

11-12-2013

Green v. State Clerk's Record v. 1 Dckt. 41235

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VOL. 1 OF 1

Vol. 1 of 1

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

LAW CLERK

S.C. #41235

Lee Edd Green, Jr.
Petitioner-Appellant

vs.

State of Idaho
Respondent

CLERK'S RECORD ON APPEAL

*Appealed from the District Court of the Third Judicial District
of the State of Idaho, in and for the County of Owyhee.*

Lawrence G. Wasden,
Attorney General
Attorney for Respondent

Richard L. Harris,
Attorney for Appellant

FILED - COPY

NOV 12 2013

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

411235

COPY

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IN THE SUPREME COURT OF THE
STATE OF IDAHO

LEE EDD GREEN,)	
)	SUPREME COURT NO. 41235
Petitioner-Appellant,)	
)	
v.)	
)	
STATE OF IDAHO ,)	
)	
Respondent,)	
_____)	

Appeal from the Third Judicial District, Owyhee County, Idaho

HONORABLE MOLLY HUSKEY, presiding,

Richard L. Harris, Attorney at Law PO Box 1438, Caldwell, ID 83605

Honorable Lawrence G. Wasden, Attorney General, PO Box 83720, Boise, Idaho 83720-0010

Lee Edd Green Jr., Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
3/6/2013	NCPC	TRINA	New Case Filed - Post Conviction Relief
		TRINA	Filing: H10 - Post-conviction act proceedings Paid by: Richard L. Harris Receipt number: 0061349 Dated: 3/6/2013 Amount: \$.00 (Cash) For: Green, Lee Edd Jr. (subject)
	APER	TRINA	Subject: Green, Lee Edd Jr. Appearance Richard L Harris
	AFFD	TRINA	Affidavit of Lee E. Green
	FSTC	TRINA	File Sent To Caldwell basket for Judge Huskey to pick up
3/7/2013	MISC	TRINA	States Objection to Petition for Post Conviction Relief, Denial of All Material Allegations and States Motion for Summary Dismissal of Petition
3/18/2013	ORDR	TRINA	Order Setting Status Conference, and Evidentiary Hearing
	HRSC	TRINA	Hearing Scheduled (Evidentiary 07/12/2013 01:30 AM) 1/2 day hearing
	HRSC	TRINA	Hearing Scheduled (Telephonic Status Conference 07/08/2013 08:15 AM)
4/19/2013	HRSC	TRINA	Hearing Scheduled (Telephonic Status Conference 05/13/2013 01:00 PM)
5/13/2013	HRVC	TRINA	Hearing result for Telephonic Status Conference scheduled on 07/08/2013 08:15 AM: Hearing Vacated
	HRSC	TRINA	Hearing Scheduled (Telephonic Status Conference 07/08/2013 01:00 PM)
	HRHD	TRINA	Hearing result for Telephonic Status Conference scheduled on 05/13/2013 01:00 PM: Hearing Held/Laura Whiting Court Reporter
5/14/2013	NOTC	TRINA	Notice of Intent to Dismiss Uniform Post Conviction Petition
5/28/2013	MISC	TRINA	Motion for Leave to File an Amended Petition for Post Convictions Relief and NOH
	MEMO	TRINA	Memorandum in Opposition of Intent to Dismiss Petition for Post Conviction Relief
	MISC	TRINA	Amended Petition for Post Conviction Relief
	HRSC	TRINA	Hearing Scheduled (Motion 07/08/2013 01:00 PM) Motion to Amend Petition for Post Conviction Relief
5/31/2013	MISC	TRINA	Respondents Disclosure of Witnesses for Hearing of Uniform Post-Conviction
	MOTN	TRINA	Motion for Preparation of Transcript of the Change of Plea Hearing of August 4, 2011 before the Hon. Rena J. Hoff at the Canyon County Courthouse

Lee Edd Green Jr., Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
6/6/2013	MISC	TRINA	State's Memorandum in Support of Re-Newed Motion to Dismiss Uniform Post Convictions Relief Petition	Molly J. Huskey
6/7/2013	MISC	TRINA	Second Affidavit of Lee E. Green, Jr.	Molly J. Huskey
6/21/2013	ORDR	LENA	Order Dismissing Uniform Post-Conviction Petition	Molly J. Huskey
	JDMT	LENA	Final Judgment	Molly J. Huskey
	DPHR	LENA	Disposition With Hearing	Molly J. Huskey
	HRVC	LENA	Hearing result for Evidentiary scheduled on 07/12/2013 01:30 AM: Hearing Vacated 1/2 day hearing	Molly J. Huskey
	HRVC	LENA	Hearing result for Motion scheduled on 07/08/2013 01:00 PM: Hearing Vacated Motion to Amend Petition for Post Conviction Relief	Molly J. Huskey
	INHD	LENA	Hearing result for Telephonic Status Conference scheduled on 07/08/2013 01:00 PM: Interim Hearing Held	Molly J. Huskey
	STAT	LENA	STATUS CHANGED: closed	Molly J. Huskey
7/1/2013	MOTN	TRINA	Motion to Reconsider Order Dismissing Uniform Post-Conviction Petition and Final Judgment and NOH	Molly J. Huskey
	HRSC	TRINA	Hearing Scheduled (Motion 07/12/2013 01:00 PM) Petitioners Motion to Reconsider Order Dismissing	Molly J. Huskey
	STAT	TRINA	STATUS CHANGED: Closed pending clerk action	Molly J. Huskey
	MISC	TRINA	Amended NOH on Motion to Reconsider	Molly J. Huskey
	CONT	TRINA	Hearing result for Motion scheduled on 07/12/2013 01:00 PM: Continued Petitioners Motion to Reconsider Order Dismissing	Molly J. Huskey
	HRSC	TRINA	Hearing Scheduled (Motion 08/09/2013 09:00 AM) Petitioners Motion to Reconsider Order Dismissing Uniform Post-Conviction Petition and Final Judgment	Molly J. Huskey
7/2/2013	MISC	TRINA	Denial of Motion to Reconsider Dismissal of Uniform Post-Conviction Petition	Molly J. Huskey
	HRVC	TRINA	Hearing result for Motion scheduled on 08/09/2013 09:00 AM: Hearing Vacated Petitioners Motion to Reconsider Order Dismissing Uniform Post-Conviction Petition and Final Judgment	Molly J. Huskey
	STAT	TRINA	STATUS CHANGED: closed	Molly J. Huskey
7/17/2013	NOTC	TRINA	Notice of Appeal	Molly J. Huskey
	APSC	TRINA	Appealed To The Supreme Court	Molly J. Huskey
7/25/2013	ORDR	TRINA	Order Conditionally Dismissing Appeal	Molly J. Huskey

Date: 10/4/2013

Third Judicial District Court - Owyhee County

User: TRINA

Time: 09:19 AM

ROA Report

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Case: CV-2013-0002860-M Current Judge: Molly J. Huskey
Lee Edd Green Jr., Plaintiff vs State Of Idaho, Defendant

Lee Edd Green Jr., Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
3/15/2013	MISC	TRINA	Amended Notice of Appeal to Supreme Court	Molly J. Huskey
	BNDC	TRINA	Bond Posted - Cash (Receipt 63006 Dated 8/15/2013 for 58.00)	Molly J. Huskey
	STAT	TRINA	STATUS CHANGED: Closed pending clerk action	Molly J. Huskey

FILED

A.M. 2:24 P.M.

MAR 06 2013

Charlotte Sherburn, Clerk

TRINA AMAN

Deputy Clerk

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1438
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

Attorney for Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, JR...	)	CASE NO. <i>CV-13-2860</i>
)	
Petitioner,	)	PETITION FOR POST
	)	CONVICTION RELIEF
vs.)	
)	
THE STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW the above named Petitioner by and through his attorney and
Petitions this Court and alleges as follows:

1. Petitioner is presently in the custody of the Idaho Board of Corrections. A
Judgment and Commitment was entered in the above named Court on November 11,
2011 sentencing the Defendant to an aggregate term to the Board of Corrections for 15
years fixed followed by 15 years indeterminate with the Court retaining jurisdiction for
180 days. The rider review was conducted on June 8, 2012, with the Court dropping
jurisdiction and imposing the underlying sentence. A Rule 35 Motion for a reduction of
sentence was filed on June 26, 2012. A Notice of Appeal was filed on June 27, 2012. an
Order denying the Rule 35 Motion was entered on August 17, 2012. An Order

ASSIGNED JUDGE

Molly Huskey

dismissing the appeal was entered on August 22, 2012. The defendant is confined currently to the custody of the Board of Corrections.

2. This Petition is brought pursuant to the Idaho Uniform Post-Conviction Procedure Act, Idaho Code Section 19-4901 et. seq.

3. This Petition is supported by the affidavit of the Petitioner which is attached hereto and made part of this Petition by reference.

4. Defendant was represented at the District Court trial proceedings by the Owyhee County Public Defenders Office.

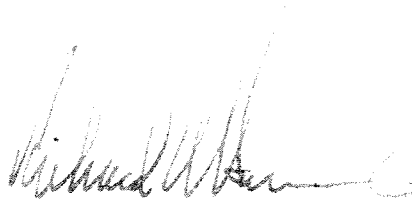
5. Defendant declares that he received ineffective assistance at the trial of the above referenced matter in the following particulars:

- a. Defendant's attorney presented no defense to the charge against him calling no witnesses no presenting any evidence in defense of the charge.
- b. That Defendant's attorney knew that defenses existed particularly a self defense claim and that witnesses existed in support of that defense. But Counsel did not subpoena such witnesses on Defendant's behalf nor did Counsel present a self defense claim.
- c. Defendant's counsel apparently relied upon a mistaken identity claim, asserting that the State's case in support of the charge amounted to only the victim's word against the word of the Defendant.
- d. However, Counsel for Defendant did not call the Defendant as a witness to refute the identification made by the victim and called no witnesses in defense of the charge.
- e. Previously and subsequent to the trial of the matter I, the Defendant, was able to obtain an affidavit of an eye witness which established that the victim was the aggressor and that any act done by myself was done in response and self defense of the alleged victims actions.
- f. That even though trial counsel was aware of the self defense claim and knew witnesses were available at the time of trial to raise such self defense claim, counsel did not proceed with such claim and refused to offer such defense even though Defendant requested he do so, and provided the names of the witnesses who could support such claims and defenses
- g. That because of the ineffective assistance of counsel who did not present any defense whatsoever at the time of trial I was wrongly convicted of the offense, and have been incarcerated for several years.

h. I request this court take judicial notice of the all of the records, documents and filings in the criminal case including all post trial proceedings affidavits and other documents filed in the above Court and designated as Case No. CR-2011-6870 and all proceedings incident thereto.

6. I respectfully request the Court conduct a hearing on this Petition and grant relief as may be appropriate including re-arraignment and a grant of a new trial based upon the foregoing.

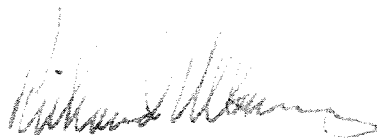
DATED: This 5 day of March, 2013.



RICHARD L. HARRIS

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following 5 day of March, 2013.

Douglas Emery	<input checked="" type="checkbox"/>	UNITED STATES MAIL
Owyhee County Prosecutor	<input type="checkbox"/>	COURTHOUSE BASKET
Owyhee County Courthouse	<input type="checkbox"/>	FACSIMILE
P.O. Box 128		
Murphy, Idaho 83650		



RICHARD L. HARRIS

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1328
Caldwell, Id. 83606-1438
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Facsimile (208) 459-1300
ISB # 1387

FILED
A.M. 2:31 P.M.
MAR 06 2013
Charlotte Sherburn, Clerk
TRINA AMAN
Deputy Clerk

Attorney For: Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, Jr.,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

CASE NO. **CV-13-02860**
AFFIDAVIT OF LEE E. GREEN

STATE OF IDAHO)
) : ss.
County of Ada)

LEE E. GREEN, Jr. upon his oath having been first duly sworn deposes and says:

1. I am the Defendant in that certain Owyhee County criminal case designated as CR-2011-06870.
2. I make this declaration on my own personal knowledge and belief.
3. I entered a plea of guilty (Alford Plea) to two felony counts as alleged by the Prosecuting Attorney of Owyhee County.
4. The plea was subject to a Rule 11 Plea Agreement. The agreement as represented to me by my attorney, Bill Wellman, was I would enter a plea of

ASSIGNED JUDGE

guilty to the charges as finally set forth in the amended information, I would be placed on a rider and if I did a successful rider I would be placed on probation. Mr. Wellman told me numerous times I would get a rider and probation. I was never told prior to making the decision to enter a plea of guilty there would be an underlying sentence. I was simply told I would get a rider then be placed on probation. That is what I relied on in entering the plea.

5. Mr. Wellman also told me that if the judge did not follow what had been set forth in the plea agreement, then the Rule 11 would go into effect and a court date would be set and we would go to trial.

6. I do not ever remember being told or receiving any information that as part of that agreement I would waive my Rule 35 and appeal rights. The waiver of the Rule 35 and appeal rights apparently was put on the actual agreement in someone's handwriting after I had signed on to the Rule 11 Plea Agreement. I have no recollection of the handwriting being on the agreement at the time I signed the agreement or approved the agreement. I have been advised by my current attorney that as a general proposition that as a part of the Rule 11 plea agreement a defendant waives those rights. I just know that it was never mentioned to me during the discussions about the agreement. What was repeated several times was that I would do a rider and get probation.

7. Just before the sentencing hearing, Mr. Wellman told me that the judge's underlying sentence was going to be harsh. That was the first time I was told there would be a sentence. I was only told that I would get a rider and probation.

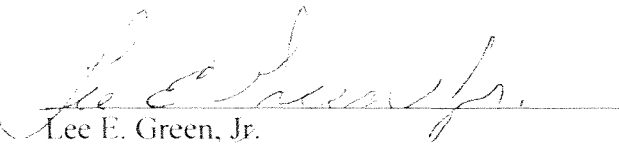
8. What I received at sentencing was a sentence to the custody of the Board of Corrections for an aggregate sentence of fifteen years fixed followed by a term of fifteen years indeterminate with the Court retaining jurisdiction (the rider). Once I completed the rider I would be placed on probation.
9. So Mr. Wellman said to me to do a good rider and I would be back before the judge and be placed on probation.
10. I completed a successful rider and received a recommendation from the Board of Corrections to be placed on probation.
11. When the review hearing was conducted a new judge was involved in the case. Judge Culet was the original sentencing judge. Judge Husky was the judge at the review hearing. Judge Husky is a female judge. Mr. Wellman, a few days prior to the review hearing, told me that a new judge had been assigned to my case and the new judge was female. I asked Mr. Wellman if we get a different judge because I was uncomfortable with a female judge conducting the review. I only learned of this change two days before the review hearing. Mr. Wellman said we could not change judges but since I had completed a successful rider I would be placed on probation.
12. At the review hearing, Judge Husky announced that even though I had completed a successful rider, in her opinion, I could not be rehabilitated and she dropped jurisdiction which obligated me to serve the underlying sentence.
13. I learned at that point there was no language in the Rule 11 agreement binding the judge to follow the recommendation of the Board of Corrections that I be

placed on probation even though I had been promised by my attorney I would serve a rider and be placed on probation.

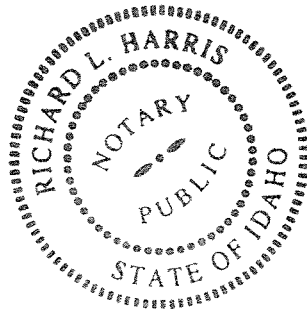
14. The only reason I agreed to the Rule 11 plea agreement was because of that promise that I would be placed on probation after the rider.
15. I completely relied on that promise when I agreed to the Rule 11 agreement.
16. I am aware that Mr. Wellman did file a Rule 35 and an Appeal but those were dismissed based upon the waiver contained as part of the Rule 11 agreement.
17. I believe that my attorney failed in his representation of me in the following respects:
 - a. Failing to advise me that I had waived my right to file a Rule 35 Motion and/or an appeal.
 - b. Promising me that if I agreed to the Rule 11 plea agreement I would only serve a rider and then be placed on probation.
 - c. Failing to ensure that the Rule 11 plea agreement contained language binding the judge to placing me on probation if I successfully completed the rider and received a recommendation from the Board of Corrections of probation and leaving it to the reviewing judge to place me on probation.
 - d. Failing to disqualify Judge Husky upon her assignment to the case and knowing of the judge's proclivities and/or bias in sex offender cases.
 - e. Failing to be prepared, to having reviewed the Rule 11 language to protect my interests, and to offer clear, unambiguous, and accurate

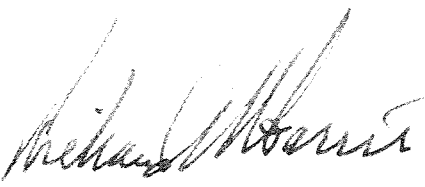
information and advice to me at the time of acceptance of the Rule 11 plea agreement.

18. I relied on the advice of my attorney in making the decisions I made in this matter. I was advised I would be placed on probation and that did not occur. That advice was wrong, the consequence of which I am obligated to serve at least a fifteen year fixed sentence. And I could not challenge the decision of the reviewing Court by Rule 35 or an appeal.
19. I believe I was not ably served by my attorney as stated above and believe I should be entitled to the relief provided by this Post Conviction Relief proceeding.


Lee E. Green, Jr.

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public for Idaho, on the 5th day of ~~February~~ March, 2013.




Notary public for Idaho
Residing at: Idaho
Commission Expires: 1/31

FILED

AM 3:00 PM

MAR 07 2013

Charlotte Sherburn, Clerk

TRINA AMAN

Deputy Clerk

Douglas D. Emery
Owyhee County Prosecuting Attorney
Owyhee County Courthouse
P. O. Box 128
Murphy, Idaho 83650
Phone 208-495-1153
Facsimile 208-495-2592

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN, JR.,
Petitioner,

Vs.

THE STATE OF IDAHO,
Respondent.

CV-2013-02960

Case No. CR-2011-6870-M

STATE'S OBJECTION TO PETITION
FOR POST CONVICTION RELIEF;
DENIAL OF ALL MATERIAL
ALLEGATIONS -and-

STATE'S MOTION FOR SUMMARY
DISMISSAL OF PETITION

COMES NOW, Respondent State of Idaho, by and through, Douglas D. Emery,
Owyhee County Prosecuting Attorney to enter a formal objection to the Petition for Post
Conviction Relief , to enter denials to all material allegations contained therein, and to
move for Summary Dismissal of the petition for Post Conviction Relief, filed on or about
March 4, 2013.

STATE'S OBJECTION TO PETITION
FOR POST CONVICTION RELIEF

PAGE - 1

ORIGINAL

Two (2) defense counsel assisted petitioner in preparation of his case for trial

As the underlying criminal case CR- 2011-06870, was being readied for jury trial, petitioner had benefit of two (2) seasoned counsel; William H. Wellman and David J. Smethers, to assist in his defense of the charges.

Negotiated binding I.C.R. 11 Agreement

In the course of reaching a negotiated resolution short of trial in the underlying criminal case CR- 2011-06870, the procession agreed to dismiss multiple counts of lewd conduct with a minor, Idaho Code §18-1508 and reduce one of the charges from Sexual Battery, Idaho Code §18-1507(f) to Injury to a Child, Idaho Code §18-1501(1). As part of that negotiated resolution, reached freely at arm's length, Defendant Lee Edd Green expressly entered a "waiver of Rule 35, Appeal and Post Conviction." That I.C.R. 11 Plea Agreement, affixed hereto as **ATTACHMENT 1**, was *prepared by defense counsel*.

The I.C.R. 11 Agreement expressly provided that the--- "*Terms and length of sentences will be open for argument;*" and that "*The state is free to argue for imposition of sentence after the retained jurisdiction was free to bears petitioner's signature, as well as those of the prosecutor and defense counsel.*" Emphasis added.

The binding Rule 11 Agreement did not guarantee that petitioner's sentence would be limited to a retained jurisdiction, nor that he was guaranteed that he would be placed on probation following a retained jurisdiction. The terms of such agreement were read in open court and placed on the record at the time of entry of petitioner's

guilty plea.

That binding Rule 11 Agreement was signed by Petitioner Lee Edd Green as well as counsel. See **ATTACHMENT 1**.

The Petition for Post Conviction Relief, filed in this matter is in direct violation of that signed Rule 11 Agreement, entered in good faith and placed on record.

Waiver by Petitioner of his rights to file I.C.R. 35 Motion, Appeal and Post Conviction Relief

Under the Binding Rule 11 Agreement, Petitioner Lee Edd Green, knowingly, voluntarily and intelligently waived his rights to file to seek a reduction of his sentence pursuant to Idaho Criminal Rule 35. Likewise, the petitioner made knowing, voluntary and intelligent waivers of this right to appeal any issue in the underlying case and likewise waived his right to Post Conviction Relief. Such agreement was entered on the record at the time of the entry of his guilty pleas.

State's Motion for Summary Dismissal

The State seeks Summary Dismissal of the petition of March 4th, 2013, pursuant to Idaho Code §19-4906 (c), in "that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

There are two separated basis under which the Court may properly grants the State's Motion for Summary Dismissal; those being: 1) Waiver and 2) Untimeliness.

1. Petitioner waived his Post Conviction Rights

In the underlying case, at least two (2) rulings have been entered reflecting that

pursuant to the binding I.C.R. Agreement, negotiated at arms length, Petitioner waived his rights under I.C.R. 35, his right to appeal and right to pursue Post Conviction Relief. The ORDER DENYING MOTION FOR REDUCTION OF SENTENCE, entered by Molly J. Huskey entered August 17, 2012, as well as, the Idaho Supreme Court's ORDER GRANTING MOTION TO DISMISS APPEAL entered August 22, 2012 (Supreme Court of Idaho, Ref. 12-399; State v. Lee Edd Green), each respectively have held that all such rights were waived by Petitioner at the time of his acceptance of the I.C.R. Agreement and entry of guilty pleas. In view of the waivers entered by Petitioner, he has no standing and no basis in law to pursue the Petition for Post Conviction Relief.

2. Untimeliness

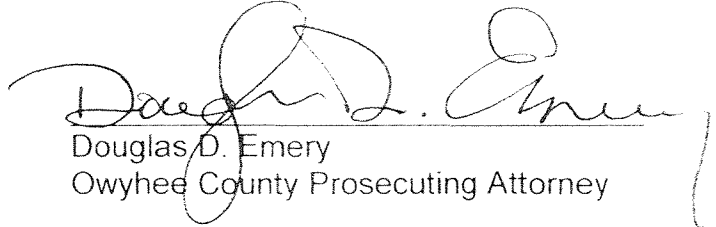
The Petition for Post Conviction Relief is disingenuous and in direct violation the Binding I.C.R. 11 Agreement which petitioner entered. Petitioner was sentenced November 18, 2011. The requisite time in which to pursue a Post Conviction Relief is set forth in Idaho Code §19-4902 (1), which expressly provides that the post conviction petition or application must be filed *within one (1) year* of any right to appeal. Assuming that Petitioner had waived only his right to appeal and to pursue an I.C.R. 35 Motion, his window of time, in which to have actually filed a Post Conviction Relief Petition, would have been one year from the entry of the sentence imposed by the court; or on or before , November 2012, more than three months ago. The petition is untimely.

A petitioner's failure to file a timely petition for post conviction relief, because of his mistaken belief that he had more time to file, does not equate, to a deprivation to do so. Schultz v. State, 151 Idaho 383, 256 P. 3d 791, (Ct. App. 2011).

Conclusion

Based upon the preceding, the state urges that Summary Dismissal be granted.

Respectfully submitted this 7th day of March, 2013.


Douglas D. Emery
Owyhee County Prosecuting Attorney

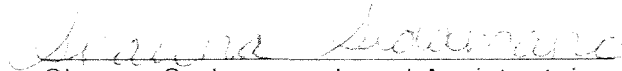
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 2013, I placed a true and correct copy of the foregoing State's Objection to Petitioner for Post Conviction Relief to the following:

Richard L. Harris, Esq.
Attorney at Law
P.O. Box 1438
Caldwell, ID 83606-1438

Keith and Jolyn Green
250 S. 8th Ave. W.
Marsing, ID 83639

Sharon Green
936 Monument Peak Dr.
Gardnerville, NV 89460


Shauna Sedamano, Legal Assistant in
Office of Owyhee County Prosecuting Attorney

WILLIAM H. WELLMAN
DAVID J. SMETHERS
OWYHEE COUNTY PUBLIC DEFENDERS
PO Box 453
Nampa, Idaho 83653-0453
208-336-1145
FAX-208-336-1263

Attorney for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

STATE OF IDAHO)	
	)	CASE NO. 2011-4183
Plaintiff,)	
	)	IDAHO CRIMINAL RULE 11
vs.)	
	)	PLEA AGREEMENT
GREEN, Lee Edd)	
)	
Defendant.)	

Comes now the defendant, by and through the above listed attorneys of record, and the State of Idaho, represented by Douglas Emery and Erica Kallin, pursuant to Idaho Criminal Rule 11, hereby agree as follows:

The defendant will to plead guilty to Counts I, II, and plead pursuant to *North Carolina vs. Alford* in Count III, as listed in the THIRD AMENDED INDICTMENT. The remaining counts will be dismissed upon acceptance by the Court of this Rule 11 Plea Agreement. In exchange for the aforementioned pleas, the parties agree that the defendant will be sentenced as follows:

- The defendant will undergo a psychosexual evaluation by Dr. Johnston of SANE Solutions prior to sentencing;
- Terms and length of sentences will be open to argument;

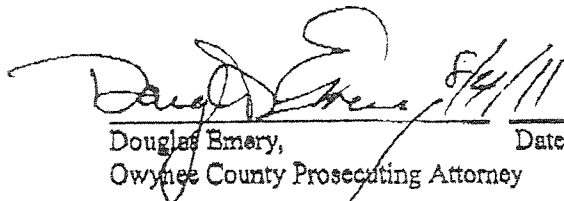

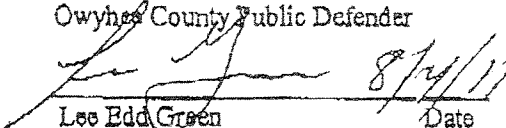
-The Court will retain jurisdiction in order to evaluate the defendant for an approximate period of one-hundred eighty days at the time of the sentencing hearing.

-The state is free to argue for imposition of sentence after the retained jurisdiction program.

Other terms and conditions of this plea agreement:

Victims Restitution ~
Waiver of Rule 35, Appeal and Post Conviction

Should the Court decline to accept this Rule 11 plea agreement, the defendant shall be allowed to withdraw his pleas of "guilty" and the matter will be reset for jury trial.

	8/4/11		8/4/11
Douglas Emery, Owyhee County Prosecuting Attorney	Date	William Wellman Owyhee County Public Defender	Date
			8/4/11
		Lee Edd Green Defendant	Date

James C. Morfitt, District Judge

DATED this _____ day of _____, 2011

MAR 18 2013

Charlotte Sherburn, Clerk

TRINA AMAN

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

<p>LEE EDD GREEN, JR.,</p> <p>Petitioner,</p> <p>vs.</p> <p>THE STATE OF IDAHO,</p> <p>Respondent.</p>	<p>CASE NO. CV13-2860</p> <p>ORDER SETTING STATUS CONFERENCE, AND EVIDENTIARY HEARING</p>
--	---

This is a civil action.

THEREFORE, THIS ORDERS THAT:

The above-described matter is set as follows: if an evidentiary hearing is granted it shall be set for a for a one-half day (1/2) day **evidentiary hearing to commence on the 12th day of July, 2013 at 1:30 p.m.** before the Honorable Molly J. Huskey, at the Owyhee County Courthouse, Murphy, Idaho. A **telephonic status** conference will be set for the **8th day July, 2013 at 8:15 a.m.** in Caldwell, Canyon County, Idaho.

THIS ALSO ORDERS that the following scheduling dates shall be complied with:

- (a) Amendment of pleadings shall be completed by **April 3, 2013;**
- (b) Any answers or responses shall comply with IRCP 12(a);
- (c) All discovery requests and supporting memoranda shall be completed by **May 16, 2013;**

- (d) The filing, noticing, and hearing of all pretrial motions, including motions for summary dismissal, shall be filed and noticed in compliance with I.R.C.P. 56(c);
- (e) The last day for petitioner to disclose witnesses, including experts, together with their opinions and reports, shall be by **May 30, 2013**;
- (f) The last day for respondent to disclose rebuttal experts, together with their opinions and reports shall be **June 6, 2013**;
- (g) **The court further notifies** the parties they must **strictly** adhere to **I.R.C.P. 56(a), 56(b), 56(d) and 56(e)**. If affidavits setting out **facts on personal knowledge** do **not** demonstrate **on their face** the evidence contained therein is admissible under the Idaho Rules of Evidence (or a case on point construing the same) or I.C. §19-4903, the parties must file a memorandum in support of the affidavit(s) or applicable parts, specifically referencing the evidence in question and citing the court and opposing counsel to the rule or case supporting the court's consideration of the affidavit(s) proffered;
- (h) In the event any party elects to move to **strike an affidavit** as setting forth evidence that is not otherwise admissible, such moving party, in either the **motion or a supporting memorandum**, will direct the court with specificity to the paragraph or paragraphs objected to and will further cite the court to the rule or case that supports the motion to strike.
- (i) **The court reminds** the parties that a motion under I.R.C.P. 37(a) requires a certification that the movant has, in good faith, conferred or

attempted to confer with the party not making the disclosure (serving as the object of the motion) in an effort to secure the disclosure without court action.

(j) Any requests for judicial notice must specifically list and include the documents for which judicial notice is requested.

(a) The parties shall review and comply with any and all standards articulated in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012);

(b) Any amendments to the petition shall comply with I.R.C.P. 15(a). Upon filing either the amended petition or a motion for leave to file the amended petition, counsel shall verify that he/she has visited with the petitioner, reviewed the claims listed in both the initial and amended post-conviction petition and obtained the petitioner's verified signature for the amended petition.

THIS FURTHER ORDERS that all parties shall file with the court no later than seven (7) days prior to the status conference the following:

- (a) A concise written statement of the theory of recovery or defense, the elements of such theory, and supporting authorities;
- (b) A written list identifying stipulated facts, all witnesses, and all exhibits to be introduced at trial, accompanied by a statement pertaining to each exhibit on whether each exhibit in question is stipulated as admissible;
- (c) A written statement that the parties have discussed settlement or the use of extrajudicial proceedings including alternative dispute techniques to resolve the dispute.

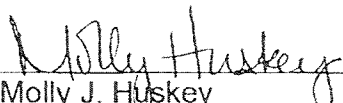
Henceforth, all parties shall submit two additional copies of all filed motions, briefs, supporting memoranda, and affidavits as follows:

- One hard copy to the Judge's chambers, and
- One electronic copy, in MS WORD format, to the Judge's law clerk at the following email address: amedema@canyonco.org.

THIS FINALLY ORDERS that:

- Attorneys attending the status conference must have authority to enter into stipulations regarding factual issues and admissions of exhibits or of other evidence; and,
- Noncompliance with this ORDER may result in the court imposing sanctions.
- All exhibits each party intends to introduce at trial will be pre-marked in coordination with the court's clerk and under the positive control of the clerk throughout the trial.**
- Any open or closing presentations shall be pre-marked as demonstrative exhibits and provided to the court two (2) business days before trial.**

Dated this 12th day of March, 2013.


Molly J. Huskey
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on 15th day of March, 2013, s/he served a true and correct copy of the original of the foregoing ORDER SETTING STATUS CONFERENCE, AND EVIDENTIARY HEARING on the following individuals in the manner described:

- Upon counsel for the petitioner:

Richard L. Harris
ATTORNEY AT LAW
1023 Arthur St
PO Box 1438
Caldwell, ID 83606

- upon counsel for respondent:

Douglas D. Emery
OWYHEE COUNTY PROSECUTOR'S OFFICE
Owyhee County Courthouse
PO Box 128
Murphy, ID 83650

when s/he caused the same to be deposited into the US Mails, sufficient postage attached..

CHARLOTTE SHERBURN, Clerk of the Court

By: 
Deputy Clerk of the Court

The Judicial District Court, State of Idaho
in and For the County of Owyhee
Murphy, Idaho

FILED

11:47 A.M. P.M.

APR 19 2013

Charlotte Sherburn Clerk
Trina Aman
TRINA AMAN
Deputy Clerk

LEE EDD GREEN, JR.,
Petitioner,
vs.
STATE OF IDAHO,
Respondent.

Case No: CV-2013-0002860-M

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Status Conference **Monday, May 13, 2013 01:00 PM**
Judge: Molly J. Huskey
Location: Canyon County Courthouse, Caldwell, ID 83605

(Mr. Emery will appear in Courtroom #1, Murphy, Idaho)
(Mr. Harris can appear telephonically or appear at the Canyon County Courthouse).

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Friday, April 19, 2013.

Richard L. Harris
Fax:459-1300

Douglas D. Emery
Copy placed in basket

Dated: Friday, April 19, 2013
Charlotte Sherburn
Clerk Of The District Court

By: *Trina Aman*
Deputy Clerk

Trina Aman

From: Trina Aman
Sent: Friday, April 19, 2013 11:04 AM
To: Linda Steude (secls@canyonco.org)
Subject: FW: Lee Green
Attachments: doc20130419105826.pdf

Attached: NOH

Thanks,
Trina

Send Result Report

MFP



Firmware Version 2GR_2000.022.001 2008.08.06

Job No. : 058936 Total Time : 0'00'11" Page : 001

Completed

Document : doc20130419105814

Third Judicial District Court, State of Idaho
In and For the County of Owyhee
Murphy, Idaho

FILED
H/O A.M. P.M.
APR 19 2013

LEE EDD GREEN, JR.,
Petitioner,
vs.
STATE OF IDAHO,
Respondent.

Charlotte Sherburn, Clerk
Thana Ama
Deputy Clerk

Case No: CV-2013-0002860-M

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Status Conference Monday, May 13, 2013 01:00 PM
Judge: Molly J. Huskey
Location: Canyon County Courthouse, Caldwell, ID 83605

(Mr. Emery will appear in Courtroom #1, Murphy, Idaho)
(Mr. Harris can appear telephonically or appear at the Canyon County Courthouse).

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Friday, April 19, 2013.

Richard L. Harris
Fax:459-1300

No.	Date and Time	Destination	Times	Type	Result	Resolution / ECM
001	04/19/2013 10:58	4591300	0'00'11"	FAX	OK	200x200 Fine / On

Third Judicial District Court, State of Idaho
and For the County of Owyhee
Murphy, Idaho

Presiding Honorable Molly Huskey Dated: May 13, 2013

LEE EDD GREEN, JR.,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

Case No: CV-2013-0002860-M

COURT MINUTES

Telephonic – Recording Courtroom #1 Murphy
Time: 1:05 p.m.

THE ABOVE ENTITLED MATTER Came on regularly for hearing a Status Conference. Douglas D. Emery , Owyhee County Prosecuting Attorney, present. Richard Harris not present.

The Court noted that Mr. Harris was not present in Caldwell and was not present telephonically.

Notice of Hearing was faxed to Mr. Harris's Office April 19, 2013 instructing him to appear at the Canyon County Courthouse or telephonically.

The Court inquired of the Mr. Emery and the Clerk, as to whether or not Mr. Harris contacted the Clerk's Office.

The Clerk and Mr. Emery both responded that Mr. Harris had not contacted their Offices.

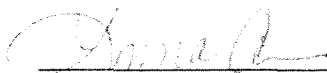
The Court is close to issuing an Order to Show Cause for Mr. Harris to appear before the Court and explain his failure to appear.

The Court requested that a new conflict attorney be appointed for the petitioner in this matter.

It was noted that Mr. Harris is retained counsel.

The Court will reset a telephonic status conference for July 8, 2013 at 1:00 p.m.

Dated: Monday, May 13, 2013
Charlotte Sherburn
Clerk Of The District Court

By: 
Deputy Clerk

This Judicial District Court, State of Idaho
in and For the County of Owyhee
Murphy, Idaho

11:00 AM
A.M. 2:08 P.M.

MAY 13 2013

ANGELA BARKELL, CLERK

~~TRINA AMAN~~
Deputy Clerk

LEE EDD GREEN, JR.,
Petitioner,
vs.
STATE OF IDAHO,
Respondent.

Case No: CV-2013-0002860-M
AMENDED
NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Status Conference

Monday, July 08, 2013 01:00 PM

Judge: Molly J. Huskey

Location: Canyon County Courthouse, Caldwell, Idaho

Mr. Emery will appear in Courtroom #1, Murphy, Idaho

Mr. Harris must provide the Court with a telephone number that he may be reached at or personally appear at Judge Huskey's or Linda Steude's Office at the Canyon County Courthouse in Caldwell for further instructions.

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Monday, May 13, 2013.

Richard L. Harris
Fax: 459-1300

Douglas D. Emery
Copy placed in basket

Dated: Monday, May 13, 2013
Charlotte Sherburn
Clerk Of The District Court

By: TRINA AMAN
Deputy Clerk

Trina Aman

From: Trina Aman
Sent: Tuesday, May 14, 2013 08:22 AM
To: Tara Hill (secth@canyonco.org); Linda Steude (secls@canyonco.org)
Subject: FW: Lee Edd Green, Jr. vs. State of Idaho CV-13-02860
Attachments: doc20130513165633.pdf

Attached: Amended NOH

Thanks,
Trina

FILED

A.M. 11 P.M.

MAY 14 2013

ANGELA BARKELL, CLERK

TRINA AMAN

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

CASE NO. CV13-2860

NOTICE OF INTENT TO DISMISS
UNIFORM POST-CONVICTION
PETITION

In Owyhee County case CR-2011-6870, pursuant to a plea agreement, the Petitioner pleaded guilty to two counts of Lewd Conduct with a Child under 16 and one count of felony Injury to Child. Pursuant to the plea agreement, the Petitioner waived his right to file an appeal, a motion pursuant to Idaho Criminal Rule 35, and any petitions pursuant to the Uniform Post-Conviction Petition Act. He was sentenced to a unified term of 20 years, with 10 years fixed, concurrently, on each of the lewd conduct charges and a unified term of 10 years, with five (5) years fixed on the injury to child, with this sentence running consecutively to the lewd conduct charges, with the court retaining jurisdiction. The Judgment of Conviction was entered December 20, 2011.

Following the retained jurisdiction program, the Court relinquished jurisdiction. The Petitioner filed a motion pursuant to Idaho Criminal Rule 35 which was denied based on the plea agreement. The Petitioner also filed an appeal, which was dismissed by the Idaho Supreme Court. A Remittitur was issued September 12, 2012.

The Petitioner filed this petition pursuant to the Uniform Post-Conviction Petition Act, on December 13, 2012. In this verified petition, the Petitioner claims that:

1. He received ineffective assistance of counsel because his attorney:
 - a. Presented no defense to the charge;
 - b. Did not subpoena witnesses that would support a self-defense claim nor did he raise the self-defense claim;
 - c. Relied on a mistaken identity claim and told the Petitioner that it was the victim's word against the Petitioner's;
 - d. Never called the Defendant as a witness to refute the identification of the Petitioner by the victim;
 - e. Did not present the affidavit of an eye witness that established the victim was the aggressor and that any act of the Petitioner was done in self-defense or in response to the victim's actions;
 - f. Counsel refused to raise the self-defense claim or put on witnesses for that defense;
2. Because of counsel's actions (or inactions), the Petitioner has been wrongly convicted of the offense.

The State filed an objection, asserting that Petitioner has waived his right to file this petition based on the plea agreement and that the Petition is untimely. Based on the above, the Court issues this Proposed Notice of Intent to Dismiss and gives the Petitioner 30 days to respond to the issues addressed herein. The Court gives notice of its Intent to Dismiss on the following grounds:

Timeliness

Post-conviction petition must be filed "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). In this case, because the Petitioner waived his right to file an appeal, he had one year to file his post-conviction petition from the entry of judgment, thus, he had one year from December 20, 2011, or until December 20, 2012. Because the petition was not filed until March 6, 2013, the court finds the petition was not timely filed, nor has any evidence been presented to justify any equitable tolling, therefore, the Court gives notice of its intent to dismiss the petition on this ground.

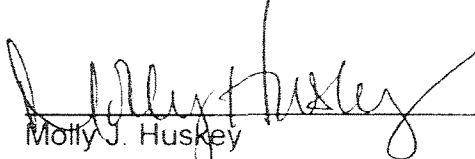
Waiver of Right to File Post-Conviction Petition

The court declines to dismiss the Petition on this ground. While Petitioner may have waived the right to file a petition pursuant to the Uniform Post Conviction Petition Act, the State has not established that it was a knowing, intelligent and voluntary waiver of his statutory right to seek collateral review. A waiver provision of this sort creates a conflict of interest for the defense attorney who advises his client to accept such a term of the plea agreement, particularly where the defense attorney is advising the client to waive any claims against his defense counsel without getting any independent advice about the waiver. (See NACDL Ethics Advisory Committee Formal Opinion 12-02, NOTICE OF INTENT TO DISMISS - Page -3

October 27, 2012 (opining that "the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client's ability to claim ineffective assistance of counsel [because] the lawyer has a conflict of interest because it becomes a prospective limiting of liability.") Such a provision can also create an ethical violation for the prosecutor who seeks such a waiver. *Id.* As such, the Court declines to find the waiver of the right to pursue post-conviction relief was a knowing, intelligent and voluntary waiver.

Therefore, it is HEREBY ORDERED, that unless the Petitioner provides admissible evidence to address the above deficiency, the Petition will be dismissed on June 17, 2013.

Dated this 14th day of May, 2013.


Molly J. Huskey
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of May, 2013, s/he served a true and correct copy of the original of the foregoing NOTICE OF INTENT TO DISMISS PETITION on the following individuals in the manner described:

- upon counsel for petitioner:

Richard L. Harris
P.O. Box 1438
Caldwell, Idaho 83606-1438

- upon counsel for Respondent:

Douglas Emery
P.O. Box 128
Murphy, Idaho 83650

- and upon Petitioner:

Lee Edd Green #101330
Idaho State Correctional Institution
Unit 14
P.O. Box 14
Boise Idaho 83707

and/or when s/he deposited each a copy of the foregoing ORDER in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

ANGELA BARKELL
Angela Barkell
CHRIS YAMAMOTO,
Clerk of the Court

By: **TRINA AMAN**
Deputy Clerk of the Court

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1438
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

FILED
A.M. 4:45 P.M.
MAY 28 2013
ANGELA BARKELL, CLERK
TRINA AMAN
Deputy Clerk

Attorney for Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, JR.,	)	CASE NO. <i>CV-13-02860</i>
)	
Petitioner,	)	MOTION FOR LEAVE TO FILE
	)	AN AMENDED PETITION FOR
vs.	)	POST CONVICTION RELIEF AND
	)	NOTICE OF HEARING
)	
THE STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

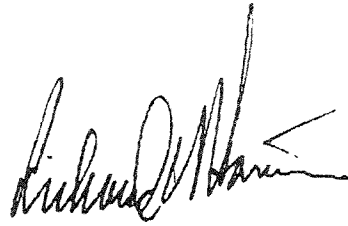
COMES NOW the above named Petitioner by and through his attorney and moves the court for an Order permitting and allowing the filing of an Amended Petition for Post Conviction Relief, a copy of which is attached to this Motion and made a part thereof. The grounds of this Motion are as follows:

1. This motion is made pursuant to Rule 47, ICR.
2. Clarification of the issues subject to the Petition for Post Conviction is needed to more specifically frame the issues before the Court in support of Defendant's entry of an Alford plea of guilty, the Rule 11 Plea Agreement and

the issues involving the waiver of Defendant's right to file Rule 35 motions, right to file an appeal, and right to pursue post conviction relief.

- 3. Clarification is needed in the pleading to more clearly allege factors indicating ineffective assistance of counsel.
- 4. Defendant has previously filed with the Court an affidavit in support of his Petition which should be considered in support of this motion to amend the petition.

Dated this 26 day of May, 2013.



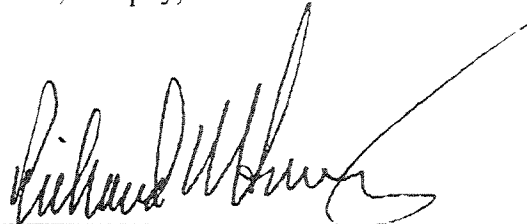
Richard L. Harris
Attorney for Defendant

NOTICE OF HEARING

TO: Clerk of the Court
Doug Emery, Owyhee County Prosecuting Attorney

Please take Notice that the Defendant will call for hearing the above and foregoing Motion to Amend Petition for Post Conviction Relief at the hour of 1:00 p.m., July 8, 2013 or as soon thereafter as the matter can be heard at the courtroom of the above entitled Court, Owyhee County Courthouse, Murphy, Idaho.

Dated this 26 day of May, 2013.



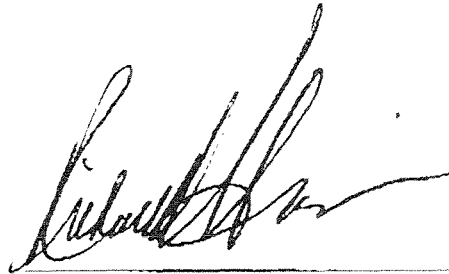
Richard L. Harris

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing instrument was served upon the following this X day of May, 2013:

Douglas Emery
Owyhee County Prosecutor
P. O. Box 128
Murphy, Idaho 83650
Facsimile: (208) 495-2592

_____	UNITED STATE MAIL
_____	COURTHOUSE BASKET
<u>✓</u>	FACSIMILE



RICHARD L. HARRIS

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1328
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

FILED
A.M. / P.M.
MAY 28 2013
ANGELA BARKELL, CLERK
TRINAMAN
Deputy Clerk

Attorney For: Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, Jr.,	)	CASE NO. GR-2011-06870
)	
Petitioner,	)	MEMORANDUM IN
	)	OPPOSITION OF INTENT TO
vs.	)	DISMISS PETITION FOR POST
	)	CONVICTION RELIEF
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

13 02800 JK

COMES NOW Counsel for the above named Defendant and submits the following Memorandum in Opposition to the Notice of Intent to Dismiss Petition for Post Conviction Relief filed previously by the Court.

STATEMENT OF CASE

The Defendant entered an "Alford" plea of guilty pursuant to a Rule 11 Plea Agreement to two counts of Lewd Conduct with a child under 16 in violation of Idaho Code 18-1508, and one count of Felony Injury to a Child in violation of Idaho Code 18-1501(1) on November 28, 2011. The Rule 11 Plea Agreement specifically provided that the Court retain jurisdiction in the matter to allow an opportunity for the Board of Corrections to evaluate the Defendant to determine if he was a suitable candidate for

community based supervision. The Court sentenced the Defendant on December 20, 2011 to an aggregate term of 15, years fixed followed by 15 years indeterminate with the Court retaining jurisdiction for 180 days. A review hearing was held on the Retained Jurisdiction on June 8, 2012 and an Order Relinquishing Jurisdiction and imposing the underlying sentence was entered on June 15, 2012. The Court had received an evaluation from the Board of Corrections recommending the Defendant be returned to the community and be placed on probation. Notwithstanding the recommendation, the Court dropped jurisdiction and imposed the sentence. Then Counsel for the Defendant on June 26, 2012, filed a Rule 35 Motion requesting a reduction of sentence. A Notice of Appeal was filed on June 27, 2012. An Order denying the Rule 35 Motion was entered on August 27, 2012. An Order of the Idaho Supreme Court dismissing the appeal was entered on August 22, 2012. Both dismissals were based upon the Defendant's waiver of both of those rights as part of the Rule 11 plea agreement. A Remittitur remanding the case from the Supreme Court to the District Court was filed on September 12, 2012. The Defendant filed a Petition for Post Conviction relief on March 6, 2013. Pending before the Court is Defendant's Amended Petition for Post Conviction Relief and Defendant is requesting leave of Court to file the Amended Petition and proceed on the basis of the Amended Petition.

ISSUES BEFORE THE COURT

1. ON WHAT DATE DID THE ONE YEAR STATUTE OF LIMITATIONS BEGIN TO RUN ON DEFENDANT'S PETITION FOR POST CONVICTION RELIEF:

- (a) Was the beginning date December 21, 2011, the day following the original sentence and the day after the Judgment and Commitment Retained Jurisdiction was filed?
- (b) Was the beginning date June 16, 2012, the day following the date of the Order Relinquishing Jurisdiction by the District Court?
- (c) Was the beginning date August 18, 2012, the day following the Order denying the relief requested by the Rule 35 Motion? Or August 23, 2012, the day following the Order dismissing the Appeal to the Supreme Court? Or September 13, 2012, the day following the Remittitur from the Supreme Court to the District Court?

ARGUMENT AND AUTHORITIES

The Court on May 14, 2013, entered a "NOTICE OF INTENT TO DISMISS UNIFORM POST-CONVICTION PETITION." Subsequent to the filing of the Defendant's Petition for Post Conviction Relief, the prosecuting attorney for Owyhee County filed an objection to the Petition alleging that the Defendant had waived his right to pursue post conviction relief because in pursuing the plea of guilty pursuant to Rule 11, ICR, the Defendant expressly waived the right to do so, and he further alleged the Petition was untimely. The Court has given notice that intends to dismiss the Petition on timeliness but has declined to dismiss the Petition on a waiver of right to file for post conviction relief.

The Court by the Notice stated:

"...the State has not established that it was a knowing, intelligent and voluntary waiver of his statutory right to seek collateral review. A waiver provision of this sort creates a conflict of interest for the defense attorney who advises his client to accept such a term of the plea agreement, particularly where the defense attorney is advising the client to waive any claims against his defense counsel without getting any independent advice about the waiver. (See NACDL Ethics Advisory

Committee Formal Opinion 12-02, October 27, 2012 (opining that ‘the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client’s ability to claim ineffective assistance of counsel [because] the lawyer has a conflict of interest because it becomes a prospective limiting of liability.’) Such a provision can also create an ethical violation for the prosecutor who seeks such a waiver. *Id.*”

It is assumed by the Defendant by the Court’s foregoing statement that if there was not a “knowing, intelligent and voluntary waiver of his statutory right to seek collateral review.” likewise there was not a knowing, intelligent and voluntary waiver of his right to file a Rule 35 motion or a right to file an appeal. It is the waiver of those two rights that is the essence of this claim of ineffective assistance of counsel, among other allegations. Some background is necessary. The Defendant’s plea to the charges upon which he was sentenced was based upon a Rule 11 binding plea agreement. The importance of the plea agreement was that the Court would retain jurisdiction and place the Defendant on the “rider” program notwithstanding the underlying sentence. In agreeing to that resolution of the case the Defendant agreed to forego other defenses which he believed were important to him, and the assurance he would be placed on probation after completion of the rider. He would not have agreed to the plea arrangement were not that if that was not the basis of the agreement. On December 20, 2011 when pronouncing judgment in this matter the Court did retain jurisdiction in this case. The title of the judgment is “Judgment and Commitment Retained Jurisdiction.” The Defendant was committed to the Board of Corrections to determine if he could qualify for community based supervision on probation. The Defendant did receive a recommendation for community based probation. However, the Court did not

agree with the recommendation of the Review Committee and relinquished jurisdiction of the Court resulting in a situation where the Defendant would serve the sentence imposed.

It is the Order of the Court relinquishing jurisdiction that has brought this case to the posture that it is today. It was anticipated by Defendant's attorney at the time and the assurance he conveyed to the Defendant, that if the Defendant completed a favorable rider and received a recommendation of probation that the Court would place the Defendant on probation. This counsel has practiced law in Canyon County for over forty years, both as a prosecutor and as defense counsel, and this is the first case I am aware of where a court has retained jurisdiction, where a defendant has received a probation recommendation by the Board of Corrections Review Committee and the Court has dropped jurisdiction and not placed the defendant on probation. There have been cases where a defendant has not received a probation recommendation from the review committee and the court dropped jurisdiction. That is a reasonable response by the court. The court requires a defendant to conduct himself on the rider in such manner as to earn a recommendation of probation. But where a Defendant has done so and received such recommendation it is expected that the court will follow that recommendation and allow the defendant an opportunity to succeed on probation.

It is at the point where the Court relinquished jurisdiction in this case that it becomes convoluted. Idaho Code 19-4902(a) establishes the time frame in which an application for post conviction relief may be filed. That statute provides in part:

"...An application 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."

The question then is when did the expiration of the time for appeal begin? When was that date? Did it begin on December 20, 2011, honoring the waiver of an appeal contained in the plea agreement? The Court has announced in the Notice of Intent to Dismiss that the one year period of time commenced to run from December 20, 2011, or until December 20, 2013 apparently honoring the waiver in the plea agreement. If the waiver was not honored, then the expiration of the appeal time would have been 42 days later or January 31, 2012. Since the Defendant's Petition was not filed until March 13, 2013, the Court has determined the Petition was not filed timely under either calculation of time and therefore should be dismissed. But is December 20, 2011 or January 31, 2012, the correct date when the time for post conviction relief began to run?

The judgment and commitment and sentence entered on December 20, 2011, reserved jurisdiction with the Court for up to 180 days. It was contemplated that if the Defendant performed well on his rider and received a recommendation of probation he would be placed on probation and consequently in the normal course of things there would have no necessity to file an appeal or even a Rule 35 motion to request of the court further relief. However, here at the rider review hearing jurisdiction was dropped and the sentence imposed. Rule 35, ICR, provides in part "...The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction." No one would waive the right to file a Rule 35 motion in a situation where the court releases retained jurisdiction particularly in a situation where the review committee recommends probation. Jeopardy to the Defendant had not attached until the court released its jurisdiction. The Rule also provides that "...no defendant may file more than one motion seeking a reduction of sentence under

this Rule.” It makes no sense to file such motion until there is an affirmative need to do so and in this instance that would not occur until jurisdiction was released by the court. A defendant has an affirmative right to appeal from an adverse ruling on a Rule 35 Motion. (Rule 11(c) IAR) Here, the Defendant was precluded from filing a Rule 35 motion because such right to do so was waived by the language of the plea agreement. When he did so anyway, it was dismissed on the grounds that he had waived such right. As such counsel failed the defendant by agreeing to the waiver of his post judgment rights on the assumption he would be placed on probation if he did a good rider. However there is case law to the effect that a Rule 35 motion is not reviewable under the Uniform Post-conviction Procedure Act. *Hanks v State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992), *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997)

Moreover, it makes no sense to appeal from the “Judgment and Commitment Retained Jurisdiction” prior to the expiration of the retained jurisdiction. The case law indicates that expiration of the time to file an appeal is enlarged by a sentence in which the court retains jurisdiction. “In a criminal case, the time to file an appeal is enlarged by the length of time the district court retains jurisdiction, however when the court releases retained jurisdiction or places the defendant on probation, the time limitation for filing starts to run. Perfecting an appeal within the specified time is jurisdictional requirement and an appeal taken after expiration of the filing period must be dismissed.” *State v Joyner*, 121 Idaho 376 at 378 (Idaho App. 1992); *State v. Tucker*, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct. App. 1982). The period to file such an appeal is 42 days from the date the court releases its jurisdiction.

Here the Court relinquished jurisdiction of the case on June 15, 2012. The defendant would have had 120 days from that date to file a Rule 35 Motion, and 42 days or to July 27 to file a direct appeal. In fact Counsel filed a Rule 35 Motion timely which was dismissed On August 17, 2012, and an appeal was dismissed by the Supreme Court on August 23, 2012. The remittitur from the Supreme Court was filed on September 13, 2012. So was the correct time to file a Petition for Post Conviction relief December 20, 2012, or one year from June 15, 2012 or one year from September 13, 2012? In the event that retained jurisdiction enlarges the time in which to file an appeal or a Rule 35 motion as the case law cited above indicates, it must of necessity enlarge the time to file a Petition for Post Conviction Relief. Therefore the correct date from which to calculate the filing of an appeal in this case would have been not December 20, 2011, but 42 days from June 15, 2012, when the Order releasing jurisdiction by the district court occurred. Therefore, based upon that understanding, the Petition here was timely filed. And that would be true even considering a waiver by the Defendant of his right to appeal.

With reference to the waiver of his right to file post conviction motions, etc., the affidavit of Mr. Green states: "I do not ever remember being told or receiving any information that as part of that agreement I would waive my Rule 35 and appeal rights. The waiver of the Rule 35 and appeal rights apparently was put on the actual agreement in someone's handwriting after I had signed on to the Rule 11 Plea Agreement. I have no recollection of the handwriting being on the agreement at the time I signed or approved the agreement. ...I just know that it was never mentioned to me during the discussions about the agreement. What was repeated several times was that I would do a rider and get probation." (Affidavit of Lee E. Green, Jr. P. 2)

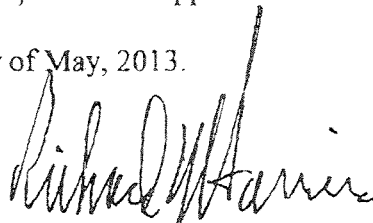
Moreover, at paragraph 17 of Mr. Green's affidavit, it sets forth with particularity the precise elements of the failure of counsel to provide effective representation with reference to the waiver issue. But in addition the Defendant entered an "Alford" plea of guilty to the charges because he believed he had defenses to the charges brought against him but the same were not fully investigated or pursued and ultimately relied on the promises made to him that if he served a good retained jurisdiction program he would be placed on probation. Relying on that promise he accepted the plea agreement and entered his plea.

The Court in its Notice of Intent to Dismiss the Petition has stated that it has declined to dismiss on the grounds of the waiver of defendant's right to file such Petition but rather on timeliness of the Petition. But, based on the foregoing a dismissal on timeliness would be in error.

CONCLUSION

The retention of jurisdiction in this matter by the Court enlarged the time in which the Defendant could file a direct appeal to the appellate court. Even if there was a waiver of the Defendant's right to appeal, the limitation of time would not have commenced until June 15, 2012 plus the 42 days in which to perfect the appeal.

Respectfully submitted this 28 day of May, 2013.

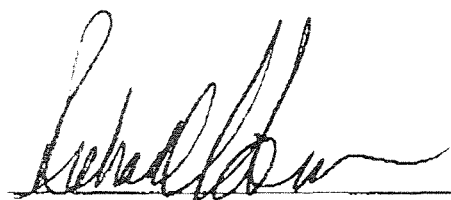


Richard L. Harris

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a true and correct copy of the foregoing instrument was served upon the following this 14 day of May, 2013:

Douglas Emery	_____	UNITED STATE MAIL
Owyhee County Prosecutor	_____	COURTHOUSE BASKET
P. O. Box 128	_____	
Murphy, Idaho 83650	<input checked="" type="checkbox"/>	FACSIMILE
Facsimile: (208) 495-2592		



RICHARD L. HARRIS

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1438
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

Attorney for Petitioner

FILED
A.M. 1:15 P.M.

MAY 28 2013

ANGELA BARKELL CLERK
TRINA AMAN
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, JR.,)

Petitioner,)

vs.)

THE STATE OF IDAHO.)

Respondent.)

CASE NO. *CV-13-02860 JK*

AMENDED PETITION FOR
POST CONVICTION RELIEF

COMES NOW the above named Petitioner by and through his attorney and submits this Amended Petition for Post Conviction Relief this and alleges as follows:

1. Petitioner is presently in the custody of the Idaho Board of Corrections. A Judgment and Commitment Retained Jurisdiction was entered in the above named Court on December 20, 2011 sentencing the Defendant to an aggregate term to the Board of Corrections for 15 years fixed followed by 15 years indeterminate with the Court retaining jurisdiction for 180 days. The rider review was conducted on June 8, 2012, with the Court relinquishing jurisdiction and imposing the underlying sentence by Order of the Court dated June 15, 2012. A Rule 35 Motion for a reduction of sentence was filed on June 26, 2012. A Notice of Appeal was filed on June 27, 2012. An Order denying the

Rule 35 Motion was entered on August 17, 2012. An Order dismissing the appeal was entered on August 22, 2012 and a Remittitur remanding the case from the Supreme Court to the District Court was filed of record on September 12, 2012. The defendant is confined currently to the custody of the Board of Corrections.

2. This Petition is brought pursuant to the Idaho Uniform Post-Conviction Procedure Act, Idaho Code Section 19-4901 et. seq.

3. This Petition is supported by the affidavit of the Petitioner which is attached hereto and made part of this Petition by reference.

4. Defendant was represented at the District Court trial proceedings by the Owyhee County Public Defenders Office.

5. Defendant declares that he received ineffective assistance at the trial of the above referenced matter in the following particulars:

- a. Defendant's attorney presented no defense to the charges against him or conducting a complete investigation regarding the charges.
- b. That Defendant's attorney knew that defenses existed and that witnesses existed in support of his defense. But Counsel did not investigate or subpoena such witnesses on Defendant's behalf.
- c. Defendant's counsel apparently relied upon a mistaken identity claim, asserting that the State's case in support of the charge amounted to only the victim's word against the word of the Defendant.
- d. That even though trial counsel was aware that defenses existed and knew witnesses were available at the time of trial to raise such defenses, counsel did not proceed with such claim and refused to offer such defense even though Defendant requested he do so, and provided the names of the witnesses who could support such claims and defenses. Rather trial counsel urged the Defendant to resolve the case through a plea rather than pursue defenses that pertained to the allegations.
- e. Trial Counsel permitted and allowed the Rule 11 Plea Agreement to contain language which waived Defendant's right to appeal the Judgment and Commitment Retained Jurisdiction entered on December 20, 2011; or appeal from the Order Relinquishing Jurisdiction entered June 15, 2012; or from filing a Rule 35 Motion for


a modification of the sentence or even pursuing a post conviction relief proceeding.

- f. Trial counsel failed to ensure language was contained in the Rule 11 Plea agreement that in the event the Review Committee recommended probation that the court would place the Defendant on probation.
- g. Trial counsel assured the Defendant the Plea Agreement provided that whatever the sentence the court would retain jurisdiction and after completion of the rider the Defendant would be placed on probation and then it would be up to the Defendant to complete the probation satisfactorily.
- h. I request this court take judicial notice of the all of the records, documents and filings in the criminal case including all post trial proceedings affidavits and other documents filed in the above Court and designated as Case No. CR-2011-6870 and all proceedings incident thereto.

6. The Court filed It's Notice of Intent to Dismiss Uniform Post-Conviction Petition, filed of record with the Clerk on May 14, 2013. The Defendant requests the filing of this Amended Petition for Post Conviction Relief as a partial response to the Court's Notice of Intent to Dismiss and seeks leave of Court to allow and permit such filing.

7. I respectfully request the Court conduct a hearing on this Petition and grant relief as may be appropriate including re-arraignment and a grant of a new trial based upon the foregoing.

DATED: This 28 day of May, 2013.



RICHARD L. HARRIS

STATE OF IDAHO)
 : ss
 County of Canyon)

Lee E. Green, Jr. upon his oath being first duly sworn deposes and says: I am the Defendant in the above entitled matter; that I have read the above and foregoing petition, know the contents thereof and believe the statements therein contained are true and correct as I verily believe.

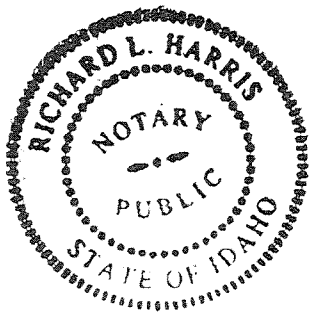
Lee E. Green Jr.

 Lee E. Green, Jr.

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public in and for said State on the 27 day of May, 2013.

Richard L. Harris


Notary Public for Idaho
 Residing at:
 Commission expires:



I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following 29 day of May, 2013.

Douglas Emery
Owyhee County Prosecutor
Owyhee County Courthouse
P.O. Box 128
Murphy, Idaho 83650

_____	UNITED STATES MAIL
_____	COURTHOUSE BASKET
<u> ✓ </u>	FACSIMILE



RICHARD L. HARRIS

Douglas D. Emery
Owyhee County Prosecuting Attorney
Owyhee County Courthouse
P.O. Box 128
Murphy, Idaho 83650
Telephone: (208) 495-1153
Fax: (208) 495-2592

FILED

A.M. P.M.

MAY 31 2013

ANGELA BARKELL, CLERK

TRINA AMAN
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Case No. CV-2013-2860

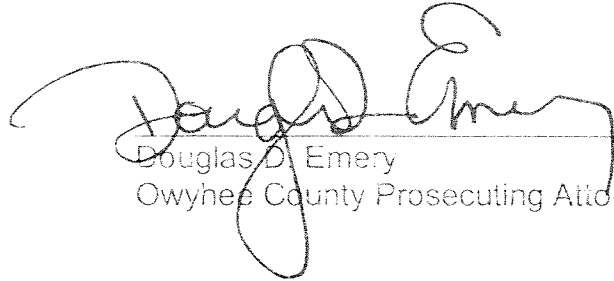
**RESPONDENT'S DISCLOSURE OF
WITNESSES FOR HEARING OF
UNIFORM POST-CONVICTION**

COMES NOW, Respondent the State of Idaho, by and through, DOUGLAS D. EMERY, Owyhee County Prosecuting Attorney to herein disclose and provide a list of witnesses which the state intends to call at the above referenced hearing presently scheduled before this Honorable Court, Friday, July 12, 2013 at 1:30 p.m.

Respondent's intended witnesses include:

- a. William H. Wellman, Attorney (former counsel of record);
- b. David J. Smethers, Attorney, (former counsel of record);
- c. Deputy Canyon County Clerk of the Court, present August 4, 2011 at the time of Change of Pleas;
- d. Lynn Guyer, Warden; North Idaho Correctional Institute, Cottonwood, ID
- e. Bryan Gimmeson, LPC; North Idaho Correctional Institute, Cottonwood, ID
- f. Witnesses referenced within law enforcement reports and Idaho Department of Correction file.

Dated this 30th day of May, 2013.



Douglas D. Emery
Owyhee County Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2013 I placed a true and correct copy of the foregoing Respondent's Disclosure of Witnesses for Hearing of Uniform Post-Conviction in the United States mail, postage prepaid, and addressed to the following:

Richard L. Harris, Esq.
P.O. Box 1438
Caldwell, ID 83606-1438



Shauna Sedamano, Legal Assistant

Douglas D. Emery
Owyhee County Prosecuting Attorney
Owyhee County Courthouse
P. O. Box 128
Murphy, Idaho 83650
Phone 208-495-1153
Facsimile 208-495-2592

Motion:
FILED
A.M. 5:44 P.M.

MAY 31 2013

ANGELA BARKELL, CLERK
~~TRINA AMAN~~
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN, JR.,

PETITIONER.

v.

THE STATE OF IDAHO,

Respondent.

Case No. CV-2013-2860

MOTION and ORDER
FOR PREPARATION OF
TRANSCRIPT OF THE CHANGE OF
PLEA HEARING OF AUGUST 4,
2011 BEFORE THE HONORABLE
RENAE J. HOFF AT THE CANYON
COUNTY COURTHOUSE

COMES NOW, Douglas D. Emery, Owyhee County Prosecuting Attorney, to hereby move for an Order directing the preparation of an official transcript from the change of plea proceeding/hearing held the afternoon of August 4, 2011 before the Honorable Renae J. Hoff, in the district court at the Canyon County Courthouse.

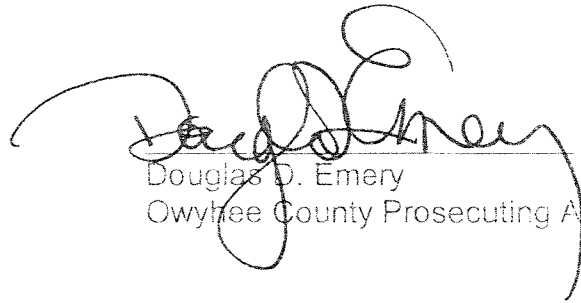
The requisite portions of the hearing to be transcribed are to include:

1. The introduction of the signed I.C.R. 11 Agreement and all statements and references made regarding such;
2. Statements, references and agreements made by Petitioner, Lee Edd Green, Jr. on the record of the court in the presence of counsel.

MOTION AND ORDER FOR PREPARATION OF TRANSCRIPT OF THE CHANGE OF
PLEA HEARING OF AUGUST 4, 2011 BEFORE THE HONORABLE RENAE J. HOFF
AT THE CANYON COUNTY COURTHOUSE PAGE - 1

ORIGINAL

DATED this 29th day of May, 2013.


Douglas D. Emery
Owyhee County Prosecuting Attorney

ORDER

THE COURT having reviewed the foregoing Motion and good cause appearing therefore,

IT IS HEREBY ORDERED AND THIS DOES ORDER that an official transcript of the change of plea proceeding/hearing held the afternoon of August 4, 2011 before the Honorable Renae J. Hoff be prepared and provided to counsel.

IT IS SO ORDERED.

DATED this ____ day of _____ 2013.

Molly J. Huskey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of May, 2013 I placed a true and correct copy of the foregoing Motion and Order for Preparation of Transcript of Hearing in the United States mail, postage prepaid, and addressed to the following:

Richard L. Harris, Esq.
P.O. Box 1438
Caldwell, ID 83606-1438



Shauna Sedamano, Legal Assistant

MOTION AND ORDER FOR PREPARATION OF TRANSCRIPT OF THE CHANGE OF PLEA HEARING OF AUGUST 4, 2011 BEFORE THE HONORABLE RENAE J. HOFF AT THE CANYON COUNTY COURTHOUSE PAGE - 2

ORIGINAL

Douglas D. Emery
Owyhee County Prosecuting Attorney
Owyhee County Courthouse
P. O. Box 128
Murphy, Idaho 83650
Phone 208-495-1153
Facsimile 208-495-2592

FILED
10:06 A.M. P.M.

JUN 06 2013

ANGELA BARKELL CLERK
TRINA AMAN
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN, JR.,
Petitioner,

Vs.

THE STATE OF IDAHO,
Respondent.

CV.13-02860 JK
Case No. ~~CR-2011-6870-M~~

STATE'S MEMORANDUM IN
SUPPORT OF RE-NEWED MOTION
TO DISMISS UNIFORM POST
CONVICTION RELIEF PETITION

COMES NOW, Respondent State of Idaho, by and through, Douglas D. Emery,
Owyhee County Prosecuting Attorney to submit the STATE'S MEMORANDUM IN
SUPPORT OF RE-NEWED MOTION TO DISMISS PETITION.

DISCUSSION

The March 6, 2013 petition filed under the Uniform Post Conviction Act is
untimely as petitioner had one (1) year from the entry of the judgment of
December 20, 2011 or not later than December 21, 2012, in which to file.

ORIGINAL

Change of plea before Renae J. Hoff , District Judge

On page 8 of Petitioner's Memorandum in Opposition to Dismiss Petition, a statement attributable to petitioner reflects that Mr. Green now asserts:

"I do not ever remember being told or receiving information that a part of that <ICR 11 Plea> agreement that I would waive my Rule 35 and appeal rights. . . ."

While petitioner now asserts that he *lacks recollection* of that Rule 11 Agreement which he signed along with his attorney, petitioner in fact acknowledged such agreement and that that he was waiving all rights to challenge his sentence and all post conviction relief rights, in exchange for the state's dismissal of several viable felony counts.

The Rule 11 Agreement expressly provided that the---

"Terms and length of sentences will be open for argument;" and that "The state is free to argue for imposition of sentence after the retained jurisdiction was free to bears petitioner's signature, as well as those of the prosecutor and defense counsel." Emphasis added.

That agreement and petitioner's knowing and voluntary and intelligent waiver of his rights were placed on record at the time of the entry of plea, August 4, 2011, before the Honorable Renae J. Hoff. (An official transcript of that change of plea hearing has been requested and is being prepared).

Sentencing before Gregory M. Culet, District Judge

Petitioner further acknowledged that he had waived his post conviction rights as part of the negotiated resolution of the case, at the sentencing November 28, 2011

A true and correct copy of the court's audio recording of the November 20, 2011 Sentence Hearing is enclosed, as **ATTACHMENT 1**.

Pertinent excerpts of the sentencing before Judge Culet reflect:

* * *

JUDGE CULET: There are other factors that come fit . . . in your case Mr. Green. *You are self-absorbed, self-centered and selfish. I mean everything about this case was about someone who never looked past their need for their own satisfaction.* Emphasis added.

Count I and II Lewd Conduct with a minor under 16—There will be . . . in each case a commitment of 10 years fixed followed by 10 years indeterminate for a total of 20 concurrent with each other on each case. I will retain jurisdiction for up to 365 days with the recommendation that the department utilize the sex offender program.

Count III: Felony Injury to a Child there will be a 10 year commitment with 5 years fixed and 5 years determinate and that will run consecutive to the other sentences

Total of 30 year commitment to the DOC with 15 years fixed. Now I will retain jurisdiction on that case also for a period of 365 days.

Understand the realities; the offenses in this case are egregious. The destruction that occurs is significant. The psychosexual evaluation requires that until you are even if you make probation you will need to be supervised for decades because of the risk to the public. Now I am aware in my tenure as a judge where the perpetrator of the crime have in fact turned things around in their lives. I have been in numerous seminars where there have been questions asked by judges in the audience and/or lawyers who ever is participating--- Q. DOES THIS TREATMENT WORK? And the point is, yes it can work and it can make changes in people, it can change how they think, how they behave, how they act, *but there is an entire convoluted, sick thinking process that goes on with this, . . . and typically. . . it takes a lengthy period of time.* Emphasis added.

Now retained jurisdiction is designed to see if you are a candidate for that program. You need to understand also that sex offenders who take advantage of the treatment . . . even if they don't get a retained jurisdiction tend to be eligible for release upon. . . *serving the . . . fixed portion of their sentence, but. . . sex offenders that don't take advantage of it tend to serve out their entire time.* That is apparent trend, I can't pin that down to any studies, it has just been my observation. Emphasis added.

But either way . . . if in fact you do jump through the hoops, ***acknowledge your responsibility your accountability and take advantage of what is offered to you in this program, then there is still going to be leverage available to the state to supervise you until you are 76 years of age,*** because 30 years is you are 46 now so you are basically being supervised, even in the community for the rest of your adulthood. . . . ***[A]nd there is also the risk that you could be spending that much***

time in the penitentiary. Emphasis added.

* * *

JUDGE CULET: *Normally there are certain post judgment rights, the right to appeal, the right to Post Conviction Relief and a Right to Rule 35 Motion for Sentence Modification. Those have been waived by your agreement. Do I understand that?* Emphasis added.

DEFENDANT GREEN: *That 's correct.* Emphasis added.

JUDGE CULET: Okay. So I would, um uh I would, I'll note that for the record that the um that normally I give a written form to that request, *that has been waived pursuant to this plea negotiation and I have sentenced in accordance with the plea agreement here today.* Emphasis added.

Defendant was then placed in the retained jurisdiction program.

ATTACHMENT 1, November 28, 2011, sentencing. (enclosed).

II.

Events subsequent to the November 28, 2011 sentencing

Following the November 28th sentencing before Judge Culet, the Judgment of Conviction entered of record December 20, 2012. Thereafter defendant served a period in the retained jurisdiction program.

A rider review hearing was held June 8, 2012, relating to petitioner's performance, attitude and conduct while in the retained jurisdiction. As provided in the ICR 11 Agreement which petitioner had knowingly and voluntarily and intelligently signed and was entered on record, the state opposed his release urged the court to impose sentence. In view of the retained jurisdiction materials and report, with consideration of petitioner's attitude, control issues and lack of progress, the court correctly relinquished jurisdiction and imposed sentence.

On June 26, 2012, petitioner filed a Motion for ICR 35 Modification of sentence. The state opposed each filing, as being directly contrary to the ICR 11 Agreement which Green had knowingly, voluntarily and intelligently entered. On August 17, 2012, this court properly denied the Rule 35 motion.

A Notice of Appeal of sentence was likewise, filed by petitioner's attorney, June 27, 2012. The Office of Idaho Attorney General entered an objection to such appeal, on the basis that Green had knowingly, voluntarily and intelligently waived his appellate rights. The Idaho Supreme Court agreed and on August 22, 2012, entered an Order Dismissing the Appeal. (Supreme Court of Idaho, Ref. 12-399; State v. Lee Edd Green).

No timely challenges were made to either of those rulings.

III.

The untimely filing of the Post Conviction Relief Petition constitutes an additional waiver of petitioner's post conviction relief rights.

Petitioner was sentenced November 18, 2011. The requisite time in which to pursue a Post Conviction Relief is set forth in Idaho Code §19-4902 *within one (1) year* of any right to appeal. Petitioner Green, accordingly had one (1) year from the entry of the judgment of December 20, 2011 or not later than December 20, 2012, to file. The petition is untimely.

The tolling of a statutory deadline is jurisdictional. The failure to timely file a petition is a basis for dismissal, particularly where a petitioner fails to establish that he was unable due to circumstances beyond his control, to make the necessary filing. Amboh v. State, 149 Idaho 650 (Ct. App. 2010).

The dismissal of a petition is appropriate in cases such as the present, where the

STATE'S MEMORANDUM IN SUPPORT OF RE-NEWED MOTION TO DISMISS 5

filing was not made within the statutory period is appropriate. In matters of appeal raised in challenging an order of dismissal, the appellate courts review the basis for the ruling. Ridgley v. State, 148 Idaho 671, 675 (2010), Berg v. State, 131 Idaho 517, 518 (1998), Sheahan v. State, 146 Idaho 101, 104 (Ct. App. 2008). In issues of law or application of the limitation of a statute, the appellate courts exercise free review. Kriebel v. State, 148 Idaho 188, 190 (Ct. App. 2009); Rhoades v. State, 148 Idaho 247, 250 (2009); Downing v. State, 136 Idaho 367, 370 (Ct. App. 2001); Martinez v. State, 130 Idaho 530, 532,(Ct. App. 1997).

Here, Petitioner Green has not demonstrated that the statute of limitations, which ran December 21, 2012, one-year from the filing of the Judgment of Conviction, should be to tolled. Kriebel, 148 Idaho at 190.

Petitioner made two (2) timely filings. On June 26, 2012 a ICR 35 motion was filed with this court. A Notice of Appeal was filed the next day, June 27, 2012, with the supreme court. Such filings were made, irrespective of the provisions of the Rule 11 Agreement, which petitioner had knowingly, voluntarily and intelligently entered.

A petition for Post Conviction Relief could likewise have been generated and filed prior to December 21, 2012, had such been intended.

In his belated petition for Post Conviction Relief, Green now asserts a myriad of claims not previously alleged. (See also Notice of Intent to Dismiss, pg 2). Here, petitioner essentially wants the benefit an *illusion* that--- i.e.: he was guaranteed probation, following the retained jurisdiction program, (Affidavit of Lee E. Green, Jr. pg 2 and Memorandum in Opposition to Dismiss, pg 8), when no such provision in the Rule

11 Agreement exists and the official record of the court made when petitioner was present with competent counsel, reflects otherwise.

Petition asserts that he does "*not remember*" (see Affidavit of Lee E. Green, Jr. . . pg 2 and Memorandum in Opposition to Dismiss, pg 8), that the Rule 11 Agreement which he willfully entered, signed in the presence of counsel and was placed upon the official record of the court, reflects that his sentence could be imposed following the retained jurisdiction.

A claim or issue which could have been raised on appeal may not be considered in post-conviction proceedings. Hughes v. Smith, 148 Idaho 448, 462 (Ct. App. 2009). Here, all claims of petitioner not previously raised in his ill fated IRE 35 Motion and Notice of Appeal, should be dismissed as a matter of law.

IV.

The petition was not timely filed due to petitioner's own inactivity

Petitioner takes issue with the calculation of the one (1) year period for filing the post conviction petition. On pg 3 of his Memorandum in Opposition, Green essentially contends that the starting of the one year period should be manipulated--- (eg. from June 2012—Order Relinquishing Jurisdiction; August 2012—Order Denying Rule 35; August 2012—Order Dismissing Appeal; September 2012—Remitturer), so as to arrive at a conclusion that his petition was timely filed.

Alternatively, Green would have this court conclude that the statute of limitations should be tolled based upon his belated claims that--- he was confused, does *not*

remember, or, was assisted by ineffective counsel.

Here, petitioner's IRE 35 Motion and intended Notice of Appeal had each respectively been denied by August 22, 2012, *approximately four (4) months prior to the petition deadline*. In view of the state's opposition to his court filings and the separate unfavorable court rulings rendered, petitioner was aware that his asserted "perceptions" and claims, were not favorably received. Petitioner had ample opportunity to direct that counsel lodge a timely petition for post conviction relief, or to otherwise generate a timely pro-se petition.

The failure to file a timely petition is an appropriate basis for dismissal. Savas v. State, 139 Idaho 957 (Ct. App. 2003). Tolling is not allowed for a petitioner's own inactivity. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008).

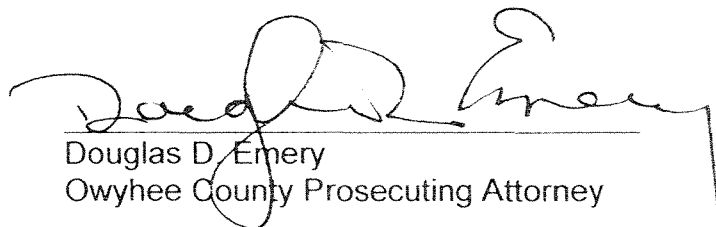
In Schultz v. State, 151 Idaho 383, 256 P.3d 791, (Ct. App. 2011), our court of appeals held that a similar petition was barred due to the un-timeliness of filing. There, a petitioner made a like ineffective assistance of counsel claim. Shultz further argued that allowances for his misunderstanding of the deadline for filing should be overlooked, because he was under the impression that he had a longer period in which to file. The court of appeals rejected those arguments and upheld the dismissal of the petition by the district court.

Dismissal is likewise appropriate in the present case.

CONCLUSION

Petitioner had ample opportunity to make a timely filing. The belated filing was due to petitioner's own inactivity. Dismissal should be granted.

Respectfully submitted this 5th day of June, 2013.


Douglas D. Emery
Owyhee County Prosecuting Attorney


CERTIFICATE OF SERVICE

I, the undersigned HEREBY CERTIFY that on this 5th day of June, 2013, I placed a true and correct copy of the foregoing **STATE'S MEMORANDUM IN SUPPORT OF RE-NEWED MOTION TO DISMISS PETITION**, to the following:

Richard L. Harris, Esq.
Attorney at Law
P.O. Box 1438
Caldwell, ID 83606-1438

Keith and Jolyn Green
250 S. 8th Ave. W.
Marsing, ID 83639

Sharon Green
936 Monument Peak Dr.
Gardnerville, NV 89460


Shauna Sedamano, Legal Assistant in
Office of Owyhee County Prosecuting Attorney

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1328
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

FILED
A.M. 5:09 P.M.

JUN 07 2013

ANGELA BARKELL, CLERK

TRINA AWAN
Deputy Clerk

Attorney For: Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, Jr.,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

CASE NO. *CV-2013-2866*
SECOND AFFIDAVIT OF
LEE E. GREEN, Jr.

STATE OF IDAHO)
: ss.
County of Ada)

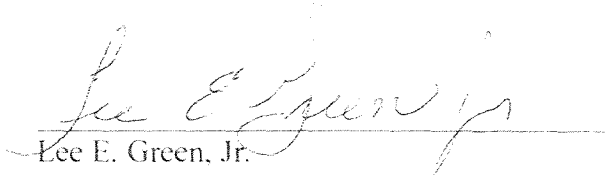
LEE E. GREEN, Jr. upon his oath having been first duly sworn deposes and says:

1. I am the Defendant in that certain Owyhee County criminal case designated as CR-2011-06870.
2. I make this declaration on my own personal knowledge and belief.
3. I previously submitted an affidavit to the Court in support of the Petition for Post Conviction Relief. I make this second affidavit to supplement the information in the first affidavit.

4. I entered a plea to felony charges brought against me, two counts of Lewd & Lacivious conduct and one count of injury to a child.
5. The injury to a child charges was an amended charge. The original charge was based on an alleged rape that I was charged with committing. I denied committing that crime. In fact the crime was alleged to have been committed on a Saturday night and was alleged to have occurred in Owyhee County. The previous Friday I left Idaho and hauled some cows to Baker, Oregon. I spent the remainder of the day in Baker, Oregon, all day Saturday and Saturday night and left Baker to come back to Idaho on Sunday afternoon. I arrived back in Idaho approximately 3:30 to 4:00 p.m. on Sunday. I was not in Idaho on the date or time the alleged rape supposedly occurred. I have at least ten other witnesses that would testify that I was not in Idaho but in Oregon when this crime allegedly occurred and would establish a defense of alibi for me. I provided my attorney with this information.
6. I was also charged with four counts of Lewd conduct. Two of those counts I was not involved at all and there is corroborating evidence which would affirmatively establish that. The other two counts come down to my word against the word of the alleged victims. I was advised by my attorney that if the matter went to trial, because the nature of the crimes and all of the circumstances there was a very high probability I would be found guilty on all counts. Because the attorneys had worked out a plea bargain with the prosecutor in which two of the L&L charges would be dismissed in return for a plea to two L&L charges and the rape charge would be amended to the

injury to a child charge with a sentence to the Board of Corrections but a guaranty that the court would retain jurisdiction and I would do a rider. At the end of the rider I would be put on probation. I responded to my attorney that I was not guilty of the rape and why should I plead to the reduced or amended charge arising out of a charge I absolutely did not commit. I was told by Mr. Wellman that in order to get the retained jurisdiction as part of the Rule 11 agreement and hence probation, I had to plead to the amended charge as a part of the agreement otherwise the prosecutor would not agree to the rider. I did not at the time think that fair, and I certainly do not believe it is fair now. But I was assured that at the end of the rider I would be placed on probation. I was told that accepting the plea agreement was the only way I could be assured of being on probation.


7. I reluctantly agreed to the plea agreement based upon the representations to me that at the end of the rider I would be placed on probation, but otherwise if the matter went to trial without the plea agreement it was likely I could be sentenced to a term in the penitentiary.
8. I was sentenced to the Board of Corrections with the court retaining jurisdiction. I received a favorable recommendation for community based probation but instead of the Court placing me on probation the Court relinquished jurisdiction and I am now serving the sentence imposed.
9. The only reason I agreed to the plea agreement was the assurance of my attorney that I would be placed on probation.
10. I reaffirm the statements made by me in my previous affidavit



Lee E. Green, Jr.

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public for Idaho, on the 31 day of May, 2013.





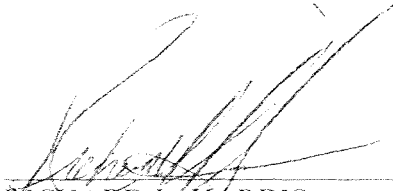
Notary public for Idaho
Residing at:
Commission Expires: 5/31/2014

CERTIFICATE OF SERVICE

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following this 6th day of June, 2013.

DOUG EMERY
Owyhee County Prosecutor
Owhyee County Courthouse
P. O. Box 128
Murphy, Idaho 83650
Facsimile: (208) 495-2592

UNITED STATES MAIL
 COURTHOUSE BASKET
 HAND DELIVERED



RICHARD L. HARRIS

FILED
A.M. P.M.

JUN 21 2013

ANGELA BARKELL, CLERK
Lena Johnson
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

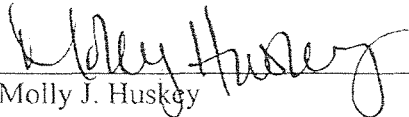
<p>LEE EDD GREEN, JR., Petitioner, vs. STATE OF IDAHO, Respondent.</p>	<p>CASE NO. CV13-2860 ORDER DISMISSING UNIFORM POST-CONVICTION PETITION</p>
--	--

On May 14, 2013, this Court issued its Notice of Intent to Dismiss Uniform Post-Conviction Petition in this matter. The Petitioner was advised in the Notice of Intent that unless he provided admissible evidence to address the deficiencies in the Petition, the Petition would be dismissed on June 17, 2013. No additional information, affidavits, or amended pleadings have been filed. Therefore, for the reasons listed in the Notice of Intent to Dismiss Uniform Post-Conviction Petition:

ORDER

IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief is
DISMISSED.

Dated this 21 day of June, 2013.



Molly J. Husky
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of June, 2013, s/he served a true and correct copy of the original of the foregoing Order on the following individuals in the manner described:

- upon counsel for the state:

Douglas D. Emery
Owyhee County Prosecuting Attorney
P.O. Box 128
Murphy, ID 83650

- upon counsel for petitioner:

Richard Harris
P.O. Box 1438
Caldwell, ID 83606-1438

- upon petitioner:

Lee Edd Green #101330
Idaho State Correctional Institution
Unit 14
P/O/ Box 14
Boise, ID 83707

and/or when s/he deposited each a copy of the foregoing ORDER in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

ANGELA BARKELL
Clerk of the Court

By: Lena Johnson
Deputy Clerk of the Court

FILED

A.M. P.M.

JUN 21 2013

ANGELA BARKELL, CLERK
~~Lena Johnson~~

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN, JR.,
Petitioner,

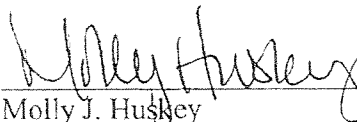
vs.

STATE OF IDAHO,
Respondent.

CASE NO. CV13-2860
FINAL JUDGMENT

Pursuant to the Order Dismissing Uniform Post-Conviction Petition in this matter,
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Petition is
dismissed with prejudice.

Dated this 21 day of June, 2013.



Molly J. Hussey
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the _____ day of June, 2013, s/he served a true and correct copy of the original of the foregoing Final Judgment on the following individuals in the manner described:

- upon counsel for the state:

Douglas D. Emery
Owyhee County Prosecuting Attorney
P.O. Box 128
Murphy, ID 83650

- upon counsel for petitioner:

Richard Harris
P.O. Box 1438
Caldwell, ID 83606-1438

- upon petitioner:

Lee Edd Green #101330
Idaho State Correctional Institution
Unit 14
P/O/ Box 14
Boise, ID 83707

and/or when s/he deposited each a copy of the foregoing Final Judgment in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

ANGELA BARKELL

Clerk of the Court

Lena Johnson

By: _____

Deputy Clerk of the Court

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1438
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

FILED
10:53 A.M. P.M.

JUL 01 2013

ANGELA BARKELL CLERK
TRINA AMAN
Deputy Clerk

Attorney for Petitioner

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE E. GREEN, JR.,	)	CASE NO. CV-2013-2860
)	
Petitioner.	)	MOTION TO RECONSIDER
	)	ORDER DISMISSING UNIFORM
vs.	)	POST-CONVICTION PETITION
	)	AND FINAL JUDGMENT
	)	AND NOTICE OF HEARING
THE STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

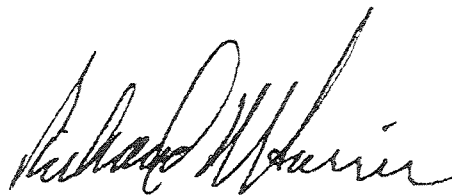
COMES NOW the above named Petitioner by and through his attorney and moves the Court to reconsider it's Order dismissing Petitioner's Petition for Post Conviction Relief on the grounds and for the reasons as follows:

1. This motion is based upon the provisions of Rule 11(a)(2)(B); and Rule 59(e) IRCP.
2. The Notice of Intent to Dismiss indicates that the Petition was going to be dismissed on the grounds of timeliness and the Court determined the one year period for filing such Petition commenced to run on December 20, 2011 and

placed on probation upon recommendation of the Board of Corrections. He received that probation recommendation of the Board of Corrections and per the promise he was not placed on probation. That is established by the record here.

6. But the Court's ruling that because he waived his right to pursue post conviction relief does not toll the running of the one year period while serving the rider, but constitutes a conflict of interest where the Petitioner waived his rights to appeal, file a Rule 35 Motion or file for Post-Conviction Relief establishes clearly ineffective assistance of counsel, which is clearly established in the record before the Court, and establishes prima facially the need for a hearing on the merits of the Petition.
7. In conclusion there is sufficient "admissible evidence" in the record regarding a need for a hearing, and a conflict of interest that exists in the record which requires further proceedings in this matter.
8. It is requested the Court conduct a re-evaluation in this matter and grant Petitioner a hearing on his Petition.

Dated this 1 day of ~~June~~^{July}, 2013.



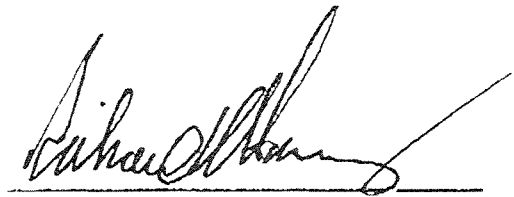
Richard L. Harris
Attorney for Defendant

NOTICE OF HEARING

TO: Clerk of the Court
Doug Emery, Owyhee County Prosecuting Attorney

Please take Notice that the Defendant will call for hearing the above and foregoing Motion to Amend Petition for Post Conviction Relief at the hour of 1:00 p.m., July 12, 2013 or as soon thereafter as the matter can be heard at the courtroom of the above entitled Court. Owyhee County Courthouse, Murphy, Idaho.

Dated this 1 day of ~~June~~^{July}, 2013.



Richard L. Harris

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on the following in the manner indicated on the 1 day of ~~June~~^{July}, 2013.

Douglas Emery	_____	UNITED STATES MAIL
Owyhee County Prosecutor	_____	COURTHOUSE BASKET
Owyhee County Courthouse	_____	FACSIMILE
P.O. Box 128	✓	
Murphy, Idaho 83650		



RICHARD L. HARRIS

RICHARD L. HARRIS
ATTORNEY AT LAW
1023 Arthur Street
P. O. Box 1438
Caldwell, Idaho 83605
Telephone: (208) 459-1588
Fax: (208) 459-1300
ISB No. 1387

FILED

A.M. 1:44 P.M.

JUL 01 2013

ANGELA BARKELL, CLERK
TRINA AMAN
Deputy Clerk

Attorney for Petitioner

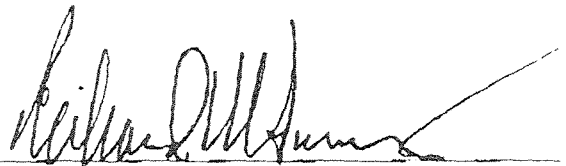
IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE GREEN, JR.)	
	)	CASE NO. CV-2013-2860
Petitioner.)	
)	
vs.	)	AMENDED NOTICE OF HEARING
	)	ON MOTION TO RECONSIDER
STATE OF IDAHO.	)	ORDER DISMISSING UNIFORM
	)	POST-CONVICTION PETITION
Respondent.	)	AND FINAL JUDGMENT
)	

TO: DOUG EMERY, Owyhee County Prosecutor; and
CLERK OF THE COURT

YOU AND EACH OF YOU please take notice that the above-named Defendant will call for hearing his Motion To Reconsider Order Dismissing Uniform Post-Conviction Petition For Final Judgment on the 9th day of August, 2013 at the hour of 9:00 o'clock a.m. or as soon thereafter as the matter can be heard in the above-entitled courtroom, Owyhee County Courthouse, Murphy, Idaho.

DATED: This 1 day of July, 2013.

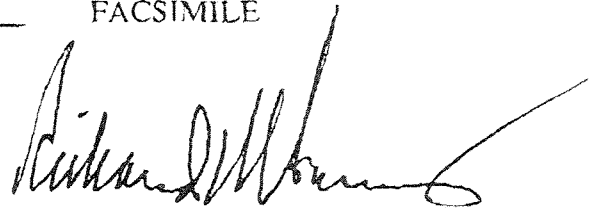

RICHARD L. HARRIS

CERTIFICATE OF SERVICE

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following this 1 day of July, 2013.

DOUGLAS EMERY
Owyhee County Prosecutor
Owyhee County Courthouse
P. O. Box 128
Murphy, Idaho 83650
Facsimile: (208) 495-2592

UNITED STATES MAIL
 COURTHOUSE BASKET
 FACSIMILE



RICHARD L. HARRIS

FILED

9:11 A.M. P.M.

JUL 02 2013

ANGELA BARKELL, CLERK

~~TRINA AMAN~~

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

CASE NO. CV13-2860

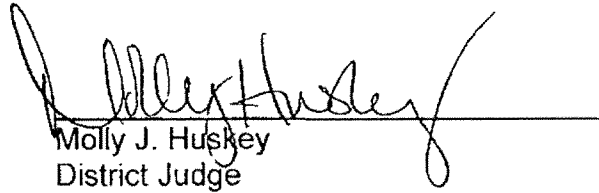
DENIAL OF MOTION TO RECONSIDER
DISMISSAL OF UNIFORM POST-
CONVICTION PETITION

Petitioner has filed a motion to reconsider the Court's Order Dismissing the Petition filed in this case. The Court declines to do so. Although the Petitioner believes that the period of retained jurisdiction tolls the time for the filing of a post-conviction petition, in this case, the Petitioner is incorrect. A period of retained jurisdiction will toll the period for filing the notice of appeal, which concomitantly tolls the period in which the post-conviction petition must be filed; however, in this case, the Petitioner waived his right to file an appeal, therefore, the period of retained jurisdiction did not act to toll the time for filing the post-conviction petition. *See Gonzalez v. State*, 139 Idaho 384, 79 P.3d 743 (Ct. App. 2003), (a period of probation did not toll the time for filing a post-

conviction petition and therefore, the petition untimely filed, where the claims in the petition related to the Judgment of Conviction.)

The Petitioner has cited no authority that holds that the time frame for filing the post-conviction petition is tolled by the period in which the Court retains jurisdiction, where the appeal has been waived. As such, the Court declines to reconsider its Order.

Dated this 1st day of July, 2013.



Molly J. Huskey
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 1st day of July, 2013, s/he served a true and correct copy of the original of the foregoing **DENIAL OF MOTION TO RECONSIDER** on the following individuals in the manner described:

- upon counsel for petitioner:

Richard L. Harris
P.O. Box 1438
Caldwell, Idaho 83606-1438

- upon counsel for Respondent:

Douglas Emery
P.O. Box 128
Murphy, Idaho 83650

- and upon Petitioner:

Lee Edd Green #101330
Idaho State Correctional Institution
Unit 14
P.O. Box 14
Boise Idaho 83707

and/or when s/he deposited each a copy of the foregoing ORDER in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

ANGELA BARKELL,
Clerk of the Court

By: TRINA AMAN
Deputy Clerk of the Court

RICHARD L. HARRIS
Attorney At Law
P. O. Box 1438
1023 Arthur Street
Caldwell, Idaho 83605
Telephone: (208) 459-1588
Facsimile: (208) 459-1300
ISB No. 1387

FILED
A.M. 3:50 P.M.

JUL 17 2013

ANGELA BARKELL, CLERK
Deputy Clerk

Attorney For Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN,	)	CASE NO. CV-2013-2860
)	
Plaintiff-Respondent.)	
)	
vs.)	
)	
STATE OF IDAHO,	)	NOTICE OF APPEAL
)	
Defendant-Appellant.)	
_____)	

TO: THE ABOVE-NAMED RESPONDENT, THE STATE OF IDAHO, AND ITS ATTORNEYS, CANYON COUNTY PROSECUTING ATTORNEY, ALAN LANCE, ATTORNEY GENERAL FOR IDAHO, THE COURT REPORTER, AND CHRIS YAMAMOTO, CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN:

1. The above-named Defendant-Appellant appeals against the above-named Plaintiff-Respondent, to the Supreme Court of the State of Idaho, from the Denial Of Motion to Reconsider Dismissal Of Uniform Post Conviction Petition entered filed by the Court on July 2, 2013.

2. Defendant-Appellant has the right to appeal to the Idaho Supreme Court, from the Conviction and sentence imposed as described in paragraph 1 above, and said Conviction and Sentence are appealable issues under Rule 11 (c) (1), Idaho Appellate Rules.

3. The Defendant-Appellant requests that the Reporter's Transcript include the following:

- A. Reporter's Transcript as defined in Rule 25 (a), Idaho Appellate Rule is requested.
- B. Defendant-Appellant requests that the Standard Reporters Transcript be supplemented pursuant to Rule 25 (c) by the preparation and filing of the following as identified in Rule 25 (c) (5) (6).

(1) All hearings and proceedings. A transcript of all sentencing proceedings.

4. The Defendant-Appellant requests the following documents to be included in the Clerks record:

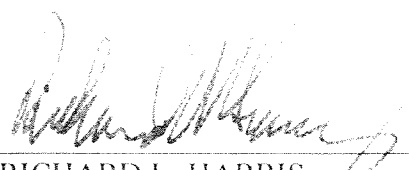
- A. All documents defined in Rule 28, I.A.R.;
- B. All pre-trial motions;
- C. The presentence report;
- D. Any other letter or document lodged or filed with the Court regarding this case:

5. I hereby certify:

- A. That a copy of this Notice of Appeal has been served on the Court Reporter;

- B. That service has been made on all parties required to be served pursuant to Rule 20, Idaho Appellate Rules, and the Attorney General of Idaho, Alan Lance §67-1401 (1), Idaho Code;
- C. That Defendant-Appellant is exempt from paying the estimated transcript fee because he is indigent and unable to pay for said preparation and is currently incarcerated with the Idaho State Board Of Corrections and therefore unable to pay said fees;
- D. That the Defendant-Appellant is exempt from paying the estimated fee for preparation of this record because he is indigent and unable to pay for such preparation because he is currently incarcerated with the Idaho State Board Of Corrections and therefore unable to pay said fees;
- E. That the Defendant-Appellant is exempt from paying the Appellant's fees because he indigent and unable to pay the filing fee and is currently incarcerated with the Idaho State Board Of Corrections and therefore unable to pay said fees.

DATED: This 15 day of July, 2013.



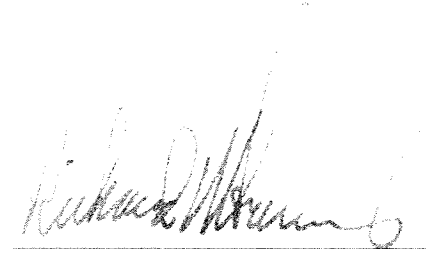
RICHARD L. HARRIS

CERTIFICATE OF SERVICE

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following on this 16 day of July, 2013.

DOUGLAS EMERY	<input checked="" type="checkbox"/>	United States Mail
Owyhee County Prosecutor		
Owyhee County Courthouse	<input type="checkbox"/>	Hand Delivered
P. O. Box 128		
Murphy, Idaho 83650	<input type="checkbox"/>	Facsimile
Facsimile: (208) 459-7474		

LAWRENCE WASDEN	<input checked="" type="checkbox"/>	United States Mail
Attorney General of Idaho		
Attorney General Office	<input type="checkbox"/>	Hand Delivered
State of Idaho		
P. O. Box 83720	<input type="checkbox"/>	Facsimile
Boise, Idaho 83702-0010		



RICHARD L. HARRIS

In the Supreme Court of the State of Idaho

FILED
 _____ A.M. _____ P.M.
 JUL 25 2013
 ANGELA BARKELL, CLERK
 Deputy Clerk

LEE EDD GREEN, JR.,)	
)	
Petitioner-Appellant,	)	ORDER CONDITIONALLY
	)	DISMISSING APPEAL
v.)	
	)	Supreme Court Docket No. 41235-2013
STATE OF IDAHO,	)	Owyhee County No. 2013-2860
)	
Respondent.)	

The Appellant having failed to pay the necessary fee for preparation of the Clerk’s Record on appeal as required by Idaho Appellate Rule 24(c) and the Reporter’s Transcript, if requested, as required by Idaho Appellate Rule 27(c). The Notice of Appeal is not in compliance with Idaho Appellate Rules 17(a), the title is incorrect; 17(d) the name of the Attorney General is incorrect; 17(o)5(a), and 25(b), transcripts must be listed by date(s) and title(s); 17(o)8(a), requires service on the reporter(s) of whom transcripts have been requested. Neither the Notice of Appeal nor the Certificate of Services shows service upon the reporter(s) of whom transcripts are request. Therefore, good cause appearing,

IT HEREBY IS ORDERED that this appeal be, and hereby is, CONDITIONALLY DISMISSED unless the required fee for preparation of the Clerk’s Record is paid to the District Court Clerk and the fee for preparation of the Reporter’s Transcript is paid to the District Court Reporter or an Order is obtained from the District Court providing for payment at county expense within twenty-one (21) days from the date of this Order.

IT FURTHER IS ORDERED that in the event the fees are paid, or an order is entered for a fee waiver, this is, SUSPENDED for Appellant’s counsel to file an AMENDED NOTICE OF APPEAL, in compliance with Idaho Appellate Rules 17(a), 17(d), 17(o)5(b), and 17(o)8(a), with the District Court Clerk within fourteen (14) days from the date of the payment of fees or entry of a fee waiver. In the event, an AMENDED NOTICE OF APPEAL is not filed in District Court, this appeal may be DISMISSED.

IT FURTHER IS ORDERED that this appeal is SUSPENDED until further notice.

ORDER CONDITIONALLY DISMISSING APPEAL – Docket No. 41235-2013

DATED this 24 day of July, 2013.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

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

RICHARD L. HARRIS
Attorney At Law
P. O. Box 1438
1023 Arthur Street
Caldwell, Idaho 83605
Telephone: (208) 459-1588
Facsimile: (208) 459-1300
ISB No. 1387

FILED
A.M. 1:11 P.M.
AUG 15 2013
ANGELA BARKELL, CLERK
Deputy Clerk

Attorney For Plaintiff/Appellant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF OWYHEE

LEE EDD GREEN,	)	CASE NO. CV-2013-2860
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
STATE OF IDAHO,	)	AMENDED
	)	NOTICE OF APPEAL
)	
Defendant/Respondent.)	
_____)	

TO: THE ABOVE-NAMED RESPONDENT, THE STATE OF IDAHO, AND IT'S ATTORNEYS, OWYHEE COUNTY PROSECUTING ATTORNEY, LAWRENCE WASHEN, ATTORNEY GENERAL FOR IDAHO, THE COURT REPORTER, AND, CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN:

1. The above-named Plaintiff/Appellant appeals against the above-named Defendant/Respondent, to the Supreme Court of the State of Idaho, from the Denial Of Motion to Reconsider Dismissal Of Uniform Post Conviction Petition entered filed by the Court on July 2, 2013.

2. Plaintiff/Appellant has the right to appeal to the Idaho Supreme Court, from the Conviction and sentence imposed as described in paragraph 1 above, and said Conviction and Sentence are appealable issues under Rule 11 (c) (1), Idaho Appellate Rules.

3. The Plaintiff/Appellant requests that the Reporter's Transcript include the following:

- A. Reporter's Transcript as defined in Rule 25 (a), Idaho Appellate Rule is requested.
- B. Plaintiff/Appellant requests that the Standard Reporters Transcript be supplemented pursuant to Rule 25 (c) by the preparation and filing of the following as identified in Rule 25 (c) (5) (6).

(1) All hearings and proceedings. A transcript of all sentencing proceedings.

4. The Plaintiff/Appellant requests the following documents to be included in the Clerks record:

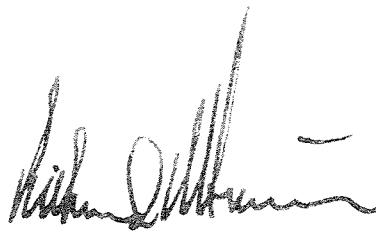
- A. All documents defined in Rule 28, I.A.R.;
- B. All pre-trial motions;
- C. The presentence report;
- D. Any other letter or document lodged or filed with the Court regarding this case;

5. I hereby certify:

- A. That a copy of this Notice of Appeal has been served on the Court Reporter;

- B. That service has been made on all parties required to be served pursuant to Rule 20. Idaho Appellate Rules, and the Attorney General of Idaho. Lawrence Wasden §67-1401 (1), Idaho Code;
- C. That Plaintiff/Appellant is exempt from paying the estimated transcript fee because he is indigent and unable to pay for said preparation and is currently incarcerated with the Idaho State Board Of Corrections and therefore unable to pay said fees;
- D. That the Plaintiff/Appellant is exempt from paying the estimated fee for preparation of this record because he is indigent and unable to pay for such preparation because he is currently incarcerated with the Idaho State Board Of Corrections and therefore unable to pay said fees;
- E. That the Plaintiff/Appellant is exempt from paying the Appellant's fees because he indigent and unable to pay the filing fee and is currently incarcerated with the Idaho State Board Of Corrections and therefore unable to pay said fees.

DATED: This 14 day of July, 2013.



RICHARD L. HARRIS

CERTIFICATE OF SERVICE

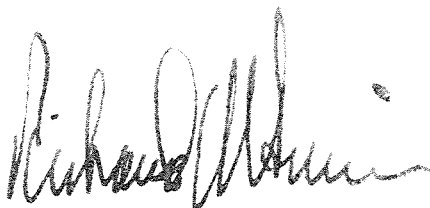
I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following on this 14 day of ^{July}~~July~~, 2013.

DOUGLAS EMERY
Owyhee County Prosecutor
Owyhee County Courthouse
P. O. Box 128
Murphy, Idaho 83650
Facsimile: (208) 459-7474

United States Mail
 Hand Delivered
 Facsimile

LAWRENCE WASDEN
Attorney General of Idaho
Attorney General Office
State of Idaho
P. O. Box 83720
Boise, Idaho 83702-0010

United States Mail
 Hand Delivered
 Facsimile



RICHARD L. HARRIS

FILED

10:21 A.M. P.M.

OCT 10 2013

ANGELA BARKELL, CLERK

Trina Aman
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

Lee Edd Green, Jr.,)	
	)	SUPREME COURT Case No. 41235
)	
Petitioner-Appellant,	)	CLERK'S CERTIFICATE OF
vs.	)	EXHIBITS
)	
State of Idaho ,)	
)	
Respondent,)	
)	
)	

I, Trina Aman, Deputy Clerk of the District Court of the Third Judicial District of the State of Idaho in and for the County of Owyhee, do hereby certify that the following is a list consisting of documents to be sent as exhibits and which will be lodged with the Supreme Court:

No exhibits

IN WITNESS WHEREOF, I have hereunto set by hand and affixed the seal of the said Court this 10th day of October, 2013.

ANGELA BARKELL
Clerk of the District Court

Trina Aman
Deputy Clerk

CLERK'S CERTIFICATE OF EXHIBITS

FILED

10:24 A.M. P.M.

OCT 10 2013

ANGELA BARKELL, CLERK

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

* * * * *

Lee Edd Green, Jr.,
Petitioner-Appellant,
vs.
State of Idaho,
Respondent,

NOTICE OF LODGING RECORD
Supreme Court Case
41235

Notice is hereby given that on 10/10, 2013, the Clerk's Record (x) mailed to the Attorneys of Record.

The parties shall have twenty-eight (28) days from the date of service of the appeal record to file any objections, together with a Notice of Hearing, with the District Court. If no objection is filed, the record will be deemed settled and will be filed with the Supreme Court.

If there are multiple (Appellants) (Respondents), I will serve the record, and any transcript, upon the parties upon receipt of a stipulation of the parties, or court order stating

Notice of Lodging Clerks Record

which party shall be served. If no stipulation or order is filed in seven (7) days, I will serve the party whose name appears first in the case title.

ANGELA BARKELL, CLERK
CLERK OF THE DISTRICT COURT

By *Anna Aron*
Deputy Clerk

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

Richard L. Harris
Attorney at Law
PO Box 1438
Caldwell, Id 83605

Honorable Lawrence G. Wasden, Attorney General
PO Box 83720
Boise, Id 83720-0010

Notice of Lodging Clerks Record

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF OWYHEE

FILED

10:51 A.M. P.M.

OCT 10 2013

ANGELA BARKELL, CLERK

(Trina Aman)
Deputy Clerk

Certificate of Service

Supreme Court Case
41235

Lee Edd Green, Jr.,
Petitioner-Appellant,
vs.
State of Idaho,
Respondent,

I, Trina Aman, Deputy Clerk the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following: **Clerk's Record**

to each of the Attorneys of Record in this cause as follows:

ANGELA BARKELL
Clerk of the District Court

BY *(Trina Aman)*
Deputy Clerk

Date of Service: 10/10/13

Clerk of the Court
Idaho Supreme Court
P.O. Box 83720
Boise, Id 83720-0101

Richard L. Harris
Attorney at Law
PO Box 1438
Caldwell, Id 83605

Honorable Lawrence G. Wasden, Attorney General
PO Box 83720
Boise, Id 83720-0010