

APPENDICES

Appendix A	Opinion of the Colorado Court of Appeals
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Appendix A

15CA0455 Peo v Marquez 04-13-2017

COLORADO COURT OF APPEALS

DATE FILED: April 13, 2017
CASE NUMBER: 2015CA455

Court of Appeals No. 15CA0455
Weld County District Court No. 13CR1331
Honorable Timothy G. Kerns, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Andres Marquez,

Defendant-Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE WEBB
Bernard and Dunn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced April 13, 2017

Cynthia H. Coffman, Attorney General, Carmen Moraleta, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Katayoun A. Donnelly, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Andres Marquez, appeals the trial court's order denying his motion to withdraw his guilty plea. Specifically, he asserts that by allowing alternative defense counsel (ADC) to continue representing him after ADC had submitted to the court a "Special Report Upon Appointment for Limited Purpose of Investigating Defendant's Allegations of Ineffective Assistance of Counsel" ("Special Report"), the court completely deprived him of counsel, and thereby committed structural error. Discerning no such complete deprivation, we affirm.

I. Background

¶ 2 Defendant, while represented by a public defender, pleaded guilty to child abuse and attempted sexual assault on a child. But before sentencing, defendant filed a pro se motion to withdraw the plea. He asserted a "conflict of interest" and stated that his attorney was "not representing [him] as he is suppose[d] to." He requested that the court allow him to hire his own attorney and withdraw his plea "because [he] was having communication problems with [the public defender] due to not being able to understand." The record indicates that defendant could not speak or read English.

¶ 3 Defendant's public defender moved to have the court appoint ADC for the limited purpose of pursuing a motion to withdraw defendant's plea. The public defender noted that defendant was asserting ineffective assistance of counsel, failure to investigate, and a lack of understanding regarding the plea bargain procedures and time frame in which to make a decision regarding the plea bargain, all purportedly due to the public defender's inadequate representation. The public defender asked that the court appoint conflict-free counsel to "investigate [defendant's] claims and file appropriate motions on his behalf."

¶ 4 In response to the motion, the court appointed ADC for the "limited purposes set forth in the motion." ADC filed the Special Report indicating, among other things, that "because there is a factual dispute over coercion, the Court may wish to conduct such a hearing, as naturally this fact directly effects [sic] the voluntary nature of the plea." The record does not reflect that defendant received a copy of this report, nor does it include a copy translated in to Spanish.

¶ 5 The district court set the matter for a contested hearing on the motion to withdraw. At the hearing, defendant testified that his

public defender had coerced him into accepting the guilty plea and had not investigated the case properly. The public defender also provided extensive testimony. ADC argued that defendant's plea was not voluntary, and that there was no evidence "any investigation was actually completed" by the public defender.

¶ 6 Following the hearing, the court entered a detailed order denying the motion to withdraw the plea. Specifically, the court credited the public defender's testimony over defendant's, and concluded that defendant had not shown good cause to withdraw his plea. The court held that defendant's plea was knowing, intelligent, and voluntary. The court also found that defendant had failed to establish either coercion or that the public defender's performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 7 Defendant then wrote two pro se letters to the court, requesting (1) a second investigation into the threats his public defender had purportedly made against him, and (2) advising the court that he had not been able to speak with ADC because his public defender was still his attorney. He asked that the public defender be removed from his case, and that the court "let [him]

know if [ADC] will be [his] attorney.” Shortly thereafter, the public defender withdrew from the case, and defendant proceeded to sentencing with ADC counsel. The court sentenced defendant to three years in the custody of the Department of Corrections.

II. ADC’s Representation

¶ 8 Defendant’s sole contention on appeal is that the trial court committed structural error because it allowed ADC to act as a factfinder for the court rather than as an advocate, thereby completely depriving him of counsel at the hearing on his motion to withdraw. The record does not support this contention.

A. Standard of Review and Preservation

¶ 9 “Structural errors are not amenable to either a harmless error or a plain error analysis because such errors affect the framework within which the trial proceeds, and are not errors in the trial process itself.” *People v. Hassen*, 2015 CO 49, ¶ 7 (citations omitted); *see also People v. Edwards*, 101 P.3d 1118, 1123 (Colo. App. 2004), *aff’d*, 129 P.3d 977 (Colo. 2006); *People v. Phillips*, 91 P.3d 476, 478-79 (Colo. App. 2004).

¶ 10 Less clear is whether a structural error must be preserved. Our supreme court has never addressed this question. In *People v.*

Johnson, 2015 COA 54, ¶ 15, the division said, “[d]enial of the right to self-representation is structural error, which, *if preserved*, requires reversal.” (Emphasis added). *But see United States v. Gonzalez*, 110 F.3d 936, 946 (2d Cir. 1997) (“We have no doubt that many, if not most, structural errors will lead to reversal, whether or not preserved.”).

¶ 11 To be sure, defendant did not object to representation by ADC at any time before or during the hearing on the motion to withdraw, and seemed to embrace ADC’s representation at sentencing. Still, on the particular and perhaps unique facts presented, we decline to limit review for lack of preservation.

¶ 12 First, the record does not indicate that defendant ever received a copy of the Special Report. Second, even if defendant had received a copy, the record does not include a copy translated into Spanish, and defendant could not read English. Third, seeing the report as a basis for arguing complete deprivation of counsel would be very difficult for anyone other than a lawyer.

B. Law

¶ 13 The fundamental right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and is considered

essential to a fair trial. *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989). A complete deprivation of counsel constitutes structural error. *Hagos v. People*, 2012 CO 63, ¶ 10. For example, an actual conflict may completely deprive a defendant of the constitutional right to counsel. *People v. Delgadillo*, 2012 COA 33, ¶ 7.

¶ 14 An attorney appointed to represent a criminal defendant must provide the client with professionally competent assistance. Thus, a complete deprivation may occur where the court appoints an attorney to serve only as the court’s factfinder, rather than to represent the defendant. *People v. Breaman*, 939 P.2d 1348, 1351 (Colo. 1997); see *Dooly v. People*, 2013 CO 34, ¶ 7 (trial counsel is the “captain of the ship” regarding matters of trial strategy, but must make choices to represent the interests of the client, not the court).

¶ 15 Even so, a court may instruct an attorney that he or she is not required to pursue meritless claims. *Breaman*, 939 P.2d at 1351. Further, once a defendant’s motion is before the court, the court has “certain independent obligations irrespective of the attorney’s conclusions or analysis.” *Id.* at 1352.

C. Application

¶ 16 Defendant fails to show the requisite complete deprivation for the following reasons.

¶ 17 First, contrary to defendant's contention, the record does not show that the district court appointed ADC to act only as the court's factfinder. Rather, the court's order, read in conjunction with the motion, instructed counsel to proceed regarding defendant's motion. Because this order did not deprive defendant of counsel, it was not in error. *See id.* at 1351 & n.1.

¶ 18 Second, the Special Report was far more than, as defendant maintains, an *Anders*-style appellate brief in the district court. *See Anders v. California*, 386 U.S. 738 (1967). True enough, our supreme court has disapproved filing an *Anders*-style appellate brief in conjunction with an attorney's motion to withdraw. *A.L.L. v. People*, 226 P.3d 1054, 1058 (Colo. 2010). But ADC did not present the Special Report as a basis to withdraw defendant's motion. Rather, ADC acted with candor toward the court while also putting forth defendant's best arguments for withdrawal of the plea and raising the propriety of an evidentiary hearing.

¶ 19 Not surprisingly, ADC limited the claims at the hearing to those identified as meritorious in the Special Report. However, doing so did not create an actual conflict, absent some indication that counsel acted for a reason other than his best judgment on the merits of those claims. While counsel’s judgment might be questioned insofar as the Special Report concludes that defendant “pled guilty with full knowledge,” no actual conflict arose because defendant’s pro se motion did not assert otherwise. And in any event, the sole question before us is whether the court acted appropriately in allowing ADC to proceed after submitting the Special Report, not whether ADC provided ineffective assistance of counsel by parsing the claims as he did.

¶ 20 In the end, the court conducted its own review of the motion and entered its own findings of fact and conclusions of law. Then it issued a detailed order denying defendant’s motion to withdraw his plea.

¶ 21 In saying this much, we make clear that we do not approve of ADC’s presenting the Special Report. Nor do we approve of the Special Report’s explaining why some claims that might be implied in defendant’s motion lacked merit. Acting as captain of the ship,

ADC should simply have requested a hearing and raised only those claims that he considered meritorious. *See People v. Wallin*, 167 P.3d 183, 187 (Colo. App. 2007) (counsel should not join arguments that have merit with a request for review of concededly meritless claims); *cf. People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007) (“Appellate counsel is not required to raise on appeal every nonfrivolous issue a defendant desires to raise.”).

¶ 22 Finally, contrary to defendant’s claim on appeal, the record does not show that the court appointed ADC to represent defendant at sentencing over defendant’s explicit objections. Rather, defendant requested removal of the public defender in his pro se letters to the court after the hearing on the motion to withdraw. In those letters, he expressed concern that he was not permitted to talk with ADC as he wished, and he asked the court to clarify that ADC was his attorney.

¶ 23 Under these circumstances, we cannot conclude that the court’s actions completely deprived defendant of counsel.

III. Conclusion

¶ 24 The order denying the motion to withdraw is affirmed, without prejudice to any claim that defendant may have under Crim. P. 35(c).

