2-10-2012

State v. Overline Appellant's Brief Dckt. 38929

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38929
	)	
v.	)	
	)	
KEVIN CHRISTIAN OVERLINE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

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PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Kevin Christian Overline appeals following his convictions after a jury trial for lewd conduct with a minor under sixteen, sexual abuse of a child under the age of sixteen years, and possession of sexually exploitive material. Mr. Overline asserts that the district court committed fundamental, structural error when it excluded the public from portions of his jury trial, and abused its discretion when it imposed excessive sentences and denied his Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion.

Statement of the Facts and Course of Proceedings

Mr. Overline was charged by Indictment with one count each of lewd conduct with a minor under sixteen, sexual abuse of a child under the age of sixteen years, and possession of sexually exploitive material. (R., pp.19-20.) The charges stemmed from acts purportedly committed by Mr. Overline against A.B., the then ten-year-old daughter of his live-in girlfriend. (PSI File,[1] p.2.) All three crimes arise from pictures that were taken of A.B.'s genitals, anus, and breasts, with some of the pictures showing what appear to be a man's hands touching A.B.'s body, while she was asleep in her bedroom. (Tr., p.260, L.9 – p.273, L.21.)

The matter proceeded to a jury trial. The public was excluded from Mr. Overline's trial during portions of the testimony of two witnesses. The first instance occurred during the testimony of the alleged victim, after the prosecutor indicated that she would be publishing nude images of the alleged victim purportedly taken by

[1] All references to the Presentence Investigation Report (PSI) will be to "PSI File," a paginated PDF document containing the PSI and supporting documentation.

Mr. Overline. At that point, the following exchange took place between the prosecutor and the district court:

THE COURT:	So if you're going to publish these, I do want to clear the courtroom.
[Prosecutor:]	I think that's just the quickest way to put them on.
THE COURT:	Right.
[Prosecutor:]	The victim-witness coordinator is asking whether she needs to go out and/or if she needs to stay.
THE COURT:	That's really up to the witness in this case. If she would feel more comfortable with the victim-witness coordinator present, then she can have her present.

(Tr., p.259, L.15 – p.260, L.1.)

The alleged victim then testified concerning fifteen of the sixty-five photographs that were admitted into evidence after the public was excluded from the trial. Nothing in the record indicates when (or if), during the cross-examination, redirect, or recross-examination of the alleged victim that took place immediately after the publication and testimony about the photographs, the public was permitted back in the courtroom. (Tr., p.260, L.9 – p.277, L.21.)

The second instance occurred during the testimony of the State's computer expert, prior to his display and discussion of nude images of the alleged victim. The following exchange then occurred:

THE COURT:	We – because there's going to be publications [sic] of the pictures, all of the parties that are here must leave. The public must be excluded. Are we ready to bring in the jury?
[Prosecutor:]	Yes, Your Honor.
[Defense Counsel:]	Yes.

THE COURT: When that is over, then he – the bailiff will go out into the hallway to let people know that that's over.

(Tr., p.345, Ls.6-16.) In neither instance does defense counsel appear to have objected to the district court's actions.[2]

Mr. Overline was found guilty of all three counts. (R., pp.164-66.) The State requested concurrent, unified sentences of twenty years, with six years fixed, on the lewd conduct charge, fifteen years, with five years fixed, on the sexual abuse charge, and ten years, with five years fixed, on the possession of sexually exploitive material charge. (Tr., p.477, Ls.3-10.) Defense counsel requested a rider, with the sentences consisting of two or three years fixed with "a longer indeterminate tail[.]" (Tr., p.484, Ls.7-16.) The district court imposed concurrent, unified sentences of fifteen years, with five years fixed, on the lewd conduct and sexual abuse charges, and a unified sentence

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[2] At a pre-trial hearing, the following exchange took place among the parties and the court:

[Prosecutor:] I'm wondering if I can just publish them personally to the jury or we can clear the courtroom out since it is a young victim.

THE COURT: I – I would probably clear – clear the area. I think that would make more sense. Is that okay with you?

[Defense Counsel:] That's fine.

THE COURT: Okay. But this isn't like videos or anything like that? It's just photographs?

[Prosecutor:] Photographs.

THE COURT: And it's up to you whether you want to just publish it individually or put it on the overhead. But if you – I think if you want to do it on the overhead, that's fine, and then we can – we'll just have everybody out.

(Supp.Tr., p.7, L.20 – p.8, L.11.)

of ten years, with five years fixed, on the possession of sexually exploitive material charge. (R., pp.185-86.) Mr. Overline filed a Notice of Appeal timely from the judgment of conviction. (R., p.191.)

Mr. Overline then filed a Rule 35 motion, requesting leniency. (R., p.214.) The district court gave the defense one month within which to provide supporting documentation. (R., p.217.) The defense filed a letter from Mr. Overline within the one month period, in which he provided new information in support of his Rule 35 motion. The letter explained that he was taking classes at the chapel, attending Saturday and Sunday services, that no programming was available until his parole date was closer, and that he had a job working at the laundry. He then compared his sentences to those received by others who he believed had committed more serious crimes. (R., pp.219-20.) Ultimately, the district court denied the Rule 35 motion. (R., p.226.)

ISSUES

1. Did the district court commit fundamental, structural error in violation of Mr. Overline's Sixth Amendment right to a public trial when it excluded the public from portions of his jury trial?

2. Did the district court abuse its discretion by imposing excessive sentences?

3. Did the district court abuse its discretion when it denied Mr. Overline's Rule 35 motion in light of the new information provided?

ARGUMENT

I.

The District Court Committed Fundamental, Structural Error In Violation Of Mr. Overline's Sixth Amendment Right To A Public Trial When It Excluded The Public From Portions Of His Jury Trial

A. Introduction

Mr. Overline asserts that the district court erred when it excluded the public from portions of his jury trial without obtaining his informed consent before doing so. Although counsel for Mr. Overline did not object to the exclusions, Mr. Overline asserts that the error in excluding the public from his trial constitutes fundamental error, and is, therefore, reviewable on appeal absent objection. Because denial of the right to a public trial is structural error, the prejudice prong of the test announced by this Court in *State v. Perry*, 150 Idaho 209 (2010) does not apply, and this Court should reverse Mr. Overline's convictions without considering whether he can demonstrate specific prejudice. Finally, Mr. Overline urges this Court to reject any argument that Mr. Overline's counsel could waive his right to a public trial through statements or by his conduct.

B. The District Court Committed Fundamental, Structural Error In Violation Of Mr. Overline's Sixth Amendment Right To A Public Trial When It Excluded The Public From Portions Of His Trial

1. The Violation

The Sixth Amendment to the United States Constitution, in relevant part, provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. CONST. amend VI. The Sixth Amendment's public trial guarantee has been incorporated against the states through the Fourteenth Amendment. *In re*

Oliver, 333 U.S. 257, 273 (1948). Excluding the public from even a portion of trial proceedings constitutes a violation of the Sixth Amendment right. *See Presley v. Georgia*, __ U.S. __, 130 S.Ct. 721 (2010) (exclusion during *voir dire*); *Waller v. Georgia*, 467 U.S. 39 (1984) (exclusion during suppression hearing). Violation of the right constitutes structural error. *See Waller*, 467 U.S. at 49-50; *State v. Perry*, 150 Idaho 209, 222 (2010) (citing *Waller*). A violation of the right to a public trial is not subject to harmless error analysis, and a defendant need not demonstrate specific prejudice in order to prevail on appeal. *Neder v. United States*, 527 U.S. 1, 8 (1999); *Waller*, 467 U.S. at 49-50.

The public was excluded from Mr. Overline's jury trial during portions of the testimony of two witnesses. The first instance occurred during the testimony of the alleged victim, after the prosecutor indicated that she would be publishing images of the alleged victim nude purportedly taken by Mr. Overline. At that point, the following exchange took place between the prosecutor and the district court:

THE COURT:	So if you're going to publish these, I do want to clear the courtroom.
[Prosecutor:]	I think that's just the quickest way to put them on.
THE COURT:	Right.
[Prosecutor:]	The victim-witness coordinator is asking whether she needs to go out and/or if she needs to stay.
THE COURT:	That's really up to the witness in this case. If she would feel more comfortable with the victim-witness coordinator present, then she can have her present.

(Tr., p.259, L.15 – p.260, L.1.)

The alleged victim then testified concerning fifteen of the sixty-five photographs that were admitted into evidence after the public was excluded from the trial. Nothing in

the record indicates when (or if), during the cross-examination, redirect, or recross-examination of the alleged victim that took place immediately after the testimony about the photographs, the public was permitted back inside the courtroom. (Tr., p.260, L.9 – p.277, L.21.)

The second instance occurred during the testimony of the State's computer expert, prior to his discussion of nude images of the alleged victim. The following exchange then occurred:

> THE COURT: That's just the date that's shown. We – because there's going to be publications [sic] of the pictures, all of the parties that are here must leave. The public must be excluded.
>
> Are we ready to bring in the jury?
>
> [Prosecutor:] Yes, Your Honor.
>
> [Defense Counsel:] Yes.
>
> THE COURT: When that is over, then he – the bailiff will go out into the hallway to let people know that that's over.

(Tr., p.345, Ls.6-16.) In neither instance does defense counsel appear to have objected to the district court's actions.

In *Waller,* the United States Supreme Court provided the test to be applied before a court may exclude the public from any portion of a trial. The Court explained,

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller, 467 U.S. at 48. The trial court must consider alternatives even when none are offered by the parties. *Presley*, 130 S. Ct. at 725.

Based on the excerpts of the trial set forth above, it cannot be disputed that the district court did not conduct the analysis required under *Waller*, rendering the error plain. First, neither the State nor the court identified the prejudice that was likely to occur if the courtroom was not closed to the public.[3] Second, the closure was broader than necessary to protect any interest, which is evidenced by the fact that the State was allowed to choose whether it wanted to publish the photographs to the jury or using an overhead projector; it chose to publish them on the overhead because doing so was the "quickest way" to present the evidence. (Tr., p.259, L.15 – p.260, L.1.) Third, the district court did not consider reasonable alternatives, including privately publishing the pictures to the jury or setting up the projector (or using some sort of screen) so as to prevent the public from seeing the images during the testimony. Finally, the district court made no findings whatsoever, let alone findings sufficient to support the closure of the courtroom.

In *Cowles Pub. Co. v. Magistrate Court of the First Judicial Dist. Of State, County of Kootenai*, 118 Idaho 753 (1990), the Idaho Supreme Court, considering the closely-related First Amendment right[4] that implicitly provides the right of the public to attend trials, recognized,

> The presumption remains that preliminary hearings in Idaho will remain open *absent the defendant's request*[5] *and an overriding interest in a fair*

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[3] Appellate counsel accepts that the interest sought to be protected by the State and the district court was avoiding displaying the photographs to the public. However, the extent to which some sort of prejudice would occur if this interest was not protected is not clear.

[4] The United States Supreme Court has recognized that the Sixth and First Amendment guarantees of public access to trials (and related proceedings) are co-extensive. *See Waller*, 467 U.S. at 46 ("there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and the public").

[5] The Court was considering how a statute, Idaho Code § 19-811, could be construed as constitutional in light of the First Amendment right of the public to attend preliminary

> *trial*. The right to an open public preliminary hearing and trial is a shared right of the accused and the public, with the common element and concern being the assurance of fairness.

Id. at 760 (emphasis added).

The United States Supreme Court has also recognized what the Idaho Supreme Court did in *Cowles*: the public trial guarantee is a crucial part of the process that ensures a criminal defendant receives a fair trial. *See Waller*, 467 U.S. at 46 ("The central aim of a criminal proceeding must be to try the accused fairly, and '[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'") (brackets in original) (quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380 (1979)). The importance of the right to the fairness of the underlying proceeding is a strong indication that counsel did not fail to object for strategic purposes, and that any such intention on the part of defense counsel would have been unreasonable.

2. The Right Was Not Waived

Mr. Overline anticipates that the State will argue that his right to a public trial was waived either when his attorney failed to object to the closure of the courtroom, or when, at a pre-trial hearing, his attorney said, "That's fine[,]" when the district court announced that it intended *either* to "clear the area" or publish the exhibits privately to the jury. (Supp.Tr., p.7, L.20 – p.8, L.11.)

The Utah Supreme Court has identified three approaches that appellate courts have taken when considering how and when the right to a public trial may be waived.

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hearings. *Cowles*, 118 Idaho at 760. The plain language of the statute requires the exclusion of the public "upon the request of the defendant[.]" I.C. § 19-811.

State v. Butterfield, 784 P.2d 153 (Utah 1989). The first is that the right is not waived by a failure to object. The second is that it is "waived by silence only if the failure to object represents an intentional and knowing act by the defendant." The third, which it describes as "the apparent majority view," allows for waiver of the right by silence. *Id.* at 155.

Ultimately, the Utah Supreme Court adopted the majority view, reasoning that the right to a public trial is different than other rights that require a personal waiver by the defendant, such as the right to trial, the right to be present at trial, the right to trial by jury, and the right to an interpreter at trial. The Court reasoned, "A unifying characteristic of these rights appears to be that they are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process." *Id.* at 156. In finding the right to a public trial to be different, the Court reasoned, recognizing that the right "is important in assuring that abuses by the state are not permitted to be hidden from public view[,]" that "the absence of the public in a particular case does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process." *Id.*

One reason that this Court should reject the Utah Supreme Court's goal-based reasoning is because it predates the analysis of the significance of constitutional trial rights adopted by the United States Supreme Court in recent years. Specifically, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Court rejected a goal-based approach to the Sixth Amendment right to confront witnesses, explaining,

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, *the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.* It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about

> the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.
>
> ...
>
> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Crawford at 61-62 (emphasis added). Similarly, deciding whether a structural, constitutional right can be waived by silence or the conduct of counsel, without the defendant being informed of that right, merely because a court has determined that the right does not "necessarily affect qualitatively the guilt-determining process" the way that a deprivation of the right to a jury trial[6] does is the type of goal-based reasoning about a procedural right that was rejected in *Crawford* and which should be rejected by this Court.

Another reason that this Court should reject the reasoning adopted by the Utah Supreme Court is that it ignores one important reason for the right to a public trial: "a public trial encourages witnesses to come forward and discourages perjury." *Waller*, 467 U.S. at 46 (discussing this reason as different from the fact that a public trial assures that a defendant is dealt with fairly and that the prosecutor and judge "carry out their duties responsibly").

Finally, and perhaps most importantly, this Court should reject the approach taken by the Utah Supreme Court because Idaho case law disfavors finding waivers of constitutional rights when they are not clear from the record. *See State v. Lopez*, 144

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[6] The Utah Supreme Court gives no reason or evidence in support of its conclusion that the presence or absence of a jury at trial "necessarily affect[s] qualitatively the guilt-determining process[,]" nor does it explain why the presence or absence of the public at a trial is less-important than the right to a jury trial. The Court simply asserts both propositions as if they were self-evident.

Idaho 349, 352 (Ct. App. 2007) ("A waiver is a voluntary relinquishment or abandonment of a known right or privilege, and courts should indulge every reasonable presumption against waiver") (citing *Barker v. Wingo*, 407 U.S. 514 (1972)); *State v. Stuart*, 113 Idaho 494, 497 (Ct. App. 1987) ("Waiver, in the broad sense, is defined as the voluntary relinquishment of a known right. There must be expressed consent or affirmative conduct manifesting consent for waiver of a speedy trial. Furthermore, every reasonable presumption against waiver must be indulged") (internal citations omitted). The United States Supreme Court has reached the same conclusion. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege") (internal footnotes, quotation marks, and citations omitted).

Mr. Overline asserts that this Court should instead adopt the approach taken by the Seventh Circuit, which it set forth as follows:

> The Supreme Court has noted, "[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial." Consequently, "every reasonable presumption should be indulged against" waiver of a fundamental trial right. This heightened standard of waiver has been applied to plea agreements, the right against self-incrimination, the right to a trial, the right to a trial by jury, the right to an attorney, and the right to confront witnesses. Furthermore, in dealing with the fundamental trial right to representation by counsel, the Supreme Court has held that presumption of waiver from a silent record is impermissible.
>
> The common element of the cases mentioned in the paragraph above is the fact that the rights with which they deal all concern the fairness of the trial. The right to a *public* trial also concerns the right to a *fair* trial. So, like other fundamental trial rights, a right to a public trial may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right.

Walton v. Briley, 361 F.3d 431, 433-34 (7th Cir. 2004) (internal citations omitted) (emphases in original); *see also Com. v. Edward*, 912 N.E. 2d 515, 523-24 (Mass. App. Ct. 2009) ("Notwithstanding its structural character, the right to a public trial, like other structural rights, can be waived. Waiver requires a sound rationale for closure and the defendant's knowing agreement."); *State v. Bone-Club*, 906 P.2d 325, 329 (Wash. 1995) (considering the state constitution's similar public trial guarantee and "dismissing the State's argument that Defendant's failure to object freed the trial court from the strictures of the closure requirements").

Finally, to the extent that defense counsel's statement, "That's fine," at a pre-tiral conference amounted to an attempt to waive Mr. Overline's right to a public trial, such a waiver must be read as narrowly as possible. *See Stuart*, 113 Idaho at 497 ("every reasonable presumption against waiver [of a constitutional right] must be indulged") (internal citations omitted). An examination of the question asked of defense counsel reveals that any waiver is not as broad as what the court later did. Specifically, defense counsel was asked whether he was okay with the district court's intention to "clear the area" *or* publish the photographs privately to the jury. (Supp.Tr., p.7, L.24 – p.8, L.1.) It was only after that statement that the district court, without seeking further input from defense counsel, announced that it would "just have everybody out" if the State chose to publish the images on the overhead rather than individually to the jury. At no time did the district court seek to inform Mr. Overline of his right to a public trial or seek his input. (Supp.Tr., p.8, Ls.7-11.)

Considering the importance of the right to a public trial to fairness of the proceedings, as recognized by the Seventh Circuit and by this Court in *Cowles*, this Court should adopt the approach taken by the Seventh Circuit, Massachusetts, and

Washington, and require that the record demonstrate that any waiver of the right be knowing and voluntary *on the part of the defendant.* For the same reason that a lawyer can't waive the right to a jury trial, a lawyer shouldn't be allowed to waive the right to a public trial.

II.

The District Court Abused Its Discretion By Imposing Excessive Sentences

Mr. Overline asserts that, considering the mitigating factors present in his case, the district court abused its discretion when it imposed concurrent, unified sentences of fifteen years, with five years fixed, on the charges of lewd conduct and sexual abuse, and ten years, with five years fixed, on the charge of possession of sexually exploitive material.

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. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

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.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Overline does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Overline must show that, in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). 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. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978)).

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. This Court has also ruled that ingestion of drugs and alcohol, resulting in an impaired capacity to appreciate the criminality of one's conduct, can be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981).

Mr. Overline admitted to using methamphetamine several times per week over a period of twenty years. (PSI File,[7] p.19.) He has expressed a desire to participate in drug treatment. (PSI File, p.20.) At sentencing, defense counsel explained that Mr. Overline "related to me that he had been up for approximately four, maybe five days at the time of this incident ... and that he had been doing meth during that time and hadn't slept." (Tr., p.480, Ls.12-16.) Mr. Overline confirmed this information when, during his PSI, he explained that he was

> "still not sure why I did [it] except I was not thinking very clear [sic] at all after being up that many nights without any sleep." He repeated that he had been using methamphetamine regularly and not sleeping due to his drug use.

[7] The PSI and supporting materials are contained in a PDF file and, for ease of reference, citations to their contents will be to "PSI File."

(PSI File, p.8.) The psychosexual evaluator concluded that Mr. Overline's "inappropriate sexual behavior [with the victim] seemed to be an extension of his methamphetamine issues." (PSI File, p.49.)

Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991). Mr. Overline expressed remorse when, at sentencing, he announced, "I'd like to say I'm so very sorry for [the victim]. I never meant to hurt her and I hope some day she can forgive me for what I did." (Tr., p.486, Ls.11-13.) During his PSI, Mr. Overline noted, "I admit to my crime & take full responsibility." (PSI File, p.20.)

The Idaho Supreme Court has recognized that a desire to undergo sex offender treatment is a mitigating factor to be considered. *See State v. Jackson*, 130 Idaho 293, 295-96 (1997) (finding a fixed-life sentence excessive for reasons that included the defendant's acceptance of responsibility, including "not blam[ing] the victims in any way," desire to undergo sex offender treatment, "desire to change his behavior and possibility for rehabilitation"). Mr. Overline is open to treatment, specifically believing that "he would benefit from sexual offender treatment" because it would "'help me realize how bad things are I did.'" (PSI File, p.45.) According to the psychosexual evaluator, Mr. Overline "would pose a low risk to re-offend when compared with other sexual offenders, provided he was actively involved in treatment and remained clean and sober." (PSI File, p.47.) The psychosexual evaluator noted, "testing suggested motivation for treatment[,]" and he was "considered amenable for sexual offender treatment at a community based setting, provided he conjointly participated in substance abuse treatment." (PSI File, p.50.)

The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (1998) (quoting *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227 (1971)); *see also State v. Nice*, 103 Idaho 89, 91 (1982). In both *Hoskins* and *Nice*, the Idaho Supreme Court considered, among other important factors, that the defendants had no prior felony convictions. *Hoskins* at 673; *Nice* at 90. Prior to this case, Mr. Overline had not been convicted of a felony.[8] (PSI File, p.22.)

The Idaho Supreme Court has recognized that an important factor in fashioning a sentence is whether an offender enjoys the support of family and friends in his rehabilitation efforts. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who, *inter alia*, had the support of his family in his rehabilitation efforts). Mr. Overline enjoys the support of his two adult daughters and his father. (PSI File, pp.10-11, 15-16.) One of his daughters told the PSI writer that, if granted probation, he could live with her while he got back on his feet. (PSI File, p.12.)

Mr. Overline asserts that, based on the mitigating factors present in his case, the district court abused its discretion when it sentenced him to concurrent, unified sentences of fifteen years, with five years fixed, on the charges of lewd conduct and sexual abuse, and ten years, with five years fixed, on the charge of possession of sexually exploitive material. He asserts that the fixed portions of his sentences should have been, at most, three years, with the opportunity to complete a rider or be suspended while he was allowed to be on probation.

[8] Mr. Overline's prior record shows two misdemeanor convictions: failure to carry a license in 1990 and speeding in a work zone in 2008. (PSI File, p.9.)

III.

The District Court Abused Its Discretion When It Denied Mr. Overline's Rule 35 Motion In Light Of The New Information Provided

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447 (Ct. App. 1984)). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* (citing *Lopez* at 450). "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.* (citing *State v. Hernandez*, 121 Idaho 114 (Ct. App. 1991)).

The new information provided by Mr. Overline in support of his Rule 35 motion was in the form of a letter. In the letter, he explained that he was taking classes at the chapel and attending Saturday and Sunday services, that no programming was available until his parole date was closer, and that he had a job working at the prison laundry.

Mr. Overline asserts that when this new information is considered along with the mitigating factors identified in section II, *supra*, the district court abused its discretion when it denied his Rule 35 motion.

CONCLUSION

Mr. Overline respectfully requests that this Court vacate his judgment of conviction because the district court violated his Sixth Amendment right to a public trial. In the alternative, he respectfully requests that this Court reduce the fixed portions of his underlying sentences from five years each to three years each, and order that his sentences be suspended while he serves a period of probation.

DATED this 10th day of February, 2012.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of February, 2012, 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:

KEVIN CHRISTIAN OVERLINE
INMATE #99605
ISCI
PO BOX 14
BOISE ID 83707

CHERI C COPSEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

SEAN C BEAVER
ATTORNEY AT LAW
E-MAILED BRIEF

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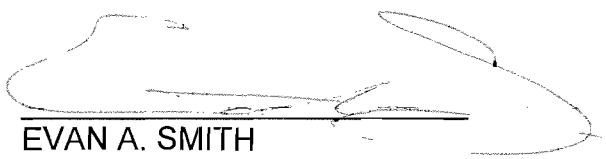
Hand delivered to the Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SJH/eas