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## Condon v. State Appellant's Brief Dckt. 40346

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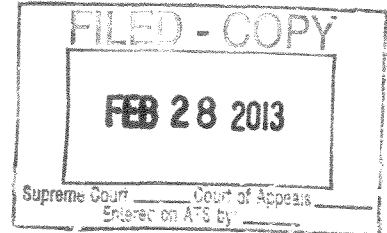
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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

TIMOTHY CHARLES CONDON, )  
 )  
 Petitioner-Appellant, )  
 )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )

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NO. 40346



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**BRIEF OF APPELLANT**

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

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**HONORABLE BRADLY S. FORD**  
District Judge

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# TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case .....	1
Statement of Facts and Course of the Underlying Criminal Proceedings (S.Ct. Docket No. 38584) .....	1
Course of Post-Conviction Proceedings (S.Ct. Docket No. 40346) .....	2
ISSUES.....	5
ARGUMENT .....	6
The District Court Erred When It Summarily Dismissed Condon’s Claim That His Trial Counsel Was Ineffective In Handling The Issue Of Condon’s Excessive Bail.....	6
A.    Introduction.....	6
B.    Standard Of Review .....	6
C.    General Legal Standards Applicable to Post-Conviction Proceedings.....	7
D.    The District Court Erred In Summarily Dismissing Condon’s Claim That His Trial Counsel Ineffectively Handled The Issue Of Excessive Bail.....	8
CONCLUSION .....	13
CERTIFICATE OF MAILING.....	13

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aeschliman v. State</u> , 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999) .....	6
<u>Berg v. State</u> , 131 Idaho 517, 960 P.2d 738 (1998) .....	8
<u>Cooper v. State</u> , 96 Idaho 542, 531 P.2d 1187 (1975) .....	8
<u>Cunningham v. State</u> , 117 Idaho 428, 788 P.2d 243 (Ct. App. 1990) .....	9
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001) .....	7
<u>Giles v. State</u> , 125 Idaho 921, 877 P.2d 365 (1994) .....	9
<u>Gonzales v. State</u> , 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991) .....	8, 10
<u>Hassett v. State</u> , 127 Idaho 313, 900 P.2d 221 (Ct. App. 1995) .....	7
<u>Hauschulz v. State</u> , 144 Idaho 834, 172 P.3d 1109 (2007) .....	6
<u>Hill v. Lockhart</u> , 474 U.S. 52 (1985) .....	8
<u>Martinez v. State</u> , 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995) .....	7
<u>Matthews v. State</u> , 122 Idaho 801, 839 P.2d 1215 (1992) .....	6
<u>Roman v. State</u> , 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994) .....	7, 8
<u>State v. Bearshield</u> , 104 Idaho 676, 662 P.2d 548 (1983) .....	7
<u>State v. Condon</u> , 2011 Unpub. Opinion No. 697 (Ct. App. 11/14/11) .....	2
<u>State v. Porter</u> , 130 Idaho 772, 948 P.2d 127 (1997) .....	9
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984) .....	8
<u>Wilson v. State</u> , 133 Idaho 874, 993 P.2d 1205 (Ct. App. 2000) .....	8

**STATUTES**

I.C. § 19-4903 ..... 7

I.C. § 19-4906 ..... 7

**RULES**

I.R.C.P. 8 ..... 7

I.R.C.P. 56 ..... 7

## STATEMENT OF THE CASE

### Nature of the Case

Timothy Charles Condon appeals from the district court's summary dismissal of his petition for post-conviction relief.

### Statement of Facts and Course of the Underlying Criminal Proceedings (S.Ct. Docket No. 38584)<sup>1</sup>

Condon was charged with felony driving under the influence and with being a persistent violator. (38584 R., pp.1-6; 40346 R., pp.4, 99, 102, 141-142.) Bond was set at one million dollars (\$1,000,000). (38584 R., pp.7-9; 40346 R., pp.14, 102, 116, 150.) Pursuant to a plea agreement, Condon pled guilty to felony driving under the influence in exchange for the dismissal of the persistent violator charge. (38584 R., pp.10, 17-20, 27; 40346 R., pp.4, 99; 38584 Change of Plea Tr., p.2, Ls.10-14.) Condon's counsel filed a motion for pre-sentencing release, on the basis that bond was excessive, so that Condon could obtain treatment at the Rescue Mission. (38584 R., pp.23-24; 40346 R., pp.16, 17, 84-85, 102, 109.) At the hearing on the motion for pre-trial release, Condon's counsel withdrew the motion. (38584 R., p.25; 40346 R., p.102.) Condon's counsel then asked for an earlier sentencing date, which the district court granted. (38584 R., p.25; 40346 R., p.102.)

At the sentencing hearing fourteen days later, the district court entered judgment and imposed a unified sentence of ten years with five years fixed.

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<sup>1</sup> Condon is, contemporaneously with the filing of this brief, filing a motion requesting that the Idaho Supreme Court take Judicial Notice of the clerk's record and transcripts in the direct appeal from his underlying criminal conviction, State v. Condon, S.Ct. No. 38584.

(38584 R., pp. 27, 34, 49-50; 40346 R., pp.4, 56, 99, 142.) In determining the length of that sentence, the district court relied, in part, on Condon's failure to obtain or complete alcohol treatment, as well as the alcohol evaluation's recommendation that Condon undertake intensive inpatient treatment. (38584 Sent. Tr., p.17, L.23 – p.18, L.20; p.19, L.24 – p.20, L.3; p.22, L.20 – p.23, L.2; p.24, Ls.19-21; 40346 R. pp.55-56.) Condon filed a pro se Rule 35 motion, which was denied. (38584 Augmentation Record; 40346 R., pp.5, 86-88, 92-98, 99, 142.) Condon timely appealed. (38584 R., pp.35-37, 40-44; 40346 R., pp.5, 99, 142.)

On direct appeal, the Idaho Court of Appeals affirmed Condon's sentence and the denial of his Rule 35 motion. State v. Condon, 2011 Unpublished Opinion No. 697 (Ct. App. November 14, 2011); (R., pp.99-100).

#### Course of Post-Conviction Proceedings (S.Ct. Docket No. 40346)

Condon filed a timely *pro se* petition for post-conviction relief (40346 R., pp.4-17), and moved for the appointment of counsel to represent him (40346 R., pp.18-28). Among the allegations made by Condon was a claim that his trial counsel was ineffective because he had not pursued Condon's request that he challenge Condon's excessive bail, and that Condon had a bed waiting for him at the intensive inpatient treatment program at the Rescue Mission prior to sentencing. (40346 R., pp.6, 13, 14, 16-17.)

Counsel was appointed and given the opportunity to file an amended petition (40346 R., pp.29-34, 38-44, 61-62), but, after obtaining the sentencing transcripts, elected not to do so (40346 R., pp.45-60, 70-71, 141).

The state filed a motion for summary dismissal arguing, with regard to Condon's excessive bail/ineffective assistance of counsel claim, that Condon had not alleged specific facts in support of his claim, that Condon had not alleged how he was prejudiced, and that his claim was disproven by the record because trial counsel had actually filed a motion to reduce bail, although he later withdrew it. (40346 R., pp.101, 108-109.) The district court held a hearing on the state's motion for summary dismissal, and asked the parties to submit closing arguments in writing. (40346 R., pp.112-115.) The district court took notice of the proceedings in the underlying criminal case and indicated it would take the matter under advisement. (40346 R., pp.113, 115, 141-143; 40346 Tr., p.29, Ls.3-29; p.51, L.13 – p.52, L.16.)

In her written closing arguments, Condon's post-conviction counsel, based upon the allegations made in Condon's petition and in response to the state's argument at the hearing (40346 Tr., p.37, Ls.5-12), made clear the prejudice to Condon by his trial attorney's failure to pursue the motion to reduce bail: "had his bail been set reasonably – or had he been released to treatment, he could have shown the Court and his pre-sentence [investigator] that he was amenable to treatment and receive a lighter sentence." (40346 R., p.120.)

The district court issued a written order granting the state's motion for summary disposition. (40346 R., pp.140-156.) Addressing Condon's claim of ineffective assistance of counsel in pursuing a challenge to his excessive bail, the district court accepted the state's argument that Condon's claim was



disproven by the record, and that Condon could not prove prejudice, because, according to the district court, Condon's trial attorney's act of withdrawing the motion for pre-sentencing release benefitted Condon. (40346 R., pp.152-153.) Condon timely appealed from the district court's order summarily dismissing his petition for post-conviction relief. (40346 R., pp.159-163.)

## ISSUE

Condon's trial counsel filed a motion for his pre-trial release without bail, on the grounds that bail was excessive, so that Condon could begin alcohol treatment prior to sentencing. Counsel later withdrew the motion and asked that sentencing be expedited. At sentencing, the district court relied, in part, on Condon's failure to ever obtain or complete alcohol treatment when it determined his unified sentence of ten years, with five years fixed. Did the district court err when it summarily dismissed Condon's claim that his trial counsel was ineffective in his handling of the issue of Condon's excessive bail?

## ARGUMENT

### The District Court Erred When It Summarily Dismissed Condon's Claim That His Trial Counsel Was Ineffective In Handling The Issue Of Condon's Excessive Bail

#### A. Introduction

When liberally construed in Condon's favor, the factual allegations Condon presented in his post-conviction petition and supporting materials, the facts in the record before the district court, and the reasonable inferences therefrom raised a genuine issue of material fact of whether trial counsel was ineffective with regard to his handling of Condon's excessive bail when he withdrew Condon's motion for excessive bail, preventing Condon from obtaining the benefit of pre-sentencing alcohol treatment, which might have induced the sentencing judge to impose a lesser sentence. The district court erred when it summarily dismissed this claim.

#### B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). The appellate court will liberally construe the facts and reasonable inferences in favor of the petitioner. Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007).

C. General Legal Standards Applicable to Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Hassett v. State, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct. App. 1995). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than “a short and plain statement of the claim” that would suffice for a complaint. Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995) (*referencing* I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (*citing* I.C. § 19-4903).

A court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. Summary dismissal is akin to summary judgment. Hassett, 127 Idaho at 315, 900 P.2d at 223 (*referencing* I.R.C.P. 56). A claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 if the applicant “has not presented evidence making a prima facie case as to

each essential element of the claims upon which the applicant bears the burden of proof.” Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); Roman, 125 Idaho at 647, 873 P.2d at 901.

Dismissal is proper where the evidence controverts an essential element of the applicant’s claim or does not support relief as a matter of law. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Wilson v. State, 133 Idaho 874, 878, 993 P.2d 1205, 1209 (Ct. App. 2000). However, if an applicant presents a material factual issue, an evidentiary hearing must be conducted. Gonzales v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

D. The District Court Erred In Summarily Dismissing Condon’s Claim That His Trial Counsel Ineffectively Handled The Issue Of Excessive Bail

To be entitled to relief on a claim of ineffective assistance of counsel, a post-conviction petitioner must satisfy the two prong test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must demonstrate: 1) that counsel’s performance fell below an objective standard of reasonableness, and 2) that there is a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88. The “prejudice” requirement focuses on whether counsel’s deficient performance affected the outcome of the case. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

A reviewing court evaluates counsel's performance at the time of the alleged error, not in hindsight, and presumes that "trial counsel was

competent and that trial tactics were based on sound legal strategy." State v. Porter, 130 Idaho 772, 791-92, 948 P.2d 127, 146-47 (1997). Trial counsel's strategic and tactical decisions will not be second-guessed on review or serve as a basis for post-conviction relief under a claim of ineffective counsel unless the UPCPA petitioner has shown that the decision resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994); Cunningham v. State, 117 Idaho 428, 430-31, 788 P.2d 243, 245-46 (Ct. App. 1990).

Condon's petition alleged that Condon's trial counsel was ineffective because he "did not bring up excessive bail issues." (40346 R., pp.6, 13, 14.) A reasonable inference from this allegation is that it is not limited to whether counsel filed the motion, but whether he truly brought it before the court for its consideration and ruling. To support the second prong of ineffective assistance of counsel, whether he had been prejudiced by the failure to pursue the motion, Condon alleged that prior to sentencing he had obtained a bed at an alcohol treatment facility (40346 R., pp.16, 17), and provided sentencing transcripts that demonstrated the judge relied, in part, on Condon's failure to obtain or complete alcohol treatment when it imposed the five-year fixed sentence (38584 Sent. Tr., p.17, L.23 – p.18, L.20; p.19, L.24 – p.20, L.3; p.22, L.20 – p.23, L.2; p.24, Ls.19-21; 40346 R. pp.55-56.). The record before the court established that trial counsel did file a motion for pre-sentencing release, based on Condon's excessive bail, to allow Condon to be

released to obtain alcohol treatment (38584 R., pp.23-24; 40346 R., pp.16-17, 84-85, 102, 109) but withdrew that motion prior to sentencing, and then asked that sentencing be expedited (38584 R., p.25; 40346 R., pp.102, 150). Condon's post-conviction counsel made clear the prejudice to Condon by this action: "had his bail been set reasonably – or had he been released to treatment, he could have shown the Court and his pre-sentence [investigator] that he was amenable to treatment and receive a lighter sentence." (40346 R., p.120.)

Counsel for the state agreed that the motion for pre-sentencing release was based on excessive bail and the availability of a bed at the Rescue Mission. (40346 R., pp.102, 109.) Counsel for the state agreed that trial counsel withdrew the motion "and instead asked the court to move [Condon's] sentencing date from March 28, 2011, when it was originally scheduled, to February 15, 2011." (40346 R., p.102.) Condon's essential allegations as to deficient performance (filing but withdrawing the motion) and prejudice (withdrawing the motion prior to sentencing despite the availability of a bed at a treatment facility) were thus not only alleged but uncontroverted by the state. Because Condon had presented a material factual issue, "an evidentiary hearing must be conducted." Gonzales, 120 Idaho at 763, 819 P.2d at 1163.

The state argued below, however, that "[t]he court granted this scheduling change to allow [Condon] the opportunity to be released from jail." (40346 R., p.102.) The state, guessing as to trial counsel's motives, posited

“I think it’s apparent that the trial attorney didn’t think he could be successful on the motion, and so having the petitioner sentenced earlier would allow him to spend less time in the County Jail and move forward on his sentence.” (40346 Tr., p.37, Ls.7-12.) On its face, this is conjecture and does not disprove or undermine Condon’s allegations of deficient performance or prejudice. It is difficult to conceive of what tangible benefit would accrue to Condon by this action. Expediting sentencing simply meant that Condon accrued his credit for time served in a state prison rather than a county jail. This is not a benefit, let alone one on par with obtaining alcohol treatment to demonstrate to a sentencing judge that a more lenient sentence would be reasonable. Withdrawing the motion meant Condon would definitely not be released prior to sentencing, and so would definitely not have the opportunity to enter treatment and show the district court that he was serious and could succeed, to the end that he could possibly be seen as being worth a more lenient sentence, to whatever degree. Such a move does not serve any strategic or tactical purpose, and is contrary to Condon’s interest in presenting the best possible case at sentencing. It is deficient conduct that resulted in prejudice to Condon’s case.

The district court, however, expanded on the state’s conjecture as to trial counsel’s reasons for withdrawing the motion for pre-sentencing release, finding that trial counsel withdrew the motion for pre-sentencing release “in exchange for the sentencing date to be moved from March 28, 2011 until February 15, 2011” (40346 R., p.150), or, stated alternately, “so that the



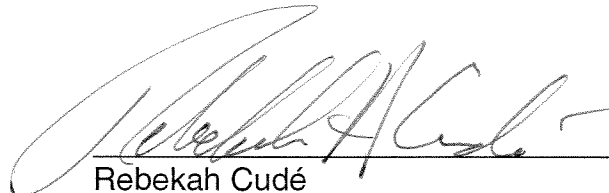
defendant could have resolution of the matter without having to be incarcerated in the Canyon County Jail for an additional six weeks” (40346 R., p.152). Even accepting, for the purposes of argument only, that there is support in the record for such a finding, it does not support the ultimate conclusion that Condon’s allegation that this is deficient performance and that he was prejudiced thereby were insufficient or somehow disproven by the record. At best, they beg the question, again, of what possible strategic benefit such a move could have been. The district court erred when it made this conclusion, and erred when it did not recognize this as precisely the sort of material factual issue that must be resolved at an evidentiary hearing.

The district court erred when it relied on counsel’s decision to withdraw Condon’s request for release, and characterized it as an exchange for a speedier sentencing, as support for its determinations that trial counsel’s actions were objectively reasonable and that Condon did not allege prejudice. There exist factual issues for hearing as to whether counsel’s performance was deficient and to what extent the deficiency prejudiced Condon’s ability to present his best case at sentencing. Because Condon supported both prongs with factual allegations that remained in dispute, the district court erred when it dismissed this claim without an evidentiary hearing.

CONCLUSION

Condon's petition and supporting materials present a genuine issue of material fact regarding his trial counsel's handling of the excessive bail issue. Condon respectfully asks this Court to reverse the district court's summary dismissal and remand the case for an evidentiary hearing on Condon's claim that his trial counsel rendered him ineffective assistance with the reduction of his excessive bail, preventing him from obtaining alcohol treatment before sentencing.


DATED this <sup>28<sup>th</sup></sup> 27<sup>th</sup> day of February, 2013.

  
Rebekah Cudé  
Attorney for Petitioner-Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this <sup>28<sup>th</sup></sup> 27<sup>th</sup> day of February, 2013, I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be hand-delivered to the Attorney General's mailbox at Supreme Court for:

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