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State v. Elizarraraz Appellant's Reply Brief Dckt. 46106

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46106-2018**
	)	
v.	)	**ADA COUNTY NO. CR-FE-2012-13853**
	)	
ROBERT CHARLES ELIZARRARAZ,	)	**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

On appeal, Robert Charles Elizarraraz asserts the district court erred when it determined it had the authority to extend a no contact order, and the district court abused its discretion when it amended the no contact order by extending its duration. The plain language of the judicial rule governing the modification or termination of no contact orders, Idaho Criminal Rule 46.2(b), does not authorize a district court to extend the duration of a no contract order.

In its Respondent's Brief, the State argued the district court correctly determined that the plain language of Rule 46.2 gave the court the authority to modify the no contact order by extending its duration, and the district court did not abuse its discretion by extending the no contact order. (*See* Resp. Br., pp.8-15.)

This Reply Brief is necessary to address the State's arguments on the interpretation of Rule 46.2.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Elizarraraz's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

I. Did the district court err when it determined it had the authority to extend the no contact order?

II. Did the district court abuse its discretion when it amended the no contact order by extending the order's duration?

ARGUMENT

I.

The District Court Erred When It Determined It Had The Authority To Extend The No Contact Order

A. Introduction

Mr. Elizarraraz asserts the district court erred when it determined it had the authority to extend the no contact order. The plain language of Idaho Criminal Rule 46.2(b) does not authorize a district court to extend the duration of a no contract order. Further, the plain language interpretation of Rule 46.2(b) would not produce an absurd result.

B. The Plain Language Of Idaho Criminal Rule 46.2(b) Does Not Authorize A District Court To Extend The Duration Of A No Contact Order

The plain language of Idaho Criminal Rule 46.2(b) does not authorize a district court to extend the duration of a no contract order. Subsection (b) of Rule 46.2, entitled "Modification or Termination at Request of Protected Person," provides that, "A protected person named in a no contact order may request modification or termination of that order by filing a written and signed request with the clerk of the court in which the criminal offense is filed." I.C.R. 46.2(b).

The plain, ordinary meaning of the word "termination" in the Rule does not authorize the extension in time of a no contact order. *See* Termination, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The end of something in time or existence; conclusion or discontinuance."). Moreover, the term "modification" in the Rule cannot include changes in time to a no contact order, because such an interpretation would improperly render the "termination" language in the Rule surplusage. *See Obendorf v. Terra Hug Spray Co.*, 145 Idaho 892, 900 (2008); Modification, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A change to something; an alteration or amendment."). If "modification" in the Rule encompassed changes in time to a no contact order,

the term would necessarily include changes shortening or ending the order in time, as well as changes extending the order in time. But that would render the "termination" language surplusage, as both modification and termination would cover the district court's authority to end in time a no contact order. *See Obendorf*, 145 Idaho at 900.

Based on cases from other jurisdictions, the State argues there is no "overlap whatsoever between 'modification' and 'termination,'" because modification "presupposes that the modified thing will still be around after the change, alteration, or amendment," while termination "does not." (*See* Resp. Br., p.11.) However, a more complete examination of the case law from two of the five other jurisdictions undermines the State's argument.

For example, the State cites an Ohio case, *Smith v. Ray*, 72 N.E.2d 921 (Ohio Ct. App. 1947). (Resp. Br., p.11.) In *Smith*, the Ohio Court of Appeals stated, "The power to modify does not confer the power to destroy." *Smith*, 72 N.E.2d at 927. But the State has neglected to mention that, after *Smith*, the Ohio Supreme Court held that the difference between modification and termination of alimony was "a distinction without a difference. 'Modification' and 'termination' of an alimony award are simply different points or degrees on the same continuum." *See In re Adams*, 543 N.E.2d 797, 799 (Ohio 1989). Later, the Ohio Supreme Court expressly rejected an argument that "the term 'modify' . . . has a different meaning from the term 'terminate' . . . ." *Kimble v. Kimble*, 780 N.E.2d 273, 274 (Ohio 2002). In *Kimble*, the Ohio Supreme Court instead concluded, in light of *Adams*, "that a motion to terminate spousal support falls within the definition of a 'modification,' since it seeks to alter, change, or reduce the support award." *Id.* at 274-75.

The State likewise did not mention developments in Arizona law after a case cited in the Respondent's Brief, *Diefenbach v. Holmberg*, 26 P.3d 1186 (Ariz. Ct. App. 2001). (*See* Resp.

Br., pp.11-12.) The Arizona Court of Appeals in *Diefenbach* did not agree "that the term 'non-modifiable' is synonymous with 'non-terminable.'" *Diefenbach*, 26 P.3d at 1187. However, the Arizona Supreme Court later addressed a different provision of the statute at issue in *Diefenbach*, noting the term "terminate" was amended into the provision six years after it first used the term "modify." *In re Marriage of Waldren*, 171 P.3d 1214 (Ariz. 2007). Per the Court in *Marriage of Waldren*, the legislative history of that amendment "shows that the legislature did not deem the addition of the word 'termination' a substantive change; that is, [the statute] was viewed as including the power to modify and terminate maintenance and support provisions both before and after the amendment." *Id.* at 1217. Further, the parties in that case did "not dispute that during those six years 'modification' was understood to include 'termination.'" *Id.*

The Arizona Supreme Court in *Marriage of Waldren* held, "*Diefenbach* does not guide our inquiry because it addressed a unique provision . . . a provision not at issue in this case." *Id.* at 1218. The *Marriage of Waldren* Court also disapproved "of dictum in *Diefenbach* stating that while courts lack jurisdiction under [another statute] to modify decrees regarding non-modifiable maintenance terms, they retain jurisdiction to terminate such provisions." *Id.* at 1218 n.4.

Thus, a more complete examination of the case law from those two jurisdictions serves to undermine the State's argument. The Ohio Supreme Court expressly rejected the type of argument advanced by the State, while the Arizona Supreme Court called such arguments into doubt. *See Kimble*, 780 N.E.2d at 274; *Marriage of Waldren*, 171 P.3d at 1217-18.

The State further contends that, even if there were some overlap between shortening an order and terminating it, the district court in the instant case extended the no contact order, "which has no overlap with termination." (*See* Resp. Br., p.12.) But as Mr. Elizarraraz asserted before the district court: "[T]he Rule only permits one action regarding its *duration*. The rule

provides that the court may terminate the order prior to its expiration. It does not permit the court to take the opposite step to extend the order." (*See* Limited R., p.32 (emphasis in original).) If modification as used in the Rule encompassed changes in time to a no contact order, the term would necessarily include changes shortening or ending the order in time, as well as changes extending the order in time. Shortening, ending, or extending a no contact order would all be "changes" to the order, fitting within the plain meaning of "modification." *See* Modification, BLACK'S LAW DICTIONARY. Thus, this argument by the State would still improperly render the "termination" language in the Rule (which also covers ending an order) surplusage. *See Obendorf*, 145 Idaho at 900.

In sum, despite the State's arguments, Rule 46.2(b), using the plain, ordinary meaning of the Rule's language, and giving meaning to every word in the Rule, does not authorize a district court to extend the duration of a no contact order.

C. The Plain Language Interpretation Of Rule 46.2(b) Would Not Produce An Absurd Result

The plain language interpretation of Idaho Criminal Rule 46.2(b) would not produce an absurd result. If the Rule allowed for extending the duration of a no contact order, district courts would be able to indefinitely extend such orders, a practice disapproved of by the Idaho Supreme Court. *See State v. Cobler*, 148 Idaho 769, 772 (2010); *State v. Castro*, 145 Idaho 173, 175-76 (2008). Thus, the plain language interpretation of Rule 46.2(b), which does not authorize extending the duration of a no contact order, would not produce an absurd result. Additionally, the plain language interpretation of the Rule would not produce an absurd result because individuals have other ways to obtain protection orders, such as domestic violence protection orders. *See* I.C. § 39-6304.

The State argues that Mr. Elizarraraz's "approach would lead to absurd results" because "it would incentivize courts to enter the longest possible no contact orders." (Resp. Br., p.13.) But just because the State sees the plain language approach to the Rule as "defendant-penalizing," does not mean the approach is unreasonable or would lead to "absurd results." (*See* Resp. Br., p.13.) Rather, the State undercuts its absurd results argument by admitting that "a lengthy order in the first instance would invariably be proper under *Castro* and *Cobler*," and "[a] 50-year order could always be terminated at the victim's request, if things improve." (*See* Resp. Br., p.13.)

The plain language of Rule 46.2(b) does not authorize a district court to extend the duration of a no contact order. Also, the plain language interpretation of Rule 46.2(b) would not produce an absurd result. Thus, the district court erred when it determined it had the authority to extend the no contact order. The order regarding the district court's jurisdiction to extend the no contact order should be vacated, and Mr. Elizarraraz's matter should be remanded to the district court for further proceedings.

II.

The District Court Abused Its Discretion When It Amended The No Contact Order By Extending The Order's Duration

Mr. Elizarraraz asserts the district court abused its discretion when it amended the no contact order by extending the order's duration, because the district court did not act consistently with the applicable legal standards. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018). The plain language of Rule 46.2 does not authorize a district court to extend the duration of a no contact order. The order amending the no contact order should be vacated, and Mr. Elizarraraz's matter should be remanded to the district court for further proceedings.

The State contends that the district court "correctly concluded that the plain text of the statute and rule authorized it to extend the no contact order." (*See* Resp. Br., pp.14-15.) The State argument on this point is unremarkable, and no further reply is necessary. Thus, Mr. Elizarraraz would direct this Court's attention to pages 15-16 of the Appellant's Brief.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Elizarraraz respectfully requests that this Court vacate the order regarding the district court's jurisdiction to extend the no contact order and the order amending the no contact order, and remand this matter to the district court for further proceedings.

DATED this 25th day of September, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
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BPM/eas