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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 44958 & 44968
Plaintiff-Respondent,)	
)	ADA COUNTY NOS. CR-FE-2016-7003
v.)	& CR-FE-2016-31420
)	
DAMIAN A. AYARZAGOITIA,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE SAMUEL A. HOAGLAND
District Judge**

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

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STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, in two separate cases Damian Ayarzagoitia pled guilty to one count of aggravated battery with a deadly weapon enhancement, one count of misdemeanor malicious injury to property, three counts of misdemeanor petit theft, and one count of burglary. He received an aggregate unified sentence of forty years, with twenty years fixed.

On appeal, Mr. Ayarzagoitia contends that this aggregate sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He further contends that the district court abused its discretion in failing to reduce his sentence in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motions. Mr. Ayarzagoitia further contends that the district court abused its discretion by ordering the full amount of restitution in light of his inability to pay.

Statement of the Facts & Course of Proceedings

Supreme Court Docket No. 44958 (Ada County district court case number 2016-7003 (*hereinafter*, the aggravated battery case)) and Supreme Court Docket No. 44968 (Ada County district court case number 2016-31420 (*hereinafter*, the burglary case)) have been consolidated for appellate purposes. (R., p.2.)

In the aggravated battery case, in the early morning hours of May 30, 2016, Ryan Garcia Larrimore was stabbed approximately four times about the head and neck with a small knife. (Presentence Investigation Report (*hereinafter*, PSI), p.3.) Each wound was approximately 1 cm in length. (PSI, p.3.) A man came forward and confessed that he and two friends accosted Mr. Garcia Larrimore. (PSI, p.4.) After stabbing Mr. Garcia Larrimore, they had him get into a nearby pond to clean up. (PSI, p.4.) After bathing, Mr. Garcia Larrimore was provided with

clean clothes, but his backpack, clothes, and shoes were thrown into the pond by the three assailants. (PSI, p.4.) Damian Ayarzagotia was identified as one of the men responsible. (PSI, p.4.) Apparently, a leader in the homeless community had put a “green light” on Mr. Garcia Larrimore, presumably this meant that others in the homeless community were obliged to harm him. (PSI, pp.4-5.)

Based on these facts, Mr. Ayarzagotia was charged by information with aggravated battery with a deadly weapon enhancement and a persistent violator sentencing enhancement as Mr. Ayarzagotia had prior felony convictions. (R., pp.54-55, 72-73, 81-82.)

In the burglary case, police were contacted on May 26, 2016, by a business owner about a burglary and vandalism. (PSI, p.5.) A surveillance video showed that Mr. Ayarzagotia and a friend had entered the business, which had been cleaned by a company for which Mr. Ayarzagotia used to work, using a spare key he had made. (PSI, pp.5-6.) While inside the business, Mr. Ayarzagotia and his friend took a laptop computer and poured substances on surfaces and equipment in the office. (PSI, p.5.) Mr. Ayarzagotia was charged by information with one count of burglary, one count of misdemeanor malicious injury to property, and three counts of petit theft. (R., pp.238-239.)

Pursuant to a plea agreement, Mr. Ayarzagotia pled guilty to one count of burglary and one count of aggravated battery. (12/1/16 Tr., p.30, L.5 – p.31, L.1; R., pp.115-124, 246-255.) Initially, as a condition of the plea agreement, the State agreed to dismiss the misdemeanor charges in the burglary case; however, Mr. Ayarzagotia wanted to take responsibility for all of his actions, and insisted on pleading guilty to the misdemeanor charges as well as the felony charges. (12/1/16 Tr., p.6, L.21 – p.9, L.4; p.32, L.10 – p.34, L.5.) In exchange, the State agreed to dismiss the persistent violator enhancement. (12/1/16 Tr., p.6, Ls.8-20; R., pp.123, 254.)

There was no agreement as to sentencing recommendations. (12/1/16 Tr., p.6, L.10 – p.7, L.11; R., pp.123, 254.)

