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## State v. Krambule Respondent's Brief Dckt. 44433

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO, )  
 ) No. 44433  
 Plaintiff-Respondent, )  
 )  
 v. ) Franklin County Case No.  
 ) CR-2014-246  
 )  
 MARJORIE BALLS KRAMBULE, )  
 )  
 Defendant-Appellant. )  
 )  
 )  
 )  
 )  
 )

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**BRIEF OF RESPONDENT**

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**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 Krambule appeals from the district court's order revoking her withheld judgment and continuing probation.

### Statement Of The Facts And Course Of The Proceedings

In April 2014, the state charged Krambule with possession of methamphetamine. (R., pp.48-52.) The district court appointed the public defender's office to represent Krambule. (See R., p.7.) On the day of the scheduled jury trial, Krambule entered into a plea agreement with the state. (R., pp.75-76, 83-91.) Krambule entered an *Alford*<sup>1</sup> plea to an amended charge of accessory to possession of methamphetamine. (R., pp.83-91.) The state agreed to recommend that the district court enter a withheld judgment and place Krambule on probation. (Id.)

Prior to sentencing, Krambule filed a motion to withdraw her guilty plea. (R., pp.92-93.) At a hearing on that motion, Krambule's appointed counsel also made a motion to withdraw from the case, citing Krambule's desire to retain private counsel. (R., pp.96-99.) The district court granted both motions. (Id.) A few weeks later, private counsel retained by Krambule filed a notice of appearance in the case. (R., pp.101-102.)

Approximately one month before the scheduled date of the continued jury trial, Krambule's retained counsel filed a motion to withdraw. (R., pp.126-127, 137-139.) At a subsequent hearing, counsel indicated that Krambule had fired

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

counsel's firm and that continued representation would be contrary to the Idaho Rules of Professional Conduct. (Aug., Ex. B, 1:24 – 6:40.<sup>2</sup>) Later during the hearing, after consulting with Krambule, counsel informed the court that Krambule wished to attempt to reach an agreement with the prosecutor to resolve the case, and then, failing that, retain new private counsel. (Aug., Ex. B, 11:31 – 12:00.) The district court granted counsel's motion to withdraw. (R., p.143; Aug., Ex. B, 14:56 – 17:01.)

At the conclusion of the hearing, Krambule met with the prosecutor, who, shortly thereafter, informed the court that a plea agreement had been reached. (Aug., Ex. C, 0:25 – 1:30.) Once again, Krambule agreed to enter an *Alford* plea to an amended charge of accessory to possession of methamphetamine. (R., pp.143-146; Aug., Ex. C, 1:40 – 3:32.) The state again agreed to recommend that the district court enter a withheld judgment and place Krambule on probation with no additional incarceration to serve. (R., pp.143-146; Aug., Ex. C, 1:40 – 3:32.) The state also agreed to dismiss a related misdemeanor drug

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<sup>2</sup> The Idaho Supreme Court denied Krambule's motion to augment the appellate record with then-unprepared transcripts of the 10/30/14 hearing on Krambule's motion to withdraw her guilty plea, the 1/22/15 hearing on Krambule's retained counsel's motion to withdraw from the case, and the 1/22/15 change of plea and sentencing hearing conducted after Krambule entered into a plea agreement with the state in a *pro se* capacity. (4/10/17 Motion to Augment; 4/18/17 Order.) The state notes that, despite the denial of this motion, these transcripts were still prepared and filed with the Idaho Supreme Court on May 31, 2017. (5/31/17 Notice of Transcripts Filed.) These transcripts are not a part of the appellate record. The Idaho Supreme Court later *granted* Krambule's motion to augment the appellate record with audio recordings of the same three hearings. (5/12/17 Order.) These recordings were obtained by Krambule's appellate counsel and attached to the motion to augment. (4/26/17 Motion to Augment.) Krambule had also requested and obtained at least one of these recordings from the district court in the course of the underlying criminal case. (See R., pp.172-174.)

paraphernalia charge. (R., p.144; see also Idaho Data Repository, State v. Krambule, Franklin County District Court Case No. CR-2014-00267.) The parties stipulated to waive the presentence investigation and proceed directly to sentencing. (Id.) The district court accepted the plea, entered a withheld judgment, and placed Krambule on probation for three years. (R., pp.143-146; Aug., Ex. C, 5:12 – 18:36.) Krambule did not appeal from the order withholding judgment.

More than a year later, the state filed a motion for probation violation, alleging that Krambule violated her probation by using methamphetamine. (R., pp.155-158.) After an evidentiary hearing, the district court found that Krambule violated her probation as alleged by the state. (R., pp.190-194; 7/27/16 Tr., p.103, L.3 – p.128, L.20.) The district court revoked Krambule's withheld judgment, imposed a unified four-year sentence with two years fixed, suspended the sentence, placed Krambule back on probation, and ordered her to serve 10 days in custody in the county jail. (R., pp.190-194; 7/27/16 Tr., p.137, L.9 – p.141, L.7.) Krambule timely appealed from the order revoking her withheld judgment. (R., pp.196-199.)



## ISSUES

Krambule states the issues on appeal as:

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?

(Appellant's brief, p. 8.)

The state rephrases the issues as:

1. Does this Court lack jurisdiction over the issues Krambule raises on appeal because her notice of appeal was timely only from the district court's order revoking withheld judgment and continuing probation?
2. If this Court reaches the merits of her claims, has Krambule failed to show that the district court violated her constitutional rights by permitting her to enter a *pro se* guilty plea?

## ARGUMENT

### I.

#### This Court Lacks Jurisdiction Over The Issues Krambule Raises On Appeal Because Her Notice Of Appeal Is Timely Only From The District Court's Order Revoking Withheld Judgment And Continuing Probation

##### A. Introduction

Krambule contends that the district court violated her constitutional rights by allowing her to plead guilty and be sentenced in a *pro se* capacity without first obtaining a valid waiver of her right to counsel. (See generally Appellant's brief.) However, this Court lacks jurisdiction to consider the merits of this issue because Krambule's notice of appeal was timely only from the district court's order revoking Krambule's withheld judgment. Therefore, this appeal must be dismissed.

##### B. Standard Of Review

"A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal." State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

##### C. This Court Lacks Jurisdiction To Review The Issues Raised On Appeal

An appeal from the district court "may be made only by physically filing a notice of appeal ... within 42 days" of an appealable order. I.A.R. 14(a). A timely

filed notice of appeal is a prerequisite to appellate jurisdiction. I.A.R. 21; State v. Payan, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996); State v. Fuller, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983). The failure to file a notice of appeal within the time limits prescribed by the appellate rules requires “automatic dismissal” of the appeal. I.A.R. 21; see also State v. Tucker, 103 Idaho 885, 888, 655 P.2d 92, 95 (1982).

Where a notice of appeal is timely only from an order revoking probation, the issues on appeal are confined to that order. State v. Dryden, 105 Idaho 848, 852, 673 P.2d 809, 813 (Ct. App. 1983); see also State v. Russell, 122 Idaho 488, 489 n.1, 835 P.2d 1299, 1300 n.1 (1992) (no appellate jurisdiction to consider original final judgment of conviction where appeal was only timely to challenge probation revocation); State v. Jensen, 138 Idaho 941, 943-944, 71 P.3d 1088, 1090-1091 (Ct. App. 2003) (no appellate jurisdiction to consider defendant’s claim of double jeopardy where defendant’s notice of appeal was only timely as to the order revoking his probation); Tucker, 103 Idaho at 888, 655 P.2d at 95 (no appellate jurisdiction to entertain the question of whether the district court could lawfully enhance defendant’s sentence where the notice of appeal was filed after the order revoking probation was entered and more than one year from the date of the original sentence).

In this case, Krambule entered her *pro se* guilty plea on January 22, 2015. (R., pp.143-146.) The district court entered its order withholding judgment that same date. (Id.) While an order withholding judgment is appealable as a matter of right, I.A.R. 11(C)(2), Krambule did not file a notice of appeal within 42 days of

the entry of that order. More than a year later, on August 1, 2016, the district court entered its order revoking Krambule's withheld judgment after Krambule violated her probation. (R., pp.190-194.) On August 10, 2016, Krambule filed a notice of appeal timely from the order revoking withheld judgment, commencing this appellate proceeding. (R., pp.196-199.) This Court therefore has appellate jurisdiction only over challenges to that order. While Krambule attempts to frame her primary issue on appeal as a challenge to the order revoking her withheld judgment, she alleges only a constitutional violation with respect to her January 2015 guilty plea. (Appellant's brief, pp.9-13.) Because this Court does not have appellate jurisdiction to consider challenges to Krambule's withheld judgment, this appeal must be dismissed.

Krambule cites various cases which, she asserts, support her proposition that this Court may entertain the merits of the issues she raises on appeal. (Id.) However, none of the cases cited by Krambule concern the issue of appellate jurisdiction.

In State v. Farfan-Galvan, 161 Idaho 610, 389 P.3d 155 (2016), and Burgett v. Texas, 389 U.S. 109 (1967), defendant-appellants raised *collateral* challenges to judgments of convictions which had become final, after those prior convictions were utilized by the state to enhance the punishment for a new criminal charge, or to enhance the new charge's severity. In neither case did the defendant-appellant attempt to *directly* challenge a conviction after the judgment had become final and after the appellate court had lost jurisdiction to entertain such challenges. Meyers v. Hansen, 148 Idaho 283, 221 P.3d 81 (2007), and

other cases recognizing that “void judgments can be attacked at any time,” do not stand for the separate proposition that an individual may challenge an allegedly “void” order in *any court*, regardless of whether the court has jurisdiction to entertain the issue. Instead, an individual aggrieved by a judgment that she asserts is “void” may raise that challenge at any time during a proceeding in which the district court actually has jurisdiction over such a challenge. Finally, State v. Perry, 150 Idaho 209, 219-227, 245 P.3d 961, 971-979 (2010), State v. Jackson, 140 Idaho 636, 639-641, 97 P.3d 1025, 1028-1030 (Ct. App. 2004), and State v. Hunnel, 125 Idaho 623, 625-626, 873 P.2d 877, 879-880 (1994), hold that certain alleged fundamental errors may be raised for the first time on appeal *in valid appellate challenges to judgments of conviction* — not, as Krambule appears to assert, that certain alleged fundamental errors can expand the jurisdiction of an appellate court even after the judgment has become final and the time for appeal has expired.

In summary, nothing in the cases cited by Krambule support her proposition that an Idaho appellate court re-gains jurisdiction to consider the merits of a direct challenge to a judgment (or withheld judgment) which has become final, even after the district court enters an order revoking probation or, as in this case, enters an order revoking a withheld judgment. In other words, a defendant does not gain a new opportunity to raise challenges to her judgment of conviction or withheld judgment simply by violating her probation.

This Court lacks appellate jurisdiction to address the merits of Krambule’s claims raised on appeal. This appeal must be dismissed.

II.

If This Court Reaches The Merits Of Her Claims, Krambule Has Failed To Show That The District Court Violated Her Constitutional Rights By Permitting Her To Enter A Pro Se Guilty Plea

A. Introduction

In the event that this Court reaches the merits of Krambule's contention that her withheld judgment is void because she pled guilty without validly waiving her right to counsel (See generally Appellant's brief), Krambule has still failed to show she is entitled to relief. A review of the totality of the circumstances in this case reveals that Krambule knowingly and voluntarily waived her right to counsel and therefore has failed to demonstrate fundamental error.

B. Standard Of Review

When reviewing a lower court's determination regarding the waiver of a constitutional right, the appellate court accepts the trial court's findings of fact if supported by substantial evidence; however, the appellate court freely reviews the court's application of constitutional requirements to the facts as found. State v. Hoffman, 116 Idaho 689, 691, 778 P.2d 811, 813 (Ct. App. 1989). The appellate court examines the "totality of the circumstances in determining the validity of a defendant's waiver of counsel." State v. Anderson, 144 Idaho 743, 746, 170 P.3d 886, 889 (2007).

The appellate courts of this state will only review unpreserved assertions of error under the fundamental error doctrine. Perry, 150 Idaho at 226, 245 P.3d at 978.

C. Krambule Validly Waived Her Right To Counsel

Because Krambule failed to challenge her guilty plea below, she must demonstrate fundamental error on appeal, even assuming that this Court has jurisdiction to entertain this issue. Perry, 150 Idaho at 226, 245 P.3d at 978. To do so, Krambule must demonstrate: (1) a constitutional violation; (2) that the violation is clear and obvious without the need for additional information not contained in the appellate record; and (3) that prejudice resulted. Id. Krambule cannot make such a showing.

A criminal defendant has a constitutional right of self-representation which derives from the Sixth Amendment. Faretta v. California, 422 U.S. 806, 818 (1975). To validly waive the right to counsel the defendant must make a knowing, voluntary and intelligent waiver. State v. Dalrymple, 144 Idaho 628, 633-634, 167 P.3d 765, 770-771 (2007) (citing State v. Lovelace, 140 Idaho 53, 64, 90 P.3d 278, 289 (2003)). The State bears the burden to prove that the defendant voluntarily waived his Sixth Amendment rights. Id.

While some jurisdictions have held that a specific warning from the trial court concerning the dangers of self-representation is a prerequisite for a constitutionally valid waiver of the right to counsel, others have held that Faretta requires only that the defendants be aware of the disadvantages of proceeding *pro se*, and that such awareness sometimes can be discerned even in the absence of admonitions from the court. See Jackson, 140 Idaho at 639-640, 97 P.3d at 1028-1029 (summarizing relevant cases). The United States Supreme Court has held that less rigorous warnings regarding self-representation are

required before trial than at trial, “because, at that stage, ‘the full dangers and disadvantages of self-representation...are less substantial and more obvious to an accused than they are at trial.’” Iowa v. Tovar, 541 U.S. 77, 90 (2004) (quoting Patterson v. Illinois, 487 U.S. 285, 289 (1988)).

When determining whether a waiver of the right to counsel was valid, Idaho courts examine the totality of the circumstances. Anderson, 144 Idaho at 746, 170 P.3d at 889; see also Lovelace, 140 Idaho at 64, 90 P.3d at 289; State v. King, 131 Idaho 374, 376, 957 P.2d 352, 354 (Ct. App. 1998). An Idaho appellate court’s determination of whether a waiver was valid is not limited to a review of the hearing at which the waiver was made: “[t]he particular moment of the waiver is not the only consideration; rather, the record as a whole is considered.” Anderson, 144 Idaho at 746-747, 170 P.3d at 889-890; see also Dalrymple, 144 Idaho at 634, 167 P.3d at 771 (“While contemporaneous *Faretta* warnings are perhaps the most prudent means to ensure the defendant’s grasp of the disadvantages of self-representation, we look to the record as a whole to determine if [appellant] knowingly, intelligently, and voluntarily waived his constitutional right.” (citation omitted)).

The state submits that in the unique circumstances of this case, Krambule validly waived her right to counsel prior to entering a *pro se* guilty plea despite the absence of specific Faretta warnings or a thorough plea colloquy accompanying her second guilty plea. In the course of the underlying criminal proceeding, Krambule was represented by both appointed and retained counsel. While represented by appointed counsel, Krambule entered a guilty plea and was



informed of her relevant rights. (R., pp.83-91.) Krambule later withdrew that plea and retained private counsel. (R., pp.96-99, 101-102.)

At the subsequent hearing on retained counsel's motion to withdraw, Krambule told the court that she was not requesting that new counsel be appointed, and that she supported her retained counsel's motion to withdraw. (Aug., Ex. B, 7:02 – 9:38.) Retained counsel, who was still representing Krambule at that point in the hearing, consulted with Krambule and informed the court that Krambule was "intending on discussing things with [the prosecutor] on a plea agreement." (Aug., Ex. B, 10:06 – 11:59.) Krambule's retained counsel explained that whether Krambule sought alternative private legal counsel would depend on whether such an agreement could be reached. (Id.) After granting counsel's motion to withdraw, the court informed Krambule that she was "free," and that "if [she] would like to today," she could "talk to [the prosecutor]." (Aug., Ex. B, 17:02 – 17:41.) Krambule did so, an agreement was reached, and the guilty plea was entered. (R., pp.143-146; Aug., Ex. C, 0:25 – 3:32.)

The district court did not violate Krambule's constitutional rights by permitting her to enter a *pro se* guilty plea in these circumstances. The court was very familiar with Krambule, having presided over her previous change of plea and sentencing hearing, and at least nine other hearings at which Krambule appeared. (R., pp.2-9.) Further, it was only after consulting with privately retained counsel that Krambule elected to talk to the prosecutor in a *pro se* capacity and enter into a plea agreement. This plea agreement was substantially similar to the agreement Krambule previously entered into while represented by

appointed counsel. It is clear from the record that Krambule knew of her right to appointed counsel, and her right to procure private counsel, and that she knowingly chose to forgo both prior to entering her guilty plea.

Krambule knowingly and intelligently waived her right to counsel prior to pleading guilty. She has therefore failed to demonstrate that the district court committed fundamental error.

#### CONCLUSION

The state respectfully requests this Court to dismiss Krambule's appeal or, alternatively, affirm the judgment of conviction and the district court's order revoking Krambule's withheld judgment.

DATED this 7th day of July, 2017.

/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of July, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ANDREA W. REYNOLDS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

MWO/dd