

7-2-2014

# State v. Schmierer Appellant's Reply Brief Dckt. 40733

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 40733
	)	
v.	)	CANYON COUNTY NO. CR 2009-1259
	)	
ARTHUR GENE SCHMIERER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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JUL - 2 2014

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
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## STATEMENT OF THE CASE

### Nature of the Case

Pursuant to a plea agreement, Arthur Gene Schmierer pled guilty to two counts of internet enticement. On appeal, Mr. Schmierer asserts that the district court erred in denying his motion to correct an illegal sentence. Mr. Schmierer asserts that the prosecuting attorney had no authority to issue an amended superseding indictment which alleged a new crime (Count II) that was not charged in the original indictment and that was not an included offense of the crime initially charged by indictment. Thus, Mr. Schmierer asserts that charging instrument was insufficient to confer subject matter jurisdiction over Count II.

This Reply Brief is necessary to clarify a potentially misleading factual assertion contained in the Respondent's Brief and to address the State's argument that Mr. Schmierer may not challenge the district court's jurisdiction because he pled guilty.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Schmierer's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err in denying Mr. Schmierer's I.C.R. 35 motion to correct an illegal sentence?

## ARGUMENT

### The District Court Erred When It Denied Mr. Schmierer's I.C.R. 35 Motion To Correct An Illegal Sentence

Mr. Schmierer asserts on appeal that the district court erred in denying his motion to correct an illegal sentence because the prosecutor issued an amended superseding indictment which alleged a new crime (Count II) that was not charged in the original indictment. Count II was initially a charge of attempted lewd conduct with a fictitious minor in Idaho, which was then amended to charge Mr. Schmierer with internet enticement of a fictitious minor in Utah. Because the prosecutor amended Count II to charge an entirely new crime, with a different victim, Mr. Schmierer asserts that the charging instrument was insufficient to confer subject matter jurisdiction over Count II and therefore, the amended superseding indictment was invalid.

The State disputes the factual basis for Count II of the Amended Superseding Indictment. (Respondent's Brief, p.5 n.2.) The State claims that the person Mr. Schmierer was communicating with was neither a minor child nor was she from Utah. (Respondent's Brief, p.5 n.2.) The State then goes on to identify "Emily Kotter" as the fictitious minor in Idaho. *Id.* Although the State is quick to point out that the Amended Indictment contains no language of any "fictitious minor in Utah," the State ignores the fact that the factual basis for the guilty plea to Count II was explained by the prosecutor at sentencing. (Respondent's Brief, p.5 n.3.) As referenced in Mr. Schmierer's Appellant's Brief, the prosecutor told the district court:

What I'd like to do for the Court, since you didn't have the opportunity of reviewing all of the discovery that goes along with this case, is to give the Court some background as to how this case came about and talk about the count that arose through Utah as well so the Court knows that's the

second count that was the attempted lewd conduct was amended to that second count.

(5/18/09 Tr., p.21, Ls.18-25.) The prosecutor then went on to explain how Mr. Schmierer was brought to the attention of detectives in Idaho when the Iron County Sheriff's Office, in Utah, contacted them in an attempt to find out more information about Mr. Schmierer. (5/18/09 Tr., p.22, Ls.1-11.) The Utah detective had begun to communicate with Mr. Schmierer, and was seeking additional information from the Idaho authorities. (5/18/09 Tr., p.22, Ls.12-14.) Thus the prosecutor made clear that Count II, the second count of internet enticement, was for the communication that occurred with the detectives from Iron County, Utah. Such was conduct for which Mr. Schmierer was never indicted by the Idaho grand jury. Therefore, the district court lacked subject matter jurisdiction because the Amended Superseding Indictment charged a crime that was not an included offense under the original indictment, and in fact related to an entirely different incident, involving a different fictitious minor in Utah, than the facts voted on by the grand jury.

The State also appears to be claiming that Mr. Schmierer, because he pled guilty, cannot challenge the lack of jurisdiction in any of the prior proceedings. (Respondent's Brief, p.8.) In support of its claim that a plea of guilty waives all non-jurisdictional defenses, the State claims that Mr. Schmierer mistakenly relies on cases in which the defendant went to trial. (Respondent's Brief, p.8 n.6.) However, the State's claim ignores the holding in *State v. Lute*, 150 Idaho 837, 840-41 (2011). *Lute* was a case in which the defendant pled guilty to a charge in an amended indictment which was different from what was charged in the original indictment. Approximately ten years later, the defendant filed an I.C.R. 35 motion in which he argued that the

district court was without subject matter jurisdiction or personal jurisdiction when it entered the judgment because the grand jury term had expired by the time he was indicted. *Id.* at 839. The Idaho Supreme Court found that a valid indictment had never been entered against the defendant, thus the district court never had subject matter jurisdiction over the case. *Id.* at 841. The Court reversed the district court's denial of the defendant's I.C.R. 35 motion and remanded the case with instructions to grant the motion and vacate the conviction. *Id.*

Further, the State's reliance on *State v. Fowler*, 105 Idaho 642 (Ct. App. 1983), a case in which the Court of Appeals held that the defendant's guilty plea to the amended information waived any non-jurisdictional defects, is misplaced, particularly where Mr. Schmierer asserts that the district court lacked subject matter jurisdiction such that it could not convict him of Count II.

Here, Count II was a new charge and the facts comprising this charge were never put before the grand jury. Thus, the Amended Superseding Indictment filed in this case was invalid as the district court never had subject matter jurisdiction over Mr. Schmierer's case regarding the second count of internet enticement. Thus, the trial court was without subject matter jurisdiction to accept Mr. Schmierer's guilty plea, or sentence him upon his conviction on Count II. Therefore, because the district court did not have subject matter jurisdiction as to Count II—the offense of internet enticement as alleged in the Superseding Amended Indictment in this case—Mr. Schmierer asks that this Court reverse the district court's order denying his I.C.R. 35 motion and remand this case to the district court with instructions to vacate his conviction.

CONCLUSION

Mr. Schmierer respectfully requests that this Court remand his case to the district court with instructions to vacate his judgment of conviction and sentence for Count II because the district court never had subject matter jurisdiction over this charge.

DATED this 2<sup>nd</sup> day of July, 2014.

  
Full SALLY J. COOLEY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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E-MAILED BRIEF

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