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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45627**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-16-34457**
v.	)	
	)	
BYRON LEE SANCHEZ,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Bryon Sanchez appeals from the district court's judgment of conviction for one count of threats against a public servant. Specifically, the State alleged Mr. Sanchez threatened harm in a letter to a prosecutor with the intent to influence the prosecutor's actions in a child protection proceeding or future parole hearing. A jury found Mr. Sanchez guilty of this offense following a two-day trial.

Prior to trial, Mr. Sanchez moved to dismiss the charge against him, arguing the statute criminalizing threats against public servants was overbroad on its face and thus in violation of the First Amendment. The district court denied his motion. Also prior to trial, Mr. Sanchez moved to exclude two exhibits: a face sheet of the judgment of conviction for a prior offense and a face sheet of his pending post-conviction petition stemming from this prior offense. The district court admitted both exhibits over his objections. Then, at trial, the State elicited testimony from the allegedly threatened prosecutor on his reaction to the letter. Mr. Sanchez objected to this testimony.

Now on appeal, Mr. Sanchez raises five issues. First, he argues the district court erred by denying his motion to dismiss because the statute is facially overbroad. Second, he contends the district court abused its discretion by admitting irrelevant evidence of the prosecutor's reaction to the letter. Third, he submits the district court abused its discretion by admitting irrelevant and prejudicial evidence of the nature of his prior conviction on the judgment of conviction face sheet. Fourth, he asserts the district court abused its discretion by admitting irrelevant evidence of Mr. Sanchez's post-conviction petition. Finally, he maintains these errors in the aggregate, if not individually harmful, deprived him of the right to a fair trial. For these reasons, Mr. Sanchez

respectfully requests that this Court vacate his judgment of conviction or order the district court to dismiss the charge against him.

Statement of Facts and Course of Proceedings

In September 2016, while Mr. Sanchez incarcerated for an offense arising out of Gem County, he sent a letter to the Gem County prosecutor, Erick Thomson. The letter reads in its entirety:

> Hello Erick,
>
> I hope you and your's are doing well and congradulations on the new addition to your family.
>
> To business: A prosecutor has the responsibility of a minister of justice . . . This responsibility carries with it specific obligations to see that the defendant is accorded justice, that guilt is decided upon the basis for sufficient evidence and that precautions are taken to prevent and to rectify the conviction of innocent persons. I.C.R. 3.8(g), (H).
>
> I am about to put some things into motion that neither you or I can undo.
>
> I don't want to, but I absolutely will. I would like to think that we are reasonable. I consider myself a Christian. Retribution does not restore. Hurting others, (even when they deserve it) also injuries me. I seek mitigation. I am coming to you from a position of Legal strength asking you to consider coming to the prison and talking privately.
>
> I have operated transparently from the beginning. I am willing to make a one time offer which must be acted upon very soon; otherwise I will be forced to do this the hard-way. My chess pieces are ready to move, and moving. Parties have been contacted who await instructions.
>
> I seek an opportunity to show Idaho what mercy looks like.
>
> My God desires mercy over judgement, but make no mistake, when left no options, He will execute vengence and wrath. Mistakes have been made; let us mitigate them by having an honest private conversation and decide what action may be acceptable to all parties.
>
> Me, sitting in prison, with my children in harm's way, for a crime I didn't commit, past my fixed time, is unacceptable. I have four possible solutions to

> offer and all of them are more pleasant than what is about to happen. Refuse, and what happens next is your doing.

(State's Ex. 1 (spelling, capitalization, and punctuation in original).) The letter was signed by Mr. Sanchez. (State's Ex. 1.) Consequently, the State filed a Criminal Complaint alleging Mr. Sanchez committed the crime of threats against a public servant, in violation of I.C. § 18-1353(1)(b). (R., pp.11–12; *see also* R., pp.49–50 (Amended Complaint).) Following a preliminary hearing, the magistrate found probable cause for the offense and bound Mr. Sanchez over to district court. (R., pp.48, 51–52, 53–54.) The State then filed an Information charging Mr. Sanchez with threats against a public servant. (R., pp.59–60.) Later, the State amended the Information to add a sentencing enhancement pursuant to I.C. § 19-2520F for the commission of a crime on the grounds of a correctional facility. (R., pp.90–91, 114.)

Prior to trial, Mr. Sanchez filed two motions to dismiss the charge against him. (R., pp.148, 149–50.) Relevant here, Mr. Sanchez argued in one motion that the statute of the charged offense, I.C. § 18-1353(1)(b), was overbroad on its face. (R., p.148.) He filed a memorandum in support, the State objected to his motion, and Mr. Sanchez replied. (R., pp.152–59, 166–72, 179–81.) The district court held a hearing on the motion and took the matter under advisement. (R., pp.204–05; Tr., p.7, L.4–p.34, L.16.) In a memorandum decision, the district court held I.C. § 18-1353(1)(b) did not criminalize a substantial amount of protected speech and therefore was not overbroad. (R., pp.211–16.)

Shortly thereafter, the State filed another information to amend the charge.[1] (R., pp.224–25.) The final charged offense read:

[1] This amendment was in response to the district court's ruling on Mr. Sanchez's other motion to dismiss. Mr. Sanchez also argued for dismissal because the charging document failed to include the element of "harm." (R., pp.149–50.) The district court held the charging document was not

> That the Defendant, BYRON LEE SANCHEZ, on or about the 29th day of September, 2016, in the County of Ada, State of Idaho, did threaten harm to a public servant, Gem County Prosecutor Erick Thomson, with the purpose to influence his decision, opinion, recommendation (vote) or other exercise of discretion in a judicial or administrative proceeding, to-wit: a pending child protection proceeding and/or future parole hearings by sending a threatening letter to Prosecutor Erick Thomson.

(R., pp.224–25.) In short, the State charged Mr. Sanchez with threatening harm to Mr. Thomson by sending a letter with the intent to influence Mr. Thomson's actions on a pending child protection proceeding or future parole hearing.

Also prior to trial, Mr. Sanchez moved to exclude two of the State's exhibits (State's Exhibits 3 and 4). (*See generally* Tr., p.48, L.18–p.60, L.13, p.62, L.7–p.73, L.9.) First, the State intended to present the first page of Mr. Sanchez's judgment of conviction. (State's Ex. 3.) This first page showed, among other things, the nature of the crime of conviction (injury to a child) and the sentence. Mr. Sanchez objected to the inclusion of the crime and sentence and requested that those facts be redacted from the judgment of conviction face sheet. (Tr., p.43, Ls.15–17, p.50, Ls.6–p.54, L.16, p.62, Ls.21–25.) He argued this evidence was irrelevant, impermissible character evidence, and unfairly prejudicial. (Tr., p.50, Ls.6–p.54, L.16, p.58, Ls.3–12, p.62, L.12–p.65, L.19.) The State agreed to redact only the sentence. (Tr., p.54, L.20–p.58, L.1, p.65, L.20–p.73, L.7.) In light of the State's concession, the district court ordered the State to redact the sentence, but held the crime of conviction was relevant and not unfairly prejudicial. (Tr., p.58, L.13–p.60, L.7, p.68, Ls.11–19, p.71, L.24–p.72, L.2.) Second, Mr. Sanchez challenged the admission of the first page of his petition for post-conviction relief. (Tr., p.49, Ls.1–3; State's Ex. 4.) He argued this evidence was not relevant and more prejudicial than

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insufficient or defective, but granted the State leave to amend the information to add the "harm" element. (R., pp.218–20.)

probative. (Tr., p.49, Ls.1–3, p.50, Ls.6–7, p.65, Ls.15–19.) The district court disagreed, ruling the evidence was relevant for motive and context and not overly prejudicial. (Tr., p.59, L.15–p.60, L.13.)

At trial, the State called Mr. Thomson as a witness and presented the letter written by Mr. Sanchez. (*See generally* Tr., p.181, L.1–p.224, L.14; State's Ex. 1.) Relevant for this appeal, the State elicited testimony from Mr. Thomson regarding his reaction to Mr. Sanchez's letter and why he had that reaction. (Tr., p.199, L.5–p.200, L.10.) The district court overruled Mr. Sanchez's objection to this testimony on relevancy grounds. (Tr., p.199, Ls.7–8.) The State also presented three face sheets: a permanency plan order for child protection proceedings with Mr. Sanchez's children, Mr. Sanchez's judgment of conviction, and Mr. Sanchez's petition for post-conviction relief. (State's Exs.2–4.) Mr. Sanchez reiterated his previous objections to admission of these exhibits. (Tr., p.190, L.14.) Mr. Thomson testified that the child protection proceeding and post-conviction proceeding were "active" cases. (Tr., p.188, Ls.3–24.) After Mr. Thomson's testimony, the State called Detective Weires. (*See generally* Tr., p.225, L.4–p.230, L.13.) He testified that he interviewed Mr. Sanchez at the Idaho State Correctional Center, and Mr. Sanchez admitting to writing the letter. (Tr., p.226, L.1–p.229, L.6.) The State rested. (Tr., p.230, Ls.19–20.)

After the State rested, the district court and the parties discussed the jury instructions and some other matters. (*See generally* Tr., p.232, L.18–p.261, L.1.) Regarding the jury instructions, Mr. Sanchez objected to the district court's proposed instruction regarding his prior conviction. (Tr., p.235, L.19–p.236, L.11, p.237, L.1–p.244, L.7.) This instruction informed the jury that the evidence of Mr. Sanchez's commission of other acts could be considered for the limited purpose to prove his motive. (*See* Tr., p.238, Ls.15–22.) Mr. Sanchez argued his prior conviction should

not be considered for motive, but could be considered for a different limited purpose to prove the existence of a judicial or administrative proceeding related to Mr. Sanchez. (Tr., p.235, L.19–p.236, L.11, p.239, L.18–p.241, L.1.) The district court agreed to add the limited purpose of proving the existence of the proceedings, but also ruled the prior conviction could prove motive. (Tr., p.238, L.23–p.239, L.17, p.240, L.22–p.241, L.19, p.242, Ls.1–7, p.242, Ls.12–20, p.242, L.25–p.244, L.3.)

On the second day of trial, the district court provided the parties with its revised instruction. It read:

> Evidence has been introduced for the purpose of showing that the defendant committed acts other than that for which the defendant is on trial. Such evidence is not to be considered by you to prove the defendant's character or that the defendant has a disposition to commit crimes. Such evidence may be considered by you only for the limited purpose of proving the defendant's motive and/or to demonstrate the underlying facts and circumstances giving rise to the charge and/or to prove the existence and nature of the proceedings from which the state claims the defendant was seeking relief.

(R., p.266; Tr., p.269, Ls.2–9.) Mr. Sanchez renewed his objection. (Tr., p.269, Ls.12–13.)

In the defense's case-in-chief, Mr. Sanchez testified in his defense. (*See generally* Tr., p.275, L.19–p.313, L.9.) On rebuttal, the State recalled Detective Weires and played a portion of his interview with Mr. Sanchez. (Tr., p.316, L.6–p.321, L.2.) The jury found Mr. Sanchez guilty as charged. (R., p.275.)

The district court sentenced him to five years, with four years fixed. (Tr., p.378, Ls.1–7; R., pp.280–82.) Mr. Sanchez timely appealed from the district court's judgment of conviction. (R., pp.284–85.)

ISSUES

I. Did the district court err by denying Mr. Sanchez's motion to dismiss because I.C. § 18-1353(1)(b) is facially overbroad?

II. Did the district court abuse its discretion by admitting irrelevant evidence of Mr. Thomson's reaction to Mr. Sanchez's letter?

III. Did the district court abuse its discretion by admitting irrelevant and prejudicial evidence of Mr. Sanchez's prior conviction for injury to a child?

IV. Did the district court abuse its discretion by admitting irrelevant evidence of Mr. Sanchez's post-conviction petition?

V. Did these errors in the aggregate deprive Mr. Sanchez of his right to a fair trial?

ARGUMENT

I.

The District Court Erred By Denying Mr. Sanchez's Motion To Dismiss Because I.C. § 18-1353(1)(b) Is Facially Overbroad

A. Introduction

Mr. Sanchez asserts the district court should have granted his motion to dismiss because I.C. § 18-1353(1)(b) is an overly broad statute that significantly compromises First Amendment protections. The statute criminalizes threats of harm to public servants to influence decisions, but the statutory definition of "harm" is so broad as to proscribe a substantial amount of protected speech. Mr. Sanchez submits this Court should hold I.C. § 18-1353(1)(b) is overbroad on its face and therefore unconstitutional for its real and substantial intrusion upon constitutionally protected conduct.

B. Standard Of Review

This Court reviews the constitutionality of a statute de novo. *State v. Korsen*, 138 Idaho 706, 711 (2003), *abrogated on other grounds by Evans v. Michigan*, 568 U.S. 313 (2013). "The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and 'must overcome a strong presumption of validity.'" *Id.* (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709 (1990)).

C. Idaho Code § 18-1353(1)(b) Is Facially Overbroad Because It Prohibits A Substantial Amount Of Constitutionally Protected Speech And Expressive Conduct

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting U.S. CONST. amend. I.) Article I, Section 9 of the

Idaho Constitution contains a similar protection. IDAHO CONST. art. I, § 9. "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Black*, 538 U.S. at 358; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (same).

