5-24-2017

State v. LeVeque Appellant's Reply Brief Dckt. 43877

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43877**
	)	
v.	)	**KOOTENAI COUNTY NO.**
	)	**CR 2013-11265**
KILO J. LE VEQUE,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Kilo Le Veque contends the district court erred by relinquishing jurisdiction based solely on the fact that he did not waive his Fifth Amendment rights and participate in a full-disclosure polygraph during his period of retained jurisdiction, thereby making the same error it had in *State v. Van Komen*, 160 Idaho 534 (2016). He also contends the district court erred by failing to recognize that it had the authority to consider his challenge to the validity of the changes his probation officer made to the substantive terms of his supervision – specifically, the addition of sex-offender-specific terms after his sentences for burglary and possession of a controlled substance were imposed.

The State's responses on the first issue are contrary to established precedent, and its responses on the second are not responsive to the issue actually on appeal. Therefore, this Court should reject those arguments, vacate the order relinquishing jurisdiction and the order revoking probation, and remand this case to a new district court judge for a proper determination of whether, and on what terms, Mr. Le Veque should be placed on probation.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Le Veque's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

I. Whether the district court erred by relinquishing jurisdiction solely because Mr. Le Veque had not taken a full-disclosure polygraph during his period of retained jurisdiction.

II. Whether the district court abused its discretion by refusing to consider Mr. Le Veque's challenges to the propriety of the terms of probation at the revocation hearing.

ARGUMENT

I.

The District Court Erred By Relinquishing Jurisdiction Solely Because Mr. Le Veque Had Not Taken A Full-Disclosure Polygraph During His Period Of Retained Jurisdiction

A. Introduction

The State raises three main points in trying to argue that *Van Komen* should not control the result on this issue. None are persuasive as each is inconsistent with the relevant case law. First, the invocation requirement is not applicable to Mr. Le Veque's case because he was never asked any questions, and so, never in a position where he would have had to invoke them. And even if that requirement did apply, any failure to invoke is excused because the district court put him in the classic penalty situation at the disposition hearing. Second, even if double jeopardy protections might address some of the potential for self-incrimination, the fact that a single course of conduct can give rise to a number of different charges means there is still a reasonably apprehensible danger of self-incrimination to Mr. Le Veque's participation in the polygraph the district court wanted him to take. Third, as *Van Komen* itself demonstrates, this challenge need not be made to the district court for it to be properly before this Court on appeal.

B. The Invocation Requirement Is Not Applicable In Mr. Le Veque's Case

1. Since Mr. Le Veque Was Asked Any Questions During His Period Of Retained Jurisdiction, He Was Not Required To Expressly Invoke His Fifth Amendment Rights Because He Never Waived Those Rights In The First Place

The fundamental underpinning of the right to remain silent is that "[t]he Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' and that privilege is only fulfilled when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . .

for such silence.'" *Estelle v. Smith*, 451 U.S. 454, 458 (1981) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) and *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), respectively) (ellipsis from *Estelle*). As a result, the Idaho Supreme Court has recognized there is a distinction "between the Fifth Amendment privilege against self-incrimination and the framework set out under *Miranda v. Arizona*, 384 U.S. 436 . . . (1966), to protect those rights in certain circumstances. *Miranda* warnings are merely a method of protecting one's Fifth Amendment rights. That *Miranda* is not required does not mean the privilege against self-incrimination does not exist." *Estrada v. State*, 143 Idaho 558, 563 n.2 (2006).

Because no questions were put to him during the period of retained jurisdiction, Mr. Le Veque's case exists in the context of the pure privilege against self-incrimination. The invocation requirement is not applicable in that context; rather, it is part of the *Miranda* analysis. *See Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) ("A requirement of an unambiguous invocation *of Miranda rights* results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity.") (emphasis added) (internal quotation marks and alterations omitted). Thus, under *Miranda*, the interrogator is required to make a person's rights known to him prior to beginning a custodial interrogation and ask if he is willing to waive those rights and speak with the interrogator.[1] If the defendant agrees to do so, he must then invoke those rights if he wants to bring them back into effect. *See, e.g.*, *State v. Parker*, 157 Idaho 132, 147 (2014) (holding that testimony commenting on the defendant's pre-arrest silence, invoked after he had answered some questions, was improper regardless of whether *Miranda* warnings had been given at that point); *State v. Galvan*, 156

[1] The State bears the burden to prove a valid wavier of those rights. *State v. Padilla*, 101 Idaho 713, 719 (1980).

Idaho 379, 385 (Ct. App. 2014) (explaining that, after the defendant has waived his Fifth Amendment rights, mere silence "could mean a number of things other than invocation of this right," such as embarrassment, a desire to protect another, or a play for time to come up with a good answer to the question).

Nevertheless, the person has the inherent right to not waive those rights (*i.e.*, stand silent) in the first place. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) (holding that, before the defendant waives his rights, silence in response to *Miranda* warnings "may be nothing more than the arrestees exercise of these *Miranda* rights," and thus, cannot be used against the person who was not waiving his right to remain silent); *accord State v. Ellington*, 151 Idaho 53, 60 (2011); *cf. Florida v. Royer*, 460 U.S. 491, 498 (1983) (acknowledging that, during a consensual encounter, a person does not have to answer questions, but rather, may stand silent and simply ignore the officer's questions). In this case, the State has failed to carry its burden to show that Mr. Le Veque waived his right to remain silent in the first place. Mr. Le Veque did not answer any questions, as none were put to him, nor did he choose to speak on his own. Rather, he simply remained silent. Without a waiver of his right to remain silent, using his silence against him violates the Fifth Amendment. *See Doyle*, 426 U.S. at 617-18; *Van Komen*, 160 Idaho at 540.

The State's assertions based on the United States Supreme Court's decision in *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174 (2013), do not alter this conclusion. (*See* Resp. Br., p.7) First, *Salinas* is a fractured opinion, meaning there is no rule upon which a majority of justices concurring in the judgment agreed. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Only two other justices joined the lead opinion upon which the State relies, and would hold that the Fifth Amendment did not prevent the prosecution from commenting on the

defendant's post-arrest, post-*Miranda* silence after he had voluntarily answered other questions because the defendant did not expressly invoke his Fifth Amendment rights. *Salinas*, 133 S. Ct. at 2178-84 (Alito, J., with whom Roberts, C.J., and Kennedy, J., joined). Two justices concurred in the judgment, but they reached that conclusion by using a completely different rationale – that inferences from silence are not prohibited by the Fifth Amendment at all. *Id*. at 2184 (Thomas, J., with whom Scalia, J., joins, concurring in the judgment). The actual plurality of justices rejected both those lines of analysis and would hold there was a violation of the Fifth Amendment in that case. *Id*. at 2185-91 (Breyer, J., with whom Ginsburg, Sotomayor, and Kagan, Js., join, dissenting). As a result, there is no controlling principle of law emerging from *Salinas*. *See State v. Stanfield*, 158 Idaho 327, 336-37 (2015) (reaching a similar conclusion in regard to the fractured opinion in *Williams v. Illinois*, 567 U.S. 50 (2012)), *cert. denied*. As a result, the State's reliance on the lead opinion in *Salinas* as controlling on this question is misplaced; the prevailing rule is the one articulated in cases like *Doyle* and *Estelle*, discussed *supra*.

Furthermore, the State leaves an important aspect of the rule articulated in the *Salinas* lead opinion out of its analysis. The rule, according to the State, is merely that "'a witness does not [invoke the privilege against self-incrimination] by simply standing mute.'" (Resp. Br., p.7 (quoting *Salinas*, 133 S. Ct. at 2178 (opinion of Alito, J.)) (brackets from Resp. Br.).) However, the lead opinion actually determined: "Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination *in response to the officer's question*." *Salinas*, 133 S. Ct. at 2178 (opinion of Alito, J.) (emphasis added). Thus, according to the lead opinion in *Salinas*, where the defendant had waived his rights by making voluntary statements post-arrest and post-*Miranda* before he decided to stand silent in response to the next

question, he had to expressly invoke his rights to rely on their protection at that point. *See id.* at 2182; *Galvan*, 156 Idaho at 385. However, as there was no point during the relevant time when Mr. Le Veque was asked questions to which he might need to invoke his rights, the invocation requirement is inapplicable to his case under an accurate understanding of the rule used by the lead opinion in *Salinas*.

Therefore, under the pure privilege to remain silent recognized in *Estelle* and *Estrada*, Mr. Le Veque was not required to invoke the Fifth Amendment for the district court's use of his silence to violate his rights. It is, in fact, this aspect of that right to which *Van Komen* speaks: "[T]he court in its own words relinquished jurisdiction solely because Defendant refused *to waive* his Fifth Amendment rights and answer questions that could incriminate him and result in new felony charges. The courts' action violated Defendant's Fifth Amendment rights." *Van Komen*, 160 Idaho at 540 (emphasis added).

It is on this core point that Mr. Le Veque's case is nearly identical to *Van Komen*. (*Compare* Resp. Br., pp.5-6.) After the *Van Komen* had been issued, the same district court judge made the same decision the Idaho Supreme Court had just rejected by relinquishing jurisdiction over Mr. Le Veque because he had not waived his Fifth Amendment rights and taken a polygraph test. (Supp. Tr., p.8, L.24 - p.9, L.5.) As such, it failed to fulfill the fundamental promise of the Fifth Amendment to Mr. Le Veque – to be able to remain silent unless he voluntarily chose to speak without being punished for doing so. *Estelle*, 451 U.S. at 458. Therefore, as in *Van Komen*, that erroneous order should be vacated and the case remanded to a different judge.

2. Alternatively, Since Mr. Le Veque Was Subjected To The "Classic Penalty Scenario," Any Failure To Invoke His Rights, If He Were Required To Do So, Is Excused

If this Court determines Mr. Le Veque was required to invoke his rights despite not actually being asked any questions during the period of retained jurisdiction, (*see* Resp. Br., p.7 (noting that, after the district court announced its decision to relinquish jurisdiction, Mr. Le Veque "requested the opportunity to retake his failed polygraph examination," rather than expressly invoking his rights)), the State's argument, that no invocation means no protection, is still mistaken. That is because Mr. Le Veque was excused from the invocation requirement under the "classic penalty situation" exception to that requirement. *Murphy*, 465 U.S. at 435; *accord Salinas*, 133 S. Ct. at 2179-80 (opinion of Alito, J.)

One scenario in which the classic penalty situation arises is when "the state . . . sought to induce him to forgo the Fifth Amendment privileged by threating to impose economic or other sanctions capable of forcing the self-incrimination which the Amendment forbids."[2] *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). The extension of a term of incarceration is a sufficient penalty to trigger Fifth Amendment protections. *See McKune v. Lile*, 536 U.S. 24, 38 (2002) (plurality opinion) and *id*. at 52 (O'Connor, J., concurring); *see also Van Komen*, 160 Idaho at 540 (noting that, according to both Justice O'Connor and the four dissenting justices, "*any* penalty for asserting the right to remain silent that was likely to compel an incriminating statement violates the Fifth Amendment") (emphasis added). The classic penalty situation arises even in cases where "the attempt to override the witnesses' privilege proved unsuccessful" or "the state could not constitutionally make good on its prior threat." *Murphy*, 465 U.S. at 434.

[2] The courts are state actors, and so, when "the state" bears an obligation to enforce a defendant's rights, such as the one *Murphy* identifies, the courts are included within the term "the state." *See State v. Folk*, 151 Idaho 327, 334 (2011).

That is exactly what the district court did at the disposition hearing in this case – it sought to induce Mr. Le Veque to forgo his Fifth Amendment right and make disclosures during the period of retained jurisdiction by threatening him with relinquishment (*i.e.*, not releasing him from incarceration) at the end of that period if he did not make the desired disclosures: "Right now I don't feel that there is any hope for you to be successful on probation, and *that includes even after a retained*, so you need to come back here a year from now and convince me *that you've done something that would cause me to believe that you can be honest* and that you can be safely supervised on probation." (Tr., p.116, Ls.14-19 (emphasis added); *see also* R., p.312 (expressly stating his honesty should be shown via a full-disclosure polygraph).) Thus, from the disposition hearing forward, Mr. Le Veque was in the classic penalty situation. Therefore, any failure to invoke the Fifth Amendment privilege from that point through relinquishment is excused and any indication of wiliness to cede to that pressure would be impermissibly coerced. *Compare State v. Powell*, 161 Idaho 774, 2017 WL 587254 (Ct. App. Feb. 14, 2017) (holding that telling a potential parolee that his failure to answer questions about uncharged sexual conduct would result in the denial of parole was enough to create the classic penalty scenario), *not yet final*.[3]

As such, the district court's decision to relinquish jurisdiction based on the fact that he had not waived his Fifth Amendment rights and taken a polygraph during the period of retained jurisdiction was a violation of the Fifth Amendment.

[3] The WestLaw citation is provided for this Court's convenience because, although an Idaho Reporter citation has been assigned, the Idaho Supreme Court has recently granted the State's motion to allow an untimely petition for review in *Powell*, and a decision on that petition for review is currently pending.

C. There Was A Reasonably Apprehensible Danger Of Self-Incrimination In Making The Disclosures The District Court Desired Despite Double Jeopardy Protections To Trigger Fifth Amendment Protections

The State also contends the Fifth Amendment protections were not implicated in this case because it believes that, since Mr. Le Veque cannot be punished a second time for the same conduct addressed by the South Dakota conviction, there was no risk of self-incrimination in him making the disclosures the district court want him to make in the full-disclosure polygraph. (Resp. Br., pp.7-8.) Much as Mr. Le Veque would like that to be true, the reality is that "[t]hose familiar with criminal procedure know that when there is evidence indicating that a defendant committed more than one offense during a course of conduct, the prosecuting attorney can seek an indictment charging each of those crimes as separate counts." *State v. Flegel*, 151 Idaho 525, 530 (2011).

What this means in the Fifth Amendment context is that the protections will trigger if there is "a real danger of legal detriment arising from the disclosure," in that the declarant could reasonably apprehend the disclosure could, itself, be used in another prosecution or it could lead to other evidence which might be used in another prosecution. *State v. Jones*, 129 Idaho 471, 476 (Ct. App. 1996). However, a defendant does not need to prove his own guilt in regard to the potential legal detriment in order to show a real and appreciable danger of incrimination in order to benefit from the Fifth Amendment protections. *Idaho State Tax Comm'n v. Peterson*, 107 Idaho 260, 262 (1984).

A polygraph such as the one the district court ordered in this case can address much more subject matter than just the narrow conduct which resulted in the South Dakota charge. As a result, there are several aspects in which real threats of self-incrimination exist in regard to making disclosures during such a polygraph. *Cf. Estrada*, 143 Idaho at 563 (explaining that in a

psychosexual evaluation, which usually includes a polygraph similar to what the district court desired in this case, "[b]ecause of the nature of the information sought, a defendant is more likely to make incriminating statements during a psychosexual evaluation than during a routine presentence investigation"). For example, in *Van Komen*, the Idaho Supreme Court indicated that a full-disclosure polygraph about a prior sexual relationship presented a real danger of self-incrimination in that the person might admit conduct which could indicate the presence of various other potential sexually-based offenses. *Van Komen*, 160 Idaho at 538; *see also State v. Grinolds*, 121 Idaho 673, 675 (1992) (holding that multiple, sufficiently-distinct sexual acts against the same victim during the same overarching incident could result in two separate charges). That real danger of self-incrimination is not limited to other potential sexual offenses. *See, e.g.*, *State v. Moad*, 156 Idaho 654, 661 (Ct. App. 2014) (holding separate convictions for rape and battery, despite being part of the same overarching course of conduct and occurring close in time and "in a jail cell a few feet apart," did not violate the protections against double jeopardy).

Furthermore, there is the real danger that the prosecutor could decide the disclosures in the polygraph contradict the facts upon which the *nolo contendere* plea was based (*see* R., p.138), and so, file charges for perjury. *See* S.D. Codified Laws, § 23A-7-4(5) (providing that the district court can ask the defendant questions about the underlying offense while taking a *nolo contendere* plea and any answers given at that time are admissible in a perjury prosecution); *State v. Danielson*, 786 N.W.2d 354, 357-58 (S.D. 2010) (reversing an order dismissing a perjury charge that was based on double jeopardy grounds even though the question raised by the perjury charge was interrelated to the issue addressed by the other conviction). As such, there are real

and appreciable risks of self-incrimination in making such disclosures during a full-disclosure polygraph.

Besides, double jeopardy is an affirmative defense which the defendant must necessarily raise *after* new charges have been filed. *See* I.C.R. 12(b); *compare* S.D. Codified Laws, § 23A-8-3 (codifying South Dakota's version of Rule 12(b)). The same is true of other defenses, such as expiration of the statute of limitations. As such, the new prosecution based on the disclosure will have already begun before such defenses even comes into play. Thus, based on the disclosures in the Idaho polygraph, legal detriments – the stigma, trauma, and embarrassment, not to mention the potential for continued incarceration, that are attendant to a criminal prosecution, *see, e.g.,* Elizabeth S. Jahncke, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. Rev. 112, 117 (1991) – will have already begun to occur. Therefore, *the risk* of legal consequence based on the disclosure is present, and thus, *the danger* of self-incrimination, exists. As such, Mr. Le Veque's Fifth Amendment rights are properly in play despite the potential applicability of double jeopardy protections is some respects.

D. A Decision To Relinquish Jurisdiction Which Violates The Fifth Amendment Need Not Be Contemporaneously Objected-To In Order To Preserve That Challenge For An Immediately-Ensuing Direct Appeal

Normally, contemporaneous objections to sentencing decisions are not required in order to preserve challenges thereto for appeal because "the only point of sentencing proceedings is to contest—absent express agreement—the sentence to be imposed." *State v. Clontz*, 156 Idaho 787, 791 (Ct. App. 2014). Accordingly, in *Van Komen*, the Idaho Supreme Court considered this precise challenge to a decision to relinquish jurisdiction despite the fact that, while the defendant had invoked the Fifth Amendment rights, no objection had been made to the district court's

statements, either before or after the district court announced its decision to relinquish jurisdiction. *See generally Van Komen*, 160 Idaho 534.

There was no reason for Mr. Le Veque to have raised this issue prior to the district court's decision because both the rider staff and the prosecutor were recommending probation. (APSI, p.7; Supp. Tr., p.5, Ls.17-21.) Furthermore, once the district court made its decision, there was no mechanism by which he might ask it to reconsider that decision on the Fifth Amendment basis.[4] Although Idaho Criminal Rule 35 (*hereinafter*, Rule 35) allows for a defendant to request reconsideration of a decision to relinquish jurisdiction, "the purpose of the extended jurisdiction under Rule 35 is to allow the district court a limited time in which to determine whether a defendant's sentence is unduly severe." *State v. Knutsen*, 138 Idaho 918, 922-23 (Ct. App. 2003); *see also State v. Huffman*, 144 Idaho 201, 203 (2007) (holding that, in order to show a sentence is unduly severe, the defendant must present new information which had not yet been before the district court). The reason for that limited scope of reconsideration of a decision to relinquish jurisdiction is that Rule 35 "'is not designed to re-examine the facts underlying the case to determine whether a sentence is illegal; rather the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence is excessive.'" *State v. Wolfe*, 158 Idaho 55, 65 (2015) (quoting *State v. Clements*, 148 Idaho 82, 86 (2009)). As such, the Court of Appeals has held a challenge to the process by which the district court

[4] Besides, motions for reconsideration are generally not required to preserve issues for appeal. *See, e.g.*, *In re Guardianship of Doe*, 157 Idaho 750, 758 (2014) ("Once the court ruled, . . . Guardians did not have to file a motion for reconsideration in order to preserve the issue [a claim for attorney's fees following a *sua sponte* denial of fees entered by the court] for appeal.")

relinquished jurisdiction could not be brought under Rule 35; rather, "the defendant must file an appeal" to make such an argument.[5] *State v. Alvarado*, 132 Idaho 248, 249 (Ct. App. 1998).

The argument that the decision to relinquish jurisdiction violates the Fifth Amendment is not an allegation that the decision to relinquish jurisdiction was not authorized by law, nor is it a claim that the sentences being executed were excessive in light of new evidence. Therefore, it is not an argument which can properly be made in a Rule 35 motion. *See Wolfe*, 158 Idaho at 65; *Clements*, 148 Idaho at 86; *Huffman*, 144 Idaho at 203. Rather, to raise that claim, Mr. Le Veque had to, and did, file an appeal. *See Alvarado*, 132 Idaho at 249; *compare Van Komen*, 160 Idaho 534. Therefore, the State's fundamental error argument is meritless.[6]

Since the district court made the same erroneous decision it made in *Van Komen*, this Court should, as it did in *Van Komen*, vacate that order and remand the case for further proceedings before a new judge.

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[5] To the extent Rule 35(b) allows for a defendant to raise a challenge that the sentence was imposed in an illegal manner, that subsection is not applicable because the challenge Mr. Le Veque raised here is not to the imposition of the sentence. *See, e.g., State v. Steelsmith*, 153 Idaho 577, 581 (Ct. App. 2012) (reaffirming that a sentence is "imposed" when it is pronounced, not when the district court relinquishes jurisdiction). Therefore, Mr. Le Veque could not have raised this argument through Rule 35(b); this argument, as *Alvarado* explains, must be raised on appeal.

[6] Should this Court decide to change Idaho law in this regard, and so, now require this argument to be raised under fundamental error if it was not made below, Mr. Le Veque can satisfy the test for fundamental error. *See State v. Perry*, 150 Idaho 209, 226 (2010). The district court's error violated his Fifth Amendment rights. *Van Komen*, 160 Idaho at 540. As discussed in Section I(B)(1), *supra*, Mr. Le Veque did not waive that right, as no questions were asked of him, nor did he voluntarily speak during the relevant time. The violation is clear from the record, as the district court stated, much like in *Van Komen*, it was relinquishing jurisdiction solely because Mr. Le Veque had not waived his Fifth Amendment rights and taken a polygraph examination. (Supp. Tr., p.8, L.24 - p.9, L.5.) The violation affected the outcome, and thus, prejudiced him, since the district court refused to release him on probation as recommended by the prosecutor, defense counsel, and rider staff, and thus, effectively extended the term of his incarceration. *See McKune*, 536 U.S. at 38, 52; *Van Komen*, 160 Idaho at 540.

II.

The District Court Abused Its Discretion By Refusing To Consider Mr. Le Veque's Challenges To The Propriety Of The Terms Of Probation At The Revocation Hearing

The second issue on appeal is that, when the district court initially revoked Mr. Le Veque's probation, it failed on the second step of the analysis for reviewing discretionary decisions – whether the district court perceived the outer bounds of its discretion. *See State v. Hedger*, 115 Idaho 598, 600 (1989); *State v. Brashier*, 127 Idaho 730, 737 (Ct. App. 1995). However, the majority of the State's arguments on this issue speak only to the third step of that analysis – whether the district court reached its decision in an exercise of reason – as they focus on whether the district court's decision to revoke probation was justified by the facts. (*See* Resp. Br., pp.11-14.)

Those arguments are irrelevant to this appeal because, regardless of whether the district court's decision might have been a reasonable one, the district court's the exercise of discretion "must be exercised consistent with any legal standards applicable to the discretionary decision." *Brashier*, 127 Idaho at 737. As such, "[w]hen a trial court has unduly narrowed the scope of its discretion through a misapprehension of applicable law, the proper course of action is for the appellate court to remand the case so that the trial court can make the discretionary decision anew, in light of the proper legal standards governing that decision." *Id.*; *accord State v. Villavicencio*, 159 Idaho 430, 437 (Ct. App. 2015). Therefore, this Court should reject the State's irrelevant arguments as to the third step of the abuse of discretion analysis.

The only point the State makes which might be relevant to the second step of the abuse of discursion analysis is its assertion that "the district court recognized the limits on its authority to tell the Department of Correction how to classify and supervise probationers." (Resp. Br., p.13.) That, too, misses the point. The issue is not whether the district court recognized the shallow end

of its discretionary pool. The issue is whether the district court recognized how deep the pool went in the other direction – that it *could*, in fact, tell the probation officer how to supervise Mr. Le Veque. The State makes no argument to the contrary on that point. (*See generally* Resp. Br.)

That is unsurprising since the Court of Appeals has recently reaffirmed that the district court has the authority to review, and if appropriate, declare invalid, a probation officer's subsequent modifications to the substantive terms of supervision. *See State v. Santana*, ___ P.3d ___, 2017 WL 875974 (Ct. App. March 6, 2017). In fact, "*only* the sentencing court may set the substantive conditions of probation" because probation is an agreement between the defendant and the sentencing court. *Id*. at *3 (emphasis added). Therefore, even though the sentencing court had included a term "requiring Santana to cooperate with the rules and terms of the probation department," a subsequent modification to the substantive terms of probation by the probation officer (in that case, the addition of a Fourth Amendment waiver) "was not a valid condition of Santana's probation," since he did not have notice that the sentencing court would expect him to abide by that condition if he agreed to the terms of probation. *Id*. at **2-3. Since the waiver was not a valid term of probation, the Court of Appeals concluded the lower courts had not erred by concluding a warrantless search of the probationer's home could not be based on that invalid term of probation. *Id*. at *3 (ultimately reversing the order to suppress on other grounds).

Similarly, in Mr. Le Veque's case, the probation officer made changes to the substantive terms of probation after sentences for burglary and possession of a controlled substance had been imposed. She added a requirement that he complete sex offender treatment. (Exhibits, p.3.) She also added a requirement that he have a chaperone present if he would be around children.

(Exhibits, p.3.) She added limitations on where Mr. Le Veque could spend his time, on whether he could form romantic relationships, and whether he could own internet-capable devices. (Exhibits, p.3.) None of these substantive terms were part of the conditions of the agreement between Mr. Le Veque and the sentencing court, nor did he have notice that they might be. (*See generally* R., pp.121-25 (order for probation listing the terms of probation).) This is particularly problematic since the basis for requiring those terms of supervision (the existence and nature of the South Dakota conviction) was discussed in the materials submitted to the district court before sentencing (*see* PSI, p.8), and even with that information, the sentencing court did not require those terms be included in the terms of supervision. Therefore, contrary to the district court's belief, it absolutely had the authority to not only review the propriety of, but also to invalidate, those terms of supervision. (*See* App. Br., pp.12-14.) Moreover, if it found those terms to be invalid, then the alleged probation violations based on the invalid terms cannot stand. *See State v. Jones*, 123 Idaho 315, 318 (Ct. App. 1993).

Since the district court unduly narrowed the scope of its discretion based on its misunderstanding of the relevant law, its decision to relinquish jurisdiction constituted an abuse of its discretion. *Brashier*, 127 Idaho at 737. The proper remedy is to remand the case so that the district court can make that decision anew with appreciation of the whole scope of its discretion. *Id*.

CONCLUSION

Mr. Le Veque respectfully requests that this Court vacate the order relinquishing jurisdiction and the order revoking probation, and that it remand this case for further proceedings before a new judge.

DATED this 24th day of May, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of May, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KILO J LE VEQUE
INMATE #110075
ICIO
381 WEST HOSPITAL DRIVE
OROFINO ID 83544

JOHN T. MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

DOUGLAS A PIERCE
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas