2-3-2014

State v. Guardiola Appellant's Brief 2 Dckt. 40780

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. CESAR GUARDIOLA, Defendant-Appellant.	NO. 40780 CANYON COUNTY NO. CR 2004-22475 REVISED APPELLANT'S BRIEF

REVISED BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

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

Statement of the Facts and Course of Proceedings

Mr. Guardiola drank three beers (Presentence Investigation Report (*hereinafter,* PSI), p.3.) He then started driving and was eating a bag of chips. (PSI, p.3.) The bag of chips fell to the floor of the car and Mr. Guardiola bent over to pick them up. (PSI, p.3.) Mr. Guardiola rear ended a car which was turning. (PSI, pp.2-3.) The police officer that initially arrived at the scene did not smell any alcohol on Mr. Guardiola's breath. (PSI, p.2.) However, Mr. Guardiola consented to a blood test which indicated that his BAC was .09. (PSI, p.2.) The victims suffered serious injuries and their medical bills totaled $18,716.35. (R., p.53; PSI, pp.1-3.)

Mr. Guardiola was charged, by information, with aggravated driving under the influence of alcohol. (R., pp.21-22.) Pursuant to a binding Rule 11 plea agreement, Mr. Guardiola pleaded guilty to aggravated battery. (R., pp.35-39.) The district court accepted the plea agreement and imposed a unified sentence of five years, with two years fixed, but suspended that sentence and placed Mr. Guardiola on probation. (R., pp.48-51.)

After a period of probation, the State filed a petition for probation violation alleging that Mr. Guardiola violated the terms of his probation. (R., pp.73-74.) Mr. Guardiola admitted to violating the terms of his probation by driving without a valid driver's license, changing his residence without permission, failing to maintain employment, failing to pay restitution, and failing to pay court ordered fees. (R., pp.75-77, 88.) The district court revoked and reinstated Mr. Guardiola's probation. (R., pp.92-93.)

After a second period of probation, the State filed a petition for probation violation alleging that Mr. Guardiola violated the terms of his probation. (R., pp.98-99.) Mr. Guardiola admitted to violating the terms of his probation by failing to submit monthly reports to his probation officer, failing to make monthly restitution payments, and failing to make monthly fee payments. (R., pp.100-101, 124-126.) The district court revoked and reinstated Mr. Guardiola's probation. (R., pp.127-132.)

After a third period of probation, the State filed a petition for probation violation alleging that Mr. Guardiola violated the terms of his probation. (R., pp.141-142.) Mr. Guardiola admitted to violating the terms of his probation for changing his residence without permission, failing to submit monthly reports to his probation officer, working out of state without permission, and failing to make restitution payments. (R., pp.143-145,174-177.) The district court revoked probation and executed the underlying sentence. (R., pp.178-180, 187-188.)

Mr. Guardiola filed a Rule 35 motion requesting leniency, which was denied by the district court. (R., pp.182-183, 203-212.) Mr. Guardiola timely appealed. (R., pp.213-215.)

On appeal, Mr. Guardiola filed a motion to augment the record with various transcripts. (Motion to Augment, pp.1-4.) The State objected in part to Mr. Guardiola'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 to Augment), pp.1-4.) Thereafter, the Idaho Supreme Court entered an order denying Mr. Guardiola's request for transcripts of the change of plea hearing held on April 4, 2005, the sentencing hearing held on June 6, 2005, the evidentiary/dispositional hearing held on May 21, 2007, the evidentiary hearing held on November 22, 2010, and the dispositional hearing held on December 15, 2010. (Order, Denying Motion to Augment and Suspend the Briefing Schedule *Without Prejudice* (*hereinafter*, Order Denying Motion to Augment), pp.1-2.)

ISSUES

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

ARGUMENT

I.

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

A. Introduction

The United States Supreme Court has repeatedly held 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 on appeal or if a sufficient substitute for the transcript exists.

In this case, the Idaho Supreme Court denied Mr. Guardiola's request for transcripts of the change of plea hearing held on April 4, 2005, the sentencing hearing held on June 6, 2005, the evidentiary/dispositional hearing held on May 21, 2007, the evidentiary hearing held on November 22, 2010, and the dispositional hearing held on December 15, 2010. (Order Denying Motion to Augment), pp.1-2.) On appeal, Mr. Guardiola is challenging the Idaho Supreme Court's denial of his request for transcripts of the sentencing hearing held on June 6, 2005, the evidentiary/dispositional hearing held on May 21, 2007, and the dispositional hearing held on December 15, 2010.[1] Mr. Guardiola asserts that the requested transcripts are relevant to the issue of

[1] Judge Dennis E. Goff presided over the change of plea hearing held on April 4, 2005, and the evidentiary hearing held on November 22, 2010 (R., pp.35, 124.) However, Judge Juneal C. Kerrick presided over all of the other hearings in this matter and entered the order being challenged on this appeal. As such, Mr. Guardiola is not

whether the district court abused its discretion when denied his 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, By Failing To Provide Mr. Guardiola With Access To The Requested Transcripts, Has Denied Him Due Process And Equal Protection Because He Cannot Obtain A Merits 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. Sec. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). The Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a relevant

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challenging the denial of his request for change of plea hearing held on April 4, 2005, and the evidentiary hearing held on November 22, 2010, on appeal.

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 an Idaho Criminal Rule 35(b) motion is an appeal as of right as defined by Idaho Appellate Rule 11(c)(9). *See State v. Fuller*, 104 Idaho 891 (Ct. App. 1983) (holding an order denying a motion for reduction of sentence under Rule 35 is an appealable order pursuant to then I.A.R. 11(c)(6)).

The United States Supreme Court has issued a long line of opinions directly addressing 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 material 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 and 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 equal footing 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 the 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 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 accurate, 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 the defendant's indigency. The United States Supreme Court held 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 whether 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*, 327 U.S. at 494. The Court first expanded upon its holding 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 funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised on

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 held "where the grounds of appeal . . . make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds. *Id* at 195.

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardner 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. Guardiola's 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. "In

examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing . . . . " *State v. Pierce*, 150 Idaho 1, 5 (2010); *see also State v. Hanington*, 148 Idaho 26, 28 (Ct. App. 2009); *State v. Arazia*, 109 Idaho 188, 189 (Ct. App. 1985) ("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."). 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 sentencing decisions.

In this case, Judge Kerrick denied the Rule 35 motion being challenged on appeal. (R., pp.203-211.) Judge Kerrick also presided over the sentencing hearing held on June 6, 2005, the evidentiary/dispositional hearing held on May 21, 2007, and the dispositional hearing held on December 15, 2010. (R., pp.40, 87, 127.) Since *Hanington*, *supra*, indicates that an appellate court will review the entire record before the district court and the *Adams* Opinion, *infra*, indicates that an appellate court will presume Judge Kerrick relied on her memory of those proceedings when she denied Mr. Guardiola's Rule 35 motion, the transcripts of those hearings will be necessary for an appellate court to review the merits of his appellate sentencing claim.

The Idaho Supreme Court issued an opinion in *State v. Brunet*, 2013 Opinion No.108 (November 13, 2013) (petition for rehearing pending), which addressed the scope of review of an appeal filed from an order revoking probation, wherein the appellant argued that his sentence was excessively harsh. In that case, the Idaho Supreme Court determined that the defendant had not demonstrated a colorable need

for the requested transcripts, and so, held there was no violation of the defendant's rights by denying him copies of the transcripts. *Brunet*, 2013 Opinion No.108, pp.4-6. However, the Court did not change any of the pre-existing standards governing what transcripts are necessary for appellate review. *See generally id.* In fact, it reaffirmed the standard discussed in *Pierce* – that where the length of the sentence is at issue, the appellate court will conduct an independent review of the entire record available to the district court. *Id.* at 5. At best, the *Brunet* Opinion provides no guidance for determining whether requested transcripts are necessary to address merits of sentencing related issues. At worst, *Brunet* contravenes United States Supreme Court authority and the Fourteenth Amendment.

The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, 153 Idaho 618 (Ct. App. 2012), which addressed the scope of review of an appeal filed from an order revoking probation. 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. 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 620-21. 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) (citation omitted). This case has provided no more guidance than *Brunet* because it also holds that all the information known to the district court is relevant, but failed to provide and explanation of the circumstances under which transcripts of the prior proceedings will or will not be necessary to address sentencing issues on appeal.

The instant case is distinguishable because *Morgan* only addressed the order revoking probation, and here Mr. Guardiola 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."[2] *Hanington*, 148 Idaho at 28. Furthermore, whether the transcripts of the

[2] In *Morgan*, the Court of Appeals refused to address Mr. Morgan's claim that the Idaho Supreme Court denied him due process on the basis that 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

requested proceedings were before the district court at the time of the district court denied Mr. Guardiola's Rule 35 motion is not germane to the question of 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 was filed. Rather, the 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 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 its judicial district and the

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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 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). 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. Mr. Guardiola recognizes that the Idaho Court of Appeals has recently rejected virtually identical arguments in *State v. Cornelison*, 2013 Published Opinion 22 (Ct. App. April 11, 2013). However, Mr. Guardiola disagrees with the holding in that case.

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 denied Mr. Guardiola's Rule 35 motion.

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 the denial of a Rule 35 motion after a period of probation, the applicable standard of review requires an independent and comprehensive inquiry into 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 hold 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 presumed the judge would automatically consider 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 presume that the district court will remember and consider the events from the prior proceedings when it makes sentencing determination after revoking probation.

Since the requested transcripts are within the applicable standard of review, the Idaho Supreme court's decision to deny Mr. Guardiola access to those transcripts constitutes a due process and equal protection violation. In *Lane v. Brown*, 372 U.S. 477 (1963), 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); *see also State v. Beason*, 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko*, 108 Idaho 872, 873 (Ct. App. 1985). If the transcripts are missing, but the record contains court

minutes that may be sufficient so that a meaningful review of an appellant's claim is possible, then the transcripts are not necessary for review even though the Court of Appeals has "strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide . . . [a] record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). If Mr. Guardiola fails to provide the appellate court with transcripts necessary for review of his claim, the legal presumption will apply and Mr. Guardiola's sentencing claims will not be addressed on their actual merits. If it is state action, combined with Mr. Guardiola's indigency, which prevents him from access to the necessary transcripts, then such action is a violation of the equal protection and due process clauses and any such presumption should no longer apply.

Moreover, and in light of the denial of the transcripts, 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. Guardiola was first given the opportunity of multiple periods of probation, the district court must have found that the circumstances were right to give him an 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. Guardiola. Denial of access to the requested transcripts has prevented Mr. Guardiola from addressing those positive factors in support of his appellate sentencing claims. In light of that denial, Mr. Guardiola 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 an indigent defendant transcripts necessary for a merits-based review on appeal. In this case, the requested transcripts are

necessary to address 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 entirely on the district court's express sentencing rationale[3]; to the contrary, the question on appeal is whether the record itself supports the district court's ultimate sentencing decision.

D. The Idaho Supreme Court, By Failing To Provide Mr. Guardiola 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 held that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants 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.

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[3] Both the United States Supreme Court and the Idaho Supreme Court have consistently held that due process requires trial courts to expressly articulate, on the record, their rationale for revoking probation in order to facilitate an effective merits based review of those decisions. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also State v. Chapman*, 111 Idaho 152 (1986), *supra.*

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 supports 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 to be made or undercutting an argument. Therefore, Mr. Guardiola has not obtained review of the court proceeding 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's "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 substance.

Standards 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. Guardiola on the probable role the transcripts may play in the appeal.

Mr. Guardiola is entitled to effective assistance of counsel in this appeal, and effective counsel cannot be given in the absence of access to the relevant transcripts. Therefore, the Idaho Supreme Court has denied Mr. Guardiola 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 or arguments which arise as a result of that review.

II.

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

A. The Doctrine Of Invited Error Does Not Preclude Mr. Guardiola From Challenging The Denial Of His Rule 35 Motion On Appeal

Mr. Guardiola recognizes that he entered into a binding Rule 11 agreement and stipulated to the length of his sentence when it was originally imposed. (R., pp.35-39, 48-51.) The doctrine of invited error generally precludes a party from requesting a specific ruling from a trial court and then challenging that ruling on appeal. *State v. Carlson*, 134 Idaho 389, 402 (Ct. App. 2000). Despite the doctrine of invited error, the Idaho Court of Appeals has held that a defendant can obtain a sentence reduction pursuant to a Rule 35 motion after a stipulated sentence has been imposed. *State v. Person*, 145 Idaho 293, 299 (Ct. App. 2007). In order to obtain a sentence reduction after the imposition of a stipulated sentence:

> [A] defendant requesting reduction of a stipulated sentence must show that his motion is based upon unforeseen events that occurred after entry of his guilty plea or new information that was not available and could not, by reasonable diligence, have been obtained by the defendant before he pled guilty pursuant to the agreement. The defendant must also show that these unanticipated developments are of such consequence as to render the agreed sentence plainly unjust.

Id. (citations omitted).

As such, the doctrine of invited error does not preclude a defendant from filing a Rule 35 motion requesting leniency after receiving a stipulated sentence, so long as the defendant provides new information, the consequences of which render the agreed sentence plainly unjust. Mr. Guardiola argues that the new information provided in Section II(B), *infra*, meets the foregoing standard.

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

Mr. Guardiola asserts that the unified sentence of five years, with two years 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.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *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. Guardiola does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Guardiola 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).

Mr. Guardiola provided new information in support of his Rule 35 motion. Specifically, Mr. Guardiola was diagnosed with a heart condition called Wolff–Parkinson–White syndrome, which results in a disruption of the electrical currents in the heart. (R., pp.195-202.) Mr. Guardiola argued that his sentence should be reduced so that he might have access to medical treatment for his condition in the community. (R., p.210.) This is a serious condition and complications with medical treatments could result in the need of a pacemaker or possibly death. (R., p.202.) As such, Mr. Guardiola presented new information in support of his Rule 35 motion.

There are additional mitigating factors which support the conclusion that Mr. Guardiola's sentence is excessively harsh. Specifically, Mr. Guardiola's family support is a mitigating factor. Mr. Guardiola has a good relationship with his mother and with his five siblings. (PSI, p.6.) At the time of sentencing, Mr. Guardiola had a stable relationship with his wife and children. (Alcohol-Drug Evaluation Report attached to PSI, p.1.)

Additionally, Mr. Guardiola's employment history is mitigating. Mr. Guardiola earned his GED. (PSI, p.8.) Prior to sentencing, Mr. Guardiola had a steady employment history. (PSI, pp.8-9.) Mr. Guardiola maintained employment with the same employer for approximately nine years. (Alcohol-Drug Evaluation Report attached to PSI, p.4.) Prior to sentencing, Mr. Guardiola did not have any financial problems. (Alcohol-Drug Evaluation Report attached to PSI, p.4.) While on his most recent period of probation, Mr. Guardiola lost an employment opportunity in Idaho so he got a job in Utah. (11/19/12 Tr., p.4, Ls.4-8.) Mr. Guardiola then had a heart attack which has caused him long term health problems. (11/19/12 Tr., p.4, LS.9-12.) While he was in custody for his most recent probation violations he continued to work and completed the sheriff's programming twice. (11/19/12 Tr., p.6, Ls.14-19.)

Prior to sentencing, Mr. Guardiola participated in a substance addiction evaluation which concluded that he was not addicted to alcohol. (Alcohol-Drug Evaluation Report attached to PSI, p.1.) In fact, the original presentence investigator recommended probation. (PSI, p.11.)

In sum, when Mr. Guardiola's new medical condition is considered in light of the other mitigating factors present in this matter, it supports the conclusion that Mr. Guardiola's sentence is excessively harsh.

CONCLUSION

Mr. Guardiola respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues or arguments which arise as a result of that review. In the event this request is denied, Mr. Guardiola requests that the fixed portion of his sentence be reduced. Alternatively, Mr. Guardiola respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 17th day of January, 2014.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of January, 2014, 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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