Electronically Filed
3/23/2023 12:51 PM
Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Sara Velasquez, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 49376-2021**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-17-34113**
	)	
BRITIAN LEE BARR,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE SAMUEL A. HOAGLAND
District Judge

RAÚL R. LABRADOR
Attorney General
State of Idaho

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

KIMBERLY A. COSTER
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.idaho.gov

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature Of The Case

Britian Lee Barr appeals from the district court's order denying his Rule 35 motion to correct a purportedly illegal sentence. On appeal he claims I.C. § 19-2520G(3), mandating consecutive sentences for repeat offenders in child sex-abuse cases, violates the Idaho Constitution's separation of powers provisions, and is unconstitutional.

Statement Of The Facts And Course Of The Proceedings

This Court[1] summarized the underlying facts as follows:

> In March 2017, detectives found hundreds of photos and videos of child pornography on Barr's laptop, cell phones, and computer storage devices. Barr admitted to officers he had been downloading child pornography. Based on the recovered videos, Barr was charged by Information with five felony counts of sexual exploitation of a child. The State also filed an Information Part II alleging that Barr had been convicted of possessing child pornography, he was a repeat sex offender, and thus was subject to the mandatory minimum sentence provisions in Idaho Code section 19-2520G. The State later filed a second case charging Barr with more counts of possession of child pornography, and the two cases were consolidated for trial.
>
> At a pretrial hearing the parties proffered a proposed Rule 11 plea agreement to the district court. Both parties agreed, in exchange for Barr's guilty plea to the initial five counts filed against him, the State would dismiss the remaining charges in the latter case. The parties also agreed to a unified sentence of fifty years, with twenty years fixed. The district court raised concerns about the plea agreement, mainly regarding whether the submitted sentence was illegal because it called for the sentences to run concurrently, rather than consecutively, as required under section 19-2520G. The parties both agreed there was some case law that referred to how the sentences for each count needed to run consecutively, but even so, they believed that their proposed sentence was not an illegal one. The district court declined to make any findings or determinations at that point, but continued the hearing for three weeks to explore whether the parties were proposing an illegal sentence as it had been described.

[1] Because Barr's direct appeal was previously retained by the Idaho Supreme Court, and because this appeal presents a first-impression claim interpreting the Idaho Constitution, the state respectfully requests the Idaho Supreme Court retain this appeal.

> Barr eventually rejected the twenty-year fixed sentence in the proposed Rule 11 plea agreement and the case went to trial.

State v. Barr, 166 Idaho 783, 785, 463 P.3d 1286, 1288 (2020) (hereinafter "Barr I").

On the second day of trial Barr decided to plead guilty. (5/15/18 Tr., p.4, Ls.7-14[2].) The state's prior offer was now off the table; as such, Barr now agreed to plead guilty to all five counts and to admit to being a repeat sex offender. (See 5/15/18 Tr., p.4, L.18 – p.5, L.2.) Everyone below—including the state, Barr, Barr's counsel, and the district court—appeared to think that this meant that Barr would be subject to five consecutive 15-year sentences. (5/15/18 Tr., p.4, Ls.15-25; p.15, Ls.14-19; p.33, Ls.22-25.) Barr himself affirmed he understood that, if he did not go to trial, he would face "essentially 75 years fixed time in prison." (5/15/18 Tr., p.10, L.21 – p.11, L.6.) Barr likewise affirmed he understood "that the court virtually would have no discretion in the final sentence because of the Information Part Two" and that he understood the court could not "reduce the sentence or make it run concurrently or anything like that." (5/15/18 Tr., p.16, Ls.14-21.) Following a thorough colloquy Barr pleaded guilty to all five counts and admitted the sentencing enhancement. (5/15/18 Tr., p.21, L.13 – p.25, L.25.)

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

[2] The transcripts and clerk's record from Barr's direct appeal, no. 46094, were augmented into the record in this case on Barr's motion.

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

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

(5/15/18 Tr., p.39, L.1 – p.40, L.2; p.41, Ls.4-25.) The district court sentenced Barr to five consecutive 15-year fixed sentences. (46094 R., p.189.)

Barr appealed from his judgment of conviction. Barr I, 166 Idaho at 785, 463 P.3d at 1288. He pressed two interrelated claims, arguing the district court abused its discretion by "failing to perceive that it had discretion to: (1) order indeterminate and determinate portions of Barr's five fifteen-year sentences, and (2) run his sentences concurrently with one another." Id. at 786, 463 P.3d at 1289. Barr additionally argued "that if the legislature intended section 19-2520G(3) to deprive the court of its traditional power to determine whether to run a sentence consecutively, then the statute is unconstitutional." Id.

This Court declined to address all of these issues on appeal, concluding Barr failed to preserve them in district court with timely objections. Id. at 786-87, 463 P.3d at 1289-90. With particular regard to Barr's constitutional claim, this Court concluded that, "[w]hile the district

judge expressed his personal opinions and frustrations with mandatory minimum sentencing laws, the issue was not before the district court," who "never heard arguments from the parties or issued a *ruling* on whether section 19-2520G was unconstitutional." Id. at 787, 463 P.3d at 1290 (emphasis original) (footnote omitted). To this point, this Court appended a footnote, stating: "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. n.1. This Court affirmed the judgment of conviction and sentence. Id. at 787.

Thereafter, on May 14, 2021, Barr filed a Rule 35(a) motion in district court to correct a purportedly illegal sentence. (R., pp.30-39.) The basis of the motion was Barr's view that "district courts possess the inherent, *exclusive* constitutional discretion to decide whether to run the sentence concurrently or consecutively." (R., p.35 (emphasis added).) Consequently, per Barr, Section 19-2520G(3) "is unconstitutional" and "did not deprive the [district court] of its traditional power to decide whether to run sentences consecutively or concurrently." (Id.) "Because the Legislature could not constitutionally deprive" the district court of that power, Barr claimed, the court "retained its traditional, inherent discretionary authority to determine whether to run those five terms consecutively or concurrently." (R., p.38 (italics omitted).) Barr accordingly argued "the imposition of mandatory consecutive sentences was illegal on the face of the record," and moved the court for a "new sentencing hearing." (R., p.39.) The state objected to the motion, arguing, among other things, that "the legislature has the power to mandate a consecutive sentence." (R., p.43 (cleaned up).)

The district court held a hearing on Barr's motion. (R., p.75; 10/13/21 Tr., p.4, L.7 – p.23, L.13.) The parties subsequently submitted written briefing with additional authorities. (R., pp.76-91.)

The district court denied Barr's Rule 35 motion. (R., pp.92-102.) It identified the "sole issue," which was one of first impression: "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.'" (R., p.94 (footnote omitted, brackets original).) The district court concluded it would not, because the "effect of making a sentence consecutive or concurrent impacts the length of time spent in incarceration, and is thus, part of the sentence." (R., p.97.) This was constitutionally permissible, the court found, because "the legislature is empowered to designate mandatory consecutive sentences under the plain language of Article V, Section 13 of the Idaho Constitution." (Id.) The court also observed that Barr had not identified, "nor has this Court found, a case from any other jurisdiction holding that legislatively imposed mandatory consecutive sentences violate[] the separation of powers doctrine." (R., p.100.) To the contrary, "[o]ther courts have routinely addressed and rejected the argument that mandatory consecutive sentences violate the separation of powers doctrine." (Id.)

Thus, the court concluded, "[t]he legislature is empowered pursuant to Article V, Section 13 to provide for mandatory minimum sentences for any crimes," including mandatory consecutive sentences, and 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.101.) Consequently, "the mandatory consecutive sentence requirement in Idaho Code § 19-2520G(3) does not violate the separation of powers doctrine." (Id.)

The district court accordingly entered an order denying Barr's Rule 35 motion. (R, p.102.) Barr timely appealed. (R., pp.103-06.)

ISSUE

Barr states the issue on appeal as:

> 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?

(Appellant's brief, p.8.)

The state rephrases the issue as:

Is Section 19-2520G(3) constitutional because mandatory consecutive sentences are allowed by the Idaho Constitution, would be permitted at early common law, were permitted in Idaho in 1890, and because no court to address this issue has ever found a separation-of-powers violation?

ARGUMENT

Section 19-2520G(3) Is Constitutional Because Mandatory Consecutive Sentences Are Allowed By The Idaho Constitution, Would Be Permitted At Early Common Law, Were Permitted In Idaho In 1890, And Because Every Court To Address This Issue Has Found No Separation-Of-Powers Violation

A. Introduction

Barr claims Section 19-2520G(3), which mandates consecutive sentences for repeat-offenders in child sex abuse cases, is unconstitutional. That is so, according to Barr, because "Idaho's courts possess inherent authority and judicial power to choose whether the sentences they impose run consecutively or concurrently with any other sentence." (Appellant's brief, p.9.) Per Barr, "[m]andatory 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." (Id.)

Barr is incorrect. Section 19-2520G is constitutional, and does not violate the Idaho Constitution's separation of powers, for at least three reasons. *First*, Article V, Section 13 of the Idaho Constitution gives the Legislature the power to designate mandatory minimum sentences. As the district court correctly found, the Legislature's power to impose a mandatory minimum sentence would include the power to mandate a consecutive sentence, which is what Section 19-2520G(3) does.

Second, even if Article V, Section 13, did not give the Legislature the power to mandate consecutive sentences, throughout history, a court's common-law discretion to choose between consecutive and concurrent sentences could be constrained by statute. Thus, in 1890, a court's common-law discretion to impose a consecutive sentence was not an *exclusive* power. And it is demonstrably the case that, in 1890, in territorial Idaho, mandatory consecutive sentences were

permitted by law. Any common-law authority reflected in the Idaho Constitution would recognize all that, and Section 19-2520G(3) would be proper under that authority.

Third and finally, every single appellate court that has confronted this issue has rejected Barr's claims. To the state's knowledge, not a single appellate court that has addressed legislatively mandated consecutive sentences has found a separation of powers violation. The district court below—which arrived at the same conclusion in denying Barr's Rule 35 motion—was correct.

B. Standard Of Review

"Issues of constitutional and statutory interpretation are questions of law and are reviewed by this Court de novo." State v. Winkler, 167 Idaho 527, 529, 473 P.3d 796, 798 (2020). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003), abrogated on other grounds, Evans v. Michigan, 568 U.S. 313, 320 (2013). The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id. "Generally, the federal framework is appropriate for analysis of state constitutional questions unless the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies." CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 383, 299 P.3d 186, 190 (2013).

C. Section 19-2520G(3) Does Not Violate Separation Of Powers Because Article V, Section 13 Gives The Legislature Power To Impose Constraints On A Court's Sentencing Authority Via Mandatory Minimum Sentences, Which Necessarily Includes The Power To Mandate Consecutive Sentences

Section 19-2520G(3) does not violate the Idaho Constitution's separation of powers provisions. Article II, Section 1 of the Idaho Constitution distributes power to the three distinct

departments of government, and provides that "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." This Court has held that "the separation of powers doctrine is triggered when (1) a 'textually demonstrable constitutional commitment' assigns the matter to a particular branch of government; or (2) the matter implicates another branch's discretionary authority." Tucker v. State, 162 Idaho 11, 29, 394 P.3d 54, 72 (2017).

No one disputes that Article V, Section 13 of the Idaho Constitution prohibits the legislature from "depriv[ing] the judicial department of any power or jurisdiction which rightly pertains to it." But it also "unquestionably" gives the Legislature the ability, "by appropriate statutory language," to "prescribe mandatory minimum fixed sentences for crimes," State v. Toyne, 151 Idaho 779, 782, 264 P.3d 418, 421 (Ct. App. 2011), as follows:

> SECTION 13. POWER OF LEGISLATURE RESPECTING 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; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution, *provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.*

IDAHO CONST. art. V, § 13 (emphasis added).

In State v. Pena-Reyes, 131 Idaho 656, 657, 962 P.2d 1040, 1041 (1998), this Court recounted the history leading up to the 1978 amendment that created that mandatory-minimum provision highlighted above. It began in 1971, when this Court, in State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971), "held the judiciary had the inherent right to suspend sentences." Pena-Reyes, 131 Idaho at 657, 962 P.2d at 1041. Then, "[i]n 1978, in response to *McCoy*, the legislature

proposed and the people adopted an amendment to Article 5, Section 13, of the Idaho Constitution, which added" the mandatory minimum sentencing provision. Id. Thus, this Court explained, "[t]his amendment effectively circumscribes the power of our courts to suspend a mandatory minimum sentence contained in a statute enacted pursuant to the authority of our constitution." Id.

Section 19-2520G(3) is the mandatory-minimum statute at issue here. It provides that:

> (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(3) (emphasis added).

The "sole issue" here is straightforward: whether the highlighted "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." (R., p.94 (footnote omitted).) Barr's view is that it does, because "[m]andatory consecutive sentences are not expressly permitted in the Idaho Constitution." (Appellant's brief, p.9.)

The district court rejected that view. It concluded that the "effect of making a sentence consecutive or concurrent" naturally "impacts the length of time spent in incarceration, and is thus, part of the sentence." (R., p.97.) Analogizing to mandatory minimum fines, 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." (Id.) Thus, because Section 19-

2520G(3) "plainly requires mandatory consecutive sentences as part of the mandatory minimum sentence" for repeat offenders in child sex-abuse cases, the statute is constitutional. (R., p.98.)

The district court was exactly right. While no Idaho case directly addresses the question of whether the Legislature's power to establish mandatory minimum sentences would include the power to mandate consecutive sentences, a review of several cases on point shows that it would.

To begin with, the district court rightly observed that, "like fines," "whether a sentence is consecutive or concurrent … is part of a sentence." (R., p.97.) Barr does not appear to dispute that common-sense observation. (See Appellant's brief.) It is hard to imagine he could. This core commonality matters because the Idaho Court of Appeals has already addressed and dispatched Barr's separation-of-power arguments—only in the context of mandatory fines, instead of mandatory consecutive sentences. State v. Alexander, 138 Idaho 18, 25, 56 P.3d 780, 787 (Ct. App. 2002).

In Alexander, the defendant challenged the district court's imposition of "the statutory minimum fine of $10,000" on separation-of-powers grounds. Id., 138 at 22, 56 P.3d at 784. Just like Barr, Alexander bet the farm on the courts' inherent powers: he "argue[d] that the mandatory statutory fine imposed by the district court violates the separation of powers doctrine found in Article II, Section 1, of the Idaho Constitution by taking away the inherent power of a sentencing court to impose a lesser fine or suspend the fine altogether." Id. at 25, 56 P.3d at 787. Along similar lines, he "assert[ed] that the mandatory minimum fine took away the district court's ability to consider penological purposes and [his] character, which would have allowed the district court to fashion an appropriate sentence." Id. And, just like Barr, Alexander "acknowledge[d] that Article V, Section 13, of the Idaho Constitution permits the legislature to mandate minimum

sentences for crimes." Id. However, he claimed, "the word '*sentences'* as used in Section 13 does not include *fines*." Id. (emphasis added).

The Court of Appeals properly rejected Alexander's claims. Relying on Court of Appeals' precedent and the plain definition of "sentence," the court concluded that "mandatory minimum fines" were "part of the sentences." Id. at 26, 56 P.3d at 788. That was because "sentence" means "the *punishment* imposed on a criminal wrongdoer." Id. (emphasis original). The Court of Appeals accordingly found, "contrary to Alexander's position," that the mandatory fines are "part of the mandatory sentence imposed by that section and authorized by the Idaho Constitution." Id. And "[b]ecause the Court has upheld the legislative power to mandate minimum sentences, and has treated mandatory minimum fines as part of the sentences, the fines, as *part of the sentences*, do not create a separation of powers violation under the Idaho Constitution." Id. (emphasis added); see also State v. Rogerson, 132 Idaho 53, 966 P.2d 53 (Ct. App. 1998).

The Alexander Court's reasoning applies with equal force here. If fines are part of the sentences that the Legislature may permissibly mandate under Article V, Section 13, then the choice of when a sentence commences—i.e., whether it is consecutive or concurrent—necessarily must be part of the sentence too, and within the Legislature's Article V, Section 13 powers. The district court correctly concluded the same. (R., pp.95-97.)

On appeal Barr argues that Alexander is distinguishable because "the legislature has inherent authority to prescribe financial penalties as punishment for crimes." (Appellant's brief, p.19.) This observation—while true—neither distinguishes fines and sentences, nor resolves things in his favor. To be sure, the Legislature has the authority to prescribe financial penalties, but that is because the Legislature has the general "power to define crime and *fix punishment*," period. State v. Ahmed, 169 Idaho 151, 163, 492 P.3d 1110, 1122 (2021) (emphasis added)

(observing it is "uniformly held" that this power "rests with the legislature, and that the legislature has great latitude in the exercise of that power") (quoting Malloroy v. State, 91 Idaho 914, 915, 435 P.2d 254, 255 (1967)); see also Mistretta v. United States, 488 U.S. 361, 364 (1989) (observing that "Congress, of course, has the power to fix the sentence for a federal crime … and the scope of judicial discretion with respect to a sentence is subject to congressional control"). But no one thinks the Legislature's inherent authority to prescribe "punishment for crimes" is *limited* to financial penalties—it also includes the power to prescribe *prison sentences*. So because the Legislature has the power to prescribe *both* fines and sentences, Alexander easily cuts through this Gordian knot: a sentence's commencement date, like fines, should be treated as "part of the mandatory sentences authorized by the state constitution." 138 Idaho at 26, 56 P.3d at 788.

Barr maintains that fines are different "because the judicial choice of concurrent or consecutive sentences" is an inherent "discretionary power reserved to the judiciary." (Appellant's brief, p.19.) But that is begging the question: whether that discretionary power is ultimately "reserved for the judiciary" is the issue teed up this appeal. Moreover, going straight for checkmate on inherent powers, at this juncture, skips past the salient constitutional issue. Because even if courts historically had the inherent power to order consecutive sentences, that matters little if the 1978 amendment divested that power and transferred it to the Legislature. And as shown above, if the Alexander Court was correct about mandatory fines, we can infer that the 1978 amendment did just that.

A review of this Court's mandatory-minimum sentencing cases supports this view. Take Pena-Reyes. There, this Court shot down a challenge to the cocaine trafficking statute, which "imposes a mandatory minimum sentence of five years for a guilty plea to trafficking in cocaine, which 'shall not be suspended, deferred, or withheld.'" Pena-Reyes, 131 Idaho at 656, 962 P.2d

at 1040 (quoting I.C. § 37-2732B(a)(7)). Pena-Reyes pressed the now-familiar claim: he argued that statutory provision "violates Article 5, Section 13, of the Idaho Constitution because it prohibits the sentencing judge from exercising the inherent judicial power to suspend sentences." Id. This Court rejected that view, noting that the Article V amendment came as a response to McCoy, which "held the judiciary had the inherent right to suspend sentences." Id. at 657, 962 P.2d at 1041. This Court concluded the "amendment effectively circumscribes the power of our courts to suspend a mandatory minimum sentence contained in a statute enacted pursuant to the authority of our constitution"; thus, this Court found, "I.C. § 37-2732B(a)(7) does not violate Article 5, Section 13, of the Idaho Constitution." Id.

The significance of this decision is twofold. *First*, Pena-Reyes demonstrates that the Legislature's power to mandate minimum sentences under Article V, Section 13, should be read comprehensively. Importantly, the provision itself says nothing about *suspending* a sentence. IDAHO CONST. art. V, § 13. Nor does the provision state that courts "shall *impose*" sentences—it simply says that "any sentence imposed shall be not less than the mandatory minimum." Id. And yet, this Court found this concise language "effectively circumscribes the power of our courts to *suspend* a mandatory minimum sentence." Pena-Reyes, 131 Idaho at 657, 962 P.2d at 1041 (emphasis added).

Second, this amounts to a rejection of Barr's view: that Section 19-2520G(3) "violates the separation of powers" because Article V, Section 13 "does not *expressly permit* the legislature" to decide when a sentence will commence. (Appellant's brief, p.14) (emphasis added).) Barr asserts that,

> Article V, § 13's only restrictions on the court's sentencing powers are that the sentence imposed by the court "shall [be not] less than" [sic] 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.

(Appellant's brief, p.19 (emphasis original).)

In other words, on Barr's view, it is not nearly enough to say the "mandatory minimum sentence so imposed shall not be reduced"—Article V, Section 13 is required to itemize, point by point, each and every facet of a sentence that could possibly come under the court's discretion. In Barr's apparent view, to have any teeth as a mandatory minimum provision, Article V, Section 13 needs 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.

But under Pena-Reyes, this cannot be correct. Again, in that case, the Constitution's lack of an express restriction on sentence suspension did not matter; this Court still found courts' inherent "power … to suspend" a mandatory minimum sentence was precluded by Article V, Section 13. Pena-Reyes, 131 Idaho at 656, 962 P.2d at 1040. That same common-sense conclusion applies here—just because Article V, Section 13 does not contain an "express restriction" on a court's ability to run a consecutive or concurrent sentence, does not mean the constitutional amendment does not reach this fundamental aspect of a sentence. See also Toyne, 151 Idaho at 782, 264 P.3d at 421 (similarly concluding Article V, Section 13 "allows the legislature to preclude suspension of the sentence for particular crimes or preclude use of other alternative sentencing options that might otherwise be available to the sentencing court").

State v. Olivas, 158 Idaho 375, 347 P.3d 1189 (2015), demonstrates the same point from a different angle. There, this Court entertained a challenge to I.C. § 18-8311(1), part of the Sex

Offender Registration and Community Right-to-Know Act ("SORA"). The statute provided that, if a defendant was convicted of failing to register under SORA while on probation, "the probation … shall be revoked and the penalty for violating this chapter shall be served consecutively to the offender's original sentence." Olivas, 158 Idaho at 378, 347 P.3d at 1192 (quoting I.C. § 18-8311(1)). The state argued that the district court "could not retain jurisdiction over Olivas for either conviction." Id. Disagreeing with the state, the lower court ordered the SORA-violation sentence to run consecutive to Olivas's original sentence—but it retained jurisdiction over the original sentence, then suspended that sentence, placing Olivas on probation. Id.

The question before this Court was whether Section 18-8311—which only required probation revocation in the original case, and required the second sentence to be served consecutively—also "impose[d] an additional limitation on the court's sentencing authority":

> Specifically, the question is whether the statute mandates that the court must order the original suspended term of imprisonment to be served *without exception*—meaning that the court has no authority to later suspend the original sentence, retain jurisdiction, and reinstate probation. Such limitations by the legislature on the court's sentencing authority necessarily implicate the separation of powers doctrine.

Id. at 378-79, 347 P.3d at 1192-93 (emphasis added).

This Court rejected that the district court would have no authority to suspend the original sentence. Id. at 379, 347 P.3d at 1193. That was so because "the court's subsequent authority to suspend, defer, withhold, commute, or retain jurisdiction on the original sentence is not explicitly proscribed in the *statute*." Id. (emphasis added). Simply put, the text of the SORA statute did not contain a mandatory-minimum provision with respect to the *original* sentence—any legislative "intent to impose such constraints on the district court's inherent sentencing authority is reached only by inference." Id. This was insufficient, for the reasons this Court explained:

> In summary, this constitutional amendment provides a narrow exception for the legislature to exercise powers traditionally granted to the judicial branch: the legislature may encroach on the court's sentencing powers *only with the enactment of an express mandatory minimum sentence* pursuant to Article V, Section 13.

Id. at 380, 347 P.3d at 1194 (emphasis added).

It is crucial that the Olivas Court did not find a separation of powers violation based on anything missing in the *Constitution*. Instead, this Court found, "[a]bsent the *legislature's* proper exercise of authority granted in Article V, Section 13, the courts retain their inherent power to suspend or reduce a sentence." Id. at 381, 347 P.3d at 1195. In other words, it was a failing of the *SORA statute* to articulate the mandatory-minimum specifics—not the Idaho Constitution. Id. And the implication is that, if the SORA statute had included that specific language, the statute would have been upheld. See id. Of course the statute here *does* have such specific language—it provides, "[p]ursuant to section 13, article V of the Idaho constitution," that "[a]ny sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court." I.C. § 19-2520G(1), (3).

This logic can also be seen in Doan v. State, 132 Idaho 796, 798, 979 P.2d 1154, 1156 (1999). There, this Court held that the Idaho Department of Correction, "a department of the executive branch," could lawfully "recalculate[]" Doan's "sentence schedule" and "insert a sentence between the fixed and indeterminate portions of another sentence imposed by the judiciary," without violating the separation of powers provision in "Article II, § 1." Id., 132 Idaho at 798, 802, 979 P.2d at 1156, 1160. The court reached this conclusion after finding IDOC was authorized to act by Article X, Section 5 of the Idaho Constitution. Id. at 802, 979 P.2d at 1160 ("[T]he Idaho Constitution expressly gives the Board of Corrections authority over "the control, direction, and management of the penitentiaries of the state ... and of adult probation and parole, *with such compensation powers, and duties as may be prescribed by law*.") (emphasis original)

(quoting Flores v. State, 109 Idaho 182, 184, 706 P.2d 71, 73 (Ct. App. 1985)). Notably, this Court did not require the Idaho Constitution to *expressly* say anything about sentence scheduling in order to find IDOC's actions did not violate the constitutional separation of powers—the general grant of authority, found in Article X, Section 5, was enough.

* * *

"The judicial power to choose whether to run sentences consecutively or concurrently" (Appellant's brief, p.14), is simply the ability to choose when a sentence commences. That choice will naturally "impact[] the length of time spent in incarceration," and is necessarily "part of the sentence" (R., p.97)—just like ordering fines is part of a sentence. Alexander, 138 Idaho at 26, 56 P.3d at 788. Which means that the choice to run a sentence consecutively—whatever its status at common-law—can be legislatively mandated under Article V, Section 13. And this Court's decisions in Pena-Reyes, Olivas, and Doan undermine Barr's claim otherwise: that "express" permission must be forged into Idaho Constitution itself, before any constituent part of a sentence can be passed on by the Legislature. (See Appellant's brief, p.14.) That view doesn't follow from the constitutional text or from decades of this Court's doctrinal authority. For all these reasons, the mandatory consecutive sentence provision in Section 19-2520G(3) does not violate separation of powers, and is constitutional under Article V, Section 13, irrespective of the common law.

D. In 1890, A Court's Common-Law Discretion To Impose A Consecutive Sentence Was Subject To Limitation By Statute—Which Means Section 19-2520G(3) Would Not Violate Any Common-Law Authority Now Part Of Idaho Law

In the alternative, even assuming the 1978 amendment did not give the Legislature the power to mandate consecutive sentences, Section 19-2520G(3) would not violate the Idaho Constitution's separation of powers provisions. Barr's conception of the common-law power to choose a consecutive sentence is that it is an *exclusive*, impenetrable judicial power: he argues it

is "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." (Appellant's brief, p.14.) The slightest legislative impingement on that hermetically sealed power, in Barr's unforgiving view, would accordingly be unconstitutional. (See R., p.35 (likewise arguing district courts "possess inherent, *exclusive* constitutional discretion" in this regard) (emphasis added).)

But a review of the historical record shows that from the very beginning, at English common law, courts did not have the *exclusive* ability to decide when sentences would commence. At the very least, in 1890, at the time of the framing of Idaho's Constitution, the common-law power had plainly evolved into discretion that could be modified by statute; many American courts from that era viewed courts' discretion as subject to legislative constraints, to one degree or another. Beyond that, mandatory consecutive sentences were demonstrably permitted in Idaho in 1890. And the Idaho case Barr relies on here—State v. Lawrence, 98 Idaho 399, 565 P.2d 989 (1977)—does not cast doubt on any of this. Thus, contrary to Barr's view, because the common-law discretion to impose a consecutive or concurrent sentence was itself subject to statutory constraint in Idaho in 1890, Section 19-2520G(3) would not be unconstitutional.

1. Legal Standards

When construing the Idaho Constitution, "the primary object is to determine the intent of the framers." State v. Clarke, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019) (quoting Idaho Press Club, Inc. v. State Legislature, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006)). "In the absence of the words of the framers," this Court looks to "the practices at common law and the statutes of Idaho when our constitution was adopted and approved by the citizens of Idaho." Id. (quoting State v. Creech, 105 Idaho 362, 392, 670 P.2d 463, 493 (1983)). For over a century, this Court has "taken this approach to interpreting our state constitution." Id. (citing Toncray v. Budge, 14

Idaho 621, 647, 95 P. 26, 34-35 (1908) ("We must now determine the meaning of the language used in [Art. 6, § 3 of the Idaho Constitution] in the light of conditions as they existed, at the time the constitutional convention was in session, in July, 1889.") "Case law and statutes existing in 1889" are particularly significant, because "many of the delegates to the Constitutional Convention were outstanding lawyers in their day, we generally presume that they knew and acted on such prior and contemporaneous interpretations of constitutional words which they used." Id. (quoting Paulson v. Minidoka Cnty. Sch. Dist. No. 331, 93 Idaho 469, 472 n.3, 463 P.2d 935, 938 n.3 (1970). However, while "preexisting statutes and the common law may be used to help inform" this Court's "interpretation of the Idaho Constitution … they are not the embodiment of, nor are they incorporated within, the Constitution. To hold otherwise would elevate statutes and the common law that predate the Constitution's adoption to constitutional status." Id.

2. The English Common Law

Early English common law recognized judges' discretionary power to order a consecutive sentence. In Rex v. Wilkes, 19 Howell's State Trials 1075, 1136 (1763-70) (Att. A, p.5[3]), Lord Wilmot, Chief Justice of the Court of Common Pleas, recognized that "a judgement of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offense, is good in law." However, even those cases did not recognize a court's *exclusive* power to choose when to commence a sentence. Even then, it was later observed, "*a statute* was necessary to give the court such power" in felony cases. In re Breton, 44 A. 125, 126 (Me. 1899) (emphasis added) (citing Reg. v. Cutbush, 2 L. R. Q. B. 379). Wilkes appears to acknowledge a similar limitation, contrasting "treasons and

[3] A copy of the full Wilkes decision can be found at https://hdl.handle.net/2027/hvd.hxj2ez (last accessed March 18, 2023). Because that website's user interface is as medieval as the cases found therein, the pertinent excerpts of that opinion have been attached to this brief for ease of reference.

felonies"—which contained "a certain known judgment, which cannot be departed from"—with "misdemeanors, where punishment is discretionary." 19 Howell's State Trials at 1133; (Att. A, p.4). Thus, it was only "a familiar rule of the common law *with respect to misdemeanors* that the court may order the imprisonment on one count or indictment to begin on the expiration of that on another." Breton, 44 A. at 126 (emphasis added). From the very beginning, courts' discretion here was subject to legislative constraint.

3. Common Law in 1890

As the common law developed in 19th-century America, it became even more clear that courts did not possess exclusive power to choose when a sentence would start. By then, a court's discretion could be constrained—or even extinguished—by statute. Surveying the changing landscape in 1899, Maine's Supreme Court observed that "[i]n some of our states it has been denied that the court" has the ability to run a consecutive sentence "in *any* case, *unless given by statute.*" Breton, 44 A. at 126 (emphasis added). In other words, in many states the common-law rule had now completely flipped: "in the absence of a statutory provision authorizing it to be done, the court had no power to order a term of imprisonment in the penitentiary to commence at a future period of time." Prince v. State, 44 Tex. 480, 483 (Texas 1876); see also James v. Ward, 59 Ky. 271, 275 (Ky. Ct. App. 1859).

On the other hand, the Breton Court thought that the "great weight of authority … undoubtedly" still left courts the discretion to choose whether to order a consecutive sentence. 44 A. at 126. However, even this statement does not show that discretion was *exclusive*—the Breton Court went on to say that "*[a]ll the authorities agree*, however, that, *in the absence of any statute*, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named will run concurrently." Id.

(emphasis added). And the Breton Court itself, when reviewing its own common-law rule on consecutive sentences, made sure to check whether the legislature had altered it: the court only found its consecutive-sentence rule was still in force after verifying it had not "ever been changed, or its operation in any manner modified, *by the statutes of this state*." Id. (emphasis added).

So there was certainly a divergence of opinion in 1890 as to the precise contours of the common law on consecutive sentences. But it seems clear that by then, across the country, it was not an exclusive power belonging to the courts; it was a discretionary power that could be modified by state statute. That brings us to Idaho.

4. *In re Esmond*

For our purposes, the case at the center of the bullseye is In re Esmond, 42 F. 827 (Dist. S.D. 1890). The year was 1890. The place: territorial Idaho. The crime: good old-fashioned mail theft. Id. Esmond had previously picked up "four convictions for offenses connected with the robbery of the United State[s] mail." Id. And in 1886, he was sentenced to four consecutive three-year sentences. Id. "There being no United States prison in the territory of Idaho," Esmond ended up in a United States penitentiary in Sioux Falls, "in the territory of Dakota." Id. Esmond argued to the federal court that his sentence "beyond the first imprisonment is illegal and void because it is indefinite and uncertain, and the court had no power to impose" what he called "a cumulative sentence." Id.

The Esmond Court first reviewed "the statute of Idaho" that controlled the question, which stated,

> When any person is convicted of two or more crimes, before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon 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.

Id. (emphasis added) (quoting Idaho Rev. Stat. § 7237 (1887)). Esmond argued that statute did "not apply" to federal offenses "tried in the territorial courts." Id. The court declined to resolve that thorny issue (though it thought "it may well be held that such legislation is obligatory upon the territorial courts" in those circumstances). Id. at 828.

Instead, the Esmond Court turned to the alternative "general question"—that is, the common-law question: whether consecutive sentences, "in the absence of any statute, are valid." Id. The court first observed that there was "quite a conflict of authorities" on that issue. Id. On one side of the ledger, there were cases where courts found consecutive sentences flatly invalid. In Bloom's Case, 19 N.W. 200, 201 (Mich. 1884), the Michigan Supreme Court arrived at that conclusion due to an error in the judgment; the future sentence commencement date was not "certain and definite." But in Miller v. Allen, 11 Ind. 389, 390 (Ind. 1858), the Indiana Supreme Court found consecutive sentences unlawful because they were not authorized by statute:

> *In the absence of any statutory provision authorizing it to be done, the Courts have no authority to order a term of imprisonment in the penitentiary to commence at a future period of time*; and the order to that effect may be regarded as a nullity. The judgment would then stand as an ordinary judgment, to be carried into effect as in other cases.

(emphasis added).

On the other side of the ledger, the Esmond Court noted, were five other courts that had upheld court-imposed consecutive sentences; it accordingly found the "great weight of authority" was "in favor of the legality of" consecutive sentences. 42 F. at 829. The Esmond Court was "therefore constrained to hold that the sentence in this case is legal." Id.

However, the Esmond Court did not go so far as to find the majority-rule courts were discussing an *exclusive* power to impose such sentences, or that the legislature could not constrain that power. A review of the five cases cited in Esmond shows three of those courts did not reach

that issue—in those cases, the courts did not mention any statutory constraints on sentencing. Brown v. Commonwealth, 1833 WL 3299, at *1 (Pa. 1833); In re Jackson, No. 3730, 1877 WL 18339, at *2 (D.C. 1877); Johnson v. People, 83 Ill. 431, 437 (1876). Likewise, in State v. Smith, 5 Day 175, 179 (Conn. 1811), there was no conflicting statute for the Connecticut Supreme Court to analyze, because the statute there did "not direct at what period of the prisoner's life, the term of confinement shall commence."

While those four decisions did not address the salient issue, the final case cited in Esmond did. Ex parte Kirby, 18 P. 655, 657 (Cal. 1888), demonstrates that in 1890, the discretion to order a consecutive sentence was not impervious to legislative restraint. In Kirby, the trial court failed to designate whether two sentences would run concurrently or consecutively. Id. at 657. Consequently, Kirby argued, "the sentences" should have "ran concurrently." Id. The California Supreme Court rejected this view, and did so based entirely on a mandatory consecutive statute:

> Whatever might be the correct rule in such a case at common law, or in some of the other states where such a statute as exists here is not in force, *we hold that the question herein must be and is determined by the provisions of section 669 of the Penal Code*. Section 669 of the Penal Code is in these words: 'When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, *the imprisonment to which he is sentenced upon 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.

Id. at 657 (emphasis added).

In sum, Esmond's survey of the 19th-century legal landscape shows a "conflict of authorities" on the overall propriety of consecutive sentences, 42 F. at 828, but total agreement on the narrow issue here: whether a court's power to impose a consecutive statute is an airtight, exclusive judicial power. All the courts that reached this issue concluded a court's discretion *was* subject to legislative constraint. Simply put, Esmond shows in Idaho in 1890, that judges had the

discretion to impose a consecutive sentence *unless* a statute provided otherwise. Any common law authority reflected in the Idaho Constitution would look the same, and would similarly allow Section 19-2520G(3).

5. Idaho's Statutes in 1890

This Court also looks to "statutes existing in 1889" in order to "help inform" this Court's "interpretation of the Idaho Constitution." Clarke, 165 Idaho at 397, 446 P.3d at 455. A review of those statutes only reaffirms that, in Idaho in 1890, the idea that the common law could be modified by statute was alive and well. Indeed, the Revised Statutes at the time stated: "[t]he common law of England, so far as it is not repugnant to, or inconsistent with the constitution or laws of the United States, *in all cases not provided for in these Revised Statutes*, is the rule of decision in all the courts of this territory." Idaho Rev. Stat. § 18 (1887) (emphasis added); see State v. Dorff, Docket No. 48119, p.7 (Idaho Sup. Ct., March 20, 2023) (opinion not yet final).

Beyond that, it is demonstrably the case that the Idaho Territorial Legislature chose to restrain courts' discretion to impose concurrent sentences. Recall that Esmond was sentenced pursuant to the predecessor statute to I.C. § 18-308, which then held that "the imprisonment to which" a defendant "is sentenced upon the second or other subsequent conviction *must commence at the termination of the first term of imprisonment*." Esmond, 42 F. 827 (emphasis added) (quoting Idaho Rev. Stat. § 7237). In other words, Esmond was sentenced pursuant to a *mandatory consecutive sentencing* scheme, in territorial Idaho, in 1886—a distant legislative ancestor to the mandatory consecutive sentence-statute here. See I.C. § 19-2520G(3). And that was not the only mandatory consecutive-sentence statute in effect in Idaho in 1889—there was also Idaho Rev. Stat. § 6452 (1887), which provided a defendant charged with escape from Territorial prison was "punishable by imprisonment" that would "commence *from the time he would otherwise have been*

discharged from said prison." (emphasis added). This statute still exists today in amended form. See I.C. § 18-2505(1) (escape requires consecutive sentence).

Thus, we know that legislative modifications to the common law would have been uncontroversial in Idaho in 1890. Not only that, we know the Idaho Territorial Legislature actually chose to constrain a judge's discretion by requiring mandatory minimum consecutive sentences. All of this is further evidence that the framers of the Idaho Constitution would have understood the common-law upshot here: that a court's discretion to impose a consecutive sentence is subject to legislative constraint.

6. *State v. Lawrence*

Barr's competing history of the common law is premised almost entirely on Lawrence, 98 Idaho 399, 565 P.2d 989 (and on State v. Cisernos-Gonzalez, 141 Idaho 494, 496, 112 P.3d 782 (2004), which simply reiterated the Lawrence Court's view). In Lawrence, this Court held that "[a]t common law the courts had discretionary power to impose a consecutive sentence and permissive legislation was not necessary." 98 Idaho at 400, 565 P.2d at 990. Thus, this Court rejected Lawrence's argument that "the district court lacked authority to impose" a "consecutive sentence," because that ability was not "specifically set out in the statute as being within the court's discretion." Id. None of this changes the state's view on the common law, articulated above, for at least four reasons.

First, note carefully the Lawrence Court's holding: the "*permissive* legislation was not *necessary*" for the trial court to impose a consecutive sentence. Id. (emphasis added). In other words, courts retain their traditional discretion to impose a consecutive sentence, even if a statute does not expressly *grant* them that ability. The state agrees with this much. But this does not address whether courts may *exclusively* exercise that authority, despite any legislative *restriction*

on that discretion—a wholly different question, and the precise issue here (which the Lawrence Court does not address).

Second, with due regard to the Lawrence Court, the state submits that a citation to that case is historically inadequate to show what common-law power was in existence in Idaho in 1890. Yes, the Lawrence Court had its assessment of the common law—supported with citations to two cases from the 1960s, see id.—but the view of a Court in 1977, without any citation to 19th-century authority, tells us very little about the actual views being kicked around a century prior.

Third, and to that point, the Lawrence Court's own cited authority reaffirms the state's view: that by 1890, a court's discretion to order a consecutive or concurrent sentence could be constrained by statute. It only takes a bit of digging down the decisional rabbit-hole to see this. Lawrence cited two cases (neither from Idaho): State v. Crouch, 407 P.2d 671 (N.M. 1965), and State v. Jones, 440 P.2d 371 (Or. 1968). Working backwards from Crouch, 407 P.2d at 673, takes us to Swope v. Cooksie, 285 P.2d 793, 794 (N.M. 1955), which stated that, "*[i]n the absence of statute* at common law two or more sentences are to be served concurrently unless otherwise ordered by the Court." (emphasis added). Going another layer down, to Com. Ex rel. Lerner v. Smith, 30 A.2d 347, 350 (Pa. 1943) (emphasis added), we find another restatement of the "general rule": "*in the absence of a statute*, the sentence imposed begins to run from the date of imposition." Similarly, a review of Jones, brings us again to the view that "permissive legislation was not *necessary*" for a court to order a consecutive sentence, which is true, but irrelevant to the question here. 440 P.2d at 372 (emphasis added). Thus, Lawrence's own cited authority is completely in line with the state's view.

Fourth, the structure of Lawrence itself strongly suggests agreement with the state's position—that the Legislature *could* constrain courts' sentencing discretion if it chose to. If we

take Barr's point to heart, Lawrence must stand for the proposition that courts have the exclusive, untouchable power to impose consecutive sentences, which cannot be influenced by the Legislature. But if that is so, why would the Lawrence Court spend almost the entire opinion asking whether there was a statute "which indicated that the legislature intended to deprive the courts of this common law authority"? 98 Idaho at 401, 565 P.2d at 991. While the Lawrence Court seemed to indicate in a footnote that it was only "[a]ssuming the legislature has the power to do so," it never held the Legislature did *not* have such a power. See id., n.1[4]. In any event, that "assumption" still doesn't explain why the Court took the analytical pathway it did: if Barr was right that the Legislature lacked that power to begin with, then Lawrence's entire undertaking—asking whether Section 18-308 "limit[s] the authority of the district courts to impose consecutive sentences"—would be pointless. Id. And, if Barr were right, Lawrence should have simply relied on the purported exclusive common-law authority, and never mentioned "any legislative intent to abrogate or modify the common law rule." Id. This Court did not say that, which only suggests the state's view—that courts have discretion here *except* as limited by statute—is the correct one.

7. *Oregon v. Ice & Setser v. United States*

The only other cases Barr relies on for his common-law arguments[5] are Oregon v. Ice, 555 U.S. 160, 169 (2009), and Setser v. United States, 566 U.S. 231 (2012) (see Appellant's brief, p.14). Neither case undercuts the state's view of the common law.

[4] Moreover, if the Lawrence Court's footnote was implying the Legislature lacked that power, the only case it relied on for that implication was McCoy, 94 Idaho 236, 486 P.2d 247—which was abrogated a year after the Lawrence decision by the Article V, Section 13 amendment.

[5] One presumes Barr is relying on federal authority only for his arguments regarding the common law—insofar as he faults the district court for "glean[ing] support for its conclusion[s]" regarding separation of powers "from federal cases." (Appellant's brief, p.27 (contending the court's reliance on federal authority was "misplaced, since the federal constitution does not contain an express separation of powers clause").)

