

12-29-2010

# Zepeda v. State Clerk's Record Dckt. 38199

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LAW CLERK

IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

SUPREME COURT NO. 38199-2010  
DISTRICT COURT NO. CV 2010-79

JOSE LUIS ZEPEDA  
Plaintiff/Appellant

Vs.  
STATE OF IDAHO  
Defendant/Respondent

COPY

Appealed from the District Court of the Fifth Judicial District  
of the State of Idaho, in and for  
Minidoka County

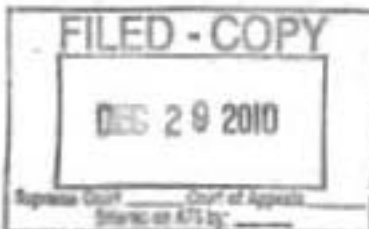
Honorable MICHAEL R. CRABTREE, District Judge

Lawrence Wasden, IDAHO ATTORNEY GENERAL, P. O.  
Box 83720, Boise, ID 83720-0010  
Attorney for Respondent State of Idaho

Molly Huskey, STATE APPELLATE PUBLIC DEFENDER,  
3647 Lake Harbor Ln. Boise, ID 83703  
Attorney for Appellant JOSE LUIS ZEPEDA

Filed this 26<sup>th</sup> day of November, 2010.

Duane Smith, Clerk  
Santos Garza, Deputy



38199

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

**Supreme Court Docket No.  
Minidoka County Case No.**

**38199-2010  
CV-2010-79**

JOSE LUIS ZEPEDA,  
Plaintiff/Appellant,  
vs.

STATE OF IDAHO,  
Defendant/Respondent.

---

Appealed from the district Court of the Fifth Judicial District  
of the State of Idaho  
in and for Minidoka County

**Honorable MICHAEL R. CRABTREE, District Judge**

Lawrence Wasden, IDAHO ATTORNEY GENERAL, P.O. Box 83720, Boise, ID. 83720

Attorney for Respondent, STATE OF IDAHO

Molly J. Huskey, IDAHO STATE PUBLIC DEFENDER,  
3647 Lake Harbor Ln. Boise, ID. 83703

Attorney for Appellant, JOSE LUIS ZEPEDA

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Jose Luis Zepeda Jr., Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
2/5/2010	NCPC	JANET	New Case Filed-Post Conviction Relief - Petition and affidavit for post-conviction relief	Michael R. Crabtree
		JANET	Filing: H10 - Post-conviction act proceedings Paid by: Zepeda, Jose Luis Jr. (subject) Receipt number: 0001083 Dated: 2/10/2010 Amount: \$.00 (Cash) For: Zepeda, Jose Luis Jr. (subject)	Michael R. Crabtree
	MOTN	JANET	Motion and affidavit in support for appointment of counsel	Michael R. Crabtree
	MOTN	JANET	Motion and affidavit for permission to proceed on partial payment of court fees (prisoner)	Michael R. Crabtree
2/10/2010	CHJG	JANET	Change Assigned Judge	Michael R. Crabtree
2/19/2010	ORPD	JANET	Plaintiff: Zepeda, Jose Luis Jr. Order Appointing Public Defender Court appointed Daniel S. Brown	Michael R. Crabtree
	ORDR	JANET	Order granting motion for appointment of counsel	Michael R. Crabtree
3/3/2010	ANSW	SANTOS	Answer to Petition for Post Conviction Relief	Michael R. Crabtree
3/4/2010	HRSC	JANET	Hearing Scheduled (Status Conference 03/29/2010 09:00 AM)	Michael R. Crabtree
	NOTC	JANET	Notice OF HEARING	Michael R. Crabtree
3/29/2010	HRVC	JANET	Hearing result for Status Conference held on 03/29/2010 09:00 AM: Hearing Vacated	Michael R. Crabtree
4/2/2010	HRSC	JANET	Hearing Scheduled (Motion 04/19/2010 09:00 AM) Motion for Status	Michael R. Crabtree
	NOTC	JANET	Notice of hearing	Michael R. Crabtree
4/5/2010	MOTN	SANTOS	Ex Parte Motion for Payment	Michael R. Crabtree
4/6/2010	MOTN	JANET	Motion for status conference	Michael R. Crabtree
	NOTC	JANET	Notice of hearing	Michael R. Crabtree
4/7/2010	ORDR	SANTOS	ExParte Order for Payment \$137.50	Michael R. Crabtree
4/13/2010	MOTN	SANTOS	ExParte Motion for Payment	Michael R. Crabtree
4/16/2010	ORDR	SANTOS	ExParte Order for Payment \$110.00	Michael R. Crabtree
4/19/2010	CMIN	JANET	Court Minutes Hearing type: Motion Hearing date: 4/19/2010 Time: 9:50 am Courtroom: District Courtroom-1 Court reporter: Minutes Clerk: Janet Sunderland Tape Number: Party: Jose Zepeda, Attorney: Daniel Brown Party: State of Idaho, Attorney: Lance Stevenson (10 minutes - printed)	Michael R. Crabtree
	MOTN	SANTOS	ExParte Motion for Payment	Michael R. Crabtree
	INHD	JANET	Hearing result for Motion held on 04/19/2010 09:00 AM: Interim Hearing Held Motion for Status	Michael R. Crabtree
4/23/2010	ORDR	SANTOS	ExParte Orderfor Payment \$110.00	Michael R. Crabtree

VI



## Jose Luis Zepeda Jr., Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
4/27/2010	MOTN	SANTOS	ExParte Motion for payment	Michael R. Crabtree
4/30/2010	ORDR	SANTOS	ExParte Order for Payment	Michael R. Crabtree
5/10/2010	MOTN	SANTOS	ExParte Motion for Payment	Michael R. Crabtree
5/14/2010	ORDR	SANTOS	Ex Parte Order for Payment \$165.00	Michael R. Crabtree
7/7/2010	MOTN	JANET	Motion for summary dismissal and brief in support	Michael R. Crabtree
7/12/2010	MOTN	JANET	Ex-Parte Motion for payment	Michael R. Crabtree
	ORDR	JANET	Scheduling Order regarding state's motion for summary dismissal	Michael R. Crabtree
7/15/2010	MISC	JANET	Objection	Michael R. Crabtree
7/16/2010	ORDR	JANET	Ex-Parte Order for payment (\$478.50)	Michael R. Crabtree
7/19/2010	MOTN	SANTOS	Ex-Parte Motion for Payment	Michael R. Crabtree
7/23/2010	ORDR	SANTOS	Ex Parte Order for Payment \$\$192.50	Michael R. Crabtree
8/6/2010	MOTN	JANET	Ex-Parte Motion for extension of time to file plaintiff's brief	Michael R. Crabtree
8/9/2010	MOTN	JANET	Amended Ex-Parte motion for extension of time to file plaintiff's brief	Michael R. Crabtree
8/10/2010	ORDR	JANET	Amended Ex-Parte Order re: extension of time to file plaintiff's brief (and extending time for respondent's brief)	Michael R. Crabtree
	MEMO	JANET	Memorandum in support of petitioner's objection to motion for summary dismissal	Michael R. Crabtree
8/11/2010	AFFD	JANET	Affidavit of Jose Luis Zepeda	Michael R. Crabtree
8/16/2010	MOTN	SANTOS	Ex Parte Motion for Payment	Michael R. Crabtree
8/19/2010	ORDR	SANTOS	Ex parte Order for Payment	Michael R. Crabtree
9/8/2010	ORDR	JANET	Memorandum Decision and Order granting State's Motion for summary dismissal	Michael R. Crabtree
9/20/2010	MOTN	SANTOS	Ex-Parte Motion for payment	Michael R. Crabtree
9/22/2010	MOTN	JANET	Motion for reconsiderations	Michael R. Crabtree
9/24/2010	MEMO	JANET	Petitioner's memorandum in support of motion for reconsideration	Michael R. Crabtree
9/27/2010	ORDR	SANTOS	Ex Parte Order for Payment	Michael R. Crabtree
9/29/2010	MOTN	SANTOS	Ex Parte Motion for Payment	Michael R. Crabtree
10/12/2010	ORDR	JANET	Order denying Petitioner's Motion for Reconsideration	Michael R. Crabtree
10/13/2010	ORDR	SANTOS	ExParte Order for payment \$247.50	Michael R. Crabtree
10/20/2010	APSC	JANET	Appealed To The Supreme Court - Notice of appeal	Michael R. Crabtree
10/21/2010	MOTN	JANET	ex-parte motion for appointment of state appellate public defender	Michael R. Crabtree
10/25/2010	MOTN	SANTOS	ExParte Motion for Payment	Michael R. Crabtree
	ORDR	SANTOS	ExParte Order for appointment of State Appellate Public Defender	Michael R. Crabtree

Date: 11/9/2010

Fifth Judicial District Court - Minidoka County

User: SANTOS

Time: 09:35 AM

ROA Report

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Case: CV-2010-0000079 Current Judge: Michael R. Crabtree

Jose Luis Zepeda Jr., Plaintiff vs State Of Idaho, Defendant

Jose Luis Zepeda Jr., Plaintiff vs State Of Idaho, Defendant

<u>Date</u>	<u>Code</u>	<u>User</u>		<u>Judge</u>
10/29/2010	ORDR	SANTOS	ExParte Order for Payment \$137.50	Michael R. Crabtree
11/4/2010	MISC	SANTOS	SC Document Clerk's Record Due Date Set	Michael R. Crabtree

Inmate Name JOSE Luis ZEPEDA JR  
IDOC No. 36287  
Address OWYHEE County Jail  
PO Box 128 MURPHY ID 83650

2010-11-05 PM 9:49  
DUNNE DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE Luis ZEPEDA JR )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
 )  
 )  
Respondent. )  
 )

Case No. CV-2010-71  
**PETITION AND AFFIDAVIT  
FOR POST CONVICTION  
RELIEF**

The Petitioner alleges:

1. Place of detention if in custody: OWYHEE County Jail
2. Name and location of the Court which imposed judgement/sentence: FIFTH DISTRICT COURT MINIDOKA COUNTY RUPERT ID 83350
3. The case number and the offense or offenses for which sentence was imposed:
  - (a) Case Number: CR-2009-2284
  - (b) Offense Convicted: POSSESSION of Stolen Property
4. The date upon which sentence was imposed and the terms of sentence:
  - a. Date of Sentence: 10-05-2009
  - b. Terms of Sentence: 3 + 5 FOR 8 YRS

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

Of guilty                       Of not guilty

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

Yes    No

If so, what was the Docket Number of the Appeal? 37093

7. State concisely all the grounds on which you base your application for post conviction relief: (Use additional sheets if necessary.)

(a) THERE EXISTS EVIDENCE OF MATERIAL FACTS NOT PREVIOUSLY PRESENTED. TO WIT A LETTER

(b) THE INEFFECTIVENESS OF COUNSEL.

(c) \_\_\_\_\_

8. Prior to this petition, have you filed with respect to this conviction:

a. Petitions in State or Federal Court for habeas corpus? NO

b. Any other petitions, motions, or applications in any other court? YES

c. If you answered yes to a or b above, state the name and court in which each petition, motion or application was filed:

I FILED AN APPEAL TO THE SUPREME COURT

9. If your application is based upon the failure of counsel to adequately represent you, state concisely *and in detail* what counsel failed to do in representing your interests:

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

10. Are you seeking leave to proceed in forma pauperis, that is, requesting the proceeding be at county expense? (If your answer is "yes", you must fill out a Motion to Proceed in Forma Pauperis and supporting affidavit.)

Yes      [ ] No

11. Are you requesting the appointment of counsel to represent you in this case? (If your answer is "yes", you must fill out a Motion for the Appointment of Counsel and supporting affidavit, as well as a Motion to Proceed In Forma Pauperis and supporting affidavit.)

Yes      [ ] No

12. State specifically the relief you seek:

I AM ASKING FOR THE APPOINTMENT OF COUNSEL

9.  
(A) I ASKED the ATTORNEY to get Ahold of BRIAN CARD BECAUSE HE WOULD BE ABLE to HELP in my DEFENSE. But the ATTORNEY did not MAKE ANY ATTEMPTS AT getting Ahold of H.M.

(B) I ASKED Him to get A lie detector done on me HE SAID NO, I ASKED Him to take my CASE to trial, HE told me just to take A PLEA Bargain

(C) I ASKED the ATTORNEY to REMOVE Him SELF AS Counsel, HE WOULDNT do it. I ASKED to WITHDRAW my PLEA BECAUSE I still wanted to go to trial. HE SAID that I COULD not that But I found out that I. C. R 33 (C) STATES that I COULD HAVE WITHDRAWN my PLEA BEFORE Sentence WAS Imposed.

### Trust Fund Resident Activity

Resident Id	Personal Id	Last Name	First Name	Class	Unit	Building	Pod	Bed
12208	10498	ZEPEDA	JOSE	GP	Owyhee C...	Main		
<b>Beginning Balance</b>								
								\$0.00
Task No.	Date	Task	Check No.	Comment	Amount			
7074	10/30/2009 17:03:04	Intake			\$0.00			
7075	10/30/2009 17:03:04	ROA		Checks	\$44.00			
7076	10/30/2009 17:54:57	ROA		Reversed Task No. 7075	(\$44.00)			
7079	10/30/2009 18:08:09	Release Disbursement - R...			\$0.00			
7080	10/30/2009 18:09:11	Intake			\$0.00			
7310	11/20/2009 15:34:03	ROA		Money Order	\$20.00			
7314	11/20/2009 18:22:51	Automated Payment		Phone Sales	(\$5.00)			
7351	11/23/2009 03:03:15	Sale			(\$3.86)			
7384	11/25/2009 11:02:47	Automated Payment		Phone Sales	(\$5.00)			
7446	12/2/2009 15:39:16	Automated Payment		Phone Sales	(\$6.00)			
7470	12/6/2009 16:26:20	ROA		Cash Money Only	\$10.00			
7483	12/7/2009 04:12:37	Sale			(\$1.44)			
7510	12/8/2009 21:56:16	Automated Payment		Phone Sales	(\$4.00)			
7518	12/10/2009 00:05:40	Automated Payment		Phone Sales	(\$4.70)			
7796	1/6/2010 15:09:49	ROA		Money Order	\$10.00			
7800	1/6/2010 17:44:21	Automated Payment		Phone Sales	(\$5.00)			
7815	1/8/2010 17:07:44	Automated Payment		Phone Sales	(\$5.00)			
<b>Ending Balance</b>								
								\$0.00

13. This Petition may be accompanied by affidavits in support of the petition. (Forms for this are available.)

DATED this 1 day of February, 2010.

Jose L Zepeda Jr  
Petitioner

STATE OF IDAHO )  
 ) ss  
County of MINIDOKA )

JOSE LUIS ZEPEDA JR being sworn, deposes and says that the party is the Petitioner in the above-entitled appeal and that all statements in this PETITION FOR POST CONVICTION RELIEF are true and correct to the best of his or her knowledge and belief.

Jose L Zepeda Jr  
Petitioner

SUBSCRIBED AND SWORN and AFFIRMED to before me this 1<sup>st</sup> day of February, 2010.

(SEAL)

Beverly L White  
Notary Public for Idaho  
Commission expires: 2-4-2015

**NOTARY PUBLIC**  
Beverly L. White  
STATE OF IDAHO



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 1<sup>st</sup> day of FEBRUARY, 20 10, I mailed a copy of this PETITION FOR POST CONVICTION RELIEF for the purposes of filing with the court and of mailing a true and correct copy via prison mail system to the U.S. mail system to:

MINNIDOKA County Prosecuting Attorney  
LANCE STEVENSON PO Box 368  
RUPERT ID 83350

Joe L. Zepeda Jr.  
Petitioner

AFFIDAVIT OF FACTS IN SUPPORT OF POST-CONVICTION PETITION

STATE OF IDAHO )  
 ) ss  
COUNTY OF MINIDOKA )

JOSE LUIS ZEPEDA JR, being first duly sworn on oath, deposes and says:

THERE EXISTS EVIDENCE OF MATERIAL FACTS NOT PREVIOUSLY PRESENTED.  
A LETTER THAT WOULD HAVE HELPED IN MY DEFENSE HAD THE ATTORNEY INVESTIGATED  
LIKE I ASKED HIM. I ALSO STATE THAT I BELIEVE THE ATTORNEY WAS INEFFECTIVE  
AS COUNSEL TO THE FACT THAT I ASKED TO DO A FEW THINGS SUCH AS GETTING  
A HOLD OF BRIAN CARD, GETTING ALIEN DETECTOR DONE FOR ME. HE SAID NO BOTH  
WOULD HAVE HELPED MY DEFENSE I ASKED HIM TO WITHDRAW MY PLEA  
BECAUSE I WANTED TO GO TO TRIAL HE SAID I WAS NOT ALLOWED TO  
WITHDRAW BUT I.C.R 33(C) CLEARLY STATES THAT I COULD IN FACT  
HAVE WITHDRAWN MY PLEA BEFORE THE SENTENCE WAS IMPOSED SO IT  
CLEARLY SHOWS THAT THE ATTORNEY WAS INEFFECTIVE AS COUNSEL, HE  
ALSO FAILED TO CONDUCT ADEQUATE PRE-TRIAL INVESTIGATION, HE FAILED  
TO DEVELOP ADVERSARIAL OR FIGHTING ATTITUDE, HE ALSO FAILED TO  
ATTEMPT TO DEVELOP EFFECTIVE REPORT WITH CLIENT, AND WHERE I  
ENTERED A PLEA OF GUILTY BUT CONDITIONED SUCH A PLEA WITH A  
STATEMENT TO THE EFFECT THAT I DID NOT ADMIT THE FACTS OF THE  
CHARGE AND PRIOR TO SENTENCING I MOVED TO WITHDRAW  
THE PLEA AND ACCORDING TO THE ATTORNEY THE COURT WOULD NOT  
GRANT SUCH A MOTION. SO I PRAY AND RESPECTFULLY

ASK THE COURT TO GRANT RELIEF IN THIS CASE.  
THANK YOU.

Further your affiant sayeth not.

Gore L. Zepeda Jr.  
Signature of Affiant

SUBSCRIBED AND SWORN AND AFFIRMED TO before me this 1<sup>st</sup> day of  
February, 2010

**NOTARY PUBLIC**  
Beverly L. White  
STATE OF IDAHO

Beverly L. White  
Notary Public for Idaho  
My Commission Expires: 2-4-2015

THAT there exists evidence of material facts not previously presented in this case. To wit a letter that would have helped in my defense, had the attorney investigated like I asked him, I also state that I believe that the attorney was ineffective as counsel due to the fact that I had asked him to do a few things such as getting a hold of Brian Card who would and could have helped my defense. I asked him to get a lie detector test done for me he said no, I asked to go to trial he said no, I also asked him to withdraw my plea because I felt better going to trial he said that I was not allowed to withdraw. BUT I.C.R 33 (c) clearly states that I could in fact have withdrawn my plea before the sentence was imposed so it clearly shows that the attorney was ineffective as counsel, he also failed to attempt to develop effective rapport with client, he failed to conduct adequate pre-trial investigation he failed to develop adversarial or fighting attitude. And where I entered a plea of guilty but conditioned such a plea with a statement to the effect that I did not admit the facts of the charge and prior to sentencing I moved to withdraw the plea and according to the attorney the court would not grant such a motion, so I pray and respectfully ask the court to grant relief. THANK YOU

FILED  
CASE

2010 FEB -5 PM 3:49

BUNKE DEPUTY

JOSE LUIS ZEPEDA JR  
Full Name of Party Filing This Document

OWYHEE County Jail PO Box 128  
Mailing Address (Street or Post Office Box)

MURPHY ID 83650  
City, State and Zip Code

Telephone Number

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

Case No.: CV-2010-79

MOTION AND AFFIDAVIT FOR  
PERMISSION TO PROCEED ON PARTIAL  
PAYMENT OF COURT FEES (PRISONER)

\_\_\_\_\_  
Plaintiff,  
  
vs.  
  
JOSE LUIS ZEPEDA JR  
\_\_\_\_\_  
Defendant.

**IMPORTANT NOTICE:** Idaho Code § 31-3220A requires that you serve upon counsel for the county sheriff, the department of correction or the private correctional facility, whichever may apply, a copy of this motion and affidavit and any other documents filed in connection with this request. You must file proof of such service with the court when you file this document.

STATE OF IDAHO )  
 ) ss.  
County of MINIDOKA )

[ ] Plaintiff [X] Defendant asks to start or defend this case on partial payment of court fees, and swears under oath

1. This is an action for (type of case) POST Conviction Relief. I believe I'm entitled to get what I am asking for.

2. [ ] I have not previously brought this claim against the same party or a claim based on the same operative facts in any state or federal court. [ ] I have filed this claim against the same party or a claim based on the same operative facts in a state or federal court.

3. I am unable to pay all the court costs now. I have attached to this affidavit a current statement of my inmate account, certified by a custodian of inmate accounts, that reflects the activity of the account over my period of incarceration or for the last twelve (12) months, whichever is less.

4. I understand I will be required to pay an initial partial filing fee in the amount of 20% of the greater of: (a) the average monthly deposits to my inmate account or (b) the average monthly balance in my inmate account for the last six (6) months. I also understand that I must pay the remainder of the filing fee by making monthly payments of 20% of the preceding month's income in my inmate account until the fee is paid in full.

5. I verify that the statements made in this affidavit are true. I understand that a false statement in this affidavit is perjury and I could be sent to prison for an additional fourteen (14) years.

**Do not leave any items blank.** If any item does not apply, write "N/A". Attach additional pages if more space is needed for any response.

**IDENTIFICATION AND RESIDENCE:**

Name: JOSE Luis ZEPEDA JR Other name(s) I have used: \_\_\_\_\_

Address: OWYHEE County Jail PO Box 128 MURPHY ID 83650

How long at that address? 4 months Phone: Ø

Date and place of birth: [REDACTED] NYSSA OREGON

**DEPENDENTS:**

I am  single [ ] married. If married, you must provide the following information:

Name of spouse: N/A

My other dependents (including minor children) are

**INCOME:**

Amount of my income: \$ 0 per [ ] week [ ] month

Other than my inmate account I have outside money from: \_\_\_\_\_

My spouse's income: \$ NIA per [ ] week [ ] month.

**ASSETS:**

List all real property (land and buildings) owned or being purchased by you.

Your Address	City	State	Legal Description	Value	Equity
			<u>NIA</u>		
			<u>NIA</u>		

List all other property owned by you and state its value.

Description (provide description for each item)	Value
Cash	<u>0</u>
Notes and Receivables	<u>NIA</u>
Vehicles:	<u>NIA</u>
Bank/Credit Union/Savings/Checking Accounts	<u>NIA</u>
Stocks/Bonds/Investments/Certificates of Deposit	<u>NIA</u>
Trust Funds	<u>NIA</u>
Retirement Accounts/IRAs/401(k)s	<u>NIA</u>
Cash Value Insurance	<u>NIA</u>
Motorcycles/Boats/RVs/Snowmobiles:	<u>NIA</u>
Furniture/Appliances	<u>NIA</u>
Jewelry/Antiques/Collectibles	<u>NIA</u>

**Description** (provide description for each item)

**Value**

TVs/Stereos/Computers/Electronics	N/A
Tools/Equipment	N/A
Sporting Goods/Guns	N/A
Horses/Livestock/Tack	N/A
Other (describe)	N/A

**EXPENSES:** List all of your monthly expenses.

**Expense**

**Average  
Monthly Payment**

Rent/House Payment	N/A
Vehicle Payment(s)	N/A
Credit Cards: (list each account number)	N/A
	N/A
Loans: (name of lender and reason for loan)	N/A
	N/A
Electricity/Natural Gas	N/A
Water/Sewer/Trash	N/A
Phone	N/A
Groceries	N/A
Clothing	N/A
Auto Fuel	N/A
Auto Maintenance	N/A
Cosmetics/Haircuts/Salons	N/A
Entertainment/Books/Magazines	N/A
Home Insurance	N/A



Expense	Average Monthly Payment
Auto Insurance	N/A
Life Insurance	N/A
Medical Insurance	N/A
Medical Expense	N/A
Other	Child Support - I Am currently behind \$22,000 due to being incarcerated at this time

**MISCELLANEOUS:**

How much can you borrow? \$ 0 From whom? N/A  
 When did you file your last income tax return? 2006 Amount of refund: \$ 0

**PERSONAL REFERENCES: (These persons must be able to verify information provided)**

Name	Address	Phone	Years Known
<u>Cristina ZEPEDA</u>	<u>943 N 200W R4PCT ID 83350</u>	<u>(208) 219-0308</u>	

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Typed or Printed Name

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of \_\_\_\_\_,  
20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public for Idaho  
Residing at \_\_\_\_\_  
My Commission expires \_\_\_\_\_

FILED  
CASE

2010 FEB -5 PM 3:49

DUMAS  
DEPUTY

Inmate name JOSE Luis ZEPEDA JR  
IDOC No. 36287  
Address OWYHEE County Jail  
Po Box 128 MURPHY ID 83650

Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE Luis ZEPEDA JR )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
 )  
 )  
Respondent. )  
 )

Case No. CV-2010-79

**MOTION AND AFFIDAVIT IN  
SUPPORT FOR  
APPOINTMENT OF  
COUNSEL**

COMES NOW, JOSE Luis ZEPEDA JR, Petitioner in the above  
entitled matter and moves this Honorable Court to grant Petitioner's Motion for Appointment of  
Counsel for the reasons more fully set forth herein and in the Affidavit in Support of Motion for  
Appointment of Counsel.

1. Petitioner is currently incarcerated within the Idaho Department of Corrections  
under the direct care, custody and control of Warden STEVE MENENDEZ  
of the OWYHEE County Jail.

2. The issues to be presented in this case may become to complex for the Petitioner  
to properly pursue. Petitioner lacks the knowledge and skill needed to represent him herself.

3. Petitioner Respondent required assistance completing these pleadings, as he she  
was unable to do it him herself.

MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL - 1  
Revised: 10-13-05

SCANNED

4. Other: \_\_\_\_\_

DATED this 1 day of February, 2010.

Jose L Zepeda Jr  
Petitioner

**AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL**

STATE OF IDAHO            )  
  ) ss  
County of MINIDOKA    )

JOSE LUIS ZEPEDA JR, after first being duly sworn upon his/her oath, deposes and says as follows:

1. I am the Affiant in the above-entitled case;
2. I am currently residing at the OWYHEE County Jail under the care, custody and control of Warden STEVE MENENDEZ;
3. I am indigent and do not have any funds to hire private counsel;
4. I am without bank accounts, stocks, bonds, real estate or any other form of real property;
5. I am unable to provide any other form of security;
6. I am untrained in the law;
7. If I am forced to proceed without counsel being appointed I will be unfairly handicapped in competing with trained and competent counsel of the State;

Further your affiant sayeth naught.

WHEREFORE, Petitioner respectfully prays that this Honorable Court issue its Order granting Petitioner's Motion for Appointment of Counsel to represent his/her interest, or in the alternative grant any such relief to which it may appear the Petitioner is entitled to.

DATED This 1 day of February, 20 10.

Jose Zepeda Jr.  
Petitioner

SUBSCRIBED AND SWORN AND AFFIRMED to before me this 1<sup>st</sup> day of February, 20 10.

(SEAL)

Beverly L. White  
Notary Public for Idaho  
Commission expires: 2-4-2015

**NOTARY PUBLIC**  
Beverly L. White  
STATE OF IDAHO

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 1<sup>st</sup> day of February, 2010, I mailed a copy of this MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL for the purposes of filing with the court and of mailing a true and correct copy via prison mail system for processing to the U.S. mail system to:

MINNIDOKA County Prosecuting Attorney  
LANCE Stevenson PO Box 368  
RUPERT ID 83350

Jose L Zapeda Jr.  
Petitioner

2010 FEB 19 PM 2:20

*[Signature]*  
CLERK  
DEPUTY

Inmate name JOSE LUIS ZEPEDA JR  
IDOC No. 36287  
Address OWYHEE County Jail  
PO Box 128 MURPHY ID 83650

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE LUIS ZEPEDA JR )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
 )  
Respondent. )

Case No. CV-2010-79

**ORDER GRANTING  
MOTION FOR  
APPOINTMENT  
OF COUNSEL**

IT IS HEARBY ORDERED that the Petitioner's Motion for Appointment of Counsel is granted and Daniel S. Brown (attorney's name), a duly licensed attorney in the State of Idaho, is hereby appointed to represent said defendant in all proceedings involving the post conviction petition.

