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State v. Adams Appellant's Reply Brief Dckt. 45139

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45139**
	)	
v.	)	**CUSTER COUNTY NO. CR 2016-277**
	)	
SABRA L. ADAMS,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

Sabra Adams was convicted of aggravated assault after a jury trial. On appeal, she asserts the district court erred when it denied her motion for a mistrial after one juror admitted, midway through the trial, that he knew the complaining witness's mother. Ms. Adams asserts district court erred in admitting irrelevant evidence which was also prohibited 404(b) propensity evidence. Ms. Adams also asserts that that the State committed prosecutorial misconduct when the prosecutor disparaged the defense and misstated the reasonable doubt standard, thereby lessening the State's burden of proof. Finally, Ms. Adams contends that the district court erred by denying her motion for a new trial.

This Reply Brief is necessary to address the State's erroneous contentions regarding the 404(b) evidence admitted during Ms. Adams' trial, and to correct the State's erroneous assumption that a *Brady* violation cannot be addressed through a motion for a new trial.

Statement of the Facts and Course of Proceedings

While the statement of the facts and course of proceedings were previously articulated in Ms. Adams' Appellant's Brief, and need not be repeated in this Reply Brief, one of the State's characterizations of a fact is at issue and correction is required. The State erroneously classified Mr. Wes Sherwood as "[Ms.] Adams' friend." (Resp. Br., p.6.) However, this was error as Mr. Sherwood was identified as Ms. Latisha Smith's friend by Ms. Smith herself. (*See* Trial Tr., p.170, L.22 – p.171, L.8.)

ISSUES[1]

I. Did the district court err in admitting irrelevant propensity evidence?

II. Was Ms. Adams' constitutional right to a fair trial with an impartial jury violated when the district court failed to give a curative instruction and denied her motion for mistrial following a seated juror's disclosure that he knew the complaining witness's mother?

III. Did the prosecutor commit misconduct by disparaging the defense and by misstating the State's burden of proof?

IV. Did the district court abuse its discretion by denying Ms. Adams' motion for a new trial as the court's finding that Ms. Adams' newly discovered evidence was evidence the defense should have located had it exercised due diligence is not supported by substantial evidence and misapplies the applicable law?

[1] Ms. Adams will address only the State's arguments as to the 404(b) propensity evidence (Issue #1) and the *Brady* claim (Issue #4). The State's arguments regarding Issues #2, #3 are unavailing and no additional argument is required.

ARGUMENT

I.

The District Court Erred In Admitting Irrelevant Propensity Evidence

At trial, the jury heard from a State's witness that Ms. Adams threatened her about giving her knife back, saying she would slit her throat and said she was going to "burn down the bar." (Trial Tr., p.227, Ls.7-10.) This testimony was admitted over defense counsel's objection that such conduct is irrelevant to whether Ms. Adams committed aggravated assault against Latisha Smith, and further, was propensity evidence improperly admitted absent I.R.E. 404(b) considerations of notice and probative value versus prejudicial effect.

The State's argument that the statement made by Ms. Adams as she left the bar was "intrinsic to the crime charged" is simply another way of saying "res gestae" evidence, a doctrine which was abandoned by the Idaho Supreme Court in *State v. Kralovec*, 161 Idaho 569, 573-74 (2017). (Resp. Br., p.12.) Notably, in support of its "intrinsic to the crime charged" exception, the State cites to a 2012 Court of Appeals decision for the definition of when evidence of an act is "intrinsic" with evidence of the crime charged. (*See* Resp. Br., p.12 (quoting *State v. Whitaker*, 152 Idaho 945, 949 (Ct. App. 2012).) The *Whitaker* Court explained:

> Evidence of an act is intrinsic when it and evidence of the crime charged are inextricably intertwined, or both acts are part of a single criminal episode, or it was a necessary preliminary to the crime charged." *State v. Sheldon*, 145 Idaho 225, 228, 178 P.3d 28, 31 (2008) (quoting *United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir.2007)). Evidence is inextricably intertwined when it is "so interconnected with the charged offense that a complete account of the charged offense could not be given to the jury without disclosure of the uncharged misconduct."

Whitaker, 152 Idaho at 949 (internal quotations omitted).

This is merely another way of describing the "res gestae" doctrine. *See State v. Kralovec*, 161 Idaho 569, 573 (2017). In *Kralovec*, the Idaho reiterated the district court's explanation of res gestae and described it as "sound":

> *Res gestae* evidence is other acts that occur during the commission of or in close temporal proximity to the charged offense which must be described to complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings. It is admissible, despite I.R.E. 404(b)'s general prohibition on prior bad act evidence, if the charged act and the uncharged act are so inseparably connected that the jury cannot be given a rational and complete presentation of the alleged crime without reference to the uncharged misconduct.

Id. 161 Idaho at 573 (internal citations and quotations omitted). However, in *Kralovec*, the Idaho Supreme Court "decline[d] to perpetuate the use of the *res gestae* doctrine in Idaho," concluding that "evidence previously considered admissible as *res gestae* is only admissible if it meets the criteria established by the Idaho Rules of Evidence." *Kralovec*, 161 Idaho at 573-74. Here, the evidence did not meet the criteria of I.R.E. 404(b) and thus should not have been admitted.

Where the State failed to file timely notice that it intended to introduce 404(b) evidence, the evidence of Ms. Adams' prior bad acts is inadmissible. *See State v. Sheldon*, 145 Idaho 225, 230-31 (2008). The Idaho Supreme Court has held that compliance with the notice requirement of I.R.E. 404(b) is mandatory. *Id*. As the introduction of this evidence was highly prejudicial to the defendant, and because such evidence also likely caught defense counsel off-guard when the district court permitted its introduction, the district court erred in admitting the testimony and Ms. Adams' conviction should be vacated. *See id.*

The State claims that the witness's testimony that Ms. Adams threatened Ms. Shippy was not I.R.E. 404(b) evidence, but was evidence of the crime for which Ms. Adams was on trial. (Resp. Br., p.19.) However, a threat made to a bystander as she was exiting the bar was not the act for which Ms. Adams was charged. It was a separate bad act, a threat made after the incident for which she was charged. *See State v. Greensweig*, 102 Idaho 794, 798 (Ct. App. 1982)

(holding propensity evidence of subsequent bad conduct was not inadmissible merely because the event testified to occurred subsequent to the crime being prosecuted in the current case but must be analyzed the same as evidence of prior bad conduct).

Additionally, the State misstates Ms. Adams' argument on appeal—it claims she is asserting that the "district court did not provide a sufficient enough record to support the admission of Ms. Shippy's testimony" (Resp. Br., p.14); however, that is not the case. Ms. Adams contends that the district court erred in admitting prohibited I.R.E. 404(b) evidence. (App. Br., pp.12-15.) Further, the State misapprehends Ms. Adams' obligation to make a record supporting her claim on appeal. (Resp. Br., p.15.) The State claims Ms. Adams' argument fails "because it was Adams' burden, both below and on appeal to provide any record of the district court's decision or analysis during the sidebar she requested." (Resp. Br., p.14.) The State cites to *State v. Beck*, 128 Idaho 416, 422 (Ct. App. 1996), in support of its proposition that it was Ms. Adams' burden "to make a record." (Resp. Br., pp.15-16.) In *Beck*, the court held "where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *Beck*, 128 Idaho at 422. However, *Beck* was a case in which the appellant asserted that the district court abused its sentencing discretion, but failed to ensure that a copy of the PSI was in the record on appeal. *Id*. Here, a sidebar occurred, but it was untranscribed. The appellant cannot be held responsible for lack of a record on appeal when no record was created. Cases such as *Beck* and *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999) (holding appellant failed to provide for the Court's review "crucial evidence upon which the district court relied"—a photograph of the porch in which a privacy interest was asserted), hold that "where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court," not that the appellant can be penalized anytime the district court supplies reasoning or

issues a ruling that was not transcribed or recorded for reasons within the district court's control. *Beck*, 128 Idaho at 422. Further, such a standard would undoubtedly run afoul of the defendant's due process rights. *See State v. Strand*, 137 Idaho 457, 462 (2002) (holding one aspect of a criminal defendant's due process and equal protection rights is that the defendant has a right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below.") Where a defendant is guaranteed a statutory right to appellate review as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the Due Process Clause of the 14th Amendment protects the defendant on appeal. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *North Carolina v. Pearce*, 395 U.S. 711, 724-25 (1969); *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1966); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956). In order to satisfy due process, an appellant must be provided with "a 'record of sufficient completeness,' . . . for adequate consideration of the errors assigned." *Draper v. Washington*, 372 U.S. 487, 497-99 (1963) (quoting *Coppedge v. United States*, 369 U.S. 438, 446 (1962)).

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Hardy v. United States, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (footnote omitted). Thus, as the majority in *Hardy* recognized, in order for an appellate attorney to identify points of trial error and determine their merit, the attorney should be able to read "the entire transcript." *Id.* at 279-80. A procedure which deprives an appellant "of a full record, briefs, and arguments" also deprives the appellant of "'all hope of any (adequate and effective) appeal at all.'" *Entsminger v. Iowa*, 386 U.S. 748, 752 (1967) (quoting *Lane v. Brown*, 372 U.S. 477, 485 (1963)).

The State next claims that Ms. Adams' assertion that the State did not comply with the notice requirement of 404(b) was not preserved (Resp. Br., p.14 n. 2); however, it is the State's burden to show that evidence of prohibited 404(b) propensity is admissible—the Rule provides that it is *inadmissible*, absent notice and when it is admitted for some other purpose. "Under I.R.E. 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a defendant's criminal propensity." *State v. Johnson*, 148 Idaho 664, 667 (2010). Such evidence may, however, be admissible for a non-propensity or non-character purposes so long as the prosecution provides timely notice of its intent to use such evidence. *Id*; I.R.E. 404(b). The reviewing court employs a two-step analysis to determine: (1) whether, under I.R.E. 404(b), the evidence is relevant as a matter of law to an issue other than character or criminal propensity; and (2) 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*.

Here, the State sought to have the evidence admitted for an improper purpose—to show Ms. Adams' propensity to make threats of violence. During closing remarks, the prosecutor told the jury:

> And it's clear to see how angry she was during the course of this incident and during the immediate aftermath of the incident. And I ask you to recall the testimony that not only did she threaten Latisha, she also threatened to kill Nicole Shippy and others in the bar and to burn down the bar itself. This is a very, very angry woman. And so the motive is clear as a bell, as they say.

(Trial Tr., p.357, Ls.19-23.). Such evidence is unfairly prejudicial because it tends to suggest that the jury should base its decision on an improper basis." *See State v. Rawlings*, 159 Idaho 498, 506 (2015) (internal citations omitted). The district court erred because Ms. Adams' conduct after the incident is irrelevant to whether she committed aggravated assault against Latisha Smith, and further, was propensity evidence improperly admitted absent I.R.E. 404(b)

considerations. Ms. Adams asserts that district court erroneously admitted the irrelevant testimony without analyzing the prejudicial nature of the testimony, and it failed to address the State's I.R.E. 404(b) notice violation.

IV.

The District Court Abused Its Discretion In Denying Ms. Adams' Motion For A New Trial As The Court's Finding That Ms. Adams' Newly Discovered Evidence Was Evidence The Defense Should Have Located Had It Exercised Due Diligence Is Not Supported By Substantial Evidence And Misapplies The Applicable Law

Ms. Adams' motion for new trial was based upon newly discovered evidence that Wes Sherwood, an eyewitness to the incident, had spoken to the investigating deputy the night before trial and told him that Ms. Adams did not have a knife during the altercation. (R., pp.216-217.) In his sworn statement, Mr. Sherwood affirmed that Deputy Talbot told him not to show up at court to testify. (R., p.217.) However, in analyzing the new evidence in light of the standards set forth in *Brady*, the district court found the State did not suppress the existence of Wes Sherwood and denied the motion. (R., p.229.)

Although the investigating officer conducted interviews with Mr. Sherwood the night before trial, the State did not disclose that the interviews occurred, what was discussed—that Mr. Sherwood was present during the altercation and neither party had a knife, or that the officer then told the eyewitness not to show up at court to testify at Ms. Adams' trial. (R., pp.216-17.) Mr. Sherwood's testimony was evidence that could have been used to impeach the statements of the State's witnesses, or undermine their credibility and cast doubt on the truthfulness of their testimony. By suppressing this exculpatory evidence, the State violated Ms. Adams' due process rights.

Ms. Adams asserts that the district court abused its discretion in denying her motion for a new trial. By Ms. Smith's own account, Mr. Sherwood was right there during the altercation, holding her arms. (*See* Trial Tr., p.180, Ls.18-19; p.395, Ls.14-20; p.411, Ls.18-22.) It was critical for Ms. Adams to have information as to the substance of his testimony where the only other defense witnesses were friends with the defendant who may not have seen the entire altercation. (Trial Tr., p.362, L.20 – p.363, L.8 (prosecutor telling the jury that Ms. Moore did not see the whole incident, that Ms. Moore's "back was to the defendant at the time that the incident apparently started.") Ms. Smith described Mr. Sherwood as a friend of hers; thus, it would be reasonable for the defense to assume that his testimony would not be exculpatory but would instead favor his friend, Ms. Smith.[2] (Trial Tr., p.170, L.22 – p.171, L.8.) A third witness for the defense, one like Mr. Sherwood who was friends with the complaining witness and who was involved in breaking up the scuffle, would likely have very persuasive testimony sufficient to undermine confidence in the verdict.

The State asserts that Ms. Adams' Brady claim is unpreserved because, "[t]he district court, when denying Adams' motion, cited to *Brady* for the proposition that the state cannot suppress material favorable to the defendant." (Resp. Br., pp.32-39.) The State appears to believe that, despite the district court's order analyzing Ms. Adams' assertions under Brady, somehow the district court did not conduct a "*Brady* analysis;" thus, the issue is unpreserved. (Resp. Br., p.35.) This is untenable, particularly in light of the holding of the Idaho Supreme Court in *State v. DuValt*, 131 Idaho 550, 553 (1998) (holding that most issues cannot be raised

[2] The only testimony or evidence that Mr. Sherwood was Ms. Adams' friend was through Deputy Talbot's affidavit, and he fails to explain why he believed this to be true; Ms. Adams refuted this characterization at the hearing on her motion for a new trial. (R., pp.226-27; Trial Tr., p.397, Ls.20-24.)

for the first time on appeal; "An exception to this rule, however, has been applied by this Court when the issue was argued to or decided by the trial court.") The issue was preserved where Ms. Adams argued that the problem was with the exculpatory or impeaching testimony the State had learned of before trial that was not disclosed to the defense. (Trial Tr., p.410, Ls.3-8.) This is precisely the *Brady* standard. Which the district court recognized and ruled on. (R., pp.229-230.) "This is because [Brady] claims derive from prosecutorial misconduct, whereas *Drapeau* claims deal with evidence that was unknown to the defendant not due to prosecutorial misconduct." *State v. Lankford*, 162 Idaho 477, 503 (2017).

As she did in the trial court, on appeal Ms. Adams argued that the district court erred when it denied her motion for a new trial because the State failed to disclose the fact that Deputy Talbot interviewed Mr. Sherwood the evening before trial, Mr. Sherwood told the officer he witnessed the altercation and neither woman had a knife, and the officer then told him his testimony would not be needed at Ms. Adams' trial. (App. Br., pp.31-43.) Notably, neither the prosecution nor the defense referenced *State v. Drapeau*, 97 Idaho 685, 691 (1976), or argued that the issue must be analyzed under *Drapeau* factors, which is the State's assertion on appeal. (Resp. Br., pp.32-39; *see* R., pp.209-230; *see also* Trial Tr., pp.391-412.) In its written motion, the defense asserted that the State had a duty pursuant to I.C.R. 16(a) to automatically disclose any evidence in its possession which tends to negate guilt. (R., p.210.) Defense counsel set forth the factors of I.C. § 19-2406 (R., p.210), at the motion hearing and maintained that the State suppressed the evidence. (Trial Tr., p.394, Ls.16-25; p.395, L.24 – p.396, L.4; p.410, Ls.3-8.) Ultimately, a *Brady* claim *is* properly raised in a motion for a new trial, and the district court would have been remiss to ignore the *Brady* claim in ruling on the motion. *See Lankford*, 162

Idaho at 503, 507 (holding defendant was entitled to a new trial where witness's false testimony about his motive for testifying "*could* have affected the judgment of the jury.")

