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State v. Allmaras Appellant's Brief Dckt. 45821

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Respondent,	**NOS. 45821 & 46817**
v.	**KOOTENAI COUNTY NO. CR-14-20024**
MATTHEW ALLEN ALLMARAS,	**APPELLANT'S BRIEF**
Defendant-Appellant.	

BRIEF OF APPELLANT

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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Matthew Allmaras appeals because the district court revoked his probation based on an unlawful term – one that conditioned his release from incarceration on waiving his Fifth Amendment rights and taking a full-disclosure polygraph. The district court's decision to follow through on that unlawful threat in this case runs directly contrary to several recent decision from the Idaho Supreme Court and Court of Appeals and should be reversed for the same reasons.[1]

The district court compounded its violation of Mr. Allmaras' Fifth Amendment rights when it subsequently relinquished jurisdiction over his case because he did not take a polygraph for the court during the period of retained jurisdiction. That decision is particularly problematic because it was based on essentially the same provision which the Idaho Supreme Court has held to not be an enforceable order because it was ambiguous. As such, attempting to enforce such a provision was impermissibly arbitrary.

For any or all those reasons, this Court should vacate or reverse the erroneous decision in this case. As it has done in several cases, it should remand for further proceedings in front of a different judge.

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[1] At the time of the decision to revoke Mr. Allmaras' probation, this same district court judge had been reversed for making essentially the same error in *State v. Van Komen*, 160 Idaho 534, 538-40 (2016). By the time it subsequently relinquished jurisdiction over Mr. Allmaras, three other decisions had been issued in which the courts found this same district court judge had committed similar errors. *State v. Le Veque*, 164 Idaho 110, 116 (2018); *State v. Reed*, 163 Idaho 681, 685-87 (Ct. App. 2018); *State v. Le Veque*, 2017 WL 5560270 (Ct. App. 2017), *vacated on other grounds by Le Veque*, 164 Idaho 110. Mr. Allmaras' case is also not the only one currently pending on appeal which includes this issue by the same district court judge – the same issue has been raised in *State v. Guzman*, Docket No. 46401.

Statement of the Facts and Course of Proceedings

When the district court suspended Mr. Allmaras' sentence in this case, it told him he would be required to serve 180 days in the local jail as part of his probation, and it conditioned his release from that incarceration on him taking a "full-disclosure polygraph." (45821 R., p.163.)[2] If he did not pass that polygraph, or even "if you don't get a full disclosure polygraph in the next 180 days, I'll send you on a rider." (Tr., p.56 (p.18, Ls.9-12).)[3]

Mr. Allmaras subsequently filed a motion asking the district court to clarify that term of his probation (Term 21) or otherwise modify his sentence because that term made it illegal. (45821 R., pp.139-40.) The district court explained, "what I've at all times been wanting to get to the bottom of is what he did on the events in question [sic]." (Tr., p.28 (p.12, Ls.11-12).) Mr. Allmaras argued he had already made the required disclosure in that regard when he proffered, and the district court accepted, his *Alford* plea.[4] (Tr., p.29 (p.13, Ls.13-14).) As such, he asserted that requiring a further polygraph examination about those events, which could

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[2] Since the record is provided in two different volumes, citations thereto will identify the case number in which the cited volume was provided. Citations to the record in Docket No. 45821 will be to the 3rd Supplemental Clerk's Record, which is contained in the electronic file with the name beginning "Supplemental Clerk Record Appeal Volume 1 11-30-2018."

[3] All the relevant transcripts are provided in the electronic document provided in Docket No. 46817 with the file name beginning "Transcript Appeal Volume 1." However, the transcripts in that file are individually paginated and some are provided four-to-a-page, while others are provided one-to-a-page. Therefore, to avoid confusion, citations to the transcripts will be in the following format: (Tr., p.[electronic page number], (p.[internal transcript page number], Ls.[internal transcript line numbers]).)

