11-20-2012

State v. Cornelison Appellant's Reply Brief Dckt. 39616

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39616
	)	
v.	)	
	)	
JESSE SCOTT CORNELISON,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

Statutes

STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Cornelison argued that the Idaho Supreme Court denied him due process and equal protection when it denied his Motion to Augment the record on appeal with various transcripts. Mr. Cornelison argues that the requested transcripts are necessary for his appeal because the district court could utilize its own memory of the prior proceedings when it decided to revoke Mr. Cornelison's probation. In response, the State argues that the only relevant transcripts are those from the final probation admission hearing and the probation revocation hearing based on the new standard of review articulated in *State v. Morgan*, 2012 Opinion No. 38 (Ct. App. July 10, 2012) (not yet final).

This brief is necessary to address the *Morgan* opinion and the State's assertion that only the transcripts of the final probation admission hearing and the probation revocation hearing are relevant to the issues on appeal. Mr. Cornelison argues that the requested transcripts are relevant because a district court can rely on its own memory of the prior proceedings when it considers whether to revoke probation or reduce a sentence. Since Idaho appellate courts conduct an independent review of the entire record when determining whether a district court abused its discretion in regard to a probation/sentencing determination, what the district court actually considered is irrelevant. The only questions are: whether the information at issue was before the district court, and whether that information is relevant to the probation/sentencing issues on appeal.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Cornelison's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

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

2. Did the district court abuse its discretion when it revoked Mr. Cornelison's probation?[1]

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

[1] This brief will not address issues II and III.

ARGUMENT

I.

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

A. Introduction

In Idaho, district courts consider a broad range of information when making sentencing decisions. Due to this broad range of information considered, Idaho appellate courts have scrupulously required defendants to provide an extensive appellate record because they conduct an independent review of the entire record before the district court when determining whether an abuse of discretion occurred in regard to a sentencing/probation determination. In other words, the question on appeal generally does not focus on how or what the district court actually considered. Instead, the central question is whether the record before the district court supports its sentencing/probation determination.

Since Idaho appellate courts need to have all of the relevant information that was before the district court to conduct this analysis, they will presume that any missing information supports the trial court's determination and refuse to rule on the merits of the issue. In some instances, the Court of Appeals has refused to address the merits of issues on appeal due to the appellants' failure to provide transcripts of hearings which occurred years before the disposition of the issue on appeal and were never discussed by the district court.

B. In The Event This Case Is Assigned To The Court Of Appeals, The Court Has The Authority To Address The Issues Raised In The Appellant's Brief

1. The Idaho Rules Of Appellate Procedure Require The Idaho Court Of Appeals To Address The Issues Raised In Mr. Costin's Appeal

In his Appellant's Brief, Mr. Cornelison argued, for the first time in this appeal, that the denial of his request for the transcripts violated the Fourteenth Amendment's due process and equal protections clauses. (Appellant's Brief, pp.5-17.) In response the State argued, based on *State v. Morgan*, 2012 Opinion No. 38 (Ct. App. July 10, 2012) (not yet final), that the Court of Appeals does not have the authority to address Mr. Cornelison's due process argument because it would be tantamount to entertaining an appeal from the Supreme Court. (Respondent's Brief, pp.6-7.) The State went on to implicitly argue that Mr. Cornelison should file a renewed motion to augment with the Court of Appeals in the event this case is assigned to that court. (Respondent's Brief, pp.6-7.) Contrary to the State's assertion, Idaho Appellate Rule 108 requires the Court of Appeals to rule on the merits of all cases to which it is assigned by the Supreme Court. The relevant portions of I.A.R. 108 state as follows:

> Cases Reserved to Supreme Court. The Court of Appeals shall hear and decide all cases assigned to it by the Supreme Court; provided that the Supreme Court will not assign the following cases:
>
> (1) Proceedings invoking the original jurisdiction of the Idaho Supreme Court;
>
> (2) Appeals from imposition of sentences of capital punishment in criminal cases;
>
> (3) Appeals from the Industrial Commission;
>
> (4) Appeals from the Public Utilities Commission;

> (5) Review of the recommendatory orders of the Board of Commissioners of the Idaho State Bar;
>
> (6) Review of recommendatory orders of the Judicial Council.

(emphasis added). Since the issues raised in his Appellant's Brief do not fall into any of the foregoing categories, the Idaho Court of Appeals has the authority to address the issues raised in his Appellant's Brief.

Further, an assignment of this case to the Court of Appeals functions as an implicit grant of authority from the Idaho Supreme Court to review Mr. Cornelison's claims about the constitutionality of the merits of its decision to deny his request for the transcripts. The Supreme Court will be aware of Mr. Cornelison's due process issue when it makes it decision to either keep this appeal of assign it to the Court of Appeals. This position is bolstered by the Internal Rules of the Supreme Court. Specifically, I.R.S.C. 21, which governs the assignment of cases. The language of I.R.S.C. 21 follows:

> Assignment of Cases. The chief justice (or designee) shall make the tentative assignment of cases as between the Supreme Court and the Court of Appeals. Copies of each assignment sheet shall be given to the justices, affording each an opportunity to object and request the Court to reconsider the assignment.
> . . .
>
> Any objection to the assignment shall be stated, with reasons, in writing and circulated to all the justices.
> . . .
>
> At the request of any justice, the objection to the assignment shall be taken up at conference.

The assignment of cases is not an arbitrary process; according to the rule, it is a deliberate process which affords all the justices the ability to object and provide input into the decision to assign a case to the Court of Appeals. Therefore, the Supreme

Court will be aware of Mr. Cornelison's due process and equal protection arguments when it makes the decision to either keep this case or assign this case to the Court of Appeals. In the event this case is assigned to the Court of Appeals, the Supreme Court will be implicitly granting the court authority to address the merits of Mr. Cornelison's claims of error.

Additionally, the State implicitly asserted that Mr. Cornelison should file a renewed motion to augment the record with the Court of Appeals in the event this case is assigned to the Court of Appeals. (Respondent's Brief, pp.6-7.) This assertion is without merit because the Idaho Appellate Rules require all motions to be filed with the Idaho Supreme Court. For example, Idaho Appellate Rule 110 states as follows:

> All motions, petitions, briefs and other appellate documents, other than the initial notice of appeal, shall be filed with the Clerk of the Supreme Court as required by the Idaho Appellate Rules with the court heading of the Supreme Court of the State of Idaho as provided by Rule 6. There shall be no separate filings directed to or filed with the Court of Appeals. In the event of an assignment of a case to the Court of Appeals, the title of the proceeding and the identifying number thereof shall not be changed except that the Clerk of the Supreme Court may add additional letters or other notations to the case number so as to identify the assignment of the case. All case files shall be maintained in the office of the Clerk of the Supreme Court.

(emphasis added). Furthermore, Idaho Appellate Rule 30 requires that all motions to augment be filed with the Supreme Court. The relevant portions of I.A.R. 30 follow:

> Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record.
>
> . . .
>
> Unless otherwise expressly ordered by the Supreme Court such motion shall be determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court.

(emphasis added). Mr. Cornelison is not aware of any court rule which allows a party to an appeal to file a motion directly with the Court of Appeals. Idaho Appellate Rule 110 expressly prohibits such filings. Therefore, the State's contention that Mr. Cornelison could have filed a renewed motion to augment directly with the Court of Appeals is contrary to the Idaho Appellate Rules.

In sum, when the Idaho Supreme Court assigns an appeal to the Idaho Court of Appeals, the Idaho Appellate Rules require the Court of Appeals to decide all issues addressed in that appeal. Even though Mr. Cornelison is challenging the constitutionality of the Supreme Court's decision to deny his request for the transcripts, an assignment of this case to the Court of Appeals functions as an implicit grant of authority from the Idaho Supreme Court to review all issues raised in the Appellant's Brief.

2. An Assignment Of This Case to An Appellate Tribunal With No Authority To Address Mr. Cornelison's Claims Of Error Will Violate His Right To Procedural Due Process On Appeal

In the event the Idaho Supreme Court assigns this case to the Court of Appeals and it determines that the Court of Appeals does not have the authority to address all of the issues Mr. Cornelison's raised in his appellant's brief, he argues, in the alternative, that will function as a separate denial of his federal due process rights, which guarantee him a fair appeal. The Constitutions of both United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. CONST. amend. XIV; ID. 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*, 132 Idaho 221, 227 (1998) (citing *Smith v. Idaho Dept. of Correction*, 128 Idaho 768, 771 (1996)).

While there is no federal guarantee to an appeal from criminal state court proceedings, after a state decides to provide appellate review, the due process and equal protection clauses of the Fourteenth Amendment are applicable during the entirety of the appellate proceedings. *Griffin v. Illinois* 351 U.S. 12, 18 (1956). In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Additionally, 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).

In this case, Mr. Cornelison argues that due process protections apply to every stage of his appeal. Those protections apply to any appellate procedural decision made by the Idaho Supreme Court. Even though Mr. Cornelison does not have an independent right to appeal from the order denying his motion to augment, he can challenge the constitutionality of the order because it is a procedural component of his

appeal and the Fourteenth Amendment's due process clause applies to all procedures affecting his appeal. If the Idaho Supreme Court assigns this appeal to the Idaho Court of Appeals, knowing that the Court of Appeals had no authority to reverse an order of the Supreme Court, a unique and independent procedural due process violation will occur because the Supreme Court will have precluded Mr. Cornelison from any state procedure by which he could raise his federal constitutional claims challenging the denial of his motion to augment.

C. The *Morgan* Decision Is In Conflict With Idaho Supreme Court Precedent

The State also argues that the requested transcripts are not relevant under the standard of review articled in *Morgan*. However, the *Morgan* opinion changed the prior standard of review in a manner which is inconsistent with Supreme Court precedent. In 1986, the Idaho Supreme Court reviewed an alleged due process violation during a probation revocation proceeding. *State v. Chapman,* 111 Idaho 149 (1986). One of the issues in that case involved the district court's reconsideration of evidence concerning events that had occurred prior to the alleged probation violation. *Id.* at 153. Chapman wanted to limit the district court's review to "only evidence *subsequent* to the original probation decision." *Id.* (emphasis in the original). The Idaho Supreme Court rejected that idea and stated, "*[v]ery little information* about a defendant will be irrelevant to the effort of the law to individualize treatment of convicted persons." *Id.* (emphasis in the original) (citations omitted). The *Chapman* Court noted that "[p]recluding consideration of Chapman's conduct prior to his being placed on probation would unwisely skew the trial court's consideration of the necessary facts which the court needs in order to properly individualize its decision *vis-a-vis* him." *Id.* Then, relying on *State v.*

Trowbridge, 95 Idaho 640 (1973), the *Chapman* Court identified a number of factors the district court must consider when determining whether to continue a person on probation. *Id.* at 153-54. The *Chapman* Court also noted that a decision to place a person on probation is not the same as a finding that a person is capable of rehabilitation; instead, probation is a tool that the State may use to combat recidivism. *Id.* at 154. The Court then identified a number of other factors the district court must consider when making the decision of whether to continue with probation after it has found a probation violation. *Id.*

More recently in 2010, the Idaho Supreme Court was specifically asked to resolve the question of whether the district court abused its discretion when revoking probation and ordering a suspended sentence into execution. *State v. Pierce,* 150 Idaho 1 (2010). Pierce argued that the sentence the district court executed was excessive in light of the mitigating circumstances present in his case. *Id.* at 5-6. Before reviewing the relevant facts, the Court noted that the "standard of review of a criminal sentence is also well-established" and that the "Court conducts an independent review of the entire record available to the trial court at sentencing." *Id.* at 5 (emphasis added).

Although the Idaho Supreme Court has never directly answered the question of the scope of appellate review in jurisdictional relinquishment/probation revocation proceedings, it has clearly indicated that the proper standard for the district court's determination of what consequences should be passed on to an individual after finding a violation of probation is review of the entire record. The *Morgan* Court's decision to adopt a different standard of review appears to be in conflict with Idaho Supreme Court precedent.

D. The New Standard Of Review Articulated in *Morgan* Provides Little Guidance To Counsel When Counsel Is Determining Which Transcripts Will Be Necessary For An Appeal

The State argues that the requested transcripts are not necessary for this appeal in reliance on the new standard of review articulated in *Morgan*. (Respondent's Brief, pp.7-8.) However, the *Morgan* standard of review provides little guidance for counsel and, therefore, counsel must still request all of transcripts to provide for a meaningful appeal and to prevent claims of ineffective assistance of counsel.

