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State v. Barr Appellant's Reply Brief Dckt. 46094

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

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46094-2018**
	)	
v.	)	**ADA COUNTY NO. CR01-17-34113**
	)	
BRITIAN LEE BARR,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY 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

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STATEMENT OF THE CASE

Nature of the Case

This case presents two important questions regarding the correct interpretation of I.C. § 19-2520G – the statute which provides for a mandatory minimum sentence of fifteen years for repeat violations of certain sex offenses. The first question presented is whether the district court has discretion under the statute to designate the indeterminate and determinate portions of the mandatory minimum sentence, a question decided incorrectly in *State v. Ephraim*, 152 Idaho 176, 179 (Ct. App. 2011). The second question is one of first impression and asks whether, in a case where the district court imposes multiple mandatory minimum sentences pursuant to the statute, the court has discretion to decide whether to run those mandatory minimum sentences concurrently with each other.

Britain Lee Barr was 30 years old when he pled guilty to possessing five child pornography videos downloaded from the internet, and being a repeat sex offender (having previously possessed child pornography), subject to the I.C. § 19-2520G's mandatory minimum sentencing provisions. The district court sentenced him to five "fixed and determinate" fifteen-year sentences, to run consecutively to each other, for an aggregate determinate term of 75 years. This sentence means Mr. Barr will be imprisoned until the year 2089; he will be 101 years old at that time.

The district court imposed this sentence because it believed it had no discretionary power or authority to impose a less severe sentence, but stated, "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." (Tr., p.41, Ls.9-12.)

On appeal, Mr. Barr argues that the district court abused its discretion when it failed to perceive its discretion to impose a less severe sentence. He asserts the district court had two opportunities to exercise discretion that would result in a less severe sentence. First, the district court had discretion to designate the indeterminate and determinate portions of the mandatory fifteen-year sentences. Mr. Barr argues that the Court of Appeals decision in *State v. Ephraim,* 152 Idaho 176, 179 (Ct. App. 2011), was wrongly decided and should be rejected or overruled. Second, he argues that the district court had discretion to run his mandatory minimum sentences concurrently.

This Reply Brief is necessary to address the State's assertions in section I of the Respondent's Brief regarding the "invited error doctrine," and to show that the doctrine does not apply in this case. While Mr. Barr *understood* that the district court he would be sentenced to five, consecutive 15-year fixed terms, and while he did not formally object to that sentence, Mr. Barr did not "consciously invite" the district court's legal conclusion that it lacked discretion or authority to impose any lesser sentence. Rather, the *State* was the only party to actually request and encourage the court to impose that sentence, and the only party to assert that a 75-year fixed term was the sentence required by law.

Additionally, this Reply Brief addresses the State's argument, in section III.B of the Respondent's Brief, regarding the preservation of Mr. Barr's constitutional "separation of powers" argument, and to show that this claim, having been raised and decided by the district court, is properly before this Court on appeal.

The State's arguments on the merits, which are set forth in sections II and subsection III.D of the Respondent's Brief, are unremarkable, and Mr. Barr respectfully refers this Court to his the arguments made in his Appellant's Brief as his response.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings are set forth in Mr. Barr's Appellant's Brief. They need not be repeated in this Reply Brief but are incorporated by this reference.

ISSUE

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?

ARGUMENT

Section 19-2520G Requires A Mandatory Minimum Unified Sentence Of Fifteen Years For Each Of The Five Counts; However, The District Court Erred In Concluding That It Lacked Any Discretion To Impose A Sentence Less Harsh Than A Sentence Of 75 Years Fixed

Contrary to the State's assertions in section I of its Respondent's Brief, the doctrine of invited error does not apply in this case because Mr. Barr did not "consciously invite" the district court's error. Also, and contrary to the State's argument in section III.B of its Respondent's Brief regarding the preservation of Mr. Barr's constitutional "separation of powers" argument, Mr. Barr's argument is properly before this Court because it was raised and decided by the district court.

A. The Invited Error Doctrine Does Not Apply

The district court's failure to perceive its discretion regarding Mr. Barr's sentence was not a failure that was invited by Mr. Barr. Therefore, opposite to the State's assertion (Resp. Br., pp.10-12), Mr. Barr's appellate claim is not barred by the invited error doctrine.

Mr. Barr's actions do not fall within the meaning of the invited error doctrine because: (1) he did not "consciously invite" the district court to commit the error; (2) failure to object is not invited error; (3) there is no record of "explicit suggestion, encouragement, or acquiescence" regarding the district court's interpretation of its sentencing discretion; and (4) acknowledgement of the district court's interpretation of the statute is not invited error.

1. Mr. Barr Did Not "Consciously Invite" The Error

Idaho's formulation of the "invited error doctrine" provides that,

> In criminal cases, a defendant may not *consciously invite* district court actions, and then successfully claim these actions are erroneous on appeal. Nor may a criminal defendant successfully allege error in a ruling of the court, when the defendant himself requested the ruling. It has long been the law in Idaho that one

> may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible.

State v. Owsely, 105 Idaho 863, 837-38 (1983) (internal citations omitted) (emphasis added); *accord State v. Abudullah*, 158 Idaho 386, 420-21 (2014) (specially quoting the term "consciously"); and *State v. Hall*, 163 Idaho 744, 771 (2018) (same). The doctrine of invited error applies to sentencing decisions as well as to rulings during trial." *State v. Griffiths*, 110 Idaho 613, 614 (Ct. App. 1983). "The purpose of the invited error doctrine is to prevent a party who *caused* or *played an important role in prompting* the trial court to make a decision from later challenging that decision on appeal." *State v. Adamcik*, 152 Idaho 445, 447 (2012) (quoting *State v. Blake*, 133 Idaho 237, 240 (1999) (internal quotation marks omitted)(emphasis added).

The State argues, "Barr had every opportunity below to unveil his claims that the district court had the discretion to run concurrent or indeterminate sentences." (Resp.Br., p.11.) However, the "opportunity" to assert a claim of error does not equate to "invited error." Moreover, the two opportunities identified by the State – the pretrial conference on December 28th and the sentencing hearing on May 15, 2018 – show that Mr. Barr did nothing to "consciously invite" the district court's error.

a. No Invited Error At The Pretrial Conference

It is true that, at the pretrial conference, the language of the statute became an issue. However, this was an issue raised *sua sponte* by the district court and concerned the application of the language to the parties' then-proposed plea agreement, which called for the sentence to run concurrent to the sentence in a previous probation case. In support of the parties' proffered agreement, the *State* advised the district court of an existing Court of Appeals case to contrast and distinguish the Court of Appeals' case from the present one.

Mr. Barr merely acknowledged there was a case "that just talked about" requiring consecutive sentences. He did not urge the court to conclude that the case was *correctly* decided. Nor did he urge that the case provided authority for interpreting the statute (it did not). Mr. Barr did not urge the case should in any way at any time apply to limit the district court's discretion in his case. On the contrary, his purpose at the time was to argue that this case did *not* apply to him.

The mere acknowledgment that he was aware of a case that "just talked about" requiring consecutive sentences was clearly *not* an invitation to the district court that it use that case *against* him – not then, nor at some different time and context. The State's contrary assertions should be rejected.

Additionally, at the conclusion of the status conference, the judge was still contemplating the limitations of the consecutive sentencing requirement, stating that "any other sentence imposed by the court" carried a "fairly broad interpretation;" that "any other" meant *any* other; but also that the statute "leaves some ambiguity" as to the meaning of "other sentence." By subsequently advising Mr. Barr at that same status conference hearing that "the law *could* require five consecutive 15-year sentences," it is clear the district court had not, as of that date, decided whether the statute left it any sentencing discretion. (*See* 12/28/17 Tr., p.11, Ls.2-15.)

By the time it took Mr. Barr's guilty plea, on May 15, 2018, the district court had reached a conclusion that it had no discretion to impose any less severe sentence than 75 years fixed. There is no record of any explicit statement by Mr. Barr in the intervening months prompting, encouraging, requesting, or otherwise "consciously inviting" the district court to find that the statute deprived the court of all discretion to impose other than concurrent, fixed 15-year sentences.

b. No Invited Error At The Sentencing Hearing

Mr. Barr also did not invite any error in his subsequent plea and sentencing hearing, on May 15, 2018. On the day Mr. Barr ultimately decided to plead guilty, he asked, "I'm just confused with exactly how the process going forward is going to be." (5/15/18 Tr., p.5, Ls.13-14.) The district court answered:

COURT: Well, I can tell you it's as simple as this: If you don't plead guilty …we're going to go forward with the trial.

MR. BARR: Okay.

COURT: If you do plead guilty, then you're facing essentially 75 years fixed time in prison.

MR. BARR: Okay.

COURT: Those are the options you have.

MR. BARR: Okay.

COURT: So which one do you want?

MR. BARR: I'll plead guilty.

COURT: Are you confused about how this works?

MR. BARR: No, Your honor. Not any more.

…

COURT: *You understand that the law requires a mandatory minimum of 15 years each and it's required by law that the sentences be served consecutively*?

MR. BARR: I do, Your Honor.

COURT: And *you understand that* the court virtually would have no discretion in the final sentence because of the Information Part Two?

MR. BARR: I do, Your Honor.

COURT: I couldn't reduce the sentence or make it run concurrently or anything like that. *You do understand that*?

MR. BARR: I do, Your Honor.

(5/15/18 Tr., p.10, L.15 – p.16, L.15.)

Contrary to the State's assertion, this colloquy simply sets forth Mr. Barr's *understanding* of the consequences he faced by pleading guilty; he *understood* that the court believed "that *the law requires* a mandatory minimum of 15 years each *and it's required by law that the sentences be served consecutively.*" (*See* 5/15/18 Tr., p.10, L.15 – p.16, L.15.) There is nothing in the record to show that he encouraged, or consciously invited, the district court in that belief.

The State, on the other hand, actually cited the Court of Appeals' unpublished opinion in *State v. Morton* as *authority* for requiring a mandatory minimum sentence of 75 years fixed, stating:

> Your Honor, I would just ask that you follow the 75 years as spelled out by Idaho 19-2520(G) and *Idaho v. Morton*. It was ruled by the Idaho Court of Appeals, and sentence him to the 75 years.

(5/15/18 Tr., p.33-, Ls.23-26.)

It was the *State's* position that Mr. Barr *should* be sentenced to consecutive fixed terms totaling 75 years; Mr. Barr understood that position and he did not object.

2. The Failure To Object Is Not Invited Error

The State's argument appears to confuse the invited error doctrine with the defendant's failure to object. Idaho's appellate courts do not require that a criminal defendant object to the appropriateness of his sentence when it is pronounced in order to preserve the issue for appeal. *See State v. Clontz*, 156 Idaho 787 (Ct. App. 2014). Additionally, as observed by the Idaho Supreme Court, "a failure to object is not enough to invoke the invited error doctrine." *State v. Lankford*, 162 Idaho 477, 484-85 (2017); *see also State v. Adamcik*, 152 Idaho 445, 447 (2012)

(an appellant who did not encourage the district court to offer the specific instructions given, but merely failed to object, is not precluded by the invited error doctrine from raising an issue on appeal.) Thus, Mr. Barr's failure to object to the district court's misperception of its discretion does not preclude Mr. Barr from challenging his sentence as an abuse of discretion on appeal.

3. No Record Of "Explicit Suggestion, Encouragement, Or Acquiescence" Regarding The District Court's Interpretation Of Its Sentencing Discretion

In *State v. Lankford*, the defendant challenged on appeal the manner in which the trial court had advised the jury regarding the defendant's prior trial. 162 Idaho 447, 484-85 (2017). The State argued on appeal that any error was invited by the defendant. *Id.* The Idaho Supreme Court rejected the State's assertion, and concluded that invited error had not been demonstrated, explaining:

> The State has presented various transcript excerpts and other evidence which suggest that Lankford explicitly agreed to the district court's voir dire advisement regarding the prior trial, the State ultimately concedes that, although discussed between the parties, "there is nothing in the record explicitly stating what [defense] counsel suggested" the court do to handle the issue of the earlier trial. *Because there is no record of explicit suggestion, encouragement, or acquiescence* by Lankford regarding the advisement *and because a failure to object is not enough to invoke the invited error doctrine*, we hold that Lankford's claim is *not* barred and will consider the underlying claim of fundamental error.

Id. (emphasis added).

As in *Lankford*, there is no record of an "explicit suggestion, encouragement, or acquiescence" by Mr. Barr in the district court's legal conclusion that the law requires fixed, consecutive minimum sentences. What is clear is that, on the morning that Mr. Barr decided he could not go forward with the trial and would instead plead guilty, the district court had *already* concluded that, because of the mandatory minimum sentencing statute, it had no authority to sentence Mr. Barr to a term less severe than 75-years fixed. Before taking Mr. Barr's guilty plea that morning, the district court *told* Mr. Barr exactly how it perceived the limitations placed on

its authority, explaining, "*the law requires* a mandatory minimum of 15 years each" and "*it's required by law* that the sentences be served consecutively," and "the court virtually would have *no discretion* in the final sentence." (5/15/18 Tr., p.10, L.15 – p.16, L.12.)

4. Acknowledgement Of The District Court's Interpretation Of The Statute Is Not Invited Error

In *State v. Blake*, the Idaho Supreme Court declined to apply the invited error doctrine to bar a defendant's challenge to jury instructions where the defendant at trial had "concurred" that the instructions were the ones that the trial judge had decided to give, and did not otherwise object on the record. 133 Idaho 237 (1999). The defendant on appeal argued that the trial court had already decided which instructions it would give, and that his counsel was simply acceding because any further argument would be futile. *Id.* The Supreme Court noted there had been an informal conference and the instructions had been discussed, and the trial court provided counsel the instructions it was going to give, along with an opportunity to object on the record. Blake's counsel confirmed that the instruction was the one the court intended and then stated he "concurred" and declined to place any objection on the record. *Id.* at 240. On appeal, Blake challenged the instruction as improper. The Court held that Blake's concurrence had not "invited" the error, and that the judge had already made the decision to give the instruction at a prior informal conference. *Id.*

Similar to the defendant in *Blake*, Mr. Barr did not "invite" the district court to rule that it had no discretion to order a less harsh sentence; he was merely acknowledging the sentence the district court already knew it would impose when Mr. Barr pled guilty. Mr. Barr's statement that he *understood* the court believed it did not have discretion and he understood what sentence the court was going to impose, was not an *invitation* to the court to decide it lacked discretion or authority to do otherwise.

B. Mr. Barr's Separation Of Powers Argument Was Raised And Decided By The District Court And Is Properly Before This Court

Contrary to the State's argument in section III.C of its Respondent's Brief, (Resp.Br., pp.21-22), Mr. Barr's constitutional separation of powers argument is properly raised on appeal, because the issue was raised and decided by the district court.

As a general rule "[i]ssues not raised below will not be considered by this Court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." *State v. Garcia-Rodriguez,* 162 Idaho 271, 275 (2017) (citations omitted). "An exception to this rule, however, has been applied by this Court when the issue was argued to or decided by the trial court." *State v. Duvalt*, 131 Idaho 550, 554 (1998).

Referring to the mandatory minimum sentencing statute in this case, and mandatory minimum legislation in general, the district court stated:

> Those laws are passed by the legislature to essentially usurp the court's ability to impose a sentence that fits both the crime and the criminal. The legislature with a sweeping statute has decided that everybody convicted of the same offenses should be given the same punishment without allowing the judges to weigh the pros and cons, the benefits and detriments, the costs in all regards and in all respects. I personally I [sic] think that's a violation of the constitutional power of judges and the judicial branch of government, but I think those issues have been litigated and the judiciary at higher levels have concluded that mandatory minimum sentencing laws are not a violation of the power – separation of powers doctrine within our constitutions.

(5/15/18 Tr., p.37, Ls.9-34.) Thus, the district court raised the constitutional issue, stating correctly that the legislature's act "usurped" judicial authority in violation of the constitution's separation of powers clause, but then decided, erroneously, that the appellate courts' previous decisions controlled the district court's decision in this case. It is clear that the district court raised the substantive issue of whether the mandatory minimum sentencing provisions section 19-2025G unconstitutionally violated the separation of powers clause, and whether the appellate

court's had previously ruled on this issue. The constitutional issue Mr. Barr raises on appeal is properly preserved by the district court's rulings.

Additionally, in *Ada County Highway District v. Brooke View*, this Court explained that so long as a substantive issue is properly preserved, a party's appellate argument may evolve on appeal, 162 Idaho148, 149 n.2 (2017). In *Brooke View*, the district court had addressed the legal issue the party had raised on appeal, and that party had not changed its legal position toward that distinct issue, even though the specific legal arguments it used to support its position had evolved. The Idaho Supreme Court held that the evolution of specific arguments, specifically, by supplementing the argument with authority, was proper and necessary, noting that "during the time of an appeal, parties will ruminate on issues and case law will be decided that may need to be applied to the specific facts of the case at hand." *Id*. The Supreme Court later noted that "these pragmatic evolutions do not leave room for a party to raise new substantive issues on appeal or adopt a new position on an issue *that the trial court has not had the opportunity to rule on*." *State Gonzales*, 165 Idaho 95, 96 (2019).

In the present case, of course, the district court itself raised the separation of powers issue and ruled on it. Mr. Barr's specific legal arguments exploring the authority for that ruling, and the correctness of it, are properly before this Court on appeal.

CONCLUSION

For the reasons set forth above, and those set forth in the Appellant's Brief, Mr. Barr respectfully requests that the Court vacate his judgment of conviction and remand his case to the district court for resentencing, with the 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.

DATED this 20th day of June, 2019.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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