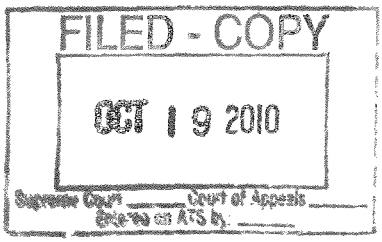
10-19-2010

State v. Reid Appellant's Brief Dckt. 37107

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff/Respondent,	)	
	)	S.Ct. No. 37107-2009
vs.	)	
	)	
COREY S. REID,	)	
	)	
Defendant/Appellant.	)	
	)	



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Shoshone

HONORABLE FRED GIBLER
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a conviction and sentence for two counts of aiding and abetting first degree murder. I.C. §§ 18-4001, 18-4003(a), and 18-204. R 383, 387. The convictions in this case should be reversed because the jury was not properly instructed that Mr. Reid could only be convicted if it found beyond a reasonable doubt that he acted with premeditation. The convictions should also be reversed because of the admission of certain photographs at trial. In the alternative, the sentence should be vacated because it was based upon unreliable evidence.

B. Procedural History

Appellant, Corey Reid, was charged by information with two counts of aiding and abetting first degree murder in connection with the deaths of Neil Howard and Cindy Bewick. Jon Kienholz, Jr., was the principal. R 78 - 79. Mr. Reid was convicted and sentenced to a term of life with 30 years fixed. R 383. This appeal timely followed. R 387.

C. Statement of Facts

On August 8, 2008, Virgil Testky, who was picking berries at Dobson Pass, discovered the body of Mr. Howard. When he returned with law enforcement, they also found Ms. Bewick's body. Tr. p. 224, ln. 19 - p. 226, ln. 16.

Jon Kienholz pled guilty to the first degree murder of Mr. Howard and Ms. Bewick. Tr. p. 470, ln. 1 - 10. Per his own testimony, he initially lied to law enforcement. Tr. p. 470, ln. 20 - 22. Later, he told the state, "I'll testify to whatever you want." Following that statement, he testified against Mr. Reid in order to avoid the death penalty. Tr. p. 650 , ln. 21 - p. 651, ln.15.

Mr. Kienholz testified that he had recently returned to Idaho following a stint in the army

wherein he received extensive firearms training. Tr. p. 363, ln. 6 - 16. According to Mr. Kienholz, he and Mr. Reid were longtime friends and they, along with Mr. Reid's girlfriend, Kristin Purtill, and Mr. Howard and Ms. Bewick (who were also in a relationship and had a young son together), were planning to go to Bolivia. Mr. Kienholz intended to make a living there by selling illegal substances. The plan was very disorganized, but the group had decided to use Mr. Howard's car for transportation. Tr. p. 364, ln. 4 - p. 370, ln. 16.

Early in the morning on the day that would end with Mr. Kienholz killing Mr. Howard and Ms. Bewick, he borrowed Mr. Howard's car. He then picked up Mr. Reid and Ms. Purtill. Tr. p. 375, ln. 13 - p. 376, ln. 6. They all then picked up Braecyn Wood and drove to Coeur d'Alene and later to Spokane. Tr. p. 376, ln. 14 - 15. Along the way, items were pawned and marijuana was purchased. Everyone in the car was smoking the marijuana. Tr. p. 378, ln. 24 - p. 380, ln. 4.

According to Mr. Kienholz, during the drive, Mr. Kienholz called Luke Hill and offered to trade him drugs for the use of his gun. Mr. Kienholz dropped everyone off and went to get the gun. When he returned, he was showing off with the gun and he testified that Mr. Reid smiled and laughed. Tr. p. 381, ln. 1 - p. 385, ln. 12.

Everyone next drove to Daryl Bewick's house where Mr. Howard and Ms. Bewick were. When they arrived there, Mr. Howard and Ms. Bewick told Mr. Kienholz that Ms. Purtill was trying to turn them in on outstanding warrants. Mr. Kienholz testified that he told Mr. Reid about this and Mr. Reid became angry. Tr. p. 394, ln. 10 - p. 395, ln. 8.

At that time, according to Mr. Kienholz's testimony, he told Mr. Reid and Ms. Purtill that he could "snuff the problem out." He also told Mr. Howard and Ms. Bewick not to worry

because he did not think that "there was any weight behind their assumption." Tr. p. 395, ln. 19 - 24.

Everyone then got in Mr. Howard's car and drove to Silverton. The two couples, Mr. Howard and Ms. Bewick, and Mr. Reid and Ms. Purtill, were not speaking. They drove toward Wayne Barrett's house where, after dropping everyone off at a field, Mr. Kienholz went to get ammunition for the gun. Mr. Kienholz also picked up a pair of mechanic's gloves which he wore for the rest of the day. Tr. p. 397, ln. 1 - p. 400, ln. 20.

Following that, Mr. Kienholz got everyone from the field and they drove up to Dobson Pass. There was again, according to Mr. Kienholz's testimony, a lot of animosity in the air. Once at the pass, they went to a campsite and built a fire. Mr. Kienholz made people work together on this, apparently in an effort to make peace. Tr. p. 402, ln. 1 - p. 404, ln. 16.

According to Mr. Kienholz's testimony, after a while, he suggested that he and Mr. Reid leave the others at the campsite. When he did this, Mr. Howard told Ms. Bewick to get his knife and this made Ms. Purtill resistant to being left behind with them. So, only Mr. Howard and Ms. Bewick were left at the camp. Tr. p. 408, ln. 12 - p. 409, ln. 25.

Mr. Kienholz testified that he told Mr. Reid about the knife and Mr. Reid became irate and said, "We have to kill them." Tr. p. 410, ln. 13 - p. 411, ln. 16.

The three drove from the camp to Mr. Wood's house, where they dropped off Ms. Purtill and met Mr. Reid's cousin, Hiram Wilson. Mr. Kienholz did not know Mr. Wilson, but Mr. Reid told him that Mr. Wilson should be allowed to come along because he was "down for anything" and also because he had just received money for his birthday. Tr. p. 411, ln. 20 - p. 413, ln. 23.

Mr. Kienholz agreed to taking Mr. Wilson along, and he drove Mr. Wilson and Mr. Reid to Mr. Wilson's sister's house for Mr. Wilson to get his birthday money. According to Mr. Kienholz, during the drive, Mr. Reid "briefed" Mr. Wilson, telling him that they were going to kill Mr. Howard and Ms. Bewick. However, Mr. Wilson did not appear to believe that Mr. Reid was serious. Tr. 414, ln. 22 - p. 416, ln. 4.

