3-27-2018

# State v. Woods Appellant's Brief Dckt. 45094

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

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| **STATE OF IDAHO,** | ) | |
| | ) | **NO. 45094** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **CANYON COUNTY NO. CR 2016-7911** |
| **v.** | ) | |
| | ) | |
| **JAYSON L. WOODS,** | ) | **APPELLANT'S BRIEF** |
| | ) | |
| **Defendant-Appellant.** | ) | |
| _____ | ) | |

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# BRIEF OF APPELLANT

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

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**HONORABLE GEORGE A. SOUTHWORTH**
**District Judge**

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**ERIC D. FREDERICKSEN**
**State Appellate Public Defender**
**I.S.B. #6555**

**JUSTIN M. CURTIS**
**BRIAN R. DICKSON**
**Deputy State Appellate Public Defenders**
**I.S.B. #6406 & 8701**
**322 E. Front Street, Suite 570**
**Boise, Idaho 83702**
**Phone: (208) 334-2712**
**Fax: (208) 334-2985**
**E-mail: documents@sapd.state.id.us**

**ATTORNEYS FOR DEFENDANT-APPELLANT**

**KENNETH K. JORGENSEN**
**Deputy Attorney General**
**Criminal Law Division**
**P.O. Box 83720**
**Boise, Idaho 83720-0010**
**(208) 334-4534**

**ATTORNEY FOR PLAINTIFF-RESPONDENT**

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## STATEMENT OF THE CASE

### Nature of the Case

Jayson L. Woods appeals from his judgment of conviction, asserting that the district court violated his Confrontation Clause rights by permitting a data acquisition and recovery technician to testify via Skype video conferencing, and that the district court committed fundamental error, violating his right to be free from double jeopardy, by failing to merge his conspiracy charge with the robbery, and thus, the murder, charges.

### Statement of the Facts and Course of Proceedings

In the early morning hours of April 29, 2016, several Canyon County residents were awakened by a man ringing their doorbell and asking for help. (Tr., p.835, L.4 – p.836, L.8; p.861, Ls.18-22.) Christopher Odenberg with the Canyon County Sheriff's Office responded and found this individual, who was identified as Steven Nelson. (Tr., p.845, Ls.15-21.)

Mr. Nelson told Deputy Odenberg that he had responded to a Backpage.com advertisement for a male escort for sex, and that he picked up a man at a Walmart store and they had driven out to Gott's Point. (Tr., p.846, L.12-16.) Mr. Nelson stated that the other man had asked if he had the money, and once Mr. Nelson showed him the money, the man attacked Mr. Nelson by choking and kicking him, before stealing his clothes, phone, and car keys. (Tr., p.846, Ls.11-25.) Mr. Nelson told Deputy Odenberg that he was injured, and that he believed he was dying due to having Hepatitis C and cirrhosis of the liver. (Tr., p.847, L.20 – p.848, L.10.) Mr. Nelson was eventually transported to St. Alphonsus Regional Medical Center in Boise, where he died from cardiac arrest. (Tr. p.919, Ls.10-17.)

The Canyon County Sheriff's Office was then contacted by Abigail Williams, who agreed to speak with investigators. (Tr., p.1537, Ls.9-16.) She testified that she and Mr. Woods,

her ex-boyfriend, had a business relationship where she would have sex with men for money and she would turn the money over to Mr. Woods. (Tr., p.1481, L.20 – p.1483, L.3.) Advertisements would be placed online, and Mr. Woods would set everything up while she would perform the sexual acts. (Tr., p.1483, L.24 – p.1484, L.3.)

Ms. Williams testified that on the evening at issue, she was driving around with Mr. Woods, Kelly Schneider, Kevin Tracy, and Daniel Henkel, and that "we had put up ads for all the men as well as had an ad for myself …" (Tr., p.1500, Ls.19-25.) Mr. Nelson responded to one of Kelly Schneider's advertisements. (Tr., p.1506, Ls.13-16; p.1510, Ls.17-18.) Mr. Woods testified that he told Mr. Schneider to agree to the transaction, but that "if you can't go through with it, just take the money and go." (Tr., p.1729, Ls. 2-3.) Mr. Schneider took Mr. Nelson's money at this exchange and then ran. (Tr., p.1729, Ls.18-21.) Mr. Woods explained that this was a "grab and go":

> A grab and go is where you meet up with somebody and you can't – you decide not to do the service, not to provide the service, and you already have your money up front. They already give you the money. So you decide to just make an excuse and walk away.
>
> The purpose of a grab and go was mainly for the comfort of the escort. Like if the person wasn't hygienically clean or they were mistreating the escort or, for example, the escort just didn't get a good vibe and wasn't comfortable, they just walk away.

