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

STATE OF IDAHO,	)	
	)	**NO. 49376-2021**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-17-34113**
v.	)	
	)	
BRITIAN LEE BARR,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE SAMUEL HOAGLAND
District Judge

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STATEMENT OF THE CASE

Nature of the Case

This case presents an important question not previously decided by Idaho's appellate courts; namely, whether I.C. § 19-2520G(3)'s consecutive sentence mandate violates the Idaho Constitution's strict separation of powers requirement by impermissibly encroaching upon a sentencing court's inherent authority to choose whether to impose consecutive or concurrent sentences. The district court sentenced Britian Lee Barr to five 15-year mandatory minimum sentences, and ordered the sentences to run consecutively, resulting in a total fixed time of 75 years. The district court erroneously believed I.C. § 19-2520G(3) deprived the court of its authority to run the sentences concurrently: "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." (5/15/18 Tr., p.41, Ls.9-12.)

Mr. Barr challenged the constitutionality of the consecutive sentence mandate on direct appeal from his judgment of conviction, but the Idaho Supreme Court found that the issue had not been preserved for appeal. *See State v. Barr*, 166 Idaho 783, 787 (2020), as amended (June 25, 2020). At the same time, however, the Supreme Court noted, "nothing in this opinion should be construed to limit Barr's right to challenge the legality of his sentence under I.C.R. 35(a)." *Id*. at 787 n.1.

In response, Mr. Barr raised the constitutional issue in an Idaho Criminal Rule 35(a) motion challenging the legality of his sentence. The district court denied Mr. Barr's motion, holding, "the legislature is empowered to designate mandatory consecutive sentences under the

plain language of Article V, Section 13 of the Idaho Constitution, because whether a sentence is consecutive or concurrent, like fines, is part of a sentence." (R., p.97.)

On appeal, Mr. Barr argues I.C. § 19-2520G(3)'s consecutive sentence mandate is not permitted by the constitution, and that the district court's contrary conclusion is erroneous as a matter of law. He respectfully asks that this Court reverse the district court's denial of his Rule 35(a) motion and remand the case for sentencing, without the consecutive sentencing mandate.

Statement of Facts and Course of Proceedings

1. Mr. Barr's Sentences

Mr. Barr was 28 years-old when he was charged by Information with five counts of sexual exploitation of a child, with each count based on the possession of a different, sexually explicit video of a child downloaded from the internet. (Aug.R., pp.34, 170.)[1] The State also filed an Information Part II alleging Mr. Barr to be a repeat sex offender, having previously been convicted of possessing child pornography, and therefore subject to the 15-year mandatory minimum sentence provided in Idaho Code § 19-2520G.[2] (Aug.R., pp.48, 52.) The State later filed a second case charging Mr. Barr with additional counts of possessing child pornography, and the two cases were consolidated for trial. (Aug.R., pp.32, 39; 12/28/17 Tr., p.4, Ls.7-18.)

[1] Citations to "Aug.R." refer to the Clerk's Record in the prior appeal, *State v. Barr*, No. 46094-2018, which was augmented into the appellate record in this case. *See* Order Augmenting Appeal, dated January 19, 2022. Citations to "R." are to the Limited Clerk's Record prepared for this appeal; hearing transcripts are referenced by citation to the hearing dates.

[2] The statute prohibiting sexual exploitation of a child otherwise provides for a maximum prison term of ten years. *See* I.C. § 18-1507(3).

Plea negotiations were not fruitful, and Mr. Barr proceeded to trial. (5/15/18 Tr., p.4.) However, prior to opening statements, Mr. Barr decided to change his pleas. (5/15/18 Tr., p.5, Ls.15-22.) While the jurors waited in the jury room, Mr. Barr pleaded guilty to the five counts alleged in the first case and admitted to being a repeat sex offender (5/15/18 Tr., p.10, L.21 – p.11, L.2; p.24, Ls.8-25), and the State agreed to dismiss the second case. (5/15/18 Tr., p.5, Ls.1-2.)

The district court told Mr. Barr, "If you plead guilty, then you are facing essentially 75 years fixed time in prison." (5/15/28 Tr., p.10, Ls.21-22.) The court also stated its belief that, "The court virtually would have no discretion in the final sentence because of the Information Part Two … I couldn't reduce the sentence *or make it run concurrently or anything like that*." (5/15/18 Tr., p.16, Ls.14-19 (emphasis added).)

The district court accepted Mr. Barr's guilty pleas. (5/15/18 Tr., p.30, Ls.7-16.) The district court restated its belief that it had no sentencing discretion in this case, and with the parties' consent, proceeded directly to sentencing, dispensing with the presentence investigation, psychosexual evaluation, or evidence in mitigation. (5/15/18 Tr., p.30, L.17 – p.33, L.13.)

For each of the five counts, the district court imposed the mandatory minimum sentence of 15 years fixed. (5/15/18 Tr., p.40, Ls.3-13; Aug.R., pp.188-90.) Additionally, the court ordered that the 15-year sentences run consecutively, resulting in a final, aggregate term of 75 years fixed. (5/15/18 Tr., p.40, Ls.3-13; Aug.R., pp.188-90.) In pronouncing sentence, the district court stated:

> 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 ….

(5/15/18 Tr., p.41, Ls.9-12 (emphasis added).)

2. Mr. Barr's Appeal From The District Court's Judgment

Mr. Barr appealed. *See State v. Barr*, 166 Idaho 783, 787 (2020), as amended (June 25, 2020). Relevant to this case, Mr. Barr argued that the consecutive sentencing mandate in I.C. § 19-2530G(3) is unconstitutional because that mandate exceeds the legislature's limited constitutional authority, and that the district court had therefore retained its discretionary authority to run his sentences concurrently. *Id.* The Idaho Supreme Court refused to consider the issue, finding it had not been preserved for appeal. *Id.* At the same time, the Court noted: "Nothing in this opinion should be construed to limit Barr's right to challenge the legality of his sentence under I.C.R. 35(a)." *Id. at* 787, n.1.

3. Mr. Barr's Subsequent Rule 35(a) Motion

In response to the Court's suggestion, Mr. Barr filed a motion in the district court to correct an illegal sentence pursuant to Idaho Criminal Rule 35(a).[3] (R., p.30.)

[3] Mr. Barr also filed a timely petition for post-conviction relief, *see Barr v. State*, Ada County case number CV01-21-8581, asserting he received ineffective assistance of counsel based on counsel's failure to raise the constitutional issue below. The district court has ordered all proceedings in the post-conviction case stayed pending the outcome of the present appeal. *Id.*

a. Mr. Barr's Argument In The District Court

Mr. Barr argued that the imposition of mandatory consecutive sentences was illegal on the face of the record. (R., pp.35-39, 58-65, 90.) He argued the record shows the district court ordered consecutive sentences because it believed it was required to do so by I.C. § 19-2520G(3), but that the statute is clearly unconstitutional and was not binding on the court. (R., pp.35-39, 58-65.) Specifically, Mr. Barr argued that the choice to run sentences consecutively *or* concurrently is an inherent discretionary power that properly belongs to the judiciary, not the legislature. (R., pp.35-39, 58-65.) He argued that mandatory consecutive sentences are not "expressly directed or permitted" in the Idaho Constitution, and the authority granted to the legislature in Article V, section 13, to require mandatory *minimum* sentences does not expressly permit the enactment of mandatory *consecutive* sentencing statutes. (R., pp.36-39, 86.) He argued, therefore, that I.C. § 19-2520G(3)'s consecutive sentence mandate impermissibly encroaches on the powers of the judiciary, in violation of Idaho Constitution's separation of powers clauses in Article II, § 1, and Article V, § 13. (R., pp.35-36, 86.)

b. The District Court's Decision Denying The Rule 35(a) Motion

The district court denied Mr. Barr's motion. (R., pp.92-102.) The court ruled that Mr. Barr's constitutional challenge to his mandatory consecutive sentences was "properly raised in a Rule 35 motion." (R., p.94, n.2.) The court observed the motion presented an issue that "is purely legal and does not involve any factual issues," and that the Idaho Supreme Court had suggested that Mr. Barr "'could challenge the legality of his sentence' with respect to this issue."

(R., p.94, n.2 (quoting *Barr*, 166 Idaho at 787 n.1).) The district court concluded, "[t]he sole issue before it" was "whether the requirement in Idaho Code § 19-2520G(3) that '[a]ny sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court' violates the separation of powers doctrine," and that the issue was "one of first impression." (R., p.94.)

The district court ultimately decided that the consecutive sentence mandate in I.C. § 19-2520G(3) does not violate the Idaho Constitution's separation of powers requirement. (R., p.101.) The court concluded, "the legislature is empowered to designate mandatory consecutive sentences under the plain language of Article V, Section 13 of the Idaho Constitution, because whether a sentence is consecutive or concurrent, *like fines*, is part of a sentence." (R., pp.94-97 (emphasis added).)

The district court cited two Idaho cases it believed supported its conclusion: *State v. Cardona*, 102 Idaho 668 (1981), which upheld a firearm enhancement statute against a separation of powers challenge, and *State v. Ewell*, 147 Idaho 31, 34 (Ct. App. 2009), which analogized the enhanced penalty provided in Section 19-2520G to the penalty in firearm enhancement. (R., pp.98-99).

Finally, the district court said it had not located any outside authorities holding that mandatory consecutive sentencing statutes violate the separation of powers clauses of other constitutions. (R., pp.100-101.) Then, citing decisions from two states (Rhode Island and Nebraska, both of which were previously discussed by Mr. Barr), and decisions interpreting the

federal separation of powers doctrine, the district court stated, "Other courts have routinely addressed and rejected" the separation of powers argument. (R., pp.100-101.)

In concluding its analysis, the district court wrote:

> In sum, the court concludes that the mandatory consecutive sentence requirement in Idaho Code § 19-2520G(3) does not violate the separation of powers doctrine. The legislature is empowered pursuant to Article V, Section 13 to provide for mandatory minimum sentences for any crimes. Idaho appellate courts have upheld the legislature's ability to impose mandatory minimum fines as well as a mandatory consecutive term of imprisonment under the firearm enhancement statute. Idaho Code § 19-2520G is similar in effect to the firearm enhancement statute. Finally, there is no out of state authority on point persuading this Court that the separation of powers doctrine is violated in this case.

(R., p.102.)

Mr. Barr filed a timely Notice of Appeal. (R., p.103.)

ISSUE

Does Idaho Code § 19-2520G(3) violate the Idaho Constitution's strict separation of powers clauses by impermissibly encroaching on the inherent judicial power of the courts to choose whether a sentence shall run consecutively or concurrently?

ARGUMENT

Idaho Code § 19-2520G(3) Violates The Idaho Constitution's Strict Separation Of Powers Clauses By Impermissibly Encroaching On The Inherent Judicial Power Of The Courts To Choose Whether A Sentence Shall Run Consecutively Or Concurrently

A. Introduction

Idaho's courts possess inherent authority and judicial power to choose whether the sentences they impose run consecutively or concurrently with any other sentence. Mandatory consecutive sentence statutes are not expressly permitted in the Idaho Constitution, and therefore I.C. § 19-2520G(3)'s consecutive sentence mandate violates the Idaho Constitution's strict separation of powers clauses in Article II, § 1, and Article V, § 13. The district court's contrary conclusion is erroneous as a matter of law. The district court's denial of Mr. Barr's Criminal Rule 35(a) motion should be reversed, and the case should be remanded for sentencing without the consecutive sentencing mandate.

B. Standard Of Review

The appellate court "freely reviews constitutional issues and questions of statutory interpretation because they are questions of law." *State v. Winkler*, 167 Idaho 527, 529 (2020); *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 907 (2020). "When interpreting constitutional provisions, the fundamental object 'is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters.'" *Winkler*, 167 Idaho at 531 (quoting *Sweeney v. Otter*, 119 Idaho 135, 139 (1990)). Where a provision in the constitution is "clear and unambiguous," the

expressed intent of the drafters must be given effect. *Id.* A constitutional provision will be deemed to be ambiguous only if the reviewing court concludes that "reasonable minds might differ or be uncertain as to its meaning." *Id.* If the reviewing court finds the provision to be ambiguous, only then can it utilize the rules of statutory construction "to determine and give effect to the legislative intent." *Reclaim Idaho v. Denney*, 169 Idaho 406, 427, 497 P.3d 160, 181 (2021).

The Idaho Supreme Court has stated that its power to declare legislative action unconstitutional "should be exercised only in clear cases." *Leavitt v. Craven*, 154 Idaho 661, 665 (2012). The Court has also stated that it "must always be watchful, as it has been in the past, that no one of the three separate departments of the government encroach upon the powers properly belonging to another." *State v. McCoy*, 94 Idaho 236, 241 (1971); *see State v. Olivas*, 158 Idaho 375, 380 (2015) (quoting *McCoy*); *Holly Care Ctr. v. State, Dep't of Emp.*, 110 Idaho 76, 81 (1986) (same).

The legislative mandate to run sentences consecutively in I.C. § 19-2520G(3) presents a clear case of the legislature's impermissible exercise of a judicial power, and this Court should declare that part of the statute unconstitutional.

C. Idaho Code § 19-2520G(3)'s Consecutive Sentence Mandate Impermissibly Exercises And Interferes With The Inherent Power Of The Courts To Choose Whether To Run Sentences Concurrently, In Violation Of The Idaho Constitution's Separation Of Powers Provisions

1. The Provisions In The Idaho Constitution Require Strict Separation Of Powers

The Idaho Constitution divides the powers of the state government into three separate, independent, and co-equal departments – legislative, executive, and judicial – and strictly forbids any one of the three departments from exercising any powers belonging to another department, "except as in this constitution expressly directed or permitted." *See* IDAHO CONST. art. II, § 1.[4] The Constitution expressly vests the state's judicial power in the courts. *See* IDAHO CONST. art. V, § 2.

The judicial article, Article V, contains a redoubling of the strict separation of powers respecting the legislature and the courts, stating, "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government," and sets forth the only two exceptions.[5] IDAHO CONST.

[4] Article II, section 1 provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, *except as in this constitution expressly directed or permitted*.

(Emphasis added.)

[5] The first exception directs that "the legislature shall provide a proper system of appeals" and regulate, when necessary, the methods of proceeding" in the lower courts; the second exception

art. V, § 13. *See R. E. W. Const. Co. v. Dist. Ct. of Third Jud. Dist.*, 88 Idaho 426, 437 (1965) (observing that this language is "a direct recognition and reiteration of the separation of powers provided by Art. 2, § 1.")

Thus, a strict separation of powers is not merely implied or doctrinal; *the text* of the Idaho Constitution prohibits the legislative exercise of, or interference with, judicial powers "except as in this constitution expressly directed or permitted." IDAHO CONST. art. II, § 1, IDAHO CONST. art. V, § 13.

The Idaho Supreme Court has stated, "This court always must be watchful, as it has been in the past, that no one of the three separate departments of the government encroach upon the powers properly belonging to another." *McCoy*, 94 Idaho at 241 (1971); *see also Holly Care Ctr. v. State, Dep't of Emp.*, 110 Idaho 76, 81 (1986) (same); *R.E.W. Constr. Co. v. Dist. Court of the Third Judicial Dist*., 88 Idaho 426, 437 (1965) (same). The Court has also stated that a legislative enactment that violates the Constitution's separation of powers is unconstitutional, null, void, and unenforceable. *See State v. Olivas*, 158 Idaho 375, 380 (2015); *State v. Sarabia*, 125 Idaho 815, 817 (1994).

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permits that "the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentences so provided [and] shall not be reduced." IDAHO CONST. art. V, § 13.

2. The Choice Whether To Run The Sentence Consecutively Or Concurrently With Another Sentence Is A Power That Belongs To The Judiciary, Not The Legislature

a. The Judicial Powers Vested In The Courts

The Constitution does not enumerate the powers that belong to the judiciary; however, the Idaho Supreme Court has recognized the exercise of certain judicial functions as inherently belonging to the courts and as such, are powers that belong to the judiciary. *See e.g.*, *State v. McCoy*, 94 Idaho at 241 (recognizing that courts have inherent discretionary sentencing powers which the legislature cannot usurp by statute); *R.E.W. Const. Co. v. District Ct. of the Third Jud. Dist.*, 88 Idaho 426 (1965) (recognizing the constitutional authority to make rules of court procedure belongs to the judiciary, not the legislature); *Application of Kaufman*, 69 Idaho 297 (1949) (recognizing the authority to supervise admission to the bar as a judicial power).

b. The Choice Of Concurrent Or Consecutive Sentences Is An Inherent Sentencing Power Of The Courts And Belongs To The Judiciary

The Idaho Supreme Court has identified three inherent powers belonging to sentencing courts:[6] (1) the power to suspend the sentence that it imposes, *see McCoy*, 94 Idaho at 240; (2) the power to reduce the sentence, *see* Idaho Criminal Rule 35(b), *State v. Brown*, 170 Idaho 439 (2022); and, relevant here, (3) the power to choose whether to run the sentence consecutively or concurrently with another sentence, *see State v. Lawrence*, 98 Idaho 399, 401 (1977).

[6] Not all sentencing powers belong the courts; for example, the power to commute the sentence is a "creature of the executive branch," *State v. Thiel*, 158 Idaho 103, 111 (2015), and the power to withhold judgment "is a legislative creation," *State v. Branson*, 128 Idaho 790, 792 (1996).

In *Lawrence*, the Court observed that Idaho courts possess inherent discretionary authority to select whether to run a sentence consecutively or concurrently, stating,

> It is an inherent power of the Court to impose sentences, *including the choice of concurrent or consecutive terms, when the occasion demands it*.

Id. (quoting *State v. Jones*, 440 P.2d 371 (Ore.1968) (emphasis added).

The Idaho Supreme Court has continued to recognize the inherent authority of the courts to choose whether to run sentences consecutively or concurrently as a judicial power that belongs to the courts, not the legislature. *See State v. Cisneros-Gonzalez*, 141 Idaho 494, 496 (2004) (observing that the powers reserved to the judiciary and not enumerated in the constitution are defined in the context of the common law, and that, "[u]nder the common law, the courts in Idaho have discretionary power to impose cumulative sentences"); *see also Setser v. United States*, 566 U.S. 231, 236 (2012) (wherein Justice Scalia observed, "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings …."); *Oregon v. Ice*, 555 U.S. 160, 163-64 (2009) (observing that the common law generally entrusted the decision whether sentences for discrete offenses should be served consecutively or concurrently to judges' unfettered discretion).

As demonstrated below, because the Idaho Constitution does not expressly permit the legislature to exercise the judicial power to choose whether to run sentences consecutively or concurrently, or to deprive the courts of that judicial power, I.C. § 19-2520G(3) violates the separation of powers.

3. Idaho Code § 19-2520G(3) Attempts To Exercise The Judicial Power To Choose To Run Sentences Consecutively, And Deprives The Courts Of Their Judicial Power To Choose To Run Sentences Concurrently Instead

Idaho Code § 19-2520G(3) clearly and unambiguously violates the Idaho Constitution by depriving sentencing courts of their inherent power to choose to run sentences concurrently. Idaho Code § 19-2520G provides in full:

> (1) Pursuant to section 13, article V of the Idaho Constitution, the legislature intends to provide mandatory minimum sentences for repeat offenders who have previously been found guilty of or pleaded guilty to child sexual abuse. … In order to protect children from becoming victims of this type of conduct by perpetrators, it is necessary to provide the mandatory minimum sentencing format contained in subsection (2) of this section. By enacting mandatory minimum sentences, the legislature does not seek to limit the court's power to impose in any case a longer sentence as provided by law.
>
> (2) Any person who is found guilty of or pleads guilty to any offense requiring sex offender registration as set forth in section 18-8304, Idaho Code, or any attempt or conspiracy to commit such a crime, shall be sentenced to a mandatory minimum term of confinement to the custody of the state board of correction for a period of not less than fifteen (15) years, if it is found by the trier of fact that previous to the commission of such crime the defendant has been found guilty of or has pleaded guilty to a violation of any crime or an offense committed in this state or another state which, if committed in this state, would require the person to register as a sexual offender as set forth in section 18-8304, Idaho Code.
>
> (3) The mandatory minimum term provided in this section shall be imposed where the aggravating factor is separately charged in the information or indictment and admitted by the accused or found to be true by the trier of fact at a trial of the substantive crime. A court shall not have the power to suspend, withhold, retain jurisdiction, or commute a mandatory minimum sentence imposed pursuant to this section. *Any sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court.*

I.C. § 19-2520G (emphasis added).

At issue here is the last sentence in subsection (3), which directs that the court "shall run" the minimum sentence that it has imposed "consecutive to any other sentence imposed by the court." *Id.* This provision clearly and unambiguously attempts to exercise the judicial power to choose to run the sentence consecutively, and deprives the courts of their inherent power to choose to run the sentences concurrently. The statute violates the separation of powers because the exercise of, and limitation on, such judicial power by the legislature is not expressly directed or permitted by the Idaho Constitution.

4. Mandated Consecutive Sentences Are Not Permitted In The Idaho Constitution

As noted above, the text of the Idaho Constitution prohibits the legislature from exercising, or encroaching upon, the court's judicial powers "except" as "expressly directed or permitted in this Constitution," and there are just two exceptions in the Constitution. Relevant here, Article V, section 13, of the Idaho Constitution states:

> the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall not be less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

IDAHO CONST. art. V, § 13.

This exception, added by an amendment in 1978, grants the legislature authority to enact mandatory minimum sentences that Idaho courts have no power to reduce or to suspend. *See Olivas*, 158 Idaho 380; *State v. Pena-Reyes*, 131 Idaho 656, 657 (1998); *Sarabia*, 125 Idaho at 817. As stated by the Idaho Supreme Court, this language "provides a *narrow exception* for the legislature to exercise powers traditionally granted to the judicial branch." *Olivas*, 158 Idaho at 380 (emphasis added).

The exception, however, merely allows the legislature to require mandatory minimum sentences that "shall not be *less than*" the mandatory minimum and "shall not be *reduced*." IDAHO CONST. art. V, § 13 (emphasis added). Nothing in this exception gives the legislature the power to enact laws requiring that sentences run consecutively, or depriving courts of their inherent power to choose to run sentences concurrently.

a. The Plain Language Of Article V, § 13 Does Not Expressly Permit Mandatory ed Consecutive Sentences

The district court concluded that "the legislature is empowered to designate mandatory consecutive sentences under the plain language of Article V, Section 13 of the Idaho Constitution, because whether a sentence is consecutive or concurrent, like fines, is part of a sentence." (R., p.97.) This conclusion is incorrect for multiple reasons.

i. A "Minimum Sentence" Is Not A "Consecutive Sentence"

First, Article V, § 13, does not grant the legislature broad power to mandate "sentences"; instead, it says the legislature can provide "mandatory *minimum* sentences" for any crime. IDAHO CONST. art. V, § 13. A "minimum sentence" is not a "consecutive sentence" by the plain language meaning of those terms.

Black's Law Dictionary defines "minimum sentence" as the "least amount of time that a convicted criminal must serve in prison before becoming eligible for parole." (Black's Law Dictionary, 11th ed. 2019.) Likewise, when the proposed amendment was presented to the citizens of Idaho for vote in 1978, the legislature told Idahoans the Amendment's "effect of adoption" would be to empower the legislature to require "a minimum period of incarceration."

See "1978 Legislative Council's Statement Of Meaning And Purpose, H.J.R. 6," *infra,* at subsection (b). The Webster's dictionary definition of "minimum" means "the least quantity assignable, admissible or possible," or "the least of a set of numbers," or "a number not greater than any other number," or "the lowest degree or amount of variation." *See* Webster's Third New International Dictionary (2003).

By contrast, the Black's Law Dictionary defines "consecutive sentence" to mean "two or more sentences of jail time to be served in sequence …. " (Black's Law Dictionary, 11th ed. 2019.) Thus, under the plain language meaning of the terms, a "minimum sentence" is not "two or more sentences," and therefore the Amendment's grant of permission to the legislature to provide mandatory "minimum sentences" does not expressly include a grant of power to mandate such sentences run consecutively.

The district court also reasoned that mandating consecutive sentences falls within the authority to provide mandatory minimum sentences, because "the effect of making a sentence consecutive or concurrent impacts the length of time a defendant serves in jail or prison." (R., p.97.) However, while the quoted statement may be correct, it does not follow that mandatory consecutive sentences are "minimum sentences," because "making a sentence consecutive" does not impact the length of the mandatory minimum sentence *for the crime*. Rather, making the sentence run consecutive determines *when* the mandatory minimum sentence commences; it has no impact on the length of mandatory minimum itself.

ii. The Choice Of Consecutive Sentences Is Not "Like Fines"

The district court also equated the choice of "consecutive sentences" with "fines." (*See* R., p.97.) This also is incorrect. The legislature has inherent authority to prescribe financial penalties as punishment for crimes. *C.f.*, *State v. Alexander*, 138 Idaho 18, 26 (Ct. App. 2002) (observing that legislature's authority to prescribe punishment for crimes includes "pecuniary criminal punishment"). However, the judicial choice of concurrent or consecutive sentences is distinct from the legislative function of prescribing the penalty for the crime; it is an inherent discretionary power reserved to the judiciary. *See Cisneros-Gonzalez*, 141 Idaho at 496; *Lawrence*, 98 Idaho at 401; *accord Setser v. United States*, 566 U.S. at 236; *Oregon v. Ice*, 555 U.S. at 163-64. Thus, the district court's reliance on *Alexander* is misplaced, and its conclusion that the choice of consecutive sentences is "like fines" conflicts with this Court's precedent that distinguishes the legislature's inherent power and function of defining crimes and prescribing penalties, from the courts' inherent power and authority over the choice to run the sentence imposed concurrently or consecutively with other sentences.

As noted above, Article V, § 13's *only* restrictions on the court's sentencing powers are that the sentence imposed by the court "shall not be less than" the mandatory minimum sentence and "shall not be reduced." IDAHO CONST. art. V, § 13. There is no *express* restriction on the court's inherent power to choose between concurrent or consecutive sentences, and as such, the restriction found in I.C. § 19-2520G(3) violates the Idaho Constitution.

iii. Permission To Provide Mandatory Minimum Sentences Is *Not* Permission To Prescribe "All Consequences" Of The Conviction

Furthermore, the district court was incorrect to the extent that it agreed with the State that the 1978 Amendment to Article V, § 13, granted the legislature the power to enact statutes that provide "all consequences of a criminal conviction," and "more than simply the period of incarceration in jail or prison." (R. p.96 (referring to Justice Horton's dissent in *Olivas*, 158 Idaho at 382 (Horton, J., dissenting).) The *Olivas* majority rejected this reading of the 1978 amendment, and found Article V § 13 "provides a *narrow exception* for the legislature to exercise powers traditionally granted to the judicial branch." *Olivas*, 158 Idaho at 380 (emphasis added). Moreover, the *Olivas* dissent's reading conflicts with the legislature's own statement to Idahoans when it proposed the amendment in 1978: if Idahoans adopted the proposed amendment, the legislature would have power to enact statutes requiring that a person "convicted of a specific crime" would "serve a minimum period of incarceration." *See* The 1978 Legislative Council's Statement of Meaning and Purpose, H.J.R. 6, *infra* at pages 22-23.

iv. The Legislature's Own Understanding Of A "Mandatory Minimum Sentence" Demonstrates That A Mandate For Consecutive Sentences Is Not A Mandatory Minimum Sentence

The language of I.C. § 19-2520G is further evidence that "mandatory minimum sentence" does not include mandated consecutive sentences. Section (1) of I.C. § 19-2520(G), states:

> Pursuant to section 13, article V of the Idaho constitution, the legislature intends to provide mandatory minimum sentences for repeat offenders who have previously been found guilty of or pleaded guilty to child sexual abuse. . . . In order to protect children from becoming victims of this type of conduct by

> perpetrators, it is necessary to provide *the mandatory minimum sentencing format contained in subsection (2) of this section*.

(Emphasis added.)

As set forth in the statute, the "mandatory minimum sentencing format contained in subsection (2)" provides for a fifteen-year mandatory minimum sentence. *See* I.C. § 19-2520G(2). The consecutive sentence mandate, however, is *not* in subsection (2). It is contained in subsection (3). Thus, when it enacted I.C. § 19-2520G, the legislature itself did not understand subsection (3)'s consecutive sentence mandate to be part of "the mandatory minimum sentencing format" authorized in the Constitution.

b. The Historical Context Of The 1978 Amendment To Article V, § 13, Demonstrates That Mandatory Consecutive Sentences Are Not Permitted

The legislative history of the Amendment, and the legislature's statements to the citizens of Idaho disclosing the Amendment's effect if the citizens adopted it, show that the Amendment's purpose and intended effect was to permit statutory mandatory minimum terms of confinement that the courts could not reduce or suspend. Noticeably absent from the legislative history of the 1978 Amendment is mention of an intent to acquire or exercise the power to mandate consecutive sentences. (*See generally* 1978 House Minutes of the Judiciary Committee (January 17, 1978), 1978 Senate Minutes, Judiciary and Rules Committee (March 2, 1978).)

i. The 1978 Amendment Responded To *State v. McCoy*

The language added to the Constitution by the 1978 amendment was in response to the Idaho Supreme Court's 1971 opinion in *State v. McCoy*. *See* 1978 House Joint Resolution

(H.J.R.) 6, Statement of Purpose; 1978 (House) RS 2901, Statement of Purpose; *see also State v. Pena-Reyes*, 131 Idaho 656, 657 (1988). The Court in *McCoy* invalidated a statute that required a 10-day jail term for a DUI conviction, and that made the duty to impose the penalty "mandatory on every judge of every court of the state of Idaho without any right to exercise judicial discretion." 94 Idaho at 241. The *McCoy* Court faulted the statute for two reasons: "It not only abrogates the power of the court to suspend sentence when the circumstances and good conscience might justify such action; it also removes any authority to impose a lighter sentence." *Id*. at 241. The *McCoy* Court held the statute violated the separation of powers by abrogating the "traditional sentencing powers" properly belonging to the judiciary. *Id.* at 241. In declaring the statute unconstitutional, the *McCoy* Court said that that it "must always be watchful, as it has been in the past, that no one of the three separate departments of the government encroach upon the powers properly belonging to another." *Id.*

ii. The Legislature's Stated "Effect Of Adoption" When It Proposed The Amendment To Voters In 1978

In response to *McCoy*, the legislature proposed that the Constitution be amended to give the legislature the power the *McCoy* Court found lacking to enact mandatory minimum sentences. *See* 1978 H.J.R 6, Statement of Purpose; 1978 RS 2910 Statement of Purpose. Thereafter, the legislature directed that the question of the proposed amendment's adoption be presented to Idaho citizens for vote, as required by the Idaho Constitution. *See* IDAHO CONST. art. XX, section 1. In accordance with I.C. § 67-453, and at the direction of the legislature, the Legislative Council prepared a statement purpose for the proposed constitutional amendment

and "the effect" of the amendment if adopted, and published that statement. *See* 1978 H.J.R.6, sections 3, 4; *see* "Statement of Meaning and Purpose of The Proposed Constitutional Amendment Offered By House Joint Resolution Number 6 [H.J.R.6], As Amended," attached as Appendix B, to the Minutes of the July 19 and 20 1978 Legislative Council Committee on Criminal Sentencing (emphasis added) (herein referred to as "1978 Legislative Council's Statement of Meaning and Purpose, H.J.R. 6"); *see also* Constitutional Amendments, Legislative Council's Statement of Meaning And Purpose H.J.R.6, *The Idaho Statesman*, Boise, Sunday, November 5, 1978, p.18 (publishing the identical "Effect of Adoption" language) (reprinted in Access World News – Historical and Current, NewsBank, page 114 (https://inforweb-newsbannk-com.proxy.boisepubliclibrary.org (accessed 9/22/2022)).

> As represented to the people, the effect of the proposed amendment would be as follows:
>
> Effect of Adoption
>
> If adopted, this amendment would empower the Legislature to pass criminal laws containing provisions that would require that a person convicted of a specific crime *serve a minimum period of incarceration,* without the possibility of the sentence being reduced [except by the Board of Correction].

1978 Legislative Council's Statement of Meaning and Purpose, H.J.R. 6 (emphasis added).

As reflected by its own statement of Effect of Adoption, the legislature told the citizens of Idaho that the proposed amendment would empower the legislature to enact statutes requiring "a minimum period of incarceration" that courts could not reduce; *that* is the proposal that Idahoans considered and voted to adopt. Idahoans did *not* approve a grant of *other* powers to the legislature. Consequently, reading the 1978 amendment to Article V, § 13 to give additional

powers to the legislature beyond what was submitted to and voted by the people would itself violate the Idaho Constitution. *See* IDAHO CONST. art. XX, section 1 (requiring that amendments to the Constitution be first submitted to and voted on by the electorate). The amendment adopted by Idahoans did not grant the legislature power to mandate consecutive sentences or to deprive sentencing courts of their inherent power to run sentences concurrently instead.

5. Idaho's Appellate Courts Have Not Previously Held That The Legislature Has Constitution Power To Mandate Consecutive Sentences, And Neither *State v. Cardona* Nor *State v. Ewell* Supports The District Court's Conclusion In This Case

The district court also erred in finding that *State v. Cardona*, 102 Idaho 668, 669 (1981), dealing with a firearm enhancement statute, was "analogous and on point" and supported the constitutionality of 19-2520G(3)'s consecutive sentence mandate. (R., pp.98-99.) The district court misread *Cardona's* holding – and overlooked the holdings of all subsequent appellate decisions that have since addressed the subject – that the firearm statute does *not* provide for a separate consecutive sentence; it provides for an increase in the length of the single sentence to be imposed for the crime committed. In *Cardona*, the Court construed the language of an early version of the firearm enhancement statute, I.C. § 19-2520. At the time, that statute provided that any person who used or carried a firearm during the commission of certain crimes (listed in the statute), shall:

> in addition to the sentence imposed for the crime, be imprisoned for not less than three (3) years nor more than fifteen (15) years. Such *additional sentence shall run consecutively to any other sentence imposed for the above crimes*.

Cardona, at 670 (emphasis added).

Notwithstanding the statute's "additional sentence" and "consecutively to" language, the *Cardona* Court concluded that the firearm statute did not create a separate offense or require a separate additional sentence, but that it simply *increased* the sentence for the underlying crime. [7] *Id.* (stating that the firearm statute "simply renders a person convicted of certain felonies liable to punishment in excess of that which might have been imposed upon him had he not used or possessed a firearm"); *accord State v. Farwell*, 144 Idaho 732, 736 (2007) (holding that the firearm enhancement statute "increases the maximum sentence authorized for the underlying crime" and "is not a separate sentence.") The *Cardona* Court further explained, "in scope and application," the firearm enhancement statute "can be analogized to the habitual offender statute." *Id.* Notably, the habitual offender statute, I.C. § 19-2514, provides for an enhanced sentence, not an additional consecutive sentence. *See also State v. Farwell*, 144 Idaho 732, 736 (2007) (stating that the firearm enhancement statute "increases the maximum sentence authorized for the underlying crime" and "is not a separate sentence").

Thus, although the *Cardona* Court upheld the statute against a separation of powers challenge, the Court did *not* hold the legislature had authority to mandate consecutive sentences. *Cardona*, 102 Idaho at 699-70. Rather, the *Cardona* Court found there was no there was no

[7] The firearm enhancement statute has since been amended to correct its misuse of the "consecutive" terminology. *See* 1986 Idaho Sess. Laws ch. 319, § 2, p.75 (amending the firearm statute to clarify that the sentence for the underlying crime is to be "extended").

constitutional conflict to resolve because the firearm statute did *not* require imposition of a "consecutive" sentence. *Id*.

After *Cardona*, the Court of Appeals has cautioned against the misuse of the term "consecutive sentence" when referring to a sentence enhancement for a firearm. Thus, in *State v. Camarillo*, the Court stated,

> The term "consecutive" is inappropriate when referring to a sentence enhancement for use of a firearm. It may connote, inaccurately, the existence of two separate sentences. It is well established in our case law that, regardless of the terminology employed, a firearm enhancement is part of a single sentence. … the base sentence and the enhancement should be construed as one continuous sentence.

116 Idaho 413, 414 (Ct. App. 1989) (emphasis added). *See also State v. Ewell*, 147 Idaho 31, 37 (Ct. App. 2009) (quoting the excerpt from *Camarillo* and "warn[ing] against the analytical danger in referring to the penalty for the underlying offense and the enhancement … as 'consecutive'"). Thus, contrary to the district court's reasoning (R., pp.98-99), *Cardona* lends no support for the conclusion that the legislature has authority to mandate consecutive sentences.

The district court also incorrectly found support from a statement in *Ewell*, 147 Idaho at 35, that "the penalty for I.C. § 2520G is analogous to the enhancement" in the firearm enhancement statute. (R., p.99.) *Ewell* does not involve a consecutive sentence or implicate the consecutive sentence mandate in subsection (3) of I.C. § 19-2520G. *Id*. Instead, *Ewell* addresses whether a defendant can be sentenced to the fifteen-year mandatory minimum sentence provided in subsection (2) if the maximum sentence for the underlying substantive offense is only ten years. 147 Idaho at 35-36. The *Ewell* Court answered in the affirmative, stating that, insofar as

it "provides for a penalty greater than the maximum allowable penalty for the underlying charge," the enhanced penalty provided for in I.C. § 19-2520G is analogous to the enhancement provided in the firearm enhancement statute. *Id*. at 35. Because *Ewell* does not involve consecutive sentences or mention the mandate for consecutive sentences in subsection (3), it lends no support to the district court's decision here.

6. The Decisions From Other Jurisdictions Are Not Helpful In Resolving The Issue Because None Of Those Cases Analyze Constitutional Provisions Or Judicial Powers Like Idaho's

The decisions from other jurisdictions cited by the district court are not helpful to this Court in resolving the separation of powers question presented in this case, because none share the same constitutionally significant features. (*See* R., pp.100-01 (citing e.g., *State v. Monteiro*, 924 A.2d 784 (R.I. 2007) (construing R.I. Const. Article V: "The powers of the government shall be distributed into three separate and distinct departments: the legislative, executive and judicial."); *United States v. Vargas*, 204 Appx.92 (2nd Cir. 2006) (decided under the federal constitution); *United States v. Walker*, 473 F.3d 71, 76 (3rd Cir. 2007) (same); *United States v. Lowry*, 175 Fed. Appx. 134, 136 (9th Cir. 2006) (same); *United States v. Henry*, 2014 WL 2711909 (E.D. Mich. 2014) (same); *State v. Stratton*, 374 N.W.2d 31 (Neb. 1985).)

To the extent the district court purported to glean support for its conclusion from federal cases (*see* R., p.110), such support is misplaced, since the federal constitution does not contain an express separation of powers clause. *See generally* U.S. CONST. art. I, §§ 1, 9. Rather, the separation of powers is doctrinal, and is inferred from the specific grants and limitations in the federal constitution. *See* Tarr, G. Alan, "Interpreting the Separation of Powers in State

Constitutions," NYU Annual Survey of American Law, Vol.59:329 (April 2003) at 333 (commenting on the federal constitution's "lax" separation of powers). In Idaho, by contrast, the strict separation of powers is expressed in the text of the Idaho Constitution. *See* IDAHO CONST. art. V, § 13.

The district court also pointed to Nebraska, which has an "expressly directed or permitted" clause like Idaho's and which upheld mandatory consecutive sentences in *State v. Stratton*, 374 N.W.2d 31, 34–35 (Neb. 1985). (R., p.101.) But *Stratton* does not interpret the meaning of that clause in the opinion; nor is there any indication that the appellant argued there was no express direction or permission elsewhere in the Nebraska state constitution. *See id*. In addition, the out-of-state cases cited by *Stratton* do not involve mandatory consecutive statutes. *Id*. at 34-35. Thus, the *Stratton* opinion does not aid this Court in understanding the meaning of the Idaho Constitution's "expressly directed or permitted" clause. Furthermore, the Nebraska Court was highly deferential to its legislature's authority, while the Idaho Supreme Court has repeatedly declared its vigilance in maintenance of the separation of powers. *See e.g., Olivas,* 158 Idaho at 381 (J. Horton, dissenting) (observing that the majority's opinion reflected its "jealous protection of judicial prerogatives"); *McCoy*, 94 Idaho at 241 (1971) ("This court always must be watchful, as it has been in the past, that no one of the three separate departments of the government encroach upon the powers properly belonging to another."); *R.E.W. Constr. Co. v. Dist. Ct. of the Third Judicial Dist.*, 88 Idaho 426, 437 (1965) (same); *Holly Care Ctr. v. State, Dep't of Emp.*, 110 Idaho 76, 81 (1986) (same).

Unlike Idaho, none of these jurisdictions recognize the court's inherent authority to choose consecutive or concurrent sentences as a power belonging to the judicial department, *see Cisneros-Gonzalez*, 141 Idaho at 496, and then analyze a separation of powers clauses like Idaho's that strictly prohibit the legislature from exercising judicial powers unless "expressly directed or permitted," *see* IDAHO CONST. art. II, § 1, art V, § 13. Not only do none of the cases share the foregoing critical features with this case, not one shares Idaho's constitutional history or construes language resembling that added by 1978 Amendment to Article V § 13. Unsurprisingly, there is no outside authority that is "on point" or otherwise useful here.

Ultimately, for all of the reasons above, the mandated consecutive sentencing provision in I.C. § 19-2520G(3) violates the separation of powers provisions in the Idaho Constitution, and the consecutive sentence mandate "is therefore unconstitutional, null void, and unenforceable." *Sarabia*, 125 Idaho at 817. The district court's contrary conclusion is erroneous. The criminal judgment imposing mandatory consecutive sentences is illegal on the face of the record, and the district court's order denying Mr. Barr's motion to correct the illegal sentence must therefore be reversed.

CONCLUSION

Mr. Barr respectfully asks this Court to hold that the mandatory consecutive sentence provision in I.C. § 19-2520G(3) violates Article II, § 1 and Article V, § 13 of the Idaho Constitution, and to reverse the district court's order denying his Rule 35(a) motion and remand the case to the district court for resentencing, without the unconstitutional consecutive sentencing mandate.

DATED this 3rd day of November, 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November, 2022, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

KAC/eas