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## State v. Baker Respondent's Brief Dckt. 39877

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	NO. 39877
Plaintiff-Appellant,	)	
	)	
VS.	)	
	)	
CAREY MITCHELL BAKER,	)	
	)	
Defendant-Respondent.	)	
_____	)	

**REPLY BRIEF OF RESPONDENT**

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

**HONORABLE BARRY E. WATSON, Magistrate Judge  
HONORABLE CARL B. KERRICK, District Judge**

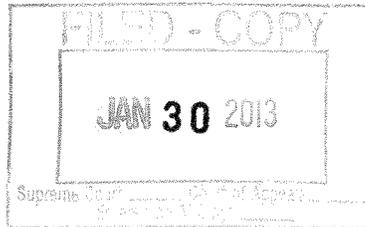
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## Statement of the Case

On March 4, 2009, an Ada County magistrate entered a civil protection order prohibiting Mr. Baker from having contact with his estranged wife, Robyn Shea, for a period of one year. (Tr. 84-86; *See also*, Plaintiff's Jury Trial Exhibit 1<sup>1</sup>) Between May 26, 2009 and September 17, 2009, Mr. Baker telephoned Ms. Shea on multiple occasions. (Tr. 46:1-5). During all the calls made, Mr. Baker was in Ada County. (Tr. 49:22).

On September 10, 2009, the Boise City Attorney's Office filed a complaint charging Mr. Baker for a violation of the no contact order by leaving a voice message on Ms. Shea's phone on August 24, 2009. (Tr. 31-32; *see also*, Plaintiff's Exhibit 2<sup>2</sup>). On December 8, 2009, the Coeur d'Alene City Attorney's Office filed a complaint charging Mr. Baker with twelve counts of violating the Ada County protection order for messages left on Ms. Shea's phone, including the alleged violation that occurred on August 24, 2009. (Tr. 44:11-16).

On February 17, 2010 at a hearing in Ada County with Judge MacGregor Irby, Mr. Baker pleads guilty to a violation of no contact order with Robyn Shea as the protected person, with the date of this occurring on August 24<sup>th</sup>, 2009 telephone message. (Tr. 23). During that time, Mr. Baker's attorney states on the record there is a plea agreement with the State, and the State agrees to pursue no further charges regarding no contact order violations from the past to today's date. (Tr. 23: 12-20; *see also*, Defendant's Exhibit A<sup>3</sup>) This plea agreement did not have any specific agreements with regard to sentencing recommendations. (Tr. 23:21-22). During the sentencing of Mr. Baker, the Ada County prosecutor plays a CD of voicemail messages left by Mr. Baker on Robyn Shea's voicemail. (Tr. 23:24-25; *see also*, Defendant's Exhibit B<sup>4</sup>). The judge listens to the majority of the messages, the same exact messages

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<sup>1</sup> Ms. Shea's protection order against Mr. Baker.

<sup>2</sup> Plaintiff's Exhibit 2 cited herein was admitted at the October 8, 2010 hearing on Mr. Baker's motion to dismiss. Exhibit 2 relates to the Ada County Police Report Complaint.

<sup>3</sup> Exhibit A cited herein was admitted at the October 8, 2010 hearing on Mr. Baker's motion to dismiss. Exhibit A relates to the Defendant's hearing from February 17, 2010 with Judge Irby.

<sup>4</sup> Exhibit B cited herein was admitted at the October 8, 2010 hearing on Mr. Baker's motion to dismiss. It is a CD of 12 voice messages left by Mr. Baker to Ms. Shea.

Kootenai County's charges are based on, and sentenced Mr. Baker according to the understanding there would be no further prosecutions with Mr. Baker. (Tr. 24).

Mr. Baker was unaware of the Kootenai County charges when he and the Boise City Attorney's Office reached a plea agreement in the Ada County case. (Tr. 43:16 – 44:22). However, it appears Ada County prosecutors were aware of the Kootenai County charges by January 2010 based on the January 11, 2010 letter from Boise City Attorney's Office requesting information from Coeur d'Alene City Attorney's Office regarding protection order violations committed by Mr. Baker and the October 2, 2009 police report indicating Coeur d'Alene contacted Boise City Attorney's Office. (*See*, Plaintiff's Exhibit 1<sup>5</sup>). However, no reference to the pending Kootenai County charges were made by the prosecutor at the February 17, 2010 hearing where Mr. Baker cemented his plea agreement by pleading guilty to the no contact violation on August 24, 2009. (*See*, Defendant's Exhibit A).

On April 2, 2010, Mr. Baker was arrested on the Kootenai County charges origination from the Ada County protection order. (Tr. 44: 21-23). Mr. Baker subsequently moved to dismiss the Kootenai County complaint because Kootenai County was barred from any protection order violations alleged to have occurred before February 17, 2010 by the Ada County plea agreement. (Tr. 43-47). The magistrate court dismissed Kootenai County's Count VI based on double jeopardy. (Tr. 45:12-22). The court denied Mr. Baker's motion to dismiss the remaining eleven counts because the Ada County plea agreement was not binding on the Coeur d'Alene City Attorney's Office. (Tr. 45:24 - 47:25).

On February 1, 2011, Mr. Baker was found guilty of all eleven remaining counts in the Kootenai County case. (Tr. 180). As a result of Kootenai County not honoring the Ada County plea bargain, Mr. Baker has had to make several trips to Coeur d'Alene to defend himself, and has had problems with fulfilling the terms of his prior sentence of probation because he has been coming up to Coeur d'Alene. (Sentencing Hr'g Tr. 3:15-22). Furthermore, Mr. Baker and his attorney told the court at his sentencing

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<sup>5</sup> Plaintiff's Exhibit 1 cited herein was admitted at the October 8, 2010 hearing on Mr. Baker's motion to dismiss. Exhibit 1 relates to the letter from Boise requesting information from the Coeur d'Alene City Attorney's Office.

he is actively pursuing treatment on his own and goes to treatment two to three times a week, pays \$840.00 a month for child support, and works for the City of Boise. (Sentencing Hr'g Tr. 4:24-25; 5:1-7).

After the sentencing, Mr. Baker subsequently appealed to the district court arguing the magistrate erred in denying his motion to dismiss all the Kootenai County charges originating from the Ada County protection order. The district court held Mr. Baker's plea agreement barred Kootenai County from prosecuting the eleven protection order violations Mr. Baker committed between May and September 2009. (*See*, District Court's Appellate Opinion and Order No: CR 2009-24916).

### **Standard of Review**

The standard of review for plea agreements in this case is twofold. When the determination that a plea agreement is ambiguous, it is a question of law. *State v. Allen*, 143 Idaho 267, 272, 141 P.3d 1136, 1141 (Ct.App.2006). However, the interpretation of an ambiguous term is a question of fact. *Id.* Factual determinations made by a court will not be set aside on review unless they are clearly erroneous. *State v. Peterson*, 148 Idaho 593, 595, 226 P.3d 535 (2010). An appellate court exercises free review over questions of law. *Powell v. Sellers*, 130 Idaho 122, 125, 937 P.2d 434 (Ct.App. 1997). Furthermore, whether a "plea agreement has been breached is a question of law to be reviewed by this [c]ourt *de novo*, in accordance with contract law standards." *State v. Jafek*, 141 Idaho 71, 73, 106 P.3d 397 (2005) (citing *United States v. Bunner*, 134 F.3d 1000, 1003 (10th Cir. 1998)).

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision to determine whether it correctly decided the issues presented to it on appeal." *Borely v. Smith*, 149 Idaho 171, 176, 233 P.3d 103 (2010) (citing *Idaho Dept. of Health and Welfare v. Doe*, 148 Idaho 124, 126, 219 P.3d 448 (2009)).

## Issue Presented on Appeal

Whether the district court erred in concluding that the prosecution of Mr. Baker in Kootenai County was barred by the Ada County plea agreement?

### Argument

#### **The District Court did not Error in Concluding that the Prosecution of Baker in Kootenai County was Barred by the Ada County Plea Agreement.**

##### A. Introduction

The district court acknowledged Idaho case law has not addressed whether one prosecutor in the State of Idaho can bind other prosecutors of different counties in the state by entering into a plea agreement with a defendant. The court also found there is split authority on this issue. Therefore, the district rested its decision in finding Mr. Baker's convictions should be vacated under the following rational<sup>6</sup>:

1. The language of the plea agreement is ambiguous, as to whether the party, "State of Idaho" is limited only to the prosecutor who entered into the plea agreement. Thus, the district court held the appropriate remedy for Mr. Baker requires specific performance of the plea agreement when construed in a light most favorable to Mr. Baker.
2. Venue for prosecution of the twelve violations of the no contact order was appropriate in either Ada County or Kootenai County because the offenses were committed by the use of a telephone and occur both in the county where the phone call originated, as well as the county where the phone call was received.
3. The power of the prosecuting attorney is not strictly limited to county boundary lines or judicial districts, based on I.C. §19-504, I.C. §31-2604, and the term venue being used rather than jurisdiction in Chapter 3 of title 19 of the Idaho Code.

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<sup>6</sup> See, District Court's Appellate Opinion and Order No: CR 2009-24916

4. Last, there is no evidence from the record Mr. Baker was apprised that the Boise City prosecutor acts in a limited fashion, and would not be able to bind all prosecutors in the State of Idaho to its plea agreement.

Based on the court's rational, the district court is correct when it ordered Mr. Baker's eleven protection order violations vacated, because the Ada County plea agreement barred prosecution of Mr. Baker in Kootenai County.

- B. The Boise City Prosecutor's Office barred the Coeur d'Alene City Attorney's Office from pursuing additional charges against Mr. Baker because the plea agreement requires specific performance, Ada County had venue over the twelve charges, Ada County had actual and apparent authority to bind Kootenai County from prosecution, and fundamental fairness requires adherence to Mr. Baker's plea agreement.

- a. *The language of the plea agreement is ambiguous, and the appropriate remedy is specific performance.*

Plea agreements are "contractual in nature" and "must be measured by contract law standards." *State v. Cope*, 142 Idaho 492, 495, 129 P.3d 1241 (2006). The burden of proving the existence of a contract, "including the existence of a mutual intention," is "on the party asserting it." *Peterson*, 148 Idaho at 595 (quoting *Johnson v. Nasi*, 309 P.2d 380, 382 (Wash. 1957)). If the state breaches the plea agreement, "the defendant is constitutionally entitled to relief." *State v. Lampien*, 148 Idaho 367, 376, 223 P.3d 750 (2009) (citing *Jafek*, 141 Idaho at 74).

Additionally, if the agreement is ambiguous, the government "ordinarily must bear responsibility for any lack of clarity." *Peterson*, 148 Idaho at 596. "[A]mbiguities are construed in favor of the defendant. Focusing on the *defendant's* reasonable understanding also reflects the proper constitutional focus on what induced the *defendant* to plead guilty." *State v. Nienburg*, 153 Idaho 491, 283 P.3d 808 (Ct.App. 2012) (citing *Peterson*, 148 Idaho at 596) (quoting *U.S. v. De la Fuente*, 8 F.3d 1333, 1337 n. 7 (9th Cir. 1993)).

Here, the State should be bound by the plea deal in Ada County because Mr. Baker reasonably believed the plea deal in Ada County was binding on all prosecutors in Idaho. The plea agreement on the audio recording in the Ada County case articulated, Mr. Baker would be entering a plea of guilty in return for the State's agreement no further charges would be pursued against him for prior violations of the No Contact Order. Mr. Baker understood the agreement to be binding on all Idaho prosecutors because the term "State" was used. The term "State" is vague as it could refer to the prosecutors in Ada County or all prosecutors in the state of Idaho. Therefore, since the plea agreement is ambiguous, the ambiguity should be resolved in Mr. Baker's favor and the term "State" applies to all prosecutors in the state of Idaho. Just as vague wording must be avoided in plea agreements, the government must not mislead or lie to a defendant in order to get a guilty plea. *See, De la Fuente*, 8 F.3d 1333.

Here, Mr. Baker was led to believe by the Ada County prosecutor that his plea to one count of violation of the protection order would put an end to his prosecution for the twelve voicemail messages left in violation of the Ada County protection order. The Boise City Attorney's Office knew of the charges filed in Kootenai County by the Coeur d'Alene Prosecutor's Office. The Ada County prosecutors not only failed to inform him of the charges based on the same twelve recordings also provided to Coeur d'Alene, but used as a basis for sentencing the recording of these twelve voicemails for the Ada County judge. The Ada County judge listened to the majority of the twelve phone messages at the sentencing hearing and determined Mr. Baker's sentence based on the court's impression Mr. Baker would not be prosecuted for the eleven additional charges. Therefore, Mr. Baker was reasonable in his belief Ada County had the authority to bind other prosecutors in the state. Thus, as a remedy, the court

may order specific performance of the agreement or may permit the defendant to withdraw the guilty plea. *State v. Wills*, 140 Idaho 773, 102 P.3d 380 (Ct.App. 2004).

***b. Ada County had venue over Mr. Baker's no contact violations and its plea agreement barred Kootenai County from charging Mr. Baker with no contact violations prior to February 17, 2010.***

The Idaho Constitution created in Article V. sec. 2 a unified court system. Venue is a matter of convenience and economy. Essentially, the court system acts as one in dealing with a particular public offense and to do contrary would deprive a prosecutor of his power to plea bargain in any case where the offense has proper venue in more than one county. Prosecutors have the power to plea bargain by reducing penalties and not pursuing certain charges. *See, State v. Puetz*, 129 Idaho 842, 934 P.2d 15 (1997).

Ada County had venue over the twelve alleged violations of the civil no contact order because the no contact order originated in Ada County and provided the basis for all the charges brought against Mr. Baker. Furthermore, Ada County filed charges against Mr. Baker prior to Kootenai County filing charges against Mr. Baker. The legislator has determined when a public offense is committed in two or more counties, venue is in either county. I.C. § 19-304(1). Additionally, if proper venue cannot be determined, but the crime was committed in the state of Idaho, then Ada County is the proper county of venue. I.C. § 19-304(3).

Here, the twelve calls to Ms. Shea occurred in Ada County. Also, the protection order providing the basis for all the charges brought against Mr. Baker originated in Ada County. The trial court was provided an affidavit signed by Mr. Baker, who lives and works in Ada County, and was in Ada County when he made all the phone calls that are the basis of all the charges in this case. This fact was uncontested by the prosecution and the prosecution cannot raise this issue for the first time on appeal. *See, State v. Kellis*, 129 Idaho 730, 732, 932 P.2d 358, 360

(Ct.App.1997). Furthermore, Ms. Shea brought all of her phone messages to Ada County, which made a recording and presented the recordings to the Ada County Court. Therefore, Ada County clearly had proper venue over the twelve no contact violations.

The Ada county prosecutor at the very least has apparent authority to bind the prosecutors of other counties to their agreements since prosecution “shall be had in the county in which the alleged offense was committed.” I.C.R. 19. Therefore, since “prosecution in one county shall be a bar to a prosecution for the same act or offense in the other county,” Kootenai County is barred from bringing additional charges against Mr. Baker, which have already been considered and successfully prosecuted by Ada County. I.C. §19-305.<sup>7</sup>

***c. The Boise City Prosecutor’s Office had actual or apparent authority to bind the Coeur d’Alene City Attorney’s Office by its plea agreement with Mr. Baker.***

Under the agency analysis for plea bargains and the effect one prosecutor’s agreement has on a prosecutor from a different jurisdiction, the courts are divided. However, the Idaho Constitution and Idaho Statutes, indicate county prosecutor’s can bind one another to agreements made with defendants.

The Idaho constitution divides governmental power into three branches: legislative, judicial, and executive. Const. Art.II sec. 1. The judicial branch consists of a unified court system. Const.Art. II sec. 2. A prosecuting attorney in the State of Idaho is elected in each County as a member of the judicial branch. Const. Art. V sec. 18; *State v. Wharfield*, 41 Idaho 14, 236 P. 862 (1925). A prosecuting attorney is charged with the duty to prosecute all criminal actions in which his county is interested, and if the place of trial is changed, he must proceed in that county. I.C. § 39-2604. Prosecutors have “always had the authority to reduce the charges

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<sup>7</sup> The Ada County prosecutor played the majority of the recording of all 12 calls to the Ada County Court judge to be used as a basis for sentencing, and the court was under the impression when making its ruling that Mr. Baker would not be prosecuted for the eleven additional charges.

against a particular suspect and in deciding whether to charge a suspect at all.” *Puetz*, 129 Idaho at 844. Where procedure is not enumerated for a particular judicial power, such as plea bargaining, I.C. § 1-1622 confers on a judicial officer all authority necessary to carry out the power. When a public offense is committed, venue may be in any county involved, but not multiple counties at once. I.C. §19-304. The right to a fair trial and due process is guaranteed by the 14<sup>th</sup> Amendment under the United States Constitution and Art. I of the Idaho Constitution.

Other jurisdictions have held prosecutors can bind each other by their agreements. For example, the Missouri appellate courts have determined the actions of one prosecutor are binding on prosecutors in other jurisdictions. *State v. Burson*, 698 S.W.2d 557 (Mo.App.Ed. 1985). In Florida, “basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state’s recommendation.” *Lee v. State*, 501 So.2d 591, 593 (Fla. 1987). The Illinois Court of Appeals determined a plea agreement that was reached between the defendant and the State was binding on the state where the county prosecuting attorney functioned as an agent of the state. *People v. Wantland*, 397 N.D.2d 548 (Ill.App. 1979).

The cases the State has cited, which hold prosecutors can not bind other prosecutors in different jurisdictions, are distinguishable from this case. *See, Staten v. Neal*, 880 F.2d 962 (7th Cir. 1989); *State v. Barnett*, 707 N.E.2d 564 (Ohio Ct. App. 1998); *State v. Bryant*, 146 Wash. 2d 90, 103, 42 P.3d 1278, 1285 (2002).

In *Neal*, the federal government held an agreement of no prosecution by Fayette County prosecutor was not binding on prosecutor in Champaign County where offense occurred. *Neal*, 880 F.2d 962. However, Mr. Baker’s case is distinguishable from *Staten*, in several key aspects. First, in this case both Kootenai and Ada County had venue over the issue, whereas Fayette County did not have venue or jurisdiction over the issue due to the statute expressly providing,

“[w]hen any person is charged with committing an offense while confined by the Department [of Corrections], cognizance thereof shall be taken by the circuit court of *the county wherein such crime was committed.*” *Id.* at 964 (quoting Ill.Rev.Stat. ch. 38 § 1003-6-5 (1985)). Second, Idaho does not have a statute limiting the prosecutor’s duties.

Idaho prosecutors are not strictly limited to county boundary lines or the judicial districts in which they sit. This is evidenced by I.C. §31-2604(1) and the 1986 legislative revision of changing the word “jurisdiction” to “venue” in chapter 3, title 19 of the Idaho Code. 1868 Idaho Sess. Laws, ch. 289, p. 727. Idaho Code §31-2604(1) provides:

To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interest or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county.

Thus, based upon this statute, the duties of prosecuting attorneys in this state are not limited to county boundary lines. Furthermore, by the legislator changing the word jurisdiction to venue in chapter 3, title 19 of the Idaho Code, the precise location of a crime occurring within a particular county in Idaho is not required as an element to establish a crime has been committed by the accused. *See, State v. Amerson*, 129 Idaho 395, 404, 925 P.2d 399 (Ct.App. 1996).

In *Barnett*, the court held the county prosecutor had no authority to waive prosecution for an offense committed outside his county. *Barnett*, 707 N.E.2d 564. The court reached this conclusion because the two prosecutions involved different acts of gross sexual imposition allegedly committed in different counties on different days. *Id.* at 750. In Mr. Baker’s case, the offense violation was committed in both Ada and Kootenai County (based on Ms. Shea’s location when she checked her voicemail messages) due to the nature of the telephone. Therefore, the holding in *Barnett* is irrelevant to the case at hand because the additional offense allegedly committed by Barnett had no ties to county he made his plea agreement in.

Last, the state's reliance on *Bryant*, is misguided. *Bryant*, 146 Wash. 2d at 103. In *Bryant*, the court held one county prosecutor may not bind another county prosecutor to an immunity agreement without the latter's agreement. *Id.* However, the court did hold the prosecutor's agreement binding on another county prosecutor due to the doctrine of fundamental fairness under the due process clauses of the Fifth and Fourteenth Amendment. *Id.* at 1285.

Therefore, state prosecutors have actual and apparent authority to bind one another through their plea agreements because the Idaho Constitution and Idaho Statutes indicate their authority is not limited to their prospective county lines. As stated by the Supreme Court of Idaho, "a prosecutor, as the agent of the people and the state, has a unique duty . . ." *State v. Pearce*, 146 Idaho 241, 249, 192 P.2d 1065 (2008) (dictum).

***d. The doctrine of fundamental fairness requires state prosecutors be bound by their plea agreements to defendants.***

The integrity of the criminal justice system and fundamental fairness require state prosecutors be bound by their plea agreements to defendants under the due process clauses of the Fifth and Fourteenth Amendment. *Bryant*, 42 P.3d at 1285. "There is more at stake than just the liberty of this defendant. At stake is the honor of the government [,] public confidence in fair administration of justice, and the efficient administration of justice in a federal scheme of government." *Bryant*, 42 P.3d at 1285-86 (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir.1972)). "Fundamental fairness and public confidence in government officials require that [the government] be held to 'meticulous standards of both promise and performance.'" *Bryant*, 42 P.3d at 1285-86 (citing *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir.1976) (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973))). Therefore, the principle of "fundamental fairness" may require the government perform a promise made by an agent who

exceeded his actual authority. *Bryant*, 42 P.3d at 1285-86 (citing *Bemis v. United States*, 30 F.3d 220, 221 (1st Cir.1994)).

Here, Mr. Baker should be free from prosecution for the eleven no contact order violations. It is reasonable he believed his guilty plea was in exchange for an end to the matter, and as a result gave up numerous rights in exchange. Mr. Baker's belief was reasonable because, the protection order precipitating the criminal charges was an Ada County protection, was ordered by an Ada County judge, and was served on Mr. Baker in Ada County. Moreover, the twelve messages to Ms. Shea occurred in Ada County.

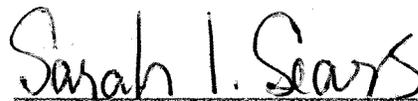
Fundamental fairness mandates the enforcement of the promise given to Mr. Baker by the Ada County prosecutor, especially as it relates to the eleven voicemail messages they purported to withhold from prosecution in exchange for the plea of guilty. Moreover, the Boise City Attorney's Office and the City of Coeur d'Alene prosecutors were in communication with each other prior to the Ada County plea agreement. The Boise City Attorney's Office knew of the Kootenai charges filed, but gave Mr. Baker the impression his plea of guilty would put an end to his prosecution for the twelve voicemail messages. *See, Peterson*, at 593 (the court suggests the prosecutor has some duty to act in good faith during the plea bargaining phase and inform the defendant of other charges which may be filed).

Therefore, due to the harm Mr. Baker has already faced, and the continuing harm should the district court's decision be overturned, fundamental fairness under the due process clause of the Fifth and Fourteenth Amendments dictates his plea agreement with Ada County prosecutors bar prosecution from Kootenai County prosecutors as it relates to the eleven remaining voicemail messages left in violation of the Ada County protection order.

### Conclusion

The Boise City Prosecutor's Office plea bargain barred the Coeur d'Alene City Attorney's Office from pursuing additional charges against Mr. Baker for several reasons. First, the plea agreement requires specific performance due to the ambiguous meaning of "State." Second, Ada County had venue over the twelve charges and thus was able to prosecute and create a binding plea agreement regarding all twelve voicemessages. Third, Ada County had actual and apparent authority to bind Kootenai County from prosecution because the Idaho Statutes and Constitution indicate prosecutors are agents of the State of Idaho and refrain from expressly limiting a prosecutor reach in Idaho. Last, fundamental fairness dictates adherence to Mr. Baker's plea agreement because the twelve phone messages were played at his sentencing hearing in Ada County. Not only did the judge formulate Mr. Bakers's sentence on the notion Mr. Baker would not be prosecuted for the eleven violations anywhere else in the State of Idaho, but the Boise City Prosecutor's Office and the Coeur d'Alene City Attorney's Office were in communication prior to the plea in Ada County.

DATED this 28<sup>th</sup> day of January, 2013



Sarah L. Sears  
Deputy Public Defender

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28 day of January, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

LORI A. FLEMING  
Deputy Attorney General  
Criminal Law Division  
PO Box 83720  
Boise, Idaho 83720-0010

