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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46094-2018**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-34113**
	)	
BRITIAN LEE BARR,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Britian Lee Barr appeals from his judgment of conviction for five counts of sexual exploitation of a child. Barr contends the district court abused its discretion by not recognizing it could designate some portions of the five consecutive 15-year sentences as indeterminate, and by not recognizing it could run those sentences concurrently. Barr additionally claims, for the first time on appeal, that the mandatory minimum sentencing scheme set forth in Idaho Code section 19-2520G is unconstitutional.

Statement Of The Facts And Course Of The Proceedings

In March 2017, a detective with the "Internet Crimes Against Children Taskforce was investigating the downloading and sharing of child pornography" on a "peer to peer network." (R., p.71.) Based on that investigation law enforcement determined that I.P. addresses connected to Barr showed "thousands of downloads of child pornography." (R., p.71.) Detectives obtained search warrants and, after searching Barr's room at a local homeless shelter, "they found computer storage devices," among other things. (R., p.72.) Barr was later found at the library and arrested; detectives secured an additional warrant for Barr's backpack and the "laptop, [Barr's] cell phones and computer storage devices" found inside it. (R., p.72.) A forensic analysis of those devices showed they contained hundreds of photos and videos of child pornography. (R., p.73.) Barr admitted to officers that he had been downloading child pornography. (R., pp.72-73.)

Barr was charged with five counts of sexual exploitation of a child based on five of the videos that were recovered. (R., pp.34-36.) The state additionally filed an

Information Part II alleging that Barr was a repeat sex offender, and, as such, was subject to mandatory minimum sentences per I.C. § 19-2520G.[1] (R., pp.48-49.)

The state's "[l]ast and best" settlement offer prior to trial was a proposed binding Rule 11 agreement, contemplating a 50-year sentence with 20 years fixed. (R., p.138.) The tentative agreement was forwarded to the district court for its review. (See R., p.46.)

The proposed agreement was taken up at a December 28, 2017 hearing. (R., p.50.) The agreement apparently envisioned that Barr's sentence would run concurrent with additional time he was facing for a probation violation. (See 12/28/17 Tr., p.6, L.4 – p.8, L.9.) The district court had questions regarding how this would work in light of the mandatory minimum sentencing enhancement:

> [THE COURT:] Then the other question that I had, counsel, on subsection 3E of this agreement on page two, it talks about the sentences running concurrent to any other cases the defendant is serving time on. And when I reviewed Idaho Code Section 19-2520(G), it seemed to indicate that it must run consecutive to any other sentence imposed by the court and it doesn't cite any prior sentence. It says any other sentence imposed by the court, but that section would apply to the first part of the sentence, not the second part of the sentence.
>
> And so I didn't do any research beyond looking at the code section, but it struck me as this deal might not work out the way you guys had planned based upon the language in the statute, but I'm not entirely certain that the language applies.
>
> The very last sentence. 2520(G). It says: "Any sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court."
>
> The words "any other" certainly carry a fairly broad interpretation. I mean, "any other" means, any other.

---

[1] The state also filed additional charges in a separate case, CR-17-38164, which was initially consolidated with this case below. (See R., pp.32-33.) The state ultimately dismissed case CR-17-38164 as part of its plea bargain with Barr. (5/5/18 Tr., p.5, Ls.1-2.)

So based on that, I wasn't quite sure if we wanted to proceed this morning.

[Prosecutor] MR. DINGER: Your Honor, there is some case law on this. What the case that I've seen is that's kind of talking about the different counts, that they have to run consecutive one to another. I've never seen anything on whether, you know, he has another case out there with a probation violation and it has to run concurrent to that.

I think I said "consecutive." I mean, concurrent.

There is case law from the Court of Appeals that says, you know, if you plead to two counts, it has to be 30 years. It has to be 15 plus 15.

So that's—so my reading of that is why we only filed the enhancements in the one case and not the other so that we could arrive at this. And it's not my reading that it has to run consecutive to his probation violation.

THE COURT: Well, it does say "any other sentence imposed by the court." And I guess where I kind of struggle is it doesn't say "any other sentence previously imposed." And it doesn't say "any other sentence imposed by the court at the same time as this sentence" or whatever. It leaves some ambiguity in there.

MR. DINGER: And we are asking this to run consecutive to the second case. So that's not a problem because it's just the—I guess it's just the probation violation.

THE COURT: I think the second case was running consecutive to this case.

MR. DINGER: Sure.

THE COURT: So I just didn't know. I read it far enough to think I wanted to address it with counsel at the hearing to see if you guys want to look at this further before proceeding, or if you just want to proceed. And if so, obviously we still need to go through the Info Two part and parcel process.

MR. DINGER: The case law that I've read, Your Honor, is that is referring to different counts. And I'm comfortable going forward, but certainly I'd defer to the court and [defense counsel] Mr. Stewart.

THE COURT: What do you think, Mr. Stewart?

(12/28/17 Tr., p.5, L.5 – p.7, L.19.)

Barr's attorney agreed that Idaho case law[2] showed that different counts "have to run consecutive one to another":

> MR. STEWART: Your Honor, *I'm trying to pull up the case that I—that is on point to this issue*. And—
>
> THE COURT: There is a case on point?
>
> MR. STEWART: Well, not exactly on point, *but it's referring to how the sentencings of each count needs to run consecutive to each other*. It didn't say anything about prior sentencings. How that plays any affect. I think that's the same case that counsel has cited where *it just talks about each count has to run consecutive to each other in the case at sentencing if there's an enhancement.* I think the way we formulated it and looking at the statute and the case law, I think it's not an illegal sentence.
>
> THE COURT: All right.

(12/28/17 Tr., p.7, L.20 – p.8, L.10 (emphasis added, paragraph break altered).) Barr rejected the state's offer of a 20-year fixed sentence on January 25, 2018. (R., p.138.) The case proceeded to trial.

On the second day of trial Barr decided to plead guilty. (5/15/18 Tr., p.4, Ls.7-14.) The state's prior offer was now off the table; as such, Barr now agreed to plead guilty to all five counts and to admit to being a repeat sex offender. (See 5/15/18 Tr., p.4, L.18 – p.5, L.2.) Everyone below—including the state, Barr, Barr's counsel, and the

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[2] The state and Barr seemed to be referring to State v. Morton, an unpublished opinion in which the Court of Appeals affirmed that the language of I.C. § 19-2520G means what it says: that "any sentence imposed under the provision of this section shall run consecutive to any *other sentence* imposed by the court," which by definition includes additional sentences imposed under 19-2520G. 2016 WL 6677881 at *2 (2016). Barr tut-tuts the prosecutor for "improperly cit[ing]" this case at sentencing (Appellant's brief, p.16, n.7), but this one-way admonishment ignores the entire exchange in which his own attorney approvingly cited the same case (see 12/28/17 Tr., p.7, L.20 – p.8, L.9).

district court—understood that this meant that Barr would be subject to five consecutive 15-year sentences. (5/15/18 Tr., p.4, Ls.15-25; p.15, Ls.14-19; p.33, Ls.22-25.)

The first person to put this shared understanding on the record was Barr's own counsel:

> THE COURT: Mr. Stewart, if you would please, put the material terms of the plea bargain agreement on the record.
>
> MR. STEWART: Yes, Your Honor. Mr. Barr, will be pleading guilty to five counts of sexual exploitation of a child; all counts are in case number ending 34113. He will also plead to the repeat sex offender enhancement. So there's a minimum mandatory 15 years *for a total of 75 years minimum for all five counts*.

(5/15/18 Tr., p.4, Ls.15-25 (emphasis added, paragraph break altered).)

Barr's counsel affirmed that he "review[ed] the plea bargain agreement" with his client and "explain[ed] the consequences" to him. (5/15/18 Tr., p.7, Ls.6-8.) Barr himself affirmed that he understood that, if he did not go to trial, he would face "essentially 75 years fixed time in prison." (5/15/18 Tr., p.10, L.21 – p.11, L.6.) Barr likewise affirmed he understood "that the court virtually would have no discretion in the final sentence because of the Information Part Two" and that he understood the court could not "reduce the sentence or make it run concurrently or anything like that." (5/15/18 Tr., p.16, Ls.14-21.) Following a thorough colloquy Barr pleaded guilty to all five counts and admitted the sentencing enhancement. (5/15/18 Tr., p.21, L.13 – p.25, L.25.)

In light of everyone's understanding that Barr would be sentenced to five consecutive 15-year fixed sentences, the district court asked whether they should just proceed to sentencing that day:

> I could order another mental health evaluation or things of that nature. *But to the extent that the sentence is fixed, it doesn't seem to me that ordering the presentence report or the rest of these materials is able to have much impact on what I can do* or what I might need to make a final decision. My point is here that I have accepted the defendant's guilty plea. I truly believe that it's been given freely and voluntarily, knowingly and intelligently, etcetera.
>
> So I'd like to hear from counsel as to whether we should just proceed with the sentencing right now or whether you want to go through the process of getting a PSI, a PSE and mental health review, that kind of stuff. I don't see what we get out of that and it seems like almost a waste of time and money because this is not the kind of a sentence that I have any real discretion in.
>
> So, Mr. Stewart.

(5/15/18 Tr., p.30, L.22 – p.31, L.15 (emphasis added).) As it happened, defense counsel agreed with the district court:

> MR. STEWART: Your Honor, *if the court is inclined to just sentence him to the minimum mandatory*, I think we can go forward today. If the court is inclined to do more *than the 75 years*, then I think we need—
>
> THE COURT: Can I do more?
>
> MR. DINGER: I don't believe so.
>
> THE COURT: I don't think so either.
>
> MR. STEWART: Okay.
>
> THE COURT: I think the underlying offenses without the Information Part Two enhancement is a maximum ten years. I think without the Information Part Two, then I would have, let's say, a maximum range of zero to 50 years combined.
>
> So in theory I could impose a less straight sentence, *but with a mandatory minimum being 15 years fixed on each count, consecutive, I don't know that I really have much discretion*.
>
> So I'm just not sure what's the point of ordering these additional things. Having said that too, all of those materials are available and I could read

> the old documents and things of that nature, but even doing that, I don't see how that does any good more or less.
>
> MR. STEWART: *I agree, Your Honor*. We can move forward today.
>
> THE COURT: Mr. Dinger, what are your thoughts here?
>
> MR. DINGER: Your Honor, I agree.

(5/15/18 Tr., p.31, L.16 – p.32, L.17 (emphasis added).)

Prior to the imposition of the five 15-year sentences, defense counsel again alluded to their fixed nature, when he opined that "*[n]ow that [Barr's] going to prison for essentially the rest of his life*, I think that's part of the consequences that he's got to follow and he understands that." (5/15/18 Tr., p.34, L.23 – p.35, L.1 (emphasis added).) When the district court asked defense counsel, "is there any legal cause you can think of why we should not proceed with the sentencing at this time," defense counsel responded "No." (5/15/18 Tr., p.37, Ls.19-22.)

The district court accepted Barr's pleas. (5/15/18 Tr., p.37, L.23 – p.38, L.3.) After expressing some "frustration with mandatory minimum sentences" the court concluded with the following:

> I impose a sentence because this is what the law requires it. While the offenses committed by the defendant are highly offensive and contribute to the making and spreading of vile child pornography and exploitation of children.
>
> The sentence in this case—I do think it would be possible for me to fashion a sentence that was not as severe if I had the discretion to do so, but I don't have that discretion and I can only assume by virtue that the law that we have is based upon a fundamental finding that Mr. Barr and other defendants in similar circumstances are a danger to the community and must be imprisoned for the safety of the community and/or to serve the objectives of punishment or retribution. And finally to whatever effect it might have to that general deterrence; that is, sending a message to others that this is what could happen.

> So in that regard because the legislature has determined what is reasonable, fair and just, the court finds on the basis of the legislature's declaration and law that it is as a matter of law reasonable, fair and just.

(5/15/18 Tr., p.39, L.1 – p.40, L.2; p.41, Ls.4-25.)

The district court sentenced Barr to five consecutive 15-year fixed sentences. (R., p.189.) He timely appeals. (R., pp.196-98.)

ISSUES

Barr states the issue on appeal as:

> Section 19-2520G requires a mandatory minimum unified sentence of fifteen years for each of the five counts; however, did the district court err in concluding that it lacked any discretion to impose an aggregate sentence less harsh than 75 years fixed?

(Appellant's brief, p.5)

The state rephrases the issues as:

I. Did Barr invite any error below by inducing and acquiescing to the district court's conclusions that the five 15-year sentences would need to be fixed and run consecutive to each other?

II. In light of the plain meaning of the statute and controlling case law, Has Barr failed to show the district court abused its discretion by concluding that the statute mandates a fixed sentence consecutive to any other sentence imposed by the court?

III. Has Barr failed to preserve his claim of constitutional error and, even if preserved, does it fail on the merits because Barr fails argue, much less show, fundamental error?

ARGUMENT

I.
Barr Invited Any Error Below By Inducing And Acquiescing In The District Court's Conclusions That The Five 15-Year Sentences Would Need To Be Fixed And Run Consecutive To Each Other

Everyone below—the district court, the state, and Barr—agreed that the district court did not have discretion to run Barr's five sentences concurrently or to set any indeterminate time. (5/15/18 Tr., p.4, Ls.15-25; p.15, Ls.14-19; p.33, Ls.22-25.) On appeal Barr abandons that position and reverses course: he now claims that the district court abused its discretion because it failed to perceive it *could have* run his sentences concurrently or fixed some smaller portion of them. (Appellant's brief, pp.8-20.)

As a threshold matter, if there was any error, Barr invited it below. Barr repeatedly induced and acquiesced in the district court's conclusion that the five 15-year sentences were required to be consecutive and fixed. (12/28/17 Tr., p.7, L.20 – p.8, L.9; 5/15/18 Tr., p.4, Ls.15-25; p.31, L.16 – p.32, L.13; p.34, L.23 – p.35, L.1.) To the extent the district court erred by agreeing with Barr and concluding it had no discretion, it was an invited error that cannot form the basis of his direct appeal.

"The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error." State v. Norton, 151 Idaho 176, 187, 254 P.3d 77, 88 (Ct. App. 2011) (citing State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993)). It seeks to prevent a party who "caused or played an important role in prompting a trial court" to make a particular decision from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). "One may not complain of errors one has consented to or acquiesced in."

Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998)).

Barr had every opportunity below to unveil his claims that the district court had the discretion to run concurrent or indeterminate sentences. The first opportunity came at the pre-trial conference, where the parties spent five minutes discussing the minutiae at the core of this appeal: I.C. § 19-2520G and its requirement that "[a]ny sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court." (12/28/17 Tr., p.5, L.5 – p.8, L.9.)

Barr's counsel weighed in on this exact issue and instead of arguing that the court had the discretion to run concurrent sentences he stated the opposite—that Idaho case law *required* the sentences to be consecutive. (See 12/28/17 Tr., p.7, L.20 – p.8, L.9.) Barr claimed that there was a case, which he thought was more or less "on point," that talked "about *each count has to run consecutive to each other in the case at sentencing* if there's an enhancement." (12/28/17 Tr., p.7, L.20 – p.8, L.6 (emphasis added).) Because Barr instructed the district court there was Idaho case law that said "the sentencings of each count need[] to run consecutive to each other" he cannot now claim the district court "misperce[ived]" its discretion or otherwise erred. (Appellant's brief, p.6.) If there was any "misperception" below Barr unmistakably invited it.

Similarly, Barr ignored every opportunity at sentencing to argue that the district court could fix less than 75 years total. (See 5/15/18 Tr.) Instead, defense counsel talked about the opposite: he said Barr would be "plead[ing] to the repeat sex offender enhancement," and "[s]o there's a minimum mandatory 15 years *for a total of 75 years*

minimum for all five counts." (5/15/18 Tr., p.4, Ls.22-25 (emphasis added).) There is no doubt defense counsel's arithmetic meant 75 years *fixed* time—this is precisely why counsel, like everyone else, agreed that ordering any presentence materials would be unnecessary. (See 5/15/18 Tr., p.32, Ls.4-14.) And this is why defense counsel stated that Barr was "going to prison for essentially the rest of his life"—because defense counsel, like everyone else, understood that 75 years of fixed time is the equivalent of a life sentence. (See 5/15/18 Tr., p.34, Ls.23-24.)

Despite all the opportunities Barr's counsel made no noises below that the district court had any discretion to run the sentences concurrently or to fix less than 75 years. (See 12/28/17 Tr.; 5/15/18 Tr.) Instead, Barr's counsel actively induced the district court to think it had no discretion: he referred to a "mandatory minimum" that he calculated as "75 years minimum for all five counts"; purported there was case law holding that a "sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court"; referred to his client going to prison "for essentially the rest of his life"; and requested that no presentence investigation be done as a result. (12/28/17 Tr., p.7, L.20 – p.8, L.9; 5/15/18 Tr., p.4, Ls.15-25; p.31, L.16 – p.32, L.17; p.34, L.23 – p.35, L.1.)

In sum, Barr led the district court to believe that it had no discretion in imposing the sentences with fixed consecutive time—and at the very least Barr acquiesced in the understanding, shared by everyone below, that the district court had no discretion. Because Barr invited any error below he cannot now raise this purported error on appeal.

II.

In Light Of The Plain Language Of The Statute And Idaho Precedent, Barr Fails To Show The District Court Abused Its Discretion By Concluding That The Statute Mandates A Fixed Sentence Consecutive To Any Other Sentence Imposed By The Court

A. Introduction

Contrary to everything he said below, Barr argues on appeal that the district court actually had the discretion "to run [his] fifteen-year sentences concurrently with each other." (Appellant's brief, p.15.) And contrary to everything he indicated below, Barr now argues that the district court had the additional discretion to "designate the indeterminate and determinate portions of Mr. Barr's fifteen-year sentences." (Appellant's brief, p.8 (capitalization altered, underlining omitted).) Barr claims the court erred by not sua sponte discovering these newly found wellsprings of discretion; as he puts it, the district court "misperce[ived] that it lacked discretion to impose any less severe sentence." (Appellant's brief, p.6.)

Barr fails to show error on both fronts. First, the district court correctly concluded that it could not run the sentences concurrently because Section 19-2520G's plain language plainly forbids it: the statute states that "Any sentence imposed under the provisions of this section shall run consecutive to *any other sentence* imposed by the court." I.C. § 19-2520G(3) (emphasis added). Because the statute's plain language mandates that sentences shall run consecutive to *any other* sentence, without limitation, and because the five sentences here were other sentences, they were required to run consecutively.

Regarding Barr's determinate-time argument, it has already been addressed and abjured by the Idaho Court of Appeals. In State v. Ephraim, the Court held in no

uncertain terms that "I.C. § 19-2520G, requires that the mandatory minimum sentence be served in confinement and, as such, is a 'fixed' or determinate sentence." 152 Idaho 176, 179, 267 P.3d 1291, 1294 (Ct. App. 2011). Barr purports that that case was "wrongly decided and should be rejected or overruled" but he does not come close to showing that. (See Appellant's brief, pp.8-14.)

Because the statute and the controlling case law required Barr's sentences to be fixed and run consecutively he fails to show an abuse of discretion.

B. Standard Of Review

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004).

When an appellant alleges an abuse of discretion on appeal, "the appellate court must determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. State v. Villavicencio, 159 Idaho 430, 437, 362 P.3d 1, 8 (Ct. App. 2015). Where a district court does "not recognize the scope of its discretion" Idaho's appellate courts have "remand[ed] to allow the district court to reconsider the motion to correct the illegal sentences with knowledge of the full scope of its discretion." Id.

C. Per The Plain Language Of Section 19-2520G, The Sentences Were Required To Run Consecutively

The objective of statutory interpretation is to give effect to legislative intent. State v. Pina, 149 Idaho 140, 144, 233 P.3d 71, 75 (2010); Robison v. Bateman-Hall, Inc., 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because the best guide to legislative intent is the wording of the statute itself, the interpretation of a statute must begin with its literal words. Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011); State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The words of a statute "'must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'" Verska, 151 Idaho at 893, 265 P.3d at 506 (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." Id. (quoting City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

The language of Section 19-2520G is plain. "*Any* sentence imposed under the provisions of this section shall run consecutive to *any other sentence* imposed by the court." I.C. § 19-2520G(3) (emphasis added). The requirement that "[a]ny" enhanced sentence run consecutive to "any other sentence" is all inclusive; "any other sentence" means *any* sentence, irrespective of whether it was ordered under I.C. § 19–2520G or not. In other words the statute simply means what it says; and as such the five sentences here were required to run consecutively.

Barr eschews the literal reading and instead adopts a literary reading. He submits that "[t]he statute mandates *only* that each of the mandatory minimum sentences run consecutive to 'any *other* sentence imposed by the court,' meaning consecutive to any sentence *other than* a mandatory minimum sentence imposed under the provision of the statute." (Appellant's brief, p.16 (emphasis in original).)

Of course, this fanciful version looks nothing like the "plain language" of the text, insofar as it shoves in new language that was never there to begin with. The statute does not say "any sentence *other than a mandatory minimum sentence imposed under the provision of the statute*," as Barr commodiously reads it. (Compare Appellant's brief, p.16 (emphasis altered) with I.C. § 19-2520G(3).) And had the legislature wished for the statute to apply to "any sentence other than a mandatory minimum sentence imposed under the provision of the statute" it could have written that instead. It did not. See I.C. § 19-2520G(3).

Because Barr's fictive gloss cannot be found in the text he fails to show he is grappling with its "plain language" at all. Much less does he show error.[3] The district court correctly concluded, based on the statute's plain language, that the sentences here were required to run consecutive to each other—because that is what the statute says. (12/28/17 Tr., p.5, Ls.8-11; 5/15/18 Tr., p.15, Ls.14-18.)

[3] Barr's alternative argument that the statute is ambiguous and subject to interpretation (Appellant's brief, pp.19-20) fails for the same reason: because the statute is plain and unambiguous it should not be improvisatorially "construed" by reading things into it that are not there. Verska, 151 Idaho at 893, 265 P.3d at 506.

D. Binding Idaho Caselaw Has Already Affirmed That Section 19-2520G Requires That Sentences Imposed Under It Must Be Determinate Sentences

Barr additionally claims that the district court "misinterpret[ed]" Section 19-2520G because it "failed to perceive its discretionary authority to order that a portion of the fifteen-year sentences be indeterminate." (Appellant's brief, pp.6-7.) As it happens, the Idaho Court of Appeals has already addressed this very issue and resolved it: the Court has concluded that "the language of the statute here, I.C. § 19-2520G, requires that the mandatory minimum sentence be served in confinement and, as such, is a 'fixed' or determinate sentence." Ephraim, 152 Idaho at 179, 267 P.3d at 1294.

In Ephraim the Court of Appeals considered and rejected arguments that were nearly identical to the ones Barr makes now. Ephraim argued, as does Barr, that "the district court has discretion to designate an indeterminate and a determinate term of [a] fifteen-year sentence" imposed pursuant to Section 19-2520G. Id. at 177, 267 P.3d at 1292. And Ephraim argued, much like Barr, that "the legislature did not intend to remove from the courts the ability to set both an indeterminate and determinate portion of the sentence," because, if it had, "the legislature would have used the word "fixed" to describe its intention." Id. at 178, 267 P.3d at 1293.

The Court of Appeals was not persuaded. Citing State v. Patterson, 148 Idaho 166, 219 P.3d 813 (Ct. App. 2009), the Court explained why these arguments failed:

> ... [I]n Harrington we stated that, "where there has been no legislative action declaring a mandatory minimum term of imprisonment, thusly canceling a court's power to suspend sentences, such power to suspend should be preserved." Harrington, 133 Idaho at 566 n. 5, 990 P.2d at 147 n. 5. We then concluded [in Patterson] that, where the statute dictates that a sentence be for a term of "confinement," it was clear that "the legislature's unambiguous intent that its violation result in actual imprisonment." Patterson, 148 Idaho at 169, 219 P.3d at 813.

> We reach the same conclusion here. Although I.C. § 19–2520G does not use the language "fixed," we reject Ephraim's assertion that the word "fixed" is required for a statute to set forth a mandatory, determinate sentence. In this instance, *the statute requires a mandatory minimum term of confinement to the custody of the Board of Correction*. In doing so, it invokes the legislative power under Section 13, Article V of the Idaho Constitution which provides that any sentence imposed not be less than the mandatory minimum or that the sentence be reduced. *Accordingly, as in* Patterson*, we conclude that the language of the statute here, I.C. § 19–2520G, requires that the mandatory minimum sentence be served in confinement and, as such, is a "fixed" or determinate sentence.*

Ephraim, 152 Idaho at 179, 267 P.3d at 1294 (emphasis altered). The Ephraim Court therefore found that "the district court did not err by reading I.C. § 19–2520G as a mandatory term of confinement and refusing to set forth an indeterminate term," and affirmed the fifteen-year fixed sentence. Id.

In light of State v. Ephraim the district court was plainly correct when it concluded that the "mandatory minimum" was "15 years *fixed on each count*." (5/15/18 Tr., p.32, Ls.4-7 (emphasis added).) It is axiomatic that "precedent from [the Idaho Supreme] Court and the Court of Appeals is binding upon the district courts in Idaho." State v. Austin, 163 Idaho 378, 381, 413 P.3d 778, 781 (2018) (citing State v. Grist, 147 Idaho 49, 53, 205 P.3d 1185, 1189 (2009) (citing State v. Guzman, 122 Idaho 981, 986, 842 P.2d 660, 665 (1992))); but see Austin, 163 Idaho at 382, 413 P.3d at 782 (finding an abuse of discretion where "the district court understandably relied on "binding precedent, but where its "decision was not consistent with legal standards"). Because binding Court of Appeals precedent makes plain that Section 19–2520G "requires that the mandatory minimum sentence be served in confinement and, as such, is a 'fixed' or determinate sentence," Barr fails to show that the district court "misinterpret[ed]" Section 19-2520G or "failed to perceive its discretionary authority" when it concluded the sentences were

required to be fixed. (Appellant's brief, p.6); Ephraim, 152 Idaho at 179, 267 P.3d at 1294.

On appeal Barr mostly rehashes the same arguments that were rejected in Ephraim. (See Appellant's brief, pp.8-14.) And despite repeatedly foreshadowing that he will reveal why Ephraim "was wrongly decided and should be rejected or overruled" (see Appellant's brief, pp.1, 2, 6), he does nothing of the sort. Barr never explicitly mentions Ephraim's holding or discusses or quotes from (much less rebuts) any of the Court's findings there. (See Appellant's brief.) Nor does he face the fact that the Ephraim Court already expressly rejected many of the rebooted claims that have now resurfaced in his brief. (See Appellant's brief.)

The promised upheaval of Ephraim never materializes; instead, Barr fires a lukewarm parting shot at Ephraim while wrapping up his substantive argument:

> While the district court [here] was mandated to impose a unified fifteen-year sentence[,] it retained discretion to designate what portion of the fifteen years would be determinate. Thus, even if the district court was restrained by, and understandably relied on, the Court of Appeals' holding in *Ephraim* in believing that it lacked discretionary authority to designate a portion of the sentences as indeterminate, its failure to perceive that it had discretion represents an abuse of discretion. *Cf. State v. Austin*, 163 Idaho 378, 382 (2018) ("[A]lthough the district court understandably relied on [binding Court of Appeals' precedent], its decision was not consistent with legal standards [and therefore the district court] abused its discretion ....")[.]

(Appellant's brief, p.14.)

This underwhelms. To show that the district court erred Barr must at least distinguish Ephraim, which the above passage does not even attempt do. Because stare decisis "requires that this Court follow[] controlling precedent," Barr's other option is the daunting task of showing that Ephraim was "manifestly wrong, has proven over time to

be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Owens, 158 Idaho 1, 4-5, 343 P.3d 30, 33-34 (2015) (citing State v. Grant, 154 Idaho 281, 287, 297 P.3d 244, 250 (2013)).

Barr fails to meet this high burden. Ephraim is controlling precedent that is directly on point and resolves this issue. Nearly all of Barr's substantive arguments were expressly rejected[4] by the Ephraim Court; furthermore, Barr fails to show that decision was manifestly wrong, has proven over time to be unjust or unwise, or should be overruled. See Owens, 158 Idaho 1, 4-5, 343 P.3d 30, 33-34. Because the Court of Appeals has already concluded that Section I.C. § 19-2520G "requires that the mandatory minimum sentence be served in confinement and, as such, is a 'fixed' or determinate sentence," Barr fails to show the district court erred by concluding the same. Ephraim, 152 Idaho at 179, 267 P.3d at 1294.

[4] Barr presents three substantive arguments on appeal regarding determinate time: a plain meaning argument (Appellant's brief, pp.8-11), a statutory construction argument (Appellant's brief, pp.11-14), and a rule of lenity argument (Appellant's brief, pp.11-14). The Ephraim Court expressly addressed the plain meaning of Section 19-2520G and expressly rejected the claim that it should be interpreted according to legislative intent. 152 Idaho at 177-79, 267 P.3d at 1292-94. And while Ephraim did not specifically address the rule of lenity that argument nevertheless fails on the merits. Because the statute is plain, there is no need to construe it in the first place, much less apply canons of construction. Verska, 151 Idaho at 893, 265 P.3d at 506.

III.
Barr Failed To Preserve His Constitutional Claim Below; In Any Event, His Claim Fails On The Merits Because He Fails To Argue, Much Less Show, Fundamental Error

A. Introduction

Tagging along with Barr's main argument is a separate constitutional claim: he argues that "[t]he legislature's attempt in section 19-2520G(3) to require courts to run such sentences consecutively goes beyond its constitutional authority," and, Barr thinks, is a "constitutionally impermissible" arrogation of the judiciary's traditional, exclusive discretionary authority to decide whether to run the sentences consecutively or concurrently." (Appellant's brief, p.24.) This argument fails as a threshold matter because it is not preserved. Defendants may not raise a constitutional challenge to a sentence for the first time on appeal. Accordingly, Barr cannot bring his late-breaking constitutional claim for the first time on appeal without arguing fundamental error, which Barr has chosen not to do.

Even if Barr's constitutional claim has not been waived on appeal it fails to show fundamental error. I.C. § 19-2520G is constitutional, and Barr fails to show that its effect of fixing consecutive sentences would constitute an improper deprivation of judicial authority.

B. Standard Of Review

Where the constitutionality of a statute is challenged the appellate court reviews it de novo. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of

constitutionality. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

C. Barr's Never-Before-Made Constitutional Claim Is Not Preserved, And Nevertheless Fails On The Merits Because He Fails To Argue, Much Less Show, Fundamental Error

It is "well established" that Idaho's appellate courts "will not address on appeal" a constitutional "challenge to a defendant's sentence where the trial court was not first given an opportunity to consider the issue." State v. Martin, 119 Idaho 577, 808 P.2d 1322 (Ct. App. 1991) (appellant "failed to raise [a] constitutional argument before the district court, and, accordingly, he cannot now raise it for the first time on appeal"); see also State v. Cortez, 122 Idaho 439, 835 P.2d 674 (Ct. App. 1992); State v. Samora, 131 Idaho 198, 199, 953 P.2d 638, 639 (Ct. App. 1998). In order to raise such a claim for the first time on appeal a defendant would need to show that it "constitute[d] fundamental error." State v. Clontz, 156 Idaho 787, 792, 331 P.3d 529, 534 (Ct. App. 2014)); State v. Drennen, 122 Idaho 1019, 1022-23, 842 P.2d 698, 701-02 (Ct. App. 1992).

Barr never argued below that Section 19-2520G is unconstitutional. (See 12/28/17 Tr.; 5/15/18 Tr.) Barr would accordingly need to argue fundamental error to attack the constitutionality of Section 19-25207G for the first time on appeal. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). He has not done so. (See Appellant's brief.) Because appellants must raise issues in their opening briefing to preserve issues for appeal, Patterson v. State, Dep't of Health &elfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011), any claim of fundamental error challenging the constitutionality of Section 19-2520G has been waived on appeal.

D. Even If It Is Not Waived, Barr's Constitutional Claim Fails On The Merits Because He Fails To Show Fundamental Error

Alternatively, to the extent Barr did not waive a fundamental error challenge, his claim fails on the merits. To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Barr has not established any of these prongs.

First, Barr fails to show any constitutional violation whatsoever. He claims that "[t]he legislature's attempt in [S]ection 19-2520G(3) to require courts to run such sentences consecutively goes beyond its constitutional authority" and "amounts to a constitutionally impermissible intrusion into the judiciary's traditional exclusive discretionary authority to decide whether to run the sentences consecutively or concurrently." (Appellant's brief, p.24.) This argument fails because the Ephraim Court specifically addressed the constitutionality of Section 19-2520G, and expressly affirmed its propriety in the context of determinate sentencing:

> In this instance, the statute requires a mandatory minimum term of confinement to the custody of the Board of Correction. *In doing so, it invokes the legislative power under Section 13, Article V of the Idaho Constitution which provides that any sentence imposed not be less than the mandatory minimum or that the sentence be reduced.* Accordingly, as in Patterson, we conclude that the language of the statute here, I.C. § 19–2520G, requires that the mandatory minimum sentence be served in confinement and, as such, is a "fixed" or determinate sentence. Thus, the district court did not err by reading I.C. § 19–2520G as a mandatory term of confinement and refusing to set forth an indeterminate term.

152 Idaho at 179, 267 P.3d at 1294 (emphasis altered).

Moreover, under the second prong of fundamental error review, Barr must prove that the alleged error "plainly exists." Perry, 150 Idaho at 228, 245 P.3d at 980. An error only plainly exists if, at the time the error was made, it was "clear or obvious." Id. This "necessitates a showing by the appellant that existing authorities have *unequivocally* resolved the issue in the appellant's favor." State v. Hadden, 152 Idaho 371, 375, 271 P.3d 1227, 1231 (Ct. App. 2012) (emphasis in original). Barr cannot make that showing here because, as already demonstrated, the controlling authorities have unequivocally ruled *against* his position: the Ephraim Court found that the statute properly "invoked the legislative power under Section 13, Article V of the Idaho Constitution." See 152 Idaho at 179, 267 P.3d at 1294. And Barr himself sensibly concedes that courts "understandably rel[y]" on binding precedent such as Ephraim. (See Appellant's brief, p.14). Because defense attorneys likewise understandably rely on binding precedent, Barr cannot show that the failure to challenge binding precedent was not a tactical move.

Finally, Barr fails to show any constitutional error was not harmless. Keep this in mind: on appeal Barr has never raised the one claim that would not be barred by invited error or some other self-inflicted procedural hurdle—an argument that the imposed sentence was *excessive*. (See Appellant's brief.) Indeed, he implicitly accepts that the district court had the authority to sentence him to five consecutive fixed 15-year sentences and could potentially give him the same sentence on remand. This is made clear by Barr's request for relief, which only asks for "an instruction that the district court exercise its discretion to decide whether any portion of the unified fifteen-year sentences should be indeterminate, and whether those sentences should be served consecutively or

concurrently." (Appellant's brief, p.25.) Barr's requested relief, on its own terms, leaves the door open for him to receive the exact same sentence on remand.

And while the district court admittedly indicated it thought "it would be *possible* for me to fashion that was not as severe if I had the discretion to do so" (5/15/18 Tr., p.41, Ls.9-11) it never definitively stated it *would have* fashioned such a sentence (see 5/15/18 Tr.). Because Barr has never claimed his sentence was excessive, and has never shown that a different sentence *would be* in the offing for him on remand, he fails to show that any purported errors were not harmless.

In sum, even if not waived, Barr's constitutional claim fails on the merits because he fails to show any fundamental error.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction.

DATED this 9th day of May, 2019.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of May, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KDG/dd