2-15-2018

State v. Herrera Appellant's Reply Brief Dckt. 44596

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44596**
	)	
v.	)	**BENEWAH COUNTY**
	)	**NO. CR 2011-2053**
JOSEPH DUANE HERRERA,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
_____	)	

_____

REPLY BRIEF OF APPELLANT

_____

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

_____

HONORABLE JOHN T. MITCHELL
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Joseph Duane Herrera appeals from his conviction for second degree murder entered following a second jury trial, for the shooting death of his girlfriend. Previously in this case, Mr. Herrera was charged with second degree murder and convicted after a three-day jury trial in 2013. He was sentenced to life, with twenty-two years fixed. He appealed, and his conviction was vacated by the Idaho Supreme Court in 2015. He was retried, and again convicted of second degree murder in 2016. This time, a different sentencing judge sentenced him to life, with thirty years fixed.

On appeal, Mr. Herrera asserts that the prosecutor vindictively prosecuted him and misled the district court when it sought to amend the information to add a firearm sentencing enhancement, and after trial by arguing for an increased sentence based on the dismissed sentencing enhancement; that the district court erred in failing to provide him with a full and fair opportunity to explain the conflict he was having with his attorney; that the district court abused its discretion when it overruled his foundation objections to Detective Berger's testimony on gunshot residue analysis because Detective Berger did not have practical experience or special knowledge that would qualify him as an expert on gunshot residue analysis; and that the prosecutor committed misconduct during closing arguments. The accumulation of the errors deprived him of his right to a fair trial. Finally, Mr. Herrera asserts that the second sentencing judge vindictively increased his sentence by eight years fixed.

This Reply Brief is necessary to address the State's arguments in response, which are unavailing.

Statement of the Facts and Course of Proceedings

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

ISSUES

I. Did the State vindictively prosecute Mr. Herrera by adding a firearm sentencing enhancement, and did the State commit misconduct when it misled the district court in order to get its motion to amend the complaint granted?

II. Did the district court err in failing to conduct a sufficient inquiry of Mr. Herrera and his trial counsel upon Mr. Herrera's request for substitute counsel?

III. Did the district court abuse its discretion when it overruled Mr. Herrera's foundation objections to Detective Berger's testimony on gunshot residue analysis?

IV. Did the State commit prosecutorial misconduct in its closing arguments?

V. Did the accumulation of errors deprive Mr. Herrera of his right to a fair trial?

VI. Did the district court impose a vindictive sentence after the second trial?

ARGUMENT

I.

Mr. Herrera's Right To Due Process Of Law Was Violated By Prosecutorial Vindictiveness When The Prosecutor Amended The Information To Add A New Sentencing Enhancement And When He Argued For Its Consideration At Sentencing; The Prosecutor Committed Misconduct When He Misled The Court As To The Purpose Of The Enhancement[1]

1. The State's Request To Amend The Information To Add A Firearm Sentencing Enhancement Constituted A Vindictive Prosecution Because The Enhancement Was Only Sought As Punishment For Mr. Herrera Exercising His Due Process Right To Challenge His Conviction

In the present case, the prosecutor acted maliciously and in bad faith when he brought a new sentencing enhancement against Mr. Herrera, after the Idaho Supreme Court granted him a new trial.

The State claims Mr. Herrera's repeated objections—first to the amendment of the Information to add a new firearm enhancement, and second to the prosecutor's use of the now-dismissed enhancement to support his argument for an additional eight fixed years of incarceration—did not serve to preserve his argument that the State maliciously prosecuted him after he exercised his constitutional rights. (Resp. Br., pp.4-5.) The record belies the State's claim.

The State filed a motion to amend the Information to add a sentencing enhancement for using a firearm during the commission of second degree murder.[2] (Limited R., pp.58-62.)

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[1] Mr. Herrera relies on his initial arguments made in the Appellant's Brief that the prosecutor committed misconduct when it misled the district court to grant the amendment but then urged the court to increase Mr. Herrera's sentence based on the now-dismissed enhancement. (App. Br., pp.20-24.)

[2] As discussed in the Appellant's Brief, there was no *new* firearm that could constitute newly discovered evidence which would have justified the prosecution seeking to add an additional firearm sentencing enhancement because the gun had been turned over to law enforcement on the day of the shooting. (*See* App. Br., p.14.)

Mr. Herrera objected and a hearing was held on plaintiff's motion to amend the Information to include a firearm enhancement. (Tr. (Vol. I), p.32, L.14 – p.41, L.11.)

At the hearing, the prosecutor, apparently recognizing that his motion to amend could be construed as a vindictive prosecution, said "It certainly isn't any personal vindictiveness that I would have and -- over the reasons for amending the information." (Tr. (Vol. I), p.34, Ls.3-9.)

Defense counsel's objection and argument that the proposed amendment infringed upon Mr. Herrera's constitutional rights where "now he is facing a greater penalty than he would if he is convicted of the offense that he had already been tried for" (Tr. (Vol. I), p.36, L.10 – p.37, L.24), further preserved the objection for vindictive prosecution for appellate review. Also, the prosecutor referenced a Court of Appeals case addressing the presumption of vindictiveness. (Tr. (Vol. I), p.38, L.19 – p.39, L.9.) The district court then acknowledged the case, saying that it did not think "the fact that the prosecuting attorney is new is the be-all end-all as far as vindictiveness," and said that it had previously researched the issue of vindictiveness and it wanted to go back and look at that research, then it would issue a decision. (Tr. (Vol. I), p.39, L.16 – p.40, L.11.) The court then issued a written decision in which it granted the State's motion, finding the amendment could not possibly result in an increased penalty.[3] (Limited R., pp.96-105.)

[3] While the district court relied on a case from another jurisdiction in recognizing that the analysis was the same for either a sentencing enhancement or a new charge in a claim of prosecutorial vindictiveness (*see State v. Patterson*, 637 S.W.2d 16 (Mo. 1982)), the district court primarily focused its in-depth analysis on a non-final Idaho Court of Appeals decision, *State v. Ostler*, 2015 Opinion No. 42335 (Dec. 8, 2015). (Limited R., pp.101-104.) Prior to the district court's decision on March 23, 2016, the Idaho Supreme Court had granted the respondent's petition for review in *Ostler* on February 11, 2016. The Idaho Supreme Court issued its Opinion affirming the judgment of conviction on November 2, 2016; therefore, the Court of Appeals' decision is no longer current law. *See State v. Ostler*, 161 Idaho 350 (2016).

Even assuming that appellate review required Mr. Herrera to object and voice the specific words, "prosecutorial vindictiveness," the error is still preserved because it was specifically addressed by the court. The Idaho Supreme Court's Opinion in *State v. DuValt*, 131 Idaho 550 (1998), is instructive:

> Preliminarily, we note that the State argues that this issue may not be raised on appeal because it was not raised to the trial court. This Court has held that ordinarily issues cannot be raised for the first time on appeal. *Sandpoint Convalescent Servs. Inc. v. Idaho Dep't of Health & Welfare*, 114 Idaho 281, 284 (1988). *An exception to this rule, however, has been applied by this Court when the issue was argued to or decided by the trial court. Northcutt v. Sun Valley Co.*, 117 Idaho 351, 356–57 (1990). In the case at bar, the trial court stated that "[d]efendant contends that he was illegally arrested when he was handcuffed and patted down. . . . The handcuffing during this investigatory stop was a reasonable means to execute the investigatory stop." Since this issue was directly addressed by the trial court below, we will decide this issue on appeal.

Id. at 553 (emphasis added). Because vindictiveness was argued to and decided by the district court, the claim is preserved on appeal.

2. The State's Request For A Longer Sentence Based On The Dismissed Sentencing Enhancement Constituted A Vindictive Prosecution Because The Enhancement Was Only Requested And Awarded As Punishment For Mr. Herrera Exercising His Due Process Right To Challenge His Conviction

While the prosecutor ultimately dismissed the sentencing enhancement because Mr. Herrera was again convicted of second degree murder (the firearm enhancement could not affect the maximum sentence of life), Mr. Herrera asserts that the vindictive prosecution did not end when the charge was dismissed. At sentencing, the prosecutor used the (now-dismissed) sentencing enhancement to argue that the district court should increase Mr. Herrera's sentence. The district court, over defense counsel's objection, *did* consider the enhancement and *did* increase the sentence. Mr. Herrera's fixed sentence was increased by *eight years* at his second sentencing hearing. The prosecutor's malicious acts of charging Mr. Herrera with a new sentencing enhancement and arguing for additional years of incarceration pursuant to the tenor of

the (now dismissed) firearm sentencing enhancement violated his right to due process as a vindictive prosecution.

"Once the government has created an appearance of vindictiveness, it cannot by its own later self-restraint cure the chilling effect of its original action." *United States v. Motley*, 655 F.2d 186, 189-90 (9th Cir. 1981) (holding defendant established an appearance of vindictiveness where he was faced with an indictment containing an enhancement provision that would take effect only if later activated by the prosecution).

After the jury convicted Mr. Herrera of second degree murder, the court dismissed the sentencing enhancement (Supp. Tr., p.110, Ls.14-15); yet, at sentencing, the prosecutor urged the court to consider the fifteen-year firearm sentencing enhancement and impose an increased penalty, to which defense counsel objected. (Tr. (Vol. II), p.996, Ls.13-22.) The district court overruled the objection, and, after hearing further arguments from the prosecutor on the firearms sentencing enhancement, asked the prosecutor to identify the code section containing the enhancement statute, and clarified that the prosecutor was asking the district court to add that additional time to the mandatory minimum. (Tr. (Vol. II), p.996, L.23 – p.997, L.25.)

Thereafter, the district court sentenced Mr. Herrera to life, with thirty years fixed; a difference of an additional eight years, fixed, from the sentence after Mr. Herrera's first trial.[4] (*See* Tr. (Vol. II), p.1020, Ls.1-3.) It is clear from the prosecutor's actions in urging the court to consider the length and purpose of the sentencing enhancement that he was seeking an increased sentence, despite saying earlier that he would *not* be asking for an increased sentence. Where defense counsel had initially objected to the enhancement as prosecutorial vindictiveness, and re-asserted/maintained that objection once the enhancement was brought up as an argument to

increase the sentence, the issue was preserved for appellate review. The State cannot show that the district court's error in overruling the objections, followed by its apparent consideration of the prosecutor's arguments, which resulted in its ultimate decision to increase the fixed portion of Mr. Herrera's sentence by *eight years*, was harmless.

II.

The District Court Erred When It Failed To Conduct A Sufficient Inquiry Of Mr. Herrera And His Trial Counsel Upon Mr. Herrera's Request For Substitute Counsel, Thereby Depriving Him Of His Right To Counsel Protected By The Sixth And Fourteenth Amendments Of The United States Constitution, As Well As Article I, § 13 Of The Idaho Constitution

Mr. Herrera filed a written motion to replace his defense counsel. (Limited R., pp.56-57.) The State claims that Mr. Herrera failed to provide a complete appellate record by failing to submit two letters given to the trial court during the hearing on Mr. Herrera's motion for substitute counsel. (Resp. Br., pp.17-21.) However, while defense counsel did mention a "letter from my client indicating his position," defense counsel was referring to the letter from Mr. Herrera to the court that was attached to defense counsel's Motion to Replace Defense Attorney filed with the district court. (Limited R., pp.56-57; Tr. (Vol. I), p.73, Ls.18-19.) The letter said, "Dear Honorable Judge Mitchell, I would like to request a meeting with you for the purpose of requesting a change of lawyer please advise of procedure," and was signed by Joseph Herrera. (Limited R., p.57.) And while an attorney-client communication was apparently handed to the district court, the court did not retain it or rely on it in ruling on the motion, saying it was handing the letter(s) back "because I don't see how those go to the representation of other Comacks." (*See* Tr. (Vol. I), p.78, Ls.9-21.) The district court clearly did not consider the

[4] After the first trial, Mr. Herrera was sentenced to life, with twenty-two years fixed. (R., pp.279-283.)

letter(s) between defense counsel and Mr. Herrera to be evidence of other fundamental differences. (Tr. (Vol. I), p.80, Ls.19-22.)

During a hearing on the motion, the district court elicited information from defense counsel regarding the basis for Mr. Herrera's motion. (Tr. (Vol. I), p.73, L.15 – p.75, L.19.) Defense counsel represented that Mr. Herrera was concerned about the amount of time that defense counsel would be able to devote to his case between now and the trial. (Tr. (Vol. I), p.73, Ls.18-22.) Defense counsel explained that he did not have sufficient time to work on the case, and advised the court that was why he was asking for a continuance. (*See* Tr. (Vol. I), Tr., p.73, L.18 – p.75, L.19.) Defense counsel also told the court he and his client were having some differences with regards to trial tactics, "but there are some fundamental differences that I'm concerned about that I do not wish to discuss in open court nor do I think that's appropriate, but they are concerning." (Tr. (Vol. I), Tr., p.75, Ls.9-19.) The district court spoke only to defense counsel regarding this issue. (Tr. (Vol. I), p.73, L.15 – p.77, L.15.)

When asked about his motion, Mr. Herrera told the court of a different conflict—one involving defense counsel's prior representation of Stefanie Comack's brother and sister—before the court told him not to interrupt. (Tr. (Vol. I), p.77, L.21 – p.78, L.13.) The district court did not seek Mr. Herrera's input again before denying the motion to replace defense attorney, saying it trusted defense counsel to assess the possibility of any conflict of interest under the Rules of Professional Conduct. (Tr. (Vol. I), p.80, Ls.6-18.) In ruling on the motion, the court found that it did not have any evidence of the "other fundamental differences." (Tr. (Vol. I), p.80, L.19 – p.81, L.9.)

The State claims that the district court "specifically rejected the claim of a conflict on the basis of counsel's representation" and that, "in determining whether a conflict exits, trial courts

are entitled to rely on representations made by counsel." (Resp. Br., p.20 (quoting *State v. Severson*, 147 Idaho 694, 704 (2009)). The case *Severson* cites for this proposition, *Kaplan v. United States*, held "the court may rely on the solemn representation of a fact made by such attorney as an officer of the court. The court may go further into the factual situation if he desires, but is under no original or continuing obligation to do so." 375 F.2d 895, 897 (9th Cir. 1967). While trial courts are entitled to rely on the factual representations of counsel in determining whether a conflict exists, Mr. Herrera asserts that the district court's inquiry was insufficient, where Mr. Herrera was never permitted to speak to the court regarding the "other fundamental differences," and the district court only sought information as to how defense counsel perceived the basis for the motion.

Although the State relies on *Severson*, the Idaho Supreme Court's holding in that case does not support the State's position. In *Severson*, the Court held: "In order to satisfy the inquiry requirement, a trial court's examination of the potential conflict must be thorough and searching and should be conducted on the record." 147 Idaho at 704. Further, the kind of inquiry that the trial court must make is one that "might ease the defendant's dissatisfaction, distrust, or concern." *Id.* (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)).

Here, like *Severson*, Mr. Herrera raised a timely conflict of interest objection; thus, the court had an affirmative duty to inquire into the potential conflict. *See Severson*, 147 Idaho at 704. The court failed to even ask Mr. Herrera about his motion made based on his belief that counsel did not have sufficient time to prepare or regarding the "fundamental differences" defense counsel identified. (Tr. (Vol. I), p.73, L.15 – p.77, L.15.) The court erred in failing to gather all of the facts necessary in making the determination of whether a conflict existed. Ultimately, by not allowing Mr. Herrera to explain his concerns regarding defense counsel's trial

preparation or to speak to the "fundamental differences" that so concerned defense counsel, the court failed to conduct an adequate inquiry.

The State asserts that the record contains "no reason to believe that Herrera could have provided any relevant personal information related to these issues." (Resp. Br., p.20.) However, it is clear from the record that the district court stopped Mr. Herrera from speaking, and did not allow him another opportunity to speak during the hearing. (*See* Tr. (Vol. I), p.77, L.21 – p.80, L.5.) The district court was obligated to give Mr. Herrera a full and fair opportunity to present the facts and reasons in support of his motion for substitute counsel. *See State v. Clayton*, 100 Idaho 896, 898 (1980); *State v. Peck*, 130 Idaho 711, 713-14 (Ct. App. 1997). Absent a full and fair opportunity, the reviewing court is unable to discern whether Mr. Herrera had legitimate grounds for his request for substitute counsel. *See Peck*, 130 Idaho at 714. The court was remiss in its obligation to inquire further of Mr. Herrera regarding all potential conflicts.

III.

The District Court Abused Its Discretion When It Overruled Mr. Herrera's Foundation Objections To Detective Berger's Testimony On Gunshot Residue Analysis

Mr. Herrera asserts the district court abused its discretion when it overruled his foundation objections to Detective Berger's testimony on gunshot residue analysis. Detective Berger did not have practical experience or special knowledge that would qualify him as an expert on gunshot residue analysis. *See* I.R.E. 702; *State v. Raudebaugh*, 124 Idaho 758, 763-64 (1993); *State v. Zimmerman*, 121 Idaho 971, 978 (1992). The State has failed to meet its burden of proving beyond a reasonable doubt that the district court's abuse of discretion was harmless. *See State v. Perry*, 150 Idaho 209, 227 (2010).

The State has admitted that the assertion that Detective Berger was not qualified as an expert on the topic of gunshot residue analysis "is apparently true." (*See* Resp. Br., p.25.) However, the State argues that Detective Berger was "testifying as an expert in deciding what investigation to conduct." (Resp. Br., p.24.) But the State actually elicited testimony from Detective Berger on whether he had "any concerns about the limitations of gunshot residue in terms of its ability to indicate forensically who shot the firearm" (Tr. (Vol. II), p.703, Ls.20-22), and whether he could "describe the limitations of gunshot residue as a forensic tool" (Tr. (Vol. II), p.704, Ls.5-6). He testified he had concerns about the limitations of gunshot residue to indicate forensically who shot the firearm. (Tr. (Vol. II), p.703, L.23.) Detective Berger also testified that "when you do a gunshot residue analysis, it doesn't quantify how much is on one person."[5] (Tr. (Vol. II), p.704, Ls.21-23.) The detective continued: "It just tells you that gunshot residue is present, so there's really – it sometimes is difficult to determine who was the one that fired the gun, but if they're in close proximity, they'll both show that they have gunshot residue, just not a total quantity of what was on there." (Tr. (Vol. II), p.704, L.23 – p.705, L.3.)

[5] The State does not think this testimony by Detective Berger was factually inaccurate. (*See* Resp. Br., p.22 n.5.) To allay any confusion on the part of the State, as the Idaho Supreme Court indicated in *Warden*, barium and antimony are two of the chemical elements that make up gunshot residue. *See State v. Warden*, 100 Idaho 21, 24 (1979); *see also State v. Babb*, 125 Idaho 934, 945 (1994) ("A forensic chemist testified that the gunshot residue test measures the presence of antimony and barium on a person's hands. The cartridge that killed Boone, however, did not contain antimony and therefore left no measurable gunshot residue to test.").

Further, contrary to the State's argument, gunshot residue analysis, as used in recent cases, may quantify the amount of gunshot residue found on the persons tested. *See, e.g.*, Brief of Respondent at 32-33, *State v. Hall*, 161 Idaho 413 (2017) (Nos. 40916/43874) (the State arguing, in a case involving a 2011 homicide, that a test showing there was significantly more gunpowder on the defendant's hands than the alleged victim's, and that the amount and distribution of gunpowder on the victim's hands was consistent with a shielding motion, was circumstantial evidence that the alleged victim was not the aggressor).

Thus, Detective Berger's testimony went beyond his training and experience as an investigator, and the State was having him testify as an expert on gunshot residue analysis.

The State also contends that, "[e]ven to the extent the testimony was admitted to prove the accuracy of Detective Berger's underlying premise—that gunshot residue testing would not have added materially to the evidence—the evidence showed Detective Berger's expertise." (Resp. Br., p.24.) The State argues it is "apparently irrelevant" that Detective Berger was not qualified as an expert on the topic of gunshot residue analysis, because he "only testified to why, based on his training and experience, he had decided to not send the residue samples to the state lab for testing." (*See* Resp. Br., p.25.)

The record belies the State's argument. As shown above, Detective Berger testified as an expert on gunshot residue analysis. (*See* Tr. (Vol. II), p.701, L.3 – p.705, L.3.) But the detective did not have practical experience or special knowledge that would qualify him as an expert on gunshot residue analysis. He testified that he had been involved in the collection of gunshot residue evidence (*see* Tr. (Vol. II), p.701, Ls.3-14, p.702, Ls.12-19), without testifying that he had ever interpreted or analyzed gunshot residue. Thus, the State did not lay the required foundation evidence showing Detective Berger was qualified as an expert on the topic of gunshot residue analysis. *See Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 837 (2007). The district court abused its discretion when it overruled Mr. Herrera's foundation objections to Detective Berger's testimony on gunshot residue analysis.

The State has failed to prove that the district court's abuse of discretion in overruling the objections to Detective Berger's testimony on gunshot residue analysis is harmless beyond a reasonable doubt. The State argues the harmless error inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted the defendant even without the admission of the

challenged evidence. (Resp. Br., p.25 (quoting *State v. Johnson*, 148 Idaho 664, 669 (2010).) However, that is the wrong standard.

As the Idaho Supreme Court held in *Perry*, a case decided after *Johnson*, "[i]f the alleged error was followed by a contemporaneous objection at trial, appellate courts shall employ the harmless error test articulated in [*Chapman v. California*, 386 U.S. 18 (1967)]." *See State v. Perry*, 150 Idaho 209, 227 (2010). Thus, the harmless error standard really provides that, "[w]here the defendant meets his initial burden of showing that a violation occurred, the State then has the burden of demonstrating to the appellate court beyond a reasonable doubt that the constitutional violation did not contribute to the jury's verdict." *Id.*

Under the actual harmless error inquiry, the State has failed to meet its burden here. The State argues "the evidence was properly admitted for at least the purpose of rebutting the inference of some improper motivation in deciding not to conduct the testing." (Resp. Br., p.26.) The State contends Mr. Herrera's counsel was advocating that "the jury could, without the benefit of expert testimony, draw the inference that the detective was trying to avoid generating exculpatory evidence." (Resp. Br., p.26.) In that light, the State argues, "surely it was not improper to provide evidence that Detective Berger made the decision on the basis of his training and experience leading him to conclude that the testing would not produce evidence material to either the prosecution or the defense." (Resp. Br., p.26.) The State's argument misses the point.

Essentially, the State argues Detective Berger's testimony was admissible because it was relevant. But the detective's testimony was inadmissible not because it was irrelevant, but because Detective Berger was not qualified as an expert on the topic of gunshot residue analysis. As Mr. Herrera asserted in the Appellant's Brief, "[i]f the State had wanted to properly offer

such rebuttal, it could have presented testimony from a witness who was actually qualified as an expert on gunshot residue analysis." (App. Br., p.38.)

Additionally, the State's conclusory statements on how limiting the testimony to purposes of rebuttal "would not have changed the trial or the arguments in any meaningful way" (*see* Resp. Br., p.26), do not help meet the State's burden here. The State has not explained why Detective Berger's testimony on gunshot residue analysis, which bolstered the State's theory of the case, did not contribute to the conviction. The State has failed to prove that the district court's abuse of discretion in overruling the objections to Detective Berger's testimony on gunshot residue analysis is harmless beyond a reasonable doubt.

IV.

The Prosecutor Committed Misconduct In Closing Arguments By Repeatedly Calling Mr. Herrera A Liar, Misstating The Facts And Evidence, And Misstating The State's Burden Of Proof

1. The Prosecutor Committed Misconduct By Calling Mr. Herrera A Liar More Than Twenty Times In Closing Arguments

The State claims that the fact that the prosecutor did not say, "Mr. Herrera is a liar" means the prosecutor did not commit misconduct, and the appellant misrepresented the record. (Resp. Br., p.29.) The State claims that precedent has distinguished between challenging a defendant's credibility and name-calling—that telling the jury a defendant was untruthful is different than using the word "liar." (Resp. Br., p.28.) An examination of the case law cited by the State lends no support for that theory.

In *State v. Moses*, one of the two cases cited by the State, the Idaho Supreme Court analyzed several cases in which the prosecutor argued that the defendant was lying, was a liar, or had not told the truth when testifying. 156 Idaho 855, 872–73 (2014). The Court's holding in

Moses provides no support for the State's theory. In *Moses*, the Court ultimately held that, because "the prosecutor did not directly call the witness a liar nor expressly accuse him of perjury;" the comment went to the strength of the evidence; thus, the prosecutor's arguments were not misconduct. 156 Idaho at 873.

The *Moses* Court said, in analyzing the Idaho Court of Appeals' holding in *State v. Kuhn*, 139 Idaho 710 (Ct. App. 2003), the other case cited by the State, that "the prosecutor 'permissibly argued that the reason there were inconsistencies in Kuhn's testimony was because he had lied under oath and that this was not the first time Kuhn had committed dishonest acts.'" *Moses*, 156 Idaho at 873 (quoting *Kuhn*, 139 Idaho at 716). But the *Kuhn* Court held that "the prosecutor crossed the line of propriety when he called Kuhn 'a liar and a thief' and expressly accused him of committing perjury, an independent felony." *Id.* (quoting *Kuhn*, 139 Idaho at 716). Contrary to the State's assertion, there is no indication that it was solely the word "liar" that roused the Court's ire, but that, the prosecutor's calling the defendant both a liar and a thief, as well as expressly accusing the defendant of committing perjury, resulted in a finding of prosecutorial misconduct in *Kuhn*.

The State spends multiple pages parsing out the number of times the prosecutor said, "Mr. Herrera is a liar" (zero times) (Resp. Br., p.29), but fails to grasp that the harm is not dependent on whether the prosecutor uses a particular phrase. *See State v. Lankford*, 162 Idaho 477, ___, 399 P.3d 804, 827-28 n.7 (2017) (noting the prosecutor's "repeated use of the term 'liar' and its various grammatical forms [was] troubling and ill-advised" but did not constitute prosecutorial misconduct). Further, the State's same exercise in searching for and counting the exact number of times the precise word "liar" was used by the prosecutor could have been performed in *Lankford* with a similarly dismal result. In that case the Idaho Supreme Court was

perplexed why prosecutors continued to choose to "use the word 'liar.'" *Id.* at ___, 399 P.3d at 828 n.7. However, in *Lankford*, like this case, the prosecutor used derivations of the word "liar":

> 1. Mark Lankford testified in this case, and there was [sic] *many lies that he told you*.
>
> 2. [Mark] *Lied* [sic] to Darrell Cox about where he was going and who he was going to meet.
>
> 3. It shows that *he's a liar*.
>
> 4. You will see *Mark Lankford is a liar*.
>
> 5. Well, *Mark lied*. He said, I don't know anything about any murders, and I don't know anything about any stolen van. That was *a lie*.
>
> 6. So *he lied* to you on the stand when he talked about the kind of money he had when he left Texas and when he came back from Texas.
>
> 7. *He lied* to Robert Lankford about the money he had when he left Texas.
>
> 8. *He lied* to Robert Lankford when he got back to Texas about why he left his car in Idaho.
>
> 9. *He lied* about that. *He lied* about having money when he left and when he returned.
>
> 10. *He lied* about going to the Frank Church River of No Return Wilderness.
>
> 11. *He lied* about having access to the hatchback door on the Camaro.
>
> 12. Again, *another lie*.
>
> 13. *He lied* about his use of the nightstick.
>
> 14. *He basically lied* about the circumstances of that nightstick.
>
> 15. *He lied* about having to use the restroom at McAlister [sic].
>
> 16. I find it strange that these people he allegedly says gave him an alibi defense have never been found.... *I submit that there is nobody that gave him a ride, and that that's a made-up story. That's another of his lies.*
>
> We note that defense counsel initiated the theme in his opening statement *by calling the State's witnesses liars and specifically calling Bryan a liar*, stating:

> You're going to find that *a lot of the testimony* that they're going to have from witnesses in this case *is going to be based on deception*, and some of the witnesses in this case are going to speculate. So, *the State's case is based on lies, deception, and speculation*. You're not going to know what Bryan Lankford is going to testify to until he actually gets upon on the stand. Bryan Lankford, by my count, has said at least 15 to 20 different times about what happened that night. Many times under oath in prior court proceedings, many times in sworn affidavits, many times in letters, many times in interviews with the police and the FBI agents. *He's a liar*, and when he testifies you're going to see that.

Id. at ___, 399 P.3d at 826–27 (emphasis added). In *Lankford*, the actual word "liar" was only used twice, but the prosecutor indicated to the jury seventeen times in closing remarks that Mr. Lankford had not told the truth. *Id*.

In focusing on the precise words used by the prosecutor, the State is missing the point. It is not just that the prosecutor told the jury Mr. Herrera was lying, but that the prosecutor *repeatedly* told the jury he was lying. (App. Br., pp.41-43.) The harm is in the repetition, the fact that the prosecutor disparaged Mr. Herrera's veracity not once, but repeatedly. Thus, it is not necessary to parse whether the prosecutor used "liar", "lying", "lied", "misrepresented", "untruthful", etc. in order to establish harm.

Similarly, there is no standard requiring that, when identifying misconduct, the appellant is not permitted to paraphrase. The State asserts that the appellant's argument is based "on manufactured quotes" (Resp. Br., p.32); however, the statements about the guilty lying, while paraphrased for enhanced readability, still accurately characterized the prosecutor's improper statements. (*See* App. Br., p.50.) Further, the appellant included full sentences from each objectionable statement to provide the utmost in clarity to the reader. (*Id*.)

2. The State Committed Prosecutorial Misconduct When The Prosecutor Misstated The Evidence, The Law, Its Burden Of Proof, And Argued Facts Not In Evidence

a. The Prosecutor Misstated The Law And Reduced The State's Burden Of Proof By Arguing That Mr. Herrera Did Not Provide Sufficient Evidence Of His Innocence And By Telling The Jury That It Had Met Its Burden Simply By Proving It Was A Contact Gun Shot Wound And/Or Mr. Herrera Lied

The State claims that the prosecutor's "argument that evidence admitted at trial was not evidence of innocence was proper . . .." (Resp. Br., p.33.) In arguing that Mr. Herrera was faking his emotional reaction to the shooting in an attempt to show "evidence of his innocence," the prosecutor misstated the trial evidence and argued facts not in evidence to the jury. (*See* Supp. Tr., p.57, Ls.12-21.)

b. The Prosecution Committed Misconduct By Misstating The Evidence Presented At Trial And Arguing Facts Not In Evidence

i. The Prosecutor Misrepresented The Facts By Telling The Jurors That The Methamphetamine Caused Mr. Herrera's Agitation, When The Testimony Had Been That Methamphetamine Amplified Mr. Herrera's Underlying Emotions

The prosecution's closing remarks contained blatant misstatements of the evidence, because at trial the testimony of Daniel Ducommun had been that when Mr. Herrera was under the influence of methamphetamine, it amplified his underlying emotional state. (*See* Tr. (Vol. II), p.928, L.23 – p.929, L.2; p.935, Ls.11-19.)

The State claims that the prosecutor "quite obviously" did not misrepresent this evidence to argue that Mr. Herrera faked hysteria after the shooting and that "the argument that Herrera's emotional agitation did not make his claims of accident more likely was a fair comment based on logical inferences supported by the evidence." (Resp. Br., p.35.) However, the prosecutor

argued in contravention to the evidence presented at trial. There was no support for his theory, other than his own speculation, and this speculation was controverted by the testimony of Daniel Ducommun. (Tr. (Vol. II), p.935, Ls.16-19.) The prosecutor improperly argued both that it was the methamphetamine that had caused Mr. Herrera to be so extremely upset after the shooting, and that Mr. Herrera was faking his reaction in an attempt to show "evidence of his innocence." (Supp. Tr., p.57, Ls.12-21, p.58, Ls.11-16, p.59, Ls.10-14.) By arguing in one breath that Mr. Herrera was faking it, and in the next sentence arguing that the methamphetamine amplified the already existing mental state, the prosecutor contradicted himself. Further, his argument that Mr. Herrera was faking his emotional reaction contradicted the only testimony at trial regarding the effect of methamphetamine on Mr. Herrera's state of mind.

The State also posits that "any lack of objection was a tactical choice," where defense counsel confronted the prosecutor's statements in his closing argument. (Resp. Br., p.35.) However, there is certainly no strategic reason to allow the prosecutor to misrepresent the evidence in its attempt to prove malice aforethought, the critical element at issue in this case. Under these facts, there was no strategic reason why defense counsel would not have raised an objection to the prosecutor's misrepresentation of evidence on perhaps the most critical issue for the jury to resolve: whether Mr. Herrera shot Ms. Comack with malice aforethought.

ii. The Prosecutor Argued Facts Not In Evidence By Telling The Jurors That The Chaos In The Bedroom Accounted For The Blood On The Magazine Found By The Bed

The State asserts that "[t]here was nothing objectionable in arguing the theory that the evidence did not exclude other possibilities for how blood got on the magazine to rebut the defense argument that the presence of the blood was proof the magazine had been ejected prior to the shooting." (Resp. Br., p.36.) In explaining how the drop of blood came to be on top of the

magazine, the prosecutor speculated to the jury that perhaps the magazine was popped out [of the gun] after the EMTs arrived and other people who were "kicking stuff around." (Supp. Tr., p.87, L.22 – p.88, L.3.) The prosecutor was arguing facts not in evidence, however. The prosecutor's comments were entirely speculative as no evidence of this had been adduced at trial.

It is misconduct for a prosecutor to place facts before the jury not in evidence. *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). In *State v. Griffiths*, 101 Idaho 163, 166 (1980), *abrogated on other grounds by State v. LePage*, 102 Idaho 387, 396 (1981), the Idaho Supreme Court rejected the contention that the prosecutor, by referring to facts that were not in evidence in closing argument, may have drawn a logical inference:

> [T]he statements were improper in the case at bar [because they] were unsubstantiated by the record. While our system of criminal justice is adversary in nature and the prosecutor is expected to be diligent and leave no stone unturned, he is nevertheless expected and required to be fair and has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics.

Id. In this case, the prosecutor's suggestions that there was chaos in the bedroom and the magazine was probably kicked around during the commotion were not supported by any facts offered into evidence. The prosecutor was not arguing that the evidence did not disprove that someone had kicked the magazine (*see* Resp. Br., p.37), but instead was asking the jury to speculate that the magazine was kicked around on the floor by the people in the room. Such speculations were unsubstantiated by the record. *See Griffiths*, 101 Idaho at 166. Therefore, as in *Griffiths*, the prosecutor committed misconduct by improperly drawing inferences about facts that were not in evidence. Mr. Herrera has met his burden to show the errors qualify as fundamental error under the *Perry* standard.

V.

Even If The Above Errors Are Individually Harmless, Mr. Herrera's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Herrera asserts that even if the Court finds that the above preserved errors were individually harmless, the district court's errors combined amount to cumulative error. *See State v. Martinez,* 125 Idaho 445, 453 (1994); *State v. Lovelass,* 133 Idaho 160, 171 (Ct. App. 1999). He asserts that the district court's preserved errors amounted to actual errors depriving him of a fair trial.

The State contends Mr. Herrera has not shown the cumulative error doctrine is theoretically applicable here, because the doctrine only applies to trial errors and Mr. Herrera only asserted one claim of objected-to trial error. (*See* Resp. Br., p.38.) However, as demonstrated above, the vindictive prosecution and request for substitute counsel issues were preserved for appellate review. Also, our appellate courts have considered alleged pretrial errors when deciding whether the cumulative error doctrine applies in a given case. *See, e.g., State v. Adamcik*, 152 Idaho 445, 483 (2012) (discussing the district court's partial denial of a motion to suppress as one of the six alleged errors aggregated by the defendant, and holding the cumulative error doctrine did not apply because the partial denial and four of the other alleged errors were determined by the Court not to have been in error). Thus, the cumulative error doctrine is applicable in this case.

The State's argument on the cumulative error doctrine is otherwise unremarkable, and no further reply is necessary. Mr. Herrera would therefore direct the Court's attention to page 64 of the Appellant's Brief.

VI.

The District Court Imposed A Vindictive Sentence After The Second Trial

Mr. Herrera asserts the district court imposed a vindictive sentence after the second trial. After his first trial, the district court imposed a unified sentence of life imprisonment, with twenty-two years fixed. (2013 Trial Tr. (Vol. I), p.389, L.24 – p.390, L.1.) However, after Mr. Herrera's second trial, the second sentencing judge, Judge Mitchell, imposed a unified sentence of life imprisonment, with thirty years fixed. (*See* Tr. (Vol. II), p.1019, L.25 – p.1020, L.3.)

While Mr. Herrera did not raise a vindictive sentence objection before the district court, he asserts the record shows fundamental error. *See State v. Perry*, 150 Idaho 209, 228 (2010). The totality of the circumstances demonstrates the district court imposed Mr. Herrera's sentence with actual vindictiveness, by increasing his sentence because he chose to exercise his right to appeal. *See North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). Thus, the district court violated Mr. Herrera's unwaived constitutional right to due process. *See State v. Baker*, 153 Idaho 692, 695 (Ct. App. 2012). The district court's error in imposing a vindictive sentence plainly exists. The error was not harmless, because the district court basically added eight years to the fixed term of Mr. Herrera's sentence for exercising his right to appeal.

The State argues the district court's comments on the lack of closure do not show a clear constitutional violation. (*See* Resp. Br., p.14.) The State contends, "[t]he district court did mention 'closure' once in the sense of an end of legal proceedings, but did so as a reason *not to impose a fixed life sentence*, even though such a sentence was warranted." (Resp. Br., p.15 (emphasis in original).) According to the State, "[f]ar from pinning the lack of closure on the decision to appeal instead of accept the results of the first trial, the district court was concerned

with the lack of closure caused by Herrera's multiple and untruthful recitations of events surrounding the murder." (Resp. Br., p.15.)

However, the district court actually stated regarding the lack of closure, "[t]he greatest thing that impacts my decision compared to [the first sentencing judge's] decision is a couple more years have ticked on and we still don't know what happened the morning of December 25th, 2011, and that's the way it will remain forever." (Tr. (Vol. II), p.1022, L.25 – p.1023, L.4.) When discussing whether the parties would "heal" in the future, the district court also stated, "[a]s I said at the outset, the fact that this had to be retried by its very nature keeps the wound open, and that's sad." (Tr. (Vol. II), p.1023, Ls.10-12.) Combined with the district court's other comments on the lack of closure (*see* Tr. (Vol. II), p.1009, L.23– p.1011, L.4, p.1015, Ls.20-23), those remarks indicate the district court increased Mr. Herrera's sentence because he exercised his right to appeal and, after winning on appeal, exercised his constitutional right to a new trial.

Thus, the totality of the circumstances shows the district court imposed Mr. Herrera's sentence with actual vindictiveness, violating Mr. Herrera's unwaived right to due process. Contrary to the State's argument, this error in imposing a vindictive sentence plainly exists. Additionally, the error here was not harmless. Because Judge Mitchell essentially added eight years to the fixed term of Mr. Herrera's sentence, there was a reasonable possibility the error affected the outcome of the case. Mr. Herrera has met all three prongs of fundamental error review. His sentence should be vacated, and the case should be remanded for resentencing.

CONCLUSION

For the reasons set forth herein, Mr. Herrera respectfully requests that this Court vacate the judgment of conviction and remand his case for a new trial. Alternatively, he asks that this Court vacate the judgment of conviction and remand his case for a new sentencing hearing in front of a different judge.

DATED this 15th day of February, 2018.

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

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of February, 2018, 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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