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# State v. Moore Appellant's Brief Dckt. 36578

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 WALTER E. MOORE, )  
 )  
 Defendant-Appellant. )

NO. 36578

APPELLANT'S BRIEF

COPY

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**BRIEF OF APPELLANT**

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

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HONORABLE JOHN P. LUSTER  
District Judge

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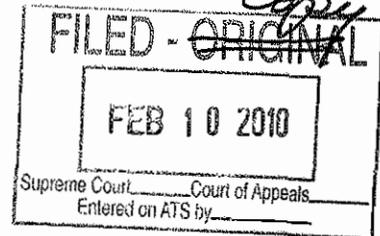
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## STATEMENT OF THE CASE

### Nature of the Case

Walter Moore respectfully requests that the Idaho Supreme Court retain this case to clarify or overrule *State v. Person*, 145 Idaho 293, 178 P.3d 658 (Ct. App. 2008).<sup>1</sup> The instant case is before the Court on appeal after Walter Moore obtained *Estrada*<sup>2</sup> relief from his post-conviction action and was resentenced by the district court. The district court imposed a unified sentence of life, with thirteen years fixed, upon Mr. Moore's plea of guilty to lewd conduct with a minor under sixteen. On appeal, Mr. Moore asserts that the district court abused its discretion in denying his request to have the district court remove his 2003 Presentence Investigation Report (*hereinafter*, PSI) and attached Psychosexual Evaluation from the possession of the Idaho Department of Corrections (*hereinafter*, IDOC) to prevent its further use by the parole board in determining whether Mr. Moore will be paroled at the conclusion of the fixed portion of his sentence. Additionally, Mr. Moore asserts that the district court abused its discretion by imposing an excessive sentence upon him in light of the mitigating factors present in his case.

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<sup>1</sup> As is set forth in detail below, to the extent Mr. Moore's argument is in conflict with *Person*, such that a defendant can never challenge the contents of a PSI if not objected to at the time of the original sentencing hearing, *Person* should be overruled or clarified as it is in conflicts with both *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007) and *State v. Rodriguez*, 132 Idaho 261, 971 P.2d 327 (1998). Moreover, overruling or clarifying *Person* is necessary because a broad interpretation of *Person* is manifestly wrong and unjust.

<sup>2</sup> *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007).

## Statement of the Facts and Course of Proceedings

In April of 2003, Mr. Moore was charged with lewd conduct with a minor under sixteen. (R., pp.22-23.) Mr. Moore entered a plea of guilty to the aforementioned charge, with the State agreeing to recommend a unified sentence of life, with fifteen years fixed, and not prosecute him for other alleged conduct. (R., p.28-30.) After accepting Mr. Moore's plea of guilty to lewd conduct with a minor under sixteen, the district court imposed a unified sentence of life, with fifteen years fixed, upon him. (R., pp.53-56.) Mr. Moore filed a timely Notice of Appeal from the district court's Order of Judgment and Conviction. (R., pp.57-59.) Mr. Moore's conviction and sentence were affirmed on appeal. *See State v. Moore*, 2004 Unpublished Opinion 477 (Ct. App. May 24, 2004)<sup>3</sup>

In June of 2008, the district court granted Mr. Moore's Petition For Post Conviction Relief (*hereinafter*, Petition) pursuant to *Estrada*, ordering that Mr. Moore be resentenced. (R., pp.70-71.) The newly assigned district court judge entered an Order for New Presentence Investigation; Psychosexual Evaluation. (R., pp.74-75.) Prior to resentencing, defense counsel for Mr. Moore filed a Motion for Removal of Prior Presentence Investigation from IDOC and Court Records. (R., pp.102-103.) At the hearing on Mr. Moore's motion, defense counsel argued, in part, that the prior PSI, attached to which is the prior psychosexual evaluation, should be removed from IDOC so the parole board cannot use it in evaluating Mr. Moore's parole possibility at the conclusion of his fixed sentence. (Tr., p.10, Ls.15-22.) The State indicated that it had no objection to removing the 2003 PSI report from possession of the IDOC. (Tr., p.24,

L.24 – p.11, L.23.) The district court denied Mr. Moore’s motion to remove the 2003 PSI from the IDOC based on its belief that it did not have the authority to do so. (Tr., p.12, L.2 – p.13, L.19.)

Mr. Moore then proceeded to sentencing and the district court imposed a unified sentence of life, with thirteen years fixed, upon him. (R., pp.116-118.) Mr. Moore filed a Notice of Appeal timely from the district court’s Amended Judgment and Sentence. (R., pp.119-123.) Mr. Moore then filed an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for a reduction in sentence, which was denied by the district court.<sup>4</sup> (Augmentation)<sup>5</sup>

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<sup>3</sup> Mr. Moore has filed a motion requesting that this Court take judicial notice of its file in *State v. Moore*, S.C. Docket No. 30096 contemporaneously with this brief.

<sup>4</sup> Because Mr. Moore did not support his Rule 35 motion with new information, that issue is not raised on appeal. See *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007).

## ISSUES

- 1) Did the district court err by denying Mr. Moore's motion to remove the 2003 PSI from the possession of the IDOC?
  
- 2) Did the district court abuse its discretion by imposing a unified sentence of life, with thirteen years fixed, upon Mr. Moore, following his plea of guilty to lewd conduct with a minor under sixteen, in light of the mitigating factors present in his case?

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<sup>5</sup> Mr. Moore's Rule 35 motion, his affidavit in support, and the district court's denial is attached to a Motion to Augment filed contemporaneously with this brief and is cited herein as "Augmentation."

## ARGUMENT

### I.

#### The District Court Abused Its Discretion By Denying Mr. Moore's Motion To Remove His 2003 PSI From The IDOC Because The District Court Failed To Recognize It Had Discretion To Require The IDOC To Relinquish Possession Of The PSI

##### A. Introduction

The district court erred by denying Mr. Moore's motion to remove his 2003 PSI and the attached psychosexual evaluation from the IDOC. The district court abused its discretion because it failed to recognize that it had any discretion to remove the report from the IDOC. Mr. Moore requests that this matter be remanded to the district court with instructions that the IDOC return Mr. Moore's 2003 PSI to the district court.

##### B. The District Court Failed To Recognize It Had The Discretion To Require That The IDOC Return Mr. Moore's 2003 PSI To The District Court To Be Sealed Or Destroyed

Mr. Moore asserts the district court erred in denying his motion for removal of his 2003 PSI from the IDOC. The district court has the discretion to require that the IDOC return Mr. Moore's 2003 PSI. Therefore, Mr. Moore requests his case be remanded to the district court with instructions that the 2003 PSI in possession of the IDOC be returned to the district court to be sealed or destroyed.

In its oral decision on Mr. Moore's Motion for Removal of Prior Presentence Investigation from IDOC and Court Records, the district court stated, "I don't think I can order the Department of Corrections to do anything with the information that they already have. I'm not even sure I have the jurisdiction at this point in time to interfere with that." (Tr., p.12, Ls.20-24.) The district court then stated that it was denying that

portion of Mr. Moore's motion to require the IDOC to return the 2003 PSI report to the district court. (Tr., p.13, Ls.1-19.)

When an exercise of discretion is reviewed on appeal, the appellate court conducts a three part multi-tiered inquiry. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). First the district court must rightly perceive the issue as one of discretion. *Id.* Second, the district court must act within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices. *Id.* Finally, the district court must reach its decision by an exercise of reason. *Id.*

At issue in this case is the district court's failure to recognize it had the discretion to remedy the issue. Under Idaho Criminal Rule (I.C.R.) Rule 32(h) the district court is ultimately responsible for maintaining the PSI. Rule 32(h)(1) provides:

Any presentence report shall be available for the purpose of assisting a sentencing court. After use in the sentencing procedure, the presentence report shall be sealed by court order, and thereafter cannot be opened without a court order authorizing release of the report or parts thereof to a specific agency or individual. Provided, the presentence report shall be available to the Idaho Department of Corrections so long as the defendant is committed to or supervised by the Department, and may be retained by the Department for three years after the defendant is discharged. The pre-sentence investigator's own copy of the presentence report similarly is restricted from use by all but authorized court personnel. Neither the defendant, defendant's counsel, the prosecuting attorney nor any person authorized by the sentencing court to receive a copy of the presentence report shall release to any other person or agency the report itself or any information contained therein, except as provided in Article 1, Section 22(9) of the Idaho Constitution. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.

I.C.R. 32(h)(i) (emphasis added).

Pursuant to this Rule, the district court maintains the sealed copy. The Department of Correction is only authorized to keep the document for three years after the defendant is released from its custody. The Department of Correction's

maintenance of the document is only temporarily and not like the district court's requirement that it keep the document under seal as part of the criminal file. The PSI does not belong to the Department of Correction, but instead it belongs to the district court. The Department of Correction is only entitled to limited possession of the PSI. Only the district court had the authority to correct and maintain the PSI. The PSI is only made "available" to the Department of Correction for a limited period of time. The PSI does not belong to the Department of Correct but instead to the district court. The Department of Correction's ability to use the PSI flows from the district court's control over the report.

The Idaho Court of Appeals has recognized that the negative impact of including improper information in a defendant's PSI is not limited to sentencing issues.

The use of a PSI does not end with the defendant's sentencing. The report goes to the Department of Corrections and may be considered by the Commission of Pardons and Parole in evaluating the defendant's suitability for parole. See I.C.R. 32(h). In addition, if the defendant reoffends, any prior PSI is usually presented to the sentencing court with an update report from the presentence investigator. Thus, a PSI follows a defendant indefinitely, and information inappropriately included therein may prejudice the defendant even if the initial sentencing court disregarded such information.

*State v. Rodriguez*, 132 Idaho 261, 262, n.1, 971 P.2d 327, 328, n.1 (1998).

In *Rodriguez*, the district court partially granted the defendant's motion to strike portions of inadmissible information contained within the PSI report. *Id.* at 262, 971 P.2d at 328. The Court of Appeals held that the district court didn't abuse its discretion declining to strike additional information that was properly contained in the PSI report. *Id.* at 264, 971 P.2d at 330.

Recently, in *Person*, the Idaho Court of Appeals had the opportunity to address a similar argument. In *Person*, the defendant, Person was convicted of second degree murder and on direct appeal successfully argued that his *Miranda*<sup>6</sup> rights were violated during a police interrogation of him. *Id.* at 295, 178 P.3d at 660. The Idaho Court of Appeals suppressed portions of Person's statements made to detectives and remanded his case to the district court. *Id.* On remand, Person entered a binding Idaho Criminal Rule 11 plea agreement, wherein the State stipulated to the sentence to be imposed upon Person. *Id.* As part of the agreement, Person "waived presentence investigation" and requested that his sentence be immediately imposed. *Id.* The district court accepted the agreement and imposed the stipulated sentence. *Id.* After the district court imposed the new sentence, Mr. Person filed a "Motion to Correct Clerical Mistakes by Retracting 2003 PSI Pursuant to I.C.R. 36 and I.C.R. 32," wherein he asked that the IDOC return all copies of his prior PSI "for redaction of information derived from his suppressed statements and correction of 'other inaccuracies'" and that the corrected PSI be returned to the IDOC. *Id.* The *Person* Court held that "a district court's authority to challenge the contents of a PSI ceases once a judge of conviction and sentence are issued." *Id.* at 296, 178 P.3d at 661.

Mr. Moore's case is distinguishable from *Person*. Unlike *Person*, where the defendant challenged the PSI subsequent to the sentencing hearing, after a sentence was already imposed, Mr. Moore sought to remove the 2003 PSI prior to his resentencing, which was ordered after the district court concluded that Mr. Moore received ineffective assistance of counsel because his trial attorney failed to advise him

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<sup>6</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

of his Fifth Amendment right against self incrimination at his original sentencing.<sup>7</sup> (See R., pp.68-69 (order granting post conviction petition), pp.102-103 (motion for removal of 2003 PSI).) Accordingly, because the district court failed to recognize the bounds of its discretion, that it had the “prerogative” to replace the 2003 version with the corrected 2008 PSI, Mr. Moore’s case should be remanded to the district court with instructions that the 2003 PSI be removed from the IDOC, such that information inappropriately included therein will not be used to prejudice Mr. Moore when he seeks parole at the conclusion of the fixed portion of his sentence.

Alternatively, if this Court concludes that *Person* stands for the proposition that a defendant is forever barred from correcting a presentence report after the initial sentencing hearing if an objection is not made at that time, it should be overruled. This Court will follow controlling precedent “unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.” *State v. Humphreys*, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). If *Person* is given an overly broad reading in its application, it must be overruled because it conflicts with existing

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<sup>7</sup> Although not relevant to the instant case, where Mr. Moore’s psychosexual evaluation was attached to his PSI report, there is a question as to whether the IDOC is ever entitled to obtain possession of a sealed psychosexual evaluation. Certainly, under Rule 32(h)(1), the IDOC is entitled to temporary possession of a PSI report. However, there is no rule authorizing the IDOC to obtain a confidential psychosexual evaluation. The purpose of sealing a psychosexual evaluation is to prevent it viewing by the general public and anyone directly connected to the court proceedings. Permitting the IDOC to possess a confidential psychosexual evaluation is troubling because it can be readily accessed by parties unrelated to the criminal proceeding, guards and employees of the IDOC.

precedent, is manifestly wrong, and overruling it is “necessary to vindicate plain, obvious principles of law and remedy continued injustice.” *Id.*

In *Estrada v. State*, this Court held that the petitioner received ineffective assistance of counsel in connection with the psychosexual evaluation. See generally *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007). Estrada had been denied the right to the assistance of counsel because his attorney failed to advise him that he had the right to remain silent and not participate in the evaluation. 143 Idaho at 563-565, 149 P.3d at 838-840. This Court remanded the case back to the district court for further proceedings. *Id.* 565, 149 P.3dat 840.

Applying *Estrada* in conjunction with *Rodriguez*, a defendant must be permitted to remove a prior, unconstitutionally obtained evaluation, from the possession of the IDOC, otherwise that defendant will continue be prejudiced by statements he made in violation of his Fifth Amendment rights. Certainly Mr. Moore’s attorney could have and should have objected to his 2003 evaluation at the time of the initial sentencing hearing. However, because he received ineffective assistance of counsel, the unconstitutionally obtained statements were included within the earlier evaluation. Without allowing the district court’s authority to control their documents such as the presentence report, the relief granted in cases such as *Estrada* has limited affect because the prejudicial impact of the of the illegally obtained statements lasts long after a sentence is imposed and executed. See *Rodriguez*, 132 Idaho at 262, n.1, 971 P.2d at 328, n.1. The purpose of post conviction proceedings is to prevent a defendant from being harmed by his counsel’s deficient performance and it necessarily follows that when a defendant received ineffective assistance of counsel at a sentencing hearing, all prejudicial impact

of the attorney's actions or inactions must be eliminated so that the defendant is placed in the position he would have been but for his counsel's deficient performance.

Thus, if this Court determines that *Person* stands for the proposition that a defendant can never challenge the contents of a PSI after the initial sentencing hearing, it must be overruled. Accordingly, Mr. Moore respectfully requests that this case be remanded to the district court with instructions that his 2003 PSI, and all of its contents (including the psychosexual evaluation), be removed from the possession of the IDOC.

## II.

### The District Court Abused Its Discretion By Imposing A Unified Sentence Of Life, With Thirteen Years Fixed, Upon Mr. Moore, Following His Plea Of Guilty To Lewd Conduct With A Minor Under Sixteen, In Light Of The Mitigating Factors Present In His Case

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. 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.” In order to show an abuse of discretion, Mr. Moore must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. 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.

Mr. Moore asserts that, given any view of the facts, his unified sentence of life, with thirteen years fixed, is excessive. Mr. Moore is the product of both the physical and

sexual abuse he suffered during childhood. Mr. Moore reported a friend sexually abused his brother when he was young and "it is possible that he too, was molested." (PSI, p.4.) At age 13, Mr. Moore indicated that he was sexually victimized by an older boy while walking home from school. (Polygraph, p.5.) Not only was Mr. Moore sexually victimized as a child/young teen, he was physically abused by his mother. On one occasion, his mother broke his nose by throwing scissors at him. (Psychosexual Eval., p.4; PSI, p.4.) Mr. Moore also reported his mother beat him with a baseball bat. (Psychosexual Eval., p.4.)

Prior to his current conviction, Mr. Moore had never before committed a felony offense. (PSI, p.3.) In fact, Mr. Moore's record is devoid of any criminal offenses, with the exception of two speeding violations, one in 1979, and one in 1982. (PSI, p.3.) Accordingly, the district court failed to adequately consider the fact that Mr. Moore, a 43 year old man at the time of the offense, had no prior criminal convictions on his record at the time of the offense.

Mr. Moore has expressed his remorse for actions leading to his conviction and his concern for the victim and the victim's family in this case. In the PSI, Mr. Moore wrote that "he prays that his victim be allowed to receive counseling." (PSI, p.3.) Mr. Moore stated that since he has been in prison "he has had the opportunity to get to know guys who have been sexually molested as children" and "has been forced to seek the long term affects of his crime, especially to those victims who did not seek counseling." (PSI, p.3.) At sentencing, Mr. Moore reiterated his remorse for his actions, stating:

I'd like to start off by asking all who knew of my actions for forgiveness, and I take full responsibility for hurting J.J., and because he

trusted me, I violated that trust. It wasn't just J.J. and the family who were victimized, it was my family and friends, anybody who read the paper, those who worked the case on all levels also became victims. I have an obligation to these people to complete counseling in addition to recovery.

...

I realize that I cannot take back what I've done I can only pray for those who have been hurt and ask God for peace and healing and that they would find forgiveness. I have asked God for forgiveness for the actions which I have committed. I know he has forgiven me. I can only ask the Court for mercy and a second chance. But this does not excuse me from my obligation to complete programming and counseling.

(Tr., p.39, Ls.14-23, p.41, Ls.5-13.) Thus, Mr. Moore has taken full responsibility for his actions and recognizes the harm he has done. Moreover, Mr. Moore is particularly concerned with the harm he has caused the victims and wants to ensure that they receive counseling to help them work through the problems he has caused. Not only does Mr. Moore understand part of his obligation to the victims in this case, but he recognizes that he too must receive the necessary treatment and counseling to ensure he never commits the same acts again.

It is important to note that Mr. Moore not only speaks to what he must do to change, but his actions since his incarceration show his desire to better himself and to help those around him in paying off his debt to society. Mr. Moore has used his incarceration to improve his employable skills such that once he is released, he can once again become a contributing member to society. While incarcerated, he "has been working hard to learn a trade, electrical blueprints, commercial wiring, residential wiring, and quite a bit of education in construction and safety." (Tr., p.34, Ls.10-24; see *generally* Sentencing Packet.)<sup>8</sup> Mr. Moore has also held jobs as a tutor, teaching assistant, and assisted in janitorial work while at the prison. (Tr., p.34, L.24 – p.35, L.8;

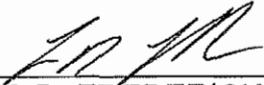
Sentencing Packet.) In the PSI, Mr. Moore indicated that he worked as a tutor to other inmate for three and one-half years and for the last six months leading up to his resentencing, worked in the library full time. (PSI, p.7.) In fact, while in the Bonner County jail prior to his resentencing, helped approximately four inmates work on their GEDs. (Tr., p.37, Ls.12-17.)

Accordingly, in light of the forgoing, Mr. Moore asserts that the district court abused its discretion by imposing and excessive sentence upon him.

#### CONCLUSION

Mr. Moore respectfully requests that this case be remanded to the district court with instructions that his 2003 PSI be removed from the possession of the IDOC. Additionally, Mr. Moore requests that this Court reduce his sentence as it deems appropriate.

DATED this 10<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
ERIC D. FREDERICKSEN  
Deputy State Appellate Public Defender

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<sup>8</sup> The "Sentencing Packet" was offered by Mr. Moore at sentencing and is included within Confidential No. 4.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10<sup>th</sup> day of February, 2010, 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:

WALTER E MOORE  
INMATE # 71366  
ICC  
PO BOX 70010  
BOISE ID 83707

JOHN P LUSTER  
DISTRICT COURT JUDGE  
E-MAILED COPY OF BRIEF

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