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# State v. Whitecotton Appellant's Brief Dckt. 45755

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Idaho Supreme Court
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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| **STATE OF IDAHO,** | ) | |
| | ) | **NO. 45755** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **POWER COUNTY NO. CR 2016-772** |
| **v.** | ) | |
| | ) | |
| **DAVID J. WHITECOTTON,** | ) | **APPELLANT'S BRIEF** |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

**BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF POWER**

**HONORABLE ROBERT C. NAFTZ**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

David Whitecotton contends the district court erred when it denied his motion to suppress. He asserts that the district court failed to conduct the required analysis, as it did not evaluate whether the known informant's report actually objectively demonstrated that Mr. Whitecotton was, or was about to, engage in criminal conduct. Moreover, under the proper standards, the facts do not actually demonstrate that Mr. Whitecotton was, or was about to be, engaged in criminal conduct, and so, the seizure did not serve the historical rationales of the investigative-detention exception to the warrant requirement. Therefore, this Court should reverse the order denying his motion to suppress.

Mr. Whitecotton also asserts that the district court abused its discretion when it imposed his sentence because it improperly considered the fact that he had successfully exercised his right to withdraw his plea and his right to a jury trial in its weighing of the sentencing factors. That is evidenced by the district court's explanation of the sentence when it ruled on his subsequent motion for leniency: "Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury." (Supp. Tr., p.16, Ls.3-5.)[1] As such, this Court should at least remand this case for either a new sentencing hearing or a new hearing on the motion for leniency.

[1] All the transcripts except the transcript of the hearing on the motion for leniency are contained in the electronic file "!-Transcripts combined." Citations to the combined transcripts will be identified as "Tr." and citations to the motion-for-leniency transcript will be identified as "Supp. Tr." Additionally, "!-Transcripts combined" provides the transcript pages four-to-a-page, and since some of those transcripts are not consecutively numbered, citations to "Tr." will be in the following format: (Tr., [electronic file page number] : [actual transcript page number], [transcript line number].)

Statement of the Facts and Course of Proceedings

Robecha Brillhart was at a pharmacy in American Falls one afternoon when she saw another customer "asking about maps." (R., p.86 (Ms. Brillhart's written statement).) She went outside and began talking with her brother and some friends. (R., p.86.) A few minutes later, the other customer also came outside. (R., p.86.) He approached the group, introduced himself, and shook her brother's hand. (R., p.86.) As they were talking, Ms. Brillhart noticed that the man was wearing a holstered gun on his side, and that "he kept turning that side toward us." (R., p.86.) She described his actions as "odd," and so, she decided to report him as a suspicious person. (R., p.86.)

Officer Rodriguez, who responded to that report, also remembered being told the man was in a black pickup with Oregon license plates. (R., p.81 (the officer's affidavit in support of probable cause).) In his affidavit, the officer characterized the reported conduct as "randomly approaching" the group and "showing off his sidearm." (R., p.81.) When he pulled into the pharmacy parking lot, the officer saw a truck matching the description he had, and he walked up to the open driver's window. (R., p.81; Exhibit C, ~0:40.) He asked the driver what was going on, the driver replied that nothing was going on, and he told the officer that he was leaving. (Exhibit C, ~0:45.) While the officer tried to continue the conversation, the driver started the truck's ignition. (Exhibit C, ~0:45.) Officer Rodriguez instructed him to shut the truck off and talk with him. (Exhibit C, ~0:58.) The driver complied. (Exhibit C, ~1:00.)

The officer then asked the driver what kind of gun he had.[2] (Exhibit C, ~1:07.) The officer also asked for the driver's identification, and the driver ultimately provided a veteran's

[2] At various points, the video shows the driver wearing a pistol in a shoulder holster. (*See generally* Exhibit C.)

identification card, which identified him as David Whitecotton. (R., p.81; Exhibit C, ~3:55.) Mr. Whitecotton verbally provided his date of birth. (Exhibit C, ~4:45.) The officer ran that information through dispatch and learned that Mr. Whitecotton's driver's license was revoked out of Oregon because of a felony DUI conviction. (R., p.81.) The State ultimately charged Mr. Whitecotton with unlawful possession of a firearm by a felon. (R., pp.50-51.)

Mr. Whitecotton filed a motion to suppress, arguing that the officer did not have probable cause to seize him. (R., p.65.) The State responded that Ms. Brillhart's report of a suspicious person, corroborated by what the officer saw when he arrived on scene, established reasonable suspicion to justify an investigative detention, either to investigate either a potential theft-type offense (such as theft, robbery, or burglary), or to investigate a potential exhibition of, or assault with, a firearm. (R., pp.72-74.) The State provided Officer Rodriguez's affidavit in support of probable cause, Ms. Brillhart's written statement, and the video from the officer's body camera as exhibits. (R., pp.76-87.) The parties waived a hearing on the motion, stipulating to submit the matter on the briefs and attached exhibits instead. (R., p.91.)

The district court found that the first few seconds of the encounter were a consensual encounter, but that the encounter quickly evolved into a seizure, since a reasonable person would not have felt free to leave once the officer instructed Mr. Whitecotton to turn off the truck and answer his questions. (R., pp.94-95.) The district court held that seizure was justified, but it did not identify what imminent criminal conduct was demonstrated by Ms. Brillhart's report. (*See generally* R., pp.96-98.) Rather, it simply concluded that, because Ms. Brillhart was a known informant, the officer could rely on her report to conduct an investigative detention. (R., pp.96-98.) Ultimately, it denied Mr. Whitecotton's motion to suppress. (R., p.98.)

Mr. Whitecotton subsequently entered a guilty plea to the charged offense. (Tr., p.9 : p.23, Ls.5-13.) In exchange, the State agreed to dismiss misdemeanor charges in other cases pending against Mr. Whitecotton. (Tr., p.8 : p.19, Ls.2-14.) The plea agreement did not include any sentencing recommendations. (Tr., p.8 : p.19, Ls.19-23.) Additionally, although Mr. Whitecotton had initially indicated in the plea questionnaire that his plea was conditioned on the ability to challenge "all" the pre-plea rulings (*see* R., p.109), defense counsel clarified that it was actually an unconditional plea. (Tr., pp.9-10 : p.26, L.19 - p.27, L.9 (defense counsel explaining the plea would have allowed Mr. Whitecotton to only appeal issues relating to the sentence imposed).)

At the ensuing sentencing hearing, but before the district court pronounced sentence, Mr. Whitecotton moved to withdraw his guilty plea for two reasons: (1) he alleged he had not been on his proper medications at the time of the change of plea hearing[3]; and (2) he asserted he did not want to forfeit the opportunity to appeal the denial of his motion to suppress by pleading guilty. (Tr., p.68 : p.3, L.11 - p.4, L.5.) He also asserted that, upon withdrawing his plea, he wanted to exercise his right to a jury trial. (Tr., p.68 : p.4, Ls.11-12.) The State admitted it would not be prejudiced if the district court granted that motion. (Tr., pp.68-69 : p.4, L.13 - p.5, L.3.) The district court granted his motion and the matter proceeded to trial. (Tr., p.70 : p.9, Ls.2-3.)

A jury ultimately found Mr. Whitecotton guilty as charged. (R., p.171.) The district court sentenced Mr. Whitecotton to a unified term of five years, with two years fixed. (Tr., p.62

[3] As defense counsel acknowledged (Tr., p.68 : p.3, Ls.17-21), during the plea colloquy, the district court had inquired about whether Mr. Whitecotton had taken his medications within the previous twenty-four hours, and Mr. Whitecotton had responded that he had. (Tr., p.8 : p.21, L.8 - p.22, L.9.)

: p.226, Ls.20-23.) Mr. Whitecotton filed a notice of appeal timely from the judgment of conviction. (R., pp.177, 180.)

Thereafter, Mr. Whitecotton filed a timely, *pro se* motion under I.C.R. 35, in which, *inter alia*, he requested leniency. (R., pp.208-12.) The district court granted Mr. Whitecotton's motion for a hearing on his motion for leniency. (R., p.215.) The district court ruled on the motion during that hearing:

> Looking at whether or not further leniency with regard to the fixed sentence, he had previously pled guilty, and we were set for sentencing, and then just determined in his mind that he was not going to appear for sentencing, and so then we had to have him arrested, and then he withdrew his plea, and he had his opportunity to go to trial.
>
> Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury. I think the two-year fixed sentence I think is sufficient in order to accomplish the goals of punishment and protection of society. The three-year indeterminate sentence, I would hope that he would be able to parole and be a productive citizen here in either Idaho or Oregon, but I think that would be the idea behind the rehabilitation for him.
>
> So considering those goals of sentencing, I think the two-year fixed, three years indeterminate sentence was appropriate under the circumstances. And so based on that, the Court is going to deny the Rule 35 motion.

(Supp. Tr., p.15, L.20 - p.16, L.18; *see* R., p.217 (the written order denying the motion for leniency.)

## ISSUES

I. Whether the district court erred when it denied Mr. Whitecotton's motion to suppress because it failed to conduct the requisite analysis, and because under the proper analysis, the contents of Ms. Brillhart's report did not objectively demonstrate he was, or was about to be, engaged in any sort of criminal conduct.

II. Whether the district court abused its discretion by considering the fact that Mr. Whitecotton exercised his rights when it imposed his sentence, as evidenced by its explanation that it "Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury."

## ARGUMENT

### I.

### The District Court Erred When It Denied Mr. Whitecotton's Motion To Suppress Because It Failed To Conduct The Requisite Analysis, And Because Under The Proper Analysis, The Contents Of Ms. Brillhart's Report Did Not Objectively Demonstrate He Was, Or Was About To Be, Engaged In Any Sort Of Criminal Conduct

#### A. Standard Of Review

When the appellate courts have exactly the same evidence that the district court considered while reviewing a decision to deny a motion to suppress, the appellate courts will freely review both the district court's factual findings and its legal conclusions. *State v. Andersen*, 164 Idaho 309, ___, 429 P.3d 850, 853 (2018) (quoting *State v. Lankford*, 162 Idaho 477, 492 (2017)); *see also State v. Smith*, 162 Idaho 878, 885 n.6 (Ct. App. 2017) (explaining that, in conducting such a review, it is not appropriate for the appellate court to consider facts which were not presented to the district court at the time the motion to suppress was being considered), *rev. denied*. While the *Lankford* standard is an exception to the traditional bifurcated standard of review, it is applicable in this case because the parties stipulated to submit the motion to suppress on the briefs and the exhibits attached thereto, and all those documents are in the appellate record. (R., pp.68-69, 91; *see* R., pp.65, 70-87; Exhibit C.)

#### B. The District Court Failed To Conduct All Of The Required Analysis, As Evidenced By Its Failure To Even Identify What Criminal Conduct Ms. Brillhart's Report Indicated

When the district court does not conduct the analysis required by precedent, the resulting decision should be vacated. *State v. Orellana-Castro*, 158 Idaho 757, 762 (2015) ("The court also did not identify what it contended was Defendant's common scheme or plan. Because the court did not conduct the analysis required [by case law], it did not act consistent with the applicable legal standards and therefore abused its discretion in denying the motion to sever.").

In regard to motions to suppress, the proscribed analysis requires the district court to evaluate whether the warrantless seizure fell within the well-delineated bounds of one of the exceptions to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 390-91 (1978). Part of that analysis is to evaluate whether the warrantless seizure served the historical rationales underlying the exception at issue, as those rationales help delineate the bounds of the exception. *See State v. Lee*, 162 Idaho 642, 651 (2017) (reversing an order denying a motion to suppress because the district warrantless seizure did not serve the historical rationales for the exception at issue there).

In this case, the State invoked the investigative-detention exception. *See Terry v. Ohio*, 392 U.S. 1 (1968). The rationale behind that exception is that officers need to be able to act swiftly to address situations based on their on-the-spot observations. *Id*. at 20-23. The Supreme Court balanced that need against the constitutional preference for a neutral magistrate to decide whether a seizure is justified. *Id*. The result was that the investigative-detention exception was limited to only those situations where the on-the-spot observations objectively demonstrate that the person was, or was about to be, engaged in criminal activity. *Id*. at 30; *State v. Willoughby*, 147 Idaho 482, 490 (2009); *State v. Orr*, 157 Idaho 206, 209 (Ct. App. 2014). A mere hunch or inchoate suspicion is not enough to justify an investigative detention. *Lee*, 162 Idaho at 648. The determination of whether there was reasonable suspicion for an investigative detention is based on the totality of the circumstances known to the officer at the time of the seizure. *Adams v. Williams*, 407 U.S. 143, 146 (1972); *State v. Wixom*, 130 Idaho 752, 754 (1997).

The district court concluded that the initial seconds of the encounter in this case constituted a consensual encounter, as the officer simply approached and asked Mr. Whitecotton what was going on, and Mr. Whitecotton replied that nothing was going on. (R., p.94; *see* Exhibit C, ~0:40.) However, a citizen is free to ignore or terminate a consensual encounter and

head about their business. *Florida v. Royer*, 460 U.S. 491, 498 (1983). Mr. Whitecotton tried to do precisely that, as he told the officer he was leaving and started his truck.[4] (Exhibit C, ~0:45.) The officer did not respect that decision, as he instructed Mr. Whitecotton to turn off the car and answer his questions. (Exhibit C, ~0:58.) The district court properly concluded that, since a reasonable person would not have felt free to disregard those instructions, Mr. Whitecotton was seized at that point. *State v. Page*, 140 Idaho 841, 843-44 (2004) (explaining that a seizure occurs when "a reasonable person would [not] have felt free to leave or otherwise decline the officer's requests and terminate the encounter") (internal quotation omitted).

