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State v. Herreman-Garcia Appellant's Reply Brief Dckt. 42941

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. ANA GISELLE HERREMAN-GARCIA, Defendant/Appellant.	)	S.Ct. Docket No. 42941 Ada Co. CR-FE-2014-5550

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho In and For the County of Ada

HONORABLE DEBORAH A. BAIL
District Judge

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1. *The State is Mistaken in its Argument that Ms. Herreman-Garcia Waived her State and Federal Constitutional Rights to Due Process*

In its brief, the State argues that Ms. Herreman-Garcia waived any due process challenges to the Information by not objecting in the district court. Respondent's Brief pp. 4-9. This argument is contrary to the record.

In the district court, the defense objected to the lack of notice sufficient to allow preparation of a defense as soon as the State asked Mr. Munoz a question relating to the paychecks issued to Ms. Herreman-Garcia. The State argued its position that it was not required to give notice and the district court ruled on the objection. As recorded in the transcript:

> [DEFENSE COUNSEL]: Your Honor, I'm going to lodge a general objection to these questions. I don't see the relevance.
>
> THE COURT: What's the legal basis of your objection?
>
> [DEFENSE COUNSEL]: The relevance to the charge, Your Honor, asking about time sheets, other checks. I don't see where we are even within the realm of relevance to the charges that are listed in the Information.
>
> THE COURT: Well, it's my understanding it would relate to Count I.
>
> [PROSECUTOR]: Yes.
>
> [DEFENSE COUNSEL]: And Count I is theft of cash, so I don't understand how –

THE COURT: That's not how Count I is framed. It is framed as in excess of $1000, so the objection is overruled. This does appear to be relevant to the issues raised by Count I.

[DEFENSE COUNSEL]: All right.

THE COURT: As well as Count II. The earlier testimony related to Court I.

[DEFENSE COUNSEL]: Why is that? Maybe I'm misinterpreting.

THE COURT: Please continue.

Tr. p. 132, ln. 24-p. 133, ln. 22.

Moments later, defense counsel again attempted to object to an exhibit relating to pay records. The court stopped the objection on the basis that it was premature since the exhibit had not been yet offered. The following transpired:

[DEFENSE COUNSEL]: I'm going to have a very big objection coming up.

THE COURT: All right. I will be waiting for it.

Tr. p. 134, ln. 20-23.

When the State offered the exhibit, defense counsel made the objection.

THE COURT: Okay. Now would be an appropriate time for your large objection. [Court excused the jury]. . . . All right state your objection.

[DEFENSE COUNSEL]: Well, Your Honor, I suppose I can see what's going on. It appears to me to be a very big bait and switch by the prosecution.

When we were at preliminary hearing, we had evidence put on on the grand theft charge that included cash withdrawals that were made through the use of an ATM card, and then we had proof of the two checks which are alleged to have been forged.

There was no proof put on at preliminary, and I have the copy of the transcript here, that even touched on the subject of falsified time cards and other checks that were being falsified in the business.

So I see now that the information says, 'did wrongfully take cash' but in reality, what's going on is these time cards, and I'm objecting based on relevance is, that they really do not go to the point of what we saw in the preliminary hearing, which is the use of the ATM card for cash withdrawals and the forgery of the two checks.

These time cards are an entirely separate manner of theft, so I would make a general relevance objection, and I think if what the State is trying to do is offering this as perhaps a –

THE COURT: Well, Counsel, I think your interpretation is a bit narrow. But I will certainly allow counsel to address the argument that somehow there is additional charges or material presented. I don't know what –

[DEFENSE COUNSEL]: So, it's a general relevance objection, because there – if there is a theft going on here, it is an entirely different type of theft than was put on at preliminary, and so that, I think, is a complete surprise today as we stand here, and I believe the record completely bears that out at preliminary.

I will also state a 404(b) objection, because I think of what's going on here is a presentation of propensity evidence. I have not received any notice from the State that they intended to put on propensity evidence to try to prove conformity to any kind of a – you know, any type of a pattern of conduct here.

And as well, if this is – if it's found to be relevant to the charges of what was presented at preliminary and they can overcome the 404(b), I think as well it's extremely prejudicial, and 403 should hold it out as well.

THE COURT: Okay.

So how do you respond to the objection as to relevance and as to – well, if it's 404(b), and the assertion that this is somehow changing the structure of the case?

[PROSECUTOR]: Your Honor, all of the documents that have been offered here in Exhibit No. 1 have been made available to the defense from the inception of the case.

These issues of these checks were addressed in the police report that [was] provided to defense in the discovery. It was very clear from the police report that the issue of these checks related to the charge of grand theft that had been brought against the defendant.

While it may be true that the evidence at preliminary hearing did not touch directly upon these checks, there was plenty of evidence submitted in – regarding the use of the debit card and the forgery of the checks and theft also of the forged checks.

The State is under no obligation to put on its entire case at the preliminary hearing. We are, of course, only required to put on enough evidence to satisfy the magistrate that there is probable cause that the defendant committed the crime she's accused of.

We are not required to put on all of the evidence that we have, and we are certainly free within, you know, the confines of discovery and obviously a fair trial, to put on a broader scope of evidence at trial than we put on in the preliminary hearing.

That's common practice. That's allowed under the law, and this does not expand or surprise the defense in any way. I don't see how this could possibility surprise the defense.

THE COURT: And so you are saying that all these documents have been previously provided to the defense in discovery?

[PROSECUTOR]: That's correct, Your Honor.

THE COURT: And they are also referenced in the police reports?

[PROSECUTOR]: Yes.

THE COURT: Okay.

[DEFENSE COUNSEL]: Your Honor, if I may respond.

As far as 404(b) is concerned, I would direct the –

THE COURT: Counsel, I don't think – the first issue is whether it's relevant, because if it's relevant and this is properly before the court, it doesn't even raise a 404(b) issue.

[DEFENSE COUNSEL]: Yes. If this is – if what they are trying to do is charge her with theft through time card violations, then yes, Your Honor, I would agree with the court there.

And maybe it's a good thing that we are at the end of today, because I think – I think maybe a careful review of the preliminary hearing will show that – and I think basically counsel did so much admit that there really wasn't any evidence of the time card violation or time card fraud being put on at all in the preliminary hearing.

So when I look at the crime of taking an ATM card, going to an ATM, and withdrawing cash wrongfully and forging a check, those are entirely different things than actually falsifying a time card and getting money out of my employer that way.

I would also say that there is this whole concept later on in the – of a unifying plan, which is mentioned in State verus Bussard, 114 Idaho 781, which is talking about how – which is how – if there is a unifying plan, you can group things together, but where is the unified plan?

Versus – ATM card theft versus time card theft, those are two different things. And, Your Honor, my client simply has not had an opportunity to vet this at preliminary. It was not vetted at all, so I think as much as the prosecution wants to say –

THE COURT: But you don't deny that you were provided the information? You are saying this was not presented at the preliminary hearing.

[DEFENSE COUNSEL]: Oh, certainly, I had the information, Your Honor, but I have been under the understanding this entire time that what was going to be presented at trial was what was presented – would come under the plan that was presented at the preliminary hearing, which is use of the ATM card for cash, and use of the – the forgery of the checks.

And I will briefly mention the 404(b) if we find it's not relevant. 404(b), I would direct the court to State versus Whitaker 152 Idaho

945, which says that even though the documents are published in discovery, notice requirement of Subsection B is mandatory, and a failure to comply creates a complete bar to admissibility.

And the entire point of it is, is to provide the other side – to provide the defense with an opportunity to know how they are going to use that evidence so that they can rebut it, and there hasn't been any notice provided.

THE COURT: Further response?

[PROSECUTOR]: Your Honor, I just don't know – I don't quite know how to respond to that, Your Honor, quite frankly.

We are not required to give the defendant an itemized notice of exactly how we intend to prove all of the charges that we have brought.

He has been put on notice through discovery of the scope of evidence that we have. It's abundantly clear from the police reports that were provided to defense that the issue of these, of checks – and we haven't fully brought this out for the court, so I know it's not entirely clear in the record exactly what we are talking about.

We are not talking about falsification of time cards here. We are talking about excess payments, additional checks that she was not entitled to that she was issuing to herself.

That's the allegation, Your Honor, so those were all issues that were raised in the police report and through the police report through discovery, the defense has been put on notice of the charges and allegations that we have brought.

Simply because we haven't addressed all of the scope, the full scope of the State's evidence at the preliminary hearing does not preclude those from now presenting that at trial.

This is not a 404(b) issue. This is directly relevant to the charge in Count I.

[DEFENSE COUNSEL]: I just have one final thought, Your Honor.

THE COURT: Um-hmm.

[DEFENSE COUNSEL]: My client does have a right to meet these at preliminary and to confront them. We chose to exercise that right, and all that was presented was the ATM usage and the two checks.

And I think if this is deemed to be relevant to something now, it's a complete change of the charge, and she is being basically denied her right to confront this at preliminary. Thank you.

If I may, too, I don't see the prejudice on the State's side, Your Honor. If there was a separate issue, I think it could be brought up in separate proceedings.

Tr. p. 136, ln. 24-p. 145, ln. 17.

The next morning the court made its ruling:

THE COURT: I have reviewed Exhibit 1. I also reviewed the preliminary hearing transcript. And the purpose of a preliminary hearing is simply to determine if there is probable cause to bind the defendant over to stand trial.

I have looked – I have reviewed the preliminary hearing transcript, and there is reference in the preliminary hearing, which was held on July 17, 2014, so well more than a month after the disclosure of this information.

And there's clear reference on the – in the preliminary hearing transcript to the double paycheck.

But the only purpose of a preliminary hearing – and that's on page 45 of the preliminary hearing transcript, where there's a specific reference to the double paychecks.

Under Idaho law, when an Information properly alleges each and every element of an offense, it is sufficient – Idaho pleading requirements require than an Information be a concise and plain statement of the charge.

Specifically, the Indictment or Information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged, and that is Idaho Criminal Rule 7(B).

Rule 12 requires that if a party – if the defense contends that there is a deficiency with the pleading, that it be raised prior to trial under Idaho Criminal Rule 12.

But this Information alleges all material elements of the offense, and it meets the standards of Idaho law for pleading purposes.

I also reviewed State versus Severson, 147 Idaho 694, which has a really good discussion about the fact that the means by which an offense is committed is not essential, provided that the Information contains the elements – all material elements of the offense, which it does.

And I do not find the objection well-founded. The objection is overruled. And counsel may proceed to address these matters.

There has been ample time since June 4th to review all these matters, either – looking at Exhibit 1 is quite straightforward. I looked at it myself. It's quite straightforward and clearly alerts anyone who looks at it to the same issue that was referenced in the preliminary hearing, that is, the double paychecks.

And so I think the objection is not well-founded. It's overruled, and counsel will be allowed to proceed. So let's bring in the jury and continue.

[DEFENSE COUNSEL]: Your Honor, if I just may make a just a quick – and I know this is kind of a motion to reconsider, but there is some verbiage on the last couple page of the preliminary transcript –

THE COURT: Counsel, I'm not going to visit it at this time. That's my ruling. I allowed a lot of discussion for it.

[DEFENSE COUNSEL]: Well –

THE COURT: And I read the entire prelim last night, and so I'm not – once I rule, then we will move on.

[DEFENSE COUNSEL]: Well, the reason is, is I posed that exact question to Judge Gardunia, and I said, 'What exactly is it that's being

bound over?' [1]

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[1] At the preliminary hearing, the following was stated:

[DEFENSE COUNSEL]: Just so I'm clear, Your Honor, so the Count I and the Count II are concerning the two checks, the 5008 and the 581; is that correct?

THE COURT: No, I did not understand that that was the State's evidence that that was solely related – Count I was solely related to the checks. My understanding is that Count I included the allegation of use of the card.

[DEFENSE COUNSEL]: Okay.

THE COURT: And money taken out of the ATM as well as unauthorized purchases. My understanding was that encompassed all of that.

[DEFENSE COUNSEL]: Okay. And then –

THE COURT: And I find the evidence supports that.

[DEFENSE COUNSEL]: Okay. For the two checks and the ATMs, and then the – in Count II, same thing.

THE COURT: I believe, if I'm correct, that the State is alleging under Count II just simply the forgery, and under Count I, the entire theft, including all of the allegations that have been made with respect to the cashing of the checks, taking of money from the ATMs and the unauthorized purchases on the debit cards.

[DEFENSE COUNSEL]: Okay.

THE COURT: Is that correct, [prosecuting attorney]?

[PROSECUTOR]: That's correct, Your Honor.

[DEFENSE COUNSEL]: Okay. I wanted to make sure of that. Thank you, Your Honor.

Prelim. Tr. p. 89, ln. 10-p. 90, ln. 13.

> THE COURT: The means is not required to be detailed in the Information. The only purpose of the preliminary hearing is to determine if there is probable cause to believe that an offense has been committed and that the Defendant is the one who committed.
>
> You were provided the information which has been disclosed to you for a considerable period of time, so the objection is not well-founded. Exhibit 1 is admitted, and we will proceed.

Tr. p. 147, ln. 13-p. p. 150, ln. 18.

These transcripts demonstrate that Ms. Herreman-Garcia did object to the lack of notice in the Information as to the charges to be faced, that the State acknowledged this objection by arguing that it did not have to give notice of the means, and that the district court specifically ruled that the Information was sufficient. The State's argument on appeal that there was no objection below is inconsistent with the record.

Furthermore, the State's insistence that Ms. Herreman-Garcia waived her state and federal constitutional rights to notice of the charges against her is contrary to the long-established doctrine that waiver of fundamental constitutional rights is not presumed from a silent record. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938), stating that courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. *See also, Smith v. State,* 146 Idaho 822, 834, 203 P.3d 1221, 1233, ftnt. 11 (2009), noting that waiver is a voluntary, intentional relinquishment of a known right or advantage and that there is a presumption against wavier of fundamental constitutional rights.

Even if defense counsel in this case had not objected to the lack of notice as to the charges faced, the State had not acknowledged the objection, and the district court had not ruled on the objection, the record is devoid of any voluntary, intentional relinquishment of a right to notice of the charges being leveled by the State. Contrary to the State's argument on appeal, Ms. Herreman-Garcia never voluntarily and intentionally relinquished her right to notice of the charges. U.S. Const. Amends. 5 and 14; Idaho Const. Art. I, §13.

The State does acknowledge that the defense made an objection, but asserts that this was an objection on the basis of a variance. Respondent's Brief p. 7. A variance arises when the proof offered at trial departs from the allegations in the indictment or information. *State v. Colwell,* 124 Idaho 560, 565-66, 861 P.2d 1225, 1230-31 (Ct. App. 1993). Variances are fatal when they affect the substantial rights of the accused. *Id.* These substantial rights include the right to due process notice of the charge and protection from another prosecution for the same offense. *State v. Windsor,* 110 Idaho 410, 416-17, 716 P.2d 1182, 1188-89 (1985). The State appears to argue that an objection to a lack of due process based upon the lack of notice of the charge and an objection based upon a variance which has resulted in a lack of due process because of a lack of notice of the charge are different objections and that this difference has some import in this case. But, its argument makes no sense. The objections are the same – that the Information did not provide adequate notice so as to allow the accused to prepare a meaningful defense and be protected against

double jeopardy. *State v. Windsor, supra*; *State v. Jones,* 140 Idaho 755, 757-58, 101 P.3d 699, 701-02 (2004); *State v. Banks,* 113 Idaho 54, 58, 740 P.2d 1039, 1043 (Ct.App. 1987).[2]

The State also argues that if the objection is an objection based upon a lack of notice creating a due process violation, that the objection could only be raised prior to trial, pursuant to ICR 12(b)(2). Subsection (d) establishes the deadlines for filing – 28 days after entry of a plea of not guilty or 7 days before trial, whichever is earlier. The subsection further allows the court to shorten or enlarge the time deadlines, and "for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule." In this case, the district court did not deny Ms. Herreman-Garcia's motion because it was untimely, nor did the State object to the timeliness of the motion. It is only now, for the first time on appeal, that the State is raising a timeliness challenge. However, the district court was correct in its determination to hear Ms. Herreman-Garcia's objection because there was good cause shown for not filing an objection to the Information prior to trial. At the preliminary hearing, the State told Ms. Herreman-Garcia and the court that the offense charged was theft of money by forging the Mittal and HOA checks, ATM withdrawals and unauthorized use of the debit card. As soon as the State altered

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[2] Even if this Court were to find some merit in the State's argument that an objection based on lack of notice is not sufficient to preserve the issue of a fatal variance, the error is a fundamental error which can be raised for the first time on appeal. *State v. Day,* 154 Idaho 476, 299 P.3d 788 (2013), holding that a variance between the charging document and the jury instructions was a fundamental error requiring that Day's conviction for lewd conduct with a minor be reversed.

its course and sought conviction of theft also for falsification of payroll records and checks, Ms. Herreman-Garcia objected. The State cannot credibly argue that there was not good cause to allow the due process objection after the start of trial when it was the State's deception - whether deliberate or unintentional - in claiming one theft at the preliminary hearing and presenting proof of another at trial that led to the delay in objecting to the Information.[3] [4]

The State's argument that Ms. Herreman-Garcia waived her state and federal constitutional due process rights to notice of the charge against her is contrary to the record and the law.

2. *Ms. Herreman-Garcia Has Shown a Due Process Violation*

The State argues that to show a due process violation, Ms. Herreman-Garcia has argued that prosecutors should ignore I.C. § 18-2409(1) and that she cannot make that argument now because she has not challenged the constitutionality of the statute. Respondent's Brief p. 10. The State is incorrect in both these assertions.

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[3] The State cites to *State v. Quintero,* 141 Idaho 619, 622, 115 P.3d 710, 713 (2005), in support of its argument on appeal that the objection in the district court was untimely. However, that case concerned a motion for dismissal based upon a lack of subject matter jurisdiction because the Information failed to include one of the elements of the crime. The motion was not made until after the State had rested. The Supreme Court held that the Information was sufficient to confer subject matter jurisdiction and reversed the district court order of dismissal. Ms. Herreman-Garcia is not raising a claim of lack of subject matter jurisdiction.

[4] It is also of note that the State concedes in footnote 4 of its brief on page 23 that issues of variances may not be addressable until trial.

Ms. Herreman-Garcia has not argued that prosecutors should ignore I.C. § 18-2409(1). Rather, she noted that in *State v. Owen,* 129 Idaho 920, 928, 935 P.2d 183, 192, ftnt. 8 (Ct. App. 1997), the Court of Appeals advised that to avoid the type of due process problem present in Ms. Herreman-Garcia's case, the prosecutor could ignore § 18-2409(1) and insert language in the Information similar to that reviewed in *State v. Darbin,* 109 Idaho 516, 518-19, 708 P.2d 921, 923-24 (Ct. App. 1985), stating the way the defendant committed the alleged theft. There is nothing in *Owen* that requires those denied due process by lack of notice in the pleading attack the constitutionality of I.C. § 18-2409(1).

Lastly, the State disputes that Ms. Herreman-Garcia did not have notice of its intent to rely upon four methods of theft to prove the charges against her: 1) misuse of the debit card; 2) paychecks paid for time not worked and/or duplicate paychecks; 3) unauthorized checks coming from A&A to her for no discernable reason; and 4) the misdirected Mittal and HOA checks. This dispute is inconsistent with the Information, the evidence presented at the preliminary hearing, and most disturbingly the prosecutor's assurance to defense counsel and the court at the preliminary hearing that Count I was based upon debit card purchases, ATM withdrawals and the misdirection of the Mittal and HOA checks.

Finally, it is of note that the State has not argued that if there was a due process violation that it was not a structural error which requires vacation of the convictions of both Counts I and II. See Appellant's Opening Brief at pages 27-28;

Respondent's Brief at pages 4-13.

3. *Conclusion*

Ms. Herreman-Garcia's unwaived state and federal constitutional rights to due process were violated when the State failed to provide sufficient notice of the charge against her so that she could prepare and present a defense. This was a structural error that requires vacation of the convictions on both Count I and Count II.

B. *The District Court Committed Fundamental Error in Failing to Give Unanimity Instructions*

The State has argued, in reliance on *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491 (1991), that Ms. Herreman-Garcia was not entitled to a specific unanimity instruction in Count I because there was only one charge of grand theft and the various acts of theft the State provided evidence of were simply different means of committing the single charged theft. This argument is contrary to due process as explained in *Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707 (1999), a post-*Schad* case, and should be rejected.

In *Schad*, the United States Supreme Court addressed the question of whether it was constitutionally acceptable to permit a jury to reach one verdict based on any combination of alternative findings. Specifically, in *Schad,* the defendant was charged with first degree murder on the alternative theories of premeditated murder and felony murder. In a plurality opinion, the Supreme Court held that premeditated murder and felony murder were simply alternative means to

a common end - first degree murder - and thus, the jury did not have to unanimously agree on which alternative was the means by which the murder was committed. The Court's plurality stated that it was impossible to set out any single test for determining when two means are so disparate as to exemplify two inherently separate offenses. Rather, the concept of due process with its demands for fundamental fairness and for the rationality that is an essential component of that fairness, must serve as the measurement of the level of definitional and verdict specificity permitted by the Constitution. 501 U.S. at 637-38, 111 S.Ct. at 2500. Justice Scalia noted in his concurrence that the Constitution does limit a state's power to define crimes in ways that would permit juries to convict while disagreeing about the means. "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *Schad,* 501 U.S. at 651, 111 S.Ct. 2491 (Scalia, J., concurring.)

Justice Scalia's comment above was quoted by the Supreme Court in *Richardson v. United States, supra.* In that case, a majority held that a jury must unanimously agree about which specific violations make up the "continuing series of violations" for purposes of a federal criminal statue which forbids any person from engaging in a continuing criminal enterprise where a continuing criminal enterprise involves a violation of the drug statutes when such violation is part of a continuing series of violations. 21 U.S.C. §§ 848(a) and (c). 526 U.S. at 815, 119 S.Ct. at 1709. The Court wrote that holding each "violation" amounts to a separate element is

consistent with the tradition of requiring juror unanimity where the issue is whether a defendant engaged in conduct that violates the law; that the statute's breadth argues against treating each individual violation as a means, for the breadth aggravates the dangers of unfairness that doing so would risk; and that the Constitution limits a state's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. 526 U.S. at 819-20, 119 S.Ct. at 1710-11. In reaching its holding, the Court specifically noted the likelihood that if violations were treated as means not requiring jury unanimity, the jury would be allowed to avoid discussion of the specific factual details of each violation covering up wide disagreement among the jurors about just what the defendant did or did not do and would aggravate the risk that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire. 526 U.S. at 819, 119 S.Ct. at 1711. It is worth noting that *Richardson* was decided just eight days prior to the Idaho Supreme Court's opinion in *State v. Nunez*, 133 Idaho 13, 981 P.3d 738 (1999), a case cited by the state, and *Richardson* is not cited by the *Nunez* Court. To the extent *Nunez* is inconsistent with *Schad* and *Richardson*, it is not good law.

The application of these principles to offenses like theft in which several transactions may be aggregated to constitute one violation requires a unanimity instruction when more than one of the underlying acts could constitute the crime on

its own. Thus, in *United States v. Newell,* 658 F.3d 1 (1st Cir. 2011), specific unanimity instructions were required for the counts of the indictment which alleged multiple fraudulent transactions as the basis for violations of 18 U.S.C. § 666 prohibiting theft or bribery in programs receiving federal funds. *See also, United States v. Holley,* 942 U.S. 916, 928-29 (5th Cir. 1991) (holding that an indictment that charged counts of perjury on the basis of multiple statements required a specific unanimity instruction, as the "government was required to prove dissimilar facts to show the knowing falsity of each statement"); *Bins v. United States,* 331 F.2d 390 393 (5th Cir. 1964) (noting that a two-count indictment, each count of which alleged multiple acts of uttering and publishing false documents in violation of 18 U.S.C. § 1010, was duplicitous, as the filing of each false document would constitute a crime and should be alleged in a separate and distinct count of the indictment); *United States v. Beros,* 833 F.2d 455, 460-61 (3rd Cir. 1987) (holding that the unanimity requirement extends to an indictment for embezzling, stealing, abstracting, or converting union funds, that includes "several transactions or occurrences, any of which would constitute one of the acts proscribed by the charged statutes"); *United States v. Fawley,* 137 F.3d 458, 471 (7th Cir. 1998) (finding error in failure to give a unanimity instruction in a perjury case that all 12 jurors must unanimously agree that a particular material statement was falsely made).

In Idaho, I.C. § 18-2407(b)(8) allows aggregation of a series of petit thefts to establish a count of grand theft. It provides:

> When any series of thefts, comprised of individual thefts having a value of one thousand dollars ($1000) or less, are part of a common scheme or plan, the thefts may be aggregated in one (1) count and the sum of the value of all the thefts shall be the value considered in determining whether the value exceeds one thousand dollars ($1000)

Id.

In accord with *Richardson, supra,* due process requires that the jury agree unanimously on each of the petit thefts which are to be aggregated to prove the grand theft.

But, in this case, not only was the jury presented with evidence of petit thefts which could be aggregated to establish Count I's charge of grand theft. It was also presented with proof of more than one grand theft (four to be precise – grand theft of the HOA check and three grand thefts of checks made out to Giselle Herreman or Giselle Gonzalez. See Tr. p. 564, ln. 1-16, where the State acknowledges that it included in its proof for Count I evidence as to both petit thefts that could be aggregated as well as multiple instances of grand theft that could have been charged as multiple counts.) In accord with *Newell, supra*; *Holley, supra*; *Bins, supra*; *Beros, supra*; and *Fawley, supra*, where more than one occurrence could constitute the charged crime, a unanimity instruction is required. As held in *State v. Southwick,* 158 Idaho 173, 181-82, 345 P.3d 232, 240-41 (Ct.App. 2014), when evidence is presented that the defendant has committed several temporally discrete acts, each of which would independently support a conviction for the crime charged, the trial court should instruct the jury that it must unanimously agree on the

specific incident constituting the offense in each count, regardless of whether the defendant requests such an instruction. Here, where there was evidence not only of multiple petit thefts which could be aggregated to establish grand theft, but also evidence of multiple grand thefts, the failure to give a specific unanimity instruction was error.[5]

With regard to Count I, Ms. Herreman-Garcia has shown that the failure to give a specific unanimity instruction violated her state and federal rights to due process. She has met the first prong of the *Perry* fundamental error analysis. *State v. Perry,* 150 Idaho 209. 226, 245 P.3d 961, 978 (2010).

Ms. Herreman-Garcia has also shown that the error was clear or obvious without the need for reference to information not contained in the appellate record, the second prong of the *Perry* standard. *Id.* The State has argued that trial counsel had an incentive not to object to the error in order to avoid facing 59 counts of theft instead of 1. Respondent's Brief p. 19. However, counsel did in fact state that he believed that Ms. Herreman-Garcia should have been charged with multiple counts as opposed to a single count of grand theft and that the failure to charge multiple counts was prejudicial. Tr. p. 566, ln. 5-20. *See also, State v. Sutton,* 151 Idaho

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[5] Compare the charge in this case with the 14 counts of grand theft charged in *State v. Whittle,* 145 Idaho 49, 175 P.3d 211 (Ct.App. 2007). Had the State charged this case the way it charged *Whittle,* it could have avoided the unanimity error. *See also, State v. Gilbert,* 112 Idaho 805, 809, 736 P.2d 857, 861 (Ct.App. 1987), noting that the principle that separate thefts may be aggregated where evidence shows that all were part of a common scheme or plan applies only when aggregating several petit thefts into a grand theft. The rule cannot be used to aggregate several felony offenses into a single felony. ICJI 554 Comment.

161, 166-67, 254 P.2d 62, 67-68 (Ct. App. 2011), finding clear error despite the State's speculations about possible motives for defense counsel to not object in the absence of any indication that defense counsel knew more about the law than did the State or the court or any indication that counsel was attempting to sandbag the court.

And, Ms. Herreman-Garcia has demonstrated prejudice, the third prong of the *Perry* standard. As set out in her Opening Brief, Ms. Herreman-Garcia had defenses to several of the alleged incidents of theft. There is a reasonable probability that not all the jurors agreed on any one instance of theft and that had they been properly instructed, the outcome of the trial would have been different.

With regard to Count II, the State has admitted that the charge was duplicitous and created a due process error. Respondent's Brief p. 15, ftnt. 2. However, the State maintains that this error must be addressed prior to trial and is not a fundamental error. The State further argues that because it made a duplicitous charge, Ms. Herreman-Garcia cannot seek to cure it by means of a special unanimity instruction. Respondent's Brief pp. 22-24. These arguments should be rejected.

While ICR 12(b)(2) does require that defense and objections based on defects in the information other than that it fails to show the jurisdiction of the court be raised before trial, a court may relieve a party of failure to comply with the rule and may grant relief from waiver. ICR 12(d) and (f). However, that is neither here nor

there for this appeal because ICR 12(b)(2) does not have anything whatsoever to do with the due process requirement of a specific unanimity instruction when the State presents evidence of more than one occurrence which could constitute the charged crime. *Southwick, supra*; *Newell, supra*; *Holley, supra*; *Bins, supra*; *Beros, supra*; *Fawley, supra.*

The lack of a specific unanimity instruction on Count II was a due process error. *Id.* It was an unwaived error because there was no reason for Ms. Herreman to give the jury an opportunity to convict on less than a unanimous verdict. The evidence against her in Count II was not strong and trial counsel could have asked the court to require the state to elect one of the two crimes charged. Thus, the first prong of the fundamental error analysis is met.

The error was clear or obvious without the need for reference to any additional evidence not contained in the appellate record because, as with Count I, there was no indication that defense counsel knew any more about the law than did the State and the court, and further there was no indication of any attempt to sandbag. *Sutton, supra.* Thus, the second prong of the fundamental error analysis is met. And, finally, there is a reasonable possibility that the alleged error affected the outcome of the trial proceedings because given the potential defenses to the charge, it is reasonably possible that not all jurors agreed that a particular forgery occurred. Thus, the third prong of the fundamental error analysis is met.

In conclusion, the court did commit fundamental error in not giving a specific

unanimity instruction on both Counts I and II. On this basis, the convictions must be reversed.

C. *Objected to Evidentiary Errors Also Require Reversal*

Ms. Herreman-Garcia relies upon her Opening Brief to establish that objected to evidentiary errors also require reversal of the convictions and that the district court violated her state and federal constitutional rights to present a defense when it disallowed certain cross-examination of Mr. Antonio Ayon.

III. CONCLUSION

Both convictions must be vacated for structural error in failing to give required due process notice of the charge against Ms. Herreman-Garcia. They must also be reversed because of fundamental error in failing to give unanimity instructions. And, further, they must be reversed because of objected to evidentiary errors. Ms. Herreman-Garcia respectfully requests that this Court grant the required relief.

Submitted this 29th day of January, 2016.

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CERTIFICATE OF SERVICE

I CERTIFY that on January 29, 2016, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Kenneth Jorgensen
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