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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY BRIEF OF APPELLANT

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

HONORABLE SAMUEL A. HOAGLAND
District Judge

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II. ARGUMENT IN REPLY

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.*

The state first contends that "[t]he remedy fashioned by the district court is consistent with Stuart v. State, 118 Idaho 932, 801 P.2d 1283 (1990), and State v. Martinez, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982)." Respondent's Brief, pg. 7. That is incorrect. In *Stuart,* the Supreme Court required the prosecutor "to show that the evidence at trial had an origin independent of the eavesdropping," noting that, [a]ny *knowledge* wrongfully gained by the government cannot be used against a defendant." 118 Idaho at 935, 801 P.2d at 1286, *citing Nardone v. United States,* 308 U.S. 338 (1939) (emphasis added). Here, however, the district court did not require the state to show an independent source. And although the state claimed that it was able to do so, there is no evidence in the record to support that claim because the district court relieved them of that burden. In fact, the "remedy" in this case is contrary to *Stuart* because the court relieved the state of its burden to show an independent source and instead placed the burden on Mr. Robins to object whenever "the defense believes that the prosecution is offering evidence or argument that could only have been obtained by way of [the] notes." R 303.

This burden-shifting is not only inconsistent with *Stuart*, it is illogical. The court instructed Mr. Robins to object when the prosecution was offering evidence or argument that *could only be obtained* by way of the note. Of course, that ignores

the possibility that the prosecution might present evidence or argument for which there could be an independent source but also could have been obtained from the note. In that case, *Stuart* requires that the state bear the burden of showing the evidence has an independent source. So, by limiting the defense objection to instances where there could not have been an independent source, the court prevented Mr. Robins from objecting in cases where the source of the information was not clear. But even the cases cited by the state recognize that it is the state's burden of proof to show the absence of prejudice in such cases. See State's Brief, pg. 19, *citing, State v. Warner*, 722 P.2d 291, 296 (Ariz .1986) ("[W]e believe the appropriate remedy in this case is to remand for a hearing to determine how, if at all, defendant was prejudiced by the state's intrusion, with the burden on the state to prove defendant was accorded a fair trial."). The trial court abused its discretion by shifting the burden to Mr. Robins because it did not act consistently with the applicable legal standards. *Taylor v. McNichols*, 149 Idaho 826, 848, 243 P.3d 642, 664 (2010).

Martinez, *supra*, is not apposite to this case because "[n]one of the information gathered through surveillance of Martinez's mail or phone calls was used as evidence in his trial." 102 Idaho at 879, 643 P.2d at 559. Here, we do not know whether any evidence was used because the court never made the state prove an independent source.

Moreover, neither *Stuart* nor *Martinez* address the additional problem

present here. The note contained more than potential evidence. It also contained notes and thoughts on "potential defense strategies," which gave the state an unfair "inside look as to how Mr. Robins views his case and his defense." R 302. In this regard, Mr. Robins' argument based upon *United States v. Danielson,* 325 F.3d 1054 (9th Cir. 2003), is not addressed by the state. Instead, it again attempts to shift the burden to Mr. Robins to identify "an[] actual strategy . . . the state became privy to as a result of its acquisition of his notes." State's Brief, pg. 10. But that is an impossible task, because as the *Danielson* Court observed: "In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy . . . 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. . . . . The prosecution team knows what it did. The defendant can only guess." *Id*., at 1070. Further, the state fails to take into account the district court's finding that the notes revealed potential defense strategies. R 302. Thus, Mr. Robins made a *prima facie* case that confidential communications were conveyed to the prosecution through the affirmative intrusion into the attorney-client relationship.

Under *Danielson,* "once the prima facie case has been established, 'the burden shifts to the government to show that there has been . . . no prejudice to the defendant[] as a result of these communications.'" 325 F.3d at 1071, *quoting, United States v. Mastroianni,* 749 F.2d 900, 908 (1st Cir. 1984). Prejudice can come from

either direct and indirect use of the knowledge, this includes more than just what evidence the state presents during the trial and can be 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. *See, United States v. Crowson,* 828 F.2d 1427, 1430 (9th Cir. 1987).

The state's reliance on *United States v. Morrison*, 449 U.S. 361 (1981), is also misplaced. That case, unlike here, involved a pre-trial motion which did not allege that the prosecutor was aware of any attorney-client privileged communications. *Id*., at 363. Federal agents met with Ms. Morrison after she had retained counsel seeking her cooperation in a related investigation. She declined to cooperate and notified her attorney. The agents visited her again and she again refused to cooperate with them. She did not incriminate herself, supply any information pertinent to her case, or reveal attorney-client confidences. 449 U.S. at 362. Thus, the defendant did not show that the government was aware of any information obtained by a wrongful intrusion into the attorney-client relationship. Here, the prosecutor was aware of such information.

The same is true in *Weatherford v. Bursey*, 429 U.S. 545, 548 (1977), the other Supreme Court case cited by the state. The prosecution did not gain any advantage from the violation of attorney-client confidentiality. While a government undercover agent was present at meetings between the attorney and client, "[a]t no

time did [he] discuss with or pass on to his superiors or to the prosecuting attorney or any of the attorney's staff any details or information regarding the plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff." *Id.*, 548 (internal quotations omitted). The same distinction holds true for *State v. Russum*, 333 P.3d 1191, 1194 (Or. App. 2014), and *Brown v. Commonwealth*, 416 S.W.3d 302, 307 (Ky. 2013), also cited by the state.[1]

By contrast, the prosecutor here obtained and read Mr. Robins' note. Mr. Robins made a prima facie showing of prejudice as the trial court found the prosecution obtained both evidence and knowledge of defense strategies. R 302. The burden then shifted to the prosecutor to show the absence of prejudice pursuant to *United States v. Danielson, supra.*

In addition, *Morrison* is distinguishable from this case because the dismissal with prejudice there was made pre-trial, when lesser measures were still available to the court. Here the district court could have fashioned an effective remedy well short of dismissal by, for example, disqualifying the Ada County Prosecuting Attorney's Office and requiring the case to be turned over to an independent prosecutor who had never seen the notes. But now, as explained in *State v. Cory,* 382 P.2d 1019, 1022 (Wash. 1963) and *United States v. Levy,* 577 F.2d 200, 210 (3rd Cir. 1978), there is no way to isolate the prejudice resulting from an invasion of the

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[1] Another case cited by the state, *Haworth v. State*, 840 P.2d 912 (Wy. 1992), is an order denying a petition for rehearing. The Wyoming Court's opinion in the case is apparently unpublished. *Haworth v. State*, No. 90-276, 1992 Wyo. LEXIS 151 (Oct. 22, 1992).

attorney-client privilege once the case has gone to trial.

Now that the trial has taken place, a new trial does not afford an effective remedy because the prosecutor in a second trial will still benefit from the original violation as the fruits of the violation are now in the public record. However, in the alternative, if a new trial is ordered, the case must be tried by a prosecutor outside the Ada County Prosecuting Attorney's Office. And that 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, including evidence that she has not reviewed Ada County files or the trial transcripts.

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

1. <u>The court abused its discretion</u>

Mr. Robins argues that the court abused its discretion in denying the motion to sever because it admitted the Douglas letter *in toto* without individualized consideration of the many statements to determine which fell within the hearsay exception, contrary to State v. Averett, 142 Idaho at 890-91, 136 P.3d at 361-62. Had the court followed the procedure mandated by *Averett*, it would have only admitted Mr. Douglas's admission that "I bodyed them dudes[.]" Exhibit 133.

To this, the state argues that "context matters." State's Brief, pg. 25. But, as previously argued, the statement that there is "no need both of us going down" when taken in context is not an admission of guilt, but rather a recognition by Mr.

Douglas of the very strong case against him. In context, the statement that Mr. Robins did not need to "go down" did not incriminate Mr. Douglas in any way. Neither statement was against Mr. Douglas's penal interests.

2. <u>The error is not harmless</u>

Since objected-to error has occurred, the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Perry*, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010). The entirety of the state's argument in this regard is the bare assertion that "any error in its admission was harmless in light of the evidence presented at trial supporting the jury's verdicts finding Robins guilty of aiding and abetting Douglas in the murders of Elliott Bailey and Travonte Calloway, and the attempted murder of Jeanette Juraska. (See, e.g., Exhibits 97-99 (phone records); 1/22/2016 Tr., pp.26-137 (Juraska's testimony); 1/25/2016 Tr., pp.6-192 (Raider's testimony).)" State's Brief, pg. 26. That is a conclusion, not an argument and does not meet the state's burden of proof. "A party waives an issue cited on appeal if either authority or argument is lacking[.]" *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

In addition to not offering any argument, the state never even summarizes its trial evidence. Its "Statement Of The Facts and Course Of Proceedings," is exactly two paragraphs long, the second consisting of seven words. Neither paragraph actually describes the evidence the state asserts shows the error was harmless. Nor does it ever argue how the exclusion of the inadmissible portions of the letter could

not have contributed to the verdict. Thus, the state's claim of harmless error fails.

But even if the evidence is examined, the error cannot be deemed harmless.

First, the state's citation to Ms. Juraska's testimony does not aid its cause. Ms. Juraska opened the door and saw Mr. Winn and Mr. Douglas. T (1/22/2016) pg. 40, ln. 12 - pg. 45, ln. 13. Ms. Juraska did not see Mr. Robins.

Second, the testimony of Anton Raider was highly dubious. Mr. Raider's alibi for the murder was that he was at his friends' house where he "hung out and smoked weed, just chilled." T (1/25/2016) pg. 58, ln. 18 - pg. 61, ln. 12. Prior to that, however, he admitted he was actively involved in the crime. Mr. Raider suspected Bailey and Calloway were the thieves and agreed to sell his .45 caliber handgun to Mr. Douglas, so Mr. Douglas could kill them. T (1/25/2016) pg. 41, ln. 4-23. He also went to Cabela's to buy ammunition for the weapon. Exhibits 111-113. He retrieved the pistol from his mom's house, cleaned it, and help to load it. He drove Mr. Winn and Mr. Douglas around to look for Bailey and Calloway prior to the shooting. T (1/25/2016) pg. 48, ln. 5-12. He let his van be driven to the murder scene. And while he denies being there, a neighbor, Matt Jamison, heard the gunfire and saw a black man and a white man 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. 156, ln. 14. Mr. Raider is the only white person among the possible participants. Exhibits 73, 119. Mr. Jamison saw Mr. Raider's van leaving. T (1/19/2016) pg. 270, ln. 2-14.

The next day, Mr. Raider located the van, went to the hardware store and bought bleach, cleaned the interior of the van, "and then drove it to a car wash and

pressure washed the inside of it." T (1/25/2016) pg. 71, ln. 9-12; Exhibit 73. And while Mr. Raider claimed he learned of the van's location during a telephone call with Mr. Robins, his cell phone records did not show that call. T (1/26/2016), pg. 74, ln. 15 - pg. 75, ln. 22; Exhibits 76, C.

Mr. Raider did not immediately report the murders to the police, as a good citizen would have done. It was not until he was charged in federal court with possession of marijuana and with possession of a weapon in connection with a drug crime, and had consulted with his Federal Public Defender, did he finger the others. In exchange for his cooperation, he received a five-year sentence in federal court and concurrent five-year sentence in state court. T (1/25/2016) pg. 76, ln. 6 - pg. 77, ln. 16; pg. 146, ln. 1-2. Thus, Mr. Raider literally got away with murder in exchange for his testimony.

In short, the evidence excluding Mr. Douglas's letter was not strong and relied upon the untrustworthy testimony of Anton Raider, who had every reason to place the blame on Mr. Robins for his own actions. The state has not shown the error was harmless beyond a reasonable doubt.

III. 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.

Respectfully submitted this 6th day of October, 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):

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Dated and certified this 6th day of October, 2017.

/s/Dennis Benjamin
Dennis Benjamin