

4-4-2008

Eby v. State Clerk's Record v. 1 Dckt. 36568

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LAW CLERK

Vol. 1 of 2

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL LEE EBY
Petitioner-Appellant,

vs.

STATE OF IDAHO,
Defendant-Respondent.

TRANSCRIPT ON APPEAL

In the District Court of the First Judicial District of
the State of Idaho, in and for the County of Kootenai

ATTORNEY FOR APPELLANT
Molly J Huskey

ATTORNEY FOR RESPONDENT
Ann Wilkinson

SUPREME COURT #34179

FILED - COPY

APR - 4 2008

Supreme Court _____ Court of Appeals _____
Entered on ATS by: _____

36568

34179

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eals

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY)	
	)	CIVIL CASE NO.
Petitioner-Appellant,	)	CV 02-674
)	
vs.)	
	)	SUPREME COURT DOCKET
STATE OF IDAHO	)	34179
)	
)	
<u>Respondent</u>)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the
County of Kootenai.

HONORABLE JOHN PATRICK LUSTER
District Judge

Attorney for Appellant
MOLLY J HUSKEY
State Appellant Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703

Attorney for Respondent
WILLIAM DOUGLAS
Kootenai County Prosecutor
P O Box 9000
Coeur d'Alene, Idaho 83816-9000

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Date: 9/28/2007

First Judicial District Court - Kootenai County

User: PARKER

Time: 10:49 AM

ROA Report

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Case: CV-2002-0000674 Current Judge: John P. Luster

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
1/31/2002	ADMR	GLASS	Administrative assignment of Judge	John P. Luster
	NEWC	GLASS	New Case Filed	John P. Luster
	MOTN	GLASS	Motion to Proceed Informa Pauperis	John P. Luster
	AFFD	GLASS	Affidavit in Support of Motion	John P. Luster
	MOTN	GLASS	Motion for Appointment of Counsel	John P. Luster
	ORDR	GLASS	Order for Waiver of Prepaid Fees	John P. Luster
	ORDR	GLASS	Order Appointing Public Defender	John P. Luster
2/7/2002	ANSW	LEITZKE	Respondent's Answer to Petition for Post-Conviction Relief	John P. Luster
2/13/2002	SUBC	VICTORIN	Substitution Of Counsel	John P. Luster
8/12/2002	NOPD	MEYER	Notice Of Proposed Dismissal Issued	John P. Luster
8/30/2002	IOPR	MEYER	Inactivity Order Printed - File Sent to Judge	John P. Luster
	MISC	LEITZKE	Keep as Active Case--Note from Judge Luster on Notice of Proposed Dismissal	John P. Luster
10/8/2002	MOTN	HILDRETH	State's Motion For Summary Judgment	John P. Luster
10/23/2002	NOAP	JANUSCH	Notice Of Appearance-Rolf Kehne	John P. Luster
10/25/2002	SUBC	LEITZKE	Substitution Of Counsel	John P. Luster
10/28/2002	NOTE	DUBE	Letter from the court to defendant regarding substitution of counsel	John P. Luster
4/30/2003	NOPD	DUBE	Notice Of Proposed Dismissal Issued	John P. Luster
5/21/2003	IOPR	DUBE	Inactivity Order Printed - File Sent to Judge	John P. Luster
6/16/2003	IOPR	MEYER	Inactivity Order Printed - File Sent to Judge	John P. Luster
	MISC	BOOTH	Petitioners response, IRCP 40(c) Notice and request for Retention	John P. Luster
	AFFD	BOOTH	Affidavit of Counsel Rolf Kehne supporting petitioners reponse to IRCP 40(c) Notice and Request for Retention	John P. Luster
6/18/2003	REVR	BOOTH	Reviewed And Retained	John P. Luster
12/15/2003	NOPD	MEYER	Notice Of Proposed Dismissal Issued	John P. Luster
1/2/2004	IOPR	DUBE	Inactivity Order Printed - File Sent to Judge	John P. Luster
	AFFD	BOOTH	Affidavit of counsel Rolf Kehne supporting petitioners response to IRCP 40(c) Notice and Request for Retention	John P. Luster
	MISC	BOOTH	Petitioner's Response to IRCP 40(c) Notice and request for retention	John P. Luster
1/14/2004	REVR	BOOTH	Reviewed And Retained	John P. Luster
7/12/2004	NOPD	MEYER	Notice Of Proposed Dismissal Issued	John P. Luster
7/29/2004	MISC	BOOTH	Petitioners Request for Retention and Response to IRCP 40(c) Notice	John P. Luster
7/30/2004	IOPR	DUBE	Inactivity Order Printed - File Sent to Judge	John P. Luster
8/10/2004	ORDR	BOOTH	Order of retention	John P. Luster

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
8/10/2004	REVR	BOOTH	Reviewed And Retained	John P. Luster
2/8/2005	NOPD	DUBE	Notice Of Proposed Dismissal Issued	John P. Luster
2/25/2005	AFFD	BOOTH	Affidavit of Counsel Rolf Kehne Supporting Petitioners Response to IRCP 40(c) Notice and Request for Retention	John P. Luster
	MISC	BOOTH	Petitioners response IRCP 40(c) Notice and Request for Retention	John P. Luster
2/28/2005	IOPR	MEYER	Inactivity Order Printed - File Sent to Judge	John P. Luster
6/14/2005	FJDE	BOOTH	Final Judgement, Order Or Decree Entered	John P. Luster
	INDS	BOOTH	Inactivity Dismissal	John P. Luster
	STAT	BOOTH	Case status changed: Closed	John P. Luster
	CVDI	BOOTH	Civil Disposition entered for: State of Idaho Post Conviction Relief, Other Party; Eby, Daniel L, Subject. order date: 6/14/2005	John P. Luster
9/6/2005	JTST	MCCOY	Jury Trial Started	John P. Luster
	LETR	MCCOY	Letter from Daniel Eby	John P. Luster
	AFIS	MCCOY	Affidavit in Support of Motion for Rehearing	John P. Luster
	NOTC	MCCOY	Notice for a Rehearing on Order of Dismissal/Retention State Post-Conviction	John P. Luster
	BRIE	MCCOY	Brief in Support of Review	John P. Luster
9/16/2005	LETR	ROBINSON	Letter To Court/Judge	John P. Luster
9/26/2005	HRSC	BOOTH	Hearing Scheduled (Motion 11/17/2005 03:30 PM)	John P. Luster
	STAT	BOOTH	Case status changed: Closed pending clerk action	John P. Luster
		BOOTH	Notice of Hearing	John P. Luster
10/3/2005	MOTN	BARKER	Motion For Appointment Of New Counsel	John P. Luster
10/4/2005	MOTN	GLASS	Motion for Telephonic Hearing	John P. Luster
11/8/2005	ORDR	BOOTH	Order for telephone hearing	John P. Luster
11/17/2005	INHD	BOOTH	Hearing result for Motion held on 11/17/2005 03:30 PM: Interim Hearing Held	John P. Luster
		BOOTH	Order Appointing Public Defender Entered	John P. Luster
3/7/2006	SUBC	MCCOY	Substitution Of Counsel - John Adams WD for Plaintiff - Linda Payne Substitutes	John P. Luster
3/13/2006	NOAP	LEITZKE	Notice Of Appearance (Linda Payne, conflict PD obo Daniel Eby)	John P. Luster
6/12/2006	LETR	BOOTH	Letter from Subject - noted by #196	John P. Luster
7/31/2006	LETR	JANUSCH	Letter from Plaintiff	John P. Luster
8/22/2006	PETN	MCCOY	AMENDED Petition for Post Conviction Relief	John P. Luster
	AFFD	MCCOY	Affidavit in Regards to the Amended Petition for Post Conviction Relief	John P. Luster

Date: 9/28/2007

First Judicial District Court - Kootenai County

User: PARKER

Time: 10:49 AM

ROA Report

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Case: CV-2002-0000674 Current Judge: John P. Luster

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
8/22/2006	MISC	MCCOY	Certificate of Service	John P. Luster
8/30/2006	AFFD	BROOK	Affidavit	John P. Luster
9/1/2006	NOTC	VICTORIN	Notice of Objection and Deniel	John P. Luster
1/26/2007	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 02/27/2007 03:30 PM)	John P. Luster
1/31/2007	MOTN	ZLATICH	Motion for summary disposition; amended notice of hearing	John P. Luster
2/6/2007	MOTN	BOOTH	Motion for telephone hearing	John P. Luster
2/11/2007		CRAMER	*****FILE # 2 CREATED*****	John P. Luster
2/12/2007	MISC	BOOTH	Eby's brief in support of Motion for summary Disposition re: Disproportionate Sentence	John P. Luster
2/15/2007	MOTN	BOOTH	Motion to permit plaintiff to appear via phone	John P. Luster
2/23/2007	ORDR	BOOTH	Order Permitting plaintiff to appear via telephone	John P. Luster
2/27/2007	CONT	WATKINS	Hearing result for Motion for Summary Judgment held on 02/27/2007 03:30 PM: Continued	John P. Luster
	HRSC	WATKINS	Hearing Scheduled (Motion for Summary Judgment 04/17/2007 03:30 PM)	John P. Luster
	STAT	WATKINS	Case status changed: Reopened	John P. Luster
		WATKINS	Notice of Hearing	John P. Luster
2/28/2007		WATKINS	Notice of Hearing	John P. Luster
3/22/2007	MOTN	BOOTH	Motion for telephone hearing (filed by Plaintiff)	John P. Luster
3/29/2007	NOTC	VICTORIN	Notice of Change of Address	John P. Luster
3/30/2007	ORDR	BOOTH	Order permitting plaintiff to appear via telephone	John P. Luster
4/9/2007	MNWD	VICTORIN	Motion For Leave To Withdraw As Attorney and Notice of Hearing	John P. Luster
	MOTN	VICTORIN	Motion to Set Aside Dismissal & Notice of Hearing	John P. Luster
4/17/2007	HRHD	WATKINS	Hearing result for Motion for Summary Judgment held on 04/17/2007 03:30 PM: Hearing Held on Motion Setting Aside Dismissal	John P. Luster
4/18/2007	MOTN	BOOTH	Motion to set aside dismissal (IRCP 40(c)) & Notice of Hearing	John P. Luster
4/24/2007	ORDR	BOOTH	Order - denies motion o set aside dismissal	John P. Luster
	FJDE	BOOTH	Final Judgement, Order Or Decree Entered	John P. Luster
	STAT	BOOTH	Case status changed: Closed	John P. Luster
5/14/2007	NOTC	CRAMER	Notice Of Appeal	John P. Luster
	MOTN	CRAMER	Motion For Appointment Of State Appellate Public Defender	John P. Luster
	APMD	PARKER	Appeal Filed Supreme Court	John P. Luster
5/21/2007	ORPD	JANUSCH	Order Appointing State Appellate Public Defender	John P. Luster
6/8/2007	LETR	JANUSCH	Letter from Daniel Eby	John P. Luster

Date: 9/28/2007

Time: 10:49 AM

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First Judicial District Court - Kootenai County

User: PARKER

ROA Report

Case: CV-2002-0000674 Current Judge: John P. Luster

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
6/14/2007	NTWD	PARKER	Notice Of Withdrawal/Linda Payne	John P. Luster

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

Inmate name Daniel Eby
IDOC No. 56540
address ICT-0-R2/Hospital Drive W. #23
Oronogo, ID. 83544

2002 JAN 31 PM 3:30

CLERK DISTRICT COURT

Darcy Glass
DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Kootenai

Daniel Eby,)
)
Petitioner,)
)
vs.)
)
State of Idaho,)
)
Respondent.)
)

Case No. CV02-674

PETITION FOR POST
CONVICTION RELIEF

The Petitioner alleges:

- Place of detention if in custody: Idaho Correctional Institution of Oronogo.
- Name and location of the Court which imposed judgement/sentence: First Judicial District, Kootenai County
- The case number and the offense or offenses for which sentence was imposed:
Case Number -- CR 97-03342 / Count 1, Murder in the First Degree,
Idaho Code §18-4001, 4002, 4003, Count 2, Conspiracy to Commit Robbery,
Idaho Code §18-1701, 18-6501, Count 3, Attempted Robbery, Idaho Code, 18-206, 18-8501, 6502
 - Case Number: CR 97-03342
 - Offense Convicted: Murder in the First / Conspiracy to Commit Robbery / Attempted Robbery

4. The date upon which sentence was imposed and the terms of sentence:

a. Date of Sentence: January 20, 1999

b. Terms of Sentence: 25 years to life / 15 years

5. Check whether a finding of guilty was made after a plea:

Guilty

Not Guilty

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. State concisely all the grounds on which you base your application for post conviction relief: (Use additional sheets if necessary.)

Ineffective Assistance of Counsel

Police or prosecutor withholding favorable information from defense

See page 204 preliminary transcripts

8. Prior to this motion, have you filed with respect to this conviction? Yes

a. Petitions in State or Federal Court for Habeas Corpus _____

b. Any other petitions, motions, or applications in any other court yes

c. If you answered yes to a or b above, state the name and court in which the

motion was filed: Idaho Supreme Court, Direct Appeal,

Rehearing and motion for review.

District court Kootenai county Rule 35 and motion for retrial.

1 Q. Well, just to yourself.
2 A. Okay.
3 Q. Were you -- you were purporting to Mr. Schmitz
4 that you wanted to prove --
5 A. Okay.
6 Q. Were you not purporting to Mr. Schmitz that you
7 wanted to prove Danny Eby wrong?
8 A. Yes.
9 Q. Thank you. Sir, could you please turn to page
10 54.
11 A. I'm on page 54.
12 Q. Would you look, sir, at the second line up from
13 the bottom of that page?
14 A. Yes.
15 Q. Did you ask Mr. Schmitz to draw you a picture of
16 this hammer?
17 A. He -- yes, I did.
18 Q. Did Mr. Schmitz comply with your wish?
19 A. He attempted to comply.
20 Q. And what did you do with that?
21 A. I destroyed it with the rest of my notes.
22 Q. How many pages of notes did you destroy?
23 A. From this interview?
24 Q. That'll do for now.
25 A. I think I probably took two or three pages, I'm

9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

1. Failed to call witnesses for rebuttal ~~witness~~ testimony
2. told me not to testify at my trial.
3. Told me not to speak to the p.S.I. Investigator.
Attorney did not pursue testimony showing that
Key Evidence was supposedly destroyed by Police

10. Are you seeking leave to proceed in forma pauperis?

Yes [] No

If your answer is "yes", fill out a Motion to Proceed In Forma Pauperis and supporting affidavit.

11. Are you requesting the appointment of counsel to represent you in this case?

Yes [] No

If your answer is "yes", fill out a Motion to Proceed In Forma Pauperis and supporting affidavit.

12. State specifically the relief you seek:

New trial and or resentencing

13. This Petition may be accompanied by affidavits in support of the petition. (Use additional sheets if necessary.)

DATED this 24 day of January, 2002.

Daniel Lee Eby
Petitioner

STATE OF IDAHO)
) ss
County of Kootenai)

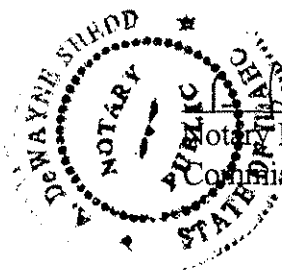
Daniel Eby, being sworn, deposes and says that the party is the Petitioner in the above-entitled appeal and that all statements in this PETITION FOR POST CONVICTION RELIEF are true and correct to the best of his or her knowledge and belief.

Daniel Lee Eby
Petitioner

SUBSCRIBED AND SWORN to before me this 24 day of Jan

2002.

(SEAL)

 Wayne Steinhilber
Notary Public for Idaho
Commission expires: 11/06/07

415

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 24 day of January, 2002, I mailed
a true and correct copy of the PETITION FOR POST CONVICTION RELIEF via the U.S. mail
system to:

Hon. Alan C. Lance County Prosecuting Attorney
Idaho Attorney General
Boise, Idaho, 83720-0010

Daniel Lee Eley
Petitioner

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

Inmate name Daniel Eby
IDOC No. S6540
Address ICED 32/Hospital Drive W. #23
Orofino, Idaho 83544

2002 JAN 25 PM 3:16

CLERK DISTRICT COURT

Darcy Glas
CLERK

Petitioner

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Kootenai

Daniel Eby)
)
Petitioner,)
)
vs.)
)
State of Idaho)
)
Respondent.)
)

Case No. CV02-674

**MOTION TO PROCEED
IN FORMA PAUPERIS
AND SUPPORTING
AFFIDAVIT**

COMES NOW, the Petitioner, Daniel Eby, in the above-entitled matter and moves this Honorable Court for an order of the Court to proceed in forma pauperis on the grounds he/she is incarcerated and indigent pursuant to Idaho Code §31-3220A. Said Motion is supported by the following Affidavit of Inability to Pay.

DATED this 24 day of January, 2002.

Daniel Lee Eby
Petitioner

MOTION TO PROCEED IN FORMA PAUPERIS
AND SUPPORTING AFFIDAVIT - 1

AFFIDAVIT OF INABILITY TO PAY

STATE OF IDAHO)
) ss
County of Kootenai)

Daniel Eby, declare under penalty of perjury, that I am the
Petitioner in the above entitled proceeding; that, in support of my request to proceed without
being required to prepay fees, cost or give security therefor, I state that because of my poverty, I
am unable to pay the costs of said proceeding or give security therefor; that I believe I am
entitled to relief.

The nature of my action is: Petition For Post Conviction Relief

In further support of this application, I answer the following questions:

1. I am presently employed. Yes No
 - a. If the answer is "Yes" my wages per month are: \$ 7.50
 - b. If the answer is "No" list last date of employment and salary:
 _____ \$ _____
2. I have received money from the following sources within the last 12 months:

business, profession or other self employment	\$ _____
rent payments, interest or dividends	\$ _____
pensions, annuities or life insurance payments	\$ _____
gifts or inheritances	\$ _____ <u>835.00</u>

MOTION TO PROCEED IN FORMA PAUPERIS
AND SUPPORTING AFFIDAVIT - 2

other sources

\$ _____

3. The real and personal property I own is: None

4. I have a savings account: Yes No \$ _____

5. I have a checking account: Yes No \$ _____

6. Balance in inmate trust account: \$ 34.62

7. Spouse's income: \$ _____

8. Affiant's dependents: None

9. Affiant's debts: None

10. Affiant's monthly expenses: None

Further, your Affiant states that I am unable to pay the court costs.

DATED this 24 day of January, 2002.

Daniel Lee Elie
Affiant

STATE OF IDAHO)
) ss
County of Kootenai)

Daniel Eby, Petitioner/Affiant verifies that the statements made in this Affidavit are true and correct, as he/she verily believes.

DATED this 24 day of January, 2002.

Daniel Lee Eby
Petitioner/Affiant

SUBSCRIBED AND SWORN to before me this 24 day of Jan, 2002.



A Dwayne Shedd
Notary Public for Idaho
Residing at: 0125 1st St
Commission Expires: 11/06/07

416
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 24 day of January, 2002, I mailed a true and correct copy of the MOTION TO PROCEED IN FORMA PAUPERIS AND SUPPORTING AFFIDAVIT via the U.S. mail system to:

Hon. Alan C. Lance County Prosecuting Attorney
Idaho Attorney General
Boise, Idaho; 83720-0010

Daniel Lee Eby
Petitioner

MOTION TO PROCEED IN FORMA PAUPERIS
AND SUPPORTING AFFIDAVIT - 4

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 01/17/2002 =

Doc No: 56540 Name: EBY, DANIEL LEE
 Account: CHK Status: ACTIVE

ICIO/B2 PRES FACIL
 TIER-C CELL-1

Transaction Dates: 01/17/2001-01/17/2002

Beginning Balance	Total Charges	Total Payments	Current Balance
15.14	1014.56	1034.04	34.62

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
01/18/2001	IO0138439-222	099-COMM SPL		9.85DB	5.29
01/23/2001	HQ0138926-018	011-RCPT MO/CC		50.00	55.29
01/25/2001	IO0139129-168	099-COMM SPL		4.98DB	50.31
01/25/2001	HQ0139144-005	011-RCPT MO/CC		20.00	70.31
01/29/2001	IO0139454-025	072-METER MAIL	062263	2.97DB	67.34
01/30/2001	IO0139540-007	071-MED CO-PAY	133654	5.00DB	62.34
01/31/2001	IO0139647-191	099-COMM SPL		28.47DB	33.87
02/01/2001	IO0139815-058	099-COMM SPL		15.02DB	18.85
02/05/2001	IO0140157-005	211-FOOD SVC		5.00	23.85
02/07/2001	IO0140464-214	099-COMM SPL		10.84DB	13.01
02/14/2001	IO0141088-230	099-COMM SPL		5.32DB	7.69
02/14/2001	HQ0141108-011	011-RCPT MO/CC		20.00	27.69
02/15/2001	IO0141209-041	099-COMM SPL		5.40DB	22.29
02/21/2001	IO0141614-207	099-COMM SPL		7.60DB	14.69
02/23/2001	HQ0141885-009	011-RCPT MO/CC		10.00	24.69
02/23/2001	HQ0141885-016	011-RCPT MO/CC		20.00	44.69
02/28/2001	IO0142277-188	099-COMM SPL		16.72DB	27.97
02/28/2001	HQ0142295-016	011-RCPT MO/CC		10.00	37.97
03/01/2001	IO0142460-006	211-FOOD SVC	KITCHEN	5.00	42.97
03/02/2001	IO0142599-004	072-METER MAIL	062456	0.68DB	42.29
03/07/2001	IO0143032-003	072-METER MAIL	062479	0.34DB	41.95
03/07/2001	IO0143054-252	099-COMM SPL		26.70DB	15.25
03/14/2001	HQ0143691-015	011-RCPT MO/CC		20.00	35.25
03/21/2001	IO0144311-206	099-COMM SPL		19.39DB	15.86
03/22/2001	IO0144398-031	099-COMM SPL		5.88DB	9.98
03/22/2001	IO0144439-006	072-METER MAIL	065432	1.02DB	8.96
03/23/2001	HQ0144519-012	011-RCPT MO/CC		20.00	28.96
03/26/2001	IO0144649-011	072-METER MAIL	065445	1.02DB	27.94
03/28/2001	IO0144862-185	099-COMM SPL		20.05DB	7.89
03/30/2001	HQ0145116-002	011-RCPT MO/CC		20.00	27.89
04/02/2001	IO0145292-006	211-FOOD SVC	KITCHEN	5.00	32.89
04/04/2001	IO0145589-194	099-COMM SPL		14.74DB	18.15
04/09/2001	HQ0146122-013	011-RCPT MO/CC		20.00	38.15
04/11/2001	IO0146263-233	099-COMM SPL		26.17DB	11.98
04/11/2001	IO0146304-061	071-MED CO-PAY	146885	7.00DB	4.98
04/12/2001	HQ0146422-010	011-RCPT MO/CC		50.00	54.98
04/18/2001	IO0146891-170	099-COMM SPL		10.87DB	44.11
04/19/2001	IO0147001-025	099-COMM SPL		9.48DB	34.63
04/25/2001	IO0147451-176	099-COMM SPL		14.20DB	20.43

STATE OF IDAHO
 Idaho Department of Correction
 I hereby certify that the foregoing is a full, true, and correct
 copy of an instrument as the same now remains on file and of
 record in my office.
 WITNESS my hand and official seal hereto affixed this

day of Jan A.D. 2002
 By [Signature]

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 01/17/2002 =

Doc No: 56540 Name: EBY, DANIEL LEE
 Account: CHK Status: ACTIVE

ICIO/B2 PRES FACIL
 TIER-C CELL-1

Transaction Dates: 01/17/2001-01/17/2002

Beginning	Total	Total	Current
Balance	Charges	Payments	Balance
15.14	1014.56	1034.04	34.62

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
04/26/2001	IO0147494-176	099-COMM SPL		14.20DB	6.23
04/26/2001	IO0147498-176	099-COMM SPL		-14.20DB	20.43
05/01/2001	HQ0147895-006	011-RCPT MO/CC		25.00	45.43
05/02/2001	IO0147984-167	099-COMM SPL		16.24DB	29.19
05/02/2001	IO0148021-006	211-FOOD SVC	KITCHEN	5.00	34.19
05/02/2001	IO0148025-020	211-JANITORIAL	FRNT YARD	10.00	44.19
05/09/2001	IO0148808-249	099-COMM SPL		14.38DB	29.81
05/10/2001	HQ0148909-014	011-RCPT MO/CC		20.00	49.81
05/16/2001	HQ0149384-005	011-RCPT MO/CC		10.00	59.81
05/16/2001	IO0149392-193	099-COMM SPL		21.12DB	38.69
05/23/2001	IO0149976-186	099-COMM SPL		8.65DB	30.04
05/30/2001	HQ0150520-009	011-RCPT MO/CC		25.00	55.04
05/31/2001	IO0150610-146	099-COMM SPL		12.49DB	42.55
06/01/2001	IO0150827-013	211-FOOD SVC	KITCHEN	5.00	47.55
06/01/2001	IO0150842-018	211-JANITORIAL	YARD	20.00	67.55
06/06/2001	IO0151257-203	099-COMM SPL		18.26DB	49.29
06/13/2001	IO0152033-172	099-COMM SPL		37.20DB	12.09
06/14/2001	IO0152166-007	072-METER MAIL	067288	0.55DB	11.54
06/14/2001	IO0152173-033	072-METER MAIL	067282	0.34DB	11.20
06/18/2001	IO0152372-011	072-METER MAIL	067305	0.68DB	10.52
06/20/2001	IO0152679-178	099-COMM SPL		7.72DB	2.80
06/26/2001	HQ0153150-013	011-RCPT MO/CC		20.00	22.80
06/26/2001	HQ0153150-014	011-RCPT MO/CC		20.00	42.80
06/27/2001	IO0153217-146	099-COMM SPL		28.12DB	14.68
07/02/2001	IO0153702-021	211-JANITORIAL	FRNT YARD	20.00	34.68
07/02/2001	IO0153709-014	211-FOOD SVC	KITCHEN	5.00	39.68
07/05/2001	IO0153951-174	099-COMM SPL		14.05DB	25.63
07/19/2001	HQ0155373-008	061-CK INMATE	66889	3.50DB	22.13
07/26/2001	HQ0155930-006	011-RCPT MO/CC		20.00	42.13
07/27/2001	HQ0156047-007	011-RCPT MO/CC		25.00	67.13
07/30/2001	IO0156261-017	211-JANITORIAL	JANITOR	20.00	87.13
08/01/2001	IO0156500-165	099-COMM SPL		30.33DB	56.80
08/01/2001	IO0156536-010	072-METER MAIL	068063	0.57DB	56.23
08/08/2001	IO0157253-199	099-COMM SPL		9.89DB	46.34
08/13/2001	HQ0157721-006	011-RCPT MO/CC		10.00	56.34
08/20/2001	IO0158298-022	072-METER MAIL	068661	1.49DB	54.85
08/21/2001	IO0158364-010	072-METER MAIL	068075	3.74DB	51.11
08/24/2001	HQ0158772-011	011-RCPT MO/CC		25.00	76.11
09/04/2001	IO0159465-017	211-JANITORIAL	YARD	20.00	96.11

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 01/17/2002 =

Doc No: 56540 Name: EBY, DANIEL LEE
 Account: CHK Status: ACTIVE

ICIO/B2 PRES FACIL
 TIER-C CBLL-1

Transaction Dates: 01/17/2001-01/17/2002

Beginning Balance	Total Charges	Total Payments	Current Balance
15.14	1014.56	1034.04	34.62

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
09/06/2001	IO0159870-259	099-COMM SPL		16.15DB	79.96
09/11/2001	HQ0160198-010	011-RCPT MO/CC		20.00	99.96
09/20/2001	HQ0161099-006	011-RCPT MO/CC		20.00	119.96
09/24/2001	HQ0161432-001	066-CK HOBBY	70083	49.67DB	70.29
09/24/2001	IO0161433-001	067-CK TX HQ161432	70083	1.49DB	68.80
09/26/2001	IO0161638-091	099-COMM SPL		12.26DB	56.54
10/01/2001	HQ0162088-005	011-RCPT MO/CC		20.00	76.54
10/03/2001	NI0162322-016	211-JANITORIAL	FRONT YARD	20.00	96.54
10/04/2001	IO0162612-138	099-COMM SPL		11.08DB	85.46
10/11/2001	IO0163168-235	099-COMM SPL		18.36DB	67.10
10/15/2001	IO0163335-017	072-METER MAIL	070752	3.04DB	64.06
10/15/2001	HQ0163342-007	011-RCPT MO/CC		10.00	74.06
10/18/2001	IO0163757-178	099-COMM SPL		21.48DB	52.58
10/18/2001	HQ0163793-006	011-RCPT MO/CC		20.00	72.58
10/22/2001	HQ0164055-011	011-RCPT MO/CC		20.00	92.58
11/01/2001	IO0165315-174	099-COMM SPL		38.09DB	54.49
11/02/2001	IO0165459-016	211-JANITORIAL	JANITORIAL	10.00	64.49
11/06/2001	HQ0165898-028	011-RCPT MO/CC		50.00	114.49
11/08/2001	IO0166352-233	099-COMM SPL		33.41DB	81.08
11/13/2001	IO0166753-028	071-MED CO-PAY	155547	5.00DB	76.08
11/14/2001	IO0166861-020	072-METER MAIL	070684	3.04DB	73.04
11/15/2001	IO0167044-294	099-COMM SPL		11.01DB	62.03
11/15/2001	IO0167044-295	099-COMM SPL		13.77DB	48.26
11/19/2001	HQ0167538-007	011-RCPT MO/CC		30.00	78.26
11/20/2001	IO0167641-223	099-COMM SPL		22.18DB	56.08
11/26/2001	HQ0168006-001	011-RCPT MO/CC		20.00	76.08
11/26/2001	HQ0168006-009	011-RCPT MO/CC		10.00	86.08
11/27/2001	HQ0168211-002	066-CK HOBBY	70734	35.35DB	50.73
11/27/2001	IO0168212-002	067-CK TX HQ168211	70734	1.06DB	49.67
11/29/2001	IO0168459-204	099-COMM SPL		28.47DB	21.20
12/04/2001	IO0169022-016	211-JANITORIAL	YARD	15.00	36.20
12/06/2001	IO0169226-029	072-METER MAIL	069196	1.03DB	35.17
12/11/2001	HQ0169731-019	011-RCPT MO/CC		10.00	45.17
12/12/2001	IO0169857-259	099-COMM SPL		29.37DB	15.80
12/13/2001	HQ0169970-006	011-RCPT MO/CC		10.00	25.80
12/13/2001	HQ0169970-020	011-RCPT MO/CC		100.00	125.80
12/17/2001	HQ0170209-020	011-RCPT MO/CC		25.00	150.80
12/18/2001	IO0170335-220	099-COMM SPL		11.23DB	139.57
12/19/2001	HQ0170561-003	061-CK INMATE	69085	90.00DB	49.57

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 01/17/2002 =

Doc No: 56540 Name: EBY, DANIEL LEE
Account: CHK Status: ACTIVE

ICIO/B2 PRES FACIL
TIER-C CELL-1

Transaction Dates: 01/17/2001-01/17/2002

Beginning Balance	Total Charges	Total Payments	Current Balance
15.14	1014.56	1034.04	34.62

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
12/26/2001	IO0170947-206	099-COMM SPL		2.03DB	47.54
12/26/2001	IO0170947-207	099-COMM SPL		33.84DB	13.70
01/03/2002	IO0171702-092	100-CR INM CMM		12.77	26.47
01/03/2002	IO0171702-093	100-CR INM CMM		13.77	40.24
01/03/2002	IO0171731-015	211-JANITORIAL	YARD	7.50	47.74
01/15/2002	IO0172790-249	099-COMM SPL		23.12DB	24.62
01/15/2002	HQ0172815-021	011-RCPT MO/CC		10.00	34.62

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

Inmate name Daniel Eby
IDOC No. 56540
Address ICIC B/Hospital Drive, #23
Crofton, Idaho, 83544

2002 JAN 31 PM 3:30

CLERK OF DISTRICT COURT
Darcy Glass
DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT

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

Daniel Eby,)
)
 Petitioner,)
)
 vs.)
)
State of Idaho,)
)
 Respondent.)
)

Case No. CV02-674

**MOTION FOR APPOINTMENT
OF COUNSEL**

COMES NOW, Daniel Eby, in the above entitled matter and moves this Honorable Court to Petitioner's Motion for Appointment of Counsel for the reasons more fully set forth herein and in the Affidavit in Support of Motion for Appointment of Counsel.

1. Petitioner is currently incarcerated within the Idaho Department of Corrections under the direct care, custody and control of Phil Foster, Warden of the ~~Idaho~~ ~~Department of Correction~~ of Crofton

2. The issues to be presented in this case may become to complex for the Petitioner to properly pursue.

3. Petitioner lacks the knowledge and skill needed to represent him/herself.

4. Other: Petitioner can not research law, there is no law library.

WHEREFORE, Petitioner respectfully prays that this Honorable Court issue it's Order granting Petitioner's Motion for Appointment of Counsel to represent his/her interest, or in the alternative grant any such relief to which it may appear the Petitioner is entitled to.

DATED this 24 day of January, 2002.

Daniel Lee Eby
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 24 day of January, 2002, I mailed a true and correct copy of the MOTION FOR APPOINTMENT OF COUNSEL via the U.S. mail system to:

Hon. Alan C. Lance County Prosecuting Attorney

Idaho Attorney General

Boise, Idaho, 83720-0010

Daniel Lee Eby
Petitioner

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

Inmate name Daniel Eby
IDOC No. 56540
Address [C. E. R.] / [Hospital] Drive N #23
Crohn, Idaho 83544

2002 JAN 31 PM 3:49

CLERK DISTRICT COURT

Percy Glass
DEPUTY

Plaintiff

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT 8
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Kootenai

Daniel Eby,)
)
) Plaintiff,)
)
) vs.)
)
State,)
)
) Defendant.)
)

Case No. CV02-674

**ORDER FOR WAIVER
OF PREPAID FEES**

PURSUANT to Idaho Code § 31-3220, and being advised of the premises;

THIS COURT does hereby ORDER the Waiver of Prepaid Fees in the above captioned case.

DATED this 24 day of January, 2002.

[Signature]
Judge

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: *[Signature]*
AT 5:18 O'CLOCK P.M.
CLERK, DISTRICT COURT
DEPUTY

DANIEL EBY,)
VS.)
STATE OF IDAHO,)

Case No: CV-2002-674
ORDER APPOINTING PUBLIC DEFENDER

The Court being fully advised as to the application of DANIEL EBY, and it appearing to be a proper case,
NOW, THEREFORE, IT IS ORDERED that

Kootenai County Public Defender
P.O. Box 9000/ 500 Government Way, Suite 200
Coeur d'Alene, ID 83814
(208) 769-4475

a duly licensed attorney in the State of Idaho, is hereby appointed to represent said applicant in all proceedings in the above entitled POST CONVICTION case.

Said applicant is further advised that he/she may be required to reimburse the Court for all or part of the cost of court appointed counsel.

Date: 1-29-02

[Signature]

Judge

Copies to:
 Public Defender
 Prosecutor

Applicant
[Signature]

Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

Inmate name Daniel Eby
IDOC No. IC10 R2 / Hospital Drive W #23
Address Hospital Drive W #23
Orofino, Idaho 83544

2007 JAN 31 PM 3:31

CLERK DISTRICT COURT
Larry Glass
DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE First JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Kootenai

Daniel Eby)
)
) Petitioner,)
)
) vs.)
)
) State of Idaho)
)
) Respondent.)
)

Case No. CV02-674
**AFFIDAVIT IN SUPPORT
OF MOTION FOR
APPOINTMENT OF
COUNSEL**

STATE OF IDAHO)
) ss
County of Kootenai)

Daniel Eby, after first being duly sworn upon his/her oath, deposes
and says as follows:

1. I am the Affiant in the above-entitled case;
2. I am currently residing at the Idaho Correctional Institution
of Orofino, under the care, custody and control of
Phil Foster, Warden;
3. I am indigent and do not have any funds to hire private counsel;
4. I am without bank accounts, stocks, bonds, real estate or any other form of real
property;

AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL - 1

Revised: 05/01/00

5. I am unable to provide any other form of security;
6. I am untrained in the law;
7. If I am forced to proceed without counsel being appointed I will be unfairly handicapped in competing with trained and competent counsel of the State;

Further your affiant sayeth naught.

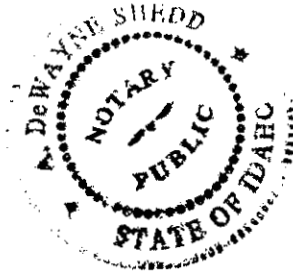
DATED This 24 day of January, 2002

Daniel Ely

Petitioner

SUBSCRIBED AND SWORN To before me this 24 day of Jan, 2002.

(SEAL)



A DeWayne Shum

Notary Public for Idaho

Commission expires: 11/02/07

414

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 24 day of January, 2002, I
mailed a true and correct copy of the AFFIDAVIT IN SUPPORT OF MOTION FOR
APPOINTMENT OF COUNSEL via the U.S. mail system to:

Hon. Alan C. Lance County Prosecuting Attorney

Idaho Attorney General

Boise, Idaho, 83720-0010

David Lee Eby
Petitioner

WILLIAM J. DOUGLAS
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 769-4465
ASSIGNED ATTORNEY:
RICK BAUGHMAN

FILED
COUNTY OF COEUR D'ALENE
33

FEB -7 PM 4:20

DEPUTY
DEPUTY
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY,)	
	)	CASE NO. CV02-674
Petitioner,)	
	)	RESPONDENT'S ANSWER
vs.	)	TO PETITION FOR
	)	POST-CONVICTION RELIEF
)	
STATE OF IDAHO)	
)	
Respondent.)	

RESPONDENT, STATE OF IDAHO, through the office of the Kootenai County Prosecuting Attorney, Rick Baughman, Deputy Prosecuting Attorney, responds to the allegations contained in the above referenced Amended Petition for Post-Conviction Relief filed by the Petitioner and states as follows:

I

Respondent denies all allegations not specifically admitted herein.

II

Respondent admits the allegations contained in paragraph(s) 1-6, & 8 of the Petition for Post-Conviction Relief with the correction clarification that sentencing was held on 1-8-99 and the Attempted Robbery conviction was overturned on appeal.

RESPONDENT'S ANSWER TO PETITION
FOR POST CONVICTION RELIEF: Page 1

III

The Respondent denies the allegations contained in paragraphs 7 and 9 of the Petition for Post Conviction Relief.

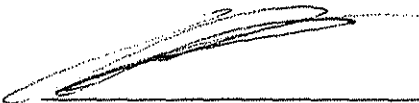
IV

AFFIRMATIVE DEFENSE

The Petition for Post-Conviction Relief fails to state a claim upon which relief can be granted.

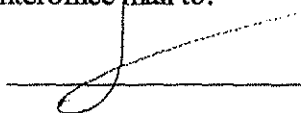
DATED this 7 day of Feb, 2002

WILLIAM J. DOUGLAS
Prosecuting Attorney for
Kootenai County, Idaho


RICK BAUGHMAN
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 7 day of Feb, 2002, a true and correct copy of the foregoing was caused to be mailed or sent interoffice mail to:
Public Defenders



ORIGINAL

FILED
JAN 13 2002
CLERK OF DISTRICT COURT

John M. Adams, Public Defender
Office of the Kootenai County Public Defender
500 Government Way Suite 600
Coeur d'Alene, Idaho 83814
Phone: (208) 664-1347; Fax: (208) 769-4475
Bar Number: 3054

CLERK OF DISTRICT COURT
DEPUTY
[Signature]

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL EBY,)	
	)	CASE NUMBER CV-02-0000674
Petitioner,)	
	)	SUBSTITUTION OF COUNSEL
STATE OF IDAHO)	
)	
Respondent.)	

NOTICE IS HEREBY GIVEN that the attorney for Daniel L. Eby, the above named Petitioner, is hereby changed. The withdrawing attorney is John M Adams and the new attorney and substitution of record JEFFREY S. SMITH, Conflict Public Defender, whose address is P.O. Box 2131, Sandpoint, Idaho 83864.

You are hereby notified that any process to be served on the above named Petitioner shall be served upon JEFFREY S. SMITH, Attorney at Law.

DATED this 17th day of February, 2002.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: [Signature]
JOHN M. ADAMS
WITHDRAWING ATTORNEY

DATED this 17th day of February, 2002.

[Signature]
JEFFREY S. SMITH
ATTORNEY OF RECORD

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 13th day of February, 2002, addressed to:

Kootenai County Prosecutor

Lisa Baer

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED

2002 AUG 12 AM 11:22

CLERK DISTRICT COURT

Deana Meyer
DEPUTY

JEFFREY S. SMITH
P.O. BOX 2131
SANDPOINT ID 83864

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Thursday, August 29, 2002 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **August 29th, 2002**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

() Counsel, as listed above.

Dated: Monday, August 12, 2002
Daniel J. English
Clerk Of The District Court

By: *Deana Meyer*
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

*New representation
will be forthcoming on
matter per John Adam
No dismissal*

DEPUTY CLERK DISTRICT COURT
2002 AUG 30 AM 11:13
FILED: Note from Judge
Lester - 5:11 PM
STATE OF IDAHO } SS
COUNTY OF KOOTENAI }

039

8-30-02

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2002 AUG 12 AM 11:22

CLERK DISTRICT COURT

Diana Meyer
DEPUTY

PROSECUTOR KOOTENAI COUNTY
INTEROFFICE DELIVERY
COEUR D'ALENE ID 83814

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Thursday, August 29, 2002 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **August 29th, 2002**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: Monday, August 12, 2002
Daniel J. English
Clerk Of The District Court

By: *Diana Meyer*
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

ORIGINAL

FILED
CLERK OF DISTRICT COURT
COUNTY OF KOOTENAI

WILLIAM J. DOUGLAS
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800
ASSIGNED ATTORNEY:
RICK BAUGHMAN

2002 OCT -8 AM 10: 32

CLERK DISTRICT COURT
Juliana Hudson
DEPUTY
JH

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL EBY,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
Respondent.)

Case No. **CV02-674**
STATE'S MOTION FOR
SUMMARY JUDGMENT

RESPONDENT, STATE OF IDAHO, through the office of the Kootenai County Prosecuting Attorney, hereby requests this honorable Court to enter Summary Dismissal of the Petition for Post-Conviction Relief pursuant to the fact that such Petitioner has not alleged or shown any prejudice and mere allegations are insufficient for proper Post Conviction filing. Therefore the Respondent requests this matter to be summarily dismissed without a hearing

DATED this 3 day of Oct, 2002.

[Signature]
RICK BAUGHMAN
Deputy Prosecuting Attorney

Prosecutor's Certificate of Transmittal

I hereby certify that on the 7 day of Oct, 2002, a true and correct copy of the foregoing was caused to be mailed to:
JEFFERY SMITH, PO BOX 2131, SANDPOINT, ID 83864

[Signature]

STATE'S MOTION FOR SUMMARY
JUDGMENT AND CORRESPONDING
MEMORANDUM: Page 1

Rolf Kehne
PO Box 520
Eagle, Idaho 83616-0520
(208) 939-2023
Attorney for Petitioner

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED.

2002 OCT 23 AM 11:31

CLERK DISTRICT COURT
[Signature]
DEPUTY

ISB #2180.

**IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO IN AND FOR KOOTENAI COUNTY**

DANIEL L. EBY ,)	
	)	CASE NO. CV02 0674
<i>Petitioner,</i>)	
	)	NOTICE OF APPEARANCE
vs.)	
)	
THE STATE OF IDAHO,)	
)	
<i>Respondent.</i>)	
_____)	

NOTICE TO THE COURT, The Clerk, The Respondent.

Please take notice that ROLF KEHNE hereby enters his appearance as attorney of record for the Petitioner, Daniel L. Eby, in the above-entitled action. The Clerk will please enter that appearance. Please send notices and pleadings to the above address.

Dated this 26 day of October, 2002.

[Signature]

Rolf Kehne
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies service on this 21 day of October, 2002, I served a true and correct copy of the foregoing NOTICE OF APPEARANCE on the following and in the manner indicated.

Kootenai County Prosecuting Attorney
PO Box C9000
Coeur d'Alene, ID 83816-9000

Hand delivery
 Facsimile
 U. S. Mail

Kootenai County Public Defender
PO Box 9000
Coeur d'Alene, ID 83816-9000

Hand delivery
 Facsimile
 U. S. Mail



Rolf M. Kehring
Attorney for Petitioner, Daniel Eby

ORIGINAL

John M. Adams, Public Defender
Office of the Kootenai County Public Defender
500 Government Way Suite 600
Coeur d'Alene, Idaho 83814
Phone: (208) 446-1700; Fax: (208) 446-1701
Bar Number: 3504

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2002 OCT 25 AM 9:23

CLEAR DISTRICT COURT
DEPUTY
[Signature]

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL L. EBY,)
Petitioner,)
v.)
STATE OF IDAHO,)
Respondent.)

CASE NUMBER CV-2002-0000674
SUBSTITUTION OF COUNSEL

NOTICE IS HEREBY GIVEN that the attorney for Daniel L. Eby is hereby changed. The new attorney and substitution of record is, Rolf M. Kehne, whose address is, P.O. Box 520, Eagle, Idaho 83616.

You are hereby notified that any process to be served on the above named defendant shall be served upon Rolf M. Kehne, Attorney at Law.


DATED this 17 day of October, 2002.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY:

[Signature]
J. BRADFORD CHAPMAN
DEPUTY PUBLIC DEFENDER

DATED this 22nd day of October, 2002.



ROLF M. KEHNE
ATTORNEY OF RECORD

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 25 day of October, 2002, addressed to:

Kootenai County Prosecutor



SUBSTITUTION OF COUNSEL -2-

045

2002/10/23 10:23:00

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO }SS
COUNTY OF KOOTENAI }
FILED: 4-30-03
AT 5:00 O'CLOCK P. M.
CLERK, DISTRICT COURT
Patricia Dubé
DEPUTY

ROLF M. KEHNE
1208 W. STATE STREET
BOISE ID 83702

*Notice of
~~Appearance~~
from D.A.
has
diff address*
[Signature]

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **May 19, 2003 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **May 19th, 2003**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: April 30, 2003
Daniel J. English
Clerk Of The District Court

By: *Patricia Dubé*
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

2003 MAY 27 AM 8:26

CLERK DISTRICT COURT

Patricia Dube
DEPUTY

PROSECUTOR KOOTENAI COUNTY

INTEROFFICE DELIVERY
COEUR D'ALENE, ID 83814

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court by 10:00 a.m. on **June 16, 2003**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **June 16, 2003**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: May 27, 2003
Daniel J. English
Clerk Of The District Court

By: *Patricia Dube*
Deputy Clerk

CV Inactivity Notice Of Proposed Dismissal

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2003 MAY 27 AM 8:26

CLERK DISTRICT COURT
Patricia Duke
DEPUTY

ROLF M. KEHNE

P. O. BOX 520
EAGLE, ID 83616-0525

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court by 10:00 a.m. on **June 16, 2003**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **June 16, 2003**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: May 27, 2003
Daniel J. English
Clerk Of The District Court

By: *Patricia Duke*
Deputy Clerk

CV Inactivity Notice Of Proposed Dismissal

Rolf M. Kehne
 Rolf Kehne Law Office PLLC
 PO Box 520
 Eagle, Idaho, 83616
 208.939.2023 (voice)
 208.939.6909 (fax)
 ISB 2190

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: NRB
 2003 JUN 16 AM 10:10
 CLERK DISTRICT COURT
 DEPUTY

Attorney for Defendant

**IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR KOOTENAI COUNTY**

DANIEL L. EBY,)	
<i>Petitioner,</i>)	
	)	CV 02-674
vs.	)	CASE NO. VC 0-2674
)	
THE STATE OF IDAHO,	)	PETITIONER'S RESPONSE
<i>Respondent.</i>	)	IRCP 40(C) NOTICE AND
	)	REQUEST FOR RETENTION
)	

Petitioner Daniel L. Eby hereby respectfully submits his response to the NOTICE OF PROPOSED DISMISSAL filed May 27, 2003. Petitioner respectfully request the Court to retain this case on the calendar, and in support thereof submits the accompanying affidavit of Rolf Kehne, counsel for Petitioner, and shows this Court as follows:

Petitioner Daniel L. Eby timely filed a Petition under the Uniform Post-Conviction Relief Act (UPCPA), I.C. §19-4901, et seq. in January, 2002.

049

The Kootenai County Commission signed a contract with counsel in mid-October, 2002, for representation of Petitioner.

Petitioner has been reasonably diligent in pursuing post-conviction relief.

In October, Counsel received files from trial counsel consisting of several thousand pages of reports, discovery, work-product, notes, Clerk's record and 1200 pages of reporters transcripts. Trial counsel's materials shipped to counsel completely fill four bankers boxes. Since receiving those files, counsel has inventoried that information, and read and made notes on most of it.

Counsel traveled twice to Orofino to meet with and interview Petitioner and/or witnesses important to investigating his case. On December 4, 2003, counsel and Petitioner met for a half day. Counsel met with Petitioner's co-defendant in the underlying criminal charge, Jeremy Schmitz, for a half day that same trip.

April 1 and 2, 2003, counsel was in Orofino to interview another witness, Cindy Hicks, who is material in that she is Petitioner's aunt, co-Defendant Schmitz's mother, and married to Clifford Hicks, who was also charged in the murder but was

allowed to plead guilty to accessory after the fact in exchange and who testified against Petitioner at Petitioner's trial. She knows or knew others who were directly or tangentially involved in the crime, its investigation, or the prosecution (or all three). Clifford Hicks refused to speak with Petitioner's counsel during that early April trip to Orofino, but he has spoken with counsel on the telephone since that trip, furnishing at least one lead that may yield proof of a constitutional violation.

Among the investigation yet to be done before Mr. Eby is prepared to file a final Petition supported by affidavits and transcript are these:

Trial counsel Brad Chapman and Lynn Nelson, their investigators, and their boss, John M. Adams need to be interviewed in more detail in Coeur d'Alene;

The other people present around the time of the murder, especially Dan Antrim, need to be interviewed;

Counsel needs to complete review of the materials submitted by trial counsel, specifically the material collected as part of the mitigation investigation conducted by counsel, investigating potential mental health issues;

Clifford Hicks' attorney at the time needs to be interviewed. This will probably require a release from Mr. Hicks. Although he agreed to sign one, he has not yet done so that Petitioner or his counsel is aware of.

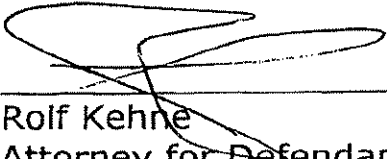
The need for other investigation may become apparent as the above is completed. For instance, a close review of the mitigation materials may justify evaluation by mental health professionals into mental issues relevant to the conviction or sentence.

Petitioner proposes the following time table:

Matter	Estimated Attorney Time	Proposed Completion Date
Finish file review and notes – mitigation investigation materials	14 hours	August 15, 2003
Meet in Coeur d'Alene With John Adams, Brad Chapman, Lynn Nelson and investigators in Kootenai County Public Defender Office	8 hours plus travel time	August 1, 2003

Matter	Estimated Attorney Time	Proposed Completion Date
Speak again with Clifford Hicks and speak or meet with his lawyer	5 hours (including arrangements)	August 1, 2003
Additional interviews/meetings with Petitioner (at least two)	5 hours plus travel time	July 11, 2003
ICR (57(b) Motion Civil Discovery (if deemed necessary) with supporting affidavit	1.5 hour to draft	August 30, 2003
Final Amended Petition with supporting affidavits, discovery, and other materials	14 hours to draft	September 15, 2003
Dispositive Motions (Summary disposition, partial summary disposition)	unknown	October 15, 2003

DATED June 16, 2003.

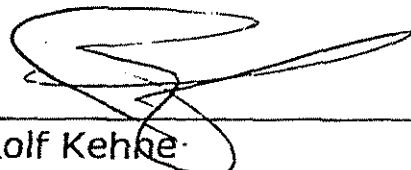


Rolf Kehne
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on June 16, 2003, I served the foregoing * upon the following by depositing the same in the U.S. Mail, properly addressed and with proper postage affixed.

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816



Rolf Kehne
Attorney for Petitioner

Rolf M. Kehne
 Rolf Kehne Law Office PLLC
 PO Box 520
 Eagle, Idaho, 83616
 208.939.2023 (voice)
 208.939.6909 (fax)
 ISB 2190

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: NRP
 2003 JUN 16 AM 10
 CLERK DISTRICT COURT
 DEPUTY

Attorney for Petitioner

**IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR KOOTENAI COUNTY**

DANIEL L. EBY,)
 Petitioner,)
)
 vs.)
)
 THE STATE OF IDAHO,)
 Respondent.)
 _____)

CV 02-674
CASE NO. VC 0-2674
**AFFIDAVIT OF COUNSEL
 ROLF KEHNE SUPPORTING
 PETITIONER'S RESPONSE TO
 IRCP 40(C) NOTICE AND
 REQUEST FOR RETENTION**

ROLF KEHNE, being first duly sworn upon his oath, deposes
 and says that:

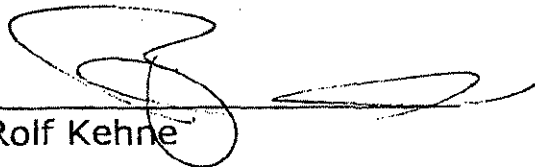
1. I am licensed to practice law in Idaho and have been so licensed since February, 1978.
2. I represent Petitioner Daniel L. Eby by virtue of a contract between myself and Kootenai County and I have represented Petitioner since mid-October, 2002.

3. I authored the accompanying Petitioner's Response To IRCP40(c) Notice And Request For Retention; I am aware of its contents and the allegations therein contained are true and accurate to the best of my knowledge, information, and belief.
4. I hereby respectfully request the Court to retain this case on the calendar.
5. I am willing to provide the Court more factual detail concerning Petitioner's claims, but I ask that if I am to do so at this time, I be allowed to do so *ex parte* and under seal for two reasons: (a) to avoid compromising the investigation by premature disclosure of preliminary findings and steps yet to be taken; and (b) to avoid making a claims of misconduct or nonfeasance against any person unless and until complete investigation shows sufficient factual support for the claims.
6. **Potential** claims thus far identified and which justify further instigation are ineffective assistance of counsel and prosecutorial misconduct.

- 7. I have invested over eighty (80) hours of attorney time in this case and cannot be ready without more work to file a final amended petition. This is not my only case. I respectfully submit that I have been reasonably diligent in investigating and pursuing Petitioner Daniel L. Eby's claims.
- 8. I believe the timetable proposed in the Petitioner's Response is realistic and that the actions listed therein are necessary to a reasonably competent handling of this case.

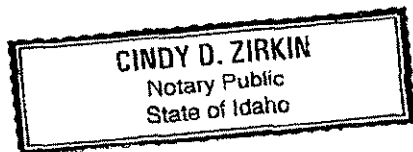

DATED this 16th day of June, 2003.

Respectfully Submitted by



Rolf Kehne

SUBSCRIBED AND SWORN to before me this 16 day of June, 2003.

NOTARY PUBLIC Residing
At Meridian, Idaho Commission
Expires March 29, 2005

CERTIFICATE OF SERVICE

I certify that on June 16, 2003, I served the foregoing * upon the following by depositing the same in the U.S. Mail, properly addressed and with proper postage affixed.

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816



Rolf Kehne
Attorney for Petitioner

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

Daniel L Eby, Plaintiff)

vs)

State Of Idaho, Defendant)

Case No: CV-2002-0000674

~~ORDER OF DISMISSAL~~ / RETENTION

ROLF M. KEHNE
Fax 208 939 6909
P. O. BOX 520
EAGLE, ID 83616-0525

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 6/18/03
3:49 P.M.
CLERK, DISTRICT COURT
DEPUTY

KCPA
Fax 446-1833

~~ORDER OF DISMISSAL~~ / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 04/30/2003, giving a show cause date of 06/16/2003, IT IS **HEREBY ORDERED** that all pending matters in this case are hereby

~~() Dismissed~~

Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: June 18 2003

Judge: D. P. [Signature]

^{faxed}
Copies mailed, postage pre-paid to:

() Counsel, as listed above.

Dated: 6/18/03
Daniel J. English
Clerk Of The District Court

By: [Signature]
Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

2003 DEC 15 AM 9:37

CLERK DISTRICT COURT

Diana Meyer
DEPUTY

ROLF M. KEHNE
P. O. BOX 520
EAGLE ID 83616-0525

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Friday, January 02, 2004 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **January 2nd, 2004**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

(X) Counsel, as listed above.

Dated: Monday, December 15, 2003
Daniel J. English
Clerk Of The District Court

By: *Diana Meyer*
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED

2003 DEC 15 AM 9:37

CLERK DISTRICT COURT

Diana Meyer
DEPUTY

PROSECUTOR KOOTENAI COUNTY
INTEROFFICE DELIVERY
COEUR D'ALENE ID 83814

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Friday, January 02, 2004 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **January 2nd, 2004**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

() Counsel, as listed above.

Dated: Monday, December 15, 2003
Daniel J. English
Clerk Of The District Court

By:

Diana Meyer
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

3

2004 JAN -2 AM 10:38

CLERK DISTRICT COURT

DEPUTY

Rolf M. Kehne
Rolf Kehne Law Office PLLC
PO Box 520
Eagle, Idaho, 83616
208.939.2023 (voice)
208.939.6909 (fax)
ISB 2180

Attorney for Petitioner

IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR KOOTENAI COUNTY

DANIEL L. EBY,	)	CASE NO. CV 02-674
<i>Petitioner,</i>)	
	)	PETITIONER'S RESPONSE TO
vs.	)	IRCP 40(C) NOTICE AND
	)	REQUEST FOR RETENTION
THE STATE OF IDAHO,)	
<i>Respondent.</i>)	
_____)	

COMES NOW the Petitioner, Danny L. Eby, by and through his counsel of record, Rolf Kehne, and hereby responds to Court's NOTICE OF PROPOSED DISMISSAL and respectfully requests the Court to retain this action on the calendar for further proceedings.

In support hereof, Petitioner offers the following:

Owing to the press of other cases, Petitioner's counsel has not been able to keep the schedule proposed in the June, 2003, RESPONSE. Specifically, Petitioner's counsel was

appointed to help develop the mitigation case in an Elmore County death penalty case, State v. Severson. Trial counsel moved for mitigation so late in the proceedings and so close to trial, that the appointment required that I drop almost everything else to work full-time on that case. (That trial counsel has since been removed and new appointed counsel got a substantial continuance and elected to hire mitigation assistance elsewhere.)

Even so, counsel has worked over forty (40) hours since the last RESPONSE for a total time spent on this case of over one hundred twenty (120) hours, all of which be for naught, if the case is dismissed at this point. That time includes completing review of the voluminous records provided by trial counsel; witness locating; telephone interviews; legal research on potential claims relating to conflicts of interest within the Public Defender Office, and that office attempt to use a "virtual wall" to isolate those conflicts; interview with John Adams; records searches regarding witnesses and potential witnesses.

Although counsel hoped to interview Petitioner's trial counsel and the Kootenai County Office Administrator during a trip to Coeur d'Alene for CLE and an IACDL Board meeting

September 19-20, 2003, last-minute things in counsel's practice prevented him from leaving early enough to accomplish these things. Counsel must, therefore, schedule another trip to Coeur d'Alene for those interviews and to visit with other witnesses in the area whom counsel has identified in the course of telephone interviews.

Counsel hopes during that trip to be able to view the prosecutor files on co-defendant Jeremy Schmitz and Clifford Hicks, who could have been charged as a co-defendant but was allowed to plead to a reduced charge, accessory after the fact, in exchange for testimony.

Counsel must also travel again to the Orofino Institution (ICIO) to again interview co-defendant Jeremy Schmitz and to confront him with information that contradicts what Mr. Schmitz told counsel in earlier interviews.

Counsel proposes the following timetable:

January 15, 2004	File Motion for Civil Discovery (Hearing at Court's convenience)
February 15, 2004	Trip(s) to Orofino and Coeur d'Alene to complete interviews and records collection;

March 15, 2004

File Amended Petition with supporting materials sufficient to withstand summary disposition.

March 15, 2004

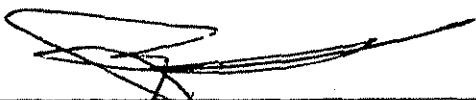
Case at issue and ready for trial setting.

Any delay in this case is not attributable to Petitioner, whose information has proved to be accurate and as detailed as possible under the circumstances, and who has called and written counsel regularly.

WHEREFORE, Petitioner prays this Honorable Court to retain this case on the calendar and not to dismiss it for non-prosecution.

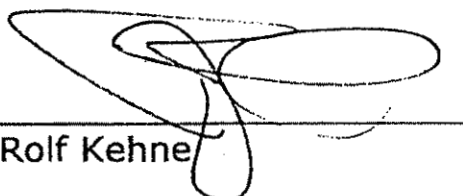
DATED this 2nd day of January, 2004.

Respectfully submitted,

By 
Rolf Kehde

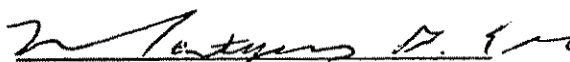
DATED this 2ND day of January, 2004.

Respectfully Submitted by



Rolf Kehne

SUBSCRIBED AND SWORN to before me this 2nd day of January, 2004.

NOTARY PUBLIC Residing
At Nampa, Ia ; Commission
Expires 01-03-2006

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2004 JAN -2 AM 10:50

CLERK DISTRICT COURT

DEPUTY

Rolf M. Kehne
Rolf Kehne Law Office PLLC
PO Box 520
Eagle, Idaho, 83616
208.939.2023 (voice)
208.939.6909 (fax)
ISB 2180

Attorney for Petitioner

**IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR KOOTENAI COUNTY**

DANIEL L. EBY,
Petitioner,

vs.

THE STATE OF IDAHO,
Respondent.

) **CASE NO. CV 02-674**

) **AFFIDAVIT OF COUNSEL**
) **ROLF KEHNE SUPPORTING**
) **PETITIONER'S RESPONSE TO**
) **IRCP 40(C) NOTICE AND**
) **REQUEST FOR RETENTION**
)

ROLF KEHNE, being first duly sworn upon his oath, deposes
and says that:

1. I am licensed to practice law in Idaho and have been so licensed since February, 1978.
2. I represent Petitioner Daniel L. Eby by virtue of a contract between myself and Kootenai County and I have represented Petitioner since mid-October, 2002.

EBY - RESPONSE TO NOTICE, REQUEST FOR RETENTION, AND
SUPPORTING AFFIDAVIT

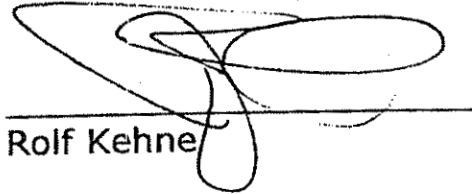
- 5 -

067

3. I authored the accompanying Petitioner's Response To IRCP40(c) Notice And Request For Retention; I am aware of its contents and the allegations therein contained are true and accurate to the best of my knowledge, information, and belief.
4. I hereby respectfully request the Court to retain this case on the calendar.
5. **Potential** claims thus far identified and which justify further instigation are ineffective assistance of counsel and prosecutorial misconduct.
6. I believe the timetable proposed in the Petitioner's Response is realistic and that the actions listed therein are necessary to a reasonably competent handling of this case.

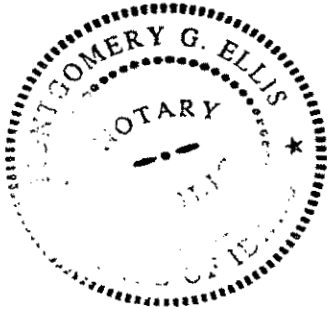
DATED this 2ND day of January, 2004.

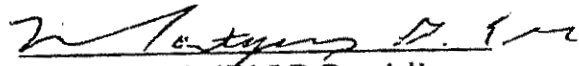
Respectfully Submitted by



Rolf Kehne

SUBSCRIBED AND SWORN to before me this 2nd day of January, 2004.




NOTARY PUBLIC Residing
At Norfolk, Va; Commission
Expires 01-01-2006

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 1/3/04 11:13 AM
AT 9:30 O'CLOCK AM
CLERK, DISTRICT COURT
DEPUTY

Daniel L Eby, Plaintiff
vs
State Of Idaho, Defendant

Case No: CV-2002-0000674

ORDER OF ~~DISMISSAL~~ / RETENTION

ROLF M. KEHNE

P. O. BOX 520
EAGLE, ID 83616-0525

ORDER OF ~~DISMISSAL~~ / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 12/15/2003, giving a show cause date of 01/02/2004, IT IS **HEREBY ORDERED** that all pending matters in this case are hereby

~~() Dismissed~~

Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: 1-5-4

Judge: D.P. Hunt

Fax 208-939-6909
Copies mailed, postage pre-paid to:

(/) Counsel, as listed above.

Dated: 1/14/04
Daniel J. English
Clerk Of The District Court

By: [Signature]
Deputy Clerk

Overdue Civil Inactivity Order Of Dismissal/Retention

070

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

Daniel L Eby, Plaintiff)

vs)

State Of Idaho, Defendant)

Case No: CV-2002-0000674

ORDER OF ~~DISMISSAL~~ / RETENTION

PROSECUTOR KOOTENAI COUNTY

INTEROFFICE DELIVERY
COEUR D'ALENE, ID 83814

ORDER OF ~~DISMISSAL~~ / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 12/15/2003, giving a show cause date of 01/02/2004, IT IS **HEREBY ORDERED** that all pending matters in this case are hereby

~~() Dismissed~~

DL Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: 1-5-04

Judge: *Phil Rute*

Fax 446-1833
Copies mailed, postage pre-paid to:

() Counsel, as listed above.

Dated: 1/14/03

Daniel J. English
Clerk Of The District Court

By: *[Signature]*

Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

2004 JUL 12 PM 2:21

CLERK DISTRICT COURT

Deana Meyer
DEPUTY

PROSECUTOR KOOTENAI COUNTY
INTEROFFICE DELIVERY
COEUR D'ALENE ID 83814

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Thursday, July 29, 2004 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **July 29th, 2004**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

(X) Counsel, as listed above.

Dated: Monday, July 12, 2004
Daniel J. English
Clerk Of The District Court

By: *Deana Meyer*
Deputy Clerk


Overdue Civil Inactivity Notice Of Proposed Dismissal

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2004 JUL 12 PM 2:21

CLERK DISTRICT COURT


DEPUTY

ROLF M. KEHNE
P. O. BOX 520
EAGLE ID 83616-0525

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Thursday, July 29, 2004 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **July 29th, 2004**.

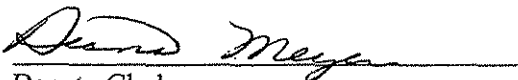
CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: Monday, July 12, 2004
Daniel J. English
Clerk Of The District Court

By:


Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

STATE OF IDAHO }
COUNTY OF KOOTENAI }
FILED } SS

2004 JUL 29 AM 10:46

CLERK DISTRICT COURT

DEPUTY

Rolf M. Kehne
Rolf Kehne Law Office PLLC
PO Box 520
Eagle, Idaho, 83616
208.939.2023 (voice)
208.939.6909 (fax)
ISB 2180

Attorney for Petitioner

**IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR KOOTENAI COUNTY**

DANIEL L. EBY,)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
Respondent.)
_____)

CASE NO. CV 02-674

**PETITIONER'S REQUEST
FOR RETENTION AND RESPONSE
TO IRCP 40(C) NOTICE**

The **Petitioner, DANIEL L. EBY,** hereby respectfully requests retention of this cause and responds to the NOTICE OF PROPOSED DISMISSAL (for inactivity) dated July 12, 2004.

SUMMARY

Petitioner has largely completed his review, investigation, research and analysis of post-conviction issues, and can file an amended petition shortly. All that remains are follow-up interviews with proposed affiants to fine-tune language and obtain signatures.

The witnesses are located in Nevada (2), Orofino (2) and the rest
PETITIONER'S REQUEST FOR RETENTION AND RESPONSE TO IRCP 40(c)
NOTICE WITH AFFIDAVIT

around Kootenai County. Petitioner believes some of that work can be accomplished by mail and fax but that at least one more trip to Kootenai County by way of Orofino is necessary before he can file an Amended Petition and supporting materials.

Petitioner proposes October 4, 2004 as a deadline for filing the Amended Petition. That week is convenient because Petitioner's counsel is scheduled to be in Kootenai County September 17th and 18th on other matters and can finish interviews and obtain at least rough draft affidavits on that trip. Although it would necessitate another trip, the Amended Petition could be completed sooner, if that is the desire of the Court.

Petitioner believes that the forthcoming Amended Petition will be final. Therefore, once the State answers, the case will be at issue and the case can be set for dispositive motions and trial at the Court's convenience.

Petitioner submits this pleading to show the Court he has not failed to prosecute this action. Petitioner can supply more detail and cites to the record than is herein contained but requests the Court to accept this overview until Petitioner has obtained final-draft supporting affidavits. In the event the Court finds this showing to be inadequate, Petitioner prays for notice of the deficiencies and 20-day notice as provided in Idaho Code § 19-4906(b).

BACKGROUND OF CASE

Daniel Eby petitions for relief from the judgment of conviction and sentences for the crimes of conspiracy to commit robbery, attempted robbery, and first degree murder entered in Kootenai County Case CRF 97-02342. Judge Haman presided over the jury trial and imposed the sentences.

Three people were charged in connection with the attempted robbery and the murder of victim Mel Evanson: Petitioner Eby, who was 18 at the time of the crimes, Jeremy Schmitz, petitioner's cousin, who was 14 at the time of the crimes, and Clifford Hicks, an adult, Jeremy Schmitz's stepfather, and husband to Petitioner's aunt. Hicks was on parole at the time and he was originally charged as a persistent violator. Nevertheless, the State allowed Hicks the lesser charge of accessory after the fact and dismissed the habitual criminal allegation.

Petitioner took an appeal. The case was assigned to the Court of Appeal. *State v. Eby*, 136 Idaho 534, 37 P.3d 625 (Ct.App. 2001).

Some of Petitioner's post-conviction issues affect sentencing. Petitioner was charged with murder under two alternative theories: premeditated murder, and felony murder - committed in the course of a robbery. The Court of Appeal agreed with Mr. Eby that admission of blame-shifting out-of-court statements of codefendant Schmitz

violated Mr. Eby's confrontation rights. The Court found the admission harmless, however, in that they tended to show premeditated murder; that sufficient independent evidence showed Mr. Eby's guilt of felony murder. The Court wrote, "The properly admitted evidence at Eby's trial overwhelmingly proves that he participated in the attempted robbery that culminated in the murder of Evenson." 136 Idaho at 539, 37 P.3d 630. The Court of Appeals also ruled that the attempted robbery merged into felony murder and must be vacated. *Id.* at 540, 37 P.3d at 631. In the course of making that determination, the Court found that Eby's murder conviction must be considered one for felony murder, not premeditated murder. The Court of Appeals wrote, "we have upheld the conviction, despite the erroneous admission of an accomplice's hearsay statements, on the basis that Eby would have been found guilty of felony murder even in the absence of the erroneously admitted evidence. Therefore, Eby's first degree murder conviction must be treated as one for felony murder, predicated upon his guilt of the attempted robbery during which the homicide occurred." *Id.*

In view of the Court of Appeals' conclusion, Petitioner Eby is at least entitled to resentencing. Judge Haman sentenced Petitioner after ruling, incorrectly it turned out, that the statements of Jeremy Schmitz were lawfully admissible. Judge Haman passed sentence without the

benefit of the Court of Appeals' conclusion that Petitioner could be convicted (and thus sentenced) only on felony murder.

The other sentencing claims are related to the relative of culpability of the three charged with these crimes. This will be alleged as claims relating to the performance of counsel in litigating relative culpability and preserving it as a sentencing and constitutional error and also as claims based upon governmental misconduct, rather than deficient performance of counsel, based on the prosecution's use of and argument based upon Clifford Hick's testimony.

Other issues relate to both conviction and sentence. Petitioner was represented by Brad Chapman and Lynn Nelson of the Kootenai County Public Defender's Office. Codefendant Jeremy Schmitz was represented upon the same charges by Kootenai County Public Defender John Adams. To the best of Petitioner's recollection and belief after investigation, there was no waiver or discussion of the conflict of interest issues related to this simultaneous active representation of codefendants by the Public Defender office. (Counsel did, however, advise Petitioner, and obtain his waiver, of another conflict of Interest arising from the potential use of testimony from a **former** client of Lynn Nelson, Crystalline Wachtel. A scan of that waiver accompanies this Request and Response.) Rather than waiver, Petitioner expects trial counsel will attempt to justify the simultaneous

representation based on the alleged erection and maintenance of a virtual wall (commonly known as a Chinese Wall) within the Kootenai County Public Defender Office. This issue, if the Court rules it is meritorious, will invalidate both the sentences and the convictions.

Idaho appellate courts have affirmed denials of relief on claims of conflicts within public defender offices in a variety of circumstances. For example, in the Kootenai County case, *State v. Cherry*, 83 P.3d 123 (Ct. App. 2003) one of Cherry's counsel accepted a job in the prosecutor's office while the case was pending. The claim was based on conflict within the prosecutor's office. In *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000), the public defender office withdrew from representation at trial due to disclosure of previous public defender clients as witnesses and independent conflict was appointed to represent Fields at trial. Fields's claim was based on that same public defender office representing Fields in post-conviction and appellate proceedings. In *Beasley v. State*, 126 Idaho 356 883 P.2d 714 (Ct. App. 1994) the pertinent conflict allegation was premised on the fact that the conflicted public defender office chose and compensated the substitute, conflicts lawyer appointed to represent Beasley. The Court of Appeals found the situation troubling but concluded Beasley failed to show prejudice.

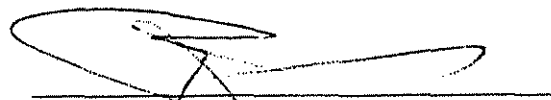
Petitioner has not found an Idaho case approving the use of "Chinese Walls" rather than appointment of outside conflicts counsel when a public defender is appointed to represent codefendants with disparate, conflicted interests. Assuming for the moment that Idaho would approve of the practice, the question then is the adequacy of the steps taken by the Kootenai County Public Defender Office in this case, an issue which Petitioner submits is very fact intensive and will require an evidentiary hearing.

CONCLUSION

Petitioner respectfully submits that this case should be retained. He has developed issues worthy of further litigation and is near completion of his Amended Petition.

WHEREFORE Petitioner respectfully prays this Court to retain this case, and to allow him until October 4, 2004 or such other date as the Court directs to file his Amended Petition and supporting materials. In the event the Court finds this showing to be inadequate, Petitioner prays for notice of the deficiencies and 20-day notice as provided in Idaho Code § 19-4906(b).

Respectfully submitted this 29 day of July, 2004, by:



Rolf Kehne
Attorney for Petitioner

AFFIDAVIT SUPPORTING RETENTION AND IRCP 40(c) RESPONSE

COUNTY OF ADA)
) ss:
 State of Idaho)

ROLF KEHNE, being first duly sworn upon his oath, deposes and says that:

1. I am licensed to practice law in Idaho and have been so licensed since February, 1978.
2. I represent Petitioner in this action.
3. I authored the foregoing and to the best of my knowledge, information, and belief the factual allegations therein are true and correct.
4. I would be farther along in prosecution of this case but for two mishaps that were in no way attributable to Petitioner.
 - a. In January of this year, my entire computer network suffered a catastrophic failure due to a virus infection. I follow safe computing practices, employing regularly updated antivirus software and a firewall. The infection, I was later told, was a virus equipped with what is known as a "time-bomb." The virus infected machines around the world but was not recognized by antivirus software until it activated on a specific date. In my case, that was January 18, 2004, or thereabouts. It

takes considerable time and labor to reinstall the operating system, applications, and all the updates (security hole patches).

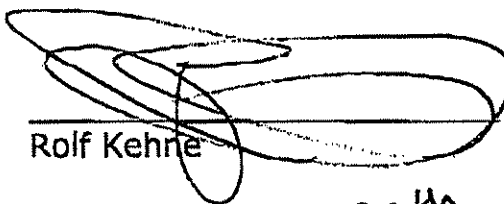
- b. After all the software was installed and updated with the critical security patches, I attempted to recover all my data and documents from backups. I used a separate hard drive for my for daily backups. I learned through this experience that read-only media are in some ways safer (although much slower) because backups on re-writeable media such as hard disks will become infected in the course of backing up files before there is any apparent problem with the backed up computer. If the infection is equipped with a time bomb, the infection on the backup may not be discernable until a restore is attempted. That (I was told) is what happened to me. Unfortunately, my backups on CD-ROM were six (6) weeks old. Thus, this episode cost me weeks while I recreated documents and data for all my cases.
5. The other mishap occurred in April, right after a trip to Kootenai County (although unrelated to the trip). I somehow injured my back sufficient to immobilize me.

With medication and physical therapy I recovered, but I lost about three weeks of productivity as a result.

- 6. Petitioner has throughout cooperated fully and honestly with me. I have just about completed what I consider to be an exhaustive investigation of his potential issues in post-conviction.

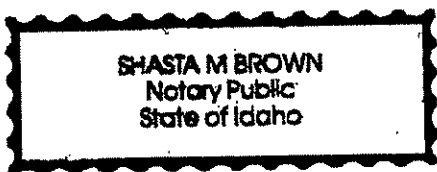
WHEREFORE I respectfully pray the Court to retain this case.

DATED this 29 day of July, 2004.



Rolf Kehne

SUBSCRIBED AND SWORN to before me this 29th day of July, 2004.

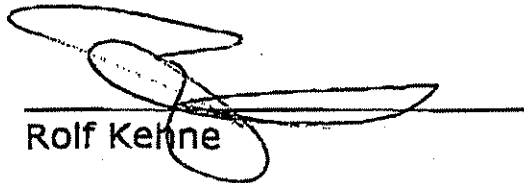


Shasta M Brown
NOTARY PUBLIC Residing
At Boise; Commission
Expires April 9, 2010

CERTIFICATE OF SERVICE

I certify that on July 29, 2004, I served the foregoing upon the following by depositing the same in the U.S. Mail, properly addressed and with proper postage affixed.

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816



Rolf Kehne

**OFFICE OF THE
KOOTENAI COUNTY PUBLIC DEFENDER
500 GOVERNMENT WAY
SUITE 200
COEUR D'ALENE, IDAHO 83814
Telephone: (208) 664-1347**

**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,	)	CASE NUMBER CR-97-3342
)	
V.)	
)	
DANIEL LEE EBY,	)	WAIVER OF POSSIBLE CONFLICT
	)	OF INTEREST
Defendant.)	
_____)	

COMES NOW the above named defendant, Daniel Lee Eby, and hereby states as follows:

1. That I am accused in the above entitled matter of various crimes stemming from the death of Melven Alfred Evenson, including the crime of Murder.
2. That I am poor and without funds to hire my own attorney. I have asked the Court to appoint an attorney to represent me, and that request was granted and the Kootenai County

WAIVER OF POSSIBLE CONFLICT OF INTEREST

Public Defender's Office has been assigned to represent me.

3. Because of the seriousness of the charges against me, I have been assigned two attorneys in the Public Defender's Office, Lynn Nelson and I. Bradford Chapman.

4. Mr. Nelson has informed me that in reviewing the potential witnesses, the State may call at trial that he has represented one of those witnesses, Christal Wachel, in a felony forgery case for which she is currently on probation.

5. I have discussed with Mr. Nelson and Mr. Chapman the potential conflict that exists in one of my attorney's having previously represented a witness for the State.

6. I HEREBY WAIVE ANY POTENTIAL CONFLICT AND HEREBY AGREE TO MR. LYNN NELSON CONTINUING TO REPRESENT ME IN THIS MATTER, IN ADDITION TO THE REPRESENTATION OF MR. BRAD CHAPMAN.

DATED this 23 day of June, 1997.

Daniel Lee Aby
Daniel Lee Aby
DEFENDANT

WAIVER OF POSSIBLE CONFLICT OF INTEREST

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

Daniel L Eby, Plaintiff

vs

State Of Idaho, Defendant

Case No: CV-2002-0000674

ORDER OF ~~DISMISSAL~~ / RETENTION

ROLF M. KEHNE
P. O. BOX 520
EAGLE, ID 83616-0525
FAX: 208-939-6909

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 8/10/04
AT 2:50 O'CLOCK PM
CLERK, DISTRICT COURT
DEPUTY

ORDER OF ~~DISMISSAL~~ / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 7/12/2004, giving a show cause date of 7/30/2004, IT IS HEREBY ORDERED that all pending matters in this case are hereby

~~() Dismissed~~

Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: 8-9-04

Judge: [Signature]

Copies sent as follows:

Faxed to Counsel as listed above

Mailed to Counsel as listed above

Dated: 8/10/04

Daniel J. English
Clerk Of The District Court

By: [Signature]
Deputy Clerk

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

Daniel L Eby, Plaintiff

vs

State Of Idaho, Defendant

)
)
)
)
)

Case No: CV-2002-0000674

ORDER OF ~~DISMISSAL~~ / RETENTION

PROSECUTOR KOOTENAI COUNTY
INTEROFFICE DELIVERY
COEUR D'ALENE, ID 83814
FAX: (208) 446-1833

ORDER OF ~~DISMISSAL~~ / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 7/12/2004, giving a show cause date of 7/30/2004, IT IS HEREBY ORDERED that all pending matters in this case are hereby

~~() Dismissed~~
PEB Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: 8-9-04

Judge: *John Patrick Ruter*

Copies sent as follows:

Faxed to Counsel as listed above

Mailed to Counsel as listed above

Dated: 8/10/21

Daniel J. English
Clerk Of The District Court

By: *[Signature]*

Deputy Clerk

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

RECEIVED - JUS

2005 FEB -8 PM 11:57

CLEAR DISTRICT COURT
Patricia Dube
DEPUTY

PROSECUTOR KOOTENAI COUNTY
INTEROFFICE DELIVERY
COEUR D'ALENE ID 83814

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Friday, February 25, 2005 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **February 25th, 2005**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: Tuesday, February 08, 2005
Daniel J. English
Clerk Of The District Court

By: *Patricia Dube*
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

FILED
2005 FEB 8 10:57 AM
CLERK DISTRICT COURT

2005 FEB 8 10:57

CLERK DISTRICT COURT

Patricia Rube
DEPUTY

ROLF M. KEHNE
P. O. BOX 520
EAGLE ID 83616-0525

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before **Friday, February 25, 2005 at 10:30 AM**, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after **February 25th, 2005**.

CASE NO.	CASE TITLE
CV-2002-0000674	Daniel L Eby, Plaintiff vs State Of Idaho, Defendant

Copies mailed, postage pre-paid to:

Counsel, as listed above.

Dated: Tuesday, February 08, 2005
Daniel J. English
Clerk Of The District Court

By: *Patricia Rube*
Deputy Clerk

Overdue Civil Inactivity Notice Of Proposed Dismissal

Rolf M. Kehne
 Rolf Kehne Law Office PLLC
 PO Box 520
 Eagle, Idaho, 83616
 208.939.2023 (voice)
 208.939.6909 (fax)
 ISB 2190

CLERK OF DISTRICT COURT
 DEPUTY
 FEB 25 11:10 AM
 1389

Attorney for Defendant

**IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR KOOTENAI COUNTY**

DANIEL L. EBY,)
) *Petitioner,*)
))
 vs.)
))
 THE STATE OF IDAHO,)
) *Respondent.*)
 _____)

CASE NO. CV 02-674

**PETITIONER'S RESPONSE
 IRCP 40(C) NOTICE AND
 REQUEST FOR RETENTION**

Petitioner Daniel L. Eby hereby respectfully submits his response to the NOTICE OF PROPOSED DISMISSAL filed February 8, 2005. Petitioner respectfully request the Court to retain this case on the calendar, and in support thereof submits the accompanying affidavit of Rolf Kehne, counsel for Petitioner, and shows this Court as follows:


Petitioner Daniel L. Eby timely filed a Petition under the Uniform Post-Conviction Relief Act (UPCPA), I.C. §19-4901.

The Petition on file is a "bare-bones" form Petition and not adequate to require the State to respond. Since the last time Petitioner reported to the Court in one of these 40(c) Responses, counsel has completed of the interviews necessary for pre-filing investigation.

Petitioner is ready to file a Petition. Counsel is scheduled to visit Petitioner at the Idaho Correctional Institution-Orofino on February 28th, 2005 at noon. Barring any unexpected concerns Petitioner might have with the Petition, the Petition will be signed that day.

An Amended Petition will be filed on or before Friday the 4th of March, 2005, or a sworn declaration explaining why it was not, and giving more detail justifying retention will be filed by that date.

DATED the February 25, 2005


Rolf Kehne
Attorney for Defendant

JEFFREY A. ...
 COUNTY OF KOOTENAI JSS
 FEB 25 AM 10:44
 CLERK DISTRICT COURT
 DEPUTY

Rolf M. Kehne
 Rolf Kehne Law Office PLLC
 PO Box 520
 Eagle, Idaho, 83616
 208.939.2023 (voice)
 208.939.6909 (fax)
 ISB 2190

IN THE FIRST JUDICIAL DISTRICT OF THE STATE OF
Attorney for Petitioner IDAHO, IN AND FOR KOOTENAI
COUNTY

DANIEL L. EBY,	)	CASE NO. CV02-674
<i>Petitioner,</i>)	
)	
vs.	)	AFFIDAVIT OF COUNSEL
	)	ROLF KEHNE SUPPORTING
	)	PETITIONER'S RESPONSE TO
THE STATE OF IDAHO,	)	IRCP 40(C) NOTICE AND
<i>Respondent.</i>	)	REQUEST FOR RETENTION
)	

ROLF KEHNE, being first duly sworn upon his oath, deposes
 and says that:

1. I am licensed to practice law in Idaho and have been so licensed since February, 1978.
2. I represent Petitioner Daniel L. Eby by virtue of a contract between myself and Kootenai County.

3. I have represented Petitioner since mid-October, 2002.
4. I authored the accompanying Petitioner's Response To IRCP40(c) Notice And Request For Retention; I am aware of its contents and the allegations therein contained are true and accurate to the best of my knowledge, information, and belief.
5. I hereby respectfully request the Court to retain this case on the calendar.
6. I am willing to provide the Court more factual detail concerning Petitioner's claims, but I ask that if I am to do so at this time, I be allowed to do so *ex parte* and under seal for two reasons: (a) to avoid compromising the investigation by premature disclosure of preliminary findings and steps yet to be taken; and (b) to avoid making a claims of misconduct or nonfeasance against any person unless and until complete investigation shows sufficient factual support for the claims.
7. Claims that will be included in the Amended Petition, which I believe to be meritorious, are law

enforcement / prosecutorial misconduct and ineffective assistance of counsel.

8. Once the Amended Petition is filed and the State has responded, Petitioner will seek leave of the Court pursuant to ICR 57 to conduct depositions of trial counsel and their investigator. Other than that, I expect the State, and perhaps the Petitioner, to move for summary disposition or partial summary disposition. Assuming the case lasts through that process, Petitioner will be ready for trial.
9. I propose the Court set a scheduling conference which would include motion deadlines, and perhaps a date for evidentiary hearing, at the court's convenience as soon as the Petition is filed and the State has responded.

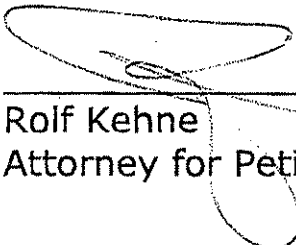
WHEREFORE, I respectfully pray this Honorable Court to retain the matter on the calendar

DATED this February 25, 2005.

CERTIFICATE OF SERVICE

I certify that on February 25, 2005, I served the foregoing Response to 40(c) Notice and the supporting affidavit in support upon the following by depositing the same in the U.S. Mail, properly addressed and with proper postage affixed.

Kootenai County Prosecuting Attorney
PO Box 9000
Coeur d'Alene, Idaho 83816



Rolf Kehne
Attorney for Petitioner

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

Daniel L Eby, Plaintiff
vs
State Of Idaho, Defendant

Case No: CV-2002-0000674

ORDER OF DISMISSAL / RETENTION

ROLF M. KEHNE
P. O. BOX 520
EAGLE, ID 83616-0525
FAX: 208-939-6909
JCP
446-1833

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 6/14/05
AT COEUR D'ALENE, IDAHO
CLERK OF DISTRICT COURT

ORDER OF DISMISSAL / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 2/8/2005, giving a show cause date of 2/28/2005, IT IS HEREBY ORDERED that all pending matters in this case are hereby

Dismissed

Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: June 14 2005

Judge: SPR

Copies sent as follows:

Faxed to Counsel as listed above

Mailed to Counsel as listed above

Dated: 6/14/05
Daniel J. English
Clerk Of The District Court
By: [Signature]
Deputy Clerk

9-01-2005

To: The Honorable Judge John Patrick Luster,

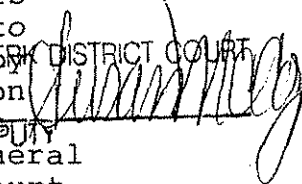
I sent you a couple of motions on 8-17-2005 i was informed by another Inmate that ive got to send that kind of stuff to the clerk of the court and that i also have to send a copy of them to the State i was unaware of this, Could you please dis regard the Notice of Appeal as i was informed that i need to file that at the end of all this. as of today I placed a copy of the NOTICE for a rehearing on order of Dismissal/Retention State Post-Conviction and a Copy of the AFFIDAVIT in support for the Motion for rehearing in the mail to the attorney general criminal division and a copy of these to the clerk of the court im sorry for all these mistakes i just don't know what im doing when it comes to law.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS

2005 SEP -6 AM 11:19

CLERK DISTRICT COURT

DEPUTY



Is there anyway that i could have a phone hearing regarding this motion and get a hearing date and time so i can have a chance to prepare to the best of my ability with my lack of knowledge in the law.
I thank you for your time.

Sincerely, Daniel Lee Eby #56540

Daniel Lee Eby 56540

Daniel L. Eby
#56540 ICI-0 C2
Hospital Dr. N.#23
Orofino, ID 83544

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED

2005 SEP -6 AM 11:19

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI
CLERK DISTRICT COURT
(Signature)
DEPUTY
40

DANIEL L. EBY,)
Plaintiff,) CASE NO. CV-2002-0000674
v)
STATE OF IDAHO,) BRIEF IN SUPPORT OF
Respondent.) REVIEW
)
)

COMES NOW, Daniel L. Eby, above named Plaintiff, Pro Se, who respect-fully requests this Honorable Court to review it's decision to dismiss Plaintiff's Petitioner for Post Conviction for the reasons more fully contained herein:

Will the Court please note that on 17 August, 2005, Plaintiff submitted a letter requesting Review of Order of Dismissal dated 2/28/05. In this letter Plaintiff included a Notice of Appeal believing this was the proper motion for review.

Plaintiff requests the Court to disregard his Notice of Appeal until his Request for Review is decided.

1. Plaintiff was unaware of pending dismissal of his Post-Conviction. See attached "Exhibit A"
2. Rolf Kehne, appointed counsel for the Plaintiff failed to notify Plaintiff of pending dismissal and appears to have some feeling, bias in the filing of post conviction for an inmate. This is evident not only in this case but as the court is aware, in the Barcella case, where the court has had to appoint other counsel because of Mr. Kehne's behavior. Plaintiff asserts that his case is the same as Barrcella's and other counsel should be appointed before dismissal.
3. Plaintiff asserts that because of Mr. Kehne's actions or lack of, Plaintiff has not been allowed to present his case in point.

4. Post Conviction is proper avenue to show ineffective assistance of counsel.
5. Evidence exists that had it been presented would have changed the outcome of the proceeding.
6. Defense counsel was ineffective.
7. Post Conviction is the last opportunity for Plaintiff to seek relief.
8. Where a Constitutional violation is alleged it cannot be construed as "Frivolous" and dismissed without a showing of fact and evidence to that effect.

As Plaintiff is ignorant of any filings, by Mr. Kehne, Plaintiff asserts that someone has already confessed to the actual charge of committing the murder. On a plea bargain this person pled to 2nd degree murder and was sentenced to 10/life. Plaintiff went to jury trial where he was found guilty of 1st degree murder and sentenced to 25/life, plus a conspiracy charge 15 fixed and attempted robbery 15 fixed on this charge all ran concurrent.

How could Plaintiff receive more time than the person who actually committed the crime...

Plaintiff asserts that this is due to ineffective assistance of counsel and that the jury based it's verdict on an erroneous admission of evidence.

ARGUMENT

Plaintiff asserts that the conviction of 1st degree murder and the resultant sentence was arrived at by an mis-informed jury. That Plaintiff was placed outside the residence where the crime took place and at best should be charged with accessory after the fact.

No evidence exists that places Plaintiff inside the area of the crime. The speculation of the witness' and the prosecutor do not establish intent of a crime on Plaintiff's part.

THE jury was not informed that the state needs to prove , beyond a reasonable doubt, that the perpetrator had the general intent to commit the underlying predicate felony.
State v Carlson, 134 Idaho 389, 3 P.3d 67(Ct App 2000)

These issues and others could not be presented on appeal due to the ineffective assistance of counsel.

Evidence was destroyed, by the investigating detective, P. Middlemore, that had it been available may have shown lack of culpability by the Plaintiff.

As a Petition For Post Conviction is an extension of a Habeas Corpus, relief can be granted when the violation rises to the level of a "fundamental defect which inherently results in a complete miscarriage of justice" or is inconsistent with fair procedure. Reed v Farley, 512 U.S. 339, 348(1994)(quoting Hill v U.S., 368 U.S. 424, 428(1962)

Defense proved ineffective when he failed to present evidence to the jury, that would establish a reasonable doubt as to the guilt or innocence of all or part of the charge.
Id. at 638 n.9; see e,g,. Wray v Johnson, 202 F.3d 515, 530 (2d Cir 2000) erroneous admission of evidence is not harmless)

Applying the Brecht standard of harmless error in habeas proceedings, habeas relief is automatically granted for " structural defects" while habeas relief for constitutionally significant trial errors is granted only when the error "had substantial and injurious effect or influence in the determining the jury's verdict". Brecht v Abrahamson, 507 U.S. 619, 623-30(1993)

(erroneous jury instruction had "substantial and injurious" influence on jury's verdict) *Barker v Yukins*, 199 F.3d 867, 874(6th Cir 1999)

Plaintiff asserts that he has shown under the Cumulative Effect Analysis due process violations which warrant further proceedings *Alvarez v Boyd*, 225 F.3d 820, 824(7th Cir 2000)

These above mentioned issues are a matter of record and could not have been brought at the direct appeal level due to the ineffective assistance of counsel.

The district court may hold an evidentiary hearing only when the petitioner has shown that (1) either the claim relies on a new, retroactive rule of constitutional law that was previously unavailable, or the claim relies on a factual basis that could not have been previously discovered by the exercise of due diligence; and (2) the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted him or her. see 28 U.S.C. §2254(e)(2)(A)(ii)

Plaintiff believes he has shown that a reasonable doubt exists as to the guilt or innocence that should have been set for further proceedings by the judge's dismissal and said dismissal of the petition for Post Conviction was premature and did not allow Petitioner to present his case in point. *O'Blasney v Solem*, 774 F.2d 925, 926(8th Cir 1985) (summary dismissal improper because allegations of insufficient evidence were legally sufficient)

CONCLUSION

Plaintiff has been denied a fair trial as guaranteed to him by the U.S. Constitution and the Constitution of the State of Idaho. U.S. Const. Amend. IV V XIV.

BRIEF IN SUPPORT-4

The actions or lack of by the defense attorney have resulted in an uninformed verdict by the jury and constitute ineffective assistance of counsel. Where counsel is ineffective it is the same as not having any counsel. Plaintiff's attempt to present these issues to the courts, ie, post conviction, have been deterred by appointed counsel and subsequently dismissed before Plaintiff's case in point has been made. Said dismissal is error. Plaintiff further attaches his exhibits as further proof of his claims.

RELIEF

Plaintiff respectfully requests this Honorable Court to issue it's Order for the following:

1. Assuming jurisdiction over this matter.
2. Reverse dismissal of Plaintiff's Post Conviction and remand for further proceedings.
3. Grant a hearing and make a decision on the facts and issues presented by the Plaintiff.
4. Remand for new trial.
5. Appoint counsel for the Plaintiff.
6. Grant any and all relief the court deems necessary to remedy the situation.

DATED this 1ST day of September, 2005.


Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have sent a copy of the foregoing document to the below listed address, via the ICI-O legal mail system.

Deputy Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010

Kootenai County Courthouse
501 GOVERNMENT WAY
P.O. Box 9000
CDA. ID 83816-9000


Plaintiff

Daniel Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino, IDAHO 83544

8-09 05

Dear Clerk of the Court,

My name is Daniel Lee Eby #56540 I was wondering if you could tell me the status of my Post-Conviction Case No. CV02-674 And if any kind of court dates or dead lines have been set in regards to my case. thank you for your time and help.

Sincerely, Daniel Eby #56540

Daniel Lee Eby 56540

EXHIBIT "A"

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

Daniel L Eby, Plaintiff)

vs)

State Of Idaho, Defendant)

Case No: CV-2002-0000674

ORDER OF DISMISSAL / RETENTION

ROLF M. KEHNE
P. O. BOX 520
EAGLE, ID 83616-0525
FAX: 208-939-6909
dcp
416-183

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 6/14/05
AT COEUR D'ALENE, IDAHO
CLERK OF DISTRICT COURT

ORDER OF DISMISSAL / RETENTION

Pursuant to the Notice of Proposed Dismissal dated: 2/8/2005, giving a show cause date of 2/28/2005, IT IS HEREBY ORDERED that all pending matters in this case are hereby

Dismissed

() Retained

pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure.

Dated: June 14 2005

Judge: Rohd

Copies sent as follows:

Faxed to Counsel as listed above

Mailed to Counsel as listed above

Dated: 6/14/05
Daniel J. English
Clerk Of The District Court

By: [Signature]
Deputy Clerk

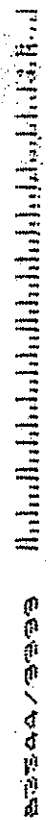
Kootenai County Courthouse
501 GOVERNMENT WAY
P.O. Box 9000
CDA, IDAHO 83816-9000

OFFENSE CORRESPONDENCE



RECEIVED AUG 16 2005

Daniel EBY #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino, IDAHO 83544



Daniel Lee Eby #5654
ICI-O Unit C-2
Hospital North Drive #23
Orofino ID. 83544

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT 2009 SEP -6 AM 11:19
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Daniel Lee Eby,)
Plaintiff,)
vs.)
State of Idaho,)
Respondent.)
)
)
)
)
)
)
)

Case No. CV-2002-0674
AFFIDAVIT IN SUPPORT FOR MOTION
FOR REHEARING

CLERK DISTRICT COURT
[Signature]
7/6

State of Idaho
County of Clearwater ss

Comes now Daniel Lee Eby Defendant in the above entitled matter,
does hereby swear under the penalty of perjury that the following
is true and correct to the best of my knowledge.

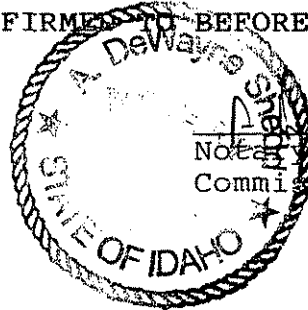
- 1. Rolf Kehne Never sent me notice that the court was going to dismiss my Post-Conviction for lack of inactivity.
- 2. If I would of known the court was going to dismiss my Post-Conviction I would have opposed the dismissal.
- 3. I spoke to Mr. Rolf Kehne around May 2005 and everything was fine with my Post-Conviction.
- 4. Mr. Rolf Kehne's Conduct has denied me Due Process of law

Dated This 2nd day of September 2005

[Signature: Daniel Lee Eby]
Defendant

SUBSCRIBED AND SWORN AND AFFIRMED TO BEFORE ME THIS 2nd day of
Sep 2005

(SEAL)



[Signature: A. DeWays]
Notary public for Idaho
Commission expires: 11/6/07

Daniel Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino ID. 83544

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF ^{2005 SEP -6 AM 11:19}
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Daniel Lee Eby,)
Plaintiff,)
vs.)
State Of Idaho,)
Respondent.)
_____)

Case No. CV-2002-0674
NOTICE FOR A REHEARING ON ORDER
OF DISMISSAL/RETENTION STATE
POST-CONVICTION

CLERK DISTRICT COURT
[Signature]
DEPUTY
[Signature]

Notice is hearby given that Daniel Lee Eby #56540, Defendant
in the above named case, Asks for a rehearing on the ORDER OF
DISMISSAL/RETENTION OF STATE POST-CONVICTION.

Dated 8-17-2005

Signed *Daniel Lee Eby 56540*

CERTIFICATE OF SERVICE

I, Daniel Lee Eby #56540 hereby certify under penalty of perjury that a true and correct copy of Notice for rehearing on order of dismissal/Retention State Post-Conviction and a copy of the AFFIDAVIT IN SUPPORT FOR MOTION FOR REHEARING Has been provided to the Deputy Attorney General Criminal Division Po. Box 83720 boise Idaho 83720 and to the Clerk of the Court at Kootenai county Courthouse 501 Government way Po.Box 9000 CDA ID. 83816-9000, By placing said motions in a postage-paid envelope and mailing said envelopes via United States mail this 1st day of SEPTEMBER 2005
Daniel Lee Eby #56540

Daniel Lee Eby

SEPTEMBER-01-2005

9-1-2005

Daniel lee Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino Idaho 83544

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2005 SEP 16 AM 11:46

CLERK DISTRICT COURT

DEPUTY

RECEIVED

SEP 16 2005

KOOTENAI COUNTY
DISTRICT COURT

Dear Clerk of the Court,

My name is Daniel Lee Eby #56540 I was wondering if you could give me the status of my case CV-02-0674 (CV-02-0674) regarding the motion for Rehearing, Brief & Affidavit in support. Thank you for your time in this matter.

Sincerely,

Daniel lee Eby #56540

Daniel Lee Eby 56540

Dated 09-13-2005

Daniel lee Eby #56
ICI-O Unit C-2
Hospital North Drive #23
Orofino Idaho 83544

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2005 OCT -3 AM 10:42

Danah Banker
CLERK DISTRICT COURT

PRO SE

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Daniel L. Eby,	)	Case No. CV-2002-0674
Plaintiff,	)	MOTION FOR APPOINTMENT OF NEW
	)	COUNSEL.
VS.)	
)	
State of Idaho,)	
Respondent.)	
)	
)	
)	

Comes now, Daniel L. Eby, In the above entitled matter and moves this Honorable court to petitioner's motion for Appointment of new counsel for the reasons more fully set forth here in.

1. Petitioner believes Mr. Kehne is in conflict resulting in bias towards this petitioner His actions or lack of have caused prejudice to this petitioner.
2. Due to Mr. Kehne's negligence petitioner's Post-Conviction was dismissed.
3. Mr. Rolf Kehne has failed to contact above petitioner in anyway as to the status of the case, Mr. kehne has not answered any letters or phone calls that petitioner has sent in the last two years or calls in the last six months. SEE ATTACHED EXHIBIT (S) A,B,C,D,E,F.
4. Petitioner is not competent in the law therefore respectfully requests other counsel in this matter or any and all relief this Honorable court deems necessary.

Dated 9-30-2005

Petitioner: *Daniel Lee Eby*

CERTIFICATE OF SERVICE

I Daniel L. Eby hereby certify that on the 30th day of September 2005, I mailed a true and correct copy of the motion for Appointment of new counsel. Via the ICI-O Legal mail system to:

Clerk of the Court
Kootenai County Court House
324 W. Garden Avenue
Coeur D' Alene, IDAHO 83816-9000

Prosecutor Kootenai County
324 W. Garden Avenue
Coeur D' Alene, IDAHO 83816-9000

Rolf kehne
Po. Box 520
Eagle, IDAHO 83616-0525

DANIEL LEE EBY #56540

DATED THIS 30th DAY OF SEPTEMBER
2005

Daniel Lee Eby #56540

September/30/2005

MOTION FOR APPOINTMENT OF NEW COUNSEL-2

Keene Attorney
208-939-6909

11/14/05
EXHIBIT (A)

FROM

TERRI HALSELL - mother of Daniel Eby.

We have made many attempts to contact you in regards to Danny case.

We are wondering if you are still handling his case.

The last time any of us has had contact - is the week you went to COA.

It was my understanding that you were going to contact Danny - either in person or memo.

To date - he hasn't been able to tell what you. Only able to reach your answering machine.

Please let one of us know the status of this case - so we have some idea of what is going on.

Danny Eby
56540 C2
IC20
Hospital #19 #23
Profess. ed
83544

Thank you
Terri Halsell
425-712-3674
6015 204th St SW #103
Lynnwood, Wa 98036

113

12-11-2003

Daniel Lee Eby#56540
ICI-0 Unit C-2
Hospital North Drive #23
Crofino IDAHO, 83544

Dear Rolf Kebue,

This is Daniel Eby#56540 Case#CV02-0674,

Im writing to see what the status of my case is and if any court dates have been set yet.

I was also wondering if (208) 939-2023 is the only number I can try to call you collect at?

The reason that im asking is because ive been trying to reach you at that number for about 4or5 months during business hours with no luck.

Could you please write and let me know how the case is going and if any court dates have been set.

Thank you for your time.

Sincerely,
Daniel Lee Eby

EXHIBIT(B)

Dear Rolf Kehne,

This is Daniel Lee Eby#56540 im just writing to check and see how thing's are going on the case.

And if they have set any kind of court date's if so i don't have to be present at all of them do i? I would prefer to only be at the main hearing were we are able to call witness's i would want to have my cousin Jeremy Schmitz suspensaed and at the hearing so that we could question him about the event's that took place the night the crime was committed.

Have you been able to talk with Brad Chapman? And find out what he meant when he said that he has a couple of idea's that might work.

Thank you for your time and help in this matter, Sincerely,

Daniel Lee Eby #56540

EXHIBIT (C)

8-2-2003

Daniel Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino IDAHO, 83544

EXHIBIT (D)

Dear Rolf Kehne,

This is Daniel Lee Eby #56540 Case No.CV02-674

Im just writing to see how things are going on the case, and if any kind of court dates have been set yet?

And im also enclosing a couple of case cites to see if you think they would be of any use.

Aiding & Abeding

U.S. V. Vossunthorn, 167 F3d 1267 (9th Cir.1999)

CHIA V. Cambra, 281 F3d 1032 (9th Cir.2002)

U.S. V. LaFleur, 971 F2d 200 (9th Cir.1991)

Instructions

James V. Kentucky, 466 US 341, 80 Led2d 346, 104 Sct 1830 (1984)

Equal Protection

City of Cleburne V. Cleburne Living Center 473 US 432, 87 Led2d 313, 105 Sct. 3249 (1985)

Have you been able to get ahold of Brad Chapman to find out what he meant by that letter, or Cliffs Attorney to see if what he told you is a fact about how the State threatened him through his Attorney.

And i was also wondering if you have been able to get ahold of my aunt Kerri or my cousin Jenni?

My aunt Kerri's last name use to be Day but she got married and im not sure what her new last name is, you could contact my mother Terri Halsell at (425) 712-3674 and im sure that she knows her new last name and possible an address or a phone number were she could be reached at, and probaly the same for my cousin

8-2-2003

Jenni Estes.

My aunt Kerri is in regards to the bloody cloths she washed for Cliff and Jeremy.

My cousin Jenni is in regards to what my aunt Cindee told her about what Cliff did in regards to the murder, one night when they were partying.

Thank you for your time and help in this matter.

Sincerely,

Daniel Eby



EXHIBIT (D)

Daniel Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino, IDAHO 83544

8-09-2005
CASE No. CV02-674

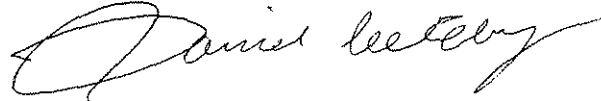
Dear Rolf Kehne,

This is Daniel Lee Eby #56540 Im writing in regards to my post-conviction and if any court dates or dead lines have been set regarding my Post-Conviction?

As of todays date i haven't been able to get in contact with you i tried to call your office (208) 939-2023 but that number has been disconnected. It gives you a new number. (208) 376-4006 but as of today i have been unable to get in contact with anybody or even an answering machine.

Could you please get in contact with me some how so that i can find out the status of my Post-Conviction. thank you

Sincerely, Daniel Eby



EXBII (E)

8-17-2005

DANIEL LEE EBY #56540
ICI-0 Unit C-6
Hospital North Drive/100
Greenville TN 37603 #3544

Dear Mr. Kehne,

It's been quiet sometime sence ive heard from you so i sent a letter to the Courts Clerk and asked what the Status Clerk of my Post-Conviction Case CV-2002-0674 was and the Courts Clerk sent me back a copy of an order of dismissal/detention saying that my post-conviction was dismissed on June 14 2005 and that you were faxed a copy of this order. I would also like to know why i was never informed about this by you or the court house? Could you please send me a copy of the appeal that you filed on my behalf regarding the dismissal of my post-conviction And copies of any other motions, briefs, petitions and copies of all the transcripts of the hearings regarding my case. Thank You

Sincerely,
Daniel lee Eby #56540

CERTIFICATE OF SERVICE

I, Daniel lee Eby #56540, hereby certify under penalty of perjury that a true and correct copy of this letter has been sent to Mr. Wolf Kehne, By placing said letter in a postage-paid envelope via United States mail this 17th day of August 2005 At 4:40PM

DANIEL LEE EBY #56540

Daniel lee Eby 56540

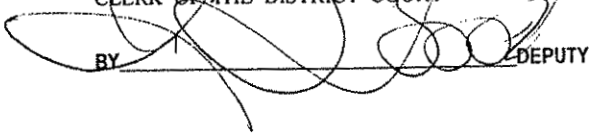
Dated: August 17 2005

8-17-2005

EXHIBIT (F)

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83816-9000

11/17/05 5:07 PM
FILED AT
STATE OF IDAHO, COUNTY OF KOOTENAI
CLERK OF THE DISTRICT COURT

BY  DEPUTY

DANIEL L EBY, PLAINTIFF)

VS)

STATE OF IDAHO, DEFENDANT)

Case No: CV-2002-0000674

ORDER APPOINTING PUBLIC DEFENDER

The Court being fully advised as to the application of Daniel Eby, and it appearing to be a proper case,

NOW, THEREFORE, IT IS ORDERED that

Kootenai County Public Defender
P.O. Box 9000/ 400 Northwest Boulevard
Coeur d'Alene, ID 83814
(208) 446-1700

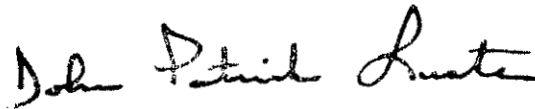
a duly licensed attorney in the State of Idaho, is hereby appointed to represent said applicant in all proceedings in the above entitled case.

NEW ATTORNEY TO BE APPOINTED TO REPRESENT DANIEL EBY

Said applicant is further advised that he/she may be required to reimburse the Court for all or part of the cost of court appointed counsel.

Date:

11/17/05

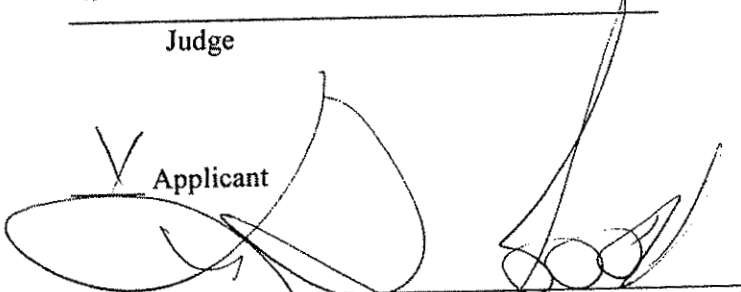



Judge


Copies to:

~~Public Defender 446-1701~~

~~Prosecutor 446-1833~~


Applicant


Deputy Clerk

Relaxed to PD 1/23/06 446-1701 

Order Appointing Public Defender - Civil

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2006 MAR -7 PM 3:39

CLERK DISTRICT COURT
DEPUTY
[Signature]

John M. Adams, Public Defender
Office of the Kootenai County Public Defender
400 Northwest Boulevard
PO Box 9000
Coeur d'Alene, Idaho 83814
Phone: (208) 446-1700; Fax: (208) 446-1701
Bar Number: 3504

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL L. EBY,)	
PLAINTIFF)	
	)	CASE NUMBER CV-02-0000674
VS.)	
	)	SUBSTITUTION OF COUNSEL
STATE OF IDAHO,)	
DEFENDANT)	

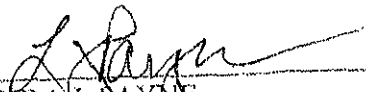
NOTICE IS HEREBY GIVEN that the attorney for Daniel L. Eby is hereby changed. The withdrawing attorney is John M. Adams, Public Defender, and new attorney and substitution of record is LINDA J. PAYNE, Conflict Public Defender, whose address is 706 Superior Street, Suite C, Sandpoint, ID 83864.

You are hereby notified that any process to be served on the above named defendant shall be served upon LINDA J. PAYNE, Attorney at Law.

DATED this 7th day of March, 2006.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER
BY: *[Signature]*
JOHN M. ADAMS
WITHDRAWING ATTORNEY

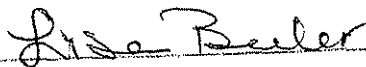
DATED this 7 day of March, 2006.


LINDA J. PAYNE
ATTORNEY OF RECORD

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 7th day of March, 2006, addressed to:

Kootenai County Prosecutor


Lisa Beuler

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2006 MAR 13 PM 12:34

CLERK DISTRICT COURT
DEPUTY
[Signature]

LINDA J. PAYNE, Bar #6222
Conflict/Contract Public Defender
706 Superior St., Suite C
Sandpoint, ID 83864
(208) 255-7555, FAX (208) 263-2580

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Daniel L. Eby)	
	)	CASE NO. CV 2002-00674
Plaintiff,)	
	)	NOTICE OF APPEARANCE
vs.)	
)	
State of Idaho,)	
)	
Defendant.)	
_____)	

COMES NOW the undersigned attorney and hereby appears for and on behalf of the
above-named plaintiff.

DATED this 9 day of March, 2006.

By: *[Signature]*
LINDA J. PAYNE
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of March, 2006, I caused a true and correct copy of the foregoing document to be served upon the following person in the following manner:

Kootenai C. Prosecutor
Couer d'Alene, ID 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. 446-1701
- Courthouse Mail
- Other: _____

By *Lombard*

Daniel Lee Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino, IDAHO 83544

6-07-06

STATE OF IDAHO
COUNTY OF KOOTENAI

FILED:

AT

D. GLOCK, M.
CLERK, DISTRICT COURT

DEPUTY

To: The Honorable Judge John Patrick Luster,

Sir, I'm sorry to bother you with this letter, My name is Daniel Lee Eby #56540 Case # CV-02-0674 Enclosed is a copy of a letter I received from my current attorney Linda Payne regarding the status of my case.

Your Honor I'm kind of worried about this letter I received from her it sounded to me like she isn't concerned about my case at all and that she will get to it when she has time. I was wondering if their is any kind of dead lines or time issues on my case?

And if it would be at all possible your Honor could I find out approximately when my case might be set for a hearing?

Sir, I thank you for your time in this matter. Sincerely,

Daniel Eby #56540

Daniel Lee Eby

✓ DJF

125

6/7/06

Legal Services
Linda J. Payne
Attorney, Advocate, Adviser

In Sandpoint Area:
706 Superior St. Suite C
Sandpoint ID 83864
(208) 255-7555
(208) 263-2580 Fax

In Coeur d'Alene Area:
By Appointment Only
(208) 665-1303
Fax (208) 667-8292

May 24, 2006

Daniel Eby
#56540
ICIO Unit C-2
#23 Hospital North Drive
Orofino ID 83544

Re: Post Conviction Claim

Mr. Eby:

I received your letter.

Mr. Barcella didn't get appointed two attorneys. His attorney (Mike Palmer) didn't have time to do it, so his attorney asked another attorney (Stan Rines) to work on his case.

His attorney filed a motion to be relieved of the duty of representing Mr. Barcella because Mr. Barcella was originally charged with a capital crime (outside the scope of our contracts with the county). Judge Luster denied the motion because 1) this is a civil action, not a capital criminal case; 2) the issue is contractual between the county and Mr. Barcella's attorney.

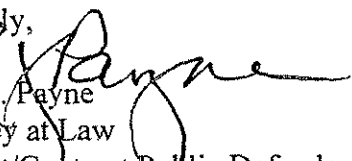
What Mr. Barcella's attorney may get out of the issue is more money.

The status of your case is in abeyance. There is no court date. I spoke with Judge Luster about your case approximately a month ago, and (since I have another murder trial upcoming with him) he is not pushing your case to hearing. He is giving me time to work on the current murder case and yours before he sets a hearing.

When I get time I will read your file and give you an analysis. As I previously said, the strongest issue in your case is that your sentence is grossly disproportionate. I seriously doubt that you would get any less than 10 years. We have plenty of time to adequately deal with your case.

Please write any time, and I will respond as soon as I can.

Sincerely,


Linda J. Payne
Attorney at Law
Conflict/Contract Public Defender

Linda J. Payne
 Attorney at Law
 Conflict/Contract Public Defender
 212 N. First Avenue, Suite 200B
 Sandpoint, Idaho 83864
 (208) 255-7555
 (208) 263-2580 Fax
 ISB #6222

Attorney for Defendant

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED

2006 AUG 22 PM 2:11

CLERK DISTRICT COURT
[Signature]
 DEPUTY
[Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL L. EBY,)	
)	
Plaintiff,	)	CASE NO. CV-2002-674
)	
vs.)	
)	
STATE OF IDAHO,	)	AMENDED PETITION
	)	FOR POST CONVICTION
Defendant,	)	RELIEF
)	


COMES NOW, plaintiff, and hereby amends his Petition for Post Conviction Relief to include a cause of action for violation of the Eighth Amendment, United States Constitution, grossly disproportionate sentences as follows:

1. The fixed term of 25 years for First Degree Murder is grossly disproportionate, cruel and unusual and as such is in violation of the Eighth Amendment to the United States Constitution.
2. The fixed term of 15 years for Conspiracy to Commit Robbery is grossly disproportionate, cruel and unusual and as such is in violation of the Eighth Amendment to the United States Constitution.

WHEREFORE, plaintiff prays as follows:

1. That the Court find that the fixed term of 25 years for First Degree Murder is grossly disproportionate and in violation of the 8th Amendment;
2. That the Court find that the fixed term of 15 years for Conspiracy to Commit Robbery is grossly disproportionate and in violation of the 8th Amendment;
3. That the Court vacate the two sentences and impose fixed terms that pass constitutional muster;
4. For other and further relief as the court deems just and equitable.

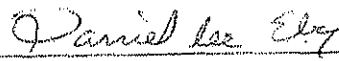
DATED this 15th day of August, 2006.



 LINDA J. RAYNE
 Attorney at Law

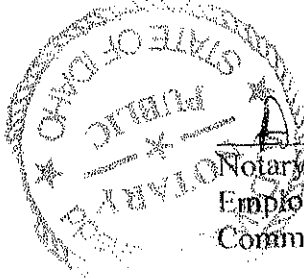
STATE OF IDAHO)
 : ss
 County of Clearwater)

I, DANIEL L. EBY, being first duly sworn upon oath, depose and say, that I am the plaintiff herein, and all statements made in the foregoing Amended Petition for Post Conviction Relief are true and correct to the best of my knowledge and belief.



 DANIEL L. EBY

SUBSCRIBED AND SWORN to before me this 18 day of August, 2006.



 Notary Public, State of Idaho
 Employed at Orofino, Idaho
 Commission expires: 11/06/07

Daniel Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino, IDAHO 83544

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED }
DM

2006 AUG 22 PM 2:10

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI CLERK DISTRICT COURT

Daniel lee Eby,)
Plaintiff,)
vs.)
State of Idaho,)
Defendant,)

Case No. CV-2002-0674
AFFIDAVIT IN REGARDS TO THE
AMENDED PETITION FOR POST-
CONVICTION RELIEF

DEPUTY
JLJ

COMES NOW, plaintiff, Daniel Lee Eby in the above entitled matter, does hereby swear under the penalty of perjury that the following is true and correct to the best of my knowledge.

1. Linda Payne, It is my understanding and belief that this Amended Petition for Post-Conviction Relief (Dated AUGUST 15 2006) that you want me to get Notarized, Is so you can add that issue in with the issue's that I filed with the court on (January 31 2002)

2. If that is not the case I would not have got the said Amended Petition (Dated August 15 2006) Notarized

3. The issue's I filed on (January 31 2002) Are as follows, Issue #1 POLICE OR PROSECUTOR WITHHOLDING FAVORABLE EVIDENCE FROM THE DEFENSE SEE PRELIMINARY HEARING TRANSCRIPTS (PG.204)

Issue #2 INEFFECTIVE ASSISTANCE OF COUNSEL DO TO THE HUGE CASE LOAD THE PUBLIC DEFENDER'S OFFICE HAS I BELIEVE THEY WERE NOT ABLE TO REPRESENT ME TO THE BEST OF THERE ABILITY, I FEEL IT WAS DETRIMENTAL TO MY CASE WITH MY ATTORNEYS AND MY CO DEFENDENT JEREMY SCHMITZ ATTORNEYS WORKING OUT OF THE SAME OFFICE were one ATTORNEY COULD BE THE BOSS OVER THE NEXT, AND THE FACT THAT MINE AND MY COUSIN JEREMY SCHMITZ INVESTIGATOR'S WERE HUSBAND AND WIFE SURE DIDN'T HELP MY CASE. (I FEEL THAT THERE WAS ALOT OF CONFLICT OF INTEREST IN MY CASE.)

4. I want you to include all this stuff in my Post-Conviction.

AFFIDAVIT IN REGARDS TO AMENDED PETITION FOR POST-CONVICTION RELIEF PAGE #1

5. I agree with this new issue you want to add in my case, the APPEALS ruled that my murder charge was one as of FELONY murder, please check appeals court decision. I don't understand why I got so much more time then my cousin Jeremy Schmitz he plead guilty to 2nd degree murder and got sentenced to 10 to life. The appeals ruled mine was a felony murder which I think should be a lesser included offense and I get sentenced to 25 to life which is grossly disproportionate, But I have never been back in front of a judge since the appeals courts ruling that mine was a felony murder rule and dismissing my ATTEMPTED ROBBERY CONVICTION.

(DATED THIS 17th DAY OF AUGUST, 2006)

Daniel Lee Eby
Daniel lee Eby
Plaintiff

STATE OF IDAHO)
 : ss
County of clearwater)

I, DANIEL Lee Eby, being first duly sworn upon oath, depose and say, that I am the plaintiff herein, and all statements made in the foregoing AFFIDAVIT IN REGARDS TO THE AMENDED PETITION FOR POST-CONVICTION RELIEF ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Daniel Lee Eby
Daniel Lee Eby

SUBSCRIBED AND SWORN to before me this 18 day of August, 2006



A. DeWanna Skold
Notary public, State of Idaho
Commission expires: 11/06/07

AFFIDAVIT IN REGARDS TO AMENDED PETITION FOR POST-CONVICTION RELIEF PAGE #2

Daniel Lee Eby #5654
ICI-O Unit C-2
Hospital North Drive #23
Orofino, Idaho 83544

STATE OF IDAHO
COUNTY OF KOCITENAI } SS
FILED:

2006 AUG 30 AM 8:19

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOCITENAI

CLERK OF DISTRICT COURT
[Signature]
DEPUTY

Daniel Lee Eby,)
Plaintiff,)
vs.)
State of Idaho,)
Defendant,)
-----)

Case No. CV-2002-0674
Affidavit in response to
Attorney letter dated August
22-2006 regarding Post-Conviction

Comes Now, Plaintiff, Daniel Lee Eby in the above entitled matter, does hereby swear under the penalty of perjury that the following is true and correct to the best of my knowledge.

1. Linda Payne, I received your letter today dated August 22-2006, the response to that letter is as follows.

2. Regarding Ineffective Assistance of counsel/ Conflict of interest. (1.) Mine and Jeremy Schmitz Attorney's and Investigator's all working out of the same office, Should be conflict of interest in it self. (2.) Counsel burdened by an actual conflict of interest: Cuyler v. Sullivan, 446 U.S. 335, 100 S. CT. 1708, 64 L. Ed,2d 333 (1980), U.S. v. Petz, 764 F.2d 1390, 1392 (11th Cir. 1985) U.S. v. Lorizzo, 786 F.2d 52, 58 (2nd Cir.1986) (3.) Who's to say what happens behind closed doors if one Attorney is in higher standings then the next in the same office.

3. Regarding Police or Prosecutor withholding favorable evidence from the defense. (1.) See Preliminary Hearing Transcripts (pg.204) Detective Paul Middlemore admits to destroying a drawing and 2 or 3 pages of notes while on the stand under oath. Who's to say what else he has destroyed in the process of the investigation he admits to destroying things on more then one occasion, how am I to know that this wasn't key evidence needed to help in the defense of my Case. Were these said items harmful to the Prosecutions case is that why the Detective destroyed those items. I believe they were harmful to there case or else they would not have been destroyed. (2.) If I would have been given all of these said item that the detective Paul Middlemore has admitted to destroying so far It may have been so compelling that it would have changed the outcome of the Jury's verdict. Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996)

AFFIDAVIT IN RESPONSE TO ATTORNEY LETTER DATED AUGUST 22-2006
PG.1 of 2

U.S. v. Clark, 988 F.2d 1459 (6th Cir. 1993) U.S. v. Cross,
928 F.2d 1030 (11th Cir. 1991)

DATED THIS 25TH DAY OF AUGUST, 2006

Daniel Lee Eby
Daniel Lee Eby
Plaintiff

STATE OF IDAHO)
 :ss
County of clearwater)

I Daniel Lee Eby, being first duly sworn upon oath, depose and say, that I am the plaintiff herein, and all statements made in the foregoing Affidavit in response to attorney letter dated August 22-2006 are true and correct to the best of my knowledge and belief.

Daniel Lee Eby
Daniel Lee Eby

SUBSCRIBED AND SWORN TO BEFORE ME THIS 25 DAY OF AUGUST, 2006



Allen Wayne Seld
Notary public, State of Idaho
Commission expires: 11/06/07

AFFIDAVIT IN RESPONSE TO ATTORNEY LETTER DATED AUGUST 22-2006
PG.2 of 2

WILLIAM J. DOUGLAS
PROSECUTING ATTORNEY
501 GOVT. WAY/ BOX 9000
COEUR D ALENE ID 83814
(208)446-1800

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2006 SEP -1 AM 10:17

CLERK DISTRICT COURT

Calby Victoria
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO)
)
Respondent.)

CASE NO. CV02-674
NOTICE OF OBJECTION
and DENIAL

✓ DLS

RESPONDENT, STATE OF IDAHO, through the office of the Kootenai County Prosecuting Attorney, Rick Baughman, Deputy Prosecuting Attorney, hereby informs the Court that the Respondent strongly objects to the filing of Petitioner's Amended Petition for Post Conviction Relief (on or about 8-16-06) based on the fact that this above captioned case has been dismissed per order of the court entered 6-14-05.

Respondent further informs the court and counsel that, in an exaggerated abundance of caution, Respondent hereby denies every allegation of Petitioner's Amended Petition for Post Conviction Relief.

DATED this 31 day of Aug, 2006.

[Signature]
RICK BAUGHMAN
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of Aug, 2006, a true and correct copy of the foregoing NOTICE OF OBJECTION was faxed to:
LINDA PAYNE, 212 N. FIRST AVENUE, SUITE 200B, SANDPOINT, ID 83864

[Signature]

LINDA J. PAYNE
 ATTORNEY AT LAW
 CONFLICT/CONTRACT PUBLIC DEFENDER
 212 N. First Avenue, Suite 200B
 Sandpoint, Idaho 83864
 (208) 255-7555
 (208) 263-2580
 ISB #6222

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED *DZ*

2007 JAN 31 AM 8:24

CLERK DISTRICT COURT
Daniel J. Catet
 DEPUTY *DZ*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL L. EBY,)
)
 Plaintiff)
)
)
 V.)
)
STATE OF IDAHO)
)
 Defendant)
)
)

**CASE NUMBER CV-2002-674
 PCR**

**MOTION FOR SUMMARY
 DISPOSITION; AMENDED
 NOTICE OF HEARING *ok*
 DATE: FEBRUARY 27, 2007
 TIME: 3:30 P.M.**

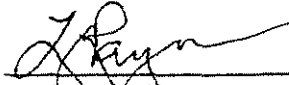
COMES NOW plaintiff, by and through his attorney, and hereby moves the Court for an order granting plaintiff's post conviction relief claim as to the excessiveness of his sentence.

This motion is based upon the files and records in this matter, upon the Court of Appeals opinion, and upon the brief to be submitted in support. The gist of plaintiff's motion is that plaintiff merely aided and abetted the murder. The two co-defendants actually performed the killing. One co-defendant's charge was reduced and he was sentenced to five years; the other co-defendant received a 10 year fixed sentence. Defendant's sentence of 25 years fixed on the

murder charge and 15 years fixed on the robbery/conspiracy charges is grossly disproportionate in violation of the Eighth Amendment to the United States Constitution.

PLEASE TAKE NOTICE that the hearing on plaintiff's Motion for Summary Disposition is scheduled for Tuesday, February 27, 2007, at the hour of 3:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable John Patrick Luster, District Judge, at the Kootenai County Courthouse, Coeur d'Alene, Idaho.


DATED this 30 day of January, 2007.

BY: 
LINDA J. PAYNE
Attorney at Law-Conflict/Contract PD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30 day of January, 2007, served a true and correct copy of the foregoing via fax or as otherwise indicated upon the parties as follows:

X Kootenai County Prosecuting Attorney
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000



Linda J. Payne
 Attorney at Law
 Conflict/Contract Public Defender
 212 N. First Avenue, Suite 200B
 Sandpoint, Idaho 83864
 (208) 255-7555
 (208) 263-2580 Fax
 ISB #6222

Attorney for Plaintiff
 DANIEL L. EBY

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED
 AT 3:03 O'CLOCK P.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 KOOTENAI

DANIEL L. EBY,)	
)	
Plaintiff,	)	CASE NO. CV-2002-674
)	
vs.)	
	)	EBY'S BRIEF IN SUPPORT
STATE OF IDAHO,	)	OF MOTION FOR SUMMARY
	)	DISPOSITION RE DISPROPOR-
Defendant,	)	TIONATE SENTENCE
)	

Plaintiff submits the following brief in support of his post conviction claim that his sentences are grossly disproportionate and in violation of the 8th Amendment to the United States Constitution.

FACTS

The facts of this matter are found in *State v. Eby*, 136 Idaho 534 (Ct. App. 2001). Mel Evenson was murdered, hit with a baseball bat. Clifford Hicks, his step-son Jeremy Schmitz and Daniel Eby were charged in Kootenai County for the murder. In a plea agreement for his testimony, Mr. Hicks' sentence was reduced to aiding and abetting

after the fact, and he received the maximum sentence, 5 years fixed. Eby requests that the court take judicial notice of Mr. Hicks' file, CR-F-1997-3355. Mr. Schmitz pled guilty to second degree murder, rather than going to trial as Mr. Eby did. He received a 10 year fixed, life indeterminate, sentence. Mr. Schmitz, who was represented by Public Defender John Adams, had a plea agreement as well, as evidenced by the Trial Transcript pp. 579, lines 19-21; pp. 589-590. Eby requests that the court take judicial notice of Mr. Schmitz' file, CR-F-1997-3342. Mr. Schmitz admitted to hitting Mr. Evenson with a baseball bat. Tr. p.594, lines. 15-19.

In a ruling which ultimately was ruled error by the Court of Appeals, the trial court judge permitted prior statements made by Mr. Schmitz indicating that Mr. Eby had beaten Mr. Evenson with a baseball bat. When the trial court sentenced Mr. Eby, he was relying on the statement that was ultimately ruled impermissible.

LAW

When reviewing whether a sentence imposed under the Uniform Sentencing Act constitutes *cruel and unusual punishment*, the Court treats the minimum period of incarceration as the duration of confinement. *State v. Matteson*, 123 Idaho 622, 626, 851 P.2d 336, 340 (1993); *State v. Daniel*, 127 Idaho 801, 804, 907 P.2d 119, 122 (Ct. App. 1995). Therefore, it is proper for the Court to analyze only whether the determinate portion of the sentence violates the state and federal constitutions. *State v. Grazian*, ___ Idaho ___ (Ct. App. 2005-069) (Slip Opinion No. 29754, attached).

EBY BRIEF IN SUPPORT . . . - Page 2

To address the constitutional challenge, the Court must first make a threshold comparison of the crime committed and the sentence imposed to determine whether the sentence leads to an inference of gross disproportionality. *Matteson*, 123 Idaho at 626, 851 P.2d at 340; *State v. Brown*, 121 Idaho 385, 394, 825 P.2d 482, 491 (1992); *State v. Olivera*, 131 Idaho 628, 632, 962 P.2d 399, 403 (Ct. App. 1998). This gross disproportionality test is equivalent to the standard under the Idaho Constitution which focuses upon whether the punishment is out of proportion to the gravity of the offense committed and such as to shock the conscience of reasonable people. *Brown*, 121 Idaho at 394, 825 P.2d at 491. If an inference of such disproportionality is found, the Court must conduct a proportionality analysis comparing the sentence to those imposed on other defendants for similar offenses. *Matteson*, 123 Idaho at 626, 851 P.2d at 340; *Olivera*, 131 Idaho at 632, 962 P.2d at 403. The burden of demonstrating that a sentence is cruel and unusual is on the person asserting the constitutional violation. *State v. Clay*, 124 Idaho 329, 332, 859 P.2d 365, 368 (Ct. App. 1993). *Id.*

In this case, the co-defendants who were at least as culpable as the plaintiff, received significantly lighter sentences of 5 and 10 years fixed, as opposed to Mr. Eby's 25 years fixed.

The significant difference in the three cases is that Mr. Eby exercised his constitutional right to trial, and his two co-defendants (father and step-son) did not.


EBY BRIEF IN SUPPORT Page 3

138

CONCLUSION

Based upon the facts, the files, records and appellate decisions in these three related cases, Mr. Eby's 25 year fixed sentence for second degree murder is grossly disproportionate and in violation of the 8th Amendment.

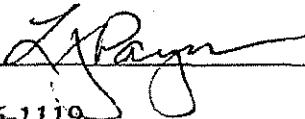
RESPECTFULLY SUBMITTED this 12th day of February, 2007.



LINDA J. PAYNE
Attorney for Plaintiff, DAN EBY

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing to the Kootenai County Prosecuting Attorney's office this 12th day of February, 2007, by faxing same to them at 446-1833.



Original faxed to Judge Luster's Chambers 446-1119

LINDA J. PAYNE
 ATTORNEY AT LAW
 CONFLICT/CONTRACT PUBLIC DEFENDER
 212 N. First Avenue, Suite 200B
 Sandpoint, Idaho 83864
 (208) 255-7555
 (208) 263-2580
 ISB #6222

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: 19 15 11
 AT 10:00 O'CLOCK A.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 KOOTENAI**


DANIEL LEE EBY,)	
)	
Plaintiff	)	CASE NUMBER CV-2002-674
	)	PCR
V.)	
	)	MOTION TO PERMIT PLAINTIFF TO
STATE OF IDAHO,	)	APPEAR VIA PHONE
)	
Defendant)	
)	

The plaintiff herein, by and through his attorney of record, Linda J. Payne, Conflict/Contract Public Defender, and hereby moves the Court for an Order permitting the plaintiff to appear via telephone at the Motion for Summary Disposition scheduled for February 27, 2007, at 3:30 p.m.

Plaintiff wishes to be present and/or to be personally heard and as such moves for this order. The number at which plaintiff may be reached is 208-476-3655 x 250, the paralegal's office at ICIO.

DATED this 15 day of February, 2007.

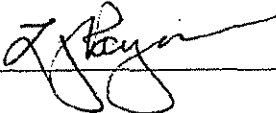
BY:


 LINDA J. PAYNE
 Attorney at Law-Conflict/Contract PD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15 day of February, 2007, served a true and correct copy of the foregoing via fax or as otherwise indicated upon the parties as follows:

X Kootenai County Prosecuting Attorney



LINDA J. PAYNE
 ATTORNEY AT LAW
 CONFLICT/CONTRACT PUBLIC DEFENDER
 212 N. First Avenue, Suite 200B
 Sandpoint, Idaho 83864
 (208) 255-7555
 (208) 263-2580
 ISB #6222

STATE OF IDAHO
 COUNTY OF KOOTENAI
 CLERK DISTRICT COURT
 DEPUTY
 1:59
 1:00 CLOCK P.M.

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL LEE EBY,)
)
 Plaintiff)
)
 V.)
)
STATE OF IDAHO,)
)
 Defendant)

**CASE NUMBER CV-2002-674
 PCR**

**ORDER PERMITTING PLAINTIFF TO
 APPEAR VIA TELEPHONE**

Plaintiff having moved to be transported for his February 27, 2007 hearing, and good cause appearing,

IT IS HEREBY ORDERED that the plaintiff appear via telephone. The telephone number the Court will call is 208-476-3655 x250.

DATED this 23rd day of February, 2007.

BY: [Signature]
 JOHN P. LUSTER
 DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23 day of February, 2007, served a true and correct copy of the foregoing via fax or as otherwise indicated upon the parties as follows:
 Kootenai County Prosecuting Attorney -446-1833
 Linda J. Payne (c/o Suzie Graham's Fax 665-7079)
 ICIO via fax 476-9745

[Signature]
 Deputy Clerk

ORDER PERMITTING PLAINTIFF TO APPEAR VIA PHONE

Daniel Lee Eby #5654
ICI-O Unit C-2
Hospital North Dr.#23
Orofino, Idaho 83544

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED 3/19/07
AT 1:30 O'CLOCK P.M.
CLERK, DISTRICT COURT
S.R. DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Daniel lee Eby,)
)
 Plaintiff,)
)
 Vs.)
)
 State of Idaho,)
)
 Defendant,)

Case No. CV-2002-0674
MOTION FOR TELEPHONE
Hearing

COMES NOW, Daniel Lee Eby, Plaintiff, In the above matter, and hereby moves the Court for an Order permitting the Plaintiff to appear via telephone at the Motion for Summary Disposition scheduled for Tuesday, April 17, 2007 at 3:30pm.

Plaintiff wishes to be personally heard, and will be unable to appear before the court, unless the court sets the matter for telephone hearing or the Court orders him transport to the hearing.

The Telephone number at which Plaintiff may be reached is 208-476-3655 the paralegal's office at the Idaho department of correction Orofino Idaho.

DATED this 19 day of March, 2007

By Daniel Lee Eby
PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 19th day of March, 2007 I mailed a true and correct copy of the MOTION FOR TELEPHONE HEARING via the ICI-O Legal Mail system to:

Kootenai County Prosecutor
Po Box 9000
CDA. Idaho 83816-9000

Clerk of the Court
District Judge John Patrick Luster
324 west garden avenue
Po. Box 9000
CDA, Idaho 83816-9000

Plaintiff's Attorney
Linda Payne
212 N. 1st Avenue, Suite 200 B
Sandpoint, Idaho 83864

MOTION FOR TELEPHONE HEARING PAGE 2.

ORIGINAL

LINDA J. PAYNE
ATTORNEY AT LAW
1034 N. Third Street, Suite 9
Coeur d'Alene ID 83814
(208) 665-1303
(208) 667-8292 FAX
ISB #6222

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 3/30/07
AT 11:53 O'CLOCK A.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 KOOTENAI**

DANIEL LEE EBY,)		
)		
Plaintiff	)	CASE NUMBER	CV-2002-674
	)		PCR
V.)		
	)	ORDER PERMITTING PLAINTIFF TO	
STATE OF IDAHO,	)	APPEAR VIA TELEPHONE	
)		
Defendant)		
)		
)		

This matter having been continued because Plaintiff was unable to appear due to a lockdown of the facility on February 27, 2007, the court having previously ordered that plaintiff be permitted to appear via telephone, and good cause appearing,

IT IS HEREBY ORDERED that the plaintiff be and hereby is permitted to appear at his April 17, 2007, 3:30 p.m. hearing via telephone. The telephone number the Court will call is 208-476-3655 x250.

DATED this 29th day of March, 2007.

BY: JP Luster
JOHN P. LUSTER
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30 day of March, 2007, served a true and correct copy of the foregoing via fax or as otherwise indicated upon the parties as follows:
Kootenai County Prosecuting Attorney 476-1833
Linda J. Payne via fax 667-8292
ICIO via fax 476-9745

ORDER PERMITTING PLAINTIFF TO APPEAR VIA PHONE

[Handwritten signature]
Page 1
[Handwritten signature]

LINDA J. PAYNE
Attorney at Law
1034 N. THIRD ST., SUITE 9
COEUR D'ALENE ID 83814
(208) 665-1303
(208) 667-8292 FAX
ISB #6222

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2007 APR -9 AM 8:20
CLERK DISTRICT COURT
Cathy Victoria
DEPUTY CA

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY,)	
)	
Plaintiff,	)	CASE NO. CV-2002-674
)	
vs.	)	MOTION TO WITHDRAW
	)	(IRCP 11(b)(2)
THE STATE OF IDAHO,)	
	)	NOTICE OF HEARING
Defendant.	)	DATE: April 17, 2007 <i>ok</i>
	)	TIME: 3:30 P.M.

COMES NOW, Linda J. Payne, conflict/contract public defender assigned to represent Daniel Lee Eby on his post conviction claim, and hereby moves to withdraw as counsel for Mr. Eby on the grounds that the attorney-client relationship has been irreparably damaged. Because Mr. Eby lacks confidence in my ability I can no longer represent him. This motion is made pursuant to I.R.C.P. 11(b)(2)

PLEASE TAKE NOTICE that an initial hearing on this matter is scheduled for Tuesday, April 17, 2007, at 3:30 p.m. before the Honorable John Patrick Luster and will be heard in conjunction with other hearings scheduled in this matter on that day and time.

DATED this 7th day of April, 2007.

L. Payne

LINDA J. PAYNE

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the Kootenai County Prosecuting Attorney, this 7th day of April, 2007, via fax, and upon Mr. Eby at ICIO, C2, Hospital Drive North #23, Orofino, ID 83544



LINDA J. PAYNE
Attorney at Law
1034 N. THIRD ST., SUITE 9
COEUR D'ALENE ID 83814
(208) 665-1303
(208) 667-8292 FAX
ISB #6222

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2007 APR -9 AM 8:20

CLERK DISTRICT COURT
Cathy Victoria
DEPUTY

IN THE DISITRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY,)	
)	
Plaintiff,	)	CASE NO. CV-2002-674
)	
vs.	)	MOTION TO SET ASIDE
	)	DISMISSAL (IRCP 40(c))
THE STATE OF IDAHO,)	
	)	NOTICE OF HEARING
Defendant.	)	DATE: April 17, 2007
	)	TIME: 3:30 P.M.

COMES NOW, Linda J. Payne, conflict/contract public defender assigned to represent Daniel Lee Eby on his post conviction claim, and hereby moves to set aside the dismissal without prejudice of this matter pursuant to I.R.C.P. 40(c).

This motion is based upon the following: Mr. Eby was appointed counsel to aid him in his post conviction claim. The matter was dismissed for inactivity. After the matter was dismissed, the court reappointed counsel. Ms. Payne was assigned. Ms. Payne amended the post conviction petition to include the only issue of grossly disproportionate sentence in violation of the 8th Amendment to the United States Constitution.

Prior counsel failed to show good cause for retention of this matter pursuant to IRCP 40(c). When counsel is appointed, the party represented has the right to effective assistance of counsel. *Hernandez v. State*, 127 Idaho 685, 905 P.2d 86 (1995). Failure to

diligently pursue a claim such that it is dismissed constitutes ineffective assistance of counsel, if the party is prejudiced by the dismissal. *Id.* In this case, Mr. Eby has a viable 8th amendment grossly disproportionate post conviction claim, though Mr. Eby and Ms. Payne disagree on the remainder of the original claims. Dismissal when a viable claim exists constitutes ineffective assistance of counsel.

If this matter remains dismissed, then Mr. Eby will file an ineffective assistance of counsel claim on prior post conviction counsel, and he will likely be appointed counsel to help him on that matter. The 8th amendment claim is a viable one, and it should be heard and decided by the Court. Judicial efficiency and economy constitute good cause and support setting aside the inactivity dismissal.

PLEASE TAKE NOTICE that the hearing on this matter is scheduled for Tuesday, April 17, 2007, at 3:30 p.m. before the Honorable John Patrick Luster and will be heard in conjunction with other hearings scheduled in this matter on that day and time.

DATED this 7th day of April, 2007.


LINDA J. PAYNE

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the Kootenai County Prosecuting Attorney, this 7th day of April, 2007, via fax, and upon Mr. Eby at ICIO, C2, Hospital Drive North #23, Orofino, ID 83544



ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI
3/21/07
10:00 CLOCK AM
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL EBY,)
)
) Petitioner,)
)
 vs.)
)
) STATE OF IDAHO,)
) Respondent.)
)

Case No. **CV02-674**

ORDER

The above entitled matters came on for a MOTION TO SET ASIDE ENTRY OF DISMISSAL and/or MOTION FOR SUMMARY JUDGMENT before the Honorable Judge Luster on April 17, 2007. Personally present were the Defendant's attorney of record, Linda Payne; defendant appeared via telephone. Also appearing was Ken Brooks, Deputy Prosecuting Attorney. Argument was given. Based upon such, the Court then ruled as follows:

HEREBY FINDS AND ORDERS:

That the Defendant's Motions to Set Aside Entry of Dismissal is hereby denied.

DATED this 24th day of April, 2007.

J. P. Luster
JUDGE LUSTER

ORDER

CLERK'S CERTIFICATE OF MAILING

I hereby certify that on the 24 day of April, 2007, that a true and correct copy of the foregoing were mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered, or Faxed to:

Prosecutor 416-183
KCPSB _____
Bonding Co. _____

Defense Attorney 467-812 Defendant _____
Auditor _____ Police Agency _____
Other _____

**DANIEL ENGLISH
CLERK OF THE DISTRICT COURT**

BY: [Signature] Deputy

STATE OF IDAHO
COUNTY OF KOOTENAI
DISTRICT COURT
THIS IS TO CERTIFY THAT THE FOREGOING IS
A TRUE COPY OF THE ORIGINAL NOW ON
FILE OF RECORD IN THIS OFFICE
SEALED ON THIS _____ DAY OF _____
DANIEL ENGLISH CLERK OF DISTRICT
COURT BY [Signature]
STATE OF IDAHO
pages

ORDER

LINDA J. PAYNE
 Attorney at Law
 1034 N. THIRD ST., SUITE 9
 COEUR D'ALENE ID 83814
 (208) 665-1303
 (208) 667-8292 FAX
 ISB #6222

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED
 10:00 AM
 DISTRICT COURT
 DEPUTY

IN THE DISITRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY,)	
)	
Plaintiff,	)	CASE NO. CV-2002-674
)	
vs.	)	MOTION TO SET ASIDE
	)	DISMISSAL (IRCP 40(c))
THE STATE OF IDAHO,)	
	)	NOTICE OF HEARING
Defendant.	)	DATE: April 17, 2007
	)	TIME: 3:30 P.M.

COMES NOW, Linda J. Payne, conflict/contract public defender assigned to represent Daniel Lee Eby on his post conviction claim, and hereby moves to set aside the dismissal without prejudice of this matter pursuant to I.R.C.P. 40(c).

This motion is based upon the following: Mr. Eby was appointed counsel to aid him in his post conviction claim. The matter was dismissed for inactivity. After the matter was dismissed, the court reappointed counsel. Ms. Payne was assigned. Ms. Payne amended the post conviction petition to include the only issue of grossly disproportionate sentence in violation of the 8th Amendment to the United States Constitution.

Prior counsel failed to show good cause for retention of this matter pursuant to IRCP 40(c). When counsel is appointed, the party represented has the right to effective assistance of counsel. *Hernandez v. State*, 127 Idaho 685, 905 P.2d 86 (1995). Failure to

diligently pursue a claim such that it is dismissed constitutes ineffective assistance of counsel, if the party is prejudiced by the dismissal. *Id.* In this case, Mr. Eby has a viable 8th amendment grossly disproportionate post conviction claim, though Mr. Eby and Ms. Payne disagree on the remainder of the original claims. Dismissal when a viable claim exists constitutes ineffective assistance of counsel.

If this matter remains dismissed, then Mr. Eby will file an ineffective assistance of counsel claim on prior post conviction counsel, and he will likely be appointed counsel to help him on that matter. The 8th amendment claim is a viable one, and it should be heard and decided by the Court. Judicial efficiency and economy constitute good cause and support setting aside the inactivity dismissal.

PLEASE TAKE NOTICE that the hearing on this matter is scheduled for Tuesday, April 17, 2007, at 3:30 p.m. before the Honorable John Patrick Luster and will be heard in conjunction with other hearings scheduled in this matter on that day and time.

DATED this 7th day of April, 2007.


LINDA J. PAYNE

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the Kootenai County Prosecuting Attorney, this 7th day of April, 2007, via fax, and upon Mr. Eby at ICIO, C2, Hospital Drive North #23, Orofino, ID 83544



 ORIGINAL

Linda J. Payne
Attorney at Law
1034 N. Third Street, Suite 9
Coeur d'Alene, Idaho 83814
(208) 665-1303
(208) 667-8292 FAX
ISB No. 6222

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }

2007 MAY 14 PM 4:56

CLERK DISTRICT COURT
Brittany Lane
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL LEE EBY,

Appellant

V.

STATE OF IDAHO,

Respondent.

CASE NUMBER CV-2002-674

NOTICE OF APPEAL

**TO: THE ABOVE NAMED RESPONDENT, STATE OF IDAHO, AND THE
CLERK OF THE ABOVE ENTITLED COURT:**

1. The above named Appellant hereby appeals against the above named Respondent, the State of Idaho, to the Idaho Supreme Court from the final Order Denying Motion to Set Aside Entry of Dismissal in this matter on April 24, 2007, the Honorable John P. Luster, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described above in paragraph one, is an appealable Judgment under and pursuant to Idaho Appellate Rule 11(a)(1).

3. The issues Appellant intends to assert in this appeal include, but are not necessarily limited to:

Denial of Motion to Set Aside Entry of Dismissal

4. Appellant requests the preparation of the entire reporter's standard transcript as defined in Rule 25 I.A.R., and to also include the following, pursuant to Rule 25 (b):

February 27, 2007 Hearing; April 17, 2007 Hearing.

5. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28 I.A.R.: None

6. I hereby certify as follows:

A. A copy of this Notice of Appeal has been served upon the court reporter.

B. The Appellant is exempt from paying the estimated transcript fee because the Appellant is an indigent who is represented by Linda J. Payne, Attorney at Law, in her capacity as Conflict/Contract Public Defender.

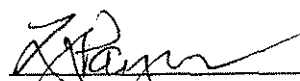
C. The Appellant is exempt from paying the filing fee because the Appellant is an indigent who is represented by Linda J. Payne, Attorney at Law, in her capacity as Conflict/Contract Public Defender.

D. The Appellant is exempt from paying the estimated fee for the preparation of the record because the Appellant is an indigent who is represented by the Linda J. Payne, Attorney at Law in her capacity as Conflict/Contract Public Defender.

E. Service has been made upon all parties required to be served pursuant to Rule 20 I.A.R., to wit the Kootenai County Prosecuting Attorney, and the Attorney General of Idaho pursuant to Section 67-1401 (1) Idaho Code.

DATED this 10 day of May, 2007.

BY:


LINDA J. PAYNE

Attorney at Law-Conflict/Contract PD

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that I have this 10 day of May, 2007, served a true and correct copy of the attached NOTICE OF APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

X Kootenai County Prosecuting Attorney via Facsimile

X Molly J. Huskey First Class Mail
State Appellate Public Defender Certified Mail
3647 Lake Harbor Lane Facsimile (208) 334-2985
Boise, Idaho 83703

X Lawrence G. Wasden First Class Mail
Attorney General Certified Mail
P.O.Box 83720 Facsimile (208) 334-2530
Boise, Idaho 83720-0010

X Reporter for District Judge John P. Luster via fax



 ORIGINAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2007 MAY 14 PM 4:56

Linda J. Payne
Attorney at Law
1034 N. Third Street, Suite 9
Coeur d'Alene, Idaho 83814
(208) 665-1303
(208) 667-8292 FAX
ISB No. 6222

DISTRICT COURT
Brian Williams
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL LEE EBY,)
)
 Appellant,)
)
 V.)
)
STATE OF IDAHO,)
)
 Respondent.)

CASE NUMBER CV-2002-674

**MOTION FOR APPOINTMENT OF
STATE APPELLATE PUBLIC DEFENDER**

COMES NOW, the above-named defendant, by and through his attorney, Linda J. Payne, Attorney at Law, and hereby moves the Court for an Order pursuant to Idaho Code §19-867, et seq., and I.A.R. Rule 13(b), (12) and (19) for its order appointing the State Appellate Public Defender's Office to represent the Appellant in all further appellate proceedings and allowing counsel for the Defendant to withdraw as counsel of record.

This motion is brought on the grounds and for the reasons that the Defendant is currently being represented by Linda J. Payne, Attorney at Law, in her capacity as a Conflict/Contract Public Defender for Kootenai County; the State Appellate Public Defender

**MOTION FOR APPOINTMENT OF STATE
APPELLATE PUBLIC DEFENDER**

-1-

is authorized by statute to represent the Defendant in all felony appellate proceedings; and it is in the interest of justice, for them to do so in this case since the Defendant is indigent, and any further proceedings on this case will be appealed.

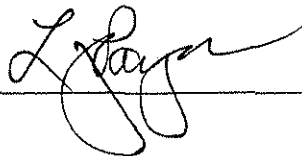
DATED this 10 day of May, 2007.

BY: 
LINDA J. RAYNE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10 day of May, 2007, served a true and correct copy of the attached MOTION FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER via interoffice mail or as otherwise indicated upon the parties as follows:

<u> </u>	Kootenai Co. Prosecuting Attorney	<input type="checkbox"/>	First Class Mail
		<input type="checkbox"/>	Certified Mail
		<input checked="" type="checkbox"/>	Facsimile 446-1833
		<input type="checkbox"/>	Courthouse Mail
<u> </u>	State Appellate Public Defender	<input type="checkbox"/>	First Class Mail
	3647 Lake Harbor Lane	<input checked="" type="checkbox"/>	Facsimile 334-2985
	Boise, Idaho 83703	<input type="checkbox"/>	Certified Mail
<u> </u>	Lawrence Wasden	<input type="checkbox"/>	First Class Mail
	Attorney General	<input type="checkbox"/>	Certified Mail
	P. O. Box 83720	<input checked="" type="checkbox"/>	Facsimile 334-2530
	Boise, Idaho 83720-0010		
<u> </u>	Reporter for District Judge John Lusters, via fax		



MOTION FOR APPOINTMENT OF STATE
APPELLATE PUBLIC DEFENDER

-2-



ORIGINAL

Linda J. Payne
Attorney at Law
1034 N. Third Street, Suite 9
Coeur d'Alene, Idaho 83814
(208) 665-1303
(208) 667-8292 FAX
ISB No. 6222

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILE #

2007 MAY 21 PM 4:10

CLERK DISTRICT COURT

Heather J. ...
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL LEE EBY,

Appellant,

V.

STATE OF IDAHO,

Respondent.

CASE NUMBER CV-2002-674

**ORDER FOR APPOINTMENT OF STATE
APPELLATE PUBLIC DEFENDER**

The Court having reviewed and considered the Appellant's Motion for Appointment of State Appellate Public Defender good cause appearing therefore;

IT IS HEREBY ORDERED that the State Appellate Public Defender's Office is appointed to represent the Defendant in all further appellate proceedings.

IT IS FURTHER ORDERED that Linda J. Payne is allowed to withdraw as counsel of record.

DATED this 18th day of May, 2007.

JPL

JOHN P. LUSTER
DISTRICT JUDGE

**ORDER FOR APPOINTMENT OF STATE
APPELLATE PUBLIC DEFENDER**

-1-

CLERK'S CERTIFICATE

I HEREBY CERTIFY that I have this 21 day of May, 2007, served a true and correct copy of the attached ORDER FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER via interoffice mail or as otherwise indicated upon the parties as follows:

_____	Linda J. Payne 1034 N. 3 rd , Suite 9 Coeur d'Alene ID 83814	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Facsimile 667-8292 First Class Mail Courthouse Mail
_____	Kootenai Co. Prosecuting Attorney	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	First Class Mail Certified Mail Facsimile 446-1833 Courthouse Mail
_____	State Appellate Public Defender 3647 Lake Harbor Lane Boise, Idaho 83703	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	First Class Mail Facsimile 334-2985 Certified Mail
_____	Lawrence Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	First Class Mail Certified Mail Facsimile 344-2530
_____	Reporter for District Judge Luster	<input checked="" type="checkbox"/>	Courthouse Mail

DANIEL J. ENGLISH
Daniel J. English
 CLERK OF DISTRICT COURT
 KOOTENAI COUNTY, IDAHO

Daniel Lee Eby #56540
ICI-O Unit C-2
Hospital North Drive #23
Orofino, Idaho 83544

RECEIVED

JUN 08 2007

KOOTENAI COUNTY
DISTRICT COURT

Alison Jensen

Clerk of the Court
District Judge
Kootenai County Justice Building
324 West Garden Avenue
P.O. Box 9000
CDA. Idaho 83816-9000

Dear Clerk of the Court

6-6-07

My name is Daniel Eby Case # CV-2002-674, my attorney Linda Payne filed a couple of motion's on May-10-2007, One being a notice of Appeal and the other being a Motion for appointment of state appellate public defender Could you please inform me as to the status of these two motions?

Thank you for your time, Sincerely,
Daniel Eby

Daniel Lee Eby

Barbara

Send Mr. Eby
copies of
those two
items i.e.
✓ Notice of
Appeal

✓ Order Appointed

done - 6-13-07
Barbara Washers



ORIGINAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

Linda J. Payne
Attorney at Law
1034 N. Third Street, Suite 9
Coeur d'Alene, Idaho 83814
(208) 665-1303
(208) 667-8292 FAX
ISB #6222

2007 JUN 14 AM 8:53

CLERK DISTRICT COURT
Joanna Barber
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL LEE EBY,

CASE NO. CV-2002-00674

Plaintiff,

vs.

**NOTICE OF WITHDRAWAL AFTER
ENTRY OF JUDGMENT PURSUANT
TO I.R.C.P. 11(b)(2)**

STATE OF IDAHO,

Defendant.

PLEASE TAKE NOTICE that the undersigned attorney hereby withdraws as counsel of record in the above entitled matter pursuant to I.R.C.P. 11(b)(2) which authorizes withdrawal by written notice after entry of judgment and the time for appeal has expired and there are no proceedings pending.

DATED this 13 day of June, 2007.

By: *L. Payne*
LINDA J. PAYNE
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of June, 2007, I caused a true and correct copy of the foregoing upon the Kootenai County PA via courthouse mail.

By: *L. Payne*

NOTICE OF WITHDRAWAL AFTER ENTRY OF
JUDGMENT PURSUANT TO I.R.C.P.11(b)(2)

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 13th day of June, 2007, caused a true and correct copy of the attached AMENDED NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

DANIEL LEE EBY
INMATE # 56540
IDAHO CORRECTIONAL INSTITUTION OROFINO C2
HOSPITAL DRIVE NORTH #23
OROFINO ID 83544

LINDA J PAYNE
ATTORNEY AT LAW
CONFLICT/CONTRACT BONNER COUNTY PD
212 N 1ST AVE STE 200
SANDPOINT ID 83864 1451

WILLIAM A RUSH
PO BOX 250
ATHOL ID 83801 0250

MARK L HIEDEMAN
BANNOCK COUNTY PROSECUTORS OFFICE
5TH & CENTER
POCATELLO ID 83205

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720 0010
Hand delivered to Attorney General's mailbox at Supreme Court

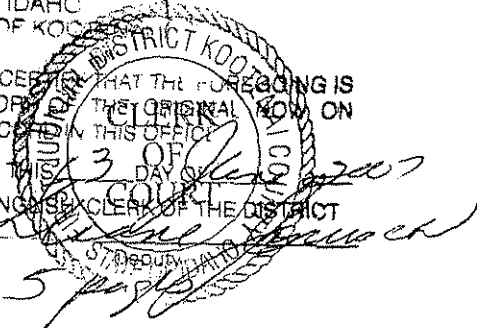
HEATHER R. CRAWFORD
Administrative Assistant

MJH/TMF/hrc

STATE OF IDAHO
COUNTY OF KOO

THIS IS TO CERTIFY THAT THE FOREGOING IS
A TRUE COPY OF THE ORIGINAL NOW ON
FILE OR RECORD IN THIS OFFICE

SEALED ON THIS 3rd DAY OF JUNE 2007
DANIEL J. ENGLISH CLERK OF THE DISTRICT
COURT BY



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MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

STATE OF IDAHO
COUNTY OF KOOTENAI } SS

FILED: 1:45 PM
13

2007 JUN 13 PM 1:43

CLERK DISTRICT COURT

Christine Jensen
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR KOOTENAI COUNTY

DANIEL LEE EBY,
Petitioner-Appellant,
v.
STATE OF IDAHO,
Respondent.

CASE NO. CV-2002-674

S.C. DOCKET NO. _____

AMENDED
NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT, STATE OF IDAHO, AND
THE PARTY'S ATTORNEYS, MARK L. HIEDEMAN, BANNOCK COUNTY
PROSECUTOR, 5TH & CENTER, POCA TELLO, ID 83205, AND THE CLERK
OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant appeals against the above-named respondent to the Idaho Supreme Court from the Order Denying Motion to Set Aside Entry of Dismissal entered in the above-entitled action on the 24th day of April, 2007, the Honorable John P. Luster, presiding.
2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a), I.A.R.

3. A preliminary statement of the issues on appeal, which the appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal, is:

- (a) Did the district court err in denying the appellant's Motion to Set Aside Entry of Dismissal?

4. There is a portion of the record that is sealed. That portion of the record that is sealed is the Presentence Investigation Report (PSI).

5. The appellant requests the preparation of the entire reporter's standard transcript as defined in I.A.R. 25(a). The appellant also requests the preparation of the following portions of the reporter's transcript:

- (a) Hearing held on February 27, 2007; and
- (b) Hearing held on April 17, 2007.

6. The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(2). The appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under I.A.R. 28(b)(2):

- (a) Any motions or responses, including all attachments, affidavits, or copies of transcripts, and any briefs or memorandums, filed or lodged, by the state, the appellate, or the court in support of, or in opposition to, the dismissal of the Post-Conviction Petition or Motion to Set Aside Entry of Dismissal;
- (b) Letter from the Court to Defendant Regarding Substitution of Counsel filed October 28, 2002;
- (c) Notice of Proposed Dismissal Issued filed April 30, 2003;

- (d) Petitioner's Responses, IRCP 40(C) Notice and Request for Retention filed June 16, 2003, January 2, 2004, and February 25, 2005;
- (e) Affidavit of Counsel Rolf Kehne Supporting Petitioner's Response to IRCP 40(C) Notice and Request for Retention filed June 16, 2003, and January 2, 2004, and February 25, 2005;
- (f) Letter from Daniel Eby filed September 6, 2005;
- (g) Affidavit in Support of Motion for Rehearing filed September 6, 2005;
- (h) Brief in Support of Review lodged September 6, 2005;
- (i) Letter to Court/Judge filed September 16, 2005;
- (k) Letter from Subject – Noted by #196 filed June 12, 2006;
- (l) Letter from Plaintiff filed July 31, 2006;
- (m) Affidavit in Regards to the Amended Petition for Post Conviction Relief filed August 22, 2006;
- (n) Affidavit filed August 30, 2006;
- (o) Notice of Objection and Denial filed September 1, 2006; and
- (p) Eby's Brief in Support of Motion for Summary Disposition Re: Disproportionate Sentence filed February 12, 2007.

7. I certify:

- (a) That a copy of this Amended Notice of Appeal has been served on the reporter;

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- (b) That the appellant is exempt from paying the estimated fee for the preparation of the record because the appellant is indigent. (Idaho Code §§ 31-3220, 31-3220A, I.A.R. 24(e));
- (c) That there is no appellate filing fee since this is an appeal in a criminal case (Idaho Code §§ 31-3220, 31-3220A, I.A.R. 23(a)(8));
- (d) That arrangements have been made with Kootenai County who will be responsible for paying for the reporter's transcript, as the client is indigent, I.C. §§ 31-3220, 31-3220A, I.A.R. 24(e);
- (e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 13th day of June, 2007.


MOLLY J. HUSKEY
State Appellate Public Defender

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: 4:10
 AT 10:00 O'CLOCK
 CLERK, DISTRICT COURT
 DEPUT

EBY, DANIEL LEE)

Petitioner- Appellant,)

vs)

STATE OF IDAHO)

Defendant - Respondent.)

Supreme Court No. CV 02-674
 District Court No.

DISTRICT COURT
 CLERK'S MOTION
 FOR EXTENSION OF
 TIME TO FILE RECORD

Comes now Diane Janusch, Deputy Court Clerk for Kootenai County, and hereby moves this court for an order extending the time to prepare and serve the appeal record until September 30, 2007.


1. The original date for filing was July 16, 2007 and the current due date is August 20, 2007.
2. The number of extensions of time previously granted is 0.
3. Were any previous extensions denied in whole or in part? No.
4. The Court Reporter lodged the Reporter's Transcript on _____, 20__
5. I have not been able to file the record for the following specific reasons:
 - (a) Vacations
 - (b) Heavy workload
 - (c) _____
 - (d) _____
6. I have contacted counsel for the parties and there () is (X) is not an objection from counsel to the request for extension.
7. The number of days deemed necessary is 45 making the due date for filing the record in September 30, 2007.
8. I expect to complete and file the record within the extended time requested.

DATED this 14 day of August, 2007


Deputy Clerk

RECOMMENDATION

I am the District Judge assigned this case and, following review of the foregoing motion, recommend approval () disapproval of this request for extension.


District Judge

ORDER

Upon consideration of the foregoing motion and good cause appearing, therefore, IT HEREBY IS ORDERED that the appeal record in this case shall be filed in this Court on or before _____, 20__.

For the Supreme Court.

Stephen W Kenyon, Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY	)	CIVIL CASE NUMER
	)	CV 02-674
)	
Petitioner/Appellant	)	SUPREME COURT NO
	)	34179
STATE OF Idaho Supreme Court	)	CLERK'S CERTIFICATE
)	
Respondent)	

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondent were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the 4 day of March 2008.

I do further certify that the Clerk's Record and Reporter's Transcript will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at

Kootenai, Idaho this ⁴ day of *March* 2008.

DANIEL J. ENGLISH
Clerk of District Court

by *Janna Breen*
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DANIEL LEE EBY	)	SUPREME COURT NO
	)	34179
Petitioner-Appellant)	
)	
STATE OF IDAHO	)	DISTRICT COURT NO
	)	CV 02-674
Respondent)	

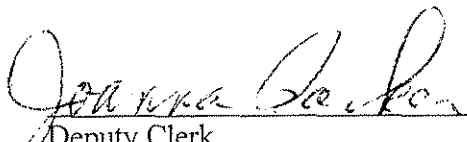
CLERK'S CERTIFICATE OF EXHIBITS

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court of Appeals.

I further certify that the following documents will be submitted as exhibits to the Record:

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 4 day of March, 2008

Daniel J. English
Clerk of the District Court


Deputy Clerk

Exhibits Letters between Plaintiff and Judge Luster & Public Defender

Letter from Daniel Eby dated June 27, 2002

Letter from Judge Luster dated July 12, 2002

Letter from Daniel Eby dated Sept 1, 2002

Letter from Judge Luster dated September 10, 2002

Letter from Daniel Eby dated Oct 11, 2002

Letter from Daniel Eby dated Aug 9, 2005

Letter from Daniel Eby dated Aug 17, 2005

Letter from Daniel Eby dated Dec 16, 2005

Letter from Daniel Eby dated Jan 17, 2006

Letter from Daniel Eby dated Feb 9, 2006

Letters from Linda J Payne dated March 15, 2006, May 24, 2006, Aug 15, 2006
Aug 22, 2006, Oct 10, 2006, Dec 21, 2006, Jan 30, 2007, Feb 16, 2007, Feb 28, 2007
March 26, 2007, April 3, 2007

Letter from Daniel Eby to Linda Payne & Judge Luster, dates May 1, 2006
March 22, 2006, June 7, 2006, July 26, 2006, July 26, 2006, Sept 5, 2006
Oct 3, 2006, Nov 20, 2006, Dec 20, 2006, Jan 15, 2007, Feb 9, 2007

Letter from Daniel Eby dated July 26, 2006

Letter from Daniel Eby dated Sept 5, 2006

Letter from Judge Luster

Letter from Daniel Eby to Linda Payne, dated March 10, 2007 & March 29, 2007

Letter from Daniel Eby, dated April 11, 2007

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DANIEL LEE EBY)	
	)	CIVIL CASE NO
Petitioner/Appellant	)	CV 02-674
)	
Vs)	
)	
STATE OF IDAHO	)	DOCKET NO.
	)	34179
Respondent)	
)	
)	
)	

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

Attorney for Appellant

MOLLY J HUSKEY
State Appellant Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703

Attorneys for Respondents

WILLIAM DOUGLAS
Kootenai County Prosecutor
P O Box 9000
Coeur d'Alene, Idaho 83816-9000

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 4 day of March, 2007

DANIEL J. ENGLISH
Clerk of the District Court

By Joanna Darko
Deputy