In recognition of the "breathing space" afforded to the First Amendment, the United States Supreme Court requires "that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973) (citations omitted). "As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). "Litigants," such as Mr. Sanchez, "therefore are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* This "expansive remedy" to invalidate a statute addresses the "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). As the United States Supreme Court reasoned in *Hicks*:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Id. "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine[,]. . . . employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

The Court's analysis of an overbreadth challenge begins with the question of whether the statute regulates constitutionally protected speech and conduct. *Korsen*, 138 Idaho at 713; *accord State v. Manzanares*, 152 Idaho 410, 423 (2012). Here, I.C. § 18-1353(1)(b) imposes a felony offense when a person "threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding." I.C. § 18-1353(1)(b), (2). There is no doubt that the statute regulates constitutionally protected speech and expressive conduct. *See State v. Poe*, 139 Idaho 885, 895 (2003) (recognizing that a threat can be constitutionally protected speech); *Watts v. United States*, 394 U.S. 705 (1969) (same). Indeed, the district court ruled that the statute prohibits speech and expressive conduct. (R., pp.212–13.) Thus, this Court must turn to the question of whether the statute "precludes a significant amount of the constitutionally protected conduct." *Korsen*, 138 Idaho at 713.

A statute regulating speech and conduct is facially overbroad "if the law prohibits a substantial amount of protected activity in relation to the law's legitimate sweep." *State v. Doe*, 148 Idaho 919 (2010); *see also Broadrick*, 413 U.S. at 615 ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). "The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (quoting *N.Y. State Club Assn., v. City of New York*, 487 U.S. 1, 141 (1988)). "[A] statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. Rather,

‘there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . .’” *Korsen*, 138 Idaho at 714 (citation omitted) (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801–02 (1984)). “If the overbreadth is ‘substantial,’ the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation.” *Id.* (quoting *State v. Leferink*, 133 Idaho 780, 785 (1999)).

In the case at bar, I.C. § 18-1353(1)(b) prohibits a substantial amount of protected activity in relation to the law’s legitimate sweep. The elements of the statute are (1) threaten harm (2) to any public servant[2] (3) with the purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding.[3] I.C. § 18-1353(1)(b). “Harm” is defined by statute as “loss, disadvantage or injury, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.” I.C. § 18-1351(4). This statutory definition of “harm” creates an overly broad statute. It fails to restrain the statute’s reach to unprotected speech in any meaningful way. Notably, this definition of “harm” does not prohibit threats of *unlawful* harm only. It criminalizes lawful threats as well.[4]

---

[2] “‘Public servant’ means any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses.” I.C. § 18-1351(8). “‘Government’ includes any branch, subdivision or agency of the government of the state or any locality within it and other political subdivisions including, but not limited to, highway districts, planning and zoning commissions and cemetery districts, and all other governmental districts, commissions or governmental bodies not specifically mentioned in this chapter.” I.C. § 18-1351(3).

[3] “‘Administrative proceeding’ means any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individual.” I.C. § 18-1351(9).

[4] Compare I.C § 18-1353(1)(a), which prohibits threats of “unlawful harm” to a public servant, party official or voter, with the statute here, I.C. § 18-1353(1)(b), which prohibits just “harm.”

As such, the definition of harm encompasses much more than “true threats” or “fighting words” so that it reaches far into protected speech and expressive conduct, including core political speech. *See Black*, 538 U.S. at 359 (recognizing that the First Amendment does not protect “true threats” (“statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”) and “fighting words” (personally abusive epithets inherently likely to provoke violence)). This definition of harm is so broad as to proscribe a substantial portion of “threats” that constitute protected speech and conduct.

By defining harm as “loss, disadvantage or injury,” the statute is almost limitless in the amount of protected speech or conduct it criminalizes. “Statutory interpretation begins with the statute’s plain language,” *State v. Owens*, 158 Idaho 1, 3 (2015), and this Court has examined the plain, ordinary meaning of words to determine overbreadth, *see Poe*, 139 Idaho at 895–96. “Loss” means “the act or fact of losing,” “failure to keep possession,” “the harm or privation of resulting from losing or being separated from something or someone,” and “the act or fact of failing to gain, win, obtain, or utilize.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1338 (2002). “Disadvantage” means “loss or damage,” especially “to reputation, credit, or finances,” “the state or fact of being without advantage: an unfavorable, inferior, or prejudicial condition,” or “an unfavorable or prejudicial quality or circumstances.” *Id.* at 643. Lastly, injury means “an act that damages, harms, or hurts.” *Id.* at 1164. The dictionary goes on to explain:

> Injury, hurt, damage, harm and mischief mean in common the act or result of inflicting on a person or thing something that causes loss, pain, distress or impairment. *Injury is the most comprehensive, applying to an act or result involving an impairment or destruction of right, health, freedom, soundness, or loss of something of value.*

Id. (emphasis added). Thus, considering the broad reach of these terms, without any statutory limit to unlawful or illegal activity, I.C. § 18-1353(1)(b) prohibits all manner of protected speech, including core political speech. *See Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988) (defining core political speech as "interactive communication[s] concerning political change," which should be at the "zenith" of First Amendment protection). For example, if an individual believes the criminal charges against him are unfounded, the statute prohibits the individual from threatening to file a bar complaint against a prosecutor. Along the same lines, if an individual believes his public defender should file a particular motion, the statute prohibits an individual from complaining about his public defender to his supervisor, a judge, or the Idaho State Bar. Likewise, if an individual has concerns with an expected administrative decision by a city council member, county commissioner, or other agency employee, the statute prohibits the individual from threatening not to vote or support that person in the next election. It also prohibits that individual from threatening to complain to other constituents, to write letters to the editor, to contact campaign donors, or even to run against the public servant in the next election. All of these threat examples fit the definition of "harm"—they are threats to cause loss, disadvantage, or injury to the public servant's finances, career, reputation, or simply quality of life. Such "threats" are undoubtedly protected speech, yet they directly fall under the purview of I.C. § 18-1353(1)(b). In fact, the statute even criminalizes a threat of picketing, handing out leaflets, or posting on a social media about any government employee or officer in order to influence that person's decision on any judicial or administrative matter. Countless Idaho citizens, in exercising their First Amendment rights, have been and will be in violation of this statute. The sweep of I.C. § 18-1353(1)(b) reaches far into protected speech and other expressive

or symbolic conduct. This expansive definition of "harm" renders I.C. § 18-1353(1)(b) facially overbroad.

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940). Idaho Code § 18-1353(1)(b), by its very nature, imposes restraint and creates fear of punishment. "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 358.

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). "'Free trade in ideas' means free trade in the opportunity *to persuade to action*, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (emphasis added). Idaho Code § 18-1353(1)(b) limits the free trade of ideas by prohibiting individuals from persuading public servants into action. It disallows speech or expressive conduct intended to coerce or embarrass public servants. However, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Expressions "intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Although some speech or expressive conduct directed towards public servants may be distasteful, provocative, or inconvenient, it is still protected by the First Amendment and cannot be proscribed by labeling it

as threats of "harm." Due to the overly broad definition of "harm," there is realistic danger that I.C. § 18-1353(1)(b) significantly compromises First Amendment protections. Therefore, I.C. § 18-1353(1)(b) is facially overbroad, and the district court erred by denying Mr. Sanchez's motion to dismiss.

II.

The District Court Abused Its Discretion By Admitting Irrelevant Evidence Of Mr. Thomson's Reaction To Mr. Sanchez's Letter

A. Introduction

Mr. Sanchez challenges the district court's admission of evidence on Mr. Thomson's reaction upon reading Mr. Sanchez's letter. Mr. Thomson's reaction was not relevant to prove any material fact. As such, the district court failed to apply the correct legal standards and therefore abused its discretion by allowing this testimony. Further, the State cannot prove this error was harmless because, through this testimony, the State also elicited irrelevant and prejudicial evidence of Mr. Sanchez's violent and aggressive history.

B. Standard Of Review

Whether the evidence is relevant is a matter of law that is subject to free review. *State v. Field*, 144 Idaho 559, 569 (2007). In general, the district court's decision to admit or exclude evidence is discretionary. *State v. Parker*, 157 Idaho 132, 138 (2014). To determine whether the district court abused its discretion, the Court considers three factors: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *State v. Ehrlick*, 158 Idaho 900, 907 (2015).

C. The District Court Failed To Apply The Correct Legal Standards Because Evidence Of Mr. Thomson's Reaction Was Not Relevant To Any Material Fact

Mr. Sanchez maintains the district court abused its discretion by overruling his relevancy objection to Mr. Thomson's reaction to his letter. Mr. Thomson's reaction was not relevant to any material fact because the charged offense does not contain any element pertaining to the fear or perception of the threat received by the public servant. The charged offense only requires proof of the defendant's *intention* to influence with a threat of harm. The public servant's reaction does not prove or disprove the defendant's intention or the threat itself. Thus, the district court failed to apply the correct legal standards and therefore abused its discretion by ruling Mr. Thomson's reaction to the letter was relevant.

Relevant evidence is admissible, unless the Idaho Rules of Evidence ("I.R.E.") or court rules provide otherwise, and irrelevant evidence is inadmissible. I.R.E. 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *State v. Sheldon*, 145 Idaho 225, 228 (2007) (quoting I.R.E. 401).

Here, the district court admitted evidence, over Mr. Sanchez's objection, regarding Mr. Thomson's reaction to Mr. Sanchez's letter. The prosecutor elicited the following testimony from Mr. Thomson:

> Q. Did you read the letter when it came to you?
>
> A. I did.
>
> *Q. What was your initial reaction to it?*
>
> *A. I was shocked, I was scared.*
>
> *[DEFENSE COUNSEL]: Objection, relevancy.*
>
> *THE COURT: Overruled.*

> BY [THE PROSECUTOR]:
>
> Q. Let's talk about being shocked and scared. Did you, during your course of your prosecution of Mr. Sanchez, learn anything about his demeanor or his interpersonal relationships that in conjunction with what he wrote in that letter gave you concern or pause?
>
> [DEFENSE COUNSEL]: Objection, leading.
>
> [THE PROSECUTOR]: It's a "yes" or "no," your Honor.
>
> THE COURT: He can answer -- the question is proper for purposes of laying a foundation and you can proceed in a non-leading fashion.
>
> [THE PROSECUTOR]: Thank you.
>
> THE WITNESS: Yes.
>
> BY [THE PROSECUTOR]:
>
> *Q. Why?*
>
> *A. Based on my prosecution of Mr. Sanchez, he had shown several different instances of being very aggressive or violent.*
>
> Q. And why did that cause you harm based on the letter itself?
>
> [DEFENSE COUNSEL]: Objection.
>
> BY [THE PROSECUTOR]: Q. Not cause you harm, why did it give you alarm based on the letter itself?
>
> A. Well, with my knowledge of Mr. Sanchez's history and the threats contained in the letter, I was worried that perhaps me or my family was in danger.

(Tr., p.199, L.5–p.200, L.10 (emphasis added).) Mr. Sanchez asserts Mr. Thomson's testimony—that his initial reaction to the letter was "shocked" and "scared"—was irrelevant. His reaction does not have any tendency to make the existence of any fact of consequence more or less probable. *See* I.R.E. 401.

Mr. Thomson's initial reaction was irrelevant because the reaction of the public servant is wholly immaterial to prove the elements of the charged offense. Idaho Code § 18-1353 creates a

felony offense for any person to "threaten[ ] harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding." I.C. § 18-1353(1)(b), (2). Thus, the State only has to prove the defendant (1) threatened harm (2) to a public servant (3) with the purpose to influence a decision, etc., in a judicial or administrative proceeding. There are no additional elements to the offense. *Cf.* I.C. § 18-901(b) (requiring a well-founded fear of violence *in the victim* for certain types of assault). The State does not have to prove the public servant received the threat of harm, understood it as such, or even had the ability to act in the desired way. *See* I.C. § 18-1353(1) ("It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason."). The focus of I.C. § 18-1353(1)(b) is the intent of the defendant, not the reaction of the public servant.[5]

Because the public servant's reaction is immaterial to the charged offense, Mr. Thomson's reaction as "shocked" and scared" was not relevant. Whether Mr. Sanchez threatened harm to Mr. Thomson is not made more or less probable by Mr. Thomson's reaction to that threat. Put another way, Mr. Thomson's reaction does not prove or disprove Mr. Sanchez's purpose in writing the letter or the existence of any threat of harm contained

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[5] The focus on the defendant's intent is in line with the purpose of the statute—to deter individuals from threatening public servants to influence their actions. If the focus was on the public servant's perception of the threat, prosecution would hinge on the idiosyncrasies of the public servant—whether that particular public servant in that specific situation received and understood the threat of harm. As such, successful prosecutions would have no relation to the actual threat of harm. For instance, what most public servants may understand to be an innocuous letter could become punishable conduct if that particular public servant feels threatened. Conversely, the most egregious threats could go unpunished if that public servant did not perceive the threat. This focus on the perception of the threat therefore runs contrary to the statute's purpose. The statute would fail to deter individuals if the individual believed, or was willing to risk, that the public servant would not perceive the threat.

therein. In short, his reaction is not relevant to the jury's finding of Mr. Sanchez's commission of the offense. Therefore, the district court failed to apply the correct legal standards and, as such, abuse its discretion when it overruled Mr. Sanchez's relevancy objection and allowed this testimony.

D. The State Cannot Prove The Admission Of Irrelevant Evidence Was Harmless

Finally, the State cannot demonstrate, beyond a reasonable doubt, the district court's abuse of discretion in admitting this irrelevant evidence was harmless. The State has the burden to prove the admission of the evidence was harmless beyond a reasonable doubt. *State v. Joy*, 155 Idaho 1, 11 (2013). "To meet that burden, the State must 'prove[ ] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (alteration in original) (internal quotation marks omitted) (quoting *State v. Perry*, 150 Idaho 209, 221 (2010)); *see also* Idaho Criminal Rule 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). This Court's inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The State cannot meet its burden here. Immediately following the admission of the reaction testimony, the State elicited testimony on the "foundation" for Mr. Thomson's reaction. (Tr., p.199, L.10–p.199, L.21.) Significantly, Mr. Thomson testified Mr. Sanchez had shown "several different instances of being very aggressive or violent" and his knowledge of this history caused his reaction. (Tr., p.199, L.23–p.200, L.10.) This testimony was impermissible character evidence, not relevant for any purpose except to show Mr. Sanchez's bad character and criminal propensity. I.R.E. 404(b); *see also Joy*, 155 Idaho at 8 (evidence of other crimes,

wrongs, or acts must be relevant to an issue other than character or propensity). Even if minimally relevant, the danger of unfair prejudice from the jury learning of Mr. Sanchez's prior bad acts substantially outweighed any probative value. I.R.E. 403. There is a substantial risk the jury considered this evidence of Mr. Sanchez's violent and aggressive past in its finding of whether Mr. Sanchez threatened harm to Mr. Thomson. Indeed, the prosecutor highlighted to the jury in closing argument that Mr. Sanchez had "an aggressive and violent history." (Tr., p.332, Ls.21–25.) Yet none of this evidence on the "foundation" for Mr. Thomson's reaction would have been presented to the jury if the district court had not admitted the evidence of Mr. Thomson's reaction in the first place. Moreover, the evidence of Mr. Thomson's reaction in and of itself is not harmless because it appeals to the passions and prejudices (and sympathies) of the jury. It also confuses the jury to focus on Mr. Thomson's reaction to the letter rather than Mr. Sanchez's intent in writing the letter and its contents. Therefore, the State cannot meet its burden to prove, beyond a reasonable doubt, that the admission of irrelevant "reaction" evidence did not contribute to the jury's verdict.

III.

The District Court Abused Its Discretion By Admitting Irrelevant And Prejudicial Evidence Of Mr. Sanchez's Prior Conviction For Injury To A Child

A. Introduction

Mr. Sanchez asserts the district court abused its discretion by admitting his judgment of conviction without a redaction of the nature of his felony conviction: injury to a child. He raises two challenges to the district court's evidentiary ruling. First, he argues the evidence of his prior conviction was not relevant for any proper purpose. Second, he contends, even if minimally relevant, the danger of unfair prejudice to Mr. Sanchez substantially outweighed the evidence's

probative value. Further, the State cannot prove the erroneous admission of this evidence was harmless.

B. Standard Of Review

> This Court reviews questions regarding the admissibility of evidence using a mixed standard of review. *State v. Stevens*, 146 Idaho 139, 143 (2008). First, whether the evidence is relevant is a matter of law that is subject to free review. *Field*, 144 Idaho at 569. Second, [the Court] review[s] the district court's determination of whether the probative value of the evidence outweighs its prejudicial effect for an abuse of discretion. *Stevens*, 146 Idaho at 143.

Ehrlick, 158 Idaho at 907. To determine whether the district court abused its discretion, the Court considers three factors: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *Id.*

C. The District Court Failed To Apply The Correct Legal Standards Or Exercise Reason Because Evidence Of Mr. Sanchez's Prior Conviction Was Irrelevant And Unfairly Prejudicial

Mr. Sanchez argues evidence of the nature of his prior conviction for injury to a child was both irrelevant and overly prejudicial. His prior conviction was not relevant to prove any material fact pertaining to the charged offense, including motive. If relevant, the danger of unfair prejudice by the jury learning Mr. Sanchez had injured a child substantially outweighed any probative value.

"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." I.R.E. 404(b). The prohibition on other bad acts evidence "has its source in the common law. The common law rule was that the doing of a criminal act, not part of the issue, is not admissible as evidence of the

doing of the criminal act charged." *State v. Grist*, 147 Idaho 49, 52 (2009) (internal quotation marks and citation omitted). "This evidence of prior misconduct 'may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." *Joy*, 155 Idaho at 8 (quoting I.R.E. 404(b)).

The Court applies to two-part standard when reviewing the district court's admission of other bad acts evidence. *Ehrlick*, 158 Idaho at 913. First, "whether, under I.R.E. 404(b), the evidence is relevant as a matter of law to an issue other than the defendant's character or criminal propensity," and second, "whether, under I.R.E. 403, the district court abused its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant." *Id.* (quoting *Joy*, 155 Idaho at 8). Under I.R.E. 404(b), the evidence must be "relevant as a matter of law to an issue other than the defendant's character or propensity." *Ehrlick*, 158 Idaho at 913. It must be "relevant to the charged offense." *Id.* (quoting *Joy*, 155 Idaho at 9).

Here, the district court ruled Mr. Sanchez's prior offense was relevant to show motive. In first reviewing the admissibility of the judgment of conviction face sheet as a whole, the district court reasoned:

> This is obviously -- I think the two levels we're talking about here, one is effectively 403, the defense brings up 404(b) evidence. I'm not sure this is true 404(b) evidence, it's really the underlying facts of the case itself and are those underlying facts related to a prior bad act. I suppose so in this sense, I think it's so interrelated with the facts of the case I'm not sure it's true 404(b) evidence in that sense.
>
> The relevance of the underlying basic facts to the court as addressed by the state also are for the jury to understand what may have motivated the defendant to reach out and try to influence, allegedly, improperly the prosecutor. What he's facing, a conviction for injury to child, a child protection proceeding, the fact that his sentence was imposed, these are all things that go to what the defendant is facing, the seriousness of it, and his motivation to seek to influence the prosecutor and are all effectively backdrop to the case. While it may have

> some collateral prejudicial effect to the defendant, since he was convicted of this case and had his parental rights challenged, is he a bad person and should we convict him because of that, I understand that argument, but I think that with proper instructions, that potential alleged prejudice does not substantially outweigh the probative value of this essential evidence of the backdrop of this case.
>
> I think the state should work hard to try to sanitize as much as possible that it can. I don't think it need to get into the whole documents, I think the face sheet basically are sufficient to convey the backdrop of this case, together with Mr. Thomson's testimony. But I think all of that is relevant in this case for the jury to understand what was going on and what allegedly motivated the defendant to act the way that he did.
>
> I do think there is some tie also in the letter that the state is arguing, it's a reasonable argument, that there is some tie, to basically to sum it up: You hurt my family, I'll hurt yours. I think that's kind of what the state is alleging the letter suggests, and I think there's some tie the jury would need to understand about what happened to him vis-à-vis his family.
>
> I'm going to deny defense's motion. I think the state understands the parameters they can get into. If you have questions on specific documents, I'm happy to look at those the morning of trial. If we need to redacted anything further that we can. I think that backdrop is important and it is not substantially outweighed by any prejudicial effect.