The Court of Appeals' prior standard of review was articulated in *State v. Hanington,* 148 Idaho 26, 27 (Ct. App. 2009). In that case, the Idaho Court of Appeals resolved an ongoing dispute about the proper standard of review in probation revocation cases. *Id.* at 27. Relying on *State v. Chacon,* 146 Idaho 520, 524-25 (Ct. App. 2008), and *State v. Coffin*, 122 Idaho 392 (Ct. App. 1992), the State sought to limit review to only facts that had arisen between the original pronouncement of the sentence and the revocation proceedings. *Hanington,* 148 Idaho at 28. Essentially, the State's position would have eliminated any need for appellate courts to review the change of plea hearing transcript, the sentencing transcript, and the presentence report because all of that information would have been available to the district court prior to the original sentencing hearing. *See id.* Hanington argued that the proper standard of review should include a review of "all facts existing both at the time of the original sentence and at the time the sentence is ordered into execution," relying on the standard established in *State v. Adams,* 115 Idaho 1053, 1055-1056 (Ct. App. 1989). *Id.* at 27. The Court of Appeals agreed with Hanington and stated:

> The State has read our somewhat differing versions of the scope of review too restrictively. We have not intended to suggest that our review is limited

> solely to events occurring between the original imposition of sentence and the decision to order the sentence into execution. 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.

Id.

The *Hannington* Court made it clear that when determining what sentence to execute, the appellate court would review the entire record, including the factors at the original sentencing hearing through the probation revocation before the court on appeal. The rationale behind this clarification makes perfect sense when looking once again to *State v. Adams*, the decision that explained why the appellate courts should look to the entire record when reviewing the executed sentence:

> [W]hen we review a sentence ordered into execution after probation has been revoked, we examine the entire record encompassing events before and after the original judgment. We adopt this scope of review for two reasons. First, the district judge, when deciding whether to order execution of the original sentence or of a reduced sentence, does not artificially segregate the facts into prejudgment and postjudgment categories. The judge naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision. When reviewing that decision, we should consider the same facts. Second, when a sentence is suspended and probation is granted, the defendant has scant reason, and no incentive, to appeal. Only if the probation is later revoked, and the sentence is ordered into execution, does the issue of an excessive sentence become genuinely meaningful. Were we to adopt the state's position that any claim of excessiveness is waived if not made on immediate appeal from the judgment pronouncing but suspending a sentence, defendants would be forced to file preventive appeals as a hedge against the risk that probation someday might be revoked. We see no reason to compel this hollow exercise. Neither do we wish to see the appellate system cluttered with such cases.

State v. Adams, 115 Idaho at 1055-56. As such, when an appellate files an appeal from an order revoking probation the applicable stand of review requires an independent and

comprehensive inquiry to the events which occurred prior to as well as the events which occurred during the probation revocation proceedings. The basis for this standard of review is that the judge "naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision." *Id.* The Court of Appeals then stated that, "When reviewing that decision, we should consider the same facts." *Id.* The Court of Appeals did not state that the district court must expressly reference the prejudgment events at the probation disposition hearing in order for this standard of review to become applicable. To the contrary, the Court of Appeals assumed the judge will automatically consider the prejudgment events when determining whether probation should be revoked.

In *Morgan,* the Court of Appeals narrowed its *Hanington* holding. (Opinion, p.4.) The Court modified the standard, finding that it meant to indicate in *Hanington* that it would not "arbitrarily confine" itself to the facts that have arisen since the original sentencing hearing. *Morgan*, Opinion No. 38, p.4. The *Morgan* Court decided not to examine the "entire record encompassing events before and after the original judgment . . . facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation" as required by *Hanington,* 148 Idaho at 28. Rather the Court of Appeals concluded that the "focus of the inquiry is the conduct underlying the trial court's decision to revoke probation" and, therefore, would "consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal." *Morgan*, Opinion No. 38, p.4.

However, counsel has no real guidance in this appeal whether the requested transcripts will be deemed relevant by the Court reviewing the Appellant's Brief. While the *Morgan* opinion narrows the standard of review, all the prior proceedings are still deemed relevant. The *Morgan* opinion just holds that the prior proceedings are less relevant. However, there is no rule which controls how relevant a prior proceeding must be in order for a transcript of that proceeding to be deemed necessary for the appeal. In the event, the transcripts at issue were not requested there is no safeguard that the reviewing Court will determine that they are relevant. If an issue on appeal is not addressed on the merits because counsel, in reliance on *Morgan*, decided to forego the request for the transcripts, the appellant will lose his/her right to a meaningful appeal and counsel will be deemed ineffective because the missing transcripts will be presumed to support the district court's sentencing/probation decisions.

The State also argues, in reliance on *Morgan*, that Mr. Cornelison was not denied due process because he could have filed an objection to the record in order to get the request transcripts. (Respondent's Brief, pp.10-11.) In deciding whether Morgan's rights were violated, the Court of Appeals held that because he could have obtained the transcript without question during the objection to the record phase, he is precluded from arguing that his Due Process rights were violated because the Court is precluding him from augmenting the appellate record. *Morgan*, Opinion No. 38, p.5. However, this ignores the procedure the Idaho Supreme Court has adopted and made available to all appellants to obtain transcripts that are needed to complete the appellate record. *See* I.A.R. 30. Idaho Appellate Rule 30 provides in part,

> Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record. Such a motion

> shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented to the original motion and to two copies of the motion which document must have a legible filing stamp of the clerk indicating the date of its filing, or the moving party must establish by citation to the record or transcript that the document was presented to the district court. Any request for augmentation with a transcript that has yet to be transcribed must identify the name of the court reporter(s) along with the date and title of the proceedings(s), and an estimated number of pages, and must contain a certificate of service on the named reporter(s).

Through this procedure, the Idaho Supreme Court has allowed all parties to obtain transcripts that need to be a part of the appellate record. If one must have completed the appellate record by the time of the settlement stage under rule I.A.R. 28, then there would be absolutely no need to have Rule 30. Idaho Appellate Rule 30 is there to ensure every opportunity is given to provide a completed record to the appellate court. As recognized in *State v. Rae,* 139 Idaho 650, 656 (Ct. App. 2004), the appellant could ask to complete the appellate record by filing a motion under I.A.R. 30 to augment the appellate record with the necessary missing transcripts.

Additionally, the State argues that Mr. Cornelison's arguments about *State v. Warren*, 123 Idaho 20 (Ct. App. 1992), constitutes either a "misrepresentation" by appellate counsel or a "misunderstanding" of the *Warren* opinion because nowhere in *Warren* "did the Court state that missing portions of the record were presumed to support the district court's opinion." (Respondent's Brief, p.9 n.1.) Contrary to the State's assertion, Mr. Cornelison neither lied about, nor misunderstood, the holding in *Warren.* In *Warren*, 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.* In response to this argument the Court of Appeals held as follows:

> 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. In regard to the character of the offender at the time of the battery, the only fact in the record we have been presented on appeal is that Warren had a drug problem. Warren "bears the burden of presenting a record sufficient" for us to evaluate the merits of his claim. *State v. Wright,* 114 Idaho 451, 453, 757 P.2d 714, 716 (Ct.App.1988) (citing *State v. Rundle,* 107 Idaho 936, 694 P.2d 400 (Ct.App.1984). The record on this appeal fails to contain the presentence investigation report or transcript from the sentencing hearing on the battery conviction. Without a more complete record and no argument by Warren as to why the sentence was unreasonable we affirm the court's decision to reduce his aggravated battery sentence to three years' fixed with ten years' indeterminate. We also affirm the order denying the Rule 35 motion with respect to this sentence.

