UIdaho Law
Digital Commons @ UIdaho Law

Not Reported | Idaho Supreme Court Records & Briefs

11-28-2012

Earl v. State Appellant's Brief Dckt. 39751

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation
"Earl v. State Appellant's Brief Dckt. 39751" (2012). *Not Reported*. 792.
https://digitalcommons.law.uidaho.edu/not_reported/792

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

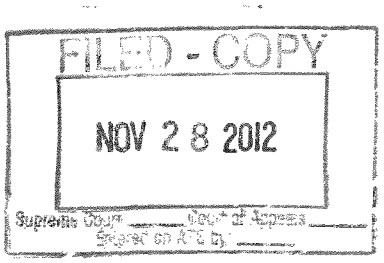
Supreme Court Docket No. 39751-2012
Minidoka County Case No. CV-2011-697

DUAINE FREDRICK EARL,
Petitioner/Appellant,

vs.

STATE OF IDAHO,
Respondent.

APPELLANT'S BRIEF



Appealed from the District Court of the Fifth Judicial
District of the State of Idaho
in and for Minidoka County

Honorable JONATHAN BRODY, Fifth District Judge

Attorney for Respondent, Idaho Attorney General,
Lawrence Wasden, P.O. Box 83720 Boise, ID. 83720

In Propria Persona, Duaine Fredrick Earl, 1462 A
South 1900 East, Hazelton, Idaho 83335

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

The nature of this case involves numerous causes and violations of Appellant's constitutional rights, including,but not limited to, the right to effective assistance of counsel throughout all legal proceedings.

Petitioner/Appellant maintains and asserts he has protection and certain undenialable rights under the United States and Idaho State Constitutions, and that those rights are being systematically violated and have been since the onset of all legal proceedings by persons acting under color of law.

ISSUES PRESENTED ON APPEAL

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.

ARGUMENT

It is the contention of Petitioner/Appellant with respect to the issues presented on appeal that he has been plagued from the onset of the State's case with ineffective assistance of counsel.

Ineffective assistance of counsel manifested itself early on when appellant was coerced into changing his plea of innocence to one of guilty through subjugation by creation of fear by original counsel appointed to represent him in this matter without benefit or any attempt to mitigate or exculpate him, which is coercion & a failure to act in a responsible and effective manner. Black's law defines coercion in part as: implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse. A person is guilty of coercion if , with purpose to unlawfully restrict another's freedom of action to his detriment, take or withhold action as an official, or cause an official to take or withhold action.

In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court held that the Sixth Amendment right to counsel attaches to "critical stages" of pretrial proceedings. Critical stages are those points in a criminal proceeding when an attorney's

presence is necessary to secure the defendant's right to a fair trial. Id. at 224-27; see Powell v. Alabama, 287 U.S. 45, 57 69 (1932) (period from arraignment to trial is "perhaps the most critical period of the proceedings" during which defendant "requires the guiding hand of counsel).

In this case there is no guiding hand which is assertion that encompasses counsel appointed to represent appellant at the post-conviction and appellate levels by Appellate Public Defender and Mini-Cassia Public Defender Office.

This matter has a plea agreement attached to it based on coercion and policies, customs and practices without affording the Appellant the opportunity to fully exercise his rights, including but not limited to rights to due process and equal protection under constitutional law.

Moreover, there are instances of ineffective representation at the post-conviction and appellate stages of this case. For example, the Addendum Brief filed with the Fifth District Court for Minidka County on behalf of the Appellant, by the Mini-Cassia Public Defender Office briefed the court on The Correct Standard for Determination on an Award of Credit for Time Served. Public Defender supports his position with numerous cites to Idaho Statute and state case law. Please review Exhibit A Addendum

Brief.

However, he fails to brief the Court on, or mention any of Appellant's other claims as out-lined in the Appellant's Petition and Affidavit in Support of Post-Conviction Relief.

Contrary to failures of the Addendum Brief to address any of his claims is the Appellant's Petition where contained therein are numerous assertions pointing towards cognizable claims, as well as written and stated in a fashion that should be liberally construed in a light most favorable with latitude extended that every person whom proceeds pro-se enjoys under existing case law. Please review Exhibit B Petition and Affidavit in Support.

Furthermore, the public defender does not discuss with him amending or augmenting to his Petition in a manner strengthening the issues within it. Additionally, Appellant takes issue with legal representation provided and/or lack thereof, from the Idaho State Appellate Office. Again, an example where Appellant's Petition is not viewed in a light most favorable to him and there materializes the same problem as previous, in regard to failures to act either through a lack of information or making any inquiry, and/or lack of communication.

Where sufficient gathered information through inquiry and communication, attorney to client should occur, but instead, in effect, the appellate defender dismisses the Appellant's Petition by having filed a motion with this Court for Leave to

Withdraw on the grounds it has no merit, thereby throwing him and any claims to relief he may have been entitled to thrown to the wayside. Please See Exhibit C Order appointing Appellate Defender.

The Supreme Court has stated, "It is now established beyond doubt that prisoners have a constitutional right of access to the Courts." Bounds v. Smith, 430 U.S. 817, 821, 97 S.Ct. 1491 (1977) The courts have cited the Due Process Clause, the Equal Protection Clause, the First Amendment, and the Privileges and Immunities Clause of Article IV of the Constitution as the basis for those rights. MURRAY V. Giarratano, 492 U.S. 1, 11 n. 6, 109 S.Ct. 2765 (1989).

The right to appointed counsel is required at criminal trial and appellate proceedings and to civil proceedings that may deprive a non-prisoner of liberty. See Murray v. Giarratano, 492 U.S. at 7, and Lassiter v. Dept. of Social Services, 452 U.S. 18 101 S.Ct. 2153 (1981).

Prisoners, Persons alike, must have court access that is "adequate, effective, and meaningful ." Bounds v. Smith, id. at 822. All categories of prisoner/persons are entitled to court access, and that right extends to Post-conviction proceedings, habeas corpus petitions, civil rights actions and other civil proceedings. Bounds v. Smith, 430 U.S. at 827 ("original action seeking new trials, release from confinement or vindication of fundamental rights").

II. Article 4 Sections 1 and 2.

Article 4 Section 1 states: Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts,records and proceedings shall be proved, and the effect thereof.

Article 4 Section 1., Opened to interpretation should be as an open door swinging both ways. The documents entitled Court Minutes, (attached hereto) do not reflect records of a transcript and/or recorded minutes that could be construed as records given to Full Faith and Credit.

On the contrary, they are records of a judicial proceeding recorded minutes that are vague, lacking specifics and clarity. i.e. @ Exhibit Also supporting this contention is verbal communication from public defender and the court found in the Court Minutes at a status hearing 10/3/2011. i.e. Exhibit D at pg. 63. It reads in part: Court explains prior employment with Minidoka Prosecutor and to discuss with client if any concern.

However, the record fails to make any further mention of it, or whether or not Appellant was made aware of the fact that the judge had ascended to his position while employed with the minidoka Prosecutor, or whether the issue was resolved through agreement, if any. This creates a thought where a situation requiring the Appellant's legal consent, very well could have

had dire consequenes to his ability to exercise his rights, including but not limited to his right of access to the courts, all possibly generated by official interests that are favorable to the state.

Article 4 Section 2. @ (1) states in part: The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The Privileges & Immunities Clause is a foundation for a U.S. Constitutional right of access to the courts. i.e. Murray v. Giarratano, 492 U.S. 1, 11 n. 6, 109 S.Ct. 2765 (1989).

III. Issues of Fifth and Eighth Amendments, Article 1 Section 6 Idaho State Constitution First Amendment, & Rights retained by the people under 9th, 10th Amendments to the U.S. Constitution and Idaho State Constitution Article 1 Sections 1, 13, and 18.

In some cases, prisoners have rights under state constitutions that are more extensive than federal constitutional rights. i.e. Cooper v. Morin, 49 N.Y.2d 69 (1979), cert. denied, 446 U.S. 984 (1980), and Block v. Rutherford, 468 U.S. 589 (1984). Several state constitutions support a right to rehabilitation, or more extensive due process rights than the federal constitution provides.

The Appellant contends that serving a state (10) year sentence running concurrently with another, plus (10) year consecutive and (20) year installment plan in a system in use of policies, customs and practices geared towards financial gains and savings

causing (10) year extensions to further state supervision is in effect, additional punishments to those already inflicted by & through policies, customs or practices causing extreme mental distress and confusion, and emotional and physical pain and is tantamount to violations of the Fifth and Eighth Amendments and contrary to Article 1 Sections 1, 6, 13, and 18. of the Idaho State Constitution.

To violate the Eighth Amendment, deprivations of basic needs must be serious enough to amount to the "wanton and unnecessary infliction of Pain." Rhodes v. Chapmen, 452 U.S. at 347; accord, Wilson v. Seiter, 111 S.Ct. at 2324. However, they need not inflict physical injury for e.g., Hicks v. Frey, 992 F.2d 1450, 1457 (6th Cir. 1993) ("Extreme conduct by custodians that causes severe emotional distress is sufficient."); Scher v. Engelke,943 F.2d 921, 924 (8th Cir. 1981) (evidence of "fear, mental anguish and misery" can establish the requisite injury for an Eighth Amendment claim), cert. denied, 112 S.Ct. 1516 (1992), or cause lasting or permanent harm. Boretti V. Wiscomb, 930 F.2d 1150, 1154-55(6th Cir. 1991).

Conditions that are physically and mentally harmful, but serve a legitimate penological objective, such as restrictions in high security units, may not violate the Eighth Amendment. i.e., e.g. Anderson v. Coughlin, 157 F.2d 33, 36 (2d Cir. 1985); Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980).

Contrariwise, one court has held that it is unconstitutional to inflict "serious psychological pain" on inmates to serve a "minor [correctional] concern," "routine and automatic security concerns," or "pragmatic interests of lesser significance." See Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993)(en banc).

At least one other federal appeals court has held that Eighth Amendment claims may be supported by "evidence of a serious or insignificant physical or emotional injury," adding that if sufficient pain was inflicted to violate the Eighth Amendment, such injury would result. Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir.), cert. denied,114 S.Ct. 393 (1993).

The Eighth Amendment standard "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Rhodes v. Chapmen, 452 U.S. at 346, quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590 (1958); accord, Helling v. McKinney, ___ U.S. ___, 113 S.Ct. 2475, 2480 (1993).

The courts have not mentioned much about how these standards evolve. However, at least one court has stated that standards of decency rise with society's standard of living. Davenport v. DeRobertis, 844 F.2d 1310, 1314-16 (7th Cir. 1988), cert.denied, 488 U.S. 908 (1989).

IV. Causations and Double jeopardy
Due process and Time Served

Appellant maintains that time spent on parole up to the moment and disposition as to a finding that a parole violation has been established, can be credited towards time served. In other words, the appellant, acting in good faith can be awarded time served for each day spent on parole, served in good faith, by the Idaho Board of Pardons and Parole up to a finding of fact establishing a violation of parole has occurred.

A) Liberty Interests

The Idaho Board of Pardons and Parole exists not only for conducting parole hearings but also to pardon,commute,awarding credit for time served and supervise persons released to parole pursuant to parole statutes. However, the federal constitution does not require states to maintain a parole system and does not create a right to parole release. Greenholtz v. Inmates of the Nebraska Penal Correctional Complex, 442 U.S. 1, 7, 99 S.Ct.2100 (1979); also Inmates v. Ohio State Adult Parole Auth., 929 F.2d 233, 238 (6th Cir. 1991). There is no constitutionally protected right to parole release or to due process of law in release proceedings unless state statutes or regulations create a liberty interest in parole release. See, e.g., In re Trantino, 177 N.J. Super. 499, 427 A.2d (1981) (legislature is obligated by state constitution to provide for parole).

Idaho State Constitution Article 1 Sections 1, 2, 13 and 18 contain mandatory language therein creating expectations that further defending liberty, special privileges, liberty through due process of law with justice freely administered to every person with remedies afforded in injury of person, character, and with rights and justice administered without denial, delay or prejudice. And see, Exhibit IDOC Handbook @ pg. 34, # 5 in respect to directions toward rehabilitation. Appellant asserts that he has served a total of 76 months of incarceration, of a 120 month sentence, leaving (44) months. The Idaho Board of Pardons and Parole have jurisdiction over this matter and can commute and/or provide an award of time served for the remainder, of the sentence based on time served while under strict parole supervision performed in good faith with a reccomendation from this Court in reflection of the same.

B) Double Jeopardy, Cruel and Unusual Punishment

Appellant remains dedicated to the contention that a (10) yr. sentence running concurrently with another, with (10) years added under strict parole supervision amounts to violation of the double jeopardy clause and constitutes cruel and unusual punishment based on policies, customs and practices of the IDOC and the state attorney generals office.

Those whom directly participate in constitutional violations may be held answerable for their actions. See, e.g., Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 559-61 (1st Cir. 1988) (holding Director of Penal Institutions, Corrections Administrator and jail superintendent liable for their roles in placing a mentally inmate in general population where there was no psychiatric care), cert. denied, 488 U.S. 823 (1988); Martin v. Lane, 766 F.Supp. 641, 649-50 (N.D.Ill. 1991)(an allegation that the warden ordered a lockdown and the departmental director approved it sufficiently alleged their personal involvement in the resulting constitutional deprivations).

Officials may be held answerable for failures to act if they cause constitutional violations. "Acts of omission are actionable ... to the same extent as acts of commission." Smith v. Ross, 482 F.2d 33, 36 (6th Cir. 1978); accord, Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1976) (medical care claims may be based on "acts or omissions"); Alexander v. Perrill, 916 F.2d 1392, 1395 (9th Cir. 1990) (prison officials "can't just sit on their duffs and not do anything" to prevent violations of rights).

Officials may be held to answer "if they set into motion a series of events" that he or she knew or reasonably should have known would cause a constitutional violation, even if others actually performed the violation. Conner v. Reinhard, 847 F.2d 384, 397 (7th Cir.), cert. denied, 488 U.S. 856 (1988); accord,

Greason v. Kemp, 891 F.2d 829, 836 (11th Cir. 1990) (" a supervisor can be held liable under section 1983 when a reasonable person in the supervisor's position would have known that his conduct infringed on the constitutional rights of the plaintiff, ... even though his conduct was causally related to the constitutional violation committed by his subordinate,....") (footnote and citations omitted).

Those who set policy, write regulations, or give orders may be held answerable even if not directly involved in enforcement of a policy, custom or practice. Redman v. County of San Diego, 942 F.2d 1435, 1446-49 (9th Cir. 1991) (en banc) (Sheriff who tolerated overcrowding and approved a dangerous classification policy could be held liable even though he did not know of the specific danger to the plaintiff; captain who wrote the policy could also be liable, cert. denied, 112 C.Ct. 972 (1992); Boswell v. Sherburne County, 849 F.2d 1117, 1123 (10th Cir. 1988) (sheriff and chief jailer could be held liable for policy of minimizing medical costs), cert. denied, 488 U.S. 1010 (1989).

A policy, custom or practice need not be formal or written to serve as a basis for liability. Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989) (evidence that the Sheriff "implicitly authorized, approved, or knowingly acquiesced" in his subordinates' action could support his liability), cert. denied, 495 U.S. 932 (1990); Smith v. Jordan, 527 F.Supp. 167, 170-71 (S.D. Ohio 1981) (Sheriff might be liable for jails "standard procedures"); Ruiz v. Estelle, 679 F.2d 1115, 1154-55 (5th Cir.

1982) (systemwide injunction against prison system's managers could be entered based on "prevalent" unlawful practices), cert. denied, 460 U.S. 1042 (1983).

"tacit authorization" may be sufficient. Fruit v. Norris, 905 F.2d 1147, 1151 (8th Cir. 1990); Bolin v.Black, 875 F.2d 1343, 1348 (8th Cir. 1989), cert. denied, 110 S.Ct. 542 (1990); Pool v. Missouri Dept. of Corrections and Human Resources, 883 F.2d 640, 645 (8th Cir. 1989).

The Double Jeopardy Clause protects a defendant from even the "risk" of being punished twice for the same offense. Abney v. U.S. 431 U.S. 651, 660-62 (1977) (double jeopardy challenges immediately appealable because Double Jeopardy Clause protects against even "risk" of conviction, including "personal strain, public embarrassment, and expense of a trial more than once for the same offense").

Although a guilty plea waives some constitutional claims, it does not necessarily waive a claim of double jeopardy. U.S. v. Kunzman, 125 F.3d 1363, 1365 (10th Cir. 1997) (defendant's entry of unconditional guilty plea does not waive right to assert a double jeopardy claim), cert. denied, 118 S.Ct. 1375 (1998).

In sentencing, the Double Jeopardy Clause prohibits courts from punishing defendants twice for the same. Ex parte Lange, 85 U.S. (18 Wall.) 163, 176 (1873)(defendant who suffered full punishment for offense could not be subjected to another).

V. CONCLUSION

The claims are prima facie and not beyond the realm of possibilities. This is not a case where it starts and goes nowhere . Therefore, Appellant Respectfully Requests and Prays Cousel be restored to him by this Court's appointment and the claims as stated be allowed to move forward vindicating his legal rights and allowed to encompass all phases of litigation from beginning to end.

We Request as well, that this Brief be reviewed under Pro-Se Standards, viewed liberally in a light most favorable to the Appellant. It is also requested the Court grant the Motion to Augment and Affidavit in support to and in supporting Appellant's Brief and assertions therein. Appellant requests this Court to issue a Declaration stating he has certain constitutional rights and the right to exercise those rights.

We also Request that the Court make a written recommendation to the Idaho Board of Pardon and Parole recommending commuting or providing an award of time served based on the time spent while on supervised parole served in good faith. Requesting as well, that the Court recommend a final discharge on both and/or one of his cases. In conclusion, a request as well to be granted leave to amend or bring the case in a more appropriate legal vehicle, or in the alternative any such relief the Court deems proper.

Respectfully Submitted this twentyeighth day of November 2012.

By Duane F Earl
the Appellant

CERTIFICATE OF SERVICE

I do Hereby Certify that I caused a true and correct copy of the foregoing Appellant's Brief to be served, by the method indicated below, and addressed to the following:

On the 28th day of November 2012

TO: Idaho Attorney General
Lawrence WAsden
P.O.Box 83720
Boise, ID. 83720

via the United States Postage Service,

By Duane F Earl
the Appellant

CV-2011-697

2012 FEB -3 AM 11:58

PATTY O. WELLER, CLERK

DEPUTY

Dennis R. Byington, Esq., ISB No. 2839
MINI-CASSIA PUBLIC DEFENDER OFFICE
111 West 15th Street
P. O. Box 188
Burley, ID 83318
(208) 878-6801

Attorney for Defendant/Petitioner

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

STATE OF IDAHO, Plaintiff vs. DUAINE EARL, Defendant	Case No. CR 1998-1107*D ADDENDUM BRIEF
DUAINE EARL, Petitioner vs. STATE OF IDAHO, Respondent.	Case No. CV 2011-697*D

COMES NOW the Defendant/ Petitioner, Duaine Earl, by and through his attorney of record, Dennis R. Byington, and submits the following:

The motion and affidavit of Defendant/Petitioner contains a supporting brief and asks for credit for time served. The current status of Idaho Law as briefed by the Idaho State Public Defender's Office is as follows:

Exhibit A

BRIEF

The Correct Standards For Determining An Award Of Credit For Time Served

There are various statutes that address credit for time served in Idaho, including I.C. §§ 18-309, 19-2603, and 20-209A. When read together, these statutes provide different standards for applying credit for time served depending upon whether the time was served before or after the judgment is entered, and whether the time was served "for" or "in connection with" the offense for which sentence was imposed. Because the credit for time served sought is credit for time served post-judgment, after the service of a bench warrant for a probation violation, I.C. § 19-2603 is the applicable standard governing his request.

A question of statutory interpretation is a question of law over which the Idaho Supreme Court exercises free review. *State v. Yager*, 139 Idaho 680, 689, 85 P.3d 656, 665 (2004) (citation omitted). The Supreme Court interprets statutes according to the plain, express meaning of the provision in question, and will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws. *Id.* (citation omitted). Further, "It is a fundamental law of statutory construction that statutes that are in *pari material* are to be construed together, to the end that the legislative intent will be given effect." *Id.* At 689-90, 85 P.3d at 665-666 (citation omitted). Because I.C. §18-309, § 19-2603, and § 20-209A all address credit for time served, the statutes must be read in *pari material*. "Statutes in *pari material* (pertaining to the same subject), although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other." *State v. Pedraza*, 101 Idaho 440, 442, 614 P2d 980, 982 (1980) (citation omitted).

1. The First Sentence of I.C. § 18-309 Addresses Only Prejudgment Incarceration And Awards Credit Only where the Prejudgment Incarceration Is A Consequence Of Or Attributable To the Charge Or Conduct For Which The Sentence Is Imposed

Idaho Code Section 18-309 is comprised of two sentences, which state:

> In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

I.C. § 18-309.

Each of these sentences addresses a distinct time period. The first sentence guarantees a defendant that credit for time served will be reflected "*in the judgment for* any period of incarceration *prior to the entry of judgment,* if such incarceration was for the offense or an included offense for which the judgment was entered." I.C. § 18-309 (emphasis added). By its own terms, this sentence of section 18-309 addresses credit for "any period of incarceration *prior to the entry of judgment*," not to post-judgment incarceration. Id.

Additionally, that same sentence requires that the credit authorized by section 18-309 be reflected "in the judgment...." I.C. § 18-309. A "judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence." *State v. Thomas*, 146 Idaho 592, 593, 199 P.3d 769, 770 (2008) (quoting I.C.R. 33(b)). Thus, because section 18-309 requires that credit for time served awarded under the first sentence of that section be reflected in the judgment, and the only credit for time served that can be reflected in the judgment is that which occurs prior to the issuance of the

judgment itself, the first sentence of I.C. § 18-309 can only logically apply to prejudgment time served.

Notably, the Idaho Court of Appeals has recognized that the first sentence of I.C. § 18-309 "deals with any period of incarceration in a county jail while the defendant is awaiting disposition of the charge," and that under that provision credit is afforded "for any *prejudgment* incarceration that is attributable to the offense for which the sentence is imposed." *State vs. Albertson*, 135 Idaho 723, 725, 23 P.3d 797, 799 (Ct. App. 2001); se also *State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992) (analyzing credit for prejudgment incarceration pursuant to § 18-309, and post-judgment incarceration accepted in order to receive probation as a condition of probation imposed pursuant to I.C. § 19-2601(2)); *State v. Buys*, 129 Idaho 122, 922 P.2d 419 (Ct. App. 1996) (denying an award of credit sought pursuant to I.C. § 18-309 for prejudgment time served voluntarily as a condition of probation).

Further, this first sentence of I.C. § 18-309 contains a caveat. Credit for pre-judgment incarceration is awarded only if "such incarceration was for the offense or an included offense for which the judgment was entered." I.C. § 18-309. This "means that the right to credit is conferred only if the prejudgment incarceration is a *consequence* of or *attributable* to the charge or conduct for which the sentence is imposed." *State v. Vasquez*, 142 Idaho 67, 68, 122 P.3d 1167, 1168 (Ct. App. 2005) (citation omitted). "Thus, there must be a causal effect between the offense and the incarceration in order for the incarceration to be 'for' the offense, as the term is used in I.C. § 18-309." *Id.*; see also *State v. Hom*, 124 Idaho 849, 865 P.2d 176 (Ct. App. (1994) (addressing a request for prejudgment credit for time served and denying credit because the prejudgment

incarceration was not caused by or attributable to the charge for which the sentence was imposed); *State v. Hale*, 116 Idaho 763, 779 P.2d 438 (1989) (addressing a request for prejudgment credit for time served and denying credit because the prejudgment incarceration was not attributable to the charge for which the sentence was imposed).

An additional caveat to prejudgment credit was found to exist by the Idaho Supreme Court in *State v. Hoch*, 102 Idaho 351, 630 P.2d 143 (1981). There, the court found that a person who had served prejudgment incarceration on two charges, and who had received consecutive sentences on those charges, could only receive credit for time served on one of the sentences. *Id.* At 352, 630 P.2d at 144. This was so because the Court found "no intent of the legislature that a person so convicted should have that credit pyramided simply because he was sentenced to consecutive terms for separate crimes." *Id.* However, "In the case of concurrent sentences, the period of presentence confinement should be credited against each sentence." *State v. Hernandez*, 120 Idaho 785, 386-87, 820 P.2d 380, 791-92 (Ct. App. 1991).

2. The Second Sentence Of I.C. § 18-309 Addresses Post-Judgment Incarceration And Awards Credit For time Served For *Any* Time Served After The Sentence Is Commenced

According to the Second Sentence of I.C. § 18-309, "the remainder of the term [of imprisonment] commences upon the pronouncement of sentence...." I.C. § 18-309. The Court of Appeals has recognized that this sentence "addresses the time served after entry of judgment." *Albertson*, 135 Idaho at 725, 23 P.3d at 799. That court found that this second sentence requires "credit against a sentence for *any* time spent in custody after the entry of judgment, except periods of county jail incarceration that were served as a condition of probation." *Id.* Similarly, in applying I.C. § 18-309 to a claim for post-

judgment incarceration, the Idaho Supreme Court has found that it "notably does not base credit on any factor other than actual incarceration...." *Taylor v. State*, 145 Idaho 866, 869, 187 P.3d 1231, 1244 (2008); see also *State v. Machen*, 100 Idaho 167, 595 P.2d 316 (1979) (finding that credit for time served during a period of retained jurisdiction should be credited towards a sentence under the terms of I.C. § 18-309), *overruled on other grounds by Rhodes v. State*, _____ Idaho _____, _____ P.3d _____ (March 17, 2010).

Admittedly, the Court of Appeals *may* have previously applied the "for the offense" limitation found in I.C. § 18-309 to a claim for credit for time served post judgment. See *State v. teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983). However, whether the court did is unclear. In *Teal*, a probationer absconded from supervision in Idaho and eventually was arrested in California on unrelated charges. *Id.* At 502, 670 P.2d at 909. Because a bench warrant had been issued on the Idaho probation violation allegations, the California authorities "kept the [Idaho] sheriff informed of the pending criminal charges in California and of [Teal's] ultimate conviction." *Id.* At 503, 670 P.2d at 910. At some point, the Idaho sheriff filed a "detainer" with the California authorities, and Mr. Teal requested a hearing on his Idaho probation violation allegations. *Id.* Mr. Teal was delivered to the Idaho sheriff while still serving his California sentence. *Id.* Mr. Teal subsequently sought credit for all time served "since he was arrested and confined in California." *Id.* at 504, 670 P.2d at 911. The Idaho Court of Appeals found that Teal was not entitled to credit for any time spent in California custody because, "Teal's arrest and confinement in California, before he was delivered to the Idaho authorities, *had nothing to do with the Idaho convictions*." *Id.* (emphasis added) (citing I.C. § 18-309, 19-2602, and 19-2603).

Because the Idaho Court of Appeals cited both section 18-309 and section 19-2603, and because the court never mentioned whether Teal was ever served with the bench warrant that had been issued, the exact basis of the Court of Appeals' opinion is unclear. Although Teal *may* have been served with the bench warrant at some point, it is equally possible he was not. The Court of Appeals finding that Teal's incarceration in California "had nothing to do with the Idaho convictions," tends to indicate that the bench warrant was never served. Although at some point the Idaho sheriff filed a "detainer" with the California authorities, this could have simply been a format request that California notify Idaho of Mr. Teal's imminent release from custody, as opposed to a request that Teal be served with the warrant for his arrest. *See State v. Bronkema*, 109 Idaho 211, 214, 706 P.2d 100, 103 (Ct. App. 1985) (finding that a "detainer" as used in I.C. § 19-5001 entails written communication from a receiving state requesting that the sending state notify the receiving state of the prisoner's imminent release from custody, or to hold the prisoner after his release from the receiving state). Given that the basis of the Court of Appeals' decision is unclear, and the holdings of *Albertson* and *Taylor*, Teal should not be read to hold that the limitation articulated in the first sentence of I.C. § 18-309 is applicable to claims for credit for time served post-judgment and granted pursuant §19-2603. Alternatively, to the extent *Teal* is read to apply the "for the offense" limitation articulated in the first sentence of § 18-309 as applicable to claims for credit for time served post-judgment, that holding should be found to be incorrect and not the law of Idaho as it is in contravention of the plain language of the statute and the Idaho Supreme Court's holding in *Taylor*.

3. Section 19-2603 Addresses Post-Judgment Incarceration When A Defendant Is Involuntarily Incarcerated While On Probation

The Idaho Court of Appeals has recognized that I.C. § 18-309, "does not directly address the question of credit for time served *after* an entry of judgment for defendants, who...have been placed on probation but ultimately have had their probation revoked. *State v. Lively*, 131 Idaho 279, 280, 954 P.2d 1075, 1076 (1998). Rather, I.C. § 19-2603 specifically addresses credit for time served when a previously suspended sentence is executed, or when a person has served a period of incarceration for probation violations during a period of withheld judgment. *See* I.C. § 19-2603; *Buys*, 129 Idaho at 127-28, 922 P.2d at 424-25 (granting credit for time served pursuant to I.C. § 19-2603 for pre-judgment time involuntarily served during a period of withheld judgment after service of the "functional equivalent" of a bench warrant). In relevant part, I.C. § 19-2603 state, "the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence, *but the time of the defendant's sentence shall count from the date of service of such bench warrant.*" *Id.* (emphasis added).

Unlike I.C. § 18-309, the plain language of I.C. § 19-2603 does not require that credit granted for time served under this section be reflected in the judgment. This makes sense because the Idaho Supreme Court has specifically found that an "order revoking probation is not a judgment." *Thomas*, 146 Idaho at 594, 199 P.3d at 771. Rather, when the trial court has sentenced the defendant, but suspended execution of the sentence and placed the defendant on probation, upon revocation of the probation "the original judgment shall be in full force and effect and may be executed according to law...." I.C. § 19-2603. Because a new judgment is not issued, credit granted for time served post-judgment cannot appear in the judgment.

Further, unlike I.C. § 18-309, the plain language of I.C. § 19-2603 does not limit an award of credit for time served to those instances where the post-judgment incarceration "was for the offense or an included offense for which the judgment was entered." *Compare* I.C. § 18-309 and I.C. § 19-2603. Rather, I.C. § 19-2603 focuses solely on the service of the bench warrant issued for a probation violation. See I.C. §§ 19-2602, -2603. "Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." *Yager*, 139 Idaho at 690, 85 P.3d 666 (citing *Kopp v. State*, 100 Idaho 160, 164, 595 P.2d 309, 314 (1979)).

Thus, the fact that the Idaho legislature declined to include the additional language that the time be served solely for the offense for which the judgment was entered in I.C. § 19-2603 is significant to show that no such requirement applies when the time is served after service of a bench warrant on a probation violation. Rather, in conformance with both the second sentence of I.C. § 18-308 and 19-2603, once a sentence commences, credit is awarded for "*any* other periods of post-judgment incarceration." Served "from the date of the service of [a probation violation] bench warrant." *Albertson*, 135 Idaho at 725, 23 P.3d at 799 (emphasis added); I.C. §§ 19-2602, -2603.

4. Section 20-309A Addresses Credit For Time Served Both Before And After Judgment And Awards Credit For All Time Spent In Physical Custody If The Detention Was Merely In Connection With The Offense For Which Sentence Was Imposed

Section 20-209A, which appears in the section of the code relating to the State Board of Corrections, further addresses credit for time served both before and after judgment. The section states:

> When a person is sentenced to the custody of the board of correction, his term of confinement begins from the date 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 part of the term for which he was sentenced.

I.C. § 20-209A (emphasis added).

This section can be read harmoniously with sections 18-309 and 19-2603. Section 20-209A recognizes that credit for any time in physical custody may be awarded when the detention is merely "in connection with the offense;..." I.C. § 20-209A. This language is broad enough to encompass both the mandatory award of credit for time served prejudgment when the incarceration is "for" the offense, and post-judgment following the service of a bench warrant. See I.C § 18-308, § 19-2603. In addition, by utilizing language broad enough to encompass both, the legislature recognized that 18-309's "for" the offense standard was not the only applicable standard, but rather that some credit could be awarded when the incarceration did not meet that standard, i.e. § 19-2603's date of service of a bench warrant standard

5. Sections 18-309, 19-2603, And 20-209A Can Be Read Harmoniously

When I.C. § 18-309, § 19-2603, and § 20-209A are read together it is apparent that credit for time served is awarded as follows:

1) Prejudgment incarceration is awarded when:

   (a) the incarceration was for the offense or an included offense for which the judgment was entered (first sentence of § 18-309), or

   (b) if served

      (i) during a period withheld judgment (first sentence of § 18-309; *Buys*, 129 Idaho at 126-27, 922 P2d. at 423-24); and

(ii) served involuntarily (*State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992); I.C. § 19-2601(2)); and

(iii) is served after the service of a bench warrant (§ 19-2603).

(c) If there is more than one sentence for which prejudgment incarceration may be awarded:

(i) credit is awarded on only one sentence if the sentences were ordered to be served consecutively (*State v. Hoch*, 102 Idaho 351, 630 P.2d 143 (1981));

(ii) credit is awarded on all sentences if the sentences are ordered to be served concurrently (*State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991)).

2. Post-judgment incarceration is awarded for any actual incarceration which occurs after the judgment (§ 18-309), so long as the incarceration is in connection with the offense for which the sentence was imposed (§ 20-209A), including when the time is served after service of a bench warrant for a probation violation (§ 19-2603).

3. No credit for time served is awarded for time

(i) during which the defendant is temporarily released from imprisonment (§ 18-309); or

(ii) during which the defendant is voluntarily absent from a penitentiary, jail, or other Board of Correction facility, or from the custody of an officer (§ 20-209A); or

(iii) which is served voluntarily as a condition of probation (*State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992); I.C. § 19-3601(2)).

ARGUMENT

The Order on motion to revoke probation attached as exhibit "A" grants the petitioner credit for time served but no amount of time is included. Our calculation of time for which credit should have been included is 232 days, see exhibit "B". Current law should grant that as credit for time served.

The Petitioner has also asked the court to look at the issue of credit for time while on supervised probation and supervised parole. The parole board does make a determination as to whether to grant credit while on parole or to forfeit that time on parole violations. The petitioner had time forfeited, see exhibit "C". He cites federal law and various state cases and code sections to support his position. We cannot say that his position is totally without merit. We ask the court to review his brief in support of that position.

DATED This 3 day of February, 2012.

MINI-CASSIA PUBLIC DEFENDER OFFICE

By _____
Dennis R. Byington
Attorney for Defendant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of February, 2012, I served a true and correct copy of the foregoing document upon the attorney named below in the manner noted:

Michael Tribe
Deputy Prosecuting Attorney
P.O. Box 368
Rupert, ID 83350

_____ By depositing copies of the same in the United States Mail, postage prepaid, at the Burley Post Office in Burley, Idaho.

_____ By hand delivering copies of the same to the office of the attorney at the address above indicated.

✓ By telecopying copies of the same to said attorney at his/her telecopy number

_____ By delivering a copy thereof to said attorney's mail file or basket at the Minidoka County Courthouse in Rupert, Idaho.

Dennis R. Byington
Attorney for Defendant/Petitioner

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

State of Idaho,
Plaintiff,
vs.
DUAINE FREDRICK EARL
SS# [redacted]
D.O.B. [redacted]
Defendant.

Case No. CR-98-01107*D

ORDER ON MOTION TO REVOKE PROBATION

I. INTRODUCTION

1. The date of disposition on the probation violation is/was November 25, 2002, (hereinafter called disposition date).
2. The State of Idaho was represented by counsel, Alan Goodman, of the Minidoka County Prosecutor's office.
3. The defendant DUAINE FREDRICK EARL, appeared personally.
4. The defendant was represented by counsel, David G. Pena.
5. John M. Melanson, District Judge, presiding.

II. EXISTING JUDGMENT(S) OF CONVICTION

The defendant DUAINE FREDRICK EARL was informed by the Court at the time of the disposition of the nature of his existing judgment(s) of conviction, which is/are:

"EXHIBIT A"
5 Pages

FILED
CASE #

2011 AUG 18 PM 1:44

Inmate Name Duaine Earl
IDOC No. 28970
Address SICI Po Box 8509
Boise, ID 83707

Petitioner

IN THE DISTRICT COURT OF THE 5TH JUDICIAL DISTRICT

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

Duaine F Earl,
Petitioner,

vs.

State of Idaho,
Respondent.

Case No. CV-2011-697

PETITION AND AFFIDAVIT FOR POST CONVICTION RELIEF

The Petitioner alleges:

1. Place of detention if in custody: SICI

2. Name and location of the Court which imposed judgement/sentence: District of Minidoka County, Rupert, ID

3. The case number and the offense or offenses for which sentence was imposed:

   (a) Case Number: CR98-01107

   (b) Offense Convicted: Statutory Rape

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

   a. Date of Sentence: 3/6/2000

   b. Terms of Sentence: 1 Fix 9 Indeterminate [redacted]

Exhibit B

3.

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

[X] Of guilty [ ] Of not guilty

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

[ ] Yes [X] No

If so, what was the Docket Number of the Appeal? ———

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

(a) Violation of Double Jeopardy Clause

(b) Violation of I.C. 20-209A

(c) Violation of I.C. 19-2603

(d) Violation of this defendant's 14th U.S. Amendment right to access application of Court Rules

(e) Violation of Sentencing Reform Act 1984

8. Prior to this petition, have you filed with respect to this conviction:

a. Petitions in State or Federal Court for habeas corpus? Federal habeas

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 each petition, motion or application was filed:

Federal habeas us district court

habeas 4th district Ada County

Motion Credit for Time Served - Minidoka

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:

(a)_____

_____

(b)_____

_____

(c)_____

_____.

10. Are you seeking leave to proceed in forma pauperis, that is, requesting the proceeding be at county expense? (If your answer is "yes", you must fill out a Motion to Proceed in Forma Pauperis and supporting affidavit.)

[X] Yes [ ] No

11. Are you requesting the appointment of counsel to represent you in this case? (If your answer is "yes", you must fill out a Motion for the Appointment of Counsel and supporting affidavit, as well as a Motion to Proceed In Forma Pauperis and supporting affidavit.)

[ ] Yes [X] No

12. State specifically the relief you seek:

Request all subsequent judgment & convictions entered in this case after March 6th, 2000 be nullified, & that I be given credit for every day served in the custody of the state board of correction which should maintain the full term release date of February 24th, 2010. —This would terminate this case as of that date.

13. This Petition may be accompanied by affidavits in support of the petition. (Forms for this are available.)

DATED this 16 day of August, 20 11.

Duane Earl
Petitioner

STATE OF IDAHO)
) ss
County of Ada)

I Duane Earl, 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.

Duane Earl
Petitioner

SUBSCRIBED AND SWORN and AFFIRMED to before me this 26th day of August, 20 11.

(SEAL)

CAROLYN PUCKETT NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Commission expires: 2-17-15

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16th day of August, 20 11, I mailed a copy of this PETITION FOR POST CONVICTION RELIEF for the purposes of filing with the court and of mailing a true and correct copy via prison mail system to the U.S. mail system to:

Minidoka County Prosecuting Attorney
Po Box 368
Rupert, ID 83350

Petitioner

AFFIDAVIT OF FACTS IN SUPPORT OF POST-CONVICTION PETITION

STATE OF IDAHO)
) ss
COUNTY OF ~~Minidoka~~ Ada CR)

I Duaine F. Earl, being first duly sworn on oath, deposes and says:

On March 6th, 2000 Honorable Judge Hart, in and for The County of Minidoka, Sentenced This Defendant for The crime of Statutory Rape. Imposed Was a 1½ 9 year Unified Sentence That made up an Aggragate (10) year determinate Term of punishment, Pursuant To I.C. 19-2513 The Sentencing Court Set The Maximum Amount of punishment To be Served with The Verbage "Not To Exceed"

Not to exceed 10 years ± date specific

According To I.C. 20-209A This defendant's Term of Confinement began March 6th, 2000 The day of The Sentence. Also This Statute provides That The Time Spent in physical Custody in Connection with The offense for which The Sentence was Imposed may be Credited Toward The Service of The Sentence.

I.C. 20-209A Clearly States That Only

The Time during which The person is Volantacily absent from The penitentary, Jail, facility Under The Control of The board of Corrections, or from The Custody of an officer after his Sentence, Shall not be Estimated or Counted as part of The Term for which he was Sentenced

Pursuant To I.C 20-243 a Copy of The judgement and Conviction was delivered To The State board of Corrections The Same day The defendant was Ordered To Report To The office of probation and parole of The Idaho Department of Corrections.

I.C 20-219 Specifically charges The State Board of Corrections with The duty of Supervising all persons Convicted of a felony placed on probation or Released from The State Penitentary on parole. IN The State of Idaho Probation and parole are The Same form of Punishment. This is further proven by The Standard Condition of Release That are Established in The Idaho department of Corrections Community Corrections Supervisions Handbook for probationers and parolees. (Exibit A)

The Idea That probation and parole in The State of Idaho are equivelant is furthered also by I.C 20-225, Where it Specifically States That any person under The State probation or parole Supervision Shall be required To Contribute not More Than fifty dollars ($50.

per month as determined by The Board of Corrections

The Cost of supervision is The direct and Indirect Costs incurred by The department of Corrections To Supervise probationers and parolee's, and That any failure To pay such Contributions Shall Constitute grounds for The revocation of probation or parole.

I.C. 20-245 States That The State board of Correction Shall have The authority To assign parolee's under The department of Corrections Supervision, probationers under Court Order or department of Corrections Supervision, and offender Residents of Community work centers under The direction and Order of The board of Corrections as Community Service Workers

This Statute clearly distinguishes between Two different forms of probation under Their Control. There are probationers under Court Order, but There are also probationers Under The department of Correction Supervision. Notice how The Verbage between probationers under The department of Corrections Supervision and parolees under The department of Corrections Supervision Contain The exact Same Classificatio This furthers The fact That The Two are equivelant in The State of Idaho, but This Statute also shows That There is a form of probation According To Idaho law That is not The Same as parole.

I.C. 19-2601 is The Idaho Statute That Allows The Sentencing Court To grant probation, or Utilize other Sentencing Alternatives Rather Than Incarcerating a defendant in The State penitentiary. The Statute gives The State four distinct Options during Sentencing.

I.C. 19-2601 Subsection 1 allows The Court To Commute The Imposed Sentence To Confine The defendant in The County Jail.

I.C. 19-2601 Subsection 2 allows The Court To Suspend The execution of The Judgement at The Time of Judgement and place The defendant on probation

I.C. 19-2601 Subsection 3 To withhold Judgement of Such Terms and for such time as it may prescribe and may place The defendant on probation

I.C. 19-2601 Subsection 4 allows The Court To Suspend The Execution of The Judgement at any Time during The first (180) days of a Sentence To The Custody of The State board of Corrections

I.C. 19-2601 Subsection 5 Specifies That The defendant placed on probation That it will be under The Care and Custody of The Board of Corrections

I.C. 19-2601 Subsection 7 Specifically limits The Time a defendant may be placed on probation To The maximum period The defendant might have been Imposed.

Chapter 26 of Idaho Criminal Procedure is The Source of much ambiguity in The Sentences Imposed by The District Courts in The State of Idaho, The Title of The Chapter is "Suspension of Judgement and Sentence and parole Offenders" This would even further prove That Under Title 19 Chapter 26 an Offender may also be placed on Supervision equal To parole.

The Title of I.C. 19-2603 is "Pronouncement and Execution of Judgement after Violation of Parole" I.C. 19-2606 is Titled " Paroled or Suspended Offender — Duty To Report - Order on Report," and The Title o I.C. 19-2607 is " Parole Secured by Misrepresentatio Since it is Obvious That direct Correlation between probation and parole Exists in Idaho law, it is Imperative To properly Break down and define The distinct Sentencing Alternatives.

First we will clearly distinguish The requirement required by law To Implement The Sentencing Alternative I.C. 19-2601 Subsection 3 allows The Court To Suspend Sentence and withhold Judgement, and T place a defendant on a probationary period. This perio

of Probation is limited by Subsection 7 of I.C. 19-2601, To The maximum Term The defendant might have been Imposed, which is Obviously The maximum Sentence Available for The Crime Since The defendant has yet To be Sentenced.

Pursuant To I.C. 19-2601 Subsection 5 The defendant is placed on probation under The Care and Custody of The Board of Corrections. In I.C. 20-245 This is The probationers under Court Order, Since The Sentence was Suspended. Only under This Instance does The defendant Stand To have The Conviction dismissed if He Successfully Completes The Imposed probationary period.

If defendant Violates probation while under a Suspended Sentence pursuant To I.C. 19-2601 Subsection 3 The Courts Can either reinstate probation, or Impose Any Sentence That Originally may have been pronounced. Once The Sentence has been Imposed Only Then do The Other Sentencing Alternatives become Available.

(State V. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978)) Clearly States That "... however, entry of Judgement is required To Implement Some of The Sentencing Alternatives, particularly Those provided in Subsection 1, 2 and 4 of This Section [19-2601]".

In (State V. Pedraza, 101 Idaho 440, 614 P.2d 980, (1980)). The Courts held That, " This Section provides Only That a Trial Court may Suspend The execution of Judgement and does not Authorize The Court To Suspend The Imposition of Sentence"

In State v. Omey, 112 Idaho 930, 736 P.2d 1384 (ct. App 1987)) The Court Stated That "A Sentence is" Imposed when it is Initially pronounced, Even Though Jurisdiction is retained after Subsection 4 of This Section [19-2601] or The Sentence is Suspended.

In (State v. Allen, 2007, 172 P.3d 1150, 144 Idaho 875) The Court Stated That "The Only legally Cognizable Sentence in a Criminal Case is The Actual Oral pronouncment in The presents of The defendant; [redacted] pronounced in Open Court by The Judge, [redacted] appearing in The [redacted].

What all is included by The Term "Sentence" Was Clarified in (State v. Josephson, 124 Idaho 286, 858 P.2d 825) where The Courts Stated "The Term "Sentence" or "Judgement" is Not Synonymous with "Jail", [redacted] Sanctions, Imposed or Suspended by The Court, Including fine, Community Service, [redacted] of driving privileges and Restitution To Victims".

These Case laws make it evident That The Sentence pronounced in Open Court March 6TH, 2000 was imposed on That day and not suspended, In fact in (Franklin V State, 87 Idaho 291, 392 P.2d 552 (1964)) The Court even stated That "an Order withholding Sentence and placing a defendant on probation is not a final Judgement, Since Sentencing is deferred, and is distinguishable from a Judgement Imposing Sentence, which is a final Judgement Through its Execution is Suspended".

Black's law Dictionary defines final Judgement as: -(18C) A Courts last action That Settles The rights of The parties and disposes of all issues in Controversy [redacted] Courts Cand, Some times, Al[redacted] and [redacted] The Judgement.

Since a Suspended Sentence as defined by Blacks law Dictionary States That: - A Sentence postponed so That The Convicted Criminal is not required To Serve Time unless he or She Commits another Crime or Violates Some other Court-Imposed Condition. • A Suspended Sentence in effect, is a form of probation, - also Termed withheld Sentence.

Then it is absolutly Obvious Since The Sentence, CR98-01107 was pronounced, Imposed, and final Judgement was entered According To I.C. 19-2601 That The Sentence was not Suspended.

In (U.S.C.A. Const. Amend. 14. State V. Coassolo, 2001, 136 Idaho 138, 30 P.3d 293) The Courts Stated "Upon the valid Conviction and sentencing of a defendant, the process having been provided, the State may deprive the defendant of his liberty for the term of the sentence pronounced by the district Judge."

This is obvious because the Fourteenth Amendment that is applicable to the States through the Due Process Clause of The 14th Amendment of The United States Constitution as a citizen of The State of Idaho.

The Double Jeopardy Clause of The Fifth Amendment States That no person shall "be subject for The same offense To be twice put in Jeopardy of life or limb." The Clause has been said to provide Three Seperate protections against Second prosecution for The same offense after an acquital, protection against Second prosecution for The same offense after a Conviction, and protection against multiple punishments for the same offense.

In fact (Crist V. Bretz, 437 U.S. at 33) provides That The application of The protection under The Double Jeopardy Clause furthers Societies Interest in protecting The Integrity of final Judgement.

The doctrines of Collateral Estoppel & Res Judicata are both Inherent in The double Jeopardy Clause of The Fifth Ammendment.

Both of These doctrines depict That Once an Issue has been Litigated between Two parties, That Issue is Then "Estopped" for ever being "relitigated" in a future proceeding.

Two Conditions must be Satisfied for The doctrine To Apply First, The Second prosicution must Involve The same parties at The first Trial, Second, The Issue Sought To be foreclosed must have been previously determind by a Valid and final Judgement.

Since both of These requirements were Satisfied at every probation Violation disposition hearing on Case # CR98-01107, These doctrines directly apply The Double Jeopardy clause of The fifth Ammendment To The protection of The final Judgement That was recorded in This Case on March 6th, 2000.

According To (Berger V. Spaulding, 881 F.2d 719, 721 (9th Cir. 1989)) The Court held that "... a prisoner has a Statutory Right To Accurate Computation of This Time and a mandatory Completion Date". Since Sentence was Imposed and final Judgement was entered on Case # CR98-01107, This case law States That dates Can and must be Calculated To determin mandatory Completion Date.

Since I.C. 20-209A Clearly States That "when a person is Sentenced To The Custody of The Board of —

Corrections, his Term of Confinement begins from The day of his Sentence." The Sentence in Case CR98-01107 began on march 6th, 2000 when The Sentence was Imposed according To I.C. 19-2601.

After The Sentence was Imposed, According To I.C. 19-2601, The Courts Then chose To retain Jurisdiction for (120) days pursuant To I.C. 19-2601 Sub-Section 4 and Ordered The defendant To a "rider," upon Completion, The Judge Then Ordered The defendant To recieve Credit for Time Served, and Elected To release This defendant Under Community Supervision To The Board of Corrections rather Than Incarcerating him in The penitentiary.

By Starting The Sentence The day of Sentencing pursuant To I.C. 20-209A we can Satisfy The Statutory right To accurate Computation of his Time and a mandatory Completion date" by Subtracting The Credit for Time Served, Pursuant To I.C. 18-309 from The maximum Term of The Sentence Set by The words " Not To Exceed

The (3650) days Imposed on this defendant for the Crime of Statutory Rape on March 6TH, 2000 projected a full Term release date of on or about March 6TH 2010, Then by Subtracting The credit for time Served from The Term, According To I.C. 18-309 and I.C. 20-209A, The full Term release date becomes on or about Feb, 24 [redacted], 2010. The Computations and dates are Statutory and mandatory, so They Too are protected from being changed by ~~The Double Jeopardy Clause of The~~ fifth Amendment

Pursuant To I.C. 20-243 a Certified Copy of The final Judgement was delivered To The State Board of corrections, which Allowed Them To Immediatly Calculate The full Term release Date of on or about Feb, 24th [redacted], 2010. Because of The Application of ~~The Double Jeopardy Clause~~ To protect The Integrity of The final Judgement entered in Case CR98-01107, These dates were barred from ever being Increased.

In (State V. Thomas, 2008, 199 P.3d 769, 146 Idaho 59, The Courts Stated That "when a trial Court has already Sentenced a defendant hand has Suspended Execution of The Sentence and placed The defendant on probation, upon revocation of The probation, The Court Cannot re-sentence The defendant, Since The Original Judgement remains in full force and effect and may be Executed according To law), Although ~~The Court Can Sua Sponte~~ reduce The Sentence

Also in (State V. Kelley 1988, 115 Idaho 311, 766 P2d 781) The courts reiterated The protection of The final Judgement by Stating "when district Court entered its first Judgement of Conviction and Sentence, Those Judgements became final and district Court did not have Jurisdiction or Authority To later either set Them aside or to Enter [redacted] Amended Judgement of Conviction when program, To which defendant was Committed as part of probation, was Termin-ated."

This law provides That any and all Subsequent Judgements and Convictions entered in Case #CR98-01107 from March 6TH, 2000 were Illegal by not Only federal law as mentioned, but also by Idaho law.

This is The Very reason why Idaho is prohibited from Imposing probation as a Sentence as allowed under The Sentencing Reform Act of 1984. Under The Act, a Sentence of probation is final Except Under a narrow set of Circumstances. The Act Explicitly prohibits The Imposition of probation when The defendant is Sentenced Simultaneously To a Term of Imprisonment for The Same or a different Offense.

As we have discussed, This is an Adement prohibition because The "Statutory Right To Accurate Computation of Time and a mandatory Completion date." That are Calculated

using The final Judgement are protected by [redacted] Jeopardy Clause of The U.S. Constitution.

The Prohibition does not State anything about Execution of The Judgement, but Only about The Imposition of Sentence of Imprisonment. as Clearly Stated by The Courts in (State V. Pedraza, 101 Idaho 440, 614 P.2d 980 (1980)) That "This Section [19-2601] provides Only That a Trial Court may Suspend The Execution of Judgement and does not Authorize The Court To Suspend The Imposition of Sentence," Probation as allowed under I.C. 19-2601 Subsection 2 and 4 meet The requirements To be prohibited from probation being Imposed as an Independent Sentence.

This Ademently Concludes That any and all case law providing probation as an Independent Sentence is absolutly Irrelevant To This Case. In fact, in (U.S. V. Thomas, 135 F.3 873, 876 (2d. Cir. 1998) it States That The Sentence of Imprisonment was Vacated because The Original probation Sentence was Illegal.

Since Idaho is prohibited from Imposing a Sentence of probation according to The Sentencing Reform Act of 1984, When probation is granted pursuant To I.C. 19-2601 Subsection 2 and 4 That Implies The probation is Simply a part of The Sentence Imposed.

In fact in (wolf V. McDonell, 418 U.S 539 (1974)). (Ex Parte Morris, 626 S.W 2nd 754 (Tex. Crim, App 1982)(En banc)) The Court of appeals held That "... Sentence must be Continuous and a prisoner or Inmate Cannot be required To Serve Out his Sentence in Installments unless an escape or premature release can be proven"....

This case law provides That since Sentence must be Imposed and final Judgement Entered prior To Ordering retained Jurisdiction, according To I.C. 19-2601 Subsection 4, or granting of probation, pursuant To I.C. 19-2601 Subsection 2 and 4, That The Sentence must legally Continue To Run

In fact, Since I.C. 20-209A Specifically States That The Sentence begins The day of Sentencing, and That The defendant is To be Concidered To be in custody of The board of Corrections until he becomes Voluntarily absent from any form of Supervision, Then This Too proves That The Sentence Continues To Run.

Herein is The direct corralation between probation as allowed pursuant To I.C. 19-2601 Subsection 2 and 4, and parole.

Parole as defined by Black's Law Dictionary States: -(17C) The Conditional release of a prisoner from Imprisonment before The full Sentence has been Served.

By Idaho Law The defendant is being paroled Out and Jurisdiction Continues with The Courts rather Than with The board of Corrections. This is how probation is granted according To I.C. 19-2601 Subsection 2 and 4, and why Title 19 Chapter 26 Includes Specific parts for

parole and why title 20 Chapter 2 applies also To probation.

Specifically, (State V. Ellis, 1950, 70 Idaho 417, 219 P.2d 953) addresses a sentencing Court contemplating The granting of parole According To I.C. 19-2601. The Court stated That "under Statute [19-2601] vesting it with discretion To grant or refuse Application for parole, Trial Court must exercise discretion in lawful and legal manner, and refusal of Application must not be Arbitrary and Cannot be based upon mere whim or Caprice or upon Any ground not Sanctioned by law!"

The fact That probation and parole is a form of Confinement under The department of Corrections is Evident because in (Dunne V. Keohane, 14 F.3d 335 (7TH Cir 1994)) reviewed and upheld That " where a prisoner is released on probation/parole and The Sentence is not Specifically Suspended, it Continues To Run. The probation/parole is a change of manner of punishment Only and not a Suspension of The Sentence.

Under I.C. 20-228 The Sentence is Not Suspended until The Warrant is issued. Then from That point Such a person is Considered To be "At large" and a fugitive from Justice. According To I.C. 20-209A Only The [redacted] prisoner is [redacted] form of [redacted], or "At [redacted] bail" →

Not be Estimated or Counted as a part of The Term for Which he was Sentenced. Also no where in The probation/parole Agreement, Signed by The defendant, does it State That The Sentence is being Suspended To Allow The prisoner To get Out on probation/parole.

When The Courts Elect To Grant probation during a running Sentence Instead of Incarcerating Them, That does not mean The Sentence is Suspended. Rather The Incarceration portion of The Sentence was not Executed, and another form of punishment was utilized. This form of probation is equivelent To parole with its Intended function, Though The Courts retain Jurisdiction Over The Case Rather Than The Board of pardons and parole

In (People V. Banks, 53 Cal. 2d 370, 1 Cal. Rptr. 669, 348 P.2d 102 (1959)) The Courts Stated "... The Entry of Conviction of a felony Together with The Imposition of Sentence of Imprisonment is in and of Itself punishment Even Though The Incarceration is withheld While The defendant Serves Out his probation Time

In (Jackson V. Coalter, 337 F.3d 74, 78-79 (1ST Cir. 2003)) The Courts held "... That Custody includes Supervised probation." Also in (U.S V. Martin, 363 F.3d 25, 35 N.17 (1ST Cir. 2004)) The Courts held That "probation is an alternative punishment To Incarceration".

(Samson V. California, 547 U.S. 843, 850 (2006)) furthered The Issue by Stating "Since an Individual must Surrender a Number of rights and is Subject To fee's with additional requirements as Ordered (supervising Officers rights To Enforce) The [redacted] Individual is There by paying a debt for his Offense, and This Constitutes punishment and has been Established "as Just another Variation of Incarceration."

Also in (Carpenter V. Lord, 177 P. 577 (1918)); (State V. Goddard, 69 OA 73: 13 PAC, 138 PAC, 243); (Chief Justice McBride); (Hughes V Pflante, 138 FED 980: CCA. 234) The Court Only furthered This point." The probationer/parolee, While on probation/parole, is a prisoner no less than a prisoner physically Confined. He is Under Compulsory Exploitation of an Officer and is under daily, personal Restraint, and is at all Times answerable To The prison Systems Officials for his Conduct."

Since probation and parole are definatly forms of Custody and punishment, and that is Explicitly prohibitted from Imposing a Sentence of probation Under The Sentencing Reform Act of 1984, due To The fact That law requires Sentence of Imprisonment be Imposed prior To granting of probation, Then The Custody and punishment Must be Applied Toward The Imposed Sentence.

This is Evident, because in (U.S. V. Sacco, 379 F.2d 368-69 (2d cir 1966)) The Courts Stated "It is a well Settled general Rule That Increasing a Sentence after The defendant has Commenced To Serve it, is a Violation of The Constitutional guarantee Against double Jeopardy."

Since 16.20-209A States That The Sentence Starts The day Sentence is Imposed, This Case law Only furthers The Protection of The full Term release date on The final Judgement. If that Date Changes after Sentence has begun, There is a Violation of The Double Jeopardy Clause

This fact is supported by (Kennick V. Superior Court, 736 F.2d 1277, 1282-83 (9th cir 1984)) where The Courts held "Only if full Time Credit is given for The time Served on probation When defendant Sentenced To prison after Revocation of probation is There No Double Jeopardy Violation.

Also in (Korematsu V. United States, 319 U.S. 432, 435, 63 S.Ct 1124, 1126 (1943)) The Court Stated "To withhold Credit for Time Served on probation is to Increase The Sentence of punishment Imposed."

The Courts Stated "Trial courts did not have Authority To Retain Jurisdiction following its revocation of defendant's probation To Consider Whether To place defendant on probation Again; Trial Court may retain Jurisdiction over defendant

following Sentencing To Custody of board of Corrections Only for first (120) or (180) days of Sentence, defendant had been on probation more Than five years, [1825) days of Sentence], And Trial Court did Not Impose new Sentence on defendant, But, Rather, required defendant To Serve balance of Original Sentence. "In (State Vs. Travis, 1994, 125 Idaho 1, 867 P.2d 234)), which furthers The point That Once Imposed Sentence begins To Run And is Not Suspended.

Through Out This Argument we adamently proved That The (10) year Sentence Imposed on This defendant for The Crime of Statutory Rape, and The final Judgement of Conviction That was Entered, On March 6th, 2000 were absolutly required as a pre requisit before The Courts Concidered Sentencing Alternatives according To I.C. 19-2601.

we Then Calculated The mandatory full Term release date by Taking The maximum Sentence of (3650) days and Then Subtracting The (10) days credited for time Served, This left (3640) days of punishment on The Imposed Sentence, which arrived at The full Term release date of on or about February 24th 2010.

we Then proved That The Courts could not legally ever Enter a Subsequent Judgement and Conviction on Case # CR98-01107, due To The absolute Protection of The Integrity of The final Judgement as protected by The -

Collateral Estoppel and Res Judicata doctrines of The Double Jeopardy Clause of [redacted] of The U.S. Constitution. We further Supported This fact using Idaho Case law

The State remedy at a probation Violation disposition hearing in This Case would be To either reinstate probation, Since Sentence was already Imposed and running, or Execute The Original final Judgement.

Since The Original final Judgement is dated, The Execution of The Balance of The Sentence should Obviously maintain The Same full Term release date. This would Satisfy all of The Case law herien Stated.

Since The Sentence was Imposed in Case # CR98-01107 and final Judgement entered prior To the granting of probation pursuant To I.C. 19-2601, The maximum Time The defendant might have been Imprisoned at The time probation was granted was absolutly (3522) days according To I.C. 19-2601 Subsection 7. This is The longest period of probation This defendant could be placed on.

It is obvious That Since Legal Custody of This defendant was Ordered by The Courts To Expire on or about February 24TH 2010 on The final Judgement entered on March 6TH 2000 The probation could not legally Extend beyond The full Term release date Since probation/parole are both Legal—

Custody. On Approxamatly July 12, 2000. The Sentencing Court placed This defendant on The maximum period of probation for The Imposed Sentence.

Even I.C. 20-222, which allows The Term of probation To be Increased after a probation Violation, also directly limits The Extension To The maximum period The defendant may have been Imprisoned. Once Again Though The maximum Term of Imprisonment for The defendant was Only Until The Full Term Release date of on or about February 24th 2000.

The fact is furthered by (Ex parte Medley 73 Idaho 474, 253 P.2d 794 (1953)) Where The Courts Stated "Period of probation can be for maximum period of Sentence which can be Imposed on defendant, or for a lesser period, but not for a greater period." Since The Sentence on Case # CR 98-01107 was Imposed prior To The granting of probation and The Courts Can Only Sentence The defendant Once for The Crime, The period of probation Could be for The full (3522) days or less, but not for More.

When a Sentence is Suspended and judgement Withheld, as Allowed pursuant To I.C. 19-2601 Subsection 3 The probationary period does not Commence until The Courts Announce The Terms of probation. This Concept was Confirmed (State V. Russell, 122 Idaho 515, 518, 835 P.2d 1326, 1328 (Ct. App 1991)).

- This procedure Obviously does not Apply To a Term of Imprisonment being Imposed, because I.C 20-209A Clearly States That Such a Sentence begins The Day of Imposition

Since The facts presented Thus far in This Argument are Concrete, We Can also use I.C. 18-309 To prove That probation granted during Sentence is WithOut doubt Legal Custody.

I.C. 18-309 plainly Talks about Computing The Term of Imprisonment. In (muchow) V. State, 142 Idaho 401, 128 P.3d 938 (2006)) The Idaho Supreme Court held "I.C. 18-309 ... does not, however, Say anything about a defendant recieving Credit against The probationary period for The Time Served in Jail. In fact, I.C. 18-309 Very Clearly Talks Only about Calculating Credit Against Term Imprisonment."

This proves Two things. first, is That on a withheld Sentence, I.C. 19-2601 Subsection 3, I.C. 18-309 does not say anything about Incarceration Impacting The Probationary period during The Suspended Sentence.

The Second Thing it proves is That Incarceration directly Impacts probation granted after Imposition of Sentence, Because I.C. 19-2601 and I.C. 20-222 both limit The Term of probation To The Term of Imprisonment Imposed. —

According To I.C. 19-2601 and I.C. 20-222 you Cannot effect The Term of Imprisonment <u>without</u> Effecting The Term of probation, which also probation, which also proves They are One and The Same.

Whether I.C. 18-309 allows for The Courts To not grant Credit for Time Served on a probationary period, I.C. 19-2601 Subsection 3, Toward a later Imposed Sentence has no bearing what-so-ever on a case where Sentence Imposed prior To granting of probation.

Probation granted <u>during</u> a running Sentence is directly proportionate To The Sentence Imposed, because probation/prison/parole are all part of The Same Term of punishment as allowed in The State of Idaho.

When I.C. 18-309 Calculates Credit against The Term of Imprisonment it <u>directly</u> Credits against probation granted <u>during</u> a running Sentence due To I.C. 19-2601 and 20-209A.

The fact The Sentence Continues To run and is not Suspended is also Clearly Stated in (State Vs Travis, 1994, 125 Idaho 1, 867 P.2d 234) where The Courts Stated "... following Sentencing To Custody of board of Corrections Only for The first (120) or (180) days of Sentence, defendant had been on probation for five years.

In October, 2000 it was alleged The defendant Violated his probation and on November 26th, 2000 The Court Imposed a new (10) year Sentence on The defendant & Commited him To The State penitentiary.

It is at This disposition hearing That The Courts Violated both State and federal laws. As Clarified in (Franklin V. State, 87 Idaho 291, 392 P2d 552 (1964)) The Sentence was Imposed and final Judgement entered on March 6th 2000. The fact The final Judgement had been entered and That The Two litigating parties were Still The State of Idaho and Duaine F Earl Satisfied The requirements for The Collateral Estoppel doctrine in The Double Jeopardy Clause

It was Illegal for The Courts To Increase The maximum Term of punishment on The defendant, yet alone To enter a Subsequent Judgement & Conviction in This Case. The Only Course of action To The State was To either reinstate probation or to execute The recorded Original final Judgement from March 6th 2000 by Simply Commiting The defendant To The State penitentiary for The balance of The running Sentence.

[redacted]

Conclusion

Since There were Obviously errors in This Case # (CR-98-01107) I respectfully request This Court To return The full Term Release date To February 24th 2010 According To The final Judgement That was recorded on March 6th 2000. As long as This expires on The Same experation Calculated from The Original Judgement and Conviction, Then There is no Double Jeopardy Violation nor Idaho laws Violated

If The Courts Would Simply Apply Credit for Time Served, pursuant To I.C. 20-209A, In The Amount of (3640) days from date of Original Sentencing for The time Spent under The Care and Custody of The State Board of Corrections, This would return The full Term release date To That Calculated on The final Judgement on February 24th 2010 & Terminate This Case. This Course of Action would return This Case To proper legal Standing by State and federal Law.

After The full Term release date is Returned To February 24th 2010. & The Case is Expired

I respectfully request This Case be closed and my civil rights be restored Pursuant To I.C 18-310

Further your affiant sayeth not.

Duane Earl
Signature of Affiant

SUBSCRIBED AND SWORN AND AFFIRMED TO before me this 12th day of August, 2011

Notary Public for Idaho
My Commission Expires: 2017-15

CAROLYN PUCKETT NOTARY PUBLIC STATE OF IDAHO

AFFIDAVIT OF FACTS IN SUPPORT OF POST CONVICTION PETITION - [redacted](27)
Revised: 10/13/05

Dennis R. Byington, Esq., ISB No. 2839
MINI-CASSIA PUBLIC DEFENDER OFFICE
111 West 15th Street
P.O. Box 188
Burley, Idaho 83318
Telephone: (208) 878-6801
Facsimile: (208) 878-3493

2012 FEB 27 AM 10: 59

PATTY [illegible], DEPUTY

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

DUAINE EARL,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV 2011-697*D

MOTION FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER

COMES NOW Dennis R. Byington, Court appointed Public Defender for the Petitioner in the above-entitled action, and moves the Court for an Order appointing the Idaho State Appellate Public Defender's Office to represent the Petitioner, Duaine Earl, in all matters relating to Petitioner's appeal to the Idaho Supreme Court, a Notice of Appeal having been filed with the Clerk of the above Court on February 21, 2012.

This motion is based on the record, documents and pleadings on file herein, together with the law in such cases made and provided.

DATED This 27 day of February, 2012.

MINI-CASSIA PUBLIC DEFENDER OFFICE

By _____
Dennis R. Byington
Attorney for Petitioner

Exhibit C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of February, 2012, I served a true and correct copy of the foregoing document upon the attorney named below in the manner noted:

(1) Lance Stevenson
Prosecuting Attorney
P.O. Box 368
Rupert, ID 83350

(2) Lawrence Wasden
Idaho Attorney General
P. O. Box 83720
Boise, Idaho 83720-0010

(3) Sara Thomas
State Appellate Public Defender
3050 North Lake Harbor Lane
Suite 100
Boise, ID 83703

2 & 3 By depositing copies of the same in the United States Mail, postage prepaid, at the Burley Post Office in Burley, Idaho.

____ By hand delivering copies of the same to the office of the attorney at the address above indicated.

1 By telecopying copies of the same to said attorney at his/her telecopy number _____.

____ By delivering a copy thereof to said attorney's mail file or basket at the Minidoka County Courthouse in Rupert, Idaho.

Dennis R. Byington
Attorney for Petitioner

Dennis R. Byington, Esq., ISB No. 2839
MINI-CASSIA PUBLIC DEFENDER OFFICE
111 West 15th Street
P.O. Box 188
Burley, Idaho 83318
(208) 878-6801

Attorney for Petitioner

2012 FEB 27 PM 4:39

PATTY A. [illegible], DEPUTY

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

DUAINE EARL, Petitioner, vs. STATE OF IDAHO, Respondent.	)	Case No. CV 2011-697*D **NOTICE AND ORDER APPOINTING STATE APPELLATE PUBLIC DEFENDER IN DIRECT APPEAL**

TO: THE OFFICE OF THE IDAHO STATE APPELLATE PUBLIC DEFENDER

The above named Petitioner filed a Petition for Post Conviction Relief relating to his conviction to the charge of Statutory Rape, in Minidoka County Case No. CR 1998-1107*D.

A hearing on the State's Motion for Summary Dismissal of Petitioner's Petition for Post Conviction Relief was held in open court on February 6, 2012. After considering the argument of counsel, the pleadings and the verified Petition, the Court took the Post Conviction matter under advisement. The State's Motion for Summary Dismissal was granted, and Petitioner's Petition for Post Conviction Relief was dismissed. The Petitioner, therefore, requests the aid of counsel in pursuing an appeal from the adverse decision in this District Court.

The Court being satisfied that said Petitioner is a needy person entitled to the services of the State Appellate Public Defender pursuant to Idaho Code §§19-852 and 19-854 and the services of the State Appellate Public Defender are available pursuant to Idaho Code §19-863A;

IT IS HEREBY ORDERED, in accordance with Idaho Code §19-870, that the State Appellate Public Defender is appointed to represent the Petitioner in all matters as indicated herein, or until relieved by this Court's order.

ADDITIONALLY, IT IS FURTHER HEREBY ORDERED that the Minidoka County Public Defender, remain as appointed counsel for the purpose of filing any motion(s) in the District Court which, if granted, could affect judgment, order or sentence in the action. The Minidoka County Public Defender shall remain as appointed counsel until all motions have been decided and the time for appeal of those motions has run.

IT IS FURTHER HEREBY ORDERED, pursuant to Idaho Code §18-963, that the County shall bear the cost of and produce to the State Appellate Public Defender a copy of the following within a reasonable time:

1. The transcript of the Motion for Summary Dismissal of Petitioner's Post Conviction Relief Hearing held February 6, 2012, or related proceedings which are recorded by the Court and which have been previously prepared.

If the State Appellate Public Defender's Office discovers during appellate preparation that an item, within the control of the Clerk or Reporter is missing, omitted or not requested and it is necessary to the appeal, the item shall be produced and the cost shall be paid by the County.

The State Appellate Public Defender's Office is provided the following information by the Court:

1. The Defendant is in custody of the Department of Correction, State of Idaho;

2. The Defendant's current address is: I.C.C., Unit P1-24B, P. O. Box 70010, Boise, ID 83707

3. The Defendant may be contacted by telephone at the following number:

DATED this 27th day of February, 2012.

Jonathan Brody
JONATHAN BRODY, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of ~~February~~ March, 2012, I served a true and correct copy of the foregoing document upon the individuals named below in the manner noted:

Lance Stevenson
Prosecuting Attorney
P.O. Box 368
Rupert, ID 83350 - Basket

Maureen Newton
Court Reporter
P. O. Box 368
Rupert, ID 83350 - Mail

Lawrence Wasden
Attorney General
P. O. Box 83720
Boise, ID 83720-0010 - Mail

Sara Thomas
State Appellate Public Defender
3050 North Lake Harbor Lane
Suite 100
Boise, ID 83703 - Mail

Supreme Court - Mail
ATTN: Clerk
P. O. Box 83720
Boise, ID 83720-0101

Dennis R. Byington - Basket
Public Defender
P. O. Box 188
Burley, ID 83318

Duaine Earl #28970
I.C.C., Unit P1-24B
P. O. Box 70010
Boise, ID 83707 - Mail

____ By depositing copies of the same in the United States Mail, postage prepaid, at the Burley Post Office in Burley, Idaho.

____ By hand delivering copies of the same to the office of the attorney at the address above indicated.

____ By telecopying copies of the same to said attorney at his/her telecopy number ____ ____.

___ By delivering a copy thereof to said attorney's mail file or basket at the Minidoka County Courthouse in Rupert, Idaho.

Patty Temple

PATTY TEMPLE
Clerk

By _____
Deputy Clerk

FILED-DISTRICT COURT
CASE #_____

2011 OCT -3 PM 3:00

PATTY TEMPLE, CLERK
_____, DEPUTY

COURT MINUTES

CV-2011-0000697

Duaine Fredrick Earl #28970, Plaintiff vs State Of Idaho, Defendant

Hearing type: Status

Hearing date: 10/3/2011

Time: 10:05 am

Judge: Jonathan Brody

Courtroom: District Courtroom-1

Court reporter: Maureen Newton

Minutes Clerk: Janet Sunderland

Party: Duaine Earl #28970, Attorney: Mini-Cassia Public Defender

Party: State of Idaho, Attorney: Mike Tribe

Petitioner is incarcerated

Court calls case, briefly reviews filings on both civil case and underlying criminal case

Mr. Byington has just received copies last Friday so have not reviewed

Mr. Tribe note have filed objection in underlying criminal case, would ask for status in civil case and then obtain a briefing schedule

Mr. Byington notes only appointed in civil matter – Court appoints to criminal matters as well

Court explains prior employment with Minidoka Prosecutor and to discuss with client if any concern, will set for status in 30 days to address if any amendment of petition, respond to State's motion and do briefing deadline on State's motion – set for status on 11-7-11 on both cases.

10:09 a.m. recess

Exhibit D

FILED
CASE # CV-2011-697

2011 NOV -7 PM 3:42

PATTY TEMPLE, CLERK
_____, DEPUTY

COURT MINUTES

CR-1998-0001107 and CV-2011-697

State of Idaho vs. Duaine Fredrick Earl #28970 and Duaine Fredrick Earl V State of Idaho

Hearing type: Status on Post-Conviction and underlying criminal case

Hearing date: 11/7/2011

Time: 10:37 am

Judge: Jonathan Brody

Courtroom: District Courtroom-1

Court reporter: Maureen Newton

Minutes Clerk: Janet Sunderland

Defense Attorney: Mini-Cassia Public Defender

Prosecutor: Michael Tribe

Defendant not present – in custody of Idaho Dept. of Correction,

Court calls cases, matters are set for status, Mr. Byington has been appointed as counsel on both cases.

Mr. Byington addresses Court, has had some communication with client and outlines what he thinks the petitioner's argument is.

Mr. Tribe notes he has filed responses

Court notes that if sentence really has expired maybe a habeas proceeding is in order – Mr. Byington notes that one has already been filed, needs more time, not sure if proceed just on petitioner's brief or if will file further documents

Court discusses with counsel and will set petition for Post-conviction for hearing on the State's motion to dismiss Post-Conviction in 30 days, will also set the motion for credit for time served on underlying case, set on 12-12-11. Counsel to file additional documents prior to hearing, advice court ASAP if need motion to transport.

10:43 a.m. recess

FILED-District Court
CASE #CV-2011-697
2011 DEC 15 AM 10:31
CATHY TEMPLE, CLERK
DEPUTY

COURT MINUTES

CV-2011-0000697 and CR-1998-1107

Duaine Fredrick Earl #28970, Plaintiff vs State Of Idaho, Defendant

Hearing type: Motion to Dismiss

Hearing date: 12/12/2011

Time: 11:45 am

Judge: Jonathan Brody

Courtroom: District Courtroom-1

Court reporter: Maureen Newton

Minutes Clerk: Janet Sunderland

Party: Duaine Earl #28970, Attorney: Mini-Cassia Public Defender

Party: State of Idaho, Attorney: Mike Tribe

Petitioner is incarcerated so not present,

Court calls case, here on motion to dismiss on PC case and status on criminal case, inquires

Mr. Byington addresses court, still trying to get information from State explains, asking for another 30 days to argue motion to dismiss

Court notes that did meet with counsel in chambers and did discuss when argument would be heard

Mr. Byington briefly reviews status of both cases, need to set both cases together, will be ready to hear State's motion to dismiss at next hearing – Mr. Tribe asks for more time

Court sets hearing on 2-6 and any filings from counsel to be received by 1-23-12.

11:48 a.m. recess

CV-2011-697

2012 FEB -6 PM 3:26

PATTY ..., CLERK

..., DEPUTY

COURT MINUTES

CV-2011-0000697 and CR-1998-107

Duaine Fredrick Earl #28970, Plaintiff vs State Of Idaho, Defendant

Hearing type: Motion

Hearing date: 2/6/2012

Time: 9:00 am

Judge: Jonathan Brody

Courtroom: District Courtroom-1

Court reporter: Maureen Newton

Minutes Clerk: Janet Sunderland

Party: Duaine Earl #28970, Attorney: Mini-Cassia Public Defender

Party: State of Idaho, Attorney: Mike Tribe

Petitioner is NOT present by telephone

Court calls cases; court has attempted to contact prison and can only reach answering machine and inquires of Mr. Byington

Mr. Byington responds, would like to try and contact Mr. Earl again this morning, they were aware of the hearing today, do not want to delay matters, is ready, is briefed, have short arguments and really just want to get submitted

Court tries to contact Mr. Earl again and reached voice mail – explains did leave message for Mr. Earl to contact Mr. Byington – continue one week

9:03 a.m. recess

9:16 a.m. session

Court, counsel and petitioner are now present

Mr. Tribe addresses court re: CR-1998-1107 have agreed to 232 days' time served on underlying criminal case

Mr. Byington addresses court, agreed to 232 days' time served

9:17 a.m. Mr. Tribe makes State's argument in support of Motion to dismiss on CV-2011-697, cites considerations, Petitioner appears to be asking for credit for time served for all time on probation and also while absconded, State objects and cites to Idaho Code 18-309 and 19-2603 and case of *Taylor V State* @ 1451866 and reads a portion from the case into the record and case cites to Idaho Code 20-209(A), continues argument, only entitled to credit for time served while in actual custody of the department

9:21 a.m. Mr. Byington responds to State's motion and cites considerations, petitioner asking for credit while in supervised probation and supervised parole, cites to exhibit C of his brief and continues argument, submit all to consideration of the court,

Court inquires – Mr. Byington asks Court to consider all issues submitted in affidavit

9:24 a.m. Mr. Earl addresses the court regarding a year he spent in county jail in 2006 that was not given credit for – Mr. Byington responds, that may have been the Cassia County Case, did research carefully and went through everything and thing that the 232 days includes all arrests for this (criminal) case – petitioner responds

9:26 a.m. Court inquires re: habeas corpus issue versus post-conviction issue

Mr. Byington responds, have resolved part of issues in criminal matter and remaining issues would be part of post conviction – nothing further

Court will take post-conviction matter under advisement and will do an amended order in criminal case.

9:27 a.m.

STATE OF IDAHO

OFFICE OF THE STATE APPELLATE PUBLIC DEFENDER

September 27, 2012

Duaine Fredrick Earl
1462 A South 1900 East
Hazelton, ID 83335

RE: Docket No. 39751.

Dear Mr. Earl:

Enclosed is an Order from the Supreme Court Granting the Motion for Leave to Withdraw and to Suspend the Briefing Schedule. Enclosed is the Clerk's Record and Reporter's transcripts for your case. At this point, our office will no longer be representing you on your appeal case.

If you have any questions pertaining to this issue, please feel free to call.

Sincerely,

NANCY SANDOVAL
Administrative Assistant

State Appellate Public Defender
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
Telephone: (208) 334-2712 FAX: (208) 334-2985

DATED this 26th day of September, 2012.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record

IDAHO SUPREME COURT **IDAHO COURT OF APPEALS**

Clerk of the Courts
(208) 334-2210

P.O. Box 83720
Boise, Idaho 83720-0101

2012 MAR 15 AM 10:13
PATTY TEMPLE, CLERK
, DEPUTY

PATTY TEMPLE, CLERK
Attn: SANTOS
MINIDOKA COUNTY COURTHOUSE
PO BOX 368
RUPERT, ID 83350

CLERK'S CERTIFICATE FILED

Docket No. 39751-2012	DUAINE FREDRICK EARL v. STATE OF IDAHO	Minidoka County District Court #2011-697

Enclosed is a copy of the CLERK'S CERTIFICATE for the above-entitled appeal, which was filed in this office on MARCH 8, 2012.

Please carefully examine the TITLE and the CERTIFICATE and advise the District Court Clerk (or the Agency secretary, if applicable) AND this office of any errors detected on this document.

The TITLE in the CERTIFICATE must appear on all DOCUMENTS filed in this Court, including all BRIEFS. An abbreviated version of the TITLE may be used if it clearly identifies the parties to this appeal when the title is extremely long.

For the Court:
Stephen W. Kenyon
Clerk of the Courts

03/13/2012 DB

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

* * * * *

DUAINE FREDRICK EARL, Petitioner/Appellant, Vs. STATE OF IDAHO, Defendant/Respondent	)SUPREME COURT NO. 39751))) CLERK'S CERTIFICATE OF) APPEAL)))))

APPEAL FROM THE FIFTH JUDICIAL DISTRICT MINIDOKA COUNTY

HONORABLE JONATHAN P. BRODY

CASE NO.: CV 2011-697

ORDER OR JUDGMENT APPEALED FROM:
Judgment filed in the above entitled action on the 15th day of February, 2012.

ATTORNEY FOR APPELLANT: Sara Thomas, IDAHO STATE APPELLATE PUBLIC DEFENDER, 3647 Lake Harbor Lane, Boise, ID 83707

ATTORNEY FOR RESPONDENT: Lawrence G. Wasden, IDAHO ATTORNEY GENERAL, P. O. Box 83720, Boise, ID 83720-0010

APPEALED BY: DUAINE EARL .

FILED - ORIGINAL
MAR - 8 2012
Supreme Court ___ Court of Appeals ___
Entered on ATS by LD

APPEALED AGAINST: STATE OF IDAHO

NOTICE OF APPEAL FILED: February 27, 2012

AMENDED NOTICE OF APPEAL FILED: NA

APPELLATE FEE PAID: NA

WAS DISTRICT COURT REPORTER'S TRANSCRIPT REQUESTED: Yes

NAME OF COURT REPORTER: Maureen Newton (hand-delivered) estimation of pages is less than 100 pages

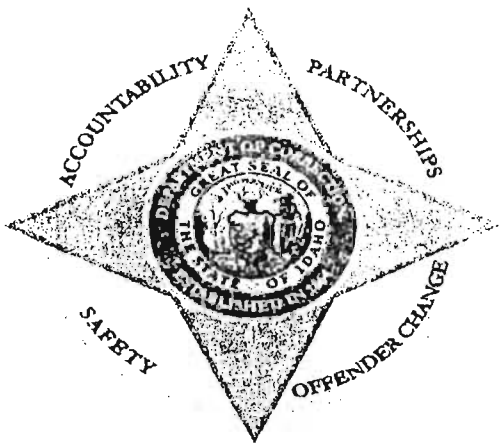
DATED: March 2, 2012

Patty Temple
Clerk of the District Court

By: _____
Deputy Clerk of the District Court

EXHIBIT "E"

IDAHO DEPARTMENT OF CORRECTION
COMMUNITY CORRECTIONS SUPERVISION HANDBOOK
For Probationers and Parolees



Idaho Department of Correction
Division of Community Corrections
ORIENTATION HANDBOOK

You are required to report to the Department of Corrections as instructed by the Court or Parole Commission and/or the Intake Probation/Parole Officer after your hearing. You must meet with Community Corrections staff within 24 hours of your hearing and/or release. **Failure to report in the manner specified is a violation of your probation or parole and a Bench or Commission warrant will be requested for your arrest.**

The purpose of this Orientation Manual is to explain the rules of and your responsibilities towards supervision on Probation or Parole either of which are considered a privilege and not a right.

Exhibit E

INTRODUCTION

As part of your conditions, you will be supervised in the community either on Probation or Parole by an Idaho State Probation/Parole Officer. The purpose of supervision is for your officer to monitor and enforce compliance with the conditions of your parole/probation, to protect the community by assisting you in minimizing your risk to reoffend, and to assist you in being a law-abiding community member. Probation/Parole Officers serve as Officers of the Court as well as Agents for the Parole Commission. Your Probation/Parole Officer assigned to you has the following responsibilities:

- Instruct you as to the conditions specified by the Court or the Parole Commission.
- Instruct you as to the conditions of the Agreement of Supervision and what they mean.
- Keep informed as to your compliance with the conditions of your supervision.
- Keep informed as to your conduct and to report your conduct to the sentencing Court or Parole Commission.
- Direct you to appropriate rehabilitation, vocational, and educational programs to bring about improvements in your conduct and your situation.
- Establish a case plan with you according to your risk assessment and ensure that you are complying with that plan.
- Use supervision activities such as, but not limited to, verification of employment, verifying sources of income, monitoring of your associations, conducting record checks, placing restrictions on your travel, and testing you for the use of drugs and alcohol.
- Impose intermediate sanctions for violations, if necessary or deemed appropriate, which may include electronic monitoring, increased contacts with your supervising officer, discretionary jail time, additional terms or conditions, order to show cause hearings before the Court, etc.
- Assess the problems you may be experiencing such as unemployment, drug problems, alcohol problems, mental health issues, financial problems, lack of residence, family problems, etc. Your officer will develop a plan to address these issues and will refer you to available community resources to assist you.

COMMUNICATION

It is essential that you understand the role of your Probation/Parole Officer and that their professional objective is to assist you in successfully completing your Probation or Parole. Your responsibilities are clearly outlined and specified by the Court or Parole Commission. One of the keys to the successful completion of supervision is communication. Take the responsibility of establishing a consistent pattern of communication with your supervising officer and your supervision can be a positive and rewarding experience.

COURT ORDER/PAROLE COMMISSION ORDER

Depending on the procedure established by your assigned District, you may be required to initial all numbered items on your Court or Parole Commission Order during your orientation. Regardless, you should always be given a copy of the order that governs your supervision and understand you are responsible for adhering to all written conditions. You will be further instructed on any specific conditions of your Court or Parole Commission Order. It is very important that you ask your Probation/Parole Officer to clarify any issues or questions that you may have regarding the conditions and rules of supervision.

AGREEMENT OF SUPERVISION

You will initial and sign the Idaho Department of Correction Agreement of Supervision if you have been sentenced to probation by the Court. Parolees will sign and

initial the Parole Commission Order and special conditions. Both of these documents cover the general conditions for Community Corrections supervision. Any special conditions will be covered in either your Court order or under the Special Conditions portion of your Parole order. Again, make sure to communicate with your Probation/Parole Officer if you have any further questions regarding the rules.

GRIEVANCE PROCEDURE

Any complaints you may have must be addressed through an informal resolution with your Probation/Parole Officer prior to a grievance being filed. You need to first seek information, advice, or help on the matter from your supervising officer and then, if you are unable to resolve the problem, then you may request to resolve the matter with the Section Supervisor. Should you choose to file a written grievance, then you have the right to appeal per the offender grievance process and may do so without the fear of retaliation.

ADDITIONAL INSTRUCTIONS

1. YOU SHALL ANSWER TRUTHFULLY ALL INQUIRIES BY THE PROBATION OFFICER AND FOLLOW THE ADVICE AND INSTRUCTIONS OF THE PROBATION/PAROLE OFFICER.

The Probation/Parole Officer is responsible for knowing what is going on in many aspects of your life. You are required to answer questions truthfully and your officer may also verify any information you provide with outside sources such as family, employers, etc. It is important to understand that directives from your officer are for ensuring your welfare, community safety, and are directly related to ensuring compliance with your conditions.

2. YOU SHALL SUPPORT YOUR DEPENDENTS AND MEET OTHER FAMILY RESPONSIBILITIES.

Your Probation/Parole Officer may meet with family members or significant others to verify that you are appropriately managing family responsibilities and to explain how the supervision process may affect them. The specific conditions of supervision that may impact immediate family members, significant others, or friends residing in your home include your restrictions on travel, removal of ALL firearms and weapons from the home, and your waiver of the 5th amendment search clause which gives IDOC personnel access to search at any time your residence, vehicles located at the residence, and all property.

Your Probation/Parole Officer may require that you provide verification monthly that you have paid any Court ordered obligated child support. You may also be required to submit a monthly budget that provides verification that you are meeting family responsibilities, maintaining all financial obligations, and living within your means.

3. YOU SHALL NOT USE OR POSSESS ALCOHOLIC BEVERAGES.

You shall not, at any time, possess, control, or consume any alcoholic beverages.