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Booth v. State Clerk's Record Dckt. 37296

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

37296

TREVOR JAMES BOOTH,

**Petitioner-
Respondent,**

-vs-

STATE OF IDAHO,

**Respondent-
Appellant.**

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

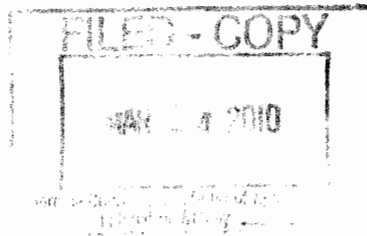
Honorable GREGORY M. CULET, District Judge

Lawrence G. Wasden, Attorney General
Kenneth K. Jorgensen, Deputy Atty. Gen.
P. O. Box 83720
Boise, Idaho 83720-0010

Attorneys for Appellant

Van G. Bishop
203 12th Ave. Rd., Ste. B
Nampa, Idaho 83686

Attorney for Respondent



37296

IN THE SUPREME COURT OF THE
STATE OF IDAHO

TREVOR JAMES BOOTH,)
)
 Petitioner-)
 Respondent,)
)
 -vs-)
)
 STATE OF IDAHO,)
)
 Respondent-)
 Appellant.)

Supreme Court No. 37296

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

Lawrence G. Wasden, Attorney General, Kenneth K. Jorgensen, Deputy Attorney General,
P. O. Box 83720, Boise, Idaho 83720-0010

Attorneys for Appellant

Van G. Bishop, 203 12th Ave. Rd., Ste. B, Nampa, Idaho 83686

Attorney for Respondent

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Post Conviction Relief

Date		Judge
8/11/2006	New Case Filed-Post Conviction Relief	Gregory M Culet
	Filing: 9SPC - Post Conviction Relief Filing Paid by: Booth, Trevor James (subject) Receipt number: 0198543 Dated: 8/11/2006 Amount: \$.00 (Cash)	Gregory M Culet
	Petition for Post Conviction	Gregory M Culet
	For Information Prior To This Date See Case File. CR2005/1658	Gregory M Culet
8/23/2006	Answer to petition PCR	Gregory M Culet
10/17/2007	Hearing Scheduled (Conference - Status 11/15/2007 08:30 AM)	Gregory M Culet
10/19/2007	Notice Of Hearing	Gregory M Culet
11/15/2007	hearing held in chambers	Gregory M Culet
11/16/2007	State's request for judicial notice	Gregory M Culet
12/17/2007	First Amended Petition for Post-Conviction Relief	Gregory M Culet
12/21/2007	Answer to First Amended Petition for Post Conviction Relief	Gregory M Culet
1/9/2008	Hearing Scheduled (Conference - Status 01/14/2008 01:00 PM)	Gregory M Culet
1/10/2008	Notice Of Hearing	Gregory M Culet
1/14/2008	Hearing result for Conference - Status held on 01/14/2008 01:00 PM: Hearing Held	Gregory M Culet
	Hearing Scheduled (Motion Hearing 04/16/2008 09:00 AM) 1st setting for summary disposition	Gregory M Culet
	Hearing Scheduled (Motion Hearing 06/06/2008 09:00 AM) 2nd setting for summary disposition	Gregory M Culet
1/23/2008	Court Scheduling Order	Gregory M Culet
3/3/2008	Motion for summary dismissal	Gregory M Culet
	Brief in support of motion for summary dismissal	Gregory M Culet
4/15/2008	Hearing result for Motion Hearing held on 04/16/2008 09:00 AM: Hearing Vacated 1st setting for summary disposition	Gregory M Culet
	Notice vacating hearing/Motion 4-16-08	Gregory M Culet
	Notice Of Hearing Motion	Gregory M Culet
6/5/2008	Hearing result for Motion Hearing held on 06/06/2008 09:00 AM: Hearing Vacated 2nd setting for summary disposition	Gregory M Culet
	Stipulation to Continue Hearing (no Order provided)	Gregory M Culet
7/10/2008	Notice of filing Exhibit A of PCR	Gregory M Culet
7/11/2008	Hearing Scheduled (Further Proceeding 07/14/2008 01:30 PM)	Gregory M Culet
7/14/2008	Hearing result for Further Proceeding held on 07/14/2008 01:30 PM: District Court Hearing Held Court Reporter:Debora Kreidler Number of Transcript Pages for this hearing estimated:less than 100 pages	Gregory M Culet
	Hearing result for Further Proceeding held on 07/14/2008 01:30 PM: Hearing Held	Gregory M Culet
	Hearing Scheduled (Conference - Status 10/02/2008 09:00 AM) scheduling	Gregory M Culet
7/22/2008	Notice of intent to dismiss/30 days	Gregory M Culet

000001

Case: CV-2006-0008651-C Current Judge: Gregory M Culet

Trevor James Booth, Plaintiff vs State Of Idaho, Defendant

Trevor James Booth, Plaintiff vs State Of Idaho, Defendant

Post Conviction Relief

Date		Judge
7/29/2008	Order Granting Partial Summary Judgment, Denying Motion For Summary Judgment As To Allegations 7(f) and 9(a), Notice Of Intent Under I.C. 19-4906(b) and ORDER SETTING STATUS CONFERENCE	Gregory M Culet
	Hearing Scheduled (Conference - Status 10/02/2008 09:00 AM)	Gregory M Culet
8/18/2008	Verification of the First Amended Petition for PCR	Gregory M Culet
	Affidavit of Trevor Booth in support of PCR	Gregory M Culet
9/9/2008	Answer and/or Response to Verification of Amended Petition for PCR	Gregory M Culet
10/2/2008	Hearing result for Conference - Status held on 10/02/2008 09:00 AM: District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: less than 100 pages	Gregory M Culet
	Hearing result for Conference - Status held on 10/02/2008 09:00 AM: Hearing Held scheduling	Gregory M Culet
	Hearing result for Conference - Status held on 10/02/2008 09:00 AM: Hearing Vacated	Gregory M Culet
	Hearing Scheduled (Evidentiary Hearing 04/13/2009 09:00 AM)	Gregory M Culet
1/22/2009	Notice Of Evidentiary Hearing	Gregory M Culet
4/10/2009	Order to Transport	Gregory M Culet
	Pre-Hearing Memorandum Statement of Facts and Conclusions of Law	Gregory M Culet
4/13/2009	Respondent's Proposed Findings of Fact and Conclusions of Law	Gregory M Culet
	Hearing result for Evidentiary Hearing held on 04/13/2009 09:00 AM: Interim Hearing Held	Gregory M Culet
	Hearing result for Evidentiary Hearing held on 04/13/2009 09:00 AM: District Court Hearing Held Court Reporter: Deborah Kreidler Number of Transcript Pages for this hearing estimated: more than 100 pages	Gregory M Culet
5/1/2009	Transcript Filed (4-13-09 Hearing)	Gregory M Culet
8/7/2009	Hearing Scheduled (Conference - Status 08/26/2009 11:00 AM) in chambers	Gregory M Culet
8/10/2009	Notice Of Hearing	Gregory M Culet
8/26/2009	Hearing result for Conference - Status held on 08/26/2009 11:00 AM: District Court Hearing Held Court Reporter: Laura Whiting Number of Transcript Pages for this hearing estimated: less than 100 pages	Gregory M Culet
	Hearing result for Conference - Status held on 08/26/2009 11:00 AM: Hearing Held	Gregory M Culet
9/14/2009	Respondent's brief	Gregory M Culet
	Proposed findings of fact, conclusions of law and order	Gregory M Culet
10/7/2009	Closing Argument, Statement of Facts and Conclusions of Law	Gregory M Culet
11/24/2009	Hearing Scheduled (Conference - Status 11/30/2009 01:00 PM)	Gregory M Culet
11/25/2009	Notice Of Hearing/Conference Status	Gregory M Culet

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Post Conviction Relief

Date		Judge
11/30/2009	Hearing result for Conference - Status held on 11/30/2009 01:00 PM: Hearing Held - IN-CHAMBERS	Gregory M Culet
12/1/2009	Findings of Fact, Conclusions of Law and Order Granting Petition for Post Conviction Relief	Gregory M Culet
12/9/2009	Motion to Reconsider	Gregory M Culet
1/11/2010	Notice of Appeal (fax) Appealed To The Supreme Court	Gregory M Culet
1/13/2010	Amended Notice fo Appeal	Gregory M Culet
1/14/2010	Hearing Scheduled (Conference - Status 01/19/2010 08:30 AM) with counsel in chambers	Gregory M Culet
1/15/2010	Notice Of Hearing	Gregory M Culet
1/19/2010	Hearing result for Conference - Status held on 01/19/2010 08:30 AM: District Court Hearing Held Court Reporter: None Number of Transcript Pages for this hearing estimated: with counsel in chambers	Gregory M Culet
	Hearing result for Conference - Status held on 01/19/2010 08:30 AM: Hearing Held with counsel in chambers	Gregory M Culet

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Telephone (208) 465-5411
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ISB #2740

FILED *LOE3D*
A.M. P.M.

AUG 11 2006

CANYON COUNTY CLERK
J DELGADO, DEPUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,)
)
 Plaintiff,)
)
 -vs-)
)
 THE STATE OF IDAHO,)
)
 Defendant.)
 _____)

CASE NO. CV *2006-8651*

PETITION FOR POST
CONVICTION RELIEF

The Petitioner, TREVOR JAMES BOOTH, by and through his attorney, VAN G. BISHOP, of the
LAW OFFICE OF VAN G. BISHOP, submits this Petition for Post-Conviction Relief, and alleges:

1. Place of detention if in custody: Idaho State Correctional Institute, sent to Texas
presently in transit to new Texas facility.
2. Name and location of Court which imposed judgment/sentence: District Court of the
Third Judicial District in and for the County of Canyon, Caldwell, Idaho, Honorable
Gregory M. Culet.
3. The case numbers and the offense or offenses for which sentence was imposed:
 - (a) Case No. CR-2005-1658-C
 - (b) Offenses Convicted: First Degree Murder.

4. The (a) date upon which sentence was imposed and the (b) term of the sentence:

(a) Date of sentence: Hearing held August 11, 2005, Judgment filed on August 16, 2005.

(b) Terms of sentence: Defendant was sentenced to a minimum period of confinement of thirty (30) years, and a subsequent indeterminate period of confinement not to exceed life.

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

(a) Of guilty: X

(b) Of not guilty:

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

7. State concisely all grounds on which you base your application for post conviction relief:

(a) Ineffective assistance of counsel.

(b) Failure to investigate and interview witnesses defendant and defendant's family provided showing threats by the victim to defendants family and to the defendant, witnesses as to the heavy involvement of the victim in the drug trade, and coercive nature of defendant in dealing with the defendant all which could have been used for reduction of the charge and or for sentencing purposes.

(c) Failure to interview members of the law enforcement drug enforcement as to evidence beneficial to defendant in reducing the charge to that of manslaughter and for mitigation

(d) Failure to file a motion and to argue for withdrawal of guilty plea once the sentence was imposed.

(e) Failure to investigate and present mitigating evidence and testimony at sentencing.

(f) Coercive and threatening tactics used against defendant and defendants family assuring

them of a 10 year sentence if he were to plead and a fixed life sentence if he took the case to trial. (See attachment "A" Memo)

8. Prior to this Petition, have you filed with respect to any conviction: No.

(a) Any petitions in State or Federal Courts for Habeas Corpus? No.

(b) Any other petitions, motions or application in this or any other Court?, Yes, Rule 35 which was summarily denied without hearing.

9. If your application is based upon failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests. Includes, but is not limited to:

(a) Private Counsel, Richard Harris, represented Defendant. Counsel did not contact nor interview witnesses which defendant and defendant's family provided to counsel which would have shown the coercive and threatening actions of the victim to defendant and the direct threat to defendant's family. Counsel coerced defendant and his parents with a memo stating that if defendant did not plea to first degree murder and went to trial he would get fixed life and by entering a plea that he would only be sentenced to ten (10) years. Counsel wrote a MEMO outlining section 18-4004 Idaho Code (not applicable here) to coerce and persuade both defendant and his parents into pleading as charged. Counsel did not investigate or evaluate the real possibility of a reduction of the charge to one of manslaughter or 2nd degree murder, even after continual requests from the defendant and his parents and sister. Counsel had defendant plea without a rule 11 plea agreement, nor a viable offer from the prosecution. Defendant's position is he had nothing to loose by going to trial on the charges, but it is clear that counsel was not and never

intended to prepare for the case to go to trial.

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


(a) Yes X

(b) No

11. State specifically the relief you seek: To have the plea of guilty set aside and the matter rescheduled for trial to pursue all legal issues in the criminal matter.

12. Petitioner respectfully reserves the right to supplement this Post Conviction Petition with an affidavit at a later time as well as supplement once the transcripts of the hearings have been prepared. Transcripts were requested for the appeal some 10 months ago and have yet been provided. Defendant has been transferred within the Idaho Department of Corrections to a facility in Texas and just recently has been moved and is in transit and cannot receive mail and assistance in completing the affidavit. Defendant respectfully requests a hearing on his Post Conviction Petition.

DATED this 11th day of August 2006.


VAN G. BISHOP
Attorney for Petitioner

VERIFICATION

Defendant is presently in transit in the correctional facility in Texas and is not available for assistance in obtaining his signature and affidavit to verify this petition. Verification shall be submitted once he has been reassigned a facility.

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing document was served by the following method indicated below to each of the following:

Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

x

U. S. Mail, postage prepaid
Personally delivered
Telecopy/fax

DATED this 11th day of August 2006.


VAN G. BISHOP

FILED E D
AUG 23 2006
CANYON COUNTY CLERK
DEPUTY
M. RUSH

dt

DAVID L. YOUNG
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605

Telephone: (208) 454-7391

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,
Defendant/Petitioner,
vs.
THE STATE OF IDAHO,
Plaintiff/Respondent.

CASE NO. CV0608651

**ANSWER TO PETITION FOR
POST CONVICTION RELIEF**

COMES NOW, The State of Idaho, by and through its attorney, the Canyon
County Prosecuting Attorney's Office, and answer the allegations of Petitioner's Petition for Post
Conviction Relief as follows:

I.

The Respondent admits Paragraph(s) 1, 2, 3(a), 3(b), 4(a), 4(b), 5(a), 6, 8(a) and
8(b) of the Petition.

II.

Respondent denies Paragraph(s) 7(a), 7(b), 7(c), 7(d), 7(e), 7(f) and 9(a) of the
Petition.

III.

Responding to the specific allegations of the Petitioner's Petition, the Respondent denies each and every allegation not expressly admitted, denied or otherwise responded to herein.

IV.

FIRST AFFIRMATIVE DEFENSE

The Defendant has failed to provide the appropriate affidavits, records and other evidence supporting his Petition pursuant to **Idaho Code**, Section 19-4903, thereby making Petitioner's Petition insufficient to sustain the requirement for a proper application for post conviction relief and must, therefore, be dismissed.

V.

SECOND AFFIRMATIVE DEFENSE

The pleadings and record in the above entitled case and in criminal case CR0501658 in Canyon County District Court are sufficient to allow the court to make a decision upon the Petitioner's Petition and said record and pleadings are sufficient to find that no purpose would be served by a post conviction relief proceeding and, therefore, the Petitioner's petition should be dismissed.

VI.

THIRD AFFIRMATIVE DEFENSE

The record and pleadings in the above entitled case and in criminal case CR0501658 are the entire record in the matter and that record supports the finding that no genuine issue of material fact exists and that a summary judgment and/or dismissal in favor of the Respondent is warranted pursuant to **Idaho Code**, Section 19-4906(c).

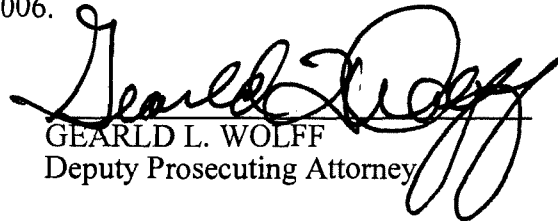
WHEREFORE, The Respondent prays this court to consider the Petitioner's Petition, the Respondent's Answer and the pleadings and record in the above entitled case and in criminal case CR0601658 and act as follows:

1. Dismiss the Petition for Post-Conviction Relief in the above entitled action

without further hearing and pursuant to **Idaho Code** provisions 19-4901 et seq.;

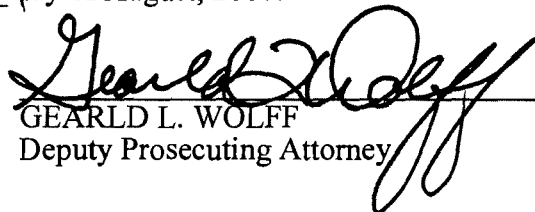
2. Grant the Respondent such other relief, legal and equitable, as the court may deem proper.

DATED This 23rd day of August, 2006.


GEARLD L. WOLFF
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY That a true and correct copy of the foregoing Answer to Petition for Post Conviction Relief was delivered to the basket of Van Bishop, Clerk's Office, Canyon County Courthouse, on or about this 23rd day of August, 2006.


GEARLD L. WOLFF
Deputy Prosecuting Attorney

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, FOR THE COUNTY OF CANYON

PRESIDING: **GREGORY M. CULET** DATE: NOVEMBER 15, 2007

TREVOR JAMES BOOTH,)	
	)	CHAMBERS MINUTES
)	
Petitioner,	)	CASE NO: CV 2006-8651*C
)	
vs.	)	TIME: 8:30 A.M.
)	
STATE OF IDAHO,)	
)	
Respondent,)	
_____)	

This having been the time heretofore set for **status conference** in the above-entitled matter, the petitioner was not present, but represented by Mr. Van Bishop, and the respondent was represented by counsel, Mr. Ken Stringfield.

The Court indicated that this was the time set for a scheduling conference.

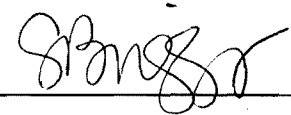
It was the Courts understanding that the petitioner wished to file and amended petition. The Court indicated that was fine, but it would need to be filed by December 15, 2007, and the respondent would be free to file an objection or a response thereto within three (3) weeks of the amended petition.

The Court indicated that the transcripts of the change of plea hearing and the sentencing hearing had been requested, but not yet received, therefore the Court would

speaking with the appeals clerk regarding the transcripts to determine when they would be provided.

The respondent would be filing a summary disposition in a timely manner once the transcripts had been received.

The Court further indicated that a second scheduling conference would be set at a later date.



Deputy Clerk

VAN G. BISHOP ISBN 2740
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203 - 12th Avenue Rd. Suite B
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Telephone: (208) 465-5411
Facsimile: (208) 465-5881

Attorney for Petitioner

F I L E D
 A.M. *12:50* P.M.
DEC 17 2007

CANYON COUNTY CLERK
 J MEYERS, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,	)	CASE NO. CV-06-08651
)	
	)	FIRST AMMENDED PETITION FOR
Petitioner,	)	POST-CONVICTION RELIEF
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

The Petitioner, **TREVOR JAMES BOOTH**, by and through his attorney, **VAN G. BISHOP**, of the **LAW OFFICES OF VAN G. BISHOP**, submits this Amended Petition for Post-Conviction Relief, and alleges:

1. Place of detention if in custody: Idaho State Correctional Institute, currently housed at Bill Clayton Detention Center, Littlefield, Texas..
2. Name and location of Court which imposed judgment/sentence: Honorable Judge Gregory M. Culet, District Court of the Third Judicial District in and for the County of Canyon, Caldwell, Idaho.
3. The case number and the offense for which sentence was imposed:
 - (a) CASE NO. CR2005-1658-C

ORIGINAL

(b) Offenses Convicted: First Degree Murder

4. The (a) date upon which sentence was imposed and the (b) term of the sentence:

(a) Date of sentence: Hearing held August 11, 2005, Judgment filed on August 16, 2005.

(b) Terms of sentence: Thirty (30) years fixed, and a subsequent indeterminate period of confinement not to exceed life.

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

(a) Of guilty: X

(b) Of not guilty:

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

7. State concisely all grounds on which you base your application for post conviction relief:

(a) Ineffective assistance of counsel.

(b) Failure to investigate and interview potential witnesses in police reports, and which the defendant and his family provided which would substantiate the treats the victim made to defendant and defendant's family. Additionally witnesses which would have substantiated the victim's activity in the drug trade in Canyon County.

(c) Failure to obtain expert advice as to the forensics evidence at the scene of the offense and the reenactment of the crime. Failed to assess and analyze the time line for which Defendant was at the residence as evidenced by the neighbors leaving and returning and the footsteps in the snow. All of this analysis and expert assistance would have substantiated defendants statement to counsel and supported a reduced charge of manslaughter or at most 2nd. Degree murder..

(d) Failure to interview members of law enforcement drug enforcement as to evidence beneficial to defendant in reducing the charge to that of manslaughter.

(e) Failure to File a Motion and argue for withdrawal of guilty plea once the sentence was imposed.

(f) Coercive and threatening tactics used against defendant and defendants family assuring them a ten (10) year sentence if he were to plead and a fixed life sentence if he took the case to trial. (Exhibit A attached to initial filing)

(g) Conflict of Interest: Counsel for the defendant had a conflict of interest with the defendant in that counsel was the victim's landlord. Counsel owned the real property, rented by the victim where the crime occurred and was active in collection of rents, arranging for maintenance as a landlord. This conflict was not told to the defendant until the pressure to enter a plea was conducted late in the court process.

8. Prior to this Petition, have you filed with respect to any conviction?

(a) Any petitions in State or Federal Courts for Habeas Corpus? NO

(b) Any other petitioners, motions or application in this or any other Court?

YES – A Rule 35 Motion for reduction of Sentence which was summarily denied without hearing.

9. If your application is based upon failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests. Includes, but is not limited to:

(a) Defendant was represented by the Private Counsel, Richard Harris. Counsel approached the case as a plea bargain rather than putting forth the necessary time, effort and investigation to prepare the

case for trial. The Defendant's grandmother made contact with counsel after the initial arraignment to pay money towards the trial and was advised by counsel that this case will not go to trial. Counsel in analyzing the case on initial visit and review of the perceived facts, determined that the court would sentence the defendant to ten (10) years and at most fifteen (15) years fixed with an Indeterminate Life. Counsel was aware of the victim's criminal activities in the drug trade in making this determination. Counsel, however, did not investigate, document and obtain the necessary witnesses to prepare the case for trial should plea negotiations breakdown or fail. The state filed a Motion for Special Verdict Form, to which counsel for defendant prepared a memo outlining section 18-4004 I.C. (not applicable in this case where death penalty was not sought) rather than filing an objection to the requested instruction. Counsel further used the memo in coercing the defendant to enter a plea to First Degree Murder advising the defendant that the court would only sentence him to ten (10) years but that if he were to go to trial there was a possibility that he could serve a fixed life sentence. Counsel also advised the defendant's mother, father and sister the same ten year sentence would be imposed. The defendant's position up until the coercive action was "*I have nothing to loose by going to trial*". Death penalty was not an option and the evidence to be presented at trial would show that the case was one of manslaughter or at most 2nd degree murder. Counsel had not prepared for trial and was not in a position to go to trial on the date of the Status Conference when the plea was entered.

(b) Counsel did not contact nor interview witnesses which the defendant and the defendant's parents and family provided to counsel who could have shown the coercive and threatening actions made by the victim to the defendant and the direct threat to his family.

(c) Counsel failed to evaluate the evidence and witnesses which if presented would show a real possibility of a reduction of the charge to one of manslaughter or 2nd degree murder, even after continual requests from the defendant, his parents and sister. An evaluation of the hard evidence, including the

neighbors leaving and return, the footprints in the snow would have shown the minimal time that defendant was at the house where the offense took place. Additionally, forensics review of the materials for the silencer at the sink would show that the victim may have prepared the weapon himself, and a reenactment of the firing in the residence would have shown the incident occurred as the defendant had stated to counsel.

(d) Counsel did not prepare the defendant's family or any other witness for the defendant for the sentencing hearing. The defendant's mother was totally caught off guard at being a potential witness at the sentencing hearing. She had not been interviewed by counsel or advised as to what types of questions he would ask, nor was she advised of the cross-examination which she would face. None of the defendant's family or friends were contacted as potential witnesses or prepared to be a witness. At sentencing counsel did not object to the mother's victim impact statement when she became personal and threatening to the defendant and exceeded the permissible content of victim's impact. Counsel did not present mitigating evidence at the sentencing hearing. Defendant had many accomplishments as stated in the memorandum in support of his Rule 35 Motion which counsel could have presented along with other accomplishments of the defendant.

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

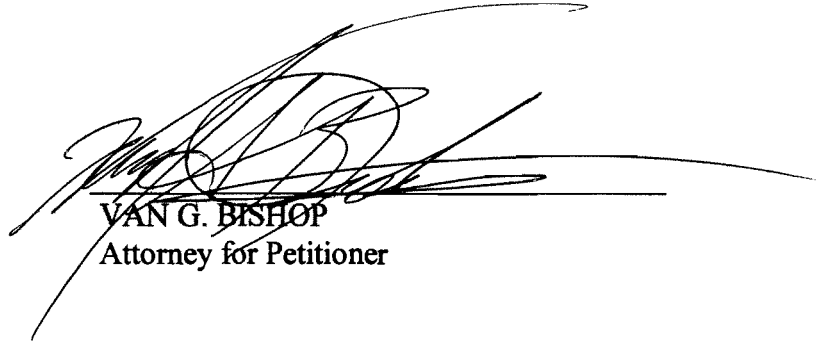
(a) Yes

(b) No **XX**

11. State specifically the relief you seek: To have the plea of guilty set aside and the matter rescheduled for trial to pursue all legal issues in the criminal matter.

12. Petitioner respectfully reserves the right to supplement this Post Conviction Petition with an affidavit at a later time and respectfully requests a hearing on his Post Conviction Petition.

DATED this 14th day of December, 2007.



VAN G. BISHOP
Attorney for Petitioner

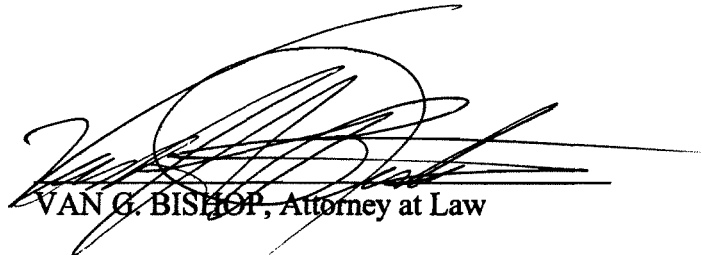
CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing document was served by the following method indicated below to each of the following:

Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

U. S. Mail, postage prepaid
 Personally delivered
 Telecopy/fax

DATED this 17th day of December, 2007.



VAN G. BISHOP, Attorney at Law

II.

SPECIFIC ANSWERS TO PETITIONER'S POST-CONVICTION ALLEGATIONS

1. Answering paragraphs 1, 2, 3(a), 3(b), 4(a), 4(b), 5(a), 6, 8(a), and 8(b) of Petitioner's First Amended Petition for Post-Conviction Relief, Respondent admits the allegations contained therein.
2. Answering paragraphs 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), (Petitioner has never filed Exhibit "A), 7(g), 9(a), 9(b), 9(c) and 9(d), the state denies the conclusory allegations.
3. Answering paragraph 8(a) and 8(b), that Petitioner has not filed any prior petitions for post-conviction relief or petitions for a writ of habeas corpus in state or federal court, Respondent believes this allegation to be true, but specifically reserves the right to raise a successive petition/res judicata/procedural default bar or defense should facts come to light indicating that the allegation is in any part false.
4. Answering paragraph 7 (a-g) and 9 (a-d), assertions of ineffective assistance of counsel, the state denies the allegations.
4. Paragraphs 10, 11 and 12 regarding in forma pauperis request/request for appointment of counsel, are not factual allegations capable of being admitted or denied.

FIRST AFFIRMATIVE DEFENSE

Petitioner's petition fails to state any grounds upon which relief can be granted. Idaho Code § 19-4901(a); I.R.C.P. 12(b)(6).

SECOND AFFIRMATIVE DEFENSE

To the extent the Petitioner's claims should have been raised on direct appeal, the claims are procedurally defaulted. Idaho Code § 19-4901(b).

THIRD AFFIRMATIVE DEFENSE

Petitioner has failed to verify his petition as required. Idaho Code §§ 19-4902(a) and 19-4903.


FOURTH AFFIRMATIVE DEFENSE

Petitioner's Petition for Post-Conviction Relief contains bare and conclusory allegations unsubstantiated by affidavits, records, or other admissible evidence, and therefore fails to raise a genuine issue of material fact. Idaho Code §§ 19-4902(a), 19-4903, and 19-4906.

WHEREFORE, Respondent prays for relief as follows:

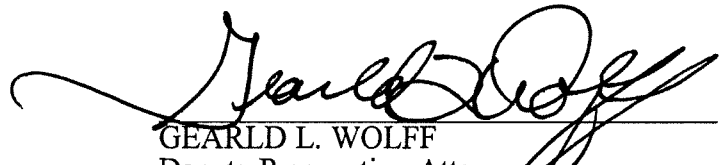
- a) That Petitioner's claims for post-conviction relief be denied;
- b) That Petitioner's claims for post-conviction relief be dismissed;
- c) for such other and further relief as the court deems necessary in the case.

DATED this 21st day of December, 2007.


GERALD L. WOLFF
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing ANSWER to be delivered to the Defendant's attorney of record by placing said copy in the basket of Van Bishop, in the Clerk's office on or about the 21st day of December, 2007.


GERALD L. WOLFF
Deputy Prosecuting Attorney

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PRESIDING: **GREGORY M. CULET** DATE: JANUARY 14, 2008

TREVOR JAMES BOOTH,)	
	)	COURT MINUTES
Plaintiff,)	
	)	CASE NO. CV 2006-8651*C
vs)	
	)	TIME: 9:30A.M.
STATE OF IDAHO,)	
	)	REPORTED BY: Nancy Christensen
Defendant.	)	Independent
)	
_____	)	DCRT 1 (119-131)

This having been the time heretofore set for **post conviction relief** in the above entitled matter, the plaintiff did not appear in court, but was represented by counsel, Mr. Van Bishop, and the State was represented by counsel, Mr. Gearld Wolff, Deputy Prosecuting Attorney.

The Court indicated that an Amended Petition for Post Conviction Release had been filed and the State had filed a response thereto.

In answer to the Courts inquiry, each of counsel indicated they had received the transcripts prepared in the case.

Mr. Wolff indicated that the State had filed a motion for the Court to take judicial notice of the transcripts as well as the clerks records. Further, the State would be filing a motion for summary disposition on several issues set forth in the Amended Petition.

Mr. Bishop advised the Court that he was waiting on an affidavit from his client who was being housed in Texas, further; he also had Mr. Richard Harris preparing an affidavit which should be filed prior to the motion for summary disposition.

Mr. Wolff advised the Court that he had not yet received attachment A to the original petition. Additionally, he had checked in the Courts file and attachment A had not been attached to the Courts petition either.

Mr. Bishop indicated that attachment A would not be a problem and obtaining Mr. Harris' affidavit should not be a problem. Therefore, he would request the Court allow him until the 24th day of February to have that information filed.

Mr. Wolff indicated that he would suggest the Court allow Mr. Bishop until the 1st day of March to have that information, as his client was being held in Texas which complicated things.

The Court indicated that Mr. Bishop was to have all the documents filed by February 1, 2008 and he could request an extension if needed.

Mr. Wolff indicated that he would have the motion for summary disposition filed within thirty (30) days thereafter.

The Court directed the respondent to have the motion for summary disposition filed by March 3, 2008, with the petition to file a response thereto by the 17th day of March 2008, and the respondent to file a reply by the 24th day of March 2008.

The Court would further order this matter set for oral argument on the motion for summary disposition for April 16, 2008 at 9:00 a.m. if the Courts death penalty case does not interfere, if the jury trial does interfere, oral argument would be heard on June 6, 2008 at 9:00 a.m.

The Court directed Mr. Bishop to prepare a scheduling order, submit it to opposing counsel for review and then to the Court.



Deputy Clerk

**VAN G. BISHOP
LAW OFFICES OF VAN G. BISHOP
203 - 12th Avenue Rd. Suite B
Nampa, Idaho 83686
Telephone: (208) 465-5411
Facsimile: (208) 465-5881
ISBN 2740**

Attorney for Defendant

F I L E D
A.M. 1:00 P.M.

JAN 23 2008

**CANYON COUNTY CLERK
J MEYERS, DEPUTY**

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

TREVOR JAMES BOOTH,	)	CASE NO. CV-06-08651
)	
Petitioner,	)	COURT SCHEDULING ORDER
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

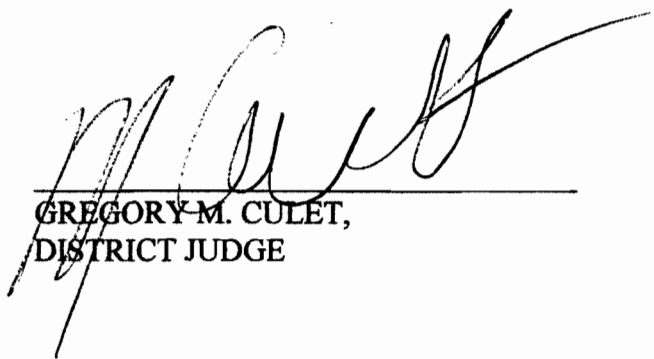
THIS MATTER was before the Court on the 14th day of January, 2008 for a status conference. The Court discussed the possible conflicting trial scheduled in Payette County which the Court as well as Petitioner's counsel is scheduled in for the last of March, April and May. Should the trial in Payette County goes then the scheduling order may need to be modified. BASED UPON the information provided to the Court, the agreement of the parties, and GOOD CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED that the scheduling order shall be entered as follows:

1. Petitioner shall file his affidavits and a copy of exhibit A on or before February 1, 2008, with the Court understanding that the petitioner is being housed in Littlefield, TX under custody of

the Department of Corrections and obtaining a notarized affidavit could be delayed do to this housing assignment.

2. Respondent shall file his Motion for Summary Judgment on or before March 3, 2008.
3. Petitioner shall file his response to State's Motion for Summary Judgment on or before March 17, 2008.
4. Respondent shall file his reply on or before March 24, 2008.
5. Oral Argument on the Motion for Summary Judgment shall be heard on April 16, 2008 at 9am if the Trial in Payette County does not interfere, if the Payette County trial interferes with the April date the Oral Argument shall be heard on June 6, 2008 at 9am.

DATED: January 22, 2008



GREGORY M. CULET,
DISTRICT JUDGE

cc: PA, V. Bishop

MAR 03 2008

CANYON COUNTY CLERK
B RAYNE, DEPUTY

dt

DAVID L. YOUNG, ISB #3679
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605
Telephone: (208) 454-7391

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR BOOTH,	)	CASE NO. CV0608651
)	
Petitioner,)	
)	
vs.	)	MOTION FOR SUMMARY
	)	DISMISSAL
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

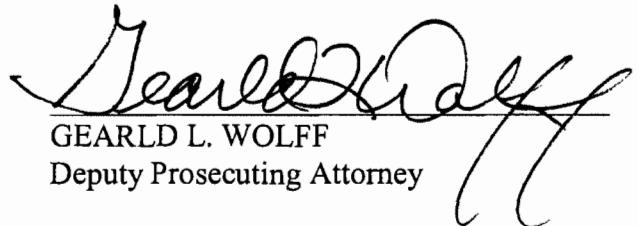
COMES NOW, the State of Idaho, by and through GEARLD L. WOLFF , and does hereby move for summary dismissal of Petitioner's Trevor Booth's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c) on the general basis that, in light of the pleadings, answers, admissions, and the record of the underlying criminal case, the petition fails to raise a genuine issue of material fact.

Petitioner's ineffective assistance of counsel claims fail to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice.

The specific grounds for dismissal of each of Petitioner's allegations are as set forth as follows:

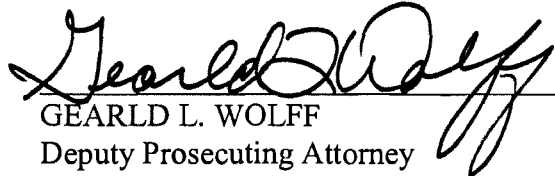
1. Petitioner has never supplied Exhibit "A" (which has been incorporated by reference to both the original Petition and the Amended Petition) to either the Court or the Respondent.
2. Neither the original Petition or Amended Petition is verified; nor are Affidavits of Fact attached, filed, or provided. The Petition/Amended Petition fail to conform to Idaho Code §19-4902. There is no factual basis to support any of Petitioner's claims, which are speculative and conclusory in nature.
3. The transcripts of the criminal proceedings and the Clerk's Record, that were filed with the State's Request for Judicial Notice on November 16, 2007, support a finding of effective representation, and prove that Petitioner can not meet the standards of Strickland v. Washington, 466 U.S. 668 (19824) and its progeny. Counsel conducted adequate discovery, engaged in meaningful preparation, filed and argue appropriate motions and made meaningful arguments at sentencing. Counsel negotiated a way to avoid the Court finding of aggravating circumstances and/or imposed a fixed life sentence as a mandatory sentence.

DATED this 3rd day of March 2008.


GEARLD L. WOLFF
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing ANSWER to be delivered to the Defendant's attorney of record by placing said copy in the basket of Van Bishop in the Clerk's office on or about the 3rd day of March, 2008.


GEARLD L. WOLFF
Deputy Prosecuting Attorney

F I L E D
A.M. | 4:50 P.M.

JUL 10 2008

CANYON COUNTY CLERK
B RAYNE, DEPUTY

VAN G. BISHOP
LAW OFFICES OF VAN G. BISHOP
203 - 12th Avenue Rd. Suite B
Nampa, Idaho 83686
Telephone: (208) 465-5411
Facsimile: (208) 465-5881
ISBN 2740

Attorney for Petitioner


IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

CASE NO. CV-06-08651
NOTICE OF FILING "EXHIBIT A"
OF POST CONVICTION PETITION

COMES NOW, VAN G. BISHOP, of the LAW OFFICES OF VAN G. BISHOP, attorney for the above-named Petitioner and submits herewith the second through fourth page of the memo counsel gave to petitioner in persuading him to plea with assurance of no more than a 15 year fixed sentence. (Reference page 3, 7-f of Amended Petition)

DATED this 9th day of July 2008.


VAN G. BISHOP
Attorney for Defendant

NOTICE OF FILING "EXHIBIT A"

ORIGINAL

MEMO

TO: TREVOR BOOTH

FROM: RLH

DATE: MAY 9, 4005

SUBJECT: Punishment for Murder

Idaho Code Sec. 18-4004 sets forth the statutory basis of sentencing for murder. That statute is as follows:

Subject to the provisions of sections 19-2515 [Sentencing in capital cases; not applicable here] and 19-2515A [Imposition of death sentence on mentally retarded persons; not applicable here] Idaho Code, every person guilty of murder of first degree murder shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed a written notice of intent to seek the death penalty as required under the provisions of section 18-4004A, Idaho Code, and provided further that whenever the death penalty is not imposed the court shall impose a sentence. If a jury or the court if a jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of death would be unjust, the court shall impose a fixed life sentence. If a jury, or the court if a jury is waived, does not find a statutory circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit for reduction of sentence for good conduct, except for meritorious service. Every person guilty of murder in the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life.

What this statute means is that upon a conviction for first degree murder, if the jury or a judge if jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt the sentence is death. However, if the prosecutor does not seek death, as is the case here, and if a statutory aggravating circumstance is found, then the sentence is a fixed life sentence. That means the person sentenced will spend his life in prison and will die there. At the pre-trial conference on Friday the Judge indicated to the prosecutor and myself that he will submit a verdict form to the jury that will ask the question of the jury: "Did Trevor Booth commit the crime of first degree murder? Yes or No. The verdict form will also contain the same question for second degree murder and for manslaughter. If the jury finds you guilty of first degree murder, the verdict

form would contain the further question of the jury: "do you find beyond a reasonable doubt a statutory aggravating circumstance.? Yes or No. Since the trial judge intends to submit that question to the jury as part of the verdict form and if the jury finds an aggravating circumstance as a part of the verdict, then the sentence to be imposed by the judge, notwithstanding all the evidence there is in mitigation, a fixed life sentence which means you will spend the rest of your life in prison.

Idaho Code 19-2515 sets forth the aggravating circumstances:

- a. The defendant was previously convicted of murder;
- b. At the time the murder was committed, another murder was committed;
- c. The defendant knowingly created a risk of death to many persons;
- d. The murder was for hire;
- e. The murder was especially heinous, atrocious or cruel;
- f. By committing the murder the defendant exhibited utter disregard for life;
- g. The murder was committed in the commission of rape, arson, burglary, kidnapping or mayhem or acted with reckless indifference to life;
- h. The defendant has exhibited a propensity to commit murder which will continue to be a continuing threat;
- i. The murder was committed against a law enforcement officer;
- j. The murder was committed against a witness or potential witness.

*This is
what they
would use*

Some of these potentially apply and others do not. The ones that may apply are e, f, and h. The rest do not apply to this case. My experience has been with murder cases that it is not too difficult for a finding to be made that the murder is heinous (a murder by definition is considered heinous) atrocious or cruel or alternatively that by committing the murder, the defendant showed utter disregard for life. Although it might be a stretch, by committing one murder, a person has demonstrated that he can commit murder especially in the context of a drug related action.

The bottom line is this. If you are convicted of first degree murder, not a death penalty case, but the jury finds an aggravating circumstance, you will spend the rest of your life in prison. I have had some preliminary discussions with the prosecutor and they may be willing to waive anything to do with an "aggravating circumstance" in return for a plea of guilty to the murder of Kellum. What that means is that the minimum term of confinement is 10 years but thereafter you would be eligible for parole. However, under the State of Idaho's sentencing scheme for all felony crimes, the Judge is required to impose a fixed term to be followed by an indeterminate term for a total term of X number of years or months. For example a sentence could be 2 + 3 for a total of five years. What that means is the person would have to serve two years but would be eligible for parole after two although the Board of Corrections could keep the person incarcerated for another 1, 2 or 3 years until the sentence was maxed out. Again typically, once the fixed term is served, the Board of Corrections releases the inmate on parole. At this point I am confident the prosecutor will not request the judge to find an

aggravating circumstance which would mean no fixed life sentence. The prosecutor has not indicated nor agreed to a minimum term of ten. The prosecutor could recommend a greater term than ten, and the judge would not be bound by the fixed term of ten years and could impose a greater term than ten years. However, the fixed term would be for a finite number and you would be eligible for parole once that number was served. My effort would be to present mitigating facts to the judge which would get you the ten number or the least number above ten as possible. Knowing the judge as I do, I do not think that number would exceed fifteen.

What does this mean in terms of decision making? Based upon the evidence as currently presented, I believe the high probability is that the jury is going to return a verdict of guilty. The evidence is that the shooter went into the house through the back door. The door was ajar when the police entered the house. The police have statements from Kellum identifying you as the shooter, not just once but he reiterated your identity as the shooter at least six times. Those statements of Kellum are admissible in evidence as a dying declaration to the hearsay rule. I have explained that rule to you previously. The police will be able to use your statement that you had gone over to the house, heard arguing and shots being fired from in the house even though you stated you did not enter the house. However an inference is going to be drawn and the prosecutor will argue that (1) the shooter did not enter the house through the front door because (a) the door was locked when the police arrived, and (b) there were no footprints in the snow leading up to the front door; (2) that when the neighbors in the back apartment left that morning no foot prints were observed in the snow; (3) that the police will testify that there was only one set of footprints leading up to the back door, the same foot prints led over to the end of the drive way and back towards the back door, and finally the same set of foot prints ostensibly then ran from the backdoor across the yard out onto the street; and (4) the footprints match up to your shoe. The inference to be drawn from these facts is that you are the shooter to the exclusion of anyone else. Otherwise there would have been other footprints in the snow and there were none, and you in fact stated you were there even though you deny the shooting. If you did not do the shooting why did Kellum identify you as being the shooter. While I can make argument that there is no evidence you were in the house other than Kellum's statement, that the weapon has not been located and the argument can be made that the real shooter has it, that is somewhat weak in comparison. If the matter goes to trial, you would have to testify as to what you have said all along. But testifying means being subject to cross examination and having to explain the lack of other peoples footprints in the snow, why Kellum identified you and dealing with motive. The motive ostensibly being the fact you owed Kellum a lot of money. Although it could be argued other people may have had motive to kill Kellum, particularly because of his acts and conduct and being heavily involved in drug dealing, there is no hard evidence that implicates anyone else.

The bottom line is this. If you go to jury trial, there is the very strong probability of facing a fixed life sentence. That means spending the rest of your life in prison. If you enter a plea to murder with the prosecutor waiving aggravated circumstances, or not

requesting the court consider aggravated circumstances, then you would face a minimum period of incarceration of ten years or whatever greater period the judge might impose. I have indicated above I do not think the Judge would impose a term greater than fifteen years followed by an indeterminate life. Life in that context means thirty years. My recommendation is because of the strong risk of spending the rest of your life in prison, a plea agreement may be your best option. Please consider and let me know as soon as possible.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON
PRESIDING: **GREGORY M. CULET** DATE: JULY 14, 2008

TREVOR JAMES BOOTH,)	
	)	COURT MINUTES
Plaintiff,)	
	)	CASE NO. CV 2006-8651*C
vs)	
	)	TIME: 9:30A.M.
STATE OF IDAHO,)	
)	
Defendant.	)	REPORTED BY: Laura Whiting
_____)	
)	
STATE OF IDAHO,	)	CASE NO. CR 2005-1658*C
)	
Plaintiff,)	
)	
vs.)	
)	
)	
TREVOR JAMES BOOTH,)	
)	
Defendant,)	
_____)	

This having been the time heretofore set for **motion for summary disposition** in the above entitled matter, the plaintiff did not appear in court but was represented by counsel, Mr. Van Bishop, and the State was represented by counsel, Mr. Gearld Wolff, Deputy Prosecuting Attorney.

The Court reviewed prior proceedings and noted the pending motion.

Mr. Bishop advised the Court that he had filed Exhibit A with the Court, however, the first page of that exhibit was missing when provided to the Court and counsel. Therefore, he was submitting the first page at this time.

The Court so noted and indicated that it would have page one attached to the exhibit in the Courts file.

In answer to the Courts inquiry, each of counsel indicated they were prepared to proceed with argument.

Mr. Wolff presented argument in support of the motion for summary disposition.

Mr. Bishop responded with argument in objection to the motion.

Mr. Wolff presented additional argument in support of the motion for summary disposition.

The Court presented findings of fact and conclusions of law and indicated it would grant the motion for summary disposition with regard to all matters excluding 9 (a) and 7 (f) of the petition, however, verification would be needed from Mr. Booth with regard to those matters. Therefore, the Court would allow thirty (30) days to begin upon filing of the order, to get said verification and would allow counsel to do additional briefing.

The Court ordered this matter set for status conference for October 2, 2008 at 9:00 a.m. which would also be utilized as a scheduling conference.

Mr. Wolff requested the Court prepare a written notice under State vs. Flores which would be sent to Mr. Booth in Texas as he had not been present at the proceeding.

The Court indicated the petition would be dismissed absent verification within thirty (30) days.

The Court directed Mr. Wolff to prepare an order for the Court's signature containing the portions of the motion which were granted and the Court would prepare a notice of intent to dismiss which would include the time frame for verification.

The Court indicated there would be a ruling, however, it would not be a final ruling under Civil Rule 35, therefore, and the appeal time would not be tolling until the final order is entered.


Deputy Clerk

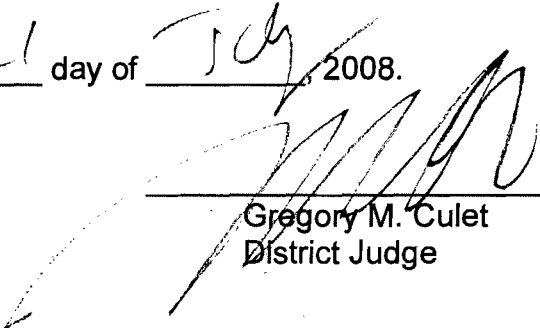
JUL 22 2008

CANYON COUNTY CLERK
B RAYNE, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,)	
)	
Plaintiff	)	NOTICE OF INTENT TO DISMISS
	)	PURSUANT TO IDAHO CODE
	)	SECTION 19-4906(c)
)	
-vs-	)	Case No. CV2006-8651
)	
STATE OF IDAHO,)	
)	
Defendant.)	

The above-entitled matter came before this Court on the State's Motion for Summary Disposition on July 14, 2008. Van Bishop appeared on behalf of the plaintiff and Gerald Wolff appeared on behalf of the defendant. Notice was given in open court to the defendant that this Court intends to dismiss the Petition unless the Petitioner verifies under oath Sections 7F and 9A of the Amended Petition. The Court further allows the defendant 30 days from the date of this order which to bring that aspect of the Petition into compliance with Idaho Code Section 19-4902 and Idaho Code Section 19-4903.

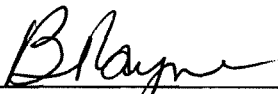
BE IT SO ORDERED, this 21 day of July, 2008.


Gregory M. Culet
District Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing order was forwarded to the following persons on this 12 of July, 2008.

Van G. Bishop
Attorney at Law
203 – 12th Ave Rd. Suite B
Nampa, Id 83686

Canyon County Prosecuting Attorney
1115 Albany
Caldwell, ID 83605



Deputy Clerk of the Court

dt

DAVID L. YOUNG, ISB #3679
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605
Telephone: (208) 454-7391

FILED
A.M. P.M.

JUL 29 2008

CANYON COUNTY CLERK
C ATKINSON, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR BOOTH,	)	CASE NO. CV2006-08651
)	
Petitioner,	)	ORDER GRANTING PARTIAL
	)	SUMMARY JUDGMENT, DENYING
vs.	)	MOTION FOR SUMMARY
	)	JUDGMENT AS TO ALLEGATIONS
STATE OF IDAHO,	)	7 (f) AND 9(a), NOTICE OF INTENT
	)	UNDER I.C. §19-4906(b) AND ORDER
Respondent.	)	SETTING STATUS CONFERENCE

This matter came before the court on July 14, 2008, on Respondent's State of Idaho Motion for Summary Judgment under I.C. §19-4906(c). Petitioner was represented by Van Bishop. Respondent was represented by Gearld L. Wolff. After hearing the arguments of counsel, reviewing the Petition, Answer, Motion and the records and transcripts previously submitted from the underlying criminal case of State v. Trevor Booth, CR2005-01658, Supreme Court docket number 32289, the Court concludes that partial summary judgment should be granted on Respondent's Motion as to the majority of Petitioner's allegations as contained in

paragraphs 7(a), (b), (c), (d), (e) and (g), and paragraphs 9(b), 9(c) and 9(d) of the Petition as there are no genuine issues of material fact as to those allegations and Respondent is entitled to judgment on those allegations as a matter of law.


Petitioner has failed to verify the Petition as to these allegations, has failed to support them with admissible evidence or affidavits, and can not carry his burden under Strickland v. Washington, 466 U.S. 668 (1984) of proving either deficient performance of counsel or prejudice.

As to the allegations contained in paragraphs 7(f) and 9(a), the court concludes that Petitioner has failed to verify or otherwise support his Petition with admissible evidence or affidavits. The Court concludes that Petitioner could potentially have viable claims and should be allowed an opportunity under I.C. §19-4906(b) to comply with statutory requirements of factually supporting his allegations. Notice is hereby given of the Court's Intent to Dismiss the Petition if Petitioner does not adequately support the Petitioner's allegations and verify the Petition. The Court hereby grants THIRTY (30) days for compliance with the requirements of the UPCRA by Petitioner, due to Petitioner being housed out of State by the Department of Corrections.

THEREFORE, Respondent's Motion for Summary Judgment is GRANTED as to allegations in paragraphs 7(a), 7(b), 7(c), 7(d), 7(e), 7(g), 9(b), 9(c) and 9(d). The Petition is DISMISSED as to those allegations. It is further ORDERED that Petitioner be given thirty (30) days to respond to the Court's Notice of Intent to Dismiss for failure to verify and factually

support the allegations of paragraphs 7(f) and 9(a). This matter is hereby set for status conference on October 2, 2008, at 9:00 a.m. before this Court.

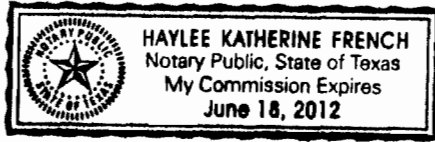
DATED this 28 day of July, 2008.



GREGORY M. CULET
District Judge

cc: PA ✓
VanBishop ✓
IDOC ✓

ORDER
H:\PCR\booth ord.wpd



Haylee French
NOTARY FOR THE STATE OF TEXAS
Commission expires: 6/18/2012

VERIFIED PETITION FOR POST CONVICTION RELIEF

1. Place of detention if in custody: Idaho State Correctional Institute, currently housed at Bill Clayton Detention Center, Littlefield, Texas..
2. Name and location of Court which imposed judgment/sentence: Honorable Judge Gregory M. Culet, District Court of the Third Judicial District in and for the County of Canyon, Caldwell, Idaho.
3. The case number and the offense for which sentence was imposed:
 - (a) CASE NO. CR2005-1658-C
 - (b) Offenses Convicted: First Degree Murder
4. The (a) date upon which sentence was imposed and the (b) term of the sentence:
 - (a) Date of sentence: Hearing held August 11, 2005, Judgment filed on August 16, 2005.
 - (b) Terms of sentence: Thirty (30) years fixed, and a subsequent indeterminate period of confinement not to exceed life.
5. Check whether a finding of guilty was made after a plea:
 - (a) Of guilty: X
 - (b) Of not guilty:
6. Did you appeal from the judgment of conviction or the imposition of sentence? YES
7. State concisely all grounds on which you base your application for post conviction relief:
 - (a) Ineffective assistance of counsel.
 - (b) Failure to investigate and interview potential witnesses in police reports, and which the defendant and his family provided which would substantiate the treats the victim made to defendant and

day of August, 2008 at Littlefield, Texas.

NOTARY FOR THE STATE OF TEXAS

Commission expires: _____

VERIFIED PETITION FOR POST CONVICTION RELIEF

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 - (b) Terms of sentence: Thirty (30) years fixed, and a subsequent indeterminate period of confinement not to exceed life.
5. Check whether a finding of guilty was made after a plea:
 - (a) Of guilty: X
 - (b) Of not guilty:
6. Did you appeal from the judgment of conviction or the imposition of sentence? YES
7. State concisely all grounds on which you base your application for post conviction relief:
 - (a) Ineffective assistance of counsel.

(b) Failure to investigate and interview potential witnesses in police reports, and which the defendant and his family provided which would substantiate the treats the victim made to defendant and defendant's family. Additionally witnesses which would have substantiated the victim's activity in the drug trade in Canyon County.

(c) Failure to obtain expert advice as to the forensics evidence at the scene of the offense and the reenactment of the crime. Failed to assess and analyze the time line for which Defendant was at the residence as evidenced by the neighbors leaving and returning and the footsteps in the snow. All of this analysis and expert assistance would have substantiated defendants statement to counsel and supported a reduced charge of manslaughter or at most 2nd. Degree murder..

(d) Failure to interview members of law enforcement drug enforcement as to evidence beneficial to defendant in reducing the charge to that of manslaughter.

(e) Failure to File a Motion and argue for withdrawal of guilty plea once the sentence was imposed.

(f) Coercive and threatening tactics used against defendant and defendants family assuring them a ten (10) year sentence if he were to plead and a fixed life sentence if he took the case to trial. (Exhibit A attached to initial filing)

(g) Conflict of Interest: Counsel for the defendant had a conflict of interest with the defendant in that counsel was the victim's landlord. Counsel owned the real property, rented by the victim where the crime occurred and was active in collection of rents, arranging for maintenance as a landlord. This conflict was not told to the defendant until the pressure to enter a plea was conducted late in the court process.

8. Prior to this Petition, have you filed with respect to any conviction?

(a) Any petitions in State or Federal Courts for Habeas Corpus? NO

(b) Any other petitioners, motions or application in this or any other Court?

YES – A Rule 35 Motion for reduction of Sentence which was summarily denied without hearing.

9. If your application is based upon failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests. Includes, but is not limited to:

(a) Defendant was represented by the Private Counsel, Richard Harris. Counsel approached the case as a plea bargain rather than putting forth the necessary time, effort and investigation to prepare the case for trial. The Defendant's grandmother made contact with counsel after the initial arraignment to pay money towards the trial and was advised by counsel that this case will not go to trial. Counsel in analyzing the case on initial visit and review of the perceived facts, determined that the court would sentence the

defendant to ten (10) years and at most fifteen (15) years fixed with an Indeterminate Life. Counsel was aware of the victim's criminal activities in the drug trade in making this determination. Counsel, however, did not investigate, document and obtain the necessary witnesses to prepare the case for trial should plea negotiations breakdown or fail. The state filed a Motion for Special Verdict Form, to which counsel for defendant prepared a memo outlining section 18-4004 I.C. (not applicable in this case where death penalty was not sought) rather than filing an objection to the requested instruction. Counsel further used the memo in coercing the defendant to enter a plea to First Degree Murder advising the defendant that the court would only sentence him to ten (10) years but that if he were to go to trial there was a possibility that he could serve a fixed life sentence. Counsel also advised the defendant's mother, father and sister the same ten year sentence would be imposed. The defendant's position up until the coercive action was "*I have nothing to loose by going to trial*". Death penalty was not an option and the evidence to be presented at trial would show that the case was one of manslaughter or at most 2nd degree murder. Counsel had not prepared for trial and was not in a position to go to trial on the date of the Status Conference when the plea was entered.

(b) Counsel did not contact nor interview witnesses which the defendant and the defendant's parents and family provided to counsel who could have shown the coercive and threatening actions made by the victim to the defendant and the direct threat to his family.

(c) Counsel failed to evaluate the evidence and witnesses which if presented would show a real possibility of a reduction of the charge to one of manslaughter or 2nd degree murder, even after continual requests from the defendant, his parents and sister. An evaluation of the hard evidence, including the neighbors leaving and return, the footprints in the snow would have shown the minimal time that defendant was at the house where the offense took place. Additionally, forensics review of the materials for the silencer at the sink would show that the victim may have prepared the weapon himself, and a reenactment of the firing in the residence would have shown the incident occurred as the defendant had stated to counsel.

(d) Counsel did not prepare the defendant's family or any other witness for the defendant for the sentencing hearing. The defendant's mother was totally caught off guard at being a potential witness at the sentencing hearing. She had not been interviewed by counsel or advised as to what types of questions he would ask, nor was she advised of the cross-examination which she would face. None of the defendant's family or friends were contacted as potential witnesses or prepared to be a witness. At sentencing counsel did not object to the mother's victim impact statement when she became personal and threatening to the defendant and exceeded the permissible content of victim's impact. Counsel did not present mitigating evidence at the sentencing hearing. Defendant had many accomplishments as stated in the memorandum in support of his Rule 35 Motion which counsel could have presented along with other accomplishments of the defendant.

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

(a) Yes

(b) No

11. State specifically the relief you seek: To have the plea of guilty set aside and the matter

rescheduled for trial to pursue all legal issues in the criminal matter.

12. Petitioner respectfully reserves the right to supplement this Post Conviction Petition with an affidavit at a later time and respectfully requests a hearing on his Post Conviction Petition.

DATED this 11th day of August, 2008.

TREVOR JAMES BOOTH, Petitioner

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing document was served by the following method indicated below to each of the following:

Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

_____ U. S. Mail, postage prepaid
XX Personally delivered
_____ Telecopy/fax

DATED this 18 day of August, 2008.


VAN G. BISHOP, Attorney at Law

12. Petitioner respectfully reserves the right to supplement this Post Conviction Petition with an affidavit at a later time and respectfully requests a hearing on his Post Conviction Petition.

DATED this 11th day of August, 2008.

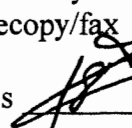

TREVOR JAMES BOOTH, Petitioner

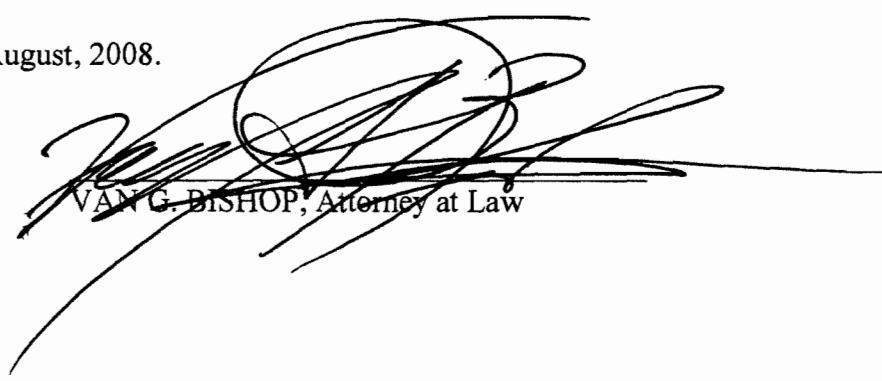
CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing document was served by the following method indicated below to each of the following:

Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

U. S. Mail, postage prepaid
 Personally delivered
 Telecopy/fax

DATED this  day of August, 2008.


VAN G. BISHOP, Attorney at Law

3. I knew Mr. Harris was not ready for trial. That my grandmother had asked how much money he needed and he told her that the case was not going to trial before he gave me the memo dated May 9, 4005.

4. I also knew that Mr. Harris had not contacted the witnesses which I had given him for my defense and without those witnesses I could be found guilty.

5. Mr. Harris told me and assured me that I would get only 10 years if I pled guilty. He told me he knows the Judge and that he was sure I would only get 10 years.

6. I wanted to go to trial and to prove that I did not intentionally shoot the victim. I never wanted to plead guilty to the charge. I only plead guilty because Mr. Harris told me I would get a Fixed Life Sentence and that the Judge would be bound to give it to me and if I plead guilty I would only get 10 years. I also knew Mr. Harris was not prepared to go to trial and had not submitted my witnesses and had not contacted them.

DATED this 11th day of August, 2008.

Trevor Booth

TREVOR JAMES BOOTH, Petitioner

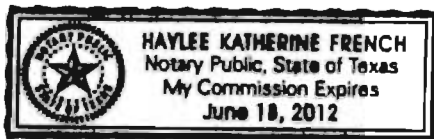
NOTARY

Trevor James Booth having identified himself to me as the Petitioner herein and signing before me this 11th day of August, 2008 at Littlefield, Texas.

Haylee French

NOTARY FOR THE STATE OF TEXAS

Commission expires: 6/18/2012



CERTIFICATE OF SERVICE:

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing document was served by the following method indicated below to each of the following:

Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

U. S. Mail, postage prepaid
 Personally delivered
 Telecopy/fax *LS*

DATED this 18 day of August, 2008.


VAN G. BISHOP, Attorney at Law

kc

DAVID L. YOUNG, ISB #3679
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605
Telephone: (208) 454-7391

F I L E D
10:30 A.M. P.M.
SEP 09 2008
CANYON COUNTY CLERK
J TUCKER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR BOOTH,	)	CASE NO. CV2006-8651
)	
Petitioner,)	
)	
vs.	)	ANSWER AND/OR RESPONSE TO
	)	VERIFICATION OF AMENDED
STATE OF IDAHO,	)	PETITION FOR POST CONVICTION
	)	RELIEF
Respondent.)	
_____)	

COMES NOW, GEARLD L. WOLFF, Deputy Prosecuting Attorney for the Respondent, State of Idaho, who files this Response to Petitioner's Verification of the First Amended Petition for Post Conviction Relief.

I.

Respondent hereby reasserts the Answer previously filed herein on December 21, 2007 and incorporates it herein by this reference.

II.

Respondent hereby denies all factual allegations contained in the Verification. Respondent specifically invokes the law of the case as created by the Court's Order of July 29, 2008, granting Partial Summary Judgment and moves to strike all allegations, except those applicable to Paragraph 7(f) and 9(a). All other matters have been resolved in favor of Respondent and are not subject to further litigation herein.

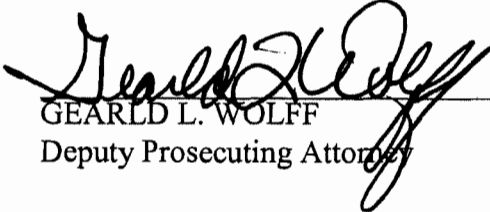
III.

Respondent, State of Idaho alleges that the Verification contains speculation, conjecture and legal assertions that can not be "verified" and moves to strike those non-factual allegations from the Verification.

IV.

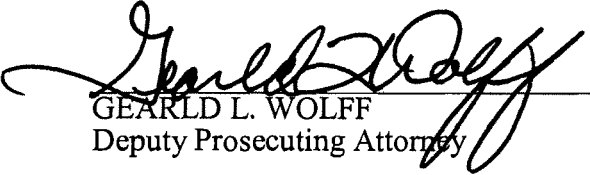
Respondent reserves the right to submit counter-affidavits to the Verification, but alleges affirmatively that trial counsel's performance was constitutionally effective as shown by the records and transcripts of the proceedings in State v. Trevor Booth, CR05-1658C, including Exhibits "A" and "B", attached hereto and incorporated herein.

Respectfully submitted this 8th day of September, 2008.


GERALD L. WOLFF
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing ANSWER to be delivered to the Defendant's attorney of record by placing said copy in Richard Harris's basket in the Clerk's office on or about the 8th day of September, 2008.


GERALD L. WOLFF
Deputy Prosecuting Attorney

*filed
f. G. W.
CH*

RECEIVED

JUN 10 2005

CCPA

RICHARD L. HARRIS
ATTORNEY AT LAW
1023 Arthur Street
P.O. Box 1438
Caldwell, Idaho 83606
Phone: (208) 459-1588
Fax: (208) 459-1300
ISB No. 1387

FILED
1000 A.M. P.M.
JUN - 9 2005
CANYON COUNTY CLERK
Starbome DEPUTY

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)	
	)	CASE NO. CR-2005-1658*C
Plaintiff,)	
	)	CONDITIONAL PLEA OF GUILTY
vs.	)	PURSUANT TO I.C.R. 11(D) (3)
	)	AND (4) BINDING PLEA AGREEMENT
TREVOR BOOTH,)	
)	
Defendant.)	

I have been informed by my attorney and in open court on this date of my constitutional rights in the above-entitled case, and I have read and fully understood the following.

I have received and read a copy of the Information and understand the nature of the charges made against me. I have told my attorney all I know about the matters referred to in it.

My attorney has explained to me the nature of the charges against me, my constitutional rights, and the punishment that could be imposed by the court upon my conditional plea of guilty.

I understand that if I plead to any count or counts in the Information or Indictment:

a. I would be presumed under the law to be innocent of the charges against me in such count or counts;

b. I would be entitled to a speedy, public jury trial by an impartial jury in which the burden would be upon the State to establish my guilty beyond a reasonable doubt to the satisfaction of all twelve (12) jurors; and

CONDITIONAL PLEA OF GUILTY PURSUANT TO I.C.R. 11
(D) (3) AND (4) BINDING PLEA AGREEMENT - 1

000058

2

[Handwritten signature]

c. Upon such trial 1) I would be entitled to remain silent and no inference could be drawn against me because of my silence; 2) I could, if I wished, testify on my own behalf; 3) I would be entitled to confront and cross-examine all witnesses against me; and 4) I would be entitled to compulsory process of the court to obtain witnesses to testify and evidence to be offered in my defense.

I understand that if my conditional plea of guilty to any count or counts is accepted by the court, I give up the foregoing rights with respect to such count or counts and the court will have the same power to sentence me as if a jury had brought in a verdict of guilty with respect to such count or counts.

My decision to conditionally plead guilty is freely and voluntarily made. I have not been induced to conditionally plead guilty by any force, coercion, pressure, or fear.

My plea of guilty is conditional and made pursuant to Idaho Criminal Rule 11 (d) (3) and (4). Should the Court accept the plea agreement, the Court shall advise me personally in open court that the Court cannot follow the plea agreement and give me the opportunity to withdraw my Plea of Guilty and reset the matter for trial.

I understand that my plea of guilty is subject to the following conditions:

a.) I will plead to the offense of First Degree Murder involving the death of Leonard Kellum which occurred on or about January 16, 2005 in the City of Caldwell, Canyon County, Idaho.

b.) That the Prosecuting Attorney will not seek and waives the right to seek an "aggravated circumstance" as that term is referenced in Idaho Code 18-4004.

c.) That the Court will make no finding of an aggravated circumstance as that term is used in Idaho Code 18-4004 for the purposes of sentencing

d.) That the sentencing range to be imposed by the Court is a minimum fixed term of ten years up to life.

e.) That the sentence to be imposed is reserved to the sound discretion of the Court.

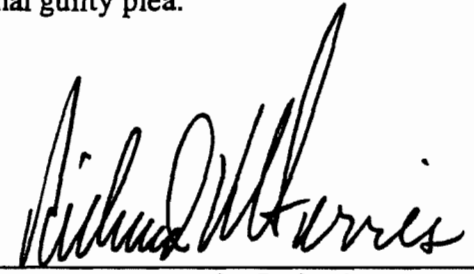
I am not under the influence of any substance, such as narcotic or alcohol, that would affect my ability to understand the nature and consequences of my action in entering a conditional guilty plea.

6-3-05
Date


Defendant

I, the attorney for the above-named defendant, have reviewed the foregoing with him, have explained to his the nature of the charges against him, his constitutional rights, and the punishment that could be imposed upon his conditional guilty plea.

6-3-05
Date


Attorney for Defendant

APPROVED AS TO FORM AND CONTENT:
Dated: This 9 day of June, 2005



For GEARLD L. WOLFF
Deputy Prosecutor For Canyon County

IN THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)
)
 Plaintiff,)
)
vs.) Case No. CR-05-01658*C
)
TREVOR J. BOOTH,)
)
 Defendant.)
_____)

CHANGE OF PLEA

JUNE 9, 2005

BEFORE THE HONORABLE GREGORY M. CULET

FOR THE PLAINTIFF: CANYON COUNTY PROSECUTOR'S OFFICE
by: CHRIS TOPMILLER
1115 Albany Street
Caldwell, Idaho 83605

FOR THE DEFENDANT: RICHARD L. HARRIS
1023 Arthur Street
Post Office Box 1438
Caldwell, Idaho 83606

REPORTED BY:

YVONNE L. HYDE GIER, C.S.R. #73, R.P.R.
Notary Public

STATE OF IDAHO vs. TREVOR BOOTH

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
 Plaintiff/Respondent,)
 vs.) Supreme Court
 Docket No. 32289
 TREVOR BOOTH,)
 Defendant/Appellant.)

TRANSCRIPT ON APPEAL
 THIRD JUDICIAL DISTRICT
 CANYON COUNTY, STATE OF IDAHO

BEFORE THE HONORABLE GREGORY M. CULET

JUNE 9, 2005

FOR APPELLANT: VAN G. BISHOP
 203 12th Ave. Rd., Ste. B
 Nampa, Idaho 83686

FOR RESPONDENT: LAWRENCE G. WARDEN
 State of Idaho Attorney General
 Statehouse
 Boise, Idaho 83720

REPORTED BY:
 YVONNE L. HYDE GIER, C.S.R. #73, R.P.R.
 Notary Public

6

1 CALDWELL, IDAHO
 2 JUNE 9, 2005, 10:08 a.m.
 3
 4 THE COURT: Now, we are back on the record.
 5 We are taking up the case of State versus Trevor Booth,
 6 2005-1658.
 7 In this particular case, there is a couple of
 8 matters. One, the last recess I took was simply to look
 9 for an alternative date for sentencing on the matter
 10 that would allow the State's witnesses and victim's
 11 family to be present. And the alternative date, after
 12 going over the calendar with my secretary and with
 13 counsels' calendars, because there is other trials in
 14 front of other judges that they have, we've come up with
 15 a sentencing time of August 11 at 1:30.
 16 Does that work for people that have to come
 17 in and for people that want to be present?
 18 MR. TOPMILLER: Yes, it does.
 19 THE COURT: Thank you. Now, with that in
 20 mind, there has been a -- my understanding is, there is
 21 going to be a change of plea on this case today. The
 22 case is set to go to jury trial next week, but there
 23 will be a change of plea.
 24 There is an agreement that was reached
 25 between the parties for the -- the State has filed a

8

IN THE DISTRICT COURT OF THE THIRD
 JUDICIAL DISTRICT OF THE STATE OF IDAHO
 IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)
 Plaintiff,)
 vs.) Case No. CR-05-01658-C
 TREVOR J. BOOTH,)
 Defendant.)

CHANGE OF PLEA

JUNE 9, 2005

BEFORE THE HONORABLE GREGORY M. CULET

FOR THE PLAINTIFF: CANYON COUNTY PROSECUTOR'S OFFICE
 by: CHRIS TOPMILLER
 1115 Albany Street
 Caldwell, Idaho 83605

FOR THE DEFENDANT: RICHARD L. HARRIS
 1023 Arthur Street
 Post Office Box 1438
 Caldwell, Idaho 83606

REPORTED BY:
 YVONNE L. HYDE GIER, C.S.R. #73, R.P.R.
 Notary Public

7

1 request or motion to pursue a presentation of proof to
 2 the jury regarding certain aggravating factors that has
 3 a bearing on the sentencing options available.
 4 Pursuant to your agreement, it's my
 5 understanding -- and I'll let counsel explain this
 6 further -- that's going to be withdrawn, there will be a
 7 plea of guilty to the current charge with the
 8 understanding, pursuant to your agreement, that the
 9 sentencing range, then, is that of -- under the current
 10 status, there is a life sentence, not less than ten
 11 years, and then the Court -- and both sides are free to
 12 argue for anything else in between, but the sentencing
 13 range would be pursuant to the charge and the plea, it
 14 is an automatic life sentence, but not less than ten
 15 years. And then it is discretionary with the court,
 16 based on arguments on both sides and presentation of
 17 evidence -- as to where that would be in terms of the
 18 fixed time and indeterminate time -- is that your
 19 understanding?
 20 MR. HARRIS: Generally yes, Judge. What
 21 Mr. Wolff has indicated to me that the starting point
 22 would be a fixed ten, and that could -- and what this
 23 conditional Rule 11 plea is, is also binding the court,
 24 that the court would not find an aggravated
 25 circumstance.

9

STATE OF IDAHO vs. TREVOR BOOTH

1 As I read the statute, it seems to be more
 2 broad than just a jury, because it talks about both the
 3 jury and the court or the jury or the court finding an
 4 aggravated circumstance.
 5 And so as I read the statute, even though a
 6 plea is entered, the court could find an aggravated
 7 circumstance that would make it a fixed life sentence.
 8 And what this Rule 11 plea agreement does that's been
 9 signed off by my client, myself, and the prosecuting
 10 attorney, is that it essentially locks the court into a
 11 position where the court would not find an aggravated
 12 circumstance so that the sentencing range would be
 13 another statute of a minimum of ten, it would be a
 14 determinate ten followed by up to life.
 15 Or it could be, depending on what the court
 16 does, it could be a 12, it could be a 15, but that would
 17 not be determined until we get to the sentencing hearing
 18 and the Court would have some discretion in that regard.
 19 It is my belief and feeling that based upon all the
 20 mitigation and evidence that I am aware of, that the
 21 court -- and we are going to request the Court to go by
 22 the statute itself, which would be a determinate 10, so
 23 that there would be an eligibility for parole
 24 thereafter.
 25 THE COURT: Just so I understand this --

10

1 well, I understand, but I want to make sure we are
 2 clear: In order for that aggravating factor to occur to
 3 be found, it would have to be proven, beyond a
 4 reasonable doubt, and by proceeding the way you are
 5 doing, it puts it into the standard sentencing
 6 proceeding, so if I accept this agreement, you are
 7 correct, when we get there, the sentence the defendant
 8 would be facing would be not less than 10 to life.
 9 MR. HARRIS: Right.
 10 THE COURT: And then the issue that both
 11 sides would be arguing for, would be what would be the
 12 determinate portion of that sentence.
 13 MR. HARRIS: That's correct.
 14 THE COURT: And then that would be presented
 15 to me at the sentencing; is that correct?
 16 MR. TOPMILLER: Judge, yes, but one thing:
 17 You could still impose fixed life if you saw fit.
 18 THE COURT: Oh, yes. But my point is, there
 19 are certain aspects about that statute that make
 20 mandatory certain penalties.
 21 MR. TOPMILLER: That's what Mr. Harris is
 22 trying to avoid.
 23 THE COURT: And -- and that's the nature of
 24 your agreement, which -- and I think once the plea is
 25 entered to this and we go to the regular sentencing

11

1 hearing, the rules of evidence aren't applicable and,
 2 therefore, there is not going to be any position to make
 3 a finding, beyond a reasonable doubt, regarding
 4 aggravating factors.
 5 Just, I would be balancing all those factors
 6 that I find in there based on the sentencing criteria
 7 that traditionally judges look at. And your arguments
 8 and presentations and victim impact statements, factors
 9 like that, I would take that into account.
 10 And then I would be sentencing between those
 11 parameters, anywhere from fixed term of 10 with a life,
 12 indeterminate terms, to a greater amount of fixed --
 13 and, you are right, it could be up to a fixed life
 14 sentence if I find it aggravating enough, but I am
 15 not bound -- I am not required to issue that sentence
 16 based on the factors, it is discretionary on my part
 17 based upon the arguments and presentations presented;
 18 correct?
 19 MR. HARRIS: It would seem to me, Judge, that
 20 because we are entering into -- we are avoiding -- if
 21 the court finds an aggravated circumstance --
 22 THE COURT: But we are talking -- I want to
 23 make sure we understand this. I don't mean that
 24 statutory one, I mean I'm balancing under Idaho Code
 25 19-2521, and State versus Toohill, in protecting the

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1 public --
 2 MR. HARRIS: I understand all those factors.
 3 THE COURT: That's what I'm talking about.
 4 MR. HARRIS: The reason we are doing this is
 5 to avoid a fixed life sentence.
 6 THE COURT: Has the State indicated what you
 7 are limiting your recommendations to?
 8 MR. TOPMILLER: We are not.
 9 MR. HARRIS: Mr. Wolff has not done that. He
 10 has only indicated to me that in his review of prior
 11 sentences in Canyon County that that range is anywhere
 12 from ten to, I think, 25. So his recommendation would
 13 be somewhere within that range. But, again, he hasn't
 14 committed at this point to doing anything.
 15 THE COURT: All right. So if I understand
 16 how you will proceed at this point then, you presented
 17 me a copy of your written agreement a moment ago that
 18 you stepped out -- I may have left it on my desk, but we
 19 have it on the record -- the following will occur:
 20 There will be a plea -- I will go over what
 21 the penalty range could be at that time so there is no
 22 misunderstanding as to what the range could be and then
 23 you can clarify that to me when we do that -- I will set
 24 the case for sentencing at a time that works for people
 25 to be present, including any victim's family can be

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STATE OF IDAHO vs. TREVOR BOOTH

1 present, and I want to make sure that's available,
 2 because they will have input into this, and then we will
 3 go to sentencing.
 4 And then what happens at that point, as
 5 counsel are aware, the State and the defense both
 6 present information -- evidence and information before
 7 the Court in argument as to what each side feels is a
 8 fair resolution. I will consider those factors and make
 9 a determination as to what is appropriate and fair under
 10 the circumstances within that range of judicial
 11 discretion -- I think that's what you are talking about;
 12 is that correct, Mr. Harris?
 13 MR. HARRIS: Well, yeah. It's my
 14 understanding that it would be within the range, but it
 15 would not be a fixed life.
 16 THE COURT: Okay. With that in mind, then,
 17 let's proceed.
 18 Mr. Harris, do you feel you have had
 19 sufficient time to discuss this with your client,
 20 including the rights, defenses, and possible
 21 consequences of a guilty plea?
 22 MR. HARRIS: I believe I have, Judge.
 23 THE COURT: Do you feel there is a factual
 24 basis for me to accept the plea?
 25 MR. HARRIS: I believe there is a factual

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1 basis for it, Judge.
 2 THE COURT: Now, any further record the State
 3 wants to make before I proceed to take the plea? Do you
 4 need to make a record today?
 5 MR. TOPMILLER: No, Judge.
 6 THE COURT: Now, the -- Mr. Booth, do you
 7 feel you have had sufficient time to discuss this with
 8 your attorney?
 9 THE DEFENDANT: Yes, Judge.
 10 THE COURT: I need to ask you a series of
 11 questions before I even proceed to take the plea.
 12 THE DEFENDANT: I understand.
 13 THE COURT: How old are you now?
 14 THE DEFENDANT: 20.
 15 THE COURT: How far did you get in school?
 16 THE DEFENDANT: I graduated high school.
 17 THE COURT: Are you currently on any
 18 medications?
 19 THE DEFENDANT: No.
 20 THE COURT: In the past 24 hours, have you
 21 had any drugs or alcoholic beverage?
 22 THE DEFENDANT: No.
 23 THE COURT: You were present in court a
 24 moment ago when your attorney discussed and the State
 25 discussed and presented to me the nature of this

15

1 agreement, and that there is going to be a sentencing
 2 hearing and both sides are free to argue within those
 3 parameters. But other than that presentation, has there
 4 been anything else said or done to force you to plead
 5 guilty?
 6 THE DEFENDANT: No, sir.
 7 THE COURT: No one suggested that just
 8 because you plead guilty, I would be lenient with you?
 9 THE DEFENDANT: No, sir.
 10 THE COURT: Now, you understand, then, we
 11 just discussed this, that the ultimate sentence in the
 12 case would be determined at the sentencing hearing by
 13 me. I will listen to the presentations of both sides --
 14 and, again, I am going to be sentencing within those
 15 parameters we just discussed.
 16 Do you understand that ultimately it will be
 17 up to me to make a final decision on that; do you
 18 understand that?
 19 THE DEFENDANT: Yes.
 20 THE COURT: There are certain rights that
 21 you waive when you plead guilty. And although you
 22 have been over these with your attorney, I want to
 23 make sure you let me know on the record that you
 24 understand them.
 25 When you plead guilty to this charge, you

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1 give up your right to a jury trial on the charge; do
 2 you understand that?
 3 THE DEFENDANT: Yes, sir.
 4 THE COURT: You give up your presumption of
 5 innocence; do you understand that?
 6 THE DEFENDANT: Yes, sir.
 7 THE COURT: You give up your right against
 8 self-incrimination; do you understand that?
 9 THE DEFENDANT: Yes, sir.
 10 THE COURT: You also give up your right to be
 11 confronted by witnesses and to cross-examine them
 12 regarding the charge and call witnesses on your own
 13 behalf regarding the underlying charge; do you
 14 understand that?
 15 THE DEFENDANT: Yes, sir.
 16 THE COURT: You still have a sentencing
 17 hearing that you can put on information and testimony
 18 about, but regarding the case itself as to whether you
 19 are guilty or not guilty, you waive that when you plead
 20 guilty; do you understand that?
 21 THE DEFENDANT: Yes, sir.
 22 THE COURT: You also -- and I may have
 23 already addressed this, but I'm making sure -- you waive
 24 your right against self-incrimination; do you understand
 25 that?

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STATE OF IDAHO vs. TREVOR BOOTH

1 THE DEFENDANT: Yes, sir.
 2 THE COURT: Now, you waive any defenses that
 3 you may have in addition to that, such as your right to
 4 challenge any confessions or admissions made to the
 5 police or any searches or seizures made by the police;
 6 do you understand that?
 7 THE DEFENDANT: Yes, sir.
 8 THE COURT: Now, you are not currently on
 9 probation or parole; is that correct?
 10 THE DEFENDANT: No, sir.
 11 THE COURT: Once this gets on your record as
 12 a felony, in the future if you get new felony charges at
 13 any time, this could be used as part of an allegation of
 14 being a persistent violator of the law subjecting you to
 15 greater penalties for that further charge; do you
 16 understand that?
 17 THE DEFENDANT: Yes, sir.
 18 THE COURT: Once I accept the plea here and
 19 as long as I can agree to the parameters that counsel
 20 have presented in your Rule 11 agreement, then you are
 21 not going to be able to withdraw your plea; do you
 22 understand that?
 23 THE DEFENDANT: Yes, sir.
 24 THE COURT: Here's the nature of the charge
 25 that I am asking for your plea with regard to,

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1 Mr. Booth. The charge is: On or about the 16th of
 2 January, 2005, in the county of Canyon, state of Idaho,
 3 that you did willfully, unlawfully, and deliberately
 4 with premeditation, with malice aforethought, kill and
 5 murder Leonard Kellum, a human being, by shooting him
 6 and inflicting wounds from which he died. That's the
 7 nature of the charge.
 8 How do you plead to that at this time?
 9 THE DEFENDANT: Guilty, Judge.
 10 THE COURT: You are pleading guilty freely
 11 and voluntarily because you did, in fact, commit the
 12 offense?
 13 THE DEFENDANT: Yes, sir.
 14 THE COURT: I will accept the plea.
 15 THE DEFENDANT: Yes, sir.
 16 THE COURT: I will order a presentence
 17 investigation, and order this set for August 11 at
 18 1:30 p.m. I will block aside a half day for that
 19 sentencing hearing.
 20 My understanding is that accommodates people
 21 who wish to attend, witnesses, those factors, and the
 22 victim's family.
 23 I will order the presentence investigation,
 24 and ask that that be done as soon as possible beforehand
 25 so counsel can submit it and be prepared to address any

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1 issue that they see are in that. That's eight weeks
 2 out, so that should be enough time. But perhaps if --
 3 you have indicated you may be able to contact them to
 4 see, make sure they can get it in early enough ahead of
 5 time.
 6 MR. TOPMILLER: We are going to ask to have
 7 it expedited.
 8 THE COURT: Thank you. And this is for both
 9 sides so you can be prepared for the hearing, I want you
 10 to have time to prepare for that.
 11 Is there anything I haven't addressed today,
 12 Mr. Harris, that needs to be addressed?
 13 MR. HARRIS: Not that I'm aware of, Judge. I
 14 would like the conditional plea agreement filed with the
 15 Court.
 16 THE COURT: Certainly, and that will be done.
 17 And anything else by the State?
 18 MR. TOPMILLER: No.
 19 MR. HARRIS: You still have that?
 20 MR. TOPMILLER: I do.
 21 THE COURT: I will have that filed at
 22 the present time and stamped by the clerk.
 23 Thank you.
 24 We are in recess, and the defendant is
 25 remanded back to the custody of the sheriff.

20

1 THE BAILIFF: All rise, please.
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 3 (Proceedings recessed at 10:23 a.m.)
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, FOR THE COUNTY OF CANYON

PRESIDING: **GREGORY M. CULET** DATE: OCTOBER 2, 2008

TREVOR JAMES BOOTH,)	
	)	COURT MINUTES
)	
Petitioner,	)	CASE NO: CV 2006-8651*C
)	
vs.	)	TIME: 9:00 A.M.
)	
STATE OF IDAHO,	)	REPORTED BY: Laura Whiting
)	
Respondent,	)	DCRT 1 (948-953)
_____)	

This having been the time heretofore set for **status conference** in the above-entitled matter, the petitioner was not present, but represented by Mr. Van Bishop, and the respondent was represented by counsel, Mr. Gearld Wolff.

The Court reviewed prior proceedings and noted that it had met with counsel in chambers prior to the hearing. It was the Courts understanding that counsel would like to have this matter set for evidentiary hearing on the post conviction relief. Additionally, the petitioner wished to participate via telephone as he did not want to be transported from the Texas facility where he is currently being held, and the officials at said facility indicated that would not be a problem.

The Court ordered this matter set for evidentiary hearing for April 13, 2009 at 9:00 a.m.

Mr. Wolff advised the Court that he did not intend on filing a motion for summary disposition.

The Court advised each of counsel to provide the Court with the preliminary information on the issues which needed to be addressed along with purposed findings of fact and conclusions of law. They should be provided thirty (30) days prior to the hearing and be provided in both a hard copy format as well as sent to the Courts e-mail address.

The Court and counsel had further discretion regarding closing arguments and additional briefings preceding the actual hearing.

The Court advised each of counsel that it would set dates for those matters to be submitted to the Court the day of the evidentiary hearing.



Deputy Clerk

file

VAN G. BISHOP ISBN 2740
LAW OFFICES OF VAN G. BISHOP
203 - 12TH AVENUE ROAD STE. B
Nampa, Idaho 83686
Telephone: (208) 465-5411
Facsimile: (208) 465-5881

Attorney for Defendant

FILED
7:00 A.M. P.M.
APR 10 2009

CANYON COUNTY CLERK
J MEYERS, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

STATE OF IDAHO)
)
Plaintiff,)
Vs.)
)
TREVOR JAMES BOOTH,)
)
Defendant.)
_____)

**CASE NO. CV-2006-0008651-C
ORDER TO TRANSPORT**

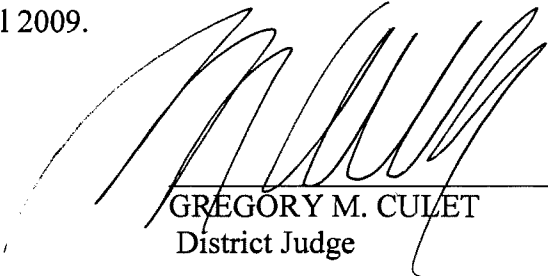
THIS COURT having set this matter for Hearing on Defendant's Petition for Post Conviction, to be heard on April 13, 2009 at 9:00 a.m. or as soon thereafter as the matter can be heard,

IT IS HEREBY ORDERED that the Defendant be transported by the Canyon County Sheriffs Office from the Idaho Department of Corrections, on or before the 13th day of April, 2009 at the hour of 9:00 a.m. to appear at the HEARING set before the District Court Judge GREGORY M. CULET at the Canyon County Courthouse, Caldwell, Idaho.

Trevor James Booth, Inmate # 78409, ISCI, Unit 13

AND FURTHER ORDERED THAT upon completion of said hearing; the Defendant shall be returned to the custody of the Idaho Department of Corrections.

DATED this 9 day of April 2009.



GREGORY M. CULET
District Judge

CERTIFICATE OF SERVICE: I HEREBY CERTIFY that a true and correct copy of the within ORDER FOR TRANSPORT was delivered to the CANYON COUNTY SHERRIFFS OFFICE, CANYON COUNTY PROSECUTORS OFFICE and VAN G. BISHOP by leaving a copy in their respective baskets at the Canyon County Courthouse and/or facsimile on this date.

DATED this 10 day of April 2009.



CLERK OF THE COURT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON
PRESIDING: **GREGORY M. CULET** DATE: **April 13, 2009**

TREVOR JAMES BOOTH,	)	COURT MINUTES
)	
Petitioner,	)	CASE NO: CV-2006-8651-C
)	
vs.	)	TIME: 9:00 A.M.
)	
	)	REPORTED BY: Debora Kreidler
STATE OF IDAHO,)	
)	
Respondent.	)	DCRT1 (927-1025)(1040-1151)
	)	(111-212)(220-259)(408-517)

This having been the time heretofore set for **evidentiary hearing** in the above-entitled matter, the petitioner was present in court with counsel Mr. Van Bishop and the respondent was represented by Mr. Kenneth Stringfield.

The Court noted the case, parties present and determined counsel was prepared to proceed.

In answer to the Court's inquiry, Mr. Bishop advised the Court there were no preliminary motions to take up, but requested the Court take judicial review of the following documents in case number CR2005-01658*C: The Magistrate Arraignment from January 18, 2005; Substitution of Counsel from Mr. Harris filed January 20, 2005; Preliminary Hearing minute from February 1, 2005; District Court Arraignment from

COURT MINUTES
APRIL 13, 2009

Page
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February 11, 2005; State's Motion in Limine filed April 18, 2005; the Motion to Suppress the Statement of the Defendant and Objection to the Request for the Motion in Limine regarding alibi filed April 26, 2005; Response to Alibi Defense filed May 12, 2005; the State's Sixth Supplemental Response to Discovery with specific regard to Tim Rainbolt, filed April 18, 2005; the Defendant's Response to Request for Discovery with specific regard to "no experts regarding forensics, limited witness and no witnesses mitigating threats or circumstances" filed May 16, 2005; the State's Motion for use of a Special Verdict Form filed May 18, 2005, coupled with the Court Minutes from May 6, 2005 and the Change of Plea on June 9, 2005 as well as the Rule 11 filed on June 9, 2005. Further, outside of the record but lodged with the Court, Mr. Bishop requested the Court take judicial notice of the Sentencing Memorandum submitted by Mr. Richard Harris on August 5, 2005; the Change of Plea held on June 9, 2005 and the transcript of the same, specifically page nine (9) line twenty (20) through page ten (10) line twenty four (24) and the Sentencing transcript from August 11, 2005.

The Court determined that Mr. Stringfield had no objection and would stipulate to the documents as listed by Mr. Harris. Further, the State did not have any other documents for the Court to take judicial review of other than the documents as previously requested in the November 16, 2007 filing. The Court determined neither of counsel had opening statements to present.

The petitioner's first witness, **JULIE A. TURNER**, was called, sworn by the clerk and direct examined. Petitioner's Exhibit #1 having been previously marked was identified as a "Memo" regarding Trevor Booth and punishment for murder. Direct examination continued. The witness was cross-examined and re-direct examined.

The petitioner's second witness, **JOHN TURNER**, was called, sworn by the clerk and direct examined. Counsel stipulated to the admission of Petitioner's Exhibit #1. Direct examination continued. The witness was cross-examined and re-direct examined. Mr. Bishop made reference to and reviewed specific documents that the Court had taken judicial review of.

The Court advised the parties it would take a brief recess and the Court recessed at 10:25 a.m.

Court reconvened at 10:40 a.m. with all parties present.

The petitioner's third witness, **JENNIFER LYNN BOOTH**, was called, sworn by the clerk, direct examined, cross-examined and re-direct examined.

The petitioner's fourth witness, **MARK BENJAMIN BOOTH**, was called, sworn by the clerk, direct examined, cross-examined and re-direct examined.

The petitioner's fifth witness, **TREVOR JAMES BOOTH**, was called, sworn by the clerk, direct examined, cross examined, re-direct examined and re-cross examined.

The petitioner rested.

The Court addressed counsel, determined it would break for lunch and instructed the parties to be prepared to reconvene at 1:00 p.m.

The Court recessed at 11:51 a.m.

Court reconvened at 1:11 p.m. with all parties present.

Mr. Stringfield requested the Court take judicial notice of the Rule 11 plea agreement document.

The Court noted for the record that it would take judicial review of the Rule 11 plea agreement from case number CR2005-01658*C.

The respondent's first witness, **RICHARD HARRIS**, was called and sworn by the clerk.

Mr. Stringfield presented statements to the Court indicating that Mr. Harris had concerns with his testimony relating to attorney-client privilege. However, under the Rules of Evidence the State's position was that the defendant was waiving that privilege due to him challenging Mr. Harris's representation. Further, Mr. Harris would like an Order from the Court regarding the same.

In answer to the Court's inquiry, Mr. Bishop indicated he had no position on the matter.

The Court clarified that the defendant would normally have that right, however Ordered that in this instance regarding post conviction relief issues and the defendant challenging the representation of counsel, the attorney-client privilege was waived.

The witness was direct examined and cross-examined. Mr. Bishop requested time to allow the witness to review Petitioner's Exhibit #1.

The Court recessed at 2:12 p.m.

Court reconvened at 2:20 p.m. with all parties present.

Cross-examination continued. The witness was re-direct examined and excused by the Court.

The witness presented statements to the Court regarding his opinion on the sentencing in this matter.

The Court recessed at 2:59 p.m.

Court reconvened at 4:08 p.m. with all parties present.

Mr. Stringfield requested the Court take judicial notice of a specific document, that being, the Defendant's Response to Request for Discovery filed in CR2005-01658*C.

Mr. Bishop advised the Court that was one of the documents he had requested the Court take judicial notice of, earlier in this hearing.

Mr. Stringfield indicated the specifics of the document he was requesting the Court take judicial notice of.

The Court so noted.

The respondent's second witness, **GEARLD WOLFF**, was called, sworn by the clerk, direct examined, cross-examined and re-direct examined.

The respondent rested.

The Court addressed counsel regarding closing arguments.

Mr. Bishop indicated he would prefer to do written closing argument.

The Court expressed opinions and addressed counsel regarding setting the matter over to hear closing argument, however would still expect counsel to brief the law.

In answer to the Court's inquiry, Mr. Stringfield advised the Court however it wished to proceed would be fine.

The Court addressed counsel regarding its usual process in this type of ruling.

In answer to the Court's inquiry, Mr. Stringfield indicated that if the Court desired written closing argument, then he would request a transcript of this hearing.

The Court noted for the record that the transcript was approximately two hundred and seven (207) pages.

Mr. Stringfield presented statements to the Court and advised he would prefer to have a transcript of this hearing and present oral closing argument.

Mr. Bishop presented statements to the Court regarding the defendant's custody status, requested he be returned to the penitentiary at this time and then brought back at a later date for closing arguments.

The Court addressed counsel regarding their briefs and any other issues of law there may be in addition to the standard ones.

Mr. Bishop presented statements to the Court regarding primary issues of law and the specifics therein.

The Court expressed opinions regarding factual findings in this matter.

Mr. Bishop presented statements to the Court regarding the Memorandum exhibit in this matter.

The Court determined the parties wanted additional time to prepare closing arguments and that preparation of the transcript in this matter would be appropriate. Therefore the Court would authorize and Order the transcript to be prepared and paid for at county expense.

Counsel concurred.

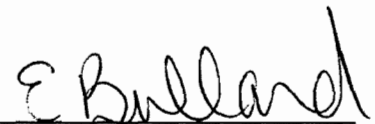
The Court directed the parties to prepare written arguments to be submitted along with proposed Findings of Fact and Conclusions of Law. Further the Court instructed counsel how to proceed regarding the format of their filings in the event they felt that any of the facts needed to be argued. The Court advised that if any additional briefing was needed, counsel could submit supporting Briefs on key issues. The Court further advised the parties that the Court may issue a written ruling or may set the matter for an oral ruling on the record.

The Court instructed Mr. Stringfield to submit a proposed Order regarding the transcript. The Court addressed counsel regarding time limits and Ordered the parties to simultaneously submit the appropriate documents to the Court and for filing by May

26, 2009. Further the Court would then follow up with a written ruling or set the matter for an oral ruling.

Counsel indicated they understood.

The Court thanked the parties for their participation in the hearing this date and Court adjourned at 5:17 p.m.


Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON
PRESIDING: **GREGORY M. CULET** DATE: **AUGUST 26, 2009**

TREVOR JAMES BOOTH,	)	COURT MINUTES
)	
Petitioner,	)	CASE NO: CV-2006-8651-C
)	
vs.	)	TIME: 11:00 A.M.
)	
STATE OF IDAHO	)	REPORTED BY: LAURA WHITING
)	
Respondent.	)	DCRT1 (11:00 – 11:08)
_____)	

This having been the time heretofore set for **status/scheduling conference** in the above-entitled matter, the petitioner was not present in court but was represented by counsel, Mr. Van Bishop; and the respondent was represented by Mr. Ty Ketlinski.

The Court called the case, noted the parties present, and reviewed prior proceedings.

The Court noted that Mr. Stringfield was no longer with the prosecutors office, that being the reason for the delay. Further, the Court noted that new counsel had been assigned. The Court noted that Mr. Bishop contacted the Court's secretary, indicating his Brief was complete. The Court further indicated it had requested all Brief's be filed at the same time.

In answer to the Court's inquiry, Mr. Ketlinski advised that Mr. Stringfield should have filed a Brief on May 26th.

Mr. Bishop advised the Court that May 26th was the initial date for the Brief, noting that he would be late with his brief. Mr. Bishop further noted that he completed his brief on or around June 2nd.

The Court expressed opinions regarding filing brief's, indicating that the later filings were legitimate and the state the parties were at was understandable due to Mr. Stringfield no longer being with the prosecutors office. The Court further expressed opinions regarding post convictions and making a record in the case.

The Court determined that Mr. Ketlinski would need a couple of weeks to file a Brief.

The Court ordered the petitioner and the respondent to submit their Brief's no later than September 14, 2009. Further, the Court ordered the petitioner and respondent to submit proposed finding and conclusions of law by September 14, 2009, requesting that they be submitted in MS Format and a hard copy.

Counsel indicated they understood and court adjourned.

Deputy Clerk

findings.¹ On October 23, 2009, the Court notified respective counsel that based on the timing of the filing of their written arguments with the Court's existing caseload and schedule, the Court would not be able to review the arguments before November 1, 2009, and therefore, the matter would be considered under advisement as of that date. **After consideration of the facts and applicable law, the Court grants the petition.**

Remaining Issues at Trial

1. Petitioner contends that he was coerced into a guilty plea to First Degree Murder because his counsel in the underlying first degree murder case utilized coercive and threatening tactics against the petitioner and his family, assuring them that the petitioner would receive a ten-year fixed sentence if he were to plead guilty to first degree murder, but he would receive a fixed life sentence if he went to trial.
2. The petitioner contends he received ineffective assistance of counsel resulting in a denial of due process rights.

Content of the Trial

Prior to the presentation of evidence, respective counsel stipulated to a request that the Court take judicial notice of various documents and records in the Booth's underlying criminal case file (No. CR2005-1658), which the Court granted. All of the requested records are also included as attachments to the State's Request for Judicial Notice, filed on November 16, 2007 (in support of the state's motion for summary disposition), that attached extensive records from the underlying criminal file, as well as the Clerk's record, transcripts (of the plea and sentencing hearings) and briefs on appeal

¹ Although there was some initial delay of the submission of the written arguments based on the mutual agreement of counsel, Petitioner's counsel was prepared to submit his written argument in July of 2009, but he was allowed by the Court to delay submission of it until the new counsel for the state was prepared to simultaneously submit the state's argument.

of that criminal case, under Docket Number 32289. The only exhibit admitted at trial was the May 9, 2005 written "memo" to Booth's from his criminal defense attorney, Richard Harris.

The witnesses at trial were Trevor Booth, Julie A. Turner (his mother), John Turner (his step-father), Jennifer Lynn Booth (his sister), Mark Benjamin Booth (his father), Richard Harris (Booth's attorney in the criminal case), and Gearld Wolff (the prosecutor in the criminal case).

Findings of Fact

1. On January 16, 2005, Leonard Kellum was killed from multiple gunshot wounds, which occurred at his residence in Caldwell, Idaho. The subsequent police investigation led investigators to believe that Trevor Booth was the individual who killed Mr. Kellum. The investigation further revealed that the before Kellum died, he twice identified Trevor Booth as the person who shot him. The police determined that the perpetrator entered the residence through the back door and shot the victim five times, utilizing an improvised silencer that had been fashioned out of a plastic soda bottle. The police further found a single set of footprints in fresh snow going from the back door of the house to the location on the street where a vehicle (identified by neighbors as a black pickup) had been parked at the time of the shooting. Booth (who owned and drove a black pickup) told investigators that he (Booth) drove his pickup truck to Kellum's residence that same morning, parked it on the street, and walked to the door of the residence for what he described as a pre-arranged meeting to pick up marijuana from Kellum for him to sell,² when he heard

² Booth told investigators that he actively sold controlled substances and that Kellum was his supplier.

screaming and gunshots, and then he left the residence.

2. Trevor James Booth was charged on January 18, 2005 with first degree murder in Canyon County, Idaho, Criminal Case No. 2005-01568. In that case, Booth was represented by attorney Richard L. Harris. The state was represented by Deputy Canyon County Prosecutor Gearld L. Wolff. The assigned judge was District Judge Gregory M. Culet, who also serves as the presiding judge in this case.
3. The case was scheduled for jury trial to commence on June 17, 2005, with a pretrial conference scheduled for May 6, 2005.
4. During the time the case was pending, Mr. Harris met with Booth periodically, and Booth's version of the events, as he related them to Harris, slowly changed from initially contending that he did not commit the offense, to eventually acknowledging that he actually killed Leonard Kellum, but that he did so because of what Booth perceived as self-defense and defense of others. More specifically, Booth informed Harris that he was a drug dealer who worked for Kellum, who was his supplier. At some point in this relationship with Kellum, Booth fell behind in paying Kellum for the drugs that he supplied, and he owed Kellum a considerable amount of money. He stated that Kellum began making threats of physical violence to Booth unless he came up with the money he owed. At some point in that process, Booth informed Kellum that he was going to discontinue dealing for him and move to California to obtain employment either with Booth's father or obtained through his father, to which Booth reported that Kellum threatened him that if he did not pay his sizable debt and/or if he quit dealing drugs for him, Kellum would do harm to Booth's family members and/or his girlfriend, who were still living in Idaho.

5. During the pendency of the case, at least one witness came forward to the law enforcement who stated that on the night before the shooting, the witness observed Booth cleaning his handgun, that Booth had recently expressed concern about his approximately \$10,000 debt to Kellum, of which he had only been able to come with \$3,000 in partial payment, and that Booth indicated that he would kill Kellum before allowing him to do harm to Booth. The witness further informed investigators that Booth had also discussed his knowledge of silencers in his presence. Still other witnesses indicated to police investigators that Booth was a known drug dealer and was known to carry a pistol or keep a shotgun. Further, police found a role of cash containing approximately \$3,000 at the victim's residence, tending to confirm the witness' story.
6. Harris was aware of all of this information as he was evaluating the case against Booth. He went over the discovery with Booth, and as Booth developed an increased understanding of the weight of the evidence against him, he began to change his story to Harris as what actually occurred.
7. On April 26, 2005, defense counsel filed a "Motion to Suppress Statement of Defendant," seeking to suppress certain statements made by Mr. Booth to law enforcement, and the motion was initially scheduled for a suppression hearing at the same time as the pretrial conference, May 6, 2005.
8. In the meantime, Deputy Prosecutor Gearld Wolff was engaged in his own case preparation, and he concluded that under the recently amended Idaho Code §18-4004,³ if any of the statutory aggravating circumstances set out in the recently

³ Based on the 2002 U.S. Supreme Court decision of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2484, 153 L.Ed.2d. 556 (2002), I.C. §18-4004 and §19-2515 were amended in 2003 to provide for jury

amended I.C. §19-2515 were found beyond a reasonable doubt at a fact finding stage of the trial, the court would be required to impose a fixed life sentence, despite the fact that this case was not a capital case. Mr. Wolff informed Booth's attorney, Richard Harris, of his view of the statute and of his intent to file a request for the Court to provide a special verdict form to the jury in the event that Booth was found guilty of first degree murder, which would instruct the jury to determine if certain statutory aggravating sentencing circumstances exist, specifically whether the murder was especially heinous, atrocious or cruel, whether the defendant exhibited utter disregard for life, or whether the defendant exhibited a propensity to commit murder which will continue to be a continuing threat.

9. Mr. Harris thereafter examined the murder statutes as modified in the 2003 legislation, and concluded that the Court did have the authority to so instruct the jury in the event that the jury found Booth guilty of first degree murder, and Harris further concluded that if any of the statutory aggravating circumstances were then found beyond a reasonable doubt by the jury, the Court would be required to sentence Booth to a fixed life term.

10. Wolff and Harris met with the presiding judge in chambers prior to the May 6, 2005 pretrial conference and suppression hearing, and presented the Court with the issue of statutory aggravating circumstances and the state's intent to request the special verdict form, and they further discussed Wolff's and Harris' mutual perspective of the

sentencing in capital murder cases. Among the amendments to the statute was the following provision: **"If a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service."** 2003 Idaho Laws, Ch. 19 (SB 1001). (Emphasis reflects the added

law in regard to that issue. The testimony of both Harris and Wolff does not indicate that the judge expressed whether he agreed with their legal assessment, but rather, the testimony reflects that based on discussion, the judge informed them that in the event the special verdict form was requested by the state and supported by the evidence, the Court would utilize the special verdict form instructing the jury to determine whether the statutory aggravating circumstances had been proven.

- a. However, both counsel believed that if a statutory aggravating factor were found beyond a reasonable doubt at a fact finding stage, the Court would have to impose a fixed life sentence, and certainly nothing that the judge told them in that conference led either counsel to believe that the Court would deviate from their expectation.

11. After the meeting in chambers, the parties went on the record and the pretrial conference and the motion to suppress were continued to June 3, 2005.
12. Based on the May 6th meeting, Mr. Harris prepared a May 9, 2005 "Memo" to Booth outlining what he believed the status of the law to be, including the sentencing requirements if aggravating circumstances were found. He informed Booth that the judge had indicated to both counsel that he would instruct the jury to determine if any aggravating circumstances had been proven, and he also informed Booth what he believed would happen should there be a jury trial (i.e., that there was a likelihood of conviction of first degree murder and a finding by the jury of an aggravating factor, resulting in a fixed life sentence), and what he believed would be Booth's likely sentence if he pled guilty in the absence of the statutory aggravating circumstances, specifically, that he believed, based on his knowledge of the Court, that the likely

sentence would be ten to fifteen years fixed, followed by indeterminate life imprisonment.

13. Particular sections of the memo reflect the following advice:

- a. The entire text of I.C. §18-4004 regarding the statutory basis of sentencing for murder was set out, followed by:

What this statute means is that upon a conviction for first degree murder, if the jury or a judge if jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt the sentence is death. However, if the prosecutor does not seek death, as is the case here, and if a statutory aggravating circumstance is found, then the sentence is a fixed life sentence. At the pre-trial conference on Friday the Judge indicated to the prosecutor and myself that he will submit a verdict form to the jury that will ask the question of the jury: "Did Trevor Booth commit the crime of first degree murder? Yes or No." The verdict form will also contain the same question for second degree murder and for manslaughter. If the jury finds you guilty of first degree murder, the verdict form would contain the further question of the jury: "Do you find beyond a reasonable doubt a statutory aggravating circumstance? Yes or No." Since the trial judge intends to submit that question to the jury as part of the verdict form and if the jury finds an aggravating circumstance as a part of the verdict, then the sentence to be imposed by the judge, notwithstanding all the evidence there is in mitigation, a fixed life sentence which means you will spend the rest of your life in prison.

- b. Thereafter, the memo sets out all the statutory aggravating circumstances listed in I.C. §19-2515, or paraphrased versions of them, and identifies the three subsections of the statute that Harris believed may apply to Booth's case, specifically, sub-sections e – ("the murder was especially heinous, atrocious or cruel"), f – ("by committing the murder the defendant exhibited utter disregard for life"), or h – ("the defendant has exhibited a propensity to commit murder which will continue to be a continuing threat"). Harris further related:

My experience has been with murder cases that it is not too difficult for

finding to be made that the murder is heinous (a murder by definition is considered heinous) atrocious or cruel or alternatively that by committing the murder, the defendant showed utter disregard for life. Although it might be stretch, by committing one murder, a person has demonstrated that he can commit murder especially in the context of a drug related transaction.

The bottom line is this. If you are convicted of first degree murder, not a death penalty case, but the jury finds an aggravating circumstance, you will spend the rest of you life in prison. I have had some preliminary discussions with the prosecutor and they may be willing to waive anything to do with an "aggravating circumstance" in return for a plea of guilty to the murder of Kellum.

- c. Harris then advised Booth that the sentencing range available to the judge in that circumstance was ten years fixed followed by life indeterminate, and he further explained how the fixed and indeterminate portions of the sentence would be handled by the Board of Corrections, and that Booth would be eligible for consideration of parole after serving the fixed time. He further advised that the prosecutor could recommend a greater term than ten years, and that the

[t]he judge would not be bound by the fixed term of ten years and could impose a greater term than ten years. . . My effort would be to present mitigating facts to the judge which would get you the ten number or the least number above ten as possible. Knowing the judge as I do, I do not think that number would exceed fifteen.

- d. Harris then discussed the existing evidence that could be used against Booth. Specifically, Harris explained the victim's repeated dying declaration made to law enforcement personnel and to paramedics that Booth shot him, and the probable admissibility of the statements at trial. Harris further explained how Booth's statements to police were inconsistent in lieu of the physical evidence. Harris also explained Booth's plausible motive to murder the

victim, that both were involved in drug dealing and Booth owed the victim “a lot of money.” The substance of this advice is set out on page 3 of the memo:

What does this mean in terms of decision making? Based upon the evidence as currently presented, I believe the high probability is that the jury is going to return a verdict of guilty. The evidence is that the shooter went into the house through the back door. The door was ajar when the police entered the house. The police have statements from Kellum identifying you as the shooter, not just once but he reiterated your identity as the shooter at least six times. Those statements of Kellum are admissible in evidence as a dying declaration to the hearsay rule. I have explained that rule to you previously. The police will be able to use your statement that you had gone over to the house, heard arguing and shots being fired from in the house even though you stated you did not enter the house. However an inference is going to be drawn and the prosecutor will argue that (1) the shooter did not enter the house through the front door because (a) the door was locked when the police arrived, and (b) there were no footprints in the snow leading up to the front door; (2) that when the neighbors in the back apartment left that morning no foot prints were observed in the snow; (3) that the police will testify that there was only one set of footprints leading up to the back door, the same foot prints led over to the end of the drive way and back towards the back door, and finally the same set of foot prints ostensibly then ran from the backdoor across the yard out onto the street; and (4) the footprints match up to your shoe. The inference to be drawn from these facts is that you are the shooter to the exclusion of anyone else. Otherwise there would have been other footprints in the snow and there were none, and you in fact stated you were there even though you deny the shooting. If you did not do the shooting why did Kellum identify you as being the shooter. While I can make argument that there is no evidence you were in the house other than Kellum’s statement, that the weapon has not been located and the argument can be made that the real shooter has it, that is somewhat weak in comparison. If the matter goes to trial, you would have to testify as to what you have said all along. But testifying means being subject to cross examination and having to explain the lack of other peoples footprints in the snow, why Kellum identified you and dealing with motive. The motive ostensibly being the fact you owed Kellum a lot of money. Although it could be argued other people may have had motive to kill Kellum, particularly because of his acts and conduct and being heavily involved in drug dealing, there is no hard evidence that implicates anyone else.

e. Harris concluded his memo with the following advice:

The bottom line is this. If you go to trial, there is the very strong probability of facing a fixed life sentence. That means spending the rest of

your life in prison. If you enter a plea to murder with the prosecutor waiving aggravated circumstances, or not requesting the court to consider aggravating circumstances, then you would face a minimum period of incarceration of ten years or whatever greater period the judge might impose. I have indicated above I do not think the judge would impose a term greater than fifteen years followed by an indeterminate life. Life in that context means thirty years. My recommendation is because of the strong risk of spending the rest of your life in prison, a plea agreement may be your best option. Please consider and let me know as soon as possible.

14. In summary, Mr. Harris articulated in the memo what he saw as the salient facts in the case and the likelihood of the prosecution being able to prove those facts. He further articulated the law that he believed to be applicable to the case, which included his opinion that the judge would be required to sentence him to fixed life if certain findings were made. His memo appears to be a carefully drafted document that conveyed to Booth what his current position was in the case, both legally and factually, and in which he made a recommendation that Booth avoid a trial and the risk of what Harris perceived would be a fixed life sentence. Nothing in the memo reflects that Harris threatened Booth into pleading guilty. Rather, the document appears to explain to Booth what his options were at the time. While none of the options offered any "safe harbor" for Booth, Harris did opine to him what was, in his view, essentially the least detrimental alternative, and that was to plead guilty and present mitigation at sentencing.

- a. Harris' opinion that the most Booth would receive from the sentencing judge with regard to the ten to fifteen year fixed portion of his sentence was based on articulated factors, such as the comparative sentences in similar cases in Canyon County, his knowledge and experience with the judge, and the additional factors in Booth's case that he felt were significant mitigating

factors, such as Booth's age, lack of significant criminal record, the unsavory background of the victim, and the fact that Booth was under the influence of drugs. However, as Harris' memo to Booth reflects, Harris advised him that the prosecutor was not prohibited from recommending a fixed term greater than ten years, and the judge was free to sentence Booth to a fixed term greater than ten years, but that Harris would attempt to limit that prospect by presenting what he deemed to be considerable mitigating evidence.

15. The issue of whether Harris' legal analysis of Idaho murder statutes was legally sound when he advised Booth regarding the consequences of the jury finding any of the statutory aggravating circumstances will be addressed in the Court's Conclusions of Law portion of this decision.

16. On May 18, 2005, the state filed a "Motion for Use of Special Verdict Form," requesting that in the event the jury found Booth guilty of first degree murder, the Court further direct the jury to answer a special verdict form pursuant to I.C. §18-4004.

a. Specifically, the proposed verdict form directed the jury to determine 1) whether the murder was especially heinous, atrocious or cruel, 2) whether the defendant exhibited utter disregard for life, or 3) whether the defendant exhibited a propensity to commit murder which will continue to be a continuing threat. The prosecution believed that the special verdict form complied with Idaho Code §18-4004, under which the prosecution contended that if the jury found one of the listed statutory aggravating circumstances, the Court would be required to impose a fixed life sentence. This motion was

also noticed up for hearing on June 3, 2005, at the same time as the continued suppression hearing and pretrial conference.

17. The state did not seek the death penalty and did not file a Written Notice of Intent to Seek the Death Penalty. Although the state did not file a specific statement of the statutory aggravating circumstances they intended to rely on, it was apparent from the circumstances set out in their motion for special verdict form what the statutory circumstances were that the state intended to pursue.

18. After Booth received Harris' memorandum, negotiations continued between the prosecution and the defense. Harris went over the memorandum with Booth's family members and continued to meet with them, including his mother, father and sister, and he discussed with them the nuances of the statutory aggravating circumstances and what the risks were of going to trial on the merits of the case.

19. On June 3, 2005, Booth and Harris both signed and executed a written plea agreement, which was also signed by Prosecutor Wolff on June 9, 2005. The document was entitled "Conditional Plea of Guilty Pursuant to I.C.R. 11(d)(3) and (4) Binding Plea Agreement," in which the state agreed not to pursue statutory aggravating circumstances as defined in I.C. §18-4004 in exchange for Booth's guilty plea to first degree murder. In the agreement, Booth specifically attested that his decision to plead guilty to first degree murder was "freely and voluntarily made," and that he was not "induced to conditionally plead guilty by any force, coercion, pressure, or fear." Additionally, Booth attested that he understood that the sentencing range was a minimum fixed term of ten years up to life, and the "sentence to be imposed is reserved to the sound discretion of the Court."

20. The Rule 11 agreement was filed with the Court on June 9, 2005, at which time Booth appeared with his attorney Harris and the plea agreement was presented on the record. In the course of presenting the terms of the plea agreement, Mr. Harris acknowledged that the Court was going to issue a life sentence, but the actual length of the fixed portion of that sentence was open for argument by both sides at sentencing. He noted that the Court was not bound by any particular fixed portion of a prison term, but noted that historically in Canyon County, the fixed portions of first degree murder sentences for similar cases in which the Court had sentencing discretion, were typically from 10 to 25 years, and that Mr. Wolff (who was not present at that hearing) had indicted that his recommendation for a fixed term was likely to be somewhere within those same parameters, but that Wolff was not binding himself to any particular commitment. Deputy Prosecutor Chris Topmiller, who was appearing for the state at the plea hearing, specifically emphasized, "Judge, yes, but one thing. You could still impose fixed life if you saw fit."

21. The Court then examined Booth regarding his plea of guilty, during which Booth told the Court that he had sufficient time to discuss this case with his attorney; that he was 20 years old and had graduated from high school; that he was not on any medication and had not had any alcoholic beverage or drugs within 24 hours; that other than the plea agreement that was presented in court, no one had said or done anything else to force him to plead guilty; that no suggested to him that just because he plead guilty the court would be lenient with him; that as long as the Court sentenced within the parameters of the Rule 11 agreement, the Court was not bound by the recommendations of counsel on either side; that by pleading guilty he gave up his

right to a jury trial, right against self-incrimination, presumption of innocence, right to be confronted by witnesses and to cross-examine them and call witness in defense of the charge (other than presentation of mitigation evidence at sentencing); that he waived the right to challenge any confessions or admissions made by him to the police or any searches or seizures made by the police; that in the event he received any new felony charges, this conviction could be used against him as part of an allegation of being a persistent violator of the law, potentially subjecting him to greater penalties than would normally be available for that later charge; that once the Court accepted his guilty plea, as long as the Court sentenced within the parameters of the plea agreement he would not be allowed to withdraw his guilty plea; and finally, that he was pleading guilty freely and voluntarily because he did, in fact, commit the offense.

22. Finally, before taking the actual plea of guilty from Booth, the Court read the language in the charging information, which included each element of first degree murder, to which Booth entered a guilty plea to the charge of first degree murder and the Court accepted the plea.

23. Booth alleges that Harris was not prepared for trial based, in part, on Harris' discussions with him regarding the case.

a. Most of Booth's evidence in this regard is based on his own testimony, and involved allegations that Harris had called him the by the victim's name at some point and otherwise gave him the impression that he was not familiar with the case.

b. Harris interviewed between twelve to twentyfive potential witnesses, and even

filed a motion to compel against the state to obtain as much discovery as possible.

- c. He also interviewed witnesses whose names had been provided to him by Booth, but determined that those witnesses' knowledge of events relevant to Booth's defense were based on what Booth himself had told them, and not from their own personal knowledge.
- d. Another witness identified as Tim (apparently this is Tim Rainbolt, who was eventually listed as a state witness in discovery) had contacted Harris and wished to talk to him about the case. The information he provided to Harris was that he was a friend of Booth who had contact with him a day or two before Kellum was killed. He told Harris that Booth had told him that Kellum had made threats against him and that Booth stated that he was going to "take care of it." Tim further related that subsequent to Kellum's death, Booth made statements to him to the effect that he "had taken care of it." Harris informed the witness that it was essentially up to him if wished to talk to the police.
- e. In another allegation, Booth claims that Harris should have hired a forensic expert. However, Harris testified that he saw little benefit to be obtained from that expenditure under the circumstances of this case. When the evidence began stacking up against Booth as it was supplied through the state's discovery and Harris' investigation, as well as Booth's own revelations to Harris, it appears that Harris was utilizing his considerable experience in criminal law (he has tried over 250 felony trials) to expend his energies and

his client's family members' money on what he perceived to be the most realistic approach to the case. As previously noted, and contrary to Booth's testimony at the trial in the post conviction relief case, Harris discussed with Booth the considerable evidence that he obtained in discovery, which is one of the factors that caused Booth to change his story to Harris as to what actually happened. Harris explained to Booth and some of his family members what he saw as the realistic circumstances facing Booth in the case, and what Booth's options were, and he provided Booth time to determine how he wanted to proceed.

24. Mr. Harris' testified that while there was evidence to support a lesser included offense of second degree murder, there was also significant evidence of premeditation and deliberation in the commission of the offense that would be sufficient to support a conviction of first degree murder. Conversely, his review of the evidence caused him to conclude that this was not a viable case to receive a verdict of the lesser offense of manslaughter, as there was no evidence that the killing occurred in the heat of passion in a sudden quarrel.

25. Harris's testimony is credible and believable that Booth did not provide him with any evidence that would satisfy the elements of the lesser offense of manslaughter, and that Booth did not tell him he wanted to pursue manslaughter as a defense, nor was manslaughter pursued as a defense by Booth's family.

26. Had the case proceeded to trial, Harris was prepared to pursue a defense of a lesser included offense of second degree murder and, despite the lack of evidence supporting a lesser offense of manslaughter, he hoped that he may even have gotten

headway with juror “nullification” resulting in manslaughter because of the unsavory behavior of the victim as a drug dealer who threatened the safety of Booth, his family, and his girlfriend. However, as Harris’ memo to Booth reflects, there was a significant amount of evidence, both direct and circumstantial, that existed against Booth.

27. Thus, the evidence reflects that two of the significant reasons Booth pled guilty to first degree murder was the reasonable expectation that the State would have a strong case against him for first degree murder, and that if he pled guilty, there was a reasonable opportunity to receive a life sentence with only a ten to fifteen-year fixed term based on case specific mitigating factors. All of this was based on the reasonable advice of his legal counsel.

28. However, another significant reason that Booth pled guilty to first degree murder was that he believed, based on the advice of legal counsel, that if he went to trial and was found guilty with at least one of the statutory aggravators also being found, the Court would be prohibited from weighing any mitigating factors and was bound to issue a mandatory fixed life sentence.

29. Although Trevor Booth’s testimony in the PCR case lacked a significant level of credibility, Richard Harris’ testimony was virtually unimpeachable. His testimony establishes that there is a reasonable probability that, but for his opinion and advice that I.C. §18-4004 provides for a mandatory fixed life sentence in a non-capital first degree murder case if a statutory aggravating circumstance is proven, the defendant would not have pled guilty and would have either insisted on going to trial and/or continued to pursue some other plea agreement.

30. At the August 11, 2005 sentencing hearing, the prosecution requested an indeterminate life sentence, with forty years fixed. The defense argued for an indeterminate life sentence, but with ten years (or close thereto) fixed.

31. Booth was sentenced to an indeterminate life sentence, with thirty years fixed. The transcript of the sentencing hearing reflects that the Court considered and weighed the mitigating factors that were presented in favor of a lighter sentence, but that the overall behavior of Booth himself, as a full time drug dealer who was actively engaged in illegal business dealings with another drug dealer/supplier, and who resorted to premeditated murder to resolve either an actual or perceived threat from his supplier, also weighed heavily in the Court's sentencing decision.

32. Booth timely appealed his conviction and sentence, but his appeal was denied. Thereafter, his Petition for Post Conviction Relief was timely filed.

Conclusions of Law

1. Idaho Code §19-4901 provides the remedy of post conviction relief to a criminal defendant who has been convicted and sentenced for a crime. It provides in relevant part:

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;

...

(7) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy: may institute, without paying a filing fee, a proceeding under this act to secure relief.

(b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited

and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Except as otherwise provided in this act, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

2. An application for post-conviction relief initiates a proceeding that is civil in nature.

The petitioner must prove by a preponderance of the evidence the truth of the allegations upon which the application for post-conviction relief is based. *Pecone v. State*, 135 Idaho 865, 26 P.3d 48 (Ct. App. 2001); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *State v. Yakovac*, 145 Idaho 437, 443 (2008). ICR 57.

3. The two (2) issues Booth presented relate to (1) whether or not he was given competent advice by his attorney when pleading guilty, and (2) whether his guilty plea was voluntary, and not coerced.

4. In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court articulated a two part-test that a defendant must meet in order to obtain post-conviction relief based upon a claim of ineffective assistance of counsel. First, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness. (*Id.* at 688) Second, if the reviewing court finds the defendant can prove that counsel's performance was constitutionally ineffective, then the defendant must prove that counsel's deficient performance resulted in prejudice.

5. Whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law but is essentially premised upon the circumstances surrounding the attorney's investigation. *Davis v. State*, 116 Idaho 401

- (Ct.App.1989). An ineffective assistance of counsel claim presents mixed issues of fact and law. *Gabourie v. State*, 125 Idaho 254, 256, 869 P.2d 571, 573 (Ct. App. 1994).
6. An attorney has duty to reasonably investigate or make a reasonable decision that particular investigations are unnecessary. *Wade v. Claderon*, 29 F.3d 1312 (9th Cir.1994).
 7. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994) citing *Strickland*, 466 U.S. at 690-91. *See also, Gibson v. State*, 110 Idaho 631 (1986).
 8. That counsel could have conducted a more thorough investigation that might have borne fruit does not establish ineffectiveness. *Burger v. Kemp*, 483 U.S. 776, 794 (1987).
 9. Petitioner must establish that counsel was put on notice to investigate a particular matter. *Hensley v. Crist*, 67 F.3d 181 (9th Cir.1995). Petitioner must allege that he informed the attorney or that the attorney knew of facts warranting investigation. *Langford v. Day*, 110 F.3d 1380, 1387 (9th Cir.1997).
 10. "We recognize that a defendant's lawyer does not always have a duty to consult experts when the government is proposing to put on expert witnesses. 'There may be no reason to question the validity of the government's proposed evidence or the evidence may be so weak that it can be demolished on cross-examination.'" *Murphy*

v. *State*, 143 Idaho 139, 145-46, 139 P.3d 741, 747-48 (Ct. App. 2006); (Citing *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir.2001)).

11. The decision of whether and how to cross examine a witness, whether to call character witnesses, how and whether to conduct a particular investigation, whether to call any particular witness, the choice of voir dire questions, the choice of witnesses, and whether or not to make specific objections, is a strategic decision and should not be second guessed unless it is made upon the basis of inadequate preparation, ignorance of relevant law or other objective shortcomings. *Cunningham v. State*, 117 Idaho 428 (Ct.App.1990); *Davis, supra* at 407; *Aragon, supra* at 763; *State v. Chapman*, 120 Idaho 466 (Ct.App.1991); *State v. Larkin*, 102 Idaho 231 (1981); *Milton, supra* at 640; and *Gabourie v. State*, 125 Idaho 254 (Ct.App.1994). (Emphasis added).

12. "Because of the distorting effects of hindsight in reconstructing the circumstances of counsel's challenged conduct, there is a strong presumption that counsel's performance was within the wide range of reasonable professional assistance-that is, 'sound trial strategy.'" *Huck v. State*, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993) (Citing *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990)).

13. Apart from the issue of Mr. Harris' advising Booth that if the jury found an aggravating circumstance he would receive a mandatory fixed life sentence (which will be addressed below), Booth has not proven that Harris' performance fell below an objective standard of reasonableness. It is clear that Harris carefully evaluated the evidence against Booth as well as the admissible exculpatory evidence, and

reasonably advised him regarding the likelihood of a guilty verdict if he were to go to trial. His investigation appears to have been diligent, competent and thorough, including his decision that not to pursue any further forensic tests. Further, he appears to have considered the futility of pursuing defenses that were not supported by the evidence and which would have needlessly wasted Booth's family's financial resources.

14. In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Supreme Court applied *Strickland, supra*, to convictions resulting from a guilty plea as opposed to a trial. The *Hill* court reformulated *Strickland's* second prong, the "prejudice" prong, to require a showing by the defendant "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." When read together, these two decisions mean that in order for the reviewing court to vacate the prior conviction it must find that: (1) defense counsel's performance fell below that of an ordinary fallible attorney; and (2) there is a reasonable probability that, but for his attorney's error(s), the defendant would not have pleaded guilty and would have insisted on going to trial.

15. "In order to show prejudice from ineffective assistance of counsel that led to the entering of a plea, the defendant must establish through objective evidence a reasonable probability that, but for counsel's advice, he would not have accepted the plea." *McCleese v. United States*, 75 F.3d 1174, 1179 (7th Cir. 1996).

16. Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be

valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), a voluntary plea of guilty intelligently made **in the light of the then applicable law** does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. **A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.**

Brady v. U.S., 397 U.S. 742, 756-757, 90 S.Ct. 1463, 1473, 25 L.Ed.2d 747 (1970).

(Emphasis added).

17. Idaho Code §18-4004 provides the punishment for murder and is unchanged from the time of Kellum's murder:

Subject to the provisions of sections 19-2515 and 19-2515A, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty as required under the provisions of section 18-4004A, Idaho Code, and provided further that whenever the death penalty is not imposed the court shall impose a sentence. If a jury, or the court if a jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of the death penalty would be unjust, the court shall impose a fixed life sentence. If a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or **if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service.** Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life. (Emphasis added).

18. It is clear that both the prosecutor and defense counsel in Booth's criminal case possessed extensive experience in the field of criminal law. Further, it is clear that

both counsel shared the view that under the applicable Idaho law in existence at the time, Booth would have been subject to a mandatory fixed life term if the jury found him guilty of first degree murder and also found that one of the statutory aggravating circumstances existed. However, Idaho Code §18-4004 very distinctly provided at that time, as it does now, "**if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years** during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service." (Emphasis added).

A. It is clear under the statute that if Booth's case had gone to trial and the Court instructed the jury to decide whether any of the aggravating circumstances had been proven beyond a reasonable doubt, such a finding of an aggravating circumstance would merely have been advisory in nature and the Court would not have been mandated to sentence Booth to a fixed life term, but would actually have been bound only to sentence within the parameters of a life sentence, with any fixed portion above ten years to be entirely within the discretion of the Court.

19. Of particular note in this case, is that the state presented no legal argument on this issue in its written brief or in its proposed Findings of Fact and Conclusions of Law. It appears that the state concedes the issue that Harris' advice to Booth was contrary to the relevant law in effect at the time when he advised Booth, "if the jury finds an aggravating circumstance as a part of the verdict, then the sentence to be imposed by the judge, notwithstanding all the evidence there is in mitigation, a fixed life sentence which means you will spend the rest of your life in prison."

20. Thus, the Court concludes that only in this limited area of advice to his client, Mr. Harris' representation fell below the objective standard of reasonableness.

21. The issue then turns to the second prong of the *Strickland* test, that is, was there is a reasonable probability that, but for Mr. Harris advising Booth that he would risked a mandatory fixed life sentence if he went to trial and was convicted of first degree murder and a statutory aggravating circumstance, the defendant would not have pleaded guilty and would have insisted on going to trial?

A. As reflected in the Court's Findings of Fact, the evidence reflects that two of the significant reasons Booth pled guilty to first degree murder was the reasonable expectation that the State would have a strong case against him for first degree murder, and that if he pled guilty there was a reasonable opportunity to receive a life sentence with only a ten to fifteen-year fixed term based on case specific mitigating factors. All of which was based on the reasonable advise of his legal counsel and not subject to post conviction relief.

22. However, this Court's Findings of Fact also reflect that another significant reason that Booth pled guilty to first degree murder is that he believed, based on the advice of legal counsel, that if he went to trial and was found guilty of first degree murder and at least one of the statutory aggravating circumstances, the Court would be prohibited from weighing any mitigating factors and was bound to issue a mandatory fixed life sentence. This advice loomed significantly in the Rule 11 plea agreement and was based on an erroneous interpretation of the law.

A. This Court had hoped that the state would have presented an argument in the post

conviction proceeding regarding this significant issue,⁴ but in the absence of any authority to the contrary, it cannot be said that the legal landscape has changed regarding the application of mandatory sentencing in a non-capital case. A mandatory fixed life sentence for first degree murder under I.C. §18-4004, with no discretion afforded the Court, is only available when death has been timely sought by the state, which was not done in Booth's criminal case.

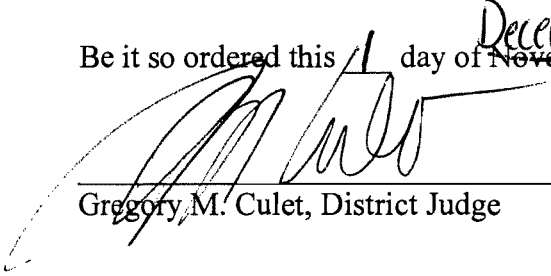
23. In fairness to both counsel in the criminal case, this Court could have, and with the benefit of hindsight, should have injected an inquiry to clarify the status of that legal issue before accepting the plea of guilty. Certainly, such an inquiry and determination would have to have been addressed further by the Court and counsel in the criminal case if it had actually gone to trial and the jury found any of the statutory aggravating circumstances that had been requested by the state had been proved.

⁴ It is not lost on the Court that, at the time of Booth's criminal case, the sentencing provisions of Idaho's murder statute had recently been amended to conform with the landmark U.S. Supreme Court case of *Ring v. Arizona, supra*, and that, at that time, there was virtually no case law in Idaho (or likely, anywhere) addressing the legality of the view of both counsel to the criminal case regarding the application of the aggravating circumstances provision of I.C. §18-4004, or a similar statute in another jurisdiction, on a non-capital case. At this point, nothing has been argued on that point and it cannot be said that the legal landscape has changed with regard to the non-availability of a statutorily mandated fixed life sentence in a non-capital murder case.

Order

Accordingly, Trevor Booth's Petition for Post Conviction Relief is granted. His sentence is to be rescinded and his guilty plea is allowed to be withdrawn, and his criminal case will be scheduled for a status/scheduling conference and thereafter reset for jury trial. Petitioner's counsel is directed to prepare an order consistent with this decision.

Be it so ordered this ^{December} 1 day of ~~November~~, 2009,



Gregory M. Culet, District Judge

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing document was served by the following method indicated below to each of the following:

Ty Ketlinski
Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

U. S. Mail, postage prepaid
 Telecopy/fax
 Personally delivered - *courthouse basket*

Van Bishop
203 12th Ave. Rd, Suite B
Nampa, ID 83686

U. S. Mail, postage prepaid
 Telecopy/fax
 Personally delivered - *courthouse basket*

DATED this 1st day of ^{Dec}~~June~~, 2009.

William Hurst
Clerk of District Court

E Bullard
Deputy Clerk

ORIGINAL

F I L E D
A.M. *4:08* P.M.

JOHN T. BUJAK, ISB #5544
TY A. KETLINSKI, ISB #5610
Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605
Telephone: (208) 454-7391
Facsimile: (208) 455-5955
tketlinski@canyonco.org

DEC 09 2009
CANYON COUNTY CLERK
V TRUJILLO, DEPUTY

Attorney for Respondent

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

TREVOR BOOTH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. CV2006-8651

MOTION TO RECONSIDER

Respondent, State of Idaho, by and through its attorney of record, Ty A. Ketlinski of the Canyon County Prosecuting Attorney's Office, hereby files this Motion to Reconsider regarding the Court's December 1, 2009 Findings of Fact, Conclusions of Law and Order Granting Petition for Post-Conviction Relief. This motion is made pursuant to Rule 11(b)(2) of the Idaho Rules of Civil Procedure.

MOTION TO RECONSIDER - 1
CV06-08651
06-05307

000110

INTRODUCTION

The Court granted Booth's Petition for Post-Conviction Relief exclusively because Booth's trial lawyer, Dick Harris, fell below the objective standard of reasonableness in advising his client about pleading guilty. Specifically, the Court found that Harris incorrectly advised Booth that he would receive a fixed life sentence if he went to trial and the jury found him guilty with aggravated circumstances.

The Court relied heavily on the absence of the State's argument in this regard.¹ The Court inferred that the State conceded this point to Booth. However, the State has not conceded this issue and objects to the Court's inference in this regard.² The State now requests the Court to consider the following argument on the issue.

The State believes that language of Idaho Code § 18-4004A is patently clear: a fixed-life sentence is required when aggravated circumstances are found in a non-capital case, and that Harris correctly advised his client in this regard. Even if Harris' advice was ultimately wrong on this point, he acted reasonably under the circumstances. Finally, Booth failed to present any evidence satisfying the second-prong of the Strickland test. The evidence Booth presented at trial did not support his theory that he would have been acquitted, receive a lesser-included offense, or ultimately receive a lighter sentence from the Court.

¹ The Court stated that the State's lack of argument in this regard was "[o]f particular note," and was written in bold typeface.

² The reason for the State's lack of argument in this regard is not germane to this motion. However, undersigned counsel understood the language of Idaho Code § 18-4004 to be self-evident and an argument in its regard unnecessary, particularly when Booth failed to show the second-prong of the Strickland test.

ARGUMENT

A. IDAHO CODE § 18-4004 REQUIRES A FIXED-LIFE SENTENCE WHEN A JURY FINDS AGGRAVATING CIRCUMSTANCES IN A NON-CAPITAL CASE.

If Harris' statutory interpretation of Idaho Code § 18-4004 is correct, then the Court cannot find that his representation fell below the objective standard of reasonableness. Using the rules of statutory construction, it is clear that Idaho Code § 18-4004 requires a fixed-life sentence in non-capital cases upon a finding of guilt with aggravated circumstances.

The cardinal rule of statutory construction is that where a statute is plain, clear, and unambiguous, a court is constrained to follow that plain meaning and neither add to the statute nor take away by judicial construction. Poison Creek Pub., Inc. v. Central Idaho Pub., Inc., 134 Idaho 426, 429 (Ct. App. 2000). Statutory interpretation always begins with an examination of the literal words of the statute. In re Permit No. 36-7200, 121 Idaho 819, 822 (1992). Unless the result is palpably absurd, a court must assume that the legislature means what is clearly stated in the statute. Id. The court must give the words their plain, usual and ordinary meaning, and there is no occasion for construction where the language of a statute is unambiguous. Sherwood v. Carter, 119 Idaho 246, 254 (1991). A court furthermore must give every word, clause and sentence effect, if possible. In re Permit No. 36-7200, 121 Idaho at 822.

In its entirety, Idaho Code § 18-4004 states:

Subject to the provisions of sections 19-2515 and 19-2515A, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty as required under the provisions of section 18-4004A, Idaho Code, and provided further that whenever the death penalty is not imposed the court shall impose a sentence. If a jury, or the court if a jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of the death penalty would be unjust, the court shall impose a fixed life sentence.

If a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life.

This statute contains four (4) sentences. Each sentence will be analyzed separately and interpreted in unison with the other sentences.

1. *"Subject to the provisions of sections 19-2515 and 19-2515A, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty as required under the provisions of section 18-4004A, Idaho Code, and provided further that whenever the death penalty is not imposed the court shall impose a sentence."*

This provision provides that a sentence for 1st degree murder must be punished by death or life in prison. However, in order for a sentence of death to be imposed, the prosecutor must file written notice. If the death penalty is not sought, then the court shall impose a sentence.

2. *"If a jury, or the court if a jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of the death penalty would be unjust, the court shall impose a fixed life sentence."*

This provision provides that in the event a jury or judge finds aggravating circumstances are present but that the death penalty is unjust, then the court must impose fixed life.

3. *"If a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service."*

This sentence presents the crux issue of this case. The Court only considered the second half of this sentence beginning with "if the death penalty is not sought." (See Findings of Fact

and Conclusions of Law, p. 25.) However, when reading the sentence from its beginning, the conjunctive “or” becomes crucial to the meaning of the statute. Breaking down this sentence, the meaning becomes clear.

If a jury [] does not find a statutory aggravating
circumstance beyond a reasonable doubt

or

if the death penalty is not sought,
[the court shall impose 10 to life].

(Emphasis and brackets added.) Thus, a sentence for ten (10) years to life is only permissible when the jury does not find aggravating circumstances or the death penalty is not sought. The Court and Booth (through his attorney) appear to use the conjunctive “and” instead of “or” in construing the meaning of this statute, which incorrectly means that fixed-life is only required when the death penalty is sought. Using the conjunctive “or,” the meaning of the statute clearly means that the Court only has discretion to sentence Booth to 10 years fixed to life when either an aggravator is not found or if the death penalty is not sought.

There was no question in this case that the State intended on going forward on aggravating circumstances without a request for the death penalty. On May 18, 2005, Prosecutor Gearld Wolff filed a Motion for Use of Special Verdict Form. The verdict form asked the jury to make a finding of aggravated circumstances. In chambers, this Court indicated that it was tending to support the submission of the special verdict form to the jury. (Petitioner’s Exhibit 1; Tr., p. 192, ll. 1-14; Tr., p. 206, ll. 10-19.)

Both Wolff and Harris interpreted the statute to mean that a finding of an aggravating factor meant fixed-life based on the plain meaning of the language of the statute. (Tr., p. 221, ll.

22-24; p. 169, ll. 16-17.) The Court, however, stated in its opinion that a jury finding of aggravating circumstances “would have been merely advisory in nature” and the Court was only constrained to 10 years to life. The authority for this proposition is unknown, particularly in lieu of the plain language of the statute.

Yet, it appears that Harris’ and Wolff’s interpretation of the third sentence of the statute is congruent with the other sentences. Clearly, the statute was intended to mandate fixed-life in any first degree murder case in which an aggravator is found. For example, in the second sentence, a fixed-life sentence is required when an aggravator is found but the jury or court finds the death penalty unjust. This sentence means that any finding of an aggravator in a death penalty case results in a minimum of a fixed-life sentence. The third sentence extends this meaning to cases where an aggravator is found but the death penalty is not sought by the prosecution.

In summary, the third sentence in Idaho Code § 18-4004 means that 10 year to life is the appropriate sentencing range only when aggravating circumstances are not found or the death penalty is not sought.

4. *“Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life.”*

This sentence provides the penalty for second degree murder.

In conclusion, Harris correctly advised Booth that if he went to trial and the jury found aggravating circumstances, he was facing a mandatory fixed-life sentence. The plain, ordinary meaning of the statute requires a fixed-life sentence.

B. HARRIS WAS OBJECTIVELY REASONABLE WHEN ADVISING HIS CLIENT ON A MANDATORY FIXED-LIFE SENTENCE IF BOOTH WAS FOUND GUILTY OF AGGRAVATING CIRCUMSTANCES.

Finally, even if Harris interpretation of the statute is ultimately incorrect, he nevertheless acted objectively reasonable under the circumstances. First, Harris cannot be judged unreasonable in his representation of Booth when it is objectively reasonable for attorneys to have differing opinions on interpreting a statute. Both Harris and Wolff shared the same interpretation of Idaho Code § 18-4004: a finding of an aggravating factor meant fixed-life for Booth. (Tr., p. 221, ll. 22-24; p. 169, ll. 16-17.) Pursuant to the it's Finding of Fact and Conclusions of Law, the Court disagrees with this interpretation.

Second, as a noted by the Court, Harris has extensive experience in criminal law. In his experience and legal judgment, if the jury came back with a verdict of first degree murder then an aggravating circumstance would probably be found. (Tr., p. 171, ll. 4-10.) Harris stated that he thought that a jury finding of the lesser included offense of manslaughter or second degree murder was also unlikely. (Tr., p. 137, ll. 13-20.) Given his judgment of the merits of the defense, he presented Booth with pleading guilty and removing the threat of an aggravating factor, or going to trial and risking a fixed-life sentence.

Given that Harris held a reasonable interpretation of the statute, and given that his analysis of the facts of the case were sound, his legal counsel to Booth was reasonable under the circumstances. This is true even if his ultimate interpretation of Idaho Code § 18-4004 was incorrect.

C. BOOTH FAILED TO SHOW SUFFICIENT EVIDENCE THAT THE RESULT OF HIS CRIMINAL CASE WOULD HAVE BEEN DIFFERENT BUT FOR HIS GUILTY PLEA.

In its Findings of Fact and Conclusions of Law, the Court did not find any facts indicating that Booth would have prevailed in the criminal trial if had not pled guilty. Indeed, as

argued by the State in its closing brief, Booth did not present any evidence that he would have been acquitted had he taken the case to trial, or that he would have received a lesser-included offense such as second degree murder or manslaughter. Harris testified that the evidence did not appear to support a claim of second degree murder, much less manslaughter.

Even if Booth was found guilty of second degree murder, he still bears the heavy burden of showing that his sentence would have been less. Second degree murder still has a sentencing range of 10 years fixed to life. Booth has failed to set forth any facts or circumstances that would support a lesser sentence if he had been found guilty of second degree murder.

DATED this 9th day of December, 2009



Ty A. Ketlinski
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December, 2009, I caused a true and correct copy of the foregoing **MOTION TO RECONSIDER** to be served, by the method(s) as indicated, upon:

Van Bishop
203 12th Avenue, Ste. B
Nampa, Idaho 83686

- U.S. Mail
- Hand Delivery
- Federal Express
- Facsimile



Ty A. Ketlinski

FILED
A.M. 2:30 P.M.

LAWRENCE G. WASDEN
Attorney General
State of Idaho

JAN 11 2010

CANYON COUNTY CLERK
T EARLS, DEPUTY

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Idaho State Bar # 4051
Deputy Attorney General
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

TREVOR JAMES BOOTH,)	
)	
Petitioner-Respondent,	)	District Court No. CV-06-08651
)	
vs.	)	NOTICE OF APPEAL
)	
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	
)	

TO: TREVOR JAMES BOOTH, THE ABOVE-NAMED PETITIONER, VAN G. BISHOP, LAW OFFICES OF VAN G. BISHOP, 203 12TH AVENUE RD. SUITE B, NAMPA, ID 83686 AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, State of Idaho, appeals against the above-named respondent to the Idaho Supreme Court from the Findings of Fact, Conclusions of Law and Order Granting Petition for Post Conviction Relief,

entered in the above-entitled action on the 1st day of December 2009, The Honorable Steve Verby presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

3. Preliminary statement of the issue on appeal: Whether the district court erred in concluding that counsel in the underlying criminal case had rendered ineffective assistance in proceedings resulting in a guilty plea.

4. To undersigned's knowledge, no part of the record has been sealed.

5. The appellant requests the preparation of the following portions of the reporter's transcript: Evidentiary hearing held April 13, 2009.

6. Appellant requests the normal clerk's record pursuant to I.A.R. 28.

7. I certify:

(a) That a copy of this notice of appeal is being served on each reporter of whom a transcript has been requested as named below at the address set out below:

DEBORA KREIDLER
Court Reporter
Canyon County District Court
1115 Albany St
Caldwell, ID 83605

LAURA WHITING
Court Reporter
Canyon County District Court
1115 Albany St
Caldwell, ID 83605

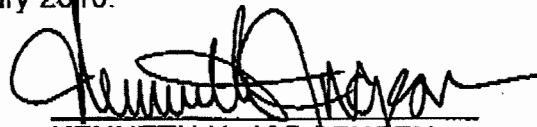
(b) That arrangements have been made with the Canyon County Prosecuting Attorney who will be responsible for paying for the reporter's transcript;

(c) That the appellant is exempt from paying the estimated fee for the preparation of the record because the State of Idaho is the appellant (Idaho Code § 31-3212);

(d) That there is no appellate filing fee since this is an appeal in a post-conviction relief case (I.A.R. 23(a)(10));

(e) That service is being made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 11th day of January 2010.


KENNETH K. JORGENSEN
Deputy Attorney General
Attorney for the Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 11th day of January 2010, caused a true and correct copy of the attached NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

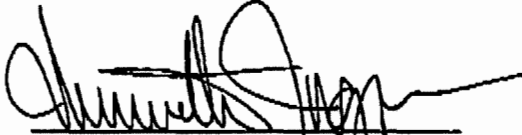
THE HONORABLE GREGORY CULET
Canyon County District Court
1115 Albany St
Caldwell, ID 83605

TY KETLINSKI
Canyon County Prosecutor's Office
1115 Albany St
Caldwell, ID 83605

VAN G. BISHOP
Law Offices of Van G. Bishop
203 12th Avenue Rd. Suite B
Nampa, ID 83686

HAND DELIVERY

MR. STEPHEN W. KENYON
CLERK OF THE COURTS
P.O. Box 83720
Boise, Idaho 83720-0101



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

000121



FILED
A.M. P.M.

JAN 13 2010

CANYON COUNTY CLERK
B RAYNE, DEPUTY

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Idaho State Bar # 4051
Deputy Attorney General
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

TREVOR JAMES BOOTH,)	
	)	District Court No. CV-06-08651
Petitioner-Respondent,)	
	)	AMENDED
vs.	)	NOTICE OF APPEAL
)	
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	
)	

TO: TREVOR JAMES BOOTH, THE ABOVE-NAMED PETITIONER, VAN G. BISHOP, LAW OFFICES OF VAN G. BISHOP, 203 12TH AVENUE RD. SUITE B, NAMPA, ID 83686 AND THE CLERK OF THE ABOVE-ENTITLED COURT:

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entered in the above-entitled action on the 1st day of December 2009, The Honorable ~~Steve Verby~~ **GREGORY CULET** presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

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7. I certify:

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DEBORA KREIDLER
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LAURA WHITING
Court Reporter
Canyon County District Court
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(b) That arrangements have been made with the Canyon County Prosecuting Attorney who will be responsible for paying for the reporter's transcript;

(c) That the appellant is exempt from paying the estimated fee for the preparation of the record because the State of Idaho is the appellant (Idaho Code § 31-3212);

(d) That there is no appellate filing fee since this is an appeal in a post-conviction relief case (I.A.R. 23(a)(10));

(e) That service is being made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 12th day of January 2010.



KENNETH K. JORGENSEN
Deputy Attorney General
Attorney for the Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 12th day of January 2010, caused a true and correct copy of the attached NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

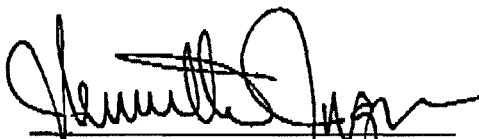
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VAN G. BISHOP
Law Offices of Van G. Bishop
203 12th Avenue Rd. Suite B
Nampa, ID 83686

HAND DELIVERY

MR. STEPHEN W. KENYON
CLERK OF THE COURTS
P.O. Box 83720
Boise, Idaho 83720-0101


KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PRESIDING: **GREGORY M. CULET** DATE: **JANUARY 19, 2010**

TREVOR JAMES BOOTH,	)	COURT MINUTES
)	
Petitioner,	)	CASE NO: CV-2006-8651-C
)	
vs.	)	TIME: 8:30 A.M.
)	
STATE OF IDAHO	)	REPORTED BY: None
)	
Respondent.	)	IN CHAMBERS
_____)	

This having been the time heretofore set for **status/scheduling conference** in the above-entitled matter, the petitioner was not present in court but was represented by counsel, Mr. Van Bishop, via telephone; and the respondent was represented by Mr. Ty Ketlinski.

The Court addressed counsel regarding a time frame for filing brief's in this case.

In answer to the Court's inquiry, Mr. Bishop advised he would file a reply within ten (10) days of this date.

The Court ordered the petitioner to submit their Brief no later than January 29, 2010, and the respondent to submit their Brief no later than February 5, 2010.

Counsel indicated they understood and court adjourned.

CURTIS

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,)
)
 Petitioner-Respondent,) Case No. CV-06-08651*C
)
 -vs-) CERTIFICATE OF EXHIBITS
)
)
 STATE OF IDAHO,)
)
 Respondent-Appellant.)

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following exhibit was used at the April 13, 2009 hearing:

Petitioner's Exhibit:

1 Memo Admitted Sent

Also being sent as an exhibit is the following:

Presentence Investigation Report (From Case #CR-05-01658*C)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 22 day of February, 2010.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *J. Randall* Deputy

CERTIFICATE OF EXHIBITS

000128

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,)	
)	
Petitioner-Respondent,)	
	)	Case No. CV-06-08651*C
)	
-vs-)	
	)	CERTIFICATE OF CLERK
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 22 day of February, 2010.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *J. Randall* Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

TREVOR JAMES BOOTH,)	
)	
Petitioner-Respondent,	)	Supreme Court No. 37296
)	
-vs-	)	CERTIFICATE OF SERVICE
)	
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

Lawrence G. Wasden, Attorney General, and Kenneth K. Jorgensen, Deputy Attorney General, P. O. Box 83720, Boise, Idaho 83720-0010

Van G. Bishop, 203 12th Ave. Rd., Ste. B, Nampa, Idaho 83686

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 22 day of February, 2010.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *J. Randall* Deputy

CERTIFICATE OF SERVICE

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