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# State v. Stephenson Respondent's Brief Dckt. 42998

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 DWANE ROBERT STEPHENSON, )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

No. 42998  
Gooding Co. Case No.  
CR-2003-619

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**BRIEF OF RESPONDENT**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF GOODING**

\_\_\_\_\_  
**HONORABLE JOHN K. BUTLER**  
District Judge  
\_\_\_\_\_

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**DEC 22 2015**  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
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## STATEMENT OF THE CASE

### Nature of the Case

Dwane Robert Stephenson appeals from the district court's order denying his I.C.R. 35(a) motion to correct an illegal sentence.

### Statement of Facts and Course of Proceedings

Stephenson pled guilty to burglary for which the court imposed a 10-year fixed sentence. State v. Stephenson, 2007 Unpublished Opinion No. 346, Docket No. 32764 (Idaho App., February 7, 2007). The Idaho Court of Appeals affirmed Stephenson's sentence. Id.

In 2015, Stephenson filed a *pro se* I.C.R. 35(a) motion to correct an illegal sentence. (R., pp.11-18.) Stephenson asserted that the district court violated his double jeopardy rights by punishing him twice for a single offense because he had been convicted, in a separate case, of a grand theft for the items stolen in the burglary case. (Id.) The district court denied Stephenson's motion, concluding Stephenson failed to demonstrate a double jeopardy violation from the face of the record. (R., p.20.) Stephenson timely appealed. (R., pp.23-25.)

## ISSUE

Stephenson states the issue on appeal as:

Did the district court err in denying Mr. Stephenson's motion to correct an illegal sentence?

(Appellant's brief, p.8.)

The state rephrases the issue on appeal as:

Has Stephenson failed to show that the district court erred in denying his I.C.R. 35(a) motion to correct an illegal sentence?

## ARGUMENT

### Stephenson Has Failed To Show That The District Court Erred In Denying His I.C.R. 35(a) Motion To Correct An Illegal Sentence

#### A. Introduction

Stephenson contends that the district court erred by denying his I.C.R. 35(a) motion to correct an illegal sentence. (See generally Appellant's brief.) Stephenson concedes not only that his claimed double jeopardy violation is not clear from the record, but that "under neither the statutory theory, nor the pleading theory, is theft an included offense of burglary." (Appellant's brief, p.9.) Nevertheless, Stephenson contends that his conviction and sentence for burglary were illegal because "he was previously convicted and punished for essentially the same offense in [a grand theft case]." (Appellant's brief, pp.9-10.) Stephenson's contention fails because he cannot demonstrate a double jeopardy violation from the face of the record, and because I.C.R. 35(a) did not permit the district court to revisit the factual basis underlying the offense to determine whether Stephenson was punished twice for the same conduct.

#### B. Standard Of Review

Whether a sentence is illegal is a question of law that is freely reviewed by the court on appeal. State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009).

C. The District Court Properly Denied Stephenson's I.C.R. 35(a) Motion To Correct An Illegal Sentence

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. This clause protects a defendant against multiple criminal punishments for the same offense. Schiro v. Farley, 510 U.S. 222, 229 (1994); State v. McKeeth, 136 Idaho 619, 622, 38 P.3d 1275, 1278 (Ct. App. 2001).

Idaho Criminal Rule 35(a) allows the trial court to correct a sentence that is “illegal from the face of the record at any time.” Therefore, a double jeopardy claim asserting that a court imposed multiple punishments for the same offense may be raised in an I.C.R. 35(a) motion when the double jeopardy violation is apparent from “the face of the record.” State v. McKinney, 153 Idaho 837, 841, 291 P.3d 1036, 1040 (2013).

However, it does not follow that *any* double jeopardy claim may be raised in an I.C.R. 35(a) motion. Where a double jeopardy challenge raised pursuant to I.C.R. 35(a) requires a district court to revisit the factual basis underlying the offense, relief is precluded by the language of I.C.R. 35(a). In Clements, 148 Idaho at 84-87, 218 P.3d at 1145-1148, the Idaho Supreme Court explained:

Therefore, the term “illegal sentence” under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing. This interpretation is harmonious with current Idaho law. As this Court recently noted in State v. Farwell, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007), Rule 35 is a “narrow rule.” Because an illegal sentence may be corrected at any time, the authority conferred by Rule 35 should be limited to uphold the finality of judgments. Rule 35 is not a vehicle designed



to reexamine the facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence was excessive. See *State v. Arthur*, 145 Idaho 219, 223, 177 P.3d 966, 970 (2008).

In this case, as the district court correctly concluded, no double jeopardy violation is apparent from the face of the record. Stephenson concedes as much,

acknowledg[ing] that the claimed double jeopardy violation is not apparent from the face of the record, as is required under the plain language of Rule 35(a) and the Supreme Court's precedent in cases such as *Clements* and *McKinney* because the record in this Gooding County case contains sparse evidence of the facts and circumstances of his theft conviction in the Twin Falls County case and because any comparison of the Twin Falls County case to this case to determine whether, factually, they constitute the same offense necessarily involves significant questions of fact.

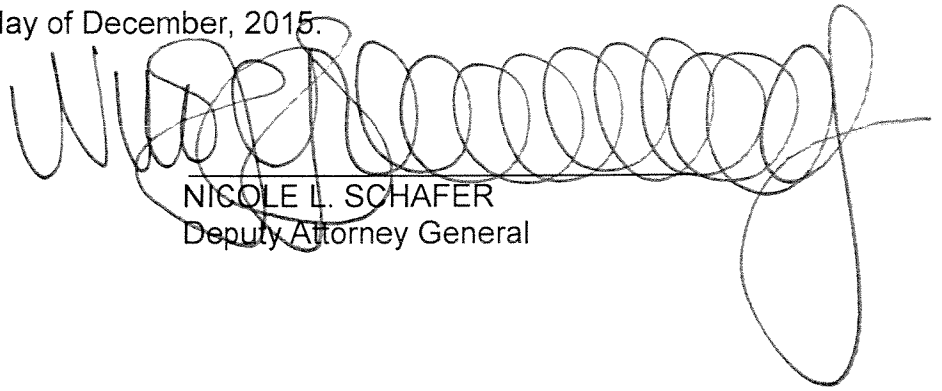
(Appellant's brief, p.9.) Additionally, as Stephenson also concedes, theft is not an included offense of burglary. (Appellant's brief, p.9 (citing *State v. Martin*, 104 Idaho 195, 196-197, 657 P.2d 492, 493-494, n.2 (Ct. App. 1983).)

Stephenson has failed to demonstrate a double jeopardy violation from the face of the record. This Court should therefore affirm the district court's denial of Stephenson's I.C.R. 35(a) motion to correct an illegal sentence.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Stephenson's I.C.R. 35(a) motion to correct an illegal sentence.

DATED this 22nd day of December, 2015.



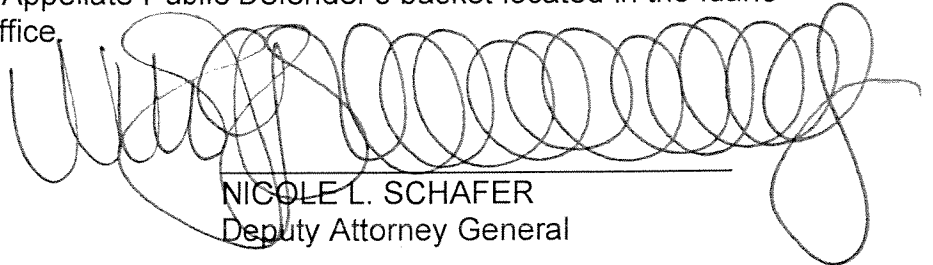
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of December, 2015, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK R. LEHTINEN  
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/dd