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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. 49376-2021**
	)	
v.	)	**ADA COUNTY NO. CR01-17-34113**
	)	
BRITIAN LEE BARR,	)	**APPELLANT'S 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 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 depriving the sentencing court of its inherent authority to choose whether to order 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' imprisonment. The district court did so because it 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 raised this constitutional issue in an Idaho Criminal Rule 35(a) motion. The district court denied the 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 violates the separation of powers clauses of the Idaho Constitution, because the authority to choose consecutive sentences is a recognized power of the judiciary, and because consecutive sentencing mandates are not permitted by Article V, § 13, of the Idaho Constitution.

This Reply Brief is necessary to address the State's arguments in opposition.

Statement of Facts and Course of Proceedings

Mr. Barr articulated the relevant facts and proceedings in the Appellant's Brief. They are not repeated here but are incorporated by reference.

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

The Idaho Supreme Court has stated that "the powers reserved to the several departments of the government, but not specifically enumerated in the Constitution, must be defined in the context of the common law." *State v. Thiel*, 158 Idaho 103, 110, 343 P.3d 1110, 1117 (2015) (quoting *State v. Branson*, 128 Idaho 790, 792, 919 P.2d 319, 321 (1996)). And it was "early held by this Court that the power to define crimes and prescribe penalties belongs to the legislative department of government [while] the power to try offenders, and to enter judgment convicting *and sentencing* those found guilty, belongs to the judicial department." *Id*. (quoting *Spanton v. Clapp*, 78 Idaho 234, 237, 299 P.2d 1103, 1104 (1956) (emphasis added).) Relevant here, the "inherent power of the Court to impose sentences, includ[es] the choice of concurrent or consecutive terms." *State v. Lawrence*, 98 Idaho 399, 401, 565 P.2d 989, 991 (1970).

The Idaho Constitution's strict separation of powers provisions prohibit the legislature from exercising, or depriving the judiciary of, any powers that belong to the judiciary "except" as "expressly directed or permitted" in the Constitution. IDAHO CONST. art. II, § 1; art. V, §13.

Idaho Code § 19-2520G(3)'s consecutive sentence mandate purports to exercise, and deprive the judiciary of, the "inherent power of the courts to choose concurrent or consecutive terms." However, mandatory consecutive sentencing statutes are not expressly permitted in the

Idaho Constitution. Therefore, Section 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 a new sentencing hearing.

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

The State does not dispute that Idaho courts possess inherent sentencing authority under common law to choose whether the sentences they impose will run consecutively or concurrently with another sentence. (Resp.Br., p.26 ("the State agrees with this much").) Indeed, Idaho's appellate courts have repeatedly recognized that trial courts held this sentencing power under the common law. *See State v. Cisneros-Gonzalez*, 141 Idaho 494, 496, 112 P.3d 782, 784 (2004) ("[u]nder the common law, the courts in Idaho have discretionary power to impose cumulative sentences"); *State v. Lawrence*, 98 Idaho 399, 565 P.2d 989 (1970) ("It is an inherent power of the Court to impose sentences, including the choice of concurrent or consecutive terms"); *see also State v. Calley*, 140 Idaho 663, 665, 99 P.3d 616, 618 (2004) ("Under the common law, the courts in Idaho have discretionary power to impose cumulative sentences"); *State v. Dunnagan*, 101 Idaho 125, 126, 609 P.2d 657, 658 (1980) ("The decision to set sentences to run concurrently or consecutively is also within the discretion of the trial court"); *State v. Lemmons*, 161 Idaho 652, 654, 389 P.3d 197, 199 (Ct. App. 2017) (trial courts have inherent authority under common law to order mandatory minimum terms of incarceration to run concurrently);

State v. Elliott, 121 Idaho 48, 52, 822 P.2d 567, 571 (Ct. App. 1991) (observing that at common law, courts held discretionary power to impose consecutive sentences); *State v. Murillo*, 135 Idaho 811, 814, 25 P.3d 124, 127 (Ct. App. 2001) (same); *State v. McKaughen*, 108 Idaho 471, 472, 700 P.2d 93, 94 (Ct. App. 1985) (same); *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 ….").

Rather, the State submits that this sentencing power does not belong to the judiciary under the constitution, because the power was "subject to statutory constraint in [territorial] Idaho in 1890." (*See* Resp.Br., pp.19, 26.) In the State's view, "the framers of the Idaho Constitution would have understood [that] a court's discretion to impose a consecutive sentence is subject to legislative constraint." (Resp.Br., p.26.) Thus, according to the State, because the territorial legislature had placed constraints on this judicial sentencing power when the Idaho Constitution in 1890,[1] the legislature was not prevented from placing such constraints on the judicial power, under the Idaho Constitution. (*See generally* Resp.Br., pp.18-30.) The State's argument should be rejected. As demonstrated below, the State's view conflicts with the text of the Idaho Constitution, with the remarks of its framers, and with the controlling precedent from this Court.

[1] The Constitution of Idaho was adopted August 6, 1889, ratified by the people November 1889, and approved by Congress July 3, 1890. *See* https://legislature.idaho.gov/statutesrules/idconst/ (last visited July 6, 2023).

1. The State's Argument Regarding *In re Esmond* Is Off-Mark; Under *Esmond*, Courts *First* Looked To See Whether The Organic Act Prohibited Enactment Of A Statute Mandating Consecutive Sentences

The State relies heavily on *In re Esmond*, 42 F. 827 (Dist. S.D. 1890), which the State calls "the case at the center of the bullseye." (Resp.Br., pp.22-23.) *Esmond* is a federal district court decision from the District of South Dakota that considered a federal sentence for robbery of the United States mail arising from the Territory of Idaho. *Esmond*, at 827. The *Esmond* Court considered an Idaho Territorial statute that purported to require running sentences consecutively.[2] The *Esmond* Court noted a conflict of authority in the area, before ultimately upholding a consecutive sentence. *Id*. Importantly, however, the court noted that the legislature's ability to require a consecutive sentence was permissible *because it was not prohibited* by the Organic Act of the Territory of Idaho.[3] As explained by the *Esmond* Court,

> Now, *if there is nothing in the organic act of the territory of Idaho impliedly or expressly prohibiting that territory from passing an act concerning cumulative sentences*, (and it is not claimed there is), it may well be that such legislation is obligatory upon the territorial courts when sitting to hear cases arising under the laws of the United States.

Esmond, 42 F. at 828 (emphasis added).

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[2] As set forth in *Esmond*, the territorial statute provided,

> When any person is convicted of two or more crimes, before sentence has been pronounced upon him for either, the improvision to which he is sentenced up the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be.

Esmond, at 827 (quoting Idaho Rev. Stat. § 7237 [(1887)]).

[3] *See* Organic Act of the Territory of Idaho, approved March 3, 1863 (12 U.S. St. 808 (1863)) (accessible at: https://llmc.com/OpenAccess/docDisplay5.aspx?textid=77176757).

The significance of this passage is that the *Esmond* Court observed that the *Organic Act*, (which was the predecessor to the Idaho Constitution), *could* have prohibited the territorial legislature from enacting a statute mandating consecutive sentences. And while the Organic Act of the Territory of Idaho contained no prohibition in that regard, *see generally* Organic Act, §§1-17, the Idaho Constitution clearly did – by adding strict separation of powers clauses to *expressly prohibit* the legislative branch from constraining the judicial powers of Idaho's courts, *see* IDAHO CONST. art. II § 1; art V, §13. Thus, the *Esmond* case, which the state refers to as "the case at the center of the bullseye," demonstrates that Mr. Barr's separation of powers argument is on target.

2. The State's View That Judicial Power Remained Subject To Legislative Constraint Under The Constitution In 1890 Conflicts With The Text Of The Idaho Constitution And The Remarks Of Its Framers

"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.'" *State v. Winkler*, 167 Idaho 527, 531, 112 P.3d 1371, 1375 (2020) (quoting *Sweeney v. Otter*, 119 Idaho 135, 139 (1990)).

In 1889, the framers of the Idaho Constitution expressed their intention that judicial powers be free from existing and future restraint by other branches of the government. First, by adopting Article II, § 1, the framers expressly prohibited any of the three branches of the new state government from exercising any powers that belonged to another branch, "except as in this constitution expressly directed or permitted." IDAHO CONST. art. II, § 1. As observed by

various scholars,[4] state constitutions adopted around the same time as Idaho's contained similar provisions, requiring that the branches of government remain separate "except" in instances "expressly directed or permitted" in the constitution. The purpose of such clauses has been described as follows:

> The separation of powers provisions worked to create a default organizing principle for purposes of holding government accountable, but the people could (through their constitution) organize government power however they liked. The deeper point was that government officials remain bound by constitutional limitations on their powers, and the escape clauses served to emphasize and reinforce this. In other words, government could not unilaterally combine or rearrange the powers of particular branches, but the people could do so in the constitution, and government was obliged to comply with whatever arrangements the people constructed.

Marshfield, JL., America's Other Separation Of Powers Tradition, 73 DUKE L.J. _ (forthcoming 2023/24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4369636 (last visited June 15, 2023); *see also* G. Alan Tarr, Interpreting the Separation of Powers in State Constitutions, 59 NYU ANN. S. AM. L. 329, 340 (2003) (noting that escape clauses "confirm[] that the populace retains the right to allocate any power to whatever branch it chooses, as long as it locates that choice in the text of the constitution.").

Second, the framers included an *additional* separation of powers provision, aimed at the legislature and specifically prohibiting that branch from constraining the powers of the courts: "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." IDAHO

[4] *See Marshfield, JL., America's Other Separation Of Powers Tradition,* 73 DUKE L.J. _, *infra,* (collecting scholarly articles).

CONST. art. V, § 13. This second provision, the "doubling down" on the prohibition against legislative usurpation of judicial powers, demonstrates the framers' intent to prevent legislative constraint of judicial powers "except" as "expressly directed or permitted" in the new constitution.

The framers' intention regarding a strict separation of the powers is also evidenced by the framers' words at the 1889 Constitutional Convention. *See State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019) (stating that, in determining the intent of the framers, "[t]he best resource is the compilation of the Proceedings and Debates of the Constitutional Convention of Idaho 1889 (I.W. Hart ed., 1912) ["PROCEEDINGS AND DEBATES"]) (internal citations and quotation marks omitted).

At the time the Idaho Constitution was adopted, neither the federal constitution nor the Organic Act of the Territory of Idaho provided the people the right of direct vote in the selection and retention of their judges; instead judges and justices were appointed by another branch of the government, to serve for life on good behavior. *See* U.S. CONST, art. II, § 2; the Organic Act, § 14.

At the convention, the people's right to select their own judges was viewed by delegates as being of great importance in the new constitution.: "If there has been any subject more than another upon which the people have comments, and which today inspires them in their anxiety to work for statehood, it is that they may have the right at least to select their own judges *and control their own courts.*" PROCEEDINGS AND DEBATES, at 1511-12 (remarks of Mr. Sweet) (emphasis added).

A discussion of the selection of judges helps to explain what those framers had in mind by providing for separate and independent branches of the government.

> MR. HEYBURN. Mr. President, there is another fact. We have taken great pains in our Bill of Rights[5] to provide that the government of our state shall be divided into three separate and distinct branches: Executive, Legislative, and Judiciary; and *to declare that they shall be separate*, and not depend one upon the other. Now, is it right, is it reasonable, to provide that they shall be separate, and not one to depend upon another, and to provide that one of these branches shall select the other? Is it not merging those two branches into one, the judicial and the executive, and allowing the executive to select the judicial? Why make the judicial branch of the government the creature of the other branches of government*? Then leave by your constitution each of these three distinct and separate branches of the government to stand alone, each one of them to guard against infringement by the other upon the rights of the people, dividing your government into three distinct branches, in order that each may be independent of the other. . . . Their powers should be kept separate and distinct, and not one allowed to infringe upon another.* And you can only secure that by not allowing one to create the other, because the creator will be the master of the created; and the creator should be the people in this case; the people should be master of the created.

Vol. 2 PROCEEDINGS AND DEBATES, at 1513 (emphasis added).

These words demonstrate that the branches of the new government were intentionally separated "in order that each may be independent of the other," and that their "powers should be kept separate and distinct, and not one allowed to infringe upon another." *Id*. Notably, at that time, no such restriction against the infringement on powers existed under Organic Act of the Territory of Idaho (12 U.S. St. 808 (1863)), or under the under the federal constitution, *see* U.S. CONST art. I-V.

[5] Later in the Convention, this separation of powers provision was moved from the Bill of Rights and given its own article, Distribution of Powers, Article I, § 2. *See* Vol.2 PROCEEDINGS AND DEBATES, at 1695.

Thus, the text of the Constitution and the remarks of its framers demonstrate that, even if the legislature could place constraints on judicial powers *before* the Constitution took effect, such constraints were prohibited by the separation of powers provisions *in* the new constitution.

3. The State's Argument That The Inherent Judicial Sentencing Power Is Not Exclusive Conflicts With *State v. McCoy* And Its Progeny

The State's argument also ignores the holdings and rationale of *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971). In *McCoy*, the Court rejected an argument identical to that presented by the State here. In *McCoy* the State had argued that "while the courts may have had power to suspend sentence at common law, the common can be amended by statute and this power abrogated." 94 Idaho at 238, 486 P.2d at 249. The *McCoy* Court acknowledged that, "the common law is accepted as part of the law of this state [and] is subject to modification by the legislature." *Id.* The *McCoy* Court further stated that, were it "deliberating upon a matter of substantive law, there would be no doubt that the legislature has effected a valid change in the common law," but that "*this is a consideration of much greater dimension.*" *Id.* at 240, 486 P.2d at 251 (emphasis added).

The *McCoy* Court went on to describe the "nature and extent of the power vested in the judiciary *and reserved to it*, *inviolate*, by Article II, § 1 *and* Article V, § 13 of the constitution." 94 Idaho at 238, 486 P.2d at 249 (emphasis added). The Court ultimately held that among those powers reserved to courts, the "power to suspend" the sentence is *inviolate*, because that power is necessarily included "the authority possessed by the courts *to sentence*." *Id.* at 240, 486 P.2d at 251 (emphasis added). Critically, the *McCoy* Court held,

> This is more than a bare rule of substantive law subject to change by the legislature. Rather, it is in the nature of an inherent right of the judicial department and one which the separation of powers concept in our system of government places above and beyond the rule of mandatory action imposed by legislative fiat.

Id. at 240, 486 P.2d at 251.

The *McCoy* Court also gave a [judicial] "common sense" reason for recognizing discretion in sentencing as an inherent judicial power; namely, the need for individualized sentencing decisions by "one fully advised of all the facts particularly concerning the defendant in each cased and not by a body far removed from these considerations." *Id*. Notably, this "common sense" reason aligns perfectly with the framers' early concern that the people elect their own district judges, and that the legislature have no power to "rotate" those judges to other districts. *See* 2 PROCEEDINGS AND DEBATES, at 1525 (remarks by Mr. Morgan, against an amendment that would have granted the legislature power to "rotate" judges between districts, stating, "we elect a judge on account of his particular fitness for the litigation that arises in his district, is one of the strongest reasons why the people should be able to retain him in that district . . . ").

Thus, *McCoy* made clear that the inherent sentencing powers of the courts at common law are reserved to the judiciary by the Idaho Constitution. *See also State v. Branson*, 128 Idaho 790, 792, 919 P.2d 319, 321 (1996) (discussing *McCoy* and observing that the courts' common law sentencing discretion, including the power to suspend the sentence, "is an 'inherent right' of the judiciary and one which the separation of powers [clause] places beyond legislative mandate"); *accord State v. Thiel*, 158 Idaho 103, 110, 343 P.3d 1110, 1117 (2015).

As noted above, it is also well established that the inherent sentencing powers of the court include "*the choice of concurrent or consecutive terms, when the occasion demands it*." *Lawrence*, 98 Idaho at 401, 565 P.2d at 991 (emphasis added).

Finally, the Idaho Supreme Court has made it clear that, even where the legislature has historically enacted statutes that purported to take over a judicial function, the Court will continue its vigilance in protecting the autonomy of the judiciary. As the Court recounted in *McCoy*,

> This court has in the past been very circumspect in protecting the autonomy envisioned for the judiciary within our constitution. In *Application of Kaufman*, 69 Idaho 297, 206 P.2d 528 (1949), the court had before it a statute which granted admission to the bar of this state to any person who had been graduated from the University of Idaho School of Law (Ch. 73, § 1 (1949) Idaho Session Laws 126). Despite a showing of a history of legislation[6] purporting to control the Idaho State Bar, this court overturned the statute as an invalid interference with judicial authority. In that case, as in this, there was no clear grant of authority stated in the constitution itself. The court was persuaded by the fact that control and administration of the organized Bar had always been recognized as a function peculiar to the judiciary.
>
> In *R.E.W. Const. Co. v. District Court of the Third Jud. Dist.*, 88 Idaho 426, 400 P.2d 390 (1965), this court confirmed the inherent authority vested in the judiciary to pass rules of procedure.[7] This decision was reached in spite of the [provision] in Article V, § 13 stating ". . . but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of

[6] Legislation purporting to control the admission of attorneys also existed at the time the Idaho Constitution was adopted. *See* Idaho Rev. Stat. §§ 3990-4014 (1887) (providing for the admission of attorneys their professional duties).

[7] The territorial legislature had also passed statutes purporting to prescribe the judicial procedures of the courts. *See e.g.*, Idaho Rev. Stat. §§ 6052-6085 (providing for the admission of witness testimony).

> proceeding in the exercise of their powers of all the courts below the Supreme Court . . ."
>
> 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.

94 Idaho at 240–41, 486 P.2d at 251–52 (1971).

For all of the reasons above, the State's argument that the judicial power to choose concurrent or consecutive terms is *not* a power belonging to the courts under the Idaho Constitution, or that such power belongs to the courts *subject to* a legislative prerogative to constrain it, should be rejected.

C. Mandatory Consecutive Sentences Are Not Express Permitted By The Language Added To Article V, § 13, In 1978

The State argues that a grant of legislative authority to mandate *consecutive* minimum sentences can be found "under the plain language" of the 1978 amendment to Article V, § 13. (Resp. Br., pp.7, 9-18.) The State is incorrect. The added language provides,

> 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.

1. The Language Of The Exception In Article V, § 13 Does Not Permit Mandatory Consecutive Sentences

There is nothing in the language of Article V, § 13 that expressly permits the legislature to mandate consecutive sentences. First, a mandatory "minimum sentence" is not a "consecutive

sentence" within the *dictionary* meanings of those terms. *See* Appellant's Br., pp.17-18 (citing Black's Law Dictionary, and Webster's Third New International Dictionary).

Even more importantly, when the amendment adding this language was presented to Idaho citizens for vote in 1978, the legislature used the following to describe the meaning and "effect" of the amendment if the people were to approve it:

> 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].

See The Idaho Statesman, Boise, November 5, 1978 (publishing the "1978 Legislative Council's Statement of Meaning and Purpose, H.J.R. 6"). Notably, the State has remained silent about this critical legislative fact. (*See generally* Resp. Br.)

2. The Reasoning Of *State v. Alexander* Does Not Support The State's Plain Language Argument

The State's plain language reading of the 1978 Amendment is not supported by the Court of Appeals' decision in *State v. Alexander*, 138 Idaho 18, 25, 56 P.3d 780, 787 (Ct. App. 2002). According to the State, because *Alexander* reasoned that a "fine" is punishment and thus "part of the mandatory minimum sentence" authorized by Article V, §13, consecutive sentences are authorized for the same reason. (Resp.Br., pp.11-12.) The State's argument is unavailing for all of the reasons argued in the Appellant's Brief. (*See* Appellant's Brief, pp.19-20.)

Additionally, *Alexander* was wrongly decided, as its expansive reading of "mandatory minimum sentences" in Article V, § 13, cannot be reconciled with the meaning given by the

Amendment's drafters when the amendment was presented to Idahoans for ratification, in 1978. (*See* supra).

Finally, the Court of Appeals' decision in *State v. Lemmons*, 161 Idaho 652, 654, 389 P.3d 197, 199 (Ct. App. 2017), illustrates and supports Mr. Barr's argument that the trial court's authority to choose concurrent or consecutive sentences is distinct, and independent from, the mandatory minimum sentences that are imposed. In *Lemmons* the defendant was sentenced on four drug counts to four mandatory minimum prison terms and four mandatory minimum fines. *Id*. The trial court ordered the prison terms to run concurrently, but concluded it lacked authority to order concurrent fines. *Id*. On appeal, the defendant argued that under *Alexander*, the fine was "part of the sentence" and therefore the trial court's authority to choose concurrent "sentences" applied to fines. *Id.* The Court of Appeals rejected that argument, declining to apply *Alexander* in this broad, all-encompassing way. The Court of Appeals correctly distinguished the trial court's authority to run the sentences concurrently as a separate and independent component of each the sentence imposed for the specific crime. The Court held that, while the trial court *did* possess common law authority to order the mandatory minimum *prison terms* to run concurrently, it *lacked* authority to order concurrent mandatory minimum *fines*. *Id*. In arriving at this conclusion, the *Lemmons* Court necessarily and implicitly regarded the minimum "sentences" as separate and distinct from the trial court's authority regarding those sentences. For this reason also, and contrary to the State's argument, a "consecutive sentence" is *not* "like a fine."

3. The State's Argument For An Expansive Reading Of The Exception in Article V, § 13, Should Be Rejected

The State wrongly argues that the language added to Article V, §13 should be read "comprehensively" to include consecutive sentencing mandates. (Resp. Br., p.14.) However, the Idaho Supreme Court has clearly stated that this language "provides a *narrow exception* for the legislature to exercise powers traditionally granted to the judicial branch." *State v. Olivas*, 158 Idaho 375, 380, 347 P.3d 1189, 1194 (2015) (emphasis added). (*See* Appellant's Br., pp.20-22.) The State's request for an *expansive* reading of the exception, to allow broader intrusions on judicial powers than expressly permitted, conflicts with the controlling precedent, and should be rejected.

4. No Additional Language Is Needed To Give Effect To The Drafter's Intent

The State's concern that an expansive reading is necessary for the mandatory minimum provision "to have any teeth," (Resp.Br., p.15), is unwarranted and misguided. According to the State, if express language is required, then the provision would "need to read,"

> Any mandatory minimum sentence so imposed shall not be reduced; shall be imposed; shall not be suspended; shall not be deferred; shall not be commuted; shall not be run concurrently; shall be served as a period of incarceration within the four walls of a prison in the state of Idaho; and any mandatory minimum fine shall not be reduced, deferred, waived, or denominated in currency other than U.S. dollars …." and so on and so on, ad infinitum.

(Resp.Br., p.15.)

However, the listed restrictions are unnecessary to give effect to the expressed intent of the provision's drafters: all but three pertain to powers that belong to the executive and legislative branches, and as such, the Constitution already provides the legislature the authority

to enact statutes pertaining to those powers.[8] Of the State's listed restrictions, just *three* pertain to judicial powers of belonging to the court: (1) the power to suspend the sentence that it imposes, *see McCoy,* 94 Idaho at 240, 486 P.2d at 251; (2) the power to reduce the sentence, *see* Idaho Criminal Rule 35(b), *State v. Brown*, 170 Idaho 439, 511 P.3d 859 (2022); and (3) the power to choose whether to run sentence of confinement consecutively or concurrently with another sentence, *see State v. Lawrence,* 98 Idaho at 401, 565 P.2d at 391 . (*See* also Appellant's Br., p.13.) The language actually added to Article V, § 13, grants the legislature authority to restrict *two* of those powers: the power to suspend the sentence and the power to reduce it. *See Olivas,* 158 Idaho at 380, 347 P.3d at 1189 (2015). However, that language grants the legislature *no* authority to place restrictions on the judicial power to choose concurrent prison sentences. Because that constitutional authority is lacking, the legislative mandate for consecutive sentencing violates the Idaho Constitution's strict separation of powers requirements.

5. <u>*Doan v. State* Does Not Support The State's Argument</u>

The Idaho Supreme Court's decision in *Doan v. State* does not support the State's argument. (Resp.Br., pp.17-18 (discussing *Doan v. State*, 132 Idaho 796, 798, 979 P.2d 1154, 1156 (1999).) In *Doan*, the Idaho Supreme Court held that the IDOC, a department of the executive branch, does not violate the separation of powers clause by inserting a fixed sentence

[8] For instance, 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). The Idaho Court of Appeals also has held that while Idaho's courts have inherent authority to run mandatory minimum *terms of confinement* concurrently, the courts lack such authority to order mandatory minimum *fines* to be concurrent. *State v. Lemmons*, 161 Idaho 652, 654, 389 P.3d 197, 199 (Ct. App. 2017).

between the fixed and determinate portions of another sentence. *Id*. at 802, 979 P.2d at 1156. The Court held this was constitutional because the IDOC was, in effect, exercising the authority expressly granted to the Board of Corrections in Article X, § 5 of the Idaho Constitution. *Id*. at 802 ("the Idaho Constitution expressly gives the Board of Corrections authority over control, direction, and management of the penitentiaries of this state … and of adult probation and parole, with such compensation powers, and duties as may be prescribed by law") (quoting *Flores v. State*, 109 Idaho 182, 184, 706 P.2d, 771, 773 (1985).

The State argues that the "logic" of *Doan* should apply in Mr. Barr's case. (*See* Resp.Br., p.17.) The State is incorrect. What was present in *Doan* is missing here. Unlike the Board of Corrections in *Doan*, the legislature here has not exercised a power that was expressly granted to it by the Idaho Constitution, because Article V, § 13, does not expressly authorize the legislature to enact mandatory consecutive statutes. Consequently, *Doan's* holding does not help the State.

6. The Legislature *Can* Properly Influence The Exercise Of Judicial Powers

The State's complaints about the "slightest legislative impingement" on a "hermetically sealed" judicial power (Resp.Br., p.19), understates what the legislature has attempted to do in this case, which is to *extinguish* the court's discretionary authority to run any of Mr. Barr's mandatory 15-year prison sentences concurrently. *See* I.C. § 19-2520G(3) ("Any sentence imposed under the provisions of this section *shall run* consecutive to any other sentence imposed by the court.") (Emphasis added).

Moreover, and contrary to the assertion of the State (*see* Resp. Br., p.28), Mr. Barr acknowledges that the legislature *can* properly *influence* the courts in the exercise of their sentencing discretion, by enacting criteria for the court's consideration and by declaring the state's sentencing policy and objectives. *See e.g.*, I.C. § 19-2521 (setting forth state's sentencing policies and goals for placing a convicted person on probation instead of imprisonment); I.C. § 19-2522 (providing for the assessment of a defendant's mental condition before sentencing); I.C. § 19-2523 (providing for consideration of mental illness in sentencing); I.C. § 19-2524 (providing for consideration, in sentencing, of community-based treatment to meet behavioral health needs).

D. Decisions From Other Jurisdictions Are Not Helpful In Resolving This Constitutional Issue Because No Other Jurisdiction Has Analyzed Idaho's Constitutional Provisions

The State asserts that Mr. Barr's argument cannot be correct because "every single appellate court that reviewed this issue has rejected Barr's claim." (Resp. Br., p.32.) This assertion, too, should be rejected, because *no* appellate court has ever considered whether legislatively mandated consecutive sentences violate the separation of powers provisions of the Idaho Constitution.

Decisions from federal courts are especially unhelpful, because unlike the Idaho Constitution, the federal constitution contains *no* provision that explicitly requires the separation of powers, s*ee generally* U.S. CONST. art. I-V, and because unlike Idaho's trial courts, federal judges lack inherent judicial sentencing powers, including the power to suspend a sentence, *see Ex parte U.S.*, 242 U.S. 27 (1916). *Compare CDA Dairy Queen, Inc. v. State Ins. Fund*, 154

Idaho 379, 383, 299 P.3d 186, 190 (2013) (observing that federal rules and methodology may be appropriate "when interpreting parts of the Idaho Constitution *that have an analogous federal provision*" (emphasis added)).

Decisions from other states are likewise unhelpful. Of the more than thirty[9] other states that have a "distribution of powers" clause in their constitution similar to Idaho's Article II, § 1, it appears that only Nebraska has upheld mandatory consecutive sentences. (*See State Stratton*, 374 N.W.2d 31, 34-35 (Neb.1985). But as pointed out in the Appellant's Brief, *Stratton* does not interpret the meaning of the clause in the opinion; nor is there any indication that the appellant argued there was no express direction or permission elsewhere in the constitution. (Appellant's Br., p.28.) Also, Nebraska's constitution is distinct from Idaho's in that the Nebraska's Constitution does *not* have a second clause like Idaho's Article V, § 13, with a targeted prohibition against the legislature depriving the judicial department of its judicial powers. *See generally* NEB. CONST. art. IV, §§ 1-31. Importantly, from Mr. Barr's research, it does not appear that Nebraska has ever recognized that its constitution vested the Nebraska judiciary with any sentencing powers that the legislature may not alter.

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[9] *See* ALA. CONST. art. III §§ 42, 43; ARIZ. CONST. art. III; ARK. CONST. art. 4 §§ 1, 2; CAL. CONST. art. 3, § 3; COLO. CONST. art. 3; FLA. CONST. art. 2, § 3; GA. CONST. art. I, § 2, 3; ILL. CONST. art. 2, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art. 3, § 1; KY. CONST. §§ 27, 28; LA. CONST. art. 2, §§ 1, 2; ME. CONST. art. 3, §§ 1, 2; MD. CONST. art. 8; MASS. CONST. pt. I, art. 30; MICH. CONST. art. 3, § 2; MINN. CONST. art. 3, § 1; MISS. CONST. art. 1, §§ 1, 2; MO. CONST. art. 2, § 1; MONT. CONST. art. III, § 1; NEB. CONST. art. II, § 1; NEV. CONST. art. 3, § 1; N.J. CONST. art. 3, 1; N.M. CONST. art. 3, § 1; OKLA. CONST. art. 4, § 1; OR. CONST. art. Ill, § 1; S.C. CONST. art. I, § 8; TENN. CONST. art. 2, §§ 1, 2; TEX. CONST. art. 2, § 1; UTAH CONST. art. 5, § 1; VT. CONST. chap. 11, § 5; VA. CONST. art. III, § 1; W. VA. CONST. art. 5, § 1; WYO. CONST. art. 2, § 1.

Thus, Idaho's constitution, the history of its making, and judicial precedent interpreting it, make Mr. Barr's separation of powers argument unique to Idaho. Moreover, the task of this Court "is to interpret the Constitution, not to follow judicial trends." *State v. Randall*, 169 Idaho 358, 367, 496 P.3d 844, 853 (2021).

The balance of the State's arguments are unremarkable, and Mr. Barr respectfully refers this Court to the arguments made in his Appellant's Brief as his response.

CONCLUSION

For the reasons set forth in the Appellant's Brief, and those herein, 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 6th day of July, 2023.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2023, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served as follows:

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KAC/eas