

5-28-2013

# Daniels v. State Clerk's Record Dckt. 40811

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CECIL G. DANIELS,	)	
	)	SUPREME COURT
PETITIONER-APPELLANT,	)	CASE NO. 40811-2013
	)	
VS.	)	
	)	
STATE OF IDAHO,	)	
	)	
RESPONDENT.	)	
_____	)	

CLERK'S RECORD ON APPEAL

SARA B. THOMAS  
STATE APPELLATE PUBLIC DEFENDER  
3050 N. LAKE HARBOR LANE  
BOISE, IDAHO 83703

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
P.O. BOX 83720  
BOISE, ID 83720-0010

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

Cecil Gerald Daniels, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge	
9/16/2011	NCPD	LEU	New Case Filed - Post Conviction Relief	District Court Clerks
		LEU	Filing: H10 - Post-conviction act proceedings Paid by: state Receipt number: 0039429 Dated: 9/19/2011 Amount: \$.00 (Cash) For:	District Court Clerks
	ADMR	LEU	Administrative assignment of Judge	Lansing L. Haynes
	MOTN	ZOOK	Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees	Lansing L. Haynes
	MOTN	ZOOK	Motion and Affidavit in Support for Appointment of Counsel	Lansing L. Haynes
9/28/2011	ADMR	MEYER	Administrative assignment of Judge	Jeff M Brudie
	ORAJ	LSMITH	Order Assigning Judge	John T. Mitchell
9/29/2011	ANSW	LEU	Respondent's Answer To Petition For Post-Conviction Relief	Jeff M Brudie
		LEU	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: State of Idaho Post Conviction Relief (other party) Receipt number: 0041279 Dated: 9/29/2011 Amount: \$.00 (Cash) For: State of Idaho Post Conviction Relief (other party)	Jeff M Brudie
	ADMR	CRUMPACKER	Administrative assignment of Judge	Carl B. Kerrick
10/5/2011	ORDR	SREED	Order Granting Motion for Appointment of Counsel	Carl B. Kerrick
11/7/2011	ORDR	LEU	Order For Telephonic Scheduling Conference	Carl B. Kerrick
11/9/2011	SUBC	LEU	Substitution Of Counsel	Carl B. Kerrick
12/1/2011	ORDR	MITCHELL	Order for Telephonic Scheduling Conference	Carl B. Kerrick
	HRSC	MITCHELL	Hearing Scheduled (Scheduling Conference 01/10/2012 11:00 AM) Telephonic - In Lewiston Court to Initiate Call.	Carl B. Kerrick
1/10/2012	HRSC	MITCHELL	Hearing Scheduled (Status Conference 03/02/2012 11:00 AM) Chambers - Nez Perce County Courthouse - Telephonic - Court to initiate call to parties.	Carl B. Kerrick
	ORDR	MITCHELL	Order for Telephonic Status Conference	Carl B. Kerrick
	HRHD	BIELEC	Hearing result for Scheduling Conference scheduled on 01/10/2012 11:00 AM: Hearing Held Telephonic - In Lewiston Court to Initiate Call.	Carl B. Kerrick
1/26/2012	ABRF	ZOOK	Appellant's Brief	Carl B. Kerrick
	AFFD	ZOOK	Affidavit of Facts of Cecil G Daniels	Carl B. Kerrick
	MISC	ZOOK	Amended Application for Post Conviction Relief	Carl B. Kerrick
3/2/2012	ORDR	HOFFMAN	Order Scheduling Briefs And Argument	Carl B. Kerrick
	HRSC	HOFFMAN	Hearing Scheduled (Oral Argument on Appeal 04/13/2012 10:00 AM) Telephonic - Nez Perce County Courthouse - Court to initiate call to parties.	Carl B. Kerrick

Cecil Gerald Daniels, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge	
3/2/2012	DCHH	HAMILTON	Hearing result for Status Conference scheduled on 03/02/2012 11:00 AM: District Court Hearing Held--NOT ON RECORD Court Reporter: NONE Number of Transcript Pages for this hearing estimated: Chambers - Nez Perce County Courthouse - Telephonic - Court to initiate call to parties.	Carl B. Kerrick
3/15/2012	BRIE	DEGLMAN	Brief Oposing Post-Conviction Relief	Carl B. Kerrick
	MNSJ	DEGLMAN	Respondent's Motion For Summary Disposition	Carl B. Kerrick
	ANSW	DEGLMAN	Respondent's Answer to Amended Application for Post-Conviction Relief	Carl B. Kerrick
3/30/2012	PRSB	ZOOK	Plaintiff's Reply Brief in Opposition to Respondent's Motion for Summary Disposition	Carl B. Kerrick
4/13/2012	HRHD	MITCHELL	Hearing result for Oral Argument on Appeal scheduled on 04/13/2012 10:00 AM: Hearing Held Telephonic - Nez Perce County Courthouse - Court to initiate call to parties.	Carl B. Kerrick
	NOTE	MITCHELL	Court Takes Matter Under Advisement and Will Issue A Written Decision	Carl B. Kerrick
5/10/2012	OPIN	HOFFMAN	Opinion And Order On Respondent's Motion for Summary Disposition	Carl B. Kerrick
9/10/2012	RFTS	ZOOK	Request For Trial Setting	Carl B. Kerrick
11/6/2012	HRSC	HOFFMAN	Hearing Scheduled (Scheduling Conference 11/29/2012 10:45 AM) TELEPHONIC - Nez Perce County to initiate the call to parties	Carl B. Kerrick
11/29/2012	HRHD	MITCHELL	Hearing result for Scheduling Conference scheduled on 11/29/2012 10:45 AM: Hearing Held TELEPHONIC - Nez Perce County to initiate the call to parties	Carl B. Kerrick
12/5/2012	NOTC	MITCHELL	Notice of Hearing	Carl B. Kerrick
	HRSC	MITCHELL	Hearing Scheduled (Evidentiary Hearing 01/28/2013 10:00 AM) 1 day - In Kootenai	Carl B. Kerrick
	HRSC	MITCHELL	Hearing Scheduled (Pre-Trial Conference 01/17/2013 10:30 AM) Telephonic - Nez Perce County (Court will initiate the call)	Carl B. Kerrick
12/12/2012	SUBF	BAXLEY	Subpoena Return/found on 12/12/12 served DW	Carl B. Kerrick
1/4/2013	NOTC	MCCOY	Notice of Assignment Change - Dennis Reuter OBO Plaintiff	Carl B. Kerrick
1/15/2013	MOTN	CLEVELAND	State's Motion for Order Waiving the Attorney-Client Privilege	Carl B. Kerrick
1/17/2013	ORDR	MITCHELL	Order Waiving the Attorney-Client Privilege	Carl B. Kerrick
	ORDR	MITCHELL	Order for Diane Walker to Appear Telephonically 1/28/13 @ 10:00	Carl B. Kerrick

Cecil Gerald Daniels, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
1/17/2013	HRHD	LEU	Hearing result for Pre-Trial Conference scheduled on 01/17/2013 10:30 AM: Hearing Held Telephonic - Nez Perce County (Court will initiate the call)
1/25/2013	MOTN	ZOOK	Motion for Telephonic Appearance
1/28/2013	HRHD	LSMITH	Hearing result for Evidentiary Hearing scheduled on 01/28/2013 10:00 AM: Hearing Held 1 day - In Kootenai (Diane Walker to appear telephonically)
3/5/2013	CVDI	LEU	Civil Disposition entered for: State of Idaho Post Conviction Relief, Other Party; Daniels, Cecil Gerald, Subject. Filing date: 3/5/2013
	FJDE	LEU	Findings Of Fact, Conclusions Of Law, And Order On Petition For Post Conviction Relief
	STAT	LEU	Case status changed: Closed pending clerk action
	STAT	LEU	Case status changed: closed
3/13/2013	NOTC	MITCHELL	Notice of Appeal
	APSC	MITCHELL	Appealed To The Supreme Court
	MOTN	MITCHELL	Motion for Appointment of State Appellate Public Defender
		MITCHELL	Filing: L4a - Appeal - Post Conviction Relief Paid by: Reuter, PRIVATE ATTORNEY, Dennis (attorney for Daniels, Cecil Gerald) Receipt number: 0010873 Dated: 3/13/2013 Amount: \$.00 (Cash) For: Daniels, Cecil Gerald (subject)
	CERT	MITCHELL	Clerk's Certificate Of Appeal
3/25/2013	ORDR	MITCHELL	Order Remanding Case for Final Judgment
3/26/2013	CERT	MITCHELL	Amended Clerk's Certificate of Appeal
3/28/2013	CVDI	MITCHELL	Civil Disposition entered for: State of Idaho Post Conviction Relief, Other Party; Daniels, Cecil Gerald, Subject. Filing date: 3/28/2013
	FJDE	MITCHELL	Final Judgement, Order Or Decree Entered
	ORPD	MITCHELL	Order Appointing State Appellate Public Defender
5/28/2013	NLTR	MITCHELL	Notice of Lodging Transcript

Inmate Name Cecil G Daniels  
IDOC No. 35067  
Address SDCC PO Box 2508  
Boise ID 83727

2011 SEP 16 AM 10: 04

CLERK DISTRICT COURT

DEPUTY

Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

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

CECIL DANIELS )

Petitioner, )

vs. )

STATE OF Idaho )

Respondent. )

Case No. CV11-750

PETITION AND AFFIDAVIT  
FOR POST CONVICTION  
RELIEF

The Petitioner alleges:

1. Place of detention if in custody: South Idaho Correctional Inst.
2. Name and location of the Court which imposed judgement/sentence: FIRST JUDICIAL DISTRICT COURT, KOOTENAI COUNTY, COEUR D'ALENE IDAHO
3. The case number and the offense or offenses for which sentence was imposed:
  - (a) Case Number: CR-2008-18482
  - (b) Offense Convicted: DUF
4. The date upon which sentence was imposed and the terms of sentence:
  - a. Date of Sentence: JULY 29, 2009
  - b. Terms of Sentence: 3 Fixed 7 Indeterminate

PETITION FOR POST CONVICTION RELIEF - 1

Revised: 10/13/05

**ASSIGNED TO JUDGE HAYNES**

3.

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

Of guilty [ ] Of not guilty

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

Yes [ ] No

If so, what was the Docket Number of the Appeal? 37054-2009

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

(a) VIOLATION OF UNITED STATES CONSTITUTION  
AMENDMENT 5 RIGHT OF DUE PROCESS

(b) VIOLATION OF UNITED STATES CONSTITUTION  
AMENDMENT 14 SEC 1 EQUAL PROTECTION

(c) VIOLATION OF THE IDAHO STATE CONSTITUTION  
ARTICLE 1 SEC 8  
SEE ATTACHMENT

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

a. Petitions in State or Federal Court for habeas corpus? YES

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

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

HABEAS CORPUS ADA CO. DISTRICT COURT CV-17C.  
CURRENTLY APPEALING TO SUPREME COURT, AND  
FURTHER IF NEEDED TO FEDERAL COURT

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

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

\_\_\_\_\_

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

\_\_\_\_\_

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

\_\_\_\_\_

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

Yes      [ ] No

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

Yes      [ ] No

12. State specifically the relief you seek:

Reduction of sentence and/or a full  
commutation of sentence and a immediate  
release from the Department of corrections

PETITION FOR POST CONVICTION RELIEF - 3

Revised: 10/13/05



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

DATED this 8 day of SEPT, 2011.

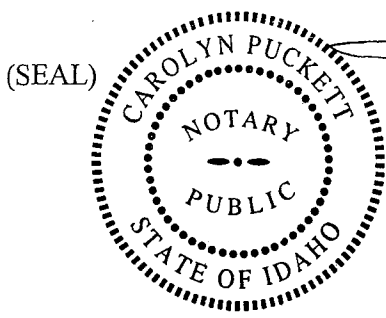
Cecil G Daniels  
Petitioner

STATE OF IDAHO )  
 ) ss  
County of Ada )

Cecil G Daniels, 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.

Cecil G Daniels  
Petitioner

SUBSCRIBED AND SWORN and AFFIRMED to before me this 8th day of SEP, 2011.



[Signature]  
Notary Public for Idaho  
Commission expires: 6-17-15

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of Sept, 2011, 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

PO Box 9000

Coeur d'Alene, Idaho 83816

Cecil G Daniels  
Petitioner

AFFIDAVIT OF FACTS IN SUPPORT OF POST-CONVICTION PETITION

STATE OF IDAHO )  
 ) ss  
COUNTY OF ADA )

Cecil G Daniels, being first duly sworn on oath, deposes and says:

The foregoing is true and correct documentation  
as filed in ADA county district court.

The state has violated the following constitutional provisions.

United States Constitution Amendment 5

United States Constitution Amendment 14 sec 1

Idaho Constitution Article 1 sec 3

Idaho Constitution Article 1 sec 8

Idaho Constitution Article 1 sec 13

Idaho Constitution Article 1 sec 18

Idaho code 19-901 Holding U.S.-vs. Wells 1908, 163 F 313

Idaho code 19-1101, 19-1102, 19-1103, 19-1201

Universal Declaration of Human Rights

Article Seven Equal protection without discrimination

Article Eight Fundamental Rights Guaranteed

Article Nine Arbitrary Arrest/DETENTION/EXILE


Article Eleven-TWO Penal Offence

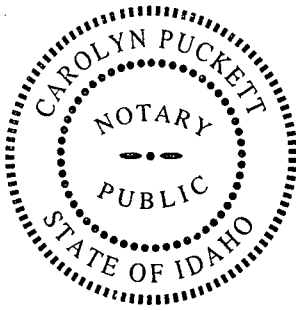
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Further your affiant sayeth not.

Cecil G Daniels  
Signature of Affiant

SUBSCRIBED AND SWORN AND AFFIRMED TO before me this 8<sup>th</sup> day of  
September, 2011.

  
Notary Public for Idaho  
My Commission Expires: 6/7/15



AFFIDAVIT OF FACTS IN SUPPORT OF POST CONVICTION PETITION - 2  
Revised: 10/13/05

2011 SEP 16 AM 10:04

CLERK DISTRICT COURT

Debra A. Zane  
DEPUTY

Cecil G Daniels  
Full Name of Party Filing Document

SRCI PO Box 8809  
Mailing Address (Street or Post Office Box)

BOISS ID 83707  
City, State and Zip Code

Telephone

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

Cecil Daniels,  
Plaintiff,  
vs.  
State of Idaho,  
Defendant.

Case No. CV11-7510

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

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

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

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

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

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

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

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

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

**IDENTIFICATION AND RESIDENCE:**

Name: Cecil B Daniels Other name(s) I have used: Jerry

Address: SICI PO Box 8500 Boise ID 83707

How long at that address? IDOC 3 yrs Phone: \_\_\_\_\_

Year and place of birth: 8-28-62 Orofino

**DEPENDENTS:**

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

Name of spouse: N/A

My other dependents including minor children (use only initials and age to identify children) are: \_\_\_\_\_

EHD 34 months

**INCOME:**

Amount of my income: \$ N/A per  week  month

Other than my inmate account I have outside money from: NA

My spouse's income: \$ \_\_\_\_\_ per  week  month.

**ASSETS:**

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

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

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

Description (provide description for each item)	Value
Cash	
Notes and Receivables	
Vehicles	
Bank/Credit Union/Savings/Checking Accounts	
Stocks/Bonds/Investments/Certificates of Deposit	
Trust Funds	
Retirement Accounts/IRAs/401(k)s	
Cash Value Insurance	
Motorcycles/Boats/RVs/Snowmobiles	
Furniture/Appliances	
Jewelry/Antiques/Collectibles	
Description (provide description for each item)	
TVs/Stereos/Computers/Electronics	
Tools/Equipment	
Sporting Goods/Guns	
Horses/Livestock/Tack	

Other (describe) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

**Expense** **Average  
Monthly Payment**

Rent/House Payment \_\_\_\_\_ *N/A*

Vehicle Payment(s) \_\_\_\_\_ *N/A*

Credit Cards (List last four digits of each account number.)

\_\_\_\_\_  
\_\_\_\_\_ *N/A*  
\_\_\_\_\_

Loans (name of lender and reason for loan)

\_\_\_\_\_  
\_\_\_\_\_ *N/A*  
\_\_\_\_\_

Electricity/Natural Gas \_\_\_\_\_

Water/Sewer/Trash \_\_\_\_\_

Phone \_\_\_\_\_

Groceries \_\_\_\_\_

Clothing \_\_\_\_\_

Auto Fuel \_\_\_\_\_

Auto Maintenance \_\_\_\_\_

Cosmetics/Haircuts/Salons \_\_\_\_\_

Entertainment/Books/Magazines \_\_\_\_\_

Home Insurance \_\_\_\_\_



Expense	Average Monthly Payment
Auto Insurance	
Life Insurance	
Medical Insurance	
Medical Expense	
Other	

N/A

**MISCELLANEOUS:**

How much can you borrow? \$ N/A From whom? \_\_\_\_\_

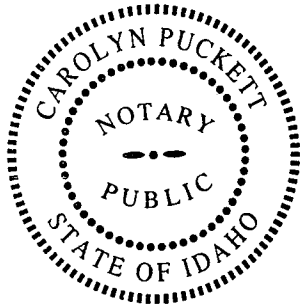
When did you file your last income tax return? 2011 Amount of refund: \$ 0

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

Name	Address	Phone	Years Known
<u>Hilary Barst</u>		<u>208-709</u>	<u>3</u>
<u>Cecil Daniels</u>		<u>Cecil H Daniels</u>	
Typed/printed		Signature	

STATE OF IDAHO )  
 ) ss.  
 County of ADA )

SUBSCRIBED AND SWORN before me on this 8th day of September, 2011



[Signature]  
 Notary Public for Idaho  
 Residing at Boise  
 Commission expires 6-17-15

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 09/08/2011 =

Doc No: 35017 Name: DANIELS, CECIL GERALD  
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL  
TIER-F CELL-1

Transaction Dates: 09/08/2010-09/08/2011

Beginning Balance	Total Charges	Total Payments	Current Balance
81.33	14996.42	14916.03	0.94

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
09/01/2011	SI0556480-053	099-COMM SPL		14.99DB	12.83
09/01/2011	SI0556480-054	099-COMM SPL		6.80DB	6.03
09/08/2011	SI0557414-070	099-COMM SPL		5.09DB	0.94

I hereby certify that these records are true and correct copies of official records or reports or entries therein of the Idaho Department of Correction

Dated: 9-8-11

Signature: 

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 09/08/2011 =

Doc No: 35017 Name: DANIELS, CECIL GERALD  
 Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL  
 TIER-F CELL-1

Transaction Dates: 09/08/2010-09/08/2011

Beginning Balance	Total Charges	Total Payments	Current Balance
81.33	14996.42	14916.03	0.94

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
09/09/2010	HQ0514269-061	068-CK WRK REL	09/04/2010	10.00DB	71.33
09/17/2010	HQ0515024-004	016-WR PAY REG	1463.53	1463.53	1534.86
09/17/2010	IF0515025-004	018-WC TX HQ515024	\$1817.58	636.15DB	898.71
09/20/2010	IF0515258-010	099-COMM SPL		9.49DB	889.22
09/27/2010	IF0516009-015	099-COMM SPL		21.26DB	867.96
09/27/2010	IF0516009-016	099-COMM SPL		39.55DB	828.41
09/30/2010	HQ0516580-003	061-CK INMATE	FINE	80.00DB	748.41
10/05/2010	IF0516934-012	099-COMM SPL		13.25DB	735.16
10/05/2010	IF0517101-010	076-LAUND FEES	SEP 2010	8.00DB	727.16
10/05/2010	IF0517119-012	077-VAN FEES	SEP 2010	104.00DB	623.16
10/07/2010	HQ0517712-017	068-CK WRK REL	10/05/1010	20.00DB	603.16
10/12/2010	IF0518045-014	099-COMM SPL		28.24DB	574.92
10/14/2010	HQ0518534-001	061-CK INMATE	CLOTHES	55.01DB	519.91
10/18/2010	IF0518770-014	099-COMM SPL		20.67DB	499.24
10/26/2010	HQ0519690-001	016-WR PAY REG	1561.75	1561.75	2060.99
10/26/2010	IF0519691-001	018-WC TX HQ519690	\$1957.50	685.13DB	1375.86
11/05/2010	IF0521060-014	076-LAUND FEES	OCT 2010	8.00DB	1367.86
11/05/2010	IF0521069-012	077-VAN FEES	OCT, 2010	112.00DB	1255.86
11/09/2010	IF0521503-014	099-COMM SPL		14.01DB	1241.85
11/12/2010	HQ0521998-013	068-CK WRK REL	11/09/2010	20.00DB	1221.85
11/18/2010	HQ0522592-005	061-CK INMATE	COS	50.00DB	1171.85
11/18/2010	HQ0522594-007	061-CK INMATE	FINE	135.00DB	1036.85
11/22/2010	IF0522964-014	099-COMM SPL		11.55DB	1025.30
11/29/2010	HQ0523476-001	323-cr A dr E	FIX519690	1561.75DB	536.45DB
11/29/2010	IF0523477-001	317-REFUND MAINT F	FIX519691	685.13	148.68
12/06/2010	IF0524312-014	077-VAN FEES	NOV, 2010	104.00DB	44.68
12/06/2010	IF0524353-015	099-COMM SPL		21.42DB	23.26
12/06/2010	IF0524425-014	076-LAUND FEES	NOV, 2010	8.00DB	15.26
12/10/2010	HQ0525480-001	016-WR PAY REG	1685.10	1685.10	1700.36
12/10/2010	HQ0525480-002	016-WR PAY REG	1561.75	1561.75	3262.11
12/10/2010	IF0525481-001	018-WC TX HQ525480	\$2359.14	825.70DB	2436.41
12/10/2010	IF0525481-002	018-WC TX HQ525480	\$2186.45	765.26DB	1671.15
12/14/2010	IF0525791-012	099-COMM SPL		19.87DB	1651.28
12/14/2010	IF0525849-001	072-METER MAIL	12142010	5.50DB	1645.78
12/16/2010	HQ0526433-002	061-CK INMATE	ELECBILL	182.33DB	1463.45
12/16/2010	HQ0526433-003	061-CK INMATE	FINE	182.00DB	1281.45
12/23/2010	HQ0527357-019	061-CK INMATE	CLOTHES	137.75DB	1143.70
12/28/2010	HQ0527610-001	016-WR PAY REG	1649.95	1649.95	2793.65
12/28/2010	IF0527611-001	018-WC TX HQ527610	\$2083.33	729.17DB	2064.48

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 09/08/2011 =

Doc No: 35017 Name: DANIELS, CECIL GERALD  
 Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL  
 TIER-F CELL-1

Transaction Dates: 09/08/2010-09/08/2011

Beginning Balance 81.33	Total Charges 14996.42	Total Payments 14916.03	Current Balance 0.94
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===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
12/29/2010	HQ0527831-004	061-CK INMATE	RENT	79.00DB	1985.48
12/29/2010	HQ0527831-005	061-CK INMATE	FINES	79.00DB	1906.48
12/29/2010	HQ0527831-006	061-CK INMATE	CLOTHES	22.94DB	1883.54
01/04/2011	IF0528409-014	099-COMM SPL		21.62DB	1861.92
01/05/2011	IF0528553-009	077-VAN FEES	DEC 2010	108.00DB	1753.92
01/05/2011	IF0528575-011	076-LAUND FEES	DEC 2010	8.00DB	1745.92
01/06/2011	HQ0528889-055	068-CK WRK REL	01/06/2011	20.00DB	1725.92
01/13/2011	HQ0529805-002	061-CK INMATE	INSURANCE	182.10DB	1543.82
01/13/2011	HQ0529805-003	061-CK INMATE	38798	8.43DB	1535.39
01/13/2011	HQ0529805-004	061-CK INMATE	FINE	182.00DB	1353.39
01/24/2011	HQ0530704-006	016-WR PAY REG	1649.96	1649.96	3003.35
01/24/2011	IF0530705-006	018-WC TX HQ530704	\$2083.33	729.17DB	2274.18
01/25/2011	IF0530869-015	099-COMM SPL		23.69DB	2250.49
01/27/2011	HQ0531273-019	061-CK INMATE	WORKBOOKS	30.00DB	2220.49
02/03/2011	IF0532248-010	077-VAN FEES	JAN, 2010	108.00DB	2112.49
02/04/2011	IF0532410-009	076-LAUND FEES	JAN, 2011	8.00DB	2104.49
02/08/2011	IF0532729-015	099-COMM SPL		31.46DB	2073.03
02/10/2011	HQ0533036-015	068-CK WRK REL	02/05/2011	20.00DB	2053.03
02/17/2011	HQ0533784-005	061-CK INMATE	ELECBILL	150.00DB	1903.03
02/17/2011	HQ0533784-006	061-CK INMATE	FINE	150.00DB	1753.03
02/22/2011	IF0533980-013	099-COMM SPL		23.69DB	1729.34
03/01/2011	HQ0534859-002	016-WR PAY REG	1649.95	1649.95	3379.29
03/01/2011	IF0534860-002	018-WC TX HQ534859	\$2309.93	808.48DB	2570.81
03/02/2011	IF0535123-011	077-VAN FEES	FEB 2011	96.00DB	2474.81
03/02/2011	IF0535134-012	076-LAUND FEES	FEB 2011	8.00DB	2466.81
03/07/2011	HQ0535576-001	016-WR PAY REG	1659.62	1659.62	4126.43
03/07/2011	IF0535577-001	018-WC TX HQ535576	\$2083.33	625.00DB	3501.43
03/08/2011	IF0535874-001	018-MAINT. FEE	FIX535577	104.17DB	3397.26
03/10/2011	HQ0536328-016	068-CK WRK REL	03/05/2011	20.00DB	3377.26
03/14/2011	IF0536515-015	099-COMM SPL		35.15DB	3342.11
03/14/2011	IF0536515-016	099-COMM SPL		31.80DB	3310.31
03/17/2011	HQ0537013-001	061-CK INMATE	FINE	150.00DB	3160.31
03/17/2011	HQ0537013-002	061-CK INMATE	FINE	450.00DB	2710.31
03/17/2011	HQ0537013-003	061-CK INMATE	BILL	295.00DB	2415.31
03/17/2011	HQ0537013-004	061-CK INMATE	RENT	158.00DB	2257.31
03/28/2011	IF0537916-010	099-COMM SPL		21.95DB	2235.36
03/31/2011	HQ0538445-017	061-CK INMATE	CLOTHES	42.35DB	2193.01
04/04/2011	IF0538908-014	077-VAN FEES	MAR, 2011	72.00DB	2121.01
04/04/2011	IF0538917-014	076-LAUND FEES	MAR, 2011	6.00DB	2115.01

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 09/08/2011 =

Doc No: 35017 Name: DANIELS, CECIL GERALD  
 Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL  
 TIER-F CELL-1

Transaction Dates: 09/08/2010-09/08/2011

Beginning Balance	Total Charges	Total Payments	Current Balance
81.33	14996.42	14916.03	0.94

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
04/11/2011	IF0539868-015	099-COMM SPL		10.00DB	2105.01
04/11/2011	IF0539868-016	099-COMM SPL		18.59DB	2086.42
04/20/2011	IF0541115-001	071-MED CO-PAY	364848	15.00DB	2071.42
04/26/2011	IF0541603-022	099-COMM SPL		26.98DB	2044.44
04/26/2011	IF0541603-023	099-COMM SPL		10.00DB	2034.44
05/16/2011	II0544142-136	099-COMM SPL		30.00DB	2004.44
05/16/2011	II0544142-137	099-COMM SPL		36.63DB	1967.81
05/18/2011	II0544557-003	100-CR INM CMM		36.63	2004.44
05/19/2011	HQ0544673-001	061-CK INMATE	POSTAGE	38.88DB	1965.56
05/20/2011	HQ0544698-003	016-WR PAY REG	1240.25	1240.25	3205.81
05/20/2011	IF0544699-003	018-WC TX HQ544698	\$1500.00	525.00DB	2680.81
05/23/2011	II0544833-139	099-COMM SPL		3.18DB	2677.63
05/23/2011	II0544833-140	099-COMM SPL		38.60DB	2639.03
05/31/2011	II0545545-135	099-COMM SPL		31.96DB	2607.07
06/06/2011	II0546413-188	099-COMM SPL		303.51DB	2303.56
06/06/2011	II0546413-189	099-COMM SPL		31.90DB	2271.66
06/13/2011	HQ0547412-004	061-CK INMATE	189722	2000.00DB	271.66
06/17/2011	HQ0547949-018	970-539420 VOIDED	4	-2000.00DB	2271.66
06/20/2011	II0548137-149	099-COMM SPL		19.08DB	2252.58
06/20/2011	II0548137-150	099-COMM SPL		10.20DB	2242.38
06/27/2011	II0548847-142	099-COMM SPL		66.72DB	2175.66
07/05/2011	II0549742-183	099-COMM SPL		10.20DB	2165.46
07/05/2011	HQ0549778-004	061-CK INMATE	189744	2000.00DB	165.46
07/11/2011	II0550590-189	099-COMM SPL		15.64DB	149.82
07/11/2011	II0550590-190	099-COMM SPL		10.20DB	139.62
07/18/2011	II0551322-186	099-COMM SPL		10.20DB	129.42
07/18/2011	II0551322-187	099-COMM SPL		31.05DB	98.37
07/25/2011	II0552021-152	099-COMM SPL		21.69DB	76.68
08/01/2011	II0552714-117	099-COMM SPL		20.62DB	56.06
08/01/2011	II0552714-118	099-COMM SPL		10.20DB	45.86
08/08/2011	II0553691-200	099-COMM SPL		22.15DB	23.71
08/15/2011	II0554512-204	099-COMM SPL		10.20DB	13.51
08/15/2011	II0554512-205	099-COMM SPL		12.41DB	1.10
08/15/2011	II0554540-002	072-METER MAIL	189872	1.08DB	0.02
08/16/2011	HQ0554610-005	011-RCPT MO/CC	RCPT MO	60.00	60.02
08/18/2011	SI0555034-068	099-COMM SPL		24.71DB	35.31
08/18/2011	SI0555097-002	100-CR INM CMM		12.41	47.72
08/25/2011	SI0555795-058	099-COMM SPL		9.70DB	38.02
08/25/2011	SI0555795-059	099-COMM SPL		10.20DB	27.82

2011 SEP 16 AM 10:04

CLERK DISTRICT COURT

Debra J. [Signature]  
DEPUTY

Inmate name Cecil G Daniels  
IDOC No. 35017  
Address 1101 W. 6th St  
Boise ID 83702

Petitioner

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

Cecil Daniels, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
STATE OF IDAHO, )  
 )  
Respondent. )  
 )

Case No. CV 11-7510

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

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

1. Petitioner is currently incarcerated within the Idaho Department of Corrections  
under the direct care, custody and control of Warden Randy Blados,  
of the South Idaho Correctional Institution

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

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

MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL - 1

Revised: 10/13/05

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

DATED this 8 day of SEPT, 2011.

Cecil G Daniels  
Petitioner

**AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL**

STATE OF IDAHO )  
 ) ss  
County of ADA )

CECIL DANIELS, after first being duly sworn upon his/her oath, deposes and says as follows:

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

Further your affiant sayeth naught.

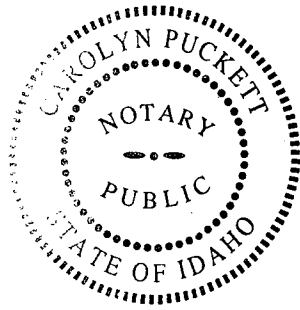
WHEREFORE, Petitioner respectfully prays that this Honorable Court issue its Order granting Petitioner's Motion for Appointment of Counsel to represent his/her interest, or in the alternative grant any such relief to which it may appear the Petitioner is entitled to.

DATED This 8 day of Sept, 2011.

Cecil G. Daniels  
Petitioner

SUBSCRIBED AND SWORN AND AFFIRMED to before me this 8<sup>th</sup> day of September, 2011.

(SEAL)



[Signature]  
Notary Public for Idaho  
Commission expires: 6-7-15



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of SEPT, 2011, I mailed a copy of this MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL for the purposes of filing with the court and of mailing a true and correct copy via prison mail system for processing to the U.S. mail system to:

Kootenai County Prosecuting Attorney  
PO BOX 9000  
COEUR D'ALENE, IDAHO 83816

Cecil G. Daniels  
Petitioner

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

ASSIGNED ATTORNEY:  
BRYANT BUSHLING

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
FILED:

*Lee Waived*  
2011 SEP 29 PM 2:49

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

**CECIL G. DANIELS** )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
**STATE OF IDAHO,** )  
 )  
Respondent. )  
\_\_\_\_\_ )

CASE NO. CV

11-7510

**RESPONDENT'S ANSWER  
TO PETITION FOR  
POST-CONVICTION RELIEF**

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 has insufficient knowledge of the facts alleged in paragraph 7 and

therefore denies the same. Paragraphs 8, 9 and 10, 11, 12 and 13 of the Petition for Post-conviction Relief are not allegations requiring an answer by Respondent.

**III**

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 29 day of September, 2011

  
\_\_\_\_\_  
BRYANT BUSHLING  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2011, a true and correct copy of the foregoing was caused to be MAILED to the  
CECIL DANIELS  
IDOC #35017  
POB 8509  
BOISE ID 83707

---

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2011 OCT -5 PM 2:23

CLERK DISTRICT COURT  
*Susan Reed*  
DEPUTY *SR*

Inmate name Cecil G Daniels  
IDOC No. 35067  
Address 8 RCL PO BOX 5509  
BOISE ID 83267

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

Cecil Daniels )  
Petitioner, )  
vs. )  
STATE OF Idaho )  
Respondent. )

Case No. CV 11-7510

**ORDER GRANTING  
MOTION FOR  
APPOINTMENT  
OF COUNSEL**

IT IS HEARBY ORDERED that the Petitioner's Motion for Appointment of Counsel is granted and \_\_\_\_\_ (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 5<sup>th</sup> day of October, 2011.

*[Signature]*  
District Judge

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. #4843

SARA B. THOMAS  
Chief, Appellate Unit  
I.S.B. #5867

DIANE M. WALKER  
Deputy State Appellate Public Defender  
I.S.B. #5920  
3647 Lake Harbor Lane  
Boise, Idaho 83703  
(208) 334-2712

STATE OF IDAHO }  
COUNTY OF KOOTENAI }  
FILED: 503,505 KC

2012 JAN 26 PM 2:25

CLERK DISTRICT COURT

*Debra J. ...*  
DEPUTY DZ

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	CV11-7510
Plaintiff-Respondent,	)	NO. 37054
	)	
v.	)	
	)	
CECIL G. DANIELS,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

STATEMENT OF THE CASE

Nature of the Case

Cecil Gerald Daniels appeals from the Judgment and Sentence in which he was sentenced to a unified term of ten-years, with three years fixed, following his conviction to felony driving under the influence. Mr. Daniels contends that the district court abused its discretion by imposing an excessive sentence. Further, Mr. Daniels contends the district court abused its discretion by denying

his Motion For Reconsideration Of Sentence Under Rule 35 (*hereinafter*, Rule 35).

Statement of the Facts & Course of Proceedings

On August 28, 2008, Officer Buhl initiated a traffic stop because he noticed a truck that emitted black smoke and the driver failed to use his turn signal. (R., p.95.) The driver, Cecil Daniels, provided a false first name and date of birth, yet gave his true surname. (R., p.96.) Officer Buhl noted that Mr. Daniels' eyes were red and bloodshot. (R., p.96.) The officer also claimed to have smelled the odor of alcohol. (R., p.96.) Mr. Daniels refused to perform the field sobriety test. (R., p.96.) The officer arrested Mr. Daniels for driving under the influence (DUI). (R., p.96.) Upon searching Mr. Daniels' vehicle incident to arrest, the officer found marijuana and an open container of alcohol. (R., p.96.)

The State charged Mr. Daniels by Information with the following crimes:

- felony DUI;
- possession of a controlled substances;
- possession of an open container;
- driving without privileges; and
- providing false information to law enforcement.

(R., pp.84-86, 163-165 (amended information).)

Mr. Daniels filed a motion to suppress the evidence. (R., pp.100-101.)

He filed a memorandum in support and argued that the officers unlawfully

detained him during the traffic stop. (R., pp.95-99.)

The district court heard testimony at the evidentiary hearing on the suppression motion. (R., pp.102-108.) The State requested the opportunity for supplemental briefing, in which the district court approved. (R., p.107.) The State argued that the stop had not been unconstitutionally extended and the search of the vehicle was proper and lawful. (R., pp.116-122.)

The district court denied the suppression motion. (R., pp.125-129.) The district court concluded that the length of the stop was not unduly prolonged. (R., pp.126-127.) The district court also concluded that the search of the vehicle was consistent with *State v. Holland*, 135 Idaho 159, 15 P.3d 1167 (2002) wherein the Idaho Supreme Court concluded that search incident to a valid arrest was constitutionally permissible relying on *New York v. Belton*, 453 U.S. 454, 460-61 (1981). The district court recognized that the defendant presented the holding of *Arizona v. Gant*, 162 P.3d 640 (Ariz.2007) and requested the district court to conclude that the officers were not permitted to search the vehicle incident to arrest. (R., pp.127-128.) The district court declined the request and determined that the Idaho Supreme Court rejected the *Gant* position and instead issued *State v. Charpentier*, 131 Idaho 649, 962 P.2d 1033 (1998). Because the district court determined that the officer could search the vehicle incident to arrest, it found it unnecessary for the court to decide the issue of whether the officer could be justified pursuant to a valid inventory search. (R., p.128.)

Mr. Daniels requested that the district court reconsider its denial of

Mr. Daniels suppression motion. (R., pp.136-137.) Mr. Daniels informed the district court that the United States Supreme Court clarified its previous decisions and clarified when an officer may search a vehicle incident to arrest. (R., pp.138-141.) The district court denied the motion to reconsider. (R., p.154.) The district court determined that the search could be justified as an inventory search and based upon information provided by the passenger that supported probable cause to believe evidence of a crime would be found in the vehicle. (R., p.147-149.)

Mr. Daniels exercised his right to a jury trial. (See *generally* Trial Transcript.) The jury convicted Mr. Daniels of felony DUI, possession of an open container of alcohol, driving without privileges, and providing false information. (R., pp.282-283.) The jury hung on the possession of a controlled substance charge. (R., p.282.)

The district court imposed upon Mr. Daniels a unified sentence of ten years, with three years fixed, following his conviction to felony driving with license suspended. (R., pp.307-311.) Mr. Daniels timely appealed. (R., pp.319-324.)

Mr. Daniels filed a timely motion to reconsider his sentence. (R., pp.312-313.) The State filed an objection. (R., pp.314-318.) The district court denied Mr. Daniels' Rule 35.



ISSUES

- 1) Did the district court abuse its discretion when it imposed upon Mr. Daniels a unified sentence of ten years, with three years fixed, following his conviction to felony driving under the influence?
  
- 2) Did the district court abuse its discretion denying Mr. Daniels' Rule 35 motion?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Imposed Upon Mr. Daniels A Unified Sentence Of Ten Years, With Three Years Fixed, Following His Conviction To Felony Driving Under The Influence

Mr. Daniels asserts that, given any view of the facts, his unified sentence of ten years, with three years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest.

The Idaho Supreme Court has held that, where a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence. Mr. Daniels does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Daniels must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Mr. Daniels asserts that the district court failed to properly consider the mitigating factors that exist in his case. Specifically, he asserts that the district court did not give proper consideration to his acknowledgment of his alcohol

addiction, his willingness to participate in long term treatment at Celebrate Recovery, his community support, and his remorse for having committed the crime.

Mr. Daniels, an alcoholic for the majority of his adult life, is now 49 years old. (Presentence Investigator, *hereinafter* PSI, p.1; R., p.291.) He admitted to the court that for thirty years he had been a drunken, lost soul. (R., p.291.) After several DUI arrests, Mr. Daniels sincerely believes that he has finally found what is needed to fill the void that exist in him – God. (R., p.291, PSI, pp.3-9.)

Mr. Daniels began consuming alcohol when he was first eleven years old. (PSI, p.22.) At nineteen, he began drinking socially, drinking regularly on the weekends. (PSI, p.22.) Mr. Daniels admits that he has participated in treatment a couple of times; however, this time he feels he will be successful because he rediscovered his relationship with God. (PSI, pp.22-24; Tr., p.311, L.10 – p.314, L.16.)

Mr. Daniels began treatment at Celebrate Recovery. (Exhibits, Letter from "Adam.") The group leader reported that Mr. Daniels demonstrated growth during his participation in the program. (Exhibits, Letter from "Adam.") The group leader believed Mr. Daniels' participation was sincere. (Exhibits, Letter from "Adam.")

Mr. Daniels grew up on a cattle ranch and experienced a good childhood. (PSI, p.17.) He recalled having a loving, close family that enjoyed spending their time together. (PSI, p.17.) As an adult, Mr. Daniels continued to have a good relationship with his parents even though the two divorced. (PSI, p.17.) Quoted

from a previous presentence report, Mr. Daniels' mom was able to report to the presentence investigator. (PSI, p.18.) She believed her son had yet to admit that he had an alcohol problem and, therefore, was not ready for treatment. (PSI, p.17.) While incarcerated in jail on the instant offense, Mr. Daniels lost his mom. (PSI, p.17.)

Mr. Daniels has community support. His brother and sister-in-law wrote a letter describing their relationship with him and explained how supportive he is as a family member. (Exhibits, Letter from Janice & David Daniels.) The letter also explained the impact Mr. Daniels would have on the family during this time of need due to his mother's death. (Exhibits, Letter from Janice & David Daniels.) They explained that Mr. Daniels' being incarcerated would be more difficult on the family. (Exhibits, Letter from Janice & David Daniels.)

Additionally, Mr. Daniels expressed his remorse, his acknowledgment that he is an alcoholic and his willingness to participate in a long term treatment program. At the sentencing hearing, Mr. Daniels stated,

Well, Your Honor, I'm scared. You know, if you'd asked me the day I got out of prison if I'd ever drink again, I'd have told you, No way." I did three years, and I did the program, I did everything that I thought I could to get out of that program. And I swore I'd never drink again. As my letter says, I tried to change, you know, my ways and stuff. And I come to Coeur d'Alene.

I come to Coeur d'Alene, you know, I was put in a halfway house and had to deal with other past guys that were on probation, guys from prison, never had drugs and alcohol in the house, and I dealt with that. A lot of things happened since I came to Coeur d'Alene, as my letter says, with my brother and Hillary and her daughter and stuff like that. And things just kept happening and kept happening. So I struggled

with that, and I kept doing pretty good.

All in all, Your Honor, I don't think this is a coincidence. I don't think this is a coincidence. I don't, not in my heart. I think it all happened for a reason. Nothing ever felt as free and as much as peace as I do right now in my heart. I think it all happened for a reason. Nothing ever felt as free and as much at peace as I do right now in my heart because of what I've went through in the last 13 months incarcerated.

I've become a born again Christian. Up until about 30 days before I got arrested, I was bragging – not bragging – begging, asking Got to remove alcohol from me. I knew I was headed back to prison. Had a baby on the way. I knew I was going to lose it. I knew it. I could feel it. I imagined it, and I seen it in my own eyes. I begged and I begged, asked Got to help me. Well, I feel God humbled me, and he put – incarcerated me. I really do.

When I was saved with Christ, I didn't – it didn't happen through another Christian, another pastor. It happened by myself and God. Happened within three weeks I was incarcerated. I just sudden kept drumming (phonetic) to the Bible, and I did it all on my own. Once that took place and I started getting in the Celebrate Recovery, I couldn't leave the Bible alone. I went to all the churches. I went as much as four times a week. It just drawed [sic] me to him. It was something I needed.

My whole life through all my drinking stuff I've had something missing in my life, something I reached for. I know I'm a good man. My letters, they speak for themselves. My family loves me. I've never even had – been in fights, arguments over drinking or anything with my family. I never took that home to my family. It was something that I dealt with in my personal life, private life, with my demons and stuff like that. And through Celebrate Recovery and a pastor, I didn't realize – maybe it was something I was trying to hide because I was – but my pride and selfishness, but I realize I had a lot of depression, anxieties that I dealt with.

...  
All I can say is I apologize. I've changed. But I hope that the Court can see that. I know my family has. Everybody that's involved in my life has seen a

change in me. I know that, if I deal with my depression and stuff like that – right now I don't even feel like I have a depression problem. I still really haven't mourned my mother yet because I've been so at peace with God.

All I can say is I apologize for my past. I can't change that. But I can change today from now on forward. I have a beautiful support group. I have a family I've never had. It's something I've missed all my whole life.

I have a lot of support in Coeur d'Alene now that I never had before. I've got pastors. I have a pastor that's going to be a – help me with my – you know, keep – watch out for me. I can't even think of the right word right now. Sponsor. It's a pastor. I have the Celebrate Recovery program, I've been dealing with Tim Remington. I have lots of options.

(Tr., p.311, L.10 – p.314, L.16.)

Based upon the above mitigating factors, Mr. Daniels asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his acceptance of responsibility, expressions of remorse, support from friends and family, acknowledgment that he is an alcoholic, and his willingness to participate in treatment, it would have crafted a more appropriate sentence.

## II.

### The District Court Abused Its Discretion When It Denied Mr. Daniels Rule 35

#### Motion

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. The criteria for examining rulings denying the requested leniency

are the same as those applied in determining whether the original sentence was reasonable. If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction.

Mr. Daniels contends that the district court abused its discretion by denying his Rule 35 motion. Mr. Daniels girlfriend wrote a letter of support for Mr. Daniels. (R., pp.339-340.) Ms. Barrett explained that she felt the district court did not give sufficient weight to Mr. Daniels expressions of remorse, his acceptance of his addiction, and his willingness to participate in a treatment program. (R., pp.339-340.) She also explained how the incarceration of Mr. Daniels impacts her, his baby, and his family. (R., pp.339-340.) The arguments in support of this contention are located in the above section of this brief and need not be repeated here, but are incorporated herein by reference.

Mr. Daniels respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

**CONCLUSION**

Mr. Daniels respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 21<sup>st</sup> day of July, 2010.

DIANE M. WALKER  
Deputy State Appellate Public Defender





STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: 503

2012 JAN 26 PM 2:24

CLERK DISTRICT COURT

*Debra J. ...*  
DEPUTY

SEAN P. WALSH  
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CONFLICT PUBLIC DEFENDER  
500 N Government Way, Suite 600  
Coeur d'Alene, ID 83814  
Phone: 208-665-7400  
Fax: 208-765-4636  
ISBN: 7235

Attorney for Petitioner

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

**CECIL G. DANIELS,** )  
 )  
Petitioner, )  
 )  
V. )  
 )  
**THE STATE OF IDAHO,** )  
 )  
Respondent. )  
\_\_\_\_\_ )

**CASE NUMBER CV11-7510**

**AFFIDAVIT OF FACTS OF CECIL G.  
DANIELS**

STATE OF IDAHO )  
 )ss  
COUNTY OF \_\_\_\_\_ )

I, **CECIL G. DANIELS**, being first duly sworn and under oath, deposes and says:

1. I am over the age of 18 years old, a United States Citizen, a resident of the State of Idaho, and I am competent to testify to the matters stated herein;
2. My trial attorney filed a Motion to Suppress that was denied.

3. Following the decision in *Arizona v. Gant*, my trial attorney moved the Court to reconsider the denial of my Motion to Suppress.
4. The Court again denied the Motion to Suppress.
5. My trial attorney filed an appeal on my case.
6. My appellate attorney filed an amended notice of appeal that alleged, among other things, that the trial court erred by denying the Motion to Suppress and the motion to reconsider the denial of the Motion to Suppress.
7. In my conversation with my appellate attorney, I discussed appealing the denial of my motion to suppress. My appellate attorney told me that we should not bother appealing the denial of the motion to suppress, but I directed her to do so anyway.
8. My appellate attorney did not argue that the denial of the motion to suppress was error. The denial of the motion to suppress was not addressed at all by the Idaho Court of Appeals. As such, I lost the right to contest the denial of the motion to suppress in my appeal.
9. Further your affiant sayeth naught.

Cecil G. Daniels  
CECIL G. DANIELS

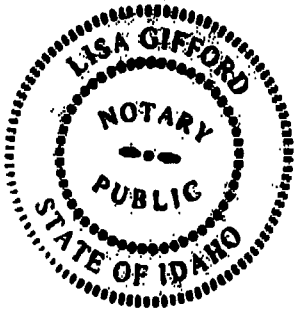
**ACKNOWLEDGEMENT**

STATE OF IDAHO )

County of Bonneville ss.

On the 19 day of January, 2012, before me Lisa Gifford personally appeared Cecil G. Daniels, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have set my hand and seal the day and year as above written.



[Signature]  
Notary Public for Idaho  
Residing at Idaho Falls.  
Commission Expires: 8/31/2015

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20 day of January, 2012, 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  
446-1833

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

[Signature]

**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 37054**

<b>STATE OF IDAHO,</b>	)	<b>2010 Unpublished Opinion No. 671</b>
	)	
<b>Plaintiff-Respondent,</b>	)	<b>Filed: October 15, 2010</b>
	)	
<b>v.</b>	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
<b>CECIL GERALD DANIELS,</b>	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Defendant-Appellant.</b>	)	<b>BE CITED AS AUTHORITY</b>

---

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Fred M. Gibler, District Judge.

Judgment of conviction and unified sentence of ten years, with a minimum period of confinement of three years, for felony driving under the influence of alcohol and/or drugs, affirmed; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

---

Before LANSING, Chief Judge, GUTIERREZ, Judge  
and MELANSON, Judge

---

**PER CURIAM**

Cecil Gerald Daniels appeals from his judgment of conviction and unified sentence of ten years, with a minimum period of confinement of three years, for felony driving under the influence of alcohol and/or drugs, Idaho Code §§ 18-8004, 18-8005. He also appeals the denial of his Idaho Criminal Rule 35 motion for reduction of the sentence. We affirm.

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121 Idaho 385, 825 P.2d

482 (1992). In evaluating the reasonableness of a sentence, we consider the nature of the offense and the character of the offender, applying our well-established standards of review. See *State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *Lopez*, 106 Idaho 447, 680 P.2d 869.

Having reviewed the record, we conclude that the district court did not abuse its discretion in imposing Daniels' sentence nor in denying Daniels' Rule 35 motion for reduction of sentence. The judgment of conviction and sentence, and the order denying Daniels' Rule 35 motion, are affirmed.

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: 50 7, 509

2012 JAN 26 PM 2: 24

CLERK DISTRICT COURT

*Debra Zook*  
DEPUTY

SEAN P. WALSH  
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ISBN: 7235

Attorney for Petitioner

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

**CECIL G. DANIELS,**

Petitioner,

V.

**THE STATE OF IDAHO,**

Respondent.

**CASE NUMBER CV-2011-7510**

**AMENDED APPLICATION FOR POST-  
CONVICTION RELIEF**

COMES NOW, the above named Petitioner, by and through his attorney of record, Sean P. Walsh, Conflict Public Defender, and hereby presents an amended application for post-conviction relief pursuant to I.C. 19-4901 et seq. from the judgment entered on September 28, 2009 in Kootenai County District Court Case No. CR-2008-0018482, before the Honorable Fred M. Gibler, District Judge. Petitioner alleges four claims based on ineffective assistance of counsel.

**Count One: Failure to Preserve Right to Appeal**

1. Trial counsel failed to preserve Petitioner's right to appeal the denial of his motion to suppress despite Petitioner's specific request that counsel preserve his right to appeal all issues in his

criminal case, all of which was below an objective standard of reasonableness for a criminal defense attorney and violated Petitioner's Sixth Amendment right to counsel and right to due process of law, and but for this deficiency Petitioner would have preserved his right to appeal the denial of his motion to suppress and would have prevailed on appeal, resulting in the reversal of his conviction.

### **Count Two: Failure to Prosecute Appeal**

2. Petitioner contends that appellate counsel failed to adequately prosecute his appeal in as much as appellate counsel refused, despite Petitioner's specific requests, to argue that the trial court erred by denying Petitioner's motion to suppress, all of which was below an objective standard of reasonableness for an appellate attorney, and violated Petitioner's Sixth Amendment right to counsel and right to due process of law, and but for this deficiency Petitioner would have argued that the denial of the motion to suppress was error, and would have prevailed on appeal, resulting in the reversal of his conviction.

### **Additional Allegations Regarding Causation**

3. Petitioner contends that trial counsel's deficiencies complained of in Count 1 and appellate counsel's deficiencies complained of in Count 2 acted both separately and in concert with one another to result in the loss of his appellate rights and arguments and ultimately resulted in the unfavorable disposition of the appeal by the Idaho Court of Appeals.

### **Additional Documents and Evidence**

4. The entire case file of Kootenai County Caser number CR-2008-0018482 is incorporated herein by reference and relied upon in bringing forth this petition. An Affidavit of Cecil G. Daniels is incorporated herein by reference, and submitted herewith, and relied upon in bringing forth this petition. The 2010 Unpublished Opinion No. 671, rendered by the Idaho Court of Appeals, is incorporated herein by reference, and submitted herewith, and relied upon in bringing forth this



petition. A copy of the brief submitted by appellate counsel is attached hereto in support of this petition. There are additional documents and items of evidence that support the claims made herein, but those additional documents and items of evidence are not attached to this petition because Petitioner does not have possession of them nor does he presently have access to them. Additional documentation will be presented to the Court at hearing in the above-entitled matter.

**Prayer for Relief**


5.A. WHEREFORE, Petitioner prays that the Court reinstate petitioner's right to appeal from all convictions entered by the Court in Kootenai County District Court Case No. CR-2008-0018482;

5. B. FURTHERMORE, Petitioner prays that the Court grant Petitioner leave to appeal the Court's denial of his motion to suppress in Kootenai County District Court Case No. CR-2008-0018482.

DATED this 26 day of January, 2012.

WALSH LAW OFFICE, PLLC

BY:

  
 \_\_\_\_\_  
 SEAN P. WALSH  
 Attorney at Law

**VERIFICATION**

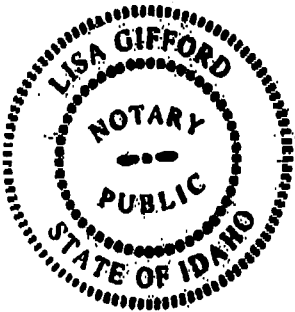
STATE OF IDAHO )  
 ) ss:  
County of Bonneville )

Cecil G. Daniels, being first duly sworn on oath, deposes and says: that he is the Petitioner in the above-entitled action; that he has read the foregoing *Amended Application For Post-Conviction Relief*, and that the contents thereof are true and correct based on his own personal knowledge.

DATED this \_\_\_\_ day of January, 2012.

Cecil G Daniels

SUBSCRIBED AND SWORN to before me this 19 day of January, 2012.



[Signature]  
NOTARY PUBLIC for Idaho  
Residing at: Idaho Falls  
My commission expires: 8/31/2015

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20 day of January, 2012, 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

Monica Ryan



CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER SCHEDULING BRIEFS AND ARGUMENT was mailed, by the undersigned at Lewiston, Idaho, this 2<sup>nd</sup> day of February, 2012, on:

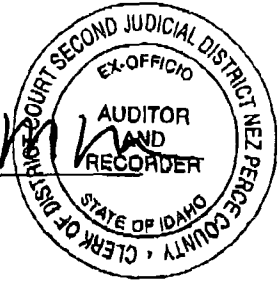
*much*

Sean Walsh  
500 N Government Way, Suite 600  
Coeur d'Alene ID 83814

Bryant Bushling  
P O Box 9000  
Coeur d'Alene ID 83816

PATTY O. WEEKS, CLERK

By *[Signature]*  
Deputy



ORDER SCHEDULING BRIEFS  
AND ARGUMENT

ORIGIN

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

ASSIGNED ATTORNEY:  
BRYANT E. BUSHLING

STATE OF IDAHO } SS  
COUNTY OF KOOTENAI

2012 MAR 15 AM 10:32

CLERK DISTRICT COURT  
*Bobee DeGruen*  
DEPUTY

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

**CECIL G. DANIELS,**

Petitioner,

vs.

**STATE OF IDAHO,**

Respondent.

CASE NO. CV 2011-7510

**BRIEF OPPOSING POST-  
CONVICTION RELIEF**

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

*ARGUMENT*

General Legal Standards Applicable To Ineffective Assistance Of Appellate  
Counsel Claims

It is well-settled that in order to establish ineffective assistance of counsel, a petitioner must provide admissible evidence that his counsel's performance was deficient and that the alleged deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984);

Richman v. State, 138 Idaho 190, 192, 59 P.3d 995, 997 (Ct. App. 2002) (“To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency.” (citations omitted)). To establish deficient performance, the petitioner must demonstrate counsel’s performance fell below an objective standard of reasonableness, Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986), and overcome the “strong presumption that counsel’s performance was within the wide range of reasonable professional assistance.” Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989).

To establish prejudice, the petitioner must show a reasonable probability that, but for trial counsel’s deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999); Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

The foregoing standards apply to claims of ineffective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 730 (1998). The relevant inquiry on the prejudice prong is whether there is a reasonable probability that, but for counsel’s errors, Daniels would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000).

Daniels Has Failed To Establish Appellate Counsel Was Ineffective For Failing To Challenge The Suppression Issue On Appeal

Daniels apparently contends that appellate counsel’s performance on appeal was deficient because he refused to argue the suppression issue, and that he was prejudiced as a result. However, Daniels is incorrect in his assumption that his desire to have his appellate counsel

argue a meritless claim is the same as a failure to “preserve” an issue on appeal.

“An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue.” Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). “Rather, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made.” LaBelle v. State, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997). Indeed, as noted by the United States Supreme Court in Jones:

Neither *Anders [v. California, 386 U.S. 738 (1967),]* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

Jones, 463 U.S. at 751 (cited with approval in LaBelle, 130 Idaho at 119, 937 P.2d at 431).

Although it is “possible to bring a *Strickland* claim based on counsel’s failure to raise a particular claim, . . . it is difficult to demonstrate that counsel was incompetent.” Mintun, 144 Idaho at 661, 168 P.3d at 45 (quoting Smith v. Robbins, 528 U.S. 259, 288 (2000)). “[O]nly when ignored issues are **clearly stronger** than those presented, will the presumption of effective assistance of counsel be overcome.” Id. (alteration original, emphasis added).

Daniels has failed to establish that the suppression issue which appellate counsel elected not to pursue was “clearly stronger” than the issue presented such that appellate counsel’s decision was objectively unreasonable.

2     Daniels Failed To Establish He Was Prejudiced By Appellate Counsel’s Failure To Challenge The Suppression Issue On Appeal


Daniels argues that his claim in Count 1 (i.e., that trial counsel failed to preserve his right to appeal) and that his claim in Count 2 (i.e., that appellate counsel’s failed to pursue a meritless

claim) resulted in some sort of cognizable post conviction claim. However, his claim in Count 1 is incorrect since trial counsel did in fact file a notice of appeal specifically preserving the suppression issue. Therefore, the issue becomes whether he has met his burden of proof showing that he should prevail because of appellate counsel's failure to pursue the suppression issue.

*CONCLUSION*

Petitioner has failed to sustain his burden of proving that his appellate counsel's performance was deficient. For the above stated reasons, Respondent respectfully requests the Court dismiss the Petition for Post Conviction Relief.

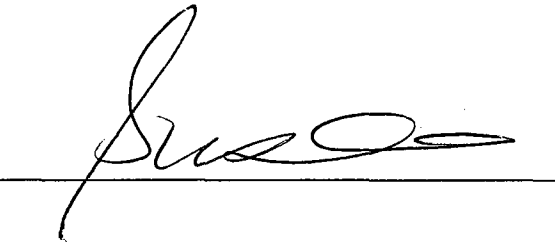
DATED this 14 day of March, 2012

  
\_\_\_\_\_  
BRYANT E. BUSHLING  
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that, on the 14 day of March, 2012, I caused the foregoing to be transmitted as followed:

SEAN WALSH  
FAXED

  
\_\_\_\_\_



ORIGINAL

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

ASSIGNED ATTORNEY:  
BRYANT E. BUSHLING

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS

2012 MAR 15 AM 10:32

CLERK DISTRICT COURT  
*Debra DeGruen*  
DEPUTY

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

<b>CECIL G. DANIELS,</b>	)	
	)	CASE NO. CV 11-7510
Petitioner,	)	
	)	<b>RESPONDENT'S MOTION FOR</b>
vs.	)	<b>SUMMARY DISPOSITION</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
Respondent.	)	
_____	)	

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 Petition for Post-Conviction Relief for the following reason.


Although a post-conviction proceeding is civil in nature, the petition must, in contrast to a complaint, "present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Small v. State*, 132 Idaho 327, 331 (Ct. App. 1998). In a post-conviction relief setting, summary disposition is appropriate when "an applicant facing a motion for summary dismissal fails to present evidence making a *prima facie* case." *Vick v. State*, 131 Idaho 121, 123 (Ct. App. 1998). In addition, when considering summary dismissal, a "court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Small*, 132 Idaho at 331.

In this case, although defendant claims in his Amended Application that trial counsel failed to preserve his right to appeal, he admits in his Affidavit that trial counsel filed an appeal. (A copy of the Notice of Appeal is attached as Exhibit 1). The Notice of Appeal was filed on October 20, 2009 and specifically preserved the issue of the denial of the Motion to Suppress. Defendant must show that his Appellate Counsel was ineffective and that such deficiency caused prejudice. However, there is no evidence that appellate counsel was ineffective. "An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue." Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). "Rather, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made." LaBelle v. State, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997).

Petitioner has failed to show that trial counsel's performance was deficient, and has further failed to present evidence to show that his appellate counsel's performance was deficient. Therefore, no prejudice can be shown since neither counsel was ineffective.

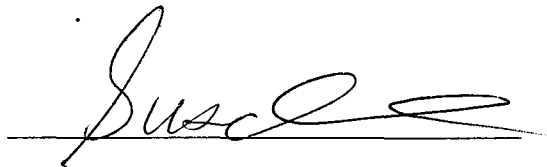
Therefore, Respondent submits that the Petition should be dismissed.

DATED this 17<sup>th</sup> day of March, 2012.

  
BRYANT E. BUSHLING  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

I hereby certify that on the 14 day of March, 2012, a true and correct copy of the foregoing was caused to be FAXED to SEAN WALSH



ORIGINAL

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

ASSIGNED ATTORNEY:  
BRYANT E. BUSHLING

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
ET

2012 MAR 15 AM 10: 32

CLERK DISTRICT COURT  
*Debra Deffen*  
DEPUTY  
BD

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

**CECIL G. DANIELS**

Petitioner,

vs.

**STATE OF IDAHO,**

Respondent.

CASE NO. CV 2011-7510

**RESPONDENT'S ANSWER  
TO AMENDED APPLICATION FOR  
POST-CONVICTION RELIEF**

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

**I**

Respondent denies all allegations not specifically admitted herein.

**II**


Respondent denies the allegation contained in Count 1 of the Amended Application for Post-conviction Relief. Respondent has insufficient knowledge of the facts alleged in Count 2 and

therefore denies the same. Respondent denies the allegations regarding causation contained in the Amended Application for Post-conviction Relief.

**III**

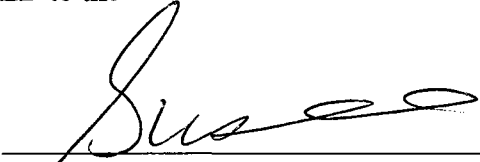
Therefore, Respondent respectfully requests that the Petition for Post-conviction Relief and Amended Application for Post-Conviction Relief be dismissed and that the Petitioner be granted no post-conviction relief.

DATED this 14 day of March, 2012

  
BRYANT E. BUSHLING  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

I hereby certify that on the 14 day of March, 2012, a true and correct copy of the foregoing was caused to be MAILED to the  
SEAN WALSH  
FAXED

  
\_\_\_\_\_

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: *SS*

2012 MAR 30 PM 4:37

CLERK DISTRICT COURT  
*Debra J. ...*  
DEPUTY

SEAN P. WALSH  
Attorney at Law  
CONFLICT PUBLIC DEFENDER  
500 N. Government Way, Suite 600  
Coeur d'Alene, ID 83814  
Phone: 208-665-7400  
Fax: 208-765-4636  
ISBN: 7235

Attorney for Petitioner

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

<b>CECIL G. DANIELS,</b>	)	
	)	<b>CASE NUMBER CV-2011-7510</b>
Petitioner,	)	
	)	
V.	)	<b>PETITIONER'S REPLY BRIEF IN</b>
	)	<b>OPPOSITION TO RESPONDENT'S</b>
<b>THE STATE OF IDAHO,</b>	)	<b>MOTION FOR SUMMARY</b>
	)	<b>DISPOSITION</b>
Respondent.	)	
_____	)	

COMES NOW Petitioner, by and through his attorney of record, Sean P Walsh, CONFLICT PUBLIC DEFENDER, and hereby submits the following *Reply Brief In Opposition To Respondent's Motion For Summary Disposition*:

**I. THE STRICKLAND TEST USUALLY APPLIES IN POST CONVICTION CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL**

In reviewing claims for ineffective assistance of counsel, Idaho Courts employ the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Mitchell v. State* 132 Idaho 274, 277, 971 P.2d 727, 730 (Idaho1998). An applicant for post-conviction relief must demonstrate that (1) counsel's performance fell below an objective standard of

**PETITIONER'S REPLY BRIEF IN  
OPPOSITION TO RESPONDENT'S  
MOTION FOR SUMMARY  
DISPOSITION**

reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *Id.*, citing *Strickland*, 466 U.S. at 687-88, 694, 104 S.Ct. 2052. A defendant is constitutionally entitled to the effective assistance of counsel on a direct appeal as of right. *Id.* However, there are cases in which prejudice is presumed and petitioners claiming ineffective assistance of counsel need only show deficient performance.

## **II. IDAHO CASE LAW HAS RECOGNIZED THAT CERTAIN CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DO NOT REQUIRE PROOF OF PREJUDICE: TRAMMEL TO RUSSELL TO BEASELY (LOZADA)**

In 1968, the Idaho Supreme Court recognized that the loss of the right to appeal in itself constituted a rights violation sufficient to entitle a petitioner to post conviction relief. In *Trammel v. State*, the petitioner alleged that his counsel incompetently informed him that he had no right to appeal from a jury conviction. *Id.* at 92 Idaho 643, 645, 448 P.2d 649, 651 (Idaho 1968). The petitioner made no reference to whether he could prove that the loss of his appellate rights somehow prejudiced him, nor did he argue that, but for the incompetence of trial counsel, petitioner would have prevailed on appeal. In *Trammel*, the Idaho Supreme Court held that “[i]f, at a full and fair evidentiary hearing, appellant proves by a preponderance of the evidence the assertions he has made, he is entitled to relief because he has been unlawfully denied his right of appeal of the conviction of grand larceny through the misconduct of inadequate and improper counsel. *Id.*, citing *Gardner v. State*, 91 Idaho 910, 435 P.2d 249 (1967); *Douglas v. People of State of California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Doyle v. United States*, 366 F.2d 394 (1966).

However, in 1990, the Idaho Court of Appeals in *Russell v. State* held that a post conviction petitioner must show that a meritorious issue was forever lost by appellate counsel's incompetence. *Id.* at 118 Idaho 65, 794 P.2d 654 (Ct.App.1990).

Nonetheless, in 1994, the Idaho Court of Appeals overruled the *Russell* opinion in accordance

with the United State Supreme Court's opinion in *Lozada v. Deeds*, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991). Noting that the U.S. Supreme Court held that the loss of appellate rights is prejudice *per se*, the Court of Appeals opinion stated:

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. *Beasley v. State*, 126 Idaho 356, 359, 883 P.2d 714, 717 (Idaho App.,1994)

Thus, it is clear that a petitioner need not prove prejudice where a complete loss of appellate rights is occasioned by the incompetence of appellate counsel. Claiming ineffective assistance of counsel need only show deficient performance.

**III. POST CONVICTION PETITIONERS NEED NOT SHOW PREJUDICE WHERE APPELLATE COUNSEL'S CONDUCT CONSTITUTES AN "ABANDONMENT" OF THE APPEAL, OR IS SO FLAGRANTLY DEFICIENT THAT CLAIMS ARE NOT PRESERVED FOR REVIEW**

In 1998, the Idaho Supreme Court recognized "that there are circumstances in which prejudice is presumed." *Mitchell v. State*, 132 Idaho 274, 277-278, 971 P.2d 727, 730 - 731 (Idaho,1998), *citing Lozada v. Deeds*, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991); *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *Beasley v. State*, 126 Idaho 356, 883 P.2d 714 (Ct.App.1994).

The *Mitchell* Court noted that *Lozada*, *Penson*, and *Beasley* were "factually distinct from

the case at bar in that they deal with situations in which appellate counsel either failed to file an appeal or failed to file an appellate brief.” *Id.* The Court noted that in *Mitchell*, appellate counsel did file an appeal and an appellate brief. In *Mitchell*, petitioner argued that “the briefs were so deficient that it was tantamount to not filing a brief, and prejudice should be presumed.” *Id.* The *Mitchell* Court then reviewed a number of cases that held that prejudice is presumed where the conduct of appellate counsel constituted an abandonment of the appeal.

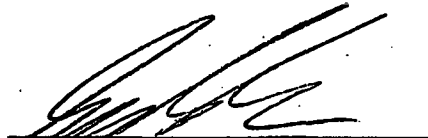
**IV. APPELLATE COUNSEL’S CONDUCT CONSTITUTED AN ABANDONMENT OF PETITIONER APPEAL OF THE DENIAL OF THE MOTION TO SUPPRESS**

In this case, the brief submitted by appellate counsel completely failed to address one of the points the Petitioner directed trial counsel and appellate counsel to argue. Specifically, appellate counsel failed to address any of her briefing to the issue of the denial of the motion to suppress. The motion to suppress was fully litigated and involved no less than two hearings before the District Court and resulted in two separate decisions from the Court. However, because of appellate counsel’s failure to even brief the denial of the motion to suppress, none of Petitioner’s arguments were even preserved for appeal. As such, Petitioner was denied his right to appeal because of appellate counsel’s conduct, and is therefore entitled to post conviction relief under the Constitutions of the United States and the State of Idaho.

DATED this 30 day of March, 2012.

WALSH LAW OFFICE, PLLC

BY:

  
SEAN P. WALSH  
Attorney at Law




**CERTIFICATE OF SERVICE**

I hereby certify that on the 30 day of March, 2012, 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: 5/10/12

Filed May 9, 2012 AT

AT 11:36 O'CLOCK AM  
CLERK, DISTRICT COURT

AM 3:18 PM LEWISTON, IDAHO

*Amelia D. Hoffman*  
DEPUTY

BY *CBK*

**CARL B. KERRICK**

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

CECIL DANIELS,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. CV 2011-7510

**OPINION AND ORDER ON  
RESPONDENT'S MOTION FOR  
SUMMARY DISPOSITION**

This matter came on before the Court on Respondent's Motion for Summary Dismissal of the Petitioner's Petition for Post-Conviction Relief. The Petitioner was represented by Sean Walsh, Attorney at Law. The Respondent was represented by Bryant Bushling, Kootenai County Deputy Prosecuting Attorney. Oral argument was presented to the Court telephonically on April 13, 2012. The Court, being fully advised in the matter, hereby renders its decision.

**BACKGROUND**

The Petitioner filed this timely Petition and Affidavit for Post-Conviction Relief on September 16, 2011. Counsel was appointed to represent the Petitioner, and an

Amended Application for Post-Conviction Relief and Affidavit of Fact of Cecil G. Daniels were filed on January 26, 2012. The Respondent's Motion for Summary Disposition was filed on March 15, 2012.

Cecil Daniels was found guilty of committing felony driving under the influence of alcohol and/or drugs, I.C. § 18-8004, 18-8005. The district court sentenced Daniels to a unified sentence of ten years, with a minimum period of confinement of three years. Daniels appealed his judgment of conviction and sentence, as well as the District Court's order denying Daniels' Rule 35 motion for reduction of sentence. In an unpublished opinion, the Idaho Court of Appeals affirmed the judgment of conviction and sentence and order denying the Rule 35 motion. *See State v. Daniels*, Docket No. 37054 (Idaho Ct. App. 2010).

The Petitioner claims trial counsel failed to preserve his right to appeal a motion to suppress that was heard and denied by the district court. Further, the Petitioner claims appellate counsel was ineffective for failing to appeal the trial court's ruling on the motion to suppress. The Petitioner requests the Court reinstate his right to appeal from all convictions entered by the Court in Kootenai County Case Cr-2008-0018482; and more specifically, leave to appeal the Court's denial of the Petitioner's motion to suppress in the underlying criminal case. The Respondent's Motion for Summary Dismissal is currently pending before this Court.

### **POST-CONVICTION RELIEF STANDARD**

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

- (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;

- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
- (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
- (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post conviction relief “may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later.” I.C. § 19-4902(a).

A petition for post-conviction relief is a special proceeding distinct from the criminal action that led to the petitioner’s conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App.1995). “An application for post-conviction relief initiates a proceeding which is civil in nature.” *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App.1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, 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.” *Id.*

The petitioner seeking post-conviction relief bears the burden of pleading and proof imposed upon a civil plaintiff. “Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief.” *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941, 943 (Ct. App.1994).

Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court’s own initiative. However, “[s]ummary 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.” *Fenstermaker*, 128 Idaho at 287, 912 P.2d at 655. “If the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each issue.” *Sanchez*, 127 Idaho at 711, 905 P.2d at 644. “It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing.” *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App.1986).

## DISCUSSION

There are two issues set forth in the post-conviction relief petition: first, whether trial counsel failed to preserve the Petitioner’s right to appeal the trial court’s ruling on a motion to suppress, and second, whether appellate counsel was ineffective for failing to pursue an appeal of the trial court’s ruling on the motion to suppress. The record indicates, and counsel concedes, there is no basis for the first claim. Trial counsel had preserved the Petitioner’s right to appeal the ruling on the motion for summary judgment. Therefore the Respondent’s motion for summary dismissal is granted as to this claim.

Thus, the only claim which must be considered for purposes of this motion is the Petitioner's second claim, ineffective assistance by appellate counsel. To prevail on this claim, the Petitioner must meet the requirements set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To prevail on a claim of ineffective assistance of counsel, a post-conviction petitioner must show that the attorney's performance was deficient and, in most cases, must also show that prejudice resulted from the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Berg v. State*, 131 Idaho 517, 520, 960 P.2d 738, 741 (1998); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). Deficient performance is established if the applicant shows that the attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Berg*, 131 Idaho at 520, 960 P.2d at 741; *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Russell*, 118 Idaho at 67, 794 P.2d at 656. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance the outcome of the criminal case would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697; *Berg*, 131 Idaho at 520, 960 P.2d at 741; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177; *Russell*, 118 Idaho at 67, 794 P.2d at 656.

*Mintun v. State*, 144 Idaho 656, 658-659, 168 P.3d 40, 42 - 43 (Ct. App. 2007). The Respondent contends the Petitioner has failed to present evidence that appellate counsel was ineffective. Further, the Respondent claims an indigent defendant does not have a right to compel appointed appellate counsel to press all claims the Petitioner wishes to pursue. The Respondent relies on *Mintun v. State* in support of the motion.

Mintun's claims that he was denied the effective assistance of counsel because appointed counsel should have raised certain additional issues on appeal are subject to the standards set forth in *Strickland*, and Mintun therefore must show that appellate counsel's performance was deficient and caused prejudice in the outcome of the appeal. *Bell*, 535 U.S. at 697-98, 122 S.Ct. at 1851-52, 152 L.Ed.2d at 928-29; *Sparks v. State*, 140 Idaho 292, 297, 92 P.3d 542, 547 (Ct.App.2004). An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue.

*Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983). Rather, the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). “Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781 (2000). “[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)).

*Id.* at 661, 168 P.3d at 45.

In the case at hand, a factual determination must be made on the issue of whether the Petitioner was denied effective assistance of counsel as a result of appellate counsel’s decision to not pursue the motion to suppress issue on appeal. The Petitioner presented an affidavit in support of the Petition which states that he discussed appealing the trial court’s ruling on the motion to suppress with his appointed counsel, and that he directed counsel to pursue the appeal. The unpublished opinion of the Idaho Court of Appeals indicates the appeal was silent as to whether the trial court erred when it denied the motion to suppress. These facts are sufficient to establish there is a genuine issue of material fact on Petitioner’s claim he was denied effective assistance by appellate counsel. Thus, an evidentiary hearing must be conducted with respect to the second claim presented within the Petition. The burden is on the Petitioner to establish, by a preponderance of the evidence, that appellate counsel was ineffective, based upon the factors set forth in *Strickland v. Washington*. Therefore, the Respondent’s motion for summary disposition is denied with respect to the Petitioner’s second claim.

## CONCLUSION

The Petitioner has raised two issues in his Petition for Post-Conviction Relief. At argument, counsel for the Petitioner conceded that trial counsel had in fact preserved the Petitioner's right to appeal the trial court's ruling on the motion to suppress. Therefore, the Petitioner's claim which has been characterized as "Count One: Failure to Preserve Right to Appeal" is summarily dismissed.

For the reasons set forth in the foregoing discussion, an evidentiary hearing must be held on the second issue, characterized as "Count Two: Failure to Prosecute Appeal." The Petitioner has established there is a material question of fact on the issue of whether appellate counsel was ineffective for failing to pursue an appeal of the trial court's ruling on the motion to suppress in the underlying criminal case. Therefore, an evidentiary hearing will be held on this issue.

## ORDER

The Respondent's Motion for Summary Disposition is hereby GRANTED in part, and DENIED in part, for the reasons stated in the foregoing opinion.

IT IS SO ORDERED.

DATED this 9<sup>th</sup> day of May 2012.



CARL B. KERRICK – District Judge



CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON RESPONDENT'S MOTION FOR SUMMARY DISPOSITION was:

\_\_\_\_\_ hand delivered via court basket, or

~~faxed~~ and mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 9<sup>th</sup> day of May, 2012, to:

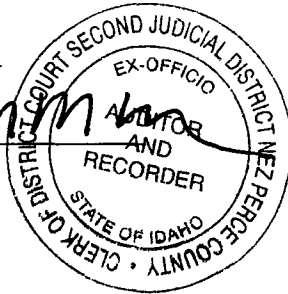
Sean Walsh  
500 N Government Way, Suite 600  
Coeur d'Alene ID 83814

Bryant E. Bushling  
Deputy Prosecutor  
P O Box 9000  
Coeur d'Alene ID 83814

PATTY O. WEEKS, CLERK

By \_\_\_\_\_

Deputy



STATE OF IDAHO #93  
COUNTY OF KOOTENAI SSNC  
FILED: 216

BO #700

2013 JAN 15 PM 3:50

CLERK DISTRICT COURT  
*[Signature]*  
DEPUTY

Barry McHugh  
Kootenai County Prosecuting Attorney  
501 Government Way/ Box 9000  
Coeur d'Alene ID 83814  
Phone: 208-446-1800

Assigned Attorney  
Bryant Bushling

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

CECIL G. DANIELS, )  
)  
Petitioner, )  
vs. )  
)  
THE STATE OF IDAHO, )  
)  
Respondent. )  
)  
\_\_\_\_\_ )

Case No. CV 2011-7510

STATE'S MOTION FOR ORDER  
WAIVING THE ATTORNEY-  
CLIENT PRIVILEGE

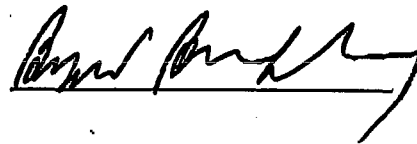
COMES NOW, Barry McHugh, Prosecuting Attorney, in and for the County of Kootenai, State of Idaho, and moves this Court to declare that the attorney-client privilege that existed between Diane Walker, Deputy State Appellate Public Defender, and any employees, investigators, consultants and/or any other agents of the State Appellate Public Defender's Office and the Petitioner, Cecil G. Daniels, as it relates to their representation of the Petitioner during the proceedings that are the subject of this Post Conviction Relief matter, is waived as required by Idaho Rule of Evidence 502(d)(3).

The State also requests an Order permitting the State to discuss this case with Diane Walker as it relates to this case.

Waiver of the attorney-client privilege is necessary in this case so that the State can adequately prepare to rebut the claims contained in the Petitioner's Petition. The State hereby incorporates by reference the claims contained in the Petitioner's Petition, as a basis for this request for attorney-client privilege waiver.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of January, 2013.

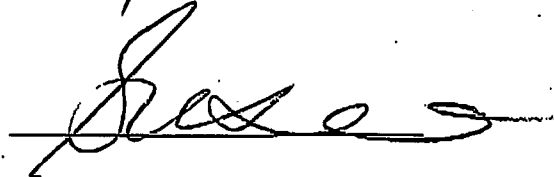
BRYANT BUSHLING  
Deputy Prosecuting Attorney



CERTIFICATE OF MAILING

I hereby certify that on the 15 day of Jan, 2013, a true and correct copy of the foregoing delivered to:

DENNIS REUTER  
FAXED



LOGGED January 17, 2013 AT  
3:06 P.M. LEWISTON, IDAHO  
BY [Signature]

**CARL B. KERRICK**

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI } ss.

STATE OF IDAHO }  
COUNTY OF KOOTENAI }  
FILED: 1/17/13  
AT 3:56 O'CLOCK P.M.  
CLERK, DISTRICT COURT  
[Signature]  
DEPUTY

CECIL G. DANIELS, )  
 )  
Petitioner, )  
vs. )  
THE STATE OF IDAHO, )  
 )  
Respondent. )

Case No. CV 2011-7510

**ORDER WAIVING THE  
ATTORNEY-CLIENT PRIVILEGE**

The Court having before it Respondent's Motion Waiving the Attorney-Client Privilege; the Court have reviewed the Motion, and the Court find this an appropriate case in which to grant the Motion, now therefore:

IT IS HEREBY ORDERED that Respondent's Motion Waiving the Attorney-Client Privilege for Diane Walker, Deputy State Appellate Public Defender, and any employees, investigators, consultants and/or any other agents of the State Appellate Public Defender's Office and the Petitioner is granted, but only to the degree necessary to address the issues raised in Petitioner's U.P.C.R. claim.

ENTERED this 17<sup>th</sup> day of January, 2013.

[Signature]  
JUDGE

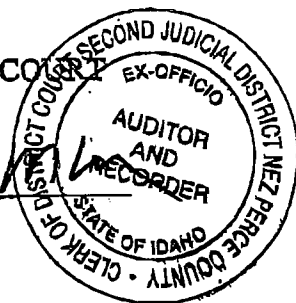
**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of January, 2013 copies of the foregoing document(s) were mailed, postage prepaid, or sent by facsimile or inter office mail to:

- Deputy Prosecuting Attorney for Kootenai County FAX 208-446-1833
- Defense Counsel Kootenai County Public Defender FAX 208-446-1701
- Defense Counsel FAX Sean Walsh (208) 765-4636
- Defendant
- Kootenai County Sheriff's Department FAX 208-446-1407
- Idaho Probation & Parole FAX 208-769-1481
- Idaho Department of Correction FAX 208-327-7445
- CCD Sentencing Team FAX 208-658-2186
- Idaho Department of Transportation FAX 208-334-8739
- Community Service Interoffice Mail or FAX 208-446-1193
- Auditor Interoffice Mail or FAX 208-446-1662
- BCI (Bureau of Criminal Investigation) FAX 208-884-7193
- Kootenai County Law Library/Transcription FAX 208-446-1187
- Clerk of the Court - Kootenai County (208) 446-1194

CLIFFORD T. HAYES  
CLERK OF THE DISTRICT COURT

By: [Signature]  
Deputy Clerk





Daniels appealed his judgment of conviction and sentence, as well as the District Court's order denying Daniels' Rule 35 motion for reduction of sentence. In an unpublished opinion, the Idaho Court of Appeals affirmed the judgment of conviction and sentence and order denying the Rule 35 motion. *See State v. Daniels*, Docket No. 37054 (Idaho Ct. App. 2010).

The Petitioner claims trial counsel failed to preserve his right to appeal a motion to suppress that was heard and denied by the district court. Further, the Petitioner claims appellate counsel was ineffective for failing to appeal the trial court's ruling on the motion to suppress. On May 9, 2012, this Court entered an opinion and order on the State's motion for summary disposition. There was no material question of fact that trial counsel filed a notice of appeal which preserved the Petitioner's right to appeal the district court's ruling denying the motion to suppress in the underlying criminal action. This Court further determined there were remaining questions of fact on the second issue, whether the Petitioner was denied effective assistance of counsel as a result of appellate counsel's decision not to pursue the motion to suppress issue on appeal.

The Petitioner requests the Court reinstate his right to appeal from all convictions entered by the Court in Kootenai County Case Cr-2008-0018482; and more specifically, leave to appeal the Court's denial of the Petitioner's motion to suppress in the underlying criminal case.

### **POST-CONVICTION RELIEF STANDARD**

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

- (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;

FINDINGS OF FACT, CONCLUSIONS OF LAW, 2  
AND ORDER ON PETITION FOR POST  
CONVICTION RELIEF

- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
- (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
- (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post conviction relief “may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later.” I.C. § 19-4902(a).

A petition for post-conviction relief is a special proceeding distinct from the criminal action that led to the petitioner’s conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App.1995). “An application for post-conviction relief initiates a proceeding which is civil in nature.” *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App.1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, 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.” *Id.*



The petitioner seeking post-conviction relief bears the burden of pleading and proof imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief."

*Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941, 943 (Ct. App.1994).

### FINDINGS OF FACT

1. Petitioner, Cecil Daniels, filed the Petition for Post Conviction Relief on September 16, 2011. Following this Court's Opinion and Order dated May 9, 2012, the only remaining claim is whether the Petitioner was denied effective assistance of counsel when appellate counsel decided to forego pursuing the motion to suppress issue on appeal.
2. Daniels was found guilty by way of jury trial of committing felony driving under the influence of alcohol and/or drugs, I.C. § 18-8004, 18-8005. Prior to the jury trial, the trial court denied a motion to suppress presented by Daniels. Within the motion to suppress Daniels argued two issues: first, that the stop was unduly prolonged by police questioning that did not pertain directly to the stop; and second, the warrantless search was not within an established exception to the warrant requirement. *Order Re: Motion to Suppress, Kootenai County Case CR 2008-18482*.
3. Trial counsel filed a Notice of Appeal on October 20, 2009. Five issues were set forth to be considered on appeal, including whether the District Court erred by denying the Defendant's motion to suppress evidence; whether the District Court erred by denying the Defendant's Motion for Reconsideration of denial of Motion to Suppress; whether the District Court erred in regards to rulings made upon

evidentiary objections at trial; whether the District Court erred in instructing the jury; and whether the District Court abused its discretion in imposing judgment and sentence. *Notice of Appeal, Kootenai County Case CR 2008-18482.*

4. Daniels testified he discussed issues for appeal with his trial counsel. Daniels directed trial counsel to appeal the district court's order denying the motion to suppress. As noted above, the motion to suppress issue was included within the notice of appeal.
5. Diane Walker, of the State Appellate Public Defenders office, was appointed to represent Daniels during the appellate process. Daniels recalled receiving a letter from Walker and speaking to Walker via telephone before the appellate brief was filed. Daniels stated he told Walker that he wanted all of the issues set forth in the notice of appeal to be raised before the appellate court.
6. Daniels testified he remembered speaking with Attorney Walker at least twice via telephone. In the first conversation he filled in the attorney about the case. Daniels testified the second conversation involved discussing a case from Arizona which affected the suppression issue.
7. Daniels stated he was not aware that the issues regarding the motion to suppress were not addressed on appeal within the appellate brief submitted by Attorney Walker. Further, Daniels testified he was not informed he could file his own brief on this issue.
8. Walker testified that she did not speak with Daniels before the appellate brief was filed. She also never told Daniels he could file his own brief regarding the motion

to suppress issue. Walker reviewed the case and made the determination that the motion to suppress would not be successful.

9. Walker explained that it is the practice of her office to send letters to appellate clients to inform them the office does accept collect phone calls and explain that clients are encouraged to call the office. A second letter was sent to Daniels to inform him which attorney was assigned to his case and included information on how to contact her.
10. Walker testified that her job requires her to make judgment calls on which issues to brief. In this case, she made a strategic decision to not appeal the motion to suppress ruling. After her review Walker only presented the sentencing issue on appeal.

### CONCLUSIONS OF LAW

The sole issue before this Court is whether the Petitioner was denied effective assistance of counsel as a result of appellate counsel's decision to not pursue the motion to suppress issue on appeal. To prevail on this claim, the Petitioner must meet the requirements set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct.App.1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674, 693-94 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable

probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. This Court has 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. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct.App.1994). The foregoing standards also apply to claims of ineffective assistance of appellate counsel. *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct.App.2007).

*Baxter v. State*, 149 Idaho 859, 863, 243 P.3d 675, 679 (Ct. App. 2010).

Whether appellate counsel should be required to raise certain claims on appeal was addressed in *Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007). The *Mintun* Court determined that appellant counsel is not required to press all nonfrivolous arguments that a defendant wishes to pursue, rather, effective appellate advocacy is a process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail.

*Mintun's* claims that he was denied the effective assistance of counsel because appointed counsel should have raised certain additional issues on appeal are subject to the standards set forth in *Strickland*, and *Mintun* therefore must show that appellate counsel's performance was deficient and caused prejudice in the outcome of the appeal. *Bell*, 535 U.S. at 697–98, 122 S.Ct. at 1851–52, 152 L.Ed.2d at 928–29; *Sparks v. State*, 140 Idaho 292, 297, 92 P.3d 542, 547 (Ct.App.2004). An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983). Rather, the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). “Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781 (2000). “[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)).

FINDINGS OF FACT, CONCLUSIONS OF LAW, 7  
AND ORDER ON PETITION FOR POST  
CONVICTION RELIEF

*Id.* at 661, 168 P.3d at 45. In the case at hand, the Petitioner asserts that an appeal of the motion to suppress issue was clearly a stronger issue for appeal than simply appealing the sentence set by the district court.

First, this Court must determine whether appellate counsel's representation during the appeal was deficient. To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). The Petitioner fails to establish that appellate counsel's representation fell below an objective standard of reasonableness. A review of the record establishes that of the five issues set forth in the Notice of Appeal, appellate counsel determined the sentencing issue was the best issue to present on appeal. While appellate counsel conceded at the evidentiary hearing that sentencing issues rarely prevail on appeal, the Petitioner was unable to present evidence in support of his argument that the motion to suppress issue was clearly a stronger issue for appeal. The Petitioner failed to bring evidence which established that counsel's decision on the issues to pursue on appeal was below an objective standard of reasonableness. Attorney Walker testified that based upon the current case law at the time, she did not believe that the motion to suppress issue would be successful on appeal.

Further, the Petitioner asserts that appellate counsel's representation fell below an objective standard of reasonableness because counsel failed to inform him that she would

not be advancing the claim, nor did she advise him he could present his own brief.<sup>1</sup>

However, this Court also noted that the Petitioner testified he discussed with counsel a case from Arizona which affected the suppression issue. Based upon the record before this Court, the Petitioner has failed to establish that counsel's strategic decisions in this matter were below an objective standard of reasonableness.

Even if the Petitioner could establish that counsel's strategic decisions fell below an objective standard of reasonableness, the burden is also upon the Petitioner to establish prejudice. The applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the appeal would have been different. *Aragon v. State*, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988). While the Petitioner asserts he may be able to pursue federal court remedies with respect to the motion to suppress, the Petitioner cannot establish that the outcome of the appeal in this matter would have been different if he had been able to present the motion to suppress issue. The Petitioner has not set forth any case law from Idaho in support of his argument. Therefore, the requirements of *Strickland v. Washington* have not been met in this case. As a result, the Petitioner's petition is dismissed.

### CONCLUSION

Based upon the foregoing analysis, the Petitioner has failed to establish that appellate counsel provided ineffective assistance of counsel for failing to raise the trial

---

<sup>1</sup> The Petitioner relies on *Anders v. Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) wherein appointed counsel filed no-merits brief and withdrew, effectively preventing the indigent defendant from seeking an appeal. The case at hand is distinguishable from *Anders*. In this case, appellate counsel reviewed the notice of appeal and background of the case and determined that the issue presented on sentencing was the only meritable appellate claim.

court's denial of the motion to suppress. As a result, the Petitioner's petition is dismissed.

**ORDER**

The Petitioner's Petition for Post Conviction Relief is hereby DENIED.

IT IS SO ORDERED.

DATED this 5<sup>th</sup> day of March 2013.



CARL B. KERRICK - District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR POST CONVICTIONL RELIEF was:

\_\_\_\_\_ hand delivered via court basket, or

faxed and mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 5<sup>th</sup> day of March, 2013, to:

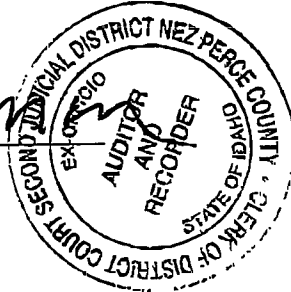
Dennis Reuter  
3416 Angie Cir  
Coeur d'Alene ID 83815

Bryant E. Bushling  
Deputy Prosecutor  
P O Box 9000  
Coeur d'Alene ID 83814

PATTY O. WEEKS, CLERK

By *Patty O. Weeks*

Deputy



FINDINGS OF FACT, CONCLUSIONS OF LAW, 11  
AND ORDER ON PETITION FOR POST  
CONVICTION RELIEF



DENNIS REUTER  
 CONFLICT PUBLIC DEFENDER  
 Attorney at Law  
 500 N. Government Way, Suite 100  
 Coeur d'Alene, Idaho 83814  
 Phone: (208) 665-7400  
 Fax: (208) 765-4636  
 ISBN: 6154

STATE OF IDAHO  
 COUNTY OF KOOTENAI  
 FILED: *SS 659*

2013 MAR 13 AM 10:12

CLERK DISTRICT COURT  
*David Mitchell*  
 DEPUTY

Attorney for Plaintiff/Appellant

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

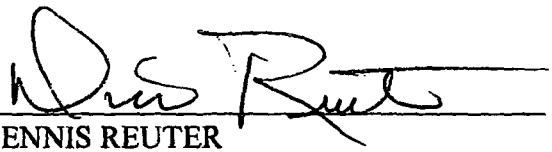
<b>CECIL G. DANIELS,</b>	)	
	)	<b>CASE NUMBER CV-11-0007510</b>
Plaintiff/Appellant	)	
	)	
V.	)	
	)	<b>NOTICE OF APPEAL</b>
<b>STATE OF IDAHO,</b>	)	
	)	
Defendant/Respondent,	)	
	)	
	)	

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

- The above named Plaintiff/Appellant hereby appeals against the above named Respondent, the State of Idaho, to the Idaho Supreme Court for the Findings of Fact, Conclusions of Law, and Order on Petition for Post Conviction Relief in the above entitled matter on or about March 5, 2013, the Honorable Carl B. Kerrick, presiding.
- 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 Plaintiff/Appellant intends to assert in this appeal include, but are not necessarily limited to:
  - a. Whether the Court abused its discretion in denying Plaintiff/Appellant's post-conviction petition.
4. Plaintiff/Appellant requests the preparation of the transcripts of the following hearings:
  - a. Court Trial held on January 28, 2013;
5. The Plaintiff/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.

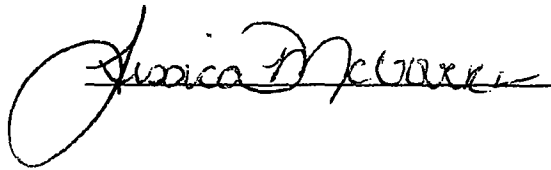
DATED this 13<sup>th</sup> day of March, 2013.

BY:   
DENNIS REUTER  
CONFLICT PUBLIC DEFENDER

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13<sup>th</sup> day of March, 2013, served a true and correct copy of the attached NOTICE OF APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

<u>  X  </u>	Kootenai County Prosecuting Attorney P.O. Box 9000 Coeur d'Alene, Idaho 83816-9000	✓	Facsimile 208-446-1833
<u>  X  </u>	Sara B. Thomas State Appellate Public Defender 3647 Lake Harbor Lane Boise, Idaho 83703	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Facsimile (208) 334-2985	
<u>  X  </u>	Lawrence G. Wasden Attorney General P.O.Box 83720 Boise, Idaho 83720-0010	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Facsimile (208) 854-8074	
<u>  X  </u>	Nancy Towler, Court Reporter Honorable Carl B. Kerrick	[✓]	Facsimile 208-799-3058



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

2013 MAR 13 PM 4: 25

Cecil G. Daniels )  
 )  
 Plaintiff/Appellant )  
 )  
 vs )  
 )  
 State of Idaho )  
 )  
 Defendant/Respondent, )  
 )  
 \_\_\_\_\_ )

CLERK DISTRICT COURT  
*Deann Mitchell*  
DEPUTY *DM*

CASE NUMBER  
CV 2011-7510

CLERKS CERTIFICATE OF  
APPEAL

Appeal from: First Judicial District, Kootenai County. Honorable Carl B. Kerrick presiding.

Order or Judgment appealed from: Final Judgment filed March 5, 2013

Case Number: CV 2011-7510

Attorney for Appellant: Dennis Reuter, Conflict Public Defender

Attorney for Respondents: Kootenai County Prosecutor

Appealed by: Cecil G. Daniels

Appealed against: State of Idaho

Notice of Appeal Filed: March 13, 2013

Amended Notice of Appeal Filed: None

Notice of Cross-Appeal Filed: None

Notice of Amended Cross Appeal filed: None

Appellate fee paid: No. Exempt.

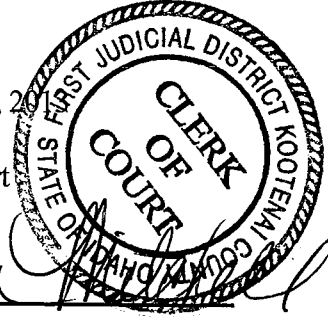
Respondent or Cross-Respondent's request for additional reporter's transcript filed: No

Was District Court Reporter's Transcript Requested: Yes

Estimated number of pages: Not listed

Name of Court Reporter: Nancy Towler

Dated: March 13, 2013  
Clifford T Hayes  
Clerk of the Court



By:

*[Handwritten Signature]*  
Deputy Clerk

# In the Supreme Court of the State of Idaho

2013 MAR 25 PM 1:42

CLERK DISTRICT COURT

*Dawn Mitchell*

CECIL G. DANIELS,  
Petitioner-Appellant,

v.

STATE OF IDAHO,  
Respondent.

ORDER REMANDING CASE FOR  
FINAL JUDGMENT

Supreme Court Docket No. 40811-2013

Kootenai County District Court No.  
CV -11-7510

This appeal is from the district court's FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR POST CONVICTION RELIEF entered on Marcy 15, 2013. It appears that a final judgment has not been entered as required by Idaho Rules of Civil Procedure 54(a) and 58(a). Idaho Rule of Civil Procedure 58(a) provides that, upon a decision by the district court that all relief shall be denied, the district court shall sign a judgment set forth on a separate document as required in I.R.C.P. 54(a). Idaho Rule of Civil Procedure 54(a) requires that the separate document be entitled "Judgment," state the relief to which a party is entitled, and not contain a recital of pleadings; the record of prior proceedings; or the district court's legal reasoning, findings of fact, or conclusions of law. Therefore, good cause appearing,

IT IS HEREBY ORDERED that pursuant to Idaho Appellate Rules 13.3 and 17(e)(2), the above-entitled matter be, and hereby is, temporarily REMANDED TO THE DISTRICT COURT and proceedings in this appeal shall be SUSPENDED to allow for the entry of a final judgment. Upon entry of the final judgment by the district court, the district court clerk is directed to transmit a certified copy of the judgment to the Clerk of this Court for inclusion into the appellate record, and this appeal shall be stayed until receipt of the judgment by the Clerk. At such time, this appeal shall proceed.

DATED this 25<sup>th</sup> day of March, 2013.

For the Idaho Supreme Court

*Stephen W. Kenyon*

Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Court Reporter  
District Court Judge

cc: 208 799 3058 3/26/13 dm (Judge Kerrick) #101

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED:  
2013 MAR 26 PM 3: 54

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

CECIL G. DANIELS, )  
 )  
 Petitioner-Appellant )  
 )  
 v. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CLERK DISTRICT COURT  
*David Mitchell*  
DEPUTY *dm*  
CASE NUMBER  
CV 2011-7510  
AMENDED  
CLERKS CERTIFICATE OF  
APPEAL

Appeal from: First Judicial District, Kootenai County. Honorable Carl B. Kerrick presiding.

Order or Judgment appealed from: Final Judgment filed March 5, 2013

Case Number: CV 2011-7510

Attorney for Appellant: Dennis Reuter, Conflict Public Defender

Attorney for Respondents: Kootenai County Prosecutor

Appealed by: Cecil G. Daniels

Appealed against: State of Idaho

Notice of Appeal Filed: March 13, 2013

Amended Notice of Appeal Filed: None

Notice of Cross-Appeal Filed: None

Notice of Amended Cross Appeal filed: None

Appellate fee paid: No. Exempt.

Respondent or Cross-Respondent's request for additional reporter's transcript filed: No

Was District Court Reporter's Transcript Requested: Yes

Estimated number of pages: Not listed

Name of Court Reporter: Nancy Towler



Dated: March 26, 2013  
Clifford T Hayes  
Clerk of the Court

By: **Dawn Mitchell**  
Deputy Clerk

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
FILED:

2013 MAR 28 PM 1:09

LODGED March 27, 2013 *Law Mitchell*  
CLERK DISTRICT COURT  
A.M. 4:39 P.M. DEWISTON, IDAHO  
BY CBK  
CARL B. KERRICK

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

CECIL G. DANIELS,	)	
	)	
Petitioner,	)	CASE NO. CV 2011-7510
	)	
v.	)	FINAL JUDGMENT
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

The above-entitled matter came before the Court on Petition for Post Conviction Relief. An evidentiary hearing was held on January 28, 2013. Following the hearing, the Court issued Findings of Fact, Conclusions of Law, and Order on Petition for Post Conviction Relief, effectively dismissing the Petition.

IT IS HEREBY THE FINAL JUDGMENT OF THE COURT THAT  
PETITIONER WARREN'S PETITION FOR POST-CONVICTION RELIEF IS  
DISMISSED.

DATED this 27<sup>th</sup> day of March 2013.

*CBK*  
CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing FINAL JUDGMENT was:

\_\_\_\_\_ hand delivered via court basket, or

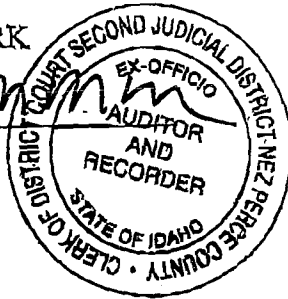
~~faxed and~~ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 28<sup>th</sup> day of March, 2013, to:

Dennis Reuter  
3416 Angie Cir  
Coeur d'Alene ID 83815

Bryant E. Bushling  
Deputy Prosecutor  
P O Box 9000  
Coeur d'Alene ID 83814

PATTY O. WEEKS, CLERK

By *Patty O. Weeks*  
Deputy



STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
FILED:

2013 MAR 28 PM 1:08

DENNIS REUTER  
CONFLICT PUBLIC DEFENDER  
Anderson Walsh PLLC  
500 N. Government Way, Suite 100  
Coeur d'Alene, Idaho 83814  
Phone: (208) 665-7400  
Fax: (208) 765-4636  
ISBN: 6154

CLERK DISTRICT COURT

RECORDED March 28, 2013 AT 9:09 A.M. BY Carl B. Kerrick  
P.M. LEWISTON, IDAHO  
CARL B. KERRICK

Attorney for Plaintiff/Respondent

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

CECIL G. DANIELS, )  
 )  
Plaintiff/Respondent )  
 )  
V. )  
 )  
STATE OF IDAHO, )  
 )  
Defendant/Appellant, )  
 )

CASE NUMBER CV-11-0007510

**ORDER FOR APPOINTMENT OF  
STATE APPELLATE PUBLIC  
DEFENDER**

**THIS MATTER** having come before the Court pursuant to Respondent's Motion for Appointment of State Appellate Public Defender, the Court having reviewed the pleadings on file and the motion; the Court being fully apprised in the matter and good cause appearing;

**IT IS HEREBY ORDERED** that DENNIS REUTER, Conflict Public Defender, shall remain counsel of record for the Plaintiff for residual purposes before the above-entitled trial Court, and the State Appellate Public Defender is hereby appointed to represent the Respondent CECIL G. DANIELS, in the above entitled matters for appellate purposes only.

DATED this 28<sup>th</sup> day of March, 2013.

Carl B. Kerrick  
DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this 28<sup>th</sup> day of March, 2013, served a true and correct copy of the attached *Order for Appointment of State Appellant Public Defender* via interoffice mail or as otherwise indicated upon the parties as follows:

X Kootenai County Prosecuting Attorney  First Class Mail  
P.O. Box 9000  Certified Mail  
Coeur d'Alene, Idaho 83816-9000  Facsimile (208) 468-1833

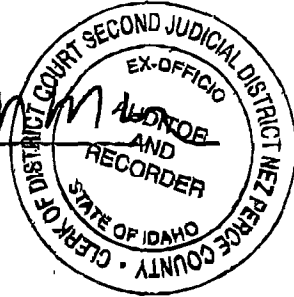
X Sara B. Thomas  First Class Mail  
State Appellate Public Defender  Certified Mail  
3050 N. Lake Harbor Lane  Facsimile (208) 334-2985  
Boise, Idaho 83703

X Lawrence G. Wasden  First Class Mail  
Attorney General  Certified Mail  
P.O.Box 83720  Facsimile (208) 854-8074  
Boise, Idaho 83720-0010

X Reporter for Honorable Judge  ~~First Class Mail~~ *hand delivered*  
Carl B. Kerrick  Certified Mail  
Nancy Towler  Facsimile (208) 769-3058

X Dennis Reuter  First Class Mail  
Anderson Walsh PLLC  Certified Mail  
500 N. Government Way, Suite 100  Facsimile (208) 765-4636  
Coeur d'Alene, ID 83814

*[Signature]*  
Deputy Clerk



TO: Clerk of the Court  
Idaho Supreme Court  
P.O. Box 83720  
Boise, ID 83720-0101

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2013 MAY 28 PM 3: 50

CLERK DISTRICT COURT  
*Dawn Mitchell*  
DEPUTY

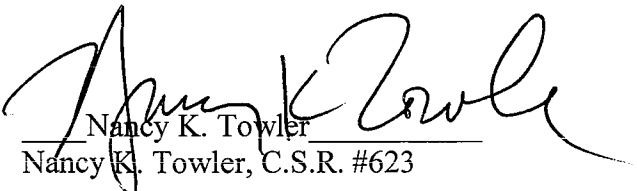
DOCKET NO. 40811-20  
(  
( Cecil Gerald Daniels  
(  
( vs.  
(  
(  
( State of Idaho

**NOTICE OF TRANSCRIPT LODGED**

Notice is hereby given that on May 24, 2013, I, Nancy K. Towler, C.S.R., lodged an electronic transcript of 42 pages in length for the above-referenced appeal with the District Court Clerk of the County of Kootenai in the First Judicial District.

Included therein: Evidentiary Hearing held on January 28, 2013, in Coeur d'Alene, Idaho.

I also filed an electronic copy with the Supreme Court of the State of Idaho on the same date.

  
\_\_\_\_\_  
Nancy K. Towler  
Nancy K. Towler, C.S.R. #623

IN THE SUPREME COURT OF THE STATE OF IDAHO

CECIL G. DANIELS, )  
 )  
 PETITIONER-APPELLANT, )  
 )  
 VS. )  
 )  
 STATE OF IDAHO, )  
 )  
 RESPONDENT. )  
 \_\_\_\_\_ )

SUPREME COURT  
CASE NO. 40811-2013

I, Clifford T. Hayes, 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 no exhibits were offered in this case.

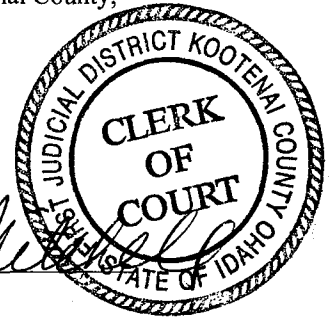
I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the 28 day of May, 2013.

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 28 day May, 2013.

CLIFFORD T. HAYES  
Clerk of the District Court

By: [Signature]  
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF IDAHO

CECIL G. DANIELS,	)	
	)	SUPREME COURT
PETITIONER-APPELLANT,	)	CASE NO. 40811-2013
	)	
VS.	)	
	)	
STATE OF IDAHO,	)	
	)	
RESPONDENT.	)	
_____	)	

CLERK'S CERTIFICATE OF SERVICE

I, Clifford T. Hayes, 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:

SARA B. THOMAS  
STATE APPELLATE PUBLIC DEFENDER  
3050 N. LAKE HARBOR LANE  
BOISE, ID 83703

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
P.O. BOX 83720  
BOISE, ID 83720-0010

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 28 day of May, 2013.

Clifford T. Hayes  
Clerk of District Court

By: *[Signature]*

