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State v. Chacon Appellant's Reply Brief Dckt. 47009

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 47009-2019**
	)	
v.	)	**BANNOCK COUNTY**
	)	**NO. CR-2017-8319**
ROCCO JOSEPH CHACON, JR.,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Rocco Chacon appeals, contending the district court erred in several ways. First, he argued it did not conduct the required analysis under I.C.R. 14 when addressing his objection to the State's motion for joinder. Furthermore, he asserted that, under the applicable standards, the district court erred by granting that motion for joinder, as well as denying Mr. Chacon's motion to sever other charges. Finally, he argued the district court erred by admitting evidence under I.R.E. 404(b).

The State makes several arguments in response, none of which have merit. Its procedural arguments are unfounded or, are themselves unpreserved. Its arguments on the merits of the joinder/severance issue are contrary to the applicable precedent and misrepresent the argument Mr. Chacon has made. Finally, its argument for harmless error on the propensity issue fails to argue under the proper standard as recently clarified by the Idaho Supreme Court. For all these reasons, this Court should reject the State's arguments and grant Mr. Chacon relief for the district court's errors.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Chacon's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

I. Whether the district court erred by denying Mr. Chacon's motion to sever the charges in this case.

II. Whether the district court erred by admitting evidence of Mr. Chacon's prior drug use and possession of paraphernalia in violation of I.R.E. 404(b).

ARGUMENT

I.

The District Court Erred By Denying Mr. Chacon's Motions To Sever The Charges In This Case

A. Mr. Chacon's Arguments Against The State's Motion To Join The Methamphetamine Charge Were Sufficient To Preserve His Appellate Arguments Under I.C.R. 14

As the Idaho Supreme Court recently pointed out, its precedent had been unclear with regard to the appropriate analyses under I.C.R. 8 and I.C.R. 14. *State v. Nava*, ___ Idaho ___, 465 P.3d 1123, 1128 (2020). Specifically, I.C.R. 8 deals with whether joinder is appropriate as a matter of law, while I.C.R. 14 examines whether an otherwise-proper joinder should still be disallowed because of the risk of undue prejudice. *Id.* at 1128-29. As such, the Supreme Court explained, when a question of proper joinder is raised, the courts start by evaluating whether joinder was proper under I.C.R. 8, and then evaluate whether the risk of undue prejudice should still require separate trials under I.C.R. 14 (provided both aspects of that argument were made). *Id.*

As such, even though the arguments in *Nava* were "blended," in that they contained assertions relevant to the analysis under I.C.R. 8 and others that were relevant to the analysis under I.C.R. 14, the Supreme Court determined it was appropriate to analyze the joinder decision under both rules on appeal. *See id.* at 1129-33. In other words, the defendant's "blended" arguments in that case persevered both issues because they took a position on the issue of joinder under both rules, and both those positions had been maintained on appeal. *See, e.g., Ada County Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017) (explaining it was appropriate for the parties to present additional authorities in support of the arguments on appeal so long as they were maintaining the same position they took on the issue below). As the Idaho

Supreme Court subsequently added, such arguments will preserve an issue for appeal even when the arguments made on below are vague – so long as "the bedrock" of the argument is present in the record and the district court made a determination on the issue, the issue is properly preserved for appeal. *State v. Godwin*, 164 Idaho 903, 914 (2019).

Nevertheless, the State contends that Mr. Chacon's "blended" arguments below did not preserve *either* issue for appeal. (Resp. Br., p.11.) That argument flies directly in the face of *Nava*, *Brooke View*, and *Godwin*. In fact, it blatantly ignores the fact that, in making his objection to the State's joinder motion, Mr. Chacon specifically referred the Court back to his motion to sever the four original charges, which he had expressly based on I.C.R. 14. (Tr., p.75, Ls.21-22 ("Your Honor, the same objection as before with regard to the firearm."); *see* R., pp.156-57 (the motion in which Mr. Chacon had made his arguments with regard to the firearm charge).) Thus, the State's assertion that on appeal – that he never "cited" I.C.R. 14 in support of his objection to joining the methamphetamine (Resp. Br., p.11) – mischaracterizes the record on this point.[1]

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[1] The State's argument in this regard – in essence, that cross-applying a prior argument, with all its citations to authority, is not enough to "cite" authority in support of the new argument – is particularly disingenuous because the State purports to make *precisely* the same sort of argument in its brief. In responding to the merits of Mr. Chacon's challenge to the denial of his motion to sever the initial four charges, the State's argument is, in its entirety:

> For this proposition [that there was no prejudice from the joinder of those charges], the state adopts the reasoning set forth by the district court at the hearing on those motions.

(Resp. Br., p.14.) Presumably, the State would assert that, by referencing this Court back to the district court's analysis, it has offered argument and citation to authority as required by *State v. Zichko*, 129 Idaho 259, 263 (1996), even though it did not reiterate all the specific points of the referenced analysis in its brief. If the State's argument to that effect is sufficient to satisfy *Zichko*, then Mr. Chacon's argument below was sufficient to preserve his arguments under I.C.R. 14. Of course, if this Court disagrees with that premise, then it should reverse the district court's decision to not sever the initial four counts because the State would have waived that

Regardless, Mr. Chacon's "blended" arguments were, just like the arguments in *Nava*, sufficient to preserve his argument on appeal under I.C.R. 14.[2] Specifically, he contended below that joining the methamphetamine charge was inappropriate because there was a risk the joinder would allow for a conviction based on improper propensity analysis, which would be impermissibly prejudicial. (Tr., p.75, Ls.8-19.) *Nava* made it clear that this sort of argument is properly made under I.C.R. 14. *See, e.g., Nava*, 465 P.3d at 1132-33 (identifying the risk that a verdict will be based on propensity analyses as one of the types of prejudice against which I.C.R. 14 protects, and then evaluating whether the evidence would have been admissible in separate trials to determine if that type of prejudice existed). As such, the bedrock, if not the entire structure, of Mr. Chacon's appellate arguments under I.C.R. 14 are present in his arguments below on the record. He has maintained the same position with respect to that issue on appeal – that, had the district court conducted the required analysis under I.C.R. 14, it would have denied the State's motion for joinder on that basis. (App. Br., pp.9-12.) Therefore, for the reasons laid out in *Brooke View* and *Godwin*, those appellate arguments were properly preserved for appeal, especially given *Nava*'s recognition that there was confusion in the law which would affect the way such arguments were made.

For all these reasons, this Court should reject the State's preservation arguments and consider the merits of his severance arguments.

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issue on appeal and there is no question as to whether Mr. Chacon preserved that issue below. (*See* R., pp.156-57 (Mr. Chacon's written motion to sever the initial four charges, specifically citing I.C.R. 14).)

[2] Whether or not Mr. Chacon chose to pursue the aspects of his arguments below which spoke to I.C.R. 8 in this appeal is irrelevant to whether the aspects of his arguments under I.C.R. 14 were sufficient to preserve his arguments in that regard for appeal. (*See generally* Resp. Br., pp.7-10 (arguing about how the charges were properly joined as a matter of law under I.C.R. 8).)

B. The State's Argument Based On I.C.R. 47 Was Not Preserved Below, And It Is Inconsistent With The Plain Language Of That Rule In Several Respects

The State's other procedural argument – that Mr. Chacon's objection to the State's motion to join the methamphetamine charge was not made in writing pursuant to I.C.R. 47 (Resp. Br., pp.10-13) – is erroneous because it is directly contrary to the plain language of that rule in several respects. First, though, the prosecutor never raised any argument under that rule below. (*See generally* R., Tr.) Therefore, this Court should reject the State's appellate argument on that separate procedural issue because it was not preserved for appeal. *See, e.g., State v. Wolfe*, 165 Idaho 338, 341-42 (2019) (refusing to consider the State's new, separate argument on appeal); *State v. Fuller*, 163 Idaho 585, 591 (2018) (same); *State v. Garcia-Rodriguez*, 162 Idaho 271, 274-75 (2017) (same).

At any rate, the State's arguments are improper under I.C.R. 47 itself. Specifically, subsection (b) of the rule provides:

> A motion, except when made during a trial or hearing, must be made in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.

