3-23-2012

# State v. Moses Appellant's Brief Dckt. 38871

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO, | ) | |
| | ) | |
| Plaintiff-Respondent, | ) | NO. 38871 |
| | ) | |
| v. | ) | |
| | ) | |
| JOSHUA MICHAEL MOSES, | ) | APPELLANT'S BRIEF |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

# BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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### Nature of the Case

Following a jury trial, Joshua Moses was convicted of grand theft by extortion, along with a persistent violator sentencing enhancement. On appeal, he alleges several claims of error occurring at his trial, each of which warrant reversal of this conviction.

First, Mr. Moses asserts that the district court erred when it permitted statements made on a phone call by another individual to be introduced as adoptive admissions against him where the State failed to establish the required foundation prior to their introduction. Second, Mr. Moses asserts that the district court erred when it prevented him from making further inquiry about a juror who had indicated to the court the juror was struggling with fulfilling his obligations during the trial because the juror was suffering from anxiety attacks. Third, Mr. Moses asserts that the district court erred when it refused to permit him to introduce evidence of prior consistent statements made by an unavailable witness at trial, after the State had been permitted to introduce prior inconsistent statements made by the same witness.

In addition, Mr. Moses maintains the prosecutor, Mr. Veharin, committed misconduct during closing argument when he attempted to shift the burden of proof to Mr. Moses. He further asserts the prosecutor committed misconduct, rising to the level of a fundamental error, when the prosecutor misled the jury as to the nature of the immunity agreement between a witness and the State, and appealed to the passions and prejudice of the jurors.

Finally, Mr. Moses submits that the aggregate effect of these errors requires reversal under the cumulative error doctrine.

Statement of the Facts and Course of Proceedings

Joshua Moses was originally charged with robbery, grand theft by extortion, and kidnapping in the first degree. (R., pp.22-23.) The State appears to have initially alleged that Mr. Moses had kidnapped and robbed Joshua Branam and, in the process, extorted money from Mr. Branam's brother-in-law, Walter Ward, as part of the kidnapping scheme. (R., pp.22-23.)

Following a preliminary hearing the district court granted the State's motion to amend the charges and Mr. Moses filed a motion to dismiss. (R., pp.81-82.) The grounds for this motion were that the State had not presented sufficient evidence as to each of the elements of the charged crimes, the State failed to file an information in support of its charges, and procedural defects occurring during the preliminary hearings violated Mr. Moses' right to due process. (R., p.81.)

Thereafter, the State filed an Information alleging only that Mr. Moses committed grand theft by extortion. (R., pp.85-86.) The State further alleged within this same information that Mr. Moses was a persistent violator for purposes of imposition of a sentencing enhancement. (R., pp.85-86.) Both of Mr. Moses' prior alleged felony convictions arose out of Washington State. (R., p.86.)

Based upon Mr. Moses' arguments in his motion to dismiss, the trial court remanded his case back to the magistrate for a new preliminary hearing. (R., pp.101-105, 110.) However, the court denied his request to dismiss the charge outright. (R., pp.101-105, 109.)

At this hearing, Mr. Branam testified upon a grant of immunity for his testimony at this preliminary hearing. (12/10/10 Prelim. Tr., p.1, L.12 – p.6, L.1, p.48, L.18 – p.78, L.23.) Mr. Branam testified he fabricated the kidnapping in an attempt to obtain money

from his brother-in-law. Mr. Ward. (12/10/10 Prelim. Tr., p.50, L.23 – p.51, L.25.) At the time he made the phone call to Mr. Ward claiming to have been kidnapped, Mr. Branam testified that he was in a separate room in the garage of a residence and that nobody else participated in making the phone call with him. (12/10/10 Prelim. Tr., p.52, L.24 – p.53, L.18.)

Mr. Branam further testified the reason for demanding money from his brother-in-law was that the funds in his banking account had been frozen, but he had subsequently paid Mr. Ward back the money that was paid out for the faked kidnapping. (12/10/10 Prelim. Tr., p.53, L.19 – p.54, L.9.) Mr. Branam testified he then asked Mr. Moses to go pick up something from Mr. Ward for him, but he did not tell Mr. Moses what it was that he was supposed to pick up, and Mr. Moses did not know what he was delivering when he dropped the money off for Mr. Branam. (12/10/10 Prelim. Tr., p.54, Ls.23-25, p.55, Ls.14-25.) Mr. Branam specifically testified Mr. Moses did not participate in the phone call Mr. Branam placed to Mr. Ward in which he claimed to have been kidnapped. (12/10/10 Prelim. Tr., p.55, Ls.1-3.)

The district court ultimately found the State had presented sufficient evidence to bind Mr. Moses over for trial. (12/10/10 Prelim. Tr., p.91, L.15 – p.92, L.3.) Following this preliminary hearing, the State filed a new Information alleging Mr. Moses had committed grand theft by extortion, as well as alleging that he was a persistent violator for purposes of imposing a sentencing enhancement. (R., pp.202-203.)

Prior to trial, the State filed a motion in limine seeking to admit statements made during the phone conversation between Mr. Branam to Mr. Ward, ostensibly as an "adoptive admission" by Mr. Moses. (R., pp.208-210.) Despite a lack of proof Mr. Moses was even present at the time the phone call was made, and the fact the only

voice Mr. Ward heard in the background was that of a "Hispanic male,"[1] the State asserted Mr. Branam's statements during this conversation should be imputed to Mr. Moses and should be admitted for proof of the matter asserted as an adoptive admission under I.R.E. 801(d)(2)(B). (R., pp.208-210.)

At the pretrial hearing, Mr. Moses opposed the State's motion. He noted that Mr. Branam was the only person who could testify as to who was present when the phone conversation occurred and who was actually able to hear what Mr. Branam was saying to Mr. Ward. (Tr., p.35, L.6 – p.37, L.5, p.38, L.16 – p.39, L.18.) Mr. Moses also noted that Mr. Branam was not listed as one of the potential witnesses to be called by the State at trial. (Tr., p.35, Ls.18-24.)

In response, the State simply asserted Mr. Moses was a participant in the phone conversation where Mr. Branam made the statements at issue but did not present any evidence to substantiate this representation. (Tr., p.40, Ls.7-12.) The district court then recited its understanding of the facts, including that Mr. Branam, during the phone conversation, handed the phone "to someone **who may be the defendant**," and that, "all this other person does, **whether it's Mr. Moses or somebody else,** is build upon that." (Tr., p.40, Ls.18-21 (emphasis added).)

The court never made any finding Mr. Moses was actually present during the phone conversation, that he had heard Mr. Branam's remarks, or that his conduct evinced acquiescence in the statements Mr. Branam had made. (Tr., p.40, L.13 – p.41, L.17.) Instead, the district court found there was sufficient foundation to admit Mr. Branam's statements as adoptive admissions against Mr. Moses, despite the fact

[1] Mr. Moses is not Hispanic. (Tr., p.372, Ls.6-22.)

that there was no proof Mr. Moses was present when Mr. Branam made the statements at issue. (Tr., p.41, Ls.1-15.)

The State's first witness at trial was Phillip Connell. (Tr., p.165, Ls.7-8.) Mr. Connell was a friend of Mr. Ward's – going back to grade school – and was driving around with Mr. Ward to various ATMs on the day of the supposed kidnapping and alleged extortion. (Tr., p.165, L.13 – p.167, L.6.) After Mr. Connell and Mr. Ward went to various cash machines and collected $2,500, Mr. Connell testified the two eventually travelled to a nearby Walmart parking lot in order to deliver the money. (Tr., p.167, L.17 – p.169, L.21.) According to Mr. Connell's testimony, Mr. Ward then got out of the vehicle and returned a short time later with Mr. Moses. (Tr., p.170, L.11 – p.171, L.14.)

Mr. Moses then allegedly placed a small motor scooter in the back of the vehicle and sat in the passenger seat. (Tr., p.171, L.15 – p.172, L.6.) Mr. Connell testified Mr. Ward then gave the money to Mr. Moses, who put it in his pocket. (Tr., p.172, L.11 – p.173, L.15.) As the three left the Walmart parking lot and began to drive to pick up Mr. Branam, Mr. Connell claimed Mr. Moses said it was "ugly business" and he didn't like the idea of having to kill someone. (Tr., p.173, Ls.16-23.) Mr. Connell also claimed Mr. Moses told him and Mr. Ward that his uncle was the person who had orchestrated the supposed kidnapping based on a drug debt. (Tr., p.177, L.2 – p.178, L.10.) However, Mr. Connell admitted on cross-examination he never put any of Mr. Moses' alleged statements in the police report he filled out that same day. (Tr., p.187, L.19 – p.188, L.4.)

Mr. Moses eventually directed Mr. Ward and Mr. Connell to a trailer park and got out of the vehicle. (Tr., p.175, L.22 – p.176, L.3.) Mr. Connell did not see where Mr. Moses went after getting out of the car and driving away on the scooter. (Tr., p.179,

Ls.4-15.) About ten minutes later, Mr. Branam came out of the same trailer park carrying a plastic bag. (Tr., p.179, L.16 – p.181, L.1.) Mr. Connell testified Mr. Branam had injuries to his face, a black eye, and that he appeared to be shaken, nervous and scared. (Tr., p.180, Ls.9-20.) After Mr. Branam got in the car, Mr. Ward and Mr. Connell drove him to a house and dropped him off. (Tr., p.181, Ls.17-21.) Then Mr. Connell and Mr. Ward located a police officer and filled out a police report. (Tr., p.182, Ls.1-9, p.186, L.23 – p.187, L.8.)

The State also called Mr. Ward to testify at Mr. Moses' trial. (Tr., p.210, Ls.18-20.) Mr. Ward testified that he and Mr. Branam were related by marriage – Mr. Ward is Mr. Branam's brother-in-law. (Tr., p.211, Ls.7-25.) Prior to the alleged extortion, Mr. Ward testified that his wife and Mr. Branam had inherited a fairly substantial sum of money. (Tr., p.212, L.16 – p.213, L.3.) Less than a month later, Mr. Ward received a phone call in the early morning hours from Mr. Branam. (Tr., p.215, L.5 – p.216, L.13.)

Mr. Moses renewed his objection to the State presenting Mr. Branam's alleged statements during this conversation for the truth of the matter asserted under the guise of an adoptive admission under I.R.E. 801. (Tr., p.237, Ls.8-11.) Despite this, the trial court permitted Mr. Ward to testify Mr. Branam had told him during this conversation that he needed $2,500 because he had been kidnapped. (Tr., p.237, Ls.3-19.) Mr. Ward also testified Mr. Branam told him that he could be killed if Mr. Ward didn't provide the money. (Tr., p.237, L.24 – p.238, L.1.)

After the phone conversation, according to Mr. Ward's testimony, he left his house and went to various ATM machines until he was able to pull together the $2,500 demanded as part of the purported kidnapping. (Tr., p.217, Ls.5-21.) He then went to the Walmart in Post Falls to deliver the money. (Tr., p.218, Ls.15-17.) After attempting

to call the number he was instructed to call, Mr. Ward testified the was eventually approached by Mr. Moses in the parking lot. (Tr., p.219, L.11 – p.220, L.7.)

Mr. Ward testified he shook Mr. Moses' hand and then motioned for him to get in the passenger seat of Mr. Ward's vehicle. (Tr., p.220, Ls.11-19.) According to Mr. Ward, he then showed Mr. Moses the money, Mr. Moses took the cash and told Mr. Ward where to go to find Mr. Branam. (Tr., p.220, L.20 – p.221, L.14.)

During this car trip, Mr. Ward claimed that Mr. Moses made several statements. First, he testified Mr. Moses stated that "taking a life wasn't easy and it wasn't something that you ever wanted to do." (Tr., p.233, Ls.5-10.) Although the prosecutor specifically asked that Mr. Ward not provide context for this remark, on cross-examination Mr. Ward admitted this alleged statement by Mr. Moses was in response to Mr. Ward saying that he had killed several people. (Tr., p.233, Ls.5-8, p.297, Ls.9-16.) Mr. Ward also testified Mr. Moses informed him Mr. Branam owed Mr. Moses' uncle the $2,500 for a drug debt and called Mr. Branam an offensive name. (Tr., p.235, L.23 – p.236, L.4.) According to his testimony, Mr. Ward believed Mr. Moses was the other individual who was part of the phone call during which Mr. Branam claimed to have been kidnapped. (Tr., p.236, Ls.12-21.)

Mr. Moses eventually directed Mr. Ward to a trailer park. (Tr., p.225, L.3 – p.226, L.11.) He then got out of Mr. Ward's truck and began pushing his scooter down the road. (Tr., p.226, Ls.12-18.) A short time later, Mr. Ward saw Mr. Branam emerge out of the trailer park, but Mr. Ward did not see which trailer he came out of. (Tr., p.228, Ls.14-22.) Mr. Branam was carrying a water bottle and a "garbage sack." (Tr., p.229, Ls.24-25.) He also had facial injuries and bruising. (Tr., p.229, Ls.14-23.) Mr. Ward testified he thought Mr. Branam looked nervous and thankful to see his brother-in-law.

(Tr., p.229, Ls.3-6.) After getting into Mr. Ward's car, Mr. Branam asked Mr. Ward for a cigarette, and then asked to be dropped off at an intersection. (Tr., p.230, L.13 – p.231, L.25.)

According to Mr. Ward, he then went to pick up his wife and attempt to contact the police. (Tr., p.232, Ls.1-9.) On the way to the sheriff's station, he and his wife saw a police officer, so they pulled into the parking lot where the officer was parked and told the officer what they believed had happened. (Tr., p.232, Ls.9-19.)

Trial proceedings recessed prior to Mr. Moses' cross-examination of Mr. Ward. However, prior to these proceedings resuming the next day, there were several issues relating to the jury that emerged. First, two of the jurors seated in Mr. Moses' trial were in a car accident with each other. (Tr., p.285, Ls.19-22.) One of the jurors was arrested on an outstanding warrant and remained incarcerated the morning of the second day of trial. (Tr., p.286, Ls.17-22.) In response, the district court determined that this juror would be deemed an "alternate" for purposes of the trial proceeding.

But another problem emerged with a third juror who informed the district court that he suffered from anxiety issues and was not sure he could continue to be a juror given "the contentious nature of the proceedings." (Tr., p.285, L.22 – p.287, L.3.) Mr. Moses asked the court for an opportunity to inquire further of this juror. (Tr., p.288, Ls.13-22.) His specific concern was whether, in the throes of an anxiety attack, this juror would be able to hear the testimony and "take in the testimony as it comes in." (Tr., p.288, Ls.13-22.) The State objected to the juror being questioned because the State didn't want the juror to be singled out. (Tr., p.288, L.25 – p.289, L.10.) The district court thereafter denied Mr. Moses' request for further inquiry. (Tr., p.289, Ls.11-16.) Rather than permit Mr. Moses to find out whether these anxiety attacks had

already interfered with, and might continue to interfere with, the juror's ability to hear and focus on the evidence at trial, the district court instead merely "announced to the entire panel that if anybody feels at any time that they do need a break, to please bring that to the court's attention." (Tr., p.289, Ls.11-16.)

Following this ruling, Mr. Ward was recalled to the stand for cross-examination. (Tr., p.291, Ls.10-17.) On cross-examination, Mr. Ward admitted Mr. Moses' alleged statements about it not being an easy thing to kill someone was in response to Mr. Ward's claim he had killed eleven people. (Tr., p.297, Ls.9-16.) He also admitted he had not put any of Mr. Moses' alleged statements in the written report of the alleged kidnapping that he provided for the police. (Tr., p.297, L.19 – p.298, L.6.) When asked about the voice he heard during his conversation with Mr. Branam, Mr. Ward testified that the voice sounded Hispanic. (Tr., p.298, Ls.16-22.) Mr. Ward also testified he had never spoken with or met Mr. Moses prior to the day of the alleged kidnapping and extortion. (Tr., p.298, L.25 – p.299, L.5.)

Regarding Mr. Moses' behavior on that day, Mr. Ward testified the was friendly and conversational in his demeanor. (Tr., p.304, Ls.19-23.) Mr. Moses did not have any observable weapons, did not try to disguise his appearance, and did not try to escape from Walmart even after Mr. Ward handed him the money. (Tr., p.304, L.24 – p.307, L.7.)

Prior to trial, Mr. Branam informed the district court; through counsel, he would be asserting his Fifth Amendment protection against self-incrimination if he were to be called to testify about his involvement in the charges against Mr. Moses. (Tr., p.63, L.11 – p.64, L.23.) This was confirmed by Mr. Branam' counsel following the State's case-in-chief. (Tr., p.346, Ls.5-8.) As a result, the district court found that Mr. Branam was

unavailable and permitted Mr. Moses to read portions of his preliminary hearing testimony into the record under I.R.E. 804(b)(1). (Tr., p.347, L.7 – p.363, L.20.)

Mr. Moses first presented the testimony of his step-father, Larry Ertz, at trial. (Tr., p.371, L.21 – p.372, L.5.) Mr. Ertz had known Mr. Moses since he was 13 years-old. (Tr., p.372, Ls.4-5.) According to Mr. Ertz, Mr. Moses was not Hispanic, did not have a Hispanic accent, and did not live in California or any other location from the time he was thirteen from which he would have developed an accent of that derivation. (Tr., p.372, Ls.6-22, p.373, L.20 – p.374, L.9.)

Next, Mr. Branam's testimony from Mr. Moses' preliminary hearing was read into the record. (Tr., p.396, L.12 – p.424, L.12.) Mr. Branam testified he alone made the phone call to his brother-in-law, Mr. Ward, in which he claimed to have been kidnapped and he did so because he needed money. (Tr., p.397, L.13 – p.400, L.10.) He made this phone call from a room near the garage of the residence that he was in, and although people were coming and going from this room, no one was with him while he made the calls. (Tr., p.401, Ls.10-11, 15-18.)

As part of his plan to get money, Mr. Branam testified he told Mr. Ward he would be hurt if Mr. Ward did not pay. (Tr., p.401, L.25 – p.402, L.4.) Apparently, Mr. Branam then asked Mr. Moses to go pick the money up for him, but did not tell Mr. Moses what exactly it was that he would be picking up. (Tr., p.402, Ls.10-24.) Mr. Branam testified Mr. Moses did not take part in the phone conversation with Mr. Ward. (Tr., p.402, L.25 – p.403, L.2.) Mr. Branam also testified Mr. Moses does not have a Hispanic accent. (Tr., p.413, Ls.15-19.) When Mr. Moses returned with the money, he told Mr. Branam that Mr. Ward was waiting for him outside the trailer park, so Mr. Branam went outside to see Mr. Ward. (Tr., p.417, Ls.3-6.) According to his testimony, Mr. Branam received

the injuries to his face from a fight he was in with Mr. Moses days prior. (Tr., p.417, L.20 – p.419, L.11.)

In response to the introduction of Mr. Branam's prior testimony from the preliminary hearing, the State called two witnesses purportedly as impeachment. The State recalled Mr. Ward to the stand. (Tr., p.429, Ls.22-24.) Mr. Ward testified he was present at this preliminary hearing and before Mr. Branam testified, he gestured to Mr. Ward and mouthed the words, "This is all a lie." (Tr., p.430, L.8 – p.432, L.21.) Mr. Moses objected to the introduction of this testimony as hearsay, but his objection was overruled by the trial court. (Tr., p.432, L.17 – p.433, L.5.)

He also testified as to a conversation that Mr. Ward claimed to have had with Mr. Branam while Mr. Branam was incarcerated. (Tr., p.435, L.6 – p.438, L.3.) Mr. Ward claimed Mr. Branam said he lied in his preliminary hearing testimony because he was afraid of reprisal from Mr. Moses – specifically, that he would be killed. (Tr., p.436, Ls.8-13.) Mr. Ward also testified Mr. Branam had described the circumstances of his kidnapping. (Tr., p.436, L.17 – p.437, L.5.) Once again, Mr. Moses objected on hearsay grounds, but his objection was overruled. (Tr., p.437, Ls.7-18.) According to Mr. Ward's testimony, Mr. Branam claimed Mr. Moses tied him to a chair, repeatedly pistol-whipped him, placed the barrel of a gun in his face, and threatened him and those close to him. (Tr., p.437, L.19 – p.438, L.3.)

The State also presented Officer Scott Harmon, who testified to out-of-court statements allegedly made by Mr. Branam about the alleged kidnapping and extortion. However, the alleged statements were made to a police officer in the course of conducting a criminal investigation. Officer Harmon had already testified in the State's case-in-chief about his role in investigating the alleged kidnapping. (Tr., p.332, L.13 –

p.338, L.22.) In this capacity, he interviewed Mr. Branam. (Tr., p.336, L.23 – p.337, L.6.)

Without any objection from Mr. Moses, the officer testified as to the statements made by Mr. Branam to Officer Harmon during the investigation. (Tr., p.441, L.17 – p.443, L.7.) Mr. Branam told the other he met Mr. Moses through his girlfriend. (Tr., p.442, Ls.8-15.) At some point, according to Mr. Branam's out-of-court statement to the officer, Mr. Moses taped Mr. Branam to a chair and beat him until he gave Mr. Moses $1,500 which, apparently, Mr. Branam happened to be carrying on his person at the time. (Tr., p.442, Ls.15-22.) The officer testified Mr. Branam then claimed to have been pistol-whipped by Mr. Moses prior to leaving to collect the ransom for Mr. Branam's kidnapping. (Tr., p.442, L.23 – p.443, L.7.)

Mr. Moses thereafter sought to introduce the testimony of two witnesses to rehabilitate Mr. Branam's testimony through prior statements made by Mr. Branam that were consistent with his preliminary hearing testimony. (Tr., p.463, Ls.12-17.) Following an offer of proof as to these witnesses' testimony the district court only allowed one of the witnesses to testify on grounds other than admission of a prior consistent statement under I.R.E. 801(d)(1)(B). (Tr., p.463, L.18 – p.470, L.2.)

Christian Beech testified he was present for and overheard a conversation between Mr. Branam and Mr. Moses. (Tr., p.478, L.17 – p.479, L.6.) During this conversation, Mr. Moses asked Mr. Branam whether there was actually any kidnapping. (Tr., p.481, Ls.14-19.) According to Mr. Beech, Mr. Branam denied a kidnapping occurred. (Tr., p.481, Ls.20-21.) In describing the tone of voice and body language of Mr. Moses and Mr. Branam during this conversation, Mr. Beech testified the two

appeared relaxed. (Tr., p.482, Ls.12-17.) Mr. Beech also denied that he was afraid of Mr. Moses or Mr. Branam. (Tr., p.482, Ls.18-24.)

The jury found Mr. Moses guilty of grand theft by extortion and that he was a persistent violator (Tr., p.531, L.25 – p.532, L.5, p.556, Ls.1-11; R., p.299.) Mr. Moses was sentenced to 30 years, with 10 years fixed, and the district court retained jurisdiction over his case.[2] (Tr., p.588, Ls.10-18; R., pp.314-316.) Mr. Moses timely appeals from his judgment of conviction and sentence. (R., p.317.)

[2] As of the writing of this Appellant's Brief, the district court has not yet held a hearing regarding the disposition of Mr. Moses' period of retained jurisdiction, although the register of actions for this case indicates that a hearing is scheduled for April 4, 2012.

## ISSUES

1. Did the district court err when it permitted Mr. Branam's statements to Mr. Ward to be introduced under I.R.E. 801(d)(2)(B) as an adoptive admission by Mr. Moses despite a lack of foundation?

2. Did the district court err when the court refused to permit Mr. Moses to inquire about a juror who expressed reservations about his ability to participate given the anxiety attacks the juror was experiencing?

3. Did the district court err when it refused to permit Mr. Moses to call a witness to the stand to testify about Mr. Branam's prior consistent statements after the court had allowed the State to present Mr. Branam's prior inconsistent statements?

4. Did the prosecutor commit misconduct by shifting the burden of proof to Mr. Moses during closing arguments?

5. Did the prosecutor commit misconduct, rising to the level of a fundamental error, by arguing facts not in evidence, misstating the evidence, and appealing to the passions and prejudices of the jurors?

6. Does the cumulative error doctrine require reversal in this case?

## ARGUMENT

### I.

### The District Court Erred When It Permitted Mr. Branam's Statements To Mr. Ward To Be Introduced Under I.R.E. 801(d)(2)(B) As Adoptive Admissions By Mr. Moses Despite A Lack Of Foundation

#### A. Introduction

Mr. Moses asserts the district court erred when it admitted statements made by Mr. Branam to Mr. Ward during a phone conversation as adoptive admissions attributable to Mr. Moses under I.R.E. 801(d)(2)(B), because the State failed to establish the necessary foundation for admission of such statements under this rule.

#### B. Standard Of Review

"The district court has broad discretion in the admission and exclusion of evidence, and its decision to admit evidence will be reversed only where there has been a clear showing of an abuse of that discretion." *State v. Perry*, 139 Idaho 520, 521 (2003). This Court applies a three-part test with regard to the question of whether the district court abused its discretion. First, this Court examines whether the district court correctly perceived the issue as one of discretion. *Id.* Second, this Court reviews whether the district court acted within the proper bounds of its discretion and consistent with the legal standards attendant to its determination. *Id.* Finally, this Court must determine whether the district court reached its discretionary determination through an exercise of reason. *Id.* Where the defendant objects to the error, the State bears the burden of establishing that the error was harmless beyond a reasonable doubt. *State v. Perry*, 150 Idaho 209, 228 (2010).

C. The District Court Erred When It Permitted Mr. Branam's Statements To Mr. Ward To Be Introduced Under I.R.E. 801(d)(2)(B) As Adoptive Admissions By Mr. Moses Despite A Lack Of Foundation

Mr. Moses asserts the district court erred when it permitted the State, over Mr. Moses' repeated objections, to introduce statements made by Mr. Branam to Mr. Ward as adoptive admissions by Mr. Moses, because the State failed to lay the required foundation for admission of the statements.

There appears to be only one published decision in Idaho addressing the introduction of the statement of another as an "adoptive admission" of the defendant pursuant to I.R.E. 801(d)(2)(B). *See State v. Nguyen*, 122 Idaho 151, 155-156 (Ct. App. 1992). While the *Nguyen* opinion deals largely with a challenge to the defendant's inability to confront the makers of the statements imputed to him as an adoptive admission, the court does provide some guidance as to the foundation required by the proponent of the evidence prior to its admissibility. *Id.*

First and foremost, the party seeking admission of the evidence has the burden to prove sufficient foundation to establish that adoption of the statement was intended. *Nguyen*, 122 Idaho at 156. While the specific burden is not detailed with great specificity in *Nguyen*, it includes proof that "the defendant heard, understood, and acquiesced in the statement." *Id.*

The *Nguyen* opinion is consistent with the holdings of other jurisdictions with regard to the foundational requirements that must be met prior to the admission of such evidence. *See, e.g., U.S. v. McKinney*, 707 F.2d 381, 384 (9th Cir. 1983); *U.S. v. Joshi*, 896 F.2d 1303, 1311-1312 (11th Cir. 1990). At the very least, the party offering the evidence must show that the party to whom the statement is to be imputed: (1) heard the statement; (2) understood what was being said; and (3) the circumstances were

such that it would be reasonable to expect him to respond. *Id.* The burden is also on the State to prove adoption of the statement was intended. *See State v. Cookson*, 657 A.2d 1154, 1157 (Me. 1995). It is the prosecution that bears the burden of proving these facts **prior to** the admission of the evidence because, in requiring this showing, "the likelihood of erroneously admitting the evidence is significantly diminished." *Joshi*, 896 F.2d at 1312.

At trial, the district court permitted the State to introduce Mr. Branam's statements during a phone call to Mr. Ward as "adoptive admissions" by Mr. Moses. (Tr., p.40, L.13 – p.41, L.8.) These statements included claims that Mr. Branam had been kidnapped and would be killed if Mr. Ward did not provide $2,500. (Tr., p.237, L.3 – p.238, L.1.) The State did not attempt to introduce the transcript from any of the preliminary hearings into evidence in support of its request, nor did the State present any testimony to the district court.[3]

The sole "evidence" the State presented was the prosecutor's mere assertion that Mr. Moses was also talking to Mr. Ward during the phone conversation. (Tr., p.37, L.16 – p.38, L.2.) However, the arguments of the parties are not evidence in criminal proceedings. *See, e.g., State v. Fondren*, 24 Idaho 663 (1913). Because the State presented no evidence that Mr. Moses was actually present when Mr. Branam made the statements to Mr. Ward, no evidence that he understood what Mr. Branam was saying, and no evidence Mr. Moses intended to adopt these remarks as his own, the State did

[3] To the extent the preliminary hearing would have had any bearing on this issue, Mr. Branam testified Mr. Moses was not present for, and did not participate in, the phone call placed to Mr. Ward in which he falsely claimed to have been kidnapped. (12/10/10 Prelim. Tr., p.55, Ls.1-3.)

not meet its evidentiary burden to admit these statements as an adoptive admission against Mr. Moses.

Moreover, the district court's findings in support of admitting these statements as adoptive admissions demonstrate there was insufficient foundation for their admission. The court found during the phone conversation, Mr. Branam handed the phone "to someone **who may be the defendant**," and "all this other person does, **whether it's Mr. Moses or somebody else,** is build upon that." (Tr., p.40, Ls.18-21 (emphasis added).) By the court's own findings, the State merely demonstrated someone, who **may be** Mr. Moses, was present at the time of the phone call, and that built upon Mr. Branam's statements.[4] There is no finding by the court that this person was actually or even likely Mr. Moses who was present, who heard and understood the statements, and who assented to these remarks.

Thus, the State failed to establish the necessary foundation to admit Mr. Branam's statements as though they were Mr. Moses' own under I.R.E. 801(d)(2)(B). Accordingly, the district court erred when it permitted the State to introduce this evidence at trial as an adoptive admission on the part of Mr. Moses.

[4] This mirrors the State's own acknowledgement in closing arguments about the evidence that tended to show Mr. Moses was not present for and was not a participant in this phone call. (Tr., p.506, L.8 – p.508, L.18.)

II.

## The District Court Erred When It Refused To Permit Mr. Moses To Inquire About A Juror Who Expressed Reservations About His Ability To Participate Given The Anxiety Attacks The Juror Was Experiencing

### A. Introduction

The district court in this case prevented Mr. Moses from making any inquiry of a juror when that juror informed the court he did not feel he could continue in the case due anxiety attacks. Because Mr. Moses had a constitutional right to have a competent jury hear and receive the trial evidence presented, the district court erred in preventing him from ensuring this juror was competent to proceed.

### B. Standard Of Review

Constitutional questions are questions of pure law, and therefore are reviewed *de novo* by this Court. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 67 (2001).

### C. The District Court Erred When It Refused To Permit Mr. Moses To Inquire About A Juror Who Expressed Reservations About His Ability To Participate Given The Anxiety Attacks The Juror Was Experiencing

Prior to the second day of trial, one of the jurors brought to the court's attention concerns that he was having anxiety issues and "was not sure he could continue" to sit as a juror on the case. (Tr., p.285, Ls.22-24.) The juror's anxiety attacks were apparently being spurred by the contentious nature of the trial proceedings. (Tr., p.286, L.23 – p.287, L.3.) Despite Mr. Moses' concerns that these anxiety issues may have interfered, and may continue to interfere, with the juror's ability to hear and pay attention to the evidence at trial, the district court erroneously refused to permit Mr. Moses to make any inquiry of the juror as to the impact of the juror's condition on his ability to receive the evidence. (Tr., p.289, Ls.11-16.)

The right to trial by competent jurors is a critical right that was recognized under Idaho law even prior to statehood. While a trial court may place some limitations on the rights of the parties to question a juror as to competence, "the right of a party to know whether a juror is qualified and competent is a substantial right that cannot, under our law, be denied." *United States v. Alexander*, 2 Idaho 354, 17 P. 746, 749 (1888). The right to a trial by competent, qualified jurors is protected both by the Sixth Amendment and by the protections afforded by constitutional due process. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 726 (1992); *Peters v. Kiff*, 407 U.S. 493, 501 (1972); *Jordan v. Com. of Massachusetts*, 225 U.S. 167 (1912). Thus, a defendant has a due process right to a jury comprised of people who are mentally and physically capable of hearing and receiving the evidence at trial. *Id.*

Included within this Sixth Amendment right is the opportunity to adequately question a juror regarding his or her capacity or qualifications to serve as a juror. As was noted by the U.S. Supreme Court in *Morgan*, "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan*, 504 U.S. at 729. While Mr. Moses did have the opportunity to question the potential jurors prior to trial, this particular juror's physical and/or mental reaction to the trial proceedings did not become apparent until he was already seated and tasked with hearing and evaluating the evidence in this case. Mr. Moses had a constitutional right to adequately inquire of this juror in order to ensure his Sixth Amendment rights were protected.[5]

[5] Mr. Moses also asserts that, even if the denial of his request to ask any questions of this juror did not rise to the level of a constitutional violation, it was at the very least an abuse of the court's discretion in light the constitutional issues at stake for Mr. Moses.

Here, the district court prevented Mr. Moses from questioning the juror about the nature, frequency, effects, and extent of the panic attacks he was suffering during the trial. By the juror's own account, he was "not sure he could continue" as a juror in Mr. Moses' case. The court's refusal to allow Mr. Moses the opportunity to ensure the juror was competent was error.

III.

## The District Court Erred When It Refused To Permit Mr. Moses To Call A Witness To The Stand To Testify About Mr. Branam's Prior Consistent Statements After The Court Had Allowed The State To Present Mr. Branam's Prior Inconsistent Statements

### A. Introduction

The district court in this case erroneously excluded evidence of Mr. Branam's prior statements that were consistent with his preliminary hearing testimony, and which Mr. Moses sought to admit after the State was allowed to introduce Mr. Branam's prior inconsistent statements. In doing so, the court failed to correctly perceive the relevance of Mr. Moses' requested evidence, failed to act consistently with applicable law, and failed to act in accordance with reason.

### B. Standard Of Review

A trial court's decision whether to admit or exclude evidence is reviewed by this Court for an abuse of discretion. *Perry*, 139 Idaho at 521.

C. The District Court Erred When It Refused To Permit Mr. Moses To Call A Witness To The Stand To Testify About Mr. Branam's Prior Consistent Statements After The Court Had Allowed The State To Present Mr. Branam's Prior Inconsistent Statements

In this case, Mr. Moses sought present the testimony of two witnesses to introduce prior statements made by Mr. Branam that were consistent with his preliminary hearing testimony. (Tr., p.463, Ls.12-17.) Specifically, he asked to present testimony from Mr. Beech and Ed Yankey regarding Mr. Branam's statements that conformed to the substance of his preliminary hearing testimony. (Tr., p.467, L.18 – p.468, L.16.) Mr. Moses asked to present these witnesses in order to rebut the State's evidence of prior inconsistent statements that had been previously allowed by the trial court. (Tr., p.463, Ls.5-11.) While the trial court permitted one of these witnesses to testify – Mr. Beech – the court excluded the other witness and permitted Mr. Beech's testimony on grounds other than that argued by Mr. Moses. (Tr., p.469, L.12 – p.470, L.2.) Because the testimony of both witnesses was relevant and admissible pursuant to I.R.E. 801(d)(1)(B), Mr. Moses asserts that this was error.

Under I.R.E. 801(d)(1)(B), a statement is not hearsay if it is "consistent with [the] declarant's testimony and is offered to rebut an express or implied charge against [the] declarant of recent fabrication or improper influence or motive." I.R.E. 801(d)(1)(B).[6] This rule is an elaboration of the well-established principle of law that, "upon introduction of evidence which seemingly impeaches or contradicts a witness's

[6] While the provisions of this rule generally require that the declarant testify at trial and be subject to cross-examination, this requirement is obviated where a hearsay statement has been admitted into evidence. *See* I.R.E. 806. Under the provisions of I.R.E. 806, in such circumstances, the credibility of the declarant may be attacked **or supported**, "by any evidence which would be admissible for those purposes if declarant had testified as a witness." I.R.E. 806 (emphasis added).

testimony, the witness must be permitted a reasonable opportunity to explain the impeaching evidence." *Openshaw v. Adams*, 92 Idaho 488, 492 (1968). Thus, where the opposing party has raised the specter that testimony introduced at trial was the product of fabrication, admission of a prior statement consistent with that testimony is appropriate pursuant to I.R.E. 801(d)(1)(B) and does not constitute hearsay. *State v. Howard*, 135 Idaho 727, 732 (2001).

By the State's own characterization, it had offered two witnesses to present prior inconsistent statements allegedly made by Mr. Branam for the purpose of attacking his credibility and implying that he had a motive to fabricate his preliminary hearing testimony. (Tr., p.429, L.22 – p.443, L.7.) In addition, Mr. Moses specifically argued the admissibility of this testimony as a prior consistent statement admissible under I.R.E. 801(d)(1). (Tr., p.465, Ls.8-20.) Despite this, the district court denied Mr. Moses' request to admit the testimony of Mr. Yankey under an apparent misapprehension of the function of evidence of a prior consistent statement pursuant to this rule.

The district court was under the apparent and erroneous belief that, because it was Mr. Ward who presented the testimony of Mr. Branam's prior inconsistent statements, any prior consistent statements presented to rebut this evidence would be directed at Mr. Ward's credibility, rather than Mr. Branam's. (Tr., p.464, Ls.13-20.) In doing so, the court misapprehended the relevance of this evidence and its admissibility at trial. Accordingly, the district court abused its discretion in excluding Mr. Yankey's testimony.

Moreover, the presentation of the testimony of Mr. Yankey would not have been merely cumulative of that provided by Mr. Beech, as the circumstances surrounding Mr. Branam's statement to Mr. Yankey had independent and substantial probative value

for purposes of rebutting the State's claim of fabrication. According to Mr. Moses' offer of proof, Mr. Yankey would testify he was housed in the same area as Mr. Branam when he was incarcerated, and he had a conversation with Mr. Branam. (Tr., p.468, Ls.21-23.) During part of this conversation, Mr. Branam asked whether Mr. Yankey had seen Mr. Moses in court. (Tr., p.468, Ls.23-24.) When asked by Mr. Yankey why Mr. Branam would be concerned about Mr. Moses' case, Mr. Branam responded that Mr. Moses "was in jail because of him, and he shouldn't be in jail because Josh Moses didn't do anything wrong." (Tr., p.469, Ls.3-7.)

Given the circumstances detailed in Mr. Moses' offer of proof as to Mr. Yankey's testimony, Mr. Branam's statements were provided in a context where he was not facing any particular threat from Mr. Yankey or Mr. Moses. Where the circumstances surrounding the making of the prior consistent statement demonstrate a greater likelihood of truth independent of any alleged prompting or influence, such statements have substantial probative value. *See, e.g., State v. McAway*, 127 Idaho 54, 59 (1995). Accordingly, the exclusion of this evidence by the trial court cannot be said to have been harmless beyond a reasonable doubt.

## IV.

## The Prosecutor Committed Misconduct, And Violated Mr. Moses' Constitutional Right To Due Process, By Shifting The Burden Of Proof To Mr. Moses During Closing Arguments

### A. Introduction

Mr. Moses asserts that the prosecutor committed prosecutorial misconduct when Mr. Verharen presented closing argument to the jury that impermissibly shifted the burden of proof to Mr. Moses.

B. Standard Of Review

For alleged acts of prosecutorial misconduct followed by a contemporaneous objection, this Court must make two determinations: first, whether misconduct occurred; and, second, whether misconduct was harmless. *Perry*, 150 Idaho at 220. The defendant bears the initial burden to show that misconduct occurred. However, the State bears the burden of showing to the reviewing court, beyond a reasonable doubt, that the misconduct did not contribute to the jury's verdict. *Id.* at 228.

C. The Prosecutor Committed By Misconduct, And Violated Mr. Moses' Constitutional Right To Due Process, By Shifting The Burden Of Proof To Mr. Moses During Closing Arguments

During closing argument, the prosecutor made the following statement to the jury regarding to the court's instructions about the State's burden to prove intent beyond a reasonable doubt, "If you think about that instruction, it may lead you down the path of **what is the evidence that establishes that [Mr. Moses] was ignorant of what was really going on?**" (Tr., p.512, Ls.8-11 (emphasis added).) Following this remark, Mr. Moses objected and asserted this argument improperly sought to shift the burden of proof from the State to Mr. Moses. (Tr., p.512, Ls.18-22.) This objection was overruled by the court. (Tr., p.512, L.23.) Mr. Verharen then continued:

> **The evidence that the defense is relying on to support that instruction that he was ignorant of what was really happening is the testimony of Mr. Branam**. Mr. Branam is not all that credible. Mr. Branam has some issues. Mr. Branam is at least in a position that's hard to attach any weight to what he says in terms of his testimony because of his drug use, because of his motivation, **but that's what the defense is relying on and nothing else**.

(Tr., p.512, L.24 – p.513, L.7 (emphasis added).)

Mr. Moses asserts because this argument improperly sought to shift the burden to Mr. Moses to disprove criminal intent, an element of the charged offense, it constituted prosecutorial misconduct.

"The requirement that the State prove every element of a crime beyond a reasonable doubt is grounded in the constitutional guarantee of due process." *State v. Felder*, 150 Idaho 269, 274 (Ct. App. 2010). Accordingly, it is misconduct for a prosecutor to distort or diminish the State's burden to prove the defendant's guilt beyond a reasonable doubt. *Id.*; *State v. Erickson*, 148 Idaho 679, 685-686 (Ct. App. 2010).

Here, the prosecutor first suggested to the jury that they might examine the issue of whether Mr. Moses had the requisite criminal intent from the perspective of whether the evidence **disproved** his intent, rather than whether the evidence proved this fact. This was a fundamental distortion of the presumption of innocence that is essential to the relative burdens of proof in a criminal trial. *Erickson*, 148 Idaho at 685. Upon Mr. Moses' objection being overruled, the State continued its improper argument with repeated statements about the evidence Mr. Moses was "relying on" in order to establish his defense. This language implied to the jury Mr. Moses bore some evidentiary burden of disproving the intent element of the State's charge in this case. Because the prosecutor's argument erroneously intimated to the jury Mr. Moses had the evidentiary burden to disprove criminal intent, this argument was improper and constituted misconduct.

V.

## The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, By Arguing Facts Not In Evidence, Misstating The Evidence, And Appealing To The Passions And Prejudices Of The Jurors

### A. Introduction

Mr. Moses asserts that the prosecutor in committed misconduct rising to the level of a fundamental error when he misinformed the jury regarding the nature of the immunity granted to Mr. Branam for his preliminary hearing testimony, and appealed to the passions and prejudices of the jury.

### B. Standard Of Review

In cases where the defendant fails to object to prosecutorial misconduct at trial, this Court will review the alleged error for whether the misconduct alleged rises to the level of a fundamental error. *State v. Perry*, 150 Idaho 209, 226 (2010). In cases of unobjected to error, this Court applies a three-step process of review. First, the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated. *Id.* Second, the error must be clear and obvious from the record without the need for additional information not contained within the record on appeal. *Id.* Finally, the defendant must show the error affected the defendant's substantial rights. *Id.* As to this last prong, the defendant must show a reasonable possibility that the error complained of affected the outcome of the trial.

C. The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, By Arguing Facts Not In Evidence, Misstating The Evidence, And Appealing To The Passions And Prejudices Of The Jurors

"Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. The prosecutor in this case attempted to induce the jury to render a verdict on factors other than the evidence introduced at trial in three ways, each of which deprived Mr. Moses of his constitutional right to a fair trial. First, Mr. Verharen referred to facts never placed into evidence i.e., the fact that there existed an immunity agreement between Mr. Branam and the State regarding his testimony at the preliminary hearing in Mr. Moses' case. Second, the prosecutor misled to the jury as to the terms of that agreement by telling the jury Mr. Branam faced absolutely no penalty for anything he might say at the preliminary hearing when, in fact, the immunity agreement set forth numerous potential penalties should Mr. Branam testify falsely. Finally, the prosecutor used inflammatory language regarding Mr. Branam's preliminary hearing testimony and used this appeal to the jurors' emotions as a vehicle to seek to induce them to disregard this important evidence at trial.

The prosecutor's closing argument violated Mr. Moses' right to due process and constituted fundamental error, because the prosecutor affirmatively and egregiously misled the jury as to the actual terms of the immunity granted to Mr. Branam. Mr. Verharen told the jury in closing arguments:

> You'll recall from the testimony that was read to you that Mr. Branam can't be testified -- can't be prosecuted for what he said in that statement that was read to you. He was given immunity. **Basically, it means that whatever he says he can't get in trouble for, so whatever he says**

> **might as well benefit himself**. What benefits him is staying in [Mr. Moses'] good graces.

(Tr., p.527, Ls.3-9 (emphasis added).)

This, stated bluntly, was a lie. The **actual** immunity agreement entered into between the State and Mr. Branam provided severe sanctions for false testimony. (R., p.31.) Specifically, this agreement provided that Mr. Branam, "**may nevertheless be prosecuted or subjected to penalty for perjury, false swearing, or contempt committed in testifying at the aforementioned preliminary hearing**." (R., p.31 (emphasis added).) The prosecutor deliberately led the jurors to believe Mr. Branam could testify to anything at all, including false or perjured testimony, with no recriminations when he knew the opposite was true. This egregious misstatement, calculated to mislead the jury as to the nature of the circumstances under which Mr. Branam testified, rose to the level of a violation of Mr. Moses' right to due process. *See also State v. Beebe*, 145 Idaho 570 (Ct. App. 2007) (finding prosecutorial misconduct rising to the level of a fundamental error where the prosecutor misstated the evidence, misstated the law, and appealed to the passions and prejudice of the jury).

Additionally, the prosecutor committed misconduct, rising to the level of a fundamental error, when he used inflammatory language intended to incite the passions and prejudices of the jury in an attempt to persuade the jurors to disregard vital evidence. It is so well-established as to be axiomatic that it is improper for a prosecutor to appeal to the passions and prejudice of the jury, or to appeal to the emotions of the jurors, in seeking conviction. *See, e.g., Perry*, 150 Idaho at 227; *State v. Johnson*, 149 Idaho 259, 266 (2010); *State v. Gross*, 146 Idaho 15, 20-21 (Ct. App. 2008); *Beebe*, 145 Idaho at 575; *State v. Baruth*, 107 Idaho 651, 656-657 (Ct. App. 1984).

With regard to Mr. Branam's preliminary hearing testimony that was read to the jury, Mr. Verharen argued, "**You can take that transcript, and you can put it in the garbage**. You don't have to rely on anything that that man said, nor should you." (Tr., p.529, Ls.21-23 (emphasis added).) In referring to Mr. Branam's testimony as "garbage," particularly on the heels of misleading the jury as to the circumstances surrounding this testimony, the prosecutor was making an improper appeal to the passions and prejudice of the jury. This, too, violated Mr. Moses' due process rights to fairness during his trial proceedings.

These due process violations are apparent from the face of the record and are clear violations of well-established law. Moreover, there is a reasonable probability this misconduct affected the outcome of Mr. Moses' trial. Most of the exculpatory evidence in Mr. Moses' trial came from Mr. Branam's preliminary hearing testimony that was read into the record. This testimony clearly reflected that Mr. Moses had no prior knowledge of, or intentional participation in, any plan to extort money from Mr. Ward. Rather, it was only Mr. Branam who orchestrated this ruse in order to obtain money for himself. By urging the jury to disregard this testimony through an appeal to the jurors' emotions, and misleading the jury as to the terms of the immunity agreement, the State took improper steps to discredit the most crucial evidence to Mr. Moses at trial. Accordingly, there is every reason to believe the prosecutor's improper argument affected the outcome in this case.

VI.

The Cumulative Error Doctrine Requires Reversal In This Case

Mr. Moses asserts each of the errors that occurred in his trial, standing alone, warrant reversal of his conviction for grand theft by extortion. However, even if the individual effect of these errors did not require reversal, Mr. Moses asserts the aggregate effect of the multiple errors occurring in his trial demonstrate this Court should reverse his conviction.

"Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *Perry*, 150 Idaho at 230. In this case, there were multiple errors occurring at trial, each one impacting on Mr. Moses' right to a fair trial. Given the existence of so many trial errors, that each had a substantial impact on Mr. Moses' due process right to fairness in his criminal proceedings, coupled with the overall weakness of the State's evidence, Mr. Moses asserts the cumulative effect of the errors in his case require reversal of his conviction.

CONCLUSION

Mr. Moses respectfully requests that this Court vacate his judgment of conviction and sentence, and remand this case for further proceedings.

DATED this 23rd day of March, 2012.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of March, 2012, 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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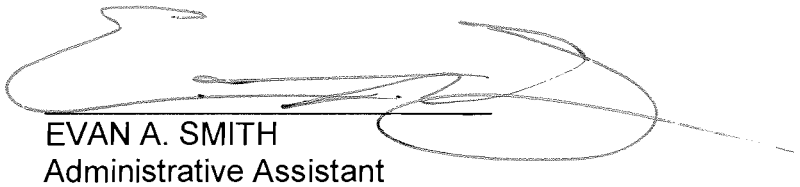

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