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State v. Floreani Respondent's Brief Dckt. 43223

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43223
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2013-16294
)	
BRIAN DANILO FLOREANI,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Floreani failed to establish that the district court abused its discretion by relinquishing jurisdiction and executing a reduced unified sentence of six years, with two and one-half years fixed, imposed upon his guilty plea to grand theft?

Floreani Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Floreani pled guilty to grand theft and the district court imposed a unified sentence of 10 years, with three years fixed, and retained jurisdiction for 365 days. (R., pp.36-40.) After a period of retained jurisdiction, the district court relinquished

jurisdiction; however, it *sua sponte* reduced Floreani's sentence to six years, with two and one-half years fixed. (R., pp.47-50.) Floreani filed a notice of appeal timely from the order relinquishing jurisdiction. (R., pp.51-53.)

Floreani asserts the district court abused its discretion when it relinquished jurisdiction or, alternatively, did not further reduce his sentence in light of his family support, purported desire "to make some real changes' in his life," his arrangements for sober housing, his willingness to seek employment and continue with programming, and his good behavior while on his rider. (Appellant's brief, pp.4-5.) The record supports the district court's decision to relinquish jurisdiction.

"Probation is a matter left to the sound discretion of the court." I.C. § 19-2601(4). The decision to relinquish jurisdiction is a matter within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. See State v. Hood, 102 Idaho 711, 712, 639 P.2d 9, 10 (1981); State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). A court's decision to relinquish jurisdiction will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521. State v. Chapel, 107 Idaho 193, 194, 687 P.2d 583, 584 (Ct. App. 1984).

Pursuant Idaho Criminal Rule 35, a court may reduce a sentence within 120 days after the court releases retained jurisdiction. A court's decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing State v. Beckett, 122 Idaho 324, 326, 834

P.2d 326, 328 (Ct. App. 1992); State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). Those standards require an appellant to “establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment.” State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives 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 wrong doing.” State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978).

Floreani is not an appropriate candidate for probation, nor has he demonstrated any entitlement to a further reduction of sentence. At the jurisdictional review hearing the state addressed Floreani’s poor attitude and his complete failure to program while on his rider. (04/09/2015 Tr., p.7, L.3 – p.10, L.15 (Appendix A).) The district court subsequently set forth its reasons for relinquishing jurisdiction and ordering a reduced sentence executed. (04/09/2015 Tr., p.23, L.11 – p.30, L.23 (Appendix B).) The state submits that Floreani has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the jurisdictional review hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Conclusion

The state respectfully requests this Court to affirm the district court's order relinquishing jurisdiction and executing a reduced unified sentence of six years with two and one-half years fixed.

DATED this 1st day of December, 2015.

/s/
LORI A. FLEMING
Deputy Attorney General

CATHERINE MINYARD
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of December, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 The defendant last came before this
 2 court, Judge Wetherell, who is now retired, on
 3 December 30, 2014, for sentencing on grand theft
 4 felony committed on or about November 18, 2013, as
 5 alleged in an information dated December 16, 2013.
 6 The record filed shows defendant pled
 7 guilty to those crimes on November 13, 2014, and
 8 the Court entered judgment of conviction on
 9 December 30, 2014, and imposed a sentence of ten
 10 years with the first three years fixed and the
 11 last three years indeterminate. The Court
 12 retained jurisdiction for 365 days and recommended
 13 a therapeutic community or a traditional rider.
 14 The defendant was placed in the
 15 therapeutic community rider at the North Idaho
 16 Correctional Institution in Cottonwood.
 17 A rider report -- sometimes called an
 18 addenda to the PSI -- was dated March 10, 2015,
 19 mailed to the Court, and received on March 16,
 20 2015. The Court has received and reviewed the
 21 file and the report.
 22 The Court also received and reviewed a
 23 letter from the defendant's parents, Dan and Nancy
 24 Floreani. That was received through the defense
 25 counsel on or about March 30, 2015.

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1 arguments, comments, and recommendations first
 2 from the State.
 3 MR. BLEAZARD: Your Honor, this is a bizarre
 4 case from what I can tell. It's got a fairly
 5 strange history in the sense that initially the
 6 State offered a one-plus-four for five years
 7 offering to withhold judgment -- offering to
 8 recommend a withheld judgment to the Court.
 9 The defendant absconded from the
 10 presentence investigation process -- or during
 11 that time, he absconded for approximately one
 12 year.
 13 When he finally came back, the State
 14 was at that point not bound by the plea agreement
 15 and recommended a two-plus-five for seven.
 16 The Court ordered a three-plus-seven
 17 for ten and sent the defendant on a rider.
 18 I say it's bizarre only in the sense
 19 that what was originally a fairly straightforward
 20 and very fair and reasonable type of
 21 recommendation from the State ended up turning
 22 into a rider that was still of benefit to the
 23 defendant in the sense that he had absconded from
 24 the presentence investigation process. But then,
 25 during the rider, he essentially quit.

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1 The purpose of today's hearing is to
 2 review the rider report and determine further
 3 disposition of this case based upon comments and
 4 recommendations therein and any comments and
 5 recommendations at this hearing.
 6 Has the defendant seen the rider report
 7 and had the opportunity to review it with counsel?
 8 MR. BLEAZARD: Yes, Your Honor.
 9 THE COURT: And does the defense have any
 10 objections, corrections, additions, modifications,
 11 or deletions to that report?
 12 MR. SMITH: No, Your Honor.
 13 THE COURT: Has the State seen that rider
 14 report and the letter and had the opportunity to
 15 review that?
 16 MR. BLEAZARD: Yes, Your Honor.
 17 THE COURT: Does the State have any
 18 objections, corrections, additions, modifications,
 19 or deletions to the report?
 20 MR. BLEAZARD: No.
 21 THE COURT: Does either party intend on
 22 presenting any evidence or testimony at the
 23 proceeding today?
 24 MR. BLEAZARD: Just argument.
 25 THE COURT: The Court, then, will hear

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1 It was difficult from reading the
 2 report to understand exactly why the defendant
 3 quit, but it does seem that he just simply
 4 couldn't deal with the people that he was around.
 5 I just would quote from one section where he
 6 quoted them as being "fake people who were
 7 hypocritical and vindictive."
 8 Certainly, in a situation like that on
 9 a rider, it's understandable that the kind of
 10 people he'd be around might be like that.
 11 However, it was the programming that he was sent
 12 to complete, and it was a program that was meant
 13 to provide him with a meaningful opportunity to
 14 change.
 15 And simply quitting that programming is
 16 very problematic from the standpoint that that's
 17 the kind of programming or the kind of opportunity
 18 he will have in the community. If you don't like
 19 the situation you're in, you have to work to
 20 improve it. And it seems very clear from his
 21 attitude that he simply wasn't willing to put up
 22 with perhaps some fake and vindictive people.
 23 I think it's a fact of this world that
 24 fake and vindictive and hypocritical people exist.
 25 Perhaps it's a regrettable part of human nature,

1 but it's going to be something that the defendant
 2 encounters in all walks of life.
 3 And so from that perspective, this case
 4 is very bizarre in the sense that the defendant
 5 was given multiple opportunities to take advantage
 6 of very reasonable situations to help him make
 7 life changes that he needed to make. What started
 8 as a simple probation recommendation turned into a
 9 rider and now to the State recommending to this
 10 Court that the Court relinquish jurisdiction and
 11 that he go to prison, which will be a much more
 12 difficult process, I'm sure, to endure for him
 13 than was the rider in many respects.
 14 I don't believe that the defendant
 15 is like many of the other people that we see that
 16 have such an engrained difficulty with criminal
 17 thinking and making changes in life. It seems to
 18 me like he's simply not willing to conform to
 19 behavioral changes and to programs that are meant
 20 to help him.
 21 And, frankly, I can't see how this
 22 Court ordering probation after this poor of a
 23 performance on a rider would be to his benefit
 24 because the probation program would be very much
 25 similar to the kind of treatment that he was

1 He absconded and basically earned
 2 himself a rider from Judge Wetherell, who was
 3 still sitting on the bench, based upon taking that
 4 time off.
 5 And, you know, this is when Brian was
 6 using. That's what he was doing during that time.
 7 And that's all he cared about at that time.
 8 And I've spoken at length with him
 9 about this and his father as well. I've spoken
 10 with his father many, many, many times during this
 11 process and just what's going on with Brian.
 12 But he's four months clean right
 13 now -- six months clean. I'm sorry. He says he's
 14 never felt better, Judge.
 15 And I know that this is an interesting
 16 case. It's a hard case for the Court to decide.
 17 I guess it's had a couple of those today.
 18 But his rider -- it's -- he's -- he
 19 didn't finish -- the relinquishment is not because
 20 of his behavior or because of his work. It's
 21 because he felt that the program itself, the
 22 situation he was in, was just hypocritical and it
 23 wasn't, I guess, taking him to the place he
 24 thought he needed to go.
 25 He is committed to doing anything this

1 receiving on a rider. And I don't think that a
 2 person gets to say, "Well, I just didn't like that
 3 kind of treatment" and then ask for probation. I
 4 think that that scoffs at the order of the Court,
 5 which was that he complete the rider and that he
 6 do so and show the Court that he can follow
 7 through with the kind of programming that was
 8 offered there.
 9 So, Your Honor, given the fact that
 10 this is a somewhat strange case, I think that the
 11 Court should give the defendant exactly what he
 12 asked for. He quit, and, essentially, by
 13 quitting, he asked that the Court relinquish
 14 jurisdiction. And that's the State's
 15 recommendation.
 16 THE COURT: Thank you, Mr. Bleazard.
 17 And Mr. Smith.
 18 MR. SMITH: Thank you, Judge.
 19 Judge, there's no question that Brian
 20 has made this case a little more interesting and a
 21 little more difficult than it was from the
 22 beginning. No question about that.
 23 This is his first felony. It consists
 24 of stealing a bike. That's it. He does have, I
 25 think, two other misdemeanors.

1 Court asks him to do.
 2 He brought all the work and things that
 3 he finished while he was in there for six weeks.
 4 A lot of it is ahead of time. He finished a lot
 5 of things that aren't mentioned in the APSI,
 6 Judge.
 7 But I think, you know, when you read
 8 the report and when he was engaged in the
 9 program that they talk about what a promising role
 10 model he is. They talk about that he's smart and
 11 charismatic, has a way with words, all of which
 12 could come together and possibly give him a
 13 successful life. They talk about his enthusiasm
 14 for the things he had done. And that's how he
 15 started off the program, Judge. He did.
 16 You see in the c-notes they talk about
 17 he gets a disciplinary report for throwing a paper
 18 airplane over a thing and littering and he's asked
 19 to write an apology letter. And I have a copy of
 20 that apology letter. And I think it's just
 21 telling how he just goes on and on and he
 22 apologizes to each of the people in his family
 23 about what a stupid, selfish decision it was. And
 24 he talks about how it put him at risk and others
 25 at risk for losing the opportunity at this

APPENDIX B

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1 those on the streets instead of while
 2 incarcerated.
 3 "Thank you for your time and
 4 consideration."
 5 I was doing all my work and my classes
 6 for my CSC. Like my FCIs -- they were about a
 7 month ahead of time, and I didn't present them
 8 because I didn't want the feedback from the people
 9 in my group because of the way that they were
 10 treating the game and the way that they were
 11 acting in the groups.
 12 I spent -- in my spare time, I'd go
 13 down to the computer and I would look up for
 14 different things for employment interests that are
 15 relevant to me and how much they pay and what
 16 degree of education needs to be done and what not.
 17 The FCIs were for my CSC group.
 18 And then for my RPG group, the first
 19 thing I was supposed to do was to write a life
 20 story and a commitment letter, and I was ahead of
 21 time on both of those. I have all those here. I
 22 just didn't have a chance -- I only had one RPG
 23 class. I didn't have a chance to present those.
 24 I have a certificate here from NEFE
 25 High School Financial Planning Program.

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1 high, and that's the only reason why I committed
 2 my crime is because I was high.
 3 And I'm just asking for the Court's
 4 mercy and a chance at probation. I know I can do
 5 it without -- without coming to prison.
 6 Thank you, Your Honor.
 7 THE COURT: Thank you, Mr. Floreani.
 8 Is there any legal cause why sentence
 9 should not be pronounced at this time?
 10 MR. SMITH: No, Your Honor.
 11 THE COURT: Mr. Floreani, I -- I think it
 12 was the State's attorney's words -- he said that
 13 this is a bizarre case. It seems as though your
 14 attorney agrees, and I think to a certain degree
 15 you do too.
 16 It strikes me that one of the issues
 17 you had with the programming out there is that
 18 they came out with an announcement that rules are
 19 rules but then didn't necessarily enforce the
 20 rules when people broke them. And yet it seems to
 21 me that you're asking this Court to do the very
 22 same thing. And it seems to me that that would be
 23 the very same kind of hypocrisy that you despise
 24 so much in your situation.
 25 I can tell by your writing and by what

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1 I also completed the hazmat
 2 qualifications. So there is another certificate
 3 that I didn't receive yet, but I completed and
 4 passed the test.
 5 My New Directions book -- I was ahead,
 6 I turned it in, and I got it back. She had very
 7 little -- very little for me to redo. There was
 8 one section, and I immediately did it. And she
 9 said it's okay to keep practicing objective
 10 observations and moved me on to the next book.
 11 And then this is the Reentry and
 12 Community Transition Guide, and I have this
 13 completed. And this wasn't -- this isn't supposed
 14 to be completed until the fifth month or when I
 15 get into my mid-prerelease. And this goes over
 16 things like identification, education, employment,
 17 communication, money, housing, transportation,
 18 health, relationships, and supervision.
 19 And I really do -- I do enjoy the CSC
 20 and the RPG. I -- I like taking a look at myself
 21 and how to change me for the better. But I know
 22 that you can do those on the streets. And
 23 I'm -- I'm six months clean and sober now. And
 24 I'm thinking clearly, and I -- this isn't -- this
 25 isn't the life for me. I don't -- I refuse to get

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1 you're saying and certainly from the information I
 2 reviewed that you're a smart guy. You need to
 3 probably understand there's a lot of people out
 4 there who aren't very smart. And there's a lot of
 5 people out there that, frankly, could have
 6 benefited a lot from your ability to teach and
 7 mentor and show them that part of the purpose of a
 8 programming in situations like that is not only
 9 for you to genuinely look at your life and how
 10 things went wrong with you but to help other
 11 people as well.
 12 Indeed, it is bizarre. Had you not
 13 absconded from the pretrial release, you would
 14 have received a -- undoubtedly received a withheld
 15 judgment. You would have been on probation. They
 16 would have sent you to some of this programming,
 17 maybe put you in the county jail for a couple of
 18 months, and sent you to an MRT class there and
 19 maybe the substance abuse class there. And, you
 20 know, you might have -- might have gone on and
 21 done just fine.
 22 But you were the one that absconded
 23 then from the pretrial release. And kind of to
 24 use your words, rules are rules. And when you
 25 absconded from that, the State was no longer

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1 obligated to stick with the plea bargain deal, the
 2 agreement that you yourself had struck and agreed
 3 to. And then, not being bound by the plea bargain
 4 agreement and I'm sure in certain part to make it
 5 clear to you and others that you are not going to
 6 be allowed to violate the terms of pretrial
 7 release, they asked for a more harsh sentence.
 8 And then Judge Wetherell, perhaps
 9 feeling like you weren't taking things very
 10 seriously, imposed an even more harsh sentence.
 11 I mean, I agree with what Mr. Smith
 12 said here. I mean, ten years in prison for
 13 stealing a bike. I mean, that really does seem
 14 outrageous. But it didn't start out at ten years.
 15 It started out with a withheld judgment. I'm
 16 guessing what would have been a five-year
 17 probation at best, at the end of which, if you had
 18 complied with everything, that all those charges
 19 would have been dismissed and there would be no
 20 felony on your record.
 21 And I think you would agree that you've
 22 kind of been your own worst enemy in this
 23 situation. I think it's fair to say that
 24 sometimes some people are too smart for their own
 25 good, and maybe that's where you were.

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1 to relinquish probation. I can't say I want to do
 2 that or I enjoy doing that. But, again, in your
 3 own words, I guess you think the whole system is
 4 hypocritical if it doesn't enforce the rules that
 5 it itself outlined in your particular case.
 6 Having considered the recommendations
 7 of the review committee and the objectives of
 8 sentencing under the Idaho Code and the case of
 9 State v. Toohill and the comments and
 10 recommendations of the State, the defense counsel,
 11 and the defendant himself, the Court makes the
 12 following findings, determinations, and
 13 disposition.
 14 The Court finds that the defendant
 15 refused to participate in the therapeutic
 16 community programming and self-relinquished
 17 knowing full well the likelihood that the original
 18 sentence would be imposed.
 19 The Court finds that the defendant
 20 would be a high-risk candidate to recidivate,
 21 relapse, and reoffend if placed on probation at
 22 this time.
 23 The Court further finds that the facts
 24 stated in the rider report are true and concurs
 25 with the conclusions and recommendations therein.

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1 I wrote a note while Mr. Bleazard was
 2 speaking about human nature, and I wrote, "The
 3 worst part of human nature is that it's so human."
 4 There are a whole lot of people in this
 5 world, and there's a whole lot of
 6 people -- they're all different from you and from
 7 me and from others. And there is a lot of people
 8 out there that could use your help.
 9 I think this Court -- that is Judge
 10 Wetherell -- felt like that in sending you up to
 11 that therapeutic community rider, a good bunch of
 12 which is to deal with people that have substance
 13 abuse problems and a good bunch of which is to
 14 deal with people who sometimes just don't have the
 15 capacity to be able to conform their lives to
 16 follow the basic rules and to show that you could
 17 do that and by doing that that the Court would
 18 feel comfortable in releasing you out into the
 19 community knowing that you would be able to follow
 20 the rules.
 21 And, again, what you did was basically
 22 self-relinquished.
 23 I'm not sure he said it in these exact
 24 words, but basically the prosecutor said, "We
 25 should just give him what he asked for," which is

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1 The Court will relinquish jurisdiction
 2 as demanded by the defendant and impose the
 3 sentence previously entered, that is ten years
 4 imprisonment with three years fixed and four years
 5 indeterminate.
 6 I have reviewed the original
 7 presentence investigation report and considered
 8 the circumstances and the crime committed and
 9 defendant's prior criminal record. I note that
 10 the original plea bargain agreement called for a
 11 sentence of five years with one year fixed and
 12 four years indeterminate but that the defendant
 13 absconded from the pretrial services and the State
 14 was not bound by that plea bargain agreement.
 15 With all due respect to Judge
 16 Wetherell, a fine judge and a personal friend of
 17 mine, I conclude that the sentence was too harsh
 18 for the crime committed and the defendant's
 19 circumstances, his prior record, and his substance
 20 abuse issues.
 21 The Court will sua sponte exercise its
 22 discretion under Rule 35 of the Idaho Criminal
 23 Rules to modify and reduce the sentence to a term
 24 of six years, two-and-a-half years fixed and
 25 three-and-a-half years indeterminate.

