 Almost three years later, Medina filed a motion for postconviction relief. As relevant here, Medina argued that there was no factual basis for the plea, rendering his conviction invalid under *Alford*.

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[2] Sentencing counsel made an offer of proof that in a jail call with Medina, the victim stated that she had not seen Medina holding a knife during their argument. Medina testified at the postconviction hearing, however, that the call itself took place *before* he pleaded guilty.

At a hearing, plea counsel testified that Medina had "waived the factual basis" for menacing because (1) "he may have been guilty of some of the other charges" and "wanted to take the plea agreement," and (2) he would be able to post bond once the other Lake County cases were dismissed. Medina also testified and acknowledged that he "was guilty of" the other Lake County cases, but he maintained that he was innocent of menacing. Under cross-examination, Medina conceded that pleading guilty to menacing "was my choice" and that "[n]obody forced me."

¶11 The postconviction court denied Medina's motion. It found that the record "reflect[ed] that [Medina] waived a factual basis for the purpose of availing himself of the plea bargain in the case"; specifically, Medina did so because he wanted to avoid prosecution in the other Lake County cases and post bond. The court found it "[p]articularly persuasive" that Medina had pleaded guilty knowing he would obtain the benefits of an "incredibly favorable" plea bargain, including the dismissal of five other cases and a stipulated one-year sentence. Moreover, the court found that the record provided sufficient grounds "to determine that there was a strong factual basis for the offense." Accordingly, the court ruled that Medina's plea was knowing and voluntary; it also ruled that "[t]here was a factual basis for the plea sufficient to meet the *Alford* requirements."

¶12 Medina appealed, arguing that under *Alford*, his plea was invalid because the trial court allowed him to waive proof of a factual basis.[3] *People v. Me-*

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[3] Medina also argued that the postconviction court erred by independently assessing whether there was a factual basis for the plea and by concluding that there was. *People v. Medina*,

dina, 2021 COA 124, ¶ 14, 501 P.3d 834, 837. A division of the court of appeals first noted that Crim. P. 11(b)(6) expressly permits a defendant to waive proof of a factual basis when the defendant enters a plea agreement. *Id.* at ¶ 18, 501 P.3d at 838. Turning to *Alford*, the division identified "two components to a plea when a defendant protests his or her innocence: (1) that the defendant's interests show he or she should enter the plea; and (2) that there is strong evidence of actual guilt" despite that protestation of innocence. *Id.* at ¶ 23, 501 P.3d at 839. The division determined, however, that *Alford* didn't resolve whether the defendant may waive a finding that there is strong evidence of actual guilt. *Id.* at ¶ 24, 501 P.3d at 839. Reviewing case law, the division determined that federal courts disagree as to whether a strong factual basis is an independent constitutional requirement for *Alford* pleas. *Id.* at ¶ 29, 501 P.3d at 839–40. The division found similar discord among state courts; some hold that a strong factual basis is constitutionally required under *Alford*, while others hold that a strong factual basis is required by state procedural rules. *Id.* at ¶¶ 34–36, 501 P.3d at 840–41.

¶13 Faced with these competing views, the division stated that Colorado "has treated an *Alford* plea like any other guilty plea" and that Crim. P. 11(b)(6)—which does not distinguish between *Alford* pleas and other guilty pleas—is consistent with that treatment. *Id.* at ¶ 41, 501 P.3d at 841. Accordingly, the division held that although "the strong factual basis from *Alford* is required as part of constitution-

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2021 COA 124, ¶ 14, 501 P.3d 834, 837. The division didn't reach those arguments, *id.*, and they aren't before us now.

al due process," it is not an *independent* right from the broader constitutional imperative that a defendant must "knowingly, voluntarily, and intelligently enter[ ] a plea agreement." *Id.* at ¶ 48, 501 P.3d at 843. And because Crim. P. 11 allows defendants to waive the factual-basis finding, the division concluded that such a waiver—if validly made—doesn't "render[ ] an *Alford* plea involuntary as a matter of law." *Id.* Applying those principles, the division determined that the postconviction court did not err by ruling that Medina waived a factual-basis finding and voluntarily, knowingly, and intelligently pleaded guilty. *Id.* at ¶ 65, 501 P.3d at 846.

¶14 Medina petitioned for certiorari review, and we granted his petition.[4]

II. Standard of Review

¶15 "The constitutional validity of a guilty plea is a question of law that we review de novo." *Brooks v. People*, 2019 CO 75M, ¶ 6, 448 P.3d 310, 312. We defer to the trial court's factual findings, however, if they are supported by the record. *Id.* Likewise, in Crim. P. 35(c) proceedings, "we review the lower court's legal conclusions de novo but defer to the postconviction court's factual findings if they are supported by the record." *People v. Corson*, 2016 CO 33, ¶ 25, 379 P.3d 288, 293.

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[4] We granted certiorari to review the following issue:

Whether a guilty plea entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), but without strong evidence of guilt, violates due process.

III. Analysis

¶16 We begin by discussing the general requirements for a valid guilty plea. We then turn to *Alford*, which upheld the validity of guilty pleas accompanied by a protestation of innocence when the defendant "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." 400 U.S. at 37, 91 S.Ct. 160. After surveying decisions that have interpreted this language, we determine that a factual-basis finding is not a constitutional prerequisite for an *Alford* plea, but rather a procedural tool that courts may use to evaluate whether the plea is voluntary, knowing, and intelligent (and therefore comports with due process). Thus, we hold that a defendant may enter an *Alford* plea while nonetheless waiving the establishment of a factual basis for the charge under Crim. P. 11(b)(6), provided that the plea is voluntary, knowing, and intelligent. Applying these principles, we affirm, albeit on slightly different grounds.

A. Guilty Pleas

¶17 Because a guilty plea involves a defendant's waiver of important constitutional rights, it "is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). A plea is invalid if "a defendant 'does not understand the nature of the constitutional protections he is waiving,' or 'has such an incomplete un-

derstanding of the charge that his plea cannot stand as an intelligent admission of guilt.'" *People v. Dist. Ct.*, 868 P.2d 400, 403 (Colo. 1994) (citation omitted) (quoting *Lacy v. People*, 775 P.2d 1, 4 (Colo. 1989)).

¶18 However, "[n]o formalistic litany is required before a court may accept a plea of guilty." *Id.* "Nor does due process generally require that the record demonstrate an adequate factual basis for the plea." *Lacy*, 775 P.2d at 5. Instead, the record "must simply show that the defendant entered his guilty plea voluntarily and understandingly." *Id.*

¶19 Alongside these constitutional requirements, we have adopted rules governing the procedures by which a defendant may plead guilty. Crim. P. 11(b). Compliance with Crim. P. 11 "normally will satisfy constitutional due process concerns." *Dist. Ct.*, 868 P.2d at 404. When a defendant pleads guilty, the court "shall not accept" the plea "without first determining that the defendant has been advised of all the rights set forth in Rule 5(a)(2)"; namely, the privilege against self-incrimination, the right to counsel, the right to request appointed counsel, the right to bail, the right to a jury trial, and (under certain circumstances) the right to demand a preliminary hearing. Crim. P. 11(b); *see also* Crim. P. 5(a)(2). Typically, the court must also determine "[t]hat there is a factual basis for the plea." Crim. P. 11(b)(6). However, the rule provides that a defendant may "waive the establishment of a factual basis for the particular charge to which he pleads" if the plea is entered as the result of a plea agreement and the court confirms that the defendant understands the basis for the agreement. *Id.*

¶20 With these standards in mind, we turn to the type of guilty plea at issue here: a plea accompanied by a protestation of innocence, also called an *Alford* plea.

B. *Alford* Pleas

¶21 In *Alford*, the United States Supreme Court confronted whether the Constitution permits a defendant to plead guilty even when the defendant maintains factual innocence. 400 U.S. at 34, 91 S.Ct. 160. The Court answered yes. *Id.* at 37, 91 S.Ct. 160.

¶22 Alford was charged with first degree murder. *Id.* at 26, 91 S.Ct. 160. At the time, North Carolina law provided that first degree murder must be punished with the death penalty unless the jury recommended life imprisonment. *Id.* at 27 n.1, 91 S.Ct. 160. And while Alford insisted that he was innocent, several witnesses incriminated him. *Id.* at 27, 91 S.Ct. 160. So, Alford decided to plead guilty to second degree murder, which was *not* a death-penalty-eligible crime. *Id.* at 27–28 & n.1, 91 S.Ct. 160. Before accepting his plea, the trial court heard testimony suggesting that Alford had committed the murder. *Id.* at 28, 91 S.Ct. 160. Alford also testified, saying that while he maintained his innocence, he wished to plead guilty to avoid the death penalty. *Id.* The court accepted Alford's plea and sentenced him to prison. *Id.* at 29, 91 S.Ct. 160.

¶23 Alford later challenged his conviction, arguing (in part) that his plea was invalid because he maintained his innocence. *See id.* at 31, 91 S.Ct. 160. The Supreme Court stated that the standard for assessing a guilty plea's validity "was and remains whether the plea represents a voluntary and intelli-

gent choice among the alternative courses of action open to the defendant." *Id.* The Court acknowledged that ordinarily, a conviction on a guilty plea "is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind." *Id.* at 32, 91 S.Ct. 160.

¶24 Nevertheless, the Court recognized that a defendant who maintains innocence "might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty." *Id.* at 33, 91 S.Ct. 160 (quoting *McCoy v. United States*, 363 F.2d 306, 308 (D.C. Cir. 1966)). Accordingly, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, ... [and] [h]e must be permitted to judge for himself in this respect." *Id.* (alterations in original) (quoting *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, 276 (1879)).

¶25 The Court noted that it had already allowed lower courts to impose a prison sentence upon a plea of nolo contendere—even though a defendant doesn't expressly admit guilt in such a plea.[5] *Id.* at 35–36, 91 S.Ct. 160 (citing *Hudson v. United States*, 272 U.S. 451, 457, 47 S.Ct. 127, 71 L.Ed. 347 (1926)). "Implicit" in that logic, the Court determined, "is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is

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[5] A nolo contendere plea, also called a no-contest plea, "literally means 'I do not wish to contend.'" *People v. Darlington*, 105 P.3d 230, 233 (Colo. 2005) (quoting *Nolo Contendere*, Black's Law Dictionary (8th ed. 2004)). As the name implies, a plea of nolo contendere permits a defendant to simply not contest guilt or innocence; still, it is "fully equivalent" to a guilty plea for purposes of the criminal case. *Id.*

unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." *Id.* at 36, 91 S.Ct. 160. So "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Id.* at 37, 91 S.Ct. 160.

¶26 Returning to Alford's case, the Court stated that it couldn't "perceive any material difference" between a nolo contendere plea and a plea accompanied by a protestation of innocence "when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea *and the record before the judge contains strong evidence of actual guilt.*" *Id.* (emphasis added). In so doing, the Court noted that some courts "properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea." *Id.* at 38 n.10, 91 S.Ct. 160 (collecting cases). But the Court reasoned that the validity of Alford's plea was clear when "viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered." *Id.* at 37–38, 91 S.Ct. 160. Thus, the Court concluded that Alford's choice to plead guilty while maintaining his innocence was constitutionally permissible. *Id.* at 38–39, 91 S.Ct. 160.

¶27 Colorado permits defendants to make the same choice. *See People v. Birdsong*, 958 P.2d 1124, 1127 (Colo. 1998). At bottom, though, "[a]n *Alford* plea is a guilty plea." *Id.*; *see also United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995) ("An *Alford*-type guilty plea is a guilty plea in all material

respects."). So, in other contexts, we have declined to differentiate an *Alford* plea from any other guilty plea. *People v. Schneider*, 25 P.3d 755, 758 (Colo. 2001) (holding that "an *Alford* plea is no different from a guilty plea" when analyzing whether a defendant may withdraw the plea); *Birdsong*, 958 P.2d at 1127 (holding that the trial court's "obligations to advise the defendant were no greater" for an *Alford* plea "than with any other guilty plea"). Nor do our procedural rules differentiate an *Alford* plea from any other guilty plea. *See* Crim. P. 11(a) (providing that a defendant may plead guilty, not guilty, not guilty by reason of insanity, or nolo contendere).

¶28 Left unresolved in our decisions, however, is whether an *Alford* plea must be supported by a finding that there is strong evidence of actual guilt, or whether a defendant may instead waive that finding. *See Lacy*, 775 P.2d at 5 & n.7 (holding that due process generally does not require that the record demonstrate an adequate factual basis for a plea but declining to address whether the same is true for *Alford* pleas); *In re Cardwell*, 50 P.3d 897, 905 n.8 (Colo. 2002) (suggesting in dicta that "the trial judge should inquire into factual guilt" when a defendant protests innocence). We turn to that issue now.

C. Strong Evidence of Actual Guilt

¶29 Medina argues that the "strong evidence of actual guilt" discussed in *Alford* is a nonwaivable, constitutional prerequisite for all *Alford* pleas, meaning that an *Alford* plea violates due process unless it is supported by a factual-basis finding. In response, the People argue that the requirement for courts to make a factual-basis finding is a product of

procedural rules, not the Constitution, and that Colorado's Crim. P. 11 allows defendants to waive that finding. Alternatively, the People argue that even if a factual-basis finding is a constitutional requirement for *Alford* pleas, defendants can waive that requirement, just as they waive numerous constitutional rights by pleading guilty.

¶30 Other appellate courts are split on this issue. *Compare Higgason v. Clark*, 984 F.2d 203, 208 (7th Cir. 1993) (holding that strong evidence of guilt is not a constitutional prerequisite for an *Alford* plea), *with Willett v. Georgia*, 608 F.2d 538, 540 (5th Cir. 1979) (holding that a factual basis must support an *Alford* plea).

¶31 Specifically, the Seventh Circuit holds that strong evidence of actual guilt is not constitutionally required, even in the context of an *Alford* plea. *Higgason*, 984 F.2d at 208. Instead, the standard for assessing whether an *Alford* plea is constitutional remains the same as with any other guilty plea: The plea must be voluntary, knowing, and intelligent. *Id.* (quoting *Alford*, 400 U.S. at 31, 91 S.Ct. 160). According to the Seventh Circuit, "[p]utting a factual basis for the plea on the record has become familiar as a result of statutes and rules, not as a result of constitutional compulsion." *Id.* The *Higgason* court recognized that Fed. R. Crim. P. 11 requires federal courts to make a factual-basis finding before accepting any guilty plea. *Id.* But *Alford* "does not imply that the factual-basis requirement of Fed. R. Crim. P. [11] and its state law counterparts comes from the Constitution." *Id.* at 207. Rather, "*Alford* tells us that strong evidence on the record can show that a plea is voluntary; it does not hold that *only* strong

evidence on the record permits a finding of voluntariness." *Id.*

¶32 The Sixth Circuit has similarly concluded that the factual-basis requirement "is not a requirement of the Constitution, but rather a requirement created by rules and statutes." *Tunning*, 69 F.3d at 111. According to that Circuit, *Alford* held that a court may accept a guilty plea accompanied by a protestation of innocence "so long as the defendant voluntarily, knowingly, and understandingly consents to be sentenced on a charge." *Roddy v. Black*, 516 F.2d 1380, 1385 (6th Cir. 1975). And "[t]his being the rule, there is no constitutional requirement that a trial judge inquire into the factual basis of a plea." *Id.* That requirement instead stems from Fed. R. Crim. P. 11, the "precise terms" of which "are not constitutionally applicable to the state courts." *Id.* at 1383, 1385; *see also* Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

¶33 In contrast, the Fifth Circuit has held that courts are constitutionally obligated to inquire into the factual basis of an *Alford* plea before accepting one. *Willett*, 608 F.2d at 540. In so doing, the Fifth Circuit focused on a footnote in *Alford*, which said that various courts "properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea." *Id.* (quoting *Alford*, 400 U.S. at 38 n.10, 91 S.Ct. 160). Extrapolating from that language, the Fifth Circuit held that "a judicial finding of some factual basis for [the] defendant's guilt is an essential part of the constitutionally-required finding of a voluntary and intelligent decision to plead guilty" in the context of an

Alford plea. *Id.* Other federal circuits have similarly concluded that evidence of guilt must support an *Alford* plea. *See United States ex rel. Dunn v. Casscles*, 494 F.2d 397, 399 (2d Cir. 1974); *United States v. Mackins*, 218 F.3d 263, 268 (3d Cir. 2000); *United States v. Mastrapa*, 509 F.3d 652, 659 (4th Cir. 2007); *White Hawk v. Solem*, 693 F.2d 825, 829 (8th Cir. 1982); *United States v. Vidal*, 561 F.3d 1113, 1119 (10th Cir. 2009); *United States v. Lefever*, 343 F. App'x 595, 597 (11th Cir. 2009). Even these courts, however, disagree as to whether "strong" evidence is necessary, as opposed to less stringent proof. *Compare White Hawk*, 693 F.2d at 829 (requiring a "strong factual basis"), *with United States v. Morrow*, 914 F.2d 608, 612 (4th Cir. 1990) ("[A]ny Rule 11 proceeding requires that a factual basis for the plea be established and we are unwilling to place more requirements in the context of an *Alford* plea.").

¶34 State courts are similarly split. Some have held that a factual-basis finding is constitutionally required for *Alford* pleas. *See, e.g., Sparrow v. State*, 102 Idaho 60, 625 P.2d 414, 415–16 (Idaho 1981); *State v. Smith*, 61 Haw. 522, 606 P.2d 86, 88–89 (Haw. 1980); *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). But others treat the issue as a matter of state procedural law, not a federal constitutional requirement. *See, e.g., People v. Barker*, 83 Ill.2d 319, 47 Ill.Dec. 399, 415 N.E.2d 404, 410 (Ill. 1980) (relying on state procedural rule modeled after Fed. R. Crim. P. 11); *Robinson v. State*, 291 A.2d 279, 280–81 (Del. 1972) (same).

¶35 Among these competing views, we find the Seventh Circuit's approach most persuasive. Alt-

hough a finding of strong evidence of actual guilt *can* show that an *Alford* plea comports with due process, it is not a constitutional prerequisite for every such plea. *Higgason*, 984 F.2d at 208. Instead, "[t]he Constitution's standard 'was and remains whether the plea represents a voluntary and intelligent choice.'" *Id.* (quoting *Alford*, 400 U.S. at 31, 91 S.Ct. 160).

¶36 While the Supreme Court noted that evidence of Alford's guilt "provided a means by which the judge could test whether the plea was being intelligently entered," *Alford*, 400 U.S. at 38, 91 S.Ct. 160, the Court didn't state that strong evidence of guilt *alone* can provide those means, *Higgason*, 984 F.2d at 207 ("'If A then B' does not imply 'if not-A then not-B.'"). To the contrary, inquiring into factual guilt is simply one way that courts may assess whether an *Alford* plea is voluntary, knowing, and intelligent—not the only way.

¶37 Crim. P. 11 is designed to facilitate the constitutionally required determination that a guilty plea is voluntary, knowing, and intelligent. *People v. Leonard*, 673 P.2d 37, 39–40 (Colo. 1983). But that doesn't mean the factual-basis finding discussed in Crim. P. 11 is *itself* a constitutional requirement; instead, the finding is procedural in nature.[6] *See Higgason*, 984 F.2d at 207; *Roddy*, 516 F.2d at 1385 ("The requirement that a federal trial judge inquire

[6] To the extent the division below concluded that a strong factual basis "is required as part of constitutional due process," *Medina*, ¶ 48, 501 P.3d at 843, we disapprove of that portion of its opinion. While a factual-basis finding may help a trial court determine that a defendant's plea comports with due process, that finding is not an integral component of due process itself. *Higgason*, 984 F.2d at 207.

into the factual basis of a plea stems from [Fed. R. Crim. P. 11], rather than from the Constitution."). Some jurisdictions' procedural rules, like the federal rules, require courts to make a factual-basis finding before accepting any guilty plea. *See, e.g.*, Fed. R. Crim. P. 11(b)(3); Cal. Penal Code § 1192.5(c) (West 2023) ("The court shall also cause an inquiry to be made of the defendant to satisfy itself ... that there is a factual basis for the plea."). But our Crim. P. 11(b)(6) expressly allows defendants to waive proof of a factual basis if their plea is entered as the result of a plea agreement. Accordingly, under the plain language of Crim. P. 11(b)(6), defendants like Medina may waive proof of a factual basis, even if they simultaneously profess their innocence.[7] *See People v. Fuqua*, 764 P.2d 56, 59 (Colo. 1988) ("[I]f [a criminal procedure rule] is plain and unambiguous, we apply the rule as written.").

¶38 This treatment comports with our previous recognition that "[a]n *Alford* plea is a guilty plea." *Birdsong*, 958 P.2d at 1127. We have long recognized that "an *Alford* plea is the functional equivalent of a guilty plea" and have declined to impose different standards when assessing either. *Schneider*, 25 P.3d at 759; *see also Birdsong*, 958 P.2d at 1127. And while we have (until today) reserved ruling on whether a factual-basis finding must support an *Al-*

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[7] In some cases, it may be better practice for trial courts to nonetheless make a factual-basis finding before accepting an *Alford* plea. A thorough inquiry into the factual basis for a plea can provide insight into whether the defendant's decision to plead guilty is indeed voluntary, knowing, and intelligent; it may also insulate the conviction from later attack by providing record support that the plea represents a voluntary and intelligent choice. *Higgason*, 984 F.2d at 207–08.

ford plea, we have nonetheless held that due process does not "generally require that the record demonstrate an adequate factual basis" for guilty pleas. *Lacy*, 775 P.2d at 5. Because we have declined to differentiate between *Alford* pleas and other guilty pleas generally, we decline to do so in this context as well.

¶39 Moreover, the determination that a guilty plea is voluntary, knowing, and intelligent necessarily depends on the circumstances of each case. *See id.* at 6. While a defendant's choice to plead guilty may be influenced by the factual basis for the charge, it may equally be influenced by other considerations. For instance, by pleading guilty to menacing, Medina was able to achieve the global disposition of several *other* criminal cases for which he had no defense. *Cf. People v. Isaacks*, 133 P.3d 1190, 1191 (Colo. 2006) (discussing a defendant who was charged with menacing but instead pleaded guilty to a conspiracy charge that "was not supported by facts" so he could take advantage of a plea bargain); *People v. Maestas*, 224 P.3d 405, 408–09 (Colo. App. 2009) (discussing a defendant who pleaded guilty to a charge of second degree assault as part of a plea agreement, even though it was "undisputed that there was no factual basis" for the charge). Like Alford, Medina "now argues in effect that the State should not have allowed him this choice." *Alford*, 400 U.S. at 38–39, 91 S.Ct. 160. But that's not what the Constitution demands. So long as the defendant's choice to plead guilty is voluntary, knowing, and intelligent, the Constitution's mandate is met. *Higgason*, 984 F.2d at 208 (quoting *Alford*, 400 U.S. at 31, 91 S.Ct. 160).

¶40 Thus, we hold that a defendant may enter an *Alford* plea while nonetheless waiving the establishment of a factual basis for the charge under Crim. P. 11(b)(6), provided that the plea is voluntary, knowing, and intelligent.

D. Application

¶41 We now turn to Medina's plea. Medina faced prosecution in several other cases when he was charged with menacing. So, Medina had a choice to make. He could plead guilty to menacing in exchange for the global disposition of his other cases (including the dismissal of numerous felony charges) and receive a stipulated sentence of one year in the Department of Corrections. Or he could proceed to trial in *all* of his cases, despite his acknowledgment that he "was guilty of" some of those charges, and perhaps try to negotiate piecemeal plea agreements along the way.

¶42 Medina chose the former option. He signed a plea that waived proof of a factual basis for the menacing charge, and his counsel told the trial court that Medina was doing so to take advantage of his plea agreement. The trial court explained the consequences of the guilty plea to Medina, stopping several times to ensure that Medina understood. Each time, Medina said that he did. In Medina's words, "it was my choice" to plead guilty, and "[n]obody forced me." On that record, the postconviction court ruled that Medina waived proof of a factual basis and voluntarily, knowingly, and intelligently pleaded guilty to take advantage of his "incredibly favorable" plea bargain.

¶43 In this appeal, Medina's sole argument is that the trial court was constitutionally required to find that there was strong evidence of actual guilt, even though Medina waived proof of a factual basis. As we have discussed, there is no such requirement. Thus, the postconviction court did not err.

IV. Conclusion

¶44 For the foregoing reasons, we affirm the division's judgment, albeit on slightly different grounds.

APPENDIX B

Colorado Court of Appeals, Division III

The PEOPLE of the State of Colorado, Plaintiff-Appellee,

v.

Delano Marco MEDINA, Defendant-Appellant.

Court of Appeals No. 19CA1196

Announced September 23, 2021

Lake County District Court No. 13CR52, Honorable Catherine J. Cheroutes, Judge

Philip J. Weiser, Attorney General, Grant R. Fevurly, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee.

Krista A. Schelhaas, Alternate Defense Counsel, Littleton, Colorado, for Defendant-Appellant.

Opinion by JUDGE JOHNSON

¶ 1 Plea bargains "are an accepted part of our jurisprudence" to resolve criminal cases in Colorado. *People v. Schneider*, 25 P.3d 755, 759 (Colo. 2001). Given their ubiquity, a situation that likely will occur again is an issue of first impression here: Are a defendant's due process rights violated if he or she enters into a plea agreement by waiving a factual basis to the offense but does so in conjunction with an *Alford* plea?

¶ 2 In *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the issue was whether a defendant could knowingly, voluntarily, and intelligently plead guilty while simultaneously professing his or her innocence. The United States Supreme Court held that such a circumstance is

permitted so long as "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.* at 37, 91 S.Ct. 160.

¶ 3 Not addressed in *Alford*, however, is whether a defendant may waive the requirement that a judge find "strong evidence of actual guilt" under applicable state criminal procedural rules. *Id.* Fed. R. Crim. P. 11 and some state criminal rules, for example, do not authorize waivers of a factual basis to facilitate entry of a plea agreement. But our Crim. P. 11 does.

¶ 4 Although Colorado cases exist involving *Alford* pleas, there are no cases specifically addressing a district court's authority under Crim. P. 11 to permit a defendant to waive a factual basis when presented with a defendant's protestation of innocence. We conclude that as long as the district court strictly adheres to the provisions of Crim. P. 11, a defendant's due process rights are not violated if he or she waives the requirement of a finding of a "strong" factual basis under *Alford* when entering a plea accompanied with a plea agreement. We do so because *Alford* did not intend to create a separate constitutional due process right when it observed that a plea of guilty is permissible when there exists a "strong" factual basis of actual guilt contained in the record.

¶ 5 In this case, because the record supports a finding that the district court strictly complied with the provisions of Crim. P. 11, defendant Delano Marco Medina (Medina) knowingly, voluntarily, and intelligently waived a factual basis for his *Alford* plea to felony menacing, which was part of a global plea agreement involving six criminal cases. Consequently, we affirm the postconviction court's order

upholding Medina's judgment of conviction entered pursuant to a plea agreement.

I. Background

¶ 6 In August 2013, Medina's wife called 911 and "reported that her husband had held a knife to her throat and threatened her." Medina's wife met with a police officer at the Lake County Sheriff's Department and told him that she and Medina had been arguing when the incident occurred. Police arrested Medina and located a small knife in his pocket. Medina was arrested and charged with felony menacing – real/simulated weapon.

¶ 7 Medina pled guilty to the menacing charge with a stipulated one-year sentence in the custody of the Department of Corrections (DOC) in exchange for dismissal of the charges in five other cases.[1] Medina's sentence ran consecutively to a sentence he anticipated he would receive in a Boulder County case.[2] Medina waived a factual basis, even though he maintained his innocence to the menacing offense. In other words, Medina contends, and the district court acknowledged, that he entered an *Alford* plea.

¶ 8 The court set the matter over for sentencing, but Medina posted bond and absconded for almost a year until he was apprehended.

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[1] The other cases include Lake County case numbers 13CR53, 13CR63, 13T75, 13M131, and 13M130. All the charges from the other cases are not identified in the record on appeal. But there was testimony at the postconviction hearing that some of the other charges included a bond violation, forgery, and two traffic cases.

[2] The Boulder County case was 13CR591. There was also testimony at the postconviction hearing that the charges from this case involved theft and impersonation.

¶ 9 At an initial appearance after his arrest, Medina's new counsel (plea counsel) — a different public defender than trial counsel who had represented him until the plea hearing — stated that she intended to file a motion to withdraw his plea because new evidence had emerged. The prosecutor indicated that the district court should proceed with sentencing because Medina had "two active felonies" when Medina pled to a "very generous one-year stipulated sentence" in the custody of the DOC.

¶ 10 At sentencing, Medina's counsel made another request to withdraw his plea. Medina claimed that he thought an *Alford* plea left open the possibility that he could withdraw his plea based on new evidence. Medina also claimed he wanted to withdraw his plea because the new evidence would show he did not actually use a knife during the menacing incident. The district court denied Medina's motion and sentenced him in accordance with the plea agreement.

¶ 11 Medina then filed a pro se motion for postconviction relief under Crim. P. 35(c). He claimed that he was innocent of the menacing charge and that he had received ineffective assistance from plea counsel. He also claimed that he did not fully understand the implications of his guilty plea. The district court appointed counsel for Medina (Rule 35 counsel).

¶ 12 The postconviction court set an evidentiary hearing on the motion. Medina's plea counsel testified that Medina waived the factual basis for the plea to enter into the plea agreement. Plea counsel also testified that Medina did so because while he may not have believed he was guilty of menacing, he

nonetheless wanted to take advantage of the offer because it would result in the dismissal of his other pending cases and reduce his bond. Medina testified that he was innocent of the menacing charge but acknowledged his guilt in some of the other cases.

¶ 13 The postconviction court entered an order denying Medina's motion. The court found that Medina had waived the factual basis of the charge because he wanted to take advantage of the plea offer. The postconviction court alternatively found that, based on the arrest warrant and complaint to felony menacing, sufficient evidence in the record as a whole supported a factual basis.

¶ 14 On appeal, Medina contends that (1) due process requires that an *Alford* plea be supported by strong evidence in the record, a requirement that is not waivable; (2) the postconviction court erred by independently evaluating whether there was strong evidence for the basis of the plea from the entire record instead of vacating the plea based on what occurred at the providency hearing; and (3) there did not exist in the record strong evidence of his guilt.[3] We do not address Medina's latter two contentions because we conclude that, under Colorado law, a defendant who enters an *Alford* plea accompanied with a plea agreement may waive a judicial finding that there was strong evidence of guilt in the record. Medina knowingly, voluntarily, and intelligently waived such a finding when he entered the guilty plea as

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[3] On appeal, Medina does not renew his claim of ineffective assistance of plea counsel. We consider this claim abandoned. *People v. Delgado*, 2019 COA 55, ¶ 9, n.3, 442 P.3d 1021 (an appellate court will not address claims raised below but not reasserted on appeal).

part of his plea agreement to the felony menacing charge.

II. Standard of Review

¶ 15 We review whether a guilty plea was knowing, voluntary, and intelligent as a mixed question of law and fact. *People v. Vicente-Sontay*, 2014 COA 175, ¶ 52, 361 P.3d 1046. In the context of a Rule 35(c) motion, "we review the [postconviction] court's legal conclusions de novo but defer to the ... court's factual findings if they are upported by the record." *People v. Corson*, 2016 CO 33, ¶ 25, 379 P.3d 288; *see also People v. Villanueva*, 2016 COA 70, ¶ 28, 374 P.3d 535.

III. Requirement of "Strong" Evidence in the Record

¶ 16 Medina argues that (1) due process requires that the district court ensure that he intelligently concluded that his interests required entry of a guilty plea; and (2) because an *Alford* plea must be supported by "strong" evidence in the record, the district court erred by allowing Medina to waive this requirement. We disagree because Medina's waiver of a factual basis for the *Alford* plea when accompanied by a plea agreement does not violate due process of law.

¶ 17 The Due Process Clauses of both the United States and Colorado Constitutions require that a guilty plea be knowing, voluntary, and intelligent. U.S. Const. amend. XIV; Colo. Const. art. II, § XXV; *see also Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *People v. Dist. Ct.*, 868 P.2d 400, 403 (Colo. 1994).

¶ 18 In Colorado, a plea may be knowing, voluntary, and intelligent even if counsel enters the plea and waives a factual basis to the underlying offense when the defendant enters into a plea agreement. Crim. P. 11(a) authorizes "[a] defendant personally or by counsel" to plead guilty, not guilty, or, with consent of the court, nolo contendere. That rule also specifically authorizes a defendant to waive a factual basis if certain criteria are met by stating

> (b) Pleas of Guilty and Nolo Contendere. The court shall not accept a plea of guilty or a plea of nolo contendere without first determining that the defendant has been advised of all the rights set forth in Rule 5(a)(2) and also determining:
>
> ...
>
> (6) That there is a factual basis for the plea. If the plea is entered as a result of a plea agreement, the court shall explain to the defendant, and satisfy itself that the defendant understands, the basis for the plea agreement, and *the defendant may then waive the establishment of a factual basis* for the particular charge to which he pleads[.]

Crim. P. 11(b)(6) (emphasis added). If a factual basis is waived, the requirement that such facts "be properly determined by (1) facts admitted to by the defendant, (2) facts or fact-finding stipulated to by the defendant, or (3) facts found by a jury" is inapplicable. *People v. Rockwell*, 125 P.3d 410, 418 (Colo. 2005).[4]

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[4] We acknowledge that, if a defendant does not waive a factual basis under Crim. P. 11 but protests his or her innocence when

¶ 19 If our rule authorizes the waiver of a factual basis, is a waiver permitted in the context of an *Alford* plea? Although Crim. P. 11 does not specifically mention *Alford* pleas, we do not view this to be fatal. *Alford* itself indicated that it did not "perceive any material difference between a plea that [the defendant] refuses to admit commission of the criminal act [nolo contendere] and a plea containing a protestation of innocence." 400 U.S. at 37, 91 S.Ct. 160; *see also Rockwell*, 125 P.3d at 417 n.8 ("[T]he defendant excuses the establishment of a factual basis for the specific charge after a full explanation of the basis for the plea agreement.").

¶ 20 Instead, the answer to this question turns on whether the requirement of a "strong" factual basis is, as Medina suggests, constitutionally required, or whether it is as we hold, simply part of the existing due process requirement that ensures a defendant's plea is knowing, intelligent, and voluntary.

¶ 21 Because we noted there are no Colorado cases on point, we first turn to *Alford*, federal cases, and other states' cases to analyze how those authorities have interpreted and applied the requirements for this type of plea.

A. *Alford* and Federal Cases

¶ 22 *Alford* started out with this basic premise for plea agreements: the "standard was and remains whether the plea represents a voluntary and intelli-

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entering into a plea agreement, the "trial [court] should inquire into factual guilt." *In re Cardwell*, 50 P.3d 897, 905 n.8 (Colo. 2002). In other words, absent a waiver of a factual basis, *Alford* mandates that the burden shifts to the court to ensure there is a strong factual basis in the record.

gent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31, 91 S.Ct. 160; *see also Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). When a defendant pleads guilty, the defendant ordinarily admits that he or she committed the crime charged against him or her and consents to a judgment of conviction. *Alford*, 400 U.S. at 32, 91 S.Ct. 160. *Alford* determined, however, that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37, 91 S.Ct. 160. It reasoned that when "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt," *see id.*, then an *Alford* plea may be accepted by the court.

¶ 23 There are two components to a plea when a defendant protests his or her innocence: (1) that the defendant's interests show he or she should enter the plea; and (2) that there is strong evidence of actual guilt (also phrased in case law as a strong factual basis in the record) despite his or her protestations of innocence. *Id.* at 37-38, 91 S.Ct. 160.

¶ 24 Unresolved by *Alford*, however, is whether the second component — a strong factual basis — can be waived by the defendant. *Alford* indicated that "[b]ecause of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice," some states and the federal courts "properly caution that pleas coupled with claims of innocence *should not* be ac-

cepted unless there is a factual basis for the plea." *Id.* at 38 n.10, 91 S.Ct. 160 (emphasis added). But the Court did not mandate that an *Alford* plea may never be accepted if there was a waiver of a factual basis.

¶ 25 Because the United States Supreme Court did not hold in *Alford*, nor has it held thereafter, that a finding of strong factual basis is constitutionally required, we next look to federal authorities concerning their interpretation of *Alford*.

¶ 26 Fed. R. Crim. P. 11(b)(3) requires a federal court, regardless of the form of the plea, to "determine there is a factual basis." Medina relies on *Willett v. Georgia*, 608 F.2d 538, 540 (5th Cir. 1979), for the proposition that a court commits constitutional error if it accepts an *Alford* plea without first finding a factual basis.

¶ 27 *Willett* focused on the voluntary nature of the plea, which may be at odds when a defendant protests his innocence yet is willing to plead guilty. Consequently, according to that court, "a judicial finding of some factual basis for defendant's guilt is an essential part of the constitutionally-required finding of a voluntary and intelligent decision to plead guilty." *Id.*

¶ 28 Other federal courts have come to a similar conclusion that the voluntariness of a plea and a factual basis are inextricably linked and, for some courts, constitutionally required. *See, e.g., Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) (although federal rules of criminal procedure are not binding on the states, they represent the constitutional minimum requirements for a knowing and voluntary plea in federal court); *United States ex rel.*

Dunn v. Casscles, 494 F.2d 397, 399-400 (2d Cir. 1974) (emphasizing the need for a factual basis to protect the innocent from a guilty plea); *United States v. Gaskins*, 485 F.2d 1046, 1049 (D.C. Cir. 1973) (When a defendant protests his innocence, Rule 11 "highlights the importance" of a district court's obligation to "assure that there is indeed a factual basis for the plea.").

¶ 29 But the federal courts are not in uniform agreement that a strong factual basis is constitutionally mandated. For example, *Willett* — the case relied on by Medina — specifically stated that its "holding [of constitutional error without a factual basis] does not imply that the terms of Fed. R. Crim. P. 11 are *constitutionally applicable* to the states." 608 F.2d at 540 n.1 (emphasis added). As a result, while some federal courts have given the strong factual basis requirement constitutional significance, others have rejected that position. *See, e.g.*, *Loftis v. Almager*, 704 F.3d 645, 650 (9th Cir. 2012) (Although *Alford* did not "explicitly hold that a factual basis was constitutionally necessary," some federal courts have "drawn from the ... language" of *Alford* to make it a requirement.).

¶ 30 Specifically, *United States v. Newman*, 912 F.2d 1119, 1123 (9th Cir. 1990), *superseded by statute as stated in United States v. Wahid*, 614 F.3d 1009 (9th Cir. 2010), stated that while a factual predicate on the record is a "good and common practice," the defendant in that case did not cite to any authority that such a requirement is "mandated in state court by the Constitution." Instead, the "factual basis [in state court] at the plea hearing may serve

to indicate the knowing and voluntary nature of the plea." *Id.*

¶ 31 *Higgason v. Clark*, 984 F.2d 203, 207 (7th Cir. 1993), went further by specifically rejecting a defendant's claim that a strong factual basis in the record is a constitutional requirement for an *Alford* plea. Instead, that court stated, "*Alford* tells us that strong evidence on the record can show that a plea is voluntary; it does not hold that *only* strong evidence on the record permits a finding of voluntariness." *Id.* Most relevant to our inquiry, *Higgason* concluded that *Alford* "certainly does not imply that the factual-basis requirement of Fed. R. Crim. P. 11(f) and its state-law counterparts comes from the Constitution." *Id.*; *see also McCarthy v. United States*, 394 U.S. 459, 465, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (Fed. R. Crim. P. 11 "has not been held to be constitutionally mandated," but "it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary.").

¶ 32 We agree with the federal authorities to the extent they acknowledge that a factual basis for a plea is not constitutionally required. And while generally Colorado courts may find persuasive federal case law interpreting rules that are analogous to ours, *see People v. Rivera*, 56 P.3d 1155, 1163 (Colo. App. 2002), "we are not bound to interpret our ... procedur[al rules] in the same way that the United States Supreme Court [or federal courts] interprets its rules," *Warne v. Hall*, 2016 CO 50, ¶ 43, 373 P.3d 588 (Gabriel, J., dissenting); *see also Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶ 23, 347 P.3d 149 (noting that various provisions of C.R.C.P. 16 are

"markedly different from the language" of its federal counterpart). Thus, we will not reflexively follow federal law that has construed a finding of a factual basis in the record — strong or otherwise — to be constitutionally required when (1) the federal rule is "markedly different" from our own criminal procedural rule, *see Antero Res. Corp.*, ¶ 23; and (2) the federal courts do not agree as to the constitutional significance of the "strong" factual basis requirement.

¶ 33 Because Fed. R. Crim. P. 11 and its state-law counterparts do not derive from the Federal Constitution, we next turn to other states' opinions to determine whether their analyses of *Alford* provide a compelling reason to accord constitutional significance to a court's finding of a strong factual basis.

B. Other States' Cases

¶ 34 Our review of other states' cases also reveals a lack of uniformity on this issue. At least forty-seven states authorize *Alford*-type pleas, but there is no consistent approach in dealing with this kind of plea. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1372 n.52 (2003) (collecting state cases authorizing *Alford* pleas).

¶ 35 Some states, for example, require a finding of a factual basis before acceptance of an *Alford* plea but do so because their Rule 11 counterparts or relevant statutory authority contain language similar to the federal rule. *See, e.g., People v. Watts*, 67 Cal.App.3d 173, 136 Cal. Rptr. 496, 500-01 (1977) (relying on state law); *Robinson v. State*, 291 A.2d

279, 281 (Del. 1972) (state rule is modeled after federal rule); *People v. Barker*, 83 Ill.2d 319, 47 Ill.Dec. 399, 415 N.E.2d 404, 410 (1980) (state rule is modeled after federal rule); *State v. Martin*, No. 13-1819, 2014 WL 6977361, at *2 (Iowa Ct. App. Dec. 10, 2014) (unpublished opinion) (relying on the state's rule that is similar to the federal rule, as it does not authorize a trial court to "accept a guilty plea without first determining the plea has a factual basis, and that factual basis must be disclosed in the record"); *State v. Dillon*, 242 Kan. 410, 748 P.2d 856, 859-60 (1988) (in analyzing a plea of nolo contendere similar to an *Alford* plea, relying on Kansas rule, which is similar to the federal rule); *Reynolds v. State*, 521 So. 2d 914, 916 (Miss. 1988) (relying on state rule); *Brown v. State*, 45 S.W.3d 506, 507-08 (Mo. Ct. App. 2001) (relying on state rule); *State v. Fontaine*, 559 A.2d 622, 624 (R.I. 1989) (state rules require a factual basis and affidavit completed by the defendant); *State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992) (state rule is modeled after federal rule); *State v. Johnson*, 105 Wis.2d 657, 314 N.W.2d 897, 901 (1981) (relying on federal and state case law).

¶ 36 Other states constitutionally require a factual basis by relying on *Alford* itself or other federal case law. *See, e.g., Allison v. State*, 495 So. 2d 739, 741 (Ala. Crim. App. 1986) (relying on *Willett*); *Goodman v. Davis*, 249 Ga. 11, 287 S.E.2d 26, 30 (1982) (relying on *Alford*); *State v. Smith*, 61 Haw. 522, 606 P.2d 86, 88-89 (1980) (relying on *Alford* to require that "searching inquiry" must be made to "defendant personally" to ensure the defendant understands the finality of his plea); *Sparrow v. State*,

102 Idaho 60, 625 P.2d 414, 415 (1981) (relying on *Alford*); *State v. Linear*, 600 So. 2d 113, 115 (La. Ct. App. 1992) (relying on *Willett*); *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977) (relying on *Alford*); *State v. Stilling*, 856 P.2d 666, 671 (Utah Ct. App. 1993) (relying on *Alford*).

¶ 37 Finally, some states have additional requirements before entry of a guilty plea. *See, e.g.*, *Commonwealth v. Eskra*, 235 Pa.Super. 575, 345 A.2d 282, 285 (1975) ("[A] trial court must reject a tendered plea of guilt if the defendant at the same time recites facts sufficient to constitute a defense to the criminal charge."); *In re Barber*, 2018 VT 78, ¶¶ 7-19, 208 Vt. 77, 195 A.3d 364 (Vermont's Rule 11 requires a defendant to personally make an admission of facts to the underlying charge before pleading guilty, which cannot be substituted with a defendant's oral admission or a stipulation by the parties); *State v. Garcia*, 192 Wis.2d 845, 532 N.W.2d 111, 116 n.5, 117 (1995) (although not constitutionally required, the court recommends a finding in the record of a "strong proof of guilt") (citation omitted).

¶ 38 Our primary duty is to interpret our supreme court's procedural rule. When out-of-state precedent lacks consistency or is based on materially different language in other states' rules or statutory authorities, we conclude that there is no persuasive reason to adopt those state's approaches to this issue. *See People v. Weiss*, 133 P.3d 1180, 1187 (Colo. 2006) (our state courts may look to other states when dealing with an issue of first impression but that precedent is not binding); *see also DC-10 Ent., LLC v. Manor Ins. Agency, Inc.*, 2013 COA 14, ¶ 18, 308 P.3d 1223 (same).

¶ 39 We thus turn to Colorado case law to determine whether our supreme court's view of *Alford* is incompatible with the notion that a strong factual basis requirement may be waived because it is not constitutionally required.

C. Colorado Cases

¶ 40 From our research and the parties' briefing, there appears to be no Colorado case dealing specifically with whether a defendant may waive the requirement of judicial finding of a strong factual basis before entering an *Alford* plea. But case law suggests that such a requirement is not inconsistent with, much less a violation of, any constitutional requirement so long as the other provisions of Crim. P. 11 are strictly satisfied.

¶ 41 We start with the plain language of Crim. P. 11, which in authorizing a waiver of a factual basis under *Alford* when entering into a plea agreement, is consistent with Colorado case law that has treated an *Alford* plea like any other guilty plea. *See Schneider*, 25 P.3d at 759 (affirming that our supreme court and the United States Supreme Court "have both concluded that an *Alford* plea is the functional equivalent of a guilty plea within the system").

¶ 42 We next turn to our supreme court's pronouncements on what constitutes a knowing, intelligent, and voluntary plea. *People v. Canino*, 181 Colo. 207, 209, 508 P.2d 1273, 1274 (1973), analyzed whether a defendant could withdraw postconviction a plea of nolo contendere when he asserted his innocence at the providency hearing. In rejecting the argument that such a plea must be withdrawn, the court noted that its concern has "always been with

reality and not ritual" when dealing with guilty pleas. *Id.* at 211, 508 P.2d at 1275. In other words, the court concluded that the constitution required that "the defendant be aware of the elements of the offense and that he voluntarily and understandingly acknowledge his guilt. A formalistic recitation by the trial judge at a providency hearing is not a constitutional requisite." *Id.*

¶ 43 Later, in *People v. Cushon*, 650 P.2d 527, 529 (Colo. 1982), our supreme court indicated that, to accept a plea where a defendant protests his innocence, the court must adhere to "[*t*]*he strictest compliance with the rules* governing a plea of guilty." (Emphasis added.) Although that case did not involve an *Alford* plea, the wording of Crim. P. 11 at that time also authorized the waiver of a factual basis. *Id.* at 527 n.1. Consequently, the strictest compliance with the rules governing guilty pleas ostensibly would likewise authorize waiver of a factual basis when accompanied with a plea agreement, especially when the court in that case reiterated its holding from *Canino* that "Crim. P. 11 requirements do[ ] not impose a prescribed ritual or wording before a guilty plea may be accepted." *Id.* at 528.

¶ 44 More recently in *People v. Birdsong*, 958 P.2d 1124 (Colo. 1998), our supreme court analyzed whether an *Alford* plea is invalid if a district court fails to advise the defendant on all collateral consequences of the sentence. Related to its analysis and relevant to our issue here, *Birdsong* relied on language in *Alford* to hold that "[a]n *Alford* plea is a guilty plea," and therefore "the trial court's obligations to advise the defendant were no greater than with any other guilty plea." *Id.* at 1127; *see also Peo-*

ple v. Venzor, 121 P.3d 260, 264 (Colo. App. 2005) (no obligation of the district court to advise the defendant on the meaning and nature of an *Alford* plea). In reaching this conclusion, *Birdsong* referred to *Alford*'s statement that "an express admission of guilt 'is not a constitutional requisite to the imposition of a criminal penalty.'" 958 P.2d at 1128 (quoting *Alford*, 400 U.S. at 37, 91 S.Ct. 160); *see also Carmichael v. People*, 206 P.3d 800, 808 (Colo. 2009) ("[A] defendant may maintain his innocence while nonetheless entering into a valid plea agreement."); *Lacy v. People*, 775 P.2d 1, 9, n.11 (Colo. 1989) (a district court is not constitutionally obligated to determine that an adequate factual basis existed to support a non-*Alford* plea).

¶ 45 If there is no "constitutional requisite" for an express admission of guilt, *see Birdsong*, 958 P.2d at 1128, and our Crim. P. 11 allows for the waiver of a factual basis when accompanied with a plea agreement, we conclude our supreme court's view of *Alford* is not inconsistent or incompatible with *Alford* itself. Indeed, our conclusion is consistent with the touchstone of whether a district court accepts a defendant's decision to enter into the plea agreement, which must be based on a "voluntary and intelligent choice." *Schneider*, 25 P.3d at 760 (citation omitted); *see also McCarthy*, 394 U.S. at 465, 89 S.Ct. 1166 (Although the procedures in Fed. R. Crim. P. 11 are not "constitutionally mandated," they exist to assist district court judges to ensure constitutionally that "a defendant's guilty plea is truly voluntary.").

¶ 46 It is certainly true that a voluntary and knowing choice may be evidenced by a finding of a strong factual basis for the charged offense that the

defendant acknowledges. And no doubt a district court judge's finding of a strong factual basis in the record is a better practice than a waiver of a factual basis when confronted with an *Alford* plea and would insulate acceptance of the plea against post-conviction challenges such as the one Medina raised. Likewise, a court need not accept a guilty plea if the defendant protests his or her innocence and is also unwilling to waive a factual basis under Crim. P. 11. *See Alford*, 400 U.S. at 38 n.11, 91 S.Ct. 160 ("A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court.").

¶ 47 Critical to our analysis is that Crim. P. 11's authorization to waive a factual basis when accompanied by a plea agreement must also be supported in the record as a defendant's voluntary and knowing decision. And the waiver of a factual basis may be demonstrated in the record in a multitude of ways and not necessarily through "ritualistic" or "talismanic" language; indeed, review of the entire providency transcript may indicate that the defendant understood the implications of his or her guilty plea even if he or she waives a judicial finding of a strong factual basis to the charged offense while simultaneously protesting one's innocence.

¶ 48 To summarize, we agree with Medina that the strong factual basis from *Alford* is required as part of constitutional due process. We disagree with him, however, that this requirement is a separate element — or separate constitutional due process right — from a court's requirement generally to determine whether a defendant knowingly, voluntarily, and intelligently entered a plea agreement. *See Lacy*,

775 P.2d at 5 ("[D]ue process generally [does not] require that the record demonstrate an adequate factual basis for the plea. ... [But] [t]he situation may be otherwise ... where the defendant insists that he is innocent."). Given the number of constitutional rights that are waived with the acceptance of a plea, we are hard-pressed to understand how waiver of a factual basis — if all of the other provisions of Crim. P. 11 are strictly satisfied based on the providency record — renders an *Alford* plea involuntary as a matter of law. *See Patton v. People*, 35 P.3d 124, 128 (Colo. 2001); *see also People v. Wade*, 708 P.2d 1366, 1369 n.4 (Colo. 1985) (In *Boykin*, the United States Supreme Court "specified three constitutional rights waived by a defendant who tenders a guilty plea: the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers.").

D. Application

¶ 49 We conclude for three reasons that Medina's *Alford* plea, even though he waived a factual basis through counsel, was nonetheless voluntary, knowing, and intelligent.

¶ 50 First, plea counsel's waiver of the factual basis on behalf of Medina at the providency hearing complied with Crim. P. 11.

¶ 51 During the hearing, Medina's plea counsel made a record that "[Medina] steadfastly maintains that the menacing would not be a provable case" and "in his heart of hearts he does not believe he's guilty of that." Medina's plea counsel also acknowledged that in spite of his client's claim of innocence to menacing, Medina was entering a plea to the menac-

ing charge "to take advantage of the plea bargain" and that Medina "waiv[ed] proof of a factual basis" for that charge.

¶ 52 The district court thoroughly questioned Medina as to his understanding of the plea agreement. The district court asked Medina if he had been using drugs, had a history of mental illness, was thinking clearly, had enough time to talk to his lawyer, was satisfied with the advice from his lawyer, and was aware of the various rights he would be waiving.

¶ 53 The district court then delineated the rights Medina would be waiving by stating,

> Let me go over some of these things with you real quick, because you're giving up some serious rights here. And you're also pleading guilty to a felony, which is pretty serious, has long-lasting ramifications. So I want to make sure you fully understand what you're doing.
>
> First off, if you were to go to trial, you have the right to have a trial by a judge or a jury. At a trial you have the right to remain silent, which means you would not have to testify at all. And if you didn't testify, I would tell the jury they cannot use your silence against you in any way. This would be a speedy public trial. At that trial you have the right to see, hear and face all THE DEFENDANTes [sic] that were called to testify against you, and your lawyer would [have] the right to cross-examine them.
>
> At the trial the People would have to prove each on [sic] every element of the charge by proof beyond a reasonable doubt. If the People could not do that, you would be found not

> guilty. At the trial you could testify if you wanted to, but nobody could make you testify. Likewise, nobody could stop you from testifying. Whether you testified or not is your decision and yours alone. You are presumed to be innocent of the charges, and this presumption of innocence remains with you until you tell me guilty or you are found guilty after trial.
>
> At a trial you have the right to present witnesses on your own behalf and you can get subpoenas, which are court orders, making them come to court. If you were convicted after trial, you'd have the right to appeal your conviction to a higher court and you would have the right to present any legal defenses you might have to the charge.
>
> Do you understand by pleading guilty you are giving up those rights?
>
> [MEDINA]: Yes.

To the charge of menacing, the district court then explained,

> Now I know that you're admitting – essentially, we're kind of doing an Alford plea. Aren't we really, basically? All right.
>
> So the plea agreement, before you can be found guilty at this trial the People would have to prove that on about the date and place charged you, by threat or physical action, knowingly placed or attempted to place another person in fear of imminent serious bodily injury. And that you used some sort of a weapon or deadly weapon in that case. And I understand you're not admitting that you did that, except that

> you're saying "I'm willing to plead guilty." But you understand if you didn't, if you pled not guilty, he'd have to prove each of those things by proof beyond a reasonable doubt?
>
> MEDINA: Yes.

Medina was therefore apprised that felony menacing involved a threat with a weapon, so he cannot now claim that a weapon was not involved or he was unaware that this was an element of the crime.

¶ 54 The district court also advised Medina that once he pled guilty, his decision was "final" by stating,

> All right. Let's see. Once you plead guilty, this is a final decision. You cannot come back at another time, change your mind, plead not guilty and have a trial. Do you understand that?
>
> MEDINA: Yes.

Following these colloquies, the district court found that Medina "waived the factual basis" for his plea and that his entering the plea was "freely, voluntarily, knowingly and intelligently given."

¶ 55 Second, besides his argument that he cannot waive a factual basis under *Alford* — which we reject — Medina does not challenge on any other basis that his plea was invalid. Indeed, Medina does not challenge, much less argue, that Crim. P. 11(b)(6) is constitutionally deficient given that the plain language of that rule permits a waiver of factual basis for all types of pleas entered as a result of a plea agreement.

¶ 56 And he does not dispute that the terms of the plea agreement were fully explained to him or that he signed the agreement, understood he was waiving

a factual basis, and understood the legal consequences flowing from the agreement. Therefore, the record supports that his acceptance of the plea entered as a result of his plea agreement at the providency hearing under Crim. P. 11 was knowing, voluntary, and intelligent. *See Patton*, 35 P.3d at 128 ("Because a guilty plea effectuates such an extensive waiver [of constitutional rights], a challenge to the conviction entered thereon is normally limited to whether the plea itself was voluntary and intelligent.").

¶ 57 Third, Medina waived the factual basis through plea counsel to take advantage of the generous global disposition of his other cases. In other words, Medina's "interest" was served by entering the global disposition. *Alford*, 400 U.S. at 33, 91 S.Ct. 160 ("As one state court observed nearly a century ago, '(r)easons other than the fact that he is guilty may induce a defendant to so plead, ... (and) (h)e must be permitted to judge for himself in this respect.' " (quoting *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, 276 (1879))); *see also State v. Albright*, 564 S.W.3d 809, 817 n.5 (Tenn. 2018) (an *Alford* plea is sometimes referred to as a "best interest" plea).

¶ 58 Medina's *Alford* plea is analogous to situations addressed in other Colorado opinions that upheld plea agreements where a defendant agreed to plead guilty to an added charge in which there was no factual basis to take advantage of a plea bargain.

¶ 59 For example, in *People v. Isaacks*, 133 P.3d 1190, 1191 (Colo. 2006), our supreme court held that although a defendant could not be sentenced under the aggravated sentencing range, he nonetheless could be sentenced under the presumptive range

when there was a waiver of a factual basis for a charge of conspiracy not supported by the facts "to take advantage of the plea bargain." Similarly, in *People v. Maestas*, 224 P.3d 405, 409 (Colo. App. 2009), a division of this court held that, in waiving a factual basis for second degree assault, the defendant waived her ability to avoid being subject to the possibility of consecutive sentences, as "she could have rejected any plea agreement that called for guilty pleas to multiple charges unless the charges were clearly based on identical evidence."

¶ 60 Although those cases dealt with sentencing and not the requirements of a plea agreement, the point remains the same: When a "fictitious" charge is part of the plea bargain presented to a defendant — for which there can clearly be no factual basis — waiving the strong factual basis for an *Alford* plea, to the extent the other provisions of Crim. P. 11 are strictly adhered to, is no different. Again, the analysis comes down to whether the district court record supports the defendant's voluntary, knowing, and intelligent decision to waive all rights afforded him or her, including the waiver of a judicial finding of a factual basis when the defendant chooses, the prosecutor authorizes, and the district court accepts an *Alford* plea as a part of a plea agreement.

¶ 61 Of significance here is that at the providency and postconviction hearings Medina expressly admitted his guilt to some of the offenses for which he was charged in the global disposition. Specifically, at the providency hearing, Medina's plea counsel stated that "there are other cases, in particular a bond violation, which do[ ] not have a defense." Also at the postconviction hearing, Medina's plea counsel testi-

fied that Medina waived the factual basis because "while [Medina] may have been guilty of some of the other charges[,] ... he was not guilty of the menacing, but he still wanted to take the plea agreement." Medina himself even testified at the postconviction hearing that he "knew the menacing case was false," but he further stated, "[t]he other cases I was guilty of. So that's kind of how this whole dilemma happened where I was guilty of some things but not guilty of other things."

¶ 62 Finally, separate from his contention that a judicial finding of a factual basis cannot be waived, Medina separately argues that withdrawing an *Alford* plea should be easier to withdraw than a non-*Alford* plea. Medina claims he would not have entered an *Alford* plea had he known that it would be so difficult to withdraw it later given his view that he had "new" evidence. We reject this contention. *Birdsong* made clear that if a district court advises the defendant on all the direct consequences flowing from an *Alford* plea, there is nothing "inherent" in such a plea that creates any special promises or limitations on the punishments that may be imposed. *Birdsong*, 958 P.2d at 1130 (citation omitted). The court in *Birdsong* relied on *State ex rel. Warren v. Schwarz*, 211 Wis.2d 710, 566 N.W.2d 173, 177 (Wis. Ct. App. 1997), *aff'd*, 219 Wis.2d 615, 579 N.W.2d 698 (1998), which reasoned that,

> [m]ore accurately stated, an *Alford* plea, if accepted by the court, permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence. There is nothing inherent in an *Alford* plea that gives the defendant any rights, or promises any limi-

> tations, with respect to the punishment imposed after the conviction.

Birdsong, 958 P.2d at 1130 (citation omitted).

¶ 63 To the extent Medina "thought" it would be easier to withdraw such a plea after the fact, we are unpersuaded for two reasons. First, the district court made clear — and Medina acknowledged — that his decision to enter a plea was "final" and the court told him that he could not come back later and have a jury trial. Second, our supreme court has rejected the idea that there should be a more lenient standard given to a defendant to withdraw an *Alford* plea on grounds of newly discovered evidence than normally applies to such a motion. *Schneider*, 25 P.3d at 759 (rejecting proposition that an *Alford* plea "may be withdrawn with greater liberality than a guilty or no contest plea").[5]

¶ 64 Given the benefit of the bargain of a "very generous" deal as described by the prosecutor, and Medina's acknowledgment that he was guilty of

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[5] This is not a situation in which a defendant presented newly discovered evidence to support his claim of innocence. Medina "claims" there are recorded jailhouse calls of his wife purportedly recanting her allegation that he had a knife when he threatened her. Even assuming this is true, this evidence was known well before his plea agreement, he still does not have any of the recordings to substantiate his contentions, and his Rule 35 counsel even acknowledged at the postconviction hearing that this did not likely qualify as newly discovered evidence. *See People v. Schneider*, 25 P.3d 755, 761-62 (Colo. 2001) (the test for withdrawal of plea due to newly discovered evidence for all pleas includes (1) discovery of the evidence occurred after the plea and could not have been discovered before; (2) charges against the defendant were actually false or unfounded; and (3) the newly discovered evidence would probably bring about an acquittal at a new trial).

some but not all charges in his six criminal cases, this is a situation where competing interests were contemplated and served by a global disposition. *See Patton*, 35 P.3d at 135 (Coats, J., dissenting) ("a defendant may plead guilty to an offense that he simultaneously claims not to have committed, if, in light of the evidence against him, it is tactically in his best interest to do so."; *see also Schneider*, 25 P.3d at 760 (A defendant's decision to plead guilty "is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." (quoting *Brady*, 397 U.S. at 756, 90 S.Ct. 1463)).

¶ 65 Accordingly, because Medina does not challenge the validity of his plea as being involuntary on any other basis beyond it lacks a judicial finding of a strong factual basis — which he waived under Crim. P. 11(b)(6) — we conclude the postconviction court did not err in its finding that he voluntarily, knowingly, and intelligently entered into his plea agreement.

E. Medina's Two Remaining Contentions

¶ 66 Based on our disposition of Medina's first issue, we decline to address his other two issues.

IV. Conclusion

¶ 67 The district court's order is affirmed.

Furman and Graham*, JJ., concur

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

APPENDIX C

District Court, Lake County, of Colorado

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

DELANO MARCO MEDINA,

Defendant.

Case Number: 2013CR52

Date Filed: May 22, 2019

ORDER RE: DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF PURSUANT TO COLO. R. CRIM. P. 35(c)

THIS MATTER, came before the Court on the Defendant's Petition for Post-Conviction Pursuant to Colo. R. Crim. P. 35(c). A hearing was conducted on April 12, 2019. The Defendant appeared in custody with his counsel Erin Wigglesworth. The People were represented by Deputy District Attorney Lauren Crisera. After hearing the testimony, evidence presented and otherwise being fully apprised in the premises, the Court hereby FINDS and ORDERS as follows:

I. PROCEDURAL HISTORY

On August 26, 2013, the Defendant was charged in this case with one count of Menacing pursuant to C.R.S. § 18-3-206(1)(a)/(b), a class 5 felony. The basis of the complaint as indicated in the warrantless arrest affidavit was that the Defendant "pulled out a knife and held it to [Ashley Medina's] throat and told

her: 'You're not going to tell me what to do. I'm the man.'" Ashley Medina was Mr. Medina's wife. On September 23, 2013, the Public Defender's officer entered in the case and made a Request for a Preliminary Hearing.

On September 30, 2013, the Defendant appeared in court with his public defender, Sommer Spector. At that time, in addition to the case at hand, the Defendant also had two new cases, 13CR53 and 13CR63 (along with several misdemeanor and traffic cases). The Court advised the Defendant on the two new cases and the issue of bond was addressed in each case. The minute order indicates that the bond in 13CR52 had been revoked but was reset to $10,000 cash/surety, that in 13CR53 there was a $100,000 cash bond or a $1 million cash/surety bond and that in 13CR63 there was a $10,000 cash bond cash/surety bond.

On October 16, 2023, the cases were bound over to District Court after the Defendant waived the preliminary hearing. Thereafter, public defender Dana Christensen took over Mr. Medina's representation. In a hearing on November 1, 2013, the Defendant's bond in 13CR53 was reduced to $25,000 cash/surety. The case was ultimately set for a Motions Hearing on January 9, 2014.

On the January 9, 2014 date, the Court was advised that there was a plea agreement which would dispose of all of Mr. Medina's cases. Mr. Christensen advised the Court that the Defendant would plead guilty to the charge of Menacing, a class 5 Felony (non-Domestic Violence), in exchange for the dismissal of his other five cases (13CR53, 13CR63, 13M130, 13M131, and 13T175). The parties stipulated to a

sentence of 1 year in the Department of Corrections to run consecutive to a sentence the Defendant anticipated from a Boulder County case.

The Record reflects that the Defendant waived a factual basis for the purpose of availing himself of the plea bargain in the case and entered an Alford plea. Specifically, Mr. Christensen advised the Court that "Mr. Medina steadfastly maintains that the menacing would not be a provable case. However, there are other cases, in particular a bond violation, which does not have a defense, and so he is entering a plea to menacing even though in his heart of hearts he does not believe he's guilty of that in order to take advantage of the plea bargain, so to that extent he would be waiving proof of a factual basis." Tr. January 9, 2014, p. 3:4-11. The Guilty Plea and Waiver of Rights signed by the Defendant and the court and filed on January 9, 2019 [sic] stated: "I understand that there is a factual basis for by [sic] guilty plea, I waive establishment of a factual basis." Plea Agreement, January 9, 2014, p. 3, Paragraph 8(e). Furthermore, the Court found at the providency hearing that the Defendant's waiver of the factual basis and his entry of plea were made knowingly, voluntarily and intelligently.

The matter was continued for sentencing to February 21, 2014 and the Defendant was released from custody after posting the $10,000.00 bond in 13CR52.

The Defendant failed to appear for his February 321, 2014 sentencing date and a warrant issued for the Defendant's arrest with a bond set at $50,000.00. After nearly a year, the Defendant appeared in custody on January 22, 2015 on the 13CR52 case along

with a new case, 14CR17. The Defendant, represented by a new public defender, Thea Reiff, indicated his intent to file a Motion to Withdraw his plea in 13CR52. The Court denied the Defendant's oral motion at that time, indicating that the sentence was stipulated. However, the Court told the Defendant that he could file a written motion if he felt there were grounds to withdraw the plea. The Defendant did not file any such motion. On March 29, 2015 the matter came on for sentencing. The Court did not permit the Defendant to withdraw his plea on that date, despite his protestations that he was an "innocent man." The Court proceeded to sentence the Defendant to 1-year Department of Corrections with credit for 165 days served.

On February 26, 2018, the Defendant filed his Motion for Post-Conviction Relief Pursuant to Colo. R. Crim. P. 35(c). By the date of the filing of the Motion and the hearing on the Defendant's 35(c) motion, he had already served his sentence in Lake County 13CR52. Mr. Medina's Motion and his supplemental motion requests that he be permitted to withdraw his guilty plea on the ground that Mr. Christensen's representation of him was ineffective and because he alleges that the plea he entered was in violation of due process of law because no factual basis was provided. As such, he requests that his plea in 13CR52 be withdrawn and that all of the charges in all of the cases (13CR53, 13CR63, 13M130, 13M131 and 13T175) be reinstated.

STATEMENT OF THE LAW

The Defendant here argues that 1) his attorney was ineffective because the Defendant believed that

by entering an Alford plea he would be permitted to withdraw the plea at a later time, and therefore, his plea was not "voluntary"; and 2) that the waiver of a factual basis does not conform with due process requirements that the plea be entered into voluntarily. These are claims pursuant to Colo. R. Crim. P. 35(c)(1). He has not made an argument that he should be entitled to withdraw his plea based upon the discovery of new evidence pursuant to Colo. R. Crim. P. 35(c)(2)(V). See, *People v. Schneider*, 25 P.3d 755 (Colo. 2001)

Colo. R. Crim. P. 35(c)(2) provides that every person convicted of a crime has a right to seek postconviction relief if (as relevant to this case) the conviction was obtained in violation of the Constitution or laws of the United States or Colorado.

> The right to bring a postconviction attack to the validity and legality of a conviction or sentence is statutory, not constitutional. *People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996) (*"Rodriguez V"*). In reviewing a Crim. P. 35(c) claim, we presume the validity of the conviction and the defendant bears the burden of proving his claims by a preponderance of the evidence. *Id.; People v. Naranjo*, 840 P.2d 319, 325 (Colo. 1992); *Kailey v. Colo. Dept. of Corr.*, 807 P.2d 563, 567 (Colo. 1991). The trial court that presides over a Crim. P. 35(c) hearing is the trier of fact and bears the responsibility of determining the weight and credibility to be given to witness testimony. *Kailey*, 807 P.2d at 567; *Lamb v. People*, 174 Colo. 441, 446, 484 P.2d 798, 800 (1971). Where the evidence in the record supports the findings and holding of the

> court, the judgment of the court will not be disturbed on review. *Kailey*, 807 P.2d at 567; *Lamb*, 174 Colo. At 446, 484 P.2d at 800.

Dunlap v. People, 173 P.3d 1054, 1061-1062 (Colo. 2007).

The test for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and addressed by numerous cases in Colorado including *People v. Rodriguez*, 914 P.2d 230, 294 (Colo. 1996); *Davis v. People*, 871 P.2d 769, 772-73 (Colo. 1994); *People v. Garcia*, 815 P.2d 937, 941 (Colo. 1991). Specifically, the defendant bears the burden of showing both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Dunlap* at 1062.

Colo. R. Crim. P. 11(b) lays out the requirements a court must follow in accepting a plea of either guilty or nolo contendere. The defendant must have been advised of his rights pursuant to Colo. R. Crim. P. 5(a)(2) and the court must also determine that the defendant understands the nature and elements of the offense to which is pleading and the effect of his plea; that his plea is voluntary; that he understands his right to a jury trial and that we [sic] waives that right, that he understands the possible penalties associated with the plea; and that the defendant understands that the court is not bound by any representations made to the defendant regarding any possible sentence. Colo. R. Crim. P. 11(b)(1)-(5). Subsection (6) requires that there be a factual basis for a plea. But, "[i]f the plea is entered as a result of a plea agreement, the court shall explain to the defendant, and satisfy itself that the defendant understands, the basis for the plea agreement, and the de-

fendant may then waive the establishment of a factual basis for the particular charge to which he pleads."

When a defendant enters a plea but indicates that the plea is either nolo contendre [sic], or with protestations of innocence, the Court must comply with the requirements of *North Carolina v. Alford*, 400 U.S. 25 (1970). The plea itself has the same effect as a guilty plea, but the record before the court must also contain strong evidence of actual guilt, despite the plea. "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Alford*, 400 U.S. at 37 (1970). See also People v. Schneider, 25 P.3d 755, 759 (Colo. 2001) ("So long as the defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt, a guilty plea is sufficient whether or not defendant admits actual guilt for the acts constituting the crime."); People v. Birdsong, 958 P.2d 1124, 1127 (Colo. 1998) ("An Alford plea is a guilty plea. As such, the trial court's obligations to advise the defendant were no greater than with any other guilty plea."); People v. Venzor, 121 P.3d 260, 264 (Colo. App. 2005) ("Contrary to defendant's argument, the trial court was not required to advise him of the meaning and nature of an Alford plea. The court was only required to (1) comply with *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969), as codified in Crim. P. 11, and

(2) satisfy itself that defendant intelligently concluded his interests required entry of the plea despite protestations of innocence, and that there was strong evidence of actual guilt.").

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Ineffective Assistance of Counsel

1. Whether counsel's performance fell below an objective standard of reasonableness.

The Defendant claims that his plea was not entered voluntarily because his attorney failed to advise him that by entering his plea he would not be able to withdraw that plea at a later time. But for his belief that he could withdraw the plea, the Defendant claims, he would not have entered into the plea agreement.

Effective assistance of counsel in the context of the entry of a guilty plea requires that the attorney have informed himself of the material legal principles that might impact the particular legal circumstances of his client. See, *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) (discussing advisement of deportation consequences of a guilty plea). In the context of this case, Mr. Christensen testified that the Defendant had several cases and that his recollection of the events was that the Defendant was primarily focused on the ability to make bond upon the entry of a plea. He recollected that while the Defendant was unable to bond on all three felony cases, he would be able to bond out on the one case to which he pled guilty. Mr. Christensen also testified and it appears clearly in the transcript as well, that while there may have been a defense to the menac-

ing charge, the charges in the other two cases that were dismissed would be difficult to defend. The transcript supports Mr. Christensen's testimony.

With respect to the advisement of his client regarding the plea, Mr. Christensen testified that it was his practice to review the plea paperwork thoroughly with a defendant prior to the entry of a plea and inquire if there were any questions. Mr. Christensen testified that he does not, as part of his practice, advise clients about withdrawal of a guilty plea prior to sentencing. He did not recall any conversation with the Defendant about the ability to withdraw a plea. Mr. Christensen did testify that if he had been asked about the ability to withdraw a guilty plea he would have advised a client that it is difficult. That a plea can be withdrawn only if there is new evidence that would not or could not have been discovered prior to the entry of the plea; if there is some reason that the intent of the plea bargain cannot be effected (the dismissal of other cases as an example); or if the court did not accept a stipulated sentence. Mr. Christensen was very clear that a change of heart was not a sufficient reason to withdraw a plea.

The Court can find no authority, or was there any evidence presented, that the failure to advise a defendant of the ability to withdraw a guilty plea is below the standard of reasonableness for defense counsel. There is no such advisement in Colo. R. Crim. P. 5 or 11. There is no indication on the record that this was an issue that Mr. Medina was concerned with. In fact, the only issue the Defendant raised throughout the colloquy was the issue of presentence confinement credit—which evidences a very different

mindset than intending to withdraw the plea. See. January 9, 2014 Tr. 6:21-22. Other issues, such as the Alford plea and whether there was a domestic violence finding to be made in the case were addressed with the Court. Furthermore, both the plea paperwork and the Court's Rule 11 advisement, along with the Defendant's responses to the Court's question indicate a clear intent and acknowledgment of the nature of his plea. See e.g. Jan. 9, 2014 Tr. 7:23-8:2 (Court's advisement as to the finality of a plea). The Court declines to find Mr. Christensen's alleged failure to advise Mr. Medina regarding the withdrawal of a plea to be unreasonable.

2. Whether the Defendant was prejudiced.

Even if Mr. Christensen's representation somehow fell below the standard of reasonableness, it is difficult to see how Mr. Medina was prejudiced. Assuming, for argument's sake, that Mr. Medina had been advised regarding his ability to withdraw a guilty plea. Presumably, Mr. Christensen would have given Mr. Medina the advisement he testified to at the hearing. Then Mr. Medina would have been informed that it would be unlikely that the Court would permit him to withdraw the plea. Or, if he was permitted to withdraw the plea, all the other charges would be reinstated. At that time, Mr. Medina's choice would have been to proceed to a Motions hearing and remain in custody pending further proceedings or accept the offer. The testimony was clear that Mr. Medina's motivation for accepting the offer was his ability to bond out. Although Mr. Medina testified during the 35(c) hearing that he would have taken the cases to trial, it seems likely to the Court

that given the choice between a stipulated 1-year DOC sentence with the ability to immediately bond vs. continued custody and the likelihood of conviction on numerous other charges, that Mr. Medina would have made the same choice. The Court finds Mr. Medina's testimony on this point to be less than credible. The Court can find no prejudice to the Defendant even if there were a failure to advise.

B. **Factual Basis and Voluntariness of the Defendant's Plea**

The transcript is clear that the Defendant waived the establishment of the factual basis on the Record as he was entering the plea pursuant to a plea bargain as provided in Colo. R. Crim. P. 11(b)(6). However, he entered an Alford plea which does require the record to contain "strong" evidence of actual guilt. And, while there was a representation that in his other cases "in particular a bond violation which does not have a defense" the transcript of the providency hearing indicates that the factual basis was waived by the defense. The Defendant alleges that the waiving of the factual basis makes the Defendant's plea involuntary and in violation of his constitutional due process rights.

Pursuant to *Alford*, the "record" must contain evidence of the factual basis. In a 10th Circuit Court of Appeals case (interpreting the federal version of the factual basis rule), the court states: "This is not to say that the trial court was required to hold an evidentiary hearing to ascertain the factual basis for Mr. Keiswetter's guilty plea. Rule 11(f) permits the trial judge to find the factual basis for the plea "in anything" that appears in the record. An inquiry

might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case." *United States v. Keiswetter*, 860 F.2d 992, 996 (10th Cir. 1988), on reh'g, 866 F.2d 1301 (10th Cir. 1989). The court went on to find that while the defendant's statement in the plea agreement that a factual basis exists, "standing alone, may not be sufficient to constitute 'strong evidence' of Mr. Keiswetter's guilt under Alford, it seems appropriate for the trial judge to take such a statement into consideration, particularly if there was other evidence in the record that supported the conclusion that Mr. Keiswetter had the necessary state of mind for the crime of conversion." Id. at 997. Another 10th Circuit Case cites to Keiswetter when stating: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea. The court may consider "anything that appears in the record" when making its determination... Thus, Rule 11 does not require the district judge to question the defendant as to the factual basis for a guilty plea; rather the rule simply imposes an obligation on the judge to determine that there is a factual basis for the plea." *United States v. Pearce*, 399 F. App'x 361, 363 (10th Cir. 2010).

The plea paperwork in this case does state that there is a factual basis and that the Defendant is waiving the factual basis. The Court did inquire specifically of the Defendant regarding the elements of the offense and the Court found that the Defendant understood the elements of the offense of menacing and was pleading guilty to those elements despite the Defendant's statements that he had not commit-

ted that offense. Particularly persuasive to the Court is the acknowledgement by the Defendant through counsel that he was entering into the agreement with the full knowledge and understanding that he was obtaining the benefit of a plea bargain. And, the plea agreement itself was incredibly favorable, with the dismissal of 5 cases, counts of violation of bond conditions that had "no defense" and numerous other charges, and a stipulated 1 year DOC sentence. Finally, the Record as a whole does include a warrantless arrest affidavit and a complaint both of which provide a sufficient factual basis as to the crime to which the Defendant pled.

Though the transcript of the providency hearing itself is not ideal, the Record as a whole does provide a sufficient basis upon which to determine that there was a strong factual basis for the offense. Further, it is clear from the providency hearing that the Defendant was well aware of the nature and benefit he was receiving from the plea bargain. In fact, Mr. Medina testified at the 35(c) hearing that his "dilemma" was that he was guilty of other things but not the menacing, but the plea offer was to the menacing. His plea was knowing, and voluntary. Mr. Medina testified at his 35(c) that no one "forced" him to enter into the plea agreement. There was a factual basis for the plea sufficient to meet the *Alford* requirements.

IV. CONCLUSION

This Court finds that the Defendant has not met his burden. Specifically, the Court finds that the representation by Mr. Christensen both met an objective standard of reasonableness and did not result

in any prejudice to the Defendant (quite the contrary, he was the recipient of a very favorable plea offer). Further, the Court finds that there was no violation of the Defendant's due process rights with regard to the voluntariness of his plea. He entered his plea to a charge to which he claimed innocence with the full knowledge of the rights he had and the implications of such a plea. The Defendant's choice to plead guilty was based on considerations related to his desire to post bond and to avoid prosecution on a number of other charges. The Record as a whole supports the factual basis for this plea.

WHEREFORE, the Defendant's Motion for Post-Conviction Relief Pursuant to Colo. R. Crim. P. 35(c) is DENIED.

SO ORDERED this May 22, 2019.

BY THE COURT:

/s/ Catherine J. Cheroutes
DISTRICT COURT JUDGE