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

STATE OF IDAHO,	)	
	)	NO. 45824
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY
v.	)	NO. CR-2015-14399
	)	
BRADLEY RICHARD BOGGS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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**BRIEF OF APPELLANT**

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

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**HONORABLE JOHN T. MITCHELL**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Bradley R. Boggs appeals from the district court's denial of his motion to modify a no contact order to have telephone contact with his child. He asserts the district court abused its discretion by denying the motion because the district court did not exercise reason in its decision.

### Statement of Facts and Course of Proceedings

In September 2015, the State charged Mr. Boggs with aggravated assault and domestic battery of his then-girlfriend Amanda Wulf, along with the deadly weapon and persistent violator sentencing enhancements. (R., pp.48–50.) According to the presentence investigation report, Mr. Boggs and Ms. Wulf got into a “heated argument.” (Conf. Exs.,<sup>1</sup> p.18.) Ms. Wulf alleged that Mr. Boggs pushed, punched, and spit on her. (Conf. Exs., pp.18–19.) She also alleged that he threatened and hit her with a screwdriver. (Conf. Exs., pp.18–19.) At the time of the alleged offenses, Ms. Wulf's child, I.W., was present. (Conf. Exs., p.19.) Mr. Boggs and Ms. Wulf also have one child together, J.W. (Conf. Exs., p.32.) Mr. Boggs considers I.W. to be his stepchild. (Conf. Exs., p.32.) I.W. was seven, and J.W. was four. (Conf. Exs., p.32.) In light of the alleged offenses, the district court issued a no contact order (“NCO”) for Ms. Wulf, which would expire one year later, in September 2016, or until dismissal of the case. (R., p.35.)

Although it appears that the NCO only applied to Ms. Wulf, on October 6, 2015, Mr. Boggs moved to modify the NCO to allow phone contact with his children. (Conf. Exs., p.7.) At the arraignment, held the next day, Mr. Boggs pled guilty to both offenses, and the State agreed to dismiss the enhancements. (R., pp.54, 56–57, 58–59, 63.) Mr. Boggs was released on

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<sup>1</sup> Citations to the confidential exhibits refer to the 124-page electronic document with certain sealed documents and the presentence investigation report.

his own recognizance. (R., pp.56–57.) As a condition of his release, Mr. Boggs had to abide by the NCO. (R., pp.57, 62.) The district court did not address Mr. Boggs’s motion to modify. (*See* R., pp.56–57.)

Then, in February 2016, Ms. Wulf wrote a letter to the district court asking to add J.W. and I.W. to the NCO. (R., p.79.) The district court held a hearing in March 2016. (R., pp.91–92.) The district court denied Mr. Boggs’s October 2015 motion to modify and granted Ms. Wulf’s request. (R., pp.91–92.) On March 15, 2016, the district court issued an order modifying the NCO to add J.W. and I.W. (Conf. Exs., p.83.)

On May 18, 2016, the district court sentenced Mr. Boggs. (R., pp.100–01.) The district court imposed an aggregate sentence of ten years, with two years fixed, and retained jurisdiction. (R., pp.101, 104–05.) At the sentencing hearing, Mr. Boggs asked the district court if it would allow Mr. Boggs to have written contact with his children. (No. 44782 Tr. Vol. I,<sup>2</sup> p.49, Ls.9–15.) The prosecutor requested to “get some input” from Ms. Wulf, and Mr. Boggs represented that she would likely not want any communication. (No. 44872 Tr. Vol. I, p.49, L.17–p.50, L.1.) The district court allowed written communication with J.W. and I.W. through Mr. Boggs’s counsel, with a copy of the communication to the prosecutor and the district court’s approval. (No. 44872 Tr. Vol. I, p.50, Ls.11–18.) In the judgment of conviction, the district court ordered:

Defendant is to have no contact of any kind with Amanda Wulf. Defendant is to have no contact with [J.W.] and [I.W.] except in writing but only then through his attorney, who must then disclose such to the prosecuting attorney and the court,

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<sup>2</sup> On May 7, 2018, this Court augmented the record with the record from Mr. Boggs’s prior appeal: No. 44782. Citations to the prior record will reference that docket number. In No. 44782, there were two transcripts. The first, cited as Volume I, contains the entry of plea hearing, held on October 7, 2015, the evidentiary hearing, probation violation disposition, and sentencing hearing, held on May 18, 2016, and the rider review hearing, held on December 5, 2016. The second transcript, cited as Volume II, contains the Rule 35 motion hearing, held on July 31, 2017.

and the court must approve of such written communication in advance of it being sent by the defendant.

(R., p.105.)

In September 2016, Ms. Wulf requested to modify the NCO to prohibit Mr. Boggs's contact with her, I.W., and J.W. (Conf. Exs., p.115.) The district court took up Ms. Wulf's request at a hearing in November 2016. (R., pp.112–13.) The court minutes indicate that Mr. Boggs had no objection to the NCO with Ms. Wulf, but wanted to continue written communication with his children. (R., p.113.) The district court modified the NCO to continue written communication with J.W. through the Kootenai County Public Defender ("KCPD"). (R., pp.113, 114.) The NCO prohibited contact with Ms. Wulf and I.W. (R., p.114.) The NCO would expire on November 2, 2030, when J.W. was eighteen years old. (R., pp.113, 114.) The district court later relinquished jurisdiction. (R., pp.116–17, 119–20.)

On August 22, 2017, Mr. Boggs moved to modify the NCO to allow telephone contact with J.W. (Conf. Exs., p.123.) On January 10, 2018, the district court held a hearing on the motion. (*See generally* Tr., p.3, L.1–p.21, L.8.) The district court admitted a letter written by Mr. Boggs in support of the motion. (Tr., p.8, Ls.9–10, p.8, Ls.20–21; Exs.,<sup>3</sup> pp.8–9.) The district court also admitted Mr. Boggs's letter to his children with a return to sender notation on the envelope. (Tr., p.9, Ls.14–25; Exs., pp.15–23.) Upon the State's objection, the district court excluded four letters written by Mr. Boggs's family regarding his ability to parent and care for J.W.<sup>4</sup> (Tr., p.8, Ls.5–18; Exs., pp.10–14.)

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<sup>3</sup> Citations to the exhibits refer to the twenty-three-page electronic document with exhibits from the preliminary hearing and the hearing on Mr. Boggs's motion to modify the NCO.

<sup>4</sup> The State objected on hearsay and authentication grounds. (Tr., p.5, L.13–p.7, L.7.) The district court ruled that Idaho Rule of Evidence ("I.R.E.") 101 did not exclude NCO proceedings, and therefore the I.R.E. applied to the letters' admission. (Tr., p.8, Ls.5–9.) The district court excluded the letters for authenticity. (Tr., p.8, Ls.12–18.) Pursuant to I.R.E. 101(d) and (e), the

At the hearing, Mr. Boggs requested that the district court allow him to have direct phone or written contact with J.W. (Tr., p.10, Ls.8–19.) Mr. Boggs also requested that the district court remove the KCPD as part of the NCO because it was outside the scope of KCPD’s representation and experience and could create ethical issues. (Tr., p.11, Ls.10–12, p.12, L.6–p.14, L.18, p.18, L.15–p.20, L.8.) Mr. Boggs suggested that, if the district court wanted to keep a third party involved, the district court should appoint a guardian ad item, request a CASA advocate, or use the victim witness coordinator at the prosecutor’s office. (Tr., p.13, Ls.15–20.) To that end, Mr. Boggs acknowledged the potential challenges in contacting J.W. without contacting Ms. Wulf, as well as Ms. Wulf’s ability to prevent Mr. Boggs from contacting J.W. by throwing away his letters or ignoring his calls. (Tr., p.11, Ls.10–24, p.13, Ls.12–22, p.19, L.19–p.20, L.8.) The prosecutor argued against modification and the removal of KCPD’s involvement. (Tr., p.14, L.20–p.18, L.12.) The prosecutor also represented to the district court that Ms. Wulf wished the NCO to remain in effect. (Tr., p.14, Ls.20–21.)

The district court granted in part and denied in part Mr. Boggs’s motion to modify. (Tr., p.20, L.9–p.21, L.2.) The district court removed KCPD and added the victim witness coordinator at the prosecutor’s office. (Tr., p.20, Ls.12–18.) The district court stated:

Based on [the prosecutor’s] represent [sic] that Ms. Wulf still would like this to remain, this No Contact Order to remain, I am going to modify the No Contact Order but only to the extent that the [KCPD] is removed, and so I’ll prepare an order . . . and I’ll interlineate, “Written contact only is allowed between Bradley Boggs and [J.W.] but only through the Kootenai County Prosecutor’s Office victims coordinator,” and it will be that person[’s] duty to look at the letters, make sure that it’s just communication between Mr. Boggs and [J.W.] and not efforts to communicate to [Ms. Wulf], and Mr. Boggs is just going to have to realize that if there is material that’s inappropriate, it’s going to the office of the Kootenai

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rules of evidence are fully or partially inapplicable to preliminary hearings, restitution hearings, sentencing proceedings, and granting or revoking probation proceedings. I.R.E. 101(d)(1), (7) (e)(3). NCO proceedings are not listed as outside the scope of the evidentiary rules. *See* I.R.E. 101(d), (e).

County Prosecuting Attorney's Office, and he'll have to conduct his correspondence appropriately, so I'll leave it at that.

(Tr., p.20, L.10–p.21, L.1.) On January 10, 2018, the district court issued an order modifying the NCO. (R., pp.197–98.) Mr. Boggs timely appealed. (R., pp.202–04.)

ISSUE

Did the district court abuse its discretion by denying in part Mr. Boggs's motion to modify the NCO to have telephone contact with his child?

## ARGUMENT

### The District Court Abused Its Discretion By Denying In Part Mr. Boggs's Motion To Modify The NCO To Have Telephone Contact With His Child

#### A. Introduction

Mr. Boggs maintains the district court abused its discretion by denying his request to have telephone contact with his child, J.W. Mr. Boggs contends the district court did not exercise reason in its decision because the district court provided no explanation as to why Mr. Boggs could have written contact with J.W. through a third party, but could not use that same safeguard to have telephone contact.

#### B. Standard Of Review

The test for determining whether a district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason.

*State v. Cobler*, 148 Idaho 769, 771 (2010).

#### C. The District Court Did Not Exercise Reason In Prohibiting Mr. Boggs From Telephone Contact With His Child

Pursuant to I.C. § 18-920(1), the district court may issue an order “forbidding contact with another person” if the district court “finds that a no contact order is appropriate” for certain offenses. I.C. § 18-920(1). Idaho Criminal Rule 46.2 governs the issuance and modification of NCOs. I.C.R. 46.2(a)–(b). “The decision whether to modify a no contact order is within the sound discretion of the district court.” *Cobler*, 148 Idaho at 771.

Here, Mr. Boggs submits the district court failed to exercise reason by denying his motion to modify the NCO to have telephone contact with J.W. As Mr. Boggs stated in his letter

to the district court, all of his letters to J.W. have been returned as “undeliverable.” (Exs., p.8.) The exhibit containing his letters to J.W. shows that the letters were returned due to an insufficient address. (Exs., p.23.) Because Mr. Boggs could not ensure that J.W. would receive his letters, he asked for telephone contact. (Exs., pp.8–9.) In support, he stated that he abided by the NCO since its issuance in 2015. (Exs., p.9.) Further, since Mr. Boggs was incarcerated, he explained that Ms. Wulf could record the phone calls and that she would only have to answer the call and “accept” it, without actually communicating with Mr. Boggs. (Exs., p.9.) The district court, however, only allowed Mr. Boggs to continue written communication with J.W., even though that communication had been unsuccessful.

Mr. Boggs submits the district court did not exercise reason in denying his request for telephone contact with J.W. The district court stated that its basis for denying modification was Ms. Wulf’s desire to keep the NCO. (*See* Tr., p.20, Ls.10–12.) This basis does not explain why the district would allow written but not telephone contact. Both forms of contact present the same risk that Mr. Boggs may try to contact Ms. Wulf through J.W. However, with a third party involved, that risk can be greatly reduced, if not completely eliminated, for either form of communication. Similar to the third party review of Mr. Boggs’s letters, there is no added risk to telephone contact if a third party facilitates the phone call. In fact, Ms. Wulf would not have to be involved in the phone call at all, unlike her receipt of a letter to J.W. Ms. Wulf could easily take J.W. to the prosecutor’s office and allow the victim witness coordinator to facilitate an occasional phone call between J.W. and Mr. Boggs. This would provide an extra level of separation for Ms. Wulf and allow Mr. Boggs to have meaningful communication with his son. *See Leavitt v. Leavitt*, 142 Idaho 664, 670 (2006) (recognizing the fundamental right to parent).

The district court’s “apparent ground” for prohibiting the telephone contact—Ms. Wulf’s desire to keep the NCO intact—“does not provide legal grounds” for the denial of Mr. Boggs’s request. *Cobler*, 148 Idaho at 772. For example, in *Cobler*, the defendant moved to modify an NCO to have contact with his children, and the district court denied the motion based on “the observation that the order was to remain in effect until dismissal of the case.” *Id.* This was the only “apparent ground” for denial. *Id.* This Court reasoned, “Such observation does not provide legal grounds for denial of the motion to modify.” *Id.* “Indeed,” this Court recognized, “the observation overlooks the fact that Idaho Criminal Rule 46.2 request an expiration date on all no contact orders.” *Id.* As such, this Court held the district court “neither acted consistently with the legal standards applicable to the specific choices available to it nor did it reach its decision by an exercise of reason.” *Id.* As in *Cobler*, the district court’s observation here that Ms. Wulf wanted the NCO to remain in effect “does not provide legal grounds” for its denial of telephone contact. *Id.* Ms. Wulf has always desired no communication between Mr. Boggs and J.W., so her continued request does not create a legally cognizable basis for the district court to deny telephone contact, but still allow written communication. In other words, Ms. Wulf’s request is a constant—it does not explain why the district court would continue one form of contact, but prohibit the other. Therefore, Mr. Boggs maintains the district court did not exercise reason and thus abused its discretion by denying his motion to modify the NCO.

CONCLUSION

Mr. Boggs respectfully requests that this Court vacate the district court's order to modify the NCO and remand this case for a new hearing on Mr. Boggs's motion to modify.

DATED this 21<sup>st</sup> day of December, 2018.

/s/ Jenny C. Swinford  
JENNY C. SWINFORD  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of December, 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

JCS/eas