
Deputy

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

STATE OF IDAHO,)
)
) Plaintiff,)
)
 vs.)
)
 BENJAMIN THOMAS ROWLEY)
)
 DOB: xx/xx/1997)
)
 SSN: XXX-XX-7700)
)
 IDOC: 105607)
)
) Defendant.)

Case No. **CRF 2017 92**
CR28-20-20175

**MEMORANDUM DECISION AND
ORDER DENYING I.C.R. 35
MOTION AND NOTICE OF
RIGHT TO APPEAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On August 15, 2023, at a disposition hearing on a probation violation in both cases, this Court imposed defendant Benjamin Thomas Rowley’s (Rowley) prison sentences as follows:

**CR28-20-20175 –
POSSESSION OF A
CONTROLLED
SUBSTANCE
(METHAMPHETAMINE),**

To the custody of the State of Idaho Board of Correction for a fixed sentence of TWO (2) years followed by an indeterminate term of FOUR (4) years for a total unified sentence of SIX (6) years. **THIS SENTENCE RUNS CONSECUTIVE TO THE SENTENCES PREVIOUSLY IMPOSED IN CRF2017 92.**

**CRF 2017 92 - COUNT I -
OPERATING A MOTOR
VEHICLE WHILE UNDER
THE INFLUENCE OF
DRUGS AND/OR AN
INTOXICATING
SUBSTANCE**

To the custody of the State of Idaho Board of Correction for a fixed sentence of FIVE (5) years followed by an indeterminate term of FIVE (5) years for a total unified sentence of TEN (10) years.

**CRF 2017 92 - COUNT II -
POSSESSION OF A
CONTROLLED
SUBSTANCE
(METHAMPHETAMINE)**

To the custody of the State of Idaho Board of Correction for a fixed sentence of FIVE (5) years followed by an indeterminate term of TWO (2) years for a total unified sentence of SEVEN (7) years. **THESE SENTENCES IN THIS CASE RUN CONCURRENT WITH EACH OTHER.**

On September 11, 2023, Rowley, through counsel, timely chose to file a “Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support” (I.C.R. 35(b) Motion), in each of these two cases. Rowley, through counsel, states: “The pleading supports a request to modify Mr. Rowley’s sentence by imposing the sentence but retaining jurisdiction and allowing him an opportunity at the rider program. If the Court is not inclined to retain jurisdiction in this matter, Mr. Rowley would request the Court reduce the fixed portion of the sentence to two years for each charge and for the sentence to run concurrent with [the sentence in the other case].” I.C.R. 35(b) Motion 2-3. Counsel for Rowley claims: “The basis for such argument consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future.” *Id.* at 2. Counsel for Rowley claims:

Additional evidence will include testimony from the defendant and possible other individuals, and documentation in support of the defendant’s request. Specifically, Mr. Rowley would testify about the treatment he was receiving through GEO Reentry Services. This treatment began prior to the Court placing him on probation in this matter on April 26, 2023. Mr. Rowley was benefitting by engaging in the treatment including Moral Reconciliation Therapy (MRT). There are additional records that support Mr. Rowley’s engagement in GEO including a Participant Progress Form, Starting Point Behavior Change Plan, Education & Employment Questionnaire, Session and Outcome Rating Scales, Individual Success Plan, and Treatment Scheduled. (Filed under seal herewith). In addition, Mr. Rowley has support in the community from individuals who wrote letters of support. (Filed under seal herewith).

Id. at 3. Counsel for Rowley requested a hearing before the Court on her I.C.R. 35(b) Motion. *Id.* This Court finds Rowley’s I.C.R. 35(b) motion in each case must be denied without a hearing for the following reasons.

II. ANALYSIS.

A. ROWLEY’S I.C.R. 35 MOTION MUST BE DENIED BECAUSE ROWLEY HAS STATED NO NEW, RELEVANT EVIDENCE.

A motion to modify a sentence “shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise

ordered by the court in its discretion.” I.C.R. 35; see *State v. Copenhaver*, 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App. 1986) (it is the defendant’s burden to present any additional evidence and the court cannot abuse its discretion in “...unduly limiting the information considered in deciding a Rule 35 motion”); *State v. Puga*, 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct. App. 1987). “The decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court.” *State v. Peterson*, 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct. App. 1994).

Where a sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). “To establish that the sentence imposed was improper, the defendant must show that in light of the governing criteria, [the] sentence was excessive under any reasonable view of the facts.” *Id.* (quoting *State v. Broadhead*, 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)). When a defendant does not identify what evidence he or she might have produced at a hearing that could not have been produced through affidavits, the district court does not abuse its discretion in refusing to hold a hearing on his or her Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

This Court has previously held that while a defendant is entitled to be present at sentencing and at resentencing when a prior invalid sentence is corrected, no such right exists on a motion to reduce a sentence. *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App.1986). “Indeed, the decision whether even to conduct a hearing on a Rule 35 motion has always been discretionary with the district court.” *Id.* A trial court abuses its discretion on whether to hold a hearing on a Rule 35 motion when it unduly limits information considered in deciding the motion. *James*, 112 Idaho at 242, 731 P.2d at 237. Ramirez has failed to show that the district court unduly limited the available information in this case. Ramirez does not even

identify what evidence he might have produced at a hearing that he was unable to produce through the affidavits which were submitted.

Id. (footnote omitted). Here, Rowley has not set forth any relevant evidence that could be adduced at hearing on an I.C.R. 35 motion. The Court cannot be required to guess at what relevant evidence Rowley could have presented at a hearing in support of his Rule 35 Motion. Because Rowley has completely failed to give any indication of any relevant facts which would support his claims, her Rule 35 Motion must be denied due to that failure alone. Neither Rowley's desire to have another period of retained jurisdiction imposed, or, a reduction in his sentence, is supported by any relevant, admissible, new evidence.

Without presenting any new explanation as to why this Court was incorrect in imposing Rowley's prison sentences on August 29, 2023, and without any presenting any new evidence, this Court has absolutely nothing upon which to base any I.C.R. 35(b) relief, let alone the specific relief of another retained jurisdiction or reduction in sentence.

Several Idaho appellate cases which discuss whether the evidence presented in an I.C.R. 35(b) motion must be "new" evidence. One of those cases is *State v. Campbell*, 170 Idaho 232, 509 P.3d 1161 (May 16, 2022). The Idaho Supreme Court held:

The district court did not abuse its discretion in denying the Rule 35(b) motion for leniency. In Campbell's original Rule 35 motion, he stated that "additional information" showed that he was at a greater risk of violence in adult prison and that rehabilitation efforts would be thwarted by the current sentence, citing a wide range of both legal and scientific articles regarding juvenile offenders published between 1994 and 2017. In denying Campbell's motion, the district court effectively concluded that this information was not new because it had already considered Campbell's age at sentencing.

The information presented by Campbell was not "new" in that it did not pertain specifically to his case or culpability. See *e.g.*, *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In *Huffman*, this Court considered a motion for leniency where the "new" information presented by the defendant consisted of "statements made by the parole board when revoking his parole" on a prior sentence. *Id.* Such information specifically

related to the defendant himself and his criminal punishments. *Id.* Here, Campbell merely presented research regarding juvenile offenders that existed long before Campbell's criminal conduct occurred. As we concluded above, the district court fully considered Campbell's youth and its potential mitigation at sentencing; consequently, additional information regarding Campbell's juvenile status was not new information for purposes of Rule 35(b). As such, we conclude that the district court did not abuse its discretion in denying Campbell's Rule 35(b) motion.

170 Idaho at 246, 509 P.3d at 1175. Just as in *Campbell and Huffman*, Rowley's request for a subsequent retained jurisdiction or reduction in his sentences is not based on any "new" evidence. Most importantly, the argument or request for concurrent sentences and a reduction in one sentence, is not related to any of the *Toohill* factors. Essentially, Rowley is simply arguing the Court to reconsider its decision, without any new evidence or even new argument.

Another case discussing whether the evidence must be "new" is *State v. Smith*, 161 Idaho 162, 384 P.3d 409 (Ct. App. 2016), in which the Idaho Court of Appeals held:

In presenting a Rule 35 motion, a defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). Thus, any colorable merit to a Rule 35 motion must arise from new or additional information presented in the motion or accompanying documentation that would create a basis for reduction of the sentence. *Wade*, 125 Idaho at 525, 873 P.2d at 170. **A Rule 35 motion that does not present such new information is not one that a reasonable person with adequate means would bring before the district court at his or her own expense and is, therefore, frivolous.** *Carter*, 157 Idaho at 903, 341 P.3d at 1272. Moreover, a Rule 35 motion is frivolous if the basis for the claim was previously considered by the district court. *Carter*, 157 Idaho at 902–03, 341 P.3d at 1271–72.

161 Idaho at 164, 384 P.3d at 411. (bold added). This Court specifically finds Rowley's I.C.R. 35(b) motions present no new information, and no new relevant information.

Accordingly, under *Smith*, Rowley's I.C.R. 35(b) motion is frivolous. This Court finds that no reasonable person with adequate means would bring such an I.C.R. 35(b) motion

before the district court at his or her own expense. Rowley's doing so is not reasonable.

The Idaho Court of Appeals concluded in *Smith*:

Alternatively, Smith argues that the district court abused its discretion in denying his Rule 35 motion on the merits. A motion for reduction of sentence under Rule 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *Huffman*, 144 Idaho at 203, 159 P.3d at 840.

As discussed above, the information Smith provided in support of his Rule 35 motion was information that was already in his possession and already considered by the district court in imposing Smith's sentence. Because Smith provided the district court with no new or additional information to support finding Smith's sentence excessive, we conclude no abuse of discretion has been shown. Therefore, the district court's order denying Smith's Rule 35 motion is affirmed.

161 Idaho at 165-66, 384 P.3d at 412-13. Rowley has presented this Court with no new evidence. That failure alone is reason for this Court to deny Rowley's I.C.R. 35(b) Motion without holding a hearing.

At first blush, Rowley's I.C.R. 35 Motion in each case discusses "additional" evidence, but none of it is "new" evidence, and none of it is "relevant" evidence. As mentioned above, counsel for Rowley claims:

Additional evidence will include testimony from the defendant and possible other individuals, and documentation in support of the defendant's request. Specifically, Mr. Rowley would testify about the treatment he was receiving through GEO Reentry Services. This treatment began prior to the Court placing him on probation in this matter on April 26, 2023. Mr. Rowley was benefitting by engaging in the treatment including Moral Reconciliation Therapy (MRT). There are additional records that support Mr. Rowley's engagement in GEO including a Participant Progress Form, Starting Point Behavior Change Plan, Education & Employment Questionnaire, Session and Outcome Rating Scales, Individual Success Plan, and Treatment Scheduled. (Filed under seal herewith). In addition, Mr. Rowley has support in the community from individuals who wrote letters of support. (Filed under seal herewith).

Id. at 3. Additional evidence is not necessarily "new" evidence, and the case law

discussed above shows that a motion brought under I.C.R. 35(b) must be supported by new evidence. The Court will address each sentence in the above paragraph written by Rowley's attorney. "Additional evidence will include testimony from the defendant and possible other individuals, and documentation in support of the defendant's request." *Id.* This tells the Court absolutely nothing. It tells the court defendant and possibly other people may testify (though breathes not a word about the names of those people), but makes no mention of what each of these people, other than Rowley, might be going to testify about. As to Rowley, counsel for Rowley gets more specific, but in that specificity, Rowley's attorney makes clear nothing new will be presented. In his I.C.R. 35(b) Motion, counsel for Rowley claims: "Specifically, Mr. Rowley would testify about the treatment he was receiving through GEO Reentry Services. This treatment began prior to the Court placing him on probation in this matter on April 26, 2023." *Id.* All that Rowley is proposing to testify about is **old** evidence, **it existed at the time of the August 29, 2023, hearing**. At the August 26, 2023, hearing, both Rowley and his attorney discussed at length Rowley's participation in the GEO program. Court Minutes 3:17:41 p.m.; 3:21:47 p.m.; 3:22:06 p.m. Next, Rowley claims

Mr. Rowley was benefitting by engaging in the treatment including Moral Reconciliation Therapy (MRT). There are additional records that support Mr. Rowley's engagement in GEO including a Participant Progress Form, Starting Point Behavior Change Plan, Education & Employment Questionnaire, Session and Outcome Rating Scales, Individual Success Plan, and Treatment Scheduled. (Filed under seal herewith).

I.C.R. 35(b) Motion 3. Again, this pertains to records from the GEO program, all of which occurred in the months before Rowley violated his probation. None of this is any **new** evidence. Finally, counsel for Rowley claims: "In addition, Mr. Rowley has support in the community from individuals who wrote letters of support. (Filed under seal herewith)" *Id.* Rowley's opportunity to provide such letters of support was at the disposition phase of his

probation violation hearing. At that point, this Court asked both the attorney for the State of Idaho and Rowley's attorney if they were ready to proceed with disposition. Both answered in the affirmative. Court Minutes 3:08:08 p.m. The four letters submitted by Rowley in support of his I.C.R. 35(b) Motion are from: Dennis Rowley (Rowley's father); Julianne Rowley (Rowley's mother); Zachary Freitas (who doesn't bother to tell this Court how he knows Rowley), and Angela Waller (friend and co-worker). Each of these four letters sing praises of Rowley, but do so based on past history...in other words, **old evidence**. Nothing about this information presented is **new** evidence, because none of these opinions were based on interactions which happened with Rowley after his August 29, 2023, disposition hearing. None of what is presented in any of the four letters is at all **relevant** evidence. Nothing in those four letters discusses evidence as to why this Court might think it could keep the public safe with Rowley on probation. Rowley was sentenced on the older of the two cases on November 27, 2017, and Rowley has been on probation or in prison every day since November 27, 2017. On November 17, 2017, this Court sent Rowley on his first period of retained jurisdiction. On June 12, 2018, this Court placed Rowley on probation. On December 22, 2020, while on felony probation, Rowley committed the new crimes in the newer case. On March 30, 2021, this Court sentenced Rowley in the newer case and in both cases sent Rowley on his second period of retained jurisdiction. Also on March 30, 2021, **the court also retained jurisdiction in Boundary County Case No. CRF 2012 590**. The Court mentions this to emphasize the fact that this Court has been trying to get Rowley to comply with probation for over eleven years. Since that March 30, 2021, order, Rowley has sort of "aged out" of the Boundary County case, as far as probation is concerned. Following that period of retained jurisdiction, on July 22, 2021, this Court placed Rowley back on probation in his two Kootenai County cases. On April 13, 2023, a Report of Violation was filed. On April 26,

2023, this Court continued Rowley on probation, only to have Rowley travel out of state to Washington, to go to Northern Quest Casino, test positive for alcohol and methamphetamine on July 21, 2023, and test positive for methamphetamine and fentanyl on July 27, 2023. Rowley admitted to this on August 15, 2023, but denied fentanyl use. An evidentiary hearing was scheduled for August 29, 2023, at which time the State withdrew the allegation of fentanyl use. The Court makes this historic recitation to point out again that nothing in those four letters submitted in support of Rowley's I.C.R. 35(b) Motion presents any evidence as to why this Court might think it could keep the public safe with Rowley on probation.

As set forth above, Rowley's other "basis" is: "The basis for such argument consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future." I.C.R. 35(b) Motion 2. This is nothing more than a "claim" by Rowley's attorney. It is not any evidence, it is simply argument, a baseless one at that. Such argument is nothing more than a throw away sentence which tells this Court absolutely nothing. The sentence has become *de rigueur* in the local legal defense community, especially the Kootenai County Public Defender's Office and with conflict public defenders. As pointed out by this Court on July 11, 2023, in *State v. Mitch Michael Curtis, Jr.*, Kootenai County Case No. CRF 2014 18896, where the defendant Curtis in that case was represented by Jonathan Williams, a different deputy public defender than is representing Rowley (referring back to a case decided on June 26, 2023, in *State v. Alyssa Duncan*, Kootenai County Case No. CR28-23-3250, where the defendant Duncan was represented by yet a different deputy public defender):

Duncan's counsel [a different public defender than Jonathan Williams] writes, "The basis for such argument consist of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his [her] future.' I.C.R. 35(b) Mot. 2. That phrase tells the Court not

one thing. Such phrase is not any new evidence at all. It is really a throw away line that is currently being used in most I.C.R. 35(b) Motions, whether from the Kootenai County Public Defender's Office or from other counsel. As an example, this Court in *State v. Brandon Louis Rice*, CR28-21-13988, in this Court's Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, filed in that case on June 12, 2023, this Court noted that defense counsel in that case gave the argument, "The basis for this Motion consists of the direct and collateral negative impact a sentence of the current nature places upon the defendant and his future." Mem. Decision and Order 3. The attorney quoted in that decision who wrote essentially verbatim sentence, was not from the Kootenai County Public Defender's Office.

Duncan, Mem. Decision and Order 2-4. The "direct and collateral negative impact" argument has been a worn out phrase used in nearly every I.C.R. 35(b) motion filed before this Court for quite some time. While not only thread-bare, the argument comprises no new evidence, which is what is needed by Rowley at this I.C.R. 35 juncture. Rowley has provided no new evidence.

B. ROWLEY'S I.C.R. 35 MOTION MUST BE DENIED ON THE MERITS (OR LACK THEREOF).

At Rowley's November 27, 2017, sentencing in CRF 2017 92, this Court utilized a presentence investigation report (PSI) filed on November 20, 2017. Rowley was given an opportunity to make corrections on that document, and made no corrections to his prior record. That record began in 2005 with a battery, assault and runaway as a juvenile, a separate delivery of a controlled substance and providing false information to law enforcement as a juvenile in 2005; a juvenile probation violation in 2006, an adult driving under the influence, and open container in 2006, a separate 2006 providing alcohol to a minor; a separate driving under the influence in 2006 (for some reason these were transferred to juvenile court); adult possession of a controlled substance and paraphernalia in 2008; driving under the influence in 2009; driving under the influence in 2012; violation of ignition interlock device requirement in 2014; and driving without privileges in 2015. Rowley has received the benefit of a retained jurisdiction in 2018,

another in 2021, yet he continues to violate probation.

The Court exercises its discretion and decides Rowley's I.C.R. 35(b) motions without a hearing. This Court finds absolutely no new evidence and no relevant evidence has been presented by counsel for Rowley in support of his I.C.R. 35(b) Motions.

Rowley's request for this Court to essentially reconsider its earlier decision without any new evidence or argument is unavailing. The Idaho Court of Appeals found a similar argument unavailing. In *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986), Anderson filed an I.C.R. 35(b) motion in which he did not argue the severity of the sentence when imposed, but rather argued prison presented a "lack of rehabilitation programs, overcrowding and violence and his severe pain and discomfort due to the lack of proper medical treatment in prison as reasons to reduce his sentence." 111 Idaho at 123, 721 P.2d at 223. In affirming the district court's denial of Anderson's I.C.R. 35(b) Motion without a hearing, the Idaho Court of Appeals held:

The record shows that the district court considered the information. Even if we assume that the statements, concerning Anderson's health difficulties, good conduct and prison overcrowding and violence, contained in the motion are true, we cannot say that the district judge abused his discretion in determining that they were insufficient to overcome the original reasons for the sentence imposed. Those reasons included the nature of the crime, "a history of criminal activity," with convictions for "lots of prior felonies and prior offenses." When he sentenced Anderson, the district judge made it clear that he had little expectation Anderson would ever be rehabilitated. The judge was guided more by Anderson's "past conduct" than by "promises of future behavior." Although rehabilitation and health difficulties may be factors to weigh in considering a motion for reduction of sentence, they are not necessarily controlling. See *State v. Rundle*, 107 Idaho 936, 694 P.2d 400 (Ct.App.1984). Other factors include deterrence and protection of society. *State v. Toohill*, supra.

Having reviewed all the information available, we conclude that the district court did not abuse its discretion in failing to exercise leniency based upon information contained in the motion without conducting a hearing. Accordingly, the order denying the Rule 35 motion is affirmed.

Id. This Court specifically finds that either a subsequent period of retained jurisdiction or reducing Rowley's sentence, would not allow this Court to fulfill its paramount

responsibility, protecting the public. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). In *Toohill*, the Idaho Court of Appeals set forth the factors a Court should consider in imposing a sentence: “(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment.”

Id. There is nothing about Rowley’s decisions over the past several years that would cause the Court to think for one second that either a subsequent period of retained jurisdiction or reducing Rowley’s sentence is warranted. Either requested relief would be anathema with this Court’s paramount duty to protect the public.

III. ORDER.

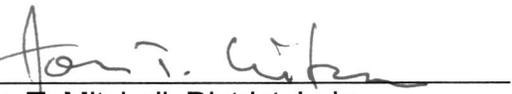
IT IS HEREBY ORDERED that defendant **BENJAMIN THOMAS ROWLEY’** I.C.R. 35(b) motion in each case is **DENIED** for the reasons set forth above: Rowley has submitted no new evidence, Rowley’s motions are devoid of any merit and are frivolous.

NOTICE OF RIGHT TO APPEAL

YOU, BENJAMIN THOMAS ROWLEY, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

DATED this 18th day of September, 2023.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of September, 2023 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

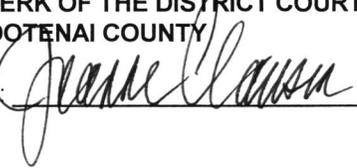
Prosecuting Attorney – Stan Mortensen *to paicowas@icr.gov* Idaho Department of Correction

Defense Attorney – Jonathan Williams *pd-fax@icr.gov* Records Division (certified copy)

Fax: (208) 327-7445 *centralrecords@idoc.idaho.gov*

BENJAMIN THOMAS ROWLEY
IDOC # 105607

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: , Deputy