2-19-2013

State v. Williams Appellant's Brief Dckt. 40077

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JASON LEONARD WILLIAMS, Defendant-Appellant.	NOS. 40077 & 40078 BONNEVILLE COUNTY NOS.CR 2004-20647 & CR 2004-12392 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE JON J. SHINDURLING
District Judge

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

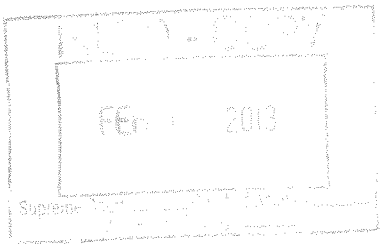
ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

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

Jeremy Williams timely appeals from the district court's order revoking probation. On appeal, Mr. Williams 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 be added to the record on appeal. Additionally, Mr. Williams argues that the district court abused its discretion when it failed to reduce his sentences *sua sponte* in both cases.

Statement of the Facts and Course of Proceedings

In docket number 40078 (*hereinafter,* First Case), Mr. Williams was charged, by Information, with burglary and aiding and abetting a grand theft. (R Vol. I, pp.20-21.) Pursuant to a plea agreement, Mr. Williams pleaded guilty to the foregoing charges and, in return, the state agreed to dismiss a charge in an unrelated matter. (R Vol. I, pp.24A-26.) On November 8, 2004, the district court imposed a unified sentence of four years, with two years fixed, for burglary and a concurrent unified sentence of eight years, with two years fixed, for aiding and abetting a grand theft. (R Vol. I, pp.56-57.) However, the district court retained jurisdiction for 180 days. (R Vol. I, pp.56-57.) Approximately, 233 days later, the district court entered an Order Returning Defendant to be placed on probation and the following day, June 30, 2005,[1] the district court entered an order suspending Mr. Williams' sentence and placing him on probation. (R Vol. I, pp.67-69.)

[1] The district court automatically lost jurisdiction in this case on May 7, 2005, and all subsequent proceedings in the First Case have been a legal nullity. *See State v. Petersen,* 149 Idaho 808 (Ct. App. 2010).

In docket number 40077 (*hereinafter,* Second Case), Mr. Williams was charged, by Information, with possession of a controlled substance. (R Vol. II, pp.133-134.) At a consolidated change of plea and sentencing hearing, Mr. Williams pleaded guilty to possession of a controlled substance. (R Vol. II, pp.137-138.) Thereafter, the district court imposed a unified sentence of five years, with two years fixed, to run concurrently with the sentence in the sentence in the First Case. (R Vol. II, pp.139-141.) The district court also retained jurisdiction. (R Vol. II, pp.139-141.) Upon review of Mr. Williams' period of retained jurisdiction (*hereinafter*, rider), the district court suspended the sentence and placed Mr. Williams' on probation. (R Vol. II, pp.139-141.)

After a period of probation, the State filed a report of probation violation in both cases alleging that Mr. Williams violated the terms of his probation. (R Vol. I, p.72; R Vol. II, p.149.) Mr. Williams admitted to violating the terms of his probation by consuming alcohol, driving without privileges, changing his residence without permission, and failing to pay for the costs of supervision. (R Vol. I, p.72; R Vol. II, p.149.)[2] The district court then continued Mr. Williams' probation in both cases. (R Vol. I, pp.79-80; R Vol. I, pp.156-157.)

After a second period of probation, the State filed a report of probation violation in both cases alleging that Mr. Williams violated the terms of his probation. (R Vol. I, pp.84; R Vol. II, p.160.) Mr. Williams admitted to violating the terms of his probation for being terminated from the Bonneville Count Drug Court due to his use of "spice" a synthetic cannabinoid.[3] The district court revoked probation in both cases and retained jurisdiction in both cases. (R Vol. I, pp.87-88; R Vol. II, pp.163-164.) Upon review of

[2]*See* Motion to Augment and Suspend the Briefing Schedule; Amended Motion to Augment.

Mr. Williams' second rider, the district court suspended his sentences and placed him on probation in both cases. (R Vol. I, pp.90-92; R Vol. II, pp.166-168.)

After a third period of probation, the State filed a report of probation violation in both cases alleging that Mr. Williams violated the terms of his probation. (R Vol. I, pp.97-98; R Vol. II, pp.172-173.) Mr. Williams admitted to violating the terms of his probation for being terminated from an aftercare program, associating with an individual who was not approved by his probation officer, and smoking spice and marijuana. (05/09/12 Tr., p.5, L.20 - p.8, L.1; 05/16/12 Tr., p.11, Ls.7-20.) Thereafter, the district court revoked probation and executed the underlying sentences in both cases. (R Vol. I, pp.103-104; R Vol. II, pp.178-179.) Mr. Williams timely appealed in both cases. (R Vol. I, pp.106-107; 181-182.)

In both cases, Mr. Williams then filed Rule 35 motions requesting leniency, which were denied by the district court.[4] (R Vol. I, pp.112-113, 117; R Vol. II, pp.187-188, 191.)

On appeal, Mr. Williams filed a motion to augment the record with various transcripts. (Motion to Augment, pp.1-4.) The State objected in part to Mr. Williams' request for the transcripts. (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.1-4.) Thereafter, the Idaho Supreme Court entered an order granting his request for various transcripts but denied his request for transcripts of the change of plea/sentencing hearing held on December 15, 2004, the admit/deny hearing held on July 16, 2008, the disposition hearing held on August 27, 2008, and the admit/deny and

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[3] *See* Motion to Augment and Suspend the Briefing Schedule; Amended Motion to Augment.

[4] Mr. Williams is not challenging the denial of his Rule 35 motions on appeal.

dispositional hearing held on August 18, 2010. (Order (*hereinafter*, Order Denying Motion to Augment), pp.1-2.)

ISSUES

1. Did the Idaho Supreme Court deny Mr. Williams due process and equal protection when it denied his Motion to Augment with transcripts necessary for review of the issues on appeal?

2. Did the district court abuse its discretion when it denied failed to reduce his sentences *sua sponte* in both cases?

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Williams Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With Transcripts Necessary For Review Of Issues On Appeal

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. Williams filed a Motion to Augment, requesting transcripts of the change of plea/sentencing hearing held on December 15, 2004, the admit/deny hearing held on July 16, 2008, the disposition hearing held on August 27, 2008, and the admit/deny and dispositional hearing held on August 18, 2010, that request was denied by the Supreme Court. On appeal, Mr. Williams is challenging the Idaho Supreme Court's denial of his request for the transcripts. Mr. Williams asserts that the requested transcripts are relevant to the issue of whether the district court abused its discretion when it failed to reduce his sentences *sua sponte* upon revoking probation because the applicable standard of review requires an appellate court to conduct an independent review of the entirety of the proceedings in order to evaluate the district court's sentencing decisions. Therefore, the Idaho Supreme Court erred in denying his request.

B. The Idaho Supreme Court, By Failing To Provide Mr. Williams 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). Const.

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 relevant transcript, the 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). Additionally, an appeal from the denial of a Rule 35 motion is an appeal of right as defined in Idaho Appellate Rule 11(9). *See State v. Fuller*, 104 Idaho 891 (Ct. App. 1983) (an order denying a motion for reduction of sentence under Rule 35 is an appealable order pursuant to I.A.R. 11(c)(6)).

The United States Supreme Court has issued a long line of opinions 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 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 [to] them without cost." *Griffin*, 351 U.S. 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. The United States Supreme Court 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.* at 257. "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. at 494. The 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 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 a review of the appellate record establishes a need for the requested transcripts it becomes the State's burden to prove that the requested transcripts 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).

If the record establishes that the requested transcripts are relevant to the issues on appeal due process and equal protection mandate that those transcripts be created at the public's expense, unless the State can prove that the requested transcripts are not relevant to the issues on appeal.

C. The Requested Transcripts Are Relevant To Mr. Williams' Appeal Because He Is Challenging The Length Of His Sentence And The Applicable Standard Of Review Requires An Appellate Court To Independently Review The Entire Record Before The District Court

The requested transcripts are necessary for review of the issue raised in this appeal because they are within an Idaho appellate court's scope of review. "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." *State v. Hanington,* 148 Idaho 26, 28 (Ct. App. 2009) (emphasis added). In other

words, an appellate court reviewing a district court's sentencing decision conducts an independent review of the entire record to determine if the record supports the district court's decisions. This standard of review is necessary in Idaho because judges are not required to state their sentencing rationale on the record. *State v. Nield*, 106 Idaho 665, 666 (1984).

The Idaho Court of Appeals recently issued an opinion in *State v. Morgan*, 153 Idaho 618 (Ct. App. 2012), which addressed the scope of review of a revocation of probation order. In that case, the defendant pleaded guilty and was placed on probation. *Id.* at 619. 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 619-620. After he completed his rider, the district court placed the defendant on probation. *Id.* at 620. The defendant subsequently 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 whether the district court abused its discretion when it revoked probation. *Id.* at 620-621. 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 621. The Court

of Appeals then clarified the scope of review for a revocation determination. Specifically it held:

> [I]n 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.

Id. (original emphasis).

Morgan is distinguishable because Morgan was challenging the order revoking probation and Mr. Williams is challenging the length of his sentence, which entails an analysis of "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."[5] *Hanington,* 148 Idaho at 28. Furthermore, whether the transcripts of the

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[5] In *Morgan*, the Court of Appeals refused to address Mr. Morgan's claim that the Idaho Supreme Court denied him due process because it does not have the power to overrule a decision by the Idaho Supreme Court. *Id.* at 621. The *Morgan* Court went on to state that it would have the authority to review a renewed motion to augment if it was filed with the Court of Appeals after the appeal was assigned to the Court of Appeals and contained information or argument which was not presented to the Idaho Supreme Court. *Id.* However, this position is untenable because the Idaho Appellate Rules require all motions to be filed directly with the Idaho Supreme Court. For example, Idaho Appellate Rule 110 states as follows:

> All motions, petitions, briefs and other appellate documents, other than the initial notice of appeal, shall be filed with the Clerk of the Supreme Court as required by the Idaho Appellate Rules with the court heading of the Supreme Court of the State of Idaho as provided by Rule 6. *There shall be no separate filings directed to or filed with the Court of Appeals.* In the event of an assignment of a case to the Court of Appeals, the title of the proceeding and the identifying number thereof shall not be changed except that the Clerk of the Supreme Court may add additional letters or other notations to the case number so as to identify the assignment of the

requested proceedings were 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. *See 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

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> case. All case files shall be maintained in the office of the Clerk of the Supreme Court.

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

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

(emphasis added). Mr. Williams is not aware of any court rule which allows a party to file a motion directly with the Court of Appeals. Idaho Appellate Rule 110 expressly prohibits such filings. Therefore, the *Morgan* Court's statement that Mr. Morgan could have filed a renewed motion to augment directly with the Court of Appeals is contrary to the Idaho Appellate Rules.

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 sentencing decision after revoking probation.

The rationale behind this position comports with the Idaho Court of Appeals reasoning in *State v. Adams*, 115 Idaho 1053, 1055-56 (Ct. App. 1989), where the Court of Appeals explained why the appellate courts should look to the entire record when reviewing the executed sentence:

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

As such, when an appellant files an appeal from a sentence ordered after the revocation of probation the applicable standard of review requires an independent and comprehensive inquiry to the events which occurred prior to, as well as, the events which occurred during the probation revocation proceedings. The basis for this standard of review is that the district court "naturally and quite properly remembers the

entire course of events and considers all relevant facts in reaching a decision." *Id.* It follows that, "[w]hen reviewing that decision, [an appellate court] should consider the same facts." *Id.* The Court of Appeals did not state that the district court must expressly reference prior proceedings at the probation disposition hearing in order for this standard of review to become applicable. To the contrary, the Court of Appeals assumed the judge will automatically consider the prejudgment events when determining what sentence should be executed after revoking probation. Whether the prior hearings were transcribed or not is irrelevant, as an appellate court will assume that the district court will remember the events from the prior proceedings when it executes a sentence after revoking probation.

In this case, the Honorable Jon J. Shindurling presided over the final disposition hearing held on May 23, 2012. (R., Vol. II, pp.175-177.) Judge Shindurling also presided over the change of plea/sentencing hearing held on December 15, 2004, the admit/deny hearing held on July 16, 2008, the disposition hearing held on August 27, 2008, and the admit/deny and dispositional hearing held on August 18, 2010, (R Vol. II, pp.137-139, 149-150, 153-155, 160-162.) As such, the *Adams* opinion indicates that an appellate court will presume Judge Shindurling relied on his memory of those proceedings when it executed Mr. Williams' sentences after revoking probation. Therefore, transcripts of those hearings will be necessary for an appellate court to review the merits of his appellate sentencing claims.

Since the requested transcripts are within the applicable standard of review, the Idaho Supreme Court's decision to deny Mr. Williams access to those transcripts constitutes a due process and equal protection violation. In *Lane v. Brown*, 372 U.S. 477 (1863), 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. Repici,* 122 Idaho 538, 541 (Ct. App. 1992); *State v. Beason,* 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko,* 108 Idaho 872, 873 (Ct. App. 1985)). If 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, then transcripts are not necessary for appellate review, even though 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. Williams fails to provide the appellate court with transcripts necessary for review of his claim, the legal presumption will apply and Mr. Williams' sentencing claims will not be addressed on their actual merits. If it is state action alone which prevents him from access to the necessary items, then such action is a violation of equal protection and due process and any such presumption should no longer apply.

Moreover, the foregoing presumption should be reversed in this case and what occurred at those hearings should be presumed to discredit the district court's final sentencing decision. When Mr. Williams was first placed on probation and given the opportunity for multiple periods of probation, the district court must have found that the circumstances were right to give him the opportunity to be a member of society. To

ignore the positive factors that were present at the previous hearings presents a negative, one-sided view of Mr. Williams. Denial of access to the requested transcripts has prevented Mr. Williams from addressing those positive factors in support of his appellate sentencing claims. In light of that denial, Mr. Williams argues that the events which occurred at the subject hearings should be presumed to invalidate the district court's final sentencing decisions in this matter.

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 necessary for a merits-based review on appeal. The requested transcripts are relevant to the issues on appeal because the applicable standard of review of an appellate sentencing claim requires the appellate court to conduct an independent review of all of the proceedings before the district court. Under this standard of review, the focus is not on the district court's express sentencing rationale; to the contrary, the question on appeal is if the record itself supports the district court's ultimate sentencing decision. As such, the decision to deny Mr. Williams' request for the transcripts will render his appeal meaningless because it will be presumed that the missing transcripts support the district court's sentencing decisions. This functions as a procedural bar to the review of Mr. Williams' appellate sentencing claims on the merits and, therefore, he should either be provided with the requested transcripts or the presumption should not be applied. Since Mr. Williams' request for those transcripts was denied, that presumption should be reversed in favor of Mr. Williams.

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

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 Court recognized a due process 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 appeal 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 factual support either in favor of any argument made or undercutting an argument. Therefore, Mr. Williams 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 sentencing determination at issue. Further, counsel is unable to advise Mr. Williams on the probable role the transcripts may play in the appeal.

Mr. Williams 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. Williams his constitutional rights to due process and equal protection which include a right to 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 Failed To Reduce Mr. Williams' Sentences, *Sua Sponte* Upon Revoking Probation

Mindful of the fact that the district court automatically lost jurisdiction in the First Case on or about May 7, 2005, Mr. Williams still asserts that the district court abused its discretion when it failed to reduce his sentences *sua sponte* upon revoking his probation.

In the Second Case, Mr. Williams asserts that, given any view of the facts, his unified sentence of five years, with two years fixed, is excessive. Due to the district court's power under I.C.R. 35 to reduce the length of the original sentence *sua sponte* upon the revocation of probation, on appeal an appellant can challenge the length of the sentence as being excessive. *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003). 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. Williams does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Williams 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.*

At the final probation disposition hearing, the State and Mr. Williams' trial counsel both told the district court that the department of probation did not recommend that the district court revoke probation. (05/23/12 Tr., p.6, L.6 - p.7, L.17.) In fact, his probation officer recommended that the district court unsatisfactorily discharge Mr. Williams from probation. (05/23/12 Tr., p.7, Ls.14-16.) Trial counsel argued that Mr. Williams has completed eight years of probation on these cases and he would "blend back into society" if he was given his regular life back. (05/23/12 Tr., p.6, Ls.17-24.) That contention is supported by the fact that at the time of the final probation violation, Mr. Williams was earning a 3.4 GPA from Stevens-Henager College and has "good support." (05/23/12 Tr., p6, Ls.23-24, p.9, Ls.3-6.)

In addition to the foregoing, there are various mitigating factors which support the conclusion that Mr. Williams' sentences are excessive. Specifically, Mr. Williams had a difficult childhood. His father was a Vietnam veteran with severe PTSD and a problem with alcohol. (2004 Presentence Investigation Report (*hereinafter,* PSI), p.7.)[6] Mr. Williams was also a ward of the State when he was either sixteen or seventeen years old. (2004 PSI, p.7.) Mr. Williams also suffers from bi-polar disorder. (2004 PSI, p.10.)

[6] The 2004 PSI was created for the First Case. However, it was used by the district court at sentencing in the Second Case. (R Vol. II, p.138.)

Additionally, Mr. Williams' positive rider performance is a mitigating factor. While on his first rider, Mr. Williams was a "motivated" participant in programming and earned a probation recommendation from the Department of Correction. (2005 Addendum to the Presentence Investigation Report (*hereinafter,* APSI), pp.4, 7.) While on his second rider, Mr. Williams did "good work" in the therapeutic community program. (2011 APSI, p.3.) In fact, Mr. Williams took "full advantage" of the therapeutic community process, which was evident by his behavior. (C-Notes Attached to the 2011 APSI, p.2.) Other inmates viewed him as a "very good role model" and the staff viewed him as a "dependable" person displaying "a real desire for recovery." (C-Notes Attached to the 2011 APSI, p.2.) Mr. Williams earned a ninety-eight-percent on a certified driver's license exam and "showed leadership" and "respect" toward his teachers assistants. (C-Notes Attached to the 2011 APSI, p.3.) He voluntarily participated in a vocational safety program, earning his Occupational Safety and Health Administration certification. (2011 APSI, p.3; C-Notes Attached to the 2011 APSI, p.4.) He earned a workforce readiness certificate and scored one hundred percent on his final exam for another employment program. (C-Notes Attached to the 2011 APSI, p.1.) On various occasions Mr. Williams would volunteer for small jobs when the opportunities arose. (C-Notes Attached to the 2011 APSI, pp.1-4.) One staff member wrote that Mr. Williams quickly volunteered "with an extremely positive attitude and without hesitation." (C-Notes Attached to the 2011 APSI, p.4.) He ultimately earned a probation recommendation from the Department of Correction after his second rider. (2011 APSI, p.4.)

Finally, Mr. Williams accepted responsibility for his behavior at the final disposition hearing. (05/23/12 Tr., p.8, L.24 - p.9, L.2.) Mr. Williams also said that despite his probation violations:

> I [continue] to move forward with my life. Even with the decisions that I make, I get back on top of it; I correct the decisions. I have had some very emotional things happen since I have been out this time that has contributed to my bad decision making. That doesn't excuse the fact, but I do keep moving forward.

(05/23/12 Tr., p.9, Ls.6-12.)

In sum, Mr. Williams made some mistakes, but he was at a point in his life that he was going to college and getting good grades. This drive to further his education is consistent with his behavior on his second rider. Mr. Williams is not the same person that was stealing from people in 2004. It appears that Mr. Williams presents a significantly lower risk to society now than he did in 2004. As such, Mr. Williams' sentences are excessively harsh.

CONCLUSION

Mr. Williams respectfully requests that this court reduce the indeterminate portions of his sentences. Alternatively, Mr. Williams respectfully requests that this court reduce his sentences as it deems appropriate.

DATED this 19th day of February, 2013.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

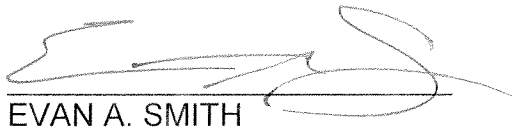
I HEREBY CERTIFY that on this 19th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JASON LEONARD WILLIAMS
INMATE #75623
BONNEVILLE COUNTY JAIL
605 N. CAPITAL AVENUE
IDAHO FALLS ID 83402

JON J SHINDURLING
DISTRICT COURT JUDGE
E-MAILED BRIEF

JAMES H BARRETT JR
BONNEVILLE COUNTY PUBLIC DEFENDERS
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

SFW/eas