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# State v. Reed Appellant's Reply Brief Dckt. 44865

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

|                       |   |                              |
|-----------------------|---|------------------------------|
| STATE OF IDAHO,       | ) |                              |
|                       | ) |                              |
| Plaintiff-Respondent, | ) | NO. 44865                    |
|                       | ) |                              |
| v.                    | ) | KOOTENAI COUNTY NO. CR 2016- |
|                       | ) | 3420                         |
| MATTHEW JOSEPH REED,  | ) |                              |
|                       | ) | 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

Matthew Reed challenges the district court's decision to relinquish jurisdiction because he refused to participate in a polygraph examination and was unable to participate in treatment at Good Samaritan, as well as the district court's sentencing decision because the court based Mr. Reed's sentence on his criminal history. In response to Mr. Reed's argument that the district court violated his Fifth Amendment rights when it relinquished jurisdiction, the State claims that Mr. Reed "would not have been required to answer questions that posed a realistic threat of incrimination," and thus there is no Fifth Amendment violation. (Resp. Br., p.14.) As discussed below, the State's argument glosses over the broad scope of the district court's order, overlooks the Court of Appeals recent decision in *State v. LeVeque*, No. 43877, 2017 WL 5560270 (Idaho Ct. App. Nov. 20, 2017), and mistakenly relies on *State v. Widmyer*, 155 Idaho 442 (2013). The district court abused its discretion when it relinquished jurisdiction, and so this Court should remand this case for a new rider review hearing in front of a new judge. Alternatively, for the reasons stated in Mr. Reed's Appellant's Brief, this Court should reduce his sentence as it deems appropriate.

## ISSUES

- I. Did the district court abuse its discretion by relinquishing jurisdiction and denying Mr. Reed's motion for redispotion because Mr. Reed could not afford the Good Samaritan program and asserted his Fifth Amendment rights with respect to the polygraph?<sup>1</sup>
  
- II. Did the district court abuse its discretion by sentencing Mr. Reed largely based on his alleged prior sex crimes, rather than the methamphetamine possession conviction at issue?

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<sup>1</sup> This reply addresses only the State's arguments regarding the Fifth Amendment violation.

## ARGUMENT

### I.

#### The District Court Abused Its Discretion By Relinquishing Jurisdiction And Denying Mr. Reed's Motion For Redisposition Because Mr. Reed Could Not Afford The Good Samaritan Program And Asserted His Fifth Amendment Rights With Respect To The Polygraph

In response to Mr. Reed's argument that the district court violated Mr. Reed's Fifth Amendment rights when it relinquished jurisdiction because he did not participate in a polygraph examination, the State asserts that Mr. Reed "would not have been required to answer questions that posed a realistic threat of incrimination." (Resp. Br., p.14.) The State is incorrect.

First, the State argues that the district court did not violate Mr. Reed's Fifth Amendment rights because, "[u]nlike the sexual contact in *Van Komen*, the subject of Reed's polygraph examination would have been about crimes that had already been adjudicated or dismissed," and thus double jeopardy protects Mr. Reed from prosecution for those offenses. (Resp. Br., pp.14–15.) This claim glosses over the broad scope of the district court's order and overlooks the Court of Appeals' recent decision in *State v. LeVeque*, No. 43877, 2017 WL 5560270 (Idaho Ct. App. Nov. 20, 2017).<sup>2</sup>

The district court ordered Mr. Reed to be polygraphed about his "account of past sexual offenses and past violence towards women." (5/24/16 Tr., p.26, L.21–p.27, L.1.) The polygraph would therefore encompass his prior criminal history involving allegations of sexual offenses and violence against women, many of which were dismissed for unknown reasons or had unknown dispositions, as well as any other crimes that were wholly absent from Mr. Reed's criminal history. (5/24/16 Tr., p.26, L.21–p.27, L.21; *see also* R., p.41; PSI, pp.6–13.) Because Mr. Reed could be prosecuted for any crimes for which he had not actually been acquitted or

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<sup>2</sup> The State has filed a petition for review in *LeVeque*.

convicted, the polygraph would undoubtedly pose a real and appreciable risk of incrimination. See *State v. Van Komen*, 160 Idaho 534, 538 (2016); *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005).

Further, even if the polygraph only delved into offenses of which Mr. Reed had already been acquitted or convicted, Mr. Reed would still face a real and appreciable risk of incrimination. As held by the Court of Appeals in *LeVeque*, the district court violated LeVeque's Fifth Amendment rights when it ordered, as a condition of probation, that he participate in a polygraph regarding a South Dakota crime *to which he had already pled guilty*. *Leveque*, 2017 WL 5560270, at \*4 ("Despite the fact that LeVeque had already been convicted of a crime as a result of the events in South Dakota about which he was to be questioned, the Fifth Amendment protections were still available to him."). Although the Court did not explain its reasoning in reaching that conclusion, the reason for such a holding is clear—questioning about a given crime could lead the defendant to make statements incriminating him in additional crimes of which the State was previously unaware or had insufficient evidence to prosecute. Therefore, any questioning about Mr. Reed's prior criminal history, even those offenses which themselves could not be reprosecuted because Mr. Reed had already been convicted, implicated his Fifth Amendment rights.

Second, the State relies on *State v. Widmyer*, 155 Idaho 442 (2013), to argue that "[e]ven if some of Reed's prior crimes were not fully adjudicated such that he was not entitled to double jeopardy protections, his Fifth Amendment rights still would not have been violated because he was not actually asked any questions that could implicate him." (Resp. Br., p.20.) *Widmyer* rejected a psychosexual examination as a condition of probation, after which the district court executed his sentence rather than placing him on probation. *Widmyer*, 155 Idaho at 444–45. The



Court of Appeals held that the district court did not violate Widmyer’s Fifth Amendment rights because, among other things, he “had not yet been asked any potentially incriminating questions.” *Id.* at 447. But that holding is no longer good law—the Idaho Supreme Court in *Van Komen* found a Fifth Amendment violation even though Van Komen failed to arrange for a polygraph examination during his rider, and therefore was never actually asked any questions. *Van Komen* 160 Idaho at 537–38. Similarly, the Court of Appeals in *LeVeque* found a Fifth Amendment violation even though LeVeque was never given the opportunity to participate in the court-ordered polygraph examination. *Leveque*, 2017 WL 5560270, at \*2. The State’s reliance on *Widmyer* is therefore misplaced. The district court abused its discretion when it relinquished jurisdiction because Mr. Reed refused to participate in a polygraph examination.

#### CONCLUSION

Mr. Reed respectfully requests that this Court remand this case for a new rider review hearing in front of a new judge or reduce his sentence as it deems appropriate.

DATED this 31<sup>st</sup> day of January, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
MAYA P. WALDRON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31<sup>st</sup> day of January, 2018, 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:

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OROFINO ID 83544

JOHN T MITCHELL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

MPW/eas