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IN THE SUPREME COURT OF THE STATE OF IDAHO

VANCE E. THUMM,	)	
	)	
Petitioner-Appellant,	)	NO. 45290
	)	
v.	)	Ada Co. CV-PC-2013-14688
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE SAMUEL A. HOAGLAND
District Judge

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ARGUMENT

THE COURT ERRED BY SUMMMARILY DISMISSING THE PETITION FOR POST-CONVICTION RELIEF

A. Introduction

Appellant files this reply brief to address a few points regarding two issues and otherwise stands on his opening brief. Those issues concern the *Bruton*[1] and/or joinder issue and the *Brady*[2] claim.

B. Ineffective Assistance of Counsel Regarding Joinder

First, Appellant responds to a complaint of the state concerning the failure to object to the pre-trial joinder. The state argues for the first time on appeal that Appellant "has not attempted to argue how, or if, his trial counsel should have anticipated the presentation of this particular evidence [statements and evidence presented at the subsequent trial] at the time of the state's pretrial joinder motion." Respondent's brief, p. 11-12.

Essentially the state is complaining that Appellant has not established who knew what when in regards to his attorney learning of the incriminating statements in relation to the trial. However, the state has waived this argument since it did not raise it below, presumably because the prosecutor was aware of when these statements were produced in discovery. Had the state raised it

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[1] *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1970).

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

below, Petitioner/Appellant could have established exactly when counsel would have learned about the statements and thus that he or she should have objected to the joinder or moved to sever.

Second, the state, just like the district court and some other courts cited by the state, misunderstands the interplay, or really lack of interplay, between *Crawford*[3] and *Bruton.*

To understand the point of *Bruton* and why it is unaffected by *Crawford*, the procedure in use at the time must be considered. In *Bruton*, two defendants were tried together, and the confession of one of them was admitted against him, but was inadmissible hearsay as to the other defendant. Accordingly, a limiting instruction was given that the confession was not to be used in determining the guilt or innocence of the other defendant. *Bruton's* point was that a limiting instruction will not always be enough to protect the Sixth Amendment rights of a declarant's co-defendants. The Supreme Court concluded that where a non-testifying defendant's extrajudicial statement is "powerfully incriminating" against other defendants--the statement may not be used in a joint trial at all. *Id*. at 135-36. In such a case, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id*. at 135.

> . . . in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction.

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[3] *Crawford v. Washington*, 541 U.S. 36 (2004).

Bruton, at p. 137.

Crawford and then *Davis*[4], on the other hand, each involved a single defendant and a hearsay statement made by a non-defendant witness. The issues in those cases respectively involved whether a testimonial statement was procedurally reliable, to wit, subject to cross-examination, and then, whether a statement was a substitute for testimony or not.

In short, there are two lines of Confrontation Clause cases. *Crawford/Davis* dealt with constitutional reliability (i.e., cross-examination) of evidence *admissible* against the defendant, whereas *Bruton* dealt with the prejudice from evidence *inadmissible* against the defendant.

Under *Crawford/Davis*, a non-testimonial hearsay statement which is admissible against the defendant himself is not barred by the Confrontation Clause. However, under *Bruton*, any "powerfully incriminating" hearsay statement of a co-defendant that is inadmissible against the defendant under the rules of evidence also cannot be admitted at the joint trial due to the Confrontation Clause (unless redacted which is not a possibility here).

Finally, as to the interplay between *Bruton* and *Crawford/Davis*, an important point is those cases had different concerns regarding the Confrontation Clause because they dealt with different kinds of trials due to the different numbers of defendants on trial. *Crawford/Davis* addressed whether admitting

[4] *Davis v. Washington*, 547 U.S. 813 (2006).

certain evidence against the defendant violates the defendant's right of confrontation. *Bruton* and its progeny address a different concern--the prejudicial effect of the unconfronted evidence heard by a jury in a joint trial.

So while both *Bruton* and *Crawford* address Confrontation Clause issues, in a joint defendant case it is *Bruton* that provides the governing standard.

The distinction between the lines of Confrontation Clause cases is easy to overlook, and it is unsurprising that some courts have gotten it wrong and believe that *Crawford* has overruled or otherwise changed *Bruton*. But it is now some 14 years after *Crawford* was decided in 2004 and the United States Supreme Court, has still never held that it overruled *Bruton*. [5]

What is easy to consider, and the key to our issue, is the question of how would Paris' statements be admissible at trial? Again, they are "Vance, you're going to prison" and you need to get rid of/burn those clothes because they are evidence (because of the blood on them).[6]

The state never addresses the initial admissibly of the statements except in a footnote. However, while *Crawford* might not keep Paris' statements from being admitted against her, neither does it provide a basis for admitting them as the state seems to suggest.

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[5] Even if this Court were to now hold that *Crawford/Davis* overruled or otherwise changed *Bruton*, that was not clearly established law in 2009 when this trial occurred, and which is the period of time referenced for an ineffective assistance of counsel claim. *State v. Abdullah*, 158 Idaho 386, 481, 348 P.3d 1, 96 (2015).

[6] The state oddly asserts without explanation that these statements do not implicate or prejudice Vance. But they directly and powerfully implicate him in a case where his defense was he didn't do it.

The district court had two theories of why Paris' statements were admissible. Both are wrong. First, the district court claimed Paris' statements "were excited utterances" and second, the district court claimed that the "burn the clothes" statement was a statement against interest of Frankie Hughes, the witness who testified about it. In its brief the state does not even acknowledge the latter basis which is obviously wrong on its face and so the state concedes the error.

Significantly, the state does not seriously argue that the statements were excited utterances either. It merely adopts the district court's analysis without further comment and does not even try to respond to Appellant's arguments about why statements from an unexcited witness are not excited utterances.

The proper way that Paris' statements are admissible that is never mentioned by the state or district court, presumably because it does not advance their cause, is as an admission of a party opponent under I.R.E. 801(d)(2)(A). However, they are only admissible against Paris as the party, not against Vance. This is why *Bruton* still applies, and the cases should have been severed. Actually, our problem is worse than that of *Bruton* where at least a limiting instruction was given (even though insufficient). In our case, the statements were inadmissible against Vance, but came in without limitation despite no evidentiary basis under the Idaho Rules of Evidence and no opportunity to cross-examine the declarant.

C. *Brady* Violation-fingerprint report

First, the state argues that the *Brady* claim is forfeited because it could have been, but was not, raised on direct appeal. This is simply wrong.

The reason the *Brady* issue could not have been raised on direct appeal is because the fingerprint report was not in the appellate record. The reason the fingerprint report was not in the appellate record was not because of some failing of Appellant, but because it was not part of the district court record. As shown even by the state's explanation of the proceedings in its brief, the prosecution, acknowledging its late disclosure, "would not attempt to introduce the report as evidence at trial." Respondent's brief, p. 43.

Thus, the fingerprint report was not an offered but rejected exhibit that becomes part of the record. Nor was it otherwise made part of the district court record. If anyone had a reason to make the report an exhibit it would be the prosecution to preserve the issue of the court's exclusion of the report, but it did not do so.

In this case, defense counsel certainly would not have placed the report into the record because as explained regarding the ineffective assistance of counsel component of this claim, trial counsel did not recognize the exculpatory nature of the report. Since retained counsel thought the report was bad for Vance she would have no reason to want it in the record. Nor would appellate counsel in the direct appeal, assuming arguendo that he for some reason realized the exculpatory nature of the fingerprint report that was not in the record,

have any way to augment the appellate record with it since it was not part of the district court record.

In short, an issue that is unsupported both in the criminal case district court record and the direct appeal appellate court record is properly brought in a petition for post-conviction relief.[7]

Second, the state does not seriously argue that delayed disclosure cannot constitute a *Brady* violation. It argues only that there is no evidence that the report could have been produced sooner. However, that is not the test for any *Brady* violation, which can be inadvertent and does not require bad faith. Rather, for a late disclosure, a logical test to use is whether the defense received the report too late to effectively utilize it. The state does not dispute this was the case, presumably because that is what the district court found when it excluded the report.

Next as to the *Brady* issue, the state takes issue for the first time on appeal about what bottles were used in the attack versus the ones fingerprinted. What the state is doing without admitting it is controverting the district court's factual findings: The district court found:

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[7] As an aside, *Brady* claims by their very nature are more suited to post-convictions proceeding since they would generally require factual development. In this they are similar to ineffective assistance of counsel claims that are brought in post-convictions even if they theoretically could be brought on direct appeal. *State v. Mitchell*, 124 Idaho 374 (Ct.App. 1993). Thus, even if the fingerprint report was in the record of the direct appeal (or could have been), Appellant suggests that the same practical rule also be followed for *Brady* claims and allow them to be brought in post-conviction proceedings.

> The fingerprint report showed that Petitioner's fingerprints showed up only on a bottle of tequila and not on the beer and liquor bottles that were actually used as weapons during the fight.

Order Granting State's Motion for Summary Disposition and Dismissing Petition for Post-Conviction Relief, p. 38. (R. p. 387.)

The state has again waived this argument by not raising it below in response to Petitioner's allegations when factual development could have occurred.

Finally, while strictly speaking the failure to provide discovery to Vance issue is separate from the *Brady* issue, it does rely on it and so will be discussed here. The fingerprint report is the perfect example of discovery that Vance was not given. Had he been, he would have discovered its exculpatory nature because he did so later and in any event, the exculpatory nature is apparent from the face of it. Trial counsel on the other hand suppressed the report without seeing it since she mistakenly thought it was inculpatory.

Thus, had Vance timely been given the report he would have discovered its exculpatory nature and prevented his trial counsel from suppressing exculpatory scientific evidence which excluded him from using particular weapons and also impeached a main state's witness.

CONCLUSION

Wherefore, for the reasons above stated and in Appellant's Opening Brief, Appellant respectfully requests the district court's order summarily dismissing his

petition for post-conviction relief be reversed and remanded to the district court.

DATED this 22nd day of June, 2018.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

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

Idaho State Attorney General
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Dated and certified this 22nd day of June, 2018.

/s/ Greg S. Silvey
Greg S. Silvey