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## State v. Hathaway Appellant's Brief Dckt. 40097

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 40097
	)	
v.	)	PAYETTE COUNTY NO. CR-2008-176
	)	
JEREMY HATHAWAY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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

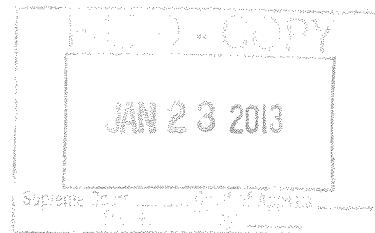
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## STATEMENT OF THE CASE

### Nature of the Case

Jeremy Hathaway timely appeals from the district court's order revoking probation. On appeal, Mr. Hathaway 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. Hathaway argues that the district court abused its discretion when it denied his oral Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion requesting leniency.

### Statement of the Facts and Course of Proceedings

Mr. Hathaway was charged with aiding and abetting burglary. (R., pp.60-61.) Pursuant to a plea agreement, he pleaded guilty to an amended charge of attempted burglary and, in return, the State agreed to dismiss a misdemeanor charge of minor in possession of alcohol. (05/06/08 Tr., p.4, L.7 - p.5, L.10; R., pp.66-74.) Thereafter, the district court imposed a unified sentence of four years, with one year and six months fixed, but suspended the sentence and placed Mr. Hathaway on probation. (R., pp.94-97.)

After a period of probation, the State filed a motion for revocation of probation. (R., pp.123-124.) Mr. Hathaway admitted to violating the terms of his probation by violating the law, changing residence without permission, submitting untruthful written reports, failing to seek employment, possessing or consuming a controlled substance, failing to submit to testing for controlled substances or alcohol, and failing to adhere to instructions provided by his probation officer. (R., pp.155-156.) Thereafter, the district court revoked probation, but retained jurisdiction. (R., pp.160-161.) Upon review of

Mr. Hathaway's period of retained jurisdiction (*hereinafter*, rider), the district court suspended the sentence and placed him on probation. (R., pp.170-172.)

After a second period of probation, the State filed a motion for revocation of probation. (R., pp.177-179.) Mr. Hathaway admitted to violating the terms of his probation by changing his residence without permission, failing to obtain employment, failing to complete treatment ordered by his probation officer, and failing to pay court ordered fees. (R., pp.180-183, 196-197.) The district court revoked probation, but then reinstated probation. (R., pp.198-199.)

After a third period of probation, the State again filed a motion for revocation of probation. (R., pp.202-203.) Mr. Hathaway admitted to violating the terms of his probation by failing to pay court ordered fees, failing to appear for a court hearing, and committing misdemeanor crimes of domestic battery and malicious injury to property. (R., pp.205-207, 222; 04/20/12 Tr., p.9, L.18 – p.10, L.6.) At the final disposition hearing, Mr. Hathaway made an oral request for a sentence reduction, which was denied by the district court. (04/20/12 Tr., p.16, Ls.16-22, p.18, Ls.3-10.) The district court then revoked probation and executed the underlying sentence. (R., pp.234-235.) Mr. Hathaway timely appealed. (R., pp.237-239.)

Mr. Hathaway filed a Rule 35 motion requesting leniency, which was denied by the district court.<sup>1</sup> (R., pp.232-233, 246-248.)

On appeal, Mr. Hathaway filed a motion to augment the record with various transcripts. (Motion to Augment, pp.1-4.) The State objected to Mr. Hathaway's request for the transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof" (*hereinafter*, Objection to Motion

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<sup>1</sup> Mr. Hathaway is not challenging the denial of his written Rule 35 motion on appeal.



to Augment), pp.1-4.) Thereafter, the Idaho Supreme Court entered an order denying his request for transcripts of the evidentiary hearing held on April 16, 2010, the disposition hearing held on May 7, 2010, and the evidentiary hearing held on November 5, 2011, and the disposition hearing held on April 15, 2011. (Order Denying Motion to Augment and to Suspend the Briefing schedule (*hereinafter*, Order Denying Motion to Augment), pp.1-2.)

## ISSUES

1. Did the Idaho Supreme Court deny Mr. Hathaway 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 Mr. Hathaway's oral Rule 35 motion requesting leniency?

