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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	NO. 45635
Plaintiff-Respondent,	)	
	)	CLEARWATER COUNTY NO. CR
v.	)	2016-951
	)	
GARY C. PARTEE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CLEARWATER**

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**HONORABLE GREGORY FITZMAURICE**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

A jury convicted Gary Partee of the consolidated charges of possession of methamphetamine, delivery of methamphetamine, and possession of methamphetamine with the intent to deliver, after the State presented evidence of statements Mr. Partee made to law enforcement as part of a confidential informant agreement. Because the agreement made immunity for those statements contingent “solely upon [Mr. Partee] being fully and completely honest,” and the parties agree Mr. Partee was fully and completely honest, the court erred by admitting that evidence. This Court should therefore vacate Mr. Partee’s judgment of conviction and reverse the order denying his motion in limine. Further, because defense counsel’s opposition to the motion to consolidate these charges turned on the outcome of the motion in limine, this Court should vacate the order consolidating the two underlying cases and remand to the district court for further proceedings.

### Statement of Facts and Course of Proceedings

On November 29, 2016, the Orofino Police Department went to Mr. Partee’s home with a search warrant and then arrested him on various felony and misdemeanor offenses. (R., pp.30–32, 40.) The State then charged Mr. Partee with possession of methamphetamine, possession of methamphetamine with the intent to deliver, possession of drug paraphernalia, resisting or obstructing, litter on occupied private property, and cruelty to animals, in Clearwater County Case No. CR-2016-951 (the “2016 case”). (R., pp.35–37, 45.)

On December 9, 2016, the State and Mr. Partee entered into a “confidential informant/testimonial agreement.” (Aug., pp.18–31, 51–54<sup>1</sup>.) Mr. Partee agreed to talk to the police about drug activity and stolen property in the area, participate in controlled buys, and testify for the State. (Aug., pp.51–53.) The State agreed to give Mr. Partee immunity for everything he disclosed to law enforcement, dismiss all cases against Mr. Partee except the possession of methamphetamine count in the 2016 case, and not file additional charges.<sup>2</sup> (Aug., pp.31, 52–54.) As for the one possession count, the parties would enter into a binding plea agreement providing that Mr. Partee would plead guilty and be placed on probation. (Aug., p.53.)

Mr. Partee participated in an interview with law enforcement, during which he answered questions about his participation in and knowledge of the sale of methamphetamine in the area. (See State’s Ex. 26.) After his release on his own recognizance, however, Mr. Partee did not participate in the controlled buys and thus did not testify for the State. (R., p.64; Aug., pp.6–7.) As a result, the State filed Clearwater County Case No. CR-2017-95 (the “2017 case”) against Mr. Partee, which alleged that he possessed methamphetamine and delivered methamphetamine. (Aug., pp.1–2, 7; Tr., p.16, L.24–p.17, L.7.)

On May 12, 2017, Mr. Partee filed a motion to dismiss the delivery charge in the 2017 case, or alternatively, to suppress the statements he made during his interview pursuant to the

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<sup>1</sup> Because the signed versions of the agreement were not legible, the court considered both unsigned and signed versions when deciding the motion in limine. (Tr., p.5, L.1–p.8, L.6.) The typed text is only legible in the unsigned version, so Mr. Partee cites primarily to that document.

<sup>2</sup> At that time, Mr. Partee had two other cases pending in Clearwater County: CR-2016-845, which charged misdemeanor maintaining a public nuisance, and CR-2016-776, which charged littering. (Aug., p.51.)

confidential informant agreement.<sup>3</sup> (Aug., pp.10–15.) He argued that the State had violated the part of the agreement that granted Mr. Partee immunity for his participation in an interview by using Mr. Partee’s statements to prosecute him with delivery of methamphetamine. (Aug., pp.12–14.) Mr. Partee conceded, however, that the State was no longer bound to enter into the plea agreement, which was contingent on his participating in the controlled buys. (Aug., p.14.) In the meantime, the State moved to consolidate the 2016 and 2017 cases. (R., p.103; Aug., p.40.)

The court held a joint hearing on both the motion in limine and the motion to consolidate. As for the motion in limine, the parties agreed to the underlying facts—Mr. Partee had participated in the interview as required in Section 1 of the agreement, but had not participated in the controlled buys or trials as required by Sections 2 and 3 of the agreement. (Tr., p.9, L.16–p.10, L.5, p.11, L.14–p.12, L.4.) The only question then was how to reconcile apparently conflicting provisions in the agreement.

Defense counsel pointed the court to a provision in Section 1, which stated that “[t]his grant of immunity is contingent solely upon the suspect being fully and completely honest,” and conflicting provisions in Section 2, which purported to relieve the State of any grant of immunity if Mr. Partee did not fully perform under the agreement. (Tr., p.13, Ls.10–11; *see also* Aug., p.41.) He argued that the court had to give effect to every part of the agreement, and thus the court should interpret it as having two parts: According to Section 1, Mr. Partee had to

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<sup>3</sup> This motion was filed as a motion to dismiss or alternatively suppress, but defense counsel later conceded that suppression, not dismissal, was the appropriate remedy. (Tr., p.15, L.8–p.16, L.6.) Although the court and parties repeatedly used the term “suppression,” because Mr. Partee’s claim involves the State’s failure to uphold its end of the confidential informant agreement, and not a violation of his constitutional rights, the motion would have been more properly titled a motion in limine. Mr. Partee therefore refers to the motion as a motion in limine throughout this brief.

answer questions fully and honestly to get immunity for his statements. To get the benefit of the plea agreement, Mr. Partee had to participate in controlled buys and testify for the State, as set forth in Sections 2 and 3. (Tr., p.14, L.4–p.15, L.3.)

The State, on the other hand, relied only on the language in Section 2. It provided that “a breach by the suspect of the terms and conditions of this agreement shall relieve the State of . . . any of its obligations herein allowing each jurisdiction entering into this agreement to pursue any and all charges deemed appropriate, to be relieved of the promises contained herein, and to utilize any information provided by the suspect against him regardless of a promise of immunity,” and so the prosecutor said, “I don’t know how it could be any clearer.” (Tr., p.17, L.12–p.18, L.1.)

As for the motion to consolidate, the State explained that the charges in both cases were part of the same course of conduct and, if the court did not consolidate them, the State would have to present much of the same evidence in both trials. (Tr., p.18, L.25–p.20, L.10.) Defense counsel largely agreed that the evidence, witnesses, and timeframe of the two cases overlapped. (Tr., p.20, Ls.12–14.) But he argued that consolidation would not be appropriate if the court granted Mr. Partee’s motion in limine. (Tr., p.20, L.12–p.21, L.12.)

The court later denied Mr. Partee’s motion in limine and granted the State’s motion to consolidate. (R., pp.110–11, Aug., pp.45–49.) As for the motion in limine, the court explained:

The Court finds that the Confidential Informant Agreement between the State and Partee is unambiguous. In looking at the document as a whole, the agreement unambiguously states in paragraph 2 A. that Partee must perform and “[f]ailure to do so for whatever reason shall be deemed a material breach of this agreement and relieve the State of any and all promises and obligations identified herein, **including any and all grants of immunity.** *Emphasis added.* Partee admitted that he did not fully perform the requirements under the Agreement in paragraphs 2 and 3.



Paragraph 2 B (G) iterates that Partee must fully perform to receive immunity:

A breach by The Suspect of the terms and conditions of this agreement shall relieve the State of any of its obligations herein, allowing each jurisdiction entering into this agreement: to pursue any and all charges deemed appropriate; to be relieved of the promises contained herein; and to utilize any information provided by the Suspect against him regardless of a promise of immunity.

(Aug., p.46.)

The State then filed a consolidated information in the 2016 case. (R., pp.113–14) Mr. Partee ultimately went to trial on three charges: possession of methamphetamine and possession of methamphetamine with the intent to deliver, which originated in the 2016 case, and delivery of methamphetamine, which originated in the 2017 case. (R., pp.149–50, 252–53, 299; Tr., p.26, L.10–p.29, L.8.) The jury found him guilty of all three counts. (R., pp.252–53.) The district court sentenced him to concurrent, unified terms of five years, with three years fixed, on each count, and also retained jurisdiction. (R., pp.296–98.) Mr. Partee timely appealed. (R., pp.301–03.)

## ISSUE

Did the district court err by denying Mr. Partee's motion in limine because the agreement conditioned its grant of immunity for Mr. Partee's statements *solely* on his being fully and completely honest during the interview?

## ARGUMENT

### The District Court Erred By Denying Mr. Partee's Motion In Limine Because The Agreement Conditioned Its Grant Of Immunity For Mr. Partee's Statements Solely On His Being Fully And Completely Honest During The Interview

“Confidential informant agreements, like plea agreements, are generally governed by contract law principles.” *State v. Chacon*, 146 Idaho 520, 522 (Ct. App. 2008). “When interpreting a contract, this Court begins with the document’s language.” *Potlatch Educ. Ass’n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633 (2010). If the contract is unambiguous, the court simply gives effect to the plain meaning of the contract’s words. *State v. Barnett*, 133 Idaho 231, 234 (1999). If a contract term is ambiguous, i.e., “there are two different reasonable interpretations or the language is nonsensical,” *Potlatch*, 148 Idaho at 633; *see also Kunz v. Nield, Inc.*, 162 Idaho 432, 439 (2017), the court conducts a factual inquiry which focuses on the parties’ intent, *Barnett*, 133 Idaho at 234.

When a contract contains two conflicting provisions, the Court should construe them consistently with the parties’ intent “as gathered from the whole contract.” *Madrid v. Roth*, 134 Idaho 802, 806 (Ct. App. 2000). “Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying any contractual provision, if reconciliation can be effected by any reasonable interpretation of the entire instrument.” *Id.*; *see also Kunz*, 162 Idaho at 440 (discussing a concurring opinion in which Justice Schroeder advocated for the above standard, but noting that the Idaho Supreme Court had only adopted its analog in the statutory context: The Court “will not construe a statute in a way which makes mere surplusage of provisions included therein.”). If possible, the provisions should be interpreted to “give protection to both parties,” rather than construing the contract in favor of just one of the parties. *Madrid*, 134 Idaho at 806. And, as a last resort, the court should construe the contract against the

drafter. See *Farm Bureau Mut. Ins. Co. of Idaho v. Schrock*, 150 Idaho 817, 821 (2011) (“[b]ecause insurance policies are contracts of adhesion that are not usually subject to negotiation between the parties, any ambiguity in a policy is construed strongly against the insurer.”) (citation omitted); *Kunz*, 162 Idaho at 442 (“If the factfinder is unable to determine the intentions of the parties from the factual evidence, then the ambiguity should be resolved against the drafter of the contract as a last resort.”).

The district court’s decision to deny Mr. Partee’s motion in limine turned on its interpretation of the agreement, and so this Court applies the standard of review applicable to civil contract cases. *Barnett*, 133 Idaho at 234. Whether a contract provision is ambiguous is a question of law reviewed de novo, as is the interpretation of an unambiguous contract term. *Id.*; *Potlatch*, 148 Idaho at 633. The interpretation of an ambiguous contract provision is a question of fact reviewed for clear error. *Potlatch*, 148 Idaho at 633; *Chacon*, 146 Idaho at 522–23.

Here, the court found:

[T]he Confidential Informant Agreement between the State and Partee is unambiguous. In looking at the document as a whole, the agreement unambiguously states in paragraph 2 A. that Partee must perform and “[f]ailure to do so for whatever reason shall be deemed a material breach of this agreement and relieve the State of any and all promises and obligations identified herein, **including any and all grants of immunity**. *Emphasis added*. Partee admitted that he did not fully perform the requirements under the Agreement in paragraphs 2 and 3.

Paragraph 2 B (G) iterates that Partee must fully perform to receive immunity:

A breach by The Suspect of the terms and conditions of this agreement shall relieve the State of any of its obligations herein, allowing each jurisdiction entering into this agreement: to pursue any and all charges deemed appropriate; to be relieved of the promises contained herein; and to utilize any information provided by the Suspect against him regardless of a promise of immunity.

(Aug., p.46.) The court’s decision never mentioned the immunity provision in Section 1.

The district court erred by reading the immunity provisions in Section 2 in isolation and giving effect to those provisions without actually considering the contract as a whole. Although the immunity provisions in Section 1 and Section 2 are unambiguous when read separately, they in fact conflict with one another. Therefore, the court should have construed the agreement as a whole to give effect to each immunity provision to the extent possible, and then construed any remaining provisions against the State as the drafter. Under that interpretation, the State could not use Mr. Partee's statements against him at trial because he was fully and completely honest and thus his statements were immunized. The court erred by denying Mr. Partee's motion in limine.

The agreement is divided into three overarching sections, titled "I. This agreement is entered into between the following parties," "II. Recitals," and "III. Agreement." (Aug., p.51.) The "Agreement" portion is again divided into three sections: Section 1 provides that Mr. Partee would give a full debriefing and in exchange the State would grant him immunity for his statements. (Aug., pp.51-53.) Section 2 states that Mr. Partee "further agrees as follows," and requires that he participate in controlled buys and testify for the State. (Aug., p.52.) Section 3 provides that "[u]pon performance of this agreement" the State would enter into a plea agreement with Mr. Partee. (Aug., p.53.)

Both Sections 1 and 2 contain provisions related to immunity. The relevant provisions in Section 1 are as follows:

A. Suspect shall be provided immunity for everything he/she discloses in the context of such interview or interviews, other than disclosure of any crime of violence. . . .

**B. This grant of immunity is contingent solely upon the Suspect being fully and completely honest. . . . Specifically, this grant of immunity shall fail should the Suspect provide false information whether or not that false information would be helpful or harmful to any investigation in which the**

**State is involved, or should The Suspect withhold material information being sought by the State. . . .**

(Aug., p.52.) The relevant provisions in Section 2 state:

A. . . . The Suspect ***must perform***, i.e., must complete each and every promised purchase of controlled substances. Failure to do so for whatever reason shall be deemed a material breach of this agreement and relieve the State of any and all promises and obligations identified herein, including any and all grants of immunity. ***This agreement may not be satisfied by good faith efforts. Performance is mandatory!***

. . . .

D. . . . **It is expressly understood that a failure to testify, or to testify honestly and fully, whether such testimony is helpful or harmful to any case the State may bring, shall be deemed a breach of this agreement, relieving the State of any immunity or other obligation [sic] set forth herein.**

. . . .

G. A breach by The Suspect of the terms and conditions of this agreement shall relieve the State of any of its obligations herein, allowing each jurisdiction entering into this agreement: to pursue any and all charges deemed appropriate; to be relieved of the promises contained herein; and to utilize any information provided by the Suspect against him regardless of a promise of immunity.

(Aug., pp.52–53.) The agreement does not define the term “immunity.”

Though unambiguous when read individually, these immunity provisions are inconsistent with one another. The court should have reconciled these provisions by limiting the meaning of the term “immunity” to the context of each paragraph and then construing any remaining inconsistencies against the State. *See Madrid*, 134 Idaho at 806; *Schrock*, 150 Idaho at 821; *Kunz*, 162 Idaho at 442. According to that interpretation, Section 1 refers to something akin to use immunity—immunity from the use of Mr. Partee’s statements, and any information derived from his statements, in a future prosecution—and grants Mr. Partee immunity solely in exchange for his fully honest answers. *See Aug.*, p.52; *State v. Pratt*, 125 Idaho 546, 561 (1993) (“use or derivative-use immunity ‘prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction

of criminal penalties on the witness.”)<sup>4</sup> (quoting *Kastigar v. United States*, 406 U.S. 441, 453 (1972)); Immunity, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining use immunity as “[i]mmunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness”).

Section 2 refers to immunity as freedom from prosecution for certain charges, which was granted in exchange for Mr. Partee’s cooperation in the controlled buys per Section 2A and willingness to testify for the State at trial per Section 2D. *See Aug.*, pp.52–53; Immunity, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining immunity generally as “freedom from prosecution granted by the government in exchange for the person’s testimony”); I.C.R. 11(f)(1)(A).

Finally, Section 2G, which refers specifically to the State’s ability to use information provided by Mr. Partee against him (i.e., use immunity) if he breaches the agreement, cannot be reconciled with the use immunity granted in Section 1. (*See Aug.*, pp.51–53.) By construing those two provisions against the drafter, only the former provision stands. *Schrock*, 150 Idaho at 821; *Kunz*, 162 Idaho at 442; *Kepler v. Arave*, 117 Idaho 946, 948 (1990) (“While provisions of a contract are to be read together and harmonized whenever possible, . . . if two clauses relating to the same thing are so repugnant that they cannot stand together, the first will be received and the later one rejected. . . .”) (quoting *Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 518 (1948)).

Because the parties agree that Mr. Partee answered law enforcement’s questions fully and honestly during the interview, the State could not use Mr. Partee’s immunized statements, or any

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<sup>4</sup> The term “immunity” usually arises in a Fifth Amendment context and thus many of the available definitions refer to compelled testimony.

information derived from those statements, to prosecute him. The district court erred by denying his motion in limine.

CONCLUSION

Mr. Partee respectfully requests that this Court vacate his judgment of conviction and the order consolidating these cases, reverse the order denying his motion in limine, and remand for further proceedings.

DATED this 4<sup>th</sup> day of October, 2018.

/s/ Maya P. Waldron  
MAYA P. WALDRON  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of October, 2018, I served a true and correct copy of the foregoing APPELLANT’S BRIEF, electronically as follows:

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/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

MPW/eas