I.C.R. 47(b). That rule is inapplicable to Mr. Chacon's arguments on the methamphetamine charge because, procedurally speaking, he was not the moving party – the State was.[3] Specifically, the State had filed a written motion asking the district court to join the

[3] The way Mr. Chacon structured his Appellant's Brief may have contributed to the State's confusion in this regard. Mr. Chacon separately addressed the district court's failure to conduct the analysis under I.C.R. 14 with respect to his objection to the State's motion to join the methamphetamine charge in Section I(B) of his Appellant's Brief. However, in Section I(C), he jointly discussed the merits of the decision to grant the State's motion to join the methamphetamine charge alongside the merits of the decision to deny Mr. Chacon's motion to sever the initial four charges, as the analysis on both issues was the same under I.C.R. 14. Mr. Chacon apologizes for any confusion the construction or terminology in his Appellant's Brief may have caused in this regard.

methamphetamine charges to the other, already-pending charges, and it noticed up a hearing on that motion for less than two weeks later. (R., pp.192-97.) At that hearing, the district court asked for additional input from the parties, and Mr. Chacon objected to the State's motion, arguing that joinder was not proper under I.C.R. 14. (*See generally* Tr., p.74, L.10 - p.76, L.4.) After hearing those arguments, the district court granted the State's motion and formally joined the charges. (Tr., p.76, L.15 - p.78, L.4; *see also* R., p.201 (the formal order of joinder).)

In fact, since the methamphetamine charge had not actually been joined at the time Mr. Chacon made his arguments, there was nothing he could actually "move" to sever at that time. *Cf. Nava*, 465 P.3d at 1127 (rejecting a narrow interpretation of I.C.R. 14 that would render a motion to sever under I.C.R. 14 as a defendant's exclusive remedy from prejudicial joinder). In other words, he was arguing on the second part of the analysis required with respect the State's motion for joinder – that the district court should not grant the motion for joinder because, even if joinder were proper under I.C.R. 8, the joinder would still be impermissibly prejudicial under I.C.R. 14. *See Nava*, 465 P.3d at 1128-29 (reaffirming that, when the district court analyzes a motion for joinder, it first determines whether joinder is proper under I.C.R. 8 and then analyzes whether such a joinder would be impermissibly prejudicial under I.C.R. 14). As such, Mr. Chacon's arguments at the hearing are better described as his objection to the State's motion for joinder, not a motion in and of themselves, and since he was not making a motion, I.C.R. 47 does not apply.

Even if I.C.R. 47 were generally applicable in regard to an objection to the other party's motion, it still would not apply in this case because there are two exceptions expressly set forth in the rule which would be controlling in Mr. Chacon's case: that I.C.R. 47 does not apply to motions "*made during a trial or hearing*," and it gives the district court the discretion to

"*permit*[] *the party to make the motion by other means*." I.C.R. 47(b) (emphasis added). Since the district court invited Mr. Chacon to make his arguments on that issue at the hearing without first requiring him to file a written objection, record implicitly demonstrates it was exercising that discretion to exempt Mr. Chacon from I.C.R. 47's requirements. (Tr., p.74, Ls.10-20.)

The State has offered no argument to try to show how the decision to proceed in this fashion would have been an abuse of the district court's discretion. (*See generally* Resp. Br.) Nor could it make such a showing on this record. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018) (articulating the standard for evaluating discretionary decisions). That is because the State scheduled the hearing on its motion for less than two weeks after the motion itself was filed, and, at that time, the trial was set to occur just one month later. (*See* R., pp.183, 192.) As such, the district court's invitation to make oral argument rather than insisting on written filings first, particularly in the run-up to the trial, was rational and promoted judicial efficiency in this regard.[4] Thus, even if I.C.R. 47 were generally applicable, the district court's decision to not insist on written filings from Mr. Chacon in this instance was reasonable.

For any or all these reasons, this Court should reject the State's unfounded and unpreserved arguments under I.C.R. 47(b).

C. The District Court Failed To Conduct The Proper Analysis Under I.C.R. 14 With Respect To Its Decision On The State's Motion To Join The Methamphetamine Charge

The district court did not evaluate whether the evidence of the methamphetamine charge would have been admissible in separate trials. This is part of the analysis under I.C.R. 14. *See, e.g., Nava*, 465 P.3d at 1132-33 (specifically evaluating whether the evidence in that case would

[4] The fact that the trial would, subsequently, be continued for other reasons does not change the reasonableness of the district court's decision to proceed without additional written filings with respect to the State's motion to join the methamphetamine charge.

have been admissible in separate trials as part of its analysis under I.C.R. 14). Thus, as Mr. Chacon argued, the district court abused its discretion by not conducting that required analysis. *See State v. Orellana-Castro*, 158 Idaho 757, 762-63 (2015) (holding the district court abused its discretion by not conducting the required analysis with respect to a joinder motion), *abrogated on other grounds by Nava*, 465 P.3d at 1128.

The State's only response in this regard was to reassert the district court's conclusion – that the jury would be able to "sort through" the charges, and thus, consider the methamphetamine charge separate from the other charges. (Resp. Br., p.12.) However, the State completely fails to mention *Orellana-Castro* in making that argument. (*See generally* Resp. Br., pp.10-13.) That is disconcerting because, in *Orellana-Castro*, the Idaho Supreme Court rejected the very argument which the State is trying to make in this regard, and that portion of *Orellana-Castro* remains good law following *Nava*. *See Nava*, 465 P.3d at 1128 (disavowing *Orellana-Castro* only insofar as it purported to create a single standard of review for both I.C.R. 8 and I.C.R. 14).

In *Orellana-Castro*, as here, the district court only determined that any prejudice which might arise from the joinder in that case would be alleviated by instructing the jury to consider each count separately; it did not evaluate whether the evidence would have been admissible in separate trials under I.R.E. 404(b). *Orellana-Castro*, 158 Idaho at 762. The State adopted that position on appeal, and so, sought to argue the district court's error in failing to conduct the required analysis was harmless. *Id.* The Supreme Court rejected that position, stating: "That instruction [to consider the charges separately] is insufficient to alleviate the prejudice from

improper joinder," which was the risk that the evaluation of the separate charges would be tainted by an improper propensity analysis.[5] *Id.*

Nevertheless, the State is trying to make that same argument again in this case – that because the jury could, and in some cases, did, consider the charges separately, there was no prejudice from the joinder of all the charges. (Resp. Br., p.10.) However, just as in *Orellana-Castro*, there is still a risk that the jury's consideration of the charges as separate entities still could have been affected by an impermissible propensity analysis. Therefore, just as in *Orellana-Castro*, the State's argument fails to prove the district court's error in failing to conduct the required analysis, was harmless beyond a reasonable doubt. *See also Montgomery v. Montgomery*, 147 Idaho 1, 6-7 (2009) (explaining that, "[w]hen the discretion exercised by a trial court is affected by an error of law, the role of the appellate court is to note the error made and remand the case for appropriate findings").

The State's argument in this regard is also directly contrary to the Supreme Court's decision in *State v. Field*, 144 Idaho 559, 565 (2007). Specifically, the State contended there was no potential for prejudice because the jury ultimately acquitted Mr. Chacon on two of the five charges against him. (Resp. Br., p.12.) However, in *Field*, the Supreme Court made it clear that "[w]hether joinder is proper is 'determined by what is alleged, *not what the proof eventually shows.*'" *Field*, 144 Idaho at 565 (quoting *State v. Cochran*, 97 Idaho 71, 73 (1975)) (emphasis added). In fact, "'where, as here, the charge which originally justified joinder turns out to lack

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[5] Unlike Mr. Chacon, *Orellana-Castro* dealt with two charges of sexual misconduct. *See Orellana-Castro*, 158 Idaho at 761-62 As the Supreme Court has pointed out, such charges carry a particularly-significant risk of prejudice in terms of propensity *See State v. Johnson*, 148 Idaho 664, 670 (2010). However, that does not change the fact that part of the analysis under I.C.R. 14 is weighing the potential prejudice in terms of propensity, and thus, the district court's failure to conduct that portion of the analysis is an abuse of its discretion. *Orellana-Castro*, 158 Idaho at 762.

the support of sufficient evidence, a trial judge should be *particularly sensitive to the possibility of such prejudice.*'" *Cochran*, 97 Idaho at 74 (quoting *Schaffer v. United States*, 362 U.S. 511, 515-16 (1960)) (emphasis added). Thus, the State's focus on what the proof eventually showed was wholly improper.

In other words, what *Field*, *Cochran*, and *Schaffer* recognize is that the fact that jury may have found the State did not carry its burden on two of the charges offers little insight into whether the three convictions it did return were improperly influenced by the prejudicial joinder of those charges.[6] *See, e.g., Cochran*, 97 Idaho at 73-74; *see also Nava*, 465 P.3d at 1129 (reiterating the concern in this regard is that the jury will find the defendant guilty of another crime simply because they found him guilty of one of the charged offenses). The warning in *Cochran* and *Schaffer*, in particular, suggests the potential concern that improper joinder might lead to the jury simply "splitting the baby" in rendering acquittals on some charges and convictions on others. *See also Nava*, 465 P.3d at 1129 (reiterating that I.C.R. 14 is designed to address a broad scope of potential prejudice). This is, in part, why *Orellana-Castro* held that the jury instruction to consider each charge separately was not sufficient to fully address the potential prejudice from joinder. *See Orellana-Castro*, 158 Idaho at 762-63. Therefore, the fact that acquittals were ultimately rendered on some charges does not show the joinder was not prejudicial. As such, this Court should disregard the State's argument in this regard, as it is contrary to clear Supreme Court precedent.

The State's argument in this regard is further revealed to be erroneous because it is based on a misapplication of *State v. Wilske*, 158 Idaho 643 (Ct. App. 2015). (*See* Resp. Br., pp.12-

[6] Mr. Chacon specifically challenged the joinder of each of the three charges for which he was ultimately convicted. (*See* R., p.156 (moving for the eluding charge to be tried separately from the unlawful possession of the firearm); Tr., p.74, L.21 - p.76, L.2 (objecting to the subsequent joinder of the methamphetamine charge to all the others).)

13.) While the State is correct, in that *Wilske* points out that, whether the evidence would have been admissible in separate trials under I.R.E. 404(b) is not determinative with respect to the analysis under I.C.R. 14, *Wilske*, 158 Idaho at 645-46,[7] that does not make *Wilske* controlling in, or even applicable to, Mr. Chacon's case. That is because, in *Wilske*, the district court *actually considered* the risk that joinder would allow for improper propensity influences to affect the verdicts. *Id.* at 646-47 (ultimately concluding there was not a significant risk of propensity influence, given the facts of that case). As such, *Wilske* is wholly irrelevant to the issue in Mr. Chacon's case, which is focused on the district court's *failure to* conduct that part of the analysis at all. That particular issue was directly addressed one month after *Wilske*, in the Supreme Court's decision in *Orellana-Castro*.[8] Therefore, *Orellana-Castro*, not *Wilske*, controls the analysis in Mr. Chacon's case.

Under the actually-controlling case law, the district court abused its discretion by not conducting a part of the required analysis under I.C.R. 14 with respect to the methamphetamine charge. That error was prejudicial because there was a significant risk that the jury's determination on the methamphetamine charge could be affected by the risk of propensity evidence, particularly in relation to the possession of the firearm charge. *See, e.g., State v. Pierce*, 137 Idaho 296, 299-300 (Ct. App. 2002) (acknowledging there is a "recognized propensity of persons engaged in selling narcotics to carry firearms"). Therefore, as in *Orellana-Castro*, this Court should vacate the conviction and remand the case for proper evaluation of the state's motion to join the methamphetamine charge. *See Orellana-Castro*, 158 Idaho at 762-63.

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[7] *See also Nava*, 465 P.3d at 1129 (noting the evaluation of prejudice under I.C.R.14 extends beyond the scope of I.R.E. 404(b))

[8] To any extent *Wilske* and *Orellana-Castro* are incompatible, *Orellana-Castro* would have abrogated *Wilske*. *See State v. Clinton*, 155 Idaho 271, 272 n.1 (2013).

D. The District Court's Decisions To Allow All The Charges To Proceed To Trial Together Were Erroneous Under The Proper Standards For I.C.R. 14

Mr. Chacon has maintained that the district court decisions – to deny his motion to sever the original charges and to grant the State's subsequent motion to join the methamphetamine charge – were not consistent with the applicable standards under I.C.R. 14 because any potential relevance each charge had to the others was outweighed by the risk of undue prejudice. (App. Br., pp.11-12.) The fact that Mr. Chacon used the methamphetamine charge as the primary example to illustrate the lack of relevance in that regard does not, as the State believes, mean he failed to offer argument or authority with regard to his motion to sever the other charges. (*See* Resp. Br., p.) In fact, the State's argument fails to appreciate that Mr. Chacon *did, in fact,* make a specific argument which addressed all three of charges for which he was convicted: "evidence of unlawful possession of methamphetamine or a firearm says little about whether the car was being driven in a reckless manner while being signaled to stop, so as to help prove felony eluding."[9] (App. Br., p.12.) He made that argument under the same authority as his other arguments in that regard (*Orellana-Castro*, 158 Idaho at 760). Therefore, the State's attempt to have his argument in that regard waived under *Zichko* for failure to make argument or cite authority is meritless. (Resp. Br., p.13.)

The State has not offered any further argument of its own on the merits of the district court's decisions to have a joint trial with all five charges; rather, it simply adopted the district court's analysis in that regard. (Resp. Br., p.14.) As explained in Section I(C) *supra*, as well as in the Appellant's Brief, pages 11-12, the district court's analysis in that regard was contrary to

[9] As Mr. Chacon indicated out at the outset of his Appellant's Brief, the acquittals on the other two charges will prevent a retrial on those charges. (*See* App. Br., p.1 n.1.) As such, there was no reason to further address the propriety of the joinder of those two charges, since any argument in that regard was rendered moot by the acquittals.

the applicable precedent. As such, no further reply in that regard is needed. Mr. Chacon simply refers this Court back to those applicable arguments and supporting authorities.

II.

The District Court Erred By Admitting Evidence Of Mr. Chacon's Prior Drug Use And Possession Of Paraphernalia In Violation Of I.R.E. 404(b)

A. Mr. Chacon's Relevancy And Prejudice Objections Preserved His Arguments Under I.R.E. 404(b)

As the Idaho Supreme Court has repeatedly made clear, the analysis under I.R.E. 404(b) contains two major components – a determination of relevancy and an evaluation of whether the risk of undue prejudice substantially outweighs the probative value. *E.g., State v. Samuel*, 165 Idaho 746, 769-70 (2019) (reiterating the analysis under I.R.E. 404(b)). The Courts have often compared the analysis on these two prongs to the analysis under I.R.E. 401 and I.R.E. 403 respectively. *See, e.g., State v. Jones*, ___ P.3d ___, 2020 WL 2111375, **4 & 5 (May 4, 2020) (quoting I.R.E. 401 while conducting the analysis under the first step of I.R.E. 404(b), and quoting I.R.E. 403 while conducting the analysis under the second step), *petition for reh'g pending*; *accord State v. Diaz*, 158 Idaho 629, 635-36 (Ct. App. 2015) (specifically citing I.R.E. 401 and 403 in conducting the analysis under I.R.E. 404(b)); *State v. Cook*, 144 Idaho 784, 788-89 & n.3 (Ct. App. 2007) (same). As a result, the Idaho Court of Appeals has expressly held that a relevancy objection can and will preserve an argument under I.R.E. 404(b) for appeal, when the thrust of the objection is aimed at the same bases which I.R.E. 404(b) addresses. *State v. Avila*, 137 Idaho 410, 412-13 (Ct. App. 2002).

Nevertheless, in blatant disregard of that clear precedent directly on point, the State still asserted that Mr. Chacon's I.R.E. 404(b) arguments were not preserved. (Resp. Br., pp.15-16.)

The only two cases it cited in support of its position – *State v. Vondenkamp*, 141 Idaho 878 (Ct. App. 2005); *State v. Norton*, 134 Idaho 875 (Ct. App. 2000) – do not so much as mention I.R.E. 401 or I.R.E. 403, *or even* 404(b). As such, those two cases are of negligible value in resolving the preservation issue, especially when there are other decisions so directly on point. In fact, one of the cases which is directly on point *actually and expressly rejected* this sort of preservation argument based on *Norton* specifically in light of the decision in *Avila*. *State v. Teasley*, 138 Idaho 113, 117 (Ct. App. 2002).

The Court of Appeals laid out the relevant analysis in its decision in *State v. McAbee*, 130 Idaho 517, 518-19 (Ct. App. 1997). In that case, while I.R.E. 404(b) was not specifically mentioned in the arguments below:

> in a series of arguments regarding the admissibility of this evidence that occurred throughout the trial, the State asserted that the evidence was relevant for purposes permitted by Rule 404(b), including the purpose of showing McAbee's intent, opportunity to commit the charged crime, and absence of mistake or accident. McAbee's attorney countered with arguments that the permissible purposes enumerated in Rule 404(b) were not applicable and also urged that the evidence should be excluded because it would be unfairly prejudicial.

McAbee, 130 Idaho at 518-19. Accordingly, the Court of Appeals held, "the issue framed in the appellant's brief [under I.R.E. 404(b)] was sufficiently preserved for appeal" by the arguments below. *Id.* at 519; *accord Avila*, 137 Idaho at 412-13 (distinguishing *State v. Cannady*, 137 Idaho 67 (2002), for this same reason – the objection in *Cannady* did not invoke the principles of relevancy that are at issue under I.R.E. 404(b), whereas the objection in *Avila* did). The analysis underlying the decisions in *McAbee* and *Avila* was recently reaffirmed by the Idaho Supreme Court in *Godwin*: so long as "the bedrock of the argument is present in the record and the district court made a determination on the issue," the issue is sufficiently preserved for appeal, even if the argument below was vague. *Godwin*, 164 Idaho at 914; *compare Jones*, ___ P.3d

___, 2020 WL 2111375, **8-9 (holding that relevance and prejudice objections are not sufficient to preserve an argument that the prosecutor failed *to give sufficient notice* as required by I.R.E. 404(b) specifically because that aspect of I.R.E. 404(b) was not apparent form the context of the arguments made below).

Here, as in *McAbee*, the prosecutor's arguments for relevance of the drug paraphernalia went directly to the purposes articulated in I.R.E. 404(b) – specifically, Mr. Chacon's knowledge and intent in terms of possessing the methamphetamine. (Tr., p.640, Ls.9-13, p.641, Ls.8-12.) Mr. Chacon, like the defendant in *McAbee*, objected along those same lines, and also argued that evidence would be more prejudicial than probative. (Tr., p.639, Ls.1-16, p.640, L.16 - p.641, L.2.) Therefore, as in *McAbee*, *Avila*, and *Teasley*, the context of the arguments below clearly relates to the principles at issue under both prongs of I.R.E. 404(b), and thus, preserved his appellate arguments framed under I.R.E. 404(b).

As such, this Court should reject the State's preservation argument, as it is clearly improper under the actually-applicable precedent.

B. The Evidence Of Mr. Chacon's Prior Drug Use And Possession Of Paraphernalia Was Not Relevant Except Through An Improper Propensity Analysis, And/Or The Risk Of Undue Prejudice Substantially Outweighed Any Potential Probative Value

The State's arguments with respect to the merits of the analysis under I.R.E. 404(b) (or, as the State would have it, under I.R.E. 401 and I.R.E. 403; the arguments are the same whichever way they are framed) are unremarkable. In fact, the State's argument with respect to the prejudice portion of the analysis constitutes a single, conclusory sentence which probably does not satisfy the requirements of *Zichko*, 129 Idaho at 263, since it does not cite authority to support the argument. (*See* Resp. Br., p.17; *see generally* Resp. Br., pp.16-19.) Either way, no

further reply is necessary on the merits of this issue; Mr. Chacon simply refers the Court back to pages 13-15 of his Appellant's Brief.

C. State Failed To Argue The Proper Standard For Harmless Error

Despite citing to the Idaho Supreme Court's recent decision in *State v. Garcia*, 166 Idaho 661, __, 462 P.3d 1125 (2020), in another portion of its brief, the State did not mention that decision in its argument that any error in admitting the paraphernalia or prior drug use was harmless.[10] (*See generally* Resp. Br., pp.19-21.) That is problematic, because the State's argument for harmless error is incompatible with the new standard articulated in *Garcia*.

Specifically, the State asserts an error will be harmless if "'beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence.'" (Resp. Br., p.19.) The State proceeds to argue that, because of all the other evidence it presented, the jury still would have convinced Mr. Chacon even without the error. (Resp. Br., pp.19-21.) However, the State's argument only discusses the evidence in terms of viewing it favorably to the State's view of the case; it leaves out the aspects of the evidence that are favorable to Mr. Chacon, such as the gaps in the chain of custody of the methamphetamine and the impact of the error on the jury's evaluation of those points. (*See generally* Resp. Br.) As such, the State's argument in this regard is actually revealed to be an argument for "overwhelming evidence." Unfortunately for the State, *Garcia* made eminently clear that "overwhelming evidence" is not a permissible basis upon which to argue harmless error. *Garcia*, 462 P.3d at 1138-39. Therefore, this Court should reject the State's harmless error argument outright.

[10] The State's only citations to *Garcia* do not discuss the harmless error standard it adopted, but rather, only discuss refer to *Garcia* for its discussion about determining whether evidence is relevant. (*See* Resp. Br., pp.16, 17-18.)

To this same point, the State's argument failed to address fully half of the relevant standard for harmless error. As *Garcia* made clear, the harmless error test actually turns on a comparison between the probative force of the other evidence *against* the probative force of the error itself. *Garcia*, 462 P.3d at 1138. Only if the probative effect of the error itself can be said to be minimal beyond a reasonable doubt when compared with the other evidence will the error be harmless. *Id.* Since the State failed to discuss the probative force of the error itself, much less demonstrate it to be minimal, as it was required to do, (*see generally* Resp. Br., pp.19-21), this Court should reject its harmless error argument outright. *State v. Almaraz*, 154 Idaho 584, 598-99 (2013) ("the State never specifically argues that [the error] did not 'contribute to the verdict obtained' as clearly required under *Perry*.[11] For example, ... As such, the State has failed to meet its burden of proving beyond a reasonable doubt that the verdict in this case would have been the same even if [the erroneous evidence] had not been admitted.")

At any rate, for the reasons the improperly-admitted evidence carried a substantial risk of prejudice, the probative force of the error in admitting the propensity evidence cannot be said to be "minimal" in the fabric of Mr. Chacon's whole case. For example, as discussed in detail in the Appellant's Brief, there was a basis for reasonable doubt on the methamphetamine charge due to the gaps in the chain of custody. (App. Br., p.6.) There was a not-insignificant risk that the jurors dismissed those doubts based on Mr. Chacon's character as a drug user and his possession of the paraphernalia. Likewise, as also discussed in detail in the Appellant's Brief, there were bases for reasonable doubt regarding Mr. Chacon's knowledge that the gun was in the car. (App. Br., p.6.) There was a not-insignificant risk that the jurors would dismiss those doubts because of the recognized propensity of those involved in drug culture to carry guns. *See*

[11] *State v. Perry*, 150 Idaho 209, 227 (2010).

Pierce, 137 Idaho at 299-300 (acknowledging this propensity connection exists). Thus, the error itself had significant probative force, a force that was not rendered minimal when compared to the other evidence the State presented on those two charges.

In fact, the State's argument, which was based in part on Mr. Chacon's testimony and the State's rebuttal evidence, demonstrates the probative force of the error. (*See* Resp. Br., pp.19-20.) His strategy, to address and explain his drug use and possession of paraphernalia, was dictated in no small part by the district court's erroneous decision to allow that evidence to be admitted in the first place during the State's case-in-chief. Thus, the State's reliance on that evidence actually demonstrates that this error had particular probative force in the overall fabric of the case, and therefore, actually shows this error was *not* harmless beyond a reasonable doubt.

Since the State has failed to argue, much less prove beyond a reasonable doubt, that the probative force of the error itself was minimal in the context of the whole case, it has failed to carry its burden to prove that error harmless under the proper standard.

CONCLUSION

Mr. Chacon respectfully requests that this Court vacate his convictions and either remand this case for separate trials on the remaining charges, or, alternatively, for a new trial without the inclusion of improper propensity evidence.

DATED this 18th day of August, 2020.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 2020, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
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BRD/eas