8-27-2014

Flieger v. State Appellant's Brief 1 Dckt. 40690

In the Supreme Court of the State of Idaho

STATE OF IDAHO,

Defendant-Respondent,

v.

PHILLIP D. FLIEGER,

Petitioner-Appellant.

NO.: 40690-2013
Twin Falls County No. 2012-3464

APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

PHILLIP DUANE FLIEGER #78503
Idaho State Correctional Center B-215-B
P.O. Box 70010
Boise, Idaho 83707

Petitioner-Appellant Pro se

ATTORNEY FOR
PETITIONER-APPELLANT

DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
P.O. BOX 83720
Boise, Idaho 83720-0010

ATTORNEY FOR
Defendant-Respondent

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ABBREVIATION'S

PHT = Preliminary Hearing Transcripts

SHT = Suppression Hearing Transcripts

MTDT = Motion To Dismiss Transcripts

STHT = Status Hearing Transcripts (8/25/08)

TT = Trial Trial Transcripts

ST = Sentencing Transcripts

RC = Record Of The Court

EX = Exhibit

I.C.R. = Idaho Criminal Rules
I.A.R. = IDAHO Appellate Rules
I.R.C.P. = Idaho Rules Civil Procedure
U.S.C.A. = United States Constitutional Amendment
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STATEMENT OF THE CASE

NATURE OF THE CASE

Phillip Duane Flieger appeals from the Order Dismissing Petition For Post Conviction Relief, Granting the State's Motion For Summary Dismissal, entered January 14, 2013. Appellant was originally found guilty after a jury trial of Three (3) counts of Possession of a controlled substance and sentenced to three Ten (10) Year to Life sentences, concurrent. Appellant appealed his conviction and sentence prior to the filing of his post-convictin. The Appellant raised numerous issues of constitutional error all premised on and due to, Ineffective Assistance of Counsel, prior to trial, during trial, and on appeal. Those issues are on appeal now here, along with the court's error and abuse of discretion in dismissing the petition..

STATEMENT OF THE FACTS AND COURSE OF THE PROCEEDINGS

For the Record, the Petitioner-Appellant disputes the factual findings and assertions of the State, the court, and those made by all appointed counsel, including appellate counsel. (Appellant has never been found guilty of intent to deliver, and never consented to any searches, and never waived any rights, including right to speedy trial.)any comments made by any party to the contrary are false and prejudicial. Furthermore, Appellant makes a federal claim, giving notice of same in his pleadings at every instance. Appellant also makes an actual innocence claim, asking for a full and fair review of the facts and documents submitted for review by Appellant to support that claim.

The Appellant gives a full and complete account of the facts in his 'Affidavit In Support of Petition For Post-Conviction Relief (See: Clerks Record Docket #40690 page 18 to page 71, Idaho Supreme Court). These facts are attached to this Brief as Exhibit #A, and are meant to support the claims and issues in the brief and are referred to in full as if fully contained herein (attached).

The Petitioner-Appellant's issues were all raised pursuant to an ineffective assistance of counsel claim, during the course of these proceedings the petitioner filed an Exhibit which was a pro-se appeal brief (See: Exhibit #68) which he had filed in his direct appeal when appeallate counsel, Justin Curtis refused to raise those issues mandated by Idaho Law be raised on direct appeal or be forfeit. Due to this madate, the appellant at the time, repeatedly asked counsel to raise the issues on direct appeal, when counsel refused to, and also committed other fatal errors in the appeal, such as telling the Supreme Court he was found guilty of intent to deliver when it was only possession, appellant had no choice but to file to preserve his right to appeal. The pro-se brief was rejected by the Clerk of the

Court due to appellant haveing counsel. This same brief was submitted as an exhibit and evidence (not as argument) in the present case with Petitioner-Appellant's Post-Conviction. The brief was submitted as proof of appellate counsel's failure to raise the issues on direct appeal, and therefore supportive of Petitioner's ineffective assistance of trial and appellate counsel's claims. The district court denied petitioner's augmentation and exhibit. When Appellant tried to submit the brief and get it augmented to the Idaho Supreme Court, it was denied again, even though it is part of the clerks record (page #460-601). This is an impermissible impediment by the state to deny a full and fair adjudication of Petitioner-Appellant's claims, concerning ineffective assistance of counsel.

Also suppressed by the government in this case is evidence supporting Petitioner-Appellant'sa actual innocence, (Affidavit's of Robert Berry)(Exhibit #1 and Exhibit #2, which is Berry's written confession and sworn testimony). This is the evidence that was withheld from the jury at trial. (see RC-18 to 71).

Petitioner-Appellant's version of the facts, which are supported by evidence submitted to the trial court but withheld from the jury are:

Mr. Flieger loaned his truck to an individual named Robert Berry, whom than used it with another man Berry described as Juan. Berry than, along with juan used drugs at verious locations and while using the truck. They than left the drugs in the truck in a bag they seen on the floorboard that was already there. when Mr. Flieger reobtained the vehicle he was pulled over that same day under suspicious circumstances (Appellant alleges stalking). Upon an illegal search narcotics were found and evidence was tainted and later destroyed. Mr. Flieger was charged and held for trial. When Flieger asked that fingerprints be taken and denied the drugs were his, the items with fingerprints were destroyed. When Mr. Flieger tried to submit testimony from the owners of the narcotics, it was suppressed. When Mr. Flieger refused to waive his speedy trial rights, due to the need to have the witnesses available and testify, his rights were waived in secret, without his consent. In the interval while awaiting a new trial date, the county sheriff did transfer one of Appellant's witnesses out of the country. (Juan). When the only and true remaining accomplice attempted to submit an Affidavit (Sworn) to his exact involvement in the crime, not only was it withheld from the jury by the trial court, but the court even threatened the deputy sheriff, Stacy Thomas , for notarizing the affidavit. When the same witness, Robert Berry, attempted to testify at trial, after lawful notice and listing, the trial court stopped the trial, deposed Berry outside the hearing of the jury, threatened him, and when he

was leaving the courtroom after testifying at deposition, the state threatened Berry outside the door of the courtroom with prosecution if he continued to testify. These incident's were witnessed by counsel, objected to, put on record, and at all times properly and fairly presented to the court. After being threatened, Berry took the plead the fifth amendment in front of the jury, his affidavit was withheld, his testimony picked apart and partially read to the jury, and the jury was informed by the state and the court not to believe his testimony which proved the innocence of the Petitioner-Appellant. These errors prejudiced the Appellant, violate his right to a fair trial, and denied the jury the right to determine the truth.

When the jury ignored the charge of Intent to Deliver, and found the 'defendant' guilty only of possession on all three counts, both the state and the court ignored this verdict at sentencing, reaccused Flieger of Intent to Deliver, and sentenced him accordingly, committing double jeopardy, and violating Appellant's substantive rights to due process of law.

The Appellant provides the Court with specific recitation and references to the record in his Exhibit's; and below, but more concisely in the Affidavit In Support (RC-18 thru 71)(Exhibit A). Along with this initial Brief on Appeal, Appellant provides the Court with a complete Exhibit file submitted in his post-conviction petition (Attached).

The district court denied augmentation and judicial notice in part, but this is in error. As the preliminary argument shows (below) it is mandated that petitioner's submit affidavits; evidence; exhibits; and supporting documents with their petitions.

Appellant was denied an evidentiary hearing, only a summary judgment proceeding, where his witnesses were not allowed, and evidence was not permitted. The state of course presented evidence, disputing petitioner's claims, but the record provided to this Court clearly shows that the district court made an unreasonable determination of the facts, and rullings contrary to United States Supreme Court precedent, as well as contradicting Idaho's own mandates. See below.

The Appellant points out that state created impediments of the evidence and facts that support Appellant's claims, is unconstitutional, reviewable, and in all instances, an exhaustion of the claims pursuant to the AEDPA and PLRA. Appellant is only required to 'give the state an opportunity' he can not force them to take that opportunity. Herein and below is their opportunity.

PRELIMINARY ARGUMENT

1. DID THE DISTRICT COURT ERROR IN DISMISSING MY PETITION FOR POST-CONVICTION RELIEF, ERROR IN DENYING AFFIDAVIT'S, EXHIBIT'S, AND EVIDENCE SUPPORTING THE PETITION, AND IS THIS FUNDAMENTAL PLAIN ERROR DENYING FAIR DUE PROCESSES PURSUANT TO STATE AND FEDERAL CONSTITUTIONAL LAW STANDARDS?

   THE APPELLANT ASSERTS YES!

A. STANDARD OF REVIEW

A petition for post-conviction relief proceeding is civil in nature, and accordingly requires proof by the preponderance of the evidence to prevail. I.C. § 19-4907; Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000). Moreover, with but few exceptions, it is the Idaho Rules of Civil Procedure which govern these types of matters. I.C.R. 57(b); Ferrier v. State, 135 Idaho 797, 25 P.3d 110 (2001); Peltier v. State, 119 Idaho 454, 808 P.2d 373 (1991); Mathews v. State, 130 Idaho 39, 936 P.2d 682 (Ct.App.1997).

The petition must contain: (a) much more than 'a short and plain statement of the claim, as required under I.R.C.P. 89(a)(1); and, (b) it must be verified with respect to those facts within the personal knowledge of the applicant, and those affidavits, records, or other evidence supporting its allegations are to be attached, or their absence explained." martinez v. State, 126 Idaho 813,816, 892 P.2d 488,491 (COA 1995), and I.C.§ 19-4903; Labelle v. State, 130 Idaho 115,117, 937 P.2d 427,429 (Ct.App.1997).

In other words, the Petitioner must make factual allegations showing each essential element of the claim, and a showing of admissible evidence must support those factual allegations. Roman v. State, 125 Idaho 644.647, 873 P.2d 898,901 (COA 1994); Stone v. State, 108 Idaho 822,824, 702 P.2d 860,862 (COA 1985); and Drapeau v. State, 103 Idaho 612,617, 651 P.2d 546,551 *COA 1982). Still, those factual allegations contained within the petition or its verified attachments are deemed to be true until controverted. Cooper v. State, 96 Idaho 542, 531 P.2d 1187 (1975); Roman, at 647.

Further, the district court may take judicial notice of the record of the underlying criminal case in the course of reaching a decision. Hays v. State, 113 Idaho 736,739, 745 P.2d 758,761 (COA 1987), aff'd 115 Idaho 315, 766 P.2d 785 (1988), and State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992), overruled on other grounds. The Idaho Supreme Court exercises free review of the district court's application of the relevant law to the facts. Dunlap v. State, 141 Idaho 50, at 56, 106 P.3d at 382; Mckinney v. State, 133 Idaho 695,699--700, 992 P.2d 144,148-49 (1999); Queen v. State, 146 Idaho 502, at 504, 198 P.3d 731, at 733.

Until allegations contained in a verified application are controverted by the state, they are deemed to be true for the purposes of determining whether an evidentiary hearing should be held. Cooper v. State, 96 Idaho 542, 531 P.2d 1187 (1975); Ramirez v. State, 113 Idaho 87, 741 P.2d 374 (Ct.App.1987). The issue on appeal from the dismissal of an application is whether the application alleges facts which, if true, would entitle the applicant to relief. Whitehawk v. State, 116 Idaho 831, 780 P.2d 153 (Ct.App.1989).

When the applicant's evidence has raised genuine issues of material fact that, if resolved in the applicant's favor, would entitle him to the relief requested, if such a factual issue is presented, an evidentiary hearing must be conducted. Gonzales v. State, 120 Idaho 759,763, 819 P.2d 1159,1163 (Ct.App.1991).

An innocent prisoner seeking collateral relief through post-conviction or habeas corpus should include a forthright claim of innocence. See: Comment, Federal habeas Corpus: The Relevance of Petitioner's Innocence, 46 UMKC L.Rev. 382 (1978); Also: Peller, In Defense of Federal Habeas Corpus Relitigation, 16 harv.Civ.Rts.-Civ.Lib.L.Rev. 579 (1982)(presenting an extensive argument in favor of post-conviction review).

The purpose behind the requirement in I.C.§ 19-4907(a) is that the trial court make specific findings of fact and expressly state its conclusions of law on each issue, is to afford the Appellate Court an adequate basis upon which to assess any appeal arising from the denial of a petition. Maxfield v. State, 108 Idaho 493, 700 P.2d 115 (Ct.App.1985).

Where genuine issues of material fact exist, an evidentiary hearing must be held. Nellsch v. State, 122 Idaho 426, 835 P.2d 661 (Ct.App.1992). In the present case, the Appellant received no evidentioary hearing and no memorandum decision or opinion was issued after the summary judgment hearing. Appellant has only been provided with a transcript of the hearing. See: Exhibit #B. Furthermore, due to the fact an evidentiary hearing was denied, and summary judgment proceedings held, any comment by the court regarding the facts alleged in Appellant's verified Affidavit (Exhibit A) and supported by his Exhibit's numbered 1 thru 96), is arguably one sided, and an abuse of descretion.

The remedies fro post-conviction relief, ..., are carried out by reopening the criminal case and conducting further proceedings in that case. State v. Law, 131 Idaho 90, 952 P.2d 905 (Ct.App.1997). The obvious prejudicial nature of the proceedings undermined the truth-finding process. see: Stricklan v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066.

The Appellant points out that the district court denied augmentation and judicial notice purposefully to prevent establishing the truth of Appellant's claims. However, the hearing (See: Exhibit C-D Transcript of augmentation and judicial notice hearing), was a clear abuse of discretion, and fundamental error. Appellant argues that although a theory is not vigorously pursued (attended) in a proceeding, if it is at least asserted it is sufficiently presented to allow a defendant to continue with it on appeal without running afoul of the general rule against asserting new theories on appeal. e.g., Masters v. State, 105 Idaho 197, 668 P.2d 73 (1983). (Exhibit D is attached) (Exhbit C, Attached)

Furthermore, failure to obtain a ruling on an issue below may not be fatal in a criminal case if the issue relates to "fundamental error." And in particular where the state engages in unethical and improper procedures to all out prevent any issue being either properly answered or provided evidentiary. e.g., State v. haggard, 94 Idaho 249, 486 P.2d 260 (1971).

Where the Appellant rasied genuine issues of material fact, which were controverted by the state, but was not allowed to present that evidence at a hearing, it was an abuse of descretion and fundamental plain error. If an application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each such issue. Sanchez v. State, 127 Idaho 709, 905 P.2d 642 (Ct.App.1995). And matters outside the record cannot be considered on appeal but must be raised by application under Post-Conviction Procedures Act. State v. Congdon, 96 Idaho 377, 529 P.2d 773 (1974).

It is error for the trial court to grant summarily dismissal of the petition sibnce there were questions of material fact present. State v. Goodrich, 104 Idaho 469, 660 P.2d 934 (1983). And where the district court's notice of proposed dismissal merely recited the language of I.C.§ 19-4901 et seq, and did not identify with any particularity why the petitioner's evidence or legal theories were deemed to be deficient, the notice was inadequate as a matter of law. Downing v. State, 132 Idaho 861, 979 P.2d 1219 (Ct.App.1999).

On the record, material questions of fact were in dispute, because these facts were in dispute, the district court's order dismissing the case must be reversed. Idaho v. Horiuchi,___F.3d___ (9th Cir. June 5, 2001), No. 98-30149.

The Appellant points out that he made a federal claim on each issue raised. And supported all claims with a Memorandum In Support (RC-page 72 thru 159). he did in fact provide a federal case cite argument at every level of the proceedings, including responses objections and Notice of Appeal. It is therefore appropriate to raise those federal claims here.

Appellant argues that a defendant may challenge the constitutionality of his conviction on direct appeal, in post-conviction proceedings available under state law, and in a petition for writ of habeas corpus. Daniels v. U.S., 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001). Federal issues can be raised and addressed in state court. Young v. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949). So long as the procedural requisites for federal review are met, and subject to important exceptions to (See: Clark) prisoner's have been permitted to raise any constitutional claims they may have. Stone v. Powell, 428 U.S. 465,474-430, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)(surveying the decision in point).

The United States Supreme Court has lectured the states on their "merry-go-round" post-conviction procedures. Marino v. Ragen, 332 U.S. 561,570, 68 S.Ct. 240, 92 L.Ed. 170 (1974)(Rutledge J. concurring).

The United States Supreme Court's power to review state judgments directly, usually by writ of certiorari, was settled early and is no longer open to question, (See: Cohens v. State of Virginia, 19 U.S. 264, 5 L.Ed. 257, 1821 WL 2186 (1821), and so the habeas jurisdiction developed is nothing short of federal trial court superintendence of state trial and appellate court adjudication of federal claims. To the adversly convicted, it promises to make meaningful the constitutional safeguards to which a criminal defendant is entitled, by way of the federal courts using it ti implement Supreme Court decisions applying the Bill of Rights to the States through the Fourteenth Amendment. It is the specific instrument to obtain release from unlawful confinement, seeking invalidation, in whole or in part, of the judgment authorizing the prisoner's confinement. Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

The Supreme Court has required a petitioner "to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schulp v. Delo, 513 U.S. 298. at 324 (1995). State Post-Conviction Remedies were intended to provide petitioner's with an opportunity to litigate all questions of fact or law surrounding their federal claims. Habeas relief serves as an incentive -in addition to direct review- for state and federal courts to faithfully apply federal law. U.S. v. Martinez, 139 F.3d 412 (4thCir.1998).

Federal Court's may intervene to correct wrongs of constitutional dimension. Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940,948, 71 L.Ed.2d 78 (1982); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979)(holding that federal habeas courts are open to determine the evidence adduced at trial in state court was sufficient

for a determination of guilt beyond a reasonable doubt.). See Also: Vachon v. New Hampshire, 414 U.S 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974); Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654, 80 A.L.R.2d 1355 (1960). And U.S. v. Peltier, 422 U.S. 531,554, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)(Brennan,J. dissenting). Henderson v. Kibbe, 431 U.S. 145,154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977)(stating that even ordinary jury instructions can be made the basis of a constitutional claim if they relieve the prosecution of the burden of proving each element of the offense charged.) Cupp v. naughten, 414 U.S. 141,147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)(same).

More importantly the Appellate argues that "The inferential waiver theory -denying the prisoner's claims when they were not, but might have been, raised at trial or on direct review, -reading the prisoner's procedural default as an implicit waiver of the opportunity to litigate a claim, or, indeed, the underlying right itself, Is now overruled in cases involving the right to counsel where courts require that the alleged waiver be a voluntary and intelligent relinquishment of the right. And/or are brought pursuant to ineffective assistance of counsel. See: Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (1938).

Appellant asserted violations of his federal constitutional rights pursuant to the United States Constitution, U.S.C.A.Const.Amend's: §§ I; II; V; VI; VIII; IX; and U.S.C.A.Const.Amend. XIV § I. In that his right to speedy trial was waived without consent or reason; right to present evidence to the jury was denied and prejudiced; Right to have the jury decide the truth and sverity of the crimes charges was violated; And, Right o be free of unreasonable search and seizure was violated. These constitutional violations were compounded through the ineffective-Inadequate Assistance of Trial counsel's and Appellate counsel. These claims were fairly and properly presented to the district court in petitioner's Affidavit's; Memornadum's; Exhibit's and Motion's on the record. The district court abused it's discretion in failing to read the claims, answer the claims, and address the claims pursuant to both state and federal law. Petitioner-Appellant was denied equal protection of the law, denied due processes, and denied proper and lawful review and opinion on each of his claims in accordance with constituional standards. Those claims and supporting federal and state law that apply to them are in the following Issues/Claims below for review. All and each of these issues were presented in full to the district court. (See Memorandum In Support of Petition For Post-Conviction Relief (Exhibit #**F**, RC-72 thru 158).

ISSUE ONE

WAS APPELLANT DENIED EFFECTIVE/ADEQUATE ASSISTANCE OF PRE-TRAIL, TRAIL, AND APPELLATE COUNSEL, VIOLATING HIS RIGHTS PURSUANT TO: U.S.C.A.CONST.AMEND'S §§ I; VI; and XIV § I: AND THE IDAHO STATE CONSTITUTION, ARTICLE I, §§ 9; 10; 13; and §18?

The Appellant asserts yes!

(Appellant respectfully refers the Court to his Affidavit In Support of Petition for the facts that support his claims, RC- page 20 thru 66)(and those pages refered to specifically in this arguement for each counsel).(Affidavit does refer to each Exhibit specifically).

A. CAUSE OF ACTION

Appellant claimed that his pre-trial counsel, Tim Williams of Twin Falls, Idaho, engaged in unethical conduct, in concert with the state and court to capriciously waive His 6th Amendment right to speedy trial without his express consent; failed to prepare for trial; failed to investigate key witnesses; preserve evidence; properly challenge the state in suppression hearing; failed to obtain exculpatory evidence; failed to object to prejudicial joinder and allegations of probation allegations; misrepresented facts in collusion with his firm to the court; Williams also withheld material evidence from Appellant and the court: (the deposition of Robert Berry taken at his office, recorded).(RC-20-66)

Appellant claimed that his pre-trial counsel, Loren Bingham, of Twin Falls, Idaho, failed to prepare for trial, investigate the case, interview witnesses, and refused to go to trial, insisting Appellant plead guilty; failed to protect His rights; obtain a bond hearing; file motions; or get hearings on Appellant's pro-se motions and objections; obtain exculpatory evidence; and only filed one motion in the whole case, after he was fired, never heard (dismissal): Prejudicing the trial Appellant's defense, and substantive rights. (RC-57-66)

Appellant claimed that His Trial Counsel, Dan Brown of Twin Falls, Idaho, failed to investigate the case; interview witnesses prior to trial; confusing and prejudicing the witnesses, jury, and the proceedings as a whole; failed to initiate proper action or object to the prosecutions intimidation of key witness, Rober Berry; failed to object to prosecutorial misconduct at trial regarding inadmissable evidence; false allegations; and failed to object to the use of previous conviction for possession, as argument for intent to deliver; failed to object to evidence at the Motel, which He was never charged with; failed to protect His rights regarding pro-se motions and objections; allowed double jeopardy at sentencing; failed to obtain exculpatory evidence: prejudicing the trial, and defense; failed to argue dismissal for 6th Amendment violations(RC-35-69)

Appellant claimed that Appellate counsel, Justine Curtis, of Boise, Idaho: failed to investigate the record and the case file; failed to raise 4th; 5th; 6th; 8th; and 14th §I Amendment claims on appeal; failed to adequately correct his own assertion in the appeal brief that Appellant had been convicted of Intent To Deliver, twice, (Appellant was only convicted of possession, ever), failed to preserve these issues for review; failed to address double jeopardy at sentencing; prosecutorial misconduct; judicial misconduct; or any pertinent trail errors at all; inadequately argued the presentation of 404(b) evidence; failed to allow Appellant to supplement the argument on appeal with the Supplemental Brief (Exhbit #68, RC-460 thru 601); attempted to force Appellant to proceed pro se when this ineffectiveness of the appeal representation was raised with him; failed to file a response brief; refused to communicate with Appellant; failed to obtain the complete record on appeal; failed to object to and correct the deletions and denial of transcripts and exhibit's on appeal; failed to protect Appellant's substantive rights to a meaningful appeal: Prejudicing Appellant's appellate processes and procedural rights. (See: All Exhibit's and RC-57 thru 66, at 63-66).

B. STANDARD OF REVIEW

Appellant points out that a claime of ineffective assistance of counsel may properly be brought under the post-conviction procedures act. Murray v State, 121 Idaho 918-25, 828 P.2d 1323,1329-30 (Ct.App.1992). To prevail on an ineffective assitance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. Stricklan v. Washington, 466 U.S. 668,687-88, 104 S.Ct. 2052,2064-65, 80 L.Ed.2d 674,693-94 (1984); Hassett v. State, 127 Idaho 313,316, 900 P.2d 221,224 (Ct.App.1995). To establishe a deficiency, the appellant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. Aragon v. State, 114 Idaho 758,760, 760 P.2d 1174,1176 (1988). To establsih prejudice, the appellant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. Id. at 761, 760 P.2d at 1177.

These same standards also apply to claims of ineffective assistance of appellate counsel. Mintun v. State, 144 Idaho 656,667, 168 P.3d 40,45 (Ct.App.2007). Counsel's combined failures noted above, and affirmed in the Affidavit In Support, attached, cannot be tactical or strategic decisions. These actions, omissions, and failures are based on "inadequate preparations, ignorance of relevant law, and other shortcomings capable of objective evaluation, and falls below an objective standard of reasonableness, setting forth sufficient evidence

to raise genuine issues of material fact. Howard v. State, 126 idaho 231,233, 880 P.2d 261,263 (Ct.App.1994). Appellant has sufficiently averred facts that, if proven true, and the record reflects they are, would satisfy both the deficiency and the prejudice prongs of the Strickland test. Appellant points further that his claims trigger applications of the Supreme Court's companion opinion to Strickland, U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). And He has submitted evidence showing that His situation is one in which prejudice must be presumed under Cronic. Strickland established the standard for a claim of ineffective assistance of counsel, setting forth components necessary to a criminal defendant's claims:

> "First, the defendant must show that counsel's performance was deficient This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trail, a trial whose result is reliable." Id. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

Strickland sets an 'objective standard of reasonableness' for judging whether errors in an attorney's performance are serious enough to render that performance defective. 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. under Strickland, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

On the same day the Supreme Court handed down Strickland, it also issued a second opinion, Cronic, offering an exception to Strickland's second prong, prejudice. Certain circumstances, said the Court, "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658, 104 S.Ct. at 2046, 80 L.Ed.2d at 668. The Court listed three such circumstances; 1) where there is a "complete denial" of counsel at a critical stage of trial; 2) where "counsel entirely fails to subject the prosecutions case to meaningful adversarial testing"; and 3) where, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a *806 presumption of prejudice is appropriate..." Id. at 659, 104 S.Ct. at 2047, 80 L.Ed.2d at 668.

The Supreme Court revisited Cronic in Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), stating: "When we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case." the Court explained, "we indicated that the attorney's failure must be

complete." Bell, 535 U.S. at 696-97, 122 S.Ct. at 1851, 152 L.Ed.2d at 928.

Appellant argues that due to the multiple layers of counsel, and their ineffectiveness in Appellant's case; the intervening periods between without counsel; failure of the trial court to hear any of his pro se motions or objections; the hindering of the state to interfere and intimidate witnesses, destroy evidence, withhold exculpatory evidence, and insert false allegations and statements to the court and jury: It is necessary to evaluate the effect of denying Appellant's access to the courts with the prejudice inferred in both Strickland and Cronic, and Bell.

Appellant points out that persons awaiting trial have a Sixth Amendment right to the assistance of counsel and to an unimpeded criminal defense, a right that is different from the more general right of access to courts and not subject to its limitations. Benjamin v. Fraser, 264 F.3d 175,184-88 (2dCir.2001); more important is: Sandin v. Conner, 515 U.S. 472,484, 1115 S.Ct. 2293 (1995). Denying access to court and it's processes to prepare a defense is the same as suppression of the evidence sought or an order that prohibits the exculpatory evidence that might have been obtained.

The right of access to the courts is a very important right, since it theoretically protects all your other rights. The right to file a court action might be said to be the remaining most "fundamental political right, because its preservative of all rights.'" McCarthy v. Madigan, 503 U.S. 140,153, 112 S.Ct. 1081 (1992)(quoting Yick Wo v. Hopkins, 118 U.S. 356,370 (1886)).

Furthermore, the courts are supposed to give pro se filings by prisoners some leeway, since prisoners are usually not trained in the formalities of legal practice. haines v. Kerner, 404 U.S. 519 (1972). Also, the rejection of appointed counsel does not foreclose a pre-trial detainee-defendant from any and every constitutional right of access to the courts, such as legal recourse to prepare and present a defensem, have subpoena served, or review the state's discovery responses in his cell. This constitutional right to prepare some type of defense must be strictly balanced against the legitimate security needs and resources constraints of the prison or jail. U.S. v. Robinson, 913 F.2d 712,717 (9thCir.1990)(See: "stand by counsel" Id. at 716. (see: also I.C.§§ 4-101 to 4-108, and I.C.§ 31-825 and I.C.§ 33-2612 et seq. See also: U.S.C.A.Const.Amend. I; & XIV; Bowmand v. Niagara Mach. and Tool Works, Inc. 832 F.2d 1052; Crowder v. Sinyard, 884 F.2d 804; and Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985).

ISSUE TWO

WAS APPELLANT DENIED ADEQUATE/EFFECTIVE ASSITANCE OF COUNSEL AT ALL TIMES RELEVANT TO HIS RIGHT TO A SPEEDY AND PUBLIC TRIAL; WAS IT FUNDAMENTAL PLAIN ERROR FOR THE COURT TO WAIVE PETITIONER"S RIGHTS ABSENT EXPRESS CONSENT: PURSUANT TO: U.S.C.A.CONST.AMEND. VI; XIV § I; AND THE IDAHO STATE CONSTITUTION, ARTICLE I, §§ 13; §18; and §9?

The Appellant asserts yes!

A. CAUSE OF ACTION

Appellant claims that the court committed fundamental error when it waived Appellant's right to a speedy trial, "in camera (chamber's) without express consent from Him. And that it was judicial misconduct to do so, and that doing it without proper notice of any kind to Appellant violated Appellant's rights. Appellant also claims that the court erred in taking judicial notice of other causes and probation allegations to justify the waiver. And violated His rights by not continuing with the trial once Appellant reported for Trial the day before, on time, and ready. And that the court's actions inn postponing trial, without cause, notice, without consent or justification violated and prejudiced Appellant's rights and due processes, and defense. (See: Affidavit In Support of Petition For post-Conviction Relief, Exhibit #A, RC-18 thru 71)(Sections Two & Three)(Also Exhibits # 1 thru 94)(Attached).

Appellant claims that his rights were violated through prosecutorial misconduct in the states instrumental actions to get His speedy trial rights waived, the trial postponed, (violating the six month deadline twice), 'introducing allegations of probation violation in a separate previous crime, know to them well previous of the trial and using it as an excuse for revoking bond and postponing trial. And that the state did so, to intimidate defense witnesses, (which had been attempted days prior to the trial settings without success). The state also refused tpo provide the exculpatory evidence (in camera hearing transcript) for use at a dismissal hearing to prevent proof of misconduct and error.

The Appellant claims that he received ineffective/Inadequate Assitance of counsel through their participation in delaying the trial (twice), inappropriately failing to protect Appellant's right to speedy trial and processes. And that counsel allowed the state to intimidate His witnesses just prior to the first trial setting, and again at the second trial setting, and during the trial. Counsel failed to protect the witnesses, interview them and present them timel. Counsel failed to object ot the waiving of Appellant's rights, and took part in it.

Counsel allowed the state to transfer a key witness out of state and intimidate another, all of which prejudiced the Appellant and violated his rights enumerated above.

Appellant claims that Appellate counsel failed to raise and argue these issues on appeal, (also see other issues), refused to investigate the case or the allegations and record pertaining to speedy trial issues. Appeal counsel failed to represent Appellant's best interests on appeal, preserve and protect His constitutional rights rights to a meaningful appeal. (See: Affidavit In Support of Petition, Exhibit #A; RC-18 thru 71)(and those Exhibit's enumerated within).

Appellant claims prejudice to His defense, His Appeal, and entire proceedings due to the actions of those mentioned above. These actions are in dispute, challenged by the Petitioner in fact and law, as violations of those rights stated. Appellant also claims that these actions are a breach of ethics, and professional conduct, contrary to judicial integrity and trust. Appellant makes a federal claim in this issue.

B. STANDARD OF REVIEW

There are four factors to consider in evaluating a claim of speedy trial violations: (1) Constitutional Protections; (2) Statutory Protections; (3) The Facts of the case; and ultimately (4) The Prejudice Caused.

the Constitutional Rights issue from the United States Constitutional Sixth Amendment, and Fourteenth Amendment; The Idaho State Constitution, Article §§ 13 and 18. Rights Statutorial issue through Idaho Code §§ 19-106 and 19-3501. And U.S.C.A. Title 28 §§ 2241 to 2254-55.

Idaho's controlling law on the issue of speedy trial rights under I.C.§ 19-3501 come from State v. Sindak, 116 Idaho 185, 774 P.2d 895 (1989),cert.denied.sub nom; Sindak v. Idaho, 493 U.S. 1076, 107 L.Ed.2d 1032, 110 S.Ct. 1125 (1990). In light of the interpretation placed upon I.C.§ 19-3501 by the Idaho Supreme Court in Sindak, the determination of "good cause" under statute must be made by reference to Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972). The Court stated: "Adhering to precedent we must continue to uniformly apply the balancing test from Barker, supra, to evaluate "good cause" sufficient to excuse a violation of speedy trial rights under I.C.§ 3501 as well as under the Federal Constitution." State v. Aberasturi, 117 Idaho 201,203, 786 P.2d 592,594 (Ct.App.1990); State v. Johnson, 119 Idaho 56, 803 P.2d 557 (Ct.App.1990).

C. WAVIER AND ASSERTION OF RIGHT

Appellant's right to a speedy trial is a fundamental right protected by the

United States and Idaho Constitution, and by I.C.§ 19-3501. Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.ED.2d 1 (1967); State v. Lindsay, 96 Idaho 474,475, 531 P.2d 236,237 (1975). Wavier of a Fundamental Constitutional right must be explicit, and come from the Defendant personally. An "established" abridgment of a constitutional right is deemed a manifest injustice as a matter of law. State v. Simons, 112 Idaho 254, 731 P.2d 797; State v. Martinez, 89 Idaho 129, 403 P.2d 597; The rule of law is that rights are not subject to waiver without having been expressly waived 'In person.' Meng v. N.Y., 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (S.Ct.1975). Under the Sixth Amendment a defendant may only waive the right by expressing it "in writing." See: Fed.Crim.R. 23(A). He may only waive the right orally, if done knowingly and intelligently "on the record" "In open court." See: Brown v. Burns, 966 F.2d 219 (9th Cir.1993).

Appellant's records indicate that it cannot be disputed that He asserted His Rights, demanded a speedy trial and was present to attend. (See: Affidavit, Exhibit #A, Section two; RC-35 thru 41). Satisfying Barker, supra. See: State v. Rodriquez-Perez, 129 Idaho 29,38, 921 P.2d 206,215 (Ct.App.1996). Furthermore, waiver of right to speedy trial for purposes of review is to be judged just as it is for other fundamental constitutional rights; prosecution must show that the claimed waiver was knowingly and voluntarily made. Harig v. Wolff (1976,DC Neb) 414 F.Supp. 290.

D. CONTROLLING AUTHORITY

All criminal defendants are guaranteed the right to a speedy and public trial pursuant to the 6th Amendment and Article I §13; §18; & §9, of the Constitutions. In Idaho, these constitutional provisions have been supplemented by legislation that sets specific time limits within which a defendant must be brought to trial. I.C.§ 19-106; § 19-3501 (2000); Schrom v. Cramer, 76 Idaho 1, 275 P.2d 979 (1954). The original statute was enacted in 1864 while Idaho was still a territory and was in force and effect at the time of the adoption of our constitution. Id. at 5, 275 P.2d at 981. Idaho Code § 19-3501 states:

> "The court, unless good cause to the contrary is shown must order the prosecution or indictment to be dismissed, in the following cases: (1) When a person has been held to answer for a public offesne, if an indictment or information is not found against him and filed with the court within six (6) months from the date of his arrest. (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the information is filed with the court. (3) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found.

Section (5): "..charged with both a felony or multiple felonies and misdemeanor or multiple misdemeanor together in the same action or charing document,...from the date that the information is filed with the court."
Section (6): "...from the date that the defendant was arraigned before the court in which the indictment is found."'

Appellant argues that unlike the statutory speedy trial guarantee, which measures timeliness from the date of filing the information or indictment, the constitutional guarantees apply from the date when either formal charges are filed or the defendant is arrested, whichever comes first. State v. hernandez, 133 Idaho 576, 990 P.2d 742 (Ct.App.1999). Subdivision 2 of I.C.§ 19-3501 is self-executing; it is not necessary for a defendant to affirmatively request a trial setting within the six months' period. State v. Dillard, 110 Idaho 834, 718 P.2d 1272 (Ct.App.), cert.denied, 479 U.S. 887, 107 S.Ct. 283, 93 L.Ed.2d 258 (1986).

Under I.C.§ 19-3501, criminal defendants are given additional; protection beyond what is required by the constitutions. State v. Brooks, 109 Idaho 726,728, 710 P.2d 636,638 (Ct.App.1985). The statute mandates that unless the state can demonstrate "good cause" for a delay greater than six months, the court must dismiss the case.

the Idaho Supreme Court has stated: "Upon careful consideration of the relevant authorites, we believe that a thorough analysis of the reasons for the delay represents the soundest method for determining what constitutes good cause," "We therefore conclude that goog cause means that there is a substantial reason that rises to the level of a legal excuse for the delay." State v. Johnson, 119 Idaho 56,58, 803 P.2d 557,559 (Ct.App.1990); State v. Stuart, 113 Idaho at 494,496, 745 P.2d 1115,1117 (Ct.App.1987)." And that a trial judge does not have unbridled discretion to find good cause, and on appeal they will independently review the lower court's decision. Johnson, 119 idaho at 58, 803 P.2d at 559; Stuart, 113 Idaho at 496, 745 P.2d at 1117; Naccarato, 126 Idaho at 13, 878 P.2d at 187. The Idaho Supreme Court has stated that, "When examining the reasons for the delay, this Court has consistently maintained that overcrowded courts are to be a 'neutral factor' which "'nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."' Cotant, 123 Idaho at 786 n. 3, 852 P.2d at 1386 n.3 (quoting Barker, 407 U.S. at 531, 92 S.Ct. at 2192); Russell, 108 Idaho at 61, 696 P.2d at 911."

E. PREJUDICE CAUSE/PREJUDICE PRESUMED

The nature and extent of the prejudice is the most important of the Barker

factors. State v. McNew, 131 Idaho 268,273, 954 P.2d 686,691 (Ct.App.1998). When considering prejudice the Court looks at prevention of oppressive pretrial incarceration, minimization of the accused's anxiety and concern, and limiting the possibility of the defense being imparied. Barker, 407 U.S. 514,532, 92 S.Ct. 2182,2193. As state above, speedy trial guarantees are designed to minimize the possibility of lengthy incarceration before trial, to reduce the lesser impairment of liberty on an accused when released on bail, and to shorten the disruption of life caused by an arrest and the presence of unresolved criminal charges, and most importantly, possible prejudice to the defense presented by the defendant. U.S. v. Loud hawk, 474 U.S. 302,311, 106 S.Ct. 648,654 (1985).

See Also: Morre v. Arizona, 414 U.S. 25,27, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); Strunk v. U.S., 412 U.S. 434,439, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973); Smith v. Hooey, 393 U.S. 374,378, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Arrant v. Wainwright, supra, 468 F.2d ay 682; Chapman v. California, 423 F.2d 682,683 (9th Cir.),cert.denied, 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269 (1970); U.S. ex rel. Burage v. Pate, 316 F.2d 582,584 (7th Cir.1963); U.S. v. Huffman, 490 F.2d 412,413 (8th Cir.1973),cert.denied, 416 U.S. 988, 94 S.Ct. 2395, 40 L.Ed.2d 766 (1974).

The Appellant has shown that he was in fact prejudiced (See: Affidaivt), he lost witnesses, evidence was destroyed that could have supported his innocence claim, and once his speedy trial was waived by the court, he was denied bail, inflicting on him an oppressive, and over excessive incarceration to attempt to force him to plead guilty.

The Appellant preserved all his issues, objecting on the record to each waiver of any right, and changing counsel when they showed prejudice and conflict. There is ample record to indicate that the Appellant did not consent to any waiver, was not present when it was done, and was in custody prior to trial, eliminating the need for any postponement.

The Appellant was denied access to witnesses, evidence, exculpatory evidence, and processes due to the delay. Furthermore, the Appellant was held without bond, and denied access to the court, denied the right to file motions and objections, and those he did try to file were disregarded by the court, saying, "The court does not entertain pro se motions," the state presented the same argument, they would not give the Appellant access to the court, and denied Him through an intentional delay in the processes that was unnecessary and in violation of His rights. (See: Exhibit #A).

ISSUE THREE

WAS APPELLANT DENIED EFFECTIVE/ADEQUATE ASSISTANCE OF COUNSEL CONCERNING HIS RIGHT TO BE FREE OF ILLEGAL SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT DUE TO COUNSEL'S FAILURES TO PROPERLY RAISE THE ISSUE PRE-TRIAL; AND AGAIN DENIED ASSISTANCE WHEN APPELLATE COUNSEL FAILED TO RAISE IT ON APPEAL: PURSUANT TO U.S.C.A.CONST.AMEND. IV: V; XIV § I; AND IDAHO STATE CONSTITUTION, ARTICLE I §§ 13 and : 17?

The Appellant asserts yes!

A. CAUSE OF ACTION

The Appellant refers the Court to His Affidavit In Support of his Petition For Post-Conviction Relief, Exhibit #A)(RC-18-71), for the complete facts surrounding this claim, which refer in turn to the Exhibit's (Attached).(RC-23 thru 34).

Appellant claims that the court erred in not granting His Motion To Suppress the evidence predicated on either: an illegal stop; a pretextual stop; and illegal detention through exctesnion; and/or illegal search.

Appellant claims his right to fair due processes were violated, effecting the entire proceedings, through prosecutorial/governmental misconduct; when the state intentionally submitted 'known' false Affidavits; false testimony by their witnesses and agent's; and intentionally withheld exculpatory evidence; in a concerted effort to overcome suppression and legitimize their case in chief.

Appellant claims that His counsels failed to properly challenge the states evidence, refused to point out the officers false testimony, failed to argue the illegal detention and search through the evidence available to him, and failed to point out that: Appellant should have been allowed to leave the scene after the ticket was written; that Appellant's assertion of events could have been established through the presentation of the police stop video; (which was and has been withheld by the state - denying exculpatory evidence); that the officers were stalking Him, lied about it, and than admitted it on audio; and failed to properly question defense witnesses; and failed to prepare for the hearing. All of which denied Appellant the Effective Assistance of Counsel.

Appellant insisted that this issue be raised on direct appeal, and appeal counsel refused to preserve it or raise it, (See: Exhibit #68; RC-460 thru 601). And therefore claims ineffective assistance of appellate counsel in this issues, as in all issues. (See: Exhibit's #1 thru #94).

The Appellant points out that the admitted practice and policy of Officers Nathan Silvester and Clint Doerr, to wit, "singling out and pursuing citizens on the public road, that they want to detain and search, without a warrant, and follow them without probable cause, until they can either fabricate a claim or

make a claim that the citizen has violated some traffic law, real or imagined, and use that as an excuse to detain them, search them, and than lie about the original intent:" is a pretextual ratiocination to detain and search that violated Appellant's Rights and is an illegal practice and custom which is unconstitutional as a whole, and held so by the United States Supreme Court and Idaho Supreme Court.

Appellant challenges both the factual findings, and the constitutional analysis of the suppression court. He asserts they are clearly erroneous creating fundamental error, in particularly in light of the record. (See: Affidavit and Section One (RC-23-34) supporting exhibits)(Attached). Appellant makes a Federal Claim in this issue, as well as all issues herein.

B. STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a mnotion to suppress is challenged, the Court accepts the trial court's findings of fact unless they are clearly erroneous, and freely reviews the application of constitutional principles to the facts. State v. Lafferty, 139 Idaho 336,338, 79 P.#d 157,159 (Ct.App.2003); State v. Atkinson, 128 Idaho 559,561, 916 P.2d 1284,1286 (Ct.App.1996). At a suppression hearing, the power to asses the credibility of witnesses, resolve a factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102,106, 897 P.2d 993-997 (1995); State v. Schevers, 132 Idaho 786,789, 979 P.2d 659.662 (Ct.App.1999). (emphasis on fundamental error)(federal below)

C. FALSIFICATION/PRETEXTUAL ANALYSIS

Appellant argues that the violation of a constitutional right by subterfuge cannot be justified, and the circumstances of Appellant's case leaves no other inference than that this was exactly the purpose of the traffic stop allegation, (subterfuge). Such allegations by police are and was analogous to submitting a false affidavit to a magistrate to get a warrant. This also invalidates the warrantless search. Taglavore v. U.S., 291 F.2d 262 (9th Cir.1961); henry v. U.S., 361 U.S. 98,103, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

When reviewing a court's decision on a motion to suppress, the Court defers to the findings of fact unless they are not supported by substantial and competent evidence in the record. State v. DuValt, 131 Idaho 550,552-53, 961 P.2d 641,643-44 (1998); State v. Thurman, 134 Idaho 90,94, 996 P.2d 309,313 (Ct.App.1999). Motions to suppress evidence for violation of constitutional rights present questions of fact and law. The facts meterial to the issues raised in this Appeal are in dispute.

Appellant points out that mere curiosity or hunches do not constitute reasonable suspicion. In re Tony C., 21 Cal.3d 888, 148 Cal.Rpt. 366, 582 P.2d 957 (1978); neither does speculation suffice to establish reasonable suspicion. State v. Dillion, 308 Minn. 464, 242 N.W.2d 84 (1976). Appellant's case deals with impermissible factors, such as improper intent and motive, that in and of themselves are constitutionally prohibitive under Fourth Amendment Jurisprudence.

The Fourth Amendment safeguard against unreasonable searches and seizures applies to the seizures of persons through arrests or detentions falling short of arrest. U.S. v. Brignoni-Ponce, 422 U.S. 873,878, 95 S.Ct. 2574,2578, 45 L.Ed.2d 607,614 n (1975); Terry v. Ohio, 392 U.S. 1,16, 88 S.Ct. 1868,1877, 20 L.Ed.2d 889,902 (1968). The stop of a vehicle is a seizure of its occupants and is therefore subject to Fourth Amendment standards. U.S. v. Cortez, 449 U.S. 411,417, 101 S.Ct. 690,694, 66 L.Ed.2d 621,628 (1981); Delaware v. Prouse, 440 U.S. 648,653-654, 99 S.Ct. 1391,1395-96, 59 L.Ed.2d 660,667-689 (1979); State v. Haworth, 106 Idaho 405,406, 679 P.2d 1123,1124 (1984). When the purpose of the detention is to investigate a possible traffic offense or other crime, it must be based upon reasonable, articulable suspicion of criminal activity. Brognoni-Ponce, supra, at 884, at 2581, and at 618; Florida v. Royer, 460 U.S. at 491,498, 103 S.Ct. 1319,1324, 75 L.Ed.2d 229,236 (1983); State v. Schumacher, 136 Idaho 509, 37 P.3d 6 (Ct.App.2001).

Appellant argues that in New York v. Harris, 495 U.S. 14 (1990), the United States Supreme Court stated: "The purpose of the Fourth Amendment's exclusionary rule is to eliminate incentives for police officers to violate that Amendment." U.S. v. Leon, 468 U.S. 897, 468 U.S. 906 (1984). "A police officer who violates the Constitution usually does so to obtain evidence that he could not secure lawfully. The best way to deter him is to provide that any evidence so obtained will not be admitted at trial. Deterrence of constitutional violations thus requires the suppression not only of evidence seized during an unconstitutional search but also of 'derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search." Murray v. U.S., 487 U.S. 533, 487 U.S. 536-537 (1988)(citing Nardone v. U,S,, 308 U.S. 341 (1939); See also: Wong Sun v. U.S., 371 U.S. 471, 488 (1963). Accord, Brown v. Illinois, 422 U.S. 590, 422 U.S. 599 (1975).

Appellant points out that by the officer's own testimony, (See: Affidavit §I and Exhibit #7 & 8), their intent was not good faith. they stated: "I know who you

are Phillip, I was looking for a reason to pull you over." Therefore, the leon exception good faith rule does not apply. The false information exception finds its origin in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). State v. Schaffer, 107 Idaho 812,819, 693 P.2d 458,465 (Ct.App.1984). Franks has been applied by the idaho Supreme Court in a case in which probable cause for the issuance of a search warrant was at issue. State v. Lindner, 100 Idaho 37, 592 P.2d 852 (1979).

Appellant argues that where the stop is only a sham or a front being used as an excuse for making a search, the stop itself and the ensuing search are illegal. e.g., Worthington v. U.S., 6 Cir., 1948, 166 F.2d 557; Henderson v. U.S., 4 Cir., 1926, 12 F.2d 528, 51 A.L.R. 420. "A stop may not be used as a pretext to search for evidence." U.S. v. Lefkowitz, 1932, 285 U.S. 452,467, 52 S.Ct. 420,424, 76 L.Ed. 877, "A stop is not justified by what the subsequent search discloses." Rios v. U.S. 253,261-262, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); Henry v. U.S., 361 U.S. 98,103, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

Appellant points out that for Constitutional purposes and analysis, the actions of individual law enforcement officers is the actions of the state itself, e.g., Ex parte Virginia, 100 U.S. 339,346-347 (1880). An Appellant can argue on collateral proceedings that the stop of His vehicle was pretext to conduct illegal search, where defense counsel did during suppression hearing assert that the case involved pretext stop. See: Amendment IV; State v. Yeates, 112 Idaho 377,380, 732 P.2d 346-49 91987). For false allegations see: Henderson, supra, at 298 (1987); nand Michigan v. Summers, 452 U.S. 692, 69 L.Ed.2d 340, 101 S.Ct. 2587; Arizona v. Evans, 514 U.S. 1, 131 L.Ed.2d 34, 115 S.Ct. 1185. Officer Silvester's "hunch" is not sufficient to justify, ex post facto, a seizure that was not objectively reasonable at its inception. Id., Terry, supra, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909.

Because the circumstances wwere far from "sufficient to warrant a prudent man's believing that the person [stopped] had committed or was committing an offense," U.S. v. Bertram, 719 F.2d 735,737-38 (5thCir.1983), probable cause did not exist.

As Idaho Courts recognized more than a decade ago in State v. Slater, 136 Idaho 293, 32 P.3d 685 (Ct.App.2001); and in State v. Martinez, 129 Idaho 426,430, 925 P.2d 1125,1129 (Ct.App.1996). "Officer must have-is aware of "specific articulable facts," together with ratiuonal inferences therefrom, which "warrant suspicion" that the person "has committed" or is about to commit a crime." "The policre officer's suspicion must be premised upon specific articulable facts and

the rational inferences drawn from those facts. State v. DuValt, 131 Idaho 550,552-53, 961 P.2d 641,643-44 (1998). id. at 298, 32 P.3d at 690. See: Prouse, supra, at 653, at 1395, at 660 (1979); State v. Maddox, 137 Idaho 821,824, 54 P.3d 464,467 (Ct.App.2002).

Appellant also argues that when the police retain a citizens identification, (as was done after the ticket was wrote in Appellant's case), it is not a consentiual detention. U.S. v. Chemaly, 741 F.2d 1346,1353 (11thCir.1984). State v. jones, 126 Idaho 791,793, 890 P.2d 1214,1216 (Ct.App.1995).

The Idaho Supreme Court gave essentially the same analysis as Terry v. Ohio, supra, in State v. lusby, 146 idaho 506, 198 P.3d 735, (page 3, ANALYSIS). Where they point out, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Stone v. powell, 428 U.S. 465,592, 96 S.Ct. 3037,3051, 49 L.Ed.2d 1067 (1976); State v. Bower, 135 Idaho 554,558, 21 P.3d 491,495 (Ct.App.2001).

The Appellant argues that while he has the burden of submitting evidence of a 'factual nexus' betwqeen the illegality and the evidence, (which he has done, see: Affidavit and Exhibits, Attached), the state has the ultimate burden of persuasion to show that the evidence is untainted. Which they have grossly failed to do! State v. Babb, 136 Idaho 95,98, 29 P.3d 406,409 (Ct.App.2001); U.S. v. Nava-Ramirez, 210 F.3d 1128,1131 (10thCir.2000); U.S. v. Kandik, 633 F.2d 1334,1335 (9th Cir.1980). Suppression is required if 'the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." State v. Wigginton, 142 Idaho 180,184, 125 P.3d 536,540 (Ct.App.2005)(quoting nava-Ramirez, supra, at 1131).

In conclusion the Appellant cites a section of the Inited States Supreme Courts ruling over fifty years ago in Henry v. U.S., 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134, (page 4): "The statute states the constitutional standard," (18 U.S.C.A. § 3052), "for it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except 'upon probable cause, supported by oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" "The requirement of probable cause has roots that are deep in our history. The general warrant, (Declared Illegal by the house of Commons in 1766. 16 hansard, Parl.Hist.Eng. 207), in which the name of the person to be arrested was left blank, and the writs of assistance, against which james otis inveighed, (Quincy's Miss.Rep. 1761-1772, Appendix, p.469) Is outlawed. And therefore, Appellant's seizure and than search was unconstitutional at best.

ISSUE FOUR

WAS APPELLANT DENIED EFFECTIVE/ADEQUATE ASSISTANCE OF COUNSEL FOR FAILURE TO EITHER, REMEDY, OBJECT, OR APPEAL THE PROSECUTORIAL & JUDICIAL MISCONDUCT; VIOLATING MY RIGHT TO REMAIN SILENT; PRESENT WITNESSES; AND DENIAL OF ACCESS TO THE COURT THROUGH DISREGARDING PRO SE MOTIONS AND OBJECTIONS; PURSUANT TO: U.S.C.A.CONST.AMEND. §§ V; Vi; and §XIV, §I, AND IDAHO CONSTITUTION, ARTICLE I §§ 1; 13; AND § 18?

The Appellant asserts yes!

(Appellant respectfully refers to His Affidavit In Support of Post-Conviction; Exhbit #A; with Exhibits #1 thru 94; and all those transcripts and Clerk's Record mentioned therein as if fully contained herein. (See: Exhibit #A §1;§2;§3;§4;§5;§6)(RC-1 thru 649).

A. CAUSE OF ACTION

Appellant claims the state condemned him to the jury for exercising His right to remain silent, accused Him of lying; and all manner of allegations for not testifying; violating His right to remain silent and be free of self incrimination.(See: Affidavit)(Attached as Exhibit #A).

Appellant claims the state made false statements and claims to the jury, asserting allegations and accusations that were never admitted into evidence, never supported or corroborated with any evidence; prejudicing the jury and His rights.

Appellant claims that the state knew their officers were committing perjury under oath, and allowed them to in support of their case, and that the state withheld exculpatory evidence to hide this fact in the form of the video of the stop; Dispatch Records; and complete Audio; as well as destroying evidence that had DNA evidence on it, e.g., the syringes in the bag, container's, baggies, and other evidence found in the bags containing the drugs.

The Appellant claims the state intimidated his witnesses, deported one key witness prior to trial, and threatened and intimidated another key witness in the middle of the trial, and suppressed his testimony when it exonerated the Appellant andsupported his claim of innocence. (See: Affidavit In Support of Petition)(Exhibit #1;2;3;4;5;6; and #7).

Appellant claims the trial court committed fundamental error and judicial misconduct when it: waived Appellant's right to a speedy trial; taking judicial notice of a prior probation violation; granting 404(b); threatening the county notary for notarizing Robert Berry's affidavit; than suppressing the affidavit;

Appellant claims judicial; misconduct by taking Robery Berry's testimony outside the presence of the jury; allowing the state to threaten the witness outside the courtroom; and threatenting Robert Berry himsrlf on the stand for

testifying for the Appellant.

Appellant claims misconduct by permitting false evidence of a conviction for possession with intent to deliever, being a drug dealer in the community; his family being drug dealers; being a threat to law enforcement; being like a child molester; and other inappropriate allegations and remarks submitted to the jury by the court and the state.

Appellant claims judicial misconduct by ignoring the jury's verdict of possession only and reaccusing Appellant of intent to deliver again at sentencing, (See: Issue Five-Double jeopardy).

Appellant claims the court committed judicial misconduct by admonishing Him for asserting a defense and exercising his right to due processes. Appellant points out the following statement by the court:

> "A jury convicted you in the newest cases of possession of a controlled substance. I recognize that that's what they convicted you of." "That's what the evidence they saw, they felt, supported in a case of beyond a reasonable doubt proof." (TT.p.1027.L-1-10); "..I am trying to step back from that and in this wide and largely unlimited view that I take, try to see what has brought you before me in a lot larger scheme or scope than they did." (TT.p.1027.L-6-10); "I have a person who has been tried twice for possession with intent to deliver drugs, as has been noted, a fairly consistent theme or defense." (TT.p.1027.L-12-15). "..,I come down to the conclusion,.." (TT.p.1028.L-11); "..,that I simply do not accept your defenses in this case." (TT.p.1028.L-16); "I accept the theory that..,"(L-18), "..,you've had.., as a need to buy these very expensive things, you've had to deal." (TT.p.1028.L-19-20).

The Appellant claims that this reaccusation and reconviction without the jury is double jeopardy, a clear and gross violation of due processes, and outright usurpation of the jury's verdict and right to a jury trial. It is also a clear proof of prejudice and biased presence of the trial court throughout the entire proceedings.

The Appellant claims the Court committed judicial misconduct through submitting to the jury an instruction that the Appellant had been convicted in a previous case of Possession with intent to Deliver: (See: Jury instruction #35); (Which states: I.C. § 37-2732(a)). And again with the jury instruction to not believe any of Robert Berry's testimony (the portions read to the jury); (See: Jury Instruction #18).

Appellant claims that these combined errors and misconduct wer not corrected by counsel, nor were they appealed by appellate counsel, all of which prejudiced the Appellant's substantive rights and violated his due processes, denying him a meaningful appeal and fair trial, denhing Him Effective Assistance of Counsel.

B. STANDARD OF REVIEW FOR PROSECUTORIAL MISCONDUCT

Appellant argues that a conviction will be reversed for prosecutorial misconduct if the conduct is sufficiently egregious so as to result in fundamental error. Id. Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of the jurors and arouses prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. State v. Kuhn, 139 Idaho 710,715, 85 P.3d 1109,1114 (Ct.App.2003).

When there is no contemporaneous objection, the Three Tiered Inquiry is: 1. Determine factually if there was misconduct. 2. Determine whether the misconduct rose to the level of fundamental error. 3. Consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless. State v. Field, 144 Idaho 556,571, 165 P.3d 273,285 (2007).

The rational of this rule is that even a timely objection to such inflammatory statements would not have cured the inherent prejudice. State v. Pecor, 132 Idaho 359,368, 972 P.2d 737,746 (Ct.App.1998). And closing argument should not include the prosecutor's personal opinions and beliefs about the credibility of a witness or inlfammatory words employed inn describing the defendant. State v. Phillips, 144 Idaho 82,86, at 87, 156 P.3d 583,587, at 588 (Ct.App.2007). it is improper to label the defendant as a 'liar" for testimony given in his defense. Kuhn, 139 idaho at 716, 85 P.3d at 1115 (Ct.App.2003).

Appellant points out that, misconduct will be regarded as fundamental error when it "goes to the foundation or basis of a defendant's right which was essential to his defense and which no court could or ought to permit him to waive." State v. Severson, 147 Idaho 694,716, 215 P.3d 414,436 (2009). see also: State v. Bingham, 116 Idaho 415,423, 776 P.2d 424,432 (1989). The requirement that the state prove the elements of an offense beyond a reasonable doubt is essential for the protection of life and liberty. In re Winship, 397 U.S. 358,362 (1970).

C. UNCONSTITUTIONAL PROSECUTORIAL MISCONDUCT

Appellant argues that the prosecutions use of words in closing argument violated His Fifth Amendment right to remain silent, (see: Exhibit A), where the state used words such as "undisputed," "unchallenged," "uncontradicted," and "unanswered" in closing argument to the jury. As well as calling appellant a "liar," and accusing Him of "intimidation," and even other crimes, without introducing any evidence to support these allegations, and this amounted to indirect references to the Appellant's nfailure to testify and violated the Fifth and Sixth Amendment rights of Appellant requiring a retrial. Williams v. Lane,

The Petitioner argues that the government may not interfere with the presentation of a defendant's case, whether the interference takes the form of an "unnecessary evidentiary rule" or some other means; the test is whether the evidence would have been material and favorable to the defense; in Mills, the Court found that the witnesses' testimony would have been cumulative and would have altered the jury's perception and determination of the facts; however, counsel failed to raise the abuse of discretion issue on appeal; the failure to do so constituted ineffective assistance of counsel. Virgin Islands v. Mills, 956 F.2d 443,445-456 (3dCir.1992).

The source for the constitutional right to present defense evidence is the due process clause of the Fifth Amendment. That clause is certainly expansive enough to function as the source of the general constitutional right the courts have recognized. U.S.C.A.Const.Amend. V; and Churchwell, The Constitutional Right To Present Evidence; Progeny of Chambers v. Mississippi, 19 Crim.L.Bull. 131,148 (1983); and Westen, The Compulsory Process Clause, 73 Mich.L.Rev. 71,109 (1974).

D. **RIGHT TO EXCULPATORY EVIDENCE**

Petitioner made a forthright claim of actual innocence! Both in pre-trial hearings, (Preliminary/Suppression/Dismissal), and at trial objections and questions as to the handling and testing and preservation of the evidence were raised, claiming prejudice and violations of Petitioner's 5ht, 6th, and 14th Amendment rights. Extensive testimony was taken at these hearings and at trial establishing this. (See Affidavit In Support & Exhibit's).

Petitioner was entitled to not only the preservation of all evidence that would support His claim, but also to cross examine that evidence through test's, expert witnesses, and the reliability of adequate and proper evidentiary preservation processes and handling. the record is clear that it was not preserved.

To have evidence gathered and preserved in a fashion that would allow for further examination is a constitutional guaranteed right. See: U.S.C.A.Const.Amend. V; Const.Amend. VI; Const.Amend. 14 § I; and Idaho State Constitution, Article I, § 7; § 13; and ; 18.

Petitioner argues that to have such evidence destroyed, altered, or contaminated, and presumed and attributed to Petitioner violates the rights enumerated above and below, and those rules and laws herein stated.

Plain error affecting substantial rights, even if not properly brought to the attention of the trial court, may serve as the basis for review. State v. Johnson, 119 Idaho 852, 810 P.2d 1138 (Ct.App.1991). These are fundamental error as well.

Petitioner points out: Pursuant to I.R.E. Rule 104(b): (Ct.App.1991):

"Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Petitioner points out; Pursuant to I.R.E. Rule 303(b);

"The Court shall not direct the jury to find a presumed fact against the accused."

I.R.E. Rule 401 states:

"Relevant Evidence" means evidence having any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Accurate testing of the evidence, and its preservation would have served for the purposes of impeaching the states claims of possession, contamination, and ownership. State v. pressnall, 119 Idaho 207, 804 P.2d 936 (Ct.App.1991); State v. Hocker, 115 Idaho 544, 768 P.2d 807 (1989).

Petitioner argues that in order to show that the results of scientific tests are material and probative, the proponent of the evidence must establish the reliability of the tests to produce accurate results. this may be done by establishing the scientific acceptability of the testing process. General scientific acceptance is a proper condition for taking judicial notice. State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct.App.1991).

In Petitioner's case, no fingerprints were taken of the syringes, which had been used according to testimony; Not all the substances were tested; officer's did not wear gloves in the search; they also contaminated the money, separating it from the rest of the evidence, giving it to the K-9 unit, which handles subtances even in the contaminated toy; among other things. No DNA testing was done, and the state destroyed that evidence altogether.

Petitioner argues that it is a due process right to have access to potentially exculpatory evidence, since it holds evidence relating to questions of guilt or excuse. Gibson v. State, 110 Idaho 631, 718 P.2d 283 (1986). In U.S. v. Scheffer the United States Supreme court considered the argument that the Sixth Amendment requires courts to allow a defendant to present allegedly exculpatory evidence. The states handling and destruction of the evidence violated Petitioner's 6th Amendment right to exercise compulsory process to present a complete defense.

Petitioner points out that He claimed he was innocent. Actual innocence menas "factual innocence, not mere legal sufficiency." Bousley v. U.S., 523 U.S. 614, at

623 (1998).

"Clear and convincing evidence is generally understood to be "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."" In re Adoption of Doe, 143 Idaho 188,191, 141 P.3d 1057,1060 (2006)(quoting Black's law Dictionary 577 (7th Ed.1999).

Petitioner argues that the right to present defense evidence is a "fundamental element of due process of law." Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). And points out that relying on the due process guarantee simplifies the constitutional analysis. See: Clinton, The right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind.L.Rev. 711,756,763,774,782,793,803,858 (1976).

Petitioner argeus that on several occasions the Supreme Court has looked to the confrontation clause as the source of an accused's constitutional right to present helpful evidence to the trier of fact. Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). The core purpose of the Sixth Amendment is that the defendant has the same rights to introduce evidence as the prosecution. Pettijohn v. Hall, 599 F.2d 476,481 (1st.Cir.1979)(Westen, The Compulsory Process Clause, 73 Mich.L.Rev. 71,96 (1974); Also: Amar, Foreword: Sixth Amendment First Principles, 84 Geo.L.J. 641,697-705 (1996).

Petitioner argues that the Eighth Amendment requires that a defendant be allowed to present all relevant evidence in mitigation. The Federal Constitution "requires States to allow consideration of mitigation evidence in all cases. Any barrier to such consideration must therefore fall." McKoy v. North Carolina, 494 U.S. 433,442, 110 S.Ct. 1227,1233, 108 L.Ed.2d 369,380 (1990). It is the government's burden to establish guilt beyond a reasonable doubt for each and every element of offense. McDaniel v. Brown, 129 S.Ct. 1038, 173 L.Ed.2d 468 (2009)(instr.).

Petitioner argues that it was constitutional fundamental error to violate statutory and constitutional protections designed specifically to preserve and protect evidence that may benefit an actual innocence claim. It was a prejudicial presumption on the part of the government to naturally presume relationship of evidence, and forgo testing and processing and testing that was enacted to protect and preserve both the evidence and the rights of the accused.

The Idaho Supreme Court has set aside a jury's finding of guilt where the state failed to present substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Horejs, 143 Idaho 260,263, 141 P.3d 1129,1132 (Ct.App.2006); State v. Medina, 128 Idaho 19,27, 909 P.2d 637,645 (Ct.App.1996).

Petitioner has claimed that the policy of throwing away exculpatory evidence without testing for prints or DNA (syringes), prejudiced His right as to present exculptaor evidence, through the mishandling and destruction of it, to obtain tests that could of proven he was innocent. Also, handling the money by Doerr, and not using gloves when searching, as well as rubbing the K-9 toy on the vehicle, all work together to demonstrate prejudice. A demonstration of "prejudice" flowing from the denial of a Constitutional safeguard may be either an essential element of the claim itself or, perhaps, an additional evidentiary requirement in the particular case before relief is awarded. Wabasha v. Solem, 694 F.2d 155,159 (8thCir.1982); Batten v. Scurr, 649 F.2d 564 (8thCir.1981).

At least two kinds of "prejudice" are identified in the cases. First, there is the "prejudice" by which a court means that there is reason to believe that the error might have affected the judgment. It is that sort of "prejudice" which mandates a reversal under state law when the error is identified on direct review in state court. Second, there is the "prejudice" which renders a trial fundamentally unfair, entitling the prisoner to relief as a federal matter - on direct review if the issue is presented there, or in collateral proceedings in federal court if the issue evades determination until that stage. Hopkins v. Jarvis, 648 F.2d 981 (5thCir.1981); Bryson v. state of Ala., 634 F.2d 862 (5thCir.1981); Nelson v. Estelle, 642 F.2d 903 (5thCir.1981).

The United states Supreme Court has held that on collateral review by a federal court of criminal judgment of a state court, the federal court assesses prejudicial impact of the state court's constitutional error under 'Brecht's' more forgiving "substnatial and injurious effect" standard, and not under 'Chapman's' "harmless beyond reasonable doubt" standard. Bowles v. Russell, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96, 68 Fed.R.Serv.3d 190 (2007).

Petitioner points out that a Confrontation Clause violation is subject to harmless error analysis of federal review. Relief is proper if any state-court error had substantial and injurious effect or influence in determining the jury's verdict. A Petitioner is entitled to relief if he can show that any constitutional violation resulted in actual prejudice. Hernandez v. Small, 282 F.3d 1132 (9thCir.2002).

An arbitrary application of even valid state law, (policy), may constitute a denial of equal protection or due process within the meaning of the Fourteenth

Amendment. Whether a violation of state law abridges the Federal Constitution is a "separate inquiry in which the key factors are fundamental fairness and prejudice from the loss of rights afforded to similarly situated defendants." powers v. White, 680 F.2d 51,52 (8thCir.1982).

Petitioner argues that an issue of fact arises: 1. upon a plea of not guilty. See: I.C. § 19-1901. Issues of fact must be tried by jury-unless waived. See: I.C. § 19-1902. A trial for felony must be by jury of twelve and result in unanimous verdict. State v. Scheminisky, 31 Idaho 504, 174 p. 611 (1918). The authority of the jury as to questions of fact is absolute as the authority of the court with respect to questions of law. State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947).

Petitioner argues that much of the evidence in this case was gathered and presented as a presumption. The evidence was confiscated with little regard for any possibility of fingerprints. Contaminated without regard for cross contamination, and destroyed without any thought for its exculpatory worth to the Petitioner. it was presented to the jury as a presumption of guilt, removing the burden of proof for the government. Presumptions under the rules of evidence relieves the party in whose favor the presumption operates from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. I.R.E. Rule 301; Krebs v. Krebs, 114 Idaho 571, 759 p.2d 77 (Ct.App.1988); Bongiovi v. Jamisan, 110 Idaho 734, 718 p.2d 1172 (1986).

The Court's have frequently resorted to the Fifth Amendment guarantee to vindicate the right to present a defense. The Supreme Court has expressly relied on the due process guarantee in several cases invalidating restrictions on an accused's ability to present exculpatory evidence. And the Court held that the application of the state hearsay rule to bar defense evidence was unconstitutional. The court held that the trial judge's ruling had denied the defendant fundamental fairness and a fair trial. Chambers v. Mississippi, 410 U.S. 284, at 290-303, 93 S.Ct. 1038, at 1043-1049, 35 L.Ed.2d 297, at 305-313 (1973).

F. RIGHT TO NEWLY DISCOVERED EVIDENCE

Petitioner has provided evidence in His Affidavit that evidence that the idaho State Laboratory, staff and Expert witnesses, were, had been, and for a long period of time wer engaged in illegal practices that possibly altered, contaiminated, changed, and/or substituted elements of evidence sent to them for testing and other considerations. these actions 'all' were in violation of law, policy, and constitutional standards for the preservation of evidence and the reliability of the testimony and testing regarding it. Raising reasonable doubt regarding the

evidence tested by The Idaho State Laboratory personnel, and more importantly, withholding this information from the defendant, denying Him the right to confront the evidence, the expert witnesses from the Lab, and question the reliability of the states allegations regarding the substances presented to the jury. In particularly in light of the fact that not all the substances were tested properly, preserved properly, and handled properly.

There is no doubt that the state in this case withheld and suppressed (whether inadvertantly or not) information that was favorable to the defense, thereby creating a Brady/Giglio scenario. In this regard, consideration of the law set-out in U.S. v. Kohring, 637 F.3d 895 (9thCir.2011) is particularly relevant to the circumstances in the principle case. Consider the following:

> "In Brady, the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1994. In Giglio, the Supreme Court extended this principle to include evidence that impeaches a witness's credibility. 405 U.S. at 154, 92 S.Ct. 763."
>
> "There are three elements of a Brady/Giglio violation: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either wilfully or inadvertently; and (3) prejudice must have ensued." United States v. Williams, 547 F.3d 1887, 1202 (9thCir.2008)(quoting Strickler v. Greene, 527 U.S. 263,281-32, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)(internal quotation marks omitted))."
>
> "Evidence is prejudicial or material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United states v. Bagley, 473 U.S. 667,682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). There is a "reasonable probability" of prejudice when suppression of evidence "undermines confidence in the outcome of the trial." kyles v. Whitley, 514 U.S. 419,434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)(citing Bagley, 473 U.S. at 678, 105 S.Ct. 3375). But a "reasonable probability" may be found "even where the remaining evidence would have been sufficient to convict the defendant." Jackson, 513 F.3d at 1071 (citing Strickler, 527 U.S. at 290, 119 S.Ct. 1936)."
>
> "Suppressed evidence is considered 'collectively, not item by item." Kyles, 514 U.S. at 436, 115 S.Ct. 1555. If a reviewing court finds a material Brady/Giglio violation, "there is no need for further harmless-error review," Id. at 435, 115 S.Ct. 1555. But if suppressed evidence is 'merely cumulative," then the failure to disclose is not a violation. Morris v. Ylst, 447 F.3d 735, 741 (9thCir. 2006)."

Of course, while Brady certainly applies under the circumstances described in Petitioner's case, it is also necessary for the petitioner to show materiality. The

law in this regard is sufficiently set out in In Re Brown, 17 Cal.4th 873 (1998), wherein the Court states as follows:

> "The current standard of review for Brady materiality was first articulated in Bagley, supra, 473 U.S. 667, although the United States Supreme Court began developing it in earlier decisions. (See Agurs, supra, 427 U.S. at p. 112 [96 S.Ct. At pp. 2401-2402]; Giglio v. United states, supra, 405 U.S. at p. 154 [92 S.Ct. At p. 766].) Recently in kyles, supra, 514 U.S. 419, the Court reemphasized four aspects articulated in Bagley critical to proper analysis of Brady error. first, "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). [Citations.] Bagley's touchstone of materiality is a "reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trail resulting in a verdict worthy of confidence." (Id. at p. 434 [115 S.Ct. At pp. 1565 -1566].)"
>
> "Second, "it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Kyles, supra, 514 U.S. at pp. 434-435 [115 S.Ct. At p. 1566], fn. Omitted.)"
>
> "Third, "once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review." (Kyles, supra, 514 U.S. at p. 435 [115 S.Ct. At p. 1566].) the one subsumes the other. (Id. at pp. 435-436 [115 S.Ct. At pp. 1566-1567].)"
>
> "Fourth, while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively.)Id. at pp. 436-437 & fn. 10 [115 S.Ct. At p. 157]; See also Agurs, supra, 427 U.S. at p. 112 [96 S.Ct. At p. 2402], fn. omitted [omission "must be evaluated in the context of the entire record"].)"
>
> "In Bagley, the court identified another relevant consideration in noting that "an incomplete response to a specific [Brady] request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." (Bagley, supra, 473 U.S. at p. 682 [105

S.Ct. At p. 3384].) Given this possibility, "undr the ['reasonable probability'] fourmulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial preoceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." (Id. at p. 683 [105 S.Ct. At p. 3384]; See, e.g., payne, supra, 63 F.3d at p. 1209.)

In the petitioner's case, the information set out in the attached Exhibit's and Affidavit In Support, (See: Exhibit## 50; 51; 52; 53; 54; 55; 56; 57; 58; 59;), relating to the numerous state lab employee staff and managers alleged deceptive practices was certainly relevant, particularly with respect to character for truthfulness. Had this information been know at the time of trial, Petitioner's counsel would certainly have been permitted to cross-examine the states expert witnesses about the deceptive conduct and challenge the integrity of the evidence submitted. And, there were no interests outweighing Petitioner's interest in presenting the evidence. Also, if the District Court would have, for whatever reason, prevented Petitioner's counsel from cross-examining the states expert witnesses on the alleged deceptive behavior, the jury would not have had sufficient information to assess their credibility, and the credibility of the evidence.

The alleged misconduct would have added an entirely new dimension to the jury's assessment of the expert witnesses and evidence attested to by the. The expert witnesses technically were the prosecution's star witness, as they were the one that could establish the most important element of the crime, i.e., that the material that was allegedly in the possession of the Defendant was, indeed, illegal substances. And as stated by the Kohring Court:

> "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case."

U.S. v. Kohring, 637 F.3d 895 (9thCir.2011)(quoting Silva v. Brown, 416 F.3d 980,987 (9thCir.2005).

the fact is, had the evidence of the lab employees' conduct been disclosed, there is at least a reasonable probability that the withheld evidence would have altered at least one juror's assessment regarding the credibility of their testimony. Based upon the above sections A. to F., and newly discovered information and argument, it is clear the state has violated Brady/Giglio and consequently the Petitioner's right to a fair trial and due processes.

G. SELF INCRIMINATION - FIFTH AMENDMENT VIOLATIONS

Petitioner has established in His Affidavit In Support, Section's One; Three; Four; Five; and Six, and within the foregoing Issue's, that the state engaged in numerous instances within the trial itself, and in particularly Closing Argument, of violating Petitioner's right to remain silent. Examples of these follows:

1.) Through soliciting improper answers from states witness (Silvester). A. "I asked him if there were any drugs in the vehicle that I needed to be aware of." (TT.p.191.L-14-16).(NOTE: This is not an appropriate question to ask a citizen stopped for a traffic violation as well).

2.) Allowing the jury to listen to Petitioner's comments to bystanders while awaiting police action during stop, in spite of objections: (TT.p.251.L-19)(part of it stated that Petitioner was taking a drug class)(the states response to the objection was: "As to cumulative, I believe that the best evidence for this jury is the Defendants' own words himself.")(TT.p.332.L-11-13).

3.) Submitting to the jury probation violation allegations, before any due process was afforded.(not until July 24, 2009-Six months after the trial). e.g., alleged dirty urinalysis for methamphetime, in an unconnected case; using the allegations to impeach through motion; getting the probation violation and it's allegations judicially noticed in the present case; falsely informing the jury that the previous conviction was for possession with intent to deliver, when it was in fact for possession only; telling the jury that Petitioner was familiar with illegal controlled substances, and on probation for possession, (TT.p.172.L-2-6); Attacking Petitioner's family and friends, accusing them of being in the drug world, (TT.p.912.L-5-10); Accusing Petitioner of collusion, without foundation, evidence, or proof, (TT.p.941.to p.962); Accusing Petitioner of speeding (when no citation or due process was ever afforded for such an allegation, (TT.p.960.L-23-25);

4.) Admonishing and condemning Petitioner to the jury for not testifying and explaining away the allegations and the evidence, (TT.p.962.L-5-7; TT.p.953.L-24-25; p.952.L-23-25); Accusing Petitioner of being untruthful, even under oath, (when he never took the stand), and remained silent exercising his right to a fair trial and fair due processes. (TT.p.997.L-24-25; TT.p.998.L-1-4); The state blames the Petitioner for all the drug problems in the community of Twin Falls, (TT.p.998.L-7-25); The state tells the Court that the Petitioner is like a sex offender, (TT.p.1006.L-20-22); And that the Petitioner endangers law enforcement just by driving down the road, (TT.p.1007.L-16-18). The states comments were objected to by the Petitioner himself, preserving them for appeal.(TT.p.1017;p.1018)

Petitioner respectfully refers the Court to Subdivision's **A.; B.; and C.** in Issue Three, above for further argument on this claim, and argues the following:

Petitioner argues that much of the evidence and statements made by the state were inadmissible either as hearsay or non-hearsay purposes, after objections were overruled on those occasions where objection was made. All of it was highly unfairly prejudicial, and lacked a proper foundation or none at all. The evidence was not helpful under Rule 701 or 702, in making a determination as to a fact in issue. See: State v. Johnson, 119 Idaho 852,855 (Ct.App.1991); State v. Boehner, 114 Idaho 311 (Ct.App.1988).

Considering the inflammatory nature of the allegations and unsupported claims, it would be impossible for this Court to conclude that any such errors in admitting these statements was harmless beyond a reasonable doubt.

Assuming, arguendo, that this Court finds the errors set forth in subdivision **A. thru G.** to have been individually harmless, Petitioner asserts that the errors combined amount to cumulative fundamental error. The cumulative error doctrine refers to an accumulation of irregularities, each of which alone might be harmless, but when aggregated, show the absence of a fair trial in contravention of the Petitioner's constitutional right to due process. State v. Paciorek, 137 Idaho 629,635 (Ct.App.2002). In order to find cumulative error, this Court must first decide that there is merit to more than one of the claims of error before determining whether these errors, when aggregated, denied Petitioner a fair trial. State v. lovelass, 133 Idaho 160, 171 (Ct.App.1999). Under the cumulative error doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. State v. Martinez, 125 Idaho 445,453 (1994).

Based on the fact that countless errors occurred in Petitioner's trial, the doctrine of cumulative error can be applied, and, in light of the other extraordinary prosecutorial misconduct occurring, reversal of the convictions with a new trial is warranted. The argument and authority in support of the asserted errors are set forth in subdivision's A thru G, above, and Issues' One, Two, Four, Five, and Six, and are incorporated herein by reference.

Petitioner argues that the Fifth Amendment to the United States Constitution states, "No person..shall be compelled in any criminal case to be a witness against himself[.]" U.S.C.A.Const.Amend. V. Similarly, the Idaho Constitution guarantees that "[n]o person shall..be compelled in any criminal case to be a witness against himself[.]" Idaho Const. Article I, § 13.

Petitioner asserts that it was fundamental error in violation of His Fifth Amendment rights when the state elicited testimony concerning his pre-arrest silence, His post-arrest invocation of His right to remain silent and to counsel and due processes, and when, in thier closing argument made numerous comments on His silence and allegatioins never admitted into evidence or true at all.

The law in idaho is well-established that a defendant's Fifth Amendment right not to have thier silence used against them in a court proceeding is applicable pre-arrest and pre-Miranda warnings. State v. Moore, 131 Idaho 814,820 (1998). And also to post-arrest requests for counsel and due process requests. State v. Dearman 422 p.2d 573,575 (Kan.1967). Evidence disclosing that one charged with a crime has asserted his constitutional right's cannot be used against him substantively as an admission of guilt. It is reversible error to permit a jury to draw an inference adverse to one accused of a crime from his reliance upon his constitutional rights.

The states comments on Petitioner's silence violated the rule that in "[i]n a criminal case, a prosecutor may not directly or indirectly comment on a defendant's invocation of his constitutional right to remain silent, either at trial or before trial, for the purposes of inferring guilt." State v. Phillips, 144 Idaho 82,86 (Ct.App.2007)(citations omitted).

The states broad scope of questions regarding Petitioner's lack of statments, or the states inferrences to guilt of uncharged, unconvicted crimes, and unproven acts were completely unnecessary, and could have been avoided had the prosecutor simply avoided asking questions that were likely to result in inadmissible testimony and evidence, and, again, resulted in the admission of both that was improper and in violation of Petitioner's Fifth Amendment rights. State v. Ellington, 151 Idaho 53,61 (2011).

Considering the clarity of the law on this subject, along with the fact that there could have been no reasonable strategic basis for defense counsel not to have objected, in those instances failing, it is clear that the error was plain, and fundamental. Whether there is a reasonable possibility that the misconduct affected the verdict, or reasonably could have affected the verdict, this has been established through the statements themselves, and there can be no doubt as to their prejudicial nature and impact. The three-prong test of State v. Perry is therefore met. See: State v. Perry, 150 Idaho 209 (Idaho 2010).

Petitioner's argument regarding prosecutorial misconduct at sentencing is asserted and argued in Issue Five, below.

H. STANDARD OF REVIEW JUDICIAL MISCONDUCT

Petitioner points out that in reviewing a discretionary decision, the Court considers: (1) Whether the lower court rightly perceived the issue as one of discretion; (2) Whether the court acted within the boundaries of such discretion and consitently with any legal standards applicable to specific choices; and (3) Whether the court reached its decision by an exercise of reason. State v. Sheldon, 145 Idaho 225,228, 178 P.3d 28, at 31 (2008). The Court must give adequate notice of specific deficiencies in defendant's evidence or legal analysis, and must properly state the grounds for dismissal. Griffin v. State, 142 Idaho 438, 128 P.3d 975 (2006).

Petitioner argues that pursuant to Idaho code § 19-2101; Order of Trial: 1. The indictement is read; 2. The State opens; 3. The Defense opens; 4. The parties may then respectively offer rebutting testimony only, unless court, permit them to offer evidence upon their original case. ... 6. The judge must then charge the jury if requested by either party; he may state the testimony and declare the law, **but must not charge the jury in respect to matters of fact.** Pursuant to I.C. § 1-1802 "A judge cannot act as attorney or counsel in a court in which he is judge,.. . (See: What amounts to practice of law within contemplation of constitutional or statutory provision, 106 A.L.R. 508).

Issues presented by conflicting witnesses and the credibility of the witnesses are for resolution by the Jury. State v. Peterson, 87 Idaho 147, 391 P.2d 846 (1994). Testimony of a witness raising questions as to the credibility and weight to be given their testimony are matters **which are exclusively for the jury's determination.** State v. Gee, 93 Idaho 636, 470 P.2d 296 (1970).

Petitioner argues that 'If there are facts in dispute or in conflict which raise a genuine issue as to whether a witness is indeed an accomplice, the court must submit that issue to the jury for resolution.' State v. Ruiz, 115 Idaho 12, 764 p.2d 89 (Ct.App.1988); State v. Brooks, 103 Idaho 892, 655 P.2d 99 (Ct.App.1982). They jury is entitled to believe or disbelieve the testimony or any portion of the testimony of a witness. State v. Bedwell, 77 Idaho 57, 286 P.2d 641 (1955); State v. Johnson, 77 Idaho 1, 287 P.2d 425 (1955), cert.denied, 350 U.S. 1007, 76 S.Ct. 649, 100 L.Ed. 869 (1956); State v. Anderson, 82 Idaho 293, 352 p.2d 972 (1960); State v. Gish, 87 Idaho 341, 393 P.2d 342 (1964).

(See: Idaho Const., Article I, § 7. And Pursuant to I.C. § 2-104: "A trial jury is a body of men or women, or both, returned from the citizens...sworn to try ,determine by a verdict a question of fact." Formation of a jury: I.C.§§19-1905, and I.C. § 19-1908).

I. EVIDENTIARY DETERMINATIONS FOR JURY

Petitioner argues that the Rules of Evidence in civil actions are applicable also to criminal actions, except as otherwise provided in Idaho Code § 19-2110. Therefore, evidence corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact or it may be entirely circumstantial. State v. McCandles, 70 Idaho 468, 222 P.2d 156 (1950); State v. Bassett, 86 Idaho 277, 385 P.2d 246 (1963). The testimony of a witness corroborating another person and himself in a crime, that exonerates the accused is admissible. State v. Cacavas, 55 Idaho 538, 44 P.2d 1110 (1935).

Petitioner argues that where the witness made unequivocal statements that he assisted in the use and transport of ddrugs and willfully participated in them, although they were not his drugs concerning which Petitioner was charged, the witness was an accomplice. And therefore the district court erred in allowing the jury to pass on accomplice issue, where it had appeared without substantial conflict in the testimony. State v. Emmons, 94 Idaho 605, 495 P.2d 11 (1972).

The Petitioner, having denied that he was involved in the crime, raised a direct conflict in the evidence on the issue of whether or not adverse witness was an accomplice, and the trial court should have submitted that issue to the jury. State v. Lucio, 99 Idaho 765, 589 P.2d 100 (1979).

Furthermore, in regards to the Petitioner's culpability, "some aiding, abetting or actual encouragement in the person's part is essential to make that person an accomplice and mere acquiescence in, or silent consent to the commission of an offense on the part of a bystander, is not sufficient to make one an accomplice. Where there was evidence presenting the issue as to whether a witness was an accomplice, the Petitioner was entitled to have His theory of the case submitted to the jury upon proper instructions, testimony, and evidence. State v. Gonzales, 92 Idaho 152, 438 P.2d 897 (1968).

Petitioner argues that it was improper for the Court to take the deposition of Robert Berry, outside the jury, when he was readily available for testimony before the jury, suppress substantial relevant parts of it, and suppress his affidavit. Idaho statutes dealing with depositions clearly are conditionally prescribed. If Berry was unavailable there would be grounds for a deposition, however, he was clearly in custody and the process was orchestrated to prejudice Petitioner. See: Idaho Code §§ 19-3101; 19-3102; 19-3103; 19-3107; 19-3111; and I.C. § 3112.

Whatever the courts and states opinion was of the witnesses knowledge or claim, it was for the jury to decide the truth of the facts, all the facts.

J. COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT

Petitioner argues that the United States Constitution's Sixth Amendment, In pertinent part, that clause reads that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor... ."

Writing for the majority, Chief Justice Warren held that the compulsory process guarantee is so fundamental that it is incorporated in the due process provision of the Fourteenth Amendment. The guarantee is therefore enforceable directly against the states. Washington v. Texas, 388 U.S. 14, at 16-17 n.4, 87 S.Ct. 1920 at 1922 n.4, 18 L.Ed.2d 1019, at 1022 n. Chief Justice Warren asserted:

> "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use." Washington, 388 U.S. at 23, 18 L.Ed.2d at 1025, 87 S.Ct. at 1925. The Chief Justice declared: "This Court had occasion in In re Oliver, 333 U.S. 257 (1948), to describe...the most basic ingredients of due process of law: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him [and] to offer testimony.", The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Based on this reasoning, the Court granted the accused a general "right to put on the stand a witness who [is] physically and mentally capable of testifying to events that he [has] personally observed, and whose testimony would have been relevant and material to the defense. Washington, 388 U.S. at 18-19. See Also: Hoeffel, The Sixth Amendment's Lost Clause: Unearthing Compulsory Process, 2002 Wis.L.Rev. 1275,1299 n. 111 (in Pennsylvania v. Ritchie, 480 U.S. 39, 56 n. 13, 94 L.Ed.2d 40, 56. n. 13, 107 S.Ct. 989,1000 n. 14 (1987), "Justice Powell, who wrote the opinion in Chambers,... cites Chambers as a Compulsory Process Clause case").

Petitioner argues that The Supreme Court has ruled that a judge's exclusion of critical exculpatory hearsay evidence is a constitutional violation of the accused's right to present witnesses in his own defense. The Court thus refused to apply the right only to competency rules altogether barring a witness' testimony; the court extended the right to evidentiary rules that have the more limited effect of preventing a witness from giving particular testimony, which can deny the accused

a trial in accord with...due process. Chambers v. Mississippi, 410 U.S. 284, at 302, 35 L.Ed.2d 297, at 312-313, 93 S.Ct. 1038, at 1049 (1973).

For a review of Supreme Court decisions concerning a criminal defendant's constitutional right to obtain witnesses in his/her favor, See: Accused's Right, Under Federal Constitution's Sixth Amendment, to Compulsory PROCESS for Obtaining Witnesses in Accused's Favor -- Supreme Court Cases, 98 L.Ed.2d 1074 (1990). See Also: Lewis, The Accused's Constitutional Right to Defend, 12 The Advocate at 299 (1980)(focusing on Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

Petitioner has made a forthright claim of innocence. An innocent prisoner seeking relief should do so. See: Comment, Federal Habeas Corpus: The Relevance of Petitioner's Innocence, 46 UMKC.L.Rev. 382 (1978). See also: Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv.Civ.Rts.--Civ.Lib.L.Rev. 579 (1982)(presenting an extensive argument in favor of post-conviction review). See also: Actual Innocence - Teague Doctrine.

Petitioner argues that he has made a comprehensive showing that His right to hae the jury decide the truth and His fate was stolen away by impropriety, misconduct, and numerous constitutional violations, that are so blatant, it shocks the conscience, and puts to shame the ethics of justice in the principle case. The trial court put itself above the jury, stripped the jury and defendant of their rights, and regressed due process back to the dark ages of inquisitionalism. And it is the type of judicial misconduct that strangles and paralyzes the State and Federal Constitutional Protections, hard fought for, of the citizens of this state and country, and must not and should not be sustained in this State, or this case.

These claims were brought to the attention of the appellate public defenders office in detail. Their refusal to address the issue on direct appeal prejudiced the Petitioner, but pursuant to procedural regularity, where he has proven that he requested the issues to be broyught, submitted a supplemental rpo se brief when counsel refused to, and was refused by the clerk due to appointed counsel, there can be no procedural bar to the presentation and review of these claims. They have been preserved, and presented here with diligence, with integrity, and with constitutional right to do so. The evidence suggest even more so, a procedural remedy affordable in this forum, collateral proceedings under post-conviction.

ISSUE FIVE

WAS PETITIONER 'S RIGHT'S TO EFFECTIVE ASSISTANCE OF COUNSEL WITH RIGHT'S TO JURY TRIAL, EQUAL PROTECTION OF LAW, PROCEDURAL DUE PROCESSES, AND RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, VIOLATED WHEN THE COURT AND THE STATE, IGNORED THE JURY'S VERDICT, REACCUSED PETITIONER OF INTENT TO DELIVER, PREJUDICING HIM AT SENTENCING, INFLICTING DOUBLE JEOPARDY AND CRUEL AND UNUSUAL PUNISHMENT: PURSUANT TO: U.S.C.A.CONST.AMEND. V; VI; VII; VIII; AND XIV § I; AND THE IDAHO STATE CONBSTITUTION, ARTICLE I, §§ 1; §7; §8; §13; and §18 ?

The Petitioner asserts Yes!

(Petitioner respectfully refers to His Affidavit In Support of Petition For Post-Conviction Relief; with Exhibit's #1 thru #94; and all those Transcripts and Clerk's Record mentioned therein, as if fully stated herein. (Exhibit's Attached) (See: Affidavit Sections: Three; Four; Five; and Six)

A. CAUSE OF ACTION

Petitioner claims the trial Court violated His right to be from from Double Jeopardy by ignoring the jury's verdict of possession of a controlled substance, and reaccusing Him of possession with intent to delvier, at sentencing.

Petitioner claims the court violated His right to be free from Double Jeopardy by reaccusing Him of possession with intent to deliver in the previous case, CR-04-2929, when he was only found guilty of possession of a controlled substance.

Petitioner claims the trial Court prejudiced the jury by informing them He was previously found guilty of Possession with Intent to Deliver in the previous case, when in fact it was only possession.

Petitioner claims the trial Court abused its discretion, and inflicted cruel and unusual punishment upon Petitioner when it sentenced Him to Ten (10) years to Life based upon an assessment of possession with intent to deliver, where He had never been convicted of said crime.

Petitioner claims the trial Court violated His right to fair due processes and equal protection of law when it reaccused Him of Intent To Deliver, in any context, where the jury ignored the charge and acquitted Him of it.

Petitioner claims the trial Court violated His constitutional protections and due process of law by accusing Him at sentencing and submitting to the jury, crimes and allegations He was never convicted of, and no evidence was provided to support such allegations. e.g., See: Affidavit In Support).

Petitioner claims His rights enumerated above were violated through the state engaging in those same acts and allegations the trial Court committed, at sentencing and throughout the trial, so stated in the seven paragraphs above. Including, reaccusing Him of possession with intent to deliver; dealing drugs; witness

intimidation; collusion; and lying. Using such allegations to prejudice Him at sentencing and with the jury.

Petitioner claims the trial Court and State prejudiced Him at sentencing through condemning and admonishing Him for asserting His right to remain silent, and right to fair due processes and right to jury trial: The State going so far as to state; ("..,if the defendant had accepted responsibility..." "admitted that he was..possessed..drugs with the intent to deliver them...we..temper our recommendation..."): Violating those rights so enumerated above.

Petitioner claims that although counsel made some objections to the statments above, counsel was far from effective in protecting Petitioner's rights against such acts, and appellate counsel refused to raise the issues at all on direct appeal, violating Petitioner's rights to effective assistance of counsel in both instances.

B. STANDARD OF REVIEW

The Idaho Supreme Court's general objectives when reviewing a Trial court's sentencing are to correct a sentence which is excessive in length, to facilitate the rehabilitation of the offender, to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process, and to promote criteria for sentencing which are both rational and just. State v. Faught, 127 Idaho 873, 908 P.2d 566 (1995).

A clear abuse of discretion is shown if the defendant establishes that, considering the sentencing objectives, the sentence is excessive under any reasonable view of the facts. State v. Broadhead, 120 Idaho 141,145, 814 P.2d 401,405 91991), overruled on other grounds, State v. Brown, 121 Idaho 336, 825 P.2d 482 (1992). A prosecutor's or court's distortion of the reasonable doubt burden of proof is an error of fundamental proportions because it goes to the foundation of the case. State v. Raudebaugh, 124 Idaho 758,769, 864 p.2d 596,607 (1993). An error is not harmless if the "record contains evidence that could rationally lead a finding for the defendant with respect to the omitted element. Neder v. U.S., 527 U.S. 1,19 (1999); State v. Hickaman, 146 Idaho 178,182, 191 P.3d 1098,1102 (2008). The reviewing court conducting the harmless-error inquiry does not "become in effect a second jury to determine whether the defendant is guilt." Neder, 527 U.S. at 19, citing R. Traynor, The Riddle of Harmless Error 50 (1970). Instead, "the reviewing court must ever bear in mind that criminal defendants have a constitutional right to have a jury, not judges, or sentencing court judges on review, decide guilt or innocence." State v. Johnson, 98 P.3d 998,1003 (N.M.2004).

The State or Trial judge may not consider a defendant's silence or refusal to

admit guilt with respect to uncharged or dismissed crimes in response to a direct request from the State at the sentencing hearing. State v. Heffern, 130 Idaho 946,950 P.2d 1285 (Ct.App.1997). Admonition during sentencing violates Idaho Code § 19-3003: 'that a defendant's refusal to testify may not prejudice him or be used against him in a criminal proceeding.'State v. Anderson, 130 Idaho 765, 947 P.2d 1013 9Ct.App.1997). "A clear abuse of discretion may be shown, and such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. Subjecting a defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." Smalis v. Pennsylvania, 476 U.S. 140,145, 106 S.Ct. 1745,1749, 90 L.Ed.2d 116,122 (1986).

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense. Schiro v. Farley, 510 U.S. 222,229, 114 S.Ct. 783,788-89, 127 L.Ed.2d 47,56 (1994); State v. McKeeth, 136 Idaho 619,622, 38 p.3d 1275,1278 (Ct.App.2001).

C. DOUBLE JEOPARDY ANALYSIS AT SENTENCING

Petitioner argues that "The Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of an acquittal by a jury verdict." Smith v. Massachusetts, 543 U.S. 462,467, 125 S.Ct. 1129,1133, 160 L.Ed.2d 914,922 (2005). A verdict constitutes an acquittal if it "actually represents a resolution, correct or not, of some or all of the factual elements of the offenses charged." Id. at 468, 125 S.Ct. at 1134, 160 L.Ed.2d at 923 (quoting U.S. v. Martin Linen Supply Co., 430 U.S. 564,571, 97 S.Ct. 1349,1355, 51 L.Ed.2d 642,650-51 (1977)). What matters is that the jury evaluated the evidence and determined that it was legally insufficient to sustain a conviction. Id. at 469, 125 S.Ct. at 1135, 160 L.Ed.2d at 923-24. As noted, double jeopardy bars reexamination of a court decreed acquittal to the same extent as an acquittal by jury verdict. Smith, 543 U.S. at 467, 125 S.Ct. at 1133, 160 L.Ed.2d at 922-23.

