

4-1-2014

# Kalashnikov v. State Respondent's Brief Dckt. 41413

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

**COPY**

SERGEY KALASHNIKOV, )  
 )  
 Petitioner-Appellant, )  
 )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )

No. 41413

Ada Co. Case No.  
CV-2013-11753

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE MICHAEL E. WETHERELL  
District Judge**

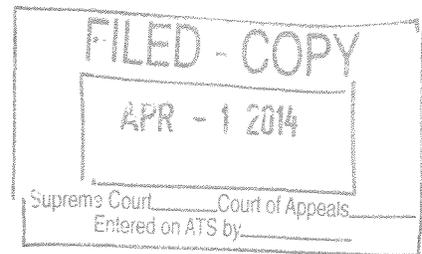
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**LAWRENCE G. WASDEN  
Attorney General  
State of Idaho**

**SERGEY KALASHNIKOV  
IDOC No. 86303  
PO Box 70010  
Boise, ID**

**PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division**

**DAPHNE J. HUANG  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534**



**ATTORNEYS FOR  
RESPONDENT**

**PRO SE  
PETITIONER-APPELLANT**

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## STATEMENT OF THE CASE

### Nature of the Case

Sergey Kalashnikov appeals from the district court's order summarily dismissing his petition for post-conviction relief.

### Statement of Facts and Course of Proceedings

Kalashnikov pleaded guilty to grand theft by possession of stolen property. State v. Kalashnikov, Docket No. 40127, 2013 Unpublished Opinion No. 547 at 1 (Idaho App. June 21, 2013). The district court entered a withheld judgment and placed Kalashnikov on probation. Id. After Kalashnikov admitted to probation violations, the court revoked probation and sentenced him to a unified term of 14 years with three and one-half years fixed. Id. Kalashnikov filed an appeal which the Court of Appeals denied. Id.

Shortly thereafter, Kalashnikov filed a petition for post-conviction relief and requested appointment of counsel. (R., pp. 3-9, 18-20.) The district court entered an order denying counsel and giving notice of its intent to dismiss Kalashnikov's petition. (R., pp. 28-30.) The court gave Kalashnikov 20 days to amend the petition or provide an affidavit identifying specific acts or omissions by the state that would support Kalashnikov's allegations of constitutional violations. (R., p. 29.) On the twentieth day, Kalashnikov filed a motion to amend and to compel discovery in which he set forth his proposed amendments to the petition. (R., pp. 31-35.) On consideration of the motion and proposed amendments, the district court denied the motion and dismissed the petition. (R., pp. 36-40.) Kalashnikov timely appealed the order of dismissal. (R., pp. 41-44, 60, 64.)

## ISSUE

Kalashnikov's brief consists of 14 numbered paragraphs and a summary paragraph. To the extent these paragraphs are intended as his identified issues, the state will not repeat them due to their length, but will refer to Appellant's brief, pp. 1-5.

The state phrases the issue as:

Has Kalashnikov failed to show his petition for post-conviction relief stated a genuine issue of material fact, and thus failed to show the district court erred in summarily dismissing the petition?

## ARGUMENT

### Kalashnikov Has Failed To Show The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

#### A. Introduction

Kalashnikov's appellate brief asserts several arguments, most of which were not raised in his petition for post-conviction relief and did not address the district court's order dismissing his petition. To the extent he discusses claims raised in the petition, Kalashnikov does not address the absence of factual allegations or other evidence to support those claims. Applying the law to the record, the district court properly found that Kalashnikov failed to raise a genuine issue of material fact that he was entitled to post-conviction relief. Accordingly, this Court should affirm the district court's order dismissing Kalashnikov's petition.

#### B. Standard Of Review

When reviewing a district court's order summarily dismissing a petition for post-conviction relief, the appellate court reviews the record to determine if there is a genuine issue of material fact which, if resolved in petitioner's favor, would require that relief be granted. Ridgley v. State, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). Although a court must accept a petitioner's un rebutted allegations as true, it need not accept mere conclusory allegations, unsupported by admissible evidence, or conclusions of law. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). Regarding questions of law, the appellate court

exercises free review. Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009).

C. The District Court Properly Dismissed Kalashnikov's Petition For Post-Conviction Relief Because Kalashnikov Failed To State A Genuine Issue Of Material Fact To Sustain It

In his petition for post-conviction relief, Kalashnikov's grounds for relief listed "violations" of constitutional and statutory provisions, and ineffective assistance of counsel for failure to advise him of those rights, but provided no factual support. (R., pp. 3-9.) The district court issued a notice of intent to dismiss the petition, noting that Kalashnikov failed to provide "even the barest outline of what acts or omissions of the state justify the relief he is seeking." (R., p. 29.) The notice gave Kalashnikov 20 days to provide "an amended petition or further supporting affidavit," stating the acts or omissions he attributes to the state and why he believes they entitle him to relief. (R., p. 29.)

Kalashnikov filed a motion to amend, again listing constitutional and statutory violations. (R., p. 31.) In addition, he alleged violations of federal criminal rules, lack of subject-matter jurisdiction, actual innocence, and ineffective assistance of counsel for suggesting – thereby allegedly coercing – his guilty plea. (R., pp. 31-32.) The district court dismissed Kalashnikov's petition, concluding he failed to raise a genuine issue of material fact entitling him to post-conviction relief. (R., pp. 36-40.) Applying the law to the facts, the district court's order was proper, and this Court should affirm.

1. Kalashnikov's Bare Citations To Legal Authority Absent Factual Support Were Properly Dismissed

Most of Kalashnikov's claims in his petition were assertions of constitutional, statutory, or rule violations absent factual allegations explaining how the cited authority was violated. These claims included alleged violations of the following: 5th, 6th, and 14th Amendments; F.R.C.P. 7(b), 12(b), 18, and 29; I.C. § 18-315. (R., p. 31.) The district court correctly determined that these "bare citations to authority without any factual allegations explaining what the state, court, or counsel did or failed to do that implicated that authority" failed to put the state on notice of the basis for Kalashnikov's claims. (R., pp. 36-39.) Kalashnikov's conclusory allegations were unsupported by admissible evidence, and thus properly dismissed on that basis. Workman, 144 Idaho at 522, 164 P.3d at 802; Ridgley, 148 Idaho at 675, 227 P.3d at 929.

2. Kalashnikov's Allegations Invoking Federal Rules, Challenging Subject-Matter Jurisdiction, And Claiming Failure To Indict By Grand Jury Were Legally Unsupported

As the district court correctly observed, many of the legal authorities cited by Kalashnikov were inapplicable to his case. (R., pp. 38.) For example, Kalashnikov asserted violations of federal criminal rules which were inapplicable in this state-court matter. (See R., p. 31.) As to the alleged violation of F.R.C.P. 29, the district court recognized that a corresponding Idaho rule exists. (R., p. 38.) However, I.C.R. 29 – allowing a motion to acquit – was inapplicable because Kalashnikov pleaded guilty. (I.C.R. 29; see R., p. 38.) Also, Kalashnikov asserted he was denied the right to indictment by grand jury. (R., pp. 9, 31.) However, the state properly prosecuted him by information under I.C.

§ 19-901 and Idaho Const. art. I § 8. (See R., p. 29 n.1.) Thus, trial counsel was not deficient in failing to inform him about a right to indictment by grand jury. (R., pp. 9, 29 n.1.)

Kalashnikov's claim the district court lacked subject-matter jurisdiction similarly fails. (R., p. 31.) "Subject matter jurisdiction in a criminal case is conferred by the filing of an 'information, indictment, or complaint alleging an offense was committed within the State of Idaho.'" State v. Quintero, 141 Idaho 619, 621, 115 P.3d 710, 712 (2005) (citing State v. Jones, 140 Idaho 755, 757-58, 101 P.3d 699, 701-02 (2004) (other citation omitted).) As the district court noted, Kalashnikov was charged by information, as provided under Idaho law. (R., p. 29 n.1.) Kalashnikov's assertion that the information was "illegal and void" lacked any factual support. Accordingly, Kalashnikov's challenge to the court's subject-matter jurisdiction was properly dismissed.

3. Kalashnikov Failed To Provide Factual Support For His Claims Of Ineffective Assistance By Trial Counsel Or Actual Innocence

To establish an ineffective assistance of counsel claim, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to deficient performance, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (citations and quotations omitted). To establish prejudice, a petitioner must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Id. "It is

not enough to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. Rather, “[c]ounsel’s errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id.

Kalashnikov failed to allege facts sufficient to support either prong of his ineffective assistance of counsel claims. In his motion to amend the petition, Kalashnikov alleged, “counsel was ineffective by suggesting petitioner plea [sic] guilty, when petitioner insisted that he was not guilty of charge.” (R., p. 31 (formatting regularized).) Without any other factual allegations, Kalashnikov concluded, “therefore plea was coerced.” (Id.) A counsel’s suggestion of a strategic option available to his client does not establish deficient performance, nor does it demonstrate coercion. See Dunlap v. State, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004) (concluding “no evidence of fraud, duress, deceit or coercion” where there was no evidence or allegation that defendant was “forced to accept the State’s offer,” or that “threats were made to him”). Indeed, Kalashnikov provided no factual basis for the conclusion his plea was coerced. (See R., pp. 3-9, 31-32.)

Kalashnikov’s claim that he “is innocent of charge” fails for the same reasons. (R., p. 31.) Having failed to explain why he pleaded guilty or how counsel coerced him into pleading guilty, Kalashnikov has provided no evidentiary basis that he did not commit the crime to which he pleaded guilty. Given the dearth of factual support for his claims, the district court properly dismissed Kalashnikov’s post-conviction petition.

D. Kalashnikov Is Precluded From Asserting New Claims On Appeal

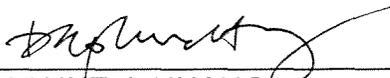
Kalashnikov's appellate brief asserts (1) challenges to the state's alleged failure to provide pre-trial discovery; (2) challenges to the magistrate court's authority and finding of probable cause to bind Kalashnikov over to district court; and (3) ineffective assistance by trial counsel (failure to file suppression motion, failure to request allegedly missing discovery, and failure to challenge validity of plea upon alleged request). (See Appellant's brief.) None of these arguments were identified or addressed in Kalashnikov's pleadings in support of his petition for post-conviction relief, thus none were addressed by the district court in the decision appealed here.

The appellate courts will not consider issues raised for the first time on appeal. Dunlap, 141 Idaho at 58, 106 P.3d at 384. Accordingly, the Court need not address these claims.

CONCLUSION

For the foregoing reasons, the state respectfully requests that this Court affirm the district court's order dismissing Kalashnikov's petition for post-conviction relief.

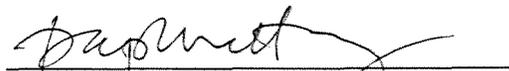
DATED this 1st day of April, 2014.

  
\_\_\_\_\_  
DAPHNE J. HUANG  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of April, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

SERGEY KALASHNIKOV  
IDOC No. 86303  
PO Box 70010  
Boise, ID 83707

  
\_\_\_\_\_  
DAPHNE J. HUANG  
Deputy Attorney General

DJH/pm