

2-23-2016

## State v. Orr Respondent's Brief Dckt. 43306

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LAWRENCE G. WASDEN  
Attorney General  
State of Idaho  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division

JESSICA M. LORELLO  
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	Nos. 43306 & 43307
Plaintiff-Respondent,	)	
	)	Ada County Case Nos.
v.	)	CR-2014-20 & CR-2014-7788
	)	
NICHOLAS BRIAN ORR,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Orr failed to establish the district court abused its discretion by denying his Rule 35 motions for reduction of his concurrent unified sentences of 25 years, with three years fixed, for first degree arson, and 10 years, with three years fixed, for felony domestic violence?

Orr Has Failed To Establish The District Court Abused Its Sentencing Discretion

On December 31, 2013, Orr “got jealous” because his neighbors, the

Trowbridges, were having a party. (PSI, p.47.<sup>1</sup>) He donned a pair of gloves, got a gas can out of his garage, walked to the Trowbridges' house, and found a "nice secluded spot" on one side of the Trowbridges' house next to their fence. (PSI, pp.45-47.) Orr then "poured gas on the ground at the base of the house, or on the house and fence itself," and lit it with a lighter. (PSI, pp.46-47.) Jeff and Gregory, other neighbors who were out walking, observed the fire and asked Orr if he needed help, to which Orr responded that he "was ok[ay]." (PSI, p.47.) Jeff and Gregory, however, realized the fire was "getting out of control," and ran to their residence to get water. (PSI, p.47.) When they returned, Orr was gone, but the fire was still burning up the side of the house. (PSI, p.47.) Jeff and Gregory put the fire out and contacted the Trowbridges. (PSI, pp.47, 53.) Officers subsequently responded and determined "[i]f Jeff and Gregory had not been present to put the fire out, it would have continued and engulfed the victims['] residence and the neighbors['] residence." (PSI, p.48.) The state charged Orr with first degree arson in case number 43306. (R., pp.43-44.)

While case number 43306 was pending, Orr attacked his wife, Nicole. (PSI, pp.185, 193.) He threw her against the wall, causing a piece of the wallboard to break off the wall "due to the impact." (PSI, pp.185, 193.) Nicole attempted to call the police, but Orr "grabbed her cell phone from her hands." (PSI, p.186.) Orr got on top of Nicole and began strangling her with both hands, telling her "multiple times that she was taking her last breath of air." (PSI, p.185.) A neighbor heard Nicole screaming and called the

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file "Orr 43306 psi.pdf."

police. (PSI, p.184.) When officers responded, they heard Nicole “screaming ‘stop you’re hurting me you’re hurting me.’” (PSI, p.184.) Officers knocked on the door and subsequently “observed the door handle shake multiple times and could hear what sounded like a struggle coming from behind the door. It appeared ... that someone was attempting to open the door and was being held back.” (PSI, p.217.) Officers were “about to make entry into the apartment when the door finally opened” and Nicole ran out, yelling for help. (PSI, p.217.) As she was running out the door, Orr attempted to “grab her and pull her back in.” (PSI, p.217.) Officers observed Nicole had redness and swelling on her neck, back, and arm. (PSI, p.193.)

The state charged Orr with attempted strangulation and intentional destruction of a telecommunication line or telecommunication device in case number 43307. (R., pp.164-65.) Pursuant to a plea agreement, Orr pled guilty to arson in case number 43306 and to an amended charge of felony domestic violence in case number 43307, and the district court imposed concurrent unified sentences of 25 years, with three years fixed, and 10 years, with three years fixed, respectively. (R., pp.56, 71-74, 173, 182-86.) Orr filed timely Rule 35 motions for reduction of his sentences, which the district court denied. (R., pp.76-78, 91-93, 189-91, 207-09.) Orr filed notices of appeal timely only from the district court’s orders denying his Rule 35 motions. (R., pp.94-97, 210-13.)

Orr asserts the district court abused its discretion by denying his Rule 35 motions for reduction of his sentences in light of his continued desire to support his children, continued family support, and participation in programs while incarcerated. (Appellant’s Brief, pp.2-4.) Orr has failed to establish an abuse of discretion.

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Orr must “show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id.

At the time of sentencing, the district court was aware Orr had family support and wished to support his family, who were struggling financially due to his incarceration. (PSI, pp.4-5, 9-10, 13-14.) The court was also aware Orr was an inmate worker and had requested to be enrolled in programs. (PSI, p.10.) That Orr began participating in prison programs is not “new” information that merits a reduction of sentence, particularly in light of the egregious nature of the offenses and the danger Orr presents to the community.

In its orders denying Orr’s Rule 35 motions, the district court stated, “The Court’s primary concern was the serious nature of the offense and the very real risk of harm to and the impact it had on the victims. ... Although rehabilitation was certainly a consideration for the Court, its primary concerns were punishment, deterrence and protecting the community.” (R., pp.92, 208.) At sentencing, the district court articulated its consideration of these factors in greater detail and set forth its reasons for imposing Orr’s sentences. (Tr., p.32, L.7 – p.49, L.2.) Orr’s participation in programs while incarcerated does not outweigh these factors and, as such, the district court’s denial of his motions for reduction of his sentences was reasonable. The state submits Orr has failed to establish an abuse of discretion in the district court’s denial of his Rule 35

motions, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court's orders denying Orr's Rule 35 motions for reduction of sentence.

DATED this 23rd day of February, 2016.

/s/  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of February, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JUSTIN M. CURTIS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

# APPENDIX A

05:37PM 1 Michael Johnston's report, that gives you the  
 05:37PM 2 evidence this Court needs in terms of making a  
 05:37PM 3 very good sentencing decision.  
 05:37PM 4 I think that my client has done  
 05:37PM 5 something very egregious, has put people at risk,  
 05:37PM 6 and we can't deny that. We're not arguing against  
 05:37PM 7 that. It's just what do we do to fix this. We  
 05:36PM 8 have got to get down to the root of this, because  
 05:36PM 9 if we don't get to the root of this, the community  
 05:36PM 10 suffers because essentially he's institutionalized  
 05:36PM 11 and we need to get him out of that.  
 05:36PM 12 I think that the smartest decision on  
 05:36PM 13 this case would be to give him a shot at a rider,  
 05:36PM 14 see how he does on that. He's been in custody  
 05:36PM 15 almost 5 months at this point. If he gets a  
 05:36PM 16 6-month rider, he'll have been in custody almost a  
 05:36PM 17 year. If he gets a TC rider, it will be another  
 05:36PM 18 year before he gets out. And it's just that the  
 05:36PM 19 State has the best opportunity and the best  
 05:36PM 20 resources to give him on that rider program and  
 05:36PM 21 that will give him his best shot to be successful.  
 05:36PM 22 I'm very, very, very convinced that if  
 05:36PM 23 he puts his mind to it and he does not drink  
 05:36PM 24 alcohol, he's going to be a fantastic person in  
 05:36PM 25 this community again. It's just that alcohol is

05:36PM 1 that trigger, and he's got to put his mind forward  
 05:36PM 2 that that's just not going to be part of his life.  
 05:36PM 3 If he can do that, he will be successful, and we  
 05:36PM 4 have the tools to give him that.  
 05:36PM 5 So I know this is a hard case because  
 05:36PM 6 it's a difficult case to make a decision on. So I  
 05:36PM 7 just ask the Court to look at all of the facts and  
 05:36PM 8 circumstances of the case, look at all the Toohill  
 05:36PM 9 factors, and look at the evidence the Court has in  
 05:36PM 10 front of it to make a good decision, and we think  
 05:36PM 11 that a rider would be the best.  
 05:36PM 12 I'm going to ask the Court for 3 years  
 05:36PM 13 fixed, 12 years indeterminate, for 15, and giving  
 05:36PM 14 him the rider opportunity.  
 05:36PM 15 And I would just -- in terms of the  
 05:36PM 16 no-contact order, Judge, I do know that we wanted  
 05:36PM 17 to be heard on that. My client would like the  
 05:36PM 18 no-contact order, at least the kids, the kids to  
 05:36PM 19 be taken off that no-contact order, because if  
 05:36PM 20 he's going to be incarcerated for some time, he  
 05:36PM 21 would like to be able to speak with his kids  
 05:36PM 22 either by phone or by mail. And if the victim is  
 05:36PM 23 not amenable to allowing him to speak through her,  
 05:36PM 24 then I do know that his family, his parents, could  
 05:36PM 25 be a third party in that regard. And I do know

05:39PM 1 that his parents do take care of the girls and are  
 05:39PM 2 very active grandparents, at least that he could  
 05:39PM 3 maybe speak with his kids by phone and/or by mail.  
 05:40PM 4 THE COURT: Okay. Thank you.  
 05:40PM 5 MR. BALL: Thank you very much.  
 05:40PM 6 THE COURT: Before hearing from Mr. Orr, let  
 05:40PM 7 me ask, Mr. Harmer, in terms of the request for  
 05:40PM 8 the no-contact order as to Nicole or the two  
 05:40PM 9 children, is Ms. Orr in court at this time?  
 05:40PM 10 MR. HARMER: She's not in court at this  
 05:40PM 11 time. She declined to be here. She's not  
 05:40PM 12 indicated that she wants any change to the  
 05:40PM 13 no-contact order.  
 05:40PM 14 THE COURT: Okay. Counsel, thank you.  
 05:40PM 15 Mr. Orr, you do have the right to  
 05:40PM 16 address the Court before sentence is imposed. Is  
 05:40PM 17 there anything that you would like to say before  
 05:40PM 18 sentencing?  
 05:40PM 19 THE DEFENDANT: I just want to let the Court  
 05:40PM 20 know that I am taking responsibility for my  
 05:40PM 21 actions. I am very sorry for all the families  
 05:41PM 22 that I've hurt. I never meant to cause this much  
 05:41PM 23 trouble. I don't think this would have happened  
 05:41PM 24 if I wasn't drinking. I don't know, I just want  
 05:41PM 25 to express how sorry I am and that I just want to

05:41PM 1 try to get back and be a good father for my kids.  
 05:41PM 2 THE COURT: Thank you.  
 05:41PM 3 Counsel, then, is there any legal  
 05:41PM 4 reason as to why sentence cannot be imposed?  
 05:41PM 5 MR. BALL: No, Your Honor. Thank you.  
 05:41PM 6 THE COURT: Thank you.  
 05:41PM 7 The Court, as I have indicated, did  
 05:41PM 8 review the materials that were submitted for its  
 05:41PM 9 consideration. And one of the things I think that  
 05:42PM 10 did indeed come out of the review of the materials  
 05:42PM 11 that struck me, and I think this goes a long way  
 05:42PM 12 towards addressing what both Mr. Ball and  
 05:42PM 13 Mr. Harmer have described as to the arson charge  
 05:42PM 14 certainly as a very strange occurrence, is the  
 05:42PM 15 fact that the Department of Correction keeps  
 05:42PM 16 statistics on the number of individuals with  
 05:42PM 17 certain characteristics that match a defendant  
 05:42PM 18 that comes before the Court for sentencing,  
 05:42PM 19 including prior record, nature of the offense and  
 05:42PM 20 things such as that.  
 05:42PM 21 There was absolutely no one in their  
 05:42PM 22 records that matched Mr. Orr's information  
 05:42PM 23 concerning the arson charge of one prior  
 05:43PM 24 conviction. And in this situation, therefore, I  
 05:43PM 25 think certainly in large part would indicate just



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05:43PM 1 indeed how strange and unusual this offense was.  
 05:43PM 2 Having said that, it is nonetheless a  
 05:43PM 3 very heinous crime. Candidly, Mr. Orr, had this  
 05:43PM 4 been a situation where -- and thankfully this did  
 05:43PM 5 not happen -- but where someone had, in fact, been  
 05:43PM 6 killed or seriously injured as a result of the  
 05:43PM 7 fire that you started in this case, I wouldn't be  
 05:43PM 8 talking about a rider or anything else in this  
 05:43PM 9 situation; I'd be figuring out how long I should  
 05:43PM 10 send you to the penitentiary.  
 05:43PM 11 In this situation, again, the impact on  
 05:43PM 12 this family, not surprisingly, is horrendous; on  
 05:43PM 13 the children, on the parents themselves, the  
 05:44PM 14 nightmares, the fear. Once again, something that  
 05:44PM 15 has affected not only this family but others who  
 05:44PM 16 were present at the same time.  
 05:44PM 17 And candidly, to simply say that you  
 05:44PM 18 had wanted to stop the laughter or the fun that  
 05:44PM 19 was going on at the time, certainly is not good  
 05:44PM 20 reason for what had happened.  
 05:44PM 21 I think the incident involving your  
 05:44PM 22 wife also is extremely troubling. Although,  
 05:44PM 23 again, there is some history of individuals there  
 05:44PM 24 in terms of someone with your prior record or lack  
 05:44PM 25 of it. And the types of sentence that had

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05:44PM 1 previously been imposed by other courts, more in  
 05:44PM 2 the nature of probation and periods of retained  
 05:44PM 3 jurisdiction.  
 05:44PM 4 But your wife pointed out a history of  
 05:44PM 5 escalating violence on the night in question. She  
 05:44PM 6 had indicated that she felt that if the police had  
 05:45PM 7 not arrived she would have died. Nonetheless, she  
 05:45PM 8 indicated that she wishes that you were not  
 05:45PM 9 incarcerated because the family is struggling  
 05:45PM 10 financially and she would prefer to have you in  
 05:45PM 11 the community at least at this point.  
 05:45PM 12 And while I appreciate her concerns  
 05:45PM 13 about the family and the well-being of the family  
 05:45PM 14 in this situation, that I think there are greater  
 05:45PM 15 concerns for the Court in its sentencing decision  
 05:45PM 16 than the fact that your family may be struggling  
 05:45PM 17 financially as a result of your incarceration.  
 05:45PM 18 This is a case where there is no  
 05:45PM 19 significant prior record. Again, there was a  
 05:45PM 20 disturbing the peace charge from 2011 for which  
 05:45PM 21 you were granted a withheld judgment; a domestic  
 05:45PM 22 battery in the presence of children were dismissed  
 05:45PM 23 at that point. There was the incident in March  
 05:46PM 24 that Mr. Harmer has alluded to in his statement to  
 05:46PM 25 the Court where there had been a report of a rape

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05:46PM 1 but no charges were filed because at that point  
 05:46PM 2 Ms. Orr did not wish to proceed.  
 05:46PM 3 Candidly, there was nothing in your  
 05:46PM 4 upbringing that would lead the Court to see any  
 05:46PM 5 reason to explain the conduct that you committed  
 05:46PM 6 either in terms of the arson or of the felony  
 05:46PM 7 domestic violence in this case. You are an only  
 05:46PM 8 child. No histories of either physical, emotional  
 05:46PM 9 or substance abuse in your family. Although there  
 05:46PM 10 was some indication of self-disclosure of a prior  
 05:46PM 11 sexual abuse by an uncle that I noted in reviewing  
 05:46PM 12 the presentence materials there.  
 05:46PM 13 Both of your parents are extremely  
 05:46PM 14 supportive and are really at a loss to explain  
 05:47PM 15 what happened in these cases. They both note your  
 05:47PM 16 background, as has Mr. Ball in his statement to  
 05:47PM 17 the Court. Your performance in school. The fact  
 05:47PM 18 that you obtained a college degree. The fact that  
 05:47PM 19 you are involved in volunteer work in the  
 05:47PM 20 community, and the fact that you are otherwise a  
 05:47PM 21 successful and productive member of the community.  
 05:47PM 22 In this situation, the overall common  
 05:47PM 23 theme, and I appreciate Mr. Harmer's argument, but  
 05:47PM 24 the overall common theme I think from the  
 05:47PM 25 information from your wife, from Detective

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05:47PM 1 Usinich, from your parents, is that alcohol was  
 05:47PM 2 certainly a significant factor in the offenses  
 05:47PM 3 that have brought you before the Court here today.  
 05:47PM 4 In this case the only substance  
 05:47PM 5 abuse -- or substance abuse, I should say, that  
 05:47PM 6 you do have, and it certainly has been abused, is  
 05:48PM 7 alcohol. Your use of alcohol increased a couple  
 05:48PM 8 of years ago, and you had self-reported that you  
 05:48PM 9 and your wife would become intoxicated by the end  
 05:48PM 10 of the evening. Your wife reported you drinking a  
 05:48PM 11 fifth of rum every night, but the report that I  
 05:48PM 12 saw in the other parts of the report in this case  
 05:48PM 13 was that, in fact, it was the two of you that were  
 05:48PM 14 consuming about a fifth of alcohol every night,  
 05:48PM 15 which was to intoxication.  
 05:48PM 16 The GAIN-I assessment diagnoses you  
 05:48PM 17 with alcohol dependence. In the GAIN-I there was  
 05:48PM 18 no indication of any significant mental health  
 05:48PM 19 issues. The Internal Mental Distress Scale was in  
 05:48PM 20 the no to minimal range, as was the Behavior  
 05:48PM 21 Complexity Scale. And the recommendation for you  
 05:48PM 22 for your substance abuse issues was for a Level I  
 05:48PM 23 outpatient treatment program, a relapse prevention  
 05:48PM 24 group and alcohol management.  
 05:48PM 25 And while I really appreciate the

05:49PM 1 information provided in the GAIN-I assessment and  
 05:49PM 2 the recommendation for treatment, candidly, I  
 05:49PM 3 think it does not go far enough in terms of  
 05:49PM 4 addressing the crimes that have brought you in  
 05:49PM 5 front of this Court, and whether or not outpatient  
 05:49PM 6 treatment indeed would be the most appropriate  
 05:49PM 7 course.

05:49PM 8 The mental health review, although not  
 05:49PM 9 specifically ordered by the Court as a result of  
 05:49PM 10 the psychological evaluation performed by  
 05:49PM 11 Dr. Michael Johnston, did note that your emotional  
 05:49PM 12 and behavioral condition was stable. And I think  
 05:49PM 13 as perhaps some indication of the reliability of  
 05:49PM 14 that review, indicated that a psychological  
 05:49PM 15 evaluation need not be prepared. Candidly, I  
 05:49PM 16 think the psychological evaluation was absolutely  
 05:49PM 17 crucial to the Court in terms of its sentencing  
 05:49PM 18 decision.

05:49PM 19 There was a domestic violence  
 05:50PM 20 evaluation prepared by Dr. Bill Arnold. In that  
 05:50PM 21 time, again, the self-report of you and your wife  
 05:50PM 22 consuming a fifth of alcohol per day. No prior  
 05:50PM 23 treatment for aggressive violence, but you did  
 05:50PM 24 complete a cognitive self-change class previously,  
 05:50PM 25 as has been noted.

05:50PM 1 The Personality Assessment Inventory  
 05:50PM 2 diagnosed you with alcohol dependence, supported  
 05:50PM 3 by your personality and no personality disorders  
 05:50PM 4 beyond that as noted by Mr. Ball.

05:50PM 5 The Spousal Assault Risk Assessment  
 05:50PM 6 Guide puts you at a moderate to high risk for  
 05:50PM 7 future intimate partner or general community  
 05:50PM 8 violence. And the Ontario Domestic Assault Risk  
 05:50PM 9 Assessment placed you in the 74 percent of persons  
 05:50PM 10 reporting similar diagnoses as having another  
 05:50PM 11 domestic violence incident within five years,  
 05:50PM 12 usually involving law enforcement.

05:50PM 13 Overall, Dr. Bill Arnold concluded that  
 05:50PM 14 you were a moderate to high risk of future  
 05:51PM 15 violence, with a substantial increase in  
 05:51PM 16 likelihood if alcohol was involved. And I think  
 05:51PM 17 this goes to some extent to explain Mr. Harmer's  
 05:51PM 18 statement that although alcohol was indeed a  
 05:51PM 19 factor, it appears that the risk of violence goes  
 05:51PM 20 beyond that. And again, alcohol is simply an  
 05:51PM 21 increasing factor in terms of violence in the  
 05:51PM 22 community or with an intimate partner.

05:51PM 23 There was no indication according to  
 05:51PM 24 Dr. Bill Arnold of any serious psychiatric  
 05:51PM 25 disorder and Dr. Bill Arnold felt that you would

05:51PM 1 benefit from a 52-week domestic batterer class.

05:51PM 2 The psychological evaluation prepared  
 05:51PM 3 by Dr. Michael Johnston, in fact, did have a bit  
 05:51PM 4 more detailed diagnosis than the other two that I  
 05:51PM 5 have mentioned. Certainly the alcohol use issue,  
 05:51PM 6 which was described as moderate. Narcissistic  
 05:51PM 7 personality traits and other specified issues  
 05:52PM 8 with impulse control and conduct disorder,  
 05:52PM 9 primarily in the form of anger. The risk level  
 05:52PM 10 from Dr. Michael Johnston's evaluation was a  
 05:52PM 11 moderate risk to reoffend within the next 5 to 10  
 05:52PM 12 years compared with other offenders, once again,  
 05:52PM 13 if successful in treatment, the risk to reoffend  
 05:52PM 14 could be reduced to low.

05:52PM 15 Dr. Michael Johnston concluded you were  
 05:52PM 16 most likely to act in opportunistic or impulsive  
 05:52PM 17 ways, engaging in aggressive behavior in response  
 05:52PM 18 to intoxication or stressors, and that your  
 05:52PM 19 potential for future aggressive behavior and  
 05:52PM 20 manipulation was moderate.

05:52PM 21 Dr. Michael Johnston did recommend  
 05:52PM 22 treatment to begin in a structured setting,  
 05:52PM 23 transferred to a community-based setting only if  
 05:52PM 24 progress was demonstrated. And, again, you are  
 05:52PM 25 moderately amenable to treatment and treatment in

05:52PM 1 a structured setting should focus on personality,  
 05:52PM 2 anger management, mood, and substance abuse  
 05:53PM 3 issues.

05:53PM 4 The LSIR score of 20 indicated a  
 05:53PM 5 moderate risk to reoffend, although in this  
 05:53PM 6 situation, candidly, given your background, I  
 05:53PM 7 don't know how reliable that score is. I would  
 05:53PM 8 tend to place more weight on the conclusions of  
 05:53PM 9 the evaluations in this case as to the risk that  
 05:53PM 10 you do pose to the community or to others.

05:53PM 11 The presentence investigator noted that  
 05:53PM 12 given the nature of the crimes that you might pose  
 05:53PM 13 an undue risk to the community and did, in fact,  
 05:53PM 14 recommend incarceration with rehabilitative  
 05:53PM 15 programming. While Dr. Michael Johnston in making  
 05:53PM 16 a similar recommendation perhaps was referring to  
 05:53PM 17 a rider, my experience in presentence  
 05:53PM 18 investigation reports is that if the presentence  
 05:53PM 19 investigator feels that a rider is appropriate, he  
 05:53PM 20 or she will recommend a rider.

05:53PM 21 And that in this situation where the  
 05:53PM 22 recommendation for the presentence investigator  
 05:53PM 23 was for incarceration with rehabilitative  
 05:54PM 24 programming, the Court has interpreted that to  
 05:54PM 25 mean being sentenced to the penitentiary with

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05 54PM 1 programming and then possible release in the  
 05 54PM 2 future on parole, depending upon your performance  
 05 54PM 3 while in the Department of Corrections' custody.  
 05 54PM 4 The Court in imposing sentence, as  
 05 54PM 5 always, is guided by the Toohili factors  
 05 54PM 6 assessment noted by Counsel in their arguments to  
 05 54PM 7 the Court. Its primary consideration is and must  
 05 54PM 8 be protecting the community. If I do nothing  
 05 54PM 9 else, I must ensure by the sentence that I impose  
 05 54PM 10 that the community is protected.  
 05 54PM 11 I do have other considerations, as has  
 05 54PM 12 been noted. They do include punishment, they do  
 05 54PM 13 include deterrence, both general and specific. In  
 05 54PM 14 other words, deterrence as to other individuals in  
 05 54PM 15 the community and as to you personally. And  
 05 54PM 16 rehabilitation is also a factor for the Court as  
 05 54PM 17 well.  
 05 54PM 18 I do agree that in this case  
 05 54PM 19 rehabilitation is and should be a consideration  
 05 56PM 20 for the Court. But my concern beyond that is the  
 05 56PM 21 nature of these crimes, and both of them are  
 05 56PM 22 serious, but in particular the arson charge. And  
 05 56PM 23 the risk that you put individuals who, although  
 05 56PM 24 perhaps neighbors, were individuals who apparently  
 05 56PM 25 their only wrongdoing, if you will, was the fact

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05 56PM 1 that they were having a New Year's Eve party. And  
 05 56PM 2 in this situation, your decision to start a fire  
 05 56PM 3 at their home and put them and others at risk as a  
 05 56PM 4 result is something that this Court feels cannot  
 05 56PM 5 be tolerated.  
 05 56PM 6 In this situation, therefore, the Court  
 05 56PM 7 in protecting the community feels that this is a  
 05 56PM 8 case for a penitentiary sentence. And I say that  
 05 56PM 9 not only because of the nature of the offense  
 05 56PM 10 itself, but because the Court does not believe  
 05 56PM 11 that in any stretch of the imagination is this a  
 05 56PM 12 case for probation. And therefore, the Court does  
 05 56PM 13 not feel that a period of retained jurisdiction to  
 05 56PM 14 determine whether or not probation would be  
 05 56PM 15 appropriate in your case is called for.  
 05 56PM 16 As a result, the Court in this case is  
 05 56PM 17 going to impose a sentence that does include  
 05 56PM 18 incarceration in the state penitentiary. It will  
 05 56PM 19 be for an extended period of time. It will give  
 05 56PM 20 you an opportunity after some period in custody  
 05 56PM 21 for perhaps release back in the community if you  
 05 56PM 22 have been able to demonstrate while in the  
 05 56PM 23 Department of Corrections' custody that you can  
 05 56PM 24 adequately address your substance abuse and other  
 05 56PM 25 issues that have brought you before this Court

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05 56PM 1 today.  
 05 56PM 2 Based upon the foregoing, the Court is  
 05 56PM 3 going to impose the following sentence:  
 05 56PM 4 In the 020 case, the arson charge, I  
 05 56PM 5 will enter a judgment of conviction. I will  
 05 56PM 6 sentence you to the custody of the Board of  
 05 56PM 7 Correction for a term of 25 years, the first 3  
 05 56PM 8 years of that sentence are to be fixed, followed  
 05 57PM 9 by 22 years indeterminate.  
 05 57PM 10 In the 7788 case, the felony domestic  
 05 57PM 11 violence charge, I will also sentence you to the  
 05 57PM 12 custody there of the Department of Correction, in  
 05 57PM 13 that case for a period of 10 years. Once again,  
 05 57PM 14 the first 3 years of that sentence are to be  
 05 57PM 15 fixed, followed by 7 years indeterminate.  
 05 57PM 16 Those sentences though will run  
 05 57PM 17 concurrently, one with the other. In this case,  
 05 57PM 18 by my calculation in the 020 case, you've been in  
 05 57PM 19 custody for actually 156 days as of today's date,  
 05 57PM 20 and you will receive credit for that time towards  
 05 57PM 21 the fixed portion of your sentence there. In the  
 05 57PM 22 7788 case, you will receive credit by my  
 05 57PM 23 calculation for 154 days there towards the fixed  
 05 57PM 24 portion of your sentence.  
 05 57PM 25 The Court in this case is not going to

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05 57PM 1 impose any fine, given the sentence otherwise  
 05 57PM 2 imposed in this case. There being no opposition  
 05 57PM 3 from the Defense in the 0020 case, the Court is  
 05 56PM 4 going to order restitution in the amount of \$600  
 05 58PM 5 there and will sign a civil judgment to that  
 05 58PM 6 effect at this time.  
 05 58PM 7 In the 0020 case, the Court is simply  
 05 58PM 8 going to enter an amended no-contact order. And  
 05 58PM 9 in this case I do show the original no-contact  
 05 58PM 10 order was actually, Mr. Harmer, as to not only  
 05 58PM 11 Mr. and Mrs. Trowbridge, but to their children as  
 05 58PM 12 well. Are you asking that the no-contact order be  
 05 59PM 13 limited to Mr. and Mrs. Trowbridge themselves and  
 05 59PM 14 to the residence?  
 05 59PM 15 MR. HARMER: No. Apparently I left that  
 05 59PM 16 out. The children should be on there as well.  
 05 59PM 17 THE COURT: Okay. Counsel, in this case I'm  
 05 59PM 18 going to go ahead and return that no-contact order  
 05 59PM 19 to you to make the necessary additions to it.  
 05 59PM 20 While you are doing that, I will turn  
 05 59PM 21 to the requested amended no-contact order in the  
 05 59PM 22 7788 case. And in that case there was a prior  
 05 59PM 23 no-contact order issued that is due to expire in  
 05 59PM 24 June of 2013. What I will do in this case is  
 05 59PM 25 enter the no-contact order as to all three

05:50PM 1 individuals, both Nicole Orr and the two children  
 05:50PM 2 with no exceptions for now.  
 06:00PM 3 Mr. Ball, because I do not have Nicole  
 06:00PM 4 Orr in court to let me know whether or not she  
 06:00PM 5 does or does not object to the changes that Mr.  
 06:00PM 6 Orr has requested in that order, I am not prepared  
 06:00PM 7 to make those changes at this point. However, I  
 06:00PM 8 would entertain a motion to amend the no-contact  
 06:00PM 9 order as necessary. And if Nicole Orr can have  
 06:00PM 10 proper notice, then I would be prepared to take  
 06:00PM 11 that up at some later point.  
 06:00PM 12 MR. BALL: Thank you, Your Honor.  
 06:00PM 13 THE COURT: But the order in this case will  
 06:00PM 14 indeed be for a period of 10 years from the date  
 06:00PM 15 of the judgment in this case, which means it would  
 06:00PM 16 expire on November the 2nd of 2024. And again, I  
 06:00PM 17 will sign that no-contact order at this time.  
 06:00PM 18 As to the requested no-contact order in  
 06:00PM 19 the 020 case, once again I will enter a no-contact  
 06:00PM 20 order, an amended no-contact order now, that will  
 06:01PM 21 be for the balance of the sentence in this case as  
 06:01PM 22 to the Trowbridges, which will be then for a  
 06:01PM 23 period of 25 years from the date of this judgment.  
 06:01PM 24 Which means that order will not expire until the  
 06:01PM 25 2nd of November of 2039. And I will go ahead and

06:01PM 1 sign that no-contact order as well.  
 06:01PM 2 Mr. Orr, I am going to have you given  
 06:01PM 3 the no-contact orders that I have issued in these  
 06:01PM 4 two cases. You do need to sign that near the  
 06:01PM 5 bottom as to each one. Your signature simply  
 06:01PM 6 acknowledges that you're aware of the order, that  
 06:01PM 7 you agree to abide by its terms, and also  
 06:01PM 8 acknowledges a copy of receipt of that order,  
 06:01PM 9 which you will receive in these two cases.  
 06:02PM 10 There being no request for restitution  
 06:02PM 11 in the 7788 case, none will enter at this point.  
 06:02PM 12 The Court though will order costs and fees in each  
 06:02PM 13 case.  
 06:02PM 14 Mr. Trowbridge (sic), in this case I am  
 06:02PM 15 also going to indicate for the record in these  
 06:02PM 16 cases, besides the no-contact order and the  
 06:02PM 17 restitution requested and the credit for time  
 06:02PM 18 served, I am also going to recommend strongly to  
 06:02PM 19 the Board of Correction that you do be considered  
 06:02PM 20 for any and all forms of therapeutic counseling  
 06:03PM 21 while in their custody. Dr. Johnston, Michael  
 06:03PM 22 Johnston, had recommended actually quite a few  
 06:03PM 23 programs, including anger management, substance  
 06:03PM 24 abuse, and other programming such as that, and I  
 06:03PM 25 felt that that recommendation was certainly

06:03PM 1 merited given the information that I had seen in  
 06:03PM 2 the cases here before the Court.  
 06:03PM 3 So in this case I am going to recommend  
 06:03PM 4 the therapeutic counseling to focus on, and I'm  
 06:03PM 5 going to spell these out specifically:  
 06:03PM 6 Personality issues, anger management, mood  
 06:03PM 7 disorder, and substance use issues. I am going to  
 06:03PM 8 specify all of those for the benefit of the  
 06:03PM 9 Department of Correction in terms of any treatment  
 06:03PM 10 that you might be afforded while in their custody.  
 06:03PM 11 Mr. Johnston (sic), in these two cases  
 06:03PM 12 I do need to advise you of your right to appeal  
 06:03PM 13 this decision of the Court. The appeal does have  
 06:03PM 14 to be filed within 42 days from the date the  
 06:03PM 15 judgment enters. If you are an indigent person  
 06:03PM 16 and could not afford your own attorney, one could  
 06:03PM 17 be appointed for you at State expense to help you  
 06:03PM 18 prosecute your appeal. Furthermore, as an  
 06:03PM 19 indigent person, the cost of the appeal could be  
 06:03PM 20 borne at State expense, as well.  
 06:04PM 21 Mr. Johnston (sic), in this case, while  
 06:04PM 22 I appreciated your counsel's argument and the  
 06:04PM 23 recommendation that I consider a period of  
 06:04PM 24 retained jurisdiction in this case, candidly, as I  
 06:04PM 25 had indicated, I don't think that probation was

06:04PM 1 really an option in this matter. And I do feel  
 06:04PM 2 that anything less than incarceration would have  
 06:04PM 3 deprecated the seriousness of these crimes,  
 06:04PM 4 especially that offense of arson. The senseless  
 06:04PM 5 nature of that crime and the risk to which you  
 06:04PM 6 imposed or you placed individuals in that home on  
 06:04PM 7 the night in question merited, I believe, the  
 06:04PM 8 significant punishment that I have imposed in this  
 06:04PM 9 case.  
 06:04PM 10 Nonetheless, I am not unmindful of the  
 06:05PM 11 need for rehabilitation, which is why I have  
 06:05PM 12 recommended the treatment or counseling while in  
 06:05PM 13 the Department's custody, and hopefully you will  
 06:05PM 14 be able to receive the benefit of that  
 06:05PM 15 programming.  
 06:05PM 16 Because as Mr. Ball has argued, and I  
 06:05PM 17 think this is absolutely true, at some point you  
 06:05PM 18 are going to be released back into the community.  
 06:05PM 19 Whenever that happens, I want to make sure that I  
 06:05PM 20 have done everything that I can in my  
 06:05PM 21 recommendations to the Department of Correction to  
 06:05PM 22 get you the treatment that you obviously need to  
 06:05PM 23 address the issues that you do have. And if you  
 06:05PM 24 are able to successfully obtain that treatment,  
 06:05PM 25 Michael Johnston tells me that your risk would be

06:05PM 1 significantly reduced. And if that's true, I  
06:05PM 2 shouldn't have to see you back in court again.  
06:05PM 3           Hopefully, sir, you will get the help  
06:05PM 4 and the treatment that you do need. Hopefully,  
06:05PM 5 again, I don't see you back in court.  
06:05PM 6           Counsel, thank you.  
06:05PM 7           MR. BALL: Thank you very much, Your Honor.  
06:05PM 8 Defense is returning the PSI, Your Honor.  
06:05PM 9           THE COURT: Counsel, thank you.  
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06:05PM 11           (Hearing concluded.)  
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