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IN THE SUPREME COURT OF IOWA

ANNA SOTHMAN,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	S.CT. NO. 19-1837
	)	
STATE OF IOWA,	)	
	)	
Respondent-Appellee.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR MARION COUNTY
HONORABLE MICHAEL K. JACOBSEN, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 21, 2020

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CERTIFICATE OF SERVICE

On the 2nd day of November, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Anna Sothman, No. 6955912, Iowa Correctional Institution for Women, 420 Mill Street, SW, Mitchellville, IA 50169.

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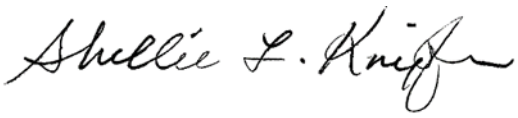

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The half-hazard plea bargain and changing advisory as to the consequences of the guilty plea resulted in a plea that was not knowing and voluntary. Counsel misinformed Sothman she would be immediately eligible for parole and she would be supported and considered within six months of entering the prison. While technically immediately eligible for parole, the reality is that the prison will not support and consider her for parole for at least seven years?

II. Whether trial counsel was ineffective for not asserting Sothman's right to have her plea proceedings in open court or having her waive that right?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This court should grant further review in this matter for the following reasons:

(1) The court of appeals has entered a decision in conflict with a decision of this court. An attorney is not free to misinform a defendant regarding the collateral consequences of her plea. Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983). Yet that is exactly what happened in the present case when Sothman was led to believe she would be considered for parole within six to 12 months.

(2) The court of appeals has decided an important question of law that has not been, but should be, settled by the supreme court. Guilty pleas are an integral part of our judicial system. Due process requires that when a defendant is given information relevant to the plea that information be correct. Particularly when it's factor in determining whether to plead guilty.

See Iowa R. App. P. 6.1103(b)(1), (2), (4).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the petitioner-appellant, Anna Sothman, from the denial of appellant's application for postconviction relief. The Honorable Michael K. Jacobsen presided in Marion County District Court.

ARGUMENT

I. The half-hazard plea bargain and changing advisory as to the consequences of the guilty plea resulted in a plea that was not knowing and voluntary. Counsel misinformed Sothman she would be immediately eligible for parole and she would be supported and considered within six months of entering the prison. While technically immediately eligible for parole, the reality is that the prison will not support and consider her for parole for at least seven years.

"Plea bargaining is an essential component of the administration of justice that is to be encouraged." U.S. v. Williams, 198 F.3d 988, 992 (7th Cir. 1999). Due process requires that a defendant enter a guilty plea voluntarily and intelligently. State v. Philo, 697 N.W.2d 481, 488 (Iowa 2005). "To enter a guilty plea voluntarily and intelligently means the defendant has a full understanding of the consequences of a

plea." Id. (quoting State v. Kress, 636 N.W.2d 12, 21 (Iowa 2001)). "[F]or the purposes of determining whether a guilty plea was involuntary due to confusion over the plea agreement, the important inquiry is what the defendant, not the defense attorney, understood.' Id. at 489.

Trial counsel misadvised Sothman that she would be immediately eligible for parole and be supported and considered for parole within six to 12 months of entering prison. (Ex.11(8/16/16 letter))(Ex.App.7-8). However, because a death was involved Sothman will not be supported by the prison for parole for several years. (PCR tr.p.58L.15-19; Ex.15(kiosk))(Ex.App.11). Further, trial counsel told Sothman the average time served for her type of sentence was 4.6 years. (Ex.11(8/16/16 letter))(Ex.App.7-8). But Sothman was told in prison a person in her position typically serves seven or more years and the Administrative Law Judge said it could be "as little as 30%" of her 50-year sentence, which would be 16.7 years. (PCR tr.p.53L.4-p.54L.7; Ex.24

(9/18/19 letter))(Ex.App.18-23). All of this misinformation led to an unknowing and involuntary guilty plea. (PCR tr.p.33 L.10-18).

A. Counsel breached his duty in misinforming Sothman she would be immediately eligible for parole and would be immediately considered and supported for parole within six to 12 months when the reality is she will not be supported or given true consideration for at least seven years, thereby, resulting in a plea that was not knowing and voluntary.

"While there is no constitutional requirement that a judge provide advice relating to parole…that does not leave a court, or an attorney, free to misinform a defendant regarding the collateral consequences of his plea." Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983). Misinformation as to the consequences of one's guilty plea is a breach of duty even regarding collateral matters such as parole. Id.

The plea agreement reached between the State and Sothman was in continuous disarray. Neither defense counsel nor the county attorney knew the sentencing laws relevant to the charge. As such the plea kept changing as the

county attorney's understanding of the consequences changed. (Ex.6(7/29/16 letter); Ex.7(8/2/16letter); Ex.10 (8/11/16letter); Ex.11(8/16/16letter))(Conf.App.20-24; Ex.App.5-8). In one letter she was told the county attorney would write a letter recommending her release *after one year*. (Ex.9(8/9/16 letter))(Ex.App.4). In the final letter before sentencing, Sothman was informed:

> Child Endangerment Resulting in Death of a Child is a Forcible Felony under Iowa Code Section 702.11. As a result, the State's position is that you are not eligible to have your sentence reconsidered, since the Judge cannot impose a suspended sentence on a Forcible Felony…. The County Attorney has indicated that if you agree not to file a Motion in Arrest of Judgment, seeking to have your guilty plea set aside in this case, *he will write a letter of recommendation in support of your parole after 6 months in prison*….
>
> The purpose of this letter is to confirm the discussions that I've had with the County Attorney in this regard, so that you are aware of what has been going on, and further to explain your legal rights in this case. As you know, you pled guilty to Child Endangerment Resulting in Death, which is punishable by a penalty of up to 50 years of incarceration in prison. We've also discussed that typical individuals, pursuant to a Legislative Services Study, *serve on average 4.6 years* on this

> type of sentence. There is no minimum sentence and *you are eligible for parole immediately upon your sentencing*.
>
> * * *
>
> Once you are sentenced, you will have the opportunity to seek parole while in prison and the State will file a letter on your behalf, recommending parole. As we've discussed, I believe you would be an excellent candidate for parole but you must understand that there are no guarantees on either a Motion to Reconsider or parole request. The ultimate decision is out of your hands.

(emphasis added)(Ex.11(8/16/16 letter)(Ex.App.7-8).

Sothman signed the bottom of the letter. (Id.p.2)(Ex.App.8).

Prior to sentencing the parties made a record in chambers where Sothman was questioned, under oath, as to her understanding of the final plea agreement.

> Q. And it's your understanding today that you will be sentenced, and the State is seeking a fifty-year – term of incarceration for – indeterminate term for up to fifty years and that there is no mandatory minimum and you would be eligible for parole. But the Court will not be granting that. That would have to go through the parole board? A. That's correct.

(Sent.tr.p.11 L.15-23).

At prison, however, Sothman was told that she would not be seriously considered for parole for several years because her case involved a death. (Ex.15(Kiosk Messages))(Ex.App.11). Yet, she had been told by trial counsel in the August 9th letter that the county attorney would write a letter of recommendation for her to be paroled after one year and a week later sent a letter saying the county attorney would support her parole after six months. (Ex.9(8/9/16 letter); Ex.11(8/16/16))(Ex.App.4, 7-8). Sothman obviously believed that release within six to 12 months was a realistic possibility given the county attorney's promised recommendations for early release within six to 12 months combined with repeatedly being told that she would be immediately eligible for parole, as is demonstrated by her March 13, 2017 letter to trial counsel. There she refers to the possibility of being paroled in August 2017, or sooner. (Ex.21(3/19/17 letter))(Ex.App.14-15).

