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State v. Widmyer Appellant's Reply Brief Dckt. 39954

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. GARRY KEVIN WIDMYER Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 39954 District Court CR-2010-16971

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE ISSUES

I. Mr. Widmyer has established an abuse of sentencing discretion.

A. Idaho Code §19-2524 does limit the ability of a court to impose as a condition of misdemeanor probation a requirement that the offender submit to a psychosexual evaluation.

II. Mr. Widmyer has demonstrated that his sentence is illegal, was imposed in an illegal manner and was imposed for Mr. Widmyer asserting his Fifth Amendment rights.

A. The probation requiring Mr. Widmyer submit to a psychosexual evaluation and polygraph violates Mr. Widmyer's right against self-incrimination.

ARGUMENT

I. Mr. Widmyer has established an abuse of sentencing discretion.

A. Idaho Code §19-2524 does limit the ability of a court to impose as a condition of misdemeanor probation a requirement that the offender submit to a psychosexual evaluation.

The government claims that Idaho Code §19-2524 "prescribes the circumstances in which a trial court must order substance abuse or mental health evaluations in a felony case." (Respondent's brief, p.16.) However the text of I.C. §19-2524 is as follows,

> When a defendant has pled guilty to or been found guilty of a felony, or when a defendant who has been convicted of a felony has admitted to or been found to have committed a violation of a condition of probation, the court, prior to the sentencing hearing or the hearing on revocation of probation, may order the defendant to undergo a substance abuse assessment and/or a mental health examination. Idaho Code Ann. § 19-2524 (West).

The text of the statute shows the plain meaning is to allow for a court to order a psychosexual evaluation for certain felons if the court so wishes. The Webster Dictionary provides four definitions of the verb "may". The definitions which apply here include "liberty", "permission", and "possibility." (http://www.webster-dictionary.net/definition/may). An analysis of the law based on the plain meaning shows the court is not required to order a psychosexual evaluation but is given permission by the legislature to request such an evaluation for certain felons if the court desires.

A review of the legislative history confirms that the intent of this law was to allow a psychosexual evaluation to be ordered for certain felons. The Statement of Purpose for the legislation states, "The legislation allows a judge to order a substance abuse assessment and/or a

mental health examination for certain convicted felons and felony parole violators that appear before the court." (STATEMENT OF PURPOSE RS 16969C1).

In light of the text of the statute and the legislative history the court did not have the authority to order a psychosexual examination in this case; thereby acted outside the bounds of discretion and not consistently with the applicable legal standards and abused its discretion by ordering the psychosexual evaluation for Mr. Widmyer, a man convicted of a misdemeanor.

II. Mr. Widmyer has demonstrated that his sentence is illegal, was imposed in an illegal manner and was imposed for Mr. Widmyer asserting his Fifth Amendments Rights.

A. The probation condition requiring Mr. Widmyer submit to a psychosexual evaluation and polygraph violates Mr. Widmyer's right against self-incrimination.

The government claims that Mr. Widmyer's Fifth Amendment rights were not violated when he was ordered to either submit to a psychosexual evaluation or go straight to jail. The government cites *Minnesota v Murphy* and *State v Crowe* in support of its claim that a state may insist as a condition of probation on compelling answers to incriminating questions.

In *Murphy*, the defendant pled guilty to a sex-related charge and was placed on probation. He was then questioned by his probation officer about other sex crimes. The defendant sought to have his statements to the probation officer suppressed on the grounds that his Fifth Amendment rights were violated. In *Murphy* the Supreme Court held that the defendant may be required to answer questions as long as the answers are not used in criminal proceedings against him. *Minnesota v. Murphy,* 465 U.S. 420, 104 S.Ct. 1136, L.Ed.2d 409 (1984).

In *Crowe* the Idaho Supreme Court held that admission of the defendant's statements to his sex offender counselor that he had fondled his niece's buttocks, in violation of his probation

agreement, did not violate his Fifth Amendment right against self-incrimination. *State v. Crowe,* 131 Idaho 109, 952 P.2d 1245 (1998).

In 2002 the Supreme Court of the United States in *McKune v Lile*, 536 U.S. 24, 122 S. Ct. 2017, a plurality decision found that adverse consequences faced by a state prisoner for refusing to make admissions required for participation in sexual abuse treatment program were not so severe as to amount to compelled self-incrimination. However, Justice O'Connor in a concurring opinion stated that she agreed with the plurality that the defendant Lile's reduction in prison privileges and his transfer to a maximum security prison were not penalties sufficiently serious to compel testimony. *Id.* at 50. She did not however, agree with the plurality on how they distinguished cases with more serious penalties. She stated:

> I believe the proper theory should recognize that it is generally acceptable to impose the risk of punishment, however great, so long as the actual imposition of such punishment is accomplished through a fair criminal process. See, *e.g., McGautha v. California, supra,* at 213, 91 S.Ct. 1454 ("The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose" (citation and internal quotation marks omitted)). Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony. *McKune v. Lile,* 536 U.S. 24, 53, 122 S. Ct. 2017, 2035, 153 L. Ed. 2d 47 (2002).

The Ninth Circuit in 2005 relying on *McKune* found that a provision of a defendant's supervised release, requiring him to successfully complete sexual abuse treatment program, violated his right against self-incrimination. *U.S. v. Antelope*, 395 F, 3d 1128 (2005). In *Antelope* the defendant was convicted of possessing child pornography. He was sentenced to five years probation with the requirement that he attend Sexual Abuse Behavior Evaluation and Recovery (SABER) which would subject him to polygraphs and a full sexual history autobiography. He challenged this requirement asserting the Fifth Amendment. His probation

was revoked for failure to comply with the conditions of probation when he refused to take the required polygraph.

The Ninth Circuit in *Antelope* started its analysis with the Constitution – the Fifth Amendment guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Constitution amendment V. The court further stated, "This right remains available to Antelope despite his conviction. *See Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime ...."); *cf. McKune v. Lile,* 536 U.S. 24, 48-54, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (O'Connor, J., concurring in 4-1-4 decision) (applying the full-blown Fifth Amendment analysis to a prisoner's claim that the prison's requirement that he participate in a sex offender treatment program violated his constitutional right" *United States v. Antelope*, 395 F.3d 1128, 1133 (9th Cir. 2005).

To establish a Fifth Amendment claim the defendant must prove two things (1) that the testimony desired by the government carried the risk of incrimination and (2) that the penalty the defendant suffered amounted to compulsion. *Id.* at 1134.

The Fifth Amendment privilege is only properly invoked in the face of a real and appreciable danger of self-incrimination. *Id.* As a general rule Fifth Amendment rights are not trumped by countervailing government interests, such as criminal rehabilitation. *Id.* at 1135. In *Antelope* the court found the risk of incrimination was real and appreciable because part of the program he was required to attend included that he reveal his full sexual history which would be checked as to accuracy with a polygraph. The court said, "Based on the nature of this requirement and Antelope's steadfast refusal to comply, it seems only fair to infer that his sexual autobiography would, in fact, reveal past sex crimes. Such an inference would be consistent with

the belief of Roger Dowty, Antelope's SABER counselor, who suspects Antelope of having committed prior sex offenses. The treatment condition placed Antelope at a crossroads-comply and incriminate himself or invoke his right against self-incrimination and be sent to prison. We therefore conclude that Antelope's successful participation in SABER triggered a real danger of self-incrimination, not simply a remote or speculative threat." *Id.*

Similarly, Mr. Widmyer was ordered to participate in a psychosexual evaluation and polygraph test as a condition of his probation. He refused. The government's interest in rehabilitation does not trump Mr. Widmyer's Fifth Amendment right. In *Antelope*, the court surmised that a refusal to comply would infer past crimes which would be consistent with the counselor's opinion. Likewise, the judge in Mr. Widmyer's case said he heard the testimony and, despite no conviction in two previous trials of Mr. Widmyer the judge stated that Mr. Widmyer's behavior "had a huge impact on the other families." The judge suspected Mr. Widmyer of committing prior offenses just as the counselor in Antelope suspected that defendant. Thus, the condition that Mr. Widmyer submit to a psychosexual evaluation placed Mr. Widmyer at a crossroads similar to the defendant in the *Antelope* case – comply and potentially incriminate himself or invoke his right against self-incrimination and be sent to prison. Therefore, Mr. Widmyer's participation in a psychosexual evaluation places him in a real danger of self-incrimination, not simply a remote or speculative threat.

The second prong of the self-incrimination inquiry asks whether the government has sought to "impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Id.* Only "some penalties are so great as to 'compel' such testimony, while others do not rise to that level." *McKune,* 536 U.S. at 49, 122 S.Ct. 2017 (O'Connor, J., concurring). In *Antelope* the Ninth Circuit found that the Court's

Court's decision in *McKune* required them to conclude that the penalty was so great as to rise to the level of compulsion. *Antelope* at 1136. The court noted:

> "Justice O'Connor made clear in her *McKune* concurrence that she would not have found a penalty of "longer incarceration" such as that here to be constitutionally permissible. *Id.* at 52, 122 S.Ct. 2017. The strength of Justice O'Connor's opinion as precedent is reinforced because it seems certain that the four dissenters in *McKune,* who argued that a loss of discretionary privileges and a transfer to less desirable living quarters under similar circumstances were sufficiently compulsive to violate Lile's privilege against self-incrimination, would find a Fifth Amendment violation where the district court revoked Antelope's conditional liberty and sentenced him to an additional ten months in prison.[3] On the basis of *McKune,* we hold that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with SABER's disclosure requirements. *Antelope* at 1138.

In the same way Mr. Widmyer faced a penalty of longer incarceration if he refused to submit to the psychosexual evaluation. Therefore, on the basis of the Supreme Court's decision in *McKune* the Court is asked to find that Mr. Widmyer's penalty rises to the level of compulsion, and accordingly remand for resentencing.

DATED this 1 day of July, 2013.

OFFICE OF THE KOOTENAI COUNTY
PUBLIC DEFENDER

BY: _____
J. BRADFORD CHAPMAN
SENIOR STAFF ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this ___1___ day of July, 2013, served a true and correct copy of the attached APPELANT'S REPLY BRIEF via interoffice mail or as otherwise indicated upon the parties as follows:

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