

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0137

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID WARREN LAMBERT,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Ninth Judicial District Court of Pondera County,
the Honorable Greg Bonilla, Presiding

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STATEMENT OF THE ISSUE

Criminal defendants have the constitutional right to counsel in resentencing hearings after revocation of a suspended sentence. Before resentencing, Lambert sought—but had not yet been provided—reappointment of a public defender after his attempts to hire private counsel were unsuccessful. The court forced Lambert to proceed pro se, providing no legal analysis or factual support for its tacit ruling that Lambert waived his right to counsel. Did the court commit structural error when it resentenced Lambert without representation by counsel?

STATEMENT OF THE CASE AND FACTS

On November 5, 2007, Defendant David Warren Lambert was sentenced in the Montana Ninth Judicial District Court of Pondera County (“District Court”) to twenty years in the Montana State Prison with five years suspended and credit for seven days’ time served. (D.C. Doc. 38 at 2.) The suspended portion of the sentence was subject to numerous conditions. (D.C. Doc. 38 at 2–4.)

On October 25, 2022, Lambert began the suspended portion of his sentence. (D.C. Doc. 44, Rep. of Violation at 1.) On January 13, 2023, the State filed a Petition to Revoke Suspended Sentence (“Petition to Revoke”) alleging six separate counts of violations. (D.C. Doc. 44.) Count III alleged Lambert violated “Probation Condition #6: Laws and Conduct” for failure to register as a sex offender as ordered to in a separate case. (D.C. Doc. 44 at 2.) Specifically, “The Defendant was ordered to register as a Sexual Offender in DC-05-0908 for the crime of Incest, a felony. The Defendant has not registered as required and has been charged with Failure to Register as a Sexual Offender, a felony.” (D.C. Doc. 44, Rep. of Violation at 2.) The record is unclear as to specifically how Lambert failed to register “as required”, but the record is clear that it was not a complete lack of registration. (D.C. Doc. 44, Rep. of Violation at 4 (stating “The Defendant is a registered Sexual Offender who has failed to change his address.”).)

Lambert was appointed Fernando Terrones from the Office of the State Public Defender (“OPD”), who appeared with Lambert at the initial appearance for the Petition to Revoke on February 21, 2023. (D.C. Doc. .01; D.C. Doc. 48.) Lambert denied all six counts. (D.C. Doc. .01.) On March 20, 2023, the District Court held an evidentiary hearing in which Lambert, still represented by Mr. Torrones, admitted to Count III. (D.C. Doc. .02.) The State did not seek to prove the Petition to Revoke’s remaining counts. (*See generally* Mar. 20, 2023 Evid. Hr.’g. Tr.) The District Court accordingly revoked Lambert’s suspended sentence and set a disposition hearing for April 3, 2023. (D.C. Doc. 53.)

On April 3, Lambert informed the District Court he wanted a continuance so he could hire private counsel: “Aarab Law Firm here in Great Falls[.]” (Apr. 3, 2023 Disp. Hr’g Tr. at 4:5.) The District Court stated “He’s incarcerated, so I’d be inclined to grant his request, let him have his private attorney.” and continued the hearing to May 1, 2023. (Apr. 3, 2023 Disp. Hr’g Tr. at 4:24–5:1, 5:16–23.)

On May 1, the following exchange occurred amongst Lambert, Mr. Torrones, and the District Court:

MR. DAVID LAMBERT: I did, Your Honor. I, I moved for a continuance trying to get another attorney, and I did not — I wasn’t able to obtain one. I called before my last hearing to Aarab Boland Law Firm. They said they’d represent me.

The week after my hearing last month, I fell off the bunk here at the jail. I injured my face,

and I was not able to get back to them. Um, then I tried to hire a new guy, and he couldn't do it. I didn't find out until Friday. Is there any way you can request another continuance?

THE COURT: Well, Mr. Terrones, you are here on Mr. Lambert's behalf, correct?

MR. FERNANDO TERRONES: Uh, yes, Your Honor, and this is an interesting situation because he doesn't want my representation and has been actively seeking private counsel.

So, um, I'm not sure if you're comfortable with him proceeding today, but if you are, Your Honor, I'm ready to proceed; and if not, then I'll talk to Matt McKittrick, down in Great Falls, and file a motion to withdraw and he'll be on his own. So, I can go either way, Your Honor.

THE COURT: Well, let me tell you something, Mr. Lambert. You have an attorney here today, um, willing to represent you. You may or may not be successful in retaining a private attorney. Um, and if you're not, you're going to be pro se, um, which means you won't have an attorney, um, because this — we're not going to continue this forever. We're not going to keep doing that. Do you understand that?

MR. DAVID LAMBERT: Yes, I do, Your Honor. And I—

THE COURT: —Well—

MR. DAVID LAMBERT: —probably will have an attorney this week.

THE COURT: Say that again, please.

MR. DAVID LAMBERT: I promise you, I will

have private counsel this week. I've got a friend helping me out (indistinguishable) and I will have an attorney this week.

THE COURT: Ms. Lennon, how many times has this been continued? Just the once?

MS. SHARI LENNON: Just the once.

MR. DAVID LAMBERT: Just the one time, Your Honor.

THE COURT: So, what you're telling me is you don't want Mr. Terrones to represent you?

MR. DAVID LAMBERT: I do not.

THE COURT: Well, I guess what we're going to do then, um, we'll continue this. I will — I will grant the continuance to the next Law and Motion Day, which is 2 weeks from today, Whitney?

JUDGE'S LAW CLERK: Yes. The 15th.

THE COURT: The, the — that'll be the 15th of May, and we're going to proceed no matter what at that particular point in time, Mr. Lambert. Do you understand me?

MR. DAVID LAMBERT: I do, indeed, sir.

(May 1, 2023 Disp. Hr'g Tr. at 5:13–7:23.) Mr. Terrones moved to withdraw on May 1, and the District Court granted the withdrawal on May 15. (D.C. Doc. 56; D.C. Doc. 57.)

At the May 15 disposition hearing, the District Court asked if Lambert had retained counsel; Lambert responded: "I tried, but the lawyer didn't return my

calls. So, I called the Office of Public Defender and (indistinguishable) they had somebody, hopefully, lined up, but I have not heard from them yet.” (May 15, 2023 Disp. Hr’g Tr. at 4:9–15.) The District Court then unilaterally decided to hold the hearing without stating any legal basis for the decision or conducting any factual analysis of whether Lambert had “knowingly, intelligently, voluntarily, and unequivocally” waived his right to counsel. (May 15, 2023 Disp. Hr’g Tr. at 4:16–21.)

The State and Lambert’s probation office recommended that the entire five-year suspended portion of Lambert’s sentence be revoked. (May 15, 2023 Disp. Hr’g Tr. at 5:16–8:14.) The District Court asked if Lambert had anything to say, and Lambert responded:

MR. DAVID LAMBERT: Um, just that I’m very sorry for — I didn’t tell you I was changing my address. Um, I would like to get some treatment. I do still have roommates and a business out there. I could go back to work, um, and I apologize to the Court for dragging this out. I certainly didn’t mean to.

The charge I had for accidentally calling my ex-wife was brought in April because it was a total accident. The, uh — and the other stuff is still pending. So, I just ask for the mercy of the Court.

That time — years at MSP, I did 6 years on the street. I did open my own small business, which I can still use my friend’s shop that I ran that out of, and I can pick things back up and

get back going again, if I was given the opportunity. If not, I certainly understand.

(May 15, 2023 Disp. Hr’g Tr. at 8:24–8:16.) The District Court ruled that the remaining five years of Lambert’s sentence be served at the Montana State Prison (with credit for time served), “The reason being that we have an **admission** of the violation of **several conditions[.]**” (May 15, 2023 Disp. Hr’g Tr. at 9:23–24 (emphasis added)). Indeed, Lambert—forced to represent himself pro se without having waived the right to counsel—unwittingly admitted to: Count IV of the Petition to Revoke, failure to report his address to his probation officer, and Count I of the Addendum to the Report of Violation, violating a protection order for calling his ex-wife from jail. (D.C. Doc. 44 at 2; D.C. Doc. 50.) The District Court issued its Order Revoking Suspended Sentence and Imposing New Sentence on May 22, 2023. (D.C. Doc. 59.) This appeal followed.

STANDARD OF REVIEW

“‘Structural error’ is that type of error that ‘affects the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 331 (1991)). “Structural error is automatically reversible and requires no additional analysis or review. Examples of structural error include . . . total deprivation of the right to counsel[.]” *Id.* at ¶ 39 (citing *Gideon v. Wainwright*, 372

U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)). This Court “will not presume that a defendant has waived his right to counsel.” *State v. Winzenburg*, 2022 MT 242, ¶ 16, 411 Mont. 65, 521 P.3d 752 (citing *State v. Swan*, 2000 MT 246, ¶ 17, 301 Mont. 439, 10 P.3d. 102).

SUMMARY OF THE ARGUMENT

While trial courts clearly have an interest in the efficient administration of justice, it cannot come at the expense of a legally unreasoned, factually unsupported deprivation of a right so fundamental as the right to counsel. Lambert unquestionably had the right to counsel at the disposition hearing where he was resentenced to five years in the Montana State Prison. Yet, the District Court forced Lambert to proceed pro se even after Lambert stated OPD counsel was requested prior to the hearing. The District Court did nothing to establish a record that Lambert was knowingly, voluntarily, intelligently, and unequivocally waiving his right to counsel; nor could a record have been established because Lambert was not waiving his right to counsel. Rather, the District Court—without conducting any kind of legal or factual analysis—erroneously forced Lambert to proceed pro se. Such total deprivation of Lambert’s right to counsel constitutes structural error and demands reversal.

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ARGUMENT

“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 2044 (1984) (citing Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)).

I. The District Court forcing Lambert to be resentenced without representation by counsel—and without Lambert waiving his right to counsel—constitutes structural error that demands reversal.

“Pursuant to the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution, a criminal defendant in Montana has the right to the assistance of counsel.” *State v. Woods*, 283 Mont. 359, 372, 942 P.2d 88, 97 (1997). “Due process protections for a revocation hearing are codified in § 46-18-203, MCA, which provides, in pertinent part: . . . the right to be represented by counsel at the revocation hearing[.]” *State v. Triplett*, 2008 MT 360, ¶ 17, 346 Mont. 383, 195 P.3d 819. “A defendant is entitled to assistance of counsel, either retained or appointed, at a hearing on revocation of probation and resentencing. Unless the record reflects a valid waiver of the right to counsel, a lawyer must be afforded at a sentencing hearing regardless of whether the hearing is labeled a revocation of probation or a deferred sentencing” *State v. Fry*, 197 Mont. 354, 357, 642 P.2d 1053, 1054 (1982).

a. Lambert was not represented by counsel at the disposition hearing.

Lambert was not represented by counsel when he was resentenced to five years of incarceration at the Montana State Prison. The record leaves no room for argument or doubt as to this fact. As such, the deprivation of his right to counsel constitutes structural error unless he knowingly, voluntarily, intelligently, and unequivocally waived his right to counsel.

b. Lambert did not knowingly, voluntarily, intelligently, and unequivocally waive his right to counsel.

“A defendant may waive his right to counsel only if a district court finds that the waiver is made knowingly, intelligently, voluntarily, and unequivocally.” *Winzenburg*, ¶ 20 (citing *State v. Marquart*, 2020 MT 1, ¶ 28, 398 Mont. 233, 455 P.3d 460). “[T]rial courts must meaningfully engage with defendants to ensure they understand the risks associated with waiving counsel.” *Id.* at ¶ 22 (citing *State v. Colt*, 255 Mont. 399, 407, 843 P.2d 747, 752 (1992)).

The District Court did not “meaningfully engage” with Lambert when it forced him to proceed pro se; nor did it make findings of fact or conduct any legal analysis that Lambert had knowingly, voluntarily, intelligently, and unequivocally waived his right to counsel. Rather, the District Court, upon learning Lambert’s first and second attempts to retain private counsel were unsuccessful at the May 1 hearing, threatened Lambert to either successfully retain private counsel or proceed pro se. Then, upon learning Lambert’s third attempt to retain private counsel was

unsuccessful and Lambert was arranging for reappointment of OPD counsel at the May 15 hearing, carried through with its threat to force Lambert to proceed pro se. Nothing about this exchange demonstrates Lambert knowingly, voluntarily, intelligently, and unequivocally waived his right to counsel.

The only reason that can be gleaned from the record for the District Court's decision is its statement that "we're not going to continue this forever." (May 1, 2023 Disp. Hr'g Tr. at 6:18–19.) At the risk of sounding overly pedantic: Lambert was not seeking to continue the disposition hearing forever. The first continuance, which was twenty-eight days, was so Lambert could seek representation from the Aarab Boland firm in Great Falls. (Apr. 3, 2023 Disp. Hr'g Tr. at 4:5.) The second continuance, which was fourteen days, was because Lambert: (1) was not able to hire the Aarab Boland firm; (2) was injured in the jail; (3) attempted to hire a second attorney but was not successful; and (4) was speaking with a friend to arrange representation by a third attorney. (May 1, 2023 Disp. Hr'g Tr. at 5:13–24, 6:24–7:5.) At the May 15 disposition hearing, Lambert stated, in effect, he had given up trying to find private counsel and asked OPD to reappoint him an attorney. (May 15, 2023 Disp. Hr'g Tr. at 4:9–15.) Lambert also stated "I apologize to the Court for dragging this out. I certainly didn't mean to." (May 15, 2023 Disp. Hr'g Tr. at 9:3–5.)

There is no evidence, argument from the State before the District Court, or support in the record to find Lambert was being anything but truthful about his struggles to hire private counsel and his desire to be represented by counsel at the disposition hearing. The District Court certainly made no findings that it did not believe Lambert or otherwise find him uncredible. Moreover, during the mere forty-two-day delay caused by Lambert's unsuccessful attempts to find private counsel, he was incarcerated. It is not as if he was walking free and attempting to delay a potential reincarceration as long as possible. There was no reasonable justification in the record to not continue the disposition hearing one last time so that OPD could be reappointed and Lambert's constitutional right to counsel be honored.

Fry is a case directly on point in which the defendant was facing revocation of a ten-year suspended sentence. 197 Mont. at 355, 642 P.2d at 1053. In the weeks preceding the hearing, Fry attempted to obtain the assistance of a public defender but was unsuccessful because that public defender determined defendant made too much money. *Id.* at 356, 642 P.2d at 1054. Upon learning this—and without conducting any factual finding or legal analysis—the district court decided to hold the hearing and resented Fry without representation by counsel. *Id.* This Court found the “record provides no basis for concluding that the defendant waived his

right to counsel” and appropriately vacated the judgment and dismissed the case. *Id.* at 359, 642 P.2d at 1056.

Like *Fry*, where the defendant was forced to proceed pro se at a petition to revoke resentencing without waiving his right to counsel, here, Lambert was forced to proceed pro se without waiving his right to counsel. Just like *Fry*, where the Court vacated the judgment and the case dismissed because the record provided no basis to conclude the defendant waived his right to counsel, here too the record is devoid of support that Lambert waived his right to counsel, and the judgment should accordingly be vacated and the case dismissed.

In contrast to *Fry*, *Winzenburg* demonstrates the record a trial court must make for this Court to affirm a defendant’s waiver of their right to counsel. *See generally Winzenburg*. Wizenburg affirmatively sought on the record to waive his right to counsel and to represent himself at his criminal trial. *Id.* at ¶ 12. The trial court held a hearing on the issue, where it: (1) informed Wizenburg of the maximum punishments if he was convicted; (2) advised Wizenburg of the “numerous disadvantages” of proceeding pro se; (3) asked Wizenburg why he wanted to represent himself; (4) listened to Wizenburg’s reasons for the same, e.g. the public defender did not file a motion he wanted filed; and (5) made a finding on the record that Wizenburg “unequivocally, knowingly, intelligently, and voluntarily waived his right to counsel[.]” *Id.* at ¶¶ 12, 13. Nevertheless, on appeal

Wizenburg argued his waiver of right to counsel was invalid. *Id.* at ¶ 23. This Court disagreed, finding the waiver was made voluntarily, knowingly, intelligently, and unequivocally because Wizenburg “understood the risks associated with self-representation and the full range of potential penalties after the District Court's numerous advisements[.]” *Id.* at ¶ 26.

Unlike in *Wizenburg*, where the defendant wanted to proceed to pro se, here, Lambert did not want to proceed pro se. Unlike in *Wizenburg*, where the trial court “meaningfully engaged” with the defendant before finding he had voluntarily, knowingly, intelligently, and unequivocally waived his right to counsel, here, the District Court did not meaningfully engage with Lambert before forcing him to proceed pro se, nor did it make any finding that Lambert had waived his right to counsel. Rather, the District Court threatened Lambert to either hire private counsel by May 15 or proceed pro se and then carried through with its threat despite Lambert arranging for reappointment of OPD after not successfully hiring private counsel.

c. Lambert was prejudiced by not being represented by counsel.

While “Structural error is presumptively prejudicial and is not subject to harmless error review” it is worth noting that Lambert was demonstrably prejudiced by not having counsel. *Van Kirk*, ¶ 38 (quoting *State v. LaMere*, 2000 MT 45, ¶¶ 39–50, 298 Mont. 358, 2 P.3d 204). Lambert, when he was represented

by counsel, admitted to the only one of six counts in the Petition to Revoke: failing to register as a sex offender “as required” under a separate conviction. (D.C. Doc. .02; D.C. Doc. 44, Rep. of Violation at 2.) The State did not seek to prove the other counts. (*See generally* Mar. 20, 2023 Evid. Hr.’g. Tr.) At the May 15 disposition hearing, Lambert, forced to defend himself without the assistance of counsel, unwittingly admitted to two separate alleged violations: (1) failing to report his address to his probation officer; and (2) violation of a protection order. (May 15, 2023 Disp. Hr’g Tr. at 8:24–8:16.) The District Court based its resentencing on Lambert’s “**admission** of the violation of **several conditions[.]**” (May 15, 2023 Disp. Hr’g Tr. at 9:23–24 (emphasis added).)

Any attorney would have instructed Lambert to keep his statements to the District Court, if any, confined to the count he had already admitted to and the potential resentencing based thereon, and they would have prevented him from admitting to other counts not even in issue at the disposition hearing. As such, Lambert was presumptively prejudiced and (while not required to be shown) demonstrably prejudiced by the total deprivation of his right to counsel.

d. If the Court does not outright order dismissal of the Petition to Revoke like it did in *Fry*, it should permit Lambert to withdraw his admission due to a change in the law after resentencing.

The Court in *Fry* vacated the judgment and dismissed the case entirely. 197 Mont. at 359, 642 P.2d at 1056. If the Court is instead inclined to reverse and

remand, it should proactively permit Lambert to withdraw his admission of failing to register as a sex offender due to a material change in the law.

State v. Hinman was published on June 30, 2023, just forty-five days after Lambert was resentenced. 2023 MT 116, 412 Mont. 434, 530 P.3d 1271. The *Hinman* Court ruled the Montana's Sexual or Violent Offender Registration Act (“SVORA”) “since its amendments in 2007, and thereafter, effectively functions as additional punishment for crimes. . . . [that] can only constitutionally apply to convictions in a prospective manner.” *Id.* ¶ 25. Lambert’s requirement to register as a sex offender stems from a 2005 case. (D.C. Doc. 44, Rep. of Violation at 2.) The conduct at issue necessarily occurred before the 2007 SVORA amendments. *See State v. Leistiko*, 256 Mont. 32, 37, 844 P.2d 97, 100 (1992) (“A law is retrospective if it changes the legal consequences of actions committed before its effective date.”)

The record is clear that Lambert was registered as a sex offender. (D.C. Doc. 44, Rep. of Violation at 4.) However, it is not clear how he failed to register “as required” and whether that requirement was added in the 2007 SVORA amendments. (*See generally* D.C. Doc. 44; Mar. 20, 2023 Evid. Hr.’g. Tr.) If the requirement was added in the 2007 SVORA amendments, then Lambert accordingly did not make the admission knowingly, voluntarily, or intelligently and good cause exists to withdraw it. *See, e.g., State v. Jones*, 2008 MT 331, ¶ 17,

346 Mont. 173, 194 P.3d 86; *see also State v. Andrews*, 2010 MT 154, ¶ 13, 357 Mont. 52, 236 P.3d 574 (while ruling not every change in the law constitutes good cause, the Court left open the possibility that subsequent changes to the criminality of conduct could constitute good cause).

As of the filing of this brief, Lambert has already spent nearly two of the five years of his revoked sentence incarcerated and will likely spend near three years by the time this case is decided. Presently, the only basis for his current incarceration is the sentence imposed by the District Court in violation of his right to counsel. Lambert should not be forced to seek withdrawal of his admission below because if it gets denied and he is resentenced, given the year-long backlog of OPD appeals, he will likely spend the entire five-year suspended portion of his sentence incarcerated in violation of his constitutional rights. As such, the Court should respectfully vacate and dismiss the Petition to Revoke as it did in *Fry*; alternatively, and considering *Hinman* substantially changed SVORA's application after Lambert was already resentenced, the Court should reverse the revocation with instruction to permit Lambert to withdraw his admission to Count III of the Petition to Revoke.

CONCLUSION

While district courts clearly have an interest in the efficient administration of justice, it cannot come at the expense of a legally unreasoned, factually

unsupported deprivation of a right so fundamental as the right to counsel. Lambert was not represented by counsel when he was resentenced to five years of incarceration at the Montana State Prison, nor did he voluntarily, knowingly, intelligently, and unequivocally waive his right to counsel. This total deprivation of his right to counsel constitutes structural error that requires vacating his sentence and dismissing the Petition to Revoke.

Respectfully submitted this 24th of February, 2025.

MURNION LAW

By: /s/ James C. Murnion
JAMES C. MURNION

ATTORNEY FOR APPELLANT
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced, Times New Roman typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, if any, the caption page, and the signature blocks; and the word count calculated by Microsoft Word for Windows is 4,067, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James C. Murnion
JAMES C. MURNION

APPENDIX

Order Revoking Suspended Sentence and Imposing New Sentence.....App. A

Relevant pages of May 15, 2023 Disposition Hearing Transcript.....App. B

CERTIFICATE OF SERVICE

I, James Clarke Murnion, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-24-2025:

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