9-10-2012

State v. Nielsen Appellant's Brief Dckt. 39655

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 39655 & 39656
	)	
v.	)	
	)	
KEVIN JOHN NIELSEN,	)	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

HONORABLE KEVIN JOHN NIELSEN
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SHAWN F. WILKERSON
Deputy State Appellate Public Defender
I.S.B. #8210
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Kevin John Nielsen timely appeals from the district court's order revoking probation. On appeal, Mr. Nielsen argues that the Idaho Supreme Court denied him due process and equal protection when it refused to augment the record with various transcripts he requested to be created at the public's expense. Mr. Nielsen also argues that the district court abused its discretion when it revoked probation and denied his oral Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion requesting sentence reduction.

Statement of the Facts and Course of Proceedings

In docket number 39656 (*hereinafter,* older case), Mr. Nielsen was charged, by Information, with four counts of grand theft by possession of stolen property and one count of possession of a controlled substance. (R., pp.41-43.) Pursuant to a plea agreement, Mr. Nielsen pleaded guilty to three counts of grand theft by possession of stolen property and, in return, the State dismissed the remaining charges. (R., pp.50-55.) The district court then imposed three concurrent unified sentences of fourteen years, with two years fixed, but retained jurisdiction. (R., pp.63-65.) Upon review of Mr. Nielsen's period of retained jurisdiction (*hereinafter,* rider), the district court suspended the sentences and placed Mr. Nielsen on probation. (R., pp.70-74.)

In docket number 39628 (*hereinafter,* new case), Mr. Nielsen was charged, by Information, with possession of a controlled substance and misdemeanor charge of driving without privileges. (R., pp.301-302.) These new charges were also submitted to the district court as a probation violation in the older case. (R., pp.91-93.) In addition to the new charge, the State also alleged that Mr. Nielsen violated various terms of his

probation in the older case. (R., pp.91-93.) In the older case, Mr. Nielsen admitted to violating the terms of his probation for driving without privileges, driving without obtaining a driver's license, and possessing a controlled substance. (R., pp.91-93, 148.) In the newer case Mr. Nielsen pleaded guilty to possession of a controlled substance, and the remaining charge was dismissed. (R., pp.340.)

At a global sentencing/probation disposition hearing, the district court revoked probation in the older case and, in the newer case, imposed a concurrent unified sentence of seven years, with three years fixed. (R., pp.154-155, 359-370.) However, the district court retained jurisdiction in both cases. (R., pp.154-155, 359-370.) Upon review of Mr. Nielsen's rider, the district court placed Mr. Nielsen on probation. (R., pp.162-165, 374-375.)

After a period of probation, the State filed two motions for probation violation in both cases. (R., pp.183-185, 395-397) Pursuant to a plea agreement, Mr. Nielsen admitted to violating the terms of his probation for using methamphetamine on multiple occasions, in both cases. (R., pp.183-185, 209-211, 395-397, 413-415.) The district court found that Mr. Nielsen was in violation of his probation agreements, but reinstated Mr. Nielsen's probation. (R., pp.212-213, 416-417.)

After a period of probation, the State filed two motions for probation violation in each case and an amended motion for probation violation in the older case. (R., pp.215-218,225-229, 419-422.) Mr. Nielsen admitted to violating the terms of both his probation agreements for failing to comply with treatment recommendations, committing the misdemeanor crime of driving under the influence of alcohol, consuming or possessing alcohol on multiple occasions, failing to notify his supervisor about contact with law enforcement, frequenting an establishment where alcohol is the primary source

of income, and failing to complete a treatment program. (R., pp.226-228, 237-238, 419-422, 438-439.) At the probation violation disposition hearing Mr. Nielsen requested the district court reduce his sentence pursuant to Rule 35. (R., pp.240, 440; 02/02/12 Tr., p.20, Ls.3-18.) Thereafter, the district court revoked probation in both cases and executed the underlying sentences without a reduction. (R., pp.241-242, 441-442.) Mr. Nielsen timely appealed in both cases. (R., pp.244-246, 444-446.)

Mr. Nielsen then filed an untimely Rule 35 motion in the newer case, which was denied by the district court.[1] (R., pp.448-458, 472-473.)

On appeal, Mr. Nielsen's appellate counsel filed a motion to augment the record with various transcripts and an addendum to the presentence report. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof (*hereinafter,* Motion to Augment), pp.1-5.) The State objected to Mr. Nielsen's request for the transcripts but not the addendum to the presentence report. (Objection in Part to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof" (*hereinafter,* Objection to Motion to Augment), pp.1-5.) Thereafter, the Idaho Supreme Court entered an order denying Mr. Nielsen's request for the transcripts but granting his request for the addendum to the presentence report. (Order Denying Motion to Augment the Record *in Part* and to Suspend the Briefing Schedule (*hereinafter,* Order Denying Motion to Augment), pp.1-2.)

[1] Mr. Nielsen is not challenging the denial of his Rule 35 motion on appeal.

ISSUES

1. Did the Idaho Supreme Court deny Mr. Nielsen 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 revoked Mr. Nielsen's probation?

3. Did the district court abuse its discretion when it denied Mr. Nielsen's oral Rule 35 motion requesting leniency?

ARGUMENT

I.

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

A. Introduction

A long line of United States Supreme Court cases hold that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. In the event the record reflects a colorable need for a transcript, the only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the transcript is irrelevant to the issues raised on appeal.

In this case, Mr. Nielsen filed a Motion to Augment, requesting transcript of the entry of plea hearing, held on October 14, 2004, the sentencing hearing held on December 02, 2004, the sentence hearing, held on February 3, 2005, the rider review hearing, held on July 28, 2005, the admit/deny and entry of plea hearing, held on September 10, 2007, the rider review hearing, held on April 3, 2008, and the dispositional hearing, held on May 6, 2010. Those requests were denied by the Supreme Court. On appeal, Mr. Nielsen is challenging the Idaho Supreme Court's denial of his request for the transcripts. Mr. Nielsen asserts that the requested transcripts are relevant to the issues of whether the district court abused its discretion in revoking probation and denying his oral Rule 35 motion because the district court could rely on its memory of the requested hearing when it revoked probation. Therefore, the Idaho Supreme Court erred in denying his requests.

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

1. The Idaho Supreme Court, By Failing To Provide Mr. Nielsen With Access To The Requested Transcripts, Has Denied Him Due Process And Equal Protection Because He Cannot Obtain A Merit Based Appellate Review Of His Sentencing Claims

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; IDAHO. 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)). 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, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a transcript, the cost of such transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to

"order a transcript to be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

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).

The United States Supreme Court has issued a long line of cases that directly address whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant trial proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits the states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with an appellate record unless some or all of the requested materials are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois,* 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost." *Griffin*, 351 at 13. At that time, the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required defendants in all other criminal cases to purchase transcripts

themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process or equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations and footnotes omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective merits-related appellate review. At the same time, the Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet adequate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of a defendant's indigency. In that case, the State argued that the defendant had already received appellate review of his conviction by the Ohio appellate court. *Burns*, 360 U.S. at 257. The United States Supreme Court rejected this argument and ruled that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *Draper v. Washington*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining access to transcripts based on a frivolousness standard. "Under the present standard, . . . they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 372 U.S. 494. The Supreme Court first expanded upon its statement in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement when stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised for appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it was held that a defendant need only make a colorable argument that he/she needs items to create a complete record on appeal. *Id.* at 195. If the State wants to deny the defendant's request, it is the State's burden to prove that the requested items are not necessary for the appeal. *Id.*

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardener v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

An application of the foregoing rules to the facts of this case creates a situation analogous to *Lane v. Brown*, 372 U.S. 477 (1863). In that case, a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly, in Idaho, an appellant must provide an adequate record or face procedural default. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, . . . and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999) (citing *State v. Beck,* 128 Idaho 416, 422 (Ct. App. 1996); *State v. Beason,* 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko,* 108 Idaho 872, 873 (Ct. App. 1985); *State v. Repici,* 122 Idaho 538, 541

(Ct. App. 1992)). If the transcripts are missing, but the record contains court minutes, that may be sufficient so that a "meaningful review of [an appellant's] claim is possible, although the Idaho Court of Appeals has "strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide an adequate record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). If Mr. Nielsen fails to provide the appellate court with the requested items, the legal presumption will apply and Mr. Nielsen's claims will not be addressed on their actual merits. If it is state action alone, which prevents him from access to the requested item, then such action is a violation of due process, as per *Lane*, and any such presumption should no longer apply.

Whether the transcripts of the requested proceeding was before the district court at the time of the probation revocation hearing is not relevant in deciding whether the transcripts are relevant to the issues on appeal because in reaching a sentencing decision, a district court is not limited to considering only that information offered at the hearing from which the appeal is filed. Rather, a court is entitled to utilize knowledge gained from its own official position and observations. *Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak,* 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during the trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon "the number of certain types of criminal transactions that [the judge] has observed in the courts within his judicial district and the quantity of drugs therein involved"); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court's reliance upon evidence presented at the preliminary hearing from a previously dismissed case because "the judge hardly could be expected

to disregard what he already knew about Gibson from the other case"). Thus, whether the prior hearings were transcribed or not is irrelevant, because the court may rely upon the information it already knows from presiding over the prior hearings when it made the decision to revoke probation.

The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, Docket No 39057, 2012 Opinion No 38 (Ct. App. 2012) (not yet final), which addressed the foregoing argument. In that case, the defendant pleaded guilty and was placed on probation. *Id.* at 1. After a period of probation, the defendant admitted to violating the terms of his probation and the district court revoked probation but retained jurisdiction. *Id.* at 1-2. After completing the rider, the district court placed the defendant on probation. *Id.* at 2. The defendant admitted to violating the terms of his probation and the district court revoked probation. *Id.* The defendant appealed from the district court's second order revoking probation. *Id.*

On appeal, the defendant filed a motion to augment the appellate record with transcripts associated with his first probation violation and disposition, which was denied by the Idaho Supreme Court. *Id.* The defendant then raised as issues on appeal the question of whether the Idaho Supreme Court denied him due process and equal protection when it denied the motion to augment and the issue of whether the district court abused its discretion when it revoked probation. *Id.* at 2-3. The Idaho Court of Appeals held that the transcripts of the prior probation proceedings were not necessary for the appeal because "they were not before the district court in the second probation violation proceedings, and the district court gave no indication that it based its revocation decision upon anything that occurred during those proceedings." *Id.* at 4.

While *Morgan* does directly deal with the issues raised in this appeal, at this point

this case is not final. Moreover, it is distinguishable because Mr. Nielsen is challenging not only the order revoking probation, but also the length of his sentence, which entails an analysis of the district court's sentencing rationale.

Additionally, the requested item is within an Idaho appellate court's scope of review. The requested transcript is relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court made appropriate sentencing determinations. *See State v. Hanington,* 148 Idaho 26, 28 (Ct. App. 2009) ("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." (emphasis added)).[2] "Where an appeal is taken from an order refusing to reduce a sentence under Rule 35, [the Appellate Court's] scope of review includes all information submitted at the original sentencing hearing and at the

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[2] In *Morgan*, *supra*, the Court of Appeals clarified the scope of review articulated in *Hanington*. Specifically it held:

> In reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation. However, that does not mean that *all* proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

Morgan, at 4. (original emphasis). As stated above, *Morgan* is not a final opinion and Mr. Nielsen is raising a sentencing claim in this appeal.

subsequent hearing held on the motion to reduce." *State v. Arazia*, 109 Idaho 188, 189 (Ct. App. 1985) (emphasis added). Since Mr. Nielsen is challenging the denial of his oral rule 35 motion, *Arazia*, holds that the original sentencing hearings in this matter need to be reviewed in this appeal.

Further support for Mr. Nielsen's position can be found in *State v. Warren*, 123 Idaho 20 (Ct. App.1992). In that case, Mr. Warren was convicted of aggravated battery in 1988 and placed on probation. *Id.* at 21. Mr. Warren's probation was then revoked and the district court retained jurisdiction for 180 days. *Id.* After completing the period of retained jurisdiction, Mr. Warren was placed on another period of probation, which was ultimately revoked. *Id.* The district court then *sua sponte* reduced the length of Mr. Warren's sentence. *Id.* Mr. Warren then appealed and alleged that the district court should have further reduced the length of his sentence. *Id.* In support of that position, Mr. Warren argued that his probation violation was trivial. *Id.* The Court of Appeals addressed that argument stating "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit off his victim's ear." *Id.* However, the Court of Appeals did not address the merits of his sentence reduction claim because he failed to provide the original Presentence Investigation Report (*hereinafter,* PSI) and a transcript of the original sentencing hearing. *Id.* Even though the original sentence was not on appeal, and happened years before the decision at issue, the Idaho Court of Appeals held that the transcript was necessary to address Mr. Warren's claims of error. Moreover, there was no indication that a transcript of that hearing was created before the probation violation hearing or that the district court referenced the original sentencing hearing at the

probation violation disposition hearing. It appears that the Court of Appeals assumed that the original sentencing hearing would address the nature of the original offense. Had Mr. Nelsien failed to request the transcript at issue, the *Warren* opinion indicates that it would be presumed to support the district court's decision to execute the original sentence.

Furthermore, the transcripts of the sentencing hearing held on December 2, 2004 and the continued sentencing hearing held on February 3, 2005, are necessary because Mr. Nielsen objected to the contents of the PSI. Specifically, the minutes of the December 2, 2004, sentencing hearing indicate that there were some discrepancies in the "PSI letter" and trial counsel asserted that Mr. Nielsen was in a funeral in Minnesota. (R., p.57.) The district court then questioned presentence investigator. (R., p.57.) Mr. Nielsen and somebody named George Gunn commented. (R., pp.57-58.) The district court then continued the sentencing hearing. (R., pp.57-58.) At the continued sentencing hearing held on February 3, 2005, trial counsel stated that there were errors in the PSI. (R., p.61.) Without access to transcripts of these two hearings this Court and appellate counsel will not know what objections to the PSI were made. Moreover, there is no way to determine the content of either Mr. Nielsen's or Mr. Gunn's comments to the district court.

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection to deny indigent defendants transcripts of trial proceedings on appeal. The decision to deny Mr. Nielsen's request for the transcripts will render his appeal meaningless because it will be presumed that the missing transcript supports the district court's sentencing decisions. This functions as a procedural bar to the review of Mr. Nielsen's appellate sentencing claims on the merits,

and therefore, Mr. neilsen should either be provided with the requested transcripts or the presumption should not be applied.

2. The Idaho Supreme Court, By Failing To Provide Mr. Nielsen With Access To The Requested Transcript Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Sixth Amendment right to counsel in the context of death penalty cases was selectively incorporated to the states through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In coming to this conclusion, the United State Supreme Court reasoned that the ability to be heard by counsel is so inextricably related to due process that the denial of counsel is tantamount to the denial of a hearing. *Powell*, 287 U.S. at 69. The Supreme Court also stated that under the facts of *Powell* "the necessity of counsel was so vital and imperative that the failure to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . [to] hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Id.* at 71-72.

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and its progeny and determined that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants the right to counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the protection of *Douglas* was extended to the right to effective assistance of counsel on appeal. According to the United States Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal-like the promise of *Gideon* that a criminal defendant

> has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

The remaining issue is defining effective assistance of counsel. According to the United States Supreme Court, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California,* 386 U.S. 738, 744 (1967), held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an active advocate on behalf of his client . . . . [Counsel's] role as advocate requires that he support his client's interest's to the best of his ability." *See also Banuelos v. State,* 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcripts prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is an additional issue to raise, or whether there is a factual support either in favor of any argument made or undercutting an argument. Therefore, Mr. Nielsen has not obtained review of the court proceedings based on the merits and was not provided with effective assistance of counsel in that endeavor.

Furthermore, in *State v. Charboneau,* 116 Idaho 129, 137 (1989) (*overruled on other grounds by State v. Card,* 121 Idaho 425 (1991)), the Idaho Supreme Court held that the starting point for evaluating whether counsel renders effective assistance of counsel in a criminal action is the American Bar Association, Standards For Criminal Justice, The Defense Function. These standards offer insight into the role and responsibilities of appellate counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect

> the validity of the judgment of conviction and sentence . . . . Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

Standard 4-8.3(b). In the absence of access to the requested transcripts, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might have affected the district court's decision to revoke probation. Further, counsel is unable to advise Mr. Nielsen on the probable role the transcripts may play in the appeal.

Mr. Nielsen is entitled to effective assistance of counsel in this appeal, and effective assistance cannot be given in the absence of access to the relevant transcripts. Therefore, the Idaho Supreme Court has denied Mr. Nielsen his constitutional right to due process which includes a right to the effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcripts and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Revoked Mr. Nielsen's Probation

Mr. Nielsen asserts that, given any view of the facts, the district court abused its discretion when it revoked his probation. When a defendant appeals from an order revoking probation the Idaho Court of Appeals has utilized the following framework:

> The decision to revoke a defendant's probation on a suspended sentence is within the discretion of the district court. I.C. § 20-222. In a probation revocation proceeding, two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? *State v. Case,* 112 Idaho 1136 (Ct. App. 1987).

State v. Corder, 115 Idaho 1137, 1138 (Ct. App. 1989).

Mr. Nielsen concedes that he violated the terms of his probation. Accordingly, he only contests the district court's decision to revoke his probation. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003). "In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with the protection of society." *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001).

Mr. Nielsen argues that the district court should have placed him on probation so he could participate in the Ada County Drug Court program. Mr. Nielsen was accepted into the Ada County drug court program. (02/02/12 Tr., p.7, L.17 – p.8, L.2.) At the probation violation disposition hearing, Mr. Nielsen's trial counsel made the following statements:

> In terms of the evaluation for Drug Court, those folks have certainly extensive experience determining whether someone's just telling them something they want to hear, whether the person's actually sincere. In this case, they certainly deemed him as somebody that they would consider letting in the program if Your Honor [would] put him in the program.
>
> I think Mr. Nielsen, in conversations with me, has indicated doing the assessment was one of the hardest things he's had to do. He had to look back at the time he's wasted using methamphetamine.

. . .

> It appears at this point he's making his first real attempts to ask for assistance in overcoming that addiction.
>
> . . .
>
> [H]e asked for the Drug Court referral . . . [because] he felt he needed that intense supervision . . . certainly a stricter program that regular probation.

(02/02/12 Tr., p.14, L.2 – p.15, L.14.)

Additionally, Mr. Nielsen expressed remorse and accepted responsibility for his actions when making the following statements:

> Yes, I have lied a lot about my drug, my past, everything. I didn't want people to know. I am begging for a chance at this. I don't want this drug in my life anymore. I put everything I love second and that drug first, and I lied to myself continuously over and over that I don't have a problem and there's nothing wrong with me.

(02/02/12 Tr., p.16, Ls.7-14.)

In sum, Mr. Nielsen's new found insight into his addiction increases the odds that he would have been able to adhere to the strict requirements of drug court. Therefore, the district court abused its discretion when it revoked his probation because drug court constituted a viable alternative to prison.

III.

The District Court Abused Its Discretion When It Denied Mr. Nielsen's Oral Rule 35 Motion Requesting Leniency

Mr. Nielsen argues that the unified sentences of fourteen years, with two years fixed, and seven years with, three years fixed are unduly harsh when they are viewed in light of the mitigating factors present in this matter. 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.*

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)). Mr. Nielsen does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Nielsen 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.*

"Where an appeal is taken from an order refusing to reduce a sentence under Rule 35, [the appellate court's] scope of review includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce." *State v. Arazia*, 109 Idaho 188, 189 (Ct. App. 1985).

As a preliminary note, Mr. Nielsen incorporates the mitigating information contained in Section II, *supra*, herein by this reference.

There were mitigating factors before the district court at the time of sentencing which, when viewed in light of the new information, provide further support for the conclusion that Mr. Nielsen's sentences are excessive. Specifically, Mr. Nielsen's support system is a mitigating factor. Mr. Nielsen has support from his mother. (11/08/07 TR., p.12, Ls.19-20; PSI, pp.9-10.)[3] She wrote a support letter characterizing him as a person with a big heart that could easily make other people laugh. (PSI, p.19.) She wrote another support letter, prior to the probation violation disposition hearing, and informed the district court that she has stage four terminal cancer which had spread from her breasts to her bones and lungs. (PSI, p.182.) She also told the district court that she depended on Mr. Nielsen as her caretaker. (PSI, p.182.) One of Mr. Nielsen's friends told a presentence investigator that he was a good guy who was willing to take time with her children. (PSI, p.16.) Mr. Nielsen's father is a successful business owner and paid Mr. Nielsen's restitution in these matters. (PSI, p.178.)

In sum, the district court abused its discretion when it denied Mr. Nielsen's oral Rule 35 motion because of Mr. Nielsen's family support. Additionally, the support Mr. Nielsen provides other members of his family provides support for the conclusion that he does care for other people.

[3] The citations to the PSI and the various attachments will adhere to the pagination contained in the electronic PDF file.

CONCLUSION

Appellate counsel 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. Nielsen respectfully requests that this Court reduce the length of the fixed portion of his sentence in docket number 39656 from three to two years. Alternatively, Mr. Nielsen respectfully requests that this Court reduce the length of his sentences as it deems appropriate.

DATED this 10th day of September, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

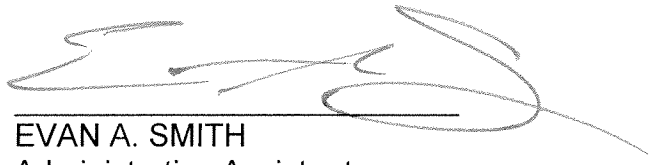
I HEREBY CERTIFY that on this 10th day of September, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KEVIN JOHN NIELSEN
INMATE #75979
ST ANTHONY WORK CENTER
125 N 8TH WEST
ST ANTHONY ID 83445

DARLA S WILLIAMSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

BRIAN MARX
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

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



EVAN A. SMITH
Administrative Assistant

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