[4] Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), Mr. Allmaras had pled to one count of injury to child, amended from lewd conduct, maintaining his innocence but admitting the State's evidence would likely result in a conviction at trial. (Tr., p.7 (p.4, Ls.8-18).) This case was delayed for a substantial period of time as Mr. Allmaras, who was living in Vancouver, Washington, struggled to find transportation to hearings in Idaho. (*See generally* 45821 R. (including several motions and stipulations for continuances of the change of plea and sentencing hearings).) Mr. Allmaras stood beside his plea even after the current district court judge, to whom this case was reassigned during the interim before sentencing, refused the binding recommendation the plea agreement had originally contained. (*See* 45821 R., p.136; Tr., p.7 (p.3, Ls.19-25).)

potentially expose him to other criminal liability, was unlawful under the Fifth Amendment. (Tr., p.29 (p.13, Ls.16-22).) Therefore, he stood on his Fifth Amendment rights and refused to take the polygraph. (Tr., p.14 (p.10, Ls.13-18).)

The district court followed through on its threat, determining that Mr. Allmaras' decision to stand silent and not take a polygraph constituted a violation of the terms of his probation, and as a result, it executed his sentence for a period of retained jurisdiction. (Tr., p.13 (p.6, Ls.21-22, p.7, Ls.17-22).) The district court repeatedly told Mr. Allmaras: "I guarantee you that if you don't come back here with a full disclosure polygraph that you pass that determines what your involvement was on the day in question, I won't consider probation; I will impose the prison sentence." (Tr., p.13 (p.8, Ls.16-20); *accord* Tr., p.14 (p.10, L.23 - p.11, L.2) ("But if I don't see a polygraph that details his knowledge of the events in question, I guarantee you I will impose the prison sentence."); Tr., p.14 (p.11, Ls.8-10) ("If you don't have a polygraph at least concerning the events in question, I will impose your prison sentence.").)

Although the district court had stated it would require a "full disclosure" polygraph at various points during the disposition hearing, and that term appeared in the initial written order retaining, though the district court struck it out. (*See* 45821 R., p.150; *see also* 46817 R., pp.220-21, 239 (order granting a motion to remove the "full disclosure" language from an amended version of the order retaining jurisdiction, which had reincorporated that term).) As the district court subsequently explained, it agreed with Mr. Allmaras that it could not order a "full disclosure" polygraph under Idaho law. (Tr., p.79 (p.21, Ls.10-12).) However, it maintained that it could still order him to take a polygraph regarding the events underlying the charges in this case. (Tr., p.79 (p.21, Ls.12-17); *accord* Tr., p.28 (p.12, Ls.11-14).)

Mr. Allmaras performed well during his period of retained jurisdiction, and the rider staff recommended his sentence be suspended for a period of probation. (Conf. Docs., pp.51-57.)[5] The staff explained that Mr. Allmaras had been an "outstanding" and active participant in his classes, engaging with the treatment programs and becoming a role model for others in the program. (Conf. Docs., pp.52-54; Tr., p.77 (p.19, Ls.1-4) (reporting that, after the rider staff's report was written, he had been able to complete his GED).) The staff noted that he presented a moderate risk to reoffend, but he had learned to identify risky thinking and behaviors, and had developed plans to deal with those situations in a prosocial manner. (Conf. Docs., p.56.) He also had a good support system in place, particularly if an interstate compact was approved, as that would allow him to be closer to his support system. (Conf. Docs. p.54.)

Mr. Allmaras was not offered a polygraph as part of the rider program. (*See generally* Conf. Docs., pp.51-57.) He was, however, able to get one on his own after he returned, but it was not conducted by an IDOC-approved polygrapher. (Tr., p.67 (p.9, Ls.20-22).) He ultimately chose not to disclose the results of that polygraph to the district court. (*See, e.g.,* Tr., p.75 (p.17, Ls.8-9).) Instead, he submitted the handbook regarding the administration and use of such polygraphs, pointing out that the handbook was clear – courts should not rely on a polygraph alone to terminate court supervision or treatment programs. (Tr., p.75 (p.17, Ls.18-22); Conf. Docs., pp.90-91.) The handbook also revealed that polygraphs which evaluate the defendant's account of the instant offense are specifically designed, in part, to learn whether there were other actions or criminal conduct that occurred, but which had not been included in the victim's allegations or the underlying charges. (Conf. Docs., p.99.)

[5] "Conf. Docs." refers to the electronic page numbers of the document provided in Docket No. 46817 with the file name which begins "Confidential Documents Appeal Volume 1."

Mr. Allmaras requested the district court suspend his sentence for a period of probation based on his performance in the rider program. (Tr., p.75 (p.17, Ls.14-16).) The prosecutor made no recommendations; rather, he noted the fact that no polygraph had been submitted for the court's review, and deferred to the district court. (Tr., p.75 (p.17, Ls.8-12).)

The district court relinquished jurisdiction specifically because Mr. Allmaras did not provide it with results from a polygraph regarding the underlying offense. (Tr., pp.79-80 (p.21, L.5 - p.21, L.11).) It asserted that, without that polygraph, it could not know "who I'm dealing with," as Mr. Allmaras and the victim had given different accounts of the events in question. (Tr., p.79 (p.21, Ls.20-25).) It did not mention any of the rider staff's report about Mr. Allmaras' ability to be successful in controlling risky behaviors and thought processes if released back to society based on his efforts in the treatment programs. (*See generally* Tr.)

Mr. Allmaras filed a motion under I.C.R. 35 asking the district court to modify the illegal sentence or reduce it and place him on probation. (46817 R., pp.250-53.) The district court denied that motion, again because it did not have a polygraph regarding Mr. Allmaras' version of events. (Tr., p.86 (p.15, Ls.13-15) (denying the motion under I.C.R. 35(a) because "I have no idea really from Mr. Allmaras' standpoint what happened back on August 9th, 2014, so I think that covers the legal issues."); Tr., p.88 (p.22, L.22 - p.23, L.1) (denying the motion under I.C.R. 35(b) because of the "uncertainty" about what happened in this case).)

Mr. Allmaras filed notices of appeal timely from the order revoking his probation, the order relinquishing jurisdiction, and the order denying his motion to correct the illegal sentence. (45821 R., p.152; 46817 R., pp.272, 310.)

ISSUES

I. Whether the district court violated Mr. Allmaras' Fifth Amendment rights by revoking his probation based on his refusal to waive those rights and participate in a full-disclosure polygraph.

II. Whether the district court erred by relinquishing jurisdiction over Mr. Allmaras based on a provision which was neither specific or distinct enough to be an enforceable order.

III. Whether the district court violated Mr. Allmaras' Fifth Amendment rights by relinquishing jurisdiction based on his failure to take a polygraph examination after it had put him in the classic penalty scenario.

ARGUMENT

I.

The District Court Violated Mr. Allmaras' Fifth Amendment Rights By Revoking His Probation Based On His Refusal To Waive Those Rights And Participate In A Full-Disclosure Polygraph

A. Standard Of Review

The appellate courts review a decision to revoke probation for an abuse of discretion. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). The district court abuses its discretion when: (1) it fails to recognize the issue as one of discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistently with the applicable legal standards, or (4) it reaches its decision without exercising reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018).

In this case, the district court acted inconsistently with the applicable legal standards by setting an unlawful term of probation on Mr. Allmaras and by revoking his probation based on his refusal to waive his rights and comply with that term of probation. Within that analysis, "[c]onstitutional issues are purely questions of law over which this Court exercises free review." *State v. Akins*, 164 Idaho 74, 76 (2018).

Likewise, whether a term of probation is valid is a question of law which is freely reviewed by the appellate court. *Le Veque*, 164 Idaho at 114. If a term of probation is invalid, it should be declared so at the revocation hearing; the district court cannot revoke probation based on an invalid term of probation. *Le Veque*, 164 Idaho at 114 (citing *State v. Hayes*, 99 Idaho 713 (1978), *State v. Mummert*, 98 Idaho 452 (1977), *State v. Oyler*, 92 Idaho 43 (1968), and *State v. Jones*, 123 Idaho 315 (Ct. App. 1993)).

B. Term 21 Of Mr. Allmaras' Probation Was Unlawful Because It Conditioned His Release From Incarceration On His Participation In A Full-Disclosure Polygraph, Thereby Impermissibly, Implicitly Seeking To Compel Him To Waive His Fifth Amendment Rights

Citizens have the right under the Fifth Amendment to refuse to participate in polygraph examinations, particularly full-disclosure examinations about their sexual behaviors, because there is a significant risk they will incriminate themselves in answering the questions posited during such examinations. *Van Komen*, 160 Idaho at 538-39; *Estrada v. State*, 143 Idaho 558, 564 (2006). They do not lose these privileges in light of a criminal conviction or because they are incarcerated. *Van Komen*, 160 Idaho at 538 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)). Those privileges are also "'as broad as the mischief against which [the Fifth Amendment] seeks to guard' and that privilege is only fulfilled when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.'" *Estelle v. Smith*, 451 U.S. 454, 458 (1981) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), and *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), respectively) (ellipsis from *Estelle*).

That privilege is violated when "the state . . . [*seeks*] *to induce* him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions capable of forcing the self-incrimination which the Amendment forbids."[6] *Murphy*, 465 U.S. at 434 (emphasis and ellipsis added). The threats of increasing the amount of time a person spends incarcerated or of continuing periods of incarceration are sufficient to trigger this sort of violation. *State v. Powell*, 161 Idaho 774, 779-80 (Ct. App. 2017) (refusal to consider a person for parole triggers this sort of violation, as it is more like relinquishing jurisdiction (*Van Komen*, 160 Idaho at 540) or

[6] The courts are state actors, and so, when "the state" bears an obligation to enforce a defendant's rights, such as the obligation recognized in *Murphy*, the courts are included within the term "the state." *See State v. Folk*, 151 Idaho 327, 334 (2011).

revoking probation (*United States v. Antelope*, 395 F.3d 1128, 1139 (9th Cir. 2005)), as opposed to only changing conditions of the term of confinement (*McKune v. Lile*, 536 U.S. 24 (2002) (fractured opinion)).)

Therefore, conditioning a person's release from incarceration in a local jail during a period of probation based on the defendant's participation in a full-disclosure polygraph and threatening revocation of probation if he does not participate in a polygraph, as Term 21 of Mr. Allmaras' probation did (45821 R., p.163), constitutes an unlawful effort to induce him to forgo his Fifth Amendment rights. As such, Term 21 was invalid.[7] That means the order revoking Mr. Allmaras' probation for not complying with that unlawful term was reversible error.

And even if Term 21 was not, itself, unlawful, the district court still could not lawfully revoke Mr. Allmaras' probation, thereby increasing the term of his incarceration, based on the fact that he exercised his rights and did not take a polygraph. And yet, that is precisely what the district court did:

> We're nearing the end of the 180-day period. There is no polygraph.
>
> And so I'm m [sic] going to determine right now that term and condition has been violated.

---

[7] Term 21 specifically ordered Mr. Allmaras to take a "full disclosure" polygraph. (45821 R., p.163.) The Idaho Supreme Court has made it clear that full disclosure polygraphs contain a risk of self-incrimination. *Van Komen*, 160 Idaho at 538-39; *Estrada*, 143 Idaho at 564. Therefore, Term 21 was invalid on its plain language.

However, at the hearing on Mr. Allmaras' challenge to that term, the district court indicated it specifically wanted the polygraph to examine the events underlying the charge in this case, and it felt that sort of polygraph would not violate the Constitution. (Tr., p.28 (p.12, Ls.11-14.) As discussed in detail in Section III(B), *infra*, the district court was wrong as both a matter of fact and a matter of law in that regard – instant-offense polygraphs are specifically designed to look, in part, for other criminal conduct that was not covered by the underlying allegations, which means they contain the risk of self-incrimination, and as such, under United States Supreme Court precedent, the defendant cannot be compelled to make statements about the events underlying the charge outside the change of plea hearing.

> There's been no request by the defense to continue that. There's certainly been no indication that – that that sort of an evaluation has been done.
>
> So, I'm going to do what I said I was going to do many, many months ago, and that is to impose your prison sentence . . . , commit you to the custody of the Idaho State Board of Correction, retain jurisdiction for up to a year . . . .

(Tr., p.13 (p.7, Ls.10-21).) That is, itself, a violation of the Fifth Amendment, even if the terms of probation are appropriate. *See Powell*, 161 Idaho at 780 (relying on the reasoning from *Antelope*, 395 F.3d at 1139, in which the Ninth Circuit held revoking probation based on the person's decision to not participate in such evaluations was impermissible). Either way, this Court should reverse the order revoking Mr. Allmaras' probation and remand this case for an order returning Mr. Allmaras to probation on proper terms.

Additionally, for the reasons set forth in *Van Komen*, this case should be transferred to a different district court judge on remand. *Van Komen*, 160 Idaho at 540 (explaining the case needed to be remanded to a different judge because the prior judge's "actions appeared vindictive because Defendant's refusal to incriminate himself regarding the extent of his sexual activity with the girl"); *accord Le Veque*, 164 Idaho at 117 (simply ordering a similar case remanded to a different district court judge and citing *Van Komen*); *Reed*, 163 Idaho at 687 (same without specifically citing *Van Komen*).

II.

The District Court Erred By Relinquishing Jurisdiction Over Mr. Allmaras Based On A Provision Which Was Neither Specific Or Distinct Enough To Be An Enforceable Order

A. Standard Of Review

District courts have authority to punish any person who willfully disobeys a specific and definite order of the court, provided it does so in accordance with the notions of fairness and due

process. *Le Veque*, 164 Idaho at 116. However, when the provision the court seeks to enforce is ambiguous, seeking to enforce it constitutes an abuse of discretion because it amounts to arbitrary action by the district court. *Id.* at 116-17; *see Lunneborg*, 163 Idaho 856, 863-64 (noting, as discussed *supra*, a district court can abuse its discretion by acting inconsistent with the applicable legal standards or not reaching its decision in an exercise of reason). The appellate courts look at the plain language of the provision itself to determine whether the provision was ambiguous. *See id.*; *see, e.g., Lepper v. Eastern Idaho Health Services, Inc.*, 160 Idaho 104, 111 (2016) (looking to the plain language of a scheduling order to determine the obligations of those under its direction).

B. The Written Provision Regarding The Polygraph In This Case Was Not Meaningfully Different From The Provision Which The Idaho Supreme Court Held To Be Unenforceably Ambiguous In *Le Veque*

The written provision which the district court sought to enforce by relinquishing jurisdiction over Mr. Allmaras should be held unenforceable for the reasons identified in *Le Veque* because the provision in this case is, in all important respects, the same as the provision in *Le Veque*.[8] Specifically, the relevant part of the written provision in this case stated:

> **THE COURT RECOMMENDS** for the defendant **SEX OFFENDER EVALUATION AND TREATMENT (DEFENDANT NEEDS TO PASS A ~~FULL DISCLOSURE~~ POLYGRAPH REGARDING THE EVENTS IN QEUSTION ON AUGUST 9, 2014** . . . .[9]

[8] While the district court did not have the benefit of the Supreme Court's opinion in *Le Veque* at the time it retained jurisdiction over Mr. Allmaras, it did have the benefit of that decision by the time it relinquished that jurisdiction. Regardless, *Le Veque* did not announce a new rule; rather, it applied the rule articulated in several prior cases to the provision at issue. *See generally Le Veque*, 426 P.3d 461. As such, even if *Le Veque* is not controlling, the district court's decision in this case should be vacated because it is contrary to those other decisions for the same reasons articulated in *Le Veque*.

[9] The district court simply went on to detail the facts surrounding the events in question which it was recommending be the subject of the polygraph. (*See* 45821 R., p.150.)

(45821 R., p.150 (strikethrough and emphasis from original).) Similarly, the written provision in *Le Veque* stated:

> **THE COURT SPECIFICALLY RECOMMENDS SEX OFFENDER TREATMENT AFTER HE FULLY DISCLOSES HIS INVOLVEMENT IN HIS SOUTH DAKOTA CRIME, AND THAT HIS DISCLOSURE IS VERIFIED WITH A POLYGRAPH.**

Le Veque, 164 Idaho at 116 (emphasis from original). The Supreme Court held the provision in *Le Veque* was not an enforceable order because it was ambiguously worded – it was framed as a recommendation rather than a mandate, and it was not clear who (the defendant or the rider program staff) the provision was directing to act. *Id.* at 116-17. The written provision in Mr. Allmaras' case suffers from the same problems.

For example, the provision in this case does not use mandatory language; rather, it was also framed as a recommendation. (45821 R., p.150.) The *Le Veque* Court explained the ambiguity in this regard was reinforced by the fact that, at other times, the district court had issued specific, definite, unambiguous orders to the defendant. *Id.* The same is true in Mr. Allmaras' case. For example, Term 25 of Mr. Allmaras' prior probation, the district court had written in that "Weekly random testing *required*" as part of the term that "*You* [Mr. Allmaras] *shall* submit to random substance abuse testing at your expense and as requested by your probation officer." (45821 R., p.164 (emphasis added).) As such, the district court could not relinquish jurisdiction over Mr. Allmaras as a means to try to enforce that ambiguous provision. *Le Veque*, 164 Idaho at 116-17. And yet, that is exactly what the district court said it was doing: "I think I've made my reasons clear all along what I required of you, and for whatever reason, and I'll never know and I don't need to know why, you've not provided that information. (Tr., p.80 (p.21, Ls.8-11).) Therefore, this Court should vacate the decision to relinquish jurisdiction in this case, just as the Supreme Court did in *Le Veque*.

Additionally, the provision was also unclear as to who was being directed to act. (45821 R., p.150.) That is true despite the fact that the district court made some statements relating to this provision at the preceding hearing. (*See, e.g.*, Tr., p.13 (p.8, Ls.10-22) ("I've been told in other cases that the Department of Corrections won't do a full disclosure polygraph as part of their sex offender evaluation and treatment program . . . . I can't tell them what to do. I can ask them what to do. . . . So it's up [to you] to get that arranged if the Department of corrections doesn't take care of it for you while you're on the rider.").) First, the written order was the actual record of the "order," and so, was the language by which Mr. Allmaras and the rider staff would have to measure their conduct. *See generally Le Veque*, 164 Idaho 110 (focusing on the written order without discussing any potential clarifications the district court may have given in that regard when it retained jurisdiction); *compare Lepper*, 160 Idaho at 111 (basing its analysis on the language of the written order despite the statements made at the relevant hearing which revealed the parties' and court's understandings of the issue). Since the written provision did not make clear at whom it was directed, it was improper to relinquish jurisdiction based on Mr. Allmaras' failure to comply with one possible reading of that provision.

Regardless, the district court's comments actually suggest the provision in question was directed at the rider staff, not Mr. Allmaras. At the hearing, the district court noted that all it could do was "ask them [IDOC] what to do," and the provision was its "recommend[ation]" for what should happen. (Tr., p.13 (p.8, Ls.14-16); 45821 R., p.150 (emphasis omitted). As such, even with the district court's comments, trying to enforce that provision against Mr. Allmaras was impermissibly arbitrary. *Compare Le Veque*, 164 Idaho at 117 ("To punish Le Veque by relinquishing jurisdiction, even in part, because the Department had decided on a course of

treatment contrary to the district court's recommendation represents an unreasonable change in position form the court's earlier deference to the Department.").

For any or all of those reasons, this Court should vacate the order relinquishing jurisdiction in this case just as the Idaho Supreme Court did in *Le Veque*.

III.

The District Court Violated Mr. Allmaras' Fifth Amendment Rights By Relinquishing Jurisdiction Based On His Failure To Take A Polygraph Examination After It Had Put Him In The Classic Penalty Scenario

A. Standard Of Review

The district court's decision to relinquish jurisdiction is reviewed under an abuse of discretion standard. *State v. Statton*, 136 Idaho 135, 137 (2001). Here, the district court abused its discretion because its decision was contrary to the applicable legal standards and the uncontradicted evidence in the record. *See Lunneborg*, 163 Idaho 856, 863-64 (articulating, as discussed *supra*, the ways in which a district court can abuse its discretion). Within that analysis, "[c]onstitutional issues are purely questions of law over which this Court exercises free review." *State v. Akins*, 164 Idaho 74, 76 (2018).

B. The Fifth Amendment Protects Against Courts Compelling Statements About The Underlying Events After The Defendant Has Plead Guilty, Which Means, In This Case, The District Court Could Not Relinquish Jurisdiction Based On Mr. Allmaras' Exercise Of That Right

The district court recognized it could not relinquish jurisdiction because Mr. Allmaras did not participate in a "full-disclosure" polygraph. (Tr., p.79 (p.21, Ls.10-12).) Nevertheless, it maintained that it could still order him to take a polygraph regarding the events underlying the

charges in this case. (Tr., p.79 (p.21, Ls.12-17); *accord* Tr., p.28 (p.12, Ls.11-14).) That conclusion is contrary to both the evidence in the record and the relevant law.

The right to refuse a polygraph extends whenever there is a risk that answering the questions in the polygraph examination carry the risk of self-incrimination. *See, e.g., State v. Widmyer*, 155 Idaho 442, 447 (Ct. App. 2013) (concluding there was no risk of self-incrimination as no potentially-incriminating questions had yet been asked of the defendant, and distinguishing *Antelope*, 395 F.3d at 1131-32, where the defendant could not be punished for refusing to answer potentially-incriminating questions put to him)). The uncontroverted facts in this record – namely the information and explanations contained in the polygrapher's handbook (Defense Exhibit A) – reveal that polygraphs about the events in question carry the risk of self-incrimination.

Specifically, there are five types of polygraph examinations that could be administered in cases such as this: "1) instant offense exams; 2) prior-allegation exams; 3) sexual history disclosure exams; 4) maintenance exams; 5) and sex offense monitoring exams." (Conf. Docs. p.98.) The type of exam the district court wanted Mr. Allmaras to take fell into the first category, as instant offense exams are used "when an offender has attempted to conceal the most invasive or abusive aspects of an admitted offense or whenever the containment team determines that accountability for the circumstances and details of the instant offense represent a substantial barrier to an examinee's engagement and progress in sex offense specific treatment." (Conf. Docs., pp.98-99; *compare* 46817 R., p.224 ("Defendant needs to pass a ~~full disclosure~~ polygraph regarding the events in question on August 9, 2014 . . . .") (emphasis omitted, strikethrough from original).)

When conducting an instant offense examination, "Examiners will use two basic types of examinations to investigate the circumstances and details of the instant offense for which the examinee was convicted: 1) the Instant Offense Exam, and 2) the Instant Offense Investigative Exam." (Conf. Docs., p.98.) During the first part (the instant offense exam), the polygrapher will seek to explore the testee's denials of the allegations, and in the second part (the instant offense investigative exam), the polygrapher will seek to explore the limits of any admitted behavior and will "search for other behaviors or offenses not included in the allegations made by the victim of the instant offense." (Conf. Docs., p.99.) The fact that the instant offense exam will probe the testee's account of the events for information about other behaviors or offenses which were not a part of the instant offense means they carry the risk of self-incrimination. *See Van Komen*, 160 Idaho at 538; *Estrada*, 143 Idaho at 562. This is true in Mr. Allmaras' case since, while he denied that he had touched the victim in the manner alleged, he had given an account of the events on the evening in question (*see* 45821 R., pp.32-35), and so, both parts of the instant offense exam would have been needed in his case.

Because the instant offense exam carried the risk of self-incrimination, the district court was wrong – it could not compel him to participate in such a polygraph without violating the Fifth Amendment, nor could it punish him for deciding not to making such statements to the district court. As such, the district court's decision to the contrary was not reached in an exercise of reason.

Additionally, the district court's conclusion that it could require Mr. Allmaras' participation in an instant-offense polygraph is contrary to the applicable legal standards. The United States Supreme Court has made it clear that, even when a defendant pleads guilty, he retains the right to remain silent at subsequent proceedings, including the sentencing hearing.

Mitchell v. United States, 526 U.S. 314, 322-23 (1999). This means the district court cannot compel additional statements or admissions about the circumstances or details of a crime during those subsequent phases of the case. *Id*. at 327-28 ("We decline to adopt an exception [to the Fifth Amendment] for the sentencing phase of a criminal case with regard to the factual determinations respecting the circumstances and details of the crime."); *accord White v. Woodall*, 572 U.S. 415, 421 (2014) (reaffirming *Mitchell* on this point).

And yet, that was precisely what the district court repeatedly stated it wanted Mr. Allmaras to do in the polygraph examination: "But I guarantee you that if you don't come back here with a full disclosure polygraph that you pass *that determines your involvement on the day in question*, I won't consider probation; I will impose the prison sentence." (Tr., p.13 (p.8, Ls.16-20) (emphasis added).) "But if I don't see a polygraph *that details his knowledge of the events in question*, I guarantee you I will impose the prison sentence." (Tr., p.14 (p.10, L.23 - p.11, L.2) (emphasis added).) As that decision is directly contrary to the applicable United States Supreme Court precedent, it should be vacated.

Finally, the district court's assertion – that without the polygraph, it could not determine the risk Mr. Allmaras would pose to society if released on probation (Tr., pp.79-80 (p.20, L.18 - p.21, L.7)) – is not a sufficient basis to justify the decision to relinquishing jurisdiction because it is still punishing him for not participating in the polygraph. This is because the Fifth Amendment protections are "as broad as broad as the mischief against which it seeks to guard." *Estelle*, 451 U.S. at 458 (internal quotation omitted).

The fundamental impropriety against which the Fifth Amendment guards is that a person shall not be punished *at all* for choosing not to speak when the answers might be incriminatory. *Id*. As such, the Court of Appeals has expressly refused to uphold similar decisions on this sort

of rationale because it amounted to an attempt to "sidestep the holding in *Van Komen*," and thus, the protections of the Fifth Amendment. *Reed*, 163 Idaho at 687 (rejecting the district court's attempt to avoid *Van Komen* by relinquishing jurisdiction based on the failure to get a polygraph and the failure to get into a particular treatment program). Likewise, in *Powell*, the Court of Appeals held that the defendant had been placed in the classic penalty scenario when he was required to answer questions during a parole interview or else be held ineligible for parole. *Id.* at 778. That was the case because, had the defendant remained silent, the determination that he was ineligible for parole – that he could not be safely supervised in the community – would have been based on an adverse inference impermissibly drawn from his decision to remain silent.[10] *Id.* Here, too, that conclusion – that the district court could not adequately determine the risk Mr. Allmaras would present if he were to be released into society without his compelled statements – constituted an adverse inference impermissibly drawn from Mr. Allmaras' decision to remain silent, and thus, a violation of the Fifth Amendment.

Since the district court could not lawfully require Mr. Allmaras to make those statements about the details of the underlying events, it could not relinquish his jurisdiction based on his refusal to make such statements. *Van Komen*, 160 Idaho at 539-40. As such, the district court's decision in that regard should be vacated. As discussed in Section I(B), *supra*, this case should be assigned to a new judge on remand for the reasons set forth in *Van Komen*.

[10] The United States Supreme Court has not yet spoken on this particular question, though it has noted a split of authority in that regard. *White*, 572 U.S. at 422-23.

CONCLUSION

Mr. Allmaras respectfully requests this Court reverse the order revoking his probation and remand this case to a different district court judge for an order returning him to probation on lawful terms. Alternatively, he requests this Court vacate the order relinquishing jurisdiction and remand this case for further proceedings before a different district court judge.

DATED this 23rd day of October, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas