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Earl v. State Respondent's Brief Dckt. 39751

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DUAINE FREDRICK EARL,)
) No. 39751
 Petitioner-Appellant,)
) Minidoka Co. Case No.
 vs.) CV-2011-697
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF MINIDOKA**

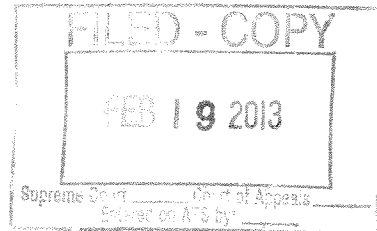
**HONORABLE JONATHAN P. BRODY
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**DUAINE FREDRICK EARL
144 W. 100 S.
Rupert, Idaho 83350**

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**ATTORNEYS FOR
RESPONDENT**

**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

Duaine Frederick Earl appeals, *pro se*, from the summary dismissal of his petition for post-conviction relief.

Statement of Facts and Course of the Proceedings

The relevant facts as outlined by the district court in its memorandum decision are as follows:

Duaine Fredrick Earl was sentenced on March 6, 2000 after pleading guilty to violating I.C. 18-6101(1), rape. The court sentenced Mr. Earl to a unified sentence of ten (10) years with one (1) year determinate, but retained jurisdiction. Mr. Earl was granted supervised probation upon returning from his rider but later violated that probation.

A report of the probation violation was filed on or about May 7, 2002 and Mr. Earl later failed to appear to his evidentiary hearing regarding that violation. Mr. Earl was later apprehended and admitted to violating his probation. Mr. Earl then had his original sentence imposed on November 25, 2002 and he was granted credit for time served. The amount of time credited was left out of the original Order on Motion to Revoke Probation dated December 2, 2002, but based upon a stipulation by the parties in this action the time credited is 232 days.

Mr. Earl has filed an application for post-conviction relief and the State has moved for Summary Dismissal of the matter. Mr. Earl is asserting that he should be granted credit for time served on probation, and as such he should be released immediately as his full term release date under that calculation would have been February 24, 2010.

(R., pp.89-90.)

Following a hearing on the state's motion for summary judgment, the court granted the state's motion and dismissed Earl's petition for post-conviction relief

finding no genuine issue of material fact. (R., pp.89-96.) Earl timely appealed.¹
(R., pp.100-102.)

¹ The State Appellate Public Defender (“SAPD”) was originally appointed to represent Earl in his appeal. (R., pp.105-108.) The SAPD subsequently withdrew from the representation of Earl based on its position that “[a]fter a thorough review, each of the three attorneys were unable to identify a viable issue for appeal.” (Affidavit in Support of Motion For Leave to Withdraw And Motion to Suspend the Briefing Schedule, p. 2.)

ISSUES

Earl states the issues on appeal as:

- I. Assistance of counsel as enunciated within the body of the sixth amendment to the U.S. Constitution;
- II. Subjection to double jeopardy for the same offense void of due process of law or just compensation;
- III. Rights to due process of law and equal protection under the law as guaranteed within the fifth and fourteenth amendments to the U.S. Constitution;
- IV. Adherence to affording full faith and credit to judicial proceedings and to records enumerated in article four section 1 of the U.S. Constitution;
- V. The right to petition the government for a redress of grievances asserted within the first amendment to the U.S. Constitution;
- VI. Rights to be free of excessive fines and cruel and unusual punishments as enunciated in the eighth amendment to the U.S. Constitution and Idaho State Constitution, article 1 section 6;
- VII. Rights retained and reserved by the people as is enunciated within the ninth and tenth amendments to the U.S. Constitution and Idaho State Constitution article 1 sections 1, 13, & 18;
- VIII. Adherence to Idaho statutes, i.e. titles 20-209A and 19-2603.

(Appellant's brief, pp.4-5 (verbatim).)

The state rephrases the issue as follows:

Has Earl failed to show error in the district court's summary dismissal of his petition for post-conviction relief?

ARGUMENT

Earl Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

The state moved for summary dismissal of Earl's petition for post-conviction relief, asserting Earl's claims regarding credit for time served, an alleged violation of his double jeopardy rights, and an alleged violation of the sentencing reform act were "bare and conclusory statements unsubstantiated by fact" and they "fail[ed] to raise a genuine issue of material fact." (R., p.49.) Earl, through counsel, then filed an "Addendum Brief" addressing the issue of credit for time served. (R., pp.66-78.) Following a hearing, the district court granted the state's motion for summary judgment "[a]fter review of the record and finding no genuine issue of material fact." (R., p.95.)

On appeal, Earl reasserts his original claims that he did not receive proper credit for time served, his sentence violated his rights against double jeopardy, was cruel and unusual, and violated his due process protections. (Appellant's brief, pp.4-5.)

Earl's arguments on appeal fail. He has not shown that the district court erred in summarily dismissing his post-conviction relief petition.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary

dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Earl Has Waived Consideration Of Claims Not Raised In His Petition For Post-Conviction Relief

Earl raises new claims for the first time on appeal. He now asserts there were "numerous causes and violations of [his] constitutional rights, including, but not limited to, the right to effective assistance of counsel throughout all legal proceedings," he did not receive the benefit of "full faith and credit to judicial proceedings," and his first, ninth and tenth amendment rights were violated. (Appellant's brief, pp.4-5.) These claims were not asserted in his petition. (R., p.2.)

It is a fundamental tenet of appellate law that a claim not raised before the district court will not be considered on appeal. State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Because these issues were not asserted in Earl's petition for post-conviction relief, they are not properly before this Court on appeal.

D. Earl Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than “a short and plain statement of the claim” that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 “if the applicant’s evidence raises

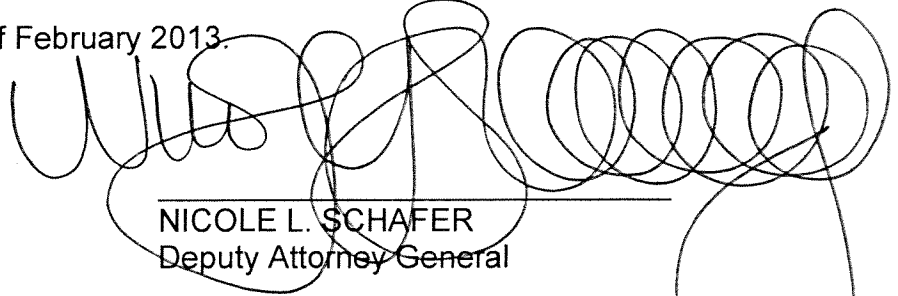
no genuine issue of material fact” as to each element of petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

In its order granting the state’s motion for summary judgment and dismissing Earl’s petition for post-conviction relief, the district court articulated the applicable legal standards (R., pp.90-92) and set forth, in detail, the reasons Earl failed to establish a genuine issue of material fact on any of his claims (R., pp.92-95). The state adopts the district court’s written opinion as its argument on appeal, a copy of which is attached hereto as Appendix A. Earl does not specifically challenge any of the court’s findings or legal conclusions (see generally Appellant’s Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Earl's petition for post-conviction relief.

DATED this 19th day of February 2013.

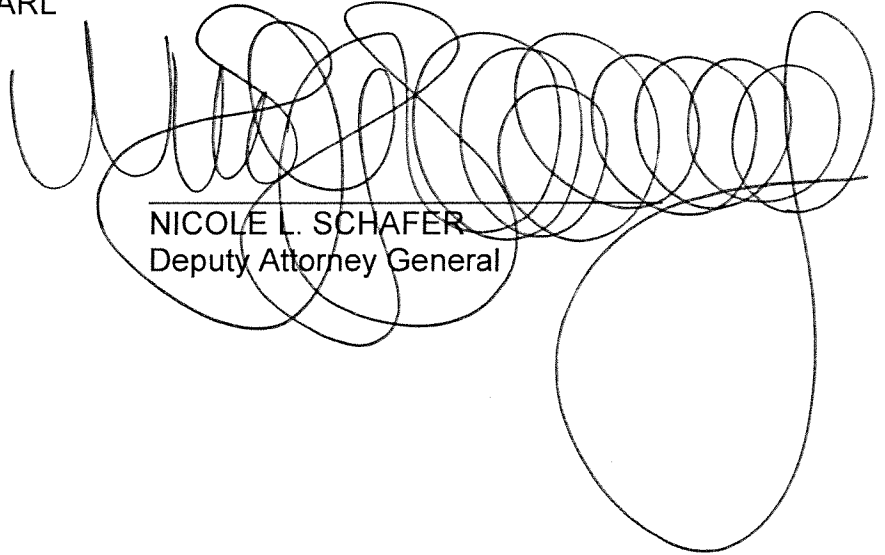


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of February 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DUAINE FREDRICK EARL
144 W. 100 S.
Rupert, ID 83350



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm

APPENDIX A

FILED DISTRICT COURT

CASE # _____

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PATTY TEMPLE, CLERK

_____, DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

THE STATE OF IDAHO,

Plaintiff,

vs.

Duaine Fredrick Earl,

Defendant.

Case No. CV-2011-0697

DOB: [REDACTED]

MEMORANDUM DECISION

I. INTRODUCTION

Duaine Fredrick Earl was sentenced on March 6, 2000 after pleading guilty to violating I.C. 18-6101(1), rape. The court sentenced Mr. Earl to a unified sentence of ten (10) years with one (1) year determinate, but retained jurisdiction. Mr. Earl was granted supervised probation upon returning from his rider but later violated that probation.

A report of the probation violation was filed on or about May 7, 2002 and Mr. Earl later failed to appear to his evidentiary hearing regarding that violation. Mr. Earl was

later apprehended and admitted to violating his probation. Mr. Earl then had his original sentence imposed on November 25, 2002 and he was granted credit for time served. The amount of time credited was left out of the original Order on Motion to Revoke Probation dated December 2, 2002, but based upon a stipulation by the parties in this action the time credited is 232 days.

Mr. Earl has filed an application for post-conviction relief and the State has moved for Summary Dismissal of the matter. Mr. Earl is asserting that he should be granted credit for time served on probation, and as such he should be released immediately as his full term release date under that calculation would have been February 24, 2010. Mr. Earl bases this conclusion on five separate grounds, but for the reasons set forth below this court disagrees with his assertions and grants the State's Motion for Summary Dismissal.

II. APPLICABLE LEGAL STANDARDS

A. Post-Conviction Standards

An application for post-conviction relief initiates a proceeding, which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678 (1983); *Clark v. State*, 92 Idaho 827, 830 (1969); *Murray v. State*, 121 Idaho 918, 921 (Ct. App. 1992). An application for post-conviction relief differs from a complaint in an ordinary civil action in that it must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). Rather an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached, or the application must state why such

supporting evidence is not included with the application. I.C. § 19-4903. Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67 (Ct. App. 1990).

The post-conviction petitioner must make factual allegations showing each essential element of the claim and a showing of admissible evidence must support those factual allegations. *Roman v. State*, 125 Idaho 644, 647 (Ct. App. 1994); *Drapeau v. State*, 103 Idaho 612, 617 (Ct. App. 1982); *Stone v. State*, 108 Idaho 822 (Ct. App. 1985). The district court may take judicial notice of the record of the underlying criminal case. *Hays v. State*, 113 Idaho 736, 739 (Ct. App. 1987), *aff'd* 115 Idaho 315 (1988), *overruled on other grounds State v. Guzman*, 122 Idaho 981 (1992).

B. Summary Dismissal Standards

Idaho Code § 19-4906(c) authorizes summary disposition of an application for post-conviction relief. Summary dismissal of an application pursuant to I.C. 19-4906(c) is the procedural equivalent of summary judgment under I.R.C.P. 56. *State v. LePage*, 138 Idaho 803, 806 (Ct. App. 2003). Summary dismissal of an application is permissible when “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law”. I.C. § 19-4906(c). If such a genuine issue of material fact is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763 (Ct. App. 1991); *Ramirez v. State*, 113 Idaho 87, 89 (Ct. App. 1987).

Conversely, the “application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal.” *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2002) *review denied* (2003); *LePage*,

138 Idaho at 807 (citing *Roman*, 125 Idaho at 647); *Follinus v. State*, 127 Idaho 897 (Ct. App. 1995); *Stone v. State*, 108 Idaho 822, 826 (Ct. App. 1985). Allegations are insufficient for the grant of relief when they do not justify relief as a matter of law. *Stuart v. State*, 118 Idaho 865, 869 (1990); *Cooper v. State*, 96 Idaho 542, 545 (1975); *Remington v. State*, 127 Idaho 443, 446-47 (Ct. App. 1995).

Bare or conclusory allegations, unsubstantiated by any facts, are inadequate to entitle a petitioner to an evidentiary hearing. *Roman*, 125 Idaho at 647; *Baruth v. Gardner*, 110 Idaho 156, 159 (Ct. App. 1986); *Stone*, 108 Idaho at 826. If a petitioner fails to present evidence establishing an essential element on which he bears the burden of proof, summary dismissal is appropriate. *Mata v. State*, 124 Idaho 588, 592 (Ct. App. 1993).

III. ANALYSIS

Reviewing the record in this case and the assertions made by Mr. Earl it is apparent that this is a matter of law and that no material facts are in dispute. There is no dispute as to the dates that Mr. Earl was imprisoned and the dates he was on probation. Rather, the dispute is centered on whether the time Mr. Earl was on probation or parole is to be considered as credit for time served. Mr. Earl claims that his assertion is supported on five different grounds, which shall be addressed in order.

A. Violations of I.C. §§ 19-2603 and 20-209A

Mr. Earl asserts that to not include his time on probation or parole would be violations of I.C. §§ 19-2603 and 20-209A, as he was not voluntarily absent from the control of the board of correction while on probation. It is clear from Mr. Earl's assertion regarding control that he has misinterpreted the plain language of the statutes and has

ignored the controlling authority; *Taylor v. State*, 145 Idaho 866 (Ct.App.2008) and *State v. Sutton*, 113 Idaho 832 (Ct.App.1987) are directly contrary to petitioner's claim.

I.C. § 20-209A states:

When a person is sentenced to the custody of the board of correction, his term of confinement begins from the day of his sentence. A person who is sentenced may receive credit toward service of his sentence for time spent in physical custody pending trial or sentencing, or appeal, if that detention was in connection with the offense for which the sentence was imposed. The time during which the person is voluntarily absent from the penitentiary, jail, facility under the control of the board of correction, or from the custody of an officer after his sentence, shall not be estimated or counted as a part of the term for which he was sentenced.

The plain language of this statute makes it clear that time spent on probation or parole is not to be included as credit for time served. Probation and parole are times that a person is voluntarily absent from a facility, jail, or penitentiary that is under the control of the board of corrections. The language is obvious that it is a physical structure (i.e. penitentiary, jail, or facility) that must be under the control of the board of correction which a person must be voluntarily absent from. The statute makes no mention of any individual person being under the control of the board of correction as Mr. Earl asserts. Also being on probation or parole is not being under the custody of an officer, as custody and supervision are two very different concepts.

Under the plain language of I.C. 20-209A it is obvious that probation and parole are considered being voluntarily absent from a physical structure that is under the control of the board of correction and that it is not being under the custody of an officer. Mr. Earl's perverted interpretation of the statute has no legal support, and Idaho case law is clear that Mr. Earl's time on supervised probation and parole does not qualify as credit

for time served. *See* I.C. §18-309; I.C. §19-2603; *see also Taylor v. State*, 145 Idaho 866, 869-870 (Ct.App.2008); *State v. Sutton*, 113 Idaho 832 (Ct.App.1987).

B. Violation of the Double Jeopardy Clause

Mr. Earl asserts that not having his time on probation and parole calculated as part of his credit for time served would in effect extend the length of his maximum sentence, and as such is a new punishment for the same crime. He claims that his probation/parole violations were matters involving the same parties from his original sentencings on the underlying crimes and that the issues had been previously determined by a valid and final judgment. For these reasons, Mr. Earl asserts that his United States 5th Amendment right against double jeopardy has been violated. This is incorrect.

The United States 5th Amendment right against double jeopardy protects a person from being prosecuted a second time for the same offense after acquittal or conviction. It also protects an individual from multiple punishments for the same offense.

In this case, Mr. Earl received a unified sentence of ten years during the original sentencing, a sentence that was later suspended when Mr. Earl was put on probation. Mr. Earl's probation was revoked after he violated the terms and conditions of probation resulting in the imposition of the original sentence. The same occurred when his parole was revoked.

In no way is this prosecuting Mr. Earl a second time for the same offense, nor is it another punishment for the same offense. Rather, Mr. Earl was given an opportunity to avoid the imposition of his original sentence; an opportunity that he squandered by violating probation. As such, Mr. Earl's claim that his United States 5th Amendment right against double jeopardy was violated has no legal support and is dismissed.

C. Violation of 14th Amendment Rights

After review of this matter, this Court has found no violation of Mr. Earl's 14th Amendment Rights. Mr. Earl was afforded due process in every action against him and the court acted lawfully throughout the course of this matter. Mr. Earl has offered no legal support for this claim and as such it too is dismissed.

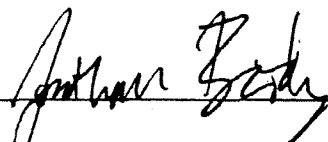
D. Violation of Sentencing Reform Act of 1984

Mr. Earl's claim of a violation of the Sentencing Reform Act of 1984 is based on his misunderstanding of the law and he offers no legal support to help his cause. The court lawfully imposed a sentence and then lawfully suspended that sentence to give Mr. Earl the opportunity to prove himself on probation. After Mr. Earl failed on probation he then had the original sentence imposed. All of the court's actions were in accordance with the Sentencing Reform Act of 1984. Mr. Earl's mischaracterization of the legal precedent regarding this Act offers no support whatsoever for his claims and as such this claim is dismissed.

IV. CONCLUSION

After review of the record and finding no genuine issue of material fact, this court finds that summary dismissal is appropriate in this matter. The legal merits of this case all fall in favor of the State, and as such their Motion for Summary Dismissal is GRANTED.

Dated this 15th day of February, 2012


Jonathan Brody, District Judge

CERTIFICATE OF MAILING

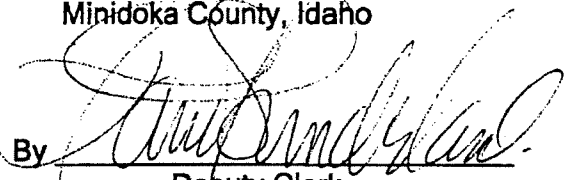
I, Janet Sunderland, the undersigned authority, do hereby certify that I mailed, by United States Mail on Feb 15, 2012 one copy of the: MEMORANDUM DECISION as notice pursuant to Rule 77(d) I.C.R. to each of the following:

Prosecuting Attorney: Michael Tribe - *Email*

Defense Counsel: Public Defender - *Email*

Idaho Department of Corrections - *Email*

Janet Sunderland
Deputy Clerk of the District Court
Minidoka County, Idaho

By 
Deputy Clerk