8-20-2012

State v. Gillespie Appellant's Brief Dckt. 39743

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ALLEN WAYNE GILLESPIE, Defendant-Appellant.	)	DOCKET NO. 39743 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

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STATEMENT OF THE CASE

Nature of the Case

Allen Gillespie asserts that the district court abused its discretion when relinquished jurisdiction, or alternatively, when it failed to reduce his sentence *sua sponte* pursuant to I.C.R. 35 (*hereinafter*, Rule 35). He contends that the district court insufficiently considered the mitigating factors in his case when it made the decision to revoke. As a result, he requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that this Court vacate the order revoking probation and remand for a new hearing.

Statement of the Facts & Course of Proceedings

Mr. Gillespie entered a binding I.C.R. 11 plea agreement with the State, agreeing to plead guilty to driving under the influence (*hereinafter*, DUI). (R., pp.18-20.) In exchange, he would be sentenced to a unified sentence of seven years, with three years fixed, and jurisdiction would be retained. (R., p.19.) The district court would specifically recommend the CAPP rider program.[1] (R., p.19.) Mr. Gillespie also agreed to waive "his appeal and Rule 35 relief." (R., p.19.) He offered that plea at his arraignment. (Tr., Vol.1, p.1, Ls.4-12.)[2] The district court accepted the I.C.R. 11 agreement.[3] (Tr., Vol.2, p.11, L.22 – p.12, L.5, p.14, Ls.14-17; *see also* R., pp.46-47.)

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[1] The CAPP program is specifically designed to present intensive treatment focused on substance abuse issues. Idaho Dep't of Correction, "Correctional Alternative Placement Program (CAPP)," http://www.idoc.idaho.gov/content/locations/prisons/correctional_alternative_placement_program.

[2] The transcripts in this case are contained in two independently-paginated volumes. To avoid confusion, the volume containing the arraignment hearing held on March 25, 2011, will be referred to as "Vol.1." The volume containing the sentencing hearing held on June 6, 2011, will be referred to as "Vol.2."

[3] The Presentence Investigation Report (*hereinafter*, PSI) noted Mr. Gillespie's desire to accept responsibility for his actions as well as the impact his mental conditions

His sentence was ordered to be concurrent to the sentences arising from three, related misdemeanors, to which Mr. Gillespie had also pled guilty. (Tr., p.16, L.18 – p.17, L.13; R, pp.5-10.)

Rather than place Mr. Gillespie in the CAPP program, the Department of Correction placed him in the Therapeutic Community rider program because he did not meet the Department's educational requirements for the CAPP program at that time.[4] As placement in the CAPP program had been a major component of the I.C.R. 11 agreement, Mr. Gillespie filed a Rule 35 motion requesting the district court place him on probation as a result of the Department of Correction's decision to place him in the TC rider program. (R., pp.53-58.) The district court denied the motion because the decision to send Mr. Gillespie to the TC program was not unreasonable and the agreement did not bind the Department of Correction.[5] (R., pp.81-82.)

Nevertheless, Mr. Gillespie was able to be somewhat successful during his period of retained jurisdiction. He did not receive any formal disciplinary reports, and

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(depression and dyslexia) have had. (PSI, pp.18-19.) It also noted that Mr. Gillespie had been sexually abused by his stepfather, an incident which had gone unaddressed in his life. (PSI, p.14.) As a result, he presents in the moderate range of victimization. (GAIN-I Recommendation and Referral Summary (*hereinafter*, GRRS), p.12.) He also has employable skills as a heating and cooling technician. (PSI, p.16.) Ultimately, the presentence investigator recommended that Mr. Gillespie participate in the CAPP program during a period of retained jurisdiction. (PSI, p.19.)

[4] The therapeutic community, or TC, rider program focuses on helping participants develop community relationships by focusing on building a "pro-social lifestyle." Idaho Dep't of Correction, "Programming," http://www.idoc.idaho.gov/content/prisons/cl/sbwcc/programming. The TC program is designed to reshape behaviors, attitudes and values, helping to resocialize the participant in preparation for release on probation. As part of that process, participants are required to attend a substance-abuse-specific program. Idaho Dep't of Correction Standard Operating Procedure 607.26.01.011, Version 2.7, pp.3-4, *available at* http://www.idoc.idaho.gov/content/policy/therapeutic_community.

[5] Neither the State nor the district court argued for denial based on the waiver of Rule 35 relief in the agreement. (*See generally* R., pp.65-66, 81-82.)

the only informal report was for exceeding the permitted number of telephone calls during one week. (Addendum to PSI (*hereinafter* APSI), p.2; C-Notes (attached to ASPI), p.1.) The APSI noted that, while he was disconcerted with his placement in the TC, as oppose to the CAPP, program, he was able to recognize some of the factors contributing to his behavior and began to work toward correcting them. (*See* APSI, p.2 ("He can admit that his need for instant gratification has created negative consequences. . . . He seems to continue to struggle with taking responsibility for his criminal thinking and behavior. At times he has been able to show that he can follow the rules . . . .").) For example, in regard to his rehabilitation in the relapse prevention group, "Mr. Gillespie is both up and down, insightful and in denial, and receives and struggles with feedback in RPG. At times, he is open to feedback, willing to participate, and can articulate insights." (Footprints Therapeutic Community Discharge Summary (*hereinafter*, Discharge Summary) (attached to APSI), p.2.) He also would have adequate support from his family. (APSI, p.3.) He had two verified places he could live on release, one with his brother, the other with his mother. (C-Notes, p.2.) However, he was not able to complete all his assigned programs. (APSI, p.1.) Because of his incomplete rehabilitation, the report recommended that the district court relinquish jurisdiction. (APSI Recommendation Notice.)

The district court accepted that recommendation without a hearing and relinquished jurisdiction. (R., pp.86-87.) Thereafter, Mr. Gillespie moved for the district court to reconsider its decision. (R., p.88.) The district court decided that this

information was unpersuasive and denied Mr. Gillespie's motion.[6] (R., pp.106-07.) Mr. Gillespie timely appealed from that order. (R., pp.108-12.)

[6] Because this constitutes a second or successive Rule 35 motion, that decision is not challenged on appeal. *See, e.g., State v. Atwood*, 122 Idaho 199, 200-01 (Ct. App. 1992); *State v. Wersland*, 125 Idaho 499, 504-05 (1994); *State v. Hurst*, 151 Idaho 430, 439 (Ct. App. 2011).

ISSUE

Whether the district court abused its discretion by relinquishing jurisdiction over Mr. Gillespie, or alternatively, by not reducing his sentence *sua sponte* pursuant to Rule 35 when it did so.

ARGUMENT

The District Court Abused Its Discretion By Relinquishing Jurisdiction Over Mr. Gillespie, Or Alternatively, By Not Reducing His Sentence *Sua Sponte* Pursuant To Rule 35 When It Did So

A. Introduction

Mr. Gillespie asserts that, when the district court relinquished jurisdiction in his case, it failed to sufficiently consider all the factors at play in his rehabilitative process, particularly those which demonstrated that he was beginning to make progress in that process and those which showed that he was in a position to continue making progress if released on probation. However, the district court decided to forego that opportunity because Mr. Gillespie had not been perfect in his first rehabilitative opportunity. That constitutes an abuse of discretion, and this Court should provide the appropriate remedy.

B. The Waiver Of Appellate Relief Included In The I.C.R. 11 Plea Agreement Does Not Extend To An Appeal From The Decision To Relinquish Jurisdiction

As a threshold matter, this Court must determine whether Mr. Gillespie's claim is justiciable. His plea agreement contained the following language: "The Defendant waives appeal and Idaho Criminal Rule 35 relief." (R., p.19.) However, Mr. Gillespie contends that this waiver does not bar the present appeal.

While appellate waivers are permissible, "I.C.R. 11(d)(1),[7] [is] a rule adopted by this Court which specifically contemplates plea agreements in which the defendant waives his right to appeal *the judgment and sentence* of the court." *State v. Murphy*, 125 Idaho 456, 457 (1994) (emphasis added). Entry of judgment and sentencing can

[7] I.C.R. 11 was amended in 2007. *See* I.C.R. 11. Currently, section (f)(1) discusses the ability of the defendant to waive his appellate rights pursuant to a plea agreement. I.C.R. 11(f)(1)

only occur once, at the sentencing hearing. *State v. Coassolo*, 136 Idaho 138, 142-43 (2001). It cannot occur after a period of jurisdiction has been served by the defendant. *Id.* Therefore, the defendant's opportunity to appeal the judgment and sentence of the court arises only from the original judgment of conviction and a waiver of those rights does not extend to a subsequent ruling to relinquish jurisdiction.

This is true even though the default rule for periods of retained jurisdiction is that, without an affirmative decision to place the defendant on probation, he will remain incarcerated. *See, e.g., State v. Peterson*, 149 Idaho 808, 812 (Ct. App. 2010). That is because the order relinquishing jurisdiction is not coextensive with the judgment of conviction. For example, a period of retained jurisdiction enlarges the filing period for "an appeal from the *sentence contained in the criminal judgment*," but does not extend the filing period in regard to any other appeal challenging other aspects of the judgment. I.A.R. 14(a) (emphasis added). Ultimately, when a defendant seeks relief from an order relinquishing jurisdiction (*i.e.*, "reconsideration" of that order), "[r]elief from such an order more appropriately should be sought through a direct appeal." *State v. Roberts*, 126 Idaho 920, 922 (1995) (emphasis added); I.A.R. 11(c)(9).[8] As such, pursuant to I.A.R. 11(c)(9), Mr. Gillespie may appeal a decision to relinquish jurisdiction of right. *Roberts*, 126 Idaho at 922. His waiver only extended to the judgment of conviction and the sentence contained therein. *Murphy*, 125 Idaho at 457; I.A.R. 14(a). Therefore, he retained the right to challenge the decision to relinquish jurisdiction itself, a right which he now exercises on direct appeal.

[8] I.A.R. 11 addresses which orders which are appealable as a matter of right and should not be confused with I.C.R. 11, which addresses guilty pleas.

Even if this Court finds that precedent to be unpersuasive, it should still permit this appeal to proceed because the waiver clause is ambiguous. The waiver clause states only that "[t]he Defendant waives appeal and Idaho Criminal Rule 35 relief." (R., p.19.) This clause is ambiguous, as it is unspecific as to the scope of that waiver, particularly as to whether it extends to every potential future ruling in this case (for example, whether to relinquish jurisdiction, or whether to grant relief pursuant to I.C. § 19-2604).[9] Every other provision of the agreement is specific. (*See, e.g.,* R., p.18-20.) For example, the sentencing provision of the agreement provides as follows:

> 2. The Defendant shall be sentenced to 36 months fixed and 48 months indeterminate, with credit for time served and the court to retain Jurisdiction and recommend placement in the CAPP program during the retained jurisdiction. If the Defendant successfully completes the retained jurisdiction, the court shall suspend the execution of the sentence and place the defendant on supervised probation for a period of four (4) years. The Defendant's driver's license shall be suspended for five (5) years with absolutely no driving privileges.

(R., p.19.) That provision is detailed in the extreme and leaves no room for debate about how long Mr. Gillespie was to be sentenced, how long his period of probation was to be, how long his license would be suspended, and to which rider program he should have been sent.[10] (*See* R., p.19.) Contrarily, the waiver clause is nowhere near as specific, ambiguously leaving open questions about whether Mr. Gillespie could pursue

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[9] I.C. § 19-2604 empowers the district court to afford various forms of relief, such as reduction, or even dismissal, of charges following successful participation in a drug court program, a period of retained jurisdiction, or a period of probation. I.C. § 19-2604. Given that Mr. Gillespie was bargaining specifically for participation in the CAPP rider program (*see* R., p.53), it is axiomatic that he would want to retain the ability to challenge a future denial of a motion in that regard.

[10] The agreement could have simply provided that the district court would retain jurisdiction, but instead, it specifically identified the CAPP program as the rider program contemplated and anticipated as a result of the agreement. (*See* R., p.53 (arguing the same point).)

future relief (or appeals from denials thereof), particularly if facts unknown at the time of the plea agreement were to come to light or certain situations arise. (*See* R., p.19.)

Plea agreements are like contracts, and thus, are analyzed pursuant to contract law standards. *State v. Doe*, 138 Idaho 409, 410-11 (Ct. App. 2003). Ambiguities in plea agreements are to be resolved in favor of the defendant.[11] *State v. Peterson*, 148 Idaho 593, 595 (2010); *see also Hughey v. United States*, 495 U.S. 411, 422 (1990) (declaring that the rule of lenity requires ambiguous agreements to be resolved in favor of the defendant, regardless of policy and legislative history). This is because the focus of a plea agreement is "'on the *defendant's* reasonable understanding [which] also reflects the proper constitutional focus on what induced the *defendant* to plead guilty.'" *State v. Nienburg*, ___ P.3d ___, Docket Number 38656, p.4 (Ct. App. 2012) (quoting *Peterson*, 148 Idaho at 596 (in turn quoting *United States v. De la Fuente*, 8 F.3d 1333, 1337 n.7)) (emphasis from *Nienburg*), *reh'g denied*. As such, the ambiguous waiver clause should be construed in Mr. Gillespie's favor. As discussed *supra*, there are several scenarios, such as the potential for relief pursuant to I.C. § 19-2604, which could have unfolded and in which Mr. Gillespie, by the very bargain he struck, would likely not have desired to waive appellate options. *See Nienburg*, Docket Number 38656, p.4. Therefore, the waiver would not extend to appeals from decisions other than the original imposition of sentence and judgment of conviction.

C. The District Court Abused Its Discretion By Revoking Mr. Gillespie's Probation Without Sufficiently Considering the Mitigating Factors In The Record

[11] Notably, in this case, the State drafted the I.C.R. 11 agreement. (R., p.18 ("COME NOW, The Plaintiff, State of Idaho . . .").) Therefore, even putting aside the rule of lenity and assessing the agreement under general contract principles, ambiguities in this agreement would be construed against the State as the drafting party. *See, e.g., Haener v. Ada County Highway Dist.*, 108 Idaho 170, 173 (1985); *Freeman & Co. v. Bolt*, 132 Idaho 152, 156 (Ct. App. 1998).

Mr. Gillespie asserts that, given any view of the facts, the decision to revoke probation and execute his unified sentences of seven years, with three years fixed, was an abuse of the district court's discretion. The decision to revoke probation is one within the district court's discretion. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). The district court must determine "whether the probation is achieving the goal of rehabilitation and whether continuation of the probation is consistent with the protection of society." *Id.* The Legislature has established the criteria for determining whether probation or incarceration is merited. *State v. Merwin*, 131 Idaho 642, 648 (1998) (citing I.C. § 19-2521). In reviewing such a decision, the Court of Appeals uses a multi-tiered inquiry, determining "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistent with any legal standards applicable to the specific choice before it; and (3) whether the lower court reached its decision by an exercise of reason." *Chavez*, 134 Idaho at 312-13 (citing *State v. Hedger*, 115 Idaho 598, 600 (1989)). Accordingly, in order to show an abuse of discretion, Mr. Gillespie must show that, in light of the governing criteria, the sentence was excessive considering any view of the facts. *See id.* at 312.

The governing criteria, or sentencing objectives, 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.* The protection of society is the primary objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Therefore, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is

influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500.

There are several factors that a court should consider to determine whether protection of society and rehabilitation (along with deterrence and retribution) are served by a particular disposition. *See State v. Knighton*, 143 Idaho 318, 320 (2006). They include, but are not limited to: "the defendant's good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family." *Id.* Insufficient consideration of these factors has been the basis for a more lenient sentence in several cases. *See, e.g., Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *rev'd on other grounds*, 117 Idaho 295, 301 (1990); *State v. Shideler*, 103 Idaho 593, 595 (1982). In this case, several of those factors are present, but were insufficiently considered by the district court as it crafted its disposition in regard to Mr. Gillespie. As a result, it did not sufficiently consider whether Mr. Gillespie's probation was adequately serving the goal of rehabilitation or whether society required protection from Mr. Gillespie through incarceration. *See Chavez*, 134 Idaho at 312. Therefore, this disposition constitutes an abuse of discretion.

The first factor requiring sufficient consideration was the underlying issue of Mr. Gillespie's abusive childhood. *See, e.g., State v. Williamson*, 135 Idaho 618, 620 (Ct. App. 2001) (considering the defendant's abusive childhood, which served as a precursor to the abuse of various narcotic substances and the impact that played on the offense). The PSI reported that Mr. Gillespie, along with his brothers, had been sexually abused by one of his step-fathers. (PSI, p.14.) This event continues to impact Mr. Gillespie, as he scores in the moderate range of victimization. (GRRS, p.12.) He

did not seek, nor was he provided, with counseling or treatment to address the effects of this abuse. (*See* PSI, p.14.) He would also likely benefit from counseling in this regard, as it may be an underlying cause of his depression. (*See* PSI, p.17.) Therefore, as in *Williamson*, that traumatic past needed to be sufficiently considered in regard to its impact on his current struggles with alcohol. *See Williamson*, 135 Idaho at 620.

Additionally, the district court needed to sufficiently consider Mr. Gillespie's mental condition. Idaho Code § 19-2523 not only suggests, but requires, the trial court to consider a defendant's mental illness or condition as a sentencing factor. *See Hollon v. State*, 132 Idaho 573, 581 (1999). Mr. Gillespie has been diagnosed with depression, which continues to affect him. (PSI, pp.16-17.) In addition, he has been diagnosed with dyslexia. (PSI, p.16.) This condition led to his placement in a special education class beginning in second grade. (PSI, p.16.) And while he was able to complete classes through ninth grade, he still has a low reading level. (PSI, p.16.) This is important since it means that his efforts to complete rehabilitative programs might be slower than otherwise expected. It does not mean that he is unable to rehabilitate, just that it might take longer, which is another reason not to forego such opportunities because he was not perfect during his period of retained jurisdiction. Without sufficiently considering such factors, the district court's decision to relinquish jurisdiction cannot be a reasonable exercise of its discretion. *See Hollon*, 132 Idaho at 581; *Cook*, 145 Idaho at 490.

Furthermore, the district court needed to consider the efforts Mr. Gillespie made during his period of retained jurisdiction. As there were deeply embedded issues, such

as the sexual abuse issue, his struggles to fully rehabilitate are not remarkable.[12] Nonetheless, he was beginning to make progress in his rehabilitative efforts. (*See, e.g.,* PSI, pp.2-3; Discharge Summary, 2; R., pp.93-95.) Just because those efforts were not perfect is not a sufficient reason to abandon rehabilitative alternatives. *See Cook*, 145 Idaho at 489 (recognizing that sentences are to be crafted so that they do not force the prison to continue detaining a person if age or rehabilitation can or does reduce the risk of recidivism); *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988) (same). *Cook* and *Eubank* reveal that providing rehabilitative alternatives may provide more protection for society in the long term. Furthermore, the timing of that rehabilitation is an important consideration when addressing rehabilitation. *See State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971); *State v. Nice*, 103 Idaho 89, 91 (1982); *Cook,* 145 Idaho at 489; *Eubank*, 114 Idaho at 639. In this case, the decision to relinquish jurisdiction cut off a timely rehabilitation process. That process should have been given more time, not cut short, as doing so decreased the overall protection the sentence affords society, and thus, the decision fails to promote two of the recognized sentencing objective, including the paramount goal of protecting society. *See Charboneau*, 124 Idaho at 500.

Evidencing Mr. Gillespie's rehabilitative progress and ongoing rehabilitative potential, he accepted responsibility from the beginning. For example, he pled guilty at his arraignment hearing. (Tr., Vol.1, p.1, Ls.4-12.) He accepted responsibility for his actions and also offered his sincere apologies to the officers he had resisted and assaulted. (*See* R., pp.7-10; PSI, pp.3, 18.) Acknowledgment of guilt and acceptance

[12] Mr. Gillespie was only about three years old when the abuse began. (PSI, p.14.) He was thirty-seven when he was sentenced. (PSI, p.1.)

of responsibility by the defendant are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010). By making these two acknowledgements, Mr. Gillespie demonstrated that he has taken these critical first steps.

Finally, he presented substantial evidence of the support offered by his family and community. (*See, e.g.,* R., pp.93-105.) Such a support network is an important commodity which helps the rehabilitation process, and which, if present, needs to be sufficiently considered in regard to the decision to forego probation. *See Kellis*, 148 Idaho at 817 (holding that familial support offered to affirm the defendant's innocence does not equate to familial support offered in consideration of rehabilitation, implying that had the support been offered for rehabilitation, it would be a mitigating factor worthy of consideration). In particular, Mr. Gillespie has ongoing familial support, as both his brother and his mother are willing and able to provide him with a place to live. (C-Notes, p.2.) He reported that the people he socialized with regularly were all gainfully employed or attending school full time, and that none were involved in illegal activity. (GRRS, p.11.) That continuing community support needed to be sufficiently considered by the district court. *See Kellis*, 148 Idaho at 817.

A sufficient examination of all these factors reveals that such a sentence, one which considers rehabilitation, still addresses all the other objectives – protection of society, punishment, and deterrence. *See State v. Ransom*, 124 Idaho 703, 713 (1993) (requiring that alternative sentences still address all the sentencing objectives). When a sentencing court suspends a sentence and orders probation, it still imposes a sentence. Therefore, both the retributive and the deterrent effects of the imposed sentence are still present. *See State v. Crockett*, 146 Idaho 13, 14-15 (Ct. App. 2008) (discussing how a sentence for a period of probation addresses all the sentencing objectives and how the

court's continuing jurisdiction affects those objectives). In addition to restricting his liberty at the discretion of the Board of Corrections and the looming sentence, he is also deprived of several of his rights (such as the right to possess a firearm), since this is a felony offense. Furthermore, the district court retains the ability to revoke the probation and execute the original sentence if Mr. Gillespie were to fail to adhere to the terms of his probation. However, it could do so knowing that all the sentencing objectives properly addressed. What the probationary period provides that a term sentence does not is the opportunity to rehabilitate in a real-world setting, allowing him to apply the lessons he would gain in out-patient treatment in a practical setting.

As such, given a sufficient consideration of all the factors, the district court's decision to relinquish jurisdiction is revealed to be an abuse of its discretion. Therefore, this Court should provide Mr. Gillespie with an appropriate remedy, and either reduce his sentence as it deems appropriate or remand for a new determination by the district court.

D. Alternatively, The District Court Abused Its Discretion By Not Reducing Mr. Gillespie's Sentences *Sua Sponte* Pursuant To Rule 35 When It Revoked His Probation

Even if the district court did not abuse its discretion by revoking Mr. Gillespie's probation, it did abuse its discretion by not further reducing his sentence *sua sponte* pursuant to Rule 35 when it did so. When the district court decides to resume the execution of a previously-suspended sentence, as it does when it revokes probation, it also has the authority to reduce the sentence, *sua sponte*, pursuant to Rule 35. *State v. Timbana*, 145 Idaho 779, 782 (2008)

The decision to not reduce a sentence that was pronounced, but suspended, will be reversed on appeal if it constitutes an abuse of the district court's discretion.

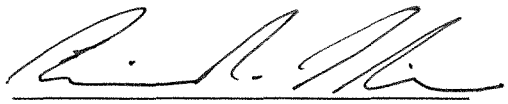
Hanington, 148 Idaho at 27. The standard of review and factors considered in such a decision are the same as those used for the initial sentencing. *Id.* (citing among others, *Toohill*, 103 Idaho at 568). Therefore, the district court needed to sufficiently consider the recognized sentencing objectives in light of the mitigating factors in the record. *See id.*; *Charboneau*, 124 Idaho at 500. A failure to do so should result in a more lenient sentence. *See, e.g., Cook*, 145 Idaho at 489-90; *Shideler*, 103 Idaho at 595.

Therefore, for all the reasons discussed in Section (B), *supra*, the district court abused its discretion by not reducing Mr. Gillespie's sentence *sua sponte*, even if only in recognition of his successful efforts on probation to that point.

CONCLUSION

Mr. Gillespie respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 20th day of August, 2012.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of August, 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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