JUDGE BERNARD and JUDGE DUNN concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT:

Alan M. Loeb
Chief Judge

DATED: September 22, 2016

Notice to self-represented parties: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cba.cobar.org/repository/Access%20to%20Justice/AppellateProBono/CBAAppProBonoProg_PublicInfoApp.pdf

Appendix B

(Court File, pp. 102-09; 118-27)

DISTRICT COURT, WELD COUNTY, STATE OF COLORADO 901 9 th Avenue P.O. Box 2031 Greeley, CO 80631 Greeley, CO 80632	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. ANDRES MARQUEZ, Defendant. Michael G.A. Williams, Esq. #31120 <i>Limited Appointment</i> P.O. BOX 1599 Longmont, CO 80501 Office: (303) 204-6629 Cell: (303) 250-3531 e-mail: michael@mgawlaw.com	▲ COURT USE ONLY ▲ Case Number: 13CR1331 Div. Ctrm. 12
SPECIAL REPORT UPON APPOINTMENT FOR LIMITED PURPOSE OF INVESTIGATING DEFENDANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL	

COMES NOW undersigned counsel, upon Court Order to investigate allegations of ineffective assistance of counsel by Defendant's Public Defender, and to investigate the legal sufficiency of Defendant's demand to withdraw his Guilty Plea pursuant to Crim.P.Rule 32(d), and submits the following report:

I. PROCEDURAL BACKGROUND RELEVANT TO SPECIAL APPOINTMENT

1. In this matter, Andres Marquez, (the "Defendant"), was charged upon the filing of an Information with: Count 1: Sexual Assault on a Child, a class 4 felony, in violation of C.R.S. § 18-3-405(1); Count 2: Sexual Assault on a Child - Pattern of Abuse, a class 3 felony, in Violation of C.R.S. § 18-3-405(1),(2)(d).

2. At the Motions Hearing (1/10/14), the Defendant moved to plead guilty to a plea bargain and tendered to the Court a Written Waiver and Guilty Plea; wherein the plea agreement states: ¹

The Defendant will plead guilty to added Count Three, Child Abuse, a class four felony, and added Count Four, Criminal Attempt to Commit Sexual Assault on a Child, a class five felony.

¹ While some of the Rule 11 Paperwork is written in both the English and the Spanish Language, the "Agreement" section is written only in the English Language; although the record is clear a Spanish Interpreter was present for all court hearings and the record indicates the Spanish Interpreter read the complete Rule 11 Paperwork to the Defendant.

Counts One through Two will be dismissed as part of the plea. On count 3, the parties stipulate to 3 years in the Department of Corrections. The sentence on Count 4 would be open to the court. The defendant further acknowledges that he will be required to register as a sexual offender, pursuant to Title 16, C.R.S. The people would reserve 90 days to file a Notice of Restitution.

At any stage of this court's sentence, the Defendant is subject to sex offender treatment, sex offender registration, polygraphs, plethysmographs, HIV testing, DNA sampling, restrictions on access to children, and any other requirements of sex offenders as imposed by the treating therapist, probation officer, the Department of Corrections, parole officer, or agent of this court.

Further, the defendant is waiving his/her right to object to the destruction of any evidence that may contain DNA which was collected through the criminal investigation in this case pursuant to the provisions of C.R.S. § 18-1-1103, as set forth in the attached evidence disposition sheet and attached evidence logs.

The parties also stipulate that the People may withdraw from the plea agreement if the defendant commits a new felony or misdemeanor while awaiting sentencing and/or fails to appear for sentencing. Restitution and costs of prosecution as to all originally filed and pled counts will be as ordered by the Court. All other conditions as ordered by the Court.

3. As a result of the plea of guilt, the jury trial was vacated, and this case was continued for Sentencing, until March 26, 2014, to accommodate the Presentence Investigation Report ("PSI"), to be completed by the Probation Department, and a Sex Offender Evaluation was ordered.

4. However, on February 10, 2014, Defendant, acting *pro se*, filed a letter with the Court; whereby said letter raises issues of ineffective assistance of counsel, undue coercion and threats by his public defender to plead guilty, and the request to withdrawal his guilty plea for those reasons (pursuant to Crim.P.Rule 32(d)).

5. On March 6, 2014, the Public Defender filed a motion requesting, and the Court Granted, court appointed Alternate Defense Counsel for the limited purpose of investigating, and if necessary, to litigate the sufficiency of Defendant's claims (e.g., whether the Defendant has a meritorious argument justifying the allowance to withdraw his guilty plea(s), pursuant to Crim.P.Rule 32(d), based upon ineffective assistance of counsel).

II. LEGAL ANALYSIS PERTAINING TO INEFFECTIVE ASSISTANCE OF COUNSEL

6. The right to counsel includes the right to “effective assistance” of counsel—that is, competent representation throughout the criminal proceeding by a lawyer acting on the defendant’s behalf. E.g., McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970) (decided under the Sixth Amendment); Armstrong v. People, 701 P.2d 17 (Colo.1985). The right guarantees a criminal defendant a level of assistance in the adversary process adequate to produce a fair, just and reliable result. People v. Garcia, 815 P.2d 937 (Colo.1991), cert. denied, 502 U.S. 1121 (1992).

7. A defendant who is convicted, or who pleads guilty, may challenge the conviction and demand a new trial on the theory that he or she was denied the constitutional right to effective assistance of counsel. See, Glasser v. United States, 315 U.S. 60 (1942); see also, Gagnon v. Scarpelli, 411 U.S. 778 (1973). A finding of ineffective assistance of counsel can never be treated as harmless error because actual prejudice is an element of the finding. Strickland v. Washington, 466 U.S. 668 (1984); People v. Perry, 68 P.3d 472 (Colo.App.2002, cert. denied (Colo.2003)).

8. Colorado has adopted the so-called “*Strickland* standard” as the test for determining whether a criminal conviction was obtained in violation of a defendant’s constitutional right to effective assistance of counsel. See, Banks v. people, 696 P.2d 293, 298-99 (Colo.1985). In order to establish 0a claim that defense counsel was constitutionally ineffective, the *defendant* must show:

(1) Defense counsel’s representation fell “outside the wide range of professionally competent assistance” which is “reasonably demanded of defense counsel in criminal cases under prevailing professional norms;” *and*

(2) The defendant was actually prejudiced as a result. Garcia, 815 P.2d at 941.

(a) *The Performance Prong.* The standard for judging whether counsel’s performance was deficient is whether, considering all the circumstances, counsel rendered “reasonable effective” assistance. This determination is made by applying an objective standard of reasonableness. Strickland, 466 U.S. at 668. In addition, in reviewing counsel’s performance, there is a “strong presumption” that defense counsel’s conduct falls within the range of constitutionally sufficient professional assistance and that counsel made “all significant decisions in the exercise of reasonable professional judgment.” Id.

(b) *The Prejudice Prong.* The standard for determining prejudice is a “but-for, reasonable probability” test. The prejudice prong of the *Strickland* test requires the court to find there is a reasonable probability that, but for counsel’s actions, the result of the proceeding would have been different. Id.

9. Specifically, the test for effective assistance of counsel in the context to the entry of a guilty plea is as follows:

[w]hen a defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged,...[h]e may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not 'within the range of competence demanded of attorneys in criminal cases.' People v. Drake, 785 P.2d 1257, 1271 (Colo.1990) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

III. FACTUAL ANALYSIS PERTAINING TO INEFFECTIVE ASSISTANCE OF COUNSEL

10. Here, the (potential) ineffective assistance claim arises because the Defendant asserts he was coerced and unduly pressured by his trial counsel into entering a guilty plea, and but for this coercion, Defendant would have gone to trial.

11. Significant, this is not a situation where there is a claim of misunderstanding, or incorrect advice, from trial counsel, to the client. See, Garcia, 815 P.2d 937; People v. Pozo, 746 P.2d 523 (Colo.1987). Specifically, the Defendant is asserting he knew precisely the nature and consequences of his plea, but was unduly corrected into taking the plea by trial counsel; and reciprocally, Mr. Justin Reed, trial counsel, has informed undersigned counsel he was following directions from his client to reach certain plea parameters, which trial counsel was able to ascertain on behalf of his client, and that at no time was Defendant coerced into taking the plea.

12. Therefore, there is zero allegation by Defendant that defense counsel must correctly advise the defendant, but failed to do so, of the alternatives to entering a guilty plea so that the defendant makes an informed choice, People v. Rael, 681 P.2d 530 (Colo.App.1984). In fact, undersigned counsel has been informed by all relevant parties, Defendant was aware of the alternatives to entering the plea, and made an 'informed' choice, even if coerced. Further, the Providency Transcript and record supports this: the Defendant did discuss the case with trial counsel to the Defendant's satisfaction, including reviewing all factual and/or legal defenses; the Defendant did not wish for Defense Counsel to do any further investigation; that trial counsel did in fact answer all of Defendant's questions, and had no further questions; and that the Defendant was aware that upon his guilty plea he would be subject to deportation and ineligible for return to the United States.

13. At issue, then is the assertion Defendant is alleging he was unduly coerced into pleading guilty by his trial counsel, which is to the heart the nature of a voluntary plea, (and wanting his trial counsel to do more investigation); yet against the Court's colloquy where Defendant specifically stated on the record he was pleading guilty of his own free will, free from coercion, and affirmed on the record he needed no more time, and desired no more investigation.

14. The case law is clear that the Defendant has an affirmative obligation to request clarification, ask questions, and otherwise inform the court during providency any complaints he

may have during the court's colloquy, at the Providency hearing. See, People v. DiGuglielmo, 33 P.3d 1248 (Colo.App.2001). The Defendant failed to do so here.

15. However, when presented with this question; why Defendant did not speak out during his providency hearing, Defendant is indicating he was so coerced by trial counsel that he was not really listening to the Court's questions and just went along with the process, as directed to him by his Public Defender.

16. Mr. Reed informed undersigned counsel, and would testify that: Defenadnt was certainly "wishy washy" and went back and forth in his mind several times throughout these court proceedings whether to plead guilty, or go to trial, but that trial counsel never coerced the Defendant. Futher Mr. Reed would testify Defendant rejected certin plea offers, but directed Mr. Reed specifically to seek the plea offer from the People that was reached.

17. In Brady v. United States, the United States Supreme Court explained the decision to plead guilty as:

...heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing lenience should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although there were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to a later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended...the likely penalties attached to alternative courses of action. 379 U.S. 742, 756 (1970).

18. It is undersigned counsel's opinion that the Defendant ultimately pled guilty, with full understanding of the plea, for the reasons as expounded in Brady, and the record seems clear on this issue, noting the Court's Colloquy. What is not clear is whether Defendant was coerced by his public defender, or whether this is a case of "buyers remorse."

19. Thus, because there is a factual dispute over coercion, the Court may wish to conduct such a hearing as naturally this fact directly effects the voluntary nature of the plea.

IV. ANALYSIS OF VINDICTIVE PROSECUTION THUS DEPRIVING DEFENDANT OF DUE PROCESS UPON THE PEOPLE WITHDRAWING THE PLEA OFFER BECAUSE THE DEFENDANT EXERCISED HIS CONSTITUTIONAL TRIAL RIGHTS.

20. In Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed2d 604 (1978), the United States Supreme Court addressed the issue of vindictive prosecution based on the

exercitation of constitutional rights by a Defendant. Colorado has adopted the analysis of the Bordenkircher decision in, e.g., People v. Talley, 677 P.2d 394 (Colo.App.1983).

21. In Bordenkircher, there, Hayes was indicted by a grand jury for uttering a forged instrument. He was advised that if he pleaded guilty, the prosecutor would recommend a sentence of five years imprisonment. If Hayes did not plead guilty, the prosecutor warned he would seek a grand jury indictment under the Kentucky Habitual Criminal Act, which would subject defendant to a mandatory sentence of life imprisonment because he had two prior felony convictions. Hayes pleaded not guilty, the additional indictment was sought and obtained, he was convicted and sentenced to life imprisonment, and Hayes appealed.

22. Here, when the Preliminary Hearing was held, the People made an oral record that an offer was extended in the case, and was withdrawn; that offer was to plead to Count 1, which is sex assault on a child, a class 4 felony, dismissing the Count 2 - pattern, which is a class 3 felony. Here, the plea agreement reached was for 'mere' child abuse, and *attempted* sexual assault on a child. Undersigned counsel offers no opinion whether this plea is "better" or "worse" than the original offer withdrawn, but it certainly is not such a dichotomy as the one articulated in Bordenkircher, which the United States Supreme Court found legally sound.

23. In words appropriate here, the US Supreme Court held the prosecutor's conduct "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution" and therefore was not in violation of the due process clause of the Fourteenth Amendment. Bordenkircher, *supra*.

24. While over-simplified, the Bordenkircher court noted that, while punishing someone for doing something the law plainly permits, is a "due process violation of the most basic sort [I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer." Bordenkircher, *supra*.

25. Therefore, there is no due process violation based on "vindictive prosecution" when the 'Plea Offer' was withdrawn by the People upon Defendant choosing to go forward with the Preliminary Hearing, and the fact another plea was offered by the People, which the Defendant was free to accept (which he did). Bordenkircher, *supra*.

V. ANALYSIS OF OTHER JUSTIFIABLE REASONS TO WITHDRAW A GUILTY PLEA

26. The Court may also grant the Defendant's request to withdraw his guilty plea where it appears the Defendant has just reasons for doing so, including a defense worthy of consideration by the jury. Champion v. People, 124 Colo. 253, 258-29, 236 P.2d 127, 130 (1951); People v. Gutierrez, 622 P.2d 547, 559 (Colo.1981).

27. Upon review of the Preliminary Hearing transcript, and the Discovery; as found by the Court at the Preliminary Hearing (evidentiary hearing held on September 12, 2013), indicates the following:

(1) There are no statutory legal defenses present, such as self-defense, mistake in fact, choice of evils, et cetera;

(2) The “defenses” present are those of general denial;

(3) The victim presents generally consistent statements through her forensic interview to her mother and law enforcement;

(3.b) There is evidence from the victim of two incidents of sexual assault upon the victim; those incidents are corroborated by circumstantial evidence concerning the timing, the circumstances in terms of the shower and other corroboration that is independent of her statements. There is also evidence that the Defendant was in a position of care and control over the victim noting the location of the incidents.

(4) Additionally, the Defendant made a statement to law enforcement; and while he did NOT admit any kind of sexual contact with the victim (PH Transcript pg 29), the discovery indicates during the Defendant’s interview with law enforcement the Defendant changed / recanted (e.g., made plausible inconsistent statements) whether he helped bathe the victim or not (specifically whether he helped to wash the victim’s back with a washcloth, or whether he was not present altogether).

28. While the mere act of bathing a child is not sexual assault, and may be a defense worthy of consideration by a jury, and thus a ‘just’ reason for allowing the withdraw of a guilty plea, *id.*, in this case, but that issue is squarely resolved though whether the Jury believes, or chooses not to believe, the trial testimony, which is another way of saying, that principal is true in all criminal trials: defendants are found guilty if the a jury believes the testimony of the People’s witnesses’; and reciprocally, defendants are acquitted if the jury does not believe the People’s witnesses and/or believes the defense witnesses ‘more’ [sic.]. There are no other defense issues present in this case.

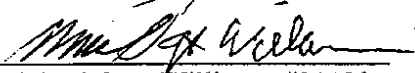
29. In other words, while there is some *potential* a jury could acquit the Defendant, there does not seem to be any independent evidence the Defendant has a defense, or is not guilty. The case law does not state burden shifting per se to the Defendant, but the case law is clear that it requires a defense worthy of consideration by a jury, and logically, if mere general denial without independent evidence supporting the same was a sufficient ‘just reason,’ every 32(d) Motion would require granting.

VI. CONCLUSION

WHEREFORE, for the above stated reasons; and even when placing the facts in light most favorable towards the Defendant; the facts as alleged by the Defendant are unsupported, but are nevertheless in conflict with what Mr. Reed would testify to. Mr. Williams awaits further direction from the Court.

DATED this 13th day of June, 2014.

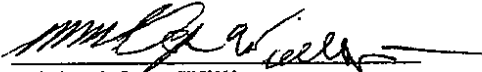
Respectfully Submitted,


Michael G.A. Williams, #31120

CERTIFICATE OF SERVICE

I CERTIFY that on the 13th day of June, 2014, I hand delivered a copy of the Foregoing Special Report Upon Appointment For Limited Purpose Of Investigating Defendant's Allegations Of Ineffective Assistance Of Counsel And Crim.P.Rule 32(d) Motion, to:

19th Judicial District Attorney
Public Defender, Weld County


Michael G.A. Williams

10-23-14

Judge I hope that by the time you get my letter you are well and in good health. This is what I most want for you Judge.

Judge, the purpose of this letter is to let you know that I want a second investigation to be opened against Mr. Justin Reed regarding the threats he made against me on January 9th and on January 10th of this year, 2014. I would also like that upon opening a new investigation, I want the female interpreters who accompanied Mr. Justin Reed to interpret for me also be present because they are my witnesses to the threats Mr. Justin Reed made against me.

The reason why I want a second investigation is because the female interpreters were not present at the 2 hearings that we had against Mr. Justin Reed on August 15th nor did they have them present on September 17th to clear things up about the threats that Mr. Justin Reed made against me. That is why I am asking that a second investigation be opened because I was not in agreement that Mr. Justin Reed was not found guilty of having threatened me. I also want to let you know that Mr. Michael Williams has not come to visit to give me information about my case or about Mr. Justin Reed's case. Since the 10th of February up until this month of October, I have not had the chance to have an interview with him nor have I been able to talk with Mr. Michael Williams by phone.

Judge with all due respect please take these matters into your hands and you make the decisions and let me know what your answer is. I'll await your position. Thank you very much Judge.

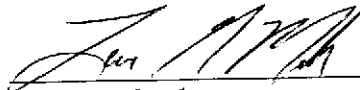
With all due respect Andres Marquez

(Punctuation added by translator for readability.)

CERTIFICATION OF TRANSLATION

I, Luis G. Mendoza, do hereby certify that the foregoing document is a true and accurate translation of a hand-written letter (dated 10-23-14 and not date stamped) from Andres Marquez for case # 13CR13331 to the best of my ability from Spanish to English and has been proofread and approved by the Colorado Office of Language Access Translation Department.

Dated this 29th day of October 2014.

A handwritten signature in black ink, appearing to read 'Luis G. Mendoza', is written over a horizontal line.

Luis G. Mendoza
Managing Court Interpreter
19th Judicial District

10-23-14

FILED IN WELD COUNTY
COMBINED COURT

2014 OCT 24 AM 10:50

JUEZ ESPERO QUE AL LLEGAR ESTA CARTA
MANOS USTED SE HENCUENTRE EN MUY
BUENA ARMONIA Y EN BUENA SALUD ESTOS
SON MIS MAIORES DESEOS PARA USTED
SEÑOR JUEZ

SEÑOR JUEZ. ESTA CARTA VA CON EL FIN
DE DESIRLE QUE YO QUIERO QUE SE REABRA
UNA SEGUNDA INVESTIGACION ENCONTRA
DEL SEÑOR JUSTIN REED SOBRE LAS
AMENAZAS QUE EL HISO SOBRE MI PERSONA
EL DIA (9) DE ENERO Y EL DIA (10) DE ENERO
DE ESTE AÑO 2014 - TAMBIEN YO QUIERO
QUE AL REABRIRSE UNA NUEVA INVESTIGACION
YO QUIERO QUE ESTEN PRESENTES LAS
INTERPRETES QUE ACOMPAÑARON AL SEÑOR
JUSTIN REED. PARA INTERPRETARLO CON
MIGO. PORQUE ELIAS SON MIS TESTIGOS
DE LAS AMENAZAS QUE EL SEÑOR
JUSTIN REED ISO ASI A MI PERSONA -

EL MOTIVO POR EL CUAL YO QUIERO UNA
SEGUNDA INVESTIGACION ES PORQUE LAS
INTERPRETES NO HESTUVIERON PRESENTES
EN LAS (2) AUDIENCIAS QUE TUVIMOS
ENCONTRA DEL SEÑOR JUSTIN REED
EL DIA (15) DE AGOSTO. NI TAMPOCO HESTUVIERON
PRESENTES EL DIA (17) DE SEPTIEMBRE

PARA ACLARAR SOBRE LAS AMENAZAS
que el señor JUSTIN REED iso sobre
mi persona POR eso yo le pido
que se REABRA NOTIA. SEGUNDA
INVESTIGACION porque yo no he tube
CONFORME de que el señor JUSTIN REED NO
se encuentra CUIPABLE DE ABUSARME
AMENAZADO. Tambien yo quiero a DEJARLE
SABER que el señor

MICHAEL WILLIAMS NO A VENIDO A
VISITARME PARA DARMEN INFORMACION
DE MI CASO. NI TAMPOCO. DEL CASO
DEL SEÑOR JUSTIN REED

DESDE EL DIA (10) DE FEBRERO ASTA
HESTE. MES DE OCTUBRE YO NO HE
TENIDO LA OPORTUNIDAD. DE TENER
UNA ENTREVISTA CON EL NI TAMPOCO
HE PODIDO ABLAR POR TELEFONO CON
EL SEÑOR. MICHAEL WILLIAMS

SEÑOR JUEZ. YO LE PIDO CON TODO EL
RESPECTO que USTED SE MERECE. que
POR FAVOR Tome CARTAS en el
ASUNTO. y USTED Tome SUS DECISIONES
Y ME DEJE SABER CUAL ES SU RESPUESTA
YO ESPERO SU DECISION. MUCHAS GRASIAS
SEÑOR JUEZ.

CON TODO RESPECTO ANDRES MARQUEZ

10-20-14


11/3/2014 4:41:22 PM

Judge I am sending you this note to let you know that today, October 20th, at 8:30 in the morning I tried to contact Mr. Michael William by phone but he refused to answer the call saying that he still wasn't sure if he was going to be my attorney. That is what the secretary, whom answered the phone call, said. Saying that they thought that maybe you were going to appoint attorney Justin Reed again and that is something that I don't want. I am not going to accept that because Mr. Justin Reed and I already had problems and that man is a "conflict interest" (written in English) and I don't want him as a defender for me. It is not fair to me that I be appointed an enemy as my attorney to defend me. Judge I would ask, with all due respect, to please let me know if Mr. Michael William will be my attorney because this has me very worried because Mr. Michael William hasn't come to see me throughout 10 months and I feel that this is discrimination against me. Please Judge, I'm asking that more attention be given to my case; reason being, I have a family out there that is awaiting for me and I have not even been able to be in touch with them, by letter or phone, because I am prohibited from talking to them for the last 15 months and that is not fair. I feel that I am losing my family due to the fact that I am not able to see them nor can I be in touch with them.

My Honor I'm asking that you please appoint for me an attorney who will be more concerned about my case and that way be able to finish this problem so that I can be reunited with my family.

My Honor with all due respect.

Thank you very much.

Sincerely Andres Marquez

This is my case number

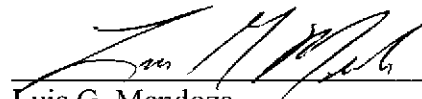
13CR1331

(Punctuation added by translator for readability.)

CERTIFICATION OF TRANSLATION

I, Luis G. Mendoza, do hereby certify that the foregoing document is a true and accurate translation of a hand-written letter (dated 10-20-14 and not date stamped) from Andres Marquez for case # 13CR13331 to the best of my ability from Spanish to English and has been proofread and approved by the Colorado Office of Language Access Translation Department.

Dated this 29th day of October 2014.



Luis G. Mendoza
Managing Court Interpreter
19th Judicial District

10-20-14

SEÑOR JUEZ, LE MANDO ESTA NOTA PARA AVISARLE QUE OY DÍA 20 DE OCTUBRE A LAS 8½ DE LA MAÑANA YO TRATE DE COMUNICARME, CON EL SEÑOR MICHAEL WILLIAM POR TELEFONO, PERO EL SE NEGÓ A RESPONDER, LA LLAMADA DICIENDO QUE EL TODAVIA NO ESTABA SEGURO DE QUE EL IBA A SER, MI ABOGADO DESO, LO Dijo LA SECRETARIA, QUE FUE LA QUE RESPONDIÓ LA LLAMADA, DICIENDO, QUE ELLOS PENSABAN QUE, AL MEJOR USTÉDES ME IBAN A PONER DE NUEVO AL ABOGADO JUSTIN REED Y ESO YO NO QUIERO NO LO VOY A ACEPTAR, PORQUE YO Y EL SEÑOR JUSTIN REED HA TUVINOS PROBLEMAS Y ESE SEÑOR ES UN CONFLICT, INTEREST Y YO NO LO QUIERO COMO DEFENSOR Y PARA MI NO ES JUSTO QUE ME PONGAN A UN ENEMIGO, COMO ABOGADO PARA QUE ME DEFENDA, SEÑOR JUEZ YO LE PIDO CON TODO EL RESPETO QUE USTÉD SE MERESE, QUE POR FAVOR USTÉD ME DEJE SABER SI EL SEÑOR MICHAEL WILLIAM VA A SER MI ABOGADO O NO VA A SER MI ABOGADO, PORQUE DESO AMI ME TIENE MUY PREOCUPADO, PORQUE EL SEÑOR MICHAEL WILLIAM NO A VENIDO A VERME ~~DE~~ A LO LARGO DE 10 MESES

y yo siento que hesta es una discriminacion
a si a mi persona, señor juez yo le pido
que por favor se le ponga mas atencion
a mi caso por el motivo de que yo
tengo, una familia alla afuera que me
hesta hesperando y yo no he podido ni
siquiera, tener, comunicacion con ellos
ni por carta, ni por telefono porque
me tienen prohibido ablar con ellos
a lo largo, de 15 meses y eso no es
justo yo siento que hestoy perdiendo a
mi familia, por el motivo de que no los
puedo mirar ni tampoco me puedo comunicar
con ellos

mi señoría yo le pido que por favor ustedes
me pongan un abogado, que ponga mas
interes, en mi caso y asi poder terminar
yo con heste problema, para yo poder
reunirme, con mi familia

mi señoría con todo mi respeto
muchas gracias

Atentamente Andres Marquez

hesta es el numero de mi caso

13CR1331

Subscribe and swear to before me in the County of Weld
this the 30th of October 2014 Julie Fagerberg

JULIE FAGERBERG

NOTARY PUBLIC

STATE OF COLORADO

NOTARY ID 20094020677

MY COMMISSION EXPIRES JULY 8, 2017

Inmate Name AUDREY S. MARQUEZ
Weld County Jail
2110 "G" Street
Greeley, CO 80631

LEGAL

QUAMMER Thomas James
GREELEY Combined Courts
901. 9th AVE PO. BOX 2038
GREELEY CO. 80632-
9503

District Court, Weld County, Colorado Court Address: 901 9th Avenue , Greeley, CO 80631	Filed 11/03/2014 03:57 PM
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. ANDRES MARQUEZ, Defendant	▲ COURT USE ONLY ▲
Justin Reed Deputy State Public Defender 822 7th Street, Ste. 300 Greeley, CO 80631 Phone Number: (970) 353-8224 FAX Number: (970) 352-8293 E-mail address: Justin.Reed@coloradodefenders.us Attorney Registration Number: 39247	Case Number: 13CR1331 Courtroom 12
MOTION TO WITHDRAW AND REQUEST FOR APPOINTMENT OF ALTERNATE DEFENSE COUNSEL	

The Office of the Public Defender moves to withdraw from the above case due to an irreconcilable conflict of interest. It is requested that Alternate Defense Counsel be appointed to represent the defendant.

DOUGLAS K. WILSON
COLORADO STATE PUBLIC DEFENDER



Justin Reed #39247
Deputy State Public Defender

CERTIFICATE OF SERVICE
I certify that on
11/03/2014, I
served the forgoing document by delivering
☒ mailing ☐ faxing ☐ same
to all opposing counsel. VH

ORDER

GRANTED on **11.3.14**, and further, IT IS ORDERED
that **Michael Williams** be appointed to represent
defendant.

BY THE COURT:



11/3/2014 4:39:45 PM

District COURT JUDGE

Appendix C

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 11, 2017 CASE NUMBER: 2017SC369
Certiorari to the Court of Appeals, 2015CA455 District Court, Weld County, 2013CR1331	
Petitioner: Andres Marquez, v. Respondent: The People of the State of Colorado.	Supreme Court Case No: 2017SC369
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 11, 2017.