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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45985
Plaintiff-Respondent,	)	
	)	Elmore County Case No.
v.	)	CR-2016-1094
	)	
COLTON HUNTER MARLEY,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Marley failed to establish that the district court abused its discretion, either by imposing a unified sentence of 10 years, with three years fixed, upon his guilty plea to felony DUI, or by placing him on probation for 10 years?

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

Marley pled guilty to felony DUI (third DUI within 10 years) and the district court imposed a unified sentence of 10 years, with three years fixed, and retained jurisdiction. (R., pp.64-67, 160-63, 196-99.) Following the period of retained jurisdiction, the district court

suspended Marley's sentence and placed him on supervised probation for 10 years. (R., pp.219-28.) Marley filed a notice of appeal timely from the district court's order placing him on probation. (R., pp.229-32.)

Marley asserts his underlying sentence is excessive in light of his substance abuse, "ADHD and Generalized Anxiety Disorder," supportive family, and desire to participate in a rehabilitative program. (Appellant's brief, pp.4-6.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits

prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for felony DUI (third DUI within 10 years) is 10 years. I.C. § 18-8005(6). The district court imposed an underlying unified sentence of 10 years, with three years fixed, which falls well within the statutory guidelines. (R., pp.196-99.) Furthermore, Marley’s sentence is appropriate in light of his ongoing substance abuse and criminal offending, his failure to rehabilitate or be deterred, and the danger he presents to the community.

Marley has a history of disregarding the law and engaging in dangerous criminal behavior. In the seven years preceding the instant offense, he was convicted of burglary, felony possession/purchase for sale of a narcotic/controlled substance, felon in possession of a firearm, “threaten crime [with] intent to terrorize,” possession of over 28.5 grams of marijuana, driving while suspended or revoked for driving under the influence, and five prior convictions for DUI. (PSI, pp.8-12.<sup>1</sup>) In this case, Marley went to a local park and, while under the influence of alcohol, began “driving on the grass and spinning around,” drove “around” three juvenile females, and “brandished a firearm at them before leaving the park.” (R., p.23.) He subsequently ran a stop sign and “nearly struck the wall going underneath the underpass,” then “tailgated a black SUV,” and, when both vehicles stopped, he “began screaming at the driver in the black SUV.” (R., p.24.) Marley proceeded to drive “at an excessive rate of speed” and was traveling approximately “50 MPH in a posted 25 MPH zone” when an officer finally stopped him. (R., p.24.) Marley failed field sobriety tests and refused to submit to breath testing, and the

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “Confidential Exhibits Volume 1.pdf.”

officer located a “Raven 25 Automatic 25 caliber” pistol “wedged in-between” the center console and the front passenger seat of Marley’s vehicle. (R., p.24.)

Marley continued to engage in criminal behavior while this case was pending. He bonded out of jail in May 2016 and, approximately six weeks later, he was charged with providing false information to an investigating law enforcement officer. (R., p.3, PSI, p.13.) He subsequently failed to appear for several court hearings in this case and a warrant was issued for his arrest. (R., pp.3, 5, 54-55.) In August 2016, Marley was charged with robbery, providing false information to an officer, possession of a controlled substance, possession of drug paraphernalia, and theft by receiving/possessing stolen property. (PSI, pp.13-14.) In September 2016, he was charged – in the State of California – with “escape while felony charge is pending” and theft of money/labor/property over \$400.00. (PSI, p.14.) Marley did not again appear in court in this case until January 26, 2017, at which time he signed a waiver of extradition with respect to charges on which he was wanted in the State of Oregon. (R., p.57.) Approximately two months later, while still in the Elmore County Jail, he committed the new crime of injuring jails; he later pled guilty to felony injuring jails as part of the plea agreement that also resolved the charges in this case. (R., pp.142-43, 160-63.)

Marley clearly presents a great risk to the community as demonstrated by his incessant criminal offending and failure to rehabilitate or be deterred. Contrary to Marley’s claim, at sentencing, that he’d “never had programming” (6/22/17 Tr., p.12, Ls.20-21), he told the presentence investigator that he “was in a[n] 18 month program in 2011 or 2012” (PSI, p.19) and attended “DUI classes” (PSI, p.19). Furthermore, Marley told the substance abuse evaluator that he “did not think substance use disorder treatment was needed.” (PSI, p.59.) The presentence investigator determined that Marley presents a high risk to reoffend and recommended

imprisonment, stating, “[I]t is apparent that Mr. Marley hasn’t learned from any of his past experiences. Mr. Marley has charges dating back to June of 2008 and hasn’t stopped since.” (PSI, pp.20, 22.)

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Marley’s sentence. (6/22/17 Tr., p.13, L.2 – p.20, L.1.) The state submits that Marley has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A).

Marley next asserts that the district court abused its discretion by placing him on probation for 10 years “because there is no indication that it would take ten years for [him] to be rehabilitated.” (Appellant’s brief, pp.6-8.) Marley’s claim of an abuse of sentencing discretion is barred by the doctrine of invited error.

A party is estopped, under the doctrine of invited error, from complaining that a ruling or action of the trial court that the party invited, consented to or acquiesced in was error. State v. Castrejon, 163 Idaho 19, 21, 407 P.3d 606, 608 (Ct. App. 2017) (review denied Jan. 4, 2018) (citations omitted). This doctrine applies to sentencing decisions as well as to rulings during trial. Id. The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to take a certain action from later challenging that action on appeal. Id. at 22, 407 P.3d at 609 (citing State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999)).

At the jurisdictional review hearing, Marley’s counsel requested that the district court place Marley on probation. (3/12/18 Tr., p.12, Ls.19-25.) The district court granted the request and placed Marley on probation for 10 years. (R., pp.219-28.) Although Marley had the right to

refuse probation and instead serve his sentence, he did not object to any of the terms of his probation, including the length of probation (see 3/12/18 Tr., p.20, L.5 – p.30, L.22). State v. Gawron, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987) (“[I]f a defendant considers the conditions of probation too harsh, he has the right to refuse probation and undergo the sentence.”). By accepting the conditions of his probation, Marley consented to the probationary period of 10 years. Because Marley requested that the district court place him on probation and consented to the conditions of that probation – including the 10-year term, he cannot claim on appeal that the district court abused its discretion when it granted his request and placed him on probation for 10 years. Therefore, Marley’s claim of an abuse of sentencing discretion is barred by the doctrine of invited error and the district court’s order placing Marley on probation for 10 years should be affirmed.

Alternatively, the 10-year probationary period is reasonable, and should be affirmed, for the same reasons Marley’s underlying sentence is reasonable. (See discussion at pp.3-5, *supra*.)

### Conclusion

The state respectfully requests this Court to affirm Marley’s conviction and sentence and the district court’s order placing Marley on probation for 10 years.

DATED this 29th day of November, 2018.

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

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of November, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

SALLY J. COOLEY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
[documents@sapd.state.id.us](mailto:documents@sapd.state.id.us).

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

# APPENDIX A

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1 THE COURT: Mr. Marley, thank you.  
 2 Mr. Marley, on your pleas of guilty in this  
 3 2016 case, Driving Under the Influence of Alcohol and  
 4 Exhibition of a Deadly Weapon, I'll find that you are  
 5 guilty. I'll enter a Judgment convicting you of those  
 6 offenses.  
 7 In this 2017 case, on your guilty plea to  
 8 this charge of Injury to Jail, I'll find that you are  
 9 guilty. I'll enter a Judgment convicting of that  
 10 offense.  
 11 In sentencing you, Mr. Marley, I'm required  
 12 to balance a number of factors. Those include deterrence  
 13 to you, deterrence to others, rehabilitation, punishment.  
 14 My ultimate goal is to protect the community.  
 15 You have a significant criminal history in  
 16 California, Mr. Marley. I recall you telling me that you  
 17 have minimal contacts with Idaho during one of your plea  
 18 colloquies. I'm not sure what exactly brought you here.  
 19 You appeared before Judge Wiebe for what I think the  
 20 police reports reflect your words were, or your statement  
 21 to the presentence investigator is that you told this  
 22 convenience store clerk you were trying to rob her in a  
 23 nice way. You took lottery tickets from her.  
 24 Judge Wiebe imposed a ten-year sentence, but  
 25 she's retained jurisdiction over you. The State's

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1 recommendation is that I do the same. With some  
 2 reluctance, I'm going to follow that recommendation. I  
 3 don't know that I would have done the same thing if you  
 4 had appeared before me on the other offense.  
 5 Here, Mr. Marley, you're here for your third  
 6 lifetime DUI offense and damaging this camera in the  
 7 jail. The DUI is a dangerous offense, but in this case I  
 8 don't find anything significantly aggravating about your  
 9 blood alcohol level. Your pattern of driving was, of  
 10 course, concerning to me. It's not -- I'm not so  
 11 concerned about the danger you pose that I'm unwilling to  
 12 go along with Judge Wiebe's decision.  
 13 Here's the reality you find yourself in,  
 14 Mr. Marley. You know, sending you into this rider  
 15 program doesn't mean the Court's committing to releasing  
 16 you at the end. It's hard for me -- you know, I've had  
 17 conversations with you on three occasions, totally  
 18 probably 20 minutes at the most. It's an uncertain  
 19 thing, at best, for me to evaluate whether you mean what  
 20 you say.  
 21 I have lots of people who appear before me  
 22 who say things, and whether they mean them at the time or  
 23 they don't, they don't follow through and they wind up  
 24 continuing to live the same kind of life that they've  
 25 been living in the past.

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1 I have some concerns, Mr. Marley, that you  
 2 just want to get through whatever program you need to get  
 3 through, get out, and go back to California and resume  
 4 living the way you were living. That's a choice you can  
 5 make. There's going to be consequences if you do that.  
 6 I don't know how California might respond to continued  
 7 criminal behavior on your part.  
 8 If you are released on probation in Idaho and  
 9 you simply flee, or you violate the terms of your  
 10 probation by committing another law violation, then  
 11 there's a realistic possibility, Mr. Marley, that the  
 12 Court will simply send you to prison in Idaho.  
 13 In Judge Wiebe's case, you're looking at ten  
 14 years. That's a long time; I don't want that for you,  
 15 sir. I'm glad you've been making some steps in the jail  
 16 to think about how you can live differently. I'm not  
 17 telling you this to suggest to you that I view you as a  
 18 bad person. I'm just trying to give you a realistic  
 19 appraisal of where you find yourself in life.  
 20 Mr. Marley, I'll sentence you on the DUI  
 21 charge is 2016-1094 to a period of ten years in the State  
 22 penitentiary. That will consist of three years fixed,  
 23 followed by seven years indeterminate. I will not impose  
 24 a fine. I understand the reason for their request for a  
 25 fine. I think I'd be sad -- lowering your rehabilitation

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1 if I saddle you with some debt.  
 2 I will order you to pay those costs, fees,  
 3 and assessments mandated by statute. I will suspend your  
 4 driver's license. Your license will be suspended for a  
 5 period of two years absolutely. That suspension will  
 6 begin upon your release from incarceration.  
 7 I'll give you credit for the time you have  
 8 served. That calculation will appear in the written  
 9 Judgment, Mr. Marley. I don't have that calculation  
 10 before me now.  
 11 On the Exhibition of a Deadly Weapon, I'll  
 12 sentence you to serve 60 days in the county jail. I'll  
 13 give you credit for the 60 days as have been serve --  
 14 having been served. I will waive court costs on that  
 15 count and not impose a fine. The 60 days in the  
 16 Exhibition of a Deadly Weapon offense will run  
 17 concurrently. Given the way credit for time served is  
 18 calculated now, I'm not sure that matters, but in the  
 19 event it does, it runs concurrently with the DUI offense.  
 20 On the Injury to Jails charge in the 2017  
 21 case, I will sentence you to serve five years in the  
 22 State penitentiary. That will consist of zero years  
 23 fixed, followed by five years indeterminate.  
 24 In this case, the sentence in the 2017 case  
 25 will run consecutive to the sentences in the 2016-1094,

17  
 1 and consecutive to Judge Wiebe's sentence in 2016-1873.  
 2 The sentences in -- for DUI and Injury to Jails in the  
 3 2016-1094 will be concurrent to Judge Wiebe's sentence in  
 4 CR-2016-1973 [verbatim].  
 5 You have concurrent ten-year sentences,  
 6 Mr. Marley, in the DUI case here and in Judge Wiebe's  
 7 case. You have an additional five years indeterminate  
 8 consecutive to those in this Injury to Jails case. I'm  
 9 hoping that will deter you from making the kinds of  
 10 decisions you've been making for a long time in the  
 11 future.  
 12 Do you have questions about the sentence the  
 13 Court has imposed, Mr. Marley?  
 14 THE DEFENDANT: So, what would that -- what  
 15 does that mean, the -- do I do the five and five or do I  
 16 do the three and seven, if I have to do it? I'm just  
 17 wondering.  
 18 THE COURT: Those -- those sentences run at  
 19 the same time, Mr. Marley. So, in -- if you went to  
 20 prison in this DUI offense, you would be eligible for  
 21 parole after three years. You may not be eligible for  
 22 parole in that other case until after five. Part of that  
 23 depends on when the sentences were imposed and how much  
 24 credit you have for time served. Basically that's how  
 25 that would work.

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 1 work?  
 2 THE DEFENDANT: Yes, Your Honor.  
 3 THE COURT: All right. I'm following that  
 4 recommendation because you've indicated that you kind of  
 5 want to learn a way to make different decisions in the  
 6 future. I think you can get some tools that will help  
 7 you.  
 8 You're going to have to commit yourself to  
 9 following the rules, Mr. Marley. This -- you've been in  
 10 custody in several places over your life. You know as  
 11 much as I do, there's lots of people in jails and prisons  
 12 who don't want you to be successful or don't care if you  
 13 are, that are simply interested in getting you to go  
 14 along with their behavior.  
 15 They'll want you to screw around with the  
 16 security equipment, or violate the rules, or barter food,  
 17 or -- you know all the ways that people can get in  
 18 trouble in custody, Mr. Marley. And if you fall into  
 19 that group, if you engage in that kind of behavior, I'm  
 20 going to take it as a sign that you're simply kind of  
 21 going through the motions and you don't really have any  
 22 interest in following society's rules when you get out.  
 23 So, I encourage you to tell those people no,  
 24 and put your head down and do some work. Learn something  
 25 and then look forward to getting out at the end of the

18  
 1 THE DEFENDANT: All right.  
 2 THE COURT: Did that answer your question,  
 3 sir?  
 4 THE DEFENDANT: Yeah. Yes, Your Honor.  
 5 THE COURT: Feel free to talk with your  
 6 attorney about the practical realities.  
 7 In these cases, I will retain jurisdiction  
 8 over you, in both the 2017 case and the 2016 case. I'll  
 9 order those sentences into execution immediately, but I  
 10 will retain jurisdiction. That means that for the first  
 11 year that you're serving this sentence, I will have the  
 12 ability to suspend the rest of the sentences and release  
 13 you onto probation.  
 14 I'm certainly willing to consider that  
 15 possibility, Mr. Marley.  
 16 You're going to be placed in a rehabilitation  
 17 program in the Department of Corrections. At the end of  
 18 that program, the Department of Corrections will give me  
 19 a report about how well you've performed. You and your  
 20 attorney, and the State's attorney, will have a chance to  
 21 present additional evidence. And at that time, I'll  
 22 decide whether I'm willing to release -- release you from  
 23 prison on these cases, or I'll simply require that you  
 24 serve the remainder of these sentences.  
 25 Do you understand how that program would

20  
 1 program.  
 2 Questions about that, sir?  
 3 THE DEFENDANT: No, Your Honor. Thank you.  
 4 THE COURT: You're welcome. Good luck to  
 5 you.  
 6 Oh, yes. I will -- on the Injury to Jail  
 7 charge, I'm not imposing a fine.  
 8 Thank you, Madame Clerk.  
 9 I will order you to pay those costs, fees,  
 10 and assessments mandated by statute in that case as well.  
 11 Mr. Marley, you have the right to appeal  
 12 the -- both of these Judgments of Conviction, these  
 13 sentences to the State Board of Correction. That appeal  
 14 must be taken within 42 days of today's date. In that  
 15 appeal, you have the right to the assistance of an  
 16 attorney. Because you are indigent, your -- the costs of  
 17 your attorney and the costs of the appeal itself will be  
 18 paid for by the State.  
 19 Do you understand your appeal rights?  
 20 THE DEFENDANT: Yes, Your Honor.  
 21 THE COURT: All right. Good luck to you,  
 22 sir.  
 23 THE DEFENDANT: Thank you.  
 24 THE COURT: You're welcome.  
 25 Counsel, thank you again. Anything else we