(Tr., p.1707, Ls.3-17.) He testified that a "grab and go" would happen about ten percent of the time. (Tr., p.1707, Ls.23-24.) Mr. Woods stated that they would not do "grab and go's" very often because "we had a reputation. I was- I was working to build a legal escort service, and we were trying to establish a positive reputation …" (Tr., p.1708, Ls.3-8.) For this reason, Mr. Woods testified that hurting clients was a "no go. That's not okay for business at all." (Tr., p.1708, Ls.23-25.)

Later that evening, Mr. Nelson sent another message to the advertisement and stated that he was willing to meet again if Mr. Schneider agreed to perform the sexual act. (Tr., p.1730, Ls.3-9.) In regard to the second encounter with Mr. Nelson, Mr. Woods testified: "we were, because we didn't know – we had never done a grab and go on the same person twice. So we didn't know if Steven Nelson was going to, you know, have a gun and try to get retribution or if was a setup to try to snake Kelly because Steven Nelson had said he wanted Kelly to come to his house." (Tr., p.1748, Ls.17-23.) Mr. Woods emphasized that "attacking Mr. Nelson was never even discussed." (Tr., p.1749, Ls.12-15.) Mr. Woods did suggest that Mr. Tracy and Mr. Henkel be at the scene "just in case Steven Nelson tried to pull something on Kelly." (Tr., p.1750, Ls.17-25.)

On the other hand, Ms. Williams testified that the plan was that "they would come into the area, and the guys would be hiding, being Kelly [sic] and Daniel would be hiding nearby, and they would ambush them and rob them." (Tr., p.1501, Ls.19-24.) Ms. Williams testified that this was Mr. Woods's idea. (Tr., p.1501, Ls.24-25.) Thus, according to the State, Mr. Woods and the others planned for Mr. Schneider to meet up with Mr. Nelson again and "take him for a larger amount of money." (Tr., p.1511, L.22 – p.1512, L.1.) Mr. Woods dropped off Kevin Tracy and Daniel Henkel at Gott's Point in order to assist Mr. Schneider if need be. (Tr. p.1513, Ls.9-14.) Mr. Henkel carried a baton. (Tr., p.1514, Ls.13-25.) Mr. Woods then dropped off Mr. Schneider at the Walmart in order to meet with Mr. Nelson. (Tr., p.1516, Ls.13-20.) Once they arrived at Gott's Point, Mr. Schneider attacked Mr. Nelson and Mr. Nelson died as a result of that attack. (Tr. p.846, Ls.11-25, p.919, Ls.10-17.)

Mr. Woods was charged with first degree murder, robbery, conspiracy to commit robbery, and accepting the earnings of a prostitute. (R., p.32.) The State alleged that Mr. Woods

aided and abetted Kelly Schneider's robbery of Mr. Nelson during which Mr. Schneider killed Mr. Nelson. (R., p.32.) Thus, the State proceeded on the theory of felony murder. At trial, Mr. Woods admitted that he was guilty of accepting the earnings of a prostitute. (Tr., p.1702, Ls.15-20.) However, Mr. Woods adamantly denied that he intended that Mr. Schneider or anyone else rob Mr. Nelson.

At trial, the State introduced data obtained from the cellular phones of the participants of the evening's events, but the State had difficulty extracting data from one of Mr. Woods's phones. The State sent this phone to Virginia to be analyzed eight months before trial, and requested that the data technician, Steve Barrios, be allowed to testify via Skype. (Tr., p.1421, Ls.3-6.) Over defense counsel's Confrontation Clause objection, the court permitted the video testimony. (Tr., p.1424, Ls.6-18.) Once the foundation was laid for how the data was obtained, the State introduced evidence of the text messages found on the phone. (Tr., p.1434, Ls.11-18; State's Ex. 200; 201; 215; 206A.)

Mr. Woods was found guilty following trial and the district court imposed sentences of life, with twenty-three years fixed for murder, life, with ten years fixed, for conspiracy to commit robbery, and fifteen years, with five years fixed, for accepting the earnings of a prostitute. (R., p.585.) The court merged the robbery charge with the murder charge. (R., p.585.) Mr. Woods appealed. (R., p.588.)

## ISSUES

I. Whether the district court erred by permitting Steve Barrios to testify via Skype?

II. Whether the district court committed fundamental error by imposing sentences for both the conspiracy charge and the felony murder charge in violation of Mr. Woods's right to be free from double jeopardy?

## ARGUMENT

## I.

## The District Court Erred By Permitting Steve Barrios To Testify Via Skype

### A. Introduction

Mr. Woods submits that district court erred by permitting Steve Barrios to testify via Skype because the State failed to establish an important public policy necessary to excuse traditional in-court testimony.

### B. Standard Of Review

Constitutional issues are questions of law over which this Court exercises free review. *State v. Forbes*, 152 Idaho 849, 851 (2012). Further, the harmless error test articulated in *Chapman v. California*, 386 U.S. 18 (1967), applies in cases of objected-to error. *See State v. Perry*, 150 Idaho 209, 221 (2010). Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, unless the State proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id*.

### C. The District Court Erred By Permitting Steve Barrios To Testify Via Skype

The district court noted that it had been advised in chambers that the State was seeking to have Steve Barrios testify through Skype rather than having him "be forced to come and testify, because availability may not be there." (Tr., p.1420, Ls.14-23.) Mr. Barrios was a data acquisition and recovery technician at Booz Alan Hamilton in Quantico, Virginia, who examined a cellular phone obtained from Mr. Woods. (Tr., p.1427, L.5 – p.1428, L.20.) The State requested that Mr. Barrios's presence at the trial be excused because, "the data recovery was just

sent back to us this week. We just recently in the last day have been able to provide a copy to Mr. Sisson as defense counsel." (Tr., p.1421, Ls.3-6.) The State then asserted that defense counsel waived any right to object because he previously did not agree to a continuance.[1] (Tr., p.1421.) Counsel for Mr. Woods acknowledged that he did not agree to a continuance, but noted that the State "had this phone for nine months, and apparently it only became a priority for them to get the data from it fairly late into the game." (Tr., p.1421.)

Counsel for Mr. Woods objected on the basis of the Confrontation Clause:

> Well, Your Honor, obviously my client has a Sixth Amendment right to confront any witness that's against him. Generally speaking, the courts in the past have preferred that in many cases, not only on the State but the federal level, that the preference is to have witnesses in court so that they can be observed not only by the defendant and his attorney but also the jury. And so although it might be a slight hardship for the State in arranging this person to fly out here for the testimony, it's not an insurmountable barrier. We can get him plane tickets. We can get him out here. Money, although once again everyone's concerned about money, but it's not something that is going to bankrupt the county. And so my client and I would strongly urge the Court to require this technical person to be here so we can cross-examine them and confront them.

(Tr., p.1422, Ls.3-22.) The State then acknowledged, "the case law does state the preference is for the [C]onfrontation [C]lause that it be in person face to face." (Tr., p.1422, Ls.22-25.) However, the State then argued,

> This witness is purely foundation. And the State did do its due diligence in attempting to get this data as fast as it possibly could. We sent the phones off in May. It's been as the – as [a prior witness] testified, it had to be first processed here, then sent off to another agency in Nebraska, and then finally ended up in Quantico. So we did our due diligence into attempting to get this information as fast as we possibly could.

(Tr., p.1423, Ls.2-11.)

[1] With regard to the continuance, the district court held, "I do not believe and I do not conclude that you waived any right to your objection because you didn't agree to a continuance." (Tr., p.1421, Ls.23-25.)

The district court noted that, while Idaho cases had addressed the propriety of special procedures with regard to child witnesses in sex offense cases, "it has not addressed the situation in this case." (Tr., p.1423, Ls.12-22.) The district court noted that some jurisdictions permitted this procedure for "minor things such as chain of custody" and then ruled,

> I have considered the costs and the time limits of flying somebody from Quantico, Virginia here to Idaho just to identify the process of getting to the phone that they were able to do it and sent a package of results, although not totally printed out, back to Idaho where those results were printed out in a usable form by the witness that has testified. I think that those are considerations that have been allowed in other cases.
>
> I will allow for foundation purposes only the Quantico witness to be questioned and cross-examined through Skype only. But it will be for foundation purposes only.

