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# State v. Ibarra Appellant's Brief Dckt. 44948

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

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|---|---|---|
| **STATE OF IDAHO,** | ) | |
| | ) | **NOS. 44948 & 44949** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **CANYON COUNTY NOS.** |
| **v.** | ) | **CR 2016-15050 & CR 2016-15466** |
| | ) | |
| **JESSICA JEAN IBARRA** | ) | **APPELLANT'S BRIEF** |
| **AKA JESSICA JEAN DELEON** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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**HONORABLE CHRISTOPHER S. NYE**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Jessica Ibarra contends the district court made two errors in this case. First, in Docket Number 44949, she contends the district court erred by denying her motion to suppress. Ms. Ibarra was unlawfully restrained by jail officials. During the unlawful restraint, she retained a right to privacy. As such, she did not lose her ability to challenge the subsequent seizure of an item she discarded while unlawfully restrained, and the evidence resulting from the search of that item should have been suppressed. Second, Ms. Ibarra contends the district court abused its discretion by imposing excessive sentences in both cases on appeal.

Accordingly, this Court should reverse the order denying her motion to suppress and reduce her sentence as it deems appropriate, or alternatively, remand these cases for new sentencing hearings.

### Statement of the Facts and Course of Proceedings

Ms. Ibarra had been arrested for possession of a controlled substance and possession of drug paraphernalia after she admitted ownership of items which police had found in the car in which she had been riding (Docket Number 44948, *hereinafter*, the "possession" case). (*See* R., pp.7-8.) She was booked into the county jail, at which time, she was strip searched, required to squat and cough, and subjected to a dog sniff. (R., pp.126-27.) No contraband was found at that time. (R., p.127.) Two days later, a second dog sniff was conducted in her cell, and no contraband was found at that time either. (R., p.127.)

A few days later, officers received a tip from another inmate that Ms. Ibarra might have contraband. (*See* Defense Exhibit A (video of interrogation of Ms. Ibarra); *see also* Tr., Vol.1,

p.11, Ls.3-20 (defense counsel noting problems with the informant's veracity)[1]; Defense Exhibit B (the register of actions for the informant's cases).) Officers entered Ms. Ibarra's cell and apparently saw Ms. Ibarra stick her hands down her pants, which they felt meant she had put something in her vagina.[2] (*See* R., p.127; Defense Exhibit A (an officer making general assertions about what happened in the cell during his interrogation of Ms. Ibarra).) Ms. Ibarra asserted she had no contraband in her hand at that time, and a search of her cell revealed no contraband. (R., p.127.)

[1] The transcripts in this case are provided in three independently bound volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcript of the hearing on the motion to suppress held on November 21, 2016. "Vol.2" will refer to the volume containing the transcript of the change of plea hearing held on December 2, 2017. "Vol.3" will refer to the volume containing the transcript of the sentencing hearing held on March 6, 2017, and it is consecutively paginated with Vol.2.

[2]The evidence proffered to the district court while the motion to suppress was being considered included only a general reference to the events leading up to the searches of Ms. Ibarra on the day in question. (*See generally* Defense Exhibits A-B; Tr., Vol.1.) However, in their briefs on the motion, both Ms. Ibarra and the prosecutor acknowledged more specific assertions of fact about those events from the officer's report. (*See* R., pp.102-07, 135-38.) The officer who testified at the motion to suppress hearing did not offer testimony about those facts despite having been involved in those events. (*See generally* Tr., Vol.1, pp.14-27; *compare* R., p.68 (affidavit of probable cause filed in support of the initial complaint).) "[I]t would be improper to consider these facts on appeal as they were not presented to the district court at the time the motion to suppress was being considered." *State v. Smith*, ___ P.3d ___, 2017 WL 5244262, *5 n.6 (Ct. App. Nov. 13, 2017), *petition for review pending*; *accord State v. Babb*, 136 Idaho 95, 97 (Ct. App. 2001) (holding that the district court improperly relied on assertions of fact in the prosecutor's brief which had not actually been proved by the evidence offered in regard to the motion to suppress).

However, out of candor, Ms. Ibarra acknowledges those more-specific assertions of fact on appeal. For example, the probable cause affidavit asserted that the tip specifically identified Ms. Ibarra and two other inmates as having methamphetamine on the unit. (R., p.68.) It alleged that, when officers entered Ms. Ibarra's cell, she appeared to have something in her hand and that she put her hands inside her pants. (R., p.68.) It asserted that, when officers ultimately secured her hands, there was nothing in them, but they purportedly smelled of vaginal fluid. (R., p.68; *but see* R., p.104 n.2 (defense counsel noting the report gave no explanation of the basis for that conclusion).)

Officers removed Ms. Ibarra and two other inmates also suspected of possessing contraband from the unit in order to conduct searches of their persons. (*See* R., pp.127-28.) The other two inmates were strip searched, and when they asked, were allowed to go to the bathroom in a toilet with the plumbing shut off. (R., 128.) When officers found no contraband on them, the other two inmates were allowed to return to the unit. (R., p.128.)

Ms. Ibarra was also strip searched, and no contraband was found. (R., pp.127-28; Tr., Vol.1, p.26, Ls.7-9.) However, when she asked permission to go to the bathroom, her request was denied, purportedly because officers were waiting on a warrant to conduct a body cavity search.[3] (R., p.129.) After some time,[4] she was ultimately allowed to go to the bathroom, but rather than being allowed to use a proper toilet, she was required to use a "port-a-toilet" consisting of a toilet seat placed over a biohazard bag. (R., p.129; Tr., Vol.1, p.26, Ls.10-12.) Ms. Ibarra described that process as "degrading, humiliating, and unsanitary." (R., p.129.) Her waste was examined, and still, no contraband was found. (R., p.129.) As one officer admitted, at that point, they had done everything they could without seeking a warrant. (Tr., Vol.1, p.41, Ls.2-6.)

Nevertheless, officers continued to keep Ms. Ibarra in handcuffs. (R., pp.129-30.) She asserted the way in which she was handcuffed aggravated the documented issues with her back. (R., p.128.) The officers also interrogated her even though she had already clearly requested to

[3] No evidence or testimony was offered to show that the officers had actually made efforts to secure a body-cavity search warrant. (*See generally* R., Tr. Vol.1.) Trial counsel also argued they would not have actually been able to get a warrant because, in light of the fact that none of their other searches of Ms. Ibarra had uncovered any contraband, they could not have shown that probable cause continued to exist at that point. (Tr., Vol.1, p.37, L.18 - p.38, L.20.)

[4] The timeline is not particularly clear, as, according to the officer, Ms. Ibarra was detained on the day in question for "over two and a half hours approximately." (Tr., Vol.1, p.25, Ls.3-7.) She was allowed to use the bathroom sometime within the first hour and a half. (Tr., Vol.1, p.26, L.19 - p.27, L.3.)

speak to a lawyer.[5] (R., p.129.) During the unlawful interrogation, one officer again mentioned the possibility that they could seek a warrant to conduct a body cavity search. (*See* Defense Exhibit A (video of the interrogation); R., p.128 (Ms. Ibarra describing this as a threat to get such a warrant if she did not cooperate).)

When Ms. Ibarra did not make any admissions in response to their questions, the officers took her back to the booking area, still in handcuffs. (*See* R., pp.129-30; Defense Exhibit A; State's Exhibit 3.) Sometime later, a video camera shows Ms. Ibarra throw something across the room. (State's Exhibit 3.) Officers located the item, seized it, searched it, and found a wrapped-up plastic container. (*See* State's Exhibits 1-2; Tr., Vol.1, p.16, L.11 - p.17, L.13.) The plastic container tested presumptively positive for methamphetamine. (Tr., Vol.1, p.17, Ls.15-20.) As a result, Ms. Ibarra was charged with possession of contraband in a jail (Docket Number 44949, *hereinafter*, the "contraband" case).

Ms. Ibarra moved to suppress the evidence found in the plastic container. (R., p.121.) She argued that incarcerated persons retain some level of a right to privacy under the Fourth Amendment, a right which is balanced against the reasonableness of officers' intrusions into that privacy. (R., p.109.) She explained that, once the strip search occurred, her body waste was examined, and the officers found no contraband, they no longer had probable cause to continue restraining her. (Tr., Vol.1, p.37, Ls.18-23.) She also argued that, even if they had tried, the officers could not have actually secured a warrant from a magistrate at that point. (Tr., Vol.1,

[5] Ms. Ibarra moved to suppress her statements from that interrogation because of the violation of her right to speak to an attorney. (R., p.121.) The prosecutor did not contest that aspect of her motion. (R., pp.138-39) As such, the district court granted that aspect of her motion. (Tr., Vol.1, p.4, Ls.5-10.)

p.37, L.18 - p.38, L.20.) Thus, the continued detention was illegal, and therefore, the plastic container should be suppressed even though she had discarded it. (Tr., Vol.1, p.38, Ls.5-17.)

The district court concluded the officers' actions were reasonable because of the jail's interest in dealing with contraband. (Tr., Vol.1, p.40, L.22 - p.41, L.1.) It also concluded "that the property seeking to be suppressed was not found as a result of a search but rather as a result I assume of a detention for two and a half hours and then property that was discarded on the floor. . . . [I]t's abandoned." (Tr., Vol.1, p.41, Ls.2-6.) As a result, it denied her motion to suppress the evidence from the plastic container. (Tr., Vol.1, p.41, Ls.6-7.)[6]

Ms. Ibarra subsequently entered a conditional guilty plea in which she reserved her right to appeal that decision. (R., pp.164-65; Tr., Vol.2, p.4, Ls.16-24.) As a result, she pled guilty to one count of possession of a controlled substance in the possession case and one count possession of contraband in prisons in the contraband case. (Tr., Vol.2, p.3, L.21 - p.4, L.1.) She also agreed to pay restitution for all the lab testing in both cases and reimbursement for her public defender. (Tr., Vol.2, p.4, Ls.2-10.) In exchange, the State agreed to dismiss various other charges and sentencing enhancements. (Tr., Vol.2, p.4, Ls.11-15.)

At the sentencing hearing, the parties acknowledged that Ms. Ibarra was still subject to a unified sentence of nineteen years, with six and one-half years fixed, in an unrelated case. (Tr., Vol.3, p.17, Ls.9-22.) The State recommended the district court impose a concurrent twelve-year aggregate sentence in these cases, consisting of a seven-year sentence, all fixed, in the possession case, followed by a consecutive five-year sentence, all indeterminate, in the contraband case. (Tr., Vol.3, p.21, Ls.12-21.)

[6] The district court did not enter a written order in regard to the motion to suppress. (*See generally* R.)

Defense counsel noted Ms. Ibarra was still relatively young and had begun taking steps toward rehabilitation. (Tr., Vol.3, p.23, Ls.8-23, p.24, Ls.16-23.) He explained it should be quickly apparent whether Ms. Ibarra was serious about pursuing those changes, and so, the addition of six months of fixed time called for by the State's requested sentence would not really serve the goals of sentencing. (Tr., Vol.3, p.26, L.7 - p.27, L.8.) Rather, he recommended the district court impose, concurrent with her sentence from the other case, an aggregate sentence of six and one-half years in these cases, consisting of a six and one-half year sentence, with three years fixed, in the possession case and a concurrent five-year sentence, all indeterminate, in the contraband case. (Tr., Vol.3, p.25, L.21 - p.26, L.6.) The district court imposed the sentence recommended by the State. (Tr., Vol.3, p.30, Ls.10-16.)

Ms. Ibarra filed timely notices of appeal from the judgments of conviction in both cases. (R., pp.34, 43, 187, 197.)

## ISSUES

I. Whether the district court erred by denying Ms. Ibarra's motion to suppress in the contraband case.

II. Whether the district court abused its discretion in both cases by imposing excessive sentences on Ms. Ibarra.

## ARGUMENT

### I.

### The District Court Erred By Denying Ms. Ibarra's Motion To Suppress In The Contraband Case

#### A. Standard Of Review

The standard of review in regard to motions to suppress is bifurcated. *State v. Ross*, 160 Idaho 757, 759 (Ct. App. 2016). The appellate court defers to the factual findings made by the district court which are supported by substantial evidence, but reviews questions of law *de novo*. *Id*.

#### B. The District Court Should Have Suppressed The Evidence From The Plastic Container Because Ms. Ibarra Discarded It While She Was Subjected To Unlawful Police Conduct

A person usually does not retain a privacy interest in an item which she discards prior to being seized herself, and so, in those cases, she may not challenge the seizure and subsequent search of those items. *See, e.g., California v. Hodari D.*, 499 U.S. 621, 625 (1991); *State v. Zuniga*, 143 Idaho 431, 437 (Ct. App. 2006). "If the abandonment is caused by illegal police conduct, however, the abandonment is not voluntary." *State v. Harwood*, 133 Idaho 50, 52 (Ct. App. 1999); *accord Ross*, 160 Idaho at 759-60. In that latter scenario, "the defendant's actions were not truly their own, but were coerced and precipitated by the illegal police conduct." *State v. Schrecengost*, 134 Idaho 547, 550 (Ct. App. 2000). As a result, in that latter scenario, the defendant retains her ability to challenge the seizure and subsequent search of the evidence in question even though she might otherwise have been said to have abandoned it. *See, e.g., Ross*, 160 Idaho at 760.

Thus, in *Ross*, the defendant was able to challenge the officers' search of a duffle bag even though he had disclaimed ownership of the bag because the officers had unlawfully seized

the duffle bag prior to his disclaimer of ownership. *Id.* His "abandonment was not voluntary and, therefore, did not divest him of standing to challenge the search of the duffle bag" because the officers were still actively engaged in the search for evidence at the time he disclaimed ownership of the duffle bag. *Id.* As a result, the fruits of the subsequent search of the duffle bag should have been suppressed. *Id.*

*Schrecengost* illustrates the contrasting scenario. In that case, the defendant was unlawfully arrested without probable cause and strip searched at the jail. *Schrecengost*, 134 Idaho at 548. The officer found and seized several baggies during that strip search. *Id.* Thereafter, while the officer was distracted, the defendant took back the baggies and tried to flush them down a toilet. *Id.* The Court of Appeals held that, because the baggies had been taken from the defendant's possession and the officers were no longer actively searching for evidence at the time the defendant discarded the evidence, her act of discarding the baggies was sufficiently separate from the illegal arrest, such that the State could use that evidence while prosecuting a new charge of destruction of evidence.[7] *Id.* at 550.

This case is more like *Ross* than *Schrecengost* because, as will be discussed in detail, *infra*, at the time Ms. Ibarra discarded the plastic container, the officers were unlawfully restraining her, they were continuing to search for evidence, and the item in question had not yet been seized from Ms. Ibarra. Additionally, the district court acknowledged Ms. Ibarra's decision to discard the container was caused by the continuing detention: "the property seeking to be suppressed was not found as a result of a search but rather as a result I assume of a detention for

[7] The *Schrecengost* Court did not express any opinion as to whether the State could have used the evidence from the baggies in other prosecutions where the seizure and search of those baggies was more directly related to the unlawful arrest, such as in regard to her original possession of the controlled substances in the baggies. *Schrecengost*, 134 Idaho at 550 n.4.

two and a half hours and then property that was discarded on the floor." (Tr., Vol.1, p.41, Ls.2-6.) Therefore, if that detention was unlawful, and if Ms. Ibarra retained a privacy interest at that time, her discarding of the plastic container would be caused by the unlawful police conduct, and so, would not have been voluntary. *Compare Ross*, 160 Idaho at 760. In that case, Ms. Ibarra would still be able to challenge the seizure and subsequent search of the plastic container.

1. Ms. Ibarra retained a right to privacy under the Fourth Amendment despite being incarcerated

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987); *accord Sivak v. State*, 111 Idaho 118, 120 (Ct. App. 1986). One of the rights which incarcerated persons retain is the right to be free from unreasonable searches and seizures. *See, e.g., Florence v. Bd. of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 327 (2012); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979); *see generally* U.S. CONST. amend IV. However, the understanding of what is and is not reasonable is different inside a penal institution than in the community at large. For example, because of the issues inherent in jail administration, an inmate's right to privacy must "always yield to what must be considered the paramount interest in institutional security." *Hudson v. Palmer*, 468 U.S. 517, 528 (1984) (finding searches of an inmate's cell to be reasonable).

As such, "correctional officers must be permitted to devise *reasonable* search policies to detect and deter the possession of contraband in facilities." *Florence*, 566 U.S. at 328 (emphasis added). However, just because one search might be reasonable in the circumstances of a particular case, that does not necessarily mean all such searches are automatically reasonable.

*Id*. at 338-39; *see id*. at 340 (Roberts, C.J., concurring) ("it is important to me that the Court does not foreclose the possibility of an exception to the rule it announces."); *id*. at 340-41 (Alito, J., concurring) (noting that the lead opinion had not addressed whether the search it had found reasonable in that case would always be reasonable, and "[i]n light of that limitation, I join the opinion of the Court in full"). Thus, the determination of whether a correctional officer's actions are reasonable in a given circumstance is determined by evaluating the totality of the circumstances, which necessarily includes the realities of incarceration. *See id*. at 327 ("There is no mechanical way to determine whether intrusions on an inmate's privacy are reasonable. The need for a particular search must be balanced against the resulting invasion of personal rights.") (citing *Bell*, 441 U.S. at 559)

The United States Supreme Court has provided guidance on how to determine whether a search for contraband is reasonable: "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations [such as locating contraband,] courts should ordinarily defer to [prison administrators'] expert judgment in such matters." *Id*. at 328 (internal quotation omitted). That said, "[w]e do not underestimate the degree to which these searches may invade the personal privacy of inmates." *Bell*, 441 U.S. at 560. As such, there are legitimate concerns that prison officials may go too far in searching for contraband, that there may be "instances of officers engaging in intentional humiliation and other abusive practices. There may also be legitimate concerns about the invasiveness of searches involving the touching of detainees." *Florence*, 566 U.S. at 339. "Such an abuse cannot be condoned." *Bell*, 441 U.S. at 560.

The totality of the circumstances in this case reveal that, at the time Ms. Ibarra discarded the plastic container, the officers had exaggerated their response beyond what was reasonable.

As the officer admitted at the suppression hearing, they had done everything they could without a warrant. (*See* Tr., Vol.1, p.27, Ls.8-12.) They had strip searched Ms. Ibarra when she first arrived at the jail. (R., pp.126-27.) That search included having her squat and cough. (R., p.127.) It also included having a canine sniff her. (R., p.126.) They had searched her cell, which included a second canine sniff. (R., p.127.) On the day in question, they conducted a second strip search of her person. (R., pp.127-28; Tr., Vol.1 p.26, Ls.7-9.) They only allowed her to go to the bathroom under supervision and then examined her waste. (R., p.129.) During each of the searches, officers did not find any contraband in Ms. Ibarra's possession. (R., pp.126-29.) Thus, they had done everything they were reasonably allowed to do, and so, by continuing to restrain her in order to go further, beyond what was reasonable, they exaggerated their response.

Exemplifying the exaggerated nature of their response, the officers subjected Ms. Ibarra to an unlawful interrogation after she invoked her Fifth Amendment right to counsel. (*See* R., pp.129, 138-39.) In that interrogation, they threatened to get a warrant that they likely could not have gotten at that point. (*See* Section I(B)(2), *infra* (detailing why, at that point, officers did not have made a showing of probable cause to a magistrate).) After conducting that unlawful interrogation, they continued to keep Ms. Ibarra handcuffed in the booking area in a way which aggravated the documented issues with her back. (R., pp.127-28.)

The exaggerated nature of these responses is particularly evident when they are compared with the officers' responses after not finding any contraband on the other two suspects. Unlike Ms. Ibarra, they were allowed to use a proper toilet and were allowed to simply return to their cells, apparently not restrained further, when the searches failed to reveal contraband. (*See* R., pp.127-28.) Since the officers' responses in Ms. Ibarra's case were not reasonable under

*Florence* and *Bell*, they were infringing on a recognizable privacy interest at that time she discarded the plastic container.

Put another way, Ms. Ibarra's rights yielded to the *reasonable* interests of the jail. When the officers found nothing during their reasonable intrusions, there was no longer an objectively-reasonable basis to continue intruding upon her rights. *Cf. State v. Henage*, 143 Idaho 655, 662 (2007) (holding that, where an officer has patted down a suspect and has no lingering, objectively-reasonable concerns about his safety, an ensuing warrantless search will be unconstitutional because the frisk had adequately addressed the reasonable concerns). Once the reasonable interests of the jail had been addressed, there was no longer a reason for Ms. Ibarra's rights to yield. As a result, Ms. Ibarra retained a privacy interest at the point the officers continued to restrain her after they had already reasonably addressed the jail's interests.

2. The continuing restriction of Ms. Ibarra's liberty was unlawful

Certainly, corrections officers can further restrict the already-limited liberty of inmates when circumstances justify it. *See, e.g., Hudson*, 468 U.S. at 528. However, when it comes to pre-trial detainees like Ms. Ibarra, the due process clause prevents them from being "punished" in a constitutional sense because there has been no adjudication of their guilt at that point in time. *Bell*, 441 U.S. at 535; *see generally* U.S. CONST. amend. XIV. As a result, a further restriction of the already-limited liberty of a pretrial detainee will be unlawful if it amounts to "punishment." *Bell*, 441 U.S. at 538-39.

The *Bell* Court provided guidance for evaluating whether a particular restriction of a pretrial detainee's liberty amounts to unconstitutional punishment: "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id*. at 539. "Conversely, if a restriction is not

reasonably related to a legitimate goal—if it is arbitrary and purposeless—a court may permissibly infer that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees." *Id.*; *accord Mallery v. Lewis*, 106 Idaho 227, 230 (1983). For example:

> [L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternate and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

*Bell*, 441 U.S. at 539 n.20.

As discussed in Section I(B)(1), *supra*, the legitimate goal of locating contraband had already been reasonably addressed by the various searches, including dog sniffs, of Ms. Ibarra's person and cell. In fact, her situation after the searches of her person and body waste on the day in question echoes the untenable scenario from *Bell*, where the detainee is loaded with chains and shackles, as the officers continued to keep Ms. Ibarra handcuffed in a manner which aggravated her back issues. (R., pp.127-28.) She was also subjected to an unlawful interrogation in violation of her Fifth Amendment right to an attorney. (*See* R., pp.129, 138-39.) Even before that point, the officers had been acting unreasonably toward Ms. Ibarra, first denying her request to use the bathroom outright, then only allowing her to go in a biohazard bag rather than in a proper toilet. (R., p.129.)

The arbitrariness of those actions is evident from the way the officers handled the two other inmates who were also suspected of possessing the contraband in question. When the other two inmates asked, they were not only allowed to go to the bathroom, but were also allowed to use a proper toilet, though the plumbing was turned off as a precaution against disposal of evidence. (*See* R., p.128.) Furthermore, when officers found no contraband after strip searching

the other two, they were allowed to return to their cells, apparently not further restrained. (*See* R., p.128.) Thus, there were alternative, less harsh methods available to the officers, which means the officers' actions toward Ms. Ibarra were arbitrary and amount to unconstitutional punishment of a pretrial detainee.

Furthermore, the continued restraint of Ms. Ibarra's liberty was purposeless because, despite the officer's threat, they could not have gotten a search warrant for a body cavity search at that point. In fact, there is no indication that the officers were actually trying to get such a warrant. (*See generally* R., Tr., Vol.1.) Rather, the evidence presented in regard to the motion to suppress only shows that the officer told Ms. Ibarra they could seek a warrant in an apparent effort to elicit an admission, including during an unlawful interrogation. (R., p.128; *see* Defense Exhibit A.) Thus, there is no evidence that the purpose of continuing to restrain Ms. Ibarra's liberty was actually to secure a warrant, as opposed to "punishing" her for not cooperating with their investigation.[8]

Even if seeking a warrant was their purpose, it was not a legitimate basis to justify the prolonged restraint because the officers did not have probable cause to justify that detention. *See State v. Kapelle*, 158 Idaho 121, 129 (Ct. App. 2014) (noting that officers could have detained the defendant to preserve the *status quo* while they sought a search warrant specifically because they had probable cause from smelling raw marijuana upon entering the house); *but see Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) ("We can assume . . . that the police violated the Fourth and Fourteenth Amendments by detaining petitioner and his companions in the house

[8] Warrantless seizures of a person are presumptively unreasonable. *See, e.g., Halen v. State*, 136 Idaho 829, 833 (2002). As such, the State bears the burden of proving that the officers' actions fall within one of the limited, well-delineated exceptions to the warrant requirement. *Id*. Thus, the lack of evidence in the record before the district court weighs in favor of granting the motion to suppress because it means the State failed to carry its burden.

while they obtained a search warrant for the premises" even though they had smelled marijuana smoke upon entering the house). That lack of probable cause also made it unlikely, given the evidence presented in regard to the motion to suppress, that the officers could have actually gotten a search warrant at that time. (Tr., Vol.1, p.37, L.18 - p.38, L.20; *see also* Tr., Vol.1, p.11, Ls.3-20 (defense counsel discussing problems with the informant's veracity).)

Specifically, warrants are not properly issued based on informant tips, even if the informant is known, when the officers have conducted a follow-up investigation and failed to corroborate the tip. *See, e.g.*, *State v. Chapple*, 124 Idaho 525, 530 (Ct. App. 1993) (concluding there was insufficient corroboration of a known confidential informant's tip, and so, the evidence properly before the magistrate failed to establish probable cause to justify issuing a search warrant); *see also State v. Turpin*, 129 Idaho 748, 750-51 (Ct. App. 1997) (holding that, where the officers' investigation had not sufficiently corroborated an informant's tip, the officers had failed to establish probable cause to justify issuing a search warrant). Here, the officers did everything they could reasonably do without a warrant and found no evidence of contraband. (*See* Tr., Vol.1, p.27, L.8-12.) Rather than blooming into probable cause, the reasonable suspicion gained by the informant's tip in this case dissipated. *See, e.g.*, *Florence*, 566 U.S. at 339 (noting that limits exist on officers' ability to search incarcerated persons); *Bell*, 441 U.S. at 560 (same). As such, the officers could not have made a sufficient showing to establish probable cause to a magistrate when their follow-up searches had not corroborated the informant's tip.

Because the officers no longer had probable cause, the continued restriction of Ms. Ibarra's already-limited liberty was not *reasonably* related to a legitimate goal. Rather, especially when contrasted against the officers' actions with the other two inmates they also suspected of possessing contraband, the officers' actions in this case were arbitrary and

purposeless, and thus, amounted to unconstitutional punishment of a pretrial detainee. By going beyond what was reasonable, these actions amount to the type of abuses which the United States Supreme Court has held "cannot be condoned." *Bell*, 441 U.S. at 560. Therefore, continuing to restrain Ms. Ibarra after officers had reasonably addressed the legitimate governmental interest was unlawful.

3. Conclusion

Because Ms. Ibarra had a right to privacy and the continuing restraint of her liberty was unlawful at the time she abandoned the plastic container, her abandonment of that container was not voluntary. *See Ross*, 160 Idaho at 760. Therefore, she can challenge the seizure and search of that container and the fruits of the illegal search should have been suppressed. *Id.*; *accord Wong Sun v. United States*, 371 U.S. 471, 484 (1963). As a result, this Court should reverse the order denying her motion to suppress that evidence.

## II.

## The District Court Abused Its Discretion In Both Cases By Imposing Excessive Sentences On Ms. Ibarra

### A. Standard Of Review

Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982). Accordingly, in order to show an abuse of discretion in the district court's sentencing decision, he must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *State v. Jackson*, 130 Idaho 293, 294 (1997). The district court abuses its discretion if it does not

appreciate the decision as one within its discretion, if it does not act within the outer bounds of that discretion or inconsistent with the applicable legal principles, or if it does not reach its decision in an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

The governing criteria, or sentencing objectives, are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id*. The protection of society is the primary objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Therefore, a sentence which protects society and also accomplishes the other objectives will be considered reasonable. *Id*.; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500; I.C. § 19-2521. However, the Idaho Supreme Court has indicated that rehabilitation is the first means the district court should consider to achieve that goal. *See State v. McCoy*, 94 Idaho 236, 240 (1971), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015).

B. A Sufficient Consideration Of The Mitigating Factors Reveals That Concurrent, Shorter Sentences Would Better Serve The Goals Of Sentencing In Ms. Ibarra's Cases

In these cases, the district court did not reach its sentencing decision in an exercise of reason, as it failed to sufficiently consider the various mitigating factors, and thus, imposed sentences which failed to serve all the goals of sentence. Specifically, there are two aspects of the imposed sentences which are flawed: the seven-year fixed term in the possession case is excessive, and the decision to make the five-year sentence in the contraband case consecutive to the sentence in the possession case is excessive.

As trial counsel pointed out, Ms. Ibarra was beginning to make efforts at rehabilitation, and it would become clear relatively quickly how serious she was about continuing those efforts. (Tr., Vol.3, p.26, L.19 - p.27, L.1.) Therefore, he argued the district court could promote the goal of rehabilitation by imposing a sentence that would not hamper her potential release from custody if she continued those efforts at rehabilitation after the six and one-half years she would be serving because of her other case. (*See* Tr., Vol.3, p.26, L.25 - p.27, L.8.) Sentences are to be crafted so they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988).

Specifically, Ms. Ibarra's efforts at rehabilitation are evidenced by her expressing remorse, accepting responsibly for her actions, and acknowledging the need for consequences to result from them. (Tr., Vol.3, p.27, L.11, p.28, Ls.1-2.) These are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). Furthermore, she agreed, as part of the plea agreement, to pay restitution for the lab costs in this case, as well as reimbursement for the public defender costs. (Tr., Vol.2, p.4, Ls.2-10; Tr., Vol.3, p.22, Ls.17-23.) Willingness to pay restitution is another factor which should be considered in mitigation. I.C. § 19-2521(2)(f); *State v. Hall*, 114 Idaho 887, 889 (Ct. App. 1988).

Additionally, trial counsel pointed out Ms. Ibarra is still relatively young. (Tr., Vol.3, p.23, Ls.8-23; *see* PSI, p.1 (noting Ms. Ibarra was 31 years old at that time).) When a defendant is still young, her age is a factor which weighs in mitigation because it speaks significantly to her rehabilitative potential. *State v. Shideler*, 103 Idaho 593, 595 (1982); *Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *Eubank*, 114 Idaho at 639. A younger offender should be treated

more leniently because she is still maturing, and still able to become a productive member of society. *See, e.g., State v. Dunnagan*, 101 Idaho 125, 126 (1980).

Ms. Ibarra's rehabilitative potential is further demonstrated by the continuing support from her mother. (*See* Presentence Investigation Report (*hereinafter*, PSI), p.14.) Family constitutes an important part of a support network, which can help in rehabilitation. *See Kellis*, 148 Idaho at 817 (holding that familial support offered to affirm the defendant's innocence does not equate to familial support offered in consideration of rehabilitation, implying that had the support been offered for rehabilitation, it would be a mitigating factor worthy of consideration). Trial counsel also explained that Ms. Ibarra's prior history, particularly of disciplinary reports while in custody, (*see* PSI, pp.7-12), was a product of her poor choices in terms of associates. (Tr., Vol.3, p.24, Ls.3-15.) However, she has begun to realize the role those decisions have played and started to address them since being incarcerated in these cases. (Tr., Vol.3, p.24, Ls.16-23.)

Ms. Ibarra also expressed a desire to achieve and maintain her sobriety. (PSI, p.20; Tr., Vol.3, p.28, Ls.22-23.) To that point, she noted that she was able to successfully participate in drug court for over a year back in 2006. (Tr., Vol.3, p.28, Ls.2-9.) Such amenability to treatment should also be considered as a mitigating factor. *See, e.g., State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

As a result of all these mitigating factors, trial counsel explained that adding six months of fixed time to Ms. Ibarra's overall term of incarceration would not really serve the goals of sentencing. (Tr., Vol.3, p.27, Ls.4-8.) Rather, taking her rehabilitative potential into account, allowing her to demonstrate her dedication to continue working toward that goal and leave it to the parole board to decide whether she should be released at the end of the six and one-half years

she would be obligated to serve regardless would better serve all the goals of sentencing. (Tr., Vol.3, p.26, L.25 - p.27, L.8.)

As a result, the district court's decision to impose a seven-year sentence, all fixed, in the possession case, rather than the six and one-half year sentence, with three years fixed, requested by trial counsel, fails to serve all the goals of sentencing, particularly the goal which the Idaho Supreme Court has indicated should be the first means considered to achieve protection of society. Similarly, its decision to run the five-year indeterminate sentence for the contraband case consecutive to the sentence in the possession case, rather than, as trial counsel requested, concurrent with the other sentences, fails to adequately consider the mitigating factors, and so, is excessive. Therefore, the district court abused its discretion in both those aspects of its sentencing decision.

## CONCLUSION

Ms. Ibarra respectfully requests that this Court reverse the decision denying her motion to suppress in the contraband case. She also respectfully requests this Court reduce both her sentences as it deems appropriate, or alternatively, remand these cases for a new sentencing hearing.

DATED this 5th day of December, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of December, 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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BRD/eas