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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47009-2019**
Plaintiff-Respondent,	)	
	)	**BANNOCK COUNTY**
v.	)	**NO. CR-2017-8319**
	)	
ROCCO JOSEPH CHACON, JR.,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Rocco Chacon contends the district court made two errors in this case. First, he asserts that it erred by denying his motions to sever the charges in this case. In fact, it did not even conduct the proper analysis required under I.C.R. 14 when evaluating one of those motions. As such, this Court should vacate his convictions and remand for new, separate trials on the remaining charges.[1]

Second, Mr. Chacon contends the district court improperly admitted evidence of uncharged drug use and paraphernalia over his objections under I.R.E. 404(b). As such, the Court should, at least, remand this case for a new trial without that improper evidence.

Statement of the Facts and Course of Proceedings

When Idaho State Police officers got a tip about Mr. Chacon's whereabouts, they decided to try to arrest him on outstanding warrants. (*E.g.,* Tr., p.374, Ls.1-6, p.376, Ls.20-22.) Without using any emergency lights, they partially surrounded his car at a stop sign with unmarked vehicles. (*See, e.g.,* Tr., p.282, Ls.9-11; State's Exhibit 20.) The officer who stopped in front of Mr. Chacon admitted he was not wearing any identifying insignia at the time he got out and pointed his gun at Mr. Chacon. (*E.g.,* Tr., p.274, L.25 - p.275, L.1 (the officer admitting his insignia was not showing); Tr., p.777, Ls.14-15 (Mr. Chacon testifying about the officer pointing his gun).) Although other officers with some identification insignia were approaching from the side of Mr. Chacon's car, (*e.g.,* Tr., p.408, L.20 - p.409, L.3, p.415, Ls.15-24), Mr. Chacon

[1] The jury acquitted Mr. Chacon on two of the five charges alleged in this case, and so, the protections against double jeopardy would prevent retrial on those two charges.

testified he was primarily focused on the man in front of him wielding a gun.[2] (Tr., p.779, L.13 - p.780, L.2.) He explained he thought he was being robbed. (Tr., p.779, Ls.7-8.) Thinking to get away from that situation, he turned his car to an opening to his right and drove off, accidentally hitting the officer in front of him as he did so.[3] (*E.g.,* Tr., p.781, Ls.7-22.) The officers opened fire as he did so, hitting Mr. Chacon's passenger. (*E.g.,* Tr., p.279, Ls.4-12, p.470, Ls.24-25 (officers explaining where they were shooting); Tr., p.476, L.25 - p.477, L.8 (one of the officers testifying about the passenger's injuries).)

The officers followed Mr. Chacon in their unmarked vehicles, but were not able to put up and activate their emergency lights until sometime later. (*See, e.g.,* Tr., p.284, Ls.14-22, p.511, Ls.10-12.) Mr. Chacon admitted that he saw the emergency lights at that point, but was still shaken by being shot at, so he continued to drive. (Tr., p.788, L.20 - p.789, L.24.) When the road ended, he continued to run on foot, but officers (one of whom was the one who had been hit by the car) apprehended Mr. Chacon. (*E.g.,* Tr., p.292, L.14 - p.294, L.17.) That officer said he found a black case in Mr. Chacon's pocket, which he put in the bed of his truck with other items taken from Mr. Chacon. (Tr., p.295, L.16 - p.296, L.10.) The items remained in the open there for an unspecified amount of time. (*See* Tr., p.295, L.25 - p.297, L.2; Exhibits, p.67 (State's Exhibit 42).)

The Pocatello Police took over the investigation at that point because of the officer-involved shooting. (Tr., p.296, L.25 - p.297, L.10.) They searched the black case and found a

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[2] There was conflicting testimony about whether Mr. Chacon actually saw and recognized that the men approaching from the side were officers. (*See generally* Tr.) However, whether or not he did is irrelevant to the analysis of the issues in this appeal.

[3] The jury fully acquitted Mr. Chacon of any criminal conduct in regard to hitting the officer. (*See* 383 (acquitting him of all the alleged forms of battery).) The officer was not severely hurt. (*See, e.g.,* Tr., p. 308, L.20 – p. 311, L.18 (the officer testifying to only having a few scrapes and bruises).)

baggie with a substance ultimately identified as methamphetamine. (Tr., p.665, L.12 - p.666, L.8, p.674, L.5 - p.675, L.21, p.695, L.18 - p.696, L.10.) They also found a handgun in the center console.[4] (*See* Tr., p.723, Ls.15-20.) In addition, they found various items that the officer described as "marijuana paraphernalia," which included a marijuana bong in the passenger door. (*See generally* Tr., p.947, L.21 - p.951, L.24.)

The State initially charged Mr. Chacon with felony eluding (the "eluding charge"), felon in possession of a firearm (the "firearm charge"), battery with intent on a law enforcement officer, and grand theft by possession. (R., pp.87-88.) Mr. Chacon moved, *inter alia*, to sever those charges under I.C.R. 14. (R., pp.156-57.) At the hearing on that motion, he explained that, in addition to the risk that the jurors would not be able to separate out the various counts in a joint trial, there was also a risk the jury would convict him because "he is, essentially, a bad guy." (Tr., p.49, L.2 - p.50, L.2.) The district court denied that motion, explaining that "I have to tell them, no you can't think of it like that. Just because you think he might be guilty of this crime, doesn't necessarily mean that he is going to be guilty of this crime," in regard to an instruction under I.C.J.I. 110 and 221.[5] (Tr., p.59, L.1 - p.60, L.24.)

Subsequently, the State filed a new charge for possession of methamphetamine (the "methamphetamine charge") and moved to join that charge into this case.[6] (R., p.197.) Mr. Chacon objected to that motion, raising the "same objection as before with regard to the firearm." (Tr., p.74, Ls.21-22.) He also argued that, in joining that charge, the jury would "be

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[4] The handgun had been stolen, but the jury acquitted Mr. Chacon of any criminal conduct in that regard. (*See* R., p.382 (acquitting him of grand theft by possession).)

[5] The district court ultimately did not give an instruction consistent with I.C.J.I. 110 or 221. (*See generally* R., pp.384-440.) However, neither party requested such instructions, either prior to trial or during the jury instruction conference. (*See generally* R., pp.244-54, 317-48; Tr., p.962, L.11 - p.974, L.24.)

[6] At trial, the prosecutor conceded that Mr. Chacon was not charged with possessing any drugs or paraphernalia except the methamphetamine allegedly found on his person. (Tr., p.640, Ls.9-10.)

getting evidence which is prejudicial to my client that should not be admitted, and wouldn't have otherwise been admitted, if we're only talking about the battery with intent case or the eluding case." (Tr., p.75, Ls.8-19.) The district court granted the State's motion to join that charge because "I think that the jury can sort through each and every charge and has the ability to do so." (Tr., p.77, L.15 - p.78, L.4.)

During the State's case-in-chief, the prosecutor sought to introduce pictures of the marijuana bong from the passenger door. (*See generally* Tr., p.636, L.23 - p.645, L.6; Exhibits, pp.68-69 (State's Exhibits 29-30).) Mr. Chacon objected on both the relevance and prejudice prongs of the I.R.E. 404(b) analysis. (Tr., p.639, Ls.6-10; *see generally* Exhibits 29-30.) The prosecutor argued the paraphernalia was relevant to Mr. Chacon's knowledge and use of the drugs on his person, describing it as a methamphetamine pipe.[7] (Tr., p.640, Ls.11-13.) The district court overruled Mr. Chacon's objections and admitted the pictures. (Tr., p.644, L.24 - p.645, L.3.)

Subsequently, during the defense case-in-chief, Mr. Chacon offered explanations for his connection with drug culture in order to explain why he thought he was being robbed. (Tr., p.823, L.9 - p.826, L.18.) During cross-examination, and over objection, the prosecutor elicited testimony from Mr. Chacon that he used heroin earlier on the day in question. (Tr., p.845, Ls.9-20 (defense counsel specifically objecting to relevance and beyond the scope of direct examination).)

[7] The State's notices of intent did not give any indication that it would be seeking to present any evidence related to other drug use or paraphernalia under I.R.E. 404(b). (R., pp.219-20, 281-83 (only identifying evidence of Mr. Chacon's prior warrants, a prior incident involving the officer who was hit by the car, and two prior incidents of Mr. Chacon running from officers as subject to admission under I.R.E. 404(b)).) However, defense counsel did not object to the introduction of his prior drug use or the drug paraphernalia on the basis that it was not included in those notices. (*See generally* Tr., R.) Mr. Chacon reserves the right to pursue remedies in that regard through post-conviction, should he deem it necessary and appropriate.

Then, during the State's rebuttal case, the prosecutor sought to elicit testimony from the officer who searched Mr. Chacon's car about the paraphernalia found in the car, and how it was related to the drug culture. (*See* Tr., p.941, Ls.1-23.) Defense counsel objected to that evidence based on relevance and improper rebuttal testimony, and that it would be improperly prejudicial propensity evidence. (Tr., p.940, Ls.15-22, p.942, Ls.1-20.) The district court overruled that objection. (Tr., p.944, Ls.4-21.)

The officer subsequently testified that he had opened a safe in the car and that it contained "mostly marijuana paraphernalia, small amounts of marijuana."[8] (Tr., p.947, Ls.21-23.) The prosecutor followed up on that, asking "When you say . . . marijuana paraphernalia, what is it that you're referring to?" and the officer answered, "Pipes, packaging material." (Tr., p.948, Ls.5-8.) Again, the prosecutor sought clarification: "So when you say 'pipes' what is a marijuana pipe?" (Tr., p.949, Ls.4-5.) The officer explained "there's several different kinds. You have bongs that contain water to clean off the smoke you're inhaling, and then you have small pipes. They're used to smoke it, made from a variety of materials." (Tr., p.949, Ls.6-10.) After asking about potential items of paraphernalia "found in the rear of the vehicle," the prosecutor asked, "How about the front passenger side?" (Tr., p.951, Ls.10-22.) The officer answered, "There was a bong in the door, passenger door." (Tr., p.951, Ls.21-24.) At no point

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[8] Defense counsel objected several times to foundation during this line of questioning, and those objections were sustained, with the district court directing the prosecutor to lay foundation for those questions. (*See, e.g.,* Tr., p.947, L.24 - p.948, L.14.) There were no accompanying motions to strike, and defense counsel did not renew the foundation objections after the prosecutor elicited testimony about the officer's training and experience with drugs and drug culture. (*See generally* Tr.)

during that discussion was methamphetamine use mentioned.[9] (*See generally* Tr., p.947, L.21 - p.951, L.24.)

Defense counsel addressed each of the charges in turn during closing arguments. With respect to the methamphetamine charge, he simply said that, unless the jurors had a doubt about "the chain of things," there was not really anything else for him to say on the methamphetamine charge. (Tr., p.1025, Ls.11-13; *see also* Tr., p.660, Ls.1-5, p.667, L.5 - p.668, L.4 (defense counsel making continuing objections about the lack of evidence showing chain of custody of the black case, which were overruled).) As to the firearm charge, defense counsel argued there was reasonable doubt about whether Mr. Chacon knew it was in the car, since the evidence introduced by the State all showed it was covered up by a black bag and it was not positioned in a way for the driver to grab and use the gun. (Tr., p.1028, L.8 - p.1029, L.18; *see* Tr., p.723, Ls.15-20 (noting the gun was positioned under the emergency brake with the barrel pointing toward the driver); Tr., p.729, Ls.13-22 (recalling the black bag covering the gun); Exhibits, p.72 (State's Exhibit 34 showing the gun in the car).) Finally, as to the eluding charge, defense counsel argued there was reasonable doubt specifically in regard to the elements that would justify a conviction for felony eluding as opposed to misdemeanor eluding after the point the officers actually activated their emergency lights. (Tr., p.1025, L.16 - p.1027, L.23.)

The jury ultimately found Mr. Chacon guilty on the eluding charge, the firearm charge, and the methamphetamine charge. (R., pp.382-83.) The district court subsequently sentenced

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[9] The only other drugs which the officer mentioned during his testimony about the paraphernalia were "pills and heroin," which he testified could be smoked by heating them on a piece of aluminum foil and the resulting smoke breathed in through a small pipe or tube. (Tr., p.953, Ls.5-9.)

him to an aggregate term of seven years, with four years fixed on this case.[10] (Tr., p.1088, Ls.1-25.) Mr. Chacon filed a notice of appeal timely from the resulting judgment of conviction. (R., pp.463, 471.)

[10] Specifically, it imposed a sentence of five years, with three years fixed on the eluding charge, a five-year sentence, with four years fixed, on the firearm charge, and a seven-year sentence, with four years fixed, on the methamphetamine charge. (Tr., p.1088, Ls.1-25.) It ordered those sentences to run concurrent to each other, but consecutive to a case in which Mr. Chacon had been on probation at the time of these offenses. (*See* Tr., p.1089, Ls.6-11.)

ISSUES

I. Whether the district court erred by denying Mr. Chacon's motion to sever the charges in this case.

II. Whether the district court erred by admitting evidence of Mr. Chacon's prior drug use and possession of paraphernalia in violation of I.R.E. 404(b).

ARGUMENT

I.

The District Court Erred By Denying Mr. Chacon's Motions To Sever The Charges In This Case

A. Standard Of Review

Idaho Criminal Rule 14 allows a court to sever charges even if joinder would be proper as a matter of law if presenting those charges in a single trial would be prejudicial to the defendant. *State v. Williams*, 163 Idaho 285, 293 (Ct. App. 2018). There are three potential sources of prejudice that the court needs to consider in that regard:

> (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not to the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

Id. (quoting *State v. Abel*, 104 Idaho 865, 867-68 (1983)); *see also State v. Orellana-Castro*, 158 Idaho 757, 760 (2015) (noting that the most common form of prejudice is the third kind, which is essentially an argument that the evidence of one offense would not be admissible in separate trials under I.R.E. 404(b)).

Whether charges should be severed under I.C.R. 14 is reviewed for an abuse of discretion. *Orellana-Castro*, 158 Idaho at 760; *State v. Field*, 144 Idaho 559, 564-65 (2007). The district court abuses its discretion when: (1) it fails to recognize the issue as one of discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistently with the applicable legal standards, or (4) it reaches its decision without exercising reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018).

B. The District Court Failed To Consider The Type Of Prejudice Mr. Chacon Alleged In His Objection To Joining The Methamphetamine Charge To The Other Charges

Mr. Chacon's argument with regard to not joining the methamphetamine charge to the eluding or firearm charges was focused specifically on the third type of prejudice under I.C.R. 14 – that it would allow improper propensity evidence to infect the analysis on each charge. (Tr., p.75, Ls.8-19.) However, the district court did not discuss that potential source of prejudice in ruling on Mr. Chacon's motion. (*See generally* Tr.) Rather, it ruled that there would be no prejudice under the first type of prejudice – whether the evidence on the various charges would confuse the jurors, or whether they would be able to keep the charges separate: "As far as prejudice is concerned, I don't know that the jury – that the defendant would be prejudiced just because there were multiple charges against him. I think that the jury can sort through each and every charge and has the ability to do so, and so I'm going to go ahead and grant the motion to join [the methamphetamine charge]." (Tr., p.77, L.20 - p.78, L.4.)

The district court abuses its discretion when it does not conduct all the analysis required of it because, in that case, it is not acting consistent with the applicable legal standards. *Compare Orellana-Castro*, 158 Idaho at 762 ("In this case, the district court did not conduct the analysis" required under I.R.E. 404(b), and as a result, "it did not act consistent with the applicable legal standards and therefore abused its discretion in denying the motion to sever"). The three different categories of prejudice under I.C.R. 14 require distinct analysis from the others. *See Abel*, 104 Idaho at 867-68; *Williams*, 163 Idaho at 293. Otherwise, there would be no reason to identify three different types of prejudice in the first place. Thus, while the evidence may not be of the kind that risks juror confusion as to which charge is being discussed, it could still be the kind that risks propensity analyses affecting the jury's deliberations. As such, analysis as to one type of prejudice will not address the other types of prejudice. Therefore, as in

Orellana-Castro, the district court abused its discretion in Mr. Chacon's case by not conducting the required analysis regarding whether the third type of prejudice should have resulted in severance of the methamphetamine charge in this case.

C. Under The Applicable Standard, The District Court Erred By Not Severing The Charges Because The Evidence Of Each Remaining Charge Would Not Have Been Admissible In Separate Trials

The district court's decision to deny Mr. Chacon's motion to sever the initial four charges, as well as its decision to join the methamphetamine charge over Mr. Chacon's objection, are not consistent with the applicable legal precedent because the evidence of each charge would not be admissible in separate trials under I.R.E. 404(b). *See Orellana-Castro*, 158 Idaho at 760. Appellate review of evidence under I.R.E. 404(b) is subject to a multi-tiered review. *State v. Naranjo*, 152 Idaho 134, 138 (Ct. App. 2011). First, there must be sufficient evidence to show that the act in question, in fact, occurred. *Id.* Second, that evidence must be relevant to a non-propensity purpose, an evaluation which the appellate courts freely review, as it is a question of law. *Id.* Third, the risk of undue prejudice cannot substantially outweigh the probative value of that evidence, an evaluation which is reviewed for an abuse of discretion. *Id.* at 139.

In this case, the prejudice specifically arises in regard to the third tier of that inquiry – any potential relevance evidence of the other charges might have had was substantially outweighed by the risk of undue prejudice. For example, as defense counsel pointed out, the only relevance the methamphetamine and firearm charges had to the eluding charge was "just matter of making him look bad by charging him with guns and drug charges and having the jury hear all of that." (Tr., p.75, Ls.13-16; *see also* R., pp.156-57 (Mr. Chacon moving to sever the firearms charge from the eluding charge for similar reasons).) In other words, the jurors could

have disregarded their reasonable doubts about whether Mr. Chacon had committed felony eluding (as opposed to misdemeanor eluding) based on his criminal propensity demonstrated by his possession of drugs and guns. (*See* Tr., p.1025, L.16 - p.1027, L.23.)

Likewise, there was a risk of undue prejudice with regard to not severing the firearm charge from the methamphetamine charge. In fact, particular care needs to be taken with these two particular types of charges, as the Court of Appeals had acknowledged there is a "recognized propensity of persons engaged in selling narcotics to carry firearms." *See, e.g., State v. Pierce*, 137 Idaho 296, 299-300 (Ct. App. 2002). As such, the jurors could have disregarded their reasonable doubts about whether Mr. Chacon possessed the methamphetamine because of "the chain of things" or his knowledge of the gun under the black bag based on his criminal propensity. (*See* Tr., p.1025, Ls.11-13, p.1028, L.8 - p.1029, L.18.)

Additionally, the evidence of each charge had little probative value beyond propensity to prove guilt on the other charges. For example, evidence of unlawful possession of methamphetamine or a firearm says little about whether the car was being driven in a reckless manner while being signaled to stop, so as to help prove felony eluding.

Since there was an undue risk that the jury would convict Mr. Chacon based on propensity considerations, and since that undue risk would have substantially outweighed the potential probative value of the evidence of the other charged conduct, the evidence of the other charges would not have been admissible in separate trials. As such, the joinder was still prejudicial regardless of the jury's ability to keep the evidence relating to the three charges separate. Therefore, the district court abused its discretion by denying Mr. Chacon's motions to sever those charges.

II.

The District Court Erred By Admitting Evidence Of Mr. Chacon's Prior Drug Use And Possession Of Paraphernalia In Violation Of I.R.E. 404(b)

A. Standard Of Review

Appellate review of evidence under I.R.E. 404(b) is subject to a multi-tiered review. *State v. Naranjo*, 152 Idaho 134, 138 (Ct. App. 2011). First, there must be sufficient evidence to show that the act in question, in fact, occurred. *Id.* Second, that evidence must be relevant to a non-propensity purpose, an evaluation which the appellate courts freely review, as it is a question of law. *Id.* Third, the risk of undue prejudice cannot substantially outweigh the probative value of that evidence, an evaluation which is reviewed for an abuse of discretion. *Id.* at 139; *see Lunneborg*, 163 Idaho at 863-64.

B. The Evidence Of Prior Drug Use And Paraphernalia Possession Was Not Relevant To This Case Except Through An Improper Propensity Analysis

1. The marijuana bong in the passenger door

The testimony offered in regard to the item found in the passenger door was that it was a marijuana bong, not a methamphetamine pipe. Specifically, the officer who searched the car testified that the item in the passenger door was a "bong." (Tr., p.951, Ls.21-24.) The only other time he used the term "bong" was to describe what he meant by "marijuana paraphernalia." (*See* Tr., p.947, L.21 - p.951, 22.) In fact, the pictures of that item show that it had a marijuana-leaf design on it. (*See* State's Exhibits 29-30.)

As such, the marijuana bong was not relevant to prove Mr. Chacon's knowing possession of the methamphetamine except through an improper propensity analysis that Mr. Chacon was a drug user. Therefore, the district court erred by admitting evidence regarding the marijuana bong

(both the pictures of it in the State's case-in-chief and the officer's testimony about it in the State's rebuttal case) under the relevance tier of the analysis under I.R.E. 404(b).

2. The heroin use earlier that day

For the same reason the marijuana bong was not relevant, the fact that Mr. Chacon used *heroin* earlier in the day has no relevance to prove his knowing possession of the *methamphetamine* except through improper propensity rationales. In fact, the district court had already acknowledged the tenuous link in that regard, as it had sustained a relevance objection to testimony that one of the officers knew Mr. Chacon's passenger because she was known to buy heroin. (Tr., p.478, Ls.12-20.) The same rationale should have applied to the evidence that Mr. Chacon used heroin earlier in the day. Therefore, the district court erred by allowing the State to elicit that evidence under the relevance tier of the analysis under I.R.E. 404(b) as well.

C. The Risk Of Undue Prejudice From The Marijuana Bong Substantially Outweighed The Potential Probative Value

As discussed in Section I(B), *supra*, Mr. Chacon's only argument on the methamphetamine charge was that, due to gaps in the chain of custody, there was reasonable doubt as to his possession and knowledge of the methamphetamine.[11] (*See* Tr., p.1025, Ls.11-13 (acknowledging, if the jurors did not have doubts about that, there was not much else for defense counsel to say).) Whatever probative value the marijuana bong might have had in that regard was substantially outweighed by the risk that the jurors would disregard their doubts about whether Mr. Chacon knowingly possessed the methamphetamine and convict him based on his

[11] Mr. Chacon did not make an argument that the evidence of his prior heroin use was unduly prejudicial. (*See generally* Tr.)

character as a drug user. Therefore, the district court also abused its discretion by admitting that evidence on the third tier of the analysis under I.R.E. 404(b).

CONCLUSION

Mr. Chacon respectfully requests that this Court vacate his convictions and either remand this case for separate trials on the remaining charges, or, alternatively, for a new trial without the inclusion of improper propensity evidence.

DATED this 25th day of February, 2020.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas