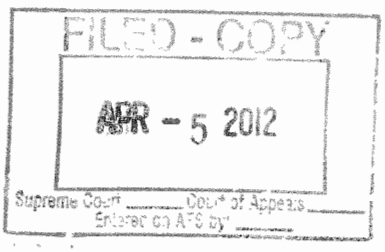
4-5-2012

State v. Herren Appellant's Reply Brief Dckt. 38783

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. NATHAN W. HERREN, Defendant/Appellant.	)	Supreme Court No. 38783



REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho,
In and For the County of Ada

HONORABLE KATHRYN A. STICKLEN
Presiding Judge

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A. This Court Must Vacate Mr. Herren's Judgment of Conviction Because the Magistrate Did Not Find – and There Was Insufficient Evidence to Prove – That Mr. Herren Had Contact in Violation of the No Contact Order

1. Section 18-920 requires contact within the ordinary meaning of the word in order to establish a criminal violation of the NCO

Pursuant to the plain language of I.C. § 18-920, a person only commits the offense set forth in that section by having *contact* in violation of the no contact order. I.C. § 18-920(2)(c). Here, the magistrate specifically found that Mr. Herren was guilty of violating I.C. § 18-920 because he knowingly remained within 100 feet of Mr. McDermott and did not find that Mr. Herren contacted Mr. McDermott within the ordinary definition of that term. Accordingly, Mr. Herren's conviction must be vacated.

The state responds that I.C. § 18-920 "does not, and is not intended to, define the meaning of the word 'contact' for purposes of determining whether a violation of a no contact order has occurred" and that the NCO must therefore "define the prohibited conduct and any violation of the terms is sufficient" to charge a criminal violation. Respondent's Brief, p. 9-10. The state's argument ignores standard rules of statutory construction and that it is the legislature's role to define substantive law prescribing norms for societal conduct.

Because the legislature did not define "contact" for purposes of I.C. § 18-920, courts must give the word its plain, usual, and ordinary meaning. *See e.g. State v. Doe*, 147 Idaho 326, 208 P.3d 730, 732 (2009) (courts gives the words of a statute their plain, usual, and ordinary meaning); *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001) (same); *Nelson By and Through Nelson v. City of Rupert*, 128 Idaho 199, 201, 911 P.2d 1111, 1113 (1996) (courts must

construe statutory terms according to their plain, obvious, and rational meanings); *Bunt v. City of Garden City*, 118 Idaho 427, 430, 797 P.2d 135, 138 (1990) (ordinary words will be given their ordinary meaning when construing a statute). The state fails to provide any authority to support its contrary argument that the absence of statutory definition instead signifies that the word "contact" means whatever conduct the presiding judge decides to prohibit in the NCO.

As set forth in Mr. Herren's Opening Brief, in common usage, "contacting" means physically touching or communicating. *See also Cooper v. Cooper*, 144 P.3d 451, 457-58 (Alaska 2006) (utilizing Webster's Third New International Dictionary definition of "contact" as setting forth common usage of the term in construing protective orders). In distinguishing *Cooper* and Alaska's statutory scheme, the state entirely misapprehends the significance of the case. Mr. Herren does not rely on that case because of any similarity between the statutes at issue and instead because the *Cooper* Court discussed that in "normal usage," the word "contact" means "physical touching or communicating." Because I.C. § 18-920 does not specially define "contact," the word must be given this ordinary and plain meaning. The *Cooper* Court's discussion of that meaning is persuasive.

Without reference to the statute itself, the state urges that Section 18-920 "permits prosecution based on a violation of a no contact order, and it is the order itself that defines what conduct, or contact, is prohibited." Respondent's Brief, p. 8. Initially, the state's interpretation is contrary to the statute's plain language which indicates the statute is violated when "the person charged or convicted *has had contact* with the stated person in violation of an order." (emphasis added). Had the legislature wished to simply criminalize any violation of the NCO regardless of whether it involved contact it would have been simple enough to instead indicate a person

committed the offense by violating the NCO's terms and omitted the phrase "had contact."

Moreover, the state's position also ignores that it is the legislature's role to define substantive law such as crimes and not the courts. *See In re SRBA Case No. 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995). Under the state's proffered interpretation, judges or judicial rule committees are left to decide what might constitute a subsequent criminal violation of a NCO depending on the conduct that is prohibited by the NCO. The legislature obviously curbed this authority by clarifying that a criminal violation of a NCO only occurs when a person "has contact" in violation of the order.

A person commits a criminal violation of a NCO by: (1) having "contact" with a protected person and (2) that contact was violation of the NCO. Because the word "contact" is not defined in the statute, it must be given its ordinary meaning. The ordinary meaning of the word "contact" is conduct that involves touching or communication. Knowingly remaining within 100 feet of a protected person does not necessarily involve contact within the ordinary meaning of the word. Accordingly, to sustain a criminal conviction under I.C. § 18-920, the state was obligated to prove that Mr. Herren had contact in violation of the NCO and could not rely solely on a violation of the distance prohibition.

2. The magistrate did not find that Mr. Herren contacted Mr. McDermott and based its finding of guilt entirely on its conclusion that Mr. Herren remained within 100 feet of Mr. McDermott

The magistrate neither found, nor was there substantial evidence to demonstrate, that Mr. Herren contacted Mr. McDermott. Rather, the magistrate found that Mr. Herren violated the NCO by knowingly remaining within 100 feet of Mr. McDermott. Although arguably a violation of the NCO's terms, knowingly remaining within 100 feet of another is not a violation of the

NCO by having contact and therefore is not a criminal violation of I.C. § 18-920.

The state's brief is devoted entirely to its flawed interpretation of Section 18-920 and it has not argued that the magistrate found that Mr. Herren had contact with Mr. McDermott within the ordinary meaning of the word. Therefore, no reply is warranted.

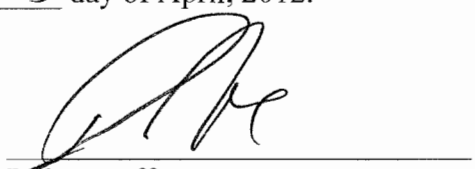
B. Because the Conviction in the 2009 Case is Unlawful, the Magistrate's Order Finding That Mr. Herren Violated His Probation and Revoking His Withheld Judgment Must Be Vacated

The magistrate's finding that Mr. Herren violated his probation was based solely on his admission to being found guilty of violating I.C. § 18-920. As set forth above and in Mr. Herren's Opening Brief, that finding of guilt and the resulting conviction must be vacated. It therefore follows that the magistrate's order finding that Mr. Herren violated his probation, therefore revoking its order withholding judgment must similarly be vacated.

III. CONCLUSION

For the reasons set forth above and in Mr. Herren's Opening Brief, Mr. Herren respectfully asks that this Court vacate his judgment of conviction and sentence in the 2009 case and the magistrate's order finding him in violation of his probation and revoking his withheld judgment in the 2007 case.

Respectfully submitted this 5 day of April, 2012.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of April, 2012, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

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