## ARGUMENT

### I.

#### The Idaho Supreme Court Denied Mr. Hathaway 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. Hathaway filed a Motion to Augment, requesting transcripts of the evidentiary hearing held on April 16, 2010, the disposition hearing held on May 7, 2010, the evidentiary hearing held on November 5, 2011, and the disposition hearing held on April 15, 2011, that request was denied by the Supreme Court. On appeal, Mr. Hathaway is challenging the Idaho Supreme Court's denial of his request for the transcripts. Mr. Hathaway asserts that the requested transcripts are relevant to the issue of whether the district court abused its discretion when it denied Mr. Hathaway's oral Rule 35 motion 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 Denied Mr. Hathaway Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With Transcripts Necessary For Review Of The Issues On Appeal

1. The Idaho Supreme Court, By Failing To Provide Mr. Hathaway 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 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).

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. The requested transcripts are relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court made appropriate sentencing determinations. "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).



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. 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. Hathaway fails to provide the appellate court with transcripts necessary for review of his claim, the legal presumption will apply and Mr. Hathaway’s 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 due process, as per *Lane*, and any such presumption should no longer apply.

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 the issue of 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. Hathaway 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.”<sup>2</sup> *Hanington*, 148 Idaho at 28. Furthermore, whether the transcripts of the

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<sup>2</sup> 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 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.

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 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 rationale behind this position perfect sense in light of *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:

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(emphasis added). Mr. Hathaway 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.

[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 appellate 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.* The Court of Appeals then stated that, "When reviewing that decision, we should consider the same facts." *Id.* The Court of Appeals did not state that the district court must expressly reference the prejudgment events at the probation disposition hearing in order for this standard of review to become applicable. To the contrary, the Court of Appeals assumed the judge will automatically consider the prejudgment events when determining whether probation should be revoked. 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 ultimately revokes probation.

In this case, the Honorable Susan E. Wiebe presided over the final disposition hearing held on June 1, 2012. (R., p.235.) The Honorable Susan E. Wiebe also presided over the evidentiary hearing held on April 16, 2010, the disposition hearing held on May 7, 2010, and the evidentiary hearing held on November 5, 2011, and the disposition hearing held on April 15, 2011, the transcripts of which were requested in the Motion to Augment. (R., pp.155-156, 158-159, 168-169, 196-197.) As such, the *Adams* opinion indicates that an appellate court will presume the district court relied on its memory of those proceedings when it revoked probation. Therefore, transcripts of those hearings will be necessary for an appellate court to review the merits of his sentencing claim.

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 the denial of a Rule 35 motion 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. Hathaway's 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. Hathaway's appellate sentencing claims on the merits and, therefore, he 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. Hathaway 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 a factual support either in favor of any argument made or undercutting an argument. Therefore, Mr. Hathaway 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 deny his oral Rule 35 motion. Further, counsel is unable to advise Mr. Hathaway on the probable role the transcripts may play in the appeal.

Mr. Hathaway 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. Hathaway 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 Denied Mr. Hathaway's Oral Rule 35 Motion Requesting Leniency

Mr. Hathaway asserts that the unified sentence of four years, with one year and six months fixed, is unduly harsh when it is 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 is 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. Hathaway does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Hathaway 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).

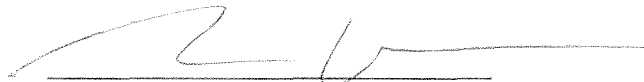
There are various mitigating factors present in this matter which support the conclusion that Mr. Hathaway’s sentence is excessive. Specifically, Mr. Hathaway earned his GED. (2008 Presentence Investigation Report (*hereinafter*, PSI), p.5.) He suffers from depression and has had suicidal ideations in the past. (2008 PSI, pp.5-6.) While on his rider, Mr. Hathaway “did very well and worked on various work crews.” (Addendum to the Presentence Investigation Report (*hereinafter*, APSI), pp.2-3.) He got along with staff and other inmates. (APSI, p.3.) “He became a positive role model and a good community member.” (APSI p.3.) Ultimately, he earned a probation recommendation from the Department of Correction. (APSI, p.3.)

In sum, the district court abused its discretion when it denied Mr. Hathaway’s oral Rule 35 motion.

CONCLUSION

Mr. Hathaway respectfully requests the requested transcripts necessary for a merits-based review of his sentencing claim be augmented into the record on appeal. In the event this request is denied, Mr. Hathaway respectfully requests that this Court reduce the fixed portion of his sentence. Alternatively, Mr. Hathaway requests that this Court reduce his sentence as it deems appropriate.

DATED this 23<sup>rd</sup> day of January, 2013.



SHAWN F. WILKERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of January, 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:

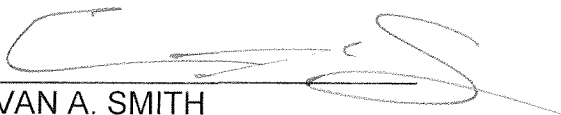
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