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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE SCOTT ANDRUS,)	
)	No. 44686
Petitioner-Appellant,)	
)	Twin Falls County Case No.
v.)	CV-42-2016-720
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
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BRIEF OF RESPONDENT

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

**HONORABLE JOHN K. BUTLER
District Judge**

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Attorney General
State of Idaho**

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**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Lawrence Scott Andrus appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In its notice of intent to dismiss Andrus' post-conviction petition, the district court set forth the following procedural background:

On March 17, 2014 Lawrence Scott Andrus (Andrus) was charged with Driving Under the Influence of Alcohol, a felony. At the time of his initial arraignment he applied for and was appointed the Twin Falls County Public Defender. On April 11, 2014 Tim Williams was substituted in as counsel for Andrus. On May 12, 2014 Andrus waived his preliminary hearing and was bound over to district court. The Information was filed May 13, 2014.

After the bind over to district court the case was assigned to Judge Bevan on May 12, 2014. Andrus was arraigned in district court on May 27, 2014 and on May 30, 2014 Judge Bevan disqualified himself as the presiding Judge and on June 3, 2014 the case was reassigned to Judge Stoker with notice to counsel.

On June 6, 2014 Judge Stoker heard a motion filed by Andrus to dismiss his counsel and, after considering the motion and arguments, denied the motion.

On November 6, 2011 the jury trial commenced. On November 7, 2014 a verdict of guilty was returned by the jury. The defendant was sentenced on December 5, 2014 and the Judgment of Conviction was entered December 8, 2014.

On December 15, 2014 a Rule 35 motion was filed, which was denied by the Court on December 30, 2014. A Notice of Appeal was filed on January 5, 2015. The Judgment of Conviction and sentence was affirmed in an amended unpublished opinion....

(R., pp.81-82 (footnotes omitted).)

On March 2, 2016, Andrus filed a petition for post-conviction relief, raising several claims of error. (R., pp.5-16, 22-24.) The district court filed a notice of intent to dismiss that petition, addressing each of Andrus' claims in turn. (R., pp.81-97.) More than 20 days later and without response from Andrus, the district court summarily dismissed Andrus' petition. (R., pp.103-06.) Andrus filed a timely notice of appeal. (R., pp.110-12.)

ISSUE

Andrus states the issue on appeal as:

Did the district court err in dismissing Andrus' petition for post-conviction relief?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Andrus failed to show that the district court erred when it summarily dismissed his petition for post-conviction relief?

ARGUMENT

Andrus Has Failed To Show That The District Court Erred When It Summarily Dismissed His Petition For Post-Conviction Relief

A. Introduction

On appeal, Andrus argues that the district court erred when it summarily dismissed his petition for post-conviction relief. (Appellant’s brief, pp.6-12.) Review of the record shows that, applying correct legal standards and procedures, the district court properly dismissed Andrus’ post-conviction petition. The district court should be affirmed.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court Correctly Dismissed Andrus’ Post-Conviction Petition

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases, the “application must contain much more than a short and plain statement of the claim that would suffice for a complaint under

I.R.C.P. 8(a)(1).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief on the trial court’s own initiative or in response to a party’s motion. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner’s un rebutted allegations as true, 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. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “Allegations contained in the application are insufficient for the granting of relief

when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

In his post-conviction petition, Andrus alleged that his due process rights were violated when the district judge initially assigned to the case disqualified himself and reassigned the case, and when the newly assigned district judge did not, *sua sponte*, disqualify himself; that the district court erred or abused its discretion by denying Andrus’ motion to dismiss his trial counsel, admonishing the parties during the trial, and failing to, *sua sponte*, exclude witnesses; that the prosecutor engaged in a selective prosecution; and that both his trial counsel and appellate counsel were ineffective on various grounds. (R., pp.6-15, 22-24.) In a detailed and well-reasoned order, the district court gave its notice of intent to dismiss the claims because they were, respectively, contrary to the law, not supported by the record of the underlying proceedings, waived below, or should have been brought on direct appeal and were therefore forfeited. (R., pp.85-96.) The district court was correct, and the state adopts the district court’s analysis from its “Notice of Intent to Dismiss” as part of its argument on appeal, a copy of which is attached as “Appendix A.”

In a generally well-written brief, Andrus airs several grievances. (See Appellant’s brief, pp.9-11.) He does not, however, show any error by the district court in its order summarily dismissing his petition for post-conviction relief. Moreover, he does not appear to cite to any legal authority in support of an argument that the district court erred when it summarily dismissed his post-conviction petition, though he recognizes that such is necessary. (See Appellant’s brief, pp.7-8 (citing State v. Grazian, 14 Idaho 510, 518, 164 P.3d 790, 798 (2007).) Where an appellant fails to present any authority in support of his argument, his claim of error is

waived. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Andrus has failed to show error by the district court.

Andrus' petition for post-conviction relief was correctly dismissed by the district court. His several claims were either unsupported by the law, unsupported by the record, or waived. The district court's order and judgment dismissing Andrus' petition for post-conviction relief should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's judgment summarily dismissing Andrus' petition for post-conviction relief.

DATED this 26th day of October, 2017.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of October, 2017, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

LAWRENCE SCOTT ANDRUS
IDOC #113829
I.S.C.C. F-BLOCK
P. O. BOX 70010
BOISE, ID 83707

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd

APPENDIX A

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

LAWRENCE SCOTT ANDRUS,)	
)	
Petitioner,)	
)	
vs.)	Case No. CV42-16-720
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

NOTICE OF INTENT TO DISMISS

On March 2, 2016 the petitioner filed his Petition for Post-Conviction Relief together with a Motion for Appointment of Counsel.¹ The Court, having reviewed the petition for post-conviction relief filed herein, and in accordance with Idaho Code § 19-4906(b), notifies petitioner that the petition, on its face, fails to meet the requirements of I.C. Section 19-4901 et seq. as set forth in further detail below.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2014 Lawrence Scott Andrus (Andrus) was charged with Driving Under the Influence of Alcohol, a felony. At the time of his initial arraignment he applied for and was

¹ The Motion for Appointment of Counsel was granted and counsel has been appointed for the petitioner.

appointed the Twin Falls County Public Defender. On April 11, 2014 Tim Williams was substituted in as counsel for Andrus. On May 12, 2014 Andrus waived his preliminary hearing and was bound over to district court. The Information was filed May 13, 2014.

After the bind over to district court the case was assigned to Judge Bevan on May 12, 2014.² Andrus was arraigned in district court on May 27, 2014 and on May 30, 2014 Judge Bevan disqualified himself as the presiding Judge and on June 3, 2014 the case was reassigned to Judge Stoker with notice to counsel.

On June 6, 2014 Judge Stoker heard a motion filed by Andrus to dismiss his counsel and, after considering the motion and arguments, denied the motion.

On November 6, 2011 the jury trial commenced. On November 7, 2014 a verdict of guilty was returned by the jury. The defendant was sentenced on December 5, 2014 and the Judgment of Conviction was entered December 8, 2014.

On December 15, 2014 a Rule 35 motion was filed, which was denied by the Court on December 30, 2014. A Notice of Appeal was filed on January 5, 2015. The Judgment of Conviction and sentence was affirmed in an amended unpublished opinion. *State v. Andrus*, 2015 Unpublished Opinion No. 689A, filed January 4, 2016.³

II.

JUDICIAL NOTICE

Pursuant to I.R.E. 201 the Court hereby takes judicial notice of the Transcript on Appeal in CR-2014-2897 (Docket No. 42878) which was lodged in this matter on April 19, 2016 consisting of the following transcripts:

-Motion of Defendant to Dismiss Trial Counsel, June 6, 2014

² On May 13, 2014 the prosecutor disqualified Judge Elgee as an alternate judge pursuant to I.C.R. 25(a)(6).

³ The original unpublished opinion was filed October 15, 2015 and the Remittitur was issued November 27, 2015.

-Motion for Bond Reduction, June 20, 2014

-Pre-Trial Conference, June 30, 2014

-Jury Trial, November 6 & 7, 2014

-Sentencing, December 5, 2014

III.

POST-CONVICTION STANDARD

A petition for post-conviction relief is a civil proceeding, entirely distinct from the underlying criminal action. *Ferrier v. State*, 135 Idaho 797 (2001). If the petition fails to present or be accompanied by admissible evidence supporting its allegations, and making a prima facie case, *i.e.* establishing each essential element of the claim, then summary dismissal is appropriate. *Hernandez v. State*, 133 Idaho 794 (1999); *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). While the Court is required to accept petitioner's un rebutted allegations, it need not accept petitioner's bare or conclusory allegations. *Berg v. State*, 131 Idaho 517 (1998); *King v. State*, 114 Idaho 442 (Ct. App. 1988). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . 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." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant's evidence because 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Idaho Code section 19-4906 authorizes summary dismissal of an application for post-conviction relief pursuant to a motion by a party, which is the procedural equivalent of a motion for summary judgment. *See also* I.R.C.P. 56. Therefore, summary dismissal is only authorized if there is no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. *Gonzales v. State*, 120 Idaho 759, 763 (Ct. App. 1991). Summary dismissal may be appropriate, however, even where the State does not controvert the petitioner's evidence because the Court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647 (Ct. App. 1994). Furthermore, our courts have held that

post-conviction allegations are insufficient for the granting of relief when they are clearly disproved by the record. *Cootz v. State*, 129 Idaho 360, 368 (Ct. App. 1996).

When considering whether there exists a triable issue of fact, the Court should consider those matters of which the Court may take judicial notice as well as the “pleading, depositions, and admissions together with any affidavits on file.” *Ricca v. State*, 124 Idaho 894, 896 (Ct. App. 1993). Because this Court is the trier of fact in post-conviction cases, this Court is not constrained to draw inferences in favor of the non-moving party. This Court is free to arrive at the most probable inferences to be drawn from the uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355 (Ct. App. 2008). The Court of Appeals in *Murphy v. State*, set forth the standard for ineffective assistance of counsel in claims of post-conviction relief as follows:

In order to prevail on a claim of ineffective assistance of counsel, the post-conviction applicant must demonstrate both that her attorney's performance was deficient, and that she was thereby prejudiced in the defense of the criminal charge. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App.1989). To show deficient performance, a petitioner must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-03. See also *Vick v. State*, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct.App.1998). If a petitioner succeeds in establishing that counsel's performance was deficient, she must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

IV.

ANALYSIS

A. Judicial Disqualification and Reassignment

The petitioner alleges that Judge Bevan violated the due process rights of the petitioner when he disqualified himself and reassigned the case to Judge Stoker and granted the State's motion to disqualify Judge Elgee as an alternate judge. The petitioner also alleges that such action constitutes "judge shopping". There is no authority that supports any contention the conduct of disqualification and reassignment is a due process violation and in fact the conduct complained of was within the provisions and the authority of I.C.R. Rule 25. Therefore this claim should be dismissed on the basis that there was no due process violation.

B. Failure of Judge to Disqualify Himself

The petitioner alleges that his trial judge should have disqualified himself based on personal bias and prejudice because the petitioner in 2003 complained to the U.S. Commerce Department concerning the transport of vehicles from Canada for sale in Idaho and that the petitioner had prevented the issuance of a Special Use Permit for certain real property.

The petitioner is referring to an alleged circumstance or event that had occurred approximately 11 years prior to his jury trial in the underlying criminal action. There is no showing that this event was brought to the attention of the trial judge or that he had any present recollection of this event. Further there is no showing that this event had any impact or effect on any decision of the trial judge. Lastly, there is no showing of any actual or implicit bias or prejudice of the trial judge towards the petitioner during the underlying criminal action.

A judge shall disqualify himself where "... the judge has a personal bias or prejudice concerning a party..." Judicial Canon 3(E)(1)(a). There is no showing in the record that the petitioner's trial judge had a present recollection of the circumstances upon which the petitioner believes that the judge should have disqualified himself and there is no showing in the record that the petitioner ever brought to the attention of the trial judge the circumstance upon which the

judge should have disqualified himself. A review of the transcripts of the proceedings in the underlying action does not demonstrate any alleged bias or prejudice on the part of the trial judge.

Pursuant to I.R.C.P. 40(d)(4) a judge may disqualify himself and such a decision is a matter of discretion for that judge. *Woods v. Sanders*, 150 Idaho 53, 244 P.3d 197 (2010). The record does not present any evidence of actual bias or prejudice upon which to base an abuse of discretion. *Roselle v. Heirs and Devisees of Grover*, 117 Idaho 530, 789 P.2d 526 (Ct. App.1990) Therefore this claim should be dismissed as it is not supported by the record.

C. Judge's Denial of Motion to Dismiss Trial Counsel

The petitioner alleges that the trial judge abused his discretion when he denied petitioner's motion to dismiss or remove his appointed counsel. A hearing on the petitioner's motion to dismiss Tim Williams as his trial counsel was conducted on June 6, 2014. The trial judge found that there were insufficient grounds to allow the petitioner to remove or dismiss his appointed counsel. The petitioner has failed to demonstrate how the trial judge "abused his discretion". This claim is not supported by the facts in the record. Further, this is a matter that could have been raised in his direct appeal and was not raised. A petition for post-conviction relief is not a substitute for a direct appeal and matters not raised in a direct appeal are forfeited.

D. Judge's Admonishment of Parties and Jurors

The petitioner alleges that the court "abused its discretion" in the following colloquy between the court and counsel: (Tr. Pg. 278, L5-14)

THE COURT: The question was, why was the defendant arrested?

MS. HARRINGTON: Yes.

THE COURT: Which is totally irrelevant in this case, by the way. Nevertheless, that was the question. And now we have gone to expressing why he was arrested, and that was without objection, Mr. Williams.

I'm going to let the answer stand. I'll let you recross on that.

The defendant has failed to establish that he was prejudiced by the colloquy between the court and the prosecutor. The record shows that the Court was ruling on an untimely objection to a question and the witnesses answer. Evidentiary rulings by the trial court are the subject matter for a direct appeal. A petition for post-conviction relief is not a substitute for a direct appeal and matters not raised in a direct appeal are forfeited.

E. Judge's Failure to Exclude Witnesses

The petitioner alleges a fundamental error occurred when the trial court failed to exclude ISP Lt. Robert Rausch while defense witness Robert La Pier testified and that "Rausch's comportment" distracted "the jury during La Pier's testimony" which was prejudicial and made a fair trial impossible.

The exclusion of witnesses is a matter of discretion for the trial court. I.R.E. 615(a). Further, any failure to exclude a witness is subject to an "abuse of discretion" standard and would be a matter of a direct appeal. A petition for post-conviction relief is not a substitute for a direct appeal and matters not raised in a direct appeal are forfeited.

F. Selective Prosecution

The petitioner alleges that the State engaged in "selective prosecution" when they charged him with felony DUI in lieu of the lesser offense of public intoxication. To make a case for selective prosecution the petitioner is "required to show that the [state] selected [him] from a larger group of non-prosecuted alleged violators because of [his] exercise of a constitutional right. (*citations omitted*)". "He must show that the selection was deliberately based on an

unjustifiable standard. (*citation omitted*)". *Maxfield v. State*, 108 Idaho 493, 498, 700 P.2d 115, 120 (Ct. App. 1985). The petitioner has failed to make a prima facie case of "selective prosecution and this claim should be dismissed.

G. Ineffective Assistance of Trial Counsel

a. Failure to file motion to disqualify judge

Pursuant to I.C.R. Rule 25 a motion to disqualify without cause must be filed no later than 14 days after written notice of the presiding judge. Rule 25(a)(2). In the case of disqualification for cause, such a motion may be filed at any time, however, such a motion must be supported by an affidavit of the party or the party's attorney setting forth the grounds upon which the motion is based. Rule 25(b), (c).

The notice of the assignment of Judge Stoker was filed and served on June 3, 2014. There is no evidence that the petitioner ever asked his attorney to disqualify the judge without cause at any time between June 3, 2014 and June 17, 2014. There is no showing that the petitioner ever provided any information or evidence to his trial attorney that would suggest that counsel should have unilaterally filed a motion to disqualify without cause or that petitioner requested such a motion be filed. Further there is not sufficient evidence in the record to suggest that a motion to disqualify for cause would have been granted. It is the burden of the petitioner to establish a sufficient record to show that such a motion would have been granted, in order to prevail on post-conviction. *Lint v. State*, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008). Based on the record before this court, this claim should be dismissed.

b. Failure to file motion to suppress breath test results

The petitioner alleges that counsel was ineffective in failing to file a motion to suppress the breathalyzer test results based on the testimony of Officer Koopman "that county agents

disregarded their duty to closely observe Andrus for the requisite fifteen minute period...”. In a post-conviction proceeding challenging an attorney’s failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney’s inactivity constituted ineffective assistance. *Lint v. State*, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008). Where the alleged deficiency is counsel’s failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.* at 477-78, 180 P.3d at 516-17.

The Court of Appeals reiterated the purpose behind the fifteen minute waiting period in *State v. Stump* when it stated that the observation period is intended to rule out the introduction of alcohol or other substances into the subject’s mouth prior to testing in order to obtain an accurate result. 146 Idaho 857, 860, 203 P.3d 1256, 1259 (Ct. App. 2009) (internal citation omitted). The court further stated that officers need not “stare fixedly” at a subject, but can use a combination of their senses of sight, smell, and hearing during the observation period so long as the officer is continually in a position of surveillance in close physical proximity to the test subject so as to confirm that the purpose of the test is met. *Id.* (internal citations omitted); *see also State v. Remsburg*, 126 Idaho 338, 340, 882 P.2d 993, 995 (Ct. App. 1994).

The petitioner has failed to establish that the officer performing the breath test was not in a position to use his other senses to assure compliance with the test procedures and the petitioner has presented no evidence or testimony that he did anything during the fifteen minute period that would have interfered with the validity of the test results. Therefore, this claim should be dismissed.

c. Failure to file motion to dismiss for lack of probable cause

The petitioner alleges that his attorney was deficient for failing to file a motion to dismiss for lack of probable cause. I.C. § 19-815A does allow for the defendant to file a motion to challenge the evidence presented at a preliminary hearing after a bind over to district court, however, the petitioner waived his right to a preliminary hearing and by waiving his right to such a hearing he essentially conceded that there was sufficient probable cause. Therefore the petitioner previously waived his right to challenge the probable cause evidence and such a motion if filed would have been frivolous and this claim should be dismissed.

d. Failure to impeach Officer Koopman's testimony

The petitioner alleges that counsel was ineffective in failing to impeach Officer Koopman's testimony at trial that there was a "slight slurring at the jail in Mr. Andrus' speech", with his Probable Cause Affidavit where the officer noted no slurring of speech. The courts have long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011). Based on the record presented this claim should be dismissed.

e. Failure to raise a defense or call witnesses to rebut Officer

Koopman's testimony

The petitioner alleges that counsel was ineffective in failing to raise a defense or to call witnesses to rebut the testimony of Officer Koopman that Andrus had consumed alcohol "for a while" and "emitted a 'stale smell' about his person." The courts have long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or

other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011).

The petitioner has not identified any witnesses that should have been called as he alleges nor has he presented any affidavits of any such witnesses as to their intended testimony. *Wolfe v. State*, 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990). Therefore, this claim should be dismissed.

**f. Failure to make timely and proper objections to the BAC results;
violation of the religious privilege; to exclude witnesses; to prosecutor
misconduct**

The petitioner alleges that his trial counsel was ineffective in failing to object to the BAC test results; an alleged violation of the religious privilege; the failure of the court to exclude witnesses and prosecutorial misconduct as concerns the prosecutor's closing argument.

The record does not establish that counsel was ineffective in failing to object to the admissibility of the BAC results, for the reasons stated in subsection **b.**, above. Further the petitioner has made no factual or legal showing that such an objection would have been sustained. Therefore, based on the record this claim should be dismissed.

The State called as a witness, Matthew Kear, a Bishop of the Church of Latter Day Saints. Bishop Kear had previously counseled the petitioner. On the day in question the petitioner had called Bishop Kear to report that he was going to end his life at the Singing Bridge. Bishop Kear told the petitioner if the petitioner was serious, that he would have to call 911. The Bishop after the call ended did in fact call 911. A recording of the 911 call was admitted into evidence. Counsel for the petitioner did not object based on religious privilege. I.R.E. 505 (A communication is "confidential" *if made privately and not intended for further disclosure...*), Rule 505(2)). In fact, during the defense examination of the Bishop, the Court

found that the privilege had been waived by the defense. It is clear from the examination by the defense, that they were attempting to establish that the petitioner did not appear to be intoxicated at the time of the communication. The courts have long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011).

It appears from the record that the failure to raise the privilege was harmless, and in fact there was a strategic reason for not asserting the privilege since the testimony was relevant to the issue of intoxication or the lack thereof. Therefore this claim should be dismissed.

The petitioner argues that counsel was ineffective in failing to seek to exclude Lt. Rausch. The exclusion of witnesses is a matter of discretion for the trial court. I.R.E. 615(a). In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted ineffective assistance. *Lint v. State*, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.* at 477-78, 180 P.3d at 516-17. Lt. Rausch was called as the State's last witness on November 7, 2014. Lt. Rausch was the State's expert relative to the validity defendant's alcohol level. There is no evidence in the record that this witness was present in court prior to his testimony. After the testimony of this witness the State rested its case. The defense then called its expert Robert Franklin La Pier to contest the State's evidence as to the defendant's level of intoxication. After the defense rested, the State called Lt. Rausch as a rebuttal witness. It appears from the record

that this witness was permitted to remain in court during the testimony of La Pier. Under I.R.E. 615(a)(2) the State does have the right to have an officer present in court. There is no showing that the State had any officer in court as a representative other than perhaps Lt. Rausch. Also it is not uncommon for an expert witness to be permitted to remain after offering his or her testimony in the event of the necessity of rebuttal testimony. However, these matters are again a matter of discretion for the trial court and there is no showing made that if a motion to exclude Lt. Rausch would have been made that it would have been granted. Therefore, this claim should be dismissed.

The petitioner also argues “prosecutorial misconduct” during closing arguments about the petitioner when she stated: “He knows how to speak, He knows how to present, and he’s so good he’s won an Emmy”. In her closing argument the prosecutor was suggesting to the jury that based on the testimony offered in the trial, including the testimony of the defendant, that the defendant was a manipulator and that his testimony, based on the evidence, was not credible. By this statement the petitioner asserts that the prosecutor “presented unsworn testimony to the jury” and counsel was ineffective in failing to object.

Closing argument “serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case.” *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555 (1975). “Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoint, the evidence and the inferences to be drawn therefrom”. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003). There is no showing that the prosecutor presented “unsworn testimony” to the jury. Further, the petitioner has not shown that the conduct complained of was harmful, assuming arguendo that it constituted misconduct. Therefore this claim should be dismissed.

**g. Failure to adequately advise defendant as to the evidence;
investigation; and court procedures**

The petitioner alleges that his trial counsel was ineffective in failing to advise him as to the investigation, the evidence and the court procedures. This claim is conclusory and is not supported by any admissible facts or evidence in the record. Therefore, this claim should be dismissed.

H. Ineffective assistance of Appellate Counsel

The petitioner alleges that appellate counsel was ineffective in failing to raise issues on appeal other than sentencing and Rule 35 issues. Appellate counsel is not required to raise every conceivable issue on appeal, but is only required to make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Jakoski v. State*, 136 Idaho 280, 32 P.3d 672 (Ct. App. 2001).

a. Failure to raise issues on appeal other than sentencing issues

The petitioner has not identified any claims that appellate counsel should have raised on appeal that were not otherwise raised. This claim is otherwise conclusory and without any factual support. Therefore, this claim should be dismissed.

**b. Failure to raise on appeal the award of \$2500.00 for public defender
reimbursement**

The petitioner asserts that the trial court abused its discretion by requiring him to reimburse the public defendant \$2,500.00. The petitioner alleges that the appellate counsel was ineffective in challenging on appeal the award of the public defender reimbursement. The petitioner argues that Idaho law requires that he have the “present means” to pay such sums.

State v. Weaver, 135 Idaho 5, 9 13 P.3d 5, 9 (Ct. App. 2000). However, after the issuance of the *Weaver* decision the legislature amended I.C. § 19-854(c), “to allow orders for reimbursement of public defender fees regardless of whether the defendant has the present ability to pay”. *State v. Wilson*, 136 Idaho 771, 40 P.3d 129 (Ct. App. 2001).

Therefore, the petitioner’s reliance upon *State v. Weaver* is misplaced and this claim should be dismissed.

V.

CONCLUSION AND ORDER

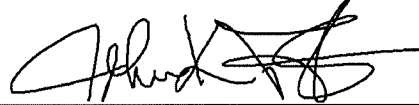
Pursuant to I.C. § 19-4906(b), Petitioner is hereby notified that based upon the Petition and the record presented to the Court, the Court provisionally intends to dismiss the claims for post-conviction relief as set forth above. Petitioner is hereby notified that he is entitled to reply to this Notice of Intent to Dismiss within twenty (20) days following the date of this order. In the

event that the Petitioner fails to respond or fails to make a timely or adequate response, the claims for post-conviction relief will be dismissed without further notice or hearing pursuant to I.C. § 19-4906(b).

IT IS SO ORDERED.

Signed: 7/11/2016 04:23 PM

DATED this _____ day of _____, 2016



John K. Butler, District Judge