Mr. Kienholz, in his initial contacts with the police, referred to Mr. Reid and Mr. Wilson as his soldiers. He also freely told Mr. Wilson and Mr. Wood that he had previously killed someone in Thailand with his bare hands and bragged about getting away with it. He testified that he had planned to murder other people besides Mr. Howard and Ms. Bewick saying, "but I don't know who hasn't [made such plans]," and gave as an example of prior plans that he had planned to murder an ex-girlfriend. He also told Mr. Wilson, prior to murdering Mr. Howard and Ms. Bewick, that he had been planning a murder for years, but he just did not know who he was going to murder and who he was going to commit the murder with. Nonetheless, Mr. Kienholz testified that he was shocked into silence when he heard Mr. Reid say that they were going to kill Mr. Howard and Ms. Bewick. Tr. p. 416, ln. 4 -12, p. 471, ln. 8 - 25, p. 640, ln. 5 - 15, p. 672, ln. 1 - p. 673, ln. 20, p. 689, ln. 1 - p. 691, ln. 8.

Mr. Kienholz testified that after learning of the plan to kill, Mr. Wilson asked to see the gun and Mr. Reid told him where it was. Mr. Wilson got the gun from the trunk by pulling down the back seat, and passed it to both Mr. Reid and Mr. Kienholz. The gun was unloaded. Tr. p. 418, ln. 3 - p. 419, ln. 15. Mr. Kienholz testified that it was just getting dark and they were driving to Dobson Pass to commit the crime. The gun was put back in the trunk and the plans were not further discussed. Tr. p. 420, ln. 1 - 18.

At the top of the pass, Mr. Kienholz decided to park the car. Mr. Reid had wanted him to continue to the campsite, but Mr. Kienholz vetoed the idea. They all got out of the car, and Mr. Kienholz told Mr. Wilson to get the gun while Mr. Reid got the ammunition. Tr. p. 420, ln. 18 - p. 421, ln. 23.

According to Mr. Kienholz, Mr. Reid got the box of ammunition from the glove box and removed the individual rounds and handed them to Mr. Kienholz. Mr. Kienholz loaded the gun and placed it in the small of his back. Mr. Wilson lent Mr. Kienholz a shirt that covered up the gun. Tr. p. 423, ln. 2 - p. 424, ln. 15.

According to Mr. Kienholz, the group then walked to the campsite, while Mr. Wilson and Mr. Kienholz planned out the tactics. But, when they got near the campsite, Mr. Reid suggested that they just walk up and get it over with. Tr. p. 426, ln. 3 - 20.

According to Mr. Kienholz, he just did not know what to do, and he kept telling himself that he could defuse the entire situation. But, at the same time, he was bound by a promise he had made to protect Mr. Reid and Ms. Purtill. Tr. p. 426, ln. 25 - p. 427, ln. 8.

As they neared the campsite, they saw Mr. Howard, and all three hid in a bush. After a while, according to Mr. Kienholz, they walked into the campsite where Mr. Kienholz told Mr. Howard a lie about how they had just robbed a gas station. Tr. p. 428, ln. 21 - p. 431, ln. 19.

Mr. Kienholz told everyone to stay and focus on the campfire. While they were focusing, Mr. Kienholz engaged Mr. Howard in conversation asking him to repeatedly guess what was ironic about the fire. It was at this time that Mr. Kienholz decided that he would not be able to stop the murders. According to Mr. Kienholz, he looked to Mr. Reid hoping he would have the strength to stop it, but Mr. Reid silently mouthed, "Come on, do it." In response, Mr. Kienholz

immediately shot Mr. Howard in the head. Tr. p. 434, ln. 7 - p. 437, ln. 22.

Mr. Howard fell to the ground, and Ms. Bewick lunged at Mr. Kienholz. Mr. Kienholz kicked her in the head and then shot her. Mr. Kienholz can remember her telling him to stop. He can also remember Mr. Howard making noises and kicking him to make him stop. Tr. p. 438, ln. 12 - p. 441, ln. 5.

Following this, according to Mr. Kienholz, Mr. Wilson took charge and together he and Mr. Kienholz drug and threw the bodies off the hillside to hide them. During this time, Mr. Kienholz put a blanket on the fire, which Mr. Reid told him to take off as it would cause smoke and draw attention to them. Tr. p. 442, ln. 16 - p. 446, ln. 3.

After this, the three drove to Mr. Wood's house, where they met Mr. Wood and Ms. Purtill. According to Mr. Kienholz, Mr. Reid told Ms. Purtill, "We did it." The whole group got in the car and began to drive. However, after a bit, Mr. Wood decided he wanted to go home, and so they drove him home, and then the remaining people drove to Boise. Tr. p. 450, ln. 5 - p. 453, ln. 6.

The group stayed in Boise for a while. During this time, Mr. Kienholz admits he did threaten to kill Mr. Reid, but he believes he immediately apologized and that Mr. Reid was not afraid of him. Tr. p. 492, ln. 4 - 24.

Mr. Wilson also testified. He, like Mr. Kienholz, had a plea agreement with the state that was contingent upon his testimony against Mr. Reid. Tr. p. 575, ln. 18 - p. 576, ln. 8. The day he went with Mr. Kienholz and Mr. Reid was the day after his seventeenth birthday. Tr. p. 495, ln. 25 - p. 496, ln. 8.

His testimony differed from Mr. Kienholz's. He testified that Mr. Reid told him that day

that they were going on a road trip to Mexico and invited him along. Mr. Wilson agreed. However, Mr. Kienholz did not want him to come along until he learned that Mr. Wilson had some birthday money. Tr. p. 504, ln. 1 - p. 505, ln. 9.

Mr. Kienholz and Mr. Reid drove Mr. Wilson to his sister's house to get the money. Mr. Wilson's sister was rationing the money out and initially gave him just $75. Then Mr. Kienholz sent him back in and he got another $25. Tr. p. 512, ln. 1 - p. 513, ln. 11.

On the way to Mr. Wilson's sister's house, Mr. Reid and Mr. Kienholz (who was called Bubba) told Mr. Wilson that they had a gun in the trunk. Mr. Kienholz told Mr. Wilson how to access the trunk and he got the gun out. Then Mr. Kienholz told Mr. Wilson that they were going to meet Mr. Howard and Ms. Bewick, and Mr. Reid said that they needed to kill them. Tr. p. 508, ln. 10 - p. 509, ln. 12. However, Mr. Wilson thought that this was a joke and that they were not going to kill anyone. Tr. p. 680, ln. 23 - p. 681, ln. 17.

On the way up to the pass, Mr. Kienholz said that he might need to pull over and throw up because it is not everyday that you kill someone, but Mr. Reid told him that he was a pussy. Tr. p. 516, ln. 5 - 10.

Mr. Wilson testified that on the way to the pass, Mr. Kienholz and Mr. Reid discussed how they wanted to proceed and that they disagreed about where to park. Tr. p. 517, ln. 16 - 23.

Contrary to Mr. Kienholz, Mr. Wilson believed that it was Mr. Reid and Mr. Kienholz who discussed tactics, not him and Mr. Kienholz. Tr. p. 523, ln. 15 - p. 524, ln. 18. Mr. Wilson also believed that after Mr. Reid gave Mr. Kienholz ammunition, he put some extra bullets in his pockets in case Mr. Kienholz missed. During the walk from the car to the campsite, Mr. Reid suggested that they just steal the car and leave Mr. Howard and Ms. Bewick behind, as they

could not do anything to stop the theft because they could not go to the police given their outstanding warrants. Mr. Kienholz did not respond to this suggestion. Tr. p. 519, ln. 4 - 15, p. 678, ln. 20 - p. 679, ln. 9.

But, Mr. Wilson agrees that they all wound up hiding in a bush. At that point Mr. Kienholz wanted to sneak up over a ridge and hide in the bushes and shoot using the light of the fire. However, Mr. Reid said it would be better to just walk into the camp and shoot. Tr. p. 524, ln. 24 - p. 526, ln. 10.

They ultimately decided to walk into the camp and when they got there, Mr. Reid, Mr. Howard, and Mr. Kienholz discussed the plan to go to Mexico. Then, Mr. Kienholz engaged Mr. Howard in a discussion about the fire. And, then he finally said that there was going to be a lot of fire where Mr. Howard was going and shot Mr. Howard. Tr. p. 533, ln. 3 - p. 534, ln. 16.

Mr. Kienholz also kicked and shot Ms. Bewick and then shot Mr. Howard again. Tr. p. 536, ln. 15 - 21.

After this, Mr. Kienholz ordered Mr. Wilson to help him move the bodies, which he did. Tr. p. 540, ln. 1 - p. 541, ln. 8.

On cross examination, Mr. Wilson clarified his testimony and explained that up until Mr. Kienholz started the conversation with Mr. Howard about why a fire is ironic, he did not believe that a murder was really planned. He believed that Mr. Kienholz and Mr. Reid were playing some kind of sick joke. Tr. p. 580, ln. 24 - p. 581, ln. 3. He did not know Mr. Kienholz, but he did know Mr. Reid and he simply did not think Mr. Reid could do anything like killing someone. Tr. p. 678, ln. 7 - 10. Throughout, it was absolutely clear that Mr. Kienholz was the leader. He gave orders that Mr. Reid and Mr. Wilson obeyed. Tr. p. 577, ln. 23 - p. 578, ln. 10

Further, Mr. Wilson clarified that at the fire, Mr. Reid did not gesture to Mr. Kienholz nor did he mouth anything. During that time, Mr. Reid was actually standing behind Mr. Kienholz. Tr. p. 579, ln. 5 - 23.

Mr. Wilson also testified that when the group was in Boise, Mr. Kienholz threatened to kill Mr. Reid. He did not appear to be joking and he did not apologize after making the threat. Tr. p. 677, ln. 4 - 10.

After some time in Boise, Mr. Wilson took the Greyhound Bus back to his home and went to the police. Tr. p. 560, ln. 12 - 20. Mr. Kienholz also made his way back to North Idaho, to his mother's, where she took him to the police. Tr. p. 471, ln. 1 - 7.

Mr. Reid and Ms. Purtill remained in Meridian with the car. The police located the car and a search warrant was secured. When they went to serve the search warrant, Mr. Reid and Ms. Purtill cooperated with them and Mr. Reid, upon questioning, told the police that the gun from North Idaho was still in the trunk. Tr. p. 569, ln. 14 - p. 573, ln. 18.

In closing, the defense argued that while there was no doubt that Mr. Kienholz murdered Mr. Howard and Ms. Bewick, the evidence of that murder had to be distinguished from the evidence offered to support the aiding and abetting charges against Mr. Reid. And, given the inconsistencies in the testimony of Mr. Kienholz and Mr. Wilson, and the evidence that Mr. Kienholz was clearly the leader and rejected Mr. Reid's suggestion that the group just steal the car and leave, Mr. Kienholz's and Mr. Wilson's credibility problems, and the need for corroboration of accomplice testimony, that the state had not proven Mr. Reid guilty. In particular, the defense focused on the failure of the state to prove that Mr. Reid acted with premeditation. Tr. p. 724, ln. 15 - 741, ln. 6

At the end of the trial, the jury convicted Mr. Reid of both counts of aiding and abetting. Tr. p. 752, ln. 1 - 24.

III. ISSUES PRESENTED FOR REVIEW

1. Did the failure to instruct the jury that it must find that Mr. Reid had the mental state of premeditation violate the constitutional guarantees of due process and a jury trial? U.S. Const. Amend. 5, 6, and 14; Idaho Const. art. 1, §§ 7 and 13.

2. Were non-probative yet highly prejudicial photographs erroneously admitted?

3. Did the district court err in basing the sentence on unreliable evidence?

IV. ARGUMENT

A. Failure to Properly Instruct the Jury As to Premeditation Requires Reversal

1. *Relevant Facts*

The jury was given the following instructions:

Instruction 17

In order for the defendant to be guilty of Count I, Aiding and Abetting First Degree Murder, the state must prove each of the following:

1. On or about the 4th day of August, 2008;

2. In the State of Idaho;

3. Jon Allen Kienholz, Jr., did without justification or excuse,

4. Willfully, unlawfully, deliberately, and

5. With malice aforethought and premeditation,

6. Kill Neil Howard, a human being, and

7. The Defendant, COREY SKII REID, aided and abetted in the commission of the crime.

If the State has failed to prove any of the above, then you must find the defendant not guilty of murder. If you find that all the above have been proven beyond a reasonable doubt then you must find the defendant guilty of murder and decide if the defendant is guilty of first degree murder.

R 322.

Instruction 18

In order for the defendant to be guilty of Count I, Aiding and Abetting First Degree Murder, the state must prove each of the following:

1. On or about the 4th day of August, 2008;

2. In the State of Idaho;

3. Jon Allen Kienholz, Jr., did without justification or excuse,

4. Willfully, unlawfully, deliberately, and

5. With malice aforethought and premeditation,

6. Kill Cynthia Bewick, a human being, and

7. The Defendant, COREY SKII REID, aided and abetted in the commission of the crime.

If the State has failed to prove any of the above, then you must find the defendant not guilty of murder. If you find that all the above have been proven beyond a reasonable doubt then you must find the defendant guilty of murder and decide if the defendant is guilty of first degree murder.

R 323.

Instruction 23

All persons who participate in a crime either before or during its commission, by intentionally aiding, abetting, advising, hiring, counseling, procuring another to commit the crime with intent to promote or assist in its commission are guilty of the crime. All such participants are considered principals in the commission of the crime. The participation of each defendant in the crime must be proved beyond a reasonable doubt.

R 328.

Instruction 24

To be an aider and abettor, one must share the criminal intent of the principal; these must be a community of purpose in the unlawful undertaking.

R 329.

Instruction 25

If you unanimously agree beyond a reasonable doubt that Jon Allen Kienholz is guilty of murder and you unanimously agree beyond a reasonable doubt that the state has proven that the murder was willful, deliberate, and premeditated, and you unanimously agree beyond a reasonable doubt that the defendant, COREY SKII REID, aided and abetted in the commission of the willful, deliberate, and premeditated murder, you must find the defendant, COREY SKII REID, guilty of Aiding and Abetting First Degree Murder.

If you unanimously agree beyond a reasonable doubt that Jon Allen Kienholz is guilty of murder but you unanimously agree beyond a reasonable doubt that the state has not proven that the murder was willful, deliberate, and premeditated, and you unanimously agree beyond a reasonable doubt that the defendant, COREY SKII REID, aided and abetted in the commission of the murder, you must find the defendant, COREY SKII REID, guilty of Aiding and Abetting Second Degree Murder.

R 331.

Nowhere do these instructions require the jury to find that Mr. Reid shared the mental state of premeditation with Mr. Kienholz. Rather, when read carefully, the instructions make clear that Mr. Kienholz must have acted with premeditation. The instructions also make clear that Mr. Reid must have shared Mr. Kienholz's intent, which would be, of course, the intent to shoot the victims. *See State v. Porter,* 142 Idaho 371, 374, 128 P.3d 908, 911 (2005)(Intent to kill is not a necessary element of murder). But, the instructions do not, in any way, state that Mr. Reid must have acted with the mental state of premeditation. This missing element denied Mr.

Reid his state and federal constitutional rights to due process and to a jury trial. Idaho Const. art. 1, §§ 7 and 13, US Const. Amends. 5, 6, and 14.

2. *Standard of Review*

The defense did not object to the instructions below. However, the issue of whether Mr. Reid's constitutional rights to due process and a jury trial were violated when the jury was not instructed as to premeditation is a matter of fundamental error which may addressed for the first time on appeal.

At the time of the preparation of this brief, the law of fundamental error is in flux. *State v. Perry*, ___ Idaho ___, ___ P.3d ___, 2010 WL 2880156 (2010), *petition for rehearing pending,* sets out a restatement of the law of fundamental error which it states is not to be applied retroactively. However, *State v. Longest,* ___ Idaho ___, ___ P.3d ___ 2010 WL 3895346, decided October 6, 2010, without comment, applies *Perry* retroactively. It remains to be seen whether the petition in *Perry* will be granted or whether a petition for rehearing will be filed in *Longest* seeking some clarification.

The pre-*Perry* law of fundamental error, the law which was in effect at the time Mr. Reid was tried, and according to the no-retroactivity statement of *Perry*, the law that should apply to Mr. Reid's case, is that fundamental error may be raised for the first time on appeal. Fundamental error is an error that "goes to the foundation or basis of a defendant's rights or to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Knowlton,* 123 Idaho 916, 918, 854 P.2d 259, 261 (1993); *State v. Bingham,* 116 Idaho 415, 423, 776 P.2d 424, 432 (1989).

Post-*Perry* fundamental error law is as follows:

> . . . in cases of unobjected to fundamental error (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious without the need for any additional information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

State v. Perry, at *15. To demonstrate an effect upon the proceedings, the appellant must show a reasonable possibility that the error affected the outcome of the trial. *Id.*

In this case, this Court need not determine whether *Perry* means what it says when it says that it is not to be applied retroactively, because under either pre- or post-*Perry* fundamental error law, there was fundamental error in not instructing the jury on the mental state of premeditation required for conviction and the error requires reversal.

3. *Fundamental Error Occurred*

Due process requires that the state prove every element of the charged offense by proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). Each element of an offense must be found by a properly instructed jury. *See State v. Olin*, 111 Idaho 516, 524-30, 725 P.2d 801, 809-15 (Ct. App. 1986).

To prove murder, the state must prove that the defendant acted with intent, specifically, malice aforethought. I.C. §§ 18-4001, 18-4002. And, to prove first degree murder, as charged in this case, the state must prove not only malice, but also premeditation. I.C. § 18-4003(a). R 78-80.

Mr. Reid was charged as an aider and abettor. I.C. § 18-204. To prove aiding and abetting the state is required to prove that the aider and abettor shared the mental state of the principal; there must be a community of purpose in the unlawful undertaking. *State v. Scroggins*,

110 Idaho 380, 386, 716 P.2d 1152, 1158 (1985), *State v. Romero-Garcia,* 139 Idaho 199, 204, 75 P.3d 1209, 1214 (Ct. App. 2003). "[T]he aider and abettor must have the requisite intent and have acted in some manner to bring about the intended result." *State v. Mitchell,* 146 Idaho 378, 383, 195 P.3d 737, 742 (Ct. App. 2008). This includes the mental state of premeditation for first degree murder. As set out in 1 Wharton's Criminal Law, Ch. 4, § 38:

> The absence of a *mens rea* precludes one from being an accomplice. Hence, a law enforcement officer or informer who feigns friendship or complicity in the commission of a crime in order to obtain incriminating evidence is not an accomplice. Similarly a person's mere presence at the time and place of the commission of a crime, or his knowledge that a crime is being committed or is about to be committed, without more, does not make him an accomplice.

See also, State v. Randles, 117 Idaho 344, 787 P.2d 1152 (1990), overruled on other grounds, *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000).

As discussed in *People v. McCoy*, 25 Cal.4th 1111, 24 P.3d 1210 (Cal. 2001), to support a finding of guilt for first degree murder on an aider and abettor theory, the prosecution may not rely on the mental state of the actual perpetrator to support intent, malice or premeditation.

> [A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as vicarious. This description is accurate as far as it goes. But the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state. When a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own *mens rea*. The aider and abettor is liable for [his or] her own *mens rea*, not the other person's. A defendant charged with murder or attempted murder cannot be held vicariously liable for the *mens rea* of an accomplice.

25 Cal.4th at 1117, 24 P.3d at 1216 (citations and internal quotations omitted, emphasis original).

The California Court states that each person's level of guilt 'floats free' not tied to the mental state or premeditation of the other. 25 Cal.4th at 1121, 25 P.3d at 1220, citing Dressler, *Understanding Criminal Law,* (2d ed. 1995) § 30.06(C), p. 450. In fact, the aider and abetter's guilt in homicide cases may be greater than that of the principle if his or her *mens rea* is more culpable or may be less than the guilt of the principle, if his or her *mens rea* is less culpable. *People v. McCoy, supra.*

In this case, the jury was instructed as to the criminal intent of malice aforethought. Instructions 19 and 20. And, the jury was instructed that to be guilty of first degree murder Mr. Kienholz must have acted with premeditation. Instructions 17 and 18. But the jury was never instructed that Mr. Reid, to be guilty of aiding and abetting, had to also share the mental state of premeditation. This was fundamental error that now requires reversal. *State v. Perry, supra.*

(1) Constitutional Violation. Mr. Reid's unwaived constitutional rights to due process and to a jury trial were violated. As set out above, the failure to instruct the jury that one of the elements of the charge against Mr. Reid was that he have the mental state of premeditation was a constitutional violation. Moreover, nowhere in the record is there any evidence of any sort that Mr. Reid waived his rights to due process, proof beyond a reasonable doubt, and a jury trial.

(2) Clear error. The law, as discussed above, is clear that the absence of premeditation by Mr. Reid precludes conviction for aiding and abetting first degree murder. *State v. Scroggins, supra, State v. Romero-Garcia, supra, State v. Mitchell, supra, People v. McCoy, supra.* The law is also clear that a jury must be instructed as to every element of the offense. *State v. Olin, supra.*

Clear error also requires a demonstration that the error was not a result of a tactical

decision by the defense. The record in this case does demonstrate that lack of proper instructions on the elements of the charges was not a result of a tactical decision. At trial, the defense offered to stipulate to several of the elements of the charge. R 209, Notice of Indisputed Facts. The offer to stipulate included that on or about August 4, 2008, in Shoshone County, Jon Allen Kienholz, Jr., willfully, unlawfully, deliberately, with premeditation and with malice, did kill and murder Neil Howard and Cynthia Bewick. *Id.* The proposed stipulation did not include any stipulation as to Mr. Reid's mental state. So, clearly, the defense disputed that element of the charge.

Further, the defense was grounded upon the fact that the state had failed to prove that Mr. Reid shared the criminal intent of premeditation. Defense counsel's closing argument included the following:

> Your instructions say that you have to find that Mr. Reid, to be guilty of this, had a combination of an act and an intent. The acts are those things that are aiding and abetting, all those acts. And those all have to happen before the – and they have to be affirmative acts and they have to happen before the murder occurred. Not afterwards. And they have to be affirmative acts. Those are the – that's the act.
>
> But then it has to be coupled with the intent, with the specific intent that someone's going to die. And then, by doing those acts with Jon Kienholz, that Mr. Reid joined Mr. Kienholz in a union, a meeting of the minds that "We are going to kill two people." And when did that occur? Your jury instructions say they have to have shared criminal intent. When did that happen? When did these two minds come together and they have a shared criminal intent? Even if you were to believe, which I'm asking you not to, everything that Kienholz, a liar, said.
>
> Hiram Wilson knew Kienholz through a pretty short or rough period of time. Didn't think he was a very truthful person. I don't think – Mr. Wood didn't think Mr. Kienholz was a truthful person. He lied to law enforcement when he needed to cover his butt. And so you need to pick out – to convict Mr. Reid, you need to pick out something that Wilson or something that Kienholz said about the time that Kienholz decided, "These two people are going to die by my hand." And then that's Kienholz's intent. And you must also find that Mr. Reid had the same

> idea and that he furthered that crime. Mr. Kienholz had to have his intent as specific as your jury instructions say. It had to be premeditated. And you have that definition. And it had to be with malice. Mr. Reid, in aiding and abetting this murder, to be guilty of first degree murder aiding and abetting would also have to have that same intent, premeditated and with malice. And that those two, if you're going to find him guilty of that, that those two minds, those two intents, would have to be shared by these two people, that they would have a community purpose for their undertaking.

Tr. p. 730, ln. 13 - p. 732, ln. 4.

> . . . Jon Kienholz – much of the evidence you saw, especially the worst part of it, had to do with proving that Jon Kienholz was (sic) premeditated and had malice aforethought before he murdered these people. Now, his premeditation and malice aforethought, in the commission of the murder, is not the same. You need to find that happened, and you need to find Mr. Reid had malice and premeditation in the idea that Kienholz was going to go forward and kill these people. . . . He [Kienholz] clearly did pull the trigger. And one version is that that's right when he made up his mind for the intent to kill, right at that moment. So if that were believable by you, you would also need to go to that point in time. and then Mr. Reid already (sic) come up with the idea and acted with the intent to have those people die that way.

Tr. p. 738, ln. 3 - 21.

The defense was mainly based on the failure of the state to prove premeditation by Mr. Reid. And, defense counsel believed that the instructions were so worded as to require proof of premeditation by Mr. Reid independently of Mr. Kienholz's state of mind. It is clear then, that the defense did not make a tactical decision to not instruct the jury that it had to find that Mr. Reid acted with premeditation. *See McKay v. State*, 148 Idaho 567, 225 P.2d 700 (2010). Rather, the lack of instruction on premeditation on the part of Mr. Reid was a result of inadvertence, not purpose by the defense.

(3) Reasonable possibility that the error affected the outcome. As the defense set out in closing, the only evidence the state offered to support premeditation by Mr. Reid was the

testimony of Mr. Kienholz and Mr. Wilson. Mr. Kienholz was a self-admitted liar who told the state, "I'll testify to whatever you want" in return for avoiding the death penalty. The jury may reasonably have rejected much or all of what Mr. Kienholz offered at trial. Likewise, Mr. Wilson was testifying in order to gain a benefit from the state, and the jury could have reasonably rejected much of his testimony. In either of those events, given the lack of any evidence besides the testimony of these two of premeditation, it is reasonably possible that had the jury been instructed that it must find that Mr. Reid had the mental state of premeditation, it would not have convicted him of aiding and abetting two first degree murders. Moreover, it is certainly reasonably possible that one of the twelve jurors would have not been able to find by proof beyond a reasonable doubt that Mr. Reid acted with premeditation resulting in a hung jury.

Conversely, the jury might have put more credence in Mr. Wilson's testimony than in Mr. Kienholz's. Mr. Wilson testified that the whole situation seemed like a joke and that he did not believe that Mr. Reid, whom he knew well, could ever do anything like killing anyone. He also testified that as they walked to the campsite, Mr. Reid was suggesting that they just leave, just steal the car and leave. This was probative of a lack of premeditation of murder on Mr. Reid's part very shortly before Mr. Kienholz killed. If the jury had been properly instructed that it was required to find Mr. Reid acted with premeditation, it might reasonably have returned, based on Mr. Wilson's testimony, a different verdict.

Because there was fundamental error in the failure to properly instruct the jury and because that error was not harmless, reversal is now required. *State v. Perry, supra.*

B. The Erroneous Admission of Photographs Requires Reversal

Reversal is required not only because of instructional error. In addition, the erroneous

admission of certain photographic evidence requires reversal.

1. *Relevant Facts*

Prior to trial, the defense moved to exclude certain photos. The grounds for exclusion included 1) that the evidence was not relevant as it did not tend to make the existence of any fact of consequence more probable pursuant to IRE 401; 2) the prejudicial value of the evidence far outweighed any possible probative value under IRE 403; 3) the evidence was cumulative since there was no dispute as to the death of both victims by gunshot wounds; and 4) the photos were so highly prejudicial that curative instructions could not prevent predispositional effect on the jury. R 162-163. In support of the motion, Mr. Reid offered to stipulate to the following: 1) That on or about the 4th day of August, 2008, 2) in Shoshone County, ID; 3) Jon Allen Kienholz, Jr., willfully, unlawfully, deliberately, with premeditation and with malice; 4) killed and murdered Neil Howard and Cynthia Bewick. R 209 - 210.

At the argument on the motion, the defense pointed out that the photographs were terribly gruesome increasing the prejudicial impact. In this case, there was no need for the state to prove that a murder occurred, as that was conceded, and, even ignoring that concession, as Mr. Kienholz was going to testify (and indeed did testify) that he shot Mr. Howard and Ms. Bewick. Therefore, the state did not need the photos to prove anything. The state did not need to prove the time or location of the deaths, the nature of the wounds, or even that murder had occurred. The photos had no relevance to proving whether or not Mr. Reid aided and abetted in the killings as they demonstrated nothing about his presence or state of mind and were highly prejudicial. Tr.

4/23/09, p. 24, ln. 10 - p. 28, ln. 9.[1]

While some photos were excluded, others were admitted. R 200-201. These included Plaintiff's Ex. 17, which shows Mr. Howard's body on the ground. He is laying in a crucifix posture with his shirt pulled up around his neck and his very bloodied head slightly askew. The state's witness who presented this photo specifically told the jury that the photo depicted Mr. Howard "in a kind of cross position." Ex. 17, Tr. p. 275, ln. 23 - p. 276, ln. 9.

State's Exhibit 22 is a particularly gruesome closeup photograph of Mr. Howard's face. A gunshot wound to his left temple is clearly visible and the top and left side of his head are covered in dried blood. His lips are parted and blood can be seen on his teeth. But, most gruesome are the maggot larvae and flies. The state's witness testified "This shows the dried blackened blood on his face. You'll see the puncture wound located in his left temple right there. If you – you can see it better in the photograph, but you can see the small larvae that's forming on his teeth. And what the – the flies come in and lay eggs on the soft tissues in the nose, the eyes, the mouth, the ears." Ex. 22, Tr. p. 279, ln. 7 - 14.

Exhibit 27 is a similarly gruesome closeup photograph of Ms. Bewick's face. As the prosecutor stated to the jury, "27 is a rather graphic photo, I believe." Tr. p. 282, ln. 18 - 19.

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[1] All of the photos subject to the motion in limine and later admitted at trial were shown at the hearing on the motion in limine. *See,* Tr. p. 28 - p. 99. Those photos are in the record before this Court with the numbers they were assigned at trial, which differ from the numbers assigned at the hearing on the motion in limine. For clarity, this brief refers to the photos by the exhibit numbers assigned at trial. The appellate record included all the photos admitted at trial. To ensure a complete record, Mr. Reid has also filed a motion to augment the appellate record with the photos as made a part of the record at the motion in limine. *See* Tr. p. 97, ln. 23 - p. 98, ln. 18. Therefore, the record will contain each of the disputed photos twice – once from when each was subject to the motion in limine, and once from when each was entered as an exhibit at trial.

Apparently, the prosecutor made this statement so that certain people could be alerted to leave the courtroom to avoid viewing it. Tr. p. 282, ln. 20 - 23. The state's witness, Detective Morgan, testified:

> 27 shows a close-up of Cindy Bewick's face as – as it was located on the scene. You'll see the bloody sweatshirt with blood around her head area. You'll see the – the pupae, where it's beyond the – before the maggot stage and prior to laying the eggs. This is the same thing. But this is where they were – how they eat the blood, and then they – and also the soft tissue prior to becoming flies. You can also see a – located right there you can see a puncture wound that appeared to be maybe a gunshot wound right there on her left.
>
> . . .
>
> And you'll see again with the – she was laying more in the shade than in the bright sunlight, which is – which is why her face has more insect activity than Neal's did at this particular time. He was pretty much in the sunlight, when the sun came up, and she was in the shady areas. And you can also see that – note that the surface animals – the crows, the coyotes – have not eaten the soft tissue like the lips and the eyes, which is where they go for, which is what they eat first. That would also indicate that she hadn't been there but just several days.

Tr. p. 282, ln. 23 - p. 284, ln. 5.

2. *Argument*

Three particularly disturbing photographs were erroneously admitted at trial. The error in admitting these photos requires a new trial.

State's Exhibit 17 shows Mr. Howard laying on the ground in a "a kind of cross position" The position of Mr. Howard's body with his arms extended straight out, his shirt pulled up to expose his torso, his shorts rolled up to just cover his genitals, and his bloodied head lying askew resting on his left arm is nearly identical to the depiction of Christ in tens of thousands of crucifixes and paintings. The pose is nearly identical to poses used in posters to advertise Mel Gibson's Passion of the Christ. Detective Morgan's testimony ensured that the jury would not

miss this symbolism and feel deeply seated religious emotion when viewing the photo.

State's Exhibit 22 is a closeup of Mr. Howard's face and shows not only his injuries, but also "insect activity" including larvae in his teeth. And, Exhibit 27 was so disturbing that the prosecutor warned those watching the trial that they might wish to leave. It is a closeup of Cindy Bewick's face. Her mouth is covered with insects eating her.

The law regarding the admission of the photographs is set out in *State v. Phillips,* 117 Idaho 609, 611-12, 790 P.2d 392-93 (Ct. App. 1990):

> Generally, photographs of a victim in a prosecution for homicide are, in the discretion of the trial court, admissible as evidence as an aid to the jury in arriving at a fair understanding of the evidence, proof of the corpus deliciti, extent of injury, condition and identification of the body, or for their bearing on the question of degree or atrociousness of the crimes, even though such photographs may have the additional effect of tending to excite the emotions of the jury. Once the trial judge determines the relevancy of a photograph, he or she must decide whether its probative value is substantially outweighed by any inflammatory effect. Absent an abuse of discretion, the trial court's decision regarding admission of such photographs will not be disturbed on appeal.

Id. (citations omitted). *See also, State v. Sanchez,* 147 Idaho 521, 525, 211 P.3d 130, 134 (Ct. App. 2009).

While photos of the victim are generally admissible, in this case, the three photos discussed above should not have been admitted because even if they were relevant, their probative value was substantially outweighed by inflammatory effect. *Id.*

The probative value of the photos was at best minimal. The fact of a murder was never in dispute. Neither was the identity of Mr. Howard and Ms. Bewick. The time of death and the method of death were never in dispute. All was admitted by Mr. Reid and all was testified to by Mr. Kienholz and Mr. Wilson. The only question in dispute was whether Mr. Reid aided and

abetted Mr. Kienholz in committing the crimes, in particular whether he shared the *mens rea* of premeditation. And, not one of these photographs contained any image that would shed any light on that question. These three photos gave the jury no evidence that had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." IRE 401.

Yet, the prejudicial effect was enormous. It is difficult to imagine more powerfully persuasive imagery than a photo of a murder victim laid out like Christ on the cross – persuasive not for purposes of encouraging jurors to carefully weigh evidence and reach a fact based verdict, but persuasive to avenge a death that has a cultural meaning beyond the death of a single human being.

Similarly, the photographs of Mr. Howard and Ms. Bewick being eaten by insects evoke powerful emotions.

Clearly the probative value of these photographs was substantially outweighed by the inflammatory effect and their admission was an abuse of discretion. *State v. Phillips, supra,* IRE 403.

A similar result was reached in *Phillips*. In that case, the Court of Appeals held that a photo of a victim's scalp lying in the snow on the side of the road should not have been admitted in a vehicular manslaughter prosecution. The Court, in deciding the photo should not have been allowed, wrote, "This photograph had no probative value, but carried with it *some* prejudicial impact not necessary to prove the manslaughter charges . . ." 117 Idaho at 612, 790 P.2d at 393 (emphasis original).

An Arizona case presents facts very close to those in this case. In *State v. Spreitz*, 190

Ariz. 129, 945 P.2d 1260 (Ariz. 1997), the state Supreme Court held that the trial court abused its discretion in admitting in a murder prosecution photographs of the victim's body as it appeared after decomposing in the desert for three days. The Court noted that the body was discolored and insects were shown partly covering it. The Court said that the insect activity was vividly apparent in the close-ups. In balancing probative value against prejudicial effect, the Arizona court noted that the medical examiner had testified clearly about wounds to the victim's body and that the photos therefore presented little or no advantage to proving matters in dispute.

The photos as described in *Spreitz* are very similar to the photos admitted in this case. In both cases, the photos are of bodies which were exposed to the elements and were at the time of the photos subject to vivid insect activity. And, as in *Spreitz*, the photos in this case provided little advantage to the jury in understanding any issue in dispute. Yet they were highly prejudicial and should have been excluded. IRE 403, *State v. Phillips, supra*; *State v. Spreitz, supra*.

The question then becomes whether the error was harmless. *State v. Phillips, supra*. The error is harmless only if this Court finds that the state has established beyond a reasonable doubt that the verdict would have been the same without the photographs. *Id.*

The error is not harmless because the state cannot meet this burden.

While there was no doubt that Mr. Kienholz murdered Mr. Howard and Ms. Bewick, as discussed above, the evidence of that murder alone did not support the aiding and abetting charges against Mr. Reid. The state had no evidence independent of its dubious and inconsistent accomplice testimony to prove the requisite mental state, premeditation, by Mr. Reid. It cannot be said beyond a reasonable doubt that the verdict would have been the same without the

erroneously admitted photos. *Id.*

Because it cannot be established beyond a reasonable doubt that the verdict would have been the same without the erroneously admitted photographs, reversal is required.

C. Consideration of Rollins' Unsworn Interview at Sentencing Violated the State and Federal Constitutional Rights to Due Process

1. *Relevant Facts*

At sentencing, the defense and state agreed to use a presentence investigation report (PSI) prepared for a 2008 conviction for possession of a controlled substance. Tr. p. 758, ln. 2 - 7, p. 786, ln. 18 - 20. That PSI is an exhibit on appeal. R 404.

That PSI reported a minimal criminal history. Mr. Reid, who was 21 at the time of sentencing, had two prior offenses of tobacco possession/distribution/use by a minor, two alcohol possession by a minor, a failure to provide proof of insurance and failure to register a vehicle, a possession of drug paraphernalia, and a driving under the influence. He had no prior violent offense convictions. PSI p. 3 - 4.

A court ordered substance abuse evaluation was also prepared and is in the record on appeal. R 404. That evaluation found that Mr. Reid has alcohol dependence, amphetamine dependence, cannabis dependence, and cocaine dependence. Ex. Evaluation from Alliance Family Services, p. 1

The day of sentencing, the state filed "Documentation in Support of State's Sentencing Recommendation." R 354 - 378. Based upon this documentation, the state asked for a sentence of life with 40 years fixed, a greater sentence than was imposed on Mr. Kienholz. Tr. p. 763, ln. 23 - p. 768, ln. 11, p. 784, ln. 1 - 4.

The state's documentation was a "draft" Idaho State Police Report which included the transcript of an unsworn interview between Detective Morgan, a deputy prosecuting attorney, and Ronald Rollins, Jr., conducted on January 22, 2009. R 357. (Mr. Reid's trial was held in May 2009.) This interview was highly damaging to Mr. Reid.

There is nothing in this interview to establish Mr. Rollins's credibility or his motivations other than the fact that he was released from jail early by his probation officer. R 368. All that is revealed is that he was in jail for some undisclosed period of time on a probation violation and that he said that he shared a cell with Mr. Reid for about a month. R. 357, 371. In the interview, it is not even clear Mr. Rollins is relating information he claims Mr. Reid shared with him directly or whether he is just reporting jailhouse rumors. R 357 - 378.

However, Mr. Rollins' interview is highly inconsistent with the evidence the state presented at Mr. Reid's trial. For example, Mr. Rollins claims that Mr. Reid said that Mr. Wilson kicked Ms. Bewick in the face so that her jaw was off to the side and that she pulled out her own hair. R. 361. Later, Mr. Rollins claims that Mr. Reid changed his story and said that he had "stepped on" Ms. Bewick's face. R. 362. Yet, at trial, there was no evidence presented either that Ms. Bewick's jaw was dislocated or that her hair had been pulled out. Rather, Mr. Kienholz and Mr. Wilson both testified that Mr. Kienholz kicked Ms. Bewick. Tr. p. 438, ln. 24 - p. 439, ln. 3, p. 536, ln. 15 - 21.

Likewise, Mr. Rollins claims that Mr. Reid told him that "they," apparently he and Mr. Kienholz, had tried to get a gun before they traded Luke Hill for a gun and had been thwarted in their efforts when a friend's father caught them trying to get into a locked gun safe. Further, according to Mr. Rollins, before they got the gun from Mr. Hill, "they" went to Jared Coe's

house and "something happened there." R. 364. Yet at the trial, there was no evidence presented that an earlier attempt to get a gun had been thwarted or anything about Jared Coe or something happening at his house.

Also, and most importantly, Mr. Rollins claimed that Mr. Reid and Mr. Kienholz's motive was to steal Mr. Howard's car for their road trip because Mr. Howard refused to give them the car voluntarily. R 364, 365, 373, 376. This motive was not the motive the state presented at trial. Instead, at trial, the state's evidence was that the motive was to respond to threats Mr. Howard and Ms. Bewick had made to Ms. Purtill. No evidence at all was provided to support a motive of auto theft.

Mr. Rollins also claimed, contrary to the evidence the state presented at trial, that Mr. Reid and Mr. Kienholz had planned the murders for two days. R 364-65. Later, he claims that Mr. Reid said that they had planned the murder for "two, three, several days." R 370. Yet at trial, the state's witness, Mr. Kienholz testified that the murders were planned on the same day that they were completed.

During the interview, Mr. Rollins claims that not only did Mr. Reid confess to aiding and abetting, but that he believed that he would get off with just probation, that he thought what had happened at the pass was funny, that he had no remorse, and that he said that Mr. Howard and Ms. Bewick were "punks" for not giving him and Mr. Kienholz the car and therefore they shot them. R 359, 361, 364, 365, 376.

At the close of the interview, Mr. Rollins vouched for his own credibility. He agreed with Detective Morgan that the detective had come to him unexpectedly early the Sunday before and that they had set up this formal interview. Mr. Rollins said, "I'm glad it happened that way,

better that way. You guys know my credibility is more, if I'd known you guys were coming for a couple of weeks that person could have, you know, been trying to weasel there (sic) way out or . . . I knew a lot of the events and I couldn't have known unless I talked to Corey." R 378. Earlier in the interview, Mr. Rollins said, "I got out of jail early, but I was asked if I would testify before anything to the jail was brought up." R 368.

Defense counsel objected to consideration of the Rollins interview. Counsel stated:

> The – I don't want to dwell on this Ronnie Rollins, but it's – it's disgusting. I think it's very poor form to bring that up today. I think it's inflammatory, and I think it's insulting to the families here today. Ronald Rollins doesn't have little credibility – he has no credibility while giving the statement in jail to get out of jail. None of the things he said was corroborated by Jon Kienholz or Hiram Wilson there. None of it happened. And I think it's very poor form to bring that up today. It's a complete lie and fabrication, inconsistent with every statement of every witness that's recorded in this case, including Mr. Reid's earliest statement. And it was all for a plea arrangement with Mr. Rollins that never materialized from the State.

Tr. P. 770, ln. 17 - p. 771, ln. 5.

The Court considered this objection, but determined to rely on the Rollins interview, at least in part, in forming a sentence. The Court stated:

> And Mr. Smith quite properly has pointed out that we have nothing to judge the credibility of Mr. Rollins. He's not here. He's not subject to cross-examination. And I recognize that and recognize that, without live testimony and cross-examination, the statements should be taken with a grain of salt.
>
> But one thing that occurred to me, as I was looking through the statements, was that the statements were made prior to the trial or any real discussion of the facts of the case. And Mr. Rollins did have a good knowledge of the facts of the case based upon what he stated that Mr. Reid had told him while they were in jail together. And so, recognizing that he was not subject to cross-examination, there is some evidence just from the statements, themselves, that they do have an element of credibility because he has details that would not have been known to him except had they been given him by Mr. Reid, as he stated. And I'm referring there to elements that – or details of the facts that came out during the trial.

Tr. p. 788, ln. 222 - p. 789, ln. 19.

In addition to the Rollins interview, the Court stated that it was going to consider statements made at the Kienholz sentencing.

> The murders have had a tremendous effect on the Bewick and Howard families and the friends of the victims, as shown by the statement of Ms. Carpenter and the testimony that was presented at trial and the statements that were made at the Kienholz sentencing. I recall those statements very well. So, there's a tremendous effect naturally upon the families of the victims.

Tr. p. 788, ln. 1 - 8.

After considering this information and arguments from counsel, and Mr. Reid's statement that he did not do enough to stop the crimes from happening and that he was very sorry, the Court sentenced Mr. Reid to life with 30 years fixed, the same sentence imposed on Mr. Kienholz. Tr. p. 786, ln. 9 - 12; p. 790, ln. 18 - p. 791, ln. 1.

2. *Argument*

While the Idaho Rules of Evidence do not apply to sentencing hearings, IRE 101(e)(3) and ICR 32(3), a defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information. *United States v. Petty,* 982 F.2d 1365, 1369 (9th Cir. 1993). *See also, State v. Molen,* 148 Idaho 950, 961, 231 P.3d 1047, 1058 (Ct. App. 2010). The due process clause of the United States Constitution requires that defendants not be sentenced based on "misinformation of constitutional magnitude." *United States v. Tucker,* 404 U.S. 443, 447, 92 S.Ct. 489, 492 (1972); *see also Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (plurality) (due process applies during sentencing), *United States v. Petty, supra. See also, State v. Molen, supra* (conjecture and speculation have no place in a presentence report). Material information is "unreliable" if it "lacks 'some minimal indicia of reliability beyond mere

allegation.'" *United States v. Ibarra,* 737 F.2d 825, 827 (9th Cir. 1984)(quoting *United States v. Baylin,* 696 F.2d 1030, 1040 (3rd Cir. 1982)). *See also, State v. Burdett,* 134 Idaho 271, 275, 1 P.3d 299, 202 (Ct. App. 2000) stating that hearsay must be disregarded at sentencing if there is no reasonable basis to deem it reliable, as where the information is simply conjecture.

In this case, consideration of the Rollins interview at sentencing violated state and federal guarantees of due process. It was entirely hearsay and did not bear even minimal indicia of reliability. In that, it was like the material which was erroneously considered by the sentencing court in *State v. Mauro,* 121 Idaho 178, 824 P.2d 109 (1991). The Supreme Court vacated the sentence in *Mauro* after the district court considered statements in the PSI suggesting the defendant's participation in a major drug distribution organization. Much of the information came from the files of the United States Attorney's office. The Supreme Court noted that the fact that much of the information came from the U.S. Attorney's office did not make it *per se* reliable and without other indicia of reliability, the information contained too much speculation and conjecture and too little support and should not have been considered at sentencing. 121 Idaho at 183, 824 P.2d at 114.

In this case, like *Mauro,* the improper information came from government files – in *Mauro,* the files of the U.S. Attorney; in this case, the files of the police and prosecutor. And, as in *Mauro,* that does not mean the information was *per se* reliable.

Further, as in *Mauro,* there was no information by which to find the government's informant credible. There is nothing in this case by which to find that Mr. Rollins was either a reliable observer or an honest reporter. To the contrary, all that is known about him is that he was in jail and that he was released early from jail apparently in connection with his interview.

But, unlike *Mauro*, and more egregiously than *Mauro*, there were indications that Mr. Rollins was not credible. As set out above, his statements were in very large part inconsistent with the evidence presented at trial.

The district court did note the complete lack of information to allow it to judge the credibility of Mr. Rollins. But, then the judge stated that he would consider the interview because it occurred to him that the interview took place before the trial and that Mr. Rollins had a "good knowledge of the facts of the case." This conclusion is debatable as Mr. Rollins' version of events was often at odds with the case the state presented. And, it is logically unsound. The fact that Mr. Rollins had some information about the case, most of which was contradicted by the evidence presented at trial, does not support a conclusion that the interview provided reliable information. The interview was nothing but hearsay from a completely unknown source. That sort of hearsay that cannot be considered in sentencing without violating the state and federal constitutional rights to due process. *State v. Mauro, supra, United States v. Petty, supra.*

Based upon this error, the sentence must now be vacated and the case remanded for resentencing. *State v. Mauro, supra.*

V. CONCLUSION

The convictions in this case must be reversed because the jury was not instructed as to the required *mens rea*. The convictions must also be reversed because of the erroneous admission of photographs.

In the alternative, the sentence must be vacated and the case remanded because it was based upon unreliable hearsay.

Respectfully submitted this 14th day of October, 2010.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 19th day of October 2010, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

Idaho Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple