

6-15-2015

Fortin v. State Clerk's Record Dckt. 43334

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CODY JAMES FORTIN,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43334

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE PATRICK H. OWEN

STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Cody J Fortin, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
5/7/2013	NPCP	CCNELSRF	New Case Filed - Post Conviction Relief	District Court Clerk
	CHGA	CCNELSRF	Judge Change: Administrative	Patrick H. Owen
	PETN	CCNELSRF	Petition and Affidavit for Post Conviction Relief	Patrick H. Owen
	AFFD	CCNELSRF	Affidavit in Support of Petition and Affidavit for Post Conviction Relief	Patrick H. Owen
	MOTN	CCNELSRF	Verified Motion for Waiver of Costs	Patrick H. Owen
	MOTN	CCNELSRF	Motion for Appointment of Counsel	Patrick H. Owen
	MOTN	CCNELSRF	Motion for the Release of PSI	Patrick H. Owen
	MOTN	CCNELSRF	Motion for Judicial Notice	Patrick H. Owen
	CERT	CCNELSRF	Certificate Of Mailing	Patrick H. Owen
5/8/2013	PROS	PRFISCKD	Prosecutor assigned Jonathan M Medema	Patrick H. Owen
5/24/2013	ANSW	CCREIDMA	Answer - Jonathan M Medema 5623 forSt of Idaho	Patrick H. Owen
	MOTN	CCREIDMA	Motion To Take Judicial Notice	Patrick H. Owen
	MOTN	CCREIDMA	Motion for Summary Disposition	Patrick H. Owen
	MISC	CCREIDMA	Brief In Support of Motion For Summary Disposition	Patrick H. Owen
	NOTC	CCREIDMA	Notice of Hearing (Fortin)	Patrick H. Owen
6/6/2013	MOTN	CCNELSRF	Motion for Extension of Time To Respond to Summary Judgment and to Vacate the June 8th 2013 Hearing on the Same States Motion	Patrick H. Owen
	AFSM	CCNELSRF	Affidavit In Support Of Motion for Extension of Time To Respond to Summary Judgment and to Vacate the June 8th 2013 Hearing on the Same States Motion	Patrick H. Owen
	MEMO	CCNELSRF	Memorandum of Points and Authorities in Support of a Motion for Extension of Time To Respond to Summary Judgment and to Vacate the June 8th 2013 Hearing on the Same States Motion	Patrick H. Owen
6/10/2013	ORDR	DCJOHNSI	Order Granting Motion for Appointment of Counsel	Patrick H. Owen
6/25/2013	HRSC	CCHEATJL	Notice Of Hearing Scheduled (Motion 07/30/2013 03:00 PM) Motion For Summary Dismissal	Patrick H. Owen
7/2/2013	MEMO	CCHUNTAM	Memorandum Decision and Order re: Appointment of Counsel, Waiver of Filing Fees, Release of the Pre-Sentence Report, and Judicial Notice of Underlying Files	Patrick H. Owen
7/19/2013	MOTN	CCHOLMEE	Motion for Stay of Proceedings and For Leave to Amend Petition	Patrick H. Owen
	MOTN	CCJOHNLE	Motion to Release PSI	Patrick H. Owen
7/29/2013	NOHG	CCVIDASL	Notice Of Hearing	Patrick H. Owen
	HRSC	CCVIDASL	Hearing Scheduled (Motion 09/17/2013 03:00 PM) Motion for Summary Dismissal and Motion to Take Judicial Notice	Patrick H. Owen

Cody J Fortin, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
7/30/2013	HRVC	CCHUNTAM	Hearing result for Motion scheduled on 07/30/2013 03:00 PM: Hearing Vacated Motion For Summary Dismissal
8/23/2013	ORDR	DCJOHNSI	Order Releasing PSI
	ORDR	DCJOHNSI	Order Granting Stay and for Leave to Amend Petition
9/16/2013	HRVC	CCHUNTAM	Hearing result for Motion scheduled on 09/17/2013 03:00 PM: Hearing Vacated Motion for Summary Dismissal and Motion to Take Judicial Notice
12/17/2013	NOTC	CCJOHNLE	Notice of Scheduling Conference Under IRCP 16(a) and 16(b)
6/17/2014	NOTC	DCJOHNSI	Notice of Status Conf
	HRSC	DCJOHNSI	Hearing Scheduled (Status 06/25/2014 03:00 PM)
6/23/2014	CONT	DCJOHNSI	Continued (Status 07/09/2014 03:00 PM)
7/9/2014	DCHH	DCJOHNSI	Hearing result for Status scheduled on 07/09/2014 03:00 PM: District Court Hearing Held Court Reporter: redlich Number of Transcript Pages for this hearing estimated:50
11/3/2014	NOHG	CCSCOTDL	Notice Of Hearing (Status Conference)(11-19-14 @ 3PM)
	HRSC	CCSCOTDL	Hearing Scheduled (Status Conference 11/19/2014 03:00 PM)
11/19/2014	DCHH	DCJOHNSI	Hearing result for Status Conference scheduled on 11/19/2014 03:00 PM: District Court Hearing Held Court Reporter: redlich Number of Transcript Pages for this hearing estimated:50
	HRSC	DCJOHNSI	Hearing Scheduled (Review Hearing 01/21/2015 03:00 PM)
1/21/2015	DCHH	DCJOHNSI	Hearing result for Review Hearing scheduled on 01/21/2015 03:00 PM: District Court Hearing Held Court Reporter: redlich Number of Transcript Pages for this hearing estimated:50
2/9/2015	NOTH	CCRADTER	Notice Of Hearing
	HRSC	CCRADTER	Hearing Scheduled (Motion for Summary Judgment 03/17/2015 03:00 PM)
2/10/2015	MEMO	CCHEATJL	Memorandum In Response To State's Motion For Summary Judgment
2/26/2015	MEMO	CCMARTJD	Reply Memorandum Regarding Motion for Summary Disposition

Cody J Fortin, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
3/17/2015	DCHH	DCJOHNSI	Hearing result for Motion for Summary Judgment scheduled on 03/17/2015 03:00 PM: District Court Hearing Held Court Reporter: redlich Number of Transcript Pages for this hearing estimated:50	Patrick H. Owen
5/12/2015	MEMO	DCJOHNSI	Memorandum Decision and Order Granting Motion for Summary Disposition	Patrick H. Owen
6/12/2015	JDMT	DCJOHNSI	Judgment	Patrick H. Owen
	CDIS	DCJOHNSI	Civil Disposition entered for: State Of Idaho, Other Party; Fortin, Cody J, Subject. Filing date: 6/12/2015	Patrick H. Owen
	STAT	DCJOHNSI	STATUS CHANGED: Closed	Patrick H. Owen
6/15/2015	NOTA	CCATKIFT	NOTICE OF APPEAL	Patrick H. Owen
6/18/2015	ORDR	DCJOHNSI	Order Appointing SAPD	Patrick H. Owen
8/11/2015	NOTC	TCWEGEKE	Notice of Transcript Lodged - Supreme Court No. 43334	Patrick H. Owen

CODY J. FORTIN # 72953
I.C.C. K Pod 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

NO. _____ FILED _____
A.M. 11:37 P.M. _____

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

PATRICK H. OWEN

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CV PC 1308285

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

Civil Case No. _____
District Court No. CR-FE-2009-19383

PETITION FOR POST
CONVICTION RELIEF

STATE OF IDAHO)
 : ss.
The County of ADA)

ORIGINAL

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above entitled cause; and, who, respectfully presents this application for post conviction relief, based upon the law and facts of the case, those grounds and causes more fully explained herein and after, as well as the petitioner's affidavit in support hereof; said affidavit being attached hereto, and by this reference, incorporated herein as though quoted in its respective entirety;

I.

PRELIMINARY STATEMENT

A. Here, the applicant brings before the Court a collateral attack upon the findings of guilt by a jury of his peers, subsequent sentencing, and those errors committed at the direct appellate stage; alleging, that each is the direct result of ineffective assistance of counsel(s), and, which individually and/or collectively require relief.

w

B. Moreover, **Notice** is hereby provided to the Court and opposing parties, pursuant to I.C. **19-4903**, that the applicant lacks both the complete record and legal expertise needed to properly prepare and present all the applicable issues or to attach the relevant portions of the case record.

For these reasons alone, notice is being given that further amendment and discovery will no doubt be required.

II. JURISDICTION

A. Petitioner is currently incarcerated within the Idaho Department of Corrections (IDOC), and housed at the Idaho Correctional Center (ICC), South of Boise, pursuant to a finding of guilty on charges of Aggravated Battery with the use of a deadly weapon in the commission of crime, where he is serving a unified term of twenty five years (25), with a minimum period of confinement of twelve (12) years, consecutive to a term of five (5) years fixed, with fifteen (15) indeterminate on charges of Assault and Battery on Certain Personnel, enhanced for the Use of Deadly Weapon handed down in a companion case.

Those findings of guilt and sentencing complained of herein were imposed by the Honorable Duff D. McKee and Honorable Patrick Owen, in criminal case CR-FE-2009-19383, in a Judgment of Conviction and Commitment filed on August 6th 2010, in the Fourth Judicial District Court, County of Ada, State of Idaho.

B. This petition challenges the constitutionality of those same convictions and sentences, charging that there exists evidence of material facts and law, not previously presented nor heard, which have abrogated the rights of the applicant guaranteed under the applicable portions of the United States and Idaho State Constitutions, and thus require the reversal of the petitioner's convictions or, at the very least, resentencing.

C. Accordingly, jurisdiction is proper in this matter pursuant to **Idaho Code 19-4901 et seq.**, and **Rule 57 of the Idaho Criminal Rules**. Furthermore, venue in these proceedings is appropriately before this Court, since the crime(s) alleged occurred within Ada County.

III.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

A. On October 13th 2009 while attending a party at a private residence the petitioner and another individual, named Darryl Shayler,¹ begin arguing, which eventually led to a physical confrontation. Sometime during that initial mutual combat Darryl received what appeared to be knife inflicted wounds in the neck and shoulder. No one testified to seeing the petitioner actually inflict those wounds including Shayler. Within minutes a second confrontation took place outside the home, where Shayler alleged Fortin cut him across face and left the scene.

The following day the petitioner was arrested in his girlfriend's driveway by uniformed and plainclothes detectives on charges of Aggravated Battery and Use of Deadly Weapon, on Shayler. Reports of the exact events that transpired before the petitioner was taken into custody on October 14th 2009 vary depending upon the teller of the tale. For the moment it is sufficient to say that an information was eventually handed down charging Fortin with assault with a dangerous weapon (a knife) on the prior day, and, assault on a police officer, with a dangerous weapon (the vehicle) on October 14th 2009.

B. At his video arraignment, bond and a date for the preliminary hearing were set, and, the office of the Ada County Public Defender was appointed to represent the petitioner.

Within days, appointed counsel approached Fortin with a deal offered by the prosecutor, the terms of which were as follows: In consideration for pleas of guilty to assault on the civilian and eluding a police officer, Fortin would be sentenced on those crimes to five (5) fixed, fifteen (15) indeterminate and zero (0) fixed, five (5) years indeterminate respectively; and, the state would drop both weapon enhancements and the assault on the police officer.

C. Fortin's parents retained a private attorney on his behalf and matters changed: An amended complaint was filed, further amended and the charges and trials for the events of October 13th and 14th separated at the request of Fortin's new counsel and against his expressed wishes.

D. Following a series of motions and hearings held on these matters, Fortin proceeded to trial on the separated charges and was found guilty by jury in what was now being designated as CR-FE-09-19383. A timely appeal was filed in that matter by conflict counsel, Greg Silvey, and an unpublished decision was handed down under Idaho Court of Appeals Docket No. 38069 on April 30, 2012 affirming the conviction; subsequently a petition for review was denied and a final remittitur issued May 22, 2012.

Here, ends the initial statement of the case and the course of the prior proceedings.

IV.

INITIAL CAUSES OF ACTION

A. **WHETHER THE INDIVIDUAL AND/OR CUMULATIVE ACTIONS AND INACTIONS OF THE PETITIONER'S ATTORNEYS AT THE INVESTIGATIVE, ENTRY OF PLEA, TRIAL, SENTENCING AND DIRECT APPEAL STAGES OF THE UNDERLYING PROCEEDINGS CONSTITUTE INSUFFICIENT, UNSUFFICIENT, AND INEFFECTIVE ASSISTANCE OF COUNSEL(S) RESULTING IN THE ABROGATION OF THE PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THOSE SAME GUARANTEES GRANTED UNDER ARTICLE I, SECTION 13 AND OTHER PORTIONS OF THE IDAHO STATE CONSTITUTION???**

1. The individual and/or collective failures, actions and inactions of Fortin's retained private trial attorney and appointed direct appeal counsel(s) - Charles Crafts and Greg Silvey, respectively - at the investigative, entry of plea, trial, sentencing and direct appeal stages of criminal case CR-FE-2009-19383 have denied the petitioner his state and federal constitutional rights to sufficient and effective assistance of counsel(s) at each of the foregoing stages of these proceedings for those reasons following, *inter alia*.

2. At the time of trial counsel's paid retention a plea bargain was on the table which would have resulted in a maximum term of imprisonment of fifteen (15) years on two felony convictions with concurrently imposed sentences in consideration for pleas of guilty. Counsel's advice to separate the charges and proceed to trial on each, instead, was clearly a matter of substandard performance. Particularly, considering Trial counsel failed to inform his client that the separation of the charges and his subsequent entries of pleas would subject

him to a sentencing where any argument for concurrent terms under the doctrine of a common course of conduct and scheme would be strictly discretionary on the part of the court, and were not a part of any plea bargain. that separation was against the express wishes of the petitioner.² Prejudice is convincingly apparent in the result: Fortin, instead, received consecutive terms of five years (5) fixed, with fifteen (15) indeterminate and twelve (12) years fixed followed by thirteen (13) years indeterminate. A decision to accept the plea bargain would have guaranteed less time and fewer convictions; while simply not separating the trials would have avoided a consecutive sentencing scheme.

The only person who benefited from the foregoing decisions to proceed and separate the trials was counsel.

3. During the investigative and trial stages the petitioner alleges the following individual and cumulative errors were perpetrated by this same attorney:

a. Counsel's failure to file a *motion in limine* regarding Forin's alleged gang affiliation, or in the alternative to move for an immediate mistrial, resulted in the jury hearing the petitioner was a gang member and having to depend upon a judicial instruction to unring that bell. This decision was neither tactical nor strategic, but rather a failure to properly investigate or to object.

b. Trial counsel's failure to conduct a pretrial interview and to subpoena as a defense witness, Casey Smith, resulted in the trial judge's refusal to allow counsel to recall this witness, where her earlier testimony could have been impeached by her statements to police closer to the time of the incident, was prejudicial and a result of neither strategic or tactical choice, but substandard performance with a prejudicial result.

c. When counsel failed to object to the admission of flight evidence during trial predicated upon relevance as criticized by the Unpublished Opinion of the Idaho Court of Appeals.³

d. This same counsel should have objected to the wording of the verdict form provided to the jury during deliberations; a form whose format destroyed the defendant's

presumption of innocence by listing seven possibilities of guilt before the entitled first consideration of not guilty. In its presented form that "instruction" to the jury denied the defendant his equal protection and due process rights by removing the presumption of innocence from the minds of jury prior to and during deliberations.

e. Despite being requested to file a Rule 35 and agreeing to do so retained counsel failed to submit that filing or to inform his client he didn't intend to keep this commitment.

4. It was substandard performance and prejudicial when appellate counsel failed to federalize any issues raised on direct appeal, even though counsel was noticed by his client of the omission (See: Appendice "A"included herewith); as well as the fact that same attorney failed to object to record that contains a complete reiteration of the Friday, February 4, 2011 restitution hearing that credits the spoken language to the opposite party speaking. Said otherwise, all of the prosecutors remarks are credited to defense counsel and vice versa.⁴

¹ Darryl Shayler is spelled Darryl Shaylor in some documents and Shayler in others.

² See: Fortin's Affidavit in Support of Post Conviction Relief, ¶ 7-9, included herewith and incorporated hereby, in this regard.

³ See: State of Idaho v. Fortin, 2012 Unpublished Opinion No. 454 Page 3 footnote 1. See: Appendice "A" included herewith and herein, in this regard.

⁴ T. Transcript Feb. 4, 2011 Page 8 beginning at line and continuing thereafter.

VI.
CONCLUSION

A. Make no mistake this is a case that centers around "he said, she said" evidence. Small differences in testimony and other evidence would have huge consequences in the result: Regardless:

B. The foregoing material facts and circumstances are sufficient to warrant appointment of counsel, judicial notice of the entire underlying record(s), and an evidentiary hearing on these and any additional issues brought to light following the court's appointed counsel or the petitioner being granted possession of the record. Specific relief is sought as follows:

VII
PRAYER FOR RELIEF

WHEREFORE, the petitioner respectfully moves this Court to enter an Order providing the following:


1. **ACCEPTANCE OF JURISDICTION** and **VENUE** in these proceedings, with normal advancement upon the Court's calendar:
2. **THAT JUDICIAL NOTICE** is to be taken of the entire underlying record(s), pursuant to I.R.E. 201, in district court number **CR-FE-2009-19383**, Court of Appeals Docket No. **38069**, as well as those same records found in companion case **CR-2009-0019475**, and:
3. **APPOINTMENT OF COUNSEL**, pursuant to I.C. **19-4904** and **19-852**;
4. **THAT DIRECTS** the Clerk to serve the respondent a conformed copy of this filing, pursuant to I.C. **19-4902**; thus **REQUIRING** the respondent to provide an **Answer**, as well as those relevant portions of the record within thirty (30) days of receipt thereof, pursuant to I.C. **19-4906(a)**.
5. **THAT**, following the passing of an adequate amount of time for the parties to prepare, an evidentiary hearing occur; and,
6. **THAT**, in the event, that the preponderance of evidence submitted eventually demonstrates that the petitioner has suffered from ineffective assistance of counsel under the

law and in view of the facts submitted, that petitioner's findings of guilty be set aside and/or the subsequent sentences be modified and/or set aside: **and/or**,

7. **AND**, for any additional relief the Court may deem necessary or proper under these circumstances.

DATED this 3 day of MAY 2013.

Respectfully submitted,




CODY J. FORTIN
Petitioner pro se

VIII.
VERIFICATION

I, DO HEREBY CERTIFY and AFFIRM that I am the petitioner in the foregoing application for post conviction relief, and; that I have read the contents thereof in their entirety, and, that the facts contained therein are true and correct to the best of my knowledge and belief in all regards.

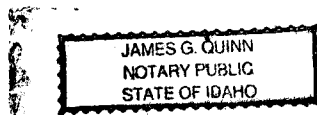
DATED this 3 day of MAY 2013.

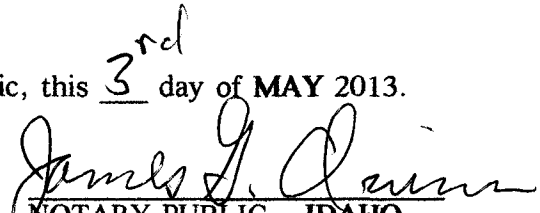


CODY J. FORTIN
Petitioner-Affiant pro se

SUBSCRIBED and SWORN to before me, a Notary Public, this 3rd day of MAY 2013.

*** SEAL ***





NOTARY PUBLIC - IDAHO

Commission Expires: 9/10/13

December 1st 2011

CODY J. FORTIN # 72953
I.C.C. K Pod 211-A
Post Office Box 70010
Boise, Idaho 83707

COPY !!!

MR. GREG SILVEY
Attorney at Law
Post Office Box 565
Star, Idaho 83669

**RE: State of Idaho v. Cody J. Fortin, Docket No. 38069:
Initial Appellant's Brief and Other Matters.**

Dear Mr. Silvey:

I very much appreciate the work you put into my initial brief on direct appeal and include my thanks for the copy you forwarded.

For some time now I've attempted to contact you through your office, unsuccessfully. While I understand your time is limited, would you be good enough to answer my single concern at this point in the proceedings: Do you feel comfortable that none of the issues presented on my direct appeal warrant have been federalized to protect my possible eventual appeal to the United States federal courts?

Please be kind enough to provide me a copy of the State's response; and, should you elect to file a reply brief, a copy of that filing. Do you anticipate oral argument in these matters?

Pending your response, I wish you well and the best over the coming Holidays.

Sincerely,



Cody J. Fortin

c: file

CODY J. FORTIN # 72953
I.C.C. K Pod 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

NO. 1137 FILED
A.M. P.M.

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

Civil Case No. CV-
District Court No. CR-FE-2009-19383

CV PC 1308285

AFFIDAVIT IN SUPPORT
OF PETITION FOR POST
CONVICTION RELIEF

STATE OF IDAHO)
 : ss.
The County of ADA)

ORIGINAL

CODY J. FORTIN, after first being duly sworn upon his oath, deposes and says:

1. AFFIANT is the petitioner pro se in the above encaptioned matter, and brings this application for post conviction relief in good faith, absent any purpose to delay or annoy:
2. AFFIANT has only a limited education, is financially indigent, and has no knowledge of case law and legal procedure; as a point of fact, all of these filings have been prepared by a former inmate law clerk, who may or may not be able to continue to aide YOUR AFFIANT since the rules that govern such assistance are growing increasingly more restrictive:
3. AFFIANT has never seen nor possessed the entire case file or fully examined a complete copy of the underlying record and discovery in these matters:

4. THAT the Idaho Correctional Center's legal resource office, where the petitioner is housed, has no state or federal reporter series, and contains only the most basic of pre-printed forms, some of which including those for post conviction relief are legally inadequate:

5. AFFIANT was adjudged indigent at the on-set and appellate stages of the underlying proceedings.

6. YOUR AFFIANT has read in it's entirety the petition in these matters, and, should YOUR AFFIANT be called upon to provide testimony in these proceedings, AFFIANT could and would testify that the facts represented therein are a true representation of the events as they occurred throughout the underlying proceedings, as well as the following specific material facts: that

7. AFFIANT was counseled convincingly by his trial attorney, Charles Craft, that he could prevail at a trial by jury; and, had that counseling not occurred, YOUR AFFIANT would have elected to accept the state's plea bargain offer that included, *inter alia*, dismissal of one felony charge and two weapon enhancements, plus a numerically lower and concurrent sentencing recommendation:

8. YOUR AFFIANT, upon being informed that his family retained attorney, Charles Crafts, intended to bifurcate his charges into two (2) separate trials advised that same counsel that he was opposed to such a decision, only to be told that this was a decision reserved for one's attorney and that it was in YOUR AFFIANT'S best interest to do so. At no time was AFFIANT told of the inherent dangers of such a choice - i.e. consecutive v. current sentences.

9. AFFIANT and his Family requested that counsel file a motion for reduction in sentence, which despite being assured would occur, never happened. Nor was the petitioner or his Family advised it would not be done prior to the expiration of time to do so.

10. FURTHER sayeth YOUR AFFIANT naught.

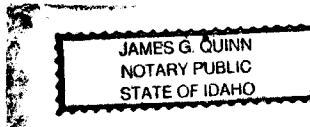
DATED this 3 day of MAY 2013.



CODY J. FORTIN
Petitioner-Affiant pro se

SUBSCRIBED and SWORN to before me, a Notary Public, this 3rd day of MAY 2013.

*** SEAL ***



NOTARY PUBLIC - IDAHO

Commission Expires: 9/10/13/

CODY J. FORTIN # 72953
I.C.C. K POD 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

NO. 11-37 FILED
A.M. _____ P.M. _____

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By RICH NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

Civil Case No. _____
District Court No. CR-FE-2009-19383

A VERIFIED MOTION FOR WAIVER
OF COSTS AND IN FORMA PAUPERIS
STATUS ON APPLICATION FOR POST
CONVICTION PROCEEDING

STATE OF IDAHO)
 : ss
COUNTY OF ADA)

ORIGINAL

COMES NOW, CODY J. FORTIN, petitioner pro se, in the underlying matter of a petition for post conviction relief; and, who, pursuant to the Idaho Rules of Civil Procedure, the Affidavit in Support hereof and within; the facts contained within the Affidavit in Support of Post Conviction Relief, included herewith; and, the accompanying Motion for Appointment of Counsel, respectfully moves this Honorable Court to grant the petitioner the waiver of any associated costs in these proceedings, as well as *in forma pauperis* status on the petitioner's motion for appointment of counsel submitted contemporaneously:

VERIFICATION FOR INDIGENT STATUS AND WAIVER OF COSTS

CODY J. FORTIN, after first being duly sworn upon his oath, deposes and says:

1. YOUR AFFIANT is the applicant in the above entitled petition and presents the following sworn testimony in support of his request for court appointed counsel and the waiver of costs in this matter:

2. AFFIANT is a pro se petitioner who has been continuously incarcerated since October of 2009 and, who, when originally charged in these proceedings was adjudged indigent:

3. YOUR AFFIANT will not be able to pay the costs involved in this proceeding, nor to obtain the necessary funds to retain a private attorney:

4. AFFIANT brings this request and underlying filing in good faith, absent any purpose to hinder, annoy or delay:

5. YOUR AFFIANT has no real or personal property beyond that of those few personal possessions allowed within the prison, and possesses no bank or savings accounts, stocks, bonds, nor receives any annuities from any outside sources.

6. AFFIANT neither owns nor possesses any automobiles, motorcycles or other recreational vehicles:

7. AFFIANT is not presently employed within the prison system and YOUR AFFIANT's only other source of funds is the occasional gift from friends and family; moreover, the current balance in YOUR AFFIANT's inmate trust account (a certified copy of which is attached hereto) - immediately prior to filing these documents is: \$16059.

8. FURTHER, sayeth YOUR AFFIANT naught.

DATED this 3 day of MAY 2013.



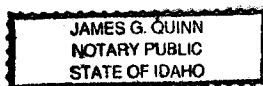
CODY J. FORTIN
Affiant pro se

SUBSCRIBED and SWORN to before me, a Notary, on this 3rd day of MAY 2013.



NOTARY PUBLIC - State of IDAHO

*** SEAL **



Commission Expires: 9 / 10 / 13

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 05/03/2013 =

Doc No: 72953 Name: FORTIN, CODY JAMES
 Account: CHK Status: ACTIVE

ICC/UNIT H PRES FACIL
 TIER-2 CELL-16

Transaction Dates: 05/03/2012-05/03/2013

Beginning Balance 24.53	Total Charges 3902.03	Total Payments 4038.09	Current Balance 160.59
-------------------------------	-----------------------------	------------------------------	------------------------------

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
05/04/2012	HQ0583680-009	011-RCPT MO/CC	261954	400.00	424.53
05/08/2012	IC0584066-443	099-COMM SPL		6.85DB	417.68
05/09/2012	IC0584250-015	078-MET MAIL	199201	0.20DB	417.48
05/09/2012	IC0584283-005	070-PHOTO COPY	180460	0.10DB	417.38
05/10/2012	HQ0584404-003	061-CK INMATE	199202	22.00DB	395.38
05/10/2012	IC0584436-019	078-MET MAIL	199200	0.45DB	394.93
05/15/2012	IC0584746-551	099-COMM SPL		14.29DB	380.64
05/22/2012	IC0585585-452	099-COMM SPL		89.35DB	291.29
05/25/2012	IC0586203-321	099-COMM SPL		65.71DB	225.58
06/05/2012	IC0587706-444	099-COMM SPL		30.73DB	194.85
06/06/2012	HQ0587873-026	022-PHONE TIME	187404	10.20DB	184.65
06/08/2012	HQ0588372-010	011-RCPT MO/CC	728942	50.00	234.65
06/12/2012	IC0588710-509	099-COMM SPL		8.46DB	226.19
06/14/2012	HQ0588957-003	012-RCPT CHECK	LOST PROP	19.00	245.19
06/14/2012	HQ0588989-002	061-CK INMATE	187402	75.00DB	170.19
06/14/2012	IC0589036-011	078-MET MAIL	207200	1.10DB	169.09
06/15/2012	IC0589197-011	045- CARLS JR	206062 D2	15.75DB	153.34
06/19/2012	IC0589346-467	099-COMM SPL		50.80DB	102.54
06/26/2012	IC0590076-378	099-COMM SPL		23.99DB	78.55
06/26/2012	HQ0590161-017	022-PHONE TIME	187405	10.20DB	68.35
06/28/2012	HQ0590284-006	011-RCPT MO/CC	742731	200.00	268.35
06/28/2012	HQ0590307-018	011-RCPT MO/CC	742733	40.00	308.35
07/02/2012	HQ0590590-011	011-RCPT MO/CC	742949	400.00	708.35
07/03/2012	IC0590613-384	099-COMM SPL		23.99DB	684.36
07/03/2012	HQ0590670-012	011-RCPT MO/CC	719140	400.00	1084.36
07/03/2012	IC0590730-385	099-COMM SPL		23.99DB	1060.37
07/03/2012	IC0590751-385	100-CR INM CMM		23.99	1084.36
07/03/2012	IC0590760-384	100-CR INM CMM		23.99	1108.35
07/03/2012	IC0590813-358	099-COMM SPL		64.02DB	1044.33
07/06/2012	HQ0591075-016	011-RCPT MO/CC	719197	400.00	1444.33
07/10/2012	IC0591536-487	099-COMM SPL		67.86DB	1376.47
07/11/2012	HQ0591751-027	022-PHONE TIME	205955	13.60DB	1362.87
07/12/2012	HQ0591970-003	061-CK INMATE	204939	200.00DB	1162.87
07/17/2012	IC0592404-433	099-COMM SPL		16.71DB	1146.16
07/24/2012	IC0593103-425	099-COMM SPL		21.60DB	1124.56
07/24/2012	IC0593105-049	100-CR INM CMM		66.09	1190.65
07/31/2012	IC0593824-376	099-COMM SPL		88.57DB	1102.08
07/31/2012	HQ0593838-025	011-RCPT MO/CC	807784	50.00	1152.08
08/07/2012	IC0594574-389	099-COMM SPL		59.52DB	1092.56

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 05/03/2013 =

Doc No: 72953 Name: FORTIN, CODY JAMES
 Account: CHK Status: ACTIVE

ICC/UNIT H PRES FACIL
 TIER-2 CELL-16

Transaction Dates: 05/03/2012-05/03/2013

Beginning Balance 24.53	Total Charges 3902.03	Total Payments 4038.09	Current Balance 160.59
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===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
08/08/2012	HQ0594872-023	022-PHONE TIME	213222	10.20DB	1082.36
08/16/2012	HQ0595887-023	061-CK INMATE	198554	450.00DB	632.36
08/16/2012	HQ0595922-008	061-CK INMATE	198555	22.00DB	610.36
08/21/2012	IC0596180-409	099-COMM SPL		54.25DB	556.11
08/21/2012	HQ0596300-002	022-PHONE TIME	214313	10.20DB	545.91
08/28/2012	IC0596848-428	099-COMM SPL		29.76DB	516.15
08/31/2012	IC0597375-427	099-COMM SPL		29.76DB	486.39
08/31/2012	IC0597411-427	099-COMM SPL		-29.76DB	516.15
09/04/2012	IC0597527-425	099-COMM SPL		-29.76DB	545.91
09/04/2012	IC0597540-424	099-COMM SPL		29.76DB	516.15
09/11/2012	IC0598721-520	099-COMM SPL		21.14DB	495.01
09/18/2012	IC0599753-510	099-COMM SPL		41.99DB	453.02
09/19/2012	HQ0599936-011	022-PHONE TIME	187403	10.20DB	442.82
09/21/2012	IC0600305-346	099-COMM SPL		66.83DB	375.99
09/26/2012	HQ0600863-020	011-RCPT MO/CC	382458	10.00	385.99
10/02/2012	IC0601354-482	099-COMM SPL		50.77DB	335.22
10/08/2012	IC0602219-456	099-COMM SPL		54.70DB	280.52
10/10/2012	HQ0602509-020	022-PHONE TIME	219984	13.60DB	266.92
10/19/2012	IC0603717-007	045-PIOZZA	D2 MEAT	18.80DB	248.12
10/23/2012	IC0604026-470	099-COMM SPL		45.41DB	202.71
10/30/2012	IC0604729-432	099-COMM SPL		24.45DB	178.26
11/06/2012	IC0605602-396	099-COMM SPL		35.53DB	142.73
11/13/2012	IC0606418-508	099-COMM SPL		61.80DB	80.93
11/13/2012	IC0606485-016	071-MED CO-PAY	89988	5.00DB	75.93
11/16/2012	IC0606927-329	099-COMM SPL		30.31DB	45.62
11/27/2012	IC0607788-550	099-COMM SPL		9.78DB	35.84
12/11/2012	HQ0609673-007	011-RCPT MO/CC	4026	150.00	185.84
12/18/2012	IC0610400-508	099-COMM SPL		77.15DB	108.69
12/19/2012	HQ0610609-019	022-PHONE TIME	233802	10.20DB	98.49
12/21/2012	IC0610945-374	099-COMM SPL		61.24DB	37.25
12/21/2012	IC0610970-004	078-MET MAIL	233803	5.14DB	32.11
12/21/2012	IC0610970-008	078-MET MAIL	233800	2.63DB	29.48
12/24/2012	HQ0611063-024	011-RCPT MO/CC	5263	50.00	79.48
12/28/2012	IC0611538-439	099-COMM SPL		23.03DB	56.45
01/08/2013	IC0612630-519	099-COMM SPL		52.89DB	3.56
01/11/2013	HQ0613233-021	011-RCPT MO/CC	6880	30.00	33.56
01/15/2013	IC0613706-576	099-COMM SPL	613513	2.08DB	31.48
01/18/2013	IC0613936-009	045-CHICKEN	235163-K	23.20DB	8.28
01/22/2013	IC0614197-020	071-MED CO-PAY	95294	5.00DB	3.28

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 05/03/2013 =

Doc No: 72953 Name: FORTIN, CODY JAMES
 Account: CHK Status: ACTIVE

ICC/UNIT H PRES FACIL
 TIER-2 CELL-16

Transaction Dates: 05/03/2012-05/03/2013

Beginning Balance	Total Charges	Total Payments	Current Balance
24.53	3902.03	4038.09	160.59

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
01/23/2013	HQ0614444-023	011-RCPT MO/CC	7518	450.00	453.28
01/29/2013	IC0614892-414	099-COMM SPL		59.77DB	393.51
01/30/2013	HQ0615047-017	022-PHONE TIME	237227	10.20DB	383.31
01/31/2013	HQ0615253-002	061-CK INMATE	241154	130.00DB	253.31
02/05/2013	IC0615653-377	099-COMM SPL		61.90DB	191.41
02/12/2013	IC0616663-546	099-COMM SPL		69.90DB	121.51
02/13/2013	HQ0616814-028	022-PHONE TIME	244436	34.00DB	87.51
02/15/2013	HQ0617093-008	011-RCPT MO/CC	9080	10.00	97.51
02/19/2013	IC0617210-486	099-COMM SPL		53.83DB	43.68
02/22/2013	IC0617777-018	078-MET MAIL	242214	2.07DB	41.61
02/26/2013	IC0617992-436	099-COMM SPL		26.71DB	14.90
03/01/2013	HQ0618498-012	011-55PT MO/CC	10059	100.00	114.90
03/05/2013	IC0618825-427	099-COMM SPL		35.98DB	78.92
03/05/2013	HQ0618850-005	011-55PT MO/CC	10213	10.02	88.94
03/05/2013	HQ0619008-003	022-PHONE TIME	244740	44.20DB	44.74
03/06/2013	HQ0619133-022	011-RCPT MO/CC	10472	350.00	394.74
03/12/2013	IC0619687-547	099-COMM SPL		65.95DB	328.79
03/13/2013	HQ0619931-027	022-PHONE TIME	248787	37.40DB	291.39
03/13/2013	HQ0619987-010	011-RCPT MO/CC	11095	10.00	301.39
03/15/2013	IC0620226-006	045-SUBWAY	249504-K	13.00DB	288.39
03/19/2013	IC0620427-469	099-COMM SPL		73.34DB	215.05
03/20/2013	HQ0620585-022	022-PHONE TIME	248913	37.40DB	177.65
03/20/2013	IC0620655-021	078-MET MAIL	249114	1.12DB	176.53
03/22/2013	HQ0620893-010	011-RCPT MO/CC	11785	350.00	526.53
03/25/2013	HQ0621046-008	011-RCPT MO/CC	11823	10.00	536.53
03/25/2013	HQ0621093-004	011-RCPT MO/CC	11894	350.00	886.53
03/26/2013	IC0621177-457	099-COMM SPL		66.56DB	819.97
03/27/2013	HQ0621382-007	022-PHONE TIME	214654	40.80DB	779.17
03/27/2013	HQ0621426-012	011-RCPT MO/CC	12104	20.00	799.17
04/02/2013	HQ0622115-012	011-RCPT MO/CC	12522	10.00	809.17
04/02/2013	IC0622140-443	099-COMM SPL		38.58DB	770.59
04/02/2013	IC0622174-015	078-MET MAIL	251003	2.58DB	768.01
04/03/2013	HQ0622301-008	022-PHONE TIME	250925	34.00DB	734.01
04/08/2013	HQ0622719-023	011-RCPT MO/CC	12931	20.00	754.01
04/09/2013	IC0622916-479	099-COMM SPL		22.88DB	731.13
04/10/2013	HQ0623057-020	022-PHONE TIME	214655	68.00DB	663.13
04/10/2013	HQ0623090-005	011-RCPT MO/CC	13164	10.00	673.13
04/11/2013	IC0623273-022	078-MET MAIL	251042	1.12DB	672.01
04/15/2013	HQ0623481-024	011-RCPT MO/CC	13361	15.00	687.01

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 05/03/2013 =

Doc No: 72953 Name: FORTIN, CODY JAMES
Account: CHK Status: ACTIVE

ICC/UNIT H PRES FACIL
TIER-2 CELL-16

Transaction Dates: 05/03/2012-05/03/2013

Beginning Balance	Total Charges	Total Payments	Current Balance
24.53	3902.03	4038.09	160.59

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
04/16/2013	IC0623592-459	099-COMM SPL		41.58DB	645.43
04/18/2013	HQ0623995-014	011-RCPT MO/CC	13605	10.00	655.43
04/23/2013	IC0624281-482	099-COMM SPL		48.24DB	607.19
04/24/2013	HQ0624428-017	022-PHONE TIME	253049	34.00DB	573.19
04/25/2013	HQ0624588-021	061-CK INMATE	251945	320.00DB	253.19
04/30/2013	IC0624969-434	099-COMM SPL		48.40DB	204.79
05/01/2013	HQ0625170-010	022-PHONE TIME	251041	44.20DB	160.59

STATE OF IDAHO

Idaho Department of Correction

I hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand hereto affixed this 3rd

day of May A.D., 2013

By [Signature]

CODY J. FORTIN # 72953
I.C.C. K POD 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

NO. 137 FILED
A.M. _____ P.M. _____

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

CV PC 13082853

Civil Case No. _____
District Court No. CR-FE-2009-19383


MOTION FOR APPOINTMENT OF
COUNSEL IN AN APPLICATION
FOR POST CONVICTION RELIEF

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above encaptioned cause of action; and, who, respectfully moves this Honorable Court, pursuant to Idaho Code 19-4903, for the appointment of counsel to represent the applicant in these proceedings for collateral relief.

Petitioner's motion is predicated upon the statute, the material facts found within the application for post conviction relief included herewith, the affidavit in support thereof; the accompanying verified motion for waiver of costs and request for *in forma pauperis* status, as well as the entire underlying record(s) in criminal case number CR-FE- 2009-19383 and Court of Appeals Docket No. 38069.

DATED this 3 day of MAY 2013

Respectfully submitted by:


CODY J. FORTIN
Petitioner-Movant pro se

CERTIFICATE OF FILING BY MAILING

I, DO HEREBY CERTIFY and AFFIRM that the original and a true and correct copy of the foregoing Petition for Post Conviction Relief, with accompanying documentation were served upon Christopher D. Rich, Clerk of Fourth Judicial District Court for filing, by placing the same in the U.S. Mail, this 3rd day of MAY 2013, addressed as follows:

MR. CHRISTOPHER D. RICH
Clerk of District Court
Fourth Judicial District
ADA COUNTY COURTHOUSE
200 Front Street
Boise, Idaho 83702



CODY J. FORTIN
Petitioner-Affiant **pro se**

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

CODY J. FORTIN # 72953
I.C.C. K POD 216-B
Post Office Box 70010
Boise, Idaho 83707
Petitioner pro se

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

Civil Case No. **CV PG 1308285**
District Court No. CR-PE-2009-19383

**MOTION FOR THE RELEASE OF THE
UNDERLYING P.S.I., PURSUANT TO
I.C.R. 32 AND THE SUBSTANTIAL
RIGHTS OF THE PETITIONER**

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above entitled cause of action; and, who, respectfully moves this Honorable Court to direct the Clerk of the Court to release and deliver to the petitioner or his court appointed counsel a full and complete copy of the presentence investigative report in the underlying criminal action, including any attachments thereto and exhibits thereof.

Petitioner's motion is predicated upon the record to date; the affidavit in support of the initial application for post conviction relief; the Idaho Criminal and Civil Rules; the fact that said report contains evidence of material facts regarding matters of sentencing that impact the substantial rights of the petitioner; and, that the absence of its integration into this record will impede the petitioner's right to provide proof of the issues.

DATED this 3 day of MAY 2013.

Respectfully submitted by:


CODY J. FORTIN - Movant pro se

CODY J. FORTIN # 72953
I.C.C. K POD 216-B
Post Office Box 70010
Boise, Idaho 83707
Petitioner pro se

NO. _____
AM 11:57 FILED P.M. _____

MAY 07 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
Petitioner,)
-vs-)
THE STATE OF IDAHO,)
Respondent.)

Civil Case No. **CV PC 1308285**
District Court No. CR-FE-2009-19383

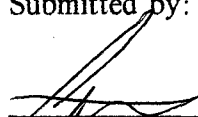
MOTION FOR JUDICIAL NOTICE
OF THE UNDERLYING CRIMINAL
CASE AND APPELLATE RECORDS,
PURSUANT TO THE IDAHO RULES
OF EVIDENCE, RULE 201

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above encaptioned cause of action; and, who, respectfully moves this Honorable Court, pursuant to Rule 201 of the Idaho Rules of Evidence, to take judicial notice of the entire underlying district court and appellate records in District Court Criminal Case No. CR-FE-2009-19383 and Idaho Court of Appeals Docket No. 38069, as well as the companion case CR-2009-0019475, including all appendices, exhibits, and attachments thereto for the purpose of these proceedings.

This motion is based upon the filings and record to date, the Rule, the protection of the petitioner's substantial rights, and the affidavit in support of post conviction relief; said affidavit being filed contemporaneously with this motion, and by this reference incorporated herein as though set out in verbatim.

DATED this 3 day of MAY 2013.

Submitted by:


CODY J. FORTIN
Petitioner-Movant pro se

FILED
Tuesday, May 07, 2013 at 11:55 AM
CHRISTOPHER D. RICH, CLERK OF THE COURT
BY: [Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J FORTIN, PLAINTIFF
Plaintiff(s)

vs

STATE OF IDAHO, DEFENDANT
Defendant(s)

CASE NO. CV-PC-2013-08285

CERTIFICATE OF MAILING

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the: **PETITION AND AFFIDAVIT FOR POST CONVICTION RELIEF** as notice pursuant to Rule 77 (d) I.R.C.P. to each of the parties or attorneys of record in this cause in envelopes addressed as follows:

CODY J FORTIN
#72953 PO BOX 70010
BOISE ID 83707

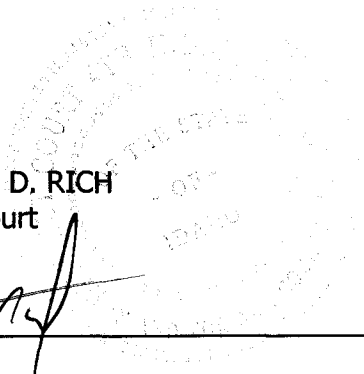
ADA COUNTY PROSECUTING ATTORNEY
(INTERDEPARTMENTAL MAIL)

ADA COUNTY PUBLIC DEFENDER
(COPY IN FILE)

Dated: Tuesday, May 07, 2013

CHRISTOPHER D. RICH
Clerk of the Court

By: [Signature]
Deputy Clerk



NO. _____
A.M. _____ FILED P.M. 2:10

MAY 24 2013

CHRISTOPHER D. RICH, Clerk
By **STEPHANIE VIDAK**
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, ID 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

CASE NO. CV-PC-2013-08285

ANSWER

COMES NOW, the State of Idaho, by and through Jonathan Medema, Deputy Prosecuting Attorney, and does hereby answer Petitioner Fortin's petition for post-conviction relief in the above-entitled action as follows:

I.

GENERAL RESPONSES TO MR. FORTIN'S POST-CONVICTION ALLEGATIONS

All allegations made by Petitioner are denied by the State unless specifically admitted herein.

MS

II.

SPECIFIC ANSWERS TO MR. FORTIN'S POST-CONVICTION ALLEGATIONS

1. Mr. Fortin's petition contains an introductory paragraph and a three paragraph Section entitled "Preliminary Statement". These paragraphs do not contain factual assertions and therefore are not capable of being admitted or denied.

2. Answering paragraph A under "Section II Jurisdiction", respondent admits Mr. Fortin is currently in the custody of the Idaho Department of Corrections. Respondent admits that in criminal case CR-FE-2009-19383, Mr. Fortin was sentenced to a term of twenty-five years in the custody of the Department of Corrections consisting of twelve years determinate and thirteen years indeterminate. The State denies that the sentence in CR-FE-2009-19383 was ordered to be served consecutively to any other sentence. The court in CR-FE-2009-0019475 ordered the sentences in that case to run consecutively to the sentence imposed in the CR-FE-2009-19383 case, from which Mr. Fortin now seeks post conviction relief.

3. Answering paragraphs B and C under "Section II Jurisdiction," respondent asserts that these paragraphs do not contain factual allegations that can be admitted or denied.

4. Answering the allegations in Section III "Statement of the Case and Prior Proceedings," respondent admits that on October 15, 2009 Mr. Fortin was before the Magistrate Division of the District Court in CR-FE-2009-0019383 for his initial appearance, what petitioner calls his video arraignment. Respondent admits that the court set bond and scheduled a preliminary hearing for October 29, 2009. Respondent admits that the court appointed the Ada County Public Defender to represent Mr. Fortin initially. Respondent admits that Charles Crafts substituted as counsel for Mr. Fortin in CR-FE-2009-0019383 on or before October 29, 2009. Respondent admits Mr. Fortin went to trial in CR-FE-2009-0019383 beginning May 17, 2010. Respondent admits the trial was only on the charges in CR-FE-2009-0019383. Respondent admits Mr. Fortin appealed from the conviction in this case and the conviction was affirmed on appeal.

Mr. Fortin states that the "charges and trials for the events of October 13th and 14th separated at the request of Mr. Fortin's new counsel and against his express wishes." (pet. P.3).

Respondent assumes Mr. Fortin is referring to the charges in CR-FE-2009-0019475 when he references the events of October 14th. With this assumption, the State admits that initially the charges in both the 19383 and 19475 cases were set for trial on the same date, although it does not appear the court ever ordered such trials to be consolidated pursuant to I.C.R. 13. The State further admits that the charges in these two cases were eventually tried separately. The State denies that the cases were tried separately at the request of Mr. Fortin's counsel. Mr. Fortin asserts he was initially offered a plea bargain where the State would recommend the sentences in the 19383 case and the 19475 run concurrently to each other. The State denies this assertion. The State denies all of the other factual assertions in Section III "Statement of the Case and Prior Proceedings."

5. Answering paragraphs A and A(1) under section heading IV "Initial Causes of Action," the State asserts that these paragraphs do not contain factual allegations and, therefore, need not be admitted or denied.

6. Answering paragraph A(2) under Section IV, petitioner asserts that, at the time he hired private counsel, a plea bargain was on the table which would have resulted in a maximum term of imprisonment of fifteen years on two felony convictions with concurrently imposed sentences in consideration of pleas of guilty. As to the assertion that the State extended a plea offer to Mr. Fortin before he hired private counsel¹, the State is without sufficient information to form a belief as to the truth of such assertion and, therefore, denies the same. There is a written offer in the State's file for CR-FE-2009-0019893 that is dated 10-28-09, the day before the initially scheduled preliminary hearing. However, the State is not aware of whether the offer was communicated to counsel that day or at the preliminary hearing on the next day, 10-29-09. As to the assertion that the State extended Mr. Fortin a plea offer that would result in Mr. Fortin pleading to only two felonies and would have resulted in a recommendation for concurrent

¹ Mr. Fortin fails to allege a date when he hired private counsel. The substitution of counsel was filed with the court 10-29-09. The State will use that date.

fifteen-year sentences, the State admits that such an offer was made in the CR-FE-2009-0019383 case. That offer did not make any mention of the charges in CR-FE-2009-0019475. The State made a simultaneous offer of settlement in the 19475 case that contemplated Mr. Fortin pleading guilty to an additional felony in that case with the State recommending the sentence in that case run consecutively to the sentence in the 19383 case. Mr. Fortin asserts that his trial counsel failed to inform him “the separation of the charges”² would “subject him to a sentencing where any argument for concurrent terms under the doctrine of a common course of conduct and scheme would be strictly discretionary on the part of the court.” (Pet. P 5). The State does not know what this means. Further, the State is without information as to conversations Mr. Fortin did or did not have with his trial counsel. Therefore, the State denies this assertion.

7. In paragraph 3(a) under section IV, Mr. Fortin makes the following statement: “Counsel’s failure to file a motion in limine regarding Fortin’s alleged gang affiliation, or in the alternative to move for an immediate mistrial, resulted in the jury hearing the petitioner was a gang member and having to depend upon a judicial instruction to unring that bell.” (Pet. P. 5). This sentence is both logically and grammatically confusing. The State assumes Mr. Fortin means to assert that his trial counsel failed to file a motion in *limine* prior to trial to exclude the introduction of evidence that Mr. Fortin was a member of a gang. Respondent admits that assertion. The State assumes Mr. Fortin means to also assert that his trial counsel failed to move for an immediate mistrial after some evidence of Mr. Fortin’s involvement in a gang was introduced at trial. The State denies this assertion and it is disproved by the record at trial.

8. In paragraph 3(b) under section IV, Mr. Fortin states, “Trial counsel’s failure to conduct a pre-trial interview and to subpoena as a witness, Casey Smith, resulted in the trial judge’s refusal to allow counsel to recall this witness...” (Pet. P. 5). This sentence is a conclusion about what formed the basis of the trial court’s ruling and it carries an implication that the trial court refused to allow counsel to recall the witness. Answering the implication that the trial court

² By this the State assumes Mr. Fortin means the decision to have separate trials in the 19383 and 19475 cases, which is what occurred.

refused to allow Mr. Fortin to recall Casey Smith, the State admits in part and denies in part. The State admits that the Court refused to allow counsel to recall Casey Smith to offer certain testimony that counsel proffered to the Court. The Court found that testimony would be cumulative. The State denies that the Court put a blanket bar on counsel recalling Casey Smith for any other procedural or substantive reason. Broadly read, Mr. Fortin's conclusory sentence assumes facts as being true – that his trial counsel failed to conduct a pre-trial interview of Casey Smith and that his trial counsel failed to subpoena Casey Smith. If Mr. Fortin means to allege these facts as being true, the State denies his trial counsel failed to interview Casey Smith. As to the allegation that he failed to interview her pre-trial, the State is without sufficient information to form a belief as to that assertions and, therefore, denies the same. The record indicates trial counsel for Mr. Fortin spoke with Ms. Smith while the trial was on going about the possibility of recalling her. As to the allegation that trial counsel failed to subpoena her, the State is without sufficient information to form a belief as to the truth of such assertion and, therefore, denies that claim.

9. In paragraph 3(c) of Section IV, petitioner states that “[w]hen counsel failed to object to the admission of flight evidence during trial predicated on relevance as criticized by the Unpublished Opinion of the Idaho Court of Appeals.” (Pet. p. 5). This is a sentence fragment. It contains no assertions or conclusions. It is not capable of being answered. The sentence fragment assumes a fact. It assumes that counsel failed to object to the admission of flight evidence during trial predicated on relevance. If Mr. Fortin intended this as an assertion of fact, the State denies it. That assertion is disproved by the record in the 19383 case.

10. In paragraph 3(d) of section IV, Mr. Fortin makes conclusions about whether the jury instructions destroyed his presumption of innocence. This is a conclusion and need not be answered. To the implied assertion that his counsel failed to object to the wording of the verdict form, the state admits this assertion. To the applied assertion that the verdict form listed “seven possibilities of guilt before the entitled first consideration of not guilty,” (Pet. p. 6), respondent objects. This assertion is vague and confusing. With that objection, respondent denies that assertion.

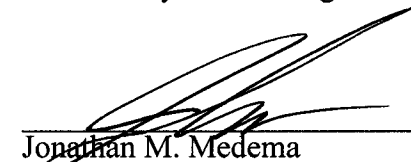
11. In paragraph 3(e) of section IV of the petition, Mr. Fortin asserts that he asked his counsel to file a rule 35 motion, counsel failed to file such motion, and counsel failed to inform Mr. Fortin of the fact no motion was filed. Respondent admits that neither Mr. Fortin nor his counsel filed a motion pursuant to I.C.R. 35 in CR-FE-2009-0019383. As to the remaining allegations, respondent is without sufficient information to form a belief as to the truth of the assertions and, therefore, denies them.

12. In paragraph 4 of section IV, Mr. Fortin asserts his appellate counsel failed to “federalize any issues raised on direct appeal”. Respondent has no idea what Mr. Fortin means to assert by this statement and, therefore, denies it. Mr. Fortin asserts that his appellate counsel failed to object to an appellate record that contains alleged errors in the transcript of the restitution hearing conducted on February 4, 2011. The State admits appellate counsel did not seek to correct alleged errors in the transcript of the restitution hearing.

13. The remainder of the petition contains conclusions of law and requests for relief. These are not capable of being answered.

DATED this 20th day of May 2013.

GREG H. BOWER
Ada County Prosecuting Attorney




Jonathan M. Medema
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23 day of May 2013, I caused a true and correct copy of the foregoing ANSWER to be placed in the United States mail, postage prepaid, addressed to:

**Cody J. Fortin, Inmate #72953
I.C.C. K Pod 216-B
PO Box 70010
Boise, ID 83707**



Legal Assistant

NO. _____
A.M. _____ P.M. 2:10

MAY 24 2013

CHRISTOPHER D. RICH, Clerk
By **STEPHANIE VIDAK**
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, ID 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,	)	CASE NO. CV-PC-2013-08285
)	
Petitioner,)	
)	
vs.	)	MOTION TO TAKE
	)	JUDICIAL NOTICE
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW, the State of Idaho, by and through Jonathan M. Medema, Deputy Prosecuting Attorney, and hereby moves this Court for an Order taking judicial notice of the below-listed documents:

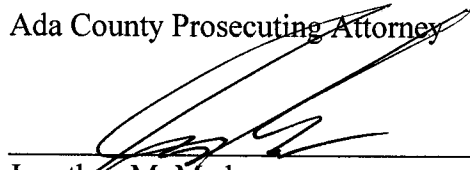
1. Transcript of Arraignment on 12/04/09 in case number CR-FE-2009-0019383
2. Transcript of Jury Trial in case number CR-FE-2009-0019383
3. Transcript of Sentencing Hearing on 8/06/10 in case number CR-FE-2009-0019383
4. Transcript of Restitution Hearing on 2/04/11 in case number CR-FE-2009-0019383
5. Appellant's Brief, State v. Fortin, Docket Number 38069
6. Decision on Appeal, State v. Fortin, Docket Number 38069, dated April 30, 2012
7. Register of Actions for case number CR-FE-2009-0019383
8. Register of Actions for case number CR-FE-2009-0019475

MM2

9. Petition for Post-Conviction Relief, Fortin v. State, CV-PC-2011-19323
10. Amended Petition for Post-Conviction Relief, Fortin v. State, CV-PC-2011-19323

DATED this 23rd day of May 2013

GREG H. BOWER
Ada County Prosecuting Attorney



Jonathan M. Medema
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23 day of May 2013, I caused a true and correct copy of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

**Cody J. Fortin, Inmate #72953
I.C.C. K Pod 216-B
PO Box 70010
Boise, ID 83707**



Legal Assistant

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 38069
)
 v.)
)
 CODY JAMES FORTIN,)
)
 Defendant-Appellant.)
 _____)

APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**PRESIDING JUDGE: HONORABLE PATRICK H. OWEN
District Judge**

**TRIAL JUDGE: HONORABLE D. DUFF MCKEE
Senior District Judge**

**GREG S. SILVEY
Attorney at Law
P.O. Box 565
Star, Idaho 83669

(208) 286-7400**

**KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400**

**ATTORNEY FOR
APPELLANT**

**ATTORNEY FOR
RESPONDENT**

STATEMENT OF THE CASE

Nature of the Case

Appellant Cody Fortin (hereinafter Mr. Fortin and/or Appellant) appeals from convictions following a jury trial for the offenses of aggravated battery and use of a deadly weapon in the commission of a crime.

Course of Proceedings

After having been charged via complaint and amended complaint with aggravated battery and use of a deadly weapon in commission of a crime, Mr. Fortin waived his preliminary hearing and was bound over to the district court on those charges and a criminal information was filed. (R. p. 8-9, 13-14, 21, 22-23.)

The matter proceeded to jury trial where Mr. Fortin was found guilty as charged. (R. p. 69.) Mr. Fortin was sentenced to 25 years with the first 12 years fixed. (R. p. 80.) Mr. Fortin timely appeals. (R. p. 83.)

Statement of the Facts

This case was the subject of a jury trial. As explained by the victim, Darryl Shaylor, he was at a house party where people were drinking and using marijuana. (Tr. 5/17/2010, p. 2.) Mr. Shaylor testified that he only had one beer and was not using drugs.¹ (Tr. 5/17/2010, p. 5.)

¹ This was a common theme of the state's witnesses, to wit, that there was alcohol, marijuana and according to one witness, methamphetamine, being used; but the particular witness testifying at the time insisted that he or she had not used the drugs and only had one drink.

Mr. Fortin and his friend Derrick came to the house and at some point, Mr. Fortin began arguing with one of the people there (Aaron Moore). (Tr. 5/17/2010, p. 6, 8.) When Mr. Fortin challenged the other people there as well, Darryl Shaylor told him "I'm not the person to be messing with tonight. I am in a bad mood." (Tr. 5/17/2010, p. 9, lns. 14-15.) According to Mr. Shaylor, about 5 or 10 minutes later Mr. Fortin came at him across the living room and so he stood up and Mr. Fortin swung at Mr. Shaylor (who said he usually waits for the first swing) and the fight happened from there. (Tr. 5/17/2010, p. 10.)

Mr. Shaylor testified that they went to the ground and were rolling around, and Mr. Fortin was trying to shove his fingers in his eyes and bite him and choke him. (Tr. 5/17/2010, p. 11.) Mr. Shaylor was able to take control and got on top and hit him and then hit him three more times in the forehead and it stopped things for a little bit and he was able to go out to the front of the house because he was feeling dizzy and had been losing blood. (Tr. 5/17/2010, p. 12.) He laid down outside and first he did not know he had been stabbed, he thought the blood was Mr. Fortin's but then realized it was his own (he had a stab injury to his neck/shoulder). (Tr. 5/17/2010, p. 12-13.)

Mr. Fortin then came outside and came up to Mr. Shaylor who saw a flash of something shiny by his pocket, and while he couldn't really see it, he assumed it was a knife. (Tr. 5/17/2010, p. 14, 18.) Mr. Shaylor said that Mr. Fortin hesitated but then his friend stepped up and encouraged him. (Tr. 5/17/2010, p. 16.) Mr. Shaylor asked him "What are you going to do with that?" (Tr. 5/17/2010, p. 18.) Mr. Fortin swung the knife and cut Mr. Shaylor across the face and then took off running. (Tr. 5/17/2010, p. 18.) Mr. Shaylor yelled at him "Are you kidding me?" (Tr. 5/17/2010, p. 19.) He felt a rush

again and laid down to try to cool down and looked around but Mr. Fortin was already gone. (Tr. 5/17/2010, p. 19.) Mr. Shaylor denied bringing or using a weapon that night. (Tr. 5/17/2010, p. 20.)

The state called many witnesses who were at the party, but none of them saw Mr. Shaylor get stabbed in the house. Kasey Smith, a close friend of Mr. Shaylor's, was at the party (where she only had one beer). (Tr. 5/17/2010, p. 51.) She testified she saw the slashing motion toward Mr. Shaylor while they were outside, although she did not put that in her statement to the police. (Tr. 5/17/2010, p. 59, 73, 74.) She never saw a knife but saw something shiny outside. (Tr. 5/17/2010, p. 83.) She also said that Mr. Fortin tried to get in Candice's car. (Tr. 5/17/2010, p. 60.)

Aaron Moore, who actually admitted to drinking 10 or 12 beers and a couple of shots of rum, did not see any of the fight because he was in the kitchen when it started and he ran away because he was a felon on probation. (Tr. 5/18/2010, p. 10, 16.)

James Bungard (who claimed he wasn't drinking or using drugs at all) testified that after the fight in the house, Mr. Fortin picked a knife up off the floor and folded it up and pretended to put it in his pocket. (Tr. 5/18/2010, p. 31, 43.) He said Mr. Fortin took the knife and went outside, and he peeked out the door and saw him quickly slash across Mr. Shaylor's face. (Tr. 5/18/2010, p. 44-45.) Interestingly, he denied that anyone was using marijuana (which almost all the other witnesses admitted), but testified that Kasey, Candice and John were smoking methamphetamine (which all the other witnesses denied) and that he had told the police that. (Tr. 5/18/2010, p. 52-53.) He also admitted that he didn't put anything in his statement to police about the

slashing, and had lied in the statement when he had said he saw Mr. Fortin brandishing a knife outside. (Tr. 5/18/2010, p. 60-61.)

John Vida, whose residence this occurred at (and who claimed he had like one or two beers but no drugs), didn't see the whole fight (or any knife). (Tr. 5/18/2010, p. 67, 70, 77.) At the first part of it he was in his backyard trying to keep his dog out of it and after the people went outside the house he saw nothing because he shut the door and locked it. Tr. 5/18/2010, p. 73, 79.)

Dawn Cliff, who had just started dating Mr. Shaylor (and claimed she wasn't drinking that night), saw Mr. Fortin outside holding what she believed to be a knife, because she saw a silver point, but she didn't see the full knife, and she didn't see what then happened between them. (Tr. 5/18/2010, p. 109-110, 112.)

Mr. Fortin did not testify at trial, however, he advised the PSI writer that while he engaged in a physical fight with the victim, he didn't stab him and never had a knife. (PSI, p. 3.)

ISSUES

I.

WHETHER THE COURT ERRED BY ADMITTING EVIDENCE OF MR. FORTIN'S
FLIGHT

II.

WHETHER THE COURT ERRED WHEN IT REFUSED TO ALLOW THE DEFENSE TO
CALL A WITNESS

III.

WHETHER THE COURT ERRED BY DENYING THE MOTION FOR MISTRIAL

IV.

WHETHER THE DOCTRINE OF CUMULATIVE ERROR REQUIRES REVERSAL

ARGUMENT

I.

THE COURT ERRED BY ADMITTING EVIDENCE OF MR. FORTIN'S FLIGHT

A. Standard of review.

The Idaho Supreme Court explained the standard of review for this issue in *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998):

Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial judge to conduct a two-part analysis. First, the judge must determine that the evidence is relevant under I.R.E. 401, and second, the judge must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. This Court reviews the question of relevancy in the admission of evidence de novo. A court's decision that evidence is more probative than prejudicial is reviewed for abuse of discretion.

Id., p. 819 (internal citations omitted).

The Idaho Supreme Court in *State v. Sheldon*, 145 Idaho 225 (2008), detailed the abuse of discretion standard:

When determining whether the district court abused its discretion, we consider:

- (1) whether the lower court rightly perceived the issue as one of discretion;
- (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and
- (3) whether the court reached its decision by an exercise of reason.

Id., p. 228.

B. The arguments and rulings on flight.

The state filed a Notice of Intent to Use I.R.E. 404(b) Evidence, which provided as follows in full (R. p. 30.):

COMES NOW, Christopher Atwood, Deputy Prosecuting Attorney for the County of Ada, and notifies the Court and Counsel of the State's intent to use facts as described below as evidence during the jury trial in this case. The State does not believe that the evidence falls under Idaho Criminal Rule 404(b) but out of caution the State provides this notice in the event the Court finds otherwise. If the Court finds the evidence is 404(b) evidence then the State believes the evidence of the defendant's crimes, wrongs, or acts is admissible to prove the defendant's identity.

The state intends to introduce evidence of the Defendant's conduct when he was approached by law enforcement officers the day after the aggravated battery occurred. When the officers approached the Defendant and informed him he was under arrest, the Defendant fled from the officers indicating consciousness of guilt from the aggravated battery he had committed one day earlier. This evidence was disclosed to Defendant in the police reports in the State's Discovery Response in CRFE2009-0019475.

Notice of Intent to Use I.R.E. 404(b) Evidence, p. 1-2. (R. p. 30-31.)

The defense objected to the I.R.E. 404(b) (hereinafter 404(b)) evidence and the matter was taken up at trial outside the presence of the jury. Defense counsel had attempted to obtain a pre-trial ruling, but the court would not take it up earlier. (Tr. 5/18/2010, p. 214, 217.)

The offer of proof by the prosecutor was that the day following the stabbing, a number of law enforcement officers approached the defendant to arrest him while he was in his vehicle. A number of officers tried to use their cars to surround the defendant while he was in his car. They had their lights on and approached the car with guns drawn and police badges visible. (Tr. 5/18/2010, p. 208.)

When the officers approached, the defendant fled from them in his car. They pursued him approximately 8-10 miles when he crashed his car and ran on foot into a field and then into a wooded area and into a ditch. The officers had called for backup and a number of officers pursued him and surrounded the ditch and called for him to come out with his hands up. Eventually they called in a K-9 who went in and bit the defendant. The defendant eventually did come out and was arrested. (Tr. 5/18/2010, p. 208-209.)

The prosecutor stated he did not intend to introduce the fact that the defendant struck a police officer during his flight because that is the subject of a different charged case, aggravated battery on a law enforcement officer. Further, the prosecutor stated that he didn't intend to introduce all of the evidence of the eluding because that is largely the other case as well, and so he did not intend to get into how fast he was going and whether or not he put other people at risk and the fact that he side-swiped another vehicle. But the prosecutor stated that he does intend to introduce the distance of the flight and that he continued his flight on foot. The prosecutor explained that he filed the 404(b) notice out of an abundance of caution, he does not believe it is 404(b) evidence, but rather, is evidence of flight. (Tr. 5/18/2010, p. 209-210.)

In response, defense counsel confirmed that there are two criminal cases pending against the defendant in this jurisdiction, the instant aggravated battery and the other one charging eluding. (Tr. 5/18/2010, p. 210.) The state did not consolidate the cases. (Tr. 5/18/2010, p. 216.)

Defense counsel argued that the prosecutor's recitation of what happened was not complete. The officers were actually plain clothes officers and were driving undercover (as opposed to simply unmarked) cars, to wit, a PT Cruiser.²

Thus, according to defense counsel, where undercover officers approach in plain clothes and unmarked cars, it is not even evidence of flight to avoid prosecution. (Tr. 5/18/2010, p. 215.) Defense counsel explained that Mr. Fortin's position was that the alleged victim had actually brought the knife to the fight the night before, and now someone was approaching him with a gun. (*Id.*)

The court clarified that the state does not believe that the evidence falls under 404(b) because it is not evidence of prior bad acts, but is evidence of flight from this act. (Tr. 5/18/2010, p. 212.) The court's ruling was as follows:

The law for years has been that flight can be argued—a flight to avoid arrest can be argued by the prosecutor as indicia of guilt. At one time, in fact, there was a pattern jury instruction where the jury was instructed that if an accused defendant fled, that the jury could construe the fact that a defendant was fleeing to avoid arrest to be an indication of guilt.

Modern instruction practice says you don't instruct juries that way anymore, but I think that the law in Idaho clearly is that counsel are entitled to argue the facts. The rational basis of that is that the circumstances, a defendant's conduct, a defendant's demonstrated conduct from the time of the event giving rise to the criminal charge to at least a reasonable time thereafter is relevant for examination to see not just what did the defendant do at the time of the crime, but what did he do after the crime was—after the alleged crime was committed. How did he

² Actually, the detective testified at trial they were driving a Nissan Altima, a Honda Accord, and a GMC SUV of some kind. (Tr. 5/19/2010, p. 57, 60.) Also, while their lights were on as the prosecutor stated, they were not traditional light bars, for instance, one car had wig wag lights (the headlights alternatively flashing) and also had rapid motion LED lights on the passenger side visor, and another car had the rapid motion LED lights on its grill. (Tr. 5/19/2010, p. 42-43.) As to their dress and identification, the detective testified that he was wearing civilian clothing (T-shirt) with his badge hanging around his neck and another officer was wearing a black windbreaker with a flip down police insignia which was not flipped down. (Tr. 5/19/2010, p. 47, 62-63.)

comport himself? Where did he go? What did he do? How did he respond when approached by officers? That is all within the –the old-fashioned word is “res gestae.” I don’t know what the modern term is but there is a more modern term for that. But that is all in the gambit of relevant circumstances and it is fair game for both sides to investigate and examine.

It is equally appropriate, for example, if a defendant’s conduct is completely the other way from any indication of guilt, that the defense may bring forward that it shows that his comportment and activities and conduct after the allegation are totally inconsistent with the prosecutor’s allegation of the occurrence of a crime. So it cuts both ways. What did the defendant do? How did he act? How did he respond? What was his conduct at least to the extent that you have a reasonable time after, and I think here we are talking about one day and think that is certainly within reach.

I indicated that I didn’t think it was a 404(b) problem because I think 404(b) discusses prior bad acts or unrelated bad acts. And if you are examining a defendant’s conduct after a circumstance with relation to the circumstance itself it is not a 404(b), it is an extension of the defendant’s conduct in connection with the circumstance.

Tr. 5/18/2010, p. 220, ln. 24—p. 222, ln. 22 (emphasis added).

A colloquy then occurred about the evidence of the police dog which went in and bit Mr. Fortin, after which the court continued:

I am not sure where that goes. My struggle on this is an extraneous issue that we are going to explore at some length that doesn’t have anything to do with any of the elements of the crime. And once you get the dog involved in this thing, I think fear of the dog—that doesn’t have any necessary connection to flight to avoid arrest.

[PROSECUTOR] No, it is just how the officers found him.

THE COURT: But that is not relevant. The fact that they –I can understand the argument that he in his flight is evidence. The officers’ response is not necessarily indicative of anything.

His flight, okay. Officers gave chase. Well, because A follows B, I’ll say okay, they gave chase because that leads to the chase on foot. But I don’t think you need to add—you don’t need to embellish the chase with the fact that it was 990 miles-an-hour though downtown Boise, you have already indicated that you are not going there, anyway.

Tr. 5/18/2010, p. 225, Ins. 2-24 (emphasis added).

A colloquy then occurred about the details of the chase, after which the court stated:

. . . I will let you put in evidence of flight but without emphasizing the police officers' response to that other than the fact that they did pursue, they did pursue him, they did add officers as needed until they finally had enough officers and had him surrounded and accomplished the arrest. Will that satisfy that State?

[PROSECUTOR] It will.

THE COURT: With that caveat I will allow the testimony, and with the representation that you are not going to go into the high speed, the crash, and the crashing into the police car, and crashing into the civilian car.

[PROSECUTOR]: That is fine.

[DEFENSE COUNSEL]: Judge, I think I should put out for the record I do just want to renew my objection to any of this evidence coming in.

THE COURT: I didn't think you were very happy about this.

[DEFENSE COUNSEL]: I just wanted to make sure there is a record.

Tr. 5/18/2011, p. 228, ln. 16—p. 229, ln. 14.

C. The court erred by admitting the evidence of flight.

First of all, the district court erred by not understanding that the evidence of flight is other bad acts evidence. Then, since it did not understand the type of evidence at issue, it failed to use the proper two step test to determine the evidence's admissibility.

The court at one point stated that the flight evidence did not fall under I.R.E. 404(b) (hereinafter 404(b)) because was not prior bad acts evidence, and later, stated there was no 404(b) problem because it did not concern prior or unrelated bad acts.

The district court was wrong, flight is other bad acts evidence. As explained by the Idaho Court of Appeals in *State v. Rossignol*, 147 Idaho 818 (Ct.App. 2009):

Escape or flight is one of the exceptions to the general rule prohibiting evidence of prior bad acts or crimes. *State v. Cootz*, 110 Idaho 807, 814, 718 P.2d 1245, 1252 (Ct. App. 1986). Evidence of escape or flight may be admissible because it may indicate a consciousness of guilt. *Id.* However, the inference of guilt may be weakened when a defendant harbors motives for escape other than guilt of the charged offense. *Id.*

Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial court to conduct a two-part analysis. *State v. Moore*, 131 Idaho 814, 819, 965 P.2d 174, 179 (1998). First, the trial court must determine that the evidence is relevant under I.R.E. 401; and, second, the court must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* This Court reviews the question of relevancy in the admission of evidence de novo. *Id.* A trial court's decision that evidence is more probative than prejudicial is reviewed for abuse of discretion. *Id.*

Id. p. 821-822.

In other words, even though there is an established exception by which flight evidence may be admissible, it is still other bad acts evidence. Thus, the proper other bad acts test must be used.³

So in our case, the district court was required to perform a two step analysis. First, the court had to find that evidence of flight was relevant. It then needed to determine that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

In addition to the law specific to evidence of flight which requires the two step analysis, such as *Rossignol, supra*, as well as *State v. Moore, supra*, since the evidence that the state desired to introduce was also an uncharged crime, the district

³ Incidentally, while 404(b) evidence is commonly referred to as prior bad acts evidence, there is no requirement that it be prior (and flight of course would not be), the rule simply refers to "other crimes, wrongs or acts."

court should have also known to perform the two step test under 404(b) itself. Here, the other bad acts evidence constituted the crime of eluding police, which was not charged in this case, but in a separate case.

This situation is similar to that in *State v. Sheldon*, 145 Idaho 225 (2008), where the Idaho Supreme Court had to determine whether the defendant's admission that he had earlier dealt methamphetamine fell under 404(b).

The initial question is whether Sheldon's statements were admissions of a past crime, wrong, or act. Since methamphetamine dealing is prohibited under I.C. § 37-2732B(a) (also I.C. § 37-2732(a)), his admission would be categorized as 404(b) evidence. Thus, the trial court was required to make a two-tiered analysis to determine whether the evidence was inadmissible propensity evidence under 404(b) or whether the evidence could be admitted for some other purpose. First, the court considers whether the evidence is relevant to a material disputed issue concerning the crime charged. Second, the court considers whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. This Court exercises free review over the first inquiry - relevance - but reviews the second inquiry - risk of unfair prejudice - under an abuse of discretion standard. Unfortunately, the district court appears not to have recognized the statements as 404(b) evidence and, thus, failed to perform the two-tiered analysis.

Id., p. 229 (emphasis added, internal citations and footnote omitted).

Our case is the same, since eluding police is a crime it would be categorized as 404(b) evidence and the two-tiered analysis required.

So in our case, whether analyzed under the established law regarding flight evidence or the more general law regarding other bad acts, the district court was clearly required to perform the two step analysis prior to its admission. As to the first step,

relevance, although it made some contrary comments, it does appear that the court did rule that the flight evidence was relevant.⁴

However, the court clearly never made any ruling about probative value or prejudice, presumably because it did not believe that the flight evidence was other bad acts evidence for which that second step was required. However characterized, this failure by the court was error. At the very least, the court abused its discretion since it admitted evidence without reference to the legal standards regarding such evidence.

In *State v. Perry*, 245 P.3d 961 (Idaho 2010), the Idaho Supreme Court explained:

Idaho shall from this point forward employ the *Chapman* harmless error test to all objected-to error. A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.

Id., 974.

In this case, the defense objected below and has established on appeal that an error occurred. Accordingly, unless the State meets its burden, the convictions must be reversed.⁵

⁴ The court mentioned at one point that the flight issue has nothing to do with any of the elements of the charged crime. It also holds that the use of the dog is not relevant, however, the court never reconciles just why if the dog is not relevant, anything else about the chase would be.

Also, it is interesting to note that the State's notice of intent to use 404(b) evidence said that the evidence of flight was relevant to show identity, which was never mentioned by the court as a reason the evidence was relevant.

⁵ This is true for every issue on appeal, each having been objected to at trial.

II.

THE COURT ERRED BY EXCLUDING A DEFENSE WITNESS

A. Standard of review.

A lower court's determination under I.R.E. 403 will not be disturbed on appeal unless it is shown to be an abuse of discretion. *State v. Birkla*, 126 Idaho 498 (Ct.App. 1994).

B. The background and court's rulings.

After the state rested, defense counsel stated that he had spoken with a witness, Candice Waters, during the break and she said that she overheard Darryl Shaylor (the victim) discussing his testimony with another witness (Kasey Smith) and that Candice knew specific questions that counsel had asked Darryl Shaylor.⁶ (Tr. 5/19/2010, p. 101-104.)

Apparently, both Kasey Smith and Darryl Shaylor had already testified when they had their discussion. (Tr. 5/19/2010, p. 105.) Candice Waters had been listed as a witness by the state, but had not been called. (Tr. 5/19/2010, p. 102-103.) Defense counsel indicated that he might call her. (Tr. 5/19/2010, p. 102.)

As to the relevance of her testimony, defense counsel explained that a primary issue of the defense was that Darryl Shaylor and other witnesses had all been talking about their stories and their stories had changed. (Tr. 5/19/2010, p. 110-111.)

Despite the fact that the witnesses were violating the court's order to not discuss the case, the court stated there was no proof that any testimony was tainted since the

⁶ Earlier in the trial there had been another instance where Darryl Shaylor had been discussing the case with another witness. Dawn Cliff overheard them and testified about it. (Tr. 5/19/2010, p. 5-12, 105-107.)

two witnesses discussing their testimony had already testified and while Candice may have overheard, she was not going to be called as a witness. (Tr. 5/19/2010, p. 107.) Thus, the court ruled that it was not going to allow the defense to call Candice Waters to testify about overhearing Darryl Shaylor discussing his testimony with another witness. (Tr. 5/19/2010, p. 108, 116-117.)

Further, the court would not allow the defense to call Candice Waters as an eyewitness to the crime. As defense counsel explained, she was an eyewitness who filled out a police statement form. (Tr. 5/19/2010, p. 114.) Defense counsel made an offer of proof, and related that during the break, she told him that she did not see Mr. Fortin throw a punch, it may have happened, but she didn't see it. (Tr. 5/19/2010, p. 114-115.) The court asked whether she was in a position to observe, and defense counsel said he didn't know, that is what this trial is for. (Tr. 5/19/2010, p. 115.) Defense counsel also explained that she would also testify that Mr. Fortin came to her car accidentally, and she had to tell him it was her car, not his. (Tr. 5/19/2010, p. 115.)

The court ruled that there was nothing relevant that was not cumulative of what the State had already presented and there is nothing exculpatory because counsel was not saying that she would testify that it did not happen, the most she can say is she didn't see it happen and that's already been the testimony of a handful of witnesses. (Tr. 5/19/2010, p. 115.) Counsel responded that those witnesses had changed their stories from their written statements to now saying they did see something outside, to which the court responded that was not accurate. (Tr. 5/19/2010, p. 115-116.)

Counsel clarified that the court was ruling that he could not call Candice Waters and the court said he could not unless he could show something that was not

cumulative or was exculpatory. Defense counsel stated that she did not see Mr. Fortin throw a punch or make a slapping motion outside. Second, she had testimony regarding the credibility of the witnesses, having been present on two occasions where Darryl Shaylor was discussing the case with other witnesses (the other one which Dawn Cliff testified about). (Tr. 5/19/2010, p. 116.)

The court ruled as follows:

Which I would not permit you to go into [Shaylor talking to other witnesses], in—in that aspect, because it doesn't impact—if—from that testimony only, because that's already been inquired into, unless she was a witness.

And unless you can represent that she was a —that she saw it, --that it didn't happen, not that she didn't see it happen, because that's not necessarily exculpatory, unless you can prove—unless you can establish that she was in a position to see, and was looking, and it didn't happen, didn't—by--by saying she didn't see it happen that it didn't happen.

If she wasn't looking, and what I'm understanding you to say is she didn't see it happen, but it could have happened, which kind of says to me she was not in a position to observe, which is not exculpatory.

I would otherwise rule that—on—on the State's case, it's--that--that anything else she adds is cumulative to what the State's already added.

[DEFENSE COUNSEL]: The only thing—the only information I can give the Court, as an offer of proof of what Candice Waters is going to say, is her statement and the--what she just told me in the hall. So other than that, I request that we be allowed to call her as witness.

THE COURT: On the--offer of proof, I would find that the evidence--the constructive evidence of what she did observe is cumulative to what the State has already offered and not exculpatory. And Counsel has not offered anything in the offer of proof that is exculpatory. And therefore, the test—the testimony would be cumulative to the State's offer and otherwise irrelevant.

Tr. 5/19/2010, p. 116, ln. 25—p. 118, ln. 6.

Not being allowed to call the witness, the defense rested without calling any witnesses. (Tr. 5/19/2010, p. 119.)

C. The court erred by excluding the defense witness.

While the district court did not cite any authority for its ruling excluding the witness, presumably it was pursuant to I.R.E. 403, which provides as follows:

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I.R.E. Rule 403 (emphasis added).

While the court claimed that Candice Water's testimony was inadmissible because it was cumulative to what the State had already presented, just because other witnesses had testified to the subject matter does not make it needlessly cumulative and therefore inadmissible.

As explained in *State v. Blackstead*, 126 Idaho 22 (Ct.App. 1994):

Statements by witnesses which corroborate the facts to which another has already testified are not necessarily inadmissible because they are "cumulative." Rule of Evidence 403 prohibits the introduction of needlessly cumulative evidence. There is no merit in the argument that this evidence was needless. The entire tenor of Blackstead's defense was that the victim had recently fabricated the allegations against him for the purpose of staying at the treatment facility or being placed with her stepmother rather than returning to her natural mother. Such an implication of recent fabrication gives importance to evidence corroborating the victim's testimony that she had mentioned the defendant's misconduct to someone within days of the occurrence.

Id. p. 22.

Like in the case above, in our case, the proposed testimony was corroborative, not cumulative, or if it was, it was not needlessly so. The evidence regarding Mr. Fortin cutting Mr. Shaylor's face while outside was extremely inconsistent. Only one witness (John Bungard) actually testified that he had saw both the knife and the slashing, but he also admitted he lied in his police statement about Mr. Fortin brandishing the knife outside and that he didn't mention the slashing in his statement to police.⁷

Kasey Smith, Mr. Shaylor's very close friend, testified she saw the slashing motion toward Mr. Shaylor while they were outside, although she did not put that in her statement to the police, and she never saw a knife but saw something shiny outside.

Dawn Cliff, who had just started dating Mr. Shaylor, saw what she believed to be a knife, because she saw a silver point, but she didn't see the full knife, and she didn't see what then happened between them.

While two other witnesses did not see what happened outside, it was because they were not outside when it happened. Aaron Moore had run away and John Vida had shut the door and locked it.

Given this testimony, the testimony of Candice Waters, to wit, that she did not see Mr. Fortin punch or slash Mr. Shaylor while they were outside, is not cumulative. While her testimony may have been the same as what all the other witnesses (who were outside at the time) told the police, for two of the three witnesses, their stories changed by the time of trial and they had now seen the slashing motion. Therefore, instead of being needlessly cumulative because it was the same as the other witnesses,

⁷ Significantly, his testimony about the drug use in the house was completely different from everyone else's, he denied anyone was using marijuana but stated that other witnesses were using methamphetamine.

the testimony of Candice Waters actually corroborated the defense theory of recent fabrication and impeached the two witnesses who did change their story. In short, where the state's witnesses are changing their story, the defense should be allowed to put on the witness who didn't.

Also, by the time of trial, only Dawn Cliff testified that she did not see the slashing motion so Candice Water's similar testimony should have been considered to be corroborative of that, not needlessly cumulative. The district court was simply wrong when it stated that a handful of witnesses had already testified this way.

Further, this was evidence favorable to the defense and was the only witness the defense would be calling. The court was incorrect in requiring defense counsel to establish prior to testifying that the witness had the opportunity to observe since as he stated, that is what the trial is for. More to the point, that was the prosecutor's job, if she didn't have the opportunity to observe then her testimony would be impeached, not disallowed in its entirety.

Finally, Candice Waters also had evidence that no one else did, to wit, that Mr. Fortin accidentally went to her car and she had to tell him to go to his. While Kasey Smith testified that he went to Candice's car, she did not include the part that it was by accident, and so the jury could have been left with the impression that Mr. Fortin was trying to attack Candice as well, and her testimony would clarify that he was not.

To summarize, a witness who says she did not see a disputed event happen is providing exculpatory evidence, and her ability to see is a matter for cross examination. Further, her evidence was not needlessly cumulative; it corroborated the other witness who did not see the slash and also impeached the witnesses who only recently said

they saw it. Finally, Candice Waters had the clarifying testimony about the car that no one else did.

While the district court's rush to conclude what it obviously considered to be a slow trial may well be understandable, it should not have come at the expense of excluding the one and only defense witness. For all the reasons above, the district court erred by excluding the witness.

III.

THE COURT ERRED DENYING THE MOTION FOR MISTRIAL

A. Standard of review.

The standard of review was explained by the Idaho Supreme Court in *State v. Field*, 144 Idaho 559 (2007):

When there is a motion for mistrial based upon prosecutorial error supported by a contemporaneous objection to the underlying procedural or evidentiary error we review the denial of a motion for mistrial for reversible error.

[T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

Id. p. 571 (internal citations omitted).

B. The motion and the court's ruling.

On cross examination, defense counsel was asking Mr. Shaylor whether he ever got a clear look at the knife because he had just said it was a shiny object. The following exchange took place:

A. Not a clear look, but I believe getting cut across the face and stabbed in the neck and seeing a shine, you know it's a knife.

Q. So it's just your opinion that this was a knife?

A. I knew it was a knife. I couldn't determine which kind.

Q. How do you know it was a knife?

A. Because it punctured me in the neck and cut me across the face, and I know most gang members carry those.

Tr. 5/17/2011, p. 30, Ins. 15-24 (emphasis added).

Defense counsel started to object and the court ruled that volunteered answer about the gang member be redacted and the jury to disregard it. However, the court stated that was all it would do since it was an open ended question, but that it would take up counsel's motion at the break. (Tr. 5/17/2010, p. 31.)

At the break, defense counsel moved for a mistrial, arguing that his question in no way, shape or form invited a response regarding gang members. Defense counsel argued that given the current prejudice against gangs, it is one of the most prejudicial things that could have been said, and it is too inflammatory to be cured by a curative instruction. (Tr. 5/19/2010, p. 41-44.)

The prosecutor stated that he had not intended to bring up the fact that he was a gang member.

And I've advised them, and I'm pretty sure I advised the victim the same thing, Mr. Shaylor, that it is not to be mentioned unless you're asked a

question that calls for it, and that you cannot lie if asked a question. You must tell the truth, but not to volunteer that information unless it's asked of you.

Tr. 5/17/2010, p. 45 lns. 13-18.

The court again ruled that defense counsel invited the error because he asked "how do you know," which allowed him to say everything that was going on in his mind, which included that gang members carry knives. If defense counsel wanted to avoid a particular answer, he should have asked precise questions or brought a motion in limine. Thus, while the court struck the answer and instructed the jury to disregard it, the court ruled that it is not a mistrial issue and denied the motion for mistrial. (Tr. 5/17/2010, p. 47-48.)

C. The court erred by denying the motion for mistrial.

Appellant disagrees with the court that the question invited the answer. The witness was simply taking advantage of the open ended question to inject prejudicial information to the jury, rather than it being some valid answer based on stream of consciousness thinking as apparently held by the court.

We know this because of the prosecutor's comments, which the court ignores. The prosecutor's admonishment was that gang information was not to be mentioned unless a question calls for it and it was not to be volunteered. In other words, even if in the victim's mind a reason he knew it was a knife was because gang members carry knives, he had been admonished to not mention gangs unless a question called for it, and it cannot seriously be argued that the question called for that answer even if he was thinking it. Even the court referred to it as a volunteered answer, showing that the question did not call for that answer.

Therefore, this is not a matter of a two word blurt out answer which was not mistrial material as held by the court. Rather, it was a victim in a case intentionally prejudicing the defendant by providing inflammatory information despite the fact that he had been told not to.

As further evidence that this was not just some inadvertent mistake, it must be remembered that this same witness also violated the court's order to not discuss his testimony with other witnesses on two different occasions. While defense counsel may have not been able to establish that this affected other testimony, it nevertheless shows that this witness was intentionally violating admonishments, and in this instance at least, did so in an obvious attempt to unfairly prejudice the defendant. This is mistrial material, and the court erred in denying it.

IV.

THE DOCTRINE OF CUMULATIVE ERROR REQUIRES REVERSAL

Appellant asserts that the errors discussed above combine to constitute cumulative error. In *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct.App. 2007), the Court of Appeals explained:

Having identified multiple errors, we would normally address whether, pursuant to I.C.R. 52, each of these errors was harmless. However the cumulative error doctrine requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself may be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. In order to find cumulative error, this Court must conclude there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial.

Id., 171 P.3d at 1289 (footnote and internal citations omitted).

The multiple errors in this trial have all been discussed at length above. Therefore, they will not be unnecessarily repeated in this section, but Appellant will simply request that his convictions be reversed and the case remanded for a new trial because of the cumulative error.

CONCLUSION

Mr. Fortin respectfully requests that this Court vacate his conviction for aggravated battery with deadly weapon enhancement.

DATED this _____ day of November, 2011.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
STATEHOUSE, ROOM 210
P.O. BOX 83720
BOISE, ID 83720-0010

U.S. Mail, postage prepaid
 Hand Delivered to the Attorney
General's mailbox at the
Supreme Court

Greg S. Silvey

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Course of Proceedings	1
Statement of the Facts	1
ISSUES PRESENTED ON APPEAL	5
ARGUMENT	6
I. The Court Erred by Admitting Evidence of Mr. Fortin's Flight	6
A. Standard of review	6
B. The arguments and ruling on flight	7
C. The Court erred by admitting the evidence of flight	11
II. The Court Erred by Excluding a Defense Witness	15
A. Standard of review	15
B. The background and court's ruling	15
C. The court erred by excluding the defense witness	18
III. The Court Erred Denying the Motion for Mistrial	21
A. Standard of review	21
B. The motion and the court's ruling	22
C. The court erred by denying the motion for mistrial	23
IV. The Doctrine of Cumulative Error Requires Reversal	24
CONCLUSION	25
CERTIFICATE OF MAILING	25

TABLE OF AUTHORITIES

Cases

State v. Birkla, 126 Idaho 498 (Ct.App. 1994) 15

State v. Blackstead, 126 Idaho 22 (Ct.App. 1994)..... 18

State v. Cook, 144 Idaho 784, 171 P.3d 1282 (Ct.App. 2007)..... 24

State v. Field, 144 Idaho 559 (2007) 21

State v. Moore, 131 Idaho 814, 965 P.2d 174 (1998)..... 6, 12

State v. Perry, 150 Idaho 209, 245 (2010)..... 14

State v. Rossignol, 147 Idaho 818 (Ct.App. 2009)..... 12

State v. Sheldon, 145 Idaho 225 (2008) 6, 13

Other

I.R.E. 403 15, 18

I.R.E. 404 7, 8, 9, 11, 12, 13, 14

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38069

STATE OF IDAHO,	)	2012 Unpublished Opinion No. 454
)	
Plaintiff-Respondent,	)	Filed: April 30, 2012
)	
v.	)	Stephen W. Kenyon, Clerk
)	
CODY JAMES FORTIN,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Judgment of conviction for aggravated battery and use of a deadly weapon in the commission of a crime, affirmed.

Greg S. Silvey, Star, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Cody James Fortin appeals from his judgment of conviction for aggravated battery and use of a deadly weapon in the commission of a crime. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 2009, the state charged Fortin with aggravated battery, I.C. §§ 18-903(a), 18-907(a), and 18-907(b); and use of a deadly weapon in the commission of a crime, I.C. § 19-2520. The information alleged that Fortin willfully and unlawfully stabbed the victim in the face and shoulder with a knife, causing the man great bodily harm or permanent disfigurement. The state filed a notice of intent to use evidence at trial that Fortin fled when approached by police officers the day after the alleged battery occurred. The state asserted that, while the evidence was not believed to fall under I.R.E. 404(b), the notice was provided out of caution in the event the

district court found otherwise. Fortin objected to the admission of such evidence at trial. A jury found Fortin guilty of aggravated battery and use of a deadly weapon in the commission of a crime. Fortin was sentenced to a unified term of twenty-five years, with a minimum period of confinement of twelve years. Fortin appeals.

II.

ANALYSIS

A. Evidence of Flight

Fortin argues that the district court abused its discretion by failing to recognize that evidence of his flight was I.R.E. 404(b) evidence and by failing to conduct an appropriate balancing analysis of the probative value of such evidence against the danger of unfair prejudice. Idaho Rule of Evidence 404(b), provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

This rule prohibits introduction of evidence of acts other than the crime for which a defendant is charged if its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. *State v. Grist*, 147 Idaho 49, 54, 205 P.3d 1185, 1190 (2009). Of course, evidence of other crimes, wrongs, or acts may implicate a person's character while also being relevant and admissible for some permissible purpose, such as those listed in the rule. When determining the admissibility of evidence to which a Rule 404(b) objection has been made, the trial court must first determine whether there is sufficient evidence of the other acts that a reasonable jury could believe the conduct actually occurred. If so, then the court must consider: (1) whether the other acts are relevant to a material and disputed issue concerning the crime charged, other than propensity; and (2) whether the probative value is substantially outweighed by the danger of unfair prejudice. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; *State v. Parmer*, 147 Idaho 210, 214, 207 P.3d 186, 190 (Ct. App. 2009).

Rule 404(b) allows evidence of other acts if admitted for the purpose of showing knowledge or consciousness of guilt. *State v. Pokorney*, 149 Idaho 459, 463, 235 P.3d 409, 413

(Ct. App. 2010). Consciousness of guilt has been found in a variety of circumstances. Evidence of flight, escape, or failure to appear on the part of a defendant is often identified as relevant to demonstrate consciousness of guilt. *State v. Moore*, 131 Idaho 814, 819-20, 965 P.2d 174, 179-80 (1998) (admitted evidence that defendant left Idaho for his home in Oregon to avoid a scheduled interview from an officer investigating lewd conduct); *State v. Rossignol*, 147 Idaho 818, 821-22, 215 P.3d 538, 541-42 (Ct. App. 2009) (allowed evidence that defendant failed to appear at a hearing to increase bond and left the jurisdiction); *State v. Friedley*, 122 Idaho 321, 322-23, 834 P.2d 323, 324-25 (Ct. App. 1992) (allowed stipulation that defendant failed to appear at arraignment and at the initially scheduled trial on drug charges).

The inference of guilt may be weakened when a defendant harbors motives for escape other than guilt of the charged offense. *Rossignol*, 147 Idaho at 821, 215 P.3d at 541. The existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. *Id.* at 822, 215 P.3d at 542. Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial court to conduct a two-part analysis. *Id.* First, the trial court must determine that the evidence is relevant under I.R.E. 401; and, second, the court must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* This Court reviews the question of relevancy in the admission of evidence de novo. *Id.* A trial court's decision that evidence is more probative than prejudicial is reviewed for abuse of discretion. *Id.*

We first address Fortin's assertion that the district court erred by failing to recognize that evidence of his flight was I.R.E. 404(b) evidence. Indeed, the district court did not view evidence of Fortin's flight as implicating I.R.E. 404(b). However, the only adverse consequence of this identified by Fortin is that the district court did not, on the record, balance the probative value of this evidence against the risk of unfair prejudice.¹ We, therefore, address that omission.

In determining that evidence of Fortin's flight would be admitted, the district court stated:

We visited at some length and talked about this in chambers before trial began, and I indicated that at that time how I was inclined to read this and how I as was inclined to rule.

¹ Fortin does not challenge the district court's determination that evidence of his flight was relevant.

....
The law for years has been that flight can be argued--a flight to avoid arrest can be argued by the prosecutor as indicia of guilt.

Accordingly, the district court referred to the probative value of the evidence of Fortin's flight. However, as Fortin asserts, the district court did not make any comments on the record regarding the danger of unfair prejudice posed by such evidence.²

In *State v. Fordyce*, 151 Idaho 868, 869-70, 264 P.3d 975, 976-77 (Ct. App. 2011), this Court addressed an argument that the district court in that case abused its discretion by failing to conduct a balancing analysis of the probative value of challenged evidence against the danger of unfair prejudice on the record. We held that, because Fordyce failed to identify any unfair prejudice from admission of the challenged evidence, the district court did not err by failing to conduct a balancing analysis on the record. *Id.* at 870-71, 264 P.3d at 977-78.

Here, with respect to identifying unfair prejudice from the flight evidence, Fortin's counsel stated at trial:

Two weeks ago . . . I actually tried to get a pretrial ruling on this and [the judge] wouldn't allow us to do it because he said he wanted the trial judge to make the determination.

The reality of it is, if I file a motion, it is my obligation to set it for notice of hearing. And the reality here is that this evidence coming in now, without any prior notice from the prosecutor, is extremely prejudicial. Obviously, it is prejudicial. It is inflammatory.

To the extent Fortin argued that evidence of his flight was unfairly prejudicial and should not have been admitted because he did not have prior notice from the prosecutor that such evidence

² The prosecutor made the following statements during trial regarding the danger of unfair prejudice posed by the evidence:

As far as whether it is prejudicial, the Court pointed out, and I agree, it is prejudicial but it is not unfair prejudice. It is not that they are going to think he did it for the wrong--for some bad reason or something unrelated. It is prejudicial because he was running from officers and shows his consciousness of guilt.

These statements, coupled with the district court's indication that the matter was discussed in chambers at some length before trial, indicate that the district court probably did consider the danger of unfair prejudice stemming from evidence of Fortin's flight. However, such discussion took place off the record, and we cannot assume that the district court conducted the proper analysis regarding unfair prejudice.

would be used, this assertion was without merit because it was belied by the record and Fortin's own statements. Specifically, prior to trial, the state filed a notice of intent to use evidence of Fortin's flight and, as just described, Fortin asserted that two weeks prior to trial he attempted to get a pretrial ruling on the state's notice of intent to use such evidence.

While not specifically identified as unfair prejudice, Fortin also argued that the state's evidence did not implicate flight because there were potential motives for Fortin's escape other than guilt of the aggravated battery. Specifically, Fortin asserted:

Now, what the prosecutor said is not a full representation of what happened. These officers approached in plain clothes in unmarked police cars, and so I don't know how you can possibly say it is even evidence of flight.

Someone approaches [Fortin] with a gun. Obviously, [the victim] is the one who brought the knife to this fight, he attacks [Fortin] the night before, and now somebody approaches [Fortin] with a gun.

We reiterate that the inference of guilt drawn from evidence of escape or flight may be weakened when a defendant harbors motives for escape other than guilt of the charged offense. *Rossignol*, 147 Idaho at 821, 215 P.3d at 541. However, the existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. *Id.* at 822, 215 P.3d at 542. Further, if Fortin fled from police the day after he committed the aggravated battery, it cannot be said that apprising the jury of this fact was necessarily unfair. Evidence is not unfairly prejudicial simply because it is damaging to a defendant's case. *Fordyce*, 151 Idaho at 870, 264 P.3d at 977. Evidence is unfairly prejudicial when it suggests decision on an improper basis. *Pokorney*, 149 Idaho at 465, 235 P.3d at 415; *State v. Floyd*, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994). That Fortin's flight indicates his consciousness of guilt of the aggravated battery offense is not unfair prejudice that would justify withholding that fact from the jury. As in *Fordyce*, Fortin has not shown reversible error because Fortin has not identified any unfair prejudice to weigh. Accordingly, we hold that the district court did not abuse its discretion by failing to conduct a balancing of the probative value of the evidence of Fortin's flight against the danger of unfair prejudice on the record.

B. Witness Exclusion

Fortin next argues that the district court abused its discretion by excluding the testimony of a potential defense witness at trial pursuant to I.R.E. 403. Idaho Rule of Evidence 403 provides that, although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The trial court has broad discretion in determining the admissibility of testimonial evidence. *State v. Smith*, 117 Idaho 225, 232, 786 P.2d 1127, 1134 (1990). A decision to admit or deny such evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion. *Id.*

At trial, after the state rested, defense counsel informed the district court that Fortin would not be calling any witnesses. Before the defense formally rested, the district court took a break to settle the jury instructions. When the parties returned, Fortin's counsel informed the district court that, during the break, a woman, who was present when the stabbing occurred and listed as a potential witness for the state but not called, told Fortin that she had previously overheard two state witnesses discussing their trial testimony after they both had testified. Fortin's counsel then asserted that, while the woman had been tainted as a potential witness, he felt compelled to call her. The state objected.

The district court then asked Fortin's counsel to make an offer of proof regarding what the potential witness was expected to testify to that was probative to the defense in this case. Fortin's counsel asserted that the potential witness was expected to testify that she did not see Fortin throw a punch in the altercation with the victim outside the residence where the fight occurred, but that it could have happened. Fortin's counsel also asserted that this woman would testify that Fortin accidentally came to get into her car when attempting to leave the residence after the altercation and that she had to inform Fortin that the car was hers, not his. The district court responded that there was nothing that was not cumulative to what the state had already presented and nothing exculpatory. The following exchange then took place between the district court and Fortin's counsel:

[COUNSEL] So, is--is the--it's the ruling of the Court I cannot call [the woman] as a witness?

[COURT] Unless you show me that there is something that is not cumulative to what the State's already shown or exculpatory.

[COUNSEL] Well, that was my conversation with [the woman]. Her--what she told me was that she did not see [Fortin] throw a punch or make a slapping motion outside. I--I think that--she--the two things she does offer, is--in terms of--I don't think it's necessarily impeachment, certainly, of her, but it goes to the credibility of the witnesses, and certainly my defense that she was present during a conversation with [the victim] on Monday, and she was also one of the

witnesses present today when [the victim] was--or yesterday when [the victim] was discussing the case and [an officer] had to break that up.

So, she's actually present for two situations where [the victim] has been discussing the facts of this case.

[COURT] Which I would not permit you to go into . . . unless she was a witness.

And unless you can represent that she was a--that she saw it, that it didn't happen, not that she didn't see it happen, because that's not necessarily exculpatory, unless you can prove--unless you can establish that she was in a position to see, and was looking, and it didn't happen, didn't--by--by saying she didn't see it happen that it didn't happen.

If she wasn't looking, and what I'm understanding you to say is she didn't see it happen, but it could have happened, which kind of says to me she was not in a position to observe, which is not exculpatory.

I would otherwise rule that--on--on the State's case, it's--that--that anything else she adds is cumulative to what the State's already added.

[COUNSEL] The only thing--the only information I can give the Court, as an offer of proof of what [the woman] is going to say, is her statement and the--what she just told me in the hall. So, other than that, I request that we be allowed to call her as a witness.

[COURT] On the--on the offer of proof, I would find that the evidence--the constructive evidence of what she did observe is cumulative to what the State has already offered and not exculpatory. And Counsel has not offered anything in the offer of proof that is exculpatory. And, therefore, the test--the testimony would be cumulative of the State's offer and otherwise irrelevant.

Fortin argues that the district court erred by excluding the proposed testimony of the potential defense witness because such testimony was not needlessly cumulative. However, even if the district court erred by excluding such testimony, convictions will not be set aside for errors or defects that have little, if any, likelihood of having changed the results of the trial. *State v. Barcella*, 135 Idaho 191, 196-97, 16 P.3d 288, 293-94 (Ct. App. 2000). Where an error concerns evidence omitted at trial, the test for harmless error is whether there is a reasonable possibility that the lack of excluded evidence contributed to the verdict. *Id.*

Here, the evidence adduced at trial was overwhelming that Fortin used a knife in the commission of the aggravated battery and, as a result, the victim suffered significant injuries. Multiple witnesses described the altercation between Fortin and the victim in this case. None testified that anyone other than Fortin and the victim were involved in the physical fight. One witness testified that, during the altercation between Fortin and the victim, the witness saw Fortin with a knife in his hand and watched Fortin make a slashing motion and connect with the

victim's face. Another witness testified that she also saw Fortin holding something in his hand during the altercation that she believed was a knife. An additional witness testified that she saw Fortin make a slashing motion toward the victim and saw something in Fortin's hand. The attending trauma surgeon testified that the penetrating wound to the victim's chest was a stab wound, although he could not say with certainty what caused the wound. However, the surgeon also testified that the wound to the victim's face was consistent with a knife wound. Given the weight of the evidence against Fortin in this case, we are convinced beyond a reasonable doubt that there is no reasonable possibility that the lack of the excluded evidence contributed to the verdict obtained against Fortin. Therefore, even assuming the district court erred by excluding the testimony of the potential defense witness, such error was harmless.

C. Motion for Mistrial

Fortin additionally asserts that the district court erred by denying his motion for a mistrial after a state's witness, the victim in this case, referenced Fortin's gang affiliation during cross-examination. In criminal cases, motions for mistrial are governed by I.C.R. 29.1. A "mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). Our standard for reviewing a district court's denial of a motion for mistrial is well established:

[T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95, 665 P.3d 1102, 1105 (Ct. App. 1983).

During cross-examination of the victim in this case, the following exchange occurred:

Q. Now, at some point, I assume--did you ever get a clear look at this knife? It seems you like--you just say it was a shiny object.

A. Not a clear look, but I believe getting cut across the face and stabbed in the neck and seeing a shine, you know it's a knife.

Q. So it's just your opinion that this was a knife?

- A. I knew it was a knife. I couldn't determine which kind.
Q. How do you know it was a knife?
A. Because it punctured me in the neck and cut me across the face,
and I know most gang members carry those.

The district court immediately instructed the jury to disregard the victim's reference to gang members; the victim completed his testimony; and, at the next break in the trial proceedings, Fortin moved for a mistrial. Fortin argued that the victim's reference to gang members led the jury to believe that Fortin was potentially a member of a gang and was, therefore, extremely prejudicial and too inflammatory for a curative instruction. Fortin did not allege that the state planted or otherwise invited the comment from the victim. In denying Fortin's motion for a mistrial, the district court explained:

In my view and my opinion, if you ask an open-ended question on cross-examination such as how or why, the witness is entitled to tell you how, and if that's on his mind, why you've got it. If there's something in that explanation that you want to build a fence around it, then, either, A, ask precise questions, or, B, you have to alert in advance with a motion in limine.

I will strike it. I've instructed the jury to disregard it, but I do not consider it to be a mistrial issue. Motion for mistrial is denied.

We presume that the jury followed the district court's instructions. *See State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997); *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996).

We conclude that, given the open-ended nature of Fortin's question on cross-examination, the lack of a motion in limine requesting a pretrial order instructing the state to admonish witnesses from referencing gang membership and the immediate instruction by the district court to the jury to disregard the victim's reference to gang members, Fortin has failed to show that the reference constituted reversible error. Therefore, the district court did not err by denying Fortin's motion for a mistrial.

D. Cumulative Error

Fortin argues that the doctrine of cumulative error requires reversal of his judgment of conviction and remand for a new trial. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's right to due process. *Moore*, 131 Idaho at 823, 965 P.2d at 183. The presence of errors alone, however, does not require the reversal of a

conviction because, under due process, a defendant is entitled to a fair trial, not an error-free trial. *Id.* In this case, there was no accumulation of irregularities. Accordingly, the cumulative error doctrine is inapplicable.

III.

CONCLUSION

Fortin did not identify any unfair prejudice resulting from the admission of evidence of his flight from police officers the day after the aggravated battery occurred. Accordingly, the district court did not abuse its discretion by failing to conduct a balancing of the probative value of the evidence of Fortin's flight against the danger of unfair prejudice on the record. Additionally, even assuming that the district court erred by excluding the testimony of the potential defense witness, such error was harmless because we are convinced beyond a reasonable doubt that there is no reasonable possibility that the lack of such evidence contributed to the jury verdict. Further, the district court did not err by denying Fortin's motion for a mistrial because Fortin failed to show that the victim's reference to gang members constituted reversible error. Finally, because there was no accumulation of irregularities in this case, the cumulative error doctrine is inapplicable. Accordingly, Fortin's judgment of conviction for aggravated battery and use of a deadly weapon in the commission of a crime is affirmed.

Chief Judge GRATTON and Judge LANSING, **CONCUR.**

State of Idaho vs. Cody James Fortin

Date	Code	User		Judge
10/14/2009	NCRF	PRNYEJED	New Case Filed - Felony	Magistrate Court Clerk
	PROS	PRNYEJED	Prosecutor assigned Ada County Prosecutor	Magistrate Court Clerk
	WARI	PRNYEJED	Warrant Issued - Arrest Bond amount: 1000000.00 Defendant: Fortin, Cody J	Magistrate Court Clerk
	XSEA	PRNYEJED	Case Sealed	Magistrate Court Clerk
	STAT	PRNYEJED	STATUS CHANGED: Inactive	Magistrate Court Clerk
10/15/2009	WART	TCMCCOSL	Warrant Returned Defendant: Fortin, Cody James	Magistrate Court Clerk
	XUNS	TCMCCOSL	Case Un-sealed	Magistrate Court Clerk
	STAT	TCMCCOSL	STATUS CHANGED: Activate (previously inactive)	Magistrate Court Clerk
	BOOK	TCMCCOSL	Booked into Jail on:	Magistrate Court Clerk
	HRSC	TCMCCOSL	Hearing Scheduled (Video Arraignment 10/15/2009 01:30 PM)	Theresa Gardunia
	ORPD	CCMANLHR	Defendant: Fortin, Cody James Order Appointing Public Defender Public defender Ada County Public Defender	Magistrate Court Clerk
	ARRN	CCMANLHR	Hearing result for Video Arraignment held on 10/15/2009 01:30 PM: Arraignment / First Appearance	Theresa Gardunia
	CHGA	CCMANLHR	Judge Change: Adminstrative	Theresa Gardunia
	HRSC	CCMANLHR	Hearing Scheduled (Preliminary 10/29/2009 08:30 AM)	Theresa Gardunia
	BSET	CCMANLHR	BOND SET: at 1000000.00 - (I18-907 Battery-Aggravated)	Theresa Gardunia
	NCON	CCMANLHR	No Contact Order: No contact order OR Civil Protection Order Issued for- Comment: with James Chaylor, Kasey Smith, Jonathan Vida, Candice Waterd, James Bungard, Dawn Cliff, and Aaron Moore DR#09-927538 Expiration Days: 365 Expiration Date: 10/15/2010	Theresa Gardunia
	ORPD	MADEFRJM	Order Appointing Public Defender	Theresa Gardunia
	ORPD	MADEFRJM	Order Appointing Public Defender	Theresa Gardunia
10/16/2009	MFBR	TCBULCEM	Motion For Bond Reduction	Theresa Gardunia
	NOHG	TCBULCEM	Notice Of Hearing	Theresa Gardunia
	RQDD	TCBULCEM	Defendant's Request for Discovery	Theresa Gardunia
10/29/2009	AMCO	CCEDWARM	Amended Complaint Filed	Theresa Gardunia
	SUBC	CCEDWARM	Substitution Of Counsel Charles Crafts	Theresa Gardunia
	CONT	CCEDWARM	Hearing result for Preliminary held on 10/29/2009 08:30 AM: Continued	Theresa Gardunia
	HRSC	CCEDWARM	Hearing Scheduled (Preliminary 11/23/2009 08:30 AM)	Theresa Gardunia
10/30/2009	ORMR	CCEDWARM	Order For Delivery of Medical Records	John Hawley 000075

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge
11/23/2009	PHWV	CCEDWARM	Hearing result for Preliminary held on 11/23/2009 08:30 AM: Preliminary Hearing Waived (bound Over)
	HRSC	CCEDWARM	Hearing Scheduled (Arraignment 12/04/2009 01:30 PM)
	COMT	CCEDWARM	Commitment
11/24/2009	INFO	TCBULCEM	Information
11/25/2009	PROS	PRBRIGCA	Prosecutor assigned Christopher S. Atwood
12/4/2009	DCAR	CCHUNTAM	Hearing result for Arraignment held on 12/04/2009 01:30 PM: District Court Arraignment- Court Reporter: Kasey Redlich Number of Pages: Less than 100 pages
	HRSC	CCHUNTAM	Hearing Scheduled (Entry of Plea 12/18/2009 01:30 PM)
12/18/2009	DCHH	CCHUNTAM	Hearing result for Entry of Plea held on 12/18/2009 01:30 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
12/29/2009	HRSC	CCHUNTAM	Hearing Scheduled (Jury Trial 02/22/2010 08:30 AM)
	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 02/05/2010 11:00 AM)
	PLEA	CCHUNTAM	A Plea is entered for charge: - NG (I18-907 Battery-Aggravated)
	PLEA	CCHUNTAM	A Plea is entered for charge: - NG (I19-2520 Enhancement-Use of a Deadly Weapon in Commission of a Felony)
1/29/2010	RQDS	TCPETEJS	State/City Request for Discovery
	RSDS	TCPETEJS	State/City Response to Discovery
2/5/2010	CONT	CCHUNTAM	Continued (Jury Trial 05/17/2010 08:30 AM)
	CONT	CCHUNTAM	Continued (Pretrial Conference 05/07/2010 11:00 AM)
4/16/2010	NOTC	TCRAMISA	Notice of Intent to Use IRE 404(b) Evidence
	RSDS	TCRAMISA	State/City Response to Discovery/Addendum
5/7/2010	DCHH	CCHUNTAM	Hearing result for Pretrial Conference held on 05/07/2010 11:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 05/14/2010 11:00 AM)
	MISC	TCRAMISA	State's List of Potential Trial Witnesses
	MISC	TCRAMISA	State's Amended List of Potential Trial Exhibits
5/14/2010	RSDS	TCRAMISA	State/City Response to Discovery/Supplemental

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge
5/14/2010	DCHH	CCHUNTAM	Hearing result for Pretrial Conference held on 05/14/2010 11:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
5/17/2010	DCHH	CCNELSRF	Hearing result for Jury Trial held on 05/17/2010 08:30 AM: District Court Hearing Held Court Reporter: Penny Tardiff Number of Transcript Pages for this hearing estimated: less than 500
	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 05/18/2010 09:00 AM) 2nd Day
5/18/2010	DCHH	CCNELSRF	Hearing result for Jury Trial held on 05/18/2010 09:00 AM: District Court Hearing Held Court Reporter: Vanessa Gosney Number of Transcript Pages for this hearing estimated: less than 1000 pages... 2nd Day
5/19/2010	HRSC	CCNELSRF	Hearing Scheduled (Jury Trial 05/19/2010 09:00 AM) 3rd Day
	DCHH	CCNELSRF	Hearing result for Jury Trial held on 05/19/2010 09:00 AM: District Court Hearing Held Court Reporter: Sue Wolf Number of Transcript Pages for this hearing estimated: less than 2000 pages 3rd Day
	JUIN	CCNELSRF	Jury Instructions Filed
	PSIO1	CCNELSRF	Pre-Sentence Investigation Evaluation Ordered
	VERD	CCNELSRF	Special Verdict Form (Guilty)
	FIGT	CCNELSRF	Finding of Guilty (I18-907 Battery-Aggravated)
	HRSC	CCNELSRF	Hearing Scheduled (Sentencing 07/02/2010 09:00 AM)
	FIGT	CCHUNTAM	Finding of Guilty (I19-2520 Enhancement-Use of a Deadly Weapon in Commission of a Felony)
	STAT	CCHUNTAM	STATUS CHANGED: closed pending clerk action
6/4/2010	MOTN	TCRAMISA	Motion to Continue Sentencing
	NOHG	TCRAMISA	Notice Of Hearing
	HRSC	TCRAMISA	Hearing Scheduled (Hearing Scheduled 06/11/2010 01:30 PM) Continue Sentencing
6/10/2010	STIP	CCHUNTAM	Stipulation to Continue
6/11/2010	CONT	CCHUNTAM	Continued (Hearing Scheduled 06/18/2010 01:30 PM) Continue Sentencing
6/18/2010	CONT	CCHUNTAM	Continued (Sentencing 08/06/2010 09:00 AM)
	DCHH	CCHUNTAM	Hearing result for Hearing Scheduled held on 06/18/2010 01:30 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 199 pages

State of Idaho vs. Cody James Fortin

Date	Code	User		Judge
7/12/2010	MOTN	TCRAMISA	Motion for Transcripts and Action of Records	Patrick H. Owen
8/5/2010	MOTN	CCHUNTAM	Motion to Transport Witness	Patrick H. Owen
	ORDR	CCHUNTAM	Order to Transport Witness from the Ada County Jail	Patrick H. Owen
8/6/2010	DCHH	CCHUNTAM	Hearing result for Sentencing held on 08/06/2010 09:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
	JAIL	CCHUNTAM	Sentenced to Jail or Detention (118-907 Battery-Aggravated) Confinement terms: Penitentiary determinate: 12 years. Penitentiary indeterminate: 13 years.	Patrick H. Owen
	SNPF	CCHUNTAM	Sentenced To Pay Fine 125.50 charge: 118-907 Battery-Aggravated	Patrick H. Owen
8/10/2010	JCOG	DCLYKEMA	Judgment of Conviction and Commitment	Patrick H. Owen
9/17/2010	APSC	TCRAMISA	Appealed To The Supreme Court	Patrick H. Owen
	MOTN	TCRAMISA	Motion for Appt of State Appellate PD	Patrick H. Owen
10/4/2010	ORDR	CCHUNTAM	Order for Appointment of State Appellate Public Defender	Patrick H. Owen
12/7/2010	HRSC	CCHUNTAM	Hearing Scheduled (Hearing Scheduled 12/10/2010 03:00 PM) restitution hearing	Patrick H. Owen
12/10/2010	DCHH	CCHUNTAM	Hearing result for Hearing Scheduled held on 12/10/2010 03:00 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
	HRSC	CCHUNTAM	Hearing Scheduled (Hearing Scheduled 01/21/2011 03:00 PM) Restitution hearing	Patrick H. Owen
1/6/2011	NOTC	CCTHIEBJ	(4) Notice Of Transcript Lodged - Supreme Court Docket No. 38069	Patrick H. Owen
1/21/2011	CONT	CCHUNTAM	Continued (Hearing Scheduled 02/04/2011 03:00 PM) Restitution hearing	Patrick H. Owen
2/4/2011	DCHH	CCHUNTAM	Hearing result for Hearing Scheduled held on 02/04/2011 03:00 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
2/8/2011	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 518.14 victim # 4	Patrick H. Owen
	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 1742.70 victim # 5	Patrick H. Owen
	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 24447.99 victim # 6	Patrick H. Owen
	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 16398.84 victim # 7	Patrick H. Owen
	ORDR	CCHUNTAM	Order for Restitution and Judgment	Patrick H. Owen

Date: 5/23/2013

Time: 12:54 PM

Page 5 of 5

Forth Judicial District Court - Ada County

User: PRFISCKD

ROA Report

Case: CR-FE-2009-0019383 Current Judge: Patrick H. Owen

Defendant: Fortin, Cody James

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge
6/13/2011	NOTC	CCTHIEBJ	(2) Notice Of Transcript Lodged - Supreme Court Docket No. 38069 Patrick H. Owen
5/2/2012	MISC	CCTHIEBJ	Opinion - Supreme Court Docket No. 38069 Patrick H. Owen
6/1/2012	REMT	TCWEGEKE	Remittitur - Affirmed - Supreme Court Docket No. 38069-2010 Patrick H. Owen

000079

State of Idaho vs. Cody James Fortin

Date	Code	User		Judge
10/15/2009	NCRF	PRNYEJED	New Case Filed - Felony	Magistrate Court Clerk
	PROS	PRNYEJED	Prosecutor assigned Ada County Prosecutor	Magistrate Court Clerk
	HRSC	TCMCCOSL	Hearing Scheduled (Video Arraignment 10/15/2009 01:30 PM)	Theresa Gardunia
	ARRN	CCMANLHR	Hearing result for Video Arraignment held on 10/15/2009 01:30 PM: Arraignment / First Appearance	Theresa Gardunia
	CHGA	CCMANLHR	Judge Change: Adminsitrative	Theresa Gardunia
	HRSC	CCMANLHR	Hearing Scheduled (Preliminary 10/29/2009 08:30 AM)	Theresa Gardunia
	BSET	CCMANLHR	BOND SET: at 1000000.00 - (118-915 {F} Assault or Battery Upon Certain Personnel)	Theresa Gardunia
	ORPD	MADEFRJM	Order Appointing Public Defender [file stamped 10/16/2009]	Theresa Gardunia
10/16/2009	MFBR	TCBULCEM	Motion For Bond Reduction	Theresa Gardunia
	NOHG	TCBULCEM	Notice Of Hearing	Theresa Gardunia
	RQDD	TCBULCEM	Defendant's Request for Discovery	Theresa Gardunia
	NOPE	TCWEGEKE	Notification of Penalties for Escape	Patrick H. Owen
10/29/2009	SUBC	CCEDWARM	Substitution Of Counsel Charles Crafts	Theresa Gardunia
	AMCO	CCEDWARM	Amended Complaint Filed	Theresa Gardunia
	CONT	CCEDWARM	Hearing result for Preliminary held on 10/29/2009 08:30 AM: Continued	Theresa Gardunia
	HRSC	CCEDWARM	Hearing Scheduled (Preliminary 11/23/2009 08:30 AM)	Theresa Gardunia
11/23/2009	PHWV	CCEDWARM	Hearing result for Preliminary held on 11/23/2009 08:30 AM: Preliminary Hearing Waived (bound Over)	Richard Grant
	HRSC	CCEDWARM	Hearing Scheduled (Arraignment 12/04/2009 01:30 PM)	Richard Grant
	AMCO	CCEDWARM	Amended Complaint Filed 2nd	Richard Grant
	COMT	CCEDWARM	Commitment	Richard Grant
11/24/2009	INFO	TCBULCEM	Information	Patrick H. Owen
11/25/2009	PROS	PRBRIGCA	Prosecutor assigned Christopher S. Atwood	Patrick H. Owen
12/4/2009	DCHH	CCHUNTAM	Hearing result for Arraignment held on 12/04/2009 01:30 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
	HRSC	CCHUNTAM	Hearing Scheduled (Entry of Plea 12/18/2009 01:30 PM)	Patrick H. Owen

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge
12/18/2009	DCHH	CCHUNTAM	Hearing result for Entry of Plea held on 12/18/2009 01:30 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
12/29/2009	HRSC	CCHUNTAM	Hearing Scheduled (Jury Trial 02/22/2010 08:30 AM)
	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 02/05/2010 11:00 AM)
1/29/2010	RQDS	TCPETEJS	State/City Request for Discovery
	RSDS	TCPETEJS	State/City Response to Discovery
2/5/2010	HRVC	CCHUNTAM	Hearing result for Jury Trial held on 02/22/2010 08:30 AM: Hearing Vacated
2/10/2010	SCHE	TCWEGEKE	Second Scheduling Order
4/14/2010	PROS	PRHEBELE	Prosecutor assigned Gabriel Haws
4/15/2010	RSDS	TCBULCEM	State/City Response to Discovery/Addendum
4/19/2010	HRSC	CCHUNTAM	Hearing Scheduled (Jury Trial 05/17/2010 08:30 AM)
4/20/2010	MOTN	TCRAMISA	Motion for PT Ruling on the Admissibility of Evidence
4/22/2010	RSDS	TCRAMISA	State/City Response to Discovery/Second Addendum
4/29/2010	MISC	TCPETEJS	State's List of Potential Trial Exhibits
	MISC	TCPETEJS	State's List of Potential Trial Witnesses
5/7/2010	DCHH	CCHUNTAM	Hearing result for Pretrial Conference held on 05/07/2010 11:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 05/14/2010 11:00 AM)
5/14/2010	DCHH	CCHUNTAM	Hearing result for Pretrial Conference held on 05/14/2010 11:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages
5/17/2010	HRVC	CCHUNTAM	Hearing result for Jury Trial held on 05/17/2010 08:30 AM: Hearing Vacated
5/18/2010	RSDS	TCRAMISA	State/City Response to Discovery/Third Addendum
5/21/2010	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 05/21/2010 11:00 AM)
	DCHH	CCHUNTAM	Hearing result for Pretrial Conference held on 05/21/2010 11:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge
5/21/2010	HRSC	CCHUNTAM	Hearing Scheduled (Change of Plea 06/11/2010 01:30 PM) Patrick H. Owen
6/10/2010	STIP	CCHUNTAM	Stipulation to Continue Patrick H. Owen
6/11/2010	CONT	CCHUNTAM	Continued (Change of Plea 06/18/2010 01:30 PM) Patrick H. Owen
6/18/2010	CONT	CCHUNTAM	Continued (Change of Plea 07/09/2010 01:30 PM) Patrick H. Owen
7/9/2010	CONT	CCHUNTAM	Continued (Change of Plea 07/16/2010 01:30 PM) Patrick H. Owen
7/12/2010	CONT	CCHUNTAM	Continued (Change of Plea 07/16/2010 11:00 AM) Patrick H. Owen
7/13/2010	PROS	PRHEBELE	Prosecutor assigned Christopher S. Atwood Patrick H. Owen
7/16/2010	DCHH	DCJOHNSI	Hearing result for Change of Plea held on 07/16/2010 11:00 AM: District Court Hearing Held Court Reporter: k redlich Number of Transcript Pages for this hearing estimated:50 Patrick H. Owen
	HRSC	DCJOHNSI	Hearing Scheduled (Jury Trial 08/30/2010 08:30 AM) Patrick H. Owen
	HRSC	DCJOHNSI	Hearing Scheduled (Pretrial Conference 08/20/2010 11:00 AM) Patrick H. Owen
7/23/2010	PROS	PRHEBELE	Prosecutor assigned Gabriel Haws Patrick H. Owen
8/2/2010	ORDR	TCOLSOMC	Third Scheduling Order Patrick H. Owen
8/19/2010	ORDR	TCWEGEKE	Order to Transport Patrick H. Owen
8/20/2010	CONT	CCHUNTAM	Continued (Pretrial Conference 08/27/2010 11:00 AM) Patrick H. Owen
8/23/2010	ORDR	TCWEGEKE	Order to Transport Patrick H. Owen
8/27/2010	DCHH	CCHUNTAM	Hearing result for Pretrial Conference held on 08/27/2010 11:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages Patrick H. Owen
8/30/2010	PLEA	CCNELSRF	A Plea is entered for charge: - GT (118-915 {F} Assault or Battery Upon Certain Personnel) Patrick H. Owen
	PLEA	CCNELSRF	A Plea is entered for charge: - GT (149-1404 {F} Officer-Flee or Attempt to Elude a Police Officer) Patrick H. Owen
	PLEA	CCNELSRF	A Plea is entered for charge: - GT (119-2520 Enhancement-Use of a Deadly Weapon in Commission of a Felony) Patrick H. Owen
	DCHH	CCNELSRF	Hearing result for Jury Trial held on 08/30/2010 08:30 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: less than 100 Patrick H. Owen
	HRSC	CCNELSRF	oHearing Scheduled (Sentencing 10/08/2010 09:00 AM) Patrick H. Owen

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge	
8/30/2010	GPA	TCWEGEKE	Guilty Plea Advisory	Patrick H. Owen
9/24/2010	ORDR	DCJOHNSI	Order to Transport	Patrick H. Owen
10/8/2010	DCHH	CCHUNTAM	Hearing result for Sentencing held on 10/08/2010 09:00 AM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
	FIGT	CCHUNTAM	Finding of Guilty (I18-915 {F} Assault or Battery Upon Certain Personnel)	Patrick H. Owen
	JAIL	CCHUNTAM	Sentenced to Jail or Detention (I18-915 {F} Assault or Battery Upon Certain Personnel) Confinement terms: Penitentiary determinate: 5 years. Penitentiary indeterminate: 15 years.	Patrick H. Owen
	FIGT	CCHUNTAM	Finding of Guilty (I49-1404 {F} Officer-Flee or Attempt to Elude a Police Officer)	Patrick H. Owen
	JAIL	CCHUNTAM	Sentenced to Jail or Detention (I49-1404 {F} Officer-Flee or Attempt to Elude a Police Officer) Confinement terms: Jail: 360 days. Credited time: 360 days.	Patrick H. Owen
	FIGT	CCHUNTAM	Finding of Guilty (I19-2520 Enhancement-Use of a Deadly Weapon in Commission of a Felony)	Patrick H. Owen
	STAT	CCHUNTAM	STATUS CHANGED: closed pending clerk action	Patrick H. Owen
	ORDR	TCWEGEKE	Order for DNA Sample and Thumbprint Impression	Patrick H. Owen
10/14/2010	STAT	CCTOMPMA	STATUS CHANGED (batch process)	
10/15/2010	JCOG	DCTYLENI	Judgment Of Conviction & Commitment	Patrick H. Owen
1/14/2011	MOTN	TCFARANM	Motion for Restitution	Patrick H. Owen
1/19/2011	NOHG	TCBROXLV	Notice Of Hearing	Patrick H. Owen
	HRSC	TCBROXLV	Hearing Scheduled (Hearing Scheduled 02/04/2011 11:00 AM) Motion for Restitution	Patrick H. Owen
1/21/2011	CONT	CCHUNTAM	Continued (Hearing Scheduled 02/04/2011 03:00 PM) Motion for Restitution	Patrick H. Owen
2/4/2011	DCHH	CCHUNTAM	Hearing result for Hearing Scheduled held on 02/04/2011 03:00 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
2/8/2011	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 500.00 victim # 1	Patrick H. Owen
	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 3578.25 victim # 2	Patrick H. Owen
	RESR	CCHUNTAM	Restitution Recommended by the Prosecutor's office. 1014.00 victim # 3	Patrick H. Owen
	ORDR	CCHUNTAM	Order for Restitution and Judgment	Patrick H. Owen
12/7/2012	APSC	TCOLSOMC	Appealed To The Supreme Court	Patrick H. Owen
	NOTA	TCOLSOMC	NOTICE OF APPEAL	Patrick H. Owen

Date: 5/23/2013

Time: 01:35 PM

Page 5 of 5

Fourth Judicial District Court - Ada County

ROA Report

User: PRFISCKD

Case: CR-FE-2009-0019475 Current Judge: Patrick H. Owen

Defendant: Fortin, Cody James

State of Idaho vs. Cody James Fortin

Date	Code	User	Judge
12/27/2012	ORDR	CCHUNTAM	Order re: Time for Filing of Appeal Patrick H. Owen
12/31/2012	ORDR	CCHUNTAM	Order Appointing State Appellate Public Defender on Direct Appeal Patrick H. Owen
1/31/2013	NOTC	CCTHIEBJ	Notice of Transcript Lodged - Supreme Court Docket No. 40602 Patrick H. Owen

000084

CODY J. FORTIN # 72953
I.C.C. K Pod 211-A
Post Office Box 70010
Boise, Idaho 83707
Petitioner pro se

NO. _____
AM. _____ FILED PM _____

OCT 06 2011
CHRISTOPHER D. RICH, Clerk
By SAYTHARA KHAM-ONE
DEPUTY

PATRICK H. OWEN

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

Civil Case No. **CV PC 1119323**
District Court No. CR-2009-0019475

**PETITION FOR POST
CONVICTION RELIEF**

ORIGINAL

STATE OF IDAHO)
 : ss.
The County of ADA)

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above entitled cause; and, who, respectfully presents this application for post conviction relief, based upon the law and facts of the case, those grounds and causes more fully explained herein and after, as well as the petitioner's affidavit in support hereof; said affidavit being attached hereto, and by this reference, incorporated herein as though quoted in its respective entirety:

I.

PRELIMINARY STATEMENT

A. This matter brings before the Court a collateral attack upon the applicant's entry of a plea(s) of guilty and subsequent sentencing; alleging, *inter alia*, that they are the wrongful result of ineffective assistance of counsel which, along with other issues, would have been available for argument on direct appeal had the petitioner's notice of appeal been timely filed.

B. Moreover, Notice is hereby provided to the Court and opposing parties, pursuant to I.C. ¶19-4903, that the applicant lacks both the complete record and legal expertise needed to properly prepare and present all the applicable issues or to attach the relevant portions of the case record.

For these reasons alone, notice is being given that further amendment and discovery will no doubt be required.

II. JURISDICTION

A. Petitioner is currently incarcerated within the Idaho Department of Corrections (IDOC), and housed at the Idaho Correctional Center (ICC), South of Boise, pursuant to pleas of guilty on charges of Assault and Battery on Certain Personnel, enhanced for Use of Deadly Weapon, where he is serving sentences of five (5) years fixed, with fifteen (15) years indeterminate, consecutive to a term of twelve (12) years fixed with a thirteen (13) years indeterminate handed down in a companion case. Those pleas and sentences complained of herein were imposed by the Honorable Patrick H. Owen, in criminal case CR-2009-0019475, on October 8th 2010, with a Judgment of Conviction and Commitment filed on October 15th 2010, in the Fourth Judicial District Court, County of Ada, State of Idaho.

B. This petition challenges the constitutionality of those same pleas and sentences, charging that there exists evidence of material facts and law, not previously presented nor heard, which have abrogated the rights of the applicant guaranteed under the applicable portions of the United States and Idaho State Constitutions, and thus require the withdrawal of the petitioner's pleas of guilty or, at the very least, resentencing.

C. Accordingly, jurisdiction is proper in this matter pursuant to Idaho Code 19-4901 et seq., and Rule 57 of the Idaho Criminal Rules. Furthermore, venue in these proceedings is appropriately before this Court, since the crime(s) alleged occurred within Ada County.

III.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

A. On October 14th 2011 the petitioner entered and stopped his car in the driveway of his girlfriend's home, where upon his vehicle was blocked in and Fortin was accosted by Boise police officers and detectives, pursuant to an arrest warrant, for an incident allegedly occurring the previous day.

Reports of the exact events that transpired before the petitioner was subsequently taken into custody vary depending upon the teller of the tale. For the moment it is sufficient to say that an information was eventually handed down charging Fortin with assault with a dangerous weapon (a knife) on the prior day, and, assault on a police officer, with a dangerous weapon (the vehicle) on October 14th 2011.

B. At his video arraignment, bond and a date for the preliminary hearing were set, and, the office of the Ada County Public Defender was appointed to represent the petitioner.

Within days, appointed counsel approached Fortin with a deal offered by the prosecutor, the terms of which were as follows: In consideration for pleas of guilty to assault on the civilian and eluding a police officer, Fortin would be sentenced on those crimes to five (5) fixed, fifteen (15) indeterminate and zero (0) fixed, five (5) years indeterminate respectively; and, the state would drop both weapon enhancements and the assault on the police officer.

C. Fortin's parents retained a private attorney on his behalf and matters changed: An amended complaint was filed, further amended and the charges and trials of October 13th and 14th separated at the request of Fortin's new counsel and against his expressed wishes.

While a series of motions and hearing were held on these matters, Fortin proceeded to trial in the separated charges and was found guilty by jury in what was now being designated as CR-FE-09-19383. A timely appeal was filed in that matter and is presently being pursued by conflict counsel, Greg Silvey, under Idaho Supreme Court Docket No. 38069-2010.

D. On October 30th 2010, the petitioner entered pleas, upon the advice of private counsel, to three (3) separate charges resulting in those convictions and sentences complained of herein and above, plus an eluding charge.

E. Immediately following his sentencing Fortin spoke with his counsel, as did a member of the petitioner's family requesting that a direct appeal be filed, as well as a motion for reduction of sentence, pursuant to ICR Rule 35. Both the petitioner and the family member were assured that each of those filings would occur.

Neither a Notice of Appeal, nor a motion for reduction of sentence were filed. Nor was any explanation for not doing so provided either the petitioner or his family.

Here, ends the initial statement of the case and the course of the prior proceedings.

IV.

INITIAL CAUSES OF ACTION

A. **WHETHER THIS ATTORNEY'S FAILURE TO FILE A TIMELY AND REQUESTED APPEAL ABROGATES THE PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THOSE SAME GUARANTEES UNDER THE APPLICABLE PORTIONS OF IDAHO'S STATE CONSTITUTION, CONSTITUTING INEFFECTIVE ASSISTANCE OF COUNSEL PER SE ?**

1. Simply said: The fact that the petitioner asked for and was told that a timely direct appeal as well as a ICR Rule 35 motion for reduction would be filed by counsel,¹ who than failed to do so, creates a presumptive case of ineffective assistance of counsel under both state and federal law..

Unless the respondent can legitimately rebut this allegation, Fortin is entitled to a resentencing, *nunc pro tunc*, thus retriggering the time frames to file his notice of appeal.

B. **DID THE PETITIONER'S ATTORNEY'S FAILURE TO ADVISE HIS CLIENT THAT THE PLEAS BEING ENTERED ALLOWED FORTIN TO BE SUBJECTED TO CONSECUTIVE SENTENCES RESULT IN THE ACCEPTANCE OF PLEAS MADE UNKNOWINGLY, UNWILLINGLY AND/OR UNINTELLIGENTLY; THUS ENTITLING THE PETITIONER, UNDER THE PROTECTIONS OF THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE U.S.**

CONSTITUTION, AND THOSE SAME COMPARABLE RIGHTS GUARANTEED BY THE IDAHO STATE CONSTITUTION, TO WITHDRAW HIS PLEA OR, IN THE ALTERNATIVE, TO HAVE HIS SENTENCES RUN CONCURRENTLY ?

Trial counsel failed to inform his client that the separation of the charges and his subsequent entries of pleas would subject him to a sentencing where any argument for concurrent terms under the doctrine of a common course of conduct and scheme would be strictly discretionary on the part of the court, and were not a part of any plea bargain.

The foregoing conduct is unquestionably substandard performance on its face, as well as preponderately prejudicial. Further, the choice not to inform his client of this material fact was neither a strategic nor a tactical decision on the part of counsel.

The result was that the petitioner pled guilty to a sentencing scheme which almost doubled the term he believed could be imposed and far exceeded the state's original offer to plead.

¹ See: Fortin's *Affidavit in Support of Post Conviction Relief*, ¶ 7-8, included herewith and incorporated hereby, in this regard.

VI.
CONCLUSION

A. The foregoing material facts and circumstances are sufficient to warrant appointment of counsel, judicial notice of the entire underlying record, and an evidentiary hearing on the these and any additional issues brought to light following the court's appointed counsel or the petitioner being granted possession of the record. Specific relief is sought as follows:

VII
PRAYER FOR RELIEF

WHEREFORE, the petitioner respectfully moves this Court to enter an Order providing the following:

1. ACCEPTANCE OF JURISDICTION and VENUE in these proceedings, with normal advancement upon the Court's calendar:
2. THAT JUDICIAL NOTICE is to be taken of the entire underlying record, pursuant to I.R.E. 201, in district court number CR-2009-0019475, and:
3. APPOINTMENT OF COUNSEL, pursuant to I.C. 19-4904 and 19-852;
4. THAT DIRECTS the Clerk to serve the respondent a conformed copy of this filing, pursuant to I.C. 19-4902; thus REQUIRING the respondent to provide an Answer, as well as those relevant portions of the record within thirty (30) days of receipt thereof, pursuant to I.C. 19-4906(a).
5. THAT, following the passing of an adequate amount of time for the parties to prepare, an evidentiary hearing occur; and,
6. THAT, in the event, that the preponderance of evidence submitted should eventually demonstrate that the petitioner has suffered from ineffective assistance of counsel under the law and in view of the facts submitted, that petitioner's plea of guilty be withdrawn and/or the subsequent sentences be modified and/or set aside: and/or,
7. THAT the petitioner be granted a resentencing, *nunc pro tunc*, and allowed to file a notice of appeal on any and all of those issues legally available had his counsel done so as promised, with the balance of these proceedings stayed pending the outcome of that appeal:
8. AND, for any additional relief the Court may deem necessary or proper under these

circumstances.

DATED this 4th day of OCTOBER 2011.

Respectfully submitted,

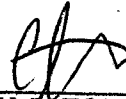


CODY J. FORTIN
Petitioner pro se

VIII.
VERIFICATION

I, DO HEREBY CERTIFY and AFFIRM that I am the petitioner in the foregoing application for post conviction relief, and; that I have read the contents thereof in their entirety, and, that the facts contained therein are true and correct to the best of my knowledge and belief in all regards.

DATED this 4th day of OCTOBER 2011.

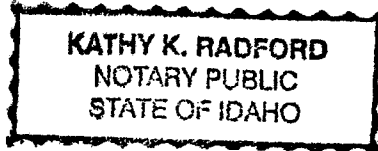


CODY J. FORTIN
Petitioner-Affiant pro se

SUBSCRIBED and SWORN to before me, a Notary Public, this 4th day of OCTOBER 2011.


NOTARY PUBLIC - IDAHO

*** SEAL ***



Commission Expires: 9/16/2017

COPY

CSA

**ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner**

**MICHAEL W. LOJEK, ISB #5611
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409**

RECEIVED

DEC 07 2011

PROSECUTING ATTORNEY'S OFFICE
BOISE, IDAHO

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CODY J. FORTIN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2011-0019323

**AMENDED PETITION FOR
POST-CONVICTION RELIEF**

COMES NOW the petitioner, CODY J. FORTIN, by and through his attorney of record, MICHAEL W. LOJEK, Ada County Public Defender's Office, and brings before this Court, pursuant to Idaho Code § 19-4901, the following Amended Petition for Post-Conviction Relief.

THE PETITIONER ALLEGES

- 1) The petitioner is currently housed at the Idaho Correctional Center in Ada County, Idaho.
- 2) A judgment of conviction was entered against the petitioner after a conviction in Ada County Case No. CR-FE-2009-0019475 on or about October 15, 2010, for:
 - COUNT I: ASSAULT AND BATTERY ON CERTAIN PERSONNEL, FELONY, Idaho Code § 18-915;
 - COUNT II: FLEEING OR ATTEMPTING TO ELUDE A PEACE OFFICER, FELONY, Idaho Code § 49-1404;
 - COUNT III: USE OF A DEADLY WEAPON IN THE COMMISSION OF A CRIME, FELONY, Idaho Code § 19-2520.
- 3) The petitioner was represented by attorney Charles C. Crafts.

4) The petitioner was sentenced on October 8, 2010, to a twenty-year term in the custody of the State Board of Correction, with a minimum period of confinement of five (5) years for COUNTS I and III, and to three hundred sixty (360) days in the Ada County Jail with credit for three hundred sixty (360) days served for COUNT II. This sentence was ordered to run consecutively to a twenty-five (25) year sentence, with twelve (12) years fixed, which was imposed on August 10, 2010, in connection with Ada County Case No. CR-FE-2009-0019383.

PROCEEDINGS

5) The petitioner timely filed a *pro se* Petition and Affidavit for Post-Conviction Relief on October 6, 2011.

6) The Court appointed the Ada County Public Defender's Office on October 17, 2011.

7) The petitioner, through appointed counsel, hereby supplements his Verified Petition for Post-Conviction Relief with this Amended Petition as contained herein.

8) In support of his Verified Petition and Amended Petition, the petitioner hereby submits the attached email correspondence between defense counsel and the petitioner's mother, dated April 24-25, 2011.

CLAIMS FOR RELIEF

9) That, pursuant to Idaho Code § 19-4901(a)(1), the petitioner was denied effective assistance of counsel required by the Sixth Amendment of the United States Constitution and Article I, section 13, of the Idaho Constitution, alleging the following:

- a) Defense counsel failed to file a Notice of Appeal within forty-two (42) days of the Court's order imposing sentence, as requested by the defendant.
- b) Defense counsel failed to file a Motion for Reduction/Reconsideration of Sentence pursuant to Idaho Criminal Rule 35 within one hundred twenty (120) days of the Court's order imposing sentence, as requested by the defendant.

RELIEF REQUESTED

10) The petitioner requests the Court for an order vacating the judgment of conviction and re-entering the judgment so as to allow the petitioner time to perfect a timely appeal, or;

11) The petitioner requests the Court for an order *nunc pro tunc* extending the deadlines by which an appeal and Rule 35 Motion may be filed.

DATED, this 2ND day of December 2011.

MICHAEL W. LOJEK
Attorney for Petitioner

CERTIFICATE OF VERIFICATION

I, CODY J. FORTIN, the petitioner named in the above-entitled action, first being duly sworn upon my oath, depose and say that I have read the foregoing amended petition and the documents, affidavits, and exhibits attached to this amended petition are hereby sworn to be true and correct to the best of my information, knowledge, and belief.

DATED, this 6 day of December 2011.

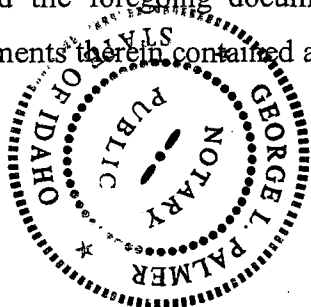
CODY J. FORTIN
Petitioner

STATE OF IDAHO)

)ss.

County of Ada)

I, GEORGE PALMER, a notary public, do hereby certify that on this 6TH day of DECEMBER 2011, personally appeared before me CODY J. FORTIN who, being by me first duly sworn, declared that he is the petitioner named in the above-entitled action, that he signed the foregoing document as the petitioner in the above-entitled action, and that the statements therein contained are true.



Notary Public
Residing at ADA COUNTY
My Commission Expires 11/17/14

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 7 day of December 2011, I mailed (served) a true and correct copy of the within instrument to:

CHRISTOPHER S. ATWOOD
Ada County Prosecutor's Office
Interdepartmental Mail



Katie Van Vorhis

Fwd:

From: **ann fortin** (fortinanny@gmail.com)
Sent: Fri 11/11/11 2:20 PM
To: LouAnn Cooper (louanncooper@hotmail.com)

----- Forwarded message -----

From: **Charles Crafts** <idaholitigator@gmail.com>
Date: Mon, Apr 25, 2011 at 1:45 PM
Subject: Re:
To: ann fortin <fortinanny@gmail.com>

Ann,

There may have been some miscommunication between Cody and I. We did file the appeal on the most significant case. The one where he received 12 years. On the second case - where he received 5 years, nothing was filed because he pled guilty and I did not believe there were any genuine issues on that case. Also, we discussed the fact that on the 12 year case he has a very good chance of having his case overturned. So, if that happens, I was hoping to re-negotiate both cases again with the prosecutor and try to have him out in five, which is the amount he has to serve on the second case. I thought I made this clear to Cody, and I can assure you I do not believe an appeal or a Rule 35 on the second case would get much traction. So, strategically, I felt like we were making the best decision.

On Apr 24, 2011 4:42 AM, "ann fortin" <fortinanny@gmail.com> wrote:

> Charles,
>
> I received a letter from Cody today and was informed that the rule 35 and
> appeal paperwork were never filed. I am at a loss for words. So that means
> that the harsh sentence stands? I really thought that was you last part of
> the job that you would have to do. I emailed you quite sometime ago and
> never got a reply, but assumed you were busy with other cases so didn't give
> it a second thought. I really don't understand why this happened...
>
> Ann

MAY 24 2013

CHRISTOPHER D. RICH, Clerk
By **STEPHANIE VIDAK**
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, ID 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

CASE NO. CV-PC-2013-08285

**MOTION FOR SUMMARY
DISPOSITION**

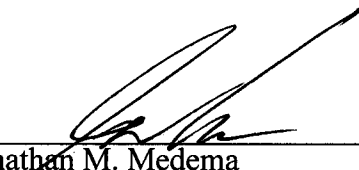
COMES NOW, the State of Idaho, by and through Jonathan M. Medema, Deputy Prosecuting Attorney for Ada County, and does hereby move for summary disposition of Cody James Fortin's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c) on the general basis that, in light of the pleadings, answers, admissions, and the record of the underlying criminal case, the petition fails to raise a genuine issue of material fact.

The specific grounds for dismissal of each of Mr. Fortin's allegations are as set forth in the Brief in Support of the State's Motion for Summary Disposition. The Brief in Support is incorporated herein.

MM

DATED this 23rd day of May 2013.

GREG H. BOWER
Ada County Prosecuting Attorney



Jonathan M. Medema
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23 day of May 2013, I caused a true and correct copy of the foregoing MOTION FOR SUMMARY DISPOSITION to be placed in the United States mail, postage prepaid, addressed to:

Cody J. Fortin, Inmate #72953
I.C.C. K Pod 216-B
PO Box 70010
Boise, ID 83707



Legal Assistant

NO. _____ FILED _____
A.M. _____ P.M. 2:10
MAY 24 2013
CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, ID 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN
Petitioner,
vs.
STATE OF IDAHO,
Respondent.

CASE NO. CV-PC-2013-08285
**BRIEF IN SUPPORT OF MOTION FOR
SUMMARY DISPOSITION**

COMES NOW, the State of Idaho, by and through Jonathan M. Medema, Deputy Prosecuting Attorney, and does hereby provide this brief in support of the state's motion for summary disposition of Cody James Fortin's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c).

FACTUAL AND PROCEDURAL HISTORY

On October 13, 2009 Mr. Fortin was at a home in Ada County. While at the home, Mr. Fortin stabbed James Shayler in the neck and shoulder area with a knife. Mr. Fortin also slashed Mr. Shayler's face with the knife. The wounds to Mr. Shayler's torso were life threatening. (Trns. 8-6-10 SH, p. 50, lns 7-8). The next morning, October 14, 2009, the State of Idaho charged Mr. Fortin by complaint with committing the crimes of Aggravated Battery and alleged the sentence

WJ

enhancement that Mr. Fortin had used a deadly weapon in the commission of that aggravated battery. The court assigned that case the moniker CR-FE-2009-0019383 and issued a warrant for Mr. Fortin's arrest.

Later in the day of October 14, 2009, police located Mr. Fortin. Mr. Fortin fled from police in a vehicle and on foot. Mr. Fortin was eventually apprehended.

On October 15, 2009, the State filed a separate complaint charging Mr. Fortin with the crimes of Aggravated Battery on a Law Enforcement Officer, Eluding a Peace Officer, and Leaving the Scene of an Accident Involving Property Damage. The State also alleged that Mr. Fortin had used a deadly weapon in his commission of the Aggravated Battery on the Law Enforcement Officer. The court assigned this case the number CR-FE-2009-0019475.

Mr. Fortin appeared before a magistrate in both cases on October 15, 2009 for his initial appearance pursuant to I.C.R. 5. The magistrate scheduled the preliminary hearing in both cases for October 29, 2009¹ and appointed counsel to represent Mr. Fortin in both cases.

On October 29, 2009, private counsel substituted as counsel of record in both cases and requested that the preliminary hearing in both cases be continued. The court reset the preliminary hearing in both cases for November 23, 2009. The State filed an amended complaint in the 19383 case changing the language, but not the nature, of the aggravated battery charge involving Mr. Shayler.

On November 23, 2009 Mr. Fortin waived his preliminary hearing in each case. In exchange for the waiver, the State made the following plea offers to Mr. Fortin. In the 19383 case, the State would require Mr. Fortin to plead guilty to both the Aggravated Battery and the sentence enhancement. The State would limit its recommendation to a unified sentence of fifteen years consisting of five determinate and ten indeterminate. The State extended a separate plea bargain in the 19475 case. That offer required Mr. Fortin to plead guilty to the Eluding a Police Officer charge. The State would dismiss the remaining charges. The State agreed to recommend a

¹ This appears to have been done for convenience or simply because 10-29 was the next day available for preliminary hearings. There was no motion to consolidate the charging documents for trial pursuant to I.C.R 13.

sentence on the Eluding charge of five years consisting of two years determinate and three years indeterminate. The State would recommend the sentence in the 19475 case run consecutively to the 19383 case.

Both cases were assigned to the same District Court and the State filed Informations charging Mr. Fortin with crimes and enhancements identical to those in the complaints.

Mr. Fortin appeared before the District Court in both cases for arraignment on December 4, 2009 and again for entry of plea on December 18, 2009. At the entry of plea hearing, Mr. Fortin stood silent in each case and the District Court entered pleas of not guilty in each case. The District Court set each case for trial to begin February 24, 2010. It appears the Court intended to start the trial in one case immediately upon the conclusion of the other. The cases were never consolidated for a simultaneous trial pursuant to I.C.R. 13.

After a continuance, Mr. Fortin proceeded to trial in the 19383 case in May of 2010. The jury found Mr. Fortin guilty of the Aggravated Battery as well as the sentence enhancement. The 19475 case was reset for trial on August 30, 2010.

On August 6, 2010, the Court sentenced Mr. Fortin in the 19383 case. The Court imposed a unified enhanced sentence on the Aggravated Battery of twenty-five years with twelve years fixed.

On August 30, 2010, the date of trial in the 19475 case, Mr. Fortin pleaded guilty to Aggravated Battery on a Law Enforcement Officer, Eluding a Police Officer and the sentence enhancement of Using a Deadly Weapon in the Commission of the Aggravated Battery. The State dismissed the charge regarding leaving the scene of a vehicle collision. There was no further plea agreement.

On October 8, 2010, the Court sentenced Mr. Fortin in the 19475 case. The Court imposed an enhanced sentence of fifteen years with five years determinate on the Aggravated Battery on a Law Enforcement Officer charge. The Court ordered that this sentence run consecutively to the sentence in the 19383 case that was earlier imposed. The Court imposed and commuted a sentence on the Eluding crime.

Mr. Fortin timely appealed from the conviction in the CR-FE-2009-0019383 case. The Court of Appeals affirmed the conviction in an unpublished opinion – Docket No. 38069 (Ct. App. April 30, 2012). Mr. Fortin’s petition for review was denied and the remittitur issued May 22, 2012.

Mr. Fortin did not appeal from the CR-FE-2009-0019475 conviction and sentence. However, in October of 2011, Mr. Fortin filed an application seeking post conviction relief from the judgment and sentence in the 19475 case. The Court assigned that case the number CV-PC-2011-19323. Mr. Fortin’s *pro se* petition alleged that his trial counsel was ineffective in three ways: failing to file a motion for sentence reduction pursuant to I.C.R. 35, failing to file a timely notice of appeal, and that trial counsel failed to inform his client that the separation of the charges and his subsequent entry of pleas would subject him to a sentencing where any argument for concurrent terms under the doctrine of a common course of conduct and scheme would be strictly discretionary on the part of the court. The Court appointed counsel to assist Mr. Fortin and with counsel’s assistance, Mr. Fortin filed an amended application for post conviction relief. In his amended petition, Mr. Fortin abandoned the claim regarding advice about separation of the charges and alleged only the failure to file a motion for sentence reduction and failure to file a timely notice of appeal.

The parties eventually stipulated that the Court grant Mr. Fortin limited post conviction relief by essentially “restarting” the time period under which Mr. Fortin could appeal his conviction in the 19475 case. The Court dismissed Mr. Fortin’s other claim. Mr. Fortin has subsequently filed a notice of appeal in the 19475 case which appeal is currently pending.

On May 7, 2013, Mr. Fortin filed a *pro se* application seeking post conviction relief from the conviction and sentence imposed in CR-FE-2009-0019383. Mr. Fortin has not filed a motion requesting appointment of counsel. Mr. Fortin’s claims all involve ineffective assistance of his trial counsel. The State will address each claim individually below. Mr. Fortin has failed to support any of his claims with sufficient admissible evidence to warrant a trial.

ARGUMENT

Mr. Fortin's first claim is that his trial counsel was constitutionally ineffective because "at the time of trial counsel's paid retention a plea bargain was on the table which would have resulted in a maximum term of imprisonment of fifteen (15) years on two felony convictions with concurrently imposed sentences in consideration for pleas of guilty. Counsel's advice to separate the charges and proceed to trial on each, instead, was clearly a matter of substandard performance." The State reads Mr. Fortin's claim to allege his trial counsel was deficient in two respects – advising Mr. Fortin to reject the plea bargain Mr. Fortin alleges was 'on the table' and somehow causing separate trials in the 19383 and 19475 cases.

The State will first address Mr. Fortin's claim that his counsel was constitutionally ineffective for advising Mr. Fortin to have his fair trial.

An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. Stuart v. State, 118 Idaho 865, 869, 801, P.2d 1216, 1220 (1990). Like a plaintiff in a civil action, the applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. Grube v. State, 135 Idaho 24, 995 P.2d 794 (2000). Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. §19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. Id.

The post-conviction petitioner must make factual allegations establishing each essential element of the claim, and a showing of admissible evidence must support those factual allegations. Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 651 (Ct. App. 1982); Stone v. State, 108 Idaho 822, 824, 702 P.2d 860, 862 (Ct. App. 1985). The district court may take judicial notice of the record of the underlying criminal case. Hays v. State, 113 Idaho 736, 739, 745 P.2d 758, 761 (Ct. App.

1987), *aff'd* 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds* State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

A court is required to accept the petitioner's un rebutted allegations as true, but need not accept the petitioner's conclusions. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001). When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing. Stuart v. State, 118 Idaho 865, 869, 801, P.2d 1216, 1220 (1990), citing Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law. Id.

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

Until about one year ago, a petitioner who had a fair trial and was sentenced in accordance with the law would not be heard to complain about his regret for having rejected a plea bargain, even if he alleged that decision was based on counsel's advice. Then, the United States Supreme Court decided Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d. 379

(2012) and Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). In Frye, the Supreme Court decided that the constitutional right to a fair trial includes a right to effective assistance of counsel during plea bargains. In Lafler, the Supreme Court dictated that in order to establish prejudice when a petitioner alleges counsel was ineffective for advising a petitioner to assert his right to trial, “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.” Lafler, 132 S.Ct. at 1385.

Neither Frye nor Lafler contain much guidance about exactly what constitutes ineffective assistance of counsel during the plea bargaining process. In Frye, counsel failed to communicate a plea bargain to Frye and Frye later pleaded guilty without a plea agreement². Frye, 132 S.Ct. at 1404. In Lafler, Missouri conceded ineffective assistance of counsel. The opinion contains no details about what Lafler’s attorney did or did not do.

A petitioner seeking post conviction relief has the burden of alleging facts in his petition that would establish the elements of his claim and to support those allegations with admissible evidence. I.C. §19-4903. In his petition, Mr. Fortin says only that his counsel advised him to proceed to trial. Mr. Fortin fails to say what his counsel told him about why counsel felt Mr. Fortin should refuse to waive his constitutional right to a trial. Mr. Fortin seems to take the position that the mere fact that counsel advised him to go to trial and he lost at trial is *per se* ineffective assistance. The United States Supreme Court has yet to go that far. If this Court accepts Mr. Fortin’s position, every criminal defendant would simply go to trial and see if they win confident in the knowledge that they could always come back and take advantage of any plea bargain through the post conviction process if they lose at trial. Mr. Fortin has failed to allege any

² Although the prosecutor at sentencing recommended a sentence identical to one alternative set forth in the plea agreement.

facts to support his conclusion that his lawyer's advice to demand that which the constitution guarantees – a full and fair trial – was in any way objectively unreasonable.

Similarly, Mr. Fortin's petition has failed to allege sufficient facts to establish prejudice from his decision to go to trial under the test articulated in Lafler. Mr. Fortin has to show that, absent his counsel's advice, the plea agreement 1) would have been presented to the court, 2) the court would have accepted its terms,³ and 3) that the conviction or sentence under the plea agreement would have been less severe than under the judgment and sentence in fact imposed.

Mr. Fortin alleges that he rejected a plea agreement by the prosecutor where "Mr. Fortin would be sentenced on those crimes to five (5) fixed, fifteen (15) indeterminate and zero (0) fixed, five (5) years indeterminate" (Pet. p. 3) on the charge of Aggravated Battery in the 19383 case and Eluding a Police Officer in the 19475 case. Mr. Fortin later alleges that the plea bargain "would have resulted in maximum term of imprisonment of fifteen (15) years on two felony convictions with concurrently imposed sentences." (Pet. p. 4). While Mr. Fortin claims that this was the plea agreement, Mr. Fortin has offered no evidence that the Court would have followed such agreement and imposed the recommended sentences. Mr. Fortin has not alleged that the plea agreement was contemplated to be binding on the Court pursuant to I.C.R. 11(f)(1)(C). Even if it were, Mr. Fortin has presented no evidence that the court would have accepted such agreement. Similarly, Mr. Fortin has presented no evidence that the Court would have followed the recommendation of the State had Mr. Fortin accepted the plea agreement as he alleges it existed. Mr. Fortin has also failed to present any evidence that, had he chosen to plead guilty, the Court would have accepted his guilty plea. Mr. Fortin took the position in the trial court that he did not use a knife against Mr. Shayler. Mr. Fortin has failed to submit admissible evidence with his petition that would establish either ineffective assistance of counsel or resulting prejudice. This Court should dismiss this claim.

³ In states like Idaho, where the majority of plea agreements are not binding on the court, it is hard to know what the Supreme Court means when it says that the trial court would have accepted the terms of the agreement. It clearly means something other than that the court would have imposed the sentence recommended in the plea bargain because that is the third prong of the Lafler test for prejudice.

Mr. Fortin alleges that his counsel was ineffective for “separating the cases for trial”. Mr. Fortin’s claim is disproved by the record below. The trials in cases CR-FE-2009-0019383 and CR-FE-2009-0019475, while set for trial to begin the same day, were never consolidated for trial pursuant to I.C.R. 13. The trials were separate because they were separate crimes resulting out of separate incidents. Mr. Fortin’s attorney did not cause the cases to be tried separately as he alleges. Therefore, the Court must dismiss this claim. Further, Mr. Fortin’s only allegation of prejudice is that he lost the opportunity to argue for concurrent sentences. This claim is disproven by the law and the record below. A sentencing court has broad discretion to make a sentence for one crime consecutive to crimes the defendant is already serving. State v. Lawrence, 98 Idaho 399 (1977). Additionally, Mr. Fortin can assert no prejudice in this case from this alleged error. Mr. Fortin seeks post conviction relief only from the conviction and sentence in the CR-FE-2009-0019383 case. The Court imposed sentence in this case before Mr. Fortin was ever convicted of the crimes in the CR-FE-2009-0019475 case. The Court’s decision to run the sentences in the 19475 case consecutively to the sentences it imposed months earlier in the 19383 case are what Mr. Fortin appears to complain about. However, he is not seeking relief from the 19475 convictions in this petition⁴. The Court must dismiss this claim.

Mr. Fortin next alleges that his trial counsel was ineffective for failing to file a motion in *limine* regarding Mr. Fortin’s alleged gang affiliation, or in the alternative to move for an immediate mistrial, “resulted in the jury hearing the petitioner was a gang member.” (Pet. p. 5). Mr. Fortin refers to a comment by Mr. Shayler during cross-examination. The relevant testimony is as follows:

Q. Now, at some point, I assume – did you ever get a clear look at this knife? It seems you like – you just say it was a shiny object.

A. Not a clear look, but I believe getting cut across the face and stabbed in the neck and seeing a shine, you know it’s a knife.

Q. So it’s just your opinion that this was a knife?

A. I knew it was a knife. I couldn’t determine which kind.

⁴ Any attempt to do so would be barred by the statute of limitations and by operation of I.C. §19-4908 as Mr. Fortin has already sought post conviction relief from the 19475 case.

Q. How do you know it was a knife?

A. Because it punctured me in the neck and cut me across the face, and I know most gang members carry those. (Trial Trns. 5-17-09 at 30).

Counsel for Mr. Fortin objected and the Court instructed the jury to disregard the statement regarding the gang member. (Trial trns. 5-17-09 at 31). Mr. Fortin claims counsel was ineffective for failing to file a motion in *limine*, presumably to prevent the State from introducing evidence of Mr. Fortin's alleged gang membership. However, Mr. Fortin has failed to show how the filing of a motion in *limine* would have prevented what occurred. The witness' answer came on cross-examination⁵. It was not introduced by the State. It was volunteered by the witness, even though the State apparently advised its witnesses, including Mr. Shaylor, not to mention any allegations of Mr. Fortin's gang membership. (Trial Trns. 5-17-09 at 45). Mr. Fortin fails to establish how the filing of a motion in *limine* would have prevented the witness from making this two-word blurb. Mr. Fortin has failed to show why his counsel should have anticipated this two-word blurb by the witness and, therefore, filed a motion to prevent it. Mr. Fortin has failed to establish ineffective assistance or any resulting prejudice. The Court must dismiss this claim.

Mr. Fortin also alleges that his counsel was ineffective for failing to move for an immediate mistrial after the witness' statement about gang membership. This claim is disproved by the record. Counsel for Mr. Fortin immediately objected. Counsel also told the Court he wanted to make a motion outside the presence of the jury. (Trial Trns. 5-17-09 at 31). The Court told counsel it would take up his motion later on. At the end of Mr. Shayler's testimony, Mr. Fortin's counsel did in fact move for a mistrial which was denied by the trial court. (Trial Trns. 5-17-09 at 41-48). Mr. Fortin's claim is disproved by the record below and must be dismissed.

Mr. Fortin alleges his attorney failed to conduct a pre-trial interview and to subpoena defense witness Casey Smith which resulted in the trial judge's refusal to allow counsel to recall

⁵ Mr. Fortin has not alleged any error by his attorney for asking the question that elicited the witness' answer.

that witness. However, Casey Smith testified at trial and was subject to questioning by counsel for Mr. Fortin. There is nothing in the record to establish that counsel for Mr. Fortin attempted to recall Ms. Smith and the Court refused because Ms. Smith was not under subpoena. Mr. Fortin fails to allege exactly what his counsel should have discovered in a pre-trial interview and asked Ms. Smith at trial. Mr. Fortin claims counsel could have impeached her with her statements to police, but counsel did so. (See Trial Trns. 5-17-09 at 71-74). Mr. Fortin's claims are conclusory and disproven by the record below. Mr. Fortin has failed to allege any facts to establish either deficient performance or resulting prejudice. The Court must dismiss this claim.

Mr. Fortin alleges that his trial counsel was ineffective for failing to object to the admission of evidence of Mr. Fortin's flight from police during trial on the basis of relevance. Evidence of flight can be relevant to show consciousness of guilt. See State v. Moore, 131 Idaho 814, 819-20, 965 P.2d 174, 179-80 (1998); State v. Rossignol, 147 Idaho 818, 821-11 (Ct.App.2009); State v. Friedley, 122 Idaho 321 (Ct.App.1992). The inference of consciousness of guilt may be weakened when the defendant harbors an ulterior motive to flee. Rossignol, 147 Idaho at 821. However, existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. Rossignol, at 822. The trial court explicitly determined that evidence of Mr. Fortin's flight from police was relevant, but limited the details the State could introduce. (See Trial Trns. at 220-229). Mr. Fortin has not shown any evidence of an alternative motive other than that argued by his counsel at trial. (Trial Trns. at 214-215). Mr. Fortin has not shown any reason to believe the Court's ruling would have been different had counsel specifically objected on the basis of relevance. Counsel did lodge a general objection. (Trial Trns. at 229). The Idaho Court of Appeals concluded that the District Court did not abuse its discretion by failing to balance the unfair prejudice of the flight evidence against its probative value. State v. Mr. Fortin, Docket No. 38069 (Ct. App. 4-30-12). Mr. Fortin has failed to establish deficient performance or resulting prejudice. The Court must dismiss this claim.

Mr. Fortin alleges that his trial counsel should have objected to the wording of the verdict form. Mr. Fortin alleges the verdict form "destroyed his presumption of innocence by listing seven possibilities of guilt before the entitled first consideration of not guilty." (Pet. p. 6). Mr.

Fortin's complaint is without merit. The jury verdict form was in a format approved by the Idaho Supreme Court. It required the jury to decide whether Mr. Fortin was guilty or not guilty of Aggravated Battery. It then required the jury to consider the weapon enhancement if it convicted Mr. Fortin of Aggravated Battery and to consider lesser offenses if the jury acquitted Mr. Fortin of Aggravated Battery. Mr. Fortin cites to no authority that this was improper. Mr. Fortin fails to state any legal basis upon which his attorney should have objected. Mr. Fortin has failed to establish his counsel's performance was objectively unreasonable. Mr. Fortin has also failed to establish any prejudice as a result of the error he alleges. The jury convicted Mr. Fortin of the first offense that it was required to consider under the verdict form. Mr. Fortin fails to say how the inclusion of the other crimes and offenses on the verdict form prejudiced Mr. Fortin in any way. The Court must dismiss this claim.

Mr. Fortin next alleges that his attorney failed to file a motion to reduce sentence pursuant to I.C.R. 35. Mr. Fortin fails to set forth any facts to show how Mr. Fortin was prejudiced by this failure. Mr. Fortin has presented no evidence about any change in circumstances between his sentencing and the expiration of the timeframe for the filing of the Rule 35 motion. Mr. Fortin has shown no evidence of why the Court would have chosen to grant him mercy had his attorney filed the motion as requested. Mr. Fortin has failed to establish any prejudice and the Court must dismiss this claim.

Lastly, Mr. Fortin alleges that his appellate attorney was ineffective for two reasons. First, Mr. Fortin claims his appellate counsel was ineffective for failing "to federalize any issues raised on direct appeal." (Pet. p. 6). The State has no idea what Mr. Fortin intends to allege. Mr. Fortin has failed to cite to any specific action he alleges his appellate counsel failed to take, any specific legal authority regarding why such action is necessary, or any prejudice as a result of such alleged inaction on the part of his appellate counsel. Mr. Fortin's claim, whatever it is, is conclusory. The Court must dismiss this claim. Second, Mr. Fortin alleges his appellate counsel failed to object to a record that contains an erroneous transcript of the hearing to determine a restitution amount. It is clear that the transcript of the February 4, 2010 hearing transposes the name of the prosecutor with the name of Mr. Fortin's counsel in the labeling of the speaker. Mr. Fortin has made no

claim of prejudice as a result of this error by the transcriptionist. The transcript remains clear who is speaking when and Mr. Fortin raised no issues regarding restitution on appeal. Mr. Fortin has failed to show any prejudice from his appellate counsel's alleged failure to object to the transcript. The Court must dismiss Mr. Fortin's claims regarding his appellate counsel.

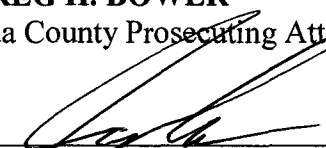
CONCLUSION

Mr. Fortin's ineffective assistance of counsel claims fail to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice. The State is therefore entitled to summary disposition pursuant to Idaho Code § 19-4906(c).

The State requests that this Court grant the State's Motion for Summary Disposition.

DATED this 23rd day of May 2013.

GREG H. BOWER
Ada County Prosecuting Attorney



Jonathan M. Medema
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23 day of May 2013, I caused a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION to be placed in the United States mail, postage prepaid, addressed to:

**Mr. Cody J. Fortin, Inmate #72953
I.C.C. K Pod 216-B
PO Box 70010
Boise, ID 83707**



Legal Assistant

Owen/Angie
MAY 5/28/13

NO. _____
A.M. _____ FILED P.M. 2:10

MAY 24 2013

CHRISTOPHER D. RICH, Clerk
By **STEPHANIE VIDA**
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

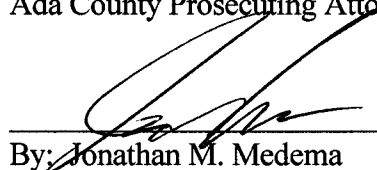
CODY JAMES FORTIN)
)
Petitioner,)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

Case No. CV-PC-2013-08285
NOTICE OF HEARING

TO: Cody James Fortin, Pro Se Petitioner: Please take notice that on the 18th day of June 2013 at the hour of 3:30 p.m. of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney, Jonathan M. Medema, will move this Honorable Court regarding the State's Motion for Summary Disposition in the above-entitled action.

DATED this 25th day of May 2013.

GREG H. BOWER
Ada County Prosecuting Attorney


By: Jonathan M. Medema
Deputy Prosecuting Attorney

1442

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23 day of May 2013, I caused a true and correct copy of the foregoing NOTICE OF HEARING to be placed in the United States mail, postage prepaid, addressed to:

**Cody J. Fortin, Inmate #72953
I.C.C. K Pod 216-B
PO Box 70010
Boise, ID 83707**



Legal Assistant

CODY J. FORTIN # 72953
I.C.C. K Pod 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

NO. _____ FILED _____
A.M. 9 P.M.

JUN 06 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)
_____)

Civil Case No. CV-PC-2013-08285
District Court No. CR-2009-0019383


**MOTION FOR AN EXTENSION OF
TIME TO RESPOND TO SUMMARY
JUDGMENT AND TO VACATE THE
JUNE 18TH 2013 HEARING ON THE
SAME STATE'S MOTION**

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above encaptioned cause of action; and, who, respectfully moves this Honorable Court, pursuant to Rule 6(b) and Rule 56(c) of the Idaho Rules of Civil Procedure, for a forty-five (45) day enlargement of time in which to file a response and objection to the respondent's May 23rd 2013 motion for summary disposition and to vacate the forthcoming June 18, 2013 hearing; thereby causing said response to be filed on or before July 25th 2013.

Petitioner's motion is predicated upon the Rules, the record to date, the included affidavit and memorandum of points and authorities in support hereof; and, by this reference incorporated herein as though quoted in their respective entireties

DATED this 4th day of JUNE 2013.

Respectfully submitted by:



CODY J. FORTIN
Petitioner-Movant pro se

w

CODY J. FORTIN # 72953
I.C.C. K Pod 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

NO. _____
A.M. 9 FILED P.M. _____

JUN 06 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF IDAHO,)
)
Respondent.)

Civil Case No. CV-PC-1308285
District Court No. CR-2009-0019383

AFFIDAVIT IN SUPPORT OF A
MOTION FOR EXTENSION OF
TIME TO RESPOND TO MOTION
FOR SUMMARY DISPOSITION &
TO VACATE THE HEARING

STATE OF IDAHO)
 : ss.
The County of ADA)

CODY J. FORTIN, after first being duly sworn upon his oath, deposes and says:

1. AFFIANT is the petitioner pro se in the above encaptioned matter, and brings this motion for enlargement of time and to vacate the June 18, 2013 hearing in good faith, absent any purpose to delay or annoy:
2. AFFIANT has only a limited education and has no knowledge of case law and legal procedure; as a point of fact, all of these filings have been prepared by a former inmate law clerk, who may or may not be able to continue to aide YOUR AFFIANT since the rules that govern such assistance are growing increasingly more restrictive:
3. AFFIANT has never seen nor possessed the entire case file or fully examined a complete copy of the underlying record and discovery in these matters:
4. THAT the Idaho Correctional Center's legal resource office, where the petitioner is housed, has no state or federal reporter series, and contains only the most basic of pre-

printed forms, some of which including those for post conviction relief are legally inadequate:

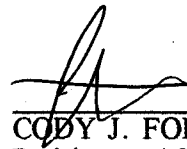
5. YOUR AFFIANT has not been advised by either the court, or the Ada County Public Defender's Office that counsel has been appointed or denied in these matters.

6. AFFIANT is of the reasonable belief that absent this enlargement of time he will be unable to protect his substantial rights.

7. YOUR AFFIANT has not sought any previous extensions of time in these regards, nor has he discussed this request with opposing counsel; however, contemporaneously with this filing a true and correct copy of each of the included documents has been provided the respondent by mail.

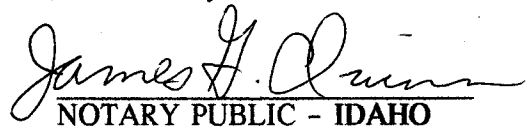
FURTHER sayeth YOUR AFFIANT naught.

DATED this 4th day of JUNE 2013.



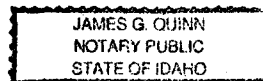
COBY J. FORTIN
Petitioner-Affiant pro se

SUBSCRIBED and SWORN to before me, a Notary Public, this 4th day of JUNE 2013.



NOTARY PUBLIC - IDAHO

*** SEAL ***



Commission Expires: 9/10/13

JUN 06 2013

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

CODY J. FORTIN # 72953
I.C.C. K Pod 216-B
Post Office Box 70010
Boise, Idaho 83707

Petitioner pro se

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,
Petitioner,
-vs-
THE STATE OF IDAHO,
Respondent.

Civil Case No. CV-PC-2013-08285
District Court No. CR-2009-0019383

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF A
MOTION FOR ENLARGEMENT OF
TIME TO RESPOND AND OBJECT
TO SUMMARY DISPOSITION

COMES NOW, CODY J. FORTIN, petitioner pro se, in the above cause of action; and presents the following points of fact and legal authority in support of an extension of time to respond and object to the respondent's May 23rd 2013 motion for summary judgment.

I.
PRELIMINARY STATEMENT

This matter brings before the Court a request for enlargement of time and the vacation of the forthcoming June 18th 2013 hearing, pursuant to the Rules and based upon the fact that the state's filings are both premature and outside the parameter of the governing rules of civil procedure.

II.
STANDARD OF LAW

Motions filed under I.C. 19-4906(c) are the functional equivalent of those sought under Rule 56(c) of the Idaho Rules of Civil Procedure. *Newman v. State*, 140 Idaho 491, 95 P.3d 642 (2004). Moreover, it is - with few exceptions - the Idaho Rules of Civil Procedure

that govern the procedural rules for post conviction relief. See: I.C.R. 57(b); and, *Ferrier v State of Idaho*, 135 Idaho 797, 25 P.3d 110 (2001, respectively, in this regard.

III.

MATERIAL FACTS AND LEGAL ARGUENDO

Simply said the respondent's motion for summary disposition and notice of hearing do not comport with the procedural rules governing these types of filings.

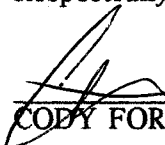
I.R.C.P. 56(c) requires that motions for summary judgment and their supporting documentation "shall be served at least twenty eight (28) days before the time fixed for the hearing." Rule 56(c). Further, where as in the instant matter, service is being accomplished by mail, these same documents must be mailed no less than thirty-one (31) days in advance of the hearing. *Ponderosa Paint Mfg. Inc. v. Yack*, 125 Idaho 310, 870 P.2d 663 (C.O.A. 1994). The mailing certificate on the respondent's filings are dated May 23rd 2013 and the hearing set for June 18th 2013: Clearly outside the rules.

Finally, it warrants judicial notice that the petition provides notice that the pro se petitioner lacks the complete record and discovery is likely to be required to protect his substantial rights See: P.C.R. p.2 ¶2; as well as the fact that the petitioner has yet to receive any notice on his motion for appointment of counsel, nor any contact by the office of the public defender in this same regard.

Accordingly, and with all due respect to opposing counsel, the state's motion for summary disposition is premature and violates the rules; thus, at the very least, the petitioner is entitled to a requested enlargement of time to respond to the state's filings and vacation of the present hearing date.

DATED this 4th day of JUNE 2013.

Respectfully submitted by:



CODY FORTIN - Petitioner pro se

CERTIFICATE OF FILING AND SERVICE BY MAILING

I, **DO HEREBY CERTIFY** and **AFFIRM** that the original and a true and correct copy of the foregoing **MOTION FOR EXTENSION OF TIME TO RESPOND TO SUMMARY JUDGMENT**, with accompanying documentation were served upon Christopher D. Rich, Clerk of Fourth Judicial District Court for filing, and the respondent by placing the same in the U.S. Mail, this 4th day of **JUNE** 2013, addressed as follows:

MR. CHRISTOPHER D. RICH
Clerk of District Court
Fourth Judicial District
ADA COUNTY COURTHOUSE
200 Front Street
Boise, Idaho 83702

MR. JONATHAN M. MEDEMA
Deputy Prosecuting Attorney
Office of Ada County Prosecutor
200 West Front Street, Rm. 3191
Boise, Idaho 83702



CODY J. FORTIN
Petitioner-Affiant *pro se*

JUN 10 2013

CHRISTOPHER D. BICH, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J FORTIN,

Plaintiff,

vs.

STATE OF IDAHO,

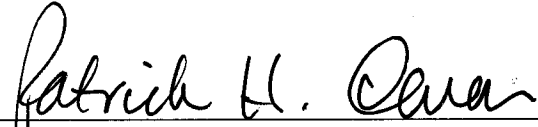
Defendant.

Case No.: CV PC 13 8285

ORDER GRANTING MOTION FOR
APPOINTMENT OF COUNSEL

IT IS HEREBY ORDERED that the Plaintiffs Motion for Appointment of Counsel is granted and Ada County Public Defender's office, or an attorney appointed by Ada County Public Defender's office, a duly licensed attorney in the State of Idaho, is hereby appointed to represent said Plaintiff in all proceedings involving this Petition for Post Conviction Relief.

DATED this 6 day of ~~May~~ June, 2013.



PATRICK H. OWEN
District Judge

cc: PA, PD, Fortin
ORDER GRANTING MOTION TO APPOINT COUNSEL

Owen
Angie
ORB
6-26-13

NO. _____
A.M. 1006 P.M. _____

JUN 25 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN)
)
Petitioner,)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

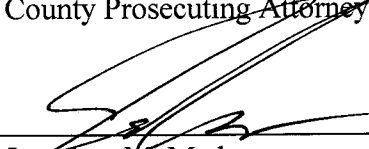
Case No. CV-PC-2013-08285

NOTICE OF HEARING

TO: CODY J. FORTIN and the Ada County Public Defender, his Attorney of Record, please take notice that on the 30th day of July 2013, at the hour of 3:00 p.m. of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney, Jonathan M. Medema, will move this Honorable Court regarding the State's Motion for Summary Dismissal in the above-entitled action.

DATED this 24th day of June 2013.

GREG H. BOWER
Ada County Prosecuting Attorney

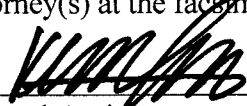
By: 
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of June 2013, I caused to be served, a true and correct copy of the foregoing Notice of Hearing upon the individual(s) named below in the manner noted:

**Ada County Public Defender
200 W. Front Street, Rm. 1107
Boise, ID 83702**

- By depositing copies of the same in the United States mail, postage prepaid, first class.
- By hand delivering said document to defense counsel.
- By depositing copies of the same in the Interdepartmental Mail.
- By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- By faxing copies of the same to said attorney(s) at the facsimile number: _____



Legal Assistant

JUL 02 2013

[Signature] D. RICH, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,
Petitioner,

Case No. CV-PC-2013-08285

vs.

MEMORANDUM DECISION
AND ORDER RE: APPOINTMENT
OF COUNSEL, WAIVER OF FILING
FEES, RELEASE OF THE PRE-
SENTENCE REPORT, AND JUDICIAL
NOTICE OF UNDERLYING FILES

STATE OF IDAHO,

Respondent.

Before the Court are Cody J. Fortin's ("Fortin") motions for appointment of counsel, waiver of filing fees, release of the pre-sentence report, and judicial notice in connection with his petition for post-conviction relief. As stated below, the Court will appoint counsel, take judicial notice of underlying files, not waive fees, and will issue an order releasing the pre-sentence report to counsel.

Background

On May 19, 2010, in Ada County Case No. CR-FE-2009-19383, Fortin was convicted by a jury of Aggravated Battery, Felony, §§ 18-903(a), 907(a) and Use of a Deadly Weapon in the Commission of a Crime. Felony, § 19-2520. On August 10, 2010, Fortin was sentenced to the custody of the State Board of Correction of the State of Idaho for an aggregate term of twenty-five (25) years, with the first twelve (12) years fixed and the remaining thirteen (13) years indeterminate. Fortin appealed his conviction and the Idaho Court of Appeals affirmed in an unpublished case. *See State v. Fortin*, Docket No. 38069 (Ct. App. April 30, 2012).

[Handwritten mark]

1 On August 30, 2010, in Ada County Case No. CR-FE-2009-19475, Fortin pleaded guilty to
2 Aggravated Battery on Law Enforcement, Felony, Idaho Code §§ 18-903(b), 907(b), 915(1);
3 Eluding a Peace Officer, Felony, Idaho Code § 4-1404(2)(c); and Use of a Deadly Weapon in the
4 Commission of a Crime. Felony, § 19-2520. As to Eluding a Peace Officer, the Court commuted
5 the sentence to time served. As to the Aggravated Battery and the enhancement, Fortin was
6 sentenced to the custody of the State Board of Correction of the State of Idaho for an aggregate term
7 of twenty (20) years, with the first five (5) years fixed and the remaining fifteen (15) years
8 indeterminate. This sentence was imposed consecutively to the sentence in the case cited above. It
9 appears that Fortin has filed an appeal as to this matter in addition to the previously adjudicated
10 appeal.
11

12 Fortin is currently serving his sentence in the custody of the Idaho Department of Correction.
13 On May 7, 2013, Fortin filed a *pro se* Petition for Post-Conviction Relief. On the same day, Fortin
14 filed, *pro se*: a motion requesting that the Court to take judicial notice of the files and records in
15 both underlying criminal cases, a motion to release the PSI, a motion to waive filing fees, and a
16 motion for the appointment of counsel. The petition alleges numerous claims of ineffective
17 assistance of counsel.
18

19 Discussion

20 Fortin requests that counsel be appointed to assist him in this matter. "The Court of Appeals
21 has ruled that when a district court is 'presented with a request for appointed counsel, the court must
22 address this request before ruling on the substantive issues in the case.'" *Charboneau v. State*, 140
23 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) (*quoting Fox v. State*, 129 Idaho 881, 934 P.2d
24 947(Ct.App.1997)).
25

1 The Uniform Post-Conviction Procedure Act provides in part that “a court-appointed
2 attorney may be made available to the applicant . . .” in a post-conviction action. Idaho Code § 19-
3 4904. Thus, the decision of whether to grant or deny a request for court-appointed counsel is in the
4 discretion of the trial court. *Plant v. State*, 143 Idaho 758, 760-61, 152 P.3d 629, 631-32 (Ct. App.
5 2006). In determining whether to appoint counsel, “the trial court should keep in mind that petitions
6 and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete.” *Id.* (quoting
7 *Charboneau*, 140 Idaho at 792). The trial court must, therefore, “afford some leniency to *pro se*
8 petitioners whose petitions may be inartful or incomplete.” *Id.* If an applicant alleges facts that
9 raise the possibility of a valid claim, the district court should appoint counsel in order to give the
10 applicant an opportunity to work with counsel and properly allege the necessary supporting facts.
11 *Charboneau*, 140 Idaho at 793. On the other hand, if claims are so patently frivolous that they could
12 not be developed into viable claims even with the assistance of counsel, the court may decline to
13 appoint counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004).

15 The Court finds that Fortin is indigent based upon the submitted prison account records and
16 the Court’s previous appointment of the State Appellate Public Defender. The Court also finds that
17 at least one claim is not so patently frivolous as to preclude its development into a viable claim.
18 Therefore, in an exercise of its discretion, the Court will appoint Fortin counsel to assist him in this
19 matter.
20

21 IT IS HEREBY ORDERED that the Ada County Public Defender, or his designee is hereby
22 appointed as Counsel for the petitioner.

23 Additionally, the Court will deny the motion to take judicial notice of the entire files of both
24 underlying cases, Case Nos. CR-FE-2009-193883 and CR-FE-2009-19475. In the Court’s view, the
25

1 proper procedure is for the Court to take note of specific matters that are part of the files. These
2 items must be made a part of the record in this case. The Court will take judicial matters of those
3 items in the underlying files that are made a part of this file.

4 As to the PSI, the Court may issue an appropriate order releasing the PSI to Fortin's counsel
5 once designated.

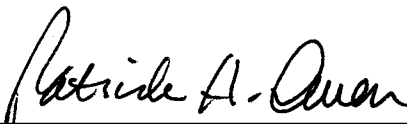
6 There are no filing fees associated with the filing of a post-conviction action. *See Appendix*
7 *A to the I.R.C.P. at H(10).* Accordingly, the Court rejects the motion to waive fees because there
8 are no fees to waive.

9
10 **Conclusion**

11 As discussed above, the Court will grant Fortin's motion for appointment of counsel. The
12 Court will deny the blanket request for judicial notice. The Court will deny the fee waiver. Finally,
13 the Court may issue an order releasing the PSI to Fortin's counsel, if counsel demonstrates good
14 cause.

15 IT IS SO ORDERED.

16 Dated this 1 day of July 2013.

17
18 

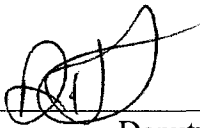
19 _____
Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 2 day of July 2013, I mailed (served) a true and correct copy
of the within instrument to:

CODY J. FORTIN
ICC K POD 216-B
PO BOX 70010
BOISE ID 83707

CHRISTOPHER D. RICH
Clerk of the District Court

By  _____
Deputy Clerk

David Lorello

NO. 1057 FILED
A.M. _____ P.M. _____

JUL 19 2013

CHRISTOPHER D. RICH, Clerk
By **ELYSHIA HOLMES**
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CODY J. FORTIN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2013-08285

**MOTION FOR STAY OF
PROCEEDINGS AND FOR LEAVE TO
AMEND PETITION**

COMES NOW the petitioner, CODY J. FORTIN, by and through his attorney, D. David Lorello, Jr., Ada County Public Defender's Office, and moves this Court for an order staying proceedings and allowing the petitioner to amend his petition after a discussion of issues with appointed counsel. The petitioner requests a stay of sixty (60) days in order to review the file, receive and review a copy of the presentence investigation report, receive and review transcripts, and prepare an amended petition.

Dated this 18th day of July 2013.

[Signature]

D. DAVID LORELLO, JR.
Attorney for Defendant

[Handwritten mark]

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 18th day of July 2013, I mailed (served) a true and correct copy of the within instrument to:

Jonathan Medema
Ada County Prosecutor's Office
Interdepartmental Mail


Katie Van Vorhis

JUL 19 2013

CHRISTOPHER D. RICH, Clerk
By KATRINA CHRISTENSEN
DEPUTY

ALAN E. TRIMMING
ADA COUNTY PUBLIC DEFENDER

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

CODY J. FORTIN,

Defendant.


Case No. CR-FE-2009-0019383
(Civil Case Ref: CV-PC-2013-08285)

MOTION TO RELEASE PSI

COMES NOW, D. David Lorello, Jr. of the Ada County Public Defender's Office, court-appointed counsel for Cody J. Fortin, and moves this Court, pursuant to Idaho Criminal Rule 32, for an order releasing the presentence investigation report prepared in the above-entitled case number to undersigned counsel.

The defendant recently filed a Petition for Post-Conviction Relief in Case No. CV-PC-2013-08285. Subsequent to his filing, the Ada County Public Defender's Office was appointed to represent the above-named defendant in post-conviction proceedings. To aid undersigned counsel in the post-conviction proceedings and familiar counsel with the defendant's case, counsel respectfully requests this Court release a copy of the presentence investigation report generated in the above-entitled case number.

Dated this 18th day of July 2013.


D. DAVID LORELLO, JR.
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 18th day of July 2013, I mailed (served) a true and correct copy of the within instrument to:

Jonathan Medema
Ada County Prosecutor's Office
Interdepartmental Mail



Katie Van Vorhis

Clara
7/22

NO. _____ FILED _____
A.M. 10:12 P.M.

JUL 29 2013

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

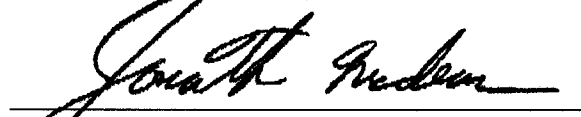
CODY J. FORTIN)
)
Petitioner,)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV-PC-2013-08285
NOTICE OF HEARING

TO: CODY J. FORTIN and David Lorello, his/her Attorney of Record, please take notice that on the 17th day of September 2013, at the hour of 3:00 p.m. of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney, Jonathan M. Medema, will move this Honorable Court regarding the State's Motion of Summary Dismissal and Motion to Take Judicial Notice in the above-entitled action.

DATED this 24th day of July 2013.

GREG H. BOWER
Ada County Prosecuting Attorney


By: Jonathan M. Medema
Deputy Prosecuting Attorney

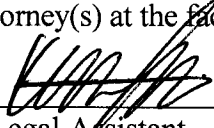
SV

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of July 2013, I caused to be served, a true and correct copy of the foregoing Notice of Hearing upon the individual(s) named below in the manner noted:

David Lorello
Ada County Public Defender
200 W. Front Street, Rm. 1107
Boise, ID 83702

- By depositing copies of the same in the United States mail, postage prepaid, first class.
- By hand delivering said document to defense counsel.
- By depositing copies of the same in the Interdepartmental Mail.
- By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- By faxing copies of the same to said attorney(s) at the facsimile number: _____



Legal Assistant

ALAN E. TRIMMING
ADA COUNTY PUBLIC DEFENDER

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

RECEIVED
JUL 19 2013
Ada County Clerk

NO. _____ FILED _____
A.M. _____ P.M. 2:45

AUG 23 2013

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

CODY J. FORTIN,

Defendant.

Case No. CR-FE-2009-0019383
(Civil Case Ref: CV-PC-2013-08285)

ORDER RELEASING PSI

This matter having come before the court upon court-appointed counsel's motion, and for good cause appearing, this Court hereby grants counsel's Motion to Release PSI.

A copy of the presentence investigation report prepared on behalf of the defendant in the above-entitled case number shall be released to D. David Lorello, Jr., court-appointed counsel for the defendant in Case No. CV-PC-2013-08285, to aid counsel in preparation of the pending post-conviction proceedings.

Counsel is to make no copies of the report, shall not disclose the report to any other person outside the office of the Ada County Public Defender, and shall surrender said copy to this Court upon completion of the defendant's post-conviction proceedings in Case No. CV-PC-2013-08285. Failure to comply with any portion of Idaho Criminal Rule 32 may be deemed a contempt of court and may be subject to appropriate sanctions.

SO ORDERED AND DATED this 23 day of August 2013.



PATRICK H. OWEN
District Judge

RECEIVED
JUL 19 2013
ADA COUNTY

NO. _____ FILED _____
A.M. _____ P.M. 2:45

AUG 23 2013

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,

Petitioner,

vs.

STATE OF IDAHO,

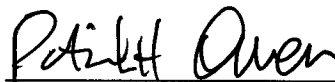
Respondent.

Case No. CV-PC-2013-08285

**ORDER GRANTING STAY OF
PROCEEDINGS AND FOR LEAVE TO
AMEND PETITION**

For good cause appearing, this Court hereby grants the Petitioner's Motion for Stay of Proceedings and for Leave to Amend Petition. The petitioner shall be given sixty (60) days from the entry of this order to file an amended petition in this matter.

SO ORDERED AND DATED this 23 day of August 2013.



PATRICK H. OWEN
District Judge

4

DEC 17 2013

By:  D. RICH, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J FORTIN,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

Case No. CV PC 13 8285

NOTICE OF SCHEDULING
CONFERENCE UNDER I.R.C.P. 16(a)
and 16(b)


The Court has determined that this matter is appropriate for a scheduling order under I.R.C.P. 16(b).

YOU ARE HEREBY NOTIFIED a telephonic scheduling conference is hereby set for **January 13, 2014, at 3:30 p.m.** before the Honorable Patrick H. Owen. A scheduling order under I.R.C.P. 16(b) may issue following this conference. The Court will initiate the call.

All parties must appear at this time in person or by counsel. Counsel must be the handling attorney, or be fully familiar with the case, and have authority to bind his/her client and law firm on all matters set forth in I.R.C.P. 16(a) and 16(b).

Dated this 17 day of December, 2013.

Christopher D Rich
Clerk of the District Court

By:  _____
Deputy Court Clerk

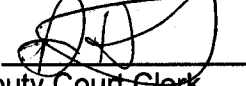
CERTIFICATE OF MAILING

I hereby certify that on this 17 day of December, 2013, I mailed (served) a true and correct copy of the within instrument to:

Ada County Public Defender
INTERDEPARTMENTAL MAIL

Ada County Prosecuting Attorney
INTERDEPARTMENTAL MAIL

Christopher D Rich
Clerk of the District Court

By:  _____
Deputy Court Clerk

FILED: 6/17, 2014 at 9:00
Christopher D. Rich, Clerk
By: _____
Inga Johnson, Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY FORTIN,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

Case No. CVPC13-08285

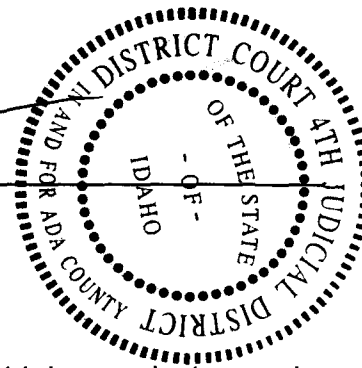
NOTICE OF STATUS CONFERENCE

YOU ARE HEREBY NOTIFIED That a Status Conference has been set on June 25,
2014 at 3:00 PM in the Ada County Courthouse regarding the above entitled matter.

Christopher D. Rich

Dated: 6/17/14

By: _____
Inga Johnson
Deputy Clerk



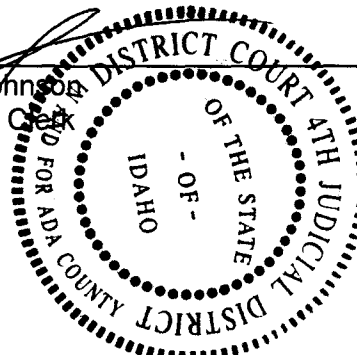
CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 17 day of June, 2014, I caused a true and correct copy of the above and foregoing instrument to be mailed, postage prepaid, to:

Ada County Prosecuting Attorney, Interdept Mail
Ada Co. Public Defender, Interdept Mail

Christopher D. Rich

By: _____
Inga Johnson
Deputy Clerk



Notice of Status Conference

Time	Speaker	Note
<u>3:44:29 PM</u>	.	
<u>3:44:32 PM</u>		Cody Fortin v. State CVPC13-08285 Status Conf. (Not Trnsp)
<u>3:44:33 PM</u>	Counsel	Lorello/Medema
<u>3:44:46 PM</u>	Lorello	Adv. of status. working with def. on affidavit to factually support allegations in petition.
<u>3:45:45 PM</u>	Ct	Q. on specifics
<u>3:48:49 PM</u>	Ct	Allows 30d to supply affidavit.
<u>3:49:05 PM</u>	Ct	will put on for scheduling conf. once received
<u>3:49:18 PM</u>		End

Owen-Ingala
10/4/2014
JM

ADA COUNTY PUBLIC DEFENDER
Attorneys for Defendant

D. DAVID LORELLO, JR., ISB #6232
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

NO. _____
A.M. _____ FILED P.M. *JML*

NOV 03 2014

CHRISTOPHER D. RICH, Clerk
By **JAMIE MARTIN**
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

vs.

CODY J. FORTIN,

Defendant.

PC
Case No. CV-~~CP~~-2013-8285

NOTICE OF HEARING
(Status Conference)

**TO: THE STATE OF IDAHO, Plaintiff, and to Jonathan Medema, Ada County
Prosecutor's Office:**

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED that the above-named Defendant will call on for hearing Status Conference, now on file with the Court. Said hearing shall take place on November 19th, 2014, at 3:00 p.m., in the courtroom of the above-entitled court, or as soon thereafter as counsel may be heard.

DATED, Friday, October 31, 2014.

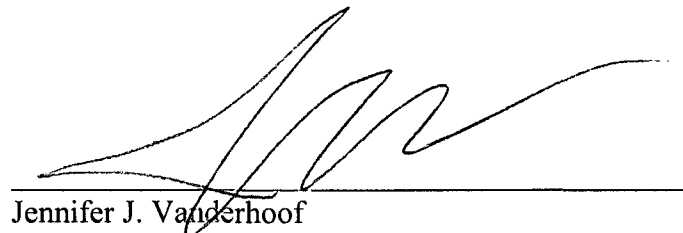


D. David Lorello, Jr.
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on Friday, October 31, 2014, I mailed (served) a true and correct copy of the within instrument to:

Jonathan Medema
Ada County Prosecutor's Office
Interdepartmental Mail


Jennifer J. Vanderhoof

DS

Time	Speaker	Note
04:35:16 PM	,	
04:35:18 PM		Cody Fortin v. State CVPC13-08285 Status Conf
04:35:19 PM	Counsel	Lorello/ Medema
04:35:31 PM	Ct	Calls case and reviews.
04:35:35 PM	Lorello	Responds- Clarifies status. Still intends on filing amended petition or affidavit or respond to motion to dismiss.
04:36:46 PM	Ct	Further Status Review- 1/21 at 3

<u>Time</u>	<u>Speaker</u>	<u>Note</u>
04:11:05 PM	.	
04:11:12 PM		Cody Fortin v. State CVPC13-08285 Review(not trnsp)
04:11:14 PM	Counsel	Lorello/ Medema
04:11:25 PM	Ct	Calls case and reviews
04:11:36 PM	Lorello	met with def twice, relying on original petition, asks 1 week to respond to Motion for Dismissal
04:12:02 PM	Medema	Asks set for hearing.
04:12:23 PM	Ct	Clerk will contact and set for hearing, order for time to respond to state.

Owen
Trga
2/10/15 JH

NO. _____
A.M. _____ FILED P.M. 200

FEB 09 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

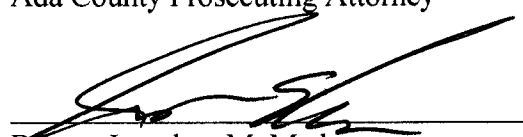
CODY JAMES FORTIN)
)
Petitioner,)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV PC 2013 08285
NOTICE OF HEARING

TO: D. David Lorello: PLEASE TAKE NOTICE that the above case has been set in the Courtroom at the Ada County Courthouse, 200 West Front Street, Boise, Idaho, in front of Judge Patrick Owen, on the 17th day of March, 2015, at 3:00 p.m. for the Motion for Summary Dismissal.

DATED this 6th day of February 2015.

JAN M. BENNETTS
Ada County Prosecuting Attorney


By: Jonathan M. Medema
Deputy Prosecuting Attorney

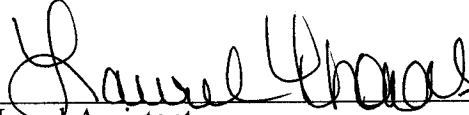
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of February 2015, I caused a true and correct copy of the foregoing NOTICE OF HEARING to be placed in the United States mail, postage prepaid, addressed to:

HAND DELIVERED
 MAILED POSTAGE PREPAID
 INTERDEPARTMENTAL MAIL
 VIA FACSIMILE

D. DAVID LORELLO
PUBLIC DEFENDER


Legal Assistant

Owen
Inga
2/11/15 JH

NO. _____ FILED _____
A.M. _____ P.M. 442

FEB 10 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2013-08285

MEMORANDUM IN RESPONSE TO
STATE'S MOTION FOR SUMMARY
DISPOSITION

COMES NOW the petitioner, CODY JAMES FORTIN, by and through his attorney, D. David Lorello, Jr., Ada County Public Defender's Office, and hereby submits to the Court this Memorandum in Response to State's Motion for Summary Disposition. This Memorandum is based upon the Petition for Post-Conviction Relief and the court records, transcripts, and reports associated with the underlying criminal matter on file with the Court.

FACTS

- On October 14, 2009, Petitioner was charged with Aggravated Battery and the use of a deadly weapon in commission of a crime (Case No. CR-FE-2009-0019383) and issued a warrant for Petitioner's arrest.

JH

- On October 15, 2009, Petitioner was charged with Aggravated Battery on a Law Enforcement Officer, Eluding a Police Officer, and Leaving the Scene of an Accident (Case No. CR-FE-2009-0019475).
- On November 23, 2009, Petitioner waived his Preliminary Hearing in exchange for the following offer:
 - CR-FE-2009-0019383: Plead guilty to Aggravated Battery plus the Use of a Deadly Weapon Enhancement and the state would cap its recommendation at a $5 + 10 = 15$; and
 - CR-FE-2009-0019475: Plead guilty to Eluding a Police Officer and the state would cap its recommendation at a $2 + 3 = 5$ with said sentence to be consecutive to CR-FE-2009-0019383.
- As of November 23, 2009, Petitioner's total exposure, pursuant to plea negotiations was $7 + 13 = 20$.
- On May 19, 2010, Petitioner was convicted after a jury trial of Aggravated Battery as well as the enhancement in CR-FE-2009-0019383.
- On August 6, 2010, the Court sentenced the Petitioner to $12 + 13 = 25$ in Case No. CR-FE-2009-0019383.
- On August 30, 2010, Petitioner entered a guilty plea to Aggravated Battery on a Law Enforcement Officer, Eluding a Police Officer, and deadly weapons enhancement in Case No. CR-FE-2009-0019475.
- Petitioner did not have any plea agreement at the time he entered his plea in Case No. CR-FE-2009-0019475.
- On October 8, 2010, the Court sentenced Petitioner to $5 + 10 = 15$ in Case No. CR-FE-2009-0019475 with said sentence to be served consecutive to the $12 + 13 = 25$ in Case No. CR-FE-2009-0019383.
- Thus, upon the conclusion of both cases, Petitioner received a sentence of $17 + 23 = 40$.

SUMMARY DISMISSAL STANDARDS

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. *State v. Bearshield*, 104 Idaho 676, 678 (1983). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. *Id.* (citing Idaho Code § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." *State v. Lovelace*, 140 Idaho 53, 72, (2003) (citing *Pratt v. State*, 134 Idaho 581, 583, (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to Idaho Code § 19-4906 only "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. *Workman v. State*, 144 Idaho 518, 522, (citing Idaho Code § 19-4906(b), (c)). The facts set forth in the Petition must be construed in the light most favorable to the Petitioner. *Id.*

ARGUMENT

I. Petitioner Has Raised A Genuine Issue of Material Fact About Whether His Trial Counsel Was Deficient In Conveying Whether Or Not A Trial Was In The Petitioner's Best Interest

The test for determining whether a defendant has received effective assistance of counsel is the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, (1984); *State v. Mathews*, 133 Idaho 300, 306, (1999). The first prong of the *Strickland* test requires the defendant to show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. The second prong requires the defendant to "show that the deficient performance prejudiced the defense." *Id.* In determining whether a defendant was deprived of reasonably competent assistance of counsel as guaranteed by the Idaho Constitution, Article 1, Section 13, Idaho courts employ the same two-part test. *Mathews*, 133 Idaho at 306. Although *Strickland* concerned an allegation of ineffective

assistance in a sentencing proceeding, the same standard applies equally to claims arising from the plea process. *Mathews*, 133 Idaho at 306.

Deficient performance by an attorney is performance that falls "outside the wide range of professional norms." *Mathews*, 133 Idaho at 306, Petitioner argues his attorney's performance was deficient because his attorney failed to inform him that proceeding to trial might allow the court to run each case consecutively to each other and increase his exposure to a lengthy jail sentence. Petition at p. 5.

The second prong of the *Strickland* test requires the petitioner to show he was prejudiced as a result of counsel's deficient conduct. *Strickland*, 466 U.S. at 687, *Mathews*, 133 Idaho at 306. In this case, Petitioner was prejudiced by counsel's advice to take Case No. CR-FE-2009-0019383 to trial and forego the plea agreement. Petitioner's resulting sentence was, for all practical purposes, more than twice the sentence he would have been recommended to receive had he accepted the plea agreement instead of proceeding to trial. Accordingly, the State's Motion for Summary Disposition should be denied.

II. Petitioner Has Raised A Genuine Issue of Material Fact About Whether His Plea Was Knowing, Voluntary and Intelligent

Trial counsel is under an obligation to advise a client and ensure any guilty plea is knowing and voluntary. "Where a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Dunlap v. State*, 141 Idaho 50, 60. Further, "a guilty plea is only valid where the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.*

For a guilty plea to be valid, the **entire** record must demonstrate that the plea was entered into in a voluntary, knowing, and intelligent manner. *State v. Heredia*, 144 Idaho 95, 96, (2007) (emphasis added). Whether a plea is voluntary and understood entails inquiry into three areas: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial; and (3) whether the defendant

understood the consequences of pleading guilty. *State v. Colyer*, 98 Idaho 32, 34, (1976). It is the third prong that is at issue in this matter.

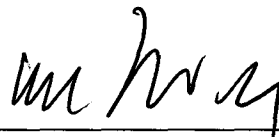
Petitioner maintains that his guilty plea was not intelligent because he misunderstood and was not familiar with the terms of the agreement. Specifically, Petitioner states that trial counsel was ineffective in advising to proceed to trial and which increased Petitioner's exposure above and beyond the exposure in the initial plea agreement. Petition at pp. 4-5.

Petitioner's Petition creates a genuine issue of material fact as to what the plea agreement actually was, what Petitioner's understanding of the plea agreement was, and whether or not Petitioner understood the plea agreement and the concordant risks of proceeding to trial. Petitioner's statement creates an issue as to whether his guilty plea and decisions were knowing and voluntary. Since trial counsel is under an obligation to ensure the Petitioner's plea is knowing and voluntary, Petitioner's statements create a genuine issue of material fact as to whether trial counsel properly advised Petitioner prior to entry of his guilty plea and about whether or not to proceed to trial. Accordingly, when interpreting the facts in the light most favorable to the Petitioner, the Court must deny the State's Motion and allow this case to proceed to hearing.

CONCLUSION

Therefore, for the reasons set forth above, the Petitioner respectfully requests that this Court deny the State's Motion for Summary Disposition.

DATED this 10th day of February 2015.



D. DAVID LORELLO, JR.
Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10 day of February 2015, I mailed a true and correct copy of the foregoing to Jonathan Medema, Ada County Prosecutor's Office, by placing the same in the Interdepartmental Mail.



Katie Van Vorhis

2/26/15
7:00 AM
clerk's #

NO. _____ FILED _____
A.M. _____ P.M. *Kp*

FEB 26 2015

CHRISTOPHER D. RICH, Clerk
By KATRINA HOLDEN
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Jonathan M. Medema
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ISB No. 5623
200 West Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)
_____)

Case No. CV PC 2013 08285
REPLY MEMORANDUM
REGARDING MOTION FOR
SUMMARY DISPOSITION

COMES NOW, the State of Idaho, by and through Jonathan M. Medema, Deputy Prosecuting Attorney for Ada County, and submits the following:

The State has moved this Court for summary dismissal of Mr. Fortin's claims for post-conviction relief. On February 10, petitioner filed a memorandum in response to that motion. The State hereby submits this reply.

Prior to a decision in the year 2012 by five (5) Justices of the Supreme Court of the United States, the American criminal justice system had spent well over 200 years concerned primarily with ensuring that persons accused by the government of committing crimes receive a fair trial by a jury of their peers before the government may punish them for such allegations. The



cause, the placing of the burden of proof upon the government, the standard of proof required, the right to a public trial, the right to a trial by jury, limitations on how jurors are selected or excluded by the government, limitations on what types of evidence the government may show such jurors; the right to counsel to assist the accused; the protection against compulsory self-incrimination; the ability to introduce evidence; the power to compel the production of evidence; the right to, in advance, discover what the government's evidence at trial will be; and the right to cross-examine witnesses presented by the government – to name but a few. We have developed a body of law designed to protect the accused not only from malfeasance or abuse of power by the accusatory body of the government, but also from errors by the Court and from incompetence on the part of the accused's attorney.

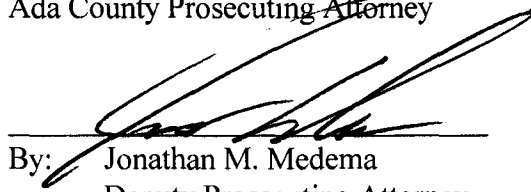
In 2012, the five (5) Justices of the Supreme Court of the United States created a new system of resolving accusations by the government that an individual has committed a crime – the plea bargain system. What protections the Court will decide that the Constitution demands defendants be afforded in the plea bargain system is still largely unknown. One can certainly not divine those protections from the language of the Constitution itself or frankly, from the two (2) opinions authored by those five (5) justices. So far, those Justices have only demanded that defendants involved in the plea bargain process be provided with effective assistance of counsel when deciding to reject a plea bargain.

Mr. Fortin's brief opposing the State's motion is understandably long on law and short on facts. That is assuredly a direct consequence of Mr. Fortin's petition and affidavit being short on facts. Mr. Fortin alleges simply that counsel advised him to reject the plea bargain, so he did. Mr. Fortin offers no specifics about what counsel told him; no basis from which this Court might conclude that counsel's performance fell below an objective standard of competence. He does not allege that his counsel failed to communicate the terms of the agreement, as in *Missouri v. Frye*; nor does he allege counsel advised him about some defense premised on misunderstanding of the law, as in *Lafler v. Cooper*. He appears simply to say that counsel advised him to avail himself of his constitution right to a fair trial and now he wishes he'd made a different choice. If that is a sufficient showing to justify post-conviction relief of some sort under this new constitutional right to plea bargain, then those five (5) justices of the Supreme Court of the United States will have ironically destroyed what they themselves say is the reality of the

criminal justice system – a system of pleas. If a defendant may reject a plea bargain and take his chances at trial safe and secure in the knowledge that if he is convicted and sentenced to some term greater than the plea bargain, he may always get back the benefit of the plea in post-conviction relief simply by alleging that his lawyer was obviously incompetent in advising him to have a trial (after all he lost and got a greater sentence); then there will be no incentive for the State to offer plea bargains at all. And, in the irony of all ironies, it may be *per se* ineffective assistance for defense counsel to ever recommend his client plead guilty. Who wouldn't risk the trial if you can get the same sentence recommendation from the State in post-conviction relief? The State submits that not even the majority in *Frye* and *Lafler* are willing to go that far. Surely this Court should not be.

DATED this 26th day of February 2015.

JAN M. BENNETTS
Ada County Prosecuting Attorney

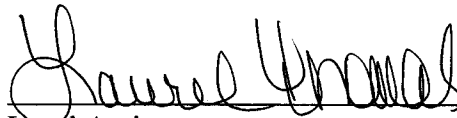

By: Jonathan M. Medema
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26 day of February 2015, I caused a true and correct copy of the foregoing Reply Memorandum Regarding Motion for Summary Disposition upon the individual(s) named below in the manner noted:

D. David Lorello, Ada County Public Defender

- By depositing copies of the same in the United States mail, postage prepaid, first class.
- By depositing copies of the same in the Interdepartmental Mail.
- By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- By faxing copies of the same to said attorney(s) at the facsimile number: _____



Legal Assistant

Time	Speaker	Note
<u>1:26:44 PM</u>		Cody Fortin v State CVPC13-08285 Motion to Dismiss Petitioner not transported.
<u>1:26:44 PM</u>	Counsel	Akamatsu (for Medema)/ Lorello
<u>3:05:03 PM</u>	Ct	Calls case and reviews.
<u>3:07:58 PM</u>	Akamatsu	Argues Motion to Dismiss.
<u>3:08:10 PM</u>	Lorello	Argues against.
<u>3:09:04 PM</u>	Ct	Reviews history of 2 criminal cases.
<u>3:10:36 PM</u>	Akamatsu	Argues further.
<u>3:11:38 PM</u>	Ct	Takes under advisment.

MAY 12 2015

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2013-08285

MEMORANDUM DECISION
AND ORDER RE: STATE'S MOTION
FOR SUMMARY DISPOSITION

Before the Court is the State's Motion for Summary Disposition Re: Cody James Fortin's ("Fortin") Petition for Post-Conviction Relief. As discussed below, the Court will grant the motion.

Background and Prior Proceedings

On May 19, 2010, in Ada County Case No. CR-FE-2009-19383 ("19383 case"), Fortin was convicted by a jury of Aggravated Battery, a felony, I.C. §§ 18-903(a), -907(a) and Use of a Deadly Weapon in the Commission of a Crime, an enhancement, I.C. § 19-2520. The Honorable Senior Judge McKee presided. The undersigned conducted a sentencing hearing on August 6, 2010. Fortin was present with his trial counsel, Charles Crafts ("Crafts"). Christopher S. Atwood, Deputy County Prosecuting Attorney, appeared and argued for the State. The Court imposed an enhanced sentence consisting of an aggregate term of twenty-five (25) years, with the first twelve (12) years fixed, and the remaining thirteen (13) years to be indeterminate. The State recommended a sentence of thirty (30) years with twenty (20) years fixed.

1 Fortin did not file a motion for a reduction of sentence pursuant to I.C.R. 35. Fortin
2 timely appealed his conviction and the Idaho Court of Appeals affirmed in an unpublished
3 opinion. *See State v. Fortin*, Docket No. 38069 (Ct. App. April 30, 2012).

4 On August 30, 2010, in Ada County Case No. CR-FE-2009-19475 ("19475 case"), Fortin
5 pleaded guilty to Aggravated Battery on Law Enforcement, a felony, I.C. §§ 18-903(b), -907(b), -
6 915(1); Eluding a Peace Officer, a felony, I.C. § 49-1404(2)(c); and Use of a Deadly Weapon
7 During the Commission of a Crime, an enhancement, I.C. § 19-2520. On October 8, 2010, the
8 Court held a sentencing hearing. The Court imposed a consecutive enhanced sentence on the
9 Aggravated Battery charge for an aggregate term of twenty (20) years, with the first five (5)
10 years fixed, and the remaining fifteen (15) years to be indeterminate. The State recommended a
11 consecutive enhanced sentence of twenty (20) years with eight (8) years fixed. As to the Eluding
12 a Peace Officer, the Court commuted the sentence to time served. Fortin did not file a Rule 35
13 motion for reduction in sentence or a notice of appeal.

14
15 On October 6, 2011, Fortin filed a petition for post-conviction relief in the 19475 case.
16 Ada County Case No. CV-PC-2011-19323. On November 2, 2012, the Court entered its
17 Judgment Granting Post Conviction Relief Per Stipulation in which the Court restarted the time
18 period to appeal the sentence. Fortin appealed his consecutive sentence of twenty (20) years and
19 the Court of Appeals affirmed in an unpublished opinion. *See State v. Fortin*, Docket No. 40602
20 (Ct. App. November 8, 2013).

21
22 Fortin is currently serving his sentences in the custody of the Idaho Department of
23 Correction. On May 7, 2013, Fortin filed a *pro se* Petition for Post-Conviction Relief of the
24 19383 case, among other *pro se* motions. As such, while the 19475 case is relevant to understand
25

1 the context of Fortin's petition, the Court will only consider the allegations in regards to the
2 19383 case in which Fortin was convicted by a jury. Fortin's initial petition for post-conviction
3 relief alleges that trial counsel and appeal counsel were ineffective as follows:

- 4 a) Trial counsel's advice to not accept the state's plea bargain and inform Fortin of
5 the consequences of his charges constitutes ineffective assistance;
- 6 b) Trial counsel's advice to separate the two proceedings, i.e., the 19383 case and the
7 19475 case, was against the express wishes of Fortin was ineffective assistance;
- 8 c) Trial counsel failed to file a motion in limine regarding Fortin's alleged gang
9 affiliation;
- 10 d) Trial counsel failed to move for an immediate mistrial following a witnesses
11 statement that Fortin was involved in gang activity;
- 12 e) Trial counsel failed to recall as a defense witness, Casey Smith, who Fortin claims
13 could have been impeached by the defense;
- 14 f) Trial counsel failed to object to the admission of flight evidence during trial;
- 15 g) Trial counsel failed to object to the wording of the verdict form, which destroyed
16 Fortin's presumption of innocence; and
- 17 h) Trial counsel failed to file a Rule 35 against the express wishes of Fortin
- 18 i) Appellate counsel failed to "federalize" some of Fortin's issues on direct appeal
19 and did not object to mistakes in the restitution hearing transcript

20 The State filed its Answer on May 25, 2013. On the same day, the State filed its motion for
21 summary disposition with a brief in support.

22 On July 2, 2013, the Court entered its Memorandum Decision and Order Re:
23 Appointment of Counsel, Waiver of Filing Fees, Release of the Pre-Sentence Report, and Judicial
24 Notice of Underlying Files. In its Order, the Court appointed counsel, took judicial notice of the
25 underlying files that were made a part of the record in this case, and released the pre-sentence
26

1 report to appointed counsel. On August 23, 2013, the Court entered its Order Granting Stay of
2 Proceedings and For Leave to Amend Petition. However, Fortin did not file an amended petition.
3 On February 10, 2015, Fortin filed his opposition in response to the State's motion for summary
4 disposition. On February 26, 2015, the State replied. This matter came for hearing on March 17,
5 2015. D. David Lorello, Jr., Deputy Ada County Public Defender, appeared on behalf of Fortin
6 and presented argument. Fortin was not transported for the hearing. Deputy Ada County
7 Prosecuting Attorney, Shelley W. Akamatsu, appeared and argued for the State. The Court took
8 the matter under advisement and will address each claim in turn.

9 Discussion

10 The Uniform Post-Conviction Procedure Act, Idaho Code § 19-4901 *et seq.* provides a
11 mechanism by which a person convicted of a crime may challenge the validity of a sentence by
12 showing, among other things, that the conviction is subject to collateral attack. *See* Idaho Code §
13 19-4901(a).¹ The remedy is not intended to be a substitute for a direct appeal from the sentence
14 or conviction. Idaho Code § 19-4901(b). However, a criminal defendant may raise a claim of
15
16
17

18 ¹“(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

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

21 (2) That the court was without jurisdiction to impose sentence;

22 (3) That the sentence exceeds the maximum authorized by law;

23 (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the
24 conviction or sentence in the interest of justice;

25 (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which
26 he was convicted, or that he is otherwise unlawfully held in custody or other restraint;

(6) Subject to the provisions of section 19-4902(b) through (g), Idaho Code, that the petitioner is innocent of the
offense; or

(7) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error
heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy: may
institute, without paying a filing fee, a proceeding under this act to secure relief.” Idaho Code § 19-4901(a).”

1 ineffective assistance of counsel either on direct appeal or reserve the issue for post-conviction
2 proceedings. *Nellsch v. State*, 122 Idaho 426, 430, 835 P.2d 661, 665 (Ct. App. 1992).

3 A petition for post-conviction relief is a special proceeding that is civil in nature and
4 therefore is entirely new and independent from the underlying criminal action which led to the
5 conviction. *Ferrier v. State*, 135 Idaho 797, 798-99, 25 P.3d 110, 111-12 (2001) (citing *Peltier v.*
6 *State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991)). The petitioner seeking post-conviction
7 relief has the burden of proving the allegations upon which the petition is based by a
8 preponderance of the evidence. I.C.R. 57(c); *Grube v. State*, 134 Idaho 24, 27, 995 P.2d 794,
9 797 (2000).

10 The Idaho Rules of Civil Procedure generally apply to post-conviction proceedings, but a
11 petition in a post-conviction proceeding differs from that of an ordinary civil action because it
12 must contain more than a "short and plain statement of the claim" that would suffice for a
13 complaint under I.R.C.P. 8(a)(1). *State v. Yakovic*, 145 Idaho 437, 444, 180 P.2d 476, 482
14 (2008). Instead, an application for post-conviction relief must be verified with respect to facts
15 within the personal knowledge of the applicant, and affidavits, records or other evidence
16 supporting its application must be attached, or the application must state why such supporting
17 evidence is not included within the application. I.C. § 19-4903; *LaBelle v. State*, 130 Idaho 115,
18 117-18, 937 P.2d 427, 429-30 (Ct. App. 1997). In other words, the application must present or
19 be accompanied by admissible evidence supporting its allegations or the application will be
20 subject to dismissal. *Id.*

21 This evidence must be evidence that would be admissible at a hearing on the claims.
22
23 *Berg v. State*, 131 Idaho 517, 518-19, 960 P.2d 738, 739-40 (1998); I.C. 19-4903. Bare or
24

1 conclusory allegations, unsubstantiated by any fact, are inadequate to entitle an applicant to an
2 evidentiary hearing. *Id.* at 121; *Nguyen v. State*, 126 Idaho 494, 497, 887 P.2d 39, 42 (Ct. App.
3 1994). The petitioner must present evidence establishing a prima facie case as to each of the
4 elements that his claim rests upon. *Pratt v. State*, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)
5 (citing *Berg v. State*, 131 Idaho 517, 518-19, 960 P.2d 738, 739-40 (1998)).

6 Each of Fortin's claims allege ineffective assistance of either trial counsel or appeal
7 counsel. To prevail on a post-conviction relief claim based on ineffective assistance of counsel
8 the applicant must establish the two prongs set forth in *Strickland v. Washington*, 466 U.S. 668,
9 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to wit: (1) counsel's performance was deficient, and (2)
10 that deficiency prejudiced appellant's case. *State v. Dunlap*, 32773, 2013 WL 4539806 (Idaho
11 Aug. 27, 2013). In order to survive a motion for summary dismissal, the applicant must show
12 that there were genuine issues of material fact as to whether counsel's performance was deficient,
13 and whether that deficiency prejudiced appellant's case. *Id.* (citing *Kelly v. State*, 149 Idaho 517,
14 522, 236 P.3d 1277, 1282 (2010). To be deficient, trial counsel's performance must have fallen
15 below "an objective standard of reasonableness." *Id.* (quoting *Dunlap v. State*, 141 Idaho 50, 59,
16 106 P.3d 376, 385 (2004). As for prejudice, the petitioner "must show a reasonable probability
17 that, but for the attorney's deficient performance, the outcome of the trial would have been
18 different." *Id.*

19
20 Idaho Code § 19-4906 authorizes summary disposition of a petition for post-conviction
21 relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal
22 of a petition is the procedural equivalent of summary judgment. The Court of Appeals has
23 explained:
24
25

1 Idaho Code § 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of a petition is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. A claim for post-conviction relief will be subject to summary dismissal if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims upon which the petitioner bears the burden of proof. Thus, summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted.

7 *Hoffman v. State*, 153 Idaho 898, 902, 277 P.3d 1050, 1054 (Ct. App. 2012) (citations omitted).

8 Allegations contained in the petition are insufficient to prevent summary dismissal if they
9 are clearly disproved by the record of the original proceedings, or do not justify relief as a matter
10 of law. *McKay v. State*, 148 Idaho 567, 569, 225 P.3d 700, 702 (2010). Summary dismissal of
11 an application for post-conviction relief may be appropriate even where the state does not
12 controvert the petitioner's evidence because, as indicated above, the court is not required to
13 accept a petitioner's mere conclusory allegations, unsupported by admissible evidence. *State v.*
14 *Lovelace*, 140 Idaho 53, 61, 90 P.3d 278, 286 (2003). Bare assertions and speculation,
15 unsupported by specific facts, do not suffice to show ineffectiveness of counsel. *State v. Rendon*,
16 107 Idaho 425, 427, 690 P.2d 360, 362 (Ct.App.1984).

18 When considering a dismissal of a post-conviction relief application without an
19 evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the
20 pleadings, depositions and admissions together with any affidavits on file which, if true, would
21 entitle the petitioner to relief. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2008).

23 A. Plea Agreement

1 Fortin claims that trial counsel was ineffective because he failed to inform Fortin that
2 proceeding to trial might allow the court to run the sentences in the 19383 and 19475 case
3 consecutively. Fortin maintains that he would have accepted the plea agreement offered by the
4 state had counsel properly advised him of the possible punishment and consequences of
5 proceeding to trial, i.e., the Court could run the sentences consecutively. In other words, Fortin
6 argues that counsel failed to advise him of the best course of action.

7 As evidence that his attorney did not adequately inform him of the consequences of not
8 accepting the plea agreement, Fortin presents in his own affidavit that, but for Crafts
9 misrepresentation that he could prevail at a trial by jury, Fortin would have accepted the state's
10 plea agreement. Even if the Court is to accept Fortin's conclusory allegations about Crafts'
11 erroneous advice as true, Fortin cannot demonstrate any prejudice because Fortin cannot
12 demonstrate that the Court would have accepted his plea as a binding plea agreement under
13 I.C.R. 11. As a general practice, this Court does not accept binding plea agreements. As part of
14 any plea colloquy, the Court routinely advise a defendant that the plea bargain is not binding on
15 the Court. If there was a plea agreement in the 19475 case, there is no evidence that the Court
16 would not have agreed to a binding plea agreement with a concurrent sentence recommendation.
17 As a consequence, Fortin cannot demonstrate any prejudice, since the Court would not have been
18 bound to follow the plea agreement.
19

20 **B. Consolidation**

21 Fortin argues that trial counsel Crafts' decision to not consolidate the 19383 case and the
22 19475 case against the wishes of Fortin constitutes ineffective assistance of counsel because
23 bifurcating the proceedings led to longer consecutive sentences. However, there is no evidence,
24
25

1 and Fortin cannot demonstrate, that he received a more lengthy sentence because the cases were
2 not consolidated.

3 **C. Motion in Limine**

4 Fortin argues that Crafts' failure to file a motion in limine regarding Fortin's alleged gang
5 affiliation, or in the alternative to move for an immediate mistrial after a state's witness
6 referenced Fortin's gang affiliation constitutes deficient performance with a prejudicial result.
7 On direct appeal in the 19383 case, Fortin challenged the trial court's denial of Fortin's motion
8 for mistrial. The Court of Appeals held:

9 During cross-examination of the victim in this case, the following exchange occurred:

10 Q. Now, at some point, I assume—did you ever get a clear look at this
11 knife? It seems you like—you just say it was a shiny object.

12 A. Not a clear look, but I believe getting cut across the face and stabbed in
13 the neck and seeing a shine, you know it's a knife.

14 Q. So it's just your opinion that this was a knife?

15 A. I knew it was a knife. I couldn't determine which kind.

16 Q. How do you know it was a knife?

17 A. Because it punctured me in the neck and cut me across the face, and I
18 know most gang members carry those.

19 The district court immediately instructed the jury to disregard the victim's
20 reference to gang members; the victim completed his testimony; and, at the next
21 break in the trial proceedings, Fortin moved for a mistrial. Fortin argued that the
22 victim's reference to gang members led the jury to believe that Fortin was
23 potentially a member of a gang and was, therefore, extremely prejudicial and too
24 inflammatory for a curative instruction. Fortin did not allege that the state planted
25 or otherwise invited the comment from the victim.

26

1 We conclude that, given the open-ended nature of Fortin's question on cross-
2 examination, the lack of a motion in limine requesting a pretrial order instructing
3 the state to admonish witnesses from referencing gang membership and the
4 immediate instruction by the district court to the jury to disregard the victim's
reference to gang members, Fortin has failed to show that the reference
constituted reversible error. Therefore, the district court did not err by denying
Fortin's motion for a mistrial.

5 *State v. Fortin*, Docket No. 38069 (Ct. App. April 30, 2012). Fortin, relying on this passage,
6 argues that Crafts' failure to file a motion in limine resulted in the jury hearing a reference to
7 Fortin's alleged gang affiliation which was prejudicial. However, Fortin does not present
8 evidence of how the above quoted gang reference prejudiced him. The trial court immediately
9 instructed the jury to disregard the comment and the Court is to presume that the jury followed
10 these instructions. See *State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct.App.1997);
11 *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct.App.1996). As such, Fortin has
12 failed to make a showing how he was prejudiced.

14 **D. Mistrial**

15 As to the failure of Crafts to immediately file for a mistrial following the witness's
16 reference to Fortin's gang affiliation, the record is clear that Crafts immediately objected and, at
17 the next break in the trial proceedings, moved for a mistrial. As such, there is no material
18 question of fact that Crafts' performance fell below an objective standard of reasonableness.

19 **E. Witness Exclusion**

20 On direct appeal in the 19383 case, Fortin argued that the trial court erred by excluding
21 the testimony of Casey Smith as a potential defense witness. Here, Fortin argues that Crafts'
22 failure to conduct a pretrial interview and subpoena Smith constitutes ineffective assistance of
23 counsel. On direct appeal, the Court of Appeals held:
24

1 Here, the evidence adduced at trial was overwhelming that Fortin used a knife in
2 the commission of the aggravated battery and, as a result, the victim suffered
3 significant injuries. Multiple witnesses described the altercation between Fortin
4 and the victim in this case. None testified that anyone other than Fortin and the
5 victim were involved in the physical fight. One witness testified that, during the
6 altercation between Fortin and the victim, the witness saw Fortin with a knife in
7 his hand and watched Fortin make a slashing motion and connect with the
8 victim's face. Another witness testified that she also saw Fortin holding something
9 in his hand during the altercation that she believed was a knife. An additional
10 witness testified that she saw Fortin make a slashing motion toward the victim and
11 saw something in Fortin's hand. The attending trauma surgeon testified that the
12 penetrating wound to the victim's chest was a stab wound, although he could not
13 say with certainty what caused the wound. However, the surgeon also testified that
14 the wound to the victim's face was consistent with a knife wound. *Given the
15 weight of the evidence against Fortin in this case, we are convinced beyond a
16 reasonable doubt that there is no reasonable possibility that the lack of the
17 excluded evidence contributed to the verdict obtained against Fortin.* Therefore,
18 even assuming the district court erred by excluding the testimony of the potential
19 defense witness, such error was harmless.

20 *Id.* (emphasis added).

21 Fortin has provided no evidence other than the bare assertion in his petition that
22 introducing this witness testimony would have resulted in a different outcome at trial. This
23 allegation is conclusory and not supported by the record. As such, Fortin has failed to
24 demonstrate prejudice.

25 **F. Evidence of Flight**

26 On direct appeal in the 19383 case, Fortin argued that the trial court erred when it
admitted evidence of his flight without conducting an appropriate balancing analysis under I.R.E.
404(b). *See State v. Fortin*, Docket No. 38069 (Ct. App. April 30, 2012). In this petition, Fortin
argues that Crafts' failure to object to Fortin's evidence of flight during trial constitutes
ineffective assistance of counsel. Fortin's allegation is not supported by the record. In affirming
the trial court's ruling to allow evidence of Fortin's flight, the Court of Appeals stated:

1 Here, with respect to identifying unfair prejudice from the flight evidence,
Fortin's counsel stated at trial:

2 Two weeks ago ... I actually tried to get a pretrial ruling on this and
3 [the judge] wouldn't allow us to do it because he said he wanted the
4 trial judge to make the determination.

5 The reality of it is, if I file a motion, it is my obligation to set it for
6 notice of hearing. And the reality here is that this evidence coming in
7 now, without any prior notice from the prosecutor, is extremely
8 prejudicial. Obviously, it is prejudicial. It is inflammatory.

9 *Id.* The record clearly indicates that Crafts was vehemently against any evidence of Fortin's
10 flight being introduced at trial. Crafts attempted to receive a pretrial ruling and objected to its
11 introduction during trial. As such, Fortin has failed to raise a genuine issue of fact as to whether
12 Crafts' performance fell below an objective standard of reasonableness for a criminal defense
13 attorney.

14 **G. Verdict Form**

15 Fortin argues that Crafts should have objected to the wording of the verdict form which
16 directed the jury to consider lesser included offenses if it found Fortin not guilty of Aggravated
17 Battery. Fortin asserts that including lesser offenses in the jury instructions destroyed his
18 presumption of innocence. Fortin's conclusory allegations are not supported by the record. Jury
19 Instruction No. C instructed the jury that Fortin is presumed innocent and the state has the burden
20 of proving his guilty beyond a reasonable doubt. The jury found Fortin guilty of Aggravated
21 Battery and the weapons enhancement. Fortin has provided no evidence that Crafts' failure to
22 object to the inclusion of the lesser offenses fell below an objective standard of reasonableness.
23 Fortin has also failed to make a showing that inclusion of lesser offenses created a reasonable

1 probability that the outcome of the trial would have been different. As such, this allegation must
2 be dismissed.

3 H. Rule 35

4 Fortin alleges that trial counsel failed to file a Rule 35 motion² on his behalf. It is
5 undisputed that Crafts did not file a Rule 35 motion. Fortin argues that he requested counsel to
6 file a Rule 35 motion and that counsel failed to do so.

7 “[I]n a post-conviction proceeding challenging an attorney’s failure to pursue a motion in
8 the underlying criminal action, the court properly may consider the probability of success of the
9 motion in question in determining whether the attorney’s inactivity constituted incompetent
10 performance.” *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 225 (Ct. App. 1995) (citing
11 *Huck v. State*, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993)).
12

13 As noted above, in order to prevail on a claim of ineffective assistance of counsel
14 an applicant must meet a two-pronged test. The applicant must show both that
15 counsel's performance was deficient and that the deficiency prejudiced the
16 applicant. Where the alleged deficiency is counsel's failure to file a ... motion, a
17 conclusion that the motion, if pursued, would not have been granted, is generally
18 determinative of both prongs of the test. If the motion lacked merit and would
19 have been denied, counsel ordinarily would not be deficient for failing to pursue
20 it, and, concomitantly, the petitioner could not have been prejudiced by the want
21 of its pursuit.

22 ²“The court may correct a sentence that has been imposed in an illegal manner within the time provided herein for
23 the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of
24 conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence
25 upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking
26 probation. Motions to correct or modify sentences under this rule must be filed within 120 days of the entry of the
judgment imposing sentence or order releasing retained jurisdiction and shall be considered and determined by the
court without the admission of additional testimony and without oral argument, unless otherwise ordered by the
court in its discretion; provided, however that no defendant may file more than one motion seeking a reduction of
sentence under this Rule.” I.C.R. 35(b).

1 *Huck*, 124 Idaho at 158–59, 857 P.2d at 637–38.

2 In this case, while Fortin may have presented evidence in support of the allegation of
3 deficient performance by not filing a Rule 35 motion, there is no evidence to show actual
4 prejudice resulting from the alleged deficiency. A Rule 35 motion is essentially a plea for
5 leniency and reconsideration. Fortin presents no additional facts which might have resulted in a
6 reduction to his original sentence. The maximum penalty for Aggravated Battery, a felony, is
7 fifteen (15) years in prison. Idaho Code § 18-908. The penalty for Use of a Deadly Weapon
8 During the Commission of a Crime, an enhancement, increases the maximum sentence
9 authorized for the Aggravated Battery conviction by fifteen (15) years. I.C. § 19-2520.
10 Accordingly, the maximum penalty for Aggravated Battery with the enhancement is thirty (30)
11 years. The sentence imposed is within the statutory bounds.

12
13 At the time the Court imposed Fortin’s sentence, it considered all relevant and required
14 sentencing factors, *see Toohill*, 103 Idaho at 565; *Reinke*, 103 Idaho at 771, and imposed a
15 reasonable and appropriate sentence for Fortin’s crimes. The Court does not find that Fortin’s
16 sentence is excessive. After a careful and thorough review of the record in the 19383 case, the
17 pre-sentence report, victim impacts and the criminal history of Fortin, the Court remains
18 convinced that the sentence was appropriate when imposed and remains reasonable. Fortin was
19 convicted of a very serious and violent crime. The Court has concerns regarding Fortin’s
20 apparent lack of remorse for his crimes and has serious concerns over trusting Fortin in the
21 community. As such, the Court would not have granted a reduction in the prisoner’s sentence
22 even if a timely Rule 35 motion had been filed. For that reason, Fortin cannot demonstrate
23 prejudice.
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I. Appeal

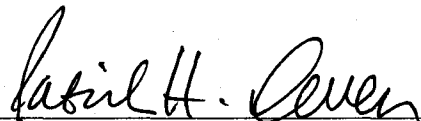
Lastly, Fortin alleges that appeal counsel, Greg Silvey, failed to “federalize” any issued on direct appeal and did not object to errors in the transcript of the February 4, 2011 restitution hearing. Both of these allegations are conclusory and must be dismissed.

Conclusion

As explained above, the Court will grant summary dismissal of all claims that trial counsel was ineffective. Counsel for the State is directed to submit an appropriate form of judgment.

IT IS SO ORDERED.

Dated this 11 day May, 2015.



Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, a true and correct copy of the within instrument as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

Ada County Prosecutor
Interdepartmental Mail

Ada County Public Defender
Interdepartmental Mail

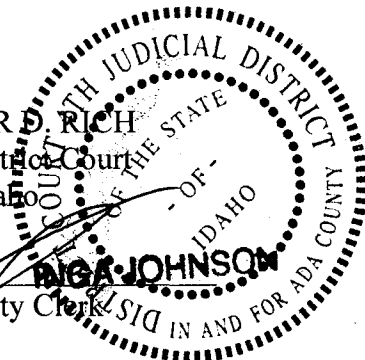
CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date:

5/12/15

By

Deputy Clerk



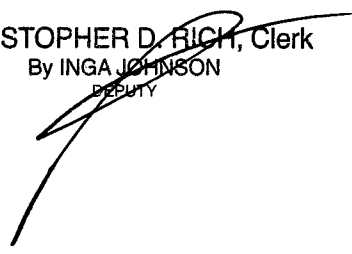
JAN M. BENNETTS
Ada County Prosecuting Attorney

Jonathan M. Medema
Deputy Prosecuting Attorney
ISB No.: 5623
200 West Front Street, Rm. 3191
Boise, Idaho 83702
Telephone: 287-7700

NO. _____ FILED _____
A.M. 10:15 P.M. _____

JUN 12 2015

CHRISTOPHER D. BICH, Clerk
By INGA JOHNSON
DEPUTY



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN)
)
Petitioner,)
Vs.)
)
State of Idaho,)
)
Respondent.)

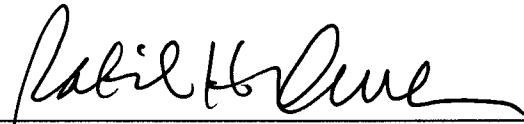
Case No. CV PC 13 08285

JUDGMENT

Judgment is entered as follows:

It is the Judgment of this Court that all of petitioner's claims for post-conviction relief contained within his application for post-conviction relief, Be and Hereby are finally **DISMISSED**.

DATED this 12 day of June, 2015.



Patrick Owen,
District Judge

cc: PA, PD

NO _____
FILED _____
A.M. _____ P.M. 1:10

JUN 15 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner-Appellant

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,
Petitioner-Appellant,

vs.

STATE OF IDAHO,
Respondent-Respondent.

Case No. CV-PC-2013-08285

NOTICE OF APPEAL

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

NOTICE IS HEREBY GIVEN THAT:

- 1) The above-named Appellant appeals against the above-named Respondent to the Idaho Supreme Court from the final decision and order entered against him in the above-entitled action on May 12, 2015, the Honorable Patrick H. Owen, District Judge, presiding.
- 2) That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to I.A.R. 11(c)(1-10).
- 3) A preliminary statement of the issues on appeal, which the Appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal is:
 - a) Did the district court err by dismissing Petitioner's Petition for Post-Conviction Relief?

- 4) Reporter's Transcript. The Appellant requests the preparation of the entire reporter's standard transcript as defined by I.A.R. 25(c). The Appellant also requests the preparation of the additional portions of the reporter's transcript:
 - a) Evidentiary Hearing held March 17, 2015 (Court Reporter: Kasey Redlich, Estimated pages: 50).
- 5) Clerk's Record. The Appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(1). In addition to those documents automatically included under I.A.R. 28(b)(1), the Appellant also requests that any briefs, statements or affidavits considered by the court, and memorandum opinions or decisions of the court be included in the Clerk's Record.
- 6) I certify:
 - a) That a copy of this Notice of Appeal has been served on the Court Reporter(s) mentioned in paragraph 4 above;
 - b) That the Appellant is exempt from paying the estimated fee for the preparation of the record because the Appellant is indigent (I.C. §§ 31-3220, 31-3220A, I.A.R. 24(e));
 - c) That there is no appellate filing fee since this is an appeal in a criminal case (I.C. §§ 31-3220, 31-3220A, I.A.R. 23(a)(10));
 - d) That Ada County will be responsible for paying for the reporter's transcript(s), as the client is indigent (I.C. §§ 31-3220, 31-3220A, I.A.R. 24(e)); and
 - e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 15th day of June 2015.



D. DAVID LORELLO, JR.
Attorney for Petitioner-Appellant

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on this 15 day of June 2015, I mailed (served) a true and correct copy of the within instrument to:

Idaho Attorney General
Criminal Division
Joe R. Williams Bldg., 4th Flr.
Statehouse Mail

Idaho State Appellate Public Defender
PO Box 2816
Boise, ID 83701

Kasey Redlich
Court Reporter
Interdepartmental Mail

Jonathan Medema
Ada County Prosecutor's Office
Interdepartmental Mail



Katie Van Vorhis

RECEIVED
JUN 15 2015
ADA COUNTY CLERK

NO. _____ FILED _____
A.M. 11:00 P.M. _____

JUN 18 2015

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

ADA COUNTY PUBLIC DEFENDER
Attorney for Petitioner-Appellant

D. David Lorello, Jr.
Deputy Public Defender
200 West Front Street, Suite 1107
Boise, Idaho 83702
Telephone: (208) 287-7400
Facsimile: (208) 287-7409

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY J. FORTIN,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

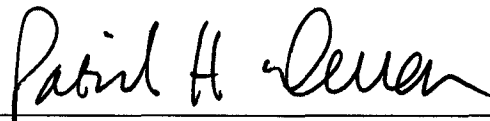
Case No. CV-PC-2013-08285

**ORDER APPOINTING STATE
APPELLATE PUBLIC DEFENDER
ON DIRECT APPEAL**

The Petitioner has elected to pursue a direct appeal in the above-entitled matter. The Petitioner being indigent and having heretofore been represented by the Ada County Public Defender's Office in the District Court, the Court finds that, under these circumstances, appointment of appellate counsel is justified. The Idaho State Appellate Public Defender shall be appointed to represent the above-named Petitioner in all matters pertaining to the direct appeal.

IT IS SO ORDERED.

DATED this 18 day of June 2015.



PATRICK H. OWEN
District Judge

CERTIFICATE OF MAILING

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have mailed one copy of the Order Appointing State Appellate Public Defender on Direct Appeal as notice pursuant to the Idaho Rules to each of the parties of record in this case in envelopes addressed as follows:

Idaho Attorney General
Criminal Division
Joe R. Williams Bldg., 4th Flr.
Statehouse Mail

Idaho State Appellate Public Defender
PO Box 2816
Boise, ID 83701

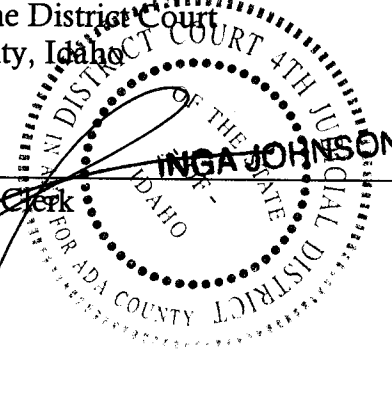
Jonathan Medema
Ada County Prosecutor's Office
Interdepartmental Mail

Ada County Public Defender's Office
Attn: Katie Van Vorhis
Interdepartmental Mail

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Date: 6/18/15

By INGA JOHNSON
Deputy Clerk



NO. _____
A.M. _____
FILED P.M. 3:23

AUG 11 2015
CHRISTOPHER D. RICH, Clerk
By KELLE WEGENER
DEPUTY

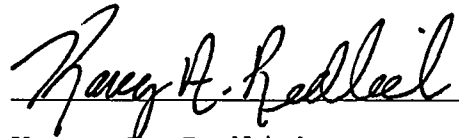
TO: CLERK OF THE COURT IDAHO SUPREME COURT
451 WEST STATE STREET, BOISE, IDAHO 83702

CODY J. FORTIN,)	
)	
)	
Petitioner-Appellant,	)	Supreme Court
	)	Docket No. 4334
)	
vs.)	
)	
	)	Case No. CV-PC-2013-08285
STATE OF IDAHO,)	
	)	NOTICE OF TRANSCRIPT
	)	LODGING
Respondent-Appellee.)	
)	

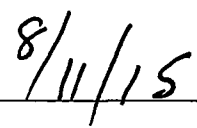
NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on August 11th, 2015, I lodged transcript(s) of the following hearing(s):

Evidentiary Hearing on March 17, 2015, of 12 pages; a total of 12 pages; for the above-referenced appeal with the District Court Clerk of the County of Ada in the Fourth Judicial District.



Kasey A. Redlich,
Certified Court Reporter



Date

KW

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43334

CERTIFICATE OF EXHIBITS

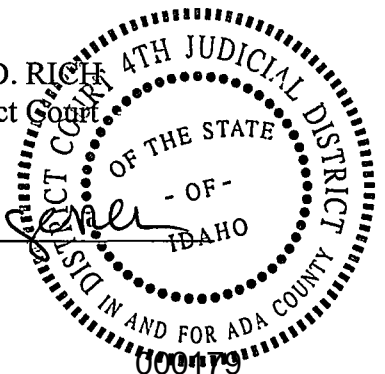
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 12th day of August, 2015.

CHRISTOPHER D. RICH
Clerk of the District Court

By K. Wesener
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,
Petitioner-Appellant,
vs.
STATE OF IDAHO,
Respondent.

Supreme Court Case No. 43334

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, 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 AND REPORTER'S TRANSCRIPT

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

STATE APPELLATE PUBLIC DEFENDER

LAWRENCE G. WASDEN

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

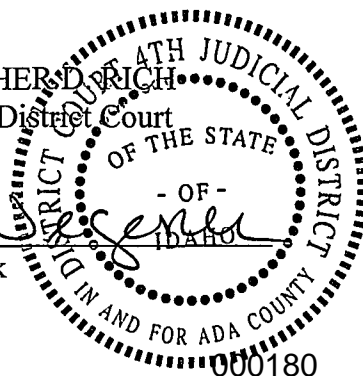
BOISE, IDAHO

BOISE, IDAHO

Date of Service: AUG 12 2015

CHRISTOPHER D. RICH
Clerk of the District Court

By Christopher D. Rich
Deputy Clerk



CERTIFICATE OF SERVICE

000180

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CODY JAMES FORTIN,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 43334

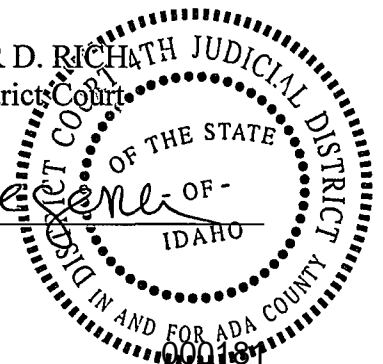
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 15th day of June, 2015.

CHRISTOPHER D. RICH
Clerk of the District Court

By KW. [Signature]
Deputy Clerk



CERTIFICATE TO RECORD