

5-25-2012

# State v. Frauenberger Augmentation Record Dckt. 39136

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In the Supreme Court of the State of Idaho

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 ROBERT JOSEPH FRAUENBERGER, )  
 )  
 Defendant-Appellant. )

ORDER GRANTING MOTION TO  
AUGMENT AND SUSPENDING THE  
BRIEFING SCHEDULE

Supreme Court Docket No. 39136-2011  
Custer County Docket No. 2010-744

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF  
was filed by counsel for Appellant on May 3, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT be, and hereby is,  
GRANTED and the District Court Reporter shall prepare and lodge the transcript listed below with  
this Court within twenty-eight (28) days of the date of this ORDER and the District Court Clerk shall  
immediately serve counsel and file the transcript with this Court. Any corrections shall be filed with  
this Court as provided by I.A.R. 30.1:

- 1. Transcript of the reading of the jury instructions, trial held on April 26-28, 2011.  
(Court Reporter Karen Konvalinka)(estimate of pages: not provided, deemed less than  
100)

IT FURTHER IS ORDERED that the augmentation record shall include the documents listed  
below, copies of which accompanied this Motion:

- 1. Defendant's Exhibit A, admitted at trial; and
- 2. Jury Instruction Number 10, presumably read to the jury during jury instruction.

IT FURTHER IS ORDERED that proceedings in this appeal shall be suspended until such  
time as the transcript listed above has been prepared and lodged with this Court, at which time the due  
date for filing of RESPONDENT'S BRIEF shall be reset.

ORDER GRANTING MOTION TO AUGMENT AND SUSPENDING THE BRIEFING  
SCHEDULE - Docket No. 39136-2011

DATED this 25<sup>th</sup> day of May, 2012.

For the Supreme Court

*Stephen W. Kenyon*  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Court Reporter

LAW CLERK

AUGMENTATION RECORD

ORDER GRANTING MOTION TO AUGMENT AND SUSPENDING THE BRIEFING  
SCHEDULE - Docket No. 39136-2011

# In the Supreme Court of the State of Idaho

|                             |   |                                     |
|-----------------------------|---|-------------------------------------|
| STATE OF IDAHO,             | ) |                                     |
|                             | ) |                                     |
| Plaintiff-Respondent,       | ) | <b>AMENDED ORDER</b>                |
|                             | ) |                                     |
| v.                          | ) | Supreme Court Docket No. 39136-2011 |
|                             | ) | Custer County District Court No.    |
| ROBERT JOSEPH FRAUENBERGER, | ) | 2010-744                            |
|                             | ) |                                     |
| Defendant-Appellant.        | ) | Ref. No. 12-477                     |

A MOTION TO TAKE JUDICIAL NOTICE AND TO AUGMENT THE APPELLATE RECORD AND STATEMENT IN SUPPORT THEREOF with Attachments "A" and "B" attached was filed by counsel for ~~Appellant~~ **Respondent** on September 6, 2012, requesting this Court for an order taking judicial notice of the item attached to this Motion as Attachment "A" and to augment this Record on Appeal with the item attached to this Motion as Attachment "B". Therefore, good cause appearing,

IT HEREBY IS ORDERED that ~~Appellant's~~ **Respondent's** MOTION TO TAKE JUDICIAL NOTICE be, and hereby is, GRANTED and this Court SHALL TAKE JUDICIAL NOTICE of the item listed below, a copy of which was attached to this Motion as Attachment "A":

1. Idaho Repository – Case Number Result Page for Custer County Case No. CR-2010-262, *State v. Richard J. Frauenberger*.

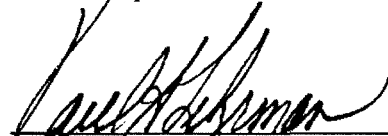
IT FURTHER IS ORDERED that ~~Appellant's~~ **Respondent's** MOTION TO AUGMENT THE APPELLATE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, a copy of which was attached to this Motion as Attachment "B":

1. A copy of the previously prepared transcript by Court Reporter Jack L. Fuller of the Preliminary Hearing held on June 28, 2010, before Magistrate Judge Charles L. Roos.

**IT FURTHER IS ORDERED that this Amended Order SHALL BE NUNC PRO TUNC to this Court's prior Order dated September 26, 2012.**

DATED this 26<sup>th</sup> day of September, 2012.

For the Supreme Court



Karel A. Lehrman, Chief Deputy Clerk for  
Stephen W. Kenyon, Clerk

cc: Counsel of Record



ATTACHMENT A

**Case Number Result Page**

Custer

1 Cases Found.

| State of Idaho vs. Robert J Frauenberger |                               |  |                    |        |  |
|--|-------------------------------|--|--------------------|--------|--|
| No hearings scheduled                    |                               |  |                    |        |  |
| Case: CR-2010-0000262                    | District Judge: Joel E Tingey |  | Amount due: \$0.00 | Closed |  |
| Charges:                                 | Violation Date                | Charge   | Citation           | Degree | Disposition  |
|  | 09/01/2009                    | I18-1508 Children-Lewd Conduct with Child Under 16<br>Arresting Officer: Police Departments,, 9550   |                    | Felony | Finding: Dismissed on Motion of Prosecutor<br>Disposition date: 11/24/2010<br>Fines/fees: \$0.00 |
|  | 09/01/2009                    | I18-1508 Children-Lewd Conduct with Child Under 16<br>Arresting Officer: Police Departments,, 9550   |                    | Felony | Finding: Dismissed on Motion of Prosecutor<br>Disposition date: 11/24/2010<br>Fines/fees: \$0.00 |
| Register of actions:                     | Date                          |  |                    |        |  |
|  | 06/07/2010                    | New Case Filed - Felony  |                    |        |  |
|  | 06/07/2010                    | Prosecutor assigned Shawn M Glen (County) Esq  |                    |        |  |
|  | 06/07/2010                    | Criminal Complaint   |                    |        |  |
|  | 06/07/2010                    | Summons Issued Frauenberger, Robert J  |                    |        |  |
|  | 06/07/2010                    | Hearing Scheduled (Felony First Appearance 06/14/2010 09:00 AM)  |                    |        |  |
|  | 06/07/2010                    | Affidavit of Scott H Birch   |                    |        |  |
|  | 06/09/2010                    | Summons Returned Frauenberger, Robert J  |                    |        |  |
|  | 06/14/2010                    | Hearing result for Felony First Appearance held on 06/14/2010 09:00 AM: Arraignment / First Appearance   |                    |        |  |
|  | 06/14/2010                    | Notification Of Rights Felony  |                    |        |  |
|  | 06/14/2010                    | Minute Entry   |                    |        |  |
|  | 06/14/2010                    | Hearing Scheduled (Preliminary 06/28/2010 01:15 PM)  |                    |        |  |
|  | 06/14/2010                    | Notice Of Hearing  |                    |        |  |
|  | 06/17/2010                    | Subpoena: Document Service Issued: on 6/17/2010 to Robert J Frauenberger; Assigned to Custer County Sheriff's Officer. Service Fee of \$0.00. Bailey Harwood |                    |        |  |
|  | 06/17/2010                    | Subpoena: Document Service Issued: on 6/17/2010 to Robert J Frauenberger; Assigned to Custer County Sheriff's Officer. Service Fee of \$0.00. Paul Nigg      |                    |        |  |
|  | 06/21/2010                    | Subpoena: Document Returned Served on 6/19/2010 to Robert J Frauenberger; Assigned to Custer County Sheriff's Officer. Service Fee of \$0.00. Bailey Harwood |                    |        |  |
|  | 06/21/2010                    | Subpoena: Document Returned Not Served on 6/21/2010 to Robert J Frauenberger; Assigned to Custer County Sheriff's Officer. Service Fee of \$0.00. Paul Nigg  |                    |        |  |
|  | 06/21/2010                    | Subpoena: Document Returned Not Served on 6/21/2010 to Robert J Frauenberger; Assigned to Custer County Sheriff's Officer. Service Fee of \$0.00.            |                    |        |  |
|  | 06/28/2010                    | Defendant: Frauenberger, Robert J Appearance R James Archibald Esq   |                    |        |  |
|  | 06/28/2010                    | Court Minutes Hearing type: Preliminary Hearing date: 6/28/2010 Time: 3:03 pm  |                    |        |  |
|  | 06/28/2010                    | Courtroom: Court reporter: Minutes Clerk: Plummer Laila Tape Number: Defense Attorney: R Archibald Prosecutor: Shawn Glen (County)                           |                    |        |  |
|  | 06/28/2010                    | Order Binding Defendant Over and Order Setting Time for Arraignment  |                    |        |  |
|  | 06/28/2010                    | Hearing result for Preliminary held on 06/28/2010 01:15 PM: Bound Over (after Prelim)  |                    |        |  |
|  | 06/28/2010                    | Order of Release Conditions  |                    |        |  |

06/29/2010 Hearing Scheduled (Felony Arraignment 07/21/2010 01:30 PM)  
06/29/2010 Notice Of Hearing  
07/01/2010 Criminal Information  
07/21/2010 Hearing result for Felony Arraignment held on 07/21/2010 01:30 PM: Hearing Held  
07/23/2010 Court Minutes Hearing type: Felony Arraignment Hearing date: 7/23/2010 Time: 11:33 am Courtroom: Court reporter: Minutes Clerk: Ruth Brunner Tape Number: Defense Attorney: R Archibald Prosecutor: Shawn Glen (County)  
07/26/2010 Hearing Scheduled (Pretrial Conference 09/15/2010 01:30 PM)  
07/26/2010 Hearing Scheduled (Jury Trial 09/28/2010 10:00 AM)  
07/26/2010 Notice Of Hearing  
07/26/2010 Pretrial Order  
07/29/2010 Subpoena: Document Service Issued: on 7/29/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Bailey Harwood  
07/30/2010 Affidavit of Shawn M. Glen  
08/02/2010 Subpoena: Document Service Issued: on 8/2/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Scott Birch  
08/02/2010 Subpoena: Document Service Issued: on 8/2/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Isabella "Bella" Maw  
08/02/2010 Subpoena: Document Service Issued: on 8/2/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Logan Cutler  
08/03/2010 Subpoena: Document Returned Served on 8/3/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.  
08/03/2010 Affidavit of Shawn M. Glen  
08/03/2010 Subpoena: Document Service Issued: on 8/3/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Paul Nigg  
08/09/2010 Subpoena: Document Returned Served on 8/4/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.  
08/16/2010 Subpoena: Document Returned Served on 8/14/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.  
09/07/2010 Subpoena: Document Returned Served on 9/1/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Isabella "Bella" Maw  
09/15/2010 Warrant Issued - Bench Bond amount: 50000.00 Fail To Appear Defendant: Frauenberger, Robert J  
09/15/2010 STATUS CHANGED: Inactive  
09/15/2010 Hearing result for Pretrial Conference held on 09/15/2010 01:30 PM: Hearing Held  
09/15/2010 Hearing result for Jury Trial held on 09/28/2010 10:00 AM: Hearing Vacated  
09/15/2010 Hearing Scheduled (Jury Trial 12/01-2/2010 10:00 AM)  
09/15/2010 Hearing Scheduled (Pretrial Conference 11/17/2010 01:30 PM)  
09/17/2010 Court Minutes Hearing type: Pretrial Conference Hearing date: 9/15/2010 Time: 1:30 pm Courtroom: Court reporter: Minutes Clerk: Ruth Brunner Tape Number: Defense Attorney: R Archibald Prosecutor: Shawn Glen (County)  
09/17/2010 Minute Entry  
09/17/2010 Notice Of Hearing  
09/20/2010 Subpoena: Document Returned Not Served on 9/20/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.  
09/27/2010 Subpoena: Document Service Issued: on 9/27/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Bailey Harwood  
09/27/2010 Subpoena: Document Service Issued: on 9/27/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Paul Nigg  
09/28/2010 Affidavit of Shawn M. Glen  
09/28/2010 Subpoena: Document Service Issued: on 9/28/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Logan Cutler  
09/29/2010 Subpoena: Document Service Issued: on 9/29/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Scott Birch

09/29/2010 Subpoena: Document Service Issued: on 9/29/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00. Isabella "Bella" Maw

09/29/2010 Order And Notice Setting Jury Trial

10/01/2010 Warrant Returned Fail To Appear Defendant: Frauenberger, Robert J

10/01/2010 STATUS CHANGED: Pending

10/01/2010 Subpoena: Document Returned Served on 9/30/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.

10/01/2010 Minute Entry

10/01/2010 Hearing Scheduled (Status 10/20/2010 01:30 PM) - Bench Warrant Served

10/01/2010 Notice Of Hearing

10/06/2010 Subpoena: Document Returned Served on 10/5/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.

10/08/2010 Motion To Amend Criminal Information

10/12/2010 Order Allowing Amendment

10/13/2010 Subpoena: Document Returned Served on 10/12/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.

10/13/2010 Amended Criminal Information

10/15/2010 Subpoena: Document Returned Served on 10/14/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.

10/20/2010 Hearing result for Status held on 10/20/2010 01:30 PM: Hearing Held

10/21/2010 Second Motion to Amend Criminal Information

10/21/2010 Second Amended Criminal Information

11/17/2010 Hearing result for Pretrial Conference held on 11/17/2010 01:30 PM: Hearing Held

11/17/2010 Preliminary Hearing Transcript Filed with Court

11/17/2010 Order to Release from Custody

11/18/2010 Court Minutes Hearing type: Pretrial Conference Hearing date: 11/17/2010 Time: 1:30 pm Courtroom: Court reporter: Jack Fuller Minutes Clerk: Ruth Bruncker Tape Number: Defense Attorney: R Archibald Prosecutor: Shawn Glen (County)

11/23/2010 Minute Entry & Order

11/24/2010 Order of Dismissal Without Prejudice

11/24/2010 Dismissed by Motion of the Prosecutor (I18-1508 Children-Lewd Conduct with Child Under 16)

11/24/2010 Dismissed by Motion of the Prosecutor (I18-1508 Children-Lewd Conduct with Child Under 16)

11/29/2010 Hearing result for Jury Trial held on 12/01/2010 10:00 AM: Hearing Vacated

11/29/2010 Subpoena: Document Returned Not Served on 11/29/2010 to Robert J Frauenberger; Assigned to . Service Fee of \$0.00.

11/29/2010 STATUS CHANGED: closed

Connection: Public



ATTACHMENT B

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO  
IN AND FOR THE COUNTY OF CUSTER

THE STATE OF IDAHO, )  
Plaintiff, )  
vs. ) CASE NO. CR-2010-262  
ROBERT J. FRAUENBERGER, )  
Defendant. )

-----

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CRIMINAL DIVISION

\*\*\*\*\*

**PRELIMINARY HEARING**

**JUNE 28, 2010**

**HONORABLE MAGISTRATE CHARLES L. ROOS PRESIDING**

\*\*\*\*\*

**JACK L. FULLER, CSR**  
Official Court Reporter  
605 N. Capital  
Idaho Falls, Idaho 83402  
Phone: (208) 529-1350 Ext. 1138  
E-Mail: jfuller@co.bonneville.id.us

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**FOR THE STATE:** Shawn M. Glenn, Esq.  
Custer County Prosecuting Attorney  
P.O. Box 630  
Challis, Idaho 83226  
Phone: (208) 879-4383  
Facsimile: (208) 879-2498  
E-Mail: custerpa@custertel.net

**FOR THE DEFENDANT:** R. James Archibald, Esq.  
Attorney at Law  
Swafford Law Office, Chartered  
525 Ninth Street  
Idaho Falls, Idaho 83404  
Phone: (208) 524-4002  
Facsimile: (208) 524-4131  
E-Mail: jima@swaffordlaw.com

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**STATE'S WITNESS:**

|   |    |
|---|----|
| BAILEY HARWOOD  |    |
| Direct Examination by Ms. Glen.....                                     | 3  |
| Cross-Examination by Mr. Archibald.....                                 | 10 |
| State Rests.....  | 16 |
| Court's Ruling.....   | 16 |
| Discussion Regarding the Court Placing Conditions<br>on OR Release..... | 17 |
| Discussion Regarding Outstanding Misdemeanor<br>Warrant in Wyoming..... | 19 |
| Proceedings Concluded.....  | 20 |
| Reporter's Certificate.....   | 21 |

**PRELIMINARY HEARING**

**JUNE 28, 2010**

1 THE COURT: We'll go back on the record on  
2 this, the 28th day of June, 2010, take up the matter  
3 scheduled for preliminary hearing, Case  
4 Number CR-2010-262, State of Idaho vs. Robert  
5 Frauenberger. Note for the record, he is present  
6 together with Mr. Archibald. Ms. Glen is present in the  
7 courtroom.

8 I said good afternoon to everyone but you,  
9 Mr. Frauenberger. Good afternoon.

10 THE DEFENDANT: Good afternoon, Your Honor.

11 THE COURT: Mr. Archibald, you have not made  
12 an appearance in this matter other than on the record  
13 today; is that correct?

14 MR. ARCHIBALD: Yes, Your Honor. I just --  
15 I got hired on this case on Friday, so I'm sorry I  
16 didn't --

17 THE COURT: That's not a problem. I'm just,  
18 for the purposes of the record, just making it clear  
19 that you are now counsel of record.

20 MR. ARCHIBALD: Yes.

21 THE COURT: Are you prepared and ready to  
22 proceed at this time?

23 MR. ARCHIBALD: Yes, Your Honor.

1 MS. GLEN: Thank you for asking.

2 THE COURT: Just thought I'd ask. Go ahead.

3 MS. GLEN: Thank you.

**BAILEY HARWOOD,**

**having been first duly sworn, testified as follows:**

**DIRECT EXAMINATION**

4 **BY MS. GLEN:**

5 **Q. Will you please tell the judge your name and**  
6 **spell your last name so that it can be heard on the**  
7 **recording?**

8 A. Bailey Harwood, H-a-r-w-o-o-d.

9 **Q. Bailey, how old are you?**

10 A. 14.

11 **Q. Last fall how old were you in between August and**  
12 **October?**

13 A. 13.

14 **Q. Do you see somebody here in the courtroom that**  
15 **you know to be Joey Frauenberger?**

16 A. Yes.

17 **Q. Can you please --**

18 THE COURT: Speak up, please. Slide real  
19 close to that if you would, please, about an inch away.

20 MS. GLEN: And you can push that a little  
21 bit closer to yourself if you want to scoot it over too.

22 Thank you.

1 THE COURT: Any preliminary motions?

2 MR. ARCHIBALD: Just move to exclude  
3 witnesses if they intend to call more than the officer.

4 THE COURT: Ms. Glen?

5 MS. GLEN: The State doesn't intend to call  
6 witnesses aside from -- well, would like to have the  
7 investigator here and only intends to call one witness,  
8 Your Honor.

9 THE COURT: Any objection to the lead  
10 investigator being present?

11 MR. ARCHIBALD: No, Your Honor.

12 THE COURT: Okay. Ms. Glen, any preliminary  
13 motions?

14 MS. GLEN: No, sir. Thank you.

15 THE COURT: You may call your first witness.

16 MS. GLEN: Thank you. The State calls  
17 Bailey Harwood.

18 THE COURT: Ms. Harwood, please come  
19 forward. Raise your right hand.

20 (Witness sworn)

21 THE COURT: Thank you. Go ahead and come up  
22 here and be seated. Ms. Harwood, would you be more  
23 comfortable if your mother came up and stood beside you?

24 THE WITNESS: No.

25 THE COURT: No? Okay.

1 **Q. (BY MS. GLEN) So you said you see Joey**  
2 **Frauenberger here in the courtroom. Can you please tell**  
3 **the judge where he's sitting and what he's wearing?**

4 A. He's sitting on my right in an orange and white  
5 suit.

6 MS. GLEN: If the record would please  
7 reflect that she's indicated the defendant?

8 THE COURT: Very well.

9 **Q. (BY MS. GLEN) Bailey, did you ever go anyplace**  
10 **with Joey and Logan Cutler, Bella Maw, and Paul Nigg**  
11 **last fall?**

12 A. Yes.

13 **Q. Where did you go?**

14 A. Big Hill.

15 **Q. Is that --**

16 THE COURT: Speak up, please. I'm sorry  
17 to --

18 THE WITNESS: Okay.

19 THE COURT: -- have to keep saying that, but  
20 we have to have a good record.

21 MS. GLEN: Yeah, you do have to just -- I  
22 know you're -- you're a quiet person, but you need to  
23 talk a little bit louder. Okay, honey? Okay.

24 **Q. (BY MS. GLEN) So you went to Big Hill?**

25 A. Yes.

- 1 Q. **Is that in Custer County?**  
 2 A. Yes.  
 3 Q. **In the state of Idaho?**  
 4 A. Yes.  
 5 Q. **How did you get to Big Hill?**  
 6 A. In a truck.  
 7 Q. **Do you remember about when you went there?**  
 8 A. No. In fall sometime.  
 9 Q. **After school started last year?**  
 10 A. Yes.  
 11 Q. **Was it before Halloween?**  
 12 A. Yeah. Yes.  
 13 Q. **Who was driving the truck?**  
 14 A. Joey.  
 15 Q. **And where were you sitting there?**  
 16 A. I was sitting by the passenger door.  
 17 Q. **For the whole time?**  
 18 A. No.  
 19 Q. **Where else were you sitting in the truck, Bailey?**  
 20 A. On Joey's lap.  
 21 Q. **Do you know how old Joey is?**  
 22 A. No.  
 23 Q. **Is he over 18?**  
 24 A. Yes.  
 25 MR. ARCHIBALD: I'll object, Your Honor,

- 1 THE COURT: Overruled.  
 2 Q. **(BY MS. GLEN) You remember what he said?**  
 3 A. Yeah.  
 4 Q. **What did he tell you?**  
 5 A. He said as long as no one found out, that it  
 6 wouldn't matter.  
 7 Q. **And did you ever go to his dad's shop?**  
 8 A. Yes.  
 9 Q. **Do you know where his dad's shop is, Bailey?**  
 10 A. Up Garden Creek.  
 11 Q. **And is that by the golf course?**  
 12 A. Yes.  
 13 Q. **Is that in Custer County too?**  
 14 A. Yes.  
 15 Q. **In Idaho?**  
 16 A. Yes.  
 17 Q. **Do you remember about when you went up there?**  
 18 A. No. Sometime in fall of last year.  
 19 Q. **So fall of 2009. How did you get to his dad's**  
 20 **shop?**  
 21 A. In his car.  
 22 Q. **In Joey's car?**  
 23 A. Yes.  
 24 Q. **Where had you met Joey?**  
 25 A. At the park.

- 1 foundation.  
 2 THE COURT: Sustained.  
 3 Q. **(BY MS. GLEN) How long had you known Joey before**  
 4 **you went up Big Hill with him and Logan and Bella?**  
 5 A. A couple of days.  
 6 Q. **Did he ever tell you how old he was?**  
 7 A. No.  
 8 Q. **Either while you were on the way up to Big Hill,**  
 9 **up Big Hill, or on the way down, did he ever touch you**  
 10 **in a sexual way, Bailey?**  
 11 A. Yes.  
 12 Q. **Can you please tell me what happened there?**  
 13 A. He fingered me.  
 14 Q. **Okay. And when you say he fingered you, can you**  
 15 **tell me where his finger was?**  
 16 A. In my vagina.  
 17 Q. **Do you know if he knew how old you were, Bailey?**  
 18 A. No.  
 19 Q. **Did you ever tell him how old you were?**  
 20 A. I think so. I don't remember.  
 21 Q. **Do you remember what he said about whether age**  
 22 **mattered or not?**  
 23 A. Yeah.  
 24 MR. ARCHIBALD: I'll object, Your Honor.  
 25 They're leading questions.

- 1 Q. **At the park here in Challis?**  
 2 A. Yes.  
 3 Q. **When you got to the park in Challis, how -- who**  
 4 **did you see with Joey?**  
 5 A. Paul Nigg.  
 6 Q. **And where did you see Paul and Joey?**  
 7 A. At the park.  
 8 Q. **Were they standing around, in a car, walking**  
 9 **around? What were they doing?**  
 10 A. They were in a car at first driving, and then  
 11 they stopped when they saw me.  
 12 Q. **What happened when they saw you?**  
 13 A. Joey pulled over and kicked Paul out.  
 14 Q. **And then what did you do?**  
 15 A. I got in the car.  
 16 Q. **What did you do in the car?**  
 17 A. We made out and smoked weed.  
 18 Q. **Where did you get the weed?**  
 19 A. Joey.  
 20 Q. **And after you were done making out and smoking**  
 21 **weed in the park, what did you do, Bailey? Where did**  
 22 **you go?**  
 23 A. Up to Joey's dad's.  
 24 Q. **What did you do at Joey's dad's place?**  
 25 A. We made out and smoked some more weed, and he was

- 1 fingering me.
- 2 Q. Is that the same thing that he was doing when he
- 3 was up in Big Hill with Logan and Bella?
- 4 A. Yes.
- 5 Q. Did he ever put his finger into your vagina?
- 6 A. Yes.
- 7 Q. Did he ever touch any part of your body, not your
- 8 lips, with his mouth?
- 9 A. Yes.
- 10 Q. Can you tell me, please, what he did?
- 11 A. He ate me out.
- 12 Q. When you say that, could you tell me specifically
- 13 what parts of his body were touching your body?
- 14 A. His tongue was touching my body.
- 15 Q. Touching your body where?
- 16 A. In my vagina.
- 17 Q. Can you tell me whether or not -- do you know
- 18 what an erection is?
- 19 A. (No audible response).
- 20 Q. You have to say "yes" or "no."
- 21 A. Yes.
- 22 Q. Can you tell me whether or not he had an erection
- 23 at any of those times?
- 24 A. No.
- 25 Q. He was not aroused or had a hard-on or a

- 1 A. Right before.
- 2 Q. Like a week before?
- 3 A. I don't know.
- 4 Q. And how would -- this Halloween, how do you know
- 5 even that's close?
- 6 A. Because I moved in October.
- 7 Q. I'm sorry?
- 8 A. Because I moved in October and it happened before
- 9 I moved.
- 10 Q. Okay. So you moved when?
- 11 A. Like right after Halloween.
- 12 Q. In November, then?
- 13 A. Yeah.
- 14 Q. Okay. So you moved in November; and it happened
- 15 right before that, like a week or two before that?
- 16 A. I think so.
- 17 Q. Do you remember what day you moved in November?
- 18 A. No.
- 19 Q. And you moved from Challis to another place?
- 20 A. Yes.
- 21 Q. And the -- and so the Big Hill incident was in
- 22 October you think; is that right?
- 23 A. Yes.
- 24 Q. And the -- at the -- the shop incident, you're
- 25 saying that happened in October as well?

- 1 boner, --
- 2 A. Oh, yeah.
- 3 Q. -- anything like that?
- 4 A. Yeah.
- 5 Q. Did you ever see him after these two times in the
- 6 city park?
- 7 A. Yes.
- 8 Q. What did he tell you, Bailey?
- 9 A. He asked why I was around and that I -- why I
- 10 told the --
- 11 Q. I'm sorry. Can you speak a little louder, honey?
- 12 A. He asked why I was around and said that I should
- 13 have kept my mouth shut and asked why the investigators
- 14 came to talk to him.
- 15 Q. And what did you tell him?
- 16 A. I just kind of walked away.
- 17 Q. Thank you.
- 18 MS. GLEN: I don't have anything further,
- 19 Your Honor.
- 20 THE COURT: Mr. Archibald?
- 21 **CROSS-EXAMINATION**
- 22 **BY MR. ARCHIBALD:**
- 23 Q. So you're saying the Big Hill incident was, your
- 24 best guess, around right before Halloween or right
- 25 after?

- 1 A. Yes.
- 2 THE COURT: Speak up, please.
- 3 THE WITNESS: Yes.
- 4 THE COURT: Thank you.
- 5 Q. (BY MR. ARCHIBALD) And so which one was first,
- 6 the Big Hill get-together or the shop get-together?
- 7 A. The Big Hill.
- 8 Q. And how far apart were they, like just a couple
- 9 of days or a week?
- 10 MS. GLEN: Objection, Your Honor, relevance.
- 11 THE COURT: Overruled. He's trying to
- 12 establish time.
- 13 A. About a week.
- 14 Q. (BY MR. ARCHIBALD) About a week between the Big
- 15 Hill incident and the shop incident?
- 16 A. Yes.
- 17 Q. Are they during school days or during the
- 18 weekend?
- 19 A. During school days.
- 20 Q. And you were going to school at the time?
- 21 A. Yes.
- 22 Q. What grade were you in?
- 23 A. Eighth.
- 24 Q. Eighth grade?
- 25 A. Yes.

1 Q. Now, when you say you guys were smoking weed, I  
2 saw in one of the reports something about getting  
3 stoned. Is that the same thing that you're talking  
4 about?

5 A. Yes.

6 Q. Smoking weed and getting stoned to you is the  
7 same thing?

8 A. Kind of.

9 THE COURT: Okay, at this point, Ms. Glen,  
10 are you offering or have you given -- granted to this  
11 witness situational immunity for anything she may  
12 testify about?

13 MS. GLEN: No, sir. The State does not  
14 intend to charge her for anything with that.

15 THE COURT: Well, then, are you granting  
16 that at this point?

17 MS. GLEN: Yes, sir.

18 THE COURT: Okay. That solves another legal  
19 issue for me. Go ahead.

20 Q. (BY MR. ARCHIBALD) So this -- when you say  
21 "getting stoned," does that mean smoking marijuana or  
22 does that mean marijuana and alcohol?

23 A. Just marijuana.

24 Q. When you went to Big Hill, did you smoke weed  
25 then?

1 A. No.

2 Q. The smoking the weed part was at the shop?

3 A. Yes.

4 Q. Had you -- when you went to Big Hill, had you  
5 consumed alcohol?

6 A. I didn't.

7 Q. When you were at the shop, did you --

8 A. No.

9 Q. -- consume alcohol?

10 A. No.

11 Q. Did you consume alcohol right before you went to  
12 Big Hill or the shop?

13 A. No.

14 Q. These incidents that you're talking about, was it  
15 daytime or nighttime?

16 A. Nighttime.

17 Q. Do you remember what time of night?

18 A. The Big Hill was at like 10:30.

19 Q. And what makes you remember that?

20 A. Because that's when I snuck out and that's when  
21 we made our plans.

22 Q. And at the shop, was that daytime or nighttime?

23 A. Nighttime.

24 Q. What time would you guess for that?

25 A. Probably like 11:30.

1 Q. 11:30 at night?

2 A. Yeah.

3 Q. And what makes you remember that time?

4 A. That's the time my grandpa goes to bed.

5 Q. I'm sorry?

6 A. That's the time my grandpa goes to bed.

7 Q. You got something to bed? I'm sorry.

8 A. My grandpa goes to bed at that time.

9 Q. Oh.

10 A. So I left like right after he went to bed.

11 Q. Okay. And so this shop incident, did you say  
12 that both you and Joey were smoking pot?

13 A. Yes.

14 Q. And at the Big Hill incident was Joey smoking  
15 pot?

16 A. No.

17 Q. But at the shop you do remember that happening?

18 A. Yes.

19 MR. ARCHIBALD: I don't have any other  
20 questions, Your Honor.

21 THE COURT: Thank you, Mr. Archibald.  
22 Anything further, Ms. Glen?

23 MS. GLEN: No, sir. Thank you.

24 THE COURT: Thank you. You may step down.  
25 Any other witnesses?

1 MS. GLEN: Before I decide that, Your Honor,  
2 I'd just ask if the Court would take judicial notice  
3 that Mr. Frauenberger is over 18 years old since he has  
4 been incarcerated in the Custer County Jail?

5 THE COURT: I can take judicial notice of  
6 that from other files.

7 MS. GLEN: Thank you. I have nothing  
8 further, then.

9 THE COURT: All right.

10 MS. GLEN: And the State rests at this time,  
11 Your Honor.

12 THE COURT: The State has rested.  
13 Mr. Archibald?

14 MR. ARCHIBALD: I don't intend to call  
15 witnesses for this hearing.

16 THE COURT: Argument if desired?

17 MS. GLEN: The State submits it on the  
18 record, Your Honor.

19 MR. ARCHIBALD: We as well.

20 COURT'S RULING

21 THE COURT: I will find there is sufficient  
22 probable cause to bind the defendant over on Counts I  
23 and II to the District Court before Judge Tingey on the  
24 21st day of July of 2010 at the hour of 1:30 p.m. or as  
25 soon thereafter as the case can be heard.



1 Anything further to come before the Court at  
 2 this time, Mr. Archibald?  
 3 MR. ARCHIBALD: I'm not his attorney on the  
 4 misdemeanors, but I understand he's been OR'd on this  
 5 felony but there's not a bond required.  
 6 THE COURT: I think so.  
 7 MR. ARCHIBALD: And so if he was summoned to  
 8 appear on this, I'd just -- I'm not sure if he's done  
 9 with his misdemeanor sentences and when he could be  
 0 expected to be released.  
 11 THE COURT: Well, he'd be released as soon  
 2 as he serves his time in the misdemeanor cases.  
 3 MR. ARCHIBALD: Okay.  
 4 THE COURT: Because there's no --  
 5 MS. GLEN: Your Honor, it's my understanding  
 6 in talking with the jail staff that I believe he is  
 7 scheduled to be released on July 7th; and if that should  
 8 be the case -- or regardless of when he is released, the  
 9 State would ask that his -- that the Court consider  
 0 placing some conditions on his OR release. I know that  
 1 the State didn't ask that earlier because he was  
 2 incarcerated and that really wasn't the issue until this  
 3 preliminary hearing; but should the Court see fit to  
 4 continue his OR release once he is released from the  
 5 jail on these misdemeanor matters, the State would ask

1 you be requested to do so by the Court to determine  
 2 whether or not you have consumed alcohol or drugs, and  
 3 those tests would be at your expense.  
 4 Do you understand that?  
 5 THE DEFENDANT: Yes, Your Honor.  
 6 THE COURT: Do you accept those terms and  
 7 conditions? Oh, and you may have no contact with the  
 8 victim in this matter or her family.  
 9 MR. ARCHIBALD: Your Honor, he mentioned  
 10 something about his talking to the probation officer  
 11 about going to Wyoming.  
 12 THE DEFENDANT: You ordered me to go to  
 13 Wyoming as soon as I left custody of Custer County Jail.  
 14 THE COURT: Well, I did do that, now that  
 15 you -- I have that recollection that he has an  
 16 outstanding warrant for his arrest in Wyoming. However,  
 17 I'm going to modify that requirement and have you take  
 18 that up with the District Court because I think it's a  
 19 misdemeanor, if I recall correctly, in Wyoming. And so  
 20 I'll modify that previous order that you -- and maintain  
 21 the fact that you not leave the state, but I'll make it  
 22 a requirement that you inform the District Court that  
 23 there's an outstanding misdemeanor warrant for him in  
 24 Wyoming, and I'll let Judge Tingey decide if he wants  
 25 him to go take care of that, which may result in a jail

1 that he be precluded from leaving the Seventh Judicial  
 2 District --  
 3 You're still in the Seventh Judicial  
 4 District, aren't you, Jim?  
 5 MR. ARCHIBALD: Yeah.  
 6 MS. GLEN: Precluded from leaving the  
 7 Seventh Judicial District without the Court's prior  
 8 approval in writing and that he be precluded from  
 9 associating with persons under the age of 18 years old.  
 10 THE COURT: All right. I will --  
 11 MS. GLEN: And also -- I'm sorry. I  
 12 apologize. And also that he be precluded from bars,  
 13 alcohol, illegal drugs. Thank you.  
 14 THE COURT: All right. I'll set conditions  
 15 of your own recognizance release as follows:  
 16 One, don't violate any laws;  
 17 Two, you must stay in contact with your  
 18 lawyer, meet with your lawyer at all times requested by  
 19 your lawyer;  
 20 Three, make all of your court appearances;  
 21 Four, you may not leave the state of Idaho  
 22 without prior written permission of the Court;  
 23 You may not consume any alcoholic beverages  
 24 or any illicit substances;  
 25 And you have to agree to be tested should

1 term. I don't know what the judge would do to him over  
 2 there. But it's been outstanding for some time. So  
 3 that's before I knew these felonies were about. So I  
 4 think the felony matter is a little bit more pressing of  
 5 an issue than a misdemeanor in Wyoming.  
 6 So you will bring that up to Judge Tingey,  
 7 then?  
 8 MR. ARCHIBALD: Yes, Your Honor.  
 9 THE COURT: Okay. And you'll remember to do  
 10 so likewise?  
 11 MS. GLEN: Yes, sir.  
 12 THE COURT: Okay. All right. Thank you for  
 13 that. I'm glad you reminded me of that fact. I didn't  
 14 want him to get in trouble with my other order by not  
 15 going, so --  
 16 Anything further to come before the Court?  
 17 MS. GLEN: No, sir. Thank you.  
 18 MR. ARCHIBALD: No, Your Honor.  
 19 THE COURT: All right. Thank you. That'll  
 20 be all.  
 21 (Proceedings concluded)  
 22  
 23  
 24  
 25

REPORTER'S CERTIFICATE

STATE OF IDAHO )  
 ) CASE NO. CR-2010-262  
COUNTY OF CUSTER )

I, JACK L. FULLER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That pursuant to request of the Custer County Prosecuting Attorney, the foregoing proceedings, having been previously recorded in digital audio, were reported in machine shorthand by me from said digital audio recording and thereafter reduced to typewriting by me and that the foregoing transcript contains a verbatim record of said proceedings to the fullest extent possible.

I further certify that I am not related to any of the parties nor do I have any interest, financial or otherwise, in the cause of action of which said proceeding was a part.

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed my seal of office this 16th day of November, 2010.



*Jack L. Fuller*

Jack L. Fuller, Idaho CSR #762  
CSR Expiration Date: 07-10-11  
Notary Expiration Date: 04-04-13

# In the Supreme Court of the State of Idaho

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 ROBERT JOSEPH FRAUENBERGER, )  
 )  
 Defendant-Appellant. )

ORDER GRANTING MOTION TO  
AUGMENT AND SUSPENDING THE  
BRIEFING SCHEDULE

Supreme Court Docket No. 39136-2011  
Custer County Docket No. 2010-744

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Appellant on May 3, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT be, and hereby is, GRANTED and the District Court Reporter shall prepare and lodge the transcript listed below with this Court within twenty-eight (28) days of the date of this ORDER and the District Court Clerk shall immediately serve counsel and file the transcript with this Court. Any corrections shall be filed with this Court as provided by I.A.R. 30.1:

1. Transcript of the reading of the jury instructions, trial held on April 26-28, 2011.  
(Court Reporter Karen Konvalinka)(estimate of pages: not provided, deemed less than 100)

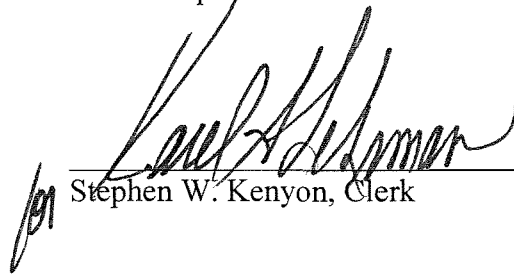
IT FURTHER IS ORDERED that the augmentation record shall include the documents listed below, copies of which accompanied this Motion:

1. Defendant's Exhibit A, admitted at trial; and
2. Jury Instruction Number 10, presumably read to the jury during jury instruction.

IT FURTHER IS ORDERED that proceedings in this appeal shall be suspended until such time as the transcript listed above has been prepared and lodged with this Court, at which time the due date for filing of RESPONDENT'S BRIEF shall be reset.

DATED this 25<sup>th</sup> day of May, 2012.

For the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Court Reporter

ORDER GRANTING MOTION TO AUGMENT AND SUSPENDING THE BRIEFING  
SCHEDULE – Docket No. 39136-2011

39136

**INSTRUCTION NO. 10**

In order for the defendant to be guilty of Count III: Lewd and Lascivious Conduct, the state must prove each of the following:

1. On or about September 30, 2009 and October 31, 2009
2. In the State of Idaho
3. The defendant Robert Joseph Frauenberger committed oral-genital contact upon or with the body of Bailey Harwood,
4. Bailey Harwood was a child under sixteen (16) years of age, and
5. The defendant committed such act with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of the defendant, of such child, or of some other person.

If any of the above has not been proved beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

|          |                        |       |
|----------|------------------------|-------|
| 09/22/09 | THC Positive + Diluted | \$35. |
| 9/22/09  | THC +                  | \$25. |
| 9/25/09  | THC +                  | \$25. |
| 9/28/09  | THC + Etg/Alcohol +    | \$35  |
| 9/30/09  | THC +                  | \$35  |
| 10/2/09  | THC + Etg/Alcohol +    | \$35  |
| 10/5/09  | Neg                    | \$20. |
| 10/7/09  | Neg                    | \$20  |
| 10/9/09  | Neg                    | \$20  |
| 10/13/09 | Neg                    | \$20. |
| 10/16/09 | Neg                    | \$20  |
| 10/19/09 | Neg                    | \$20  |
| 10/21/09 | Neg                    | \$20  |
| 10/23/09 | Neg                    | \$20  |
| 10/27/09 | Neg                    | \$20  |
| 10/29/09 | Neg                    | \$20. |
| 11/3/09  | Neg                    | \$20. |
| 11/6/09  | Neg                    | \$10  |
| 11/9/09  | Neg                    | \$20  |
| 11/12/09 | Neg                    | \$10. |
| 11/16/09 | Neg                    | \$20  |
| 11/19/09 | Neg                    | \$20  |
| 11/23/09 | Neg                    | \$20  |
| 11/30/09 | Neg                    | \$20  |
| 12/2/09  | Neg                    | \$20  |
| 12/7/09  | Neg                    | \$20  |
| 12/10/09 | Neg                    | \$20  |
| 12/14/09 | Neg                    | \$20  |
| 12/16/09 | Neg                    | \$20. |
| 1/4/10   | Neg + Alco             | \$20  |



|         |             |              |
|---------|-------------|--------------|
| 1/7/10  | Req         | \$10         |
| 1/11/10 | Req         | \$20         |
| 1/13/10 | Req         | \$20         |
| 1/21/10 | Req         | \$20         |
| 1/25/10 | Req         | \$20         |
| 1/28/10 | Req         | \$20         |
| 2/1/10  | Req         | \$20         |
| 2/4/10  | Req         | \$20         |
| 2/8/10  | Req         | \$20         |
| 2/11/10 | Req         | \$20         |
| 2/16/10 | Req         | \$20         |
| 2/22/10 | Req         | \$20         |
|         |             | <u>\$890</u> |
| 2/25/10 | Req         | \$20         |
| 3/1/10  | Req         | \$20         |
| 3/4/10  | Req         | \$20         |
| 3/8/10  | Req diluted | \$20         |
| 3/15/10 | Req         | \$20         |
| 3/22/10 | Req diluted | \$20         |
| 3/29/10 | Req         | \$20         |
| 4/1/10  | Req         | \$20         |
| 4/13/10 | Req         | \$20         |
| 4/27/10 | Req         | \$20         |
|         |             | <u>10</u>    |