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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44433
Plaintiff-Respondent,)	
)	FRANKLIN COUNTY NO. CR 2014-246
v.)	
)	
MARJORIE BALLS KRAMBULE,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF FRANKLIN**

HONORABLE MITCHELL W. BROWN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Marjorie Balls Krambule appeals from the district court's order revoking her withheld judgment for accessory to felony possession of a controlled substance and continuing her on probation. She contends the August 2016 order revoking her withheld judgment must be vacated because the January 2015 withheld judgment it purportedly revokes was entered while she was proceeding *pro se* and had not waived her right to counsel, and was thus void. Alternatively, she contends there is a structural defect in this case, requiring automatic reversal of her conviction, because she was allowed to change her plea from "not guilty" to "guilty" and was sentenced without being represented by counsel, and without waiving her right to counsel.

This Court stated in *State v. LePage*, 102 Idaho 387 (1981), that "[w]here a violation of [the right to counsel] is alleged on appeal and where . . . there appears to be some merit to the allegation, the need for efficiency in the judicial process must give way to our primary duty to protect and preserve the basic rights accorded each citizen by the Constitution." *Id.* at 391. Such is the case here. This Court should consider the merits of the issues Ms. Krambule raises, even though they are being raised for the first time in this appeal, and should vacate the order revoking Ms. Krambule's withheld judgment, vacate her conviction, and remand this case to the district court with instructions to allow her to withdraw her guilty plea and proceed with the assistance of counsel.

Statement of Facts and Course of Proceedings

Ms. Krambule called the police to report she was being physically abused by her husband, and was then subjected to a welfare check. (R., p.16.) Ms. Krambule gave the police officers who arrived at her home permission to search her home, and directed the officers to the bedroom she shared with her husband, where the officers discovered two methamphetamine pipes. (R., p.17.) She said the pipes belonged to her husband, but admitted using methamphetamine with him one week earlier. (R., p.17.) Ms. Krambule was charged by Information with felony possession of a controlled substance. (R., pp.48-49.)

Ms. Krambule was initially represented by a public defender. (R., p.43.) While represented by counsel, Ms. Krambule entered into an agreement with the State pursuant to which she agreed to plead guilty to an amended charge of accessory to possession of a controlled substance pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and, in exchange, the State agreed to recommend a withheld judgment and probation. (R., pp.83-91.) The Guilty Plea Questionnaire reflects that Ms. Krambule had been diagnosed with anxiety, depression and obsessive compulsive disorder, and was taking multiple psychotropic medications. (R., pp.83-88.) The district court accepted Ms. Krambule's guilty plea and set the case for sentencing. (R., p.90.)

Prior to sentencing, Ms. Krambule filed a motion to withdraw her guilty plea. (R., pp.92-95.) The district court held a hearing on the motion.¹ (R., pp.96-99; Mot. to

¹ The Clerk's Record does not contain a copy of the transcript of the hearing on Ms. Krambule's motion to withdraw her guilty plea. Appellate counsel for Ms. Krambule filed a Motion to Augment the Record to include a copy of this transcript, in addition to two other transcripts, and that motion was denied by this Court on April 18, 2017. Accordingly, Ms. Krambule is filing, simultaneously with this brief, a Motion to Augment

Aug., Ex. A.) As an initial matter, the district court noted “there was a lot of emotion and a lot of reluctance that was demonstrated on the part of Ms. Krambule” at the time she entered her guilty plea, and the change of plea “took an inordinate amount of time due to the emotional state of Ms. Krambule and her reluctance to enter that plea.”² (Mot. to Aug., Ex. A at 3:15-40.) Counsel for Ms. Krambule explained to the district court that Ms. Krambule felt she had been coerced into pleading guilty. (Mot. to Aug., Ex. A at 8:51-9:11). Ms. Krambule said she did not understand anything when she entered her guilty plea and wanted time to obtain counsel who could help her “understand all of this because everyone wants me to take a plea to something I didn’t do and I want a chance to prove that.” (Mot. to Aug., Ex. A. at 11:20-12:01.) She told the district court, “I’m doing what I’m told and I’m not understanding any of it.” (Mot. to Aug., Ex. A at 14:29-33.)

The district court said it believed Ms. Krambule’s guilty plea was knowing and voluntary, “but . . . by observing body language, by observing Ms. Krambule, I think her subjective belief was that she had no other alternative but to enter this guilty plea.” (Mot. to Aug., Ex. A at 32:30-33:10.) The district court granted Ms. Krambule’s motion, finding she met her burden of showing a just reason to withdraw her guilty plea. (R., pp.96-98; Mot. to Aug., Ex. A at 33:40-35:05.) Counsel for Ms. Krambule then made an oral motion to withdraw, which the district court granted due to a “divide in their relationship.” (R., p.97, Mot. to Aug., Ex. A at 35:32-54, 48:25-30, 45:15-46:15.) The

the Record to include the audio recordings of the three critical hearings that support her arguments in this appeal. (Mot. to Aug., Exs. A-C.)

² The district court described it as “probably the most difficult colloquy I’ve had with respect to a change of plea since I’ve been on the bench.” (Mot. to Aug., Ex. A at 28:20-32.)

district court told Ms. Krambule she needed “to take whatever steps necessary to retain private counsel in this matter.”³ (Mot. to Aug., Ex. A at 45:15-46:15.)

Ms. Krambule retained private counsel, who filed a notice of appearance on her behalf on November 10, 2014. (R., pp.101-02.) On January 20, 2015, Ms. Krambule’s counsel filed a motion to withdraw, stating Ms. Krambule wished to terminate the representation and certifying that withdrawal was necessary under Rule 1.16(a)(1) of the Idaho Rules of Professional Conduct.⁴ (R., pp.137-39.) The district court held a hearing on counsel’s motion on the morning of January 22, 2015. (Mot. to Aug., Ex. B.) Counsel explained he had “a legitimate concern,” not touching upon the issues in this case, which required him to move to withdraw. (Mot. to Aug., Ex. B at 2:00-4:26.) The district court asked Ms. Krambule what she intended to do if her attorney was allowed to withdraw. (Mot. to Aug., Ex. B at 7:35-40.) Ms. Krambule said, through tears, “I don’t know.” (Mot. to Aug., Ex. B at 7:41-49.) After conferring with Ms. Krambule, counsel told the district court, “I think my client would like to get alternative legal counsel, but how she’ll go about that, I don’t know.” (Mot. to Aug., Ex. B at 11:00-15.) The prosecutor told the district court he would be happy to speak with Ms. Krambule directly if the court granted her counsel’s motion to withdraw. (Mot. to Aug., Ex. B at 13:25-45.) The district court granted counsel’s motion to withdraw. (Mot. to Aug., Ex. B at 16:10-

³ It is not clear from the Record why the district court did not appoint a different public defender for Ms. Krambule at this time. There is no indication that Ms. Krambule’s financial status improved over the course of these proceedings.

⁴ Rule 1.16(a)(1) of the Idaho Rules of Professional Conduct states that “a lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law.”

17:00.) The following exchange then took place between the district court and

Ms. Krambule:

Q. Ms. Krambule, what that then means to you is that I have granted their motion, they will be allowed to withdraw. At this point in time, you're not represented in these matters, and so what I would advise you is that you're free if you would like to today to talk to [the prosecutor] And if you want to take the opportunity to [explore a resolution of this case] here today, he can now talk to you. Yes?

A. Could I get in more trouble for doing that?

Q. Well, I don't know. I mean if you --

A. If we could work out a deal, I would still be able to do what we spoke of and hire another lawyer, right?

Q. Oh, absolutely, yes. What I would caution you about today is that you don't talk about anything other than this case, certainly, and what the State may be willing to do related to this case. If you talk about things unrelated to this case, yeah, perhaps you could find yourself in trouble. I don't know. Again, I don't like to give advice from the bench. If you talk about this case, and what [the prosecutor] may or may not be willing to do, I can't imagine you getting in trouble for that.

A. Okay.

(Mot. to Aug., Ex. B at 17:01-18:36.) The district court then told Ms. Krambule, "If you want to have a meeting with [the prosecutor] here today before you leave, I'm more than comfortable in allowing that to occur." (Mot. to Aug., Ex. B at 19:44-56.) Ms. Krambule was not provided with any information about her right to counsel; nor was she provided with any information about the risks of proceeding *pro se*.

The district court held a hearing in the afternoon of January 22, 2015, where Ms. Krambule appeared *pro se*. (Mot. to Aug., Ex. C.) The prosecutor told the district court he had met with Ms. Krambule without an attorney, and reached an agreement "similar to what was reached previously. (Mot. to Aug., Ex. C at 1:07-30.) According to

the prosecutor, Ms. Krambule agreed to plead guilty to an amended charge of accessory to possession of a controlled substance, under the same conditions she had agreed to previously, and had further agreed to proceed directly to sentencing, without preparation of a presentence investigation report.⁵ (Mot. to Aug., Ex. C at 1:41-3:32.) Ms. Krambule confirmed the agreement, but stated she wanted her plea to be an *Alford* plea. (Mot. to Aug., Ex. C at 4:25-5:15.) The district court accepted Ms. Krambule's guilty plea "based upon the colloquy we had . . . a month or two ago." (Mot. to Aug., Ex. C at 5:14-30, 7:00-05.) The district court then proceeded to sentencing, stating, "I find that it would be appropriate based upon Ms. Krambule's condition, her stability, her mental health, that we forego the formal presentence investigation process and proceed to sentencing at this time in this matter." (Mot. to Aug., Ex. C at 9:41-10:05.) The district court imposed a withheld judgment and placed Ms. Krambule on probation for three years. (R., pp.143-46; Mot. to Aug., Ex. C at 13:02-45.) The minute entry and order withholding judgment was entered on January 22, 2015. (R., pp.143-49.) Ms. Krambule, still unrepresented, did not appeal from the order withholding judgment.

On March 22, 2016, the State filed a report of probation violation, alleging Ms. Krambule violated probation by testing positive for methamphetamine on January 28, and February 25, 2016. (R., pp.155-58.) The district court held a hearing on March 24, 2016, where Ms. Krambule appeared without counsel. (R., p.159.) The district court advised Ms. Krambule of her right to counsel and she stated she wished to be represented by counsel. (R., p.159.) The district court appointed a public defender

⁵ Ms. Krambule also presumably waived the provision in Idaho Criminal Rule 33(a)(1) providing that sentencing is not to occur until at least two days after a plea or verdict of guilty unless waived by the defendant.

to represent Ms. Krambule. (R., p.159.) Ms. Krambule denied violating probation and the district court set the matter for an evidentiary hearing. (R., p.160.)

Before an evidentiary hearing was held, Ms. Krambule filed, through counsel, a motion to withdraw her guilty plea and a motion for the audio recordings of the hearings held on January 22, 2015.⁶ (R., pp.169-74.) The district court held an evidentiary hearing on July 27, 2016, and found Ms. Krambule violated probation. (Tr., p.126, L.23 – p.127, L.4; R., pp.190-94.) Ms. Krambule told the district court she had not used methamphetamine or any illegal drugs since February 21, 2014, and explained to the court that her therapist wanted her to see a psychiatrist because “there is definitely something wrong in my head and I definitely need to see somebody that can fix it.” (Tr., p.136, Ls.2-8, p.137, Ls.6-8.) The district court revoked Ms. Krambule’s withheld judgment, sentenced her to a unified term of four years, with two years fixed, and then suspended her sentence and placed her on probation until January 22, 2019. (R., pp.190-94; Tr., p.139, Ls.14-23.) The order revoking withheld judgment and continuing probation was entered on August 1, 2016. (R., pp.190-94.) Ms. Krambule filed a timely notice of appeal, through counsel, on August 10, 2016. (R., pp.196-99.)

⁶ The district court did not rule on these motions. The district court stated at a hearing on June 30, 2016, “I’m just going to treat that motion to withdraw as having been filed, but not notice it up for a hearing. It will be incumbent upon [defense counsel], if he wants to notice that matter up for a hearing, to do so for a later time.” (Tr., p.21, Ls.4-8.) Defense counsel did not file a notice of hearing for either the motion to withdraw Ms. Krambule’s guilty plea or the motion for audio recordings of the January 22, 2015 hearings.

ISSUES

1. Should this Court vacate the August 2016 order revoking Ms. Krambule's withheld judgment because the January 2015 judgment it purportedly revokes was entered while Ms. Krambule was proceeding *pro se* and had not waived her right to counsel, and was thus void?
2. Alternatively, should this Court vacate Ms. Krambule's conviction for accessory to felony possession of a controlled substance because she was allowed to change her plea from "not guilty" to "guilty" and was sentenced without being represented by counsel, and without waiving her right to counsel, which is a structural defect requiring automatic reversal?

ARGUMENT

I.

This Court Should Vacate The August 2016 Order Revoking Ms. Krambule's Withheld Judgment Because The January 2015 Judgment It Purportedly Revokes Was Entered While Ms. Krambule Was Proceeding Pro Se And Had Not Waived Her Right To Counsel, And Was Thus Void

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” *Faretta v. California*, 422 U.S. 806, 807, 95 (1975). Thus, an accused may only represent himself if he “knowingly and intelligently waives the right to counsel. See *id.* at 835; see also *State v. Lovelace*, 140 Idaho 53, 64 (2004) (“To be valid, a waiver of the right to counsel must have been effected knowingly, voluntarily, and intelligently.”). “Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Faretta*, 422 U.S. at 835 (quotation marks and citation omitted); see also *State v. Anderson*, 144 Idaho 743, 746 (2007) (stating “[t]he district court must be satisfied the defendant understood the inherent risks involved in waiving the right to counsel”) (quotation marks and citation omitted); Idaho Code § 19-857 (providing that a person may waive his right to counsel if the court finds he has “acted with full awareness of his rights and of the consequences of a waiver”).

In this case, it is strikingly clear from the record that Ms. Krambule did not have a lawyer, and had not waived her right to a lawyer, when the district court accepted her

guilty plea, proceeded to sentencing, and entered a withheld judgment. (See Mot. to Aug., Exs. B, C.) Despite her attorney's statement that Ms. Krambule "would like to get alternative legal counsel," she was not advised of how she might obtain alternate counsel after her attorney was allowed to withdraw, and was arguably encouraged by the district court to meet with the prosecutor without the assistance of an attorney. (Mot. to Aug., Ex. B at 11:00-15.) After Ms. Krambule and the prosecutor arrived at a plea agreement that was almost exactly the same as the agreement Ms. Krambule had earlier disavowed, the district court accepted Ms. Krambule's guilty plea without engaging in any colloquy, presumably because the earlier colloquy had taken "an inordinate amount of time" due to Ms. Krambule's "emotional state" and her reluctance to enter a guilty plea. (Mot. to Aug., Ex. A at 3:15-40.) The district court then proceeded directly to sentencing, without any type of presentence investigation, and without ever advising Ms. Krambule of her right to an attorney and the consequences of waiving that right.

The only question is whether Ms. Krambule has a remedy for this obvious constitutional violation when she failed to file a timely notice of appeal from the original judgment (when she was, of course, unrepresented by counsel). In *State v. Farfan-Galvan*, 161 Idaho 610, 389 P.3d 155 (2016), this Court deemed significant the holding in *Burgett v. Texas*, 389 U.S. 109, 114 (1967), "that a judgment is void unless the defendant had a lawyer or waived the right." 161 Idaho at ___, 389 P.3d at 160. In *Burgett*, the United States Supreme Court held the petitioner's Tennessee conviction was void because the certified records of the conviction on their face raised a presumption that the petitioner was denied his right to counsel. 389 U.S. at 114. The

Court reasoned that “[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* [372 U.S. 335 (1963)] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case.” *Id.* at 115. The present case poses just as a much of a risk to the principle of *Gideon v. Wainwright* as did *Burgett* because Ms. Krambule continues to be punished for a felony conviction obtained in clear violation of her Sixth Amendment right to counsel.

Following *Burgett* and *Farfan-Galvan*, this Court should conclude that the withheld judgment entered in this case in January 2015 was void because Ms. Krambule did not have a lawyer and had not waived her right to a lawyer when the judgment was entered. Where a judgment is void, it is “[o]f no legal effect.” BLACK’S LAW DICTIONARY (10th ed. 2014). Thus, when the district court attempted to revoke Ms. Krambule’s withheld judgment in August 2016, there was nothing to revoke. The district court could not revoke a withheld judgment that was void, and this Court can and should vacate the district court’s August 2016 order in this appeal. See *Meyers v. Hansen*, 148 Idaho 283, 291 (2009) (agreeing with the defendant that void judgments can be attacked at any time).

II.

Alternatively, This Court Should Vacate Ms. Krambule’s Conviction For Accessory To Felony Possession Of A Controlled Substance Because She Was Allowed To Change Her Plea From “Not Guilty” To “Guilty” And Was Sentenced Without Being Represented By Counsel, And Without Waiving Her Right To Counsel, Which Is A Structural Defect Requiring Automatic Reversal

In *State v. Perry*, 150 Idaho 209 (2010), this Court explained that “some constitutional rights are so basic to a fair trial that the violation of those rights requires an automatic reversal and is not subject to harmless error analysis.” *Id.* at 222

(discussing *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)). The Court explained that certain errors, including the complete denial of counsel, constitute structural defects which are so inherently unfair that they defy harmless error review. See *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)); see also *Bement v. State*, 91 Idaho 388, 395 (1966) (noting the right to counsel has been described as “the most pervasive right of an accused” which has been accorded a “singular significance”) (quotation marks omitted). In this case, it is clear from the record that Ms. Krambule was denied her Sixth Amendment right to counsel when she changed her plea from “not guilty” to “guilty” and was sentenced while proceeding *pro se* and without having waived her right to counsel. This was a structural defect in the proceedings which requires reversal of her conviction.

Alternatively, this Court can construe the error as fundamental error, which requires reversal of Ms. Krambule’s conviction even though the issue was not raised in the district court. In *State v. Jackson*, 140 Idaho 636 (Ct. App. 2004), the Court of Appeals reversed the defendant’s conviction for possession of methamphetamine and possession of paraphernalia, concluding he was denied his Sixth Amendment right to counsel through the trial court’s acceptance of an invalid waiver. *Id.* at 641. The Court considered the issue even though it was not raised in the district court, explaining the deprivation of the right to counsel is a constitutional error that “cast[s] such doubt upon the fairness of the trial process that [it is] deemed prejudicial per se.” *Id.* at 641. Similarly, in *State v. Hunnel*, 125 Idaho 623 (1994), this Court rejected the State’s argument that the Court should decline to review the voluntariness of the defendant’s waiver of the right to counsel because the issue was not raised in the trial court. *Id.* at

625. The Court held the claimed error “qualifies as fundamental error,” which it defined as “error which so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process.” *Id.* (quotation marks and citation omitted); see *also Lovelace*, 140 Idaho at 64 (rejecting the State’s argument that the Court should decline to review the issue of the voluntaries of the defendant’s waiver of the right to counsel, concluding it qualifies as fundamental error).

Though it appears, post-*Perry*, that the issue presented in this case is one of structural error rather than fundamental error, the relief Ms. Krambule is entitled to is the same under either formulation. Because it is clear from the record that Ms. Krambule was denied her Sixth Amendment right to counsel in the proceedings leading up to the entry of the withheld judgment in January 2015, and is continuing to suffer the consequences of her felony conviction, she is entitled to relief even though this issue is being raised for the first time in this appeal.

CONCLUSION

Ms. Krambule respectfully requests that this Court vacate the district court’s order revoking her withheld judgment, vacate her conviction, and remand this case to the district court with instructions to allow Ms. Krambule to withdraw her guilty plea, and proceed with the assistance of counsel.

DATED this 25th day of April, 2017.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of April, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MARJORIE BALLS KRAMBULE
51 S 2ND EAST
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DISTRICT JUDGE
E-MAILED BRIEF

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_____/s/_____
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