4-14-2017

State v. Robins Appellant's Brief Dckt. 44296

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. ANTHONY J. ROBINS, JR., Defendant/Appellant.	)	S.Ct. Docket No. 44296 Ada Co. CR-FE-2015-126

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho In and For the County of Ada

HONORABLE SAMUEL A. HOAGLAND
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER

II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal in a criminal case. This Court should vacate the conviction and dismiss the case because the district court erred in failing to disqualify the Ada County Prosecuting Attorney's office after it confiscated an attorney-client confidential document and then did not prohibit the prosecutors who viewed the document from participating in the case. Alternatively, a new trial should be ordered because the district court erred when it: 1) refused to order the Ada County Jail to uniformly allow Mr. Robins to telephone his attorney during regular business hours; 2) denied the motion to sever defendants; and 3) admitted a letter written by the co-defendant over objection. In the second alternative, the order of restitution should be reversed in part because the court abused its discretion in taking judicial notice and there was no evidence that Medicaid is a victim under the applicable statute.

B. *Procedural History and Statement of Facts*

John Douglas was charged with committing the First-Degree Murders of Elliot Bailey and Travone Calloway, and with the Attempted First-Degree Murder of Jeanette Juraska. Appellant Anthony Robins was charged with Aiding and Abetting Mr. Douglas in all three counts. R 114-115.

Mr. Robins pleaded not guilty. R 124. He later moved for Relief from Prejudicial Joinder with Mr. Douglas's case. R 161. Mr. Robins also moved the

court for an Order to Show Cause and for Other Appropriate Relief because the state had invaded Mr. Robins's attorney-client privilege when it seized and examined notes intended for his attorneys. R 139. Mr. Robins also filed a Motion to Compel Access to Counsel because the jail was limiting his telephone access to one hour per day, often not during business hours. R 218. The court refused to grant any relief on all of these motions. R 293. These motions and the court's rulings will be discussed in greater detail below.

The state's theory at trial was that Samari Winn (who was tried separately) led Douglas to the home of Bailey and Calloway, and that Mr. Douglas shot and killed them and also shot Jeanette Juraska, who survived. Mr. Robins, according to the state, was the organizer of the murder plot and driver. The motive was that Bailey and Calloway were suspected of stealing 30 pounds of marijuana from the house that Mr. Winn, Anton Raider, and Mr. Robins rented. Mr. Robins lived in California and supplied Mr. Raider with marijuana. Mr. Raider denied any direct involvement in the shootings. He testified in support of the state's theory in exchange for substantial benefits in both state and federal courts. Mr. Robins's defense was that Mr. Raider was the victim of the marijuana theft, had the motive to kill Bailey and Calloway, and was the one who drove to and from the house in his van. Mr. Raider admitted he provided the murder weapon, ammunition and the van, and even admitted to buying bleach and power washing the interior of the van after the shootings. See T (1/19/2016) pg. 192-214; pg. 228-237 (opening

statements).

Aileen Browud, a neighbor of the victims, saw two men get out of Mr. Raider's van and walk down the street. She then heard gunfire. T (1/19/2016) pg. 246, ln. 8 - 247, ln. 13. She could not identify the ethnicity of either man. T (1/19/2016) pg. 253, ln. 19-23. However, another neighbor, Matt Jamison, also heard the gunfire and saw the two men, one black and the other white quickly leaving the scene. T (1/19/2016) pg. 267, ln. 2 - pg. 268, ln. 2; pg. 293, 2-25; pg. 295, ln. 5-20. He then saw Mr. Raider's van leaving. T (1/19/2016) pg. 270, ln. 2-14. Mr. Winn, Mr. Douglas, and Mr. Robins are all black. Exhibits 125-127. Mr. Raider is the only white person among the possible participants. Exhibits 73, 119.

Ms. Juraska testified that the doorbell rang and she opened the door. Mr. Winn and Mr. Douglas were on the porch. Mr. Douglas entered and shot everyone. She called 911. T (1/22/2016) pg. 40, ln. 12- pg. 45, ln. 13. She had met Mr. Douglas in California a few months prior, but did not immediately identify him as the shooter. T (1/22/2016) pg. 54, ln. 4 - pg. 57, ln. 22; pg. 168, ln. 4 - pg. 169, ln. 11. She later picked a photograph of Mr. Douglas out of a montage and identified him in court. T (1/22/2016) pg. 60, ln. 8 - pg. 61, ln. 19; pg. 62, ln. 13-19. Neither of the neighbors nor Ms. Juraska saw Mr. Robins.

Mr. Raider put the blame on Mr. Robins for organizing the shooting and driving his van. The defense was that Mr. Raider was the organizer/driver as he had the motive, the means, and the opportunity. T (1/19/2016) pg. 326, ln. 15 - pg.

237, ln. 4.

Mr. Raider explained that he sold drugs and that Mr. Robins was his supplier. T (1/25/2016) pg. 9, ln. 22-25. Mr. Raider and Mr. Winn lived in a rented house in Boise. Mr. Robins also had a room there, although his residence was in California. T (1/25/2016) pg. 22, ln. 1-24. One day in late October of 2013, a woman delivered two roller bags containing 30 pounds of marijuana to the house. Mr. Raider said he placed them in Mr. Robins's room because "it's not my weed or it's not – they are not my suitcases." T (1/25/2016) pg. 29, ln. 4 - pg. 30, ln. 8; pg. 34, ln. 17-23. The roller bags were stolen on October 31, while Mr. Raider was out attending to business and partying. T (1/25/2016) pg. 31, ln. 17 - pg. 32, ln. 12.

According to Mr. Raider, Mr. Robins suspected Bailey and Calloway were the thieves and said that "Big Man would be coming into town to handle the situation . . . and that he was interested in purchasing one of my handguns." T (1/25/2016) pg. 35, ln. 6-25; pg. 39, ln. 21 - pg. 40, ln. 4. With that knowledge, Mr. Raider agreed to sell a .45 caliber handgun. T (1/25/2016) pg. 41, ln. 4-23. He also went to Cabela's to buy ammunition. Exhibits 111-113. After retrieving the pistol from his mom's house, cleaning it, helping load it, and driving Mr. Douglas around to look for Bailey and Calloway, Mr. Raider claimed that he "told them I didn't really want anything to do with any of it." T (1/25/2016) pg. 47, ln. 3-4. Even so, Mr. Raider admitted he then drove Mr. Winn and Mr. Douglas to scout the house. T (1/25/2016) pg. 48, ln. 5-12.

Mr. Robins arrived in Boise the next day. Mr. Raider testified that he left the house to go to a barbeque, but came back to clear out his "weed and the guns . . . just in case" the police came after the shootings. T (1/25/2016) pg. 51, ln. 23 - pg. 53, ln. 1. But instead of doing that, he gave the van key to Mr. Robins. T (1/25/2016) pg. 53, ln. 9-13. Mr. Raider said that the others left in the van and he went into his room, "rolled a joint and sat down." T (1/25/2016) pg. 54, ln. 6-7. About 20-30 minutes later they returned. Mr. Raider noticed his van was missing but did not ask where it was; instead he "went back into [his] room . . . to go finish the joint[.]" T (1/25/2016) pg. 54, 15-22. Mr. Raider said that Mr. Robins and Mr. Douglas then went to a strip club. Mr. Winn rode his bike back to the van, retrieved the murder weapon, threw it into a dumpster, rode back to the house and called for a cab. Mr. Raider left the house on his motorcycle and went to his friends' house where he "hung out and smoked weed, just chilled." T (1/25/2016) pg. 58, ln. 18 - pg. 61, ln. 12. The next day, Mr. Raider located the van, cleaned it out with bleach "and then drove it to a car wash and pressure washed the inside of it." T (1/25/2016) pg. 71, ln. 9-12. He was photographed at the hardware store buying the bleach. Exhibit 73. While Mr. Raider claimed that Mr. Robins told him where the van was located during a telephone call, his cell phone records did not show such a call. T (1/26/2016), pg. 74, ln. 15 - pg. 75, ln. 22; Exhibits 76, C.

It was unfortunate for Mr. Raider that he did not clear out his house as he intended because it was later searched by the police. As a result, he was charged in

federal court with possession of marijuana and with possession of a weapon in connection with a drug crime. Due to his cooperation in this case, he received a five-year sentence in federal court. In addition, he pleaded guilty to aiding and abetting first-degree murder in state court in exchange for a concurrent five-year sentence. Thus, his total time served was not increased by his admitted participation in the murders. T (1/25/2016) pg. 76, ln. 6 - pg. 77, ln. 16; pg. 146, ln. 1-2.

Mr. Robins argued Mr. Raider was putting the blame on him for what Mr. Raider had actually done. He argued that it was Mr. Raider's marijuana which was stolen, that Mr. Raider was mad at Bailey and Calloway for stealing it, that it was Mr. Raider's van that transported Mr. Winn and Mr. Douglas to their house, that it was Mr. Raider's gun and bullets which killed them, that Mr. Raider was the only white person at the crime scene, and it was Mr. Raider who retrieved and cleaned the van afterward. T (1/25/2016, pg. 154, ln. 9 - pg. 156, ln. 14.

The state also presented evidence that Mr. Robins and Mr. Douglas took a circuitous route back to their respective homes driving from Boise to Seattle and then to Mr. Robins's home in Fremont, CA. Mr. Douglas then flew from Portland to his home in Pennsylvania. Exhibit 143.

A jail house letter written by Mr. Douglas to Mr. Robins was admitted, over objection. In the letter, Mr. Douglas admitted to the killings and offered to plead guilty and support Mr. Robins's defense at trial. Exhibit 133. This letter was stolen from Mr. Douglas by another jail inmate and was never received by Mr. Robins. As

will be discussed below, Mr. Robins's motion to sever defendants was based upon this letter.

Mr. Robins was found guilty on all three counts. R 481. He was sentenced to two concurrent life sentences with forty years fixed on Counts I and II, and a concurrent fifteen year fixed sentence on Count III. R 501. A timely Notice of Appeal was filed. R 505.

The court later imposed $184,112.44 in restitution, including $72,1791.50 to Medicaid State Operations over Mr. Robins's objection. R 521. A timely Amended Notice of Appeal was filed. R 524.

III. ISSUES PRESENTED FOR REVIEW

A. What is the appropriate remedy for the state's violation of Mr. Robins's attorney-client privilege?

B. Did the state unlawfully interfere with Mr. Robins's access to his attorney pre-trial and what remedy is appropriate?

C. Did the court abuse its discretion in denying the motion to sever defendants and then admitting Exhibit 133 at trial over objection and without a limiting instruction?

D. Did the court abuse its discretion in awarding $72,791.50 in restitution to Medicaid and by taking judicial notice of the existence of a contractual relationship between Medicaid and the health care providers here?

IV. ARGUMENT

A. *The District Court Erred in Not Dismissing the Case or Disqualifying the Ada County Prosecuting Attorney from Prosecuting the Case. The Proper Remedy on Appeal is Dismissal.*

1. Facts pertaining to claim

On Monday, May 11, 2015, local defense counsel Scott McKay delivered over 6000 pages of discovery to Mr. Robins at the Ada County Jail. Because of the volume, the jail stored the materials in the law library, allowing Mr. Robins to review them there. R 156.

That same day, Mr. McKay told Mr. Robins that out-of-state counsel Brian McMonagle would be coming soon to discuss the discovery. Mr. McKay advised Mr. Robins to take notes and identify matters to discuss with Mr. McMonagle. *Id.*

On May 14, 2015, the state learned that James Kreider, an inmate in an unrelated case, claimed to have a letter from Mr. Douglas to Mr. Robins which was an attempt to coordinate their stories so as to minimize liability for Mr. Robins. R 241-42. Prosecutor Shelley Akamatsu immediately called Sergeant Ivie at the jail and directed him to search for this letter. T (9/23/2015) pg. 81, ln. 21-p. 84, ln. 22.

Sergeant Ivie called on two deputies to search Mr. Krieder's cell. The deputies were instructed to search for anything that looked like Mr. Robins and Mr. Douglas were trying to talk to each other about the case. But, they found nothing. T (9/23/2015) pg. 23, ln. 19-20; p. 85, ln. 12-16. Ms. Akamatsu then instructed Sergeant Ivie to search Mr. Robins's cell. T (9/23/2015) pg. 87, ln. 11-14.

In that search, Deputy Roller understood that he was to seize any handwritten notes relating to the case that he could find. T (9/23/15) pg. 69, ln. 9-13.[1] And, he found notepaper with questions and notes stored in Mr. Robins's property bin amongst his discovery which the library had allowed him to keep. Sergeant Ivie took possession of the notepaper and booked it into evidence. T (9/23/2015) pg. 35, ln. 9-16; pg. 92, ln. 11-16. Deputy Broooks testified that he inspected the notepaper and saw that it contained questions about the trial. T (9/23/2015) pg. 27, ln. 20-25. The notes did not appear to be a letter; they did not include any names or salutation and were not in an envelope. T (9/23/2015) pg. 78, ln. 1-8.

When Sergeant Ivie booked the notes into evidence, he alerted Ms. Akamatsu. She said that it sounded promising, so he scanned the notes and emailed them to her. T (9/23/2015) pg. 93, ln. 3-24. Sergeant Ivie testified "[Ms. Akamatsu] was excited that we found something, and she wanted to see it." T (9/23/15) pg. 94, ln. 25-pg. 95, ln. 1.

The evening of May 14, Ms. Akamatsu sent Mr. McMonagle an email stating that the notes had been found in Mr. Robins's cell and booked into evidence. R 160. The notes were admitted as a sealed exhibit. Evidence Hearing Sealed Exhibit 144-49. The district court described them:

The notes at issue deal with Robins' thoughts and commentary

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[1] Sergeant Ivie testified that the instruction was to look only for the specific letter between Mr. Douglas and Mr. Robins. T (9/23/15) pg. 84, ln. 16-22.

> regarding some very specific facts of the case. It is fair to say that the State has been forewarned as to potential defense strategies.

R 301-02.

The notes include information about a potential alibi and responses that could be made to information contained in the discovery. Evidence Hearing Sealed Exhibit 144-49.

2. Decision of the district court

Mr. Robins filed a motion seeking relief for the violation of his attorney-client privilege. He asked that the court dismiss the pending charges or alternatively that the court order that the Ada County Prosecutor's Office be recused from the case; that the privileged material be returned to counsel for Mr. Robins with no copies retained by the state; that the state be forbidden from making any evidentiary use of its review of the privileged materials and that the state be required to demonstrate in advance of trial that any evidence it intends to offer originated independently of the privileged materials; and that the state be prohibited from seizing and reviewing other privileged materials. R 139-40.

The district court granted in part and denied in part the motion. R 293. Citing *Williams v. Woodford,* 384 F.3d 567, 584-85 (9th Cir. 2004), the court applied the standard that when the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel there is a Sixth Amendment violation if the interference substantially prejudices the defendant. R 299. The court held that the notes were privileged. R 301. The court further held

that Mr. Robins may have been prejudiced because the state "has had an inside look as to how Mr. Robins views his case and his defense." R 302. (At the same time, the court noted that if Mr. Robins had labeled his notes as privileged, "it is likely that the Prosecutor would not have seen them." However, the court did not hold and cited no authority for the proposition that failure to label material as privileged waives the privilege. *Id.*)

The court ordered the state to return all copies of the notes and any memos or notes it made regarding the contents. R 302. However, the court declined to dismiss the case or recuse the prosecutor because the prosecutor said that the notes contained nothing the state did not already know and that she was prepared to point to an independent source for each statement in the notes. R 301-02.

The court further held that if during the trial the defense believed the prosecutor was offering evidence or argument that could have only been obtained from the notes, the onus would be upon the defense to object and then the state would be required to demonstrate an independent source. R 303.

No objections were made on this basis during trial.

3. Standard of review

> 'When an appellant asserts the violation of a constitutional right, [the appellate court] give[s] deference to the trial court's factual findings unless those findings are clearly erroneous.' *State v. Pearce,* 146 Idaho 241, 248, 192 P.3d 1065, 1072 (2008) (citing *State v. Henage,* 143 Idaho 655, 658, 152 P.3d 16, 19 (2007)). '[The appellate court] exercise[s] free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found.' *Id.*

State v. Dunlap, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013).

To the extent that the choice of remedies is a discretionary decision, to determine whether there is an abuse of discretion the reviewing court will consider whether the lower court (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with legal standards applicable to specific choices; and (3) reached its decision by an exercise of reason. *Taylor v. McNichols*, 149 Idaho 826, 848, 243 P.3d 642, 664 (2010).

4. Why relief should be granted

The attorney-client privilege is the oldest of the privileges for confidential communications. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961).

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serve public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. . . .The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. . . . we recognize[] the purpose of the privilege to be to encourage clients to make full disclosure to their attorneys. . . . [the] privilege is founded upon the necessity, in the interest of the administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981) (internal quotations and citations omitted).

Violation of the attorney-client confidentiality may deny a defendant the constitutional right of effective assistance of counsel and the right to due process. U.S. Const. Amends. 5, 6, and 14; Idaho Const. Art. I, § 13. *Stuart v. State,* 118

Idaho 932, 935, 801 P.2d 1283, 1286 (1990). The right to effective assistance of counsel may not be disregarded by the states and to fulfill the right defendant and counsel must be allowed to discuss freely and confidentially. *Id.* at 934-35, 801 P.2d at 1285-86.

In *Stuart,* Mr. Stuart alleged that the sheriff's department recorded confidential communications; however, he did not allege that the confidential information obtained by the sheriff was shared, as it was in this case, with the prosecutor. Nonetheless, the Supreme Court required that the district court hold an evidentiary hearing to determine whether there was recording and whether Mr. Stuart's constitutional rights were violated.

> If such attorney-client conversations are found to have been recorded, the State will be required to show that the evidence at trial had an origin independent of the eavesdropping. *Any knowledge* wrongfully gained by the government cannot be used against a defendant.

Id., citing Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939) (emphasis added).

Stuart is consistent with the federal case law relied upon by the district court in this case. R 299. As noted by the district court, improper interference by the government with the confidential relationship between a defendant and counsel violates the Sixth Amendment if such interference substantially prejudices the defendant. *Williams v. Woodford,* 306 F.3d at 683. Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining

to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial. *Id.* at 682 (*citing United States v. Irwin,* 612 F.2d 1182, 1187 (9th Cir. 1980)).

When a Sixth Amendment interference with counsel case involves only particular pieces of evidence like an incriminating statement made to a government informant, the burden is placed upon the defendant to show prejudice. *United States v. Danielson,* 325 F.3d 1054, 1070 (9th Cir. 2003), citing *Kulmann v. Wilson,* 477 U.S. 436, 106 S.Ct. 2616 (1986); *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199 (1964); *United States v. Harris,* 738 F.2d 1068 (9th Cir. 1984); *United States v. Shaprio,* 669 F.2d 593 (9th Cir. 1982); *United States v. Bagley,* 641 F.2d 1235 (9th Cir. 1981). The same burden applies when the violation leads to physical evidence. *United States v. Danielson, supra,* citing *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232 (1977). "Placing the burden on the defendant in such cases makes good sense, for the defendant is in at least as good a position as the government to show why, and to what degree, a particular piece of evidence was damaging." *United States v. Danielson, supra.*

Insofar as the district court held that the onus was on the defense in this case to object to specific pieces of evidence produced at trial, its decision was arguably in accord with the federal practice.

However, more prejudice was involved in this case than simply the acquisition of certain pieces of evidence. As the district court noted, as a result of

the state's intrusion on the attorney-client privilege, the state was "forewarned as to potential defense strategies." It "had an inside look as to how Mr. Robins views his case and his defense." R 302. In other words, the state obtained knowledge as well as potential evidence.

> In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle. In such cases, it will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. The prosecution team knows what it did. The defendant can only guess.

United States v. Danielson, 325 F.3d at 1070.

> The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions.

Briggs v. Goodwin, 698 F.2d 486, 494 (D.C.Cir. 1983). *See also, United States v. Mastroianni,* 749 F.2d 900, 907 (1st Cir. 1984), and *United States v. Danielson,* 325 F.3d at 1071, quoting *Briggs.*

When confronted with prejudice as a result of the state improperly learning of potential defense strategy, the courts have adopted differing responses.

The D.C. Circuit has a per se rule that proof of mere possession of improperly obtained trial strategy information is proof of prejudice. *Briggs v. Goodwin, supra.* In the First Circuit, once a prima facie showing has been made by the defendant, the burden of proof shifts to the state. *See, United States v. Mastroianni, supra.*

The Ninth Circuit looks to *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653 (1972), for guidance. *United States v. Danielson, supra.* In *Kastigar,* the Supreme Court held that a potential criminal defendant could be compelled, despite the Fifth Amendment, to testify under a grant of use immunity. The petitioners argued against this result because criminal defendants would face difficulty in demonstrating impermissible use of the information by the government. The Court addressed this and held that once the defendant demonstrates that he testified, under a grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden to show that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. The Court stated that this is a "heavy burden." *Id.,* 406 U.S. at 460-62, 92 S.Ct. at 1664-66.

The Ninth Circuit interprets *Kastigar's* prohibition to include both direct and indirect use. Therefore, information derived from compelled testimony may not be used in providing assistance in focusing the investigation, deciding to initiate the prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy. *United States v. Crowson,* 828 F.2d 1427, 1430 (9th Cir. 1987).

The Ninth Circuit applies the *Kastigar* analysis in the analogous context of protecting against Sixth Amendment violations. *United States v. Danielson,* 325 F.3d at 1072.

> The particular proof that will satisfy the government's "heavy burden," *Kastigar,* 406 U.S. at 462, will vary from case to case, and we therefore cannot be specific as to precisely what evidence the government must bring forward. The general nature of the government's burden, however, is clear. As the Court stated in *Kastigar,* the mere assertion by the government of 'the integrity and good faith of the prosecuting authorities' is not enough. *Id.* at 460. Rather, the government must present evidence, and must show by a preponderance of that evidence, that 'all of the evidence it proposes to use,' and all of its trial strategy, were 'derived from legitimate independent sources.' *Id.* In the absence of such an evidentiary showing by the government, the defendant has suffered prejudice.

Danielson, supra.

Danielson recognizes that the government has legitimate interests in investigating criminal and potential criminal cases. It further recognizes that there can be practical problems where, as in this case, the government seeks non-privileged material but risks also obtaining privileged material. In response, the Ninth Circuit recommended that prosecutors take steps such as those taken during the prosecution of Manuel Noriega. The government taped Noriega's telephone calls, but a DEA agent unaffiliated with the prosecution screened the tapes prior to forwarding them to case agents and prosecutors to seal and segregate privileged information. *Id.*, citing *United States v. Noriega,* 764 F.Supp. 1480, 1483 (S.D.Fla. 1991).

In this case, instead of expressing excitement and asking to see the seized notes immediately, the prosecutor could have taken a more measured response and asked a simple question: Whether the material seized appear to be a letter between Mr. Douglas and Mr. Robins. Consistent with Officer Brooks's testimony at the

evidentiary hearing, the answer would have been "No" and the prosecutor would then have known she should not view the material without further inquiry - perhaps aided by submission of the notes to bar counsel for an opinion.

But, the state chose to take a risk and review the notes itself immediately.

Having proven that the state accessed and reviewed privileged material, the district court should have placed the burden upon the state to prove by a preponderance of the evidence that it would not use the privileged information. Obviously, Ada County could most easily have done this by turning the case over to an independent prosecutor who had never seen the notes. Or, it could have taken the more onerous route and offered the proof set out in *Danielson.* It could have shown that all the evidence to be introduced at trial was derived from independent sources and that all of its pre-trial and trial strategy was based upon independent sources. This strategy would include, but not be limited to decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), about what questions to ask (and in what order), about what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal. *Id.*

But, the Ada County prosecutor did not turn the case over to an independent prosecutor. Nor did it present proof that all of the evidence to be introduced, and all pre-trial and trial strategy would be and were based upon independent sources. Furthermore, the district court did not impose a remedy such as requiring an independent prosecutor or place the burden on the state to show an independent

source for all evidence and strategy. Thus, there was error. *Id.*

The trial court's solution to the problem was to place the onus on Mr. Robins to object when he felt the state was benefitting from its violation of the attorney-client privilege. The trial court abused its discretion in fashioning this remedy because it did not act consistently with the applicable legal standards. *Taylor v. McNicholes*, 149 Idaho at 848, 243 P.3d at 664.

The question then turns to remedy on appeal. Given that a trial was held, the proper remedy is vacation of the conviction and dismissal with prejudice.

As explained in *State v. Cory,* 382 P.2d 1019, 1022 (Wash. 1963), there is no way to isolate the prejudice resulting from an invasion of the attorney-client privilege after the case has gone to trial.

> If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy.

Id.

The Third Circuit also holds that the only appropriate remedy after a trial has been held is dismissal.

> The disclosed information is now in the public domain. . . . Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key

> government witnesses. More importantly, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At least in this case, where the trial has already taken place, we conclude that dismissal of the indictment is the only appropriate remedy.

United States v. Levy, 577 F.2d 200, 210 (3rd Cir. 1978). *See also, Commonwealth v. Manning,* 367 N.E.2d 635, 638-39 (Mass. 1977), dismissing an indictment when the government deliberately interfered with the attorney-client relationship both because a subsequent trial could not be purged of error and because a second trial might subject the defendant to an inexcusable risk of a greater sentence should he be reconvicted; *People v. Moore,* 57 Cal.App.3d 437, 442-43 (Cal.App.4th Dist. 1976), dismissing an indictment where the state intruded on the attorney-client relationship because "It is not the evidence which has been tainted, rather, it is Moore's right to due process."

In Idaho, the proper remedy for a violation of the attorney-client relationship is discussed in *State v. Martinez,* 102 Idaho 875, 879, 643 P.2d 555, 558-59 (Ct.App. 1982). The Court of Appeals cited *State v. Cory, supra,* noting that the remedy of dismissal applies in Washington only when there has been prejudice that materially affects the right of an accused to a fair trial that cannot be remedied by a new trial. It then declined to apply that remedy in Martinez's case because the recorded telephone conversation was not between Martinez and his trial counsel and there was no evidence that trial tactics or strategy were discussed. Likewise, improper discussions between the sheriff and Martinez in the absence of counsel did not merit

a new trial because again nothing was said that could have alerted the state to Martinez's trial strategy.

In this case, however, as the district court noted, the privileged materials viewed by the prosecutor gave the state forewarning about the defense strategy. Thus, unlike *Martinez,* a dismissal is the proper remedy. Even if a retrial were assigned to a different prosecuting attorney, the effects of the Sixth Amendment violation could not be erased. There is no way to determine how the state's case in the original trial was shaped to take advantage of information it learned through the violation of Mr. Robins's attorney-client privilege. And, a second trial, even with a new prosecutor, will not arise from a vacuum. Rather, the new prosecutor will review the previous trial and thus carry the fruits of the state's misdeeds forward in shaping the second trial. In this situation, vacation of the conviction and dismissal with prejudice is the only effective remedy. *State v. Cory, supra*; *United States v. Levy, supra*; *Commonwealth v. Manning, supra*; *People v. Moore, supra*; *State v. Martinez, supra.*

A dismissal with prejudice is required. In the alternative, if this Court should somehow conclude that a new trial can remove the taint of the prosecutor's violation of the Sixth Amendment, then a new trial must be ordered and the case tried by a prosecutor outside the Ada County Prosecuting Attorney's Office. At that trial, the new prosecutor must present proof that every piece of evidence and every strategic decision has a genesis completely independent of Ada County's intrusion into the attorney-client relationship. *Stuart v. State, supra*; *Nardone v. United*

States, supra; *United States v. Danielson, supra.*

B. *The District Court Erred by Denying the Motion for Access to Counsel.*

1. Facts pertaining to claim

On September 2, 2015, Mr. Robins and Mr. Douglas orally requested the district court to direct the Ada County Jail to make a reasonable accommodation to allow them to call their attorneys when needed as required by the Sixth Amendment. T (9/2/2015) pg. 17, ln. 24-pg. 19, ln. 3. The state objected and requested a written motion. T (9/2/2015) pg. 19, ln. 9-21; pg. 20, ln. 10.

Mr. Robins filed a written motion to compel access to counsel citing his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 1, § 13 of the Idaho Constitution. R 218-219.

In the accompanying memorandum and declaration, Mr. Robins explained that he was in lock down without phone access 23 hours per day. The one hour per day of phone access varied from day to day and often occurred outside of regular business hours when counsel could accept calls. As a result, Mr. Robins had been unable to contact counsel when he needed to do so. R 221-222, 226-227.

In its response, the state noted that in-person attorney visits were allowed by the jail 24 hours a day and that inmates have unlimited ability to write to counsel. R 249. The state also noted that Mr. Robins had never in his 235 days of imprisonment at the jail dialed his attorney of record, out of state counsel Brian McMonagle. And, he had dialed local counsel only four times. R 249-250. The state also provided the jail schedule for Mr. Robins's one hour per day access to the phone

demonstrating that the hour of access fell between 6 a.m. and 7 p.m., advancing by one hour each day. R 260.

The court heard arguments on the motion. Tr (9/23/2015) pg. 168, ln. 7- pg. 182, ln. 20. Following the arguments, the court denied the motion stating that while it had not seen any cases specifically addressing this type of situation, it did not think that there was a constitutional violation. The court stated that it was just a matter of "attorneys and clients making sure that their schedules are in proper order." T (9/23/15) pg. 182, ln. 22 - pg. 183, ln. 5.

2. Standard of review

As the constitutional error was objected to below, Mr. Robins carries the burden on appeal of establishing the error occurred. Thereafter, the state carries the burden of demonstrating that the error was harmless beyond a reasonable doubt. *State v. Perry,* 150 Idaho 209, 221-222, 245 P.3d 961, 973-974 (2010); *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967).

When a violation of constitutional rights is asserted, the appellate court defers to the district court's findings of fact when supported by substantial evidence and freely reviews the lower court's application of the facts found to the constitutional requirements. *State v. Anderson,* 143 Idaho 743, 746, 170 P.3d 886, 889 (2007).

3. Why relief should be granted

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan,* ___ U.S. ___, 132 S.Ct. 1309, 1317 (2012).

"[I]t is well settled that the right to counsel means the right to effective assistance of counsel. . . ." *State v. Ruth,* 102 Idaho 638, 642, 637 P.2d 415, 419 (1981), *citing State v. Clayton,* 100 Idaho 896, 606 P.2d 1000 (1980); *State v. Tucker,* 97 Idaho 4, 539 P.2d 556 (1975). Effective assistance requires the ability to communicate with the client. *See Baldayaque v. United States,* 338 F.3d 145, 152 (2d Cir. 2003).

The requirements for a fair trial include an opportunity for meaningful consultation with counsel. *Riggins v. Nevada,* 504 U.S. 127, 137, 112 S.Ct. 1810, 1816 (1992); *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984); *Geders v. United States,* 425 U.S. 80, 91, 96 S.Ct. 1330, 1336 (1976); *Powell v. Alabama,* 287 U.S. 45, 57, 53 S.Ct. 55, 59 (1932). The further principles underlying all these holdings is that the government may not impose any unnecessary restriction or impediment to the exercise of such rights, *Geders, supra,* and that trial judges must affirmatively safeguard those rights. *Turner v. Murray,* 476 U.S. 28, 36, 106 S.Ct. 1683, 1688 (1986); *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788 (1960).

In this case, the jail interfered with an opportunity for meaningful consultation with counsel by limiting Mr. Robins's phone access to one hour a day, at times at an hour outside of business hours so that counsel could not be reached at their offices. During this one hour a day, Mr. Robins needed to take a shower, exercise, and speak to his family, in addition to conferring with his attorney. While the state looked to the availability of other means of communication like in person

visits and mail, those means were not sufficient. In-person visits by necessity must be initiated by counsel. The jailed client cannot get into his car and go visit counsel at his office; rather, counsel must go to the jail. Primary trial counsel's office was in Philadelphia making regular in-person visit impracticable. While local counsel will know to go to the jail when counsel has an issue to discuss with the client, counsel cannot know other than by a phone call that the jailed client has an issue he wants to discuss. Likewise, mail is no substitute for the phone. In the best of circumstances, legal mail will take at least a day to reach counsel. Often legal mail will take much longer to arrive on counsel's desk. In preparing for trial, there are not days to waste waiting for the mail.

The state also looked to the fact that Mr. Robins had not previously called out-of-state counsel and only attempted to call local counsel four times. However, simply because Mr. Robins did not need to call counsel before the motion for access, did not mean that he would not need to call counsel after the motion. In fact, as the trial preparations went into higher gear, the most reasonable expectation is that the need for communication would escalate, not remain constant or decline.

Finally, the court looked to the ability of counsel to schedule their time – the implication being that counsel should organize their days in accord with the jail one hour release schedules so that during that hour counsel would be waiting by the phone in case Mr. Robins attempted to call. This is an unworkable resolution. No attorney can set aside one movable hour every day to wait by the phone for a call from the jailed client.

Mr. Robins's constitutional right to access to counsel was in fact violated and the court erred by finding otherwise. In addition, the court abused its discretion in failing to fashion a remedy because it (1) did not perceive the issue as one of discretion; (2) consequently, it failed to act within the boundaries of its discretion and consistently with legal standards applicable to specific choices; and (3) it failed reached its decision by an exercise of reason. *Taylor v. McNichols*, *supra*.

Given there was a violation, the burden is upon the state to prove harmlessness beyond a reasonable doubt. *Perry, supra*; *Chapman, supra.* Mr. Robins will respond to whatever harmlessness arguments the state presents in his Reply Brief.

Unless the state can prove harmlessness, this Court must reverse Mr. Robins's convictions as he was denied his right to access to counsel.

C. *The District Court Erred by Denying the Motion to Sever Defendants and by Admitting Exhibit 133 at Trial over Objection.*

1. Facts pertaining to claim

Mr. Robins filed a Motion for Relief From Prejudicial Joinder seeking to be severed from Mr. Douglas's trial. R 161. The basis for the motion was that a letter, written by Mr. Douglas, admitting that he was responsible for the murders, was going to be offered by the state at trial, but that the letter was not admissible against Mr. Robins. R 165-166. Mr. Douglas wrote this letter to Mr. Robins while they were both in jail, but it was obtained by another inmate before it reached Mr. Robins. That inmate turned it over to his attorney who turned it over to the

prosecuting attorney. T (1/25/2016), pg. 199, ln. 1 - pg. 202, ln. 2. The letter was filed under seal pretrial. R 214. It was admitted at trial as Exhibit 133 over objection by Mr. Robins. *Id*., pg. 204, ln. 2-8. A copy is attached as Appendix A to this brief.

While difficult to read, the letter appears to say the following:

> This is how we gonna play this. you get with your Ls tell him you want to cut a deal. But this is what you tell them. Tone ordered 30ps them dudes took the 30ps from tone he called you asked you did you know anybody who wanted to put in some work you called me told me somebody tone wanted to holler at me so tone flew me down there Boise told me what he wanted me to do only reason you and cook was down there was to pick me up and head out to Vegas or somewhere to party for cooks birthday so when yall got down there we all kicked it for a couple of days. the day of the murder you went where you went and cook went to the strip club when you got back that's when I said ya we out. that's when you said cook had the van keys that's where you called girl to take us to the strip club, you still didn't know what happened at this time we got cook come back you hit girl we packed and left people started hiting you up telling you what happened. that's when you asked me what what's up that's when I told you I bodyed them 2 dudes, now listen this is the story you have to fill in the blanks you tell them everything he said you did you tell them he did once you get back at me and let me know you got the deal you want i will let them know i want to plea out that's when i will back your story about tone was the driver and he gave me money gun everything. Not you. Run this by your Ls and get back with me aint no need both of us going down I already know yall will play yall part because love & loyalty tell your Ls to get at me so we can put this shit in motion A.S.A.P. P.S. or do you want to go with i plea out and you go trial ask me for witness and tell them tone drove the van, gave me the gun and put the hit together, it's your call get with your Ls tell him to come see me or what ever. Let me know wicth way to go. Peace Love Big Homie

Exhibit 133 (verbatim).[2]

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[2]The state interpreted this latter as follows:

Mr. Robins argued that severance should be granted because the letter was not admissible against Mr. Robins under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), noting that a separate trial was needed to protect his Sixth Amendment rights and to prevent unfair prejudice. R 168. The state conceded that "[t]he rule in *Bruton* applies when there is an incriminating statement that is admissible against one defendant, but not the co-defendant, during a joint trial." R 202. At the same time, it argued that *Bruton* did not apply because there was no

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Douglas' letter is addressed to "A". In the letter, Douglas told "A" how "they gonna play this" and then tells "A", in detail, what he should tell his attorney "Tone" did everything to get a plea deal. Douglas told "A" to tell his attorney the drugs were stolen from "Tone" and that "Tone" was the person who flew Douglas to Boise and told Douglas what to do. Douglas told "A" to tell his attorney, the only reason he ["A"] was in Boise was to pick Douglas up and go to Vegas to celebrate "cook's" [Lance Robertson's] birthday. Douglas told "A" to tell his attorney the day of the murder, he ["A"] went somewhere and "cook" [Lance Robertson] went to the strip club and when he ["A"] got back, "cook" [Lance Robertson] had the van keys so he called "girl" [Georgette Wadholm] to take Douglas and "A" to the strip club. Douglas told "A" to tell his attorney, at this time, he ["A"] still didn't know what happened". Douglas told "A" to tell his attorney, that he ["A"], "cook" [Lance Robertson] and Douglas "came back and then he ["A"] "hit" [had sex with] "girl" [Georgette Wadholm]. Douglas told "A" to tell his attorney that they ["A","cook" and Douglas] packed and left, and people started "hitting you up" [calling "A"] telling you what happened. Douglas told "A" to tell his attorney "you asked me what happened" and that's when I told you "I bodyed them 2 dudes". Douglas told "A" he has to "fill in the blanks" and say everything he [Tone] said you ["A"] did, he [Tone] did. Douglas told "A" to let him know when he gets the deal "A" wants, and then Douglas would "plea out" and "back" "A's" story about Tone was the driver, and he [Tone] gave me the money, gun, everything, not you ["A"]. Douglas told "A" to run this by his "Ls" and to get back to him. Douglas further told "A", there was "no need" they both go down. Douglas told "A" he knew "'yall will play yall part because love and loyalty". At the end of the letter, Douglas told "A", he could also go to trial, Douglas could "plea out" and then testify for "A" that Tone drove the van, gave Douglas the gun and put the hit together. Douglas signed the letter "Big Homie, J". R 199-200 (verbatim from state's pleading).

confrontation clause issue present as the letter was not testimonial evidence. R 203. It went on to argue that the letter was admissible against Mr. Robins because it was a statement against interest under I.R.E. 804(b)(3). R 212.

At the motion hearing, Mr. Robins additionally argued that the evidence was inadmissible under *State v. Averett*, 142 Idaho 879, 890-91, 136 P.3d 350, 361-62 (Ct. App. 2006). T (9/23/2015) pg. 147, ln. 10 - pg. 149, ln. 19.

The court ruled that the entire letter was admissible against Mr. Robins because it was a statement against Mr. Douglas's penal interests. R 307. It also found that *Bruton* was not applicable because the letter was not testimonial under *Crawford*. R 311. It denied the motion to sever concluding that Mr. Robins would not be prejudiced by a joint trial. R 312.

2. Standard of review

a. Severance motion

A motion for relief from prejudicial joinder is reviewed under the abuse of discretion standard. *State v. Field*, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). If a defendant is prejudiced by the joinder of offenses or defendants, "the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires." *State v. Orellana-Castro,* 158 Idaho 757, 760, 351 P.3d 1215, 1218 (2015); *quoting* I.C.R. 14

b. Admission of evidence

"When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard." *Union Bank, N.A. v. JV L.L.C.*, No. 42479, 2017 Ida. LEXIS 18, at *24 (Jan. 27, 2017), *quoting Edmunds v. Kraner*, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006).

3. Why relief should be granted

Here the court abused its discretion because it admitted the letter *in toto* without individualized consideration of the many statements to determine which fell within the hearsay exception. The court's erroneous ruling on the admissibility of the letter also led it to deny the motion to sever. Thus, the court did not act consistently with legal standards applicable to specific choices nor did it reach its decision by an exercise of reason. *Taylor v. McNichols*, *supra*.

"The declaration against interest exception to the hearsay rule allows for the admission of a statement which was at the time of its making so far contrary to the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. I.R.E. 804(b)(3)." *State v. Averett*, 142 Idaho at 890-91, 136 P.3d at 361-62. In *Averett*, an inmate testified that she shared a cell with Averett's co-defendant, Johnson, who described to her the process to make methamphetamine. Johnson also said Averett was involved in making methamphetamine. A note, written by Johnson was admitted at trial. The Court of Appeals held that some of the statements were against Johnson's penal interests. "However, the trial court did err in admitting

into evidence -- or in failing to redact -- Johnston's statement that Averett made methamphetamine for his own use and for his personal war against the government. Such statement was in no way self-inculpatory as to Johnston." 142 Idaho at 890-91, 136 P.3d at 361-62.

The *Averett* Court explained that the rule requires that each statement within a larger narrative be examined to determine whether it is against the declarant's penal interests. "In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id*., *quoting Williamson v. United States*, 512 U.S. 594, 600-01, 114 S.Ct. 2431 (1994). Within any given declaration there may be many statements and each one must be determined to be sufficiently reliable even if made as part of a narrative. *Williamson*, 512 U.S. 604. "Accordingly, each admitted statement or part thereof must be found to be truly against the penal interest of the declarant." *Averett*, 142 Idaho at 891, 136 P.3d at 362.

Here, the court abused its discretion because it did not act consistently with the applicable legal standards as it considered the letter as a whole instead of analyzing each statement. The court ruled:

> Here, the letter is genuinely self-inculpatory as to Mr. Douglas as he places the blame on himself for committing the murders. In fact, no part of the letter seeks to shift the blame to Mr. Robins, but rather seeks to give Mr. Robins an alibi, so that both Defendants do not have to "go down" for the crime. In addition, the letter was meant to be delivered to Mr. Robins, not to law enforcement. Indeed, the context would clearly indicate that Mr. Douglas would not want law

> enforcement to see it. The letter contains statements that were not intended to be given to law enforcement as a self-serving confession, but rather to another inmate in an attempt to create a story which Mr. Douglas believed would help both Defendants in their cases. *See State v. Averett*, 142 Idaho 879, 891, 136 P.3d 350, 362 (Ct. App. 2006).
>
> The Court concludes that the letter is admissible against Mr. Douglas as an admission by a party opponent, as he is the author. The Court further concludes that the letter is admissible against Mr. Robins as a statement by Mr. Douglas against his penal interest.

R 306-307.

Even though the court was aware of *Averett*, it did not follow the procedure set forth in that case. Again, this was an abuse of the trial court's discretion as to both the ruling on the admissibility of the evidence as well as the motion for relief from prejudicial joinder because the court did not act consistently with the applicable legal standards as it considered the narrative as a whole and did not analyze whether the individual statements were against Mr. Douglas's penal interest.[3] *Taylor v. McNichols*, *supra*.

Had the court followed the procedure mandated by *Averett* as requested by the parties, it would have realized that the only portion of the statement which is against Mr. Douglas's penal interest is the admission that "I bodyed them dudes[.]" Exhibit 133. The statement that there is "no need both of us going down" is not an admission of guilt, but rather an evaluation of the state's case which included an eyewitness identification of Mr. Douglas by the surviving victim and the informant

[3] Ironically, the state urged the court to analyze each statement individually. T (9/23/2015) pg. 159, ln. 3 - pg. 161, ln. 20.

testimony of Mr. Raider. In addition, the statement that Mr. Robins did not need to 'go down' did not incriminate Mr. Douglas in any way. That was not a statement against his penal interests and should have been redacted, at least. Since objected-to error has occurred, the state bears the burden of proving harmlessness beyond a reasonable doubt. *Perry, supra*; *Chapman, supra.* As with the deprivation of attorney access issue above, Mr. Robins will respond to whatever harmlessness arguments the state presents in his Reply Brief.

D. *The District Court Abused its Discretion in Ordering Restitution Payable to Idaho Medicaid State Operations in the Absence of Evidence that Medicaid is a "Victim" under I.C. § 19-5304 and it Abused its Discretion in Taking Judicial Notice of the "Well-Known Fact" That a Contractual Relationship Existed Between Medicaid and the Health Care Providers in this Case.*

1. Facts pertaining to claim

The court imposed $187,112.44 in restitution. R 522. Of that, $72.791.50 was awarded to Medicaid State Operations. *Id*. Mr. Robins objected to any award of restitution to Medicaid because it is not a victim eligible to receive restitution under I.C. § 19-5304(e). T (9/9/2017) pg. 430, ln. 1 - pg. 431, ln. 1. Specifically, Mr. Robins argued that Medicaid is not paid pursuant to a contract, as required under Idaho Code § 19-5304(e)(iv), but rather by statute. T (9/9/2017) pg. 434, ln. 17 - pg. 435, ln. 8. The court found that Medicaid was a victim stating that "I do think it's a well known fact Medicaid contracts are required between the providers and Medicaid" and that "Medicaid is certainly in the nature of insurance." T (9/9/2017), pg. 436, ln. 21-25; pg. 437, ln. 8-9.

2. Standard of review

Restitution to crime victims is governed by I.C. § 19-5304. On appeal, an award for restitution will be upheld only if it is supported by substantial evidence. *State v. Taie,* 138 Idaho 878,879, 71 P.3d 477, 478 (Ct. App. 2003); *State v. Hamilton,* 129 Idaho 938, 943, 935 P.2d 201, 206 (Ct. App. 1997); *State v. Bybee,* 115 Idaho 541, 544, 768 P.2d 804, 807 (Ct. App. 1989). Restitution is discretionary. To determine whether the district court abused its discretion, this Court evaluates whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason. *State v. Nelson*, No. 44177, 2017 Ida. LEXIS 57, at *6 (Feb. 27, 2017), *citing Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003). "The second and third requirements of the inquiry outlined above require the district court to 'base the amount of restitution upon the preponderance of evidence submitted by the prosecutor, defendant, victim, or presentence investigator.'" *Nelson, supra.*, *citing State v. Weaver*, 158 Idaho 167, 170, 345 P.3d 226, 229 (Ct. App. 2014) (internal citation omitted).

While the decision whether to require restitution is committed to the trial court's discretion, "courts of criminal jurisdiction have no power or authority to direct reparations or restitution to a crime victim in the absence of a statutory provision to such effect." *State v. Cheeney*, 144 Idaho 294, 296, 160 P.3d 451, 453

(Ct. App. 2007), *citing State v. Richmond*, 137 Idaho 35, 37, 43 P.3d 794, 796 (Ct. App. 2002). "Therefore, the trial court's exercise of discretion in requiring restitution must be within the boundaries provided in Section 19-5304." *Cheeney, supra*.

3. Why relief should be granted

The district court abused its discretion in ordering restitution paid to Medicaid because the State presented no evidence whatsoever that Medicaid is a "victim" eligible for restitution. Further, the "well-known fact" that a contract exists between Medicaid and medical providers is not capable of judicial notice under I.R.E. 310(a)-(b). Consequently, the court did not act "consistently with legal standards applicable to specific choices" nor did it "reach its decision by an exercise of reason." *Taylor v. McNichols*, 149 Idaho at 848, 243 P.3d at 664 (2010).

a. Absence of evidence from the state.

This case is analogous to *Cheeney, supra.* Cheeney pled guilty to grand theft in connection with an embezzlement scheme to take money from her physician employer. The lower court entered a restitution order in favor of the physician, the physician's bank, and a collection agency employed by the physician's insurance company. The Court of Appeals reversed the order of restitution as to the bank and the collection agency because the State provided no evidence that either entity was a victim as defined by I.C. § 19-5304(e). *Id.*

In this case, the state presented no evidence, much less substantial evidence,

that Medicaid is a victim as defined by I.C. § 19-5304(e). Substantial evidence is "relevant evidence as a reasonable mind might accept to support a conclusion." *State v. Straub*, 153 Idaho 882, 885, 292 P.3d 273, 276 (2012). Unsworn representations do not constitute "substantial evidence" upon which restitution made be based, even when made by an officer of the court. *State v. Nelson*, *supra*., 2017 Ida. LEXIS 57, at *11.

Indeed, it is not even clear if the state could ever provide such evidence.

Idaho Code § 19-5304(e) defines four categories of victims for purposes of restitution:

> (i) The directly injured victim . . .
>
> (ii) Any health care provider who has provided medical treatment to a directly injured victim if such treatment is for an injury resulting from the defendant's criminal conduct and who has not been otherwise compensated . . .
>
> (iii) The account established pursuant to the crime victims compensation act . . .
>
> (iv) A person or entity who suffers economic loss because such person or entity has made payments to or on behalf of a directly injured victim pursuant to a contract including, but not limited to, an insurance contract, or payments to or on behalf of a directly injured victim to pay or settle a claim or claims against such person or entity in tort or pursuant to statute and arising from the crime.

I.C. § 5304(e)(i)–(iv).

Clearly, Medicaid is not the directly injured victim. Nor is Medicaid a healthcare provider. *State v. Gardiner,* 127 Idaho 156, 166, 898 P.2d 615, 625 (Ct. App. 1995) (an entity that merely facilitates health care provider in providing

medical treatment and does not provide treatment itself is not a health care provider for purposes of I.C. § 19-5304(e)(ii)). Nor is Medicaid the crime victims compensation act. And, Medicaid has never been held to be a victim pursuant to I.C. § 19-5304(e)(iv).

But, the question of whether Medicaid could fall into any of the above categories is immaterial in this case because the state failed to provide any proof that it was within any of the categories. As the Court of Appeals stated in *Cheeney*:

> We need not decide whether the district court may award restitution to Stuart Allan, as Safeco's agent, because the record before us does not contain substantial evidence of an insurance contract to qualify Safeco as a victim. . . .
>
> Likewise, we need not determine whether the district court made a finding that Wells Fargo made its payment pursuant to a contract because the record before us does not support such a finding.

144 Idaho at 298, 160 P.3d at 455.

The state in this case declined to present evidence that Medicaid was a victim under the restitution statute. Therefore, this Court need not determine whether Medicaid ever could be a victim under the restitution statute. And, absent such evidence the court abused its discretion by not acting consistently with the legal standards applicable to the choice before it and by not reaching its decision by an exercise of reason. *Taylor v. McNichols*, *supra*.

b. The court's judicial notice of a contract between Medicaid and the victim's health care providers was an abuse of discretion but ultimately irrelevant.

The court's observation that it is a "well-known fact" that contracts are

required between the providers and Medicaid does not validate the award. First, if that was the court's attempt to take judicial notice of a contract, it was an abuse of discretion to do so. The court could not take judicial notice because the existence of such contracts is not "generally known within the territorial jurisdiction of the trial court," nor is it "capable of accurate and ready determination" and thus not capable of judicial notice. I.R.E. 201(b). The trial court abused its discretion in taking judicial notice of a contract because it did not act consistently with the applicable legal standards, *i.e.,* I.R.E. 210. The rule on judicial notice does not permit the court to take note of obscure "facts" not capable of ready determination.

Second, the court's supposed contract between Medicaid and the health care providers in this case is not of the type of contract required by the restitution statute. This Court's interpretation of a statute begins with the plain language, considering the statute as a whole, and giving words their plain, usual, and ordinary meanings. When the statute's language is unambiguous, the court will not consider other rules of statutory construction. *State v. Taylor*, 160 Idaho 381, 385, 373 P.3d 699, 703 (2016). *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015). Here, I.C. § 19-5304(e)(iv) allows an "entity who suffers economic loss because such person or entity has made payments to or on behalf of a directly injured victim pursuant to a contract" to recover restitution. The plain language of the statute requires a contractual relationship between the victim and the payer, not the payer and the payee.

To illustrate: Assume the victim had health insurance through Blue Shield.

In such a case, Blue Shield may recover for any payments made pursuant to its contractual relationship with the injured victim. Now assume the victim did not have health insurance through Blue Shield, but obtained medical treatment by physicians under contract with Blue Shield. The insurance company may not obtain restitution from Mr. Robins for any payments made to those physicians because it was not under a contractual requirement to do to. Likewise here, restitution is improper even if there was proof of a contract between Medicaid and the victim's health care providers, because there is no evidence of a contract – whether by judicial notice or state's proof – between the victim and Medicaid. If anything, it seems more likely that the Medicaid payments were made pursuant to federal statutes and regulations, not "pursuant to a contract" as required by the restitution statute.

In sum, the court abused its discretion in taking judicial notice of the existence of a contract between Medicaid and health care providers. Ultimately, however, that "fact" is irrelevant because there was no evidence of a contract between the victim and Medicaid, which is the contract required by statute.

c. The court abused its discretion

The imposition of restitution without any proof that Medicaid is a victim per the statute was an action beyond the power of the district court. "It is generally recognized, however, that courts of criminal jurisdiction have no power or authority to direct reparations or restitution to a crime victim in the absence of a statutory provision to such effect." *State v. Cheeney,* 144 Idaho at 296, 160 P.3d at 453. Thus,

the district court abused its discretion in awarding restitution to Medicaid, especially in light of the specific objection made to that award, because it did not act within the boundaries of its discretion. *Taylor v. McNichols*, *supra*.

V. CONCLUSION

Mr. Robins respectfully requests that this Court reverse his conviction and dismiss. Alternatively, the Court should vacate his conviction and remand to the district court for a new trial. In the latter case, the Court should hold that Medicaid is not a victim under the restitution statute as guidance to the lower court. As a second alternative, the Court should reverse the award of restitution to Medicaid.

Respectfully submitted this 14th day of April, 2017.

/s/Dennis Benjamin
Dennis Benjamin
Attorney for Anthony Robins

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 14th day of April, 2017.

/s/Dennis Benjamin
Dennis Benjamin

A

This is how we gonna play this, you get with your Cs tell him you want to cut a deal, But this is what you tell them, Tone ordered 30ps them dudes took the 30 ps from Tone he called you asked you did you know anybody who wanted to put in some work you called me told me somebody Tone wanted to holler at me so Tone flew me down there Boise told me what he wanted me to do, only reason you and Cook was down there was to pick me up and head out to Vegas or somewhere to party for Cooks birthday so when yall got down there we all kicked it for a couple of days. the day of the murder you went where you went and Cook went to the strip club when you got back that's when i said ya we out, thats when you said Cook had the van keys that's when you called girl to take us to the strip club, you still didn't know what happened at this time we got Cook came back you hit girl we packed and left people started hitting you up telling you what happened, that's when you asked me what what's up that's when i told you i bodyed them 2 dudes, now Listen this is the story you have to fill in the blanks you tell them everything he said you did you tell them he did once you get back at me and let me know you got the deal you want, i will let them know i want to plea out that's when i will back your story about Tone was the driver and he gave me money, gun, everything, not you. Run this by your Cs and get back with me ant no need both of us going down, i already know yall will play yall part because love & loyalty

- OVER -

STATE'S EXHIBIT 133

Appendix A

ll your Ls to get at me so we can put this shit in motion A.S.A.P. P.S. or do you want to go with it 'ea out and you go to trial ask me for witness and tell them Tone drove the van, gave me the gun, I put this hit together, it's your call get with your tell him to come see me or what ever. Let me ow wich way to go.

Peace Love
Big Homie, J

10