Lindsey A. Blake, ISB #7920
Rob Wood, ISB #8229
OFFICE OF THE FREMONT COUNTY
PROSECUTING ATTORNEY
22 W. 1st N.
St. Anthony, ID 83445
Tel: 208-624-4418
Email: prosecutor@co.fremont.id.us

Attorneys for the State

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

STATE OF IDAHO, Plaintiff, vs. LORI NORENE VALLOW AKA LORI NORENE DAYBELL, Defendant.	**CASE NO. CR22-21-1624** **STATE'S OBJECTION AND MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL**

The State objects to the Defendant's Motion for a New Trial and submits the following Memorandum in Support of the State's Objection:

FACTUAL AND PROCEDURAL BACKGROUND

On May 12, 2023, the Jury returned a verdict of guilty against the Defendant for the following: One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein Tylee Ryan is the victim; One Count of First-Degree Murder wherein Tylee Ryan is the victim; One Count of Conspiracy to Commit First-Degree Murder and Grand Theft by Deception wherein JJ Vallow is the victim; One Count of First-Degree Murder wherein JJ Vallow is the victim; One Count of Conspiracy to Commit First-Degree Murder

wherein Tamara Daybell is the victim; and One Count of Grand Theft wherein the United States Government is the victim.

On May 25, 2023, the Defendant filed her Motion for a New Trial which has been set for hearing on June 15, 2023.

LAW AND ARGUMENT

Idaho Criminal Rule (I.C.R.) 34(a) provides in part: "On the defendant's motion, the court may vacate any judgement and grant a new trial on any ground permitted by statute."

The statute referenced by I.C.R. 34 is Idaho Code §19-2604 which provides:

> 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.

In *State v. Cantu*, the Idaho Supreme Court reiterated: "We have concluded on prior occasions that I.C. Section 19-2406 sets forth the only grounds permitting the grant of a new trial, and therefore, limits the instances in which the trial court's discretion may be exercised. *State v. Gomez*, 126 Idaho 83, 878 P.2d 782 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1031 (1990). Although I.C.R. 34 allows a trial court to grant a new trial 'if required in the interest of justice,' this Court has concluded that I.C.R. 34 does not

provide an independent ground for a new trial. *State. V. Davis*, 127 Idaho 62, 896 P.2d 970 (1995). Rather, I.C.R. 34 simply states the standard that the trial court must apply when it considers the statutory grounds. *Id.* at 65, 896 P.2d at 973." 129 Idaho 673, 675, 931 P.2d 1191, 1193 (Ida.1997).

"A motion for a new trial may be granted if the criteria of I.C. §19-2406 and I.C.R. 34 are met. First, the statute and the rule require that the defendant make a motion for a new trial. Second, the motion must be granted on one of the grounds enunciated in §19-2604. Finally, the grant must be in the interest of justice, pursuant to I.C.R. 34. Neither the statute nor the rule prohibit the grant of a new trial on grounds not argued by the defendant, so long as the defendant has requested a new trial and the ground relied upon by the court is one of those specified in the statute." *State v. Mack,* 132 Idaho 480, 482-483, 974 P.2d 1109, 1111-1112 (Ct. App.1999).

Looking to the seven potential grounds for a new trial: (1) The Defendant was present for her trial; (2) The Defendant asserts the jury considered evidence not introduced at the trial; however, there is nothing to support the Defendant's assertion; (3) The Jurors remained through the deliberations and verdict; (4) Nothing has been alleged, nor is there any support, that the verdict was decided by a lot, to the contrary, each juror answered "yes" as to the verdict when polled; (5) The Defendant contends the court 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; however, the State opposes this assertion; (6) The Defendant contends the verdict is contrary to law or evidence, but there is nothing to support this contention; (7) There is no allegation, or assertion, of new evidence.

The Defendant focuses her argument for a new trial on Idaho Code §19-2604 subsections (2), (5) and (6). The State disagrees with the Defendant's analysis.

I. The Court Properly Instructed the Jury in Relation to the Charge(s) for Conspiracy.

A criminal conspiracy is defined in Idaho Code §18-1701 as: "If two (2) or more persons combine or conspire to commit any crime or offense prescribed by the laws of the state of Idaho, and one (1) or more of such persons does any act to effect the object of the combination or conspiracy, each shall be punishable upon conviction in the same manner and to the same extent as is provided under the laws of the state of Idaho for the punishment of the crime or offenses that each combined to commit." Pursuant to the plain language of the statute, the Defendant was on notice she was accused of conspiring with one or more persons to commit the underlying offenses contained in her charges.

