8-27-2009

State v. Ciccone Appellant's Brief Dckt. 32179

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ALBERT A. CICCONE, Defendant-Appellant.	)	NO. 32179 APPELLANT'S BRIEF

BRIEF OF APPELLANT

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

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Nature of the Case

Albert Ciccone was charged with two counts of first degree murder (by premeditation) after he struck his wife with his car, killing her and the fetus in her womb. A jury found Mr. Ciccone guilty of first degree murder with respect to his wife, but it found him guilty of the lesser offense of second degree murder with respect to the fetus. The district court imposed a fixed life sentence for the first degree murder and a fifteen year fixed sentence for the second degree murder.

A preliminary question on appeal is whether Mr. Ciccone's Notice of Appeal was timely from the district court's judgment of conviction. Assuming it is, Mr. Ciccone presents four additional issues on appeal: whether his constitutional and statutory rights to a speedy trial were violated; whether the prosecutor engaged in misconduct during his closing arguments; whether Mr. Ciccone's sentence is excessive; and whether the Idaho Supreme Court denied Mr. Ciccone due process on appeal.

Statement of the Facts and Course of Proceedings

In June 1996, Albert Ciccone, who was then nineteen years old, continued a family tradition by enlisting in the United States Air Force. (Presentence Investigation Report (*hereinafter,* PSI), pp.1, 12, 16.) Although his Air Force service took him to various duty stations in the United States and abroad, the bulk of Mr. Ciccone's career was spent at Mountain Home Air Force Base here in Idaho. (*See* PSI, pp.16.)

In early 2003, while living in Mountain Home, Mr. Ciccone met, and fell in love with, Kathleen Terry. (PSI, p.14.) They quickly moved in together and, on August 29,

2003, were married. (PSI, p.14.) Less than two weeks later, the couple was thrilled to learn that they were pregnant. (PSI, p.14.)

Unfortunately, the passionate young couple's fast-moving relationship was far from perfect. By all accounts, it was extremely turbulent, characterized as much by the lows of bitter arguments, separations, and Mr. Ciccone's intense depression, as it was by the highs of courtship, love, and the exciting prospect of a life together as a loving family. (*See, e.g.*, PSI, p.14 (Mr. Ciccone's description of the "soap-opera" that was his relationship with Kathleen).) Indeed, in September of 2003, after one of their arguments, Mr. Ciccone attempted suicide. (PSI, pp.14-15.) Fortunately, he was unsuccessful and was admitted to Intermountain Hospital, a psychiatric hospital in Boise. (PSI, p.15.) However, shortly after his release from Intermountain, Mr. Ciccone learned that his new wife had not only been unfaithful, but that she had contracted Chlamydia in the process, and may have even passed the disease to him. (*See* Tr. Vol. VIII, p.1258, L.12 – p.1259, L.4, p.1429, L.3 – p.4132, L.19.) Not too surprisingly, another argument ensued and the couple separated for a time. (Tr. Vol. VIII, p.1389, L.20 – p.1390, L.22, p.1431, L.18 – p.1432, L.8; *see* Tr., p.1257, Ls.7-20.)

Within a week or so, the couple attempted to reconcile. (PSI, p.15.) On August 16, 2003, they attended a couples' counseling session with a civilian social worker employed by the Air Force. (Tr. Vol. VIII, p.1508, L.22 – p.1509, L.22, p.1515, Ls.7-11.) During that counseling session, the social worker attempted to provoke Mr. Ciccone's anger by "punch[ing] his buttons a couple of times," and, to a limited extent, was successful, as he managed to make Mr. Ciccone "really upset" to the point where Mr. Ciccone left the room; however, Mr. Ciccone calmed down and returned. (Tr. Vol.

VIII, p.1517, L.16 – p.1518, L.25, p.1525, L.23 – p.1526, L.11.) Indeed, by the end of the one-hour session, "[t]hey seemed to be in pretty good shape" (except that the counselor believed Mr. Ciccone was still upset with him), the counselor did not see any risk of harm coming to either Kathleen or Mr. Ciccone, and, shortly after the appointment, Kathleen and Mr. Ciccone appeared to be affectionate, happy, and attentive to one another's needs. (Tr. Vol. VIII, p.1416, L.12 – p.1417, L.19, p.1519, L.15 –p.1520, L.5, p.1523, Ls.19-23.)

After leaving the base Kathleen and Mr. Ciccone stopped at a Burger King restaurant to pick up some food and bring it back to Kathleen's mother's house, which was where Kathleen was staying while the couple was separated. (Oct. 16, 2003 Interview Tr., p.34, Ls.16-20, p.40, L.5 – p.10.) When they arrived at Kathleen's mother's house, they had another argument. (PSI, p.11.) Ultimately, Kathleen got mad, threw the food at her husband and marched off down the road. (PSI, p.11.)

After cleaning his dinner off of his uniform, Mr. Ciccone resolved to head home to his apartment. (PSI, p.11.) Apparently still angry and frustrated, he punched the accelerator and flew through the gears of his powerful little sports car. (*See* PSI, p.11; *see also* Tr. Vol. VIII, p.1674, Ls.16-23, p.1692, Ls.18-22.) He lost control though, and collided with his wife.[1] (PSI, p.11.) Tragically, Kathleen died from her injuries. (*See* Tr. Vol. VIII, p.560, L.20 – p.566, L.7.)

After striking Kathleen (and a mailbox), Mr. Ciccone stopped, got out of his car, and looked toward his wife's lifeless body. (Tr. Vol. VIII, p.515, Ls.6-14, p.516, Ls.14-

[1] Mr. Ciccone is mindful of the fact that a jury ultimately found otherwise, but he contends that, while he may have been foolishly reckless in his driving, he did not deliberately strike his wife and he certainly did not do so premeditatedly.

20.) Strangely, he did not approach her; instead, he called his mother and, in a daze, wandered down the road and, eventually, out into the desert. (Tr. Vol. VIII, p.516, L.11 – p.20, p.518, L.22 – p.519, L.11, p.598, L.10 – p.600, L.12, p.609, L.3 – p.611, L.19, p.617, Ls.10-16, p.618, Ls.12-25; PSI, p.11.) According to Mr. Ciccone's mother, Mr. Ciccone's voice was unrecognizable when he first called her and, eventually, he began screaming hysterically, saying that he had been in an accident and was afraid Kathleen was hurt and needed help, and that he did not know where he was and felt like his head and chest were going to explode. (Tr. Vol. VIII, p.1704, Ls.6-8, p.1705, L.20 – p.1706, L.5.)

Eventually, Mr. Ciccone was spotted standing on a ridge about a mile into the desert and was contacted and handcuffed by authorities. (Tr. Vol. VIII, p.610, L.24 – p.611, L.19, p.613, L.4 – p.614, L.14, p.669, L.6 – 670, L.11.) He did not try to flee or resist in any way. (Tr. Vol. VIII, p.613, Ls.16-22, p.620, Ls.19-24.) He was walked back to the road, treated by medical personnel at the scene, and taken to a local hospital. (Tr. Vol. VIII, p.614, L.19 – p.615, L.11, p.1164, L.17 – p.1165, L.13.) Shortly before midnight, Mr. Ciccone was arrested and interrogated. (*See* Tr. Vol. VIII, p.1475, L.23 – p.1476, L.14 (Detective Wolfe testifying that that sought Mr. Ciccone's release from the hospital then, shortly before midnight, began interrogating him at the Elmore County Sheriff's Office); Oct. 16, 2003 Interview Tr., p.12, L.9 – p.15, L.4 (Detective Wolfe reading Mr. Ciccone his *Miranda* rights and explaining that she had to do so because Mr. Ciccone was not being held voluntarily), p.45, Ls.1-15 (Detective Wolfe explaining that, although Mr. Ciccone was in "custody" pursuant to an "investigative hold" and, thus, he was "not under arrest"), p.165, L.15 – p.171, L.12 (Detective Wolfe explaining,

at the conclusion of the interrogation, that Mr. Ciccone would be "put in custody for murder," and that he would be photographed and fingerprinted before spending the night in jail).) The following day, (October 17, 2003), Mr. Ciccone was charged with two counts of first degree murder (by premeditation)—one count for Kathleen, and one count for her unborn fetus. (R., pp.8-10.)

Mr. Ciccone's preliminary hearing began on October 30, 2003, but ended up being a piecemeal affair, stretching out over some two and one-half months. (*See generally* Tr. Vol. II, p.17, L.22 – p.78, L.11 (proceedings held on October 30, 2003); Tr. Vol. II, p.79, L.1 – p.85, L.16 (proceedings held on November 19, 2003); Tr. Vol. II, p.86, L.1 – p.164, L.23 (proceedings held on December 15, 2003); Tr. Vol. IV (proceedings held on December 29, 2003); Tr. Vol. V (proceedings held on January 12, 2004). At the conclusion of the preliminary hearing on January 12, 2004, Mr. Ciccone was bound over on both charges. (Tr. Vol. V, p.78, Ls.3-25.) Approximately two weeks later, on January 27, 2004, the district court entered an Order Holding Defendant to Answer. (R., pp.58-59.) That same day, the State filed its Information. (R., pp.60-61.)

At his arraignment on February 2, 2004, Mr. Ciccone entered not guilty pleas and requested a jury trial. (Tr. Vol. VI, p.4, Ls.5-7.) Accordingly, the district court set the case for up to a two week trial, with jury selection set to begin on July 20, 2004, and the trial itself set to begin on July 23, 2004. (R., p.66; Tr. Vol. VI, p.4, Ls.9-10, p.7, L.5 – p.9, L.11.) The district court also admonished the attorneys for both parties that they should be prepared to proceed with trial as scheduled: "Counsel, I will tell you right now, this is going to be a relatively firm trial date because we're—because of the

Severson trial in June, we're running this up pretty close to the 180-day requirement." (Tr. Vol. VI, p.6, Ls.15-19.)

At the pretrial conference of June 21, 2004 (less than a month before jury selection was to begin), the State gave no hint that it might need, or want, a continuance. (*See generally* Tr. Vol. VI, p.10, L.1 – p.25, L.13.) Nevertheless, on July 16, 2004, approximately 274 days after Mr. Ciccone was arrested, and only four days before jury selection was set to begin, the State moved to continue Mr. Ciccone's trial on the basis that certain "material" witnesses were "unavailable." (R., pp.102-08.)

On July 19, 2004, the day before jury selection was to have begun, the district court heard arguments on the State's motion. (*See generally* Tr. Vol. VII, p.1, L.1 – p.44, L.22.) At the hearing, the State reiterated the grounds set forth in its motion (Tr. Vol. VII, p.8, L.2 – p.13, L.14), and also identified additional grounds which it argued supported its motion (*see* Tr. Vol. VII, p.15, L.9 – p.19, L.9). In response, Mr. Ciccone objected to any continuance and asserted his right to a speedy trial (Tr. Vol. VII, p.19, Ls.17-23), arguing through his attorney that "[w]e are ready to go" to trial. (Tr. Vol. VII, p.22, Ls. 21-22.) At the conclusion of the hearing, the district court granted the State's motion, continuing the trial for nearly six months, to January 2005. (Tr. Vol. VII, p.25, L.25 – p.36, L.18.) The following day, it entered a written order granting the State's motion and re-setting the trial date. (R., p.114.) That order, as well as a revised scheduling order issued the same day, indicated that jury selection was to begin on the afternoon of January 4, 2005, and the trial itself was to begin on the morning of January 7, 2005. (R., pp.114, 116-17.)

On July 27, 2004, Mr. Ciccone filed a motion with the district court seeking permissive appeal of the decision to grant the State's motion for a continuance. (R., pp.122-23.) At the August 16, 2004 hearing on that motion, defense counsel emphasized the fact that there were still five or six months before trial, so there was time for an appeal in that period, and he suggested that, even if the appellate court did not order dismissal with prejudice (*see* R., p.123), it might order that Mr. Ciccone get his trial forthwith—whether that required the district court to rearrange its own schedule or whether it require that a new judge be brought in. (*See* Tr. Vol. VII, p.31, Ls.9-15.) Ultimately, the district court denied the motion for permissive appeal on the basis that its previous order granting the continuance was correct. (*See* Tr. Vol. VII, p.32, L.11 – p.34, L.13.) In a written order issued the same day, the district court provided another basis for denying Mr. Ciccone a permissive appeal—its belief that the appeal would actual delay Mr. Ciccone's trial further. (R., pp.134-35.)[2]

On December 20, 2004, approximately three weeks before his trial was to begin, Mr. Ciccone filed a motion for dismissal based upon a violation of his Constitutional and statutory rights to a speedy trial. (R., pp.168-69.) That motion was heard on January 3, 2005. (*See generally* Tr. Vol. VIII, p.40, L.3 – p.44, L.21.) During the hearing, the district court denied the motion on the basis that "good cause" had been shown for the nearly six-month continuance. (Tr. Vol. VIII, p.43, L.18 – p.44, L.21.) Later, it entered a written order to that effect. (R., pp.180-81.)

[2] It does not appear that Mr. Ciccone followed up by filing a motion with the Idaho Supreme Court, pursuant to I.A.R. 12, seeking a permissive appeal. (*See* R., pp.2-7.)

Beginning with jury selection on January 4, 2005, Mr. Ciccone's trial was held over portions of eleven different days in January of 2005. (*See generally* Tr. Vol. VIII, p.61, L.1 – p.1869, L.20.)[3] Toward the end of trial, during the prosecutor's closing arguments in rebuttal, he made a number of arguments which are of concern on appeal. First, he asserted as follows: "There's only two people that know [the details of the argument immediately prior to Kathleen's death], and Kathleen Ciccone isn't here to tell us." (Tr. Vol. VIII, p.1853, Ls.21-23.) A short time later, he argued that "[t]here is no testimony" that Mr. Ciccone was distracted or not looking at Kathleen immediately prior to striking her with his vehicle. (Tr. Vol. VIII, p.1856, Ls.2-9.) Finally, the prosecutor made the following plea: "When you kill somebody, you take away everything they have and everything they ever will have. Kathleen was 22 years old. Her death is a tragedy. Give her life meaning and give her death the sense of justice that it requires." (Tr. Vol. VIII, p.1860, Ls.15-22.)

During the late afternoon of January 25, 2005, shortly after the prosecutor made the above arguments, the jury was excused to begin its deliberations. (Tr. Vol. VIII, p.1868, Ls.4-6.) Apparently, the jury did not reach its verdicts on the evening of January 25, 2005 and, therefore, adjourned at some point for the night. (*See* R., pp.282-84.) Apparently, while the deliberations were adjourned for the night, one of the jurors sought outside information related to the case and then shared that

[3] As is discussed in detail below, the Record on Appeal presently contains the transcripts for only ten of the eleven days of trial, as the transcript of the final day of trial, January 26, 2005, has not yet been prepared. By its order of July 9, 2008, the Supreme Court has ordered preparation of the missing transcript (on or before July 30, 2008) and its inclusion into the Record on Appeal, but has compelled Mr. Ciccone to file his Appellant's Brief without the benefit of his appellate counsel having seen that transcript.

information with his fellow jurors. (*See* R., pp.282-83.) In addition, another juror apparently may have overheard the State's lead investigator talking about the case at a gas station. (*See* R., pp.282-83.) Both of these matters were taken up by the district court on January 26, 2005, and two or more jurors were questioned about the incidents. (*See* R., pp.282-83.) Unfortunately, the Record on Appeal, as it presently exists, does not disclose the precise nature of the inquiry that was undertaken or the motions, objections, and/or arguments that may have been presented by counsel.[4] (*See* R., pp.282-83.) Ultimately, however, it is clear that one of the jurors was replaced by an alternate and the jury was instructed to begin its deliberations anew. (R., pp.282-83.)

Later on January 26, 2005, the jury returned with its verdicts. (R., pp.284, 286-89, 290-93.) It found Mr. Ciccone guilty of first degree murder with respect to Kathleen, and second degree murder with respect to the fetus. (R., pp.284, 286-89, 290-93.)

On February 10, 2005, Mr. Ciccone filed a motion for a new trial based on the aforementioned juror misconduct. (R., pp.298-99.) That motion was heard on March 8, 2005; however, the district court did not rule from the bench. (*See generally* Tr., p.65, L.1 – p.72, L.24.) Instead, on March 10, 2005, it issued a written order. (R., pp.323-26.) The district court denied Mr. Ciccone's motion on the bases that: (1) defense counsel had acquiesced in the remedial measures ultimately taken by the district court, and (2) in the district court's opinion, Mr. Ciccone was not denied a fair trial because "the actions of the jury made clear they were committed to giving the defendant the fair

[4] As discussed in note 3, *supra*, the Supreme Court has effectively denied undersigned counsel an opportunity to review the transcript of the January 26, 2005 proceedings, prior to his filing of this Appellant's Brief.

trial he sought to the point of calling to the attention of the court and the parties the actions of one of their members, which they considered inappropriate." (R., pp.325-26.)

On June 7, 2005, a sentencing hearing was held. (*See generally* Tr. Vol. VIII, p.1870, L.1 – p.1954, L.25.) After hearing extensive "victim impact" statements urging the district court to impose prison sentences which would ensure that Mr. Ciccone never have an opportunity for release (*see, e.g.*, Tr. Vol. VIII, p.1890, L.24 – p.1891, L.2 (statement of Kathleen's sister), p.1893, Ls.20-23 (statement of Kathleen's father), p.197, Ls.5-24 (statement of Kathleen's mother)), and a prosecutorial request for the same (Tr. Vol. VIII, p.1932, L.22 – p.1933, L.7), the district court did, in fact, impose a fixed life sentence for Kathleen's murder (as well as a sentence of fifteen years, all fixed, for the murder of the fetus). (Tr. Vol. VIII, p.1949, L.18 – p.1950, L.10.) At some point, it filed a Judgment and Commitment; however, that document was erroneously file-stamped May 7, 2005, a date which *preceded* Mr. Ciccone's sentencing hearing by a month. (R., pp.338-40.) Thus, on June 21, 2005, the district court filed an Amended Judgment and Commitment which appears to be identical to the original Judgment and Commitment, except that it bears a valid file stamp.[5] (R., pp.342-44.)

On August 2, 2005, Mr. Ciccone filed a Notice of Appeal which was timely from the June 21, 2005 judgment of conviction. (R., pp.346-49.) Approximately two years later, on or about July 31, 2007, some of the necessary transcripts, and the record, were finally lodged with the district court.[6] After the period in which to object to the

[5] Following a restitution hearing, the district court entered a second Amended Judgment and Commitment which included a stipulated restitution figure. (R., pp.358-61.)

[6] In the interest of brevity, Mr. Ciccone does not provide citations to the motions filed with, and orders by, the Idaho Supreme Court since those documents are already in this Court's file.

Record on Appeal passed, the Idaho Supreme Court set a deadline for the filing of Mr. Ciccone's Appellant's Brief. However, because many of the requested transcripts were still missing, On October 11, 2007, Mr. Ciccone filed a motion to augment the record and suspend the briefing schedule on appeal. The Supreme Court granted Mr. Ciccone's motion in relevant part, and the appeal was once again suspended. Following preparation and receipt of the missing transcripts, on or about February 27, 2008, the Supreme Court ordered the briefing schedule resumed and set a due date of April 2, 2008 for the filing of Mr. Ciccone's Appellant's Brief. Following three extensions of time granted to Mr. Ciccone's appellate counsel, however, that due date was pushed back to June 18, 2008. On June 18, 2008, rather than file Mr. Ciccone's Appellant's Brief, undersigned counsel filed a motion to augment the record with yet another missing transcript (which had only recently been discovered to have been missing) and to suspend the briefing schedule pending preparation of the missing transcript. Ultimately, on July 9, 2008, the Supreme Court granted the motion insofar as it requested that the missing transcript be prepared and made part of the Record on Appeal (and it ordered that the transcript be filed with the Supreme Court on or before July 30, 2008), but denied it insofar as it requested another suspension of the briefing schedule (and it ordered that Mr. Ciccone's Appellant's Brief be filed on or before July 16, 2008) to allow appellate counsel to review and utilize the missing transcript in preparing Mr. Ciccone's Appellant's Brief.

ISSUES

1. Is Mr. Ciccone's Notice of Appeal timely from the district court's judgment of conviction?

2. Were Mr. Ciccone's speedy trial rights violated when, on the eve of trial, the district court granted the State's motion for a continuance and set Mr. Ciccone's trial out an additional six months?

3. Did the prosecutor engage in misconduct by twice commenting on Mr. Ciccone's silence and then asking the jury to convict Mr. Ciccone based on sympathy for the victim?

4. Is Mr. Ciccone's fixed life sentence for first degree murder excessive given any view of the facts?

5. Has the Idaho Supreme Court denied Mr. Ciccone his right to due process on appeal by requiring him to file this Appellant's Brief before all of the transcripts have been prepared?

ARGUMENT

I.

Mr. Ciccone's Notice Of Appeal Is Timely From The Judgment Of Conviction

The sentencing hearing in Mr. Ciccone's case was held on June 7, 2005. (Tr., p.1870, L.2.) The district court judge signed the Judgment and Commitment that same day. (R., p.340.) However, the handwritten file stamp on the Judgment and Commitment erroneously indicates that it was filed on May 7, 2005, at 5:05 p.m. (R., p.338.) Based upon the incorrectly-dated file stamp on the original Judgment and Commitment, the forty-two day time period within which Mr. Ciccone was required to file a Notice of Appeal expired on June 20, 2005. I.A.R. 14(a), 22. An Amended Judgment and Commitment was entered, filed stamped June 21, 2005, and signed by the district court judge that same day. (R., p.342-44.) The only change made in the Amended Judgment and Commitment appears to be the date of the file stamp. (R., p.342-44.) On August 2, 2005, exactly 42 days after the Amended Judgment and Commitment was entered, Mr. Ciccone's trial counsel filed a Notice of Appeal. (R., p.346.)

In *State v. Payan*, 128 Idaho 866, 920 P.2d 82 (1996), the Idaho Court of Appeals held that "[t]he district court's issuance of an amended judgment, which did not alter any of the terms from which Payan now appeals, did not serve to extend the period for filing an appeal or begin that period anew. Consequently, direct review of the judgment of conviction and sentence is precluded." *Id.* at 867, 920 P.2d at 83. Mr. Ciccone asserts that, while the holding in *Payan*, is the general rule, it is not applicable in cases such as his, where the entry of the initial judgment was done incorrectly, and the alteration in the amended judgment specifically alters the time to appeal.

A. The General Rule Does Not Apply When The Entry Of The Initial Judgment Was Done Incorrectly, As Absent The Correct Entry Of Judgment, The Judgment Is Not Actually Entered Until The Amended Judgment Is Filed

Initially, Mr. Ciccone acknowledges that:

> The failure to physically file a notice of appeal or notice of cross-appeal with the clerk of the district court or an administrative agency, or the failure to physically file a petition for rehearing with the clerk of the Supreme Court, each within the time limits prescribed by these rules, shall be jurisdictional and shall cause automatic dismissal of such appeal or petition, upon the motion of any party, or upon the initiative of the Supreme Court.

I.A.R. 21. However, he asserts that his appeal is timely from the only properly filed judgment of conviction entered in this case.

Idaho Criminal Rule 33(b) provides that:

> The judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Id. The Idaho Criminal Rules do not further define when a judgment is considered "entered by the clerk." *Compare* I.R.C.P. 58(a) (stating "The filing of a judgment by the court as provided in Rule 5(e) or the placing of the clerk's filing stamp on the judgment constitutes the entry of the judgment."). However, the Idaho Code does provide for "Entry of judgment – Record," in criminal actions.

> (a) When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction was had and must without unnecessary delay annex together and file the following papers, which constitute a record of the action:
>
> 1. A copy of the minutes of a challenge interposed by the defendant to the panel of a grand jury, or to an individual grand juror, and the proceedings and the decisions thereon.
> 2. The indictment and copy of the minutes of the plea or demurrer.

3. A copy of the minutes of a challenge interposed to the panel of the trial jury or to an individual juror, and the proceedings and decision thereon.
4. A copy of the minutes of the trial.
5. A copy of the minutes of the judgment.
6. Any bill or bills of exceptions.
7. The written charges asked of the court, and refused with the court's endorsement thereon.
8. A copy of all requested instruction showing those given and those refused with the court's endorsement thereon, together with a copy of all instructions given on the court's own motion.

I.C. 19-2519(a).

In criminal actions, "Documents shall be filed in the manner provided in civil actions." I.C.R. 49(c). There, filing with the court is defined as:

> The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may accept the papers for filing, in which event the judge shall note thereon the filing date, hour and minute and forthwith transmit them to the office of the clerk. The judge or clerk shall indorse upon every pleading and other paper the hour and minute of its filing.

I.R.C.P. 5(e)(1).

Whether entry of judgment in criminal actions is controlled by I.R.C.P. 8(a), or by Idaho Code section 19-2519(a), entry of judgment requires the filing of the judgment. In addition, the filing of the judgment requires that that clerk "indorse upon every pleading and other paper the hour and minute of its filing." I.R.C.P. 5(e)(1). In addition, for purposes of appeal, an order is entered and the time to appeal begins as evidenced by "the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right . . . ." I.A.R. 14(a).

It appears that the district court recognized the significance of the error in the filing date. Although Idaho Criminal Rule 36 allows clerical mistakes in judgments to be

corrected at any time, the district court did not simply have the filing date altered to read June 7, 2005. Rather, the court entered the Amended Judgment with a proper filing stamp which entered the Judgment and Commitment on June 21, 2005.

In the present case, proper entry of judgment did not occur when the original Judgment and Commitment was docketed, i.e. written on by the clerk, because the court clerk did not properly indorse upon the document the actual date and time of filing. It was not until the Amended Judgment and Commitment was filed, with a proper notation of date and time, that judgment was actually entered. Thus, the filing of the Notice of Appeal within 42 days of the Amended Judgment and Commitment presents a timely appeal from the actual judgment in this case.

B. The General Rule Does Not Apply When The Alteration In The Amended Judgment Specifically Alters The Time To Appeal

Mr. Ciccone asserts that when the alteration in the Amended Judgment is the alteration of the filing date, which specifically alters the time to appeal, the general rule of *Payan, supra*, does not apply.

In *Payan*, the Idaho Court of Appeals implicitly recognized that had an appeal been taken regarding the actual changes in the amended judgment, the appeal from the amended judgment would have been timely for those purposes. *See Payan*, 128 Idaho at 867, 920 P.2d at 83. However, Mr. Payan had not raised any issues regarding the change made in the amended judgment. *Id.* In contrast, and as argued below, the change made in the Amended Judgment and Commitment in Mr. Ciccone's case specifically altered his time to appeal. Because the change made in the Amended Judgment and Commitment was the basis of Mr. Ciccone's ability to appeal, the general rule articulated in *Payan* does not control.

The Idaho Court of Appeals has previously recognized that when a defendant is wrongfully denied his right to appeal through the ineffective assistance of counsel, "the appropriate remedy was to reenter the judgment of conviction to allow the time for filing an appeal to begin anew so the defendant can take the appeal that had been wrongfully denied." *See Jakoski v. State,* 136 Idaho 280, 286, 32 P.3d 672, 678 (Ct. App. 2001) (citation omitted). In the present case, Mr. Ciccone was wrongfully denied his right to appeal by the clerk's failure to accurately date the original Judgment and Commitment. Had the document been properly entered with the accurate filing date, June 8, 2005, a notice of appeal could have been timely filed at any time before July 20, 2005. However, with the handwritten file stamp of May 7, 2005, at 5:05 p.m, the time to appeal expired on June 20, 2005, a mere twelve days after the judgment had been signed and sentence had been imposed. I.A.R. 14(a), 22. Apparently recognizing its wrongful denial of Mr. Ciccone's right to appeal, the district court provided the remedy of re-entering the judgment "to allow the time for filing an appeal to begin anew so the defendant can take the appeal that had been wrongfully denied." *Jakoski,* 136 Idaho at 286, 32 P.3d at 678.

Because the actual change made in the Amended Judgment and Commitment in Mr. Ciccone's case was an amendment of the date of filing stamp, it specifically altered his time to appeal. *See* I.A.R. 14. As this is the proper remedy when a defendant is wrongfully denied their right to appeal, the change made in the Amended Judgment and Commitment was the basis of Mr. Ciccone's ability to appeal the judgment itself. Under these circumstances, the general rule articulated in *Payan* does not control. Rather, the appeal should be considered timely from the judgment of conviction, as is a timely

notice of appeal filed following re-entry of judgment as a result of a post-conviction action alleging ineffective assistance of counsel for failure to timely file a notice of appeal.

II.

Mr. Ciccone's Statutory And Constitutional Rights To A Speedy Trial Were Violated When The District Court Granted The State's Motion For A Continuance And Pushed His Trial Back By Almost Six Months

A. Introduction

As discussed above, Mr. Ciccone's trial was originally set to begin on July 20, 2004, which was more than nine months (278 days) after his October 16, 2003 arrest, and almost six months (175 days) after the Information was filed (on January 27, 2004). However, on the eve of trial, the State moved for a continuance. That motion was ultimately granted (over a defense objection), and the district court re-set Mr. Ciccone's trial for January 4, 2005, which represented a date that was almost fifteen months (446 days) after his arrest, and almost a full year (343 days) after the filing of the Information. Prior to the re-scheduled trial, Mr. Ciccone filed a motion to have the case dismissed based on upon violations of his statutory and constitutional right to a speedy trial, but that motion was denied by the district court and his case proceeded to trial on January 4, 2005.

As set forth below, by granting the State's motion for a continuance and allowing Mr. Ciccone to be tried almost fifteen months after his arrest and almost a full year after the filing of the Information, the district court violated Mr. Ciccone's statutory and constitutional rights to a speedy trial. As a result, Mr. Ciccone's conviction and sentence should be vacated and his case should be dismissed with prejudice.

B. The District Court Violated Mr. Ciccone's Right To A Speedy Trial As Guaranteed By The United States And Idaho Constitutions

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court recognized that the "speedy" trial guaranteed by the Sixth Amendment is a "more vague concept than other procedural rights," and that what is considered "speedy" will vary from case to case, depending on the unique facts of each. *Id.* at 521-30. Thus, the *Barker* Court adopted an *ad hoc* approach, taking into consideration four factors: (1) the length of the delay; (2) the reason(s) for the delay; (3) the defendant's assertion(s) of his right; and (4) the prejudice suffered by the defendant owing to the delay. *Id.* at 530-33. With regard to the balancing of these four factors, the Court held as follows: "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors that must be considered together with such other circumstances as may be relevant." *Id.* at 533.

The Idaho Constitution contains a virtually identical speedy trial guarantee. IDAHO CONST. art I § 13. Accordingly, the Idaho Supreme Court has adopted the same four-factored test for evaluating speedy trial claims under the Idaho Constitution as the United States Supreme Court has applied for evaluating speedy trial claims under the United States Constitution.[7] *State v. Young*, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001).

[7] Although the right to a speedy trial under the Idaho Constitution is not necessarily identical to the right to a speedy trial under the United States Constitution, *State v. Davis*, 141 Idaho 828, 836, 118 P.3d 160, 168 (Ct. App. 2005), the only difference

As set forth in detail below, under the *Barker* test, this Court should find that Mr. Ciccone's speedy trial rights (under both the Idaho Constitution and United States Constitution) were violated.

1. The Length Of The Delay Is Presumptively Prejudicial

The threshold factor to be considered pursuant to *Barker* is the length of delay. With regard to this factor, United States Supreme Court has held as follows:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go in the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.

Barker, 407 U.S. at 530-31.

As noted, Mr. Ciccone was arrested on October 16, 2003, but was not tried until January 4, 2005, a delay of nearly fifteen months (446 days). This delay ought to be sufficient to "trigger" further inquiry because, as the United States Supreme Court has observed, "[d]epending on the nature of the charges, the lower courts have generally

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identified thus far is the starting point for measuring the period of delay. According to the *Young* Court:

> Under the Sixth Amendment, the period of delay is measured from the date there is "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 479 (1971). Under the Idaho Constitution, the period of delay is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first.

Young, 136 Idaho at 117, 29 P.3d at 953. However, this distinction is not material to the present appeal because Mr. Ciccone was arrested on October 16, 2003, thus "starting the clock" on the speedy trial issue for purposes of both the Idaho Constitution and the United States Constitution.

found postaccusation delay 'presumptively prejudicial' *at least* as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (emphasis added). Indeed, the Court's observation appears to be consistent with Idaho precedent, as our courts tend to be willing to indulge full *Barker* inquiries, not only with trial delays around a year or a year and half, but sometimes even with trial delays as short as nine months. *See, e.g., State v. Hernandez*, 133 Idaho 576, 582-83, 990 P.2d 742, 748-49 (Ct. App. 1999) (implicitly finding a delay of nine months to be sufficient to trigger a full inquiry under *Barker*); *State v. Reutzel*, 130 Idaho 88, 94, 936 P.2d 1330, 1336 (Ct. App. 1997) (same); *State v. Wavrick*, 123 Idaho 83, 88, 844 P.2d 712, 717 (Ct. App. 1992) (holding that a delay of less than sixteen months is sufficient to trigger a full inquiry); *State v. Talmage*, 104 Idaho 249, 252, 658 P.2d 920, 923 (1983) (holding that a delay of seven and one-half months is sufficient to trigger a full inquiry); *State v. Lindsay*, 96 Idaho 474, 531 P.2d 236 (1975) (holding that a delay of fourteen months is sufficient to trigger a full inquiry). Perhaps this is because Idaho has a statute, the predecessor of which pre-dates statehood, that evidences the Idaho Legislature's belief that a delay of six months is simply too long to wait to try a defendant in the average case. *See* I.C. § 19-3501 (providing that, unless "good cause" is shown, if the defendant is not tried within six months from the filing of the information or the defendant's arraignment following indictment, the case against him must be dismissed); *State v. Clark*, 135 Idaho 255, 257-58, 16 P.3d 931, 933-34 (2000) (discussing the history of I.C. § 19-3501).[8]

[8] Mr. Ciccone analyzes I.C. § 19-3501 in some detail below, as that provision underlies his claim that he was denied his statutory right to a speedy trial.

2. The Reasons For The Delay, Taken As A Whole, Do Not Justify The Delay

The second factor to be considered is the reason for the delay. *Barker*, 407 U.S. at 531-32.

Initially, Mr. Ciccone concedes that he cannot now reap a benefit (in terms of the bolstering of his speedy trial claim) based on delays that are attributable to him. *See United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986); *State v. Davis*, 141 Idaho 828, 838-39, 118 P.3d 160, 170-71 (Ct. App. 2005). Accordingly, Mr. Ciccone does not now complain about the delays during the preliminary hearing stage of his case which he contributed to. As noted above, Mr. Ciccone's preliminary hearing was a protracted, piecemeal proceeding, beginning on October 30, 2003, and not ending until January 12, 2004. On the first day of that hearing, defense counsel stipulated to the State's request to call only two witnesses and continue the balance of the hearing on another day. (Tr. Vol. II, p.17, L.20 – p.23, L.15.) At that point, the preliminary hearing was recessed for almost three weeks, until November 19, 2003. On November 19, 2003, because of concerns about Mr. Ciccone's competency, defense counsel successfully moved for a second continuance to an unspecified date. (Tr. Vol. II, p.79, L.14 – p.85, L.16.) With Mr. Ciccone apparently having no further problems, the preliminary hearing resumed on December 15, 2003. (*See generally* Tr. Vol. II, p.86, L.1 – p.164, L.23.) Accordingly, Mr. Ciccone does not seek to charge the State with the delays occurring between October 30, 2003 and December 15, 2003, a period of approximately a month and half (46 days). However, he contends that the State is responsible for the remaining fourteen-month (400-day) delay.

The *Barker* Court held that, with respect to the delays attributable to the government:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. 531. In this case, Mr. Ciccone does not contend that the State ever deliberately delayed the case in order to hamper the defense; however, he contends that because all of the remaining 400-day delay is attributable to the State and, therefore, must be weighed against the State, his speedy trial rights were violated.

As discussed above, the greatest trial delay occurred when, on the eve of trial, the State filed a motion seeking a continuance of the trial date. (R., pp.102-06.) The primary basis for its request was that numerous "material"[9] prosecution witnesses were "TDY" and, therefore, "unavailable" (R., pp.102-05); but it also asserted that the defense had failed to turn over the *curriculum vitae* of one of the expert witnesses it had disclosed (R., pp.105-06). At the hearing on the State's motion, its claimed reasons for seeking a continuance expanded to include the following: (a) the trial likely could not be completed in the time originally allotted (Tr. Vol. VII, p.16, L.24 – p.19, L.9); and (b) one or two additional witnesses would be "unavailable," although not for "TDY" reasons. Ultimately, after cautioning the prosecutor that the State was creating an appealable

[9] Of the eight supposedly "material" witnesses identified by the State (seven were identified in the State's written motion (*see* R., pp.103-05), and one more was identified at the hearing on the motion (*see* Tr. Vol. VII, p.17, L.10 – p.18, L.1)), even after the State obtained the continuance it sought, it only presented testimony from three (Alan Roberts, Dr. Timothy Ruth, and Steve Brown).

issue for Mr. Ciccone, the district court granted the State's motion and continued Mr. Ciccone's trial until January 2005 (nearly six months later) because that was "the first available date when two weeks would be available on the court's calendar." (Tr. Vol. VII, p.25, L.25 – p.32, L.8.) For the reasons set forth below, none of the reasons proffered by the State, or the court, constitute "valid reasons" that might immunize the government from responsibility for the 400-day delay in bringing Mr. Ciccone to trial.

a) The State Failed To Demonstrate That The Witnesses On TDY (Or Its Functional Equivalent) Were "Unavailable"

While the *Barker* Court noted that a "missing witness" is a valid reason for the government to delay the defendant's trial, *Barker*, 407 U.S. at 531, the Idaho Court of Appeals has made it clear that "there is an enormous difference between [a witness] being inconvenienced and being unavailable. True unavailability suggests an unqualified inability to attend, while inconvenience merely implies that attendance at trial would be burdensome." *State v. Davis*, 141 Idaho 828, 837, 118 P.3d 160, 169 (Ct. App. 2005). If the State can show only that the witness would be inconvenienced, it fails to show a valid reason for delay and the delay must be weighed against the State. *See id.* Moreover, where a witness cannot be located because the State was negligent in failing to take steps to secure that witness' attendance at trial, *Barker* itself suggests that the witness is not "missing" and, thus, there is no valid reason for delay and the delay must be weighed against the government. *See Barker*, 407 U.S. at 531; *cf. Doggett*, 505 U.S. at 652-53 (weighing the delay against the government where the government was dilatory in finding the defendant).

In this case, the State's written motion for a continuance named seven "material" witnesses, six of whom (Mike Almond, Jeremy Christianson, Jason Delion, Michael Pfirmann, Dr. Timothy Ruth, and Steve Brown), it claimed were on TDY (or some sort of equivalent military assignment)[10] and could not attend Mr. Ciccone's July 2004 trial. (*See* R., pp.102-05.) However, the State's motion also reveals that the State never knew of these individuals,[11] or attempted to track them down or subpoena them until "the end of June" 2004, after receiving the report detailing the Air Force's own investigation of Mr. Ciccone's case. (R., p.102; *see also* Tr. Vol. VII, p.8, L.16 – p.13, L.14.) In other words, the State admitted that rather than conducting its own investigation into Mr. Ciccone's case in the nine months since Mr. Ciccone's arrest, it sat by and waited for the Air Force to conduct an investigation, all the while hoping to piggyback off of the Air Force's work. And when that lackadaisical approach did not pan out, the State sought a continuance to make up for lost time. However, laziness or the desire to save on investigative costs is not a valid reason for delay; it is more akin to the negligence that the *Barker* Court made clear must count against the government.

Moreover, although the State argued that six of its witnesses were on TDY or its functional equivalent, it never showed that those witnesses were truly unavailable in the

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[10] Only four of the witnesses were explicitly identified as being on TDY; however, two others were involved in some other sort of military service, according to the State. (*See* R., pp.103-04.)

[11] At the hearing on the State's motion, defense counsel questioned the veracity of the claim that most of the witnesses in question had been unknown to the State until late June 2004. (*See* Tr. Vol. VII, p.19, L.24 – p.20, L.23.) Indeed, if "[t]he names of most of the witnesses were not disclosed to the State because of military procedures until the end of June" (R., p.102), as the State claimed, it is difficult to image how they could have so quickly become "material" witnesses in a case that the State should have been investigating for the preceding nine months.

sense that it was impossible for them to have come back to Idaho to testify. Indeed, even as of July 16, 2004 (four days before trial, and the date on which the State filed its motion for a continuance), the State conceded that it did not even know where four of the six witnesses in question were. (*See* R., pp.102-03.) If the State did not even know where these witnesses were, then surely it had not bothered to ask the military if they could be transported back to Idaho, much less taken steps to serve them with subpoenas issued by whatever jurisdiction they were in. Without the State having made any such showing, this Court cannot conclude that the six witnesses in question were truly unavailable.

b) The State Failed To Demonstrate That The Witness(es) Not On TDY Was/Were "Unavailable"

In its written motion, the State mentioned one witness discovered through the Air Force investigation—a retired gentleman (Robert Reagan) who had been Mr. Ciccone's supervisor back in October of 2003—who despite unspecified "[d]iligent efforts," it could not locate. (R., p.104.) However, as argued above, the State has demonstrated negligence rather than diligence in waiting for the Air Force report before attempting to speak with a supposedly-material witness. In addition, the State has failed to establish that its efforts have, in fact, been diligent simply by offering the conclusory assertion that, in its view, it has been diligent. Accordingly, this Court cannot conclude that the State met its burden of demonstrating that Mr. Reagan was truly unavailable such that the State had a valid reason for a continuance.

Likewise, the State failed to establish that Alan Roberts, the witness identified for the first time at the hearing on the State's motion, was truly unavailable since he had simply flown out of town to spend time with his ailing mother and, in fact, would have

been back by July 28, 2004. (Tr. Vol. VII, p.17, L.19 – p.18, L.1.) At most, attendance at Mr. Ciccone's trial in July of 2004 would have been an inconvenience to Mr. Roberts, but even that is in question since he was scheduled to be back to Idaho by then anyway. Accordingly, this Court cannot conclude that the State met its burden of showing that Mr. Roberts was truly unavailable so as to warrant a continuance.

c) Defense Counsel's Less-Than-Immediate Disclosure Of The Defense Expert's *Curriculum Vitae* Was Not A Valid Reason For Delaying Trial

Another reason that the State offered in support for its motion for a continuance was that on June 18, 2004 (orally) and on June 27, 2004 (in writing), the defense had disclosed the name of one its possible expert witnesses, Brent Freeman, but that, despite requests from the State on July 6, 2004 and July 7, 2004, the defense had not furnished a *curriculum vitae* until July 16, 2004. (R., pp.105-05; Tr. Vol. VII, p.156, L.9 – p.16, L.22.) The State argued that Mr. Freeman's *curriculum vitae* was critical to the prosecution's ability to cross-examine him for the following reasons:

> He is not going to have a report. One of the only areas the State can do [sic] is to challenge his credentials. And looking over his curriculum vitae that I received Friday afternoon in making some preliminary inquiries, there already appears to be some inconsistencies on what he is claiming is his expertise versus what he has been actually trained by the Idaho State Police to do.
>
> I am not suggesting he hasn't got it elsewhere. But the State is going to have to get more information from that curriculum vitae as to where he has been an instructor, where he took the instructor's course of an accident reconstructionist, what cases he has actually been an expert on, et cetera. None of them are listed in there.
>
> So, we got that Friday before trial . . . .

(Tr. Vol. VIII, p.16, Ls.7-22.)

There are a host of flaws, however, in the State's argument. First, the State never demonstrated that it was entitled to Mr. Freeman's *curriculum vitae*. The State did not direct the district court to any rule or court order that would have required Mr. Ciccone to turn over the *curriculum vitae* at all. Second, the State never demonstrated that it was entitled to Mr. Freeman's *curriculum vitae* within any particular timeframe. Again, the State did not direct the district court to any rule or court order that would have required Mr. Ciccone to turn over the *curriculum vitae* any time prior to July 16, 2004. Third, the State's claims prejudice of the risk of prejudice were overblown. Because Mr. Freeman's name was disclosed more than a month prior to trial and, as it turns out, Mr. Freeman is a former Idaho police officer who had been trained in accident reconstruction by the Idaho State Police and, specifically, Trooper Fred Rice, the State's accident reconstruction expert in this case (*see* Tr. Vol. VII, p.16, Ls.13-14; Tr. Vol. VIII, p.1577, Ls.4-25, p.1622, Ls.5-14), and at the time of Mr. Ciccone's trial was also on retainer with the State of Idaho to provide expert accident reconstruction assistance in two civil cases (*see* Tr. Vol. VIII, p.1579, L.21 – p.1580, L.9), there was virtually no risk that the State would not be able to learn all that it could ever want to learn about Mr. Freeman with just a few short phone calls. Fourth, the fact that Mr. Freeman's *curriculum vitae* was disclosed only four days before selection was to begin was really of no consequence since he would not be testifying until after the State rested its case-in-chief and, therefore, the State would have likely had seven or more days to investigate his credentials. Fifth, even if the State was somehow put at risk of prejudice by the relatively late disclosure of Mr. Freeman's *curriculum vitae*, a six-month continuance was wholly unnecessary.

d) The Fact That The Prosecutor Underestimated The Length Of The State's Case Was Not A Valid Reason For Delaying Trial

Another justification for the continuance requested by the State was its claim that the time scheduled for trial was simply not sufficient:

> [W]e both, defense counsel and I, understood two week trial time. For whatever reason, and I know the court did advise us that you would be gone the first week of August. I don't think it dawned on either of us or at least me. And I talked to Mr. Ratliff a couple weeks ago and he said he had a day and a half of rebuttal testimony, which would give the State Friday [July 23, 2004], Monday [July 26, 2004], Tuesday [July 27, 2004] to try and get the case—to get its case in chief done.
>
> I gave the court a witness list of approximately 59 to 60 witnesses. And rereading that witness list this weekend, I could probably do it with 35 witnesses. Eight of which, seven of which, I guess, are now TDY. So, I would be down to about 24, 25 witnesses. Two of those witnesses are wholly unavailable until July 27th or back from trips on July 27th. That means I would be presenting evidence on the 28th.
>
> . . .
>
> That's trying a two count first degree murder charge in basically five court days, including openings and closings. And I assume we are either going to have to have the jury verdict on [Friday] the 30th [of July] or if the court has made arrangement through the Supreme Court to have another District Judge to pre-approve to handle taking the jury cerdict.
>
> So it is the State's opinion in a two-week trial of this magnitude and this nature, it probably is two weeks. That's two full weeks of actual testimony. And I apologize because I know the court was going to leave by [Friday] July 30th. It never dawned on me exactly what the court was saying there. And I don't think it did on Mr. Ratliff because we were talking about it we [sic] both kind of making the same inferences. A day and a half of his time.
>
> I have to have some rebuttal time, especially if he has got an expert witness that is going to come up and say my accident reconstructionist is full of bunk . . . . So, our—we are going to have to have at least some rebuttal on that sole issue.
>
> Without knowing whether or not the defendant is going to be called. And other witnesses that Mr. Ratliff—because he said the entire State's witnesses [sic]. That's 55 people. Without knowing who he is going to calling [sic] on rebuttal, probably is going to take a day to day and a half.

(Tr. Vol. VII, p.16, L.25 – p.19, L.9.)

Ultimately, the district court found this scheduling snafu compelling. However, rather than weighing the error against the government, the district court seems to have erroneously blamed both parties, as it seems to have found that *both parties* had assured the district court that Mr. Ciccone's trial could be completed by July 30, 2004; *both parties* had underestimated the length of trial; and, on the eve of trial, *both parties* sought more time than had originally been allotted for their respective presentations of evidence. (*See* Tr. Vol. VII, p.28, Ls.9-25.)

In fact, the blame for this scheduling error falls squarely on the State and/or the district court since defense counsel specifically forewarned the district court that his client's trial might extend into early August 2004, and there is no evidence to suggest that defense counsel had underestimated the length of his own case. Indeed, at the arraignment/scheduling hearing of February 2, 2004, defense counsel specifically proposed a day and a half for jury selection (half of Tuesday, July 20, 2004, and all of Wednesday, July 21, 2004) and five to seven days for the presentation of evidence (Friday July 23, 2004 through Friday, July 30, 2004, excluding Thursday, July 29, 2004, but perhaps extending as late as August 3, 2004). (Tr. Vol. VI, p.4, L.11 – p.9, L.11.) At that time, the State never questioned the five to seven days proposed by defense counsel for the presentation of evidence and it certainly never said anything about eight and a half days just to present its own evidence. (*See* Tr. Vol. VI, p.4, L.11 – p.9, L.11.) Moreover, the district court never said anything about taking a trip and having to have a verdict by July 30, 2004. (*See* Tr. Vol. VI, p.4, L.11 – p.9, L.11.) Moreover, the district

court's scheduling order, issued only three days after the scheduling hearing, contained the notation "(2 weeks)" right after the trial date. (*See* R., p.66.)

In light of the foregoing, it very much appears that the prosecutor reevaluated his case and determined he needed more time, and the district judge, for some reason, made plans to leave for a trip on July 30, 2004—a day on which he was scheduled to be in trial on Mr. Ciccone's case. (*See* Tr. Vol. VII, p.17, Ls.2-3 ("I know the court did advise us that you would be gone the first week of August."), p.18, Ls.4-9 ("I assume we are either going to have to have the jury verdict on the 30th or if the court has made arrangements through the Supreme Court to have another District Judge to pre-approve to handle taking the jury verdict."), p.18, Ls.13-14 ("I know the court was going to leave by July 30th.") The reality is that defense counsel never enlarged *his* estimate for the length of trial except to account for the State's enlarged estimate. (*See* Tr. Vol. VII, p.33, L.14.) Indeed, even after the district court granted the State's motion for a continuance, defense counsel indicated that he would need only one and one-half days to present the defense case. (Tr. Vol. VII, p.36, Ls.5-7.) Accordingly, this particular reason for the continuance of Mr. Ciccone's trial should be weighed against the government.

e) The District Court's Busy Schedule Was Not A Valid Reason For Delaying Trial

Finally, as noted above, once the district court granted the State's motion for a continuance, the next available trial setting was almost six months later. Six months, however, was far longer that would have been necessary to track down witnesses or prepare to cross-examine the defense expert though. Accordingly, even if some continuance was warranted, the length of the delay was clearly attributable to the district

court's congested calendar. As noted in *Barker*, however, "overcrowded courts . . . should be considered [against the government] since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 532. Thus, the six-month continuance should weigh against the State.

3. Mr. Ciccone Asserted His Right To A Speedy Trial

The third factor in the *Barker* analysis is "[w]hether and how the defendant assert[ed] his right" to a speedy trial. *Id.* Because the more serious the prejudice attendant to a delayed trial is, "the more likely a defendant is to complain," the "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right" to a speedy trial. *Id.* at 531-32.

In this case, Mr. Ciccone clearly and unequivocally asserted his right. When the State sought a continuance on the eve of trial, defense counsel asserted Mr. Ciccone's rights for him (*see* Tr. Vol. VII, p.19, Ls.17-23), he argued vigorously against the State's motion (*see* Tr. Vol. VII, p.19, L.24 – p.24, L.7), he complained that Mr. Ciccone had already been held in pretrial incarceration for 276 days (Tr. Vol. VII, p.22, Ls.20-21), and he specifically asserted that "[w]e are ready to go." (Tr. Vol. VII, p.22, Ls.21-22.)

As the *Barker* Court recognized, Mr. Ciccone's assertion of his right should weigh heavily against the State.

4. Mr. Ciccone Suffered Prejudice As A Result Of The Delay

The final *Barker* factor is the prejudice suffered by the defendant owing to the delay. The Supreme Court has held that prejudice in this regard includes: (a) the detrimental impact on career and family that is attendant to oppressive pretrial

incarceration; (b) anxiety and concern of someone waiting for trial; and, of course, (c) the impairment of the defense. *Barker*, 407 U.S. at 532. Obviously, the last form of prejudice is of the greatest concern because it "skews the fairness of the entire system." *Id.*

In the present case, all three types of prejudice appear to be present. Mr. Ciccone was never released on bond, so he obviously could not work or spend time with his family; he lived under a cloud of suspicion, which undoubtedly strained or destroyed the relationships he had formed with his friends in the Air Force; and he had to contend with the anxiety of waiting nearly fifteen months for his trial, not knowing whether he might walk out of jail a free men, be condemned to a life in prison, or something in between.

In addition, it appears that Mr. Ciccone suffered actual prejudice as at least one witness' memory faded significantly by the time Mr. Ciccone was finally tried in January 2005. That witness, Darlene Shaw, the first person to arrive on-scene after Mr. Ciccone's vehicle struck and killed Kathleen, testified at trial that when Mr. Ciccone got out of his car and started talking on his cell phone, he said: "I got the job done." (Tr. Vol. VIII, p.518, Ls.5-18.) When confronted with the fact that she had never revealed this information before, Ms. Shaw adamantly stated that no one had ever asked her what Mr. Ciccone had said into his cell phone. (Tr. Vol. VIII, p.520, L.16 – p.524, L.23.) However, the reality is that someone had asked her that precise question before—just two weeks after the incident (at Mr. Ciccone's preliminary hearing)—and at that time she testified that she could not hear anything Mr. Ciccone was saying into his cell phone. (Tr. Vol. II, p.34, Ls.5-9.) If Ms. Shaw's memory could have deteriorated so

significantly, one must wonder how reliable any of the witness' testimony was so long after the fact.

5. Balancing

When all of the above factors are taken together—the relatively long delay, the vast majority of which was attributable to the government, Mr. Ciccone's assertion of his right, and the prejudice suffered—this Court should find that Mr. Ciccone's right to a speedy trial, as guaranteed by both the Idaho Constitution and the United States Constitution, has been violated.

C. The District Court Violated Mr. Ciccone's Right To A Speedy Trial As Guaranteed By Idaho Statute

Idaho Code § 19-106 also guarantees to every criminal defendant in Idaho the right "[t]o a speedy and public trial," although it does not define "speedy." Nevertheless, the Idaho Code elsewhere provides as follows:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed in the following cases:
>
> . . .
>
> (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date the information is filed with the court.

I.C. § 19-3501. This statutory provision "supplements" the above-referenced Constitutional guarantees of a "speedy" trial, and has been interpreted to give "additional protection beyond what is required by the United States and Idaho Constitutions." *State v. Clark*, 135 Idaho 255, 257-58, 16 P.3d 931, 933-34 (2000).

Under section 19-3501, the "good cause" that the government is required to demonstrate[12] in order to have the defendant's trial continued beyond six months is evaluated in terms of the "reason for the delay," as that language used in *Barker*. *Clark*, 135 Idaho at 260, 16 P.3d 936. The Idaho Supreme Court has held that "good cause means that there is a substantial reason that rises to the level of a legal excuse for the delay." *Id.*

For the reasons set forth in detail in subpart B(2), above, there was neither a "valid reason" nor "good cause" for the district court to have granted the State's motion for a continuance. The State was dilatory in investigating and contacting witnesses and it failed to show that any of those witnesses were truly unavailable; the defense was not remiss in failing to sooner disclose the curriculum vitae of its expert witness and, even it was, the State was in no way prejudiced thereby; and to the extent that Mr. Ciccone's trial could not be completed in the allotted time, that error was attributable to a miscalculation on the State's part and/or the district court's error in scheduling a trip that conflicted with Mr. Ciccone's trial. Accordingly, the district court erred in granting the State's continuance and then, later, denying Mr. Ciccone's motion for dismissal under I.C. § 19-3501.

[12] *State v. Stuart*, 113 Idaho 494, 495, 745 P.2d 1115, 1116 (Ct. App. 1987) ("The burden is on the state to show good cause for the delay.").

III.

Mr. Ciccone Is Entitled To A New Trial Because The Prosecutor Engaged In Misconduct By Twice Commenting On Mr. Ciccone's Silence And Once Asking The Jury To Convict Based On Its Sympathy For The Victim

A. Introduction

Mr. Ciccone contends that his right to a fair trial,[13] his right to due process of law,[14] and his right to silence,[15] were all abridged through the prosecutor's closing arguments in this case. There are three comments at issue, all of which were made during the rebuttal portion of the prosecutor's closing argument. First, while discussing the State's contention that there was an altercation between Mr. Ciccone and Kathleen immediately before her death, and speculating that during the course of that altercation, Kathleen had thrown her purse at her husband, the prosecutor asserted that "[t]here's only two people that know, and Kathleen Ciccone isn't here to tell us." (Tr. Vol. VIII, p.1853, Ls.21-23.) A short time later, in asking the jury to reject defense counsel's argument that Kathleen's death was the result of an accident, the prosecutor argued that "[t]here is no testimony" that Mr. Ciccone was distracted or not looking at Kathleen immediately prior to striking her with his vehicle. (Tr. Vol. VIII, p.1856, Ls.2-9.) Finally, in concluding his argument, the prosecutor made the following plea:

> When you kill somebody, you take away everything they have and everything they ever will have. Kathleen was 22 years old. Her death is a tragedy. Give her life meaning and give her death the sense of justice that it requires. Hold the defendant accountable for the purposeful, willful, deliberate, premeditated actions that he took that night [sic].

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[13] *See* U.S. CONST. amends. VI, XIV; IDAHO CONST., art. I § 13.
[14] *See* U.S. CONST. amend. XIV; IDAHO CONST., art. I § 13.
[15] *See* U.S. CONST. amends. V, XIV; IDAHO CONST., art. I § 13.

(Tr. Vol. VIII, p.1860, Ls.15-22.)

Mr. Ciccone contends that the first two statements constituted misconduct because they were improper comments on his exercise of right not to testify. He asserts that that third statement was an improper plea for jury to convict Mr. Ciccone of the greatest charged offense based on matters other than the evidence of guilt or innocence, specifically, its sympathy for the victim. Based on this misconduct, Mr. Ciccone requests that he be granted a new trial.

B. Standard Of Review

Because Mr. Ciccone's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2, 137 P.3d 388, 389 (2006).

C. The Prosecutor Engaged In Misconduct When He Implicitly Asked The Asked The Jury To Draw A Negative Inference From Mr. Ciccone's Decision Not To Testify

1. A Prosecutor's Comment On The Defendant's Failure To Testify Constitutes A Violation Of The Defendant's Right To Silence

Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I § 13 of the Idaho Constitution, no person may be compelled, in any criminal case, to be made a witness against himself. The essence of this mandate, of course, is that, where the government "proposes to convict and punish an individual," it must "produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut*, 357 U.S. 568, 581-82 (1961).

In *Griffin v. California*, 380 U.S. 609 (1965), the United States Supreme Court held that this Fifth Amendment privilege against self-incrimination, made applicable to the states through the Fourteenth Amendment, forbids the government from commenting to the jury about the defendant's decision not to testify. *Id.* at 615. In determining whether a prosecutor's argument is impermissible in this regard, the court must ask whether the prosecutor "manifestly intended" to comment on the defendant's silence, or his argument was of such character that the jury would "naturally and necessarily" take that argument as a comment on the defendant's silence. *United States v. Reyes*, 966 F.2d 508, 509 (9th Cir. 1992); *State v. Wright*, 97 Idaho 229, 232, 542 P.2d 63, 66 (1975).

"Idaho follows the overwhelming number of jurisdictions holding that a prosecutor's general references to uncontradicted evidence do not necessarily reflect on the defendant's failure to testify, where *witnesses other than the defendant* could have contradicted the evidence." *State v. McMurry*, 143 Idaho 312, 314, 143 P.2d 400, 402 (Ct. App. 2006) (emphasis in original).[16] However, the Idaho Court of Appeals has recently observed that "[c]omment on the absence of evidence contradicting the state's case is particularly problematic where the defendant is the *sole witness* who would be able to contradict the evidence in question," and it noted that "courts generally hold that

[16] *See, e.g., State v. Rawlings*, 121 Idaho 930, 934-35, 829 P.2d 520, 524-25 (1992) (holding that the prosecutor's general argument that the State's evidence and testimony were unrebutted "was a comment on the evidence and not an impermissible reference to the defendant's failure to testify"); *State v. Hodges*, 105 Idaho 588, 590-92, 671 P.2d 1051, 1053-55 (1983) (holding that a prosecutor's argument that the government's expert's opinion was "uncontradicted" was not "an impermissible reference to the defendant's failure to testify" since "[t]here was no implication that defendant himself had some obligation to take the witness stand (and was admitting guilt by not doing so)").

such comment in this context is improper." *McMurry*, 143 Idaho at 315, 143 P.2d at 403 (emphasis in original). Ultimately, the *McMurry* Court held that, where the prosecutor repeatedly argued that the defense had offered no evidence of self-defense and, specifically, no evidence to counter the State's evidence on the self-defense issue, those arguments were improper because they went beyond a legitimate rebuttal of the defendant's evidence and "suggested the jury should infer guilt from [the defendant's] decision to present evidence without venturing upon the witness stand." *Id.* at 315-16, 143 P.2d at 403-04.

2. Mr. Ciccone's Right To Silence Was Violated In This Case When The Prosecutor Twice Commented On His Failure To Testify In His Own Defense

As noted above, in this case, the prosecutor made two comments during his rebuttal argument which Mr. Ciccone contends violated his Fifth and Fourteenth Amendment rights. First, in discussing what the State had sought to portray as a physical altercation between Mr. Ciccone and Kathleen[17] immediately before she walked off and was struck and killed by Mr. Ciccone's vehicle, the prosecutor, after suggesting that Kathleen may have thrown her purse at her husband during this altercation, asserted as follows: "There's only two people that know, and Kathleen Ciccone isn't here to tell us." (Tr. Vol. VIII, p.1853, Ls.3-23.) A short time later, while arguing that Mr. Ciccone intentionally struck his wife, and that the jury should reject defense counsel's "accident" theory, argued as follows:

> There is no testimony that he was looking down at his watch, that the cigarette smoke had blown in his face, that he was changing the radio

[17] Mr. Ciccone has described this dispute as "an argument over childcare," not a physical fight, although he does concede that Kathleen "threw the food" that she had in her possession. (PSI, p.11.)

> station, that a cassette dropped, a cigarette dropped in his pants, he had to try and put it out real quick. No testimony as to that. Absolutely none. He doesn't say anything about any—

(Tr. Vol. VIII, p.1856, Ls.2-9.)

Mr. Ciccone contends that both of the prosecutor's arguments violated his Fifth and Fourteenth Amendment right to silence because he is the only who could have told the jury the circumstances of his argument with Kathleen, and he is the only one who could have offered "testimony" to explain how it was that he was unable to avoid hitting his wife with his vehicle and, thus, the prosecutor's arguments were necessarily a comment on Mr. Ciccone's silence. As noted, under *Griffin*, those comments were totally improper.

3. A Prosecutorial Comment On Silence Is A Fundamental Error Which Always Warrants A New Trial

Mr. Ciccone concedes that the first prosecutorial argument complained of above was not objected to by his attorney at trial (*see* Tr. Vol. VIII, p.1853, L.8 – p.1854, L.6); the district court sustained his counsel's objection to the latter prosecutorial argument (Tr. Vol. VIII, p.1856, Ls.2-11); and, at the close of the prosecutor's rebuttal argument, the district court admonished the jury to "disregard any argument based upon what the defendant did not say," and it re-read Jury Instruction No. 55 (ICJI 301), which had apprised the jury of Mr. Ciccone's constitutional right not to testify (Tr. Vol. VIII, p.1860, L.24 – p.1861, L.11). Nevertheless, Mr. Ciccone contends that he can seek a new trial on appeal because the prosecutor's arguments were so egregious and/or inflammatory that consequent prejudice could not have been remedied by any admonishment from the district court.

a) The Prosecutor's First Comment On Mr. Ciccone's Silence Constitutes Fundamental Error, Which Can Be Considered On Appeal Despite The Absence Of A Contemporaneous Objection

The Idaho Supreme Court has held that prosecutorial misconduct constitutes fundamental error if it is "calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994) (quoted in *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003)). With regard to closing arguments specifically, prosecutorial misconduct constitutes fundamental error only if the comments were so egregious and/or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded. *State v. Cortez*, 135 Idaho 561, 565, 21 P.3d 498, 502 (Ct. App. 2001).

In this case, it is clear that the fundamental error standard is satisfied, as the Idaho Court of Appeals has already held that prosecutorial comments on the defendant's silence constitute fundamental error. *See State v. Lopez*, 141 Idaho 575, 577, 114 P.3d 133, 135 (Ct. App. 2005) (finding fundamental error where the prosecutor elicited testimony from a police officer about the defendant's post-*Miranda* silence and then highlighted that testimony during his rebuttal closing argument).

b) Neither Of The Prosecutor's Two Comments On Mr. Ciccone's Silence Were Cured By The District Court's Admonishment And Re-Reading Of Jury Instruction No. 55

As noted above, in *Lopez*, the Idaho Court of Appeals held that prosecutorial comments on the defendant's silence constitute fundamental error. Thus, the Court recognized that such are so egregious and inflammatory that a judicial admonition for

the jury to disregard them is insufficient to remedy that prejudice to the defendant. Accordingly, the district court's admonition in this case, while certainly an admirable attempt to render Mr. Ciccone's trial fair, was simply insufficient to rectify the prosecutor's gross misconduct. As a consequence, Mr. Ciccone is entitled to a new trial.

D. The Prosecutor Engaged In Misconduct When He Asked The Jury To Convict Mr. Ciccone Based On Its Sympathy For The Victim

Even where prosecutorial arguments do not directly infringe upon rights specifically guaranteed by the Constitution (such as the Fifth Amendment right against compelled self-incrimination), those arguments may nevertheless violate the United States Constitution by rendering the defendant's trial unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Moreover, the Idaho courts have long-recognized that, given the unique position of authority and trust occupied by prosecutors, they have an overarching duty to do justice and, thus, avoid using unnecessarily inflammatory tactics. *See, e.g., State v. Raudebaugh,* 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Griffiths*, 101 Idaho 163, 166, 610 P.2d 522, 525 (1980), *overruled on other grounds by State v. LePage*, 102 Idaho 387, 630 P.2d 674 (1981); *State v. Wilbanks*, 95 Idaho 346, 353-55, 509 P.2d 331, 338-40 (1973). Indeed, more than 100 years ago, the Idaho Supreme Court explained as follows:

> "A prosecuting attorney is a public officer, 'acting in a quasi judicial capacity.' It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the

> conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose." [*Holder v. State*, 25 S.W. 279 (1894).] . . .
>
> It will be observed from the foregoing authorities that the courts do not look with favor upon the action of prosecutors in going beyond any possible state of facts which can be material as to the guilt or innocence of the defendant in a particular case for which he is upon trial. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and generally in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.

State v. Irwin, 9 Idaho 35, 43-44, 71 P. 608, 610-11 (1903) (quoted with approval in *State v. Phillips*, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007)).

One hundred and two years after *Irwin* was decided, the Ninth Circuit Court of Appeals used similar reasoning to explain why inflammatory emotional pleas are still deemed to be improper:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005) (quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994) (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984))). In *Weatherspoon*, a case in which the

defendant was charged with being a convicted felon in possession of a firearm, portions of the prosecutor's closing argument focused on the personal comfort and community safety which is attendant to taking armed ex-cons off the streets. *Id.* at 1149. The Ninth Circuit held that, "[t]hat entire line of argument . . . was improper." *Id.* Then, after quoting the above language from *Koon* and *Monaghan*, it observed that since Mr. Weatherspoon's case turned solely on the question of whether he had, in fact, been in possession of a firearm on the night in question, the prosecutor's arguments about the "potential social ramifications of the jury's reaching a guilty verdict," were "irrelevant and improper" because "[t]hey were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." *Id.* at 1149-1150.

In light of the foregoing, it is now well-recognized that prosecutors may not utilize emotional appeals—whether they be appeals to sympathy, fear, anger, or any other emotions—in their closing arguments to juries. *See, e.g., State v. Beebe*, _ Idaho _, 181 P.2d 496, 501-02 (Ct. App. 2007) (finding prosecutorial misconduct where the prosecutor's closing argument highlighted concerns about the protection of the public at-large, as well as concerns for the rights of victims); *State v. Phillips*, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007) ("Here, . . . the prosecutor's appeal to the jurors' emotions was overt and express, conveying not simply that the witness's testimony was implausible or lacking credibility, but that jurors ought to respond to the testimony with irritation and resentment. Such appeals to emotion during closing argument are plainly improper."); *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 (Ct. App. 1998) ("[T]he prosecutor's statement was an improper reference to the jurors' families and hypothesized the commission of a crime against them. . . . This type of hypothesis is an

appeal to jurors' fears, not a "fact" proven by the evidence nor a reasonable inference based upon the evidence. Therefore it is not a proper consideration for the jury's decision or for counsel's argument."); *State v. Peite*, 122 Idaho 809, 819, 839 P.2d 1223, 1233 (Ct. App. 1992) (noting that it is improper for a prosecutor to ask a question of an alleged victim in order to generate sympathy for that person); *State v. Baruth*, 107 Idaho 651, 656-57, 691 P.2d 1266, 1271-72 (Ct. App. 1984) (finding prosecutorial misconduct where the prosecutor argued that "the entire criminal justice system" was on trial and that the jury was "the only thing standing between the people of this community and [the defendant] robbing or doing anything else he chooses to anyone else in the community").

As noted above, the prosecutor concluded his closing argument with the following remarks in this case:

> When you kill somebody, you take away everything they have and everything they ever will have. Kathleen was 22 years old. Her death is a tragedy. Give her life meaning and give her death the sense of justice that it requires. Hold the defendant accountable for the purposeful, willful, deliberate, premeditated actions that he took that night [sic].

(Tr. Vol. VIII, p.1860, Ls.15-22.) Those remarks were plainly improper because they asked the jury to convict Mr. Ciccone for a reason wholly irrelevant to his actual guilt or innocence—its sympathy for the deceased victim. Since Mr. Ciccone had never denied that he was the one who had taken his wife's life, the prosecutor's focus on everything that had been lost when Kathleen died and the sheer tragedy of her death, was an unabashed plea for the jury to convict Mr. Ciccone of the greatest charge, first degree murder, based on its sympathy for the victim. Although the prosecutor's argument in this regard is plain enough, he was even more explicit in his appeal to the emotions of the jurors when he openly implored the jury to find Mr. Ciccone guilty of first degree

murder to "[g]ive her life meaning and give her death the sense of justice that it requires."

Although Mr. Ciccone's trial counsel did not object to the prosecutor's plea to convict his client based on its sympathy for the victim, the lack of objection is no bar to his raising this issue on appeal. Under the standards discussed in Part III.C.3, above, the prosecutor's misconduct constitutes fundamental error because it was so egregious and inflammatory that the resulting prejudice could not have been remedied by a ruling from the district court. This is especially true where the prosecutor's improper emotional came just moments after twice commenting on Mr. Ciccone's failure to testify.

IV.

The District Court Abused Its Discretion By Imposing Upon Mr. Ciccone A Sentence (Fixed Life) Which Is Excessive Given Any View Of The Facts

A. Introduction

Mr. Ciccone does not challenge the sentence he received upon his conviction for second degree murder (of the fetus); however, he does contend that the fixed life sentence he received upon his conviction for first degree murder (of Kathleen) is excessive given any view of the facts and, therefore, represents an abuse of discretion on the part of the district court. Mr. Ciccone requests that the fixed portion of that sentence be reduced such that he may one day be eligible for parole.

B. Given Any View Of The Facts Of This Case, A Fixed Life Sentence Is Excessive

There are four recognized objectives for any sentence that is handed down in a criminal case in Idaho: (1) protection of society; (2) deterrence (both individual and general); (3) rehabilitation of the defendant; and (4) retribution. *Jackson*, 130 Idaho at

294, 939 P.2d at 1373. As a general proposition, therefore, a sentence will be "reasonable to the extent that it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. A sentence of confinement longer than necessary for these purposes is unreasonable." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Fixed life sentences, however, are somewhat unique. "A fixed life sentence is the harshest penalty available under Idaho law, short of a death sentence. It precludes any good time credit or parole. Absent an executive commutation (an event which the judiciary can neither predict nor assume), a defendant given a fixed life sentence will be imprisoned until he dies." *State v. Eubank*, 114 Idaho 635, 637, 759 P.2d 926, 928 (Ct. App. 1988). Accordingly:

> a fixed life sentence should not be regarded as a judicial hedge against uncertainty. To the contrary, a fixed life term, with its rigid preclusion of parole or good time, should be regarded as a sentence requiring a high degree of certainty—certainty that the nature of the crime demands incarceration until the perpetrator dies in prison, or certainty that the perpetrator never, at any time in his life, could be safely released.

Id. at 638, 759 P.2d at 929 (quoted with approval in *Jackson*, 130 Idaho at 294-95, 939 P.2d at 1373-74). Thus, in *Eubank*, the Court of Appeals held that a fixed life sentence will only be found to be reasonable "if the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society." *Id.*; *accord Jackson* 130 Idaho at 294, 939 P.2d at 1373. *See also State v. Helms*, 143 Idaho 79, 82-84, 137 P.3d 466, 469-71 (Ct. App. 2006) (taking the *Eubank/Jackson* standard a step further and holding that, even if it appears that the

defendant utterly lacks rehabilitation potential, a sentence of fixed life is excessive if the punishment is disproportionate to the crime).

In light of the general standards controlling the imposition of any prison sentence, as well as the *Eubank/Jackson* standard for imposition of fixed life sentences, Mr. Ciccone contends that his sentence for first degree murder is excessive. With regard to the general sentencing standards, the record, taken as a whole, demonstrates that a sentence which includes *no possibility for parole* is patently unreasonable in light of the circumstances of Mr. Ciccone's offense, his condition and character, and the minimal risk that he presents to the community at large. In addition, turning to the specific standards for the imposition of a fixed life sentence, the record simply does not support the conclusion that either Mr. Ciccone utterly lacks rehabilitative potential, or that his crime against Kathleen was so egregious as to demand the exceptionally severe sanction of a life in prison with no chance for parole.

1. Applying General Sentencing Standards, It Is Clear That Mr. Ciccone's Fixed Life Sentence Is Excessive

As noted above, in reviewing Mr. Ciccone's sentence, and indeed any sentence, for excessiveness, this Court must conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. It must then determine whether the sentence imposed is a reasonable means of effectuating Idaho's four sentencing objectives without being overkill.

a) Facts Relevant To Mr. Ciccone's Character, The Circumstances Of His Offense, And The Risk He Poses To The Community

Albert Ciccone's life story actually begins with his father, Louis Ciccone. After college, Louis served in the United States Air Force during the Vietnam War. (Letter from Louis Ciccone to Whom It May Concern, p.1 (undated) (*hereinafter,* Louis Ciccone Letter).) While he was in the Air Force, he "was injured and had three major surgeries . . . ." (Louis Ciccone Letter, p.1.) He also had complications which required further hospitalization. (Louis Ciccone Letter, p.1.) Nevertheless, Louis' Air Force experience appears to have been a blessing in at least one regard because it was through his service as an airman that he met and married his wife, June, and the couple had their daughter, Anna. (Louis Ciccone Letter, p.1.)

While Louis was in the Air Force though, he had "many episodes of panic, depression, and mental stress which [he] received care for." (Louis Ciccone Letter, p.1.) Later, when the war ended, it came time to downsize the military, and the Air Force suddenly decided that Louis was "medically unfit" for further service and discharged him, he began to have trouble coping with all of life's stressors, including the impending birth of a second child (Albert). (Louis Ciccone Letter, p.1.) Louis ended up being involuntarily committed to the mental ward of the local Veteran's Administration hospital on three separate occasions before his son even reached his thirteenth birthday. (Louis Ciccone Letter, p.1.)

When Mr. Ciccone was not in the hospital (for his mental illness or for his ongoing physical problems), he grappled with his mental illness at home. He is a paranoid schizophrenic (PSI, p.18) and he writes that "I sit in the house and my mind goes wild," but "I don't feel comfortable out in public" (Louis Ciccone Letter, p.1). He

concedes that as his kids were growing up he "may have been over sensitive to noise, fights and things that others may consider normal children's ways," and he may have been very strict with them, using "a belt on them when [he] believed they needed it," and sending their friends home and them to their rooms when they were "too loud or rowdy." (Louis Ciccone Letter, p.1; *see also* Statement of Anna Dusseau, p.1 (pointing out that, because of his mental illness, her father was more sensitive than others to minor annoyances, that he seemed intolerant of a lot of things, and that he was a "hair-trigger" in terms of his anger).) But there may be more to it than that, as Albert's mother reports that Louis was beyond "strict"; he was physically and emotionally abusive. (*See* June Ciccone Letter, p.2.) Albert confirms that his father whipped him with a leather belt, but goes on to say that, by the time he reached the age of ten, Louis "resorted to using his fists to discipline" Albert. (PSI, p.12; *see also* PSI, p.13 ("My father beat me when I was a child, he said it was for discipline, but it was a little too much for me to handle.").) In addition, June says that Louis constantly berated their son. (June Ciccone Letter, p.2.)

Interestingly, although Albert has every right to now be resentful of his father—both for the abuse and for being absent much of the time—he is actually very understanding of the limitations imposed by his father's mental illness, and very forgiving of his father's past behavior. In talking about his father, he says simply: "My father did the best he could and I love him." (PSI, p.12; *see also* PSI, p.13 (reporting that Albert and his father mended their relationship when Albert left home).)

Albert Ciccone's understanding and forgiving view of his father appears totally consistent with his character generally. One friend describes him as a "sensitive, caring person," with "a straightforward, honest personality." (Letter from Steve Boyles to

Whom It May Concern (Feb. 14, 2005).)[18] Another friend describes him as "polite, well mannered and respectful . . . a great person, one worthy of my respect." (Letter from Tony DeLuke to Whom It Many Concern (Feb. 18, 2005).) A third friend describes him as "polite and considerate" and "always car[ing] passionately for those who he is involved with." (Letter from Lisa Austin to Whom It May Concern, p.1 (undated).) A former teacher and football coach describes him as an "outstanding young man . . . honest, hardworking, and loyal," who, although not a great athlete, always earned the respect of teammates and coaches through his "unselfish attitude." (Letter from John Nemec to Whom It May Concern (Feb. 16, 2005) (*hereinafter*, Nemec Letter).) This individual goes on to say that "Albert Ciccone has always been one of my favorites. After thirty-five years as an educator, I can honestly say that I enjoyed the best profession in the world because of people like Albert. He is warm, caring, and has a genuine concern for others." (Nemec Letter.) Finally, Albert's mother, who probably knows him better than anyone else, points out that he was always the family comedian because *he was always trying to make the people around him happy*. (June Ciccone Letter, p.1.) She describes him alternately as "a good and loving man" and as "a good and caring man"; she said he "would give you his last dollar or the shirt off his back if you needed it." (June Ciccone Letter, pp.4, 9.)

Consistent with his generally good character, Albert Ciccone has always been a law-abiding citizen.[19] The present offenses are his only criminal convictions (other than

[18] The letter from Mr. Boyles is attached to the PSI.

[19] While the State would argue that Mr. Ciccone abused Kathleen prior to her death, and that he also abused his first wife, those claims are unproven and Mr. Ciccone denies them. However, if those claims are true, they seem to be fully consistent with

routine traffic violations). (PSI, p.12.) He has never been a heavy drinker, and has never used illegal drugs. (PSI, p.12.)

In addition, Mr. Ciccone has dedicated his life to public service. As noted above, at the age of nineteen, Mr. Ciccone left home to join the United States Air Force. (PSI, pp.12, 16.) He did so because he wanted to serve his country and honor a family tradition of Air Force service (Mr. Ciccone represents the third generation of his family to have served in the Air Force). (PSI, p.12.) Although Mr. Ciccone was never a star athlete or received the best grades, he has an interest in, and a knack for, computers and other high technology (June Ciccone Letter, p.2; *see* Louis Ciccone Letter, p.2), and he made a fine Electronic Warfare Systems Technician in the Air Force, rising to the rank of Staff Sergeant and receiving exceptional performance evaluations. (PSI, p.16; Enlisted Performance Report for Period Jun. 19, 1996 – Feb. 18, 1998; Enlisted Performance Report for Period Feb. 19, 1998 – Feb. 18, 1999; Enlisted Performance Report for Period Feb. 19, 1999 – Feb. 18, 2000; Enlisted Performance Report for Period Feb. 19, 2000 – Jan. 20, 2001; Enlisted Performance Report for Period Jan. 21, 2001 – Jan 20, 2002; Enlisted Performance Report for Period Jan. 21, 2002 – Jan. 20, 2003; Statement of Michael Pfirmann, p.1 (undated) (*hereinafter*, Pfirmann Statement.)

Obviously then, something must be terribly amiss for Albert Ciccone, a decent, caring, hardworking man, to be in his present situation. That something appears to be his fragile mental state.

Mr. Ciccone's emotional and mental problems and, as discussed below, are likely manageable.

The reality is that Louis Ciccone is not the only one in the Ciccone lineage who has suffered with mental illness. Louis' mother (Albert's grandmother), now deceased, was so severely afflicted that she was hospitalized at least six times, received electro-shock therapy at least five times, and attempted suicide three times. (Louis Ciccone Letter, p.4.) In addition, Albert's sister, Anna, has been diagnosed with bipolar disorder and is under the care of a psychiatrist. (PSI, p.13; June Ciccone Letter, p.2.) Finally, and most importantly, Albert seems to have inherited the family trait, as he too very clearly suffers from mental illness.[20]

Albert Ciccone's sister indicates that Albert, unfortunately, has inherited some of their father's traits. She wrote: "Frustration, anger, hurt, loneliness, depression, sorrow, pain, boredom, all of those emotions seemed to come out in fits of rage in both men in our family, my dad and my bother." (PSI, p.13; *see also* PSI, p.19 (Mr. Ciccone's admission that he has a bad temper).) And, indeed, this seems to have been the precise problem in Mr. Ciccone's relationship with Kathleen. When his relationship with Kathleen really started to fall apart, Mr. Ciccone found it impossible to cope. He would call his parents crying and talk about how he wanted his wife and unborn child back. (Louis Ciccone Letter, p.3.) His father reports that Mr. Ciccone was having panic attacks and "was going out of his mind." (Louis Ciccone Letter, p.3.) One co-worker indicated that he "seemed to be a nervous wreck," and "he seemed much more stressed" than usual. (Air Force Report § 2 – 7.) In addition, Air Force personnel

[20] While it is tempting to assume that Albert Ciccone's mental illness came from his father's side of the family, it should be noted that June Ciccone, Albert's mother has also been treated for depression and actually attempted suicide while pregnant with Albert. (PSI, pp.13, 18.)

noticed that Mr. Ciccone appeared "depressed and more tired," and even became concerned enough for Mr. Ciccone's well-being that all weapons were removed from his apartment and his roommates were instructed to keep an eye on him. (UNITED STATES AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS, REPORT OF INVESTIGATION §§ 2 – 4, 2 – 15 (*hereinafter*, Air Force Report); Pfirmann Statement, p.1.)

Finally, things came to a head when Mr. Ciccone had an argument with Kathleen and she left him. (June Ciccone Letter, p.4.) When that happened, Mr. Ciccone called his mother "to tell her he loved her and to say goodbye to her" (Louis Ciccone Letter, p.3; *accord* June Ciccone Letter, p.4), then attempted to kill himself—first by trying to hang himself, then by trying to poison himself (PSI, pp.17-18).

Mr. Ciccone's suicide attempts were unsuccessful and he was involuntarily committed to Intermountain Hospital, a psychiatric hospital in Boise, based on the obvious conclusion that he was "a danger to self." (PSI, pp.17-18; Initial Assessment, p.1; Discharge Summary, p.1.) When he presented at Intermountain Hospital, Mr. Ciccone suffered from decreased energy, concentration, and appetite; he felt unable to experience pleasure and he felt hopeless and helpless; he was socially withdrawn; he felt anxious; he could not sleep; he was having obsessive thoughts; and, of course, he had suicidal ideation. (Initial Assessment, p.1; Discharge Summary, p.1.) According to his parents, Mr. Ciccone "was very shaky, couldn't put his thoughts together," and seemed not to even recognize them initially. (Louis Ciccone Letter, p.3.) He was diagnosed with Major Depressive Disorder, and given Effexor XR, an anti-depressant. (Initial Assessment, p.3.) During his stay at Intermountain Hospital, he was also given Ativan, an anti-anxiety drug (History & Physical, p.1); however, it appears that this drug

was discontinued and, when he was released approximately ten days later, he was directed to continue taking the Effexor and Klonopin, a drug indicated to treat seizure disorders and panic disorders. (Discharge Summary, p.1; *see also* Air Force Report § 2 – 20 (indicating that Mr. Ciccone filled his Effexor and Klonopin prescriptions).)

Obviously though, Mr. Ciccone was not "cured" when, on October 3, 2003, he was released from Intermountain Hospital and, as noted above, learned that his new wife had contracted Chlamydia. When he went back to work, one his superiors noted that Mr. Ciccone "didn't seem like himself" in that, while Mr. Ciccone was typically outspoken and sociable, after leaving Intermountain Hospital, his "attention span had declined" and his "speech and work seemed slow."[21] (Air Force Report § 2 – 15; Pfirmann Statement, p.1.) This was "[q]uite a turnaround from the AI" this supervisor had known. (Pfirmann Statement, p.1.) According to this supervisor, Mr. Ciccone attributed the changes in his behavior to his medication, complaining that the drugs made him feel like, even when physically present, he was not taking an active part in whatever was going around him; he said "it was like watching" of his life. (Air Force Report § 2 – 15; Pfirmann Statement, p.1.) Thus, this supervising officer asked Mr. Ciccone's immediate supervisor to see if Mr. Ciccone's medication dosages could be lowered. (Air Force Report § 2 – 15; Pfirmann Statement, pp.1-2.) Mr. Ciccone's immediate supervisor confirmed that Mr. Ciccone appeared slow and sluggish because of the effects of the medications, and that he actually sent Mr. Ciccone back to

[21] Although Mr. Ciccone was suffering the side effects of his medication, it does not appear that he was enjoying the benefits, as his supervisor noted that he still "was never happy." (Pfirmann Statement, p.1.)

Intermountain Hospital "to get the medication doses lowered." (Air Force Report § 2 – 10.)

Apparently, the medication dosages were lowered (*see* Pfirmann Statement, p.2), but at some point during the next two weeks, some additional drugs were introduced into the mix. Mr. Ciccone reports that by the time of the crash at issue in this case, he had been prescribed Zoloft, another antidepressant, which he did not take because it "made [him] insane," and then Depakote, an anti-seizure drug (which is also used to treat the manic phase of bipolar disorder), which he says worked much better than Zoloft. (PSI, p.18.) Apparently, he was also still supposed to be on the Effexor and the Klonopin, but he had missed two doses of Klonopin. (PSI, p.18.)

As noted above, the crash at issue in this case took place on October 16, 2003, less than two weeks after Mr. Ciccone was released from Intermountain Hospital, and just a few hours after the couples' counselor had intentionally provoked his anger by stereotyping and criticizing his Catholic faith,[22] criticizing him for failing to accept responsibility for his suicide attempt,[23] and dismissing his feelings of abandonment.[24]

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[22] With regard to Mr. Ciccone's faith, the counselor testified as follows: "It's like Indians and alcohol. Everybody knows that Indians are more predisposed to alcoholism and that. I think Catholics are more predisposed to guilt and to blame other people for what is going on with them, at least in my clinical experience." (Tr. Vol. VIII, p.1526, Ls.6-11.)

[23] The counselor chose to be confrontational with Mr. Ciccone about taking responsibility for what he called Mr. Ciccone's "alleged" suicide attempt even though he conceded he "didn't know what the suicide attempt was all about" because he had not reviewed Mr. Ciccone's mental health file. (Tr. Vol. VIII, p.1518, Ls.3-7.)

[24] The counselor spoke mockingly of Mr. Ciccone's attempt to articulate what he described as his "abandonment issues," expressing an apparent belief that a grown adult's loss of emotional support from someone that he loved and trusted does not constitute abandonment because abandonment "is like you take a little child of five or six, and you leave him somewhere for a week or two or a month, that's being abandoned." (Tr. Vol. VIII, p.1517, Ls.20–25.)

(*See* Tr. Vol. VIII, p.1517, L.3 – p.1518, L.18, p.1525, L.9 – p.1526, L.11, p.1529, L.18 – p.1530, L.8.) At the time, despite all that he had been through, Mr. Ciccone was still trying to reconcile with Kathleen. Nevertheless, another argument eventually broke out, both Kathleen and Mr. Ciccone became angry, and Mr. Ciccone struck and killed Kathleen with his car as he sped down the road.

Looking back on the events of October 16, 2003, while Mr. Ciccone has not adopted the State's theory of the case or the jury's belief about what he was thinking when he hit Kathleen with his vehicle, he has nevertheless taken responsibility for her death and the death of his unborn child, and has expressed a great deal of remorse. When asked how he felt about his crimes, he wrote, "[d]eeply saddened. I would gladly trade my life to save my wife and child. I am beyond sorry. I never denied responsibility for their deaths, but I did not murder them." (PSI, p.12.) At another point, he wrote: "I take full responsibility for the death of my wife and our child, but it was not in any way a deliberate action. I am deeply sorry for all of the pain I've caused my family and for the loss of two young lives." (PSI, p.19.) Moreover, these statements appear not to have been made solely for the benefit of the sentencing judge; they appear to be genuine reflections of Mr. Ciccone's feelings since they are consistent with the statements he has made to his mother all along. (*See* June Ciccone Letter, p.8 ("He tells me continuously how sorry he is this happened and how he wishes it would have been him instead of Kathleen who died."), p.9 ("He truly loves Kathleen and mourns her loss every day . . . .").)

b) The Foregoing Facts Demonstrate That A Fixed Life Sentence Is Excessive

Assuming that Mr. Ciccone intentionally and premeditatedly murdered Kathleen (as this Court must in light of the jury's verdict), the trial evidence indicates that he did not commit a carefully-planned or sadistic murder; it demonstrates that, while in an extremely fragile mental state, he had an argument with his wife, he became angry, and after about a minute and a half of stewing, he snapped and his anger erupted in a brief, violent outburst. (*See, e.g.,* Tr. Vol. VIII, p.1778, L.24 – p.1779, L.24, p.1783, Ls.10-17, p.1784, L.22 – p.1785, L.3, p.1809, Ls.7-16, p.1819, Ls.19-25 (portions of the prosecutor's closing argument).) Thus, while his actions are reprehensible and tragic (as any murder is), the murder in this case is devoid of aggravating circumstances and, therefore, is relatively non-egregious. As such, Mr. Ciccone submits that, even if this Court were to consider the nature of the offense only, an appropriate sentence in his case would be closer to the statutory minimum than the statutory maximum. *See* I.C. § 18-4004 (implicitly recognizing that even first degree murders may demand a sentence as low as life, with ten years fixed).

This is especially true when one considers the overwhelming amount of mitigating evidence in this case. As noted above, Mr. Ciccone has had a lot of mental illness in his family; he clearly suffers from mental illness; and that mental illness appears to have had a central role in his commission of the present offense. *See* I.C. § 19-2523 (implicitly recognizing that the defendant's mental illness—especially where it has a role in the commission of the offense—is a mitigating factor which should counsel toward a lower sentence); *State v. Odiaga*, 125 Idaho 384, 391-92, 871 P.2d 801, 808-09 (1994) (same). In addition, Mr. Ciccone, although he battles mental illness

generally of excellent character, has led a law-abiding life, and has even dedicated his career to serving his country. *See State v. Nice*, 103 Idaho 89, 91, 645 P.2d 323, 325 (1982) (recognizing that the defendant's lack of a criminal record and his prior military service were mitigating factors that counseled toward a lower sentence); *State v. Shideler*, 103 Idaho 593, 595, 651 P.2d 527, 529 (1982) (recognizing that where the defendant has good character generally, and is a first offender, he should be afforded more lenient treatment). Finally, consistent with his impressive character, Mr. Ciccone has accepted responsibility for his actions[25] and has expressed his deep remorse for his actions. *See State v. Alberts*, 121 Idaho 204, 209, 824 P.2d 135, 140 (Ct. App. 1991) (treating the defendant's expressions of remorse as a mitigating circumstance counseling toward a more lenient sentence); *Shideler*, 103 Idaho at 595, 651 P.2d at 529 (treating the defendant's acceptance of responsibility as a mitigating circumstance counseling toward a more lenient sentence).

Finally, a reduction of the fixed portion of Mr. Ciccone's sentence would not put the community at risk. Because Mr. Ciccone's crime appears to stem from his emotional fragility and his inability to contain his anger at times, it is infinitely reasonable

[25] While the State will no-doubt argue that Mr. Ciccone has failed to accept responsibility for his actions because he has failed to admit that *intentionally* and *premeditatedly* murdered his wife, the fact is that Mr. Ciccone has every right to maintain his innocence through this appeal, especially where one of the alternate remedies sought is a new trial. *See, e.g., State v. Cesnik*, 122 P.3d 456, 462 (2005) (holding that a defendant cannot be punished for failing to admit guilt after a trial in which he asserted his innocence because to do so would be to nullify his right to appeal). Besides, the jury's fact-finding ought to go only so far when it comes to what Mr. Ciccone was *thinking* when the present offense was committed, for only he can truly know what his thoughts were at that moment in time.

to believe with proper medication and mental health counseling, he could safely be released on parole.

2. Applying The *Eubank/Jackson* Standard, It Is Clear That Mr. Ciccone's Fixed Life Sentence Is Excessive

a) Mr. Ciccone Has Rehabilitation Potential

As should be obvious from the foregoing discussion, Mr. Ciccone is not a career criminal, and he certainly is not a predator who seeks people out for the purpose of victimizing them. He is a man of exemplary character who, likely because of his emotional and mental problems, failed to keep an even keel in a turbulent relationship. Under these circumstances, as noted above, it is infinitely reasonable to believe that, with proper medication and counseling, Mr. Ciccone can overcome his depression and insecurities, and learn to cope constructively with his anger such that he could once again be a productive member of society. Accordingly, Mr. Ciccone's fixed life sentence cannot be justified based on any sort of finding that he is utterly lacking in rehabilitation potential.

b) While Any Murder Is Reprehensible, The Murder In This Case Was Not Particularly Egregious

As was discussed above, while the crime for which Mr. Ciccone was found guilty is certainly inexcusable, the facts and circumstances of its commission make it clear that it is *relatively* non-egregious. It was not committed as part of a killing spree; it was not undertaken as part of some sadistic desire to cause suffering or pain; and it was not thought out ahead of time and perpetrated as part of an elaborate plan. It was simply the product of any angry outburst, likely related to Mr. Ciccone's emotional and mental

problems. Accordingly, Mr. Ciccone's fixed life sentence cannot be justified based on a finding that the murder in this case was particularly egregious. To do so would be to find that first degree murder, in and of itself, is so egregious that it demands the harshest possible sentence short of death, but that clearly is not the case. *See* I.C. § 18-4004.

V.

By Requiring Mr. Ciccone To File His Appellant's Brief *Prior* To His Appellate Counsel's Receipt Of All Of The Transcripts Ordered In This Case, The Idaho Supreme Court Has Denied Mr. Ciccone His Constitutional Right To Due Process On Appeal

A. Introduction

Because Mr. Ciccone has a statutory right to appeal, I.C. § 19-2801, he has a right to due process in the prosecution of this appeal. He contends, however, that that right has been abridged by the Idaho Supreme Court's order requiring the present Appellant's Brief be filed *prior to* Mr. Ciccone's appellate counsel's receipt of all of the transcripts ordered in this case.

B. Facts Relevant To Mr. Ciccone's Due Process Claim

The court minutes from proceedings held on January 26, 2005, the final day of Mr. Ciccone's trial, indicate that after the jury began its deliberations: certain juror misconduct came to light, multiple jurors were questioned by the district court and counsel, one juror was ultimately replaced with an alternate, and the newly-composed jury was ordered to begin its deliberations anew. (*See* R., pp.282-84.) Thus, if Mr. Ciccone has any viable appellate claims related to any of the aforementioned juror misconduct, the transcript of the proceedings of January 26, 2005, would clearly be

relevant to that claim. However, as noted above, the transcript of Mr. Ciccone's last day of trial was omitted from the Record on Appeal. Thus, on June 18, 2008, Mr. Ciccone filed with the Idaho Supreme Court a motion to augment the Record on Appeal with the missing transcript, as well as a motion to suspend the briefing schedule pending preparation of the missing transcript.

On July 9, 2008, the Supreme Court granted the motion to augment the Record on Appeal, ordering the court reporter to file the missing transcript on or before July 30, 2008. At the same time, however, the Supreme Court denied the motion for a suspension of the briefing schedule, requiring that Mr. Ciccone's Appellant's Brief be filed on or before July 16, 2008, fully two weeks before the missing transcript was due to be completed.

C. Mr. Ciccone Has A Constitutional Right To Due Process In The Prosecution Of This Appeal, And This Right To Due Process Includes The Right To All Necessary Transcripts

The United States Constitution does not require any state to create an appellate court or offer any right to appeal a criminal conviction. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956). However, where a state chooses to provide a statutory right to appellate review as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the Due Process Clause of the Fourteenth Amendment protects the defendant on appeal. *Evitts v. Lucey,* 469 U.S. 387, 393 (1985); *North Carolina v. Pearce,* 395 U.S. 711, 724-25 (1969); *Rinaldi v. Yeager,* 384 U.S. 305, 310-11 (1966); *Griffin*, 351 U.S. at 18.

In order to satisfy due process, an appellant must be provided with "a 'record of sufficient completeness,' . . . for adequate consideration of the errors assigned.'"

Draper v. Washington, 372 U.S. 487, 497-99 (1963) (quoting *Coppedge v. United States*, 369 U.S. 438, 446 (1962)).

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Hardy v. United States, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (footnote omitted). Thus, as the majority in *Hardy* recognized, in order for an appellate attorney, appointed following a trial, to identify points of error and determine their merit, the attorney should be able to read "the entire transcript." *Id.* at 279-80. A procedure which deprives an appellant "of a full record, briefs, and arguments" also deprives the appellant of "'all hope of any (adequate and effective) appeal at all.'" *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) (quoting *Lane v. Brown*, 372 U.S. 477, 485 (1963)).

Since, in Idaho, the right to appeal from a felony conviction is an integral part of our criminal justice system and is an appeal as of right, I.C. § 19-2801; *see also* I.A.R. 11(c), Mr. Ciccone, who was convicted of a felony, has a right to due process in the present appeal.

D. The Idaho Supreme Court Has Violated Mr. Ciccone's Right To Due Process By Requiring Him To File His Appellant's Brief *Prior* To His Appellate Counsel's Receipt Of All Of The Transcripts Ordered In This Case

As a result of the Idaho Supreme Court's order requiring Mr. Ciccone to file his Appellant's Brief prior to receipt of the transcript of the last day of his trial, the Court has foreclosed any possibility of raising potentially-meritorious issues relating to the above-referenced juror misconduct (including any claims relating to the district court's order

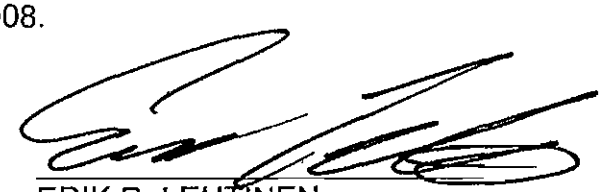
denying Mr. Ciccone's motion for a new trial which, as noted, was based on the aforementioned juror misconduct). Without the requested transcript, Mr. Ciccone's appellate counsel has no ability to review the evidence relating to the juror misconduct, ascertain what motions or objections may been made by the parties' respective counsel, or determine the precise parameters of the district court's rulings. In short, Mr. Ciccone's appellate counsel simply cannot determine whether any errors occurred with regard to the juror misconduct on the last day of trial, *see Hardy*, 375 U.S. at 288 (Goldberg, J., concurring) and, therefore, cannot ethically raise claims relating to any such errors on Mr. Ciccone's behalf at this time, even if it ultimately turns out that such claims are meritorious and would have warranted relief, *see* I.R.P.C. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact for doing so . . . ."). Moreover, even if appellate counsel could raise claims arising out of the juror misconduct on the last day of trial, his ability to do so would be meaningless since, under Idaho law, such claims would be procedurally defaulted. *See State v. Coma*, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999) ("It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, . . . and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court."); *Ebersole v. State*, 91 Idaho 630, 634, 428 P.2d 947, 951 (1967) ("The acts of a court of record are known by its records alone and cannot be established by parol testimony. The court speaks only through its records, and the judge speaks only through the court.").

In light of the foregoing, Mr. Ciccone contends that the Idaho Supreme Court's July 9, 2008 order has denied him his Fourteenth Amendment right to due process on appeal, and that he is therefore entitled to a new appeal in which all of the necessary transcripts are available *prior* to submission of his opening brief.

CONCLUSION

For the foregoing reasons, Mr. Ciccone respectfully requests that his conviction and/or sentence be vacated and either: (a) the case be ordered dismissed with prejudice; (b) the case be remanded for a new trial; or (c) his sentence be reduced or the case be remanded for a new sentencing hearing. Alternatively, he requests that he be given a new appeal in which all of the necessary transcripts are provided.

DATED this 25th day of July, 2008.



ERIK R. LEHTINEN
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of July, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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