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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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
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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 vindictively prosecuted him after trial by arguing for an increased sentence based on the dismissed sentencing enhancement; 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; 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 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.

Statement of Facts

Midmorning on December 25, 2011, Joseph Herrera's mother heard a loud bang from the upstairs of her home. (*See* Tr. (Vol. II), p.436, L.24 – p.437, L.15.) When she went upstairs, she

saw her son Joseph, holding a handgun, and he was screaming hysterically. (Tr. (Vol. II), p.437, L.16 – p.438, L.1, p.447, Ls.23-25.) Mr. Herrera told his mom he had accidentally shot his girlfriend. (Tr. (Vol. II), p.438, Ls.2-4.) When she saw the injured woman lying on the bedroom floor, Mrs. Herrera yelled to her husband to call 911, and told her son to bring her some towels. (Tr. (Vol. II), p.438, Ls.5-23.) Mrs. Herrera sat with the injured woman until the paramedics arrived. (Tr. (Vol. II), p.440, Ls.16-20, p.448, Ls.4-8.)

During the time his dad was on the phone with 911, Mr. Herrera took the phone from him in order to answer the dispatch operator's questions. (Tr. (Vol. II), p.438, L.21 – p.439, L.9, p.614, Ls.16-21; Defendant's Ex. A.) He also called and spoke to his girlfriend's family on the phone. (Tr. (Vol. II), p.614, Ls.6-25.) When Officer Scott Castles arrived at the house, he saw Joseph Herrera outside the house, hysterically screaming. (Tr. (Vol. II), p.417, L.16 – p.418, L.7.) Mr. Herrera remained at the house, hysterically shrieking and yelling—freaking out—until well after the ambulance left. (Tr. (Vol. II), p.430, Ls.3-7, p.461, Ls.12-21.) Soon after the ambulance left, Mr. Herrera's girlfriend's family arrived, armed and threatening Mr. Herrera and his family. (Tr. (Vol. II), p.459, L.14 – p.460, L.11.) At that point, Officer Castles told the still hysterical Mr. Herrera to go, meaning away from the risk posed by the armed family members. (Tr. (Vol. II), p.418, L.10 – p.420, L.9, p.428, L.15 – p.430, L.7, p.639, Ls.7-16.)

Mr. Herrera's girlfriend sustained a gunshot wound to the right side of her upper forehead, and later died of her injuries. (Tr. (Vol. II), p.472, L.1 – p.473, L.21, p.519, Ls.13-20.) A semi-automatic .380 handgun was identified as the gun involved in the shooting accident. (Tr. (Vol. I), p.337, Ls.16-25, p.338, Ls.6-23; Plaintiff's Ex. 2.) Mr. Herrera told law enforcement that when he was pulling back the slide to make sure the gun was not loaded, the

gun went off. (2013 Trial Tr. (Vol I), p.224, Ls.18-22; Tr. (Vol. I), p.342, Ls.7-15.)[1] When interviewed later that day, he told law enforcement that he had ejected the ammunition magazine[2] and pulled back the slide, and he did not believe there was a round in the chamber of the gun. (Tr. (Vol. II), p.500, Ls.10-14, p.562, Ls.17-25, p.564, L.1 – p.568, L.6, p.632, Ls.4-11; Plaintiff's Ex. 10.)

However, at the first trial,[3] Mr. Herrera testified that he had pointed the gun towards himself after telling his girlfriend he would rather kill himself than go to her parents' house. (2013 Trial Tr. (Vol. II), p.127, L.22 – p.128, L.5.) He testified she then grabbed the barrel of the gun, pulled it, and it went towards her and went off. (2013 Trial Tr. (Vol. II), p.128, Ls.5-10.)

During the first trial, four of the State's witnesses provided testimony as to matters that had been expressly excluded by the district court at a pre-trial hearing. Specifically, the district court had excluded evidence and testimony by third parties relating to statements allegedly made by Mr. Herrera's girlfriend regarding her relationship with Mr. Herrera, and events involving Mr. Herrera. (Tr. July 13, 2012, p.155, Ls.1-12.)[4] Although the district court ruled that some statements were admissible to show the girlfriend's state of mind, at trial, the State's witnesses

---

[1] For ease of reference, citations to the first trial—the one held in 2013 and cited in the prior appeal, No. 41494—will be designated as "2013 Trial Tr." The 2016 trial transcript referenced in this appeal, No. 44596, will not contain a distinguishing date but will simply be designated as "Tr."

[2] Although the interviewers in Plaintiff's Exhibit 10 used the terms "clip" and "magazine" interchangeably, they are different items. (*See* Tr. (Vol. II), p.584, Ls.3-6.) As Detective Van Leuven explained during the second trial, the correct terminology is to call the metal casing that encases the bullets a "magazine." (Tr. (Vol. II), p.800, Ls.12-25.)

[3] On November 15, 2016, the Idaho Supreme Court ordered the Clerk's Record and Reporter's Transcripts of the prior appeal, No. 41494, to be augmented to include the transcripts and record in this appeal. (Limited R., p.463.)

[4] The transcript from the July 13, 2012 hearing was part of the transcripts prepared for the prior appeal, No. 41494.

testified to specific bad acts the district court had excluded. (2013 Trial Tr. (Vol. I), p.312, Ls.9-16, p.331, L.10 – p.332, L.7; 2013 Trial Tr. (Vol. II), p.16, L.15 – p.17, L.7, p.64, L.3 – p.66, L.21.)

At the first trial, the prosecutor tried the case based on the theory that the shooting was accidental—Mr. Herrera had apparently ejected the magazine before the fatal single shot was fired and was not aware that the gun still retained a live round in the chamber. The final words in the State's rebuttal closing at the first trial were, "He pulled that gun out, he put it to her head. *He thought he took the bullets out*. He pulled the trigger and the bullet came out. That's murder in the second degree." (2013 Trial Tr. (Vol. III), p.97, Ls.15-19 (emphasis added).)

After the jury in the first trial found Mr. Herrera guilty of second degree murder (2013 Trial Tr. (Vol. III), p.101, L.18 – p.103, L.24), the district court imposed a unified sentence of life imprisonment, with twenty-two years fixed. (2013 Tr. (Vol. I), p.389, L.24 – p.390, L.1.)

Mr. Herrera appealed, and the Idaho Supreme Court vacated the judgment of conviction. *State v. Herrera*, 159 Idaho 615 (2015). The Court held the testimony elicited from the four witnesses discussed above unfairly prejudiced Mr. Herrera. *See id.* at 620-24. The Court noted the testimony, purportedly offered as bearing on the girlfriend's state of mind, instead "appears to have been intended to show previous bad acts of Herrera." *Id.* at 624.

The Idaho Supreme Court further stated, "[e]ven more concerning is the rather transparent violation of the limitations imposed by the district court on the testimony of these witnesses. The order specifically excluded testimony regarding Herrera's prior bad acts, which shed little light on the charges he was facing." *Id.* However, "the State asked questions that appeared to be deliberately designed to elicit the exact testimony that the district court had specifically prohibited." *Id.* The Court held, "[a] party's deliberate violation of an order

excluding evidence with little relevance but with great potential for prejudice is an attack on the fairness of the proceeding and cannot be countenanced." *Id.* Thus, the Court vacated Mr. Herrera's judgment of conviction and remanded the case for further proceedings. *Id.*

On remand, the district court granted Mr. Herrera's motion to disqualify the judge and reassigned the case to a different district judge, the Honorable John Mitchell. (Limited R., pp.17-21.) A different prosecutor took over the State's side of the case, and new defense counsel was appointed to represent Mr. Herrera. (*See* Limited R., pp.9, 22-23.) The district court scheduled the case for a second trial. (*See* Limited R., p.22.)

Before his second trial, Mr. Herrera filed a written motion to replace his defense counsel. (Limited R., pp.56-57.) At a hearing on the motion, Mr. Herrera's counsel clarified the bases for the motion were that defense counsel would not have adequate time to devote to the case, and Mr. Herrera told the court that defense counsel had represented his girlfriend's siblings on unrelated misdemeanor charges. (*See* Tr. (Vol. I), p.73, L.15 – p.80, L.5.) After the hearing, the district court denied the motion. (Tr. (Vol. I), p.80, L.6 – p.81, L.9.)

Prior to the second trial, the prosecutor filed a motion to amend the Information to add a sentencing enhancement because a firearm was used in commission of the crime. (Limited R., pp.58-62.) Over Mr. Herrera's objection, the district court granted the State's motion to amend the Information to add a firearm sentencing enhancement pursuant to I.C. § 19-2520. (Limited R., pp.97-105, 117-18.) The State sought the sentencing enhancement because it was concerned that, without the evidence excluded by the Idaho Supreme Court's decision, there would be a greater possibility for the jury to find Mr. Herrera guilty of manslaughter. (*See* Tr. (Vol. I), p.35, Ls.1-18.) The State argued the amendment "simply allows the potential top end of the sentence to go to 25 or 30 years, if manslaughter is found," and it wanted "the

opportunity to argue for the same determinate sentence" of twenty-two years that Mr. Herrera received after the first trial. (Limited R., pp.58-59.) In granting the State's motion to amend, the district court observed, "the State of Idaho makes it clear it is not seeking an *increased* penalty." (Limited R., p.100.)

At the second trial, the State called an investigating officer, Detective Paul Berger, to testify as to his interview of Mr. Herrera and Mr. Herrera's description of how the accident occurred. (*See generally* Tr. (Vol. II), pp.530-587: Plaintiff's Ex. 10.) Over defense counsel's objections, the State later recalled Detective Berger to inquire "as to whether or not there was any gunshot residue analysis done upon the body of [Mr. Herrera's girlfriend], whether there was any gunshot residue analysis done upon the defendant." (*See* Tr. (Vol. II), p.693, L.19 – p.694, L.2.) Detective Berger testified no analyses had been done, because "[w]e already know that he was the one that fired the gun based on his confession that he shot the gun." (Tr. (Vol. II), p.703, Ls.10-13.) He also testified there were no gunshot residue tests conducted on Mr. Herrera's girlfriend, "[b]ecause we already know that she had been shot in the head with a firearm." (Tr. (Vol. II), p.703, Ls.14-19.) However, when asked to "please describe the limitations of gunshot residue as a forensic tool," Detective Berger testified, "when you do a gunshot residue analysis, it doesn't quantify how much is on one person. 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.4 – p.705, L.3.)

Mr. Herrera did not testify in his defense at the second trial. (Supp. Tr., p.16, L.7 – p.18, L.12.)[5] However, the State read Mr. Herrera's testimony from the first trial into the record. (*See generally* Tr. (Vol. II), pp.590-668.)

At the second trial, one of the State's law enforcement witnesses testified that normally, when the slide of a gun is pulled back, the bullet in the chamber is ejected. (Tr. (Vol. II), p.566, Ls.5-9.) However, the gun used in the incident was tested, and one of the State's witnesses testified the slide feature of the gun malfunctioned five out of fifty attempts—not ejecting the bullet when the slide was pulled back. (Tr. (Vol. II), p.916, Ls.13-22.) The ejected magazine was photographed with blood on it, next to a nightstand, but some distance away from the large blood stain. (Tr. (Vol. II), p.766, L.18 – p.767, L.5; Plaintiff's Exs. 7, 8, 45; Defendant's Ex. C.)

During closing arguments in the second trial, the prosecutor argued that the shooting was not an accident, in contrast to the prosecutor's arguments in the first trial, and that Mr. Herrera was faking his extreme distress and hysteria following the shooting. (*See* Supp. Tr., p.58, Ls.11-16.) Alternatively, the prosecutor claimed that it was methamphetamine that was responsible for Mr. Herrera's extreme distress, despite trial testimony to the contrary. (Tr. (Vol. II), p.935, L.16 – p.936, L.3; Supp. Tr., p.57, Ls.12-21, p.58, Ls.11-16, p.59, Ls.10-14.) The prosecutor also called Mr. Herrera a liar or told the jury Mr. Herrera was fabricating over twenty times. (*See* Supp. Tr., p.44, L.15 – p.60, L.4, p.81, L.10 – p.84, L.4.)

The prosecutor argued to the jury that Mr. Herrera did not provide evidence of his innocence. (Supp. Tr., p.57, Ls.12-20, p.59, Ls.10-14, p.79, Ls.19-22.) The prosecutor told the jury multiple times that the fact that it was a contact gunshot wound was enough for them to find

[5] The Supplemental Transcript prepared after the Appellant's objection to the record will henceforth be referred to as "Supp. Tr."

Mr. Hrrera guilty of murder. (Supp. Tr., p.44, Ls.10-14, p.83, Ls.20-22, p.90, Ls.8-11.) Additionally, the prosecutor told the jury that "a contact wound to the head with a defendant who lies equals murder by express malice." (Supp. Tr., p.89, L.25 – p.90, L.2.) The prosecutor also represented to the jury that there were "people kicking stuff around" in the bedroom, although there had been no trial testimony that this occurred. (Supp. Tr., p.87, L.22 – p.88, L.3.)

The jury in the second trial found Mr. Herrera guilty of second degree murder. (Supp. Tr., p.107, Ls.1-11.) Immediately after trial, the district court granted the State's motion to dismiss the sentencing enhancement. (Supp. Tr., p.110, Ls.4-15.)

At the sentencing hearing, the State argued the district court could consider the dismissed sentencing enhancement when deciding the length of the fixed term of the sentence. (*See* Tr. (Vol. II), p.996, L.13 – p.997, L.25.) In imposing the sentence, Judge Mitchell observed, "[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.) The district court imposed a unified sentence of life imprisonment, with thirty years fixed. (Tr. (Vol. II), p.1019, L.25 – p.1020, L.3.)

Mr. Herrera timely appealed from the judgment of conviction. (Limited R., pp.449-452, 464-469.)

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

A. Introduction

The Due Process Clause of the Fourteenth Amendment prohibits prosecutors and courts from punishing people for exercising their legal rights. In the present case, the district court permitted the State to amend the Information, to allege a new sentencing enhancement for use of a firearm, after Mr. Herrera successfully challenged his conviction in an earlier appeal. (R., pp.42-43; Limited R., pp.117-118.) While the State dismissed the enhancement, as promised, it proceeded to use the basis for the enhancement to seek a penalty far beyond the sentence after the first trial. In seeking the amendment and in using the basis for the enhancement to convince the district court to increase the sentence, the State vindictively prosecuted Mr. Herrera. In urging the district court to allow the amendment to include the firearm sentencing enhancement, the prosecutor made false assurances to the district court on which it relied, constituting prosecutorial misconduct.

B. Standard Of Review

This Court exercises free review on the issue of whether a defendant's due process rights have been violated in light of the facts of the case. *State v. Tucker*, 138 Idaho 296, 298 (Ct. App. 2003); *State v. Crowe*, 131 Idaho 109, 111 (1998). In examining whether the district court imposed a vindictive sentence, the reviewing court examines the totality of the circumstances and the entire record of the case. *State v. Murphy*, 133 Idaho 489, 494 (Ct. App. 1999).

For alleged acts of prosecutorial misconduct followed by a contemporaneous objection, appellate courts engage in a two-step analysis, determining: (1) whether misconduct occurred; and (2) whether the misconduct was harmless. *State v. Perry*, 150 Idaho 209, 219 (2010).

C. Mr. Herrera Had A Due Process Right To Challenge His Conviction And The Firearm Sentencing Enhancement Constituted Vindictive Prosecution

Mr. Herrera's right to due process was violated when the prosecutor charged him with a new sentencing enhancement, after he exercised his right to a new trial. His due process right was again violated when the prosecutor used the (now dismissed) sentencing enhancement to argue to the district court that Mr. Herrera's fixed sentence should be increased given the policy purposes of the firearm sentencing enhancement. Each of these acts constitute a separate vindictive prosecution.

As the Idaho Court of Appeals has observed, "[t]he Fourteenth Amendment's Due Process Clause prohibits the government from punishing a person for doing what the law plainly allows him to do." *State v. Rodriguez-Perez*, 129 Idaho 29, 32 (Ct. App. 1996) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). A vindictive prosecution is one "in which a person is singled out under a law or regulation because the person has exercised a constitutionally protected right." BLACK'S LAW DICTIONARY 1258 (Bryan A. Garner, 8th Ed., West 2004). Courts have similarly noted that "prosecutorial vindictiveness" is a legal term of art with "a precise and limited meaning" that refers to "a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." *See, e.g.*, *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987).

The U.S. Supreme Court in *Bordenkircher* succinctly summed up the nature of a due process violation in the form of a vindictive sentence or vindictive prosecution:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citation omitted).

In *Blackledge v. Perry*, 417 U.S. 21 (1974), the defendant exercised his right under North Carolina law to seek a *de novo* trial after he was convicted of a misdemeanor and, in response, the prosecutor obtained a grand jury indictment charging him with a felony. *Id.* at 22-23. The United States Supreme Court held that a defendant's due process rights are violated when a prosecutor vindictively retaliates against a defendant for exercising a legally protected right. *Id.* at 27-28. While finding that there was no evidence that the prosecutor acted maliciously or in bad faith, the Supreme Court nevertheless vacated the defendant's conviction, finding, "[d]ue process of law requires that such a potential for vindictiveness must not enter in to North Carolina's two-tiered appellate process" and further found that "it was not constitutionally permissible" for the State to bring a more serious charge in response to the defendant's invocation of his statutory right. *Id.* at 28-29.

When a prosecutor attempts to retry a defendant and seeks a heavier penalty for the same act as originally charged, such conduct is inherently suspected as being vindictive. *United States v. Robison,* 644 F.2d 1270, 1273 (9th Cir. 1981). In fact, simply the appearance of retaliation by a prosecutor in response to a defendant's exercise of a protected right can have subsequent chilling effects on other defendants with similar circumstances. *United States v. Motley*, 655 F.2d 186, 188 (9th Cir. 1981). This deterrent effect was considered by the Supreme Court in fashioning the vindictive prosecution presumption. *See Blackledge*, 417 U.S. at 28. That is, the *Blackledge* Court was concerned not simply with the effect on the defendant against whom additional or new charges are filed, but with the *appearance* of vindictiveness that

chills the free exercise of the right to appeal by all defendants. *See Id.* at 28. The Court was concerned that the prosecutor can discourage appeals by "upping the ante" on the defendant. *Id.* at 27-28. Thus, the "appearance of vindictiveness" rule is prophylactic; it is "designed both to protect the present defendant from vindictiveness and to prevent a chilling of the exercise of rights by other defendants in the future." *Motley*, 655 F.2d at 188.

In order to show prosecutorial vindictiveness, a defendant must show either: (1) actual vindictiveness by means of objective evidence that a prosecutor acted in order to punish the defendant for exercising a legal right; or (2) a realistic likelihood of vindictiveness, which then raises a presumption of vindictiveness. *See United States v. Goodwin,* 457 U.S. 368, 372–73 (1982) (holding that when "action detrimental to the defendant has been taken after the exercise of a legal right . . . it [is] necessary to 'presume' an improper vindictive motive" because motives are often "complex and difficult to prove").

Once a defendant has established a presumption of prosecutorial vindictiveness, the prosecution can rebut the presumption by showing objective reasons justifying the additional charges. *Thigpen v. Roberts*, 468 U.S. 27, 32 n.6 (1984) ("[T]he *Blackledge* presumption is rebuttable."). In *Motley*, the Ninth Circuit Court of Appeals noted:

> If the government increases the severity of the charges following a defendant's exercise of a procedural right, the sequence of events gives rise to an appearance of vindictiveness, shifting the burden to the government to prove that the decision to re-indict with more severe charges did not result from any vindictive motive. "Instead, the prosecutor, to rebut the presumption, must show his decision to re-indict with more severe charges was 'justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness.'" *United States v. Burt*, 619 F.2d 831, 836 (9th Cir.1980), quoting *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980).

Motley, 655 F.2d at 188 n.1.

Here, the State's acts of charging Mr. Herrera with a new sentencing enhancement, and arguing for additional years of incarceration pursuant to the tenor of the enhancement after the first conviction was vacated, violated his right to due process as a vindictive prosecution. Further chilling any other defendant's decision to exercise his appellate rights is the fact that, not only did Mr. Herrera *not* receive a more lenient sentence after his second conviction, but he was sentenced to an additional *eight fixed years* in prison after the second trial. Any defendant who saw Mr. Herrera prevail on appeal only to be charged with a new sentencing enhancement and subsequently sentenced to *eight additional years, fixed*, *in prison*, would certainly hesitate to pursue a new trial of his or her own.

1. <u>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</u>

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. This is true for two reasons: (1) because the reasons stated by the prosecutor as to why he was seeking to amend the Information to include a new sentencing enhancement are factually false, and thus, do not withstand constitutional muster; and (2) because the firearm that the State relied upon in seeking to enhance the sentence was not newly discovered evidence, but had been turned over by Mr. Herrera's mother just minutes after the first responders arrived on December 25, 2011. (*See* Tr. (Vol. I), p.337, Ls.1-25, p.352, Ls.12-21; Tr. (Vol. II), p.439, Ls.10-22, p.441, Ls.3-19.) 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.

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. (Limited R., pp.58-62.) 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 reminded the court that he was not part of the first trial or the appeal process, and said of his motion to amend, "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.) The prosecutor also provided another seemingly non-vindictive reason for charging the new firearm enhancement. The prosecutor claimed that its reason for amending the information was because, "said decision [of the Idaho Supreme Court] envisions somewhat the possibility of a conviction for manslaughter, a possibility the earlier prosecutor likely didn't contemplate, given the evidence he had available at the time of trial." (Limited R., p.59.) The prosecutor also represented that, because the appellate court decision "limited for the most part a day's worth of testimony and four witnesses," the prosecutor was concerned that there was a greater possibility for the jury to find Mr. Herrera guilty of manslaughter. (Tr. (Vol. I), p.35, Ls.1-11.) So, to protect its sentence from the first trial, the prosecutor sought amendment so that if Mr. Herrera was convicted of manslaughter, it would still have an available sentencing range of 25 to 30 years. (Tr. (Vol. I), p.35, Ls.11-18.)

Defense counsel objected and argued against the amendment as it infringed upon Mr. Herrera's constitutional right to a jury trial and to appellate review; "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.)

The district court granted the motion, relying on the State's justifications that it wanted to be able to argue for the same determinate sentence, regardless of whether the jury convicted of murder or manslaughter and found persuasive that "the State of Idaho makes it clear it is not seeking an *increased* penalty" (Limited R., p.100) (emphasis in original), and an Amended Information alleging a sentence enhancement was filed. (Limited R., pp.117-118.[6])

However, the prosecutor's purported reasons are constitutionally infirm. First, the prosecutor's claim that he could not be vindictively prosecuting in adding a new sentencing enhancement for the second trial simply because he did not prosecute the first trial is unsupported by the law. "[T]he presumption [of vindictiveness]. . . does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial of an already-convicted defendant might be no less vindictive because he did not bring the initial prosecution." *Thigpen*, 468 U.S. at 30–32 (rejecting the argument that if two different prosecutors are involved, a presumption of vindictiveness is inappropriate). The *Thigpen* Court pointed out that its opinion in *Blackledge* "referred frequently to actions by 'the State,' rather than 'the prosecutor.'" *Id.* at 31 (quoting *Blackledge*, 417 U.S. at 28–29).

Here, the prosecutor was aware that Mr. Herrera's 2013 conviction had been vacated and a new trial ordered because of prosecutorial misconduct. (Tr. (Vol. I), p.34, Ls.5-7, p.35, Ls.1-18.) It is clear from his comments that the prosecutor was well aware of the circumstances surrounding the Idaho Supreme Court's decision to grant Mr. Herrera a new trial. (*Id.*) Thus, the prosecutor, "burdened with the retrial of an already-convicted defendant," would "be no less vindictive because he did not bring the initial prosecution." *See Thigpen*, 468 U.S. at 30-32.

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[6] The Limited Record on Appeal contains two consecutive pages identified as "118." Mr. Herrera is referring to the first page of the record labeled "118."

Second, according to the prosecutor, his concerns that this trial might result in a manslaughter conviction (instead of the second degree murder conviction he was hoping for), existed because the appellate court had held certain evidence was improperly admitted; evidence the prosecutor apparently believed he could not get a murder conviction without. The evidence the prosecutor complained it could not introduce, "a day's worth of testimony and four witnesses" (Tr. (Vol. I), p.35, Ls. 1-11), was evidence the district court had held was inadmissible at the first trial, but the prosecutor there had impermissibly introduced anyway. *State v. Herrera*, 159 Idaho 615, 621-624 (2015) (vacating Mr. Herrera's conviction where the State, in violation of the district court's order, "asked questions that appeared to be deliberately designed to elicit the exact testimony that the district court had specifically prohibited," and holding "[a] party's deliberate violation of an order excluding evidence with little relevance but with great potential for prejudice is an attack on the fairness of the proceeding and cannot be countenanced"). Thus, the prosecutor was seeking to "protect a sentence" that had been obtained by the initial prosecutor's misconduct in eliciting testimony that the district court had ruled was inadmissible.

Thirdly, the prosecutor claimed that its reason for amending the information was because, "said decision [of the Idaho Supreme Court] envisions somewhat the possibility of a conviction for manslaughter, a possibility the earlier prosecutor likely didn't contemplate, given the evidence he had available at the time of trial." (Limited R., p.59.) However, the jury *was* instructed on lesser included offenses such as voluntary and involuntary manslaughter at the first trial. (Limited R., pp.263-65.) Thus, the purported change in circumstances was fictional.

Further, whether the State has proved Mr. Herrera guilty of second degree murder is a question for the jury. Should the jury determine that Mr. Herrera was not guilty of second

degree murder, it is clearly malicious motives that would impel a prosecutor to vindictively seek a sentence for second degree murder, for conduct the jury found *did not* constitute second degree murder. The State had no sentence to "protect," that is, had the jury found Mr. Herrera guilty of manslaughter, the State could not then seek the same penalty as if they had found him guilty of murder.

Mr. Herrera's right to due process was violated when the prosecutor brought a new sentencing enhancement against him for using a firearm in the commission of the charged crime, after the district court granted him a new trial.

2. <u>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</u>

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.

It is well-established in Idaho that the sentencing process is a critical stage in the trial process and that, therefore, the constitutional right to due process applies at sentencing. *See, e.g.*, *State v. Mitchell*, 146 Idaho 378, 385 (Ct. App. 2008). "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." *Motley*, 655 F.2d at 189-90 (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 State moved to dismiss the sentencing enhancement. (Supp. Tr., p.110, Ls.4-15.) The enhancement was dismissed, yet, at sentencing, the prosecutor urged the court to consider the fifteen-year firearm sentencing enhancement and impose an increased penalty:

> The Prosecutor: In addition, people of the state have declared that the use of the gun, if separately proved, and the State did not pursue that at the time of verdict in this case, but if separately proved, the people of the state are so against guns and violence that they have provided for an additional fifteen-year term --
>
> Defense Counsel: Your Honor, I would object to the argument with regards to that. The State chose not to seek that. They were given that opportunity and did not do so.

(Tr. (Vol. II), p.996, Ls.13-22.) The district court overruled the objection, finding that it was permissible argument. (Tr. (Vol. II), p.996, Ls.23-24.) The prosecutor argued that, while the State did not pursue the firearms sentencing enhancement, "[I]t can certainly be considered in fixing the minimum term of this sentencing as a reflection of what the will of the people are in terms of general or public deterrence." (Tr. (Vol. II), p.996, L.25 – p.997, L.4.) The prosecutor argued that the people of Idaho "really don't want people, drugs and violence and guns mixing up, and when you do that, if pursued by the State, an additional fifteen years." (Tr. (Vol. II), p.997, Ls.4-6.) The prosecutor told the district court that it could "certainly consider that as

something to look at when considering the minimum term of this sentence." (Tr. (Vol. II), p.997, Ls.7-9.)

The district court then 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.997, Ls.18-25.)

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.[7] (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. The prosecutor's actions in seeking to add the firearm enhancement and in arguing a dismissed enhancement to the court constituted vindictive prosecution.

D. The State's Sentencing Argument Urging The Court To Consider The Additional Statutory Penalty For Using A Firearm Constituted Prosecutorial Misconduct Because The State Initially Misled The Court To Grant The Amendment

Mr. Herrera contends that the prosecutor lied to the district court, defense counsel, and Mr. Herrera when he claimed that the firearms enhancement would only be used to protect the original sentence, and that, notwithstanding his dismissal of the charge after hearing the verdict, he breached an implied promise when he argued in favor of an increased penalty based on the intent of the dismissed firearm enhancement at sentencing.

While this deception is certainly troubling in and of itself, *see* IDAHO R. OF PROF. CONDUCT 3.3(a)(1) (prohibiting the knowing making of false statements to a tribunal), it also

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

constitutes misconduct. *See State v. Field*, 144 Idaho 559, 571-72 (2007) (finding misconduct where the prosecutor represented one thing to the district court, then did another); *Herrera*, 159 Idaho at 623-24 (vacating Mr. Herrera's conviction where the State, in violation of the district court's order, "asked questions that appeared to be deliberately designed to elicit the exact testimony that the district court had specifically prohibited," and holding "[a] party's deliberate violation of an order excluding evidence with little relevance but with great potential for prejudice is an attack on the fairness of the proceeding and cannot be countenanced"); *State v. Ellington*, 151 Idaho 53 (2011) (finding prosecutor's conduct in telling court and defense counsel a witness would testify about vehicle speed and deceased's location, but instead eliciting testimony describing grisly injuries suffered by decedent, was "unnecessarily misleading").

Accordingly, the prosecutor's conduct violates the general duty of candor that attorneys owe as officers of the court. In addition to the duty of candor mandated under ABA Model Rule 3.3, many courts have noted that there exists a "general duty of candor imposed on all attorneys as officers of the court." *See Board of License Commissioners of Town of Tiverton v. Pastore,* 469 U.S. 238, 240 (1985) (attorneys, as officers of the court, owe a general duty of candor to the court); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993) ("the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit"); s*ee also United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Management of Va., Inc.*, 64 F.3d 920, 925 (4th Cir.1994) ("[A] lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy."); *Beam v. IPCO Corp.*, 838 F.2d 242, 249 (7th Cir.1988) ("[L]awyers have a duty of candor to the tribunal. Counsel for appellant

would be well-advised to observe that violations of this duty can lead to sanctions even more severe than payment of an opponent's fees and costs.”).

Prosecutors, in particular, owe a duty of candor. *See United States v. Wold*, 979 F.2d 632, 635 (8th Cir. 1992) (holding prosecutor’s conduct in telling trial court at a pre-trial motion hearing that a witness would not be testifying, but later calling that witness to testify at trial, was improper); *United States v. Salameh*, 152 F.3d 88, 133 (2d Cir. 1998) (prosecutor has “special duty not to mislead”).

In the State’s motion to amend, the prosecution represented to the district court that it was only seeking to amend the Information to add a sentencing enhancement to protect the earlier sentence of life, with twenty years fixed. (Limited R., pp.58-59.) The prosecutor represented that, due to the inadmissibility of the testimony of several witnesses regarding Mr. Herrera’s prior bad acts, Mr. Herrera may be convicted of manslaughter, instead of second degree murder. (Limited R., p.59.) A conviction for manslaughter was “a possibility the earlier prosecutor likely didn’t contemplate, given the evidence he had available at the time of trial.” (Limited R., p.59.) The prosecution asserted that there would be no prejudice to the defendant, the amendment would “simply allow[] the potential top end of the sentence to go to 25 or 30 years, if manslaughter is found.” (Limited R., p.59.)

In granting the State’s motion to amend the Information, the district court relied on the prosecutor’s argument that he was just protecting his sentence. The court reasoned:

> If the jury convicts of murder in the second degree, the deadly weapon [sic] enhancement is a nullity, as the maximum possible sentence for murder in the second degree is life in prison with a mandatory minimum ten years in prison. I.C. § 18-8004. However, if the jury is instructed on a manslaughter charge, and the jury convicted Herrera on that charge, the deadly [sic] weapon enhancement provision would extend the maximum sentencing range by fifteen years, from fifteen years maximum for voluntary manslaughter (I.C. § 18-4006(1)) to thirty years, including the deadly weapon enhancement.

(Limited R., pp.99-100.) The district court relied on the State's justifications that it wanted to be able to argue for the same determinate sentence, regardless of whether the jury convicted of murder or manslaughter and found persuasive that "the State of Idaho makes it clear it is not seeking an *increased* penalty." (Limited R., p.100) (emphasis in original). After the jury convicted Mr. Herrera of second degree murder, the State moved to dismiss Count II, the sentencing enhancement, and the district court dismissed Count II. (Supp. Tr., p.110, Ls.4-15.)

The prosecution went back on its word, however, at sentencing, when it argued that the purposes behind the sentencing enhancement necessitated the court to increase the minimum period of confinement because, "the people of the state are so against guns and violence that they have provided for an additional fifteen-year term." (Tr. (Vol. II), p.996, Ls.13-18.)

The court overruled defense counsel's objection, and the prosecutor argued that, even though the State dismissed the firearm sentencing enhancement, the court could certainly consider the enhancement when fixing the minimum term of Mr. Herrera's sentence "as a reflection of what the will of the people are in terms of general or public deterrence." (Tr. (Vol. II), p.996, L.19 – p.997, L.4.)

After the court clarified that the prosecutor was asking it to add that enhancement to the mandatory minimum, the court sentenced Mr. Herrera to life, with thirty years fixed. (Tr. (Vol. II), p.997, Ls.18-23, p.1020, Ls.1-3.) This sentence was eight fixed years greater than the one imposed after the first trial. (R., pp.279-282.) However, no new facts had come to light, no additional weapons were located, and Mr. Herrera did not engage in any egregious conduct while in prison. *See generally*, 2016 Presentencing Investigation Report ("PSI"). Clearly the district court was persuaded by the State's argument that the use of a firearm warranted an increased minimum sentence and it increased Mr. Herrera's minimum sentence as a result.

The State's argument asking the court to add additional time to the fixed portion of the sentence was prosecutorial misconduct. The prosecutor effectively misled the court into granting its motion to amend with the promise that the penalty would not be increased, but at sentencing sought exactly that—an increased penalty for using a firearm. Such constitutes misconduct.

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

A. Introduction

Although Mr. Herrera filed a letter requesting new counsel, during a hearing on the matter, the district court did not offer Mr. Herrera a chance to speak regarding his concern that his counsel was not prepared for trial. Mr. Herrera was only permitted to speak briefly regarding his concern about an actual conflict between himself and his counsel before he was cut off by the court. The district court did not delve into either of the problems Mr. Herrera had been having with his counsel before it denied Mr. Herrera the opportunity to address the conflict(s) any further. This failure to provide Mr. Herrera with a full and fair opportunity to present the facts in support of his request for substitute counsel deprived him of his right to counsel protected by both the federal and Idaho Constitutions. As such, Mr. Herrera's case must be remanded to the district court in order for the court to conduct the constitutionally mandated hearing in order to determine whether good cause exists for the appointment of substitute counsel and for any further proceedings that may be necessary as a result of the trial court's determination.

B. Standard Of Review And Applicable Law

When the defendant objects to a conflict of interest with his counsel, the court has an affirmative duty to inquire into the potential conflict. *State v. Severson*, 147 Idaho 694, 704 (2009). If the trial court fails to conduct an adequate inquiry, the defendant's conviction must be reversed regardless of whether the conflict adversely affected his lawyer's performance. *Id.* The adequacy of a trial court's inquiry is a constitutional issue over which the courts exercise free review. *Id.*

Both the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, § 13 of the Idaho Constitution, guarantee the right to counsel for criminal defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Pharris v. State*, 91 Idaho 456 (1967); *State v. Lippert*, 145 Idaho 586, 594 (Ct. App. 2007). The right to counsel encompasses the right to effective assistance of counsel. *State v. Clayton*, 100 Idaho 896, 897 (1980). Regardless of whether counsel is retained or appointed, a criminal defendant has a right to conflict-free counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). However, the right to counsel does not necessarily encompass the right to counsel of one's own choosing. *Lippert*, 145 Idaho at 594. "Mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in absence of extraordinary circumstances." *Id.* A trial court has discretion to appoint substitute counsel for good cause. *Clayton*, 100 Idaho at 897; *State v. Peck*, 130 Idaho 711, 713 (Ct. App. 1997). This Court reviews the district court's determination as to whether to appoint substitute counsel for an abuse of discretion. *State v. Nath*, 137 Idaho 712, 714-15 (2002).

Where a defendant requests substitute counsel, the district court is under no obligation to affirmatively act as an advocate for the defendant in determining whether to appoint substitute

counsel. *Clayton*, 100 Idaho at 898. But the court nevertheless must afford the defendant a full and fair hearing on the request for substitute counsel. *Id*.

This is the case even where the trial court maintains some initial skepticism as to the basis for the defendant's request. As was noted by the Idaho Court of Appeals in *State v. Peck*, "even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." 130 Idaho at 714 (quoting *United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982)).

C. The District Court Erred When It Failed To Conduct A Sufficient Inquiry Of Mr. Herrera Upon Mr. Herrera's Request For Appointment Of Substitute Counsel

On March 9, 2016, Mr. Herrera filed a written motion to replace his defense counsel. (Limited R., pp.56-57.) During the March 22, 2016 hearing, 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 advised the court that the letter from his client indicated his client's position, and he 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 was why he was asking for a continuance. (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.) However, rather than asking Mr. Herrera about the concerns, the district court instead spoke only to defense counsel regarding this issue. (Tr. (Vol. I), p.73, L.15 – p.77, L.15.)

When the district court did finally ask Mr. Herrera about the substance of his motion, Mr. Herrera began to explain a different conflict, one his counsel did not previously mention but which involved defense counsel's representation of the victim's brother and sister on unrelated misdemeanor charges. (Tr. (Vol. I), p.77, Ls.21-25.) Mr. Herrera only spoke a couple sentences before the district court admonished him to be quiet:

> THE COURT: And is there anything that you want to tell me regarding this motion, Mr. Herrera?
>
> THE DEFENDANT: Um, yes, sir. I also would like the Court to know that Mr. Andersen represented Jack and Kaytlin Comack. Those are siblings to Stefanie. Um, I asked him verbally and he told me he didn't remember or recall, so I sent him two certified letters, and um, right there on the bottom where the black is will indicate his response and when -- the date up top is when I got the response back.
>
> THE COURT: So --
>
> THE DEFENDANT: I had heard from other inmates that --
>
> THE COURT: I'm going to hand back the March 7th letter from Mr. Andersen to you --
>
> THE DEFENDANT: Down in the black --
>
> THE COURT: -- let me finish.
>
> THE DEFENDANT: Sorry, sir.

(Tr. (Vol. I), p.77, L.21 – p.78, L.13.) After interrupting Mr. Herrera, the district court inquired of defense counsel, who explained that he did not believe there was a conflict under Idaho Rule of Professional Conduct 1.7 that would affect his ability to represent Mr. Herrera. (Tr. (Vol. I), p.78, L.19 – p.80, L.5.) The district court denied 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.) The court found that it did not have any evidence of the "other fundamental differences," presumably meaning Mr. Herrera's allegation

that defense counsel did not have sufficient time to prepare his case for trial; that defense counsel was a very experienced attorney; and that there was no pending motion to continue. (Tr. (Vol. I), p.80, L.19 – p.81, L.9.) The district court reiterated its statements that appointed defense counsel was "an attorney with significant past experience, specifically, significant past criminal law experience, and more specifically, significant past criminal defense experience." (Limited R., p.114.) However, this decision failed to address the concerns raised by Mr. Herrera. Mr. Herrera was concerned that his counsel was unprepared for trial and that there was an actual conflict with the representation of the victim's siblings on past misdemeanor charges.

The lack of analysis by the district court is strikingly similar to the district court's process in *Nath*, *supra*. In *Nath*, the Idaho Supreme Court held that the trial court failed to conduct the mandated inquiry upon the defendant's request for substitute counsel. *Nath*, 137 Idaho at 714-715. The defendant in *Nath* requested substitute counsel due to the fact that trial counsel had failed to investigate certain potential witnesses and failed to obtain the documents requested by the defendant. *Id.* In response, the district court did not review the totality of the defendant's claims but merely characterized the defendant's dissatisfactions with counsel as a complaint that his trial counsel was not following the defendant's requests and instructions. *Id.* at 715. Because the trial court did not provide the defendant an adequate opportunity to explain his reasons for seeking substitute counsel, and because the trial court's "review of this motion did not encompass the totality of [the defendant's] claims," the Court in *Nath* held that the trial court failed to provide the defendant with the required full and fair hearing on his request. *Id.*

In this case, Mr. Herrera filed a document requesting a "change of lawyer." (Limited R., pp.56-57.) At the hearing, there were two problems identified: (1) defense counsel did not have sufficient time to devote to working on Mr. Herrera's case; and (2) defense counsel dually

represented both Mr. Herrera and the siblings of the woman shot by Mr. Herrera. However, the district court did not question Mr. Herrera as to the specifics of Mr. Herrera's claim that his counsel would not be able to devote sufficient time to his case before the trial date. Further, as to the other issue brought up by Mr. Herrera—the actual conflict of defense counsel due to the dual representation by defense counsel, the court cut off Mr. Herrera and did not allow him to finish explaining the conflict. (Tr. (Vol. I), p.77, L.21 – p.78, L.13.) The court was remiss in its obligation to inquire further of Mr. Herrera regarding both potential conflicts.

Here, just as in *Nath,* the district court conducted an incomplete assessment of the request and apparently failed to understand the totality of both of Mr. Herrera's claims. Mr. Herrera asserts that the district court failed to conduct the full and fair hearing required by law upon his request for substitute counsel, and that a remand of his case is therefore appropriate so that the trial court may properly determine whether there exists good cause for the appointment of substitute counsel.

III.

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

A. Introduction

The district court abused its discretion when it overruled Mr. Herrera's 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. The State will not be able to meet its burden of proving beyond a reasonable doubt that the district court's abuse of discretion was harmless.

The State initially called Detective Berger to testify about his interview or interrogation of Mr. Herrera. (*See generally* Tr. (Vol. II), p.530, L.20 – p.587, L.3.) He also helped the State read into the record Mr. Herrera's testimony from the first trial. (*See* Tr. (Vol. II), p.587, L.7 – p.588, L.4.)

When the State later recalled Detective Berger as a witness, Mr. Herrera objected. (*See* Tr. (Vol. II), p.692, L.21 – p.693, L.12.) Outside the presence of the jury, the State told the district court it was recalling Detective Berger to inquire "as to whether or not there was any gunshot residue analysis done upon the body of [Mr. Herrera's girlfriend], whether there was any gunshot residue analysis done upon the defendant." (Tr. (Vol. II), p.693, L.19 – p.694, L.2.) On the issue of gunshot residue analysis, Mr. Herrera objected on the grounds there was no disclosure of a gunshot residue kit, and there was no testimony that Detective Berger dealt with it. (*See* Tr. (Vol. II), p.694, Ls.12-19.) Mr. Herrera also noted Detective Berger had not done the analysis of the gunshot residue kit. (*See* Tr. Vol. II, p.696, Ls.8-11.) The State told the district court it anticipated Detective Berger, as the handling case officer, would testify no gunshot residue on Mr. Herrera or his girlfriend had been tested, and the detective would have an explanation for why it was not tested. (*See* Tr. (Vol. II), p.696, L.24 – p.697, L.5.) The district court overruled Mr. Herrera's objections. (Tr. (Vol. II), p.699, Ls.12-20.)

Upon his recall, Detective Berger testified he was familiar with what gunshot residue was. (Tr. (Vol. II), p.700, Ls.21-22.) The State asked Detective Berger to explain what gunshot residue was, and the district court sustained Mr. Herrera's objection on the basis of foundation. (Tr. (Vol. II), p.700, L.23 – p.701, L.2.) The State then asked how the detective was familiar with gunshot residue, and he answered, "[t]hrough my experience and training I'm familiar—and cases I've worked I know about gunshot residue." (Tr. (Vol. II), p.701, Ls.3-7.) The State asked

him, "[c]ould you please describe your training as it relates to gunshot residue?" (Tr. (Vol. II), p.701, Ls.8-9.) Detective Berger replied, "[m]y experience as it pertains to gunshot residue has to do with when there's a shooting-type scene, we used to take swabs of hands and stuff like that to determine if there was gunshot residue on the hands and any parts of the body." (Tr. (Vol. II), p.701, Ls.10-14.) The district court overruled Mr. Herrera's foundation objection to the State's next question, on whether gunshot residue was chemical constituents or compounds typically left after the discharge of a firearm. (Tr. (Vol. II), p.701, Ls.15-20.)

The State then asked Detective Berger, "could you tell us a little bit more about your experience with [gunshot residue] as it relates to your experience as a detective?" (Tr. (Vol. II), p.702, Ls.9-11.) The detective stated, "[t]hroughout my career as being a detective I've been involved in numerous scenes where guns have been fired or homicides, assaults, batteries, those kind of things, so based on that I've had the ability to work with or be part of a gunshot residue case." (Tr. (Vol. II), p.702, Ls.12-16.) Detective Berger testified he had become familiar with gunshot residue through those experiences, and was familiar with the limitations of gunshot residue. (Tr. (Vol. II), p.702, Ls.17-22.)

After Detective Berger explained what gunshot residue was, the State asked him, "[w]ere there any analyses concerning gunshot residue conducted upon the defendant?" (Tr. (Vol. II), p.702, L.23 – p.703, L.9.) Detective Berger testified there were not, because "[w]e already know that he was the one that fired the gun based on his confession that he shot the gun." (Tr. (Vol. II), p.703, Ls.10-13.) He also testified there were no gunshot residue tests conducted on Mr. Herrera's girlfriend, "[b]ecause we already know that she had been shot in the head with a firearm." (Tr. (Vol. II), p.703, Ls.14-19.)

The State asked, "[w]ould you have 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.) Mr. Herrera objected on the basis that "[t]here's not been sufficient foundation to qualify this person as an expert in gunshot residue and its analysis," but the district court overruled the objection. (Tr. (Vol. II), p.703, L.24 – p.704, L.3.) Detective Berger answered "yes" to the question, and the State next asked him to "please describe the limitations of gunshot residue as a forensic tool." (Tr. (Vol. II), p.704, Ls.4-6.) Mr. Herrera then objected: "this person has not been qualified as an expert, has not testified that he's been involved in the forensic analysis of gunshot residue; simply indicating that he's had some experience with it in investigations, but he's not participated in any analyzation of gunshot residue from a party, nor participated in how it is analyzed or has he been qualified to testify as to what particles or what gunshot residue show or don't show." (Tr. (Vol. II), p.704, Ls.7-16.)

The district court overruled the objection. (Tr. (Vol. II), p.704, L.20.) Detective Berger then testified, "when you do a gunshot residue analysis, it doesn't quantify how much is on one person. 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.21 – p.705, L.3.) Mr. Herrera asserts Detective Berger did not have practical experience or special knowledge that would qualify him as an expert on gunshot residue analysis, and thus the district court abused its discretion when it overruled Mr. Herrera's foundation objections to Detective Berger's testimony on gunshot residue analysis.

B. Standard Of Review

A district court's determination that a witness is qualified as an expert is discretionary, and an appellate court reviews the record to decide if that determination was an abuse of this discretion. *West v. Sonke*, 132 Idaho 133, 138 (1998). When reviewing an exercise of discretion, an appellate court conducts a multi-tiered inquiry into whether the district court: (1) rightly perceived the issue as one of discretion; (2) acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The District Court Abused Its Discretion When It Overruled Mr. Herrera's Foundation Objections To Detective Berger's Testimony On Gunshot Residue Analysis, Because Detective Berger Did Not Qualify As An Expert

Mr. Herrera asserts 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. The Idaho Rules of Evidence provide that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." I.R.E. 702.

Thus, "[a] qualified expert is one who possesses 'knowledge, skill, experience, training or education.'" *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 837 (2007) (quoting I.R.E. 702). "Formal training is not necessary, but practical experience or special knowledge must be shown to bring a witness within the category of an expert." *Id.* "The proponent of the testimony must

lay foundational evidence showing that the individual is qualified as an expert on the topic of his or her testimony." *Id.*

Here, the State did not lay that required foundational evidence showing Detective Berger was qualified as an expert on the topic of gunshot residue analysis. *State v. Zimmerman*, 121 Idaho 971 (1992), a lewd conduct case, helps illustrate why Detective Berger was not qualified. In *Zimmerman*, the Idaho Supreme Court held the district court properly limited the testimony of the defendant's expert witness. *See Zimmerman*, 121 Idaho at 972, 978. The defendant in *Zimmerman* sought to elicit testimony from the expert that it was more likely that the victim was not abused than that she was abused. *Id.* at 978. The expert was a licensed social worker who had performed a home-study of the victim's parents concerning a previous child protective action regarding the victim. *Id.*

The Idaho Supreme Court in *Zimmerman* held, "it is evident that the trial court limited the testimony because [the defendant] laid an insufficient foundation regarding [the expert's] qualifications in child sexual abuse matters." *Id.* According to the *Zimmerman* Court, "[t]here was no evidence in the record that [the expert] had training or experience in the investigation of child sexual abuse allegations. Nor was it clear whether [the expert's] job . . . required him to investigate child sexual abuse cases." *Id.* "Based upon these insufficiencies in the record," the *Zimmerman* Court held "the trial court properly excluded the testimony." *Id.*

Conversely, in *State v. Raudebaugh*, 124 Idaho 758 (1993), a murder case, the Idaho Supreme Court held the district court did not abuse its discretion in allowing a witness for the State to testify as an expert regarding blood spatter evidence. *See Raudebaugh*, 124 Idaho at 760, 763-64. The expert "testified that he had taken a one-week course in blood spatter patterns taught by a professional instructor, that he received training in crime scene evaluation in his

training as a forensic pathologist, that he had interpreted blood spatter patterns and investigated crime scenes on a number of occasions, and that he had given testimony on blood spatter patterns in other cases." *Id.* at 763-64. The *Raudebaugh* Court emphasized that the Court "has held that a witness's expertise may be based on actual field experience in the particular area." *Id.* at 764. "Given [the expert's] testimony about his qualifications to give expert testimony concerning blood spatters," the Court held, "the trial court did not abuse its discretion in allow [him] to testify as an expert under I.R.E. 702." *Id.*

Here, Detective Berger did not have practical experience or special knowledge that would qualify him as an expert on gunshot residue analysis. Similar to the lack of evidence concerning the expert's qualifications in *Zimmerman*, *see* 121 Idaho at 978, there was no evidence in the record showing Detective Berger had training or experience in the analysis of gunshot residue. Rather, Detective Berger testified his only experience with gunshot residue "has to do with when there's a shooting-type scene, we used to take swabs of hands and stuff like that to determine if there was gunshot residue on the hands and any parts of the body." (Tr. (Vol. II), p.701, Ls.8-14.) He also testified he had "been involved in numerous scenes where guns have been fired or homicides, assaults, batteries, those kind of things, so based on that I've had the ability to work with or be part of a gunshot residue case." (Tr. (Vol. II), p.702, Ls.12-16.) While the detective testified he had become familiar with gunshot residue through those experiences (Tr. (Vol. II), p.702, Ls.17-19), unlike the expert in *Raudebaugh*, *see* 124 Idaho at 763-64, Detective Berger never testified he had ever interpreted or analyzed gunshot residue.

The sum of Detective Berger's testimony was that he had been involved in the collection of gunshot residue evidence. However, the topic of his expert testimony was not the collection of gunshot residue evidence, but rather what that evidence would indicate about who fired a

gun—the analysis of gunshot residue.[8] The State, as proponent of Detective Berger's testimony, did not lay the required foundation evidence showing he was qualified as an expert on the topic of gunshot residue analysis. *See Weeks*, 143 Idaho at 837. Thus, the district court abused its discretion when it overruled Mr. Herrera's foundation objections to Detective Berger's testimony on gunshot residue analysis.

D. The State Will Be Unable To Prove That The District Court's Abuse Of Discretion In Overruling The Objections To Detective Berger's Testimony Is Harmless Beyond A Reasonable Doubt

The State will be unable to prove that the district court's abuse of discretion in overruling the objections to Detective Berger's testimony is harmless beyond a reasonable doubt. Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *See State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

[8] Additionally, some of Detective Berger's testimony was factually incorrect. He testified, "when you do a gunshot residue analysis, it doesn't quantify how much is on one person." (Tr. (Vol. II), p.704, Ls.21-24.) However, it is well-established that gunshot residue analyses may actually quantify the amount of gunshot residue found on the persons tested. *See State v. Warden*, 100 Idaho 21, 24 (1979) (describing a forensic scientist's testimony on how a gunshot residue test showed areas of the defendant's hands "contained gunshot residue in excess of seven or eight times the amount normally found on an individual's hands when that individual discharges a weapon. Further, the gunshot residue found was in excess of over one thousand times the amount normally found on an individual's hands when that individual discharges a weapon").

Here, the State will not be able to show there was no reasonable possibility the district court's abuse of discretion contributed to the conviction. The State's theory of the case was that Mr. Herrera murdered his girlfriend, because she had a contact gunshot wound and Mr. Herrera had repeatedly lied. (*See, e.g.*, Supp. Tr., p.44, Ls.10-20.) Mr. Herrera's theory of the case was that the shooting was accidental, and he did not know the gun was loaded when his girlfriend grabbed it and it went off. (*See* Supp. Tr., p.73, Ls.22-25.) According to Mr. Herrera, the State argued he was walking when he shot the gun, but that did not conform to the evidence. (*See* Supp. Tr., p.62, Ls.3-6.) Mr. Herrera asserted the physical evidence instead indicated he was sitting when he had the gun. (*See* Supp. Tr., p.62, Ls.7-22.)

Detective Berger's testimony on why the State did not conduct a gunshot residue test was important to the State's theory of the case. As discussed above, the State told the district court it was recalling Detective Berger to explain why gunshot residue analysis had not been conducted on Mr. Herrera or his girlfriend. (*See* Tr. (Vol. II), p.696, L.24 – p.697, L.5.) In his closing argument, Mr. Herrera asserted that, although the State had years to conduct an investigation, it did not analyze the gunshot residue kit for Mr. Herrera's girlfriend's hands "[b]ecause it doesn't fit their theory of the case." (Supp. Tr., p.64, Ls.8-13.) Mr. Herrera later asserted the State "can't overcome this physical evidence of where that gun had to be when the gun discharged. They can't overcome that. They chose not to do the gun residue test." (Supp. Tr., p.72, Ls.6-10.)

In its rebuttal, the State argued it was not suggesting Mr. Herrera was walking and shot the firearm, but rather that came from Mr. Herrera's first explanation for his girlfriend's death. (*See* Supp. Tr., p.81, Ls.21.) The State argued that explanation "was later contradicted by him and the physical evidence." (Supp. Tr., p.81, Ls.19-21.) The State subsequently contended,

based on Detective Berger's testimony, that "[g]unshot residue does nothing more than indicate the presence of a recently-fired firearm. It doesn't indicate who, it's just presence and proximity. It's not useful for forensics." (Supp. Tr., p.84, Ls.9-14.) The State claimed bringing up the gunshot residue was part of Mr. Herrera's trying to "misdirect" the jury "from the overwhelming strength of the evidence of a contact gunshot wound." (*See* Supp. Tr., p.84, Ls.16-20.)

Without Detective Berger's testimony on gunshot residue analysis, the State would have lost some support for its theory of the case, and would also have not been able to bring up the above argument in rebuttal to Mr. Herrera's assertions on gunshot residue. If 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. Thus, the State will not be able to show there was no reasonable possibility the district court's abuse of discretion contributed to the conviction. *See Sharp,* 101 Idaho at 507. The State will be unable to prove that the district court's abuse of discretion in overruling the objections to Detective Berger's testimony is harmless beyond a reasonable doubt.

IV.

The State Committed Prosecutorial Misconduct In Closing Arguments

A. Introduction

Mr. Herrera asserts that his right to a fair trial, guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor, in closing arguments, called him a liar over twenty times, misrepresented the State's burden of proof, misrepresented the evidence, and misrepresented the law. Mr. Herrera asserts that the prosecutor's improper closing arguments lowered the State's burden of proof, which requires reversal of his conviction.

B. Standard Of Review

A conviction will be set aside for unobjected-to prosecutorial misconduct only if the misconduct is sufficiently egregious to constitute fundamental error. *State v. Parker,* 157 Idaho 132, 141 (2014). To prove an error is fundamental, a defendant bears the burden of proving: (1) the error violated one or more of the defendant's unwaived constitutional rights; (2) the error is obvious from the existing record; and (3) the error was not harmless. *Id.*; *State v. Perry,* 150 Idaho 209, 226 (2010). If a defendant demonstrates one of his unwaived constitutional rights was plainly violated, this Court applies the harmless error test to determine whether the defendant has shown there is a reasonable possibility the error affected the outcome of the trial. *Perry*, 150 Idaho at 226. If so, the conviction is vacated and the case remanded for a new trial. *Id.* at 228. Mr. Herrera acknowledges that he did not contemporaneously object to the prosecutor's statements and thus the statements must be evaluated as fundamental error.

C. 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

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall … deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be … deprived of life, liberty or property

without due process of law." Idaho Const. art. I, § 13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. *State v. Irwin*, 9 Idaho 35, ___, 71 P. 608, 611 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.*, 71 P. at 611. The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*, 71 P. at 611.

"Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. "Indeed, the prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *State v. Moses*, 156 Idaho 855, 871 (2014)

(internal punctuation marks omitted). "Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Gross*, 146 Idaho 15, 20 (Ct. App. 2008). Misrepresentations or diminishments of the State's burden to prove the defendant's guilt beyond a reasonable doubt are impermissible. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "It is improper to misrepresent or mischaracterize the evidence in closing argument." *Moses*, 156 Idaho at 871 (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)). Nor should closing argument include counsel's personal opinion about the credibility of a witness or the guilt or innocence of the accused. *State v. Garcia*, 100 Idaho 108, 110-11 (1979).

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

In closing argument, the State repeatedly called Mr. Herrera a liar and repetitiously told jurors Mr. Herrera was fabricating. Defense counsel did not object to any of the prosecutor's statements. The prosecutor's relentless name-calling constituted prosecutorial misconduct.

In his closing argument, the prosecutor used the word "lie" or "fabricate" (or like variations) in each of the following statements to the jury:

1. The evidence shows that the defendant has lied. (Supp. Tr., p.44, L.15.)

2. His statements are not to be believed. (Supp. Tr., p.44, L.18.)

3. A contact gunshot wound plus a lying defendant equals murder. (Supp. Tr., p.44, Ls.19-20.)

4. There is the guilty conscience and lies of the defendant. (Supp. Tr., p.47, Ls.11-12.)

5. He is not worthy of any credibility. (Supp. Tr., p.48, Ls.1-2.)

6. He is not telling the truth. Innocent people do not lie. Guilty people lie. (Supp. Tr., p.49, Ls.15-16.)

7. And those major contradictions [in testimony] are not the product of a faulty memory or a recollection enhanced over a year of time; that is the product of fabrication. (Supp. Tr., p.50, Ls.10-13.)

8. He has to create a new story in order to explain away the forensics. And that's exactly what he did; fabricate and lie. (Supp. Tr., p.50, Ls.23-25.)

9. The second story not only fails because it's an obvious fabrication meant to meet physical evidence, it fails to withstand the scrutiny of common sense and logic. (Supp. Tr., p.51, Ls.1-3.)

10. His answer is, "I don't know." He doesn't know because it's a fabrication. (Supp. Tr., p.52, Ls.8-9.)

11. No; that is not a believable action. That is a fabrication, and the only one he could come up with to explain the contact gunshot wound. His statement cannot be believed. (Supp. Tr., p.53, Ls.15-18.)

12. The defendant had very convenient amnesia in this case. (Supp. Tr., p.54, L.1.)

13. It is very convenient for the defendant, when he is put to questions, to forget details. Now, yes, this might be a traumatic event, ladies and gentlemen, but traumatic events make things memorable. (Supp. Tr., p.55, Ls.22-25.)

14. His feigned ignorance is not the product of a memory faulty of time; that is the product of a fabrication, and answers he cannot fabricate quick enough to withstand the scrutiny of questioning. That tells you that he is not being truthful. (Supp. Tr., p.56, Ls.1-5.)

15. But just because they scream out, "I'm sorry. It's an accident," that doesn't make it true. (Supp. Tr., p.57, L.25 – p.58, L.2.)

16. His fabrications didn't start with Detective Berger in an interview room; they started as soon as the first-responders showed up. He was fabricating and lying in his fit of hysteria. And given his capacity for deceit, you should give his hysteria little credence as evidence of an accident. (Supp. Tr., p.58, Ls.11-16.)

17. Keep in mind, ladies and gentlemen, that in his fit of hysteria, he still maintained his lie; and that was nothing more than the effects of methamphetamine. (Supp. Tr., p.59, Ls.10-14.)

18. Physical evidence does not lie. Physical evidence does not get high on meth. Physical evidence does not tell inconsistent stories. Physical evidence can't be accused of murder and therefore have a motive to lie. (Supp. Tr., p.59, Ls.19-23.)

> 19. Physical evidence tells the truth, and the truth in this case is that it is a contact gunshot wound to the head. That is not an innocent act. That is murder. If you couple the physical evidence with the defendant's lies, deceit and omission, you arrive inexorably at the conclusion that this was murder. (Supp. Tr., p.59, L.24 – p.60, L.4.)

When given the opportunity to make rebuttal remarks, the prosecutor again focused on calling Mr. Herrera a liar:

> 20. . . . and the defendant's lies are corroboration that he is guilty because innocent people do not lie. Guilty people lie because they have something to hide; the actions of murder. (Supp. Tr., p.81, Ls.10-13.)
>
> 21. I'm asking you to infer from the evidence, the guilty conscience and lies of the defendant, that he murdered her, because innocent people don't lie; guilty people do. If this was an accident, he would not have feared the truth and he would have told what happened. (Supp. Tr., p.83, L.25 – p.84, L.4.)

The fact that Mr. Herrera was called a "liar" or his actions were characterized as "lies" or fabrications over twenty different times during closing argument surely affected the jury's deliberation of this case.

Although a prosecutor has considerable latitude in conducting closing arguments and can argue all reasonable inferences from the evidence, a prosecutor should avoid expressing a personal belief as to the credibility of the witnesses unless the comment is based solely on the evidence. *State v. Kuhn,* 139 Idaho 710, 715 (Ct. App. 2003). Here, Mr. Herrera did tell seemingly inconsistent stories when interviewed by police and when he testified at the first trial;[9] however, the prosecutor's constant harping on the inconsistencies went far beyond a mere comment on the evidence, and impermissibly strayed into misconduct. Over twenty references to Mr. Herrera as a liar or fabricator go beyond a comment on the evidence and constitute a

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[9] As set forth in the Statement of Facts, Mr. Herrera initially told law enforcement that when he pulled back the slide to make sure the gun was unloaded, it went off (2013 Trial Tr. (Vol. I), p.224, Ls.18-22; Tr. (Vol. I), p.342, Ls.7-15); later he testified that he had threatened suicide and his girlfriend pulled the gun toward her in an effort to get the gun away from him, and it went off (2013 Trial Tr. (Vol. II), p.128, Ls.5-10).

personal attack upon the defendant. Such an attack would naturally lead the jury to believe there is additional evidence not introduced at trial to which the prosecutor must be referencing.

Further, assertions similar to the prosecutor's statements that "only the guilty lie" have been found to constitute misconduct in other jurisdictions. *See, e.g.*, *State v. Escobedo*, 573 N.W.2d 271, 278 (Iowa Ct. App. 1997) (holding an "Innocent People Don't Lie" overhead slide ran "perilously close" to impermissible argument, and could have been impermissible under different circumstances, but finding no error where slide was inadvertently exposed to the jury without accompanying argument); *State v. Herrarte*, No. 6-774, 1997 WL 458710, at *4 (Iowa Ct. App. Apr. 30, 1997) ("Assuming arguendo the statement 'Innocent People Don't Lie' constitutes misconduct when conveyed by a prosecutor to the jury during closing argument . . . .").

Both the prosecutor and the trial judge have a responsibility to ensure that closing argument is kept within the proper bounds. ABA Standard 3-5.8.[10] *State v. Pabst*, 996 P.2d 321, 326 (Kan. 2000). This is because "the ultimate conclusion as to any witness' veracity rests solely with the jury." *Pabst*, 996 P.2d at 326 (relying on the ABA standards for prosecutors in holding that prosecutor's improper remarks during closing statements, including his accusing

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[10] The ABA standards for prosecutors say:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-5.8 (3d ed. 1993).

defendant of lying 11 times, coupled with timely objections overruled by trial court, denied defendant a fair trial).

The commentary in *American Bar Association Standards for Criminal Justice* standard 3-5.8 further explains the special concern with prosecutorial conduct:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

ABA Standard 3-5.8 cmt., p.107; *see In re Glasmann*, 286 P.3d 673, 679 (Wash. 2012) (holding prosecutor's misconduct permeated the state's closing argument and could not have been cured by an instruction, thus, new trial was necessary).

The Idaho Supreme Court recently censured similar prosecutorial name-calling in *State v. Lankford*, 162 Idaho 477, 399 P.3d 804 (2017). In *Lankford*, the prosecutor called Mr. Lankford a liar 16 times in its closing argument. 162 Idaho at __, 399 P.3d at 826-27. While the Idaho Supreme Court held that the prosecutor's remarks were not misconduct where Mr. Lankford had admitted to the jury that he lied about the facts of the incident, the Idaho Supreme Court admonished the State, writing that the prosecutor's "repeated use of the term 'liar' and its various grammatical forms [was] troubling and ill-advised":

> We are perplexed why the talented prosecutors of this State continue to choose to use the word "liar" and risk appeal or reversal. There are so many other powerful verbal techniques that can be used to convey the same concept to jurors.

Id., at __, 399 P.3d at 827 & 828 n.7 (2017).

Here, the prosecutor's insistence that Mr. Herrera lied about what happened prior to the shooting, and even lied about his emotional reactions after the shooting, likely caused the jury to question whether the prosecutor was relying on the evidence in the record. After the

prosecutor's repeated insistence that defendant was a liar, it is likely that the jury would instead assume the prosecutor is relying on facts not in evidence that the prosecutor had uncovered due to the extra fact-finding facilities of his office.

2. The State Committed Prosecutorial Misconduct When The Prosecutor Misstated The Evidence, The Law, And Its Burden Of Proof By Repeatedly Telling The Jury That A Contact Gunshot Wound And/Or The Lies Of The Defendant Are Sufficient To Convict Mr. Herrera Of Second Degree Murder

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *Phillips*, 144 Idaho at 86. Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id; State v. Reynolds*, 120 Idaho 445, 450 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280 (2003). However, a prosecutor may not misstate the law during closing arguments. *Phillips*, 144 Idaho at 86.

The United States Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). It is the State's burden to prove the essential elements of the offense beyond a reasonable doubt. *Id.* at 363-64. If a jury disbelieves a testifying defendant's testimony, that is insufficient to meet the State's burden. *See id.; see also United States v. Stanfield*, 521 F.2d 1122, 1125 (9th Cir. 1975) (holding the correct standard for jury consideration of evidence in a criminal case is "not which side is more believable, but whether, taking all of the evidence in the

case into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt").

Mr. Herrera was charged with second degree murder under I.C. § 18-4001 and 18-4003(g), which define second degree murder as "the unlawfully and with malice aforethought, but without premeditation, killing of a human being, by willfully and deliberately pointing a .380 handgun at her head and pulling the trigger, from which she died." (Limited R., pp.117, 293.)

This offense requires the state to prove:

> In order for the defendant to be guilty of Murder in the Second Degree, the state must prove each of the following:
>
> 1. On or about December 25, 2011
>
> 2. in the state of Idaho
>
> 3. the defendant Joseph Duane Herrera engaged in conduct which caused the death of Stefanie Comack,
>
> 4. the defendant acted without justification or excuse, and
>
> 5. with malice aforethought which resulted in the death of Stefanie Comack.

(Limited R., p.310.)

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

In lieu of requiring the State to prove Mr. Herrera guilty beyond a reasonable doubt, the prosecutor instead argued that Mr. Herrera did not prove his innocence or provide evidence of his innocence:

- This extreme emotional reaction is not the evidence of an innocent person who committed a negligent act. (Supp. Tr., p.57, Ls.12-14.)

- Do not let the Defendant's meth usage be misconstrued as evidence of innocence. He was under the influence of meth and he was agitated. (Supp. Tr. p.57, Ls.19-20.)

- Keep in mind, ladies and gentlemen, that in his fit of hysteria, he still maintained his lie; and that was nothing more than the effects of methamphetamine. Do not allow his usage of meth to be argued as evidence of his innocence. (Supp. Tr., p.59, Ls.10-14.)

- So his sleeping is a contradiction, his meth use, the threats of the family, ladies and gentlemen, that provides no evidence to support his innocence. (Supp. Tr., p.79, Ls.19-22.)

The prosecutor's argument that Mr. Herrera had to provide evidence to support his innocence is clearly wrong, and confused the jury as to what the State *did* have to prove.

During the prosecutor's closing remarks, he further misstated the State's burden of proof by misstating the law—telling the jurors that because it was a contact gunshot wound, the State has met its burden to show murder:

- A contact gun shot wound is not an accident. A contact gunshot wound is not negligence. A contact gunshot wound is not innocent. A contact gunshot wound is murder. (Supp. Tr., p.44, Ls.10-14.)

- Stefanie's last conscious moments on this earth were spent with a gun pressed against her head, and that is murder. (Supp. Tr., p.47, Ls.6-8.)

- Ladies and gentlemen, the physical evidence alone proves a murder, but there is more than just physical evidence. There is the guilty conscience and lies of the defendant. (Supp. Tr., p.47, Ls.9-12.)

- Ladies and gentlemen, this case is simple. The contact gunshot wound proves that this was not an accident. (Supp. Tr., p.83, Ls.20-22.)

- Once again, Stefanie can't testify. But as I said before, in death she's able to tell us that this was a murder because of the contact gunshot wound. (Supp. Tr., p.90, Ls.8-11.)

The State also lessened its burden of proof by telling the jurors that a contact gunshot wound + a lying defendant = murder:

- Physical evidence tells the truth, and the truth in this case is that it is a contact gunshot wound to the head. That is not an innocent act. That is murder. If you couple the

physical evidence with the defendant's lies, deceit and omission, you arrive inexorably at the conclusion that this was murder. (Supp. Tr., p.59, L.24 – p.60, L.4.)

- That's misdirection to try to misdirect you from the overwhelming strength of the evidence of a contact gunshot wound. . . .The family showing up and being mean to the defendant is no excuse for justification of murder. It was meant to distract you from the pertinent facts of this case; the contact gunshot wound and the lies of the defendant.[11] (Supp. Tr., p.84, Ls.18-25.)

- Now, as I said, ladies and gentlemen, the contact gunshot wound, plus the lies of the defendant are sufficient to find second degree murder with express malice, but go ahead, give him his best argument. Pulling out a gun, high on meth, high on marijuana, during an argument, with a gun you've never handled before, in close proximity with the person you're arguing with a mere feet away, holding it to your head, faking a suicide attempt, is naturally dangerous to human life; and that is second degree murder. This is not negligence. (Supp. Tr., p.87, Ls.11-21.)

- So, ladies and gentlemen, the physical evidence of a contact gunshot wound, and the guilty conscience of the defendant and the lying is enough for you to find him guilty. (Supp. Tr., p.89, Ls.7-10.)

- And your reasoning and common sense should tell you that a contact wound to the head with a defendant who lies equals murder by express malice. (Supp. Tr., p.89, L.25 – p.90, L.2.)

The prosecutor's closing statements reduced the State's burden of proof—essentially, the prosecutor told the jury over and over again (ten times) that if it proved there was a contact gunshot wound and/or Mr. Herrera was a liar, it had proven Mr. Herrera guilty of second degree murder. However, the prosecutor's directives to the jury eliminated one of the elements of second degree murder—malice aforethought—and ignored the defense's theory that the shooting was an accident or mistake (Jury Instruction Nos. 12, 19), thereby reducing the State's burden.

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[11] This statement also misstates the defense's theory of the case. The defense never claimed that the homicide was "justified" because Ms. Comack's family was mean to Mr. Herrera. The defense consistently maintained that Mr. Herrera did not know the gun still had a bullet in the chamber and that the shooting was accidental. (Supp. Tr., p.73, Ls.13-25.) The jury instruction requested by the defense, No. 12, was an instruction telling the jury that Mr. Herrera was not capable of committing the crime if the shooting was the result of accident or misfortune when it appeared there was not evil design, intention or culpable negligence. (Limited R., pp.138, 305; Supp. Tr., p.73, Ls.22-25.)

Furthermore, even if the jury thought Mr. Herrera had been untruthful about the events leading up to the accident, that was *not* enough to convict him of second degree murder. *See Stanfield*, 521 F.2d at 1125.

The jury had to conclude that *the State's evidence proved Mr. Herrera guilty of second degree murder* beyond a reasonable doubt. For the prosecutor to inform the jurors that, if they believed the defendant had lied, he was guilty of murder, is a misstatement of the law.

The State went even further to simplify its burden of proof by telling the jurors that only guilty people lie:

- The defendant's lies are corroboration that he is guilty because innocent people do not lie. Guilty people lie because they have something to hide; the actions of murder. (Supp. Tr., p.81, Ls.10-13.)

- Ladies and gentlemen, the physical evidence alone proves a murder, but there is more than just physical evidence. There is the guilty conscience and lies of the defendant. (Supp. Tr., p.47, Ls.9-12.)

- He is not telling the truth. Innocent people do not lie. Guilty people lie. (Supp. Tr. p.49, Ls.15-16.)

- I'm asking you to infer from the evidence, the guilty conscience and lies of the defendant, that he murdered her, because innocent people don't lie; guilty people do. If this was an accident, he would not have feared the truth and he would have told what happened. (Supp. Tr., p.83, L.25 – p.84, L.4.)

The jury could have found, based on the physical evidence, that Mr. Herrera was guilty. However, the jury also might have decided Mr. Herrera was guilty because the prosecutor made it easy for them by telling them that Mr. Herrera had lied, and, because he lied, he was guilty of murder. It was misconduct to tell the jurors that Mr. Herrera was guilty of murder because his version(s) of how the accident occurred were unclear.

Further, the prosecutor made comments that were calculated to encourage the jury to reach a guilty verdict based on an improper inference of guilt, and a reduced burden of proof, where the prosecutor told the jury during closing statements:

> And, ladies and gentlemen, I submit to you that even if you believe a firearm is empty, putting it to somebody's head with such pressure that it causes a contact gunshot wound,[12] even if you believe that weapon is empty, and you pull the trigger, believing it to be empty, that's still second degree murder, implied malice; because once again, ladies and gentlemen, you never point a gun at anyone, never point a gun at anything you don't intend to kill.[13]
>
> Even if you think the round is empty, putting a gun to somebody's head is an intentional act. Even if you think it's empty, that is dangerous because you could be wrong. And pulling the trigger, even thinking the gun to be empty, you could still be wrong. That natural consequence is very dangerous to human life. So, ladies and gentlemen, even in the defendant's best case, he still guilty of murder in the second degree.

(Supp. Tr., p.88, Ls.4-20.) It is not inherently dangerous to put an unloaded gun to a person's head. In a situation where the person holding the gun has not checked to see if the gun is loaded,

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[12] The prosecutor's claim that *pressure* was required to cause a contact gunshot wound was unsupported by the evidence. (*See, e.g.*, Tr. (Vol. II), p.820, L.19 – p.872, L.24.)

[13] The prosecutor's argument is a gun safety argument, but it was stated as if it were the law. While it is certainly true that it is not prudent to put a gun you know is unloaded up to someone's head, doing so is not second degree murder, or even implied malice. Additionally, in a situation where a movie actor fires a loaded weapon she believes contains only blanks and then kills someone, according to the State's logic, she is guilty of second degree murder. Such an argument ignores the lack of "malice aforethought" which is an essential element of second degree murder, and negates Jury Instruction No. 12 which provided: "All persons are capable of committing crimes, except those who committed the act or made the omission charged through misfortune or by accident when it appears that there was not evil design, intention or culpable negligence." (Limited R., p.305.) And Jury Instruction No. 19 provided, in relevant part:

> For the defendant to be guilty of murder in the second degree, the state must prove the defendant had a particular intent. Evidence was offered that at the time of the alleged offense the defendant was ignorant of or mistakenly believed certain facts. You should consider such evidence in determining whether the defendant was ignorant of or mistakenly believed certain facts. . . .

(Limited R., p.312.)

or where persons are playing "Russian Roulette" and there is a bullet in the gun, *that* natural consequence could be very dangerous to human life. But the "natural consequence" of an unloaded gun is not "inherently dangerous" in and of itself. While it would certainly scare a person at whom the gun is being pointed if that person did not know the gun is not loaded; the act itself is not inherently dangerous.

These statements to the jury reduced the State's burden of proof in that the State was no longer required to prove an essential element of second degree murder, "malice aforethought"; instead, the State told the jury that the very act of putting a gun to someone's head mandated a finding of murder.

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

The prosecutor misstated the trial evidence and argued facts not in evidence to the jury during his closing statements. The prosecutor claimed 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.) The prosecutor also implied that there was "chaos" in the bedroom after the shooting, which caused a critical piece of evidence—the magazine ejected from the pistol—to be kicked around. However, these arguments constituted misconduct as they were not only unsupported by the evidence, but they were actually contrary to the evidence adduced at trial.

It is a long-standing rule that the Fourteenth Amendment's due process clause prevents state governments from obtaining convictions based on a prosecutor's knowing use of false evidence. *Miller v. Pate*, 386 U.S. 1, 7 (1967). This goes not only to wholly fabricated evidence, such as was the case in *Pate*, but also to arguments which misstate the evidence

adduced at trial. Thus, in *United States v. Fearns*, the Seventh Circuit ordered that the defendant be retried where the prosecutor had tried to bolster the credibility of one of the government's witnesses by telling the jury that that witness had made a prior consistent statement, but where no evidence had ever been offered as to that alleged prior consistent statement. *United States v. Fearns*, 501 F.2d 486, 488-89 (7th Cir. 1974), *overruled on other grounds by United States v. Tucker*, 714 F.3d 1006 (7th Cir. 2013). The Seventh Circuit expressed outrage that the prosecutor had attempted such a tactic, describing his deliberate violation of a "fundamental rule, known to every lawyer," as "gross misconduct." *Id.* at 489. Therefore, a prosecutor cannot misrepresent or mischaracterize the evidence during his closing arguments. *Phillips,* 144 Idaho at 86. Additionally, closing argument should not refer to facts not in evidence. *Id.*; *State v. Cortez*, 135 Idaho 561, 565-66 (Ct. App. 2001).

For example, the Idaho Supreme Court found misconduct when a prosecutor mischaracterized the facts even though the prosecutor's statements "might constitute prosecutorial license, if based on some peripheral view of the facts . . . ." *State v. Griffiths*, 101 Idaho 163, 166 (1980), *abrogated on related grounds by State v. LePage*, 102 Idaho 387, 396 (1981) (rejecting *Griffiths*' application of the harmless error test). Despite the fact that the prosecutor may have drawn a logical inference, the *Griffiths* Court held:

> [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.

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 where the testimony at trial had been that, when Mr. Herrera was under the influence of methamphetamine, it amplified his underlying emotional state. (*See* Supp. Tr., p.57, Ls.12-21.) Daniel Ducommun, Mr. Herrera's friend since childhood, testified that he had observed Mr. Herrera under the influence of methamphetamine on multiple occasions. (Tr. (Vol. II), p.928, L.23 – p.929, L.2; p.935, Ls.11-15.) He said that methamphetamine amplified Mr. Herrera's existing emotional state. (Tr. (Vol. II), p.935, Ls.16-19.) However, he testified that he had never seen Mr. Herrera act the way he was acting right after the accident. (Tr. (Vol. II), p.935, L.24 – p.936, L.3.)

Yet the prosecutor instead characterized Mr. Herrera's extreme distress and hysteria after the shooting as a lie:

- His extreme emotional reaction is not the evidence of an innocent person who committed a negligent act. Those are the actions and behaviors of a person under the influence of methamphetamine. The defendant's own witness, his own friend of many years, testified that when the defendant is under the influence of meth, it amplifies his underlying emotional state. Do not let the Defendant's meth usage be misconstrued as evidence of innocence. He was under the influence of meth and he was agitated. (Supp. Tr., p.57, Ls.12-21.)

- His fabrications didn't start with Detective Berger in an interview room; they started as soon as the first-responders showed up. He was fabricating and lying in his fit of hysteria. And given his capacity for deceit, you should give his hysteria little credence as evidence of an accident. (Supp. Tr., p.58, Ls.11-16.)

- Keep in mind, ladies and gentlemen, that in his fit of hysteria, he still maintained his lie; and that was nothing more than the effects of methamphetamine. Do not allow his usage of meth to be argued as evidence of his innocence. (Supp. Tr., p.59, Ls.10-14.)

While the evidence supported the prosecutor's conclusion that Mr. Herrera had told differing versions of what happened in the room when his girlfriend was shot, there was no basis for the prosecutor to harangue the jury with a misrepresentation of the facts in evidence. Essentially, the prosecutor argued that Mr. Herrera was lying about what happened when the accident occurred, and then faked his hysteria and distress after the shooting. Such an implication was not based on any facts or evidence adduced at trial and was not even necessary for the prosecutor to prove his case. Further, the prosecutor's statements to the jury that it was not an accident—that Mr. Herrera *intentionally* shot his girlfriend—was certainly contrary to what the State had previously argued in the first trial. The final words in the State's rebuttal closing in the first trial were, "He pulled that gun out, he put it to her head. *He thought he took the bullets out*. He pulled the trigger and the bullet came out. That's murder in the second degree." (2013 Trial Tr. (Vol. III), p.97, Ls.15-19 (emphasis added).)

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 prosecutor argued facts not in evidence during closing argument when the prosecutor falsely alluded to the jury that there was a lot of chaos in the bedroom, "people kicking stuff around," and pointed out that there were two magazines recovered: "[defense counsel] claims that the defendant felt the firearm was empty, the magazine was out. Perhaps it was popped out after there was blood on the floor, after the EMT's, people kicking stuff around. You don't know when that magazine was kicked out. There were two magazines for that when recovered." (Supp. Tr., p.87, L.22 – p.88, L.3.) However, the prosecutor's comments were speculative as no evidence of this had been adduced at trial.

Sheriff Bob Loe testified he was the first responder to the scene, and he walked in and saw both Jerilyn Herrera and a neighbor helping the injured woman. (*See* Tr. (Vol. I), p.336, L.11 – p.337, L.5.) He saw a magazine lying by the injured woman's feet. (Tr. (Vol. I), p.337, Ls.7-14; p.352, Ls.2-11.) Ronnie Dickerson, the lead EMT going into the room, testified that the EMTs were in the room for five minutes or less before they took the injured woman out to the ambulance. (Tr. (Vol. I), p.325, Ls.2-11, p.326, Ls.6-10.) Sheriff Loe recalled that he was at the scene at 11:43 a.m. and the ambulance arrived at 11:51 a.m. (Tr. (Vol. I), p.363, Ls.1-16.) Sheriff Loe testified that after the EMTs left, he and Detective Scott Castles guarded the downstairs to make sure nobody went up to the scene upstairs, before going upstairs to check the room. (Tr. (Vol. I), p.345, Ls.3-24.) Approximately one hour after the ambulance left, Officer Castles picked up the .380 magazine that had been by the injured woman's feet. (Tr. (Vol. I), p.345, L.23 - p.346, L.1, p.348, Ls.7-15, p.360, Ls.13-20; Tr. (Vol. II), p.420, L.21 – p.423, L.18; Plaintiff's Exhibit No. 7, 8; Defendant's Exhibit C.) He testified that he took four photographs in and around the bedroom. (Tr. (Vol. II), p.426, L.2 – p.427, L.19; Plaintiff's Exs. 5, 6, 7, 8.) In the photographs, the magazine is where Sheriff Loe testified that he first saw it—right in front of the nightstand, near where the injured woman's feet were. (*See* Tr. (Vol. I), p.337, Ls.11-14, p.345, L.19 – p.346, L.1, p.352, Ls.2-11; Tr. (Vol. II), p.421, Ls.9-24; Plaintiff's Exs. 1 (11:38-40), 7, 8.) Deputy Richardson's bodycam video depicts a relatively calm and efficient scene in the bedroom, with a couple of EMTs working on the injured woman with sufficient space to do their work.[14] (Plaintiff's Ex. 1.) Thus, the prosecutor's speculation

[14] Mr. Herrera's mother did testify that she moved two items of furniture—the bed and the rocking chair—so that the emergency medical personnel could have easier access. (Tr. (Vol. II), p.441, L.20 – p.443, L.11.)

that there was "chaos" in the bedroom was contrary to the trial testimony of Sheriff Loe, Officer Castles, and the State's trial evidence.

While the State did not attempt to elicit any information from its witnesses relating to a chaotic scene *in the bedroom* or that things in there were "kicked around" *there*, the prosecutor felt free to imply such to the jury in order to discredit the defense's theory of an accidental shooting:

> Mr. Andersen claims that the defendant felt the firearm was empty, the magazine was out. . . . Perhaps it was popped out after there was blood on the floor, after the EMT's, people kicking stuff around. You don't know when that magazine was kicked out.

(Supp. Tr., p.87, L.22 – p.88, L.2.)[15] At best the prosecutor's theory was a wild guess; however, it was a guess unsupported by the trial evidence. The prosecutor commented, "There were two magazines for that when recovered" which appeared to be an attempt to mislead the jury. (Supp. Tr., p.88, Ls.2-3) While there were actually three magazines that were recovered from the room—two of the three magazines were found in a nightstand drawer. (*See* Tr. (Vol. I), p.348, Ls.16-25.) The comment, when put in context, would reasonably be interpreted such that he was trying to lead the jury to believe that there were multiple magazines found on the floor, and that, due to the "chaos," it wouldn't be possible to know whether the magazine with blood on it was the one that had been in the gun. (Supp. Tr., p.87, L.22 – p.88, L.3.) This apparently is an attempt to discredit the defense's theory—Mr. Herrera had maintained that he ejected the clip onto the floor *before* the accident occurred, and that the clip found on the floor had blood on top

[15] The prosecutor did question several of the State's witnesses about the chaos at the house when members of the Comack family arrived. (*See* Tr. (Vol. I), p.357, Ls.2-19, p.378, L.25 – p.379, L.10.) Further, on cross-examination, defense counsel asked Deputy Richardson, "Would it be fair to say that upon your arrival and events that transpired it was pretty chaotic?" to which he answered, "From my role in the event, um – I would say most events like this are chaotic. I did what I'm trained to do." (Trial Tr. (Vol. I), p.388, Ls.1-5.)

of it, which would tend to support the defense's theory that the clip was ejected before the shot was fired. The testimony was clear—there was only one magazine found on the floor with blood on it. (Tr. (Vol. I), p.345, L.19 – p.346, L.1, p.348, Ls.18-25; Tr. (Vol. II), p.766, L.18 – p.767, L.2), thus the prosecutor's statements were misleading—asking the jury to assume that there was chaos and several clips on the floor being kicked around, when this was clearly contrary to the evidence.

In this case, the prosecutor's suggestion that there was chaos in the bedroom and the magazine was probably kicked around during the commotion might be viewed as a permissible inference based on a peripheral view of the facts; however, as in *Griffiths*, there were no facts offered into evidence that actually substantiated the prosecutor's speculations. Therefore, as in *Griffiths*, the prosecutor committed misconduct by improperly drawing inferences about facts that were not in evidence.

As such, the prosecutor improperly misrepresented the evidence before the jury during closing arguments. The prosecutor's misrepresented the evidence and his comments were calculated to encourage the jury to reach a guilty verdict based on facts which were not in evidence. These comments violated Mr. Herrera's rights to a fair trial and due process under the Sixth and Fourteenth Amendments.

3. The Prosecutor's Misconduct Constitutes Fundamental Error Requiring This Court To Vacate Mr. Herrera's Conviction

Mr. Herrera did not object to the prosecutor's improper arguments; however, he asserts that the prosecutor's argument amounts to fundamental error necessitating this Court to vacate his conviction. "Where prosecutorial misconduct was not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error[.]" *Perry*, 150 Idaho at 227. "Such review includes a three-prong

inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." *Id*. at 228.

a. <u>By Arguing That The Jurors Could Find Mr. Herrera Guilty Of Second Degree Murder Because He Lied, The Prosecutor Misstated The Law And Attempted To Secure A Guilty Verdict By Improper Means, Thus Violating Mr. Herrera's Fourteenth Amendment Right To A Fair Trial</u>

The United States Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227.

"[P]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." *Sheahan,* 139 Idaho at 280 (alteration in original) (quoting *State v. Cortez,* 135 Idaho 561, 565 (Ct. App. 2001)); *State v. Parker*, 157 Idaho 132, 146 (2014) (holding that prosecutorial misconduct was not fundamental error where improper statements about nightmares or child suffering were not made or dwelled upon in support of a harsher punishment and did not misrepresent the evidence that was presented to the jury.) "It follows that a

misstatement to a jury of the State's burden rises to the level of fundamental error because it goes to the foundation of the case and would take away from a defendant a right essential to his or her defense." *State v. Erickson*, 148 Idaho 679, 685 (Ct. App. 2010) (holding the prosecutor's distortion of the State's burden of proof in closing argument was fundamental error and highly prejudicial).

In order to find Mr. Herrera guilty of second degree murder, the jury had to find the State proved that Mr. Herrera engaged in conduct which caused the death of Stefanie Comack, Mr. Herrera acted without justification or excuse, and with malice aforethought. (Limited R., p.310.) By misrepresenting the evidence and misstating the burden of proof, including telling the jury that a contact gunshot wound and/or a lying defendant means murder, the prosecution deprived Mr. Herrera of a right essential to his defense which goes to the foundation of the case. This was fundamental error. *See Erickson*, 148 Idaho at 685.

Further, by repeatedly calling Mr. Herrera a liar and claiming that he was fabricating what occurred and even his reaction to it, the State undercut Mr. Herrera's credibility and the defense's theory of the case. Where Mr. Herrera maintained the shooting was an accident—that he ejected the magazine and pulled back the slide to eject the bullet—but the prosecutor repeatedly challenged Mr. Herrera's veracity, it is likely the jury believed, at the prosecutor's insistence, that Mr. Herrera was a liar.

The prosecutor's misconduct violated Mr. Herrera's due process right to a fair trial.

b. <u>The Prosecutorial Misconduct Is Plain On Its Face</u>

The prosecutorial misconduct in this case is plain on its face, and there is no reason to believe that Mr. Herrera's counsel was "sandbagging" the district court by failing to object to the prosecutor misstating the evidence, the law and its burden of proof, falsely telling the jurors that

a contact gunshot wound and/or a lying defendant is murder, and by repeatedly calling Mr. Herrera a liar. The elements the State must prove in order for the jury to convict a defendant of second degree murder are well-established. *See State v. Porter,* 142 Idaho 371, 373-75 (2005). There is simply no strategic advantage that can possibly be gained by failing to object to, and to ask the court to correct, the prosecutor's misstatement of the law or its burden of proof. Nor is there any advantage in allowing the prosecutor to repeatedly assail the defendant's credibility where the jury, in order to find the defendant not guilty or guilty of a lesser offense, must believe the defendant's account that the shooting was an accident. Therefore, the prosecutorial misconduct is plain on its face.

c. <u>The Prosecutorial Misconduct Is Not Harmless</u>

Because Mr. Herrera did not object to the prosecutorial misconduct during trial, he bears "the burden of proving there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. Mr. Herrera asserts that there is a reasonable possibility that the prosecutorial misconduct affected the outcome of his trial.

The magazine was photographed with blood on it. (Tr. (Vol. II), p.766, L.18 – p.767, L.2; Plaintiff's Exs. 8, 45; Def's Ex. C.) It was photographed next to the side of the bed, some distance (roughly 5 feet) away from the large blood stain, next to a lighter and a hair clip. (Plaintiff's Exs. 7 & 8.) Mr. Herrera had consistently maintained that he ejected the clip from the gun and pulled back the slide to eject the bullet in the chamber just before the accident. (Tr. (Vol. II), p.500, Ls.10-14, p.562, Ls.22-25, p.564, L.1 – p.566, L.9, p.632, Ls.4-7.) Mr. Herrera was unfamiliar with the gun, and had only recently taken it from his father's dresser. (Tr. (Vol. II), p.604, L.20 – p.605, L.11, p.608, L.16 – p.609, L.8.) He had never fired it. (Tr. (Vol. II), p.636, Ls.13-14.) Detective Berger testified that, in his experience, these types of

pistols are unloaded when the slide is pulled back—the round in the chamber automatically ejects. (Tr. (Vol. II), p.566, Ls.5-9.) However, this gun was tested, and the State's witness, Stuart Jacobson, testified that the gun malfunctioned. (Tr. (Vol. II), p.916, Ls.13-16.) When tested, in five of fifty attempts, the gun failed to eject the bullet in the chambers when the slide was pulled back. (Tr. (Vol. II), p.916, Ls.17-22.) In fact, during the first trial the prosecutor conceded that Mr. Herrera believed the gun was unloaded. (2013 Trial Tr. (Vol. III), p.97, Ls.15-19 (the State arguing in its rebuttal closing: "He pulled that gun out, he put it to her head. He thought he took the bullets out. He pulled the trigger and the bullet came out. That's murder in the second degree.").) It was only during the second trial that the prosecutor argued to the jury that Mr. Herrera knew the gun was loaded, thus, he was feigning his extreme distress and hysteria when his girlfriend was shot. (*See* Supp. Tr., p.58, Ls.11-16.)

Whether Mr. Herrera's actions were accidental or whether he had malice aforethought was the central issue for the jury to decide. It is quite possible that the jurors believed that Mr. Herrera did not show "evidence of his innocence" or that his lies meant he was guilty. It is also quite possible that the jurors believed the prosecutor's argument that a contact gunshot wound, by itself, means murder. In sum, there is a reasonable possibility that the jurors applied the wrong burden of proof in determining whether the shooting was an accident or whether Mr. Herrera acted with malice aforethought, and a reasonable possibility that, had they required the State to carry its burden to prove second degree murder, the result of the proceeding would have been different. Therefore, the prosecutorial misconduct in this case was not harmless.

Although in *Parker*, the Court ultimately found the prosecutor's references to nightmares and child suffering did not rise to the level of fundamental error based on the test set forth in *State v. Adamcik*, 152 Idaho 445 (2012), the facts of Mr. Herrera's case meet the *Adamcik* test.

In *Adamcik,* the defendant alleged that the prosecutor engaged in misconduct by appealing to the jury's sympathy for the victim and the victim's family. 152 Idaho at 480–81. The *Adamcik* Court held that the prosecutor's statements were arguably improper, but did not constitute fundamental error for three reasons:

> (1) the statements were not dwelled upon or made in support of an argument that the defendant receive a harsher sentence;
>
> (2) the statements merely reiterated evidence offered previously during the trial; and
>
> (3) the district court had instructed the jury on several occasions that the prosecutor's closing statements were not to be regarded as evidence.

Adamcik, 152 Idaho at 481. Therefore, the court held that the defendant had not shown a reasonable possibility the verdict would have differed had the error not occurred. *Id.*

Here, the prosecutor's comments *did* misstate the trial evidence and the State's burden of proof, and the prosecutor *did* dwell upon these misstatements of its burden in order to ask the jury to convict Mr. Herrera of a harsher punishment—a murder conviction, as opposed to a manslaughter conviction.

The Court should find that the misconduct denied Mr. Herrera his right to a fair trial because it cannot say, beyond a reasonable doubt, that misconduct did not contribute to the verdict. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, likely influenced the jury.

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. "The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process." *State v. Paciorek,* 137 Idaho 629, 635 (Ct. App. 2002). In order to find cumulative error, this Court must first conclude that there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial. *State v. Lovelass,* 133 Idaho 160, 171 (Ct. App. 1999). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. *State v. Martinez,* 125 Idaho 445, 453 (1994). However, a finding of cumulative error must be predicated upon an accumulation of actual errors. *State v. Medina,* 128 Idaho 19, 29 (Ct. App. 1996).

Mr. Herrera asserts that the district court's preserved errors amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in sections I.C., II.C., and III.C. above, and need not be repeated, but are incorporated herein by reference.

VI.

The District Court Imposed A Vindictive Sentence After The Second Trial

A. Introduction

Mr. Herrera asserts the district court imposed a vindictive sentence after the second trial. After Mr. Herrera's 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.

At the sentencing hearing following Mr. Herrera's second trial, the district court stated the jury from the first trial had found the elements were proven, "but may have done so based on improper evidence. We'll never know." (*See* Tr. (Vol. II), p.1008, L.19 – p.1009, L.3.) Judge Mitchell stated that, in contrast, "[t]he second jury unanimously found all the facts were proven, and that was without any improper evidence being presented to them." (Tr. (Vol. II), p.1009, Ls.4-7.)

The district court then stated that in the first trial's opening argument, Mr. Herrera's counsel at the time "claimed this was an accident." (Tr. (Vol. II), p.1009, Ls.15-18.) The district court also stated Mr. Herrera's counsel from the second trial "argued to the second jury that this was an accident, and there's been claims made at various points in times that this was reckless conduct which is a step above accident as far as culpability goes." (Tr. (Vol. II), p.1009, Ls.19-23.) According to the district court, while those were strategy decisions by Mr. Herrera's counsel, "I am left today with a person that still hasn't come forward with what actually happened." (Tr. (Vol. II), p.1009, L.23 – p.1010, L.1.)

Judge Mitchell stated, "[t]he difficulty here in this case is that no one in this courtroom right now has closure, and a part of that is due to what happened in the first trial because of an attorney's decision and that's hugely unfortunate." (Tr. (Vol. II), p.1010, Ls.7-11.) The district court, after explaining that nobody knew what happened, stated, "I'm going to talk about what I

do know. And not making that statement today is not only affecting their lack of closure, but it's your showing a lack of responsibility, accountability." (Tr. (Vol. II), p.1010, L.11 – p.1011, L.4.)

Additionally, the district court stated the incident "was an intentional act every step of the way." (Tr. (Vol. II), p.1011, Ls.5-6.) The district court discussed whether there had been an argument before the shooting, and evidence that Mr. Herrera was controlling. (*See* Tr. (Vol. II), p.1012, p.7 – p.1014, L.25.) But the district court later returned to how Mr. Herrera had not "come forward with which of the stories is right, true, the truth, if any of them." (Tr. (Vol. II), p.1015, Ls.20-23.)

After going through the *Toohill* factors,[16] the district court explained why it was imposing a fixed sentence of thirty years, rather than a fixed sentence of life as the State had recommended. (*See* Tr. (Vol. II), p.1017, L.11 – p.1022, L.4.) The district court stated it had given some weight to the first sentencing judge's sentence of twenty-two years fixed. (Tr. (Vol. II), p.1021, L.22 – p.1022, L.4.) Judge Mitchell then stated, "[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.) The district court expressed the hope that everyone in the courtroom would start to heal, stating "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.7-12.) Mr. Herrera asserts that the district court, by imposing a sentence with a fixed term eight years longer than the fixed term imposed by the first sentencing judge, imposed a vindictive sentence.

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[16] *See State v. Toohill*, 103 Idaho 565 (Ct. App. 1982).

B. Standard Of Review

Although there was no vindictive sentence objection made before the district court (*see* Tr. (Vol. II), p.1024, Ls.14-20), this Court may review this issue for fundamental error. *See State v. Perry*, 150 Idaho 209, 228 (2010); *State v. Robbins*, 123 Idaho 527, 529-30 (1993). Under fundamental error review, the defendant must show the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) is not harmless. *Perry*, 150 Idaho at 228.

C. The District Court, By Imposing A Vindictive Sentence, Violated Mr. Herrera's Unwaived Constitutional Right To Due Process

Mr. Herrera asserts he has met the first prong of fundamental error review, because the district court, by imposing a vindictive sentence, violated his unwaived right to due process. *See State v. Baker*, 153 Idaho 692, 695 (Ct. App. 2012). The Fourteenth Amendment to the United States Constitution provides no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. The United States Supreme Court has held that due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

The *Pearce* Court observed that "it would be a flagrant violation [of the Due Process Clause] of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of

punishing the defendant for his having succeeded in getting his original conviction set aside." *Id.* at 723-24. The Court held that, to assure the absence of a retaliatory motivation on the part of the sentencing judge, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Pearce*, 395 U.S. at 725-26.

Later, the United States Supreme Court explained the *Pearce* Court had "applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin*, 457 U.S. 368, 374 (1982). However, the United States Supreme Court has since limited the ambit of the *Pearce* presumption of vindictiveness.

For example, in *Alabama v. Smith*, 490 U.S. 794 (1989), the United States Supreme Court held the application of the *Pearce* presumption is limited to circumstances in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. *Alabama v. Smith*, 490 U.S. at 799. The *Alabama v. Smith* Court also held that "[w]here there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Id.*

In *Texas v. McCullough*, 475 U.S. 134 (1986), the United States Supreme Court held the *Pearce* presumption "is also inapplicable because different sentencers assessed the varying sentences that McCullough received." *McCullough*, 475 U.S. at 140. In *McCullough*, a jury sentenced the defendant, and after a new trial, the trial judge imposed a greater sentence. *Id.* at 135-36. The Court in *McCullough* held that "the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more particularly since trial judges must be accorded broad discretion in sentencing." *Id.* at 140.

Idaho's appellate courts, based on *McCullough*, have held the *Pearce* presumption of vindictiveness does not apply where a different judge sentenced a defendant. *See State v. Robbins*, 123 Idaho 527, 532 (1993); *State v. Colwell*, 127 Idaho 854, 859 (Ct. App. 1995). Some courts in other jurisdictions have also read *McCullough* as meaning the *Pearce* presumption does not extend to sentences handed down by a different judge after appeal. *See, e.g.*, *United States v. Newman*, 6 F.3d 623, 630 (9th Cir. 1993); *State v. Miller*, 822 N.W.2d 360, 365 (Neb. 2012).

Conceding the *Pearce* presumption does not clearly apply and Mr. Herrera must show actual vindictiveness, the record here shows actual vindictiveness. The Idaho Court of Appeals has held, "[w]e look to the totality of the circumstances when reviewing a record for whether a sentence was imposed vindictively." *Baker*, 153 Idaho at 695 (citing *State v. Brown*, 131 Idaho 61, 72 (Ct. App. 1998)). The scope of review under the totality of the circumstances is narrowly defined, because the question of vindictiveness "focuses upon the sentencing judge's view of the defendant's decision to plead not guilty. That view cannot be determined upon a single remark removed from context. The judge's words and actions must be considered as a whole." *Id.* (quoting *State v. Regester*, 106 Idaho 296, 300 (Ct. App. 1984)).

Here, the totality of the circumstances shows the district court imposed Mr. Herrera's sentence with actual vindictiveness. The district court, while it also referred to the *Toohill* factors and other appropriate sentencing considerations, kept returning to what it perceived as a lack of closure. (*See, e.g.*, Tr. (Vol. II), p.1010, L.7 – p.1011, L.6, p.1015, Ls.20-23.) In fact, as discussed above, Judge Mitchell observed, "[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.)

This lack of closure stemmed from Mr. Herrera exercising his right to appeal and the resulting second trial. The district court stated, “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.7-12.) Thus, the district court increased Mr. Herrera’s sentence because he chose to exercise his right to appeal (and his right to a jury trial after he won his appeal), and the sentence is actually vindictive. A pair of vindictive sentencing cases from other jurisdictions illustrates why.

In *State v. Bradley*, 383 P.3d 937 (Or. Ct. App. 2016), a case involving various sex crimes, the defendant was convicted for nine counts against one victim, and for three counts against a second victim. *See Bradley*, 383 P.3d at 938. The defendant was originally sentenced to a total of 215 months imprisonment, with concurrent prison terms of 34 months, 34 months, and 115 months for the counts against the second victim. *Id.* The defendant appealed, and the Oregon Court of Appeals reversed and remanded the convictions with respect to the first victim for evidentiary error, and affirmed the three convictions with respect to the second victim. *Id.*

The trial court in *Bradley* then held a resentencing hearing on the affirmed counts, and imposed a total sentence of 183 months imprisonment, “68 months longer than the 115 months that it had originally imposed for those counts when they ran concurrently.” *Id.* at 938-39. The trial court stated it was “entitled to consider—now this is interesting—the Court is entitled to consider the sexual abuse of the child whose cases were reversed and remanded.” *Id.* at 939. The trial court also stated, “[t]he reason why I say that is because those were reversed and remanded, so he can stand trial for those again and when a Court sentences a defendant, the Court often hears from victims of crimes who were never convicted or never prosecuted, but the

Court can consider that other abuse." *Id.* The trial court further noted, "[t]he State might elect not to prosecute him on the other child's case. They might consider this sentence sufficient. But it doesn't mean I can't also consider that in making my sentence." *Id.*

On appeal, the Oregon Court of Appeals held the trial court "imposed a sentence that effectively punished defendant for his success on appeal." *Id.* at 941. The *Bradley* Court observed the trial court's conclusion that the State might not prosecute the defendant on the first victim's case was problematic, because "the state's case against defendant on the reversed counts would not be supported by [the erroneously-admitted] evidence if he were retried and, as noted, the state dismissed the reversed counts once defendant had received an increased sentence on the affirmed counts." *Id.*

The *Bradley* Court concluded, "Defendant's sentence should not have been increased such that the prosecution would be relieved of its burden to prove the reversed counts beyond a reasonable doubt. That is the essence of punishing defendant for his success on appeal." *Id.* "To the extent that the court on resentencing after an appeal relies on an impermissible consideration in increasing the sentence imposed on particular counts, the defendant establishes that the sentence is vindictive." *Id.* Thus, the *Bradley* Court held, "[b]ecause the trial court based its decision to increase the sentence for the affirmed counts on the reversed counts that were still pending prosecution, the trial court exceeded the applicable limits under the Due Process Clause of the Fourteenth Amendment. Thus, defendant has affirmatively proved actual vindictiveness." *Id.* The *Bradley* Court remanded the case for resentencing. *Id.* at 942.

In *State v. Hidalgo*, 684 So.2d 26 (La. Ct. App. 1996), a possession with intent to distribute marijuana case, the defendant initially had a sentence with thirty months of actual incarceration. *See Hidalgo*, 684 So.2d at 28. The defendant filed a motion to withdraw his

guilty plea and a motion to reconsider his sentence. *Id.* The district court denied the motion to withdraw the guilty plea. *Id.* As for the motion to reconsider the sentence, the district court amended the sentence to increase the actual incarceration time to thirty-six months. *Id.* The district court ruled as follows:

> Well, I am going to reconsider his sentence. I've thought about his case. Instead of taking his medicine, admitting his guilt, and accepting his sentence, he chose instead to attack his plea when he knew it was free and voluntary. And in thinking about it, I think I was too easy on him the first time around. So I am going to reconsider his sentence, and I am going to amend it by increasing his hard labor time to 36 months rather than 30 months, which is in accordance with the pre-sentence investigation. And, except as so amended, the sentence will be reaffirmed.

Id. at 31.

On appeal, the Louisiana Court of Appeal held the district court "not only failed to prove adequate justification on the record for its decision to increase the defendant's sentence but also apparently increased his sentence because he chose to exercise his right to attack his guilty plea." *Id.* The *Hidalgo* Court also held, "[s]ince the increased sentence failed to satisfy the dictates of due process as set forth in *Pearce* . . . such sentence must be vacated." *Id.* at 31-32. The Court remanded the matter to the trial court "for resentencing consistent with the guidelines laid down by the Supreme Court in *Pearce*." *Id.* at 32.

The district court's sentence here present several parallels with the actually vindictive sentences in *Bradley* and *Hidalgo*. By focusing on the lack of closure (*see* Tr. (Vol. II), p.1009, L.23– p.1011, L.4, p.1015, Ls.20-23, p.1022, L.25 – p.1023, L.4), Judge Mitchell effectively punished Mr. Herrera for his success on appeal. *See Bradley*, 383 P.3d at 941. As in *Bradley*, "[t]o the extent that the court on resentencing after an appeal relies on an impermissible consideration in increasing the sentence imposed on particular counts, the defendant establishes that the sentence is vindictive." *See id.*

The district court in *Hidalgo* increased the defendant's sentence because, "[i]nstead of taking his medicine, admitting his guilt, and accepting his sentence, he chose instead to attack his plea when he knew it was free and voluntary." *See Hidalgo*, 684 So.2d at 31. Similarly, the district court here increased Mr. Herrera's sentence because, instead of "com[ing] forward with which of the stories is right, true, the truth, if any of them," (*see* Tr. (Vol. II), p.1015, Ls.20-23), he exercised his right to appeal and, after winning on appeal, went to a second trial.

As *Bradley* and *Hidalgo* help illustrate, the district court increased Mr. Herrera's sentence because he chose to exercise his right to appeal. Thus, the totality of the circumstances shows Judge Mitchell imposed Mr. Herrera's sentence with actual vindictiveness. *See also State v. Sutherburg*, 402 A.2d 1294 (Me. 1979) (holding a defendant's increased fine was patently unconstitutional, because it was imposed to penalize the defendant for exercising his right to trial by jury); *State v. Morgan*, 15 So.3d 1026, 1030-31 (La. Ct. App. 2009) ("[T]here was a complete absence in the record of any relevant facts subsequent to defendant's first sentencing to suggest a harsher sentence"); *People v. Cox*, 122 A.D.2d 487, 488-89 (N.Y. App. Div. 1986) (holding that, because "the sole reason for greatly enlarging the sentence beyond the agreed upon time was defendant's exercise of his right to proceed to trial," the increased sentence was impermissible).

By increasing Mr. Herrera's sentence because he chose to exercise his right to appeal, the district court imposed an actually vindictive sentence. *See Pearce*, 395 U.S. at 725. Thus, the district court violated Mr. Herrera's unwaived right to due process. *See Baker*, 153 Idaho at 695. Mr. Herrera has met the first prong of fundamental error review.

D. <u>The Error In Imposing A Vindictive Sentence Plainly Exists</u>

Mr. Herrera has also met the second prong of fundamental error review, namely, that the error plainly exists. *See Perry*, 150 Idaho at 226. At the sentencing hearing, Mr. Herrera

requested the district court impose a unified sentence of twenty-five years, with ten years fixed. (Tr. (Vol. II), p.1001, Ls.4-10.) But the district court imposed a unified sentence of life imprisonment, with thirty years fixed. (Tr. (Vol. II), p.1019, L.25 – p.1020, L.3.) Considering the gulf between the sentence Mr. Herrera requested and the sentence the district court imposed, it cannot be said that the failure to object to the actually vindictive sentence was a tactical or strategic decision by Mr. Herrera's counsel. The district court's error in imposing a vindictive sentence plainly exists.

E. The Error In Imposing A Vindictive Sentence Was Not Harmless

Turning to the third prong of fundamental error review, Mr. Herrera has likewise shown the error here was not harmless. Under the third prong, "the defendant bear[s] the burden of proving there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. In this case, the first sentencing judge imposed upon Mr. Herrera a unified sentence of life imprisonment, with twenty-two years fixed. (2013 Tr. (Vol. I), p.389, L.24 – p.390, L.1.) After Mr. Herrera won his appeal and went through the second trial, the district court imposed a unified sentence of life imprisonment, with thirty years fixed. (Tr. (Vol. II), p.1019, L.25 – p.1020, L.3.) Essentially, Judge Mitchell added eight years to the fixed term of Mr. Herrera's sentence for exercising his right to appeal. Thus, Mr. Herrera has proven there is a reasonable possibility the error affected the outcome of his case. This error is not harmless. *See Perry*, 150 Idaho at 226.

The district court imposed a vindictive sentence after Mr. Herrera's second trial. By imposing an actually vindictive sentence, the district court violated Mr. Herrera's unwaived right to due process. This error in imposing a vindictive sentence plainly exists, and the error is not

harmless. Thus, Mr. Herrera has met all three prongs of fundamental error review. Mr. Herrera's 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 13th day of October, 2017.

_________/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 13th day October, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_________/s/________________
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SJC/eas