

1-17-2017

## State v. Arbizu Respondent's Brief Dckt. 44485

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44485
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2015-16977
	)	
ZACHARY DANIEL ARBIZU,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Arbizu failed to establish that the district court abused its discretion by imposing a unified sentence of eight years, with three years fixed, upon his guilty plea to sexual battery of a minor child 16 or 17 years of age?

Arbizu Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Arbizu pled guilty to sexual battery of a minor child 16 or 17 years of age (in violation of I.C. § 18-1508A(1)(a)) and the district court imposed a unified sentence of eight years, with three years fixed, and ordered that the sentence in this case run

consecutively to Arbizu's sentence for lewd conduct with a minor under 16 in a Canyon County case. (R., pp.26-27, 31, 51-60; PSI, p.11.) Arbizu filed a notice of appeal timely from the judgment of conviction. (R., pp.61-63.)

Arbizu asserts his sentence is excessive in light of his mental health issues, difficult childhood, and support from his grandmother and girlfriend. (Appellant's brief, pp.4-8.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum sentence for sexual battery of a minor child 16 or 17 years of age in violation of I.C. § 18-1508A(1)(a) is life in prison. I.C. § 18-1508A(4). The district court imposed a unified sentence of eight years, with three years fixed, which falls well within the statutory guidelines. (R., pp.51-60.) At sentencing, the state addressed the serious

and ongoing nature of the offense, the harm done to the victim, Arbizu's repeated sexual offending against minor children, his failure to be deterred, his abysmal performance during his two periods of retained jurisdiction, the danger he presents to the community, and his lack of amenability to outpatient treatment. (Tr., p.28, L.2 – p.30, L.25 (Appendix A).) The district court subsequently articulated its reasons for imposing Arbizu's sentence. (Tr., p.38, L.7 – p.41, L.12 (Appendix B).) The state submits that Arbizu has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

#### Conclusion

The state respectfully requests this Court to affirm Arbizu's conviction and sentence.

DATED this 17th day of January, 2017.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of January, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. MCGREEVY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

# APPENDIX A

1 THE COURT: State's argument then, Ms. Guzman.  
 2 MS. GUZMAN: Your Honor, the State is asking for  
 3 a no contact order with the victim and her child in this  
 4 case as well as all minor females. And we're asking for  
 5 restitution in the amount of \$1,500 for the DNA testing  
 6 to confirm that the baby was the defendant's child.  
 7 Per the plea agreement, the State is going to  
 8 recommend a sentence of 5 years fixed followed by 15  
 9 years indeterminate to run concurrent to the Canyon  
 10 County case.  
 11 As the Court is aware, the defendant went on two  
 12 retain jurisdictions; didn't do well on either one of  
 13 them, and so prison is the only feasible option in this  
 14 case as well.  
 15 The reason that the State is asking for the  
 16 lengthy prison sentence is that his conduct in this case  
 17 was extremely concerning.  
 18 He began dating the victim. She was 16; he was  
 19 23. He knew her age; he continued the sexual  
 20 relationship. He was even investigated for it but not  
 21 charged. He continued the relationship, and then he  
 22 impregnated her. She was 17. She gave birth at 18, and  
 23 basically was a single mother from then on out.  
 24 He's not been a father to any of the children  
 25 that he's had, but he seems to take pride in having

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1 children. He has three other children. One was born  
 2 shortly before he was incarcerated. Lots of CPS  
 3 involvement in that case and with his other two children.  
 4 He's going through the process of voluntarily  
 5 terminating his parental rights to his oldest child. And  
 6 he just doesn't seem too concerned once these small  
 7 children come on board.  
 8 After this victim was the victim in Canyon  
 9 County, and she was 14 and he was 25, she was the  
 10 babysitter for his children. And again all of the  
 11 victims seem to talk about his concerning behavior and  
 12 his sexual conduct, in that he was having numerous sexual  
 13 liaisons with tons of people at the same time.  
 14 He told the Canyon County police that he thinks  
 15 he's a sex addict and feels like he needs to do anything  
 16 to get off.  
 17 He talked about having sex with lots of strange  
 18 women. And at this point when he's talking about all  
 19 this, he's also engaging two minor females in sexual  
 20 relations. He was also on supervised misdemeanor  
 21 probation from a petit theft that had been reduced from a  
 22 grand theft at the same time.  
 23 The PSE with Dr. Engle says he's a moderate risk  
 24 to reoffend; he's not amenable to outpatient treatment.  
 25 He fabricated the death of his daughter while he

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1 was on a rider to gain attention. He seems to have a way  
 2 with words and spinning the truth to draw attention to  
 3 himself.  
 4 He had formal DORs and 15 other disciplinary  
 5 issues while he was on the rider. It is hard to imagine  
 6 a worse rider. The staff report he was needy, attention  
 7 seeking, rude, manipulative, he was fired from various  
 8 positions, that his pattern of victimizing others has not  
 9 diminished.  
 10 And it is clear from Dr. Arnold's evaluation  
 11 that the defendant does have mental health issues. But  
 12 he's been aware of those issues for quite some time and  
 13 has done very little to control them. And during his  
 14 rider he continued to use those mental health issues as a  
 15 reason for him to stay on the rider, even though they  
 16 were addressing his mental health issues.  
 17 The State believes he's a significant risk to  
 18 the community. He's kind of left a path of destruction  
 19 behind him, as you know, from the victim impact letter  
 20 and how it's left her. In fact, she was unable to read  
 21 it. She had planned to read it today. It just doesn't  
 22 seem like he cares at all for the harm that he's done for  
 23 others.  
 24 So at this point the State believes that the  
 25 sentence being recommended by the State is appropriate.

30

1 Thank you.  
 2 THE COURT: Thank you.  
 3 Mr. Loschi.  
 4 MR. LOSCHI: Judge, Zach, I think is a difficult  
 5 case with his mental health issues, because I think he  
 6 presents very differently than others. But I think he  
 7 suffers from severe mental health issues that have a lot  
 8 to do with the decisions he makes and how he acts.  
 9 You know, when I first met him and I talked to  
 10 him about his history, and he spent a number of years  
 11 during the high school period and a little bit after  
 12 essentially in assisted living. He was with life  
 13 incorporated developmental concepts. He was living in  
 14 kind of a group home and being sort of supervised in that  
 15 context.  
 16 And then I read the PSI from Canyon County;  
 17 didn't really see much in the way of mental health  
 18 history there. I saw a, you know, sort of a GAIN that  
 19 had an Axis 1 diagnosis of a generalized anxiety  
 20 disorder.  
 21 And in talking to him, his past diagnosis since  
 22 referenced in that Gain out there is aspergers. I think  
 23 he's been on the autism spectrum, and he's been  
 24 collecting disability for a number of years.  
 25 But when you read Dr. Arnold's evaluation, you

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## APPENDIX B

1 treatment is going to be really, I think, would be  
 2 counseling and almost academic in a sense, teaching him  
 3 skills; rather than a lot of other folks that we can  
 4 manage a medication regimen for them and they'll be  
 5 better able to handle that.  
 6 You know, he entered into this agreement, Rule  
 7 11 in Canyon County whereby he would get a rider, but the  
 8 underlying sentence would be left up to the judge, and he  
 9 waived his right to appeal and filed a Rule 35.  
 10 And so he got the rider, eventually flopped it,  
 11 he got the 10 plus 5, and he's at this point stuck with  
 12 that. That's what he's going to do.  
 13 I'm going to ask Your Honor to give him a 4 plus  
 14 8 concurrent with what he's currently doing.  
 15 I'd point out that the offense here is first in  
 16 time with the two. I wasn't there for Judge Nye's  
 17 sentencing, but I'd like to think that Judge Nye factored  
 18 in both offenses at the time of the PSI in coming up with  
 19 the 10 plus 5 and probably virtue of the fact there were  
 20 two crimes going on here.  
 21 But I'm asking you to give him 4 plus 8  
 22 concurrent. He's got about eight years at this point  
 23 left over, eight years left on his sentence.  
 24 He has a no contact order out of Canyon County  
 25 with, I believe it's blanket with all minor children.

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1 It's been a little bit of an issue because he's -- he may  
 2 seek to lift that. He doesn't have contact or rights  
 3 really at this point with any of his children, but my  
 4 understand is that a couple of children placed with  
 5 family or friends who are willing to allow him to have  
 6 contact if that was permitted.  
 7 We don't have objection in this case to a no  
 8 contact order with the victim. I'd ask you to leave  
 9 it -- limit it to that, let him deal with any other  
 10 contact issues out of the Canyon County case.  
 11 But I would ask you for that sentence, Judge, to  
 12 run concurrent with what he's already doing.  
 13 THE COURT: All right. Thank you.  
 14 Mr. Arbizu, before I sentence you, sir, you have  
 15 the right to make any statement. Is there some statement  
 16 you'd like to make?  
 17 THE DEFENDANT: Yes, Your Honor.  
 18 I just want to be able to do my time and learn  
 19 what I need in my classes and get out and be there for my  
 20 children and my family.  
 21 It's been very difficult on me in trying to  
 22 better understand how to explain my struggles and learn  
 23 how to move forward. I just want to be able to move on,  
 24 Your Honor. I don't want to ever come back to this  
 25 courtroom. I don't ever want to go through this again.

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1 I want to do this and go home.  
 2 And that's it.  
 3 THE COURT: All right. Thank you.  
 4 Mr. Loschi, are you aware of any reason why the  
 5 Court cannot pronounce a sentence?  
 6 MR. LOSCHI: No, Your Honor.  
 7 THE COURT: Mr. Arbizu, on your guilty plea to  
 8 this felony offense, sexual battery of a minor child 16  
 9 or 17 years of age, I find that you are guilty.  
 10 The circumstances of this case were discovered  
 11 in the investigation of the Canyon County matter, as I  
 12 read these materials.  
 13 Your victim in that case reports numerous  
 14 instances of forcible rape by you. You have always  
 15 characterized your relationship with that victim as  
 16 consensual and you deny the forcible rape.  
 17 But it is clear that there's a large difference  
 18 in the description of your conduct in that relationship  
 19 between what the victim had to say and is documented in  
 20 that Canyon County case in which you continue to state.  
 21 In any event, you knew that the victim in that case was  
 22 14 years of age and you were either 24 or 25.  
 23 Police learn that there is another pregnant  
 24 victim, the victim in this case. That was a  
 25 long-standing relationship between 2012 and 2014. Your

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1 daughter was born in December of 2014. It's that  
 2 relationship that gives rise to this case.  
 3 I'm concerned about the psycho-sexual evaluation  
 4 that was done by Dr. Engle in the Canyon County matter.  
 5 He concluded you were not amenable to outpatient  
 6 treatment; you weren't -- were amenable inpatient  
 7 treatment for the risks he identified; and he found that  
 8 you were at the high end of the moderate risk to reoffend  
 9 sexually.  
 10 I reviewed Dr. Arnold's forensic evaluation. He  
 11 concludes you're a moderate to high risk of future  
 12 violence. And to just follow up on -- your attorney  
 13 quoted from a portion of Dr. Arnold's report in which he  
 14 does indicate that your aspergers -- sometimes I think  
 15 it's now referred to as high-functioning autism --  
 16 symptoms and behaviors are a long-standing characteristic  
 17 which contribute to Mr. Arbizu's personality and his  
 18 general presentation that suggests narcissistic and  
 19 obsessive-compulsive and histrionic behavior.  
 20 Aspergers disorder adequately accounts for these  
 21 narcissistic obsessive-compulsive and histrionic  
 22 behaviors, and in the examiner's opinion, are  
 23 troublesome; however -- he goes on to note -- however,  
 24 that your obsessiveness with maladaptive criminal sexual  
 25 activities and other antisocial behaviors, which are

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1 hypothesized contribute to your moderate to high risk for  
 2 future violence.  
 3 Both Dr. Engle and Dr. Arnold agree that you  
 4 need intensive long-term monitoring and supervision by  
 5 psychiatric services as well as psychotropic medications  
 6 that can assist in managing, what he refers to as, your  
 7 maladaptive symptoms and behavior.  
 8 And while I recognize the level of service  
 9 inventory advises that you are a predictive moderate risk  
 10 to reoffend, I'm more fully informed by Dr. Engle and Dr.  
 11 Arnold who have other concerns as specified in those  
 12 evaluations.  
 13 While sentencing can serve a number of important  
 14 functions, including rehabilitation, hopefully you'll be  
 15 in a better position to be able to be managed in the  
 16 community after a period of time of incarceration;  
 17 hopefully you can benefit from the mental health services  
 18 and treatment and sexual offense treatment that's  
 19 available in these institutions.  
 20 But another sentencing objective I'm concerned  
 21 with is simply protecting the public from persons who are  
 22 likely to engage in future criminal and/or violent  
 23 behavior.  
 24 And in that regard I have in mind Dr. Engle's  
 25 concern that you have issues with pedophilia that need to

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1 be treated as well.  
 2 I am more fully informed about your mental  
 3 health issues as a result of Dr. Arnold's report, but I  
 4 nonetheless conclude that you are a significant risk at  
 5 this time.  
 6 I've considered the arguments, I've considered  
 7 all these materials. I will enter a judgment of  
 8 conviction. I will sentence you to the custody of the  
 9 state board of correction for a term of eight years,  
 10 consisting of three years fixed followed by five years  
 11 indeterminate. I will impose that sentence consecutive  
 12 to the sentence imposed by Judge Nye.  
 13 I will not in this case impose a fine.  
 14 Mr. Loschi, does the defense have a position on  
 15 the State's request for restitution?  
 16 MR. LOSCHI: No objection, to restitution.  
 17 THE COURT: I will order the restitution that  
 18 you have agreed to. I will order that you pay all those  
 19 court cost and statutory assessments that are authorized  
 20 by law.  
 21 We will calculate and give you credit for the  
 22 time that you're entitled because of your custody status  
 23 prior to today's sentencing.  
 24 And do you have a no contact order for the  
 25 Court?

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1 MS. GUZMAN: Yes, Your Honor. I believe I --  
 2 THE BAILIFF: It's up there, Your Honor.  
 3 THE COURT: Oh, I see it.  
 4 I will order that you have no contact for the  
 5 duration of this sentence with the victim identified in  
 6 the no contact order: Persons whose initials are HJ.  
 7 And is AJ the daughter?  
 8 MS. GUZMAN: Yes.  
 9 THE COURT: That's the baby?  
 10 MS. GUZMAN: Yes.  
 11 THE COURT: With HJ and AJ and any minor females  
 12 under the age of 18.  
 13 I believe that Judge Nye's sentence was  
 14 initially entered on June 15, 2015. That is a 15-year  
 15 sentence. This is a consecutive 8-year sentence. By my  
 16 rough calculation, this no contact order will not expire  
 17 until approximately June 14, 2038.  
 18 Counsel, if you have reason to think I have  
 19 miscalculated that, if you'd bring that to my attention.  
 20 I just had to do the quick calculation here on the bench.  
 21 State have any other questions about the Court's  
 22 disposition?  
 23 MS. GUZMAN: No, Your Honor.  
 24 THE COURT: Mr. Loschi?  
 25 MR. LOSCHI: No, Your Honor.

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1 THE COURT: Mr. Arbizu, I advise you, sir, that  
 2 you have the right to appeal this judgment and its terms.  
 3 You have 42 days from the written entry of this judgment  
 4 to file that appeal. In that appeal you're entitled to  
 5 be represented by an attorney. If cannot afford an  
 6 attorney, sir, one will be appointed for you at State  
 7 expense. If you are a needy person, the costs will be  
 8 paid for by the State.  
 9 At this point, sir, I do remand you to the  
 10 custody of the Ada County Sheriff for redelivery to the  
 11 proper agent of the state board of correction in  
 12 execution of these sentences.  
 13 That's all I have for you, sir.  
 14 Thank you.  
 15 MS. GUZMAN: State's returning its PSI.  
 16  
 17 (End of proceedings.)  
 18  
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 22  
 23  
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