Counsel's erroneous belief that Sothman could secure

such an early release is evident in his September 29th letter where he tells her that when she gets to Mitchellville she should begin exploring the parole process and contact him when she is ready to proceed. (Ex.14(9/29/16 letter))(Ex.App.9-10). Counsel also told Sothman's parents that the prison institution would support her parole after ten month. (Ex.20(Chaplin12/7/16 email)); PCR.Tr.p.59L.3-19)(Conf.App.26-27). The reality is that the prison institution and the parole board would not even consider a parole request for "several years." (Ex.15(KioskMessages))(Ex.App.11).

Trial counsel also told Sothman the average time served for this type of offense was 4.6 years.[1] But it appears she

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[1] Trial counsel relied upon publication for the Legislative Services Agency.

> This bill requires that anyone convicted of child endangerment resulting in the death of a child or minor serve a minimum of 70.0% of a 50-year Class B felony sentence. The average length of stay for a person convicted of child endangerment resulting in the death of a child or minor under current law is 55.4 months, or 4.6 years. This bill will make the minimum length of stay 420 months, or 35 years.

cannot even get seriously considered for parole in 4.6 years. As noted above, Sothman would be up for annual review, but the prison would not support her for parole for several years because a child died. (Ex.15(Kiosk Messages))(Ex.App.11). The administrative Law Judge said her time served could be "as little as 30%" of her sentence, which mean she would serve 16.7 years before being paroled. (Ex.24(9/18/19 letter))(Ex.App.18-23). That is well beyond an average of 4.6 years.

Sothman based her decision to plead guilty upon this misinformation that she would realistically be considered for parole after six to twelve months. The reality is much longer. The misinformation as to the true consideration for parole and the realistic time served for child endangerment convictions resulted in Sothman not making a knowing and voluntary

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Holly Lyons, Legislative Services Agency, Fiscal Note – House File 2064 (March 17, 2016), available at https://www.legis.iowa.gov/docs/publications/FN/770356.pdf.

plea.

B. Prejudice.

Sothman clearly testified at the postconviction hearing that she would not have pled guilty to child endangerment had she realized that she was not eligible for quick release due to the delays in support for her parole requests. (PCR tr.p.33L.10-18). But Sothman will not be supported for parole for several years. (PCR tr.p.59L.3-4). After her third annual review, she was told she could serve "as little time as 30%" of her 50 year sentence before being paroled. (Ex.24(9/18/19 letter))(Ex.App.18-23). That equates to 16.6 years and is well beyond the time stated by trial counsel.

II. Trial counsel was ineffective for not asserting Sothman's right to have her plea proceedings in open court or having her waive that right.

A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 686 (1984).

A. A criminal defendant has a constitutional right to a public guilty plea proceeding

The Court should expressly hold there is a constitutional right to a public guilty plea hearing. The right to a public trial applies to guilty plea proceedings. United States v. Haller, 837 F.2d 84, 86-87 (2nd Cir. 1988). "Plea hearings have typically been open to the public, and such access, as in the case of criminal trials, serves to allow public scrutiny of the conduct of courts and prosecutors." Id. at 86-87 (other citations omitted). The majority "of the criminal convictions in this country rest on pleas of guilty." Brady v. United States, 397 U.S. 742, 752, (1970).

B. Sothman did not voluntarily waive her right to a public plea proceeding so counsel should have objected.

A criminal defendant has a constitutional right to a public guilty plea proceeding. "Of uncertain origin, but nevertheless deeply rooted in the common law, the right to public trial has long been regarded as a fundamental right of the defendant in a criminal prosecution." State v. Lawrence, 167 N.W.2d 912, 913 (Iowa 1969). The United States and the

Iowa Constitution's guarantee the right to a public trial. U.S. Const. amend VI, XIV; Iowa Const. art. I, §10. "This provision reflects the tradition of our system of criminal justice that a trial is a "public event" and that "[w]hat transpires in the court room is public property."" Gannett Co. v. DePasquale, 443 U.S. 368, 411-412 (1979)(Blackman, J., dissenting in part)(quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

> More importantly, the requirement that a trial of a criminal case be public embodies our belief that secret judicial proceedings would be a menace to liberty. The public trial is rooted in the "principle that justice cannot survive behind walls of silence," and in the "traditional Anglo-American distrust for secret trials[]"

Gannett Co. v. DePasquale, 443 U.S. at 412, (Blackman, J., dissenting in part)(other citations omitted).

A "presumption of openness inheres in the very nature of a criminal trial under our system of justice." Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 573 (1980). An open trial assures that the proceedings are conducted fairly and discourages perjury, misconduct, and decisions based on

secret bias or partiality. Id. at 569. "[T]he concept of public trial includes the entire trial from the impaneling of the jury to the rendering of its verdict." Lawrence, 167 N.W.2d at 915. The right to a public trial extends to other aspects of criminal proceedings. See Waller v. Georgia, 467 U.S. 39, 43 (1984)(6th Amendment right to public trial applies to suppression hearings).

The right to a public trial applies to guilty plea proceedings. United States v. Haller, 837 F.2d 84, 86-87 (2nd Cir. 1988). "Plea hearings have typically been open to the public, and such access, as in the case of criminal trials, serves to allow public scrutiny of the conduct of courts and prosecutors." Id. 837 F.2d at 86-87 (other citations omitted). The majority "of the criminal convictions in this country rest on pleas of guilty." Brady v. United States, 397 U.S. 742, 752 (1970).

The United States Supreme Court "has made clear that the right to an open trial may give way in certain cases to

other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. at 45. Closure of trials should be rare. Id. The Waller Court provided criteria for courts to apply before excluding the public from any stage of a criminal trial:

> [T]he party seeking to close the hearing [1] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48 (numbers added).

The Iowa Supreme Court applied the Waller standard in Schultzen which addressed screening of three family members during the victim's testimony - a partial closure. State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994).

Trial counsel breached his duty to Sothman. Counsel should have determined whether Sothman was willing to waiver her right to a public proceeding. First, it is well-settled

that a criminal defendant may knowingly and voluntarily waive a constitutional right. See e.g. Boykin v. Alabama, 395 U.S. 238, 243 (1969)("the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty"). The United States Supreme Court stated in Johnson v. Zerbst:

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Sothman did not voluntarily waive a public guilty plea or any other type of public proceeding. The judge moved the parties into chambers. (Sent.tr.p.4L.5-13; PCRtr.p.88L.19-25). Neither the court nor trial counsel asked Sothman if she was willing to waive her right to a public proceeding. There

was no advisory of her right to a public proceeding. There was no objection by counsel. (PCR tr.p.89L.1-3). Counsel stated that he "viewed this proceeding in chambers as being confirmation for the judge that this decision had been made by Ms. Sothman knowingly, intelligently, and voluntarily, et cetera." (PCR tr.p.89L.8-11). In other words, the court was redoing the determination of a knowing and voluntary guilty plea since the terms and consequences of her plea had changed.

Sothman was denied her right to public guilty plea. Trial counsel should have informed her of her right and determined whether she want to proceed in the public courtroom. Counsel's failure to protect Sothman's right to a public guilty plea proceeding was a breach of an essential duty.

Trial counsel's failure to inform Sothman of her right and to ensure the trial court obtain a voluntary waiver resulted in the court's failure to follow the Waller test. A criminal

defendant does not have a right to a closed proceeding. Additionally, the right to an open courtroom is not limited to a criminal defendant. The public has a constitutional right to observe judicial proceedings. State v. Knox, 464 N.W.2d 445, 447 (Iowa 1990). The public has an interest in observing judicial proceedings which "assures that the proceedings are conducted fairly and discourages perjury, misconduct, and decisions based on secret bias or partiality." Richmond Newspaper, Inc. v. Virginia, 448 U.S. at 569. It further assures that guilty pleas are not obtained by coercion and are indeed voluntary. In re Washington Post Co., 807 F.2d 383, 389 (4th Cir. 1986).

The court's lack of colloquy with Sothman to obtain a valid voluntary waiver of her right to a public proceeding foreclosed any finding that there was an "overriding interest that was likely to be prejudiced" by conducting a public hearing. Waller, 467 U.S. at 48. The United States "Supreme Court has noted a special concern for

accommodating the attendance at trial of an accused's family members." In re Oliver, 333 U.S . 257, 271-272, 272 n.29 (1948). Trial counsel's reason for requesting a closed hearing is antithetical to the purposes of the right. Id. at 270 ("the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."). The United States Supreme Court quoted Jeremy Bentham:

> suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt so ever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'

In re Oliver, 333 U.S. at 270-271 (quoting 1 Bentham, Rationale of Judicial Evidence 524 (1827)).

While counsel may have truly believed that the plea was in Sothman's best interest, it is not his choice whether to proceed to trial or enter a plea. Iowa R. of Prof'l Conduct 32:1.2(a). It is counsel's duty to protect his client's interests no matter how misguided he may believe the choice to be. Iowa R. of Prof'l Conduct 32:1.3, cmt. 1. Whatever pressures put upon a defendant, whether by family or her attorney, a searching colloquy with the court should reveal a knowing and voluntary decision. Counsel failed to provide Sothman that process, thereby, breaching an essential duty.

Trial counsel's actions in prompting the violations of Sothman's right to a public guilty plea fell below the standard of reasonably competent attorneys. Cf. Krogmann v. State, 914 N.W.2d 293, 308 (Iowa 2018)(Counsel's failure to bring the matter to the attention of the district court fell below the standard of reasonably competent lawyers).

C. Prejudice.

Generally, in claims of ineffective-assistance-of-counsel in violation of the Sixth Amendment, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694. "This is because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."" Lado v. State, 804 N.W.2d 248, 251 (Iowa 2011) (quoting United States v. Cronic, 466 U.S. 648, 658 (1984)). "[A] person's right to counsel is only implicated when attorney error undermines the reliability and fairness of the criminal process." Lado, 804 N.W.2d at 251.

Defense counsel may also commit "structural errors." Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

1. Structural Error

The United States Supreme Court has concluded some constitutional errors are harmless and do not require the automatic reversal of the conviction. Chapman v. California, 386 U.S. 18, 22 (1967). However, the Court recognized that some errors should not be deemed harmless beyond a reasonable doubt. Id. at 23, n.8. This type of error is known as a structural error. Arizona v. Fulminante, 499 U.S. at 309–310. In Weaver, the Court explained:

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." For the same reason, a structural error "def[ies] analysis by harmless error standards."

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017)(other citations omitted).

In Waller, the Supreme Court agreed with the lower federal courts that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation

of the public-trial guarantee." Waller, 467 U.S. at 49-50. The Court noted that the general view was "that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." " Id. at 50 n.9 (citing Bennett v. Rundle, 419 F.2d 599, 608 (3rd Cir. 1969)).

In Weaver, the Court addressed whether prejudice is presumed when a violation of a public trial right is raised for the first time in an ineffective-assistance-of-counsel claim on collateral review. Petitioner's counsel did not object to the closure doing voir dire because he believed it was constitutional. Weaver, 137 S.Ct. at 1906. The Massachusetts Supreme Judicial Court denied Weaver a new trial finding he failed to prove counsel's conduct caused him prejudice. Id. at 1907.

The Weaver Court majority determined

> when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim,

> *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, [], to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Id. at 1911 (other citation omitted). The Court stated the reason for placing the burden on the petitioner derived both from the nature of the error and the difference between a public trial violation preserved and then raised on direct review and one raised as ineffective-assistance-of-counsel on collateral review. Id. at 1912. When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings the costs and uncertainties of a new trial are greater because more time has passed in most cases. The Court is more concerned about finality in a postconviction proceeding. Direct review often has given at least one opportunity for an appellate review of the trial proceedings. "These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct

review or raised instead in a claim alleging ineffective assistance of counsel." Id. at 1912.

However, in dissenting from the majority holding, Justice Breyer stated:

> The Court notes that *Strickland*' s "prejudice inquiry is not meant to be applied in a 'mechanical' fashion," [], and I agree. But, in my view, it follows from this principle that a defendant who shows that his attorney's constitutionally deficient performance produced a structural error should not face the additional—and often insurmountable—*Strickland* hurdle of demonstrating that the error changed the outcome of his proceeding.

Weaver, 137 S.Ct. at 1916 (Breyer, J., dissenting)(other citations omitted). Justice Breyer noted that the Court's "precedent does not try to parse which structural errors are truly egregious ones." "It simply views *all* structural errors as "intrinsically harmful" and holds that any structural error warrants "automatic reversal" on direct appeal "without regard to [its] effect on the outcome" of a trial." Id. (Breyer, J., dissenting). Justice Breyer continued:

> I do not see how we can read *Strickland* as requiring defendants to prove what this Court has held

> cannot be proved. If courts do not presume prejudice when counsel's deficient performance leads to a structural error, then defendants may well be unable to obtain relief for incompetence that deprived them "of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." This would be precisely the sort of "mechanical" application that *Strickland* tells us to avoid.

Id. at 1917 (Breyer, J., dissenting).

2. Sixth Amendment right to a public trial

The present case has a similar procedural posture to Weaver. Sothman's challenge is raised in a postconviction relief action. However, the process for bringing an ineffective-assistance-of-counsel claim regarding the courtroom closure in Iowa is different than in Massachusetts. Sothman's complaint must be raised through an ineffective-assistance-of-counsel claim and Iowa law permits appellants to raise such claims for the first time in postconviction relief. Iowa Code § 814.7 (2015). Massachusetts has a "well-established principle that the preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new

trial." Commonwealth v. Zinser, 847 N.E.2d 1095, 1098 (Mass. 2006). Additionally, Sothman filed her petition petition for postconviction relief two and a half years after her conviction. (Judgment Entry,9/28/16; PCR,4/16/19)(App.8-10,13-15). If Sothman had had a direct appeal, she could not have raised this issue because there were insufficient records for appeal. Essentially, the postconviction relief action was Sothman's first appeal-of-right for the issue. Therefore, Weaver does not control the prejudice requirement in the present case. But see Goods v. State, No. 18-1986, 2020 WL 1548483, at *4 (Iowa Ct. App. Apr. 1, 2020)(Weaver applied to a partially closed hearing where the issue raise via ineffective assistance of counsel)(further review application pending); State v. Levy, No. 18-0511, 2020 WL 567696 (Iowa Ct. App. Feb. 2, 2020)(declining to recognize structural err where raised via ineffective assistance).

The record demonstrates trial counsel's deficient performance resulted in a structural error. Sothman's guilty

pleas must be vacated and remanded for further proceedings. Waller, 467 U.S. at 49-50 ("the remedy should be appropriate to the violation."); State v. Levy, No. 18-0511, 2020 WL 567696 (same).

3. Article I, section 10 right to a public trial

Counsel's error in the present case resulted in Sothman being denied her right to a public guilty plea. The denial of Sothman's constitutional right to a public trial would ordinarily be considered a structural error not subject to a harmless error analysis. However, because defense counsel failed to protect the right guaranteed by Article I, section 10 which is also a violation of same constitutional provision, this court must decide whether she must show Strickland prejudice. This court should determine counsel's error resulted in structural error which is not amenable to either a harmless error or Strickland prejudice analysis.

The Iowa Supreme Court has recognized structural error occurs when: (1) counsel is completely denied, actually or

constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants. Lado, 804 N.W.2d at 252. However, the court noted Iowa's case law provides few applications of structural error. Id. at 252 n.1.

In Krogmann, an appeal from denial of postconviction relief, this court determined that a pretrial order freezing the petitioner's assets violated his right to be the master of his defense. 914 N.W.2d at 308. The court examined whether Krogmann was required to prove Strickland prejudice. The court believed prejudice should be presumed in a postconviction-relief proceeding for the type of structural error presented in the case. Id. at 324. The court, therefore, held under Article I, section 10, Krogmann was not required to show actual prejudice. Id. at 325.

It appears no other states, in consideration of its own state constitution, have declined to follow Weaver in a denial of a public trial where error was not preserved. The Weaver dissent is persuasive and should be adopted when considering the violation of Article I, section 10's guarantee to a public trial. Justice Breyer stated:

> … errors—such as the public-trial error at issue in this case—have been labeled "structural" because they have effects that "are simply too hard to measure." But how could any error whose effects are inherently indeterminate prove susceptible to actual-prejudice analysis under *Strickland*? Just as the "difficulty of assessing the effect" of such an error would turn harmless-error analysis into "a speculative inquiry into what might have occurred in an alternate universe," so too would it undermine a defendant's ability to make an actual-prejudice showing to establish an ineffective-assistance claim. The problem is evident with regard to public-trial violations. This Court has recognized that "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." As a result, "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.' " In order to establish actual prejudice from an attorney's failure to object to a public-trial violation, a defendant would face the nearly impossible burden of establishing how

> his trial might have gone differently had it been open to the public.

Weaver, 137 S.Ct. at 1917 (Breyer, J., dissenting)(other citations omitted).

To require Sothman to prove Strickland prejudice for the courtroom closure for her guilty plea would essentially provide no remedy for violating this important right. Additionally, it would not provide for any checks on the district court's actions in closing the courtroom to the public which allowed for secret proceedings.

Sothman's counsel's actions led to structural error. Sothman's guilty pleas must be vacated and remanded for further proceedings.

4. Strickland Prejudice

Alternatively, if this court determines Strickland prejudice must be show, the record demonstrates Sothman was prejudiced by her counsel's failure to protect her right to a public guilty plea. The Weaver Court held that a defendant must demonstrate either a reasonable probability of a different

outcome in his or her case or that the structural error was so serious as to render his or her trial fundamentally unfair. Weaver, 137 S.Ct. at 1911 (emphasis added).

The PCR court found that Sothman failed to prove that a public proceeding would have had a reasonably different outcome, that it was so serious as to render the proceeding fundamentally unfair, nor that Sothman would have insisted on going to trial. (Findings of Facts, Conclusions of Law and Order,13-14,10/22/19)(App.67-68).

Sothman testified she wanted her father to be present for the determination of her guilty plea being knowing and voluntary. (PCR p.26L.26L.2-7). His presence could have changed the outcome of the proceeding because he has greater insight and "able to pick up on things" that she misses. (PCRp.26 L.8-15). Sothman was in chambers without the support of her father, without her husband, and without her extended family. It was fundamentally unfair for defendant not to have a guilty plea without her family present. The right

to a public trial protects defendants against unjust convictions. Weaver, 137 S.Ct. at 1920. Or in this case, protects against entering a plea that is not knowing and voluntary. Had the court held a public guilty plea, Sothman would not have pled guilty.

D. Conclusion.

Trial counsel breached an essential duty to ensure Sothman her right to a public guilty plea. A finding of prejudice is not required under the circumstances of this case as the matter involved a structural error. However, should the court rule that Strickland is applicable, the defendant submits that there is a reasonable probability that the outcome would have been different had defendant's family been able to observe the proceedings or their absence was fundamentally unfair. This court should vacate Sothman's plea of guilty and remand to plead anew.

CONCLUSION

For the reasons stated above, the defendant respectfully requests this court to grant further review, to vacate her plea of guilty, and to remand for further proceedings.

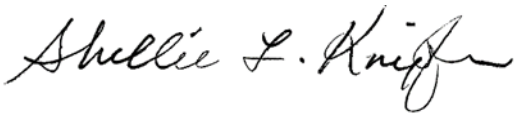
ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.28, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,584 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



_____ Dated: 11/02/20

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