4-24-2018

State v. Godwin Appellant's Brief Dckt. 44858

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44858**
Plaintiff-Respondent,	)	
	)	**IDAHO COUNTY NO. CR 2014-57506**
v.	)	
	)	
JASON ANDREW GODWIN SR,	)	**REVISED APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

Jason Godwin appeals from his Judgment of Conviction. Following a jury trial, he was convicted of the second degree murder of Kyle Anderson. On appeal, he raises six issues.

First, Mr. Godwin asserts the district court erred in denying his motion to suppress. In an issue of first impression, Mr. Godwin asserts his voluntary questioning become a custodial interrogation, requiring *Miranda* warnings, after his first confession to killing Mr. Anderson. Mr. Godwin was eventually given *Miranda* warnings, but these delayed warning did not cure the Fifth Amendment violation. He argues this intentional ask first, warn later technique should result in the suppression of his statements made after his first confession.

Next, he asserts the district court erred in prohibiting the admission of relevant victim character evidence, admitted through opinion or reputation testimony, unless Mr. Godwin was able to prove he knew about Mr. Anderson's reputation for violence and aggression.

Mr. Godwin asserts this Court should overrule or decline to follow *State v. Custodio*, 136 Idaho 197 (Ct. App. 2001). He asserts *Custodio*'s holding that specific instances of a victim's conduct are not admissible under Idaho Rule of Evidence 405(b) because a victim's propensity for violence or aggressiveness does not constitute an essential element of a self-defense claim has proven unjust. He asserts Idaho should adopt a broader approach to Rule 405(b) and employ a case-by-case analysis to determine whether specific act evidence is essential to a self-defense

claim.

Furthermore, he asserts the district court's failure to instruct the jury on justifiable homicide under I.C. § 18-4009(1) was fundamental error, essentially lowering the State's burden of proving the homicide was unlawful, the State committed prosecutorial misconduct which deprived him of a fair trial, and the errors are not harmless or, alternatively, that the errors amount to cumulative error, depriving him of his right to a fair trial.

Statement of Facts and Course of Proceedings

On a June evening in 2014, Kyle Anderson was shot in the neck outside his motorhome near Kooskia, Idaho. (Tr.,[1] p.571, Ls.3–15, p.673, Ls.8–23, p.585, Ls.6–12.) He died from the gunshot wound. (Tr., p.642, Ls.3–11.) Mr. Godwin's vehicle was identified as leaving the scene, and the police contacted him for questioning. (Tr., p.673, Ls.17–23, p.939, L.4–p.940, L.9, p.940, L.24–p.941, L.11, p.942, L.7–p.943, L.2.) The next morning, Officer Hewson with the Idaho County Sherriff's Office questioned Mr. Godwin, and Mr. Godwin admitted to shooting Mr. Anderson in response to Mr. Anderson pulling a gun on him. (*See generally* Tr., p.842, L.2–p.848, L.10, p.850, L.13–p.851, L.8; State's Exs. 68–69; *see, e.g.*, Inter. Tr.,[2] p.9, Ls.18–19.)

The State filed an Information charging Mr. Godwin with second degree murder. (R., pp.55–56.) Mr. Godwin pled not guilty. (R., p.115.)

[1] There are two transcripts on appeal. The first, cited as "Tr.," contains the suppression motion hearing, trial, and sentencing. The second transcript, which contains a status conference and final pretrial hearing, is not cited herein. In the cited transcript, the internal pagination starts over after the suppression motion hearing. As such, pages 1 to 183 of the electronic document correspond with pages 1 to 183 of the suppression motion hearing, but pages 184 to 1422 of the electronic document correspond to pages 1 to 1239 of the trial and sentencing hearing. Citations herein refer to the internal pagination of the transcript.

[2] Citations to the Interrogation Transcripts ("Inter. Tr.") refer to the court-ordered compilation of three audio recordings: Exhibits A, B, and C. Exhibit A contains the original recording of the interrogation, separated into two audio files: "Jason a" and "Jason b." Exhibits B and C contain slowed-down versions of the audio recording's disputed portion. (*See* App. Br., p.15 n.4.)

Prior to trial, Mr. Godwin moved to suppress his confession. (R., pp.178–89.) He argued his confession was involuntary and obtained in violation of his Fifth Amendment rights. (R., pp.184–89.) The State objected. (R., pp.362–70.) The district court held a hearing and later denied the motion. (R., pp.388–95, 500–08.) The district court held Mr. Godwin's confession was voluntary and Mr. Godwin did not invoke his *Miranda*[3] rights. (R., pp.502–05.) Alternatively, the district court held Mr. Godwin was not in custody for *Miranda* purposes and therefore was not entitled to the *Miranda* warnings. (R., pp.505–08.)

Also prior to trial, the State filed a Motion in Limine requesting the district court prohibit proposed defense witnesses Brandon Fisher and Billy Ellenberg from testifying "about specific instances of conduct showing that the deceased, Kyle Anderson, was violent and aggressive." (R., pp.544–47.) Each witness was expected to testify Mr. Anderson had pointed a gun at him. (R., p.544.) Defense counsel requested the specific act evidence be admitted and also requested the district court overrule *State v. Custodio*, 136 Idaho 197 (Ct. App. 2001). (Tr., p.482, L.4–p.483, L.14.) The Court held specific instances of conduct were prohibited and "[e]vidence purporting to show Kyle Anderson's propensity to violence shall be presented only in the form of reputation or opinion evidence." (R., pp.700–01.)

The trial began on February 22, 2016. (R., pp.631–33.) Mr. Anderson's girlfriend, Amanda Jones, testified she was outside with Mr. Anderson when he was shot. (Tr., p.578, L.4–p.585, L.12.) She explained she and Mr. Anderson lived in a motorhome parked in a turnout on the side of the road. (Tr., p.571, Ls.3–19.) On the evening of June 9, Mr. Anderson was outside putting a new license plate on their motorhome. (Tr., p.576, Ls.4–16, p.578, Ls.1–19.) Ms. Jones went out to help him, and she noticed a gun was falling out of his waistband. (Tr., p.578, Ls.4–5,

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

p.568, L.20–p.569, L.3, p.604, Ls.3–5.) Mr. Anderson put the gun in the back pocket of his vest. (Tr., p.579, L.8–p.580, L.15.) Mr. Anderson had the gun in his back pocket as Mr. Godwin pulled up in his vehicle. (Tr., p.580, Ls.14–22.) Ms. Jones was directly behind Mr. Anderson. (Tr., p.580, Ls.23–25.) She saw two other people in the vehicle: Carla Griner/Cutler in the passenger seat and Ernie Ruiz in the back. (Tr., p.583, Ls.18–24.) A fourth person, Beau Lynch, was in the back of the vehicle as well, but Ms. Jones did not see him until after the shooting. (Tr., p.598, Ls.8–19.) Ms. Jones testified, shortly after Mr. Godwin drove up, he shot Mr. Anderson from his vehicle. (Tr., p.585, Ls.6–12.) She denied Mr. Anderson had his gun in his hand, but claimed, at different points in her testimony, he had a screwdriver, a license plate, and nothing in his hand. (Tr., p.581, Ls.12–14, p.583, Ls.2–3, p.583, Ls.4–6.) A photograph of the crime scene shows the screwdriver and license plate resting on the back bumper of the motorhome. (Tr., p.836, L.22–p.837, L.13; State's Ex. 26.) She also denied seeing Mr. Anderson use methamphetamine the day of the shooting, the day before, or ever. (Tr., p.613, Ls.5–19.) She testified she was with him the entire day before and the day of the shooting. (Tr., p.612, L.22–p.623, L.4.)

Ms. Griner/Cutler did not testify, but Mr. Lynch and Mr. Ruiz did. Mr. Lynch initially testified he did not see Mr. Anderson with a gun in his hand. (Tr., p.714, Ls.5–11, p.714, L.21–p.715, L.2.) Later on in the trial, however, Mr. Godwin introduced Mr. Lynch's statement to the police shortly after the shooting. Mr. Lynch's story to the police changed from seeing Mr. Anderson pull a gun and move towards Mr. Godwin, who was saying "don't shoot, don't do it," to not seeing a gun. (Tr., p.982, L.3–p.984, L.11, p.985, Ls.4–15, p.986, Ls.15–23, p.988, L.1–p.989, L.9.) Mr. Ruiz denied seeing Mr. Anderson with a gun. (Tr., p.764, L.5–p.765, L.4, p.767, Ls.1–8.)

Dr. Glen Groben testified Mr. Anderson died from an intermediate range gunshot wound to the neck. (Tr., p.642, Ls.3–11; State's Ex. 58.) Dr. Groben also testified Mr. Anderson had a "significant" amount of methamphetamine in his blood. (Tr., p.658, L.24–p.659, L.2, p.660, Ls.2–8.) Dr. Groben opined Mr. Anderson would have ingested the methamphetamine "within hours" of his death and was likely feeling the effects, such as aggression. (Tr., p.662, L.2–p.663, L.6.) Additionally, the injuries to the back of Mr. Anderson's body were not consistent with Ms. Jones's testimony that Mr. Anderson had his gun in his back pocket at the time of his death. (Tr., p.640, L.24–p.641, L.12, p.654, L.22–p.657, L.19; State's Exs. 35, 37, 38, 58.)

In addition to other witnesses and exhibits, the State played the audio recording of Mr. Godwin's June 10 interrogation. (Tr., p.848, Ls.9–10, p.851, Ls.7–9; State's Exs. 68, 69.)

Mr. Godwin testified in his defense. (Tr., p.1049, L.6–p.1115, L.18.) Consistent with his June 10 confession, Mr. Godwin repeatedly testified he shot Mr. Anderson in response to him pulling a gun on him. (Tr., p.1063, L.6–p.1065, L.5, p.1093, L.20–p.1094, L.4, p.1111, Ls.3–9.)

The jury found Mr. Godwin guilty as charged. (Tr., p.1186, L.8–1187, L.1; R., p.760.) The district court sentenced him to twenty-five years, with fifteen years fixed. (Tr., p.1236, L.2–12; R., p.843.) Mr. Godwin timely appealed. (R., pp.853–55.)

ISSUES

I. Did the district court err when it denied Mr. Godwin's motion to suppress?

II. Did the district court err when it ruled Mr. Godwin could only present opinion or reputation evidence of Mr. Anderson's violent and/or aggressive character after showing that Mr. Godwin was aware of Mr. Anderson's propensity for violence?

III. Should this Court overrule *State v. Custodio* and hold specific instances of a victim's conduct, showing a violent character, can be an essential element of a self-defense claim and are admissible under Idaho Rule of Evidence 405?

IV. Did the district court's failure to instruct the jury on justifiable homicide pursuant to I.C. § 18-4009(1) amount to fundamental error?

V. Did the State violate Mr. Godwin's right to a fair trial by committing prosecutorial misconduct?

VI. Do the errors in Mr. Godwin's case amount to cumulative error?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Godwin's Motion To Suppress

A. Introduction

Mr. Godwin contends the district court erred by denying his suppression motion because his statements made after his first confession were obtained in violation of the Fifth Amendment.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012). Findings of fact are accepted "if supported by substantial evidence." *State v. Watts*, 142 Idaho 230, 234 (2005). The Court freely reviews the district court's application of constitutional principles to the facts. *Danney*, 153 Idaho at 408.

C. Statement Of Facts Relevant To The Interrogation

After Mr. Anderson was shot, law enforcement placed Mr. Godwin's residence under surveillance. (R., p.501.) Law enforcement observed, "it looked like someone had left the place in a hurry." (R., p.501; *see also* Tr., p.60, L.25–p.61, L.4, p.98, L.21–p.99, L.2.)

Officer Ulmer obtained Mr. Godwin's cellphone number and called him around 2:30 a.m. on June 10. (R., p.501; Tr., p.9, L.13–p.10, L.13.) He told Mr. Godwin he was trying to locate him and he needed to visit with him. (Tr., p.10, Ls.14–16.) He did not tell him why. (R., p.501; Tr., p.10, Ls.17–18.) Mr. Godwin first told Officer Ulmer that he was at home, but Officer Ulmer told him that he was at his home and Mr. Godwin was not there. (R., p.501; Tr., p.10, L.19–p.11,

L.1.) Mr. Godwin then told Officer Ulmer that he was in Dudley, Idaho. (R., p.501; Tr., p.15, L.14–p.16, L.7.) The phone call ended with no arrangement for Mr. Godwin to meet Officer Ulmer. (Tr., p.16, Ls.8–12.)

At 8:30 a.m., on June 10, Mr. Godwin called Officer Ulmer, Officer Ulmer missed the call, and Officer Ulmer called him back. (R., p.501; Tr., p.11, Ls.14–20.) Mr. Godwin told Officer Ulmer that he had been up since the first phone call and he wanted to know what was going on in Kooskia and why Officer Ulmer wanted to talk to him. (Tr., p.11, Ls.19–22.) Officer Ulmer did not tell Mr. Godwin why he wanted to talk to him, but told him he would explain it face-to-face. (Tr., p.11, L.23–p.12, L.1.) Mr. Godwin told Officer Ulmer he would be in Kooskia in an hour and would go to the sheriff's office. (Tr., p.12, Ls.3–6.)

About one hour later, Mr. Godwin arrived outside the sheriff's office. (R., p.501.) Officer Johnson happened to arrive there at the same time. (Tr., p.31, L.15–p.16, L.4.) Officer Johnson contacted Mr. Godwin, and Mr. Godwin again asked why the police wanted to talk to him. (Tr., p.33, L.16–p.34, L.3.) Officer Johnson told him "there had been a homicide the previous night, and there were some indications that he might possibly have been involved in some way." (Tr., p.34, Ls.3–6.) He led Mr. Godwin into the sheriff's office and directed Officer Hewson to question him. (Tr., p.35, Ls.4–10, p.37, Ls.15–21, p.56, Ls.14–25, p.99, Ls.17–25.) The conference room was at the back of the sheriff's office, through a shared office for the deputies and past several individual offices for other officers. (Tr., p.57, Ls.4–15.) It was about 20 feet long by 10 or 15 feet wide with one door and no outside windows. (Tr., p.57, L.24–p.25, L.11.) One interior window, with the blinds closed, faced the main area with the deputies' shared office. (Tr., p.58, Ls.11–14, p.130, Ls.1–3.) Officer Johnson asked Officer Hewson "to see what Jason Godwin had to say about his whereabouts during the previous 24 hours or so." (Tr., p.38, Ls.2–

4.) Mr. Godwin was their primary and only suspect for the homicide. (Tr., p.28, L.20–p.29, L.2, p.35, Ls.16–25, p.47, Ls.2–11, p.71, Ls.6–13.)

Officer Hewson began the questioning by asking Mr. Godwin what he was "drug in for," to which Mr. Godwin responded that he came in "voluntarily." (Inter. Tr., p.2, Ls.7–10.) Mr. Godwin said Officer Ulmer asked him to come in to talk. (Inter. Tr., p.2, Ls.12–21.) Officer Hewson asked Mr. Godwin about Dudley and what he was doing up there. (Inter. Tr., p.2, L.24–p.5, L.17.) About four minutes into the questioning, Officer Hewson asked Mr. Godwin what Officer Johnson talked to him about. (Tr., p.5, Ls.17–18; Ex. A (Jason a), 4:13–4:33.) Mr. Godwin responded that Officer Johnson told him Mr. Anderson was shot and killed. (Tr., p.5, Ls.19–23.) Officer Hewson then asked:

> Well, yeah, I mean your name did get thrown out there, that you may have been there. This is the whole thing, the way that we looked at it, is what it looked like to us happened was that it was probably something that wasn't meant to happen. Somebody didn't mean to do what they did. It would be a little different if Kyle got shot, and if it was just shot in cold blood: I'm going to kill you, as opposed to something happening, that somebody didn't meant for it to happen. Totally different set of circumstances. Are you sure you left at 1:00 yesterday [for Dudley]?

(Inter. Tr., p.5, L.24–p.6, L.10.) Mr. Godwin continued to go through his day on June 9 with Officer Hewson. (Inter. Tr., p.6, L.11–p.9, L.1) Officer Hewson reminded him, "I just kind of have to stress: That if I catch you telling me something that isn't true, it doesn't look good." (Inter. Tr., p.6, L.25–p.7, L.2.) After Mr. Godwin denied being in Kooskia on the evening of June 9, Officer Hewson confronted him: "There's people that saw you at the trailer at 7:00, Jason. That's what I'm talking about." (Inter. Tr., p.8, L.24–p.9, L.3.) Officer Hewson then got the first confession from Mr. Godwin:

> Q. I'm not trying to ride you, please.
>
> A. Okay.

Q. Okay. I don't like treating people like that, but you got to kind of understand what I am –

A. They're trying to accuse me of shooting this guy or (inaudible)?

Q. They are saying that, yes, something happened between you and him, and it was more or less an accident. And that's all we're trying to get cleared up. If something happened between you guys and it was an accident, I wish that you would talk to us about it.

A. *Fine. Pulled up there and –*

Q. What time?

A.–*the guy pointed a gun at me, and I grabbed my gun and shot him.*

Q. Okay.

A. And then I left.

Q. What time, Jason?

A. I don't know. About 10:00.

Q. Okay. Why would you –

A. I don't know. I pulled up there. (Inaudible) with me, and (inaudible) he was after that guy for some reason.

(Inter. Tr., p.9, Ls.5–19 (emphasis added).) This first confession occurred approximately nine minutes into the questioning. (Ex. A (Jason a), 8:40–9:48.) Officer Hewson testified he was using minimization techniques to question Mr. Godwin about his involvement in the shooting. (Tr., p.107, L.21–p.108, L.10, p.110, L.12–p.111, L.10.)

After Mr. Godwin's first confession, Officer Hewson did not provide Mr. Godwin with *Miranda* warnings. Instead, he asked Mr. Godwin, "*Explain that to me again.*" (Inter. Tr., p.10, L.3 (emphasis added).) Officer Hewson continued to question Mr. Godwin about the night of Mr. Anderson's death. (Tr., p.10, L.4–p.15, L.9.) At one point, Officer Hewson asked:

Q. So, you must know Bo's last name. What is it?

A. I'm trying to think. You guys really know everything though.

Q. *That's why if you don't tell the truth, it look worse. I mean, you get that.*

A. (Inaudible) I'm trying to tell the truth.

Q. *And right now I think you're doing great, and I think that you're gaining a lot of credibility with me.*

A. (Inaudible) shop. He pointed a gun right at me, and I pulled it out of my pocket and went after him and shot him.

(Inter. Tr., p.14, Ls.13–25 (emphasis added).) Again, Officer Hewson did not provide Mr. Godwin with *Miranda* warnings after his second confession, but instead kept questioning him. (*See* Inter. Tr., p.15, Ls.1–9.)

Mr. Godwin once again said he acted in self-defense, and Officer Hewson responded, "Yeah. Well, have you ever had your rights read to you, your *Miranda* rights? Because I'm going to do that anyway." (Inter. Tr., p.15, Ls.14–16.) Mr. Godwin asked, "Are you going to arrest me?" (Inter. Tr., p.15, L.17.) Officer Hewson answered:

Q. I don't make those kind of decisions, okay. I probably won't arrest you. That doesn't mean that somebody else like Jerry [(Officer Johnson)] or somebody might, but I'm just tell you right out of the gate that it looked or sounded to me like a scenario that happened –

A. (Inaudible) drug dealer, and Ernie was going to rip him off. That's all I know.

Q. It sounded like a scenario to me that happened; that it wasn't meant to happen. Somebody didn't go there just to kill a man, you know. That's what it looked like to me, okay.

(Inter. Tr., p.15, L.18–p.16, L.3; *see also* Ex. A (Jason a), 16:19–17:02.) Mr. Godwin again admitted to shooting Mr. Anderson in self-defense. (Inter. Tr., p.16, Ls.4–5.)

Finally, about seventeen minutes into the interrogation, Officer Hewson told Mr. Godwin that he would read him his *Miranda* rights:

> Q. Yeah. Let me see if he has a rights waiver. You should know your rights.
>
> A. (Inaudible) my rights?
>
> Q. Pardon me?
>
> A. (Inaudible) *waive my rights*?
>
> Q. No. I'm going to read you your rights. That's what I'm going to do. I'm going to see if one of these guys has –
>
> A. *You shouldn't be reading it to me after I already said something.*
>
> Q. *I didn't have to read them to you to begin with, and I still don't*, because I would have read you your rights if you were under arrest and then I questioned you. You weren't under arrest or detained at the time I – that we started talking. I just want to make sure that you know – do you have a rights waiver, just a *Miranda* warning?

(Inter. Tr., p.16, Ls.4–22 (emphasis added); Ex. A (Jason a), 17:10–17:51.) At this point, an unidentified person agreed to get a *Miranda* waiver for Officer Hewson. (Inter. Tr., p.16, L.23.) Officer Hewson continued to discuss the crime and question Mr. Godwin. (Inter. Tr., p.16, L.25–p.17, L.21.) About one minute later, Officer Hewson got a copy of the *Miranda* waiver. (Inter. Tr., p.17, L.22–p.18, L.1.) He then told Mr. Godwin:

> Q. *Miranda* warning is what this is. I want to make sure you know what your rights are. You have a right to know, right. If I can read it.
>
> A. I'm sorry, Augie (phonetic), but I ain't an attorney.[4]
>
> Q. I get it, and I knew you did, okay. That's why I wanted to keep giving you – but let's try again. I'm going to read this.
>
> A. I never had – did anything like in any point in my life, and he's pointing a gun right at my head, pretty close.

[4] The parties disputed this statement at the suppression hearing. Mr. Godwin argued that he said, "I need an attorney," (R., p.183), and the State argued that Mr. Godwin said, "I'm sorry I lied to you but I ain't an attorney," (R., p.467). Officer Hewson testified that he did not hear the word "attorney" at all from Mr. Godwin. (Tr., p.114, L.23–p.116, L.7.) The district court found that Mr. Godwin said, "I'm sorry, Augie (phonetic), but I ain't an attorney." (R., pp.505–06.) Mr. Godwin does not challenge this factual finding on appeal due to a lack of a sufficient record.

> Q. Let me read this to you, okay. You have the right to remain silent when questioned. That's pretty self-explanatory, right? If you choose to answer questions, statements you make can be used against you in a court of law. I said, they can be. You have the right to an attorney before and/or during questioning. If you are unable to afford a lawyer and if you need one, one will be appointed to you by the Court. And he's a good lawyer. I know him. Do you understand those? And you can stop talking to me, Jason, anytime you want, okay?
>
> A. I may have to.

(Inter. Tr., p.18, L.1–p.19, L.1; *see also* Ex. A (Jason a), 18:58–20:15.) After these warnings, Officer Hewson continued to question Mr. Godwin about the crime for the next thirty-seven minutes. (Inter. Tr., p.19, L.2–p.46, L.9; Ex. A (Jason a), 20:15–57:32.)

While Officer Hewson questioned Mr. Godwin, Officer Johnson met with Ms. Jones. (Tr., p.38, Ls.5–9.) Ms. Jones did not identify Mr. Godwin from a photo line-up, but she affirmatively identified Ms. Griner/Cutler. (Tr., p.38, Ls.8–14.) After a total of fifty-seven minutes of questioning, Officer Johnson interrupted Officer Hewson to inform him of the photo line-up results. (Tr., p.38, L.24–p.39, L.10; Inter. Tr., p.46, Ls.16–17; Ex. A (Jason a), 57:32–57:52.) Officer Hewson in turn told Officer Johnson that Mr. Godwin confessed to the shooting. (Tr., p.38, Ls.5–7.) During this time, Mr. Godwin went outside to have a cigarette. (Tr., p.126, L.19–p.127, L.1, p.127, L.9–p.128, L.8.) A deputy went outside with Mr. Godwin, although Officer Hewson denied asking the deputy to accompany him. (Tr., p.127, Ls.17–18, p.129, Ls.4–8.) Officer Hewson then resumed the interview and questioned Mr. Godwin for another eleven minutes until Officer Johnson entered the room. (Inter. Tr., p.46, L.17–p.53, L.20; Ex. A (Jason b), 0:00–11:53.) Officer Hewson told him, "I think we're pretty much finished up. I mean, He's painted a pretty good picture and –" (Inter. Tr., p.53, Ls.15–17.)

After the questioning, Officer Johnson or Officer Hewson had Mr. Godwin placed under arrest. (Tr., p.42, Ls.16–22.) Officer Johnson testified the arrest happened "because of the

interview with [Officer] Hewson, and [Officer] Hewson apparently felt that all of the elements were there, as he expressed to me what Jason Godwin told him. I concurred, and he was placed under arrest."[5] (Tr., p.42, L.25–p.43, L.4.) Officer Johnson testified they would not have been able to arrest Mr. Godwin without his confession. (Tr., p.43, Ls.5–18.)

D. The District Court Should Have Granted Mr. Godwin's Motion To Suppress Because Officer Hewson's Delayed *Miranda* Warnings After Mr. Godwin's First Confession Failed To Cure The Fifth Amendment Violation

Mr. Godwin asserts his statements were the product of a custodial interrogation and thus inadmissible. His Fifth Amendment claim is raised in two parts. First, Mr. Godwin contends he was subject to a custodial interrogation after his first confession and, therefore, his statements made after this confession, but before the delayed *Miranda* warnings, must be suppressed. Second, he argues his statements made after the delayed *Miranda* warnings must also be suppressed, as they were the product of a deliberate *Miranda* violation and an intentional interrogation technique to ask first, warn later.

1. After Mr. Godwin's First Confession, *Miranda* Warnings Were Required Because Officer Hewson's Questioning Of Mr. Godwin Transformed To A Custodial Interrogation Upon That Confession

"*Miranda v. Arizona* requires that a person be informed of his or her Fifth Amendment privilege against self-incrimination prior to custodial interrogation; otherwise, incriminating statements are inadmissible." *State v. Hansen*, 138 Idaho 791, 795 (2003). "*Miranda* warnings are required where a suspect is 'in custody'" and subject to an "interrogation." *State v. James*, 148 Idaho 574, 576 (2010); *Hansen*, 138 Idaho at 795. At the trial level, the district court found *Miranda* warnings were not required because Mr. Godwin "was not in custody until such time as

[5] Contrary to Officer Johnson's testimony, Officer Hewson testified he did not have enough information to arrest Mr. Godwin and Officer Johnson, along with the prosecutor, made the decision to arrest him. (Tr., p.141, L.21–p.142, L.9.)

he was arrested." (R., p.508.) The district court did not address the "interrogation" component. (*See* R., pp.505–08.) On appeal, Mr. Godwin asserts both components were met—Mr. Godwin was in custody and subject to an interrogation after his first confession.

a. Mr. Godwin Was Subjected To An Interrogation

"Interrogation" has an expansive meaning. Interrogation includes not only "express questioning," but also "its 'functional equivalent.'" *State v. Huffaker*, 160 Idaho 400, 406 (2016) (quoting *Arizona v. Mauro*, 481 U.S. 520, 526 (1987)). "The functional equivalent of interrogation includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.'" *State v. Salato*, 137 Idaho 260, 267 (Ct. App. 2001) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980)). "The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 U.S. at 301. Thus, "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect"—through either express questioning or its functional equivalent—"amounts to interrogation." *Innis*, 446 U.S. at 301.

Here, Officer Hewson interrogated Mr. Godwin. Officer Hewson engaged in a mix of express questioning and its functional equivalent to elicit incriminating responses from Mr. Godwin. After Mr. Godwin's first confession, Officer Hewson told him, "Explain that to me again." (Inter. Tr., p.10, L.3.) A police officer should know that asking a suspect to explain again how he shot the deceased victim is reasonably likely to elicit an incriminating response. Next, Officer Hewson asked Mr. Godwin if he had Mr. Anderson's gun, how he knew Mr. Anderson, why he went to Mr. Anderson's motorhome, who wanted to talk to Mr. Anderson, how he knew Mr. Ruiz, why Mr. Ruiz was with him, who was driving, what vehicle he was driving, who was

in the vehicle, what kind of gun he used, what kind of gun Mr. Anderson had, who took Mr. Anderson's gun, where everyone was located the vehicle, if he got out of the vehicle, why he got out of the vehicle, how he knew Mr. Lynch, and how far away Mr. Anderson was when he shot him. (Inter. Tr., p.10, L.8–p.15, L.1, p.17, Ls.7–21.) These questions were singularly focused on gaining information from Mr. Godwin on the night of Mr. Anderson's death. Indeed, during this barrage of questioning, Officer Hewson obtained a second confession from Mr. Godwin. (Inter. Tr., p.14, Ls.23–25.) But, instead of reading Mr. Godwin his *Miranda* rights, Officer Hewson asked another question, "How far away was [Mr. Anderson]?" (Inter. Tr., p.15, L.1.) Officer Hewson should have known these express questions and functional equivalents were reasonably likely to elicit incriminating responses from Mr. Godwin on his involvement with Mr. Anderson's death. This constituted an interrogation for *Miranda* purposes.

Moreover, Officer Hewson continued the interrogation after providing Mr. Godwin with *Miranda* warnings. Officer Hewson questioned Mr. Godwin about his activities on the night Mr. Anderson's death for the next thirty-seven minutes after the warnings. (Inter. Tr., p.19, L.2–p.53, L.20; Ex. A (Jason a), 20:16–57:52.) For example, Officer Hewson asked Mr. Godwin about what he did after he shot Mr. Anderson and if anyone threatened Ms. Jones. (Inter. Tr., p.20, L.23–p.30, L.17.) He asked about Mr. Godwin's reasons for going to Mr. Anderson's motorhome. (Inter. Tr., p.35, L.18–p.38, L.23.) Then, after the break to confer with Officer Johnson, Officer Hewson kept questioning Mr. Godwin for another eleven minutes about the shooting, including his guns and, in particular, the threats to Ms. Jones. (Inter. Tr., p.46, L.18–p.53, L.12; Ex. A (Jason b), 0:00–11:55.) Officer Hewson got at least another nine confessions out of Mr. Godwin during this post-*Miranda* phase of the interrogation. (Inter. Tr., p.22, Ls.13–14, p.23, Ls.19–21, p.27, Ls.8–10, p.36, Ls.6–9, p.38, Ls.12–13, p.39, Ls.10–12, p.39, Ls.20–23,

p.41, Ls.18–19, p.47, Ls.22–25.) Officer Hewson should have known his combination of express questioning and functional equivalents were reasonably likely to elicit incriminating responses.

b. Mr. Godwin Was In Custody

The second component to trigger *Miranda* warnings is "custody." The district court ruled determined Mr. Godwin was not in custody. (R., pp.505–08.) Mr. Godwin submits the district court's ruling was in error. He asserts, upon his first confession, he was in custody.

This custody inquiry presents is a matter of first impression for this Court—whether a suspect is in custody once he confesses to serious criminal conduct. A number of state courts have held a suspect is in custody upon his confession, and this Court should agree. A confession to a serious crime transforms a voluntary interview into a custodial situation. Alternatively, if this Court declines to adopt this bright-line rule, this Court should still consider a confession to be a significant factor in the custody determination. Either way, Mr. Godwin was in a custodial situation once he confessed to shooting Mr. Anderson. A reasonable person in Mr. Godwin's position would not perceive that he was free to leave.

"A person is in custody whenever subjected to a restraint on his or her liberty in any degree similar to a formal arrest." *Hansen*, 138 Idaho at 795 (citations omitted). "To determine whether custody has attached, 'a court must examine all of the circumstances surrounding the interrogation.'" *James*, 148 Idaho at 577 (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)).

> Factors to be considered may include the degree of restraint on the person's freedom of movement (including whether the person is placed in handcuffs), whether the subject is informed that the detention is more than temporary, the location and visibility of the interrogation, whether other individuals were present, the number of questions asked, the duration of the interrogation or detention, the time of the interrogation, the number of officers present, the number of officers involved in the interrogation, the conduct of the officers, and the nature and manner of the questioning.

State v. Christensen, 159 Idaho 339, 351 (Ct. App. 2015). "The test is an objective one and 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'" *James*, 148 Idaho at 577 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). Law enforcement's "unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." *Berkemer*, 468 U.S. at 442. "[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances," without consideration of the officer's subjective views. *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004).

Several state courts have held a suspect is in custody after his confession to a serious crime. *State v. Pitts*, 936 So. 2d 1111, 1134 (Fla. Dist. Ct. App. 2006) ("Once that confession to the commission of a serious crime had been uttered, a reasonable person in [the defendant's] situation would have understood that he would not be allowed to go free. At that point, the interrogation became custodial . . . ."); *People v. Carroll*, 742 N.E.2d 1247, 1250 (Ill. App. Ct. 2001) ("[D]efendant knew that the officers suspected him of murder because he had just, moments earlier, inculpated himself in the crime. Considering these facts, the trial court's finding that any reasonable person in defendant's position would have believed himself to be in custody despite the officers' assurances to the contrary was not manifestly erroneous."); *Jackson v. State*, 528 S.E.2d 232, 235 (Ga. 2000) ("A reasonable person in [the defendant's] position, having just confessed to involvement in a crime in the presence of law enforcement officers would, from that time forward, perceive himself to be in custody, and expect that his future freedom of action would be significantly curtailed."); *Commonwealth v. Smith*, 686 N.E.2d 983, 987 (Mass. 1997) ("[A]fter the defendant told the police that he was there to confess to the murder of his girl friend [sic], given the information the police already had received about the murder, we conclude that if

he had wanted to leave at that point, he would not have been free to do so."); *Kolb v. State*, 930 P.2d 1238, 1244 (Wyo. 1996) ("A reasonable person who confessed to a killing while being interviewed at a police station would not feel free to terminate the interview and leave the station. Thus, the interrogation that followed the confession did so while Mr. Kolb was in custody . . . ."); *People v. Ripic*, 182 A.D.2d 226, 235–36 (N.Y. App. Div. 1992) ("The People contend that defendant's 'ambiguous' statement, 'I had to kill him,' did not transform the noncustodial situation to a custodial one and that the poststatement inquiry by the investigators at the hospital was therefore proper under the circumstances. We disagree and affirm County Court's alternative finding that if defendant was not 'in custody' prior to that statement, 'there is absolutely no doubt' that she was 'in custody' after that statement."); *see also Locke v. Cattell*, 476 F.3d 46, 53 (1st Cir. 2007) (noting that "several state courts have found custodial interrogations following an admission," but recognizing "no Supreme Court case" on the issue). As explored in these cases, a reasonable person in the suspect's position would understand himself to be in custody having confessed to a serious crime to a police officer at a police station.

Applying this rule here, Mr. Godwin was in custody once he confessed to shooting Mr. Anderson. Mr. Godwin does not dispute he initially came to the police station voluntarily. (R., p.506.) This noncustodial situation changed, however, once Mr. Godwin admitted to the crime. Mr. Godwin confessed to shooting Mr. Anderson ("Pulled up there and . . . the guy pointed a gun at me, and I grabbed my gun and shot him"), and no reasonable person would feel free to leave the police station at that point. "[I]t is utter sophistry to suggest that a person in defendant's position, having made such an incriminating statement to police officers concerning the very homicide they were investigating, would feel that [ ]he was not under arrest and was free to leave." *Ripic*, 182 A.D.2d at 236. Upon his first confession, the voluntary interview

transformed to custodial interrogation, and therefore *Miranda* warnings were required.

Alternatively, even if Mr. Godwin's confession alone did not create a custodial situation, his confession is a significant factor that, along with the other circumstances, contributed to him being in custody. For example, in *Xu v. State*, the Texas appellate court held the defendant's "pivotal admission" to the crime, plus other factors, established the defendant was in custody from his admission forward. 100 S.W.3d 408, 413–15 (Tex. App. 2002). Similarly, in *State v. Oney*, the Vermont Supreme Court rejected a bright-line rule, but nonetheless reasoned, "We acknowledge that once a suspect confesses to committing a serious criminal act, this fact is significant in this evaluation." 989 A.2d 995, 1000 (Vt. 2009). "[T]he severity of the crime confessed to affects the weight we attribute to this factor." *Id.* As such, "mere confession to what defendant believed to be three misdemeanors would not necessarily lead a reasonable person in defendant's circumstances to believe that he was not free to leave." *Id.* Likewise, in *Commonwealth v. Hilton*, the Massachusetts Supreme Court refused to "'freeze-frame' the instant when the defendant first made an inculpatory remark" to create a custodial situation. 823 N.E.2d 383, 397 (Mass. 2005). "As a suspect makes incriminating statements, a previously noncustodial setting can become custodial—a person who has just confessed to a crime would reasonably expect that she was no longer free to leave. However, an interview does not automatically become custodial at the instant a defendant starts to confess." *Id.* at 396. Nevertheless, the court held the defendant was in custody shortly after her confession because the police engaged in "detailed questioning" with the defendant as the "focal point of the investigation." *Id.* at 397; *see also State v. Bartelt*, 906 N.W.2d 684, 702 (Wis. 2018) (Bradley, J., dissenting) (stating that it "stretches the bounds of credulity" for the majority to hold that a suspect could confess to serious felony and "and then march past detectives on the way out of the

interrogation room and the police station"); *but see id.* at 694–700 (majority opinion) (holding the admission to a crime is only one factor). While a confession may not immediately transform noncustodial setting into a custodial one, that confession coupled with the other factors can create a situation in which a reasonable person would not feel free to leave.

The factors in this case, including Mr. Godwin's confession, tip in favor of a custodial setting. Mr. Godwin recognizes some facts are neutral. "The mere fact that an interview was conducted in a law enforcement facility, by an officer, at that officer's request, is not sufficient for a finding of custody." *Huffaker*, 160 Idaho at 406. Mr. Godwin was questioned at the sheriff's office, by Officer Hewson, at Officer Ulmer and Johnson's request. (R., pp.506–07.) Additionally, while Officer Hewson and Officer Johnson traded information, Mr. Godwin took a cigarette break, albeit with a police officer accompanying him. (R., p.506.) Yet, despite these neutral factors, there are "some additional factual circumstances—some element of coercion or influence by law enforcement—which would cause a reasonable person to feel his or her freedom of movement was restrained." *Huffaker*, 160 Idaho at 406. First, as explored above, Mr. Godwin confessed to a serious crime: homicide. His "pivotal admission"—from denying he was in Kooskia to admitting to shooting Mr. Anderson—weighs heavily in favor of a custody determination. *See Xu*, 100 S.W.3d at 413. Second, Officer Hewson's detailed questioning about the particulars of the crime transformed the "nonaccusatory interview into a custodial interrogation." *Hilton*, 823 N.E.2d at 397. (*See* Inter. Tr., p.9, L.22–p.15, L.13.) Third, Officer Hewson used minimization techniques to get a confession and then other implicitly coercive tactics to obtain more information. For example, Officer Hewson told Mr. Godwin, "That's why if you don't tell the truth, it looks worse. I mean, you get that," "The more honest you are with me, the better it's going to look for you," and "Somebody pointed a gun at her. Don't tell me

most of the truth." (Inter. Tr., p.14, Ls.17–18, p.26, Ls.22–23, p.48, Ls.17–18.) Officer Hewson analogized the situation to the "old creepy" "horror movie" "The Hills Have Eyes" because "[w]hen you're driving down the street and you think nobody is watching, there's probably somebody watching." (Inter. Tr., p.28, Ls.13–22.) He told Mr. Godwin, "Well, it is like I told you: I don't make – I just try to find the facts, okay. I have bosses, right. I have bosses like Doug Ulmer and Jerry, you know what I mean. I have a silver badge. They have a gold badge, okay." (Inter. Tr., p.41, L.23–p.42, L.2.) Further, Officer Hewson told Mr. Godwin that the interview would not end until Officer Hewson was satisfied with Mr. Godwin's answers. When Mr. Godwin said, "We better get the gun," and Officer Hewson responded, "We will do that. Okay. We will do that. *We are not in a hurry here, Jason*. Again, it's kind of important for you to remember: what did Ernie do with Amanda outside the trailer?" (Inter. Tr., p.26, Ls.4–6 (emphasis added).) Later on, Officer Hewson said, "Just think about it. *We are not in a hurry*." (Inter. Tr., p.47, Ls.20–21 (emphasis added).) Officer Hewson also told him, "Okay, because we are doing good, I think, *so far*. Is there anything else you can think of, Jason, about this whole incident?" (Inter. Tr., p.45, Ls.12–14 (emphasis added).) These coercive statements, along with pointed questions about the crime, established a custodial setting. A reasonable person in Mr. Godwin's position, having admitted to a police officer at the police station to shooting and killing a person, would understand his situation to be that he was subject to a restraint on his liberty akin to a formal arrest.

c. Due To The Custodial Interrogation Without *Miranda* Warnings, Mr. Godwin's Statements After His First Confession, But Before The Delayed Warnings, Must Be Suppressed

As established above, Mr. Godwin was subject to a custodial interrogation after his first confession to Officer Hewson. This custodial interrogation "triggered" the requirement of

Miranda warnings. *State v. Arenas*, 161 Idaho 642, 645 (Ct. App. 2016). Accordingly, Officer Hewson was required to provide Mr. Godwin with *Miranda* warnings immediately after his confession. *See Hansen*, 138 Idaho at 795. The district court erred in determining Mr. Godwin was not in custody and, as such, no warnings were required. (R., pp.505–08.) The district court should have suppressed any "exculpatory or inculpatory statements stemming from custodial interrogation of [Mr. Godwin] unless the questioning was preceded by" *Miranda* warnings. *Munoz*, 149 Idaho at 128. Therefore, Mr. Godwin's statements between his first confession and the delayed *Miranda* warnings must be suppressed.

2. Mr. Godwin's Statements After The Delayed *Miranda* Warnings Must Also Be Suppressed Because The Warnings Did Not Cure The Fifth Amendment Violation

The final issue is whether Officer Hewson's delayed *Miranda* warnings adequately advised Mr. Godwin of his Fifth Amendment rights. The facts show, however, that Officer Hewson's midstream *Miranda* warnings did not inform Mr. Godwin that a separate and distinct round of interrogation had begun and that he had a genuine choice to remain silent. Thus, Mr. Godwin's post-warning statements were also subject to suppression.

a. Post-*Miranda* Statements Must Be Suppressed If The Interrogator Deliberately Used A Two-Step Strategy To Ask First, Warn Later

This Court recently addressed the admissibility of post-*Miranda* statements in *State v. Wass*, 162 Idaho 361, 396 P.3d 1243 (2017).[6] In *Wass*, the defendant made an unwarned inculpatory statement and the officer, upon realizing his "mistake," gave the defendant *Miranda* warnings about two minutes later. *Id.* at 1244–45. After the warnings, the officer questioned the defendant again and the defendant made the same inculpatory statement. *Id.* at 1245. To determine whether the second inculpatory statement was admissible, this Court adopted the test

from Justice Kennedy's concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004). *Wass*, 396 P.3d at 1248–49.

In *Seibert*, the U.S. Supreme Court distinguished between a "good-faith *Miranda* mistake," and a "conscious decision" to ask first, warn later. *Seibert*, 542 U.S. at 605–06, 614 (plurality opinion); *see also Oregon v. Elstad*, 470 U.S. 298 (1985) (on good-faith *Miranda* mistakes). The "manifest purpose" to ask first, warn later "is obvious"—"to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble." *Seibert*, 542 U.S. at 613. If the interrogator employed an ask first, warn later technique to elicit a confession before advising the suspect of his rights, "the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in context." *Id.* at 613. For the plurality, the ultimate question was whether "a reasonable person in the suspect's shoes could have seen the [second] questioning as a new and distinct experience" so that the *Miranda* warnings "made sense" as "a genuine choice" to remain silent. *Id.* at 615–16. The plurality identified several factors[7] to determine if the midstream *Miranda* warnings were "effective enough to accomplish their object." *Id.* at 615. Justice Kennedy, concurring in the judgment, set forth "a narrower test only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to

[6] As of the date of filing the Appellant's Brief, a Petition for a Writ Certiorari is pending with the U.S. Supreme Court.

[7] The factors are: "[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615.

undermine the *Miranda* warning." *Id.* at 622 (Kennedy, J., concurring in the judgment). Rather than employing a "multifactor test" in every case to determine if the delayed warnings accomplished their objective, Justice Kennedy advanced statement would be admissible absent a "deliberate two-step strategy." *Id.* at 621–22. This Court adopted Justice Kennedy's narrow test. *Wass*, 396 P.3d at 1248–49. Accordingly, if the two-stage interrogation was intentional, then the Court uses the *Seibert* plurality's multifactor test to determine admissibility. *Wass*, 396 P.3d at 1249. Otherwise, the post-*Miranda* statements are admissible. *Id.*

b. The Objective Facts Show Officer Hewson Used A Deliberate Two-Step Strategy With Mr. Godwin After His First Confession

Although *Wass* clarified the framework for the admissibility of ask first, warn later statements, the *Wass* Court did not explore "how a court should determine whether an interrogator used a deliberate two-step strategy." *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006) (adopting Justice Kennedy's test). The Ninth Circuit, in joining "our sister circuits," held "in determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *Williams*, 435 F.3d at 1158. The Ninth Circuit noted this was a combination of the plurality's and Justice Kennedy's approach. *Id.* at 1158 n.12. The objective evidence includes the factors from the *Seibert* plurality: "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *Williams*, 435 F.3d at 1159. The focus must be on the objective evidence to show the "question-first tactic at work" because "the intent of the officer will rarely be . . . candidly admitted." *Seibert*, 542 U.S. at 616 n.6. In summary, "[t]he court should consider any objective evidence or available expressions of

subjective intent suggesting that the officer acted deliberately to undermine and obscure the warning's meaning and effect." *Williams*, 435 F.3d at 1160.

In the case at hand, the objective evidence supports an inference that Officer Hewson deliberately used a two-stage interrogation strategy. The *Seibert* factors are in favor of an intentional tactic. After Mr. Godwin's first confession, Officer Hewson asked detailed questions about the crime. There was no lapse in time or change in setting between the first confession and the post-warning statements. The same officer (Officer Hewson) questioned Mr. Godwin for the entire interrogation.[8] Finally, Officer Hewson's questions treated the "second round as continuous with the first." *Seibert*, 542 U.S. at 615. These objective factors weigh in favor of a deliberate strategy to obtain a confession first and give "ineffective" warnings second. *Id.* at 613.

Turning to subjective evidence, Officer Hewson's testimony provides no expressions of subjective intent to alter the objective facts of an intentional two-step tactic. For one, Officer Hewson did not testify his failure to warn Mr. Godwin after the first confession was a "mistake or accident." *Wass*, 162 Idaho at 361. Officer Hewson was not trying to correct an innocent omission when he finally read Mr. Godwin the *Miranda* warnings. Second, Officer Hewson acknowledged his use of minimization techniques "to get him to say he was involved, if he was involved." (Tr., p.110, L.17–p.111, L.7.) Third, Officer Hewson's testimony on his state of mind after Mr. Godwin's first confession indicates he realized *Miranda* warnings were required, but did not act for about ten minutes of questioning. Officer Hewson testified, "I still even at that point in time [of the confession] did not feel like *Miranda* needed to be read. I typically have a history of reading *Miranda* probably long before I need to with people. But I could see the

[8] During the interrogation, Mr. Godwin briefly answered some questions from Officer Ulmer on Officer Hewson's phone. (Inter. Tr., p.32, L.14–p.33, L.14.)

conversation was changing, and I wanted to protect myself later on down the road . . . ." (Tr., p.111, Ls.16–21.) He also admitted, "I did not know he was even in the country at the time of the shooting, but things started to change so that – that's why I eventually read the *Miranda* warning to him." (Tr., p.112, Ls.1–5.) As to when the "conversation" changed, Officer Hewson testified, "At the point in time that he said he was defending himself, and he shot Kyle Anderson. And I don't remember if he expanded on that at that point in time[9] and started to talk about what they were doing with Kyle Anderson after he had been shot. I'm not sure what that point was to where I started thinking, should probably read *Miranda* warning, okay." (Tr., p.113, Ls.4–10.) He also said, "I felt that the course of the conversation was changing. All the sudden we went from being in Dudley, Idaho to being on scene and shooting him, you know. So, I just felt that things had changed enough where, you know, it was probably a good idea to read him his rights." (Tr., p.142, Ls.17–22.) This testimony shows that Mr. Godwin's first confession prompted Officer Hewson to think *Miranda* warnings were required, and yet Officer Hewson did not give those warnings right away. Instead, Officer Hewson asked Mr. Godwin, "Explain that to me again," (Inter. Tr., p.10, L.3), and questioned him for another ten minutes. Granted, Officer Hewson's testimony does not rise to the level of the *Seibert* officer's candid admission to withhold warnings, 542 U.S. at 605–06, but his testimony is, at best, neutral as to his subjective intent during the interrogation.

In sum, the objective evidence suggests Officer Hewson deliberately used a two-step tactic to obtain a confession from Mr. Godwin and then provide the requisite warnings. Unlike *Wass*, the evidence does not indicate Officer Hewson "made a mistake in questioning

[9] Mr. Godwin "expanded" on shooting Mr. Anderson because Officer Hewson said, "Explain that to me again." (Inter. Tr., p.10, L.3.)

[Mr. Godwin] before giving him his *Miranda* rights, realized his mistake, and immediately attempted to correct his mistake by giving [Mr. Godwin] his *Miranda* warnings and questioning him again." 396 P.3d at 1249. Likewise, this is not a situation where "[a]n officer may not realize that a suspect is in custody and warnings are required," or "[t]he officer may not plan to question the suspect or may be waiting for a more appropriate time." *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring in judgment). This was a situation where Officer Hewson was instructed by his superior, Officer Johnson, to get information from Mr. Godwin, the primary and only suspect in Mr. Anderson's murder. Once Officer Hewson obtained a confession, his failure to provide *Miranda* warnings immediately was a deliberate strategy to obtain more unwarned statements and to diminish the effectiveness of the delayed warnings.

c. The Midstream *Miranda* Warnings Did Not Adequately And Effectively Apprise Mr. Godwin Of His Choice To Exercise His Fifth Amendment Rights

Having established an intentional two-stage interrogation, the last question is whether Officer Hewson's delayed warnings were "effective enough to accomplish their object." *Seibert*, 542 U.S. at 615 (plurality opinion); *see also id.* at 621–22 (Kennedy, J., concurring in judgment). To determine whether a suspect understood that he "had a genuine choice" to remain silent or follow-up on his prior admissions, this Court uses the *Seibert* multifactor test. *Wass*, 396 P.3d at 1249. In addition these factors, Justice Kennedy recommended the courts examine any "curative measures," such as "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." *Id.* at 622 (Kennedy, J., concurring in judgment). Even with the focus on different factors, the concern for Justice Kennedy was the same as the plurality: "to ensure that a reasonable person in the suspect's situation would

understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.*

In this case, the *Seibert* factors do not ensure that a reasonable person in Mr. Godwin's position would adequately understand his Fifth Amendment protections once given the *Miranda* warnings. None of the *Seibert* factors were met to allow Mr. Godwin "to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.* at 622 (Kennedy, J., concurring in judgment). The least compelling factor is the first: the completeness and detail of the questions and answers. But, even so, the detail of the questions and answers in the first round mirrored the second round. Both focused on Mr. Godwin's involvement in Mr. Andersons's death. The remaining factors weigh heavily in favor of suppression: overlapping content, timing and setting, continuity of personnel, and continuity of questioning. *Id.* at 615 (plurality opinion). The contents of Mr. Godwin's statements overlapped entirely. Again, his admissions all revolved around his shooting of Mr. Anderson. The timing and setting of the first and second statements did not change. Mr. Godwin's statements were made within the same hour-long interrogation in the same room. There was continuity of police personnel. Officer Hewson questioned Mr. Godwin for almost the entire time. (See App. Br., p.30, n.8.) The interrogator's questions treated the second round as continuous with the first. Officer Hewson made no distinction or pause between the pre- and post-*Miranda* questioning. "The truly 'effective' *Miranda* warnings . . . will occur only when certain circumstances—a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning—intervene between the unwarned questioning and any postwarning statement." *Seibert*, 542 U.S. at 618 (Breyer, J., concurring). These circumstances were simply not present here.

Moreover, no curative measures were done to separate the pre- and post-*Miranda* interrogations. "[A]n additional warning that explains the likely inadmissibility of the

prewarning custodial statement may be sufficient." *Id.* at 622 (Kennedy, J., concurring in judgment). "[T]elling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail." *Id.* at 613 (plurality opinion). In this case, Officer Hewson gave no additional warnings or offered any other curative measures. (Inter. Tr., p.18, Ls.15-25.) In fact, Officer Hewson did the opposite. He repeatedly minimized the situation and the objectives of *Miranda* warnings. When Mr. Godwin asked if Officer Hewson would arrest him, Officer Hewson said, "I probably won't arrest you," even though someone else "might," because it looked to him like "it wasn't meant to happen." (Inter. Tr., p.15, L.17-p.16, L.1.) He also told Mr. Godwin "I still don't" "have to read you your rights" after the first confession. (Inter. Tr., p.16, Ls.16-20.) He warned Mr. Godwin, "That's why if you don't tell the truth, it looks worse. I mean, you get that." (Inter. Tr., p.14, Ls.17-18.) Upon hearing the *Miranda* warnings "only in the aftermath of interrogation and just after making a confession," Mr. Godwin "would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Seibert*, 542 U.S. at 613 (plurality opinion). "A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision." *Id.* And Mr. Godwin had this reaction. He told Officer Hewson right before the warnings, "You shouldn't be reading it to me after I already said something." (Inter. Tr., p.16, Ls.14-15.) Mr. Godwin's own statements show the ineffectiveness and inadequacy of the warnings. Absent any curative measures, or other *Seibert* factors to separate the two interrogations, a reasonable person in Mr. Godwin's position would not have understood the delayed *Miranda* warnings "to convey a message that [ ]he retained a

choice about continuing to talk." *Seibert*, 542 U.S. at 616–17 (plurality opinion).

In conclusion, Officer Hewson used a deliberate two-step interrogation after the first confession from Mr. Godwin. The delayed warnings did not cure the *Miranda* violation to adequately and effectively inform Mr. Godwin of his Fifth Amendment protections. Therefore, Mr. Godwin's post-warning statements, just like his pre-warning statements, must be suppressed, and the district court erred by denying his motion.

II.

The District Court Erred When It Ruled Mr. Godwin Could Only Present Opinion Or Reputation Evidence Of Mr. Anderson's Violent And/Or Aggressive Character After Showing That Mr. Godwin Was Aware Of Mr. Anderson's Propensity For Violence

A. Introduction

The district court erred when it prohibited Brandon Fisher and Billing Ellenberg from testifying about specific instances of conduct unless proper foundation was laid to show that Mr. Godwin was aware of Mr. Anderson's propensity for violence, because the character evidence was admissible to show that Mr. Anderson was acting in conformity with his violent and/or aggressive character, even if Mr. Godwin was not aware of Mr. Anderson's reputation.

B. Standard Of Review

"[T]he interpretation of a rule of evidence, like the interpretation of a statute, is reviewed de novo." *State v. Hill*, 161 Idaho 444, 447 (2016) (quoting *State v. Moore*, 131 Idaho 814, 821 (1998)).

C. The District Court Erred When It Ruled Mr. Godwin Could Only Present Opinion Or Reputation Evidence Of Mr. Anderson's Violent And/Or Aggressive Character After Showing That Mr. Godwin Was Aware Of Mr. Anderson's Propensity For Violence

In February of 2016, a Motion in Limine was filed by the State requesting that the district court prohibit proposed defense witnesses Brandon Fisher and Billy Ellenberg from testifying

"about specific instances of conduct showing that the deceased, Kyle Anderson, was violent and aggressive." (R., pp.544–547.) Each witness was expected to testify that Mr. Anderson had pointed a gun at him. (R., p.544.)

After hearing the argument of both parties, the district court ruled that:

> . . . The general rule is that evidence of character is not admissible to prove conduct at a specific incident, meaning propensity. There's an exception to the general rule that alleged that the defendant that was acting in self-defense in certain instances to bring forth propensity but only can be made as to reputation and opinion testimony is my reading of *Custodio*. And if you read the trial court in *Custodio*, the trial court said that he had previously allowed opinion testimony with reference to propensity for violence and reputation for the same. So, this order does not bar that type of evidence from being introduced, *if there's a proper foundation that the defendant in this case had knowledge of the same* or it was communicated to them . . . Evidence purporting to show Kyle Anderson's propensity to violence shall be presented only in the form of reputation or opinion evidence. . . . Again, there will be a necessary requirement of foundation to allow for the introduction of opinion testimony as to reputation or opinion.

(Tr., p.484, L.18–p.486, L.2 (emphasis added).) The Motion in Limine Order noted that specific instances of conduct were prohibited and noted that "[e]vidence purporting to show Kyle Anderson's propensity to violence shall be presented only in the form of reputation or opinion evidence." (R., pp.700–01.)

Mr. Godwin asserts that the district court's ruling that character evidence was admissible to show that Mr. Anderson was acting in conformity with his violent and/or aggressive character only if Mr. Godwin was aware of Mr. Anderson's reputation is erroneous.

Rule 404(a) reads:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> . . .
>
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or

> evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> . . .

By its plain language, Rule 404(a) places limitations on when evidence of a "person's character or a trait of character" can be used to show "the person acted in conformity therewith on a particular occasion," but it does not, in and of itself, limit the use of such evidence for any other purpose. *Id.* Rule 405 limits how evidence of an accused or victim's character can be admitted pursuant to Rule 404(a)(1) and (2):

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

I.R.E. 405. Thus, Rules 404(a) and 405 define when and how a party may present evidence of a person's character only when such evidence is offered for the jury to consider *whether the person acted in conformity with that trait of character* on a particular occasion.

This is contrary to Rule 404(b) which specifically allows the admission of evidence of a person's "other crimes, wrongs, or acts" for any purpose other than to prove that person acted in conformity therewith on a particular occasion, provided such evidence is relevant and not overly prejudicial. This type of evidence is offered to *explain the defendant's state of mind* when committing the homicide. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." I.R.E. 404(b).

This list of permissible purposes is not exclusive, *State v. Hairston*, 133 Idaho 496, 501 (1999) (citation omitted), and the Idaho Court of Appeals has recognized that a defendant claiming self-defense may present evidence of the victim's prior instances of violent conduct, provided the defendant was aware of that conduct at the time of incident, because such evidence is relevant to the defendant's state of mind. *See State v. Custodio*, 136 Idaho 197, 205 (Ct. App. 2001); *State v. Hernandez*, 133 Idaho 576, 584–85 (Ct. App. 1999).

In *Hernandez*, the Court of Appeals found that a defendant is not required to show that a defendant had knowledge of the victim's violent disposition, when character evidence of an individual's violent disposition is offered for the purpose of suggesting that the alleged victim was the aggressor. Writing for a unanimous Court of Appeals in *Hernandez*, Judge Lansing noted the differing evidentiary requirements:

> When the evidence is offered to show conforming behavior by the victim, the defendant need not show that he had prior knowledge of the victim's violent disposition, for whether the defendant was aware of the victim's propensity for violence has no bearing upon the likelihood that the victim acted in conformity with that propensity on a particular occasion. . . .
>
> On the other hand, evidence of the defendant's awareness of the victim's violent reputation or behavior is necessary foundation when character evidence is offered to support a different element of the defense of self-defense or defense of others—that the defendant reasonably feared the victim and reasonably believed that the force used was necessary to repel the victim's attack. When evidence of a victim's violent or aggressive nature is offered for this second purpose, the evidence is admissible only if it is shown that the defendant was aware of the victim's violent character, for otherwise the defendant's actions could not have been influenced by it. It is worth observing that, when the evidence is used for this second purpose, Rule 404(a) is entirely inapplicable because the character evidence is not being offered "for the purpose of proving that the [victim] acted in conformity therewith on a particular occasion." . . .
>
> Although it must be acknowledged that courts have often confused these two purposes of victim character evidence, logic dictates that the defendant's awareness of the victim's aggressiveness is irrelevant to the first purpose and is essential to the relevance of the character evidence for the second purpose.

133 Idaho at 584–85 (citations omitted).

Therefore, it is clear that under Rules 404 and 405, character evidence showing that Mr. Anderson was violent and/or aggressive was admissible even if Mr. Godwin was not aware of Mr. Anderson's reputation. The district court erred when it denied Mr. Godwin the opportunity to present evidence of the character of Mr. Anderson by requiring Mr. Godwin to show that he had prior knowledge of Mr. Anderson's reputation in order to satisfy the erroneous foundational requirement for admissibility. Moreover, the State will be unable to prove the error is harmless beyond a reasonable doubt.

D. The State Will Be Unable To Prove, Beyond A Reasonable Doubt, The District Court's Error Did Not Contribute To The Verdict

The harmless error doctrine has been defined by this Court: "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 v. California*, 386 U.S. 18, 24 (1967)). Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation 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*. *See State v. Perry*, 150 Idaho 209, 227 (2010). The State will be unable to prove, beyond a reasonable doubt, that the district court's error in denying Mr. Godwin the opportunity to present evidence of Mr. Anderson's reputation for violence, unless he had prior knowledge of his reputation, did not contribute to the guilty verdict. The only contested issue in Mr. Godwin's case was whether the killing of Mr. Anderson was justified or criminal. Certainly, evidence supporting Mr. Godwin's theory, that he acted in self-defense, would be of significant importance. Prohibiting the presentation of evidence showing that Mr. Anderson had a reputation

for violence and aggression limited the jury's ability to properly weigh the evidence. As such, the district court's error was not harmless and this Court must vacate the conviction.

III.

This Court Should Overrule *State v. Custodio* And Hold Specific Instances Of A Victim's Conduct, Showing A Violent Character, Can Be An Essential Element Of A Self-Defense Claim And Are Admissible Under Idaho Rule Of Evidence 405

A. Introduction

Mr. Godwin recognizes a line of cases which have held specific instances of a victim's conduct are not admissible under Idaho Rule of Evidence 405(b) because a victim's propensity for violence or aggressiveness does not constitute an essential element of a self-defense claim. *See State v. Custodio*, 136 Idaho 197 (Ct. App. 2001). However, he asserts this line of cases are incorrectly decided and are patently unfair to criminal defendants. Accordingly, he respectfully asks this Court to either revisit and overturn this line of cases, if assigned to the Court of Appeals, or to decline to follow the cases, if assigned the Idaho Supreme Court, and to hold that under Rule 405(b) specific instances of a victim's violent or aggressive conduct can be admissible as proof of their character and can constitute an essential element of a self-defense claim. Mr. Godwin contends if this Court does so, it should reverse his conviction and remand this case for a new trial involving proper application of Rule 405(b).

B. Standard Of Review

"[T]he interpretation of a rule of evidence, like the interpretation of a statute, is reviewed de novo." *Hill*, 161 Idaho at 447 (quoting *Moore*, 131 Idaho at 821).

C. This Court Should Overrule *State v. Custodio* And Hold Specific Instances Of A Victim's Conduct, Showing A Violent Character, Can Be An Essential Element Of A Self-Defense Claim And Are Admissible Under Idaho Rule Of Evidence 405

Mr. Godwin respectfully contends that *Custodio* and its progeny were fundamentally

flawed and unfair when they were decided, and that they remain so today.[10] It is well recognized that the doctrine of *stare decisis* need not be strictly adhered to if the precedent in question is manifestly wrong, has proven over time to be unjust or unwise, or if overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. *State v. Humphreys*, 134 Idaho 657, 660 (2000) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990)). Accordingly, he respectfully requests *Custodio* be overruled and this Court hold under Rule 405(b) specific instances of a victim's violent or aggressive conduct can be admissible as proof of their character and can constitute an essential element of a self-defense claim.

In the case at hand, the State filed a Motion in Limine requesting that the district court prohibit proposed defense witnesses Mr. Fisher and Mr. Ellenberg from testifying "about specific instances of conduct showing that the deceased, Kyle Anderson, was violent and aggressive." (R., pp.544–47.) Each witness was expected to testify that Mr. Anderson had, on separate occasions, pointed a gun at him. (R., p.544.) The State relied on *State v. Custodio*, 136 Idaho 197 (Ct. App. 2001), for its position that "specific instances of conduct may not be presented to aid a defendant in his claim of self-defense, or to show that the victim was the first aggressor." (R., pp.544–47.)

At the hearing on the Motion in Limine, defense counsel argued that "the current interpretation of Idaho Rule of Evidence ought to be overturned or disavowed . . ." (Tr., p.482,

[10] Counsel is only aware of one unpublished decision following *Custodio*'s holding in the State of Idaho, *State v. Guel*, Supreme Court Docket Number 38149, Idaho Court of Appeals, 2012 Unpublished Opinion No.655 (October 3, 2012). Mr. Godwin recognizes this is an unpublished opinion and is not to be cited as authority because it is neither case law nor binding precedent. *See* Internal Rule of the Idaho Supreme Court 15(f). However, the district court relied, in part, on *Guel* in issuing its decision in the case at hand. Accordingly, Mr. Godwin is merely citing to this case to both explain the district court's ruling and to illustrate the fact that *Custodio* is the beginning of a line of cases with similar holdings.

Ls.7–8.) Counsel noted Mr. Fisher and Mr. Ellenberg "would testify about specific prior acts of the decedent which are identical to the conduct the decedent is alleged to have done leading up to his death. . . . not just similar acts, . . . it's an identical act of pulling a weapon on someone." (Tr., p.482, Ls.20–24.) Defense counsel represented Mr. Ellenberg "would testify that just two weeks prior to his death Kyle Anderson pulled a handgun on him." (Tr., p.483, Ls.1–3.) Mr. Fisher would testify in the winter of 2013 "he was looking for an individual and went to a house where Kyle Anderson was staying" and Mr. Anderson pointed his gun at him. (Tr., p.483, Ls.3–7.)

In response to defense counsel's request that the opinion in *Custodio* be overturned or disavowed, the district court noted, "[w]hile I am tempted to do that, there are other states that have a much broader view", it was bound by precedent.[11] (Tr., p.483, L.17–p.484, L.7.) The district court ruled as follows:

> So, it is the opinion of this Court that Counsel is basically asking the Court to prevent defense witnesses Fisher and Ellenberg from testifying as to specific acts that they alleged occurred with reference to Kyle Anderson pointing a gun at them in the past. It's clear that those – that testimony would be introduced for the purpose of showing that Kyle Anderson was either a violent or aggressive person. Was the initial aggressor or otherwise. This is covered by basically two rules, as reading *Custodio*, or multiple rules. The first one would be 404(a)(2) which regards character of the victim. The general rule is that evidence of character is not admissible to prove conduct at a specific incident, meaning propensity. There's an exception to the general rule that alleged that the defendant that was acting in self-defense in certain instances to bring forth propensity but only can be made as to reputation and opinion testimony is my reading of *Custodio*. . . . however, specific evidence of instances of conduct can only be introduced as direct evidence if it falls under Rule 404(b). And the Court in *Custodio* found that evidence of specific instances of violent conduct were not admissible under 404(b) to show motive, opportunity, intent, preparation, knowledge, plan, or absence of mistake. Under the *Custodio* analysis, specific instances of Kyle Anderson' alleged violent conduct are not admissible evidence. Therefore, it's

[11] The district court noted it had "read Custodio and Gould and read all other cases relating to this." (Tr., p.483, Ls.15–17.) Throughout the hearing, *Guel* was mistakenly referred to as "Gould".

> this Court's order that any statements or references to specific instances in which Kyle Anderson pointed a gun at any witness shall be prohibited during voir dire . . . , opening statements, the trial, and closing arguments. Evidence purporting to show Kyle Anderson's propensity to violence shall be presented only in the form of reputation or opinion evidence.

(Tr., p.484, L.8–p.485, L.22.)

Mr. Godwin acknowledges the district court's decision regarding the admissibility of specific instances of a victims conduct was proper based upon currently controlling precedent. However, he asserts, as he did during trial, such precedent is both unjust and unwise and should now be overturned or disavowed.

1. Current Idaho Law And Its Origins

Under Idaho Rule of Evidence 404(a) character evidence is admissible to prove that a victim acted consistently with their propensity for violence or aggression. Under Idaho Rule of Evidence 405 provides:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

Consequently, it is also clear victim character evidence is admissible by means reputation or opinion. *Hernandez*, 133 Idaho at 584–85. However, Rule 405(b) also allows for the admission of specific instances of conduct when a character trait is an "essential element" of a claim or defense. As such, the disputed issue is whether a victim's propensity for violence or aggression is an essential element of a claim of self-defense.

In 1995, in *United States v. Keiser*, 57 F.3d 847 (9th Cir. 1995), the Ninth Circuit Court of Appeals addressed this issue. The Court noted:

> [W]e conduct our Rule 405 inquiry according to the terms of the Rule itself, which requires courts to determine whether the character a party seeks to prove constitutes "an essential element of a charge, claim, or defense." Fed.R.Evid. 405(b). The relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation.

Keiser, 57 F.3d at 856 (footnote omitted). The Court went on to hold a victim's violent character does not constitute an essential element of a self-defense claim as the claim "neither rises nor falls on [the] success in proving that [a victim] has a penchant for violent outbursts." *Id.* at 857.

In 2001, this issue was addressed for the first time in Idaho by the Court of Appeals in *Custodio.* Relying exclusively on *Keiser,* the Court held specific instances of conduct were not admissible as proof a victim's propensity for violence as propensity for violence is not an essential element of a claim of self-defense. *Custodio*, 136 Idaho at 204. The Court concluded "[p]roof of a victim's propensity for violence, standing alone, does not prove an element of a claim of self-defense. Proof of a victim's violent character does not show that the victim was the first aggressor in a particular conflict, nor does proof of a victim's passive demeanor foreclose the defendant from asserting a claim of self-defense." *Id.*

In 2012, the issue was addressed again in an unpublished opinion from the Court of Appeals in *Guel*. The Court in *Guel* affirmed the holding of *Custodio* and specifically declined the request to overrule *Custodio.*

As such, the current law in Idaho deems evidence related to a victim's character for violence or aggression as admissible through opinion or reputation evidence only and holds specific instances of conduct inadmissible because the relevant character traits are not an "essential element" of the claim or defense. Nonetheless, Mr. Godwin maintains the *Custodio/Keiser* interpretation thwarts the just administration of justice and should either be

overturned or disavowed. Instead, he argues for a more broad interpretation of Rule 405.

2. An Alternative Interpretation Of Rule 405(b)

While a number jurisdictions follow an application of a *Keiser* analysis, prohibiting the presentation of specific instances of conduct evidence to prove a victim's character regarding propensity for violence or aggression,[12] other jurisdictions allow the presentation of the specific acts evidence. Mr. Godwin asserts that underlying concerns which prompted these jurisdictions to allow the admission of specific acts evidence are important, compelling, and counsel toward a broader interpretation of Rule 405(b) in Idaho.

When the circumstances of the altercation are disputed, it is widely accepted that evidence revealing a victim's propensity for violence has significant probative value and assists the jury in determining who was the first aggressor. *State v. Adjutant*, 824 N.E.2d. 1 (Mass. 2005); 1 J. Wigmore, Evidence § 63, at 467 (3d ed. 1940). In *Adjutant*, the Massachusetts Supreme Court held when evidence concerning a victim's reputation for violence or aggressiveness was admissible for purposes of determining who was the first aggressor in a self-defense case, the preference was for "the admission of concrete and relevant evidence of specific acts over more general evidence of the victim's reputation for violence." 824 N.E.2d. at 14. The Court expressed a strong desire to supply the jury with "as complete a picture of the (often fatal) altercation as possible before deciding a defendant's guilt[.]" *Id.* It commented that specific act evidence was more compelling, although it could be more problematic than reputation or opinion evidence:

> Jurisdictions that exclude the victim's specific acts of violence and admit reputation evidence make that choice because reputation evidence is filtered,

[12] *See State v. Jenewicz*, 940 A.2d 269, 280–81 (N.J. 2008); *State v. Williams*, 685 P.2d 764, 766 (Ariz. Ct. App. 1984); *State v. Bland*, 337 N.W.2d 378, 382 (Minn. 1983); *McClellan v. State*, 570 S.W.2d 278, 280 (Ark. 1978); *State v. Alexander*, 765 P.2d 321, 324 (Wash. 1988).

> general in nature, with less potential to inflame or sidetrack the proceedings than evidence of the victim's specific acts—in essence, because such evidence is less "convincing" and thus less controversial.

Id.

The Court addressed concerns about admitting specific act evidence, but ultimately found that concerns that a jury would be "distracted by information about the victim's unrelated prior violence" were unfounded. *Id*. at 9. The Court noted that if juries are capable of evaluating similar evidence for the limited purpose of determining the reasonableness of a defendant's apprehension of the victim, they are likewise capable of weighing evidence relevant to the first aggressor issue. *Id.* Other concerns included:

> (1) the danger of ascribing character traits to a victim with proof of isolated incidents, (2) the worry that jurors will be invited to acquit the defendant on the improper ground that the victim deserved to die, (3) the potential for wasting time trying collateral questions surrounding the victim's past conduct, (4) the unfair difficulty of rebuttal by the prosecution, and (5) the strategic imbalance that flows from the inability of prosecutors to introduce similar evidence of the defendant's prior bad acts.

Id. at 11.

However, after considering these additional concerns, the Court found they did not weigh in favor of a rule prohibiting the admission of all specific act evidence. *Id.* at 12. Instead, it remarked on the importance of such evidence in self-defense cases; "[t]estimony about the victim's prior acts of violence can be convincing and reliable evidence of the victim's propensity for violence." *Id.* The Court also discussed the principle that there should be greater latitude in admitting exculpatory evidence and noted the risk is truly to the defendant as the real danger of prejudice lies in refusing to admit such evidence. *Id.* at 10. After all, when there is conflicting testimony about who was armed and at what point, specific act evidence "may be the jury's only means of assessing the likelihood of the defendant's account of the incident." *Id.* at 3 n.1. It was

determined the trial court was capable of evaluating the specific act evidence, limiting the evidence to that which was non-cumulative and relevant, and mitigating any dangers of prejudice by instructing the jury about the precise purpose of the evidence, alleviating any juror misunderstanding. *Id.* at 12-13.

The State of Massachusetts is not an outlier in admitting specific act evidence as proof of a victim's propensity for violence or aggressiveness. *See Heidel v. State*, 587 So. 2d 835, 844–46 (Miss. 1991) (holding under Rule 405(b) a victim's propensity for violence became an essential element of the defendant's defense when he claimed self-defense and allowing the admission of specific instances of conduct); *State v. Sims*, 331 N.W.2d 255, 258–59 (Neb. 1983) (holding, under a Nebraska statute with language identical to Idaho Rule 405, specific act evidence demonstrating that the victim had a propensity for violence was admissible to show the victim was the initial aggressor due to defendant's claim of self-defense claim); *State v. McIntyre*, 488 N.W.2d 612, 616 (N.D. 1992) (finding victim's acts admissible to corroborate other evidence that victim was the aggressor); *State v. Dunson*, 433 N.W.2d 676, 680 (Iowa 1988) (holding specific instances of conduct, occurring subsequent to assault for which defendant was charged, were admissible to show victim's propensity for violence in support of defendant's self-defense claim); *Henderson v. State*, 583 So.2d 276, 289 (Ala. Crim. App. 1990) (victim's acts admissible where conflicting accounts of who was the aggressor); *Harris v. United States*, 618 A.2d 140, 144 (D.C. Ct. App. 1992) (victim's acts admissible only in homicide cases); *People v. Rowland*, 69 Cal. Rptr. 269 (Cal. Ct. App. 1968) (Evidence of aggressive and violent character by specific acts of the victim on third person is admissible in homicide case where self-defense is raised as defense.); *Jordan v. Commonwealth*, 222 S.E.2d 573, 577 (Va. 1976) ("We follow the rule that an accused, producing evidence that he acted in self-defense, may show specific incidents of

prior violent conduct on the part of the victim to establish the character of the victim for turbulence and violence for the purpose of corroborating his testimony, even though such trait is unknown to the accused."); *State v. Adam*, 38 P.3d 581, 585–86 (Haw. Ct. App. 2001) ("[W]hen the factual issue is, as between the defendant and the other person, who was the aggressor, the defendant may introduce evidence of the other person's violent or aggressive character." The Court treated opinion or reputation character evidence and specific prior acts (including those reflected in the victim's criminal record) the same for purposes of corroborating a defendant's self-defense claim as to who was the initial aggressor.); *People v. Lynch*, 470 N.E.2d 1018, 1019–21 (Ill. 1984) (victim's acts admissible where conflicting accounts of who was the aggressor.).

Other jurisdictions do not limit first aggressor evidence to only opinion or reputation, but also allow the admission of relevant convictions. *See State v. Miranda*, 405 A.2d 622, 624–25 (Conn. 1978) (in a homicide prosecution, where the accused has claimed self-defense, the defendant may show the deceased was the initial aggressor by proving the deceased's alleged character for violence. "The deceased's character may be proved by reputation testimony, by opinion testimony, or by evidence of the deceased's convictions of crimes of violence, irrespective of whether the accused knew of the deceased's violent character or of the particular evidence adduced at the time of the death-dealing encounter."); *State v. Howell*, 649 P.2d 91, 96 (Utah 1982) (victim's convictions admissible to show victim was the aggressor).

Yet, other jurisdictions find specific act evidence showing a victim's propensity for violence or aggression is so compelling admission is guaranteed through the state's rules of evidence. In Wyoming, Rule 405(b) was modified to allow victim's acts to show victim was the aggressor: "(b) Specific Instances of Conduct. In cases in which character or a trait of character

of a person is an essential element of a charge, claim, or defense, or is in issue under Rule 404(a)(2), proof may also be made of specific instances of his conduct." Wyo. R. Evid. 405(B). Similarly, California's relevant rule also specifically allows for the admission of specific instances of conduct:

> (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:
>
> (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
>
> . . .

Cal. Evid. Code § 1103.

As shown in other jurisdictions, prior acts that demonstrate a propensity for initiating violence can be very significant to the first aggressor issue and their number can be controlled by the trial court's discretion. Conversely, reputation or opinions are often formed based on rumor or other unreliable hearsay sources, without any personal knowledge on the part of the person holding that opinion. Mr. Godwin assert the rigid rule articulated in *Custodio* renders Rule 405(b) a nullity, as it applies to defenses as a victim's specific act evidence can never be admissible for a self-defense claim. Yet, there is grave danger when courts limit the presentation of exculpatory evidence. Mr. Godwin asserts that this danger requires a broader reading of Rule 405(b). In evaluating specific act evidence under Rule 405(b) the analysis should not end with a rigid rule that prohibits the presentation of specific act evidence in all self-defense cases. When the "essential element" phase is evaluated with respect to a crime, the court looks to the indictment or information and the inquiry would be legal and categorical. However when looking at a defense, the analysis cannot be as definitive. It must be factual and particular to the case at

hand. In some cases, specific act evidence may not be an "essential element." However, in some cases the evidence is unquestionably essential to the presentation of a self-defense claim.

In the case at hand, the evidence of what occurred, as is often the case, is both incomplete and conflicting. The specific act evidence illuminates the crucial question at the heart of Mr. Godwin's self-defense claim—who threatened violence with a gun first in the moments prior to the fatal shooting. Evidence that Mr. Anderson had used a gun to threaten individuals that approached his property or person shows a pattern of behavior that would have supported the inference that Mr. Anderson probably acted in conformity with his history of aggression by also pulling a gun on Mr. Godwin, and that the defendant's story of self-defense was truthful. As such, his is a case where the presentation of specific act evidence was essential to his defense. Mr. Godwin requests that this Court overrule *Custodio* and employ a broader rule when a defendant claims self-defense.

3. Excluding Specific Act Character Evidence Under Rule 405(b) Effectively Deprives Defendants Of Their Fourteenth Amendment Right To A Fair Trial By Precluding A Meaningful Opportunity To Fully Present A Self-Defense Claim

In addition to denying the admission of specific act evidence under Rule 405(b), the district court effectively deprived Mr. Godwin of his constitutional right to present his defense. In acknowledging the Sixth Amendment right to compulsory process applies to the States though the due process clause of the Fourteenth Amendment, the U.S. Supreme Court held:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). While a defendant does not have an unfettered

right to present any evidence he wishes, evidentiary rules cannot be used in such a way to deprive a defendant of his basic right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 294–95 (1973). "Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . ." *Taylor v. Illinois*, 484 US 400, 407 (1988) (citing *Chambers*, 410 US at 302). Thus, if application of rules of evidence deprives a criminal defendant of a fair opportunity to defend against the charge, the conviction cannot stand. *Chambers,* 410 U.S. at 302–03.

Evidence of Mr. Anderson's character, specifically that he had pulled a gun two other individuals in similar situations, was evidence essential to Mr. Godwin's defense. The case at hand largely hinges on credibility. At the time of Mr. Anderson's death, only a handful individuals were present and able to observe the events that transpired. Of these witnesses, Ms. Jones testified Mr. Anderson had a gun on his person, but it was not in his hand when Mr. Godwin shot him. (Tr., p.580, Ls.14–22.) When asked what Mr. Anderson had in his hand when Mr. Godwin pulled up she had difficulty remembering, testifying "he had the license plate in his hand" (Tr., p.581, Ls.12–14), he had a screwdriver in his hand (Tr., p.607, Ls.2–13), and that she "didn't pay attention" (Tr., p.583, Ls.4–10.) Mr. Lynch testified at trial that he did not see Mr. Anderson pull a gun. (Tr., p.714, L.5–p.715, L.2.) However, he told police that both Mr. Anderson and Mr. Godwin had guns drawn. (Tr., p.724, L.13–p.725, L.15.) Mr. Ruiz testified that Mr. Anderson did not have a gun in his hand. (Tr., p.764, L.5–p.765, L.4, p.767, Ls.1–8.) Conversely, Mr. Godwin was consistent that Mr. Anderson had pulled a gun and that the killing was in self-defense. (Tr., p.1063, L.6–p.1064, L.18, p.1111. Ls.3–20; State's Exhibits 68, 69.)

It is clear the jury would have benefitted from hearing evidence about Mr. Anderson's

character, specifically his propensity for violence and aggression. In this case, the jury was deprived of that evidence both in the form of opinion or reputation, as discussed in Issue II, and through testimony about specific instances of conduct. The jury was entitled to hear this relevant and probative evidence. In *United States. v. Nixon*, 418 US 683 (1974), the Court observed:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

Id. at 709.

Interpreting Rules 404 and 405, as in *Custodio*, suggests the rules of evidence were intended to systematically deprive a murder defendant the ability to present specific instances of the victim's conduct, even where those instances are especially relevant, probative, and may provide the only means for a defendant to prove his account of the events, i.e. to prove his innocence. Opinion and reputation evidence, while relevant and admissible, *see* IRE 404(a)(2), 405(a), cannot substitute for the admission of direct and compelling evidence supporting a defense. Idaho's current interpretation of Rules 404 and 405 is inconsistent with basic notions of due process and by depriving Mr. Godwin of his ability to present this evidence, the district court also deprived him of his right to a fair trial.

IV.

The District Court's Failure To Instruct The Jury On Justifiable Homicide Pursuant To I.C. § 18-4009(1) Amounted To Fundamental Error

A. Introduction

Mr. Godwin asserts the district court's failure to instruct the jury on justifiable homicide constituted fundamental error.

B. Standard Of Review

"This Court reviews jury instructions to ascertain whether, when considered as a whole, they fairly and adequately present the issues and state the applicable law." *State v. Mann*, 162 Idaho 36, 40 (2017) (quoting *State v. Adamcik*, 152 Idaho 445, 472 (2012)). "Whether the trial court properly instructed the jury presents a question of law over which this Court exercises free review." *State v. Poe*, 139 Idaho 885, 905 (2004). Unobjected-to errors are reviewed for fundamental error. *Perry*, 150 Idaho at 228. Under that doctrine, the defendant has the burden to show an error in violation of one or more of the defendant's unwaived constitutional rights, the error must plainly exist, and the error must not be harmless. *Id.*

C. A Reasonable View Of The Evidence Required A Separate Jury Instruction On Justifiable Homicide Pursuant To I.C. § 18-4009(1)

Idaho Code § 18-4009 describes four scenarios in which homicide is justified, and it reads in relevant part:

> Homicide is also justifiable when committed by any person in either of the following cases:
>
> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
>
> 2. When committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
>
> 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed . . . .

I.C. § 18-4009 (subsection (4) is not relevant to this appeal). By its plain language, the statute

describes four separate scenarios in which a homicide may be justifiable. *See State v. Owens*, 158 Idaho 1, 3 (2015) ("Statutory interpretation begins with the statute's plain language."). If the homicide is justifiable under any of the four scenarios, "the person indicted must, upon his trial, be fully acquitted and discharged." I.C. § 18-4013.

At issue here is the first scenario of justifiable homicide, Subsection (1). The jury was not specifically instructed on this scenario as a lawful justification for Mr. Anderson's death. Rather, the jury received instructions consistent with self-defense under Subsection (3). (*See* Jury Instrs.,[13] pp.24–27.) Mr. Godwin submits the failure to instruct the jury on Subsection (1) was in error. The plain language of Subsection (1) establishes a separate legal justification for homicide in response to an actual, ongoing attack. This justification is distinct from self-defense in that it does not require the homicide to be solely motivated by an objectively reasonable fear. Further, this Court's recent decision in *Hall* supports giving a separate instruction on justifiable homicide under Subsection (1) if warranted by a reasonable view of the evidence. The evidence here required a separate Subsection (1) instruction.

1. I.C. § 18-4009(1) Renders A Homicide Justifiable If The Person Was Resisting An Actual, Ongoing Attack—Even If The Person's Fear Was Objectively Unreasonable And Not The Sole Motivation For Action

Subsection (1) provides that a homicide is justified when in response to an attempt (a) "to murder any person," (b) "to commit a felony," or (c) "do some great bodily injury upon any person." I.C. § 18-4009(1). Thus, under Subsection (1), the homicide is justifiable if the person is resisting an actual, ongoing attack to murder or do great bodily injury. *See Hall*, 161 Idaho at 418, 423.

[13] The jury instructions are contained in a separate document in the record, "Godwin Appeal-Jury Instructions.pdf," and will be cited to separately with the internal pagination from this document.

Unlike Subsection (1), the subsequent statute in the Idaho Code explicitly modifies justifiable homicides pursuant to Subsections (2) and (3). Idaho Code § 18-4010 reads:

> A bare fear of the commission of any of the offenses mentioned *in subdivisions 2 and 3 of the preceding section*, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to *excite the fears of a reasonable person*, and the party killing must *have acted under the influence of such fears alone*.

I.C. § 18-4010 (emphasis added). Under this statute, where the homicide is committed in response to an anticipated attack as described in Subsection (2) or (3), a bare fear of the commission of the offense is not sufficient, the fear must be objectively reasonable, and the killing must have been motivated solely by those objectively reasonable fears. I.C. §§ 18-4009(2)–(3); -4010. Reading I.C. §§ 18-4009 and 18-4010 together, the Idaho legislature distinguishes between homicides committed in response to an actual, on-going attack, where there is neither a reasonableness nor a fear requirement (Subsection (1)) and homicides committed in response to anticipated attacks, where a defendant must be act solely out of an objectively reasonable fear (Subsections (2) and (3)). I.C. §§ 18-4009, -4010.

This Court recently confirmed this interpretation of I.C. § 18-4009(1) in *Hall*. 161 Idaho at 418–25. In *Hall*, the defendant argued the district court erred by refusing his proposed instruction on justifiable homicide under Subsection (1). *Id.* at 419–20. This Court held the defendant's instructional error was not preserved and thus reviewed the issue under the fundamental error standard. *Id.* at 422–25. In doing so, the Court recognized:

> The reason it is an issue [for failing to instruct on Subsection (1)] is that Idaho Code section 18-4010 does not apply to that subsection, so there is no requirement that "the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

Id. at 418; *see also id.* at 420 n.3 ("Idaho Code section 18-4010 does not apply to justifiable homicide committed under the circumstance set forth in subsection (1) of Idaho Code section 18-

4009.") The *Hall* Court also agreed with the defendant's position that Subsection (1) "describes an actual, ongoing attack." *Id.* at 423. Later on, in denying the defendant's petition for rehearing, the Court reiterated, "As we held in the opinion, for [Subsection (1)] to apply the defendant must have been resisting an actual, ongoing attack." *Id.* at 429 (petition for rehearing order). The Court also acknowledged Subsection (3) pertained to self-defense, which must be solely motivated by an objectively reasonable fear. *Id.* at 430–31 (petition for rehearing order) (holding that the standard self-defense instructions are correct statements of the law under Subsection (3) and accompanying case law). Therefore, this Court's recent decision in *Hall* confirmed the separate scenarios for justifiable homicide in I.C. § 18-4009. Subsection (1) requires an actual, ongoing attack, while Subsection (3) does not. Conversely, Subsection (3) requires an objectively reasonable fear and action solely motivated by that fear, while Subsection (1) does not. These distinct requirements for each scenario create separate justifications for homicide.

2. A Reasonable View Of The Evidence Supported An Instruction On Justifiable Homicide Pursuant To I.C. § 18-4009(1) Because The Evidence Showed Mr. Godwin Was Resisting An Actual, Ongoing Attack From Mr. Anderson

Based on the evidence presented, the jury could have found Mr. Anderson attacked Mr. Godwin with the intent to inflict death or serious bodily injury and Mr. Godwin shot Mr. Anderson to resist that attack. The evidence therefore supported a Subsection (1) instruction.

At trial, there was no dispute that Mr. Anderson had a gun on him at the time of his death. Ms. Jones testified that she saw Mr. Anderson's gun on him that evening. (Tr., p.578, Ls.20–24, p.579, Ls.21–23, p.603, Ls.20–23.) Ms. Jones said that she saw the gun falling out of Mr. Anderson's shorts, so she told him to put in the back pocket of his vest. (Tr., p.578, L.25–p.580, L.4, p.615, Ls.6–12.) Moments before Mr. Godwin arrived, Ms. Jones testified that she felt Mr. Anderson's gun in the back of his vest. (Tr., p.580, Ls.5–25.)

Mr. Godwin also saw Mr. Anderson's gun—Mr. Anderson pulled his gun out of his vest or waistband, pointed it at Mr. Godwin, and cocked the hammer. Mr. Godwin testified that, as he pulled up to the motorhome, Mr. Anderson, "just started, you know, after us. I mean, walking real fast towards us. And then I seen him pull – pull the gun (indicating) out of his waistband." (Tr., p.1063, Ls.6–12.) Mr. Godwin further testified:

> Q. When you saw that [Mr. Anderson pull the gun], what did you think was happening?
>
> A. Well, I got scared. What the Hell, you know. It was – because we just pulled up. It was just that fast. So, I grabbed my pistol. It's in – the little 380, and it was right here in the seat. I shook the scabbard off, the holster, and I'm looking at him telling him, don't, don't. *And he cocked the hammer as I'm yelling at him: Drop the gun, don't, don't pull that gun, something to that effect. It was just that fast. And he cocked that hammer back, and I went like that (indicating).*
>
> Q. When you say you went like that (indicating) did you pull the trigger
>
> A. Yes.
>
> Q. Why?
>
> A. *Because he was going to shoot me. That's all I could see.*
>
> Q. At that point did you think you were in immediate danger of getting shot?
>
> A. Yeah. I was pretty darn scared. You know, it didn't look like he was, you know, just going to say hi. *It looked like he was rushing up there, you know, to shoot us, shoot me, or somebody.*
>
> Q. Was there any other reason, aside from saying to yourself that you pulled the trigger?
>
> A. No.
>
> Q. Did you think it was necessary to pull the trigger to save yourself?
>
> A. Yes, I did.
>
> Q. Why?
>
> A. Because I was scared, scared for my life.

Q. What happened after?

A. It was – it was – it was, you know, torment. We got out. I got out. I seen that he dropped right there, and you know I looked over and Amanda is on the ground behind the motorhome. This was – where he dropped was on the side of the motorhome, kind of in front of my door, a little back towards – way – because I went like this (indicating). *I still had my foot on the brake when I shot him. I didn't get time to even get the rig out of gear.*

Q. How fast did it happen?

A. A split second. I mean, it was fast. I mean, I couldn't believe it. . . .

(Tr., p.1063, L.13–p.1065, L.5 (emphasis added).) On cross-examination, Mr. Godwin testified Mr. Anderson pulled on a gun on him. (Tr., p.1093, L.20–p.1094, L.4.) Similarly, on redirect examination, he confirmed Mr. Anderson "came at [him] immediately with a gun" and he believed he was "in immediate danger of getting shot or getting killed." (Tr., p.1111, Ls.3–9.)

Mr. Godwin's testimony of Mr. Anderson's actual, ongoing attack is entirely consistent with his statements during Officer Hewson's interrogation. The State played the audio recording of the interrogation for the jury. (Tr., p.848, Ls.9–10, p.851, Ls.7–9; State's Exs. 68, 69.) In the interrogation, Mr. Godwin repeatedly told Officer Hewson that he pulled up to the motorhome, Mr. Anderson pulled a gun on him, and Mr. Godwin shot him in response. (Inter. Tr.,[14] p.9, Ls.16–19, p.14, Ls.23–25, p.16, Ls.4–5, p.18, Ls.12–14, p.22, Ls.13–14, p.23, Ls.19–21, p.27, Ls.8–10, p.36, Ls.6–9, p.38, Ls.12–13, p.39, Ls.10–12, p.39, Ls.20–23, p.41, Ls.18–19, p.47, Ls.22–25.)

Unlike Mr. Godwin's unequivocal testimony of Mr. Anderson pulling a gun on him, Ms. Jones's testimony was inconsistent. She testified, when Mr. Godwin drove up to their

[14] For ease of reference, Mr. Godwin cites to the Interrogation Transcript, as opposed to the minutes and seconds of the audio recording in State's Exhibits 68 and 69. Exhibits 68 and 69 mirror the interrogation transcript, except that State's Exhibit 68 redacted two discussions of Mr. Godwin's criminal history. (*See* Inter. Tr., p.13, L.25–p.14, L.9, p.34, Ls.18–25.)

motorhome, Mr. Anderson first had a license plate in his hand, then nothing in his hand, and finally a screwdriver in his hand. (Tr., p.581, Ls.12–14, p.583, Ls.2–3, p.583, Ls.4–6.) After that, she testified she did not know if Mr. Anderson had anything in his hand. (Tr., p.583, Ls.7–10, p.605, L.25–p.607, L.13.) Mr. Godwin, however, never changed his story on the gun in Mr. Anderson's hand. Along with the gun, Mr. Anderson had a significant amount of methamphetamine in his blood at the time of his death. (Tr., p.658, L.8–p.660, L.8.)

In light of this evidence, a jury instruction on justifiable homicide under Subsection (1) was fully warranted. The jury could have found Mr. Anderson pulled a gun on Mr. Godwin as he drove up, started rushing towards Mr. Godwin, and cocked the hammer. This was an actual, ongoing attack to kill or do great bodily injury to Mr. Godwin, and Mr. Godwin's shooting of Mr. Anderson was in response to that actual, ongoing attack. Therefore, the evidence presented supported a separate Subsection (1) instruction.

D. The Self-Defense Instructions Given To The Jury Were Inadequate To Instruct The Jury On The Separate Justifiable Homicide Pursuant To I.C. § 18-4009(1)

The instructions in this case failed to inform the jury of the separate scenario of justifiable homicide pursuant to I.C. § 18-4009(1). The jury was instructed only on self-defense, which falls under a different scenario of justifiable homicide pursuant to I.C. § 18-4009(3). The district court gave four self-defense instructions.[15] The district court instructed the jury:

Instruction No. 20

> The defendant contends as a defense in this case that the killing was justifiable because the defendant was acting in self-defense.
>
> Under Idaho law, homicide is justifiable if committed while resisting an attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.
>
> The burden is on the prosecution to prove beyond a reasonable doubt that

[15] Because trial counsel proposed these instructions, Mr. Godwin does not challenge them on appeal as incorrect statements of the law on self-defense.

the homicide was not justifiable. If there is a reasonable doubt whether the homicide was justifiable, you must find the defendant not guilty.

Instruction No. 21

A homicide is justifiable if the defendant was acting in self-defense.

In order to find that the defendant acted in self-defense, all of the following conditions must be found to have been in existence at the time of the killing:

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 similar 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.

In deciding upon the reasonableness of the defendant's beliefs, you should determine what an ordinary and reasonable person might have concluded from all the facts and circumstances which the evidence shows existed at that time, and not with the benefit of hindsight.

The danger must have been present and imminent, or must have so appeared to a reasonable person under the circumstances. A bare fear of death or great bodily injury is not sufficient to justify a homicide. The defendant must have acted under the influence of fears that only a reasonable person would have had in a similar position.

The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable. If there is a reasonable doubt whether the homicide was justifiable, you must find the defendant not guilty.

Instruction No. 22

The kind and degree of force which a person may lawfully use in self-defense are limited by what a reasonable person in the same situation as such a person, seeing what the person sees and knowing what the person knows, then would believe to be necessary. Any use of force beyond that is regarded by the law as excessive. Although a person may believe that the person is acting, and may act, in self-defense, the person is not justified in using a degree of force clearly in excess of that apparently and reasonably necessary under the existing facts and circumstances.

Instruction No. 23

> In the exercise of the right of self-defense, one need not retreat. One my stand one's ground and defend oneself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation with similar knowledge. This law applies even though the person being attacked might more easily have gained safety by flight or by withdrawing from the scene.

(Jury Instrs., pp.24–27.) For a number of reasons, these instructions failed to instruct the jury on justifiable homicide pursuant to I.C. § 18-4009(1).

For one, the conditions the jury must find to determine Mr. Godwin acted in self-defense are inconsistent with justifiable homicide pursuant to Subsection (1). Instruction No. 21 first tells the jury to find "the defendant must have believed that the defendant was *in imminent danger* of death or great bodily harm." (Jury Instrs., p.25 (emphasis added).) This instruction simply does not apply to circumstances where the defendant is actually suffering an "actual, ongoing attack" to do great bodily harm, as required for justifiable homicide in Subsection (1). Rather, it applies only where the defendant believes an attack is imminent, which is required for self-defense pursuant to Subsection (3). I.C. § 18-4009(3) ("and imminent danger of such design being accomplished"). Second, Instruction No. 21 requires "that the action the defendant took was necessary to save the defendant from danger." (Jury Instrs., p.25.) Subsection (1) does not have a necessity requirement. Third, this instruction contains an objectively reasonable fear requirement. (Jury Instrs., p.25.) Again, Subsection (1) does not have this requirement. *See* I.C. §§ 18-4009, -4010; *Hall*, 161 Idaho at 418, 420 n.3. Fourth, the instruction requires that the defendant act only in response to the objectively reasonable fear, (Jury Instrs., p.25), and again, Subsection (1) lacks this requirement. *See* I.C. §§ 18-4009, -4010; *Hall*, 161 Idaho at 418. Finally, the district court instructed the jury, "A bare fear of death or great bodily injury is not sufficient to justify a homicide." (Jury Instrs., p.25.) As in the other inconsistencies outlined

here, justifiable homicide under Subsection (1) is not precluded by a "bare fear." *See* I.C. §§ 18-4009, -4010; *Hall*, 161 Idaho at 418, 420 n.3.

Instruction No. 22 further compounded the harm caused by the district court's failure to instruct the jury on justifiable homicide under Subsection (1). Instruction No. 22 provided additional guidance on the condition of an objectively reasonable fear and the use of force. Yet again, I.C. § 18-4009(1) has no requirement that the individual act in an objectively reasonable manner, using only the force a jury would think is allowable, in order for a homicide committed in response to an actual, ongoing attack upon him to be justifiable. *See* I.C. §§ 18-4009, -4010; *Hall*, 161 Idaho at 418, 420 n.3.

Finally, Instruction Nos. 20 and 21, read together, inform the jury to consider self-defense pursuant to Subsection (3) only, despite the unexplained reference to Subsection (1) in Instruction No. 20. Instruction No. 20 informed the jury that Mr. Godwin contended "the killing was justifiable because the defendant *was acting in self-defense*." (Jury Instrs., p.24 (emphasis added).) The next sentence of Instruction No. 20 actually recited the law in I.C. § 18-4009(1). But, this incomplete reference to Subsection (1) failed to instruct the jury that Subsection (1) was an entirely separate scenario of justifiable homicide, distinct from self-defense. (Jury Instrs., p.24.) The general statement of the law on Subsection (1) did not instruct the jury that it could also find Mr. Godwin not guilty based on Subsection (1) alone. Rather, this statement erroneously informed the jury that Subsection (1) was part of the legal definition of self-defense. The next instruction, No. 21, confirmed that the jury should consider self-defense only. It stated, "A homicide is justifiable *if the defendant was acting in self-defense*. In order to find that the defendant *acted in self-defense*, all of the following conditions must be found to have been in existence at the time of the killing . . . ." (Jury Instrs., p.25 (emphasis added).) Instruction No. 21

then went through the four conditions for the jury to find in order to find Mr. Godwin acted in self-defense. (Jury Instrs., p.25.) Reading Instruction Nos. 20 and 21 together, the jury was instructed to consider the justifiable homicide scenario of self-defense only, pursuant to Subsection (3). The jury was not given any instructions to consider the conditions of Subsection (1) to find Mr. Godwin not guilty for justifiable homicide due to an actual, ongoing attack.

In sum, these instructions informed the jury on the law and conditions to find that Mr. Godwin acted in self-defense under Subsection (3). The jury was not adequately apprised of the law of justifiable homicide pursuant to Subsection (1). Nor was it instructed that it could find Mr. Godwin not guilty if he was resisting an actual, ongoing attack by Mr. Anderson, without any consideration of objective reasonableness, "bare fear," or the necessary and proper use of force.

E. The District Court's Failure To Instruct The Jury On Justifiable Homicide Pursuant To I.C. § 18-4009(1) Was Fundamental Error

Mr. Godwin did not propose a separate justifiable homicide instruction at trial, and therefore he must demonstrate fundamental error on appeal. Mr. Godwin has met this burden.

1. The Failure To Instruct The Jury On Justifiable Homicide Violated Mr. Godwin's Unwaived Constitutional Right To Due Process

A criminal defendant's right to a fair trial is protected by the due process clause of the Fourteenth Amendment and Article I, § 13 of the Idaho Constitution. U.S. CONST. amend. XIV; IDAHO CONST. art. 1 § 13. "The requirement that the State prove every element of a crime beyond a reasonable doubt is grounded in the constitutional guarantee of due process." *State v. Crowe*, 135 Idaho 43, 47 (Ct. App. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970)).

> An erroneous instruction that relieves the State of its burden to prove an element of a charged crime can be characterized as either a violation of due process,

> *State v. Draper*, 151 Idaho 576, 588 (2011); *State v. Anderson*, 144 Idaho 743, 749 (2007); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); or as a violation of the Sixth Amendment's jury trial guarantee. *Neder v. United States*, 527 U.S. 1, 12 (1999); *Sullivan*, 508 U.S. at 277–78.

State v. Parsons, 153 Idaho 666, 669 (Ct. App. 2012). "A jury instruction that lightens the prosecution's burden of proof by shifting to the defendant the burden of persuasion on an essential element, omitting an element of the crime, or creating a conclusive presumption as to an element, is impermissible." *Crowe*, 135 Idaho at 47.

"In charging the jury, the court must state to them all matters of law necessary for their information." *Hall*, 161 Idaho at 423 (quoting I.C. § 19-2132(a)).

> In other words, a trial court must deliver instructions on the rules of law that are material to the determination of the defendant's guilt or innocence. This necessarily includes instructions on the "nature and elements of the crime charged and the essential legal principles applicable to the evidence that has been admitted.

State v. Severson, 147 Idaho 694, 710 (2009) (citations and quotation marks omitted). "A defendant in a criminal action is entitled to have his theory of the case submitted to the jury under proper instructions. A defendant is entitled to an instruction where there is a reasonable view of the evidence presented in the case that would support the theory." *Hall*, 161 Idaho at 423. "It is not an error to give jury instructions that mirror the language of the statute related to the crime." *Adamcik*, 152 Idaho at 477 (citing *Holland v. Peterson*, 95 Idaho 728 (1974)).

This Court has recognized the failure to properly instruct the jury on justifiable homicide is an appropriate claim to raise as fundamental error. In *Hall*, this Court held the defendant did not preserve his claim that the district court failed to instruct the jury on justifiable homicide under Subsection (1). *Hall*, 161 Idaho 420–22. Due to the unpreserved claim, this Court held the defendant "cannot assign as error the failure to instruct on subsection (1) of Idaho Code section 18-4009. The issue can only be raised as fundamental error." *Id.* at 422. This Court then

addressed the failure to give a Subsection (1) instruction under the fundamental error standard. *Id.* at 422–25. This Court noted, "The first inquiry is whether there was an error in the jury instruction." *Id.* at 423 (quoting *State v. Skunkcap*, 157 Idaho 221, 227 (2014)). A reasonable view of the evidence must support the instruction. *Id.* Ultimately, the Court held, "[T]here was not a reasonable view of the evidence supporting the defense's proposed instruction. Because there was no error in failing to give the instruction, there could not be fundamental error with respect to the failure to do so." *Id.* at 425. Although the *Hall* Court rejected the defendant's fundamental error claim, the *Hall* Court recognized the failure to provide the jury with the justifiable homicide instruction under Subsection (1) could be raised as fundamental error.

Here, Mr. Godwin asserts his unwaived constitutional rights to due process and a fair trial were violated by the district court's failure to instruct the jury specifically on Subsection (1). In order to prove Mr. Godwin committed second degree murder, the State had to prove Mr. Godwin killed Mr. Anderson, acted without justification or excuse, and acted with malice aforethought. I.C. §§ 18-4001, -4002. (Jury Instrs., pp.18–20.) These are all elements of the charged offense. By failing to instruct the jury on Subsection (1) specifically, the State was relieved of its burden to prove all element of the offense beyond a reasonable doubt. Subsection (1) is an integral part of justifiable homicide, and the jury must be instructed on all law relevant to its determination. Without a Subsection (1) instruction, the jury could have found Mr. Godwin acted without legal justification, even though Subsection (1), as a matter of law, establishes that the homicide was justified. Moreover, unlike in *Hall*, a reasonable view of the evidence supported this instruction. *See* Part IV.C.2. The jury did not have complete and accurate instructions on homicide, and the instructions did not hold the State to its burden to prove the elements of second degree murder beyond a reasonable doubt. Therefore, the district court's failure to properly instruct the jury on

justifiable homicide violated Mr. Godwin's constitutional right to due process and a fair trial.

2. The Error Is Obvious From The Record

This error with the jury instructions is clear from record. As discussed above, the four separate scenarios of justifiable homicide in I.C. §§ 18-4009 and 18-4010 have been in effect in Idaho since 1887. The statutes' language is clear and unambiguous—justifiable homicide due to an actual, ongoing attack (Subsection (1)) has entirely separate elements from justifiable homicide due to self-defense (Subsection (3)). Both, independently of each other, create a legal justification for homicide. I.C. § 18-4013. Moreover, this Court in *Hall* recently clarified and confirmed these different scenarios of justifiable homicide. 161 Idaho at 418–25. In light of the statute's plain language and *Hall*, there is no dispute as to the propriety of a separate Subsection (1) instruction when supported by the evidence, as is the case here. This error is purely a question of law, and it is clear from the record that the evidence warranted this instruction.

Additionally, there is no legitimate tactical or strategic reason for trial counsel to fail to request this instruction. This instruction would allow the jury to find Mr. Godwin not guilty due to a lawful justification for Mr. Anderson's death. The conditions for an actual, ongoing attack pursuant to Subsection (1) are much less demanding than the conditions for self-defense in Subsection (3), as outlined in Instruction Nos. 20 to 23. Mr. Godwin gained no tactical advantage by failing to request this instruction. Essentially, without this instruction, the jury found Mr. Godwin guilty without complete and accurate instructions on whether the homicide was lawful. There is no basis to conclude trial counsel had knowledge of the inadequate instructions and failed to object for some strategic reasons. Therefore, this error is obvious from the record.

3. The Error Is Not Harmless

Finally, the failure to instruct the jury on Subsection (1) of I.C. § 18-4009 is not harmless.

To show the error prejudiced him, Mr. Godwin bears "the burden of proving there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226.

As discussed above, justifiable homicide under Subsection (1) and self-defense under Subsection (3) contain entirely different elements. The jury may have rejected Mr. Godwin's self-defense claim because it did not find Mr. Godwin's fear to be objectively reasonable, his actions to be solely motivated by fear, or his actions to be reasonably necessary in response to that fear. Any or all of these reasons could have defeated the jury finding Mr. Godwin acted in self-defense. None of these hurdles are present in justifiable homicide pursuant to Subsection (1). Mr. Godwin had to show only that he shot Mr. Anderson while resisting Mr. Anderson's actual, ongoing attack to kill or do great bodily harm. Based on the evidence presented, the jury could have found Mr. Godwin's shooting of Mr. Anderson was justifiable under Subsection (1), even if his fear was unreasonable, his actions were not solely motivated by fear, and his actions were more than necessary to respond to his fear. There is a reasonable possibility that this error in failing to include the jury instruction on justifiable homicide pursuant to Subsection (1) affected the outcome at trial. As such, Mr. Godwin has established fundamental error, and this Court should vacate his judgment of conviction and remand his case for a new trial.

V.

The State Violated Mr. Godwin's Right To A Fair Trial By Committing Prosecutorial Misconduct

A. Introduction

Mr. Godwin asserts the prosecutor committed misconduct in his case which requires the vacation of his conviction.

B. Standard Of Review

Because Mr. Godwin's prosecutorial misconduct claims are grounded in constitutional

principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006). Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861 (Ct. App. 2009). Mr. Godwin raises instances of un-objected to misconduct. The fundamental error standard was articulated in Section IV(B) and is incorporated herein by reference.

C. The State Violated Mr. Godwin's Right To A Fair Trial By Committing Prosecutorial Misconduct

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802–03 (1952) (Frankfurter, J., dissenting). Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005); *Greer v. Miller*, 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Greer*, 483 U.S. at 765.

1. The Prosecution Committed Misconduct By Vouching For The Evidence Presented And State's Witnesses

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v.*

Sheahan, 139 Idaho 267, 280 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

In closing argument, "both the prosecutor and defense counsel are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom," and that this includes "the right to identify how, from the party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses." *State v. Lovelass*, 133 Idaho 160, 168 (Ct. App. 1999) (citation omitted). However, "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence or as to the guilt of the defendant." *Id*. (citation omitted). Closing argument should not include the prosecutor's personal opinions and beliefs about the credibility of a witness. *Phillips*, 144 Idaho at 86.

In the case at hand, the prosecution repeatedly told the jury he personally believed in the State's case and the State's witnesses were credible. The prosecution's statements went much further than the permissible bounds and encouraged the jury to rely on the prosecutor's beliefs:

> Now, Amanda Jones is not the most sophisticated witness, but I would submit to you, I don't think she came off as a schemer, a planner. She was not sophisticated, but I would submit to you and you judge her testimony. **I would submit to you that she was telling the truth**, and that something you have to decide, not me.

(Tr., p.1142, Ls.17–22 (emphasis added).)

> Beau Lynch. . . . What motive does he have to lie? Judge his testimony. He was scared. He was scared to sit up there and tell the truth about his former boss, a friend. And **I think he was scared, and I think he was nervous, but even with all that, even with all that he still told the truth**. And these credibility questions are what you have to answer.

(Tr., p.1143, Ls.9–19 (emphasis added).)

> . . . And Amanda Jones, she's not a sophisticated witness, but **I believe she was a credible witness**. Testimony from here was Mr. Goodwin, after he shoots and

> kills Mr. Anderson, runs up to here. She's on her knees, and he's got the gun pointed at her head. Why would she make that up? What incentive does she have to say that? The shooting is over. Her boyfriend is dead. I mean, when you talk about credibility, what reason does she have to lie about that? I mean, it doesn't help – it doesn't help the shooting incident. It's something that happened to her and she's telling you, but what I'm saying is if someone -- if you believe that, **which I think was credible**, it is totally inconsistent with self-defense, and these are factors for you to consider.

(Tr., p.1145, L.13–p.1146, L.2 (emphasis added).)

> . . . And **I would submit that the evidence that the witnesses that the State put on are credible**, and, again, ladies and gentlemen, the State would ask you to find Mr. Goodwin guilty of second degree murder.

(Tr., p.1177, L.15–19 (emphasis added).)

A prosecutor may commit misconduct by vouching during his closing arguments for the credibility of the evidence he presented. *State v. Wheeler*, 149 Idaho 364, 368 (Ct. App. 2010). A prosecutor improperly vouches for evidence when he puts the prestige of the state behind that evidence, expressing his personal opinions or beliefs about the quality of that evidence. *Id.*

Idaho Rule of Professional Conduct 3.4 provides, "A lawyer shall not . . . in trial . . . state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused." The rule applies to both the prosecuting attorney and to defense counsel. *State v. Carson*, 151 Idaho 713, 721 (2011). With respect to due process, the United States Supreme Court has explained why the prosecutor cannot vouch for a witness's credibility or express a personal opinion of the defendant's guilt, stating:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18–19 (1985).

In the case at hand, the State vouched for the credibility of two specific witnesses, Amanda Jones and Beau Lynch, and interjected the prosecutor's personal belief regarding the credibility of the evidence numerous times during closing arguments. Admittedly, the prosecution noted several times that credibility determinations had to be made by the jury. However, despite these statements, the prosecution clearly intended to interject personal opinions in an attempt to improperly influence the jury's credibility determinations, encouraging the jury to trust the State's view of the evidence rather its own.

Mr. Godwin asserts the comments by the prosecution crossed the line and amounted to more than a fair comment on the evidence or inferences to be drawn there from. Instead, they were attempts to bolster the credibility of Ms. Jones, Mr. Lynch, and the State's case in general. The closing, when reviewed in its entirety, was designed to inform the jury of the conclusions that should be reached based upon the beliefs and conclusions of the prosecutor.

2. The Alleged Instances Of Prosecutorial Misconduct Are Reviewable As Fundamental Error

Prosecutorial vouching for the credibility of a witness either through bolstering or undermining credibility is not merely an evidentiary issue as it is when a witness provides vouching testimony. Instead, it is a distinct form of prosecutorial misconduct that implicates a constitutional right. It is a violation of Mr. Godwin's Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. As such, prosecutorial misconduct, in general, directly violates a constitutional right. It should be noted the Idaho Supreme Court stated in *Perry*, "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that

may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. This is an implicit recognition by the Idaho Supreme Court that prosecutorial misconduct claims are linked to a constitutional provision.

The State also violated Mr. Godwin's right to a jury trial when the prosecutor attempted to encroach upon the jury's vital and exclusive function to weigh the evidence presented. The State's argument interfered with the jury's ability to make an impartial decision by clouding the issues through expressing personal beliefs about the strength of the State's case and the truth of Mr. Lynch and Ms. Jones' testimony, thereby interfering with Mr. Godwin's Sixth Amendment right to an impartial jury. "The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore*, 228 P.3d 760, 765–66 (Wash. 2010) (quoting *State v. Lane*, 889 P.2d 929 (Wash. 1995) (quoting *State v. Crotts*, 22 Wash. 245, 250–51, 60 P. 403 (1900)).

The misconduct in this case violated both Mr. Godwin's state and federal constitutional rights to due process and federal and state constitutional rights to a jury trial. As such, the first element of the fundamental error test has been met.

Additionally, the error in this case plainly exists from the record and no additional information is necessary. The record in this case suggests no reason to conclude that defense counsel elected, as a matter of trial strategy, to waive any objection when the prosecution committed numerous instance of misconduct. Further, it cannot be a tactical decision on the part of the defense to have a jury reach a verdict, not based on the evidence and law, but based on impermissible grounds presented through misconduct. As such, the second element of the fundamental error test has been met.

Therefore, this misconduct is reviewable as fundamental error. Mr. Godwin then has the

burden to prove that the error was not harmless. He asserts it was not.

3. The Prosecutorial Misconduct Requires Vacation Of The Conviction

In the case at hand, the prosecutorial misconduct requires vacation of the conviction because it cannot be said that it did not affect the outcome of the trial. The prosecution bolstered the credibility of Amanda Jones and Beau Lynch and bolstered the strength of its case through the prosecutor's expression of his personal beliefs. This misconduct encouraged the jury to disregard their exclusive role as the judges of credibility in favor of the prosecutor's beliefs. This is a case that largely hinges on credibility. At the time of Mr. Anderson's death, only a handful individuals were present and able to observe the events that transpired: Mr. Anderson, Ms. Jones, Mr. Godwin, Mr. Lynch, Mr. Ruiz, and Ms. Griner/Cutler. The deceased and Ms. Griner/Cutler did not testify at trial. As such, evidence of the events that transpired came in through the three witnesses called by the State and Mr. Godwin. If Mr. Godwin's account of the events of the evening of Mr. Anderson's death are accurate and credible, the killing of Mr. Anderson was justifiable. However, if the account of other parties present was accurate or credible, his actions were not justified and were criminal.

There were credibility issues which each of the witnesses. Ms. Jones openly lied during her testimony. Shortly after the shooting of Mr. Anderson, Ms. Jones was asked to identify the shooter. (Tr., p. 933, L.16–p.934, L.11.) She did not identify Mr. Godwin. However, during trial she testified that she had identified Mr. Godwin. (Tr., p.614, Ls.1–9.) Officer Johnson testified that Ms. Jones was unable to identify Mr. Godwin from the photo lineup. (Tr., p.934, Ls.9–15.) As such, Ms. Jones' statement to the contrary was false.

She also had issues recalling other events. When asked what Mr. Anderson had in his hand when Mr. Godwin pulled up she noted "he had the license plate in his hand" (Tr., p.581, Ls.12–14), he had a screwdriver in his hand (Tr., p.607, Ls.2–13), and that she "didn't pay

attention" (Tr., p.583, Ls.4–10). She was unable to remember what Mr. Godwin looks like, and then, moments later, was able to identify him. (Tr., p.585, L.16–p.587, L.22.) Ms. Jones also accused Mr. Ruiz of pointing a gun at her and threatening her. (Tr., p.608, L.4–p.610, L.7.)

Mr. Lynch testified at trial that he did not see Mr. Anderson pull a gun. (Tr., p.714, L.5–p.715, L.2.) However, he told police that both Mr. Anderson and Mr. Godwin had guns drawn. (Tr., p.724, L.13–p.725, L.15.)

Mr. Ruiz testified that he did not point a gun at Ms. Jones. (Tr., p.787, L.17–p.788, L.3.) As such, either Ms. Jones or Mr. Ruiz is correct about that specific event, but one of the two was lying.

Certainly, Mr. Godwin's early statements to investigators were not accurate. He openly acknowledged that when he first began talking to police he lied about his whereabouts and involvement in the death of Mr. Anderson. (Tr., p.1075, Ls.9–12, p.1082, L.5–p.1084, L.7.) However, shortly into the interrogation, Mr. Godwin admitted involvement and asserted the killing was self–defense. (Tr., p.1063, L.6–p.1064, L.18, p.1111. Ls.3–20; State's Exs. 68, 69.) He maintains that the homicide was justified.

As such, there were numerous inconsistencies and outright lies in the eye-witness testimony. Determining who to believe was the jury's most vital decision. The prosecutor's repeated comments that he, a representative of the State of Idaho, believed in the case and the testimony of Ms. Jones and Mr. Lynch likely impacted the way the jury made its credibility determinations and, as a result, likely affected the outcome of the trial.

Therefore, the prosecutorial misconduct could have influenced the way the jury considered the evidence, made credibility determinations, and rendered their verdict. This Court should find that the misconduct denied Mr. Godwin of his right to a fair trial because it cannot

say beyond a reasonable doubt that misconduct did not contribute to the verdict. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, likely influenced the jury. This Court must vacate the conviction.

VI.

Even If The Above Errors Are Individually Harmless, Mr. Godwin's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Godwin asserts if the Court finds that the above errors were harmless, the district court's errors combined amount to cumulative error. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. *State v. Paciorek*, 137 Idaho 629, 635 (Ct. App. 2002). In order to find cumulative error, this Court must first conclude there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial. *State v. Lovelass*, 133 Idaho 160, 171 (Ct. App. 1999). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. *State v. Martinez*, 125 Idaho 445, 453 (1994). However, a finding of cumulative error must be predicated upon an accumulation of actual errors. *State v. Medina*, 128 Idaho 19, 29 (Ct. App. 1996).

Mr. Godwin asserts the district court's errors amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in Parts I–IV above, and need not be repeated, but are incorporated herein by reference.

CONCLUSION

Mr. Godwin respectfully requests that this Court vacate his conviction and remand this case for a new trial.

DATED this 24th day of April, 2018.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of April, 2018, 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:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas