IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

JEAN VALJEAN	*	
	*	
	*	
	*	CASE NO. S13G0198
	*	
APPELLANT,	*	
	*	Ct. of App. No. A12A1129
VS.	*	
	*	
	*	
STATE OF GEORGIA,	*	
	*	
APPELLEE.	*	

MERITS BRIEF OF JEAN VALJEAN

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STATEMENT OF THE CASE

Jean Valjean did not have an attorney on the day he became a convicted felon. (Slip op. at 2-3). This uncounseled conviction has become an essential predicate for a 12-year recidivist sentence for simple possession of methamphetamine. (Id.) But for this felony conviction, Mr. Valjean would be eligible for parole. Because of this uncounseled conviction, he is not. See O.C.G.A. § 17-10-7(c) (2006).[1]

A. The Opinion of Court of Appeals

The opinion of the Court of Appeals recites most of the essential facts, and the relevant part is reproduced below for the Court's convenience:

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[1] The applicable version stated, in relevant part:

> any person who, after having been convicted under the laws of this state for three felonies. . . commits a felony within this state other than a capital felony must, 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) (2006). Under present law, this statute no longer applies to those sentenced for drug possession. O.C.G.A. § 17-10-7(b.1) (2013).

In May 2006, Valjean was charged with one count of possession of methamphetamine. The state subsequently filed a notice of its intent to seek recidivist sentencing based on Valjean's prior felony convictions. On August 28, 2006, Valjean pled guilty to the charge of possession of methamphetamine. The trial court accepted the plea and imposed a 30-year sentence, ordering Valjean to serve 12 years in confinement and the remainder of the sentence on probation. The trial court also found that this was Valjean's fourth felony conviction and thus sentenced him pursuant to OCGA § 17-10-7 (c), which provides that any person who has been convicted of three prior felonies must, upon conviction for a fourth felony, "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."

In June 2011, Valjean filed a motion to correct a void sentence, arguing that his recidivist sentence under OCGA § 17-10-7 (c) was improper because one of his three prior felony convictions was based on an uncounseled guilty plea. The trial court denied the motion.[2] Valjean appeals.

Valjean acknowledges that he had the assistance of counsel for two prior felony convictions from 2004, one for possession of methamphetamine and another for possession of methamphetamine with intent to distribute. However, he claims that the state failed to present any evidence that he had an attorney for a 1999 felony conviction for possession of cocaine. Thus, he argues, that

[2] The trial court expressly found that it had jurisdiction to rule on Mr. Valjean's Motion to Correct Void Sentence. (Record at 154-55).

> uncounseled conviction cannot serve as a predicate offense for recidivist sentencing under OCGA § 17-10-7 (c). The argument is without merit.
>
> The record reveals that in 1997, with the assistance of counsel, Valjean pled guilty to possession of cocaine and was given first offender probation. In 1999, the trial court revoked that probation and imposed a four-year sentence with eight months to be served in jail. It is true that Valjean appeared at that 1999 revocation hearing without an attorney.

(Slip op. at 1-2). This Court's order granting of *certiorari* instructed the parties to brief whether the Appellant waived his right to counsel at the 1999 hearing and whether he may attack his current sentence via a motion to correct void sentence. Accordingly, the 1999 adjudication of guilt and the 2006 sentencing hearing are set forth in greater detail.

B. The 1999 Adjudication of Guilt

The Court of Appeals failed to illuminate a critical portion of the record, the transcript of Mr. Valjean's 1999 adjudication of guilt. The transcript of this summary proceeding runs three pages. (Supplemental Record at 2-4). After Valjean's probation officer styled the case, the following colloquy occurred:

BY THE COURT:
Q. MR. VALJEAN, DO YOU UNDERSTAND WHY WE'RE HERE THIS MORNING?

A. YES, MA'AM.

Q. AND DO YOU UNDERSTAND THAT YOU HAD [*sic*] THE RIGHT TO HIRE A LAWYER?

A. YES, MA'AM.

Q. DO YOU WANT TO GO FORWARD WITHOUT ONE?

A. YES, MA'AM.

(Id. at 2-3). This was the only discussion of Valjean's right to appointed counsel at the hearing. The trial court made no inquiry whatsoever about the appointment of counsel. (Id.). It never asked about Mr. Valjean's education or financial status, nor did it advise him of his clearly established right to request appointed counsel.[3] (Id.). Indeed, the trial court did not even ask Mr. Valjean if he could read. (Id.).

The Court of Appeals gave two reasons for affirming Mr. Valjean's sentence. First, it concluded that Mr. Valjean did not have the right to

[3] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973), requires that the trial court advise probation revocation defendants that they may request appointed counsel and creates standards for when counsel should be appointed.

an attorney during the 1999 adjudication of guilt. (Slip op. at 3). In the alternative, it summarily concluded that "The state further showed by the transcript of the 1999 revocation hearing that he waived representation by counsel at that hearing," (Id. at 4), though it never explained why it deemed the foregoing colloquy a valid waiver.

C. The 2006 Sentencing Hearing

The Court of Appeals also paid little attention to the details of the 2006 proceeding. Since the day of his sentencing, the Appellant has strenuously argued that he is not a § 17-10-7(c) recidivist.

The State gave notice that it was seeking a recidivist sentence on August 18, 2006. (R1 at 46). Its notice claimed, somewhat illogically, that it was seeking recidivist treatment under the mutually exclusive[4] provisions of § 17-10-7(a) "and" § 17-10-7(c). (Id. at 47). It notified the Appellant that it planned to introduce "All convictions found on the Defendant's Georgia Criminal History (GCIC)" and specifically recited four alleged predicate convictions. (Id. at 46-47). Though one of these

[4] Code § 17-10-7(a) permits parole while § 17-10-7(c) does not.

predicate convictions was for shoplifting, it did not specify whether this conviction was a misdemeanor or a felony. (Id. at 47).

The Defendant pled guilty to possession of methamphetamine on August 28, 2006. (R2 at 9). Before the Defendant entered this plea, defense counsel argued that § 17-10-7 "does not apply to convictions for possession of drugs."[5] (Id. at 3). At his sentencing, the Appellant sought the same ruling he seeks today:

[5] After citing Mann v. State, 273 Ga. 366, 368 (2001), defense counsel argued:

> In the instant case, like Mann, we are dealing with the interplay of two Georgia statutes, 16-13-30 and the statute for repeat criminals.
>
> The important thing here is that the portion of 16-13-30 which deals for convictions for ordinary possession expressly sets forth its own scheme for people who are convicted of multiple or – pardon me – who are convicted multiple times. It indicates that the sentencing range for the first conviction is a minimum of two years and a maximum of fifteen, and that the sentencing range for second and subsequent convictions is a minimum five years and the maximum thirty.
>
> The principles of statutory construction elucidated in Mann are directly implicated in the instant case. Here we have a general scheme for repeat offenders which is found in title 17 of the code and a much more specific scheme which is found in § 16-13-30. . .

(R2 at 4-5).

> notwithstanding the State's efforts to treat Valjean as a repeat criminal under the provision in title 17 of the code, the controlling range is set forth in § 16-13-30, and the court can sentence Mr. Valjean to any amount of time or probation within this range.

(Id. at 5). The Court responded to this argument by saying "let's do the plea first and then deal with sentencing later." (Id.). After accepting the Appellant's guilty plea and hearing further argument, the trial court ruled that § 17-10-7(c) applied. (Id. at 16).

The State attached certified copies of Valjean's previous sentencing orders to its recidivism notice, (R1 at 46-71), but forgot to move for their introduction during sentencing, (R2 at 1-26). Simply put, there was no proffer of dubious evidence that put Valjean on notice of the need to object. (Id.). Rather, the trial court informally reviewed the alleged predicate convictions before imposing sentence. (Id. at 22-23). During this process, the prosecutor admitted that the shoplifting conviction recited in the State's Recidivist Notice was a misdemeanor.[6] (Id. at 22-23). The trial court never referred to Nash v. State, 271 Ga.

[6] Only felony convictions could be used to support a recidivist sentence. See O.C.G.A. § 17-10-7(c) (2006).

281 (1999), nor did it inquire whether the predicate convictions were counseled during the sentencing proceedings. (Id. at 1-26).

The trial court sentenced the Appellant to 30 years with 12 years to be served in prison. (Id. at 26). Critically, it ruled that the Appellant was a recidivist under § 17-10-7(c) and therefore ineligible for parole. (Id.).

ENUMERATION OF ERROR

The trial court and the Court of Appeals erred by concluding that Mr. Valjean's uncounseled, 1999 adjudication of guilt could support a recidivist sentence of which it is an essential predicate. This Court has jurisdiction to review by writ of *certiorari* decisions of the Court of Appeals which are of great gravity or public importance. Ga. Const. Art. VI, § VI, Para. V.

This Court's order granting *certiorari* instructed the parties to brief three issues.[7] For the sake of clarity, Appellant will address them in the following order:

1. Did the Appellant have the right to appointed counsel at his 1999 adjudication of guilt?
2. If such a right existed, did the Appellant validly waive it?
3. If Appellant's 1999 conviction was defective for want of appointed counsel, does this render his current sentence void?

[7] Issue number two in this Court's order granting *certiorari* poses two distinct questions.

ARGUMENT AND CITATION OF AUTHORITY

I. The Appellant Had the Right to Appointed Counsel at His 1999 Adjudication of Guilt

The Supreme Court has long recognized the Sixth Amendment right to appointed counsel at deferred sentencing proceedings. Mempa v. Rhay, 389 U.S. 128, 137 (1967). Georgia adjudications of guilt are deferred sentencing proceedings at which this right applies. See O.C.G.A. § 42-8-60(a)(1) (authorizing trial courts sentencing first offenders to "defer further proceeding and place the defendant on probation as provided by law").

A. Georgia Law Gave Appellant the Right to Appointed Counsel at a 1999 Adjudication of Guilt

At the time of Appellant's 1999 adjudication of guilt, Georgia statutory law extended the right to appointed counsel, inter alia, to any "proceeding of a criminal nature" in superior court.[8] O.C.G.A.

[8] This statutory language reacted to and codified the Supreme Court's decision in Loper v. Beto, 405 U.S. 473, 481 (1972). In Loper, the high court wrote:

> [Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963)] announced a clear and simple constitutional rule: In the absence of waiver, a felony conviction is invalid if it was

§ 17-12-4(a) (1999). "Criminal proceedings" were defined as including "any proceedings [*sic*] in which a person is charged with a violation of a local ordinance or state law; and, because of the violation, the person may be confined in any jail or other penal institution in this state." Code of Georgia § 17-12-2(3) (1999).

> obtained in a court that denied the defendant the help of a lawyer.

Loper, 405 U.S. at 481. The Georgia General Assembly promptly heeded the call of Loper. Two years after Loper was decided, the General Assembly required superior courts to appoint counsel for indigent defendants in all "criminal proceedings." See Ga. L. 1974 p. 1100 § 1 (codified as Code of Georgia § 27-3203 (Harrison 1975)). Criminal proceedings were defined as including "any proceeding in which a person is charged with a violation of a local ordinance or State law and, because of such violation, such person may be incarcerated in any penal institution in the State." Ga. L. 1974 p. 1100 § 1(a); Code of Georgia § 27-3203 (Harrison 1975)).

During the 1981 recodification, the definition of "criminal proceedings" was relocated from the predecessor of § 17-12-4 to § 17-12-2. Code of Georgia §§ 17-12-2(3) and 17-12-4 (Harrison 1981). However, the recodified statute retained the requirement that superior courts appoint counsel for indigent defendants in all "criminal proceedings." Indeed, recodification expanded the definition of "criminal proceedings" to encompass "any proceedings in which a person is charged with a violation of a local ordinance or state law; and, because of the violation, the person may be confined in any jail or other penal institution in this state." Code of Georgia § 17-12-2(3) (Harrison 1981). After recodification, §§ 17-12-2 and 17-12-4 remained unchanged through the Appellant's 1999 adjudication of guilt.

The Georgia Indigent Defense Act of 2003 further expanded the right to appointed counsel, and made it clear that this right applies to any superior court case in which the defendant may receive a sentence of imprisonment or probation as well as "probation revocations in superior court." Ga. L. 2003 p. 191 § 1 (codified as O.C.G.A. § 17-12-23(a)).

To determine whether an adjudication of guilt is a "criminal proceeding," this Court must look to O.C.G.A. § 42-8-60, which authorizes First Offender treatment. Where a defendant who has not been convicted of a felony pleads guilty to such an offense, Georgia trial courts have discretion to offer First Offender treatment. O.C.G.A. § 42-8-60. "A first offender's guilty plea does not constitute a 'conviction' as that term is defined in the Criminal Code of Georgia." Davis v. State, 273 Ga. 14, 15 (2000). Under this procedure, the court "*Defer[s]* further proceeding and place[s] the defendant on probation as provided by law." O.C.G.A.§ 42-8-60(a)(1) (emphasis added). Should the defendant violate his probation, "court may enter an adjudication of guilt and proceed as otherwise provided by law." O.C.G.A. § 42-8-60(b).

The deferred sentencing and disposition feature of the First Offender Act is no idle technicality, it can cost a wayward first offender many years in prison. As this Court has explained:

> the General Assembly intended [that] first offender probation to have a different effect than probation in other cases. Any probationary sentence entered under this Act is preliminary only, and, if completed without violation, permits the offender complete rehabilitation without the stigma of a felony conviction. If, however, such

> offender does not take advantage of such opportunity for rehabilitation, his trial which has, in effect, been suspended is continued and an adjudication of guilt is made and a sentence entered.

State v. Wiley, 233 Ga. 316, 317-18 (1974). Accordingly, a first offender who is adjudicated guilty may "receive any sentence permitted by law for the offense he has been found guilty of committing." Id. at 318.

Adjudications of guilt fit well within the definition of "criminal proceedings" found in former § 17-12-2(3). This definition has two prongs. First, the defendant must be "charged with a violation of a local ordinance or state law." This prong is satisfied by the deferred sentencing feature of First Offender treatment. At the time of his 1999 adjudication of guilt, Jean Valjean had not been convicted of any felony. His possession of cocaine charge was still pending, and the trial court retained almost unfettered discretion over whether to convict him and where to sentence him within the statutory range. Wiley, 233 Ga. at 317-18.[9] The second prong of former § 17-12-2(3) is also

[9] Conversely, had Valjean received ordinary probation, this charge would have been resolved by his 1997 guilty plea. He would have already been convicted and would have received a determinate sentence. See O.C.G.A § 17-10-1(a) (1997). At the 1999 probation revocation, the trial court would have been limited to "order[ing] the execution of the sentence originally imposed or of any portion thereof." O.C.G.A. § 42-8-38(c).

satisfied because the Appellant could have been sentenced to either jail or prison when adjudicated guilty. See O.C.G.A. § 42-8-60(b) (1999) (directing court adjudicating a first offender guilty to "proceed as otherwise directed by law"); O.C.G.A. § 16-13-30(c) (1999) (permitting up to 15 years imprisonment for possession of cocaine).