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1 Defendant will receive credit for time
 2 served of 194 days to this date.
 3 The Court recommends that the defendant
 4 successfully complete therapeutic community
 5 programming before he's released.
 6 Now, Mr. Floreani, I'm sure I didn't
 7 make you very happy in imposing that sentence, but
 8 I do think I imposed the sentence that is
 9 essentially what you've asked for.
 10 You've only done about six months of
 11 the two-and-a-half years, so fundamentally what
 12 we're looking at is two years.
 13 Attorneys that appear regularly before
 14 me know that I do speak in some common themes, and
 15 Mr. Smith mentioned one of them that's come up
 16 several times today, which is the theme of "timing
 17 is everything." And it seems to me that in
 18 Cottonwood at this time, it wasn't the right time
 19 for you.
 20 I think what's going to happen in this
 21 circumstance is you're just going to get
 22 warehoused for about one more year, and then
 23 they're going to give you another chance at this
 24 therapeutic community programming.
 25 This is my advice for you. If you

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1 judgment of the Court that you have the right to
 2 appeal. To do that, you have to file a written
 3 notice within 42 days. You have the right to be
 4 represented by a lawyer in that appeal, and if you
 5 can't afford one, a lawyer will be appointed to
 6 represent you. If you can't afford the costs of
 7 appeal, those can be provided as well.
 8 Mr. Smith's already appealed a couple
 9 of other cases of mine, and believe me, it won't
 10 hurt my feelings if you do so. Quite frankly, I
 11 don't think you'll get anywhere with it, but
 12 you're welcome to try.
 13 Defendant is remanded to the custody of
 14 the Ada County Sheriff's Office for transportation
 15 to the custody of the Idaho Department of
 16 Correction.
 17 The parties will return the presentence
 18 investigation to the Court and the APSIs to the
 19 clerk.
 20 Anything further at this time?
 21 MR. BLEAZARD: Nothing from the State, Your
 22 Honor.
 23 THE COURT: Defendant is excused, and we'll
 24 call the next case.
 25 (Proceedings concluded.)

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1 can't see the benefit of it for yourself,
 2 understand that there's a lot of people that will
 3 be in that programming that could really use your
 4 help and assistance.
 5 Hopefully, by that time, you'll have
 6 not just six months, but another year on top of
 7 that of being clean and sober and that you can be
 8 reading and writing and learning a lot while
 9 you're in prison and that you can use all of those
 10 skills and abilities to help people that need your
 11 help to get through that program more than you
 12 need your help to get through that program.
 13 That's what I think that you can do for
 14 other people. And I think you will find that by
 15 helping others, you will get far more out of it
 16 than you would if you were just looking at it from
 17 the perspective of helping yourself.
 18 In other words, it seems to me like
 19 your perspective is maybe this was just too easy,
 20 that it seemed kind of foolish to make you do it.
 21 But the way I see it is that you can be helping
 22 other people, and I think you'll find that you'll
 23 be helping yourself a whole lot more.
 24 Now, you need to understand that if
 25 you're dissatisfied with this decision and

REPORTER'S CERTIFICATE

1
 2
 3
 4
 5 I, RACHELLE CAHOON, court reporter,
 6 County of Ada, State of Idaho, hereby certify:
 7 That I am the reporter who transcribed
 8 the proceedings had in the above-entitled action
 9 in machine shorthand and thereafter the same was
 10 reduced into typewriting under my direct
 11 supervision; and
 12 That to the extent the audio was audible
 13 and intelligible, the foregoing transcript
 14 contains a full, true, and accurate record of the
 15 proceedings had in the above and foregoing cause,
 16 which was heard at Boise, Idaho.
 17 IN WITNESS WHEREOF, I have hereunto set
 18 my hand August 26, 2015.
 19
 20
 21
 22 RACHELLE CAHOON, court reporter
 23 SRT NO. 1026
 24
 25