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# State v. Bosier Appellant's Brief Dckt. 36631

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 JOSHUA BOSIER, )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

NO. 36631

COPY

APPELLANT'S BRIEF

\_\_\_\_\_  
BRIEF OF APPELLANT  
\_\_\_\_\_

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

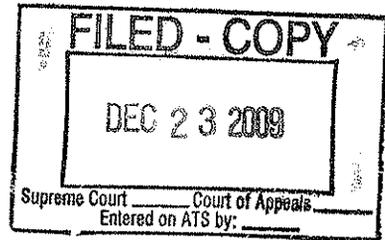
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## STATEMENT OF THE CASE

### Nature of the Case

This case arises from the remand of Joshua Bosier's prior successful appeal of the district court's *sua sponte* revocation of his probation. In Idaho Supreme Court Case No.34745, the Court of Appeals found that the district court had violated Mr. Bosier's constitutional rights to due process when the court *sua sponte* summoned Mr. Bosier into court and revoked his probation without any allegation that he had violated his probation and without any prior notice or an opportunity to be heard. *State v. Bosier*, 2009 Unpublished Opinion No. 439 at pp.2-3 (April 29, 2009) (*hereinafter*, Opinion). The Court of Appeals then vacated the district court's first and second amended judgments of conviction, but *not* his original judgment of conviction and sentence, and remanded the case "for reinstatement of the original probation."

But upon remand, the district court in this case did not simply perform the task it was directed to – reinstatement of the original probation. Instead, the court decided to alter Mr. Bosier's sentence by ordering his underlying sentence and probation to run consecutively to sentences that he was serving arising from Canyon County proceedings.

Mr. Bosier timely appeals from the district court's Third Amended Judgment of Conviction and Order Suspending Sentence, and asserts that the district court was without jurisdiction to alter his sentence given the directive of the Court of Appeals' Opinion in this case. Additionally, Mr. Bosier asserts that the district court erred in entering this third amended judgment because the district court unlawfully increased his sentence. Finally, Mr. Bosier asserts that the increase of his sentence upon remand

from his successful appeal constituted a vindictive sentence that deprived him of due process of law.

### Statement of the Facts and Course of Proceedings

The following Statement of Facts and Course of Proceedings were articulated in the Court of Appeals' prior opinion in this case:

*Bosier pled guilty to felony possession of a controlled substance, I.C. § 37-2732(c). In exchange for his guilty plea, the state dismissed additional charges, including an allegation that Bosier was a persistent violator. At that time, Bosier was involved in four different criminal cases in various stages before three different courts. The district court sentenced Bosier to a unified term of seven years, with a minimum period of confinement of three years. The district court suspended Bosier's sentence and placed him on probation for seven years. The district court also ordered the sentence to run concurrently with Bosier's sentence in another unrelated case for which he had been placed on probation.*

One month later, the district court summoned Bosier for another hearing. At that time, the district court explained that it was previously under the mistaken belief that Bosier had a retained jurisdiction opportunity in one of his other cases when, in fact, jurisdiction had been relinquished. The district court then entered an amended judgment of conviction sentencing Bosier to a unified term of seven years, with a minimum period of confinement of three years. The amended judgment of conviction had the effect of revoking Bosier's probation and reinstating the sentence of the original judgment of conviction. The district court ordered the sentence to run concurrently with all other sentences currently being served by Bosier.

One week later, Bosier wrote a letter to the district court alleging that it had revoked his probation without cause and asking the district court to reduce his sentence. The district court treated the letter as an I.C.R. 35 motion to reduce Bosier's sentence. After a hearing, the district court entered a second amended judgment of conviction modifying Bosier's sentence to a unified term of seven years, with a minimum period of confinement of two years.

Opinion, pp.1-2. (See also Appellant's Brief in Idaho Supreme Court Case No. 34745 (hereinafter, 34745 Appellant's Brief), pp.1-7.)

On appeal, Mr. Bosier asserted that the district court violated his constitutional right to due process when the court *sua sponte* revoked his probation and executed his sentence without any allegation of a probation violation or any proof that he had violated the terms and conditions of his probation, and without any prior notice or provision for an opportunity to be heard.<sup>1</sup> (34745 Appellant's Brief, pp.8-15.) The Court of Appeals agreed with Mr. Bosier's assertions regarding the violation of his due process rights in light of the lack of prior notice and an opportunity to be heard. (Opinion, pp.2-3.) Based upon this finding, the Court of Appeals declined to address the other issues raised on appeal given that the lack of notice was deemed dispositive. (Opinion, pp.2-3.)

As a remedy for the due process violation found, the Court of Appeals ordered the following:

The district court violated Bosier's right to due process when it revoked his probation without notice and an adequate opportunity to be heard. Accordingly, *Bosier's first and second amended judgments of conviction for possession of a controlled substance are vacated and the case remanded for reinstatement of the original probation.*

Opinion, p.3.

While the Court of Appeals vacated Mr. Bosier's first and second amended judgments of conviction, the court left Mr. Bosier's original judgment of conviction and sentence intact.<sup>2</sup> (Opinion, p.3 n.1; 34745 R., pp.42-48.)

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<sup>1</sup> Mr. Bosier also asserted that the district court abused its discretion when it failed to further reduce Mr. Bosier's sentence upon revoking his probation. (Appellant's Brief, pp.16-19.) This claim is not at issue in this appeal as it was rendered moot by the Court of Appeals' disposition in Mr. Bosier's earlier appeal. See, e.g., *State v. Nab*, 112 Idaho 1139, 1140, 739 P.2d 438, 439 (Ct. App. 1987).

<sup>2</sup> The first and second amended judgments of conviction were entered by the district court after *sua sponte* revoking Mr. Bosier's probation. (34745 R., pp.53-55, 63-65.)

Upon remand, however, the district court did not follow the directive of the Court of Appeals to simply re-instate Mr. Bosier under the original terms and conditions of his probation, as originally set forth in his original judgment of conviction and sentence. Instead, the district court decided to *alter* his judgment by making his underlying sentence, and the term of his probation consecutive to two sentences that he received from Canyon County.<sup>3</sup> (Tr., p.6, L.10 – p.7, L.15; R., p.12; 34745 R., p.43.) Mr. Bosier’s original judgment of sentence, which was expressly left in place by the Court of Appeals upon remand, provided that Mr. Bosier’s judgment of conviction and sentence was “to commence immediately,” but was suspended and that Mr. Bosier was placed on probation for seven years, “commencing on October 3, 2007.” (Opinion, p.3 n.1; 34745 R., p.43.)

Mr. Bosier timely appeals from the district court’s Third Amended Judgment of Conviction and Sentence. (R., pp.11, 18.)

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<sup>3</sup> Although never articulated by the district court, the “Canyon County sentences” referred to by the district court appear to be his sentences arising from Canyon County district court case nos. CR-03-23206 and CR-06-19488. (See 11/2/07 Tr., p.34, Ls.3-25.) Mr. Bosier has sought to augment the record with the register of actions from these two cases through a motion to augment that has been filed simultaneously with this brief.

## ISSUES

1. Did the district court lack jurisdiction in this case to alter Mr. Bosier's underlying sentence upon remand from the Idaho Court of Appeals specifically directing the district court to reinstate "the original probation" as ordered in Mr. Bosier's original judgment of conviction?
2. Did the district court err when it increased the aggregate term of Mr. Bosier's sentence through filing an amended judgment of conviction and sentence when the Idaho Court of Appeals did not vacate Mr. Bosier's original judgment of conviction and sentence?
3. Did the district court impose a vindictive sentence when it increased the aggregate term of Mr. Bosier's judgment of conviction and sentence upon Mr. Bosier's successful appeal?

## ARGUMENT

### I.

#### The District Court Lacked Jurisdiction In This Case To Alter Mr. Bosier's Underlying Sentence Upon Remand From The Idaho Court Of Appeals Specifically Directing The District Court To Reinstate "The Original Probation"

##### A. Introduction

The Court of Appeals' prior opinion in this case remanded Mr. Bosier's case with specific instructions to the district court as to what actions could follow. Specifically, the Court of Appeals remanded this case with a directive to the court to reinstate the terms and conditions of Mr. Bosier's original probation as set forth in his original judgment of conviction and sentence. Because the district court took action that was in excess of the limited subject matter jurisdiction conferred by the Court of Appeals' Opinion to perform the ministerial task of reinstating Mr. Bosier's original judgment of conviction and terms and conditions of probation, and because the district court's action was further in contravention of I.A.R. 38, the district court lacked jurisdiction to alter Mr. Bosier's sentence upon remand. The district court's third amended judgment of conviction is therefore void, and this case should be remanded back to the district court with instructions to comply with the original directive as set forth by the Court of Appeals in the prior appeal in this case.

B. The District Court Lacked Jurisdiction In This Case To Alter Mr. Bosier's Underlying Sentence Upon Remand From The Idaho Court Of Appeals Specifically Directing The District Court To Reinstate "The Original Probation"

1. The District Court Lacked Subject Matter Jurisdiction To Enter A New Judgment Of Conviction And Order Of Probation Where The Court Of Appeals Opinion Only Provided Jurisdiction For The District Court To Perform The Ministerial Task Of Re-Entering Mr. Bosier's Original Judgment Of Conviction And Order Of Probation

"Issues about the district court's jurisdiction are issues of law, over which the Court exercises independent review." *State v. Rogers*, 140 Idaho 223, 227, 91 P.3e 1127, 1131 (2004). The issue of whether the district court lacked subject matter jurisdiction over a particular case may be raised at any time, and cannot be waived by a party, nor can the lack of subject matter jurisdiction be consented to by the parties to the action. *See, e.g., State v. Armstrong*, 146 Idaho 372, 374, 195 P.3d 731, 733 (Ct. App. 2008). In light of this, a party may assert that the district court lacked subject matter jurisdiction in a case for the first time on appeal. *Id.*

The Court in *Rogers* delineated what is meant by the term "subject matter jurisdiction":

"Jurisdiction over the subject matter" has been variously defined as referring to (1) the nature of the cause of action and of the relief sought; (2) the class of cases to which the particular one belongs and the nature of the relief sought; (3) the power of a court to hear and determine cases of the general class to which the particular one belongs; (4) both the class of cases and the particular subject matter involved; and (5) the competency of the court to hear and decide the case.

*Rogers*, 140 Idaho at 228, 91 P.3d at 1131.

And the competency of the district court to hear and decide substantive issues in a case is generally terminated once a dispositive appellate ruling on those issues has been rendered, unless the directive from the appellate court expressly provides for the

further exercise of the district court's discretion. "Absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time to appeal or affirmance of the judgment on appeal." *State v. Jakoski*, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003). The district court does not enjoy "perpetual jurisdiction to amend or set aside final judgments in cases that they have heard." *Id.* Thus, as noted by the Court in *Jakoski*, the final determination of an appeal can operate to terminate the general subject matter jurisdiction of the district court to take action in a particular case. *Id.*; see also *Armstrong*, 146 Idaho at 378, 195 P.3d at 737.

While an order remanding a case to the district court can confer subject matter jurisdiction to take the actions directed by the appellate court, the degree to which jurisdiction is conferred is wholly dependant on the nature of the directive from the appellate court. "The general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000). "Subsidiary issues," do not arise in cases where the sole action that the district court is directed to undertake from the appellate court is a "ministerial act," such as entering an amended judgment. *Hummer v. Evans*, 132 Idaho 830, 833, 979 P.2d 1188, 1191 (1999). Merely requiring the district court to comply with the directive of an opinion from the appellate court is not sufficient to confer subject matter jurisdiction on the district court to consider substantive issues in a case. *Id.* As noted by the Court in *Hummer*:

Indeed, the language of the Remittitur provides that the opinion of the Court directs whether there any continuing jurisdiction of the district judge

exists. In this case, our ruling did not open the door for the district judge to address substantive issues in the case.

*Id.*

In this case, as in *Hummer*, the directive of the Court of Appeals in the prior appellate decision in this case directed the district court to take the purely ministerial action of reinstating Mr. Bosier on probation under the terms and conditions that were previously established in the original judgment of conviction in this case. (Opinion, p.3.) This directive did not confer any subject matter jurisdiction on the district court to re-litigate its sentencing decision – the court was merely directed to give force and effect to the prior sentencing order that placed Mr. Bosier on probation. As such, the district court's third amended judgment of conviction in this case was entered without subject matter jurisdiction.

2. Pursuant To I.A.R. 38, The District Court Lacked The Authority To Disregard The Directive Of The Court Of Appeals' Opinion And To Instead Resentence Mr. Bosier

Idaho Appellate Rule 38 provides, in pertinent part, that:

When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and the presiding district court judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final *and that the district court or administrative agency shall forthwith comply with the directive of the opinion.*

I.A.R. 38(c) (emphasis added).

The language of this rule is mandatory – once an opinion becomes final, the district court is required to comply with the specific directives provided by the opinion rendered by either the Court of Appeals or the Supreme Court.<sup>4</sup>

In this case, however, the district court chose to disregard the directives established by the prior Court of Appeals Opinion in this case. Instead of performing the task directed to it – to reinstate Mr. Bosier on the “original probation” as set forth in his original judgment of conviction – the district court unilaterally determined that it wanted to sentence Mr. Bosier anew. Because the district court failed to comply with the provisions of I.A.R. 38, which circumscribe the court’s authority to act upon remand, the district court acted in excess of its jurisdiction and abused its discretion.

## II.

### The District Court Erred When It Increased The Aggregate Term Of Mr. Bosier’s Sentence Through Filing An Amended Judgment Of Conviction And Sentence When The Idaho Court Of Appeals Did Not Vacate Mr. Bosier’s Original Judgment Of Conviction And Sentence

#### A. Introduction

In addition to acting without subject matter jurisdiction, the terms of the third amended judgment of conviction and order of probation entered by the district court in this case constitute an abuse of discretion. The district court in this case acted well outside of clearly established applicable legal standards when the court increased the aggregate length of Mr. Bosier’s sentence beyond that articulated in Mr. Bosier’s original judgment of conviction and sentence, which was left intact by the prior Court of Appeals’ opinion in this case.

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<sup>4</sup> Remittitur was issued in Mr. Bosier’s original appeal on May 21, 2009.

B. The District Court Erred When It Increased The Aggregate Term Of Mr. Bosier's Sentence Through Filing An Amended Judgment Of Conviction And Sentence When The Idaho Court Of Appeals Did Not Vacate Mr. Bosier's Original Judgment Of Conviction And Sentence

Sentencing determinations are generally reviewed by this Court for an abuse of discretion. See, e.g., *State v. Jafek*, 141 Idaho 71, 74, 106 P.3d 397, 400 (2005). When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the proper boundaries of its discretion and consistently with the legal standards applicable to its exercise of discretion; and (3) whether the court reached its decision through an exercise of reason. *Id.* at 401, 106 P.3d at 75.

The district court's entry of the third amended judgment of conviction and order of probation runs afoul of the second prong of the abuse of discretion standard because the district court exceeded its authority when it increased Mr. Bosier's sentence from the sentence and order of probation that was originally entered in this case.

"When the trial court has sentenced the defendant and has suspended execution of the sentence and placed the defendant on probation, upon revocation of probation the court cannot resentence the defendant." *State v. Thomas*, 146 Idaho 592, 594, 199 P.3d 769, 771 (2008). Additionally, it has long been established in Idaho that, "when a trial court initially sentenced a criminal defendant to a definite term of imprisonment, but has suspended the sentence and granted probation, it may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." *State v. Pedraza*, 101 Idaho 440, 443, 614 P.2d 980, 983 (1980). Though this clear principle

was established over a quarter century ago, the district court failed to abide by this clear legal standard applicable to its exercise of discretion.

In this case, the Court of Appeals only vacated the district court's first and second amended judgments of conviction in Mr. Bosier's case – the court expressly left his original judgment of conviction and sentence intact and ordered the district court to reinstate Mr. Bosier on probation under these terms. (Opinion, p.3 n.1.) This is consistent with prior precedent in which Idaho courts have recognized that, upon vacating an amended judgment that alters a sentence, the original sentence remains in effect. *See State v. Allen*, 144 Idaho 875, 878, 172 P.3d 1150, 1153 (Ct. App. 2007).

Therefore, in Mr. Bosier's case, he has been sentenced to a definite term of imprisonment under the terms and conditions of his original judgment of conviction and order suspending his sentence. (34745 R., pp.42-47.) Despite the fact that Mr. Bosier's sentence had already been pronounced, the district court has simply sought to override and increase the sentence that was originally put in place through entering a third amended judgment of conviction. (R., pp.11-15.)

This Third Amended Judgment of Conviction, and Order Suspending Sentence imposed two increases to Mr. Bosier's original judgment of conviction and order of probation. First, it adds the new term that Mr. Bosier's underlying sentence is to "run **consecutively** to the defendant's Canyon County sentences." (R., p.12.) Second, it alters Mr. Bosier's term of probation so that it is to commence "upon the defendant's release from prison," rather than the original term which set Mr. Bosier's probation to commence "on October 3, 2007." (R., p.12; 34745 R., p.43.) Both alterations result in an increased sentence against Mr. Bosier.

For purposes of determining whether punishment has been increased, Idaho courts have consistently viewed an order that a sentence is to run consecutively to another sentence as an increase in the sentence, as it constitutes an increase in the aggregate time that a defendant must serve. See, e.g., *Cook v. State*, 145 Idaho 482, 487-490, 180 P.3d 521, 526-529 (Ct. App. 2008); *State v. Whittle*, 145 Idaho 49, 52, 175 P.3d 211, 214 (Ct. App. 2007); *State v. Hoskins*, 131 Idaho 670, 673, 962 P.2d 1054, 1057 (Ct. App. 1998); *State v. Castro*, 131 Idaho 274, 276, 954 P.2d 692, 694 (Ct. App. 1998); *State v. Amerson*, 129 Idaho 395, 407-408, 925 P.2d 399, 411-412 (Ct. App. 1992); *State v. Alberts*, 121 Idaho 204, 207, 824 P.2d 135, 138 (Ct. App. 1992). In *Alberts*, the Court of Appeals specifically noted that the effect of an increase in the overall, aggregate sentence by ordering a sentence to run consecutively, rather than concurrently, to other sentences is subject to appellate review for whether this creates an excessive sentence. *Alberts*, 121 Idaho at 207, 824 P.2d at 138.

This issue has previously been decided by the Court of Appeals in *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984). In *Mendenhall*, the issue for the court's resolution was whether sentences originally ordered to run concurrently could be changed upon the revocation of the defendant's probation so that the sentences would be set to run consecutively. *Mendenhall*, 106 Idaho at 390, 679 P.2d at 667. The *Mendenhall* Court found that such an alteration of a sentence upon revoking probation was impermissible because this operates to increase the term of the defendant's sentence when probation is revoked. *Id.* at 394-395, 679 P.2d at 671-672.

As noted by the court:

By making the sentences consecutive without adjusting their terms, the judge went beyond mere correction of the sentences. He imposed a

harsher penalty. That decision implicates the decision found in *State v. Pedraza*.

*Id.* at 394, 679 P.2d at 671.

The case law is consistent in other closely related contexts as well. It has likewise been held to be error for a district court to order that the sentence originally imposed, but suspended, would be served consecutively for a later sentence imposed for a crime which occurred during the period of probation. See *King v. State*, 114 Idaho 442, 446-447, 757 P.2d 705, 709-710 (Ct. App. 1988); *State v. West*, 105 Idaho 505, 506-507, 670 P.2d 912, 913-914 (Ct. App. 1983). In particular, the court in *King* noted that, “we perceived no difference between the alteration of [the defendant’s] sentence, to make it consecutive, and the ‘increase’ referred to in *Pedraza*.” *King*, 114 Idaho at 446, 757 P.2d at 709.

In this case, the district court imposed a harsher sentence than the sentence imposed in the original judgment of conviction in this case, which was specifically left intact by the Court of Appeals’ prior decision. The district court’s third amended judgment of conviction, the court added terms that were not present in Mr. Bosier’s original judgment of conviction – that Mr. Bosier’s sentence was to run consecutively to his Canyon County sentences and that Mr. Bosier’s probation was not to commence until his release from prison (as opposed to his suspended sentence commencing “immediately” and his probation “commencing on October 3, 2007”). (R., p.12; 34745 R., p.43.)

The alteration made by the district court impermissibly increased the aggregate term of Mr. Bosier’s sentence in this case. The district court lacked the authority to do so based upon well-established and clearly applicable standards of law. As such, the

district court erred in this case in entering the third amended judgment of conviction that increased Mr. Bosier's underlying sentence and the terms of his probation.

### III.

#### The District Court Imposed A Vindictive Sentence When It Increased The Aggregate Term Of Mr. Bosier's Judgment Of Conviction And Sentence Upon Mr. Bosier's Successful Appeal

As an initial matter, Mr. Bosier did not raise any assertion that his resentencing to a greater aggregate term upon his successful appeal of the district court's *sua sponte* revocation of his probation constituted a vindictive sentence that violated his due process rights. However, the Idaho Supreme Court has already determined that the "right to be free from vindictive sentencing" constitutes a fundamental error that can be reviewed for the first time on appeal, "because it would go to the foundation or basis of [the defendant's] rights." *State v. Robbins*, 123 Idaho 527, 530, 850 P.2d 176, 179 (1993). As such, Mr. Bosier's assertion of vindictiveness in his resentencing is properly justiciable on appeal.

The U.S. Supreme Court in *North Carolina v. Pearce* articulated the parameters of what constitutes a vindictive sentence that violates the due process protections of the Fourteenth Amendment. *North Carolina v. Pearce*, 395 U.S. 711, 723-724 (1969). The Court in *Pearce* established that the imposition of a heightened penalty on a criminal defendant for successfully asserting his or her statutory or constitutional rights is a violation of due process. *Id.* This is because, "penalizing those who choose to exercise constitutional rights 'would be patently unconstitutional.'" *Id.* at 724 (citing *U.S. v. Jackson*, 390 U.S. 570, 581 (1968)). Additionally, the threat of heightened punishment

imposed as a result of the exercise of rights will likely create a chilling effect on the exercise of rights by other defendants. *Id.*

It is worth noting that nothing in this standard requires a showing of anything more than the fact that heightened punishment was imposed on a criminal defendant that was solely attributable to the exercise of his or her rights. The term “vindictive” as that term is used in the context of sentencing, has a very particular and narrow meaning. *See, e.g., Nairn v. State*, 837 So.2d 519, 519 (Fla. Dist. Ct. App. 2003). As stated by the court in *Nairn*:

As used in the sentencing process the word “vindictive” has lost its dictionary definitions. The sentencing term “vindictive” has become a “term of art,” describing the legal effect of an objective course of action, generally not implying any personal or subjective animosity on the part of the trial judge. That being the case a defendant challenging a sentence as being vindictive may not need to demonstrate that the sentencing judge was acting out of any degree of malice.

*Nairn*, 837 So.2d at 519 (internal citations omitted).

In this case, the same judge as originally sentenced Mr. Bosier sought to increase his sentence after Mr. Bosier successfully pursued his appeal. (R., p.15; 34745 R., p.46.) Although there was some confusion regarding the Canyon County district courts’ dispositions on the charges arising from that county, the district court was aware of Mr. Bosier’s charges arising from Canyon County at the time that Mr. Bosier was originally sentenced. (10/3/07 Tr., p.21, L.13 – p.23, L.20; 34745 PSI, pp.7-8.) In fact, the underlying circumstances of the Canyon County cases were set forth in the presentence investigation report prepared prior to Mr. Bosier’s original sentencing wherein Mr. Bosier was originally placed on probation. (34745 PSI, p.8.)

No additional facts were adduced at the hearing on remand of Mr. Bosier's case prior to the district court increasing Mr. Bosier's sentence, other than Mr. Bosier's participation in therapeutic programming while incarcerated. (See 6/17/09 Tr., *generally*.) The only new information would appear to show Mr. Bosier's positive behavior during his incarceration. Therefore, other than the fact that Mr. Bosier had successfully overturned the district court's *sua sponte* revocation of his probation on appeal, there was no materially new information that would support the district court's increase in Mr. Bosier's sentence. It would appear that the district court was simply seeking to circumvent what the Court of Appeals had already stated was improper in Mr. Bosier's prior appeal – to change Mr. Bosier's judgment of conviction and sentence without any prior notice to Mr. Bosier, nor with any allegation that Mr. Bosier had violated the terms and conditions of his probation.

#### CONCLUSION

Mr. Bosier respectfully requests that this Court vacate the district court's Third Amended Judgment of Conviction and Order Suspending Sentence; and remand this case with the instructions to the district court to re-instate Mr. Bosier on probation under his original Judgment of Conviction and Order Suspending Sentence that was entered by the district court on October 5, 2007.

DATED this 23<sup>rd</sup> day of December, 2009.

  
for SARAH E. TOMPKINS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of December, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOSHUA BOSIER  
4414 W IRVING STREET  
BOISE ID 83704

MICHAEL R MCLAUGHLIN  
DISTRICT COURT JUDGE  
E-MAILED COPY OF BRIEF

ADA COUNTY PUBLIC DEFENDER  
200 W FRONT ST  
BOISE ID 83702

STATEHOUSE MAIL

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand deliver to Attorney General's mailbox at Supreme Court

A handwritten signature in black ink, appearing to read 'Evan A. Smith', written over a horizontal line.

EVAN A. SMITH  
Administrative Assistant

SET/eas

