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## State v. Pulsifer Appellant's Brief Dckt. 39416

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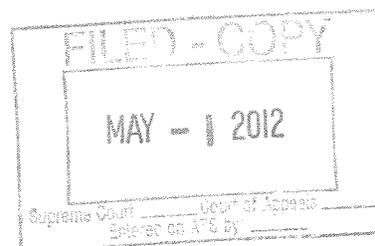
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
)  
Plaintiff/Respondent, )  
)  
vs. )  
)  
MICHAEL D. PULSIFER, )  
)  
Defendant/Appellant. )  
\_\_\_\_\_ )

S.Ct. No. 39416



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OPENING BRIEF OF APPELLANT

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Appeal from the District Court of the Fifth  
Judicial District of the State of Idaho  
In and For the County of Twin Falls

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HONORABLE RANDY J. STOKER  
Presiding Judge

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

This is an appeal from a conviction and sentence imposed following a guilty plea to a single count of possession of methamphetamine. R pp. 74-76;166-169. Relief should be granted because the failure to order a psychiatric evaluation and conduct a hearing to determine Mr. Pulsifer's competence to plead guilty and be sentenced violated the state and federal constitutional rights to due process as well as I.C. §§ 18-210 --18-212. U.S. Const. Amends. 5 and 14; Idaho Const. Art. I, § 13.

### B. Procedural History and Statement of Facts

Appellant Michael Pulsifer was originally charged with possession of methamphetamine with intent to deliver in violation of I.C. § 37-2732(a)(1)(A) based upon the discovery of methamphetamine in a car which he was driving. R pp. 49-51; PSR p. 2. (The presentence report is included as an exhibit on appeal.)

Ultimately, Mr. Pulsifer entered a guilty plea to possession of methamphetamine in violation of I.C. § 37-2732(c)(1). R pp. 74-76; Tr. p. 9, ln. 18-24. Prior to sentencing, the court ordered Mr. Pulsifer to undergo a substance abuse assessment in accord with I.C. § 19-2524(2). R pp. 71-72.

Upon completion of the PSR, Mr. Pulsifer's counsel asked that the sentencing hearing be continued and made the following request:

. . . As mentioned in the presentence investigation report, Mr. Pulsifer suffered a car accident within the last year and had spent some time in a coma. It's come to my attention just last Friday that he may have suffered some brain damage during that time that is concerning to his friends and family and may be causing some lingering issues in the mental health department. We are asking that the court not

only continue, but also order a mental health evaluation so that we can hopefully try and determine the extent of any impairment that may have happened and whether he is in need of any current mental health treatment.

Tr. p. 12, ln. 22 - p. 13, ln. 8.

Counsel also represented that the state had no objection to this request. Tr. p. 13, ln. 9-13.

The court granted the continuance and said that it would order an evaluation. Tr. p. 13, ln. 21 - p. 14, ln. 9.

However, when the court entered the order for an evaluation, the court ordered a “mental health examination pursuant to I.C. § 19-2524.” R 124-125. The court did not order a competency evaluation pursuant to I.C. §§ 18-210-18-212.

An examination in accord with I.C. § 19-2524 was performed by Marjean Flowers-Hazen, LMSW, an Adult Mental Health Clinician for the State of Idaho. Ms. Flowers-Hazen did not address the question of whether Mr. Pulsifer was competent. Rather, she addressed the requirements of I.C. § 19-2524. However, she noted doubts about Mr. Pulsifer’s competency. PSR pp. 35-48.

She wrote:

Michael was involved in a car accident in November, 2010 at which time he received a major head trauma. He described the injuries he sustained and the accident as “I sliced my head wide open. I had massive swelling of the head and I had a tube in my head. I was in a coma for 9 days and I had my accident before Thanksgiving and the first time I remember waking up was in the middle of December and I was in Idaho Falls.” He also reported he was told on numerous occasions that with the injuries that he sustained he was lucky to be alive.

PSR p. 38.

He stated that he pled guilty to that charge but he is not guilty. He reported that

he thought he pled guilty to a charge that would not send him back to prison, however he has since found out that this charge could send him to prison. He felt that he misunderstood the plea agreement when he pled guilty. He stated he would not have a problem with being on probation now but he does not want to go back to prison, especially for something he did not do.

PSR p. 40.

1. *Insight*

It is unclear at this time if Michael understands the situation. He reported that he thought he took a plea agreement that would not require jail time. He is contemplating withdrawing his plea at this time. He maintains he is innocent of this crime, however he was not opposed to being placed on probation if it made the situation easier.

PSR p. 45.

I recommend Michael speak with an attorney about his current legal charges. He does not appear to understand the terms of his plea agreement. I also recommend he be followed by a medical provider who will be able to assist him after he received his brain injury (sic).

PSR p. 46.

At the sentencing hearing, Mr. Pulsifer's counsel referenced his brain injury and its impact on him. Regarding the GAIN Assessment, counsel stated that Mr. Pulsifer believed that he had reported that he had problems as a result of the brain injury but that was not reflected in the assessment. And, she noted that he may have been unable to fill in the dots on the question form properly leading to inaccuracies in the assessment. Tr p. 24, ln. 11 - p. 25, ln. 3.

Mr. Pulsifer likewise noted his impairment stating:

My situation with the accident, it put me, it put me, although it's getting better and better all the time now, it put me during that particular point in time from January all the way up til some time in August of comprehending right, being able to talk right and speak at any term, understanding what was being said, reading, and I still have a lot of problem with the comprehension and the reading right now.

Tr. p. 31, ln. 17-24.

He also explained about a mix-up in his meeting with his attorney:

. . . And I missed that appointment because it was going to be, it was actually on Wednesday, but I was there on Thursday at 9:00 a.m. in the morning. The records they have show that and that would have been, that would have been the time that I would have had a little more time to go over a lot of this issue here.

I haven't really had enough – there's a lot of stuff in there that if I did say something in that order, I don't really comprehend why I would say it and why that would happen, you know, because I did want treatment and things like that. I did ask for a lot of those things.

Tr. p. 32, ln. 10-22.

He finished his comments to the court:

My biggest – my biggest issue is the pleading guilty of this to what's being said. At the time I just don't think I realized that that was the situation that was going to happen. I didn't, you know, my thing of that was I thought it was just going to drop down. I didn't realize it was going to be like this. And I would definitely like a little more time to finish this, if possible.

Tr. p. 34, ln. 5-12.

In sentencing Mr. Pulsifer, the court stated:

The mental health report that we had in this case, as I read it, indicates that you do not have a mental health problem, but it is more a substance abuse problem. So I have taken that report into consideration here also.

Tr. p. 37, ln. 5-9.

Thereafter, based upon a prior record that the court characterized as “not good” and a history of prior penitentiary time and parole time, the court stated it believed that Mr. Pulsifer had a drug problem and that incarceration was necessary. The court then declined to impose the sentence recommended by the defense (seven years with one fixed) and that recommended by the state (seven years with four fixed) and imposed a term of seven years with three fixed. Tr. p. 30,

ln. 5-7; p. 38, ln. 9-25. The court further ordered restitution of \$887.19. R 148-149.

This appeal timely follows. R 151-154.

### III. ISSUE PRESENTED ON APPEAL

Did the failure to order a psychiatric evaluation and conduct a hearing to determine Mr. Pulsifer's competence to plead guilty and be sentenced violate the state and federal constitutional rights to due process as well as I.C. §§ 18-210--18-212? U.S. Const. Amends. 5 and 14; Idaho Const. Art. I, § 13.

### IV. ARGUMENT

The Court's Failure to Order a Psychiatric Evaluation and Conduct a Hearing to Determine Mr. Pulsifer's Competence Violated the State and Federal Constitutional Rights to Due Process and I.C. §§ 18-210--18-212

Both the state and federal constitutions, as well as I.C. §§ 18-210--18-212, prohibit the trial, conviction, sentencing or punishment of a person who lacks mental competency. In this case, given the information before the court of Mr. Pulsifer's lack of mental competency, the district court erred in not ordering a competency evaluation and then determining whether Mr. Pulsifer was competent. Because of this error, the conviction must now be reversed.

The prohibition against the criminal prosecution of incompetent people "is fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904 (1975). Failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent denies the due process right to a fair trial. *Id.*, citing *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966). *See also, Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1988) (*per curiam*); *Indiana v. Edwards*, 554 U.S. 164, 169-70, 128 S.Ct. 2379, 2383 (2008); *State v. Lovelace*, 140 Idaho 53, 62, 90 P.3d 278, 287 (2003).

Idaho protects the due process right to not be tried, convicted, sentenced or punished while incompetent through I.C. §§ 18-210–18-212. Section 18-211 states:

Whenever there is reason to doubt a defendant’s competence to proceed as set out in § 18-210, Idaho Code, the court shall appoint at least one (1) qualified psychiatrist or licensed psychologist or request the director of the department of health and welfare to designate at least one (1) qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant . . .

Section 18-212 states that “when the defendant’s fitness to proceed is drawn in question, the issue shall be determined by the court.”

The statutes make no provision for allowing counsel to waive the due process right to not be tried, convicted, sentenced or punished while incompetent. Nor do the statutes allow the court to defer the issue to counsel’s determination. Rather, there is a clear duty imposed upon the court to act *sua sponte* upon obtaining information that calls the defendant’s competency into question. Moreover, the court’s duty to observe and act *sua sponte* regarding issues of the defendant’s competency continues throughout the proceedings. *State v. Potter*, 109 Idaho 967, 969, 712 P.2d 668, 670 (Ct. App. 1985).

To be competent, the defendant must have “a rational as well as a factual understanding of the proceedings against him” and have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” *Dusky v. United States*, 362 U.S. at 402, 80 S.Ct. at 788. *See also, State v. Lovelace*, 140 Idaho at 62, 90 P.3d at 287. The standard for competency is the same for pleading guilty as it is for standing trial. *Godinez v. Moran*, 509 U.S. 389, 391, 113 S.Ct. 2680, 2682 (1993).

The decision of whether reasonable grounds exist to order a psychological/psychiatric evaluation is left to the district court’s discretion. *State v. Hawkins*, 148 Idaho 774, 777, 229

P.3d 379, 382 (Ct. App. 2009), *rev. denied* (2010); *State v. Longoria*, 133 Idaho 819, 822, 992 P.2d 1219, 1222 (Ct. App. 1999). On appeal, the inquiry is: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of that discretion and consistently with any legal standard applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Id.*<sup>1</sup>

“A trial judge must conduct a competency hearing, regardless of whether one is requested, whenever the evidence before the judge raises a *bona fide* doubt about the defendant’s competence to stand trial.” *Hawkins*, 148 Idaho at 778, 229 P.3d at 383, citing *Williams v. Woodford*, 384 F.3d 567, 603-04 (9<sup>th</sup> Cir. 2004).

In reviewing a case to determine whether the lower court erred in not conducting competency proceedings, the appellate court determines “whether evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant’s competence.” *United States v. Lewis*, 991 F.2d 524 (9<sup>th</sup> Cir. 1993), *citing Chavez v.*

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<sup>1</sup> The *Hawkins* abuse of discretion standard of review applies rather than the *Perry* fundamental error standard. *State v. Perry*, 150 Idaho 209, 245 P.3d (2010). *Perry* cannot apply because the second prong of the *Perry* standard requires that the error be plain on the record, including that it must be plain from the record that the failure to object was not a tactical decision. Application of this standard to the *sua sponte* duty of the district court to determine competency would insulate this duty from appellate review and undermine the purpose of the statutes which is to place the duty to act with the courts independent of any duty on the part of counsel. Further, application of *Perry* would require a presumption that counsel could waive the right of an incompetent client to not be tried during the period of incompetency, which is completely contrary to the state and federal guarantees of due process because a determination of incompetency is a determination that the defendant is unable to understand the proceedings and assist in his/her own defense. If a defendant cannot understand the proceedings and assist in his/her own defense, the defendant cannot give consent to an attorney to act in his/her behalf and/or waive constitutional rights.

*United States*, 656 F.2d 512, 516 (9<sup>th</sup> Cir. 1981), *citing Bassett v. McCarthy*, 549 F.2d 616, 621 (9<sup>th</sup> Cir.), *cert. denied*, 434 U.S. 849, 98 S.Ct. 158 (1977).

While each case is different and there is no set of particular facts which signal incompetence, suggestive evidence includes the defendant's demeanor before the trial judge, irrational behavior of the defendant, and available medical evaluations of competence. *Williams v. Woodford*, 384 F.3d at 604, *citing Drope*, 420 U.S. at 180, 95 S.Ct. 896; *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 489 (9<sup>th</sup> Cir. 1997), *Moran v. Godinez*, 57 F.3d 690, 695 (9<sup>th</sup> Cir. 1994).

In this case, the suggestive evidence of competency issues included concerns voiced by Mr. Pulsifer's family and friends as conveyed to the court by counsel; repeated statements in the mental health evaluation that Mr. Pulsifer did not appear to understand the legal proceedings; Mr. Pulsifer's confusion about when his attorney appointments were; Mr. Pulsifer's inability to fill out an answer sheet for the GAIN assessment by bubbling in his intended answers; counsel's request for an evaluation; and Mr. Pulsifer's statements at sentencing which raise concerns about his ability to form and convey coherent thoughts.

Taking the entire record into account, the district court should have entertained a good faith doubt about Mr. Pulsifer's competency to proceed. *State v. Hayes*, 138 Idaho 761, 764, 69 P.3d 161, 184 (Ct. App. 2003); *Hawkins*, 148 Idaho at 783, 229 P.3d at 388. *Godinez v. Moran*, 509 U.S. 389, 401, 113 S.Ct. 2680, 2687 (1993) (same standard applied by United States Supreme Court). Therefore, the failure to *sua sponte* order a mental evaluation and determine competency was an abuse of discretion. *Id.*

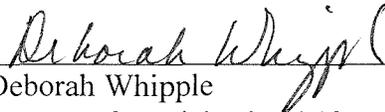
The proper remedy for this error is set out in *Hawkins*. There, the Court of Appeals held that as it is not possible to retroactively make a competency determination, the proper remedy is

to vacate the judgment of conviction leaving the state free to re-prosecute if the defendant is later found competent.

**V. CONCLUSION**

For the reasons set forth above, Mr. Pulsifer asks that his conviction be vacated.

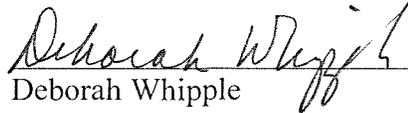
Respectfully submitted this <sup>14</sup>1 day of May, 2012.

  
\_\_\_\_\_  
Deborah Whipple  
Attorney for Michael Pulsifer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 14 day of May, 2012, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

Idaho Attorney General  
Criminal Law Division  
P.O. Box 83720  
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Deborah Whipple