The United States Supreme Court has made it clear that if an acquittal has occurred, double jeopardy bars a retrial even if the acquittal was entered because of an error of law by the trial court. The Supreme Court held: .."[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' ...affects the accuracy of that determination, but it does not alter its essential character." U.S. v. Scott, 437

U.S. 82,98, 98 S.Ct. 2187,2197, 57 L.Ed.2d 65[79](1978) (quoting id., at 106, 98 S.Ct., at 2201[57 L.Ed.2d, at 83-84] (BRENNAN, J., dissenting))."Thus, this Court's cases hold that an acquittal on the merits bars retrial even if based on legal error." Arizona v. Rumsey, 467 U.S. 203,211, 104 S.Ct. 2305,2310, 81 L.Ed.2d 164,171-72 (1984).

Petitioner argues that double jeopardy bars a retrial even if the trial court's acquittal was based upon a mistake in determining the degree of recklessness necessary to sustain a conviction. Smalis v. Pennsylvania, 476 U.S. 140,144 n.7, 106 S.Ct. 1745,1748 n.7, 90 L.Ed.2d 116,121 n.7 (1986). It is clear in the principle case that the Court and the State, violated the Jury's Sovereign Veredictum; and the Petitioner's Vested Right to Substantive Law.

When a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous. Sanabria v. U.S., 437 U.S. 54,64, 98 S.Ct. 2170,2179, 57 L.Ed.2d 43,63-64 (1978); U.S. v. Blanton, 476 F.3d 767 (9thCir.2007); U.S. v. Ogles, 440 F.3d 1095 (9thCir.2006); State v. Korsen, 138 Idaho 706,716-18, 69 P.3d 126,136-38 (2003).

Petitioner points out that in the principle case, "The verdict was made upon the facts and evidence given to the jury as they determined the truth, and therefore, profoundly represents a resolution of the factual elements of the offenses charged." See: U.S. v. Scott, 437 U.S. 82,97, 98 S.Ct. 2187,2197, 57 L.Ed.2d 65,78 (1978), quoting U.S. v. Martin Linen Supply Co., 430 U.S. 564,571, 97 S.Ct. 1349,1355, 51 L.Ed.2d 642,650-51 (1977).

The Idaho Supreme Court, in State v. Korsen, 138 Idaho 706,716-717, 69 P.3d 126,136-137 (2003), held: "The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Article I, § 13 of the Idaho Constitution provides that "[n]o person shall be twice put in jeopardy for the same offense." Jeopardy attaches in a jury trial when the jury is impaneled and sworn. State v. Santana, 135 Idaho 58,64, 14 P.3d 378,384 (Ct.App.2000)."

Petitioner argues that it was not for the Court and the State to inflict a higher degree of guilt upon the Petitioner. When it appears that a defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only. State v. Koho, 91 Idaho 450, 423 P.2d 1004 (1967)(SeeAlso: Idaho Code § 19-2105). Furthermore, whenever a crime is distinguished into degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

See: Idaho Code § 19-2311. Also, A general verdict upon a plea of not guilty is either "guilty" or "not guilty" which imports a conviction or acquittal of the offense charged in the indictment. see: Idaho Code § 19-2305. and when there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it, must be entered; but when there is a verdict of acquittal, the court can not require the jury to reconsider, it. See: Idaho Code § 19-2314.

Petitioner argues that the Double Jeopardy Clause encompasses the corollary doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436,444-45 (1970). Developed in civil litigation, collateral estoppel has become an established component of federal criminal law and is embodied in the Fifth Amendment's guarantee against double jeopardy. Id. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443., Id. at 446; See, e.g., U.S. v. Ford, 371 F.3d 550,555-56 (9thCir.2004) (collateral estoppel bar to prosecution for intent to distribute drugs because defendant's previous acquittal relied on same fully-litigated facts).

D. MULTIPLE ENHANCED PENALTIES PROHIBITED

Petitioner respectfully points out that: 1. He was charged with and sentenced under Idaho's Persistent violator enhancement: Idaho Code § 19-2514; And also: 2.He was charged with and sentenced for Idaho's Second Offense, Uniform Controlled Substances Act: Idaho Code § 37-2739; And: 3. He was charged with, convicted and sentenced for Possession Of a Controlled Substance: Idaho Code § 37-2732(c)(1).

Petitioner argues that He has been subjected to Double Jeopardy; Multiplicity; Cruel and Unusual Punishment; and that, Idaho's statute on the prohibition against multiple enhanced penalties has been violated. The Petitioner argues that it was not the intent of the legislature in I.C. § 37-2739, "Second offense of the Act," to enhance an individuals sentence for simple possession.(and/or if it was, it violates double jeopardy clause.)

Petitioner argues that a reading of Idaho Code §§ 37-2739; § 37-2739A; and I.C. § 37-2739B: are consistent in their references to, Trafficking; Delivery; Intent To Deliver; and Manufacturing. None of which the Petitioner points out, has He ever been convicted of. Furthermore, more importantly: I.C. § 37-2739 states: "..,who is not subject to a fixed minimum term under section 37-2739B,"

Petitioner points out that the Court and state, as indicated at sentencing, did

reaccuse and reindicte Him with renewed allegations of Intent to Deliver, (when HE had been acquitted of that charge on all counts), and also accused Him of other allegations not even introduced into evidence, and than enhanced His sentence with a Fixed Minimum of Ten (10) years to Life on all counts. Even doing so in case No: CR-04-2929, (in that it was submitted to the jury as intent to deliver as a matter of record using I.C. § 37-2732(a)), and also submitted at sentencing as Intent To Deliver as the facts establish.

The Petitioner points out that the State and Court's comments at sentencing and to the jury clearly show: Prejudice; Bias; Denial of Due Processes; Double Jeopardy; and disregard for judicial ethics. They in fact are subjecting the Petitioner to punishment and enhancements conducive to I.C. §§ 37-2739A, 37-2739B, and therefore inappropriate pursuant to the wording of the statute itself, and those constitutional protections enumerated above.

Petitioner points out that pursuant to I.C. § 19-2520E, it states: "Notwithstanding the enhanced penalty provisions in section 19-2520, 19-2520A, 19-2520B and 19-2520C, Idaho Code, any person convicted of two (2) or more substantive crimes provided for in the above code sections, which crimes arose out of the same indivisible course of conduct, may only be subject to one (1) enhanced penalty."

Petitioner argues that clearly, multiple enhancements are illegal and also improper, and considering that the Petitioner has never either been accused, charged nor convicted of any kind of sex offense whatsoever, the States prejudices, and the Courts concurrences, to such allegations, and the application of I.C. §§ 19-2520(A)(B) or (C), are wholly without any merit, law, or justification.

Petitioner argues that out of fairness to the accused, "criminal statutes are strictly construed in their substantive elements and in their sanctions." State v. MCKaughen, 108 Idaho 471,473, 700 P.2d 93,95(Ct.App.1985)(citing State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980)).

Additionally, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." McKaughen, 108 Idaho at 473, 700 P.2d at 95 (citing Rewis v. U.S., 401 U.S. 808,812, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971); Thompson, 101 Idaho at 437, 614 P.2d at 977). Sentencing is a matter generally committed to the discretion of the trial judge. State v. Pratt, 125 Idaho 594,600, 873 P.2d 848,854 (1994); State v. Jones, 125 Idaho 477,489, 873 P.2d 122,134 (1994); State v. Brown, 121 Idaho 385,394, 825 P.2d 482,491 (1992).

Petitioner argues that the Court in His case abused it's discretion, and the

State overreached it's authority and power in charging the indictment with multiple enhancement's, and abused Petitioner's rights with improper inferences of other crimes and their relationship to mandatory minimum enhancements and harsh punishment State v. Evans, 107 Idaho 429, 690 P.2d 364 (Ct.App.1984); State v. Johns, 112 Idaho 873, 736 P.2d 1327 (1987); State v. Custodio, 136 Idaho 197, 30 P.3d 975 (Ct.App.2001). An original sentence imposed on a defendant which containes two separate enhancements is invalid since it violates I.C. § 19-2520E; State v. Searcy, 118 Idaho 632, 798 P.2d 914 (1990) modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct.App.1993) 120 Idaho 882, 820 P.2d 1239 (Ct.App.1991).

Petitioner argues that this presents an issue of statutory construction, a question of law which is subject to free review. City of Sun Valley, 128 Idaho 219,221, 912 P.2d 106,108 (1996); Harris v. Dep't. of Health & Welfare, 123 Idaho 295,297, 847 P.2d 1156,1158 (1992). The interpretation of a statute begins with an examination of its literal words. In re Permit No. 36-7200, 121 Idaho 819,823, 828 P.2d 848,852 (1992); Ada County v. Gibson, 126 Idaho 854,856, 893 P.2d 801,803 (Ct.App.1995). Where statutory language is unambiguous, the clearly expressed intent of the legislature must be given effect, and there is no occasion for a court to consider rules of construction. Wolfe v. Farm Bureau Ins. Co., 128 Idaho 398,404, 913 P.2d 1168,1174 (1996).

Petitioner asserts that it has been settled throughout our history that the constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," In re Winship, 397 U.S. 358,364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." U.S. v. Gaudin, 515 U.S. 506,511, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995). These basic precepts, firmly rooted in the common law, have provided the bssis for decisions interpreting modern criminal statutes and sentencing procedures.

In Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000), the Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the presecribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., at 490, 147 L.Ed.2d 435, 120 S.Ct. 2348. In Ring v. Arizona, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002), the Court reaffirmed their conclusion that the characterization of critical facts is constitutionally irrelevant. "If a State makes an increase in a

defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." Id., at 602, 153 L.Ed.2d 556, 122 S.Ct. 2428.

For the reasons explained above, the requirement of the Sixth Amendment are clear. The application of the trial courts sentencing scheme violated the Petitioner's right to have the jury find the existence of "any particlular fact" that the law makes essential to his punishment. Blakely v. Washington, 542 U.S.___,at___, 124 S.Ct. 2531, 159 L.Ed.2d 403(slip op., at 5). The right is implicated whenever a judge seeks to impose a setnence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." Id., at___, 124 S.Ct. 2531, 159 L.Ed.2d 403(slip op., at 7). the Supreme Court precedents make clear "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Ibid. 124 S.Ct. 2531, 159 L.Ed.2d 403 (slip op., at 7)(emphasis in original).

Petitioner argues that more importantly than the language used by the Supreme Court's holding in Apprendi are the principles they sought to vindicate. Those principles are unquestionably applicable. they are not the product of recent inovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law. Jones v. U.S., 526 U.S. 227, at 244-248, 143 L.Ed.2d 311, 119 S.Ct. 1215. The Framers of the Constitution understood the threat of "judicial despotism" that could arise from "arbitrary punishments upon arbitrary convictions" without the benefit of a jury in criminal cases. The Federalist No. 83, p.499 (C. Rossiter ed. 1961)(A. Hamilton). The Founders presumably carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta. As was noted by the Supreme Court in Apprendi:

> "The historical foundation for our recognition of these principles extends down centuries into the common law. 'To guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...'" 530 U.S., at 477, 147 L.Ed.2d 435, 120 S.Ct. 2348 (citations omitted)."

Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable.

CONCLUDING ARGUMENT

The Petitioner has shown that His speedy trial rights were waived by the court, not Him, and not for any just cause. Furthermore, if this Court determines there was some, unknown justification, which Petitioner asserts there is not, for the waiver, there can be no justification for the continuance, postponement, and a further six month delay, once Petitioner reported for court the day before the trial was to begin. The prejudice asserted is profound, turned the course of the trial, and was measurably damaging to Petitioner's defense, witnesses, and evidence. Also, the manner in which the right was waived, contrary to judicial integrity, prejudice may be presumed, for both manner of implementation - and length of delay. To determine otherwise would make meaningless the requirement of "expressly waived in person" and completely change the injustice defined by "fundamental error." See: Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); and State v. Lindsay, 96 Idaho 474, 531 P.2d 236 (1975). See Also: Issue Two; Affidavit § 2.

The Petitioner has shown that the both the Suppression hearing Court's and the Trial Court's finding's of fact regarding the illegal-pretextual stop of Petitioner are erroneous. And the the officers lied, submitted false affidavits of probable cause, mishandled the evidence, and than the state withheld the video of the stop and comnplete transcript of the audio, intentionally, to deny Petitioner exculpatory evidence that proves beyond a doubt the lies and misconduct. Without the video, this Court has the officer's own words, on record that they were stalking Petitioner and did so until they could fabricate a reason to pull Him over and search Him. All of which is contrary to constitutional principles, well founded and recognized, which constitutional principles, should have guided the suppression court and trial court to establish that Petitioner's fundamental rights were violated long before now. See: Taglavore v. United states, 291 F.2d 262 (9thCir.1961); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); State v. Lafferty, 139 Idaho 336, 79 P.3d 157 (Ct.App.2003); State v. Schevers, 132 idaho 786, 979 P.2d 659 (Ct.App.1999). See Also: Issue One; and Affidavit Section One.

The Petitioner has shown that His Fifth Amendment Right to be free of self incrimination was violated multiple times, on multiple levels. Furthermore, the state engaged in prosecutorial misconduct that cannot be denied, prejudiced the jury, created fundamental constitutional error, and denied Petitioner a fair trial in any context. Petitioner concludes that the unethicle, gross misconduct of the states prosecutor's is so unusually improper and inadmissable, that it serves to also prove the complete ineffectiveness of counsel in application to this case.

PRAYER FOR RELIEF

Appellant prays this Honorable Court will vacate the cinviction and sentence in this case and set the matter for a new trial;

In the Alternative, Appellant prays this Court will vacate the judgement of conviction and sentence, and dismiss the case entirely.

And grant any and such other relief this Court deems just and necessary under the circumstances.

DATED This 25th day of August, 2014.

Phillip D. Flieger #78503
PHILLIP DUANE FLIEGER #78503
Petitioner/Appellant Pro se

CERTIFICATE OF SERVICE

I, Phillip Duane Flieger, hereby certify that on This 25th day of August, 2014, I mailed a true and correct copy of: APPELLANT'S OPENING INITAL BRIEF ON APPEAL,

to the parties listed below, by placing same in the Institutional Mail System, by handing it to the Institutional Paralegal Resource Center, privileged legal mail, for placement in the U.S. Mail.

Phillip D. Flieger #78503

PHILLIP DUANE FLIEGER #78503
Petitioner/Appellant Pro se

DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
~~P.O. Box 83720~~
Boise, idaho 83720-0010