Mr. Cornelison recognizes that the *Warren* opinion does not use the word "presumption", but that distinction is inapposite when the cases cited by the Court of Appeals in the foregoing quote are reviewed. For example, the *Warren* Court cited to *State v. Rundle,* 107 Idaho 936 (Ct. App. 1984), which held as follows:

> The burden of showing that the original sentence was unduly severe is upon the moving party. When a discretionary decision related to sentencing is challenged on appeal, the appellant bears the burden of presenting a sufficient record to evaluate the **merits** of the challenge. *E.g., State v. Wolf,* 102 Idaho 789, 640 P.2d 1190 (Ct.App.1982). Here, the record is **fatally** incomplete. It does not contain the original sentence, the presentence report (if any) or a transcript of any proceedings related to the original sentence. The record consists primarily of Rundle's motion, the district court's order, and an affidavit, accompanied by a memorandum, stating reasons for the relief sought. These reasons are largely limited to averments that Rundle has learned his lesson about obeying the law, that

> he has complied with regulations at the Idaho State Correctional Institution and that further confinement would ill serve his rehabilitation or the welfare of his family.

Id. at 937-38 (emphasis added). *Rundle* was cited in another Court of Appeals case, *State v. Fortin*, 124 Idaho 323 (Ct. App. 1993). In that case, Mr. Fortin filed a Rule 35 motion requesting leniency. *Id.* at 327-23. In support of his motion, Mr. Fortin wanted to submit testimony from a person who was with him on the night of his offense. *Id.* at 328. The Court of Appeals made the following holding concerning this proposed testimony:

> Fortin stated in his motion that he wished to present the testimony of Darin Walker, who was Fortin's passenger the night of the accident. Fortin did not, in his motion or by affidavit, inform the district court what the substance of Walker's testimony would be. This Court will not disturb the district court's discretionary decision without any evidence that the proffered testimony was relevant. Fortin bore the burden of presenting a sufficient record to allow judicial evaluation of the **merits** of his Rule 35 motion. *State v. Rundle,* 107 Idaho 936, 937, 694 P.2d 400, 401 (Ct.App.1984); *State v. Ramirez,* 122 Idaho 830, 839 P.2d 1244 (Ct.App.1992). Having failed to make such a record, Fortin has not shown that the district court abused its discretion by denying the motion without admitting Walker's testimony.

Id. In both *Rundle* and *Fortin*, the Court of Appeals held that it would not review the merits of an appellate claim of error in the event the appellant fails to provide an adequate record for review of that issue. As such, Mr. Cornelison was not misrepresenting or misunderstanding the holding of *Warren*, when he argued that "the *Warren* opinion indicates that it would be presumed to support the district court's decision to execute the original sentence," had Mr. Cornelison failed to request the transcripts at issue. While the cases do not use the phrase "presumed to support the

original sentencing decision,"[2] *Warren*, *Rundle*, and *Fortin* all hold that an appellate claim of error will not be addressed on the merits in the event the appellant fails to provide an adequate record to review the issue.

In sum, the *Morgan* opinion leaves appellate counsel guessing as to which transcripts will be needed to provide an adequate record to review sentencing/probationary decisions. *Morgan* still says the entire record is relevant for review of those issues, but the earlier proceedings are less relevant. Since the cases such as *Warren*, *Rundle*, and *Fortin* were not overruled in *Morgan*, in order to ensure that appellants will have the merits of their appellate claims addressed, appellate counsel will have to continue to request all of the transcripts of the prior proceedings.

[2] Later opinions have refined this standard. For example, in *State v. Coma* 133 Idaho 29 (ct. App. 1999), the Idaho Court of Appeals held, "[i]t 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, *State v. Beck,* 128 Idaho 416, 422, 913 P.2d 1186, 1192 (Ct. App. 1996); *State v. Beason,* 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991); *State v. Murinko,* 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985), and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court. *State v. Repici,* 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992)." *Id.* at 34.

CONCLUSION

Mr. Cornelison respectfully requests access to the requested transcripts 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. Cornelison respectfully requests that this Court remand this matter with instruction to place Mr. Cornelison on probation. Alternatively, Mr. Cornelison respectfully requests that this Court reduce the length of the indeterminate portion of his sentence.

DATED this 20th day of November, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of November, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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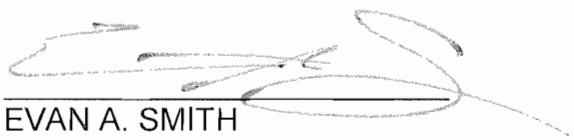

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