IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

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

STATE OF IDAHO, Plaintiff, vs. MICAH ABRAHAM WULFF, Defendant.	CASE NO. CR-12-19332 MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

Defendant's Motion to Suppress is based upon the following factual history:

On October 23, 2012, at approximately 11:24 p.m., Deputy Larsen of the Kootenai County Sheriff's Department was stationary in the north parking lot of the Sheriff's Department Public Safety Building, when his attention was drawn to the sound of a vehicle accelerating at a high rate of speed. (Mot. to Suppress Hearing, Test. Dep. Larsen). Deputy Larsen noted in his report that he observed a dark colored vehicle pass the north gate heading eastbound on Dalton Avenue. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Deputy Larsen estimated the speed of the vehicle at 50-60 miles per hour. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Deputy Larsen pulled out of the parking lot, began to follow the vehicle, and radioed other patrol

units in the area that he was trying to catch up to the vehicle. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). During the pursuit, Deputy Larsen estimated that the vehicle was traveling at 60 miles per hour in areas where the posted speed limit ranges from 25 to 35 miles per hour. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). As he approached Deerhaven Avenue, Deputy Larsen activated his overhead lights; the vehicle came to a stop at this point. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report).

Deputy Larsen approached the driver's side door and spoke with the driver, whom he identified by his Idaho Driver's License as Micah A. Wulff, Defendant. (Mot. to Suppress Hearing, Test. Dep. Larsen). Deputy Larsen reported that he asked Defendant why he was driving so fast, to which Defendant replied "I don't know, I probably shouldn't be driving." (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Deputy Larsen noted that he detected a strong odor of alcoholic beverage coming from the vehicle as Defendant spoke. (Mot. to Suppress Hearing, Test. Dep. Larsen). Deputy Larsen also reported that, without prompting, Defendant told him that he had been "drinking in town." (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report).

Deputy Larsen informed Defendant he was being detained and asked Defendant to exit the vehicle. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Deputy Larsen noted that Defendant was cooperative and complied. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). As Defendant neared Deputy Larsen, Deputy Larsen observed that the odor of alcohol grew stronger and that Defendant was unsteady on his feet. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report).

When Deputy Larsen asked Defendant how much he had had to drink, Defendant,

with some additional prompting, informed Deputy Larsen that he had had some "vodka drinks." (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Deputy Larsen reported that during his conversation with Defendant, Defendant was having a difficult time maintaining his balance and that his eyes were red and bloodshot. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report).

Deputy Larsen informed Defendant that he was going to have Defendant perform some field sobriety evaluations; Defendant had some difficulties performing the field sobriety evaluations. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Based upon Defendant's performance of the field sobriety evaluations, the odor of alcohol emitting from Defendant's person, Defendant's admission to consuming alcohol that evening, and Defendant's high rate of speed while driving, Deputy Larsen reported that he believed Defendant had been operating a motor vehicle while under the influence, in violation of I.C. § 18-8004. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). Deputy Larsen placed Defendant into custody and transferred him to the Kootenai County Public Safety Building ("PSB"). (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). At the PSB, Deputy Larsen began the process to take a breath sample from Defendant. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). When Deputy Larsen asked Defendant to sit in the chair near the breath sampling instrument, Defendant stated "I'm not going anywhere near that" and pointed to the breath sampling instrument. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report).

Deputy Larsen then informed Defendant that he would transfer Defendant to Kootenai Medical Center ("KMC") for a blood draw. (Mot. to Suppress Hearing, Test.

Dep. Larsen; Incident Report). Defendant stated he understood and accompanied Deputy Larsen to his vehicle. (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). At no point did Deputy Larsen obtain a warrant for the blood test.

At KMC, a nurse began to prepare Defendant's arm for the blood draw, however, Defendant allegedly became uncooperative and placed his left arm in a "block" position, telling the nurse "you're not touching me." (Mot. to Suppress Hearing, Test. Dep. Larsen; Incident Report). When two security officers arrived Defendant allowed the nurse to perform the blood draw without further issue.

Defendant has brought this Motion to Suppress the blood draw on the basis that it was an unreasonable search since it was done without first obtaining a search warrant.

DISCUSSION

1. **Whether evidence obtained as a result of drawing and testing Defendant's blood must be suppressed because the blood draw was conducted without a search warrant?**

Administration of blood alcohol testing constitutes a seizure of the person, and a search within the purview of the Fourth Amendment. *State v. LeClercq*, 149 Idaho 905, 243 P.3d 1093, 1095 (Ct. App. 2010), citing *Schumber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1833-34, 16 L.Ed.2d 908, 917-18 (1966); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007) (other citation omitted). Searches and seizures performed without a warrant are presumptively unreasonable. *Id.* (citation omitted).

> To overcome this presumption, the State bears the burden of establishing two prerequisites. First, the State must prove that a warrantless search fell within a well-recognized exception to the warrant requirement. Second, the State must show that even if the search is permissible under an exception to the warrant requirement, it must still be reasonable in light of all of the other surrounding circumstances.

Id. (internal citations omitted).

Idaho's Implied Consent Statute, I.C. § 18-8002 provides that:

> (1) Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol ..., and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.
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> ...
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> (3) At the time evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that *if he refuses to submit* to or if he fails to complete, evidentiary testing:
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> > (a) He is subject to a civil penalty of two hundred fifty dollars ($250) for refusing to take the test;
> >
> > (b) He has the right to request a hearing within seven (7) days to show cause why he refused to submit to, or complete evidentiary testing;
> >
> > (c) If he does not request a hearing or does not prevail at the hearing, the court shall sustain the civil penalty and his driver's license will be suspended absolutely for one (1) year if this is his first refusal and two (2) years if this is his second refusal within ten (10) years;
> >
> > (d) Provided however, if he is admitted to a problem solving court program and has served at least forty-five (45) days of an absolute suspension of driving privileges, then he may be eligible for a restricted permit for the purpose of getting to and from work, school or an alcohol treatment program; and
> >
> > (e) After submitting to evidentiary testing he may, when practicable, at his own expense, have additional tests made by a person of his own choosing.

(emphasis added).

Under Idaho's implied consent statute, anyone who drives or is in actual physical control of a vehicle is deemed to have impliedly consented to evidentiary testing for alcohol when an officer who has reasonable grounds to believe an individual is driving

under the influence requests this testing. *LeClercq*, 149 Idaho at ___, 243 P.3d at 1095-96, *quoting Diaz*, 144 Idaho at 302, 160 P.3d at 741 (other citation omitted); I.C. § 18-8002(1). Such implied consent is an exception to the warrant requirement. *Id.* at 1095, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973) (other citation omitted). This implied consent to evidentiary testing includes testing of a suspect's blood or urine under I.C. § 18-8002, in addition to breathalyzer testing—the test requested is of the officer's choosing. *Diaz*, 144 Idaho at 302, 160 P.3d at 741, citing *Halen v. State*, 136 Idaho 829, 833, 41 P.3d 257, 261 (2002).

According to Idaho case law, the right of an officer to order a blood draw is not limited by I.C. § 18-8002(6)(b). *Diaz,* 144 Idaho at 303, 160 P.3d at 742. Under I.C. § 18-8002(6)(b), an order for a blood draw must be supported by probable cause that one of the enumerated crimes, such as aggravated DUI or vehicular manslaughter, have occurred. I.C. § 18-8002(6)(b). However, in *Halen v. State,* 136 Idaho 829, 833–34, 41 P.3d 257, 261–62 (2002), the Supreme Court of Idaho "held that Idaho Code § 18–8002(6)(b) limits only when an officer can *order* medical personnel to administer a blood withdrawal but does not otherwise limit when an officer 'may *request* that a defendant peacefully submit to a blood withdrawal.'" *Diaz,* 144 Idaho at 303, 160 P.3d at 742 (quoting *Halen,* 136 Idaho at 834, 41 P.3d at 262 (emphasis supplied)).

Despite the fact that "[n]othing in Idaho Code § 18–8002 limits the officer's authority to require a defendant to submit to a blood draw[,]" the recent United States Supreme Court Case *Missouri v. McNeely,* 569 U.S. ___ (2013), places new limits on the ability of law enforcement to conduct a blood test without a warrant. *Diaz,* 144 Idaho at 303, 160 P.3d at 742. In *McNeely,* the U.S. Supreme Court stated that "[i]n those drunk-

driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." 569 U.S. ___.

The U.S. Supreme Court recognized that there may be some circumstances that would "make obtaining a warrant impractical such that the dissipation of alcohol from the blood stream will support an exigency justifying a properly conducted warrantless blood test[,]" but the Court rejected the risk of dissipation of alcohol as a per se exception to the warrant requirement. *Id.* Instead, the Court emphasized that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined *case by case based on the totality of the circumstances*." *Id.* (emphasis added).

It is not disputed that Deputy Larsen had probable cause to believe that Defendant was driving under the influence. Probable cause is information that "would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that such person is guilty." *State v. Weber*, 116 Idaho 449, 776 P.2d 458, 461 (1989). In passing on the question of probable cause, the expertise and experience of the officer may be taken into account. *State v. Ramirez*, 121 Idaho 319, 323, 824 P.2d 894, 898 (Ct.App.1991).

Deputy Larsen allegedly observed Defendant operating a vehicle at a speed 25 to 35 miles per hour over the posted speed limit, that the odor of alcohol was emanating from Defendant's person, that Defendant performed poorly on field sobriety evaluations, and that Defendant admitted to consuming alcohol prior to driving that night. (Mot. to Suppress Hearing, Test. Dep. Larsen; State's Br. in Opp'n to Def.'s Mot. to Suppress; Incident Report). Based upon these observations, it was reasonable for Deputy Larsen to

believe that Defendant had committed the offense of Driving Under the Influence.

Deputy Larsen transported Defendant to the Public Safety Building where Defendant subsequently refused to submit to the breathalyzer test. (State's Br. in Opp'n to Def.'s Mot. to Suppress). After Defendant refused the breath test, Deputy Larsen transferred him to KMC for a blood draw; Deputy Larsen *did not* obtain a warrant prior to the blood draw. (State's Br. in Opp'n to Def.'s Mot. to Suppress). When it appeared the Defendant may attempt to block the nurse and physically refuse the blood draw, two additional security personnel entered the room. (Mot. to Suppress Hearing, Test. Dep. Larsen). Ultimately, no force was used against Defendant and Defendant complied with the blood draw. However, there is no evidence or allegation that Defendant gave his consent to the blood draw, only that with the implied threat of force he succumbed to the test. *Id.*

a. Whether Idaho's Implied Consent Statute Voids the Requirement that Police Must Obtain a Warrant Prior to Conducting an Evidentiary Blood Draw Where There are No Exigent Circumstances

The State argues that the warrantless blood draw was proper under Idaho's Implied Consent Statute, I.C. § 18-8002. The State argues that, pursuant to the Idaho Statute, Defendant impliedly consented to evidentiary testing of his blood.[1] (State's Br. in Opp'n to Def.'s Mot. to Suppress). The State further argues that once implied consent has been given by an individual who has "taken advantage of the privilege of driving on Idaho roads" that individual cannot withdraw the implied consent. *Id.*

The State alleges that in the case at bar, "at the time [Defendant] was taken to the

[1] It should be observed, however, the statute itself provides negative ramifications for a refusal to submit to evidentiary testing; specifically an individual accepts the risk that his driver's license will be suspended. If all drivers impliedly consented, it seems that a refusal could never truly occur as any evidentiary testing could be forced.

hospital for the blood draw, the Defendant for all intents and purposes had consented to the blood draw." *Id.* The State further argues that the U.S. Supreme Court did not "delve or decide the constitutionality of" implied consent statutes in its *McNeely* decision. *Id.* The State notes that any discussion by the U.S. Supreme Court in *McNeely* was dicta and "does not change the status of implied consent law in Idaho." *Id.*

The State's logic, however, is contradictory to a reasonable interpretation of the implied consent statute, I.C. § 18-8002, and to the recent U.S. Supreme Court *McNeely* decision. In *McNeely,* the U.S. Supreme Court specifically stated that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable *must* be determined case by case based on the totality of the circumstances." *McNeely,* 569 U.S. ___ (emphasis added). Adopting the State's view, implied consent statutes would, in essence, act as a per se exception to the warrant requirement. In turn, implied consent statutes would have the effect of making the *McNeely* decision of little or no consequence.

The State points out that *McNeely* did not explicitly address implied consent statutes. While this is correct, it would be antithetical to interpret the *McNeely* opinion as permitting warrantless blood draws simply because a state has legislation that allows such action. Under the State's logic, states could circumvent the *McNeely* decision by simply relying on implied consent statutes. In other words, the State's position is that states can bypass the U.S. Supreme Court's announcement that, absent exigent circumstances, the Fourth Amendment mandates that an officer obtain a warrant prior to conducting a blood draw by simply arguing implied consent. Therefore, despite the fact that the U.S. Supreme Court did not directly discuss implied consent statutes, interpreting the *McNeely* opinion as permitting forced blood draws simply because a state has legislation that

allows such action would render the *McNeely* decision a dead letter.

b. Whether There Were Exigent Circumstances Which Justified the Warrantless Blood Draw?

In *McNeely,* the U.S. Supreme Court cited several factors that may lead to circumstances where a warrantless blood test of a drunk-driving suspect may be appropriate. *Id.* Factors that may contribute to exigent circumstances may include: (1) time must be spent investigating the scene of the accident and transporting an injured suspect to the hospital to receive treatment; (2) the availability of a magistrate and procedures in place for obtaining a warrant; (3) "metabolization of alcohol in the bloodstream and the ensuing loss of evidence[;]" and (4) other "practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence[.]" *Id.*

The State's alternative argument is that there were exigent circumstances sufficient to justify the warrantless withdrawal of Defendant's blood. Specific exigent circumstances the State alleges were present in this case include: (1) that retrograde extrapolation is not available in the state of Idaho, and therefore "the legal environment in Idaho should be seen as one of the 'special facts' supporting a finding of exigency"[2] (State's Br. in Opp'n to Def.'s Mot. to Suppress); (2) that obtaining a warrant requires time, "[a]t best, the process currently takes several hours[,]" and therefore even assuming

[2] The State cites no authority for this broad assertion that "in Idaho retrograde extrapolation is not permitted" and this statement is only in part correct. The State is correct that where an individual's evidentiary testing results reveal that the individual's BAC is below the legal limit the State cannot use retrograde extrapolation to prosecute him. I.C. 18-8004(2); *State v. Daniel*, 132 Idaho 701, 979 P.2d 103 (1998). However, that limited exception does not equivalate to a rule that retrograde extrapolation is *never* allowed in Idaho. In fact, several Idaho cases have insinuated that retrograde extrapolation may be allowable. *State v. Robinett*, 141 Idaho 110, 106 P.3d 436 (2004); *State v. Stutliff*, 97 Idaho 523, 547 P.2d 1128 (1976). (applying a repealed statute, the court stated "This section entitles either party to produce a witness capable of extrapolating the results to a prior period of time. The burden, however, is on the party who seeks to introduce this evidence."); *State v. Knoll*, 110 Idaho 678, 718 P.2d 589 (Ct.App. 1986).

Deputy Larsen had taken steps to obtain a warrant it would have taken several hours to acquire[3] (State's Br. in Opp'n to Def.'s Mot. to Suppress); and (3) that the State is "in the untenable position of having an ethical obligation to preserve evidence that could be exculpatory while that evidence is in the body of an adversarial party." (State's Br. in Opp'n to Def.'s Mot. to Suppress).

Similar to the State's primary argument, its alternative exigent circumstances argument suggests that in Idaho, or at least in Kootenai County, there should be a per se exception to the warrant requirement. Like the State's primary argument, these assertions go against the tenor of the *McNeely* opinion. As noted above, in *McNeely,* the U.S. Supreme Court specifically stated that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable *must* be determined case by case based on the totality of the circumstances." *McNeely,* 569 U.S. ___ (emphasis added).

In the case at bar, the State has not alleged any unique facts, which under the totality of the circumstances, would result in an exigency justifying a warrantless blood draw. The State argues that "it took Deputy Larsen some time to catch up to and stop the vehicle driven by the Defendant[.]"(State's Br. in Opp'n to Def.'s Mot. to Suppress). However, Deputy Larsen did not testify as to the specific amount of time it took for him to catch Defendant, and there is no evidence that a significant amount of time elapsed between Deputy Larsen's initial sighting of the vehicle and the execution of the traffic stop. (Mot. to Suppress Hearing, Test. Dep. Larsen).

The State also argues that Deputy Larsen had to transfer Defendant to the jail

[3] The State later mentions in its Brief, however, that due to Defendant's excessive BAC (.217) "he would have still been over the legal limit 6 hours after the initial call was made." (State's Br. in Opp'n to Def.'s Mot. to Suppress). This statement by the State discredits the alleged exigent circumstance that would result from waiting for a warrant.

first, then following Defendant's refusal to the breath test, Deputy Larsen had to transport Defendant to the hospital. (State's Br. in Opp'n to Def.'s Mot. to Suppress). Deputy Larsen estimated that approximately one hour and twenty five minutes elapsed from the arrest to the time of the blood draw. (Mot. to Suppress Hearing, Test. Dep. Larsen). However, other than the dissipation of Defendant's blood alcohol content, the State has made no argument of exigency unique to this case which would justify the warrantless blood draw, and, more importantly, no attempt to secure a warrant was ever made.

2. Whether Exclusion is the Proper Remedy?

Finally, the State asserts "that the defendant is not deserving of a remedy." (State's Br. in Opp'n to Def.'s Mot. to Suppress). The State cites to Defendant's BAC of .217 and also the officer's "good faith" and reliance on 18-8002, *State v. Wheeler,* 149 Idaho 364, 233 P.3d 1286 (Ct.App. 2010), and *State v. Diaz,* 144 Idaho 300, 160 P.3d 739 (2007). (State's Br. in Opp'n to Def.'s Mot. to Suppress). The State asks the Court to consider a parallel between this case and the reasoning of the inevitable discovery doctrine, and to determine that the exclusionary rule is not the proper remedy in this case. *Id.* The State asserts that if the officer had known a warrant was required, he would have obtained one, and therefore there was not misconduct on his part.

Both the Idaho Courts and Federal Courts have noted that "[t]he primary justification for the exclusionary rule ... is the deterrence of police conduct that violates Fourth Amendment rights." *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *State v. Koivu,* 152 Idaho 511, 514, 272 P.3d 483, 486 (2012). In *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the U.S. Supreme Court adopted the *Leon* "good-faith" exception to the exclusionary rule under the Fourth

Amendment; essentially the *Leon* Rule is that exclusion is not the appropriate remedy where police have acted in good faith when conducting their search. *Koivu*, 152 Idaho at 514, 272 P.3d at 486; *Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. The *Leon* Rule "has since expanded the good-faith exception to include a search conducted in reasonable reliance upon a subsequently invalidated statute because legislators, like judges, are not the focus of the rule[.]" *Id.* at 515, 272 P.3d at 487. The Idaho Supreme Court, however, has rejected the *Leon* rule, most recently in the 2012 *Koivu* case. There the Idaho Supreme Court stated:

> The exclusionary rule is a judicially created remedy for searches and seizures that violate the Constitution. ... [C]ourts have disagreed over the years as to whether there should be any remedy for such constitutional violations and, if so, whether it should focus upon redressing the wrong committed against the victim of the unconstitutional search or seizure or only upon deterring future violations of such constitutional rights by law enforcement officials.
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> ...
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> This Court's rejection of the *Leon* good-faith exception in [*State v.*] *Guzman[, 122 Idaho 981, 842 P.2d 660 (1992),]* was supported by an independent exclusionary rule announced eighty-five years ago in [*State v.*] *Arregui[, 44 Idaho 43, 254 P. 788 (1927).* In *Arregui,* there was no claim of law enforcement misconduct. ... When *Guzman* was decided, "Idaho had clearly developed an exclusionary rule as a constitutionally mandated remedy for illegal searches and seizures in addition to other purposes behind the rule such as recognizing the exclusionary rule as a deterrent for police misconduct." *Donato,* 135 Idaho at 472, 20 P.3d at 8. In some instances, we have construed Article I, section 17, to provide greater protection than is provided by the United States Supreme Court's construction of the Fourth Amendment. "[W]e provided greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *Id.* To overrule *Guzman* and hold that the exclusionary rule's sole purpose is to deter police misconduct, we would also have to overrule *Arregui,* which adopted the exclusionary rule in Idaho in a case in which there was no police misconduct.

Koivu, 152 Idaho 511, 519, 272 P.3d 483, 491 (2012).

Therefore, under the current Idaho law there is no recognized good faith exception, and thus exclusion is the appropriate remedy.

ORDER:

Based upon the foregoing, IT IS HERBY ORDERED, that:

1. The warrantless blood draw was not justified by exigent circumstances, and therefore violated Defendant's Fourth Amendment rights under the U.S. Supreme Court's decision in *Missouri v. McNeely*; Defendant's Motion to Suppress is GRANTED.

2. Because Idaho has declined to follow the *Leon* Good Faith Exception, evidence of the warrantless blood draw is excluded.

DATED: This 18 day of June, 2013

Benjamin R. Simpson
District Judge # 101

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of June, 2013, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

J. Lynn Brooks
Kootenai County Public Defender
Fax: (208) 446-1701

___ First Class Mail
__✓__ Faxed

Kootenai County Prosecutor, CR
Fax: (208) 446-1833

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Deputy Clerk