At the sentencing hearing, the State asked the district court to sentence Mr. Ayarzagoitia to forty years. (3/17/17 Tr., p.50, Ls.3-13; p.74, Ls.11-20.) Mr. Ayarzagoitia's counsel asked the district court to place Mr. Ayarzagoitia in a mental hospital or to impose a fixed sentence of ten years, leaving to the court's discretion the amount of consecutive, indeterminate time. (3/17/17 Tr., p.83, L.14 – p.84, L.8; p.91, L.21 – p.92, L.2.) Mr. Ayarzagoitia asked the district court to "impose what [the prosecutor]'s asking for."¹ (3/17/17 Tr., p.92, L.23 – p.93, L.5.)

Mr. Ayarzagoitia was sentenced to an aggregate sentence of forty years, with twenty years fixed. (3/17/17 Tr., p.94, L.17 – p.95, L.2; R., pp.133, 159, 263-267, 289-293.) The court gave the State until August 17, 2017, to submit a restitution request. (3/17/17 Tr., p.46, Ls.3-24.) Although the State failed to submit a restitution request within the time allotted by the court, the district court overruled the defendants' timeliness objections and set the matter for a restitution hearing. (8/24/17 Tr., p.6, L.3 – p.8, L.22.) After a restitution hearing, the court ordered Mr. Ayarzagotia to pay \$59,283.32, jointly and severally with his co-defendants. (Augmentation, pp.35-37.) The court determined the CVCP was owed \$25,000.00 of the \$59,283.32 total, for payments it had made to the medical providers. (1/26/18 Tr., p.36, Ls.2-4; Augmentation, pp.35-37.)

¹ Mr. Ayarzagoitia apparently misunderstood the State's request for a fixed sentence of forty years. Notably, the prosecutor's sentencing recommendation to the district court did not contain the word "fixed" but asked the court to "impose all 40 of those years" or "to impose the full max sentence of 40 years." (3/17/17 Tr., p.50, Ls.14-15.) Further, Mr. Ayarzagoitia suffers from ADHD and other mental health conditions which may have impacted his ability to understand what the prosecutor was asking the court to do. (PSI, p.17.)

Mr. Ayarzagoitia then filed timely *pro se* Rule 35 motions asking the district court to reconsider the sentence in light of his serious mental health conditions. (R., pp.163-170, 299-302.) Mr. Ayarzagoitia asked the court to reduce his aggregate sentence to twenty years, with ten years fixed, and to suspend execution of the sentence in order to commit him to a state hospital for treatment. (R., pp.166, 169.) The district court denied Mr. Ayarzagoitia's Rule 35 motions without a hearing. (R., pp.182-189, 313-320.) Mr. Ayarzagoitia filed *pro se* notices of appeal timely from the judgment of conviction and the district court's order denying his Rule 35 motions. (R., pp.137-141, 175-179, 268-272, 308-312.)

ISSUES

- I. Did the district court abuse its discretion when it imposed an aggregate unified sentence of forty years, with twenty years fixed, upon Mr. Ayarzagoitia following his pleas of guilty to one count of aggravated battery with a deadly weapon sentencing enhancement, one count of misdemeanor malicious injury to property, three counts of misdemeanor petit theft, and one count of burglary?

- II. Did the district court abuse its discretion when it denied Mr. Ayarzagoitia's Idaho Criminal Rule 35 Motions?

- III. Did the district court abuse its discretion in ordering Mr. Ayarzagoitia to pay restitution to the Crime Victims Compensation Program?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed An Aggregate Unified Sentence Of Forty Years, With Twenty Years Fixed, Upon Mr. Ayarzagoitia Following His Pleas Of Guilty To Aggravated Battery With A Deadly Weapon, Misdemeanor Malicious Injury To Property, Three Counts Of Petit Theft, And Burglary

Mr. Ayarzagoitia asserts that, given any view of the facts, his unified sentence of forty years, with twenty years fixed, is excessive. 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. Ayarzagoitia does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Ayarzagoitia must show that in light of the governing criteria, the sentences were 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.*

In light of the mitigating factors present in this case, Mr. Ayarzagoitia’s sentence is excessive considering any view of the facts.

At sentencing, Mr. Ayarzagoitia was only 39 years old, but he has long struggled to manage his mental health conditions. (PSI, p.3, 16-18; 3/17/17 Tr., p.77, L.17 – p.83, L.16.)

Mr. Ayarzagoitia has been diagnosed with ADHD, Intermittent Explosive Behavior Disorder, Tourette's Syndrome, and Borderline Personality Disorder. (PSI, pp.16-18.) He also has a learning disability. (PSI, p.17.) Mr. Ayarzagoitia was first diagnosed with mental health conditions when he was eight years old, and his childhood was spent in psychiatric hospitals and facilities. (PSI, pp.14-15, 17-18.) During his childhood, beginning before he was four years old, Mr. Ayarzagoitia was physically abused, first by his father and then his step-father. (PSI, pp.14-15, 17.) Even during his multiple confinements in psychiatric facilities as a child, Mr. Ayarzagoitia was physically abused—during one such stay his arm was broken, at a different facility his femur was broken. (PSI, pp.17-18.) The Idaho Supreme Court has held that the trial court must consider a defendant's mental illness as a factor at sentencing. *Hollon v. State*, 132 Idaho 573, 581 (1999).

Mr. Ayarzagoitia expressed remorse and accepted responsibility for his actions. (PSI, p.4; 12/1/16 Tr., p.30, L.5 – p.34, L.5; 3/17/17 Tr., p.88, Ls.5-17.) Mr. Ayarzagoitia insisted on pleading guilty to all of the charged offenses, and he wanted the court to know that he wanted to take responsibility for his wrongs. (12/1/16 Tr., p.8, L.24 – p.11, L.8; PSI, p.20.) At his sentencing hearing, Mr. Ayarzagoitia asked the prosecutor to tell the victim that he was sorry. (3/17/17 Tr., p.100, Ls.3-5.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Mr. Ayarzagoitia asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his remorse and serious mental illnesses, it would have imposed a less severe sentence.

II.

The District Court Abused Its Discretion When It Denied Mr. Ayarzagoitia's Rule 35 Motions For Sentence Reduction In Light Of The New Information Offered In Support Of His Rule 35 Motions

Although Mr. Ayarzagoitia contends that his sentence is excessive in light of the information in front of the district court at the time of his March 17, 2017 sentencing hearing (*see* Part I, *supra*), he asserts that the excessiveness of his sentences is even more apparent in light of the new information submitted in conjunction with Mr. Ayarzagoitia's Rule 35 motions. Mr. Ayarzagoitia asserts that the district court's denial of his motions for sentence modifications represents an abuse of discretion.

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.*

In support of his motions for a sentence reduction, Mr. Ayarzagoitia submitted new information regarding the management of his mental health conditions. Mr. Ayarzagoitia is now on medication, a mood stabilizer, but will otherwise not receive mental health treatment while incarcerated. (R., p.165.) Further, he was denied housing in the Behavioral Health Unit (where offenders with serious mental health issues are typically housed). (R., p.165.) Mr. Ayarzagoitia expressed his concern that, without treatment, he might reoffend. (R., p.165.) Mr. Ayarzagoitia asked the court to reduce his sentences from forty years, with twenty years fixed, to twenty

years, with ten years, fixed. (R., p.166.) In light of this new information regarding Mr. Ayarzagoitia's mental health conditions, the district court should have reduced his sentences.

Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear the district court abused its discretion in failing to reduce Mr. Ayarzagoitia's sentences in response to his Rule 35 motions.

III.

The District Court Abused Its Discretion By Ordering Mr. Ayarzagoitia To Pay Restitution To The CVCP

A. Introduction

Mr. Ayarzagoitia asserts the district court abused its discretion by ordering him to pay restitution to the (Crime Victims Compensation Program (*hereinafter*, CVCP)). Specifically, he contends the district court failed to exercise reason in its decision because the district court did not give sufficient weight to Mr. Ayarzagoitia's financial resources, earning ability, and the parameters of the CVCP.

B. The District Court Abused Its Discretion By Ordering Mr. Ayarzagoitia To Pay Restitution To The CVCP

The decision regarding whether to order restitution, and in what amount, is within the district court's discretion and is guided by consideration of the factors set forth in Idaho Code section 19-5304(7). *State v. Richmond*, 137 Idaho 35, 37 (Ct. App. 2002). The issue of causation in restitution cases is a question of fact to be decided by the trial court. *See Cramer v. Slater*, 146 Idaho 868, 875 (2009). The district court's factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence. *State v. Lombard*, 149 Idaho 819, 822 (Ct. App. 2010).

State v. Corbus, 150 Idaho 599, 602 (2011). Substantial evidence is "relevant evidence as a reasonable mind might accept to support a conclusion." *State v. Wisdom*, 161 Idaho 916, 919, 393 P.3d 576, 579 (2017) (quoting *State v. Straub*, 153 Idaho 882, 885 (2013)).

“To determine whether the district court abused its discretion, this Court evaluates whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason.” *Id.*

C. The District Court Abused Its Discretion By Ordering Mr. Ayarzagoitia To Pay Restitution Even Though He Had No Ability To Pay

“‘The decision regarding whether to order restitution, and in what amount, is within the district court’s discretion,’ guided by factors in Idaho Code section 19-5304(7).” *State v. Hurlles*, 158 Idaho 569, 573 (2015) (quoting *State v. Corbus*, 150 Idaho 599, 602 (2011)). The statute provides that the district court “shall” consider:

the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and such other factors as the court deems appropriate. The immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.

I.C. § 19-5304(7). While the statute provides that “immediate inability to pay” shall not alone be a reason to not order restitution, in Mr. Ayarzagoitia’s case, there are additional reasons which make it apparent that the district court failed to reach its decision by an exercise in reason in ordering Mr. Ayarzagoitia to pay \$25,000.00 in restitution to the CVCP.

In its written ruling, the district court recognized Mr. Ayarzagoitia’s present inability to pay the substantial restitution amount, but reasoned, “the present ability to pay is not a critical factor in determining whether a defendant should be ordered to pay restitution.” (Augmentation, p.43.) The district court considered the future earning potential and the severe injuries and trauma to the victim, holding that “the Defendants’ present inability to pay does not preclude a restitution order in this case.” (Augmentation, p.43.) The district court abused its discretion in failing to consider Mr. Ayarzagoitia’s mental illness, his receipt of disability income due to his

mental illness, the voluntary nature of CVCP payments, and the availability of funds to the CVCP from sources other than defendants' restitution payments.

Mr. Ayarzagoitia was sentenced to forty years of imprisonment, with twenty years fixed, at the age of thirty-nine. (R., pp.133-134; PSI, p.3.) He will be eligible for parole when he is fifty-nine, but it is entirely possible he will be incarcerated until he is seventy-nine. (R., pp.133-134.) During his incarceration, "he is prevented from earning any significant amounts of money for restitution." *State v. Bybee*, 115 Idaho 541, 543 (Ct. App. 1989). When he is released from prison, his advanced age will likely make it very difficult for him to find gainful employment. Further, he will likely have to disclose his felony convictions, which also limits his employment options. Along with these hurdles, Mr. Ayarzagoitia has significant mental health issues. He has been diagnosed with ADHD, Tourette's Syndrome, Borderline Personality Disorder, and with a learning disability. (PSI, pp.16-18.) These circumstances greatly limit, if not completely foreclose, Mr. Ayarzagoitia's current and future earning ability. In fact, Mr. Ayarzagoitia receives Social Security Disability for his mental illness, and he has been unable to work for most of his life. (PSI, pp.17, 19.) The district court should have given more weight to these factors in its restitution decision. In light of the significance of these factors, Mr. Ayarzagoitia asserts the district court abused its discretion by ordering him to pay, jointly and severally with his co-defendants, \$25,000.00 in restitution to the CVCP.

D. The District Court Abused Its Discretion By Ordering Mr. Ayarzagoitia To Pay Restitution Where The CVCP's Payments Were Discretionary And The CVCP Receives Alternative Sources Of Income

"Idaho Code § 19-5304(2) authorizes the sentencing court to order a defendant to pay restitution for economic loss to the victim of a crime." *State v. McNeil*, 158 Idaho 280, 283 (Ct. App. 2014). "Victim" means the "directly injured victim," which in turn means "a person . .

. . who suffers economic loss or injury as the result of the defendant’s criminal conduct and shall also include the immediate family of a minor” I.C. § 19-5304(1)(e). Economic loss “includes, but is not limited to, direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct” I.C. § 19-5304(1)(a). The definition of “victim” includes the CVCP, “(e) “Victim” shall mean: . . . (iii) The account established pursuant to the crime victims compensation act, chapter 10, title 72, Idaho Code, from which payment was made to or on behalf of a directly injured victim pursuant to the requirements of Idaho law as a result of the defendant’s criminal conduct.” “Economic loss shall be based upon the preponderance of evidence submitted to the court by the prosecutor, defendant, victim or presentence investigator. . . . [T]he court may consider such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court.” I.C. § 19-5304(6).

Article I, section 22 of the Idaho Constitution denotes a constitutional guarantee of crime victims’ rights as created by statute, and states that victims are entitled “[t]o restitution, as provided by law, from the person committing the offense that caused the victim's loss.” Idaho Const. art. I, § 22.

Mr. Ayarzagoitia recognizes that I.C. § 19-5304 provides that CVCP can be identified as a “victim” and the statute contains language regarding that organization’s entitlement to restitution payments. I.C. § 19-5304. However, Ms. Leah Little from the CVCP testified that the CVCP is not *required* to pay on behalf of an injured person. (1/26/18 Tr., p.50, Ls.1-11.) Further, the CVCP has three funding sources: (1) a federal block grant; (2) fees assessed from misdemeanor and felony defendants; and (3) recovery from criminal defendants paying

restitution. (1/26/18 Tr., p.45, L.12 – p.46, L.23.) In this case, the CVCP voluntarily paid the medical care providers directly. (1/26/18 Tr., p.50, Ls.1-11.)

As Mr. Ayarzagoitia asserted at the restitution hearing:

I've asked my attorney to explain something as far as an objection to the payment of the Victim's Compensation Fund on the basis of the Victim's Compensation Fund made a paid [sic] to the hospital voluntarily. I didn't commit a crime against the Victim's Compensation Fund. I do not believe that I should be ordered to pay them.

I understand that I'd have to pay the hospital and I agree to that. But as far as paying the Victim's Compensation Fund, they chose voluntarily to do that and there's no state law requiring them to do that.

(1/26/18 Tr., p.74, Ls.4-14.)²

Ultimately, CVCP's decision to pay was discretionary and where Mr. Ayarzagoitia does not have the present or future ability to pay, and the CVCP obtains funding from other sources such as a federal block grant and fines assessed of misdemeanor and felony defendants, he asserts that the district court abused its discretion in ordering him jointly and severally liable for compensation to the CVCP for \$25,000.

² The prosecutor acknowledged that Mr. Ayarzagoitia's argument was sound, differentiating between "somebody that suffers and economic loss" and should be compensated versus "somebody that just chooses to pay out money." (1/26/18 Tr., p. 74, L.25 – p.75, L.6.)

CONCLUSION

Mr. Ayarzagoitia respectfully requests that this Court reduce his sentences as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motions be vacated and the cases remanded to the district court for further proceedings. Alternatively, Mr. Ayarzagoitia requests that this Court reduce or vacate the district court's restitution order and remand this case for further proceedings.

DATED this 16th day of May, 2018.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of May, 2018, 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:

DAMIAN A AYARZAGOITIA
INMATE #66184
ISCC
PO BOX 70010
BOISE ID 83707

SAMUEL A HOAGLAND
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas