6-15-2012

State v. Waters Appellant's Brief Dckt. 39063

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39063
	)	
v.	)	
	)	
MICHELLE JOY WATERS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

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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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Michelle Waters entered an *Alford*[1] plea of guilty to second degree arson and misdemeanor driving under the influence. She was sentenced to 15 years, with three and one-half years fixed, upon her plea to second degree arson. At her sentencing, the district court decreed that Ms. Waters was prohibited from having any contact with her minor children for two years, and to thereafter only have contact in writing with her children until they reached the age of 18. However, the district court never entered a separate no contact order and, accordingly, never served a separate no contact order on Ms. Waters. This no-contact provision was merely listed in a single paragraph in Ms. Waters' judgment of conviction.

On appeal, Ms. Waters asserts that the no contact order entered by the district court in this case fails to meet with almost every requirement contained within Idaho Criminal Rule 46.2 and, therefore, a remand to the district court is required so that the district court may enter a proper no contact order pursuant to I.C. § 18-920 and I.C.R. 46.2.

In addition, Ms. Waters asserts that the district court abused its discretion when it denied her Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion seeking a reduction of her sentence.

Statement of the Facts and Course of Proceedings

Michelle Waters was charged with first degree arson and misdemeanor driving under the influence. (R., pp.65-66.) However, prior to her arraignment on these

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

charges, a criminal no contact order was entered against Ms. Waters pursuant to I.C. § 18-920 that precluded Ms. Waters from having any contact with her four minor children. (R., p.11.) Ms. Waters thereafter filed a motion to modify this no contact order so as to allow her to have limited contact with her children. (R., pp.56-57.) At her arraignment, Ms. Waters asked the district court to modify the terms of her no contact order to at least provide her with the ability to contact her four children either by phone or through the mail. (10/26/10 Tr.,[2] p.13, Ls.2-12.) She noted that she had been the primary care giver for her children for many years, and further asked the court to permit some limited contact in order to assist them in dealing with the criminal process Ms. Waters was facing. (10/26/10 Tr., p.13, Ls.2-12.) The State opposed this motion and it was denied by the district court. (10/26/10 Tr., p.13, L.16 – p.15, L.14.) However, the district court did inform Ms. Waters that the denial of the motion to modify the no contact order was "without prejudice," and that she could renew her motion at a later time. (10/26/10 Tr., p.15, Ls.13-19.)

About two months later, Ms. Waters again filed a motion seeking to modify the criminal no contact order. (R., pp.84-87.) Appended to this motion was a letter written by one of Ms. Waters' children, L.W., to a family law attorney in a then-pending custody modification proceeding. (R., p.87.) In this letter, L.W. implored the attorney to permit her to see her mother "as soon as possible" and informed this attorney at length as to all of the reasons why L.W. needed to have contact with her mother. (R., p.87.) Ms. Waters subsequently filed an amended second motion seeking to modify the no contact order that also appended another letter from one of her sons, P.W., that likewise

[2] Because there are multiple volumes of transcripts of proceedings in this case, for ease of reference, citations made herein to the transcripts of proceedings are made in accordance with the date of the proceeding transcribed.

asked the district court to permit Ms. Waters the ability to have some form of contact with her children. (R., pp.91-94.) The district court denied this motion without prejudice. (R., p.98.)

Ms. Waters ultimately entered an *Alford* plea of guilty to second degree arson and misdemeanor driving under the influence. (5/3/11 Tr., p.5, L.4 – p.20, L.16; R., pp.149-155.) In exchange for her plea, the State also agreed to limit its sentencing recommendation to 15 years, with five years fixed and to dismiss a felony charge in another case. (5/3/11 Tr., p.6, Ls.6-20.) Ms. Waters retained the right to request a lesser sentence. (5/3/11 Tr., p.6, L.14.)

The district court sentenced Ms. Waters to an aggregate sentence of 15 years, with 3 and one-half years fixed, upon her plea of guilty to second degree arson, and to 180 days for her plea of guilty to misdemeanor driving under the influence. (6/20/11 Tr., p.72, Ls.2-16; R., pp.161-163.) At the sentencing hearing, the district court ordered Ms. Waters to have no contact with her children for an absolute period of two years, with the court permitting only written contact with her children for an unspecified period of time following those two years. (6/20/11 Tr., p.73, L.7 – p.76, L.9.) When asked by the bailiff whether Ms. Waters needed to sign the no contact order, the court merely responded that, "Well, I've ordered the no contact order." (6/20/11 Tr., p.78, Ls.7-10.)

The district court never entered a separate no contact order pursuant to the court's oral determination at sentencing that a new no contact order would be entered against Ms. Waters. Instead, the second "no contact order" in this case was merely entered as a paragraph in Ms. Waters' judgment of conviction. (R., p.163.) This provision provided – in its entirety – that:

> IT IS FURTHER ORDERED that the defendant shall have no contact with Dr. Waters or any of her children for an absolute period of two (2) years.

After June 20, 2013, the defendant may communicate with the protected parties in writing.

(R., p.163.)

Based upon the vagueness of the court's order, Ms. Waters thereafter filed a motion to clarify the no contact order. (R., p.168.) Specifically, Ms. Waters sought clarification as to the date of termination of this order, since the district court stated both that the no contact order had a specific date of termination and that Ms. Waters could not have any contact other than in writing with her children after the termination of the order. (R. p.168.) The district court initially held a hearing on this motion, but delayed ruling on the motion because Ms. Waters' former husband could not be present and wished to be heard on any request for modification. (8/2/11 Tr., p.79, L.4 – p.86, L.18.) The court also suggested that the parties could submit any additional affidavits for the court's consideration regarding the issue of whether the no contact order should be modified. (8/2/11 Tr., p.85, L.24 – p.86, L.18.) However, the district court did acknowledge that the terms of the no contact order did need to be clarified. (8/2/11 Tr., p.86, Ls.15-18.)

After the hearing on this motion, Ms. Waters' counsel submitted an affidavit in support of the request for clarification. Within this affidavit, counsel requested the district court also consider the prior period of one year that Ms. Waters was prohibited from having contact with her children – pursuant to the earlier no contact order entered at her arraignment – as part of the "cooling off" period that the court believed was needed between Ms. Waters and her children; and to essentially reduce the term of Ms. Waters' no contact order by one year. (R., pp.187-189.) Ms. Waters, through counsel's affidavit, made additional alternative requests for modification of the no contact order. First, she asked the district court to modify the order so that it would

terminate completely as of her oldest child's 18th birthday on October 2, 2011. (R., p.188.) Second, Ms. Waters asked that the order terminate in its entirety by August 12, 2012 – which would provide a satisfactory cooling off period. (R., p.188.) If the district court was unwilling to modify the order in the manner suggested, Ms. Waters further asked that the provisions of the no contact order extending past the two year fixed period be limited to only the time during which each of her children were minors, and that it terminate with regard to each of her children upon them reaching the age of 18. (R., p.188.)

In addition to requesting clarification and modification of the no contact order entered by the district court at sentencing, Ms. Waters also filed a timely Rule 35 motion requesting a reduction of her sentence. (Motion to Reduce Sentence, Augment.[3]) In this motion, Ms. Waters pointed out to the district court that, due to prison overcrowding, she had not been placed in any substance abuse or mental health treatment programs, and would not be placed in any such programs until approximately 2013. (Motion to Reduce Sentence, Augment.) She further corrected a misapprehension of the court at sentencing regarding whether Ms. Waters had previously had the opportunity to receive treatment for her prior substance abuse problems. While the court expressed its belief at her sentencing hearing that Ms. Waters had received such treatment in the past, Ms. Waters clarified that the only program she had participated in was one that provided monitoring for nurses in recovery – this program did not provide any direct counseling or treatment. (Motion to Reduce Sentence, Augment.) Ms. Waters further provided

[3] Ms. Waters' motion asking for a reduction of her sentence, along with several other documents in this case, were augmented into the record pursuant to Ms. Waters' motion to augment the record, which was granted by the Idaho Supreme Court on March 29, 2012. For ease of reference, citations to those documents incorporated into the record pursuant to this order are made in accordance with the document title.

additional documentation on the Program for Recovering Nurses, as well as a letter of support that was submitted by her father. (Motion to Reduce Sentence, Augment.) Finally, Ms. Waters noted that she had been a "model prisoner" during her incarceration. (Motion to Reduce Sentence, Augment.)

Thereafter, the district court entered an order clarifying the no contact order and denying Ms. Waters' Rule 35 motion. (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) The district court initially found, within this order, that the no contact order issued by the court at sentencing, "was vague and subject to interpretation and requires clarification." (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.)

In clarifying the no contact order, the court indicated that its intent was that Ms. Waters be prohibited from contacting her children for two years from the date of sentencing. (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) However, in light of the fact that Ms. Waters had already been prohibited from contacting her children under the prior no contact order, the district court modified the present no contact order so that it would prohibit contact, "for a two (2) year period commencing August 6, 2010 and expiring August 6, 2012." (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) Following this period, the district court indicated, Ms. Waters was free to contact her children once they reached the age of 18, but that she could only contact her children who were still minors in writing. (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) The district court further vested Ms. Waters' ex-husband with the power to permit additional contacts either in person or by telephone

between Ms. Waters and her minor children following August 6, 2012. (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.)

Regarding Ms. Waters' request for leniency at sentencing, the district court denied that motion. (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) In doing so, the court found that the sentence, "was appropriate at the time it was imposed," and that, "the Court is not convinced that circumstances have changed or that the Court improperly imposed the sentence." (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.)

Subsequent to this order, the eldest of Ms. Waters' children, M.W., filed his own motion to modify the second no contact order entered against Ms. Waters so that he could have contact with his mother. (Request to Modify No Contact Order, Augment.) M.W. noted in this motion that he was over 18 years old. (Request to Modify No Contact Order, Augment.) The court initially held a hearing on this motion, but delayed ruling on the motion due to the fact that Ms. Waters' ex-husband had requested to be present but was unavailable to attend that hearing. (2/21/12 Tr., p.16, L.14 – p.27, L.8.) However, the district court did advise M.W. that, even if the court did grant his motion, the no contact order entered at Ms. Waters' sentencing would preclude M.W. from indirectly communicating any messages between Ms. Waters and her other children – despite the fact that there was nothing in the district court's order at sentencing that addressed indirect communications. (2/21/12 Tr., p.22, L.23 – p.23, L.24.)

At the second hearing on M.W.'s motion to modify, the district court again heard from M.W. regarding his request to be able to have contact with his mother. (3/1/12 Tr., p.28, L.14 – p.46, L.9.) The court additionally heard from Ms. Waters' former

husband, who opposed any modification of the no contact order. (3/1/12 Tr., p.42, L.3 – p.43, L.3.) The district court ultimately granted M.W.'s request to modify the no contact order so that he would be allowed to have contact with Ms. Waters. (3/1/12 Tr., p.44, L.19 – p.46, L.9; Order Modifying No Contact Order, Augment.) However, as before, the district court repeatedly warned M.W. that he would not be allowed to pass any messages from Ms. Waters to her remaining children even with the court's modification. (3/1/12 Tr., p.35, L.24 – p.36, L.16, p.40, L.16 – p.41, L.17.)

Ms. Waters timely appeals from the judgment of conviction and sentence entered in her case. (R., p.174.)

ISSUES

1. Did the district court enter an invalid criminal no contact order against Ms. Waters, and further err by failing to correct the infirmities within this order upon being presented with Ms. Waters' motion seeking clarification and modifications of this order?

2. Did the district court abuse its discretion when it denied Ms. Waters' Rule 35 motion seeking a reduction of her sentence?

ARGUMENT

I.

The District Court Erred When It Entered An Invalid Criminal No Contact Order Against Ms. Waters, And Further Erred By Failing To Correct The Infirmities Within This Order Upon Being Presented With Ms. Waters' Motion Seeking Clarification And Modifications Of This Order

A. Introduction

The no contact order entered by the district court in this case at Ms. Waters' sentencing, and subsequently modified by the court thereafter, fails to meet with nearly every requirement for a valid no contact order as set for in I.C.R. 46.2. Despite the court being put on notice as to the vagueness of this order, the district court did not correct its failure to enter a valid no contact order, but merely amended the terms of the original no contact order in subsequent orders that likewise failed to meet the requirements of I.C.R. 46.2. Because these requirements are mandatory, and because the order entered by the district court at Ms. Waters' sentencing is too vague to be enforceable, Ms. Waters asks this Court to vacate the no contact order entered by the district court at her sentencing.

B. Standard Of Review

Questions regarding the proper interpretation of statutes and court rules are questions of law that this Court reviews *de novo*. *See, e.g. State v. Castro*, 145 Idaho 173, 175 (2008).

C. The District Court Erred When It Entered An Invalid Criminal No Contact Order Against Ms. Waters, And Further Erred By Failing To Correct The Infirmities Within This Order Upon Being Presented With Ms. Waters' Motion Seeking Clarification And Modifications Of This Order

The no contact order entered by the district court at Ms. Waters' sentencing failed to comply with nearly all of the mandatory requirements for such orders contained within I.C.R. 46.2. Despite being put on notice that the court's order – consisting solely of a single paragraph contained within Ms. Waters' judgment of conviction – had problems with vagueness, the district court failed to correct the deficiencies in its order despite also modifying the no contact order on several occasions. Because this order subjected Ms. Waters to separate criminal liability for any violation of its terms, and because the district court's no contact order was so deficient as to provide virtually no notice as to the essential terms of this order, Ms. Waters asserts that this order should be vacated.

In 1997, the Idaho legislature enacted I.C. § 18-920, which authorized a trial court to enter a no contact order against a defendant upon being charged with any of a number of enumerated offenses, or for any offense for which the court found such an order to be appropriate. *See* S.L. 1997, ch.314 § 1; *State v. Jeppesen*, 138 Idaho 71, 74-75 (2002). This statute was subsequently amended so as to permit a no contact order to be issued by the trial court in conjunction with a defendant's conviction as well. *Jeppesen*, 138 Idaho at 75.

Subsequently, in 2002, the Idaho Supreme Court promulgated I.C.R. 46.2 in order to govern the issuance of criminal no contact orders pursuant to I.C. § 18-920. *State v. Castro*, 145 Idaho 173, 175 (2008). This rule provides, in pertinent part, that:

> (a) No contact orders issued pursuant to Idaho Code § 18-920 shall be in writing and served on or signed by the defendant. Each judicial district shall adopt by administrative order a form for no contact orders for that

district. **No contact orders must contain, at a minimum, the following information:**

(1) The case number, defendant's name and victim's name;

(2) A distance restriction;

(3) That the order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case;

(4) An advisory that:

(a) A violation of the order may be prosecuted as a separate crime under I.C. § 18-920 for which no bail will be set until an appearance before a judge, and the possible penalties for this crime,

(b) The no contact order can only be modified by a judge, and

(c) When more than one domestic violence protection order is in place, the most restrictive provision will control any conflicting terms of any other civil or criminal protection order.

I.C. § 18-920(a) (emphasis added).

Virtually none of the advisories that are mandated for a valid no contact order under I.C.R. 46.2 are found in the no contact order that was entered by the district court at Ms. Waters' sentencing. This order was set forth in its entirety within Ms. Waters' judgment of conviction and sentence as follows:

> IT IS FURTHER ORDERED that the defendant shall have no contact with Dr. Waters or any of her children for an absolute period of two (2) years. After June 20, 2013, the defendant may communicate with the protected parties in writing.

(R., p.163.)

This order was not on a separate form that had been promulgated for Ada County, despite the fact that such forms are available.[4] *See* I.C.R. 46.2(a). Although this order states that it applies to Ms. Waters' children, none of them are named (by either full name or by initials) within the order. *See* I.C.R. 46.2(a)(1). The order contains no distance restriction whatsoever. *See* I.C.R. 46.2(a)(2). As originally written, the order purported to contain both a date of termination – June 20, 2013 – and a provision that extended the term indefinitely. *See* I.C.R. 46.2(a)(3). However, even as amended, the district court's order clarifying the no contact order extends the term of the order to "when the children reach the age of eighteen." (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) There is no advisory in this order at all regarding any of the potential criminal penalties that may be imposed – as a separate criminal offense – for a violation of this order; that the order could only be modified by a judge; or that, if another no contact order or domestic violence protection order is in place, that the more restrictive provisions would control what contacts are permitted. *See* I.C.R. 46.2(a)(4).

Each of the required provisions and advisories for a valid no contact order under I.C.R. 46.2(a) are either deficient, or entirely absent from, the no contact order in this case. These requirements are not merely procedural formalities that have little bearing on the overall validity of a criminal no contact order. The required information to be contained within these orders are essential in order to comport with due process requirements as to notice to those impacted by such a no contact order.

[4] It is apparent that these forms are available for Ada County because a magistrate had entered a prior no contact order against Ms. Waters in this case using such forms. (R., p.11.)

Due process requires that the charged individual have prior notice of the no-contact order before criminal liability can be imposed on the basis of an alleged violation of that order's terms. "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process." *Wright v. Georgia*, 373 U.S. 284, 293 (1963). In fact, even when the regulation at issue is a prison rule, as opposed to a criminal statute, due process requires fair notice that the conduct at issue is prohibited before a sanction can be imposed. *See, e.g., Nelson v. Hayden*, 138 Idaho 619, 622 (Ct. App. 2003).

Regarding penal laws of general applicability, satisfying the notice requirement demanded by due process is fairly straightforward – the statute itself that defines a criminal offense is generally deemed to put the public on notice as to what conduct may or may not subject them to criminal punishment. *See, e.g., Wilson v. State*, 133 Idaho 874, 880 (Ct. App. 2000). As was noted by the *Wilson* Court, "it is axiomatic that citizens are presumptively charged with knowledge of the law once such laws are passed." *Id.*

But no-contact orders that are entered solely against a particular individual are different. Unlike criminal statutes, which define criminal offenses generally and apply to all those subject to the laws of Idaho, criminal no-contact orders are issued solely against one individual and are frequently directed at contacts that would be entirely legal in absence of the individualized order. *See* I.C. § 18-920. In addition, no person may be arrested for the offense of violation of a no-contact order without a warrant unless there is probable cause to believe both that the person has violated the no-contact order and **that the person had prior notice of the order**. I.C. § 18-920(4).

Accordingly, the mandatory requirements set forth in I.C.R. 46.2(a), which are required in all criminal no contact orders, are not mere artifacts of formality – they are necessary prerequisites to the validity of a no contact order. In this case, none of those requisites are met with regard to the court's no contact order. The absence of clear provisions as to what conduct is forbidden under the no contact order in this case, and when criminal liability may result as a violation of this order, can be seen in the district court's repeated interactions with Ms. Waters' eldest child as to potential violations based on indirect or third-party contacts, despite the absence of any language within the no contact order that addressed this type of contact

During the two hearings on M.W.'s motion to modify the no contact order, the district court made repeated remarks indicating the court's belief that Ms. Waters would be in violation of the no contact order entered against her at sentencing if she asked M.W. to convey a message indirectly to any of her other children still subject to the no contact order. (2/21/12 Tr., p.22, L.23 – p.23, L.24; 3/1/12 Tr., p.35, L.24 – p.36, L.16 p.40, L.16 – p.41, L.17.) However, a prohibition against indirect or third party contacts is not reflected in the no contact order that was entered against Ms. Waters within her judgment of conviction. (R., p.163.) Had the district court actually used the model forms provided by Ada County for no contact orders, as is required under I.C.R. 46.2(a), this information would have been conveyed clearly as a term of the no contact order, as these forms contain an advisory that the term "contact" would include contacts, "in person or through another person." (R., p.11.)

Additionally, it is entirely unclear whether Ms. Waters would be in violation of this order if she were to attend any of her children's school functions without attempting to directly convey any communications to her children given that there is no recitation of

whether there is any distance restriction as part of this order. Similarly, those charged with enforcing this order would not have clear guidance as to whether Ms. Waters attending any of her children's school functions would be a violation.

Moreover, even after the district court was put on notice that the no contact order was vague, the court's purported correction to the lack of a date of termination did not comply with the requirements of I.C.R. 46.2. Although the court entered an order clarifying the no contact order, the amendments made by the district court did not cure the order's infirmity regarding a definite date of termination. This clarification and amendment provided that the no contact order would expire on August 6, 2012 – but then went on to state that Ms. Waters was only permitted to have contact in writing with her children until the child reached the age of 18. (Order Clarifying No Contact Order and Denying Motion for Sentence Reduction, Augment.) This is not the type of definite date of termination contemplated or required by I.C.R. 46.2(a)(3), as those charged with enforcing this order would have no way to determine on the face of the order when the order would lapse with each of the individual children.

Among the reasons why the Idaho Supreme Court modified I.C.R. 46.2 to require a definite date of termination was that, in absence of such a date, there was a significant risk of, "confusion, false arrests, and lawsuits," resulting from the inability to determine whether a no contact order without a termination date was still in effect. *Castro*, 145 Idaho at 175-176. Although there will come a date when each of Ms. Waters' children will turn 18, the dates for each of her children are not set forth in the no contact order, which creates the same risk of confusion and false arrests for those charged with enforcing this order as is present for those orders with no stated date of termination.

In sum, the district court's no contact order in this case fails to meet with virtually every mandatory requirement for criminal no contact orders set forth in I.C.R. 46.2(a). However, this Court treats the provisions of a sentence relating to criminal no contact orders as severable from the remaining sentence. *See Jeppesen*, 138 Idaho at 75. Accordingly, where the no contact order is invalid, this Court will vacate the no contact order as a severable provision from the underlying judgment of conviction and sentence. *Id.* Ms. Waters therefore asks that this Court vacate the no contact order entered by the district court at Ms. Waters' sentencing and remand this case for further proceedings.

II.

The District Court Abused Its Discretion When It Denied Ms. Waters' Rule 35 Motion Seeking A Reduction Of Her Sentence

Ms. Waters asserts that the district court abused its discretion when it denied her Rule 35 motion seeking a reduction of her sentence.

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record,

giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Ms. Waters does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Ms. Waters must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

As a preliminary matter, Ms. Waters provided the district court with new and additional information that was not available to the court at the time of her sentencing. First, Ms. Waters informed the district court that, due to prison overcrowding, Ms. Waters had not been placed in any mental health or substance abuse treatment programs, and that she would not be eligible for such programs until approximately 2013. (Motion to Reduce Sentence, Augment.) Second, Ms. Waters corrected a factual misapprehension at sentencing regarding her prior participation in the Program for Recovering Nurses. Namely, she informed the court that, contrary to prior representations at sentencing, she never actually received any drug or mental health counseling through this program. (Motion to Reduce Sentence, Augment.) Third, Ms. Waters informed the district court that she had been a model prisoner during the course of her incarceration, demonstrating "herself to be reliable, obedient, and

amenable to structure." (Motion to Reduce Sentence, Augment.) Finally, she produced an additional letter of support from her father. (Motion to Reduce Sentence, Augment.)

This new information regarding the exact nature of the Program for Recovering Nurses is important because it corrected a factual misapprehension regarding Ms. Waters' past opportunities for substance abuse treatment and therapeutic resources. At sentencing, the State made repeated remarks regarding Ms. Waters' past opportunities for "attempted rehab and programming and things," in an effort to convey to the court that Ms. Waters had previously been given treatment resources for substance abuse and had nevertheless relapsed. (6/20/11 Tr., p.24, Ls.1-6, p.27, Ls.16-23, p.28, Ls.10-20.) This argument was directed towards a minimization of Ms. Waters' potential for rehabilitation in light of the State's apparent belief that the Program for Recovering Nurses included some form of treatment or therapeutic component.

As was clarified by Ms. Waters in her Rule 35 motion, the Program for Recovering Nurses does not actually provide any mental health or substance abuse counseling or treatment. (Motion to Reduce Sentence, Augment.) Rather, "this program monitors impaired nurses suffering from chemical abuse or dependency," and does not provide any "direct counseling, treatment, or aftercare services." (Motion to Reduce Sentence, Defendant's Exhibit A, Augment.) This information is particularly relevant to the district court's sentencing determination in light of the fact that Ms. Waters presentence investigation report recommended that she receive a rider in part so that Ms. Waters would be eligible to receive the therapeutic resources provided

through the retained jurisdiction program. (Presentence Investigation Report (*hereinafter,* PSI), p.38.)[5]

Additionally, a review of the entire record in this case demonstrates that Ms. Waters' sentence of 15 years, with three and one-half years, was excessive. Ms. Waters has demonstrable and significant rehabilitative potential. Ms. Waters obtained masters degree in Fine Arts and Medical Illustrations, and subsequently returned to school to obtain her nursing degree. (PSI, p.28.) Ms. Waters has been gainfully employed for most of her adult life prior to her arrest and conviction in this case. (PSI, p.28.) Given her skills and education, there is every probability that Ms. Waters will be able to re-enter society as a positive and contributing member to her community.

More importantly, Ms. Waters clearly recognized the harm caused by her actions, accepted responsibility for her own behavior, and is clearly committed to taking whatever steps are necessary in the future to ensure that she never repeats her past mistakes. At her sentencing hearing, Ms. Waters expressed sincere remorse for the pain her actions caused – most especially to her friends, her family, and her children. (6/20/11 Tr., p.60, L.21 – p.61, L.1.) Ms. Waters accepted responsibility for being the agent of that harm and apologized to the court and her loved ones for her actions. (6/20/11 Tr., p.61, Ls.6-18.)

Not only did Ms. Waters express remorse and accept responsibility for her past actions, she expressed her firm commitment to changing her future course of behavior to make sure that she would never repeat the past patterns of thinking and action that

[5] For ease of reference, citations to the pages contained within the presentence investigation report are made in accordance with the numbering reflected in the electronic formatting of this document.

caused her offense. (6/20/11 Tr., p.61, L.19 – p.64, L.15.) She had already begun this process at the time of her sentence – Ms. Waters had attended all of the therapeutic and religious programs that were made available to her as of the time of her sentencing. (6/20/11 Tr., p.63, Ls.6-11.) Certificates showing her completion of these programs were also provided to the district court at sentencing. (PSI, pp.227-229.)

Additionally, Ms. Waters' criminal actions in this case are partly attributable to her underlying mental health conditions. Ms. Waters has been diagnosed with major, recurrent depression. (PSI, p.4.) She had been in counseling for her depression since 2001, although her struggles with depression appear to be on-going. (PSI, pp.30-31, 182-189, 199-200.) Her mental condition is further exacerbated by her history of substance addiction. (PSI, p.200.) Her mental health evaluation also noted that, at the time of the alleged arson, Ms. Waters was taking medications that could have impacted her reasoning faculties caused impairment to her overall memory and cognition and, therefore, likely contributed to her underlying offense. (PSI, pp.201-202.) This report concluded that Ms. Waters was a low risk to reoffend given appropriate treatment and supervision upon her release. (PSI, p.203.)

Moreover, a review of Ms. Waters criminal history reveals that her present offenses – along with the offense that was dismissed as part of her plea agreement – are her only criminal offenses outside of one traffic offense several years prior. (PSI, p.7.) As was noted within Ms. Waters' mental health evaluation, she also has no history of setting fires, which renders her present offense a, "unique and somewhat aberrant event." (PSI, p.203.)

Finally, Ms. Waters has a very significant support network among her friends and family. Many of these people wrote letters of support for Ms. Waters at sentencing that

attested to her good character. (PSI, pp.230-261.) Given what appears to be unwavering support from a host of friends, family, and former colleagues, Ms. Waters will re-enter the community with the assistance of a broad network of people who will be of great assistance to her rehabilitation.

In light of the new and additional information provided by Ms. Waters through her Rule 35 motion, as well as the entire record in this case, Ms. Waters' sentence of 15 years, with three and one-half years fixed, for second degree arson was well beyond that required to adequately protect society and to serve the related goals of rehabilitation, retribution, and deterrence. Accordingly, Ms. Waters submits that the district court abused its discretion when it denied her Rule 35 motion seeking a reduction of her sentence.

CONCLUSION

Ms. Waters respectfully requests that this Court vacate the no contact order entered against her. Additionally, she asks that this Court reverse the district court's order denying her Rule 35 motion seeking a reduction of her sentence, and remand this case for further proceedings. In the alternative, she asks that this Court reduce her sentence as it deems appropriate.

DATED this 15th day of June, 2012.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of June, 2012, 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:

MICHELLE JOY WATERS
INMATE #100409
PWCC
1451 FORE ROAD
POCATELLO ID 83205

RONALD J WILPER
DISTRICT COURT JUDGE
E-MAILED BRIEF

JAMES BALL
ATTORNEY AT LAW
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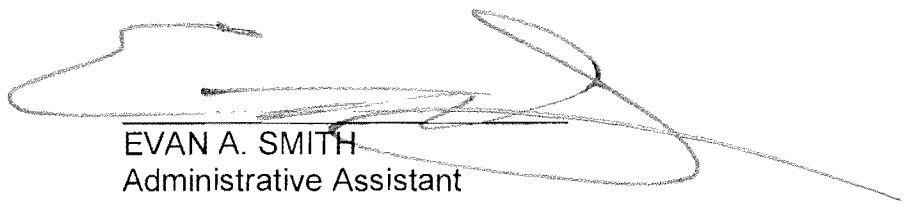
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
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SET/eas