6-15-2012

State v. Ciccone Appellant's Reply Brief Dckt. 38817

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38817
	)	
v.	)	
	)	
ALBERT A. CICCONE,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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District Judge

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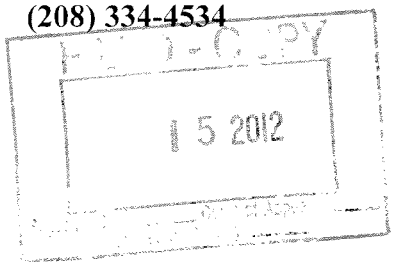

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 2

ISSUES PRESENTED ON APPEAL 3

ARGUMENT 4

I. 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 4

A. The Prosecutor Engaged In Misconduct When He (Twice) Implicitly Asked The Jury To Draw A Negative Inference From Mr. Ciccone's Decision Not To Testify 4

1. The Prosecutor Engaged In Misconduct When He Commented On Mr. Ciccone's Silence When, In Describing An Alleged Altercation Between Mr. Ciccone And His Wife, He Argued That "There's Only Two People That Know [What Happened], And Kathleen Ciccone Isn't Here To Tell Us" 5

2. The Prosecutor Engaged In Misconduct When He Commented On Mr. Ciccone's Silence By Arguing That "There Is No Testimony" That Mr. Ciccone Was Distracted Or Not Looking At His Wife Immediately Before Striking Her With His Car 7

B. The Prosecutor Engaged In Misconduct When He Asked The Jurors To Convict Mr. Ciccone Based On Their Sympathy For The Victim 9

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 11

A. Whether We Are Talking About The Constitutional Or Statutory Right To A Speedy Trial, The State Is Incorrect When It Claims That A Witness's Temporary Military Duty Outside The State Is Automatically A Sufficient Reason For Delaying A Defendant's Trial 13

B. The District Court's Violation Of Mr. Ciccone's Statutory Right To A Speedy Trial Is Not Without A Remedy 16

C. Mr. Ciccone Clearly And Unequivocally Asserted His Right To A Speedy Trial 16

III. The District Court Abused Its Discretion By Imposing Upon Mr. Ciccone A Sentence (Fixed Life) Which Is Excessive Given Any View Of The Facts 17

CONCLUSION 19

CERTIFICATE OF MAILING 20

TABLE OF AUTHORITIES

Cases

Barker v. Wingo, 407 U.S. 514 (1972) 11, 17

Bell v. State, 651 S.E.2d 218 (Ga. Ct. App. 2007) 13, 14

Chapman v. California, 386 U.S. 18 (1967) 9

Commonwealth v. Hyland, 875 A.2d 1175 (Pa. 2005) 13, 14

Culombe v. Connecticut, 357 U.S. 568 (1961) 9

Kelley v. Commonwealth, 439 S.E. 2d 616 (Va. Ct. App. 1994) 13, 14

Marbury v. Madison, 1 Cranch 137 (1803) 16

People v. Chardon, 2005 WL 2866923 *4 (N.Y. S. Ct. 2005) 14

State v. Davis, 141 Idaho 828 (Ct. App. 2005) 14

State v. McKeeth, 136 Idaho 619 (Ct. App. 2001) 16

State v. Stuart, 113 Idaho 494 (Ct. App. 1987) 16

State v. Watkins, 152 Idaho 764 (Ct. App. 2012) 8

State v. Zichko, 129 Idaho 259 (1996) 12

Rules

I.A.R. 35(b)(6) 12

STATEMENT OF THE CASE

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.

On appeal Mr. Ciccone presents three issues for this Court's consideration: (1) whether the prosecutor engaged in misconduct during his closing arguments; (2) whether Mr. Ciccone's constitutional and statutory rights to a speedy trial were violated; and (3) whether Mr. Ciccone's fixed life sentence is excessive. He respectfully requests that this Court vacate his conviction and/or sentence and: order that the case be dismissed based on violations of his speedy trial rights; remand the case for a new trial based on the prosecutor's misconduct; or reduce his fixed life sentence (or remand the case for a new sentencing hearing) based on the excessiveness of that sentence.

The State argues that the prosecutor did not engage in any misconduct and, alternatively, to the extent that he did, that misconduct does not rise to the level of fundamental error or was harmless (Respondent's Brief, pp.5-18), Mr. Ciccone was not denied his rights to a speedy a trial (Respondent's Brief, pp.19-35), and Mr. Ciccone's sentence is not excessive (Respondent's Brief, pp.38-45). The present reply brief is necessary to address each of these arguments.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously articulated in Mr. Ciccone's Appellant's Brief and, therefore, are not repeated herein.

ISSUES

1. 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?

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

ARGUMENT

I.

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

In his Appellant's Brief, Mr. Ciccone argued that the prosecutor engaged in misconduct when, during the rebuttal portion of his closing argument, he twice commented on Mr. Ciccone's silence, *i.e*, his decision not to testify, and once asked the jury to convict Mr. Ciccone out of sympathy for the alleged victim. (Appellant's Brief, pp.9-21.) In response, the State addresses each instance of misconduct in turn, attempting to characterize the prosecutor's statements as permissible comments on the evidence and arguing (alternatively) that the unobjected-to misconduct does not meet the standard for fundamental error and the objected-to misconduct was harmless. (Respondent's Brief, pp.5-18.) For the reasons set forth more fully below, the State's arguments are without merit.

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

In his Appellant's Brief, Mr. Ciccone argued that the prosecutor engaged in misconduct by twice asking the jury to draw a negative inference from Mr. Ciccone's exercise of his Fifth Amendment right not to testify. He argued that the first such incident occurred when, in discussing what the State had sought to portray as a physical altercation between Mr. Ciccone and his wife immediately before she walked off and was struck and killed by Mr. Ciccone's vehicle, the prosecutor, after suggesting that Kathleen Ciccone 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; *see* Appellant's Brief, pp.9, 12-14.) He argued that the second such incident occurred when, while arguing that

Mr. Ciccone intentionally struck his wife, and that the jury should reject defense counsel's "accident" theory, the prosecutor 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 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; *see* Appellant's Brief, pp.9, 12-13.)

In its Respondent's Brief, the State addresses each comment in turn, arguing that both of the prosecutor's statements were permissible comments on the evidence; alternatively, the State contends that the second comment, which was objected-to, was harmless. (Respondent's Brief, pp.5-18.) These arguments fail.

1. The Prosecutor Engaged In Misconduct When He Commented On Mr. Ciccone's Silence When, In Describing An Alleged Altercation Between Mr. Ciccone And His Wife, He Argued That "There's Only Two People That Know [What Happened], And Kathleen Ciccone Isn't Here To Tell Us"

As noted, in discussing what the State had sought to portray as a physical altercation between Mr. Ciccone and his wife immediately before she walked off and was struck and killed by Mr. Ciccone's vehicle, the prosecutor, after suggesting that Kathleen Ciccone 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.) In his Appellant's Brief, Mr. Ciccone argued that this was necessarily a comment on Mr. Ciccone's silence since he was the only other one who knew exactly what had happened with his wife immediately prior to her death, and, thus, he was the only one who could have told the jury precisely what had happened, but he did not testify. (Appellant's Brief, pp.9, 12-13.)

The State argues that the prosecutor's argument was not an improper comment on Mr. Ciccone's decision not to testify, but rather a comment on statements Mr. Ciccone made

during his interrogation regarding "the state of certain evidence."[1] (Respondent's Brief, pp.9-10.) The State further argues that the prosecutor's argument "centered around Ciccone's actual statements and Kathleen's inability to refute them, rather than Ciccone's failure to testify . . . ." (Respondent's Brief, pp.9-10.) The State's argument, however, is illogical and represents a mischaracterization of what was actually argued to the jury.

As was quoted in the State's own brief, the relevant portion of the prosecutor's argument is as follows:

> Let's talk about [defense counsel] talking about the scene on K & R Ranch Road. How this precious purse a woman would have carried, the bag of food she obviously had in her possession because that's what Albert said.
>
> So I guess she has got the purse in the car, the bag of food in the car, the medicine, the sweater tied around her and everything. And she decided to get out with all of that stuff on K & R Ranch Road . . . and decided to walk however many feet -- let's just say -- it is on the chart -- walk up there with all the purse, sweatshirt tied around her waist, bottle of pills, and all the food bag, and had enough wherewithal to throw it all at him right- or left-handed. Maybe she let the purse down to get the McDonalds bag or Burger King to throw at him. Maybe she just left it there. I don't know. *There's only two people that know, and Kathleen Ciccone isn't here to tell us.*

(Tr. Vol. VIII, p.1853, Ls.3-23 (emphasis added); *see also* Respondent's Brief, p.9.)

The context of the prosecutor's argument makes it clear that he was not talking about Mr. Ciccone's interrogation, or even about Mr. Ciccone's actual statements. Rather, it makes it obvious that he was commenting on the state of the physical evidence and the inferences to be

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[1] In addition to arguing that there was no misconduct in the first instance, the State further asserts that there was no fundamental error. However, since the State presented only two conclusory statements on this point (*see* Respondent's Brief, p.9 ("Ciccone, however, has failed to show that complained of comments constituted misconduct at all, much less misconduct rising to the level of fundamental error."), p.10 ("Ciccone has failed to establish error, much less any constitutional error that is 'clear or obvious' from the record and actually prejudiced Ciccone's right to a fair trial. [*State v.*] *Perry*, 150 Idaho [209,] 226 . . . [(2010)].)," no further discussion of the fundamental error question is required herein and Mr. Ciccone refers this Court to pages 13 through 16 of his Appellant's Brief, where the fundamental error issue is analyzed fully.

drawn therefrom and, most importantly, he was asking the jury to accept the State's speculative version of events because Mr. Ciccone failed to testify and, therefore, failed to refute that version of events. As such, the prosecutor's argument cannot reasonably be construed as anything but a comment on Mr. Ciccone's silence and, thus, was highly improper.

2. The Prosecutor Engaged In Misconduct When He Commented On Mr. Ciccone's Silence By Arguing That "There Is No Testimony" That Mr. Ciccone Was Distracted Or Not Looking At His Wife Immediately Before Striking Her With His Car

Moments after making the above argument, while arguing that Mr. Ciccone intentionally struck his wife, and that the jury should reject defense counsel's "accident" theory, the prosecutor further 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 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 (emphasis added).) In his Appellant's Brief, Mr. Ciccone argued that this was also a comment on Mr. Ciccone's silence since he was the only one in the world who could have testified where he was looking and whether he was distracted in the split second before he struck his wife with his car. (Appellant's Brief, pp.9-10, 12-13, 14-16.)

The State responds, by claiming that the prosecutor's argument was not necessarily a comment on Mr. Ciccone's decision not to testify, but could "equally be viewed as a comment . . . on the absence of any reasonable explanation during his interview with Detective Wolfe from which the jury could conclude Kathleen's death was the result of an accident." (Respondent's Brief, p.11.) In attempting to further this argument, the State contends that the prosecutor's repeated use of the word "testimony" was merely an "inartful" way of referring to Mr. Ciccone's statements to the police. (Respondent's Brief, pp.11-12.)

Because the State's disingenuous argument on this issue is belied not only by a commonsense reading of the plain language of the prosecutor's argument, but also by the context in which that argument was made, Mr. Ciccone submits that this Court should completely disregard that argument.

As an alternative to its mischaracterization of the prosecutor's comment on Mr. Ciccone's silence as a benign comment on the evidence, the State argues that, to the extent that the prosecutor committed misconduct, that misconduct was harmless. (Respondent's Brief, pp.13-14.) But there again, the State's argument is based on a mischaracterization—this time, of Mr. Ciccone's argument. The State characterizes Mr. Ciccone's argument alternative as being "that this Court is *precluded* from finding the error harmless under *State v. Lopez*, 141 Idaho 575, 114 P.3d 133 (Ct. App. 2005)" (Respondent's Brief, p.13 (emphasis added)), and "that whenever a claim of prosecutorial misconduct based upon a comment on the defendant's silence is reviewed under the fundamental error doctrine, the error can never be harmless because it cannot be cured by a judicial admonition" (Respondent's Brief, p.13 (emphasis added)). However, Mr. Ciccone never made such arguments. He never spoke in such absolutes, and he certainly never argued that *Lopez* categorically precludes a finding of harmless error; he merely asserted that *Lopez* makes it clear that "prosecutorial comments on the defendant's silence *may* be so prejudicial that even a curative instruction is insufficient to cure the error." (Appellant's Brief, p.15 (emphasis added).)

The fact is that curative instructions may be insufficient to cure certain trial errors. *See State v. Watkins*, 152 Idaho 764, __, 274 P.3d 1279, 1282-83 (Ct. App. 2012) (explicitly rejecting the State's argument that, because jurors are generally presumed to follow instructions, a curative instruction will automatically render a trial error harmless). This is especially true

where the error is particularly prejudicial or the case is particularly close. *Id.* at 1283. Given the facts and circumstances of this case (*see* Appellant's Brief, pp.14-16), Mr. Ciccone submits that the prosecutor's comment on his silence was not harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967).

B. The Prosecutor Engaged In Misconduct When He Asked The Jurors To Convict Mr. Ciccone Based On Their Sympathy For The Victim

In his Appellant's Brief, Mr. Ciccone also argued that the prosecutor committed misconduct when he concluded his closing arguments with the following remarks:

> 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; *see* Appellant's Brief, pp.16-21.) Specifically, Mr. Ciccone argued that these remarks were improper because they were a plea for the jury to convict Mr. Ciccone based on matters outside the evidence—namely, sympathy for the deceased. (Appellant's Brief, pp.19-21.)

In response, the State argues that "the prosecutor was merely repeating what Ciccone himself had already argued," through his counsel, about the deceased's death being tragic, and that it was a "proper, measured response to Ciccone's argument that the jury should 'hold [Ciccone] in [their] hands' and only find him guilty of 'accidentally'" killing his wife and his unborn child. (Respondent's Brief, pp.16-17.) The State also argues, in the alternative, that even if the prosecutor did something improper, the error does not rise to the level of fundamental error. (Respondent's Brief, pp.17-18.)

Again, however, the State has completely mischaracterized the prosecutor's arguments, and the context in which they were made, in an effort to make them seem benign. Looking at the

portion of defense counsel's closing argument which the State now claims the offensive comments were made in response to,[2] one can see very clearly that what defense counsel was arguing was: (1) the decedent's death was the result of Mr. Ciccone's reckless driving, not malice, and, therefore, Mr. Ciccone should not be found guilty of murder; (2) despite the tragedy of this case, the jurors ought to not to be swayed by sympathy or vindictiveness in reaching their conclusions but, instead, because of the gravity of their mission, should faithfully follow the law; and (3) the jurors should not allow themselves to be bullied into finding Mr. Ciccone guilty.

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[2] On page 15 of its Respondent's Brief, the State identifies the argument of defense counsel which it claims the prosecutorial arguments in question were responding to. That argument of defense counsel was as follows:

> Stupid car driver. Absolutely stupid. Dumbest thing he ever did. Undisputed. We agree. But that's not premeditation. That is not malignant heart. That is not something with malice aforethought.
>
> If we caught one of our kids driving like that, we'd take the car keys away and ground them. No. There is nothing that I can do, that Albert can do, that anybody in this courtroom can do about the loss that everybody has suffered. I can't fix that. I wish to God I could. I would. He wishes he could. He wishes he could fix that.
>
> Forget about the lawyers and lawsuit. He wishes he could bring her back, but he can't. So June Ciccone, Kathy Figueredo, they have held their kids in their hands all these years. I have held Albert in my hands for the past year. Now I am going to hand him over to you, each of you individually. You each hold Albert in your hands. You each have the power to make a decision. You each have the ability to decide how to handle this case, each and every one of you. And you can't let anybody else bully you. You can't let anybody else step on you. You have to go back there in that room, that little room back there, and decide. You, each of you, have to decide.
>
> If you feel during this process that somebody is pushing you in a direction you don't want to go, just send a note to the bailiff. The bailiff will give it to the judge, and the judge will take care of it.
>
> You each have got Albert in your hands. You each get to decide. You each have that power. So use it, use it faithfully. Follow the rules given to you by the judge. Make sure he proves any case he has got beyond a reasonable doubt. Look at that evidence. Because right now, I am giving you Albert. Thank you.

(Tr. Vol. VIII, p.1847, L.1 – p.1848, L.13.)

(*See* Tr. Vol. VIII, p.1847, L.1 – p.1848, L.13.) Defense counsel most certainly did not urge the jury to decide this case based on sympathy or a desire to seek "justice," *i.e.*, revenge (in fact, he argued quite the opposite, which is completely appropriate), and, thus, the prosecutor had no right to make any such exhortations either. Moreover, even if defense counsel had said something improper, the State's remedy would have been to object; improper arguments by defense counsel are not license for the prosecutor to engage in misconduct in return. Surely, two wrongs do not make a right.

In light of the foregoing, the prosecutor's violation of Mr. Ciccone's rights to due process and a fair trial is clear and obvious. Further, the effect on the outcome of the trial is equally clear, as it was an exhortation to find Mr. Ciccone guilty of first degree (premeditated) murder, the greatest offense on which the jury was instructed.

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

In his Appellant's Brief, Mr. Ciccone argued that his statutory and constitutional rights to a speedy trial were violated because he was not tried until 446 days (nearly 15 months) after his arrest, and 343 days (nearly a full year) after the State's filing of its Information. (Appellant's Brief, pp.21-38.) He argued first that under the standards set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), his speedy trial rights under both the United States and Idaho Constitutions[3] were violated by the delay in bringing him to trial because the

[3] As noted in Mr. Ciccone's Appellant's Brief (pp.22-23 & n.10), the Idaho Supreme Court has adopted the same four-factored test for evaluating speedy trial claims brought under the Idaho Constitution as was mandated by the United States Supreme Court in *Barker v. Wingo* for speedy trial claims raised under the United States Constitution.

length of the delay was presumptively prejudicial, the State's reasons for the delay did not justify that delay, Mr. Ciccone timely asserted his right to a speedy trial, and Mr. Ciccone was prejudiced by the delay in bringing his case to trial. (Appellant's Brief, pp.22-36.) Next, he argued that his speedy trial rights under I.C. §§ 19-106 and 19-3501 were violated because, as had been previously demonstrated, the reasons for the delay in bringing him to trial were insufficient to justify the delay and, therefore, the State had failed to show "good cause" for the delay. (Appellant's Brief, pp.36-37.)

In response, the State begins its argument with a discussion of Idaho's speedy trial statute, asserting that, because certain of the State's witnesses were military personnel, temporarily assigned to duty outside the State of Idaho, they were necessarily "unavailable" and that, in the absence of proof that the State caused the witnesses to become unavailable, their unavailability was automatically a sufficient justification (*i.e.*, "good cause" within the meaning of I.C. § 19-3501) for delaying Mr. Ciccone's trial.[4] (Respondent's Brief, pp.20-27.) As an alternative to its contention that Mr. Ciccone's argument fails on its merits, the State further asserts that any violation of the speedy trial statute is harmless because "the remedy for a statutory speedy trial violation is dismissal without prejudice. *See* I.C. §§ 19-3501, 19-3506."

[4] On appeal, the State has failed to argue its other claimed bases for continuing Mr. Ciccone's trial from its original setting of July 20, 2004, to its ultimate setting of January 5, 2005. (*See* Respondent's Brief, p.22 n.4 ("The State believes the trial court's determination as to the unavailability of witnesses is dispositive of Ciccone's statutory speedy trial claim and therefore limits its analysis of the reason for delay to this issue. The State, however, does not waive these additional grounds for delay but relies on and incorporates by reference herein the prosecutor's argument and the district court's rationale.").) Thus, whether intentional or not, the State has forfeited any argument arising out of these grounds for the continuance. *See* I.A.R. 35(b)(6) (requiring that the respondent's brief on appeal contain "the contentions of the respondent . . . , the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon"); *State v. Zichko*, 129 Idaho 259, 263 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking . . . .").

(Respondent's Brief, pp.28-29.) Only then does the State address Mr. Ciccone's constitutional claims. (Respondent's Brief, pp.29-35.) While the State's arguments address each of the four factors in the *Barker v. Wingo* test, of note for purposes of this Reply Brief are its claims that the purported "unavailability" of its witnesses was a valid reason for delaying Mr. Ciccone's trial (Respondent's Brief, pp.31-33), and that Mr. Ciccone failed to timely assert his right to a speedy trial (Respondent's Brief, p.33).[5]

As set forth below, the State's arguments are without merit. First, it is clear that the State's "unavailability" analysis is deeply flawed. Second, as even the State concedes, the Idaho courts have already recognized that, with the statutory right to a speedy trial comes a meaningful remedy of some kind and, thus, speedy trial rights vindicated on appeal must result in reversals of convictions. Finally, contrary to the State's claim, Mr. Ciccone clearly and unequivocally asserted his right to a speedy trial.

A. Whether We Are Talking About The Constitutional Or Statutory Right To A Speedy Trial, The State Is Incorrect When It Claims That A Witness's Temporary Military Duty Outside The State Is Automatically A Sufficient Reason For Delaying A Defendant's Trial

Repeatedly citing the same three cases—*Bell v. State*, 651 S.E.2d 218 (Ga. Ct. App. 2007), *Commonwealth v. Hyland*, 875 A.2d 1175 (Pa. 2005)), and *Kelley v. Commonwealth*, 439 S.E. 2d 616 (Va. Ct. App. 1994)—the State argues that "the unavailability of a material witness due to service in the United States armed forces constitutes sufficient justification for delay" of a defendant's trial. (Respondent's Brief, pp.23, 26-27.) Implicit in this argument is the

[5] The State's arguments with regard to the other two *Barker* factors—the length of the delay and the prejudice owing to that delay—are unremarkable and, therefore, are adequately addressed by Mr. Ciccone's Appellant's Brief. (*See* Appellant's Brief, pp.23-24 (length of delay), pp.35-36 (prejudice).)

assumption that merely being assigned to temporary military duty out of state necessarily makes one "unavailable" for trial. (*See* Respondent's Brief, pp.22-24, 26-27.)

While the State's argument is supported by the three out-of-state cases it relies upon, none of these cases is particularly persuasive. In each instance, the court in question simply assumed (as the district court did below in this case, and as the State asks this Court to do now), that the temporary out-of-state military assignment of a witness creates "an unqualified inability" on the part of that witness to attend the defendant's trial, not just a burden on him.[6] *See Bell*, 287 Ga. App. at 302; *Hyland*, 875 A.2d at 1191-92; *Kelley*, 439 S.E.2d at 619. However, such an approach is questionable since, it should not be assumed that the military would have refused the State's request to allow the witnesses in question to travel back to Idaho for Mr. Ciccone's trial.[7] Indeed, the State has offered no reason to believe that a serviceman temporarily stationed out of state could not be compelled to return to the State of Idaho through issuance of an appropriate subpoena or warrant, or that, in the interest of comity, the United States military would not allow

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[6] As was noted in Mr. Ciccone's Appellant's Brief (pp.26-27), as well as the State's Respondent's Brief, pp.22-23), in *State v. Davis*, 141 Idaho 828 (Ct. App. 2005), the Idaho Court of Appeals held that, when *Barker* spoke of a "missing witness" being a valid reason for the government to delay a criminal defendant's trial, "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." *Id.* at 837.

[7] In his Appellant's Brief (pp.28, 29), Mr. Ciccone cited *People v. Chardon*, 2005 WL 2866923 *4 (N.Y. S. Ct. 2005) (unpublished opinion), for the commonsense notion that it cannot be assumed that witnesses whose military service has taken them out of state are *per se* "unavailable" under *Barker v. Wingo*. As the State correctly points out though, the portion of *Chardon* relied upon by Mr. Ciccone appears to have been rejected by an intermediate appellate court in New York. *See People v. Chardon*, 922 N.Y.S.2d 127, 128-29 (N.Y. App. Div. 2011). Nevertheless, Mr. Ciccone contends that it is illogical to presume that, just because someone is out of state on military business, that person is necessarily unable to attend an Idaho trial. Such a bright-line rule, although convenient, tends to undermine *Barker v. Wingo's* fact-specific inquiry, as well as the requirement that the government show the witness's unqualified inability to attend the trial.

its servicemen to return to Idaho. Quite to the contrary, the State's own arguments in favor of a continuance suggest that the witnesses' attendance may very well have been secured had it acted in a timely fashion. (*See, e.g.*, R. Vol. I, pp.107-08 ("[T]he State . . . has witnesses who are unavailable because of temporary assignments out of the state and as such all subpoena's [sic] must go through the military chain of command to get them back to Idaho to testify."); Tr. Vol. VII, p.13, Ls.3-8 ("If I am going to be able to send [subpoenas] to them, then I have to get not only an out of state court to serve them, lawfully serve them, but in a case where they are in South Korea, we would have to go through the Federal Court system to even get those served over there.").)

As was argued in Mr. Ciccone's Appellant's Brief, the reality is that the State has failed in this case to meet its burden of demonstrating that the witnesses at issue were truly "unavailable." (*See* Appellant's Brief, pp.26-29.) To show true unavailability, the State must show that, despite its *diligent efforts*, it was unable to secure the presence of the relevant witnesses. Here, the State has utterly failed to show that it made diligent efforts to obtain the attendance of the witnesses in question.

While the State would have this Court believe that the district court found that it had made "*diligent efforts* to obtain" the information that would have allowed it to secure the attendance of the witnesses in question (Respondent's Brief, pp.25-26 (emphasis added)), that claim is untrue. In fact, the citation now relied upon by the State reveals that the district court found only that "the prosecution in this case did make *efforts* to be in touch with the Air Force regarding these witnesses . . . ." (Tr. Vol. VII, p.29, Ls.5-7 (emphasis added).) Moreover, the facts could not have supported such a finding since, as was discussed in some detail in Mr. Ciccone's Appellant's Brief, the crux of the State's problem in securing the attendance of its

witnesses was that it chose not to independently investigate this case and, instead, hoped to have its case handed to it on a silver platter by Air Force investigators. (*See* Appellant's Brief, p.27.) Thus, contrary to the State's assertion on appeal (*see* Respondent's Brief, pp.25-27), it was, in fact, negligent in its prosecution of this case and its negligence did contribute to the purported "unavailability" of its witnesses.

B. The District Court's Violation Of Mr. Ciccone's Statutory Right To A Speedy Trial Is Not Without A Remedy

In its Respondent's Brief, the State argues that, even if Mr. Ciccone's statutory right to a speedy trial in was violated in this case, that error was harmless because the only remedy for a violation of that right is dismissal without prejudice. (Respondent's Brief, pp.28-29.) In essence, the State seeks to have this Court hold that there is no real remedy for speedy trial violations.

Not only is the State's argument flawed as a matter of policy, *cf. Marbury v. Madison*, 1 Cranch 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."), but it is also inconsistent with precedent. Even the State acknowledges that in *State v. Stuart*, 113 Idaho 494, 497 (Ct. App. 1987), the Idaho Court of Appeals held that the remedy for statutory speedy trial violations found on appeal is reversal of the convictions in question. (Respondent's Brief, p.28.) And Stuart was not an aberration, as a similar result obtained in *State v. McKeeth*, 136 Idaho 619, 626-27 (Ct. App. 2001), where the Court of Appeals found a violation of the defendant's statutory right to a speedy trial and, as a result, reversed the judgment of conviction.

C. Mr. Ciccone Clearly And Unequivocally Asserted His Right To A Speedy Trial

In his Appellant's Brief, Mr. Ciccone argued that all four of the *Barker v. Wingo* factors weigh in his favor. (Appellant's Brief, pp.23-36.) In doing so, he pointed out that he had timely asserted his right to a speedy trial below. (Appellant's Brief, pp.34-35.) However, the State now claims otherwise, arguing as follows:

> Although Ciccone asserted his *statutory* right to a speedy trial at the July 19, 2004 hearing [on the State's motion for a continuance on the eve of trial] (7/19/04 Tr., p.19, Ls.13-23), he did not unequivocally assert his *constitutional* right to a speedy trial until he filed his motion to dismiss on December 20, 2004 (R. vol. II, pp.168-69; see also Trial Tr., p.41, L.18 – p.43, L.2.)

(Respondent's Brief, p.33 (emphasis in original).)

The State's present argument is meritless. *Barker* says nothing about the defendant having to explicitly cite the Constitution in order to gain the benefit of its guarantee of a speedy trial; in discussing the importance of the defendant's assertion of his right, that opinion focused on whether the defendant expressed a desire to have his case tried because such a desire is the best evidence of whether he was deprived of a fair trial through its delay. *Barker*, 407 U.S. at 531-32. In this case, Mr. Ciccone clearly and unequivocally expressed such a desire. (Tr. Vol. VII, p.19, Ls.17-23, p.22, Ls.21-22.)

III.

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

In his Appellant's Brief, Mr. Ciccone argued that his fixed life sentence is excessive in light of the overwhelming nature of the mitigating evidence before the district court, as well as the relatively (for a first degree murder case) non-egregious circumstances of the offense. (Appellant's Brief, pp.38-51.) In response, the State presents a host of reasons why it believes

that Mr. Ciccone's fixed life sentence does not represent an abuse of the district court's sentencing discretion (Respondent's Brief, pp.36-44), most of which are unremarkable and, thus, require no further response. However, a few discreet issues warrant some clarification.

First, the State contends that Mr. Ciccone has never accepted responsibility nor expressed any remorse for the criminality of his actions. (Respondent's Brief, p.37.) This claim is extremely misleading, if not patently false. In fact, as was observed in Mr. Ciccone's Appellant's Brief (pp.47-48), 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 his wife 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." (Presentence Investigation Report (*hereinafter,*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; *see also* 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 . . . .").)

Second, the State claims that "there was evidence at the scene that suggested Ciccone had engaged in a physical confrontation with" his wife immediately before striking her with his car (Respondent's Brief, p.43), that allegation is little more than fanciful speculation on the State's part. The reality is that, at trial, one of the police detectives wanted to testify that, in his *non*-expert opinion, scuff marks and supposed cloth pattern transfers in the dirt were consistent with a

physical altercation having occurred. (*See* Tr. Vol. VIII, p.874, L.9 – p.875, L.25.) However, that highly speculative, non-expert opinion was precluded. (Tr. Vol. VIII, p.874, L.9 – p.875, L.25.) Thus, the trial evidence showed only that there were scuff marks in the dirt.

Finally, with regard to Mr. Ciccone's mental illness, the State asserts that "[t]here is *no evidence* . . . that he in fact has a mental illness or that his suicide attempt was the result of such an illness, as opposed to merely attention-seeking behavior . . . ." (Respondent's Brief, p.43.) However, this line of argument on the State's part is meritless. As is discussed in Mr. Ciccone's Appellant's Brief, the record in this case is littered with references to Mr. Ciccone's mental illness. (*See, e.g.*, Appellant's brief, pp.43-47 (discussing Mr. Ciccone's depression, his suicide attempt, his prolonged stay at Intermountain Hospital, his diagnosis with major depressive disorder, the many medications that were prescribed for him).) Moreover, while the record does not contain an express statement causally linking Mr. Ciccone's mental illness to his suicide attempt, the connection appears quite clear.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Ciccone respectfully requests that his conviction and/or sentence be vacated and either: (a) the case be 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.

DATED this 15th day of June, 2012.

ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of June, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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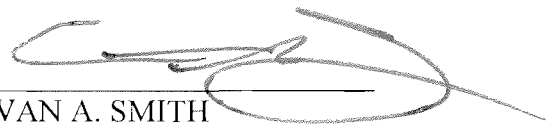

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