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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45271
)	
v.)	ADA COUNTY NO. CR01-17-2856
)	
ROBERT RAY FERGUSON,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE MELISSA MOODY
District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	2
ARGUMENT	3
When Mr. Ferguson Admitted To His Prior Felony Convictions, The District Court Committed Fundamental Error By Failing To Inquire Into His Understanding Of The Consequences Of A Persistent Violator Sentencing Enhancement Before Accepting The Admissions	3
A. Introduction	3
B. The District Court’s Failure To Inquire Into Mr. Ferguson’s Understanding Of The Consequences Before Accepting His Admissions Violated His Unwaived Constitutional Right To Due Process	3
C. The Error Plainly Exists.....	4
D. The Error Was Not Harmless.....	5
CONCLUSION.....	7
CERTIFICATE OF MAILING	8

TABLE OF AUTHORITIES

Cases

State v. Carrasco, 117 Idaho 295 (1990)4

State v. Cheatham, 139 Idaho 413 (Ct. App. 2003).....3, 5, 7

State v. Colyer, 98 Idaho 32 (1976)3

State v. Hochrein, 154 Idaho 993 (Ct. App. 2013)5

State v. Perry, 150 Idaho 209 (2010)3, 4, 5, 6

State v. Vasquez, No. 45346, 2018 WL 1788478 (Idaho Apr. 16, 2018).....6, 7

United States v. Olano, 507 U.S. 725 (1993)5

STATEMENT OF THE CASE

Nature of the Case

On appeal, Robert Ray Ferguson asserts the district court committed fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting his admissions to two prior felony convictions.

In its Respondent's Brief, the State argues Mr. Ferguson's claim of fundamental error is disproved by the record, because the record showed he knew the sentencing consequences of his admissions. (*See* Resp. Br., pp.3-6.)

This Reply Brief is necessary to address the State's unavailing arguments.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Ferguson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

When Mr. Ferguson admitted to his prior felony convictions, did the district court commit fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions?

ARGUMENT

When Mr. Ferguson Admitted To His Prior Felony Convictions, The District Court Committed Fundamental Error By Failing To Inquire Into His Understanding Of The Consequences Of A Persistent Violator Sentencing Enhancement Before Accepting The Admissions

A. Introduction

Mr. Ferguson asserts that when he admitted to his prior felony convictions, the district court committed fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions. The district court's failure to inquire violated Mr. Ferguson's unwaived constitutional right to due process. *See State v. Cheatham*, 139 Idaho 413 (Ct. App. 2003). This error plainly exists, and was not harmless. *See State v. Perry*, 150 Idaho 209, 228 (2010).

B. The District Court's Failure To Inquire Into Mr. Ferguson's Understanding Of The Consequences Before Accepting His Admissions Violated His Unwaived Constitutional Right To Due Process

Mr. Ferguson asserts that the district court's failure to inquire into his understanding of the consequences before accepting his admissions violated his unwaived constitutional right to due process. *See Cheatham*, 139 Idaho at 418.

The State argues that the record shows that Mr. Ferguson "understood the potential consequences, as those had been explained to him less than two weeks previously when he was arraigned on the enhancement." (Resp. Br., p.4.) The State's suggestion that this Court should consider the entire record (*see* Resp. Br., p.5), is well-taken. *See State v. Colyer*, 98 Idaho 32, 34 (1976) ("It is clear that the voluntariness of a guilty plea can be determined by considering all of the relevant surrounding circumstances contained in the record.").

However, a review of the relevant surrounding circumstances from the entire record indicates Mr. Ferguson did not understand the potential consequences at the time he made the admissions. Mr. Ferguson was emotional following the jury verdict, as the district court recognized when, after the admissions, it told him, “I don’t mean to torture you with all of this. . . . I know it has been an emotional verdict for you.” (*See Tr.*, p.336, Ls.20-25.) Further, the district court did not inform Mr. Ferguson that, by making the admissions, he would be waiving his right not to testify. (*See generally Tr.*, p.332, L.20 – p.336, L.25.) Even at the pretrial conference some two weeks before the trial, the district court did not discuss Mr. Ferguson’s right not to testify with respect to the sentencing enhancement. (*See generally Tr.*, p.23, L.15 – p.25, L.24.)

Thus, although the district court had mentioned the potential consequences at the pretrial conference (*see Tr.*, p.24, L.22 – p.25, L.8), the combination of the district court’s failure to inquire and the other relevant surrounding circumstances here indicate Mr. Ferguson did not understand the potential consequences at the time of the admissions.¹

C. The Error Plainly Exists

Mr. Ferguson asserts the district court’s error in failing to inquire plainly exists, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision. *See Perry*, 150 Idaho at 228.

¹ Mr. Ferguson does not assert that, as a matter of law, a district court must always repeat its explanation of the potential consequences of a sentencing enhancement when a defendant admits to the factual basis for the enhancement, where the district court previously informed the defendant of the potential consequences. *See State v. Carrasco*, 117 Idaho 295, 300-01 (1990).

The State argues, “[t]he record is certainly not *clear* that the lack of an objection was not tactical, either because counsel knew [Mr.] Ferguson understood the consequences of the admissions . . . because a jury finding was nearly assured based on the evidence, or because the defense wished to see how the sentencing proceeded.” (Resp. Br., pp.5-6.) However, the inquiry for the second prong of *Perry* “is whether ‘the error is clear under current law.’” *State v. Hochrein*, 154 Idaho 993, 998 (Ct. App. 2013) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). “[T]he second element of the *Perry* test for fundamental error, requiring that the error plainly exist, necessitates a showing by the appellant that existing authorities have unequivocally resolved the issue in the appellant’s favor.” *Id.*

Regarding this case, *Cheatham* has unequivocally resolved the issue of what due process a defendant is entitled to when waiving a jury trial on a persistent violator sentencing enhancement, in Mr. Ferguson’s favor. *See Cheatham*, 139 Idaho at 418. Thus, in light of *Cheatham*, any belief by trial counsel that a jury finding would be assured, or desire by trial counsel to see how the sentencing would proceed, would not have obviated Mr. Ferguson’s constitutional right to due process here. Additionally, considering the admissions exposed Mr. Ferguson to a potential life sentence, the record does not indicate counsel made a tactical decision to have the district court fail to inquire. The district court’s error in failing to inquire plainly exists. *See Hochrein*, 154 Idaho at 998.

D. The Error Was Not Harmless

Mr. Ferguson asserts the district court’s error in failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions was not harmless. *See Perry*, 150 Idaho at 228.

The State argues, “[b]ecause it is the finding of being a persistent violator that [Mr. Ferguson] claims violated his due process rights, the only way the trial would have come out differently but for the error is if he was found not to be a persistent violator.” (Resp. Br., p.6.)

However, the requirements of the third prong of *Perry* are not so limited. *See State v. Vasquez*, No. 45346, 2018 WL 1788478, at *5 (Idaho Apr. 16, 2018) (indicating a defendant could have argued that an invalid waiver of a her right to a jury trial affected the outcome of the trial proceedings by asserting “that had the district court asked her personally whether she was waiving her jury trial right, she would have said no *or* that if she had gone through a jury trial she would have been acquitted” (emphasis added)).² In this case, Mr. Ferguson’s assertion that he would not have been exposed to a life sentence without the persistent violator sentencing enhancement is sufficient to meet the third prong of *Perry*. The district court’s error in failing to inquire into Mr. Ferguson’s understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions was not harmless. *See Perry*, 150 Idaho at 228.

In sum, the district court’s failure to inquire violated Mr. Ferguson’s unwaived constitutional right to due process. This error plainly exists, and was not harmless. Thus, despite the State’s arguments, Mr. Ferguson has shown the district court committed fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting his admissions. *See Perry*, 150 Idaho at 228.

² In *Vasquez*, the Idaho Supreme Court held the trial court’s failure to obtain the defendant’s personal waiver of her right to trial by jury clearly violated her constitutional right to trial by jury, a constitutionally invalid waiver of the right to jury trial is a structural defect, and structural defects automatically satisfy the third prong of *Perry*. *See Vasquez*, 2018 WL 1788478, at *5-6.

Mr. Ferguson's sentence should be vacated, and the matter should be remanded to the district court to readdress the persistent violator allegations, including conducting a trial on those allegations if necessary, and for subsequent resentencing. *See Cheatham*, 139 Idaho at 418-19.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Ferguson respectfully requests that this Court vacate his sentence and remand the matter to the district court for resentencing, following a trial or other proper disposition of the persistent violator allegations.

DATED this 18th day of April, 2018.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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E-MAILED BRIEF

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_____/s/_____
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