DATED this 19<sup>th</sup> day of Feb., 2010.

*[Signature]*  
District Judge

ORIGINAL

FILED  
CASE #

2010 MAR -3 PM 4:33

DUPLICATE  
DEPUTY

**MINIDOKA COUNTY PROSECUTING ATTORNEY  
STATE OF IDAHO**

LANCE D. STEVENSON, *Prosecuting Attorney (ISB#7733)*  
MICHAEL P. TRIBE, *Deputy Prosecuting Attorney (ISB#6816)*  
ALAN GOODMAN, *Deputy Prosecuting Attorney (ISB#2778)*  
ROBERT S. HEMSLEY, *Deputy Prosecuting Attorney (ISB#7955)*  
715 G. Street, P. O. Box 368  
Rupert, ID 83350  
Office: (208)436-7187  
Facsimile: (208) 436-3177

ATTORNEYS FOR STATE OF IDAHO

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA  
DISTRICT COURT**

---

<b>JOSE LUIS ZEPEDA JR.,</b>	)	<b>Case No. CV-2010-0079</b>
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	<b>ANSWER TO PETITION</b>
	)	<b>FOR POST CONVICTION RELIEF</b>
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	

---

COMES NOW, the State of Idaho, by and through Michael P. Tribe, Minidoka County Prosecuting Attorney, and does hereby answer Petitioner's ("Jose Luis Zepeda Jr.") petition for post-conviction relief in the above-entitled action as follows:

**I.  
GENERAL RESPONSES TO JOSE LUIS ZEPEDA'S POST-CONVICTION  
ALLEGATIONS**

All allegations made by Jose Luis Zepeda are denied by Respondent unless specifically

ANSWER - 1

SCANNED

admitted herein.

**II.**  
**SPECIFIC ANSWERS TO JOSE LUIS ZEPEDA'S POST-CONVICTION**  
**ALLEGATIONS**

1. Answering paragraphs one (1), two (2), three (3) and (4) of page one (1) of the Petition for Post-Conviction Relief, Respondent admits the allegations contained therein.
2. Answering paragraphs five (5) and six (6) of page two (2) of the Petition for Post-Conviction Relief, Respondent admits the allegations contained therein.
3. Answering paragraph seven (7), of page two (2) Respondent denies the allegations contained therein.
  - a) Respondent denies that evidence of material facts exist that was not previously presented.
  - b) Respondent denies the claims of ineffective assistance of counsel.
4. Answering paragraph eight (8), Respondent admits the contents contained therein.
5. Answering paragraph nine (9), Respondent denies the contents contained therein including subparagraphs (A), (B) and (C) attached to the Petition.
6. Answering paragraphs ten (10), and eleven (11) and twelve (12), Respondent admits the allegations.
7. Answering paragraphs twelve (12) and thirteen (13), Respondent denies the allegations.



**FIRST AFFIRMATIVE DEFENSE**

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

**SECOND AFFIRMATIVE DEFENSE**

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

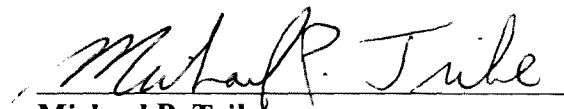
**THIRD AFFIRMATIVE DEFENSE**

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

WHEREFORE, Respondent prays for relief as follows:

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

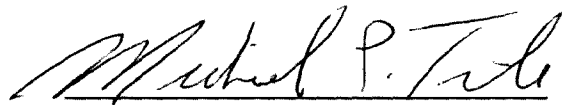
DATED this 3rd day of March 2010.

  
**Michael P. Tribe**  
**Minidoka County Prosecuting Attorney**

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of March 2010, I caused a true and correct copy of the foregoing ANSWER to be placed in the United States mail, postage prepaid, addressed to:

Jose Luis Zepeda Jr.  
IDOC # 36287  
Owyhee County Jail  
PO BOX 128 Murphy, ID 83650



**Michael P. Tribe**  
**Minidoka County Prosecuting Attorney**

**COURT MINUTES**

2010 APR 19 PM 3:43

*[Signature]*  
DUANE S. \_\_\_\_\_  
DEPUTY

**CV-2010-0000079**

**Jose Luis Zepeda Jr., Plaintiff vs State Of Idaho, Defendant**

**Hearing type: Motion**

**Hearing date: 4/19/2010**

**Time: 9:50 am**

**Judge: Michael R. Crabtree**

**Courtroom: District Courtroom-1**

**Court reporter: Maureen Newton**

**Minutes Clerk: Janet Sunderland**

**Party: Jose Zepeda, Attorney: Greg Fuller**

**Party: State of Idaho, Attorney: Lance Stevenson**

Petitioner is not present, is in custody of State

Court calls case, notes here on counsel's requested status

Mr. Fuller addresses Court, petition may be premature, cites considerations, particular case (criminal) is on direct appeal continues, reviews issues in petition, cites to State V Jackson continues, asks Court to set another status in this matter in 60-90 days to allow contact with appeal counsel and make decisions about issues, also try to get a hold of letter that was supposedly attached to petition continues comments.

Mr. Stevenson responds – will be doing a motion for summary judgment which feel entitled to do, notes does have an affidavit of facts and maybe that is the letter referring to, no objection.

Court comments, state is free to proceed as in any civil case, notes issues on appeal need to be clarified, if counsel wish to have status Court is happy to have one,

Mr. Fuller responds –

Court responds regarding basis for hearing, haven't scheduled for evidentiary hearing, will rely on State to proceed at this point, comments further, will not schedule for a hearing at this point in absence of motions – Case in recess @ 10:00 a.m.

CASE  
2010-7 AM 11:51  
DU [Signature] COUNTY

OFFICE OF THE PROSECUTING ATTORNEY  
MINIDOKA COUNTY, STATE OF IDAHO  
LANCE D. STEVENSON, Prosecuting Attorney (ISB#7733)  
ALAN GOODMAN, Deputy Prosecuting Attorney (ISB#2778)  
ROBERT S. HEMSLEY, Deputy Prosecuting Attorney (ISB#7955)  
MICHAEL P. TRIBE, Deputy Prosecuting Attorney (ISB#6816)  
715 G. Street, P. O. Box 368  
Rupert, ID 83350  
Office: (208)436-7187  
Facsimile: (208) 436-3177

ATTORNEYS FOR STATE OF IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE LUIS ZEPEDA JR,	)	CASE NO. CV- <del>2008-892</del> <sup>2010-79</sup>
	)	
Petitioner,	)	
	)	
vs.	)	MOTION FOR SUMMARY
	)	DISMISSAL AND BRIEF IN SUPPORT
	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

COMES NOW State of Idaho, Respondent, by and through Michael P. Tribe, Deputy Prosecuting Attorney for Minidoka County, and hereby moves the Court for Summary Dismissal dismissing the Petitioner's, Jose Luis Zepeda Jr., Post Conviction Relief Petition pursuant to Idaho Code § 19-4906(c) and submits the following brief in support of motion for summary dismissal.

## **I. FACTUAL AND PROCEDURAL HISTORY**

On July 27, 2009, petitioner pled guilty to grand theft by receiving/possessing stolen property in violation of Idaho Code § 18-2403(4). The District Court imposed a unified eight-year sentence, with a three-year determinate term and a subsequent indeterminate term of five-years. Petitioner then filed an appeal to the Supreme Court on October 26, 2009, which is currently pending.

Petitioner filed the current Petition and Affidavit for Post Conviction Relief on February 11, 2010. The petition alleged two grounds for post conviction relief. The first is the alleged existence “of evidence of material facts not previously presented. To wit a letter.” The second ground is a claim of “ineffectiveness of counsel.”

## **II. APPLICABLE LEGAL STANDARDS**

### **A. General Standards**

An application for post-conviction relief initiates a proceeding, which is civil in nature. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); Murray v. State, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App.1992). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. Like a

plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990).

The post-conviction 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 (Ct. App. 1994); Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 651 (Ct. App. 1982); Stone v. State, 108 Idaho 822, 824, 702 P.2d 860, 862 (Ct. App. 1985). The district court may take judicial notice of the record of the underlying criminal case. Hays v. State, 113 Idaho 736, 739, 745 P.2d 758, 761 (Ct. App. 1987), *aff'd* 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds* State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

B. Legal Standards Applicable To Summary Dismissal Under Idaho Code § 19-4906(c)

Idaho Code Section 19-4906(c) authorizes summary disposition of an application for post-conviction relief. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. State v. LePage, 138 Idaho 803, 806, 69 P.3d 1064, 1067 (Ct. App. 2003). I.C. § 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a genuine issue of material fact is presented, an evidentiary hearing must be conducted. Gonzales v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); Ramirez v. State, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

Conversely, the "application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." Goodwin v. State, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002) *review denied* (2003); LePage, 138 Idaho at 807, 69 P.3d at 1068 (citing Roman 125 Idaho at 647, 873 P.2d at 901). Follinus v. State, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995) (Follinus's claim that his attorney had been ineffective in failing to obtain a *Franks* hearing to contest the veracity of statements by the search warrant affiant was properly summarily dismissed where the court found that trial counsel did obtain, in effect, a *Franks* hearing at the suppression hearing); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985) (record of extradition proceedings disproved applicant's claim that he was denied right to counsel in those proceedings). Allegations are insufficient for the grant of relief when they do not justify relief as a matter of law. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Remington v. State, 127 Idaho 443, 446-47 901 P.2d 1344, 1347-48 (Ct. App. 1995); Dunlap v. State, 126 Idaho 901, 906, 894 P.2d 134, 139 (Ct. App. 1995) (police affidavit was sufficient to support issuance of search warrant, and defense

attorney therefore was not deficient in failing to move to suppress evidence on the ground that warrant was illegally issued).

Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Roman, 125 Idaho at 647, 873 P.2d at 901; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone, 108 Idaho at 826, 702 P.2d at 864. If a petitioner fails to present evidence establishing an essential element on which he bears the burden of proof, summary dismissal is appropriate. Mata v. State, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). Although the *Strickland v. Washington* standard has typically been applied to ineffective assistance of counsel occurring at trial or sentencing, its standard is equally applicable to ineffective assistance claims arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

**III. Petitioner's Claims Fail To Raise A Genuine  
Issue Of Material Fact And Do Not  
Entitle Him To Judgment As A Matter Of Law**

A. Legal Standards Applicable To Petitioner's Burden Of Making Out A Prima Facie Case of Evidence Not Previously Presented Or Newly Discovered Evidence.

Petitioner in his *Affidavit of Facts in Support of Post Conviction Petition* alleges that “[t]here exists evidence of material facts not previously presented. Specifically, “[a] letter that would have helped in my defense had the attorney investigated like I asked him.” *Affidavit of Facts in Support of Post Conviction Petition*, p. 1. The petitioner does not allege what was contained in the letter nor does he establish that the “evidence of material facts” would have had any impact of the outcome of his case.

The Uniform Post-Conviction Procedure Act provides relief from a conviction



where there exists evidence of material facts not previously presented and heard, and that requires vacation of the conviction or sentence in the interest of justice. Idaho Code § 19-4901(a)(4). The request for a new trial in a post-conviction proceeding based on newly discovered evidence is the same as a motion for new trial subsequent to a jury verdict. The test for determining whether a defendant is entitled to a new trial is set forth in State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976). The Drapeau court quoted from a treatise on the Federal Rules of Civil Procedure regarding the test for determining whether the defendant is entitled to a new trial.

Although defendants are tireless in seeking new trials on the ground of newly discovered evidence, motions on this ground are not favored by the courts and are viewed with great caution. No court wishes a defendant to remain in jail if he has discovered evidence showing that he is not guilty, but after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial. Accordingly rather exacting standards have been developed by the courts for motions of this kind. *A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant.* 2 C. Wright, Federal Practice and Procedure: Criminal s 557, at 515 (1969) (emphasis added).

This analysis by Professor Wright is consistent with the approach taken by this Court in the past to motions for new trials tendered by defendants in criminal proceedings on the ground of newly discovered evidence.

State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976). The grounds upon which a new trial may be granted are set out in I.C. § 19-2406.

When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:

...

7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

B. Discussion Regarding Petitioner's Claim Of Evidence Not Previously Presented or Newly Discovered Evidence.

Based on the current pleadings by the petitioner in this case and the above-cited legal authority, there is no showing of newly discovered evidence. Rather there is a claim of a letter that wasn't presented by the petitioner's attorney and such a claim is more properly assigned as a claim of ineffective assistance of counsel. There is no demonstration that the letter or that the evidence is material. Even if the letter should have been investigated or presented by petitioner's attorney, there is no allegation in the petition or the accompanying affidavit that the contents of the letter would have affected the outcome of the petitioner's case or that it will likely have produced an acquittal, especially in light of the fact that he entered a guilty plea. There is also no allegation that there was a failure to learn of the evidence due to no lack of diligence on the part of the petitioner or his attorney. Petitioner merely contends that his attorney failed to investigate the contents of the letter and such claim goes to ineffective assistance of counsel.

Therefore, petitioner's claim based on newly discovered should be denied and summary dismissal is appropriate on this claim.

C. Legal Standards Applicable To Petitioner's Burden Of Making Out A Prima Facie Case Of Ineffective Assistance Of Counsel

To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate both that (a) his counsel's performance fell below an objective standard of reasonableness and (b) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); LaBelle v. State, 130 Idaho 115, 118, 937 P.2d 427, 430 (Ct. App. 1997). "Because of the distorting effects of hindsight in reconstructing the circumstances of counsel's challenged conduct, there is a strong presumption that counsel's performance was within the wide range of reasonable professional assistance -- that is, 'sound trial strategy.'" Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989) (quoting Strickland, 466 U.S. at 689-90); Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). A petitioner must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" to establish that counsel's performance was "outside the wide range of professionally competent assistance." Claibourne v. Lewis, 64 F.3d 1373, 1377 (9th Cir.1995) (quoting, Strickland, 466 U.S. at 690).

Thus, the first element – deficient performance – “requires a showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The second element – prejudice – requires a showing that counsel's deficient performance actually had an adverse effect on his defense; i.e., but for counsel's deficient performance, there was a reasonable probability the outcome of the trial would have been

different. Strickland, 466 U.S. at 693; Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Regarding the second element, petitioner has the burden of showing that his trial counsels' deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

As explained in Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992), "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better."

D. Discussion Regarding Petitioner's Claim Of Ineffective Assistance Of Counsel

In his *Affidavit of Facts in Support of Post Conviction*, the petitioner has made the following claims against his attorney: 1) not getting a hold of Brian Card; 2) not setting up a lie detector test; 3) asking his attorney to withdraw his guilty plea which was not done; 4) conduct adequate pre-trial investigation; 5) failed to "develop adversarial or fighting attitude,"; and, 6) failed to developed "effective rapport with client."

None of the six (6) above-listed claims meet the Strickland test for ineffective assistance of counsel. There is no showing of deficient performance such that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. There are no facts presented establishing that the attorney's conduct fell below an objective standard of reasonableness. The burden of establishing deficient counsel is on that of the petitioner. Therefore, the petitioner's claim fails as to the first element of the ineffective assistance claim.

In addition, the second element of the Strickland test, prejudice, which requires a showing that counsel's deficient performance actually had an adverse effect on his defense, has not been established or even articulated by the petitioner. There is no explanation of why Brian Card is important or why the failure of a lie detector test prejudiced the petitioner. Claim number four (4) is vague and fails to articulate what more should have been done by counsel and claims five (5) and six (6) cannot provide grounds for relief even if true.

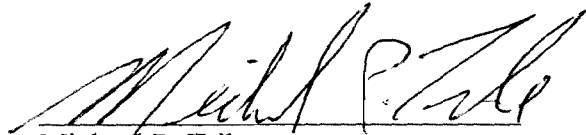
Claim three (3), failure of counsel to file a motion to withdraw a guilty plea when requested could provide a claim for ineffective assistance of counsel. However, motions to withdraw guilty pleas are seldom granted and the petitioner has not made a showing that it would have been successful or what his reason for requesting the motion was. Again, the burden is on the petitioner to establish an actual adverse effect on his case. At this juncture, it appears that he is simply inviting the District Court to second-guess his trial counsel's strategic decision without any facts that such decisions were made due to inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. Wiggins v. Smith, 539 U.S. 510, 533 (2003).

#### **IV. CONCLUSION**

Petitioner's claims regarding newly discovered evidence are bare and conclusory statements unsubstantiated by fact and should be dismissed. In addition, petitioner's ineffective assistance of counsel claim fails to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice. The State, therefore,

respectively requests that this Court grant the State's Motion for Summary Dismissal without hearing or oral argument.

DATED this 6th day of July 2010.

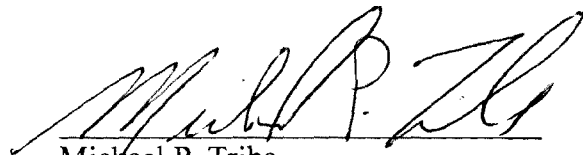
A handwritten signature in black ink, appearing to read "Michael P. Tribe", written over a horizontal line.

Michael P. Tribe  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 7 day of July 2010, I caused a true and correct copy of the foregoing MOTION FOR SUMMARY DISMISSAL to be placed in the United States mail, postage prepaid, addressed to:

Daniel S. Brown  
P.O. Box L  
Twin Falls, ID 83301



Michael P. Tribe  
Deputy Prosecuting Attorney

2010 JUL 12 PM 4:33

DUANE STUBBS  
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE LUIS ZEPEDA, JR.,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

Case No. CV-2010-79

SCHEDULING ORDER REGARDING  
STATE'S MOTION FOR SUMMARY DISMISSAL

On July 7, 2010, the State filed with the court a Motion for Summary Dismissal. The State did not request oral argument.

The Petitioner's pleadings in opposition to the State's motion are to be filed with the court no later than 5:00 p.m., August 6, 2010. The Petitioner must indicate whether oral argument on the motion is requested.

The State's Reply is to be filed with the court no later than 5:00 p.m., August 20, 2010.

Dated July 12<sup>th</sup>, 2010.



MICHAEL R. CRABTREE  
District Judge



CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 of July, 2010, I served a true, correct copy of the SCHEDULING ORDER REGARDING STATE'S MOTION FOR SUMMARY DISMISSAL upon the following in the manner provided:

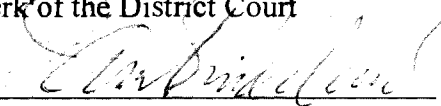
Minidoka County Prosecuting Attorney  
P. O. Box 368  
Rupert, ID 83350

EMAIL &  
 Hand Delivery - Basket  
 Facsimile

Daniel S. Brown  
P. O. Box L  
Twin Falls, ID 83303-0055

EMAIL & MAIL  
 Hand Delivery - Basket  
 Facsimile

  
Clerk of the District Court

By   
Deputy Clerk

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
Attorneys at Law  
P. O. Box L  
161 Main Avenue West  
Twin Falls, ID 83301  
Telephone: (208) 734-1602  
Facsimile: (208) 734-1606  
ISB #1442  
ISB #7538

Attorney for Plaintiff

FILED  
CASE

2010 JUL 15 PM 3:02

DUNN  
CLERK

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. CV-2010-0000079
Plaintiff,	)	
	)	
vs.	)	<u>OBJECTION</u>
	)	
STATE OF IDAHO,	)	
	)	
Defendant.	)	

\*\*\*\*\*

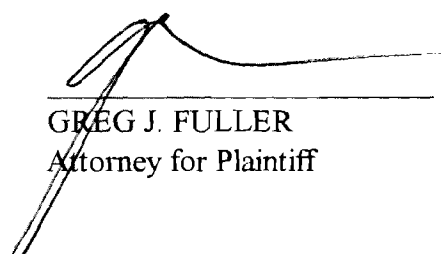
COMES NOW Plaintiff, Jose Luis Zepeda, Jr., by and through his attorneys of record,  
Fuller Law Offices, and hereby objects to Defendant's Motion for Summary Dismissal and

SCANNED  
40

Brief in Support, and will file a Brief in Support thereof within the next ten (10) days, i.e., on or before Friday, July 23, 2010.

DATED This 14<sup>th</sup> day of July, 2010.

FULLER LAW OFFICES



---

GREG J. FULLER  
Attorney for Plaintiff

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 14<sup>th</sup> day of July, 2010, a true and correct copy of the foregoing Objection was mailed, United States Mail, postage prepaid, to the following:

Lance Stevenson  
Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350



---

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
 Attorneys at Law  
 P. O. Box L  
 161 Main Avenue West  
 Twin Falls, ID 83301  
 Telephone: (208) 734-1602  
 Facsimile: (208) 734-1606  
 ISB #1442  
 ISB #7538

Attorney for Plaintiff

2010-09-05 PM 1:37

*[Handwritten signature]*  
 DUNN SECURITY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. <del>CR</del> <sup>✓</sup> -2010-0000079
Plaintiff,	)	
	)	
vs.	)	<u>EX-PARTE MOTION</u>
	)	<u>FOR EXTENSION OF</u>
STATE OF IDAHO,	)	<u>TIME TO FILE PLAINTIFF'S</u>
	)	<u>BRIEF</u>
Defendant.	)	

\*\*\*\*\*

COMES NOW Plaintiff, Jose Luis Zepeda, Jr., by and through his attorneys of record,  
 Fuller Law Offices, and hereby moves this Court for an Ex-Parte Order extending the time

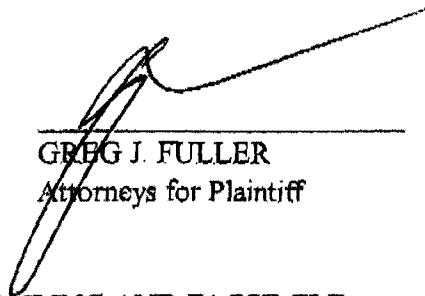
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within which Plaintiff is to file his Brief in this matter from Friday, August 6, 2010, at 5:00 o'clock p.m. to Monday, August 9, 2010, at 5:00 o'clock p.m.

This Motion is made and based upon the papers and pleadings on file herein and upon the fact that counsel for Plaintiff have been in extensive litigation during the past week, i.e., a jury trial in Cassia County and several other hearings in the Fifth Judicial District, and, therefore, have been unable to finalize said Brief. Counsel for Defendant has been contacted and has **no objection** to the requested extension of time.

DATED This 6<sup>th</sup> day of August, 2010.

FULLER LAW OFFICES



GREG J. FULLER  
Attorneys for Plaintiff


CERTIFICATE OF MAILING AND FACSIMILE

I, the undersigned, do hereby certify that on the 6<sup>th</sup> day of August, 2010, a true and correct copy of the foregoing Ex-Parte Motion for Extension was mailed, United States Mail, postage prepaid, to the following:

Lance Stevenson  
Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350  
(208) 436-3177



**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
Attorneys at Law  
P. O. Box L  
161 Main Avenue West  
Twin Falls, ID 83301  
Telephone: (208) 734-1602  
Facsimile: (208) 734-1606  
ISB #1442  
ISB #7538

2010-08-09 PM 04:25  
  
DUPLICATE COPY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. CR-2010-0000079
Plaintiff,	)	
	)	<u>AMENDED</u>
vs.	)	<u>EX-PARTE MOTION</u>
	)	<u>FOR EXTENSION OF</u>
STATE OF IDAHO,	)	<u>TIME TO FILE PLAINTIFF'S</u>
	)	<u>BRIEF</u>
Defendant.	)	

\*\*\*\*\*

COMES NOW Plaintiff, Jose Luis Zepeda, Jr., by and through his attorneys of record,  
Fuller Law Offices, and hereby moves this Court for an Ex-Parte Order extending the time

EX-PARTE MOTION FOR EXTENSION OF TIME - 1

08/09/2010 16:30 65272

DISTRICT

PAGE 03

08/09/2010 16:33 2087341606

FULLER LAW OFFICES

PAGE 03/04

2010 Aug 9:03  
*[Signature]*  
DEPUTY

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
Attorneys at Law  
P. O. Box L  
161 Main Avenue West  
Twin Falls, ID 83301  
Telephone: (208) 734-1602  
Facsimile: (208) 734-1606  
ISB #1442  
ISB #7538

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR., )

Plaintiff, )

vs. )

STATE OF IDAHO, )

Defendant. )

Case No. CR-2010-0000079

AMENDED

EX-PARTE ORDER

RE: EXTENSION OF

TIME TO FILE PLAINTIFF'S

BRIEF and *Extending*  
*Time for Respondent's*  
*Brief*

\*\*\*\*\*

BASED UPON Plaintiff's Ex-Parte Motion for Extension of Time to File Plaintiff's

Brief, the Defendant having no objection, and good cause appearing therefore;

EX-PARTE ORDER RE: EXTENSION - 1

45  
SCANNED

IT IS HEREBY ORDERED That the time for Plaintiff to file his Brief in this matter is hereby extended and same shall be filed no later than Tuesday, August 10, 2010, at 12:00 o'clock p.m. *Time for Respondent's Reply Brief filing is*

DATED This 9<sup>th</sup> day of August, 2010.

*Extended accordingly.*



MICHAEL CRABTREE  
District Judge

*PC: Minidoka Prosecutor - Emailed  
Greg Fuller - Emailed*



**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
 Attorneys at Law  
 P. O. Box L  
 161 Main Avenue West  
 Twin Falls, ID 83301  
 Telephone: (208) 734-1602  
 Facsimile: (208) 734-1606  
 ISB #1442  
 ISB #7538

07/08  
 10 11:02  
 FULLER  
 COUNTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. CV-2010-0000079
Petitioner,	)	
	)	<u>MEMORANDUM IN</u>
vs.	)	<u>SUPPORT OF PETITIONER'S</u>
	)	<u>OBJECTION TO MOTION</u>
STATE OF IDAHO,	)	<u>FOR SUMMARY DISMISSAL</u>
	)	
Respondent.	)	

\*\*\*\*\*

COMES NOW Petitioner, Jose Luis Zepeda, Jr., by and through his attorneys of  
 record, Fuller Law Offices, and hereby requests that the Court deny Respondent's Motion for

MEMORANDUM - 1

Summary Dismissal for the following reasons:

First of all, Petitioner would stipulate to the apparent accuracy of the State's statement regarding the factual and procedural history of this matter. And, Petitioner would further stipulate to the accuracy and probable relevance of the applicable legal standards set out by the State in its Brief, adding with particularity the following legal standards:

Idaho Code Section 19-4906(c) authorizes summary disposition of an application for post-conviction relief. Summary dismissal of an application pursuant to I.C. §19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. State v. LePage, 138 Idaho 803, 806, 69 P.3d 1064, 1067 (Ct. App. 2003). I.C. §19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Summary dismissal is permissible only when the applicant's evidence has raised *no genuine issue of material fact*, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. [emphasis added.] *If such a genuine issue of material fact is presented, an evidentiary hearing must be conducted.* [emphasis added.] Gonzalez v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); Ramirez v. State, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

Conversely, the "application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." Goodwin v. State, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002) *review denied* (2003); LePage, 138 Idaho at 807, 69 P.3d at 1068 (citing Roman 125 Idaho at 647, 873 P.2d at 901).

Petitioner has alleged that his appointed counsel has violated his Sixth Amendment right to counsel by failure to perform various tasks. And, while Petitioner has listed a number of

general areas where his counsel has allegedly erred, counsel intends to concentrate on two specific areas, primarily for the reason that the immediate issue at hand involves the State's Motion for Summary Dismissal pursuant to Idaho Code Section 19-4906(c). Basically, it is Petitioner's position that there do exist issues of material facts such that an evidentiary hearing must be conducted, pursuant to *Gonzalez v. State* and other cases listed above. First of all, it is important to point out that although there is an appeal to the Supreme Court presently pending which was filed on or about October 26, 2009, none of the issues set out in Petitioner's post conviction action are issues that were presented to the Appeal Court.

Also, there was a plea agreement entered in this case wherein Petitioner agreed to plead guilty to the theft and the state dismissed the persistent violator allegation and recommended a sentence of eight years with three fixed to run concurrently with the sentences in the other two cases.

The first issue involves Petitioner's claim that there "exists evidence of material facts not previously presented," to wit: a letter. In fact, there are two letters which counsel feels are significant, copies of which have been filed as a supplement to the original Petition by way of Affidavit of Jose Luis Zepeda, Jr., filed contemporaneously herewith, copies of which are attached hereto and incorporated herein by reference. The correspondence from the Mini-Cassia Public Defender's Office is significant for the reasons that it does indicate that the Petitioner in this case did request the Public Defender, in a letter of January 6, 2010, to withdraw his plea of guilty prior to being sentenced.

The correspondence from Brian R. Card is significant and relevant to Petitioner's first

issue involving evidence of material facts not previously presented. I believe the letter speaks for itself which would support Petitioner's representations at the time that Petitioner entered a plea of guilty. In fact, when it was time to enter the plea, according to the transcript on appeal, Petitioner informed the Court that he had been released from custody in Ada County and had accepted a ride back to his home from two other detainees. When they got to Rupert, Idaho, the person driving asked if he could leave the car at Petitioner's home and Petitioner agreed. However, Petitioner *did not know that the car was stolen*. However, presumably because of the plea bargain, he did tell the Court that he should have known it was stolen. Hearing this recitation, the Court held that it could not accept a guilty plea. Petitioner then stated to the Court, "Your Honor, I want to plead guilty to the charge. I should have known that the car was stolen. I did not take steps to find out that it wasn't, base on - like I said, all I was trying to do was get back to Rupert." In addition, defense counsel explained to the Court that there were two letters in the car written by someone was still in jail telling Mr. Zepeda to take the car and give him a piece of the action. Counsel stated, "[T]here's quite a bit o facts that the State would have used to prove this case against him." Defense counsel then suggested an *Alford* plea, and the Court accepted that plea finding that there was a factual basis.

The whole point here is that the above-cited information, that is, that Petitioner had notified his counsel that he wanted to withdraw his plea of guilty, that he actually entered an *Alford* plea to the charge, and that according to Petitioner, he notified his lawyer *prior to sentencing* that he wished to withdraw his plea of guilty, and the letter from his attorney dated January 12, 2009, a copy of which is attached hereto and incorporated herein by reference,

MEMORANDUM - 4

indicates an apparent unwillingness to abide by Petitioner's request, *all together* certainly create a "loss of opportunity" by Petitioner to withdraw his plea of guilty and try the case on the merits such that he was prejudiced sufficiently to support a claim of ineffective assistance of counsel based on the failure to withdraw the plea as was requested. Although there appears to be no "smoking gun" here, demonstrating that Petitioner did, in fact, communicate his wish to withdraw his plea of guilty *prior* to sentencing, these allegations certainly raise a genuine issue of material fact as to whether or not he did in fact communicate this intent to his counsel in a timely fashion. Since counsel did not pursue Petitioner's request to withdraw his plea as directed by Petitioner, Petitioner suffered prejudice and loss of his opportunity to defend himself against the accusation that he possessed stolen property when, in fact, he never knew the property was stolen.

The issue regarding Petitioner's claim of evidence not previously presented or newly discovered evidence involves the letter from Brian R. Card. Respondent claims that Petitioner's claim based on newly discovered evidence should be denied for the reasons that there is no demonstration that the letter is material, there is no allegation in the Petition that the contents of the letter would have affected the outcome of Petitioner's case or that it would likely have produced an acquittal (there was no showing of the actual letter but only a claim that the letter existed.) Based upon all of this, Respondent claims that Summary Dismissal is appropriate on this claim.

However, said letter has now been presented and filed as an Affidavit supplementing Petitioner's previously filed papers, and said letter obviously speaks for itself, i.e., the letter, at

the very least, presents an issue as to whether or not Petitioner actually knew that the property he was accused of being in possession of was stolen. Although the letter itself is obviously not conclusive as to whether Petitioner actually knew the property was or was not stolen, it at least raises a "genuine issue of material fact" as to whether one of the elements necessary for conviction actually existed, especially considering the fact that the Petitioner entered an *Alford* plea. Petitioner always maintained that he didn't actually know that the property was stolen, but only suggested that he "should have known" the property was stolen. For this reason alone, Respondent's Motion for Summary Dismissal on this claim should be denied.

The following cited authority adequately supports Petitioner's position that Summary Dismissal is not appropriate in this case:

*Parrott v. State*, 117 Idaho 272 (1990), 787 P.2d 258, states as follows:

Turning to Parrott's argument that the district court erred in dismissing his petition without an evidentiary hearing, we first note the standard of review. A trial court may grant a motion by either party for summary disposition of an application for post conviction relief where it appears from the pleadings that there is no genuine issue of material fact. I.C. §19-4906(c). However, where issues of material fact exist, an evidentiary hearing must be held. I.C. §19-4907; *Stone v. State*, 108 Idaho 822, 824, 702 P.2d 860, 862 (Ct.App. 1985); *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct.App. 1982).

On appeal, this Court must decide whether the State's summary disposition motion was properly granted. This requires that we view the facts in a light most favorable to the petitioner, and determine whether they would entitle him to relief if accepted as true. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct.App. 1987); *Wolfe v. State*, 114 Idaho 659, 759 P.2d 950 (Ct.App. 1988) (petition for review denied, December 8, 1988). While this requires that the petitioner's un rebutted allegations be accepted as true, we are not required to accept the petitioner's conclusions. *Kraft v. State*, 100 Idaho 671, 603 P.2d 1005 (1979).

The Court in *State v. Jacskon*, 96 Idaho 584 (1975), 532 P.2d 926, states:

It is the conclusion of this court that when the defendant entered a plea of guilty but conditioned such plea with a statement to the effect that he did not admit the facts of the charge, and prior to sentencing the defendant then moved to withdraw the plea of guilty, it was an abuse of discretion by the trial court not to grant such a motion. Thus, the judgment on which the plea of guilty was entered must be set aside, and the cause remanded with directions for the trial court to allow the defendant to change his plea to not guilty and set the case for trial.

In *State v. Rodriguez*, 118 Idaho 957 (App. 1990), 801 P.2d 1308, the Court stated:

An *Alford* plea was accepted by our Supreme Court as a just reason for withdrawal of a guilty plea. *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975). The Court in *Jackson, supra*, stated: "when the defendant entered a plea of guilty but conditioned such plea with a statement tot he effect that he did not admit the facts of the charge, and prior to sentencing the defendant then moved to withdraw the plea of guilty, it was an abuse of discretion by the trial court not to grant such a motion."

The Court in *Ricca v. State*, 124 Idaho 894 (App. 1993), 865 P.2d 985, the Court stated:

... Loss of the opportunity to appeal is itself sufficient prejudice to support a claim of ineffective assistance of counsel based on a failure to appeal as requested.

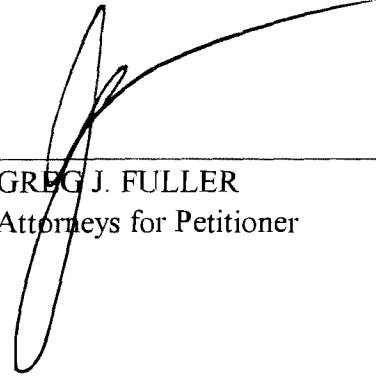
...

Ricca's application raises a genuine issue of material fact as to whether he communicated his intent to appeal to his counsel. If counsel did not pursue an appeal as directed by Ricca, Ricca suffered prejudice in the loss of his opportunity to appeal. Accordingly, we vacate the dismissal by the district court with respect to the claim of ineffective assistance of counsel raised by Ricca's application. We remand the matter for an evidentiary hearing where both Ricca and defense counsel, who represented Ricca in the underlying criminal case, may be called to testify. It will be necessary for the district court to make a finding whether Ricca's desire to appeal was adequately communicated to his attorney and that the attorney's failure to file a direct

appeal resulted from deficient performance. *See, e.g. Sanders v. State*, 117 Idaho 939, 792 P.2d 964 (Ct.App. 1990). If the district court finds that ineffective assistance of counsel deprived Ricca of his opportunity to appeal, the proper remedy is for the district court to vacate and re-enter the judgment of conviction so that Ricca may perfect a timely appeal. *Mata, supra*.

RESPECTFULLY SUBMITTED This 10<sup>th</sup> day of August, 2010.

FULLER LAW OFFICES



---


GREG J. FULLER  
Attorneys for Petitioner



CERTIFICATE OF MAILING AND FACSIMILE

I, the undersigned, do hereby certify that on the 10<sup>th</sup> day of August, 2010, a true and correct copy of the foregoing Affidavit was mailed, United States Mail, postage prepaid, and transmitted, via facsimile, to the following:

Lance Stevenson  
Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350  
(208) 436-3177



A handwritten signature in cursive script, reading "Lance Stevenson", is written over a horizontal line.

**MINI-CASSIA  
PUBLIC DEFENDER OFFICE**

111 West 15<sup>th</sup> Street P. O. Box 188  
Burley, ID 83318  
(208) 878-6801 Fax (208) 878-3483

PUBLIC DEFENDER  
**DENNIS R. BYINGTON**  
CHIEF DEPUTY PUBLIC DEFENDER  
**TIMOTHY J. SCHNEIDER**

Minidoka County Courthouse  
(By appointment only)

DEPUTY PUBLIC DEFENDERS  
**JACOB D. TWIGGS**  
**ROBERT J. SQUIRE**  
DEPUTY JUVENILE PUBLIC DEFENDER  
**DOUGLAS R. WHIPPLE**

January 12, 2010

Jose Zepeda, Jr.  
c/o Owyhee County Jail  
P. O. Box 128  
Murphy, ID 83650

Re: Minidoka County Case No. CR 2009-2284\*D

Dear Mr. Zepeda:

We are in receipt of your January 6, 2010 letter regarding withdrawing your guilty plea. In spite of it all, you still wanted to enter a voluntary plea. On what basis is it not a voluntary plea?

We are forwarding a copy of the letter from Brian Card to you, against our advice. Again, we must caution you not circulate the letter around. It could cause a lot of problems for you and him.

A copy of the Appeal documents on the Court's denial of your Rule 35 Motion, are enclosed.

Yours truly,

MINI-CASSIA PUBLIC DEFENDER OFFICE

By   
Dennis R. Byington

DRB/rk  
Enclosures

PLAINTIFF'S  
EXHIBIT

'A'

To whom it may concern:  
October 22, 2009

My name is Brian Card, I am writing this letter from the Ada County Jail in Boise Idaho. This letter is in reference to the facts and circumstances of the case of Theft against Mr. Jose Sepeda. At no time did Jose knowingly possess stolen property as I assured him the vehicle was insured, registered and one-hundred percent legal. I asked Jose to take possession and care and custody of the Chrysler to assist me in determining the proper disposition as I was incapacitated. I have no knowledge of the vehicle not being legal, thus making it impossible for Jose to commit the acts alleged against him. I am sad and hurt that my friend has suffered consequences in an attempt to assist me. I sincerely wish that some law enforcement or investigator would have assisted me in clearing Mr. Sepeda's name but I have yet to be contacted in reference to this case. I look forward to the opportunity to vindicate Mr. Sepeda and have him cleared of any wrongdoing in this matter.

Sincerely,

Brian Card

IO DL # GB1763720

PLAINTIFF'S  
EXHIBIT

"B"

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
Attorneys at Law  
P. O. Box L  
161 Main Avenue West  
Twin Falls, ID 83301  
Telephone: (208) 734-1602  
Facsimile: (208) 734-1606  
ISB #1442  
ISB #7538

2010 AUG 11 AM 11:02  
DUAL  
DePUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR., )

Petitioner, )

vs. )

STATE OF IDAHO, )

Respondent. )

Case No. CR-2010-0000079

AFFIDAVIT OF  
JOSE LUIS ZEPEDA, JR.

\*\*\*\*\*

STATE OF IDAHO )

ss.

County of Clearwater

AFFIDAVIT - I

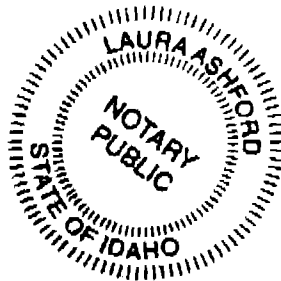
JOSE LUIS ZEPEDA, JR , Being first duly sworn upon oath deposes and states as follows

1. That I am the Petitioner in the above-entitled matter and make this Affidavit based upon my own personal knowledge and belief.
2. That attached hereto and incorporated herein by reference as Exhibit "A" is a true and correct copy of a letter which I received from Dennis R. Byington, Mini-Cassia Public Defender, dated January 12, 2010;
3. That attached hereto and incorporated hereby by reference as Exhibit "B" is a true and correct copy of a letter dated August 22, 2009, from Brian R. Card;
4. That I respectfully request that this Honorable Court accept both Exhibit "A" and Exhibit "B" as additional information in support of my Pctition and Affidavit for Post Conviction Relief previously filed in the above-entitled matter

DATED This 10 day of August, 2010.

*Jose Luis Zepeda Jr*  
JOSE LUIS ZEPEDA, JR

SUBSCRIBED AND SWORN To before me this 10 day of August, 2010



*Laura Ashford*  
Notary Public for State of Idaho  
Residing at *Levi-Hon*  
Commission expires *July 26 2011*

# MINI-CASSIA PUBLIC DEFENDER OFFICE

111 West 15<sup>th</sup> Street P. O. Box 188  
Burley, ID 83318  
(208) 878-6801 Fax (208) 878-3483

PUBLIC DEFENDER  
**DENNIS R. BYINGTON**  
CHIEF DEPUTY PUBLIC DEFENDER  
**TIMOTHY J. SCHNEIDER**

Minidoka County Courthouse  
(By appointment only)

DEPUTY PUBLIC DEFENDERS  
**JACOB D. TWIGGS**  
**ROBERT J. SQUIRE**  
DEPUTY JUVENILE PUBLIC DEFENDER  
**DOUGLAS R. WHITTLE**

January 12, 2010

Jose Zepeda, Jr.  
c/o Owyhee County Jail  
P. O. Box 128  
Murphy, ID 83650

Re: Minidoka County Case No. CR 2009-2284\*D

Dear Mr. Zepeda:

We are in receipt of your January 6, 2010 letter regarding withdrawing your guilty plea. In spite of it all, you still wanted to enter a voluntary plea. On what basis is it not a voluntary plea?

We are forwarding a copy of the letter from Brian Card to you, against our advice. Again, we must caution you not circulate the letter around. It could cause a lot of problems for you and him.

A copy of the Appeal documents on the Court's denial of your Rule 35 Motion, are enclosed.

Yours truly,

MINI-CASSIA PUBLIC DEFENDER OFFICE

By   
Dennis R. Byington

DRB/rk  
Enclosures



To whom it may concern:  
October 22, 2009

My name is Brian Card, I am writing this letter from the Ada County Jail in Boise Idaho. This letter is in reference to the facts and circumstances of the case of Theft against Mr. Jose Sepeda. At no time did Jose knowingly possess stolen property as I accused him the vehicle was insured, registered and one-hundred percent legal. I asked Jose to take possession and care and custody of the Chrysler to assist me in determining the proper disposition as I was incarcerated.

I have no knowledge of the vehicle not being legal, thus making it impossible for Jose to commit the acts alleged against him. I am sad and hurt that my friend has suffered consequences in an attempt to assist me. I sincerely wish that some law enforcement or investigator would have assisted me in clearing Mr. Sepeda's name but I have yet to be contacted in reference to this case. I look forward to the opportunity to vindicate Mr. Sepeda and have him cleared of any wrongdoing in this matter.

Sincerely,

Brian R Card

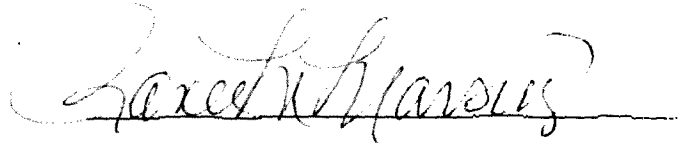
IDOL# 681763720



CERTIFICATE OF MAILING AND FACSIMILE

I, the undersigned, do hereby certify that on the 10<sup>th</sup> day of August, 2010, a true and correct copy of the foregoing Affidavit was mailed, United States Mail, postage prepaid, and transmitted, via facsimile, to the following

Lance Stevenson  
Mhidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350  
(208) 436-3177





FILED  
CASE #

2010 SEP -8 PM 3:44

DUANE [Signature] DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE LUIS ZEPEDA, JR.,

Petitioner,

vs.

Case No. CV-2010-79

STATE OF IDAHO,

Respondent.

**MEMORANDUM DECISION AND ORDER  
GRANTING STATE'S MOTION FOR SUMMARY DISMISSAL**

**Procedural Background**

The Petitioner (hereafter "Mr. Zepeda") entered an Alford plea of guilty to the offense of grand theft by possession of stolen property, a violation of Idaho Code § 18-2403(4), in Minidoka County case CR-2009-2284. On October 5, 2009, the court sentenced Mr. Zepeda to a total period of confinement of eight years, with three years determinate and five years indeterminate. Mr. Zepeda filed an appeal on October 26, 2009. The appeal is pending.

Mr. Zepeda filed his petition for post-conviction relief on February 5, 2010, claiming evidence not previously presented and ineffective assistance of counsel. He also filed a motion for appointment of counsel which the court granted. On July 7, 2010, the State filed the instant Motion for Summary Dismissal. Mr. Zepeda filed his Objection

on July 15, 2010 and his Memorandum in Support of Petitioner's Objection to Motion for Summary Dismissal (hereafter "Memorandum") on August 10, 2010.

### Discussion

An application for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, and must contain much more than a "short and plain statement of the claim" that would suffice as a complaint under I.R.C.P. 8(a)(1). *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995).

The summary dismissal of a post-conviction action is permissible when the petitioner fails to raise a genuine issue of material fact that, if resolved in his or her favor, would entitle the petitioner to the requested relief. I.C. § 19-4906; *Murphy v. State*, 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006). "If the applicant . . . fails to present evidence making a prima facie case . . . establishing each element of the claim, then summary dismissal is appropriate. The applicant's factual showing must be based upon evidence that would be admissible at [an evidentiary] hearing." *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Mr. Zepeda raises several claims in his petition for post-conviction relief. The claims are examined separately below, consistent with the standards applicable on a motion for summary dismissal.

**A. Evidence of Material Facts Not Previously Presented**

Mr. Zepeda alleges the existence of material facts not previously presented in the form of a letter from Brian R. Card that is attached as an exhibit to Mr. Zepeda's Memorandum. By this letter, Mr. Card states that Mr. Zepeda had no knowledge that the property (a car) was stolen because Mr. Card allegedly told him that the car was registered, insured, and legal. Mr. Zepeda contends that this letter raises a genuine issue of material fact as to whether or not he knew that the car in his possession was stolen.

When a petitioner bases a post-conviction petition on the ground of evidence of material facts not previously presented, the court examines the claim under the standard for a motion for new trial subsequent to a jury verdict. *Rodgers v. State*, 129 Idaho 720, 723, 932 P.2d 348, 351 (1997). A new trial based on the ground of newly discovered evidence is warranted only where the defendant shows: "(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) it will probably produce an acquittal; and (4) failure to learn of the evidence was not due to a lack of diligence on the part of the defendant." *State v. Stevens*, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008) (citing *State v. Drapeau*, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976)). Evidence into which the defense simply did not inquire does not constitute newly discovered evidence that would warrant a new trial. *See id.* at 146, 191 P.3d at 224.

In this case, Mr. Zepeda apparently knew of Mr. Card's statements and involvement at the inception of the case. Mr. Zepeda has not shown that this evidence was inaccessible or undiscoverable, even after an exercise of reasonable diligence.

Therefore, the letter from Mr. Card is not “newly discovered” simply because Mr. Zepeda’s attorney allegedly chose not to contact Mr. Card earlier in the case.

Regarding the materiality of the proffered evidence, Mr. Zepeda pled guilty even after denying that he had the requisite mental state to commit the crime. The court initially refused to accept Mr. Zepeda’s plea on this basis, but allowed him to enter an Alford plea when he continued to express his desire to plead guilty. The issue of whether Mr. Zepeda had the requisite mental state to commit grand theft by possession of stolen property was not tested at a trial, nor was it an issue once Mr. Zepeda determined that he would enter an Alford plea of guilty. Therefore, additional evidence at this stage regarding his lack of knowledge that the property was stolen is immaterial and cumulative. Further, Mr. Zepeda has not shown that Mr. Card’s letter would have affected the outcome of this case or that he would not have pled guilty if the letter had been presented earlier.

Mr. Zepeda has failed to meet his burden in showing a genuine issue of material fact that would entitle him to relief on the ground of evidence of material facts not previously presented. Therefore, this claim is dismissed.

#### **B. Ineffective Assistance of Counsel**

To prevail on an ineffective assistance of counsel claim, the petitioner must establish: 1) that the attorney’s conduct fell below an objective standard of reasonableness; and 2) there is a reasonable probability, that, but for counsel’s errors, the result of the proceedings would have been different. *LaBelle v. State*, 130 Idaho 115, 118, 937 P.2d 427 (Ct. App. 1997); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The second prong is a showing of prejudice to the petitioner resulting from his counsel’s

deficient performance. Where a defendant pleads guilty, the defendant must show that, but for the alleged errors of counsel, he or she would not have pled guilty. *Remington v. State*, 127 Idaho 443, 446, 901 P.2d 1344, 1347 (Ct. App. 1995).

“Because of the distorting effects of hindsight in reconstructing the circumstances of counsel’s challenged conduct, there is a strong presumption that counsel’s performance was within the wide range of reasonable professional assistance” and that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243 (Ct. App. 1989); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052 (1984). “The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better.” *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706 (1992).

In his Petition and Affidavit, Mr. Zepeda alleges that his attorney: (1) failed to contact Brian Card; (2) failed to arrange for a polygraph test; (3) failed to withdraw as counsel upon request; (4) failed to file a motion to withdraw the guilty plea upon request; (5) failed to conduct adequate pretrial investigation; (6) failed to develop an “adversarial or fighting” attitude; and (7) failed to develop effective rapport with Mr. Zepeda.

The only aspect of the attorney’s performance addressed in Mr. Zepeda’s Memorandum is his attorney’s alleged failure to file a motion to withdraw his guilty plea. In support of this allegation, Mr. Zepeda provides a copy of a letter from his attorney, indicating that, after sentencing, Mr. Zepeda requested that his attorney file a motion to withdraw his guilty plea. His attorney refused to file such a motion because he believed Mr. Zepeda’s Alford plea of guilty was plainly voluntary.


Withdrawal of a properly entered guilty plea is “not an automatic right and more substantial reasons than just asserting legal innocence must be given.” *State v. Dopp*, 124 Idaho 481, 486, 861 P.2d 51, 56 (1993) (overruling *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975)). Mr. Zepeda has failed to provide substantial reasons beyond his assertion of legal innocence that would warrant a motion to withdraw his plea of guilty. He has not shown that his attorney’s refusal to file the motion was conduct that fell below an objective standard of reasonableness or that there was a reasonable probability that such a motion would have been granted.

All of the other allegations in Mr. Zepeda’s Petition and Affidavit regarding his claim of ineffective assistance of counsel are similarly bare and incomplete as to the elements of the claim. Mr. Zepeda has failed to meet his burden of presenting sufficient evidence to raise a genuine issue of material fact that the performance of his attorney fell below an objective standard of reasonableness and that the outcome of his case would have been different if his counsel had performed effectively. Because he has not presented evidence to raise a genuine issue of material fact, an evidentiary hearing is not warranted and the State is entitled to judgment as a matter of law.

**Order**

For the reasons set forth above, the State’s Motion for Summary Dismissal is granted and Mr. Zepeda’s Petition for Post-Conviction Relief is dismissed in its entirety.

It is so **ORDERED** this 8<sup>th</sup> day of September, 2010

  
MICHAEL R. CRABTREE  
District Judge

**RIGHT TO APPEAL/LEAVE TO APPEAL IN FORMA PAUPERIS**

The Right: The court hereby advises the Petitioner, of the right to appeal this Order within forty two (42) days of the date it is file stamped by the clerk of the court. I.A.R. 14(a).

In Forma Pauperis: The court further advises the Petitioner of the right of a person who is unable to pay the costs of an appeal to apply for leave to appeal in forma pauperis, meaning the right as an indigent to proceed without liability for court costs and fees and the right to be represented by a court appointed attorney at no cost to the Petitioner.

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 of Sept., 2010, I served a true, correct copy of the MEMORANDUM DECISION AND ORDER GRANTING STATE'S MOTION FOR SUMMARY DISPOSITION upon the following in the manner provided:

Minidoka County Prosecuting Attorney  
P. O. Box 368  
Rupert, ID 83350

First Class Mail  
 Hand Delivery - Basket  
 Facsimile

Daniel S. Brown  
FULLER LAW OFFICE  
P. O. Box 1  
Twin Falls, ID 83301

First Class Mail  
 Hand Delivery - Basket  
 Facsimile

*Duane Smith*

Clerk of the District Court

By *Steve Brubaker*

Deputy Clerk



**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
 Attorneys at Law  
 P. O. Box L  
 161 Main Avenue West  
 Twin Falls, ID 83303  
 Telephone: (208) 734-1602  
 Facsimile: (208) 734-1606  
 ISB # 1442  
 ISB #7538

[Faint stamp and handwritten signature/initials]

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	Case No. CV-2010-0000079
	)	
Petitioner,	)	<u>PETITIONER'S MEMORANDUM</u>
	)	<u>IN SUPPORT OF</u>
	)	<u>MOTION FOR</u>
vs.	)	<u>RECONSIDERATION</u>
	)	
STATE OF IDAHO,	)	
	)	
Defendant.	)	

\*\*\*\*\*

COMES NOW the Petitioner, Jose Luis Zepeda, Jr., by and through his attorney of record, Fuller Law Offices, and hereby requests that this Honorable Court reconsider it's

Decision and Order Granting State's Motion for Summary Dismissal for the following reasons:

First of all, the Court has decided that Petitioner does not have an automatic right to withdraw his plea of guilty, despite the fact that his plea was an Alford Plea and he had previously made assertions of legal innocence. The Court relies upon *State v. Dopp*, 124 Idaho 481, 486, 861 P.2d 51, 56 (1993), stating the proposition that that case overrules *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975). Essentially, the Court stated that the Petitioner failed to provide substantial reasons beyond his assertion of legal innocence that would warrant a motion to withdraw his plea of guilty.

While I admit that *State v. Dopp* certainly modifies *State v. Jackson*, I am afraid I must agree with Justice Bistline's analysis of *State v. Jackson* in his concurring opinion in *Dopp*. For the Court's convenience, and the fact that I believe that analysis is extremely relevant to issues in this case, I will restate the analysis as follows:

While, in this one justice's view, the Court should not be "hesitant to reverse ourselves when a doctrine, a defense, or a holding in a case, has been proven over tie to be unjust or unwise," *Salinas v. Vierstras*, 107 Idaho 984, 990, 695 P.2d 369, 375 (1985), the rule of *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975), is neither unjust nor unwise. Thus, while there are occasions for overruling precedent, see *State v. Guzman*, 122 Idaho 981, 987-998, 842 P.2d 660, 666-78 (1992) (wherein the logical and factual flaws in the good-faith exception to the exclusionary rule as well as the precedential and policy reasons for rejecting that rule were demonstrated, at length), this is not one of them. Accordingly, I disagree with the majority's decision to overrule *State v. Jackson*, although I concur in the result of the opinion because of the prospective only application of today's holding.

Justice Johnson who dissented in part in *Guzman* performed an admirable service in synthesizing this Court's decisions regarding the doctrine of *stare decisis* when he said that

[f]rom these “precedents” we can glean that prior decisions of this Court should govern unless they are manifestly wrong or have proven over time to be unjust or unwise. While I am prepared to accept these limitations on the rule of stare decisis, I am not prepared to allow these limitations to convert the precedents of this Court into ephemeral edicts that are here today and gone tomorrow, the duration of their lifespan depending on the composition and disposition of the Court. This is not to say that I am unwilling to overrule precedent that is manifestly wrong.

122 Idaho at 1001, 842 P.2d at 680. Similar sentiments were earlier expressed in a specially concurring opinion by the author of today’s *State v. Dopp* majority opinion. In a scholarly, well written, informative, and “in-depth review of the legal principal of *stare decisis*,” Justice McDevitt concluded that “[w]hile it may seem that *stare decisis* is a rule of convenience, it is not. I believe this rule requires us to stand by our prior decisions unless there are compelling and cogent reasons that necessitate a departure from our prior rulings.” *State v. Card*, 121 Idaho 425, 440-52, 825 P.2d 1081, 1096-1108 (1991), (McDevitt, J., specifically concurring). It is not unreasonable to believe that Justice Trout and Justice Pro Tem. Woodland have an equally high regard for the doctrine of *stare decisis* as do Justices McDevitt and Johnson, but their views on the subject matter have not yet been advanced, and may later surface in the Idaho and Pacific Reporters.

Given the recent and fervent adulation at the altar of *stare decisis* it might be expected that the majority opinion would make an offering which would forcefully demonstrate how *State v. Jackson* was “manifestly wrong” and would additionally establish the “compelling and cogent reasons” which are needed in order to depart from our prior rulings. Instead, the majority’s explanation of why *Jackson* must be overruled is as “ephemeral” as that case itself now appears to be.

Initially, it should be noted that this is not an example of a single aberrant case existing outside the mainstream of the law. In that case, the overruling of the rogue case would be more of a housekeeping matter and thus not subject to the “unjust or unwise” test. Here, to the contrary, a review of the Idaho cases cited by the majority shows those cases are consistent with and do not undermine the *Jackson* rule. In *State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992), the defendant did not enter an *Alford* plea, and the motion to withdraw was made after he was sentenced. Thus, I.C.R. 33(c) required a showing of “manifest injustice.” In

*Jackson*, a showing of manifest injustice was not required because the motion to withdraw the guilty plea was made prior to the sentencing. *State v. Martinez*, 89 Idaho 129, 403 P.2d 597 (1965), involves the same factual situation as *Lavy*.

Although *State v. Hawkin*, 117 Idaho 285, 787 P.2d 271 (1990) and *State v. Ballard*, 114 Idaho 799, 761 P.2d 1151 (1988), are pre-sentencing withdrawal cases, both are easily distinguishable from *Jackson*. First, neither *Hawkins* nor *Ballard* is an *Alford* plea case. Second, in both cases, the state would have been severely prejudiced if the motion to withdraw the plea had been granted. In *Hawkins*, the guilty plea was entered twelve days into trial, and this Court carefully distinguished that case from cases like *Jackson*, where no trial had commenced. In *Ballard*, the defendant absconded from the jurisdiction for three years after he entered his plea. There, the trial court found the state's case had been prejudiced by the defendant's voluntary absence. These cases do nothing to the vitality of *Jackson* because there was no showing of prejudice to the state in *Jackson* and the case simply does not address that situation.

In short, *Jackson*, is firmly in the mainstream of the law. Thus some "compelling and cogent reason" must exist to overrule it.

The majority, however, can muster only one infirm reason why *Jackson* should be overruled, to wit: "the utility of *Alford* pleas will be severely reduced if defendants are permitted to withdraw them before sentencing for no additional reason." 124 Idaho at 486, 861 P.2d at 56. The careful reader might have stopped there and wondered how the utility of *Alford* pleas could be *reduced* by adhering to the rule *now* in effect. This Justice was brought to ponder on that possibility. Would the utility of *Miranda* warnings be severely reduced if the United States Supreme Court refused to overrule *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)? If so, would the utility of *Miranda* warnings be increased if that case were overruled? Unless the laws of physics have been turned on their head ("for every *inaction* there is an equal and opposite "action"), a reasonable guess is that the utility of *Alford* pleas would remain the same if *Jackson* is not overruled. Any other conclusion, i.e., the majority's, is simply irrational.

The majority, apparently oblivious to the concept of cause and effect, blithely trips along to make the following statement: "[s]uch a holding [i.e. not overruling *Jackson*] might well lead to a reluctance on the part of prosecutors and judges to agree to the acceptance of such pleas." *Id.*, 124 Idaho at 486, 861 P.2d at 56. According to the majority, "[t]his would impair judicial efficiency by eliminating a useful procedure for the resolution of criminal cases; it would also work to the detriment of defendants." *Id.*

As might be expected in this case, neither the State nor the majority has ponited to one iota of evidence, either empirical or anecdotal, about what the effect of *Jackson* has been on *Alford* pleas. However, I suspect that if the effect of *Jackson* is as pervasive and profound as the majority suggests, the Court would have heard about it sometime during the nearly twenty years which have lapsed since that case was announced. If the kind of baseless speculation engaged in by the majority is now all that is needed to overcome stare decisis, then an "open session" sign has been declared which can only tend to expose existing case law precedent to unwarranted attacks.

This justice would not overrule *Jackson* because there is no reason, much less a "compelling and cogent reason," to do so.

Additionally, because *Jackson* is soundly premised upon solid constitutional considerations, and because *Jackson* protects the accused's right to a jury trial along with the other constitutional rights appurtenant thereto it should remain unmolested. The rights created by the United States Constitutional exist to check the power of the state and thereby protect every citizen's liberty. The minor inconvenience borne by trial courts and the state in cases like *Jackson* and *Dopp*'s case now before us, is so inconsequential that no sensible person would subvert those fundamental and cherished rights merely to avoid such a minor annoyance. Ironically, it is the majority who now creat4es a "harsh mandate" by holding that a claim of actual innocence is not a substantial enough reason to withdraw a guilty plea even if that motion is made prior to sentencing and there is no prejudice to the state. What must be kept firmly in mind is that an assertion of innocence is the most substantial reason for a trial which a person can advance, notwithstanding the majority's trivialization of that concept.

Instead of overruling cases "willy nilly," the majority should temper today's opinion and "course a less strident vein under the auspices" of stare decisis.

However, it would appear that the Court feels that *State v. Dopp* does, indeed, overrule *State v. Jackson* and, if that is the case, the Petitioner in this case would have to provide other substantial reasons beyond his mere assertion of legal innocence in order to have withdrawn his plea of guilty. Of course, Petitioner has alleged the existence of material facts not previously presented in the form of a letter from Brian R. Card, which basically indicates that the Petitioner

had no knowledge that the property in question was actually stolen because he, Mr. Card, had told him that the car was registered, insured and legal. Petitioner contended that this letter did raise a genuine issue of fact as to whether or not he had knowledge that the car was stolen, an issue directly related to establishing the existence of nonexistence of the necessary intent to justify the charge.

Petitioner also provided a copy of a letter from his attorney indicating that he had requested that his attorney file a motion to withdraw his plea of guilty. Evidently, his attorney refused to file this motion because he believed Petitioner's Alford plea was plainly voluntary.

As to the newly discovered evidence, i.e., the letter from Brian Card, the Court has ruled that any additional evidence regarding his lack of knowledge that the property was stolen is immaterial and cumulative, and that the letter involving Mr. Card has not been shown to effect the outcome of this case, or shown that Petitioner would not have pled guilty if the letter had been presented earlier. However, while the Court may conclude that the additional evidence provided by Petitioner would not have affected the outcome of the case, this evidence certainly *does* provide a *substantial reason* beyond Petitioner's assertion of legal innocence which would absolutely warrant a motion to withdraw his plea of guilty.

In fact, it is these two issues that provide the basis for the Court's granting of the State's Motion for Summary Disposition. The important thing to remember is the only question at issue in this case was whether the Petitioner presented enough evidence that would raise genuine issues of material fact such that summary dismissal would not be appropriate. The genuine issues of material fact in this case are whether the Petitioner should have been allowed to withdraw his plea

of guilty because he provided substantial reasons beyond his assertion of legal innocence that would warrant granting a motion to withdraw his plea. These substantial reasons are represented by the letter and statements of Mr. Card, which was attached to Petitioner's Memorandum, and the letter from his attorney indicating that he knew that Petitioner wished to withdraw his plea and that Petitioner had communicated that to him.

In *State v. Rodriguez*, 118 Idaho 957, 801 P.2d 1308 (1990), the Court stated:

It follows that a court, in addressing a withdrawal motion, must consider not only whether the defendant has asserted his innocence, but also the reason why the defenses now presented were not put forward at the time of original pleading.

In the principal case, the defense attorney simply declined Petitioner's request to withdraw his plea of guilty, or to present the statement from Mr. Card as possible evidence. Why he did that, or did not do that, can only be determined with a hearing on the matter.

The only question here that is not discussed in the Court's opinion is whether the wish to withdraw the plea of guilty was communicated to the lawyer prior to sentencing or after sentencing, thereby greatly affecting the burden necessary on the part of Petitioner to prove his case. And, equally important in this matter, is the effect the letter from Mr. Card would have had in establishing the main element of the crime in chief, i.e., Petitioner's intent at the time he took possession of the property.

The Court has simply taken the position that this evidence is either immaterial and cumulative, or insufficient to raise a genuine issue of material fact as to whether the performance of his attorney fell below an objective standard of reasonableness and the outcome of the case would have been different if counsel had performed effectively.

As to the issue of when Petitioner's wish to withdraw his plea of guilty was made, i.e., before or after sentencing, Petitioner plainly states in his Affidavit attached to his original Petition for Post Conviction Relief that prior to sentencing he moved to withdraw his plea. This statement, along with the letter from his attorney, indicating that he also contacted his attorney in writing to withdraw his plea, although the writing was after sentencing, is an important issue because it establishes the burden necessary on the part of Petitioner to support his position that he was denied due process.

If there is no evidence to the contrary, the Court should have assumed that Petitioner's allegation that he advised his attorney to withdraw his plea before sentencing was true.

In *State v. Parrott*, 117 Idaho 272, 787 P.2d 258 (1990), the Court stated:

On appeal, this Court must decide whether the State's summary disposition motion was properly granted. This requires that we view the facts in a light most favorable to the petitioner, and determine whether they would entitle him to relief if accepted as true. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct.App. 1987); *Wolfe v. State*, 114 Idaho 659, 759 P.2d 950 (Ct.App. 1988) (petition for review denied, December 8, 1988). While this requires that the petitioner's un rebutted allegations be accepted as true, we are not required to accept the petitioner's conclusions. *Kraft v. State*, 100 Idaho 671, 603 P.2d 1005 (1979).

The point here is that the very evidence that the Court has ruled either immaterial or inadequate, and, in any case, inadmissible, is the very evidence going to the most important issue of all, i.e., Petitioner's right under all of these circumstances, to withdraw his plea of guilty and to try the case on the merits.

In short, the Court's interpretation of *Dobb* that it overrules *State v. Jackson* does not justify the Court's granting of the State's Motion for Summary Dismissal for the reasons that the



very evidence considered by the Court to be irrelevant to a trial in this matter (the Court apparently didn't feel it would make any difference in the outcome), certainly does create a triable issue of fact as to whether there are substantial reasons beyond the Petitioner's assertion of innocence that would warrant a withdrawal of Petitioner's plea of guilty, thereby giving him a right to a jury trial.

The case of *Ricca v. State*, 124 Idaho 894, 865 P.2d 985 (App. 1993), draws an appropriate analogy of the situation in the principal case, although it does deal with appeal rather than a withdrawal of plea motion. In this regard, consider the following:

Loss of the opportunity to appeal is itself sufficient prejudice to support a claim of ineffective assistance of counsel based on a failure to appeal as requested.

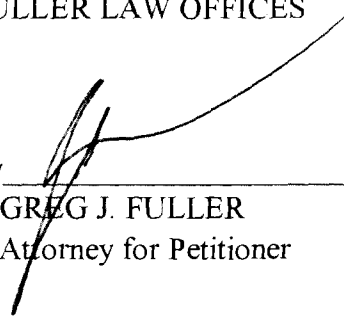
...

Ricca's application raises a genuine issue of material fact as to whether he communicated his intent to appeal to his counsel. If counsel did not pursue an appeal as directed by Ricca, Ricca suffered prejudice in the loss of his opportunity to appeal. Accordingly, we vacate the dismissal by the district court with respect to the claim of ineffective assistance of counsel raised by Ricca's application. We remand the matter for an evidentiary hearing where both Ricca and defense counsel, who represented Ricca in the underlying criminal case, may be called to testify. It will be necessary for the district court to make a finding whether Ricca's desire to appeal was adequately communicated to his attorney and that the attorney's failure to file a direct appeal resulted from deficient performance. *See, e.g., Sanders v. State*, 117 Idaho 939, 792 P.2d 964 (Ct.App. 1990). If the district court finds that ineffective assistance of counsel deprived Ricca of his opportunity to appeal, the proper remedy is for the district court to vacate and re-enter the judgment of conviction so that Ricca may perfect a timely appeal. *Mata, supra*.

RESPECTFULLY SUBMITTED This 23<sup>RD</sup> day of September, 2010.

FULLER LAW OFFICES

By

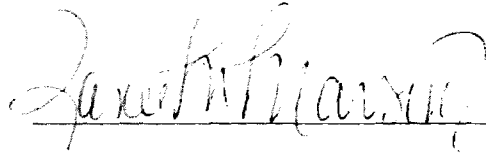
  
\_\_\_\_\_  
GREG J. FULLER  
Attorney for Petitioner

79

CERTIFICATE OF MAILING and FACSIMILE

I, the undersigned, do hereby certify that on the 27<sup>th</sup> day of September, 2010, I caused a true and correct copy of the foregoing document to be mailed, United States Mail, postage prepaid, and transmitted, via facsimile, to the following:

Lance Stevenson  
Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350  
(208) 436-3177

  
\_\_\_\_\_

012  
 000012  
 0:00  
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

JOSE LUIS ZEPEDA, JR.,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2010-79

**ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

The Petitioner (hereafter "Mr. Zepeda") entered an *Alford* plea of guilty to the offense of grand theft by possession of stolen property, a violation of Idaho Code § 18-2403(4), in Minidoka County case CR-2009-2284. On October 5, 2009, the court sentenced Mr. Zepeda to a total unified period of confinement of eight years, with three years determinate. Mr. Zepeda filed an appeal on October 26, 2009. The Idaho Court of Appeals issued an unpublished opinion on September 8, 2010, amending a prior unpublished opinion, which affirmed Mr. Zepeda's judgment of conviction.

Mr. Zepeda filed his Petition for Post-Conviction Relief in the present case on February 5, 2010, claiming evidence not previously presented and ineffective assistance of counsel. On July 7, 2010, the State filed a Motion for Summary Dismissal. The court

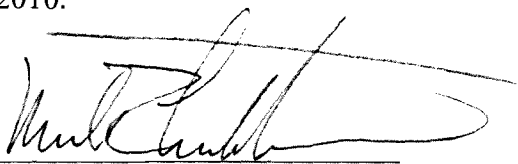
granted the State's Motion on September 8, 2010. Mr. Zepeda filed the instant Motion for Reconsideration on September 22, 2010 and his supporting Memorandum on September 24, 2010.

Upon review, Mr. Zepeda's Motion for Reconsideration is denied without a hearing. The decision whether to grant or deny a motion for reconsideration rests in the sound discretion of the trial court. *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007).

The legal standards and reasoning applicable in this case are set forth in the court's Memorandum Decision and Order Granting State's Motion for Summary Dismissal dated September 8, 2010. This court previously considered the letters from Brian Card and Mr. Zepeda's attorney that were submitted with Mr. Zepeda's Objection to the Motion for Summary Dismissal. However, Mr. Zepeda did not present a genuine issue of material fact sufficient to warrant an evidentiary hearing and his Petition was bare or incomplete as to the elements of his claims.

At this stage, Mr. Zepeda's Motion for Reconsideration does not provide new facts or admissible evidence to support the allegations in his Petition. Although Mr. Zepeda makes additional arguments regarding the significance and relevance of the letters referenced above, the court is satisfied that its September 8, 2010 grant of summary dismissal was appropriate. For the above reasons, Mr. Zepeda's Motion for Reconsideration is hereby denied.

It is so **ORDERED** this 12<sup>th</sup> day of October, 2010.

  
MICHAEL R. CRABTREE  
District Judge

**RIGHT TO APPEAL/LEAVE TO APPEAL IN FORMA PAUPERIS**

The Right: The court hereby advises the Petitioner, of the right to appeal this Order within forty two (42) days of the date it is file stamped by the clerk of the court. I.A.R. 14(a).

In Forma Pauperis: The court further advises the Petitioner of the right of a person who is unable to pay the costs of an appeal to apply for leave to appeal in forma pauperis, meaning the right as an indigent to proceed without liability for court costs and fees and the right to be represented by a court appointed attorney at no cost to the Petitioner.

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 of October, 2010, I served a true, correct copy of the ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION upon the following in the manner provided:

Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350

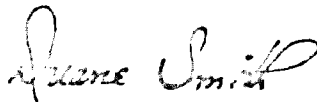
( ) First Class Mail  
() Hand Delivery - Basket  
( ) Facsimile

Daniel S. Brown  
FULLER LAW OFFICE  
P. O. Box L  
Twin Falls, ID 83301

() First Class Mail  
( ) Hand Delivery - Basket  
( ) Facsimile

Jose Luis Zepeda, Jr. #36287  
Idaho Correctional Institution, Orofino, C2  
Hospital Drive North #23  
Orofino, Idaho 83544

() First Class Mail  
( ) Hand Delivery - Basket  
( ) Facsimile



Clerk of the District Court

By   
Deputy Clerk

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
Attorneys at Law  
P. O. Box L  
161 Main Avenue West  
Twin Falls, ID 83303  
Telephone: (208) 734-1602  
Facsimile: (208) 734-1606  
ISB #1442  
ISB #7538

10/20/2010 Fri 11:40  
DUPLICATE  
DUTY

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. CV-2010-00079
Plaintiff/Appellant,	)	
	)	<u>NOTICE OF APPEAL</u>
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Defendant/Respondent.	)	

\*\*\*\*\*

TO: The State of Idaho and its attorney, Lawrence G. Wasden, Idaho Attorney General, Lance Stevenson, Minidoka County Prosecutor, and to the Clerk of the above-entitled Court:

NOTICE IS HEREBY GIVEN:

1. The Appellant, Jose Luis Zepeda, Jr., appeals against the Respondent to the Idaho

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Supreme Court from the Memorandum Decision and Order Granting State's Motion for Summary Dismissal file stamped in the above-entitled action on the 8<sup>th</sup> day of September, 2010, the Honorable Michael R. Crabtree presiding, and the Order Denying Petitioner's Motion for Reconsideration file stamped in the above-entitled action on the 12<sup>th</sup> day of October, 2010, the Honorable Michael R. Crabtree presiding.

2. The Appellant has a right to appeal to the Idaho Supreme Court, and the Judgment or Order described in paragraph 1 above is an appealable Order under and pursuant to I.A.R. 11(c)(1).

3. A preliminary statement of the issues on appeal which the Appellant then intends to assert in the appeal includes, but is not limited to, the following:

(a) Whether or not the District Court erred in granting the State's Motion for Summary Disposition.

(b) Whether or not the District Court erred in denying the Petitioner's Motion for Reconsideration.

4. (a) A reporter's transcript is requested.

(b) The Appellant requests the preparation of the following portion of the reporter's transcript.

The entire standard reporter's transcript of all recorded hearings.

5. The Appellant requests the documents included in the clerk's record automatically under Rule 28, I.A.R. No Order has been entered sealing all or any part of the record or transcript.



6. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter.

(b) That the Clerk of the District Court has been not paid the estimated fee for preparation of the designated Reporter's Transcript as the Defendant has filed an Ex-Parte Motion for Appointment of Appellate Public Defender.

(c) That the Clerk of the District Court has not been paid the estimated fee for preparation of the designated Clerk's Record as the Defendant has filed an Ex-Parte Motion for Appointment of Appellate Public Defender.

(d) That all applicable appellate filing fees have been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 and also upon the Attorney General of the State of Idaho.

DATED This 20<sup>th</sup> day of October, 2010.

FULLER LAW OFFICES

By 

GREG J. FULLER  
Attorneys for Plaintiff/Appellant

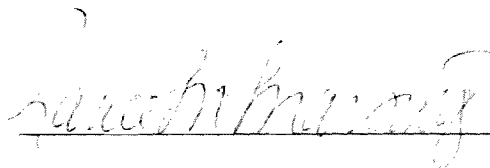
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 30<sup>th</sup> day of October, 2010, a true and correct copy of the foregoing Notice of Appeal was mailed, postage paid to:

Lawrence G. Wasden  
Idaho Attorney General  
P. O. Box 83720  
Statehouse Mail  
Boise, ID 83720

Lance Stevenson  
Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350

**Court Reporter**  
Minidoka County Courthouse  
P. O. Box 368  
Rupert, ID 83350

  
\_\_\_\_\_

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
Attorneys at Law  
P. O. Box L  
161 Main Avenue West  
Twin Falls, ID 83303  
Telephone: (208) 734-1602  
Facsimile: (208) 734-1606  
ISB #1442  
ISB #7538

2010 OCT 21 10:18:33

DU [Signature] 2010

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. CV-2010-00079
Plaintiff/Appellant,	)	
	)	
vs.	)	<u>EX-PARTE MOTION FOR</u>
	)	<u>APPOINTMENT OF STATE</u>
STATE OF IDAHO,	)	<u>APPELLATE PUBLIC DEFENDER</u>
	)	
Defendant/Respondent.	)	

\*\*\*\*\*

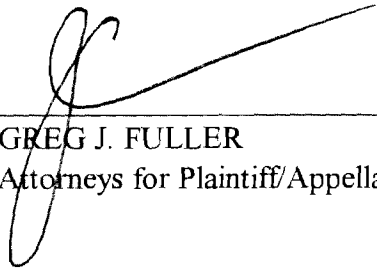
COMES NOW Jose Luis Zepeda, Jr., above-named Plaintiff/Appellant, by and through his attorney of record, Greg J. Fuller, and hereby moves this Honorable Court for an Order pursuant to Idaho Code Section 19-867, appointing the State Appellate Public Defender's Office to represent said Plaintiff/Appellant in all further appellate proceedings and

allowing counsel for Plaintiff to withdraw as counsel of record. This Motion is made and based upon the grounds and for the reasons that the Plaintiff/Appellant is currently incarcerated and is indigent; the State Appellate Public Defender's Office is authorized by statute to represent the Plaintiff/Appellant in all felony appellate proceedings; and it is in the interests of justice for them to do so in this case since the Plaintiff/Appellant is indigent and any further proceedings on this case will be appeals.

DATED This 20<sup>th</sup> day of October, 2010.

FULLER LAW OFFICES

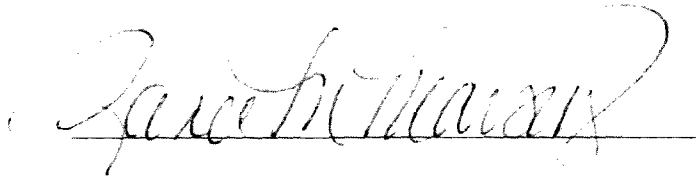
By

  
\_\_\_\_\_  
GREG J. FULLER  
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the foregoing was mailed, postage paid to:

Lance Stevenson  
Minidoka County Prosecutor  
P. O. Box 368  
Rupert, ID 83350

  
\_\_\_\_\_

**Greg J. Fuller**  
**Daniel S. Brown**  
**FULLER LAW OFFICES**  
 Attorneys at Law  
 P. O. Box L  
 161 Main Avenue West  
 Twin Falls, ID 83303  
 Telephone: (208) 734-1602  
 Facsimile: (208) 734-1606  
 ISB #1442  
 ISB #7538

11/25/2010 11:41 AM  
 DUNE  
 4

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\*\*\*\*\*

JOSE LUIS ZEPEDA, JR.,	)	
	)	Case No. CV-2010-00079
Plaintiff/Appellant,	)	
	)	
vs.	)	<u>EX-PARTE ORDER FOR</u>
	)	<u>APPOINTMENT OF STATE</u>
STATE OF IDAHO,	)	<u>APPELLATE PUBLIC DEFENDER</u>
	)	
Defendant/Respondent.	)	

\*\*\*\*\*

BASED UPON the Ex-Parte Motion for Appointment of State Appellate Public  
 Defender filed by Plaintiff/Appellant, and good cause appearing therefore;

IT IS HEREBY ORDERED pursuant to Idaho Code Section 19-867, that the State Appellate Public Defender's Office is hereby appointed to represent said Plaintiff/Appellant in all further appellate proceedings and counsel for the Plaintiff is hereby allowed to withdraw as counsel of record.

DATED This 25<sup>th</sup> day of October, 2010.

A handwritten signature in black ink, appearing to read "Michael Crabtree", is written over a horizontal line.

MICHAEL CRABTREE  
District Judge

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 26<sup>th</sup> day of October, 2010, she caused a true and correct copy of the foregoing EX-PARTE ORDER FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER to be served upon the following persons by depositing copies of the same in the United States Mail, postage prepaid.

Lance Stevenson  
Minidoka Co. Prosecuting Attorney  
P.O. Box 368  
Rupert, ID. 83350

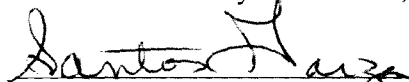
Lawrence Wasden  
State Attorney General  
P.O. Box 83720  
Boise, ID. 83720-0010

Supreme Court  
Appeals Dept.  
P.O. Box 83720  
Boise, ID. 83720-0101

Molly Huskey  
State Public Defender  
3647 Lake Harbor Lane  
Boise, ID. 83703

Court Reporter  
Maureen Newton  
P.O. Box 368  
Rupert, ID. 83350

Dated this 26<sup>th</sup> day of October, 2010

  
Santos Garza, Deputy Clerk

**IDAHO SUPREME COURT**



**IDAHO COURT OF APPEALS**

Clerk of the Courts  
(208) 334-2210

2010 NOV -4 AM 10:00 P.O. Box 83720  
Boise, Idaho 83720-0101

DUPN  
— Ae — DEPUTY

DUANE SMITH, CLERK  
Attn: SANTOS  
MINIDOKA COUNTY COURTHOUSE  
PO BOX 368  
RUPERT, ID 83350

**CLERK'S RECORD DUE DATE SET**

Docket No. 38199-2010      JOSE LUIS ZEPEDA, JR.      Minidoka County District Court  
v. STATE OF IDAHO      #2010-79

The CLERK'S RECORD must be filed in this office by JANUARY 5, 2011.

For the Court:  
Stephen W. Kenyon  
Clerk of the Courts

11/03/2010 DB

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\* \* \* \* \*

<b>JOSE LUIS ZEPEDA, JR. ,</b>	)	<b>SUPREME COURT NO. 38199-2010</b>
	)	
Plaintiff/Appellant,	)	<b>District Court # CV-2010-79*D</b>
vs.	)	
	)	<b>CLERK'S CERTIFICATE TO</b>
<b>STATE OF IDAHO,</b>	)	<b>RECORD</b>
	)	
Defendant/Respondent.	)	
<hr/>		
STATE OF IDAHO )	)	
)ss.	)	
County of Minidoka )	)	

I, DUANE SMITH, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that the above and foregoing record in the above-entitled case was compiled and bound under my direction, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by counsel.

I FURTHER CERTIFY that the Notice of Appeal was filed on the 20<sup>TH</sup> day of October, 2010

DUANE SMITH  
Clerk of the District Court

By: Santos Garza  
Santos Garza, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

\* \* \* \* \*

<b>JOSE LUIS ZEPEDA, JR.</b>	)	<b>Supreme Court No. 38199-2010</b>
	)	
Plaintiff/Appellant,	)	<b>District Court No. CV-2010-79*D</b>
vs.	)	
	)	<b>CLERK'S CERTIFICATE OF</b>
<b>STATE OF IDAHO,</b>	)	<b>SERVICE</b>
	)	
Defendant/Respondent.	)	
<hr/>		

I, Santos Garza, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, do hereby certify that I have personally served or mailed by United States Mail, postage prepaid, one copy of the Transcript on Appeal and the Clerk's Record to each of the parties or their attorney of record as follows:

Lawrence Wasden, Esq.  
IDAHO ATTORNEY GENERAL  
P. O. Box 83720  
Boise, ID 83720-0010

Molly J. Huskey  
IDAHO STATE APPELLATE PUBLIC DEFENDER  
3647 Lake Harbor Lane  
Boise, ID 83703

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in Rupert, Idaho, the 24 day of November, 2010.

DUANE SMITH  
Clerk of the District Court

By: Santos Garza  
Santos Garza, Deputy Clerk