In *State v. Yang*, the defendant argued "there was a fatal variance between the elements instruction for conspiracy to traffic in marijuana and the second amended information charging him with that offense." 167 Idaho 944, 947, 477 P.3d 998, 1001 (Ct.App.2020). The Court determined, "[a] variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy." *Id.* Internal Citations Omitted.

In *Yang, "*the second amended information alleged that Yang 'did willfully and knowingly combine, conspire, confederate, and agree with [S.C.], [D.C.], *and* [K.E.].'…[t]he district court instructed the jury on the elements necessary to find Yang guilty of the conspiracy charge to include… 3. the defendant Cheng Yang, and [S.C.], [D.C.] *and/or* [K.E.] agreed." *Id.*

"Yang objected to the use of 'and/or' in the third element of Instruction 18, arguing that the term made the instruction inconsistent with the conjunctive list of coconspirators alleged in the second amended information. The district court rejected Yang's argument, concluding that

the jury instruction could list the coconspirators' identities disjunctively when the charging document listed them conjunctively without creating a fatal variance." *Id.* at 948.

"On appeal, Yang argues the district court erred because, by listing the coconspirators disjunctively, Instruction 18 relieved the State of its burden to prove the existence of an agreement between all the coconspirators alleged in the charging document to commit the crime of trafficking in marijuana. That is, Yang alleges that Instruction 18 deprived him of fair notice of the charge against him and prejudiced his defense." *Id.*

The Idaho Court of Appeals found:

> Use of "and/or" in Instruction 18 did not create a fatal variance. Idaho Code Section 18-1701 requires that a defendant have an agreement to commit a crime with only one other person to form a conspiracy--not the number of individuals pled in the charging document. *See State v. Goggin*, 157 Idaho 1, 12-13, 333 P.3d 112, 123-24 (2014). Additionally, the identity of a coconspirator is not a necessary element of the crime of conspiracy. *See id.; see also United States v. Ray*, 899 F.3d 852, 865-66 (10th Cir. 2018) (holding that no constructive amendment occurred when the district court substituted the name of the defendant's wife with the phrase "another individual" when reading the indictment to the jury); *United States v. Johnson*, 719 F.3d 660, 668 (8th Cir. 2013) ("Because the identity of a defendant's coconspirators is not an essential element of conspiracy, the district court's failure to include the names of the coconspirators in the jury instructions was not a constructive amendment of the indictment.") (citation omitted). Thus, despite pleading a conjunctive list of alleged coconspirators in the second amended information, the State was not required to prove that all three coconspirators agreed with Yang to commit the crime of trafficking in marijuana. *See Berger v. United States*, 295 U.S. 78, 81, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) ("It is settled by the great weight of authority that, although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, the variance is not material."). Thus, whether Yang's alleged coconspirators were listed conjunctively or disjunctively in the jury instructions was immaterial. Proof that Yang had an agreement with any one of the alleged coconspirators was sufficient. Consequently, Instruction 18 did not deprive Yang of fair notice or prejudice his defense because the instruction identified the same alleged coconspirators as the second amended information. *Id.*

The Defendant is making the same argument as the defendant in *Yang*. As provided above, this particular argument has been previously litigated by other defendants, and the various courts have clearly established any variance regarding the named coconspirators or number of coconspirators is not a material variance since the burden with conspiracy is to prove only that the defendant conspired with at least one other person – not to prove an agreement between all named conspirators or even the identity of the other coconspirator(s). The Defendant was on proper notice of the conspiracy charges against her.

II. The Court Properly Allowed for Amendment of the Indictment.

Idaho Criminal Rule 7(e) and Idaho Code §19-1420 govern the amendment of an indictment. I.C.R. 7(e) provides: "The court may permit amendment of a complaint, an information or indictment at any time before the prosecution rests if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

I.C. §19-1420 provides: "An indictment or information may be amended by the prosecuting attorney without leave of the court, at any time before the defendant pleads, and at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An information or indictment cannot be amended so as to charge an offense other than that for which the defendant has been held to answer."

The Defendant references amendments which were made to Counts I, III and VII of the Indictment. Counts I and III charged the Defendant with Conspiracy to Commit First Degree Murder and Grand Theft, and Count VII charged the Defendant with Grand Theft. In Count VII of the Indictment, while the Defendant was charged with Grand Theft pursuant to Idaho Code §18-2403(4)(a), the Indictment including the language "by deceit and with intent to deprive" which is reflective of the language contained I.C. §18-2403(2)(a). This charge of Grand Theft is

the same underlying Grand Theft referenced by the Conspiracy charges in Counts I and III. The Defendant was clearly on notice of the charge and allegations surrounding the Grand Theft and Conspiracy charges including conspiring to commit Grand Theft. The requested modification from (4)(a) to (2)(a), which was due to a clerical error, allowed for the code to accurately reflect the language in the Indictment. There was no new offense charged by the amendment, nor was the Defendant prejudiced.

I.C. §18-2403(4)(a) provides: "[a] person commits theft when he knowingly receives, retains, conceals, obtains control over, possess, or disposes of stolen property, knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen, and (a) [i]ntends to deprive the owner permanently of the use or benefit of the property."

Idaho Code §18-2403(2)(a) provides: "[t]heft includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subsection (1) of this section, committed in any of the following ways: (a) [b]y deception obtains or exerts control over property of the owner." Idaho Code §18-2403(1) states: "[a] person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."

The amendment in this case was simply to correct the subsection within the same statute. If anything, the State increased its burden to prove the theft was done using deception. The Defendant incorrectly indicates the modification changed the intent from "an intent to deprive" to an "intent to deceive." *See Defendant's Motion for a New Trial, Page 3.* Under both subsections, the intent is consistent with depriving the owner of the property. Under (2)(a), the requirement is to only prove a defendant "knowingly" "obtained control over property," whereas,

under (4)(a), the requirement is to prove a defendant "willfully exercised control over" the property of another through "deception."

In *State v. Bullis*, the Idaho Supreme Court considered a modification of an Idaho Code on an indictment and found:

> The indictment in this case sets out clearly and in language easily understood the facts sufficient to establish the jurisdiction of the district court, and the act or omission constituting the offense of which Bullis was convicted. The change in code sections, from I.C.§18-1402 which describes the difference between burglary in the first degree and burglary in the second degree to I.C. §18-1401 which defines the crime of burglary in general did not have the effect of changing the offense with which appellant was charged. It was easily ascertained, both before and after the amendments of which appellant complains, what offense appellant allegedly committed and where it occurred. No substantial right of appellant having been affected by the amendments and because the unamended indictment was initially substantially sufficient under I.C. §§19-1418, 19-1419, the trial court did not err in allowing the amendments which concern matters of form only." 93 Idaho 749, 752-753, 472 P.2d 315, 318-319 (Ida. 1970).

Similarly, in *State v. Dunn*, the Idaho Supreme Court found "[t]he amendment did not charge a new or different offense and it made no substantial difference as to the charge of obtaining money by false pretenses whether the indictment stated appellant received the fictitious contract or executed it, because the balance of the indictment both before and after the amendment impliedly charged appellant with having fabricated the contract." 60 Idaho 568, 573, 94 P.2d 779, 780 (Ida. 1939).

In *State v. Severson*, the Idaho Supreme Court reiterated:

> An indictment may be amended at any time before the prosecution rests without being returned to the grand jury, so long as doing so does not prejudice the defendant's substantial rights or charge the defendant with a new offense. Idaho Crim. R. 7(e); *see also* I.C. § 19-1420; *State v. O'Neill*, 118 Idaho 244, 249, 796 P.2d 121, 126 (1990). Thus, an amendment that merely alleges additional means by which the defendant may have committed the crime is permissible if it does not prejudice the defendant. *See Banks*, 113 Idaho at 57-60, 740 P.2d at 1042-45 (permitting amendment to information to include age of victim in order to reflect statutory rape as an alternative way of committing rape); *see also People v. Liberty*,

> 39 Cal. App. 360, 178 P. 868, 868 (Cal. 1919) (holding that the trial court's decision to permit an amendment adding additional means by which the defendant committed the crime of engaging in lewd and lascivious acts with a minor was permissible because it did not prejudice the defendant's rights); *People v. Coleman*, 49 Ill. 2d 565, 276 N.E.2d 721, 724 (Ill. 1971) (holding that an amendment to an indictment alleging alternative means by which defendant may have killed his wife was permissible because it did not prejudice the defendant); *People v. McKendrick*, 138 Ill. App. 3d 1018, 486 N.E.2d 1297, 1303-04, 93 Ill. Dec. 462 (Ill. App. Ct. 1985) (holding that an amendment modifying the means by which the defendant committed sexual assault was permissible); *State v. Powell*, 34 Wn. App. 791, 664 P.2d 1, 3 (Wash. Ct. App. 1983) (holding that it was within the trial court's discretion to amend the indictment to include alternative means of committing first-degree murder). Factors relevant to determining whether the defendant was prejudiced include whether the amendment alleging the additional facts took the defendant by surprise, impaired the defendant's ability to adequately prepare his defense, necessitated extensive further preparation by the defendant, or subjected him to double jeopardy. *Banks*, 113 Idaho at 58-60, 740 P.2d at 1043-45; *Coleman*, 276 N.E.2d at 724. 147 Idaho 694, 709, 215 P.3d 414, 430 (Ida. 2009).

The Court found the amendment "was permissible under standards of due process and Rule 7(e) because the defendant was not charged with a new offense since the "amendment merely alleged an alternative way Severson might have committed the crime." *Id.* It "did not prejudice any of Severson's substantial rights." *Id.* at 710. The amendment was made almost a year before the trial, and the defendant was aware "the prosecution had advanced the theory that Mary died from suffocation." *Id.*

While the Indictment in this case wasn't amended until just before the close of the State's case, the Defendant was on notice of the Grand Theft was being prosecuted on a theory of theft by deception, and that the Grand Theft was the basis of the Conspiracy to Commit First Degree Murder and Grand Theft. The plain language of the Indictment put the Defendant on notice of this, as well as, the discovery provided to the Defendant and theory put forth by the State at Grand Jury. Furthermore, it did not charge a new offense for two reasons: (1) the actual charge was conspiracy to commit the offense; and (2) the amendment was merely an alternative way

and an alternative subsection by which the crime of Grand Theft can be committed – not a new charge.

III. The Jury Instructions were Not Confusing and there is No Support for the Assertion Jurors Considered Evidence Not Presented During the Trial.

The Defendant is simply attempting to twist a post-trial media interview of a juror to support her misplaced argument that the Court misdirected the jury on a matter of law, or erred in the decision of any question of law arising during the course of trial and/or that the jury received evidence out of court.

Post-trial evidence as to juror post-conviction statements is inadmissible and prohibited under Idaho Rule of Evidence (I.R.E.) 606. I.R.E. 606(b)(1) provides:

> Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment.
> The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

I.R.E. 606(b)(2) provides some exceptions to the exclusion of a juror's testimony; however, none of the exceptions to the prohibition of using a juror's extrajudicial statements to collaterally attack a conviction apply to the arguments presented in the Defendant's motion for a new trial. The Court should refuse to consider the Defendant's point as to Juror 8's, or any other juror's, statements to the media post-trial.

Even if the Court were to consider the statements purported by the Defendant to support her attack on the Court's instructions and evidentiary rulings, the Defendant's motion fails on its face. As provided by the Defendant in her Motion for a New Trial, Juror 8 stated: "[w]e didn't consider this during our deliberations, because it was clear to us, the instructions were clear,

Arizona evidence and testimony is only for demonstrative purposes." *See Defendant's Motion for a New Trial, Page 4.*

During a follow up interview with that same juror on May 30, 2023, the interviewer (Nate Eaton) asks if Juror 8 (Saul Hernandez) found the jury instructions they were given confusing, and Juror 8 responds, "I personally did not. I thought the judge gave us instructions throughout the trial – throughout the process – multiple times and those instructions never changed in my opinion – even up to the very last date – up to the moment before we were released to go deliberate. The instructions were clear…"

There is no actual evidence to support that there was any confusion regarding 404(b) evidence and any demonstrative evidence. It is clear Juror 8 is unequivocal in stating the jury instructions were clear, and the 404(b) evidence which was introduced was not considered for any purpose other than in compliance with the instructions provided by the Court.

The Defendant erroneously concludes the juror must have relied on a body cam video of Charles Vallow's interactions with law enforcement which was not presented during the Defendant's trial. During the first interview with the juror, there is not an indication as to when the juror watched the body cam – whether before or after trial. However, in the follow up interview on May 30, 2023, Juror 8 explained he was released from his obligations as a juror on Friday after the verdict was rendered. The following Sunday, he watched a new episode of a show referencing the case which was the first time he saw the body cam footage of Charles Vallow which he referenced in his first interview. He was very clear that he did not view any outside evidence during the trial.

Outside of the fact Juror 8 is unequivocal that the Court's instructions were clear and followed, the Idaho Supreme Court has previously determined, "the impeachment of the verdict

by affidavits made after verdict rendered… has never been recognized by this court. (*State v. Davis*, 6 Idaho 159, 53 P. 678.)" *State v. Rigley,* 7 Idaho 292, 294, 62 P. 679, 679 (Ida. 1900).

