

Uldaho Law

Digital Commons @ Uldaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

4-21-2017

State v. Herrera Clerk's Record v. 1 Dckt. 44596

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"State v. Herrera Clerk's Record v. 1 Dckt. 44596" (2017). *Idaho Supreme Court Records & Briefs, All*. 7071. https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7071

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

Vol. 1 of 7

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

STATE OF IDAHO
Plaintiff / Respondent

VS

SUPREME COURT CASE # 44596

JOSEPH DUANNE HERRERA
Defendant/Appellant

CLERK'S RECORD OF APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in
and for the County of Benewah

Volume I

Eric D. Fredericksen
Appellant Public Defender
322 E. Front Street, Suite 570
Boise, ID 83702

Kenneth K Jorgensen
Deputy Attorney General
Attorney for the Respondent
PO BOX 83720
Boise, ID 83720

FILED - ORIGINAL
APR 21 2017
Supreme Court Court of Appeals
Entered on ATS by BS

44596

ORIGINAL

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF IDAHO,
IN AND FOR THE COUNTY OF BENEWAH**

STATE OF IDAHO)
Plaintiff /Respondent)
VS)
Joseph Duane Herrera) SUPREME COURT CASE # 44596
Defendant/Appellant)
)

CLERK'S RECORD OF APPEAL

Appeal from the District Court of the First Judicial District, in and for the County of Benewah

HONORABLE JOHN T. MITCHELL

Eric D, Fredericksen
Office of State Appellant Public Defender
Attorney for Appellant
322 E. Front Street, Suite 570
Boise, ID 83702

Kenneth K. Jorgensen
Office of Attorney General
Attorney for Respondent
PO BOX 83720
Boise, ID 83720

TABLE OF CONTENTS

		<u>Page</u>
1	ROA	1-15
2	Remittitur	December 28, 2015 16
3	Motion to Disqualify	December 30, 2015 17-18
4	Order to Disqualify	December 31, 2015 19-20
5	Order of Reassignment	January 6, 2016 21
6	Stipulation to Continue Pre-Trial and Trial	February 23, 2016 22-23
7	Motion to Authorize the Benewah County District Court Fund to Pay International Forensic Experts, LLC, Pursuant to the Contract and Agreement Dated 12/08/15 Attached	February 24, 2016 24-25
8	Order to Authorize the Benewah County District Court Fund to Pay International Forensic Experts, LLC, Pursuant to the Contract Agreement Dated 12/08/15 Attached	February 24, 2016 26-27
9	Court Minutes	February 24, 2016 28-30
10	Order to Keep Defendant in Custody at the Benewah County Jail	March 2, 2016 31-32
11	Motion in Limine Regarding Defendant's Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court	March 2, 2016 33-42
12	Motion to Exclude James Comack From Court Proceedings	March 2, 2016 43-45
13	Objection to Motion	March 3, 2016 46-47
14	Objection to Motion	March 3, 2016 48-49
15	Amended Objection to Motion	March 4, 2016 50-51
16	Amended Objection to Motion	March 4, 2016 52-53
17	Court Minutes	March 8, 2016 54
18	Motion to Transport for Hearings	March 8, 2016 55
19	Motion to Replace Defense Attorney	March 9, 2016 56-57
20	Motion to Permit Amended Information	March 9, 2016 58-62

1A

21	Order to Transport for Hearings	March 10, 2016	63-64
22	Brief In Support of Motion in Limine Regarding Feeling By the Defendant	March 10, 2016	65-67
23	Motion in Limine Regarding Fleeing by the Defendant	March 10, 2016	68-70
24	Motion for Benewah County Sheriff to Transfer Defendant's Medications and for the Kootenai County Jail to Administer Medications Prescribed to Defendant During any Time Periods he is in Custody at the Kootenai County Jail During Defendant's Trial	March 10, 2016	71-73
25	Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding His Rebuttal to the Character Evidence and other Evidence Ruled Inadmissible by the Idaho Supreme Court	March 10, 2016	74-76
26	Motion for Defendant to be able to Wear Street Clothes and the Defendant not be Handcuffed or have other restraints in the Presence of the Jury during Defendant's Trial	March 10, 2016	77-79
27	Brief in Support of Motion in Limine Re Display of Stephanie Comack, Photographs to the Jury in Opening Argument and Prior Determination by the Court on the Photographs that the State Intends to Produce in Evidence Regarding Stephanie Comack	March 10, 2016	80-83
28	Motion in Limine Re Display of Stephanie Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State Intends to Produce in Evidence Regarding Stephanie Comack	March 10, 2016	84-86
29	Motion to Release Evidence	March 17, 2016	87-88
30	Court Minutes	March 22, 2016	89-95
31	Memorandum Decision and Order on Pre-Trial Motions Heard on March 22, 2016, Order Vacating April 25, 2016 Trial and Rescheduling Trial to Begin July 18, 2016	March 23, 2016	96-116
32	Amended Prosecuting Attorney's Information	March 24, 2016	117-118
33	Defendant's Requested Jury Instructions	April 8, 2016	118-140
34	Defendant's First Response to Request for Discovery after Remand for New Trial	April 8, 2016	141-142

35	Stipulation Regarding Release of Exhibits	April 11, 2016	143-144
36	Notice of Intent to Use 404(b) Evidence	April 11, 2016	145-148
37	Motion to Transport for Hearings	April 11, 2016	149-151
38	Order to Transport for Hearings	April 12, 2016	152-153
39	Motion in Limine Regarding Defendant's Prior Testimony	April 13, 2016	154-156
40	Brief in Support of Motion in Limine Regarding Defendant's Prior Testimony	April 13, 2016	157-162
41	Affidavit in Support of Motion For Approval of Additional Compensation For Benewah County Public Defender	April 13, 2016	163-165
42	Motion For Approval of Additional Compensation for Benewah Public Defender	April 13, 2016	166-181
43	Objection to State's Notice of Intent to use 404(B) Evidence Filed and Dated April 11, 2016	April 13, 2016	182-185
44	Notice to Vacate Hearing on Defendant's Motion in Limine on Defendant's Prior Testimony	April 19, 2016	186
45	Request for Jury Instructions	April 19, 2016	187-205
46	Court Minutes	April 20, 2016	206-211
47	Stipulation Regarding Payment of Duplication Costs	April 22, 2016	212-215
48	Order Re Payment of Duplication of Court Exhibits	April 25, 2016	216-217
49	Order To Transport for Hearings	June 27, 2016	218-219
50	Court Minutes	June 29, 2016	220
51	State's Third Amended Witness and Exhibit List	July 11, 2016	221-224
52	Motion to Transport for Trial	July 13, 2016	225-227
53	Defendant's First Response to Request for Discovery After Remand for New Trial	July 14, 2016	228-230
54	Motion to Transport Witness for Trial	July 14, 2016	231
55	Order to Transport Witness for Trial	July 15, 2016	232-233

56	Supplemental Response to Request for Discovery	July 15, 2016	234-235
57	Order to Transport Witness for Trial	July 17, 2016	236-237
58	Order to Transport for Trial	July 17, 2016	238-239
59	Court Minutes	July 18, 2016	240-261
60	Court Minutes	July 20, 2016	262-280
61	Court Minutes	July 21, 2016	281-285
62	Exhibit List	July 18-21, 2016	286-290
63	Jury Instructions	July 21, 2016	291-330
64	Verdict	July 21, 2016	331-332
65	Order for Presentence Report and Evaluations	July 22, 2016	333
66	Order Entering Jury Verdict of Guilty and for Presentence Investigation	July 25, 2016	334-336
67	Motion to Extend Time to File Post Trial motions	August 3, 2016	337
68	Motion to Continue Sentencing	August 31, 2016	338-339
69	Order to Continue Sentencing	August 31, 2016	340-341
70	Notice of Filing Under Seal	September 15, 2016	342-343
71	Second Motion for Approval of Additional Compensation for Benewah Public Defender	September 19, 2016	344-363
72	Notice of Filing Department of Corrections Records	October 20, 2016	364-374
73	Notice of Intent of the Court to Rely on Certain Materials at October 26, 2016 Sentencing Hearing	October 24, 2016	375-395
74	Defendant's Corrections Regarding Presentence Investigation Report	October 25, 2016	396-438
75	Court Minutes	October 26, 2016	439-446
76	Sentencing Disposition and Notice of Right to Appeal	October 26, 2016	447-448
77	Notice of Appeal	October 26, 2016	449-452

78	Motion to Appoint State Appellate Public Defender	October 26, 2016	453-454
79	Order Appointing State Public Defender	October 26, 2016	455-456
80	Court Minutes	November 1, 2016	457-458
81	Order on Juror Questionnaires	November 1, 2016	459
82	Order for Approval of Additional Compensation for Benewah Public Defender	November 1, 2016	460-461
83	Clerk's Certificate of Appeal	November 10, 2016	462
84	Order Augmenting Prior Appeal	November 15, 2016	463
85	Amended Notice of Appeal	November 30, 2016	464-469
86	Certificate of Service	January 18, 2017	470
87	Certificate of Exhibits	January 18, 2017	471-472
88	Certificate of Record	January 18, 2017	473

INDEX

			<u>Page</u>
1	Affidavit in Support of Motion For Approval of Additional Compensation For Benewah County Public Defender	April 13, 2016	163-165
2	Amended Notice of Appeal	November 30, 2016	464-469
3	Amended Objection to Motion	March 4, 2016	50-51
4	Amended Objection to Motion	March 4, 2016	52-53
5	Amended Prosecuting Attorney's Information	March 24, 2016	117-118
6	Brief in Support of Motion in Limine Re Display of Stephanie Comack, Photographs to the Jury in Opening Argument and Prior Determination by the Court on the Photographs that the State Intends to Produce in Evidence Regarding Stephanie Comack	March 10, 2016	80-83
7	Brief in Support of Motion in Limine Regarding Defendant's Prior Testimony	April 13, 2016	157-162
8	Brief In Support of Motion in Limine Regarding Feeling By the Defendant	March 10, 2016	65-67
9	Certificate of Exhibits	January 18, 2017	471-472
10	Certificate of Record	January 18, 2017	473
11	Certificate of Service	January 18, 2017	470
12	Clerk's Certificate of Appeal	November 10, 2016	462
13	Court Minutes	February 24, 2016	28-30
14	Court Minutes	March 8, 2016	54
15	Court Minutes	March 22, 2016	89-95
16	Court Minutes	April 20, 2016	206-211
17	Court Minutes	June 29, 2016	220
18	Court Minutes	July 18, 2016	240-261
19	Court Minutes	July 20, 2016	262-280

20	Court Minutes	July 21, 2016	281-285
21	Court Minutes	October 26, 2016	439-446
22	Court Minutes	November 1, 2016	457-458
23	Defendant's Corrections Regarding Presentence Investigation Report	October 25, 2016	396-438
24	Defendant's First Response to Request for Discovery After Remand for New Trial	April 8, 2016	141-142
25	Defendant's First Response to Request for Discovery After Remand for New Trial	July 14, 2016	228-230
26	Defendant's Requested Jury Instructions	April 8, 2016	118-140
27	Exhibit List	July 18-21, 2016	286-290
28	Jury Instructions	July 21, 2016	291-330
29	Memorandum Decision and Order on Pre-Trial Motions Heard on March 22, 2016, Order Vacating April 25, 2016 Trial and Rescheduling Trial to Begin July 18, 2016	March 23, 2016	96-116
30	Motion For Approval of Additional Compensation for Benewah Public Defender	April 13, 2016	166-181
31	Motion for Benewah County Sheriff to Transfer Defendant's Medications and for the Kootenai County Jail to Administer Medications Prescribed to Defendant During any Time Periods he is in Custody at the Kootenai County Jail During Defendant's Trial	March 10, 2016	71-73
32	Motion for Defendant to be able to Wear Street Clothes and the Defendant not be Handcuffed or have other restraints in the Presence of the Jury during Defendant's Trial	March 10, 2016	77-79
33	Motion in Limine Re Display of Stephanie Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State Intends to Produce in Evidence Regarding Stephanie Comack	March 10, 2016	84-86
34	Motion in Limine Regarding Defendant's Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court	March 2, 2016	33-42
35	Motion in Limine Regarding Defendant's Prior Testimony	April 13, 2016	154-156

36	Motion in Limine Regarding Fleeing by the Defendant	March 10, 2016	68-70
37	Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding His Rebuttal to the Character Evidence and other Evidence Ruled Inadmissible by the Idaho Supreme Court	March 10, 2016	74-76
38	Motion to Appoint State Appellate Public Defender	October 26, 2016	453-454
39	Motion to Authorize the Benewah County District Court Fund to Pay International Forensic Experts, LLC, Pursuant to the Contract and Agreement Dated 12/08/15 Attached	February 24, 2016	24-25
40	Motion to Continue Sentencing	August 31, 2016	338-339
41	Motion to Disqualify	December 30, 2015	17-18
42	Motion to Exclude James Comack From Court Proceedings	March 2, 2016	43-45
43	Motion to Extend Time to File Post Trial motions	August 3, 2016	337
44	Motion to Permit Amended Information	March 9, 2016	58-62
45	Motion to Release Evidence	March 17, 2016	87-88
46	Motion to Replace Defense Attorney	March 9, 2016	56-57
47	Motion to Transport for Hearings	March 8, 2016	55
48	Motion to Transport for Hearings	April 11, 2016	149-151
49	Motion to Transport for Trial	July 13, 2016	225-227
50	Motion to Transport Witness for Trial	July 14, 2016	231
51	Notice of Appeal	October 26, 2016	449-452
52	Notice of Filing Department of Corrections Records	October 20, 2016	364-374
53	Notice of Filing Under Seal	September 15, 2016	342-343
54	Notice of Intent of the Court to Rely on Certain Materials at October 26, 2016 Sentencing Hearing	October 24, 2016	375-395
55	Notice of Intent to Use 404(b) Evidence	April 11, 2016	145-148

56	Notice to Vacate Hearing on Defendant's Motion in Limine on Defendant's Prior Testimony	April 19, 2016	186
57	Objection to Motion	March 3, 2016	46-47
58	Objection to Motion	March 3, 2016	48-49
59	Objection to State's Notice of Intent to use 404(B) Evidence Filed and Dated April 11, 2016	April 13, 2016	182-185
60	Order Appointing State Public Defender	October 26, 2016	455-456
61	Order Augmenting Prior Appeal	November 15, 2016	463
62	Order Entering Jury Verdict of Guilty and for Presentence Investigation	July 25, 2016	334-336
63	Order for Approval of Additional Compensation for Benewah Public Defender	November 1, 2016	460-461
64	Order for Presentence Report and Evaluations	July 22, 2016	333
65	Order of Reassignment	January 6, 2016	21
66	Order on Juror Questionnaires	November 1, 2016	459
67	Order Re Payment of Duplication of Court Exhibits	April 25, 2016	216-217
68	Order to Authorize the Benewah County District Court Fund to Pay International Forensic Experts, LLC, Pursuant to the Contract Agreement Dated 12/08/15 Attached	February 24, 2016	26-27
69	Order to Continue Sentencing	August 31, 2016	340-341
70	Order to Disqualify	December 31, 2015	19-20
71	Order to Keep Defendant in Custody at the Benewah County Jail	March 2, 2016	31-32
72	Order to Transport for Hearings	March 10, 2016	63-64
73	Order to Transport for Hearings	April 12, 2016	152-153
74	Order To Transport for Hearings	June 27, 2016	218-219
75	Order to Transport for Trial	July 17, 2016	238-239
76	Order to Transport Witness for Trial	July 15, 2016	232-233

77	Order to Transport Witness for Trial	July 17, 2016	236-237
78	Remittitur	December 28, 2015	16
79	Request for Jury Instructions	April 19, 2016	187-205
80	ROA		1-15
81	Second Motion for Approval of Additional Compensation for Benewah Public Defender	September 19, 2016	344-363
82	Sentencing Disposition and Notice of Right to Appeal	October 26, 2016	447-448
83	State's Third Amended Witness and Exhibit List	July 11, 2016	221-224
84	Stipulation to Continue Pre-Trial and Trial	February 23, 2016	22-23
85	Stipulation Regarding Payment of Duplication Costs	April 22, 2016	212-215
86	Stipulation Regarding Release of Exhibits	April 11, 2016	143-144
87	Supplemental Response to Request for Discovery	July 15, 2016	234-235
88	Verdict	July 21, 2016	331-332

Felony

Date		Judge
7/18/0016	Hearing result for Jury Trial scheduled on 07/18/2016 09:00 AM: Jury Trial Started Murder II	John T. Mitchell
12/27/2011	New Case Filed - Felony Prosecutor assigned Douglas P Payne Criminal Complaint Arraignment / First Appearance Court Minutes for Probable Cause Hearing	Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden
	Document sealed	
	Commitment - Held To Answer \$200.000.00 Hearing Scheduled (Preliminary 01/09/2012 01:30 PM) 2nd Murder Notice Of Hearing Court Minutes	Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden
1/4/2012	Subpoena Issued Officer Bob Loe, Chief Margaret Lehmbacher, Dr Clyde Hason, S.A. Paul Berger ISP, Derek Barden, Deputy Michael Richardson, Raymond Roy, Katlyn Comack, Suzie Comack, Eunice McEwen, Ron Hodge	Patrick R. McFadden
1/5/2012	Subpoena Returned Kaytlin Comack, Derek Barden, Raymond Roy, Susan Comack Clyde Hanson, Margaret Lehmbacher, Ron Hodge, Robert Loe	Patrick R. McFadden
1/6/2012	Defendant: Herrera, Joseph Duane Order Appointing Public Defender Public defender William Butler Order Appointing Public Defender Court Minutes	Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden
1/9/2012	Court Minutes Hearing type: Preliminary Hearing date: 1/9/2012 Time: 9:09 am Courtroom: District Courtroom Court reporter: Minutes Clerk: Stacy Bradbury Tape Number: Defense Attorney: William Butler Prosecutor: Douglas Payne	Patrick R. McFadden
	Continued (Preliminary 01/23/2012 01:30 PM) 2nd Murder Notice Of Hearing	Patrick R. McFadden Patrick R. McFadden
1/10/2012	First Supplemental Response to Discovery	Patrick R. McFadden
1/11/2012	Motion For Bond Reduction or Release on Own Recognizance and Notice of Hearing Hearing Scheduled (Motion 01/23/2012 01:30 PM) Motion for Bond Reduction	Patrick R. McFadden Patrick R. McFadden
1/12/2012	Subpoena Issued Subpoena Issued Officer Bob Loe, Chief Margaret Lehmbacher, Dr Clyde Hason, S.A. Paul Berger ISP, Derek Barden, Deputy Michael Richardson, Raymond Roy, Katlyn Comack, Suzie Comack, Eunice McEwen, Ron Hodge Notice of intent to Use 404 (b) Evidence	Patrick R. McFadden Patrick R. McFadden

Felony

Date		Judge
1/12/2012	Subpoena Returned Chief Margaret Lehmbecker, Michael Richardson, Clyde Hanson, Ron Hodge, Robert Loe+-	Patrick R. McFadden
1/17/2012	Motion to Continue Preliminary Hearing Subpoena Returned Raymond Roy Susan Comack, Kaytlin Comack	Patrick R. McFadden Patrick R. McFadden
1/18/2012	Order to Continue Preliminary Hearing Continued (Preliminary 03/26/2012 01:30 PM) 2nd Murder Notice Of Hearing	Patrick R. McFadden Patrick R. McFadden Patrick R. McFadden
1/23/2012	Subpoena Returned Michael Richardson, Derek Barden	Patrick R. McFadden
1/25/2012	Hearing result for Motion scheduled on 01/23/2012 01:30 PM: Hearing Vacated Motion for Bond Reduction	Patrick R. McFadden
2/28/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Carissa Receipt number: 0000531 Dated: 2/28/2012 Amount: \$8.00 (Credit card)	Patrick R. McFadden
3/13/2012	Miscellaneous Payment: Technology Cost - CC Paid by: Carissa Receipt number: 0000531 Dated: 2/28/2012 Amount: \$3.00 (Credit card)	Patrick R. McFadden
3/13/2012	Subpoena Issued Officer BOb Loe, Ronnie Dickerson, Jerrilyn Herrera, Jesse Herrera, Cheif Margaret Lehmbecker, Dr Clyde Hansen, Ron Hodge, Officer Scott Castles	Patrick R. McFadden
3/15/2012	Subpoena Returned Officer BOb Loe, Ronnie Dickerson, Jerrilyn Herrera, Jesse Herrera, Chief Margaret Lehmbecker, Dr Clyde Hansen, Ron Hodge, Officer Scott Castles	Patrick R. McFadden
3/21/2012	Ex-parte Motion for Investigators	Patrick R. McFadden
3/26/2012	Court Minutes Hearing type: Preliminary Hearing date: 3/26/2012 Time: 9:35 am Courtroom: District Courtroom Court reporter: Minutes Clerk: Stacy Bradbury Tape Number: Defense Attorney: William Butler Prosecutor: Douglas Payne	Patrick R. McFadden
3/26/2012	Hearing result for Preliminary scheduled on 03/26/2012 01:30 PM: Preliminary Hearing Held 2nd Murder	Patrick R. McFadden
3/26/2012	Order Holding Defendant To Answer To District Court	Patrick R. McFadden
3/26/2012	Hearing result for Preliminary scheduled on 03/26/2012 01:30 PM: Hearing Held 2nd Murder	Patrick R. McFadden
3/27/2012	Prosecuting Attorney's Information	Fred M. Gibler
3/27/2012	Notice Of Hearing of Arraignment	Fred M. Gibler
3/27/2012	Hearing Scheduled (Arraignment 04/13/2012 09:30 AM) Murder in 2nd Degree	Fred M. Gibler
3/30/2012	Order (Bond Reduction to \$100,000.00)	Patrick R. McFadden
4/9/2012	Hearing Scheduled (Motion 04/13/2012 09:30 AM) Motion for Investigators (Butler)	Fred M. Gibler
4/9/2012	Ex-Parte Motion for Investigators and Funds and Notice of Hearing	Fred M. Gibler

Felony

Date		Judge
4/13/2012	Request for Cameras in the Courtroom (Mary Orr)	Fred M. Gibler
	Court Authorization	Fred M. Gibler
	Request for Cameras in the Courtroom (Dylan Wohlenhaus)	Fred M. Gibler
	Court Authorization	Fred M. Gibler
	Hearing result for Arraignment scheduled on 04/13/2012 09:30 AM: Hearing Held Murder in 2nd Degree	Fred M. Gibler
	Hearing result for Motion scheduled on 04/13/2012 09:30 AM: Hearing Vacated Motion for Investigators and Funds (Butler)	Fred M. Gibler
	Order Entering Plea of Not Guilty	Fred M. Gibler
	A Plea is entered for charge: - NG (I18-4001-II Murder II)	Fred M. Gibler
	Court Minutes	Fred M. Gibler
4/19/2012	Order for Investigators (to be filed under seal)	Fred M. Gibler
	Document sealed	
4/23/2012	Hearing Scheduled (Jury Trial 08/14/2012 09:30 AM)	Fred M. Gibler
	Motion for Transcript of Preliminary Hearing	Fred M. Gibler
	Notice Of Trial	Fred M. Gibler
5/1/2012	Order	Fred M. Gibler
5/3/2012	Ex-parte Motion for Transcript	Fred M. Gibler
5/4/2012	Order RE: Ex-parte Motion for Transcript	Fred M. Gibler
5/9/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: James Thomson Receipt number: 0001285 Dated: 5/9/2012 Amount: \$2.00 (Credit card)	Fred M. Gibler
	Miscellaneous Payment: Technology Cost - CC Paid by: James Thomson Receipt number: 0001285 Dated: 5/9/2012 Amount: \$3.00 (Credit card)	Fred M. Gibler
5/18/2012	Transcript Filed-Transcript of Preliminary Hearing - copies to PA, Butler	Fred M. Gibler
	Stipulation for Extension of Time to File Discovery Response and Pretrial Motions	Fred M. Gibler
	Order for Extension of Time to File Discovery Response and Pretrial Motions	Fred M. Gibler
5/21/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Law Office of Staci L. Anderson, PLLC Receipt number: 0001397 Dated: 5/21/2012 Amount: \$123.00 (Check)	Fred M. Gibler
	Voided Receipt (Receipt# 1397 dated 5/21/2012)	Fred M. Gibler
5/23/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Saetrum Law Offices Receipt number: 0001419 Dated: 5/23/2012 Amount: \$67.00 (Check)	Fred M. Gibler
	Miscellaneous Payment: Registered Mail Fee Paid by: Saetrum Law Offices Receipt number: 0001419 Dated: 5/23/2012 Amount: \$3.00 (Check)	Fred M. Gibler
6/13/2012	Second Supplemental Response To Request For Discovery	Fred M. Gibler
	Witness and Exhibit List	Fred M. Gibler
	Motion in Limine	Fred M. Gibler

Felony

Date		Judge
6/13/2012	Notice of Intent to Use I.R.E. 803(24) and 804(6) Evidence	Fred M. Gibler
	Second Notice of Intent to Use 404(b) Evidence	Fred M. Gibler
	State's Second Motion in Limine	Fred M. Gibler
6/14/2012	Ex-parte Motion for Investigator Funds and Notice of Hearing	Fred M. Gibler
	Hearing Scheduled (Motion 06/15/2012 09:30 AM) Ex-Parte Motion for Investigator Funds	Fred M. Gibler
6/15/2012	Motion to Change Venue	Fred M. Gibler
	Motion to Suppress or Dismiss	Fred M. Gibler
6/18/2012	Registered Agent Return of Service - Subpoena Duces Tecum - Benewah Community Hospital	Fred M. Gibler
6/19/2012	Notice Of Hearing	Fred M. Gibler
6/20/2012	Hearing result for Motion scheduled on 06/15/2012 09:30 AM: Hearing Vacated Ex-Parte Motion for Investigator Funds	Fred M. Gibler
	Hearing Scheduled (Motion in Limine 07/13/2012 01:00 PM) State's Motion and 2nd Motion in Limine	Fred M. Gibler
	Order for Investigator Funds	Fred M. Gibler
	Document sealed	
	Defendant's Supplemental Request For Discovery	Fred M. Gibler
6/22/2012	Amended Notice Of Hearing	Fred M. Gibler
6/27/2012	Response To Defendant's Supplemental Request For Discovery	Fred M. Gibler
6/28/2012	Notice of Election to Proceed Under Idaho Code 9-420	Fred M. Gibler
	Certification of Records as "Not Found"	Fred M. Gibler
	State's Amendment to Notices of Intent to Use 404(b) and Hearsay Evidence	Fred M. Gibler
	State's Motion for Determination of Admissability of Evidence	Fred M. Gibler
	Plaintiff's Brief in Support of Admission of Victim's Statement and 404(b) Evidence	Fred M. Gibler
	Subpoena Issued - James Comack, Suzie Comack, Jack Comack, Katlyn Comack, Eunice McEwen, Kianna Appell, Kim Smith, Bobbie Riddle, Tiffany Reeves, Roger Hossfeld, Eunice McEwen	Fred M. Gibler
6/29/2012	First Amendment to State's Witness List	Fred M. Gibler
7/2/2012	Subpoena Returned - Kimberly Anna Smith, Tiffany Ann Reeves, Kiani Rayelle Appell, Bobbie Joe Riddle, James Eric Comack, Jennifer Lynn Yumi Hickson	Fred M. Gibler
7/5/2012	Subpoena Returned - Rodger Harold Hossfeld, Jr.	Fred M. Gibler
7/6/2012	Notice Of Hearing	Fred M. Gibler
7/9/2012	Subpoena Returned - Eunice Marie McEwen	Fred M. Gibler
7/10/2012	Subpoena Issued - Officer Scott Castles, Chief Margaret Lehmbecker, Det. Paul Berger	Fred M. Gibler
	Subpoena Returned - Scott Charles Castles, Jr., Margaret Ann Lehmbecker	Fred M. Gibler

Felony

Date		Judge
7/13/2012	Hearing result for Motion in Limine scheduled on 07/13/2012 01:00 PM: Hearing Held State's Motion and 2nd Motion in Limine Defense Motion to Change Venue and Motions to Suppress	Fred M. Gibler
	New folder No. 2 Action Agency Billing - \$2500.00	Fred M. Gibler
	Document sealed	
	Request for Cameras in the Courtroom and Court Authorization	Fred M. Gibler Fred M. Gibler
	Court Minutes	Fred M. Gibler
7/16/2012	Subpoena Returned - Caytlin Comack	Fred M. Gibler
7/20/2012	Order Denying Defendant's Motion to Suppress or Dismiss	Fred M. Gibler
7/24/2012	Subpoena Issued - Ron Hodge, Det. Paul Berger, Det. Michael Van Leuven, Det. Charles Greear, Officer Robert W. Loe, Chief Margaret Lehmbecker, Jesse Herrera, Jerilyn Herrera, Dr. Clyde Hansen, Derek Bsarden, Raymond Roy, James Comack, Suzie Comack, Katlyn Comack, Danny Ducommun, Jana Hanson, Vincent Hanson, Stuart Jacobsen, Officer Scott Castles, Ronnie Dickerson, Trp. Glenn Bakken, Dr. Sally Aiken, Deputy Michael Richardson, Deputy Robert Rogers, Deputy Rodney B. Dickenson, Bobbie Riddle, Janelle Buell, Dr. Paul F. Paschall	Fred M. Gibler
	Order on State's Motion for Determination of Admissability of Evidence	Fred M. Gibler
	Supplement to Motion to Change Venue	Fred M. Gibler
7/26/2012	Subpoena Returned - Margaret Ann Lehmbecker, Rodney Bryan Dickenson, Derek Barden	Fred M. Gibler
	Hearing Scheduled (Motion 08/01/2012 02:00 PM) Defense Motion to Continue Jury Trial	Fred M. Gibler
	Motion to Continue Jury Trial	Fred M. Gibler
	Order Denying Motion to Change Venue	Fred M. Gibler
7/27/2012	Subpoena Returned - Jerilynn Ronda Herrera, Susan Comack, Dan Ducommen, Vincent Hanson, Jana Hanson, Zachary Paul Sifford, Robert E. Rogers, Scott C. Castles, Raymond Roy, Robert W. Loe, Sr., Clyde Hansen, Bobbie Joe Riddle, Michael J. Richardson, Ronald Lee Hodge, Janelle Marie Buell	Fred M. Gibler
	Notice Of Hearing	Fred M. Gibler
7/29/2012	Subpoena Returned - Susan Comack	Fred M. Gibler
7/30/2012	Subpoena Returned - Ronald Dickerson, Jesse Herrera	Fred M. Gibler
7/31/2012	Subpoena Returned - Jack Henry Comack, James Eric Comack, Kaytlin Comack	Fred M. Gibler
8/1/2012	Hearing result for Motion scheduled on 08/01/2012 02:00 PM: Hearing Held Defense Motion to Continue Jury Trial	Fred M. Gibler
	Motion Granted	Fred M. Gibler
	Hearing result for Jury Trial scheduled on 08/14/2012 09:30 AM: Continued 2nd Degree Murder	Fred M. Gibler
	Request for Cameras in the Courtroom and Court Authorization Granted	Fred M. Gibler
	Court Minutes	Fred M. Gibler

Felony

Date		Judge
8/2/2012	Order Continuing Jury Trial	Fred M. Gibler
8/3/2012	Hearing Scheduled (Jury Trial 12/11/2012 09:30 AM) 2nd Degree Murder Notice Of Trial	Fred M. Gibler Fred M. Gibler
8/6/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: James Thomson Receipt number: 0002173 Dated: 8/6/2012 Amount: \$9.00 (Credit card)	Fred M. Gibler
	Miscellaneous Payment: Technology Cost - CC Paid by: James Thomson Receipt number: 0002173 Dated: 8/6/2012 Amount: \$3.00 (Credit card)	Fred M. Gibler
9/25/2012	Notice of Substitution of Counsel	Fred M. Gibler
	Defendant: Herrera, Joseph Duane Appearance James E Siebe	Fred M. Gibler
9/26/2012	Request For Discovery	Fred M. Gibler
11/20/2012	Motion to Continue	Fred M. Gibler
11/21/2012	Order to Continue	Fred M. Gibler
	Continued (Jury Trial 03/12/2013 09:00 AM) 2nd Degree Murder	Fred M. Gibler
12/28/2012	Request For Discovery and Alibi Demand	Fred M. Gibler
2/1/2013	Hearing Scheduled (Status 02/22/2013 09:30 AM)	Fred M. Gibler
	Notice Of Hearing	Fred M. Gibler
2/22/2013	Hearing result for Status scheduled on 02/22/2013 09:30 AM: Hearing Held	Fred M. Gibler
	Court Minutes	Fred M. Gibler
2/25/2013	Subpoena Issued - Det. Michael Van Leuven, Officer Robert W. Loe, Chief Margaret Lehmbecker, Jesse Herrera, Jerilyn Herrera, Dr. Clyde Hansen, Derek Barden, Raymond Roy, James Comack, Susie Comack, Katlyn Comack, Eunice McEwen, Jana Hanson, Vincsent Hanson, Det. Paul Berger, Stuart Jacobsen, Deputy Scott Castles, Ronnie Dickerson, Trp. Glenn Bakken, Det. Charles Greear, Sally Aiken, Deputy Michael Richardson, Robby Rogers, Deputy Rodney B. Dickenson, Bobbie Riddle, Janelle Buell, Dr. Paul F. Paschall	Fred M. Gibler
2/26/2013	Subpoena Returned - Dr. Clyde Hansen	Fred M. Gibler
2/27/2013	Subpoena Returned - Susan Ann Comack, Ronald Lee Dickerson, Bobbie Joe Riddle, Jana Lee Hanson, Jana Lee Hanson, Vincent Leon Hanson, Raymond Albert Roy, Rodney Bryan Dickenson, Kaytlin Jacklin Marie Comack, Derek Daniel Barden, Margaret Ann Lehmbecker	Fred M. Gibler
2/28/2013	Subpoena Returned - Michael John Richardson, Scott Charles Castles, Jr., Jerilynn Ronda Herrera, Jesse Warren Herrera, Janelle Marie Buell, James Eric Comack, Robert Earl Rogers	Fred M. Gibler
3/1/2013	Subpoena Returned - Robert William Loe, Sr.	Fred M. Gibler
	State's Second Amended Witness and Exhibit List	Fred M. Gibler
3/4/2013	Personal/Recalled Return of Service - Eunice McEwen	Fred M. Gibler
3/5/2013	Proposed Jury Instructions/defendant	Fred M. Gibler
3/8/2013	Request for Cameras in the Courtroom - Gazette Record	Fred M. Gibler
	Request for Cameras in the Courtroom - KHQ News	Fred M. Gibler
	Request for Jury Instructions	Fred M. Gibler

Felony

Date		Judge
3/8/2013	Request for Cameras in the Courtroom	Fred M. Gibler
	Request for Cameras in the Courtroom	Fred M. Gibler
3/11/2013	Court Authorization	Fred M. Gibler
3/12/2013	Hearing result for Jury Trial scheduled on 03/12/2013 09:00 AM: Jury Trial Started 2nd Degree Murder March 12-15 and 19-20, 2013	Fred M. Gibler
	Hearing result for Jury Trial scheduled on 03/12/2013 09:00 AM: Hearing Vacated 2nd Degree Murder March 12-15 and 19-20, 2013	Fred M. Gibler
	Court Minutes	Fred M. Gibler
3/13/2013	Hearing Scheduled (Status 03/22/2013 09:30 AM)	Fred M. Gibler
	Notice Of Hearing	Fred M. Gibler
	Court Authorization	Fred M. Gibler
3/18/2013	Motion in Limine	Fred M. Gibler
3/19/2013	Motion to Disable Firearm	Fred M. Gibler
	Order Approving Disabling of Firearm	Fred M. Gibler
3/22/2013	Hearing result for Status scheduled on 03/22/2013 09:30 AM: Hearing Held	Fred M. Gibler
	Court Minutes	Fred M. Gibler
3/25/2013	Hearing Scheduled (Jury Trial 06/11/2013 09:30 AM) Trial dates June 11-14, 18-19 in Kooteanai County 2nd Degree Murder	Fred M. Gibler
	Notice Of Trial	Fred M. Gibler
4/3/2013	Subpoena Issued - Det. Michael Van Leuven, Officer Robert W. Loe, Chief Margaret Lehmbecker, Jesse Herrera, Jerilyn Herrera, Dr. Clyde Hansen, Derek Barden, Raymond Roy, James Comack, Susie Comack, Katlyn Comack, Eunice McEwen, Jana Hanson, Vincsent Hanson, Det. Paul Berger, Stuart Jacobsen, Deputy Scott Castles, Ronnie Dickerson, Trp. Glenn Bakken, Det. Charles Greear, Sally Aiken, Deputy Michael Richardson, Robby Rogers, Deputy Rodney B. Dickenson, Bobbie Riddle, Janelle Buell, Dr. Paul F. Paschall	Fred M. Gibler
4/4/2013	Order Setting Trial	Fred M. Gibler
4/8/2013	Subpoena Returned - Raymond Albert Roy, Jesse Warren Herrera, Robert William Loe, Sr., Susan Ann Comack, Margaret Ann Lehmbecker, James Eric Comack, Rodney Bryan Dickenson, Michael John Richardson, Scott Charles Castles, Jr., Bobbie Joe Riddle, Dr. Clyde Hansen, Jerilynn Ronda Herrera, Ronald LOee Dickerson, Kaytlin Jacklin Marie Comack, Janelle Marie Buell	Fred M. Gibler
4/11/2013	Subpoena Returned - Derek Daniel Barden	Fred M. Gibler
6/5/2013	Notice of Additional Witness	Fred M. Gibler
	Five Blank Subpoenas Issued	Fred M. Gibler
6/11/2013	Court Minutes	Fred M. Gibler
	Court Minutes	Fred M. Gibler
	Amended Prosecuting Attorney's Information	Fred M. Gibler

Felony

Date		Judge
6/11/2013	Hearing result for Jury Trial scheduled on 06/11/2013 09:30 AM: Hearing Held Trial dates June 11-14, 18-19 2nd Degree Murder	Fred M. Gibler
	Hearing result for Jury Trial scheduled on 06/11/2013 09:30 AM: Jury Trial Started Trial dates June 11-14, 18-19 2nd Degree Murder	Fred M. Gibler
6/12/2013	Court Minutes	Fred M. Gibler
6/13/2013	Court Minutes	Fred M. Gibler
6/14/2013	3 blank Subpoenas Issued	Fred M. Gibler
6/18/2013	Court Minutes	Fred M. Gibler
6/19/2013	Court Minutes	Fred M. Gibler
	Jury Instructions/defendant	Fred M. Gibler
	Jury Instructions	Fred M. Gibler
	Verdict	Fred M. Gibler
	Pre-Sentence Investigation Evaluation Ordered	Fred M. Gibler
6/21/2013	Order Entering Jury Verdict of Guilty and for Presentence Investigation Found Guilty After Trial (I18-4001-II Murder II)	Fred M. Gibler
	Court Accepts Guilty Plea (I18-4001-II Murder II)	Fred M. Gibler
	STATUS CHANGED: closed pending clerk action	Fred M. Gibler
6/25/2013	Hearing Scheduled (Sentencing 08/29/2013 03:00 PM) 2nd Degree Murder	Fred M. Gibler
	Notice Of Hearing	Fred M. Gibler
8/23/2013	Presentence Report	Fred M. Gibler
	Document sealed	
8/28/2013	Order in RE: Dress Clothes	Fred M. Gibler
8/29/2013	Hearing result for Sentencing scheduled on 08/29/2013 03:00 PM: Hearing Held 2nd Degree Murder	Fred M. Gibler
	Judgment and Sentence	Fred M. Gibler
	Sentenced To Incarceration (I18-4001-II Murder II) Confinement terms: Credited time: 640 days. Penitentiary determinate: 22 years.	Fred M. Gibler
	Other Sentencing Information: Indeterminate Life sentence.	Fred M. Gibler
	Court Minutes	Fred M. Gibler
9/9/2013	Sentenced To Pay Fine 240.50 charge: I18-4001-II Murder II	Fred M. Gibler
9/18/2013	Order for Appointment of Idaho State Appellate Public Defender for Purposes of Appeal	Fred M. Gibler
10/1/2013	Notice Of Appeal	Fred M. Gibler
	Appealed To The Supreme Court	Fred M. Gibler
	STATUS CHANGED: Inactive	Fred M. Gibler
12/13/2013	Notice Of Lodging Transcript On Appeal - Byrl Cinnamon	Fred M. Gibler
	Notice Of Lodging Transcript On Appeal - Anita Self	Fred M. Gibler
	Notice Of Lodging Transcript On Appeal - Valerie Nunemacher	Fred M. Gibler

Felony

Date		Judge
1/24/2014	Notice Of Telephonic Hearing	Fred M. Gibler
	Hearing Scheduled (Hearing Scheduled 02/14/2014 12:00 PM) Telephonic Hearing	Fred M. Gibler
	Response To "Objection to the Record" and Motion to Vacate Hearing	Fred M. Gibler
1/28/2014	Amended Notice of Telephonic Hearing	Fred M. Gibler
1/30/2014	Hearing result for Hearing Scheduled scheduled on 02/14/2014 12:00 PM: Hearing Vacated	Fred M. Gibler
	Objection to the Record	Fred M. Gibler
	Order Granting Objection to the Record	Fred M. Gibler
2/28/2014	Notice of Transcript lodged Julie FOLAND	Fred M. Gibler
3/3/2014	Statement \$513.50 Julie Foland Appeal Transcript	Fred M. Gibler
3/31/2014	Petition For Post-Conviction Relief	Fred M. Gibler
8/7/2015	Opinion	Fred M. Gibler
	Summary Statement	Fred M. Gibler
8/19/2015	Order (To transport defendant from IDOC to Benewah County)	Fred M. Gibler
	BOND SET: at \$200,000.00	Fred M. Gibler
8/26/2015	Court Minutes Hearing type: Status Hearing date: 8/26/2015 Time: 10:41 am Courtroom: Court reporter: Minutes Clerk: Angela Medley Tape Number: Defense Attorney: James Siebe Prosecutor: Douglas Payne	Fred M. Gibler
8/28/2015	Defendant: Herrera, Joseph Duane Appearance Clayton G Andersen	Fred M. Gibler
	Order Appointing Public Defender	Fred M. Gibler
	Hearing Scheduled (Status 09/18/2015 09:30 AM)	Fred M. Gibler
	Notice Of Hearing	Fred M. Gibler
	Petition For Rehearing	Fred M. Gibler
9/18/2015	Court Minutes Hearing type: Status Hearing date: 9/18/2015 Time: 1:43 pm Courtroom: Court reporter: Minutes Clerk: Stacy Bradbury Tape Number: Defense Attorney: Clayton Andersen Prosecutor: Douglas Payne	Fred M. Gibler
9/23/2015	Hearing result for Status scheduled on 09/18/2015 09:30 AM: Hearing Held	Fred M. Gibler
11/6/2015	Order Denying Petition For Rehearing	Fred M. Gibler

Felony

Date		Judge
11/30/2015	2015 Opinion No. 111 Substitution Opinion. The Court's Prior Opinion Dated August 7, 2015 is Hereby Withdrawn	Fred M. Gibler
	STATUS CHANGED: Reopened	Fred M. Gibler
12/7/2015	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Gazette Record Receipt number: 0002697 Dated: 12/7/2015 Amount: \$13.00 (Check)	Fred M. Gibler
12/28/2015	Remittitur	Fred M. Gibler
	Hearing Scheduled (Status 04/22/2016 09:30 AM) In Benewah.. Is trial Going?	Fred M. Gibler
	Hearing Scheduled (Jury Trial 04/26/2016 09:30 AM) Murder... Trial will be at Kootenai County Courthouse 324 W. Garden Ave Coeurd'Alene, ID 83814 a	Fred M. Gibler
	Notice of Hearing	Fred M. Gibler
12/30/2015	Motion to Disqualify-Clayton Andersen	Fred M. Gibler
	Hearing Scheduled (Tentative Hearing-Paperwork not filed 02/05/2016 11:30 AM) Motion for appointment of Expert Witness/Fees/House in Benewah/Limine and Mediation -Clayton Andersen	Fred M. Gibler
12/31/2015	Disqualification Of Judge - Cause (Judge Gibler)-Clayton Andersen	Fred M. Gibler
1/6/2016	Order Of Re-Assignment Honorable John T. Mitchell	Fred M. Gibler
	Change Assigned Judge	John T. Mitchell
	Hearing result for Jury Trial scheduled on 04/26/2016 09:30 AM: Hearing Held Murder... Trial will be at Kootenai County Courthouse 324 W. Garden Ave Coeurd'Alene, ID 83814 a	Fred M. Gibler
	Hearing result for Status scheduled on 04/22/2016 09:30 AM: Hearing Vacated In Benewah.. Is trial Going?	Fred M. Gibler
	Prosecutor assigned Brian D Thie	John T. Mitchell
1/20/2016	Hearing result for Tentative Hearing-Paperwork not filed scheduled on 02/05/2016 11:30 AM: Hearing Vacated Motion for appointment of Expert Witness/Fees/House in Benewah/Limine and Mediation -Clayton Andersen	Fred M. Gibler
	Hearing Scheduled (Pretrial Conference 04/13/2016 01:30 PM) Hearing at Kootenai County Courthouse	John T. Mitchell
	Hearing Scheduled (Jury Trial 04/25/2016 09:00 AM) Hearing will be Held Kootenai County Courthouse	John T. Mitchell
1/22/2016	Notice Of Trial	John T. Mitchell
2/5/2016	Notice Of Trial	John T. Mitchell
	Hearing Scheduled (Status 02/24/2016 11:30 AM) Scheduling Confrence	John T. Mitchell
	Notice Of Hearing	John T. Mitchell
2/23/2016	Stipulation to Continue Pre-trial and Trial	John T. Mitchell
2/24/2016	Hearing result for Status scheduled on 02/24/2016 11:30 AM: Hearing Held Scheduling Confrence	John T. Mitchell
	Motion to Authorize the Benewah County District Court Fund to Pay internation Forsensic Experts. LLC, Pususnt to the Contract Agreement Dated 12/08/15 Attached	John T. Mitchell

Felony

Date		Judge
2/24/2016	Order to Authorize the Benewah County District Court Fund to Pay international Forsensic Experts. LLC, Pursuant to the Contract Agreement Dated 12/08/15 Attached	John T. Mitchell
	Court Minutes	John T. Mitchell
3/1/2016	Subpoena Issued Ronnie Dickerson, Janelle Buell, Deputy R. Dickenson, Deputy M Richardson, Sally Aiken, Det. Charles Greear, Officer Scott Castles, Stuart Jacobsen, Det Paul Berger, Det. Michael Leuven, Dr. Clyde Hansen, Chief Margaret Lehmbecker, Officer Robert Loe	John T. Mitchell
3/2/2016	Order to Keep Defendant in Custody at the Benewah County Jail	John T. Mitchell
	Motion in Limine Regarding Defendant's Character Evidence and Other Evidence Ruled inadmissible by the Idaho Supreme Court	John T. Mitchell
	Motion to Exclude James Comack from Court Proceedings	John T. Mitchell
3/3/2016	Objection to Motion	John T. Mitchell
	Objection to Motion	John T. Mitchell
3/4/2016	Amended Objection to Motion	John T. Mitchell
	Amended Objection to Motion	John T. Mitchell
3/8/2016	Court Minutes Hearing type: Hearing Scheduled Hearing date: 3/8/2016 Time: 10:18 am Courtroom: Court reporter: Minutes Clerk: Stacy Bradbury Tape Number: Defense Attorney: Clayton Andersen Prosecutor: Brian Thie	John T. Mitchell
	Court Minutes-Mediation with Judge Stensgar	John T. Mitchell
	Motion to Transport for Hearing	John T. Mitchell
3/9/2016	Motion to Replace Defense Attorney	John T. Mitchell
	Motion to Permit Amended Information	John T. Mitchell
3/10/2016	Subpoena Returned Margaret Lehmbecker, Robert Loe, Scott Castles	John T. Mitchell
	Notice of Hearing	John T. Mitchell
	Order to Transport for Hearings	John T. Mitchell
	Brief in Support of Motion in Limine Regarding Fleeing By the Defendant	John T. Mitchell
	Motion in Limine Regarding Fleeing By the Defendant	John T. Mitchell
	Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding his Rebuttal to the Character Evidence and other Evidence Ruled inadmissible by the Idaho Supreme Court	John T. Mitchell
	Motion For Benewah County Sheriff to Transfer Defendant's Medications and For the Kootenai County Jail to Administer Medications Prescribed to Defendant During any Time Periods he is in Custody at the Kootenai County Jail During Defendant's Trial	John T. Mitchell
	Motion For Defendant to be able to wear street clothes and the Defendant not be handcuffed or have other restraints in the presence of the Jury During Defendant's Trial	John T. Mitchell

State of Idaho vs. Joseph Duane Herrera

Felony

Date		Judge
3/10/2016	Brief in Support of Motion in Limine Re Display of Stephanie Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State intends to Produce in Evidence Regarding Stephanie Comack	John T. Mitchell
	Motion in Limine Re Display of Stephanie Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State intends to Produce in Evidence Regarding Stephanie Comack	John T. Mitchell
	Notice of Hearing on Defendant's Motions	John T. Mitchell
	Hearing Scheduled (Motion 04/22/2016 04:00 PM) Motions Hearing to be held in Kootenai County Courthouse	John T. Mitchell
3/14/2016	Subpoena Returned Michael Richardson, Janelle Buell, Clyde Hansen. Ronald Dickerson, Rodney Dickenson	John T. Mitchell
	Amended Notice of Hearing	John T. Mitchell
3/15/2016	Subpoena Issued Jesse W. Herrera, Jerilyn Herrera	John T. Mitchell
3/16/2016	Subpoena Issued Glen Bakken, Roy Raymond	John T. Mitchell
3/17/2016	Motion to Release Evidence	John T. Mitchell
3/22/2016	Subpoena Returned Raymond Albert Roy	John T. Mitchell
	Court Minutes	John T. Mitchell
3/23/2016	Memorandum Decision and Order on Pre-trial Motions heard on Marhc 22, 2016, Order Vacating April 25, 2016, Trial and Rescheduling Trial to Begin July 18th, 2016	John T. Mitchell
3/24/2016	Hearing result for Motion scheduled on 04/22/2016 04:00 PM: Hearing Vacated Motions	John T. Mitchell
	Notice Of Vacating Pretrial/ Motion/ and Jury Trial and resetting Hearing	John T. Mitchell
	Hearing result for Jury Trial scheduled on 04/25/2016 09:00 AM: Hearing Vacated Hearing will be Held Kootenai County Courthouse	John T. Mitchell
	Hearing result for Pretrial Conference scheduled on 04/13/2016 01:30 PM: Hearing Vacated Hearing at Kootenai County Courthouse	John T. Mitchell
	Hearing Scheduled (Jury Trial 07/18/2016 09:00 AM) Murder	John T. Mitchell
	Hearing Scheduled (Status 04/20/2016 09:00 AM) Re-Examination of Witness	John T. Mitchell
	Hearing Scheduled (Pretrial Conference 06/29/2016 04:00 PM)	John T. Mitchell
	Notice Of Trial	John T. Mitchell
	Amended Prosecuting Attorney's Information	John T. Mitchell
3/25/2016	Subpoena Issued (Jeri Herrera, Jesse W. Herrera, Dr. Sally Aiken, Ronnie Dickerson, Janelle Buell, Deputy Michael Richardson, Deputy R. Bryan Dickenson, Officer Scott Castles, Dr. Clyde Hansen, Chief Margaret Lehmbeker, Officer Robert W. Loe, Stuart Jacobsen, Detective Michael Van Leuven, Detective Charles Greear, Detective Paul Berger)	John T. Mitchell
3/28/2016	Subpoena Returned Robert Loe, Michael Richardson	John T. Mitchell
3/29/2016	Subpoena Returned Margaret Lehmbeker, Scott Castles, Janelle Buell, Rodney Dickenson, Ronald Dickerson,	John T. Mitchell
4/4/2016	Subpoena Returned Dr Clyde Hansen	John T. Mitchell

State of Idaho vs. Joseph Duane Herrera

Felony

Date		Judge
4/8/2016	Defendant(s) Requested Jury Instructions	John T. Mitchell
	Defendants First Response to Request for Discovery after Demand for New Trial	John T. Mitchell
4/11/2016	Stipulation Regarding Release of Exhibits	John T. Mitchell
	Notice of Intent to Use 404(b) Evidence	John T. Mitchell
	Motion to Transport for Hearing	John T. Mitchell
4/12/2016	Order Regarding Release of Exhibits	John T. Mitchell
	Order to Transport For Hearing	John T. Mitchell
4/13/2016	Subpoena Issued Katlyn Comack, Bobbie Jo (Riddle) Comack, Susie Comack, Eunice McEwen	John T. Mitchell
	Motion in Limine Regarding Defendant's Prior Testimony	John T. Mitchell
	Brief in Support of Motion in Limine Regarding Defendant's Prior Testimony	John T. Mitchell
	Affidavit in Support of Motion For Approval of Additional Compensation For Benewah Public Defender	John T. Mitchell
	Motion For Approval of Additional Compensation for Benewah Public Defender	John T. Mitchell
	Notice of Hearing on Defendant's Motion in Limine on Defendant's Prior Testimony	John T. Mitchell
	Notice of Hearing on Defendant's Motion for Approval of Additional Compensation for Benewah Public Defender	John T. Mitchell
	Objection to State's Notice of Intent to Use 404(b) Evidence Filed and Dated April 11, 2016	John T. Mitchell
4/19/2016	Notice to Vacate Hearing on Defendant's Motion in Limine on Defendant's Prior Testimony	John T. Mitchell
	Request For Jury Instructions	John T. Mitchell
4/20/2016	Hearing result for Status scheduled on 04/20/2016 09:00 AM: Hearing Held Re-Examination of Witness	John T. Mitchell
	Court Minutes	John T. Mitchell
4/22/2016	Stipulation Regarding Payment of Duplication Costs	John T. Mitchell
4/25/2016	Order Re: Payment of Duplication of Court Exhibits	John T. Mitchell
6/27/2016	Motion for transport for Hearings	John T. Mitchell
	Order to Transport for Hearing	John T. Mitchell
6/29/2016	Court Minutes	John T. Mitchell
	Hearing result for Pretrial Conference scheduled on 06/29/2016 04:00 PM: Hearing Held	John T. Mitchell
7/11/2016	State's Third Amended Witness List and Exhibit List	John T. Mitchell
7/13/2016	Motion to Transport for Trial	John T. Mitchell
	Order to Transport for Trial	John T. Mitchell
7/14/2016	Defendant's First Response to Request For Discovery After Remand For New Trial	John T. Mitchell
	Subpoena Issued Raymond Roy, Cindy Loe, Daniel Ducommun, Jason Bierman	John T. Mitchell

State of Idaho vs. Joseph Duane Herrera

Felony

Date		Judge
7/14/2016	Motion to Transport Witness for Trial	John T. Mitchell
7/15/2016	Order to Transport Witness for Trial	Scott L Wayman
	State's Supplemental Response To Request For Discovery	John T. Mitchell
	Request For Cameras in the Courtroom	John T. Mitchell
7/17/2016	Order to Transport Witness for Trial (7.18.16)	John T. Mitchell
	Order to Transport Witness for Trial (7.20.16)	John T. Mitchell
7/18/2016	Court Minutes (Status)	John T. Mitchell
7/19/2016	Court Minutes (Trial - Day 1)	John T. Mitchell
	Court Minutes (Trial - Day 2)	John T. Mitchell
7/20/2016	Court Minutes (Trial - Day 3)	John T. Mitchell
7/21/2016	Found Guilty After Trial	John T. Mitchell
	Found Guilty After Trial (I18-4001-II Murder II)	John T. Mitchell
	Court Accepts Guilty Plea (I18-4001-II Murder II)	John T. Mitchell
	STATUS CHANGED: closed pending clerk action	John T. Mitchell
	Court Minutes (Trial - Day 4)	John T. Mitchell
	Jury Instructions Filed	John T. Mitchell
	Verdict	John T. Mitchell
	Sentenced To Incarceration (I18-4001-II Murder II) Confinement terms: Penitentiary determinate: 30 years.	John T. Mitchell
7/22/2016	Pre-Sentence Investigation Evaluation Ordered	John T. Mitchell
	Hearing Scheduled (Sentencing 09/06/2016 09:00 AM)	John T. Mitchell
	Notice Of Hearing	John T. Mitchell
7/25/2016	Order Entering Jury Verdict Of Guilty And For Presentence Investigation	John T. Mitchell
8/3/2016	Motion to Extend Time to File Post Trial Motions	John T. Mitchell
8/4/2016	Motion to Extend Time to File Post Trial Motions	John T. Mitchell
8/31/2016	Motion to Continue Sentencing	John T. Mitchell
	Order to Continue Sentencing	John T. Mitchell
	Continued (Sentencing 10/26/2016 09:00 AM) II Murder	John T. Mitchell
	Notice Of Hearing	John T. Mitchell
9/15/2016	Notice of Filing Under Seal	John T. Mitchell
	Document sealed	
9/19/2016	Second Motion For Approval of Additional Compensation For Benewah Public Defender	John T. Mitchell
10/5/2016	Notice of Hearing on Defendant's Second Motion for Approval of Additional Compensation For Benewah Public Defender	John T. Mitchell
	Hearing Scheduled (Motion 10/26/2016 09:00 AM) Motion for Approval of Additional Compensation For Benewah Public Defender	John T. Mitchell
10/20/2016	Presentence Report	John T. Mitchell
	Notice of Filing Department of Corrections Recprds	John T. Mitchell

State of Idaho vs. Joseph Duane Herrera

Felony

Date		Judge
10/24/2016	Notice of Intent of the Court to Rely on Certain Materials at October 26th, 2016 Sentencing Hearing	John T. Mitchell
10/25/2016	Defendant's Corrections Regarding Presentence Investigation Report	John T. Mitchell
10/26/2016	Hearing result for Sentencing scheduled on 10/26/2016 09:00 AM: Hearing Held II Murder	John T. Mitchell
	Hearing result for Motion scheduled on 10/26/2016 09:00 AM: Continued Motion for Approval of Additional Compensation For Benewah Public Defender	John T. Mitchell
	Court Minutes- Sentencing Hearing Julie Foland Court Reporter	John T. Mitchell
	Sentencing Disposition and Notice of Right to Appeal	John T. Mitchell
	Sentenced To Incarceration (I18-4001-II Murder II) Confinement terms: Penitentiary determinate: 30 years.	John T. Mitchell
	Other Sentencing Information: Indeterminate Life sentence.	John T. Mitchell
	Notice Of Appeal	John T. Mitchell
	Motion to Appoint State Appellate Public Defender	John T. Mitchell
10/28/2016	Order Appointing State Public Defender	John T. Mitchell
	Clerk's Certificate Of Appeal	John T. Mitchell
10/31/2016	Hearing Scheduled (Motion 11/01/2016 02:00 PM) Held in Kootenai County	John T. Mitchell
11/1/2016	Hearing result for Motion scheduled on 11/01/2016 02:00 PM: Hearing Held Held in Kootenai County	John T. Mitchell
	Order on Juror Questionnaires	John T. Mitchell
	Order for Approval of Additional Compensation for Benewah Pubic Defender	John T. Mitchell
11/18/2016	Affidavit Regarding Jury Questionnaires	John T. Mitchell
11/30/2016	Amended Notice Of Appeal	John T. Mitchell
12/7/2016	Amended Clerk's Certificate Of Appeal	John T. Mitchell
12/19/2016	Statement \$3331.25 Cost of Transcript	John T. Mitchell
	Notice Transcript Lodged-Julie Foland	John T. Mitchell
	Transcript Filed	John T. Mitchell
1/9/2017	Transcript Lodged	John T. Mitchell
	Transcript Filed	John T. Mitchell

In the Supreme Court of the State of Idaho

FILED
2015 DEC 28 AM 10:45

BY:  . DEPUTY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 v.)
)
 JOSEPH D. HERRERA,)
)
 Defendant-Appellant.)

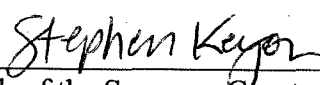
REMITTITUR
Supreme Court Docket No. 41494
Benewah County Court No. 2011-2053

TO: FIRST JUDICIAL DISTRICT, COUNTY OF BENEWAH.

The Court having announced its Opinion in this cause August 7, 2015, which was withdrawn November 30, 2015, and the Court having announced its Substitute Opinion on November 30, 2015; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Substitute Opinion, if any action is required.

DATED this 22 day of December, 2015.


Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge
Publisher(s)

FILED
BENEWAH COUNTY

2015 DEC 30 PM 2:57

BY:  . DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

Case No. CR11-2053

MOTION TO DISQUALIFY

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves the Court as follows:

RELIEF SOUGHT

For an Order Disqualifying Fred Gibler as the District Judge in this matter.

GROUND OF MOTION

The ground of this Motion is ICR 25(a)(5).

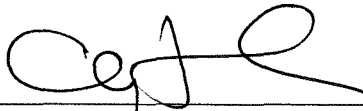
BASIS OF MOTION

The basis of this motion is all the records and files of this action.

ORAL ARGUMENT AND LENGTH OF HEARING

Oral argument and/or testimony is unnecessary under the rule.

DATED this ____ day of December, 2015.



Clayton Andersen
Benewah County Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of December, 2015., I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2015 DEC 31 AM 11:13

BY: [Signature] DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

Case No. CR11-2053

ORDER TO DISQUALIFY

This matter having come before the Court on the undersigned date pursuant to Defendant's Motion to Disqualify Judge Fred Gibler, the Court having reviewed the files and records herein and good cause appearing;

IT IS HEREBY ORDERED the Honorable Fred Gibler is disqualified and the case is submitted to the trial court district judge for reassignment

DATED this 31 day of December, 2015.

[Signature]
Fred Gibler
District Judge

ORDER TO DISQUALIFY PAGE 1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31ST day of December, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

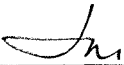
Clayton Andersen interoffice mail

KARLENE BEHLINGER-TCA

Lansing Haynes facsimile transmitted to: 446-1188
District Judge

Benewah Prosecutor interoffice mail

CLERK OF THE DISTRICT COURT

By: 
Deputy


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31ST day of December, 2015., I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail

Benewah Public Defender


Deputy Clerk
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 JAN -6 AM 9:57

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH [Signature] DEPUTY

STATE OF IDAHO,)	
)	
Plaintiff,	)	CASE NO. CR 2011-2053
)	
vs.)	
	)	ORDER OF REASSIGNMENT
JOSEPH HERRERA,)	
)	
Defendant.)	

The Honorable Fred M. Gilller, having been disqualified pursuant to ICR 25(a) now, therefore,

IT IS HEREBY ORDERED that the above matter is reassigned to the Honorable John T. Mitchell, District Judge, for the disposition of any pending and further proceedings.

IT IS FURTHER ORDERED that the following alternate judges are hereby assigned to preside in this case: Cynthia K.C. Meyers, Lansing L. Haynes, John P. Luster, Benjamin R. Simpson, Charles W. Hosack, George R. Reinhardt, III, Steve Verby, Jeff Brudie, Carl Kerrick, John Stegner, Michael Griffin, James Judd, Gregory FitzMaurice.

DATED this 5 day of Jan, 2016

Lansing L. Haynes
 LANSING L. HAYNES
 Administrative District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 6 day of Jan, 2016, a true and correct copy of the foregoing was sent via facsimile, to the following:

Judge Mitchell
Faxed: 208-446-1132

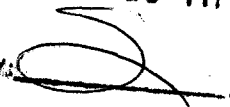
Clayton Andersen
Public Defender
Interoffice Mail

Benewah County Prosecutor
Interoffice Mail

CLERK OF THE DISTRICT COURT
 By [Signature]
 Deputy Clerk

ORDER OF REASSIGNMENT: 1
CR

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

FILED
BENEWAH COUNTY
2016 FEB 23 PM 2:33
BY:  DEPUTY

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

CASE NO. CR11-2053

**STIPULATION TO CONTINUE PRE-
TRIAL AND TRIAL**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender and the Benewah Prosecutor, Brian Thie stipulate to continue the status conference scheduled for February 24, 2016, the pre-trial scheduled for April 13, 2016 at 1:30 p.m. and the trial scheduled to begin on April 25, 2016, for the following reasons:

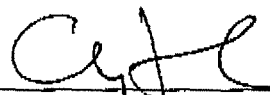
1. The parties have agreed to engage in mediation pursuant to Idaho Criminal Rule 18.1 utilizing District Court Judge John Stegner;
2. The Defendant agrees to waive his right to a quick and speedy trial under the United State Constitution, The Idaho Constitution and Idaho Code Section 19-3501;
3. The Benewah County Prosecutor state wishes to file an Amended Information;
4. The Defendant seeks to have three experts retained at state expense for forensic analysis of the weapon involved, the mental state of the Defendant at the time of the alleged offense and

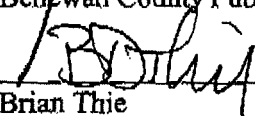
STIPULATION TO CONTINUE PRE-TRIAL AND TRIAL PAGE 1

22

- forensic review of the autopsy;
5. The Benewah County Prosecutor will need additional time to respond to the expert witnesses of the Defendant;
 6. Although the parties have in good faith already discussed stipulating to pre-trial motions, the parties need additional time to file and respond to anticipated pre-trial motions;
 7. The Benewah County Prosecutor State and the Defendant do not believe that there is adequate time to properly prepare for the prosecution and defense of this matter based on the existing pre-trial and trial dates in April 2016;
 8. The Benewah County Prosecutor and the Defendant request a pre-trial and trial in the month of September 2016.

DATED this 23 day of February, 2016.


 Clayton Andersen
 Benewah County Public Defender

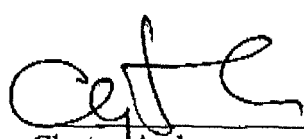

 Brian Thie
 Benewah Prosecuting attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of February, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:


Benewah County Prosecutor

[] Interoffice mail


 Clayton Andersen
 Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 FEB 24 PM 3:49

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

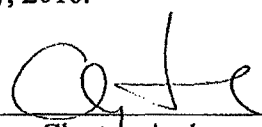
Defendant.

CASE NO. CR11-2053

**MOTION TO AUTHORIZE THE
BENEWAH COUNTY DISTRICT
COURT FUND TO PAY
INTERNATIONAL FORENSIC
EXPERTS, LLC, PURSUANT TO THE
CONTRACT AGREEMENT DATED
12/08/15 ATTACHED**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves for the Benewah District Court Fund to Pay International Forensic Experts, LLC, pursuant to the Contract Agreement dated December 8, 2015 attached with the understanding that any additional funding shall be approved in advance.

DATED this 24 day of February, 2016.


Clayton Andersen
Benewah County Public Defender

No Objection

Brian Thie
Benewah Prosecuting attorney

**MOTION TO AUTHORIZE THE BENEWAH COUNTY DISTRICT COURT FUND TO PAY
INTERNATIONAL FORENSIC EXPERTS, LLC, PURSUANT TO THE CONTRACT AGREEMENT
DATED 12/08/15 ATTACHED PAGE 1**

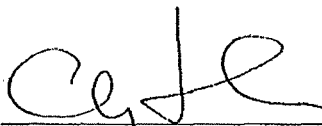
24

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of February 2016,, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 FEB 24 PM 3:49

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

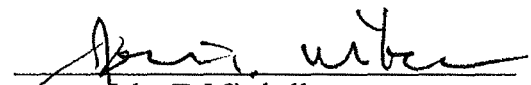
Defendant.

CASE NO. CR11-2053

**ORDER TO AUTHORIZE THE
BENEWAH COUNTY DISTRICT
COURT FUND TO PAY
INTERNATIONAL FORENSIC
EXPERTS, LLC, PURSUANT TO THE
CONTRACT AGREEMENT DATED
12/08/15 ATTACHED**

Based upon the Motion to Authorize the Benewah County District Court Fund to Pay
International Forensic Experts, LLC ^{\$1,725.00 JTM 2/24/16} pursuant to the Contract Agreement dated December 8, 2015
attached with the understanding that any additional funding shall be approved in advance.

DATED this 24th day of February, 2016.



John T. Mitchell
District Judge

Approved as to Form

Brian Thie
Benewah Prosecuting attorney

**ORDER TO AUTHORIZE THE BENEWAH COUNTY DISTRICT COURT FUND TO PAY
INTERNATIONAL FORENSIC EXPERTS, LLC, PURSUANT TO THE CONTRACT AGREEMENT
DATED 12/08/15 ATTACHED PAGE 1**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of February 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor
Benewah County Public defender

interoffice mail
 interoffice mail



Deputy Clerk

**ORDER TO AUTHORIZE THE BENEWAH COUNTY DISTRICT COURT FUND TO PAY
INTERNATIONAL FORENSIC EXPERTS, LLC, PURSUANT TO THE CONTRACT AGREEMENT
DATED 12/08/15 ATTACHED PAGE 2**

27-

Description	BENEWAH CR 2011-2053 Herrera, Joseph 20160224 Status Conference Judge Mitchell Court Reporter Julie Foland Clerk Kim Hushman		
Date	2/24/2016	Location	1K-COURTROOM8
Time	Speaker	Note	
<u>11:26:38 AM</u>	J	Calls case; Anderson obo of Def not present; Thie for PA	
<u>11:33:03 AM</u>		Has been a stip to continue PTC for mid April as well as the trial; Read Stip and will hear argument on that; not inclined to grant motion; has been scheduled for trial I only moved it back one day. Not telling you that I am not inflexible but need argument from you.	
<u>11:34:06 AM</u>	Anderson	Simply stated the 1st is there are logistic issues; need expert to review weapon. Funds for expert; we don't know if he is available on that date.	
<u>11:35:11 AM</u>		I have a Motion for funds; The state has not acted on that;	
<u>11:35:37 AM</u>	Thie	No obj to payment of court funds of \$1,724	
<u>11:35:55 AM</u>	Anderson	Sumbits Motion and proposed Order.	
<u>11:36:18 AM</u>	J	Reviews	
<u>11:36:32 AM</u>	Anderson	I knew that was his position	
<u>11:36:45 AM</u>	J	Funds are Ordered \$1725	
<u>11:36:56 AM</u>	Anderson	We have discussed the option of mediation; unique factors in this case and could be resolved via mediation; Selected Judge Stegner for mediation; his available date is May 15 or May 25; we selected May 25 and would have all information to him by that date. It should take at least a day.	
<u>11:38:24 AM</u>		No other mediator has been explored; confidence in Judge Stegner. He was approached yesterday(2/22/2016). This is a trial that will last upwards of 7 or 8 days. It takes a lot longer to prepare a defense, interview witnesses, etc. The other practical aspect is that there are many other cases I am involved in as well as Mr Thie. We have discussed what would be the pressures to be prepared for this case.	
<u>11:40:55 AM</u>	Thie	Only thing I would add is I am new on this case as well. Discusses previous trial as well as counsel. Cold case to both of us and want to be prepared. Other experts may be called and want adequate time to take care of that. We concurr Andersons motion to continue.	
<u>11:42:24 AM</u>		There are 3 file boxes of materials and I've been working through those. The more I look the more I see I will need more time to devote to this case. Closed CdA office to take care of this case.	

	Anderson	Will take a lot of overtime and I'm not afraid to do so. A lot of information out there and I've already spent countless hours already.
<u>11:43:59 AM</u>	J	I am going to deny the motion at this time; explains. Anderson appeared on this case in September; August actually and it has been about 8 months. Mr Seibe appeared in September and it was held 7 months later. Mediation should have been discussed a long time ago. Brudy does a great job may be available. Plaintiff wanted to file an Amended Info and it has not happened. As far as expert witness argument; money part has been taken care of and I do note that I went through and read minutes from trial; it took 5 days from start to finish; including power outage; other problems that occurred addressed. I am not understanding why it would take 7-8 days.
<u>11:47:19 AM</u>		No detailed argument for that. The plaintiff had 3 people that were to testify; the def called no expert but had other witnesses. Straightforward trial; the number of subs were because of continuances; Deny Motion
<u>11:48:35 AM</u>	Anderson	I did not obtain case file until September; Explains. I have not had nor believe I will have time to properly prepare for this case;
<u>11:49:38 AM</u>	J	Have not heard anything to support claim
<u>11:49:48 AM</u>	Anderson	There was only 2 wit for defense; we will have around 10. Don't know if Def will testify; Simply stated I am probably 75% of time spend as Benewah PD in other cases and add this and expect a person to do this in this time frame; not possible to do the job with the number of hours; need to be properly prepared; argues. This kind of case takes extraordinary amount of time. Urge you not to do this. In addition, the State will probably also want an expert. Number of unknowns that make it difficult.
<u>11:53:08 AM</u>	J	But you have one but don't know if they are available?
<u>11:53:19 AM</u>	Anderson	Witness needs to be properly prepared;
<u>11:54:05 AM</u>	J	At this time The Stip Motion is denied; continue on and if you need to you can set up another hearing. Still 2 months out from trial..
<u>11:54:31 AM</u>	Thie	I mirror Mr Andersons concerns; small county and I have other cases as well. Explains. Think the state would be prejudice on other cases if not committed to those as well. Client is fine with where he is; def waived speedy; and currently in Benewah county jail. Has gone on appeal once already would hate to see it come back again.
<u>11:56:25 AM</u>	J	Still Denying the Motion; if need to can come back at a later time.
<u>11:57:04 AM</u>	Thie	Will file Motion to Amend Information; Add on Count of Dangerous Weapon. Will have to prepare for. Have not filed a Motion yet.
<u>11:57:58 AM</u>		No obj to timing of Motion; critical stage of proceedings. Believe

	Anderson	on other matters I would indicate that he says he does not need to be present.
<u>11:58:35 AM</u>	J	Agree; will schedule that for a hearing here or when I can go to Benewah.
<u>11:59:00 AM</u>	Anderson	Some discussion about moving def to Kootenai County; that makes it more difficult for me. Stip to that NOT to happen.
<u>11:59:33 AM</u>	J	Has court been involved in this discussion
<u>11:59:43 AM</u>	Anderson	It has been discussed with Sherriff office (Benewah)
<u>12:00:00 PM</u>	J	Basis
<u>12:00:03 PM</u>	Anderson	Don't know. Was a concern my client had. He was moved last time. He had less contact w/his DA;
<u>12:00:28 PM</u>	J	Make a Motion to keep in Benewah
<u>12:00:35 PM</u>	Thie	No obj
<u>12:00:39 PM</u>	J	Motion Granted to not have Def moved; other than transport for hearing if need be.
<u>12:01:03 PM</u>	Anderson	Will prepare
<u>12:01:08 PM</u>	END	

Produced by FTR Gold™
www.fortherecord.com

FILED
BENEWAH COUNTY

2016 MAR -2 PM 12: 25

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

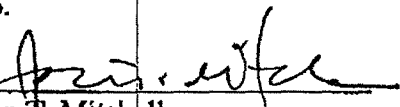
CASE NO. CR11-2053


**ORDER TO KEEP DEFENDANT IN
CUSTODY AT THE BENEWAH
COUNTY JAIL**

Based upon the Stipulation to Keep the Defendant in the Benewah County jail and good cause appearing,

IT IS HEREBY ORDERED that the defendant shall remain at the Benewah County jail until just before the commencement of his trial as scheduled by the court and during the trial, the defendant shall be incarcerated at the Kootenai County Jail.

DATED this 2nd day of March, 2016.


John T. Mitchell
Clayton Andersen

Approved as to Form

Brian Thie
Benewah Prosecuting attorney

ORDER TO HAVE DEFENDANT REMAIN IN BENEWAH COUNTY JAIL UNTIL COMMENCEMENT OF TRIAL PAGE 1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of ~~February~~ ^{March} 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail

Benewah Public Defender

interoffice mail

Benewah County Sheriff

interoffice mail

Foothill County Sheriff




Deputy Clerk

ORDER TO HAVE DEFENDANT REMAIN IN BENEWAH COUNTY JAIL UNTIL COMMENCEMENT OF TRIAL PAGE 2

FILED
BENEWAH COUNTY

2016 MAR -2 PM 12:46

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA


Defendant.

CASE NO. CR11-2053

**MOTION IN LIMINE REGARDING
DEFENDANT'S CHARACTER
EVIDENCE AND OTHER EVIDENCE
RULED INADMISSIBLE BY THE
IDAHO SUPREME COURT**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves for an Order Limiting the Character Evidence by the state in its case in chief, the character evidence and other evidence ruled inadmissible by the Idaho Supreme Court in the decision set forth in Exhibit 1 attached.

DATED this 2 day of March, 2016.



Clayton Andersen
Benewah County Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail



Clayton Andersen
Benewah County Public Defender

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 41494

STATE OF IDAHO,	)	Boise, June 2015 Term
)	
Plaintiff-Respondent,	)	2015 Opinion No. 111
)	
v.	)	Filed: November 30, 2015
)	
JOSEPH D. HERRERA,	)	Stephen W. Kenyon, Clerk
)	
Defendant-Appellant.	)	SUBSTITUTE OPINION. THE
	)	COURT'S PRIOR OPINION
	)	DATED AUGUST 7, 2015 IS
	)	HEREBY WITHDRAWN

Appeal from the District Court of the First Judicial District of the State of Idaho, Benewah County. Hon. Fred M. Gibler, District Judge.

The judgment of conviction is vacated and the case is remanded.

Sara B. Thomas, State Appellate Public Defender, Boise, for appellant. Justin M. Curtis argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

J. JONES, Chief Justice

Joseph Herrera appeals from a conviction of second-degree murder. Herrera was holding a firearm that discharged, killing his girlfriend, Stefanie Comack. Herrera argues (1) there was insufficient evidence to support a finding of malice, and (2) improper testimony from a number of witnesses unfairly prejudiced his case.

**I.
FACTUAL AND PROCEDURAL BACKGROUND**

At the time of the shooting, Herrera and Stefanie had been dating for three to four months and were living together in Herrera's parents' house. For some time leading up to the shooting, Herrera was in possession of two of his father's handguns, which he had taken without his father's knowledge. On December 24, 2011, Herrera was out late and arrived home around 4:30 or 5:00 a.m. on Christmas morning, having used both methamphetamine and marijuana that

morning. Herrera testified that when he arrived home he went to sleep for a few hours and woke up at roughly 10:00 a.m. When Herrera and Stefanie woke up Christmas morning, they began arguing about Facebook messages Stefanie had exchanged with other men and the fact that Herrera did not want to go to Stefanie's mother's house for Christmas.

Herrera testified the gun that killed Stefanie was in the drawer of a nightstand next to his bed the morning of the shooting. He testified that during the course of their argument, Stefanie was packing her things to go to her mother's house and that he was handling the gun. Herrera claims that Stefanie was packing to go to her mother's house only to celebrate Christmas, but the State's theory was that she was packing to leave Herrera and end the relationship. He testified that he planned to drive Stefanie to her mother's house and was unloading the gun to hide it so his mother would not find it while he was gone. At some point, Herrera removed the magazine from the gun, but there was a round in the chamber. Herrera testified that at the moment he picked the gun up out of the drawer, he did not believe there was a round in the chamber.

He gave varying accounts of what exactly caused the gun to discharge. Herrera told the first officer on scene that when he was trying to unload the gun it just "went off and hit her in the head." In a police interview several hours after the shooting, Herrera told the officers he was in the process of taking the magazine out of the gun, and then he pulled the slide back, and the gun went off. At trial, Herrera testified that he began to lift the gun to point it at himself to make the point to Stefanie that he would rather kill himself than go to her mother's house for Christmas. He said that when he began to do this, Stefanie "grabbed the barrel of the gun and pulled it and it went off." In his factual account provided at trial, Herrera did not testify to ever touching or pulling on the gun's slide. When asked whether he did pull the slide back, Herrera stated that he did not remember. Herrera testified that, although he had never shot this gun before, he did have experience shooting guns, and he had taken a hunter's safety course.

Although Herrera testified he did not remember the gun coming into contact with Stefanie's forehead, testimony from the emergency room physician who first examined Stefanie and from the county medical examiner strongly evidenced that the gun was pressed against Stefanie's forehead when it fired. Additionally, testimony from an Idaho State Police forensic scientist established that the gun was incapable of firing without the trigger being pulled. He also testified that when the magazine was in the gun and there was only one cartridge remaining in the gun, the gun tended to fail to eject the final cartridge from the chamber when the slide was

pulled.

By all accounts, Herrera was extremely upset after the fatal shot was fired. His mother testified that Herrera “was standing, and was waving his arms, and he was screaming and saying, ‘Oh, my God. I accidentally shot Stefanie.’” When the first officer arrived, Herrera ran to him, screaming for help because he had accidentally shot his girlfriend. The officer described Herrera as “totally hysterical,” that “[h]e was just screaming. Not really coherently very much.”

Following a police interview, Herrera was arrested and charged with second-degree murder. Prior to trial, the district court held a hearing to determine the admissibility of certain evidence at trial, consisting primarily of testimony from third parties as to statements allegedly made by Stefanie concerning her relationship with Herrera and past violent events involving Herrera. The court ruled that a number of these statements would be admissible at trial to show Stefanie’s state of mind in the days leading up to the shooting. With these statements the State attempted to show that Stefanie was unhappy in the relationship and intended to end it. There were also statements made by witnesses at trial concerning matters the court had specifically excluded following the pre-trial hearing. The jury was instructed on second-degree murder, voluntary manslaughter, and involuntary manslaughter. Herrera was convicted of second-degree murder and sentenced to life in prison with twenty-two years fixed. He timely appealed.

II. ISSUES ON APPEAL

Herrera raises the following issues on appeal:

1. Whether there is sufficient evidence to support a finding of the malice required for a second-degree murder conviction.
2. Whether testimony at trial unfairly prejudiced Herrera’s case.

III. ANALYSIS

A. **There was sufficient evidence to support the jury’s verdict.**

Herrera argues that, as a matter of law, one who believes a gun is unloaded cannot have the malice required for second degree murder if that gun fires and a death results. He also argues that allowing one to be convicted of murder under the circumstances in this case would render a nullity part of Idaho Code section 18-4006’s involuntary manslaughter provision. This issue is a mixed question of law and fact. The legal question is whether a belief that a gun is unloaded prevents any possible finding of the malice required for murder. If the answer to that question is

anything but an unqualified “yes,” the factual determination must then be made as to whether Herrera’s specific conduct shows he acted with malice. The authorities do not support the bright-line distinction between murder and manslaughter that Herrera suggests.

“Murder is the unlawful killing of a human being . . . with malice aforethought.” I.C. § 18-4001. Malice can be express or implied. I.C. § 18-4002. It is express where one has the deliberate intention to unlawfully take a life. *Id.* One acts with implied malice where “the circumstances attending the killing show an abandoned and malignant heart.” *Id.* Implied malice may include killings where there is no intent to kill, such as a killing during the commission of a felony or a killing evidencing a depraved heart. *State v. Lankford*, 116 Idaho 860, 866–67, 781 P.2d 197, 203–04 (1989). In *State v. Porter*, we stated the elements of implied malice that will support a charge of murder under a depraved heart theory are met when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

142 Idaho, 371, 374–75, 128 P.3d 908, 911–12 (2005); *see also* ICJI 702. Ultimately, it is the province of the jury to determine whether the evidence in the record supports only a conviction of manslaughter or whether there is sufficient proof of malice to amount to murder.¹ *State v. Gomez*, 94 Idaho 323, 325, 487 P.2d 686, 688 (1971).

Herrera cites several sources to support his argument that the authorities uniformly hold one cannot have the requisite malice for murder and also believe his or her gun to be unloaded. He quotes American Jurisprudence as follows:

Where a person points a pistol at another in sport, as a joke, or merely to cause fright, believing and perhaps having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he or she is guilty of manslaughter.

40 Am. Jur. 2d Homicide § 90. He also cites several cases from non-controlling jurisdictions to support the same proposition. However, Herrera fails to address language in these sources acknowledging circumstances where such conduct can amount to second-degree murder.

¹ Although the court may apply a presumption of malice where the use of a deadly weapon results in unlawful death, *Gomez*, 94 Idaho at 325, 487 P.2d at 688, the district court denied the State’s request for an instruction on this presumption. The record does not contain the discussion leading to the court’s rejection of the instruction, and we do not address the applicability of the presumption to this case.

American Jurisprudence states that the standard quoted by Herrera is correct only “under circumstances not evidencing a heart devoid of a sense of social duty.” *Id.* Additionally, the cases he cites show that courts look at the totality of the circumstances surrounding the killing to decide whether a defendant acted with malice. While the courts do consider whether the shooter believed the firearm to be loaded, that is one of several factors. None of the sources cited by Herrera support the bright-line distinction he suggests. Therefore, even assuming *arguendo* that Herrera believed the firearm to be unloaded, an examination of his specific conduct is necessary to determine whether there was substantial evidence to support a finding of malice.

Herrera further argues that to allow one to be convicted of murder while believing the firearm to be unloaded would nullify a portion of the involuntary manslaughter provision. In relevant part, that section provides that involuntary manslaughter is the non-malicious “unlawful killing of a human being . . . in the operation of any firearm or deadly weapon in a reckless, careless or negligent manner.” I.C. § 18-4006(2). Although involuntary manslaughter includes some killings that result from reckless operation of a firearm, when the degree of recklessness rises to the level of a disregard for human life, the killing rises to the level of murder. LaFave’s treatise on criminal law is helpful in a further explanation of this concept, and we have made use of that source a number of times in discussing malice. *See, e.g. Lankford*, 116 Idaho at 866–67, 781 P.2d at 203–204; *State v. Enno*, 119 Idaho 392, 404, 807 P.2d 610, 622 (1991).

LaFave explains the conduct required for depraved heart murder by a comparison to various lesser degrees of risk. 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.4(a) (2d ed.). Conduct that creates an “unreasonable risk” of injury is “ordinary negligence.” *Id.* Conduct that creates a “high degree of risk” is “gross negligence.” *Id.* If the person creating that risk realizes the risk, the conduct is “reckless.” *Id.* Grossly negligent or ordinary reckless conduct that results in death may serve as a basis for manslaughter but is insufficient for murder. *Id.* For depraved heart murder there must be a “very high degree” of risk, which is something quite substantial, but is “something far less than certainty or substantial certainty.” *Id.* (footnote omitted). The difference between these risks is one of degree, and there is no exact boundary between each category. *Id.* However, it is not the degree of risk in the abstract that matters to the determination; in other words, it is not the mathematical probability of harm that shows the degree or risk. *Id.* Instead, it is evaluated by “what the defendant should realize to be the degree of risk, in the light of the surrounding circumstances which he knows.” *Id.*

In assessing the category of risk, the social utility of the conduct should also be considered. *Id.* For example, one speeding through crowded streets in a reckless manner in order to rush an injured passenger to the hospital for emergency treatment may create a very high probability that someone will be killed. *Id.* But that high probability should be considered in light of the social utility of trying to save the passenger. *Id.* Therefore, the degree of risk in that situation might only rise to the level required for manslaughter. *Id.* That example is in contrast with a Texas case where a defendant fired two bullets into the side of the caboose of a passing train. *Id.* (citing *Banks v. State*, 211 S.W. 217 (Tex. Crim. 1919)). Under the circumstances of that case, it was more likely that someone would not be killed than that someone would be. *Id.* When considering the area of the inside of the caboose filled by vital organs of its human occupants, perhaps there was no more than a five percent chance that one would be killed by this conduct. *Id.* The probability of death in the shooting case might be far less than that of the driving example. However, “[i]n view of the lack of social utility in shooting into the side of the caboose, the risk of 5% was held enough for murder in that case.” *Id.*

These types of reckless conduct that create a very high degree of risk and include little or no social utility amount to a disregard for human life sufficient to constitute malice and should, therefore, be punishable as murder when the conduct results in death. Reckless conduct creating lesser degrees of risk or perhaps including a higher degree of social utility do not show malice and should, therefore, be punishable by manslaughter when the conduct results in death. Though there is not a clear-cut distinction between these types of conduct, it is clear that I.C. § 18-4006’s categorization of the reckless operation of a firearm as involuntary manslaughter will not be nullified by allowing a finding of malice where the shooter’s reckless conduct amounts to such a high degree of risk that it is essentially a disregard for human life.

The State presented evidence in this case that: (1) Herrera was in possession of the gun when it discharged; (2) the gun was held to Stefanie’s forehead at the moment it discharged; (3) the gun could not discharge without the trigger being pulled; (4) Herrera was at least partially under the influence of drugs at the time of the shooting; (5) Herrera and Stefanie were arguing in the moments leading up to the shooting; and (6) Herrera had experience in shooting guns. Given such circumstances, the question of second degree murder was properly submitted to the jury. Furthermore, this evidence was sufficient to support the jury’s verdict, with or without the objectionable evidence identified in Section III.B.

B. Testimony elicited at trial unfairly prejudiced Herrera.

For questions of admissibility of evidence, the Court employs a mixed standard of review: “First, whether the evidence is relevant is a matter of law that is subject to free review. Second, we review the district court’s determination of whether the probative value of the evidence outweighs its prejudicial effect for an abuse of discretion.” *State v. Shackelford*, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010) (internal citation omitted). Abuse-of-discretion review requires an examination of “(1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason.” *Id.* Should the Court find error in the evidentiary rulings of the district court, we must then determine whether such error was “harmless.” *State v. Moses*, 156 Idaho 855, 867, 332 P.3d 767, 779 (2014).

Herrera argues four witnesses at trial provided inappropriate testimony concerning his alleged prior acts and hearsay statements allegedly made by Stefanie in the weeks leading up to her death.² He argues that the majority of this testimony was irrelevant and that the prejudicial effect substantially outweighed any minimal probative value there may have been. The State responds that Stefanie’s statements were relevant to show she was unhappy in her relationship with Herrera and intended to end it. It further responds that any risk of unfair prejudice to Herrera was alleviated by the district court’s limiting instructions. We agree with Herrera.

“Hearsay” is an out-of-court statement “offered in evidence to prove the truth of the matter asserted.” I.R.E. 801(c); *State v. Trevino*, 132 Idaho 888, 894, 980 P.2d 552, 558 (1999). Hearsay evidence is generally inadmissible except as provided in the Idaho Rules of Evidence or other rules promulgated by the Court. I.R.E. 802. There are several exceptions to the general rule

² We refer to these statements as “hearsay statements” because the district court stated both at the hearing on the admissibility of evidence and at trial that it was admitting the statements under I.R.E. 803(3), which provides for the admission of hearsay statements of the declarant’s then-existing state of mind. However, the district court also specifically instructed the jury that the statements were not to be considered for the truth of any matters asserted therein, which seems to take the statements outside the scope of the definition of “hearsay.” We recently reiterated in *State v. Abdullah* that statements circumstantially showing a declarant’s state of mind, but not stating it, may be admissible for a non-hearsay purpose, in which case, an analysis under the hearsay rules need not be undertaken. 158 Idaho 386, 437, 348 P.3d 1, 52 (2015). We further stated that “[s]ince the declaration is admissible in either event, it seems of no practical importance to determine in a given instance whether the declaration offered to show the declarant’s existing state of mind is technically hearsay or non-hearsay.” *Id.* (quoting *State v. Radabaugh*, 93 Idaho 727, 731, 471 P.2d 582, 586 (1970)). Therefore, we do not rule on the issue of whether these challenged statements amount to hearsay statements or not. Additionally, although we also refer to the statements as “state-of-mind evidence,” as explained below, the statements actually have quite a tenuous relationship to the declarant’s state of mind.

particular circumstances presented by this case to find that Herrera was denied the opportunity of a fair trial. The judgment of conviction must therefore be vacated.

IV.

CONCLUSION

We vacate the judgment of conviction. The case is remanded for further proceedings consistent with this opinion.

JUSTICES EISMANN, BURDICK, W. JONES and HORTON CONCUR.

FILED
BENEWAH COUNTY

2016 MAR -2 PM 2:29

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**MOTION TO EXCLUDE JAMES
COMACK FROM COURT
PROCEEDINGS**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public
Defender moves the Court as follows:

RELIEF SOUGHT

1. For an Order Excluding James Comack from the court proceedings..

2. GROUNDS OF MOTION

The grounds of this Motion are as follows:

1. ICR 12(b)

2. Jim Comack has previously disturbed court proceedings including an attempt to attack the Defendant at Trial in this matter. (See Trail Transcript 177) and court minutes and other court proceedings (Trial Transcript page 179).
3. The previous order of Judge Gibler occurring at the trial of this matter (See Trail Transcript page 179).
4. The Defendant has been advised by numerous persons that James Comack wishes to harm or kill him and he has no reason to believe that these threats have subsided or are no longer valid.)
5. The Defendant's fundamental right to a fair trial.

BASIS OF MOTION

The basis of this motion is all the records and files of this action and evidence to be adduced at a hearing in this matter.

ORAL ARGUMENT AND LENGTH OF HEARING

Oral argument and/or testimony in support thereof. Requested time is ten minutes.

DATED this 2 day of March, 2016.

Attorney for Defendant

By: _____

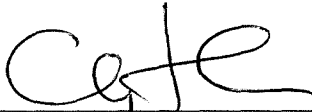
Clayton Andersen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

Interoffice mail



Clayton Andersen

FILED
BENEWAH COUNTY

2016 MAR 3 PM 4:14

BY: [Signature] DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR11-2053
)	
vs.)	
	)	OBJECTION TO MOTION
JODY DUANE HERRERA,)	
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for the County of Benewah, State of Idaho, on behalf of Benewah County and hereby objects to the defendant's Motion to Exclude James Comack From Court Proceedings and requests that a hearing be set for James Comack to be heard.

DATED this 3 day of March, 2016.

[Signature]
Brian D. Thie
Prosecuting Attorney

I hereby certify that on the 3
day of March, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By BDH

FILED
BENEWAH COUNTY

2016 MAR -3 PM 4:14

BY: [Signature] DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR11-2053
)	
vs.)	
	)	OBJECTION TO MOTION
JODY DUANE HERRERA,)	
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for the County of Benewah, State of Idaho, on behalf of Benewah County and hereby objects to the defendant's vague Motion in Limine Regarding Defendant's Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court and requests that the defendant set out specific evidence to be excluded.

DATED this 3 day of March, 2016.

[Signature]
Brian D. Thie
Prosecuting Attorney

I hereby certify that on the 3
day of March, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By BDT

FILED
BENEWAH COUNTY

2016 MAR -4 PM 4:29

BY: [Signature] DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR11-2053
)	
vs.	)	AMENDED
	)	OBJECTION TO MOTION
JOSEPH DUANE HERRERA,)	
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for the County of Benewah, State of Idaho, on behalf of Benewah County and hereby objects to the defendant's Motion to Exclude James Comack From Court Proceedings and requests that a hearing be set for James Comack to be heard.

DATED this 4 day of March, 2016.

[Signature]
Brian D. Thie
Prosecuting Attorney

I hereby certify that on the 4
day of MAY, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By

BDT

FILED
BENEWAH COUNTY

2016 MAR -4 PM 4:28

BY: [Signature] DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR11-2053
)	
vs.	)	AMENDED
	)	OBJECTION TO MOTION
JOSEPH DUANE HERRERA,)	
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for the County of Benewah, State of Idaho, on behalf of Benewah County and hereby objects to the defendant's vague Motion in Limine Regarding Defendant's Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court and requests that the defendant set out specific evidence to be excluded.

DATED this 4 day of MARCH, 2016.

[Signature]
Brian D. Thie
Prosecuting Attorney

I hereby certify that on the 4
day of MAY, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By

B. Butler

COURT MINUTES

CR-2011-0002053

State of Idaho vs. Joseph Duane Herrera

Hearing type: Mediation

Hearing date: 3/8/2016

Time: 10:18 am

Judge: Stensgar

Courtroom: 001

Minutes Clerk: Stacy Bradbury

Tape Number:

Defense Attorney: Clayton Andersen

Prosecutor: Brian Thie

1020 Judge Calls Case Defendant is Present in Custody. Susan and Stephany Comack and Stephany Reeves. Mediation. I am not presiding Judge and will not be the presiding Judge. We are here to try and come to an agreement. It has to be acceptable to each side. I will talk to each side separately. Normally we are not allowed to do that because it would be ex-parte communication. What you say to me will be said in confidence and only will be said to the other side unless I have your permission. All have given permission to talk to both sides. Mr Herrera would like to proceed today with Mr Andersen I will be continuing to seek new counsel after the mediation. In a 2nd degree murder trial case it will be very hard for an anther attorney to get up to speed with your case. If we come to an agreement we will come back on the record, and if we can't we can't.

1027 Recess

FILED
BENEWAH COUNTY

2016 MAR -8 PM 4:52

BY:  .DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

Case No. CR11-2053

MOTION TO TRANSPORT FOR
HEARINGS

COMES NOW, Clayton Andersen, Benewah County Public Defender, and moves to have the Defendant transported by the Benewah County Sheriff's Office for court hearings before Judge Mitchell at 4:00 p.m. on March 22, 2016 in Kootenai County Courthouse and to return the Defendant to the Benewah County Jail after completion of the hearings held in this matter. The prosecutor has no objection to this motion pursuant to oral agreement by telephone on March 8, 2016.

I HEREBY CERTIFY that on the 8 day of March 2016, a true and correct copy of the foregoing document was served upon the Benewah County Prosecutor.

DATED this 8 day of March, 2016.



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 MAR -9 AM 9:30

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

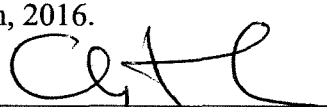
Case No. CR11-2053

MOTION TO REPLACE DEFENSE
ATTORNEY

COMES NOW, Clayton Andersen, Benewah County Public Defender, and moves for the court to consider the Defendant's request by letter attached to have the undersigned replaced.

I HEREBY CERTIFY that on the 9 day of March 2016, a true and correct copy of the foregoing document was served upon the Benewah County Prosecutor.

DATED this 8 day of March, 2016.



Clayton Andersen
Benewah County Public Defender

Dear Honorable Judge Mitchell,

I would like to request A Meeting
With you for the purpose of requesting
A change of lawyer please advise of procedure

Sincerely,

Joe Herrera
Joe Herrera

FILED
BENEWAH COUNTY

2016 MAR -9 PM 1:54

BY:  .DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,)	
	)	Case No. CR11-2053
vs.)	
	)	MOTION TO PERMIT
JOSEPH DUANE HERRERA,	)	AMENDED INFORMATION
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for Benewah County, State of Idaho, and moves this court for an order permitting amendment of the Prosecuting Attorney's Information filed herein. This motion is made pursuant to I.C.R. 7, and on the grounds that:

1) Counsel is new to the case having been appointed as prosecuting attorney on October 1, 2015. As such he was not original trial counsel and had no interest in the matter at the time of trial or appeal.

2) Counsel affirms that this motion is not brought for vindictiveness because the defendant obtained a reversal of the judgment and order for new trial.

3) As a result of the appeal, not only was the jury verdict reversed, but several witnesses will not be allowed to testify

as to matters, including prior bad acts by the defendant, as relayed to them by the victim, Stefanie Comack.

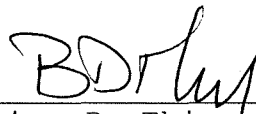
4) Secondly, said decision of the Supreme Court envisions somewhat the possibility of a conviction for manslaughter, a possibility the earlier prosecutor likely didn't contemplate, given the evidence he had available at the time of trial.

5) By amending the information, no new charges are brought, there is no prejudice to the defendant due to new facts being determined. It simply allows the potential top end of the sentence to go to 25 or 30 years, if manslaughter is found.

6) When the trial court sentenced after the first trial, it sentenced defendant 22 years to life. The evidence heard by the court would have still been heard in any event at sentencing and so, regardless of the verdict, the State would still like the opportunity to argue for the same determinate sentence.

WHEREFORE the State prays for an order of this court allowing amendment of the Prosecuting Attorney's Information, so that it alleges in Part II that defendant did use a firearm while committing the crime alleged in Count I of the information. A copy of the proposed Amended Information is attached hereto.

DATED this 9 day of March, 2016.



Brian D. Thie
Prosecuting Attorney

I hereby certify that on the 9
day of March, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage prepaid,
to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By BDIly

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)
)
 Plaintiff,)
) Case No. CR11-2053
 vs.)
) AMENDED PROSECUTING
 JOSEPH DUANE HERRERA,) ATTORNEY'S INFORMATION
 DOB: [REDACTED])
)
 Defendant.)
 _____)

BRIAN D. THIE, Prosecuting Attorney in and for Benewah County, State of Idaho, who, in the name and by the authority of said State prosecutes in its behalf, in proper person comes into said District Court in the County of Benewah, State of Idaho, on the _____ day of _____, 2016, and gives the Court to understand and be informed that JOSEPH DUANE HERRERA is accused by this Information of:

COUNT I

That the crime of MURDER IN THE SECOND DEGREE, a felony, in violation of Idaho Code Section 18-4001 and 18-4003(g), which has been committed by the said defendant as follows, to-wit: that the said JOSEPH DUANE HERRERA on or about the 25th day of December, 2011, in the County of Benewah, State of Idaho, did unlawfully and with malice aforethought, but without premeditation, kill Stefanie Comack, a human being, by willfully

and deliberately pointing a .380 handgun at her head and pulling the trigger, from which she died; and

PART II

That the crime of USE OF A FIREARM DURING THE COMMISSION OF A CRIME, a felony, in violation of Idaho Code Section 19-2520 has been committed by the said defendant as follows, to-wit: that the said JOSEPH DUANE HERRERA on or about the 25th day of December, 2011, at and in the County of Benewah, State of Idaho, he did then and there use a firearm, to-wit: a .380 handgun, in the commission of the crime alleged in Count I.

All of which is contrary to the statute in such case made and provided and against the peace and dignity of the State of Idaho.

Prosecuting Attorney

I hereby certify that on the _____
day of _____, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By _____

FILED
BENEWAH COUNTY

2016 MAR 10 PM 2:41

BY:  . DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

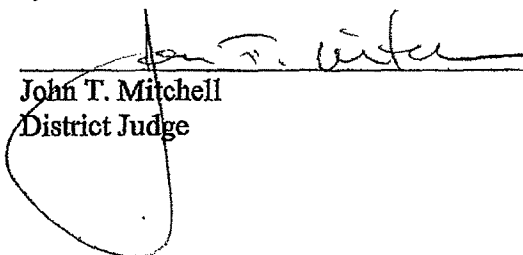
Defendant.

Case No. CR11-2053

ORDER TO TRANSPORT FOR
HEARINGS

Based on the Motion of the Defendant to Transport for Hearings and good cause appearing,
IT IS HEREBY ORDERED the Defendant shall be transported by the Benewah County
Sheriff's Office for court hearings before Judge Mitchell at 4:00 p.m. on March 22, 2016 in Kootenai
County Courthouse and to return the Defendant to the Benewah County Jail after completion of the
hearings held in this matter.

DATED this 10th day of March, 2016.


John T. Mitchell
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of ~~February~~ March 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

- Benewah County Prosecutor interoffice mail
- Benewah Public Defender interoffice mail
- Benewah County Sheriff interoffice mail



Deputy Clerk

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:19

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**BRIEF IN SUPPORT OF
MOTION IN LIMINE
REGARDING FLEEING BY THE
DEFENDANT**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender submits his brief in support of His Motion in Limine regarding Fleeing by the Defendant as follows:

FACTUAL REVIEW

The transcript of the prior trial clearly shows that the Defendant removed himself from 319 South 14th Street, St. Maries, ID, shortly after noon because of numerous Comack family members appearing at this location armed and shouting threats of physical violence to the Defendant and he was told to leave by Officer Castle. The Defendant voluntarily came to the St. Maries Police station at approximately 6:00 p.m. on December 25, 2011.

ARGUMENT AND AUTHORITY

The facts of this case clearly demonstrate that the Defendant's departure from the alleged crime scene was done after Stefanie Comack's family came to the Defendant's residence armed as well as making verbal threats towards the Defendant and the Defendant was instructed to leave by Officer Castle. In State v. Wrenn, 99 Idaho 506 (1978), the Idaho Supreme Court stated "Mere departure from area where crime allegedly took place is not by itself sufficient to support jury instruction allowing jury to consider defendant's flight as evidence of guilt. For departure to take legal significance of flight, there must be other circumstances present and unexplained which, together with departure, reasonably justify inference that it was done with consciousness of guilt and in effort to avoid apprehension or prosecution based on that guilt."

The Idaho Supreme Court in State v. Moore, 131 Idaho 814 (1998), stated "Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial judge to conduct a two-part analysis; the judge first must determine that the evidence is relevant, and then the judge must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Rules of Evid., Rules 401, 403." The court further stated, "For defendant's departure to take on the legal significance of flight to avoid prosecution, there must be other circumstances present and unexplained which, together with the departure, reasonably justify an inference that it was done with a consciousness of guilt and in an effort to avoid apprehension or prosecution based on that guilt."

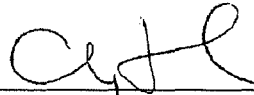
bb

CONCLUSION

Under the facts of this case, the departure is explained because of the conduct of Stefanie Comack's family and Officer Loe's instructions for the Defendant to leave so that the probative value of his departure would be outweighed by the unfair prejudice to the Defendant.

DATED this 10 day of March, 2016.

Attorney for Defendant



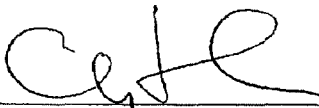
Clayton Andersen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

interoffice mail



Clayton Andersen

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:19

BY:  . DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**MOTION IN LIMINE
REGARDING FLEEING BY THE
DEFENDANT**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves the Court as follows:

RELIEF SOUGHT

For an Order In Limine that the State be precluded from argument or presenting in its case in chief evidence that the Defendant fled from law enforcement on December 25, 2011, as a conscientiousness of guilt or as an admission of guilt.

68

GROUNDS OF MOTION

The grounds of this Motion are as follows:

1. ICR 12(b)
2. The Defendant left 319 South 14th Street, St. Maries, ID because of numerous Comack family members appearing at this location armed and shouting threats of physical violence to the Defendant.
3. The Defendant was told to leave by Officer Castle;
4. The trial transcript;
5. The Defendant at the time of his departure had not been arrested or charged with any criminal offense.
6. IRE 401 & 403;
7. The Defendant's Brief in Support of Motion in Limine
8. The Defendant's fundamental right to a fair trial.

BASIS OF MOTION

The basis of this motion is all the records and files of this action and evidence to be adduced at a hearing in this matter.

ORAL ARGUMENT AND LENGTH OF HEARING

Oral argument and/or testimony in support thereof. Requested time is thirty minutes.

DATED this 10 day of March, 2016.

69

Attorney for Defendant



Clayton Andersen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

interoffice mail



Clayton Andersen

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:18

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**MOTION FOR BENEWAH
COUNTY SHERIFF TO
TRANSFER DEFENDANT'S
MEDICATIONS AND FOR THE
KOOTENAI COUNTY JAIL TO
ADMINISTER MEDICATIONS
PRESCRIBED TO DEFENDANT
DURING ANY TIME PERIODS
HE IS IN CUSTODY AT THE
KOOTENAI COUNTY JAIL
DURING DEFENDANT'S TRIAL**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves the Court as follows:

RELIEF SOUGHT

For an Order requiring the Kootenai County Sheriff Jail staff to permit the Defendant to take the medications prescribed to him and for the Benewah County Sheriff's to transfer the

MOTION FOR BENEWAH COUNTY SHERIFF TO TRANSFER DEFENDANT'S MEDICATIONS AND FOR THE KOOTENAI COUNTY JAIL TO ADMINISTER MEDICATIONS PRESCRIBED TO DEFENDANT DURING ANY TIME PERIODS HE IS IN CUSTODY AT THE KOOTENAI COUNTY JAIL DURING DEFENDANT'S TRIAL PAGE 1

71

medication for the Defendant when the Defendant is transferred to the Kootenai County Jail during the trial scheduled in this matter.

GROUNDS OF MOTION

The grounds of this Motion are as follows:

1. ICR 12(b)
2. The Defendant requires this medication in order to effectively assist his attorney during the trial of this matter.
3. During the Defendant's incarceration at the Kootenai County Jail, he was not permitted to take his medication necessitating a court order.
4. The Defendant's fundamental right to a fair trial.

BASIS OF MOTION

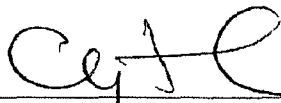
The basis of this motion is all the records and files of this action and evidence to be adduced at a hearing in this matter.

ORAL ARGUMENT AND LENGTH OF HEARING

Oral argument and/or testimony in support thereof. Requested time is less than ten minutes.

DATED this 10 day of March, 2016.

Attorney for Defendant



Clayton Andersen

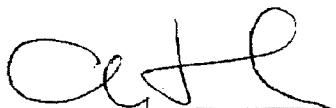
MOTION FOR BENEWAH COUNTY SHERIFF TO TRANSFER DEFENDANT'S MEDICATIONS AND FOR THE KOOTENAI COUNTY JAIL TO ADMINISTER MEDICATIONS PRESCRIBED TO DEFENDANT DURING ANY TIME PERIODS HE IS IN CUSTODY AT THE KOOTENAI COUNTY JAIL DURING DEFENDANT'S TRIAL PAGE 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

interoffice mail



Clayton Andersen

MOTION FOR BENEWAH COUNTY SHERIFF TO TRANSFER DEFENDANT'S MEDICATIONS AND FOR THE KOOTENAI COUNTY JAIL TO ADMINISTER MEDICATIONS PRESCRIBED TO DEFENDANT DURING ANY TIME PERIODS HE IS IN CUSTODY AT THE KOOTENAI COUNTY JAIL DURING DEFENDANT'S TRIAL PAGE 3

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:18

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

CASE NO. CR11-2053

**MOTION IN LIMINE REGARDING
PORTIONS OF DEFENDANT'S PRIOR
TESTIMONY REGARDING HIS
REBUTTAL TO THE CHARACTER
EVIDENCE AND OTHER EVIDENCE
RULED INADMISSIBLE BY THE
IDAHO SUPREME COURT**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves for an Order Limiting the portions of Defendant's prior testimony regarding his rebuttal cadence to the character evidence by the state in its case in chief and other evidence ruled inadmissible by the Idaho Supreme Court in the decision in this matter.

GROUND OF MOTION

1. The decision by the Idaho Supreme Court in this matter.
2. The trial transcript testimony of the defendant as follows:
 - a. P. 88 L 12 to P. 89 L2;
 - b. P. 89 L. 3-19;
 - c. P. 90 L 1-2;

MOTION IN LIMINE REGARDING PORTIONS OF DEFENDANT'S PRIOR TESTIMONY REGARDING HIS REBUTTAL TO THE CHARACTER EVIDENCE AND OTHER EVIDENCE RULED INADMISSIBLE BY THE IDAHO SUPREME COURT PAGE 1

- d. P. 90 L 10-P. 91 L. 1;
- e. P. 109 line 10-20;
- f. P.149 line 6-11.

GROUNDS OF MOTION

- 1. Idaho Supreme Court Opinion;
- 2. IRE 401 and 404;
- 3. Prior trial transcript.

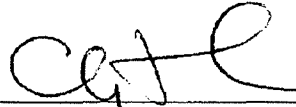
BASIS OF MOTION

The basis of this motion is all of the records and files of this action.

ORAL ARGUMENT

Oral argument is requested and the estimated time of argument is 20 minutes.

DATED this 16 day of March, 2016.



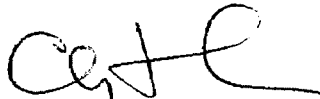
 Clayton Andersen
 Benewah County Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:18

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**MOTION FOR DEFENDANT TO
BE ABLE TO WEAR STREET
CLOTHES AND THE
DEFENDANT NOT BE
HANDCUFFED OR HAVE
OTHER RESTRAINTS IN THE
PRESENCE OF THE JURY
DURING DEFENDANT'S TRIAL**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves the Court as follows:

RELIEF SOUGHT

For an Order that the Defendant be able to wear civilian clothing and that he not be in handcuffs or other restraints in the presence of the jury during his trial.

GROUND'S OF MOTION

The grounds of this Motion are as follows:

MOTION FOR DEFENDANT TO BE ABLE TO WEAR STREET CLOTHES AND THE DEFENDANT NOT BE HANDCUFFED OR HAVE OTHER RESTRAINTS IN THE PRESENCE OF THE JURY DURING DEFENDANT'S TRIAL PAGE 1

1. ICR 12(b);
2. The Defendant's appearance in jail house clothing has an inference of guilt;
3. The Defendant's request to wear civilian clothing was previous granted by the court;
4. The restraint of the Defendant in handcuff's does not allow him to write effectively and has an inference of guilt if viewed by the jury;
5. The restraint of the Defendant by other means has an inference of guilt if viewed by the jury;
6. The Defendant has not had any history of threatening or attempting to escape or to abide by the requests of the court or the sheriff's office;
7. There is no history of the Defendant threatening behavior which is disruptive to the courtroom process.
8. The Defendant's fundamental right to a fair trial.

BASIS OF MOTION

The basis of this motion is all the records and files of this action and evidence to be adduced at a hearing in this matter.

ORAL ARGUMENT AND LENGTH OF HEARING

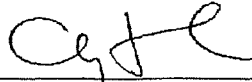
Oral argument and/or testimony in support thereof. Requested time is less than ten minutes.

DATED this 10 day of March, 2016.

MOTION FOR DEFENDANT TO BE ABLE TO WEAR STREET CLOTHES AND THE DEFENDANT NOT BE HANDCUFFED OR HAVE OTHER RESTRAINTS IN THE PRESENCE OF THE JURY DURING DEFENDANT'S TRIAL PAGE 2

78

Attorney for Defendant



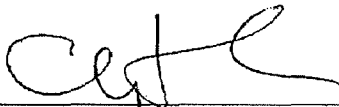
Clayton Andersen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

Interoffice mail



Clayton Andersen

MOTION FOR DEFENDANT TO BE ABLE TO WEAR STREET CLOTHES AND THE DEFENDANT NOT BE HANDCUFFED OR HAVE OTHER RESTRAINTS IN THE PRESENCE OF THE JURY DURING DEFENDANT'S TRIAL PAGE 3

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:18

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**BRIEF IN SUPPORT OF
MOTION IN LIMINE RE
DISPLAY OF STEPANIE
COMACK'S PHOTOGRAPHS TO
THE JURY IN OPENING
ARGUMENT AND A PRIOR
DETERMINATION BY THE
COURT ON THE
PHOTOGRAPHS THAT THE
STATE INTENDS TO PRODUCE
IN EVIDENCE REGARDING
STEPANIE COMACK**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender SUBMITS THE Brief in Support of Defendant's Motion re Display of Stephanie Comack's Photographs to the Jury in Opening Argument and a prior determination by the Court on the Photographs that the State intends to Produce in Evidence Regarding Stefanie Comack as follows:

**BRIEF IN SUPPORT OF MOTION IN LIMINE RE DISPLAY OF STEPANIE COMACK'S
PHOTOGRAPHS TO THE JURY IN OPENING ARGUMENT AND A PRIOR DETERMINATION BY
THE COURT ON THE PHOTOGRAPHS THAT THE STATE INTENDS TO PRODUCE IN EVIDENCE
REGARDING STEPANIE COMACK
PAGE 1**

80

FACTUAL DISCUSSION

The state has not presented the Defendant with a copy of the photographs that the state intends to produce to the jury so the court needs to require the state to produce these photographs so the court can review the photographs so that the court can determine the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ARGUMENT AND LEGAL AUTHORITY

The Idaho Supreme Court in State v. Enno, 119 Idaho 392 (1991) stated the trial court's discretion regarding photographic evidence as follows:

The applicable rule in determining whether such relevant evidence is admissible is whether its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." I.R.E. 403; see State v. Scroggins, 110 Idaho 380, 716 P.2d 1152 (1985); State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985); State v. Beason, 95 Idaho 267, 506 P.2d 1340 (1973); **624 *406 State v. Martinez, 92 Idaho 183, 439 P.2d 691 (1968).

The comments to I.R.E. 403 state: Rule 403 authorizes the trial court to exclude relevant evidence that it finds, in essence, will do more harm than good to the truth-finding process or the efficiency of the judicial process. The rule recognizes existing case law granting the court broad discretion in the conduct of the trial. It applies to all forms of evidence.

Report of the Idaho State Bar Evidence Committee. Rule 403, p. 1 (1983). The determination of whether or not to admit such evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Windsor, 110 Idaho 410, 416, 716 P.2d 1182, 1188 (1985); State v. Abel, 104 Idaho 865, 664 P.2d 772 (1983).

This court commented further by stating,

BRIEF IN SUPPORT OF MOTION IN LIMINE RE DISPLAY OF STEPANIE COMACK'S PHOTOGRAPHS TO THE JURY IN OPENING ARGUMENT AND A PRIOR DETERMINATION BY THE COURT ON THE PHOTOGRAPHS THAT THE STATE INTENDS TO PRODUCE IN EVIDENCE REGARDING STEPANIE COMACK

PAGE 2

81:

The general rule is that photographs of the victim in a prosecution for homicide duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question are, in the discretion of the trial court, admissible in evidence as an aid to the jury in arriving at a fair understanding of the evidence, proof of the corpus delicti, extent of injury, condition and identification of the body, or for their bearing on the question of the degree or atrociousness of the crime, even though such photographs may have the additional effect of tending to excite the emotions of the jury.

The Defendant requests that the state produce the photographs that are intended to be used in evidence so the court can conduct the determination of the number of photographs to be admitted and whether certain photographs are cumulative of the probative value so as not to constitute danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

CONCLUSION

There are numerous cases regarding the issue of photographs in murder cases in Idaho. In these cases the court conducted a review of the photographs so as to allow the state to adequately present its case to the jury balanced by the whether the probative value was sufficient to overcome any possible inflammatory effect on the jury.

DATED this 10 day of March, 2016.

Attorney for Defendant



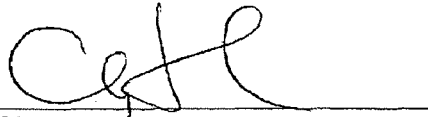
Clayton Andersen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

interoffice mail



Clayton Andersen

FILED
BENEWAH COUNTY

2016 MAR 10 AM 10:18

BY:  . DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR11-2053

**MOTION IN LIMINE RE
DISPLAY OF STEPANIE
COMACK'S PHOTOGRAPHS TO
THE JURY IN OPENING
ARGUMENT AND A PRIOR
DETERMINATION BY THE
COURT ON THE
PHOTOGRAPHS THAT THE
STATE INTENDS TO PRODUCE
IN EVIDENCE REGARDING
STEPANIE COMACK**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves the Court as follows:

RELIEF SOUGHT

For an Order in Limine prohibiting the display of Stefanie Comack's photographs during the Prosecutor's Opening Statement and photographs to be displayed to the jury of Stephanie Comack during the trial scheduled in this matter.

MOTION IN LIMINE RE DISPLAY OF STEPANIE COMACK'S PHOTOGRAPHS TO THE JURY IN OPENING ARGUMENT AND A PRIOR DETERMINATION BY THE COURT ON THE PHOTOGRAPHS THAT THE STATE INTENDS TO PRODUCE IN EVIDENCE REGARDING STEPANIE COMACK
PAGE 1

GROUNDS OF MOTION

The grounds of this Motion are as follows:

- 1. ICR 12(b)
- 2. The photographs particularly autopsy photographs of Stefanie Comack prior to their admission would be highly prejudicial to the jury;
- 3. Excessive display of numerous photographs of the alleged victim would be more prejudicial than probative;
- 4. IRE 401 and 403;
- 5. Brief in Support of this Motion;
- 6. The Defendant's fundamental right to a fair trial.

BASIS OF MOTION

The basis of this motion is all the records and files of this action and evidence to be adduced at a hearing in this matter.

ORAL ARGUMENT AND LENGTH OF HEARING

Oral argument and/or testimony in support thereof. Requested time is less than twenty minutes.

DATED this 10 day of March, 2016.

Attorney for Defendant



Clayton Andersen

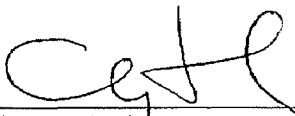
**MOTION IN LIMINE RE DISPLAY OF STEPANIE COMACK'S PHOTOGRAPHS TO THE JURY IN OPENING ARGUMENT AND A PRIOR DETERMINATION BY THE COURT ON THE PHOTOGRAPHS THAT THE STATE INTENDS TO PRODUCE IN EVIDENCE REGARDING STEPANIE COMACK
PAGE 2**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of March, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

interoffice mail



Clayton Andersen

FILED
BENEWAH COUNTY

2016 MAR 17 AM 10:29

BY: [Signature] .DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,)	
	)	Case No. CR11-2053
vs.)	
	)	MOTION TO RELEASE
JOSEPH DUANE HERRERA,	)	EVIDENCE
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for Benewah County, State of Idaho, and hereby moves this Court for an order that the State's evidence from the 2013 trial in this case, be released to the Benewah County Sheriff's Office for trial preparation.

DATED this 17 day of March 2016.

[Signature]
Brian D. Thie
Prosecuting Attorney

87

I hereby certify that a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid on the 17 day of
MARCH, 2016, to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By

BDT

Description	BENEWAH CR 2011-2053 Hernandez, Joseph 20160322 Motions Judge Mitchell Court Reporter Julie Foland Clerk Jeanne Clausen		
Date	3/22/2016	Location	1K-COURTROOM8
Time	Speaker	Note	
<u>03:59:28 PM</u>	J	Calls case - Mr. Thie present on behalf of the plaintiff, Benewah County. Mr. Andersen present for the the defendant. Mr. Robins present for Kootenai County. The defendant is not present. There is a motion to exclude Mr. Comack. For the time being, I'm allowing you to remain Mr. Comack. If there are any problems Mr. Comack, you will be escorted from the courtroom. I understand your situation completly, I have to maintain order in the courtroom.	
<u>04:01:36 PM</u>	PA	No objection.	
<u>04:01:42 PM</u>	DA	Some degree of difficulty because I haven't been able to converse with my client.	
<u>04:02:14 PM</u>	J	I wanted to deal with this issue before deft was present.	
<u>04:02:32 PM</u>	DA	I understand and thank the court for the precautions.	
<u>04:04:06 PM</u>	J	Gives the attorneys a copy of my standard stock jury instructions. My are not significantly different than what Judge Gibler used.	
<u>04:04:50 PM</u>	J	Mr. Herrera is now present.	
<u>04:05:45 PM</u>	DA	My client understands and would like to have his handcuffs undone so that he use his pencil.	
<u>04:06:31 PM</u>	J	Deny this request.	
<u>04:06:37 PM</u>	J	Motion for release of evidence and motion to permit amended information has been filed by the plaintiff.	
<u>04:07:09 PM</u>	PA	There was a motion and a brief that was sent to the court.	
<u>04:07:30 PM</u>	DA	We received a copy of the motion but no seperate brief.	
<u>04:07:51 PM</u>	PA	The brief is contained in the motion.	
<u>04:09:09 PM</u>	J	I understand the motion.	
<u>04:09:19 PM</u>	DA	Oppose the motion to amend.	
<u>04:11:03 PM</u>	PA	I've got no dog in this hunt as to the prior trial and the appeal. Rule the allows amendment to information until the verdict is rendered. This amended information doesn't allege any new charges. Weapon enhancement. The appellate court limited the evidence coming in. Invite possibility for manslaughter and would like to have sentencing range. 25 to 30 years added.	
<u>04:13:54 PM</u>	DA	Motion was served but not filed.	

<u>04:14:23 PM</u>	PA	We have a certificate of service.
<u>04:17:26 PM</u>	DA	Deny motion to amend informaiton. They didn't do this the first trial.
<u>04:17:52 PM</u>	J	Motion was filed on 3/9/16.
<u>04:18:44 PM</u>	DA	Cites State vs Frank as authority. Amending information is up to trial court discretion.
<u>04:19:13 PM</u>	PA	State vs. Ausler. Charged with additional felony after coming back on an appeal. There is a presumption and should be simple to overcome. I have no personal vindictiveness in this case.
<u>04:20:26 PM</u>	J	I didn't have a copy of the motion which has some briefing in it. I'm going to read the Ausler case and take this under advisement. An enhancement and not a new crime. Remand from Idaho Supreme Court takes us right back to the day before trial. I don't know that fact that PA is new. I'll get a decision out as soon as possible.
<u>04:22:40 PM</u>	J	Motion to release evidence.
<u>04:22:57 PM</u>	PA	I don't believe Ausler doesn't set the standard. Would like to augment record.
<u>04:23:33 PM</u>	J	I will need it to me by 8am tomorrow. Mr. Andersen will have until 8am Thursday to respond.
<u>04:24:08 PM</u>	PA	The evidence be released to ISP and not Benewah Sheriff.
<u>04:24:37 PM</u>	J	Motion to release evidence, only talking about the gun?
<u>04:24:52 PM</u>	PA	City of Benewah states ISP has the gun. Looking at the other evidence.
<u>04:25:27 PM</u>	J	I have the other evidence - everything but the gun.
<u>04:25:45 PM</u>	PA	Nothing else to add.
<u>04:25:51 PM</u>	J	What do you want to have happen to evidence(other than the gun)?
<u>04:27:16 PM</u>	PA	We would like to have any ISP officer come an pickup the evidence that court has in possession?
<u>04:28:18 PM</u>	DA	Would like to have a copy of these items. I would suggest that a third party make a copy of these exhibits. We believe that there were some audio recordings. Ko. Co. Prosecutor has the ability to make copies of these. Photographs could be duplicated. 2 audio portions that need to be duplicated.
<u>04:32:14 PM</u>	PA	Not everything is duplicatible. I don't have copies and don't know what is crossed referenced.
<u>04:33:43 PM</u>	DA	I don't believe that the defense admitted any exhibits.
<u>04:34:36 PM</u>		Court does not have these exhibits - Gun #2; shell casing #3; clip #80; bong #81; bullet #83; everything else appears to be in file.

90

	J	I'm going order the Ko. Co. Bailiff to make a copy available to plaintiff and defendant. The originals will stay here. Need to find out where the other exhibits are.
<u>04:37:42 PM</u>	DA	Supreme court decision is instructive as to what will not be allowed. If they have other evidence that they intend to introduce - not sure what they are intending to do. Requires state to disclose what it is and can it be permitted.
<u>04:39:56 PM</u>	PA	I don't know if decision by Supreme Court is completely clear. Reversed judgment because plaintiff had violated trial court order. Already had a motion in limine for prior bad acts. Don't know what additional disclosure there would be that defense counsel might have.
<u>04:43:00 PM</u>	DA	I'd like to have a clear record. I did receive prior defense counsel's file. Things that I'm concerned about. If going to use any character evidence, they should disclose uner 404(b) evidence.
<u>04:44:22 PM</u>	J	The decision by Judge biler 7/23/12 - that order is still in effect. Go back the moment before trial. All of Judge Gibler's orders are still in effect. Require that plaintiff disclose by 4/15/16 all 404(b) evidence. I find some deviation from Judge Gibler's order do to some of the witnesses, but some by prosecutors. Those same 4 witnesses are going to testify outside presence of jury, won't allow any deviation on direct. Set a hearing date on 4/20/16 at 9am. I will admonish these witnesses on that day and admonish them on day of trial.
<u>04:48:27 PM</u>	PA	Will be able to get thru those4 witnesses.
<u>04:48:41 PM</u>	dA	Agrees.
<u>04:48:44 PM</u>	J	Motion - deft prior testimony. I don't have transcript of day 4 of trial.
<u>04:49:08 PM</u>	DA	I've prepared those portions. I do understand that state has reviewed those.
<u>04:50:31 PM</u>	PA	No objections to subparts A,B & C.
<u>04:50:51 PM</u>	J	Subparts A,B & C are granted. Reviews D,E & F - read the transcript.
<u>04:52:18 PM</u>	PA	Testimony be redacted - no objection.
<u>04:53:21 PM</u>	J	Testimony of deft, want redacted incase this testimony is read to jury.
<u>04:53:52 PM</u>	DA	Yes.
<u>04:54:09 PM</u>	PA	No objection to redacting of D.
<u>04:54:24 PM</u>	J	D is reacted.
<u>04:54:39 PM</u>	PA	E - objection. The decision of Supreme Crt is controlling. Didn't see that testimony being tied to anything being excluded by

		supreme crt.
<u>04:55:54 PM</u>	DA	404(b) analysis. Not relevant to anything and causes confusion. Deals with relationship improperly commented on.
<u>04:57:25 PM</u>	PA	Grants E. Not finding why this is relevant in anyway. Not covered in Supreme Crt decision, but can confuse the jury. Striking that portion based upon relevance.
<u>04:58:28 PM</u>	J	F - suicide.
<u>04:58:59 PM</u>	DA	401 and 404(b) and Supreme Crt decision.
<u>04:59:17 PM</u>	PA	Threatened suicide came thru testimony by Bobby Riddle. Supreme crt doesn't address deft threatening to kill himself. Maybe 404 evidence. Fair game in this trial.
<u>05:01:11 PM</u>	DA	Ms. Riddle was limited to testify as to state of mind of victim. Shouldn't be allowed.
<u>05:01:47 PM</u>	J	Mentioned by Supreme Crt, no rulling or decision. State will have to list as a 404(b) issue and brief it. Will withhold ruling until hear from state and give defense a chance to respond. Deadline for any 404(b) evidence disclosed by plaintiff 4/11/16. Response by defense on 4/14/16. Argument on 20th.
<u>05:04:53 PM</u>	DA	Transferring the deft and keeping him on his meds, state agrees.
<u>05:05:22 PM</u>	PA	No objection to medications being transferred, leave up to jail admin. Provide court and counsel list of medications and is he able to assist on his behalf.
<u>05:06:22 PM</u>	DA	This is ludicriss. My client has been on same meds. He was denied some of his medicaitons. Would be happy to give a list of what he is taking. We want it to be consistent.
<u>05:08:00 PM</u>	Deft	Taking Claunipin 4mg, doctabpin, trahamdol - 3 times a day and zantac - 2 a day.
<u>05:08:49 PM</u>	J	I will order to the extent I can order the sheriff, that they provide Mr. Herrera his meds while he is here for trial. If they won't, will order that he be transported everyday from Benewah co.
<u>05:10:50 PM</u>	PA	No obj street clothes.
<u>05:11:00 PM</u>	J	Grants order that deft be allowed street clothes.
<u>05:11:27 PM</u>	DA	Jurors are prejudiced by deft being restrained.
<u>05:11:50 PM</u>	J	I will require you Mr. Andersen to deal with clothes. I will allow use if it is not visible. Jury will not know that Mr. Herrera is incustody. Evidence of deft's fleeing.
<u>05:12:57 PM</u>	DA	State has no objection.
<u>05:13:04 PM</u>	PA	Agrees.
<u>05:13:07 PM</u>	J	Granted. State vs Rosingal. Motion to exclude James Comack from trial.

<u>05:13:46 PM</u>	DA	Number of incidences. Showed up at residence armed and made threats. Voices anger toward my client and his family and this also happened in courtroom. My client and I don't want to be looking over our shoulder during the trial. A lot of activity by Mr. Comack. I feel it is justified.
<u>05:15:49 PM</u>	PA	Family of decendent be present at trial Constitutional right. Court can inquire with Mr. Comack himself if you wish.
<u>05:17:06 PM</u>	DA	Nothing else to add. Prior behavior is unusual and given same sanction given by Judge Gibler. Nothing has changed but passage of time.
<u>05:18:26 PM</u>	J	Not going to grant motion. I will allow Mr. James Comack at trial. Notify court of days you will be inattendance thru bailiff's office. Sit only in back of courtroom and bailiff on each side of you. You will go thru metal detector and be frisked. No threats made to deft and attorney. No disturbances at anytime. If you distrupe proceedings, you will be escorted out immediately. If you are removed, you will never be allowed back in. You will need to judge if it is getting too intense. You will go out the North side at all times.
<u>05:21:22 PM</u>	Mr. Comack	I'm fine with this and I will be here everyday.
<u>05:21:42 PM</u>	J	I you follow this protocol, you will be done and not allowed to come back in. I have to make sure everyone is safe. We aren't going to try this 3 times.
<u>05:22:29 PM</u>	PA	Nothing further.
<u>05:22:33 PM</u>	DA	Nothing further.
<u>05:22:51 PM</u>	DA	Letter from my client indicating his position. Concerned about my amount of time to devote to this case and I'm also concerned. I keep accurate records and spent over 110 hrs on PD cases since 3/1/16. Fulltime staff person. I put in 14.5 hrs yesterday and today close to 12 hrs. I'm concerned about nature of charge, I want to do an excellent job. Concerned about amount of time it will take. I'm requesting about 60 days from 4/25/16 date. Differences between myself and client as to how trial will proceed - tactitcal. Concerns with this.
<u>05:28:02 PM</u>	PA	State doesn't take a position as to change in attorney. If there are other issues defense would like to discuss outside presence of myself, not issues with that. Renewed motion to continue - no objection. Couple of witness issues and their availability. Additional forensic work.
<u>05:30:35 PM</u>	DA	My client would like to make a statement to court.
<u>05:30:48 PM</u>	Deft	Mr. Andersen represented Jack and Kate Comack which are siblings to Stephanie. I sent him 2 certified letters - presents to court for review and his response.

<u>05:32:01 PM</u>	J	Past representation of other Comacks.
<u>05:32:45 PM</u>	DA	Represented Kaitlin Comack and unaware of any relationship to Joseph Herrera. Represented Jack Comack - nothing was ever discussed about this case. Jack Comack wasn't a witness that was listed.
<u>05:35:19 PM</u>	J	Denying motion to withdraw attorney made by Mr. Herrera. You have a right to an attorney, but not a right to who you want. Mr. Andersen is telling me that he doesn't have a conflict. I don't have an order to continue before me, so I'm not ruling on that. Mr. Andersen is a very experienced attorney. I haven't heard how many hours have been spent on this case. Juror questions.
<u>05:37:42 PM</u>	DA	Would like to share special questions to jurors with the prosecutor. Fact that this incident happened on Christmas Day. Some jurors will answer questions off the questionnaire.
<u>05:40:29 PM</u>	PA	Haven't had much time to talk about this.
<u>05:41:44 PM</u>	J	This needs to go jury pool pretty soon.
<u>05:42:08 PM</u>	DA	I will give a list of questions to PA tomorrow. Can get this all to the Jury Commissioner by this Friday.
<u>05:43:15 PM</u>	PA	Up to the court's discretion.
<u>05:43:23 PM</u>	J	DA to get those questions to PA tomorrow and plaintiff to me by Friday.
<u>05:44:04 PM</u>	PA	3 days of testimony.
<u>05:44:37 PM</u>	DA	5 days for entire trial.
<u>05:45:08 PM</u>	J	Motion to continue which hasn't been made yet.
<u>05:45:22 PM</u>	DA	Motion to continue. Several witnesses and one of them is located in Alaska.
<u>05:45:59 PM</u>	PA	Nothing additional to add. No objection to defendant's motion to continue.
<u>05:46:38 PM</u>	J	Reason that I have from defense prospective, we will never hear this case. What have you done to releave the burden.
<u>05:47:22 PM</u>	DA	I would be prepared. Taken stps on taking many new clinets and efforsts to resolve cases assigned to me.
<u>05:48:03 PM</u>	J	I'm not telling you how to run PD contract for Benewah County.
<u>05:48:30 PM</u>	DA	I've spent 66 hours on this case so far. Normally spend 2 hours a day or more. I need 60 days from 4/25/16.
<u>05:50:42 PM</u>	J	7/18/16 for 5 days.
<u>05:51:23 PM</u>	PA	This will work
<u>05:51:29 PM</u>	DA	I will make it work.
<u>05:51:36 PM</u>	J	Set this for 7/18/16 at 9am for 5 days. All of the other deadlines

		still stand. I don't issue pretrial orders in criminal cases.
05:52:34 PM	PA	Not requesting any.
05:52:42 PM	DA	No your honor.
05:52:48 PM	J	Mr. Comack left a while back. Victim rights coordinator available to assist Mr. Comack.
05:53:19 PM	Mr. Robins	Would like to talk to Mr. McHugh first, but don't see why he would not.
05:54:10 PM	PA	Would like any resources KCPA can offer.
05:54:37 PM	J	Victims right coordinator cour make Mr. Comack aware of new trial date. There won't be any further continuances.
05:55:51 PM	End	

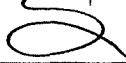
Produced by FTR Gold™
www.fortherecord.com

95

STATE OF IDAHO)
County of BENEWAH)^{ss}

FILED: March 23, 2016

AT 4:30 o'clock P M
CLERK, DISTRICT COURT


Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)
)
) *Plaintiff,*)
)
)
 vs.)
)
) JOSEPH DUANE HERRERA,)
)
) *Defendant.*)
 _____)

Case No. **BEN CRF 2011 2053**

**MEMORANDUM DECISION AND
ORDER ON PRE-TRIAL MOTIONS
HEARD ON MARCH 22, 2016,
ORDER VACATING APRIL 25, 2016,
TRIAL AND RESCHEDULING TRIAL
TO BEGIN JULY 18, 2016**

I. FACTUAL BACKGROUND.

This matter came before the Court on March 22, 2016, on various pre-trial motions by both parties. At the time of the March 22, 2016, hearing, the case had been set for a five-day jury trial scheduled to begin April 25, 2016. That trial date had been set on December 28, 2015.

II. ANALYSIS OF MOTIONS AND ORDER ON MOTIONS.

A. PLAINTIFF'S MOTIONS.

1. Plaintiff's Motion to Release Evidence.

IT IS HEREBY ORDERED THAT the Plaintiff's Motion to Release Evidence is **GRANTED.**

IT IS FURTHER ORDERED THAT the Deputy Clerk of Court for Kootenai County and/or the Kootenai County Bailiff prepare two copies (one for each party) of each exhibit

previously admitted in the April 2013, trial; each party to pay their cost of making such exhibits. The original exhibits admitted into evidence in the April 2013 trial shall remain in the custody of the Deputy Clerk of Court for Kootenai County, and the original exhibits may be re-marked by the party offering the exhibit (all were marked and offered by the plaintiff State of Idaho in the April 2013 trial) for use in the upcoming trial.

IT IS FURTHER ORDERED THAT the Deputy Clerk of Benewah County, the Sheriff of Benewah County, the City Attorney for St. Maries, Idaho, make all effort to locate: Exhibit 2, gun; Exhibit 3, shell casing; Exhibit 80, gun clip or magazine; Exhibit 81, bong; and Exhibit 83, bullet in a bottle.

2. Plaintiff's Motion to Permit Amended Information.

The plaintiff's Motion to Permit Amended Information was not sent to the Court. As a result, the Court had to take such motion under advisement following the March 22, 2016, hearing. Defendant did not respond in writing to plaintiff's motion.

The plaintiff, through the Benewah County Prosecuting Attorney, seeks to amend the Information to add the sentencing enhancement provision of I.C. § 19-2520, use of a firearm during the commission of a crime. At oral argument on March 22, 2016, the Benewah County Prosecuting Attorney argued such amendment only constituted a sentencing enhancement and did not constitute a new or additional crime. However, the "Amended Prosecuting Attorney's Information" attached to the plaintiff's Motion to Permit Amended Information, reads in part:

That the crime of USE OF A FIREARM DURING THE COMMISSION OF A CRIME, a felony, in violation of Idaho Code Section 19-2520 has been committed by the said defendant as follows, to-wit: that the said JOSEPH DUANE HERRERA on or about the 25th day of December, 2011, at and in the County of Benewah, State of Idaho, he did then and there use a firearm, to-wit: a .380 handgun, in the commission of the crime alleged in Count I [Murder in the Second Degree].

Amended Prosecuting Attorney's Information, p. 2. The Court specifically finds that the sentencing enhancement provision of I.C. § 19-2520 is just that, an enhancement, and not a new or separate crime. The Idaho Court of Appeals has held: "The statute does not label such conduct a separate crime, but instead operates to extend by fifteen years the maximum term of imprisonment for the crime in which the weapon was used." *State v. Gerardo*, 147 Idaho 22, 29, 205 P.3d 671, 678 (Ct. App. 2009). The Idaho Court of Appeals has found it error to charge the firearm enhancement provision as a substantive crime. *Id.*, n. 6. The sentencing enhancement of I.C. § 19-2520 may be imposed only if the use of a firearm "...is separately charged in the information and admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime." I.C. § 19-2520; *State v. Gerardo*, 147 Idaho 22, 29, 205 P.3d 671, 678 (Ct. App. 2009). The sentencing enhancement of I.C. § 19-2520 specifically applies to murder crimes. I.C. § 19-2520

Plaintiff's counsel claims, "Counsel affirms that this motion is not brought for vindictiveness because the defendant obtained a reversal of the judgment and order for new trial." Motion to Permit Amended Information, p. 1. The plaintiff's motion is not supported by an affidavit, so the use of the word "affirms" by plaintiff's counsel is misplaced. The plaintiff State of Idaho does give reasons for adding the sentence enhancement provision in its motion. Counsel for the State of Idaho claims he is new to the case, only being appointed Benewah County Prosecuting Attorney on October 1, 2015. *Id.* Counsel for the State of Idaho claims the Idaho Supreme Court decision will have the result that, "...several witnesses will not be allowed to testify as to matters, including prior bad acts by the defendant, as relayed to the defendant by the victim, Stefanie Comack." *Id.*, pp. 1-2. This Court notes that was also Judge Gibler's ruling,

which the then Benewah County Prosecuting Attorney blatantly disregarded at trial in his examination of four witnesses. The Benewah County Prosecuting Attorney at the time was Doug Payne. Since that April 2013, trial, Payne has now been appointed Magistrate Judge in Benewah County. The Idaho Supreme Court held: "While Herrera has not raised the issue of prosecutorial misconduct in connection with this line of questioning, it appears obvious to this Court that the State's questions were specifically designed to elicit testimony regarding those matters the trial court had previously ruled admissible." *State v. Joseph D. Herrera*, 2015 Opinion No. 111, p. 11. (November 30, 2015) (substitute opinion). The current Benewah County Prosecuting Attorney, Brian Thie, now argues "Secondly, said decision [of the Idaho Supreme Court] envisions somewhat the possibility of a conviction for manslaughter, a possibility the earlier prosecutor likely didn't contemplate, given the evidence he had available at the time of trial." *Id.*, p. 2. The Benewah County Prosecuting Attorney now argues, "By amending the information, no new charges are brought, there is no prejudice to the defendant due to new facts being determined. It simply allows the potential top end of the sentence to go to 25 or 30 years, if manslaughter is found." *Id.*, p. 2. Essentially, the State is not charging the lesser offense of manslaughter, but is adding the sentence enhancement provision of the use of a deadly weapon to the at all times alleged crime of murder in the second degree. If the jury convicts of murder in the second degree, the deadly weapon enhancement is a nullity, as the maximum possible sentence for murder in the second degree is life in prison with a mandatory minimum ten years in prison. I.C. § 18-8004. However, if the jury is instructed on a manslaughter charge, and the jury convicted Herrera on that charge, the deadly weapon enhancement provision would extend the maximum sentencing range by fifteen years, from fifteen years maximum for

voluntary manslaughter (I.C. § 18-4006(1)) to thirty years, including the deadly weapon enhancement. Having thirty years available, the Benewah County Prosecuting Attorney is candid that, if the amendment to allow the deadly weapons enhancement provision were to be granted, then, "...regardless of the verdict, the State would still like the opportunity to argue for the same determinate sentence." *Id.* While that candid remark may appear to be vindictive, the State of Idaho makes it clear it is not seeking an *increased* penalty.

Neither the State nor Herrera cited *State v. Scott Lewis Ostler*, 2015 WL 8087619, Idaho Court of Appeals Decision No. 42335 (Ct. App. Dec. 8, 2015), which this Court finds very instructive. At his first trial, Ostler was charged with two counts of lewd conduct with a minor child under sixteen and one count of sexual abuse of a child under the age of sixteen years. A jury found Ostler guilty of all three counts. 2015 WL 8087619, pp. 2-3, Court of Appeals decision, p. 1. Prior to sentencing, the district court, sua sponte, requested briefing from the parties on the issue of whether the court had subject-matter jurisdiction over the case, as it was unclear whether Ostler was at least fourteen years of age at the time of the commission of the two acts of lewd conduct. *Id.* Ultimately, the court set aside the convictions and ordered a new trial pursuant to I.C. § 19-2406(6) and Idaho Criminal Rule 34. *Id.* In its Amended Information, the State charged Ostler with four felony counts instead of three; three counts of lewd conduct with a minor under sixteen and one count of sexual abuse of a child under sixteen. *Id.* The case proceeded to a jury trial. Ostler did not object to the inclusion of the additional charge at any time. The jury found Ostler guilty on all four felony counts. 2015 WL 8087619, p. 3, Court of Appeals decision, p. 2. On appeal, for the first time, Ostler alleged that the State's conduct, which exposed him to increased jeopardy, was

a vindictive prosecution in violation of his right to due process under the Fourteenth Amendment to the United States Constitution. *Id.* The Idaho Court of Appeals analysis follows:

Ordinarily, the decision on whether to prosecute and what charge to file is a matter of prosecutorial discretion. *State v. Storm*, 123 Idaho 228, 233, 846 P.2d 230, 235 (Ct.App.1993). However, a defendant's constitutionally protected right to due process is implicated when a prosecutor vindictively retaliates against a defendant for exercising a legally protected right. *Blackledge v. Perry*, 417 U.S. 21, 27–28, 94 S.Ct. 2098, 2102–03, 40 L.Ed.2d 628, 634–35 (1974) (extending *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656, 668–69 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), to cover prosecutors in addition to judges); *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667–68, 54 L.Ed.2d 604, 610–11 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”).

To demonstrate prosecutorial vindictiveness, a defendant must show either: (1) actual vindictiveness through objective evidence that a prosecutor acted in order to punish the defendant for exercising a legal right; or (2) a realistic likelihood of vindictiveness, which then raises a presumption of vindictiveness. *United States v. Goodwin*, 457 U.S. 368, 372–73, 102 S.Ct. 2485, 2488–89, 73 L.Ed.2d 74, 79–81 (1982) (reasoning that because motives are often “complex and difficult to prove,” in cases where “action detrimental to the defendant has been taken after the exercise of a legal right ... it [is] necessary to ‘presume’ an improper vindictive motive”). The defendant's burden of establishing actual vindictive prosecution is heavy in light of the discretion prosecutors are given in performing their duties. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687, 698 (1996).

Ostler does not allege a claim of actual vindictiveness through objective evidence. Instead, Ostler argues that the United States Supreme Court's decision in *Blackledge* requires this Court to find a presumption of vindictiveness. In *Blackledge*, the Supreme Court explained that the prosecutor's conduct of increasing a defendant's charge from a misdemeanor to a felony after the defendant secured a new trial on appeal gave rise to a realistic likelihood of vindictiveness:

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by “upping the ante” through a felony indictment whenever a convicted

misdemeanant pursues his statutory appellant remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

Blackledge, 417 U.S. at 27–28, 94 S.Ct. at 2102–03, 40 L.Ed.2d at 634–35. Because the increased charges were based upon the same facts underlying the initial conviction and occurred only after the defendant invoked his statutory right to a new trial on appeal, the Court held that the prosecutor's conduct gave rise to a per se presumption of vindictiveness. *Id.* The Court based this presumption upon the constitutional requirement that defendants be able to invoke their right to challenge their conviction without apprehension of retaliation. *Id.*

Later, in *Goodwin*, the Supreme Court distinguished between pretrial and post-conviction increases in punishment by prosecutors, acknowledging the deep-seated bias within the judicial system against the retrial of decided issues. *Goodwin*, 457 U.S. at 376–77, 102 S.Ct. at 2490–91, 73 L.Ed.2d at 82–83. In dicta, the Court specifically noted the judicial doctrines of stare decisis, res judicata, the law of the case, and double jeopardy; the Court opined that “the same institutional pressure that supports [those doctrines] might also subconsciously motivate a vindictive prosecutorial ... response to a defendant's exercise of his right to obtain a retrial of a decided question.” *Id.* at 377, 102 S.Ct. at 2490–91, 73 L.Ed.2d at 83. The Court recognized that “a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision” based upon the prosecutor's strong interest in avoiding having to retry an entire case.” *id.*

A prosecutor's attempt to retry a defendant after a mistrial, seeking a heavier penalty for the same acts as originally charged, appears inherently suspect. See *United States v. Robison*, 644 F.2d 1270, 1273 (9th Cir.1981). Even the appearance of retaliatory conduct by prosecutors in response to a defendant's exercise of a protected right can have subsequent chilling effects on other defendants faced with similar circumstances. *United States v. Motley*, 655 F.2d 186, 188 (9th Cir.1981). This deterrent effect is precisely what the Supreme Court sought to avoid with the vindictive prosecution presumption. *Blackledge*, 417 U.S. at 28, 94 S.Ct. at 2103, 40 L.Ed.2d at 634–35 (“A person convicted of an offense is entitled to pursue his statutory right ... without apprehension that the State will retaliate.”).

Ostler's case differs from *Blackledge* in that Ostler was not appealing his conviction. However, Ostler was nonetheless exercising a statutorily protected right by filing a motion for a judgment of acquittal in response to the court's concern that it did not have subject-matter jurisdiction over the charges. As an issue of first impression for this Court, we hold that the *Blackledge* presumption of vindictiveness arises where a defendant, after being convicted, exercises a statutory right to obtain a retrial and is subsequently charged with additional or more severe charges. See *Goodwin*, 457 U.S. at 372, 102 S.Ct. at 2488, 73 L.Ed.2d at 79–80 (“[A]n individual ... may not be punished for exercising a protected

statutory or constitutional right.”). The prosecutor’s conduct of bringing an additional charge against Ostler after he exercised his post-conviction statutory right to a new trial thus created a presumption of vindictiveness.

Once a defendant has established a presumption of prosecutorial vindictiveness, the prosecution can rebut the presumption by showing objective reasons justifying the additional charges. *Thigpen v. Roberts*, 468 U.S. 27, 32 n. 6, 104 S.Ct. 2916, 2920 n. 6, 82 L.Ed.2d 23, 29–30 n. 6 (1984) (“[T]he *Blackledge* presumption is rebuttable.”). See also *Goodwin*, 457 U.S. at 376 n. 8, 102 S.Ct. at 2490 n. 8, 73 L.Ed.2d at 82–83 n. 8; *Blackledge*, 417 U.S. at 29 n. 7, 94 S.Ct. at 2103 n. 7, 40 L.Ed.2d at 635 n. 7. A successful rebuttal to a presumption of vindictiveness would thus render the first prong of the *Perry* analysis unsatisfied.

Ostler suggests that here, because the State “provided no reason in the district court for adding a fourth charge,” the State is now precluded from justifying its charging decision for the first time on appeal. Ostler cites to *Pearce* and *Blackledge* to support the proposition that the State must have affirmatively established a nonvindictive justification at the trial court level. In *Pearce*, the Supreme Court held that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so *must* affirmatively appear ... [a]nd the factual data upon which the increased sentence is based *must* be made part of the record.” *Pearce*, 395 U.S. at 726, 89 S.Ct. at 2081, 23 L.Ed.2d at 670 (emphasis added). Then, in *Blackledge*, the Court extended *Pearce* to prosecutors, holding that situations posing a realistic likelihood of vindictiveness by a prosecutor require a rule analogous to that of the *Pearce* case. *Blackledge*, 417 U.S. at 27, 94 S.Ct. at 2102, 40 L.Ed.2d at 634. There, the Court contemplated that *Blackledge* “would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge from the outset.” *Id.* at 29 n. 7, 94 S.Ct. at 2103 n. 7, 40 L.Ed.2d at 635 n. 7.

After *Blackledge*, the Supreme Court applied the prosecutorial vindictiveness presumption to a case where a prosecutor imposed more serious charges on a defendant after a successful appeal. *Thigpen*, 468 U.S. at 27, 104 S.Ct. at 2916, 82 L.Ed.2d at 23. Although it found the prosecutor’s conduct presumptively vindictive under *Blackledge*, the Court acknowledged that the presumption was nonetheless rebuttable. *Id.* at 32 n. 6, 104 S.Ct. at 2920 n. 6, 82 L.Ed.2d at 29–30 n. 6. However, because “the State had ample opportunity below to attempt to rebut [the presumption] but did not do so,” the State’s conduct was deemed unconstitutionally vindictive. *Id.*

Consequently, a prosecutor seeking to impose additional or more severe charges after a defendant secures a new trial must affirmatively give sufficient reasons for the increase on the record. See *State v. Edwardson*, 146 Wis.2d 198, 430 N.W.2d 604, 607 (1988). Here, because the State did not provide *any* justification for the additional charge at the trial court level, the State did not rebut the presumption of vindictiveness. See *State v. Grist*, 152 Idaho 786, 794, 275 P.3d 12, 20 (Ct.App.2012) (holding that a sentencing judge is required to affirmatively

make the reasons for an increased sentence after remand part of the record, regardless of whether the defendant objected). Therefore, Ostler's claim satisfies the first prong of *Perry* because the prosecutor's conduct was presumptively vindictive in violation of Ostler's unwaived right to due process.

We next consider the second prong of the *Perry* analysis—whether the prosecutorial vindictiveness alleged by Ostler is clear or obvious without the need for reference to additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision. Here, the error plainly exists based upon a review of the record. Prosecutors initially charged Ostler with three felonies. After Ostler was convicted on all three counts, the court set aside those convictions and ordered a new trial. Prosecutors then brought an additional felony charge against Ostler based upon the same evidence supporting the original convictions. The State offered no justification at the trial court level to explain the additional charge. This error plainly exists on the face of the record. Therefore, Ostler's claim also satisfies the second prong of *Perry*.

Having concluded that Ostler has met all three prongs of the *Perry* analysis, we hold that Ostler has established fundamental error. The appropriate remedy is for this Court to vacate the conviction arising from the improper charge and remand. *Perry*, 150 Idaho at 228, 245 P.3d at 979.

2015 WL 8087619, pp. 4-6, Idaho Court of Appeals decision, pp. 2-5. The obvious difference between Herrera's case and *Ostler* is the State of Idaho in Herrera's case is not seeking to add a new charge. Instead, the State of Idaho seeks to add a sentencing enhancement provision. However, in *State v. Patterson*, 637 S.W.2d 16 (Missouri 1982), the Supreme Court of Missouri, *en banc*, analyzed a sentencing enhancement provision the same as analyzing a new charge in a claim of prosecutorial vindictiveness, reasoning, "It is the increased penalty associated with the charge that makes it 'more serious.'" 637 S.W.2d 16, 18.

That is really the distinguishing feature in the present case, the sentence enhancement provision does not *increase* the potential sentence for the crime Herrera was convicted of in the first trial, murder in the second degree. The weapons enhancement provision has no effect on the mandatory minimum for murder in the

second degree, and cannot increase the potential maximum of life for murder in the second degree. As the Idaho Court of Appeals held in *Ostler*, “Consequently, a prosecutor seeking to impose additional or more severe charges after a defendant secures a new trial must affirmatively give sufficient reasons for the increase on the record.” 2015 WL 8087619, p. 5, Idaho Court of Appeals decision, p. 5, citing *State v. Edwardsen*, 146 Wis.2d 198, 430 N.W.2d 604, 607 (1988). Again, there is no *increase*, there is no *additional charge*, there is no possible *increased penalty*. There is a possibility of an increased punishment for a lesser included offense, but not a charged offense. The jury in the April 2013, trial, was instructed on the lesser included offense of manslaughter (Instruction 19-23), but the jury never reached that issue as the jury convicted Herrera of murder in the second degree. This Court is unable to see how *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), applies to an uncharged crime (manslaughter), for which the jury was instructed, but for which the jury did not render a verdict of any kind, especially when that uncharged crime is a lesser included offense.

IT IS HEREBY ORDERED THAT the Plaintiff’s Motion to Permit Amended Information is **GRANTED**.

IT IS FURTHER ORDERED THAT the Plaintiff must file an Amended Information which does not characterize I.C. § 19-2520 as a new crime.

B. DEFENDANT’S MOTIONS.

1. Defendant’s “Motion in Limine Regarding Defendant’s Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court.”

Herrera requests a ruling on evidence which may be submitted at the upcoming re-trial of Herrera, when that evidence was ruled inadmissible by the Idaho Supreme

Court. Counsel for plaintiff argues that Herrera's motion is "vague." The Court finds that argument inapt, as the motion refers to the Idaho Supreme Court decision *State v. Joseph D. Herrera*, 2015 Opinion No. 111 (November 30, 2015) (substitute opinion).

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's Motion in Limine Regarding Defendant's Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court to Suppress is **GRANTED** as follows:

IT IS FURTHER ORDERED THAT Judge Fred M. Gibler's Prior Order of July 23, 2012, is still in effect, as it was issued before the trial.

IT IS FURTHER ORDERED that the Benewah County Prosecutor must submit all questions to be asked at trial of each of the four witnesses specifically mentioned by the Idaho Supreme Court (Eunice McEwen, Bobbie Jo Riddle, Susie Comack, and Kaytlin Comack) by no later than April 15, 2016. Defense counsel will have an opportunity at the April 20, 2016, hearing to object to any proposed question. A hearing will be held on April 20, 2016, at 9:00 a.m., at which time the Court will admonish each witness as to what exactly may be testified about and what may not be testified about. At that hearing the Benewah County Prosecutor will then conduct his examination of each witness, and the Court, outside the presence of any jury, will make rulings on any objection to any answers given. A transcript of each witness' testimony will be prepared and provided to those witnesses, and those witnesses will be ordered to testify consistently with that testimony at the jury trial.

IT IS FURTHER ORDERED that the Benewah County Prosecutor must disclose ALL evidence requested under I.R.E. 404(b) by no later than April 11, 2016.

/

/

2. Defendant's "Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding his Rebuttal to the Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court."

Herrera testified at the April 2013 trial. It is not clear in Herrera's "Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding his Rebuttal to the Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court" that Herrera seeks to exclude portions of that testimony if it were offered in the re-trial of his case, but at oral argument on March 22, 2016, counsel for Herrera made it clear that was in fact what he was attempting to do by this motion.

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's "Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding his Rebuttal to the Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court" is **GRANTED** (the following portions are **EXCLUDED** at re-trial) as to the following portions of the trial transcript: p. 88, L. 12 – p. 89, L. 2 (prior violence to Stefanie Comack, prior occasions point a gun to Stefanie Comack's head; no objection by plaintiff); p. 89, LI. 3-19(no objection by plaintiff); p. 90, LI. 1-2 (prior incident of Herrera breaking Stefanie Comack's phone; no objection by plaintiff); p. 90, L. 10 – p. 91, L. 1 (prior break ups and reconciliations between Herrera and Stefanie Comack; no objection by plaintiff); p. 109 LI. 10-20 (Stefanie Comack's family contacting Herrera about ordering Stefanie around; this Court finds such testimony to be completely not relevant).

IT IS FURTHER ORDERED THAT JOSEPH DUANE HERRERA's "Motion in Limine Regarding Portions of Defendant's Prior Testimony Regarding his Rebuttal to the Character Evidence and Other Evidence Ruled Inadmissible by the Idaho Supreme Court" is **DENIED** (the following portion is **NOT EXCLUDED** at re-trial) as to the following portion of the trial transcript: p. 149, LI. 6-11 (dealing with suicidality of Herrera; this

Court's ruling today is consistent with Judge Gibler's prior ruling and implicitly, the Idaho Supreme Court Opinion at p. 11). The Court finds evidence of suicidality of the defendant may be relevant to why Stefanie Comack was at the time of her death trying to leave Herrera, an issue which is relevant to rebut the defense that the gun was fired accidentally.

3. Defendant's "Motion for Benewah County Sheriff to Transfer Defendant's Medications and for the Kootenai County Jail to Administer Medications Prescribed to Defendant During any Time Periods he is in Custody at the Kootenai County Jail During Defendant's Trial."

Herrera claims the Kootenai County Sheriff refused to provide him his medications during the April 2013 trial.

The Court is aware of what it can and cannot order a sheriff to do. The Court can encourage the Kootenai County Sheriff to provide Herrera with his medications while he is in custody at the Kootenai County Jail, but cannot order the Kootenai County Sheriff to do so. The Court can order any sheriff to transport a prisoner. Accordingly;

The Court encourages the Kootenai County Sheriff to provide Herrera with his medications while he is in custody at the Kootenai County Jail. Those medications and dosages are: Klonopin, 2 mg. a.m. and 2 mg. p.m.; Doxepin, 50 mg., p.m.; Tramadol, 150 mg. a.m. 150 mg. noon and 150 mg. p.m.; and Zantac, one pill (unknown dosage) at a.m., one pill at p.m.

IT IS HEREBY ORDERED THAT if the Kootenai County Sheriff is unwilling to provide Herrera with these medications, then the Kootenai County Sheriff shall so advise the Court of that fact in writing, with a copy to the Benewah County Prosecuting Attorney and Herrera's attorney, by no later than July 10, 2016.

IT IS FURTHER ORDERED THAT if the Kootenai County Sheriff is unwilling to

provide Herrera with these medications, then Benewah County Sheriff will transport Herrera to and from the Benewah County Jail to the Kootenai County Justice Building, each day for the jury trial now scheduled to begin July 18, 2016.

4. Defendant's "Motion for Defendant to be Able to Wear Street Clothes and the Defendant Not to be Handcuffed or Have Other Restraints in the Presence of the Jury During Defendant's Trial."

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's "Motion for Defendant to be Able to Wear Street Clothes and the Defendant Not to be Handcuffed or Have Other Restraints in the Presence of the Jury During Defendant's Trial" is **GRANTED.**

IT IS FURTHER ORDERED that counsel for Herrera provide clothes for Herrera to wear throughout the trial and provide those clothes to the Kootenai County Jail or the Benewah County Jail as the case may be.

IT IS FURTHER ORDERED that Herrera not be handcuffed while in the courtroom during his trial, and that he not be shackled, but leg restraints not visible to the jury may be used in the courtroom. Herrera will be brought in and taken from the courtroom at all times outside the presence of the jury.

5. Defendant's "Motion in Limine Regarding Fleeing by the Defendant."

Herrera seeks "...an Order in Limine that the State be precluded from argument or presenting in its case-in-chief evidence that the Defendant fled from law enforcement on December 24, 2011, as a conscientiousness of guilt or as an admission of guilt. Motion in Limine Regarding Fleeing by the Defendant, p. 1. Counsel for Herrera cited to *State v. Wrenn*, 99 Idaho 506(1978) and *State v. Moore*, 131 Idaho 814 965 P.2d 174 (1998) to support his motion that Herrera's departure from the scene of the crime should not give rise to an instruction that the jury could consider such flight as evidence

of guilt. Brief in Support of Motion in Limine Regarding Fleeing by the Defendant, p. 2. The Court has read both cases, and finds *State v. Rossignol*, 147 Idaho 818, 215 P.3d 538 (Ct. App. 2009) to be more instructive and more on point. *Wrenn* discusses the unusual circumstances which would need to be present in order to support an instruction on the inferences that can be drawn from flight. The Court finds no such instruction on the issue of flight will be given.

Moore discusses the admissibility of evidence on flight, and *Rossignol* provides an even more thorough discussion on the admissibility of evidence on flight. The Court finds evidence of Herrera's flight is relevant to the issues at trial, and such evidence is not substantially outweighed by the danger of unfair prejudice to Herrera.

Escape or flight is one of the exceptions to the general rule prohibiting evidence of prior bad acts or crimes. Evidence of escape or flight may be admissible because it may indicate a consciousness of guilt. However, the inference of guilt may be weakened when a defendant harbors motives for escape other than guilt of the charged offense.

Rossignol, 147 Idaho 818, 821, 215 P.3d 538, 541. (citations omitted).

Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial judge to conduct a two-part analysis. First, the judge must determine that the evidence is relevant under I.R.E. 401, and second the judge must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Moore, 131 Idaho 814, 819, 965 P.2d 174, 179. (citations omitted). Evidence of flight is inconsistent with Herrera's defense of an accidental shooting. Counsel for Herrera claims: "The Defendant left 319 South 14th Street, St. Maries, ID because of numerous Comack family members appearing at this location armed and shouting threats of physical violence to the Defendant." Motion in Limine Regarding Fleeing by the Defendant, p. 2. However, "The 'existence of alternative reasons for the escape goes to the weight of the evidence, not its admissibility.'" *Rossignol*, 147 Idaho 818, 822, 215

P.3d 538, 542. (citation omitted).

Evidence need only be of slight relevance to meet the requirements of I.R.E. 401. See, *State v. Waddle*, 125 Idaho 526, 528, 873 P.2d 1717, 173 (Ct. App. 1994). Instead, we conclude that the existence of alternative reasons for the escape or flight goes to the weight of the evidence and not to its relevance or admissibility. The district court did not err in concluding the evidence of Rossignol's flight was relevant.

Rossignol, 147 Idaho 818, 823, 215 P.3d 538, 543. As mentioned above, evidence of flight is inconsistent with Herrera's defense of an accidental shooting. Thus, evidence of flight is relevant. The fact that Herrera may have other explanations for leaving the scene goes to the weight of that evidence. Herrera's ability to offer such an explanation at trial decreases the danger of unfair prejudice. *Id.*

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's "Motion in Limine Regarding Fleeing by the Defendant" is **GRANTED** to the extent that no jury instruction will be given regarding the inferences that may be given to Herrera's flight.

IT IS FURTHER ORDERED THAT JOSEPH DUANE HERRERA's "Motion in Limine Regarding Fleeing by the Defendant" is **DENIED** to the extent it concerned the exclusion of evidence of flight. Evidence of Herrera's actions after the shooting, including his flight from the scene, is admissible.

6. Defendant's "Motion to Exclude James Comack from Court Proceedings."

Herrera wants an order removing Comack from all court proceedings. "Motion to Exclude James Comack from Court Proceedings, p. 1. Herrera bases this on Herrera's claim that James Comack has threatened to kill Herrera, James Comack's prior conduct in court, and Herrera's right to a fair trial. *Id.*, pp. 1-2.

James Comack is the father of the decedent, Stefanie Comack. As such, he is a "victim" of this crime. A "'Victim' is an individual who suffers direct or threatened

physical, financial or emotional harm as the result of the commission of a crime or juvenile offense.” I.C. § 19-5306(5)(a). Idaho Constitution Article I, Section 22 mandates that “A crime victim, as defined by statute, has the following rights: (4) to be present at all criminal justice proceedings.” See *also* I.C. § 19-5306(b). Thus, this Court finds James Comack has a right to be present at trial.

However, James Comack does not have the right to disrupt the trial or any other criminal court proceeding. The Court has the inherent power to control the courtroom for the protection of the participants, court staff and the jury. At the first trial in April 2013, James Comack was disruptive, so disruptive that Judge Gibler had him removed from the courtroom and so disruptive upon his removal that he caused significant injury to a Kootenai County Bailiff who attempted to remove him. *Tr.*, p. 177, L. 5 – p. 180, L. 3. At that time, Judge Gibler noted that James Comack had been disruptive at an earlier proceeding in Benewah County. *Id.*

James Comack appeared at the March 22, 2016, hearing, at which Herrera was present in custody. The Court announced the following to James Comack and asked him if he understood the Court’s ruling, to which James Comack responded that he did understand.

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA’s “Motion to Exclude James Comack from Court Proceedings” is **DENIED**.

IT IS FURTHER ORDERED THAT at any future court proceeding in this case, including any hearing, the jury trial and any sentencing that may follow, JAMES COMACK MUST AT ALL TIMES OBEY THE FOLLOWING RULES OR FACE IMMEDIATE AND PERMANENT REMOVAL FROM ALL PROCEEDINGS IN THIS CASE:

- 1) JAMES COMACK is to be seated only in the last row of any courtroom.
- 2) A Kootenai County Bailiff will sit on each side of James Comack at all times while the Court is in session.
- 3) James Comack is to be not disruptive physically, verbally, emotionally, no sighs, no eye rolling.
- 4) James Comack must leave the Courtroom during any recess.
- 5) James Comack may only enter and leave the Kootenai County Justice Building through the one entrance on the north side of that building (Garden Avenue), and Herrera and all counsel will exit to the South. At no time may Comack be present outside the Kootenai County Justice Building other than on the north side of Garden Avenue, other than to walk directly from Garden Avenue to the north entrance of the Kootenai County Justice Building and go through the magnetometer.
- 6) James Comack may bring no weapon of any kind to the Kootenai County Justice Building.
- 7) James Comack will be pat searched in addition to passing through the magnetometer prior to going into the courtroom.
- 8) One of Kootenai County Victim Services Advocates will present this Order to James Comack and act as his contact point with the Court in the future.

7. Defendant's "Motion in Limine Re Display of Stephanie [sic] Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State Intends to Produce in Evidence Regarding Stephanie [sic] Comack."

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's "Motion in Limine Re Display of Stephanie [sic] Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State

Intends to Produce in Evidence Regarding Stepanie [sic] Comack" as it pertains to opening argument is **GRANTED**. No evidence will be shown to the jury at any time during the trial until it has been admitted.

IT IS FURTHER ORDERED THAT JOSEPH DUANE HERRERA's "Motion in Limine Re Display of Stepanie [sic] Comack's Photographs to the Jury in Opening Argument and a Prior Determination by the Court on the Photographs that the State Intends to Produce in Evidence Regarding Stepanie [sic] Comack" as it pertains to photographs sought to be admitted into evidence at trial is **GRANTED** only to the extent that the State must disclose all such exhibits/evidence of Stefanie Comack in advance, and that prior to offering such exhibits/evidence of Stefanie Comack, the Court must make a determination as to the cumulative nature, if any, of such exhibits/evidence.

8. Defendant's "Motion to Replace Defense Attorney."

Herrera's present attorney is the Benewah County Public Defender, Clayton Andersen. Order Appointing Public Defender, August 18, 2015. Clayton Andersen has been court appointed to represent Herrera. Herrera has the right to an attorney. At his first trial, Herrera had a private attorney. While Herrera has a right to an attorney appointed to represent him if he no longer has the funds to hire his own attorney, Herrera does not have the right to pick and choose who that court-appointed attorney is. The Court finds Clayton Andersen is an attorney with significant past experience, specifically, significant past criminal law experience, and more specifically, significant past criminal defense experience.

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's "Motion to Replace Defense Attorney" is **DENIED**.

/

C. ORDER ON ISSUES RAISED BY THE COURT.

1. Prior Orders Issued in this Case.

The decision by the Idaho Supreme Court does nothing to disrupt any rulings made by Judge Gibler prior to the April 2013 trial. Accordingly;

IT IS HEREBY ORDERED THAT all prior orders issued by Judge Fred M. Gibler prior to the original jury trial remain in full force and effect.

2. Defendant's Oral Motion to Continue Trial Made on March 22, 2016, to Which the Benewah County Prosecuting Attorney Stated he had "No Objection."

At the conclusion of the March 22, 2016, hearing on other motions, counsel for Herrera made a motion to continue the trial. The Benewah County Prosecuting Attorney stated his "no objection" to that motion on the record.

IT IS HEREBY ORDERED THAT JOSEPH DUANE HERRERA's Motion to Continue is **GRANTED**.

IT IS FURTHER ORDERED THAT JOSEPH DUANE HERRERA's Motion to Continue results in a waiver of his right to a speedy trial.

IT IS FURTHER ORDERED THAT JOSEPH DUANE HERRERA's five-day Jury Trial will begin on July 18, 2016, at 9:00 a.m., at a courtroom in Kootenai County.

IT IS FURTHER ORDERED that all proposed jury instructions be filed with the Clerk of the Court in Benewah County, with a copy sent to the Court in chambers, by no later than April 18, 2016.

IT IS FURTHER ORDERED that by April 15, 2016, both parties meet and confer and identify which stock instructions (Court's stock instructions were handed to both counsel at the March 22, 2016, hearing) can be agreed should be given, and meet and confer as to which of each other's instructions can be agreed should be given, and notify

the Court of any such agreement when their jury instructions are filed on April 18, 2016.

DATED this 23rd day of March, 2016

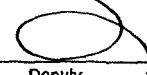

JOHN T. MITCHELL, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of March, 2016 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Clayton Andersen
Benewah County Prosecuting Attorney - Brian Thie
Kootenai County Dep. Pros. Atty. - David Robins
Kootenai County Victim Services Coordinator, for James Comack
Kootenai County Sheriff
Benewah County Sheriff
Pete Barnes, Kootenai County Jury Commissioner and Chief Bailiff
Jeanne Clausen, Deputy Kootenai County Clerk of Court
Stacy Bradbury, Deputy Benewah County Clerk of Court

CLERK OF THE DISTRICT COURT
BENEWAH COUNTY

BY: 
Deputy

FILED
BENEWAH COUNTY

2016 MAR 24 PM 2:34

BY: [Signature] DEPUTY

BRIAN D. THIE #4817
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,)	
	)	Case No. CR11-2053
vs.)	
	)	AMENDED PROSECUTING
JOSEPH DUANE HERRERA,	)	ATTORNEY'S INFORMATION
DOB: [REDACTED])	
)	
Defendant.)	
)	

BRIAN D. THIE, Prosecuting Attorney in and for Benewah County, State of Idaho, who, in the name and by the authority of said State prosecutes in its behalf, in proper person comes into said District Court in the County of Benewah, State of Idaho, on the 24 day of March, 2016, and gives the Court to understand and be informed that JOSEPH DUANE HERRERA is accused by this Information of:

COUNT I

That the crime of MURDER IN THE SECOND DEGREE, a felony, in violation of Idaho Code Section 18-4001 and 18-4003(g), which has been committed by the said defendant as follows, to-wit: that the said JOSEPH DUANE HERRERA on or about the 25th day of December, 2011, in the County of Benewah, State of Idaho, did unlawfully and with malice aforethought, but without premeditation, kill Stefanie Comack, a human being, by willfully

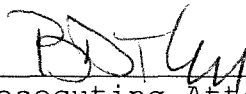
and deliberately pointing a .380 handgun at her head and pulling the trigger, from which she died; and

PART II

SENTENCING ENHANCEMENT, pursuant to Idaho Code Section 19-2520.

That the defendant, JOSEPH DUANE HERRERA, on or about the 25th day of December, 2011, at and in the County of Benewah, State of Idaho, did use a firearm, to-wit: a .380 handgun, in the commission of the crime alleged in Count I.


All of which is contrary to the statute in such case made and provided and against the peace and dignity of the State of Idaho.



Prosecuting Attorney

I hereby certify that on the 27
day of MAY, 2016, a true
and correct copy of the foregoing
was delivered/mailed, postage
prepaid to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By  _____

FILED
BENEWAH COUNTY

2016 APR -8 AM 8:35

BY:  . DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948
Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

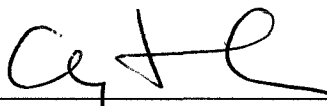
CASE NO. **CRF-11-2053**

**DEFENDANT'S REQUESTED
JURY INSTRUCTIONS**

COMES NOW, the Defendant, Joseph Herrera, by and through Clayton Andersen Benewah Public Defender and hereby submits the proposed Jury Instructions No. A through S attached hereto. I certify a cop[y of this document and attachments were delivered by interoffice mail to Brian Thie Benewah Prosecuting Attorney.

DATED this 7 day of April, 2016.

Attorney for Defendant



Clayton Andersen

ICJI 221 INSTRUCTION ON USING VERDICT FORM -- MULTIPLE COUNTS

DEFENDANT'S INSTRUCTION NO. A

If your unanimous verdict is that the defendant is not guilty of Second Degree Murder, you must acquit him of that charge. In that event, you must next consider the included offense of Voluntary Manslaughter. If your unanimous verdict is that the defendant is not guilty of Voluntary Manslaughter, you must acquit him of that charge. If your unanimous verdict is that the defendant is not guilty of involuntary manslaughter, you must acquit him of that charge.

It is for you, the jury, to determine from all the evidence in this case, applying the law as given in these instructions, whether defendant is guilty or not guilty of the offense charged or of any included offense.

With respect to the facts alleged in the Amended Information, the offense of Second Degree Murder includes the offenses of voluntary manslaughter and involuntary manslaughter. It is possible for you to return any one, but only one of the following verdicts:

GUILTY of Second Degree Murder or

NOT GUILTY of Second Degree Murder or

GUILTY of Voluntary Manslaughter or

NOT GUILTY of Voluntary Manslaughter or

GUILTY of Involuntary Manslaughter or

NOT GUILTY Involuntary Manslaughter.

When you are deliberating you should first consider the crime charged. You should consider the included offenses in the order listed only in the event the state has failed to convince you beyond a reasonable doubt of the defendant's guilt with respect to the crime charged and each preceding included offense. In the event the state has failed to convince you beyond a reasonable doubt of the defendant's guilt of the crimes charged, you must find the Defendant **NOT GUILTY**.

Because of the charge and included offenses you will be provided a verdict form to complete to set forth your verdict.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____

COVERED _____

John T. Mitchell, JUDGE

Comment

This instruction should be used with verdict form, ICJI 222. This instruction can and should be modified to reflect all included offenses, counts and special circumstances. This instruction should not be used to determine special circumstances which require a bifurcated trial, e.g., felony DUI. See ICJI 1008 and ICJI 1009.

Both instructions ICJI 221 and ICJI 223 are designed to accomplish the same task, i.e., informing the jury how to fill out a verdict form containing multiple counts, lesser included offenses or requiring the jury to answer whether special circumstances exist. These two instructions are alternative methods. The court should use whichever one seems best suited for the task, together with the companion verdict, ICJI 222 or ICJI 224.

ICJI 301 EFFECT OF DEFENDANT'S ELECTION NOT TO TESTIFY

DEFENDANT'S INSTRUCTION NO. 8

A defendant in a criminal trial has a constitutional right not to be compelled to testify. The decision whether to testify is left to the defendant, acting with the advice and assistance of the defendant's lawyer. You must not draw any inference of guilt from the fact that the defendant does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

- GIVEN _____
- REFUSED _____
- ACCEPTED _____
- MODIFIED _____
- COVERED _____

John T. Mitchell, JUDGE

ICJI 319 IMPEACHMENT -- PRIOR INCONSISTENT STATEMENTS UNDER OATH

DEFENDANT'S INSTRUCTION NO. C

You have heard the testimony of Joseph Herrera. You will recall it was brought out that before this trial that this witness made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom they were made under oath at another trial. Because of this, you may consider these statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

The committee recommends that this instruction be given immediately following the witness' testimony upon request made by the party opposing the impeachment. Without such a request, it may be given at the close of the evidence.

ICJI 320 USE OF WITNESS' PRIOR CONSISTENT STATEMENTS

DEFENDANT'S INSTRUCTION NO. D

testified in the (state's) (defense) case during the trial. You will recall that it was brought out that before this trial this witness made statements which were the same as, or similar to, what the witness said here in the courtroom. These earlier statements were brought to your attention to help you decide whether you believe Joseph Herrera's testimony.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

The committee recommends that this instruction be given immediately following the witness' testimony upon request made by the party opposing the impeachment. Without such a request, it may be given at the close of the evidence.

ICJI 342 CRIMINAL OR GROSS NEGLIGENCE DEFINED

DEFENDANT'S INSTRUCTION NO. E

Criminal negligence or gross negligence means such negligence as amounts to a wanton, flagrant or reckless disregard of consequences or willful indifference of the safety or rights of others.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

State v. Taylor, 59 Idaho 724, 735, 87 P.2d 454, 459 (1939).

ICJI 345 EXPERT WITNESS TESTIMONY

DEFENDANT'S INSTRUCTION NO. F

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

This is the last paragraph of ICJI 104.

ICJI 701 MURDER DEFINED

DEFENDANT'S INSTRUCTION NO. 6

Murder is the killing of a human being without legal justification or excuse and with malice aforethought

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

For legal justification see I.C. § 18-4009. For further instruction on legal justification see ICJI 1514 and ICJI 1515. Excusable homicide is defined in I.C. § 18-4012. For instructions on excusable homicide and self-defense see ICJI 1516 to ICJI 1521.

The elements of murder by torture are discussed in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

ICJI 702 MALICE—DEFINED

DEFENDANT'S INSTRUCTION NO. H

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. § 18-4002.

Do not use this instruction if the only murder charge is felony murder or murder by the intentional application of torture because these crimes do not require proof of malice aforethought. Idaho Code § 18-4001; *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989).

There is no legal distinction between malice and malice aforethought. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

When the charge is attempted second degree murder, this instruction must be amended to delete any reference to implied malice. The intent to kill is required for attempted second degree murder. *State v. Buckley*, 131 Idaho 164, 953 P.2d 604 (1998).

ICJI 705 SECOND DEGREE MURDER

DEFENDANT'S INSTRUCTION NO. I

In order for the defendant to be guilty of Second Degree Murder, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera engaged in conduct which caused the death of Stephanie Comack,
4. the defendant acted without justification or excuse, and
5. with malice aforethought which resulted in the death of Stephanie Comack.

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of second degree murder.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. § 18-4001, 18-4003.

ICJI 707 MURDER AND MANSLAUGHTER DISTINGUISHED

DEFENDANT'S INSTRUCTION NO. 11

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

The bracketed paragraph should be used if there is an issue as to the lapse of time between the provocation and the homicide.

ICJI 708 VOLUNTARY MANSLAUGHTER

DEFENDANT'S INSTRUCTION NO. K

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera engaged in conduct which caused the death of Stephanie Comack, and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven 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 of voluntary manslaughter.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. § 18-4006.

Use the bracketed material in paragraph number 4 if this instruction is given as an included offense to murder, after giving the transition instruction, ICJI 225.

If the court is going to instruct on the included offense of Involuntary Manslaughter, the transition instruction, ICJI 225, should be given along with the appropriate Involuntary Manslaughter instruction following the last sentence of this instruction.

INSTRUCTION NO. 1

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera engaged in conduct which caused the death of Stephanie Comack, and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven 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 of voluntary manslaughter.

ICJI 711 INVOLUNTARY MANSLAUGHTER—NEGLIGENCE

DEFENDANT'S INSTRUCTION NO. M

In order for the defendant to be guilty of Involuntary Manslaughter, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera deliberately pointing a .380 handgun at the head of Stephanie Comack and pulling the trigger,
4. the defendant's conduct was such that an ordinary person would anticipate that death might occur under the circumstances,
5. the defendant's conduct, was committed with reckless disregard of consequences and of the right of others, and
6. the defendant's conduct produced the death of Stephnie Comack. In order for the defendant to be guilty of Involuntary Manslaughter, the state must prove each of the following:

If any of the above has not been proven 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.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. § 18-4006(2).

The phrase "without due caution and circumspection," as in IC § 18-4006(2), ordinarily means negligence. *State v. Wojahn*, 282 P.2d 675 (Or. 1955). The reference to negligence in criminal statutes usually means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114. The

legislature can define a particular offense to require only ordinary negligence, however.
Haxforth v. State, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990); *State v. Curtis*, 106
Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

ICJI 712 INVOLUNTARY MANSLAUGHTER—NEGLIGENT USE OF DEADLY WEAPON

DEFENDANT'S INSTRUCTION NO. N

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera used a firearm with reckless disregard of the consequences and of the rights of others,
4. producing the death of Stephanie Comack.

If any of the above has not been proven 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.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. § 18-4006(2).

In order for a negligent act to be criminal, it must be more than the failure to exercise ordinary care. The reference to negligence in a criminal statute means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114.

Hands or other body parts or appendages may not, by themselves, constitute deadly weapons under the aggravated assault and aggravated battery statutes. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993). A boot can be a deadly weapon under IC § 18-905. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992). In general, an instrumentality may be a deadly weapon if it is capable of being used in a deadly manner and the evidence indicates that its possessor intended on that occasion to use it as a weapon. *Townsend*, at 886, 865 P.2d at 977, citing *Huston*, and *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963). A pocket knife may be a deadly weapon, depending on the circumstances of its use. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

ICJI 713 INVOLUNTARY MANSLAUGHTER—PERPETRATION OF UNLAWFUL ACT

DEFENDANT'S INSTRUCTION NO. 0

INSTRUCTION NO.

In order for the defendant to be guilty of Involuntary Manslaughter through perpetration of an unlawful act, the state must prove the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera committed the unlawful act of willfully and deliberately pointing a .380 handgun at Stephanie Comack's head and pulling the trigger, and
4. in the of the unlawful act, the defendant produced the death of Stephanie Comack.

If any of the above has not been proven 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.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. § 18-4006(2)

Use separate instruction for definition of "attempt" if appropriate, and elements of the alleged unlawful act.

ICJI 1402 FIREARM DEFINED

DEFENDANT'S INSTRUCTION NO. P

The term "firearm" means any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas or mechanical means, whether operable or inoperable.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. s 18-3316(3).

ICJI 1503 INTOXICATION DEFENSE

DEFENDANT'S INSTRUCTION NO. Q

Our law provides that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of the person having been in such condition."

This means that voluntary intoxication, if the evidence shows that the defendant was in such a condition when the defendant allegedly committed the crime charged, is not a defense in this case.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. s 18-116. *See Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); *State v. Ransom*, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002).

Involuntary intoxication is a defense. I.C. s 18-116.

[Revised July 2005]

ICJI 1508 MISFORTUNE OR ACCIDENT DEFENSE

DEFENDANT'S INSTRUCTION NO. R

All persons are capable of committing crimes, except those who committed the act or made the omission charged through misfortune or by accident when it appears that there was not evil design, intention or culpable negligence.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

John T. Mitchell, JUDGE

Comment

I.C. s 18-201(3).

The committee recommends that rather than instruct in the specific language of I.C. s 18-201(3), the court should instruct the jury in language tailored to the facts of the case, assuming a defense under I.C. s 18-201(3) applies to the case.

The reference to "culpable negligence" in I.C. s 18-201(3) is simply a reiteration of the excusable homicide standard under I.C. s 18-4012. Negligence in committing an unlawful act, resulting in death, is "culpable negligence." *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990).

ICJI 1510 IGNORANCE OR MISTAKE OF FACT DEFENSE

INSTRUCTION NO. 5

For the defendant to be guilty of Second Degree Murder, the state must prove the defendant had a malice. Evidence was offered that at the time of the alleged offense the defendant was ignorant of or mistakenly believed certain facts. You should consider such evidence in determining whether the defendant had the required malice.

If from all the evidence you have a reasonable doubt whether the defendant had such malice, you must find the defendant not guilty of Second Degree Murder.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____

JOHN T. MITCHELL JUDGE

Comment

I.C. s 18-201(1). Ignorance or mistake of fact is only a defense to a crime having a specific intent as an element. *State v. Stiffler*, 117 Idaho 405, 788 P.2d 220 (1990). Its purpose is to show that the defendant lacked such specific intent because the defendant was ignorant or mistaken as to the facts (e.g., he mistakenly believed the object he took was his own and therefore did not intend to deprive the owner of the object). Since such evidence is offered to show the defendant did not have a specific intent that is an element of the crime, the defendant cannot be required to prove that the defendant was ignorant or mistaken as to the facts. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). For such defense to prevail, the defendant need only create a reasonable doubt as to whether the defendant had the required specific intent.

The legislature, in codifying the crime of sexual battery of a minor child 16 or 17 years of age, I.C. s 18-1508A, intended to incorporate the immemorial tradition of the common law that a mistake of fact as to the complainant's age is no defense. *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996).

Further comment by Defendant. The Defendant is entitled to a jury instruction setting forth his theory of the case. The Defendant's defense has been that he did not believe the pistol was loaded when it was discharged so this ignorance or mistake of fact bears directly on his motive. This instruction is based on Idaho Code Section 18-201 which states,

PERSONS CAPABLE OF COMMITTING CRIMES. All persons are capable of

committing crimes, except those belonging to the following classes:

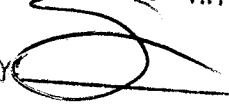
1. **Persons who committed the act or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent.**
2. Persons who committed the act charged without being conscious thereof.
3. **Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was not evil design, intention or culpable negligence.**
4. Persons (unless the crime be punishable with death) who committed the act or made the omission charged, under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.
(emphasis added)

The state's theory of the case is that the Defendant's discharge of a firearm in the position that the firearm was placed by the Defendant when the trigger was pulled by the Defendant demonstrated that he acted with malice. The Defendant's theory of the case is that the discharge of the weapon was done by accident or if the trigger was pulled that the Defendant was ignorant or mistaken that the the firearm was loaded. While this instruction relates to intent. The Supreme Court in *State v. Porter*, 142 Idaho 371 (2005) has ruled that "Malice may constitute the necessary mental element for second-degree murder although a deliberate intent to kill is not proved. Intent to kill is not necessary to establish voluntary manslaughter; abrogating *State v. Atwood*, 105 Idaho 315, 669 P.2d 204, and *State v. Ransom*, 137 Idaho 560, 50 P.3d 1055. I.C. § 18-4006." The key determination for the jury is to determine if the Defendant had the express or implied malice regarding second degree murder. See ICJI 707.

State v. Gomez, 94 Idaho 323 (1971) stated, 'The issue of intoxication as a mitigating factor, alluded to by appellant in mentioning his consumption of 'over a dozen beers' during the evening of the shooting, deserves a brief comment. Since it was voluntary, any possible intoxication did not make appellant's act less criminal, but may properly have been considered by the trier of fact as negating a necessary finding of a particular purpose, motive, or intent-in this case, malice aforethought. I.C. s 8-116. *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941). As indicated above, it is a factual question for the jury to determine whether the intoxication was of such degree as to preclude appellant from formulating the necessary malice. *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967); *State v. Snowden*, supra. There is enough competent evidence to justify the jury in not finding sufficient intoxication to negate a finding of malice. *State v. Griffith*, supra; *State v. Snowden*, supra."

FILED
BENEWAH COUNTY

2016 APR -8 AM 8:35

BY  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

CASE NO. CR 11-2053

**DEFENDANT'S FIRST
RESPONSE TO REQUEST FOR
DISCOVERY AFTER REMAND
FOR NEW TRIAL**

The Defendant, through Clayton Andersen attorney for Defendant, and hereby submits the following Response to Discovery.

1. There are the following documents:

A. The trial transcript of the previous trial;

B. All exhibits previously admitted into evidence at the previous trial.

2. There are no results or reports of physical or mental examinations or scientific tests which are in the possession of the Defendant at this time, which will be submitted prior to the time of trial.

DEFENDANT'S RESPONSE TO REQUEST FOR DISCOVERY PAGE 1

The following are the names and addresses of witnesses who may be called at the time of trial on behalf of the Defendant:

a. The Defendant herein, in addition to people, if any, that have been disclosed as potential witnesses by the State, and any other persons who were named by the State within other discovery materials.

b. Daniel Ducommun
2355 Railroad Grade Rd.
St. Maries, ID 83861

DATED this 7 day of April, 2016.

Attorney for Defendant

By: Clayton Andersen
Clayton Andersen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of April, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah Prosecutor

Hand Delivered

Clayton Andersen
Clayton Andersen

FILED
BENEWAH COUNTY

2016 APR 11 PM 3:37

BY  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

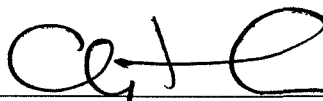
Defendant.

CASE NO. CR11-2053


**STIPULATION REGARDING RELEASE
OF EXHIBITS**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender and the Benewah Prosecutor, Brian Thie stipulate to the release of all exhibits marked or admitted for the previous trial in this matter held by the court to Idaho State Police Detective Paul Berger. The parties have agreed that any evidentiary chain of custody issue regarding the delivery of these exhibits shall not be raised. The parties have agreed that these exhibits may be examined by the parties' attorneys, their respective experts or third parties by mutual agreement without the necessity of a court order.

DATED this 11 day of April, 2016.



Clayton Andersen
Benewah County Public Defender




Brian Thie
Benewah Prosecuting attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of April, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 APR 11 PM 3:32

BY: [Signature] . DEPUTY

BRIAN D. THIE #4789
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR11-2053
)	
vs.)	
	)	NOTICE OF INTENT TO
JOSEPH DUANE HERRERA,	)	USE 404(b) EVIDENCE
)	
Defendant.)	
_____)	

COMES NOW BRIAN D. THIE, Prosecuting Attorney for Benewah County, State of Idaho, and gives notice that the State intends to introduce evidence pursuant to I.R.E. 404(b) as follows:

1. That about December 21, 2011, four days before Stephanie was shot Stephanie came to James Comack's house seeking a place to stay and James told her he would help her get on her feet, but 11:00 P.M. that night the defendant arrived and Stephanie went with him, when James intervened she said, "Don't. You don't know him, he is psycho."

2. Susie Comack told Stephanie Comack that, "This is not normal, you don't have to live like this," and Stephanie replied, "You don't understand Mom, he's psycho."

3. About December 23 Stephanie e-mailed Katlyn, "I'm starting to realize he (the defendant) doesn't care. Why are

people so mean... I'm starting to realize he really doesn't care. I thought I'd be a lot more sad about it, but I think I might hate him too much to be sad."

4. Testimony of Bobbie Riddle that they often argued and that Stephanie Comack said she couldn't leave Joseph Herrera because he threatened to kill himself if she did so.

5. Bobbie Riddle's, Eunice McEwen's, James Comack's, Susie Comack's and Katlyn Comack's testimonies that in December 2011 Stephanie Comack told each of them that Stephanie was afraid to leave Joseph Herrera because Joseph said he would kill himself if she did.

6. Facebook foundation re: relationship between the defendant and the victim.

7. That Stephanie Comack was scared of the defendant.

8. Evidence of drug use by the defendant.

The State also intends to introduce evidence pursuant to I.R.E. 404(b) that has potential for use as rebuttal evidence as follows:

1. Testimony of Eunice McEwen that Eunice had heard Joseph Herrera insult and verbally abuse Stephanie; that on December 10, 2011, she went to get Stephanie Comack at Susie Comack's home. Stephanie Comack was upset and angry at Joseph Herrera. Stephanie Comack then told Eunice McEwen that her head hurt because Joseph Herrera had hurt her, that on that day Joseph Herrera hit her, choked her, hit her head on the car shifter and pointed a gun at her head and said, "shut up." Stephanie Comack told Eunice McEwen not to tell anyone about this while Stephanie Comack was pointing her finger at her own temple; and that on or

about December 10, 2011, Eunice McEwen was on the phone with Stephanie Comack and could hear Joseph Herrera in the room when Stephanie Comack told Eunice McEwen that Comack has to go and then Eunice McEwen heard the phone breaking and that a few days later Stephanie Comack told her Joseph Herrera had broken her phone.

2. Testimony of James Comack, Stephanie's father, that the defendant would not allow Stephanie to have a job or spend time with friends or family. That James loaned his cell phone to Stephanie in November and December 2011 and that when she returned it there were several texts by Joseph Herrera to Stephanie, which threatened violence or suicide, including one which said, "I'm serious this time, I'm going to do it this time, just remember I love you."

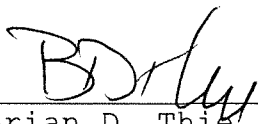
3. Testimony of Susie Comack, Stephanie's mother, that Stephanie Comack told her that the defendant would not let her have a job or spend time with friends or family and that on December 10, 2011, Joseph Herrera broke Stephanie Comack's phone in half because Stephanie wanted to call Susie Comack for a ride; that on December 17, 2011, Susie Comack saw bruises on Stephanie Comack and asked her if Joseph Herrera did it and Stephanie Comack would not answer; that on December 24, 2011, Susie Comack gave Stephanie Comack a new phone and told Stephanie to tell Joseph Herrera that Susie would break his hands if he touched Stephanie's phone again.

4. Testimony of Katlyn Comack that the defendant was controlling of Stephanie and would call repeatedly or otherwise cause her to keep away from others and that on or about December 10, 2011, Stephanie Comack said Joseph Herrera broke Stephanie's

phone in half because Stephanie was trying to call her parents; that about December 17, 2011, Katlyn Comack saw bruises on Stephanie Comack's arm and Stephanie Comack would not answer when asked if Joseph Herrera did it and that Stephanie Comack told Katlyn Comack that she felt safe at Susie Comack's home, but then went back to Joseph Herrera; and that about December 23, 2011, Katlyn Comack asked Stephanie Comack to come live with Katlyn to escape Stephanie's abuse by defendant but Stephanie Comack responded that Stephanie could not move in with Katlyn because Joseph Herrera was "crazy" and that Joseph Herrera knew where Katlyn lived.

5. Testimony of Bobbie Riddle that in December 2011 Stephanie Comack told Bobbie Riddle that Joseph Herrera would "slap her (Stephanie) around."

DATED this 11 day of April, 2016.




Brian D. Thie
Prosecuting Attorney

I hereby certify that on the _____ day of _____, 2016, a true and correct copy of the foregoing was delivered/mailed, postage prepaid, to:

Clayton Andersen
Attorney at Law
Courthouse Mailbox
St. Maries, Idaho

By _____

2016 APR 11 PM 4:32

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

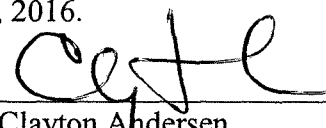
Case No. CR11-2053

MOTION TO TRANSPORT FOR
HEARINGS

COMES NOW, Clayton Andersen, Benewah County Public Defender, and moves to have the Defendant transported by the Benewah County Sheriff's Office for court hearings before Judge Mitchell at 9:00 a.m. April 20, 2016 in Kootenai County Courthouse and to return the Defendant to the Benewah County Jail after completion of the hearings held in this matter. The prosecutor has no objection to this motion pursuant to oral agreement by telephone on April 5, 2016.

I HEREBY CERTIFY that on the 11 day of April 2016, a true and correct copy of the foregoing document was served upon the Benewah County Prosecutor.

DATED this 11 day of April, 2016.



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 APR 12 AM 8:52

BY [Signature] DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

CASE NO. CR11-2053

**ORDER REGARDING RELEASE OF
EXHIBITS**

Based upon the Stipulation for Release of Exhibits by the Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender and the Benewah Prosecutor, Brian Thie and good cause appearing,

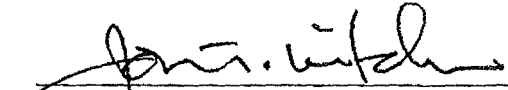
IT IS HEREBY ORDERED that the court clerks in Kootenai County and Benewah County shall release of all exhibits marked or admitted for the previous trial in this matter held by the court


to Idaho State Police Detective Paul Berger, *Paul Berger to make arrangements with the Court's Deputy Court Clerk to obtain these exhibits by calling*
IT IS FURTHER ORDERED that any evidentiary chain of custody issue regarding the *208-446 1103.*
delivery of these exhibits shall not be raised.

IT IS FURTHER ORDERED that these exhibits may be examined by the parties' attorneys, *Jan 4/12/16*
their respective experts or third parties by mutual agreement without the necessity of a court order.

DATED this 12th day of April, 2016.

150



John T. Mitchell
District Judge
Approved



Brian Thie
Benewah County Prosecutor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of April, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor
Benewah Public Defender
ISP Det. Paul Beyer

interoffice mail
 interoffice mail
 Fax (208) 309-8616



Deputy Clerk

FILED
BENEWAH COUNTY

2016 APR 12 AM 8:52

BY:  DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA,

Defendant.

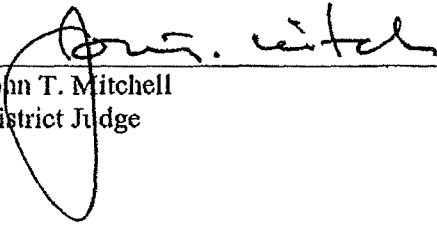
Case No. CR11-2053

ORDER TO TRANSPORT FOR
HEARINGS

Based on the Motion of the Defendant to Transport for Hearings and good cause appearing,

IT IS HEREBY ORDERED the Defendant shall be transported by the Benewah County Sheriff's Office for court hearings before Judge Mitchell at 9:00 a.m. on April 20, 2016 in Kootenai County Courthouse and to return the Defendant to the Benewah County Jail after completion of the hearings held in this matter.

DATED this 12th day of April, 2016.



John T. Mitchell
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of April 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor interoffice mail

Benewah Public Defender interoffice mail

Benewah County Sheriff interoffice mail



Deputy Clerk

FILED
BENEWAH COUNTY

2016 APR 13 PM 1:36

BY:  .DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

CASE NO. CR11-2053

**MOTION IN LIMINE REGARDING
DEFENDANT'S PRIOR TESTIMONY**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender moves for an Order Limiting the Defendant's prior testimony by the state in its case in chief.

GROUND OF MOTION

1. The decision by the Idaho Supreme Court in this matter.
2. The prior testimony of the Defendant should not be permitted because the new trial was based on the state's prosecutorial misconduct so that fundamental fairness and due process requires that the Defendant receive a new trial.
3. The Defendant understands that the state intends to use the prior testimony of the Defendant by having a yet undisclosed third party read the trial transcript testimony of the Defendant. This procedure in allowing the state to use the Defendant's prior testimony by reading the testimony to the jury denies the fact finder of one of the essential

- observations of the demeanor of the testimony of the Defendant on the witness stand.
4. The Defendant's prior attorney was ineffective in advising the Defendant of the effect of the waiver of his 5th amendment rights, the potential consequences of testifying and failed to prepare the Defendant for testifying.
 5. The Defendant's 5th, 6th, and 14th Amendment rights under the United States Constitution and Article I Section 13 of the Idaho Constitution.
 6. The fundamental unfairness of allowing the state to violate the previous trial court order regarding testimony of previous witness and now allowing the state to use the prior testimony of the Defendant in the current trial rewards the misconduct of the state and grants the state an unfair advantage in the new trial that the state would not have had at the previous trial.
 7. Idaho Rules of Evidence 801(d)(2)(A); 804(a) (1); 804(b)(1); and 1103.
 8. The prior testimony of the Defendant was induced in part by the state's use of improper character evidence such that this misconduct should preclude the state from using the former testimony as the prior testimony was not solely motivated by lawful evidence adduced against him.
 9. The Brief filed in Support of this Motion.
 10. Allowing the state to use the Defendant's prior testimony would prejudice the substantive rights of the Defendant by granting the State an unfair advantage at the new trial.

BASIS OF MOTION

The basis of this motion is all of the records and files of this action.

ORAL ARGUMENT

Oral argument is requested and the estimated time of argument is 20 minutes.

DATED this 13 day of April, 2016.



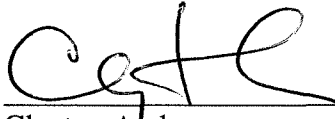
Clayton Andersen
Benewah County Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of April, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Benewah County Prosecutor

interoffice mail



Clayton Andersen
Benewah County Public Defender

FILED
BENEWAH COUNTY

2016 APR 13 PM 1:36

BY: _____, DEPUTY

CLAYTON ANDERSEN ISB #1860
Benewah County Public Defender
222 S. 7th Suite G-07
St. Maries, ID 83861
Telephone: (208) 245-2521
Fax: (208) 245-245-3948

Attorney for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH HERRERA

Defendant.

CASE NO. CR11-2053

**BRIEF IN SUPPORT OF MOTION IN
LIMINE REGARDING DEFENDANT'S
PRIOR TESTIMONY**

The Defendant, Joseph Herrera, by and through Clayton Andersen, Benewah Public Defender submits the Defendant's Brief in Support of Motion in Limine Re Defendant's prior testimony by the state in its case in chief.

FACTUAL DISCUSSION

The Defendant testified in his prior trial. The testimony was done in part to give the Defendant's version of the events of December 11, 2011 and was done to rebut the character evidence elicited by the state during the states' case in chief. The Idaho Supreme Court vacated the judgment of conviction and remanded the case for further proceedings consistent with this opinion resulting in a scheduling of a new trial.

ARGUMENT AND LEGAL AUTHORITY

The Idaho Supreme Court on pages 7-13, the Idaho Supreme Court discusses in detail the
BRIEF IN SUPPORT OF MOTION IN LIMINE REGARDING DEFENDANT'S PRIOR TESTIMONY
PAGE 1

testimony of the four witnesses which the Defendant contended had provided inappropriate testimony concerning his alleged prior acts and hearsay statements allegedly made by Stephanie in the weeks leading up to her death. The court simply stated, "We agree with Herrera." (end of paragraph page 7 of decision under subsection **B. Testimony elicited at trial unfairly prejudiced Herrera**).

The Idaho Supreme Court discussed the testimony of each of these witnesses at length. While the court commented as to Kaytlin Comack's testimony that the prosecutor did not appear to intentionally elicit any testimony about bruises and there was no direct connection in the testimony to link Herrera to the bruising, the logical inference would be to connect Herrera as the source of the bruising. This evidence was in direct violation of the trial court's pre-trial order and court found the evidence highly prejudicial.

The court discussed the testimony of Eunice McEwen which the Idaho Supreme Court determined was highly prejudicial to Herrera. This was the state asked a question about an event which resulted in a response which was proscribed by rule 803(3). The Defendant argues in this brief that this was in fact an intentional act by the prosecutor to elicit prejudicial testimony supportive of the state's theory of the case.

The court discussed the testimony of Bobbie Jo Riddle, Stephanie father's girlfriend at the time and now his wife testified again in violation of the court's pre-trial order about Stephanie's statement that Herrera had slapped her around and choked her. Again, the background of the case shows that the state knew Riddle had previously testified that Herrera was abusive yet despite this knowledge the State asked Riddle whether Stephanie had said Herrera mistreated her and what he had done to mistreat her. The Idaho Supreme Court saw this as prosecutorial misconduct.