STATE OF IDAHO )
County of BENEWAH )ss

FILED_____

AT_____ O'clock _____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. Edwardsen,* 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, Ll. 3-19(no objection by plaintiff); p. 90, Ll. 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 Ll. 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, Ll. 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 Sevices 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 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."**

IT IS HEREBY 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 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 April, 2016

_____
JOHN T. MITCHELL, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the _____ day of April, 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