Applying the analysis of affidavits being insufficient to impeach a verdict, use of an interview of a juror would fall short of meeting any requirements to show actual support for setting a verdict aside as outlined by both I.R.E. 606 and jurisprudence of the Idaho Supreme Court.

Additionally, in *State v. Alwin*, the defendant's motion for a new trial based on the admission of a trimmed down booking photo was denied. The Court reiterated, "[p]hotographs showing the…appearance of a person are generally admissible in the discretion of the trial court, unless the photograph is so inflammatory that its probative value is outweighed by the prejudice which might result from its inflammatory nature." 164 Idaho 160, 166, 426 P.3d 1260, 1266 (Ida. 2018), citing to *State v. Carter*, 103 Idaho 917, 921, 655 P.2d 434, 438 (1981). "Such photos used to 'describe a person…are admissible for the purpose of explaining and applying the evidence and assisting the jury in understanding the case.'" *Id.* at 166-167. Internal Citations Omitted. The Court determined that use of the mugshot which had been trimmed down was proper in assisting the jury in understanding how the officer identified the defendant, and the use of the photo was not prejudicial to the Defendant. While the photo was not determined to be 404(b) evidence, a similar analysis was applied regarding the relevance and any potential prejudice to the Defendant. Of course, if it had been determined to be 404(b) evidence a different analysis would have been applied to determine the admissibility and a limiting instruction would have been given.

In this case, the jury was instructed multiple times regarding the use of 404(b) to be considered for limited purposes. The Court instructed the jury each time 404(b) evidence was being introduced and subsequently provided the following instruction:

Jury Instruction 14

> Evidence has been introduced for the purpose of showing that the defendant committed acts other than that for which the defendant is on trial. At the time this evidence was introduced, you were advised of its limited purpose. Such evidence, if believed, is not to be considered by you to prove the defendant's character or that the defendant has a disposition to commit crimes. Such evidence may be considered by you only for the limited purpose of proving the defendant's motive, intent, preparation, plan, knowledge, or absence of mistake or accident.

The Court provided a separate instruction regarding demonstrative evidence which specifically identified the demonstrative exhibits:

Jury Instruction Number 15:

> Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. This includes those exhibits admitted for demonstrative or illustrative purposes only.
> Do not consider such evidence for any purpose except the limited purpose for which it was admitted. The following exhibits were admitted only as demonstrative or illustrative exhibits:
> 6, 10A, 30, 31A, 31B, 69, 76, 84, 85, 86, 111, 112, 113, 114, 115, 116, 117, 107B, 179A, 179B, 184C, 184D, 184E, 185A, 182A, 182B.
> These exhibits are available for your review during your deliberations upon your request. Please advise the Bailiff, by written note, or any such request.

The instructions provided by the Court regarding the 404(b) evidence and the demonstrative exhibits were very clear.

The Defendant's assertion regarding this potential ground for a new trial fails as there is no proof jurors considered information or evidence which was not introduced at trial. With regard to any allegation the instructions from the Court were not clear, this assertion from the Defendant also fails given the instructions were clear, and also given the same juror the

Defendant attempts to use statements from to establish the instructions were not clear, unequivocally stated – in both of his interviews – that the instructions were clear and the Court reiterated them multiple times.

CONCLUSION

Due to there being no valid support for any of the grounds outlined in I.C. §19-2406 and there being no support that it would be in the interest of justice pursuant to I.C.R. 34, the Defendant's Motion for a New Trial fails. Wherefore, the State respectfully requests this Court deny the Defendant's Motion for a New Trial.

Respectfully submitted this 7th day of June, 2023.

/s/Lindsey A. Blake
Lindsey A. Blake
Fremont County Prosecuting Attorney

/s/Rob H. Wood
Rob H. Wood
Madison County Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2023, that a copy of the foregoing State's Objection and Memorandum in Response to Defendant's Motion for a New Trial was served as follows:

Jim Archibald
1493 North 1070 East
Shelley, Idaho 83274
jimarchibald@gmail.com

- ☐ U.S. First Class Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- X File & serve
- ☐ Email

John Thomas
605 North Capital Ave.
Idaho Falls, Idaho 83402
jthomaseserve@co.bonneville.id.us

- ☐ U.S. First Class Mail
- ☐ Hand Delivered
- ☐ Courthouse Box
- ☐ Facsimile:
- X File & serve
- ☐ Email

Pat Smith

_____

PAT SMITH, Legal Secretary