

FILED 11/8/2021

AT 9:15 O'clock A M

CLERK, DISTRICT COURT


Deputy

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

STATE OF IDAHO,)
)
 Plaintiff/Respondent,)
 vs.)
)
 DARRELL AVON MITCHELL, III,)
)
 Defendant/Appellant.)
)

Case No. **CR28-20-8837**

**MEMORANDUM DECISION AND
ORDER ON APPEAL AFFIRMING
MAGISTRATE JUDGE'S SENTENCING
DECISION**

I. INTRODUCTION

This matter comes before the Court on appeal by the defendant/appellant Darrell Avon Mitchell, III (Mitchell) of the May 28, 2021, sentence imposed by the Honorable Clark A. Peterson, Magistrate Judge (Judge Peterson), and of the prosecutor's statements made at that sentencing hearing. Notice of Appeal 2, ¶ 3a. and b. One of the issues on appeal is "Did the Magistrate Court abuse its discretion when imposing sentence." *Id.* at ¶ 3a. Mitchell was sentenced to supervised probation for the crime of resisting and obstructing a peace officer, I.C. §18-705. In his brief on appeal, counsel for Mitchell added, "The Defendant contends that the Magistrate Court abused its discretion **when it used the Defendant's race** as a factor in determining its sentence." Appellant's Br. in Supp. of Appeal, ii, 2-3, 5-7 (bold added). Thus, Mitchell, a white male, objects to Judge Peterson imposing supervised probation as Mitchell's sentence for resisting and obstructing a peace

officer because he is a white man. The problem with Mitchell making that argument on appeal is that Mitchell himself made the commission of the crime resisting and obstructing a peace officer all about Officer Newbill's race. Mitchell's comments to the peace officer during and after the commission of his crime involved race, and those racist comments made by Mitchell were part and parcel of Mitchell's resisting, delaying or obstructing Officer Newbill in the discharge of his official duties, resulting in his violation of I.C. §18-705, to which Mitchell pled guilty. Thus, it was not only logical, but absolutely necessary for Judge Peterson to discuss race, really Mitchell's racism, at sentencing.

On June 17, 2020, Officer Newbill was called to a domestic battery. The Probable Cause Declaration of Officer Newbill reads:

I believe that there is probable cause that the above described offense(s) was (were) committed by the defendant [Darrell Mitchell] based on the following facts:

CASE SUMMARY:

Darrell went to his Ex-wife's (Stormy M. Hayes) daughter's apartment (Cassie M. Deniger) to talk with Stormy. While in the apartment Stormy and Darrell got into a verbal argument. Stormy told Darrell to leave. Darrell then called Stormy a "fucking bitch". He then said something along the lines of "fuck all you Mother Fuckers, lets go." He ripped off his shirt and went after Stormy. Cassie claimed Darrell reached up like he was going to grab Stormy by the neck. Cassie stopped Darrell from grabbing her mom. Cassie then punched Darrell multiple times in the face.

Darrell was restrained by people in the apartment until he calmed down. He then left the house. Upon arriving on scene, I told Darrell to walk over to me. Darrell ran from me, even after being told to stop. He was charged for the above listed charges.

NARRATIVE:

On 06/17/20 at approximately 0040 hours, I responded to 2829 N Julia St #206 regarding a domestic dispute. The call notes stated the RP [Reporting Party] identified as Joram B. Fultz heard a domestic dispute in the unit below him.

Upon arriving on scene, I parked my patrol car on the west side of the apartment. I observed a male walk out of apartment #206 and walk east

toward the far stair case. The male was later identified as Darrell Avon Mitchell III by his Idaho Driver's license. I walked up the western stairs and introduced myself as Coeur d'Alene Police. I asked Darrell what was going on. Darrell immediately told me the occupants of apartment #206 were fighting. I could see blood all over Darrell's face, which appeared to come from his nose. I told Darrell I could see blood on him and that he needed to come over to me.

Darrell immediately stated there was no blood, then proceeded to run down the staircase away from me. I yelled for Darrell to stop, but he continued running away from me. I caught up to Darrell and grabbed ahold of his back and right arm and dragged him to the ground. I placed him in handcuffs. I asked Darrell why he ran from me. Darrell informed me he had a warrant for his arrest. Darrell began to refer to me as a "Nigger". When Darrell was asked if he wanted medical attention he said "Fuck You".

I told Darrell to sit on the curb but he refused. He continued to call me a "Nigger" and was placed in the back of a patrol vehicle. It was obvious that Darrell was not going to cooperate with me, as he had not listened to any commands since I contacted him and the multiple racial slurs he called me.

Ofc. Edwards stayed with Darrell in the patrol vehicle. I went up to apartment #206. There were 5 occupants in the apartment. Ofc. Hutchison interviewed a female identified as Stormy M. Haze. See his supplemental report for further. Ofc. Reneau interviewed the 3 males in the apartment, identified as Jereme D. Woodard, William R. Collett, and David A. Simmons. See his supplemental for further.

I spoke with Stormy's daughter identified as Cassie M. Deniger outside of the apartment. I asked Stormy what happened and learned the following information in summary: For exact quotes and verbiage refer to my viewu video.

Stormy and Darrell have been in an on again off again relationship for approximately 5 years. Stormy and Cassie just returned to Cassie's apartment after leaving Stormy's house. Darrell came over to the apartment approximately 20 minutes before LE arrival. Darrell and Stormy where arguing in Cassie's room with her present, so nothing would happen. Stormy told Darrell to leave. Darrell called her a "Fucking Bitch." Darrell then ripped off his shirt and jacket and yelled something along the lines of "Fuck all you Motherfuckers, lets go." This appeared to be a challenge to fight. Darrell then went after Stormy. Cassie said Darrell reached up like he was going to grab Stormy's neck. Cassie stepped in the middle of Stormy and Darrell. She punched Darrell in the face with her right fist. Darrell continued to try to go after Stormy. Cassie continued to punch Darrell in the face. The physical altercation between the

occupants in the apartment continued for approximately 5-10 minutes. After the situation calmed down they threatened to call the cops on Darrell. They tried to get him to leave and offered to give him a ride. Darrell refused to leave.

Darrell then left after LE arrived.

Cassie initially stated Darrell grabbed ahold of Stormy's neck. Upon further questioning Cassie stated he reached up for her neck but was stopped by the other occupants of the apartment.

Cassie's had scrapes and bruises on her knuckles which matched her story.

I spoke with Ofc. Hutchison and Ofc. Reneau. I informed them of the information

I learned and they told me they received similar statements from the other occupants.

I returned back to my patrol vehicle and drove to where Darrell was. I transferred Darrell into my patrol vehicle. During the transfer, Darrell made a statement like "Your going to make me ride with the Nigger." He proceeded to call me a "Nigger" a few more times after that. I informed Darrell he was under arrest for his warrants and Battery (which was later changed). I found out later that Darrell and Stormy had been married in 2018 briefly, which would make their relationship a domestic relationship per Idaho code.

I transported Darrell to the KCPSB along with his property.

I asked Darrell if he would speak with me. Darrell stated he would. I read him his Miranda Rights. He said he understood and would talk to me. I asked Darrell what happened. I learned the following information in summary:

Darrell and Stormy have been in an on again off again relationship for approximately 4 years. In 2018 they got married for approximately 6 months, then they divorced. On today's date Stormy picked him up and brought him to Cassie's house to talk. While at the apartment Cassie was using methamphetamine out of a pipe. Darrell asked if he could take a hit of the pipe. This angered Stormy who then punched him in the nose.

Darrell was backed out of the bedroom and then held on the ground by 2 of the males that where in the house. During this time Darrell was calling Stormy different expletives. Stormy scratched Darrell in the face. When the two males got off of Darrell he said he was leaving and walked out of the apartment, which is when I contacted him.

I asked Darrell if Cassie had punched him in the nose. Darrell said he could of swore it was Stormy, but he has been drinking all day. Darrell never made any movement toward Stormy that could be seen as threatening. He also said they were not arguing before hand. The physical altercation only occurred because he asked to smoke methamphetamine.

Darrell stated he never ripped off his shirt, but claimed he had taken his shirt of in Stormy's vehicle when she spilt alcohol on it. Darrell's statement was in stark contrast of the other statements learned on scene. Darrell's account seemed to remove all guilt from him. The injuries Darrell and Cassie sustained appeared to match Cassie's account. After taking into account all statements, I decided to book Darrell on his warrant as well as resisting/obstructing officers. He was cited and released for Domestic Assault.

I photographed Darrell's injuries. Darrell admitted the injures to his face were all from the altercation inside the apartment. I learned later that this was not what he told officer's on scene. He told officers that the "nigger" caused the injuries to his face, obviously referring to myself. Darrell's injuries consisted of a bloody nose and a large abrasions on the side of his face. He also had multiple cuts on the side of his neck. Darrell informed me the only injuries he sustained from our altercation was some abrasions on his knee and hands from being pulled onto the ground.

I later uploaded my viewu video and pictures to Viper.

Probable Cause Decl. in Supp. of Warrantless Arrest 2-4. At sentencing, Mitchell admitted alcohol was involved. May 28, 2021, Setencing Hr'g Tr. (Tr.) 13:7-9. Mitchell admitted to Officer Newbill that he was seeking methamphetamine from his victim Stormy, and he told Officer Newbill that he knew he had a warrant for his arrest. Probable Cause Decl. in Supp. of Warrantless Arrest 3-4. To say Mitchell was combative with Stormy would be an understatement. That combative nature spilled over into Mitchell's initial encounter with Officer Newbill. Mitchell immediately made that combative encounter with Officer Newbill a racist combative encounter. Mitchell then kept it racist through the process of being arrested and transported and through booking at the jail. Judge Peterson commented that, given the extent of Mitchell's racist comments, Mitchell was in fact truly a racist. Judge

Peterson told Mitchell:

I can't order you to change your thoughts and beliefs, Mr. Mitchell, but—nor am I going to be willing to say that this is just a night of being drunk and being stupid. You're 58 years old. The only way these things come out is if you truly are the racist that's depicted in these things,

....

I don't say these things to you to be mean to you at all, and if you truly have made a change of person, I support that. I believe we can do that at any time in our lives, but I'm not willing to adopt a fiction that this is just alcohol-fueled anger.

Tr. 16:4-22. For Mitchell to claim Judge Peterson abused his discretion in making Mitchell's sentencing about racism is absurd. Mitchell made Mitchell's attitude toward Officer Newbill's race an integral part of the crime he committed on June 17, 2020. Judge Peterson did not make race an issue. Mitchell made his racism an issue. Indeed, by filing this appeal, Mitchell continues, through his attorney, to make his racism an issue.

The additional absurdity is that this appeal is really all about Mitchell not liking the fact that Judge Peterson placed him on supervised probation, as opposed to the plea agreement between the parties (to which Judge Peterson was not bound) for unsupervised probation. Given the facts of this case, Mitchell's appeal for that reason is an absolute waste of taxpayer's dollars and judicial resources. Unsupervised probation was an impossibility for Mitchell. No reasonable judge would have placed Mitchell on **unsupervised** probation, when Mitchell, a 58-year old white man, who is violent to women and to law enforcement, drinks, uses methamphetamine, has a lengthy criminal record (much of which is comprised of violent offenses), knew he had a warrant for his arrest, and holds deeply engrained racist beliefs to the extent that he cannot control the expression of those racist beliefs even when doing so will obviously be against his own interests. Judge Peterson was not optimistic that Mitchell would tolerate supervised probation, and forecast Mitchell serving all of his jail sentence. Judge Peterson ordered Mitchell to turn himself in

to the Kootenai County Jail on June 4, 2021, to serve nineteen additional days in custody. Tr. 14:24-15:22. Judge Peterson added: "Failure to appear for jail is telling me you don't want to do probation, and I'll issue a warrant for you in the full amount of 354 days, so if you don't surrender, you'll just get a bench warrant, and you'll be basically telling me you don't have any interest in doing probation." Tr. 15:21-16:3.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 17, 2020, Mitchell was charged with violation of I.C. §18-918(3)(a) domestic assault and I.C. §18-705 resisting and obstruction a peace officer. On March 15, 2021, Mitchell pled guilty to the charge of resisting and obstruction a peace officer. In its plea agreement, the State stipulated to dismissing the charge of domestic assault, and, pursuant to the agreement with Mitchell and his attorney, the deputy prosecuting attorney Kyle Sears (Sears) recommended the following at the May 28, 2021, sentencing hearing:

State's asking for 365 days of jail with 354 of those days suspended, 11 days credit for time served, a \$2,000 fine including court costs with \$1,600 suspended, two years of unsupervised probation, an extension of previously issued no contact order for an additional two years, a substance abuse evaluation along with any recommended treatment, and a letter of apology to CDAPD Ofc. Newbill.

Tr. 4:7-13. The stipulated resolution was also previously read on to the record at the Pre-Trial Conferene held on March 15, 2021. Appellant's Br. in Supp. Appeal 1. At the May 28, 2021, sentencing hearing, on behalf of the State, Sears continued by stating:

I think the letter of apology is particularly important as this interaction with law enforcement is one of the most atrocious I've ever read. It's replete with some of the most racist, ignorant language I've ever read in my life, and he was supposed to have that letter done today. Apparently that's not a priority for him.

Mr. Mitchell has an extensive, extensive criminal history dating back to 1991 with a taking a motor vehicle, domestic assault 2005 in Washington, a DUI from 2015 also Washington, another domestic assault from 2017, a fail to comply from 2017. Out of Arizona he has a receiving stolen property from 1989, theft 1992; out of Texas robbery 1992. Here in

Idaho he has a DUI from 2006, perjury from 2007, domestic battery from 2007, straight battery 2009, resist/obstruct 2014, violation of No Contact Order 2014, a probation violation 2015. He's had eight protection orders issued against him and nine warrants. Out of Montana he has a destruction of a telephone 2008, another DUI in 2014, violation of a No Contact Order 2008.

I reached out to the victim in this case, Your Honor. She's Miss Daniels, Ms. Stormy Daniels. She had such trauma, and she's been on such a good course after this that she felt that she could not be present today without perhaps relapsing, so she elected not to be present.

I would just ask that the Court use its discretion to try to address the underlying issues here of bias, clearly deeply-held racist beliefs, and I ask that the Court recommend or require the anger management courses which are clearly needed in this case, as well as the No Contact Order with Ms. Haze, and a letter of apology to the officer in this case.

Tr. 4:14-5:23. Mitchell's counsel Jonathan Williams (Williams) responded:

These are joint recommendations carefully contemplated between Mr. Sears and I. We would ask the Court to follow along with them. Mr. Mitchell did complete a letter of apology to Officer Newbill which I have in my possession right now.

.....

We have no objection to the No Contact Order extending as a term of probation, so with that, it would be two years of that No Contact order through the unsupervised probation. He has already completed the substance abuse evaluation. Like I said, Your Honor, he'd be fine with going through that anger management course as a term, as well as any recommended treatment from that substance abuse evaluation, and then as these are stipulated requests, Your Honor, we would ask the Court to follow along with that.

Id. at 6:5-10, 713-22. Mitchell then told Judge Peterson:

I am disgusted in the way I acted towards him. I have – he was just doing his job, and I was angry over the situation I was in. I feel like I got set up and – and I really do apologize to him. If I could do it in person, I would.

.....

I guess I just lost it. I was angry, and stuff just started coming out of my mouth. I really do apologize to him. You know, I have no business saying what I said. You know, those are horrible things, and I even apologized to him when I got to the jail and told him I was sorry, you know, I was in the holding cells. I called him over there and I told him – I said I was sorry, you know what I mean. I understand – just like I wrote – you know, was saying, you know, I understand you have a job to do and,

you know, I shouldn't be talking to you like that.

Id. at 8:1-5, 9:11-18, 9:21-10:1. Judge Peterson then stated:

Boy, I'm really struggling with there not being additional actual incarceration and at, the very least, supervised probation here. You folks negotiated this. If there's anything else you wanted to put on the record, I'd be happy to hear it, but I have my job to do, and I'm not bound by your recommendations.

The conduct here is just egregious. Calling the officer the "N" word. Then when he had to ride in the vehicle with that officer, he says you're gonnam ake me ride with the "N" word. He called him that multiple times. He even blamed his injuries on the fact saying that "N" word caused them, to him, referring to the officer, when in fact injuries had occurred because he was out of control and he was committing a domestic violence on another person.

The parties have dismissed the domestic violation action, and we're here on the resist/obstruct charge, but I tend to agree with Mr. Sears' encapsulation of them after. This is about some of the worst I've ever read, and, you know, you can't commit thought crimes in our country, so one is – I guess can hold ignorant, racist, offensive, and horrible beliefs, which clearly Mr. Mitchell does, but behaviors can get you in trouble, and the behaviors here are just beyond the pale, and I don't know how I can complete my obligation to the community as a sentencing judge here without supervised probation, without additional actual incarceration, but you folks have indicated you've negotiated this, and I'll give you folks an opportunity if you wish to give me some sentencing reasons and justifications why supervised probation, given his horrendous record and other things, are not appropriate here.

Id. at 9:3-10:10. Counsel for the State responded:

State had witness issues, Your Honor. On that I submit to the Court's discretion. It has a firm understanding of the events and the atrocious behavior that was conducted by Mr. Mitchell.

Id. at 10:11-14. The Court responded:

All right. I understand what you're saying, and I certainly am not trying to put you in a position of undermining the deal that you have struck, and I'm not intending to put you in that position, but I want the parties to be given an opportunity to make any further record they want to make. I imagine the goal here is to attempt to convince me to go along with this resolution, so Mr. Williams, anything further you wanted to put on the record?

Id. at 10:15-23. Mitchell's counsel reiterated Mitchell's subsequent sobriety and attempts at changing his behavior. *Id.* at 11. Mitchell's counsel added:

While the Court is correct those are abhorrent views and his behavior that night was terrible, I believe that he can – he has changed from that night and again would sincerely take back his behavior, and he knows that it's wrong.

I think given the opportunity on unsupervised probation that he'll maintain his sobriety, he will get held for his anger issues, and that the Court can be safe in its knowledge that this is an appropriate sentence as negotiated between the parties[.]”

Id. at 11:18-12:2. Counsel for the State then responded:

I appreciate counsel's representation that Mr. Mitchell has turned his life around, but the evaluation specifically notes that he seems to be under-reporting his previous criminal activity, DUI charges and previous battery charges, and based on that she made the recommendation for the evaluation of anger and relapse prevention. Clearly it's more minimization and under-reporting by Mr. Mitchell.

Id. at 12:7-15.

Judge Peterson then responded, “I wasn't intending anyone to be construed as putting in a position of not scrupulously arguing for your resolution. In fact, you both are.”

Id. Judge Peterson offered Mitchell one last opportunity to address the court, and then held:

Whenever I consider sentencing I keep in mind the *Toohill* factors that are well known to the Court, and the Court's job today is to do individual justice to Mr. Mitchell. While philosophically the Court may consider a number of other matters, what is of interest to the Court and the Court's business is individual justice to Mr. Mitchell, often summarized by Aristotle as, “What is justice but to give every man his due?”

It's difficult for me to sit here and read these comments and not wonder would we be treating this case the same if Mr. Mitchell was black with a lengthy criminal history, talking about – making comments like this regarding white people. I think he would be labeled as a societal miscreant and a – he wouldn't be treated like Mr. Mitchell is being treated here today with a recommendation with his horrific record of unsupervised probation and no additional jail time, and I – it's that thought that leads the Court here to consider that this is just simply wrong.

I appreciate the State has witness concerns. That's likely what led to the domestic matter being dismissed, but one would imagine you don't have witness concerns regarding resist/obstruct.

I can't in good conscience, as I weigh the *Toohill* factors, place him on unsupervised probation, so probation will be supervised. I'll go along generally with the terms and conditions, but I simply think 11 days is insufficient for actual jail. I think 30 days is required, and he'll surrender to do the remaining 19 days of jail. . . . And there will be 30 days of discretionary set aside for his probation officer[. . .] Work release is not authorized. You simply cannot treat – cannot behave in the manner you behaved and get the benefit of work release; \$2,000 fine, 1600 suspended

Id. at 13:12-15:3. Judge Peterson then went on to say:

I can't order you to change your thoughts and beliefs, Mr. Mitchell, but – nor am I going to be willing to say that this is just a night of being drunk and being stupid. You're 50 years old. The only way these things come out is if you truly are the racist that's depicted in these things, and if that's the case, it's not my hypothetical black man that I was talking about earlier who is a detriment to society; it is you. These – your conduct and behavior is antisocial. It's – it is against our American values of equality, and it – everything our flag stands for you were not on that night, and I cannot in good conscience fail to impose additional jail time and supervise you given your very difficult criminal record here.

I don't say these things to you to be mean to you at all, and if you truly have made a change of person, I support that. I believe we can do that at any time in our lives, but I'm not willing to adopt a fiction that this is just alcohol-fueled anger. That's – I've done – I'm 54. I've done criminal law all my professional career. I am very familiar with alcohol-fueled anger. We see it all the time, and it doesn't look like this. This is something far, far different, and I'm sorry that that's where we are, and I hope that your attorney's representations that you've made personal changes are true.

Id. at 16:4-17:4.

Judge Peterson set Mitchell's report date for the remaining nineteen days of custody for June 4, 2021. *Id.* at 17:5-6. Mitchell filed his appeal on June 2, 2021. The transcript of the sentencing hearing was filed on June 14, 2021. On August 11, 2021, Mitchell filed Appellant's Brief in Support of Appeal. On September 7, 2021, the State filed Appellate

Brief of Respondent. No reply brief was filed by Mitchell. Oral argument occurred on October 27, 2021. At the conclusion of that hearing, this Court stated it was affirming Judge Peterson's decision in its entirety, but that it would be writing a decision. On November 1, 2021, this Court filed its Notice of Intent to Judicial Notice. As of the date of this opinion, neither party has objected to this Court taking judicial notice of Officer Newbill's Declaration in Support of Warrantless Arrest.

III. STANDARD OF REVIEW

Idaho Criminal Rule 54(f)(1) states that "the district court must hear appeals from the magistrate court as an appellate proceeding[.]" The rule further states that "[t]he district court must review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court under the statutes of law of this state, and the Idaho Appellate Rules." I.C.R. 54(f). When a district court makes an appellate review of a magistrate judge's decision, the district court "should perform that task in the same manner as [the Supreme Court of Idaho] performs its appellate review of the trial decision of a district court." *Hawkins v. Hawkins*, 99 Idaho 785, 788-89, 589 P.2d 532, 535-36 (1978).

A sentence will only be overturned on appeal if it was illegal or an abuse of discretion. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). A sentence within the statutory limits is legal and will usually not be considered an abuse of discretion by the reviewing court. *State v. Chapel*, 107 Idaho 193, 195, 687 P.2d 583, 585 (1984). "Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion." 134 Idaho at 276, 1 P.3d at 304 (citing *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992)). In *Lunneborg v. My*

Fun Life, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018), the Idaho Supreme Court held that there is now a four-part test when determining whether the lower court abused its discretion, which requires the reviewing court to determine whether the lower court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.”

The standard of review for prosecutorial misconduct is ordinarily harmless error. *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). However, “[w]here prosecutorial misconduct was not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error.” *Id.*; *State v. Merrill*, 164 Idaho 233, 235, 428 P.3d 811, 813 (2018). Fundamental error exists where the error: “(1) violates one or more of the defendant’s unwaived constitutional rights; (2) it is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings.” *State v. Merrill*, 164 Idaho 233, 235, 428 P.3d 811, 813 (Ct. App. 2018) (citing *Perry*, 150 Idaho at 226, 245 P.3d at 978).

IV. ANALYSIS

Mitchell appeals the magistrate court’s sentencing because: (1) Judge Peterson abused his discretion when he used Mitchell’s race as a factor in determining his sentencing; and (2) Judge Peterson abused his discretion when he did not give further reasoning for imposing his sentence. Appellant’s Br. in Supp. of Appeal ii, 5-8. Additionally, Mitchell alleges the prosecution breached its plea agreement by adopting a position fundamentally at odds with the promised sentence recommendation, which constitutes fundamental error. *Id.* at ii, 8-13. A review of the transcript of the May 28,

2021, sentencing hearing shows that at no point did Mitchell's attorney object to anything said by Kyle Sears, the Deputy Prosecuting Attorney. Mitchell requests the sentence be vacated and remanded for resentencing before a different magistrate judge. *Id.* at 13. The Court will address each of Mitchell's baseless arguments on appeal in turn.

A. Judge Peterson did not abuse his discretion in imposing Mitchell's sentence.

A sentence is legal if it falls within the statutory maximum prescribed for the crime in question. See *State v. Chapel*, 107 Idaho 193, 195, 687 P.2d 583, 585 (1984). Here, the sentence imposed was within the statutory maximum of one year in jail prescribed for the crime of Resisting and Obstructing Officers. I.C. § 18-705. Therefore, in order to prevail, Mitchell must show that Judge Peterson abused his discretion in imposing the sentence.

1. Judge Peterson did not abuse his discretion because he did not use Mitchell's race as a factor in determining Mitchell's sentence.

Mitchell argues that:

[T]he Magistrate Court abused its discretion when it used Defendant's race as a determining factor in imposing its sentence. The record reflects that the Court properly reasoned it had discretion in deciding whether to follow the parties' recommendation and whether to impose its sentence outside of those recommendations. However the factor of the Defendant's race and his hypothetical treatment he would have received if he were black was patently unreasonable and within the outer boundaries of its discretion.

The Court did reason it had discretion to impose sentence and made mention of *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). The Court also specifically stated that it is "the Court's business is individual justice to Mr. Mitchell, often summarized by Aristotle as, 'What is Justice but to give every man his due?'" (5/28/2021 Tr., p.13, L.21-L.25-p.14, L.1-L.6).

The Court then stated it was reluctant to follow the sentencing recommendations and stated, "[i]t's difficult for me to sit here and read these comments and not wonder would we be treating this case the same if Mr. Mitchell was black with a lengthy criminal history, talking about - making comments like this regarding white people. I think he would be labeled as a societal miscreant and a-he wouldn't be

treated like Mr. Mitchell is being treated here today with a recommendation with his horrific record of unsupervised probation and no additional jail time, and I- it's that thought that leads the Court here to consider that this is just simply wrong." (5/28/2021 Tr.,p.13, L.21-L.25-p.14, L.1-L.6).

While the Court did make mention of *State v. Toohill*, its main reasoning was that in the Court's opinion if Defendant were black he would not get the benefit of the present sentencing recommendations, and that because Defendant is white, he should not be entitled to those recommendations.

This is a clear abuse of discretion and was well outside the outer boundaries of the Court's discretion. By pinning its reasoning on race, the Court was inconsistent with the legal standards applicable to the specific choices available to it, and clearly reached its decision with unsound reasoning.

Appellant's Br. 5-6 (bold added).

The State responds that Mitchell:

asserts a false equivalency, maintaining that the magistrate's statements regarding systemic racism in our society resulted in a harsher sentence for him. Appellant, maintains that his conduct, criminal history, and lack of candor toward the court were factors not considered by the magistrate; instead proceeding on the conviction that it was his *race* that resulted in what he perceives to be a harsh sentence.

.....

Individual justice in this case did not denote race baiting as Appellant has attempted to characterize it. Appellant has in effect hijacked the appellate process in an attempted [sic] to mischaracterize the magistrate's philosophical statements regarding systemic racial injustice within our society to characterize himself as the victim.

Resp't's Br. 5, 7 (citations omitted) (referring to Judge Peterson's comment about individual justice on page 13 of the sentencing transcript).

The crux of Mitchell's complaint on appeal centers around Judge Peterson's comments at the sentencing hearing noted in bold above. Any reasonable person would find that emboldened comment to be nothing more than Judge Peterson's astonishment about the "deal" Mitchell got for a joint recommendation of the attorneys for unsupervised

probation, given his prior record and the facts of Mitchell's conduct for which he was being sentenced. The fact that Judge Peterson was critical of the attorneys' joint recommendation for unsupervised probation, a term he was not bound to follow and a term he obviously could not stomach (nor could any other reasonable judge), does not turn this comment into the scenario counsel for Mitchell paints: "By pinning its reasoning on race, the Court was inconsistent with the legal standards applicable to the specific choices available to it, and clearly reached its decision with unsound reasoning." Appellant's Br. in Supp. of Appeal 6. Judge Peterson did not in any way make Mitchell's race an issue in his sentencing decision. Judge Peterson only posited a question to the attorneys, obviously a rhetorical question, as to whether a black defendant with a record similar to Mitchell (a white man) would have received a similar favorable recommendation from these attorneys. Asking that rhetorical question in no way made Judge Peterson's decision about Mitchell's race. Mitchell's argument on appeal is absurd.

Counsel for Mitchell then cites *State v. Hodge*, 124 Idaho 927, 930, 866 P. 2d 184, 187 (Ct. App. 1993) for the Idaho Court of Appeals' holding that "[a] defendant's race should never be a factor in the determination of a sentence, whether in trial for a murder or for a traffic offense". *Id.* The Idaho Court of Appeals in *Hodge* cited *State v. Hightower*, 120 N.J. 378, 577 A.2d 99, 119 (1990) to bolster its holding. Counsel for Mitchell gives no analysis whatsoever of *Hodge* or of *Hightower* in his appellant's brief. Instead, counsel for Mitchell concludes with the conclusory argument, "In this case, by the Court's own comments, it is clear that race did play a factor in the Court's imposition of its sentence and was an abuse of discretion." *Id.* at 6-7. No analysis for this ridiculous argument is given by counsel for Mitchell.

This Court on appeal wonders if counsel for Mitchell has at any point read *Hodge* or

Hightower. Since counsel for Mitchell did not engage in any sort of analysis under *Hodge* or *Hightower*, this Court will.

In *Hodge*, the trial court was sentencing co-defendants Hodge and Cabe, who together committed an armed robbery of a restaurant. Cabe received half the sentence Hodge was given. On appeal, Hodge claimed, "The only difference between Hodge and Cabe, Hodge claims, is that he is Afro-American and Cabe is white." 124 Idaho at 929-30, 866 P. 2d at 186-87. The Idaho Court of Appeals held, "The record, however, does not show any indication that race played a part in the district court's decision. Indeed, the opposite is true." 124 Idaho at 930, 866 P. 2d at 187. The Idaho Court of Appeals then discussed how Hodge made recorded statements to an informant that Hodge was interested in committing more armed robberies, that he would have raped a particular female employee of the restaurant had she been there, that he didn't commit robberies for the money but "instead did it for the 'high' and the exhilaration of walking through a door with a gun and a mask and commanding people to do as he said," that "he wished to increase the 'high' and talked of getting fully automatic weapons to use in the robberies," that "Hodge indicated to his accomplices that he would shoot them, should they turn against him as witnesses," and that several times "Hodge related details of previous robberies that were of sufficient detail to indicate he had been present during those crimes." *Id.* The Idaho Court of Appeals found, "although there is nothing in the record to indicate that the district court based its decision on race, there is ample evidence that the district court considered the character of Hodge as demonstrated by his own statements and other evidence." *Id.* "This Court takes very seriously allegations that a criminal defendant has been sentenced differently than a co-defendant based solely on his race. In the case before us, however, these charges amount to no more than speculation." 124

Idaho at 931, 866 P. 2d at 188. “Speculation about the possibility of racial discrimination, with nothing in the record to support it, is not enough in itself to show there has been a constitutional violation.” 124 Idaho at 932, 866 P. 2d at 189. Hodge claimed his race was a factor in his sentencing, without any proof of such. Mitchell claims race to be a factor when he and he alone made the subject of race a factor in his commission of the crime, and he and his counsel now make the subject of race the cornerstone of Mitchell’s appeal.

The Idaho Court of Appeals in *Hodge*, 124 Idaho at 930, 866 P.2d at 187, cited *Hightower*, 120 N.J. 378, 577 A.2d 99, in essence for the quotation, “a defendant’s race should never be a factor in the determination of a sentence, whether in a trial for murder or for a traffic offense.” 120 N.J. at 419, 577 A.2d at 119. That finding was in the context of the Supreme Court of New Jersey finding a prosecutor’s line of questioning at trial. In the present case, the subject of race only came up in the context of a hypothetical question to the attorneys for negotiating a plea agreement the trial court could not countenance.

This Court notes that the United States Supreme Court has also held that it is constitutionally impermissible to consider factors such as race, religion, or political affiliation in imposing a sentence. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747 (1983). However, that is not in any way what happened in this case.

In Mitchell’s case, Judge Peterson asked a rhetorical question of the attorneys regarding the plea agreement, when it was Mitchell, a white man, who wove the subject of his racist beliefs *into the fabric of the facts of the crime* to which he pled guilty. The Idaho Court of Appeals has held that it is constitutionally permissible for a court to consider a defendant’s racist belief system in limited circumstances, such as “assessing the danger he presents to society, a factor that is unquestionably legitimate for consideration by a sentencing court.” *State v. Warfield*, 136 Idaho 376, 379, 34 P.3d 37, 40 (Ct. App. 2001).

“Warfield was a resident of the Aryan Nations compound near Hayden, Idaho.” 136 Idaho at 377, 34 P.3d at 38. Warfield told his female victim she should be allowed to live “because you’re white.” 136 Idaho at 379, 34 P.2d at 40. The Idaho Court of Appeals held, “thus, Warfield's racist belief system was relevant in assessing the danger he presents to society, a factor that is unquestionably legitimate for consideration by a sentencing court.” *Id.* This is exactly what Judge Peterson did in explaining that he could not go along with the plea agreement the attorneys had concocted, in part because of Mitchell’s racist beliefs. When using race as a sentencing factor, it must be “relevant to help prove any aggravating circumstance” or in assessing the danger to society or the likelihood that the defendant would repeat the crime. *State v. Tadlock*, 136 Idaho 413, 416, 34 P.3d 1096, 1099 (Ct. App. 2001) (quoting *Dawson v. Delaware*, 503 U.S. 159, 166, 112 S. Ct. 1093, 1098 (1992)). Thus, if Mitchell had made unsolicited derogatory racial comments while discussing a speeding ticket with a white police officer, those comments would not be relevant at his sentencing. However, Mitchell made his unsolicited derogatory racial comments repeatedly to and about Officer Newbill, as Officer Newbill dealt with Mitchell’s resisting and obstructing behavior, and those unsolicited derogatory racist remarks continued by Mitchell as Officer Newbill arrested, transported and booked Mitchell. Moreover, Officer Newbill was only present at the scene due to a concerned citizen’s report of Mitchell domestically abusing his ex-wife because he was drunk and she wouldn’t give Mitchell any methamphetamine. Those unsolicited derogatory racist comments evince Mitchell’s deep seated racist beliefs, and Mitchell’s comments are relevant to the underlying crime. Indeed, it would have been error for Judge Peterson to have ignored what Mitchell repeatedly said about Officer Newbill’s race, given the fact that Mitchell was charged with resisting and obstructing an officer.

Finally, in deciding that Judge Peterson did not abuse his discretion in sentencing Mitchell, it must be kept in mind what Mitchell did not like about Judge Peterson's sentence--the fact that Judge Peterson had the temerity to impose **supervised** probation rather than the unsupervised probation the attorneys were peddling at sentencing. This is not the situation where a person's race might have affected the length of a prison sentence, or whether that sentence was imposed. This is a situation where Judge Peterson made a rational decision to put a person with a known violent history who had committed violent acts (beat a woman and resisted an officer) while making repeated derogatory racial comments about the arresting officer's skin color, on **supervised** probation. Only a true racist would be outraged, which likely explains Mitchell's appeal.

2. Judge Peterson did not abuse his discretion in not discussing each of the individual *Toohill* factors in imposing Mitchell's sentence.

The Idaho Supreme Court has found four main objectives of criminal punishment: "(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (1982). The primary consideration is "the good order and protection of society." *Id.* (citing *State v. Moore*, 78 Idaho 359, 363, 304 P.2d 1101, 1103 (1956)). A court must consider these factors when imposing a sentence. *Id.* "In deference to the discretionary authority vested in Idaho's trial courts, we will not substitute our view for that of a sentencing judge where reasonable minds might differ. An appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the foregoing criteria." *Id.*

It is clear that Mitchell believes Judge Peterson should have addressed each of the four separate objectives of *Toohill* separately, and that discussing them collectively was not enough. Counsel for Mitchell argues:

However, the Court did not state that the sentence was related to factors such as the protection of society, punishment, retribution, or necessary for rehabilitation. The Court generally stated that in reference to the Defendant, "I can't in good conscience, as I weigh the *Toohill* factors, place him on unsupervised probation, so probation will be supervised. . . .

Based on the Court's stated reasoning it is clear that it did not weigh the factors of protecting society, deterrence, rehabilitation or retribution in regards to the present case. Therefore, the sentence that was imposed was not reasonable and was an abuse of discretion and the sentence must be vacated and remanded for resentencing before a different Judge.

Appellant's Br. In Supp. of Appeal 7-8. Mitchell has provided the Court with no citation to any appellate decision mandating that each of the four *Toohill* objectives must be individually articulated by the sentencing judge, followed by a separate analysis of each objective. No citation exists for the simple reason that the Idaho Court of Appeals in *Toohill* held just the opposite, that "an appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the foregoing criteria." 103 Idaho at 568, 650 P.2d at 710. The Idaho Supreme Court has clarified this in no uncertain terms:

We review the record for the information that was known to the sentencing court at the time the sentence was imposed. "A sentence is reasonable if at the time of imposition it appears necessary to achieve 'the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to the given case.'" *State v. Lundquist*, 134 Idaho 831, 836, 11 P.3d 27, 32 (2000) (quoting from *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct.App.1982)). To show an abuse of discretion, the defendant must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts. *State v. Strand*, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002).

State v. Oliver, 144 Idaho 722, 726-27, 170 P.3d 387, 391-92 (2007). Not only does the sentencing judge not have to articulate and analyze each of the four *Toohill* criteria, on appeal, the appellate court will scour the entire record to review all the information known to the sentencing court, and as long as there is some evidence of the primary objective of protecting the public, the sentence will stand. No other interpretation can be reached.

Even counsel for Mitchell noted this criteria of protecting the public was satisfied, in writing (as noted above), "The Court generally stated that in reference to the Defendant, 'I can't in good conscience, as I weigh the *Toohill* factors, place him on unsupervised probation, so probation will be supervised."

Mitchell argues that, "in addition to using race as a factor in its imposition of its sentence [already debunked above], the Court [Judge Peterson] did not give any further reasoning behind its decision to impose supervised probation and additional jail time." Appellant's Br. In Supp. of Appeal 7. This claim is belied by Mitchell in his own brief on the same page, when counsel for Mitchell writes, "In the present case the Court made mention of Defendant's criminal record" *Id.* Counsel for the State gave Judge Peterson the prior criminal record, which was so lengthy counsel chose to organize it by State rather than by date of the crime:

Mr. Mitchell has an extensive, extensive criminal history dating back to 1991 with a taking a motor vehicle, domestic assault 2005 in Washington, a DUI from 2015 also Washington, another domestic assault from 2017, a fail to comply from 2017. Out of Arizona he has a receiving stolen property from 1989, theft 1992, out of Texas robbery 1992. Here in Idaho he has a DUI from 2006, perjury from 2007, domestic battery from 2007, straight battery 2009, resist/obstruct 2014, violation of No Contact Order 2014, a probation violation 2015. He's had eight protection orders issued against him and nine warrants. Out of Montana he has a DUI from 2007. It also appears that in Idaho he has a destruction of a telephone 2008, another DUI in 2014, violation of a No Contact Order 2008.

Tr. 4:21-5:10. Judge Peterson acknowledged Mitchell's criminal record and discussed the events in question in discharging his "obligation to the community" could only occur by his imposing "supervised probation." That is clearly for "the primary objective of protecting society," but also is "to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to the given case." 144 Idaho at 726-27, 170 P.3d at 391-92 (citing *Lundquist*, 134 Idaho at 836, 11 P.3d at 32) (quoting from *Toohill*, 103 Idaho at 568, 650

P.2d at 710).

Mitchell argues that Judge Peterson's determination was so unreasonable upon the facts of the case as to represent a "clear abuse of discretion" and that it was unreasonable "to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." Appellant's Br. in Supp. of Appeal

7. Such argument is patently false.

B. The deputy prosecuting attorney did not circumvent the plea agreement because he did not adopt a position fundamentally at odds with the promised sentence recommendation.

Mitchell argues that:

At sentencing, the prosecuting attorney circumvented the plea agreement by adopting a position fundamentally at odds with the promised sentence recommendation, which constituted a fundamental error. Despite promising to recommend a sentence that included unsupervised probation and no further jail time, the prosecuting attorney undermined that by making statements to the Court that in effect begged the Court to not follow the stipulated agreement.

First, the prosecuting attorney made statements highlighting the importance of the letter of apology to CDAPD Ofc. Newbill by stating that the Defendant's interaction with him that night according to the police report was "one of the most atrocious I've ever read. It's replete with some of the most racist, ignorant language I've ever read in my life." (5/28/2021 Tr., p.4, L.14-L.18). The prosecuting attorney went on to state that, "I would just ask that the Court use its discretion to try to address the underlying issues here of bias, clearly deeply-held racist beliefs, and I ask that the Court recommend or require the anger management courses which are clearly needed in this case." (5/28/2021 Tr., p.5, L.17-.21).

Second, the prosecuting attorney, unprompted, highlighted Defendant's criminal history, stating that, "Mr. Mitchell has an extensive, extensive criminal history dating back to 1991." (5/28/2021 Tr., p.4, L.21-L.22).

Third, when prompted by the Court to give further explanation for the State's sentencing recommendations, the prosecuting attorney stated the State would defer to the Court, but that the State "has a firm understanding of the events and the atrocious behavior that was

conducted by Mr. Mitchell.” (5/28/2021 Tr., p.10,L.120L.14).

Finally, when addressing the statements made by the Defendant expressing remorse and a willingness to comply with substance abuse treatment [Judge Peterson] stated, “I appreciate counsel's representation that Mr. Mitchell has turned his life around, but the evaluator in the substance abuse evaluation specifically notes that he seems to be under-reporting his previous criminal activity, DUI charges and previous battery charges, and based on that she made the recommendation for the evaluation of anger and relapse prevention. Clearly it's more minimization and under-reporting by Mr. Mitchell.” (5/28/2021 Tr., p.12, L.7-L.15).

.....

In the present case, the statements made by the prosecution significantly undermined the plea agreement by expressly implying that a harsher sentence should be imposed and was a tacit adoption of a recommendation altogether different than the one for which the state and Defendant had bargained for.

Again, while the prosecution does not have a duty to make its sentencing recommendations enthusiastically, it actively took a position at odds with the stipulated plea agreement. Like in *Daubs* [*State v. Daubs*, 140 Idaho 299, 92, P.3d 549 (Ct. App. 2004)] and *Wills* [*State v. Wills*, 140 Idaho 773, 102 P.23d 380 (Ct. App. 2004)], the prosecuting attorney made numerous statements in regards to the Defendant's actions calling the Defendant's actions atrocious and behavior as some of the worst the State has ever seen. Further, the prosecuting attorney made mention of the Defendant's criminal history, unprompted, calling it “extensive, extensive” before going in to great detail dating back all the way to 1991. Finally, when asked by the Court to further explain its recommendations, the prosecuting attorney declined to elaborate and stated the State was deferring to the opinions espoused by the Court and that the State “has a firm understanding of the events and the atrocious behavior that was conducted by Mr. Mitchell.” Based on those statements, the prosecution constructively disavowed its recommendation of unsupervised probation and no further jail time and was in direct contravention of the plea agreement, ultimately failing to keep its side of the previously stipulated plea bargain. Due to the prosecution directly contravening the plea agreement and directly adopting a position fundamentally at odds with that proposed agreement, the sentence must be vacated and remanded for a resentencing before a different judge.

Appellant's Br. in Supp. of Appeal 10-13. In the first sentence of the above passage, counsel for Mitchell simply throws out the term “fundamental error,” without more.

However, the analysis of “fundamental error” changed significantly in 2010 with *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). At oral argument on appeal on

October 27, 2021, this Court asked Mitchell's attorney Jonathan Williams, "Did you ever at sentencing, Mr. Williams, object to anything Mr. Sears said to Judge Peterson?" To which Williams responded:

No, your Honor. I did not. However, the standard of review shows that an objection at the trial court is not necessary. It's a fundamental error that's reviewed, and based on the violation of my client's un-waived constitutional rights, there doesn't have to be an objection at the trial court level.

Based on Williams' response to this Court's question, it is obvious Williams has not read *Perry* or *Merrill*, as Williams at oral argument simply regurgitated the state of the law that existed prior to 2010. Curiously, Williams cited the old law in his brief on appeal, and then set forth the three-part test set forth in *Perry*. Appellant's Br. in Supp. of Appeal 9. Following which, Williams then engaged in absolutely no analysis under the three-part test in *Perry*. It is troubling that Williams would quote the old, superseded case law to the Court at oral argument. It is also obvious from the State's brief and the lack of comment at oral argument, that the attorney for the State also had no idea that the law changed in 2010. Williams has it completely wrong in his statement to this Court at oral argument. *Perry* makes it clear that if defense counsel fails to object to an argument made by the prosecutor which violates an agreement, then it is defendant who bears the very difficult burden of proof on appeal to show all three-parts of *Perry* are met. Williams made no attempt to make any such showing in either his brief or in oral argument. This fundamental misunderstanding of the current state of the law by both attorneys will be discussed in detail below.

The State responds in its brief:

The State has an ongoing ethical obligation to fully inform the court of facts relevant to the magistrates sentencing considerations. To the extent that a prosecutor is involved in the sentencing process, they should seek to assure that a judge is fairly and fully informed. . . .

Appellant asserts that by highlighting the letter of apology, the State violated its plea agreement. The argument falls short however, as per the plea agreement recognized by both parties, a letter of apology was due to the arresting officer at sentencing. The State had a duty to inform the court of the agreement terms. Far from "fundamentally at odds" with the sentencing recommendations outlined in the agreement, the States characterization of Appellant's interaction with Officer Newbill was an honest reaction to the record and facts of this case. Additionally, Appellant was to have the letter completed by sentencing, this however was not the case and the State was obliged to inform the court of Appellant s [sic] lack of compliance with the plea agreement.

Appellant additionally contends that by informing the court of his criminal history, the State was taking a position fundamentally at odds with the plea agreement. Again, the State has a continuous obligation of candor toward the tribunal. In order to make just, informed decisions, the court must have the most accurate information available regarding the facts and the law. A prosecutor in his or her role as administer of justice, must provide information to the court in an honest and forthright manner. *National Prosecution Standards*, 3rd Edition §6-1.1, *comment* Pg.73 (2009). For the State to fail in its obligation to fully inform the court of Appellant 's [sic] previous criminal convictions would be to leave the magistrate ill informed as to his duties.

This reasoning equally applies with Appellant's lack of candor when obtaining his substance abuse evaluation. In her report, Ms. Lowry MA/SUDA, noted that a diagnostic criterion for Alcohol Use Disorder had not been met, seemingly due to Appellant's apparent under reporting of his previous criminal activity. (*Substance Abuse Evaluation* Pg. 3). The State has an ongoing duty to ensure that sentencing is based upon complete and accurate information drawn from the pre-sentence report and any other information the state possesses. *National Prosecution Standards*, 3rd Edition §7-1.4 (2009). To that end, the State is required to disclose to the court any information in its files relevant to the sentencing process and upon noticing any material information within a pre-sentence report which conflicts with information known to the State, it is the duty of the prosecutor to notify the appropriate parties of such conflicting information. *Id.*

Appellant characterizes the States candor as fundamentally at odds with the plea agreement. It is the position of the State that candor to the court; particularly as it relates to a defendant's lack thereof, is relevant to the sentencing process.

Appellant contends the State's conduct constituted fundamental error analogous to the sentencing conduct in *State v. Daubs* and *State v. Jones*. Both are distinguishable.

Rsp't's Br. 10-12. At the end of the above quoted segment, the State tosses out the word "fundamental error," but, similar to Mitchell, counsel for the State fails to recognize the analysis of fundamental error changed in 2010, after *Daubs* and *Jones* were written. Again, this will be addressed below.

Additionally, the State has made no claim that the National Prosecution Standards are binding on this Court. Nor, to this Court's knowledge, have those standards been adopted by the Idaho Supreme Court as a mandatory rule of ethics that prosecutors must follow. In any event, the counsel for the State certainly owes the sentencing court candor and cannot mislead the court. I.R.P.C. 3.3.

The Court will discuss *Daubs*, *Jones* and *Wills*, as those were the cases cited by counsel for Mitchell and for the State. This Court will discuss those cases primarily to compare and contrast the facts of those cases with the facts in Mitchell's case. Again, the reader needs to understand that these cases are out of date after *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

For about 25 years, the Idaho Court of Appeals held, and later the Idaho Supreme Court adopted the concept that breach of a plea agreement constitutes "fundamental error" without much further analysis. *State v. Jafek*, 141 Idaho 71, 74, 106 P.3d 397, 400 (2005) (holding that claim of state's breach of plea agreement goes to the foundation or basis of defendant's rights and, therefore, constitutes fundamental error); *State v. Allen*, 143 Idaho 267, 271-72, 141 P.3d 1136, 1140-41 (Ct. App. 2006). From 1985 (beginning with *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985)) to 2010, that was the case. In 2010, that ended with the Idaho Supreme Court's decision in *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010). In *Perry*, the Idaho Supreme Court "abandoned the definitions it had previously utilized to describe what may constitute fundamental error. The *Perry*

Court held that an appellate court should reverse an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings." *State v. Merrill*, 164 Idaho 233, 235, 428 P.3d 811, 813 (Ct. App. 2018) (citing *Perry*, 150 Idaho at 226, 245 P.3d at 978). Prior to *Perry*, there was no requirement on appeal that the defense attorney object when the prosecuting attorney was running afoul of the plea agreement. That allowed the defendant to raise the issue of breach of a plea agreement for the first time on appeal.

Post *Perry*, if the defense attorney does not object, and Williams did not object on Mitchell's behalf in the present case, then the appellate court should reverse the trial court only if all three parts of the three-part test above have been proven by the defendant. Thus, in Mitchell's case, since his attorney Williams did not object, it is Mitchell's burden to prove "fundamental error" exists, and the only way to do that is by proving the error does *each* of above-cited elements. See *Merrill*, 164 Idaho at 235, 428 P.3d at 813, citing *Perry*, 150 Idaho at 226, 245 P.3d at 978. This Court finds Mitchell has absolutely failed in his burden of proving any of the three elements. Failure to any of the three is fatal to Mitchell's appeal, but he has failed on all three elements. This Court will start with the most obvious, the last element. There can be no doubt that nothing said by either attorney affected Judge Peterson's decision to impose supervised probation. There can be no doubt because **Judge Peterson told them so**. This is set forth above, but is repeated for the convenience of the reader:

Boy, I'm really struggling with there not being additional actual incarceration and at, the very least, supervised probation here. You folks negotiated this. If there's anything else you wanted to put on the record, I'd be happy to hear it, but I have my job to do, and I'm not bound by your

recommendations.

The conduct here is just egregious. Calling the officer the "N" word. Then when he had to ride in the vehicle with that officer, he says you're gonnam ake me ride with the "N" word. He called him that multiple times. He even blamed his injuries on the fact saying that "N" word caused them, to him, referring to the officer, when in fact injuries had occurred because he was out of control and he was committing a domestic violence on another person.

The parties have dismissed the domestic violation action, and we're here on the resist/obstruct charge, but I tend to agree with Mr. Sears' encapsulation of them atter. This is about some of the worst I've ever read, and, you know, you can't commit thought crimes in our country, so one is – I guess can hold ignorant, racist, offensive, and horrible beliefs, which clearly Mr. Mitchell does, but behaviors can get you in trouble, and the behaviors here are just beyond the pale, and I don't know how I can complete my obligation to the community as a sentencing judge here without supervised probation, without additional actual incarceration, but you folks have indicated you've negotiated this, and I'll give you folks an opportunity if you wish to give me some sentencing reasons and justifications why supervised probation, given his horrendous record and other things, are not appropriate here.

Tr. 9:3-10:10. Counsel for the State responded:

State had witness issues, You Honor. On that I submit to the Court's discretion. It has a firm understanding of the events and the atrocious behavior that was conducted by Mr. Mitchell.

Id. at 10:11-14. The Court responded:

All right. I understand what you're saying, and I certainly am not trying to put you in a position of undermining the deal that you have struck, and I'm not intending to put you in that position, but I want the parties to be given an opportunity to make any further record they want to make. I imagine the goal here is to attempt to convince me to go along with this resolution, so Mr. Williams, anything further you wanted to put on the record?

Id. at 10:15-23. Because nothing stated by the attorneys changed Judge Peterson's decision to impose supervised probation, Mitchell loses on appeal.

The analysis by the Idaho Court of Appeals in *Merrill* is instructive to the facts of this case. Because the Idaho Court of Appeals in *Merrill* so clearly explained the new law

under *Perry*, and gave detailed analysis in applying that law to the facts in *Merrill*, and because the attorneys in the appeal have yet to read and understand *Perry* and *Merrill*, the entire *Merrill* opinion is set forth as follows:

FACTS AND PROCEDURE

In 2013 (Docket No. 44822), Merrill pled guilty to one count of burglary. I.C. §§ 18-1401 and 18-1403. Judgment was withheld and he was placed on probation for five years. After violating the terms and conditions of his probation, Merrill's withheld judgment was revoked and he was sentenced to a unified term of five years, with a minimum period of confinement of two years. The sentence was suspended and he was placed on probation. Thereafter, Merrill violated the terms of his probation. The district court ordered execution of Merrill's sentence, retained jurisdiction, and ultimately placed Merrill on another period of probation.

In 2015 (Docket No. 44823), while still on probation in his 2013 case, Merrill pled guilty to another count of burglary. I.C. §§ 18-1401 and 18-1403. The district court sentenced Merrill to a unified term of ten years, with a minimum period of confinement of four years, to run consecutive to his 2013 burglary sentence. Both the 2013 and 2015 cases were the subject of probation violation proceedings in June 2016, at which time Merrill was continued on probation with modified terms.

In September 2016 (Docket No. 44824), Merrill was charged with three new crimes, including felony fleeing or attempting to elude a peace officer. I.C. § 49-1404(2)(a)(b)(c) and/or (d). Merrill entered into a plea agreement with the State whereby he pled guilty to felony fleeing or attempting to elude a peace officer, and the State dismissed the other two charges and agreed to concur with the recommendation in the presentence investigation report (PSI). The presentence investigator recommended retained jurisdiction.

As a result of the 2016 charges, the State filed motions to revoke Merrill's probation in the 2013 and 2015 burglary cases and Merrill admitted to violating his probation. The district court held a joint sentencing and disposition hearing in all three cases and sentenced Merrill to a unified term of five years, with a minimum period of confinement of two years, for felony fleeing or attempting to elude a peace officer in the 2016 case and revoked Merrill's probation in the 2013 and 2015 burglary cases and ordered Merrill's sentences executed. Merrill's 2016 sentence was ordered to run concurrently with the sentences in Merrill's burglary cases. Merrill filed I.C.R. 35 motions for reduction of all three of his sentences, which the district court denied. Merrill appealed in all three cases, and the cases have been consolidated on appeal.

II. STANDARD OF REVIEW

Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Idaho decisional law, however, has long allowed appellate courts to consider a claim of error to which no objection was made below if the issue presented rises to the level of fundamental error. See *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court abandoned the definitions it had previously utilized to describe what may constitute fundamental error. The *Perry* Court held that an appellate court should reverse an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings. *Id.* at 226, 245 P.3d at 978.

III. ANALYSIS

Merrill argues, for the first time on appeal, that the State breached its plea agreement by making statements that were fundamentally at odds with the disposition the State was obligated to recommend. The three-part test for unobjected-to fundamental error from *Perry* applies to claims of prosecutorial breach of a plea agreement at sentencing. *State v. Stocks*, 153 Idaho 171, 174, 280 P.3d 198, 201 (Ct. App. 2012); *State v. Gomez*, 153 Idaho 253, 256, 281 P.3d 90, 93 (2012). Thus, to be entitled to relief, Merrill must show the alleged breach (1) violates one or more of his unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record, including any information as to whether the failure to object was a tactical decision; and (3) affected the outcome of the trial proceedings. See *Perry*, 150 Idaho at 226, 245 P.3d at 978. Merrill has failed to do so.

There is no written plea agreement in the record. At the change of plea hearing, Merrill's counsel represented the terms of the plea agreement as follows: "Pursuant to a letter agreement, [Merrill] will plead guilty to the felony eluding. The State will dismiss the misdemeanor, and the State will also dismiss the persistent violator. The State will concur with the presentence investigation recommendation. [Merrill] will agree to pay any reimbursement and restitution." The district court then asked whether the plea agreement encompassed Merrill's pending probation violations, to which defense counsel responded: "By pleading guilty to a new felony, that will necessitate that he will be found guilty on the [probation violations], because we will admit to the [probation violations] as well." However, there is no indication that the State agreed to a particular disposition, or to make any recommendation, in relation to the probation cases even though all three cases were consolidated for

purposes of sentencing and disposition. With respect to the felony eluding charge, the presentence investigator noted that Merrill's "previous chances at probation and treatment" and the nature of the felony eluding charge "could merit a recommendation of incarceration with IDOC," but the presentence investigator recommended retained jurisdiction because the program had changed since Merrill's prior period of retained jurisdiction.

At the combined sentencing and disposition hearing, defense counsel presented his sentencing argument first, stating:

Because of the new charges and the probation violations, we understand the recommendation of the presentence reporter of a rider. We appreciate that rather than a recommendation of prison. And Mr. Merrill is willing to engage in any other treatment required, and he understands the recommendation is now for the residential treatment that is provided by the Idaho Department of Corrections.

Defense counsel then asked the district court to consider probation with a condition that Merrill attend a treatment recovery program and, if not placed on probation, that the district court retain jurisdiction. Merrill also asked that any sentence imposed on the felony eluding charge run concurrently with his two burglary sentences. In response, the district court inquired why, given Merrill's history, it should "even entertain a request for a retained jurisdiction rather than simply imposing the sentence, specifically given the nature of the [eluding] charge." Defense counsel explained:

The presentence [investigator] believes that the new program offered by IDOC may offer Mr. Merrill some other treatment that he hasn't had. That's my guess.

I, likewise, expected a recommendation of imposing the sentence. But the presentence investigator believed that some additional treatment and a new program may be beneficial before the Court imposes sentence.

Following this exchange, the prosecutor presented the State's sentencing recommendation beginning with the acknowledgment: "We entered a plea agreement on this case which bound us to follow the recommendations" of the PSI. The prosecutor noted that Merrill had three pending cases for disposition and that the prosecutor "dealt with [Merrill's] mother" in a different courtroom the prior week and then stated:

And, quite frankly, I don't know how else to put it. It's just been a headache, because the performance hasn't been there. The promises have been made, but the performances haven't been there.

And I don't know if I have too much extra stuff in my eggnog or the presentence investigator writer does, but what the conclusion of it is—I think I was expecting to have an IDOC recommendation in this case.

The prosecutor further stated that, “Quite frankly, though, the last paragraph [of the PSI] on page 19 is almost spot on with how I feel.” The prosecutor then read the last paragraph of the PSI, which provides:

Mr. Merrill has an extensive criminal history. The instant offense is his third felony. He has completed a rider and had a chance to participate in a specialty court. He has had previous chances at probation and treatment and that, along with the nature of the instant offense, could merit a recommendation of incarceration with IDOC.

However, the fact that the retained jurisdiction program has changed since he was last sent on one is another option; therefore, I respectfully recommend a retained jurisdiction.

Next, the prosecutor told the district court that there were “two things in [Merrill's] favor for a retained jurisdiction” and “only two things”—Merrill “‘only’ did the CAPP Rider, and he's young.” The prosecutor commented that his tone was “negative” because, in his view, probation was “out of the question” given Merrill's history and his lack of a support system, including Merrill's mother and brother. The prosecutor continued by stating:

So that's how irritated I am by this, and that's why I think a straight prison recommendation is just fantastic.

But by giving him the benefit of the doubt, I'll turn my anger into a recommendation of an underlying sentence of five years fixed. I think he's earned it at this point.

And now the ball is on his court, and I'll recommend that the Court order a retained jurisdiction and give him that one chance at the new program. That might—and the benefit of—that I'm getting to with the two benefits, the CAPP Rider doesn't address his criminal thinking, which I think is there.

It may address it in some form or another, but I think, from what I know about the new retained jurisdiction, that might hit it out of the park for him and get him on the right track. At least let him take a swing at that is my recommendation.

Merrill did not object to the prosecutor's comments, and the district court noted the presentence investigator's recommendation but declined to retain jurisdiction. The district court imposed a unified five-year sentence,

with a minimum period of confinement of two years, to run concurrently with Merrill's two burglary sentences.

Merrill argues fundamental error occurred in his case because the prosecutor breached the plea agreement and violated Merrill's constitutional rights by making statements that were fundamentally at odds with the recommendation the State was required to make under the plea agreement. Specifically, Merrill contends the prosecutor's comments made a mockery of and undermined the retained jurisdiction recommendation. With respect to prong two of *Perry*, Merrill argues the alleged breach is clear and obvious in light of the terms of the plea agreement and argues there is nothing in the record to indicate the failure to object was a tactical decision because Merrill had nothing to gain by allowing the allegedly improper statements to be made. Lastly, Merrill argues the alleged breach of plea affected his substantial rights and affected the outcome of his sentencing because retained jurisdiction was a reasonable disposition in his case, it was the only disposition recommended in the PSI, Merrill was entitled to the State's unequivocal concurrence with the recommendation, and it was reasonably possible that the district court would have followed the recommendation of retained jurisdiction if the State had not made the comments about which he complains.

The State argues that it did not breach the plea agreement because the prosecutor expressly recommended retained jurisdiction as he was obligated to do. The State further argues that, although the prosecutor expressed "surprise" at the recommendation in light of Merrill's history, that surprise was shared by everyone and did not constitute a breach. In addition, the State argues that, although the prosecutor "strenuously opposed" Merrill's probation recommendation, this also did not constitute a breach because nothing in the plea agreement precluded the State from objecting to probation since probation was not recommended in the PSI. Finally, the State argues that there is no basis for concluding the prosecutor's comments affected Merrill's sentence because "Merrill likely would not have received a period of retained jurisdiction in any event" given the district court's focus on Merrill's need for Level 3.5 residential treatment, his lack of awareness of his needs for treatment for rehabilitation to succeed, and his ongoing criminality.

We hold that Merrill has failed to establish a clear violation of his due process rights. The requirement that a violation be clear all but definitively defeats a claim of an implied violation of the type that Merrill advances here. See *Stocks*, 153 Idaho at 174, 280 P.3d at 201. This principal was explained in *Stocks*. The plea agreement in *Stocks* precluded the State from recommending a harsher sentence than the sentence recommended in the PSI, which was for retained jurisdiction. *Id.* The prosecutor, in accord with the plea agreement, recommended a period of retained jurisdiction but prefaced the recommendation by

referencing a number of concerns, including Stocks' statements made about the details of his offense, the existence of a prior victim, and Stocks' use of the Internet to view child pornography. *Id.* at 173, 280 P.3d at 200. Stocks contended, for the first time on appeal, that the prosecutor impliedly breached the plea agreement by making comments that were inconsistent with the agreement to recommend retained jurisdiction. *Id.* at 174, 280 P.3d at 201. This Court rejected Stocks' claim that his due process rights were clearly violated, holding that the prosecutor's sentencing remarks were relevant to both the underlying sentence to be imposed and to the length of a term of probation, had the district court decided to grant probation, as the prosecutor made no agreement to stand silent or to limit his ability to persuade the court that either period of time be significant. *Id.* at 174-75, 280 P.3d at 201-02.

As in *Stocks*, the prosecutor in this case recommended retained jurisdiction as required by the plea agreement. Merrill's argument, like Stocks' argument, rests upon an implied breach arising from remarks Merrill contends were "fundamentally at odds" with the prosecutor's actual recommendation. We decline to find a clear constitutional violation under these circumstances. While the prosecutor unquestionably expressed irritation with the presentence investigator's retained jurisdiction recommendation, the prosecutor made the required recommendation and, as in *Stocks*, nothing precluded the prosecutor from arguing against probation. We will not parse through individual remarks at sentencing to determine whether any of the remarks impliedly breached the plea agreement when the applicable standard requires Merrill to show a clear constitutional violation. Merrill has failed to do so.

Even if there was a clear violation of Merrill's unwaived constitutional right, Merrill has also failed to meet his burden under prong two of the *Perry* analysis as it relates to whether defense counsel's failure to object was a tactical decision. On this point, Merrill argues that the failure to object was not tactical because there was "nothing to gain by allowing the prosecutor to make disparaging remarks" and, "had he objected to these statements and prevented the prosecutor from making such a forceful argument for incarceration, the court might have decided to follow the presentence investigator's recommendation for retained jurisdiction." Merrill has pointed to nothing in the record to support his assertion that an objection would have prevented the prosecutor from making such an argument or that the district court might have decided to retain jurisdiction but for the prosecutor's argument. The relevant question under *Perry*'s second prong is whether there is a need for additional information, not included in the record, as to whether the failure to object was a tactical decision—not whether there was a reason to object or what might have happened had an objection been made. That Merrill can posit a reason counsel should have objected does not mean counsel did not make a tactical decision to not object. There are reasons that the failure to object could have been tactical. For example, counsel may have

perceived the prosecutor's comments as proper argument against the defense's probation recommendation. Counsel may have also declined to object based on his familiarity with the district court's sentencing practices, including that the district court was not likely to retain jurisdiction under the circumstances, which the district court had already signaled it was not inclined to do given Merrill's history and the nature of the offense. The only way to resolve that question is through information that is not included in the record. See *Mintun v. State*, 144 Idaho 656, 662, 168 P.3d 40, 46 (Ct. App. 2007) (A trial attorney's failure to object to inadmissible evidence or other potential errors may be done for legitimate strategic or tactical purposes. The record on direct appeal rarely discloses this practical strategy. It would be incorrect to grant relief in such a circumstance.).

The third prong of the *Perry* analysis requires Merrill to demonstrate the alleged breach affected his or her substantial rights, meaning it must have affected the outcome of the sentencing in the case. *Perry*, 150 Idaho at 226, 245 P.3d at 978. In breach of plea agreement cases, the defendant will not always be able to show prejudice, either because he or she obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request) or because he or she likely would not have obtained those benefits in any event. *Puckett v. United States*, 556 U.S. 129, 141-42, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). Merrill argues that, because retained jurisdiction was a reasonable disposition of the case and it was reasonably possible that the district court would have given weight to the State's equivocal recommendation for retained jurisdiction, the breach influenced the district court's decision to not retain jurisdiction. However, when making its sentencing decision, the district court listed a number of reasons that it did not retain jurisdiction or place Merrill on probation. Specifically, the district court cited Merrill's need for Level 3.5 residential treatment, his numerous probation violations in the two burglary cases, and his ongoing criminality. During sentencing, the district court stated:

Just so that we're clear, whatever [the prosecutor] said about your mother, I don't know what's going on there, because those aren't my cases. And I don't punish you because your mom is involved in any other things. The only point that I take from that is he's saying that, whatever support system you have here, she's not it. I can't disagree with that aspect of it.

But when I go back and look through, first of all, the one thing that sticks out is that you're in need of Level 3.5 residential treatment.

The other thing is in your statements here to the Court. I have concerns about where you really are going wrong, and I think it's that you—maybe it's an attempt to mitigate and get a lesser sentence or get probation, but you

really lack understanding if you simply think that you can do this all on your own, given the circumstances you're in. I think you lack awareness of what it takes for treatment, and that's concerning, given the treatment that you've been provided.

You've been in front of me numerous times, and to go through that 2013 case, you've been given break after break after break, trying to get you to break this cycle and to get ahold of this addiction that you have.

And then when I look at this offense, fleeing or attempting to elude a peace officer, there's just simply no excuse for that.

And under the circumstances, this Court does not think, simply because there is a new program in the retained jurisdiction, that that's beneficial. That program is also in the prison setting, and under the circumstances, I'm declining to exercise retained jurisdiction as well. So I'm imposing the sentences in each of these cases.

There is no indication that the district court made its sentencing decision based on the prosecutor's comments. Rather, it is apparent from the record that the district court's concerns regarding retained jurisdiction existed prior to the prosecutor's remarks, and the district court's own remarks when imposing sentence explain why it did not believe retained jurisdiction was appropriate. Regardless of any implied breach, Merrill "likely would not have obtained [retained jurisdiction] in any event." This conclusion is reinforced by the district court's denial of Merrill's Rule 35 motion in which Merrill asked the district court to reconsider retaining jurisdiction. In its order denying Merrill's Rule 35 motion, the district court explained why it elected to impose a prison sentence without retaining jurisdiction, including noting that incarceration may be valuable to help change Merrill's lifestyle and life choices. Merrill has failed to show there is a reasonable possibility that the prosecutor's comments affected the district court's decision not to retain jurisdiction. Merrill has failed to show a clear violation of an unwaived constitutional right resulting from an implied breach of the plea agreement or that the alleged breach would have affected the outcome of the sentencing. As such, he has failed to meet his burden of showing fundamental error.

IV. CONCLUSION

Because Merrill failed to demonstrate a clear violation of an unwaived constitutional right in relation to the alleged breach of plea agreement in Docket No. 44824, Merrill's fundamental error argument fails, and his judgment of conviction for felony fleeing or attempting to elude a peace officer is affirmed. The district court's orders revoking probation in Docket Nos. 44822 and 44823 are also affirmed because Merrill has not challenged those orders on appeal.

164 Idaho 233-240, 428 P.3d 811-18 (footnotes omitted). Just as in *Merrill*, this Court finds that the State did not breach the plea agreement because the State clearly did not recommend supervised probation to Judge Peterson. Mitchell “has failed to establish a clear violation of his due process rights.” Mitchell has failed element one required by *Perry*. Because Mitchell has proven no *clear* violation, Mitchell makes only an *implied* violation. In *Merrill*, the Court of Appeals held: “We will not parse through individual remarks at sentencing to determine whether any of the remarks impliedly breached the plea agreement when the applicable standard requires Merrill to show a clear constitutional violation. Merrill has failed to do so.” 164 Idaho at 238, 428 P.3d at 816. This Court finds the same failure applies to Mitchell. On to the second element. In *Merrill*, the Idaho Court of Appeals held, “Even if there was a clear violation of Merrill's unwaived constitutional right, Merrill has also failed to meet his burden under prong two of the *Perry* analysis as it relates to whether defense counsel's failure to object was a tactical decision.” *Id.* Mitchell has wholly failed to address this element, because his attorney evidently did not realize there was a need to do so. On to the third element. In *Merrill*, the Idaho Court of Appeals held: “The third prong of the *Perry* analysis requires Merrill to demonstrate the alleged breach affected his or her substantial rights, meaning it must have affected the outcome of the sentencing in the case.” *Id.* Again, Mitchell has not addressed this element, apparently because his attorney did not realize there was a need to do so. Under the current law, Mitchell's appeal fails under all three elements of *Perry*. The Court now turns to outdated case law because, 1) it is what the parties cited to this Court, and 2) it may be helpful to compare the facts of Mitchell's case to the facts of those cases.

The Idaho Supreme Court has held that if a prosecutor presents evidence or argument that is “fundamentally at odds” with the recommendation contained in the plea

agreement, the agreement is breached. *State v. Lankford*, 127 Idaho 608, 617, 903 P.2d 1305, 1314 (1995). Given its unique facts, *Lankford* is not instructive to the present case. *Lankford* concerned a resentencing in a murder conviction, where the prosecuting attorney specifically ignored the district court's warnings.

In *State v. Jones*, 139 Idaho 299, 77 P.3d 988 (Ct. App. 2003) the Idaho Court of Appeals found that because the prosecuting attorney entered into an agreement for retained jurisdiction, that contemplated the possibility that Jones could be placed on probation after he served the period of retained jurisdiction. 139 Idaho at 300, 77 P.3d at 989. The Idaho Court of Appeals noted:

At Jones's sentencing hearing, the prosecutor began her sentencing recommendation with the following comments:

Well, Your Honor, I have to say that I've been doing research or been involved in the area of domestic violence pretty much since my senior year of high school and this is probably one of the most disturbing cases I've ever dealt with, read about, seen, been involved in, so it's really as-it's a very emotional case for me to talk about, and so I'll try to do my best to keep it together.

She then addressed the court at length, emphasizing the violence of the present offense, Jones's history of violence, and his refusal to take responsibility for his numerous offenses. She concluded her comments as follows:

And certainly I think [the presentence investigator] when he talks about, makes the recommendation that supervised probation is not recommended because Mrs. Jones needs to be protected, not just Mrs. Jones but those four children need to be protected from this violent man. And I think of the comment that no rehabilitation can occur until he realizes the seriousness of his unlawful behavior and that goes back to the 1992 incident.

He doesn't accept responsibility for any of this behavior and this is just-this is-I think it's disgusting the way he has behaved and continues to not accept responsibility. Definitely there appears to be an alcohol problem which exacerbates the violence concerns. I originally, when we

had the prelim[inary hearing], had offered that I would recommend retained jurisdiction. I'm bound by that. Certainly the court will do what Your Honor feels is appropriate. I did not know all the information I do know now and I will just leave that with the court. Thank you.

Jones's counsel did not object to the prosecutor's comments. The district court then imposed a unified sentence of five years with three and one-half years determinate and did not retain jurisdiction.

139 Idaho at 300-01, 77 P.3d at 989-90. These facts in *Jones* are much different than the facts in Mitchell's case. It is clear that, in *Jones*, the prosecuting attorney was having buyer's remorse, and communicated that to the sentencing judge. She prefaced her comments with, "I originally, when we had the prelim[inary hearing], had offered that I would recommend retained jurisdiction." 139 Idaho at 301, 77 P.3d at 990. Even though she next said, "I'm bound by that", her next statement is not consistent with that: "Certainly the court will do what Your Honor feels is appropriate. I did not know all the information I do know now and I will just leave that with the court." *Id.* None of those facts are present in Mitchell's case. Under the circumstances presented in *Jones*, the Idaho Court of Appeals reasoned that:

It is well established that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427, 433 (1971). This principle is derived from the Due Process Clause and the fundamental rule that, to be valid, a guilty plea must be both voluntary and intelligent. *Mabry v. Johnson*, 467 U.S. 504, 508-09, 104 S.Ct. 2543, 2546-47, 81 L.Ed.2d 437, 442-43 (1984); *State v. Rutherford*, 107 Idaho 910, 913, 693 P.2d 1112, 1115 (Ct.App.1985). If the prosecution has breached its promise given in a plea agreement, whether that breach was intentional or inadvertent, it cannot be said that the defendant's plea was knowing and voluntary, for the defendant has been led to plead guilty on a false premise. In such event, the defendant will be entitled to relief. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433; *Mabry*, 467 U.S. at 508-09, 104 S.Ct. at 2546-47, 81 L.Ed.2d at 442-43; *Fuhrman*, 137 Idaho at 744, 52 P.3d at 889; *State v. Richards*, 127 Idaho 31, 39, 896 P.2d 357, 365 (Ct.App.1995). As a remedy, the court may order specific performance of the agreement or

may permit the defendant to withdraw the guilty plea. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499, 30 L.Ed.2d at 433; *State v. Kennedy*, Docket No. 28565, 139 Idaho 244, 76 P.3d 988, 2003 WL 21054323 (Ct.App. May 12, 2003); *State v. Seaman*, 125 Idaho 955, 957, 877 P.2d 926, 928 (Ct.App.1994); *Rutherford*, 107 Idaho at 916, 693 P.2d at 1118.

The prosecution's obligation to recommend a sentence promised in a plea agreement does not carry with it the obligation to make the recommendation enthusiastically. *United States v. Benchimol*, 471 U.S. 453, 455, 105 S.Ct. 2103, 2104, 85 L.Ed.2d 462, 465 (1985); *United States v. Canada*, 960 F.2d 263, 270 (1st Cir.1992); *United States v. Badaracco*, 954 F.2d 928, 941 (3rd Cir.1992); *State v. VanBuren*, 101 Wash.App. 206, 2 P.3d 991, 995 (2000). A prosecutor may not circumvent a plea agreement, however, through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor impliedly disavow the recommendation as something which the prosecutor no longer supports. *Canada*, 960 F.2d at 270; *Badaracco*, 954 F.2d at 941; *VanBuren*, 2 P.3d at 995. Although prosecutors need not use any particular form of expression in recommending an agreed sentence, "their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse." *Canada*, 960 F.2d at 269.

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The Wisconsin Court of Appeals confronted a case that is factually similar to that before us in *State v. Poole*, 131 Wis.2d 359, 394 N.W.2d 909 (Ct.App.1986), where the defendant had agreed to plead guilty in exchange for the State's recommendation of a fine of \$1,500. At sentencing, the prosecutor recommended the fine, but then noted that this recommendation was agreed upon "before we knew of the other instances. But that is our agreement." *Id.* The "other instance" to which the prosecutor referred was a separate case in which the defendant's probation had been revoked. In examining the propriety of the prosecutor's conduct, the appellate court considered numerous opinions from other jurisdictions that had found prosecutorial breaches of plea agreements where the prosecutor may have technically made the agreed recommendation but also conveyed reservations about it. The *Poole* court concluded that the state's "use of qualified or negative language in making the sentence recommendation" violated the plea agreement. *Id.* at 911. The Wisconsin court deemed impermissible the prosecutor's comments which implied that circumstances had changed since the plea bargain was made, and that the state would not have made the same agreement if it had known of the other instances of defendant's misconduct. The court ruled that "[a] comment which implies reservations about the recommendation 'taint[s] the sentencing process' and breaches the agreement." *Id.* (quoting *Matter of Palodichuk*, 22 Wash.App. 107, 589 P.2d 269, 271 (1978)). See also *Canada*, 960 F.2d at 270, 271 ("While a prosecutor normally need not present promised recommendations to the court with any particular degree of enthusiasm, it

is improper for the prosecutor to inject material reservations about the agreement to which the government has committed itself.”)

The principles expressed in the foregoing cases lead inescapably to the conclusion that the prosecutor in the present case violated the plea agreement. Like the State's arguments in *Lankford*, the prosecutor's comments here were “fundamentally at odds” with the State's promised sentencing recommendation, which called for leniency. Although the prosecutor uttered the recommendation required by the plea agreement, her other statements effectively disavowed the recommendation of retained jurisdiction and advocated a harsher sentence. Consequently, Jones did not receive the benefit of his plea bargain.

139 Idaho at 301-03, 77 P.3d at 990-92.

In the present case, counsel for the State at no time injected any “new information” at the sentencing hearing which was found subsequent to the plea agreement, as was the case in *Poole*, discussed in *Jones*. Mitchell pled guilty on March 15, 2021, which was the first day of his scheduled jury trial. The minutes from that hearing discuss the dismissal of the domestic battery and plea of guilty to resisting but do not mention any agreement as to additional jail or supervised versus unsupervised probation. There is no written plea agreement in Mitchell's court file. Sentencing occurred on May 28, 2021. At that hearing, Judge Peterson noted the file contained a Substance Use Disorder Evaluation was filed on May 20, 2021. Tr. 3:28-23. The record shows that such evaluation was filed by Mitchell's attorney and not by counsel for the State. Based on that evaluation, counsel for the State asked that an anger evaluation be conducted, but not prior to sentencing. *Id.* at 3:13-20.

In the present case, counsel for the State did not “circumvent a plea agreement, however, through words or actions that convey a reservation about a promised recommendation”, as discussed in *Jones*. 139 Idaho at 302, 77 P.3d at 991. Counsel for the State likely did not make his recommendation enthusiastically, but he is not required to do so under *Jones*. This Court specifically finds that everything counsel for the State said about Mitchell, his prior record, the facts of his crime of resisting and obstructing for which

he was being sentenced, was true. This Court finds that at no time did the attorney for the State “impliedly disavow the recommendation as something which the prosecutor no longer supports”, as discussed in *Jones*. In fact, even when it was obvious that Judge Peterson was having a very difficult time stomaching the recommendation for unsupervised probation (Judge Peterson said, “I’ll give you folks an opportunity if you wish to give me some sentencing reasons and justifications why supervised probation, given his horrendous record and other things, are not appropriate here.” Tr. 10:6-10), counsel for the State honorably and directly responded, “State had witness issues, Your Honor. On that I submit to the Court’s discretion.” *Id.* 10:11-12. This Court finds the evidence is uncontroverted that counsel for the State not only did not circumvent the plea agreement, did not convey any reservation about the recommendation, did not disavow the recommendation, and in fact, **stood up for the recommendation in the only way he could.**

In *Daubs*, the Idaho Court of Appeals was presented with a situation similar to the facts in *Jones*, where the prosecuting attorney had entered into an agreement to recommend a retained jurisdiction (or a rider). Unlike the situation in *Jones* where the prosecutor’s buyer’s remorse was due to new information acquired since the agreement, the prosecutor’s buyer’s remorse in *Daubs* was blamed on a different deputy prosecuting attorney who told the sentencing judge:

Your honor, I have spoken with [the prosecutor assigned to the case], and the State has agreed to recommend no more than a Rider in this case.

The PSI investigator, however, clearly is recommending prison based on the nature of Mr. Daub's crimes, his prior record, and his substance abuse problems.

Rather than having me restate the information presented to the Court in the PSI and in the letters from the victims, I would ask that this

Court hear from [the victim's parents], who are here. They're better able than I am to explain the horrific consequences that this crime has had on them, their daughters, and their entire family.

140 Idaho 299, 301, 92 P.3d 549, 551. To which the Idaho Court of Appeals held:

This language, when taken in context of the entire proceeding, is clearly fundamentally at odds with the terms of the plea agreement. After referring to the agreement to make the rider recommendation, the prosecutor highlighted the contrary recommendation of the PSI investigator as well as the basis for that recommendation: prison, because of the nature of Daub's crimes, his prior record, and his substance abuse problems. The prosecutor then introduced the victims' parents, and prefaced the parents' statements by indicating that, "[t]hey're better able than I am to explain the horrific consequences that this crime has had on them, their daughters, and their entire family." We conclude that the statements and evidence given to the sentencing judge amount to an abrogation of the plea agreement, and a tacit adoption of a recommendation altogether different than the one for which the state and defendant had bargained.

Where, as here, the state has reached a plea agreement, it was error for the prosecution to emphasize the harsher PSI prison sentence recommendation and to embellish the nature of the victims' parents' statements. We conclude that the prosecution impliedly embraced the PSI recommendation, and constructively disavowed its recommendation of no more than a rider. Because these actions were in direct contravention of the plea agreement, we conclude that the state failed to fulfill its side of the bargain.

Id. In Mitchell's case there was no blaming a different prosecuting attorney. The only justification was problems with the complaining witness. That is why the case was not going to trial and that was why the deputy prosecuting attorney was willing to enter into an agreement for unsupervised probation. At no time in Mitchell's case did the deputy prosecuting attorney ever refer to a "contrary recommendation" as was the case in *Daubs*.

In *State v. Wills*, 140 Idaho 773, 102 P.3d 380 (2004), the Idaho Court of Appeals addressed a situation where Wills agreed to plead guilty to two counts of lewd conduct of a minor under the age of sixteen, with the State agreeing to recommend a sentence of fifteen years with a minimum sentence of three years. 140 Idaho at 774, 102 P.3d at 381. At

sentencing the prosecutor argued the sentences the state was recommending were the minimum that should be imposed. *Id.* The prosecutor said:

What he did to these two little ones is just completely horrendous and almost unthinkable. And I think, at a very minimum, he should get three years fixed followed by twelve indeterminate for fifteen. I think the state is showing great restraint by only recommending that sentence.

Id. Obviously, when the prosecuting attorney said, “at a very minimum, he should get three years fixed”, the prosecuting attorney was really arguing a minimum sentence to the court when what was agreed to was not a minimum sentence but was the maximum that could have been requested by the prosecutor under the agreement. In arguing “at a very minimum”, the prosecutor was arguing that the judge do more, which is what the sentencing judge did in that case. *Id.* Those certainly are not the facts in the present case.

The Idaho Court of Appeals in *Wills* discussed the law:

The prosecution's obligation to recommend a sentence promised in a plea agreement does not carry with it the obligation to make the recommendation enthusiastically. *United States v. Benchimol*, 471 U.S. 453, 455, 105 S.Ct. 2103, 2105, 85 L.Ed.2d 462, 466 (1985); *Jones*, 139 Idaho at 302, 77 P.3d at 991. A prosecutor may not circumvent a plea agreement, however, through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor impliedly disavow the recommendation as something that the prosecutor no longer supports. *Jones*, 139 Idaho at 302, 77 P.3d at 991. Although prosecutors need not use any particular form of expression in recommending an agreed sentence, their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse. *Id.* A prosecutor may make additional sentencing recommendations, so long as they are not inconsistent or incompatible with the plea agreement. *State v. Potts*, 132 Idaho 865, 867, 979 P.2d 1223, 1225 (Ct.App.1999). Further, absent an agreement to the contrary, the prosecutor may refer to information relevant to sentencing and refer to the objectives of sentencing. *State v. Richards*, 127 Idaho 31, 40, 896 P.2d 357, 366 (Ct.App.1995).

140 Idaho at 775, 102 P.3d at 382. The Idaho Court of Appeals then held:

Wills was entitled to have the prosecutor's conduct conform to what *Wills* reasonably understood to be the bargain. See *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir.1992). Webster's defines

“recommend” as “to mention or introduce as being worthy of acceptance, use, or trial.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 1897 (3d ed.1993). By presenting the recommended sentences as the *minimum* to be imposed and indicating that this minimum recommendation was made with “great restraint,” the prosecutor failed to endorse the recommended terms as the ones the district court should accept. Instead, the prosecutor conveyed a reservation regarding the advisability of imposing those sentences and implied that longer terms would be more appropriate. This conduct was fundamentally at odds with what the state agreed to do under the plea agreement. Accordingly, we conclude that the prosecutor breached the plea agreement and, as a result, Wills was denied the benefit of his bargain.

140 Idaho at 776, 102 P.3d at 383. The deputy prosecuting attorney in Mitchell’s case did none of these things.

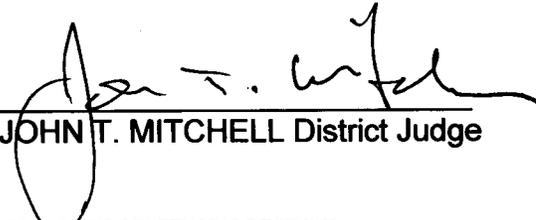
The Idaho Supreme Court held that it is not a breach when a prosecutor recommends additional sentencing terms that are not inconsistent with those specified in the plea agreement. *State v. Potts*, 132 Idaho 865, 867, 979 P.2d 1223, 1225 (1999); *State v. Brooke*, 134 Idaho 807, 810, 10 P.3d 756, 759 (2000). Thus, it is perfectly acceptable that counsel for the State recommended an anger evaluation in Mitchell’s case.

V. CONCLUSION AND ORDER.

On his appeal, in an effort to avoid supervised probation, Mitchell has wholly ignored the current state of the law under *Perry* and *Merrill*. It is difficult to imagine a more misguided and uninformed appeal than this. For the reasons set forth above, Judge Peterson’s sentencing decision of Mitchell is affirmed in all aspects. Mitchell has warranted the extreme sanction of supervised probation.

IT IS HEREBY ORDERED THAT Judge Peterson’s sentencing decision is AFFIRMED.

DATED this 8th day of November, 2021


JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of November, 2021 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Jonathan Williams *pdfaxescop*
Prosecuting Attorney - Kyle Sears *I.O.*
cdapnsnotices@cdaid.org

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY *[Signature]*
Deputy