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

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 44858
	)	
v.	)	IDAHO COUNTY NO. CR 2014-57506
	)	
JASON ANDREW GODWIN SR,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

\_\_\_\_\_  
**REPLY 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**

\_\_\_\_\_  
**HONORABLE GREGORY FITZMAURICE**  
District Judge  
\_\_\_\_\_

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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 in the State of Idaho, Mr. Godwin asserts, after confessing to killing Mr. Anderson, his once voluntary questioning became a custodial interrogation, requiring *Miranda*<sup>1</sup> warnings. Mr. Godwin was eventually provided *Miranda* warnings; however, these delayed warnings were only provided after he confessed and was subject to significant additional questioning. He argues that this ask first, warn later approach was impermissible, intentional, and should result in the suppression of all 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. This Idaho Rule of Evidence 404 and 405 evidence was admissible whether or not Mr. Godwin was aware of Mr. Anderson's reputation. As such, it was error to exclude the evidence and the error requires the reversal of Mr. Godwin's conviction.

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 Rule 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.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

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.

Additionally, Mr. Godwin asserts the State committed prosecutorial misconduct which deprived him of a fair trial. The prosecution violated its duty to see that Mr. Godwin had a fair trial by engaged in vouching behavior. Mr. Godwin contends the misconduct committed in his case constituted fundamental error and the error is not harmless.

Finally, Mr. Godwin asserts the errors are not harmless or, alternatively, the errors amount to cumulative error, depriving him of his right to a fair trial.

This Reply Brief is necessary to address the State's assertions to the contrary.

#### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were articulated in Mr. Godwin's Appellant's Brief. (App. Br., pp.6-9.) They need not be repeated in this Reply Brief, but are incorporated by reference.

## 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 that 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 that 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

On appeal, Mr. Godwin argued the district court erred by denying his motion to suppress statements made during a custodial interrogation because Officer Hewson's delayed *Miranda* warnings after Mr. Godwin's first confession did not cure the Fifth Amendment violation. (App. Br., pp.10–34.) The State responded. (Resp. Br., pp.5–13.) Mr. Godwin now replies to some, but not all, of the State's arguments.

The State first asserted Mr. Godwin's argument was not preserved for appeal. (Resp. Br., pp.7–8.) Mr. Godwin disagrees. In Mr. Godwin's memorandum in support of his motion to suppress, he identified two "grounds" for the motion: whether his confession was voluntary and whether he invoked his *Miranda* rights. (R., p.179.) In the second *Miranda*-based argument, Mr. Godwin also contended, "having made a confession," Officer "Hewson had made a decision that [Mr.] Godwin was not going to be leaving the station." (R., p.189.) Mr. Godwin continued:

[Mr.] Godwin should have been read his *Miranda* rights at the outset of the interrogation. Had that been done, the defendant would have invoked those rights and, as he stated when they were first mentioned, not waive them. *However, having already made statements while in custody, the defendant was trapped.*

The circumstantial evidence supports the finding that [Mr.] Godwin was never free to leave and would have been stopped had he tried to do so. . . . The only "suspect" referenced in the investigative reports is [Mr.] Godwin. Whether he was told so or not, [Mr.] Godwin was the focus of the investigation. He was arrested after the interrogation ended.

For these foregoing reasons, [Mr.] Godwin's statements to law enforcement authorities were the product of police coercion elicited through the use of overreaching techniques. Under the totality of the circumstances, his statements were not voluntary.

(R., pp.187–88 (emphasis added).) Mr. Godwin then expanded on this argument at the suppression motion hearing. He argued he was subject to a custodial interrogation. (Tr., p.153,

L.19–p.160, L.11.) He maintained that a reasonable person in his situation would not feel free to leave once “something changed” in the interview. (Tr., p.158, L.1–p.159, L.22.) Then, in ruling on the motion to suppression, the district court determined Mr. Godwin was not in custody. (R., pp.505–08.) The district court did not reach the issue of the adequacy of the *Miranda* warnings. For the district court, the custody determination resolved the issue—if Mr. Godwin was not in custody, no *Miranda* warnings were required, so whether those warnings were sufficient was beside the point. Accordingly, Mr. Godwin first argued on appeal that he was subject to a custodial interrogation, which required *Miranda* warnings. (App. Br., pp.17–25.) The establishment of a custodial interrogation does not end the inquiry, however. Once Mr. Godwin showed he was subject to a custodial interrogation, he also had to show that the *Miranda* warnings were inadequate. (App. Br., pp.25–34.) Mr. Godwin was obligated to address this issue on appeal because it is part and parcel of the custodial interrogation issue. If Mr. Godwin had argued that he was subject to a custodial interrogation, but not argued the *Miranda* warnings were inadequate, he would have essentially waived this issue. The adequacy of the *Miranda* warnings is a crucial part of a custodial interrogation analysis. Therefore, Mr. Godwin maintains that he has not raised a new issue on appeal, but rather has argued all aspects of an issue raised below.

Next, the State submits this Court should reject Mr. Godwin’s “novel proposition” that a confession to serious criminal conduct transforms voluntary police questioning into a custodial situation. (Resp. Br., p.10.) Although Mr. Godwin disputes his position is novel—considering several other courts have ruled in his favor—he recognizes this is a matter of first impression. (App. Br., pp.20–23.) To this end, Mr. Godwin also disputes the State’s contention that *State v. James*, 148 Idaho 574 (2010), has rejected his proposition. (Resp. Br., p.10.) In *James*, a police

officer told three occupants of car that if none of them “fessed up” to the contraband found in the car, he would “arrest them all.” *Id.* at 575. This Court determined “the threat of lawful arrest alone does not transform non-custodial questioning into the functional equivalent of arrest, requiring *Miranda* warnings.” *Id.* at 578. A threat of lawful arrest, however, is not the same as a confession to homicide. One is a claim by law enforcement of a future act; the other is an admission by the suspect to the commission of a serious offense. A reasonable person would not believe an officer’s threat or warning that he will arrest in the future to be a current restraint on freedom of movement. On the other hand, a reasonable person would believe his admission to an officer, at the police station, to the commission of the very crime that the officer is investigating to cause restraint in his freedom of movement. That individual would not expect to leave the police station freely. Thus, contrary to the State’s argument, *James* has not addressed the issue at bar. As argued here and in his Appellant’s Brief, Mr. Godwin maintains that his confession to homicide, in and of itself, or the facts of his interrogation collectively created a custodial setting. (App. Br., pp.20–25.)

Finally, Mr. Godwin challenges the State’s claim that any error in the district court’s denial of his motion to suppress was harmless. This is absurd. The State points to a hypothetical trial in which Mr. Godwin’s confessions were excluded, but then introduced to the jury for impeachment purposes after Mr. Godwin testified in his defense. This argument relies on speculation upon even more speculation. Moreover, it is not the test for harmless error. The harmless error standard examines the effect of the error “upon the guilty verdict in the case at hand.” *State v. Thomas*, 157 Idaho 916, 919 (2015) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). Here, the State has not shown, beyond a reasonable doubt, that this error “did not contribute to the verdict obtained.” *State v. Perry*, 150 Idaho 209, 221 (2010) (quoting

*Chapman v. California*, 386 U.S. 18, 24 (1967). Far from it. It is pure conjecture from the State that Mr. Godwin would have testified in his defense had his confessions been properly suppressed. It is also pure speculation from the State that the prosecutor would have used Mr. Godwin's confessions for impeachment purposes. The amount of guesswork needed to evaluate the State's position demonstrates why the harmless error standard considers the impact of the error upon the actual trial, not what could have happened absent the error. And what happened in this case was the prosecutor's presentation of Mr. Godwin's multiple confessions and use of those confessions to prove its case. First, the prosecutor told the jury in opening statements that "[t]his audiotaped interview is very important." (Tr., p.500, L.23.) The prosecutor outlined this evidence in advance for the jury in his opening statement. (Tr., p.495, Ls.6–12, p.496, Ls.17–21, p.500, L.1–p.502, L.4, p.505, L.23–p.506, L.3.) Next, the prosecutor played the interrogation recordings for the jury in its case-in-chief. (Tr., p.848, Ls.9–10, p.851, Ls.7–8.) Lastly, the prosecutor referred back to Mr. Godwin's confessions in closing argument. The prosecutor told the jury, "We know that [Mr. Godwin] lied over and over to Detective Hewson when he gave that interview. That interview was the next morning. Everything was fresh in Jason Godwin's mind, and he lied. He said lie after lie in that interview." (Tr., p.1137, Ls.20–24; *see also* Tr., p.1177, Ls.14–15 ("We know that he has lied before. He is not credible. He admitted to many lies.")) The prosecutor discussed the interrogation with Officer Hewson and the reasonable inferences from it multiple times. (Tr., p.1137, L.20–p.1139, L.25, p.1144, L.22–p.1145, L.6, p.1147, L.21–p.1148, L.19.) Based on the actual events of the trial, the State cannot show the erroneous admission of Mr. Godwin's confessions did not contribute to the jury's guilty verdict. The State's proposed "hypothetical trial" approach (which is not supported by any legal authority) is the improper standard for harmless error. This Court should reject the State's

new standard and examine the impact of the error on the verdict actually obtained. Using the appropriate standard, the State has not proven beyond a reasonable doubt the error was harmless.

Based on the argument herein and those contained in Mr. Godwin's Appellant's Brief, he asserts the district court erred by denying his motion to suppress, and this Court should reverse or vacate the district court's order denying his motion and remand this case for further proceedings.

## II.

### The District Court Erred When It Ruled That 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

On appeal, Mr. Godwin argued 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. The State has asserted, in a very brief response, that Mr. Godwin "failed to show that the district court abused its discretion when, properly following controlling precedent, it granted the state's motion in limine." (Resp. Br., p.14.) It appears that the State believed that Mr. Godwin had raised, in Issue II, an issue with the district court's determination that specific instances of Mr. Anderson's conduct were inadmissible.<sup>2</sup> (Resp.

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<sup>2</sup> Mr. Godwin acknowledges a typo in the introduction of the issue where the term "specific instances" was used instead of the proper terms "opinion or reputation evidence." (App. Br., p.34.) However, the remainder of the sentence (referring to character evidence), as well as the issue statement and substantive portion of the issue, clearly designate the issue as an error in interpreting I.R.E. 404(a) and prohibiting the introduction of character or opinion evidence unless Mr. Godwin could show that he had prior knowledge of Mr. Anderson's character. (App. Br., pp.34-39.)

Br., pp.13–14.) However, this was plainly not the issue raised.<sup>3</sup> Mr. Godwin asserted error in the district court’s ruling that opinion or reputation evidence was admissible only if Mr. Godwin was aware of Mr. Anderson’s reputation. (App. Br., pp.34–39.) The State failed to address the issue presented. As such, the State has forfeited their right to present argument on this issue. Additionally, the State has failed to meet their burden in proving that the error was harmless. *See Perry*, 150 Idaho at 227.

### 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

On appeal, Mr. Godwin asserted *State v. Custodio*, 136 Idaho 197 (Ct. App. 2001) and its progeny were incorrectly decided and are patently unfair to criminal defendants. He respectfully requested that this Court 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. The State’s arguments to the contrary are unremarkable. As such, Mr. Godwin does not provide any additional argument on this issue and relies on the arguments provided in the Appellant’s Brief. (*See App. Br.*, pp.39–51.)

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<sup>3</sup> Mr. Godwin’s arguments regarding the admissibility of specific instances of conduct and the request to overrule *State v. Custodio*, 136 Idaho 197 (Ct. App. 2001) can be found in Issue III.

#### IV.

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

Mr. Godwin also argued on appeal that a reasonable view of the evidence supported an instruction on justifiable homicide and the district court's failure to give this instruction constituted fundamental error. (App. Br., pp.57–76.) The State's arguments in response are not persuasive.

As an initial matter, the State argues this error is not preserved. (Resp. Br., pp.21–23.) That is correct. But Mr. Godwin never argued otherwise on appeal. Mr. Godwin raised this claim pursuant to the fundamental error doctrine. (App. Br., pp.71–75.) Accordingly, the State's position that this Court should hold a party waives an instructional error if not raised below, that Mr. Godwin waived this error, and that Mr. Godwin invited this error miss the mark. Moreover, the State's assertion that instructional errors are waived if not preserved would eliminate the fundamental error doctrine as applied to jury instructions. This argument is unsupported by law. This Court reaffirmed in *State v. Hall*, 161 Idaho 413 (2016), that an alleged error pertaining to a jury instruction can be raised for the first time on appeal as fundamental error. *Id.* at 422–23. Mr. Godwin has done that here. (See App. Br., pp.57–76.) As such, Mr. Godwin submits this Court can review this assignment of error on appeal.

Next, the State's argument that Mr. Anderson's conduct towards Mr. Godwin was not an "actual, ongoing attack" is misplaced. An actual, ongoing attack is not defined by battery or assault, as argued by the State. (Resp. Br., pp.25–26.) There are no such limitations in I.C. § 18-4009(1). Idaho Code § 18-4009(1) simply provides that homicide is justifiable "[w]hen resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person." Mr. Godwin maintains the act of pointing a gun directly at another person and

cocking the hammer is an attempt to murder, commit a felony, or do some great bodily injury. It is an actual, ongoing attack. (*See* App. Br., pp.63–66.) The State’s argument that Mr. Godwin had to wait until the gun was discharged to respond would dispel the need to defend oneself altogether. It should go without saying, but, if the gun was discharged, Mr. Godwin would have been shot. At that point, the danger is abated, and the privilege of self-defense has expired. *See Hall*, 161 Idaho at 424. Simply put, a deceased or gravely injured person cannot defend oneself from the harm that already occurred. The State’s argument is illogical and contravenes the right of self-defense.

For all other issues, including whether this issue satisfies the fundamental error standard, Mr. Godwin respectfully refers this Court to his Appellant’s Brief. (App. Br., pp.71–76.)

## V.

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

Mr. Godwin argued the prosecutor committed misconduct in his case which requires the vacation of his conviction. (App. Br., pp.66–74.) Response is necessary to address the State’s assertions that he “cherry-picked” quotes and, to the extent the prosecutor’s comments amounted to misconduct, there was no prejudice because “the prosecutor did not convey any impression that he was aware of evidence that had been withheld from the jury.” (Resp. Br., pp.32–35.) The State’s arguments are flawed.

First, the State asserts Mr. Godwin “cherry-picked” the quotes he relied upon and took them out of context. (Resp. Br., pp.32–34.) Mr. Godwin adamantly denies this allegation and asserts that by quoting only the relevant portions, he has, in no way, manipulated the words or intent of the prosecutor’s closing.

Furhter, the State has taken issue with Mr. Godwin's quoted excerpt:

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).) The next sentence includes the following, “And what Mr. Monson and I tell you is not evidence, but the evidence proves that Mr. Godwin is guilty of second degree murder.” (Tr., p.1142, Ls.22–24.) The State asserts the quoted material merely shows that the prosecutor was acting appropriately by reminding the jury that they have to make credibility determinations and that the prosecutor's statements were not evidence. (Resp. Br., p.32.) The State's assertion is disingenuous as it relies on only the proper portions of the closing argument and ignores the nefarious portions, employing the very tactic of which it accuses Mr. Godwin. Regardless, the State's reading ignores the additional statement asserting that the prosecutor believed Ms. Jones. A prosecutor should not be allowed to commit misconduct and avoid the repercussions by also peppering his argument with appropriate statements. This proverbial wink does little, if anything, to eradicate the suggestion that the jury should believe the prosecutor's view of the evidence over its own.

Next, the State takes issue with another quote in Mr. Godwin's brief:

. . . 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.

(App. Br., pp.68–69 (quoting Tr., p.1145, L.13–p.1146, L.2 (emphasis added).) The State asserts

the quote does not amount to misconduct because it was merely a belief regarding credibility based on inferences from the evidence presented at trial. (Resp. Br., p.33.) In support of this argument the State cites *State v. Sheahan*, 139 Idaho 267, 280 (2003), as holding, “[i]t is not improper for the prosecutor to express a belief that a witness is credible when his comment is based on inferences from evidence presented at trial.” (Resp. Br., p.33.) However, *Sheahan* actually states, “[i]t is improper, however, for the prosecution to express a personal belief as to the credibility of witnesses, unless the comment is based solely on inferences from evidence presented at trial.” *Sheahan*, 139 Idaho at 280. Although presumably acknowledging that the prosecutor was expressing a personal belief regarding the credibility of Ms. Jones, the State failed to argue that said belief was “based solely” on inferences from the evidence. (Resp. Br., p.33.) As such, the State’s argument is lacking legal support.

Later, the State, using the appropriate legal standard, asserted the quote referring to Mr. Lynch was proper when looking at all of the evidence. (Resp. Br., p.33.) However, the statement by the prosecutor appears to rely on his opinion, not upon evidence. The prosecutor did not attempt to rein in his statement regarding Mr. Lynch by tying it to the evidence. (*See generally* Tr., p.1134, L.10–p.1150, L.18.) Instead, the prosecution again vouched for the credibility of the State’s witnesses by expressing personal opinion:

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).) Further, making bold statements about credibility and then reminding the jury that they get to make the determination is insufficient to cure the suggestion provided by the prosecutor’s inducement to trust the government’s judgment.

The State then argues the prosecutor’s final statement to the jury was taken out of context. (Resp. Br., p.34.) The quoted portion was the last statement made during the rebuttal closing argument: “. . . 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).) It is true that the statement came after a review of some of the evidence presented; however, there was once again no attempt to directly tie the statement to evidence presented or ensure that the jury was aware the statement was based solely on the evidence. Instead it left the jury, in the final moments before deliberation, with the impression that the prosecutor believed its evidence and witnesses were credible and impliedly suggested the jury should trust the prosecutor’s judgment. These statements amount to prosecutorial misconduct and present a due process violation. As noted by the United States Supreme Court:

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).

Finally, the State has asserted that there was no prejudice because “the prosecutor did not convey any impression that he was aware of evidence that had been withheld from the jury.” (Resp. Br., pp.32–35.) The State’s assertion is misplaced. Even if the prosecutor’s vouching comments did not imply there was additional evidence, they nonetheless posed the second danger discussed in *Young*—that the jury would trust the Government’s judgment rather than its own.

As such, Mr. Godwin maintains that the improper comments made by the prosecution during closing arguments, constituting misconduct, likely influenced the jury and, as result, this Court must vacate his 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

Although the majority of the State's argument concerning cumulative error is unremarkable and does not require a response, it should be noted the State has cited an incorrect harmless error standard. The State asserted that any possible accumulation of error cannot be harmless because "the evidence of Godwin's guilt was overwhelming." (Resp. Br., pp.36-37.) However, the Idaho Supreme Court determined the Idaho harmless error standard is the test articulated in *Chapman*: "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." *Chapman v. California*, 386 U.S. 18, 24 (1967); see *State v. Perry*, 150 Idaho 209, 227 (2010). As such, in determining whether the errors are harmless, the appellate court must use a test of whether there was no reasonable possibility that such errors contributed to the conviction, not whether the evidence was overwhelming.

CONCLUSION

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

DATED this 29<sup>th</sup> day of August, 2018.

/s/ Elizabeth Ann Allred  
ELIZABETH ANN ALLRED  
Deputy State Appellate Public Defender

/s/ Jenny C. Swinford  
JENNY C. SWINFORD  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of August, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

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

EAA/eas