(Tr., p.58, L.13–p.60, L.13.) In short, the district court ruled the nature of Mr. Sanchez's prior conviction for injury to a child, and his sentence, were relevant to Mr. Sanchez's motive in writing the letter. Later on, the district court agreed Mr. Sanchez's sentence should be redacted, but ruled the nature of his conviction should be left in. The district court again ruled the evidence was not "true 404(b) evidence." (Tr., p.71, Ls.2–3.) As for relevance, the district court reasoned:

> I think the state has proved judicial proceedings. I think it's part of the process what happened, I think it goes to motive and intent, so I will admit it. I don't think the prejudice involved in the fact that he was convicted of these offenses and what his procedure was at the time that he was writing these letters and what he was trying to obtain, I don't think that any quote/unquote "prejudice" from that is unfair under the circumstances, and to the extent it is, I don't think that it substantially outweighs the probative value of the evidence, so I'll permit it.

(Tr., p.71, Ls.12–23.) In accordance with the district court's ruling, during the State's direct examination of Mr. Thomson, the State presented Exhibit 3, the face sheet of Mr. Sanchez's judgment of conviction. (Tr., p.190, L.17; State's Ex. 3.) It stated, in capital letters, that Mr. Sanchez pled guilty to "INJURY TO A CHILD, a felony." (State's Ex. 3.) The sentence was blacked-out. (State's Ex. 3.) The district court subsequently instructed the jury that it could consider this evidence for "motive and/or to demonstrate the underlying facts and circumstances giving rise to the charge and/or to prove the existence and nature of the proceedings from which the state claims the defendant was seeking relief." (R., p.266.) While conferencing on the jury instructions, the district court again discussed the relevancy of this evidence:

> I think that it is relevant for context. The evidence was admitted -- as I tried to explain, hopefully artfully, hopefully not too confusingly – was admitted for context of what exactly happened here. It was admitted because it is proof of the underlying proceeding. And I realize it's charged as a parole proceeding, but the parole proceeding exists only because the felony exists, and the parole proceeding exists only because he's in prison. The ultimate gain is to get out of prison related to this felony. I think it's also relevant, as I've indicated, for motive and the reason why he would write the letter, in addition to wanting out, it's the context of why it would be potentially considered a threat, in part because of the seriousness of the thing for which Mr. Thomson prosecuted him for and the seriousness of the consequences of that prosecution. So I think it's all relevant in terms of the context. I agree it's not relevant, the jury shouldn't use it for the purpose of saying, well, he's a convict, he's in jail, he's in prison, he's a bad guy, therefore he probably meant something bad by this. I agree, that's why I agreed to the limiting instruction, why it should be there. So I will add some language that says effectively it should be considered only for the purpose of proving the defendant's motive as it relates to the proceedings from which he was seeking relief.

(Tr., p.243, L.1–p.244, L.3)

As an initial matter, the district court's determination that Mr. Sanchez's prior conviction was not "true 404(b) evidence" was erroneous. In *State v. Kralovec*, 161 Idaho 569 (2017), this Court rejected the use of the so-called "res gestae" exception to circumvent the rules of evidence, especially I.R.E. 404(b)'s prohibition of prior bad acts. *Id.* at 573–74. The res gestae exception

allowed the admission of prior bad act evidence, despite I.R.E. 404(b), to address the concern that the jury could not "be given a rational and complete presentation of the alleged crime without reference to the uncharged misconduct." *Id.* at 573 (quoting *State v. Blackstead*, 126 Idaho 14, 19 (Ct. App. 1994)). The *Kralovec* Court, however, held "that evidence previously considered admissible as res gestae is only admissible if it meets the criteria established by the Idaho Rules of Evidence." *Id.* at 574. Thus, evidence of other crimes, wrongs, or acts, even those "inescapably connected" to the charged act, must satisfy the evidentiary standards. *Id.* at 573–74. Here, the district court determined that the information contained in the judgment of conviction face sheet was "so interrelated with the facts of this case" to remove it from the strictures of I.R.E. 404(b). (Tr., p.58, Ls.15–20.) This was in error. Evidence of the nature of Mr. Sanchez's prior conviction for felony injury to a child is clearly evidence of a prior crime. It is another act that is not the criminal act charged. *Grist*, 147 Idaho at 52 (discussing I.R.E. 404(b)'s "common law" source that "the doing of a criminal act, not part of the issue, is not admissible as evidence of the doing of the criminal act charged"); *State v. Medrano*, 123 Idaho 114, 119 (Ct. App. 1992) ("[E]vidence of a person's actions or conduct, other than that set forth as an ultimate issue for trial, is generally inadmissible under I.R.E. 404(b)." (quoting *State v. Rodriguez*, 118 Idaho 948, 950 (Ct. App. 1990))). Therefore, in light of *Kralovec*, the district court failed to apply the correct legal standards by ruling that evidence of Mr. Sanchez's prior felony conviction was not subject to the confines of I.R.E. 404(b).

Next, the district court failed to apply the correct legal standards by determining that evidence of Mr. Sanchez's prior conviction was relevant to prove motive, one of the exceptions to admit prior bad act evidence under I.R.E. 404(b). "Motive is generally defined as that which leads or tempts the mind to indulge in a particular act." *State v. Pepcorn*, 152 Idaho 678, 689

(2012) (quoting *State v. Stevens*, 93 Idaho 48, 53 (1969)). "Evidence of motive is relevant when the existence of a motive is a circumstance tending to make it more probable that the person in question did the act." *State v. Folk*, 157 Idaho 869, 877 (Ct. App. 2014) (quoting *State v. Russo*, 157 Idaho 299, 308 (2014)). Motive evidence, however, is "still limited" by I.R.E. 404(b)'s prohibition of "the introduction of evidence of acts other than the crime for which a defendant is charged if its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Id.* (citations omitted). As explored below, Mr. Sanchez's prior conviction has no relevance as to "why" he "did the act charged." 1 WHARTON'S CRIMINAL EVIDENCE § 4:49 (15th ed. Nov. 2017). Its only purpose demonstrates a propensity to engage in criminal conduct.

Mr. Sanchez's prior conviction for injury to a child does not make it more or less probable that he threatened harm in order to influence Mr. Thomson, unless the prior offense is used as propensity evidence. The inference from this evidence (that Mr. Sanchez injured a child) is character evidence, plain and simple: Mr. Sanchez is the kind of person who would harm others, including children. The conclusion from this evidence, therefore, is that Mr. Sanchez acted in accordance with this character by threatening harm to Mr. Thomson or his family. It is pure propensity evidence—Mr. Sanchez harmed a child so he is more likely to threaten harm to another person. As such, this evidence completely fails to show *why* Mr. Sanchez threatened harm. It only shows his propensity or proclivity to (threaten) harm. *Folk*, 157 Idaho at 878 ("Folk's prior convictions are merely propensity evidence that allow persons to infer that if Folk committed the prior offenses, he must have committed the offense at issue."). Thus, the nature of his prior conviction is irrelevant to show motive.

Indeed, Mr. Sanchez's motive for threatening harm is contained in the charging document: to influence Mr. Thomson's decisions in a child protection proceeding or parole hearing. (R., pp.224–25.) Going one step further, the underlying goal for his motive to influence, according to the State, was to get released from custody, get money damages, and regain custody of his children. (*See* Tr., p.335, L.19–p.336, L.19.) The nature of his prior conviction has no bearing on Mr. Sanchez's purpose for writing the letter or its contents. To be sure, Mr. Sanchez does not dispute the relevancy of the judgment of conviction face sheet itself, which indicated a past criminal conviction due to Mr. Thomson's prosecution, and he did not challenge the "felony" designation, (Tr., p.54, Ls.14–16), but the nature of that conviction is an entirely different matter. It is not relevant to the charged offense. It asks the jury to infer Mr. Sanchez's threatened harm to Mr. Thomson because Mr. Sanchez has harmed in the past. This is impermissible under I.R.E. 404(b). As such, the district court failed to apply the correct legal standards by admitting the nature of Mr. Sanchez's prior conviction as evidence of motive or for any other purpose.

Lastly, the district court failed to exercise reason when weighed this evidence's probative value, if any, against the danger of unfair prejudice. The district court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." I.R.E. 403. "Evidence is unfairly prejudicial when it suggests decision on an improper basis." *State v. Fordyce*, 151 Idaho 868, 870 (Ct. App. 2011). This evidence of Mr. Sanchez's prior conviction suggests a guilty verdict on the improper bases of propensity and appeals to the passion and prejudices of the jury. Crimes against children are some of the most—if not the most—damaging evidence for a jury to hear. *Cf. State v. Johnson*, 148 Idaho 664, 670 (2010) ("Evidence of prior sexual misconduct with young children

is so prejudicial that there is a reasonable possibility this error contributed to Johnson's conviction."). This type of evidence is inherently inflammatory. And here, in particular, this evidence is much more inflammatory than the charged offense and its evidence. This evidence also encourages the jury to convict based on the belief that Mr. Sanchez has a propensity to harm others. On balance, it cannot be said that the evidence's probative value, if any, for Mr. Sanchez's alleged "motive" or other purpose substantially outweighs the danger of unfair prejudice attributable to evidence of injuring a child. The district court therefore failed to exercise reason when it ruled that this evidence was admissible under I.R.E. 403.

D. The State Cannot Prove The Admission Of Propensity Evidence Was Harmless

Similar to the "reaction" evidence, the State cannot demonstrate, beyond a reasonable doubt, the district court's abuse of discretion in admitting irrelevant and prejudicial evidence was harmless. This State had the burden to prove, beyond a reasonable doubt, that this error did not contribute to the guilty verdict actually rendered in this trial. *Joy*, 155 Idaho at 11; *see also Sullivan*, 508 U.S. at 279. The State will be unable meet its burden here. As discussed above, evidence of Mr. Sanchez injuring a child is inherently inflammatory and prejudicial, especially in comparison to the evidence of the offense at issue. Along the same lines, this prior bad act evidence was not an allegation or suspicion of prior misconduct against a child, but a felony conviction following a guilty plea. This gives the evidence an air of reliability and credibility in the minds of the jurors—Mr. Sanchez undoubtedly committed this past offense of harm to a child, so he probably committed this offense too. What is more, the district court compounded the error by specifically instructing the jury to consider this evidence for motive. (R., p.266.) Although the district court instructed the jury not to consider the evidence for "character" or "a disposition to commit crimes," (R., p.266), it is impossible not to consider the evidence for these

purposes if it is considered for motive. The only reasonable inference to draw from this evidence under the guise of "motive" is that Mr. Sanchez has a proclivity to harm others. There is no other way to construe this evidence for a motive purpose. In addition, as in the reaction evidence, this evidence also appeals to the passions and prejudices of the jury. Therefore, the State cannot meet its burden to prove, beyond a reasonable doubt, that the admission of the irrelevant and prejudicial evidence of Mr. Sanchez's prior conviction for injury to a child did not contribute to the jury's verdict.

IV.

The District Court Abused Its Discretion By Admitting Irrelevant Evidence Of Mr. Sanchez's Pending Post-Conviction Petition

A. Introduction

Mr. Sanchez challenges the district court's admission of evidence of his pending post-conviction petition challenging his prior felony conviction. The existence of the post-conviction case was not relevant to prove any material fact. As such, the district court failed to apply the correct legal standards and therefore abused its discretion by admitting this evidence. Moreover, the State cannot prove the admission of this irrelevant evidence was harmless beyond a reasonable doubt.

B. Standard Of Review

Whether the evidence is relevant is a matter of law that is subject to free review. *Field*, 144 Idaho at 569. The decision to admit or exclude evidence is discretionary. *Parker*, 157 Idaho at 138. This Court examines three factors for review of discretionary decisions: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the

outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *Ehrlick*, 158 Idaho at 907.

C. The District Court Failed To Apply The Correct Legal Standards Because Evidence Of Mr. Sanchez's Pending Post-Conviction Petition Was Not Relevant To Any Material Fact

Mr. Sanchez maintains the district court abused its discretion by overruling his relevancy objection to his post-conviction petition face sheet. The existence of post-conviction proceedings was immaterial to the charged offense.

Irrelevant evidence is inadmissible. I.R.E. 402. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Sheldon*, 145 Idaho at 228 (quoting I.R.E. 401).

Here, over Mr. Sanchez's objection, the district court admitted the face sheet of Mr. Sanchez's post-conviction petition. (Tr., p.190, L.17; State's Ex. 4.) Mr. Thomson testified that a post-conviction proceeding was "sort of like an appeal" and allowed an individual to challenge his criminal conviction. (Tr., p.187, Ls.16–24.) He further testified that State's Exhibit 4 was the initial petition filed by Mr. Sanchez to initiate the post-conviction case. (Tr., p.189, L.21–p.190, L.4.) Mr. Sanchez maintains the existence of his pending post-conviction petition was irrelevant.

Any evidence pertaining to the post-conviction case was not relevant because the State did not charge Mr. Sanchez with intending to influence the post-conviction proceeding. The State charged Mr. Sanchez with writing the letter to influence "a pending child protection proceeding and/or future parole hearings." (R., pp.224–25.) Likewise, the jury instruction on the elements of the offense contained the same limitation to a child protection proceeding or parole

hearing. (R., p.259.) Thus, the post-conviction proceeding itself was not relevant to prove the elements of the charged offense. Moreover, the post-conviction proceeding did not make it more or less likely that Mr. Sanchez was trying to influence the child protection proceeding or a future parole hearing. The post-conviction petition face sheet does not mention Mr. Sanchez's children or parole. (State's Ex. 4.) Admittedly, while the post-conviction proceeding shows that Mr. Sanchez was challenging his underlying felony conviction, it does not tend to prove or disprove a threat of harm with the purpose of influencing the two proceedings at issue. The State provided no evidentiary link to connect the post-conviction proceedings with the other proceedings. Accordingly, the existence of the post-conviction proceeding was immaterial to prove any fact of consequence. The district court failed to apply the correct legal standards and therefore abused its discretion by ruling this evidence was relevant.

D. The State Cannot Prove The Admission Of Irrelevant Evidence Was Harmless

Yet again, the State will be unable to meet its burden to prove harmless error. The State had the burden to prove, beyond a reasonable doubt, that this error did not contribute to the guilty verdict actually rendered in the trial. *Joy*, 155 Idaho at 11; *see also Sullivan*, 508 U.S. at 279. The evidence of Mr. Sanchez's pending post-conviction case was harmful for two reasons. First, it painted Mr. Sanchez in a negative light as an overly litigious individual. In other words, the evidence prejudiced the jury against Mr. Sanchez for exercising his right to post-conviction relief. Second, and more importantly, it misled the jury and confused the issues by indicating that the jury could find Mr. Sanchez guilty of intending to influence a different proceeding than the two proceedings alleged in the charging document. Mr. Sanchez's letter was sufficiently vague to allow the jury to infer that Mr. Sanchez wrote the letter to influence any of the three proceedings: the child protection proceeding, a future parole hearing, or the post-conviction

proceeding. (*See* State's Ex. 1.) Moreover, the prosecutor did not limit his argument to the two proceedings alleged in the charging document. In his opening statement, prosecutor submitted that Mr. Sanchez was trying to influence Mr. Thomson in his "pending cases." (Tr., p.178, Ls.19–20.) The prosecutor then presented evidence of "three proceedings" in the State's case-in-chief. (*See* Tr., p.186, L.15–p.193, L.6.) In closing argument, the prosecutor argued that there were "three contexts wherein Mr. Thomson had personal interaction with" Mr. Sanchez. (Tr., p.335, Ls.24–25.) Mr. Sanchez responded in closing argument by asserting that State did not charge Mr. Sanchez with threatening harm to influence the post-conviction proceeding, so the jury should not consider that proceeding as evidence in its deliberations. (Tr., p.337, Ls.19–25, p.340, L.25–p.343, L.16, p.345, L.19–p.346, L.8.) In rebuttal, however, the prosecutor did not correct this area of confusion for the jury. (*See* Tr., p.346, L.13–p.328, L.7.) Instead, the prosecutor began his rebuttal by telling the jury that the defense's argument was "a distinction without a difference." (Tr., p.346, Ls.16–17.) The prosecutor failed to clarify for the jury that Mr. Sanchez was not charged with threatening harm to influence the post-conviction proceeding. (*See* Tr., p.346, L.13–p.328, L.7.) As such, it cannot be said that the evidence of the post-conviction proceeding is not attributable to the guilty verdict. Therefore, the State cannot prove this error was harmless.

V.

<u>These Errors In The Aggregate Deprived Mr. Sanchez Of His Right To A Fair Trial</u>

As argued above, the district court abused its discretion by improperly admitting evidence of Mr. Thomson's reaction to Mr. Sanchez's letter, the nature of Mr. Sanchez's prior felony conviction, and the post-conviction proceeding. *See* Parts II–IV. These evidentiary errors, taken individually, are not harmless. *See* Parts II.D, III.D, IV.D. But, even if these errors are

deemed harmless individually, these errors in the aggregate reveal the absence of a fair trial. "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *Perry*, 150 Idaho at 230. To be sure, the presence of multiple errors by itself does not require the reversal of a conviction, "since under due process a defendant is entitled to a fair trial, not an error-free trial." *State v. Johnson*, 163 Idaho 412 (2018) (quoting *State v. Moore*, 131 Idaho 814, 823 (1998)). Nevertheless, the aggregation of errors can create such substantial prejudice to the defendant as to deprive him of a fair trial.

Here, the aggregated errors deprived Mr. Sanchez of a fair trial. The jury learned Mr. Sanchez had not only a felony conviction for injuring a child, but also a violent and aggressive history. They also learned Mr. Thomson was shocked and scared by the letter, which improperly appealed to jurors' emotions and confused the issues. In addition, the jury learned Mr. Sanchez was pursing post-conviction relief, which was unrelated to the charged offense, but could be a proceeding that Mr. Sanchez was seeking to influence through the letter. The accumulation of these errors encouraged the jury to render a guilty verdict on inadmissible, overly prejudicial evidence. This evidence told the jury that Mr. Sanchez had injured a child, was violent and aggressive, shocked and scared a seasoned prosecutor, and was trying to influence his post-conviction proceeding. None of this evidence was related to the elements of charged offense. This evidence confused the issues and prejudiced the jury against Mr. Sanchez. If not harmful individually, these errors in the aggregate deprived Mr. Sanchez of a fair trial.

CONCLUSION

Due to the facial overbreadth of I.C. § 18-1353(1)(b), Mr. Sanchez respectfully requests that this Court reverse the district court's order denying his motion to dismiss and remand this case for an order of dismissal. In the alternative, he respectfully requests that this Court vacate his judgment of conviction and remand his case for a new trial in light of the evidentiary errors.

DATED this 27th day of July, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

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