12-5-2011

Ewell v. State Respondent's Brief Dckt. 38373

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERIC HAROLD EWELL	)	
	)	
Petitioner-Appellant,	)	NO. 38373
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Eric Harold Ewell appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of the Underlying Criminal Proceedings

The facts of the underlying criminal case were set forth by the Idaho Court of Appeals in Ewell's prior appeal as follows:

> Police found numerous sexually-explicit pictures of minors on a computer to which Ewell had access. One of the pictures was used by Ewell in a profile for an internet chat room. Ewell was arrested and charged with six counts of possession of sexually exploitive material, I.C. § 18-1507A, with a sentence enhancement for being a repeat sexual offender, I.C. § 19-2520G. The sentence enhancement statute mandates a fifteen-year minimum term of confinement for a crime requiring registration as a sex offender under I.C. § 18-8304 if the individual was previously convicted of such an offense in Idaho or of a substantially equivalent offense in another state. The information alleged that Ewell had been convicted of luring with a sexual motivation in the state of Washington. WASH.REV.CODE § 9A.40.090. Ewell filed a motion to dismiss the enhancement for being a repeat sexual offender because the previous Washington offense of luring with a sexual motivation, used to justify the enhancement, had no substantially equivalent Idaho counterpart that was included in the listed offenses of I.C. § 18-8304 requiring sex offender registration in Idaho.
>
> After Ewell filed the motion to dismiss the sentence enhancement, the state amended the information to include other previous sexual offenses committed in Washington. These offenses included luring, luring with a sexual motivation, and communicating with a minor for immoral purposes. Ewell then filed another motion to dismiss the enhancement for being a repeat sexual offender, arguing that I.C. § 19-2520G was unconstitutionally vague and inapplicable to the charge against him. The district court denied both of Ewell's motions, holding that I.C. § 19-2520G applied to Ewell because luring with a sexual motivation was substantially similar to the Idaho offenses of second

> degree kidnapping of an unrelated minor child and first degree kidnapping, both of which require sex offender registration in Idaho. Furthermore, the district court held that the statute was not unconstitutionally vague.
>
> Ewell entered a conditional guilty plea to one count of possession of sexually exploitative material and admitted the enhancement for being a repeat sexual offender, specifically that he had previously been convicted in Washington of luring, luring with a sexual motivation, and communication with a minor for immoral purposes. The state dismissed the remaining counts of possession of sexually exploitative material. The district court sentenced Ewell to a unified term of twenty-five years, with a minimum period of confinement of fifteen years. Ewell appeal[ed], challenging the district court's denial of his two motions to dismiss the enhancement for being a repeat sexual offender.

State v. Ewell, 147 Idaho 31, 33, 205 P.3d 680, 682 (Ct. App. 2009) (review denied April 16, 2009).

Ewell argued on appeal that the district court erred in denying his motion to dismiss the sentence enhancement for being a repeat sexual offender, contending as he had below that his prior Washington conviction for luring with a sexual motivation was not substantially similar to any Idaho offense requiring sex offender registration. Id. at 33-34, 205 P.3d at 682-83. The Idaho Court of Appeals declined to reach the merits of Ewell's claim, noting that, after Ewell filed his motion to dismiss, the state amended the information to include two additional prior Washington convictions to justify the enhancement. Id. at 34, 205 P.3d at 683. Because Ewell never challenged the use of the two additional prior convictions as a basis for the enhancement alleged in the amended information, the Court of Appeals Court held: "[A]ny deficiency in the original information is irrelevant. Therefore, Ewell has not shown that the district court erred in denying his motion to dismiss the enhancement for being a repeat

sexual offender even if we assume that luring with a sexual motivation has no substantially equivalent Idaho counterpart." Id. The Court of Appeals also rejected Ewell's claims that enhancement statute did not apply to him and/or was unconstitutionally vague. Id. at 34-37, 205 P.3d at 683-86.

After the Court of Appeals affirmed Ewell's conviction for possession of sexually exploitive material, with a sentence enhancement for being a repeat sexual offender, the state moved to correct Ewell's sentence. (R., p.113.) The district court granted the motion and "re-sentenced Ewell to an aggregate term of fifteen (15) year(s), to be served as flows: a minimum period of confinement of fifteen (15) year(s), followed by a subsequent indeterminate period of custody not to exceed zero (0) year(s)." (R., p.113 (emphasis original).)

Statement of Facts and Course of Post-Conviction Proceedings

Ewell filed a timely *pro* se petition for post-conviction relief and, in it, alleged the following grounds for relief:

> (a) Violation of Fifth, Sixth and Fourteenth Amend. Rights.
>
> (b) Guilty plea was neither knowingly nor intelligently given.
>
> (c) Psychosexual evaluation Marandaized [sic] PSI was not reviewed, nor rights given. Counsel admitted short-comings.

(R., p.4 (capitalization altered).) He also filed a 67-page "Affidavit In Support Of Post Conviction Relief" (R., pp.13-79), to which he referred in his petition (R., p.5).

At Ewell's request, the district court appointed counsel to represent Ewell in the post-conviction proceeding. (R., pp.90-93, 95.) After conducting two

status conferences, the district court entered an order conditionally dismissing Ewell's petition. (R., pp.104-20.) In its order, the court summarized the nature of Ewell's claims as follows:

> On February 24, 2010, the Petitioner, Eric Harold Ewell, filed a Petition for Post-Conviction Relief, alleging ineffective [assistance of] counsel ... based on his allegation that his attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against him and that he had a constitutional right to refuse to participate. He further contends that his attorney should have sat in on both examinations with him and that his counsel was ineffective by failing to have him examined by an independent psychiatrist. Ewell also claimed the use of his past crimes to enhance his sentence violated the Double Jeopardy clause, his guilty plea was "given under false information" because the sentence he received was not the one represented to him, he did not have an opportunity to read his pre-sentence report and that he was under stress when he completed the psychosexual evaluation. He also asks that *Stuart v. State*, 145 Idaho 467, 180 P.3d 506 (Ct. App. 2007), should be overruled.

(R., p.104 (footnote omitted).) The court noted, generally, that Ewell did not support any of his allegations "with any other affidavits or evidence" and that "his factual allegations are not supported by the record." (R., p.104.) The court then addressed each claim individually, pointing out specific deficiencies and finding, with respect to each claim, that Ewell failed to present a genuine issue of material fact that would entitle him to an evidentiary hearing. (R., pp.115-19.) The court gave Ewell 20 days in which to respond to the proposed dismissal. (R., pp.105, 119.) Ewell failed to respond and the district court entered an order dismissing Ewell's petition for the same reasons articulated in its order of conditional dismissal. (R., pp.121-37.) Ewell timely appealed. (R., pp.138-40.)

ISSUE

Ewell states the issue on appeal as:

> Did the district court err by dismissing one of Mr. Ewell's claims because it misperceived the nature of that claim?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Ewell failed to show error in the summary dismissal of his post-conviction petition?

ARGUMENT

Ewell Has Failed To Establish Error In The Summary Dismissal Of His Post-Conviction Petition

A. Introduction

Ewell challenges the dismissal of his post-conviction petition, arguing that the district court misperceived, and therefore failed to address, one of his claims. (Appellant's brief, pp.5-8.) Specifically, Ewell argues that the district court failed to address an allegation, set forth at page 62 of his 67-page affidavit in support of his post-conviction petition, that he

> was denied effective assistance again when his attorney failed to preserve the primary issue for appeal. Attorney Van Bishop "admitted his own incompetence" in a letter dated May 13, 2009, where he stated "I was ineffective in that I did not preserve the primary issue for appeal when I did not renew the motion to dismiss after the state amended the information (concerning the Prior Misd. Charge)[.] It is referred to in the States [sic] brief and the Courts [sic] decision."

(R., p.74.) According to Ewell's appellate attorney, this was a claim by Ewell that trial counsel was ineffective for not renewing his motion to dismiss to argue that the prior Washington convictions alleged in the amended information could not be used to justify the repeat sexual offender enhancement because none of the Washington offenses were substantially similar to any Idaho offense requiring sex offender registration. (Appellant's brief, pp.5-7.) The district court apparently did not perceive it as such, as it did not specifically address this "claim" in either its order of conditional dismissal or its order finally dismissing Ewell's petition. (See generally, R., pp.104-37.) Ewell now argues that the district court erred and the case must be remanded for consideration of this

"claim" by the district court.[1] (Appellant's brief, pp.7-8.) Ewell's argument is without merit for several reasons.

First, Ewell's petition does not include a claim that trial counsel was ineffective for failing to renew his motion to dismiss to argue against the use of his prior convictions for enhancement purposes, nor was the district court required to scour the affidavit in support of Ewell's petition to divine the "claim" Ewell now contends should have been addressed. Because Ewell did not allege the "claim" in his petition, he cannot complain for the first time on appeal that the district court failed to address it.

Second, even though the trial court did not specifically address the factual allegations in Ewell's affidavit that counsel failed to preserve for appeal the issue of whether his prior convictions were valid for enhancement purposes, Ewell has failed to show any basis for reversal. The district court adequately addressed the ineffective assistance of counsel claim(s) alleged in Ewell's petition by giving Ewell notice, generally, that he failed to support any of his allegations with admissible evidence and by finally dismissing the petition on that same basis after Ewell failed to respond.

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[1] Ewell argues that the district court misperceived the allegations regarding trial counsel's alleged ineffectiveness in failing to "preserve the primary issue for appeal" as "a claim that his attorney should have generally challenged the use of prior allegations against him as a double jeopardy violation." (Appellant's brief, p.7 (citing R., p.135).) Ewell is incorrect. Ewell alleged in his affidavit that use of his prior convictions violated double jeopardy. (R., pp.75-76.) The district court treated these allegations as raising a substantive double jeopardy claim, not a claim that Ewell's trial counsel was ineffective for failing to object on double jeopardy grounds to the use of Ewell's prior convictions at sentencing. (See R., pp.117-18, 135 (addressing double jeopardy claim separate from claims of ineffective assistance of counsel).)

Finally, even if the statements in Ewell's affidavit were sufficient to allege a claim that trial counsel was ineffective for not renewing his motion to dismiss to challenge the use of his prior convictions for enhancement purposes, and even if the district court erred by failing to specifically address that claim, the error was harmless because the claim fails as matter of law and there is no additional evidence Ewell could have presented in support of his claim to establish he was entitled to relief.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Ewell Should Be Precluded From Arguing For The First Time On Appeal That The District Court Failed To Address A "Claim" Never Alleged By Ewell In His Petition

An application for post-conviction relief must "specifically set forth the grounds upon which the application is based, and clearly state the relief desired." I.C. § 19-4903; Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004); Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008). Pursuant to I.C. § 19-4908, "[a]ll grounds for relief must be raised in the original, supplemental, or amended **application**." Monahan, 145 Idaho at 875, 187 P.3d at 1250 (citing I.C. § 19-4908) (emphasis added); Dunlap, 141 Idaho at 56, 106

P.3d at 382. A ground for relief known to the petitioner but not set forth in the original, supplemental or amended application is waived. I.C. § 19-4908. Lake v. State, 126 Idaho 333, 882 P.2d 988 (Ct. App. 1994).

Ewell's *pro se* post-conviction petition specifically set forth only four grounds for relief:

> (a) Violation of Fifth, Sixth and Fourteenth Amend. Rights.
>
> (b) Guilty plea was neither knowingly nor intelligently given.
>
> (c) Psychosexual evaluation Marandaized [sic] PSI was not reviewed, nor rights given. Counsel admitted short-comings.

(R., p.4 (capitalization altered).) Nowhere in his *pro se* petition did Ewell allege the claim he now asserts the district court failed to address – *i.e.*, that trial counsel was ineffective for not renewing his motion to dismiss to argue that that the prior Washington convictions alleged in the amended information could not be used to justify the repeat sexual offender enhancement because none of the Washington offenses were substantially similar to any Idaho offense requiring sex offender registration. (See generally R., pp.3-7.) Nor did Ewell's post-conviction counsel ever seek or obtain leave of the court to amend Ewell's petition to assert such a claim. Because Ewell did not specifically (or even generally) allege this claim in his post-conviction petition, the claim was waived and the district court necessarily did not err by failing to address it. I.C. § 19-4908; see also Kelly v. State, 149 Idaho 517, 523-24, 236 P.3d 1277, 1283-84 (2010) ("It is clearly established under Idaho law that a cause of actions not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.") (citations and internal

quotation marks omitted); Cole v. State, 135 Idaho 107, 110-11, 15 P.3d 820, 823-24 (2000) (district court did not err in summarily dismissing post-conviction petition without considering claims neither alleged in the original petition, nor properly before the court in an amended petition filed without leave of the court).

On appeal, even Ewell does not cite his post-conviction petition as the source of his claim that trial counsel was ineffective for not renewing his motion to dismiss, after the information was amended, to challenge the use of his prior Washington convictions to justify the repeat sexual offender enhancement. (See, generally, Appellant's brief.) He points instead to a few lines of text in the 67-page affidavit he filed in support of his petition, where he asserted:

> The defendant was denied effective assistance again when his attorney failed to preserve the primary issue for appeal. Attorney Van Bishop "admitted his own incompetence" in a letter dated May 13, 2009, where he stated "I was ineffective in that I did not preserve the primary issue for appeal when I did not renew the motion to dismiss after the state amended the information (concerning the Prior Misd. Charge)[.] It is referred to in the States [sic] brief and the Courts [sic] decision."

(R., p.74, cited in Appellant's brief, pp.5-7.) The cited text occupies only eight lines of Ewell's 67-page affidavit, falls under the heading, "Stuart is Distinguishable From The Case At Bar, And Therefore, Should Not Apply" (R., p.73), and is sandwiched between Ewell's lengthy argument that he was entitled to have counsel present during his presentence interviews and evaluations (R., pp.13-73) and his arguments that trial counsel failed to perfect his appeal (R., p.74) and that the use of his "past crimes" to enhance his sentence violated double jeopardy (R., pp.74-76). Contrary to Ewell's argument on appeal, however, there are at least two reasons why the inclusion of the above-cited text

in Ewell's affidavit was not sufficient to raise the ineffective assistance of counsel claim that Ewell now argues the district court failed to address.

First, the "claim" was not specifically alleged in the petition as required by I.C. § 19-4908, but was instead contained in the affidavit Ewell filed in support of the claims in the petition. Although Ewell referred to the affidavit in his petition (see R., p.5), he did not include in the actual petition any specific claim that counsel was ineffective for failing to file a renewed motion to dismiss. (See generally R., pp.3-7.) Attaching a 67-page affidavit of facts and argument to a petition and requiring the district court to ferret out the "claims" therein does not meet the requirement of I.C. §§ 19-4903 and 19-4908 that all grounds for relief be specifically set forth in the petition itself. Because Ewell did not allege the "claim" in his petition, the district court was not required to address it. Cole, 135 Idaho at 110-11, 15 P.3d at 823-24.

Second, even if a post-conviction petitioner could state a claim for post-conviction relief by alleging it only in an affidavit filed in support of his post-conviction petition, there is no basis to believe that the above-cited portion of Ewell's affidavit actually raised the claim that Ewell now contends the district court should have addressed. The cited text states only that defense counsel "'admitted his own incompetence'" and was ineffective for failing "'to preserve the primary issue for appeal when [he] did not renew the motion to dismiss after the state amended the information (concerning the Prior Misd. Charge).'" (R., p.74.) On its face, this language does not assert a *claim* (deficient performance and prejudice), only an unsupported *fact* (defense counsel admitted he did not

preserve an issue for appeal). Nowhere in the cited text (or elsewhere in the affidavit) did Ewell allege the claim he now asserts on appeal – *i.e.,* that his attorney should have field a renewed motion to dismiss to challenge "the applicability of the Washington offenses because they were not substantially similar to any Idaho offenses." (Appellant's brief, p.7 (citing R., p.74).) The cited text does state that counsel's alleged shortcomings (not preserving the primary issue for appeal and failing to renew a motion to dismiss) are "'referred to in the States [sic] brief and the Courts [sic] decision.'" (R., p.74.) However, there is no context from which to glean to what brief and decision the affidavit was referring.

It was Ewell's burden to "specifically set forth the grounds upon which" his post-conviction petition was based. I.C. § 19-4903; see also Monahan, 145 Idaho at 877 n.2, 187 P.3d at 1252 n.2 ("[C]laims of ineffective assistance of counsel should be individually pled with specificity."). Having failed to specifically allege that trial counsel was ineffective for failing to renew the motion to dismiss the repeat sexual offender enhancement on the basis that the prior Washington convictions alleged in the amended information were not substantially similar to any Idaho offenses requiring sex offender registration, Ewell cannot successfully claim on appeal that the allegations in his affidavit constituted a stand-alone ineffective assistance of counsel claim that the district court was required to consider before summarily dismissing his petition.

D. The District Court Adequately Addressed Ewell's Ineffective Assistance Of Counsel Claim(s) By Giving Ewell Notice That He Failed To Support Any Of His Allegations With Admissible Evidence And By Finally Dismissing The Petition On That Same Basis After Ewell Failed To Respond

A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999). Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief when the applicant's evidence has raised no genuine issue of material fact, which if resolved in the applicant's favor, would entitle the applicant to the requested relief. Downing, 132 Idaho at 863, 979 P.2d at 1221; Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(b), a district court may *sua sponte* dismiss a post-conviction application when the court is satisfied that the applicant is not entitled to relief. Downing, 132 Idaho at 863, 979 P.2d at 1221. In such instances, the court must give the petitioner notice of the reasons for its contemplated dismissal, and an opportunity, within 20 days, to respond. I.C. § 19-4906(b); Saykhamchone v. State, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); Downing, 132 Idaho at 863, 979 P.2d at 1221. The purpose of the 20-day notice requirement of I.C. § 19-4906(b) is to ensure that the applicant will have an opportunity to challenge an adverse decision before it becomes final. Baruth v. Gardner, 110 Idaho 156, 158, 715 P.2d 369, 371 (Ct. App. 1986); Gibbs v. State, 103 Idaho 758, 759, 653 P.2d 813, 814 (Ct. App. 1982).

Liberally construed, Ewell's post-conviction petition alleged ineffective assistance of counsel, variously referred to by Ewell as: "Violation of ... Sixth ... Amend. Rights," "PSI was not reviewed, nor rights given," and "Counsel admitted short-comings." (R., p.4.) The facts and argument upon which Ewell based his ineffective assistance of counsel claim(s) were set forth by Ewell in a 67-page affidavit filed in support of his petition. (R., pp.13-79.) Exercising its authority under I.C. § 19-4906(b), the district court gave Ewell notice of its intent to dismiss his petition in its entirety (R., pp.104-20), noting, generally, that Ewell failed to support any of his claims "with any other affidavits or evidence" and that "his factual allegations are not supported by the record" (R., p.104). The court specifically addressed the factual allegations underpinning the ineffective assistance of counsel claims it deemed raised in Ewell's petition – *i.e.*, that counsel was ineffective in relation to the presentence investigation and evaluation processes (see R., pp.115-17) – but it did not address the factual allegation in Ewell's affidavit that trial counsel failed to "preserve the primary issues for appeal when [he] did not renew the motion to dismiss after the state amended the information (concerning the Prior Misd. Charge)" (R., p.74). The court gave Ewell 20 days to respond to the proposed bases for dismissal of his petition. (R., pp.105, 119.) When Ewell failed to do so the district court entered an order finally dismissing the petition for the reasons articulated in its notice. (R., pp.121-37.)

For the first time on appeal Ewell argues that the factual allegation in his affidavit regarding trial counsel's failure to renew his motion to dismiss was an

independent ineffective assistance of counsel claim that the trial court misperceived and/or failed to address. (Appellant's brief, pp.5-8.) For the reasons set forth in Section C, *supra*, the factual allegation in Ewell's affidavit did not meet the requirements of a claim under the UPCPA because it was not specifically set forth in Ewell's post-conviction petition, see I.C. §§ 19-4903; 19-4908, and did not otherwise have the attributes of an ineffective assistance of counsel claim because it failed to allege either deficient performance or prejudice, see Strickland v. Washington, 466 U.S. 668 (1984). Moreover, despite being given the opportunity to do so, Ewell never argued to the district court before it finally dismissed his petition that it had "misperceived" one of his claims. Having failed to do so, Ewell cannot complain for the first time on appeal that the court misperceived the allegations of his petition. See, e.g., Monahan v. State, 145 Idaho 872, 877, 187 P.3d 1247, 1252 (Ct. App. 2008) (citing Sanchez v. Arave, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991)) ("Generally, issues not raised below may not be considered for the first time on appeal.").

The state acknowledges that a post-conviction petitioner need not respond to a district court's notice of intent to dismiss in order to preserve for appeal his claim that the petition was improperly dismissed. See Garza v. State, 139 Idaho 533, 82 P.3d 445 (2003) (failure to respond to notice of intent to dismiss did not bar appeal of dismissal). However, where, as here, a represented petitioner receives notice of the bases for dismissal and fails to respond, he cannot later claim on appeal that petition was dismissed without adequate notice. DeRushé v. State, 146 Idaho 599, 601-02, 200 P.3d 1148,

1150-51 (2009). Ewell's claim on appeal is, in essence, just that – *i.e.*, a claim that his petition was dismissed without notice of the basis for dismissal of the allegation in his affidavit regarding trial counsel's failure to renew the motion to dismiss. Ewell's appellate claim is without merit.

There can be no question that the district court's order of conditional dismissal put Ewell on notice that it intended to dismiss his petition in its entirety, on the bases set forth in notice. The district court addressed Ewell's claims as it perceived them and set forth its rationale for dismissing those claims, including Ewell's failure to support any of his allegations with admissible evidence. (R., pp.104-20.) Although Ewell appears to argue otherwise, the district court was not required to address every factual allegation in Ewell's 67-page affidavit before finally dismissing the claims in his petition on the grounds set forth in its notice of intent to dismiss. If Ewell believed the court failed to recognize his factual allegations regarding trial counsel's alleged failure to "preserve the primary issue for appeal" as an independent ineffective assistance of counsel claim, it was incumbent upon him to alert the court, after receiving notice of the proposed bases for dismissal, that the court had misperceived one of his claims. DeRushé, 146 Idaho at 602, 200 P.3d at 1151 (failure to complain about adequacy of notice of bases for proposed dismissal, before petition was finally dismissed, constituted a waiver of that issue on appeal); cf. Monahan, 145 Idaho at 876-77, 187 P.3d at 1251-52 (petitioner could not argue for the first time on appeal that trial court failed to rule on an unpled claim where claim was not tried with consent of the parties at the evidentiary hearing and petitioner failed to take

proper steps to receive a ruling from the district court on the unpled issue before the petition was dismissed). Because he failed to do so, Ewell has failed to show any basis for reversal.

E. If The District Court Erred By Failing To Specifically Address The Factual Allegation In Ewell's Affidavit Regarding Trial Counsel's Failure To Renew The Motion To Dismiss, Such Error Is Harmless

Idaho Code § 19-4906 provides for the summary disposition of an application for post-conviction relief upon motion by a party or on the court's own initiative. Follinus v. State, 127 Idaho 897, 899, 908 P.2d 590, 592 (Ct. App. 1995). "When the court considering the petition for post-conviction relief is contemplating dismissal *sua sponte*, it must notify the parties of its intention to dismiss and must provide its reasons for the potential dismissal." Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993) (citations omitted). The purpose of the notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Martinez v. State, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).

The district court dismissed Ewell's post-conviction petition without specifically addressing the allegation contained in Ewell's affidavit that trial counsel was ineffective for failing to file a renewed motion to dismiss after the information was amended. Any error in the dismissal of this allegation without notice is harmless, however, because Ewell's claim ultimately fails as a matter of

law, and no legal authority or evidence Ewell could have presented would have overcome summary dismissal of his claim. See I.R.C.P. 61. ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); Gomez v. State, 120 Idaho 632, 634, 818 P.2d 336 (Ct. App. 1991) (applying harmless error analysis in post-conviction case).

The amended information alleged that Ewell was subject to the repeat sexual offender enhancement of I.C. § 19-2520G because he had previously pled guilty in the State of Washington to the following felonies: (1) Luring A Person With A Sexual Motivation, RCW 9A.40.090 and RCW 9.94A.030(38); (2) Communication With A Minor For Immoral Purposes, RCW 9.58A.090; and (3) Luring, RCW 9A.40.090. (#35093 R., p.64.[2]) As framed by Ewell on appeal, the crux of the allegation in his affidavit filed in support of his post-conviction petition was that trial counsel was ineffective for failing to renew his motion to dismiss the repeat sexual offender enhancement, after the information was amended, "so that he could assert that the Washington offenses were not substantially similar to Idaho offenses." (Appellant's brief, p.8.) To succeed on this claim, Ewell was required to demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Ewell did not even

[2] The district court took judicial notice of the record and transcripts in Ewell's underlying criminal case. (R., pp.105, 122.) Contemporaneously with the filing of this brief, the state is filing a motion requesting the Idaho Supreme Court to do the same.

allege deficient performance or prejudice in his affidavit, nor could he have presented any additional evidence or legal authority to establish an issue of material fact with respect to this claim because, even if made, a renewed motion to dismiss the repeat sexual offender enhancement on the basis that the Washington offenses were not substantially similar to any Idaho offenses requiring sex offender registration would have failed as a matter of law. See Wolf v. State, ___ P.3d ___, 2011 WL 1900460 *3 (Ct. App. 2011) (rev. denied 8/16/11) (citing Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App.1996)) ("Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test.").

As noted by the Court of Appeals in Ewell's direct appeal from his judgment, I.C. § 19-2520G "mandates a fifteen-year minimum term of confinement for a crime requiring registration as a sex offender under I.C. § 18-8304 if the individual was previously convicted of such an offense in Idaho *or of a substantially equivalent offense in another state*."[3] State v. Ewell, 147 Idaho

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[3] The relevant portion of the statute provides:

> Any person who is found guilty of or pleads guilty to any offense requiring sex offender registration as set forth in section 18-8304, Idaho Code, ... shall be sentenced to a mandatory minimum term of confinement to the custody of the state board of correction for a period of not less than fifteen (15) years, if it is found by the trier of fact that previous to the commission of such crime the defendant has been found guilty of or has pleaded guilty to a violation of any crime or an offense committed in this state or another state which, if committed in this state, would require the person to register as a sexual offender as set forth in section 18-8304, Idaho Code.

I.C. § 19-2520G(2).

31, 33, 205 P.3d 680, 682 (Ct. App. 2009) (emphasis added). Whether a criminal offense in another state is substantially equivalent to an Idaho offense is a question of law that requires comparison of the relevant statues. See State v. Schmoll, 144 Idaho 800, 803-05, 172 P.3d 555, 558-60 (Ct. App. 2007) (comparing Montana DUI statute with Idaho DUI statute to determine whether defendant's prior Montana DUI conviction qualified for purposes of enhancement as "substantially conforming" to the provisions of I.C. § 18-8004). Exact correspondence between the foreign statute(s) and the Idaho statute(s) at issue is not required. Id.

In the underlying criminal case, the district analyzed the applicable statutes, applied the correct legal standards and correctly determined in a well-researched and reasoned opinion that the Washington offenses of luring, RCW 9A.40.090, and luring with sexual motivation, RCW 9A.40.090 and RCW 9.94A.030(38), are crimes which, if committed in Idaho, would require sex offender registration and, as such, trigger the mandatory minimum sentence requirement of I.C. § 19-2520G(2). The state adopts as its argument on appeal the district court's analysis, as set forth at pages two (2) through five (5) of the court's Order Denying Motions To Dismiss Count VII. (#35093 R., pp.70-73.) The order is attached as Appendix A to this brief and is incorporated herein by reference.

Like luring and luring with sexual motivation, the Washington offense of communication with a minor for immoral purposes, RCW 9.58A.090, of which the amended information alleged Ewell was convicted in 2002 (#35093 R., p.64), is

also a crime that, if committed in Idaho, would require sex offender registration. Under RCW 9.68A.090, any person "who communicates with a minor for immoral purposes" is guilty of a crime. For purposes of that statute, a minor is "any person under eighteen years of age." RCW 9.68A.011(5). The term "immoral purposes" is not specifically defined by statute. However, to avoid overbreadth and vagueness concerns, the Supreme Court of Washington has interpreted RCW 9.68A.090 to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." State v. McNallie, 846 P.2d 1358, 1363-64 (Wash. 1993). So limited, the Washington offense of communication with a minor for immoral purposes is substantially similar to Idaho offenses that prohibit the solicitation and/or attempted solicitation of a minor child to participate in a sexual act, including, but not limited to, attempted lewd conduct, I.C. § 18-1508, attempted sexual battery of a minor child sixteen or seventeen years of age, I.C. § 18-1508A, and attempted enticing of children over the internet, I.C. § 18-1509A – all of which require sex offender registration pursuant to I.C. § 18-8304. Because the Washington offense of communication with a minor for immoral purposes is an offense that, if committed in Idaho, would have required sex offender registration, the state properly relied on that offense as a basis for the repeat sexual offender enhancement alleged in the amended information.

Even if Ewell's trial counsel would have filed a renewed motion to dismiss the repeat sexual offender enhancement on the basis that the Washington offenses alleged in the amended information were not substantially similar to any

Idaho offenses requiring sex offender registration, such motion would not have succeeded. The state needed only to prove that Ewell had been previously convicted of one prior offense that, if committed in Idaho, would have required sex offender registration. I.C. § 19-2520G. Because, as set forth above, all three Washington offenses alleged in the amended information qualified as offenses that would require sex offender registration in Idaho, any renewed motion to dismiss the repeat sexual offender enhancement would have failed as a matter of law. Accordingly, even if the district court erred in dismissing Ewell's petition without specifically addressing the claim regarding trial counsel's failure to file a renewed motion to dismiss, such error was harmless because there is nothing Ewell could present to overcome summary dismissal of this claim.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Ewell's petition for post-conviction relief.

DATED this 5th day of December 2011.

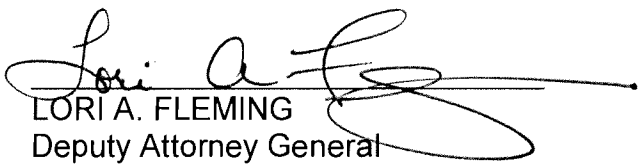
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of December 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



LORI A. FLEMING
Deputy Attorney General

LAF/pm

APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

ERIC HOWARD EWELL

Defendant.

CASE NO. H0700608

ORDER DENYING MOTIONS TO DISMISS COUNT VII

On June 11, 2007, Eric Howard Ewell moved to dismiss Count VII of the Information on the basis that a conviction for Luring in Washington was insufficient to invoke sex offender registration in Idaho, making I.C. § 19-2520G prescribing mandatory minimum sentencing inapplicable. The Court heard argument on August 1, 2007, and orally denied the Motion. This memorandum constitutes the Court's conclusions of law.

On September 13, 2007, Ewell again moved to dismiss Count VII, contending that the statute is unconstitutionally vague in that the penalty is ambiguous. The State failed to file any response.

For the reasons stated below, the Court denies Ewell's Motions.

BACKGROUND

On May 8, 2007, the State charged Eric Harold Ewell by Information with Counts I-VI, Possession of Sexually Exploitative Material, Felony, I.C. § 18-1507A and Count VII, Sexual Offender Enhancement, Felony, I.C. § 19-2520G. The Sexual Offender Enhancement charge was based on Ewell's Washington 2002 conviction for Luring with a finding of Sexual Motivation in violation of Wash. Rev. Code §§ 9A.40.090 and 9.94A.835. Ewell was, in fact, required to register as a sex offender in Washington state because of his conviction for this crime.

On June 11, 2007, Ewell moved to dismiss Count VII of the Information on the basis that a conviction for Luring with a finding of Sexual Motivation in Washington was insufficient to

invoke sex offender registration in Idaho, making I.C. § 19-2520G inapplicable to him as a matter of law. The Court denied his Motion orally.

September 13, 2007, Ewell renewed his Motion, arguing I.C. § 19-2520G was unconstitutionally vague. The Court disagrees.

ANALYSIS

I. I.C. § 19-2520G APPLIES TO EWELL.

The State charged Ewell under I.C. § 19-2520G, the sexual offender enhancement statute, in addition to six counts of Possession of Sexually Exploitative Material. Ewell contends this enhancement statute does not apply to him because his Washington crime would not have required sex offender registration in Idaho. I.C. § 19-2520G provides in relevant part as follows:

> (2) Any person who is found guilty of or pleads guilty to any offense requiring sex offender registration as set forth in section 18-8304, Idaho Code, . . . shall be sentenced to a mandatory minimum term of confinement to the custody of the state board of correction for a period of not less than fifteen (15) years, if it is found by the trier of fact that previous to the commission of such crime the defendant has been found guilty of or has pleaded guilty to a violation of any crime or an offense committed in this state *or another state which, if committed in this state*, would require the person to register as a sexual offender as set forth in section 18-8304, Idaho Code.

Ewell contends the crime of Luring with a finding of Sexual Motivation would not require him to register in Idaho if convicted in Idaho. Therefore, the Court examined the Washington code to determine what this crime entails.

The Revised Code of Washington (R.C.W.) for the crime of Luring reads in relevant part as follows:

> A person commits the crime of luring if the person:
>
> (1) (a) Orders, lures, or attempts to lure a minor . . . into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian . . . ; and
>
> (c) Is unknown to the child . . . .
>
> * * *
>
> (4) Luring is a class C felony.[1]

[1] Class C felonies are punishable by up to five years in state prison, or by a fine of ten thousand dollars, or both in Washington. R.C.W. 9A.20.021.

R.C.W. 9A.40.090. Ewell was convicted of Luring with a finding of Sexual Motivation.[2] In Washington, the state prosecutor may attach a special allegation of sexual motivation to a charge when a reasonable and objective fact finder could find a sexual motivation for the crime. R.C.W. 9.94A.835.[3] Under Washington law, sexual motivation "means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." R.C.W. 9.94A.030(43). At trial, the state must prove the allegation of sexual motivation beyond a reasonable doubt. R.C.W. 9.94A.835(2). A conviction with a special allegation of sexual motivation requires the person to register as a sex offender under the Washington Sex Offender Registration statute. *See* R.C.W. 9A.44.130(1)(a), R.C.W. 9.94A.030. Therefore, Ewell was required to register as a sex offender in Washington.

However, in order for Luring with a Sexual Motivation to function as a predicate to the mandatory minimums found in I.C. § 19-2520G, it must also be an offense that if committed in Idaho would require the person to register as a sexual offender under I.C. § 18-8304. *See* I.C. § 19-2520G(2). The State contends that the Washington crime of Luring would constitute the Idaho crime of Second Degree Kidnapping, Felony, I.C. § 18-4503, where the victim is an unrelated minor. The Court agrees. The Court also finds that Ewell could potentially have been convicted of First Degree Kidnapping in Idaho under the same elements for conviction of Luring with a Sexual Motivation.

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[2] Ewell was also convicted of Communication with a Minor for Immoral Purposes, felony (R.C.W. 9.68A.090), a sex crime and Luring, felony, R.C.W. 9A.40.090.

[3] R.C.W. 9.94A.835. Special allegation--Sexual motivation—Procedures

(1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030(38)(a) or (c) when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact-finder.

(2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030(38)(a) or (c).

Second Degree Kidnapping (I.C. §§ 18-4501, -4503) where the victim is an unrelated minor child triggers Idaho's sexual offender registration statute. I.C. § 18-8304(a).[4] I.C. § 18-4501 establishes the elements of Kidnapping and describes them as follows:

> Every person who wilfully: "Leads, takes, entices away or detains a child under the age of sixteen (16) years, with intent to keep or conceal it from its custodial parent, guardian . . . ;"

Where the leading, taking, enticing away or detaining of an unrelated minor child is not for the purpose of raping or committing any lewd and lascivious act for the defendant's sexual gratification, it is Kidnapping in the Second Degree. Conviction for Kidnapping in the Second Degree requires a person to register *regardless* of whether the defendant enticed the child for sexual purposes. I.C. § 18-8304(a). Where the kidnapping is for the purpose of committing a lewd act or rape, it is Kidnapping in the First Degree, and the defendant is likewise required to register. *Id.*

Comparing both the Washington crime and Second Degree Kidnapping, it is clear that if Ewell had committed the same acts in Idaho that made him guilty of Luring with a Sexual Motivation in Washington, he would have committed Second Degree Kidnapping where the victim was an unrelated child, triggering Idaho's sex offender registration. Leading, taking, enticing or detaining is clearly substantially equivalent to "ordering, luring, or attempt to lure." In fact, the use of word "lure" in Washington's Luring A Child statute is intended to prohibit a defined class of persons from enticing or attempting to entice a child into specific place. *State v. Dana*, 926 P.2d 344 *reconsideration denied, review denied,* 948 P.2d 389 (Wash.1996).

Moreover, both statutes require the victim be a child. The Washington crime of Luring also requires the victim be unknown to the defendant. This is substantially equivalent to Idaho's requirement that the victim and defendant be unrelated. The Court finds this element to substantially equivalent.

Furthermore, although expressed differently, clearly Washington's requirement that the child be lured into an obscured or inaccessible area is substantially equivalent to Idaho's enticing

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[4] The Idaho registration requirement applies to any person who on or after July 1, 1993, is convicted "of the crime, or an attempt, a solicitation, or a conspiracy to commit a crime provided for in . . . section 18-4503 (second degree kidnapping where the victim is an unrelated minor child . . ." I.C § 18-8304(1)(a).

the child away with intent to keep or conceal the child from the custodial parent. The intent to conceal the child from the child's parent or guardian is implicit in the Luring statute.

Luring with a finding of Sexual Motivation also meets the elements of First Degree Kidnapping. First Degree Kidnapping is identical to Second Degree Kidnapping with the added requirement that the kidnapping be committed for the purpose of committing a lewd and lascivious act upon a child under the age of sixteen with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of any person. I.C. 18-4502. Washington's special finding of sexual motivation clearly satisfies the intent requirement for First Degree Kidnapping.

Therefore, the Court finds that Luring with a finding of Sexual Motivation is substantially equivalent to Second Degree Kidnapping of an unrelated child and First Degree Kidnapping, both of which require registration.[5] Thus, Ewell's prior conviction in Washington satisfies the enhancement requirement found in I.C. § 19-2520G.

II. I.C. § 19-2520G IS CONSTITUTIONAL.

Ewell contends this statute is unconstitutionally vague and, therefore, asks the Court to dismiss Count VII. The void-for-vagueness doctrine is premised upon the Due Process Clause of the Fourteenth Amendment. *State v. Casano*, 140 Idaho 461, 464, 95 P.3d 79, 82 (Ct. App. 2004). This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness to permit ordinary people to understand what conduct is prohibited and to prevent arbitrary and discriminatory enforcement. *Id.* An enactment is void for vagueness if its prohibitions are not clearly defined. *Id.* Due process requires that defendants be informed as to what the state commands or forbids and that persons of common intelligence not be forced to guess at the meaning of the criminal law. *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003); *State v. Cobb*, 132 Idaho 195, 969 P.2d 244 (1998), citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Furthermore, as a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes. *United States v. Smith*, 795 F.2d 841, 847 n. 4 (9th

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[5] The fact that an included offense would include I.C. § 18-1509, Enticing Children, does not change the analysis.

Cir.1986), citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), *Smith v. United States*, cert. denied, 481 U.S. 1032 (1987).

A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. *Korsen*, 138 Idaho at 712, 69 P.3d at 132. For a "facial vagueness" challenge to be successful, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Id.* quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). In other words, the challenger must show that the enactment is invalid *in toto*.

To succeed on an "as applied" vagueness challenge, a complainant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him. A "facial vagueness" analysis is mutually exclusive from an "as applied" analysis. *See Schwartzmiller, supra* at 1346.

A statute should not be held void for vagueness if it can be given any practical interpretation. *State v. Hart*, 135 Idaho 827, 25 P.3d 850 (2001).

Ewell challenges this statute both as applied and facially.

A. Ewell's facial challenge fails.

Ewell complains about the potential sanctions and claims they are unclear. The Court disagrees. The analysis begins with the statutory language itself. Ewell was charged separately in the Information under I.C. § 19-2520G which states, in relevant part, as follows:

> ****
>
> (2) Any person who is found guilty of or pleads guilty to any offense requiring sex offender registration as set forth in section 18-8304, Idaho Code, . . ., shall be sentenced to a mandatory minimum term of confinement to the custody of the state board of correction for a period of not less than fifteen (15) years, if it is found by the trier of fact that previous to the commission of such crime the defendant has been found guilty of or has pleaded guilty to a violation of any crime or an offense committed in this state or another state which, if committed in this state, would require the person to register as a sexual offender as set forth in section 18-8304, Idaho Code.
>
> ****
>
> (4) The mandatory minimum term provided in this section shall be imposed where the aggravating factor is separately charged in the information or indictment

> and admitted by the accused or found to be true by the trier of fact at a trial of the substantive crime. A court shall not have the power to suspend, withhold, retain jurisdiction, or commute a mandatory minimum sentence imposed pursuant to this section. Any sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court.

(Emphasis added.) The Court finds this statute is clear and unambiguous.

If a person has been previously convicted of a crime requiring sex offender registration and either a jury finds the person guilty or the person pleads guilty of a new offense which would also require registration and that person is charged separately in the Information or Indictment under this statute, the court must impose a mandatory fifteen year sentence consecutive to any other sentence the court imposes in that case. There is nothing about the statute that is unclear or unconstitutional.

Therefore, Ewell, who was charged separately in the Information, faces a sentence of fifteen (15) years consecutive to any sentence the Court imposes for the underlying charges of six counts of Possession of Sexually Exploitative Material. Each count carries a potential ten (10) year sentence. If the Court were to run each count consecutively, Ewell faces a potential sentence of seventy-five (75) years with fifteen (15) years fixed.[6]

B. Ewell's as applied challenge fails.

Likewise, Ewell's challenge to the statute as applied fails. Ewell contends this statute does not apply to him because the maximum sentence applicable to Possession of Sexually Exploitative Material is only ten years. Therefore, he argues this statute limits the Court's discretion and forces the Court to "guess" what the sentence could be under the statute as applied to a crime for which the maximum sentence is less. The Court disagrees.

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[6] The fifteen year fixed sentence is served first. According to I.C. § 19-2513,

> If the offense carries a mandatory minimum penalty as provided by statute, the court shall specify a minimum period of confinement consistent with such statute. If the offense is subject to an enhanced penalty as provided by statute, or if consecutive sentences are imposed for multiple offenses, the court shall, if required by statute, direct that the enhancement or each consecutive sentence contain a minimum period of confinement; *In such event, all minimum terms of confinement shall be served before any indeterminate periods commence to run.*

(Emphasis added.)

This is precisely the kind of crime this statute was amended to enhance. The purpose was to increase the potential penalty and to limit the Court's ability to suspend that sentence. There is nothing inherently wrong about that.

Furthermore, the Supreme Court has already ruled that a statute providing additional mandatory sentences for certain behaviors, like enhancement for use of a firearm (I.C. § 19-2520), was not invalid for violating doctrine of separation of powers, even prior to amendment to Constitution authorizing legislature to prescribe minimum sentences for crimes committed with firearms. Const. Art. 1, § 11; *see State v. Grob*, 107 Idaho 496, 690 P.2d 951 (1984).

Therefore, the Court denies the Motions to Dismiss.

IT IS SO ORDERED.

Dated this 23rd day of October 2007.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of October 2007 I mailed (served) a true and correct copy of the within instrument to:

GREG H. BOWER
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J. DAVID NAVARRO
Clerk of the District Court

Melanie Anderson
~~John Weatherby~~, Deputy Clerk