JON R. COX, ISB No. 4487
THE COX LAW FIRM, PLLC
199 N. Capitol Blvd., Ste. 601
Boise, Idaho 83702
Post Office Box 1828
Boise, Idaho 83701
Telephone: (208) 287-2008
Facsimile: (208) 287-2009
coxlaw@coxlawboise.com
jon@coxlawboise.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, vs. AARON ANSON VON EHLINGER, Defendant.	)	Case No. CR01-21-34839 **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR ACQUITTAL OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**

COMES NOW, the Defendant, Aaron Anson von Ehlinger, by and through his attorney of record, Jon R. Cox of The Cox Law Firm, PLLC, and hereby submits this Memorandum in support of Defendant's Motion for Acquittal or, in the Alternative Motion for a New Trial.

STATEMENT OF PROCEDURE

This matter came before the Court for Jury trial on the 26th of April, 2022 through the 29th of April, 2022. The defendant having been charged by amended complaint alleging two counts; Count I, Rape. Count II Forcible Penetration with a Foreign Object. The Information was filed, subsequent to a preliminary hearing, on the 1st day of November 2021. The defendant was

arraigned on the 8th day of November 2021 and entered his not guilty pleas to both counts on that date. As indicated this matter proceeded to trial. At the close of the State's case in chief the Defense moved under Idaho Criminal Rule 29 for an acquittal. The motion was denied by the Court and the case was presented to the Jury for deliberations and said deliberations ended in the following verdict.

Count I – Rape ….. GUILTY

Count II – Forcible Penetration with a Foreign Object ….. NOT GUILTY

STATEMENT OF FACTS

During the presentation of evidence by the State, they chose not to call the victim J.V. in their case in chief. We are aware that although J.V. attempted to testify, she was not able to present full testimony or be cross examined by the Defense. The State was provided an opportunity to have J.V. returned to the stand to complete her testimony but elected not to do so. As a result of the State's election in that regard, the Court advised the Jury that they were not to consider any of the testimony provided by J.V and to act as if she had not testified at all and further could not consider any of the statements made by her while on the stand. (T.T. pg. 230 ln 23-25, pg.231 ln 1-13).

Prior to the attempt to have J.V testify the State called Ann Wardel to provide evidence of statements made by J.V in connection with her allegations of assault by the defendant. Ms. Wardel is a nurse employed by Saint Alphonsus hospital and also the coordinator of the Community Sexual Assault Team. at F.A.C.E.S. that provide medical treatment and care to victims of sexual assault and domestic violence (T.T. pg. 26 ln 1-25, pg. 27 ln 1-2). After some general inquiry about training as a sexual assault nurse and procedures followed in these regards, Ms. Wardel was asked by the State the following question. What did she tell you took place inside the apartment? (T.T. pg. 39, ln 5-6). Wardel's response was as follows:

> "She said that they arrived—her and the assailant arrived at the apartment. She sat down, I believe, at some sort of table while he went to grab whatever they stopped by, and I think he also used the restroom or something. Anyway, when he came backout from the back room, he took her hand and told her to come sit on the sofa with him. At that time, he started to stroke her thigh, attempted to kiss her, and then picked her up and took her into the bedroom, where she says he digitally penetrated her vagina, pulled her bra and shirt down and fondled her breast while kissing her all over. And he grabbed the back of her head with a handful of hair and **pulled her head down towards his penis**. And when she attempted to pull her head back, she hit her head on the wall or headboard. And then he sat on her chest, pinned her arms down, masturbated on top of her and then ejaculated on her stomach. (T.T. Pg. 39, ln 7-23). (**emphasis added**)

At no time during this exchange between the State and Wardel did Wardel indicate that the defendant inserted his penis in J.V.'s mouth. Clearly Wardel testified that J.V. indicated that the defendant "digitally penetrated her vagina" but as the Jury acquitted the defendant of that allegation it is of no consequence here. The only statements made by J.V. through Wardel on the issue of the allegation of rape was that "...he pulled her head down towards his penis" The State further tried to illicit testimony from Wardel that defendant forced his penis into her mouth by pinning her down with his knees. This question was objected to on the basis of leading and the Court sustained that objection. (T.T. pg. 40, ln 2-10)

The State again attempted to illicit the same testimony necessary to prove the allegation of rape by asking a leading question as follows. STATE: Question-- "When did she describe that the defendant straddled her and used his knees to pin her arms down? (T.T. pg. 41, ln 15-16), Wardel's

response, “So she told me that when he pulled her head towards his penis and she said no, she aimed her head back, hit her head. And then she stopped, she said participating, and so he got on top her [sic] at that point and pinned her arms down.” (T.T. pg. 41. Ln 17-21). The issue of timing had been asked and answered. The State then again, in an attempt to lead Wardel into the ultimate question, asked “And then he forced his penis into her mouth?” (T.T. pg.41, ln 22) A leading objection was made by the defense. The Court indicated that it seemed to the Court that the “…testimony is already in, it was a question of timing that was being clarified.” (T.T. pg. 41, ln 24-25, pg.42, ln 1-2). It is not clear at all to the Defense that the testimony concerning the penetration with Defendant’s penis in J.V.’s mouth was already in evidence at all. Rather the only testimony related to this allegation was that he pulled her head towards his penis and she then pulled her head away.

A full review of the testimony up to the point of these two leading questions by the State is devoid of any facts testified to by Wardel that the defendant forced his penis into J.V.s mouth. Defense would ask the Court to reconsider its overruling of the Defense objection to leading as it appears that this was not done to clarify the timing of the actions. It appears from the transcript that on page 41 lines 15-16 the State was asking a question about timing. Wardel’s response on that same page, lines 17-21 answer that question about timing. The next question by the State on line 22 “And then he forced his penis into her mouth” This was done only to lead the witness to the ultimate question of rape. Up to this point where this second leading question is asked about forcible penetration, of which was objected to for leading and overruled by the Court, there was no evidence by Wardel that Defendant had penetrated J.V.’s mouth with his penis.

ARGUMENT

Motion for Judgment of acquittal

Idaho Criminal Rule 29(a) provides as follows:

> **(a) Before Submission to the Jury.** After the prosecution closes its evidence or after the close of all the evidence, the court on defendant's motion or on its own motion, must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence. If the court dismisses an offense, the court must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense.

Idaho Criminal Rule 29(c) provides as follows:

> **(c) After Jury Verdict or Discharge.**
>
> **(1)** A defendant may move for a judgment of acquittal, or renew the motion, within 14 days after the jury is discharged or within such further time as the court orders during that 14-day period.
> **(2)** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.
> **(3)** A defendant is not required to move for a judgment of acquittal before the court submits the case to a jury as a prerequisite to making such a motion after jury discharge.

Counsel has attempted to set forth, the facts as presented to the jury in the States case in chief were devoid of evidence by the accuser of the penetration of her mouth with Defendants penis. ICR 29 requires that state present sufficient evidence to sustain a conviction. Evidence that defendant did so without consent and/or by force is required to convict the Defendant of Count I—Rape as alleged in the information. The evidence presented by the State to the jury consisted of testimony by Ms. Wardel, the F.A.C.E.S nurse, who took the statement of JV and then came to court to present that evidence in the place of JV. This method employed by the State, of putting

on its case without the accuser providing testimony was not only insufficient, but also has denied the Defendant the right to not only confront but to cross-examine his accuser, which is his Constitutional right under the 6th Amendment to the United States Constitution.

In COY v IOWA, 108 S.Ct. 2798 (1988), the United States Supreme Court reversed the conviction of COY on two counts of engaging in lascivious acts with a child. Justice Scalia held that: (1) confrontation clause provides criminal defendant right to "confront" face to face witnesses giving evidence against him at trial, and (2) placement of screens between the defendant and child sexual assault victims during testimony against defendant violated the defendant's confrontation clause rights.

In COY the complaining witnesses were children. Those children testified in court, albeit behind a screen so as not to have to face the accused. The Supreme Court in a 6-2 decision determined that this in an of itself violated the accused's 6th amendment rights to confrontation. The instant case is distinguishable in its level of this constitutional violation by way of facts that the accuser in this case is an adult with a child of her own. It can not be said that J.V. was somehow immature or should not be required to face the very person that she accuses of this crime. It could be said that her unwillingness to testify and her behavior on the stand for the brief time she was there was as a result of some trauma. It could also be said that her behavior was as a result having to confront a man that was innocent of the accusations that she laid upon him.

The reasoning behind this ruling in COY and a discussion by Justice Scalia as to why the right to confrontation is so important to a defendant in a criminal trial follows:

> [The Sixth Amendment's guarantee of face-to face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that

there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." Pointer v Texas, 380 U.S. 400,404, 85S.Ct. 1065,1068, 13 L.Ed.2d 923 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face whom you ***1018** disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry…. In this country, if someone dislikes you or accuses you, he must come up in front. He cannot hide behind the shadow." Press release of remarks given to the B'nai B'rith Anti–Defamation League, November 23, 1953, quoted in Pollitt, *supra,* at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness,[2] the right of ****2802** confrontation ***1019** "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee v. Illinois,* 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

[1] The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in *Jay v. Boyd,* 351 U.S. 345, 375–376, 76 S.Ct. 919, 935–936, 100 L.Ed. 1242 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion

to discuss ***1020** the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." *Kentucky v. Stincer, supra,* 482 U.S., at 736, 107 S.Ct., at 2662. The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.] (Coy 1017-1020)

It appears clear that the United States Supreme Court holds the right to confrontation and cross examination, of witness who bring charges against a defendant, is vital to our processes as a nation. That a person who faces the loss of liberty should be afforded the opportunity to confront their accusers and require those accusers to make the accusations before the Defendant and the body deciding that person's fate, the jury.

In the instant case, unlike the minor aged victims in Coy, J.V. is an adult woman with a child of her own. Despite the fact that victims in Coy were children who testified in court and were simply screened from the defendant while testifying, the Supreme Court found that screening of their testimony, so as to not have to face the defendant, was enough to invoke a challenge for a violation of the confrontation clause and reverse the conviction and remand the case.

The state in this case chose to proceed with its case in chief by not calling JV to the stand and instead to rely on the hearsay testimony of JV through a single witness (Wardel) who had no personal knowledge of the events and instead relied on a recitation of events after the fact. In that scenario the jury had no ability to determine the credibility of the accuser or the veracity of her version of events.

By way of the States presentation of the evidence in this case, on the ultimate issue of what happened in that room the evidence was insufficient to allow the jury to convict beyond a reasonable doubt. Particularly, after a full review of

the testimony of Wardel, up to the point of the two leading questions by the State where the state attempted to lead the witness to the ultimate issue of forcible penetration, the evidence is devoid of any facts testified to by Wardel that the Defendant forced his penis into J.V.s mouth. Defense would ask the Court to reconsider its overruling of the Defense second objection to leading and sustain said objection, as it appears that this was not done to clarify the timing of the actions, as the court stated in its explanation for its ruling overruling the defense objection. It appears from the transcript that on page 41 lines 15-16 the State was asking a question about timing. Wardel's response on that same page, lines 17-21 answers that specific question about timing. The next question by the State on page 41 line 22 "And then he forced his penis into her mouth?" This was done only to lead the witness to the ultimate question of rape. Up to this point where this second leading question is asked about forcible penetration, of which was objected to for leading and overruled by the Court, there was no direct evidence by Wardel that Defendant had penetrated J.V.'s mouth with his penis. The record is further devoid of any further testimony on the issue of forcible penetration.

The Defense respectfully requests that this court enter a judgment of acquittal on Count I-Rape as the state did not produce sufficient evidence upon which a jury could convict.

Motion for a new trial

Idaho Criminal Rule 34. New Trial

(a) In General. On the defendant's motion, the court may vacate any judgment and grant a new trial on any ground permitted by statute. 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 two years after final judgment. 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, finding of guilty, or imposition of sentence, or within any further time the court may set during the 14-day period.
(c) Presiding Judge. The motion must be considered and ruled upon by the judge who presided over the trial unless: (1) the judge who presided over the trial no longer holds the same judicial office that the judge held at the time of the trial; or (2) other extraordinary circumstances exist, such as the judge's disqualification, death, illness, or other disability.

The defense bases its motion for a new trial on both "Newly Discovered Evidence under ICR 34(b) (1) and "Other Grounds" under ICR 34(b)(2).

"**Any Grounds"**

ICR 34(b)(2) provides that the Court, on the defendant's motion may vacate any judgment and grant a new trial on any ground permitted by statute. The defendant asserts that a new trial should be granted on the grounds that the 6th and 14th Amendments to the United States Constitution as well as Article I section 13 of the Idaho Constitution have been violated in that defendants right to confront and cross examine his accuser has not been afforded to him.

6th Amendment to US Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

14th Amendment to US Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1 section 13 of the Idaho Constitution

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.

As is set out in the arguments above related to defense's motion for a judgment of acquittal the defense asserts that the state's mode of prosecution by not calling the accuser and instead relying on an exception to the hearsay rule has denied the defendant the right to due process by not providing the defendant his right to confront and cross examine the very person who provides the basis for the charges. The Idaho constitutional provisions related to searches and seizures and due process of law are substantially the same as those of the United States Constitution. *State v Peterson,* 81 Idaho 233, 340 P2nd 444 (1959).

Again, it is clear from the holding in *Coy v Iowa*, *supra*, that the US Supreme Court holds the right of a person who is charged with a crime to have the opportunity to face, confront and cross exam those that accuse him of such crime is deeply rooted in not only our US jurisprudence but throughout time.

[The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," *California v. Green,* 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the ***1016** charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J.Pub.L. 381, 384–387 (1959).] *COY* at pg. 1015.

In the instant case the State can not assert that J.V. was unavailable to testify. The record is clear of her attempts to testify and then abruptly leaving the witness stand after answering very few questions. Some may say she was traumatized by the proceedings. Other's may say that her reaction was caused by for the first time having to confront the very person she brought charges against and faced with the reality that her story may be challenged. As Justice Scalia opined in *COY.*

> [The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.] COY at pg.1019.

The Defendant asserts that the manner in which the State attempted to produce the accuser and the happenings that took place upon her taking the stand and then abruptly leaving denying the right to fully confront and cross examine are "other grounds" upon which a new trial could be granted.

"Newly Discovered Evidence"

The Defense has filed, under seal, the affidavit of B.B. asserting that J.V. made various claims to her about the circumstances of the night in question that were conflicting with the version of events told to Wardel at F.A.C.E.S. This information was obtained by the Defense during the jury deliberations as set forth in the affidavit of A.S., assistant to counsel for the defense. It is not lost on the defense that the information learned from B.B. during jury deliberations would only have come in at trial as possible impeachment if J.V. had testified and been subject to cross examination. If this evidence had been discovered

earlier than during deliberations, it is likely that the defense would have subpoenaed J.V. to insure that such evidence could be considered by the Jury.

In the converse, if J.V. had testified and was cross examined, and the Defense learned of this new evidence again, during jury deliberations, would that amount to sufficient support for a new trial? We can certainly not know that with the state of affairs of the trial that transpired in this case. Defense asserts that the denial of defendant's constitutional rights, as a result of the method in which the State presented its case, in failing to present to the jury the very testimony upon which these charges were brought, rendered any new evidence of the nature presented here to be critical.

CONCLUSION

For the foregoing reasons, the Defendant requests that the Court grant the Defendant's motion for acquittal, or in the alternative, grant a new trial.

The Defendant requests a hearing on this motion.

DATED this 4th day of August, 2022.

THE COX LAW FIRM, PLLC

By: _____
JON COX, of the firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of August, 2022 I caused to be served a true and correct copy of the foregoing document upon the following individual, by the method indicated, and addressed as follows:

Ada County Prosecuting Attorney 200 W. Front Street, Rm 3191 Boise, Idaho 83702	[ ] U.S. Mail, postage prepaid [ ] Hand Delivered [ ] Facsimile – 287-7709 [x] eFile/Email acpocourtdocs@adacounty.id.gov

JON R. COX