8-1-2017

State v. Richardson Appellant's Reply Brief Dckt. 44042

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44042**
	)	
v.	)	**NEZ PERCE COUNTY NO. CR 2012-82**
	)	
KYLE A. RICHARDSON,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

HONORABLE JAY GASKILL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

For four years, Kyle Richardson waited while the State continued his trial, then sought an appeal, then unnecessarily delayed having him transported to Idaho for trial. While Mr. Richardson waited, he was ineligible to undergo critically necessary drug treatment thereby increasing the risk that his congestive heart condition would end his life sooner, rather than later. Due to the State's delays, and despite Mr. Richardson's efforts to resolve the matter, he was not tried until four years after he was initially arrested, and thus he was only able to have eighteen months of his twelve-year, with five years fixed, Idaho sentence served concurrently with his five-year federal sentence. Further, the trial witnesses' memories were seriously impaired due to the length of time that had passed since Mr. Richardson was first arrested for selling methamphetamine to a State confidential informant (*hereinafter*, CI) on three occasions in 2011. Because Mr. Richardson's jury trial was unnecessarily delayed for four years, his Constitutional and statutory rights to a speedy trial and his rights under the Interstate Agreement on Detainers were violated, his convictions and sentences should be vacated and his case dismissed with prejudice.[1]

In its Respondent's Brief, the State first asserts that Mr. Richardson delayed his own trial because defense counsel sought time "to file responsive motions" to the state's motion in limine seeking to use the preliminary hearing transcript of Robert Bauer. (Respondent's Brief, p.10.) However, Mr. Bauer passed away on March 23, 2012, yet the State waited until the last day of

[1] Mr. Richardson also asserts that the district court erred when it admitted evidence of uncharged prior bad acts at trial. Mr. Richardson further contends that the district court erred in awarding $2,738.46 in restitution where the State failed to prove by a preponderance of the evidence the amount requested on behalf of the ISP.

July, just 20 days before the jury trial was set to begin, to seek to use its now-deceased witness's prior testimony. (R., pp.79-80, 119.) Mr. Richardson quickly filed a response on August 9, 2012; however, the State did not file a reply in time for the August 16, 2012 hearing because the prosecutor had been on vacation. (8/16/12 Tr., p.12, L.23 – p.13, L.1.) Despite these facts, the State now seeks to penalize Mr. Richardson because the district court set out the trial date to allow the motion to be heard. The State also argues that Mr. Richardson caused delay in his case by crafting too persuasive of an argument against the admittance of the preliminary hearing testimony of Robert Bauer, such that the district court denied the State's motio,n which required the state to file an interlocutory appeal. (Respondent's Brief, pp.11, 15.) Finally, the State argues that any error in the district court's denial of Mr. Richardson's motion to dismiss was harmless, because the dismissal would have been without prejudice and the State could have re-filed the charges in a new complaint. (Respondent's Brief, pp.17-18.) All of these arguments are without merit.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Richardson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

ISSUES[2]

1. Did the district court err when it violated Mr. Richardson's speedy trial rights?

2. Did the district court err in denying Mr. Richardson's motion to dismiss based on the State's failure to comply with the Interstate Agreement on Detainers' 180 day deadline?

3. Did the district court err in admitting evidence of Mr. Richardson's prior bad acts?

4. Did the district court abuse its discretion when it ordered Mr. Richardson to pay restitution in the absence of substantial evidence to support such an award?

[2] In his Reply Brief, Mr. Richardson will address only the State's arguments as to his first issue, whether Mr. Richardson's speedy trial rights were violated. The remaining issues were fully addressed in Mr. Richardson's initial Appellant's Brief.

ARGUMENT

Mr. Richardson's Statutory And Constitutional Rights To A Speedy Trial Were Violated When The District Court Denied His Motion To Dismiss And Set The Case For Trial Four Years After The Information Was Filed

A. Introduction/Clarification

Both the district court's decision and the State's arguments on appeal are premised on the belief that federal and state Constitutional speedy trial rights and statutes are suspended or ineffective when the defendant is being held in another jurisdiction. (R., p.273; Respondent's Brief, p.13.) This is inaccurate. The IAD does have its own speedy trial provision, but that is separate and apart from Constitutional or statutory speedy trial rights. As stated by the United States Court of Appeals for the Ninth Circuit, "[t]he protections of the IAD are not founded on constitutional rights, or the preservation of a fair trial, but are designed to facilitate a defendant's rehabilitation in prison and to avoid disruptions caused when charges are outstanding against the prisoner in another jurisdiction." *United States v. Black*, 609 F.2d 1330, 1334 (9th Cir. 1979); see also *Reed v. Farley*, 512 U.S. 339, 358 (1994) (plurality opinion) (Scalia, J. and Thomas, J., concurring in part and concurring in judgment) (violation of IAD technicality "neither produces nor is analogous to (1) lack of jurisdiction of the convicting court, (2) constitutional violation, or (3) miscarriage of justice or denial of rudimentary procedures.")).[3]

Further, "[t]he IAD amounts to nothing more than a set of procedural rules, and the rights it protects in no way affect the fairness and accuracy of the factfinding procedure or other due process or trial rights." *People v. Nitz*, 268 Cal. Rptr. 54, 57 (Cal. Ct. App. 1990) (citing *Gray v. Benson* 458 F. Supp. 1209, 1213 (D. Kan.1978)); *see also People v. Brooks*, 234 Cal. Rptr. 573

[3] The United States Supreme Court has held the IAD's interpretation presents a question of federal law. *State v. Mangum*, 153 Idaho 705, 709 (Ct. App. 2012). Therefore, the Idaho appellate courts will give particular attention to federal court decisions interpreting the IAD. *Id.*

(Cal. Ct. App. 1987) (problems that IAD was intended to remedy were administrative problems; legislative history shows little concern with speedy trial rights per se); *Drescher v. Superior Court of California*, 267 Cal. Rptr. 661 (Cal. Ct. App. 1990) (The purpose of IAD is to facilitate rehabilitation in prison and to avoid disruptions, rather than to preserve right to fair trial); *Watson v. Ralston*, 419 F. Supp. 536 (W.D. Wis. 1976) (holding that by making the United States a party to the Interstate Agreement on Detainers, Congress did not intend that the Sixth Amendment guaranty of a speedy trial was to be measured by the speedy trial provisions of the Agreement); *State v. Dean*, 399 A. 2d. 1367 (Md. Ct. Spec. App. 1979) (holding that defendant who is incarcerated in another state is not required to invoke the provisions of the Interstate Agreement on Detainers as a condition precedent to preserving his claim to a denial of the speedy trial rights guaranteed by the Sixth Amendment to the Constitution); *People v. Rodriguez*, 209 N.W. 2d 441 (Mich. App. 1973) (holding that the Interstate Agreement on Detainers is not the sole guaranty of the right to a speedy trial when an accused is imprisoned in a foreign jurisdiction).

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

1. The Four Year Delay Is Presumptively Prejudicial

The State has conceded that the delay in this case of nearly four years (1,433 days) triggered the *Barker* balancing test. (Respondent's Brief, p.8.)

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

The State claims that all of the delays causing Mr. Richardson's trial to occur four years after the information was first filed can be attributed to Mr. Richardson (Respondent's Brief, pp.7-17); however, this is a fallacy. Mr. Richardson is not responsible for the delays.

The State asserts that Mr. Richardson complains of two delays before he was tried on these charges. (Respondent's Brief, p.9.) However, in his Appellant's Brief, Mr. Richardson identified the length of delay as nearly four years, and specifically addressed three time periods in which delays occurred prior to his trial. (Appellant's Brief, pp.12-17.) In Section II of the Appellant's Brief, Mr. Richardson further discussed the State's delays in trying him within the six month time period. (Appellant's Brief, pp.22-36.) Notably, the State did not provide reasons for why it failed to act for almost twelve months—from the time the speedy trial demand was filed in February of 2015, until the December 2015 trial. Mr. Richardson incorporates by reference his discussion of the delays occurring in bringing him to trial as set forth in Section II of the Appellant's Brief.

The State mischaracterizes what occurred at the August 16, 2012 hearing and appears to be implying that Mr. Richardson waived his right to a speedy trial when his counsel confirmed with the court that there was no "implication of speedy trial at all because of that." (Respondent's Brief, pp.10-11.) However, a "waiver" occurs when the defendant has engaged in conduct which may be characterized as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The State's contention is absurd.

The State's motion to use the preliminary hearing testimony of Robert Bauer was filed only 20 days before the August 20, 2012 trial was set to begin. (8/16/12 Tr., p.12, Ls.1-9.)

However, Mr. Bauer passed away on March 23, 2012. (R., p.125.) The State filed its Motion to Admit Preliminary Hearing Transcript Testimony of Robert Bauer – Deceased on July 31, 2012. (R., pp.79-103.) The State should have been aware that its key witness had passed away back in March, yet the State waited until the last day of July, just 20 days before the jury trial was set to begin, to seek to use its now-deceased witness's prior testimony. (R., pp.79-80.) Mr. Richardson quickly filed a response on August 9, 2012; however, the State did not file a reply in time for the August 16, 2012 hearing, because the prosecutor had been on vacation. (8/16/12 Tr., p.12, L.23 – p.13, L.1.) Mr. Richardson attached to his response a copy of Mr. Bauer's obituary, as published in the local newspaper, indicating Mr. Bauer died on March 23, 2012. (R., pp.119-125.)

A hearing was held on the State's motion on August 16, 2012. (R., p.153.) At the hearing, the prosecutor apologized for not filing a written response to Mr. Richardson's objection to the State's motion to use the preliminary hearing testimony, she explained that she "was on vacation until the beginning of the week, so [she] had not had an opportunity to respond in writing." (8/16/12 Tr., p.12, L.23 – p.13, L.1.) She told the district court she was prepared to respond orally if the Court wanted to take oral argument. (8/16/12 Tr., p.13, Ls.2-3.) The court met with both counsel in chambers, and, when back on the record, said that it would be moving the trial date "because the motions filed on your behalf have come in very close to the trial date and we need to sort those motions out." (8/16/12 Tr., p.13, L.11 – p.14, L.4.) The court set the pending motions to be heard in one month. (8/16/12 Tr., p.14, Ls.4-8.) The court commented that setting the trial out would allow the State an opportunity to respond and get their response filed before the hearing. (8/16/12 Tr., p.14, Ls.9-21.) Defense counsel then clarified that the

vacation of the trial date did not affect his client's speedy trial rights, to which the district court agreed. (8/16/12 Tr., p.15, Ls.4-15.) To be clear, the discourse was as follows:

> THE COURT: We are back on the record, I have had an opportunity to speak with Counsel.
>
> And, Counsel, as we have discussed, we have pending motions in each of the two cases, and admittedly the motions have come in in such a time frame that it would make it difficult obviously for the State to respond and the Court to decide these. And what happens in one case may have some affect [sic] on the resolution of the other case, as I understand it.
>
> So, Mr. Richardson, in light of that, what we are going to do is vacate the trial settings for Monday, so that -- because the motions filed on your behalf have come in very close to the trial date and we need to sort those motions out. So we are vacating both trial dates, and I'm going to schedule all of the pending motion, and that would be in both cases, for oral argument on the 20th of September at 10:30 a.m.
>
> So, Mr. Richardson, you must be present on September 20 at 10:30 a.m., and that's when we will – I will hear argument on the motions. In the interim time period, the State will have an opportunity to respond and get their response briefing to the Court. We are going to argue the -- have motions in both cases argued at the same time, the Court intends to then enter a decision as to the motions, and then we will get together subsequent to that and talk about either rescheduling for trial or some kind of resolution based on what the Court has decided as to those pending motions. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. So I will see you all back here on the 20th of September at 10:30 a.m. so that we can hear motions in both cases. And, again, the jury trial scheduled in both of these cases for Monday at 9;00 a.m. are vacated.
>
> MS. DICKERSON: Thank you, your Honor.
>
> MR. RADAKOVICH: Your Honor, may I also state just in all fairness for the record that since the trials were vacated because of some lateness of the motions, I don't consider that there is any implication of speedy trial at all because of that.
>
> THE COURT: Thank you for articulating that. And I think, Mr. Richardson, that would be the Court's view as well, I think this is necessitated by the time -- I guess lack of timeliness, I'm not pointing fingers at any one, but the reason we are doing this is so that the motions filed by the Defendant can be sorted out.

(8/16/12 Tr., p.13, L.15 – p.15, L.15.) The Idaho Court of Appeals "has held that '[t]he unauthorized representations of defense counsel do not constitute a waiver of [a defendant's] rights that would preclude [a defendant] from later asserting a violation of his right to a speedy trial.'" *State v. Lopez*, 144 Idaho 349, 352 (Ct. App. 2007) (quoting *State v. Beck*, 128 Idaho 416, 419 (Ct. App. 1996)).

Further, the Oxford dictionary defines "implication" as a noun meaning:

- 1. the conclusion that can be drawn from something, although it is not explicitly stated: "the implication is that no one person at the bank is responsible" synonyms: suggestion, insinuation, innuendo, hint, intimation, imputation

- 2. the action or state of being involved in something: "our implication in the problems" synonyms: incrimination, involvement, connection, entanglement, association, inculpation

Based on its response, the court clearly understood that defense counsel was asking if the court's decision to vacate and reset the trial date so that the pending motions could be fully briefed was going to be deemed some sort of speedy trial waiver or a request for continuance. The district court reassured defense counsel that the delay (to allow the State to file both a reply in support of its motion in limine and presumably a response to the defendant's motion to suppress in Nez Perce County case number 2011-8658) would not be attributed to the defense such that it could affect Mr. Richardson's speedy trial rights. Mr. Richardson did not request the trial date to be vacated. While his counsel recognized that the court may wish to vacate the trial date to allow the State additional time to reply to Mr. Richardson's objection to evidence the State sought to use at trial, the prosecutor offered to simply respond at the hearing, negating any need for additional response time. (R., p.153.) Further, while the court likely hoped for a global resolution with Mr. Richardson's other case, there was no need to vacate the trial date in *this*

case.[4] Acquiescing to the court's scheduling decision did not constitute a request by Mr. Richardson to vacate the trial date.

The State also claims that Mr. Richardson caused delay by stipulating with counsel to continue the preliminary hearing and by requesting a two week extension to file pre-trial motions. (Respondent's Brief, p.9.) First, *Folk* holds that postponement of the *trial*, not the preliminary hearing, at defendant's request waives the protection of the speedy trial clause. *State v. Folk* 151 Idaho 327, 332 (2011). Second, although Mr. Richardson did file a motion requesting an additional two weeks to complete pre-trial motions, the motion was never ruled on, presumably because the State asked for a continuance two weeks later, which the district court's response was to vacate the trial setting. (R., pp.70-75.) Thus, Mr. Richardson did not instigate a delay of the trial.

The State claims that "because Richardson caused the need for the interlocutory appeal by inviting the district court to exclude essential evidence on an erroneous basis, the attendant delay was also attributable to Richardson and does not implicate his speedy trial rights." (Respondent's Brief, p.11.) The State continues by arguing that almost all of the delay in bringing Mr. Richardson to trial "is directly attributable to Richardson's inviting the district court to make an erroneous ruling on the admissibility of essential evidence in his case (which necessitated an interlocutory appeal)." (Respondent's Brief, p.15.) The State apparently argues that Mr. Richardson caused delay in his case by crafting too persuasive of an argument against the admittance of the preliminary hearing testimony of Robert Bauer. Such an argument is preposterous. The duty to bring a defendant to trial lies with the State, not the defendant. *Barker v. Wingo*, 407 U.S. 514, 527 (1974); *State v. Hobson*, 99 Idaho 200, 202 (1978). It is

[4] Defense counsel did not consent to the cases being set for trial together. (R., p.65.)

ludicrous for the State to suggest that Mr. Richardson should be penalized for making a legal argument that persuaded the district court, but which the appellate court ultimately reversed.

The State summarizes Mr. Richardson's speedy trial claims as amounting to "two delays" (Respondent's Brief, p.9); however, while Mr. Richardson's trial was delayed by the State's first request that the trial be vacated due to an unavailable witness, and the State's second delay to make an interlocutory appeal, Mr. Richardson also suffered substantial delay as discussed in detail in Section II of the Appellant's Brief. That is, once Mr. Richardson was served with a bench warrant on January 6, 2015 (R., p.231), he filed a demand for speedy trial on February 2, 2015, seeking to have his Idaho charges resolved (R., pp.207-210), yet the State failed to try Mr. Richardson until December of 2015, almost a full year after he demanded a speedy trial.

Mr. Richardson Suffered Prejudice As A Result Of The Delay

The record does not support the State's claim that Mr. Richardson suffered no prejudice. It is quite clear from the record that Mr. Richardson wanted his Idaho case resolved and he suffered from the stress and uncertainty of not knowing what would be his fate. Mr. Richardson was forced to file multiple pleadings seeking resolution (R., pp.207-210; 230-239, 244-248, 266-268, 270-272, 275-280); his attorney attended a litany of monthly status hearings, asserting Mr. Richardson's wish to be tried (R., pp.212-218, 229, 240; 2/19/25 Tr.; 4/23/15 Tr.); in addition to Mr. Richardson's lost opportunity to attend an excellent substance abuse treatment program in Oregon (2/19/15 Tr., p.27, Ls.13-24; R., pp.268, 275-277; PSI, p.10).

The State asserts that Mr. Richardson never "sat in jail" in relation to this case until October of 2015 because he did not request credit for time served for any of the previous period of incarceration. (Respondent's Brief, p.14.) The period of time for which Mr. Richardson asked for credit for time served does not establish, as fact, the length of time he sat in jail in

relation to this case. This is particularly true in light of the recent decision by the Idaho Supreme Court in *State v. Brand*, 162 Idaho 189 (2017) (holding that defendants were entitled to credit for time served as long as their prejudgment incarceration was for the offense they were convicted of and sentenced for). The law has changed, even since Mr. Richardson filed his motion for credit for time served on March 11, 2016.[5] (R., p.365.)

The State claims that Mr. Richardson suffered no prejudice during his years of incarceration while the Idaho charges stagnated because Mr. Richardson was incarcerated and serving his time for a different crime. (Respondent's Brief, pp.13-14.) However, Mr. Richardson certainly suffered prejudice due to the anxiety and concern of a pending, unresolved case in another state and suffered in his ability to defend himself, as discussed in the Appellant's Brief.

When analyzing prejudice to the defense caused by pretrial delay, the reviewing court will look to the details of the evidence that the defendant claims has become stale, "and conducts a loose 'but-for' analysis to look for a causal connection between the delay and the prejudice." *United States v. Battis*, 474 F. Supp. 2d 727, 734 (E.D. Pa. 2007). Because "what has been forgotten can rarely be shown," the defendant is not necessarily required to affirmatively show how he has been prejudiced by the delay because there is a presumption of prejudice that grows correspondingly with the length of the delay. *Doggett v. United States*, 505 U.S. 647, 655-57 (1992) (holding delay of 32 months (over eight years) presumptively prejudicial to defendant).

The speedy trial guarantee protects three basic demands of the criminal justice system: "(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and

[5] Mr. Richardson reserves the right to file a motion pursuant to I.C.R. 35(c) seeking credit for all time spent incarcerated in this case.

concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself." *Smith v. Hooey*, 393 U.S. 374, 378 (1969) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). "These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction." *Id*.

When discussing these three demands, the United States Supreme Court has said:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.
>
> And while it might be argued that a person already in prison would be less likely than others to be affected by 'anxiety and concern accompanying public accusation,' there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.
>
> In the opinion of the former Director of the Federal Bureau of Prisons,
>
> > '[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement.'
>
> Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses

> disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

Smith v. Hooey, 393 U.S. 374, 378–80 (1969) (internal footnotes and citations omitted). Further, as the United States Supreme Court noted, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655–56 (1992). Although such presumptive prejudice must be considered in conjunction with the other criteria set forth in *Barker*, "it is part of the mix of relevant facts, and its importance increases with the length of delay." *Id*.

Here, Mr. Richardson was initially sent to a superb drug treatment facility in Oregon but, due to his pending state cases in Idaho, he was transferred to Indiana and thereby lost the opportunity to participate in the much-needed drug treatment program. (2/19/15 Tr., p.27, Ls.13-24; R., p.268; PSI, p.10.) Mr. Richardson also had to contend with the anxiety of waiting nearly four years for his trial, not knowing whether he might walk out of jail a free man, be condemned to a life in prison, or something in between. Finally, Mr. Richardson's defense was significantly compromised because the witnesses could not recall the circumstances by which Mr. Richardson was alleged to have sold methamphetamine—including locations and whether the CI was out of the sight of the officers at critical times. Thus, Mr. Richardson suffered significant prejudice due to the four-year delay.

C. The District Court Violated Mr. Richardson's Right To A Speedy Trial As Guaranteed By Idaho Statute And The Error Was Not Harmless

The State asserts that Mr. "Richardson waived his statutory speedy trial rights when he caused his trial to be postponed." (Respondent's Brief, pp.15-18.) However, a "waiver" occurs when the defendant has engaged in conduct which may be characterized as "an intentional

relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). As discussed in section B, herein, Mr. Richardson did not "waive" his state statutory right to a speedy trial by acquiescing to the district court's decision to set out the trial or by becoming incarcerated on an unrelated charge.

Finally, the State argues that any error in the district court's denial of Mr. Richardson's motion to dismiss was harmless, because the dismissal would have been without prejudice and the State could have re-filed the charges in a new complaint. (Respondent's Brief, pp.17-18.) The State's argument is specious for a number of reasons.

First, if this Court finds the district court should have granted Mr. Richardson's motion to dismiss, by definition, the error would not be harmless, because this Court would necessarily have to find the district court should have dismissed the case. The harmless error test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967), applying to all preserved errors found by Idaho Appellate Courts (*see State v. Perry*, 150 Idaho 209, 227 (2010)), is not beholden to the presumed ability or inability of the prosecutor to re-file charges and obtain convictions anew. Such a standard would require an appellate Court to theorize what might have happened in proceedings conducted in an alternative universe, or what could happen in future proceedings conducted in this universe, rather than look at how the error effected the actual proceedings spawning the appeal before the Court. This is simply not the standard. *See State v. Sharp*, 101 Idaho 498, 507 (1980) citing *Chapman*, 386 U.S. at 24 ("To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction.").

Next, while the prosecutor *may* have re-filed charges if the district court granted Mr. Richardson's motion to dismiss, there is no evidence in the record that it *would* have done

so. The State is required to show the error is harmless beyond a reasonable doubt (*see Perry*), a standard that requires more than supposition on the part of the State's appellate counsel.

In sum, the State's harmless error argument fails because it misapplies the *Perry* standard. Idaho Appellate Courts consider what actually happened, not what could have happened if the district court did not err in the first place. If the prosecutor seeks to re-file charges upon this Court granting Mr. Richardson's request for appellate relief, the legality of such a decision, and the consequences thereof, should be first addressed by the district court.

CONCLUSION

Mr. Richardson respectfully requests that this Court vacate the district court's order denying his motion to dismiss and remand his case to the district court for the entry of an order dismissing the instant matter with prejudice. Alternatively, Mr. Richardson respectfully requests that this Court vacate his convictions and remand to the district court for a new trial. Mr. Richardson requests that the restitution award be vacated.

DATED this 1st day of August, 2017.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of August, 2017, 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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_____/s/_____
EVAN A. SMITH
Administrative Assistant

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