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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>MICHAEL ANTHONY</b>	)	
<b>SANCHEZ,</b>	)	
	)	<b>NO. 46854-2019</b>
<b>Petitioner-Appellant,</b>	)	
	)	<b>KOOTENAI COUNTY</b>
<b>v.</b>	)	<b>NO. CV28-18-9328</b>
	)	
<b>STATE OF IDAHO,</b>	)	<b>APPELLANT'S BRIEF</b>
	)	
<b>Respondent.</b>	)	
_____		

\_\_\_\_\_  
**BRIEF OF APPELLANT**  
\_\_\_\_\_

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

\_\_\_\_\_  
**HONORABLE JOHN T. MITCHELL**  
**District Judge**  
\_\_\_\_\_

**ERIC D. FREDERICKSEN**  
**State Appellate Public Defender**  
**I.S.B. #6555**

**SALLY J. COOLEY**  
**Deputy State Appellate Public Defender**  
**I.S.B. #7353**  
**322 E. Front Street, Suite 570**  
**Boise, Idaho 83702**  
**Phone: (208) 334-2712**  
**Fax: (208) 334-2985**  
**E-mail: documents@sapd.state.id.us**

**ATTORNEYS FOR  
PETITIONER-APPELLANT**

**KENNETH K. JORGENSEN**  
**Deputy Attorney General**  
**Criminal Law Division**  
**P.O. Box 83720**  
**Boise, Idaho 83720-0010**  
**(208) 334-4534**

**ATTORNEY FOR  
RESPONDENT**

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUE PRESENTED ON APPEAL .....	4
ARGUMENT .....	5
The District Court Erred In Dismissing Mr. Sanchez’s Post-Conviction Petition Where His Claim That Trial Counsel Was Ineffective For Failing To Present Certain Mitigating Evidence At The Disposition/Sentencing Hearing Was Timely Filed From The Order Revoking Probation.....	5
A. Post-Conviction Jurisprudence.....	5
B. The District Court Erred In Dismissing Mr. Sanchez’s Post-Conviction Petition Where The Claim That Trial Counsel Was Ineffective For Failing To Present Certain Mitigating Evidence At The Disposition/Sentencing Hearing Was Timely Filed From The Order Revoking Probation .....	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	10

**TABLE OF AUTHORITIES**

Cases

*Aragon v. State*, 114 Idaho 758 (1988) .....6

*Charboneau v. State*, 144 Idaho 900 (2007).....6, 7

*Cochran v. State*, 133 Idaho 205 (Ct. App. 1999) .....6

*Coontz v. State*, 129 Idaho 360 (Ct. App. 1996).....7

*Drapeau v. State*, 103 Idaho 612 (Ct. App. 1982).....7

*Evensioski v. State*, 136 Idaho 189 (2001) .....5

*Freeman v. State*, 122 Idaho 627 (Ct. App. 1992).....6

*Martinez v. State*, 126 Idaho 813 (Ct. App. 1995).....7

*Muchow v. State*, 142 Idaho 401 (2006).....8

*Murray v. State*, 121 Idaho 918 (Ct. App. 1992).....6

*Nellsch v. State*, 122 Idaho 426 (Ct. App. 1992) .....5

*Peltier v. State*, 119 Idaho 454 (1991) .....5

*Small v. State*, 132 Idaho 327 (Ct. App. 1989).....7

*State v. Sanchez*, No. 45058, Unpublished Opinion No. 642 (Ct. App. Nov. 9, 2017) .....1

*Strickland v. Washington*, 466 U.S. 668 (1984) .....6

*Tramel v. State*, 92 Idaho 643 (1968).....7

Statutes

I.C. § 19-4901 .....5

I.C. § 19-4902 .....5

I.C. § 19-4903 .....5, 6

I.C. § 19-4904 .....5

I.C. § 19-4905 .....5

I.C. § 19-4906.....	5, 7
I.C. § 19-4907.....	5
I.C. § 19-4908.....	5
I.C. § 19-4909.....	5
I.C. § 19-4910.....	5
I.C. § 19-4911.....	5

Rules

I.C.R. 35 .....	<i>passim</i>
I.R.C.P. 56 .....	6

Additional Authorities

UPCPA .....	5, 6
-------------	------

## STATEMENT OF THE CASE

### Nature of the Case

Michael Anthony Sanchez appeals from the district court's Judgment summarily dismissing his Petition for Post-Conviction Relief. The district court dismissed Mr. Sanchez's petition, finding his petition was only timely from the denial of his successive I.C.R. 35 motion. (Tr., p.8, Ls.13-19.) However, the Petition was timely from a separate order revoking probation, which was not noticed as a basis for dismissal by the State or the district court. Further, Mr. Sanchez's claims regarding the disposition hearing were never addressed by the State or the district court. The district court erred in summarily dismissing the Petition because the notice of the basis for dismissal concerned only the I.C.R. 35 denial, and the Petition was timely from the order revoking probation.

### Statement of Facts and Course of Proceedings

Michael Anthony Sanchez pled guilty to two counts of robbery, one count of burglary, and one count of grand theft in Kootenai County case number CRF-2013-23775. (R., pp.31, 36.) He was sentenced on June 11, 2014, to an aggregate sentence of thirty years, with fifteen years fixed, with the district court retaining jurisdiction. (R., pp.31, 36.) After a period of retained jurisdiction, the district court placed Mr. Sanchez on probation. (R., p.36.) After Mr. Sanchez admitted to violating some of the terms and conditions of his probation, the district court revoked probation. (R., pp.36-37.) Mr. Sanchez filed an I.C.R. 35 motion seeking leniency, but the district court denied the motion. (R., p.37.) Mr. Sanchez appealed from the order revoking probation, but the Court of Appeals affirmed the district court's decision. (*State v. Sanchez*, No. 45058, Unpublished Opinion No. 642 (Ct. App. Nov. 9, 2017); R., pp.36-37.) A remittitur was issued on December 5, 2017. (R., p.29.)

On December 5, 2018, Mr. Sanchez filed a Petition seeking Post Conviction Relief. (R., pp.5-20.) In his Petition, Mr. Sanchez asserted that he should be granted post-conviction relief because his trial attorney was ineffective for failing to file an appeal as requested, failing to file a motion to disqualify the judge, inducing Mr. Sanchez to plead guilty, and by failing to file a motion to change the venue. (R., pp.7-20.) Mr. Sanchez asserted that he wrote multiple letters to his trial counsel, asking him to introduce mitigating evidence at his sentencing/disposition hearing; however, trial counsel did not tell the court this mitigating information and instead remained silent. (R., pp.15-16.) The mitigating evidence was that: (1) he was a first-time father and this would have a positive effect on his future behavior; (2) prison programming was insufficient, because he needed a much more structured drug and alcohol program such as the Port of Hope; (3) he was a productive citizen in the community as he was paying taxes and was employed; (4) he had community support—persons who were ready to verbalize their support. (R., pp.15-16.)

The district court appointed counsel to assist Mr. Sanchez. (R., p.2.) The State filed its Answer on December 24, 2018. (R., pp.21-24.) The State filed a motion for summary disposition and supporting affidavit, in which it asserted that the Petition was only timely from the remittitur of the appeal of the denial of client’s second I.C.R. 35 motion on May 22, 2017. (R., pp.25-43.) The motion sought summary dismissal because the Petition was untimely from the entry of the underlying sentence on June 12, 2014. (R., p.40.) The State referenced the remittitur it attached to the affidavit, but concluded “[t]his remittitur, though, applies solely to the appeal of this Court’s denial of Petitioner’s second I.C.R. 35 motion on May 22, 2017.” (R., pp.40-41.) The State’s affidavit in support of its motion for summary disposition attached the Idaho Court of Appeals’ unpublished decision affirming the decision revoking Mr. Sanchez’s

probation and the remittitur. (R., pp.25-37.) The State also asserted that Mr. Sanchez failed to show prejudice where “he has not, and cannot, demonstrate the likelihood of success as to any I.C.R. 35 motion.” (R., p.42.) Appointed counsel did not respond to the State’s motion for summary disposition. (R., p.3.) After the State filed a reply in support of its motion for summary disposition, the district court held a summary dismissal hearing. (R., pp.44-48.)

At the hearing, the State asserted that the only claim the post-conviction was timely from was the denial of the second Rule 35 motion. (Tr., p.5, Ls.8-13.) Mr. Sanchez’s attorney agreed that this post-conviction was timely from the successive Rule 35 motion. (Tr., p.6, L.21 – p.8, L.3.) The district court granted the motion for summary dismissal, ruling:

Right now the only thing that is even potentially still alive is the denial of the successive Rule 35, and the only evidence that I have is the Declaration of Michael A. Sanchez in Support of Post-Conviction Relief, Page 2, Paragraph, I guess, 13 is applicable. “My trial counsel did refuse to do as I requested him to do on multiple occasions,” so it’s not really specific, but I suppose that if I view it in context with Paragraph . . . 14, “Trial counsel did willfully mess up my Rule 35 two times. I believe it was intentional. I also believe that he refused to do as I requested because he was prejudiced against me.”

That doesn’t get to the point that Ms. Payne argued that Mr. Sanchez allegedly didn’t – didn’t want Mr. Pierce, his attorney at the time, to file a Rule 35 at the time of sentencing when he was sent on his retained. I don’t have any evidence of that. There’s nothing in the petition. There’s nothing in the declaration. And I – I do find that even if there was, the *Strickland* standard has in no way been met; neither an allegation, let alone any sort of proof that the attorney’s performance fell below an objective standard, and a demonstration of actual prejudice, so that’s the only thing that’s even possibly alive, and I think it’s appropriate for summary dismissal, and the other issues are all untimely.

(Tr., p.8, L.13 – p.9, L.15.) The district court entered a final Judgment on March 5, 2019. (R., pp.51-52.)

Mr. Sanchez filed a Notice of Appeal timely from the district court’s Judgment summarily dismissing his Petition. (R., pp.53-56.)

ISSUE

Did the district court err in dismissing Mr. Sanchez's Post-Conviction Petition?

## ARGUMENT

### The District Court Erred In Dismissing Mr. Sanchez’s Post-Conviction Petition Where His Claim That Trial Counsel Was Ineffective For Failing To Present Certain Mitigating Evidence At The Disposition/Sentencing Hearing Was Timely Filed From The Order Revoking Probation

Mr. Sanchez established that issues of material fact existed as to his assertion that his trial counsel was ineffective for failing to present mitigating information at the disposition/sentencing hearing, before the district court revoked Mr. Sanchez’s probation. In support of his claims, Mr. Sanchez submitted evidence in the form of a sworn affidavit. There was no evidence submitted which controverted Mr. Sanchez’s claims. Both the State and the district court addressed an entirely different basis for dismissal—the successive Rule 35 motion—and Mr. Sanchez’s Petition was dismissed solely on those grounds. As such, the basis for dismissal failed to address the claims timely from the order revoking probation and Mr. Sanchez certainly should have been allotted an evidentiary hearing on these claims.

#### A. Post-Conviction Jurisprudence

In an appeal from post-conviction proceedings, the appellate court will exercise free review of the district court’s application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434 (Ct. App. 1992) (citations omitted). The review of “a district court’s construction and application of a statute, the Uniform Post-Conviction Procedure Act (UPCPA), is a matter of free review.” *Evensioski v. State*, 136 Idaho 189, 190 (2001) (citations omitted).

A Petition for Post-Conviction Relief is separate and distinct from the underlying criminal action which led to the petitioner’s conviction. *Peltier v. State*, 119 Idaho 454, 456 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter*, UPCPA) (I.C. §§ 19-4901 to 4911), and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. Because it is a civil proceeding, the petitioner must prove his

allegations by a preponderance of the evidence. *Charboneau v. State*, 144 Idaho 900, 903 (2007). However, the petition initiating post-conviction proceeding differs from the complaint initiating a civil action. A post-conviction petition must include more than “a short and plain statement of the claim”; it “must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached.” *Id.*; I.C. § 19-4903.

The limitation period for filing a post-conviction petition begins to run, after an unsuccessful appeal, when the reviewing court issues a remittitur. *Freeman v. State*, 122 Idaho 627, 629 (Ct. App. 1992). “Because the district court was not required to take any action pertaining to the judgment of conviction, it was final when the remittitur was issued.” *Cochran v. State*, 133 Idaho 205, 207 (Ct. App. 1999).

A claim of ineffective assistance of counsel may properly be brought through post-conviction proceedings. *Murray v. State*, 121 Idaho 918, 924-25 (Ct. App. 1992). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel’s performance was constitutionally deficient—that the attorney’s representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760 (1988). After a defendant shows that his counsel was deficient, prejudice is shown if there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, at 694; *Aragon*, at 760.

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any

material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c). In analyzing a post-conviction petition under this standard, the district court need not “accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Martinez v. State*, 126 Idaho 813, 816-17 (Ct. App. 1995). Additionally, the district court need not accept those of the petitioner’s allegations which are “clearly disproved by the record.” *Coontz v. State*, 129 Idaho 360, 368 (Ct. App. 1996). However, if the petitioner presents some shred of evidentiary support for his allegations, the district court must take the petitioner’s allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646 (1968) (holding that the State’s motion to dismiss was unsupported by any affidavits or depositions, and therefore did not “controvert” the facts alleged in the petitioner’s application). This is so even if the allegations appear incredible on their face. *Id.* The district court is required to accept the petitioner’s un rebutted allegations as true, but is not required to accept the petitioner’s conclusion. *Charboneau*, 144 Idaho at 903. Thus, only after the State controverts the petitioner’s allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612 (Ct. App. 1982). In doing so, it must still liberally construe the facts and draw reasonable inferences in favor of the petitioner. *Small v. State*, 132 Idaho 327, 331 (Ct. App. 1998).

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Id.* If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State’s motion. I.C. § 19-4906(b), (c).

Because evaluation of a motion for summary disposition does not involve the finding of contested facts by the district court, it necessarily involves only determinations of law.

Accordingly, an appellate court will review a district court's summary dismissal order *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03 (2006).

B. The District Court Erred In Dismissing Mr. Sanchez's Post-Conviction Petition Where The Claim That Trial Counsel Was Ineffective For Failing To Present Certain Mitigating Evidence At The Disposition/Sentencing Hearing Was Timely Filed From The Order Revoking Probation

Here, one post-conviction issue was whether Mr. Sanchez's trial counsel was ineffective for failing to present mitigating evidence at his probation disposition/sentencing hearing that Mr. Sanchez: (1) was a first-time father and this would have a positive effect on his future behavior; (2) would not benefit from prison programming, because he needed a much more structured drug and alcohol program such as the Port of Hope; (3) was a productive citizen in the community as he was paying taxes and was employed; (4) had community support—persons who were ready to verbalize their support. (R., pp.15-16.) The deficient performance by Mr. Sanchez's attorney at his probation disposition/sentencing hearing was asserted as a post-conviction claim; however, the issue was never addressed by the district court in its decision to grant the State's motion for summary dismissal. (*See Tr.*, p.8, L.13 – p.9, L.21.) At the February 26, 2019 hearing on the State's motion for summary dismissal, both parties and the district court discussed only the successive Rule 35 motion. (*See generally Tr.*) The district court decided only the successive Rule 35 claims made in the Petition, finding that the only issue "still alive" was the denial of the second Rule 35 motion and concluding that Mr. Sanchez's claims were not specific other than to say, "My trial counsel did refuse to do as I requested him to do on multiple occasions." (Tr., p.8, Ls.19-21.) The district court considered the statement in conjunction with Mr. Sanchez's later statement, "Trial counsel did willfully mess up my Rule 35

two times. I believe it was intentional. I also believe that he refused to do as I requested because he was prejudiced against me.” (Tr., p.8, L.21 – p.9, L.1.) The court concluded:

That doesn’t get to the point that Ms. Payne argued that Mr. Sanchez allegedly didn’t – didn’t want Mr. Pierce, his attorney at the time, to file a Rule 35 at the time of sentencing when he was sent on his retained. I don’t have any evidence of that. There’s nothing in the petition. There’s nothing in the declaration. And I – I do find that even if there was, the *Strickland* standard has in no way been met; neither an allegation, let alone any sort of proof that the attorney’s performance fell below an objective standard, and a demonstration of actual prejudice, so that’s the only thing that’s even possibly alive, and I think it’s appropriate for summary dismissal, and the other issues are all untimely.

(Tr., p.8, L.13 – p.9, L.15.) The district court dismissed the petition because it did not find that Mr. Sanchez supported his allegation that his counsel’s performance was deficient for filing a Rule 35 from Mr. Sanchez’s sentencing hearing, and that Mr. Sanchez did not show prejudice even if the performance in filing a premature Rule 35 was deficient. (Tr., p.8, L.16 – p.9, L.15.) The court found that all other issues were untimely. (Tr., p.8, Ls.14-16; p.9, Ls.9-15.)

The district court correctly found that the Petition was untimely from the original judgment of conviction and the guilty plea (Tr., p.9, Ls.16-19); however, the district court failed to recognize that the post-conviction action *was* timely filed from the remittitur issued after Mr. Sanchez’s appeal from the order revoking probation (R., p.19). The district court erred by dismissing the Petition in its entirety, as Mr. Sanchez’s Petition, filed on December 5, 2018, was timely filed from the remittitur issued on December 5, 2017. (R., pp.5, 19.)

Mr. Sanchez’s Petition was timely filed where he timely appealed the revocation of his probation, a remittitur in the appeal was issued on December 5, 2017, and Mr. Sanchez filed his post-conviction petition one year later. Thus, the district court erred where it concluded that only the successive Rule 35 motion was at issue, and by dismissing the Petition in its entirety, on that basis.

CONCLUSION

Mr. Sanchez respectfully requests that this Court vacate the district court's order summarily dismissing his post-conviction action and remand this case to the district court for an evidentiary hearing on all of the timely claims made in his petition for post-conviction relief.

DATED this 22<sup>nd</sup> day of October, 2019.

/s/ Sally J. Cooley  
SALLY J. COOLEY  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of October, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

SJC/eas