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Hanks v. Idaho Appellant's Reply Brief Dckt. 46435

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MELVIN DEAN HANKS, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	SUPREME COURT NO. 46435-2018 MINIDOKA COUNTY NO. CV-2016-932

REPLY BRIEF OF APPELLANT MELVIN DEAN HANKS

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

HONORABLE JONATHAN P. BRODY
District Judge

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A. There is An Issue of Material Fact Regarding the Duration of Mr. Hanks' "Determinate" Life Term

Sentencing laws were in in flux when the district court sentenced Melvin Hanks in 1984 and many prosecutors, defense attorneys and judges believed that "determinate life" meant either parole or discharge after 30 years. Mr. Hanks, his family and attorney all believed the determinate life term would be less than Mr. Hanks' natural life. No transcript was prepared of the proceeding because Mr. Hanks' trial counsel — William J. Tway — did not appeal the sentence. Nor did Mr. Hanks have reason to appeal a fixed life term at that time - as reflected by a different attorney's statements seeking a sentence reduction under Idaho Criminal Rule 35, Mr. Hanks continued to believe his "determinate" life term was 30 years and asked the district court to reduce his sentence to an "indeterminate" life term to allow for release within 15 years.

Mr. Hanks' position in the Rule 35 motion and the prevalent confusion in the legal community regarding the duration of a "determinate life term" corroborate Mr. Hanks' sister's recollection that the district court did not intend for Mr. Hanks to die in prison. In response, the state circularly argues that no issue of fact exists regarding the duration of Mr. Hanks' "determinate" life sentence because the conviction and commitment refer to a "determinate" life sentence. Respondent's Brief, p. 7-8. The issue is not whether the district court used the term "determinate" but, rather, whether the district court sentenced Mr. Hanks to die in prison with no chance of parole when it imposed a "determinate" life term in October 1984.

The state notes that the district court indicated Mr. Hanks' assumption that his determinate life term was for 30 years was not supported by the record in denying Mr. Hanks' Rule 35 motion a year after sentencing. Respondent's Brief, p. 8. In light of this indication, the state argues the "record" disproves Mr. Hanks' claim that the district court imposed a sentence for less than Mr. Hanks' natural life. *Id.*

However, the district court's memory — especially a year after the sentencing — is *not* the "record" of what occurred at Mr. Hanks' sentencing hearing. *See Matthews v. State*, 122 Idaho 801, 807–08, 839 P.2d 1215, 1221–22 (1992) (error for the district court to base its decision on judicial notice of the judge's personal recollection of events in the criminal proceeding). Without a transcript or recording of the sentencing hearing, there is no "record" to clearly disprove the sister's understanding that the life sentence fell short of natural life.

The state also notes that the Court of Appeals disproved of the theory that "determinate" life meant 30 years several months before Mr. Hanks' sentencing in *State v. Wilson*, 105 Idaho 669, 672 P.2d 237 (Ct. App. 1983), *aff'd in part, rev'd in part*, 107 Idaho 506, 690 P.2d 1338 (1984). Respondent's Brief, p. 7-8. Of course, the Court of Appeals' opinion never became final and the Idaho Supreme Court issued its opinion in *Wilson* after Mr. Hanks' sentencing.

According to the state, the attorneys and prosecutor in *Wilson* represented an anomaly who had fallen prey to a "false conversion fallacy." Respondent's Brief, p. 7-8. However, the appellate court's repudiation of the theory that "determinate" life meant 30 years does not negate the fact that the belief was prevalent in the legal community when Mr. Hanks was sentenced.

Indeed, in *Wilson*, the Court of Appeals noted the district court — none other than the venerable Edward J Lodge — "did not express a view" on the definition of determinate life and, in "his post-sentencing letter to the Attorney General, he urged that the duration of a fixed 'life' sentence be clarified." *Wilson*, 105 Idaho at 675, 672 P.2d at 243. The Court reasoned "the view apparently has evolved that a life sentence means thirty years and that a person sentenced to a fixed life sentence will be eligible for release—outright or on parole—after thirty years" arose from language in several Idaho Supreme Court decisions." *Id.*

That the Court of Appeals published its holding "that the duration of such a sentence is the full natural life of the inmate" belies the state's argument that the parties' belief in that case was isolated. *See id.* at 675–76, 672 P.2d at 243–44. Indeed, varying interpretations of determinate life were common as sentencing statutes were being amended. *See also State v. Hoffman*, 111 Idaho 966, 967, 729 P.2d 441, 442 (Ct. App. 1986) (use of "fixed indeterminate" language at the first sentencing reflected judge's belief that the statutes divided fixed sentences into a category of "fixed determinate" over which the Commission of Pardons and Parole had no commutation power and "fixed indeterminate" sentence over which the commission would have the power of commutation).

While there is no dispute the district court imposed a sentence labeled "determinate life," Mr. Hanks' sister and the limited record establish an issue of fact as to whether the determinate life term pronounced during his sentencing hearing on October 11, 1984 was one that carried the possibility of parole. The absence of any official recording of the sentencing hearing cannot be held against Mr. Hanks without violating due process as protected by the Fourteenth

Amendment. Accordingly, this Court should vacate the judgment dismissing his petition and remand for further proceedings.

B. Judicial Estoppel Does Not Apply

On January 28, 1985, an attorney filed an Idaho Criminal Rule 35 motion asking the district court to reduce Mr. Hanks' sentence to "indeterminate life," which would increase access to rehabilitative programs because he would be paroled within 10 years. R. 51-53. Mr. Hanks' attorney argued that since a determinate life sentence would result in Mr. Hanks' release within 30 years, it made sense to allow him access to programming sooner rather than later. R. 51. On January 8, 1986, the district court indicated it opinion that the determinate life term meant Mr. Hanks' natural life and declined to reduce the sentence.

Four years later, on August 24, 1990, Mr. Hanks signed an affidavit drafted by an attorney in support of his post-conviction relief action that averred that he was ineligible for rehabilitation and training with a determinate life sentence because he was not eligible for consideration for parole. R. 336. The Court of Appeals affirmed the district court's dismissal of the petition as dismissed as untimely without considering the claims' merits. *Hanks v. State*, 121 Idaho 153, 154–55, 823 P.2d 187, 188-89 (Ct. App. 1992).

According to the state, Mr. Hanks' argument that the district court pronounced a 30 year sentence when it imposed "determinate" life in October 1984 is somehow incompatible with his acknowledgement that the prison treated the sentence as one without a full term release date by denying rehabilitative opportunities. The state thus claims the district court should have applied judicial estoppel.

However, judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first. *Hoagland v. Ada Cty.*, 154 Idaho 900, 912, 303 P.3d 587, 599 (2013). The policy behind judicial estoppel is to prevent parties from playing fast and loose with the legal system thereby protecting the integrity of the judicial system. *Hoagland*, 154 Idaho at 912, 303 P.3d at 599; *A & J Constr. Co. v. Wood*, 141 Idaho 682, 685, 116 P.3d 12, 16 (2005).

Initially, Mr. Hanks' understanding of the duration of the determinate life sentence pronounced at his sentencing hearing in 1984 is not incompatible with acknowledging that the prison treated his sentence as one of his natural life in 1990. Mr. Hanks' argument that a sentence to die in prison was unconstitutional is *consistent* and not incompatible his belief the district court intended to grant the opportunity for parole with its "determinate" life term. No court has addressed the merits of Mr. Hanks' challenge to his sentence. *Cf State v. Shanahan*, 165 Idaho 343, 445 P.3d 152, 163 (2019) (holding Eighth Amendment claim foreclosed by the doctrine of res judicata because argument was in substance a reiteration of earlier argument before the sentencing court and the Court of Appeals). Moreover, contrary to the state's suggestion, Mr. Hanks did not ask the district court to construe his determinate life term as 30 years in the Rule 35. Rather, Mr. Hanks took that fact as a given and used it as the springboard for his arguments in support of an "indeterminate" life term.

And applying judicial estoppel in this case would fail to further the underlying policy to prevent fast and loose behavior, at least on the part of criminal defendants. Six years after Mr. Hanks was sentenced, on September 18, 1992, the Idaho Supreme Court suspended the attorney

representing Mr. Hanks at sentencing — Mr. Tway — from the practice of law for two years for making misleading statements to a court during a probation revocation proceedings and for misapplying client trust funds. *Matter of Tway*, 123 Idaho 59, 62, 844 P.2d 688, 691 (1992). While those disciplinary proceedings were pending, in summer 1992, Mr. Tway deceived clients regarding the applicable statute of limitations, the status of their case and the location of their trust funds. *Idaho State Bar v. Tway*, 128 Idaho 794, 796, 919 P.2d 323, 325 (1996). In that case, Mr. Tway failed to conduct minimal legal research regarding the statute of limitations and then misdirected his clients regarding the status. *Tway*, 128 Idaho at 796, 919 P.2d at 325.

The Bar recommended that Mr. Tway be disbarred because he was already under suspension for similar misconduct, some of the charged acts occurred while he was being prosecuted in the first disciplinary case, he refused to acknowledge the wrongful nature of his conduct, he demonstrated indifference toward making restitution to previous misappropriation victims, and he lied during a deposition taken in the course of the earlier prosecution which deceit concealed the fact of the present misappropriation. *Tway*, 128 Idaho at 797, 919 P.2d at 326. The Court noted the misconduct "appears to have been part of an ongoing pattern of misconduct which this Court has already addressed" and imposed the maximum suspension of five years pursuant. *Tway*, 128 Idaho at 799, 919 P.2d at 328.

Rather than appeal Mr. Hanks' sentence and order a transcript, this same Mr. Tway provided Mr. Hanks with the falsely annotated court documents that cemented his client's belief that he would be free in less than 30 years. And Mr. Hanks had no reason to know the sentence construed as enduring his natural life until the Rule 35 order was filed a year later. Because yet

another attorney filed Mr. Hanks' post-conviction relief too late, the Court never heard the merits. *Hanks*, 121 Idaho at 153–55, 823 P.2d at 187–89.

Today, the real life Mr. Hanks could not present a starker contrast to a suave litigator playing "fast and loose" with court procedural rules. Indeed, Mr. Hanks is a [redacted] man who paces the tier mumbling to himself and is subjected to extortion and teasing by other inmates.[1] A jail house lawyer (Steve Priest) assisted Mr. Hanks initiate the instant case. *See* R. 122-126; 130-141. Mr. Hanks is a simple man and a "hapless litigant [who has been unable to] even find the right door" to challenge his sentence in a hostile "Kafkaesque" labyrinth of procedural bars. *See Schultz v. State*, 159 Idaho 486, 490, 362 P.3d 561, 565 (Ct. App. 2015) (Judge Schwartzman specially concurring)

Society has a significant interest in a just outcome in criminal proceedings, especially one that involves the forfeiture of a man's life. In fact, society might question the benefit of finality where our bursting prisons are forced to divert increasing resources from rehabilitation to geriatric care for inmates with life sentences of questionable constitutional validity.

Allowing one corrupt attorney's conduct to forever close justice's doors threatens, rather than protects, the integrity of the judicial system. Mr. Hanks did not take inconsistent positions in claiming the district court's "determinate" life term expired after 30 years and in arguing that a

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[1] Mr. Hanks' age, previous alcoholism and the length of his incarceration are evident from the record — all facts that support an inference that Mr. Hanks faculties are in decline. Counsel's elaboration with the specifics of Mr. Hanks' functioning is based on her personal observation and interactions with Mr. Hanks and consultation with others with direct knowledge.

sentence of his natural life was unconstitutional. Judicial estoppel does not apply in these circumstances and the district court did not err in declining to apply the doctrine.

C. This Court Should Construe the Ambiguity in the Record to Avoid an Eighth Amendment Violation

The Eighth Amendment forbids extreme sentences that are grossly disproportionate to the crime. *Ewing v. California*, 538 U.S. 11, 23 (2003). Proportionality is considered according to the evolving standards of decency that mark the progress of a maturing society rather than viewed less through a historical prism. *Miller v. Alabama*, 567 U.S. at 469-70 (2012); *Shanahan*, 165 Idaho at 354, 445 P.3d at 163.

The state correctly notes that the constitutionality of Mr. Hanks' sentence is not directly before the Court. However, in considering Mr. Hanks' claim, the unconstitutional nature of Mr. Hanks' sentence further dictates that the absence of a transcript should not be held against Mr. Hanks.

The state also argues Mr. Hanks' sentence is neither cruel nor unusual because the kidnapping statute provides for a determinate life sentence and life without parole has only been held unconstitutional for non homicide offenses in the case of juveniles. However, Mr. Hanks was ineligible for the death penalty under *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). And as *Miller* establishes, the irrevocable nature of death in prison is being recognized as akin to the death penalty. The practice scarcely exists in the rest of the World. *Who's Really Sentenced To Life Without Parole?*: *Searching For "Ugly Disproportionalities" In The American Criminal Justice System,* Wisconsin Law Review 2015:789

Mr. Hanks' sentence, which has never been reviewed, is far more severe than other sentences this Court has reviewed for kidnapping. *See e.g. State v. Bingham*, 116 Idaho 415, 428, 776 P.2d 424, 437 (1989) (upholding sentence of 5 years indeterminate on rape conviction and probation for life on kidnapping conviction were not excessive in context of his rape of retarded [redacted] *State v. Bagshaw*, 137 Idaho 613, 617, 51 P.3d 427, 431 (Ct. App. 2002) (upholding unified life sentences with 25 years determinate for robbery convictions, 25 year determinate sentences for kidnapping convictions, and determinate 10 year sentence for burglary conviction); *State v. Weaver*, 135 Idaho 5, 7, 13 P.3d 5, 7 (Ct. App. 2000) (no abuse of discretion in sentence to indeterminate life sentence with 15 years fixed for kidnapping); *State v. Norton*, 134 Idaho 875, 882, 11 P.3d 494, 501 (Ct. App. 2000) (affirming concurrent sentences of unified terms of life, with minimum period of confinement of 35 years on rape conviction and a minimum period of confinement of 25 years on first degree kidnapping conviction); *State v. Thomas*, 133 Idaho 800, 804, 992 P.2d 795, 799 (Ct. App. 1999) (maximum sentence of a determinate term of 40 years' imprisonment, including a 15-year enhancement for the use of a firearm in the commission of a felony, was not excessive for a kidnapping); *State v. Medrano*, 123 Idaho 114, 121, 844 P.2d 1364, 1371 (Ct. App. 1992) (fixed sentence of 18 years for first-degree kidnapping was lawful); *State v. Lenwai*, 122 Idaho 258, 261, 833 P.2d 116, 119 (Ct. App. 1992) (eight years for the combined crimes of rape, burglary, kidnapping and the infamous crime against nature was not an abuse of discretion); *State v. Martinez*, 122 Idaho 193, 195, 832 P.2d 764, 766 (Ct. App. 1992) (upholding concurrent indeterminate life sentences with 20 years fixed for rape and forcible sexual penetration with foreign object, and concurrent indeterminate 25-year sentence with

minimum term of 15 years for kidnapping in extremely odious and brutal circumstances); *State v. Dowalo*, 122 Idaho 761, 765, 838 P.2d 890, 894 (Ct. App. 1992) (upholding fixed sentence of 18 years for first-degree kidnapping of young girl where defendant forcibly abducted young girl and molested her); *State v. Soto*, 121 Idaho 53, 61, 822 P.2d 572, 580 (Ct. App. 1991) (sentence with probable term of confinement of seven years for kidnapping [redacted] girl and assaulting her with intent of committing lewd and lascivious act was well within statutory limits and was not unreasonable or abuse of discretion even though defendant did not have criminal record and had fairly stable family and work history); *State v. Estes*, 120 Idaho 953, 954–55, 821 P.2d 1008, 1009–10 (Ct. App. 1991) (upholding 15 year sentence imposed upon defendant convicted of first-degree kidnapping of [redacted] boy) *State v. Wolverton*, 120 Idaho 559, 565, 817 P.2d 1083, 1089 (Ct. App. 1991) (upholding sentence to concurrent life terms plus 15 years, with minimum of 25 years in prison, for each charge of rape, robbery, kidnapping, and use of a firearm in the commission of those crimes was not excessively harsh); *State v. Leyva*, 117 Idaho 462, 465, 788 P.2d 863, 866 (Ct. App. 1990) (upholding concurrent unified sentences of 20 years with 5 year minimum period of confinement for defendant who pled guilty to kidnapping and raping [redacted] girl); *State v. Burnham*, 115 Idaho 730, 732, 769 P.2d 607, 609 (Ct. App. 1989) (minimum six-year periods of confinement for rape and kidnapping convictions was not excessive); *State v. Spurgeon*, 107 Idaho 173, 175, 687 P.2d 17, 19 (Ct. App. 1984) (upholding four concurrent sentences, each for an indeterminate term not to exceed 15 years, for two robberies).

Counsel located one case affirming a fixed life sentence for a kidnapping offense that did not involve homicide — a case involving first-degree kidnapping and lewd conduct with minor. *State v. Nelson*, 131 Idaho 210, 221, 953 P.2d 650, 661 (Ct. App. 1998); *see also State v. Brown*, 121 Idaho 385, 394, 825 P.2d 482, 491 (1992) (defendant not only raped the victim but almost killed her. Unlike the crimes Mr. Hanks committed during the kidnapping, lewd conduct and rape carry a potential life sentence. Conversely, appellate courts have declined to uphold fixed sentences in other cases not involving homicide. *See State v. Jackson*, 130 Idaho 293, 296, 939 P. 2d 1372, 1375 (1997) (reversing fixed life for lewd conduct with instruction to reduce determinate term to fifteen years); *State v. Helm*s, 143 Idaho 79, 83–84, 137 P.3d 466, 470–71 (Ct. App. 2006) (reversing fixed life for throwing toilet water at guard).

Death in prison bears many similarities to the death penalty and evolving decency standards dictate that it be reserved for the most serious of offenses. Mr. Hanks — now age seventy six and having served thirty-six years in custody — has served more time for kidnapping than could be imposed as consecutive, maximum penalties for the crimes he committed during the kidnapping. This Court should construe ambiguities in the record in Mr. Hanks' favor to avoid a result that if likely violates Eighth Amendment.

III. CONCLUSION

For all the reasons state above and in Mr. Hanks' opening brief, this Court should conclude the district court erred in finding no issue of material fact supported Mr. Hanks' claim that his sentence expired and reverse the judgment and remand for further proceedings.

Respectfully submitted this 7th day of October 2019

FYFFE LAW

/s/ Robyn Fyffe
ROBYN FYFFE
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CERTIFICATE OF SERVICE

I CERTIFY that on October 7, 2019, I served the foregoing document via the File and Serve system to the email that was identified as the service contact for the Criminal Appellate Unit of the Office of the Attorney General.

FYFFE LAW

/s/ Robyn Fyffe
ROBYN FYFFE