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State v. Kelley Appellant's Reply Brief Dckt. 43403

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-Respondent vs. THOMAS CAMPBELL KELLEY, Defendant-Appellant.	)	Supreme Court No. 43403

APPELLANT'S BRIEF IN REPLY

Appeal from the District Court of the
Fourth Judicial District of the State of Idaho,
in and for the County of Ada

HONORABLE TIMOTHY HANSEN, District Judge

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The State in it's Brief of Respondent relies heavily on *United States v. Chavez,* 627 F 2d 953 (9th Cir. 1980), where the Court upheld a provision of the tax code which stated within the penalty provision itself that costs associated with the costs of the prosecution was Constitutional. In that case, the statute which was being challenged by the Defendant was 26 USC 7203 which read,

> "Any person...(who willfully fails to return, supply information, or pay tax required by law, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution." Id.

This is completely different than the statute being challenged in this case, which is a separate statute that addresses recoupment for the State under a wide array of criminal offenses, with varying penalties associated with the crimes. In *Chavez*, the Court specifically couched its decision in the fact that the costs themselves were a part of a statute which was specific and limited with regard to the penalty which a Defendant could face, which was a misdemeanor. It stated.

> "Section 7203 provides for a punishment of not more than $10,000.00, or more than one year imprisonment, or both. Any sentence that would be imposed upon conviction, within those bounds, would be within the ordinary discretion of the trial judge. The presence of the mandatory costs of prosecution provision does not, with any degree of certainty, substantially increase the threatened punishment. Any encouragement of the waiver of constitutional rights that this provision may induce is substantially different from the pressures that undeniably existed in Jackson, and cannot be said to be an impermissible burden upon the exercise of constitutional rights."

The court thus specifically couched its decision as limited to this particular statue, and because of the limited punishment a Defendant could face, as reasonable. It noted that,

> "In holding that §7203's costs of prosecution provision does not create does not create an impermissible burden on the exercise of constitutional rights, we recognize that the Second Circuit has suggested that a mandatory costs of prosecution provision might be constitutionally suspect. In *United States v. Glover*, 588 F.2d 876 (CA2 1978), the Second Circuit considered the operation 28 U.S.C. §1918(b), which authorizes a district court to impose costs in a noncapital case. Since §1918(b) is discretionary the Second Circuit found no constitutional problems. The Court mentioned in dictum that a statute which directed that the costs prosecution be assessed and against all convicted defendant's might be unconstitutional."

This is the statute being addressed here: One which directs costs of prosecution against all criminal defenses of various categories, including the Uniform Controlled Substances Act, the Racketeering Act, and the money laundering and illegal investment provisions of Section 18-8201 Idaho Code. *See* I.C. §37-2732(k), some of which carry a possible penalty of life imprisonment. Any chilling effect upon the Defendant's ability or inventive to assert a right to trial by jury in such a case would thus be unconstitutional, in line with the holding in *United States v. Jackson*, 390 U.S. 570 (1968).

DATED this 19th day of January, 2016.

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