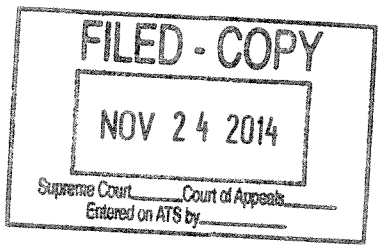
11-24-2014

Clapp v. State Appellant's Brief Dckt. 42258

IN THE SUPREME COURT OF THE STATE OF IDAHO

TYLER SHAWN CLAPP, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 42258 Ada Co. No. CV-PC-2013-15226



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE MIKE WETHERELL,
District Judge

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A. *Nature of the Case*

This is an appeal from the summary dismissal of Appellant Tyler Clapp's petition for post-conviction relief. The order of summary dismissal should be reversed in part because the court dismissed all of the fifth cause of action and part of the first cause of action on grounds not raised by the state in its motion for summary disposition without giving Mr. Clapp any prior notice of its intent to dismiss on those bases. Further, the fifth cause of action is clearly meritorious.

B. *Procedural History and Statement of Facts*

Mr. Clapp filed a *pro se* petition for post conviction relief challenging the district court's decision to revoke probation and impose a slightly reduced sentence. R 4. He attached transcripts from the probation revocation proceedings to the petition. R 16; 20-33. He attached an affidavit from his father, Christopher Clapp, as well as documents from the underlying criminal case and some medical records. R 18; 34-37. And he also filed his own Affidavit of Facts in Support of Post Conviction Relief. R 45-46.

The respondent answered the petition and later moved for summary disposition. R 48; 65. Attached to the respondent's brief in support of its motion was a copy of the judgment in the underlying criminal case (R 109), a copy of the Statement of Defendant's Rights in Felony Case (R 112), and a copy of the probation violation report (R 76-80). The respondent also attached a copy of the transcript from the October 20, 2011, probation violation hearing (R 93-106) and the November 10, 2011, probation violation dispositional hearing in the underlying criminal case. R 81-90. Finally, the respondent attached a copy of the unpublished Court of Appeals opinion from

the direct appeal. R 107-108.

Mr. Clapp moved for the appointment of counsel (R 116), but also filed a timely response to the respondent's motion to dismiss. R 124 (Styled as a "Motion to Dismiss State's Motion for Summary Disposition"). Attached to that pleading was a copy of the SAPD brief from the sentencing appeal in his case. R 134-139. The Court appointed counsel and stayed proceedings for 30 days "to enable appointed counsel to familiarize him/herself with the case and to prepare any amended petition or amended briefs as appropriate." R 146. Counsel filed an Amended Petition. R 200.

The Amended Petition alleged five causes of action which are set forth in the left column in the table below. Relevant to this appeal, Mr. Clapp argued that his trial counsel was ineffective for not seeking a mental health examination and for not providing mental health records to the court before the dispositional hearing. R 201. He also argued that appellate counsel was ineffective for failing to argue that the court violated Mr. Clapp's due process rights by considering unreliable evidence at the dispositional hearing. R 205.

The respondent filed an Answer generally denying each of the five causes of action. R 220. It then filed a Motion for Summary Disposition and a Brief in Support. R 225-226. It argued that the five causes of action should be summarily dismissed as set forth in the middle column in the table below. The Respondent also attached the report of probation violation and the transcripts of the probation violation proceedings as Exhibits A-C to its brief. R 237-252 (transcript of admit/deny hearing); 253-257 (probation violation report); 254-267 (transcript of dispositional hearing).

In response, Mr. Clapp argued that trial counsel improperly advised him to proceed to

disposition without a new mental health examination and that the reports from Nampa Medical Center, which were available to counsel, but not presented to the Court, showed the need for an updated evaluation. R 268-269. And he argued that his due process rights were violated when the court relied upon unreliable hearsay statements, *i.e.*, the disputed probation violation allegation that he had been driving, which was dismissed by the state, and that his appellate attorney was ineffective for failing to raise that issue on appeal. 270-271.

The court granted the respondent's motion without holding a hearing. R 274. It dismissed the first and fifth causes of action for the reasons shown in the right column in the table below.

AMENDED PETITION	MOTION FOR SUMMARY DISPOSITION	COURT'S RULING
1. Trial counsel was ineffective for "fail[ing] to properly investigate and obtain evidence in mitigation of the crime; to wit: mental health treatment records from Nampa Medical, and an updated mental health evaluation that complied with the requirements of Idaho Code 19-2524." R 201.	1. This ineffective assistance of trial counsel should be dismissed because "the Defendant had a Mental Health Evaluation performed a year earlier. . . . The Defendant acknowledged this and states that use of the prior Mental Health Evaluation was appropriate." R 230.	1. Trial counsel was not ineffective for failing to obtain an updated mental health evaluation because both trial counsel and Mr. Clapp told the court one was not necessary. In addition, Mr. Clapp informed the court that he had been suffering from depression and that he had been treated for it. Therefore, the court had the information which the Nampa Medical records showed at the time of sentencing. R 280.

5. Ineffective assistance of appellate counsel for failing to raise a challenge to the district court's use of unreliable hearsay that he was driving at the probation violation dispositional hearing. R 205.	5. This claim should also be dismissed because there is no right to confrontation at probation dispositional hearings. R 233.	5. Appellate counsel was not ineffective for failing to raise a due process challenge to the allegation that Mr. Clapp was driving because it was supported by substantial evidence and the Court found it to be credible. Furthermore, there was sufficient unchallenged evidence in the record to justify revocation of probation without the disputed evidence. R 284.

A Final Judgment was filed and this appeal timely follows. R 288; 290.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in dismissing the portion of Mr. Clapp's first cause of action, *i.e.*, that counsel was ineffective for not providing mental health records to the court, on a basis which was not raised in the state's motion for summary disposition without giving Mr. Clapp twenty-days notice of its intent to dismiss on that basis?

2. Did the district court also err by dismissing Mr. Clapp's fifth cause of action on an alternative basis which was not raised in the state's motion for summary disposition without giving Mr. Clapp twenty-days notice of its intent to dismiss on that basis?

3. Did the district court err in dismissing Mr. Clapp's fifth cause of action because the allegation that Mr. Clapp had been driving was not supported by sufficiently reliable evidence and thus should have been challenged on appeal?

IV. ARGUMENT

A. *The District Court Erred by Dismissing a Portion of Mr. Clapp's First Cause of Action on a Basis not Raised in the State's Motion for Summary Disposition Without First Giving Him Twenty-Days Notice of its Intent to Dismiss on That Basis*

1. Facts Pertaining to Argument

On October 20, 2011, Mr. Clapp admitted two probation violations. First, that on July 27, 2011, he admitted that he drank beer on five or six occasions while on probation. Second, he admitted that he was intoxicated when he turned himself into the Ada County Jail on August 5, 2011, for three days of discretionary jail time for that previous violation. R 242 (T pg. 5, ln. 7-13).[1]

Defense counsel told the court that a new mental health assessment would not be needed because one had been completed about a year earlier. R 242 (T pg. 6, ln. 2-14). The court also questioned Mr. Clapp about the need for an updated mental health evaluation:

> Q. Do you understand in this case those evaluations were performed slightly more than a year ago and that you have agreed that there's no need to update those evaluations?
>
> A. Yes, sir, I understand.
>
> Q. I know that you had to consult with Mr. Geddes with regard to that. I'm not wanting to make any inquiry into what conversations you had. But do you have any reservations you want to express to me about that?
>
> A. My drinking is -- I don't drink as much as I did when the evaluation was taken, and I'm now on medication. Those two issues I would think would [not[2]] reflect

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[1] The transcripts from the probation revocation proceedings are included in the clerk's record in this case. Mr. Clapp cites to the page in the record where the transcript appears and also to the page and line numbers of the transcript.

[2] It is obvious from the context that Mr. Clapp is telling the court that the PSR would not accurately reflect the fact that he was now drinking less and was on medication. Mr. Clapp either

accurately in the older PSI. That's my only issue that I have with it.

Q. Who were you treating with? Terry Reilly?

A. Terry Reilly Clinic, Dr. Shane Vlcek.

Q. And is that over in –

A. That's here in Boise.

Q. If requested to do so, would you sign a waiver to obtain those treatment records so that we could have those in the presentence report, or you could provide them to your attorney so that he could supplement the record with those treatment records?

A. Yes, sir.

Q. All right. If you wish to do that, then, the court would have no objection to that information being provided to assist the court in sentencing. All right?

A. All right.

R 243-44 (T pg. 12, ln 15 - pg. 13, ln. 22).

However, trial counsel did not obtain the psychological records from the Terry Reilly Clinic. He did tell the court that Mr. Clapp "was struggling with unemployment and some significant mental health issues, which he has had for – on and off for awhile, mostly relating to depression. [¶] As we know, alcohol abuse certainly exacerbates depression." R 263 (T pg. 7, ln. 15-20). Counsel did note that Mr. Clapp "was working with a doctor to address his depression issues." R 263 (T pg. 8, ln. 18-20.) Along these lines, counsel argued that Mr. Clapp was "essentially homeless" for "a significant period of time" and "was really struggling" and concluded that Mr. Clapp's "life's circumstances . . . did build up against him did take a toll on

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misspoke or the transcript is incorrect. Mr. Clapp alleged in his affidavit in support of his *pro se* petition that he informed appellate counsel "in writing that there was an error in the transcripts with regard to the PSI." R 45.

his mental health. And when he really started to get depressed and looked at his situation . . . it was a pretty grim picture. And he admits that he had moments of weakness and began to drink." R 264 (T pg. 9, ln. 7-22).

Mr. Clapp told the court that he had relapsed with alcohol, but had "decided to go see a doctor at the Terry Reilly Clinic. After some tests and stuff, he prescribed fluoxetine, that I am still on in the jail. Being on my meds improved my overall daily mood and mostly solved my self-medicating with alcohol." R 265 (T pg. 13, ln. 13-18). He continued, "[a]nd I think my medicines have helped and finally gave me a fighting chance to stay sober. I significantly reduced my drinking from almost daily last year to a handful of relapses this year. [¶] And whenever I do get out, I am going to have my meds slightly increased and have no relapses. And I think that's the key to my sobriety[.]" R 265 (T pg. 14, ln. 1-8).

The court, without discussing Mr. Clapp's mental health issues other than to say that "I have got to think about more than just what's good for Tyler Clapp," reduced his sentence from ten years with three and one-half years fixed to ten years with three years fixed and imposed that sentence. R 265-66 (T pg. 15, ln. 7 - pg. 17, ln. 19).

As noted above, Mr. Clapp alleged in the first cause of action of his Amended Post-Conviction Petition that trial counsel was ineffective for his "failure to properly investigate and obtain evidence in mitigation of the crime; to wit: mental health treatment records from Nampa Medical, and an updated mental health evaluation that complied with the requirements of Idaho Code 19-2524." R 201.

The state argued that this claim should be dismissed because "the Defendant had a Mental Health Evaluation performed a year earlier. . . . The Defendant acknowledged this and states that

use of the prior Mental Health Evaluation was appropriate." R 230-1. The trial court dismissed the portion of the claim dealing with failure to request an updated mental health evaluation as follows: "Trial counsel was not ineffective for failing to obtain an updated mental health evaluation because both trial counsel and Mr. Clapp told the court one was not necessary. R 280. However, it went on to dismiss the portion of the claim relating to the failure to obtain medical records on a basis not argued by the state in its motion: "In addition, Mr. Clapp informed the court that he had been suffering from depression and that he had been treated for it. Therefore, the court had the information which the Nampa Medical records showed at the time of sentencing." R 280.

2. Why Relief Should be Granted

Here, the district court's reason for dismissing the claim that trial counsel should have obtained Mr. Clapp's medical records for consideration by the court was not raised in the state's motion. Therefore, the dismissal of that part of the first cause of action was *sua sponte* and without proper notice.

The applicable law is set out in *Buss v. State,* 147 Idaho 514, 211 P.3d 123 (Ct. App. 2009):

> Pursuant to I.C. § 19-4906(b), the district court may *sua sponte* dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Saykhamchone v. State,* 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The reason that subsection (b), but not section (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Id.* Idaho Rules of Civil Procedure 7(b)(1) requires that the grounds of a motion be stated with 'particularity.' *See DeRushé v. State,*

> 146 Idaho 599, 200 P.3d 1148 (2009) (reiterating the requirement of reasonable particularity in post-conviction cases.) If the state's motion fails to give such notice of the grounds for dismissal, the court may grant summary dismissal only if the court first gives the applicant the requisite twenty-day notice of intent to dismiss and the ground therefore pursuant to I.C. § 19-4906(b). *See Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798. Similarly, where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide the twenty-day notice.

147 Idaho at 517, 211 P.3d at 126 (footnotes omitted). *See also, Kelly v. State,* 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) ("Thus, where a trial court dismisses a claim based upon grounds other than those offered – by the State's motion for summary dismissal, and accompanying memoranda -- the defendant seeking post-conviction relief must be provided with a 20-day notice period."); *see also Baxter v. State*, 149 Idaho 859, 865, 243 P.3d 675, 681 (Ct. App. 2010) (Noting that if the court dismisses on grounds not presented in the state's motion, the petitioner has no opportunity to respond and attempt to establish a material issue of fact.).

Although Mr. Clapp is not required to show he was prejudiced by the court's lack of notice, it is worth noting that he attached reports from the Nampa Medical Clinic to his *pro se* post-conviction petition. The document confirmed that he had been prescribed fluoxetine for depression. Further, the medical report noted that Mr. Clapp's scoring on the PHQ-9 "suggests major depression."[3] It went on to note that his "[t]otal score is 15. Warrants treatment for depression, using antidepressant, psychotherapy and/or a combination of treatment. Scoring suggests patient's functionality is impaired." R 43. This document confirms what trial counsel and Mr. Clapp told the court at the dispositional hearing but also goes further because it

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[3] Major depression is included in the Idaho Department of Health and Welfare's definition of "Serious Mental Illness." IDAPA 16.07.33.15(d).

describes the severity of Mr. Clapp's depression, suggests the lost of functionality in his day-to-day life which helps to explain his relapse, and sets forth a recommended treatment plan.

This Court should vacate that portion of the order of dismissal and remand for further proceedings.

B. ***The District Court Erred by Dismissing Mr. Clapp's Fifth Cause of Action on a Basis not Raised in the State's Motion for Summary Disposition Without First Giving Him Twenty-Days Notice of its Intent to Dismiss on That Basis***

1. Facts Pertaining to Argument

Mr. Clapp's fifth cause of action was that appellate counsel was ineffective for failing to raise a challenge to the district court's use of unreliable hearsay at the probation violation dispositional hearing. R 205. The state moved for summary disposition arguing that the claim should be dismissed because there is no right to confrontation at probation dispositional hearings. R 233. The court dismissed the claim for two reasons: 1) appellate counsel was not ineffective for failing to raise a due process challenge to the allegation that Mr. Clapp was driving in violation of probation because it was supported by substantial evidence and the Court found it to be credible; 2) there was sufficient unchallenged evidence in the record to justify revocation of probation without the disputed evidence. R 284.

2. Why Relief Should be Granted

The district court's reasons for dismissing the claim that appellate counsel was ineffective were not raised in the state's motion. Therefore, the dismissal of the first cause of action was in part *sua sponte* but the court failed to give Mr. Clapp the twenty days notice required under I.C. § 19-4906(b). Therefore, the dismissal of this claim should be reversed under *Buss v. State, supra.* However, if this Court does not reverse for lack of notice, it should reverse because the court's

basis for dismissal is in error.

C. *In the Alternative, the District Court Also Erred in Dismissing Mr. Clapp's Fifth Cause of Action on the Merits of the Claim. Mr. Clapp Presented a Prima Facie Case That Appellate Counsel was Ineffective for Failing to Raise the Claim That the Evidence That Mr. Clapp was Driving was not Sufficiently Reliable to be Considered*

1. Facts Pertaining to Argument

A Probation Violation Report was filed on August 11, 2011. The Report, written by probation officer Darla Maqueda, alleged seven terms of probation had been violated. The two terms relevant here are that Mr. Clapp had been drinking, which he admitted to at the probation violation hearing, and the allegation that Mr. Clapp had been driving, which he denied. R 77-78. Specifically, the report alleged that:

> On July 27, 2011, the defendant admitted to driving his dad's truck knowing that he does not have a valid license. He reported the last time he drove was on July 13, 2011. When asked on other specific dates he has been driving, he could not recall, but stated it has been a lot.

R 77. Mr. Clapp admitted to violating his probation by drinking and the state dismissed the other allegations. The agreement allowed the state to argue about all the allegations at the dispositional hearing. R 96 (T pg. 5, ln. 7-16; pg 6, ln. 21-25). After the admission to the probation violation, Mr. Clapp asked the court to set bond pending disposition. The state opposed the granting of bond arguing, in part, that Mr. Clapp's admitted use of alcohol combined with the information that "[t]he defendant has admitted to his probation officer that he has driven on many occasions" militated against the granting of bond. R 100 (T pg. 21, ln. 12 - pg. 22, ln. 7). Mr. Clapp's attorney responded:

> That in regards to those other allegations, my client denies them adamantly. I did speak to his father. His father seems to confirm his position on there that that was a falsehood. [¶] Obviously, I don't know the answer to that question, but his

probation officer clearly thought he was driving or indicated that he admitted to driving, Tyler says that is not true.

R 100 (T pg. 22, ln. 10-18).

At the dispositional hearing, the state asked that the sentence should be imposed and argued:

> And in reviewing the probation officer's report of violation . . . he has admitted to her that he is driving again, last admitted driving on July 13th of 2011. In fact, he can't really recall the exact dates and times he has been drinking, but he has been driving his dad's truck a lot. So he's drinking; he is driving; and he is not taking advantage of the programming that this Court ordered him to do.
>
> . . . .
>
> Mr. Clapp continues to do what Mr. Clapp wants to do and that is to drink and that's to drive. And if he is going to do those two things, Your Honor, he is a danger to have in this community. And if he is a danger, he needs to have his sentence imposed.

R 86 (T pg. 5, ln. 19 - pg. 6, ln. 20). The Court agreed:

> Every time you get intoxicated, and in terms of probation violations here, you didn't make CAP aftercare, and then driving in your father's truck regularly. Now, it is only one small step to driving the truck regularly and driving the truck intoxicated. You weren't supposed to be driving a vehicle. And you are putting not only yourself at risk when you do that, you are putting the public at risk as well.
>
> And it would be bad enough that if you just go out there and you get drunk and you drive and kill yourself, but if you kill some innocent third party, that's about the worse outcome you can have.

R 88 (T pg. 15, ln. 23 - pg. 16, ln. 11).

Mr. Clapp filed a Notice of Appeal from the order revoking probation and imposing the amended sentence. Mr. Clapp alleged the following about his relationship with his appellate counsel:

> The Idaho State Appellate Defender in this case represented Petitioner on appeal in this case. The Petitioner informed appellate counsel that he wished to challenge the court's reliance upon evidence that Petitioner deemed unreliable in the Petitioner's Report of Violation, particularly the claim that he was "driving a lot" as reported by his probation officer. In addition to challenging the length of the sentence, Petitioner asked appellate counsel to challenge the sentence on due process grounds and for a challenge to the denial of his Rule 35 motion.
>
> Petitioner asserts that Appellate counsel advised him that he did not know too much about "due process" grounds for relief and failed to file any kind of an appeal except for an abuse of discretion.
>
> Petitioner contends that he has merit to his due process challenge under federal and state law. (*See State v. Martinez, 154 Idaho 940, 303 P.2d [sic] 627 (2013) for due process overview of guidelines pertaining to use of hearsay at sentencing).* Petitioner advised his attorney that he wished to pursue these claims, but his attorney did not provide effective assistance of counsel and waived these claims.

R 182 (italics in original).

And, in fact, appellate counsel did not raise a due process challenge to the court's use of the hearsay allegations that Mr. Clapp had been driving. According to this Court's Unpublished Opinion: "On appeal, Clapp does not challenge the district court's decision to revoke probation, but argues only that this sentence is excessive and that the district court should have further reduced Clapp's sentence upon revocation of probation." R 108.

As noted above, the court dismissed the ineffective assistance of appellate counsel cause of action because the allegation that Mr. Clapp had been driving was supported by substantial credible evidence and that there were other reasons in the record to justify the imposition of sentence. That determination was in error and cannot be used to justify the dismissal of the claim.

2. Why Relief Should be Granted

A defendant in a criminal case is guaranteed the effective assistance of counsel under the

Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v. California,* 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.* An ineffective assistance of appellate counsel claim is judged under the standards set forth in *Strickland. See e.g., Mintun v. State*, 144 Idaho 656, 658, 168 P.3d 40, 42 (Ct. App. 2007).

Here appellate counsel's performance was deficient for failing to raise the issue that the evidence relied upon by the court in imposing sentence was not sufficiently reliable because it was much stronger than the issue actually raised in the appeal. While a sentencing court may consider information that would not be admissible at trial there must be sufficient indicia of its reliability. "[A] defendant clearly has a due process right not to be sentenced on the basis of materially false incorrect information. Due process requires some minimal indicia of reliability."

United States v. Petty, 982 F.2d 1365, 1369 (9th Cir) *amended*, 992 F.2d 1015 (9th Cir. 1993), *cert denied* 510 U.S. 1040 (1994); *United States v. Jordan*, 256 F.3d 922, 931 (9th Cir. 2001). Similarly, this Court stated in *State v. Dunn*, 134 Idaho 165, 172, 997 P.2d 626, 633 (Ct. App. 2000), that "a defendant is denied due process when the sentencing judge relies upon information that is materially untrue or when a judge makes materially false assumptions of fact." 134 Idaho at 172, 997 P.2d at 633 citing *State v. Gawron*, 124 Idaho 625, 627, 852 P.2d 317, 319 (Ct. App. 1993).

The factual findings of a sentencing court will not be disturbed on appeal so long as they are supported by substantial evidence. *State v. Eddins*, 156 Idaho 645, 330 P.3d 391 (Ct. App. 2014); *State v. Straub*, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013). "Substantial evidence is such evidence as a reasonable mind might accept to support a conclusion." *Eddins, supra.* Here, there was not substantial evidence for the court to conclude that Mr. Clapp had driven his father's truck. Mr. Clapp refused to admit that probation violation allegation and, in fact, adamantly denied that he had done so. Trial counsel told the court that he had spoken to Mr. Clapp's father (the owner of the truck) and that he seemed to confirm Mr. Clapp's position.[4] The only thing before the court was the probation officer's report of violation which alleged Mr. Clapp admitted he had driven his father's truck, but Mr. Clapp denied making that statement too. Thus, a reasonable mind would not accept the insufficiently reliable hearsay allegations contained in that report as sufficient proof of the serious allegations contained therein.

Further, the court's error in considering that evidence was not harmless. The state argued

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[4] As part of the *pro se* petition, Mr. Clapp's father provided an affidavit which stated: "During the time my son lived with me for several years. I never let him use my truck for any reason[.] To my knowledge he never drove drunk." R 18.

that Mr. Clapp's sentence should be imposed because he was drinking and he was driving. R 86 (T pg. 5, ln. 19 - pg. 6, ln. 20) ("Mr. Clapp continues to do what Mr. Clapp wants to do and that is to drink and that's to drive. And if he is going to do those two things, Your Honor, he is a danger to have in this community. And if he is a danger, he needs to have his sentence imposed."). Further, the court's comments at the dispositional hearing demonstrate that the court was mainly concerned with the possibility that Mr. Clapp would drive after drinking and possibly hurt himself or others. R 88 (T pg. 15, ln. 23 - pg. 16, ln. 11) ("Now, it is only one small step to driving the truck regularly and driving the truck intoxicated. [¶] And it would be bad enough that if you just go out there and you get drunk and you drive and kill yourself, but if you kill some innocent third party, that's about the worse outcome you can have."). Finally, the court denied Mr. Clapp's Rule 35 motion reiterating the concern for public safety. R 37 ("Furthermore, Mr. Clapp has also shown that he is not a good candidate for supervision in the community – even while on probation for a drinking related offense, Mr. Clapp continued to drink and to drive.").

As demonstrated above, the due process issue is meritorious. Had it been raised on appeal, this Court would have vacated the order revoking probation and remanded for further proceedings because the court plainly relied upon the allegation as the primary basis for sending Mr. Clapp to prison. The failure to raise the issue on appeal was ineffective assistance of counsel under *Mintun v. State*, *supra*, and the court erred by summarily dismissing this claim.

V. CONCLUSION

For the reasons set forth above, Mr. Clapp respectfully requests that the order of summary disposition as to his first cause of action be reversed in part. He also respectfully requests that the order of summary disposition as to his fifth cause of action be reversed *in toto* and the matter

be remanded for further proceedings.

Respectfully submitted this 24th day of November, 2014.

Dennis Benjamin
Attorney for Tyler Clapp

CERTIFICATE OF SERVICE

I CERTIFY that on November 24, 2014, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin