STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

JERRY ALLAN HILL,

Defendant.

Case No. **CRF 2008 26363**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant JERRY ALLAN HILL's Motion for a New Trial is denied.
Arthur Verharen, Dep. Prosecuting Attorney, lawyer for the Plaintiff.
Mark Jackson, Coeur d'Alene, lawyer for Defendant Hill.

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I. FACTUAL BACKGROUND.

This matter is before the Court on Defendant Jerry Allan Hill's (Hill) "Motion for a New Trial" following a May 13, 2010, jury verdict of guilty on three counts of grand theft.

On November 25, 2008, a criminal complaint was filed against Jerry Allan Hill (Hill) alleging three counts of grand theft (each a theft or thefts in aggregate of $1,000) from Jordan, Hill and Hall Inc., d/b/a GMAC Real Estate Northwest (of which Hill was a partner), each count covering three discrete periods: Count I January 1, 2004 – June 30, 2005, Count II July 1, 2005 – December 31, 2005, and Count III January 1, 2006 – May 31, 2006. Criminal Complaint, pp. 1-2. Hill appeared under summons and was arraigned on December 17, 2008. Hill applied for a public defender on December 26, 2008, and was

granted such on that date.

At Hill's initial appearance on December 17, 2008, a preliminary hearing was ordered within 21 days, and was scheduled for January 6, 2009. Hill applied for a public defender on December 26, 2008, and was granted such by Judge Friedlander on that same date. At that January 6, 2009, preliminary hearing, Hill's attorney moved for a continuance. The preliminary hearing was rescheduled for January 27, 2009. At the preliminary hearing on January 27, 2009, Hill's attorney again moved for a continuance, this time until at least March 1, 2009. Hill's motion to continue was granted and the preliminary hearing was rescheduled for March 24, 2009. On March 12, 2009, the State filed a motion to continue due to the unavailability of a witness for the preliminary hearing on March 24, 2009. Hill's attorney did not object to that motion. The preliminary hearing was rescheduled for April 2, 2009. On March 26, 2009, Hill's attorney filed a motion to continue the April 2, 2009, hearing, and the State did not object. On March 30, 2009, Hill filed a Waiver of Speedy Trial, and on March 31, 2009, Hill's motion to continue was granted. The preliminary hearing was rescheduled for April 21, 2009. On April 21, 2009, a preliminary hearing was held, continued to a second day on May 15, 2009. On May 22, 2009, Magistrate Judge Penny Friedlander announced her decision on the record, binding Hill over for trial on all three counts. An "Information" was filed on May 27, 2009.

Hill was arraigned before this Court on July 1, 2009, and on July 25, 2009, Hill filed a written not guilty plea. Hill's trial was scheduled for August 3, 2009. On July 23, 2009, Hill's attorney, along with the deputy prosecuting attorney, requested a continuance. The request for a continuance made by Hill's attorney was so that they "could get a forensic accountant" and due to a pending bankruptcy. The motion to continue was granted and the matter was set for a jury trial on October 5, 2009. Hill waived his right to a speedy trial. On

September 17, 2009, Hill made a motion to continue to allow more time for discovery. That motion was granted and the trial was rescheduled for December 7, 2009. On December 3, 2009, Hill made a motion to continue, again due to the bankruptcy, but Hill's counsel informed the Court, with Hill present at counsel table alongside counsel, that Hill "*had hired an accountant*." Trial was scheduled for March 1, 2010. At a hearing on pre-trial motions on February 22, 2010, Hill's attorney announced that Hill would be making a motion to continue at the pre-trial conference scheduled for February 25, 2010. The deputy prosecutor did not object at the hearing on February 22, 2009, so the pre-trial conference scheduled for February 25, 2010, and jury trial scheduled for March 1, 2010, were vacated, and the jury trial was scheduled for May 10, 2010. On April 29, 2010, a pre-trial conference was scheduled, counsel appeared, and no objection was made by either party to proceeding to trial on May 10, 2010. On May 6, 2010, Hill's counsel made a motion to continue the trial, based on the fact that the defense had just received additional discovery from the prosecution. The deputy prosecutor informed the Court and Hill's counsel that much of it was information previously discovered but now in a different form for trial. This Court denied the motion to continue due to: the number of previous continuances; while some of this material may have been new to Hill's counsel, none of this material was new to Hill; there remained four days to review any new documents prior to trial; and because this Court had given this trial a special setting for the four-day jury trial.

The four-day jury trial began on May 10, 2010, and on the fourth day, May 13, 2010, at seven minutes before noon, the jury began deliberating. At 3:20 that afternoon, the jury reached its unanimous verdict, finding Hill guilty on all three counts. Sentencing was scheduled for July 20, 2010. On June 4, 2010, the Court moved the sentencing date to July 27, 2010. On July 27, 2010, Hill's attorney moved to continue the sentencing hearing,

and no objection was made to that motion by the deputy prosecutor. Sentencing was scheduled for August 24, 2010. On August 23, 2010, Hill sent a personal letter to the Court complaining that his public defender had never had the time to meet with him, that he promised to hire an accountant and an investigator, which never happened, that Mark Jackson who represented Hill in 2008 on these charges (apparently before they were filed) "had all the evidence showing my innocence and had gone over that evidence with his accountant", that Mark Jackson had sent the prosecutor "…all this material along with a letter hoping to convince the Prosecutor that this was a civil trial and not a criminal one", that his public defender requested this letter and these documents from the current prosecutor and received them just a few days before trial, that Hill had called the accountant for sentencing but he was on vacation, and requesting that this Court appoint a different public defender. Obviously, that letter became the focus at the August 24, 2010, sentencing hearing.

At the beginning of the sentencing hearing, Hill's attorney made a motion to continue the sentencing hearing. Just before noon on August 24, 2010, over the prosecutor's objection, the Court continued the sentencing hearing and rescheduled such for September 28, 2010. However, since Hill had provided this Court with this letter the day before Hill's sentencing hearing, and since the letter had no "new" information regarding any event that had occurred since the jury verdict, the Court ordered Hill to go to the public defender's office immediately and meet non-stop with his attorney until the issues between Hill and his attorney could be addressed and resolved (or not), that John Adams, the Kootenai County Public Defender had to be involved in these discussions, and that a decision had to be made by the end of the day. The Court admonished Hill that the Court does not manage what experts are employed by a defendant or the public defender, and the Court asked Hill

who this accountant was that Mark Jackson had hired more than two years ago, the accountant Hill had referenced in his letter to the Court. Hill did not know the accountant's name. The Court ordered Hill to disclose the name of this accountant by the end of the day as well.

On September 27, 2010, the day before the sentencing hearing, Hill's attorney filed a "Motion to Continue the Hearing", "…on the grounds that defendant requires expert accounting testimony regarding both the sentencing and restitution issues." Motion to Continue, p. 1. Counsel for Hill advised the Court in that motion that accountant Tom Baker could review the documents by late October 2010, and that Suzanne Metzger could review the records by mid-November 2010. At the September 28, 2010, sentencing hearing, the Court heard argument by Hill's attorney regarding the motion to continue. The motion to continue was primarily focused on the State's restitution request, $177,031.19 for each of the two other partners, Brad Jordan and Patrick Hall, or $354,062.38. Motion for Restitution, filed June 4, 2010, p. 1. The Court denied the motion to continue sentencing because at the last hearing the Court stated there would be no more continuances, because it had been fifteen weeks since the jury verdict and nearly two years since Hill was charged with these crimes, and because the jury had returned a verdict on the basis of the evidence presented and not on evidence that Hill was still trying to create. The restitution hearing was continued.

At the three-hour sentencing hearing on September 28, 2010, Hill had several people testify on his behalf, but no accountant testified on behalf of Hill. At the conclusion of that sentencing hearing, this Court sentenced Hill to three years fixed, three years indeterminate, total unified sentence of six years on all three counts, with the sentence on all three counts to run concurrent. Hill was sentenced to a retained jurisdiction.

Up to this point in time, from the first scheduled preliminary hearing to sentencing, a span of almost twenty-two months, Hill at all times had been represented in Court by the office of the Kootenai County Public Defender.

On October 12, 2010, attorney Mark Jackson filed a Substitution of Counsel, substituting for the public defender as counsel for Hill. On that same date, the last possible day under I.C.R. 34, Mark Jackson on behalf of Hill filed a "Motion for a New Trial", an "Affidavit of Mark A. Jackson in Support of Motion for Extension of Time to File Motion for a New Trial." The Court granted Hill an extension of time until October 26, 2010, to file any amended motion for new trial, but the Court would not stay the imposition of Hill's sentence. On October 26, 2010, Hill filed an "Amended Motion for a New Trial." On December 16, 2010, Hill noticed that motion for a hearing on February 15, 2011. On January 26, 2011, Hill filed an "Affidavit of Jerry Hill", an "Affidavit of Suzanne S. Metzger". and an "Affidavit of John Kelpin". On January 29, 2011, Hill filed a "Brief in Support of Defendant's Motion for a New Trial" and an "Affidavit of Elizabeth A. Primozich." On January 31, 2011, the State filed its "Brief in Opposition to Motion for New Trial." On February 8, 2011, Hill filed "Defendant's Responsive Brief." On February 15, 2011, this Court heard oral argument on Hill's motion for a new trial. At the beginning of that argument the Court heard the State's objection to the various affidavits submitted by Hill on the grounds of relevance and hearsay, pursuant to *State v. Hayes,* 144 Idaho 574, 578, 165 P.3d 288, 292 (Ct.App. 2007). Brief in Opposition to Motion for New Trial, p. 2. The Court stated it would take those objections under advisement. At the conclusion of that oral argument, the Court took Hill's motion for new trial under advisement.

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II. STANDARD OF REVIEW.

A motion under I.C.R. 34 is a matter committed to the discretion of the trial court. The trial court may grant a new trial in the interest of justice. I.C.R. 34; *State v. Hayes,* 144 Idaho 574, 577, 165 P.3d 288, 291. Idaho Appellate Courts review the denial of a motion for new trial for an abuse of the trial court's discretion. *Id.* A motion for a new trial based on newly discovered evidence involves questions of both fact and law. An abuse of discretion will be found if the trial court's findings of fact are not supported by substantial evidence or if the trial court does not correctly apply the law. *Id.* Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making, and conservation of scarce judicial resources. *Id., citing State v. Eddins,* 142 Idaho 423, 425, 128 P.3d 960, 962 (Ct.App. 2006). Where the court's exercise of discretion is predicated upon factual findings and upon the application of legal standards to the facts found, we apply the "clearly erroneous" test to the findings and we determine whether the legal standards have been properly identified. *State v. Ames,* 112 Idaho 144, 146 730 P.2d 1064, 1066 (Ct.App. 1986).

III. ANALYSIS.

A. Evidentiary Objections by the State as to Hill's "New" Evidence.

At oral argument on February 15, 2011, counsel for the State objected to much of Hill's "new" evidence on hearsay grounds and relevance grounds. As discussed below, the submitted "new" evidence was considered by the Court, and after being considered by the Court, the relevance objection is sustained. The Court addresses the hearsay objection in the opinion. Due to the pervasive lack of relevance of the "new" evidence submitted by Hill, the Court will not address the hearsay objection other than as noted in this opinion.

B. Analysis of Hill's Motion for a New Trial.

1. Introduction.

Hill makes his Motion for a New Trial under I.C.R. 34 and I.C. § 19-2406. Idaho Code § 19-2406 reads:

> **19-2406.GROUNDS FOR NEW TRIAL**. When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:
>
> 1. When the trial has been had in his absence, if the indictment is for a felony.
> 2. When the jury has received any evidence out of court other than that resulting from a view of the premises.
> 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.
> 4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors.
> 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.
> 6. When the verdict is contrary to law or evidence.
> 7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

Idaho Rule of Criminal Procedure 34 reads:

> **Rule 34. New trial.**
> The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice. If the trial was by court without a jury the court on motion of a defendant for new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two (2) years after final judgment. A motion for a new trial based on any other ground may be made at any time within fourteen (14) days after verdict, finding of guilt or imposition of sentence, or within such further time as the court may fix during the fourteen (14) day period.

Federal Rule of Criminal Procedure 33 is essentially the same as I.C.R. 34. The rules are arranged differently, the time period for newly discovered evidence is greater in the federal rules (not an issue in Hill's case), but the requirement of being "in the interests of justice" is the same in both rules. Federal Rule of Criminal Procedure 33 reads:

> **Rule 33. New Trial.**
> **(a) Defendant's Motion.**
> Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
> **(b) Time to File.**
> **(1) *Newly Discovered Evidence.***
> Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.
> **(2) *Other Grounds.***
> Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

The federal rule is mentioned in this decision as there is more case law which discusses the federal rule as compared to the Idaho rule. *See generally* 44 A.L.R.Fed. 13.

Hill bases his Motion for a New Trial on the following grounds:

> 1. New evidence exists which the Defendant could not with reasonable diligence have discovered or produced at trial.
> 2. The verdict was contrary to law or evidence.
> 3. The court misdirected the jury in a matter of law, or erred in decisions involving questions of law arising during trial.
> 4. The jury was guilty of misconduct by which a fair and due consideration of the case has been prevented.
> 5. Any other grounds allowed under I.C. § 19-2604 uncovered in the investigation of the above case
> 6. The Defendant is entitled to a new trial based on various facts and evidence, including but not limited to the following: (25 instances)

Amended Motion for New Trial, pp. 1-5. In the twenty-five examples of "various facts", none are items of evidence that were not known to Hill, or knowable to Hill in the

exercise of reasonable diligence, prior to and at the time of trial. In Hill's brief, Hill apparently limits those six grounds to three of the grounds under I.C. § 19-2406:

> 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.
> 6. When the verdict is contrary to law or evidence.
> 7. When new evidence is discovered material to the Defendant, and which he could not with reasonable diligence have discovered an[d] produced at trial.

Brief in Support of Defendant's Motion for a New Trial, p. 1.

2. The Impossibility of Testing Hill's Claims.

For Hill to make these claims it is important to know exactly what was laid before the jury by way of testimony. Hill has not presented a transcript of the four-day trial, making this task essentially impossible. This flaw by Hill is in itself fatal to Hill because it is Hill who carries the burden on this motion. "The burden of proof on such a motion is clearly on the defendant" 44 A.L.R. Fed. 13, § 2(b), p. 41. § 11.

In briefing, Hill's attorney claims Hill could not afford a transcript of the jury trial. "Jerry could not afford a transcript". Brief in Support of Defendant's Motion for a New Trial, p. 8. Considering that much of Hill's argument on his motion for a new trial is his claim that he could not afford an accountant at trial, and yet he found an accountant for his motion for a new trial, and now he lacks a transcript, one could wonder where this claim of always being one step behind might end. This Court concludes it ends right here. Just as if Hill wishes to appeal the verdict or this Court's rulings, Hill will need to pay for a transcript so that the appellate courts will know what to review, so too he must provide this Court with an appropriate record from which to decide his motion for a new trial. He has failed in this regard.

Twelve of Hill's peers sat as jurors and listened to four days of testimony and pondered over a plethora of exhibits. Hill himself testified, and that was likely his

undoing. Any claims as to the inadequacy of the "testimony" presented to the jury is incapable of analysis. The Court has reviewed its own notes, but that is not the record. Hill has simply failed to present the record to the Court.

3. Legal Inadequacies of Hill's Motion.

a. Hill's Claim That the Corporation "Owed Me Money".

Much, if not all, of Hill's argument for a new trial is predicated in some way on his "defense" that the business, Jordan Hill & Hall, *owed Hill a lot of money*. Hill claims in his brief:

> l. The jury never heard Ms. Metzger's summaries confirming the various different times that Jerry was actually owed money by the corporation, which is consistent with Jerry's position at trial.
> m. **The jury never heard Ms. Metzger's opinion that at the time of trial, JHH owed Jerry in excess of $168,000.00.** She based this opinion upon using Exhibit No. 12 and removing the Mullan and Maverick properties, removing the "commission" items and interest and applying the proceeds from Jerry's lake home.

Brief in Support of Defendant's Motion for a New Trial, pp. 5, 6. (bold in original). First of all, this is nothing "new". Hill made that claim in his testimony to the jury, in his closing argument, and before the Court at sentencing. Second, "they owed it to me" is not a defense. Writing it in bold doesn't make it a defense, nor does writing it in bold make the issue relevant.

Idaho Code § 18-2406 sets forth the "defenses" to the charge of theft. Nowhere in that statute is the defense of "*they owed it to me*" found. That was the mantra proclaimed by Hill in his own testimony before the jury. From the Court's notes, Hill told the jury when asked by his own attorney about Exhibit 12 (the report of Curtis Clark): "When the company was formed I was owed money by the corporation", "They always owed me money", "they owed me a lot of money" (regarding the 3/7/06 entry), "They owe me" (regarding the 9/25/06 entry). When cross-examined, Hill testified: "Why would I want to

hide it, the company owed me money?" (regarding Exhibit 8), and "The company owed me money and my personal expenses were taken out of what they owed me." (regarding Exhibit 12). Items in nature of a set-off do not constitute a defense to a charge of larceny or embezzlement. *State v. Cocharane,* 51 Idaho 521, 526, 6 P.2d 489, 491 (1931). Idaho Code § 18-2406 reads:

> **18-2406. DEFENSES.**
> (1) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.
> * * *
> (3) In any prosecution for theft committed by trespassory taking or the offense previously known as embezzlement, it is an affirmative defense that the property was appropriated openly and avowedly, and under a claim of right made in good faith. It is not a defense to a theft committed by such conduct that the accused intended to restore the property taken, but may be considered by the court to mitigate punishment if the property is voluntarily and actually restored (or tendered) prior to the filing of any complaint or indictment relating thereto, and this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against such other person.

Subsections (2), (4) and (5) are not relevant to this case. If the money was owed to Hill by the corporation, then Hill could argue that he had a "claim of right". However, the evidence adduced at trial did not show Hill "appropriated" the corporation's property "openly and avowedly". Quite the opposite, Hill was sneaky. That was the evidence presented to the jury by the State. Hill testified to rebut this, but the jury, understandably, must not have believed Hill's testimony. None of the "evidence" presented to the Court by Hill on Hill's motion for a new trial changes this. Hill requested a jury instruction pursuant to I.C. § 18-2406(3). Defendant's Requested Instruction No. 1. Such an instruction was given. The jury was instructed:

> It is an affirmative defense to the offense of theft, that the property was appropriated openly and avowedly, and under a claim of right made in good faith.
> The burden is on the State to prove defendant's guilt beyond a

> reasonable doubt. To find the defendant guilty, therefore, you must conclude beyond a reasonable doubt, that the property was not appropriated openly and avowedly, and not under a claim of right made in good faith.
>
> It is not a defense to the offense of theft, that the defendant has an interest therein, when the owner(s) also has an interest to which the defendant is not entitled.
>
> It is not a defense to the offense of theft, that the defendant intended to restore the property taken.
>
> It is not a defense to the offense of theft, that the defendant retained property of another to offset or pay demands held against the defendant.

Court's Instruction No. 14. Obviously, the jury felt the State had met its burden of proving that the property was not appropriated openly and avowedly, and not under a claim of right made in good faith. When asked by his attorney about the Spokane Chief's luxury box which Hill purchased with the corporate credit card: "I intended to pay that back." As the above instruction (which comports with I.C. § 18-2406(3)), that is *not* a defense.

Because "set-off" is not a defense, Hill in his new affidavit essentially admits the crime: "I accept responsibility of contributing to the confusion by making personal purchases with corporate funds; but at the same time, the company owed me monies." Affidavit of Jerry Hill, p.15, ¶ 25.

b. The "Standard" on a Motion for New Trial.

The Idaho appellate courts have consistently held:

> A motion for a new trial based on newly discovered evidence must satisfy the test adopted in *State v. Drapeau,* 97 Idaho 685, 551 P.2d 972 (1976). The requirements under that test are:
>
> > (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant.
>
> *Id.,* at 97 Idaho 691, 551 P.2d 978, quoting 2 C. WRIGHT, FEDERAL

> PRACTICE AND PROCEDURE: CRIMINAL § 557, at 515 (1969).[1] [FN1. This language has been retained in the 1982 edition of Wright's text. *See* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 557, at 315 (1982).] If the alleged new evidence does not meet each of the requirements set forth in *Drapeau,* the district court should not grant a motion for a new trial.[2] [FN2. These standards are the same whether the motion for new trial is based on newly discovered evidence under I.C. § 19-2406(7) or under the auspices of I.C.R. 34 (permitting a new trial "if required in the interest of justice").]

State v. Ames, 112 Idaho 144, 146 730 P.2d 1064, 1066 (Ct.App. 1986); *State v. Pugsley,* 119 Idaho 62, 63, 803 P.2d 563, 564 (Ct.App. 1991). *See also* 44 A.L.R.Fed. 13 § 1, p. 37.

i. No "Newly Discovered Evidence" Submitted.

Hill's "newly discovered evidence" is really old evidence, at all times known to Hill, run through a "new" person, Suzanne Metzger, an accountant.

Other "new" evidence are the affidavits of Primozich and Kelpin. Elizabeth (Ellie) Primozich submitted an affidavit in support of Hill's motion for a new trial. Primozich was known to Hill prior to trial. Affidavit of Elizabeth A. Primozich, p. 1-3, ¶¶ 3, 4, 6, 10. Several witnesses at trial testified about Primozich. Primozich is no one "new" to Hill, nor does she provide any "new" evidence. John Kelpin submitted an affidavit in support of Hill's motion for a new trial. Kelpin was known to Hill prior to trial. Affidavit of John Kelpin, pp. 1-2, ¶¶ 4, 5. The evidence must have been unknown or unavailable to the defendant at the time of trial. *U.S. v. Winters,* 600 F.3d 963 (8th Cir. 2010). This issue is discussed further in part (d) immediately below.

ii. Evidence Submitted is Not Material.

Much of Metzger's "expert" "opinion" discusses the "fact" that Hill was owed money by the corporation from which he stole money. As discussed above, that is not a defense. Thus, that "testimony" is not material.

iii. Evidence Submitted Will Not Probably Produce an Acquittal.

In order to succeed on a motion for new trial based on newly discovered evidence, a defendant must show, inter alia, that the new evidence will *probably* produce an acquittal. *Estes v. State,* 111 Idaho 430, 439, 725 P.2d 135, 144 (1986). It is unclear if Hill is aware of the correct standard or if Hill's new attorney is simply being candid with the Court, as Hill's new attorney, in concluding Hill's brief on his motion for a new trial, writes:

> In conclusion, the undersigned respectfully request a new trial. The new information before the court would have been very relevant to a jury, and certainly it can be said such evidence "might" have changed the result of the verdict.

Brief in Support of Motion for a New Trial, pp. 10-11. If Hill's new counsel is simply being candid with the Court, the Court appreciates that candor and Hill's new counsel's effort to not overstate Hill's case. Anything "might" happen. Unfortunately for Hill, that is not enough. For this Court to properly exercise its discretion and grant Hill's motion for a new trial, this Court would have to be convinced that the "new evidence" (there is no "new evidence", but ignoring that for the moment) *probably* would produce an acquittal. As *Estes* shows, it is not enough that the "new evidence" would probably "change the result of the verdict", as Hill writes. It is not enough for Hill to at this time convince this Court that the jury might be hung. *Estes* shows Hill must convince this Court that a new jury *probably* would *acquit* Hill. There is absolutely no way Hill has convinced the Court that the "new evidence" would probably produce all twelve jurors unanimously deciding the State had not met its burden of proof on grand theft.

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iv. Any Failure by Hill to Learn of the Evidence Submitted on Hill's Motion for a New Trial is Due to a Lack of Diligence by Hill or Hill's Agents.

The standard is that of "ordinary diligence." 44 A.L.R.Fed. 13, § 6, pp. 59-68. Not only must this Court consider Hill's knowledge, and Martin Neils' knowledge, but also Mark Jackson's knowledge today, and in 2008 when he initially represented Hill on these charges. The knowledge or diligence of defense counsel may be considered by the court in determining whether the lack of knowledge and the diligence requirements have been met for the purposes of a motion for a new trial. 44 A.L.R.Fed. 13, § 72. Hill's complaint that: "I again told Mr. Neils that we needed to get an accountant…" is of no avail, as Hill himself testifies in his affidavit that "…Tom Baker, a local accountant, who assisted Mr. Jackson during his representation of me." Affidavit of Jerry Hill, p. 4, ¶ 8.

A disturbing recurrent feature of Hill's motion for a new trial is Hill's willingness and Hill's new counsel's willingness to throw Hill's public defender under the bus for not obtaining the evidence Hill knew about (thus, making it not "new" evidence). As but one example, Hill complains in his affidavit: "I had asked Mr. Neils before trial to contact Ellie Primozich, the former bookkeeper, as well as the accountants at Magnuson McHugh, who did the JHH accounting work, but he never did." Affidavit of Jerry Hill, p. 3, ¶ 6. **Factually**, nothing contained in Primozich's affidavit would result in a new trial. Most of the affidavit is hearsay ("I recall Suzanne Metzger being frustrated about JHH getting their books timely completed", ¶ 7), most of it is cumulative ("Jerry always had a good character", ¶ 6), and most of it is not relevant (poor bookkeeping, cash flow problems ¶¶ 7, 8, and 9). **Legally,** nothing contained in Primozich's affidavit is "new" as Hill knew Primozinch when Hill started at this real estate company. "Ineffective assistance of counsel cannot be ground for new trial under Rule 33 if facts alleged in support of motion were within defendant's knowledge at time of trial." 44 A.L.R.Fed. 13,

p. 43, § 3. citing *United States v Jackson,* 88 F.3d 845 (10th Cir. 1996); 44 A.L.R.Fed. 13, § 5, p. 53. "The testimony of witnesses, whom the defendant stated he had requested his trial counsel to call as defense witnesses, was held by the court not to constitute newly discovered evidence for the purposes of a motion for a new trial." *Id.,* § 16, p. 92, citations omitted.

Hill in his affidavit claims: "This was an accounting case. My education is a high school diploma and 1 ½ years of general college classes, none of which were bookkeeping classes" (Affidavit of Jerry Hill, p. 3, ¶ 6), and "In sum, there was sloppy bookkeeping at JHH, especially during the building boom years of 2004-07." *Id.,* p. 15, ¶ 25. Claims by Hill that he did not know what was going on within the business are not to be considered by this Court on Hill's motion for a new trial as it strains credulity to assume a criminal defendant did not know how his own business was being operated. 44 A.L.R.Fed. 13, § 12, pp. 82-83.

Any new evidence Hill himself would bring to a new trial cannot be newly discovered evidence. "Defendant's own testimony which would certainly have been available to him at trial." *Id.,* § 24, p. 109.

If Metzger's testimony were admissible (much of it is not), it still would not warrant a new trial. A new expert to testify is ordinarily not grounds for a new trial. *Id.,* § 26, pp. 114-117. Such testimony could have been obtained at the time of trial. *Id., citing United States v. Iannelli,* 528 F.2d 1290 (3rd Cir. 1976); *Wright v. United States,* 215 F.2d 498 (DC Cir. 1954); or a request to adjourn could have been made. *United States v. Keller,* 145 F.Supp 692 (D. N.J. 1956).

It cannot be said Hill did not have adequate time to prepare for this trial and find all available evidence in his defense. The Court has set forth above the extremely large

number of continuances involved in this case.

4. Factual Inadequacies of Hill's Motion.

Much of what Hill states in his "Brief in Support of Defendant's Motion for a New Trial" is simply not true. Some of these unsupported claims by Hill may be due to the fact that prior to trial, during trial, and at sentencing, Hill had the same deputy public defender, Martin Neils, and then, immediately after sentencing, Hill retained private attorney Mark Jackson to represent him. It is attorney Jackson who has made the claims contained in Hill's "Brief in Support of Defendant's Motion for a New Trial". It is understandable how Hill's claims of what happened at trial are simply false, given the fact that there is no trial transcript at present and given the fact that Jackson was not present at trial.

Both Hill in his affidavit and Metzger in her affidavit, jump on the bandwagon and join Hill's new attorney in being critical of Hill's former attorney who represented Hill for nearly two years from preliminary hearing through trial to sentencing. Hill makes the claim that his former attorney "was overwhelmed by this case with his other workload." Affidavit of Jerry Hill, p. 3, ¶ 5. Metzger writes that she was "surprised that [she] was never contacted" by Hill's attorney prior to trial. Affidavit of Suzanne Metzger, p. 3, ¶ 6. Aside from lacking any foundation, these claims by Hill and Metzger beg the question: "Where is the affidavit of Martin Neils giving any credibility to any of these claims?"

The following are examples of what "evidence" Hill claims was not presented to the jury. Hill makes the claim "**The jury might easily have reached a different verdict had they heard the testimony of Suzanne Metzger.**" Brief in Support of Defendant's Motion for a New Trial, p. 4. (bold in original). Printing something in bold does not make the proposition true. Hill claims Metzger would show a different jury:

> a. The jury never heard from an actual staff attorney of MM who worked with JHH, who knew the shareholders and bookkeeper, and was aware of the "confusing" shareholder loans within the company.

Id. No citation is given to that bald statement. The Court has read Metzger's affidavit, and Metzger never references "an actual staff attorney of MM" (Magnuson McHugh). Metzger is not an attorney. Affidavit of Suzanne Metzger, pp. 1-2, ¶ 1. Metzger was an accountant at Magnuson, McHugh & Co., P. A. from June 2000 to September 2010, and Magnuson McHugh performed work for Jordan Hill and Hall. *Id.,* p. 2, ¶ 3. Metzger did state in her affidavit that: "Shareholder loans at JHH with all three members was a constant point of discussion or dispute between JHH members and MM." *Id.,* p. 5, ¶ 8. First, that opinion would inherently be based on nothing but hearsay. Second, even if that opinion were admissible, it does nothing to prove the legality or illegality of any "loan" to Hill that was discussed in the present case. Hill next claims in his brief:

> b. The jury never heard that it was common for shareholders to personally purchase property on behalf of businesses.
> c. The jury never heard that it was common among small businesses for partners or shareholders to make personal charges on company credit cards.
> d. The jury never heard that it was common place for shareholders in similar companies to purchase items with the intent that those items be deemed company purchases through reimbursement.
> e. The jury never heard it was commonplace among similar small businesses for loans to exist between shareholders and the company.

Brief in Support of Defendant's Motion for a New Trial, p. 4. **First**, what "similar small businesses" do is of absolutely no relevance to this case. What "shareholders" in other companies do is of no relevance. Had such evidence been elicited at trial and objected to on relevance, that objection would have to have been sustained. What *is* relevant is what *Hill* did and why. There was plenty of testimony about that. What *is* relevant is what others did *at Hill's direction*, and there was testimony on that point by Hill and by others, such as Sauni Walker and Linda Yacano. It might be relevant what Hill's

partners Hall and Jordan did in this particular corporation and why, and Hill testified about what they did, as did Brad Jordan. **Second**, even Metzger's affidavit shows Jordan, Hill and Hall was not a "small business" ("JHH was a large client…", Affidavit of Suzanne S. Metzger, p. 5, ¶ 8). **Third**, what other "similar small businesses" do is not *new* evidence.

5. The Verdict is Not Contrary to Law or Evidence.

Hill also claims as a ground for a new trial, that the verdict was "contrary to law or evidence." Brief in Support of Defendant's Motion for a New Trial, p. 1. As pointed out by the State, that ground ordinarily applies to circumstances in which the defendant asks the court to overrule the verdict of the jury," which can be construed as a claim that there was not substantial evidence to support the verdict of the jury. Brief in Opposition to Motion for New Trial, p. 9, citing *State v. Olson,* 119 Idaho 370, 372, 806 P.2d 963, 965 (Ct.App. 1991). There is more than substantial evidence to support the verdict reached by the jury in Hill's case. This Court must "…give full consideration to the right of the jury to determine the credibility of witnesses, the weight to be afforded evidence, as well as the right to draw all justifiable inferences from the evidence before them. *State v. Hamilton,* 129 Idaho 938, 941, 935 P.2d 201, 204 (Ct.App. 1997). There is sufficient factual basis for the jury's verdict. Hill paid for several significant high value items with a company credit card, kept that fact from his partners, there was evidence of his surreptitious actions in keeping that fact from his partners and bookkeepers, and Hill could not avail himself of his claim that "they owed me money."

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6. The Court did not Misdirect the Jury.

Hill claims "the court has misdirected the jury in a matter of law, or has erred in

the decision of any question of law arising during the course of the trial." Brief in Support of Defendant's Motion for a New Trial, p. 1. Nothing further to flesh out this claim is made by Hill in his Brief in Support of Motion for a New Trial, and no reference to this argument is made at all in Hill's "Defendant's Responsive Brief." No error in the admission of evidence nor the giving of any instruction (nor failure to give an instruction) has been made by Hill's new attorney. The Court can only assume that Hill has abandoned this claim.

IV. CONCLUSION AND ORDER.

The A.L.R. section quoted extensively in this opinion begins with the following admonition:

> Counsel for a convicted defendant should realize that the likelihood of obtaining a new trial based on newly discovered evidence is not good. Not only is this reflected by the results of the cases collected in this annotation, where the number of instances in which the motion was denied vastly exceeds those in which it was granted; but there is also judicial authority to the effect that a motion for a new trial is not regarded with favor and is granted only with great caution.

44 A.L.R. Fed. 13, § 2(b), p. 41. § 10. As the State notes in its brief, Idaho appellate courts have noted that high burden on the defendant:

> Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making, and conservation of scarce juridical resources.

State v. Stevens, 146 Idaho 139, 144, 191 P.3d 217, 222 (Ct.App. 2008), quoting *State v. Hayes,* 144 Idaho 574, 577, 165 P.3d 288, 291 (Ct.App. 2007). Brief in Opposition to Motion for New Trial, p. 3. Hill has simply not met his high burden on his motion for a new trial. Hill's motion must be denied.

The State points out (yet Hill refuses to recognize) the fact that Hill purchased several expensive items on the company credit card (a $2,000 generator on June 4, 2005,

Exhibit 3; $3,000 for Spokane Chiefs Box Seats on October 8, 2005, Exhibit 5; log furniture shoes, televisions and a gas stove in December 2005), and then Hill wrote the company check to pay that paid for those items. Brief in Opposition to Motion for New Trial, pp. 6-7. Other instances are highlighted by the State where the trail was not quite as direct as the above where *Hill himself* signed the check that paid for these credit card purchases (*Id.,* p. 7-8), but since Hill could not explain these purchases at trial, they were just as inculpating.

IT IS HERBY ORDERED THAT JERRY ALLAN HILL's Motion for New Trial is **DENIED**.

DATED this 22nd day of February, 2011

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Mark Jackson
Courtesy copy to Martin Neils
Prosecuting Attorney – Arthur Verharen

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy