

7-21-2011

Gosch v. State Clerk's Record Dckt. 38791

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

KIRK J GOSCH,

LAW CLERK

Plaintiff/Appellant,

vs

STATE OF IDAHO,

Defendant/Respondents. Court of Appeals

Entered on ATS by: _____

FILED - COPY
JUL 21 2011

CLERK'S RECORD ON
APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF IDAHO, IN AND
FOR THE COUNTY OF KOOTENAI

ATTORNEY FOR APPELLANTS
Molly Huskey

ATTORNEY FOR RESPONDENTS
Lawrence G Wasden

SUPREME COURT DOCKET 38791-2011

**SEE AUGMENTATION
RECORD**

38791

IN THE SUPREME COURT OF THE STATE OF IDAHO

KIRK J GOSCH

Plaintiff/Appellant,

vs

STATE OF IDAHO

Defendant/Respondent,

CLERK'S RECORD

SUPREME COURT NO.
38791-2011

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE BENJAMIN R SIMPSON
District Judge

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

Attorney for Appellants

Lawrence G Wasden
Attorney General
PO Box 83720
Boise ID 83720-0010

Attorneys for Respondents

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Filed May 6, 2011105

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Filed June 19, 200935

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Filed April 22, 2011101

UNIFORM PRETRIAL ORDER
Filed August 9, 201059

Kirk Juillard Gosch, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | Judge |
|------------|------|----------|--|
| 7/27/2007 | NCPC | JANUSCH | New Case Filed - Post Conviction Relief To Be Assigned |
| | | JANUSCH | Filing: 9SPC - Post Conviction Relief Filing Paid by: state Receipt number: 0755153 Dated: 7/30/2007 Amount: \$.00 (Cash) For: [NONE] To Be Assigned |
| | PETN | JANUSCH | Petition & Affidavit for Post Conviction Relief To Be Assigned |
| | AFFD | JANUSCH | Affidavit of Kirk Gosch To Be Assigned |
| | MOTN | JANUSCH | Motion & Affidavit for Fee Waiver To Be Assigned |
| 7/30/2007 | ADMR | JANUSCH | Administrative assignment of Judge Charles W. Hosack |
| 8/1/2007 | ANSW | MCCOY | Respondent's Answer to Petition for Post-Conviction Relief Charles W. Hosack |
| 8/9/2007 | MISC | MCCORD | petitioner's response to respondent's answer to petition for post-conviction relief Charles W. Hosack |
| 8/16/2007 | ORDR | RICKARD | Order For Waiver Of Prepaid Fees (Prisoner) Charles W. Hosack |
| | ORDR | RICKARD | Order Granting Motion For Appointment Of Counsel Charles W. Hosack |
| 8/24/2007 | SUBC | BOWLES | Substitution Of Counsel Charles W. Hosack |
| 2/20/2008 | NOPD | DUBE | Notice Of Proposed Dismissal Issued Charles W. Hosack |
| 3/11/2008 | IOPR | MEYER | Inactivity Order Printed - File Sent to Judge Charles W. Hosack |
| | AFFD | LSMITH | Affidavit in support of retention Charles W. Hosack |
| | AFFD | LSMITH | Affidavit in support of Amended Petition for Post Conviction Relief Charles W. Hosack |
| | MOTN | LSMITH | Motion to permit plaintiff to file an Amended Post Conviction Relief Petition Charles W. Hosack |
| | ORDR | LSMITH | Order of retention Charles W. Hosack |
| 3/17/2008 | HRSC | ROHRBACH | Hearing Scheduled (Motion to Amend 04/15/2008 03:00 PM) Petition/Payne/15 min Charles W. Hosack |
| 3/21/2008 | NOHG | LSMITH | Notice Of Hearing Charles W. Hosack |
| 4/14/2008 | HRVC | ROHRBACH | Hearing result for Motion to Amend held on 04/15/2008 03:00 PM: Hearing Vacated Petition/Payne/15 min Charles W. Hosack |
| 4/21/2008 | STIP | ROHRBACH | Stipulation to Permit Plaintiff to File Amended Petition as Proposed & Vacate 4-15-08 hrg Charles W. Hosack |
| 5/1/2008 | STIP | PARKER | Stipulation to Permit Plaintiff to File Amended Petition as Proposed and to Vacate Motion Set for 4/15/08 at 3:00P M Charles W. Hosack |
| 8/18/2008 | PETN | MCCOY | AMENDED Petition for Post Conviction Relief Charles W. Hosack |
| | AFFD | MCCOY | Affidavit in Support of Amended Petition for Post Conviction Relief Charles W. Hosack |
| 9/23/2008 | ANSW | LSMITH | Amended Answer Charles W. Hosack |
| 11/19/2008 | HRSC | ROHRBACH | Hearing Scheduled (Status Conference 02/17/2009 03:00 PM) Payne Charles W. Hosack |
| 11/24/2008 | NOHG | ROBINSON | Notice Of Hearing Charles W. Hosack |

Kirk Juillard Gosch, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|-----------|------|------------|---|---------------------|
| 12/2/2008 | MISC | HUFFMAN | Substitution of Counsel - Jed K Nixon for Linda J Payne Conflict PD | Charles W. Hosack |
| 2/17/2009 | INHD | ROHRBACH | Hearing result for Status Conference held on 02/17/2009 03:00 PM: Interim Hearing Held Payne | Charles W. Hosack |
| | DCHH | ROHRBACH | District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated: | Charles W. Hosack |
| | NOTE | ROHRBACH | Tickle for 30 days | Charles W. Hosack |
| 3/13/2009 | BRIE | BAXLEY | Brief In Support of State's Motion For Summary Disposition | Charles W. Hosack |
| 6/16/2009 | HRSC | ROHRBACH | Hearing Scheduled (Motion to Dismiss 07/16/2009 03:00 PM) Verharen - 15 min | Charles W. Hosack |
| 6/17/2009 | NOHG | SREED | Notice Of Hearing | Charles W. Hosack |
| 6/19/2009 | MOTN | CRUMPACKER | Respondents Motion for Summary Disposition | Charles W. Hosack |
| 7/15/2009 | OBJT | LEU | Objection To Motion For Summary Disposition | Charles W. Hosack |
| 7/16/2009 | HRHD | ROHRBACH | Hearing result for Motion to Dismiss held on 07/16/2009 03:00 PM: Hearing Held Verharen - 15 min | Charles W. Hosack |
| | DCHH | ROHRBACH | District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated: | Charles W. Hosack |
| 7/17/2009 | ORDR | ROHRBACH | Order - 60 days to file Amended Petition | Charles W. Hosack |
| 9/15/2009 | AFFD | COCHRAN | Affidavit in Support of Amended Petition for Post Conviction Relief | Charles W. Hosack |
| | PETN | RICKARD | Amended Petition For Post Conviction Relief | Charles W. Hosack |
| 1/5/2010 | ADMR | MEYER | Administrative assignment of Judge (batch process) | |
| 1/6/2010 | | SREED | Notice of Reassignment of Case to Correct Jurisdiction and Judge | Benjamin R. Simpson |
| 4/22/2010 | HRSC | LARSEN | Hearing Scheduled (Status Conference 06/23/2010 03:00 PM) | Benjamin R. Simpson |
| | | LARSEN | Notice of Hearing | Benjamin R. Simpson |
| 6/23/2010 | HRHD | LARSEN | Hearing result for Status Conference held on 06/23/2010 03:00 PM: Hearing Held | Benjamin R. Simpson |
| | DCHH | LARSEN | District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated: under 100 pages | Benjamin R. Simpson |
| | MEMO | LARSEN | 2nd Amended Memorandum Opinion On Respondent's Motion For Summary Disposition | Benjamin R. Simpson |
| 7/12/2010 | AFFD | CRUMPACKER | Affidavit of Kirk Gosch | Benjamin R. Simpson |
| | PETN | LARSEN | Amended Petition For Post Conviction Relief | Benjamin R. Simpson |

Kirk Juillard Gosch, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | Judge |
|-----------|------|------------|---|
| 8/9/2010 | HRSC | LARSEN | Hearing Scheduled (Court Trial Scheduled 02/28/2011 09:00 AM) half day trial |
| | | LARSEN | Notice of Trial |
| | PTOR | LARSEN | Uniform Pretrial Order |
| 2/25/2011 | MNCN | LARSEN | Motion To Continue Trial |
| | ORCT | LARSEN | Order To Continue Trial |
| | CONT | LARSEN | Hearing result for Court Trial Scheduled held on 02/28/2011 09:00 AM: Continued half day trial |
| | HRSC | LARSEN | Hearing Scheduled (Pre-Trial Conference 04/21/2011 08:00 AM) |
| | HRSC | LARSEN | Hearing Scheduled (Court Trial Scheduled 04/26/2011 09:00 AM) half day trial |
| 2/28/2011 | SUBC | BIELEC | Substitution Of Counsel |
| 3/1/2011 | NOTC | LARSEN | Trial Notice |
| | NOHG | LARSEN | Notice Of Pre-Trial Conference And Trial |
| 4/19/2011 | MOTN | CRUMPACKER | Motion for Telephonic Appearance |
| 4/21/2011 | HRHD | LARSEN | Hearing result for Pre-Trial Conference held on 04/21/2011 08:00 AM: Hearing Held |
| | DCHH | LARSEN | District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated: under 100 pages |
| | PTCO | CRUMPACKER | Pre-Trial Compliance |
| 4/22/2011 | ORDR | LARSEN | Order Denying Motion To Compel Counsel To Speak |
| | MISC | BAXLEY | Respondent's Witness List |
| | MOTN | BAXLEY | Motion To Take Judicial Notice |
| | BRIE | CLEVELAND | Respondent's Trial Brief |
| | MISC | LARSEN | Proposed Findings Of Fact And Conclusions Of Law |
| 4/26/2011 | | LARSEN | Amended Notice of Trial |
| | | LARSEN | 2nd Amended Notice of Trial |
| 5/3/2011 | CTST | LARSEN | Hearing result for Court Trial Scheduled held on 05/03/2011 09:00 AM: Court Trial Started half day trial |
| | DCHH | LARSEN | District Court Hearing Held Court Reporter: JoAnn Schaller Number of Transcript Pages for this hearing estimated: under 100 pages |
| 5/6/2011 | FACT | LARSEN | Findings Of Fact, Conclusions Of Law And Order |
| | JDMT | LARSEN | Judgment Of Dismissal |

Kirk Juillard Gosch, Plaintiff vs State Of Idaho, Defendant

| Date | Code | User | | Judge |
|-----------|------|--------|---|---------------------|
| 5/6/2011 | CVDI | LARSEN | Civil Disposition entered for: State of Idaho Post Conviction Relief, Other Party; Gosch, Kirk Juillard, Subject. Filing date: 5/6/2011 | Benjamin R. Simpson |
| | FJDE | LARSEN | Final Judgement, Order Or Decree Entered | Benjamin R. Simpson |
| | STAT | LARSEN | Case status changed: Closed | Benjamin R. Simpson |
| | MOTN | LARSEN | Motion For Appointment Of State Public Defender In Direct Appeal; Retaining Trial Counsel For Residual Purposes | Benjamin R. Simpson |
| | NOTC | LARSEN | Notice Of Appeal | Benjamin R. Simpson |
| 5/10/2011 | ORPD | LARSEN | Order For Appointment Of State Public Defender In Direct Appeal; Retaining Trial Counsel For Residual Purposes | Benjamin R. Simpson |
| 5/16/2011 | NOTC | LARSEN | Idaho Supreme Court Notice Of Appeal Filed | Benjamin R. Simpson |

Inmate Name KIRK J. GOSCH
IDOC No. 63663 SICI
Address P.O. BOX 8509
BOISE, IDAHO 83707

- MEN'S CWC 2007 JUL 27 AM 10:20

CLERK DISTRICT COURT

Marie Jensen
DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CV 07-5443

Case No. CR-05-403

KIRK J. GOSCH)

Petitioner,)

vs.)

THE STATE OF IDAHO)

Respondent.)

**PETITION AND AFFIDAVIT
FOR POST CONVICTION
RELIEF**

The Petitioner alleges:

1. Place of detention if in custody: SOUTH IDAHO STATE CORRECTIONAL INSTITUTION
2. Name and location of the Court which imposed judgement/sentence: FIRST DISTRICT, KOOTENAI COUNTY, COEUR D'ALENE, IDAHO
3. The case number and the offense or offenses for which sentence was imposed:
 - (a) Case Number: CR-05-403
 - (b) Offense Convicted: IDAHO CODE 37-2732(a),(e)
4. The date upon which sentence was imposed and the terms of sentence:
 - a. Date of Sentence: 09.13.06
 - b. Terms of Sentence: TWO(2) FIXED, THREE(3) INDETERMINATE RESPECTIVELY ON ALL COUNTS

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? _____

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

(a) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

(b) BREACH OF CONTRACT BY THE STATE

(c) WITHOLDING OF EXCULPATORY EVIDENCE

(d) DUE PROCESS VIOLATIONS

ATTACHED IS - FACTS IN SUPPORT

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? NO

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

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) SEE ATTACHED "FACTS IN SUPPORT..."

(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:

SEE ATTACHED "PRAYER FOR RELIEF"

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

DATED this 17 day of July, 2007.

Kirk J. Gosch
Petitioner

STATE OF IDAHO)
) ss
County of ADA)

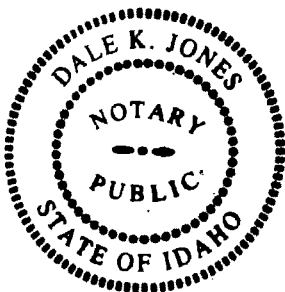
KIRK J. GOSCH, being sworn, deposes and says that the party is the Petitioner in the above-entitled appeal and that all statements in this PETITION FOR POST CONVICTION RELIEF are true and correct to the best of his or her knowledge and belief.

Kirk J. Gosch
Petitioner

SUBSCRIBED AND SWORN and AFFIRMED to before me this 17 day of July, 2007.

(SEAL)

Dale K. Jones
Notary Public for Idaho
Commission expires: 07-14-09



FACTS IN SUPPORT OF ISSUES

A) Counsel was Ineffective By THE Following:

1) Counsel did NOT keep PETITIONER Informed of ALL COURT PROCEEDINGS. PETITIONER WAS NOT MADE AWARE OF A suppression HEARING CHANGE AND CAUSED PETITIONER NOT TO BE PRESENT AT SAID HEARING.

2) COUNSEL did NOT call witnesses AT TRIAL THAT THE PETITIONER REQUESTED. THESE WITNESSES would HAVE TESTIFIED THAT THE PETITIONER did NOT own VEHICLE THAT DRUGS WERE FOUND IN NOR did PETITIONER EVER DRIVE VEHICLE. ALSO THESE WITNESSES would HAVE TESTIFIED THAT THE CO-DEFENDANT WAS DROPPED OFF AT SAID VEHICLE. CO-DEFENDANT WAS IN THE PROCESS OF BUYING SAID VEHICLE AND WAS USING IT AS HIS OWN.

3) COUNSEL did NOT OBJECT TO AN EVICTION NOTICE, ENTERED AS EVIDENCE, THAT SHOWED PETITIONER'S NAME ON IT. PETITIONER HAD NEVER SEEN THE DOCUMENT PRIOR TO THIS AND did NOT LIVE OR EVER HAD LIVED AT STATED RESIDENCE, LISTED ON THE DOCUMENT.

4) COUNSEL did NOT PRESENT FACTS AS TO WHOSE RESIDENCE IT WAS, WHICH would HAVE SHOWN THAT PETITIONER did NOT LIVE THERE.

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PETITION FOR POST CONVICTION RELIEF - 5

5) COUNSEL did NOT PRESENT FACTS AS, REQUESTED BY PETITIONER, TO WHOSE MONEY WAS ACTUALLY IN PETITIONER'S JEEP NOR did HE PRESENT EVIDENCE THAT THE CO-DEFENDANT WAS DRIVING JEEP AT THE TIME WITH PETITIONER NOT PRESENT. COUNSEL did NOT MAKE THE JURY AWARE THAT THE MONEY'S OWNERSHIP WAS NEVER CLAIMED BY PETITIONER

6) COUNSEL DISCOURAGED PETITIONER TO NOT APPEAL GUILTY VERDICT BY TELLING HIM THAT THE COCAINE CHARGE WHICH THE JURY FOUND HIM INNOCENT OF WOULD BE BROUGHT UP AGAIN AND COULD BE FOUND GUILTY. COUNSEL OFFERED NO ENCOURAGEMENT TO WIN AN APPEAL, EVEN IN LIGHT OF SERIOUS ISSUES.

7) COUNSEL did NOT EXPLAIN TO PETITIONER THE EXACT MEANINGS OF THE SIGNED PLEA BARGAIN AGREEMENT. HE did NOT EXPLAIN WHAT THE STATE MEANT BY "CO-OPERATION". THE STATE LEFT THE MEANING VAUZE AND COUNSEL did NOT INSIST TO DETAIL IT'S MEANING.

8) COUNSEL did NOT PRESENT EVIDENCE NOR OBJECT TO THE SEARCH WARRANT WHICH HAD PETITIONER'S NAME ON IT, BUT THE RESIDENCE STATED AND SEARCHED WAS NOT PETITIONER'S. PETITIONER did NOT LIVE

006
PETITIONER FOR POST CONVICTION RELIEF

AT SAID RESIDENCE.

9) COUNSEL did NOT OBJECT TO EVIDENCE SEIZED FROM VEHICLE PARKED OUTSIDE RESIDENCE WHICH WAS NOT PETITIONER'S RESIDENCE NOR WAS VEHICLE OWNED BY PETITIONER. COUNSEL ALSO did NOT OBJECT TO VEHICLE NOT BEING ON SEARCH WARRANT.

10) COUNSEL WAS UNAVAILABLE DURING PROCEEDINGS TO PETITIONER. COUNSEL STATED THAT HIS CASE LOAD KEPT HIM FROM BEING AVAILABLE. COUNSEL WOULD NOT RETURN CALLS NOR SHOW UP FOR APPOINTMENTS WITH PETITIONER.

B) A BREACH OF PLEA BARGAIN CONTRACT BY THE STATE WAS COMMITTED BY THE FOLLOWING:

1) ALL PARTIES AGREED THAT THE CHARGES WOULD BE REDUCED TO MISDEMEANORS OR DISMISSED ENTIRELY IF PETITIONER CO-OPERATED WITH THE STATE. THE STATE WANTED NAMES OF DRUG TRAFFICERS AND ALSO WANTED A CONTROLLED BUY SET UP. PETITIONER GAVE NAMES AND did SET UP A CONTROLLED BUY. THE CONTROLLED BUY WAS NOT CARRIED THROUGH BY THE STATE. PETITIONER FULLFILLED HIS PART OF THE CONTRACT BUT THE STATE BREACHED THE CONTRACT BY NOT REDUCING OR DISMISSING PETITION FOR POST CONVICTION RELIEF-7 007

CHARGES.

2) PETITIONER WAS STILL CHARGED WITH FELONIES AND HAD TO BRING THEM TO TRIAL. THE PROSECUTION WENT FURTHER TO SAY THAT THE PETITIONER DID NOT CO-OPERATE, WHICH WAS UNTRUE.

C) EXCULPATORY EVIDENCE WAS NOT PRESENTED BY THE FOLLOWING:

1) THE PROSECUTION DID NOT OFFER AS EVIDENCE THAT THE SEARCH WARRANT'S ADDRESS WAS NOT PETITIONER'S NOR MENTION THAT THE VEHICLE IN WHICH DRUGS WERE FOUND WAS NOT PETITIONER'S VEHICLE.

2) FINGER PRINTS WERE NOT TAKEN FROM VEHICLE WHERE DRUGS WERE FOUND NOR WERE THEY TAKEN FROM THE PLASTIC BAGS THAT DRUGS WERE FOUND IN. ALSO FINGER PRINTS WERE NOT TAKEN FROM ALL THE BUTANE CANS FOUND UNDER THE SINK DURING EXECUTION OF THE SEARCH WARRANT. THIS AMOUNTED TO 10-12 CANS IN WHICH FINGER PRINTS WERE NOT TAKEN FROM BY THE STATE.

3) THE FACT OF QUESTIONABLE OWNERSHIP OF THE SEIZED MONEY WAS NEVER BROUGHT UP BY THE PROSECUTION. THE MONEY WAS
PETITION FOR POST CONVICTION RELIEF-8 008

NOT PETITIONER'S. THE FACTS DID NOT SUPPORT THAT THE PETITIONER DID OWN THE MONEY OR THE DRUGS.

Q) DUE PROCESS VIOLATIONS WERE COMMITTED BY THE FOLLOWING:

1) THE SEARCH WARRANT'S ADDRESS WAS NOT PETITIONER'S NOR WAS THE VEHICLE WHERE DRUGS WERE FOUND WAS NOT PETITIONER'S. THE MONEY WAS NOT PROVEN TO BE PETITIONER'S NOR WAS THE DRUGS PROVEN TO BE PETITIONER'S.

2) PETITIONER WAS NOT INFORMED OF A SUPPRESSION HEARING DATE CHANGE. THIS CHANGE PREVENTED PETITIONER FROM ATTENDING DUE TO NOT BEING INFORMED OF CHANGE. PETITIONER HAD A RIGHT TO BE PRESENT AND WOULD HAVE CERTAINLY ATTENDED IF HE WOULD HAVE KNOWN ABOUT THE CHANGE.

IN SUMMARY

PETITIONER HAD INEFFECTIVE COUNSEL. IF PETITIONER WOULD HAVE BEEN REPRESENTED BY EFFECTIVE COUNSEL THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT. THE STATE BREACHED THE PETITIONER'S RIGHT TO A FAIR TRIAL.

CONTRACT BETWEEN THE PETITIONER AND THE STATE. IF THE STATE WOULD HAVE FULLFILLED THEIR PART OF THE CONTRACT THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT. THE PROSECUTION WITHELD EVIDENCE WHICH WOULD HAVE SHOWN THAT THE PETITIONER'S INVOLVEMENT WAS NOT AS PRESENTED. THESE ISSUES HAVE MERIT AND WOULD HAVE CHANGED THE OUTCOME OF THE PROCEEDINGS.

PRAYER FOR RELIEF

GRANT PETITIONER AN EVIDENTURY HEARING SO THAT WITH COMPETANT COUNSEL THESE ISSUES CAN BE FUTHER INVESTIGATED.

ORDER COMPLIANCE WITH THE PLEA BARGAIN CONTRACT WITH THE STATE, BY THE STATE.

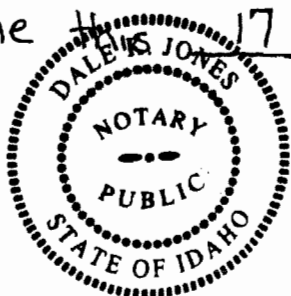
GRANT PETITIONER COMPETANT COUNSEL SO THAT THESE ISSUES CAN BE FUTHER INVESTIGATED.

OR GRANT ANY OTHER RELIEF THE COURT DEEMS APPROPRIATE.

DATED THIS ^{KG.} ~~14~~¹⁷ TH DAY OF July, 2007.

[Signature]
PETITIONER

SUBSCRIBED AND SWORN and AFFIRMED to before me this 17 day of July, 2007.



[Signature]
Notary Public for Idaho
Commission expires: 07-14-09

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the ^{23rd} ~~17~~ day of July, 2007, 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:

KOOTENAI County Prosecuting Attorney

P.O. BOX 9000C

COEUR D'ALENE, ID. 83816

[Signature]
Petitioner



Dale K. Jones
07-14-09

Affidavit of KIRK J. GO ^{STATE OF IDAHO} PETITIONER.
_{COUNTY OF ROOTENAI}

FILED: 2007 JUL 27 AM 10:20
CLERK DISTRICT COURT
Shane James
DEPUTY

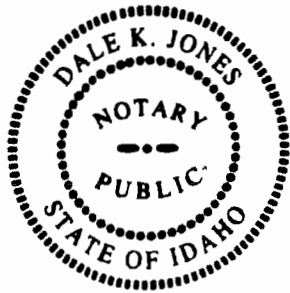
THESE ISSUES I'VE PRESENTED WERE CRITICLED IN DETERMINING OF MY PROCEEDINGS. I KNOW THAT THINGS WOULD HAVE BEEN DIFFERENT IF THESE THINGS DID NOT OCCURE. I FEEL THE STATE USED ME TO OBTAIN INFORMATION THEN DENIED ME WHAT THEY HAD PROMISED. MY ATTORNEY, FROM THE PUBLIC DEFENDERS OFFICE, DID NOT REPRESENT ME PROPERLY NOR WAS HE AVAILIBLE FOR CONSOLTATION AND ADVICE. I FEEL AN INJUSTICE WAS DONE AND I SUFFERED FOR IT. I HOPE THE COURT CAN SEE THIS AND GIVE ME AN OPPURTUNITY, WITH COMPETANT COUNSEL, TO FURTHER PRESENT FACTS IN SUPPORT OF MY ISSUES. THE ISSUES CAN BE PROVEN WITH COURT RECORDS AND TESTIMONY. I WOULD ASK THE COURT TO GRANT ME A HEARING SO THAT THESE ISSUES CAN BE RESOLVED.

FUTHER AFFIANT SAYATH NAUGHT.
DATED THIS 14TH DAY OF JULY, 2007.

DATED THIS 17 DAY OF July, 2007.

K. C. L.
SIGNATURE

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 17 DAY OF July, 2007.



Dale K. Jones
NOTARY PUBLIC FOR IDAHO
COMMISSION EXPIRES: 07-14-08

207 ORIC...

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

WILLIAM J. DOUGLAS
Prosecuting Attorney
Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800

2007 AUG -1 PM 4: 24

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|------------------------|---|-------------------------------|
| KIRK J. GOSCH, |) | |
| |) | CASE NO. CV 07-5443 |
| Petitioner, |) | |
| |) | RESPONDENT'S ANSWER |
| vs. |) | TO PETITION FOR |
| |) | POST-CONVICTION RELIEF |
| |) | |
| STATE OF IDAHO, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

Respondent, State of Idaho, through the office of the Kootenai County Prosecuting Attorney, responds to the allegations contained in the Petition for Post-conviction Relief filed by the Petitioner and states as follows:

I

Respondent denies all allegations not specifically admitted herein.

II

Respondent admits the allegations contained in paragraphs 1-6 of the Petition for Post-conviction Relief. Respondent denies the allegations in paragraphs 7 and 9. Respondent has insufficient knowledge of the facts alleged in paragraph 8 and therefore denies the same.

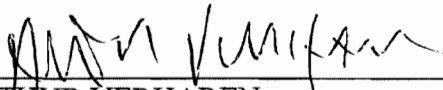
Paragraphs 10-13 of the Petition for Post-conviction Relief are not allegations requiring an answer by Respondent.

Affirmative Defense

Petitioner's complaint fails to state a claim upon which relief can be granted.

Therefore, Respondent respectfully requests that the Petition for Post-conviction Relief be dismissed and that the Petitioner be granted no post-conviction relief.

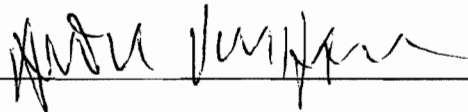
DATED this 31 day of July, 2007



ARTHUR VERHAREN
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of July, 2007, a true and correct copy of the foregoing was caused to be sent to Kirk Gosch, IDOC No. 63663, POB 8509, Boise, ID 83707



KIRK J. GOSCH
IDOC NO. 63663 - SICI - MEN'S CWC
P.O. BOX 8509
BOISE, ID 83707

PETITIONER PRO SE

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2007 AUG -9 PM 1:10

CLERK DISTRICT COURT

Kalman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR
THE COUNTY OF KOOTENAI

KIRK J. GOSCH,
PETITIONER

VS.

STATE OF IDAHO,
RESPONDENT

CASE NO. CV 07-5443

PETITIONER'S RESPONSE

TO RESPONDENT'S ANSWER

TO PETITION FOR POST-

CONVICTION RELIEF

KIRK J. GOSCH, PETITIONER, OFFERS TO THE COURT
THIS RESPONSE TO RESPONDENT'S FILED ANSWER AND
STATES AS FOLLOWS:

1) RESPONDENT, STATE OF IDAHO, DENIES ALLEGATION.
STATED IN PETITIONER'S POST CONVICTION RELIEF,
BUT MERELY ASKS FOR DISMISSAL BASED ON
SIMPLE DENIAL, NOT THE OFFERING OF FACTS.

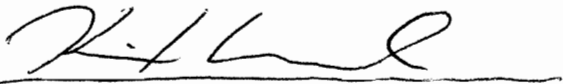
2) RESPONDENT, STATE OF IDAHO, ADMITS
INSUFFICIENT KNOWLEDGE OF THE FACTS AND
AGAIN ASKS FOR DISMISSAL BASED ON THAT.

3) RESPONDENT, STATE OF IDAHO, STATES THAT
THE PETITIONER FAILS TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED, FAILING TO
ACKNOWLEDGE THE SERIOUSNESS OF THE CLAIMS
STATED AND TRYING TO MINIMIZE THE

Importance of Investigation of the Facts.

BASED ON THE ANSWER SUBMITTED BY THE STATE, THE PETITIONER WOULD ASK THE COURT TO GRANT AN EVIDENTIARY HEARING SO THAT THE IMPORTANCE OF THE CLAIMS CAN BE DETERMINED AND THE TRUE FACTS OF THE ALLEGATIONS CAN BE BROUGHT OUT. PETITIONER'S CLAIMS HAVE MERIT AND ARE SEVERE ENOUGH TO WARRANT AN EVIDENTIARY HEARING. DISMISSAL WOULD NOT SERVE JUSTICE.

DATED THIS 5TH DAY OF AUGUST, 2007.

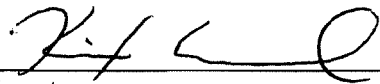


PETITIONER

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 7th day of August 2007, I
mailed a true and correct copy of PETITIONER'S RESPONSE - AFFIDAVIT via the U.S.
mail system to:

KOOTENAI COUNTY PROSECUTING ATTORNEY
P.O. BOX 9000
COEUR D'ALENE, ID 83816-9000



Signature

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

Inmate name KIRK J. GOSCH
IDOC No. 63663 SIC1 - MEN'S CWC
Address Box 8509
BOISE, ID 83707

2007 AUG 15 PM 3:35

CLERK DISTRICT COURT

DEPUTY
JUDICIAL DISTRICT

Petitioner

IN THE DISTRICT COURT OF THE FIRST

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KIRK J. GOSCH)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO)
)
Respondent.)
)

Case No. CV07-5443
CRF 403

**ORDER FOR WAIVER
OF PREPAID FEES
(PRISONER)**

Having reviewed the Petitioner's [] Respondent's Motion and Affidavit for Fee Waiver,

THIS COURT ORDERS a partial fee of \$ 0 must be paid.

[] THIS COURT DENIES the waiver because the Court finds the applicant is not an indigent prisoner pursuant to Idaho Code § 31-3220A.

DATED this 15 day of July, 2007

[Signature]
District Judge

I certify that a copy was served:

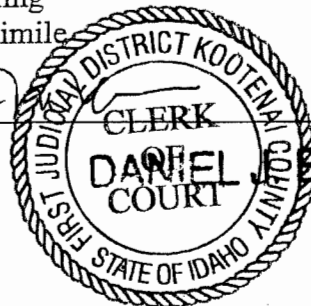
Name: Kirk Gosch [] Hand-delivery

Address: 63663 SIC1 - MENS CWC Mailing

City, State, Zip: BOISE, ID 83707 [] Facsimile

August 16, 2007
Date

[Signature]
Deputy Clerk



Inmate name KIRK J. GOSCH
IDOC No. 63663 SCL - MEN'S CWC
Address Box 8509
BOISE, ID. 83707

AUG 16 PM 3:35

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KIRK J. GOSCH)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO)
)
Respondent.)

CU07-5443

Case No. CRF-403

**ORDER GRANTING
MOTION FOR
APPOINTMENT
OF COUNSEL**

IT IS HEARBY ORDERED that the Petitioner's Motion for Appointment of Counsel is granted and Kootenai County Public Defender (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 14 day of August, 2007.

[Signature]
District Judge

*Copies to ISCPA - ID - Entire file
ISCPD - ID - Entire file*

8-20-07
[Signature]

Linda J. Payne
Attorney at Law
Contract Public Defender
1034 N. Third Street, Suite 9
Coeur d'Alene, Idaho 83814
(208) 665-1303; 255-7555
(208) 667-8292 FAX
ISB #6222

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

JM
2008 AUG 18 AM 10:57

(CLERK DISTRICT) COURT
Quinn Kelly
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|----------------------|---|-----------------------|
| KIRK JUILLARD GOSCH, |) | |
| |) | |
| Plaintiff, |) | CASE NO. CV-2007-5443 |
| |) | |
| vs. |) | |
| |) | |
| STATE OF IDAHO, |) | AMENDED PETITION |
| |) | FOR POST CONVICTION |
| Defendant, |) | RELIEF |
| |) | |

COMES NOW, plaintiff, and hereby amends his Petition for Post Conviction

Relief as follows:

1. Petitioner is not in custody.
2. The Court which imposed the sentence is the First Judicial District of the State of Idaho, In and For the County of Kootenai.
3. The case number is CR-2005-403. The sentence was imposed for a conviction of Manufacturing a Controlled Substance (Marijuana), a violation of Idaho Code 37-2732(a), Possession of Marijuana with Intent to Deliver, a violation of Idaho Code 37-2732(a), and Possession of

Marijuana in Excess of Three Ounces, a violation of Idaho Code 37-2732(e).

4. The sentence was imposed on September 20, 2006, probation violation disposition October 18, 2006. The sentence was two determinate plus three indeterminate for a total unified sentence of 5 years. The sentence was the same on each count, run concurrently.
5. A finding of guilty was made after a plea of not guilty.
6. No appeal from the judgment of conviction was made.
7. The grounds upon which this application for post conviction relief are based follow:

Ineffective Assistance of Trial Counsel in violation of the Sixth Amendment.
8. Prior to this petition, petitioner has filed no state or federal habeas corpus petitions. Prior to this petition, petitioner has filed no other petitions, motions or applications in any other court.

WHEREFORE, plaintiff prays as follows:

1. That the Court find that defendant's counsel was ineffective and in violation of his Sixth Amendment Right to Counsel by erroneously advising Mr. Gosch that if he appealed, he could be retried on the trafficking in cocaine not guilty jury verdict, and that such advise caused Mr. Gosch to refrain from filing an appeal, and that he was prejudiced thereby.

2. That the Court grant Mr. Gosch 42 days from the entry of its Order on this post conviction matter to file an appeal.
3. For other and further relief as the court deems just and equitable.

DATED this 3 day of March, 2008.

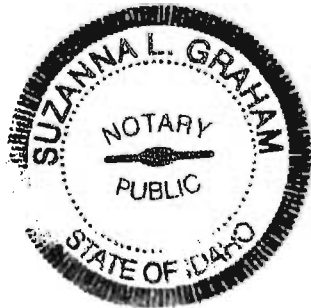

KIRK JUIILLARD GOSCH

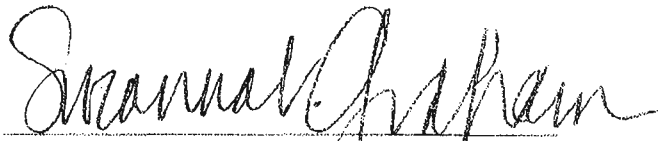
STATE OF IDAHO)
 : ss
County of Kootenai)

I, KIRK JUIILLARD GOSCH, being first duly sworn upon oath, depose and say, that I am the plaintiff herein, and all statements made in the foregoing Amended Petition for Post Conviction Relief are true and correct to the best of my knowledge and belief.


KIRK JUIILLARD GOSCH

SUBSCRIBED AND SWORN to before me this 3 day of March, 2008.




Notary Public, State of Idaho
Employed at Coeur d'Alene, Idaho
Commission expires: 10/31/2013

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person in the following manner:

Kootenai County Prosecuting Attorney

U.S. Mail, Postage Prepaid

Overnight Mail

Hand delivered

Facsimile No.

Courthouse Mail

Other: _____

By Missy Wilson

WILLIAM J. DOUGLAS
Prosecuting Attorney
501 Govt Way/Box 9000
Coeur d'Alene, ID 83816-1971
Telephone: (208) 446-1800

ASSIGNED ATTORNEY:
BLAKE SWENSON

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2008 SEP 23 AM 10:35

CLERK DISTRICT COURT
[Signature]
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

| | | |
|-----------------------------|---|------------------------------|
| KIRK JUILLARD GOSCH, |) | |
| |) | CASE NO. CV-2007-5443 |
| Petitioner, |) | |
| |) | <u>AMENDED ANSWER</u> |
| vs. |) | |
| |) | |
| STATE OF IDAHO |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

RESPONDENT, STATE OF IDAHO, through the office of the Kootenai County Prosecuting Attorney, Blake G Swenson, Deputy Prosecuting Attorney, responds to the allegations contained in the above referenced Petition for Post-Conviction Relief filed by the Petitioner and states as follows:

I

Respondent denies all allegations not specifically admitted herein.

II

Respondent admits the allegations contained in paragraph(s) 1-5, of the Petition for Post-Conviction Relief.

III

Respondent has no knowledge by which to admit or deny the allegation contained in paragraph(s) 6-8 of the Petition for Post-Conviction Relief, and therefore denies the same.

IV

DEFENSES

First Affirmative Defense

The Petition for Post-Conviction Relief fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The Petition for Post-Conviction Relief fails to allege sufficient facts that would vest jurisdiction in this Court.

Respondent, having fully answered all allegations contained in the Petition for Post-Conviction Relief filed herein, Respondent hereby respectfully prays as follows:

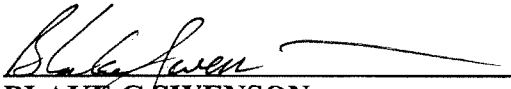
- 1.) that this matter be dismissed for lack of jurisdiction;
- 2.) that this matter be dismissed for failure to state a claim;
- 3.) that this matter be dismissed on its merits;
- 4.) that petitioner take nothing by way of the Amended Petition for Post-Conviction Relief.
- 5.) that this Honorable Court take judicial notice of the underlying criminal case.
- 5.) for such further relief as the Court deems just.

///

///

DATED this 22 day of Sept., 2008.

WILLIAM J. DOUGLAS
Prosecuting Attorney for
Kootenai County, Idaho




BLAKE G SWENSON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of Sept, 2008, a true and correct copy of the foregoing was caused to be mailed, faxed, or sent interoffice mail to:

Lind Payne, Conflict Public Defender, 1034 N. Third Street, Suite 9, CDA, ID 83814.
Fax: (208) 667-8292



BARRY MCHUGH
 Prosecuting Attorney
 501 N. Government Way/P.O. BOX 9000
 Coeur d'Alene, ID 83816-9000
 Telephone: (208) 446-1800

Assigned Attorney:
TERRI LAIRD
 Deputy Prosecuting Attorney

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED

DEC 13 AM 10:10

CLERK DISTRICT COURT

Patty Bayley
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|-----------------|---|------------------------------------|
| KIRK J. GOSCH, |) | |
| |) | CASE NO. CV-07-5443 |
| Plaintiff, |) | |
| |) | BRIEF IN SUPPORT OF STATE'S |
| vs. |) | MOTION FOR SUMMARY |
| |) | DISPOSITION |
| STATE OF IDAHO, |) | |
| |) | |
| Respondent. |) | |
| _____) |) | |

COMES NOW TERRI LAIRD, Deputy Prosecuting Attorney for Kootenai County, Idaho, the "Respondent" in the above-titled matter, and hereby submits a brief in support of the State's "Motion for Summary Disposition" filed concurrently herewith.

STATEMENT OF THE CASE

In Kootenai County case #F05-403, the Petitioner (hereinafter referred to as "Gosch") was convicted by a jury of Manufacturing a Controlled Substance (Marijuana), Possession of Marijuana with the Intent to Deliver and Possession of Marijuana in Excess of Three Ounces.

Sentencing was held on September 20th, 2006. Gosch was sentenced to a five (5) year prison sentence, with two (2) years fixed plus three (3) years indeterminate.

Petitioner never filed an appeal (as he concedes on page 2 of his "Petition and Affidavit for Post-Conviction Relief," hereinafter referred to as his "petition"). Petitioner first filed a Petition for Post Conviction Relief on or about July 27, 2007. The State filed her Answer on or

about July 31, 2007. Petitioner filed an Amended Petition and Affidavit for Post Conviction Relief on or about March 3, 2008. The State filed an Amended Answer on or about September 22, 2008, and the State now moves for summary disposition in its favor.

ISSUE

Has Gosch failed to state a genuine issue of material fact in his petition?

ARGUMENT

Gosch has failed to state a genuine issue of material fact.

Gosch in his Petition alleges ineffective assistance of counsel in paragraph 7, essentially making an argument that his counsel advised him not to appeal his conviction. Gosch elaborates on this argument in the affidavit attached to his amended petition, but he makes just the one basic argument. As to his ineffective assistance of counsel claim, Gosch has failed to state a genuine issue of material fact, and the State is entitled to summary disposition of this argument as a matter of law.

Summary dismissal upon a motion to dismiss a petition for post-conviction relief is permissible where the evidence raises no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Gonzalez v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct.App. 1991). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App. 1986).

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Hassett v. State, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct.App. 1995). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct.App. 1995), referencing I.R.C.P. 8. The court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's

conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App. 1994). A claim for post-conviction relief is subject to summary dismissal pursuant to I.C. section 19-4906 if the applicant “has not presented evidence making a *prima facie* case as to each essential element of the claims upon which the applicant bears the burden of proof.” Berg v. State, 131 Idaho 517, 960 P.2d 738, 739 (1998); Roman, at 647, and at P.2d 901.

An applicant for post-conviction relief due to ineffective assistance of counsel must meet a two-pronged test. First, he must show that the attorney’s representation did not meet objective standards of competence, i.e. that counsel’s conduct did not fall “within the wide range of reasonable professional assistance.” Strickland v. Washington, 466 U.S. 668, 689 (1984) and Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Second, the applicant must demonstrate that he was prejudiced by his attorney’s deficient performance. Strickland, 466 U.S. at 691-96 and Aragon, 114 Idaho 760-61, 760 P.2d at 1176-77. To withstand a motion for summary disposition of an ineffective assistance claim, the petitioner must allege facts meeting both these prongs. Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992) and Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct.Ap. 1994).

To establish the deficient performance prong of Strickland, a petitioner must demonstrate that his counsel’s performance fell below an objective standard of reasonableness. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986). “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 at 689. Strategic or tactical decisions made by trial counsel will not be second-guessed on review, unless those decisions are made upon a basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. State v. Roles, 122 Idaho 138, 145, 832 P.2d 311, 318 (Ct.App. 1992); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App. 1989). “The constitutional requirement for ineffective 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, 123 Idaho 77, 80,

844 P.2d 706, 709 (1992).

To establish prejudice, a petitioner must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon, at 761 and at 1177; Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct.App. 1999); Roman, at 649 and at 903. That is, a petitioner must show that his attorney's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. Satisfaction of the prejudice element requires a showing that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-29 (1985). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903.

As to his ineffective assistance of counsel claims, Gosch has failed to even adequately allege that counsel failed the Strickland test. Certainly Gosch has failed to produce admissible evidence that either prong of the Strickland test – deficient performance and resulting prejudice – can be proven here. The only evidence that Gosch provides is his own affidavit—his own self-serving, subjective statements. Gosch fails to provide any objective evidence to satisfy either prong of the Strickland test. Therefore, there is no genuine issue of material fact presented in his petition, and the State is entitled to summary disposition as a matter of law.

Nowhere in his petition, or in the affidavit attached thereto, does Gosch even begin to properly allege that his attorney's performance was deficient and/or that prejudice resulted. He simply offers bald assertions and speculation that his attorney gave certain advice upon which he chose to rely. Petitioner provides no objective evidence that his attorneys' advice was deficient. There is no analysis whatsoever of why the alleged failing would be an objective instance of deficient performance, nor is there any analysis offered as to why counsels' alleged failing resulted in fundamental prejudice to Gosch.

For instance, while Gosch's sole claim is that his attorney was deficient in advising him to not appeal his conviction, Gosch offers no analysis whatsoever of what specifically he would have appealed, what would be the likely result of an appeal, or how an appeal would have likely affected his case. There is nothing submitted to instruct the court as to how the suggested failure

of counsel would have been deficient by an objective standard, or how he was prejudiced by the purported ineffective assistance. Gosch simply doesn't even start the legal analysis necessary to survive summary disposition.

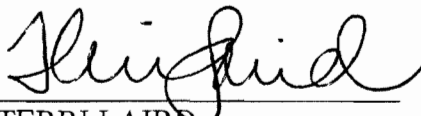
Gosch provides no evidence, other than bald, speculative assertions, of ineffective assistance of counsel. On the contrary, Gosch maintains that he chose not to file an appeal; his attorneys merely gave him advice that he chose to follow (page 2 of his "Petition and Affidavit for Post-Conviction Relief,""). Petitioner does not even allege that his attorneys refused to file an appeal on his behalf. Now, after his deadline has passed to file an appeal, Petitioner second-guesses his decision not to file an appeal. Petitioner's regret in following his attorneys' advice does not entitle him to post-conviction relief. Conceivably, Gosch's attorneys provided him with sound advice regarding the appeal. Yet, Petitioner has provided no evidence to the contrary. Gosch has the burden of making a *prima facie* case for each element he must prove to avoid summary disposition, and he has failed to do so.

CONCLUSION

Gosch has the burden to allege genuine issues of material fact. He has failed to meet that burden. Indeed, he has failed to even allege a proper legal argument, let alone to adduce sufficient evidence to raise a *prima facie* case establishing each element he must prove. There is simply nothing presented in Gosch's petition or affidavit that entitles him to post-conviction relief, even if taken at face value. The State asserts that it is entitled to summary disposition as a matter of law and respectfully requests that Iglesias' petition for post-conviction be summarily dismissed.

Dated this 12th day of March, 2009.

BARRY MCHUGH
Prosecuting Attorney for
Kootenai County, Idaho


TERRI LAIRD
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of March, 2009, a true and correct copy of the foregoing "Brief in Support of State's Motion for Summary Disposition" was caused to be mailed via U.S. mail, postage prepaid, or hand-delivered, or faxed, or delivered via interoffice mail, to:

Jed K. Nixon
Public Defender's Office

A handwritten signature, possibly "Jed K. Nixon", is written above a horizontal line.

ORIGINAL

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83814
Telephone: (208) 446-1800

2009 JUN 19 AM 10:16

CLERK DISTRICT COURT
Barb Crum
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KIRK J. GOSCH,)
)
Petitioner,)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

Case No. CV 07-5443

**RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION**

COMES NOW, Respondent, State of Idaho, through the office of the Kootenai County
Prosecuting Attorney and hereby moves the Court for Summary Dismissal of the Amended
Petition for Post-Conviction Relief for the reasons addressed in the brief previously filed in this
matter.

DATED this 15th day of June, 2009.

Arthur Verharen
ARTHUR VERHAREN
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of June, 2009, a true and correct copy of the
foregoing was caused to be sent to Jed K. Nixon, Conflict Public Defender

Arthur Verharen

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

#1 506 de 6

2009 JUL 15 PM 4:52

CLERK DISTRICT COURT
Debra J. [Signature]
DEPUTY

JED K. NIXON
NIXON LAW OFFICE
409 Coeur d'Alene Avenue
P.O. Box 1560
Coeur d'Alene, Idaho 83816-1560
Telephone: (208) 667-4655
FAX: (208) 765-4702
Idaho State Bar Number: 6598

Attorney for Petitioner

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

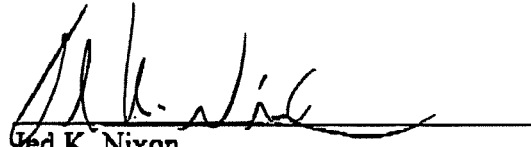
| | | |
|-----------------|---|--------------------------------|
| KIRK J. GOSCH, |) | |
| |) | |
| Petitioner, |) | CASE NO.: CV 07-5443 |
| |) | |
| vs. |) | OBJECTION TO MOTION |
| |) | FOR SUMMARY DISPOSITION |
| STATE OF IDAHO, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

COMES NOW, the Petitioner, KIRK J. GOSCH, by and through his attorney of record, JED K. NIXON of NIXON LAW OFFICE, and hereby objects to the Motion for Summary Disposition as follows:

1. This Motion is based on the files and records herein and such other and further reasons and grounds to be provided at hearing hereon.
2. Petitioner has submitted a genuine issue of material fact and requests an Evidentiary Hearing be regularly set by the Court.

Petitioner requests the right to present oral argument and evidence at the hearing for the Motion for Summary Dismissal; and will submit briefing if so required by this Court.

DATED this 15th day of July, 2009.


Ted K. Nixon
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify on the 15th day of July 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Kootenai County Prosecutor
501 Government Way
P.O. Box 9000
Coeur d'Alene, ID 83814

- Hand-delivered
- Regular mail
- Certified mail
- Fax: 208-446-1833



NIXON LAW OFFICE

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED: 7-17-09
AT 10:35 O'CLOCK A M
CLERK, DISTRICT COURT
Shari
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KIRK JULLIARD GOSCH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

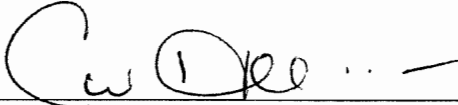
Case No. CV-07-5443

ORDER

The Honorable Charles W. Hosack, District Judge, heard oral argument in the above-entitled case on Respondent's Motion for Summary Disposition on July 16, 2009. At the conclusion of the hearing, the Court advised the parties of its ruling. NOW, THEREFORE

IT IS HEREBY ORDERED, Petitioner is granted 60 days in which to file an amended petition setting forth any legal grounds or other reasons as to why he would appeal his conviction.

Dated this 17 day of July 2009.


The Honorable Charles W. Hosack, District Judge

CERTIFICATE OF DELIVERY / MAILING

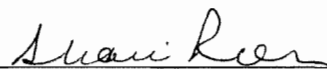
I hereby certify that on the 17 day of July 2009, a true and correct copy of the foregoing was faxed, to:

Jed Nixon
Fax: (208) 765-4702
704

Kootenai County Prosecutor's Office
Fax: (208) 446-1833 704

1802

DANIEL ENGLISH
CLERK OF THE DISTRICT COURT



Deputy Clerk

Linda J. Payne
Attorney at Law
Contract Public Defender
1034 N. Third Street, Suite 9
Coeur d'Alene, Idaho 83814
(208) 665-1303; 255-7555
(208) 667-8292 FAX
ISB #6222

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED 307
HWP
2007 SEP 15 PM 4:16

CLERK DISTRICT COURT
Macey Cochran
DEPUTY

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|----------------------|---|---------------------------|
| KIRK JUILLARD GOSCH, |) | |
| |) | |
| Plaintiff, |) | CASE NO. CV-2007-5443 |
| |) | |
| vs. |) | |
| |) | |
| STATE OF IDAHO, |) | AFFIDAVIT IN SUPPORT OF |
| |) | AMENDED PETITION FOR POST |
| Defendant, |) | CONVICTION RELIEF |
| |) | |

STATE OF IDAHO)
: SS
County of Kootenai)

Plaintiff, KIRK JUILLARD GOSCH, being first duly sworn under oath, deposes
and says:

1. That I am the Petitioner in the above entitled matter, am over the age of 18 years, and am competent to testify herein.
2. After I was convicted by a jury in this matter on the marijuana-related charges and found not guilty by a jury on the cocaine charge, I discussed the possibility of appealing the guilty verdicts with my attorneys, Anne Taylor and Christopher Schwartz.

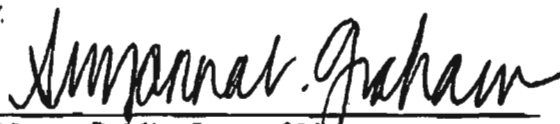
3. They told me that if I appealed the not guilty verdicts that I could be recharged with the cocaine charge despite the fact that the jury found me not guilty.
4. I questioned them because that did not seem right to me. Upon questioning, Mr. Schwartz told me that he had been a law clerk for the Idaho Supreme Court/Court of Appeals and that he had done research on this issue. He told me again that the law permits the prosecutor to refile the cocaine charge even though a jury found me not guilty.
5. Because of my attorneys' advice, I did not pursue an appeal. Had I not been told by my attorneys that the cocaine charge could be refiled, I would have timely filed an appeal.

DATED this 3 day of March, 2008.


KIRK JULIARD GOSCH
Juillard

SUBSCRIBED AND SWORN to before me this 3 day of March, 2008.




Notary Public, State of Idaho
Employed at Coeur d'Alene, Idaho
Commission expires: 10.31.2013

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person in the following manner:

Kootenai County Prosecuting Attorney

U.S. Mail, Postage Prepaid

Overnight Mail

Hand delivered

Facsimile No.

Courthouse Mail

Other: _____

By Melissa Wilson

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED 307
KY

SEP 15 PM 4:16

CLERK DISTRICT COURT
[Signature]
DEPUTY

JED K. NIXON
NIXON LAW OFFICE
409 Coeur d'Alene Avenue
P.O. Box 1560
Coeur d'Alene, Idaho 83816-1560
Telephone: (208) 667-4655
FAX: (208) 765-4702
Idaho State Bar Number: 6598

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KIRK GOSCH,

Petitioner,

vs.

STATE OF IDAHO,

Respondant.

5443
Case No. CV 07-5113

**AMENDED PETITION FOR
POST CONVICTION RELIEF**

COMES NOW, the Petitioner, KIRK GOSCH, by and through his attorney of record JED K. NIXON, of NIXON LAW OFFICE, and hereby amends his Petition for Post Conviction Relief as follows:

1. Petitioner is currently not in custody.
2. The Court which imposed the sentence is the First Judicial District of the State of Idaho, the County of Kootenai, The Honorable Charles W. Hosack, District Judge, Presiding.

3. The case number is CRF 2005-403. The sentence was imposed for a conviction of one count of Manufacturing a Controlled Substance (Marijuana), Idaho Code §37-2732(a), Possession of Marijuana with Intent to Deliver, Idaho Code §37-2732(a) and Possession of Marijuana in Excess of Three Ounces, Idaho Code §37-2732(e).

4. The sentence was imposed on September 20, 2006, with a probation violation disposition held October 18, 2006. The sentence was two years determinate, plus three years indeterminate for a total unified sentence of five years. The sentence was the same on each count, to run concurrently.

5. A finding of guilty was made after a plea of not guilty.

6. No appeal from the judgment of conviction was made.

7. The ground upon which this Amended Application for Post Conviction Relief is based upon the ineffective assistance of Mr. Gosch's trial counsel in violation of his Sixth Amendment rights under the United States Constitution, for failure to timely file Mr. Gosch's appeal.

8. Pursuant to the Court's July 17, 2009 Order, Mr. Gosch's legal grounds for filing said appeal would have been as followed:

a.) As a matter of law, Mr. Gosch was entitled to relief as requested in his Motion to Suppress, argued in front of Judge Hosack on January 13, 2006; denied on January 30, 2006. More specifically Mr. Gosch argued evidence seized by the State of Idaho should have been suppressed because:

- i.) The search warrant issued in this matter was overbroad and based upon stale information.
- ii.) The State's search of the white sedan was an unlawful extension of the issued search warrant and not subject to any exception to the warrant requirement.

Further, the Court denied Mr. Gosch's Motion for Interlocutory Appeal; the motion was argued on February 17, 2006; and subsequently denied on February 27, 2006.

- b) For any other such grounds or reasons as determined by Mr. Gosch and appellate counsel, arising from the jury trial beginning on July 25, 2006, resulting in a returned verdict on July 27, 2006.

9. Pursuant to Idaho Appellate Rule 11, Mr. Gosch is entitled to an appeal as a matter of right from a final judgment of conviction and/or any order made after judgment affecting the substantial rights of the defendant.

10. Prior to this Petition, the Petitioner has filed no state or federal habeas corpus petitions; the Petitioner has filed no other petitions, motions or applications in any other court.

WHEREFORE, Petitioner prays as follows:

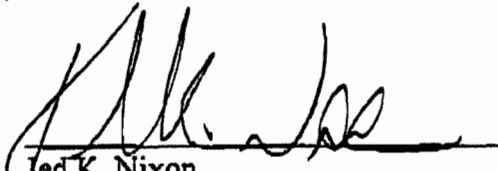
- 1. The Court find the Petitioner's trial counsel was ineffective in violation of his Sixth Amendment Right to Counsel by not filing an appeal in a timely manner; or in the alternative, for the Court to find Mr. Gosch's counsel was ineffective and in violation

of his Sixth Amendment Right to Counsel by erroneously advising Mr. Gosch if he appealed, he could be retried on the trafficking in cocaine charge, despite the jury's not guilty verdict. Said advice caused an appeal not to be filed, and thereby prejudiced Mr. Gosch.

2. That the Court grant Mr. Gosch 42 days from the entry of its Order on this post conviction matter to file an appeal.

3. For any other further relief as the Court deems just and equitable.

DATED this 15th day of September, 2009.

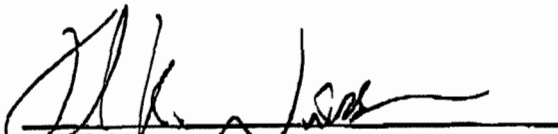

Jed K. Nixon

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 15th day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

KOOTENAI COUNTY PROSECUTOR
ARTHUR VERHAREN

Hand-delivered
 Regular Mail
 Facsimile: 446-1833


Jed K. Nixon

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 6-23-10
AT 3:08 O'CLOCK P.M.
CLERK, DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KIRK JULLIARD GOSCH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Case No. CV-07-5443

MEMORANDUM OPINION ON
RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION

2nd AMENDED

FACTS

Petitioner Kirk Gosch was convicted by a jury in Kootenai county criminal case # CR-05-403 of Manufacturing a Controlled Substance (Marijuana), Possession with Intent to Deliver and Possession of Marijuana in Excess of Three Ounces. He was also found Not Guilty for Possession of Cocaine. Petitioner was sentenced on September 20, 2006 to 2 years fixed and 3 years indeterminate. Petitioner never appealed his convictions. According to the affidavit of Mr. Gosch, his attorney told him that if he appealed his convictions, the state could then recharge him with the cocaine charge despite the fact that the jury found him not guilty. Mr. Gosch testifies that he did not pursue an appeal due solely to the advice given by his attorney. Thereafter Mr. Gosch filed this post-conviction relief action on July 27, 2007. The sole claim in his amended petition is that he was denied effective assistance of counsel. Specifically, Mr. Gosch alleges

that his counsel was ineffective in violation of his Sixth Amendment Right to Counsel by erroneously advising him that if he appealed, he could be retried on the cocaine charge notwithstanding a not guilty jury verdict, and he further alleges that he was prejudiced by refraining from filing an appeal in reliance upon the erroneous advice.

DISCUSSION

The differing standards between a post-conviction relief proceeding and an ordinary civil action were set out in *Hassett v. State*, 127 Idaho 313, 900 P.2d 221 (Ct. App. 1995). There the court stated

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 petition. I.C. §19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

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 petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. Summary dismissal of a petition for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence, for the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. (citations omitted)

Claims of ineffective assistance of counsel may properly be brought under the Post-Conviction Relief Act. *Aeschliman v. State*, 132 Idaho 397, 403 (Ct. App. 1999). To succeed in proving a claim of ineffective assistance of counsel the applicant must meet a two-part test. First, the applicant must show the attorney's conduct was not objectively reasonable. *Strickland v. Washington*, 466 U.S. 668 (1984); *Aragon v. State*, 114 Idaho 758, 760 (1988). Second, if the attorney's assistance can be shown to be incompetent, the applicant must also show a reasonable

probability that the deficient conduct prejudiced the applicant's case. *Id.* The applicant for post-conviction relief is required to make a prima facie case by presenting admissible evidence on each essential element of his or her claim. *Berg v. State*, 131 Idaho 517, 518-19, 960 P.2d 738 (1998); I.C. §19-4903. The Court will address each element of Mr. Gosch's claim.

1) Prejudice

A petitioner must prove in an ineffective assistance of counsel claim, that, but for his counsel's deficient performance the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The reason being that the right to effective assistance of counsel is recognized for the impact it has on the ability of the accused to receive a fair and reliable trial or appeal. Normally there is a strong presumption of reliability in judicial proceedings. A rebuttable presumption arises which requires a strong showing by the defendant that "attorney error" undermined the reliability of the proceeding. However, in the case where a petitioner was denied a judicial proceeding all together, there is no way to determine whether the outcome would have been different or whether the proceeding is reliable, because the proceeding never existed. Therefore, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal" *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

A component of the test in *Roe* requires the defendant to show that he "otherwise would have taken" an appeal. In *Roe* the U.S. Supreme Court found that evidence that there were non-frivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will be highly relevant in making this determination. That's not to say that a defendant's inability to "specify the points he would raise were his right to appeal reinstated" will foreclose

the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed.

In this case, Mr. Gosch does not specify the non-frivolous points he would raise were his right to appeal reinstated. Although this is not a per se requirement as to the prejudice element, he must present at least substantial reasons to believe that he would have appealed, but for the erroneous advice of counsel. Here Mr. Gosch only submits his own affidavit stating that his attorney gave him erroneous legal advice which caused him not to file an appeal that he otherwise would have taken. The State argues that Mr. Gosch “offers no analysis whatsoever of what specifically he would have appealed, what would be the likely result of an appeal, or how an appeal would have likely affected his case.” Mr. Gosch only states in an affidavit that he would’ve appealed. Without knowing whether he had non-frivolous grounds for appeal the Court finds no other substantial reason to believe that Mr. Gosch would’ve appealed, other than his word. It would be helpful to make out a prima facie showing for the petitioner to submit some evidence of his claims on appeal if it were reinstated.

2) Deficient Performance

An applicant for post-conviction relief is not automatically entitled to an evidentiary hearing; if the applicant failed to present evidence establishing an essential element on which he or she bears the burden of proof, summary dismissal is appropriate. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App.1993). Where a defendant asks his attorney to appeal and the attorney refuses, the defendant is deprived of effective assistance of counsel. *Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1259 (Ct. App. 1993); *Sanders v. State*, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). However, a defendant who initially requests an appeal may later decide against it in reliance upon competent advice of counsel. If a lawyer appropriately advises

against an appeal, and the defendant accepts that advice, there is no violation of the right to effective assistance. *Mata*, 124 Idaho at 593. The prejudice inquiry is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place. *Roe*. Specifically, both elements may be satisfied if the defendant shows non-frivolous grounds for appeal. *Id.*

In this case Mr. Gosch alleges that the advice given to him by his attorneys concerning the consequences of appeal was legally incorrect. In order to determine whether counsel in this case performed deficiently it would appear that two inquiries are relevant. 1) Was the advice of counsel as alleged by the petitioner, in fact legally erroneous, and 2) did the petitioner have non-frivolous grounds for appealing.

Whether the advice as alleged by the petitioner is actually erroneous is a question of law. Before the Court can address whether questions of fact exist as to Mr. Gosch's counsel's performance, the threshold question of whether the advice was legally erroneous as alleged must be answered. Neither party in this action has submitted legal briefing with regard to this issue. On its own initiative, the Court has researched the issue and in the case of *Green v. U.S.* the U.S. Supreme Court directly addressed the issue of whether an appeal of a conviction on one count opens the door to be retried on a charge of which the defendant was acquitted. The Court held unequivocally that where a person was tried and acquitted of a charge, but found guilty of second charge and on appeal the conviction was reversed and remanded for a new trial, the state could not twice put that person in jeopardy by trying him again for the charge for which he was acquitted. *Green v. U.S.*, 355 U.S. 184 (1957).

Counsel's advice in this case, that the petitioner could be re-tried for the charges for which he was acquitted by a jury, was legally erroneous. However, the question of whether the

petitioner otherwise had non-frivolous grounds for appeal has not been answered. It very well could be that, even though counsel advised the defendant not to appeal based on an erroneous interpretation of the law, petitioner did not have non-frivolous grounds to appeal anyway. Thus the advice not to appeal would in reality be competent, regardless of counsel's reasoning for giving the advice. Therefore, before the Court can determine whether issue of fact exist regarding counsel's deficient performance, the question of whether the petitioner had non-frivolous grounds for appeal must be addressed.

CONCLUSION

Having reviewed Mr. Gosch's petition for post-conviction relief this Court finds it necessary to determine whether petitioner had non-frivolous grounds for appeal before the motion for summary disposition can be fully addressed. The Court grants leave of 20 days for the petitioner to file an amended petition showing non-frivolous grounds for appeal. If after 20 days the petitioner has not come forth with an amended petition, the Court will grant the respondent's motion for summary disposition.

Dated this ~~22~~ day of June, 2010

~~23~~
Bey R. S.

~~The Honorable Charles W. Hesack, District Judge~~
Benjamin R. Simpson 1001

CLERK'S CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 24th day of ~~July~~ ^{June 2010}, 2009, a true and correct copy of the foregoing was mailed / delivered by regular U.S. Mail, postage prepaid, interoffice mail, hand delivered, or faxed to:

Jed Nixon, ~~Public Defender's Office~~
Fax: 208-446-1701 765-4702

Kootenai County Prosecutor
Fax: 208-446-1833

9149 #

CLERK OF THE DISTRICT COURT

By 
Deputy Clerk

Amended baxed
6-30-10 #
9334

2nd Amended
baxed 7-12-10
#9621

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: #856

2010 JUL 12 PM 2:10

CLERK DISTRICT COURT
DEPUTY *[Signature]*

JED K. NIXON
CONFLICT PUBLIC DEFENDER
409 Coeur d'Alene Avenue
P.O. Box 1560
Coeur d'Alene, Idaho 83816-1560
Telephone: (208) 667-4655
FAX: (208) 765-4702
Idaho State Bar Number: 6598

Conflict Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KIRK GOSCH,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV 07-0005443

**AMENDED PETITION FOR
POST CONVICTION RELIEF**

COMES NOW, the Petitioner, KIRK GOSCH, by and through his attorney of record JED K. NIXON, Conflict Public Defender, and hereby amends his Petition for Post Conviction Relief as follows:

1. Petitioner is currently in custody.
2. The Court which imposed the sentence is the First Judicial District of the State of Idaho, the County of Kootenai, The Honorable Charles W. Hosack, District Judge, Presiding.

AMENDED PETITION FOR
POST CONVICTION RELIEF

3. The case number is CRF 2005-403. The sentence was imposed for a conviction of one (1) count of Manufacturing a Controlled Substance (Marijuana), Idaho Code §37-2732(a), one (1) count of Possession of Marijuana with Intent to Deliver, Idaho Code §37-2732(a), and one (1) count of Possession of Marijuana in Excess of Three (3) Ounces, Idaho Code §37-2732(e).

4. On September 20, 2006, the sentence of two (2) years determinate plus three (3) years indeterminate for a total unified sentence of five (5) years was imposed.

5. After Mr. Gosch plead not guilty, a jury made a finding of guilty after trial.

6. No appeal from the Judgment and Sentencing Disposition was made.

7. No transcript was ever requested or provided for the purposes of an appeal.

8. The ground upon which this Amended Petition for Post Conviction Relief is sought is the violation of Mr. Gosch's Sixth Amendment rights under the United States Constitution. Mr. Gosch's original counsel gave him erroneous advice which led to the failure of Mr. Gosch's second counsel to timely file an appeal on his behalf.

9. Pursuant to the Memorandum Opinion on Respondent's Motion for Summary Disposition entered on June 23, 2010 by Judge Simpson, Mr. Gosch's legal grounds for filing said appeal are as follows:

A.) As a matter of law, Mr. Gosch was entitled to relief as requested in his Motion to Suppress argued in front of Judge Hosack on January 13, 2006, and denied on January 30, 2006. More specifically, Mr. Gosch argued evidence seized by the State of Idaho should have been suppressed because:

1.) The search warrant issued in this matter was overbroad and based upon stale information.

2.) The State's search of the white sedan was an unlawful extension of the issued search warrant and not subject to any exception to the warrant requirement.

Further, the Court denied Mr. Gosch's Motion for Interlocutory Appeal; the motion was argued on February 17, 2006 and subsequently denied on February 27, 2006.

B.) A Motion to Enforce the Plea Agreement was filed on February 9, 2006, and which was denied on February 17, 2006. Mr. Gosch would like to file an appeal of the Court's denial of this Motion.

C.) For any other such grounds or reasons as determined by Mr. Gosch and appellate counsel arising from the jury trial beginning on July 25, 2006, and resulting in a conviction on July 27, 2006.

10. Pursuant to Idaho Appellate Rule 11, Mr. Gosch is entitled to an appeal as a matter of right from a final judgment of conviction and/or any order made after judgment affecting the substantial rights of the Defendant.

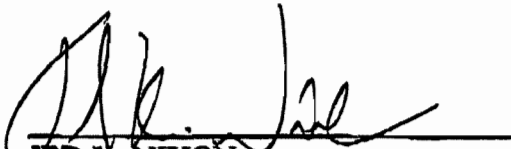
11. Prior to this Petition, the Petitioner has filed no state or federal habeas corpus petitions; the Petitioner has filed no other petitions, motions or applications in any other court.

12. The Petitioner reserves his right to assert other issues of appeal.

WHEREFORE, Petitioner prays as follows:

1. For an Order finding the Petitioner's trial counsel ineffective and in violation of his Sixth Amendment Right to Counsel.
2. For an Order granting Mr. Gosch forty-two (42) days from the entry of its Order on this post conviction matter to file an appeal.
3. For any other further relief as the Court deems just and equitable.

DATED this 11th day of July, 2010.

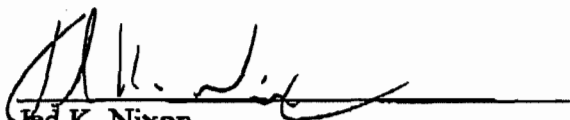

JED K. NIXON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 11th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

KOOTENAI COUNTY PROSECUTOR
ARTHUR VERHAREN

Hand-delivered
 Regular Mail
 Facsimile: 446-1833


Jed K. Nixon

AMENDED PETITION FOR
POST CONVICTION RELIEF

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 8-9-10
AT 4:15 O'CLOCK P M
CLERK, DISTRICT COURT
DEPUTY

UNIFORM PRETRIAL ORDER

In order to assist with the trial of this matter **IT IS HEREBY ORDERED** that:

1. **DISCOVERY:**

All written discovery shall be initiated so that timely responses shall be completed thirty-five (35) days before trial. The last day for taking any discovery depositions shall be twenty-one (21) days before trial.

2. **EXPERT WITNESSES:**

Not later than one hundred fifty (150) days before trial, Plaintiff(s) shall disclose all experts to be called at trial. Not later than ninety (90) days before, Defendant(s) shall disclose all experts to be called at trial. Such disclosure shall consist of at least the information required to be disclosed pursuant to I.R.C.P. 26(b)(4)(i). Notice of compliance shall be contemporaneously filed with the Court.

3. **PRETRIAL MOTIONS:**

Motions for summary judgment shall be timely filed so as to be heard not later than sixty (60) days before trial. (NOTICE: DUE TO COURT CONGESTION IT IS ADVISABLE TO CONTACT THE COURT FOR SCHEDULING SUMMARY JUDGMENT MOTIONS AT LEAST 90 DAYS PRIOR TO HEARING.) Motions in limine concerning designated witnesses and exhibits shall be submitted in writing at least seven (7) days before trial. The last day for hearing all other pretrial motions including other motions in limine shall be twenty-one (21) days before trial.

4. **MOTIONS FOR SUMMARY JUDGMENT:**

There shall be served and filed with each motion for summary judgment a separate concise statement, together with a reference to the record, of each of the material facts as to which the moving party contends there are no genuine issues of dispute. Any party opposing the motion shall, not later than fourteen (14) days after the service of the motion for summary judgment and the statement of facts, serve and file a separate

concise statement, together with a reference to the record, setting forth all material facts as to which it is contended there exist genuine issues necessary to be litigated.

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy, except and to the extent that such facts are asserted to be actually in good faith controverted by a statement filed in opposition to the motion.

5. DISCOVERY DISPUTES:

Unless otherwise ordered, the Court will not entertain any discovery motion, except those brought by a person appearing pro se and those brought pursuant to I.R.C.P. 26(c) by a person who is not a party, unless counsel for the moving party files with the Court, at the time of filing the motion, a statement showing that the lawyer making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion. The motion shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated.

6. EXHIBITS AND EXHIBIT LISTS:

Exhibit lists and copies of exhibits shall be prepared and exchanged between parties and filed with the Clerk at least fourteen (14) days before trial. The original exhibits should be filed with the Clerk at the time of trial. Using the attached form, each party shall prepare a list of exhibits, it expects to offer. Two copies of the exhibit list are to be filed with the Clerk, and a copy is to be provided to opposing parties. Exhibits should be listed in the order that the party anticipates they will be offered. Exhibit labels can be obtained from the Court Clerk. Each party shall affix labels to their exhibits before trial. After the labels are marked and attached to the original exhibit, copies should be made. Plaintiff's exhibits should be marked in numerical sequence. Defendant's exhibits should be marked in alphabetical sequence. The civil action number of the case and the date of the trial should also be placed on each of the exhibit labels. It is expected that each party will have a copy of all exhibits to be used at trial.

7. **LIST OF WITNESSES:**

Witness lists shall be prepared and exchanged between parties and filed with the Clerk at least fourteen (14) days before trial. Each party shall provide opposing parties with a list of the party's witnesses and shall provide the Court with two copies of each list of witnesses. Witnesses should be listed in the order they are anticipated to be called.

8. **BRIEFS AND MEMORANDA:**

In addition to any original brief or memorandum filed with the Clerk of Court, a copy shall be provided to the Court. To the extent counsel rely on legal authorities not contained in the Idaho Reports, a copy of each case or authority cited shall be attached to the Court's copy of the brief or memorandum.

9. **TRIAL BRIEFS:**

Trial briefs shall be prepared and exchanged between the parties and filed with the Clerk at least seven (7) days before trial.

10. **PROPOSED FINDINGS AND CONCLUSIONS:**

If the trial is to the Court, each party shall at least seven (7) days prior to trial file with the opposing parties and the Court, proposed Findings of Fact and Conclusions of Law Supporting their position.

11. **MODIFICATION:**

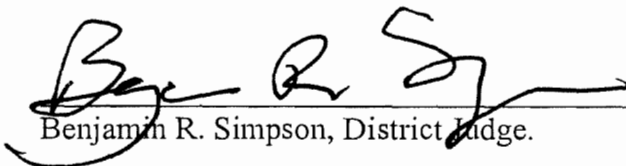
This Pretrial Order may be modified by stipulation of the parties upon entry of an order by the Court approving such stipulation. Any party may, upon motion and for good cause shown, seek leave of Court modifying the terms of this order, upon such terms and conditions as the Court deems fit. Any party may request a pretrial conference pursuant to I.R.C.P. 16(i).

12. **SANCTIONS FOR NONCONFORMANCE:**

Failure to timely comply in all respects with the provisions of this order shall subject non-complying parties to sanctions pursuant to I.R.C.P. Rule 16(i), which may include:

- (a) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence;
- (b) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (c) In lieu of any of the foregoing orders or in addition thereto, an order threatening as a contempt of Court the failure to comply;
- (d) In lieu or in addition to any other sanction, the Judge shall require the party or the attorney representing such party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the Judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

IT IS FURTHER ORDERED that any vacation or continuation of the trial date shall not change or alter any of the discovery or disclosure dates established by the initial trial setting. Any party may, upon motion and for good cause shown, request that the discovery and disclosure dates be altered on vacation or continuance of the trial date.


Benjamin R. Simpson, District Judge.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 APR 21 PM 4:51

CLERK DISTRICT COURT
San G. [Signature]
DEPUTY
PB

SEAN P. WALSH
WALSH LAW OFFICE, PLLC
206 Indiana Street, Suite 117
Coeur d'Alene, ID 83814
Phone: 208-665-7400
Fax: 208-765-4636
ISBN: 7235

Attorney for Defendant

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

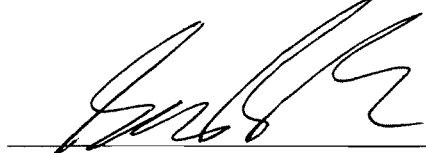
| | | |
|------------------------|---|---------------------------------|
| KIRK J GOSCH, |) | |
| |) | |
| Plaintiff, |) | CASE NUMBER CV-2007-5443 |
| |) | |
| V. |) | PRETRIAL COMPLIANCE |
| |) | |
| STATE OF IDAHO, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMES NOW, Plaintiff, Kirk J. Gosch, by and through his attorney of record, Sean P. Walsh of the law firm WALSH LAW OFFICE, PLLC, and in compliance with the pretrial and scheduling order, hereby submits the following:

1. Witnesses: Kirk Gosch, Petitioner herein.
2. Exhibit List: See Attached.
3. Points and Authorities: *Beasley v. State*, 126 Idaho 356 (Ct. App. 1994)

DATED this 21 day of April, 2011.

WALSH LAW OFFICE, PLLC

By: 
SEAN P. WALSH
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of April, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Kootenai County Prosecuting Attorney
208-446-1833

- U.S. Mail
- Hand Delivered
- Fax
- Overnight Mail



STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 2-27-06
AT 11:10 O'CLOCK A M
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

KIRK GOSCH,

Defendant.

Case No. ^{CR} ~~CX~~-05-403

**ORDER DENYING DEFENDANT'S
MOTION FOR INTERLOCUTORY
APPEAL**

Before the Court is Defendant Kirk Gosch's Motion for Interlocutory Appeal. Defendant moves for an interlocutory appeal of two of this Court's orders: 1) the order denying Defendant's motion to suppress, and 2) the order denying Defendant's motion to enforce the plea agreement. The Court heard oral argument on Defendant's motion on February 17, 2006. At the conclusion of the hearing, the Court took the matter under advisement to be ruled on within the 14-day time period provided in Appellate Rule 12(b).

Appellate Rule 12 provides the mechanism by which a party may seek an appeal of an interlocutory order of a district court. The party must first seek permission to appeal from the district court, then seek acceptance of the appeal from the Supreme Court. I.A.R. 12(b) and (c). Permission may be granted where the order in question involves a "controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal

from the order may materially advance the orderly resolution of the litigation.” I.A.R. 12(a). As the Supreme Court explained in Budell v. Todd, 105 Idaho 2, 665 P.2d 701 (1983), “It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved.” Budell, at 4, 665 P.2d at 703. The Budell Court further explained:

The [Supreme] Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11.

Id.

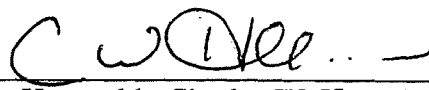
Defendant asserts that his motion to enforce the plea agreement he entered into with the State raises an issue of first impression regarding the extent to which contract law should be applied in the context of plea agreements. This Court disagrees. The plea agreement in this case provided that Defendant was to complete two tasks. Whether or not Defendant accomplished these tasks would be a determination made “solely by the State.” (Plea Agreement, Exhibit A to Defendant’s Motion to Enforce Plea Agreement.) The testimony at the hearing was that the State did not consider Defendant to have fulfilled his end of the plea agreement. The Court’s decision to deny Defendant’s motion to enforce the agreement was thus made on purely factual grounds and involves no substantial legal issue or legal question of first impression. Accordingly, the Court denies Defendant’s request for an interlocutory appeal of the order denying Defendant’s Motion to Enforce Plea Agreement.

Defendant also asserts that his Motion to Suppress presents a question of first impression in regards to the warrantless search of Defendant’s vehicle, while his vehicle was parked in his

private driveway. While it is true that no reported cases in Idaho have ever dealt with the use of a drug detecting dog unit to inspect a vehicle parked in a private driveway, there are ample cases discussing the use of a drug detecting dog during the scope of a valid traffic stop, e.g., State v. Tucker, 132 Idaho 841, 979 P.2d 1199 (1999); Gallegos, 120 Idaho 894, 821 P.2d 949 (1991); State v. Gibson, 141 Idaho 277, 108 P.3d 424 (Ct. App. 2005), as well as the authority of the police to search without a warrant a vehicle parked in a private driveway pursuant to the automobile exception to the warrant requirement, e.g. United States v. Hatley, 15 F.3d 856 (9th Cir.1994); United States v. Markham, 844 F.2d 366 (6th Cir.1988); State v. Bottelson, 102 Idaho 90, 625 P.2d 1093 (1981). In addition, this Court reads State v. Sapp, 110 Idaho 153, 715 P.2d 366 (Ct. App. 1986), to support the conclusion that the police were lawfully on the premises to be searched pursuant to a search warrant when they employed the use of a drug detection dog in the Defendant's driveway. Consequently, it is this Court's determination that it has merely applied existing case law to the facts of the present case, not issued an order involving a legal question of first impression. NOW, THEREFORE,

IT IS HEREBY ORDERED, AND THIS DOES ORDER, that Defendant's Motion for Interlocutory Appeal is denied.

Dated this 24 day of February, 2006.



The Honorable Charles W. Hosack, District Judge


CERTIFICATE OF DELIVERY / MAILING

On this 27 day of February, 2006, a true and correct copy of the foregoing was mailed in the U.S. Mail, postage prepaid, sent via facsimile, or sent via interoffice mail as indicated below to the following counsel:

Kootenai County Prosecutor's Office
Art Verharen

Kootenai County Public Defender's Office
Anne Taylor

DANIEL ENGLISH
CLERK OF THE DISTRICT COURT


Deputy Clerk

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
CLERK OF COURT
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE FOR RECORD IN THIS OFFICE.
SEALED ON THIS 19TH DAY OF APR 2011
CLIFFORD T. HAYES, CLERK OF THE DISTRICT COURT BY [Signature]
Deputy
PAGES 1-4
OF 4

STATE OF IDAHO)
County of Kootenai)"
FILED 1-30-06

At 8:14 O'clock A.M.
CLERK OF THE DISTRICT COURT

Debra Douglas
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,

Plaintiff,

vs.

KIRK J. GOSCH,

Defendant.

Case No. *CR-05-403*

MEMORANDUM OPINION

Art Verharan, Kootenai Co. Prosecutor's Office, for Plaintiff.

Anne Taylor, Kootenai Co. Public Defender's Office, for Defendant.

I.

FACTS AND PROCEDURAL HISTORY

On December 2, 2004, Defendant Kirk Gosch was stopped in his vehicle by Hayden City police officers and cited for possession of marijuana and paraphernalia. Defendant's criminal history includes a prior arrest, in October 2003, for possession of paraphernalia. This information was communicated to the Idaho State Police (hereinafter "ISP"). At the time, the ISP had reports dating back approximately two years of

Defendant's involvement in a marijuana smuggling operation between Canada and Kootenai County.

In late December, the ISP conducted a garbage pull at Defendant's residence, Officers found several plastic baggies with corners cut off, as well as some baggies with a white powdery substance in them.

On January 6, 2005, the ISP initiated surveillance on the Defendant's residence, during which officers conducted another garbage pull. As a result of that pull, officers found heat-sealed plastic bags, some bearing labels of "A" or "B," which markings are used to denote grades of marijuana from Canada. Officers also found plant stems, which tested positive for marijuana, several large butane gas cylinders, and two broken glass jars, which tested positive for THC. Last, officers found several zip lock baggies emanating a strong odor of marijuana and containing a green leafy substance.

As a result of this evidence, ISP Detective Morgan requested a search warrant for Defendant's residence and vehicle. The magistrate court granted a search warrant for 11974 N. Rimrock Road, Kootenai County, ID, and for a black 1996 Jeep registered to the Defendant. The warrant authorized officers to search for evidence and fruits of the crimes of Trafficking in Marijuana and Conspiracy to Traffic in Marijuana.

Prior to execution of the search warrant, one of the surveillance officers, ISP Detective Carlock, observed Defendant and two other individuals carrying items from Defendant's residence to an area in which two vehicles were parked. From Detective Carlock's position, she could not always detect which vehicle the items were loaded into. However, Detective Carlock testified that she observed items being placed into a black

Jeep, and, on at least one occasion, she observed Defendant load items into a white Suzuki.

The search warrant was executed at approximately 1:30 p.m. During execution of the warrant, a canine unit was used to investigate two vehicles located on the premises but not listed in the search warrant: a white Suzuki sedan registered to Defendant, and a white GMC pickup truck. Cocaine and marijuana were subsequently found in the trunk of the Suzuki.

In the house, officers found several devices used for the ingestion of marijuana and several glass vials, which contained suspected "honey oil" (a refined marijuana substance). Officers also seized from the house multiple empty glass vials, packaging materials, a bottle of MSM (commonly used as a cutting/bulking additive for cocaine distribution), and scales.

Defendant was subsequently charged with Trafficking in Cocaine, Manufacturing a Controlled Substance, Possession of a Controlled Substance with the Intent to Deliver, and Possession of Marijuana in Excess of Three Ounces. Defendant now moves for the suppression of evidence seized from his residence and the white Suzuki, on the grounds that the search warrant was improperly based on stale information and overly broad and that the search of the Suzuki was an impermissible extension of the search warrant and not within a recognized exception to the warrant requirement.

The State argues first that there is nothing in the record that would allow the Court to find that the search warrant was not properly based on probable cause and overly broad, due to the Defendant's failure to request and make available a transcript of the search warrant hearing. Therefore, the Court should presume that probable cause

existed to support the search warrant issued. Second, the State argues that, because there existed probable cause to believe contraband would be found in the Suzuki, the search of the Suzuki was within the automobile exception to the warrant requirement.

Alternatively, the State argues that the doctrine of inevitable discovery should be applied so as to prevent suppression of the evidence seized from the Suzuki.

For the reasons discussed in this memorandum opinion, Defendant's motion to suppress is denied.

II.

DISCUSSION

A. The Court Cannot Conclude that the Search Warrant Lacked Probable Cause or Was Overbroad.

Defendant argues that the evidence seized from his residence should be suppressed on the grounds that the warrant authorizing the search of the residence was improperly based on stale information and overly broad. The State argues in response that there is nothing before the Court which would allow the Court to make such a determination, since the Defendant has not placed into the record a transcript of the search warrant hearing.

In reviewing a lower court's determination of probable cause, an appellate court examines the warrant affidavit submitted to the magistrate to determine whether it provided the magistrate with a substantial basis for concluding that probable cause existed. State v. Yager, 139 Idaho 680, 662, 85 P.3d 656, 686 (2004). Where sworn testimony at a search warrant hearing takes the place of a warrant affidavit, the testimony is part of the appellate record and is reviewed in transcript form. See Id. Great deference

is given to the probable cause determinations of magistrates, and doubts are resolved in favor of the warrant. Id.

A defendant challenging a magistrate court's issuance of a warrant in the context of a motion to suppress before the district court is essentially an appellant claiming error in a lower court's decision. It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error. State v. Coma, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999). Where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court. Id.

Although Defendant's counsel invites the Court to take judicial notice of the testimony before the magistrate court when it made the decision to issue a search warrant for Defendant's residence, counsel does not provide the Court with a method by which the Court may review said testimony. Defendant has neither provided the Court with a copy of a transcript of the search warrant hearing, nor cited to the record with any specificity as to which facts relied upon by the magistrate court were stale and therefore did not add up to probable cause to support the issuance of the search warrant. Instead, Defendant's counsel simply suggests that the Court obtain a tape of the search warrant hearing and make its determination upon review of the tape.

The burden is on the defendant to establish that the issuance of a search warrant was not supported by probable cause. State v. Patterson, 139 Idaho 858, 863, 87 P.3d 967, 972 (Ct. App. 2004). Having failed to provide an adequate record from which the Court may make such a determination, Defendant has failed to meet this burden.

Accordingly, the Court cannot find that the search warrant issued for Defendant's residence and Jeep lacked probable cause or was overly broad.

B. The Search of the Suzuki was Within the Automobile Exception to the Warrant Requirement.

The State argues that the facts known to the officers at Defendant's residence, at the time of the execution of the search warrant, established probable cause to believe the Suzuki contained evidence of a crime. Having probable cause, the officers were then permitted to search the Suzuki without obtaining a warrant. In response, Defendant urges this Court to distinguish between the circumstances of this case and the usual traffic stop, during which it is well-established law that an officer may employ the use of a narcotic detecting dog to sniff the exterior of a lawfully stopped vehicle.

Both the Fourth Amendment of the U.S. Constitution and Article I of the Idaho Constitution prohibit unreasonable searches and seizures. The warrantless search of an automobile is presumptively unreasonable; however, this presumption may be overcome, if the evidence establishes that the search comes within one of the few specifically established and well-delineated exceptions to the warrant requirement or was otherwise reasonable under the circumstances. See State v. Weaver, 127 Idaho 288, 290, 900 P.2d 196, 198 (1995). The burden of overcoming a presumption of unreasonableness is on the state. See Id.; See also Flippo v. West Virginia, 528 U.S. 11, 13 (1999).

Under the automobile exception to the warrant requirement, police may search an automobile and the containers within it when they have probable cause to believe that the automobile contains contraband or evidence of a crime. State v. Gibson, 141 Idaho 277, ___, 108 P.3d 424, 428 (Ct. App. 2005) (citing State v. Gallegos, 120 Idaho 894, 898, 821 P.2d 949, 953 (1991)). The exception is based upon "both the automobile's ready

mobility . . . and upon the lesser expectation of privacy in an automobile as compared to the privacy interest in a home.” Gibson, at ____, 108 P.3d at 428-429 (citing California v. Carney, 471 U.S. 386, 390- 92 (1985), and State v. Bottelson, 102 Idaho 90, 93, 625 P.2d 1093, 1096 (1981)). As a result, courts have focused on the apparent ready mobility and location of a subject vehicle when deciding whether or not the automobile exception should apply. The Supreme Court in Carney explained:

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes--temporary or otherwise--the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

Carney, at 392-393.

As the above-cited language and existing case law make clear, the automobile exception is not limited to vehicles stopped on a highway, but extends to vehicles parked in private driveways. See e.g. United States v. Hatley, 15 F.3d 856, 859 (9th Cir.1994) (holding that the automobile exception applied to an apparently mobile vehicle parked in a private driveway, even though the vehicle was later discovered to be inoperable); United States v. Markham, 844 F.2d 366, 368 (6th Cir.1988) (concluding that the automobile exception applied to an unoccupied motor home parked in a private driveway). See also State v. Bottelson, 102 Idaho 90, 625 P.2d 1093 (1981) (holding that automobile exception applied to vehicle parked in private driveway, where there was “abundant” probable cause to suspect that a burglary was in progress).

In the present case, Defendant contends that since the Suzuki “was not about to be moved” and was “secure where it was,” the mobility concerns that justify the automobile exception were not present when the Suzuki was searched without a warrant. This assertion is simply not supported by existing case law. The distinction between vehicles that may be searched without a warrant and those that may not is not made based on whether or not the subject vehicle is “secure” or “not about to be moved.” Rather, the distinction primarily rests on the ability of the subject vehicle to be readily moved to another location. Here, the Suzuki was located in a driveway in close proximity to Defendant’s residence. There was no testimony that it was mounted on blocks, had flat tires or was otherwise inoperable. Cf. Hatley, at 859. Contrary to Defendant’s argument, the actions of the Defendant on the day of the search indicate that he was using, or was about to use, both the Suzuki and the Jeep to transport belongings from his residence to another location, which in and of itself indicates that the Suzuki was capable of being moved in the manner contemplated by the automobile exception. The fact that the Suzuki was parked in a residential driveway and without an operator when the warrantless search commenced does not place the Suzuki outside of the automobile exception.

Having found the Suzuki to be a readily mobile vehicle within the meaning of the automobile exception, the Court now turns to the question of whether or not the police had probable cause to suspect the Suzuki contained contraband or evidence of a crime. When a reliable drug-detection dog indicates that a lawfully stopped vehicle contains the odor of controlled substances, the officer has probable cause to believe that there are drugs in the vehicle and may search it without a warrant. State v. Gibson, 141 Idaho 277,

___, 108 P.3d 424, 428 (citing State v. Tucker, 132 Idaho 841, 843, 979 P.2d 1199, 1201 (1999), and Gallegos, 120 Idaho at 898, 821 P.2d at 953)). Allowing the dog to sniff along the outside of a motor vehicle does not constitute a search under the Fourth Amendment. State v. Parkinson, 135 Idaho 357, 363, 17 P.3d 301, 307 (Ct. App. 2000).

Kootenai County Police Deputy Shaw was called by the ISP to assist in the execution of the search warrant. When Deputy Shaw arrived, execution of the search warrant was already underway. Like the other officers at Defendant's residence, Deputy Shaw and his dog, Karo, were lawfully on the premises. Cf. State v. Sapp, 110 Idaho 153, 715 P.2d 366 (Ct. App. 1986) (holding that the backyard of a residence was within the scope of a search warrant authorizing a search of the "premises"). While lawfully on the premises, Deputy Shaw walked Karo around the GMC pickup and Suzuki. Karo exhibited several changes of behavior relevant to the Suzuki, which indicated to Deputy Shaw that Karo was detecting the odor of narcotics on or in the Suzuki, although Karo could not, from the exterior, pinpoint the source of the odor. At this point, Deputy Shaw had probable cause to conduct a warrantless search of the Suzuki. As Karo's handler since 2002, Deputy Shaw was trained and experienced in recognizing the changes in Karo's behavior as indicative of the presence of at least the odor of controlled substances. Karo is certified as a narcotics detecting dog in both Washington and Idaho, and there is sufficient evidence in the record establishing that Karo is reliable in this regard.

Having observed an alert to the presence of the odor of a controlled substance by a reliable narcotics detecting dog, the officers in the present case had probable cause to believe that the Suzuki contained contraband or evidence of a crime. The officers were permitted to search the vehicle without obtaining a warrant. Although the use of the

canine unit in this case was not in the context of a routine traffic stop, as is the usual canine unit scenario involved in Idaho's reported cases, the Court finds that its use did not violate the Defendant's Constitutional rights.

III.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress is denied.

Entered this 27 day of January, 2006.

C. W. Hosack
Charles W. Hosack, District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 30 day of January, 2006, a true and correct copy of the foregoing was mailed in the U.S. Mail, postage prepaid, sent via facsimile, or sent via interoffice mail as indicated below to the following counsel:

Kootenai County Prosecutor's Office
Art Verharen
Fax 446-1833

1-30-06 @ 8:14 Am BJD

Kootenai County Public Defender's Office
Anne Taylor
Fax 446-1701

DANIEL ENGLISH
CLERK OF THE COURT

By Barbara Douglas

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
CLERK OF COURT
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE.
SEALED ON THIS 19TH DAY OF APR 2011
CLIFFORD T. HAYES, CLERK OF THE DISTRICT COURT BY [Signature]
Deputy
PAGES 1210
OF 10

COUNTY OF KOOTENAI 500
FILED: 9-20-06
AT 1:50 O'CLOCK P M
CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 KIRK JUILLARD GOSCH)
 DOB: [REDACTED])
 SSN: [REDACTED])
)
 Defendant.)

CASE NO. CRF 2005-403
JUDGMENT AND SENTENCING
DISPOSITION

On September 13, 2006, before the Honorable Charles W. Hosack, District Judge, you, **KIRK JUILLARD GOSCH**, personally appeared for sentencing. Also appearing were Blake Swenson, Deputy Prosecuting Attorney for Kootenai County, Idaho, and your lawyer, Christopher Schwartz, Deputy Public Defender for Kootenai County, Idaho.

WHEREUPON, the previously ordered presentence report having been filed, and the Court having ascertained that you have had an opportunity to read the presentence report and review it with your lawyer, and you having been given the opportunity to explain, correct or deny parts of the presentence report, and having done so, and you having been given the opportunity to make a statement, and defendant having done so, and recommendations having been made by counsel for the State and by your lawyer, and there being no legal reason given why judgment and sentence should not then be pronounced, the Court did then pronounce its

JUDGMENT AND SENTENCING DISPOSITION: 1
CRF 2005-403 KIRK JULLIARD GOSCH

000 (3)

sentencing disposition as follows:

IT IS HEREBY ORDERED THAT YOU, KIRK JUILLARD GOSCH, after exercising your right to a jury trial, and the jury having entered a verdict of guilty to the criminal offense charged in the Information on file herein as follows:

COUNT II – MANUFACTURING A CONTROLLED SUBSTANCE

(MARIJUANA), a felony, Idaho Code §37-2732(a),

COUNT III – POSSESSION OF MARIJUANA WITH INTENT TO DELIVER, a ,
felony, Idaho Code §37-2732(a), and

COUNT IV – POSSESSION OF MARIJUANA IN EXCESS OF THREE OUNCES,
a felony, Idaho Code §37-2732(e),

that you, **KIRK JUILLARD GOSCH,** are guilty of the crime(s) so charged.

IT IS FURTHER ORDERED that you, **KIRK JUILLARD GOSCH,** are sentenced to the Idaho State Board of Correction as follows:

COUNT II -For a total unified sentence not to exceed five (5) years, commencing with a fixed period of two (2) years, to be followed by an additional indeterminate period of three (3) years,

COUNT III – For a total unified sentence not to exceed five (5) years, commencing with a fixed period of two (2) years, to be followed by an additional indeterminate period of three (3) years, and

COUNT IV – For a total unified sentence not to exceed five (5) years, commencing with a fixed period of two (2) years, to be followed by an additional indeterminate period of three (3) years,

said sentences to run concurrently with each other.

IT IS FURTHER ORDERED that the execution of sentence be suspended for a period of three (3) years and six (6) months, during which time you will be on supervised probation.

IT IS FURTHER ORDERED that in the presence of your probation officer, you shall on a certified copy of this order endorse your receipt of a copy of this order and shall have initialed your acceptance, agreement, and consent to each of the terms and conditions contained in this order. Your probation officer shall return to the court the certified copy which contains your endorsement.

IT IS FURTHER ORDERED that you, **KIRK JUILLARD GOSCH**, comply with each of the following **TERMS AND CONDITIONS OF PROBATION**:

1. That you shall pay a fine of \$1,000.00.
2. That you shall pay court costs and fees of \$107.50 on each charge.
3. That you shall pay additional costs, fees, restitutions and reimbursements as

follows:

| | | |
|----|-----------------------------------|--------|
| f. | Reimburse defense costs | 150.00 |
| g. | Reimburse prosecution costs | 150.00 |
| h. | Reimburse the District Court Fund | 150.00 |

4. All of the above sums shall be paid to the Kootenai County Clerk at the Kootenai County Courthouse, in monthly installments to be determined by your probation officer, based upon your ability to pay. Based upon a periodic review of your financial circumstances, your probation officer may increase or decrease the amount of your monthly payment, it being the intent that your financial obligations under this sentence be paid in full prior to your discharge

from probation. All payments shall be made in the form of cash, cashier's check or money order. The clerk shall distribute the payments in the priority set by the Idaho Supreme Court.

5. That you shall pay to the Idaho Department of Corrections its costs of supervision of your probation, in an amount not to exceed the maximum allowable by Idaho Code §20-225.

6. That the Court shall reserve jurisdiction to determine the amount of restitution you shall pay in this matter. Once determined, restitution shall be paid on a schedule to be determined by your probation officer as a term of your probation.

7. That you shall serve one hundred eighty (180) days local incarceration in the Kootenai County Jail commencing on September 22, 2006 at the hour of 5:00 P.M. Work release and treatment release is granted.

8. That you shall attend and complete any rehabilitation, educational, and vocational training programs as your probation officer may designate.

9. That you shall make every effort to obtain and maintain full time employment or be enrolled in a full time educational program.

10. That you shall undergo at your own expense a substance abuse evaluation if requested by your probation officer and you shall attend and successfully complete any substance abuse and mental health counseling which your probation officer may designate.

11. That you shall comply with all of the rules, regulations and requirements of the Idaho Department of Corrections.

12. That you will be supervised at any level deemed necessary by the Department of Correction, including the use of an electronic home monitoring device or interlock device.

13. That you shall commit no violations of any law of the United States of America, or of any law of any other country, or of any law of any state county, city, or other political subdivision.

14. That you shall consume no alcoholic beverages during the period of your probation.

15. That you shall not enter any establishment wherein the primary source of revenue is the sale of alcoholic beverages.

16. That you shall not use or possess any controlled substances except pursuant to a valid prescription, nor enter any establishment or frequent any home, business, or other premises where there are illegal controlled substances or drug paraphernalia, or is occupied by or frequented by drug users.

17. That you shall not associate with any individuals specified by your probation officer.

18. That you shall submit to analysis of your blood, breath or urine at your own expense at the request of your probation officer or any law enforcement officer.

19. That you shall not purchase, possess, or use any substance intended to alter the results of urinalysis testing for the presence of controlled substances or alcohol.

20. That you shall submit to searches of your person, personal property, automobiles, and residence without a search warrant at the request of your probation officer.

21. By accepting this probation you do hereby waive extradition to the State of Idaho and also agree that you will not contest any effort by any State to return you to the State of Idaho.

22. That you shall, at the request of your probation officer, submit to a polygraph examination at your expense.

23. If requested by your probation officer, you will be required to reside within the State of Idaho.

24. That in addition to any other local incarceration you are given ninety (90) days in the county jail to be served and imposed at the discretion of your probation officer and upon the written approval of the District Court.

IT IS FURTHER ORDERED that as long as you, **KIRK JUILLARD GOSCH**, abide by and perform all of the foregoing conditions, execution of the original judgment and sentence will continue to be suspended. If you violate any of the terms and conditions of your probation, you will be brought before the Court for execution of the balance of your sentence.

IT IS FURTHER ORDERED that any bail posted in this matter shall be exonerated, provided that any deposit shall be applied pursuant to **Idaho Code § 19-2923**.

NOTICE OF RIGHT TO APPEAL

YOU, KIRK JUILLARD GOSCH, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

DATED this 18 day of September, 2006.

Charles W. Hosack
CHARLES W. HOSACK
DISTRICT JUDGE

RECEIPT BY DEFENDANT

I, **KIRK JULLIARD GOSCH**, hereby acknowledge receipt of a copy of the foregoing order and hereby accept and agree to the above terms and conditions of probation. By accepting this probation, I do hereby agree that if I am placed on probation to a destination outside the State of Idaho, or if I leave the confines of the State of Idaho, with or without the permission of my probation officer, I do hereby waive extradition to the State of Idaho. I further agree that I will not contest any effort by any State to return me to the State of Idaho.

DATED this _____ day of September, 2006.

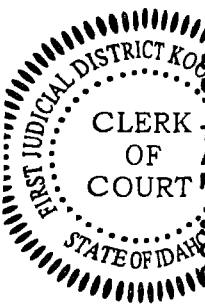
DEFENDANT

WITNESS

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 20 day of September, 2006, a copy of the foregoing Judgment and Sentencing Disposition was mailed, postage prepaid, faxed, or sent by interoffice mail to:

- 704 Deputy Prosecuting Attorney for Kootenai County
- 704 Deputy Public Defender for Kootenai County
- 704 Probation & Parole (Fax: 769-1481)
- 704 Kootenai County Sheriff's Department
- 20 Kootenai County Auditor


 CLERK OF THE DISTRICT COURT } ss
 STATE OF IDAHO }
 COUNTY OF KOOTENAI }
 THIS IS TO CERTIFY THAT THE FOREGOING IS
 A TRUE COPY OF THE ORIGINAL NOW ON
 FILE OF RECORD IN THIS OFFICE.
 SEALED ON THIS 17th DAY OF APR 2011
 CLAYTON J. HAYES, CLERK OF THE DISTRICT
 COURT BY [Signature]
 Deputy
 PAGES 1-7
 OF 7

DANIEL ENGLISH
CLERK OF THE DISTRICT COURT

By [Signature]
Deputy Clerk

JUDGMENT AND SENTENCING DISPOSITION: 7
CRF 2005-403 KIRK JULLIARD GOSCH

Westlaw

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▷

Court of Appeals of Idaho.
 Travis L. BEASLEY, Petitioner-Appellant,
 v.
 STATE of Idaho, Respondent.

 No. 20419.
 July 18, 1994.
 Rehearing Denied Aug. 26, 1994.

Applicant filed petition for postconviction relief raising various claims of ineffective assistance of counsel. The District Court of the First Judicial District, Boundary County, James R. Michaud, J., denied application, and applicant appealed. The Court of Appeals, Perry, J., held that: (1) applicant's counsel's failure to file appeal despite applicant's request deprived him of his opportunity to appeal, raising presumption of prejudice from deficient performance; (2) selection of applicant's counsel by public defender who was representing codefendant and compensation from public defender's contract of funds suggested conflict of interest which deprived applicant of his right to independent representation; but (3) defendant did not establish that potential conflict of interest impaired conflict counsel's performance.

Vacated in part and affirmed in part.

West Headnotes

[1] Criminal Law 110 ↪1519(1)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1511 Counsel
 110k1519 Effectiveness of Counsel
 110k1519(1) k. In General. Most
 Cited Cases
 (Formerly 110k998(8))
 Defendant's claim that he was denied his right to effective assistance of counsel was properly

raised on postconviction. U.S.C.A. Const.Amend. 6 ; I.C. § 19-4901(a)(1).

[2] Criminal Law 110 ↪1881

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)I In General
 110k1879 Standard of Effective Assistance in General
 110k1881 k. Deficient Representation and Prejudice in General. Most Cited Cases
 (Formerly 110k641.13(1))
 To establish violation of constitutional guarantee to effective assistance of counsel, defendant must show both deficient performance and resulting prejudice. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ↪1519(1)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1511 Counsel
 110k1519 Effectiveness of Counsel
 110k1519(1) k. In General. Most
 Cited Cases
 (Formerly 110k998(8))
 To show that counsel's performance was deficient, applicant for postconviction relief has burden of showing that his or her attorney's representation fell below objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ↪1519(3)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1511 Counsel
 110k1519 Effectiveness of Counsel
 110k1519(3) k. Prejudicial Effect.
 Most Cited Cases
 (Formerly 110k998(8))

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To establish prejudice from defense counsel's deficient performance, applicant for postconviction relief must show reasonable probability that, but for his or her attorney's deficient performance, outcome of trial would have been different. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ↪1519(15)

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(B) Grounds for Relief
 110k1511 Counsel
 110k1519 Effectiveness of Counsel
 110k1519(15) k. Appeal. Most

Cited Cases

(Formerly 110k998(8))

Applicant was entitled to postconviction relief based on his counsel's failure to file appeal as requested without having to show prejudice by identifying meritorious issues that were lost as result of counsel's failure to file appeal. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ↪1718

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)2 Stage of Proceedings as Affecting Right
 110k1718 k. Critical Stages. Most

Cited Cases

(Formerly 110k641.3(2))

Criminal Law 110 ↪1741

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)2 Stage of Proceedings as Affecting Right

110k1741 k. Appeal or Certiorari; Further Appeal; Proceedings on Remand. Most Cited Cases

(Formerly 110k641.3(2), 110k1077.3)

Defendant's right to representation by counsel extends to all critical stages of his trial, including appeal. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ↪1870

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)1 In General
 110k1870 k. In General. Most Cited

Cases

(Formerly 110k641.13(1))

Defendant's right to counsel includes right to effective assistance of counsel. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ↪1967

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1966 Appeal
 110k1967 k. In General. Most Cited

Cases

(Formerly 110k1077.3)

Where criminal defendant advises his or her attorney of desire to appeal, and attorney fails to take necessary steps to file appeal, defendant has been denied his or her constitutional right to effective assistance of counsel at critical stage in proceedings. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ↪1663

110 Criminal Law
 110XXX Post-Conviction Relief
 110XXX(C) Proceedings
 110XXX(C)3 Hearing and Determination
 110k1662 Disposition
 110k1663 k. In General. Most Cited

Cases

(Formerly 110k998(18))

On postconviction, applicant alleging denial of appeal because his lawyer did not file appeal as re-

quested would be restored to status enjoyed immediately following judgment of conviction when he was entitled to direct appeal; applicant should not be required to identify meritorious issues that would have been raised on appeal, since this would amount to additional hurdle to clear just because his rights were violated at some earlier stage in proceedings.

[10] Criminal Law 110 ↪1967

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1966 Appeal
 110k1967 k. In General. Most Cited Cases

(Formerly 110k641.13(7))
 Loss of opportunity to appeal is itself sufficient prejudice to support claim of ineffective assistance of counsel based on failure to appeal as requested by criminal defendant. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 ↪1803

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)7 Joint Representation of Codefendants

110k1803 k. Partners and Associates; Public Defenders. Most Cited Cases
 (Formerly 110k641.5(6))

Selection of defense counsel by public defender who represented codefendant who eventually testified as a prosecution witness suggested conflict of interest which deprived defendant of his right to independent representation; because conflicts counsel was selected by public defender and compensated from the public defender's contract funds, there was legitimate concern that conflicts counsel may be influenced by personal, economic interest in future conflicts representation, that may be contrary to interest of his client and temper his advocacy on behalf of his client. U.S.C.A.

Const.Amend. 6.

[12] Criminal Law 110 ↪1800

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)7 Joint Representation of Codefendants

110k1800 k. In General. Most Cited Cases
 (Formerly 110k641.5(.5))
 Determination of whether attorney representing defendant engaged in multiple representation is mixed question of law and fact.

[13] Criminal Law 110 ↪1800

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)7 Joint Representation of Codefendants

110k1800 k. In General. Most Cited Cases
 (Formerly 110k641.5(.5))
 Multiple representation per se does not violate defendant's right to effective assistance of counsel, unless it gives rise to conflict of interest. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 ↪1790

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)6 Conflict of Interest

110k1790 k. Advice, Inquiry, and Determination. Most Cited Cases
 (Formerly 110k641.5(.5))
 Defense counsel has ethical obligation to avoid conflicting representations and to advise court promptly when conflict of interest arises during course of trial.

[15] Criminal Law 110 ↪1781

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110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)6 Conflict of Interest
 110k1781 k. Prejudice and Harm in
 General. Most Cited Cases
 (Formerly 110k641.5(.5))
 When defense counsel is burdened by actual
 conflict of interest, counsel breaches duty of loyalty
 to client.

[16] Criminal Law 110 ↪1783

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)6 Conflict of Interest
 110k1782 Particular Cases or Situations
 110k1783 k. In General. Most Cited
 Cases
 (Formerly 110k641.5(.5))
 Defendant did not establish prejudice from potential
 conflict of interest by conflict attorney stemming
 from method used for his selection and compensation.
 U.S.C.A. Const.Amend. 6.

[17] Criminal Law 110 ↪1780

110 Criminal Law
 110XXXI Counsel
 110XXXI(B) Right of Defendant to Counsel
 110XXXI(B)6 Conflict of Interest
 110k1780 k. In General. Most Cited
 Cases
 (Formerly 110k641.5(.5))
 Possibility of conflict of interest is insufficient
 to impugn criminal conviction.

[18] Criminal Law 110 ↪1890

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1890 k. In General. Most Cited

Cases
 (Formerly 110k641.13(2.1))

Defendant did not establish that his counsel
 rendered ineffective assistance by failing to advise
 him not to give statement to police, where counsel
 testified that he normally advised his clients not to
 make statements to police, and defendant failed to
 present any evidence on advise counsel had given
 him regarding statement. U.S.C.A. Const.Amend. 6 .

****716*358** James H. Paulsen, Sandpoint, for appellant.

Larry EchoHawk, Atty. Gen., Thomas P. Watkins,
 Deputy Atty. Gen. (argued), Boise, for respondent.

PERRY, Judge.

In this appeal, Travis Beasley challenges the
 district court's denial of his post-conviction application
 alleging ineffective assistance of counsel in
 two related cases. After conducting a hearing on his
 application, the district court ruled that Beasley had
 not satisfied his burden of establishing a violation
 of his constitutional right to the effective assistance
 of counsel with regard to any of the claims alleged
 in his application. We affirm in part, vacate in part,
 and remand.

FACTUAL AND PROCEDURAL HISTORY

In October 1990, Beasley was initially questioned
 as part of a police investigation into a break-in
 at the Mountain Springs Laundromat in Bonners
 Ferry, Idaho. He was charged with one count of
 burglary and one count of grand theft. In exchange
 for an agreement with the state not to oppose his
 request for release, Beasley gave a statement to the
 police. As a result of the statement, which implicated
 him in another crime, Beasley was charged in
 connection with burglaries at Trygg Chain in Bonners
 Ferry. The magistrate subsequently denied
 Beasley's request to be released on his own recognizance.

When Beasley was first arrested in the Moun-

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tain Springs case in October 1990, he contacted Gary Elliott, a public defender with whom he had prior dealings. Attorney Elliott, however, was no longer under contract as public defender for Boundary County, the contract having expired October 1, 1990.^{FN1} At his arraignment in each case, counsel was appointed to represent Beasley in the district court. Elliott undertook Beasley's representation and acted as his counsel through the December 9, 1990, hearing on a motion to continue the trial date in the Mountain Springs case. Attorneys Featherston and Elliott testified at the post-conviction hearing that Elliott's efforts on behalf of Beasley were provided in his capacity as a conflicts attorney hired by Featherston.

FN1. Attorney Elliott and attorney Dan Featherston, who maintained separate offices, joined in a contract to provide public defender services in Boundary County between October 1988 and October 1990. As of October 1, 1990, however, Featherston individually contracted as the public defender.

At the hearing on the motion to continue, Elliott advised that he could no longer represent Beasley because he would be leaving his law practice to become a magistrate. Elliott further informed the district court that Featherston, the current Boundary County public defender, represented one of Beasley's co-defendants which created a conflict of interest precluding Featherston from representing Beasley in the Mountain Springs case.

The district court ordered that new counsel be appointed to represent Beasley and continued the trial in the Mountain Springs case. Pursuant to the public defender contract, Featherston hired a private attorney as substitute conflicts counsel for Beasley. A notice of substitution of counsel, signed by Elliott, Featherston and Roger Hanlon, the new conflicts counsel, was filed with the district court in both cases on December 18, 1990.

Following a two-day trial, a jury found Beasley

guilty of burglary and grand theft in the Mountain Springs Laundromat case. In the Trygg Chain case, Beasley entered a plea of guilty to two counts of first degree burglary and the remaining three counts against him were dismissed. The cases were consolidated for sentencing, at which time Beasley received concurrent sentences of three to ten years. The judgment of conviction was entered on March 18, 1991.

On May 22, 1991, Beasley filed an application for post-conviction relief, raising various claims of ineffective assistance of counsel. He pointed to attorney Elliott's alleged failure to advise him against giving the statement to the police that led to the charges in the Trygg Chain case. Beasley also pointed to attorney Hanlon's allegedly deficient performance**717 *359 at trial in the Mountain Springs case. Beasley specifically alleged that Hanlon failed to move to suppress his statement to the police, failed to adequately investigate the case, failed to meet with Beasley until the day of trial, and failed to file an appeal from the judgment of conviction. Beasley also contended that a conflict of interest arose out of the public defender's representation of Beasley and his co-defendant, which denied him the effective assistance of counsel due him under the Constitution.

Beasley and the three attorneys involved in his representation testified at the hearing on his post-conviction application. Following the hearing, the district court denied relief and dismissed the application, concluding that Beasley had failed on each of his claims to show deficient performance by counsel or prejudice to Beasley sufficient to satisfy the two-pronged standard for ineffective assistance derived from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On the conflict of interest claim and counsel's failure to directly appeal, the district court found that Beasley had requested an appeal that counsel inexplicably did not file. The district court, citing *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct.App.1990), said that Beasley must:

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at a minimum demonstrate there were issues that could have been raised on direct appeal and that those issues will not be resolved on their merits as a result of this post-conviction proceeding.

Because Beasley failed to specify direct appeal issues in his post-conviction application, supported by proof at the hearing, the district court concluded that Beasley had not shown prejudice and therefore, was not entitled to relief. Beasley appealed.

ANALYSIS

[1] The Uniform Post-Conviction Procedure Act, I.C. §§ 19-4901 to 19-4911, is available to show that the conviction was in violation of constitutional rights. I.C. § 19-4901(a)(1). Beasley's claim that he was denied his Sixth Amendment right to the effective assistance of counsel, therefore, is properly raised on post-conviction. *See Parrott v. State*, 117 Idaho 272, 787 P.2d 258 (1990); *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct.App.1992).

[2][3][4] In order to establish a violation of the constitutional guarantee to effective assistance of counsel, the defendant must show *both* deficient performance and resulting prejudice. *Gibson v. State*, 110 Idaho 631, 634-35, 718 P.2d 283, 286-87 (1986), *citing Strickland, supra*. To show that counsel's performance was deficient, the applicant for post-conviction relief has the burden of showing that his or her attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for his or her attorney's deficient performance, the outcome of the trial would have been different. *Id.*

1. COUNSEL'S FAILURE TO FILE A DIRECT APPEAL

[5] In his application, Beasley asserts that his counsel's conduct in not filing a direct appeal upon his request was deficient performance under *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct.App.1983), and *State v. Dillard*, 110 Idaho 834,

718 P.2d 1272 (Ct.App.1986), *cert. denied*, 479 U.S. 887, 107 S.Ct. 283, 93 L.Ed.2d 258 (1986), where the Court did not require that prejudice be shown before affording the applicant post-conviction relief. Accordingly, Beasley argues that the district court erred in requiring him to identify the meritorious issues which were lost as a result of the lack of a direct appeal pursuant to *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct.App.1990). Beasley contends that *Russell, supra*, is superseded by subsequent United States Supreme Court authority which holds that it is prejudice *per se* when a criminal defendant requests that an appeal be filed and his counsel fails to comply with this request. *See Lozada v. Deeds*, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991). We agree.

[6][7][8] A defendant's right to representation by counsel extends to all critical stages of his trial, including appeal. *Flores, supra*, 104 Idaho at 194, 657 P.2d at 491, *citing **718*360 Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). This right to counsel includes the right to effective assistance of counsel. *State v. Clayton*, 100 Idaho 896, 897, 606 P.2d 1000, 1001 (1980). Where a criminal defendant advises his or her attorney of a desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his or her constitutional right to the effective assistance of counsel at a critical stage in the proceedings. *Flores, supra*, 104 Idaho at 194-95, 657 P.2d at 491-92.

Beasley's case is distinguishable from *Flores, supra*, where the appellate court remanded to the district court for a factual finding as to whether the defendant had made known to counsel his desire to appeal. *Compare also Sanders v. State*, 117 Idaho 939, 792 P.2d 964 (Ct.App.1990) (trial court's finding in post-conviction proceeding that petitioner had failed to communicate to his attorney his desire to appeal, based upon evidence presented, was not clearly erroneous). It is undisputed here that Beasley advised his trial counsel of his wish to appeal his conviction. The record also clearly shows that

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trial counsel, and the public defender who assumed Beasley's representation after the entry of his judgment of conviction, understood that Beasley desired to appeal.^{FN2} Therefore, a remand in this case for that factual finding is unnecessary.

FN2. Attorney Hanlon testified that his representation of Beasley ended once the judgment of conviction was entered and after he had conveyed to Featherston that Beasley wanted to appeal. Attorney Featherston testified that he was advised of Beasley's desire to appeal, but upon review of the file he determined that a post-conviction proceeding, not an appeal, would be the best course of action. He discussed this with Beasley in various meetings with Beasley at the jail. However, their communications broke down due to a deteriorating relationship. Featherston testified that he did not file a notice of appeal on Beasley's behalf as requested within forty-two days from entry of the judgment of conviction.

Unlike *Flores* and *Sanders*, which dealt only with the deficient performance prong of the defendant's ineffective assistance claim, *Russell* addressed the issue of prejudice from counsel's failure to file an appeal. The Court of Appeals explained therein, that because Russell had failed to show prejudice by not identifying what meritorious issues were lost as a result of the lack of a direct appeal, he was not entitled to post-conviction relief. *Russell, supra*, 118 Idaho at 69, 794 P.2d at 659.^{FN3} *Russell*, however, is distinguishable from the instant matter. In his post-conviction application, Russell chose to raise not only his claims of ineffective assistance, which are proper issues for post-conviction, but also his challenges to the voluntariness of his guilty plea, which were his direct appeal issues. Rather than allow the direct appeal that had been previously denied to Russell, the Court properly resolved all of the issues that were before it. Having resolved those issues, the Court concluded that Russell had

not raised any other issue for consideration in a direct appeal from his convictions and, consequently, had not shown prejudice from lack of the appeal. Here, we conclude that the language in *Russell*, which requires a showing of prejudice when ineffectiveness of counsel is attributed to counsel's failure to file an appeal, was dicta and is not controlling under the facts in Beasley's case.

FN3. The failure to appeal issue as a basis for Russell's ineffective assistance claim was not raised in the district court. The reasoning of the Court in *Russell*, however, was consistent with the Court of Appeals' comment in *Sanders v. State*, 117 Idaho 939, 941 n. 2, 792 P.2d 964, 966 n. 2 (Ct.App.1990), which we now criticize. The footnote indicated that *Sanders* would have to show the meritorious nature of any appeal by identifying the issues he would have raised on appeal, although this Court expressly stated it would "intimate no view that any such appeal would have been meritorious."

Dillard, supra, is also cited by Beasley as authority for the granting of post-conviction relief on an ineffective assistance claim based on failure to file an appeal without regard to the probability of success on appeal. In the appeal from Dillard's judgment of conviction, the Court of Appeals affirmed the granting of the delayed appeal^{FN4} as relief in the post*361 -**719 conviction proceedings alleging ineffectiveness of counsel for failure to perfect an appeal. *Dillard, supra*, 110 Idaho at 846, 718 P.2d at 1284. Ruling on the post-conviction application, the district court granted relief after finding that Dillard had requested his counsel to file an appeal, although no appeal was filed, and without requiring a further showing of prejudice suffered by the lack of an appeal. However, the Court of Appeals was not requested to, nor did it directly address the question of whether prejudice may be presumed when counsel's failure to file an appeal is deemed to be ineffective per-

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formance. We decline to rely solely on *Dillard* as precedent with regard to whether a post-conviction applicant must show prejudice from counsel's failure to file an appeal as requested.

FN4. In *Dillard*, the district court's order granting post-conviction relief in the form of a delayed appeal was not appealed by the state. The state's brief in the delayed appeal began by claiming that the appeal was jurisdictionally defective. The Court of Appeals held, however, that the delayed appeal was not jurisdictionally defective and considered the issues raised by *Dillard* attacking his conviction. *Dillard, supra*, 110 Idaho at 838, 718 P.2d at 1276.

In 1969, the United States Supreme Court criticized the Ninth Circuit's decision requiring a federal habeas corpus petitioner "to show more than a simple deprivation of this right [to an appeal] before relief can be accorded [and requiring] him to show some likelihood of success on appeal." *Rodriguez v. United States*, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d 340 (1969). The Supreme Court held that the courts below had erred in rejecting petitioner's relief because of his failure to specify the points he would raise were his right to appeal reinstated. *Id.* Following *Rodriguez*,

a number of federal and state courts have held that when it is clear that a petitioner wished to pursue an appeal, but the appeal was either not timely perfected or was dismissed for failure to file an appellate brief, then the petitioner has suffered prejudice per se, and the appeal may be reinstated *without a showing* that the issues which could have been raised on appeal had a reasonable probability of success.

Matter of Frampton, 45 Wash.App. 554, 726 P.2d 486, 489 (1986) (citations omitted). See also *Abels v. Kaiser*, 913 F.2d 821 (10th Cir.1990) (prejudice presumed from failure to file appeal, relying on *Rodriguez, supra*); *Estes v. United States*, 883 F.2d 645 (8th Cir.1989) (prejudice presumed

from failure to file appeal, relying on pre-*Strickland* cases for standard of ineffective assistance requiring deficient performance and resulting prejudice). Although *Rodriguez* arose from a prosecution in the federal court, more recently in a prosecution by the state of Nevada, the United States Supreme Court recognized a presumption of prejudice where counsel failed to perfect a criminal defendant's appeal. See *Lozada v. Deeds*, 498 U.S. 430, 432, 111 S.Ct. 860, 861, 112 L.Ed.2d 956 (1991).

[9] The rationale offered by these courts is sound. A defendant denied an appeal because his lawyer did not file an appeal as requested should not be given an additional hurdle to clear just because his rights were violated at some earlier stage in the proceedings. See *Rodriguez, supra*, 395 U.S. at 330, 89 S.Ct. at 1717. On post-conviction then, the defendant should not be required to identify the meritorious issues that would have been raised, but should be restored to the status enjoyed immediately following the judgment of conviction when the defendant was entitled to a direct appeal.

In addition, it has been said that a defendant whose counsel failed to file an appeal as requested has been deprived, not of the effective assistance of counsel, but of any assistance of counsel on appeal. *Castellanos v. United States*, 26 F.3d 717 (7th Cir.1994). Counsel's failure to perfect an appeal "essentially waive[s] respondent's opportunity to make a case on the merits; in this sense it is difficult to distinguish respondent's situation from that of someone with no counsel at all." *Evitts v. Lucey*, 469 U.S. 387, 394 n. 6, 105 S.Ct. 830, 835 n. 6, 83 L.Ed.2d 821 (1985).

The United States Supreme Court has also held that the prejudice component of *Strickland* does not apply when an appellate lawyer fails either to file an appeal brief or to satisfy the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) ^{FN5} in seeking leave to withdraw during an appeal. *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300*362 **720 (1988). Since *Penson*, every court that has squarely

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confronted the question with regard to the need to prove prejudice has held that failure to take an appeal, despite the defendant's request, is ineffective assistance without regard to the probability of success on appeal. *Castellanos, supra*, 26 F.3d at 718, citing *Bonneau v. United States*, 961 F.2d 17 (1st Cir.1992); *Williams v. Lockhart*, 849 F.2d 1134, 1137 n. 3 (8th Cir.1988); *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir.1993); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir.1991).

FN5. *Anders* allows appointed counsel to withdraw from a first appeal as of right on the basis that the appeal is frivolous.

[10] Adopting this reasoning, we adhere, therefore, to our recent opinion in *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct.App.1993), where we stated that the prejudice suffered by Mata, who claimed that his counsel did not file an appeal as requested, was the loss of the opportunity to appeal. That loss is itself sufficient prejudice to support a claim of ineffective assistance of counsel based on a failure to appeal as requested by a criminal defendant. *Ricca v. State*, 124 Idaho 894, 898, 865 P.2d 985, 989 (Ct.App.1993). Having determined that Beasley's counsel either neglected or refused to file an appeal despite Beasley's request, we conclude that ineffective assistance of counsel deprived Beasley of his opportunity to appeal and that prejudice is presumed from this deficient performance.

Accordingly, we hold that the district court incorrectly required Beasley to establish prejudice in its denial of his post-conviction application. The judgment of conviction must be vacated and reentered so that Beasley may perfect a timely appeal. See *Mata, supra*.

2. CONFLICTS ISSUE

[11] Beasley also alleges that a conflict of interest arose when the public defender's office represented both his interests and those of a co-defendant who eventually testified as a prosecution witness at Beasley's trial in the Mountain Springs case. Beasley's argument is premised on the belief

that his representation was or could have been in some way directed by the public defender. Even though a conflicts attorney was employed to replace the public defender initially appointed in Beasley's case, Beasley asserts that the conflict persisted because it was the public defender who selected, hired and paid the conflicts attorneys. Beasley claims that, as a result of the conflict of interest, he received ineffective assistance of counsel.

[12][13] The determination of whether an attorney representing the defendant engaged in multiple representation is a mixed question of law and fact. *Cuyler v. Sullivan*, 446 U.S. 335, 342, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980). Multiple representation *per se*, however, does not violate the Sixth Amendment unless it gives rise to a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1177, 55 L.Ed.2d 426 (1978).

[14][15] Defense counsel has an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. See *Cuyler, supra*, 446 U.S. at 346, n. 11, 100 S.Ct. at 1717, n. 11, citing ABA Code of Professional Responsibility, DR 5-105, EC 5-15 (1976); ABA Project on Standards for Criminal Justice, Defense Function § 3.5(b) (App Draft 1971). When counsel is burdened by an actual conflict of interest, counsel breaches the duty of loyalty, the most basic of counsel's duties to his or her client. See *Strickland, supra*, 466 U.S. at 692, 104 S.Ct. at 2067.

In order to establish a violation of the Sixth Amendment-forming the basis of an ineffective assistance claim-a defendant who raised no objection at trial must demonstrate not only that an actual conflict of interest existed, but also that the conflict adversely affected the lawyer's performance. *Cuyler, supra*, 446 U.S. at 350, 100 S.Ct. at 1719; *McNeeley v. State*, 111 Idaho 200, 202, 722 P.2d 1067, 1069 (Ct.App.1986). Only upon a showing of such adverse effect is the prejudice from counsel's error presumed. *Strickland, supra*, 466 U.S. at 692, 104 S.Ct. at 2067, citing *Cuyler, supra*.

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In ruling on Beasley's application for post-conviction relief, the district court did not analyze Beasley's claims of ineffective assistance based on a conflict of interest separately from his allegation of counsel's failure to **721 *363 file an appeal. The district court only considered the alleged conflict of interest as a possible explanation for counsel's failure to appeal Beasley's conviction. The district court then determined that Beasley had failed to show he was prejudiced as a result of his counsel's failure to file the appeal.

It would have been preferable for the district court to have examined Beasley's allegations of conflict of interest at the various stages of the proceedings in this case. Although the district court made no finding as to whether a conflict existed, we are not bound to order a reversal where the record is clear and yields an obvious answer to the relevant question. *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct.App.1989).

Upon our review of the record, we find that Beasley's assertion that his counsel had been selected by the public defender and compensated from the public defender's contract funds suggests a conflict of interest which deprived him of his right to independent representation. Beasley makes a compelling argument against allowing the public defender to, in essence, pick his opponent by personally selecting conflicts counsel. Because of this selection process and method of payment, there is also a legitimate concern that conflicts counsel may be influenced by a personal, economic interest in future conflicts representation, which interest may be contrary to the interests of his client and lead counsel into tempering his advocacy on behalf of his client.

[16][17] While the contractual arrangement described here presents a potential conflict of interest, in order to prevail Beasley must not only show a conflict but that the conflict impaired counsel's performance. We conclude, however, that Beasley has not shown any deficiency in his counsel's performance stemming from the methodology used to select

and compensate the conflict attorney. The possibility of conflict is insufficient to impugn a criminal conviction. *Cuyler, supra*, 446 U.S. at 350, 100 S.Ct. at 1719.

We conclude that the only showing of prejudice made by Beasley was that which stemmed from counsel's failure to file the appeal which Beasley had requested. We affirm the district court's denial of post-conviction relief on Beasley's claim of ineffective assistance of counsel founded on his conflict of interest allegations.

3. MISCELLANEOUS ISSUES

The balance of Beasley's claims of ineffective assistance of counsel can be disposed of in a summary fashion. We have reviewed the district court's determination that Beasley failed to establish by a preponderance of the evidence that his trial counsel's performance was deficient when he did not file a motion to suppress Beasley's statement and did not meet with Beasley until the day of trial. We affirm the decision of the district court.

[18] Finally, we review the district court's determination that Beasley did not meet his burden of proof with regard to his claim that his counsel rendered ineffective assistance by failing to advise him not to give a statement to the police. The district court considered the testimony of counsel, indicating that he normally advised his clients not to make statements to the police. Beasley failed to present any evidence as to the advice counsel had given him regarding giving a statement, and the district court held counsel's conduct not to be deficient. In view of the absence of evidence of deficient performance, an essential element of the claim of ineffective assistance, the district court's denial of post-conviction relief is affirmed.

CONCLUSION

The record herein demonstrates a factual basis for post-conviction relief on the ineffectiveness claim based on counsel's failure to appeal. The determination of whether an appeal should be taken or not rests solely with the accused and is not to be de-

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cided by his attorney. *Gardner v. State*, 91 Idaho 909, 912, 435 P.2d 249, 251 (1967). Under the facts in this case, counsel did not act to adequately protect Beasley's right to appeal. The judgment of conviction must be vacated and reentered to allow Beasley to seek review through a delayed appeal. All matters resolved in this opinion shall be *res judicata* on any such appeal. As to all other claims, **722 *364 the district court's denial of post-conviction relief is affirmed.

WALTERS, C.J., and LANSING, J., concur.

Idaho App., 1994.
Beasley v. State
126 Idaho 356, 883 P.2d 714

END OF DOCUMENT

STATE OF IDAHO } ss
 COUNTY OF KOOTENAI
 FILED: 4-22-11
 AT 1:20 O'CLOCK P.M.
 CLERK, DISTRICT COURT
 [Signature]
 DEPUTY
 DL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | |
|--|--|
| <p>KIRK GOSCH, Petitioner, vs. STATE OF IDAHO, Respondent.</p> | <p>CASE NO. CV-2007-5443 ORDER DENYING MOTION TO COMPEL COUNSEL TO SPEAK</p> |
|--|--|

On April 21, 2011, in open court and on the record, this Court indicated its intent to sign an order upon presentment requiring Ann Taylor and Mark Durant to speak to Petitioner and Respondent with regard to the allegations set forth in Petitioner's Amended Petition for Post-Conviction Relief. This motion was made orally by Respondent, without prior notice to Petitioner, and without the accompaniment of any recitation of authority.

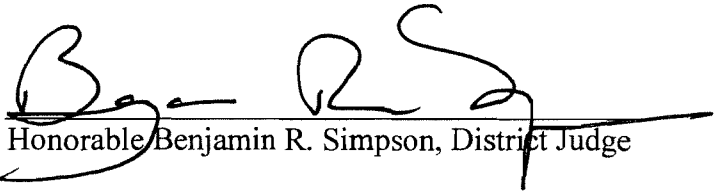
Based upon further consideration, it is incumbent upon the Court to deny Respondent's motion. Post-conviction matters are civil in nature, and thus are governed by the Idaho Rules of Civil Procedure. *Kelly v. State*, 149 Idaho 517, ___, 236 P.3d 1277, 1281 (July 27, 2010) (quoting *DeRushe v. State*, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009)) (other citations omitted). Therefore, the discovery rules set forth in the Idaho Rules of Civil Procedure are applicable and binding herein. The Respondent has failed to provide the Court with an indication

**ORDER DENYING MOTION TO COMPEL
 COUNSEL TO SPEAK**

that it has availed itself of the procedures and remedies set forth in the Rules of Civil Procedure, in order to permit this Court to compel Ann Taylor or Mark Durant to Speak.

IT IS HEREBY ORDERED that Respondent's motion to require Ann Taylor and Mark Durant to speak to Petitioner and Respondent is denied.

Dated this 22 day of April, 2011.


Honorable Benjamin R. Simpson, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of April, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

Ann Taylor
Kootenai County Public Defender's Office
Fax: (208) 446-1701


Art Verharen
~~5431 N. Government Way Ste 101A~~
~~Coeur d'Alene, ID 83816~~
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Mark Durant
Investigator, Kootenai County Public Defender's Office
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Sean Walsh
Walsh Law Office, PLLC
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Coeur d'Alene, ID 83814
Fax: (208) 765-4636

Kootenai County Prosecuting Attorney
Fax: (208)446-1833

2256


Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83814
Telephone: (208) 446-1800

2011 APR 22 PM 4:39

CLERK DISTRICT COURT
James K. Cleland
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KIRK GOSCH,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

CASE NO. CV 2007-5443

RESPONDENT'S TRIAL BRIEF

COMES NOW, RESPONDENT, STATE OF IDAHO, by and through Arthur Verharen,
Deputy Prosecuting Attorney for Kootenai County, and hereby submits Respondent's Trial
Brief.

APPLICABLE LAW

In the context of ineffective assistance of counsel claims, an applicant must satisfy two
separate tests. *Roman v. State*, 125 Idaho 644, 649 (Ct. App. 1994). The first issue centers on
whether, utilizing an objective standard, applicant's counsel fell short of competence standards.
Id. In making this determination, "there is a strong presumption that counsel's performance falls
within the wide range of competent professional assistance." *Id.* In evaluating that performance,
"a court must endeavor 'to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct,' and to evaluate the conduct from counsel's perspective at the time." *Milburn v. State*, 135 Idaho 701, 706 (Ct. App. 2000) quoting *Strickland v. Washington*, 466 U.S. 668 (1984).

The second step in successfully asserting an ineffective assistance of counsel claim is that the applicant "must show there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Roman*, 125 Idaho at 649. In other words, the applicant must present sufficient evidence that due to counsel's failure to provide competent representation, applicant was somehow "prejudiced." *Id.* In summary, a post-conviction "applicant must show actual unreasonable performance by trial counsel and actual prejudice." *Milburn*, 135 Idaho at 706.

ARGUMENT

The principal issue in our case is whether Anne Taylor told Petitioner that if he filed an appeal the state could retry the cocaine trafficking count. That issue will remain unanswered until Ms. Taylor is called as a witness in this matter and compelled to testify.

CONCLUSION

In the event the Court finds that Anne Taylor's professional assistance to Petitioner was not ineffective and that Petitioner suffered no prejudice, Respondent requests the Court dismiss the Amended Petition.

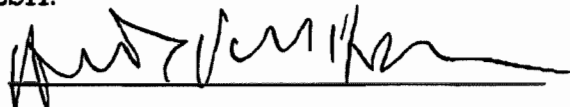
DATED this 22 day of April, 2011.



ARTHUR VERHAREN
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of April, 2011, a true and correct copy of the foregoing was caused to be FAXED to SEAN WALSH.



BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83814
Telephone: (208) 446-1800

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 4-22-11
AT 4:39 O'CLOCK P.M.
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI.

KIRK GOSCH,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

CASE NO. CV 2007-5443

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The above matter came on for hearing before Judge Simpson on _____. The Petitioner and his attorney were present as was an attorney for Respondent.

FINDINGS OF FACT

1. Defendant's trial counsel, Anne Taylor, (did - did not) communicate to Petitioner that the state could recharge him with the cocaine count if he filed an appeal.
2. Defendant did not file an appeal because _____.

CONCLUSIONS OF LAW

1. (Proposed conclusions of law will be forwarded when Respondent is able determine what the facts will be).

ORDER: Based on the Findings of Fact and Conclusions of Law,

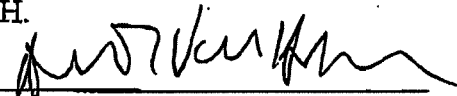
IT IS HEREBY ORDERED that the Petition for Post Conviction Relief be _____.

DATED this _____ day of April, 2011

District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of April, 2011, a true and correct copy of the foregoing was caused to be FAXED to SEAN WALSH.



STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 5-6-11
AT 3:30 O'CLOCK P.M.
CLERK, DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | |
|---|---|
| KIRK GOSCH, Petitioner, vs. STATE OF IDAHO, Respondent. | CASE NO. CV-2007-5443 FINDINGS OF FACT AND CONCLUSIONS OF LAW |
|---|---|

The above matter came on for hearing before Judge Simpson on May 3, 2011. The Petitioner participated telephonically and his attorney was present, as was attorney for Respondent.

FINDINGS OF FACT

1. The only time Petitioner expressed his desire to “appeal everything” was walking to the Public Defender’s Office, with his attorneys, immediately after the verdict had been taken in CR-F05-403.
2. This expression of his desire to “appeal everything” occurred prior to sentencing, and prior to judgment.
3. This statement was made during a time of stress and confusion for the Petitioner, as he had learned of his verdict just prior to making this statement.

4. Upon expressing a desire to “appeal everything”, Petitioner was directed by his attorneys to contact them the next day by scheduling an appointment.
5. Petitioner was instructed to contact his counsel the next day because his attorneys believed Petitioner was in a confused and stressful state due to the recent verdict. Therefore, waiting a day would allow Petitioner to digest the verdict, and more clearly articulate what exactly he wanted to appeal.
6. After the verdict Petitioner never scheduled an appointment, nor spoke with his attorneys in regards to an appeal.
7. The Public Defender’s Office made several attempts to contact Petitioner following his request to “appeal everything”.
8. These attempts included an attempt to make available to Petitioner the services of the Public Defender’s Investigator, prior to Petitioner’s sentencing.
9. Despite numerous attempts to contact Petitioner, however, the Public Defender’s Office was unsuccessful in its attempts to reach him.
10. At his sentencing, Petitioner was notified, in writing, of his right to appeal.

CONCLUSIONS OF LAW

1. A post-conviction applicant has the burden of proving the grounds upon which he seeks relief. *Sanders v. State*, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990), citing I.C.R. 57(c).
2. A criminal defendant’s right to counsel includes the right to representation on appeal. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993) (citations omitted). If a defendant asks his attorney to appeal, and an attorney thereafter refuses to do so, the defendant is deprived of effective assistance of counsel. *Id.* at 593, 861 P.2d at 1258 (citations omitted).

3. In post-conviction proceedings, a petitioner need not identify the meritorious issues that would have been raised, had an appeal been filed, in order to make a proper showing of ineffective assistance. *Beasley v. State*, 126 Idaho 356, 361, 883 P.2d 714, 719 (1994). Rather, a defendant who proves that he was denied an appeal because his lawyer did not file an appeal as requested, states a meritorious claim for ineffective assistance without regard to the probability of success on appeal. *Id.* In other words, the loss of the right to appeal is sufficient prejudice, in and of itself, to support a claim of ineffective assistance. *Id.* at 362, 883 P.2d at 720.
4. *Beasley* and the current matter before this Court are distinguishable, because *Beasley* requested an appeal of his conviction, and the record clearly showed that trial counsel, and the public defender who assumed representation of *Beasley* after entry of his judgment of conviction, understood that *Beasley* desired to appeal. *Id.* at 360, 883 P.2d at 718.
5. Other cases in Idaho are similarly distinguishable. In *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct. App. 1983), the Petitioner claimed that he requested an appeal multiple times, and that his attorney ignored this request. The court held that “[i]f Flores’ allegations were true and if the attorney’s inaction caused Flores not to appeal, he would be entitled to relief.” *Id.* at 195, 657 P.2d at 492. Therefore, the appellate court held that a material issue of fact existed, and therefore the district court’s order of dismissal was vacated and remanded for an evidentiary hearing as to that issue. *Id.*
6. In *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App. 1986), the court recognized the holding in *Flores*, including the fact that “if Flores’ allegations were true *and* if the attorney’s inaction caused Flores not to appeal, he would be entitled to relief on his post-conviction petition.” *Dillard*, 110 Idaho at 838, 718 P.2d at 1276 (emphasis added).

Additionally, *Dillard* recognized that the pertinent questions were “whether an appeal had been filed and, if not, *whether Dillard’s attorney was at fault in not filing an appeal.*”

Id. (Emphasis added). The *Dillard* matter also explained that a letter from Dillard’s trial counsel, which was dated twelve days after the judgment of conviction, recognized that Dillard wished to seek an appeal, and that an appeal would be filed shortly. *Id.*

7. In *Sanders, supra*, the Court held:

It is also well settled that where state law allows for direct appeal of a criminal conviction, a defendant has a right to effective assistance of counsel on appeal. The determination of whether an appeal should be taken rests solely with the defendant. His counsel has no duty to prosecute an appeal in the absence of an affirmative request from the defendant. Where a criminal defendant advises his attorney of his desire to appeal, and the attorney fails to take the necessary steps to file the appeal, the defendant has a basis for a claim that he has been denied the right to effective assistance of counsel. However, it is implicit in this rule of law that the desire to appeal must have been communicated to counsel or otherwise understood by him.

Id. at 940, 796 P.2d at 965 (internal citations and quotations omitted). Sanders alleged that, at the conclusion of his sentencing hearing, he turned to his attorney and said, “appeal this.” *Id.* at 941, 796 P.2d at 966. Counsel did not recall whether Sanders made such a statement or not. *Id.* at 940, 796 P.2d at 966. The district court rejected Sanders’ claim, and held:

[t]here is simply no showing that the attorney’s representation of Sanders was deficient with respect to his failure to file [an appeal]. . . . Even accepting petitioner’s testimony that he said “appeal this” to the attorney at the conclusion of the sentencing hearing, it is clear that in the commotion of the termination of proceedings that day and Mr. Sander’s haste to turn from counsel table to the family of the murder victim to extend his apology, whatever communication he made to the attorney simply was not heard by him, if in fact, that statement was made at all. *Counsel cannot be held to execute on a client’s request when the request is not fully and fairly communicated to counsel.* Furthermore, throughout all of the contacts petitioner had with the Office of the Public Defender . . . Mr. Sanders never expressed to anyone in that office his wish to prosecute a direct appeal of the sentence. Mr. Sanders never inquired about the progress of such an appeal.

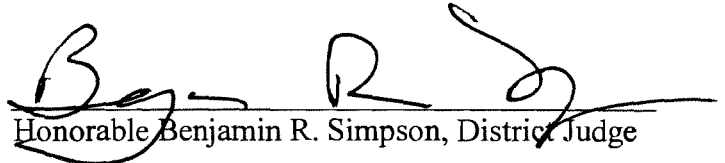
Id. (Emphasis added). The appellate court affirmed the trial court. *Id.*

8. As these cases illustrate, at an evidentiary hearing in which the district court determines whether a petitioner communicated his intent to appeal to his counsel, and whether counsel thereafter failed to pursue an appeal, “[i]t [is] necessary for the . . . court to make a finding whether [petitioner’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.” *Ricca v. State*, 124 Idaho 894, 898, 865 P.2d 985, 989 (Ct. App. 1993) (citation omitted). Thereafter, if the court concludes that ineffective assistance deprived the petitioner of his opportunity to appeal, the petitioner will be entitled to relief. *Id.*
9. Here, Petitioner made a single request to “appeal everything”. This request was made during a time of confusion and stress, directly after Petitioner heard the verdict. In fact, this statement was made even prior to Petitioner’s ability to appeal, as no sentence or judgment had yet been rendered. Petitioner’s attorneys asked Petitioner to set up an appointment, at which point they could discuss a potential appeal. However, Petitioner thereafter did not contact his attorneys, did not respond to attempted correspondence from his attorneys, and never again evidenced a desire to appeal.
10. Petitioner’s attorneys acted reasonably when attempting to set up an appointment with Petitioner, as Petitioner initially made a request to appeal during a confusing and stressful time.
11. Unlike the authority set forth above, Petitioner’s desire to appeal was not simply ignored; Petitioner ignored his counsel.
12. Unlike the authority set forth above, it was not the attorneys’ inaction which caused Petitioner not to appeal, but the Petitioner’s own inaction which resulted in a failure to appeal. Thus, Petitioner’s request was not fully and fairly communicated to counsel, such as to warrant a conclusion that it was the attorneys’ ineffective assistance which deprived

the Petitioner of his opportunity to appeal.

13. Counsel reasonably believed that Petitioner had abandoned any desire to file an appeal, as Petitioner ignored counsels' repeated attempts to communicate with Petitioner regarding an appeal.
14. Petitioner's trial counsel never told Petitioner that he could be retried on the cocaine charge for which he was acquitted, if he filed an appeal.

Dated this 6 day of May, 2011.


Honorable Benjamin R. Simpson, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of May, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

Art Verharen
Fax: (208) 446-1833

Sean Walsh
Walsh Law Office, PLLC
206 Indiana St., Ste, 117
Coeur d'Alene, ID 83814
Fax: (208) 765-4636

3267


Deputy Clerk

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 5-6-11
AT 3:30 O'CLOCK P.M.
CLERK DISTRICT COURT
[Signature]
DEPUTY
[Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | |
|--|--|
| <p>KIRK GOSCH, Petitioner, vs. STATE OF IDAHO, Respondent.</p> | <p>CASE NO. CV-2007-5443 JUDGMENT OF DISMISSAL</p> |
|--|--|

The Court having before it the above Respondent's motion, and good cause appearing, now, therefore,

IT IS HEREBY ORDERED that the Post-Conviction Relief Petition sought on behalf of the Petitioner is and shall be hereby dismissed with prejudice.

Dated this 6 day of May, 2011.

[Signature]
Honorable Benjamin R. Simpson, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of May, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

Art Verharen
Fax: (208) 446-1833

Sean Walsh
Walsh Law Office, PLLC
206 Indiana St., Ste, 117
Coeur d'Alene, ID 83814
Fax: (208) 765-4636

3266#


Deputy Clerk

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2011 MAY -6 PM 4: 53

CLERK DISTRICT COURT

DEPUTY



SEAN P. WALSH
CONFLICT PUBLIC DEFENDER
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Attorney for Defendant

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

KIRK J. GOSCH,

Plaintiff/
Appellant,

V.

STATE OF IDAHO,

Defendant/
Respondent.

CASE NUMBER CV07-5443

NOTICE OF APPEAL

**TO: THE ABOVE NAMED RESPONDENT, STATE OF IDAHO, AND THE
CLERK OF THE ABOVE ENTITLED COURT:**

1. The above named Appellant hereby appeals against the above named Respondent, the State of Idaho, to the Idaho Supreme Court from the Order Denying Motion To Reconsider Sentence entered in the above entitled matter on May 3, 2011, the Honorable Simpson, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described above in paragraph one, is an appealable Judgment under and pursuant to Idaho Appellate Rule 11(a).

3. The issues Appellant intends to assert in this appeal include, but are not necessarily limited to:

Whether the Court abused its discretion in denying the Appellant's Amended Petition For Post Conviction Relief.

4. Appellant requests the preparation of the transcript of the hearing on trial held on May 3, 2011.

5. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28 I.A.R.: None

6. I hereby certify as follows:

A. A copy of this Notice of Appeal has been served upon all court reporters from whom a transcript is requested. The name and address of each such reporter is marked below in the Certificate of Service.

B. The Appellant is exempt from paying the estimated transcript fee because the Appellant is an indigent who is represented by a Conflict Public Defender pursuant to Court Appointment.


C. The Appellant is exempt from paying the filing fee because the Appellant is an indigent who is represented by a Conflict Public Defender pursuant to Court Appointment.

D. The Appellant is exempt from paying the estimated fee for the preparation of the record because the Appellant is an indigent who is represented by a Conflict Public Defender pursuant to Court Appointment.

E. Service has been made upon all parties required to be served pursuant to Rule 20 I.A.R., to wit the Kootenai County Prosecuting Attorney, and the Attorney General of Idaho pursuant to Section 67-1401 (1) Idaho Code.

DATED this 6 day of May, 2011.

BY:



SEAN P. WALSH
CONFLICT PUBLIC DEFENDER

STATE OF IDAHO } ss
 COUNTY OF KOOTENAI
 FILED: 5-70-11
 AT 9:55 O'CLOCK AM
 CLERK, DISTRICT COURT

 DEPUTY

SEAN P. WALSH
 CONFLICT PUBLIC DEFENDER
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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

| | | |
|---|--|---|
| <p>KIRK J. GOSCH,</p> <p style="padding-left: 100px;">Plaintiff,</p> <p>V.</p> <p>STATE OF IDAHO,</p> <p style="padding-left: 100px;">Defendant.</p> <hr style="width: 100%;"/> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>CASE NUMBER CV07-5443</p> <p>ORDER FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER IN DIRECT APPEAL; RETAINING TRIAL COUNSEL FOR RESIDUAL PURPOSES</p> |
|---|--|---|

TO: OFFICE OF THE IDAHO STATE APPELLATE PUBLIC DEFENDER, AND, SEAN P. WALSH, WALSH LAW OFFICE, PLLC., KOOTENAI COUNTY.

A judgment having been entered by this Court on May 3, 2011, and the defendant having requested the aid of counsel in pursuing a direct appeal from this district court in this felony matter, and defendant's trial counsel having filed a timely notice of appeal, and the Court being satisfied that said defendant continues to be a needy person entitled to public representation, therefore,

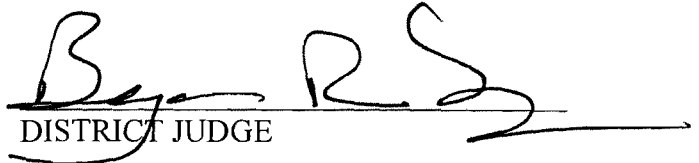
IT IS HEREBY ORDERED, in accordance with I.C. 19-870, that the State Appellate Public Defender is appointed to represent defendant in all further proceedings involving his appeal.

**ORDER FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER IN
 DIRECT APPEAL; RETAINING TRIAL COUNSEL FOR RESIDUAL PURPOSES -1-**

IT IS FURTHER ORDERED that trial counsel shall remain as appointed counsel of record for all other matters involving action in the trial court which, if resulting in an order in defendant's favor, could affect the judgment, order or sentencing in the action, until the expiration of the time limit for filing said motions or, if sought and denied, upon the expiration of the time for appeal of such ruling with the responsibility to decide whether or not a further appeal will be taken in such matters.

IT IS FURTHER ORDERED that trial counsel shall cooperate with the Office of State Appellate Public Defender in the prosecution of defendant's appeal.

DATED this 10 day of May, 2011.


DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of, served a of May, 2011 true and correct copy of the attached ORDER FOR APPOINTMENT OF STATE APPELLATE PUBLIC DEFENDER via facsimile, interoffice mail or as otherwise indicated upon the parties as follows:

- X Sean P. Walsh, Conflict Public Defender [] First Class Mail
 206 E. Indiana Ave., Suite 117 [] Facsimile (208) ~~665-7400~~
 Coeur d'Alene, ID 83814 765-4636

- X Kootenai County Prosecuting Attorney [] Interoffice Mail
 [] Facsimile (208) 446-1833

- X State Appellate Public Defender [] First Class Mail
 3647 Lake Harbor Lane [] Certified Mail
 Boise, Idaho 83703 [] Facsimile (208) 334-2985

- X Lawrence G. Wasden [] First Class Mail
 Attorney General [] Certified Mail
 P.O. Box 83720 [] Facsimile (208) ~~334-2530~~
 Boise, Idaho 83720-0010 854-8071

- X Supreme Court (certified) [] First Class Mail
 [X] Fax Certified (208) 334-2616

- Reporter for District Judge John T. Mitchell, Julie Foland via Interoffice Mail

- Reporter for District Judge Fred M. Gibler, Byrl R. Cinnamon via Interoffice Mail

- Reporter for District Judge John P. Luster, Anne MacMannus via Interoffice Mail

- ✓ Reporter for District Judge Benjamin R. Simpson Charles W. Hosack, JoAnn Schaller via Interoffice Mail

- Reporter for District Judge Lansing Haynes, Laurie Johnson via Interoffice Mail

3392

Devin Jensen

PLAINTIFF'S EXHIBITS

- EXHIBIT #1 - Memorandum Opinion Filed 1/30/06
- EXHIBIT #2 - Order Denying Defendant's Motion
for Interlocutory Appeal Filed 2/27/06
- EXHIBIT #3 - Judgment and Sentencing Disposition Filed 9/20/06

IN THE SUPREME COURT OF THE STATE OF IDAHO

KIRK J GOSCH)
)
Plaintiff/Appellant,)
vs)
)
STATE OF IDAHO)
)
Defendant/Respondents ,)
_____)

SUPREME COURT NO.
38791-2011

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that exhibits were offered and sent to Supreme Court.

I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the 14 day of June, 2011:

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 14 day June, 2011.

Clifford T Hayes
Clerk of the District Court

By: Cathy Victorino
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|------------------------|---|-------------------|
| KIRK J GOSCH |) | |
| |) | |
| |) | |
| Plaintiff/Appellant, |) | |
| vs |) | |
| |) | |
| STATE OF IDAHO |) | SUPREME COURT NO. |
| |) | 38791-2011 |
| |) | |
| Defendant/Respondents, |) | |
| _____ |) | |

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of record in this cause as follows:

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

Lawrence G Wasden
Attorney General
PO Box 83720
Boise ID 83720-0010

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 14 day of June, 2011.

Clifford T Hayes
Clerk of the District Court

by: Cathy Victorino

aaa