IN THE COURT OF APPEALS OF GEORGIA

APPEAL CASE NO. A19A0983

(Worth County Indictment No. 17-CR-0005)

THOMAS B. BRADSHAW

Appellant

VS.

THE STATE OF GEORGIA

Appellee

BRIEF OF APPELLANT

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December 21, 2018

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PART I

STATEMENT OF THE CASE

This is an appeal from a denial of a motion to withdraw guilty plea from the Superior Court of Worth County.

On January 9, 2017, THOMAS BRENT BRADSHAW, appellant herein, was indicted by the Worth County Grand Jury for the offenses of Aggravated Child Molestation (O.C.G.A. §16-6-4(c))[1] (Count I), Child Molestation (O.C.G.A. §16-6-4(a)) (Count II), and Possession of Drug Related Objects (O.C.G.A. §16-13-32.2) (Count III). The offenses contained in Counts I and II were alleged to have been committed "between the 1st day of May, 2016, and the 5th day of November, 2016" and named "N.W., a child under the age of 16 years" as the victim. The offense charged in Count III was alleged to have been committed "on or about the 5th day of November, 2016" and involved "a pipe, an object intended for the purpose of inhaling cocaine." (R-13 to 16). The names of four officers with the

[1] For the reader's convenience, when this document is viewed in PDF format on an internet capable machine text highlighted in **blue** indicates hyperlinks which when clicked on will take the reader to copies of the cited authorities maintained in databases freely available to the public via the open internet. The sites linked to in this brief are maintained by Cornell Law School's Legal Information Institute, Justia, Google Scholar and other entities. Those entities are solely responsible for the accuracy of these materials.

Worth County Sheriff's Office appeared at the very top of the State's witness list. (R-17).

Appellant was already in custody when he was indicted. On December 16, 2016, appellant had previously appeared before the Honorable Bill Reinhardt, Judge, Superior Courts, Tifton Judicial Circuit, for a bond hearing. (BH-1 to 53). At the conclusion of the hearing appellant was denied bond. (BH-52).

On October 19, 2017, appellant appeared before the Honorable Melanie B. Cross, Judge, Superior Courts, Tifton Judicial Circuit, for the purpose of placing on the record appellant's rejection of a plea offer by the State. (RPO-1 to 15). At that time his assigned public defender put on the record that the defendant was rejecting the State's offer of *20, serve 15* for Child Molestation and that the defendant had been advised that if he were convicted at trial he could receive life in prison as a recidivist. (RPO-1-2). Appellant told the court he was not ready for trial. Appellant asked again for a bond so that he might have an opportunity to hire "a better lawyer". He protested his innocence. (RPO-3 to 5). The prosecuting attorney informed the court that if appellant was convicted the court would have no choice but to impose life in prison without the possibility of parole. (RPO-7). The court had the following colloquy with appellant:

> THE COURT: If you go to trial, because you – a notice of recidivism has been sent to your attorney, if you are convicted, I have no discretion in the sentencing, okay?

> THE DEFENDANT: Yes, ma'am.
> THE COURT: It would be life without the possibility of parole. I just need to make sure you understand that because, come Monday morning, we're striking a jury on this case.
> THE DEFENDANT: Yes, ma'am. (RPO-7, 8).

Appellant continued to complain about the performance of his public defender, that she was not helping him and argued the plea offer from the state was disproportionate to what another inmate, similarly situated, had received (20 do 5). (RPO-8, 9, 10). This argument was summarily rejected by the court who sternly reminded appellant the trial would be next Monday if he did not take a plea today. (RPO-8, 9, 10). Appellant was given another opportunity to speak privately with his public defender. The hearing concluded with Mr. Bradshaw informing the court that he had finally rejected the State's offer and wanted a trial. (RPO-11).

No trial occurred the following Monday. Court was called off.

Three months later, on Monday, January 29th, 2018, the case came up again. At that time appellant and the same assistant public defender appeared and a jury was selected. Judge Reinhardt was presiding. A jury was selected but appellant changed his plea to guilty prior to the commencement of opening remarks which were scheduled for the next morning. The plea was entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) (Even where a defendant protests his

innocence a plea of guilty is valid if "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt" *Id*. at 38.)

After a false start where appellant couldn't get his lines right, Judge Reinhardt ultimately accepted the plea and set sentencing for a later date. (GP-1 to 21). In its colloquy with appellant the court summarized the plea as follows:

> THE COURT: Okay. And understanding that evidence, even without admitting guilt to that *aggravated child molestation charge*, I understand you believe it to be in your best interest to enter a plea of guilty pursuant to *Alford versus North Carolina*, which does not require any affirmative admission of guilt on that charge but that *you want to take the 25 years no parole on that charge*; is that correct?
> THE DEFENDANT: Yes, sir. (GP-12). (emphasis supplied)

On February 26, 2018, appellant appeared before Judge Reinhardt for sentencing. (SH-1 to 43).

At this hearing the State presented evidence in aggravation that appellant subsequent to the entry of the plea had attempted to smuggle contraband (cigarettes and drugs) into the jail. The State called Worth County Deputy Sheriff Wesley Chambliss who testified that an investigation had been conducted by the Sheriff's

department which included eavesdropping on and recording appellant's phone calls. (SH-3 to 8). During the State's cross-examination of appellant's daughter, DANIELLE BRADSHAW, it became apparent the state's attorney had actually listened to a recording of one of appellant's calls to which his daughter had been a party. (SH-17,18,19).

Although the State's attorney noted that under the plea bargain with appellant he was not being sentenced as a recidivist ("…although he's not being sentenced under 17-10-7, he does have three prior felony convictions"[2] (SH-36)), at the conclusion of this hearing Judge Reinhardt imposed a sentence of life in prison without the possibility of parole as to Count I. He gave appellant 5 years, probation, consecutive, as to Count II and 12 months, probation, concurrent, as to Count III. (SH-41; R-125),

On March 11th, 2018, appellant, through his trial counsel, filed a "Motion to Withdraw Guilty Plea". The motion alleged appellant's trial counsel was ineffective, the plea was not knowingly and voluntarily made, and was not supported by a factual basis. (R-123).

[2] That code section provides "any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served." O.C.G.A. §17-10-7(c).

On April 18, 2018, the motion to withdraw the guilty plea was heard by Judge Reinhardt. Appellant was now represented by substitute appointed counsel. (WD-1 to 101). Appellant testified and contended his public defender would not present evidence he wanted to present, that he was sick on the day the plea was taken and may not have understood everything said at the guilty plea hearing. (WD-15, 16, 17).

Appellant stated that based on what his lawyer told him he believed the *Alford* Plea he tendered was basically a bench trial and he did not understand he was pleading guilty. (WD-29, 30).

Appellant's trial attorney was called as a witness for the State at the hearing on the motion to withdraw guilty plea. She confirmed appellant was sick on the day the plea was taken but she did not believe he was "delirious" and she thought he understood the proceedings. (WD-81,82), She stated she had thoroughly explained the plea to him and that he understood.

Counsel said one bone of contention between appellant and herself was that appellant had wanted her to attack the Sheriff an action for which she apparently saw no justification. (WD-91, 92).

The attorney described in detail her frustration during numerous meetings with appellant at the jail where she was able to present him with few

recommendations other than to take whatever deal the State was willing to offer to avoid life without parole. (WD-36 to 85).

On June 18, 2018, Judge Reinhardt entered an order denying the motion to withdraw the guilty plea. However, he did modify the sentence to reduce the sentence on Count I to 25 years in prison followed by probation for life. (R-167).

A notice of appeal was filed on July 17, 2018. (R-1). The undersigned filed a Notice of Substitution of Counsel in the trial court on July 24, 2018. The appeal was docketed in this court on December 13, 2018.

Further facts will be developed as needed.

PART II

ENUMERATION OF ERRORS

1. Appellant's substitute attorney at the hearing on the motion to withdraw guilty plea counsel was ineffective because she failed to raise the issue of the misconduct of the Worth County Sheriff's Department in monitoring and recording confidential conversations between appellant and his trial attorney at the Worth County Jail.

2. The trial court erred when it denied appellant's motion to withdraw his guilty plea because the record does not affirmatively reflect the plea was knowingly, voluntarily and intelligently entered with a full understanding of his rights including the right to a trial by jury.

STATEMENT OF JURISDICTION

The Georgia Court of Appeals, rather than the Georgia Supreme Court, has jurisdiction of this case under Georgia Constitution Article VI, Section V, Paragraph III because it is not within the classes of cases jurisdiction of which is exclusively reserved to the Georgia Supreme Court under Georgia Constitution, Article VI, Section VI, Paragraph II or Paragraph III.

In Georgia, "[a] defendant has a right to appeal directly the denial of his timely motion to withdraw a guilty plea." (Citations, punctuation and emphasis omitted.) *Carter v. Johnson*, 278 Ga. 202, 205 (2004).

PART III

ARGUMENT AND CITATION OF AUTHORITIES

1. APPELLANT'S SUBSTITUTE COUNSEL AT THE MOTION TO WITHDRAW GUILTY PLEA HEARING WAS INEFFECTIVE BECAUSE SHE FAILED TO RAISE THE ISSUE OF THE MISCONDUCT OF THE WORTH COUNTY SHERIFF'S DEPARTMENT IN MONITORING AND RECORDING CONFIDENTIAL CONVERSATIONS BETWEEN APPELLANT AND HIS TRIAL ATTORNEY AT THE WORTH COUNTY JAIL.

Standard of Review. In reviewing this enumeration of error an appellate court should employ the "Plain Error" standard of review. Plain error is that which is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding. *Meeker v. State*, 282 Ga. App. 77, 637 S.E.2d 806 (2006). Moreover, because this error involves an issue affecting "fundamental fairness and unreliability" in the trial process it must be viewed as a "structural error". *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). A Structural error is one which is a "violation of a basic protection … without which a criminal trial cannot reliably serve its function." *Sullivan v. Lousiana*, 508 U.S. 275 (1999). As such, structural errors are not subject to a harmless error analysis. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007); *Hunt v. State*, 268 Ga. App. 568, 602 S.E.2d 312 (2004). See also *Tyner v. State*, 334 Ga. App. 890, 895, 780 S.E.2d 494 (2015)

(Denial of right to counsel is a structural error and, as such, the appellate court is "*precluded from engaging in a harmless-error analysis…*". emphasis supplied).

The standard for assessing whether counsel rendered constitutionally effective assistance is set out in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by the Georgia Supreme Court in *Smith v. Francis*, 253 Ga. 782, 325 S.E.2d 362 (1985). Under *Strickland*, a criminal defendant must show both that his counsel's performance was deficient, and but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. *Stanford v. Stewart*, 274 Ga. 468, 470, 554 S.E.2d 480 (2001). Thus, a defendant charging ineffective assistance of counsel does not need to show that the *ultimate* outcome would be different: that is, to overcome the *Jackson v. Virginia*, 443 U.S. 307 (1979), "any rational trier of fact" standard. Under the correct *Strickland* analysis, a defendant need only show that his trial counsel was deficient and that there is a reasonable probability that counsel's error prejudiced the defense. *Stanford* at 470.

While it is true counsel's performance is deemed not to be deficient when it falls within a wide range of reasonable professional conduct and counsel's decisions were made in the exercise of reasonable professional judgment, reasonable professional judgment requires proper investigation and researching the

law. The right to reasonably effective counsel is violated when the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). Even where counsel's decisions at trial were part of a deliberate trial strategy counsel's performance may nonetheless be deemed deficient where it is not shown the "strategy was reasonable under the circumstances or that the decision to pursue such a strategy was made in the exercise of reasonable professional judgment". *Ottley v. State*, 325 Ga. App. 15, 752 S.E.2d 92, 97 (2013).

Argument. As previously noted, at the hearing on the motion to withdraw guilty plea appellant's trial counsel testified Mr. Bradshaw wanted her to attack the Worth County Sheriff's Department. She explained,

> And then we got into an argument; and that's when he indicated that I was ineffective, that I was involved in *all the controversy going on with the sheriff, and that was -- just to be fair, that was prior to it coming out about the recordings*; and to be fair, Mr. Bradshaw had indicated a lot of concern between October of last year and January of this year about the sheriff's office being corrupt and about them trying to set him up. (WD-91, 92). (emphasis supplied).

What did counsel mean when she mentioned a "controversy going on with the sheriff" and the "recordings"? The record of this case does not tell us what she meant.

The record of this case may not reflect what counsel was referring to but the public record gives us a pretty good idea. At the time of appellant's arrest and throughout his prosecution in this case the Sheriff of Worth County, Georgia, was JEFF HOBBY. A simple search of his name turns up a good bit of information about Sheriff Hobby available on the internet.

The first thing one will find is that on April 14, 2017, Sheriff Hobby and dozens of officers descended on the Worth County High School. They put the school on a four hour lock-down and proceeded to conduct what were later described as "unreasonable, aggressive, and invasive" body searches of some 900 students at the school. They were looking for drugs. They found nothing. They had no warrant. The raid quickly garnered national attention and condemnation.[3]

In October of 2017 Sheriff Hobby and two of his deputies were indicted for sexual battery, false imprisonment and violation of oath of office arising out of the

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[3] Jacey Fortin, "How far can they go? Police search of hundreds of students stokes lawsuit and constitutional questions.", New York Times, June 13, 2017, at https://www.nytimes.com/2017/06/13/us/georgia-police-patdown-students.html (last visited 12/19/18 at 8:10 PM).

searches.[4] That same month the Georgia Bureau of Investigation (GBI) began an investigation of the Sheriff which eventually led to another indictment.[5]

In November of 2017 Georgia Governor Nathan Deal suspended Sheriff Hobby.[6] Later that same month a 3 million dollar settlement was reached in a civil rights lawsuit brought by the Southern Center for Human Rights over the high school drug search.[7]

Well. That explains the "controversy" or at least some of it. But what about the "recordings"? What was that all about? This question was answered

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[4] Kyle Swenson, "Georgia sheriff, deputies indicted after body searches of 900 high school students", The Washington Post, October 6, 2017 at https://www.washingtonpost.com/news/morning-mix/wp/2017/10/06/georgia-sheriff-deputies-indicted-after-body-searches-of-900-high-school-students/? noredirect=on&utm_term=.b5db767af65a (last visited 12/19/18 at 8:29 PM).

[5] Brad Schrade, "Ga. sheriff in massive drug search faces new trouble: his own son", The Atlanta Journal-Constitution, October 18, 2017 at https://www.ajc.com/blog/investigations/sheriff-massive-drug-search-faces-new-trouble-his-own-son /ISDXdGCD4nK2ldxtG6oHnK/ (last visited 12/19/18 at 8:41 PM).

[6] Tim Stello, "Sheriff Suspended after deputies allegedly 'Groped' students in massive drug search", NBC News, November 13, 2017, at https://www.nbcnews.com/news/us-news/sheriff-suspended-after-deputies-allegedly-groped-students-massive-drug-search-n820486 (last visited 12/19/18 at 9:54 PM).

[7] The Associated Press, "Settlement reached in school search lawsuit", The Honolulu Star-Advertiser, November 19, 2017, at http://www.staradvertiser.com/2017/11/14/breaking-news/proposed-3m-settlement-reached-in-school-search-lawsuit/ (last visited 12/19/18 at 9:02 PM).

somewhat on March 9, 2018, when it was reported Sheriff Hobby had been arrested by the GBI and charged with 66 counts of eavesdropping and surveillance involving a recording device at the attorney-client conference room at the Worth County Jail. However, the names of the persons targeted by the sheriff were not given in the story. [8]

More details of the jail bugging emerged in early May of 2018, some 5 months after appellant entered his plea. It was reported Sheriff Hobby had been indicted again. This time it was for 90 counts related to illegal eavesdropping and recording at the Worth County Jail. The High Sheriff had placed an audio and video recording device in the attorney-client room. The sheriff was charged with using the device to monitor and record attorney-client conferences on some 89 occasions. The device recorded those conversations from July 20, 2017, to February 27, 2018, which covered appellant's time at the facility. Although Sheriff Hobby had been suspended in November, 2017, the interim sheriff continued to use the equipment and it was not removed until a second interim

[8]Alexandria Ikomoni, "Suspended Worth County Sheriff arrested by GBI", WXFLFox31, March 9, 2018 at https://wfxl.com/news/local/suspended-worth-co-sheriff-arrested-by-gbi (last visited 12/20/18 at 12:37 AM).

sheriff took office in March, 2018. Again, the names of the persons bugged were not publicized. [9]

Besides the internet there is another modern invention that helps people get information even if they are on a little island in the South Pacific. It is called the telephone. A call to the Clerk of the Superior Court of Worth County on December 20, 2018, ascertained that office's records reflect that on May 15, 2018, an indictment was returned against Jeffery Harold Hobby charging him with one count of violation of oath of office and 89 counts of invasion of privacy. The case number is 18CR0062. The helpful clerk was kind enough to send the undersigned a copy of the indictment. (She may well receive a box of delicious chocolate covered macadamia nuts in the near future.)

The indictment makes for some very interesting reading. Perhaps the most interesting thing about it is *the indictment alleges that on no less than 10 occasions confidential conversations between Thomas Bradshaw and his lawyer were observed and recorded by law enforcement officials.* (emphasis supplied) (Counts 17, 28, 38, 63, 66, 71, 76, 78, 79, 82). This document constitutes an admission *in judicio* that the Worth County Sheriff was bugging the appellant and his lawyer

[9] Jennifer Parks, "Suspended Worth sheriff Jeff Hobby indicted on 90 counts", The Albany Herald, May 16, 2018, at https://www.albanyherald.com/news/local/suspended-worth-sheriff-jeff-hobby-indicted-on-counts/article_1b46702c-4c26-58c7-8b25-3504f20485a3.html (last visited 12/19/18 at 10:29 PM).

and that it was a crime to do so. The State is admitting it happened and it was wrong.

This court should read the Hobby indictment but there is no copy in the record of this case. That is because it did not exist at the time of appellant's plea or even the hearing on his motion to withdraw the plea. Appellant is cognizant of this Court's Rule 24(g) which prohibits the attachment of exhibits to the briefs of the parties. Concurrent herewith appellant has filed a Motion to Supplement the Record pursuant to Rule 40(c) of the Rules of this court and O.C.G.A. §5-6-41(f) asking this court to direct the Clerk of the Superior Court of Worth County to certify the indictment in Case No. 18CR0062 and transmit it to this court for inclusion in the record of this case on appeal. The undersigned contacted the district attorney on December 20, 2018, about stipulating it into the record. On December 21, 2018, he was advised the district attorney has no objection to supplementing the record with this document.

Sheriff Hobby's saga finally came to an end on July 25, 2018. On that day Hobby entered pleas of guilty to three counts of violation of oath of office. Judge Reinhardt took the plea. He only gave the Sheriff 6 months of jail time and 5 years of probation. The judge granted Sheriff Hobby first offender treatment. The plea resolved all charges against him. Hobby immediately resigned as the Sheriff of Worth County following the plea. It was a pretty good deal for the Sheriff.

District Attorney Paul Bowden said "[t]he District Attorney's Office is hopeful that the resolution of this case will allow the victims, Worth County Sheriff's Department, and the community to begin the healing process."[10]

Appellant's first substitute counsel should have pursued the issue of the Sheriff's Department eavesdropping and recording of attorney-client conversations. She should have inquired about this as well as the prosecuting attorneys' knowledge of the practice and whether it was used on appellant. If the original public defender's testimony may be taken at face value the Sheriff's Department eavesdropping misconduct was known before the hearing on the motion to withdraw the guilty plea. It may be reasonably inferred from the record and from publicly available sources of information that appellant's substitute counsel was aware of it as well, at least generally.

Law enforcement's conduct in this case was nothing short of outrageous. The attorney-client privilege is the "oldest of the privileges for confidential

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[10]Terry Lewis, "Former Worth County Sheriff Jeff Hobby takes plea deal", The Albany Herald, July 26, 2018 at https://www.albanyherald.com/news/local/former-worth-county-sheriff-jeff-hobby-takes-plea-deal/article_ 2e8bf945-5616-52b4-ae76-c6ef5903c50b.html (last visited 12/19/18 at 10:50 PM); See also Asia Simone Burns, "Former sheriff charged with sexual battery, obstruction pleads guilty", The Atlanta Journal-Constitution, July 26, 2018, at https://www.ajc.com/news/crime--law/former-sheriff-charged-with-sexual-battery-obstruction-pleads-guilty/5TqdnU8gEbwRnQSEO4zVSI/ (last visited 12/19/18 at 11:03 PM).

communications known to the common law." *Upjohn Co. v. United States*. 449 U.S. 383, 389 (1981). It "is founded on the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequence of the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

Warrantless electronic interception of private conversation by the government violates the 4th Amendment to the United States Constitution. *Katz v. United States*, 389 U.S. 347, 353-359 (1967). It should be "obvious and apparent to any reasonable law enforcement official … that the Fourth Amendment requires that a warrant be secured before … privileged communications which are normally entitled to be kept confidential as a matter of law – can be electronically monitored, intercepted, or recorded." *Gennusa v. Canova*, 748 F.3d 1103, 1114 (11th Cir. 2014). Where police officers monitored, intercepted and listened to privileged conversations between a suspect and his lawyer in an interview room of a Sheriff's department those officers were not entitled to qualified immunity against claims under the 4th Amendment and the Federal Wiretap Act, 18 U.S.C. §2510, *et seq*. *Gennusa*, Id. at 1103. Where the government without a warrant intercepts and records conversations between a defendant and his attorney the

conviction must be set aside and the case remanded for new trial. *O'Brien v. United States*, 386 U.S. 345 (1967).

Appellant's first substitute counsel should have made inquiries into the interception and recording of attorney-client conversations at the jail by the Sheriff. Sheriff Hobby was apparently arrested for the jail wiretapping in late February or early March, 2018, well before the hearing on the motion to withdraw the guilty plea on April 18, 2018. His arrest was highly publicized even if the specifics of who he actually bugged were not. Appellant's trial attorney knew about it. She mentioned it. ("the recordings" WD-91-92).

Appellant's first substitute attorney should have made specific inquiries as to whether the sheriff's wiretapping activities extended to appellant's meetings with his attorney. This might have been as simple as asking appellant's public defender what she knew about "the recordings" or, better yet, the prosecuting attorney. The prosecuting attorney must have known something about it. Had substitute counsel made inquiries she would have learned that this misconduct had occurred not once, but on many occasions with her client. She should have better developed a record for this court to review. She could have looked at the sheriff's eavesdropping arrest warrant to see it her client was mentioned. Even if appellant's substitute counsel didn't know anything about the sheriff's shenanigans at the jail, she should have. She should have argued this misconduct required the guilty plea be set aside

and appellant re-tried in a fair process which did not involve the police listening in on his conversations with his lawyer. And that is precisely what this court should do.

District Attorney Bowden hopes the resolution of Sheriff Hobby's case will allow his victims to begin the healing process. The healing process for one of those victims, Thomas Bradshaw, can begin right now with the reversal of Judge Reinhardt's decision and a remand for proceedings anew.

2. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE RECORD DOES NOT AFFIRMATIVELY REFLECT THE PLEA WAS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED WITH A VALID WAIVER OF THE RIGHT TO A TRIAL BY JURY.[11]

Standard of Review. In reviewing this enumeration of error an appellate court should employ the "Plain Error" standard of review. Plain error is that which is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding. *Meeker v. State*, 282 Ga. App. 77, 637 S.E.2d 806 (2006). Moreover, because this error involves an issue affecting "fundamental fairness and unreliability" in the trial process it must be viewed as a "structural error". *United*

[11] The inspiration for this ground must be credited to the Honorable Michael K. Soong, Judge, District Court, 5th Judicial Circuit of the State of Hawai'i. He lives and works on Kauai. Judge Soong always starts his court on time. He is knowledgeable, patient, courteous, and respectful to the parties, counsel, and court staff. He moves his docket in an expeditious fashion. While observing proceedings in his court the undersigned noticed Judge Soong, unlike many Georgia judges, including the one in this case, routinely poses the *Duarte-Higareda* interrogatories during his plea colloquies with defendants in cases in which the right to a jury trial is available. Judge Soong always includes every question and requires affirmative responses from the defendants. If the defendant doesn't understand these rights there will be no plea accepted by Judge Soong.

States v. Gonzalez-Lopez, 548 U.S. 140 (2006). A Structural error is one which is a "violation of a basic protection … without which a criminal trial cannot reliably serve its function." *Sullivan v. Lousiana*, 508 U.S. 275 (1999). As such, structural errors are not subject to a harmless error analysis. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007); *Hunt v. State*, 268 Ga. App. 568, 602 S.E.2d 312 (2004). Because denial of the right to a jury trial is a structural error, it requires automatic reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, (1993).

Argument. In his Motion to Withdraw the Guilty Plea appellant contended his plea was not knowingly and voluntarily made. (R-123).

The trial court committed clear and reversible error when it refused to allow appellant to withdraw his guilty plea because the plea record is constitutionally deficient on its face.

Appellant's plea was not knowing, voluntary and intelligent because he was not fully and fairly advised of his right to a trial by jury.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the United States Supreme Court declared the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a guilty plea record to contain "an affirmative showing

that it was intelligent and voluntary".[12] At a minimum the record must reflect three informed waivers by the defendant. The court explained,

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. … Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. ***Second, is the right to trial by jury.*** Third, is the right to confront one's accusers. ***We cannot presume a waiver of these three important federal rights from a silent record.*** (emphasis supplied).
>
> *Boykin*, *supra*, 395 U.S. at 240.

A criminal defendant's right to a jury trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir.1985). The

[12] See also *Roberts v. Greenway*, 233 Ga. 473 (1975), *Demsom v. Frazien*, 284 Ga. 672 (2008) and *Tyner v. State*, 289 Ga. 592 (2011).

right also resides in Article III, Section 2 of the federal Constitution ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"). These protections extend to persons accused of crimes in any United States jurisdiction even in remote unincorporated territories, such as American Samoa, which are not within any United States federal court district. *King v. Morton*, 520 F.2d 1140 (DC Cir. 1975), *on remand*, *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977); *United States v. Kil Soo Lee*, 472 F.3d 638 (9th Cir. 2006).

The right to a jury trial may only be waived if the following four conditions are met: (1) the waiver is in writing; (2) the government consents; (3) the court accepts the waiver; and (4) the waiver is made voluntarily, knowingly, and intelligently. *Cochran,* 770 F.2d at 851. The adequacy of a jury waiver is a mixed question of fact and law which the court reviews *de novo*. *United States v. Christensen,* 18 F.3d 822, 824 (9th Cir.1994).

With regard to the fourth requirement that the waiver be voluntarily, knowingly, and intelligently made, the 9th Circuit Court of Appeals has set forth guidelines for trial courts to follow in making that determination. The trial court must inform the defendant "*(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial."* (emphasis supplied) *United States v. Duarte-Higareda*, 113

F.3d 1000, 1002 (9th Cir. 1997). Because no colloquy appeared in the record the *Duarte-Higareda* court reversed the bench trial conviction of a non-English speaking defendant although there was a translator present and a written waiver of jury trial was signed by the defendant.

In *Hawai'i v. Gomez-Lobato*, 130 Haw. 465, 312 P.3d 897 (2013), the Supreme Court of Hawai'i applied *Duarte-Higareda* and reversed the bench trial conviction at issue. In that case, Gomez-Lobato, a native Spanish speaker, was represented by counsel and had the assistance of an interpreter. He had signed a standard jury trial waiver form. The trial court had engaged in a colloquy with the defendant. In reversing the conviction the State Supreme Court noted the absence of the *Duarte-Higareda* interrogatories in the record and concluded, "[a]lthough the family court conducted a colloquy with Gomez-Lobato regarding the waiver form, the family court's questions were not sufficient to establish that Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a jury trial." 312 P.3d at 903. The court emphasized that while trial courts may not be required to conduct the full *Duarte-Higareda* four-factor colloquy in every case, the colloquy must be sufficient to establish a defendant validly waived his or her right to a jury trial "under the totality of the circumstances surrounding the case." 312 P.3d at 904.

In *California v. Sivongxxay*, 3 Cal. 5th 151 (2017), a death penalty appeal, the defendant was a Laotian refuge with no formal education. The trial court did engage in a colloquy with the defendant. Of the *Duarte-Higareda,* four-factor colloquy, the court told him (1) he had a right to a trial by a jury of 12 people, (2) he and his attorney would participate in the jury selection process and (3) that if he gave up his right to a trial by jury the judge alone would determine his guilt and punishment. While acknowledging the colloquy engaged in by the court lacked the advisement as to the juror unanimity requirement the court nonetheless concluded the waiver was shown to have been knowing, voluntary and intelligent and that "under the totality of the circumstances standard, the presence or absence of a reference in a colloquy to this particular attribute of a jury trial, or to the impartiality requirement, is not necessarily determinative of whether a waiver meets constitutional standards." 3 Cal. 5th at 168.

In *Alvarez v. Lopez*, 835 F.3d 1024 (9th Cir. 2016), the court revisited the jury trial waiver issue in a different context. The issue there was whether a native American tribal court violated a criminal defendant's rights by failing to inform him that he could receive a jury trial only by requesting one. While Alvarez was informed that he had a right to a jury trial he was not told he had to request it to get one under tribal court rules. None of the *Duarte-Higareda,* four-factor colloquy

questions were posed. Alvarez represented himself, was convicted, and sentenced to five years in prison. He did not seek a direct appeal of his conviction.

Alvarez raised the jury trial waiver issue for the first time when he filed a federal habeas corpus action. While acknowledging its reluctance to intrude on tribal sovereignty, the court nonetheless concluded "we think it clear that Alvarez's interests here outweigh those of the Community. It hardly undermines tribal sovereignty to require that the Community inform defendants of the nature of their rights, including what must be done to invoke them. The fact that such a requirement presents minimal intrusion into a tribe's sovereignty may explain why "all tribal courts presented with the question have concluded that there must be a knowing and voluntary waiver of [the] … jury right" [and] … [b]ecause denial of the right to a jury trial is a structural error, it requires automatic reversal. See *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)." 835 F.3d at 1029-1030.

While admittedly none of these cases were decided in Georgia or even the 11th Circuit, they are nonetheless relevant and instructive because the Georgia Supreme Court has endorsed the *Duarte-Higareda* standard. See *Balbosa v. State*, 275 Ga. 574, 571 S.E. 2d 368, 369 (2002) ("To ensure that Balbosa waived his right to a jury trial voluntarily, knowingly and intelligently, the trial court should

have conducted a colloquy with Balbosa himself. *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir.1997).").

The record in this case does not reflect appellant's waiver of his right to a trial by jury was knowingly, voluntarily, and intelligently made as required by these authorities.

The record in this case includes a colloquy between the court and appellant. Concerning a trial by jury, the court told Mr. Bradshaw as follows:

> THE COURT: All right. Do you understand now, Mr. Bradshaw, by entering this plea of guilty, you're giving up your right to a jury trial? You have the constitutional right to a jury trial that's guaranteed by the United States. Nobody can take that away from you. If you want a trial, you'll have your trial of course, but, if you plead guilty now, you're waiving or giving up your right to have that jury hear your case and they would decide your guilt or innocence. Do you understand that you're giving up that right?
>
> THE DEFENDANT: Yes. (GP-16, 17).

The record also includes a document captioned "Advice and Waiver of Rights" which is signed by appellant and his attorney. (R-116). Concerning the right to a trial by jury the document simply states:

> 7. Do you understand that you have the right … [t]o a trial by jury[?]
>
> 9. Do you understand that by pleading guilty you are giving up those rights? (R-116).

Nowhere in the transcript or the record does it appear the appellant was advised that (1) the jury would be composed of 12 persons, (2) that the appellant would be allowed to participate in the selection of the jury, (3) that the jury's verdict must be unanimous or (4) that if he waived his right to a jury the court alone would decide appellant's guilt or innocence.

These are the essential features of a trial by jury and it cannot be said the failure to advise them was harmless.

It might be argued that appellant's plea came after he and his lawyer had struck a jury and this process educated him on the essential features of a trial by jury. However, there is no transcript of the jury selection proceedings in the record before this court so the record is silent other than the court's colloquy with appellant and the advice and waiver of rights form. There is nothing that shows

appellant participated in or was actually even present when the jury was selected or that he understood the process in even a basic fashion.

Even if it may be said appellant did personally waive his right to a trial by jury it certainly cannot be said under the totality of the circumstances that the waiver was knowing, voluntary, and intelligent. Under the circumstances of this case, the trial court committed clear and reversible error when it failed to engage appellant in a colloquy which included at least some of the *Duarte-Higareda* interrogatories.

These advisements are required to be in the record but they are not.

PART IV
CONCLUSION

This case raises troubling questions about the fairness of the criminal justice system in Worth County. It is clear law enforcement systematically violated the confidentiality of appellant's conversations with his public defender. It is just as clear his substitute appointed attorney did not pursue or investigate law enforcement's misconduct although the sheriff had been arrested for this conduct some time before the hearing and the arrest had been publicized. The record indicates appellant's original attorney was aware of the eavesdropping by the time the motion to withdraw the guilty plea was heard. Substitute counsel should have investigated the issue, determined the facts, and complained to the court. In addition, the record of appellant's guilty plea is woefully inadequate and fails to reflect appellant's plea was knowingly, voluntarily and intelligently entered with a full understanding of his right to a trial by jury.

Appellant did not raise the issue of prosecutorial misconduct by the State's attorneys in his motion to withdraw the guilty plea and the record on that issue is not fully developed. The undersigned is reluctant to make accusations at this juncture without more. Nonetheless, while it is clear the misconduct of the police was the primary cause for concern, there remain equally troubling questions about the prosecutors' conduct in this process. According to the same story which

reported the sheriff's eavesdropping arrest, "On February 26, the District Attorney's office was given information about a possible recording device in the attorney-client interview room at the Worth County jail, which they say was installed at the direction of Hobby."[13]

It they knew about the misconduct why didn't the prosecuting attorneys disclose the eavesdropping to appellant, his attorney, or the court before the hearing on the motion to withdraw the plea on April 18, 2018? Were prosecutors aware of the contentious meetings between appellant and his public defender? Were the state's attorneys listening to the recordings or being briefed by the officers who did the bugging? Is that why every time his lawyer talked to them the plea offer went up? Did knowledge of appellant's meetings with his lawyer give them an unfair advantage in plea negotiations and trial preparation? Is this why they didn't disclose? These are questions which should have been asked by appellant's first substitute counsel. They most certainly will be asked if this case is reversed and remanded as it must be.

For the foregoing stated reasons the trial court's denial of appellant's motion to withdraw his guilty plea must be reversed.

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[13]Alexandria Ikomoni, "Suspended Worth County Sheriff arrested by GBI", WXFLFox31, March 9, 2018 at https://wfxl.com/news/local/suspended-worth-co-sheriff-arrested-by-gbi (last visited 12/20/18 at 12:37 AM).

The undersigned hereby certifies this submission does not exceed the word count limit imposed by Rule 24 of this Court.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of the foregoing Appellant's Brief upon opposing counsel by electronic mail and by United States Mail addressed as shown below:

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