The instant case illustrates the stark distinction between adjudications of guilt and ordinary probation revocations. Had the Appellant been an ordinary probationer, he could have received, at most, two years of imprisonment at his 1999 revocation. Because Mr. Valjean was a first offender, the stakes were many times greater. Not only could he be branded a felon, stripped of his right to vote, O.C.G.A. § 21-2-216(b), and made ineligible for many forms of employment, O.C.G.A. § 45-2-1(3), and federal public assistance, 21 U.S.C. § 862(b)(1), he was also facing the immediate and very real possibility of 13 years in prison.

The 1999 adjudication of guilt was criminal in nature and the Appellant had the right to appointed counsel under Georgia law. See

O.C.G.A. § 17-12-4 (1999) (requiring courts "provide for the representation of indigent persons in criminal proceedings").

B. Federal Constitutional Law Gives Indigent Defendants the Right to Appointed Counsel in Deferred Sentencing Proceedings

Five decades ago, the Supreme Court recognized that the Sixth Amendment includes the right to appointed counsel at a felony trial. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). "There was no occasion in Gideon to enumerate the various stages of a criminal proceeding at which counsel was required." Mempa, 389 U.S. at 134. However, Mempa explained that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where the substantial rights of a criminal accused may be affected." Id.

In Mempa, the Supreme Court analyzed "the extent of the right to counsel at the time of sentencing where the sentencing has been deferred subject to probation." Id. at 130. Mempa was placed on probation and given a deferred sentence for "joyriding" under a

Washington State procedure.[10] Id. While on probation, he was accused of burglary, and his probation was revoked after an uncounseled hearing. Id. at 131. Mempa later filed a habeas petition arguing the State's failure to appoint counsel at the later hearing violated the Sixth Amendment. The Supreme Court agreed, holding "a lawyer must be afforded at this proceeding whether it is labeled a revocation of probation or a deferred sentencing proceeding." Id. at 137. Mempa has never been overruled.

In Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973), the high court addressed the right to counsel in ordinary probation revocations. It held that "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." Id. However, Gagnon did not overrule Mempa. Rather, it expressly reiterated the holding of Mempa, explaining, "a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing." Gagnon, 411 U.S. at 781.

[10] Under this procedure, if a defendant violated his probation, the trial judge was required to impose the maximum sentence for the initial offense, but was also required to recommend how much time the defendant should serve before receiving parole. Mempa, 389 U.S. at 131 n.2.

Indeed, the high court leaned heavily on the fact that a probationer has already been convicted of a crime to justify the non-appointment of counsel. Id. at 789 ("we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime"). Thus, the Supreme Court found that the distinction between deferred sentencing hearings and probation revocations justified different rules regarding the appointment of counsel. See id.

The Supreme Court cited Mempa with approval only a year ago. See Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 1385 (2012) (citing Mempa for the proposition that "there exists a right to counsel during sentencing in both noncapital and capital cases"). Mempa has commanded the continued adherence of our sister states' highest courts.[11] It is an important early decision on the right to appointed counsel that remains good law.

[11] See South Carolina v. Hill, 630 S.E.2d 274, 278 (S.C. 2006) ("The Supreme Court held that due process required that the probationers have counsel at these proceedings because they amounted to 'deferred sentencing hearings.' In our view, Mempa and Gagnon are not in conflict"); Nelson v. Wyoming, 934 P.2d 1238, 1241 (Wyo. 1997) ("We find Mempa v. Rhay dispositive"); Rhode Island v. Chabot,

II. Appellant Did Not Validly Waive His Right to Appointed Counsel

The trial court's failure to advise Valjean of his right to appointed counsel precludes an intelligent waiver of that right.

"While the Constitution does not force a lawyer upon a defendant, it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent." Iowa v. Tovar, 541 U.S. 77, 87-88 (2004) (internal citations and punctuation omitted). In the context of a guilty plea, "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, *of his right to be counseled regarding his plea*, and of the range of allowable

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682 A.2d 1377, 1379 (R.I. 1996) ("This court has recognized a defendant's right to assistance of counsel in a revocation-of-probation proceeding where a sentence may be imposed"); Illinois v. Gazelle, 649 N.E.2d 381, 383 (Ill. 1995) ("a probationer who is sentenced after probation revocation is entitled to an attorney"); Idaho v. Young, 833 P.2d 911, 915 (Idaho 1992) ("counsel must be appointed in a probation revocation hearing when the sentence has not yet been passed"); In re: Wentworth, 564 P.2d 810, 813 (Wash. 1977) ("where the trial court defers or suspends the imposition of a sentence, Mempa is applicable"); Louk v. Haynes, 223 S.E.2d 780, 788 (W.Va. 1976) ("the suspension of a sentence coupled with probation is a 'critical stage' of the trial proceeding to which the right to counsel attaches"); Pennsylvania v. Crawford, 352 A.2d 52, 55 (Pa. 1976) ("the Gagnon Court expressly recognized the continued vitality of Mempa v. Rhay"); Louisiana v. White, 325 So.2d 584, 585 (La. 1976) (the "federal constitution mandates the right (unless waived) to the assistance of counsel at every critical stage of the proceedings, including an initial or deferred sentencing"); Allen v. Tennessee, 505 S.W.2d 715, 719 (Tenn. 1974) ("the revocation of a suspended sentence is a critical stage of a criminal prosecution").

punishments attendant upon the entry of a guilty plea." Id. (emphasis added).

The federal decisions create a strong presumption against waiver of the right to appointed counsel:

> a criminal defendant has both a constitutional right to representation by counsel and a constitutional right to self-representation. To accommodate both of these rights simultaneously, this court has held *that the right to counsel is preeminent over the right to self-representation* because the former attaches automatically and must be waived affirmatively to be lost, while the latter does not attach unless and until it [is] asserted. . .
>
> Waiver of the right to counsel and invocation of the correlative right to self-representation is no simple matter, however. Two requirements must be met. First, the defendant must 'clearly and unequivocally' assert his desire to represent himself thus waiving his right to counsel. Second, the court must determine that the defendant has made this election "knowingly and intelligently"'

Marshall v. Dugger, 925 F.2d 374, 376 (11th Cir. 1991); accord U.S. v. Garey, 483 F.3d 1159, 1162 (11th Cir. 2007). "Under the law of [the Eleventh] Circuit, it is much easier to waive ones right to self-representation than to waive other constitutional rights, such as the

right to counsel." Dorman v. Wainright, 798 F.2d 1358, 1367 (11th Cir. 1986).

Even defendants who seek to discharge their court-appointed attorney and obtain a new lawyer do not automatically forfeit their "preeminent right to counsel." See Garey, 483 F.3d at 1165.[12] In Dorman, a waiver was held invalid even after the accused went to great lengths to reject his appointed counsel:

> No reasonable person could deny that Dorman wanted to conduct his own defense. Not only did he cite *Faretta* in several written requests to the trial judge but he began civil proceedings against the Public Defender hoping to create a conflict of interest that would force the trial judge to discharge appointed counsel and allow Dorman to defend himself.

Dorman, 798 F.2d at 1366-67 (affirming grant of habeas petition because attempted waiver of the right to counsel was ineffective).

Failure to advise the defendant of his right to counsel during a plea hearing precludes the waiver of this right. Fullwood v. State, 290 Ga. 335, 335 (2012) (reversing denial of habeas petition because

[12] "[T]he trial court committed reversible error in allowing Garey to proceed pro se. In the absence of a clear and unequivocal request to proceed pro se, the proper course was for the district court to require Garey to proceed with his court-appointed counsel." Garey, 483 F.3d at 1165.

petitioner was not advised that he had the right to counsel when entering a plea); Jones v. Terry, 279 Ga. 623, 625 (2005) (same).

At the beginning of the 1999 adjudication of guilt, the following colloquy occurred:

> THE COURT: Mr. Valjean, do you know why we're here this morning?
>
> VALJEAN: Yes, ma'am.
>
> THE COURT: And do you understand that you had [*sic*] the right to hire a lawyer?
>
> VALJEAN: Yes ma'am.
>
> THE COURT: Do you want to go forward without one?
>
> VALJEAN: Yes, ma'am.

(Supplemental Record at 2-3). This pithy colloquy was materially defective. Rather than informing Mr. Valjean of his right to appointed counsel, the trial court pointedly used the past tense, telling him he "had the right to *hire* a lawyer." (Id. at 3) (emphasis added). Not only did the trial court imply that Valjean could only have a lawyer if he could afford to pay one, it also implied that this right no longer existed. The trial court made no inquiry into Valjean's education or intelligence.

It never asked about his financial status. Indeed, it did not even ascertain whether he could read.[13]

This colloquy is a far cry from the more thorough procedures the Eleventh Circuit scrutinized and rejected in Dorman and Marshall. Even if the Appellant's statement that he would go forward without a lawyer somehow counts as invocation of the right to self-representation,[14] the trial court ignored its duty to ensure that this purported invocation was "knowing and intelligent." See Marshall, 925 F.2d at 376 (reversing conviction because waiver of counsel was insufficient); Dorman, 798 at 1358 (same). Because the trial court failed to inform the Appellant of his right to appointed counsel, this right was not validly waived. Fullwood, 290 Ga. at 335 (reversing denial of habeas petition because petitioner was not advised that he had the right to appointed counsel when entering a plea); Jones, 279 Ga. at 625 (2005) (same).

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[13] Cf. Powell v. Alabama, 287 U.S. 45, 71 (1932) (recognizing 30 years before Gideon the right to appointed counsel in certain cases where the accused "is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like").

[14] The Appellant does not concede that he invoked his right to self-representation. Rather, he acquiesced to self-representation after the trial court's statements suggested he did not have the right to appointed counsel.

B. The Trial Court Failed to Inform the Appellant of his Right to Request Appointed Counsel

Even if there were no per se right to appointed counsel at felony adjudications of guilt, the trial court failed to comply with Gagnon, which required trial courts to advise probationers of their right to request counsel. Gagnon, 411 U.S. at 790. When such a request is made, the court has a duty to determine whether there is a "colorable" claim of innocence or mitigation. Id.[15]

In the instant case, the trial court never asked the Appellant whether he wished to request appointed counsel. (Supplemental Record at 2-4). Instead, it acted as if there were little possibility of appointing counsel for any probationer. Even if Mempa does not apply, and Valjean

[15] Georgia's appellate courts have scrupulously enforced these requirements. In Elkins v. State, 147 Ga. App. 837, 837 (1978), the trial court conducted a probation revocation without informing the probationer of his right to request appointed counsel. The Court of Appeals explained that a probationer cannot waive appointed counsel when he is not informed of his right to request it. Id. Accordingly, the Court of Appeals "treat[ed] the case as if a request for counsel had been made and refused," and reversed the revocation of the appellant's probation. Id. The Court of Appeals reiterated this principle in Parrish v. State, 164 Ga. App. 575, 576-77 (1982), again reversing a probation revocation where the probationer was not informed of his right to request counsel.

had only a qualified right to appointed counsel at the 1999 hearing, the trial court's procedures violated this right.

III. Appellant's Recidivist Sentence is Void and May be Corrected at Any Time

The trial court's conclusion that it had jurisdiction to correct the Appellant's sentence, (R1 at 154),[16] was correct.

At sentencing, the Appellant argued that § 17-10-7 did not apply to him because § 16-13-30 provides its own scheme for sentencing repeat drug offenders. (R2 at 3-5). Over his objection, the trial court insisted upon applying the recidivist statute. (Id. at 16). It proceeded to ignore Nash v. State, 271 Ga. 281, 285 (1999), this Court's seminal decision interpreting § 17-10-7, by failing to inquire into whether the Appellant's predicate convictions were counseled.[17] (Id. at 22-23). The Court of Appeals later chided the trial court for taking the defendant's plea before it ruled on the recidivism issue. See Valjean v. State, 287 Ga. App. 500, 500 (2007) ("the better practice would have been for the trial court to have resolved the issue of recidivist sentencing and to

[16] "As the Defendant has set forth a cognizable reason why his sentence may be void, this Court has jurisdiction to modify Defendant's sentence if it so finds." (R1 at 154).

[17] When Mr. Valjean was sentenced, the trial court had vast discretion over his fate, as it alone had the authority to probate the sentence he was about to receive. See Hill v. State, 272 Ga. App. 280, 282 (2005) ("[a]lthough subsection (c) prohibits parole, it does not dispense with the trial court's discretion to probate or suspend part of a sentence").

have informed Valjean of the court's decision before accepting his guilty plea").

The Appellant did not forfeit his right to the correct application of § 17-10-7 and Nash by arguing they did not apply at all. No such waiver occurred because the Appellant was not sentenced under a hyper-technical regime where a man supplicating for his liberty must state his objections in the alternative. See, e.g. Wade v. State, 231 Ga. 131, 133-34 (1973). As a citizen of Georgia, he was sentenced under a flexible system that promotes considered, in-chambers deliberation by allowing trial courts to revisit their rulings.

Georgia has long entrusted its judges with broad powers to reduce criminal sentences. See Gobles v. Hayes, 194 Ga. 297, 299-300 (1942) (holding trial court could probate a prison sentence throughout the term of court in which it was imposed). The power to revisit a criminal sentence for virtually any reason continues today. See O.C.G.A. § 17-10-1(f). This discretion is wholly inconsistent with the contemporaneous objection rule, whose core concern is avoiding the need for multiple trials by "afford[ing] the trial court an opportunity to take remedial action." See Allen v. State, 280 Ga. 678, 680 (2006). This

concern is only weakly implicated in sentencing proceedings, which do not require selecting a jury and tend towards brevity.[18]

A. The State Failed to Prove that Appellant is a § 17-10-7(c) Recidivist

When the State seeks a recidivist sentence, Nash v. State, 271 Ga. 281 (1995), allocates the burden of proof. Nash was based upon slightly different facts than the instant case as it involved a conviction resulting immediately from a guilty plea rather than from a subsequent adjudication of guilt. Nevertheless, Chief Justice Hunstein's opinion in Nash was broad and discursive. It "revised our previous scheme regarding the allocation of burdens of proof" in recidivist sentencing in light of Parke v. Raley, 506 U.S. 20 (1992). As Chief Justice Hunstein explained:

> [T]he burden is on the State to prove both the existence of the prior guilty pleas and *that the defendant was represented by counsel in all felony cases* and those misdemeanor proceedings where imprisonment resulted. Upon such a showing, the presumption of regularity is then applied and the burden shifts to the

[18] The transcript of Appellant's guilty plea and sentencing runs 26 pages. (R2). This hearing took approximately 30 minutes.

> defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea.