In *Lankford*, the Idaho Supreme Court concluded that *Brady* and *Napue* claims are properly raised through a motion for a new trial, although subject to different standards. *Id.* 162 Idaho at 502-03. While all *Brady* and *Napue* claims are prosecutorial misconduct, not all prosecutorial misconduct takes the form of a *Brady* and/or *Napue* violation. Generally, because prosecutorial misconduct is not an enumerated statutory ground for a new trial, it is not a cognizable basis for a motion for a new trial. *See* I.C. § 19-2406; *State v. Cantu*, 129 Idaho 673, 675 (1997) ("Although I.C.R. 34 allows a trial court to grant a new trial 'if required in the interest of justice,' this Court has concluded that I.C.R. 34 does not provide an independent ground for a new trial. Rather, I.C.R. 34 simply states the standard that the trial court must apply when it considers the statutory grounds." (citations omitted)); *State v. Olson*, 138 Idaho 438, 442 (Ct. App. 2003) ("[T]he only grounds upon which a new trial may be granted in a criminal case are those set forth in I.C. § 19-2406, which do not include prosecutorial misconduct."); I.C.R. 34 ("The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice."). Moreover, because most prosecutorial misconduct claims involve a prosecutor's conduct at trial, they do not qualify as newly discovered evidence, which *is* an enumerated statutory ground for a new trial. *See* I.C. § 19-2406(7) ("[T]he court may . . . grant a new trial in the following cases only: . . . (7) When evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at trial."); *State v. Carlson*, 134 Idaho 389, 398 (Ct. App. 2000) (affirming district court's denial of defendant's motion for new trial premised on prosecutor's misconduct at trial because prosecutorial misconduct at trial is not among the recognized grounds for a new trial).

Brady claims are different; by definition, they involve information discovered after trial that was unknown to the defense, but known to prosecutors. Such information usually comes to light when a defendant learns after trial that a prosecutor withheld exculpatory evidence from the defense. A *Brady* violation is of constitutional dimension; in addition to being incompatible "with the rudimentary demands of justice," *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), it deprives a defendant of due process and a fair trial by deceiving and depriving the fact-finder of important evidence relevant to the credibility of witnesses and the determination of guilt, thereby undermining confidence in the verdict. For these reasons, a defendant's right to pursue post-trial relief from prosecutors' *Brady* violations through a motion for a new trial has always been recognized. *Cf. United States v. Agurs*, 427 U.S. 97 (1976) (considering and deciding the merits of the defendant's *Brady* claim, brought through a motion for new trial, that the State withheld exculpatory impeachment evidence); *State v. Avelar*, 132 Idaho 775, 781 (1999) (considering and deciding the merits of the defendant's motion for a new trial based on the State's failure to disclose criminal activities of informant who was a principal witness against the defendant at trial); *State v. Branigh*, 155 Idaho 404, 421 (Ct. App. 2013) (considering merits of defendant's motion for a new trial based on prosecutor's suppression of valuable impeachment evidence in violation of *Brady*); *State v. Osborne*, 130 Idaho 365, 372 (Ct. App. 1997) ("In those instances where exculpatory evidence is discovered after trial, the appropriate mechanism to challenge the nondisclosure of the evidence would be a motion for a new trial under I.C. § 19-2406 and I.C.R. 34 or an action for post-conviction relief under I.C. § 19-4901.").

Thus, the *Lankford* Court reiterated of the long-standing recognition that convictions obtained by prosecutors' presentation of false or perjured testimony, or by prosecutors'

concealment or withholding of material evidence, are subject to attack through a motion for a new trial based on newly discovered evidence. *Lankford*, 162 Idaho at 502-03.

In this case, the State correctly pointed out that a *Brady* violation is not subject to the same standard as other newly discovered evidence. (Resp. Br., p.34.) *Brady* claims impose a lower burden on defendants seeking a new trial than would normally apply to a motion for a new trial premised on other newly discovered evidence. For example, in *State v. Drapeau*, 97 Idaho 685, 691 (1976), the Idaho Supreme Court adopted a four-part test for evaluating motions for a new trial based on newly discovered evidence. Under this test, a defendant must show: (1) the evidence is newly discovered and was unknown to him at the time of trial; (2) the evidence is material and not simply cumulative or impeaching; (3) the evidence will probably produce an acquittal; and (4) the defendant's failure to learn of the evidence was not due to his lack of diligence. *Drapeau*, 97 Idaho at 691 (citing with approval 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 557, at 515 (1969)).[3] This four-part test imposes a high and exacting burden on a defendant seeking a new trial based on newly discovered evidence. *Id.* Such motions are not favored by courts and are viewed with a fair amount of skepticism because "after a man has had his day in court, and has been fairly tried, there is a proper reluctance to given him a second trial." *Id.*

Nevertheless, the United States Supreme Court, the Idaho Supreme Court, and the Idaho Court of Appeals have refused to apply this four-part test to motions for a new trial based on a prosecutor's suppression of exculpatory evidence, which it has explicitly defined to include

[3]In adopting this standard, the *Drapeau* Court observed that Idaho's new trial rule was taken, almost verbatim, from the federal new trial rule. 97 Idaho at 691. Concomitantly, the four-part test adopted by the *Drapeau* Court was and is the same test used by federal courts to evaluate new trial claims based on newly discovered evidence. *Id.*

impeachment evidence.[4] *See United States v. Agurs*, 427 U.S. 97, 111 (1976); *Avelar*, 132 Idaho at 781; *State v. Branigh*, 155 Idaho 404, 421 (Ct. App. 2013). In *Agurs*, the United States Supreme Court explicitly rejected the applicability of the usual new trial standards to motions premised on *Brady* and *Napue* violations.

> On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

427 U.S. at 111 (footnote omitted). As a result, the standards for reviewing whether a *Brady* violation warrants a new trial are the same, regardless of whether the claim is raised through a motion for new trial, or a petition for post-conviction relief. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (applying *Brady* standard to review of petitioner's state post-conviction claim that the State withheld exculpatory evidence, including evidence that would have supported his alibi and would have impeached important state witnesses, and reversing the state court's denial of post-conviction relief because the new evidence was sufficient to undermine confidence in the verdict); *Agurs*, 427 U.S. at 111-12 (applying *Brady* standard to review of defendant's motion

[4]The four-part test "applies however, only to ordinary motions on the ground of newly discovered evidence . . . . [A] less restrictive rule applies if the motion is based on a claim of false testimony at the trial, and in cases where the prosecutor fails to disclose or suppresses exculpatory evidence in violation of *Brady*." 3 FED. PRAC. & PROC. CRIM. § 584 (4th ed.).

for a new trial based on newly discovered evidence that the government withheld evidence of victim's prior violent criminal history); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (applying *Napue* standard to grant defendant's motion for a new trial based on newly discovered evidence that government promised not to prosecute defendant's co-conspirator if he testified against the defendant, where that promise was not disclosed to the defendant and prosecutor allowed the co-conspirator's false trial testimony that he could still be prosecuted and was offered nothing in exchange for testimony, to go uncorrected); *State v. Shackelford*, 150 Idaho 355, 380-81 (2010) (applying *Brady* standard to review petitioner's post-conviction claim that the State withheld exculpatory evidence from him at trial); *Avelar*, 132 Idaho at 781 (applying *Brady* to review defendant's motion for a new trial claim that the State suppressed impeachment evidence about its principal witness against him at trial); *Branigh*, 155 Idaho at 421 (applying *Brady* and explicitly rejecting *Drapeau* as the proper standard for reviewing defendant's motion for a new trial based on State's suppression of impeachment evidence about its principal witness against defendant at trial); *see also cf. State v. Ellington*, 157 Idaho 480, 485 n.4 (2014) (recognizing there are exceptions to the general applicability of the *Drapeau* standard to motions for a new trial premised on newly discovered evidence).

Brady violations involve conduct by the State that deprives a defendant of his right to a fair trial. *Brady* stands for the proposition that a State violates a defendant's due process rights when it suppresses evidence favorable to a defendant, where such evidence is material either to a defendant's guilt or punishment. *Id.* at 87. There are three components to a *Brady* violation: (1) the evidence must be favorable to the accused, which includes impeachment evidence relating to state witnesses; (2) the evidence must have been suppressed by the state, either intentionally or

inadvertently; and (3) prejudice must have ensued. *Stickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Favorable evidence includes evidence tending to exculpate the accused, evidence tending to reduce punishment, and any other evidence that adversely affects the credibility of the government's witnesses. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio*, 405 U.S. at 154. Withheld evidence can be "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Turner v. United States*, ___ U.S. ___, ___, 137 S. Ct. 1885, 1893 (2017) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)*; Bagley*, 473 U.S. at 682. It is important to remember a "reasonable probability" requires a showing only that the suppressed evidence undermines confidence in the outcome, not that the outcome would have been different. *Kyles*, 514 U.S. at 433-35; *Bagley*, 473 U.S. at 682.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but *whether in its absence he received a fair trial*, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."
>
> The second aspect of *Bagley* materiality bearing emphasis here is that *it is not a sufficiency of evidence test.* A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. *The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict.* One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles, 514 U.S. at 434-35 (internal citations omitted) (emphasis added).

In *Wearry v. Cain*, 136 S. Ct. 1002 (2016), the United States Supreme Court recently weighed in on the importance and impact of *Brady* violations. The Court, in a 6-2 per curiam decision, reiterated that "[t]o prevail on his *Brady* claim, [the petitioner] need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* at 1006 (internal citations and quotations omitted) (footnote omitted).

Ms. Adams' counsel raised the issue of the State withholding exculpatory evidence by filing a motion for a new trial, pursuant to I.C. § 19-2406. (R., pp.209-213.) Defense counsel asserted that the prosecutor failed to disclose the investigating officer's interview of Mr. Sherwood the night before trial, despite the prosecution's ongoing duty to disclose any evidence in the prosecutor's possession which tends to negate the guilt, pursuant to I.C.R. 16(a). (R., pp.209-210.) Counsel asserted that the witness was interviewed by an investigating officer the day before trial, told the officer exculpatory information, and was then told his testimony would not be needed at trial. (R., pp.209-213.) The district court appropriately analyzed the information under the *Brady* standard, but ultimately denied the motion, concluding that Ms. Adams did not meet prong two of *Brad*y where "the Defendant was made aware of the existence of the additional witness, his existence was not suppressed." (R., p.229.) However, this was error. The real question before the district court was not whether the existence of the witness was suppressed (R., p.229), but whether the State failed to disclose the interview, the facts learned from Mr. Sherwood—that Deputy Talbot interviewed Mr. Sherwood on the eve of trial and Mr. Sherwood told him that he witnessed the encounter and Ms. Adams did not have a knife. Further, the court should have considered whether the State further suppressed the information it had gleaned from Mr. Sherwood by telling him that his testimony at trial would

not be needed and recalling his subpoena. The record lends additional support for Ms. Adams' contentions. Although Archie Wes Sherwood[5] was not identified as a State's witness for trial in its December 20, 2016 disclosure, the prosecution prepared a subpoena for Mr. Sherwood on January 4, 2017. (R., pp.113-14, 179.) However, the subpoena was not served, as shown by the subsequently filed Recalled Return of Service in which the comments explain: "NOT NEEDED FOR TRIAL." (R., pp.179-80.) Service was recalled the day of trial, on January 5, 2017. (R., p.180; *See generally*, Trial Tr.) The record supports the assertions made in Ms. Adams' motion for a new trial due to a *Brady* violation where a subpoena was issued to Mr. Sherwood the day before trial, but, after Deputy Talbot spoke to Mr. Sherwood and learned that he would testify that neither Ms. Adams nor Ms. Smith had a knife, Deputy Talbot told Mr. Sherwood he would not need to testify at Ms. Adams' trial, and the next day the subpoena was recalled because he was "not needed for trial." Ms. Adams has shown that the evidence was material, it was favorable to her case, it was suppressed by the State, and "that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (internal citations and quotations omitted) (footnote omitted).

[5] Apparently Mr. Sherwood was commonly known by his middle name. It is only in the Subpoena that he is identified by what is presumably his legal name of "Archie Wes Sherwood." (R., p.179.)

CONCLUSION

Ms. Adams respectfully requests that this Court vacate her conviction and remand her case to the district court for further proceedings.

DATED this 24th day of August, 2018.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, electronically as follows:

KENNETH K JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
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SJC/eas