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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	<b>NO. 45909</b>
Plaintiff-Respondent,	)	
	)	<b>ADA COUNTY</b>
v.	)	<b>NO. CR-FE-2005-245</b>
	)	
MARK WESLEY GABLE,	)	
	)	
Defendant-Appellant.	)	
_____	)	

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**BRIEF OF APPELLANT**

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

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**HONORABLE SAMUEL A. HOAGLAND**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Mark Wesley Gable appeals from the district court's order denying his third motion pursuant to Idaho Criminal Rule 35(a) to correct an illegal sentence. Mindful of the narrow reading this Court has given to the term "illegal sentence," Mr. Gable contends the district court erred in denying this motion because his trial counsel did not advise him that he had a constitutional right to remain silent during the presentence investigation.

### Statement of Facts and Course of Proceedings

Mr. Gable was convicted of three counts of aiding and abetting burglary and one count of conspiracy to traffic in methamphetamine and was sentenced to a unified term of 30 years, with 20 years fixed. (43767 R., pp.30, 86.)<sup>1</sup> Mr. Gable filed a direct appeal, and the Court of Appeals affirmed in an unpublished decision. (43767 R., p.30.) Mr. Gable filed a petition for post-conviction relief, which the district court dismissed following an evidentiary hearing. The Court of Appeals affirmed in an unpublished decision. *See Gable v. State*, No. 36233, 2010 WL 9587352 (Ct. App. June 22, 2010) (unpublished).

In July 2011, Mr. Gable filed a motion pursuant to Idaho Criminal Rule 34 for a new trial, which the district court denied as untimely. (43767 R., pp.7-11, 30-31.) In October 2015, Mr. Gable filed a motion pursuant to Idaho Criminal Rule 35(a) to correct an illegal sentence. (43767 R., pp.32-86.) The district court denied the motion, and Mr. Gable appealed. (43767 R., pp.122-29.) The Court of Appeals affirmed in an unpublished decision. *See State v. Gable*, No. 43767, 2016 WL 3240253 (Ct. App. June 6, 2016) (unpublished). Mr. Gable filed a second

Rule 35(a) motion to correct an illegal sentence in 2016, which the district court denied. (R., pp.14-16, 86.)

This appeal arises from multiple pro se motions filed by Mr. Gable on February 28, 2018. Mr. Gable filed, *inter alia*, a third Rule 35(a) motion to correct an illegal sentence, arguing his sentence was illegal because his trial counsel did not advise him that he had a constitutional right to remain silent during the presentence investigation. (R., pp.35-39.) Mr. Gable filed other motions asking the district court to, *inter alia*, appoint conflict counsel, redact the presentence investigation report, and order a confidential neuropsychological evaluation at public expense. (R., pp.23-24, 27-30, 40.)

The district court issued an order on March 7, 2018, denying Mr. Gable's third Rule 35(a) motion. (R., pp.82-89.) The district court denied Mr. Gable's motion for appointment of conflict counsel because it concluded Mr. Gable's motions are frivolous in that "there is absolutely no question that the sentence imposed is not illegal from the face of the record as required by Idaho Criminal Rule 35(a)." (R., p.83.) The district court denied Mr. Gable's motion to redact the presentence investigation report because Mr. Gable "articulated no legitimate basis" for such redaction. (R., p.85.) The district court denied Mr. Gable's motion for a neuropsychological examination because Mr. Gable cited no valid legal basis for the examination and noted any report could not be considered to reduce his sentence under Idaho Criminal Rule 35(b), as the time for seeking a reduction of sentence under that rule had passed. (R., pp.85-86.) Mr. Gable filed a timely notice of appeal from the district court's March 7, 2018 order. (R., pp.116-19.)

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<sup>1</sup> The Supreme Court issued an order on April 18, 2018, augmenting the record on appeal in this case with the record on appeal in Case No. 43767. (R., p.2.) For consistency, all references to the record in Case No. 43767 will include the case number.

ISSUE

Did the district court err in denying Mr. Gable's third motion to correct an illegal sentence?

## ARGUMENT

### The District Court Erred In Denying Mr. Gable's Third Motion To Correct An Illegal Sentence

Mr. Gable contends the district court erred in denying his third Rule 35(a) motion to correct an illegal sentence because his trial counsel did not advise him that he had a constitutional right to remain silent during the presentence investigation. Whether a sentence is illegal is a question of law over which this Court exercises free review. *State v. Farwell*, 144 Idaho 732, 735 (2007). Idaho Criminal Rule 35(a) provides that “[t]he court may correct a sentence that is illegal from the face of the record at any time. The district court denied Mr. Gable’s motion because it concluded “it is beyond doubt that the sentence is not illegal from the face of the record.” (R., pp.86-87.) Mindful of the narrow reading this Court has given to the term “illegal sentence” in Rule 35(a), Mr. Gable contends the district court erred in denying his motion because he would have remained silent during the presentence investigation if he had been advised that he had a constitutional right to do so.

## CONCLUSION

Mr. Gable respectfully requests that this Court vacate the district court’s order denying his third Rule 35(a) motion, and remand this case to the district court for further proceedings.

DATED this 22<sup>nd</sup> day of October, 2018.

/s/ Andrea W. Reynolds  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of October, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

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

AWR/eas