

2-4-2014

## State v. Burnet Respondent's Brief 1 Dckt. 40840

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,	)	
	)	No. 40840
Plaintiff-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CR-2009-2942
	)	
JAY MORRIS BURNET,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

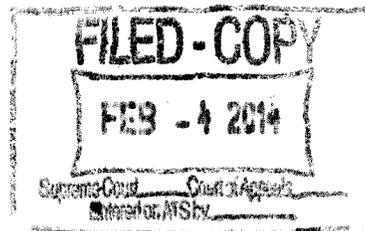
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case .....	1
Statement Of Facts And Course Of Proceedings .....	1
ISSUE .....	3
ARGUMENT .....	4
Burnet Has Failed To Present A Justiciable Claim To This Court For Review .....	4
CONCLUSION .....	5
CERTIFICATE OF SERVICE.....	5

TABLE OF AUTHORITIES

CASES

PAGE

State v. Pedraza, 101 Idaho 440, 614 P.2d 980 (1980).....4

## STATEMENT OF THE CASE

### Nature Of The Case

Jay Morris Burnet appeals from the trial court's modification of his sentence following the revocation of Burnet's probation. Specifically, Burnet contends the district court abused its discretion by increasing his sentence.

### Statement Of Facts And Course Of Proceedings

As part of a global resolution of multiple charges against him, Burnet pled guilty in 2009 to eluding a police officer. The court sentenced Burnet to a unified five year sentence with all five years fixed, to be served consecutively to his other sentences. (R., p.87.) In 2011, Burnet pled guilty to a new charge and entered admissions to probation violations. (R., pp.143-145.) The court sentenced Burnet, including a modification of his previous eluding charge from a "fixed" sentence of "FIVE (5) years followed by an indeterminate term of ZERO (0) years" to a "fixed sentence of FOUR (4) years fixed and an indeterminate sentence of ONE (1) year INDETERMINATE." (R., p.146 (emphasis original).) As in his original judgment, the eluding sentence was consecutive to the previously entered sentences. (Id.)

An amended judgment and sentence and notice of right to appeal was entered by the trial court in response to a post-conviction action alleging ineffective assistance of counsel for failure to file an appeal. (R., pp.152-157.) That amended judgment contained the same language as the original regarding

the modification of Burnet's sentence for eluding a police officer. (R., p.155.)

Burnet timely appealed from the amended judgment. (R., pp.158-159.)

## ISSUE

Burnet states the issue on appeal as:

Whether the district court abused its discretion when it increased Mr. Burnet's term of imprisonment when it revoked his probation?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Is Burnet's claim of error based on a misreading of the record?

## ARGUMENT

### Burnet Has Failed To Present A Justiciable Claim To This Court For Review

Burnet asserts on appeal the district court abused its discretion by “increas(ing) the term of imprisonment upon revocation of probation.” (Appellant’s brief, p.6.) This increase, Burnet claims, was a result of the modification of his sentence for eluding a police officer where the court “increased the fixed portion of Mr. Burnet’s unified five-year sentence in the 2009 case from zero years to four years when it revoked his probation.” (Appellant’s brief, p.5.) Burnet cites to the record as supporting his assertion that his original sentence was “imposed as a unified term of five years, *with zero years fixed.*” (Appellant’s brief, p.6 (emphasis original) (citing to R., p.87).) Although an increase in sentence upon the revocation of probation would have been error, see State v. Pedraza, 101 Idaho 440, 442, 614 P.2d 980, 983 (1980) (“when a trial court has initially sentenced a criminal defendant to a definite term of imprisonment, but has suspended the sentenced and granted probation, it may not later upon revocation of probation set aside that sentence and increase the term of imprisonment”), no such increase occurred in this case. Burnet has simply misread the record.

Upon his plea of guilty to eluding a police officer Burnet was originally sentenced to a unified five year sentence with all five years fixed, to be served consecutively to his other sentences. (R., p.87.) Upon revocation of his probation, the court modified Burnet’s sentence for the eluding charge from a “fixed” sentence of “FIVE (5) years followed by an indeterminate term of ZERO

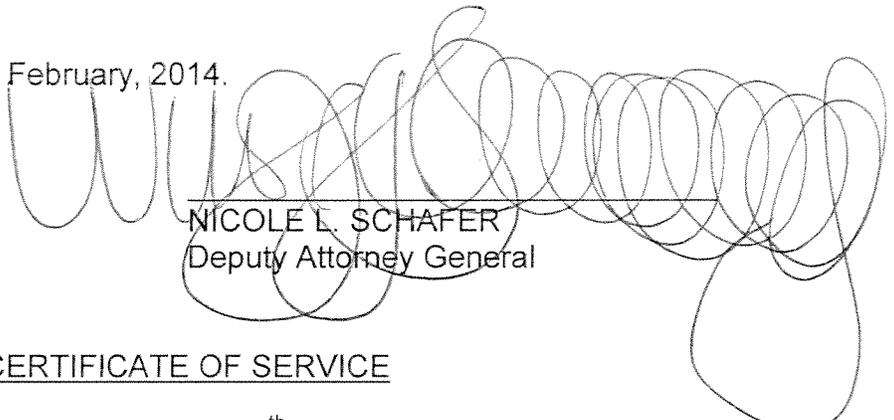
(0) years)” to a “fixed sentence of FOUR (4) years fixed and an indeterminate sentence of ONE (1) year INDETERMINATE.” (R., p.146 (emphasis original).) As in his original judgment, the eluding sentence was consecutive to the previously entered sentences. (Id.) The record clearly establishes the court *reduced*, rather than increased, the sentence.

The issue presented by Burnet on appeal is based on a misreading of the record. Burnet has therefore filed to show error.

CONCLUSION

The state respectfully requests this Court affirm the amended judgment.

Dated this 4<sup>th</sup> day of February, 2014.



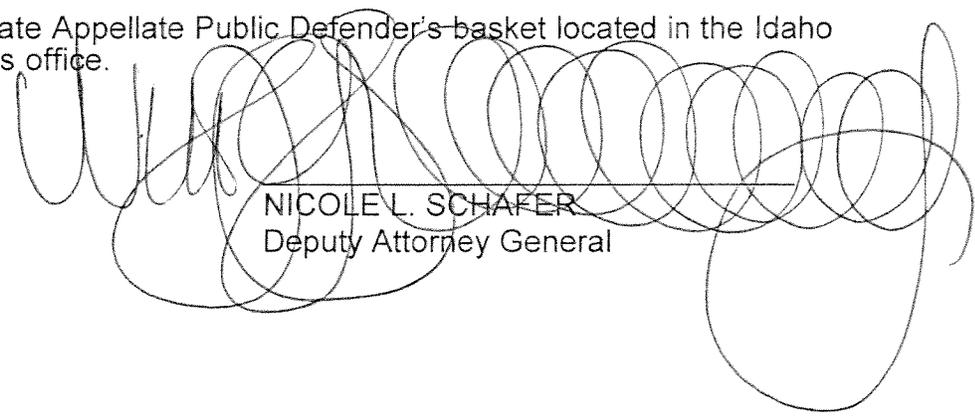
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4<sup>th</sup> day of February, 2014 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

BRAN R. DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm