10-20-2017

State v. Reed Appellant's Brief Dckt. 44865

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

The district court in this case sentenced Mr. Reed not based on his current methamphetamine possession conviction, but on his past alleged sex offenses. It went on to relinquish jurisdiction after learning that Mr. Reed could not afford to pay for treatment at Good Samaritan and did not participate in a polygraph about his alleged sex offenses. As for its decision to relinquish jurisdiction, the court abused its discretion by basing that decision on Mr. Reed's indigence and his exercise of his Fifth Amendment right to silence. Regarding Mr. Reed's initial sentencing, the court abused its discretion by focusing largely on Mr. Reed's prior alleged sex offenses. This Court should therefore remand this case for a new rider review hearing in front of a new judge or reduce Mr. Reed's sentence as it deems appropriate.

Statement of Facts and Course of Proceedings

In exchange for Mr. Reed's guilty plea to possessing methamphetamine, the State agreed to recommend a retained jurisdiction and to not object to Mr. Reed being screened for drug court. (R., p.34; 3/16/16 Tr., p.4, Ls.18-25, p.9, L.14 – p.10, L.1.) At sentencing, the State recommended a retained jurisdiction and defense counsel recommended, consistent with the PSI investigator, that the court place Mr. Reed on probation. (5/24/16 Tr., p.16, Ls.7-21; PSI, p.20.) If Mr. Reed could get accepted into Good Samaritan's treatment program, defense counsel asked that his participation in that program be a condition of his probation. (5/24/16 Tr., p.18, Ls.8-17.) After Mr. Reed addressed the court, the court said:

> THE COURT: I have some questions for you. . . . Ordinarily I don't put a whole lot of importance in things in a presentence report's prior criminal reiteration that aren't—where I don't know the outcome, but in August 16th of

> 2006 you committed and were found guilty of battery. I don't know whether that's a felony or a misdemeanor. You haven't clarified that. But you were also charged with oral copulation with a person under sixteen, sexual penetration with a foreign object of a victim under sixteen, and a knowing, et cetera, of a child, I have no idea what that is, under eighteen I guess, and that was when you were twenty-three, so what's your story of what happened there?

(5/24/16 Tr., p.19, L.22 – p.20, L.11.) The court went on to ask Mr. Reed to explain each of the sex and domestic crimes listed in his PSI, many of which were marked as "dismissed" or "disposition not received." (5/24/16 Tr., p.20, L.12 – p.25, L.14; PSI, pp.6-13.) Finally, the court asked Mr. Reed to explain the tattoo on his neck, which apparently reads "trust no bitch," and his involvement in the "white boy gang." (5/24/16 Tr., p.25, L.14 – p.26, L.7; PSI, p.4.)

The court then sentenced Mr. Reed to serve seven years fixed and retained jurisdiction. (5/24/16 Tr., p.26, Ls.11-21.) The Court added:

> I will need a polygraph on your return regarding your account of past sexual offenses and past violence towards women, and if you do all those things, then I will not consider you for probation unless you can get into Good Samaritan for ten months. . . .
>
> . . . .
>
> . . . The reason for your sentence is your criminal record, and while I realize that there were dismissals on the sex crimes that I asked you about, I have several concerns about your explanation given the fact that there are three different events over the course of . . . five different years. There's violence to women on multiple occasions. You've got a huge drug problem. You've been to prison. You've joined a gang.
>
> I'm not overly optimistic about granting you probation sometime in the future, but those are the things you need to do. You need to get anger treatment while you're in the penitentiary, chemical dependency while in the penitentiary, come back with the polygraph, and commit to going to Good Samaritan for ten months. . . .

(5/24/16 Tr., p.26, L.21 – p.27, L.21; *see also* R., p.41 (the judgment of conviction dictating the same requirements).)

At the rider review hearing, both the State and defense counsel asked that the court place Mr. Reed on probation because he did well on his rider. (1/10/17 Tr., p.31, L.8 – p.32, L.22.)

Indeed, Mr. Reed received only informal sanctions and no formal DORs, and so the IDOC also recommended probation. (PSI, pp.45-`60.) The district court, however, focused on its order that Mr. Reed take a polygraph and get into Good Samaritan's treatment program.

> THE COURT: . . . Back on May 24th, 2016, when I sent you on this rider I recommended a CAPP Rider . . . to deal with addictions and past violence, and I also said you will need to have a polygraph on your return regarding your account of past sex offenses and violence towards women, and you will need to do Good Samaritan for ten months, so I take it you're not interested in Good Samaritan?
>
> THE DEFENDANT: I didn't have the money at the time because—at that time I said I might have the money, but I didn't have the money. I called them and I told them that and, uh—
>
> THE COURT: And I take it you don't have a polygraph?
>
> THE DEFENDANT: No.
>
> THE COURT: Ok, well I meant what I said. I am going to relinquish jurisdiction, impose the prison sentence that I originally imposed which was seven years fixed—
>
> THE DEFENDANT: I have to do seven years?
>
> THE COURT: Let me finish, please. Seven years fixed, zero years indeterminate, total of seven. I will modify that slightly to six years fixed, one year indeterminate only for the purpose of trying to give you some incentive to do well while you're in prison and behave yourself so that you can get out; really it's only to try to incentivize your conduct while you're in the penitentiary. You don't have either the polygraph or the—
>
> THE DEFENDANT: I never—
>
> THE COURT: —the arrangement to live at Good Samaritan, and that's what I told you back in May. . . .

(1/10/17 Tr., p.33, L.8 – p.34, L.14; *see also* R., pp.47-48.)

That same day, Mr. Reed filed a motion for redisposition. (R., p.45.) It explained that defense counsel "neglected to make a clear record regarding the Defendant's assertion of his 5th amendment right in regards to the Court's request that the Defendant participate in a polygraph examination related to conduct separate and distinct to the charge in this matter," and asked for a new rider review hearing so that counsel could make the record clear. (R., p.45.)

At the redisposition hearing, defense counsel explained that the notes of the substitute attorney who attended the sentencing hearing with Mr. Reed had indicated that she had asserted

Mr. Reed's Fifth Amendment rights. (2/27/17 Tr., p.3, Ls.3-10.) But, after the rider review hearing, defense counsel got a copy of the minutes of the sentencing hearing and realized that she had not. (2/27/17 Tr., p.3, Ls.14-17.) Therefore, defense counsel clarified that Mr. Reed had not participated in the polygraph because he was asserting his Fifth Amendment rights under *Estrada v. State*, 143 Idaho 558 (2006), and *State v. Van Komen*, 160 Idaho 534 (2016).[1] Defense counsel argued that *Van Komen* "makes it clear that someone in Mr. Reed's situation does have a right to assert their privilege, and that the assertion of that privilege should not be the basis of relinquishing jurisdiction." (2/27/17 Tr., p.4, Ls.4-8.)

The State responded that it did not believe a motion for redisposition was the appropriate "vehicle" for counsel's request, if he was asking that the court revisit Mr. Reed's sentence. (2/27/17 Tr., p.4, Ls.14-18.) But, to the extent counsel wanted to make the record clear for appellate purposes, the State said,

> I would ask that this Court refine the record as to its intention, if that's the case, as to why he was sent to—if you are indeed punishing him for the exercise of his Fifth Amendment rights, perhaps the appellate courts must know that so they can make a decision regarding the viability of the sentence. Otherwise, if Your Honor did not punish him for asserting his Fifth Amendment Right and impose accordingly, I would ask that that also be put on the record and subject to appellate review.

(2/27/17 Tr., p.4, L.19 – p.5, L.5.)

After taking another look at *Van Komen*, the district court denied Mr. Reed's motion. (2/27/17 Tr., p.5, L.20 – p.6, L.3.) It explained that this case is "significantly different" from *Van Komen*:

> First of all, I'm not even sure—well, there was no statement that Mr. Reed wished to maintain his Fifth Amendment Right [sic] to remain silent back at sentencing

[1] This Court decided *Van Komen* a couple of months after the district court sentenced Mr. Reed and about six months before the district court relinquished jurisdiction.

on May 24th, 2016, nor at the Rider Review Hearing, which was held on January 10th, 2017. And I don't think that occurred in *VanKomen* [sic] either. But there was never indication [sic] when I imposed the requirement on the rider, or when I had the rider review hearing, that Mr. Reed wished to invoke his Fifth Amendment Right [sic]. Even if he had, what I was seeking clarification on when I sent Mr. Reed on a rider on May 24th, 2016—I'll just quote from my order.

I was recommending a [CAPP] rider to deal with addiction and past violence. Will need a polygraph on return regarding his account of past sex offenses and violence towards women, and will have to do good Samaritan ten-month program.

When I sentenced Mr. Reed and sent him on a retained, he—we discussed those prior offenses. And in 2010, sexual intercourse with a minor under the age of 18, he, Mr. Reed, explained that he was living with parents of a minor, and 2006 incident that he pled guilty to battery to resolve the case, that all the remaining charges were dismissed. So, I don't even know that there is the ability to be charged for past conduct. Let's assume that there is. And in that case, in that assumed set of facts, or under that assumed set of facts, *VanKomen* [sic] says—I'll just quote from it.

"However, the Court in its own words relinquished jurisdiction solely because defendant refused to waive his Fifth Amendment Right [sic] to answer questions that could incriminate him and result in new felony charges."

And that's not the case here.

The minutes reflect—I assume the transcript on appeal will reflect that I relinquished jurisdiction on Mr. Reed for two reasons. We don't have on [sic] a polygraph of any sort, and there was no arrangement to live at Good Samaritan. That is—

(2/27/17 Tr., p.6, L.9 – p.7, L.20.) At that point, Mr. Reed interrupted:

THE DEFENDANT: Yeah, there was.

THE COURT: That is what I told you back in May and—

THE DEFENDANT: I—I had got ahold of MJ at Pastor Tim's program (unintelligible).

THE COURT: I'm sorry, Mr. Reed.

THE DEFENDANT: What's that?

THE COURT: It's my turn to talk. And if your attorney wants to call you as a witness, he can do that, but I've made my record.

(2/27/17 Tr., p.7, L.21 – p.8, L.5.) The court then ended the hearing.

In its written order on redisposition filed a month later, the court gave two reasons for denying the motion:

This Court finds that the present case is distinguishable from the case of *State v. Van Komen*, 160 Id 534 (2016), in that in that case the Supreme Court

> found error in the District Court's decision to relinquish jurisdiction over the Defendant based solely upon the Defendant's refusal to waive his 5th Amendment rights against self-incrimination by participating in a court ordered polygraph examination. In the present case, the Court's decision to relinquish jurisdiction is based upon two factors, first, that the Defendant has failed to participate in a polygraph examination and second, that the Defendant failed to make arrangements to participate in the "Good Samaritan" program upon his return from the retained jurisdiction program. Therefore, the decision to relinquish jurisdiction is not based solely upon the Defendant's refusal to participate in a polygraph examination.
>
> Further this Court finds that neither at the time of sentencing on May 24, 2016 or at the time of the jurisdictional review hearing on January 10, 2017, did the Defendant claim that the reason that he had failed to participate in the court ordered polygraph examination was due to an assertion of his 5th Amendment rights against self-incrimination.

(R., pp.72-73.)

Mr. Reed later filed an Idaho Criminal Rule 35 motion requesting leniency. (R., p.70.) At a hearing on that motion, Mr. Reed testified that he did not get into the Good Samaritan program because "they said [he] had a sex case" and he didn't have $2500. (5/1/17 Tr., p.9, Ls.15-22.) Mr. Reed said that the sex case was not consistent with his criminal history. (5/1/17 Tr., p.9, L.23 – p.10, L.1.) He also told the court that he had been going to school in prison, attending support groups and bible study, and working in the kitchen. (5/1/17 Tr., p.9, Ls.7-11.) He had a plan for when he is released—he would get a job, participate in narcotics anonymous, and continue working on his sobriety. (5/1/17 Tr., p.10, L.19 – p.11, L.16.) Defense counsel clarified that,

> at this juncture and at the time of his jurisdictional review hearing the Good Samaritan program was not an option for him, partly due to funding as Mr. Reed testified to. $2500 is a substantial amount of money for an indigent defendant to obtain while incarcerated, and so it is his position that the condition set forth upon Mr. Reed by this court that he gain entry into the Good Samaritan program was something that he was unable to satisfy as a result of his indigency and incarceration.

(5/1/17 Tr., p.15, Ls.3-12.) Mr. Reed asked that the court consider placing him on probation or reduce his sentence to five years fixed with two years indeterminate. (5/1/17 Tr., p.10, Ls.5-18, p.13, Ls.6-9, p.16, Ls.17-24.)

The district court denied the motion. It explained that defense counsel didn't list Mr. Reed's performance since his incarceration as a basis in his motion, but even if the court did consider that ground, it expects a defendant to take advantage of those opportunities. (5/1/17 Tr., p.17, Ls.1-9.) As for the Good Samaritan program, the court said,

> Well, I don't know how you get new information to explain what you didn't do at the time that I required Mr. Reed to do it, and there wasn't any explanation given in my review of the court minutes on February 27th—I'm sorry. That was the re-disposition hearing. *There wasn't any evidence presented on behalf of the defense at the jurisdictional review hearing about not being able to afford Good Samaritan or not being able to get into Good Samaritan because of a prior sex offense,* so I'm simply not able to understand how an additional reason could be arrived at after the pertinent point in time which was January 10th, 2017, and even if that were true, even if it were the case that he couldn't get into Good Samaritan because of a prior sex offense, that should've been explained to the Court way back at the time of sentencing on May 24th, 2016, and *what was told to me on May 24th, 2016, by Ms. Chesebro at the time on behalf of Mr. Reed was that he's made contact with Good Samaritan, not confident that finances will be there*, but that was the only explanation given, and that's the day that I required Mr. Reed, when he came back for his rider review, to have it set up that he get into Good Samaritan. It says it on his court order. I said it on the record.
>
> *And I also directed him to have a polygraph regarding his account of past sex offenses and violence towards women and he didn't have that either,* so he didn't do any of the things that he needed to do when he came back from his jurisdictional review and apparently he still doesn't. He still doesn't have any plan to get into Good Samaritan or anything similar, and *certainly nothing to assure the Court that the risk posed in his presentence report as to prior sex offenses and abuse towards women has been mitigated at all, and it's not just one event.*
>
> I mean, it's an event on August 16th, 2006, in Redding County, oral copulation with a person under sixteen, sexual penetration with a foreign object, victim under sixteen, and then a third crime, he pled guilty to battery and at sentencing claimed that there was some underage contact, but pled guilty to battery to resolve it, so some contact tells me that there's still an event there, there's still a bad act; 2007 sex with a minor in High Desert County, California. Defendant's explanation at that time was it never happened, it was all hearsay, and there's no conviction there, so I have to believe Mr. Reed at the time, but then

> there's a 2010 sexual intercourse with a minor under the age of eighteen. The defendant's explanation was that he was living with a girl and living with that girl's parents at the time. That doesn't change the fact that that girl wasn't of age of consent. Then there's all of the violent acts, and *there's been no explanation as to any of those at sentencing, at the jurisdictional review, at the present time.*
>
> I have no idea what—well, I do have an idea as to the type of person that we're dealing with: A person who affiliated with White Boy Gang while in prison, a person who's been in prison on and off for quite a period of time, and again, came back from a jurisdictional review with some *pretty clear and relatively simple requirements* to have done in order to be considered for probation and *chose* not to do any of those.
>
> I've already made my reduction. I've converted it from seven fixed to six years fixed and one year indeterminate to try to give Mr. Reed an incentive to do well while he's in serving the fixed portion of his sentence, and to try to help him not become an individual—an institutionalized individual, but my first duty is to protect the public, and Mr. Reed *chose* not to come back to court with the things that he needed to do in order for me to make that assessment and convince me that I'm not dealing with a person who is as dangerous as he appears in the evaluations and the reports that I have, so if you'd please prepare an order to that effect, Ms. Montalvo.

(5/1/17 Tr., p.17, L.20 – p.20, L.22 (emphasis added).)

Mr. Reed filed a notice of appeal timely from the district court's order relinquishing jurisdiction. (R., pp.49-51.)

ISSUES

I. Did the district court abuse 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?

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?

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

The district court at sentencing imposed two unqualified conditions on Mr. Reed's ability to earn a chance at probation—he had to get admitted into Good Samaritan's treatment program and he had to take a polygraph on past allegations of sexual and domestic crimes. When Mr. Reed failed to meet those conditions because he could not afford treatment and because he exercised his Fifth Amendment rights, the district court relinquished jurisdiction. Because the district court did not reach that decision through an exercise of reason and did not act consistently with the applicable legal standards, it abused its discretion.

A. Standard Of Review

This Court reviews a decision to relinquish jurisdiction for an abuse of discretion. *State v. Brunet*, 155 Idaho 724, 729 (2013). A court properly exercises its discretion when it: (1) correctly perceives the issue to be one of discretion; (2) acts within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reaches its decision by an exercise of reason. *Id.*

B. The District Court Abused Its Discretion By Relinquishing Jurisdiction Because Mr. Reed Could Not Afford Good Samaritan's Treatment Program

By relinquishing Mr. Reed because he did not get into Good Samaritan's treatment program, which he could not afford, the district court failed to reach its decision by an exercise

of reason.[2] The court was well aware that Mr. Reed was indigent. (R., pp.2324 (Mr. Reed's financial statement and order appointing a public defender).) Indeed, Mr. Reed said at the sentencing hearing that he may not have the funds to get into the Good Samaritan program (5/24/16 Tr., p.18, Ls.8-17), and he tried to convey as much at the rider review hearing: "I didn't have the money at the time because—at that time I said I might have the money, but I didn't have the money. I called them and I told them that and, uh—" (1/10/17 Tr., p.33, Ls.16-19). Rather than listen to Mr. Reed's explanation, the district court cut him off. (1/10/17 Tr., p.33, Ls.19-20; *see also* 2/27/17 Tr., p.7, L.21 – p.8, L.5 (Mr. Reed trying to explain why he did not get into Good Samaritan during the redisposition hearing, and the district court again cutting him off).)[3] It appears that the district court didn't find the reason for Mr. Reed's noncompliance relevant, even when that reason was Mr. Reed's indigence. In fact, it appears the district court believed that Mr. Reed was making up an excuse for his noncompliance, when he had in fact said, on the record at the relinquishment hearing, that he "didn't have the money." (1/10/17 Tr., p.33, L.8 – p.34, L.14; *see also* 5/1/17 Tr., p.17, L.20 – p.20, L.22 (the district court incorrectly stating that "[t]here wasn't any evidence presented on behalf of the defense at the jurisdictional review hearing about not being able to afford Good Samaritan or not being able to get into Good Samaritan because of a prior sex offense, so I'm simply not able to understand how an additional

[2] Although the Idaho Supreme Court has held that a defendant has no liberty interest in probation during a period of retained jurisdiction, *State v. Dabney*, 159 Idaho 790, 367 P.3d 185, 192 (2016), Mr. Reed contends that holding is incorrect and that the district court violated his due process and equal protection rights by relinquishing jurisdiction based on his indigence, *see, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *State v. Braaten*, 144 Idaho 606, 609 (Ct. App. 2007).

[3] Relatedly, as was discussed later on in the proceedings, Mr. Reed may have been ineligible for Good Samaritan's program because he has a past conviction for a sex offense. (5/1/17 Tr., p.9, Ls.15-22.) That does not change the fact that, knowing what it knew at the time, the district court abused its discretion by relinquishing jurisdiction. Nor does it change the fact that, with appropriate treatment, Mr. Reed could be a suitable candidate for probation.

reason could be arrived at after the pertinent point in time which was January 10th, 2017.").) Therefore, the district court did not reach its decision to relinquish jurisdiction by an exercise of reason because it denied Mr. Reed the opportunity to explain his efforts to get into Good Samaritan and ignored the only explanation he was able to give—that he was unable to pay for Good Samaritan.

C. The District Court Violated Mr. Reed's Fifth Amendment Rights By Relinquishing Jurisdiction Because He Did Not Take A Polygraph About His Past Alleged Sex Offenses

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." "The United States Supreme Court has held the Fifth Amendment protects against the use of a witness's compelled answers and 'evidence derived therefrom' in any subsequent criminal trial." *State v. Radford*, 134 Idaho 187, 193 (2000) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973)). This right "is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *State v. Van Komen*, 160 Idaho 534, 538 (2016) (quoting *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)). This includes relinquishment proceedings. *Van Komen*, 160 Idaho at 539. Further, "as a general rule, countervailing government interests, such as criminal rehabilitation, do not trump this right." *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005).

1. Because The District Court Considered Mr. Reed's Fifth Amendment Rights At Redisposition, But Denied The Motion And Affirmed Its Decision To Relinquish Jurisdiction, This Issue Is Preserved For Review

"Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Here, although Mr. Reed did not expressly invoke his Fifth Amendment rights at the sentencing or relinquishment hearings, on redisposition he did assert those rights, and explained that he intended to assert those rights from the outset. (R., p.45; 2/27/17 Tr., p.3, Ls.3-17.) The State agreed it would be appropriate for Mr. Reed to clarify his position and for the court to "refine the record" regarding its ruling on the polygraph so the reason for relinquishment is "on the record and subject to appellate review." (2/27/17 Tr., p.4, L.19 – p.5, L.5.) That's precisely what the court did—it explained its reasons for relinquishing jurisdiction and attempted to distinguish its decision to relinquish jurisdiction here from its decision to relinquish jurisdiction in *Van Komen*. Therefore, this issue is properly preserved for appellate review.[4]

2. Mr. Reed Faced A Risk Of Incrimination For Participating In The Polygraph, And Suffered A Penalty Amounting To Compulsion For Refusing To Take The Polygraph

To establish a Fifth Amendment claim, a witness must show that: (1) the testimony sought by the government carried the risk of incrimination; and (2) the penalty faced for refusing to testify amounted to compulsion. *See Van Komen*, 160 Idaho at 538, 540; *Antelope*, 395 F.3d

[4] Should the Court disagree, Mr. Reed's claim prevails under even the fundamental error standard of review. The district court's decision violated Mr. Reed's unwaived Fifth Amendment right to remain silent, the error is clear from the record, and the error undoubtedly affected the district court's decision to relinquish jurisdiction. *See Perry*, 150 Idaho at 226.

at 1134; *see also McKune v. Lile*, 536 U.S. 24, 49 (2002) (J. O'Connor, concurring[5]) ("The text of the Fifth Amendment does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself—it prohibits only the compulsion of such testimony . . . . [A]s suggested by the text of the Fifth Amendment, *we have asked whether the pressure imposed in such situations rises to a level where it is likely to 'compe[l]' a person 'to be a witness against himself.'*") (emphasis added).

To satisfy the first prong, the witness must face "a real and appreciable danger of self-incrimination." *Antelope*, 395 F.3d at 1134 (quoting *McCoy v. Comm'r*, 969 F.2d 1234, 1236 (9th Cir. 1983)). "This is not to say . . . that the prosecutorial sword must actually strike or be poised to strike," but the threat cannot be "remote, unlikely, or speculative." *Id.* at 1134; *see also Van Komen*, 160 Idaho at 538 (discussing how *Van Komen* could have exposed himself to criminal prosecution for rape, lewd conduct, and sexual battery by discussing his alleged sexual relationship with a sixteen-year-old girl).

To meet the second prong, the defendant need only face "any penalty for asserting the right to remain silent that was likely to compel an incriminating statement." *Van Komen*, 160 Idaho at 540; *see also Antelope*, 395 F.3d at 1135 (the question is "whether the government has sought to 'impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.'") (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)).

Mr. Reed faced a risk of incrimination for participating in the polygraph, and suffered a penalty amounting to compulsion for refusing to take it. First, the polygraph carried a real and

[5] Justice O'Connor's concurring opinion was the narrowest and thus controls. *See Antelope*, 395 F.3d at 1133 n.1.

appreciable risk of incrimination. The district court ordered Mr. Reed to be polygraphed on his "account of past sexual offenses and past violence towards women." (5/24/16 Tr., p.26, L.21 – p.27, L.1.) That would encompass his prior criminal history of allegations of sexual offenses and violence against women, many of which were dismissed for unknown reasons or had unknown dispositions, and perhaps other crimes that were 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.) A polygraph regarding Mr. Reed's past sexual offenses and violence against women, in the hands of the court and prosecutor, would present a real and appreciable risk of incrimination.

Second, Mr. Reed in fact suffered a penalty amounting to compulsion for not taking the polygraph. At the relinquishment hearing, the court made it clear why it was relinquishing jurisdiction:

> THE COURT: . . . Back on May 24th, 2016, when I sent you on this rider I recommended a CAPP Rider . . . to deal with addictions and past violence, and I also said you will need to have a polygraph on your return regarding your account of past sex offenses and violence towards women, and you will need to do Good Samaritan for ten months. . .
>
> THE COURT: And I take it you don't have a polygraph?
>
> THE DEFENDANT: No.
>
> THE COURT: Ok, well I meant what I said. I am going to relinquish jurisdiction, impose the prison sentence that I originally imposed which was seven years fixed—
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> . . . .
>
> . . . You don't have either the polygraph or the—
>
> . . . .
>
> —the arrangement to live at Good Samaritan,[6] and that's what I told you back in May. . . .

[6] At the redisposition hearing, the district court distinguished its relinquishment of Mr. Reed from its impermissible relinquishment in *Van Komen* by stating that here, unlike in *Van Komen*, it was relinquishing both because Mr. Reed did not participate in the polygraph and because he did not get into Good Samaritan. (R., pp.72-73; 2/27/17 Tr., p.6, L.9 – p.7, L.20; *see also Van Komen*, 160 Idaho at 540 ("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

(1/10/17 Tr., p.33, L.8 – p.34, L.14 (footnote added); *see also* R., pp.47-48.) Mr. Reed was in fact relinquished because he did not participate in the polygraph, a penalty which amounted to compulsion under the Fifth Amendment. *See Van Komen*, 160 Idaho at 539-41.

Therefore, the district court violated Mr. Reed's Fifth Amendment rights, failed to act consistently with the applicable legal standards, and thus abused its discretion by relinquishing jurisdiction. 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.

II.

The District Court Abused Its Discretion By Sentencing Mr. Reed Largely Based On His Alleged Prior Sex Crimes Rather Than The Methamphetamine Possession Conviction At Issue

The Court reviews the district court's sentencing decision for an abuse of discretion, which asks whether the lower court: (1) rightly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the applicable legal standards; and (3) reached its decision by an exercise of reason." *State v. Findeisen*, 133 Idaho 228, 229 (Ct. App. 1999). "A trial judge may consider a myriad of factors in imposing a sentence. . . . includ[ing] a defendant's past criminal history and, with due caution, the existence of [a] defendant's alleged criminal activity for which no charges have been filed, or where charges have been dismissed." *State v. Heffern*, 130 Idaho 946, 949-50 (Ct. App. 1997); *see also*

Amendment rights."). As explained above, however, that basis for relinquishment was equally invalid because Mr. Reed could not afford to pay for Good Samaritan.

Findeisen, 133 Idaho at 229. The court abuses its discretion, however, by essentially imposing a sentence for offenses other than the one actually before the court. *Findeisen*, 133 Idaho at 229.

Here, the district court acted outside of the boundaries of its discretion and did not reach its decision by an exercise of reason because it essentially sentenced Mr. Reed for his prior sex offenses, some of which were unproven or disputed, and not the methamphetamine possession charge that was before the court. The court's focus at sentencing was clear: It explained that it ordinarily does not "put a whole lot of importance in things in a presentence report's prior criminal reiteration," but then asked Mr. Reed to explain each of the sex and domestic crimes listed in his PSI. (5/24/16 Tr., p.19, L.24 – p.25, L.14; PSI, pp.6-13.) It asked Mr. Reed about the tattoo on his neck that says "trust no bitch" (5/24/16 Tr., p.25, L.14 – p.26, L.7; PSI, p.4), and ordered Mr. Reed to take a polygraph "regarding your account of past sexual offenses and past violence towards women" (5/24/16 Tr., p.26, L.21 – p.27, L.1). And, in its own words, the court sentenced Mr. Reed as it did because of his prior alleged sex offenses. (5/24/16 Tr., p.27, Ls.7-14 ("The reason for your sentence is your criminal record, and while I realize that there were dismissals on the sex crimes that I asked you about, I have several concerns about your explanation given the fact that there are three different events over the course of . . . five different years. There's violence to women on multiple occasions."); *see also* 5/1/17 Tr., p.17, L.20 – p.20, L.22 (the district court explaining, while denying Mr. Reed's Rule 35 motion, that he had done "nothing to assure the Court that the risk posed in his presentence report as to prior sex offenses and abuse towards women has been mitigated at all, and it's not just one event.").)

The court's decision therefore focused on Mr. Reed's prior alleged sex offenses, and whether Mr. Reed posed a danger to society based on those past offenses, while it mentioned his drug use as a mere afterthought. (*See* 5/24/16 Tr., p.27, Ls.14 – p.27, L.20 ("You've got a huge

drug problem . . . . You need to get . . . chemical dependency [treatment] while in the penitentiary.").) In short, the record in this case at the very least "suggests that the district court went beyond this authority and essentially imposed sentence for offenses other than the one that was before the court." *Findeisen*, 133 Idaho at 229. The court therefore abused its discretion by imposing an excessive sentence.

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 Mr. Reed's sentence as it deems appropriate.

DATED this 20th day of October, 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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