UIdaho Law
Digital Commons @ UIdaho Law

Not Reported | Idaho Supreme Court Records & Briefs

7-30-2018

State v. Bennett Appellant's Brief Dckt. 45483

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation
"State v. Bennett Appellant's Brief Dckt. 45483" (2018). *Not Reported*. 4660.
https://digitalcommons.law.uidaho.edu/not_reported/4660

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

Electronically Filed
7/30/2018 1:30 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Melanie Gagnepain, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NOS. 45483 & 45484**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY CASE NOS.**
v.	)	**CR 2017-10118 & CR 2017-5661**
	)	
JAMIE LYNN BENNETT,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE SCOTT WAYMAN
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

LARA E. ANDERSON
Deputy State Appellate Public Defender
I.S.B. #9855
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUES PRESENTED ON APPEAL 4

ARGUMENT 5

I. Ms. Bennett's Constitutional Rights To Due Process Were Violated At The Sentencing Hearing By The State's Breach Of The Rule 11 Plea Agreement And The Court's Imposition Of A Harsher Sentence Than That To Which She Agreed 5

A. Introduction 5

B. Standard Of Review 5

C. Ms. Bennett's Unwaived Constitutional Right to Due Process Was Violated At The Sentencing Hearing 6

1. The Error Involves An Unwaived Constitutional Right 6

2. The Error Is Clear And Obvious 7

a. Existence Of A Contract 7

b. Breach Of Contract 8

c. Counsel's Failure To Object Is Not Due To Tactical Strategy 13

3. Ms. Bennett's Substantial Rights Were Affected 14

II. Following Ms. Bennett's Convictions For Burglary And Fraud, The District Court Abused Its Discretion By Imposing A Unified Sentence Of Ten Years, With Two Years Fixed, Plus A Concurrent Five Years, With Two Years Fixed 16

III. The District Court Abused Its Discretion When It Denied Ms. Bennett's Rule 35 Motions For A Reduction Of Sentence In Light Of Additional Information 19

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases

McCarthy v. United States, 394 U.S. 459 (1969) 6

McKinney v. State, 162 Idaho 286 (2017) 7

Puckett v. United States, 556 U.S. 129 (2009) 14

Santobello v. New York, 404 U.S. 257 (1971) 8, 15

State v. Alberts, 121 Idaho 204 (Ct. App. 1991) 20

State v. Baker, 156 Idaho 209 (2014) 8

State v. Broadhead, 120 Idaho 141 (1991) 17

State v. Brown, 121 Idaho 385 (1992) 17

State v. Chapel, 107 Idaho 193 (Ct. App. 1984) 12

State v. Coassolo, 136 Idaho 138 (2001) 17

State v. Cotton, 100 Idaho 573 (1979) 16

State v. Daubs, 140 Idaho 299 (Ct. App. 2004) 12

State v. Day, 154 Idaho 476 (Ct. App. 2013) 13

State v. Forde, 113 Idaho 21 (Ct. App. 1987) 19

State v. Gomez, 153 Idaho 253 (2012) 5, 6

State v. Hernandez, 121 Idaho 114 (Ct. App. 1991) 20

State v. Jackson, 130 Idaho 293 (1997) 16

State v. Jafek, 141 Idaho 71 (2005) 6

State v. Jones, 139 Idaho 299 (Ct. App. 2003) 11

State v. Kellis, 148 Idaho 812 (Ct. App. 2010) 17

State v. Knowlton, 123 Idaho 916 (1993) 6

State v. Lankford, 127 Idaho 608 (1995) 11

State v. Lopez, 106 Idaho 447 (Ct. App.1984)....................19

State v. Nice, 103 Idaho 89 (1982)....................18

State v. Perry, 150 Idaho 209 (2010)....................*passim*

State v. Peterson, 148 Idaho 593 (2010)....................8, 10

State v. Reinke, 103 Idaho 771 (Ct. App. 1982)....................16

State v. Rutherford, 107 Idaho 910 (Ct. App. 1985)....................6

State v. Sandoval, 92 Idaho 853 (1969)....................18

State v. Sutton, 151 Idaho 161 (Ct. App. 2011)....................13

State v. Toohill, 103 Idaho 565 (Ct. App. 1982)....................21

State v. Trent, 125 Idaho 251 (Ct. App. 1994)....................19

State v. Willis, 140 Idaho 773 (Ct. App. 2004)....................8

State v. Wolfe, 99 Idaho 382 (1978)....................17

Statutes

I.C. § 19–2514....................2

I.C. § 19–2601(4)....................12

Rules

Idaho Criminal Rule 11....................2, 5, 10, 14

Idaho Criminal Rule 35....................*passim*

Constitutional Provisions

Idaho Const. art. I, §13....................6

U.S. Const. amend XIV; § 1....................6

STATEMENT OF THE CASE

Nature of the Case

Ms. Bennett was charged in two separate cases with one count of burglary and one count of forgery. In each case, Ms. Bennett entered into a plea agreement to plead to one count, in exchange for the State's maximum recommended sentence of "not to exceed a rider." During a combined sentencing hearing, the State recommend an imposed prison sentence. Accordingly, on the burglary case, the district court sentenced Ms. Bennett to a ten-year term, with two years fixed. (Case No. CR-2017-5661 ("Case 5661")) On the forgery case, the district court sentenced her to a five-year term, with two years fixed, and ordered both cases to be served concurrently. (Case No. CR-2017-10118 ("Case 10118"). Ms. Bennett thereafter filed a motion for reduction of sentence pursuant to Idaho Criminal Rule 35 ("Rule 35"), which was denied by the court. Ms. Bennett asserts on appeal that her Constitutional Rights to Due Process were infringed by the State's breach of the plea agreement, warranting relief; alternatively, she asserts the district court abused its discretion by imposing an excessive sentence, and denying her Rule 35 motions in light of new mitigation evidence.

Statement of the Facts and Course of Proceedings

In April of 2017, Jamie Thacker reported to police that her debit card had been stolen while she was at the Anytime Fitness gym. (Presentence Investigation ("PSI"), p.3.) Ms. Thacker suspected a woman she saw near the gym parking lot who appeared to be living out of her car. After further investigation, police identified Ms. Bennett as the individual who took the card, and discovered that she made several attempts to use the same card on the same day. During questioning, Ms. Bennett admitted taking the card. (PSI, pp.3-4.) She was charged with one count of grand theft of a financial instrument and three counts of burglary, along with a

persistent violator enhancement pursuant to I.C. § 19-2514. (R., pp.34-36.) (Case 5661).[1] The parties entered into a Idaho Criminal Rule 11 ("Rule 11") agreement whereby Ms. Bennett agreed to plead to one burglary count, waive appeal as to her conviction, pay restitution, and waive the preliminary hearing. (R., p.49.) In exchange, the State agreed to dismiss the persistent violator enhancement, the remaining charges, and recommend a sentence no harsher than "NTE Rider." (R., pp.47-49). On June 8, 2017, Ms. Bennett pled guilty to one count of burglary. (Tr.1, p.7, Ls.4-12.)[2]

Before Ms. Bennett was sentenced on the first case, Case 5661, a new case was filed addressing alleged crimes occurring before the April Anytime Fitness incident. There, the State alleged Ms. Bennett had taken a Chinook Restaurant patron's credit card and used it several times in February 2017 at various local businesses. (R., p.102.) Ms. Bennett was arraigned on July 13, 2017, and charged with criminal possession of a financial transaction card and grand theft by acquiring lost property. (R., pp.116-117.)

On the date set for sentencing on the original case, Case 5661, August 17, 2017, Ms. Bennett agreed to enter into a Rule11 agreement in Case 10118 with terms identical to the Rule 11 in case 5661 (except for the crime), i.e., she would plead guilty to one count, waive appeal as to her conviction, pay restitution, and waive her preliminary hearing, and the State would dismiss the enhancement, remaining charges, and recommend a sentence no higher than

[1]An order consolidating Ms. Bennett's cases for all purposes was entered on November 2, 2017, and likewise, a single, consolidated record was prepared (R., pp.76, 143.)
[2]Two transcripts were prepared for these consolidated appeals. Transcript 1 ("Tr.1") contains the June 8, 2017, entry of plea hearing in Case 5661 and the January 22, 2018, Rule 35 Motion hearing. Transcript 2 ("Tr.2") contains the entry/change of plea in Case 10118 on August 17, 2017, as well as the combined sentencing hearing on both cases, which also occurred on August 17, 2017.

"NTE Rider." (R., p.114.) At the sentencing hearing, the State exceeded the recommendation to which it committed:

> The State would recommend five years fixed, five years indeterminate, total underlying of ten years. No objection to a retain [sic] jurisdiction if the Court feels it's warranted. Recommend those on both cases to run concurrent. Request that restitution remain open for 90 days.

(Tr.2, p.12, L.23 – p.13, L.4.) On the burglary case, Case 5661, the district court imposed a ten-year term, with two years determinate, and eight years indeterminate. (R, pp.57-61.) On the fraud case, Case 10118, the court imposed a five-year term, with two years determinate. The court ordered both cases to run concurrently with each other. (R., pp.127-131.) Ms. Bennett timely appealed her sentences.[3] (R., pp.68-70, 132-134.)

Ms. Bennett then filed Rule 35 motions for reconsideration. (R., pp.63-64, 139-140.) She did not attach any documents, but provided new information through her testimony at the hearing in support of her motion. (Tr.1, p.11, L.15 – p.15, L.4.) Therein, she informed the court she was being housed at the East Boise Community Re-entry Center, and was awaiting release in order to work in the community. She requested the court reduce her indeterminate time, so that she could secure housing in Coeur d'Alene, work, save money to pay her fines, and successfully complete parole. Lastly, she relayed she had been an inmate worker at all of the facilities she had previously been at, including through Kootenai County Jail, and Pocatello prison. (Tr.1, p.13, L.6 – p.15, L.4.) The district court denied her requests to reduce her sentence. (Tr.1, p.18, L.25 – p.19, L.4.) Ms. Bennett's appeal incorporates appeals of the court's Rule 35 denials.

[3] Ms. Bennett waived her right to appeal her convictions, but did not waive her right to appeal the length of her sentences. (R., pp.49, 114.)

ISSUES

I. Was Ms. Bennett's Constitutional Right to Due Process violated at the sentencing hearing when the State breached the plea agreement, and Ms. Bennett's counsel's failure to object cannot be excused as a tactical decision?

II. Did the district court abuse its discretion when it imposed upon Ms. Bennett a ten-year sentence, with two years fixed, for a burglary conviction, plus a concurrent five-year sentence, with two years fixed, for a fraud conviction?

III. Did the district court abuse its discretion when it denied Ms. Bennett's Rule 35 motions in light of her testimony regarding her rehabilitation and minimal risk to the community, demonstrating a reduced sentence would fulfill sentencing goals?

ARGUMENT

I.

Ms. Bennett's Constitutional Rights To Due Process Were Violated At The Sentencing Hearing By The State's Breach Of The Rule 11 Plea Agreement And The Court's Imposition Of A Harsher Sentence Than That To Which She Agreed

A. Introduction

When the State enters a plea agreement with a defendant and promises to recommend a particular disposition at sentencing, the prosecutor is obligated to recommend that sentence. As part of the plea agreement in this case, the State specifically promised to recommend a sentence of "NTE Rider" which is shorthand for a recommended sentence "not to exceed a rider." Yet at the sentencing hearing, the prosecutor *did not* recommend a rider, but rather recommended imposition of a prison sentence. Ms. Bennett's counsel failed to object, and the district court imposed a prison sentence. This unobjected-to failure of the State to follow the terms of the Rule 11 plea agreements resulted in a sentence above and beyond what Ms. Bennett bargained for, and constitutes fundamental error. Her sentence must be vacated.

B. Standard Of Review

Ms. Bennett's claim that the prosecutor breached the plea agreement as a matter of law is reviewed by this Court *de novo*, in accordance with contract law standards. *State v. Gomez*, 153 Idaho 253, 256 (2012). Although Ms. Bennett did not object to the prosecutor's recommendation in the district court, her claim that the State breached the plea agreement is reviewable by this Court under the *Perry* fundamental error doctrine. *State v. Gomez,* 153 Idaho 253, 255 (2012) (citing *State v. Perry,* 150 Idaho 209, 225 (2010). *Perry* sets forth the applicable standard:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Perry, 150 Idaho at 226.

C. Ms. Bennett's Unwaived Constitutional Right to Due Process Was Violated At The Sentencing Hearing

1. The Error Involves An Unwaived Constitutional Right

The State's breach of the plea agreement affected Ms. Bennett's unwaived Constitutional Rights. The Right to Due Process, as embodied in the United States Constitution, forbids the State from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend XIV; § 1. The Idaho Constitution likewise guarantees Due Process to the accused. Idaho Const. art. I, §13. The Idaho Supreme Court has held, post-*Perry,* the State's breach of a plea agreement "goes to the foundation or basis of a defendant's rights." *State v. Gomez*, 153 Idaho 253, 256 (2012) (internal citations omitted). A breach of the plea agreement implicates Due Process because it impugns the integrity of a guilty plea.

> Because a claim that the State breached a plea agreement affects whether the agreement was knowingly or voluntarily entered, it "goes to the foundation or basis of a defendant's rights...." *State v. Knowlton*, 123 Idaho 916, 918, 854 P.2d 259, 261 (1993). Therefore, it is fundamental error and can be raised for the first time on appeal. *See State v. Rutherford,* 107 Idaho 910, 915, 693 P.2d 1112, 1117 (Ct.App.1985).

State v. Jafek, 141 Idaho 71, 74 (2005); *See also McCarthy v. United States*, 394 U.S. 459 (1969).

("A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.") (internal citations omitted.)

In this case, Ms. Bennett entered into agreements with the State to plead guilty to two crimes on the condition that the State would recommend a sentence no harsher than retained jurisdiction. She did not get what she bargained for, and the voluntariness of her plea is impugned. As such, Ms. Bennett satisfies the first prong of the Perry test because the State's breach violated her unwaived constitutional right.

2. <u>The Error Is Clear And Obvious</u>

Ms. Bennett's claim of error satisfies the second prong of the *Perry* test, which requires that the error be "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision." *Perry*, 150 Idaho at 226. The existence of the contract, the State's breach of the contract, and counsel's lack of tactical purpose, are contained within the documents filed with the court as well as statements made by the parties and the court during proceedings.

a. <u>Existence Of A Contract</u>

When a prosecutor and defendant enter into a plea agreement, they mutually bind themselves to the terms of an enforceable contract. *McKinney v. State*, 162 Idaho 286 (2017) (finding defendant was bound to a condition in his plea agreement, that he waive his right to

appeal). The law is well-settled that plea bargains are contracts, and one party's failure to keep its promise is a breach of that contact. *State v. Peterson,* 148 Idaho 593 (2010). The burden of proving the breach is on the plaintiff, or in this case, Ms. Bennett. *Id.* at 595. In Case 5661, Ms. Bennett can demonstrate the existence of a contract through the filed Pretrial Settlement Offer extended by the State, and agreed to and signed by Ms. Bennett. (R., p.49.) She agreed to plead guilty to one felony, waive the preliminary hearing and her right to appeal, and pay restitution, all in exchange for the State's dismissal of the persistent violator enhancement and the remaining charges, and recommendation of a sentence no harsher than "NTE Rider." (R., pp.47-49). In Case 10118, a nearly identical arrangement was made, except that Ms. Bennett agreed to plead guilty to a different felony. (R., p.114.) Thus, the existence of the contracts is clear from the record.

b. Breach Of Contract

The State's breach of the contract is also plain and clear from the record, because the State did not recommend the district court sentence Ms. Bennett to probation or retained jurisdiction, and constructively disavowed either sentence.

> It is well established that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. **This principle is derived from the Due Process Clause and the fundamental rule that, to be valid, a guilty plea must be both voluntary and intelligent.** If the prosecution has breached its promise given in a plea agreement, whether that breach was intentional or inadvertent, it cannot be said that the defendant's plea was knowing and voluntary, for the defendant has been led to plead guilty on a false promise. In such event, the defendant will be entitled to relief.

State v. Baker, 156 Idaho 209, 214, 322 P.3d 291, 296 (2014) (quoting *State v. Willis*, 140 Idaho 773, 775 (Ct. App. 2004) and *Santobello v. New York*, 404 U.S. 257, 262 (1971) (emphasis added.) Here, Ms. Bennett's plea rested on the State's promise to recommend a sentence no

harsher than a rider, yet the State recommended prison. At the hearing, while emphasizing the most derogatory parts of the PSI, the State argued:

> This is a terrible record, as indicated in the PSI. This appears to be at Page 7, 7, now 8 felony convictions. 17 misdemeanor convictions. And two more misdemeanor cases pending.
>
> This report, I'm sure the Court is reviewed. I'm not gonna regurgitate what happened in this case or cases.
>
> You get down to Page 20 in the PSI, some of the summary, it says that she does present as a glib, charming and likeable individual who simply has made some poor choices in her life due to difficult circumstances and financial strain. However, when looking at her over-all pattern of behavior and speaking with individuals who know her and who have been victimized by her, it becomes apparent that though she presents well, she is very self-serving, antisocial mindset.
>
> The next paragraph, "She has displayed remarkable criminal versatility. Multiple charges pending in multiple jurisdictions. And appears to have little remorse – genuine remorse for her actions. It appears that her behavior is escalating. She poses a significant threat to the community and is not a good candidate for probation at this time.
>
> The State would recommend five years fixed, five years indeterminate, total underlying of ten years.
>
> **No objection to a retain [sic] jurisdiction if the Court feels it's warranted.**
>
> Recommend those on both cases to run concurrent.
>
> Request that restitution remain open for 90 days.

(Tr.2, p.11, L.24 – p.13, L.6.) (emphasis added.) By failing to recommend probation or a rider, the State failed to fulfill the most significant term of the contract – the length of incarceration. And there can be no doubt that the State agreed to this plea contract. Based upon the offer itself, it is apparent it was generated and extended by the State, and consisted of a fillable form document. (R., pp.48-49, 116-117.) Its terms were clear and unambiguous.

"Sentence recommendation: NTE Rider," is noted in both Pretrial Settlement Offers under the State's obligations. (R., pp.49, 114.) That "NTE Rider" is commonly used to mean "not to exceed a rider" is shown through counsel's and the court's reference to the same, and the prosecutor's agreement to the terms of the contract during the sentencing hearing:

Mr. Jones: I believe the State would then be dismissing the grand theft charge. And then the State would agree not to exceed a Rider. (Tr.2, p.3, Ls.11-13.)

The Court: Okay, I have been handed the Pretrial Settlement Agreement in Case No. 17-10118, indicating that there will be a plea of guilty to Count I, Possession of a Financial Transaction Card. She's waived her right to appeal the conviction. Any restitution, if applicable. She waived her right to a preliminary hearing. The State is agreeing to a sentence recommendation not to exceed a Rider and to dismiss – or not to file enhancement charges and Count II.

That appears to be the agreement. Is that the agreement as far as the State is concerned? (Tr.2, p.4, Ls.12-23.)

Mr. Black: **It is, Your Honor**. (Tr.2, p.4, L.24.) (emphasis added.)

Based upon its extension of the offer, and its comments in court, the State clearly understood the term "NTE" and agreed to be bound by the terms of the contract.

Even if one were to argue there were ambiguities in the plea agreement contract, any ambiguities would favor Ms. Bennett. *State v. Peterson*, 148 Idaho 593 (2010). In *Peterson*, the prosecutor and the State orally agreed to a Rule 11 through a series of exchanges on the record that Peterson would plead guilty to a weapons charge in exchange for the State's dismissal of all other charges. At a post-sentencing motion to dismiss hearing, the Court expressed doubt as to whether the plea agreement actually incorporated dismissal of the remaining charges, refusing to dismiss a felony charge. *Id*. at 595. Upon review, the court determined Peterson met his burden of demonstrating the existence of a contract as well as its terms. First, it determined any ambiguities in a plea agreement are to be construed in the defendant's favor, and second, Peterson's counsel clarified the agreement on the record regarding the contemplated dismissal of all charges and the prosecution had the opportunity to comment but stood silent. *Id.* at 597.

Likewise, the prosecutor's statement that it did not object to a rider, if the court felt it appropriate, was not ambiguous and did have the same meaning as, "Your Honor, we

recommend probation or a rider." The prosecutor's argument was simply not consistent with any term of the contract. And even if this Court determined the statement, "no objection to a retain [ed] jurisdiction if the Court feels its warranted," is not a clear breach of the contract, the State's focus during argument on negative aspects of Ms. Bennett's PSI, emphasizing the comments regarding appropriateness for probation and threat to the community, it was effectively disavowing a recommendation for retained jurisdiction. The case of *State v. Jones*, 139 Idaho 299 (Ct. App. 2003), is illustrative.

In *Jones*, the prosecutor agreed to recommend retained jurisdiction in exchange for the defendant's guilty plea. *Id*. at 300. However, while the prosecutor made the requisite recommendation, she also argued to the district court that the presentence investigator advised against supervised probation, in part, out of concern for the safety of the victims and defendant's poor prospects for rehabilitation. *Id*. The prosecutor added that, while she was bound to her recommendation, she did not have all of the aggravating information at the time of the plea agreement and, thus, left it up to the court's discretion. *Id*., at 300-01. The Court of Appeals vacated the sentence, holding that the additional statements made by the prosecutor were "fundamentally at odds" with the recommendation that the State had promised; although the prosecutor uttered the requisite wording make the recommendation called for in the plea agreement, her additional statements "effectively disavowed the recommendation for retained jurisdiction," and thereby deprived the defendant of the benefit of his bargain, constituting a breach of the agreement. *Id*. at 303.

The prosecutor's recommendation is more onerous here, because it did not even include acknowledgement that it was bound to recommend a rider like the prosecutor in *Jones*. If relief was warranted in *Jones*, surely it is warranted here. *See also State v. Lankford*, 127 Idaho 608,

617 (1995)("[a]llowing the state to make the arguments and introduce the evidence in aggravation to the extent that was done was reversible error, because it was so fundamentally at odds with the position the state was obligated to recommend that it amounted to a violation of the agreement."); *See also State v. Daubs*, 140 Idaho 299, 301 (Ct. App. 2004) (finding prosecutor's over-emphasis of the harsher sentence recommended in the presentence investigation report acted as a "constructive disavowal" of the State's required recommendation.) Similar to the prosecutors in *Jones, Lankford,* and *Daubs*, and recognizing that the underlying purpose behind "the retained jurisdiction statute, I.C. § 19–2601(4), is to allow the trial court additional time to evaluate the defendant's rehabilitation potential and suitability for probation," and that "[p]robation is the ultimate objective sought by a defendant who asks a court to retain jurisdiction." *State v. Chapel*, 107 Idaho 193, 194 (Ct. App. 1984), the State's argument for a prison sentence and emphasis on Ms. Bennett's "terrible record," and "antisocial mindset," acted as constructive disavowal of probation and retained jurisdiction.

Meanwhile, contrary to the State's failure to abide by the contract terms, the record clearly shows that Ms. Bennett fulfilled her end of the contract. One term of the contract was that she agree to plead guilty to felony burglary. *Id.* She did that on June 8, 2017. (Tr.1, p.7, Ls.4-12.) She agreed to waive her preliminary hearing, and did so during the April 21, 2017, hearing. (R., p.32.) She gave up her right to appeal the conviction and agreed to restitution by signing the Pretrial Settlement Offer, and refraining from objecting to those conditions at sentencing. (Transcript 1, generally, pp.3-18.) Similarly, her fulfillment of the same terms on case 10118 is clearly documented in the record: On July 7, 2017, a Pretrial Settlement Offer signed by Ms. Bennett was filed in district court; on August 17, 2017, she waived her

preliminary hearing, entered a guilty plea to felony fraud, and refrained from objecting to restitution or her waiver of her right to appeal her conviction. (Tr.1, generally, pp.3-18.)

Given that Ms. Bennett fulfilled her end of the bargain, there is no justification for the State's failure to fulfill the terms of the plea agreement. Nor is there any plausible justification for counsel's failure to object.

c. Counsel's Failure To Object Is Not Due To Tactical Strategy

The record clearly demonstrates counsel's failure to object was not attributable to a tactical decision where Ms. Bennett would, in the immediate future, face years in prison as opposed to no prison with a probation sentence or less than one year with a rider. It is not necessary for Ms. Bennett to provide evidence of counsel's decision-making process because there is no feasible reason to justify subjecting one's client to a harsher sentence. *See State v. Sutton*, 151 Idaho 161, 167 (Ct. App. 2011) (applying objective "reasonable trial strategist" standard to conclude that information outside the record was not necessary to determine that the defendant's failure to object was not a strategic decision.) Upon review, mere speculation that some tactical reason supported a defendant's counsel's failure to object is insufficient. *Id.* at 167 ("We are left with only the State's speculation that Sutton made a tactical decision not to object. This Court concludes that information outside the record is not necessary to determine that Sutton's failure to object was not a strategic decision.") *See also State v. Day*, 154 Idaho 476, 482 (Ct. App. 2013) (rejecting speculative argument that Day's failure to request a jury instruction was based upon legitimate trial strategy, where "there is no indication in the record that Day knew any more about the law than the state or the trial court, nor was there any indication that Day was attempting to sandbag the court.")

Moreover, any potentially asserted concern the State would have had over defendant's sandbagging by purposefully failing to raise an objection with the hopes that he will be successive on appeal is nonsensical given the high burden a defendant must meet and statistical reality that a criminal defendant is infrequently warranted relief on appeal.

Had counsel objected and reminded the State as well as the court that the parties had entered into a Rule 11 plea agreement, which incidentally carries more force than a non-Rule 11 plea agreement, the court likely would have imposed probation or a retained jurisdiction. The record also clearly shows that a tactical decision not to object to the State's sentencing recommendation was at odds with the argument further by Ms. Bennett's counsel. Her attorney argued for probation, and in the alternative, a rider. (Tr.2, p.15, Ls.3-8.) Counsel's simultaneous objection to the prosecutor's statements would have been entirely consistent with Ms. Bennett's strategic interests, and consistent with counsel's stated position. Applying an objective standard, there was no cognizable strategic advantage to Ms. Bennett for failing to object to the prosecutor's request for a prison sentence instead of probation or a rider.

4. Ms. Bennett's Substantial Rights Were Affected

Ms. Bennett's claim also satisfies the third part of the fundamental error standard, that the State's breach of the plea agreement was a significant infringement on her substantial rights. *Perry*, 150 Idaho at 226, 228. Although as argued *infra*, the government's breach of a plea agreement calls into doubt the voluntariness of a plea, the breach does not mandate automatic reversal absent a "case-specific and fact-intensive basis" requiring the defendant to demonstrate prejudice, for in some scenarios, despite the government's breach, a defendant might have obtained the benefits contemplated by the deal or would not have obtained those in any event. *Puckett v. United States*, 556 U.S. 129, 142–43 (2009) ("It is true enough that when the

Government reneges on a plea deal, the integrity of the system may be called into question, but there may well be countervailing factors in particular cases.") Under this standard, Ms. Bennett must demonstrate "a reasonable possibility" that the State's breach affected the outcome of her sentencing. *Perry*, 150 Idaho at 226, 228. Under the *Perry* standard, a defendant is not required to demonstrate that a different outcome was "probable" or "likely," only that it was "reasonably *possible*." *Id.* Here there was a reasonable possibility that Ms. Bennett would not have readily entered guilty pleas if she was aware the State would recommend prison for the imposition of a prison sentence is on the harsh edge of the sentencing continuum. Given Ms. Bennett's personal circumstances and homeless status at the time of the offenses, a jury trial, even if not resulting in acquittal, may have brought more mitigating facts to light and garnered sympathy for Ms. Bennett, given the crimes were not violent in nature. There is also a reasonable possibility the district court would have imposed probation or a rider.

It is also reasonably possible that the district court would have given weight to the State's *unequivocal* recommendation for retained jurisdiction, had one been made. Courts have long recognized the importance of the government's recommendation on the sentence imposed. *See*, *e.g. Santobello v. New York*, 404 U.S. 257 (1971) (vacating defendant's sentence because the prosecutor breached a promise to refrain from recommending a specific term of imprisonment). This can be gleaned by the fact the district court adopted some of the same language and argument of the prosecutor, such as calling her record a "terrible record," and citing the number of misdemeanor convictions. The court stated:

> When I look at the Presentence Report, I see someone with a terrible record in front of me, plus sentencing for two additional theft charges here today. Several felonies. Apparently eight felony convictions, 17 misdemeanors. And it appears the majority of these are theft offenses.
>
> The Presentence Report concludes that you're a threat to society and that there's a high potential for recidivism.

> I think that both of those conclusions are entirely correct, just based upon your history. You've done a Rider in the past. That hasn't – doesn't seem to have helped anything. The thing that's unusual about this case is the – as both counsel know most of the criminal cases we get in here there's the issue of substance abuse and that does not seem to be an issue in this case. Normally if I were to send someone on a Rider, that rehabilitation is going to be an overriding factor. . . .
>
> I'm certainly one who believes in giving people a second and third chances but when someone comes in with this type of record, I think that the conclusion in the Presentence Report is correct that incarceration is required.

(Tr.2, p.16, L.1 – p.17, L.3.) The district court's stated preference to impose riders for rehabilitation and provide second and third chances when warranted supports that if the State had actually recommended probation or a rider as promised, the court would likely have sentenced Ms. Bennett to probation or a rider. (Tr.2, p.17, Ls.1-3.) As such, Ms. Bennett has shown her substantial rights were affected.

II.

Following Ms. Bennett's Convictions For Burglary And Fraud, The District Court Abused Its Discretion By Imposing A Unified Sentence Of Ten Years, With Two Years Fixed, Plus A Concurrent Five Years, With Two Years Fixed

Ms. Bennett asserts that, given any view of the facts, her unified ten and five year sentences were excessive. 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)). Ms. Bennett does not allege that her sentence exceeds the statutory maximum.

Accordingly, in order to show an abuse of discretion, Ms. Bennett 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), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Here, an independent review of the record reveals it was unreasonable to impose a ten-year and five-year sentence upon Ms. Bennett, denying her probation or retained jurisdiction, because such sentence was overly harsh and unnecessary to accomplish sentencing goals in light of the evidence in mitigation. The first factor was Ms. Bennett's early acceptance of responsibility. Ms. Bennett entered guilty pleas in the early stages of both cases. (R., pp.26, 29.) During the sentencing hearing, she apologized to the victims and took responsibility:

> I would like to take the time to apologize to the victims and any and all family members that I have lied to and hurt during this process. And I am eager to get the counseling that I need in order to correct my way of thinking and decision making and I am extremely motivated to do so. I have spent 131 days thinking about just that and I really want to better my life and rebuild myself from the inside out so I can be a better mother to my children. And that's what motivates me most.

(Tr.2, p.15, Ls.13-23.) Acknowledgement of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010).

In addition to her acceptance of responsibility, Ms. Bennett demonstrated that she had the ability to perform well on probation supervision given her successful performance on the same in

the past. “The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision.” *State v. Sandoval*, 92 Idaho 853, 860 (1969) (citations omitted.) Here, according to the PSI, despite Ms. Bennett’s criminal history containing multiple convictions, she has “no recorded probation violations.” (PSI, p.7.) For instance, Ms. Bennett completed a rider in 2005, was placed on probation and completed the same and paid full restitution. (PSI, p.8.) Although both the prosecutor and the judge commented at the severity of Ms. Bennett’s criminal history, the numbers of convictions suggests a history much worse than actual. Regarding Ms. Bennett’s reported seventeen or so misdemeanor convictions, fifteen of those arose out of one case California case from 2004, rather than double digit cases. (PSI, p.5.) And four of her felony convictions likewise occurred in the same case. (PSI, p.5.)

In addition, Ms. Bennett’s character and life circumstances should have been more fully taken into consideration. Ms. Bennett explained that she was homeless and desperate at the time that she committed these offenses. She had been living out of her car. (PSI, p.4.) She did not have much family support, as her mother had died in 2015, and her father had a criminal history for theft and a sexual offense. (PSI, p.9.) Even though finances did not appear to be a factor in her childhood, there was major instability. *Id.* Her parents divorced and re-married multiple times, and her father was a heavy drinker. *Id.* Moreover, her ex-husband and half-brother indicated there were significant concerns about her drug use, which intimates the possibility of the disease of addiction or substance abuse, which Idaho courts have held should be considered as a mitigating factor when imposing sentence. *State v. Nice*, 103 Idaho 89 (1982) (PSI, pp.9-11.)

Based upon the district court’s statements at sentencing, it inaccurately concluded Ms. Bennett did not have a need for help with substance abuse or other treatment, and this played

a crucial role in the court's decision to not sentence her to a rider. (Tr.2, p.16, Ls.13-19.) The district court's conclusion that there was no substance abuse or need for help was belied by her ex-husband's and half-brother's comments (PSI, pp.9-11), and even Ms. Bennett's attorney recommended treatment at a program called "Restored Paths." (Tr.2, p.15, Ls.3-5.)

Lastly, Ms. Bennett had demonstrated the ability to comply with community supervision and that rehabilitation was fruitful. At the time of sentencing, Ms. Bennett had a job and was working at Riverview Electrical and Detailing. (Tr.2, p.10, Ls.12-21.) She had also been successful on probation in the past and had paid restitution to previous victims. (PSI, p.8.)

Based upon all of these factors, probation or at most, retained jurisdiction, would have been a sufficient sentence to fulfill sentencing goals. The district court's refusal to place Ms. Bennett on either, combined with its failure to recognize the need for treatment, resulted in an excessive sentence and an abuse of discretion.

III.

The District Court Abused Its Discretion When It Denied Ms. Bennett's Rule 35 Motions For A Reduction Of Sentence In Light Of Additional Information

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*, 106 Idaho 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).

In support of Ms. Bennett's Rule 35 motions, she provided new information to the court through her own testimony. She relayed she was at the East Boise Re-Entry Center where she had been since December 29, 2017, and she was waiting to be released onto job search in order to find a job in the community. (Tr.1, p.12, Ls.16-25.) Ms. Bennett requested that the court reduce her indeterminate term only, thoughtfully explaining that she would like to complete her determine term, work and save money, and be able to secure a job and housing at a familiar apartment complex before her return into the community in Coeur d'Alene. (Tr.1, p.13, L.6 – p.14, L.14.) She also relayed that since her sentencing, she was permitted by IDOC to participate as an inmate worker in the community. (Tr.1, p.14, Ls.18-25.) This information demonstrated that rehabilitation efforts were already having a dramatic effect, because an inmate being allowed to work outside in the community in not commonplace. Ms. Bennett's comments, including that she requested only a reduction in her *indeterminate* time, demonstrated rehabilitation through Ms. Bennett's increased awareness and insight, as well as a reduced risk of harm to the public through Ms. Bennett's identification of an articulated treatment plan upon release. She also expressed eagerness to be held accountable for her actions. (Tr.1, p.13, L.6 – p.14, L.14.) This attitude bode well for a reduced need for long incarceration. *See, e.g., State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991) (amenability to treatment should be considered a mitigating factor).

Therefore, in light of her proven rehabilitation and ability to work in the community while serving her sentence, her previously-imposed sentence was longer than necessary, and

unreasonable, under the circumstances. *See State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). As such, it was error for the district court to deny her Rule 35 motions.

CONCLUSION

Ms. Bennett respectfully requests this Court to reduce her sentence as it deems appropriate. Alternatively, she requests this Court to remand her case to the district court for further proceedings consistent with the goals of sentencing and the parties' plea agreement.

DATED this 30th day of July, 2018.

/s/ Lara E. Anderson
LARA E. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Delivered via e-mail to: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

LEA/eas