SUMMARY
September 23, 2021

2021COA124

No. 19CA1196, *People v. Medina* — Criminal Procedure — Pleas — Pleas of Guilty or Nolo Contendere — *Alford* plea; Constitutional Law — Fourteenth Amendment — Due Process

An *Alford* plea — derived from *North Carolina v. Alford*, 400 U.S. 25 (1970) — is one in which a defendant protests his or her innocence but is nonetheless willing to enter into a guilty plea for the charged offense. Such a plea 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. A division of the court holds that a defendant entering into an *Alford* plea may waive a judicial finding of a "strong" factual basis of actual guilt, *see id.*, and that such a waiver does not violate due process if a district court strictly complies with the requirements of Crim. P. 11.

COLORADO COURT OF APPEALS **2021COA124**

Court of Appeals No. 19CA1196
Lake County District Court No. 13CR52
Honorable Catherine J. Cheroutes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Delano Marco Medina,

Defendant-Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE JOHNSON
Furman and Graham*, JJ., concur

Announced September 23, 2021

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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.

¶ 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 (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.

¶ 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

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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.

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.

¶ 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 part of his plea agreement to the felony menacing charge.

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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 (an appellate court will not address claims raised below but not reasserted on appeal).

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. 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 supported by the record." *People v. Corson*, 2016 CO 33, ¶ 25; *see also People v. Villanueva*, 2016 COA 70, ¶ 28.

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 (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:
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> . . .
>
> (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]

¶ 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; *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,

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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 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.

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 intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31; *see also Boykin v. Alabama*, 395 U.S. 238, 242 (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. *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. 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.

¶ 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 accepted unless there is a factual basis for the plea." *Id.* at 38 n.10 (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 (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 (Gabriel, J., dissenting); *see also Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶ 23 (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*, 136 Cal. Rptr. 496, 500-01 (Ct. App. 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*, 415 N.E.2d 404, 410 (Ill. 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*, 748 P.2d 856, 859-60 (Kan. 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*, 314 N.W.2d 897, 901 (Wis. 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*, 287 S.E.2d 26, 30 (Ga. 1982) (relying on *Alford*);

State v. Smith, 606 P.2d 86, 88-89 (Haw. 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*, 625 P.2d 414, 415 (Idaho 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*, 345 A.2d 282, 285 (Pa. Super. Ct. 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 (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*, 532 N.W.2d 111, 116 n.5, 117 (Wis. 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 (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 People 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); *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 (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 postconviction 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 ("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. 2007); *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 menacing 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 ("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*, 2 N.W. 275, 276 (Iowa 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 testified 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*, 566 N.W.2d 173, 177 (Wis. Ct. App. 1997), *aff'd*, 579 N.W.2d 698 (Wis. 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 limitations, 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 some but not all charges in his six criminal cases, this is a situation where competing interests were contemplated and

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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).

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)).

¶ 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.

JUDGE FURMAN and JUDGE GRAHAM concur.