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State v. Gandenberger Appellant's Brief Dckt. 39557

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL A. GANDENBERGER, Defendant-Appellant.	)	NO. 39557 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 ELMORE

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STATEMENT OF THE CASE

Nature of the Case

Michael Gandenberger asserts that the district court's determination that he willfully violated his probation was clearly erroneous. The evidence demonstrated that he, as well as the family members who help to supervise him (Mr. Gandenberger has been diagnosed with paranoid schizophrenia), believed that he was complying with the terms and conditions of his probation, in that he had responsible adults, who he believed to be "approved supervisors," who were present with him during family gatherings where young children were also present. Their confusion was as to who qualified as an "approved supervisor." Because he was making a good faith effort to comply with the terms of his probation, Mr. Gandenberger did not willfully violate those conditions, and the district court's finding to the contrary was not based on substantial and competent evidence, and thus, was clearly erroneous.

Furthermore, based on the recent change to the Idaho Criminal Rules, specifically I.C.R. 33(e), because the evidence could not sustain a finding of willful violation, the decision to revoke probation was beyond the outer bounds of the district court's discretion. The application of the new language of I.C.R. 33(e) is an issue of first impression in Idaho. However, even under the prior rule, the decision to revoke Mr. Gandenberger's probation should be reversed because the district court did not actually consider alternative methods to address the "violation." Because Mr. Gandenberger did not commit a willful violation of the terms of his probation, the district court's decision to revoke his probation was in error and should be reversed.

Statement of the Facts and Course of Proceedings

Mr. Gandenberger pled guilty to a felony charge for failure to register as a sex offender and a misdemeanor charge for being within five hundred feet of school children, and was sentenced to an aggregate unified term of five years, with one year fixed, although that sentence was suspended for a five-year term of probation. (R., pp.149-58.) He had been striving to comply with the terms of his probation. (Tr., Vol.3, p.12, L.11 - p.13, L.6, p.32, Ls.21-23.)[1] He was living with his stepfather, Steven Howe, who supervised Mr. Gandenberger, accompanied him to meetings with his probation officer, and helped him adhere to the terms of his probation. (Tr., Vol.2, p.4, Ls.8-14; Tr., Vol.3, p.13, Ls.7-12.) In fact, Mr. Howe had been attempting to establish a guardianship over Mr. Gandenberger, who has been diagnosed with chronic paranoid schizophrenia.[2] (Tr., Vol.1, p.40, Ls.15-18; Vol.3, p.16, L.19 - p.19, L.9.) As the crime underlying his period of probation was failure to register as a sex offender and violation of prohibited access to school children (R., p.149), Term 3 of Mr. Gandenberger's probation was: "I will not initiate, maintain, or establish contact with

[1] The transcripts in this case are contained in three independently bound and paginated volumes. To promote clarity, the volume containing the first part of the revocation hearing, held on November 22, 2011, will be referred to as "Vol.1." The volume containing the second part of the revocation hearing, held on December 6, 2011, will be referred to as "Vol.2." The volume containing the disposition hearing, held on December 20, 2011, will be referred to as "Vol.3."

[2] Mr. Gandenberger's current parole officer, Rick Cedillo, was not aware that Mr. Gandenberger had been diagnosed with schizophrenia until after the revocation hearing occurred. (Tr., Vol.3, p.7, Ls.6-9.) Mr. Howe and Deo Peppersack, Mr. Gandenberger's therapist, both testified that they had tried to talk with Mr. Cedillo to inform him of Mr. Gandenberger's condition, but that Mr. Cedillo had never made himself available to them. (Tr., Vol.3, p.15, L.20 - p.16, L.4; *see also* Tr., Vol.3, p.7, L.21 - p.8, L.2 (Mr. Cedillo testifying that he did not know who Mr. Gandenberger's stepfather was until he was identified by defense counsel, despite the fact that Mr. Howe would accompany Mr. Gandenberger to almost all of his meetings with his probation officer (*see* Tr., Vol.3, p.13, Ls.7-9)); Tr., Vol.2, p.42, L.22 - p.43, L.13.)

any person, male or female, under the age of 18 years without the presence of an approved supervisor. The supervisor must be over the age of 21 and be approved by both my supervising officer and therapist." (State's Exhibit 5.) Mr. Howe was helping Mr. Gandenberger to adhere to that, as well as the other terms of his probation. (Tr., Vol.3, p.13, Ls.5-19.)

In that regard, Mr. Howe, relying on information given to him by one of Mr. Gandenberger's probation officers,[3] believed that Mr. Gandenberger would be in compliance with Term 3 if there were responsible adults present when Mr. Gandenberger was around children.[4] (*See, e.g.,* Tr., Vol.2, p.4, L.23 - p.5, L.5, p.9, Ls.1-15; Tr., Vol.3, p.14, Ls.6-19.) As such, when Mr. Howe decided to host a family barbeque, he made sure that there would be a number of responsible adults, including himself, present to supervise Mr. Gandenberger. (Tr., Vol.2, p.5, Ls.1-22.) Additionally, according to Wendy Smith (Mr. Gandenberger's cousin and the mother of the children at issue), because the house and yard were not big, it was not possible for Mr. Gandenberger to have found himself alone with anyone. (Tr., Vol.1, p.52, Ls.4-12.) She also testified that her children, especially her daughter, were not alone with Mr. Gandenberger. (Tr., p.51, Ls.2-7, p.52, L.13 - p.53, L.2, p.54, L.22 - p.55, L.5.)

Nevertheless, Mr. Gandenberger reported that he had inappropriate touched Ms. Smith's daughter at one of those barbeques. (Tr., p.16, L.17 - p.17, L.4.) As a result of those statements, the State alleged that Mr. Gandenberger had violated Term 3 of his probation, as well as another term (that he would obey all laws). (*See*

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[3] Mr. Howe was unable to recall the name of the probation officer who gave him that information. (Tr., Vol.2, p.9, Ls.5-15.)

[4] In fact, Mr. Gandenberger was required to have an approved chaperone (as opposed to any responsible adult), and his record indicated that no chaperones had been approved. (Tr., Vol.1, p.32, Ls.2-19.)

R., pp.159-60.) After hearing the evidence presented at the revocation hearing, the district court determined that there was no opportunity for Mr. Gandenberger to have done what he admitted doing. (*See* Tr., Vol.2, p.16, L.12 - p.17, L.5.) Ms. Smith testified that she believed the admission was a delusion, a product of Mr. Gandenberger's schizophrenia. (Tr., Vol.1, p.55, Ls.9-11.) Ms. Peppersack confirmed that such delusions may be products of schizophrenia and that a person suffering from schizophrenia would have a difficult time distinguishing between such a delusion and reality. (Tr., Vol.1, p.40, L.4 - p.47, L.4.) As such, the district court found that the State had failed to prove that Mr. Gandenberger had violated the law by touching Ms. Smith's daughter, despite his admission. (Tr., Vol.3, p.33, Ls.9-24.)

However, the district court determined that, "based on a literal reading of [State's] Exhibit 5," Mr. Gandenberger had violated Term 3 of his probation by willfully being in the presence of children. (Tr., Vol.2, p.19, Ls.12-16; Tr., Vol.3, p.35, Ls.1-5.) It contrasted Mr. Gandenberger's violation with a different case where the defendant had been actively seeking to put himself in proximity with children (*i.e.*, had been volunteering to direct a youth choir, trying to become a scout leader, and spending his time at city parks and schools). (Tr., Vol.2, p.19, L.17 - p.20, L.10.) Nevertheless, based on its finding, the district court revoked Mr. Gandenberger's probation and executed his underlying sentence. (Tr., Vol.3, p.38, Ls.14-17.)

In doing so, it accused Mr. Gandenberger and his family of not appreciating the significance of the terms of Mr. Gandenberger's probation. (Tr., Vol.3, p.36, Ls.1-5.) It decided that Ms. Peppersack and Mr. Gandenberger's other care providers could not secure results in their treatment of Mr. Gandenberger. (Tr., Vol.3, p.38, Ls.18-21.) And even though Ms. Peppersack recommended that the district court consider an assisted

living facility as an alternative to incarceration, the district court did not consider that alternative because "[t]here is no program here that I'm presented with for assisted living. This is pie in the sky if you will." (Tr., p.37, Ls.17-19.) As a result, the district court executed a sentence of five years, with one year fixed, on Mr. Gandenberger. (R., pp.188-91.) Mr. Gandenberger timely appealed from that order. (R., pp.193-95.)

ISSUE

Whether, absent any substantial and competent evidence to support a finding that Mr. Gandenberger willfully violated the terms of his probation, the district court's decision to revoke Mr. Gandenberger's probation was in error.

ARGUMENT

Absent Any Substantial And Competent Evidence To Support A Finding That Mr. Gandenberger Willfully Violated The Terms Of His Probation, The District Court's Decision To Revoke Mr. Gandenberger's Probation Was In Error

A. Introduction

The district court made a clearly erroneous finding that Mr. Gandenberger's violation of the terms his probation was willful. Based on the evidence presented at the revocation hearing, Mr. Gandenberger, as well as the family members who supervised him, believed that they were not causing Mr. Gandenberger to violate the terms of his probation when they brought children to family barbeques and responsible adults were present to supervise Mr. Gandenberger. As such, the violation was not willful. As the Idaho Supreme Court has held, the criminalization of such good faith decisions which nevertheless result in error is inappropriate.

Because the violation was not willful, the amended version of I.C.R. 33(e) does not allow for Mr. Gandenberger's probation to be revoked. The new language in I.C.R. 33(e) applies to Mr. Gandenberger's case because it is a substantive change in the criminal rules, as it limits the range of conduct for which he could be punished and affects the type of punishment that can lawfully be imposed on him. As such, according to Idaho Supreme Court and United States Supreme Court precedent, the new language of I.C.R. 33(e) applies retroactively to Mr. Gandenberger's case. However, even under the old rule, which only required the district court to consider alternatives to incarceration before revoking probation following a non-willful violation, the district court still erred by revoking Mr. Gandenberger's probation. It did not consider alternatives, stating only that they were "pie in the sky" dreams, not actual alternatives. Therefore, because the violation was not willful, the district court's decision to revoke

Mr. Gandenberger's probation was in error under either rule, and should, therefore, be reversed.

B. The District Court's Determination That Mr. Gandenberger Willfully Violated The Terms Of His Probation Was Clearly Erroneous And Improperly Punished A Good Faith Effort To Comply With The Terms Of Probation

Where a finding of fact is not supported by substantial or competent evidence, it is clearly erroneous and should be set aside. *See, e.g., State v. Henage*, 143 Idaho 655, 659 (2007). In this case, the district court found that "the probation violation established by the State here was a willful violation. There is nothing beyond the probationer's control or that his conduct wasn't willful in being present around these children." (Tr., Vol.3, p.35, Ls.1-4.) That finding is not supported by substantial or competent evidence, and therefore should be set aside.

1. Contrary To Idaho Supreme Court Precedent, The District Court's Finding Of A Willful Violation In This Case Punished Mr. Gandenberger's Good Faith Effort To Comply With The Terms Of His Probation

The district court's determination that Mr. Gandenberger willfully violated the terms of his probation was based on a misreading of the relevant term of probation and it inappropriately punished his good faith effort to comply with those terms. Mr. Gandenberger was alleged to have violated Term 3 of his probation agreement (R., p.160), which reads: "I will not initiate, maintain, or establish contact with any person, male or female, under the age of 18 years *without the presence of an approved supervisor.* The supervisor must be over the age of 21 and be approved by both my supervising officer and therapist." (State's Exhibit 5 (emphasis added).) That term does not provide that Mr. Gandenberger could never be around children, as the district court stated. (*Compare* State's Exhibit 5 *with* Tr., Vol.3, p.35, Ls.1-4.)

Rather, the term contemplates that Mr. Gandenberger may initiate, maintain, or establish contact with children, so long as he is accompanied by an approved supervisor. (State's Exhibit 5.) Therefore, in order to be in violation of that term of probation, Mr. Gandenberger must have initiated, maintained, or established contact with those children while willfully being out of the presence of an approved supervisor. (*See* State's Exhibit 5.) The district court's interpretation of that term – that "the probation violation established by the State here is a willful violation. There is nothing beyond the probationer's control or that his conduct wasn't willful *in being present around these children*" – incorrectly affixed the *mens rea* element of the violation to being around children (*i.e.*, looking at whether Mr. Gandenberger was willfully initiating contact with children). (Tr., Vol.3, p.35, Ls.1-4.) The term of probation expressly allows Mr. Gandenberger to be willfully around children, even to initiate contact with them, if he does so in the presence of an "approved supervisor." (State's Exhibit 5.) Therefore, the *mens rea* element of the violation is properly applied to whether Mr. Gandenberger was outside of the presence of an approved supervisor (*i.e.*, looking at whether Mr. Gandenberger was willfully outside the presence of an approved supervisor and initiating contact with children). (*See* State's Exhibit 5.) Therefore, because the district court's finding regarding the mental element inappropriately focused on the wrong part of the term of probation, it is not based on substantial and competent evidence and should be set aside as clearly erroneous.

Furthermore, there is no evidence to support a finding that Mr. Gandenberger was willfully outside the presence of an approved supervisor. While it is true that the agreement itself notified Mr. Gandenberger that supervisors must be approved by his probation officer and his therapist (State's Exhibit 5), the uncontradicted evidence also

reveals that Mr. Gandenberger and his stepfather (who is trying to establish guardianship over Mr. Gandenberger (Tr., Vol.3, p.16, L.19 - p.19, L.10)) understood that, so long as there were adults present, Mr. Gandenberger was adhering to the terms of his probation. (*See, e.g.,* Tr., Vol.2, p.4, L.23 - p.5, L.5, p.9, Ls.1-15; Tr., Vol.3, p.14, Ls.6-19.) The Idaho Supreme Court and the Court of Appeals have both recognized that, where a probationer is making good faith efforts to conform his actions to the requirements of the law, criminalizing those good faith efforts, even if they are erroneous, is unacceptable. *State v. Young*, 138 Idaho 370, 373 (2002); *State v. Halbesleben*, 139 Idaho 165, 170 (Ct. App. 2003).

As the *Young* Court pointed out, when analyzing the mental element of a criminal action, some situations require more than a simple finding that the person intended to act as they did. *Young*, 138 Idaho at 373. In *Young*, which dealt with injury to a child, the question was not whether Mr. Young had willfully decided to not take his child to a medical professional, but whether he willfully withheld treatment knowing that the treatment he had provided was insufficient. *Id.* The former of these analyses "misstates the law—it allowed Young to be convicted even if he made a good faith mistake believing the treatment he provided was adequate for the injuries." *Id.* Similarly, in *Halbesleben*, the question was not whether Mr. Halbesleben had willfully left his child in the situation he did, but whether he had left the child in that situation with willful disregard of the known danger of that situation. *Halbesleben*, 139 Idaho at 170. Were the defendant permitted to be convicted on only the former analysis, "it would criminalize 'good faith decisions that turn out poorly,'" an interpretation rejected by the Supreme Court in *Young*." *Id.* (quoting *Young*, 138 Idaho at 373). Such errors in

analysis are not harmless; they must be reversed and the cases remanded for further proceedings. *Young*, 138 Idaho at 373; *Halbesleben*, 139 Idaho at 170.

In this case, Mr. Gandenberger's stepfather testified that they were relying on information given to them by one of Mr. Gandenberger's prior probation officers. In fact, Mr. Howe testified that he felt Mr. Gandenberger had been doing very well on his probation. (Tr., Vol.3, p.12, L.11 - p.12, L.6.) And, as Mr. Gandenberger told the district court, "I'm doing my best and trying as far as knowing right from wrong." (Tr., Vol.3, p.32, Ls.21-23.) Mr. Howe testified that they had been informed by one of Mr. Gandenberger's prior probation officers that, so long as a responsible adult was present, Mr. Gandenberger could be around children and still adhere to the terms of his probation.[5] (*See, e.g.,* Tr., Vol.3, p.14, Ls.6-19.) Therefore, when Mr. Howe decided to invite family over for a barbeque, he made sure that a responsible adult would be with Mr. Gandenberger at all times. (Tr., Vol.2, p.5, Ls.6-22.) The uncontradicted evidence reveals that Mr. Gandenberger was making a good faith effort, with the help of his stepfather, to adhere to the terms of his probation.

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[5] Mr. Howe also testified that Mr. Gandenberger's new probation officer would not talk with him about Mr. Gandenberger's probation. (Tr., Vol.3, p.15, L.20 - p.16, L.4; *see also* Tr., Vol.3, p.7, L.21 - p.8, L.2 (Mr. Cedillo testifying that he did not know who Mr. Gandenberger's stepfather was until he was identified by defense counsel, despite the fact that Mr. Howe would accompany Mr. Gandenberger to almost all of his meetings with his probation officer (Tr., Vol.3, p.13, Ls.7-9)).) Ms. Peppersack also testified that Mr. Cedillo had not made himself available when she tried to contact him to discuss Mr. Gandenberger's schizophrenia or the effect that condition had on Mr. Gandenberger. (Tr., Vol.2, p.42, L.22 - p.43, L.13.) Consequently, Mr. Cedillo was not aware that Mr. Gandenberger had even been diagnosed with chronic paranoid schizophrenia until after the revocation proceedings were held. (Tr., Vol.3, p.7, Ls.6-9.) As such, Mr. Cedillo could not have been aware of the impact that condition would have on Mr. Gandenberger's ability to comprehend the nuances of his probationary terms (*i.e.*, who qualified as an approved supervisor), or that Mr. Gandenberger's stepfather was attempting to establish a guardianship over Mr. Gandenberger because of those issues.

As such, there is no substantial or competent evidence upon which to base a finding that Mr. Gandenberger was willfully without an approved supervisor at the barbeques where children were present. *See Young*, 138 Idaho at 373; *Halbesleben*, 139 Idaho at 170. Rather, efforts were made to ensure that Mr. Gandenberger was supervised at those events. Thus, the district court's finding that Mr. Ganenberger had violated the terms of his probation in that regard is clearly erroneous and should be set aside. *See Henage*, 143 Idaho at 659. And, as will be discussed in Section C, *infra*, where the district court cannot make the finding that the probationer willfully violated the terms of probation, it cannot revoke probation. I.C.R. 33(e). Therefore, this Court should reverse the erroneous decision to revoke Mr. Gandenberger's probation.

2. The District Court's Finding Of A Willful Violation Is Clearly Erroneous Because Mr. Gandenberger Did Not "Initiate, Maintain, Or Establish Contact" As Proscribed By The Term Of Probation At Issue

Furthermore, the fact that Mr. Gandenberger was simply present where children were does not actually constitute a violation of Term 3 of his probation agreement; Mr. Gandenberger did not "initiate, maintain, or establish contact" with the children at the family barbeques. (*See* State's Exhibit 5.) As such, the district court's determination that Mr. Gandenberger willfully violated the terms of his probation is clearly erroneous. The language used in this particular term of probation does not prohibit Mr. Gandenberger from being willfully in the same area as a child. (*See* Tr., Vol.2, p.15, L.21 - p.16, L.1.) Rather, he cannot "*initiate, maintain, or establish* contact . . ." with a child without a supervisor present.[6] (State's Exhibit 5.) In this case,

[6] Probation, as a form of punishment, should be geared toward the protection of society. *See, e.g., United States v. Knights*, 534 U.S. 112, 119 (2001); *State v. Charboneau*, 124 Idaho 497, 500 (1993). As such, the point of this term of probation is to prevent the probationer from actively seeking opportunities to be alone with potential victims or in

Mr. Gandenberger did not willfully initiate, maintain, or establish the contact with these children. (*See* Tr., Vol.2, p.4, Ls.15-17 (Mr. Gandenberger's stepfather testifying that it was he who arranged the family barbeques).) Mr. Gandenberger did not seek out an opportunity to be alone with children, or to create an interaction with them. (*Compare* Tr., Vol.2, p.19, L.24 - p.20, L.10 (the district court describing a different case where the defendant volunteered to direct a youth choir and a scout leader, as well as spending time at a public playground, attempting to create a situation where he could establish new relationships with potential victims).) As such, there is no evidence to show that Mr. Gandenberger either initiated or established contact with these children.

Therefore, Mr. Gandenberger could have only violated that term if he willfully "maintained" contact with the children.[7] There is not any substantial or competent evidence to support a finding in that regard either. According to Ms. Smith, Mr. Gandenberger and his stepfather share "a little closet of a house." (Tr., Vol.1, p.52, Ls.4-5; *see also* Tr., Vol.2, p.6, Ls.22-23 (Mr. Gandenberger's stepfather testifying that "[m]y house is just a little house").) Ms. Smith added that, during the barbeques, "there was never any possible time for [Mr. Gandenberger] to be alone with anybody." (Tr., Vol.1, p.52, Ls.11-12.) Therefore, given the particular location, it was not possible for Mr. Gandenberger to avoid contact with the guests and remain at his residence.

Additionally, Mr. Gandenberger's interactions with Ms. Smith's children were not inappropriate, nor were they beyond the extent of the children's interaction with the

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positions of power over them. (*See, e.g.,* Tr., Vol.2, p.19, L.24 - p.20, L.10.) The evidence, however, does not demonstrate that was what Mr. Gandenberger was trying to do, and so, does not actually demonstrate a willful violation of that term of his probation. It definitely does not demonstrate a reason to revoke his probation, as there is no evidence that he could not be successful on probation.

[7] In this context, "maintain" is defined as "to continue in : CARRY ON." Merriam-Webster's Dictionary and Thesaurus, 490 (2007).

other adults present. (*See* Tr., Vol.1, p.56, L.17 - p.57, L.2.; Tr., Vol.2, p.8, L.22 - p.9, L.4.) When asked by the prosecutor if Mr. Gandenberger and her children play together, Ms. Smith answered "Kind of." (Tr., Vol.1, p.56, Ls.17-18.) In fact, the district court recognized that the contact was not different from that had by any of the other adults at the barbeque. (Tr., Vol.2, p.20, Ls.13-16.) This evidence does not demonstrate that Mr. Gandenberger was continuing in or carrying on the relationship in the manner sought to be discouraged by the term of probation. (*Compare* Tr., Vol.2, p.19, L.24 - p.20, L.10.) All it demonstrates is that Mr. Gandenberger was at a family get-together and, like everyone else, played with the children for a time. He did not "maintain" or "carry on" that contact in an inappropriate manner. (*See* Tr., Vol.1, p.55, Ls.9-11 (Ms. Smith indicating that had Mr. Gandenberger acted inappropriately, she would have been advocating for repercussions, but that was not the case). However, particularly since it was his Mr. Howe, not Mr. Gandenberger, who arranged the family get-together, Mr. Gandenberger did not willfully create the situation to be in the presence of children, as contemplated by the term of probation. Therefore, Mr. Gandenberger did not actually violate that term of probation at all, much less violate it willfully.

C. As The Evidence Does Not Support A Finding That Mr. Gandenberger Willfully Violated The Terms Of His Probation, The District Court's Decision To Revoke Mr. Gandenberger's Probation Was Erroneous And Should Be Reversed

The district court's decision to revoke Mr. Gandenberger's probation, premised on the clearly erroneous determination that he willfully violated the terms of his probation agreement, is impermissible because of a recent amendment to I.C.R. 33(e).[8]

[8] The district court's order was filed on December 20, 2011. (R., p.188.) The amendment to I.C.R. 33(e) went into effect July 1, 2012. *See* Idaho Supreme Court

Even though that amendment occurred after the district court decided to revoke Mr. Gandenberger's probation, that rule, as a substantive change, applies retroactively and prohibits the revocation of probation where the violation was not willful.

Nevertheless, even under the previous rule (established in *State v. Sanchez*, 149 Idaho 102 (2009), and *State v. Leach*, 135 Idaho 525 (Ct. App. 2001)), the district court's decision to revoke Mr. Gandenberger's probation was in error because the district court did not consider alternative options to address the violation. Therefore, under either rule, the district court's decision is in error and should be reversed.

1. I.C.R. 33(e) Is A Substantive Rule And, Therefore, Applies Retroactively

The United States Supreme Court and Idaho Supreme Court have both recognized that "[n]ew substantive rules generally apply retroactively because they 'necessarily carry a significant risk that the defendant stands convicted of an act that the law does not make criminal or *faces a punishment that the law cannot impose upon him.*'" *Rhoades v. State*, 149 Idaho 130, 139 (2009) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352-53 (2004)) (emphasis added). In that regard, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* The change to I.C.R. 33(e) does exactly that, limiting the range of conduct that the law punishes from any violation of the terms of probation to only those that are willful. It also changes the punishment that could be imposed on Mr. Gandenberger for his actions. As such, where the evidence does not support a finding that the probationer willfully violated the terms of his probation, I.C.R. 33(e)

Order, In Re: Amendments of Idaho Criminal Rules (I.C.R.) 6.6, 16, 25(a), 33, 41(a) and 54.1, entered on February 9, 2012, p.5 (*available at* http://www.isc.idaho.gov/orders/ICR_Order_6.6-etc_07.12.pdf).

applies retroactively and the district court erred in revoking probation. As explained in Section I(B), *supra*, Mr. Gandenberger did not willfully violate the terms of his probation, and therefore, the decision to revoke his probation should be reversed pursuant to I.C.R. 33(e).

The new language in I.C.R. 33(e) alters the range of conduct that may be punished. The relevant part of the amended rule reads: "The court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation." I.C.R. 33(e) (2012). Contrarily, the old rule only stated: "The court shall not revoke probation except after a hearing at which the defendant shall be present and appraised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing." I.C.R. 33(e) (2011). Additionally, the new version of the rule uses the language "*shall* not," which means that the restriction is mandatory. *See, e.g., Doe v. State*, 137 Idaho 758, 760 (2002) (quoting *Rife v. Long*, 127 Idaho 841, 848 (1995)). Therefore, where the violation is not willful, probation cannot be revoked. *See id.*

As evidenced by the change in the language, the 2012 rule change adds a significant restriction to the range of conduct punishable under the law: only those violations which are willful can result in revocation. *See* I.C.R. 33(e). It also limits the punishment that Mr. Gandenberger could lawfully face. *See id.* The result of that alteration in the rule means that I.C.R. 33(e) is a substantive change, and thus, applies retroactively. *Rhoades*, 149 Idaho at 139. As such, if Mr. Gandenberger did not willfully violate the terms of his probation, the district court's decision to revoke his probation

should be reversed, lest Mr. Gandenberger be made to face a punishment that cannot be lawfully imposed on him. *See Schriro*, 542 U.S. at 352-53.

2. The District Court Erred When It Revoked Mr. Gandenberger's Probation Without Considering Alternative Means To Address The Violation

Even if the amendment to I.C.R. 33(e) does not apply retroactively, the decision to revoke Mr. Gandenberger's probation was still in error under the old rule, and should, therefore, still be reversed. The old rule set forth by the Court of Appeals held that "if a probationer's violation of a probation condition was not willful, or was beyond the probationer's control, a court may not revoke probation and order imprisonment without first considering alternative methods to address the violation." *Leach*, 135 Idaho at 529 (citing *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), and *State v. Lafferty*, 125 Idaho 378, 382-83 (Ct. App. 1994)).[9] In *Lafferty*, relying on the same principle, the Court of Appeals found that, the district court had sufficiently considered the alternatives available following a non-willful violation, when it gave the defendant a thirty-day opportunity to gather and present information on potential alternative living situations available to him. *Lafferty*, 125 Idaho at 382-83.

The Idaho Supreme Court subsequently adopted the *Leach* rule in *Sanchez*. *Sanchez*, 149 Idaho at 106. In that case, as in *Lafferty*, the Idaho Supreme Court found that the violation was not willful, but that the district court had considered alternatives to incarceration:

> [T]he district court here was able to consider other facilities by looking at the program Sanchez was currently on with the California Department of Corrections. Sanchez had been living at a halfway house, attending daily classes, and was being supervised by a California parole officer.

[9] The *Leach* Court found that the defendant had willfully violated the terms of her probation, and so did not review whether the district court had properly considered alternative options to revocation. *See Leach*, 135 Idaho at 531.

> However, the district court determined this program was not sufficient to protect the public or provide for Sanchez's rehabilitation.

Id. After considering the specifics of the alternative option (the halfway house) as it related to Mr. Sanchez's particular needs, the district court was able to reject that option within its discretion. *See id.* As such, *Sanchez* indicates that the consideration of alternatives should focus on particular situations available and the particular characteristics of the probationer, as opposed to broad discussions of generic situations.

Contrary to *Sanchez* and *Lafferty*, the district court in this case gave no such consideration to the specific information regarding alternative programs before it, nor did it allow for the defense to gather any such information: "There is no program here that I'm presented with for assisted living. This is pie in the sky, if you will. Where is it going to be? Who is going to pay for it? Is the Department going to approve it? And so forth." (Tr., Vol.3, p.37, Ls.17-20.) The district court cannot consider information that it does not have. In this case particularly, such an alternative needed to be considered in this case because, according to Mr. Gandenberger's therapist, an assisted living facility would further Mr. Gandenberger's rehabilitative efforts, whereas incarceration would retard them. (*See* Defendant's Exhibit A; 2010 Peppersack Letter attached to PSI.) Additionally, the district could have given Mr. Gandenberger the opportunity to gather that information and present it so that it could consider those alternatives. *See Lafferty*, 125 Idaho at 382-83. As it did not, the district court failed to comply with the old rule, and thus, its decision to revoke probation and order incarceration was beyond its discretion. *Sanchez*, 149 Idaho at 106; *Leach*, 135 Idaho at 529; *Lafferty*, 125 Idaho at 382-83. As such, its decision to revoke Mr. Gandenberger's probation following a non-

willful violation without considering alternatives to address the violation should be reversed and this case remanded for further proceedings.

CONCLUSION

Because the district court's decision was based on a clearly erroneous determination that he had willfully violated the terms of his probation, Mr. Gandenberger respectfully requests that this Court reverse the order revoking his probation and remand this case for further proceedings.

DATED this 16th day of October, 2012.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of October, 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:

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