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## State v. Malec Appellant's Brief Dckt. 42508

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 JAMES ROBERT MALEC, )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

NO. 42508  
CANYON CNTY NO. CR 2008-41816  
APPELLANT'S BRIEF

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BRIEF OF APPELLANT  
\_\_\_\_\_

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

\_\_\_\_\_  
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District Judge  
\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

Following a Christmas night incident at his residence involving his stepson Justin Eilers, a professional mixed martial arts fighter, James Malec was charged with second degree murder. Mr. Malec proceeded to trial on the charge of second degree murder and presented a claim of self defense. The jury acquitted Mr. Malec of second degree murder, but convicted him of the lesser offense of voluntary manslaughter apparently finding that Mr. Malec “acted *unlawfully* upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.” On appeal, Mr. Malec contends that the district court erred in excluding as unfairly prejudicial Defense Exhibit C, a DVD depicting Mr. Eilers participating in a mixed martial arts match as the video is relevant to Mr. Malec’s claim of self defense. Additionally, Mr. Malec asserts the district court deprived him of his right to due process when it failed to preserve the video deposition of Gary John which was viewed as evidence in Mr. Malec’s trial.

### Statement of Facts and Course of Proceedings

Thirty-year old Justin Eilers was a 6’2”, 230 pound professional mixed martial arts fighter. (Tr., p.106, Ls.17-25.) Mixed martial arts (“MMA”) is a “very violent,” “vicious,” “contact sport” where two individuals attempt to incapacitate each other by knocking the other person unconscious or obtaining a submission. (See Tr., p.107, Ls.14-25, p.358, L.24 – p.360, L.6.) Mr. Eilers was so talented in his craft that he even fought in Pay Per View fights in the UFC.<sup>1</sup> (Tr., p.359, Ls.9-12.)

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<sup>1</sup> The Ultimate Fighting Championship touts itself as the “world’s leading MMA promoter.” See <http://www.ufc.com/discover/ufc/index>, last visited November 8, 2015. See also <http://www.ufc.com/fighter/Justin-Eilers>, last visited November 8, 2015.

On December 25, 2008, James Malec and his wife, Gwen Moore, hosted a Christmas party of their residence in Canyon County, Idaho. (Tr., p.90, Ls.2-15.) Mr. Malec is a 5'8", 49-year-old retired law enforcement officer with no prior martial arts training. (Tr., p.367, Ls.13-20.) Among the attendees at the party was Justin Eilers, who was Ms. Moore's son and Mr. Malec's step-son. (Tr., p.89, Ls.3-4.) Before the night in question, Mr. Malec and Mr. Eilers enjoyed a good relationship. (Tr., p.333, Ls.7-15, p.357, Ls.3-5.)

During the party, both Mr. Malec and Mr. Eilers were consuming alcohol. (Tr., p.92, Ls.7-9.) Ms. Moore testified that Mr. Eilers was intoxicated, telling the jury that he "had been drinking quite a bit." (Tr., p.93, Ls.22-24.) In fact, Mr. Eiler's blood alcohol level was a .17. (Jury Instruction No. 9.)<sup>2</sup> At some point in the night, while Mr. Malec and Ms. Moore were in the kitchen, Mr. Eilers got into an argument with his ex-girlfriend Melanie Cox about the treatment and parenting of their son T.E. (Tr., p.90, L.24 – p.91, L.5, p.94, Ls.19-23, p.375, Ls.9-19.) The argument between Mr. Eilers and Ms. Cox started inside the residence, but as it became more heated, moved outside. (Tr., p.196, L.12 – p.197, L.25.) Mr. Malec and Ms. Moore remained inside the residence and continued to do the dishes. (Tr., p.375, Ls.9-19.) Mr. Eilers was yelling throughout the argument. (Tr., p.197, Ls.5-22.) After between 15 to 30 minutes of argument outside, Ms. Cox terminated the argument saying, "I just cannot deal with this yelling anymore" and walked away. (Tr., p.198, Ls.22 – p.199, L.6, p.217, L.21 – p.218, L.8.) Mr. Eilers went back inside the residence. (Tr., p.376, Ls.21-25.)

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<sup>2</sup> The Jury Instructions given at trial are attached to a Motion to Augment filed contemporaneously with this brief.

Mr. Eilers came into the area between the kitchen and laundry and made several comments to Ms. Moore and Mr. Malec.<sup>3</sup> (Tr., p.376, L.23 - p.378, L.2.) Ms. Moore described her son as furious. (Tr., p.110, Ls.18-21.) Ms. Moore attempted to calm Mr. Eilers down but he just got “louder” and “[m]ore angry.” (Tr., p.94, L.19 – p.95, L.5.) Mr. Eilers then “took his arm and swiped everything off the counter.” (Tr., p.95, Ls.6-12, p.378, Ls.3-4.) Ms. Moore asked Mr. Eilers to leave and Mr. Eilers “stood his ground in front of her.” (Tr., p.379, Ls.15-22.)

Mr. Malec watched Mr. Eilers go back and forth with this mother and observed that Mr. Eilers “swept again and swept, and appeared to hit [Ms. Moore].” (Tr., p.382, Ls.9-14.) Between the first and second swipes of the table, Mr. Eilers taunted Mr. Malec, “What you got, old man? Put one in me. Put one in me.” (Tr., p.386, Ls.16-24.) After the second sweep, Mr. Malec testified that Mr. Eiler’s stated, “I’ll kill you. I’ll do it.” (Tr., p.385, Ls.14-19.) Mr. Malec stated “You need to leave” and then after a second said “You need to get back. You need to get down on the ground now. You need to get down.” (Tr., p.383, L.20 – p.384, L.2.) At this point, Mr. Malec had drawn his handgun and pointed it in Mr. Eilers’ direction, in a high ready position.<sup>4</sup> (Tr., p.384, Ls.3-7, p.385, Ls.1-3.) Mr. Eilers testified that Mr. Eilers “took a step forward, raised his hands” and “at that point I shot him.” (Tr., p.386, Ls.1-2.) At the moment the shot was fired, Mr. Malec testified that Mr. Eilers was five to six feet from him. (Tr., p.407, Ls.23-25.) Mr. Eilers died of a single bullet wound to the chest. (Tr., p.261, L.1 – p.262, L.9.)

In January of 2009, Mr. Malec was charged by Information with second degree murder. (R., pp.62-63.) Prior to trial, the State filed a Motion for Deposition of Material

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<sup>3</sup> Mr. Malec testified that Mr. Eilers said “Fuck you, Mom. Fuck you, Jim.” (Tr., p.379, Ls.5-8.)

Witness when it discovered that one of its material witnesses, Gary John, was scheduled to be out of the country during the time of the scheduled trial. (R., pp.95-96.) The district court then issued an order for the pre-trial deposition of Mr. John. (R., p.109.) Mr. Malec proceeded to trial and was convicted of the lesser offense of voluntary manslaughter. (R., pp.143-172.) Following a sentencing hearing, the district court imposed a unified sentence of fifteen years, with six and one-half years fixed, upon Mr. Malec. (R., pp.210-211.) Although Mr. Malec did not initially appeal, his appellate rights were reinstated following the grant of his Petition for Post Conviction Relief. (R., pp.241-242.) Following the grant of his post conviction petition, Mr. Malec timely appealed. (R., pp.244-246.)

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<sup>4</sup> Mr. Malec described a “high ready position” as “I just put it above, you know, above the person.” (Tr., p.385, Ls.9-10.)

## ISSUES

1. Did the district court err by excluding Defendant's Exhibit C, a DVD depicting Mr. Eilers participating in a mixed martial arts match, which was relevant to Mr. Malec's claim of self defense and not unduly prejudicial?
2. Did the district court deprive Mr. Malec of his right to due process when it failed to preserve the video deposition of Gary John which was viewed as evidence in Mr. Malec's trial?

## ARGUMENT

### I.

#### The District Court Erred By Excluding Defendant's Exhibit C, A DVD Depicting Mr. Eilers Participating In A Mixed Martial Arts Match, Which Was Relevant To Mr. Malec's Claim Of Self Defense And Was Not Unduly Prejudicial

##### A. Introduction

The State filed a Motion *in Limine* to prevent Mr. Malec from presenting a video showing Mr. Eilers participating in a mix martial arts competition. Following an offer of proof by the defense, the district court ruled that while the video did have relevance, it was unduly prejudicial to the State. Mr. Malec asserts that the district court erred in excluding the video as it was relevant to his self defense claim and presented very little if any prejudice to the State.

##### B. The District Court Erred By Excluding Defendant's Exhibit C, A DVD Depicting Mr. Eilers Participating In A Mixed Martial Arts Match, Which Was Relevant To Mr. Malec's Claim Of Self Defense And Was Not Unduly Prejudicial

Prior to trial, the State filed a Motion *in Limine* asking the district court to exclude a DVD showing Mr. Eilers participating in an MMA match arguing that said video was "irrelevant and unfairly prejudicial." (R., pp.136-137.) The video shows Mr. Eilers participating in a sanctioned, professional MMA match with another competitor. (Defendant's Exhibit C.)<sup>5</sup> In the short video, Mr. Eilers moves in, quickly strikes the other athlete with his fist, knocking the man to the canvas. (Defendant's Exhibit C.) Mr. Eilers then pounces on top of the other man, striking the fighter repeatedly, incapacitating the man and causing a stoppage of the fight within ten seconds of the punch. (Defendant's Exhibit C.) At the hearing on the State's Motion *in Limine*, the

prosecutor argued “as stated by counsel, the reasoning of getting that video in is one to show how quick[] Justin Eilers was and that he could move in that rather limited space fairly quickly, which would go to the defendant’s feeling of a threat and why he responded that way.” (Tr., p.46, Ls.21-25.) In arguing that the video was irrelevant and unfairly prejudicial, the State continued,

And when we look at the video, what we see are two fighters, both of whom have assumed the risk. They agree to the type of conduct, recognizing the level of danger that’s in there. How Justin Eilers was in the ring is not really a fair issue for the jury to decide or use in its determination. There’s a huge difference between getting into a fair fight with a referee sitting there and people watching and acting in a certain way.

And if the jury were to see the level of violence that is there, they may translate that level of violence to a completely unrelated, dissimilar activity. And because of that, the State feels that that's unfair prejudice.

(Tr., p.47, Ls.10-21.)

Defense counsel responded,

[W]ith regard to a video, I understand Mr. James’ argument. I mean, it’s an argument that I guess the State makes. But to say that its irrelevant when you talk about two individuals, presumably in roughly the same shape, roughly the same size, one of them closes in less than a second, knocks the individual to the ground, and pummels him until he’s unconscious, until referees have to take him off, he knows about Justin Eilers’ propensity and abilities in the ring. That is part of the decision making process.

...

This individual had the ability to - - to cause grievous bodily harm. And to suggest that a video, a very short video of his fighting abilities is irrelevant, demonstrative of his fighting abilities, and which demonstrates the kind of matches that Mr. Malec has observed personally of Justin Eilers, down close and personal.

Well, Judge, relevance is relevance. And it does tend to prove a fact that is at issue. And that is why . . . Mr. Malec [did] react in the way he did with what he was confronted with. That’s why it is relevant. Its not

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<sup>5</sup> Contemporaneously with this brief, Mr. Malec has filed a Motion to Augment the record Defense Exhibit C, which was offered and admitted during trial.

prejudicial. We're not talking about a witness. We're not talking about a defendant. Thank you.

(Tr., p.55, L.21 - p.56, L.19.) The State responded by arguing that MMA is a brutal sport and Mr. Eilers was just participating in a sport and following the rules. (Tr., p.56, L.21 - p.58, L.8.) The defense countered, "Judge, this is self-defense to a homicide. What would be unfair and prejudicial is this gentleman not to be able to put in all of the data that he had available to him to make a decision when he made the decision that he did." (Tr., p.58, Ls.19-23.) The district court concluded it could not rule on the admissibility of the video until evidence was offered at trial. (See Tr., p.60, L.8 - p.62, L.2.)

During the trial, the sole defense of the case centered around self defense as both parties conceded that Mr. Malec shot and killed Mr. Eiler on that Christmas night. (Jury Instruction No. 9 ("James Malec shot Justin Eilers on December 25, 2008, which ultimately resulted in the death of Justin Eilers.")) At trial, the defense provided an offer of proof, wherein Mr. Malec testified that he had personally seen Mr. Eilers fight MMA, was aware of his style, his ability to close quickly, put a person on the mat, and pummel them into submission.<sup>6</sup> (Tr., p.361, L.7 - p.362, L.11.) The district court then ruled as follows, "I can understand the argument that it is - - that there is some relevance to it. . . . But based on my viewing of that clip . . . and the fact that the circumstances would be dissimilar . . . I think that the danger of unfair prejudice substantially outweighs the relevance that it would serve as a demonstrative exhibit." (Tr., p.365, Ls.15-25.)

Then, at trial, Mr. Malec testified that Mr. Eilers was five to six feet from him, challenging him to a fight, threatening to kill him, physically assaulting Ms. Moore, and

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<sup>6</sup> Mr. Malec acknowledged that he had not seen Defense Exhibit C until trial. (Tr., p.362, L.19 - p.363, L.8.)

advancing in his direction at the time of the shooting. (See Tr., p.383, L.20 - p.384, L.7, p.385, Ls.1-3, 14-19, p.386, Ls.1-24, p.407, Ls.23-25.) Mr. Malec testified that based upon Mr. Eilers' anger, actions, physical prowess, athleticism, and fighting ability, his only option was to shoot Mr. Eilers or let Mr. Eilers attack him and be seriously injured or killed. (Tr., p.389, L.25 - p.390, L.8.)

Mr. Malec submits that the district court erred excluding Defense Exhibit C.

1. The District Court Correctly Determined That The DVD Was Relevant To Mr. Malec's Claim Of Self Defense

Whether evidence is relevant is a question of law that an appellate court reviews *de novo*. *State v. Joy*, 155 Idaho 1, 6 (2013). "All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." I.R.E. 402. The Idaho Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. "Whether a fact is 'of consequence' or material is determined by its relationship to the legal theories presented by the parties." *State v. Shackelford*, 150 Idaho 355, 364 (2010) (quoting *State v. Yakovac*, 145 Idaho 437, 444 (2008)). "[W]hen examining relevancy, we look to whether the fact that the statement was made is relevant to a legal theory presented by the parties." *Id.* at 365.

The DVD depicting Mr. Eiler participating in a mixed martial arts match is relevant because it has a tendency to make it more probable that Mr. Malec was acting objectively reasonable in shooting Mr. Eiler that night. Mr. Malec's theory of the case

was that he acted in self-defense. In order for self defense to be a complete defense to second degree murder, the jury must find all of the following:

1. The defendant must have believed that the defendant was in imminent danger of death or great bodily harm.
2. In addition to that belief, the defendant must have believed that the action the defendant took was necessary to save the defendant from the danger presented.
3. The circumstances must have been such that a reasonable person, under the circumstances, would have believed that the defendant was in imminent danger of death or great bodily injury and believed that the action taken was necessary.
4. The defendant must have acted only in response to that danger and not for some other motivation.
5. When there is no longer any reasonable appearance of danger, the right of self-defense ends.

(Jury Instruction 20.)

At trial, Mr. Malec testified that, based upon his knowledge of Mr. Eilers' physical capabilities, Mr. Malec believed he was in imminent danger and the action taken was his only option. (Tr., p.389, L.25 - p.390, L.8.) Thus, the only questions before the jury were whether an actual danger was imminent and whether Mr. Malec acted objectively reasonable. The DVD provides evidence, through a recorded demonstration, of Mr. Eilers ability to close a distance quickly to strike and incapacitate another person in a very short period of time. In fact, it was the only evidence that could accurately portray Mr. Eilers physical presence and athleticism as Mr. Eilers was deceased at the time of trial. Thus, the DVD makes the existence of a fact, that Mr. Malec was in imminent danger and acted objectively reasonable, more probable than it would be without the evidence.

Accordingly, Defendant's Exhibit C was relevant.

2. The Probative Value Of The DVD Was Not Outweighed By The Possibility Of Unfair Prejudice

The probative value of the DVD was not outweighed by the possibility of unfair prejudice. “As with the admissibility of any piece of evidence, where the probative value of the statement[s] is substantially outweighed by the danger of unfair prejudice . . . this evidence should be excluded.” *State v. Goodrich*, 97 Idaho 472, 477 (1976); see *Shackelford*, 150 Idaho at 364. This essentially requires an analysis of the exclusion of the DVD under Idaho Rule of Evidence 403, which allows for the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” See I.R.E. 403. This inquiry does not center on “whether the evidence is harmful to the strategy of the party opposing its introduction,” but on whether the evidence “invites inordinate appeal to lines of reasoning outside the evidence or emotions which are irrelevant to the decision making process.” *State v. Rhoades*, 119 Idaho 594, 604 (1991).

To the extent the State has a constitutional right that can be prejudiced, the probative value of the DVD was not outweighed by the possibility of unfair prejudice, because the DVD does not invite “inordinate appeal to lines of reasoning outside the evidence or emotions which are irrelevant to the decision making process.” See *id.* The State suffers little, and likely, no prejudice by the presentation of the video. Rather, the DVD in question depicts an MMA competition between Mr. Eilers and another participant. The event is legal and all parties consent to the contact. In other words, it is a sporting event that Mr. Eilers is participating in, not a street fight where Mr. Eilers is breaking the law as would be the nature of a prior bad act as contemplated by Idaho Rule of Evidence 404(b). In fact, throughout the trial, the jury had already been informed that Mr. Eiler was a professional MMA fighter that had fought in Pay Per View

events. The video just depicts for the jury, in terms of an actual recording of Justin Eilers, what it had already been told by witnesses in the case. That MMA is a brutal and violent sport does not make the video prejudicial. Rather, it makes it even more relevant as it shows Mr. Eilers capability to do serious harm, from a distance, in a very short period of time, all of which is relevant and necessary for the jury to determine whether Mr. Malec acted in self defense.

Accordingly, the probative value of the DVD was not outweighed by the possibility of unfair prejudice and as a result, the district court erred in excluding the video.

C. The State Will Be Unable To Prove That The Error Is Harmless

The State will be unable to prove that the exclusion of the DVD was harmless beyond a reasonable doubt. Where alleged error is followed by a contemporaneous objection and the appellant shows that an error 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).

This was obviously a close case in which the jury struggled to reach a conclusion, as evidenced by Mr. Malec being acquitted of second degree murder, only to be found guilty of voluntary manslaughter for acting "unlawfully upon a sudden quarrel or heat of passion." (Jury Instruction No. 20.) Thus, it is apparent that although Mr. Malec believed his actions were reasonable, the jury did not find they were

objectively reasonable, and as a result his reaction to a sudden quarrel was unlawful. It cannot be said the error is harmless beyond a reasonable doubt where the excluded evidence addresses the very element determining whether Mr. Malec had a complete defense to the charge, or was guilty of a lesser offense based upon his mistaken belief that his actions were reasonable.

In short, the State will be unable to prove that the exclusion of the DVD is harmless beyond a reasonable doubt.

## II.

### The District Court Deprived Mr. Malec Of His Right To Due Process When It Failed To Preserve The Video Deposition Testimony Of Gary John

#### A. Introduction

The district court did not properly preserve a copy of the deposition testimony of Gary John, which was viewed by the jury during Mr. Malec's trial. The district court's failure to preserve an adequate record in that regard deprived Mr. Malec of his due process rights. Therefore, this Court should vacate Mr. Malec's conviction and remand his case for a new trial.

#### B. Relevant Factual Background

Prior to trial, the State filed a Motion for Deposition of Material Witness when it discovered that one of its material witnesses, Gary John, was scheduled to be out of the country during the time of the scheduled trial. (R., pp.95-96.) The district court then issued an order for the pre-trial deposition of Mr. John. (R., p.109.) A video deposition was then conducted and presented to the jury during trial. (Tr., p.279, Ls.17-22.) At the time of its presentation, the parties stipulated that the reporter not take down the video.

(Tr., p.278, Ls.15-19.) The contents of the video deposition are unknown as the copy the district court provided to this Court is corrupted and cannot be played.<sup>7</sup> However, according to Shawn Naccarato, the forensic supervisor for the Canyon County Sheriff's Office, Mr. John was the Captain in charge of the crime lab and crime scene at the Malec residence. (Tr., p.284, Ls.5-25.) Mr. Naccarato testified to the location of blood splatter and the shell casing within the residence. (Tr., p.291, L.10 – p.309, L.18.) The location of blood and the spent shell casing is obviously an important issue as it can help identify where Mr. Eiler was in relation to Mr. Malec at the time of the shooting. It is presumed, since Mr. Naccarato was called to the Malec residence to assist Mr. John at the scene, his testimony material to the case.

C. By Not Preserving A Sufficient Record For Appeal, The District Court Violated Mr. Malec's Due Process Rights

It is well recognized that, in order to provide a defendant-appellant with due process, the State must afford him a sufficient appellate record. *Draper v. Washington*, 372 U.S. 487, 498 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). A sufficient record is one that allows for an adequate review of the proceedings below for errors. See *State v. Morgan*, 153 Idaho 618, 620-621 (Ct. App. 2012). The Idaho Supreme Court has consistently held that, when the inadequate appellate record is caused by the district court's failure to maintain an adequate record below, that violates the defendant-appellant's due process rights by depriving the proceedings of the necessary fundamental fairness. See, e.g., *State v. Zielinski*, 119 Idaho 316, 318 (1991);

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<sup>7</sup> Contemporaneously with this brief, Mr. Malec has filed a Motion to Augment with the video deposition, identified as Joint Exhibit 1. Undersigned counsel attempted to obtain a copy of Joint Exhibit 1 and was informed by the district court clerk that a copy could not be made as the file was corrupted.

*Martinez v. State*, 92 Idaho 148, 149-50 (1968); *Ebersole v. State*, 91 Idaho 630, 636 (1967).

In *Zielinski*, a magistrate judge “apparently attempted to tape record the testimony of the detective” who was providing evidence in support of a search warrant. *Id.* 119 Idaho at 317. *Zielinski* attempted to obtain a transcript of the search warrant proceedings, only to discover that the audio tape of the proceeding was blank, and no other record of the proceeding existed. *Id.* The district court ordered that the State should be given the opportunity to reconstruct the record as to the probable cause which supported the issuance of the warrant. *Id.* On review of that order, the Idaho Supreme Court relied upon *Ebersole v. State*, 91 Idaho 630 (1967), and found that the failure to preserve an adequate record of the search warrant proceedings resulted in, “such a lack of fundamental fairness and deviation from established rules of procedure as to necessitate the conclusion that [the defendant] has not been afforded the protection of the due process clauses of the Constitutions of the United States and this State.” *Zielinski*, 119 Idaho at 319 (quoting *Ebersole*, 91 Idaho at 636). The Court also found the due process considerations articulated in *Ebersole* to be “even more compelling” when search warrant proceedings are at issue. *Id.* “Because search warrant applications are presented *ex parte* to magistrate judges, [the defendant] was not present at the time the detective’s testimony was presented, and therefore, [the defendant] could not have contested testimony at a reconstruction hearing as to what the detective said.” *Id.*

Similarly, in *Martinez*, the Idaho Supreme Court found that, “[w]hen a person, such as the petitioner herein is deprived, through no fault of his own, of the opportunity of affirmatively establishing the facts to demonstrate the legality or illegality of his

incarceration, a fundamental lack of fairness in the judicial process is established.” *Martinez*, 92 Idaho at 150. In *Martinez*, a petitioner for a writ of habeas corpus asserted that he had not knowingly and voluntarily waived his right to an attorney during an arraignment. The habeas court was provided with court minutes of the arraignment which indicated that the petitioner was asked if he wanted an attorney and replied that he did not. *Id.* at 149. On appeal, the Idaho Supreme Court found that the lack of a transcript of the proceedings at issue had denied Mr. Martinez his constitutional rights. *Id.* at 150.

Here, by failing to preserve the Mr. John’s video deposition, Mr. Malec is deprived of any ability to know what occurred during the deposition, which was offered at trial, and challenge any errors or admissions to the testimony. In sum, Mr. Malec was deprived of his due process protections and fundamental fairness in appellate review.

Another reason why such a failure constitutes a due a process violation is, “where pertinent portions of the record are missing, they are presumed to support the actions of the trial court.” *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999) (citation omitted). As a result of this presumption, Mr. Malec will be prevented from addressing all of the evidence offered during trial. Therefore, Mr. Malec will be denied due process on appeal as he was denied access to the information before the district court and, as such, that information could be presumed to support the district court’s order denying his motion to withdraw his guilty plea. *See, e.g., Draper*, 372 U.S. at 498; *Griffin*, 351 U.S. at 19; *Martinez*, 92 Idaho at 149-50; *Ebersole*, 91 Idaho at 636.

Because it was not Mr. Malec's fault that the district court lost the exhibit, he argues that the presumption contained in *Coma*, *supra*, should be reversed and the missing exhibit should be presumed to undermine the jury's verdict. Support for this

presumption can also be found in the Fourteenth Amendment's Due Process Clause because in criminal actions, one-sided procedural rules that benefit the government violate the Fourteenth Amendment's Due Process Clause. See *Wardius v. Oregon*, 412 U.S. 470 (1973). Mr. Malec asserts that, under a logical extension of the reasoning set forth in *Wardius*, there is no legitimate reason why a one-sided procedural rule that benefits the government in criminal prosecutions should be treated any differently. Since the State benefits from the *Coma* presumption when a defendant fails to provide an adequate record on appeal, defendants should benefit from the same presumption when the district court fails to preserve an adequate record on appeal.

In sum, this Court should vacate the jury's guilty verdict and remand his case for a new trial.

#### CONCLUSION

Mr. Malec respectfully requests that his conviction for voluntary manslaughter be vacated and case remanded to the district court for a new trial.

DATED this 9<sup>th</sup> day of November, 2015.

  
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ERIC D. FREDERICKSEN  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9<sup>th</sup> day of November, 2015, 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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EVAN A. SMITH  
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EDF/eas