(Tr., p.1424, Ls.6-18.) Mr. Barrios then testified that he received a cellular phone from Don Lukasik at RCFL a data recovery lab in Boise, recovered the data from the phone, and sent the copy of the data back to Mr. Lukasik at RCFL. (Tr., p.1428, L.15 – p.1430, L.6.) Mr. Woods submits that the district court erred by permitting Mr. Barrios to testify via Skype, because cost and convenience do not excuse the Confrontation Clause's general requirement that witnesses be present for face-to-face testimony.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (alternation in original) (quoting U.S. CONST. amend. VI). "The Confrontation Clause 'is made obligatory on the States by the Fourteenth Amendment.'" *State v. Richardson*, 156 Idaho 524, 528 (2014) (quoting *Pointer v. Texas*, 380 U.S. 400, 403 (1965)).

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to

> cross-examination, "the greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

*California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE § 1367 (3d ed. 1940)).

The United States Supreme Court addressed the use of video testimony in *Maryland v. Craig*, 497 U.S. 836 (1990). In *Craig*, the Court addressed the constitutionality of a procedure permitted by a Maryland statute that allowed a child victim to testify via a one-way closed circuit television instead of appearing in court. This mechanism allowed those in the courtroom to observe the child as he or she testified and was cross-examined in a separate room; the child, however, could not see the defendant. *Id*. at 841. The defendant was still able to communicate with his defense counsel during cross-examination. *Id*. at 842. After reviewing the history and purpose of the Confrontation Clause, the Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy *and* only where the reliability of the testimony is otherwise assured." *Id*. at 850. (emphasis added).

The Court concluded that the testimony provided via the one-way circuit television was reliable, because it afforded elements of confrontation—oath, cross-examination, and observation of the witness's demeanor—that "adequately ensure[d] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id*. at 851. Next, the Court held that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of

face-to-face confrontation with the defendant." *Id.* at 855. The Court explained that the "requisite finding of necessity must ... be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify[,]" such that the child would be traumatized by the presence of the defendant and that the emotional distress to be suffered is more than *de minimus*. *Id*. at 855-56.

While *Craig* addresses the use of one-way video testimony, Mr. Woods submits that the standard announced in *Craig* must apply to two-way video testimony as well. Courts in other jurisdictions agree: "We deem two-way video testimony, although it provides some additional confrontation assurances than one-way video testimony does, nevertheless to fall short of providing the same guarantees as physical, in-court testimony." *White v. State*, 116 A.3d 520, 544 (Ct. App. Md. 2015). "Even the most cutting-edge technology cannot wholly replace the weight of in-court testimony, for the electronic delivery of that testimony—no matter how clearly depicted and crisply heard—is isolated from the solemn atmosphere of the courtroom and compromises human connection to emotions like fear, apprehension, or confusion." *Id*. Therefore, the Court of Special Appeals of Maryland concluded,

> the *Craig* standard applies when the State seeks to present witness testimony via two-way video conference against a defendant in a criminal proceeding. And, the issues this Court must resolve pursuant to the standard set forth in *Craig* are whether … testimony via a two-way medium was reliable; whether the denial of [the defendant's] right to confront [the witness] in person furthered an important public policy; and whether the court made a sufficient finding of necessity.

*Id*. Mr. Woods submits that in this case, the State failed to demonstrate that denial of face-to-face confrontation furthered an important public policy and that testimony via Skype was a necessity. In *White*, the court noted that the defendant argued that, "convenience and efficiency are not sufficiently important public policies to warrant dispensing the right to physical face-to-

face confrontation, and we agree." *Id*. at 545. *White* relied on *United State v. Yates*, 438 F.3d 1307 (11th Cir. 2006). In *Yates*, the Eleventh Circuit concluded, where the State sought video testimony from a witness that was overseas,

> The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

*Id*. at 1316.

This Court should agree with the courts in *White* and *Yates* and hold that the State's concerns about convenience and efficiency are not important public policies that support the admission of testimony by two-way video conference. First, the State presented no evidence, or even argument, as to what it would cost to fly Mr. Barrios to Idaho for trial in this case. Second, the State presented no evidence, or even argument, as to the efforts that it had made to secure Mr. Barrios's presence. The State represented to the court that it had "sent the phones off in May," and the trial in this case was held in late January of the following year. (Tr., p.1423, Ls.2-11.) The State thus knew that this witness's testimony might be necessary for months. Finally, though the State asserted that Mr. Barrios's "availability" was at issue, (Tr., p.1420, Ls.21-24), Mr. Barrios was clearly not "unavailable" pursuant to the Rules of Evidence. *See* I.R.E. 804(a). However, even if the State had presented evidence or argument as to what the costs might be to secure Mr. Barrios's presence, concerns about expediency and convenience are insufficient policy considerations and do not excuse face-to-face confrontation.

Finally, Mr. Woods notes that, though not cited or discussed in the district court in this case, Idaho Criminal Rule 43.2 provides:

> Forensic testimony may be offered by video teleconference. For testimony by video teleconference to be admissible:
>
> **(a) Witness Visible to Participants.** The forensic scientist must be visible to the court, defendant, counsel, jury, and others physically present in the courtroom.
>
> (1) The court and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.
>
> (2) The defendant, counsel from both sides, and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.
>
> (3) A defendant who is represented by counsel must be able to consult privately with defense counsel during the proceeding.
>
> **(b) Written Notice Required**. The party intending to submit testimony by video teleconference must give written notice to the court and opposing party 28 days before the proceeding date.
>
> **(c) Written Notice of Objection or Affirmative Consent.** A party opposing the giving of testimony by video teleconference must give the court and opposing party written notification of objection or affirmative consent at least 14 days before the proceeding date.
>
> **(d) Party Responsible for Coordinating.** The party seeking to introduce testimony by video teleconference is responsible for coordinating the audiovisual feed into the courtroom. Nothing in this rule requires court personnel to assist in the preparation or presentation of the testimony provided by the provisions of this rule.
>
> The testimony must be recorded in the same manner as any other testimony in the proceeding.

I.C.R. 43.2. This Rule does not define "forensic evidence," but to the extent that it could potentially allow for video testimony in cases such as these without requiring the State demonstrate that denial of face-to-face confrontation is necessary to further an important public policy *and* only where the reliability of the testimony is otherwise assured, the Rule is

unconstitutional in light of *Craig*. Further, although Mr. Woods did not object on this basis, Mr. Woods notes that the State did not comply with the written notice requirement of the Rule. (*See generally*, R.)

In sum, the State's concerns about cost and convenience do not override Mr. Woods's right to confront witnesses in court. The district court therefore erred by permitting Mr. Barrios to testify via Skype.

## II.

## The District Court Committed Fundamental Error By Imposing Sentences For Both The Conspiracy Charge And The Felony Murder Charge In Violation Of Mr. Woods's Right To Be Free From Double Jeopardy

### A. Introduction

While the district court recognized that Idaho law required Mr. Woods's robbery conviction to merge with his felony murder conviction, it failed to recognize that those offenses also merged with the conspiracy conviction due to the Idaho Constitution's protection against double jeopardy. The violation of that right is shown through Idaho's pleading theory, which reveals the acts by which Mr. Woods was alleged to have furthered the conspiracy were the means or method by which he aided and abetted the robbery, and thus, the murder. That is because the acts Mr. Woods was charged to have committed in furtherance of the conspiracy were the same acts by which he was alleged to have aided and abetted the robbery.

The district court's error in imposing two sentences for the same conduct constitutes fundamental error because it affects one of Mr. Woods's unwaived constitutional rights, is clear from the record, and is prejudicial to Mr. Woods. *State v. Perry*, 150 Idaho 209, 226 (2010); *State v. Moad*, 156 Idaho 654, 657-58 (Ct. App. 2014) (explaining that a defendant may raise claims regarding double jeopardy violations as fundamental error.)

B. The Dual Convictions Violated Mr. Woods's Idaho Constitutional Right To Be Free From Double Jeopardy

One of the protections afforded by the right to be free from double jeopardy is the protection against multiple punishments for the same offense. *Moad*, 156 Idaho 658. This protection "is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *State v. Moffat*, 154 Idaho 529, 534 (Ct. App. 2013) (quoting *Brown v. Ohio*, 432 U.S. 161, 169-70 (1977)). Rather, "when a person commits multiple acts against the same victim during a single criminal episode and each act could independently support a conviction for the same offense, for purposes of double jeopardy the 'offense' is typically the episode, not the individual act." *Id*.

To determine whether such a course of conduct constitutes "the same offense" under its state constitution, Idaho uses the pleading theory. *See, e.g., State v. Sepulveda*, 161 Idaho 79, 87 (2016) (applying the pleading theory to a claim of double jeopardy raised solely under the Idaho Constitution). That theory looks at the language of the charging document to evaluate whether one of the offenses is alleged "as a means or element of the commission of the higher offense." *State v. McKinney*, 153 Idaho 837, 841 (2013); *State v. Weatherly*, 160 Idaho 302, 305 (Ct. App. 2016). Because of this focus on the charging language, the pleading theory offers more protections than its federal counterpart. *McKinney*, 153 Idaho at 841; *Weatherly*, 160 Idaho at 305.

Recognizing that Idaho has traditionally afforded more protections against double jeopardy, both the Idaho Supreme Court and the Court of Appeals have both held that conspiracy and the substantive offense constitute "the same offense" in Idaho when all the acts the defendant is alleged to have committed in furtherance of the conspiracy are the same acts by which he is alleged to have aided and abetted the substantive offense. *State v. Sterley*, 112 Idaho

1097, 1101 (1987); *State v. Gallatin*, 106 Idaho 564, 567-68 (Ct. App. 1984) (acknowledging the contrary federal rule that "a conviction and sentence on a count charging conspiracy will not, on a theory of double punishment, prevent conviction and sentence on another count charging the substantive offense").

In *Sterley*, for example, the defendant was charged with conspiracy to deliver a controlled substance as well as aiding and abetting delivery of a controlled substance. *Sterley*, 112 Idaho at 1098. "The Information, charging Sterley, listed delivery as one of the elements of the conspiracy." *Id*. As a result, "everything Sterley did to aid and abet the delivery of cocaine was also done in furtherance of the conspiracy," and so, the Supreme Court held that "the delivery is totally subsumed in the conspiracy conviction." *Id*. In other words, the charged conduct could not be divided into separate temporal units, and so, the two convictions were for "the same offense," which meant they violated Idaho's protections against double jeopardy, and one had to be vacated. *Id*.; *but see State v. Sanchez-Castro*, 157 Idaho 647, 648 (2014) (holding that, based on the language of the charging document in that case, the substantive offense was not charged as an element of the conspiracy, but only as the goal of the conspiracy, and so, the two convictions were not for the same offense).

Likewise, the *Gallatin* Court looked at the acts alleged in the charging document, and concluded "everything Gallatin did to aid and abet the delivery of the cocaine, he did also in furtherance of the conspiracy. His conduct was one continuous 'act.' He did nothing more as a principle by aiding and abetting the delivery of the cocaine than he did in furtherance of the conspiracy." *Gallatin*, 106 Idaho at 569. As a result, the Court of Appeals held the defendant in that case could only be convicted of the conspiracy charge and the additional conviction for the

subsumed substantive offense had to be vacated in the face of Idaho's protections against double jeopardy. *Id*.

While the analysis in both *Sterley* and *Gallatin* is similar to that required by the pleading theory, they were both actually analyzing the double jeopardy question under I.C. § 18-301, which has since been repealed. *See Sterley*, 106 Idaho at 569 (acknowledging the difference between the protections in I.C. § 18-301 and the protections under the Idaho Constitution). However, because the pleading theory survived the repeal of I.C. § 18-301, *see Sepulveda*, 161 Idaho at 87, *Sterley* and *Gallatin* remain useful in understanding how Idaho has traditionally understood its protections against double jeopardy in cases involving charges for both the conspiracy and the associated substantive offense. Nevertheless, as the Supreme Court explained in *Sanchez-Castro*, the question of whether such charges merge under Idaho's constitutional protection against double jeopardy remains one of first impression.[2] *Sanchez-Castro*, 157 Idaho at 648.

Applying the pleading theory in this case reveals the answer to that question is the affirmative – the two offenses merge due to the Idaho Constitution's protections. Specifically, the Indictment alleged Mr. Woods acted in furtherance of the conspiracy by:

> 1. On or about April 29th 2016, Jayson Woods drove Kelly Schneider or Daniel Henkel in a Chevy HHR to meet Steven Nelson at a Walmart in Nampa, Idaho.
>
> 2. On or about April 29th 2016, Jayson Woods drove Daniel Henkel and Kevin Tracy in a Chevy HHR to Gott's Point to wait for Kelly Schneider to rob Steven Nelson at that location.

[2] The Supreme Court did not answer that question in *Sanchez-Castro*, likely due the fact that the appellant in that case had not presented argument or authority in regard to the pleading theory analysis. *Sanchez-Castro*, 157 Idaho at 649; *see State v. Porter*, 130 Idaho 772, 795 (1997) (explaining the Court does not address issues not supported by argument or authority); *see also State v. Barton*, 154 Idaho 289, 294 (2013) (Horton, J., concurring) (explaining that the Court should not address issues such as the continuing viability of precedent with a constitutional foothold without first receiving "input from interested parties").

> . . .
>
> 5. On or about April 29th 2016, Jayson Woods returned with Kelly Schneider to a Walmart in Nampa Idaho to meet with Steven Nelson.
>
> . . .
>
> 12. On or about April 29th 2016, Kelly Schneider gave Jayson Woods forty dollars from the proceeds of the robbery.

(R., p.34 (the omitted charged acts only refer to the actions of the other conspirators, not Mr. Woods).) Likewise, the Indictment alleged Mr. Woods aided and abetted the robbery by:

> Jayson L. Woods, on or about the 29th day of April, 2016, . . . did aid, abet, assist, facilitate and/or encourage Kelley Schneider to feloniously, intentionally and by means of force or fear take from the person and/or immediate presence of Steven Nelson certain property . . . .

(R., p.33.) Thus, Mr. Woods was alleged to have furthered conspiracy by facilitating Kelly Schneider's ability to forcibly take property from Mr. Nelson by driving him to meet Mr. Nelson and driving the backup to Gott's Point. Like the defendants in *Sterley* and *Gallatin*, everything Mr. Woods was alleged to have done to aid and abet the robbery of Mr. Nelson, he had also done in furtherance of the conspiracy to rob Mr. Nelson. As a result, his participation in the conspiracy was the means or method by which he aided and abetted the robbery, and thus, the murder. Therefore, separate convictions for the conspiracy and the substantive offense are impermissible under the Idaho Constitution's protections against double jeopardy and the two offenses should have merged.

That conclusion becomes even more apparent by looking at the contrasting situation presented in *State v. Sensenig*, 110 Idaho 83 (Ct. App. 1985) (also evaluating the double jeopardy question under I.C. § 18-301). In that case, the defendant and his co-conspirators agreed to commit a series of robberies at various stores across Idaho and Utah. *Id*. at 85. The *Sensenig* Court determined that, while the allegations regarding the conspiracy and the

substantive offense overlapped, there were temporal and spatial distinctions between the acts committed in furtherance of the conspiracy and the acts committed in aiding and abetting one of the particular robberies. *See id.*; *but see Moad*, 156 Idaho 654 (upholding separate convictions for acts occurring during a single course of conduct because those acts occurred at different times in different areas of the defendant's prison cell). Because it found distinct acts, the *Sensenig* Court held the conspiracy conviction did not merge with the conviction for aiding and abetting of one of the planned robberies.[3] *Sensenig*, 110 Idaho at 85.

Unlike *Sensenig*, the conspiracy and the robbery charges in the Indictment in Mr. Woods's case both refer only to Mr. Woods's actions in the car on the night of April 29, 2016, which were directed against Mr. Nelson. (R., pp.33-34.) Therefore, there is no temporal or spatial distinction between the alleged conspiratorial conduct and the alleged abetting conduct in this case. Rather, under the pleading theory, the conspiracy and substantive offense charges in

[3] This conclusion in *Sensenig* appears to be at odds with the Court of Appeals' prior decision in *Gallatin*. Though *Sensenig* did not recite the language of the charging document, its description of the conspiracy suggests that charge included the acts for aiding the specific robbery in question *as well as* acts relating to the other, uncharged robberies. *Sensenig*, 110 Idaho 53-54. However, just because the conspiracy was broader than the specific robbery does not mean that everything done to aid and abet the robbery was not also done in furtherance of the conspiracy. Because that was still the case, *Gallatin* still would have required the substantive charge to be vacated due to Idaho's protections against double jeopardy. *Gallatin*, 106 Idaho at 569; *but see Sensenig*, 110 Idaho at 54.

That conflict is ultimately unimportant, however, because the issue was resolved by the Idaho Supreme Court's decision in *Sterley* two years later. The *Sterley* Court adopted *Gallatin*'s approach, thereby effectively overruling the contrary approach in *Sensenig*. *Sterley*, 112 Idaho at 1098 (holding that one of the two convictions had to be vacated because "the delivery is totally subsumed in the conspiracy conviction" since "everything Sterley did to aid and abet the delivery of cocaine was also done in furtherance of the conspiracy"); *cf. State v. Clinton*, 155 Idaho 271, 272 n.1 (2013) (explaining the Supreme Court does not search for conflicting decisions from the Court of Appeals when it decides a point of law; it simply announces the law going forward). The same is true in Mr. Woods's case – if the conspiracy charge were broader than just the robbery of Mr. Nelson, all Mr. Woods's acts aiding and abetting the robbery of Mr. Nelson were still done in furtherance of the broader conspiracy charge, and so, still charged "the same offense" under Idaho's pleading theory.

Mr. Woods's case were for the same course of conduct, and thus, "the same offense." As a result, the dual punishments violate the Idaho Constitution's protections against the double jeopardy. There is no evidence in the record to suggest Mr. Woods waived his right to be free from double jeopardy. (*See generally* R.) Therefore, the first prong of the *Perry* analysis is satisfied in this case.

C. The Error Is Clear From The Face Of The Record

As discussed in Section II (B), *supra*, the Indictment in this case makes it clear which acts Mr. Woods was charged with committing in furtherance of the conspiracy and that those are the same acts by which he allegedly aided and abetted the robbery, and thus, the murder. (R., pp.33-34.) The Judgment of Conviction reveals that convictions were entered and sentences were imposed for both the conspiracy and the murder charges. (R., pp.585-87.) Therefore, the double punishment for the same charged acts is clear from the face of the record, and thus, the second prong of the *Perry* analysis is met in this case.

D. The Error Prejudiced Mr. Woods

The prejudice in this case, the effect of the district court's error on the outcome of the proceedings, is obvious from the fact that Mr. Woods has two convictions, and so, is serving two sentences for his single charged course of conduct in this case instead of one. (*See* R., pp.585-87.) Therefore, the third prong of *Perry* is met in this case.

E. Remedy

Because all three prongs of the *Perry* standard are satisfied by the district court's imposition of the two sentences in Mr. Woods's case, this Court should grant relief for that fundamental error. *Sterley* and *Gallatin* provide guidance as to the proper relief for this error. In

*Sterley*, the Supreme Court remanded the case for the district court to vacate one of the two convictions and sentences, though it noted the substantive offense was the one subsumed. *Sterley*, 112 Idaho at 1098. In fact, under *Gallatin*, the district court in *Sterley* was obligated to vacate the conviction for the substantive offense. *Gallatin*, 106 Idaho at 570 (holding the conviction for the conspiracy was the one which properly survived because the defendant's actions were more properly addressed under the law against conspiracy). For those same reasons, this Court should remand this case with instructions to simply vacate Mr. Woods's conviction and sentence on the murder charge.

## CONCLUSION

Mr. Woods requests that his convictions be vacated and his case remanded for further proceedings. Alternatively, he requests that this Court remand this case with instructions to simply vacate Mr. Woods's conviction and sentence on the murder charge.

DATED this 27th day of March, 2018.

_____/s/_____
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 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:

JAYSON L WOODS
INMATE #122952
ISCI
PO BOX 14
BOISE ID 83707

GEORGE A SOUTHWORTH
DISTRICT COURT JUDGE
E-MAILED BRIEF

LARY G SISSON
ATTORNEY AT LAW
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JMC/eas