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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Docket No. 45260
Plaintiff/Appellee)	
)	Kootenai County Docket No. 2016-7215
)	
vs.)	
)	
NICHOLAS BRIAN SUNSERI,)	
)	
Defendant/Appellant.)	
)	
)	

APPELLANT'S REPLY

Appeal from the District Court of the First Judicial District for Kootenai County.
Honorable Cynthia Meyer, District Judge Presiding

K. Jill Bolton ISBN: 5269

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APPELLANT'S REPLY

1. SUMMARY OF APPELLANT'S REBUTTAL

This Court is called upon to decide whether an individual who learns only after the entry of his guilty plea, that he will face a lifetime ban on his fundamental right to possess firearms and ammunition as a consequence of his misdemeanor conviction **and** that he has meritorious defenses to the misdemeanor charges has established the minimal **"just cause"** to withdraw his guilty plea prior to sentencing.

This case goes beyond the age-old collateral versus direct consequence analysis of the Court's plea colloquy urged by the State in its Response. This case is larger than the question of merely whether the magistrate was required to advise Mr. Sunseri of the loss of his Second Amendment rights upon conviction for the misdemeanor charge of domestic violence. This case implicates the very question of what constitutes just cause for a misdemeanor defendant to withdraw his guilty plea prior to sentencing.

Mr. Sunseri submits that where an individual hastily enters an uncounseled guilty plea to a misdemeanor domestic violence charge to secure his release, then, with assistance of counsel, learns that he will forever lose his Second Amendment rights upon conviction, obtains the State's evidence against him and learns he has meritorious defenses to the charges, that individual has established **"just cause"** to withdrawal his pre-sentencing guilty plea. Indeed, if Mr. Sunseri's case doesn't establish the requisite **"just cause"** then what circumstances would?

2. THE CRITICAL QUESTION ON APPEAL

The central question of this appeal is what constitutes **"just cause"** to permit withdrawal of a pre-sentencing guilty plea. The case law in Idaho on this point, while significant, does not address the unique issues and questions presented here. The facts that Mr. Sunseri put before the

lower court in support of his motion to withdraw his pre-sentencing guilty plea pursuant to Idaho Criminal Rule 33(c) are:

- a misdemeanor defendant;
- in custody and appearing by video;
- without legal counsel;
- desperate to secure his release to return to work;
- offered a plea agreement that recommended his release;
- unaware and not advised by the magistrate at the time of his plea of the consequences to his Second Amendment rights;
- post-plea assistance of counsel in understanding his meritorious defenses to the charges;
- post plea assistance of counsel in understanding the immediate lifetime ban on his right to possess firearms and ammunition upon conviction; and
- verification to the trial court that he would not have pled guilty had he known these things.

3. THE STATE FAILS TO ADDRESS THE “JUST CAUSE” QUESTION

The State’s response does not squarely confront this critical question of what constitutes “just cause” for a pre-sentence withdrawal of a misdemeanor guilty plea. The State’s analysis instead focuses narrowly on whether the impact on Mr. Sunseri’s Second Amendment rights is a collateral consequence of which the magistrate was required to inform him. But a trial court’s failure to advise a defendant of a collateral consequence, even if we assume the failure to advise of the lifetime ban on his Second Amendment rights is a collateral consequence, does not *a fortiori* mean the defendant does not have just cause to withdraw his plea.

The State's analysis misses the mark because it fails to provide any authority that rejects Mr. Sunseri's position. Even the district court below remarked on how **just** Mr. Sunseri's **cause** appeared to be:

The Court cannot conceive that the loss of a substantial right predicated upon a misdemeanor conviction should require anything less [than Court notice]; particularly when a defendant is appearing via video from jail and is not represented by counsel...Particularly when a defendant is incarcerated and presented with a Hobson's choice to plead not guilty and potentially remain in jail and lose employment, or accept the plea offer and be released. (R. at 217).

But sadly, the district court applied the same flawed logic as the State:

The loss of the right to possess a firearm is a collateral consequence regardless of the legal fiction that characterizes it as such...Therefore, inasmuch as the Court would like to find that fairness and justice require that a defendant be informed of the loss of a fundamental right prior to entering a guilty plea for a misdemeanor charge of domestic violence, that is not currently the state of the law. (R. at 217).

The court's failure to advise a misdemeanor defendant of a consequence that it never before has been required to advise a misdemeanor defendant of is not the issue here. The issue is whether Mr. Sunseri, under all of the circumstances of his case – consulting with counsel after his plea, learning that the consequence of conviction would be the immediate lifetime ban on his right to possess firearms and ammunition and learning of his legal defenses to the charges -- has established “**just cause**” to withdraw his guilty plea.

In affirming the magistrate, the district court followed the same flawed analysis of whether the magistrate was required to inform Mr. Sunseri of the impact on his Second Amendment rights, rather than the material inquiry of whether Mr. Sunseri has established “just cause” for the withdrawal of his guilty plea.

The State's Response also does not address the fact that the district court ignored the critical part of Mr. Sunseri's claim relating to his meritorious defenses. Mr. Sunseri established by affidavit in support of his motion to withdraw his guilty plea that it was only after the entry of

his guilty plea that he obtained counsel, was able to review the State's evidence, and discovered his meritorious defenses to the charges. (R. 38, 39). The district court simply brushed aside this argument and ignored his affidavit indicating that Mr. Sunseri "did not argue that he had not in fact committed the offense..." (R. 221).

When a defendant moves to withdraw his guilty plea before sentencing, the trial court must determine whether the defendant entered a knowing, intelligent, and voluntary plea. *State v. Hanslovan*, 147 Idaho 530, 536, 211 P.3d 775, 781 (Ct. App. 2008). To determine whether the defendant entered a knowing, intelligent, and voluntary plea, the court looks at the whole record and considers: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial; and (3) whether the defendant understood the consequences of pleading guilty. *Workman v. State*, 144 Idaho 518, 527, 164 P.3d 798, 807 (2007). If the court determines the defendant entered a knowing, intelligent, and voluntary plea, it must **[then]** ask whether the defendant showed **just cause** to withdraw the plea. *Hanslovan*, 147 Idaho at 536, 211 P.3d at 781 (emphasis added). Once the defendant shows **just cause** to withdraw the plea, the State may avoid withdrawal of the plea only by demonstrating prejudice. *Id.*

The State's response focuses only on the first part of the *Hanslovan* inquiry – i.e. whether the plea was knowing, intelligent and voluntary. It is strictly in this inquiry that the question arises as to whether the trial court must advise a defendant of collateral consequences. By ending here, the State, like the district court, missed the "**just cause**" analysis. Without analysis or authority, the State's response simply states "not being aware of a collateral consequence does not constitute a just reason to withdraw that guilty plea." (Resp. Br. at 8).

But here it is the second and separate question in *Hanslovan* that is critical. The question

is not only whether Mr. Sunseri's plea was knowing and voluntary, but whether, under all of the circumstances of his case he showed "just cause" to withdraw the plea.

The State also confuses Mr. Sunseri's argument when it asserts that he "appears to argue that his guilty plea to domestic battery in the presence of a child violated his constitutional due process rights because his guilty plea deprived him of his Second Amendment rights." *Id.* at 16. Mr. Sunseri's argument is that after consulting with counsel, obtaining the State's evidence, learning about his meritorious defenses and learning of the impact on his Second Amendment rights, Mr. Sunseri would not have pled guilty. Therefore, Mr. Sunseri asserts that he had the requisite just cause to withdraw his guilty plea.

The State also misapplies and misunderstands the direct and immediate consequences to Mr. Sunseri upon conviction of the misdemeanor crime of domestic violence. It is not, as the State asserts, an impact that happens only when and if the federal government indicts him for violations of 18 U.S.C. § 922(g), it is a lifetime ban and prohibition on his right to possess and purchase a firearm in Idaho or any other State. *See* Brady Act of 1993, Public Law 103-159 (establishing the National Instant Criminal Background Check System (NICS) and prohibiting Federal Firearms Licensees (FFL) from transferring firearms in violation of Section 992(g) or (n) of Title 18 United States Code). In other words, upon conviction of the misdemeanor crime of domestic violence, Mr. Sunseri will be turned away by his local, State of Idaho, FFL should he attempt to buy a gun. Therefore, Mr. Sunseri's concern is not with the Federal Government, but it is with the impact a conviction of a misdemeanor crime of domestic violence has on his Second Amendment rights and that he was not made aware of this impact by either the State of Idaho in its plea offer, or the Court who took his plea.

It bears repeating that at the time that Mr. Sunseri sat in jail, conferred with the court by

video, without the assistance of counsel, and was offered a plea deal that proposed his immediate release, Mr. Sunseri was facing a **misdemeanor** conviction, not a felony conviction. In contrast to misdemeanants, “felons lose out on fundamental rights such as voting and serving on juries, and face discrimination that need only survive rational basis review...[i]ndeed felons are categorically different from the individuals who have a fundamental right to bear arms.” *United States v. Chovan*, 735 F.3d 1127, at 1145 (9th Cir. 2013)(Bea, J. concurring), quoting *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Given this categorical difference, how could Mr. Sunseri have known or even had a reasonable basis to suspect that he would face a permanent ban on his Second Amendment rights upon conviction of a misdemeanor? He didn’t and the Court didn’t advise him and he learned about it only after his plea and after consulting with his legal counsel. He then promptly and justly moved to withdraw his plea.

Mr. Sunseri has satisfied the just cause requirement for withdrawal of his pre-sentencing guilty plea to the misdemeanor crime of domestic violence and this Court should permit the withdrawal.

4. THE JUDGE’S FAILURE TO ADVISE MR. SUNSERI OF THE LIFETIME BAN ON HIS SECOND AMENDMENT RIGHTS ALSO PROVIDES HIM WITH JUST CAUSE TO WITHDRAW HIS GUILTY PLEA.

The State’s Response focuses on this Court’s lengthy history of interpreting Rule 11’s requirement – “that the defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other **direct** consequences that apply.” I.C.R. 11(c)(2) (emphasis added).

Mr. Sunseri does not dispute that this has been the traditional analysis for state and federal courts interpreting the voluntariness of a guilty plea. However, what Mr. Sunseri proposes, in light of the sea change in this traditional analysis in the analogous deportation

context, is that there is reason for this Court to expand the interpretation here. See, e.g. *Padilla v. Kentucky*, 559 U.S. 356, at 365-66 (holding that “[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence” and applying the *Strickland* analysis to Padilla’s ineffective assistance of counsel claims); *People v. Peque*, 22 N.Y.3d 168, at 193-194; 3 N.E.3d 617 at 634-635 (N.Y. 2013)(holding that while “the consequences of deportation did not fit squarely within the direct consequences mold...fundamental fairness still requires a trial court to make a non-citizen defendant aware of the risk of deportation because deportation frequently results from a non-citizen’s guilty plea and constitutes a uniquely devastating deprivation of liberty.”).

While the State correctly points out that the more recent *United States v. Delgados-Ramos* case did not require Courts to advise defendants of deportation consequences, it left open such challenges where defendants properly assert that they would not have entered the plea but for the court’s alleged error. *Delgados-Ramos*, 635 F.3d 1237, 1241-42 (9th Cir. 2011). Mr. Sunseri in this case has established that he would not have pleaded guilty had he known of the consequences to his Second Amendment rights. (R. 38, 39).

Further, this Court has recognized and ensured similar protections for individuals facing important and so-called “collateral consequences” to their pleas by expanding the criminal rules to require advising certain criminal defendants of non-direct consequences of a defendant’s plea. I.C.R. 11. Trial courts in Idaho must advise all defendants, prior to entering their guilty pleas, that if they are not a United States citizen, they face the consequence of deportation. I.C.R.11(d)(1). Sex offenders pleading guilty to crimes requiring sex offender registration must similarly be advised at the time of their guilty pleas of the sex offender registration requirements.

I.C.R. 11(d)(2). While the current Idaho criminal rules do not state that Courts must advise a misdemeanor defendant that he will, upon conviction, immediately face a lifetime ban on his Second Amendment rights (see, *Chovan*, 735 F.3d 1127 (9th Circ. 2013), cert. denied 135 S.Ct. 187 (2014)), this substantive Constitutional right is immediately and automatically lost upon conviction. *Id.*

This Court is now presented with an opportunity to decide that the loss of a fundamental right, such as the right to own and possess firearms, “the true palladium of liberty” deserves some notice prior to permanent deprivation. *McDonald v. City of Chicago*, 388 U.S. 742, at 769-70 (1967).

5. CONCLUSION

The State’s response does not refute Mr. Sunseri’s “just cause” to withdraw his pre-sentence guilty plea. This Court must find that under the facts and circumstances of Mr. Sunseri’s case, he has established just cause to withdraw his guilty plea.

This Court should reverse the lower court’s decision and direct that Mr. Sunseri’s Motion to Withdraw his guilty plea be granted.

DATED THIS 13th day of March, 2018.

BOLTON LAW, PLLC
Attorney for Defendant/Appellant



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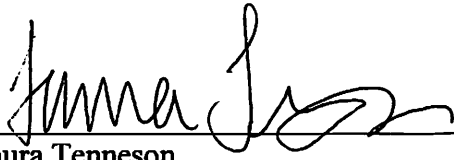
CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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