

9-21-2012

# State v. Tankovich Appellant's Reply Brief 1 Dckt. 38813

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38801
	)	
v.	)	
	)	
WILLIAM M. TANKOVICH, JR.,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	

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REPLY BRIEF OF APPELLANT

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

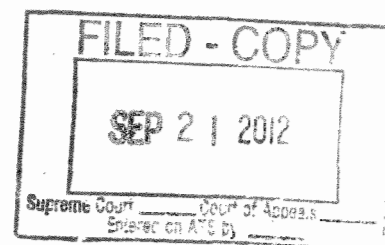
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## STATEMENT OF THE CASE

### Nature of the Case

William Michael Tankovich, Jr., appeals from his judgment of conviction for malicious harassment and conspiracy to commit malicious harassment. Mr. Tankovich was found guilty and the district court imposed concurrent unified sentences of five years, with two years fixed, and suspended the sentences and placed Mr. Tankovich on probation. Mr. Tankovich now appeals, and he asserts that the district court erred by permitting an expert witness to testify regarding the meaning of Mr. Tankovich's tattoos because the testimony suggested that Mr. Tankovich was a member of a gang or had been to prison, which is both not relevant and unfairly prejudicial. This Reply Brief addresses the State's argument that Mr. Tankovich's claims are not preserved for appeal.

### Statement of the Facts and Course of Proceedings

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

## ISSUE

Did the district court err by permitting Mr. Higgins to testify because part of his testimony was not relevant and unfairly prejudiced Mr. Tankovich?

## ARGUMENT

### The District Court Erred By Permitting Mr. Higgins To Testify Because Part of His Testimony Was Not Relevant And Unfairly Prejudiced Mr. Tankovich

#### A. Introduction

Mr. Tankovich asserts that the district court erred by permitting an expert witness to testify regarding the meaning of Mr. Tankovich's tattoos because the testimony suggested that Mr. Tankovich was a member of a gang or had been to prison, which is both not relevant and unfairly prejudicial.

#### B. The District Court Erred By Permitting Mr. Higgins To Testify Because Part of His Testimony Was Not Relevant And Unfairly Prejudiced Mr. Tankovich

The State has asserted that Mr. Tankovich's claims on appeal were not preserved in the district court. The State is correct. Mr. Tankovich's primary argument on appeal is that Mr. Higgins' testimony was unfairly prejudicial and thus should have been excluded pursuant to I.R.E. 403. (Appellant's Brief, pp.14-17.) As the State itself notes, Mr. Tankovich objected to Mr. Higgins' testimony due to the risk of "unfair prejudice." (Repondent's Brief, p.11.) In the district court, Mr. Tankovich objected to Mr. Higgins presenting any testimony at all. On appeal, Mr. Tankovich has simply pointed to portions of his testimony that indicate that it was unfairly prejudicial and should have been excluded. Mr. Tankovich's I.R.E. 403 claim is clearly preserved.

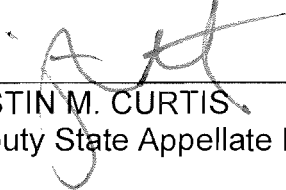
The relevance argument is also preserved. When arguing against the admitting of Mr. Higgins' testimony, counsel for Mr. Tankovich stated that there was no doubt that a racial slur was used, which "lessened" any relevance, and also argued that, "there is no element this person actually helps the jury with; there is no material fact that he

helps them with.” (Tr., p.2096, L.22 – p.2098, L.5.) Idaho Rule of Evidence 401 defines “relevant evidence.” Under that Rule, “[r]elevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” I.R.E. 401. By arguing that Mr. Higgins’ testimony did not provide any material facts with regard to the elements of the crime, counsel was making a relevancy objection to Mr. Higgins’ testimony. This argument is thus preserved for appeal.

#### CONCLUSION

Mr. Tankovich respectfully requests that his convictions be vacated and his case remanded for further proceedings.

DATED this 21<sup>st</sup> day of September, 2012.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21<sup>st</sup> day of September, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:


WILLIAM M TANKOVICH JR  
1037 N 23RD ST  
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DISTRICT COURT JUDGE  
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EVAN A. SMITH  
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JMC/eas