

1-30-2013

## State v. Free Appellant's Reply Brief Dckt. 39495

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39495
	)	
v.	)	ADA COUNTY NO. CR 2008-5674
	)	
MARK FREE,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	

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REPLY 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

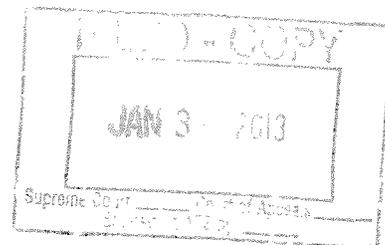
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## STATEMENT OF THE CASE

### Nature of the Case

In his Appellant's Brief, Mr. Free argued that the Idaho Supreme Court denied him due process and equal protection when it denied his Motion to Augment the record on appeal with various transcripts. Mr. Free argues that the requested transcripts are necessary for his appeal because the district court could utilize its own memory of the prior proceedings when it executed a sentence after revoking probation. In response, the State argues that, in the event this case is assigned to the Court of Appeals, it will not have the ability to address this issue. (Respondent's Brief, pp.6-7.) Additionally, the State argued that the requested transcripts are not relevant under a new standard of review articulated in *State v. Morgan*, 153 Idaho 618 (Ct. App. 2012).

This brief is necessary to address the State's assertion, based on the *Morgan* Opinion, that the requested transcripts are not relevant to the issues on appeal. (Respondent's Brief, pp.8-11.)

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Free's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUES

1. Did the Idaho Supreme Court deny Mr. Free due process and equal protection when it denied his Motion to Augment with the requested transcripts?
2. Did the district court abuse its discretion when it denied Mr. Free's oral Rule 35 motion requesting leniency, in light of the mitigating factors present in this matter?<sup>1</sup>

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<sup>1</sup> Issue II will not be addressed in this brief.

## ARGUMENT

### The Idaho Supreme Court Denied Mr. Free Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With Necessary Transcripts

#### A. Introduction

In Idaho, district courts consider a broad range of information when making sentencing decisions. Due to this broad range of information considered, Idaho appellate courts have scrupulously required defendants to provide an extensive appellate record because they conduct an independent review of the entire record before the district court when determining whether an abuse of discretion occurred in regard to a sentencing determination. In other words, the question on appeal generally does not focus on how or what the district court actually considered. Instead, the central question is whether the record before the district court supports its sentencing determination. Since Idaho appellate courts need to have all of the relevant information that was before the district court to conduct this analysis, they will presume that any missing information supports the trial court's determination and refuse to rule on the merits of the issue.

#### B. In The Event This Case Is Assigned To The Court Of Appeals, The Court Has The Authority To Address The Issues Raised In The Appellant's Brief

##### 1. The Idaho Rules Of Appellate Procedure Require The Idaho Court Of Appeals To Address The Issues Raised In Mr. Free's Appeal

In his Appellant's Brief, Mr. Free argued that the denial of his request for the transcript violated the Fourteenth Amendment's due process and equal protections clauses. (Appellant's Brief, pp.4-17.) In response, the State argued, based on *State v.*

*Morgan*, 153 Idaho 618 (Ct. App. 2012), that the Court of Appeals does not have the authority to address Mr. Free's due process argument because it would be tantamount to entertaining an appeal from the Supreme Court. (Respondent's Brief, pp.6-7.) Contrary to the State's assertion, Idaho Appellate Rule 108 requires the Court of Appeals to rule on the merits of all cases to which it is assigned by the Supreme Court. The relevant portions of I.A.R. 108 state as follows:

Cases Reserved to Supreme Court. The Court of Appeals shall hear and decide all cases assigned to it by the Supreme Court; provided that the Supreme Court will not assign the following cases:

- (1) Proceedings invoking the original jurisdiction of the Idaho Supreme Court;
- (2) Appeals from imposition of sentences of capital punishment in criminal cases;
- (3) Appeals from the Industrial Commission;
- (4) Appeals from the Public Utilities Commission;
- (5) Review of the recommendatory orders of the Board of Commissioners of the Idaho State Bar;
- (6) Review of recommendatory orders of the Judicial Council.

(Emphasis added.) Since the issues raised in his Appellant's Brief do not fall into any of the foregoing categories, the Idaho Court of Appeals has the authority to address the issues raised in his Appellant's Brief.

Further, an assignment of this case to the Court of Appeals functions as an implicit grant of authority from the Idaho Supreme Court to review Mr. Free's claims about the constitutionality of the merits of its decision to deny his request for the transcript. The Supreme Court will be aware of Mr. Free's due process issue when it makes its decision to either keep this appeal or assign it to the Court of Appeals. This

position is bolstered by the Internal Rules of the Supreme Court. Specifically, I.R.S.C. 21, which governs the assignment of cases. The language of I.R.S.C. 21 follows:

Assignment of Cases. The chief justice (or designee) shall make the tentative assignment of cases as between the Supreme Court and the Court of Appeals. Copies of each assignment sheet shall be given to the justices, affording each an opportunity to object and request the Court to reconsider the assignment.

...

Any objection to the assignment shall be stated, with reasons, in writing and circulated to all the justices.

...

At the request of any justice, the objection to the assignment shall be taken up at conference.

The assignment of cases is not an arbitrary process; according to the rule, it is a deliberate process which affords all the justices the ability to object and provide input into the decision to assign a case to the Court of Appeals. Therefore, the Supreme Court will be aware of Mr. Free's due process and equal protection arguments when it makes the decision to either keep this case or assign this case to the Court of Appeals. In the event this case is assigned to the Court of Appeals, the Supreme Court will be implicitly granting the court authority to address the merits of Mr. Free's claims of error.

Additionally, the State asserted that Mr. Free should file a renewed motion to augment the record with the Court of Appeals in the event this case is assigned to the Court of Appeals. (Respondent's Brief, p.11.) This assertion is without merit because the Idaho Appellate Rules require all motions to be filed with the Idaho Supreme Court. For example, Idaho Appellate Rule 110 states as follows:

All motions, petitions, briefs and other appellate documents, other than the initial notice of appeal, shall be filed with the Clerk of the Supreme Court

as required by the Idaho Appellate Rules with the court heading of the Supreme Court of the State of Idaho as provided by Rule 6. There shall be no separate filings directed to or filed with the Court of Appeals. In the event of an assignment of a case to the Court of Appeals, the title of the proceeding and the identifying number thereof shall not be changed except that the Clerk of the Supreme Court may add additional letters or other notations to the case number so as to identify the assignment of the case. All case files shall be maintained in the office of the Clerk of the Supreme Court.

(Emphasis added.) Furthermore, Idaho Appellate Rule 30 requires that all motions to augment be filed with the Supreme Court. The relevant portions of I.A.R. 30 follow:

Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record.

...

Unless otherwise expressly ordered by the Supreme Court such motion shall be determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court.

(Emphasis added.) Mr. Free is not aware of any court rule which allows a party to an appeal to file a motion directly with the Court of Appeals. Idaho Appellate Rule 110 expressly prohibits such filings. Therefore, the State's contention that Mr. Free could file a renewed motion to augment directly with the Court of Appeals is contrary to the Idaho Appellate Rules.

In sum, when the Idaho Supreme Court assigns an appeal to the Idaho Court of Appeals, the Idaho Appellate Rules require the Court of Appeals to decide all issues addressed in that appeal. Even though Mr. Free is challenging the constitutionality of the Supreme Court's decision to deny his request for the transcript, an assignment of this case to the Court of Appeals functions as an implicit grant of authority from the Idaho Supreme Court to review all issues raised in the Appellant's Brief.

2. An Assignment Of This Case to An Appellate Tribunal With No Authority To Address Mr. Free's Claims Of Error Will Violate His Right To Procedural Due Process On Appeal

In the event the Idaho Supreme Court assigns this case to the Court of Appeals and it determines that the Court of Appeals does not have the authority to address all of the issues Mr. Free raised in his appellant's brief, he argues, in the alternative, that will function as a separate denial of his federal due process rights, which guarantee him a fair appeal. The Constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. See U.S. CONST. amend. XIV; ID. CONST. art. I §13.

It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

*State v. Card*, 121 Idaho 425, 445 (1991) (overruled on other grounds by *State v. Wood*, 132 Idaho 88 (1998)). Additionally, the Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State*, 132 Idaho 221, 227 (1998) (citing *Smith v. Idaho Dept. of Correction*, 128 Idaho 768, 771 (1996)).

While there is no federal guarantee to an appeal from criminal state court proceedings, after a state decides to provide appellate review, the due process and equal protection clauses of the Fourteenth Amendment are applicable during the entirety of the appellate proceedings. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). In

Idaho, a criminal defendant's right to appeal is created by statute. See I.C. § 19-2801. An appeal from an order revoking probation is an appeal of right as defined in Idaho Appellate Rule 11. An order revoking probation is an order "made after judgment affecting the substantial rights of the defendant." *State v. Dryden*, 105 Idaho 848, 852 (Ct. App. 1983). Additionally, an appeal from the denial of a Rule 35 motion is an appeal of right as defined in Idaho Appellate Rule 11(9). See *State v. Fuller*, 104 Idaho 891 (Ct. App. 1983) (an order denying a motion for reduction of sentence under a Rule 35 is an appealable order pursuant to I.A.R. 11(c)(6)).

In this case, Mr. Free argues that due process protections apply to every stage of his appeal. Those protections apply to any appellate procedural decision made by the Idaho Supreme Court. Even though Mr. Free does not have an independent right to appeal from the order denying his motion to augment, he can challenge the constitutionality of the order because it is a procedural component of his appeal and the Fourteenth Amendment's due process clause applies to all procedures affecting his appeal. If the Idaho Supreme Court assigns this appeal to the Idaho Court of Appeals, knowing that the Court of Appeals has no authority to reverse an order of the Supreme Court, a unique and independent procedural due process violation will occur because the Supreme Court will have precluded Mr. Free from any state procedure by which he could raise his federal constitutional claims challenging the denial of his motion to augment.

C. The New Standard Of Review Articulated in *Morgan* Is Inapposite As It Did Not Alter The Standard Of Review Applicable When An Appellant Challenges The Length Of A Sentence Which Is Executed After The Revocation Of Probation

The State argues that the requested transcripts are not necessary for this appeal in reliance on the new standard of review articulated in *Morgan*. (Respondent's Brief, pp.7-11.) However, the *Morgan* standard of review is only applicable to the question of whether probation should be revoked and not to the question of what sentence should be executed after probation is revoked. *State v. Hanington*, 148 Idaho 26 (Ct. App. 2009), made it clear what standard of review is applicable when the question on appeal is what the appropriate sentence should be after probation is revoked. *Morgan* is inapposite as Mr. Free is challenging the length of his sentence on appeal.

In *Hanington*, the Idaho Court of Appeals resolved an ongoing dispute about the proper standard of review in probation revocation cases. *Id.* at 27. Relying on *State v. Chacon*, 146 Idaho 520, 524-25 (Ct. App. 2008), and *State v. Coffin*, 122 Idaho 392 (Ct. App. 1992), the State sought to limit review to only facts that had arisen between the original pronouncement of the sentence and the revocation proceedings. *Hanington*, 148 Idaho at 28. Essentially, the State's position would eliminate the need for appellate review of any evidence, arguments, or factors obtained by the district court prior to the proceeding at issue. *Hanington* argued that the proper standard of review should include a review of "all facts existing both at the time of the original sentence and at the time the sentence is ordered into execution," relying on the standard established in *State v. Adams*, 115 Idaho 1053, 1055-1056 (Ct. App. 1989). *Id.* at 27. The Court of Appeals agreed with *Hanington* and stated:

The State has read our somewhat differing versions of the scope of review too restrictively. We have not intended to suggest that our review is limited

solely to events occurring between the original imposition of sentence and the decision to order the sentence into execution. When we review a sentence that is ordered into execution following a period of probation, we will examine the entire record encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation.

*Id.*

The *Hanington* Court made it clear that when determining what sentence to execute, the appellate court would review the entire record, including the factors at the original sentencing hearing through the probation revocation before the court on appeal. The rationale behind this clarification makes perfect sense when looking once again to *State v. Adams*, the decision that explained why the appellate courts should look to the entire record when reviewing the executed sentence:

[W]hen we review a sentence ordered into execution after probation has been revoked, we examine the entire record encompassing events before and after the original judgment. We adopt this scope of review for two reasons. First, the district judge, when deciding whether to order execution of the original sentence or of a reduced sentence, does not artificially segregate the facts into prejudgment and postjudgment categories. The judge naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision. When reviewing that decision, we should consider the same facts. Second, when a sentence is suspended and probation is granted, the defendant has scant reason, and no incentive, to appeal. Only if the probation is later revoked, and the sentence is ordered into execution, does the issue of an excessive sentence become genuinely meaningful. Were we to adopt the state's position that any claim of excessiveness is waived if not made on immediate appeal from the judgment pronouncing but suspending a sentence, defendants would be forced to file preventive appeals as a hedge against the risk that probation someday might be revoked. We see no reason to compel this hollow exercise. Neither do we wish to see the appellate system cluttered with such cases.

*Adams*, 115 Idaho at 1055-56. As such, when an appellant files an appeal from an order revoking probation and challenges the length of his/her sentence, the applicable

standard of review requires an independent and comprehensive inquiry to the events which occurred prior to as well as the events which occurred during the probation revocation proceedings. The basis for this standard of review is that the judge “naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision.” *Id.* Based on that presumption, the Court of Appeals stated that, “When reviewing that decision, we should consider the same facts.” *Id.* The Court of Appeals did not state that either the district court or the defendant must expressly reference the prejudgment events at the probation disposition hearing in order for this standard of review to become applicable. To the contrary, the Court of Appeals assumed the judge will automatically consider the prejudgment events when determining whether the district court abused its discretion when executing a sentence after probation was revoked. As such, the State’s assertion that Mr. Free’s argument “relies on mere gross speculation that the district court ‘may’ have considered information” from the requested hearings (Respondent’s Brief, p.9) misconstrues the applicable standard of review because the Court of Appeals will presume that the district court relied on information it observed at those hearings.

The *Morgan* Opinion did not change the *Hanington* standard of review in regard to the question of what sentence should be executed after probation is revoked. In *Morgan*, the issues on appeal were whether the Idaho Supreme Court denied Morgan due process and equal protection when it denied his request for transcripts to be augmented into the appeal record and whether “the district court abused its discretion when it revoked probation.” *Morgan*, 153 Idaho at 620. *Morgan* did not challenge the length of the sentence which was executed after his probation was revoked. As such,

Morgan does not alter the applicable standard of review in this matter as Mr. Free is challenging the length of his sentence.

In sum, the *Morgan* Opinion only dealt with an appeal challenging the district court's decision to revoke probation. *Hanington* still controls the applicable standard of review when a sentence is challenged after probation is revoked. As such, the requested transcript is relevant to the sentencing issue raised on appeal, and lack of access to that transcript will prevent Mr. Free from a merits based review of his sentencing issue.

#### CONCLUSION

Mr. Free respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Free respectfully requests that this Court reduce the fixed portion of his sentence. Alternatively, Mr. Free respectfully requests that this Court reduce the indeterminate portion of his sentence.

DATED this 30<sup>th</sup> day of January, 2013.



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SHAWN F. WILKERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30<sup>th</sup> day of January, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DEBORAH A BAIL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

BRIAN MARX  
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EVAN A. SMITH  
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