Nash, 271 Ga. at 285 (emphasis added); accord See Beck v. State, 283 Ga. 352, 353 (2008). This regime formalizes the venerable principle that felony convictions obtained in violation of the Sixth Amendment are void and may not be used to enhance future sentences. See Burgett v. Texas, 389 U.S. 109, 114-15 (1967) (vacating recidivist sentence because "the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void"); Wolcott v. State, 278 Ga. 664, 668 (2004) (uncounseled conviction cannot be used to enhance sentence).

The instant case is more factually complex than Nash because the Appellant's initial conviction stemmed from an uncounseled adjudication of guilt rather than a guilty plea. Nevertheless, because the Appellant had the same right to appointed counsel at his adjudication of guilt as at a guilty plea, see supra, the familiar Nash framework should apply.

Because the Appellant's 1999 adjudication of guilt was uncounseled, (R1 at 155-56), no "presumption of regularity" attached to this conviction, and the Appellant bears no burden of proving any further violation of his rights. See Beck, 283 Ga. at 353; Nash, 271 Ga. at 286. The State simply failed to prove that the Appellant is a recidivist within the meaning of former § 17-10-7(c) and Nash.

B. The Trial Court Imposed "A Punishment the Law Does Not Allow"

In sentencing the Appellant as a § 17-10-7(c) recidivist, the trial court "impose[d] a punishment the law does not allow." Cf. Rooney, 287 Ga. at 3.

Parole eligibility is a crucial element of any criminal sentence and is oftentimes more important than the nominal sentence a defendant receives. Georgia law gives The Board of Pardons and Paroles sweeping powers to grant or deny parole. See Ga. Const. Art. IV, § II, Para. II. Under Code § 42-9-46, non-recidivists are presumptively eligible for parole, the Parole Board need only give ten days notice of its action. Charron v. State Bd. of Pardons & Paroles, 253 Ga. 274, 277 (1984).

However, subsection(c) recidivists are ineligible for the Parole Board's clemency.[19]

This Court's decisions have recognized the towering importance of parole eligibility, repeatedly finding defense attorneys ineffective for failing to advise their clients about parole eligibility or providing inaccurate information on that subject.[20]

In the instant case, an ordinary sentence of 12 years is within the former statutory range for a first conviction for possession of methamphetamine. See O.C.G.A. § 16-13-30(e). However, a sentence of 12 years without the possibility of parole is not. See O.C.G.A.

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[19] See Ga. Const. Art. IV, § II, Para. II(b)(4) (stating in enumeration of Parole Board's powers that "Any general law previously enacted by the General Assembly providing for life without parole or for mandatory service of sentences without suspension, probation, or parole is hereby ratified and approved"); O.C.G.A. § 17-10-7(c) (2006) (a defendant who has been convicted of three felonies prior to the commission of a new felony offense must serve the statutory maximum sentence and "shall not be eligible for parole until the maximum sentence has been served"); see generally Moore v. Ray, 269 Ga. 457, 458 (1998) ("the legislature's power to prescribe punishment for crime includes the power to make ineligibility for parole part of the punishment").

[20] See Johnson v. State, 289 Ga. 532, 534-35 (2011) (trial counsel ineffective when he "failed to inform Johnson prior to his rejection of the State's plea offer that he was facing a mandatory sentence of life without parole if convicted at trial"); Johnson v. Roberts, 287 Ga. 112, 113 (2010) ("Johnson carried his burden of establishing that his defense counsel performed deficiently by affirmatively misleading Johnson regarding his parole eligibility"); Tillman v. Gee, 284 Ga. 416, 418 (2008) (same as Johnson v. Roberts); Smith v. Williams, 277 Ga. 778, 779 (2004) ("Smith's attorney was deficient in not discovering the 90% rule [for vehicular homicide] and consequently misinforming Smith about his parole eligibility").

§ 17-10-7(c) (requiring three prior felony convictions for a sentence to be non-parolable); Nash, 271 Ga. at 285 (predicate convictions must be counseled).

C. Sentences That the Law Does not Allow Are Void and May be Corrected at Any Time

Sentencing courts have broad discretion to reduce sentences for one year after they are imposed and 120 days after the conclusion of direct review. O.C.G.A. § 17-10-1(f).[21] After this period expires, "[a] sentencing court retains jurisdiction to correct a void sentence at any time."[22] Rooney v. State, 287 Ga. 1, 2-3 (2010) (reaching merits of claim

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[21] The Appellant does not claim that § 17-10-1(f) permits the modification of his sentence today, but rather that its existence is incompatible with the contemporary objection rule or plain error review and therefore inveighs against the waiver of his constitutional claims. Indeed, sentencing is so removed from plain error review that the expiration of the modification period specified in § 17-10-1(f) does not end a trial court's discretion to revise a sentence. So long as an offender is on probation, the trial court retains the discretion to shorten or modify such probation, even decades after sentence is imposed. See O.C.G.A. § 42-8-37(b) ("when satisfied that its action would be for the best interests of justice and the welfare of society, the trial court may discharge the probationer from further supervision"); accord O.C.G.A. § 17-10-1(a)(5). In 2018, when the Appellant finishes the custodial portion of his sentence, the trial court will have jurisdiction to shorten his probation. See O.C.G.A. § 42-8-37(b). None of this is consonant with plain error review.

[22] Georgia law has long permitted the correction of unlawful sentences at any time. See, e.g. Wade v. State, 231 Ga. 131, 133-34 (1973) (order imposing consecutive sentences when the jury imposed concurrent sentences was unlawful and could be corrected at any time); Heard v. Gill, 204 Ga. 261, 262 (1948) (sentence which exceeded that imposed by the jury was unlawful and could be corrected at any

that the trial court improperly imposed consecutive sentences even though this argument was raised years after sentencing); accord Williams v. State, 277 Ga. 686, 689 (1999).

"A sentence is void if the court imposes a punishment the law does not allow." Rooney, 287 Ga. at 3. All that is required to confer jurisdiction to review an otherwise final sentence is a "colorable" claim that the past sentence is void. Wiggins v. State, 288 Ga. 169, 171 (2010) (reviewing and then rejecting prisoner's claim that sex offender registration requirement was unconstitutional even though challenge occurred years after sentence was imposed). Wiggins teaches that motions to correct void sentences are not confined to situations where the length of a defendant's sentence is too long. They are also appropriate where, as here, the defendant claims that unconstitutional conditions are attached to his sentence. Just as this Court had jurisdiction to review whether the sex offender conditions imposed upon Wiggins were constitutional, it also has jurisdiction to review whether

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time); Morris v. Clark, 156 Ga. 489, 489 (1923) (sentence which violated "the Act of 1910" was voidable and could be corrected at any time); Moore v. Wheeler, 109 Ga. 62, 62 (1900) (sentence imposed under an unconstitutional statute was void and could be corrected at any time).

the trial Court's ruling that Mr. Valjean is a recidivist violated the Sixth Amendment.

When the State fails to prove three proper, predicate convictions, a recidivist sentence is void and may be corrected notwithstanding the defendant's failure to object at sentencing. Swan v. State, 276 Ga. App. 827, 830 (2005) (recidivist enhancement based upon first offender sentence was "a sentence that the law will not allow, and a challenge to such void sentence cannot be waived by the failure to object"); Arkwright v. State, 275 Ga. App. 375, 376-77 (2005) (recidivist sentence predicated upon prior conviction that was also used to prove possession of a firearm by a convicted felon was "not authorized by the law" and was vacated notwithstanding trial counsel's failure to object); Allen v. State, 268 Ga. App. 519, 534 (2004) (same holding as Arkwright); Headspeth v. State, 266 Ga. App. 414, 415 (2004) (recidivist punishment predicated on prior first offender sentence was "a sentence that the law will not allow, and a challenge to such void sentence cannot be waived by the failure to object"); see also Cook v. State, 305 Ga. App. 516, 517 (challenge to recidivist sentence not waived by trial counsel's failure to object).

D. Newly Enacted Law Forbids the Appellant's Sentence

The Appellant's sentence is "a punishment the law does not allow," cf. Rooney, 287 Ga. at 3, for another reason. The Georgia Criminal Justice Reform Act of 2012, Ga. L. 2012, p. 899, § 4-4, forbids recidivist sentences for simple possession of drugs.[23] See O.C.G.A. § 17-10-7(b.1) (2013). Valjean's sentence would plainly be illegal if it were imposed for 2013 conduct.

As explained supra, Georgia caselaw allows criminal defendants to challenge sentences the law does not allow at any time. The General Assembly has declared that citizens convicted of drug possession should not be treated as recidivists. There is no good reason for applying judicially crafted rules of waiver to uphold a sentence that offends the public policy of this state. This Court should extend Rooney to permit prisoners serving recidivist sentences that are illegal under present law to challenge their sentences. At a minimum, this Court should disfavor the waiver of constitutional challenges to sentences that violate the public policy of Georgia. Today, any felony probationer has the right to

[23] The Appellant does not contend that this legislation is fully retroactive. The Appellant argues only that the law should disfavor the waiver of a constitutional challenge to a sentence that current law does not permit.

counsel at any superior court revocation hearing and no citizen can be sentenced as a recidivist for simple drug possession. The Appellant should not twice be the victim of dead law.

Had the trial court heeded Nash and the Sixth Amendment, the Appellant could already have earned the chance to walk among his fellow man and prove that he is again worthy of his natural liberty. Its legal errors have denied him this chance. This Court need not decide whether Jean Valjean should return to the piney hills of North Georgia, but, consonant with Georgia law, it should let the Parole Board ponder this question.

WHEREFORE Petitioner prays for the same relief he sought at sentencing: a ruling that he is not a § 17-10-7(c) recidivist.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing APPELLATE BRIEF on the DISTRICT ATTORNEY via U.S. Mail with sufficient postage to the following recipient:

Hall County District Attorney's Office
Attn: Wanda Vance, Esq.
P.O. Box 1690
Gainesville, GA 30503

Done this _____ day of _____, 2013.

_____
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