It is true the Ice Court stated that, at common law, the decision to impose a consecutive sentence "rested exclusively with the judge." 555 U.S. at 168 (footnote omitted). However, that statement was in response to Ice's argument that the *jury* had discretion to make that choice—which the Supreme Court rejected: "[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently." Id. But the Ice Court did not suggest that the *legislature* would be powerless to cabin a court's discretion at common law—to the contrary, the Supreme Court stated that, as a matter of "historical practice and respect for state sovereignty," the "specification of the regime for administering multiple sentences has long been considered the prerogative of *state legislatures*." Id. (emphasis added).

The Ice Court's ensuing summary of the historical development is similar to what the state sketched out above: that "legislative reforms" changed whatever common-law rules might have originally been in place, and in some states, "the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice." Id. at 169.

Moreover, precisely that sort of legislative reform was exemplified in Ice. The Oregon statute exerts near-maximum control over a court's discretion: it "provides that sentences *shall run concurrently* unless the judge finds statutorily described facts." Id. at 165 (emphasis added) (citing Ore. Rev. Stat. § 137.123(1) (2007)). The Supreme Court upheld that arrangement on Sixth Amendment grounds, and in doing so, well summarized the legislature's power to corral a court's discretion:

> It bears emphasis that state legislative innovations like Oregon's seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will. Limiting judicial discretion to impose consecutive sentences serves the "salutary objectives" of promoting sentences proportionate to "the gravity of the offense," and of reducing disparities in sentence length. All agree that a scheme making consecutive sentences the rule, and concurrent sentences the exception, encounters

> no Sixth Amendment shoal. To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense. Neither [Apprendi v. New Jersey, 530 U.S. 466 (2000)] nor our Sixth Amendment traditions compel straitjacketing the States in that manner.

Id. at 171 (citations omitted). Thus, while the Ice Court did not address a separation-of-powers claim head on, its Sixth Amendment analysis is plainly consistent with the state's view of the common law.

Likewise, nothing in Setser is incompatible with the state's view. There, the Supreme Court noted that "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively," but that unremarkable observation says nothing about the legislature's ability to constrain that discretion. Setser, 566 U.S. at 236. And likewise in that case, the backdrop of the decision was 18 U.S.C. § 3854, which is an explicit legislative curtailment of a court's consecutive-sentencing power:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, *except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt*. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. § 3814(a) (emphasis added). Subsection (b) of that same federal statute additionally commanded that courts "shall consider" certain legislatively-chosen factors before imposing a concurrent or consecutive. 18 U.S.C. § 3814(b). Accordingly, while Setser was not decided on separation-of-power grounds, the existence of yet another statute restraining court discretion here is significant. See 566 U.S. at 231-245.

All told, history shows the common-law power to impose a consecutive sentence was not exclusive—it was within the court's discretion except as provided by statute. That was certainly the case in Idaho by 1890, and Barr fails to show otherwise. As such, any common-law authority would allow Section 19-2520G(3), and Barr fails to show the statute violates separation-of-power principles.

E. Every Appellate Court That Has Reviewed This Issue Has Rejected Barr's Arguments

Legislatures can temper a court's common-law discretion to impose consecutive sentences, for the reasons explained above. Real-world examples of this can be found all over the country. As it happens, a multitude of states and federal jurisdictions have statutes that restrict, to one degree or another, courts' discretion to choose between consecutive and concurrent sentences. See, e.g., People v. Espinoza, 463 P.3d 855, 856 (Colo. 2020) (stating "[w]e have long held that *in the absence of legislation to the contrary*, sentencing courts in this jurisdiction have the inherent power to order sentences for different convictions to be served either consecutively or concurrently," and citing Colorado statutes that "contain provisions restricting a sentencing court's discretion in this regard") (emphasis added); see Smith v. State, 474 N.E.2d 71, 73 (Ind. 1985) (holding "*except where the statute deems it mandatory*, the imposition of consecutive sentences is committed to the trial court's discretion, subject to the requirement that it set forth its reasons for imposing consecutive sentences") (emphasis added) and Ind. Code Ann. § 35-50-1-2 (mandating a sentence "must be served consecutively" where "a person used a firearm in the commission of the offense"); see State v. Hitchcock, 134 N.E.3d 164, 169 (Ohio 2019) (rejecting the notion "that trial courts are authorized to impose such consecutive terms" because, "*[a]bsent express statutory authorization* for a trial court to impose the increased penalty of consecutive sentences, the trial court must follow

the default rule of running the sentences concurrently") (emphasis added); see 18 U.S.C. § 3814(a), (b); see Ore. Rev. Stat. § 137.123(1).

This is a target-rich environment for constitutional challenges. If Barr was correct that *any* legislation restricting courts' discretion would be an unconstitutional arrogation of power, then, it seems, there should be lots of decisions finding separation of powers violations. Or at least one.

That is not the case. As far as the state knows, every single appellate court that has reviewed this issue has rejected Barr's claim. As the district court rightly pointed out, "[o]ther have routinely addressed and rejected the argument that mandatory consecutive sentences violate the separation of powers doctrine." (R., p.100.) And Barr does not cite a single court that says otherwise—not one. (See Appellant's brief.)

Instead, state courts have uniformly rejected Barr's claim. See, e.g., State v. Monteiro, 924 A.2d 784 (R.I. 2007); People v. Belton, 540 N.E.2d 990, 998 (Ill. App. 1989); State v. McClellen, 382 N.W.2d 24, 25 (Neb. 1986). Federal courts have uniformly rejected it too. See, e.g., United States v. Henry, 2014 WL 2711909, at *1 (E.D. Mich. 2014) (unpublished); United States v. Vargas, 204 Fed. Appx. 92, 93-94 (2nd Cir. 2006); United States v. Walker, 473 F.3d 71, 76 (3rd Cir. 2007); United States v. Alkufi, 636 Fed. Appx. 323 (6th Cir. 2016) (unpublished); United States v. Lowry, 175 Fed. Appx. 134, 136 (9th Cir. 2006). The weight of authority strongly suggests that Barr's contrarian view of the common law—that courts have exclusive, impregnable authority here—is simply mistaken.

Barr brushes all of this aside, claiming that the Idaho Constitution's purportedly unique structure makes it a national outlier. According to Barr, those cases "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" as the Idaho Constitution. (Appellant's brief, p.27.)

Specifically, Barr asserts, Article II, Section 1, "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.'" (Appellant's brief, p.11.) Barr made a similar claim below: that "those cases" are "inapplicable to the question here," due to Article II, Section 1 "doubling-down on its restriction of the legislature regarding judicial powers." (R., p.89.) Barr asserts that in light of that structure, among other things, Idaho's Constitution defies comparison: "[u]nsurprisingly … no outside authority that is 'on point' or otherwise useful here." (Appellant's brief, p.29.)

Two responses. First, the state questions the whole premise here—Barr is essentially arguing that the Idaho Constitution has an *extra*-secure separation of powers doctrine, as if the separated powers are even more separate, by dint of the "doubling-down" (R., p.89), "expressly directed" language in Article II, Section 1. So on Barr's view, if the initial division of powers creates the secure vault where the judicial power is squirreled away, then the "expressly directed" language is an extra board nailed to the door, just to be sure.

But this is fairly nonsensical. The powers are either separated or they are not. And if the powers are separated, they cannot be arrogated by another branch. There is no need for an additional "doubling down" clause to fortify these divisions—otherwise, state constitutions *without* the doubling-down language would not truly have separated powers. Were that so, the governmental branches in those states would be sitting ducks; competing branches could pilfer powers, willy-nilly, without any recourse—all because their hapless framers didn't think to throw some "doubling down" language in there, just in case. But of course that is not the state of affairs. Every single state, even those with constitutions without an "expressly directed" clause, seems to *think* it has a working separation of powers doctrine. Surely that counts for something.

But even assuming Barr is right about the significance of the "expressly directed" language, his argument fails on the merits. Barr acknowledges that Nebraska's Constitution has a similar "expressly directed" clause and the Nebraska Supreme Court has, in fact, held that mandatory consecutive sentencing "does not offend the distribution of powers mandated by the Nebraska Constitution." State v. Stratton, 374 N.W.2d 31, 34-35 (Neb. 1985); (see Appellant's brief, p.28). Of course, this alone disproves Barr's theory about Idaho's constitution being sui generis, based on the "expressly directed" clause. And Barr identifies no other state, with an "expressly directed" clause in its constitution, that has adopted his eccentric view. Thus, the overwhelming weight of authority to address these issues—including the subset of authority with constitutions just like Idaho's—still goes against Barr's claim.

Barr accordingly fails to show anything exceptional about the "expressly directed" language. And he fails to unearth even one court that has agreed with his arguments. Based on the undeniable weight of authority, the district court below was in good company. It correctly denied Barr's motion.

CONCLUSION

The state respectfully requests this Court affirm the district court's order denying Barr's motion for Rule 35 relief.