The district court erred, however, when it concluded that the warrantless seizure was justified simply because the officer could corroborate some of the facts in Ms. Brillhart's report. (R., pp.96-98.) It is true that an officer can rely on the report of a known informant to warrantlessly detain a suspicious person to determine his identity or investigate other relevant facts. *Adams*, 407 U.S. at 145-46. However, that rule does not exist in a vacuum; it must be understood in light of the historical rationales which underlie the exception. *Lee*, 162 Idaho at 651-52.

The *Adams* rule is expressly based on the historical rationales set forth in *Terry*. *Adams*, 407 U.S. at 145-46 (discussing the rationales behind the *Terry* decision and "[a]pplying these principles to the present case, we believe that [the officer] acted justifiably in responding to his informant's tip"). Thus, when the *Adams* rule is understood in light of its historical rationales, it only allows an officer to warrantlessly seize a person based on a known informant's report if the informant's report presents facts which objectively demonstrate the suspicious person was, or

[4] No suspicion can be gained by a citizen's decision to take advantage of the option to end a consensual encounter. *Royer*, 460 U.S. at 498.

was about to be, engaged in criminal conduct. *Navarette v. California*, 572 U.S. 393, 401 (2014) (quoting *Terry*, 392 U.S. at 30) ("Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'"); *cf. State v. Van Dorne*, 139 Idaho 961, 963 (Ct. App. 2004) (citing *United States v. Hensley*, 469 U.S. 221 (1985) (explaining an officer can rely on another officer's report, "so long as the person who generated the report possessed the requisite reasonable suspicion"). Were the *Adams* rule not limited in that respect, officers would be able to warrantlessly seize citizens based on the hunches and inchoate suspicions of the known informants.

Therefore, in *Terry*, it was the fact that the police officer, with thirty years' experience with store thefts in that neighborhood, had observed two men for an extended period of time, during which they walked from a corner to a store front and back some twenty-four times and stopped to confer with each other or a third person at the end of each lap, that justified the seizure. *Terry*, 392 U.S. at 23. Those repeated actions created a reasonable suspicion that the men were reconnoitering the store in anticipation of burglarizing it. *Id.* Likewise, in *Adams*, it was not the informant's report that the suspicious person had a gun, but the report that the suspicious person was in possession of narcotics and a gun, which justified the investigative detention of the person. *See Adams*, 407 U.S. at 146-47. Finally, in *Navarette*, the report that a particular vehicle had run another car off the road contained sufficient facts to give rise to suspicion that it was being driven under the influence. *Navarette*, 572 U.S. at 401-04.

However, in this case, the district court simply noted the officer was able to rely on Ms. Brillhart's report "concerning the Defendant's odd behavior" and left it at that. (R., p.97.) It did not go on and actually evaluate whether the facts in Ms. Brillhart's report objectively demonstrated that Mr. Whitecotton was, or was about to be, engaged in criminal conduct. (*See*

*generally* R., pp.96-98.) In fact, it did not even identify what criminal conduct Ms. Brillhart's report supposedly indicated. (*See generally* R., pp.96-98.) Without that analysis into what criminal conduct the report indicated, the district court effectively and erroneously divorced the exception form its historical rationales. *Compare Lee*, 162 Idaho at 651. Since the district court failed to conduct the required analysis, this Court should vacate the order denying the motion to suppress. *Orellana-Castro*, 158 Idaho at 762.

C. Ms. Brillhart's Report Did Not Justify Warrantlessly Seizing Mr. Whitecotton Because The Facts In Her Report Only Gave Rise To An Inchoate Suspicion, Not The Required Objective Demonstration That He Was, Or Was About To Be, Engaged In Criminal Conduct

This Court should also reverse the order denying the motion to suppress on the merits. Based on the evidence presented to the district court, the most the officer could have been said to have known at the time he warrantlessly seized Mr. Whitecotton was that:

- That afternoon, a man had come to a pharmacy in American Falls in a black truck with Oregon license plates (R., pp.81. 86);
- He had gone into the pharmacy and "ask[ed] about maps" (R., p.86);
- When he left the pharmacy, he approached a group of people, introduced himself and shook hands with one of them[5] (R., p.86);
- He was openly carrying "a holstered gun" on his side (R., p.86);
- "He kept turning that side toward [the group]," which Ms. Brillhart felt was "odd"[6] (R., p.86); and

[5]The officer said the report was that Mr. Whitecotton had "randomly approached" the group, but Ms. Brillhart did not describe it as such in her written statement. (*Compare* R., pp.81, 86.)
[6] The officer said the report was that Mr. Whitecotton was "show[ing] off his sidearm," but Ms. Brillhart did not describe it that way in her written statement. (*Compare* R., pp.81, 86.)

- A man was sitting by himself in a black truck with Oregon plates getting ready to leave the pharmacy's parking lot when the officer arrived on scene (Exhibit C; R., p.97).

The totality of those circumstances do not demonstrate that, at the time Officer Rodriguez seized Mr. Whitecotton, he was, or was about to be, engaged in any sort of criminal conduct.

1. The facts known to the officer at the moment he seized Mr. Whitecotton did not objectively demonstrate that Mr. Whitecotton was, or was about to be, engaged in a theft-type offense

As in *Terry*, all the facts about Mr. Whitecotton's actions were, in and of themselves, not suspicious. *See Terry*, 392 U.S. at 22; *compare Adams*, 407 U.S. at 146-47 (wherein the fact that the person was reportedly in possession of narcotics inherently created suspicion of criminal activity). Open-carrying a gun is, by statutory operation, not suspicious. I.C. § 18-3302(4)(a) (expressly excluding open-carrying of weapons from statutory restriction). If it were, that would mean Idahoans would be forced to give up their Fourth Amendment rights in order to fully exercise their Second Amendment rights. The fact that Mr. Whitecotton wanted to purchase some maps was not suspicious, especially since his license plates showed he was from out of state. Nor was it suspicious that a person from out of town might follow up on an inquiry for maps by approaching a group of locals to talk to them.

However, unlike *Terry*, there are no other surrounding circumstances to generate suspicion out of the totality of these independently-innocuous acts. There is no evidence, for example, that this was a high-crime area or that Ms. Brillhart had any sort of training in detecting criminal activity. *Compare Terry*, 392 U.S. at 23 (noting the officer had thirty years of experience investigating store thefts in the neighborhood in question). There was also no repetitious conduct to give rise to a suspicion that he was reconnoitering the pharmacy.

*Compare id.* (noting the importance of the two men pacing to the store front twenty-four times). Therefore, unlike *Terry*, the totality of the circumstances in this case do not objectively demonstrate that Mr. Whitecotton was about to engage in theft-type conduct. Rather, all the officer had at that moment he seized Mr. Whitecotton was an inchoate suspicion about him based on Ms. Brillhart's hunch that he was acting "odd." That is not enough to justify conducing the warrantless seizure.

2. The facts known to the officer at the moment he seized Mr. Whitecotton did not objectively demonstrate that Mr. Whitecotton was, or was about to, engage in criminal exhibition of a firearm

Likewise, there is nothing in the reported facts which would objectively demonstrate there was anything criminal in the way in which Mr. Whitecotton was carrying his holstered gun. That is because criminal exhibition of a weapon only occurs if a person, not acting in self-defense, "draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel."[7] I.C. § 18-3303. Naturally, when a statute is unambiguous, the Court gives the words of a statute their plain, ordinary meanings. *Verska v. Saint Alphonsus Reg'l Med. Ctr*, 151 Idaho 889, 893 (2011). The language of I.C. § 18-3303 is not ambiguous. *See State v. Coleman*, 163 Idaho 671, 674 (Ct. App. 2018) (finding another part of I.C. § 18-3303's single sentence to be unambiguous).

There are two ways in which Mr. Whitecotton's actions do not fall within the scope of the plain language of that statute. First, he did not "exhibit" the gun. In this context, "exhibit" means "to show or display; to offer or present for inspection. To produce anything in public, so that it may be taken into possession." THE LAW DICTIONARY, *featuring BLACK'S LAW DICTIONARY*

[7] Only the first part of I.C. § 18-3303 is applicable in this case, as there was no evidence of a fight or quarrel. (*See generally* R.)

*FREE ONLINE LEGAL DICTIONARY, 2nd ed., available at* https://thelawdictionary.org/exhibit/ (last accessed Jan. 29, 2019). Because Mr. Whitecotton kept the gun holstered throughout the encounter, he did not show or display the gun so that another person could take possession of it or inspect it. Therefore, he did not "exhibit" it according to the plain definition of that term. *See also See* I.C. § 18-3302(1), (4)(a) (noting that the statutory restrictions on the right to bear arms "must be strictly construed so as to give maximum scope to the rights retained by the people," and that the ability to open-carry a weapon is excluded from statutory restriction).

That the term "exhibit" requires the gun to be unholstered is reinforced by the other language in the statute. *See Verska*, 151 Idaho at 893 (reaffirming that "the statute must be construed as a whole"). After all, the meaning of a word is often made clear by the context it is in (*noscitur a scoiis*). *State v. Schulz*, 151 Idaho 863, 867 (2011). In this case, the term "exhibits" is immediately preceded by the term "draws." I.C. § 18-3303. In this context, "draw" means "7 : to bring or pull out <*drew* a gun>." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, 244 (2007) (emphasis from original). Thus, the context reinforces that this statute requires the gun to be unholstered – to be brought out, pulled out, or offered for inspection – to be criminal conduct. Because Mr. Whitecotton kept his gun holstered throughout the encounter, he did not "exhibit" it in the manner contemplated by the plain language of the statute.

Second, even if Mr. Whitecotton did "exhibit" his holstered gun, he did not do so in a "rude, angry and threatening manner." I.C. § 18-3303. The statute's use of the term "and" is important because, in 1990, the Legislature repealed an exhibition statute which used the term "or" in this same phrase. *See State v. Croasdale*, 120 Idaho 18, 19-20 & n.1 (Ct. App. 1991) (quoting the previous version of I.C. § 18-3302, and noting its repeal). The term "or" is disjunctive and so, when it is used, it provides a choice between the listed items – if any one of

the listed items is present, the statute applies regardless of whether the other listed items are also present. *State v. Cota-Medina*, 163 Idaho 593, 600 (2018). The term "and," on the other hand, is conjunctive, which means, when it is used, all the listed items must be present for the statute to apply. *See id.*

There is no indication in this record that Mr. Whitecotton's actions were angry, rude, or threatening, much less all three as the statutory language requires. In fact, Ms. Brillhart's statement actually indicates his interaction with the group was polite and congenial, as he approached openly (even if "randomly"), introduced himself, shook hands with at least one member of the group, and began conversing with them. (R., p.86.) There were no allegations that he made any threatening statements or gestures.[8] (*See* R., p.86 (Ms. Brillhart describing the way he stood with the gun as "odd"); R., p.81 (Officer Rodriguez describing the report as "showing off" the gun).) Therefore, even if Mr. Whitecotton did "exhibit" his holstered gun, the report still did not establish reasonable suspicion he had *criminally* exhibited it.

Finally, even if Mr. Whitecotton had criminally exhibited the gun to the group, warrantlessly seizing him for that completed conduct is still improper. When Officer Rodriguez arrived on scene, Mr. Whitecotton was sitting in his truck, not displaying the gun beyond the fact that he was carrying it openly. (*See* Exhibit C.) Therefore, at the moment of the seizure, Mr. Whitecotton *was not* exhibiting the gun, nor was he *about to* exhibit the gun, and so, the warrantless seizure did not serve the historical rationales underlying the exception. *Compare Lee*, 162 Idaho at 651 (reversing the denial of a motion to suppress because the seizure did not serve the historical rationales of the exception at issue in that case).

[8] The fact that there were no threats or attempts to harm reported also means there was no reasonable suspicion to investigate assault with a firearm. *See* I.C. §§ 18-901, -905.

The United States Supreme Court has held that officers can conduct investigative detentions when the complete crime reported would be a felony, though whether even that is appropriate has recently been called into question. *United States v. Hensley*, 469 U.S. 221, 228-29 (1985) *called into doubt by Navarette*, 572 U.S. at 410 n.3 (Scalia, J., dissenting) ("The circumstances that may justify a stop under *Terry* . . . to investigate past criminal activity are far from clear" but the issue was not, as the majority had also noted, not raised in that case). However, since exhibition of a weapon under I.C. § 18-3303 is only a misdemeanor, the investigative detention for that completed offense is not permitted even under the permissive view of *Hensley*. Therefore, even if Ms. Brillhart's report was sufficient to create suspicion that Mr. Whitecotton had criminally exhibited the gun, there was no exigency under *Terry* to justify not presenting the matter to a magistrate per the constitutional preference.

D. Conclusion

Since nothing about the facts known to Officer Rodriguez at the moment he seized Mr. Whitecotton objectively demonstrated that he was, or was about to be, engaged in criminal behavior, that information did not establish reasonable suspicion as the well-delineated bounds of the investigative-detention exception requires. Therefore, even though the officer could rely on Ms. Brillhart's report, the information that report provided him was still insufficient to justify the warrantless investigative detention of Mr. Whitecotton.

Because the warrantless seizure was not justified under an exception to the warrant requirement, all the evidence the officer found as a result of that unlawful seizure should have been suppressed. *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). In this case, that means the gun and Mr. Whitecotton's identity, and thus, the judgment of conviction out of Oregon should have been suppressed.

## II.

## The District Court Abused Its Discretion By Considering The Fact That Mr. Whitecotton Exercised His Rights When It Imposed His Sentence, As Evidenced By Its Explanation That It "Certainly Had To Look At The Case Much Differently Once He Withdrew That Plea And Required The State To Prove His Guilt To A Jury"

### A. Standard Of Review

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation omitted). The district court abuses its discretion when: (1) it fails to recognize that the decision is one within its discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistent with the applicable legal standards; or (4) it does not reach its decision through an exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018).

The district court's explanation of its initial sentencing decision while ruling on a motion for leniency can reveal that the sentencing decision was not made in accordance with the applicable legal standards. *State v. Anderson*, 152 Idaho 21, 23 (Ct. App. 2011) (explaining that, "[f]rom the district court's statements in its order denying Anderson's Rule 35 motion, it is apparent that the court" misunderstood what the applicable statute allowed it to do when it was imposing that sentence). The district court's statements demonstrate a similar abuse of discretion occurred in Mr. Whitecotton's case. As such, this Court should, at least, remand this case for a new sentencing hearing or a new hearing on his motion for leniency in front of a new judge.

B. The District Court's Revelation That It Had Considered Mr. Whitecotton's Exercise Of His Right To Withdraw An Unconstitutional Guilty Plea And His Right To A Jury Trial In Its Sentencing Decision Shows A Clear Abuse Of Discretion

The United States Supreme Court has made it clear that, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' . . . For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). Naturally, a decision to demand a trial by a jury is an exercise of a constitutional right. *See* U.S. Const. amend V; Idaho Const. art. I, § 7. While a guilty plea does waive the right to a trial, if the defendant is allowed to withdraw the plea, then the waiver is also necessarily withdrawn. In that scenario, the constitutional right to request a trial would be restored to the defendant, upon the withdrawal of the plea. As such, that defendant would be well within his restored rights to demand a trial even though he had initially pled guilty.

The law also plainly allows a defendant who has entered a guilty plea to move the district court to allow him to withdraw that plea on the basis that the plea was not knowing, intelligent, or voluntary. I.C. § 19-1714; I.C.R. 33(c). That is because a plea which is not knowing, intelligent, or voluntary is not constitutional. *State v. Ayala*, 118 Idaho 94, 94 (Ct. App. 1990) (citing *State v. Coyler*, 98 Idaho 32 (1976)) ("Under our state and federal constitutions, a guilty plea must be voluntary—which means knowingly and intelligently as well as free from coercion."); *accord State v. Sunseri*, ___ P.3d ___, 2018 WL 5628898, *3 (2018) ("The first step in analyzing a motion to withdraw a guilty plea is to determine whether the plea was knowingly, intelligently, and voluntarily made. If the plea is constitutionally valid, the court must then determine whether there are any other just reasons for withdrawal of the plea.") (internal

quotation and emphasis omitted). As such, a motion claiming the plea was not knowing, intelligent, or voluntary amounts to an exercise of the defendant's constitutional rights, in addition to an exercise of his statutory rights under I.C. § 19-1714. Therefore, the courts also cannot punish a defendant for exercising his right to move to withdraw an unconstitutional plea.[9]

Mr. Whitecotton chose to exercise both those rights. He moved to withdraw his plea, identifying two reasons it was not knowing, intelligent, and voluntary. First, he explained that he had intended to condition his plea on reserving his ability to appeal the denial of his motion to suppress, but the plea he had entered did not include a term to that effect (*i.e.*, his plea had not been knowing or intelligent).[10] (Tr., p.68 : p.4, Ls.2-5; *see* R., p.109 (the guilty plea questionnaire showing that Mr. Whitecotton initially indicated he wanted to condition his plea on the ability to challenge "all" the pretrial rulings); Tr., p.10 : p.27, Ls.3-4 (trial counsel clarifying that the plea was unconditional). Second, Mr. Whitecotton asserted that he had not actually been on his medications at the time he entered the plea (*i.e.*, his plea had not been knowing). (Tr., p.68 : p.3, Ls.17-20.) He also asserted that, upon withdrawing his plea, he intended to exercise his right to a jury trial. (Tr., p.68 : p.4, Ls.11-12.) The district court obviously found

[9] This is not to say that there is an automatic right to withdraw a plea, because there is not. *Sunseri*, 2018 WL 5628898, *4 (quoting *State v. Hartsock*, 160 Idaho 639, 641 (Ct. App. 2016)). Even when the defendant claims his plea was not constitutional, he must still prove the plea is actually flawed before withdrawal will be allowed. *Id.* The point here is simply that he has the right *to raise* the issue to the court, and he cannot be punished for doing so, regardless of whether he is successful.

[10] In ruling on Mr. Whitecotton's motion to withdraw his plea, the district court said, "I'm not sure how he would waive it," referring to his ability to appeal the decision on his motion to suppress, by entering the unconditional plea. (Tr., p.68 : p.4, Ls.2-10.) However, the appellate courts have been clear that, when a defendant enters an unconditional plea, he waives the ability to challenge any non-jurisdictional defect in the proceedings to that point, such as the decision on a motion to suppress. *State v. Green*, 130 Idaho 503, 505-06 (1997); *State v. Rodriguez*, 118 Idaho 957, 959-60 (Ct. App. 1990). Fortunately, since the district court ultimately granted the motion to withdraw the plea, the district court's failure to appreciate the effect of the unconditional waiver did not result in a reversible error.

his explanations justified his motion, as it granted his motion to withdraw the plea and immediately set a trial schedule. (Tr., pp.69-70 : p.5, L.19 - p.9, L.9.)

However, the district court attached a price to Mr. Whitecotton's decision to exercise those rights. That the price had been extracted was actually revealed when the district court ruled on Mr. Whitecotton's motion for leniency, as it explained why the sentence it had imposed was appropriate: "Certainly had to look at the case much differently once he withdrew that plea and required the State to prove his guilt to a jury." (Supp. Tr., p.16, Ls.3-5.) As the North Carolina Supreme Court succinctly observed: "Where it can be reasonably inferred from the language of the trial judge that the sentence was imposed at least in part because the defendant did not agree to a plea offer by the state and insisted on a trial by jury, the defendant's constitutional right to a trial by jury has been abridged, and a new sentencing hearing must result." *State v. Cannon*, 387 S.E.2d 450, 451 (N.C. 1990); *see Goodwin*, 457 U.S. 372; *Bordenkircher*, 434 U.S. at 363.

Essentially, including the unconstitutional consideration within the weighing adversely impacted Mr. Whitecotton's sentence because it changed how the district court balanced out the other mitigating and aggravating factors. As a result, the term of the resulting sentence was altered solely because he exercised his rights. Therefore, it is improper for the courts to include such a factor within the weighing when they impose sentences. *United States v. Moskovits*, 86 F.3d 1303, 1310-11 (3rd Cir. 1996) (explaining that a similar statement, made "in the context of [the judge] setting out his reasons for the harsher sentence he was imposing," revealed the court had improperly punished the defendant for exercising the right to a jury trial); *accord United States v. Rodriguez*, 959 F.2d 193, 197 (11th Cir. 1992) (holding the court cannot weigh the defendant's exercise of his rights against him in the sentencing calculus); *United States v.*

*Watt*, 910 F.2d 587, 592 (9th Cir. 1990) (same), *abrogated on other grounds by United States v. Anderson*, 942 F.2d 606, 614 (1991); *compare United States v. Frost*, 914 F.2d 756, 774 (6th Cir. 1990) (finding no error because "[m]any factors may be considered in sentencing and nothing indicates that the district court considered an improper factor such as the defendants' exercise of their constitutional right to a trial").

Finally, while the district court did reference other appropriate considerations which would ostensibly support the sentence imposed (*see* Supp. Tr., p.15, L.20 - p.16, L.18), that does not inoculate its decision from the effects of its express abuse of discretion. As the Idaho Supreme Court has explained in the related context of relinquishing jurisdiction, although the district court could have lawfully relinquished jurisdiction by considering other facts, its decision had to be vacated because "the court in its own words relinquished jurisdiction solely because Defendant refused to waive his Fifth Amendment right and answer questions that could incriminate him and result in new felony charges. The court's action violated Defendant's Fifth Amendment rights." *State v. Van Komen*, 160 Idaho 534, 540 (2016).

The reason the courts have refused to ignore this sort of express violation in such circumstances is that the effect of such an error is not limited to this particular case. Rather, as the Ninth Circuit recently reiterated, "[e]nhancing a sentence solely because a Defendant chooses to go to trial risks chilling future criminal defendants from exercising their rights. And imposing a penalty for asserting a constitutional right heightens the risk that future defendants will plead guilty not to accept responsibility, but to escape the sentencing court's wrath." *United States v. Hernandez*, 894 F.3d 1104, 1112 (9th Cir. 2018); *compare North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (explaining that the risk of a similar chilling effect was part of the reason the district court could not increase the defendant's sentence in that case solely because the

defendant had successfully challenged his initial conviction on appeal). As a result, even if this Court were to conclude the term of Mr. Whitecotton's sentence were appropriate because of the other sentencing factors, that would not address the chilling factor this improper decision would continue to have on future defendants. Thus, this Court should still, like the *Van Komen* Court did, remand for reconsideration of the tainted sentencing decision.

From any angle, the district court's own words reveal its sentencing decision was contrary to the applicable legal standards, and thus, an abuse of its discretion. As such, this Court should remand this case for either a new sentencing hearing or a new hearing on the motion for leniency. Additionally, for the reasons the Idaho Supreme Court identified in *Van Komen*, 160 Idaho at 540, this Court should order this case assigned to a new judge on remand.

## CONCLUSION

Mr. Whitecotton respectfully requests this Court reverse the district court's order denying his motion to suppress and remand this case for further proceedings. Alternatively, he requests this Court remand this case for a new sentencing hearing or a new hearing on his motion for leniency.

DATED this 12th day of February, 2019.

/s/ Brian R. Dickson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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