5-29-2012

State v. Day Appellant's Brief Dckt. 39165

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent,	)	NO. 39165
v.	)	
KIM J. DAY, Defendant-Appellant.	)	APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature of the Case

Kim J. Day timely appeals from the district court's order revoking probation and executing a unified sentence of fourteen years, with four years fixed, which Mr. Day received upon entering a guilty plea to grand theft. Mr. Day argues that the Idaho Supreme Court denied him due process of law and equal protection when it refused to augment the record on appeal with the transcript of his June 16, 2008, sentencing hearing. Additionally, Mr. Day argues that the district court abused its discretion when it revoked his probation and executed the underlying sentence.

Statement of the Facts and Course of Proceedings

Mr. Day was charged, by Information, with grand theft for stealing approximately $40,000 from his employer. (R., pp.15-16; Presentence Investigation Report (*hereinafter,* PSI), p.2.) Pursuant to a plea agreement, Mr. Day pleaded guilty to grand theft. (R., pp.20-23, 25-26.) Thereafter, the district court imposed a unified sentence of fourteen years, with four years fixed, but suspended the sentence and placed Mr. Day on probation. (R., pp.33-35.)

After a period of probation, Mr. Day was convicted of a new offense, for lewd conduct with a minor under sixteen. (R, pp.64-65.) The State filed a report of probation violation based on the events associated with Mr. Day's conviction for lewd conduct. (R., pp.46-47.) Based on the doctrine of collateral estoppel, the district court found that Mr. Day had violated the terms of his probation due to his conviction for lewd conduct. (R., pp.64-65.)

At the probation violation disposition hearing, the district court stated that it was aware of Mr. Day's decision to appeal his conviction for lewd conduct. (08/29/11 Tr., p.2, Ls.19-22.) The district court then revoked Mr. Day's probation, but said it would reconsider its decision to revoke probation in the event Mr. Day's conviction for lewd conduct is overturned on appeal.[1] (08/29/11 Tr., p.3, Ls.7.) Mr. Day's trial counsel then said "I guess my only concern would be filing a Rule 35 after -- if his conviction is, in fact, overturned, if the Court would even have jurisdiction to hear a Rule 35 at that point." (08/29/11 Tr., p.3, Ls.21-24.) The district court responded by saying "I don't really know the answer to that question . . . it may be worthwhile to appeal this then . . ." (08/29/11 Tr., p.3, L.25 – p.4, L.3.) Mr. Day timely appealed. (R., pp.70-73.)

On appeal, Mr. Day's appellate counsel filed a motion to augment the record with various transcripts and to suspend the briefing schedule pending the preparation of those transcripts. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof, (*hereinafter,* Motion to Augment), pp.1-5.) The State objected in part to Mr. Day's request for the transcripts. (Objection in Part to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof " (*hereinafter,* Objection to Motion to Augment), pp.1-4.) Thereafter, the Idaho Supreme Court entered an order denying Mr. Day's request for a transcript of his sentencing hearing held on June 16, 2008, but granted his request for the probation violation disposition hearing held on August 15, 2011. (Order (*hereinafter,* Order Denying Motion to Augment), pp.1-2.)

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[1] The district court took judicial notice of the judgment of conviction and the psychosexual evaluation in the lewd conduct case. (08/29/11 Tr., p.1, Ls.15-18.) Additionally, the district court included those documents in the appellate record in this matter. (R., p.78.)

ISSUES

1. Did the Idaho Supreme Court deny Mr. Day due process and equal protection when it denied his Motion to Augment with the requested transcript?

2. Did the district court abuse its discretion when it revoked Mr. Day's probation?

3. Did the district court abuse its discretion when it failed to reduce Mr. Day's sentence *sua sponte* upon revoking probation?

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Day Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With A Necessary Transcript

A. Introduction

A long line of United States Supreme Court cases hold that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. In the event the record reflects a colorable need for a transcript, the only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the transcript is irrelevant to the issues raised on appeal.

In this case, Mr. Day filed a Motion to Augment, requesting a transcript of the June 16, 2008 sentencing hearing, wherein he argued that, when determining whether to revoke probation, a district court can consider all of the prior hearings. That motion was denied by the Supreme Court. On appeal, Mr. Day is challenging the Idaho Supreme Court's denial of his request for a transcript of the June 16, 2008 sentencing hearing. Mr. Day asserts that the requested transcript is relevant to the issues addressed at the probation violation disposition hearing because the sentencing occurred before the probation violation disposition hearing, and the district court could rely on its memory of that hearing when it decided to revoke Mr. Day's probation. Therefore, the Idaho Supreme Court erred in denying his request.

B. The Idaho Supreme Court Denied Mr. Day Due Process And Equal Protection When It Denied His Motion To Augment The Appellate Record With A Necessary Transcript

1. The Idaho Supreme Court, By Failing To Provide Mr. Day With Access To The Requested Transcript, Has Denied Him Due Process Because He Cannot Obtain A Merit Based Appellate Review Of His Sentencing Claims

The constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. CONST. amend. XIV; IDAHO. CONST. art. I §13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). Additionally, the Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a transcript, the cost of such transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to

"order a transcript to be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

An appeal from an order revoking probation is an appeal of right as defined in Idaho Appellate Rule 11. An order revoking probation is an order "made after judgment affecting the substantial rights of the defendant." *State v. Dryden*, 105 Idaho 848, 852 (Ct. App. 1983).

The United States Supreme Court has issued a long line of cases that directly address whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant trial proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits a states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with an appellate record unless some or all of the requested materials are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois* 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost." *Griffin*, 351 at 13. At that time, the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required defendants in all other criminal cases to purchase transcripts

themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process or equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations and footnotes omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective merits-related appellate review. At the same time, the Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet adequate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of a defendant's indigency. In that case, the State argued that the defendant had already received appellate review of his conviction by the Ohio appellate court. *Burns*, 360 U.S. at 257. The United States Supreme Court rejected this argument and ruled that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *State v. Draper*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining access to transcripts based on a frivolousness standard. "Under the present standard, . . . , they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 372 U.S. 494. The Supreme Court first expanded upon its statement in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement when stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised for appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it was held that a defendant need only make a colorable argument that he/she needs items to create a complete record on appeal. *Id.* at 195. If the State wants to deny the defendant's request, it is the State's burden to prove that the requested items are not necessary for the appeal. *Id.*

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardener v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

An application of the foregoing rules to the facts of this case creates a situation analogous to *Lane v. Brown*, 372 U.S. 477 (1863). In that case, a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly, in Idaho, an appellant must provide an adequate record or face procedural default. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, . . . and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999) (citing *State v. Beck,* 128 Idaho 416, 422 (Ct. App. 1996); *State v. Beason,* 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko,* 108 Idaho 872, 873 (Ct. App. 1985); *State v. Repici,* 122 Idaho 538, 541

(Ct. App. 1992)). If the transcripts are missing, but the record contains court minutes, that may be sufficient so that a "meaningful review of [an appellant's] claim is possible, although the Idaho Court of Appeals has "strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide an adequate record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). If Mr. Day fails to provide the appellate court with the requested item, the legal presumption will apply and Mr. Day's claims will not be addressed on their actual merits. If it is state action alone, which prevents him from access to the requested items, then such action is a violation of due process, as per *Lane*, and any such presumption should no longer apply.

Whether the transcript of the requested proceeding was before the district court at the time of the probation revocation hearing is not relevant in deciding whether the transcript is relevant to the issues on appeal because in reaching a sentencing or probation decision, a district court is not limited to considering only that information offered at sentencing or a probation disposition hearing. Rather, a court is entitled to utilize knowledge gained from its own official position and observations. *Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak,* 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during the trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon "the number of certain types of criminal transactions that [the judge] has observed in the courts within his judicial district and the quantity of drugs therein involved"); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court's reliance upon evidence presented at the preliminary hearing from a previously dismissed case because "the judge hardly could be expected to disregard what he already knew about Gibson from the other case"). Thus, whether

the prior hearings were transcribed or not is irrelevant, because the court may rely upon the information it already knows from presiding over the prior hearings when it made the decision to revoke Mr. Day's probation.

Additionally, the requested items are within an Idaho appellate court's scope of review. The transcript of the June 16, 2008, sentencing hearing is relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court appropriately revoked probation. *See State v. Hanington,* 148 Idaho 26, 28 (Ct. App. 2009) ("When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." (emphasis added)).

Further support for Mr. Day's position can be found in *State v. Warren*, 123 Idaho 20 (Ct. App.1992). In that case, Mr. Warren was convicted of aggravated battery in 1988 and placed on probation. *Id.* at 21. Mr. Warren's probation was then revoked and the district court retained jurisdiction for 180 days. *Id.* After completing the period of retained jurisdiction, Mr. Warren was placed on another period of probation, which was ultimately revoked. *Id.* The district court then *sua sponte* reduced the length of Mr. Warren's sentence. Id. Mr. Warren then appealed and alleged that the district court should have further reduced the length of his sentence. *Id.* In support of that position, Mr. Warren argued that his probation violation was trivial. *Id.* The Court of Appeals addressed that argument stating "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit

off his victim's ear." *Id.* However, the Court of Appeals did not address the merits of his sentence reduction claim because he failed to provide a transcript of the original PSI and a transcript of the original sentencing hearing. *Id.* Even though the original sentence was not on appeal, and happened years before the decision at issue, the Idaho Court of Appeals held that the transcript was necessary to address Mr. Warren's claims of error. Moreover, there was no indication that the district court referenced the original sentencing hearing at the probation violation disposition hearing. It appears that the Court of Appeals assumed that the original sentencing hearing would address the nature of the original offense. Had Mr. Day failed to request the transcript of the June 16, 2008, sentencing hearing, the *Warren* opinion indicates that it would be presumed to support the district court's decision to execute the original sentence.

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection under to deny indigent defendants transcripts of trial proceedings on appeal. The decision to deny Mr. Day's request for the June 16, 2008 sentencing hearing will render his appeal meaningless because it will be presumed that the missing transcript supports the district court's decision to revoke probation and execute the original sentence. This functions as a procedural bar to the review of Mr. Day's appellate sentencing claims on the merits, and therefore, Mr. Day should either be provided with the requested transcript or the presumption should not be applied.

2. The Idaho Supreme Court, By Failing To Provide Mr. Day With Access To The Requested Transcript Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Powell v. Alabama*, 287 U.S. 45 (1932) the Sixth Amendment right to counsel in the context of death penalty cases was selectively incorporated to the states through

the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In coming to this conclusion, the United State Supreme Court reasoned that the ability to be heard by counsel is so inextricable related to due process that the denial of counsel is tantamount to the denial of a hearing. *Powell*, 287 U.S. at 69. The Supreme Court also stated that under the facts of *Powell* "the necessity of counsel was so vital and imperative that the failure to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . [to] hold otherwise would to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Id.* at 71-72.

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and is progeny and determined that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants the right to counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the protection of *Douglas* was extended to the right to effective assistance of counsel on appeal. According to the United States Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal-like the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

The remaining issue is defining effective assistance of counsel. According to the United States Supreme Court, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California,* 386 U.S. 738, 744 (1967), held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an

active advocate on behalf of his client . . . . [Counsel's] role as advocate requires that he support his client's interest's to the best of his ability." *See also Banuelos v. State,* 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcript prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is an additional issue to raise, or whether there is a factual support either in favor of any argument made or undercutting an argument. Therefore, Mr. Day has not obtained review of the court proceedings based on the merits and was not provided with effective assistance of counsel in that endeavor.

Furthermore, in *State v. Charboneau,* 116 Idaho 129, 137 (1989) (*overruled on other grounds by State v. Card,* 121 Idaho 425 (1991)), the Idaho Supreme Court held that the starting point for evaluating whether counsel renders effective assistance of counsel in a criminal action is the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMNAL JUSTICE, THE DEFENSE FUNCTION. These standards offer insight into the role and responsibilities of appellate counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence . . . . Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

Standard 4-8.3(b). In the absence of access to the requested transcript, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might have affected the district court's decision to revoke Mr. Day's probation and execute the underlying sentence. Further,

counsel is unable to advise Mr. Day on the probable role the transcript may play in the appeal.

Mr. Day is entitled to effective assistance of counsel in this appeal, and effective assistance cannot be given in the absence of access to all of the relevant transcripts. Therefore, the Idaho Supreme Court has denied Mr. Day his constitutional right to due process which includes a right to the effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcript and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Revoked Mr. Day's Probation

A. Introduction

The district court abused its discretion when it revoked Mr. Day's probation because it did so based on the erroneous assumption that it would have continuing jurisdiction and, therefore, the discretion to modify that order in the event Mr. Day's conviction for lewd conduct is overturned on appeal. Contrary to the district court's assumption, it lost its jurisdiction over Mr. Day fourteen days after it revoked probation. Therefore, the district court abused its discretion because it revoked probation, in part, based on its own misperception of the law.

B. The District Court Abused Its Discretion When It Revoked Mr. Day's Probation

Mr. Day asserts that, given any view of the facts, the district court abused its discretion when it revoked his probation. When a defendant appeals from an order revoking probation the Idaho Court of Appeals has utilized the following framework:

> The decision to revoke a defendant's probation on a suspended sentence is within the discretion of the district court. I.C. § 20-222. In a probation revocation proceeding, two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? *State v. Case,* 112 Idaho 1136 (Ct. App. 1987).

State v. Corder, 115 Idaho 1137, 1138 (Ct. App. 1989).

Mr. Day does not contest the fact that he was convicted of lewd conduct, which was the justification used by the district court to revoke his probation.[2] Accordingly, he only contests the district court's decision to revoke his probation. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003).

Here, Mr. Day argues that the district court abused its discretion when it revoked his probation because that decision was based, in large part, on its erroneous assumption that it would have continuing jurisdiction over Mr. Day, and therefore, the discretion to reinstate Mr. Day's probation in the event Mr. Day's conviction for lewd conduct is overturned on appeal. At the probation violation disposition hearing, the district court first concluded that Mr. Day was collaterally estopped from denying his

[2] However, Mr. Day contests the validity of that conviction, and it is currently on appeal. (08/29/11 Tr., p.2, Ls.19-25; *State v. Day*, Idaho Supreme Court docket number 39044.)

conviction for lewd and lascivious conduct. (08/29/11 Tr., p.1, Ls.7-13.) Based on that conclusion, the district court determined that Mr. Day violated his probation. (08/29/11 Tr., p.1, Ls.13-15.) The district court then implicitly recognized that Mr. Day's appeal from that conviction had merit because the psychosexual evaluation concluded that Mr. Day probably did not engage in lewd conduct.[3] (08/29/11 Tr., p.1, Ls.15-19, p.2, Ls.19-22.) The district court then said:

> Certainly if the conviction gets overturned, that's grounds for me to reconsider the revocation of probation; but as it stands right now with the Bingham County conviction and also the sentence in Bingham County, I don't think it makes sense for me to do anything other than revoke probation under the circumstances.

(08/29/11 Tr., p.3, Ls.5-11.) In regard to the foregoing comment, trial counsel said, "I guess my only concern would be filing a Rule 35 after – if his conviction is, in fact, overturned, if the Court would even have jurisdiction to hear a Rule 35 at that point. (08/29/11 Tr., p.3, Ls.21-24.) The district court responded by saying "I don't really know the answer to that question . . . it may be worthwhile to appeal this then . . . ." (08/29/11 Tr., p.3, L.25 – p.4, L.3.)

The district court erred when it assumed that it would have the jurisdiction to amend its order revoking probation in the event Mr. Day's conviction for lewd conduct is vacated on appeal. The Idaho Supreme Court "has long recognized that a court's jurisdiction to amend or set aside the judgment in a case does not continue forever. *State v. Jakoski*, 139 Idaho 352, 354 (2003). "Absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once

[3] The psychosexual evaluator "strongly suggest[ed] that Mr. Day did not engage in the offensive conduct . . . ." (Psychosexual Evaluation, p.11.)

the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal." *Id.* at 355 (footnote omitted).

Idaho Criminal Rule 35(b) does extend a district court's jurisdiction to reduce a sentence which includes the ability to revisit an order to revoking probation. *See State v. Knutsen*, 138 Idaho 918, 920-923 (Ct. App. 2003). However, an I.C.R. 35 motion requesting a sentence reduction must be filed within fourteen days from the order revoking probation. I.C.R. 35(b). Once a timely I.C.R. 35 motion has been filed, the district court's jurisdiction to rule on that motion is extended for a reasonable period of time. *State v. Chapman*, 121 Idaho 351, 353 (1992).

Due to these time constraints, there is no way the district court would have jurisdiction over this matter, pursuant to an I.C.R. 35 motion, by the time Mr. Day's appeal from his lewd conduct conviction is completed. Here, the district court has lost jurisdiction because the fourteen day time period for Mr. Day to file an I.C.R. 35 motion has lapsed and the appeal in *State v. Day*, Supreme Court docket number 39044 is still pending.[4]

In sum, the district court abused its discretion when it revoked Mr. Day's probation because it thought its jurisdiction over Mr. Day would never terminate. However, his jurisdiction terminated upon entering its order revoking probation. Only the filing of an I.C.R. 35 motion could have been extended its jurisdiction, but that jurisdictional extension ended before Mr. Day's appeal in the lewd conduct case was completed. Thus, the district court misperceived the controlling legal standards and

[4] Mr. Day requests that this Court take judicial notice of the appellate record in *State v. Day*, Supreme Court docket number 39044 for the limited proposition that an appeal was filed in that matter and that it is currently pending.

based its revocation decision, in large part, on that misperception. Accordingly, it abused its discretion.

III.

The District Court Abused Its Discretion When It Failed To Reduce Mr. Day's Sentence *Sua Sponte* Upon Revoking Probation

Mr. Day asserts that, given any view of the facts, his unified sentence of five years, with two years fixed is excessive. Due to the district court's power under I.C.R. 35 to reduce the length of the original sentence *sua sponte* upon the revocation of probation, on appeal an appellant can challenge the length of the sentence as being excessive. *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003). 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. Day does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Day must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* 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.*

There are various mitigating factors in this matter which support the conclusion that Mr. Day's sentence is excessively harsh. Specifically, Mr. Day's mental health is a mitigating factor. The Idaho Supreme Court held that even in instances where there is no nexus between a crime and the mental health issue(s), mental health evidence is relevant to sentence mitigation. *State v. Payne*, 146 Idaho 548, 569-70 (2008). Implicit in the foregoing is that the mitigating weight afforded to a defendant's mental health should be amplified when there is a nexus between the mental health issue and the commission of the offense. Here, the psychosexual evaluator, Dr. Lindsey, noted that Mr. Day's theft crimes could be partially associated with impulse control caused by ADHD. (Psychosexual Evaluation, p.7.) Thus, Mr. Day's mental health should be afforded amplified mitigating weight because his ADHD reduces his culpability for the commission of the underlying offense.

Additionally, Mr. Day has support from his friends and family. In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that support of family and friends were mitigating factors. Here, Mr. Day grew up in a stable home and has continuing support from his parents, siblings, and friends. (PSI, pp.4-5.) Mr. Day is the father of four children and he regularly communicates with them. (PSI, pp.7-8.) According to his mother, he always pays his child support. (PSI, p.5.) The existence of Mr. Day's support network is further evinced by the various letter people submitted on his behalf. (PSI, pp.20-23.)[5]

Further, Mr. Day's work ethic and employment history are mitigating factors. In *State v. Hagedorn*, 129 Idaho 155, 161 (Ct. App. 1996), it was deemed appropriate to

[5] There were various documents attached to the PSI. For ease of citation, those documents have been numbered beginning with the cover of the 2008 PSI and ending on page 29.

consider a defendant's employment background as a mitigating factor. Mr. Day received a high school diploma. (PSI, p.8.) He also cornpleted an associates degree in nuclear safety at Eastern Idaho Technical College. (Psychosexual Evaluation, p.5.) He also earned a certification in nuclear safety and health physics from Salem Nuclear College in Salem, New Jersey. (Psychosexual Evaluation, p.5.) He also completed a post-degree internship at the INL at the naval reactor. (Psychosexual Evaluation, p.5.) Mr. Day has an extensive employment history, but cannot continue to work in the nuclear field due to his felony convictions. (Psychosexual Evaluation, p.5.) Mr. Day is also considered by others to be a hard worker. (PSI, pp.5-6.)

As a final point, Mr. Day's conviction for lewd conduct should not be afforded significant aggravating weight because is still pending on appeal and the conviction has been put into serious doubt by the psychosexual evaluation. Based on Mr. Day's polygraph results, the psychosexual evaluator, Dr. Lindsey, concluded that there is a "distinct possibility that Mr. Day did not engage in the criminal conduct for which he was convicted recently in a jury trial." (Psychosexual Evaluation, p.11.) Dr. Lindsay also stated that if some genital touching did occur, "it does not appear to have occurred with the requisite intent for a Lewd Conduct conviction." (Psychosexual Evaluation, p.11.) Dr. Lindsey also concluded that "whether or not Mr. Day actually committed the sex crime that he has been convicted of . . . he nonetheless rates at low risk of sexual offending in the future." (Psychosexual Evaluation, p.12.)

In sum, there are various mitigating factors present which support the conclusion that Mr. Day's sentence is unduly harsh.

CONCLUSION

Appellate counsel respectfully requests access to the requested transcript and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Day respectfully requests that this Court remand this matter with instruction for the district court to place Mr. Day on probation with terms of probation it deems appropriate. Alternatively, Mr. Day respectfully requests that the district court reduce the indeterminate portion of his sentence.

DATED this 29th day of May, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of May, 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:

KIM J DAY
BONNEVILLE COUNTY JAIL
INMATE #50045
605 N CAPITAL AVENUE
IDAHO FALLS ID 83402

JOEL E TINGEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

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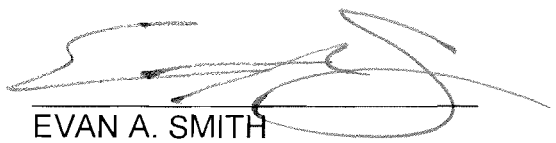

EVAN A. SMITH
Administrative Assistant

SFW/eas