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IN THE SUPREME OF THE STATE OF IDAHO

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

BRIEF OF APPELLANT

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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STATEMENT OF THE CASE

1. NATURE OF THE CASE

This Court is called upon to decide what constitutes “just cause” for a misdemeanor defendant to withdraw his guilty plea prior to sentencing. Where an individual hastily enters a guilty plea to a misdemeanor domestic violence charge to secure his release, then learns not only that he has meritorious defenses to the charges, but also that he will forever lose his Second Amendment right to own and possess firearms and ammunition, and establishes he would not have pleaded guilty had he been aware of these things, has that individual established “just cause” to withdraw his pre-sentencing guilty plea? The answer must be yes.

The Courts below erred in focusing solely on whether or not the Appellant (“Mr. Sunseri”) should have been advised by the Court of the permanent firearms ban consequence at the time of his guilty plea. Deciding the Court was not required to advise him of this devastating impact on his fundamental rights, the lower Courts established an untenable result. This Court is called upon to decide whether meritorious defenses and consequences to a Constitutionally secured fundamental right constitutes the requisite “just cause” for a misdemeanant to withdraw his guilty plea prior to sentencing. Put another way, if these reasons, including loss of a Constitutionally secured, fundamental right is not “just cause” what is? The lower Court’s decision denying Mr. Sunseri’s motion to withdraw his pre-sentencing guilty plea must be reversed.

The right to consult with legal counsel at each stage of an adversarial judicial proceeding by an individual charged with a crime is the cornerstone of the Sixth Amendment right to

counsel. Mr. Sunseri was advised of this right when he opted to accept the City of Coeur d'Alene prosecuting attorney's offer to plead guilty to the misdemeanor charge of domestic violence and obtain the city's recommendation that he be released from jail. He needed to return to his job and the charge, after all, was classified as just a misdemeanor. After securing his immediate release and saving his employment, Mr. Sunseri exercised his Constitutionally guaranteed right to counsel prior to his sentencing hearing.

With the assistance of counsel, Mr. Sunseri obtained the City's evidence and learned about his defenses to the charges. Additionally, he learned that upon his sentence and conviction, he faced an immediate, lifetime ban on his Second Amendment right to own and possess firearms and ammunition. With the assistance of counsel, he then filed his motion to withdraw his plea with the following Affidavit in support:

2. PROCEDURAL HISTORY

On April 15, 2016, Mr. Sunseri was arrested by the City of Coeur d'Alene Police Department and charged with domestic battery in the presence of a child in violation of Idaho Code § 18-918(b)(4). He remained in custody pending his arraignment on April 19, 2016 before Kootenai County Magistrate Judge James D. Stow. After an advice of rights discussion with all defendants present for arraignments that day, Judge Stow presented Mr. Sunseri with the City of Coeur d'Alene Prosecuting Attorney's offer, accepted his guilty plea, and released him from custody.

Mr. Sunseri then sought and obtained the assistance of legal counsel who appeared on May 13, 2016. The City and Mr. Sunseri's counsel exchanged criminal discovery disclosures

and, on June 13, 2016, Mr. Sunseri filed his motion to withdraw his guilty plea and demand for jury trial supported by his Memorandum in Support and his “Affidavit of Nicholas Sunseri.” The City of Coeur d’Alene filed its Memorandum of Authorities in Opposition to Mr. Sunseri’s motion to withdraw his guilty plea on June 30, 2016. Mr. Sunseri filed his Reply Memorandum on July 5, 2016. Mr. Sunseri’s motion to withdraw his plea was heard by the Honorable Robert J. Caldwell on July 8, 2016. Judge Caldwell denied his motion by oral decision hearing held on July 21, 2016. On July 27, 2016, Judge Caldwell issued his written Order Denying Defendant’s Motion to Withdraw Guilty Plea.

Mr. Sunseri filed his Notice of Appeal on July 27, 2016 and Motion to Stay the Imposition of his Sentence Pending Appeal on the same day. Mr. Sunseri’s Motion to Stay was heard by Judge Peterson on August 31, 2016 and denied on the record. Sentencing was held on October 11, 2016 and at that time Judge Peterson granted Mr. Sunseri’s Motion to Stay Execution of the Sentence Pending Appeal. An Order Staying the Execution of the Sentence Pending Appeal was entered on November 15, 2016.

Mr. Sunseri then timely appealed the Magistrate’s decision denying his motion to withdraw his guilty plea to the Honorable District Judge Meyer. Judge Meyer heard the appeal on April 25, 2017 and issued her Memorandum Decision and Order on Appeal on May 22, 2017. Mr. Sunseri then timely appealed the District Court’s decision to this Court.

2. STATEMENT OF FACTS

On April 15, 2016, Mr. Sunseri was arrested and incarcerated in the Kootenai County jail on charges of domestic battery or assault in the presence of a child and interfering with a 911

call. He was held in jail without bond. While still in custody and without legal counsel, Mr. Sunseri appeared for his initial appearance before the Honorable Judge Stow. Audio of Arraignment (April 18, 2016).

The audio recording of the arraignment hearing demonstrates that Judge Stow advised all defendants of their right to remain silent, their right to the assistance of counsel and the appointment of counsel at public expense if they could not afford one, and the right to a trial by jury. *Id.* When Mr. Sunseri appeared on his specific case, the following pertinent plea colloquy took place. Mr. Sunseri is asked by Judge Stow if he recalls the rights the judge had gone over with everyone at the start of the proceedings. Mr. Sunseri indicates he did. Judge Stow then advises Mr. Sunseri of the following: (1) that the crime of domestic violence in the presence of a child carries with it up to 1 year in jail and a \$1,000 fine; (2) that the prosecuting attorney was offering that in exchange for his guilty plea to the domestic violence charge, s/he would recommend his immediate release from jail with a sentencing recommendation of his 3 days in jail to be credited, a \$300 fine and 2 years of unsupervised probation. According to Judge Stow, the prosecutor also agreed to dismiss the interference with a 911 call charge. *Id.*

The audio recording also reflects that Mr. Sunseri asks Judge Stow whether he would get out of jail today if he pled guilty. Judge Stow advises him that the prosecutor's offer, if accepted, would recommend that he be released from jail, but cautioned him that he should not make a decision based on whether or not he will get out of jail. Judge Stow then proceeded with a plea colloquy, accepts his plea and orders his release from custody. *Id.*

While the audio recording of the initial appearance indicates that Judge Stow advised him

of the potential punishment for domestic violence under Idaho law and his basic rights as a criminal defendant, it does not demonstrate that Mr. Sunseri was advised of one consequence that would be very important not only to Mr. Sunseri, but to any misdemeanant charged with a domestic violence crime. Upon conviction of an Idaho state misdemeanor crime of domestic violence, he faced a lifetime ban on his Second Amendment rights to receive and possess firearms or ammunition pursuant to 18 U.S.C. § 922(g)(9).

District Judge Meyer on appeal aptly noted: “This Court is not aware of any other misdemeanor offense that would result in the lifetime loss of a fundamental right. It is precisely the unique nature of this prohibition that offends the notion that such a loss is a collateral consequence.” (Mem. Dec. and Order on Appeal, May 22, 2017).

Also, Mr. Sunseri was not supplied with the police reports or evidence the City purported to have in support of the charges.

Through his affidavit in support of his motion to withdraw his guilty plea, Mr. Sunseri established that he pled guilty because he wanted to return to work and did not want to lose his job after serving 3 days in jail. (Sunseri Aff., June 13, 2016). Mr. Sunseri’s right to own and possess firearms and ammunition, afforded him by the Second Amendment, is very important to him and had he known that this would be the consequence of his guilty plea, he would not have pleaded guilty. *Id.* Mr. Sunseri learned of the consequences to his Second Amendment rights only after he pleaded guilty to the misdemeanor crime of domestic violence and obtained counsel. *Id.* Additionally, after obtaining counsel, Mr. Sunseri obtained the City’s evidence and learned that he had meritorious defenses to the charges. *Id.* He wanted to withdraw his plea and

he had just reasons for doing so.

Both the Magistrate and District Court Judges found that Mr. Sunseri's loss of the right to possess firearms and ammunition upon conviction of the misdemeanor domestic violence crime is a "collateral consequence and not a direct consequence of a finding of guilty." Thus, they reasoned, Judge Stow was not required to advise him of this consequence and his failure to do so did not justify the withdrawal of his guilty plea. Mem. Dec. and Order (May 22, 2017) *aff'g* Oral Decision at 8:37 (July 21, 2016). Neither Court took this analysis to the next level of the impact this plea has on Mr. Sunseri's substantial rights. Both decisions hinged solely on whether Judge Stow needed to advise Mr. Sunseri of his loss of rights.

Both the Magistrate and District Court Judges ignored consideration or reference to all of Mr. Sunseri's reasons supporting his motion to withdraw his guilty plea. In particular, both courts ignored that he asserted meritorious defenses to the charges before his sentencing hearing. *Id.* Indeed, the District Court on appeal noted that Mr. Sunseri "also argues that he had a meritorious defense to the charges against him," but dismisses the argument as "not brought before the magistrate court" indicating that "this Court will not consider it for the first time on appeal." Mem. Dec. and Order (May 22, 2017) at 3. Mr. Sunseri's affidavit in support of his motion to withdraw his guilty plea was very clear. It set forth and preserved all of these issues on appeal, including his meritorious defenses argument. (Sunseri Aff., June 13, 2016). Further, Mr. Sunseri's affidavit established that the failure to inform him impacted his substantial rights. He would not have pleaded guilty had he known of these consequences and the outcome of his case would have been different had he been so advised. Neither of the lower courts considered the

impact on Mr. Sunseri's substantial rights and the District Court on appeal erroneously found that Mr. Sunseri failed to raise all of these issues before the Magistrate. His Affidavit demonstrates this clear error.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, vs. NICHOLAS BRIAN SUNSERI, Plaintiff, Defendant.	CASE NO. CRM-16-7215 AFFIDAVIT OF NICHOLAS BRIAN SUNSERI
---	--

STATE OF WASHINGTON)
County of Spokane) ss.

I, NICHOLAS BRIAN SUNSERI, being first duly sworn on oath deposes and states:

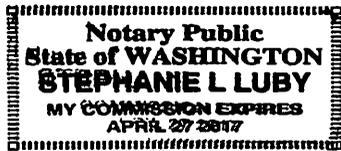
1. I am the Defendant in the above entitled matter.
2. On April 15, 2016 I was arrested for domestic violence related charges. I was held in jail without bond until I next appeared in court on April 18, 2016. This time in jail caused me great concern regarding my employment and I very much needed to secure my release in order to get back to work and not lose my job.

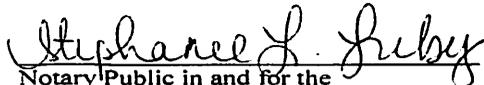
3. On April 18, 2016, I had my initial appearance with Judge Stow and the prosecuting attorney offered that I plead guilty to a misdemeanor domestic violence charge, in exchange for dismissal of another charge and a recommendation that I be immediately released from jail. The prosecutor's offer was very appealing because it made it likely I would be immediately released from jail and be able to return to my job.
4. I pled guilty because I wanted to return to work and did not want to lose my job. At the time of my plea, I understood that the prosecutor's recommendation would be for me to be credited for my 3 days in jail and receive no more jail time, that I would receive a 2 year period of unsupervised probation and a \$300.00 fine.
5. I was not advised that a consequence of my guilty plea was a lifetime ban on my right to own and possess firearms and ammunition. This right is very important to me. Had I known I would lose this important right, I would not have pled guilty.
6. After my guilty plea, I obtained legal counsel and I now understand that I have meritorious defenses to the prosecutor's charges.
7. I would therefore like to withdraw my guilty plea and exercise my right to a jury trial on the charges.

DATED this 10th day of June, 2016.


 NICHOLAS BRIAN SUNSERI
 Defendant/Affiant

SUBSCRIBED and SWORN to before me this 10 day of June, 2016.




 Notary Public in and for the
 State of Washington
 Commission expires: 4.27.2017

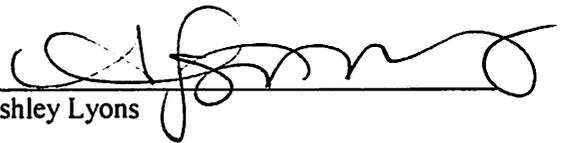
This Affidavit was certified as filed by fax with the Kootenai County Clerk's office.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of June, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Roy Gowey
COEUR D'ALENE CITY PROSECUTOR
816 E. Sherman Ave. Ste. 4
Coeur d'Alene, ID 83814

[] U.S. Mail
[] Hand Delivered
[X] Facsimile : (208)769-2326
[] Overnight Mail



Ashley Lyons

And the Kootenai County clerk's receipt of the faxed copy was confirmed.

* * * Communication Result Report (Jun. 13. 2016 3:21PM) * * *
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Notwithstanding his sworn affidavit and all of the reasons establishing the requisite “just cause” both the Magistrate and the District Court on appeal from the Magistrate ignored this evidence. Further, both the Magistrate and the District Court based their decisions to deny Mr. Sunseri’s motion to withdraw his guilty plea solely on the faulty reasoning that since the

Magistrate Judge who took Mr. Sunseri's plea wasn't required to advise him of the consequences to his Second Amendment rights, his post plea comprehension of this consequence was immaterial. In so holding, both lower courts abused their discretion in denying Mr. Sunseri's Motion to Withdraw his Guilty Plea.

This case appeals the District Court's decision affirming the Magistrate Court's denial of Mr. Sunseri's motion to withdraw his guilty plea, prior to sentencing on the misdemeanor charge of domestic violence in the presence of a child, in violation of Idaho Code § 18-918(4).

3. STANDARD OF REVIEW

Appeals of a magistrate's decision require an examination of the record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *State v. Korn*, 148 Idaho 413, 415, 224 P.3d 480, 482 (2009); *State v. Boehm*, 346 P.3d 311, 314 (Ct. App. 2015).

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and **such discretion should be liberally applied**. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986)(emphasis added).

Appellate review of the denial of a motion to withdraw a guilty plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific

choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

An elaboration of this standard in the plea withdrawal context was supplied by the prohibition era Idaho Supreme Court case of *State v. Raponi*, 32 Idaho 368, 182 P.2d 855 (1919). This case supplied the original language that “discretion should be liberally exercised” and provided that “[d]iscretion, in this sense, means the court’s power to decide the particular matter before it **according to its sense of justice and fitness, a power which, however, can only be exercised in accordance with the law, or with equitable principles**, as the case may be.” *Id.* at 373 (emphasis added).

Further, this Court has recognized that in the context of permitting the withdraw of a guilty plea, a Court’s “exercise of this discretion is affected by the timing of the motion to withdraw the guilty plea...a motion made after sentencing may be granted ‘only to correct manifest injustice.’ A less rigorous standard applies to a motion made before sentencing.” *State v. Ballard*, 1114 Idaho 799, 761 P.2d 1151 (1988).

4. SUMMARY OF ARGUMENT

A criminal defendant may withdraw his pre-sentence guilty plea upon a showing of just cause. After making this showing, the State may avoid the withdrawal only where it can demonstrate that it will suffer prejudice.

Here, Mr. Sunseri was not advised by Judge Stow, nor did he know at the time of the entry of his plea that he would automatically be subjected to a lifetime ban on his Second Amendment right to own and possess firearms and ammunition upon conviction. Mr. Sunseri

pleaded guilty to a misdemeanor, understanding only that by doing so he would receive the benefit of the City Prosecuting Attorney's recommendation of his immediate release from jail with credit for the 3 days he served, two years of unsupervised probation, a \$300 fine, a requirement to obtain an evaluation and follow treatment recommendations, and the dismissal of a second misdemeanor charge.

Mr. Sunseri then consulted with an attorney about his hasty plea. He obtained comprehensive advice about his case, his defenses and the impact of a conviction on his Second Amendment Rights. Fully informed, Mr. Sunseri moved to withdraw his plea promptly and prior to sentencing. Through his affidavit in support of his motion to withdraw his guilty plea, Mr. Sunseri established that he did not understand he would face this lifetime ban on his rights to possess firearms and ammunition, that he had meritorious defenses *and* he would not have pleaded guilty had he known what he learned from consulting with legal counsel.

Under current Idaho criminal rules, defendants charged with serious sex crimes must be advised of the collateral consequence of sex offender registration requirements. I.C.R. 11(d). And non-citizens must be advised of the collateral consequences of deportation. *Id.* But a misdemeanor defendant charged with domestic violence is not told, or at least not required to be told by criminal rule, that he will forever lose his Second Amendment rights. This cannot stand.

The consequence to the Mr. Sunseri of losing his gun rights is similar, if not more important, than the consequence that non-citizen defendants face upon criminal conviction and should be analyzed in a similar fashion. Just as non-citizen defendants have been deemed entitled to advisement of the consequence of deportation and removal from the United States upon

conviction of certain crimes, so too should a U.S. citizen be advised of the consequences to his Second Amendment rights upon conviction of a misdemeanor crime of domestic violence.

Even if courts are not required to provide this notice, their failure to do so should permit a domestic violence misdemeanant to withdraw his guilty plea, particularly at the pre-sentencing stage where a plea withdraw is permitted upon a showing of just cause.

5. ARGUMENT

The United States Supreme Court has recognized that the right to keep and bear arms is a fundamental right which the states must confer upon their citizens under the fourteenth amendment. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S.Ct. 3020 (2010). As Justice Alito, noted in the majority opinion and the district court in Mr. Sunseri's appeal aptly quoted:

Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as the "true palladium of liberty" and explained that prohibitions on the right would place liberty "on the brink of destruction." 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1083); see also W. Rawle, A view of the Constitution of the United States of America, 125-126 (2d ed. 1829)(reprint 2009); 3 J. Story, Commentaries on the Constitution of the United States § 1890, p. 746 (1833)("The right of citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them").

Id. at 769-70, 130 S.Ct. at 3037-38. See also, Mem. Dec. and Order, at 11 (May 22, 2017).

A guilty plea is subject to review for determination of whether it was knowingly, intelligently, and voluntarily made. *State v. Hanslovan*, 147 Idaho 530, 536, 211 P.3d 775, 781 (Ct. App. 2008); *State v. Rodriguez*, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). If

the plea is constitutionally valid, the court must then determine whether the defendant has shown another just reason for withdrawing the plea. Idaho Criminal Rule 33(c); *State v. Flowers*, 150 Idaho 568, 571, 249 P.3d 367, 370 (2011). This just reason standard does not require that the defendant establish manifest injustice or a constitutional defect in the guilty plea. *Flowers*, 150 Idaho at 571, 249 P.3d at 370; *State v. Henderson*, 113 Idaho 411, 413, 744 P.2d 795, 797 (Ct. App. 1987). Once a just reason is shown, the Court should deny the motion to withdraw only where the State establishes prejudice. *Flowers*, 150 Idaho at 571, 249 P.3d at 370. The defendant's failure to present and support a plausible reason will dictate against granting withdrawal, even absent prejudice to the prosecution. *State v. Dopp*, 124 Idaho 481, 485, 861 P.2d 51, 55 (1993). The good faith, credibility, and weight of the defendant's assertions in support of his motion to withdraw his plea are matters for the trial court to decide. *Hanslovan*, 147 Idaho at 537, 211 P.3d at 782.

Before accepting a guilty plea, the trial court is charged with establishing on “the record of the entire proceedings, including reasonable inferences drawn therefrom,” in pertinent part, that “the defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply.” I.C.R. 11(c)(2).

At any time before sentence is imposed or imposition of a sentence is suspended, a defendant may move the court to withdraw his guilty plea. I.C.R. 33(c). This rule provides a remedy for a defendant who has pleaded guilty and then later learns that the actual consequences of his plea are different than what he understood. It also “distinguishes between pleas made prior to and after sentencing, exacting a less rigorous measure of proof for presentence motions.” *State*

v. Dopp, 861 P.2d 51 at 55, 124 Idaho 481 at 485 (1993). A plea that does not include all the elements of I.C.R. 11(c), including the voluntariness requirements of that rule, may be withdrawn. *Id.*

The *Dopp* court established a two-part test for pre-sentencing withdrawals of guilty pleas. First, the defendant who seeks to withdraw his plea “must show a just reason for withdrawing the plea.” Second, once the defendant has shown his just reason, the State may avoid the withdrawal only by demonstrating prejudice. *Id.*; see also *State v. Hawkins*, 117 Idaho 285, 289, 787 P.2d 271, 275 (1990); *State v. Ballard*, 114 Idaho 799, 801, 761 P.2d 1151, 1153 (1988); and *United States v. Carden*, 599 F.2d 1320 (4th Cir.1979).

The timing of the motion to withdraw is important. In *State v. Henderson*, the Court of Appeals found that the district court abused its discretion in denying a pre-sentencing motion to withdraw a guilty plea, finding:

[t]his is not a situation where the defendant pled guilty, discovered what his sentence would be, and then sought to withdraw the plea. Rather this is a case where the motion was filed before judgment and sentencing. Consequently, Henderson was not required to demonstrate a ‘manifest injustice,’ nor was he required to establish a constitutional defect in his plea. **He was required only to present a fair and just reason for withdrawing the plea.**

113 Idaho 411, at 413, 744 P.2d 795, at 797 (Ct. App. 1987)(emphasis added).

Unlike any other misdemeanants, an individual who pleads guilty to a state domestic violence crime, faces a lifetime ban on his right to possess firearms and ammunition. Specifically, federal law proscribes anyone who: “has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce,

or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(9). A violation of this federal statute is a federal felony offense punishable by up to 10 years in prison and a \$250,000 fine. 18 U.S.C. § 924(a)(2). Again, this is a **lifetime ban** to individuals convicted of state domestic violence crimes. See *United States v. Chovan*; 735 F.3d 1127 (9th Cir. 2013) (affirming the constitutionality of 922(g)(9)’s lifetime ban on the possession of firearms by individuals convicted of state misdemeanor crimes of domestic violence.); *cert. denied* 135 S.Ct. 187 (2014).

A. Mr. Sunseri Demonstrated Just Cause to Withdraw His Pre-Sentence Guilty Plea

The scope of the court's discretion is affected by the timing of the motion. Where the motion is filed before sentencing, the defendant need only show a "just reason" for withdrawing the plea. I.C.R. 33(c); *State v. Ballard*, 114 Idaho 799, 801, 761 P.2d 1151, 1153 (1988); *State v. Dopp*, 124 Idaho 512, 516, 861 P.2d 82, 86 (Ct. App. 1992). The court is also allowed to "temper its liberality" in these cases "by weighing the defendant's apparent motive." *State v. Mayer*, 139 Idaho at 647, 84 P.3d at 583 (Ct. App. 2004). A plausible reason, absent prejudice to the state, will permit granting the withdrawal. *Id.* (emphasis added).

Mr. Sunseri consulted with and retained an attorney after he pleaded guilty to the misdemeanor crime of domestic violence. With counsel on board, Mr. Sunseri obtained the City of Coeur d’Alene’s evidence and learned that he had meritorious defenses to the charges. He also learned that upon conviction he would forever lose his Second Amendment rights to own and possess firearms and ammunition. Educating himself on his defenses with counsel’s assistance

and learning that he would lose his Second Amendment rights most certainly established a plausible reason and the required “just cause” to grant his motion to withdraw his guilty plea.

When he entered his guilty plea, he very much wanted to be released from jail and return to his work. The offer supplied to him by the prosecuting attorney, as conveyed by Judge Stow, permitted his immediate release. He was charged only with a misdemeanor and he had no idea, nor was he advised that his guilty plea would lead to such important consequences to the rights he had previously enjoyed all of his adult life. His colloquy with Judge Stow reflects his very real concern with obtaining his immediate release. Had his colloquy involved notice of the impact on his Second Amendment rights, he would not have accepted the City’s offer.

Moreover, Mr. Sunseri established his just cause by his affidavit in support of his motion to withdraw his guilty plea. He established that after he pleaded guilty but before sentencing he has learned that he has meritorious defenses to his criminal charges and he would not have pleaded guilty had he known of the impact on his gun rights.

At the hearing on his motion to withdraw his guilty plea, Judge Caldwell was presented with the required “just cause” and his failure to grant the withdrawal motion was an abuse of discretion.

The most recent and compelling precedent pertaining to plea withdrawals involving so-called “collateral consequences” was established by the Ninth Circuit in *United States v. Delgados-Ramos*, which analyzed a Defendant’s right to withdraw his plea where he had not been advised of the collateral consequence of deportation. 635 F.3d 1237 (9th Cir. 2011). Delgados-Ramos sought to withdraw his plea under the more stringent post-sentencing

standards. The Ninth Circuit found that had Delgados-Ramos simply established that he would not have pleaded guilty had he known of the deportation consequences of his plea, he would have prevailed on his motion. Having failed to establish that, however, his attempt to withdraw his plea was properly denied. This Ninth Circuit precedent establishes that once a defendant demonstrates that he would not have pleaded guilty had he known of the plea consequences, such as deportation, but was not informed of these consequences at the time of his plea, the Court's failure to inform him will have impacted his "substantial rights" permitting the withdrawal of his guilty plea. *Delgados-Ramos* at 1241-42, citing *United States v. Dominguez-Benitez*, 542 US. 74 at 82-83 (2004).

In this case, like the Court requirements in *Delgados-Ramos*, Idaho Criminal Rule 11 did not require Judge Stow to advise Mr. Sunseri of the lifetime ban on his right to possess firearms and ammunition. However, even if Mr. Sunseri were in the same disadvantaged posture of Delgados Ramos, raising the issue for the first time only after sentencing under the more stringent standard of review, he would prevail on his motion to withdraw his plea. Mr. Sunseri, unlike Delgados-Ramos, established that the court's failure to inform him did affect his substantial rights. Mr. Sunseri, by affidavit in support of his motion to withdraw his guilty plea, established that he would not have pleaded guilty had he been fully advised by Judge Stow of these consequences. In other words, the outcome in his case would have been different had he been advised of this consequence and therefore the Court's failure to advise him did in fact affect his substantial rights.

When Mr. Sunseri presented his motion to withdraw his plea to Judge Caldwell, it was in

this pre-sentencing phase. His reasons were not only that he should have been informed about the consequences to his Second Amendment Rights to own and possess firearms, but that the failure to advise him affected his substantial rights. Upon consulting with his counsel, a right of which he was advised, he obtained the City's evidence and learned he had meritorious defenses. He wanted to exercise his right to a trial by jury and did not want to face a lifetime ban on his Second Amendment Rights to own and possess firearms and ammunition. Moreover, he would not have pleaded guilty had he known what he learned from his counsel. These reasons far exceeded the required "plausible" and "just" reason standard of this Court's precedents and the lower courts should have permitted the withdrawal.

B. The State failed to establish prejudice

In the State's written response, it made no claim of prejudice anywhere in its briefing. Instead, the State simply argued at the Motion to Withdraw hearing that granting the motion to withdraw would mean that more time might transpire before the case was heard at trial. The City prosecutor asserted: "The State suffers prejudice whenever there is a delay in a case like this, whenever there is a victim who is in a, I guess, emotional entanglement with the defendant where there's testimony that's going to be difficult to give." Tr. Mtn. to Withdraw Guilty Plea, at 6 (July 8, 2016). Mr. Sunseri submits that this purported "prejudice" falls far short of the prejudice that must be demonstrated to overcome Mr. Sunseri's "just cause." Any emotional entanglement and difficulty a putative domestic violence victim may have in testifying against an alleged defendant more likely would dissipate, rather than become more difficult to give in a true domestic violence scenario. Further, it is probably true that anytime a defendant seeks to

withdraw his guilty plea, trial is likely to be set at a later date. Thus, if a later trial date, standing alone, were the standard of prejudice, it's hard to imagine a scenario wherein the State would not suffer prejudice – making the rules permitting a plea to be withdrawn meaningless.

Further, the State could demonstrate no actual prejudice. Had Judge Caldwell permitted the withdrawal, the matter would have proceeded to trial and the State would have its opportunity to prosecute its case. The same holds true today.

C. Even under a hypothetical post-conviction analysis, Mr. Sunseri should be allowed to withdraw his plea because he was deprived of his Second Amendment rights without due process

The State and Federal Constitutions guarantee that the State shall not deprive any person of his or her liberty without due process of law. U.S. Const, amend XIV; ID Const, art I, § 13. Federal courts have recognized that the right to own and possess firearms stems from “the Second Amendment [which] protects the right of individuals to privately keep and bear their own firearms.” *United States v. Emerson* 270 F.3d 203 (5th Cir. 2001), cert. denied *Emerson v. United States*, 536 U.S. 907 (2002); U.S. Const, amend II. Thus, such deprivation may not occur without due process of law. *Id.* To ensure that a criminal defendant receives due process before pleading guilty and surrendering his or her most fundamental liberties to the State, a trial court bears the responsibility to confirm that the defendant's plea is knowing, intelligent and voluntary. *United States v Ruiz*, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002); *Boykin v Alabama*, 395 U.S. 238, 243-244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In particular, it "must be clear that 'the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *North Carolina v Alford*, 400 U.S. 25, at 31 (1970).

At his plea, however, Mr. Sunseri did not know and was not advised that he was forfeiting his fundamental right to keep and bear arms. The United States Supreme Court has recognized that the right to keep and bear arms is a fundamental right that the fourteenth amendment requires states provide their own citizens. *McDonald*, 561 U.S. 742, 130 S.Ct. 3020 (2010).

In the comparable deportation consequence scenario, New York State's highest court has found that while the consequence 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." *People v. Peque*, 22 N.Y.3d 168 at 193-194, 3 N.E.3d 617 at 634-635 (N.Y. 2013).

Just like the State of Idaho in this case, the State of New York argued that deportation was a strictly collateral consequence of a guilty plea, about which a trial court has no duty to inform a defendant. But New York's highest court disagreed with the State and found that: "deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness." *Id.* 980 N.Y.S.2d at 297.

Indeed, the State of Idaho seems to have already recognized the importance of this advisement in the deportation and sex offender contexts with Idaho Criminal Rule 11(d) which mandates that the trial court advise criminal defendants of potentially applicable deportation as well as sex offender registration requirements during guilty plea colloquies involving predicate

offenses.

Losing your fundamental right and interest in owning and possessing firearms, “the true palladium of liberty” recognized by our United States Supreme Court, certainly deserves some notice prior to permanent deprivation. *McDonald*, 561 U.S. at 769-70 (2010). Surely if non-citizens must be advised of deportation consequences and convicted sex offenders notified of registration requirements, surely U.S. citizens facing conviction of only a misdemeanor crime, should be notified of the consequence to their Constitutionally guaranteed right to keep and bear arms.

The lower courts’ strict reliance on the direct versus the collateral consequences analysis in denying Mr. Sunseri’s Motion to Withdraw his guilty plea was an abuse of discretion.

D. A conviction for a State of Idaho domestic violence crime results in the immediate and direct consequence of a lifetime ban on the use and possession of firearms, and the trial court’s failure to inform Mr. Sunseri permits his withdrawal of his guilty plea.

The consequences that flow from the plea of guilty and ultimate sentence and conviction for a State of Idaho crime of domestic violence are the immediate lifetime ban on that defendant’s right to possess and use firearms and ammunition. See *United States v. Chovan*; 735 F.3d 1127 (9th Cir. 2013); cert. denied 135 S.Ct. 187 (2014). The loss of this substantive, Constitutional right is definite and completely automatic, and takes effect immediately upon conviction. *Id.* This is not some later discretionary call of a federal prosecutor about whether or not to charge a defendant for violating that law.

A consequence has also been defined as "collateral" where "it lies within the discretion of

the court whether to impose it," or where "its imposition is controlled by an agency which operates beyond the direct authority of the trial judge." See *United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir.1997) ("A consequence" has been defined as direct where it is "definite, immediate and largely automatic."). See also *United States v. Salerno*, 66 F.3d 544, 551 (2nd Cir.1995) (same); *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 267, 633 N.Y.S.2d 270 (N.Y.1995) (same); *State v. Barton*, 93 Wash.2d 301, 609 P.2d 1353, 1356 (Wash.1980) (same).

The consequences that flow from a conviction for a state crime of domestic violence include the immediate prohibition on the use and possession of firearms and ammunition. This consequence is definite and completely automatic, and takes effect immediately upon conviction. 18 U.S.C. § 922(g)(9); *United States v. Chovan*; 735 F.3d 1127 (9th Cir. 2013). As such, prior to accepting a plea of guilty to a State of Idaho misdemeanor crime of domestic violence, the consequences of facing a lifetime ban on an individual's constitutionally secured and fundamental right to own and possess firearms and ammunition is such a substantial and unique consequence of a plea that, like the notice of deportation or sex offender registration, should be disclosed by the trial court to inform a defendant as a matter of fundamental fairness. Because Mr. Sunseri was not advised of this right, he should have been allowed to withdraw his plea.

6. Conclusion

Mr. Sunseri established the required "just cause" to withdraw his pre-sentence guilty plea. This Court must find that upon learning after the plea and before sentencing that he had meritorious defenses to the charges and that he would forever be deprived of his fundamental right to own and possess firearms and ammunition, the minimal "just cause" requirement was

certainly met. Whether deemed by Idaho courts as “direct” or “collateral,” a lifetime ban on one’s Second Amendment Rights, must qualify as just cause to withdraw a pre-sentencing guilty plea. Since the City of Coeur d’Alene failed to establish prejudice, it was error for the court’s below to deny his motion to withdraw his guilty plea.

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

DATED THIS 13th day of November, 2017.

BOLTON LAW, PLLC
Attorney for Defendant/Appellant



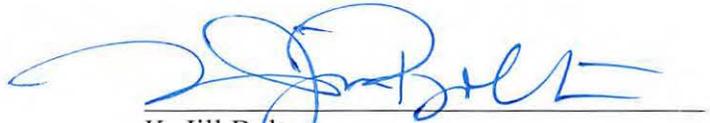
K. JILL BOLTON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of November, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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