DATED this 23rd day of March, 2023.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of March, 2023, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.idaho.gov

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

KDG/dd

ATTACHMENT A

1719

A COMPLETE COLLECTION OF State Trials

AND

PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS

FROM THE

EARLIEST PERIOD TO THE YEAR 1783,

WITH NOTES AND OTHER ILLUSTRATIONS:

COMPILED BY

T. B. HOWELL, Esq. F.R.S. F.S.A.

INCLUDING,

IN ADDITION TO THE WHOLE OF THE MATTER CONTAINED IN THE

FOLIO EDITION OF HARGRAVE,

UPWARDS OF TWO HUNDRED CASES NEVER BEFORE COLLECTED;

TO WHICH IS SUBJOINED

A Table of Parallel Reference,

RENDERING THIS EDITION APPLICABLE TO THOSE BOOKS OF AUTHORITY IN WHICH REFERENCES ARE MADE TO THE FOLIO EDITION.

IN TWENTY-ONE VOLUMES.

VOL. XIX.

26 GEORGE II. to 10 GEORGE III.....1753—1770.

LONDON:

Printed by T. C. Hansard, Peterborough-Court, Fleet-Street:

FOR LONGMAN, HURST, REES, ORME, and BROWN; J. M. RICHARDSON; BLACK, PARBURY, and ALLEN; BALDWIN, CRADOCK, and JOY; E. JEFFERY; J. HATCHARD; R. H. EVANS; J. BOOKER; E. LLOYD; J. BOOTH; BUDD and CALKIN; AND T. C. HANSARD.

1816.

REIGN OF KING GEORGE THE THIRD.

'de Vicineto;' they established the practice, and said, 'to make a contrary resolution in 'this Case, would be, in some measure, to over-'turn the justice of the nation for several years 'past.' There was an interval of five or six years in that case—but here there is near a century.

The King and the earl of Devon, Easter, 3 Ja. 2.* Though the information was filed by the attorney general, it was taken up by the solicitor general, and shews the same powers. Proceedings were brought up into this court, to found a complaint upon; but there was no writ of error. The judgment was never reversed. There was not the least complaint. This House acted upon it. This is a recognition of his authority.

[Here the Chief Justice stated many cases in the Exchequer, Chancery, and King's-bench; and particularly, the Queen and Lawson, Easter, 7th of queen Anne, which was an information exhibited in the Exchequer by sir James Montague, 'solicitor general,' and where the judgment was affirmed by lord Cowper, Holt and Treby.]

The attorney general is no more a sworn officer of the King's-bench than the solicitor general.

As to the 2d Question:

The inserting the vacancy of the office of attorney general in the record sometimes, and at other times omitting it, shews it was thought a matter of indifference. There are more criminal informations in the Exchequer, without those words than with them. At most it could be only an irregularity, which would not make the information void; because it is the king's suit, and the Court is well founded in opening their jurisdiction upon it; all irregularities must be challenged in time, and if not challenged, are waived; and the pleading and going to trial are clearly a waiver, if there had been any weight at all in this objection; but we think there is none. In this case, the information, though filed by the solicitor, is brought into court by the attorney, who was the same person who filed it. By so doing, he has adopted it; and it is become his information to every intent and purpose whatsoever.

When filed—process—when brought into Court—read over and charged with it. It is now done by the officer—but it is for the attorney. If there was any foundation—it should have been objected to then. If not, it must be considered as waived.

On the 3d Question:

We are of opinion that the defendant, being convicted of two offences, it was necessary that two judgments should be pronounced, one upon each information.

Fine and imprisonment, or other corporal punishment, may be awarded for such offences as are contained in these informations.

The kind, and the quantity, are left by the law to the discretion of the Court, which passes the sentence; and that discretion is regulated by the nature of the offence, and the circumstances which aggravate and extenuate it; by the state and condition of the delinquent, and the imprisonment he has already suffered: and that discretion is always exercised with that lenity and compassion which do so eminently distinguish the administration of criminal justice in this kingdom.

That sound discretion led the Court to fine and imprisonment, as the proper and adequate punishment for these offences. A very large fine might have amounted to perpetual imprisonment: a very small fine must necessarily have produced a prolongation of the imprisonment. By mixing them together, the keen edge of each is taken off, and the consequence of a large fine, or a very long imprisonment, carefully avoided.

A fine of 500*l.* and ten months imprisonment, is the punishment for the treasonable libel; a fine of 500*l.* and twelve months imprisonment, to commence from the determination of the former imprisonment, is the punishment for the blasphemous libel. The objection is, that the sentence for the blasphemous libel is erroneous, because the punishment is not to take place till another punishment is ended, either by effluxion of time or other sooner determination of it; which may be by a reversal of that judgment, or the king's pardon; and that all judgments are to take immediate effect, and not to commence 'in futuro.' In general, the language of all judgments for offences, respects the time of giving the judgment; though the punishment, directed to be inflicted, is in no case inflicted immediately; and in many cases, the judgment directs the punishment to be 'in futuro,' and must be so according to the nature of the punishment.

In petit larceny—to be whipt three market days successively—to set a man in the pillory three times, at a week's or a month's distance—to find security for good behaviour from the

* Middlesex.—Information filed by sir Robert Sawyer, 'attorney general,' against William earl of Devon, states, that he on the 24th April, 3 J. 2, *vi et armis*, at the city of Westminster, in Middlesex, within the palace of our lord the king there, to wit, in Whitehall, (the king being then abiding in the said palace) one Thomas Colepepper, esq., then and there in the peace of God, and our said lord the king, did provoke and challenge to fight with him the said William earl of Devon, with intention to kill and murder him the said Thomas, &c.

Plea.—And now (that is to say) on Friday, next after the morrow of the Ascension of our Lord, in this same term, before our lord the king at Westminster, comes as well sir Thomas Powis, knight, 'solicitor general' of the said king, who, for our said lord the king, now prosecutes in his proper person, as the said William earl of Devon, in his proper person; and the said earl says, &c.

end of a certain imprisonment, or an uncertain one, as those imprisonments are, where a fine is to be paid.

In treasons and felonies—a certain known judgment, which cannot be departed from, viz. in the present tense of the subjunctive passive: but in misdemeanors, where punishment is discretionary, the limitation, as to time, seems only to be, that the punishment shall take place before a total dismission of the party: a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment 'in futuro.' But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it. And every case of this kind must depend upon the peculiar circumstances which attend it.

In this case, it must be assumed, that fine and imprisonment were the proper kind of punishment to be inflicted for these offences; because the Court intrusted by the constitution with deciding upon the punishment, has said so. The facts and circumstances which guided their judgment, in that respect, are not before your lordships. They hear a report of the trial, and affidavits of every fact which aggravates or alleviates the offence; and therefore your lordships must now proceed upon a supposition, that fine and imprisonment were the adequate punishments to be inflicted for each offence. You will be disposed to say and to think so, because they are the mildest and gentlest punishments.

The punishment might have been inflicted different ways.

1st, By imprisonment for twelve months; but as he was already sentenced to ten months, it would have been only an imprisonment for two.

2d, By imprisonment for twenty-two months; which would, in effect, have been for twelve.

But this would have been most grossly unjust, because if the first judgment should be reversed, or he had been pardoned, he would have been imprisoned twenty-two months, when the Court only intended an imprisonment of twelve.

3d, The Court might have laid a fine of 1,000*l.* with a short imprisonment for one offence; and a small fine, with an imprisonment for twenty-two months for the other.

This would have been equally unjust—for the offences are different, and have no relation to one another. The prosecutions are distinct, and the records as separate from one another as if there had been two separate delinquents; and the offences on each record, must be as separately and distinctly estimated; and though judgment happened to be passed at the same time for both offences, yet the rule of admeasuring must be the same as if the judgment had been pronounced at different times

The punishment must be proportioned to the specific offence contained in the record, upon which the judgment is then to be pronounced; and must be neither longer nor shorter, wider nor narrower, than that specific offence deserves. The balance is to be held with a steady even hand; and the crime and the punishment are to counterpoise each other; and a judgment given, or to be given against the same person for a distinct offence, is not to be thrown into either scale, to add an atom to either.

To lay a fine of 1,000*l.* for one offence, and twenty-two months imprisonment for the other, when the Court thought a fine of 500*l.* and an imprisonment of ten months, was the proper and adequate punishment for one offence, and a fine of 500*l.* and an imprisonment of twelve months for the other, would have been twisting the two offences and their punishments together, and a departure from the first principle of distributive justice, which commands all judges to inflict that punishment, and that punishment only, which they think commensurate to the specific crime before them; and it might have been productive of the same injustice I have already mentioned, viz. the judgment in one might be reversed or pardoned; and the delinquent would then be subject to a larger fine or a longer imprisonment, than the Court intended to subject him to for one of the offences only.

We cannot explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case.

It is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other; but only providing, from the situation of the delinquent, to effectuate the punishment the Court thought his crime deserved. It is shaping the judgment to the peculiar circumstances of the case; and the necessity of postponing the commencement of the imprisonment, under the second judgment, arises from the party's own guilt, which had subjected him to a present imprisonment; and therefore the question really is, Whether a man under a sentence of imprisonment for one offence, can be sentenced to be imprisoned again for another offence? If he can, this is the only form by which it can be done consistent with justice. If it cannot be done, then in all offences which are punishable only by fine and imprisonment, if a man has committed twenty, and has been sentenced to imprisonment for one of them, he must be fined for all the rest, which will amount to perpetual imprisonment with nine parts in ten of the people most likely to commit such offences: or an imprisonment must be directed for every offence after the first, inadequate and disproportionate to it.

For suppose twenty offences of the same malignity, and meriting exactly the same punishments—if six months imprisonment were the punishment directed for the first offence;

the second must be twelve months: and, proceeding progressively, the twentieth must be ten years: and thus six months and ten years will be the punishment for offences which ought to have been punished exactly alike. Or, if it be an offence where whipping or pillory might be inflicted, the alternative of a moderate imprisonment will not be in the power of the Court to inflict; but they will be under the necessity of laying a large fine, or directing one of the other severe corporal punishments.

In Dr. Bonham's case, 8 Co. 107. The charter granted by king Henry 8, confirmed by an act of 14 Hen. 8, c. 5, gives the censors of the College of Physicians a power to punish physicians for a mal and insufficient administration of physic, by amercement, imprisonment, &c.

Dr. Bonham was convened, examined, and found insufficient by the censors. He was amerced 5*l.* to be paid at their next meeting: and 'deinceps abstineret, etc. quousque in-'ventus fuerit sufficiens sub pœna conjiciendi 'in carcerem, si in premissis delinqueret.'

He persevered to practise, and they summoned him again. He made default. The censors ordered him to be arrested, and afterwards he came before them, and being asked to submit to their authority, he refused: and they committed him, and awarded that he should continue in gaol till they released him.

It appears from this case, 1st, That he was under no prior sentence of imprisonment, as here.

2dly, That after the judgment of his insufficiency, he was dismissed, with a threat of imprisonment only; and was afterwards committed to prison for not submitting to their authority.

Whereas the delinquent here was never dismissed, nor out of custody, for a moment.

3dly, It was a special power and authority of a very singular and despotic nature, committed to private persons, and therefore to be executed strictly: and when they are empowered to imprison, if they find a person insufficient, the punishment must immediately follow the judgment; because, if suspended a day, it might be suspended a year. If totally dismissed, and the party is at liberty, the power over him is determined.

So in the case of the 27th of Henry 7, Y. B. on the statute of Westminster 2d, 13 Edward 1, c. 11.; if bailiffs, &c. are found in arrear, 'arrestentur corpora eorum, et per 'testimonium auditorum ejusdem compoti, mit-'tantur et liberentur proximæ Goalæ Domini 'Regis in partibus illis.'

No time was limited; they must commit immediately.—In that case, it was contended on the plea, that he had been at large; and then their power over him was determined, and so that what they did after, was *tortius*. It was a special power and authority, to be exercised strictly; and therefore held that the commitment must be to the next gaol, whether in the county or not: and if false imprisonment was brought against auditors, they must shew that they pursued their power. And the same answer applies to the other cases upon the statutes of forcible entries.

[He then cited various other precedents, particularly the case of the King and Dalton, 3 Geo. 1, 1716, in which the first judgment was given in July preceding, upon an indictment for seditious words against the king: and the punishment was a fine of twenty-five marks and commitment for one year, and to find sureties for three years. There was a second conviction, in July, of a like offence, and judgment of a fine of twenty-five marks and commitment 'pro spacio unius anni integri post 'expirationem prior. Judic. imprisonament. 'versus eum nuper adjudicatum."]

In Answer to the Questions therefore proposed by your lordships, our unanimous Opinion is:

1st, That an information filed by the king's solicitor general, during the vacancy of the office of attorney general, is good in law.

2dly, That in such a case, it is not necessary, in point of law, to aver upon the record that the attorney general's office was vacant.

3dly, That a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law.*

Whereupon it was ordered and adjudged, That the Judgments of the Court of King's-bench be affirmed.†

On Wednesday the 7th of February, 1770, Mr. Davenport moved that the defendant might be brought up, either into court within this term, or before a judge at chambers after the end of it, to enter into the recognizance required of him by the abovementioned rule of court: for, his imprisonment will end upon a day which does not fall within any term; namely, upon Easter Tuesday next.

The Court told him, they had thought of this already; and they conceived the best method would be, to make a rule for his entering into the recognizance before the marshal, or some other justice of the peace for the county of Surrey.

And accordingly, they ordered such a rule to be drawn up: which was done, in these words:

Ordered, That at the expiration of the imprisonment of the defendant, by virtue of the judgment of this Court pronounced against him in this cause on Saturday next after fifteen days from the day of the Holy Trinity in the eighth

---

* Concerning a judgment of imprisonment to commence upon the determination of an imprisonment awarded for another offence, see the Case of lord George Gordon, Term Rep.

† Vide Journals of the House of Lords, vol. 32, p. 222.

year of the reign of his present majesty, the security required by the said judgment to be given by him the said defendant for his good behaviour for the space of seven years, to wit, himself the said defendant in the sum of 1,000*l.* with two sufficient sureties in 500*l.* each, may be taken by and before any justice of the peace of and for the county of Surrey.

---

543. The Case of Brass Crosby, esq. Lord-Mayor of London, on a Commitment by the House of Commons. Court of Common-Pleas, Easter Term: 11 George III. A. D. 1771.*

[This Case is from Mr. Serjeant Wilson's Reports, 3 Wils. 188. The history of the transactions of which this Case was a branch, with the proceedings of the House of Commons, the reader may possess himself of, by resorting to the Annual Register for 1771, and the New Parliamentary History for the same year. Upon refusal of the Court of Common Pleas to discharge the Lord Mayor, the Court of Exchequer was moved for a Habeas Corpus; and the Case was argued by counsel on a like return to that Court: but the application there also failed of success, and the Lord Mayor was remanded.]†

THE lieutenant of the Tower of London was commanded to have before the justices of the bench here, the body of Brass Crosby, esq. lord mayor of London, by him detained in the king's prison, in the Tower of London, by whatsoever name he was called, together with the day, and cause of his caption and detention, on Monday next, after three weeks from Easter-day; that the said justices seeing the cause, might do that which of right, and according to the law and custom of England, ought to be done; and further to do and receive what the same justices here should then consider in that behalf. And now here, at this day, (to wit) Monday next, April 22, 1771, after three weeks from Easter-day, in this term cometh the said Brass Crosby, in his proper person, under the custody of Charles Rainsford, esq. deputy-lieutenant of the Tower of London, brought to the bar here; and the said deputy-lieutenant then here returneth, that before the coming of the said writ, (to wit) on the 27th day of March last, the said Brass Crosby was committed to the Tower of London, by virtue of a certain warrant under the hand of sir Fletcher Norton, knight, Speaker of the House of Commons, which follows in these words: "Whereas the House of Commons have this day adjudged, that Brass Crosby, esq. lord-mayor of London, a member of this House, having signed a warrant for the commitment of the messenger of the House, for having executed the warrant of the Speaker, issued under the order of the House, and held the said messenger to bail, is guilty of a breach of privilege of the House; and whereas the said House hath this day ordered, that the said Brass Crosby, esq. lord mayor of London, and a member of this House, be for his said offence committed to the Tower of London: these are therefore to require you to receive into your custody the body of the said Brass Crosby, esq. and him safely keep during the pleasure of the said House, for which this shall be your sufficient warrant. Given under my hand, the 25th day of March, 1771." And that this was the cause of the caption and detention of the said Brass Crosby, in the prison aforesaid: the body of which said Brass Crosby he hath here ready, as by the said writ he was commanded, &c. Whereupon, the premises being seen, and fully examined and understood by the justices here, it seemeth to the said justices here, that the aforesaid cause of commitment of the said Brass Crosby, esq. to the king's prison of the Tower of London aforesaid, in the return above specified, is good and sufficient in law to detain the said Brass Crosby, esq. in the prison aforesaid: therefore the said Brass Crosby, esq. is by the Court here remanded to the Tower of London, &c.

The Argument for the discharge of the Prisoner.

Serjeants Glynn and Jephson argued, that it appeared by the return of this Habeas Corpus, that the cause of commitment of the lord-mayor to the Tower of London was insufficient in law for the detention of him there; and therefore this Court ought to discharge him out of the custody of the lieutenant of the Tower of London.

Here follows the substance of serjeant Glynn's Argument, after the writ and return were filed.

* See 2 Blackst. 754.

† See the proceedings against Richard Thompson, clerk, for a high misdemeanor against the privilege of parliament, vol. 8, p. 1, and the matter subjoined to that Case: see also Mr. Hargrave's learned opinions concerning the cases of the commitments of the honourable Simon Butler and Mr. Oliver Bond by the Irish House of Lords in 1793, and of Mr. Perry by the British House of Lords in 1798, published in his Juridical Arguments and Collections, vol. 1, p. 1, vol. 2, p. 183.