6-20-2012

State v. Morris Appellant's Brief Dckt. 38678

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38678
	)	
v.	)	
	)	
LARRY EUGENE MORRIS,	)	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

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District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

STATEMENT OF THE CASE

Nature of the Case

Larry Eugene Morris timely appeals from the district court's orders denying his I.C.R. 35 motion requesting leniency, and his I.C.R. 33(d) motion requesting commutation of his sentence. On appeal, Mr. Morris argues that the district court had jurisdiction to commute his sentence pursuant to I.C.R. 33(d) and I.C. § 19-2601(4), because it was filed within 365 days from the judgment of conviction. Mr. Morris also argues that the district court abused its discretion when it failed to either further reduce his unified sentence of ten years, with four years fixed, or place him on probation.

Statement of the Facts and Course of Proceedings

Mr. Morris was charged, by Information, with possession of a controlled substance, possession of drug paraphernalia, resisting and/or obstructing law enforcement, and a persistent violator enhancement. (R., pp.49-51.) Pursuant to a plea agreement, Mr. Morris pleaded guilty to possession of a controlled substance and the persistent violator enhancement. (R., pp.59-61, 63; 07/23/10 Tr., p.7, L.2 – p.8, L.12.) In return, the State agreed dismiss the remaining charges. (R., pp.59-61, 63; 07/23/10 Tr., p.7, L.2 – p.8, L.12.)

As part of this plea agreement, Mr. Morris also agreed to cooperate with law enforcement as a confidential informant and, in return, the State would recommend probation. (11/29/10 Tr., p.30, L.6 – p.38, L.6; 02/08/11 Tr., p.75, L.24 – p.77, L.10.) After agreeing to cooperate with the police, Mr. Morris' girlfriend gave birth to a girl. (02/08/11 Tr., p.79, Ls.1-2.) The baby was initially taken into the custody of the department of health and welfare. (02/08/11 Tr., p.79, Ls.2-4.) Mr. Morris and his

girlfriend were then given custody of the baby, but he was told he would lose custody and violate a court order if he associated with anyone using drugs or tested positive for any drugs. (02/08/11 Tr., p.79, L..4-6, p.87, L.16 – p.88, L.10, p.95, L.3 – p.96, L.2.) In order for Mr. Morris to effectively cooperate as a confidential information, however, he would have had to use drugs and associate with people using drugs. (11/29/10 Tr., p.61, Ls.5-15; 02/08/11 Tr., L.10, p.95, L.3 – p.96, L.2.)) Mr. Morris decided to breach the cooperation plea agreement, as he would rather risk prison than lose custody of his baby. (11/29/10 Tr., p.61, Ls.5-15; 02/08/11 Tr., p.78, L.19 – p.79, L.18.) Prior to sentencing, the State provided additional sentencing materials, which consisted of a letter written by Sergeant O'Dell who was Mr. Morris' contact with law enforcement. (Additional Plaintiff's Sentencing Materials, pp.1-4.) In that letter, Sergeant O'Dell rebuked Mr. Morris for his failure to cooperate as a confidential informant. (Additional Plaintiff's Sentencing Materials, pp.1-4.) At sentencing, Mr. Morris' breach of the cooperation plea agreement was the main reason the State did not recommend probation. (11/29/10 Tr., p.54, L.20 – p.58, L.18.) Thereafter, the district court imposed and executed a unified sentence of ten years, with five years fixed. (R., pp.76-78.)[1]

Mr. Morris filed an I.C.R. 35 motion requesting a term of probation. (R., pp.79-80.) Instead, the district court reduced his sentence to a unified sentence of ten years, with four years fixed. (R., pp.100-101.) Mr. Morris timely appealed. (R., pp.102-105.)

Mr. Morris then filed an I.C.R. 33(d) motion requesting that the district court commute his sentence and place him on probation.[2] (Supp., R., pp.97-103.) This

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[1] At the sentencing hearing, Mr. Morris pleaded guilty to a misdemeanor charge of driving without privileges and the State dismissed another misdemeanor case. (11/29/10 Tr., p.25, L.17 – p.29, L.16.)

[2] Mr. Morris filed various *pro se* motions which will not be addressed on appeal. (Supp., R., pp.9-19, 21-75, 112-184.)

motion was filed on September 1, 2011, approximately nine months after the November 30, 2010, judgment of conviction was filed. (Supp., R., pp.19; R., p.76.) In support of his motion, Mr. Morris argued that I.C.R. 33(d) does not have any limiting language pertaining to jurisdiction, and I.C.R. 33's complementary statute, I.C. 19-2601(4), expressly grants the district court jurisdiction to suspend a defendant's sentence at any time during the first 365 days of the sentence. (Supp. R., pp.101-102.) Mr. Morris also argued that the pending appeal from the I.C.R. 35 motion extended the district court's jurisdiction over the matter.[3] (Supp. R., pp.100-102.) The district court rejected the former argument on the basis that "[b]oth the rule and the statute outline options for sentencing and seem applicable only at the time of sentencing." (Supp. R., p.108.) The district court also rejected the latter argument because no appeal was filed from the judgment of conviction and the district court took no action at sentencing pursuant to I.C. § 19-2601 to retain jurisdiction over this matter. (Supp., R., p.108.) The district court also concluded that it would not grant the motion even if it had jurisdiction. (Supp. R., pp.106-111.) Mr. Morris timely appealed. (Supp. R., pp.185-188.)

[3] Mr. Morris will not pursue this argument on appeal.

ISSUES

1) Did the district court have jurisdiction to commute Mr. Morris' sentence pursuant to Idaho Criminal Rule 33(d) and Idaho Code Section 19-2601(4)?

2) Did the district court abuse its discretion when it denied Mr. Morris's request for probation, made pursuant to Idaho Criminal Rule 35?

3) Did the district court abuse its discretion when it denied Mr. Morris' Idaho Criminal Rule 33(d) motion on its merits?

ARGUMENT

I.

The District Court Had Jurisdiction To Commute Mr. Morris' Sentence Pursuant To Idaho Criminal Rule 33(d) And Idaho Code Section 19-2601(4)

A. Introduction

The first sentence of Idaho Code Section 19-2601(4) states that a district court may suspend the execution of a judgment at any time during the first 365 days of the sentence. There are no other temporal limitations contained in that statute. Idaho Criminal Rule 33(d) contains no language limiting a district court's jurisdiction to commute a sentence. Due to the express and unambiguous language of the statute and the court rule, the district court erred when it concluded that its jurisdiction to commute a sentence only exists at sentencing.

B. Standard Of Review

The Idaho Supreme Court utilizes the following framework when interpreting a statute:

> The interpretation of a statute is a question of law over which we exercise free review. It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. A statute is ambiguous where the language is capable of more than one reasonable construction.

City of Sandpoint v. Sandpoint Independent Highway Dist., 139 Idaho 65, 69 (2003).

C. The District Court Had Jurisdiction To Commute Mr. Morris' Sentence Pursuant To Idaho Criminal Rule 33(d) And Idaho Code Section 19-2601(4)

"Absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by

expiration of the time for appeal or affirmance of the judgment on appeal." *State v. Johnson*, 152 Idaho 41, (2011) (quoting *State v. Jakoski,* 139 Idaho 352, 354 (2003)). The district court's jurisdiction in this matter was extended by I.C.R. 33(d) and I.C. § 19-2601(4).[4] The relevant language of I.C.R. 33(d) follows:

> For an offense not punishable by death, the district court or the magistrates division may commute the sentence, suspend the execution of the judgment, or withhold judgment, and place the defendant upon probation as provided by law and these rules.

There is no temporal language stating when or if a district court ever loses its ability to modify a sentence pursuant to this rule. However, I.C. § 19-2601 does contain such language. The relevant portions of I.C. § 19-2601 follow:

> Whenever any person shall have been convicted, or enter a plea of guilty, in any district court of the state of Idaho, of or to any crime against the laws of the state, except those of treason or murder, the court in its discretion, may:
>
> > 4. Suspend the execution of the judgment at any time during the first three hundred sixty-five (365) days of a sentence to the custody of the state board of correction. The court shall retain jurisdiction over the prisoner for a period of up to the first three hundred sixty-five (365) days . . . .

(emphasis added). Since there is no ambiguity in either the statute or the rule, the district court should not have engaged in statutory construction when reviewing the question of whether it had jurisdiction over Mr. Morris' case. When interpreting a statute courts are to adhere to the literal language of the statute unless there is an ambiguity. *City of Sandpoint*, 139 Idaho at 69. In order to be deemed ambiguous a statute must be deemed to have more than one reasonable construction. *Id.* No ambiguity exists even if the plain language of a statute creates a palpably absurd result. *Verska v. Saint*

[4] Idaho Criminal Rule 33(d) is complemented by I.C. § 19-2601. *See State v. Harrington*, 133 Idaho 563, 567 (Ct. App. 1999) (holding that authority to suspend a sentence is authorized under both I.C.R. 33(d) and I.C. § 19-2601).

Alphonsus Regional Medical Center, 151 Idaho 889, 894-896 (2011). When dealing with an unambiguous statute, Idaho courts cannot engage in statutory construction, or in other words modify or void a statute, because the power to do so is legislative not judicial. *Id.*

There is only one reasonable construction of I.C. § 19-25601(4). The first sentence of I.C. § 19-2601(4) clearly states that a district court can suspend execution at any time during the first 365 days of a sentence. There is no other language in the statute which controls when a district court may suspend the sentence. As stated above, I.C.R. 33(d) contains no language limiting when a district court may commute a sentence. Therefore, the district court erred when it engaged in statutory interpretation because the applicable statute and rule are not subject to multiple interpretations. In doing so, the district court violated the Idaho Supreme Court's holding in *Verska*, *supra*, and the Idaho Constitution, which vests the power to enact legislation in the State's Legislature. *See* Idaho Const. Art. II § 1, Art III, § 1.

The district court had jurisdiction to commute Mr. Morris' sentence because the plain unambiguous language of the first sentence of I.C. § 19-2601(4) clearly states that the district court can suspend a defendant's sentence at any time during the first 365 days of that sentence. Since Mr. Morris filed his motion on September 1, 2011, which was approximately 275 days after the November 30, 2010, judgment of conviction was filed, Mr. Morris' motion was filed within the applicable 365 day timeframe set forth in I.C. § 19-2601(4).[5] (Supp., R., pp.19; R., p.76.)

[5] No argument can be made that the district court's delay in ruling on the motion stripped it of jurisdiction because the order denying the motion was filed on November 17, 2011, which was approximately 352 days after the judgment of conviction. Therefore, the district court ruled on Mr. Morris' I.C.R. 33(d) motion with the 365 day time period provided in I.C. § 19-2601(4).

Even if I.C. § 19-2601(4) and I.C.R. 33(d) are deemed ambiguous, the district court's interpretation of the statute and rule is not supported by the general rules of statutory construction. "The principle of lenity mandates that criminal statutes be read narrowly and, where ambiguity exists, in a manner that provides leniency toward defendants." *Harrington*, 133 Idaho at 566. "If the statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean." *City of Sandpoint*, 139 Idaho at 69. "We are required to give effect to every word and clause of a statute." *State v. Baer*, 132 Idaho 416, 418 (Ct. App. 1999). "The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein." *Sweitzer v. Dean*, 118 Idaho 568, 572 (1990). Additionally, "we have held that we cannot insert into statutes terms or provisions which are obviously not there." *Matter of Adoption of Chaney*, 126 Idaho 554, 558 (1995). The first sentence of I.C. § 19-2601(4) states that a district court may "[s]uspend the execution of the judgment at any time during the first three hundred sixty-five (365) days of a sentence to the custody of the state board of correction." Despite that language, the district court reasoned that both I.C.R. 33(d) and I.C. § 19-2601 "seem applicable only at the time of sentencing." (Supp. R., p.108.) Since I.C.R 33(d) has no limiting language, the only way the district court could come to that conclusion was to replace the words "at any time within the first three hundred sixty-five (365) days of a sentence" with "at the time of sentencing." In other words, the district court looked at I.C. § 19-2601(4) and rewrote the statute to say that a district court may suspend the execution of the judgment at the time of sentencing to the custody of the state board of correction. This interpretation violated the foregoing rules because it treated the "at any time during the first three hundred sixty-five (365) days of a sentence" language as mere surplusage by reading it out of the statute. The

district court also violated the rules of statutory construction when it inserted the "at the time of sentencing language" into the statute. Moreover, the district court's interpretation was not in accord with the rule of lenity because it interpreted that statute in a manner which favored the State.

Additionally, the district court's interpretation of I.C. § 19-2601(4), is not consistent with the language contained in I.C. § 19-2601(2). "Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." *City of Sandpoint*, 139 Idaho at 69. The relevant language of I.C. § 19-2601(2) follows:

> 2. Suspend the execution of the judgment at the time of judgment or at any time during the term of a sentence in the county jail and place the defendant on probation under such terms and conditions as it deems necessary and expedient

(emphasis added). In I.C. § 19-2601(2), the Legislature expressly limited the district court's ability to place a defendant on probation to the time of sentencing or after sentencing, but only if the defendant was still in the county jail. On the other hand, I.C. § 19-2601(4), does not contain any language which limits its application to the time of sentencing. Instead, it uses the phrase at any time during the first 365 days of the sentence. Therefore, the Legislature's omission of the "at the time of sentencing" language in I.C. § 19-2601(4), and the inclusion of that phrase in I.C. § 19-2601(2), was intentional. *City of Sandpoint*, 139 Idaho at 69.

Further, the use of the phrase "at any time" in both I.C. § 19-2601(2) and I.C. § 19-2601(4) supports the conclusion that the Legislature intended to extend a district court's jurisdiction over a criminal cases during the first 365 days of a sentence. "'Other portions of the same act or section may be resorted to as an aid to determine

the sense in which a word, phrase, or clause is used, and such phrase, word, or clause, repeatedly used in a statute, will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is a different meaning intended, such as a difference in subject-matter which might raise a different presumption.'" *St. Luke's Magic Valley Regional Medical Center, Ltd. v. Board of County Com'rs of Gooding*, 149 Idaho 584, 589 (2010) (quoting *Kerley v. Wetherell*, 61 Idaho 31, 41 (1939)). "It is the duty of the courts in construing statutes to harmonize and reconcile laws wherever possible and to adopt that construction of statutory provision which harmonizes and reconciles it with other statutory provisions." *Sweitzer v. Dean*, 118 Idaho 568, 572 (1990). Idaho Code Section 19-2601(2) allows a district court to suspend a sentence "at any time" while a defendant is in county jail and I.C. § 19-2601(4) also uses the language "at any time" during the first 365 days of a sentence. The only way to logically harmonize these sections is to conclude that the use of the phrase "at any time" in each section actually means "at any time." Otherwise, and to maintain consistency, ignoring that phrase in I.C. § 19-2601(4) would require a construction that ignores the use of "at any time" in I.C. § 19-2601(2). This would mean that a district court cannot place a defendant on probation while he/she is in county jail. Therefore, the district court's interpretation of I.C. § 19-2601(4) cannot be harmonized with I.C. § 19-2601(2).

In sum, the district court had jurisdiction over Mr. Morris' I.C.R. 33(d) motion pursuant to 19-2601(4). Any other conclusion would require a judicial construction of an unambiguous statute, which functions as a violation of the separation of powers doctrine. Even if it is determined that an ambiguity exists, the district court's interpretation of I.C. § 19-2601(4) runs afoul of the basic rules of statutory construction.

Therefore, the district court erred when it determined that it did not have jurisdiction over Mr. Morris' motion.

II.

The District Court Abused Its Discretion When It Denied Mr. Morris's Request For Probation, Made Pursuant To Idaho Criminal Rule 35

A. Introduction

Prior to the sentencing hearing, Sergeant O'Dell wrote a negative letter expressing his frustration with Mr. Morris and his failure to carry out his agreement to be a confidential informant. At the I.C.R. 35 hearing, Sergeant O'Dell testified that he did not fully understand the circumstances behind Mr. Morris' decision to stop cooperating with him. Specifically, Sergeant O'Dell did not know that the child protection case was started after Mr. Morris agreed to be a confidential informant and that carrying out the agreement would cause Mr. Morris to lose custody over his daughter. Additionally, he testified that Mr. Morris did volunteer helpful information about two violent robberies, and that this occurred before charges were brought in this matter.

B. The District Court Abused Its Discretion When It Denied Mr. Morris's Request For Probation, Made Pursuant To Idaho Criminal Rule 35

Mr. Morris asserts that, given any view of the facts, the district court abused its discretion when it denied his request for probation made pursuant to I.C.R. 35. Additionally, Mr. Morris asserts that, given any view of the facts, his unified sentence of ten years, with four years fixed, is excessive. 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). "The

criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "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.*

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)). Mr. Morris does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Morris must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* 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.*

At the I.C.R. 35 hearing, Sergeant O'Dell was called to testify about Mr. Morris' agreement to cooperate as a confidential informant. (02/08/111 Tr., p.75, L.18 – p.79, L.20.) Sergeant O'Dell was asked about the letter he wrote prior to sentencing and if he was aware at the time how Mr. Morris' cooperation as a confidential informant would

affect Mr. Morris' child custody case. (02/08/11 Tr., p.75, L.24 – p.78, L.18.) Sergeant O'Dell stated that he was not fully aware of the situation and went on to state:

> From the follow-up information I gathered regarding that, I don't think Larry explained himself very well to me at that time.
>
> After about a month . . . Larry had a baby. The baby was taken away. They were being supervised by Health & Welfare. And it turned out that if Larry testified positive for drugs again, the baby would be taken away again. He tried to explain to me that if he went back into the environment he was in before, he may have used. In essence, he told me: "I would rather keep my baby and take my chances at sentencing than go back into that environment, use drugs, and have the baby taken away." He really didn't explain it to me in those terms. But later I learned that was potentially why he did not cooperate . . . that's . . . kind of a double edged sword.

(02/08/11 Tr., p.78, L.16 – p.79, L.14.) Sergeant O'Dell also testified that his letter omitted the fact that Mr. Morris volunteered "very useful information" pertaining to two armed robberies before he was charged in this matter.[6] (02/08/11 Tr., p.77, L.22 – p.78, L.15, p.102, Ls.2-8.) This information is important because it rebuts significant aggravating evidence which was used against Mr. Morris at sentencing. In fact, one of the main reasons the State did not recommend probation was Mr. Morris' failure to be a confidential informant. (11/29/10 Tr., p.54, L.20 – p.58, L.18.)

Mr. Morris also provided a letter from Port of Hope indicating that before sentencing he was cooperating with his treatment and his counselor had planned to alter his treatment to a lower level of care. (Letter from Port of Hope file stamped December 29, 2010.)

Additionally, Mr. Morris had family support at the time of the I.C.R. 35 hearing. In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that support of family and friends were mitigating factors. Mr. Morris provided support

letters indicating that he has a good character and was dedicated to his daughter and sobriety. (Letters from Lona Lindstrom file stamped January 26, 2011 and February 4, 2011; Letter from Stacy Johnson file stamped February 1, 2011; Letter from Rojean Gravelle, file stamped January 19, 2011.)[7] These letters also indicate that his girlfriend, Lona Lindstrom, and her family support him. Ms. Lindstrom also indicated that she had rented an apartment so Mr. Morris could live with her and their then five month old daughter. (Letter from Lona Lindstrom file stamped, February 4, 2011, pp.1-2.) Ms. Lindstrom also indicated that before sentencing, Mr. Morris had his plumbing license reinstated and was earning twenty dollars an hour, and has a job waiting for him when he is released from custody. (Letter from Lona Lindstrom file stamped, February 4, 2011, p.3.) As a display of their support, Mr. Morris' family attended his I.C.R. 35 hearing. (02/08/12 Tr., p.74, Ls.13-18.) Mr. Morris' recidivism risk will be reduced because he will have a stable domestic environment when he is released from custody.

There was additional information present at sentencing which, when viewed in light of Mr. Morris' new information, supports either placement on probation or a reduction of his sentence. Specifically Mr. Morris' rehabilitative efforts, prior to sentencing, evince his amenability for rehabilitation. At sentencing, Mr. Morris' daughter's court appointed special advocate (*hereinafter,* CASA) made the following statements about Mr. Morris and his girlfriend:

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[6] The district court made a factual finding that this was new information. (02/08/11, Tr., p.101, Ls.11-16.)

[7] The letter from Rojean Gravelle was not included in the Clerk's Certificate (R., pp.112.) However, it was submitted by the district court in the Supplement Clerk's record. (Supp. R., p.43.) The district court did take this letter under consideration in regard to Mr. Morris' I.C.R. 35 motion. (02/08/11 Tr., p.74, Ls.3-12.)

I have been very, very pleased with what they have accomplished in the last couple of months.

Their UAs have been all negative. They both enrolled in the Port of Hope in their outpatient [intensive] therapy. I've checked with both of their counselors. They are making all their appointments. They do have family members that are concerned and supportive.

I do realize that he has quit a few charges against him in the past, but I am amazed in this short period of time to see the progress they [sic] have made. And I do think a lot of it has to do with the fact that they have a baby daughter together. And they are making incredible strides to be a family and to do the right thing.

. . .

I know at CASA - - my role is to advocate for the child. And I have been very, very pleased with the progress I have seen in the last several months.

. . .

[H]e acts as a loving father. I think he is crazy about his daughter.

(11/29/10 Tr., p.44, L.4 – p.45, L.14.) According to Mr. Morris' sister:

This is the first time that I've ever seen my brother sober without being in jail first. And it gives me goose bumps every time. And it makes me cry. I love him. I love them both. I'm very, very proud. I'm proud to say he is my brother today.

(11/29/10 Tr., p.46, L.24 – p.47, L.2, p.47, 25 – p.48, L.4.) According to the presentence investigator:

Mr. Morris now has a three month old daughter and appears to be taking positive steps like he has never taken in the past, to a brighter future. He did have an air of sincerity and purpose in his voice, blended with a sense of humor.

. . .

Mr. Morris does not appear to be a threat to the community at this time and is a candidate for supervised probation.

(Presentence Investigation Report (*hereinafter,* PSI), p.14.) Even his substance use evaluator concluded that Mr. Morris should be treated in an intensive outpatient program. (GAIN-I Recommendation and Referral Summary, p.11.)

There are other mitigating factors present at sentencing which, when viewed in light of Mr. Morris' new information, support either placement on probation or a reduction of his sentence. Specifically, Mr. Morris' employment history is a mitigating factor. In *State v. Hagedorn*, 129 Idaho 155, 161 (Ct. App. 1996), the defendant's employment background was considered as a mitigating factor. Mr. Morris earned his GED. (07/23/10 Tr., p.13, Ls.5-6.) He has also completed college courses pertaining to the plumbing profession. (PSI, p.11.) He is also employable in the plumbing profession and has proven he is capable of maintaining steady employment for a period of three years. (PSI, p.12.) He was employed in this profession at the time of sentencing. (11/29/10 Tr., p.62, Ls.8-13; PSI, pp.11-12.)

Mr. Morris had family support at the time of sentencing. In fact, his family is willing to help him maintain his sobriety. (11/29/10 Tr., p.46, L.22 – p.48, L.14.) Many of his family members were present at his sentencing hearing. (11/29/10 Tr., p.49, Ls.13-16.) In fact, his sister testified that she would report him to law enforcement if she found out that he was no longer sober. (11/29/10 Tr., p.48, Ls.12-17.)

Mr. Morris' childhood abuse is also a mitigating factor. The Court of Appeals has recognized exposure to abuse during a defendant's childhood as a mitigating factor. *State v. Williams*, 135 Idaho 618, 620 (Ct. App. 2001). Mr. Morris was the victim of sexual abuse as a child. (PSI, p.10.)

In sum, Mr. Morris provided new information in support of his I.C.R. 35 motion which indicated that he cooperated with law enforcement and his failure to provide

further cooperation was attributable to the filing of the child protection action. When this is viewed in light of Mr. Morris' rehabilitative efforts prior to sentencing it supports the conclusion that the district court abused its discretion when to failed to place him on probation or further reduce the length of his sentence.

III.

The District Court Abused Its Discretion When It Determined It Would Deny Mr. Morris' Idaho Criminal Rule 33(d) Motion On Its Merits

It has been established that in instances where "a lower court makes a ruling based on two alternative grounds and only one of those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis. *State v. Grazian*, 144 Idaho 510, 517-18 (2007) (citing *State v. Goodwin,* 131 Idaho 364, 366 (Ct. App. 1998). Since the district court said it would deny Mr. Morris' I.C.R. 33(d) motion on the merits, Mr. Morris must address the merit of his I.C.R. 33(d) motion.

As a preliminary matter, the legal standards governing this issue were previously articulated in Section II of this brief and will not be repeated here. Additionally, Mr. Morris incorporates the mitigating information contained in Section II of this brief.

In support of his I.C.R. 33(d) motion, Mr. Morris provided a letter from the department of health and welfare indicating that the child protection case had been dropped. (Supp. R., p.28.) He also wrote a letter indicating that his problems communicating with Sergeant O'Dell were partially attributable to his inability to afford phone service. (Supp., R., p.63.)

Mr. Morris also informed the district court that Ms. Lindstrom needed his support because her fifteen year old son had committed suicide. (Supp. R., p.9.)

At the I.C.R. 33(d) hearing, Ms. Lindstrom's mother, Rojean Gravelle, testified that in the four months prior to Mr. Morris' sentencing in this case he was a positive influence in her daughter's life and was being a dedicated father. (10/21/11 Tr., p.20, L.21 – p.24, L.22.) Mr. Morris' mother also testified at that hearing and pledged her support and stated she had previously lost hope with Mr. Morris but this time she thinks he is dedicated to sober lifestyle. (10/21/11 Tr., p.26, L.19 – p.29, L.8.) She also stated that Mr. Morris lost both his grandmothers and an uncle while he was in prison for the instant offense. (10/21/11 Tr., p.30, Ls.16-17.)

In light of new information provided in support of Mr. Morris' I.C.R. 33(d) motion, the district court abused its discretion when it denied his motion.

CONCLUSION

Mr. Morris respectfully requests that this Court remand this matter to the district court with instructions to review the merits of Mr. Morris' I.C.R. 33(d) motion. Alternatively, Mr. Morris respectfully requests that this Court remand this case with instructions to place Mr. Morris on probation. Alternatively, Mr. Morris respectfully requests that this Court reduce the fixed portion of his sentence.

DATED this 20th day of June, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

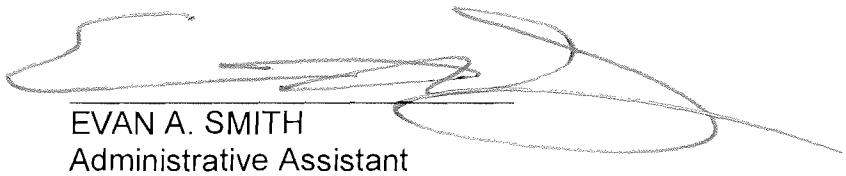
CERTIFICATE OF MAILING

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

LARRY EUGENE MORRIS
INMATE #25486
ICIO
23 HOSPITAL DRIVE
OROFINO ID 83544

LANSING L HAYNES
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SFW/eas