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Ash v. State Clerk's Record Dckt. 44295

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRY LEE ASH,
Petitioner-Appellant,
vs.
STATE OF IDAHO,
Respondent.

Supreme Court Case No. 44295

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

Terry Lee Ash, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
2/9/2015	PETN	CCMURPST	Verified Petition for Post Conviction Relief	District Court Clerk
	MOTN	CCMURPST	Motion for and Order Taking Judicial Notice of the Record, Transcript(s), Direct Appeal, and Collateral Proceedings	District Court Clerk
	MOAF	CCMURPST	Motion & Affidavit in Support for Appointment of Counsel	District Court Clerk
	CHGA	CCMURPST	Judge Change: Administrative	Patrick H. Owen
2/11/2015	ORDR	DCJOHNSI	Order Appointing PD	Patrick H. Owen
3/3/2015	NOTC	DCJOHNSI	Notice of Status Conf.	Patrick H. Owen
	HRSC	DCJOHNSI	Hearing Scheduled (Status 03/11/2015 11:00 AM)	Patrick H. Owen
3/5/2015	NOTC	CCSNELNJ	Notice of Appearance (ellsworth for terry lee ash)	Patrick H. Owen
3/6/2015	AFFD	CCMURPST	Affidavit of Facts in Support of Post-Conviction Relief	Patrick H. Owen
	AFFD	CCMURPST	Affidavit of Patti Kincheloe	Patrick H. Owen
	AFFD	CCMURPST	Affidavit of Dawn Anne Peerce	Patrick H. Owen
	AFFD	CCMURPST	Affidavit of David J. Shuffman	Patrick H. Owen
3/9/2015	MOTN	CCHOLDKJ	Motion for Release of Presentence Investigation Report	Patrick H. Owen
	MOTN	CCMURPST	Motion to Correct Clerical Errors	Patrick H. Owen
3/11/2015	HRHD	DCJOHNSI	Hearing result for Status scheduled on 03/11/2015 11:00 AM: Hearing Held	Patrick H. Owen
3/16/2015	OGPS	DCJOHNSI	Order Governing Proceedings and Setting Trial	Patrick H. Owen
	HRSC	DCJOHNSI	Hearing Scheduled (Court Trial 12/04/2015 09:00 AM)	Patrick H. Owen
	HRSC	DCJOHNSI	Hearing Scheduled (Pretrial Conference 11/18/2015 11:00 AM)	Patrick H. Owen
	ORDR	DCJOHNSI	Order Releasing PSI	Patrick H. Owen
5/15/2015	MOTN	TCMEREKV	Motion To Enlarge Time To Amend Pleadings	Patrick H. Owen
5/19/2015	ORDR	DCJOHNSI	Order Enlarging Time	Patrick H. Owen
6/17/2015	MOTN	CCHOLDKJ	Second Motion to Enlarge Time to Amend Pleadings	Patrick H. Owen
6/23/2015	ORDR	DCJOHNSI	Order to Enlarge Time	Patrick H. Owen
7/1/2015	NOTC	CCVIDASL	Notice of Intent to Proceed on Pro Se Petition	Patrick H. Owen
7/9/2015	MOTN	CCSNELNJ	Motion for Preperation of Additional Transcripts	Patrick H. Owen
7/16/2015	NOHG	CCVIDASL	Notice Of Hearing Re Motion for Additional Transcripts (7.30.15 @:30 PM)	Patrick H. Owen
	HRSC	CCVIDASL	Hearing Scheduled (Motion 07/30/2015 02:30 PM) Motion for Additional Transcripts	Patrick H. Owen
7/23/2015	PROS	PRHALTKL	Prosecutor assigned Shelley W Akamatsu	Patrick H. Owen

Terry Lee Ash, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
7/30/2015	DCHH	DCJOHNSI	Hearing result for Motion scheduled on 07/30/2015 02:30 PM: District Court Hearing Held Court Reporter: redlich Number of Transcript Pages for this hearing estimated: Motion for Additional Transcripts-50
	ORDR	DCJOHNSI	Order for Additional Transcripts
9/8/2015	MISC	DCJOHNSI	Transcript Filed
10/8/2015	MOTN	CCMYERHK	Motion For Leave To Amend Petition for Post-Conviction Relief
	AFFD	CCMYERHK	Affidavit Of Joseph L Ellsworth, Counsel for Petitioner Terry Lee Ash, In Support of Motion For Leave To Amend Petition for Post-Conviction Relief
	MEMO	CCMYERHK	Memorandum In Support of Motion For Leave To Amend Petition for Post-Conviction Relief
10/19/2015	ANSW	TCLAFFSD	Answer (Akamatsu for The State of Idaho)
	MOTN	TCLAFFSD	Motion For Summary Disposition & Admission For Exhibits 1-4
	BREF	TCLAFFSD	Brief In Support In Motion
10/22/2015	NOTC	DCJOHNSI	Notice of Status Conf
	HRSC	DCJOHNSI	Hearing Scheduled (Status by Phone 11/05/2015 03:00 PM)
11/5/2015	CONT	DCJOHNSI	Continued (Status by Phone 11/10/2015 02:45 PM)
11/9/2015	CONT	DCJOHNSI	Continued (Status by Phone 11/10/2015 03:30 PM)
11/10/2015	HRVC	DCJOHNSI	Hearing result for Court Trial scheduled on 12/04/2015 09:00 AM: Hearing Vacated
	HRVC	DCJOHNSI	Hearing result for Pretrial Conference scheduled on 11/18/2015 11:00 AM: Hearing Vacated
	HRHD	DCJOHNSI	Hearing result for Status by Phone scheduled on 11/10/2015 03:30 PM: Hearing Held
11/13/2015	NOTH	CCJOHNLE	Notice Of Hearing (12/18/15 @ 9:30)
	HRSC	CCJOHNLE	Hearing Scheduled (Motion for Summary Judgment 12/18/2015 09:30 AM)
11/20/2015	AMEN	CCVIDASL	Amended Petition for Post Conviction Relief
	OBJC	CCVIDASL	Objection to Motion for Summary Disposition and Counter Motion for Summary Disposition on Counts V-VI
	NOHG	CCVIDASL	Notice Of Hearing Re Counter Motion for Summary Disposition on Counts V-VI (12.18.15 @ 9:30 PM)

Terry Lee Ash, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
12/16/2015	HRHD	DCJOHNSI	Hearing result for Motion for Summary Judgment scheduled on 12/18/2015 09:30 AM: Hearing Held and Counter Motion for Summary Disposition on Counts V-VI
12/22/2015	NOTC	DCJOHNSI	Notice Resetting Hearing
	ORTR	DCJOHNSI	Order To Transport
	HRSC	DCJOHNSI	Hearing Scheduled (Motion 01/05/2016 04:00 PM)
1/5/2016	DCHH	DCJOHNSI	Hearing result for Motion scheduled on 01/05/2016 04:00 PM: District Court Hearing Held Court Reporter: madsen Number of Transcript Pages for this hearing estimated:50
2/5/2016	SUPL	TCLAFFSD	Supplemental Brief In Support Of Motion For Summary Disposition Of Claims 6 and 7
3/18/2016	MEMO	TCLAFFSD	Memorandum In Reply To Motion For Summary Disposition Of Claims 6 & 7
3/24/2016	HRSC	CCHEATJL	Notice of Hearing Scheduled (Motion for Summary Judgment 04/25/2016 03:00 PM)
4/25/2016	DCHH	DCJOHNSI	Hearing result for Motion for Summary Judgment scheduled on 04/25/2016 03:00 PM: District Court Hearing Held Court Reporter: redlich Number of Transcript Pages for this hearing estimated:50
6/2/2016	ORDR	DCJOHNSI	Order Granting Motion to Summarily Dismiss the Petition
6/13/2016	JDMT	DCJOHNSI	Judgment
	CDIS	DCJOHNSI	Civil Disposition entered for: State Of Idaho, Other Party; Ash, Terry Lee, Subject. Filing date: 6/13/2016
	STAT	DCJOHNSI	STATUS CHANGED: Closed
6/22/2016	NOTA	CCATKIFT	NOTICE OF APPEAL
	APSC	CCATKIFT	Appealed To The Supreme Court
7/5/2016	MOTN	CCWRIGRM	Motion for Appointment of State Appellate Public Defender
7/15/2016	ORDR	DCJOHNSI	Order for SAPD
8/3/2016	NOTC	TCSIMOSL	Notice of Transcript Lodged - Supreme Court No. 44295

Terry L. Ash
36025 ISCC / G 212 B
P.O. Box 70010
Boise, ID. 83707

FEB 09 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
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

TERRY LEE ASH,
Petitioner,

v.

STATE OF IDAHO,
Respondent.

CV PC 1502064
Case No. CV-PC-2015-_____

Formerly Ada Co. Case No. CR-FE-2011-13777

**VERIFIED PETITION FOR
POST-CONVICTION RELIEF**

COMES NOW, Terry L. Ash, the Petitioner in the above-entitled cause, who pursuant to Idaho Code § 19-4901, et seq., alleges the following:

BACKGROUND

1. The Petitioner is in the care, custody and control of the Idaho Department of Correction, confined within the Idaho State Correctional Center, Boise, Idaho.

2. Following a jury trial the Petitioner was convicted of operating a motor vehicle under the influence of alcohol (DUI), Idaho code § 18-8004, and admitted to having a prior felony DUI conviction within fifteen years, I.C. § 18-8005(9), and to being a persistent violator, I.C. § 19-2514.

3. The Fourth Judicial District Court, County of Ada, Boise City,

ORIGINAL

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Idaho, is the sentencing Court wherein a Judgment of Conviction and Commitment was entered on October 25, 2012. See: State v. Ash, Ada County Case No. CR-FE-2011-13777, and by this reference is incorporated herein.

4. On October 17, 2012, the matter came before the Court, the Honorable Patrick H. Owen, District judge presiding, for pronouncement of judgment and sentencing. The Court imposed sentence as follows:

"[I]T IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant is guilty of the crime of OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL (ONE FELONY CONVICTION WITHIN FIFTEEN YEARS), FELONY I.C. §18-8004, 8005(9), as enhanced by Idaho Code §19-2514, and that he be sentenced pursuant to the Unified Sentencing Act of 1986, I.C. §19-2513, to the custody of the State of Idaho Board of Correction for: an aggregate term of LIFE, to be served as follows: a minimum period of confinement of fifteen (15) years, followed by a subsequent indeterminate period of custody not to exceed LIFE."

Judgment of Conviction and Commitment, p. 2, ¶ 2.

5. On November 20, 2012, a timely Notice of Appeal was filed on behalf of the Petitioner. Subsequent thereto an Amended Notice of Appeal was filed February 8, 2013.

6. Thereafter, the Petitioner filed a pro se motion for correction or reduction of sentence, pursuant to Idaho Criminal Rule 35, entered December 24, 2012. The District Court appointed counsel through the Ada County Public Defender's Office to represent Petitioner in all proceedings involving Rule 35 relief.

7. The District Court further ordered that the State Appellate Public Defender be appointed to represent Petitioner in all matters pertaining to the direct appeal, as entered January 14, 2013.

8. On May 29, 2013, the District Court issued its Memorandum Decision and Order RE: Defendant's Rule 35 Motion, denying the Petitioner's request for

reduction of sentence.

9. The Idaho Court of Appeals affirmed the conviction, enhanced sentence, and the order denying Idaho Criminal Rule 35 motion for reduction of sentence January 23, 2014, issuing its per curium, unpublished Opinion No. 332.

10. Following the submission of a Petition for Review, the Idaho Supreme Court denied review and issued its Remittitur February 10, 2014. See: State v. Ash, Docket No. 40495, and by this reference is incorporated herein.

11. The Petitioner is seeking to proceed in forma pauperis, has submitted a motion for appointment of counsel, together with an affidavit in support, with an attached certified copy of his Inmate Banking Statement. The Petitioner is indigent, suffers from a serious mental health condition and is in need of court appointed counsel to properly present his post-conviction claims.

12. Petitioner's application for relief raises substantial doubt about the reliability of the finding of guilt, and could not, in the exercise of due diligence, have been presented earlier. This action is in accord with Idaho Code §19-4901 et seq., which states in pertinent part:

(a) That the conviction and sentence is in violation of the constitution of the United States and/or the constitution of the State of Idaho;

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

(c) That the conviction or sentence is otherwise subject to collateral attack upon any 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.

Idaho Code, Chapter 19, Title 49 - UNIFORM POST-CONVICTION PROCEDURE ACT.

13. The applicants pro se Petition sets forth grounds¹ for relief, that when proven true, are contrary to or involve an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

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FIRST CAUSE OF ACTION

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

TRIAL COUNSEL'S FAILURE TO CONDUCT AN INDEPENDANT PRE-TRIAL INVESTIGATION, OR TO EXERCISE COMPULSORY PROCESS TO COMPEL MATERIAL DEFENSE WITNESSES TO TRIAL - INDIVIDUALLY OR CUMULATIVELY - RISES TO THE LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL; ABRIDGING PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, INCLUDING SIMILAR GUARANTEES PROVIDED BY ARTICLE I, §§ 6 AND 13, ALONG WITH ARTICLE XXI, § 20 OF THE IDAHO STATE CONSTITUTION.

14. Trial counsel, Brian L. Boyle, ISB No. 6233, neglected to conduct an independent investigation prior to trial. Such an investigation was essential to the defense--- in order to make informed decisions concerning strategy, to establish a timeline of events, and to corroborate the Petitioner's trial testimony.

15. The Petitioner informed counsel of the location where his vehicle became immobilized.

16. Counsel was aware of the nature and circumstances surrounding the incident, including the likely whereabouts of material witnesses who could

¹ Provided that in doing so shall not preclude the Petitioner from asserting other grounds for relief as codified for in I.C. §19-4906(a), by means of supplementing or augmentation of claims, to include an opportunity to work with the assistance of counsel to further develop these or other claims for relief.

verify the Petitioner's account of what transpired.

17. The Winkler Dairy sits adjacent to where the events of this case occurred and is located in southwest Ada County near the crossroads of Swan Falls and Nicholson Roads.

18. Trial counsel neglected to meet with or to interview essential witnesses who were working at the dairy in the early morning hours of September 4, 2011. These dairymen directly interacted with the Petitioner within minutes after his car left the roadway and became immobilized.

19. The dairymen spoke directly with the Petitioner at the crucial and all important moment in time, i.e. right after the vehicle incident. Accordingly, these individuals had the ideal vantage point in which to observe the Petitioner's condition, appearance, affect and demeanor.

20. Defense counsel failed to meet with or to interview the Petitioner's companions (Sherry and Nicole) who were camping together Labor Day weekend 2011. It is highly probable these ladies could have attested to the relevant facts in the case.

21. Counsel failed to meet with any of the State's witnesses prior to trial, to discern the nature of their testimony before making critical decisions involving defense strategy and options going forward.

22. Counsel failed to meet with the State's pharmacology expert, Dr. Gary Dawson, prior to trial. Because toxicology was an important component in the case, such an endeavor was necessary to examine Dr. Dawson's opinions, theories related to alcohol absorption, or to assess whether it was feasible to challenge the qualification and opinions of the prosecutions expert witness.

23. Defense counsel neglected to hire an investigator to identify and/or interview potential defense witnesses.

24. Counsel utterly failed in his duty to conduct an independent investigation or to fully explore and determine the facts and circumstances surrounding this case.

SECOND CAUSE OF ACTION

II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

TRIAL COUNSEL'S FAILURE TO OBTAIN AN INDEPENDENT, COMPREHENSIVE MENTAL HEALTH EVALUATION - EITHER PRE-TRIAL, OR BEFORE IMPOSITION OF SENTENCE - RISES TO THE LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL; IN VIOLATION OF PETITIONER'S RIGHTS PROTECTED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, INCLUDING SIMILAR GUARANTEES PROVIDED BY ARTICLE I, §§ 6 AND 13, ALONG WITH ARTICLE XXI, § 20 OF THE IDAHO STATE CONSTITUTION.

25. Although defense counsel sought and obtained a necessary mental health evaluation, and the trial court ordered Petitioner to undergo such a mental evaluation pursuant to I.C. § 18-211 (R. pp. 52-53) that evaluation was inadequate, cursory and produced a biased, incomplete, and unreliable report.

26. The Idaho Department of Health and Welfare (IDHW) dispatched a licensed psychologist to the Ada County jail where an incomplete examination occurred. The entire evaluation lasted approximately thirty (30) minutes and failed to generate an accurate portrayal of the Petitioner's diminished mental acuity.

27. The Petitioner tried to volunteer information to the psychologist, e.g. the importance of past medical records that would document multiple instances of severe trauma that resulted in a neurological brain injury. Petitioner asked the IDHW evaluator to contact his previous and current health care providers. The Petitioner's efforts were rebuffed by the state's psychologist.

28. Later, defense counsel received a copy of the evaluator's findings and report. Counsel disclosed to the Petitioner "the report isn't helpful". When Petitioner explained to counsel the perfunctory evaluation process; the failure, or unwillingness by the IDHW to contact Petitioner's former health care provider(s) to acquire such medical records, counsel stated he would look into obtaining the records.

29. Upon information and belief, the District Court was never presented this relevant information, due in part to counsel's failure to follow through and obtain the essential medical documentation.

30. The Petitioner suffered prejudice resulting from counsel's deficient performance; insofar as the district court ascertained a desirability to sentence Petitioner to 15 to life— absent the Petitioner's complete medical history, to wit: a neurological brain injury, and the likelihood such medical facts would have served to mitigate the Court's imposition of sentence.

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THIRD CAUSE OF ACTION

III. INEFFECTIVE ASSISTANCE OF COUNSEL - RULE 35 PROCEEDINGS

COURT APPOINTED DEFENSE COUNSEL FAILED TO ADEQUATELY REVIEW THE TRIAL RECORD; AMEND PETITIONER'S PRO-SE MOTION, OR PRESENT THE SENTENCING COURT WITH SUBSTANTIAL MITIGATING FACTORS IN CONSIDERATION FOR REDUCTION OF SENTENCE. INACTION OF THIS MAGNITUDE RISES TO THE LEVEL OF INEFFECTIVE ASSISTANCE, IN VIOLATION OF PETITIONER'S RIGHTS PROTECTED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, INCLUDING SIMILAR GUARANTEES PROVIDED BY ARTICLE I, §§ 6 AND 13, ALONG WITH ARTICLE XXI, § 20 OF THE IDAHO STATE CONSTITUTION.

31. On or about December 24, 2012, the Petitioner filed a pro se motion for reconsideration of sentence, pursuant to Idaho Criminal Rule 35. (R. pp. 157-161)

32. Petitioner's motion for relief included a rudimentary statement as to the reasons Mr. Ash believed the Court should grant relief. Id. (R. pp. 158-160)

33. Essentially, the Petitioner presented the Court with yet another summary of the events leading up to this case. In a sincere, yet inarticulate way, Petitioner asked the Court to provide him with meaningful alcohol rehabilitation; inferring it draconian--- should he spend the remainder of his life in prison without ever getting the specialized addiction treatment coupled with needed mental health assistance.

34. Absent from the pro se motion are any reference to the cognitive disabilities of the Petitioner. Consequently no medical records were submitted to establish the severity or degree of the Petitioner's mental disability.

35. Individuals who have sustained acute brain injuries, often times are quite incapable of articulating for themselves the predicate facts involving their own mental health problems.

36. Under this vein of reason the Court appointed counsel through the Ada County Public Defender's Office. Ransom Bailey was the handling attorney assigned to assist the Petitioner in pursuit of Rule 35 relief.

37. Counsel Bailey completely abandoned the Petitioner during the Rule 35 process. In all, counsel spoke to Mr. Ash only on one occasion, and that conversation lasted less than five minutes.

38. Efforts by the Petitioner to communicate with counsel were unsuccessful. The public defender's office routinely declined Petitioner's phone calls. Once contact was established Petitioner's messages and written letter's went unanswered.

39. The Petitioner required the assistance of counsel to contact and obtain documentation which would persuade the court to restructure Petitioner's sentence. e.g. acceptance to a long term dual diagnosis inpatient treatment facility; past and present medical records, to include a comprehensive / independent mental health assessment; affidavits from the Petitioner's family and friends demonstrating support for an alternative to lengthy incarceration.

40. This case required presentation of material facts in order for the district court to consider sentencing alternatives. The needed legal assistance to prepare a meaningful Rule 35 motion was not forthcoming. In point of fact, counsel provided no real advocacy at all.

41. But for counsel's deficient performance, the Rule 35 motion would likely have inured Petitioner relief in the form of a sentence reduction.

FOURTH CAUSE OF ACTION

IV. PROSECUTORIAL MISCONDUCT

STATE PROSECUTOR VIOLATED THE PETITIONER'S SUBSTANTIVE RIGHT TO A FAIR TRIAL BY PRESENTING INADMISSIBLE TESTIMONY DURING THE STATE'S CASE IN CHIEF - TESTIMONY THE TRIAL COURT PREVIOUSLY RULED WOULD COME IN ONLY ON REBUTTAL, WHEN AND IF DEFENDANT TESTIFIED TO CERTAIN PREDICATE FACTS. MISCONDUCT OF THIS MAGNITUDE VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, AS SET FORTH IN THE U.S. CONSTITUTION, INCLUDING SUCH SIMILAR PROTECTIONS PROVIDED IN ARTICLE I, § 13, ALONG WITH ARTICLE XXI, § 20 OF THE IDAHO STATE CONSTITUTION.

42. This case initially went to trial March 12, 2012. (R. p. 4)

43. The Record reflects the Court declared a mistrial when a prosecution witness, arresting Officer Paul Lim, while in the presence of the jury volunteered information regarding alleged statements made by the Petitioner after having invoked his Fifth Amendment right against self-incrimination.

44. Thereafter, the court rescheduled the trial proceedings, another prosecutor was assigned the case and multiple hearings were conducted to work out several unresolved matters.

45. A pre-trial hearing was held May 14, 2012, the Honorable Jonathan Brody, district judge for Minidoka County, sitting by assignment and covering the trial for Judge Owen.

46. During the May 14, 2012 hearing, defense counsel (Brian Boyle) noticed the Court of an extremely late discovery disclosure from the prosecution, Shelley Armstrong-Akamatsu, involving recorded phone calls made by the Petitioner while in custody at the Ada County Jail. (Pre-Trial Tr., pp. 1-29)

47. The prosecutor informed the Court:

MS. ARMSTRONG: There are two fifteen-minute-phone calls that were provided to counsel at 10:30 in the morning on Friday. I'm only proposing to play one call in rebuttal if the defendant takes the stand and claims he drank of [sic] lot of alcohol waiting for the officer to show up. That's it.

(Pre-trial Tr., p. 6, Ls. 3-8)

48. Defense counsel objected to the late disclosure by the prosecutor and made three (3) separate motions:

- a) That the evidence be suppressed for any purposes, including rebuttal;
- b) That the case be dismissed with prejudice based on the proceedings of the case (Mistrial), unfair surprise and the length of time provided the state an opportunity to recalibrate its strategy right up to the last business day in which the re-trial was to begin;
- c) That in the event the case was not dismissed entirely, counsel sought a continuance of the trial to consider the evidence, advise his client on the potential effect it may have on the defense's trial preparation.

(Pre-trial Tr., pp. 4-5, Ls. 1-25)

49. What followed were lengthy exchanges between the parties and the district court, where Hon. Judge Brody applied Rule 16(b)(1) analysis as to the discovery violation.

50. In an attempt to assuage the Court's concerns involving potential sanctions for the discovery violation, that would likely have impacted the Court's decision regarding admissibility of the jail phone calls, the prosecution reiterated its earlier representations to the Court:

MS. ARMSTRONG: All I'm asking -- I'm limiting myself by not putting it on the case in chief. I'm kind of mitigating this for everybody by just saying, Hey, your client's not going to be allowed to get up on the stand claim anything he wants. He's going to be stuck with his inconsistent statements. That's it.

(Pre-trial Tr., p. 14, Ls. 24-25; p. 15, Ls. 1-4)

51. As a result of Ms. Armstrong's emphatic arguments to avoid a possible sanction for late discovery---and to ensure the Court would later allow the introduction of that highly prejudicial evidence (phone-call), the Court denied the defense's motion to dismiss. (Pre-trial Tr., pp. 21-22, Ls. 1-25; p. 23, Ls. 1-8)

52. Honorable Judge Brody granted the defense motion for continuance of the trial calendar after the Petitioner agreed to waive his right to speedy trial. (Pre-trial Tr., p. 26, Ls. 3-9)

53. The transcript from the May 14, 2012, Pre-trial hearing is unclear as to an explicit ruling from the Court on the admissibility of the jail phone calls. But there can be no mistaking the factual record of Ms. Armstrong's vehement representations such testimony was intended only for purposes of rebuttal, if and when the Petitioner elected to testify in his own defense.

54. Despite such declarations in open court proceedings, Ms. Armstrong willfully engaged in prosecutorial misconduct by implementing a trial by ambush tactic when calling prosecution witness, Philip Tuttle, to the witness stand during the State's case in chief. (Tr. pp. 168-175)

55. The Petitioner was prejudiced by the prosecutor's misrepresentations, in developing a trial strategy consistent with the Pre-trial representations by Ms. Armstrong.

56. The Petitioner was left no alternative other than to take the stand and to testify in his own defense, something a defendant is not required to do, in order to provide clarity and context to State's Exhibit # 9, CD audio of jail recorded phone calls. (Tr., p. 175)

57. Prosecutorial misconduct of this magnitude can only be attributed

to nefarious purpose and intent and cannot be tolerated in system of justice that depends upon the integrity of prosecutor's who adhere to fair and honest dealings in a court of law.

FIFTH CAUSE OF ACTION

V. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

COURT APPOINTED APPELLATE COUNSEL FAILED TO ADEQUATELY REVIEW THE TRIAL RECORD, OR PRESENT ON DIRECT APPEAL A FREESTANDING CLAIM INVOLVING STRUCTURAL ERROR - OR TO SEEK APPELLATE REVIEW FOR CLAIMS OF PROSECUTORIAL MISCONDUCT - DUE TO THE IMPROPER INTRODUCTION AND ADMISSION OF TESTIMONY DURING THE STATE'S CASE IN CHIEF, ABRIDGING PETITIONER'S RIGHTS PROTECTED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, INCLUDING SIMILAR GUARANTEES PROVIDED BY ARTICLE I, §§ 6 AND 13, ALONG WITH ARTICLE XXI, § 20 OF THE IDAHO STATE CONSTITUTION.

58. At trial, the state introduced testimony from a criminal investigator, Philip Tuttle, an employee of the Ada County Prosecuting Attorney's Office.

59. The facts surrounding investigator Tuttle's testimony are set forth above (Petitioner's Fourth Cause of Action, ¶¶ 42-57) and need not be repeated here. The Petitioner incorporates paragraphs 42-57, in haec verba, as if fully set forth herein.

60. Appellate counsel was appointed by and through the Office of the State Appellate Public Defender, to assist the Petitioner in direct appeal proceedings.

61. Deputy State Appellate Public Defender, Diane M. Walker, was the handling attorney assigned to represent the Petitioner's interests on direct appeal. State v. Ash, Idaho Supreme Court No. 40495.

62. Appellate counsel raised two (2) issues on appeal. The first claim argued that the District Court abused its discretion when it imposed a unified sentence of life, with fifteen years fixed, following Petitioner's conviction for felony DUI with a persistent violator enhancement. Id., (Appellant's Brief, pg. 5)

63. The second claim raised by appellate counsel before the Court of Appeals alleged the District Court had abused its discretion when it denied the Petitioner's Rule 35 motion for reduction of sentence in light of new and additional information offered. Id.

64. Throughout the course of appellate proceedings, an unfortunate breakdown of attorney-client communication occurred. Petitioner was insistent that every viable claim be presented in order to avoid procedural bars to such claims---should further proceedings become necessary.

65. Counselor Walker steadfastly refused to raise additional, more substantial claims, involving prosecutorial misconduct and/or court error. Petitioner felt he was being stone-walled in his desire to have all potential claims presented on appeal.

66. Government appointed appellate counsel failed to discover the aforementioned errors, or to properly present issues for a merit determinations by the Idaho Supreme Court.

67. Such performance fell measurable below that of a competent professional.

68. Petitioner was prejudiced by counsel's oversight, and lack of co-operation, because the issue involving the improper admission of testimony during the State's case in chief, presented serious questions concerning whether Petitioner received a fair trial, including other constitutional

questions as well.

69. As a result, the Petitioner was denied effective assistance of appellate counsel in violation of the Sixth Amendment.

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VI. THERE EXISTS ADDITIONAL FACTS TO SUPPORT
PETITIONER'S APPLICATION FOR RELIEF

70. Mr. Ash alleges there are certain facts and information to warrant relief, but that information and documentation lie outside Petitioner's access, ability, and/or control.

71. Pursuant to I.C. § 19-4903 the Petitioner reserves the right to present additional affidavits, records, and other forms of supporting evidence at such time those material facts become available.

72. In order to satisfy preponderance of evidence standards, it will be necessary to obtain information, documentation, and depositions from individuals who can attest to the matters alleged herein. Certain other persons have been non-responsive or un-cooperative to the diligent efforts of the Petitioner to secure this essential documentation.

73. Accordingly, the Petitioner reserves the right to compulsory process to compel the release of material, i.e. medical records and other testimony that is crucial to a fair presentation and decision in these matters.

74. Due to the Petitioner's limited abilities, Mr. Ash will need assistance of conflict free counsel, to assist him in the proper presentation of his claims.

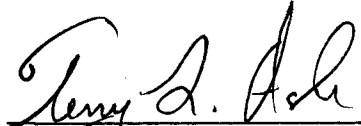
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PRAYER FOR RELIEF

WHEREFORE, the Petitioner asks the Court to **grant** the following relief:

- (a) ORDER the Respondent to answer the Petition in accord with I.C. § 19-4906(a);
- (b) FIND and DECLARE for the Petitioner on each of the foregoing claims;
- (c) ORDER that an evidentiary hearing be held to resolve issues of material fact in dispute between the parties consistent with I.C. § 19-4907;
- (d) VACATE the Judgment and Commitment of the underlying criminal case, and ORDER a new trial in the interest of justice;
- (e) GRANT such further and other relief as this Court deems just and appropriate under the premises.

DATED this 5th day of February, 2015.



Terry L. Ash

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VERIFICATION

STATE OF IDAHO)
 :
County of Ada)

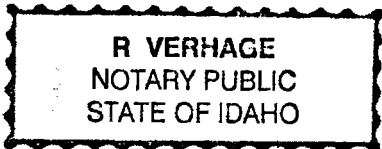
I, Terry L. Ash, being duly sworn upon oath, depose and say that I subscribed to the foregoing VERIFIED PETITION FOR POST-CONVICTION RELIEF, that I know the contents thereof, and attest that the matters and allegations therein are true.

DATED this 5th day of February, 2015.

Terry L. Ash
Terry L. Ash

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public in and for said State, this 5th day of February, 2015.

*** Seal ***



R
Notary Public for Idaho
Residing @ Canyon County
Commission expires: 5/13/2019.

Terry L. Ash
36025 ISCC / G 212 B
P.O. Box 70010
Boise, ID 83707

NO. _____
A.M. _____ FILED P.M. 3:32

FEB 09 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

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

TERRY LEE ASH,
Petitioner,

v.

STATE OF IDAHO,
Respondent.

PC 1502064
Case No. CV-PC-2015-_____

**MOTION FOR AN ORDER TAKING JUDICIAL
NOTICE OF THE RECORD, TRANSCRIPT(S),
DIRECT APPEAL, AND COLLATERAL
PROCEEDINGS**

COMES NOW, Terry L. Ash, the petitioner in the above-entitled cause, and hereby moves this court pursuant to I.R.E 201(d), for an order Taking Judicial Notice Of The Record, trial(s) transcript(s), the transcript of all other hearings held, and the PSI in Ada County Case No. CR-FE-2011-13777, the underlying criminal case, for the purpose of reviewing Petitioner's post-conviction claims.

Idaho Code § 19-4906(a) requires that, "[I]f the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application." The Petitioner submits that the requested record of all the underlying proceedings is not readily

MOTION FOR AN ORDER TAKING JUDICIAL NOTICE OF THE RECORD,
TRANSCRIPT(S), DIRECT APPEAL, AND COLLATERAL PROCEEDINGS - 1

SAM

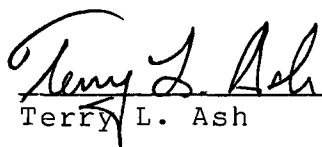
ORIGINAL
000022

available for the Petitioner to file with this motion, and/or is too voluminous for the state to file with its answer. Furthermore, in Matthews v. State, 122 Idaho 801, 808, 839 P.2d 1215, 1222 (1992), the Idaho Supreme Court stated, "we hold that prior to dismissing a petition for post-conviction relief, the district court is required to obtain that portion of the trial transcript as is necessary to a determination 'on the basis of the application, the answer or motion, and the record,' that there are ..." material issues of fact warranting post-conviction relief.

The Petitioner asserts that taking judicial notice of the clerk's record, transcripts in the underlying criminal case, to include the initial trial which resulted in mistrial, the second trial, to include the appellate review and all collateral proceedings is necessary to provide the court with the full record relied upon by the Petitioner in furtherance of the claims presented in the Verified Petition for Post-Conviction Relief.

Due to the scope of Petitioner's claims, encompassing trial counsel's ineffective assistance throughout the course of proceedings, taking judicial notice of the entire record is appropriate.

DATED this 5th day of February, 2015.


Terry L. Ash

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 5th day of February, 2015, I caused a true and correct copy of the above and foregoing to be served upon the following person:

JAN M. BENNETTS
Ada County Prosecuting Attorney
200 W. Front St., Room 3191
Boise, ID 83702

- * By tendering a copy of the same to prison officials; ISCC Resource Center; paralegal R. Verhage, for placement in the institutional mail system, U.S. Mail first class postage prepaid.


Terry L. Ash

FEB 09 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Inmate name Terry L. Ash
IDOC No. 36025
Address ISCC / G 212 B
P.O. Box 70010
Boise, ID 83707
Petitioner

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

TERRY LEE ASH,)
)
) Petitioner,)
)
) vs.)
)
) STATE OF IDAHO,)
)
) Respondent.)
)

CV PC 1502064
Case No. CV-PC-2015-

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

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

1. Petitioner is currently incarcerated within the Idaho Department of Corrections under the direct care, custody and control of Warden Randy E. Blades, of the Idaho State Correctional Center (ISCC).
2. The issues to be presented in this case may become to complex for the Petitioner to properly pursue. Petitioner lacks the knowledge and skill needed to represent him/herself.
3. Petitioner/Respondent required assistance completing these pleadings, as he/she was unable to do it him/herself.

SM

ORIGINAL

4. Petitioner suffers from post-traumatic stress disorder, is incapable of self-representation and would be severely handicapped were counsel not appointed and be forced to oppose the highly trained attorney / prosecutor.

5. Other: Petitioner is completely without the necessary resources to retain private counsel.

DATED this 5th day of February, 2015.

Terry L. Ash
Petitioner

AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL

STATE OF IDAHO)
) ss
County of Ada)

I, Terry Lee Ash, after first being duly sworn upon his/her oath, deposes and says as follows:

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

Further your affiant sayeth naught.

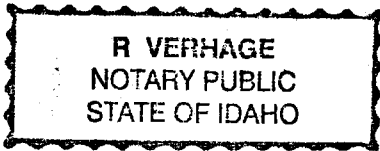
WHEREFORE, Petitioner respectfully prays that this Honorable Court issue its Order granting Petitioner's Motion for Appointment of Counsel to represent his/her interest, or in the alternative grant any such relief to which it may appear the Petitioner is entitled to.

DATED This 5th day of February, 2015.

Terry D. Aske
Petitioner

SUBSCRIBED AND SWORN AND AFFIRMED to before me this 5th day of February, 2015.

(SEAL)

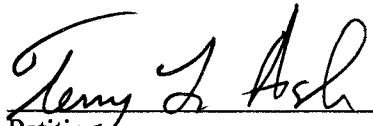


R
Notary Public for Idaho
Commission expires: 5/31/19

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 5th day of February, 2015, I mailed a copy of this MOTION AND AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL for the purposes of filing with the court and of mailing a true and correct copy via prison mail system for processing to the U.S. mail system to:

Jan M. Bennetts Ada County Prosecuting Attorney
200 W. Front St., Rm. 3191
Boise, ID 83702



Petitioner

G 212

OFFSTMT

STATE OF IDAHO
DEPARTMENT OF CORRECTIONS
TRUST FUND STATEMENT

DATE: 02/02/2015
TIME: 09:21:07

Doc No: 36025 Name: ASH, TERRY LEE

ICC/UNIT G PRES FACIL
TIER-2 CELL-12

Transaction Dates: 01/01/2015-02/02/2015

Checking Status: ACTIVE
Savings Status: INACTIVE

CHECKING:

Beginning Balance	Total Charges	Total Payments	Current Balance
0.40	38.19	37.80	0.01

SAVINGS:

Beginning Balance	Total Charges	Total Payments	Current Balance
0.00	0.00	0.00	0.00

== CHECKING TRANSACTIONS ==

Date	Batch	Description	Ref Doc	Amount	Balance
01/06/2015	IC0697217-029	209-EDUCATION	DEC PAY	37.80	38.20
01/13/2015	IC0698170-608	099-COMM SPL		27.43DB	10.77
01/13/2015	IC0698170-609	099-COMM SPL		7.50DB	3.27
01/27/2015	IC0699568-497	099-COMM SPL		2.76DB	0.51
01/29/2015	IC0699872-002	070-PHOTO COPY	002078	0.50DB	0.01

IDAHO DEPARTMENT OF CORRECTION
Offender Personal Funds Withdrawal Slip

Date: 1-25-2015

Voucher Number: **002078**

Balance Before Draw: _____ Facility/Housing Unit: BIC A 2125

Offender Trust Account Withdrawal Details

Key	Description	Qty	Per	Total Price	Key	Description	Qty	Per	Total Price
					>	Trust	1		.50
Please charge to my offender trust account the sum of									\$.50

I authorized the amount charged to be paid to:

(Payee) _____

(Street Address) _____

(City, State, and Zip Code) _____

(For the Purpose of) _____

(Offender's Printed Name) _____

(Offender's Signature) _____

(Offender's Initials) T.L.A.

(IDOC Number) 36025

The offender's trust account has been charged in the amount authorized: _____
(Approving Official's Signature and Associate ID Number)

**IDAHO DEPARTMENT OF CORRECTION
Offender Concern Form**

G212B

Offender Name: Terry L. Ash
Institution, Housing Unit, & Cell: ISCC, G-212B

IDOC Number: 36025
Date: 2/29/15

To: Inmate Accounts
(Address to appropriate staff. Person most directly responsible for this issue or concern)

Issue/Concern: Re-submitting request for Certified Statement for State filing Post Conviction - 1yr Statement. A Notice just posted on call-out... with this change of my deadline, Feb 5th, I need this soon. Not to mention the Paralegal is only here (2) days a week
(Description of the Issue must be written only on the lines provided above.) Thank You

Offender signature: Terry L. Ash

Staff Section

(Signature of Staff Member Acknowledging receipt) / Associate ID # _____ Collected/Received: _____
(Date collected or Received)

Reply: _____

Responding Staff Signature: _____ Associate ID #: _____ Date: _____

Pink copy to offender (after receiving staff's signature),
Original and yellow to responding staff (after completing reply, yellow copy returned to offender.)
Appendix A 316.02.01.001
(Appendix last updated 2/14/12)

PRT3NCRCF

**IDAHO DEPARTMENT OF CORRECTION
Offender Personal Funds Withdrawal Slip**

Date: 1/27/15 Voucher Number: **002422**
Balance Before Draw: 62 Facility/Housing Unit: ISCC G-212B

Offender Trust Account Withdrawal Details

Key	Description	Qty	Per	Total Price	Key	Description	Qty	Per	Total Price

Please charge to my offender trust account the sum of \$ 50

I authorized the amount charged to be paid to:
ISCC / IDOC
(Payee)
Gene ZB 237
(City, State, and Zip Code)
Terry L. Ash
(Offender's Printed Name)

PO Box 7011
(Street Address)
Leah, FL
(For the Purpose of)
ICA 36025
(Offender's Initials) (IDOC Number)

The offender's trust account has been charged in the amount authorized: _____
(Approving Official's Signature and Associate ID Number)

Pink copy (offender maintains)
Original and Yellow copy to approving official (after completing, yellow copy returned to offender)
SOP 114.03.03.011 Slip updated 08-27-12

PRT3NCRFWNSCI

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IDAHO DEPARTMENT OF CORRECTION
Offender Concern Form

Offender Name: Ash, Terry L.
Institution, Housing Unit, & Cell: ISCC G 212 B
To: MS. VERHAGE - Paralegal RESOURCE Ctr.
(Address to appropriate staff. Person most directly responsible for this issue or concern)

IDOC Number: 36025
Date: 1-25-15

Issue/Concern: I am in need of a certified statement of my inmate account. I.C. § 30-3220A requires that I attach one to my pleadings when I file certain documents with the Court. The ISCC Handbook, 0918 paragraph 2 - distributed by Warden Blades, states that the paralegal will also provide certified bank statements to those offenders who need them for legal filing. In the recent past I understand you have been declining to fulfill this duty, and instead refer men to Inmate Accounts. This creates undue delay. My post conviction petition must be filed no later than FEB. 5th. Please assist me in obtaining my Bank Statement before my deadline.

(Description of the issue must be written only on the lines provided above.)

Offender signature: Terry L. Ash

Thank you.

Staff Section: 1

DRABOO, 1 B112
(Signature of Staff Member Acknowledging Receipt) / Associate ID #

Collected/Received: 1-25-15
(Date collected or received)

Reply: I am figuring this out with the warden. I do not currently have the ability to print or certify account statements. If you want to meet your deadline, you will want to contact inmate accounts.

Responding Staff Signature: [Signature] Associate ID: 0029 Date: 1/26/15

Pink copy to offender (after receiving staff's signature).
Original and Yellow copy to responding staff (after completing the reply, yellow copy returned to offender)

Appendix A
316.02.01.001
(Appendix last updated 2/14/12)

IDAHO DEPARTMENT OF CORRECTION
Offender Concern Form

G212 36025
IDOC Number: 36025
Date: 1/27/15

Offender Name: Terry L. Ash
Institution, Housing Unit, & Cell: ISCC G-212B
To: Inmate Accounts
(Address to appropriate staff. Person most directly responsible for this issue or concern)

Issue/Concern: I need a certified statement of my inmate account. as this is required for my Post Conviction. ISCC Handbook, 0918 paragraph 2 states the Paralegal provide this... yet I am being tur in cycle & my deadline is closing in fast. Please let the paralegal know this is supposed to be done & provide me with a cert. stat. if you will.

(Description of the issue must be written only on the lines provided above.)

Offender signature: Terry L. Ash

Thank you

Staff Section: 1

ACV A394, A394
(Signature of Staff Member Acknowledging receipt) / Associate ID #

Collected/Received: 1-27-15
(Date collected or Received)

Reply: Certified Statements cost fifty cents each. Please submit a check or authorization for deduction from your account along with your request for a certified statement

Responding Staff Signature: [Signature] Associate ID #: [ID] Date: 2 2 2015

Pink copy to offender (after receiving staff's signature).
Original and yellow to responding staff (after completing reply, yellow copy returned to offender.)

Appendix A 316.02.01.001
(Appendix last updated 2/14/12)

PRT3NCRFC

NO. _____
A.M. 9:15 FILED P.M. _____

Inmate name Terry L. Ash
IDOC No. 36025
Address ISCC / G 212 B
P.O. Box 70010
Boise, ID 83707

FEB 11 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

TERRY LEE ASH)
)
) Petitioner,)
)
) vs.)
)
) STATE OF IDAHO)
)
) Respondent.)
)

CV PC 1502064
Case No. CV-PC-2015-

ORDER GRANTING
MOTION FOR
APPOINTMENT
OF COUNSEL

IT IS HEARBY ORDERED that the Petitioner's Motion for Appointment of Counsel is granted and Ada County Public Defender ^{or designate} (attorney's name), a duly licensed attorney in the State of Idaho, is hereby appointed to represent said defendant in all proceedings involving the post conviction petition.

DATED this 11 day of February, 2015.

Patricia H. Owen
District Judge

ORDER GRANTING MOTION TO APPOINT COUNSEL
Revised 10/13/05

8 CC: PA, PD, Δ Ash

FILED: 3/3, 2014 at 3:45
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

TERRY LEE ASH,
Petitioner,

vs.

Case No. CVPC15-02064

STATE OF IDAHO,
Respondent.

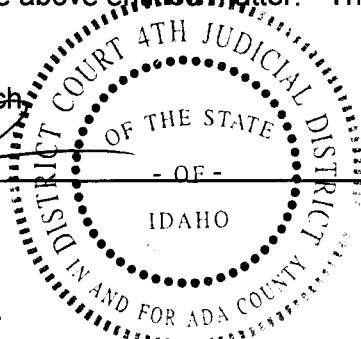
NOTICE OF STATUS CONFERENCE

YOU ARE HEREBY NOTIFIED That a Status Conference has been set on March 11, 2015 at 11:00 AM in the Ada County Courthouse regarding the above ~~entitled~~ matter. The Petitioner will NOT be transported.

Dated: 3/9/15

Christopher D. Rich

By: _____
Inga Johnson
Deputy Clerk



CERTIFICATE OF MAILING

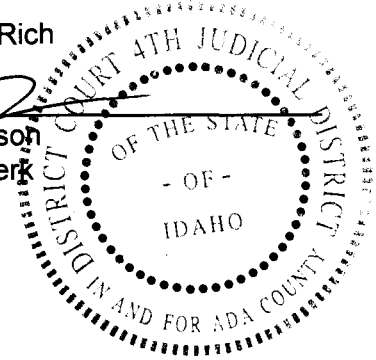
I HEREBY CERTIFY That on this 4 day of March, 2015, I caused a true and correct copy of the above and foregoing instrument to be mailed, postage prepaid, to:

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 RECEIVED
March 5, 2015 10:54:28 AM MST

REMOTE CSID
208 345 8945

DUPLICATION
72

PAGES
2

STATUS
Received

03/05/2015 THU 11:53 FAX 208 345 8945 BKTD --- ada clerk of court

001/002

NO. _____
A.M. _____ FILED PM 7:04

MAR 05 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

ATTORNEY FOR PETITIONER CONFLICT COUNSEL

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

TERRY LEE ASH,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

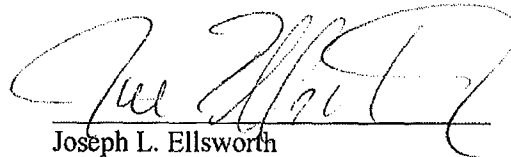
Case No.: CV PC 2015 2064

NOTICE OF APPEARANCE
(Conflict Counsel)

COMES NOW Joseph L. Ellsworth, and hereby substituting for the Ada County
Public Defender, enters an appearance as the Conflict Attorney of Record for the
Petitioner, Terry Lee Ash, in the above-entitled case.

Please direct all notices or pleadings through this office.

DATED this 5th day of March 2015.


Joseph L. Ellsworth

ORIGINAL

ms

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of March 2015, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709

Ada County Public Defender
200 W. Front Street
Boise ID 83702

US Mail
 Hand Delivery
 Facsimile: 287-7409

Megan Niece
Megan Niece, Legal Assistant

civil files?
acc - Ingd
3/12/2015
SM

MAR - 6 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

1 Terry L. Ash
36025 ISCC / G 212 B
2 P.O. Box 70010
Boise, ID 83707
3
4
5
6

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

9 TERRY LEE ASH,
10
11 Petitioner,
12
13 v.
14 STATE OF IDAHO,
Respondent.

Case No. CV-PC-1502064

**AFFIDAVIT OF FACTS IN SUPPORT OF
POST-CONVICTION RELIEF**

15
16 STATE OF IDAHO)
17 County of Ada) : scilicet

18 I, Terry L. Ash, being first duly sworn upon oath, and under penalty of
19 perjury, depose and say:

20 I make the following declaration based on my own personal knowledge of
21 the facts and circumstances set forth herein.

22 On September 4, 2011, I was arrested and charged with operating a motor
23 vehicle under the influence of alcohol (DUI); enhanced to a felony due to a
24 prior conviction within fifteen (15) years.

ORIGINAL

SM

1 Following the initial arraignment and some preliminary proceedings in
2 the case, I retained the services of a local private attorney, Brian L Boyle,
3 Idaho State Bar No. 6233.

4 The circumstances and events leading up to my arrest occurred in the
5 early morning hours of September 4, 2011, at approximately 5:20 a.m.

6 While driving in an area of rural Ada County, traveling nearly 50 miles
7 per hour, I experienced a blown tire causing me to lose control of the vehicle
8 and I came to a rest in an off-road section of ground.

9 As a result, my car became immobilized leaving me stranded next to the
10 roadway. The vehicle sustained two (2) flat tires, and because I had just
11 purchased the car only a few days before---there was no tire-jack or spare
12 tire(s) to enable me to repair the car roadside.

13 Within a few minutes time I saw that lights were on at a nearby farm,
14 and I could hear the distinct sounds of work being performed nearby. Walking
15 that short distance I entered a milk barn and asked the dairymen for help.
16 That individual, a hispanic male approximately 30 years of age, suggested I
17 wait until the milking was complete and indicated he could then tow my car to
18 an appropriate and level resting place.

19 Approximately forty-five (45) minutes passed as I watched cows being
20 milked. Eventually, another worker approached and suggested that I wait for
21 the owner who was due to arrive in an additional thirty to forty-five (30-45)
22 minutes. The second worker stated that together they would then be able to
23 assist me in removing my car from the roadside.

24 Realizing it was going to be awhile before the dairymen would be
25

1 able to help, I returned to my car to smoke a cigarette and wait for their
2 assistance. I estimate having spent forty-five minutes to an hour at the
3 dairy and in the presence of those two dairy workers.

4 While awaiting the dairy owner's assistance, the morning temperature
5 began to rise. As time passed a couple fishermen drove up, towing a boat,
6 they stopped and asked if I was alright. Because I'd already arranged for
7 towing I declined their offer to phone for help. Upon information and belief,
8 I now understand the names of the fishermen to be Matt Thomas and John
9 Johnson.

10 Eventually I became thirsty. It was then that I made the poor decision
11 to drink some beer's while I waited for the dairymen. In all I consumed three
12 (3), sixteen (16) ounce beer's (an equivalent of four (4), twelve (12) ounce
13 cans). The beverages were in a cooler left over from my camping trip that
14 Memorial Day weekend.

15 I did not drive my car after consuming alcohol that morning.

16 Thereafter, the owner of Winkler Dairy approached with his tractor.
17 While he was towing my car to a nearby location (at approximately 7:55 a.m.)
18 is when law enforcement arrived. A full two and a half hours had elapsed
19 since I first went off the road.

20 Deputy Paul Lim of the Ada County Sheriff's Office requested my driver's
21 license, registration and insurance. I complied. As soon as Deputy Lim had
22 accessed his in-car computer is when he discovered I'd previously been
23 convicted of DUI. Officer Lim's demeanor immediately changed. His
24 interaction with me became accusative. Despite informing Officer Lim that I
25

1 had been at the location for several hours, and had consumed beer; I'd done so
2 only after my car became immobilized.

3 Nevertheless, Officer Lim insisted on conducting field sobriety tests
4 and ultimately placed me under arrest and transported me to the Ada County
5 Jail. Later, at approximately 9:10 a.m., a breathalyzer test was administered
6 which revealed a .13 blood/alcohol concentration (BAC). This reading is
7 consistent with my having consumed the equivalent of 4 drinks between 6:45 and
8 8:00 that morning. It does not reveal alcohol impairment at 5:15 a.m., when I
9 was actually driving.

10 This was the backdrop of information that led me to hire attorney Brian
11 Boyle. I relayed all of the aforementioned facts, and counsel assured me he
12 would fully investigate the matter.

13 As the case progressed, I specifically asked attorney Boyle if he had
14 made contact with the dairy worker's. Those men could attest to the fact that
15 while I was in their presence, during the early morning hours of September 4,
16 2011, I was not intoxicated. Mr. Boyle assured me he would personally go to
17 the Winkler Dairy, interview each individual who had personal knowledge and
18 observations of the events that morning.

19 Upon information and belief, no investigation of this type ever
20 occurred, as trial began, Mr. Boyle acknowledged he had not spoken directly
21 to the dairymen, nor had counsel enlisted the services of an investigator in
22 order to secure those witnesses testimony for trial.

23 Pretrial communication between Mr. Boyle and I was very limited.
24 On several occasions Mr. Boyle expressed reservation to discussing the case
25

1 over the phone, and when I asked counsel to come to the jail to consult with
2 me over these important matters, Mr. Boyle expressed the difficulty arranging
3 attorney client visits. In all, counsel only came to the jail on two or three
4 occasions and those were very short discussions lasting only a few minutes.

5 In an effort to effectively communicate with my attorney, I wrote
6 letters from the jail outlining my concerns regarding the case. I also relied
7 on a friend, Johnny Frix, who would relay messages to Mr. Boyle, because his
8 office did not accept the vast majority of my calls.

9 In these written, and relayed communications, I expressed to Mr. Boyle
10 the importance of locating the Winkler Dairy worker's to corroborate that I
11 was sober when I encountered them at 5:30 the morning in question. I received
12 no reply from Mr. Boyle.

13 The trial was re-scheduled several times. Trial counsel sought
14 several continuances, and represented to the Court that these delays were
15 necessary in order to confer with me regarding important aspects of the case.
16 No detailed pre-trial consultations occurred---and I was forced to glean small
17 bits of information by whispering to Mr. Boyle before, during and after the
18 in court pre-trial hearings. This was entirely inadequate and inappropriate
19 method for developing a defense strategy for trial.

20 On February 6, 2012, the Court ordered that I undergo a
21 neuro-psychometric evaluation to determine if my mental health was a
22 significant factor in the case; whether I was capable of assisting in my own
23 defense; and to gain insight into whether I was mentally competent to
24 understand the legal charges and trial proceedings pending against me.

1 Soon thereafter a psychologist from the Idaho Department of Health and
2 Welfare came to the jail to talk with me and to prepare an evaluation for the
3 Court. I answered each of the questions presented to me. The written
4 questionnaire, which I believe was an MMPI II, took the majority of time the
5 psychologist had allotted to spend with me. At best, it was a perfunctory
6 examination which failed to include many important details necessary to
7 establish an accurate assessment of my overall mental condition.

8 Although I never saw the final Report which was submitted to the Court
9 for consideration, Mr. Boyle advised that "it may be helpful later on should
10 an appeal become necessary."

11 I informed Mr. Boyle of the serious injuries I have sustained over the
12 years and asked that he obtain the hospital records of those injuries. e.g.,
13 a serious head trauma resulted from my being ejected through a window during a
14 high impact truck collision (Lewiston, Idaho, 1978, admitted to the intensive
15 care unit at St. Joseph's Hospital); I sustained extensive injuries, open head
16 contusion, ruptured intestines, and a compound fracture of my left forearm in
17 a May 2, 1982 motorcycle accident (Seattle, WA, Harborview Medical Center);
18 struck as a pedestrian in a hit-and-run collision (30 + days hospitalization,
19 resulting in a fractured femur and broken pelvis, Harborview Medical Center,
20 Seattle, WA, February 27, 1985).

21 Moreover, I relayed to Mr. Boyle details of a significant head injury I
22 sustained from a 1994 house fire. Counsel stated that he would prepare a
23 formal records request to obtain my medical records. Despite Mr. Boyle's
24 representations to the district court of his concern regarding my mental
25

1 competency, on or about February 6, 2012, during in chambers conference, Mr.
2 Boyle failed or otherwise neglected to present the Court with the specific
3 health care records that were necessary in order for the Court to properly
4 discern my mental competency.

5 Had Mr. Boyle endeavored to secure those records, counsel would have
6 discovered I was under the care of a physician in early November, 2011; that I
7 had been diagnosed manic depressive bi-polar disorder; that I had been
8 prescribed narcotic medications (Rx Wellbutrin®) from a Dr. Nancy ___ ? ___,
9 NORCO Medical, my healthcare provider by and through Boise State University
10 (Fall Semester 2011). This information was essential for the defense to
11 demonstrate the degree of the defendant's illness, mental defect, and level
12 of functional impairment.

13 I have repeatedly attempted to obtain my medical records during my
14 incarceration—but without success. Letters to those health care providers
15 have gone unanswered. In 2014 I sought the assistance of an IDOC clinician,
16 Mr. Gray, who initially expressed a willingness to help me secure my prior
17 medical records. Thereafter, when Mr. Gray learned of my need to attach this
18 information to my post-conviction petition, he then declined to assist me
19 further.

20 Those medical records are material to the trial court's erroneous
21 determination concerning the extent of my mental disease or defect; and
22 consequently I require the assistance of a conflict attorney to obtain such
23 records and to present the same in support of my claims for post-conviction
24 relief.

1 Mr. Boyle's pre-trial investigation, assuming such an investigation
2 occurred at all, was completely inadequate in light of the facts and
3 information provided to trial counsel. Mr. Boyle failed to ensure a detailed
4 investigation was undertaken, and made critical decisions on my behalf absent
5 a full consideration of all the facts and circumstances involving this case.

6 Specifically, Mr. Boyle neglected to contact David Shuffman, the
7 individual who had retrieved my vehicle from nearby the Winkler Dairy,
8 at the crossroads of Swan Falls and Nicholson roads in southwest Ada County.
9 Mr. Shuffman would have provided counsel with the vehicle bill of sale and
10 could have corroborated the car had been purchased on or about October 30,
11 2011.

12 That information was crucial to the defense insofar as the state
13 misrepresented the extent of damage attributed to the car accident--- when in
14 fact the vehicle's body damage had happened before I had even bought the car.

15 Had Mr. Boyle performed even a cursory investigation of the vehicle, he
16 could have dispelled a major premise of the prosecution's theory of the case,
17 e.g. that the car's body damage was a result of the events of November 4,
18 2011, when in truth it was not. Mr. Shuffman, and the car's original owner,
19 could and would have testified the prosecutor's arguments were incorrect.

20 Furthermore, trial counsel's failure to conduct a proper pre-trial
21 investigation precluded the defense from presenting the testimony of John
22 Johnson, the other fisherman who was on scene at approximately 7:00 AM the
23 morning in question. This individual had a vantage point in which to make
24 independent observations concerning my demeanor and affect the morning of
25

1 November 4, 2011. Mr. Johnson could have provided an independent recollection
2 to my having declined their offer to phone for help---which was starkly
3 different than what the State later presented to the jury by Matt Thomas, an
4 Idaho Department of Correction, District III Field and Community Services
5 Parole officer. A thorough investigation should have included each
6 eyewitness's observations, and not have allowed biased, evolving views of
7 Mr. Thomas go unchecked at trial.

8 Following the jury verdict Mr. Boyle failed, or otherwise neglected, to
9 contact my immediate family members who were available and willing to provide
10 mitigating testimony to assist the Court in fashioning an appropriate sentence.
11 For instance my aunt, Patti Kincheloe, was available and willing to testify to
12 harsh upbringing I experienced as a child. Ms. Kincheloe was also aware of my
13 diminished mental capacity and could have provided insight into the numerous
14 head injuries I had sustained over the years. But for counsel's inadvertence,
15 the Court would have possessed a greater understanding of my diminished mental
16 condition. Such information would likely have inured me a more lenient
17 sentence, one involving meaningful mental health treatment rather than a life
18 sentence.

19 Similarly, Mr. Boyle neglected to contact my sister, Dawn Peer, who was
20 also available and willing to testify on my behalf in favor of a blended
21 sentence to include meaningful substance abuse and mental health treatment.
22 But for counsel's omissions, the Court's sentencing options would have been
23 vastly different.

24 Prior to sentencing I asked Mr. Boyle to contact both my sister (Ms.
25

1 Peer) and my aunt (Ms. Kincheloe) for purposes of calling them to testify on
2 my behalf. Mr. Boyle accepted from me their contact information and expressed
3 his willingness to present family and friend's in support for leniency by the
4 sentencing Court. Trial counsel failed to contact my family and friends and
5 neglected to present such mitigating testimony for the Court's sentencing
6 consideration.

7 Moreover, following the imposition of sentence, I filed a Rule 35 motion
8 seeking a sentence reduction. The Court appointed counsel, Mr. Ransom Bailey,
9 Deputy Ada County Public Defender, to represent my interests in the Rule 35
10 proceeding. I provided Mr. Bailey the aforementioned and asked counsel to
11 obtain my medical records, to contact my family and friends, to amend and
12 re-work my pro se rule 35 motion, and lastly, to request the Court to conduct
13 a hearing where all of this mitigating information could be presented in
14 support of sentence relief.

15 Mr. Bailey failed or otherwise neglected to perform any of my reasonable
16 requests for assistance. Consequently, the District Court dismissed my Rule
17 35 motion---absent a full and fair presentation of the facts in support of
18 sentence re-consideration.

19 Thereafter, the trial Court appointed appellate counsel, Ms. Diane
20 Walker of the Idaho State Appellate Public Defender's Office. Although Ms.
21 Walker did argue certain issues involving the improper dismissal of the Rule
22 35 motion, appellate counsel refused to present my claim involving
23 prosecutorial misconduct, wherein Ms. Armstrong-Akamatsu misrepresented to the
24 Court (and to defense counsel, Mr. Boyle) the State would limit their
25 presentation of audio recordings of damaging jail phone calls, State's Exhibit

1 number nine (9), together with testimony of investigator Phil Tuttle.
2 Prosecutor misconduct is a serious matter. Claims of this type would have
3 invoked my substantive right to receive a fair trial, something the ambush
4 tactics of Ms. Armstrong infringed upon when the State presented what was
5 purported to be "rebuttal testimony" was instead presented during the State's
6 case in chief. In sum, the prosecutor's misconduct was a substantially more
7 robust argument than those presented by appellate counsel Ms. Walker.
8 Government appointed counsel, who operate under an impermissible and outright
9 conflict of interest, must not be allowed to waive my substantive due process
10 claims.

11 I have made extensive efforts to secure, and be granted access to the
12 file records of my previous attorney's. Each of my reasonable requests were
13 ignored by my former attorney's of record. See Exhibit(s) 1 and 2, attached
14 hereto and by this reference are incorporated herein.

15 There exists additional information that is material to my
16 post-conviction claims, and despite my endeavors to obtain such information, I
17 have been denied an opportunity to present such documentation to the Court.
18 Accordingly, I will need the assistance of conflict counsel, together with the
19 compulsory power of the Court to ensure the release of evidence in this case
20 occurs.

21 Further sayeth your Affiant naught.

22 //
23 //
24 //

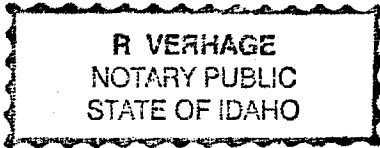
25

DATED this 3rd day March, 2015.

Terry L. Ash
Terry L. Ash

SUBSCRIBED and SWORN to before me, the undersigned Notary Public in and for said State, this 3rd day of March, 2015.

*** Seal ***



R
Notary Public for Idaho
Residing @ Canyon County
Commission expires: 5 / 13 / 2019.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2015, I caused a true and correct copy of the foregoing to be served upon the following persons:

JAN M. BENNETTS
Ada County Prosecuting Attorney
200 W. Front St, Rm. 3191
Boise, ID 83702-7300

* By depositing a copy of the same within the institutional mail system, U.S. Mail, first class postage prepaid.

Terry L. Ash
Terry L. Ash

EXHIBIT - 1

Ash v. State,
Case No. CV-PC-2015-2064

000048

Terry L. Ash
36025 ISCC / G 212 A
P.O. Box 70010
Boise, Idaho
83707

October 30, 2014

BOYLE LAW OFFICE
Brian L. Boyle
Attorney at Law
410 S. Orchard, Suite 184
Boise, ID. 83705

RE: State v. Ash, Ada Co. Case No. CR-FE-2011-13777

Dear Mr. Boyle,

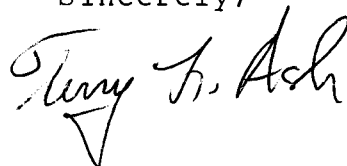
I write to request that your office provide me a copy of all case file documentation in the above referenced case. As I plan and prepare a post-conviction filing — for reasons I believe amount to a manifest injustice, a thorough review of the entire file is necessary.

In the event certain portions of the file are under seal of the court (PSI), simply notify me which document(s) you retain and I will then seek an order of the court permitting in-camera review.

Please notify me of any copy fees involved and I will be happy to forward payment thereof.

Thank you in advance for your time and assistance as I look forward to hearing from you.

Sincerely,



c.file
TLA/pt.

000049

Terry L. Ash
36025 ISCC / G 212 A
OFFENDER NAME 70010
OFFENDER NO. 83707 HOUSING UNIT
IDAHO DEPARTMENT OF CORRECTION
INSTITUTION
ADDRESS P.O. BOX
CITY STATE ZIP
OFFICE OF CORRECTION

G 22

BOISE ID 837

31 OCT 2014 PM 2 L



FOREVER USA

Bank Swallow

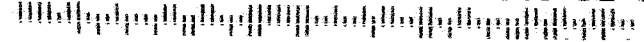
BOYLE LAW OFFICE
Brian L. Boyle
Attorney at Law
410 S. Orchard, Suite 184
Boise, Idaho 83705

NIXIE 841 6E 1009 0111/11/14

RETURN TO SENDER
NOT DELIVERABLE AS ADDRESSED
UNABLE TO FORWARD

83705-1233
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BC: 83707011010 *1436-18069-31-39

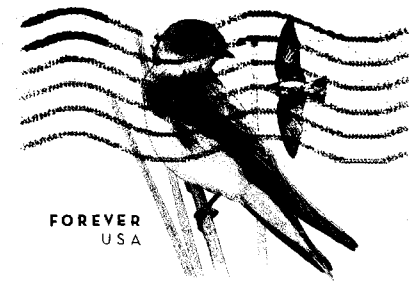


Terry L. Ash
36025 ISCC / G 21 A
P.O. Box 70010
Boise ID 83707 HOUSING UNIT
IDAHO DEPARTMENT OF CORRECTION
Institution
Address P.O. Box
City State Zip
INMATE CORRESPONDENCE

BOISE ID 837

24 NOV 2014 PM 2 L

G.G



FOREVER USA

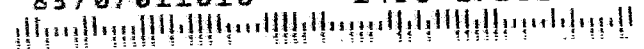
Bank Swallow

BOYLE LAW OFFICE
Brian L. Boyle
Attorney at Law
1999 Eagles Homestead Dr.
Ammon, Idaho 83406

NIXIE 841 6E 1009 0112/03/14

RETURN TO SENDER
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UNABLE TO FORWARD

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Terry L. Ash
36025 ISCC / G 212 A
P.O. Box 70010
Boise, ID. 83707
DEPARTMENT OF CORRECTION
P.O. Box
State Zip
CORRESPONDENCE

G-212-B



BOYLE LAW OFFICE
Brian L. Boyle
Attorney at Law
903 E. Winding Creek Dr., Suite 150
Eagle, Idaho 83616

X 441 NEF 1009A1300001/12/15
FORWARD TIME EXP RTN TO SEND
LAW OFFICE OF BRIAN L BOYLE PLLC
410 S ORCHARD ST STE 184
BOISE ID 83705-1293

83616700110

RETURN TO SENDER
|||

EXHIBIT - 2

Ash v. State

Case No. CV-PC-2015-2064

000052

2011-12 Fall Semester

Name : Ash Terry Lee
 ID Number : 310940
 Social Security # : [REDACTED]
 Address : [REDACTED]

Division : Lower Division Work
 Degree :
 Class : Freshman
 Advisor :


Major 1 : 6230A Applied Accounting - AAS
 Major 2 :
 Major 3 :
 Minor 1 :
 Minor 2 :
 Minor 3 :

Course:	Professor	Days	Beg Date	Beg Time	End Date	End Time	Loc / Bldg / Room	Status	Hours
BSTC 133 W01	Business English Darcy J Holcomb	TR	08/22/2011	09:30 AM	12/15/2011	10:45 AM	CWI CWADA 1206	Current	3.00
BSTC 138 W02	Applied Business Math Jenny L Miller	MWF	08/22/2011	02:30 PM	12/15/2011	03:45 PM	CWI CWADA 1204	Current	3.00
BSTC 162 W03	Business Computer Applications I Lynda L Benson	MW	08/22/2011	11:00 AM	12/15/2011	12:15 PM	CWI CWADA 1207	Current	3.00
BSTC 199 W05	Basic Keyboarding Jenny L Miller	MW	08/22/2011	01:00 PM	09/23/2011	02:15 PM	CWI CWADA 1205	Current	1.00
BSTC 199 W08	Document Formatting Jenny L Miller	MW	09/26/2011	01:00 PM	12/15/2011	02:15 PM	CWI CWADA 1205	Current	2.00
MKTC 121 W02	Business Concepts Robert Alan Walker	TR	08/22/2011	08:00 AM	12/15/2011	09:15 AM	CWI CWADA 1208	Current	3.00

Total Hours: 15.00


Received a grant per diem - 2yrs. for housing. Became president of this Clean-n-Sober House w/14 Vets
 2011 Spring Semester @ BSU, 12 Credits, 3.86 GPA
 Had Patent Research done, United Patent, Graded @ 3.6 on 1-5 scale
 2011 Summer Seession @ CWI, 6 credits, 3.5 GPA, Wrote Business Plan,
 Registered Business w/ Secretary of State, Insured Business - \$1,000,000, Limited Liability
 Fall Semester @ CWI, Student Schedule above. Awarded (2) Scholarships
 Developing the "It's About Time" concept(s). Target audience: Veterans, Alcoholics, Addicts, & Ex-felons: Housing, Job Development, & Living in the solution

Logistics Cleaning
 W A Handyman Twist



Terry L. Ash
 Owner

1042 N. Clover
 Boise, ID 83703.
 208-389-8520
 [fax]
 trash77@gmail.com



Students are responsible for payment of their tuition. See www.csi.edu/tuition for tuition cost and due dates. Community Ed and short term training fees due upon registration.

Days: M=Monday T=Tuesday W=Wednesday R=Thursday F=Friday S=Saturday U=Sunday

MAR - 6 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Terry L. Ash
Full Name/Prisoner Name
IDOC No. 36025
ICC G-212A
P.O. Box 70010
Boise, ID 83707
Complete Mailing Address

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

Terry L. Ash)
)
Plaintiff/Petitioner,)
)
vs.)
)
STATE OF IDAHO)
)
Defendant/Respondent.)

Case No. CV-PC-2015-2064

AFFIDAVIT OF

Patti Kinchelol

STATE OF IDAHO)
) ss
County of Ada)

Patti Kinchelol after first being duly sworn upon his/her oath, deposes and says as follows: Terry was born to a 14 year old mother & 16 year old father, so his life was bad from birth. He wasn't treated well from birth, and was nine years old when he started to sniff gas, glue and anything he could do to get high, later he started drinking so he could

AFFIDAVIT OF Patti Kinchelol pg. 1
Revised 10/24/05

MAR 10 2015

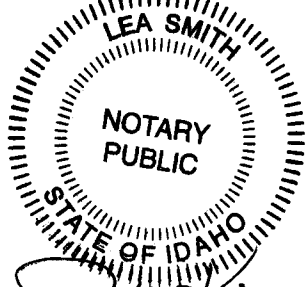
be accepted by the adults, as his parents were drinking very heavy by then. He had lots of discipline problems, and was sent to the military. He was discharged because of his drinking and behavior problems. He spent several years living in Seattle in a program for alcoholics, where they gave them a check and they drank until it was gone. He was in several accidents because of his drinking over the years. He was at a girlfriend's house and got drunk and dropped a cigarette, caught the house on fire and almost died. He is very depressed, and has been all his life. He has had a very hard life, and has made alcohol a huge part of it which has caused many issues for him all his life.

Further your affiant sayeth naught.

DATED This 9th day of July, 2014.

Patti Kincheloe
Signature

SUBSCRIBED AND SWORN To before me this 9th day of July, 2014.



Lea Smith
Notary Public for Idaho
Commission expires: 7/21/16

AFFIDAVIT OF
Revised 10/24/05

Patti Kincheloe - pg. 2

MAR - 6 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Terry L. Ash
Full Name/Prisoner Name
IDOC No. 36025
ICC G-212A
P.O. Box 70010
Boise, ID 83707
Complete Mailing Address

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

Terry L. Ash)
)
Plaintiff/Petitioner,)
)
vs.)
)
STATE OF IDAHO)
)
Defendant/Respondent.)

Case No. CV-PC-2015-2064

AFFIDAVIT OF

Dawn Anne Peerm

STATE OF IDAHO)
) ss
County of Ada)

Dawn Anne Peerm, after first being duly sworn upon his/her oath, deposes and says as follows: Terry has had issues since he was 9 yrs. old. He was in trouble a lot. (some started because he wanted to be just like his dad. (Not a good role model)) He started sniffing glue and gas and drinking alcohol. He was in so many car accidents and bike accidents (etc.) He was sent to St. Anthony's at a

AFFIDAVIT OF Dawn Anne Peerm - pg. 1
Revised 10/24/05

SM

young age, he needed help then and never got it.

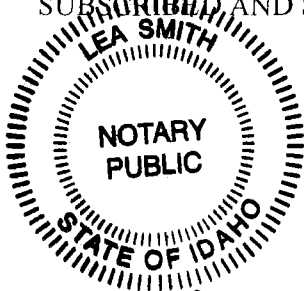
Terry was in his ex-girls house (drunk). He was smoking and dropped his cigarette and started a fire. Not sure of the exact date - Sept/Oct - 1993/1994. When he was pulled out he was dead. They ~~resuscitated~~ ^{resuscitated} and took him to the hospital. He was in I.C.U. (St. Josephs Hospital/Lewiston Idaho) for 16 days. They found out he was trying to kill himself so from there he was sent to the 5th floor (mental health) We were told that he could have brain damage and that depression would most likely be an issue. He was very depressed when he started drinking the day of the fire and suffered with it a lot. He never received the help he needed and has suffered because of it.

Further your affiant sayeth naught.

DATED This 9 day of July, 2014.

Dawn Anne Beck
Signature

SUBSCRIBED AND SWORN To before me this 9th day of July, 2014.



Lea Smith
Notary Public for Idaho
Commission expires: 7/21/16

AFFIDAVIT OF Dawn Anne Beck pg. 2
Revised 10/24/05

MAR - 6 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

Terry L. Ash
Full Name/Prisoner Name
IDOC No. 36025
I SCC G-212A
P.O. Box 70010
Boise, ID 83707
Complete Mailing Address

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

TERRY L. ASH)
)
Plaintiff/Petitioner,)
)
vs.)
)
STATE OF IDAHO)
)
Defendant/Respondent.)

Case No. CV-PC-2015-2064

AFFIDAVIT OF
DAVID J. SHUFFMAN

STATE OF IDAHO)
) ss
County of Ada)

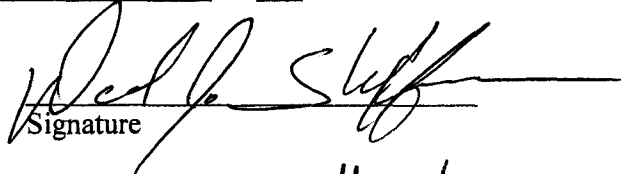
I, David J. Shuffman, after first being duly sworn upon his/her oath, deposes
and says as follows: I MET TERRY LEE ASH IN THE
SPRING OF 2011. THIS WAS THROUGH
THE VA OF BOISE & FRIENDS LIVING
@ THE CLAWER HOUSE, PART OF VA HOUSING.
TERRY DID MANY REMODELING PROJECTS
(OVER)

AFFIDAVIT OF DAVID J. SHUFFMAN - pg. 1
Revised 10/24/05

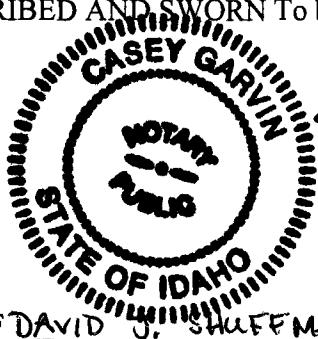
AROUND MY HOME - 301 HANAN DR., BOISE,
IDAHO, 83705. ONE OF THE FIRST WAS
PAINTING & PREPING HOME. FOR MUCH OF
THE PAINTING I WAS OUT OF TOWN & THE
NEIGHBORS SAID HE WAS "ALWAYS WORKING"
HARD! I'VE HAD THE EXTERIOR DONE PROFESSIONALLY
TWICE AND HIS (TERRY'S) JOB BEST. HE ALSO
HELPED WITH FLOORING, ROOFING, RE-DOING
A SHED AND CAR PORT, ALONG WITH A
LOT OF YARD WORK. HE WAS ALWAYS VERY
PROFESSIONAL & FRUGAL WITH MY MONEY AS
HE GOT WHATEVER HE NEEDED TO A JOB.
TERRY WAS VERY HONEST & THOUGHTFUL
AROUND THE HOME & MY SERVICE DOG.


Further your affiant sayeth naught.

DATED This 19 day of NOVEMBER, 2014.


Signature

SUBSCRIBED AND SWORN To before me this 19 day of November, 2014.




Notary Public for Idaho
Commission expires: Apr. 14, 2020

Judge Owen
Juga
3/10/15
LH

** INBOUND NOTIFICATION : FAX RECEIVED SUCCESSFULLY **

TIME RECEIVED

March 9, 2015 4:46:28 PM MDT

REMOTE CSID

208 345 8945

DURATION

138

PAGES

4

STATUS

Received

03/09/2015 MON 16:44 FAX 208 345 8945 EKTU ---- ada clerk of court

A.M.

208/004

MAR 09 2015

CHRISTOPHER D. RICH, Clerk
By KATRINA HOLDEN
DEPUTY

ORIGINAL

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

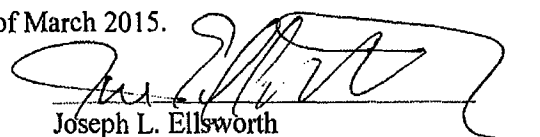
CONFLICT PUBLIC DEFENDER, ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,)	
)	
Petitioner,	)	Case No.: CV-PC-2015-2064
)	
vs.	)	MOTION FOR RELEASE
	)	OF PRESENTENCE
STATE OF IDAHO,	)	INVESTIGATION REPORT
)	
Respondent.)	
)	

COMES NOW the above-named Petitioner, by and through counsel of record, pursuant to Rule 5.2, I.R.C.P., and hereby moves this Court for its Order that a copy of the Presentence Investigation Report from the underlying criminal case, case number CR FE 2011 13777, the Honorable Patrick H. Owen presiding, be provided to counsel of record in the above-entitled case. Such copy of the Presentence Investigation Report is necessary to the investigation into the claims of the Petitioner above-listed, and shall be used for the preparation of an Amended Petition in the above-entitled case. Since Petitioner is indigent, it is requested said copy be prepared at State expense.

DATED this 9th day of March 2015.


Joseph L. Ellsworth
Attorney for Petitioner

LH

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March 2015, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

US Mail
 Hand Delivery
 Facsimile: 287-7709

Megan Niece
Megan Niece, Legal Assistant

Civil files?
over-Engl

3/12 RECEIVED
MAR-9 2015

Terry L. Ash
Ada County Clerk
ISCC / G 212 B
P.O. Box 70010
Boise, ID 83707

NO. _____ FILED _____
A.M. _____ P.M. 2:17

MAR 09 2015

CHRISTOPHER D. RICH, Clerk
By SEAN MURPHY
DEPUTY

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

TERRY LEE ASH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-2064

MOTION TO CORRECT CLERICAL ERRORS

COMES NOW, Terry L. Ash, the petitioner in the above-entitled cause, and pursuant to Rule 60(a) of the Idaho Rules of Civil Procedure, does hereby provide notice of clerical errors previously set forth within the AFFIDAVIT OF FACTS IN SUPPORT OF POST-CONVICTION RELIEF. Accordingly, the petitioner respectfully moves the Court to correct the record of the following scrivener's error(s):

Affidavit of Facts in Support of Post-Conviction Relief, dated March 3, 2015, under signature of the petitioner;

Pg. 7, Ln. 6, should reflect "I was under the care of a physician in early September, 2011";

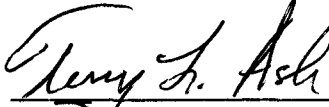
Pg. 8, Ls. 10-11, should reflect "the car had been purchased on or about August 30, 2011."

SM

Pg. 8, Ls. 17-18, should reflect "the events of
September 4, 2011, ..."

Therefore, and for good cause appearing, the petitioner asks the Court
to correct the aforementioned clerical error(s).

DATED this 5th day of March, 2015.



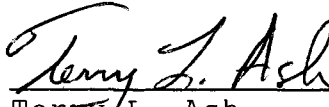
Terry L. Ash

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2015, I caused a true
and correct copy of the foregoing to be served upon the following person:

JAN M. BENNETTS
Ada County Prosecuting Attorney
200 W. Front St., Rm. 3191
Boise, ID 83702-7300

- * By depositing a copy of the same within the institutional
mail system, U.S. Mail, first class postage prepaid.



Terry L. Ash

MAR 16 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

TERRY LEE ASH
Petitioner,

vs.

STATE OF IDAHO,
Respondant.

Case No. CV PC 15-02064

ORDER GOVERNING
PROCEEDINGS AND SETTING TRIAL

Upon a scheduling conference held pursuant to notice, and the Court being advised, it is hereby ordered that:

- 1) The one (1) day court trial of this action shall commence before this Court on **December 4, 2015, at 9:00 a.m.**
- 2) Notice is hereby given, pursuant to Idaho Rules of Civil Procedure 40(d)(1)(G) that an alternate judge may be assigned to preside over the trial of this case. The following is a list of potential alternate judges:

- | | |
|----------------------------|--------------------------|
| Hon. G.D. Carey | Hon. James C Morfitt |
| Hon. Gregory M. Culet | Hon. Gerald Schroeder |
| Hon. Dennis Goff | Hon. Kathryn A. Sticklen |
| Hon. Daniel C Hurlbutt, Jr | Hon. Linda Trout |
| Hon. James Judd | Hon. Darla Williamson |
| Hon. Michael McLaughlin | Hon. W.H. Woodland |
| Hon. Duff McKee | |

Any sitting Fourth District Judge

Unless a party has previously exercised their right to disqualification without cause under Rule 40(d)(1), each party shall have the right to file one (1) motion for disqualification without cause as to any alternate judge not later than ten (10) days after service of this written notice listing the alternate judge.

- 3) A pretrial conference is hereby set for **November 18, 2015, at 11:00 a.m.**

- a) All parties must be represented at the pretrial conference. Counsel must be the handling attorney, or be fully familiar with the case and have authority to bind the client and law firm to all matters within I.R.C.P 16.
- b) In addition to the requirements of I.R.C.P. 16(c), at the pretrial conference, each party shall be required to serve on all other parties and file with the Court a complete list of exhibits and witnesses in accordance with I.R.C.P. 16(h).
- 4) Amended petition to be filed, shall be filed by May 15, 2015.
- 5) Answer to ~~amended~~ petition shall be filed by June 15, 2015.
- 6) All exhibits must be submitted at the time of trial. All exhibits shall be pre-marked, **including the case number.**

DATED THIS 13 day of March, 2015.



PATRICK H. OWEN
District Judge

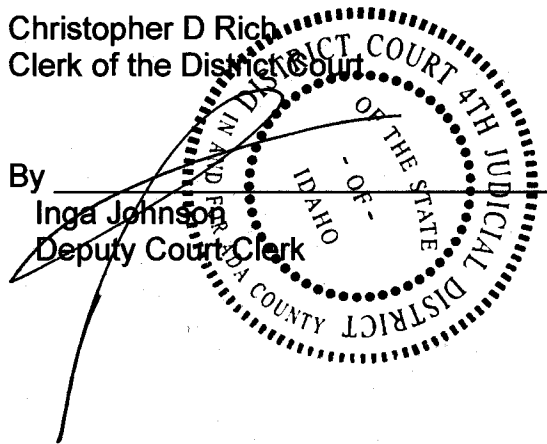
CERTIFICATE OF MAILING

I hereby certify that on this 16 day of March 2015, I mailed (served) a true and correct copy of the within instrument to:

Joe Ellsworth Attorney at Law 1031 E Park Blvd Boise Id 83712	ADA COUNTY PROSECUTING ATTORNEY INTERDEPARTMENTAL MAIL
--	---

Christopher D Rich
Clerk of the District Court

By _____
Inga Johnson
Deputy Court Clerk



ORIGINAL

NO. _____ FILED _____
A.M. 9:05 P.M. _____

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

MAR 16 2015

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

CONFLICT PUBLIC DEFENDER, ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

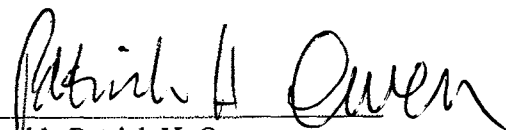
Case No.: CV-PC-2015-2064

**ORDER FOR RELEASE OF
PRESENTENCE
INVESTIGATION REPORT**

The above-entitled matter having come before the Court, and good cause appearing therefore;

THE COURT HEREBY ORDERS AND THIS DOES ORDER that a copy of the Presentence Investigation Report from the underlying criminal case, case number CR FE 2011 13777 , the Honorable Patrick H. Owen presiding, be provided to counsel of record, Joseph L. Ellsworth, in the above-entitled case. Upon completion of the Post-Conviction case, said copy of the Presentence Investigation Report will be returned to the Court.

DATED this 11 day of March 2015.



Honorable Patrick H. Owen
Fourth Judicial District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of March 2015, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

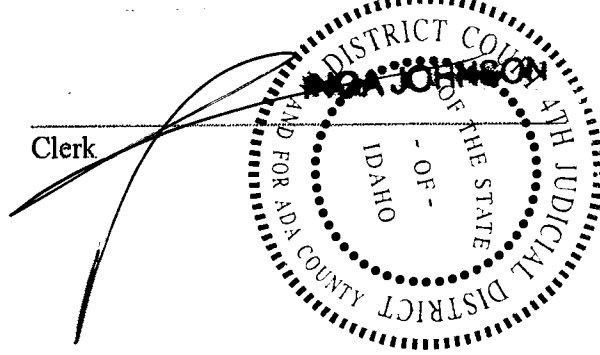
Interdepartmental Mail
 Hand Delivery
 Facsimile: 287-7709

Joseph L. Ellsworth
Ellsworth, Kallas & DeFranco
1031 E. Park Blvd.
Boise, Idaho 83712

US Mail
 Hand Delivery
 Facsimile: 345-8945

CHRISTOPHER D. RICH

Clerk



TIME RECEIVED

May 15, 2015 1:39:49 PM MDT

REMOTE CSID

208 345 8945

DURATION

75

PAGES

2

STATUS

Received

05/15/2015 FRI 13:38 FAX 208 345 8945 BKTD --- ada clerk of court

001/002

NO. _____
A.M. _____ FILED PM 3:49

MAY 15 2015

CHRISTOPHER D. RICH, Clerk
By KYLE MEREDITH
DEPUTY

JOSEPH L. ELLSWORTH
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Phone: (208) 336-1843
Fax: (208) 345-8945
Idaho State Bar #3702

Attorney for Petitioner

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

TERRY ASH,)	
)	
Petitioner,	)	Case No: CV PC 1502064
)	
vs.)	
	)	MOTION TO ENLARGE
	)	TIME TO AMEND PLEADINGS
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Comes Not Petitioner, by and through counsel, Joseph L. Ellsworth, and hereby moves the court for an order enlarging time for an additional 30 (thirty) days to file an amended petition in the above-entitled matter.

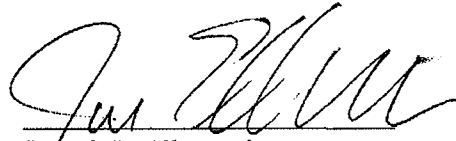
Counsel for Petitioner moves on the basis that the investigation into the matter is continuing in an attempt to locate potential witnesses or evidence identified in the pro se petition now on file.

ORIGINAL

Counsel for the Petitioner has worked diligently to complete this task by today's date, but additional time is necessary to complete the field investigation.

Counsel believes that 30 (thirty days) is sufficient to complete the investigation and that there will be no prejudice to the State to the Idaho in the matter.

Dated this 15th day of May 2015.


Joseph L. Ellsworth

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2015 I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

Terry Ash, Petitioner

- U.S. Mail
- Facsimile
- Hand Delivery


Legal Assistant - Stacie Krahn

TIME RECEIVED

May 15, 2015 1:42:55 PM MDT

REMOTE CSID

208 345 8945

DURATION

70

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STATUS

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05/15/2015 FRI 13:41 FAX 208 345 8945 BKTD --- ada clerk of court

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MAY 15 2015
ADA COUNTY CLERK

NO. _____ FILED
A.M. 8:40 P.M. _____

MAY 19 2015

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

JOSEPH L. ELLSWORTH
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Phone: (208) 336-1843
Fax: (208) 345-8945
Idaho State Bar #3702

Attorney for Petitioner

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

TERRY ASH,)	
)	
Petitioner,	)	Case No: CV PC 1502064
)	
vs.)	
	)	ORDER ENLARGING TIME
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Upon motion of the Petitioner, and for good cause shown, the motion to enlarge time is granted. The Petitioner shall file his amended petition or before June 15, 2015. The State shall file a responsive pleading on or before July 15, 2015. All other court dates shall remain as previously scheduled by the court.

Dated this 18 day of May 2015.

Patrick H. Owen
Honorable Judge Patrick Owen

ORDER ENLARGING TIME

ORIGINAL

000071

8

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of May, 2015 I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

Joseph L. Ellsworth
1031 E. Park Blvd.
Boise, Idaho 83712

- U.S. Mail
- Facsimile
- Hand Delivery

CHRISTOPHER D. RICH
 INGA JOHNSON
 Clerk of Court

OWN
7mg
ng
6-18-15

TIME RECEIVED

June 17, 2015 3:35:13 PM MDT

REMOTE CSID

208 345 8945

DURATION

131

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4

STATUS

Received

06/17/2015 WED 15:32 FAX 208 345 8945 BKTD --- ada clerk of court

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ORIGINAL

NO. _____
A.M. _____ FILED P.M. 440

JUN 17 2015

CHRISTOPHER D. RICH, Clerk
By KATRINA HOLDEN
DEPUTY

JOSEPH L. ELLSWORTH
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Phone: (208) 336-1843
Fax: (208) 345-8945
Idaho State Bar #3702

Attorney for Petitioner

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

TERRY ASH,)	
)	
Petitioner,	)	Case No: CV PC 1502064
)	
vs.	)	SECOND
	)	MOTION TO ENLARGE
	)	TIME TO AMEND PLEADINGS
STATE OF IDAHO,)	
)	
Respondent.)	
)	

Comes Not Petitioner, by and through counsel, Joseph L. Ellsworth, and hereby moves the court for an order enlarging time for a short extension of time to file an amended petition in the above-entitled matter.


Counsel for Petitioner moves on the basis that the investigation attempting to locate potential witnesses and/or evidence took longer than anticipated due to the age of the case. Petitioner's counsel has now exhausted any reasonable efforts to locate

KA

witnesses but needs a short extension to complete the review of remaining claims for a possible amendment.

Counsel would ask leave to file additional pleadings or motions on or before July 1, 2015.

Dated this 17th day of June, 2015.


Joseph L. Ellsworth

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2015 I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

Terry Ash, Petitioner

- U.S. Mail
- Facsimile
- Hand Delivery


Legal Assistant - Stacie Krahn

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

ATTORNEY FOR PETITIONER

NO. _____ FILED _____
A.M. 9:10 P.M. _____

JUN 23 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

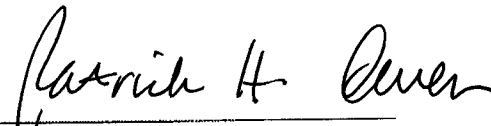
TERRY ASH,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)

Case No.: CV PC 1502064

**ORDER TO ENLARGE TIME
TO AMEND PLEADINGS**

Upon motion of the Petitioner, and for good cause shown, the motion to enlarge time is granted. The petitioner shall file amended petition on or before July 1, 2015. The State shall file a responsive pleading within thirty (30) days thereafter. No further extensions shall be granted without good cause.

DATED this 23 day of June, 2015.



Honorable Judge Patrick Owen

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of June, 2015, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

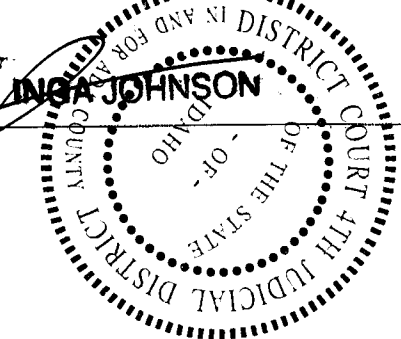
Interdepartmental Mail
 Hand Delivery
 Facsimile: 287-7709

Joseph L. Ellsworth
Ellsworth, Kallas, Talboy & DeFranco
1031 E. Park Blvd.
Boise, Idaho 83712

US Mail
 Hand Delivery
 Facsimile: 345-8945

CHRISTOPHER D. RICH

[Handwritten signature]
Clerk



Owen
7-2-15
vs
7-2-15

TIME RECEIVED

June 30, 2015 5:38:36 PM MDT

REMOTE CSID

208 345 8945

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71

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06/30/2015 TUE 17:37 FAX 208 345 8945 BKTD --- ada clerk of court

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NO. 114 FILED
A.M. PM

JUL 01 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

Attorney for Petitioner

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

TERRY LEE ASH,)	
	)	Case No. CV PC 2015 2064
Petitioner,)	
	)	NOTICE OF INTENT
	)	TO PROCEED ON PRO SE
STATE OF IDAHO,	)	PETITION
)	
Respondent.)	
_____)	

COMES NOW, JOSEPH L. ELLSWORTH, counsel for Petitioner TERRY LEE ASH, and hereby informs the court of notice of intent to proceed on the original pro se petition now on file herein. After investigation, Petitioner's counsel is unable to file any amended pleading on behalf of the Petitioner.

DATED this 30th day of June, 2015.


JOSEPH L. ELLSWORTH

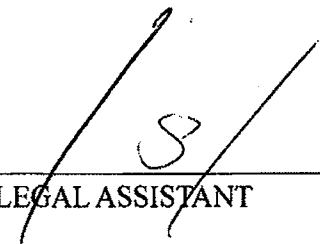
SN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of June, 2015 a true and correct copy of the within and foregoing document was served by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709



LEGAL ASSISTANT

Owen
vs
7-10

TIME RECEIVED

July 9, 2015 1:32:31 PM MDT

REMOTE CSID

208 345 8945

DURATION

133

PAGES

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07/09/2015 THU 13:30 FAX 208 345 8945 EXT D --- ada clerk of court

001/004

NO. _____
A.M. _____ FILED PM UPB

JUL 09 2015

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JOSEPH L. ELLSWORTH
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Phone: (208) 336-1843
Fax: (208) 345-8945
Idaho State Bar #3702

Attorney for Petitioner

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

TERRY ASH,)	
)	
Petitioner,	)	Case No: CV PC 1502064
)	
vs.)	
	)	MOTION FOR PREPARATION
	)	OF ADDITIONAL TRANSCRIPTS
STATE OF IDAHO,)	
)	
Respondent.)	
)	

Comes Now Petitioner, by and through counsel, Joseph L. Ellsworth, and hereby moves the court for an order for transcripts of testimony from the 1st trial (declared a mistrial), said trial held March 12, 2012 and for transcripts of post trial motion hearings held March 14, 21, 2012.


The basis for the motion is that the Petitioner's trial attorney claimed the mistrial was based upon prosecutorial misconduct. The matter was briefed and argued but current counsel for Petitioner is unable to review the matter fully without a transcript. Counsel

WJ

seeks only that portion of the trial transcript from March 12, relevant to the mistrial (objection, rulings) and the post trial hearings.

Counsel has previously completed review of the file and notified the court of the status. This issue, however, remains outstanding, due to the lack of prepared transcripts. Transcript preparation is necessary to complete resolution of this case.

Dated this 9th day of July, 2015.


Joseph L. Ellsworth

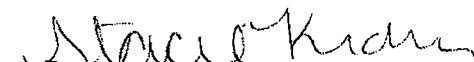
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2015 I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

Terry Ash, Petitioner

- U.S. Mail
- Facsimile
- Hand Delivery


Legal Assistant - Stacie Krahn

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ing
DRB
7-17-15

TIME RECEIVED July 16, 2015 3:37:27 PM MDT REMOTE CSID 208 345 8945 DURATION 42 PAGES 2 STATUS Received

07/16/2015 THU 15:36 FAX 208 345 8945 EXTD --- ada clerk of court 001/002

ORIGINAL

NQ. _____ FILED _____
A.M. _____ P.M. _____

JUL 16 2015

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS, TALBOY & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,)
)
Petitioner,) Case No.: CV-PC-2015-2064
)
vs.) NOTICE OF HEARING
)
STATE OF IDAHO,)
)
Respondent.)

TO: ADA COUNTY PROSECUTING ATTORNEY

PLEASE TAKE NOTICE that the Petitioner, by and through attorney of record,
will call on for hearing the Motion for Additional Transcripts, on **Thursday, July 30,**
2015 at 2:30 p.m., at the Ada County Courthouse, 200 West Front Street, Boise, Idaho,
in front of the Honorable Judge Patrick H. Owen.

DATED this 16th day of July, 2015.


Joseph L. Ellsworth
Attorney for Petitioner

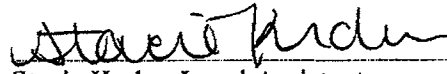
SV

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2015, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

US Mail
 Hand Delivery
 Facsimile: 287-7709



Stacie Krahn, Legal Assistant

Time	Speaker	Note
<u>01:28:52 PM</u>		Terry Ash v State CVPC15-02064 Motion for Transcripts
<u>01:29:29 PM</u>	Counsel	Ellsworth/ Haws
<u>02:30:36 PM</u>	Ct	Calls case and reviews
<u>02:31:04 PM</u>	Ct	Q. Mr. Ellsworth on specifics of Motion
<u>02:32:50 PM</u>	Court	and counsel discuss specifics
<u>02:43:21 PM</u>	Ellsworth	Asking for transcript from the 3/13/2012?
<u>02:45:31 PM</u>	Ellsworth	Asks for copies of Affid of Howe from that time frame from criminal file, and "boyle's" pleading
<u>02:46:12 PM</u>	Ct	Can get copies of anything from file
<u>02:46:25 PM</u>		End

Over
Filed
1/5
7-10-15

NO. _____
A.M. _____ FILED P.M. 3:00

JUL 30 2015

CHRISTOPHER D. RICH, Clerk
By INGA JOHNSON
DEPUTY

JOSEPH L. ELLSWORTH
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Phone: (208) 336-1843
Fax: (208) 345-8945
Idaho State Bar #3702

Attorney for Petitioner

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

TERRY ASH,)	
)	
Petitioner,	)	Case No: CV PC 1502064
)	
vs.)	
	)	ORDER FOR PREPARATION
	)	OF ADDITIONAL TRANSCRIPTS
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Upon Motion of the Petitioner, and for good cause shown, the court orders that transcripts of testimony from the first trial (declared a mistrial), held March 12, 2012 and post trial motion hearing^{13,} held March 14, 2012 be prepared at county expense. The reporter is instructed only to prepare that portion of the trial transcript relevant to the mistrial (testimony, objection and rulings) and the post trial motion hearing of March 14, 21, 2012.

Dated this 30 day of July, 2015
Fabrice H. Owen
District Judge

ORDER FOR TRANSCRIPTS -1

cc: PA, Δ Ellsworth, Redlich

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

NO _____
FILED _____
A.M. _____ P.M. 4:55

OCT 08 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,)	
	)	MOTION FOR LEAVE TO AMEND
vs.	)	PETITION FOR POST-CONVICTION
	)	RELIEF
STATE OF IDAHO,)	
)	
Respondent.)	
)	

COMES NOW the Petitioner, Terry Lee Ash, by and through his attorney of record, Joseph L. Ellsworth, of the firm Ellsworth, Kallas & DeFranco, PLLC, and hereby submits this Motion for Leave to Amend the Petitioner's Petition for Post-Conviction Relief pursuant to I.C. §§ 19-4906 and 4908, and I.R.C.P. 15(a). As discussed fully in the accompanying Memorandum in Support, this Court should grant leave to amend the pro se Petition in the interest of justice.

Petitioner moves to amend by adding the claims included in the Proposed Amended Petition attached hereto.

ORIGINAL

DATED this 8th day of October, 2015.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.



Joseph L. Ellsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of October, 2015, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street, Suite 3191
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709



Stacie Krahn, Legal Assistant

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,	)	PROPOSED
	)	AMENDED PETITION FOR POST-
vs.	)	CONVICTION RELIEF
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

The Petitioner's Verified Petition for Post-Conviction Relief ("Petition"), filed with this Court on February 9, 2015, is incorporated herein by this reference as though set forth in full. By this Amended Petition ("Amendment"), the Petitioner adds the following claims to said Verified Petition:

VII. SIXTH CAUSE OF ACTION – INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner's Trial Counsel was ineffective in allowing a second trial to go forward without objection, or motion to dismiss the second prosecution upon grounds of double jeopardy under Amendment V of the United States Constitution and Article I § 13 of the Idaho Constitution.

In the first trial, the prosecutor deliberately elicited information from a witness that commented on Petitioner's invocation of his right to remain silent during while in custody. The prosecutor admitted in her affidavit to the court that this was intentional strategy to box in the Petitioner's testimony, even though the Petitioner had not made a decision on whether to testify at this trial. This testimony was impermissible under the U.S. and Idaho Constitutions. The court properly granted a mistrial on motion of the defense.

Although a motion for mistrial was filed, and the court ruled that the conduct of the prosecutor was improper, counsel for Petitioner failed to file any motion to dismiss a subsequent prosecution for the same offense. Petitioner was tried and convicted in the second trial. No appeal or relief has ever been sought to address this issue.

The trial record shows that the Petitioner was re-tried for the same alleged offenses and convicted on June 12, 2012.

At no time did Trial Counsel object to the re-trial. Trial counsel performed below an objectively reasonable standard of competence by failing to raise objection to a second trial. The Petitioner was prejudiced by this failure to object since an objection should have been sustained on double jeopardy grounds, resulting in an acquittal of the Petitioner.

VIII. SEVENTH CAUSE OF ACTION – PROSECUTORIAL MISCONDUCT / DOUBLE JEOPARDY CLAIM

The State of Idaho, though the office of the Ada County Prosecutor, committed prosecutorial misconduct in first trial in eliciting testimony from Officer Lim as to the Petitioner's invocation of the right to remain silent while in custody. The prosecuting attorney admitted in her own affidavit that this was done for the intentional and deliberate purpose of

violating the Petitioner's constitutional rights by boxing him into a particular version of facts event though Petitioner had not yet testified. In granting the mistrial, the district court found that this strategy was deliberate and improper. This was not an oversight or error on the prosecutor's part, but rather a deliberate strategy designed to impeach the Petitioner or hamper his decision on testifying at all. A copy of the transcript of the ruling on this conduct is attached as Exhibit 1, hereto. A copy of the transcript of Jeanne Howe's affidavit is attached as Exhibit 2, hereto.

Despite the mistrial and a finding of prosecutorial misconduct, the prosecution filed a second prosecution against Petitioner. Petitioner's attorney failed to file any motion to dismiss this second action. The Petitioner was denied effective assistance of counsel and wrongfully tried and convicted of an offense in violation of his constitutional rights.

Petitioner's rights to be free from double jeopardy are guaranteed under Amendment V of the United States Constitution and Article I § 13 of the Idaho Constitution. Petitioner's rights were violated by the second prosecution and conviction under these circumstances. Therefore, Petitioner's conviction is illegal and should be set aside by the court.

DATED this ____ day of October, 2015.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.

Joseph L. Ellsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ___ day of October, 2015, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street, Suite 3191
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709

Stacie Krahn, Legal Assistant

EXHIBIT 1

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

TERRY ASH,)	
)	
Plaintiff,	)	Case No. CV-PC-2015-02064
)	
vs.)	
)	
STATE OF IDAHO,)	
	)	TRANSCRIPT (EXCERPT)
)	
Defendant.)	
)	

BEFORE THE HONORABLE PATRICK H. OWEN,
DISTRICT JUDGE

BE IT REMEMBERED, that this matter came on for hearing, in the courtroom of the Ada County Courthouse in Boise, Idaho, on March 12, 2012; March 13, 2012; and March 21, 2012.

COPY

I N D E X

<u>HEARING DATE</u>	<u>PAGE</u>
<u>March 12, 2012</u>	1 - 8
WITNESSES:	
Paul Lim	
Direct - Howe	1
(No exhibits marked or admitted.)	
<u>March 13, 2012</u>	9 - 17
(No witnesses called.)	
(No exhibits marked or admitted.)	
<u>March 21, 2012</u>	18 - 22
(No witnesses called.)	
(No exhibits marked or admitted.)	

APPEARANCES

For the Plaintiff:

GENE HOWE
JILL LONGHURST
JONATHAN MEDEMA
Ada County Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho, 83702

For the Defendant:

BRIAN L. BOYLE
Law Office Of Brian Boyle
2643 N. Tricia Way
Meridian, Idaho 83646

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BOISE, IDAHO, MONDAY, MARCH 12, 2012

(Excerpt of jury trial proceedings:)
(Deputy Paul Lim, having been previously sworn.)

DIRECT EXAMINATION

BY MS. HOWE:

Q Now, after he performed those FSTs and you arrested him, did he say anything about drinking any more alcohol besides the one beer?

A He decided not to say anything more after that.

Q Once you transported him, where did you take him?

A To the Ada County Jail intoxilyzer room.

Q And when you got there, what did you do?

MR. BOYLE: Your Honor, may I approach the bench?

THE COURT: Yes, sir.

(Bench conference between Court and counsel.)
(Proceedings were had but were not transcribed as part of requested excerpt.)
(Recess taken.)

1 (Jury absent.)

2

3 THE COURT: Thank you. Go ahead and be seated.

4

5 Just a few moments ago during the examination of
6 Deputy Lim, the State's attorney asked a question which
7 prompted a response, more or less along the lines of he
8 decided not to answer any more questions.

8

9 Mr. Boyle approached and had a bench conference
10 at the bench that should not have been heard by the jury,
11 expressed concerns that the State was eliciting a comment
12 on the privilege against self-incrimination.

12

13 The answer itself didn't implicate the privilege
14 against self-incrimination, but he did respond in such a
15 way that counsel had that concern.

15

16 Anything further to your point then, Mr. Boyle?

16

17 MR. BOYLE: Your Honor, I know there's a recent
18 case, I don't have it here, where just the implication or
19 the inference of a defendant asserting his right against
20 self-incrimination can be grounds for a mistrial.

20

21 And I certainly think that it's reasonable to
22 assume that some of the jurors, especially after voir
23 dire, that his failure to be completely open with the
24 police might work against him in this matter, Your Honor.

24

25 THE COURT: Are you asking that the Court
declare a mistrial?

1 MR. BOYLE: I am making that motion, Your Honor.
2 THE COURT: All right.
3 State's response.
4 MS. HOWE: Thank you, Your Honor. Actually, in
5 the audio the defendant does not invoke. In fact, he
6 continues to talk while he's being transported. He also
7 talks while he's at the jail. There's no request for a
8 lawyer per se on the audio, is the State's recall, in any
9 way. And I would be glad to provide that to the Court.
10 If he had invoked, the State certainly would not have
11 asked that question.
12 THE COURT: That is not responsive to the
13 motion. The motion --
14 MS. HOWE: The State --
15 THE COURT: Let me finish, please.
16 The motion is in the form of an objection to a
17 response made by the witness in which the witness made a
18 statement to the effect that Mr. Ash decided not to
19 answer any more questions. And the objection is made as
20 though it's an unfair comment on the privilege against
21 self-incrimination.
22 And the response I'm looking for is your
23 response to the motion for a mistrial based on that
24 statement by this witness.
25 MS. HOWE: Thank you, Your Honor.

1 The State would object to that mistrial. I
2 don't think the commentary that the deputy provided
3 implicates his 5th Amendment invocation in this
4 particular case. And I would object to that at this
5 time.

6 THE COURT: All right.

7 Mr. Boyle, any other --

8 MR. BOYLE: Your Honor, I think clearly saying
9 that he decided not to say anything further demonstrates
10 to the jury that he -- or could be understood by the jury
11 that he did decide not to talk any further and could be
12 held against him in the deliberations, Your Honor.

13 THE COURT: All right. Thank you. I'll take
14 the matter under advisement.

15 Kasey, if you could pull up at least a rough
16 draft of the questions and the answers that follow.

17 THE REPORTER: Sure, Judge.

18 THE COURT: We'll take a recess then. Thank
19 you.

20

21 (Recess taken.)

22 (Jury absent.)

23

24 THE COURT: I asked the reporter to come into
25 chambers and have her read to me the question that

1 prompted the response, and in writing it down for the
2 record --

3 We're back on the record. This is State of
4 Idaho v. Terry Ash, 2011-13777. Mr. Ash present with
5 counsel, Mr. Boyle. The State's attorney, Ms. Howe,
6 present. Deputy Lim is on the stand. Our jury is not
7 present.

8 Now, as I wrote down the question as it was read
9 to me by Madam Reporter, the question is this: "Now,
10 after he performed the field sobriety test and you
11 arrested him, did he say anything about drinking any more
12 alcohol besides the one beer?"

13 "Answer: He decided not to say anything more
14 after that."

15 The question was phrased in a way that elicited
16 either testimony or an answer about post-arrest
17 statements. It did not then address Miranda, the
18 foundation for post-arrest statements at all.

19 And the officer's answer that "He decided not to
20 say anything more after that," in the context of the
21 question, it fairly can be read to say after he was
22 arrested he decided not to say anything more.

23 Certainly it is settled that it is erroneous for
24 a prosecutor to introduce the fact of post-arrest silence
25 for the purpose of raising an inference of guilt. Even

1 in the form of police testimony regarding post arrest
2 silence, it is improper for the State to elicit police
3 testimony of post-arrest silence as a violation as
4 certainly implication of defendant's 5th Amendment
5 rights. Certainly the defendant's right to remain silent
6 attaches upon custody. And a prosecutor cannot use
7 post-custody silence to infer guilt in its case in chief.

8 Now, the most recent articulation of the
9 problems in this area is State v. Ellington, a 2011
10 Supreme Court case found at 151 Idaho 53, where, as I
11 recall the precise setting, the defendant is in the back
12 of a police car, the detective arrived and attempted to
13 question the defendant to -- did not answer any questions
14 in that sequence. As I recall the case was testified to
15 by the detective or the officer.

16 Now, in response to a motion for mistrial made
17 immediately after that, the prosecutor responded,
18 according to the Court, that the question had been
19 phrased in such a leading way to avoid a comment on the
20 defendant's silence.

21 The Supreme Court noted, however, the State
22 cannot provide any reason why it was at all relevant to
23 ask the question to Sergeant Maskel (phonetic) to begin
24 with when it was granted in a leading way or not. The
25 fact that he was not being interviewed -- was being

1 interviewed was unnecessary testimony.

2 And the conclusion the Supreme Court came to is
3 the prosecutor or the witness was attempting to and did
4 draw attention to the defendant's post-arrest silence.

5 The State's further argument that it was the
6 officer that commented on the silence and, therefore,
7 relieving the prosecutor from any obligation was, in the
8 words of the Court, unavailing. The officer is a
9 representative of the State. To hold the prosecutor may
10 elicit prejudicial answers or comments on post-arrest
11 silence by later claiming that the officer and not the
12 prosecutor supplied the prejudicial answer undermines the
13 purpose of the rule barring comment on post-arrest
14 silence.

15 In the Court's view, this is a serious question
16 on the answer the officer gave in his testimony, "He
17 decided not to say anything more after that," I think
18 when we have one way of interpreting that is a blatant
19 comment on the defendant's post-arrest silence which, in
20 this Court's view, would be improper.

21 What we're going to do today is we're going to
22 finish with the testimony for today. I'll take any
23 further submission in writing from the State before five
24 o'clock p.m.

25 You'll have an opportunity to respond to that,

1 Mr. Boyle. I'll take this up again tomorrow morning.

2 I cannot think of any reason why the State would
3 have asked about post-arrest contact if, in fact, the
4 answer is going to be that he decided not to say anything
5 after his arrest.

6 It's troubling.

7 In any event, I will continue to consider this
8 matter under advisement.

9 Ms. Howe, I'll give you until five o'clock p.m.
10 to submit any further position that you have on the
11 defendant's motion for a mistrial based on an improper
12 comment on the defendant's post-arrest silence.

13 Mr. Boyle, I'll give you an opportunity to
14 respond today.

15 And I'll take this matter up at 8:15 a.m.
16 tomorrow morning.

17 Let's bring the jury back in, please.

18

19 (End of excerpt of proceedings)

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BOISE, IDAHO, TUESDAY, MARCH 13, 2012

THE COURT: We'll go on the record. This is State of Idaho v. Terry Lee Ash, 2011-13777. Mr. Ash is present. He is in custody, although he is dressed in civilian clothes for trial. His attorney, Mr. Boyle, is present. The State's attorneys, Ms. Howe, Ms. Longhurst are present. The jury is not present.

It is about 8:30 a.m. on what was to be the second day of the trial.

I made a record yesterday of a question that was asked the arresting officer and the answer that was given. I made a further record of a sidebar conference I had with counsel immediately after the answer was given, in which Mr. Boyle raised a concern that the question and answer could be construed as an improper comment on the defendant's post arrest silence in violation of his 5th Amendment privilege against self-incrimination.

When we took a recess shortly after that, I made a record of the sidebar conference. And Mr. Boyle moved for a mistrial. I gave the State until five o'clock yesterday to file any written brief on that motion.

The State filed an affidavit by way of an e-mail at about 5:40 p.m. in which the State's attorney stated that notwithstanding having reviewed the recorded

1 incident on two prior occasions, she did not hear -- says
2 that she was not aware that the defendant had invoked
3 during that process.

4 She further explains that her purpose in
5 eliciting the testimony was, in her words, to preempt the
6 defendant from testifying differently than what he told
7 the officer because she had some reason to think that the
8 defendant, if he was to testify, would provide a
9 different account than he provided to the arresting
10 officer.

11 In an e-mail that accompanied the affidavit
12 attachment, the State's attorney indicated that she was
13 unable to find any law that stated any law differently
14 than the Court recited it yesterday.

15 This morning I also received from Mr. Boyle a
16 response to Ms. Howe's affidavit indicating that nothing
17 in the affidavit changes the facts or the conclusion that
18 the question and answer were improper and constitute
19 fundamental error.

20 Anything further to your objection and motion
21 for new trial, Mr. Boyle?

22 MR. BOYLE: Your Honor, just a preliminary
23 matter. Paragraph 18 of the State's affidavit clearly
24 talks about discussions we had in the context of a plea
25 negotiation. And I believe it should be stricken under

1 Idaho Rule of Evidence 408.

2 THE COURT: Well, it is not apparent from the
3 paragraph that that is in the context of a settlement
4 negotiation, so I'd have to have a further foundation to
5 come to that conclusion. I don't need to make that
6 conclusion for any ruling I'm going to make today, Mr.
7 Boyle.

8 MR. BOYLE: Okay. Thank you.

9 THE COURT: Anything further then, Mr. Boyle?

10 MR. BOYLE: No, Your Honor.

11 THE COURT: Further response from the State,
12 Ms. Longhurst?

13 MS. LONGHURST: Thank you, Judge.

14 Judge, it occurs to me that there are really two
15 questions here. And the first one is was the statement
16 that the officer made on the stand during his direct
17 examination something that produced information for the
18 jury that's so prejudicial that it created a situation
19 where there's an unfair trial.

20 And I think the Court has a very good grasp of
21 the exact statement that was made and the implications of
22 that and can make a decision in your discretion.

23 And the other question is was this an
24 intentional act of misconduct. And the State prefers to
25 characterize this as an error issue. Was this a mistake

1 that was understandable/excusable? Was the prosecutor
2 attempting to bring up issues that relate to the
3 defendant's constitutional rights or not.

4 And I think that that's a separate question than
5 calling the entire process or the entire situation
6 misconduct.

7 So the State's asking the Court to review that
8 in a two-step analysis. One: Is this a situation where
9 we have a problem with a fair trial. And if it is, is
10 this an intentional act or is this misconduct.

11 And I think the reason the State produced the
12 affidavit is in reviewing a lot of the recent cases on
13 misconduct or when misconduct has been alleged against
14 the prosecutor, I think it's important to make a record
15 of what we did or didn't know by the prosecutor himselfes
16 (sic). And that's the purpose of my office sending me
17 here to assist Ms. Howe this morning, is we wanted to
18 make sure that whatever record needs to be made we make
19 more factually about what was going on.

20 And the prosecutor maintains that she didn't
21 hear this. There were statements the defendant made
22 spontaneously while being transported that she thought
23 were relevant, and she was going toward that direction
24 with this line of questioning and didn't understand or
25 didn't know this was going to occur until the officer

1 made the statement and pointed out to her where it was
2 made it's not in the police reports in other matters.

3 So that's the way the State is looking at this,
4 and I'm asking the Court to review this as far as whether
5 this is misconduct as error as a secondary analysis or a
6 secondary step to whether or not this was a situation
7 that produced information the jury might conclude was
8 prejudicial to the defendant commenting on his right to
9 silence.

10 THE COURT: Ms. Longhurst, thank you.

11 I'm going to give you my ruling.

12 The question that was asked framed the question
13 in such a way that it elicited information from the
14 officer about statements that were made post arrest.
15 That's the critical part of the question. The question
16 incorporates the condition about post-arrest statements.

17 Now, this is where the problem begins and,
18 likely, this is where the problem will end.

19 First of all, if the intention was to elicit
20 post-arrest statements, part of the foundation would have
21 to be that Miranda rights were given and waived. The
22 State is not allowed to elicit testimony about
23 post-arrest statements in the absence of Miranda. This
24 is not a Miranda situation from the question because no
25 foundation was made for that.

1 So this question was not preceded by questions
2 that would normally be asked when a person is in custody
3 to establish that Miranda was given and there's an
4 exception to the post-arrest statement restrictions.

5 Alternatively, as the State's attorney has
6 suggested, she was attempting to elicit testimony about
7 statements that were volunteered post arrest.

8 Well, there's a separate foundation that has to
9 be laid for post-arrest statements that were volunteered.
10 And none of that foundation was laid at all or attempted.

11 So the bare question here simply asks the
12 officer to testify about post-arrest statements. And the
13 difficulty, as I outlined yesterday, is that an officer
14 may not testify about post-arrest silence. The courts
15 say that it's fundamental error. It violates per se the
16 defendant's constitutional right to a fair trial.

17 Whereas here, there is an immediate objection
18 made. The Court doesn't have any discretion.
19 Occasionally on appeal, the appellate courts are able to
20 view this in the context of all of the other evidence
21 that was elicited at trial in the absence of an immediate
22 objection, and on occasion and in exceptional cases the
23 Court of Appeals or the Supreme Court can look at the
24 entirety of the trial and decide that that fundamental
25 error was harmless.

1 That's not the situation that I have because the
2 objection was made immediately.

3 I have some other difficulties with the State's
4 affidavit.

5 I understand that the State had a strategy where
6 if it elicited testimony from the officer about
7 post-arrest silence that it would box the defendant into
8 making a more difficult decision about whether to testify
9 to a set of facts that is different than the defendant's
10 statements to the officer prior to his arrest. I
11 understand that strategy.

12 There are two fundamental difficulties with that
13 strategy. First, the State is not permitted to
14 anticipate testimony by the defendant. The defendant has
15 the right not to testify. It is entirely improper for
16 the State to begin in its case in chief to try to impeach
17 testimony which has not yet occurred no matter how well
18 founded the State's belief is that that will eventually
19 happen. That is improper.

20 Secondly, the State's theory of admissibility is
21 that, as I understand it from the affidavit, that the
22 post-arrest silence could be used to impeach the
23 anticipated testimony of the defendant.

24 Now, even if the State could do that, which I've
25 already explained it cannot, the difficulty is that the

1 prohibition against eliciting silence post arrest goes
2 not only to the prohibition when used for an inference of
3 guilt, but it is equally applicable in an attempt to
4 impeach the defendant with his trial testimony. Both of
5 those things are prohibited.

6 The only exception that the Court is aware for
7 the legitimate use of post-arrest silence is when it is
8 offered to impeach the defendant's version of post-arrest
9 conduct that would be impeached by post-arrest silence.

10 So the defendant would have to testify about a
11 set of facts that occurred post arrest that is different
12 than the officer's testimony post arrest. It could not
13 otherwise be used for impeachment. So the State's
14 articulation of its reasoning for getting into this area
15 in my view is fundamentally flawed.

16 Now, because the inquiry into post-arrest
17 silence is regarded as fundamental error, I don't have
18 any option at this point. I'm unable to weigh, as the
19 State has asked that I do, in terms of attempting to
20 calculate whether this has the prohibitive effect on this
21 jury because I'm not able to do that. Fundamental error
22 is fundamental error.

23 The inquiry into the defendant's post-arrest
24 statements that elicited the testimony that can be fairly
25 construed -- be construed, rather -- as a comment on the

1 defendant's post-arrest silence requires the Court to
2 grant the defendant's motion for mistrial.

3 I will discharge the jury.

4 I will set this matter for further proceedings
5 to my calendar this Friday, March 16th at 1:30 p.m.

6 Anything else for the Court to take up in this
7 matter today, Mr. Boyle?

8 MR. BOYLE: Your Honor, my client is without
9 significant means. He's been in the custody for several
10 months on this issue. I would like an opportunity to be
11 heard on the issue of either removing bail and releasing
12 him on his own recognizance or having bail reduced while
13 we proceed further.

14 THE COURT: I'll take up your application on
15 Friday at 1:30.

16 MR. BOYLE: Thank you, Your Honor.

17 THE COURT: Anything else from the State then?

18 MS. LONGHURST: No, sir.

19 THE COURT: That's all I have for you.

20 The parties are excused.

21 MR. BOYLE: Thank you, Your Honor.

22

23 (End of proceedings.)

24

25

1 BOISE, IDAHO, WEDNESDAY, MARCH 21, 2012

2

3 THE COURT: We'll take up State of Idaho vs.
4 Terry Ash. This is 2011-13777. Mr. Ash is present in
5 custody with counsel, Mr. Boyle. The State's attorney
6 Mr. Medema is here.

7 This case is before the Court to reset the trial
8 of this matter. This had been scheduled for Friday
9 afternoon last week.

10 Mr. Boyle, Mr. Ash, I apologize, the afternoon
11 that we had scheduled for this I had to attend funeral
12 services in a matter that had not yet -- wasn't on my --
13 I didn't know that was going to happen on Friday. So
14 that's why you were moved to today's date, sir.

15 My intention is to get this back on my trial
16 calendar as quickly as I can.

17 April 16th?

18 MR. MEDEMA: That's fine with the State.

19 MR. BOYLE: I actually have a matter that day.
20 I have a misdemeanor matter that day.

21 THE COURT: May 14th?

22 MR. BOYLE: That should work, Your Honor.

23 MR. MEDEMA: Yes, sir.

24 THE COURT: All right. The trial is
25 scheduled -- trial will be scheduled to begin then at

1 8:30 a.m. on May 14th.

2 Pretrial conference will be May 4th at eleven
3 o'clock a.m.

4 All right. Any questions about the resetting of
5 the trial then?

6 MR. MEDEMA: No, sir.

7 MR. BOYLE: No, Your Honor.

8 THE COURT: Mr. Boyle, you want to be heard on
9 bond?

10 MR. BOYLE: Yes, Your Honor.

11 THE COURT: Go ahead, sir.

12 MR. BOYLE: I'm sorry?

13 THE COURT: Go ahead.

14 MR. BOYLE: My client's been in custody since
15 September of last year. The bond was set at \$50,000,
16 which is, in his case, far too high.

17 Mr. Ash, it's no secret to either the
18 prosecution or the Court he has had a criminal history in
19 the past, he doesn't have a history of not showing up to
20 court. He has a business in the area. Two of his
21 friends are here. And based with the mistrial, he is
22 faced with spending more time in jail.

23 I would ask the Court to release Mr. Ash on his
24 own recognizance. Measures can be taken, such as a GPS
25 ankle bracelet, alcohol bracelet to monitor to assure

1 that he shows up to court. He's -- he'll stay in
2 constant contact with me. And Mr. Ash has assured me he
3 will show up at all court hearings, Your Honor.

4 THE COURT: Mr. Boyle, thank you.

5 Mr. Medema.

6 MR. MEDEMA: Thank you. Judge, I'm concerned
7 about the risk that Mr. Ash may pose to the community.
8 He has DUI convictions in 1980, 1982, 1984, 1986, 1976,
9 1990, two in 1993; felony DUIs in 1995, 1996, 1996, 2002,
10 2005. He has convictions for eluding a peace officer in
11 1974 and 2005 and a series of theft offenses. And so I'm
12 concerned about his pattern of driving under the
13 influence.

14 Thank you.

15 THE COURT: Thank you.

16 Mr. Boyle, anything else?

17 MR. BOYLE: Your Honor, I think the issue here
18 isn't necessarily his criminal past but whether or not
19 he'll show up to court. I think that's the purpose of
20 the bond. Mr. Ash will show up to court and there are
21 measures that can be taken to assure that that happens,
22 Your Honor.

23 THE COURT: Certainly the Court is entitled to
24 consider potential harm to the community if he is
25 released based on his prior criminal record. The Court

1 can also consider that, in this case, in addition to the
2 felony DUI charge, the defendant's been charged with the
3 Part 2 that he's a persistent violator, making this a
4 potential life term case.

5 Given everything that I've heard, I'll decline
6 your request to reduce his bond.

7 Anything else for the Court to take up in this
8 matter today then?

9 MR. BOYLE: Your Honor, I would like to point
10 out in the affidavit filed by the State to try and
11 prevent the granting of a mistrial, they mentioned a
12 video and audio.

13 I took this case over from the public defender.
14 There was no video or audio. It was either inadvertent
15 or not provided by the State. I talked to the handling
16 prosecutor in this. She says that she did provide it to
17 the public defender.

18 In that affidavit it stated that he had
19 mentioned that he was going to stand on the 5th. I have
20 not had a chance to listen to that video. And I would
21 like to seek leave from the Court to file a motion to
22 suppress even though that time has passed based on that.

23 In addition, my client has paid me for one
24 trial. And based on the prosecutorial misconduct, he has
25 to go through another trial. And I would also like to

1 file a motion to be appointed a public defender in this
2 case and have my fees for the second trial be paid by the
3 State, Your Honor.

4 THE COURT: Well, this is the first I've heard
5 of any of that. If you have further applications to make
6 along any of those lines, submit them in writing,
7 schedule them for hearing, give the State adequate notice
8 and opportunity to be heard. I won't take any of that up
9 this morning.

10 MR. BOYLE: Certainly, Your Honor. I was just
11 going to mention to the Court that I will be bringing
12 those up.

13 THE COURT: I heard everything.

14 All right. Anything else for the Court to take
15 up this morning then?

16 MR. MEDEMA: No, sir.

17 THE COURT: That's all I have for you, Mr. Ash.
18 Thank you.

19 MR. BOYLE: Thank you, Your Honor.

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21 (End of proceedings.)

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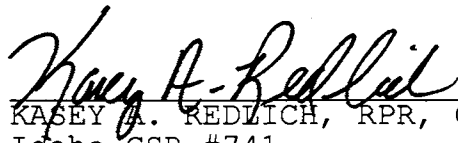
REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, KASEY A. REDLICH, Certified Court Reporter of the County of Ada, State of Idaho, hereby certify:

That I attended the hearing in the above-entitled matter and reported in stenograph the proceedings had thereat; that I thereafter, from the shorthand record made by me at said hearing, prepared a typewritten transcript of said EXCERPT of proceedings; that pages 1 through 26 constitutes said transcript EXCERPT and that said transcript EXCERPT is true and accurate.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of September, 2015.



KASEY A. REDLICH, RPR, CSR
Idaho CSR #741
Ada County Courthouse
200 West Front Street
Boise, Idaho 83702

EXHIBIT 2

MAR 13 2012

By: CHRISTOPHER D. RICH, Clerk
DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Jeanne M. Howe
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, ID 83702

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,	)	Case No. CR-FE-2011-0013777
)	
vs.	)	AFFIDAVIT
)	
)	
TERRY LEE ASH,)	
)	
Defendant.)	
_____)	
STATE OF IDAHO)	
	)	ss.
County of Ada)	

COMES NOW, Jeanne M. Howe, who does swear and affirm the following:

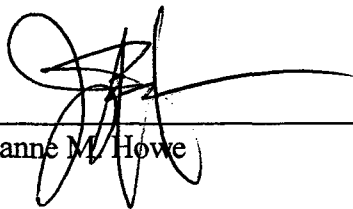
1. Your affiant is a deputy prosecuting attorney in the Ada County Prosecutor's Office in ADA County, Idaho.
2. Your affiant is the handling attorney for the case known as State v. Terry Lee Ash, CR-FE-2011-0013777.
3. Your affiant represented the prosecution in court on March 12, 2012 at the jury trial.
4. Prior to trial, your affiant reviewed reports and materials in preparation for trial.

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5. Part of the materials your affiant reviewed included a compact disc with a video of the deputy's contact with the Defendant on September 4, 2011.
6. Your affiant watched and listened to the entire audio and video of the disc at least two times and reviewed different segments of the video additional times.
7. Despite listening and watching the video multiple times, your affiant did not hear the Defendant make the statement at 8:13:41 in regard to "Standing on the Fifth" and therefore was unaware of the statement.
8. Your affiant believes the statement was difficult to hear because the Defendant said it in a slurred voice in a low tone and occurred while the deputy performed the pat down. Additionally, your affiant did not intend to play the video for the jury, therefore did not review it in a manner to redact out certain statements.
9. Your affiant met with the deputy that recorded the video for trial preparation in regard to the contents of the compact disc but was unaware of the Defendant's statement made in regard to "Standing on the Fifth" so did not discuss that with the deputy.
10. At trial your affiant asked the deputy if the Defendant made statements about whether he had more than one beer after he completed the field sobriety tests.
11. On March 12, 2012, after the Court gave a recess after an objection made at trial by the Defendant's attorney in regard to your affiant's question.
12. Only after your affiant, the deputy and another attorney from the ADA County Prosecutor's Office listening to the audio two more times and having the deputy point out the exact place in the video the Defendant made the statement, did your affiant finally hear the statement that is referred to in paragraph #7.
13. Your affiant not only did not hear the statement referred to in paragraph #7, but thought the Defendant was speaking to the deputies freely throughout the entire video based on several unprompted statements throughout the video.
14. Based on not hearing the Defendant make the statement referred to in paragraph #7 and the fact that the Defendant continued to talk and make unprompted comments throughout the video, your affiant did not believe the Defendant had invoked his right to silence;
15. Your affiant understands how the Fifth Amendment applies to suspect and defendants' rights and would not intentionally attempt to violate that right.
16. Your affiant did not intentionally attempt to elicit testimony that would violate the Defendant's Fifth Amendment right to silence.

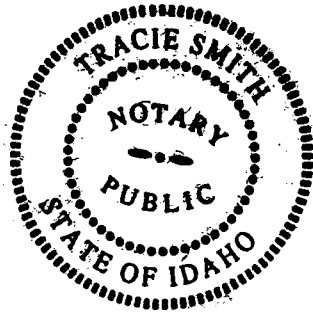
17. Had your affiant been aware of the statement referred to in paragraph #7, your affiant would not have asked the deputy the question in regard to any statements the Defendant may have made.
18. In preparation for trial, your affiant learned from the Defendant's attorney through multiple discussions, that the Defendant planned to testify that he consumed more alcohol than he originally told the deputy and during voir dire at trial, the Defendant's attorney asked questions tending to suggest that defense. Based on these factors, your affiant asked the deputy if the Defendant ever said he had more than one beer to preempt defense.
19. Your affiant did not know the Defendant invoked his right to remain silent and believed the testimony would be admissible. Your affiant notes that the Defendant continued to make unprompted statements on the way to the Ada County Jail reflected the Defendant's awareness that he was impaired and would likely be convicted.

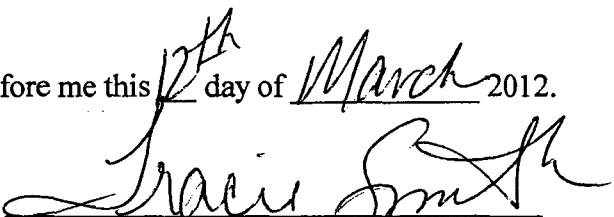
DATED this 12th day of March 2012.



Jeanne M. Howe

SUBSCRIBED AND SWORN to before me this 12th day of March 2012.





NOTARY PUBLIC, STATE OF IDAHO
RESIDING AT: base
COMMISSION EXPIRES: 10/22/2016

<u>Time</u>	<u>Speaker</u>	<u>Note</u>
<u>7:54:14 AM</u>		CRFE1113777 Terry Ash
<u>8:30:24 AM</u>	State Attorney	Jeanne Howe present with Jill Longhurst
<u>8:30:39 AM</u>	Personal Attorney	Brian Boyle present
<u>8:30:44 AM</u>	Defendant	present in custody in civilian clothing
<u>8:30:54 AM</u>	Judge Owen	discussion regarding issues from first day of trial
<u>8:34:10 AM</u>	Personal Attorney	requests paragraph be stricken from State's affidavit
<u>8:34:21 AM</u>		
<u>8:34:44 AM</u>	State Attorney	Ms. Longhurst argues against mistrial, and against misconduct of prosecutor
<u>8:36:54 AM</u>	Judge Owen	addresses counsel regarding ruling
<u>8:43:24 AM</u>	Judge Owen	Mistrial granted - jury will be released; and Court will call on Friday at 1:30 p.m. calendar.
<u>8:44:02 AM</u>	Adjourn.	
<u>8:44:02 AM</u>		

*Jury
Trial
Done*

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

OCT 08 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,)	
	)	AFFIDAVIT OF JOSEPH L.
vs.	)	ELLSWORTH, COUNSEL FOR
	)	PETITIONER TERRY LEE ASH, IN
STATE OF IDAHO,	)	SUPPORT OF MOTION FOR LEAVE
	)	TO AMEND PETITION FOR POST-
Respondent.	)	CONVICTION RELIEF
)	

COMES NOW Joseph L. Ellsworth, of the firm Ellsworth, Kallas & DeFranco, PLLC,
attorney of record for Terry Lee Ash, being duly sworn and under oath, hereby states as follows:

1. I Joseph L. Ellsworth, attorney at law, of the firm of the firm Ellsworth, Kallas & DeFranco, PLLC, and over 18 years of age.
2. I am the attorney of record for Terry Lee Ash in his action for Post-Conviction Relief, Case Number CV-PC-2015-2064.
3. In the course of my investigation of Mr. Ash's post-conviction relief case and his underlying criminal case, no transcript of any portion of his first criminal trial was provided to me.

ORIGINAL

AS

4. On July 9, 2015 I moved the Court for a hearing on the matter of providing me with a transcript of relevant portions of Mr. Ash's first criminal trial, said trial ending in mistrial.
5. On or about September 9, 2015 I received a transcript of relevant portions of Mr. Ash's first trial as ordered by this Court.
6. Upon study of said transcript, I came to believe, based on my professional knowledge and experience, that viable issues of Ineffective Assistance of Counsel and Prosecutorial Misconduct were available to Mr. Ash.
7. Based on my professional knowledge and experience, the proper course for obtaining relief under said issues was to prepare a Motion for Leave to Amend Petition for Post-Conviction Relief, an Amended Petition for Post-Conviction Relief, and a Memorandum in Support for each.
8. Said materials are being or have been prepared for submission to this Court as quickly as practicable.

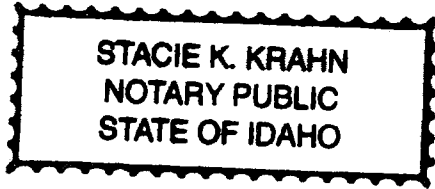
DATED this 9th day of October, 2015.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.



Joseph L. Ellsworth
Attorney for Petitioner

Subscribed and Sworn before me, a notary public for the State of Idaho this 0th day of October, 2015.



Stacie K. Krahn
NOTARY PUBLIC FOR IDAHO
RESIDING AT BOISE, IDAHO
MY COMMISSION EXPIRES: 5.7.2021

01/20/15
11/20/15
10/20/15
10/15

NO _____ FILED _____
A.M. _____ P.M. 4:55

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

OCT 08 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,)	
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION FOR LEAVE TO AMEND
	)	PETITION FOR POST-CONVICTION
STATE OF IDAHO,	)	RELIEF
)	
Respondent.)	
)	

COMES NOW the Petitioner, Terry Lee Ash, by and through his attorney of record, Joseph L. Ellsworth, of the firm Ellsworth, Kallas & DeFranco, PLLC, and hereby submits this Memorandum in Support of Motion for Leave to Amend the Petitioner's Petition for Post-Conviction Relief pursuant to I.C. §§ 19-4906 and 4908, and I.R.C.P. 15(a).

BACKGROUND

On September 4, 2011, Terry Lee Ash, the Petitioner, was arrested for driving under the influence. His first trial ended when in a mistrial on March 12, 2012. His second trial ended in conviction on June 12 of that year, for which he was sentenced to 15 years to life, including a persistent violator enhancement. His appeal was denied, with Remittitur issued on February 20, 2014.

ORIGINAL

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Mr. Ash filed a pro se Petition for Post-Conviction Relief on February 5, 2015. On February 11 the Ada County Public Defender was appointed counsel, which in turn appointed the undersigned as conflict counsel, who in turn entered Notice of Appearance on March 5.

On March 16, this Court issued an Order Governing Proceedings and Setting Trial. Any Amended Petition was to be filed by May 15, later amended to June 15, then to July 1. Any Answer was to be filed by June 15, later amended to July 15, then to July 31. Pretrial Conference was scheduled for November 18, with trial set for December 4, 2015. Based upon his review of materials theretofore available to him, on June 30 Petitioner's Counsel filed a Notice of Intent to Proceed on Pro-Se Petition.

During his investigation, Counsel became aware that no transcripts of the first trial (the mistrial) had been supplied to him. See Affidavit of Joseph L. Ellsworth. Since that mistrial arose from defense attorney's assertion of prosecutorial misconduct, Petitioner's Counsel deemed further inquiry necessary. Therefore, on July 9 he moved this Court for preparation and release of a transcript of portions of the first trial. This Court held a hearing on July 30 and issued an Order for Preparation of Additional Transcripts the same day. Said transcript excerpt ("Excerpt") was prepared on September 8 and received by Counsel on or about September 9.

Said Excerpt is now prepared and reveals that mistrial came at the Defense's motion, when, on direct examination of the arresting officer, the Prosecution committed fundamental error in the testimony it sought to elicit. The proposed Amended Petition now seeks to raise issues of Ineffective Assistance of Counsel and Prosecutorial Misconduct for allowing the Second Trial to go forward when double jeopardy should have been asserted as a bar to subsequent prosecution.

ARGUMENT

An application for post-conviction relief initiates a proceeding that is civil in nature. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). Aside from a heightened pleading standard, action for post-conviction relief is governed by the Idaho Rules of Civil Procedure. *Id.* at 271-72, 628-29. A party may amend a pleading by leave of the court, and “leave shall be freely given when justice so requires.” I.R.C.P. 15(a); *Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986). That is, district courts should favor liberal grants of leave to amend a complaint in the interests of justice. *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997); *Taylor v. McNichols*, 149 Idaho 826, 847, 243 P.3d 642, 663 (2010). The burden of showing why a court should not grant leave to amend a complaint on falls to the party opposed to the amendment. *Clark*, 110 Idaho at 326, 715 P.2d at 996 (citing *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272–73, 561 P.2d 1299, 1305–06 (1977)).

One purpose of Rule 15(a) is to allow the best chance for each claim to be determined on its merits, rather than on some procedural technicality. *Clark*, 110 Idaho at 326, 715 P.2d at 996 (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962) and C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1471 (1971)). This idea has long been adhered to in Idaho, well predating the Rules of Civil Procedure. *Hessing v. Drake*, 90 Idaho 67, 71, 408 P.2d 180, 182 (1965) (citing *Rankin v. Caldwell*, 15 Idaho 625, 99 P. 108 (1908); *Sweeney v. Johnson*, 23 Idaho 530, 130 P. 997 (1913); and *Trask v. Boise King Placers Co.*, 26 Idaho 290, 142 P. 1073 (1914)). Thus, Leave to amend to state new or alternative theories of recovery should be granted. *Great Basin Grain Co.*, 98 Idaho at 273, 561 P.2d at 1306.

Within the context of Rule 15's purpose, courts consider the following three interrelated factors in ruling on a motion to amend a pleading: validity of claims asserted, timeliness, and prejudice to the nonmovant. Nevertheless, at the amended pleading stage, the court may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend; that is more properly determined at the summary judgment stage. *Christensen Family Trust v. Christensen*, 133 Idaho 866, 872, 993 P.2d 1197, 1203 (1999).

Validity of the Claims

The Court may consider whether the amended pleading sets forth a valid claim. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). See also *Hoots v. Craven*, 146 Idaho 271, 275, 192 P. 3d. 1095, 1099 (Ct. App. 2008). A valid claim, in this context, is a claim which sets forth allegations, which if proven, would entitle the Petitioner to the relief he seeks. *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1296 (Ct. App. 1986).

The proposed Amended Petition will include claims of both ineffective assistance of counsel and prosecutorial misconduct. A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Barcella v. State*, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009), *Dixon v. State*, 157 Idaho 582, 584, 338 P.3d 561, 563 (Ct. App. 2014), review denied (Dec. 12, 2014).

Likewise, prosecutorial misconduct may properly come in post-conviction relief actions. See generally *DeRushe v. State*, 146 Idaho 599, 601-02, 200 P.3d 1148, 1150-51 (2009); *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004).

Timeliness

Timeliness alone is not a sufficient reason to deny a motion to amend. *Christensen*, 133 Idaho at 871, 993 P.2d at 1202. Appropriate factors to consider include whether the motion to amend comes after court-imposed deadlines have passed, whether substantial work has already been completed, and whether the proposed amendment would delay upcoming hearings or trial. *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 756, 331 P.3d 491, 498 (2014). In looking at timeliness, courts consider the motives of the movant, which may involve bad faith, undue delay, and dilatoriness. *Christensen*, 133 Idaho at 871, 993 P.2d at 1202. Courts also consider the import of disallowing the amendment, which may involve avoiding undue delay, ending repeated failures to cure deficiencies or avoiding futility. *Id.* In absence of such factors as these, leave to amend should be freely given. *Id.*

The Amended Petition admittedly comes after a Court-imposed deadline. However, the Petitioner and Counsel brought the amendment as soon as it could reasonably be discovered. The new claims were not readily apparent from materials supplied to Counsel, but required some research into the previous trial. There were no transcripts of this proceeding. Counsel now brings the Amendment as soon as practicable after Counsel discovered the issue. To allow the merits of these fundamental issues to go unaddressed would certainly not comport with the *Foman/Clark* spirit. Lastly, judicial economy would be served by allowing the Amendment since the Petitioner may be able to bring them in a separate, successive Motion for Post-Conviction Relief pursuant to I.C. § 19-4908.

Prejudice

Another factor which bears upon granting leave to amend is prejudice to the nonmoving party. *Black Canyon Racquetball Club*, 119 Idaho at 175, 804 P.2d at 904. Prejudice may be

inferred when an amended complaint would leave insufficient time or opportunity for nonmovant to prepare or revise its defense. The State will not be prejudiced by an Amended Petition. Both parties appear to be early in their preparations. The facts at issue are those of the original trial record, which have been as well known or better known to the State than to the Petitioner. The Petitioner is adding claims, not changing any, so little defense preparation will need to be reworked (indeed, the State has yet to file a responsive pleading). The matter is a legal issue at this point and does not involve preservation of witness testimony or other factual matters that could hinder the State in any way. Only the Petitioner is in prison, so there is no claim of prejudice to the State of Idaho.

CONCLUSION

The Petitioner is seeking leave to amend his Petition for Post-Conviction Relief. This Court should grant leave to amend in the interest of justice.

DATED this 9th day of October, 2015.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.



Joseph L. Ellsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of October, 2015, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street, Suite 3191
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709

Stacie Krahn
Stacie Krahn, Legal Assistant

NO. 8-10 FILED
A.M. _____ P.M. _____

OCT 19 2015

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shelley W. Akamatsu
Deputy Prosecuting Attorney
200 West Front Street, Suite 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

TERRY ASH,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)

Case No. CV PC 2015-2064

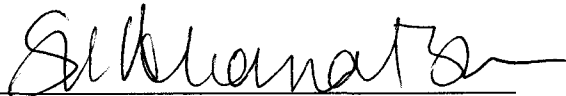
ANSWER

COMES NOW, the State of Idaho, by and through Shelley W. Akamatsu, Deputy Prosecuting Attorney and does answer the petition of Mr. Ash's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c).

I.
Admissions

Petitioner denies claims 1-7

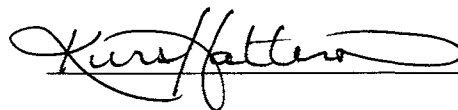
DATED this 16 day of Oct. 2015.


Shelley W. Akamatsu
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of October 2015, I
caused a true and correct copy of the foregoing to be placed in the United States mail,
postage prepaid, addressed to:

Mr. Joe Ellsworth
1031 E. Park Blvd.
Boise, Idaho 83712



JAN M. BENNETTS
Ada County Prosecuting Attorney

Shelley W. Akamatsu
Deputy Prosecuting Attorney
200 West Front Street, Suite 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

NO. 8110 FILED _____
A.M. _____ P.M. _____

OCT 19 2015

CHRISTOPHER D. RICH, Clerk
By STACEY LAFERTY
DEPUTY

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

TERRY ASH,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)

Case No. CV PC 2015-2064

MOTION FOR SUMMARY
DISPOSITION & ADMISSION
OF EXHIBITS 1-4

COMES NOW, the State of Idaho, by and through Shelley W. Akamatsu, Deputy Prosecuting Attorney and moves for summary dismissal of Mr. Ash's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c).

The respondent moves the court to summarily dismiss this petition as it is bare and conclusory, is contrary to the law, and fails to state claims upon which the court can grant relief.

The respondent hereby submits copies of three separate official trial transcripts as State's Exhibit 1-3 and a copy of the Court's Order Denying the Motion to Reduce the Sentence as Exhibit 4.

SR

DATED this 16th day of October 2015.



Shelley W. Akamatsu
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of October 2015, I
caused a true and correct copy of the foregoing to be placed in the United States mail,
postage prepaid, addressed to:

Mr. Joe Ellsworth
1031 E. Park Blvd.
Boise, Idaho 83712



OCT 19 2015

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shelley W. Akamatsu
Deputy Prosecuting Attorney
200 West Front Street, Suite 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

TERRY ASH,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)

Case No. CV PC 2015-2064

**BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
DISPOSITION**

COMES NOW, the State of Idaho, by and through Shelley W. Akamatsu, Deputy Prosecuting Attorney and does hereby provide this brief in support of the state's motion for summary dismissal of Ash's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c).

I. Factual and Procedural History

Ash was found guilty of operating a motor vehicle under the influence of alcohol (DUI), I.C. 18-8004, and admitted to having a prior felony DUI conviction within fifteen years, I.C. 18-8005(9), and to being a persistent violator, I.C. 19-2514, on June 12, 2012. Ash was sentenced to a life sentence with fifteen determinate. Ash filed a motion to

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reduce his sentence pursuant to I.R.C.P. 35 which the court denied on May 29, 2013. Ash appealed claiming: (1) the trial court abused its discretion by denying his motion to reduce his sentence. In an unpublished opinion, the Court of Appeals affirmed the district court. *State v. Ash*, 2014 Unpub No. 332 (2014) and remittitur issued February 20, 2014.

Ash filed this petition for post-conviction relief claiming: (1) his attorney failed to investigate his defense; (2) his attorney failed to object to the Court's use of the mental health evaluation at sentencing; (3) his attorney failed to amend his pro se motion to reduce his sentence and include sentencing alternatives; (4) prosecutorial misconduct related to a jail call caused his case not to be dismissed; (5) his appellate attorney failed to raise arguments on appeal; (6) his attorney failed to object to the second trial or move to dismiss; (7) prosecutorial misconduct for refiling a case against Ash that was barred by the double jeopardy clause.

II.

Applicable Legal Standards

A. General Standards

An application for post-conviction relief initiates a proceeding which is civil in nature. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); Murray v. State, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App.1992). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under

I.R.C.P. 8(a)(1). Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). 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 application must be filed with the clerk of the district court in which the conviction took place. I.C. 19-4902.

Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact. I.C. § 19-4906(b), (c). On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the appellate Court will determine whether a genuine issue of fact existed based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Gilpin-Grubb v. State*, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002), *citing LaBelle v. State*, 130 Idaho 115, 118, 937 P.2d 427, 430 (Ct.App.1997).

A court is required to accept the petitioner's unrebutted 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.*

Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. *Roman*, 125 Idaho at 647, 873 P.2d at 901; *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); *Stone*, 108 Idaho at 826, 702 P.2d at 864. If a petitioner fails to present evidence establishing an essential element on which he bears the burden of proof, summary disposition is appropriate. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). Where petitioner's affidavits are based upon hearsay rather than personal knowledge, summary disposition without an evidentiary hearing is appropriate. *Ivey v. State*, 123 Idaho 77, 844 P.2d 706 (1993).

B. Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show his counsel's performance was objectively deficient and that, but for the attorney's deficient performance, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2066 (1984) Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Thomas v. State*, 145 Idaho 765, 769, 185 P.3d 921, 925 (Ct. App. 2008). The court may not second-guess trial counsel in the particularities of trial preparation. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690; *State v. Mathews*, 133 Idaho 300, 306-07, 986 P.2d 323, 329-30 (1999). The court must assess counsel's conduct by way of

an objective review of reasonableness under prevailing professional norms so as to eliminate the distorting effects of hindsight. *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Murphy*, 143 Idaho at 147, 139 P.3d at 749. The court must also make every effort to avoid a post hoc rationalization of the attorney's conduct. *Wiggins*, 539 U.S. at 526-27; *Murphy*, 143 Idaho at 147, 139 P.3d at 749.

In order to survive summary dismissal of a petition for post-conviction relief based on a claim of ineffective assistance of counsel, the petitioner must establish by a preponderance of the evidence: (1) a material issue of fact exists as to whether counsel's performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced petitioner's case. *Raudebaugh v. State*, 135 Idaho 602 (2001); *Pratt v. State*, 134 Idaho 581, 583 (2000) (citing *Berg v. State*, 131 Idaho 517 (1998))

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

III.

Analysis

A. Defense Investigation

Ash has claimed he is entitled to relief because his trial attorney failed to interview two women “Sherry and Nicole” who were camping with the defendant before he crashed his car, and two unidentified dairy workers he talked to after the crash. Ash’s claim should be dismissed, because it is bare and conclusory. Mr. Ash has failed to identify *who* the witnesses were his attorney failed to interview, but more importantly, *what* any of the witnesses would have said that would have changed the outcome of the trial. Ash’ claim is bare and conclusory because he is merely concluding the witness’ testimony would have affected the outcome of the trial without providing *any facts* of *what* they would have said, to support his conclusion.

B. Mental Health Evaluation

Ash has claimed his trial attorney was ineffective for failing to object to the Court’s use of the mental health evaluation at sentencing. Ash’s claim should be dismissed, because it is bare and conclusory. Ash claimed his attorney should have objected to the use of the evaluation because the evaluator didn’t obtain his previous medical records or enough time interviewing him. Ash has failed to explain *what* the medical records would have shown and *how* the inclusion of the records would have affected the outcome of the sentencing hearing. Ash has failed to explain *what* he did not get a chance to tell the evaluator due to the length of the interview and *how* that would have changed the outcome of the sentencing hearing. Ash’ claim is bare and conclusory because he is

merely concluding the inclusion of medical records or spending more time interviewing him would have affected the outcome of his sentence without providing *any facts* to support his conclusion.

C. **Amending the Pro Se Motion to Reduce his Sentence**

Ash has claimed his attorney was ineffective for failing to amend his pro se motion to reduce his sentence. Ash's claim should be dismissed, because it is bare and conclusory. Ash claimed his attorney should have amended his pro se motion but failed to explain *how* his pro se motion should have been amended or *what specific basis for reduction* was not included that would have affected the outcome of the court's decision on the motion.

Ash made seven (7) claims in his affidavit in support of his motion to reduce his sentence: 1) he was factually innocent of the crime charged; 2) his sentence was harsh compared to the sentences received by others convicted for DUI even when those persons caused property damage or injury; 3) his current sentence was effectively a fixed life sentence and thus precludes any hope for rehabilitation and release into the community; 4) he challenged several facts as contained in the Pre-Sentence Investigation Report; 5) Idaho courts had not offered him any opportunity to make use of supportive services; 6) he admitted he has a disease but argued he should be given an opportunity to change rather than be "warehoused;" and 7) he argued that the prosecuting attorney made false statements regarding Ash to the public and to the Court which caused a public outcry which influenced his sentence. Ash's court appointed

counsel then filed an addendum to the motion that contained documents regarding rehabilitation for Ash.

The court denied the motion and addendum for a sentence reduction after considering all of the reasons listed in the preceding paragraph. After analysis of all of the claims, the court issued a written opinion denying the motion indicating none of it “...altered the Court’s opinion that Ash’s sentence was reasonable.” *See State’s Exhibit 4 Court’s Order Denying Motion for Sentence Reduction.* Ash’s claim should be dismissed, because it is bare and conclusory.

D. Prosecutorial Misconduct

Ash has claimed the prosecutor committed misconduct by calling Phil Tuttle to testify, during its case in chief, as to the authenticity of a call Ash made to his friend from the Ada County Jail. Ash claimed the prosecution “ambushed” him by calling Phil Tuttle during its case in chief, rather than on rebuttal in the event he testified. Ash claimed he was had “no alternative” other than to take the stand and provide “clarity and context” to the call. Ash has failed to state a claim as a matter of law.

After the mistrial in March, 2012, the court reset the case for trial to commence May 14, 2012. The prosecutor found the call Ash made to his friend from the jail, on May 11, 2012, and emailed it to Ash’s counsel at 10:30 a.m. The prosecutor indicated to Ash’s counsel the call would only be used during cross examination of the defendant or during rebuttal during the trial *set to begin on Monday, May 14, 2012.* The State’s attorney filed an addendum to discovery on May 11, 2012, disclosing the call and the witness, Phil Tuttle.

Ash’s counsel filed a motion to suppress or exclude the jail call alleging the State

violated I.C.R.P. 16. On the day of the May 12, 2012, trial, the court held a hearing on the motion. The court found the State did not violate I.C.R.P. 16. Ash's counsel then requested a continuance of the trial. The court granted Ash's request for a continuance and set the matter to begin a month later on June 11, 2012.

I.C. 19-2101 governs the order of trial. The prosecutor is required to open the cause and offer the evidence in support of the indictment. *Id.* The defense is not required to present any evidence. One of the elements of operating a motor vehicle under the influence is to prove the defendant was either .08 breath alcohol level or under the influence of alcohol when he drove the car. The State presented Gary Dawson, PhD. as an expert in the area of pharmacology to testify about Ash's level of impairment while he was driving before the crash. On cross-examination, Ash's counsel continually asked hypothetical questions of Dawson involving consumption of three to four beers the morning *after* the crash. The State was required to prove Ash's alcohol level of impairment *while* he was driving before the crash. The State's attorney was permitted to present the testimony of the jail call as it had been disclosed and was admissible under the rules of evidence. The court must dismiss this claim as it fails as a matter of law.

E. Appeal

Ash has claimed his appellate attorney was ineffective for refusing to raise "other claims" on his appeal. Ash's claim should be dismissed, because it is bare and conclusory. Ash claimed his appellate attorney should have raised "other claims", but has failed to articulate or identify *what* claims should have been raised and *why* or *how* this would have changed the outcome of his appeal. Ash' claim is bare and conclusory

because he is merely concluding the “other issues” would have affected the outcome of his sentence without providing *any facts* to support his conclusion.

F. Objection or Dismissal of Second Trial

Ash has claimed his attorney was ineffective for failing to object or seek dismissal of the case prior to the second trial. Ash’s claim should be dismissed, because it is bare and conclusory. Ash claimed his attorney should have objected or sought dismissal of the case prior to the second trial, but has failed to articulate or identify upon *what basis* or *what legal theory* the motion should have been made and *how* asserting this unidentified legal theory would have changed the outcome of the case. Ash’ claim is bare and conclusory because he is merely concluding the objecting or moving to dismiss the case prior to the second trial would have affected the outcome of the case without proving *any facts* in support of his conclusion.

G. Prosecutorial Misconduct Double Jeopardy

Ash has claimed the prosecutor committed misconduct by “...filing a second prosecution against Petitioner,” and violating the double jeopardy clause. Ash’s claim has failed to state a claim as a matter of law, is contrary to the record and bare and conclusory. On September 4, 2011, Ash was arrested and charged with operating a motor vehicle under the influence of alcohol under Case number CRFE 2011-013777. In March, 2012, the defense requested and the Court granted a mistrial. The case was rescheduled and occurred on June 11, and 12, 2012. The record is contrary to Ash’s claim a “second” prosecution was filed against him. The basic rule is that criminal actions may be terminated by a mistrial without double jeopardy consequences if there is a sufficiently compelling reason

to do so, some procedural error or other problem obstructing a full and fair adjudication of the case which is serious enough to outweigh the interest of the defendant in obtaining a final resolution of the charges against him--what is commonly termed a "manifest necessity" or "legal necessity." *State v. Stevens*, 126 Idaho 822, 826-27, 892 P.2d 889, 893-94 (1995) (quoting John E. Theuman, Annotation, *Former Jeopardy as Bar to Retrial of Criminal Defendant After Original Court's Sua Sponte Declaration of a Mistrial -- State Cases*, 40 A.L.R.4th 741, 745-47 (1985)) As a matter of law, Ash is also precluded from making any double jeopardy defense to his retrial because he waived it by requesting and receiving the mistrial in March, 2012.

WHEREFORE the Respondent requests that this court grant its Motion for Summary Disposition of the Original and Amended Petition.

DATED this 16th day of October, 2015.



Shelley W. Akamatsu
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of October 2015, I caused a true and correct copy of the foregoing to be placed in the United States mail, postage prepaid, addressed to:

Mr. Joe Ellsworth
1031 E. Park Blvd.
Boise, Idaho 83712



OCT 22 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

TERRY ASH,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

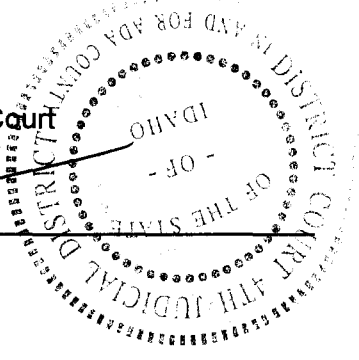
Case No. CV PC15-02064

NOTICE OF
TELEPHONIC STATUS CONFERENCE

A **telephonic** status conference is hereby set for **November 5, 2015, at 3:00 p.m.**
before the Honorable Patrick H. Owen, Ada County Courthouse, Boise, Idaho.
Counsel must appear **telephonically** at this time. The Court will initiate the call.
Dated this 22nd day of October, 2015.

Christopher D Rich
Clerk of the District Court

By: _____
Inga Johnson
Deputy Court Clerk



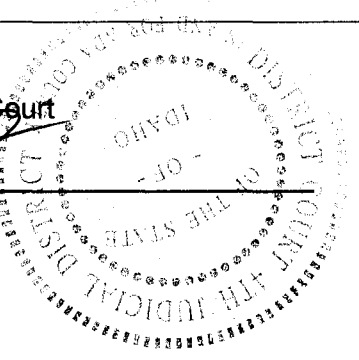
CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of October, 2015, I mailed (served) a true and correct copy of the within instrument to:

Shelley Akamatsu Ada County Prosecuting Attorney Via e-mail	Joseph Ellsworth Attorney at Law Via e-mail
---	---

Christopher D Rich
Clerk of the District Court

By: _____
Inga Johnson
Deputy Court Clerk



[Handwritten mark]

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NOV 13 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shelley W. Akamatsu
Deputy Prosecuting Attorney
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


TERRY LEE ASH,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent,)
_____)

Case No. CV-PC-2015-02064
NOTICE OF HEARING

TO: TERRY LEE ASH and Joseph Ellsworth, his Attorney of Record, you will please take notice that on the 18th day of December, 2015, at the hour of 9:30 of said day, or as soon thereafter as counsel can be heard, the State will address this Honorable Court regarding the State's Motion for Summary Judgment filed in the above-entitled action.

DATED this 13 day of November 2015.

JAN M. BENNETTS
Ada County Prosecuting Attorney



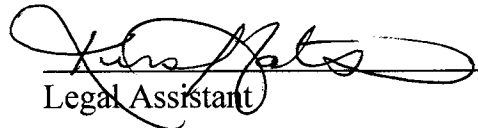
Shelley W. Akamatsu
Deputy Prosecuting Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of November 2015, a true and correct copy of the foregoing Notice of Hearing was served to: Joe Ellsworth in the manner noted below:

- 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 email:*
- By faxing copies of the same to said attorney(s) at the facsimile number: 345-8945*



Legal Assistant

NO. _____
AM. _____ FILED *4/14*
P.M.

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

NOV 20 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAD
DEPUTY

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,	)	AMENDED PETITION FOR POST-
	)	CONVICTION RELIEF
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

The Petitioner's Verified Petition for Post-Conviction Relief ("Petition"), filed with this Court on February 9, 2015, is incorporated herein by this reference as though set forth in full. By this Amended Petition ("Amendment"), the Petitioner adds the following claims to said Verified Petition:

VII. SIXTH CAUSE OF ACTION – INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner's Trial Counsel was ineffective in allowing a second trial to go forward without objection, or motion to dismiss the second prosecution upon grounds of double jeopardy under Amendment V of the United States Constitution and Article I § 13 of the Idaho Constitution.

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In the first trial, the prosecutor deliberately elicited information from a witness that commented on Petitioner's invocation of his right to remain silent during while in custody. The prosecutor admitted in her affidavit to the court that this was intentional strategy to box in the Petitioner's testimony, even though the Petitioner had not made a decision on whether to testify at this trial. This testimony was impermissible under the U.S. and Idaho Constitutions. The court properly granted a mistrial on motion of the defense.

Although a motion for mistrial was filed, and the court ruled that the conduct of the prosecutor was improper, counsel for Petitioner failed to file any motion to dismiss a subsequent prosecution for the same offense. Petitioner was tried and convicted in the second trial. No appeal or relief has ever been sought to address this issue.

The trial record shows that the Petitioner was re-tried for the same alleged offenses and convicted on June 12, 2012.

At no time did Trial Counsel object to the re-trial. Trial counsel performed below an objectively reasonable standard of competence by failing to raise objection to a second trial. The Petitioner was prejudiced by this failure to object since an objection should have been sustained on double jeopardy grounds, resulting in an acquittal of the Petitioner.

VIII. SEVENTH CAUSE OF ACTION – PROSECUTORIAL MISCONDUCT / DOUBLE JEOPARDY CLAIM

The State of Idaho, through the office of the Ada County Prosecutor, committed prosecutorial misconduct in first trial in eliciting testimony from Officer Lim as to the Petitioner's invocation of the right to remain silent while in custody. The prosecuting attorney admitted in her own affidavit that this was done for the intentional and deliberate purpose of

violating the Petitioner's constitutional rights by boxing him into a particular version of facts event though Petitioner had not yet testified. In granting the mistrial, the district court found that this strategy was deliberate and improper. This was not an oversight or error on the prosecutor's part, but rather a deliberate strategy designed to impeach the Petitioner or hamper his decision on testifying at all. A copy of the transcript of the ruling on this conduct is attached as Exhibit 1, hereto. A copy of the transcript of Jeanne Howe's affidavit is attached as Exhibit 2, hereto.

Despite the mistrial and a finding of prosecutorial misconduct, the prosecution filed a second prosecution against Petitioner. Petitioner's attorney failed to file any motion to dismiss this second action. The Petitioner was denied effective assistance of counsel and wrongfully tried and convicted of an offense in violation of his constitutional rights.

Petitioner's rights to be free from double jeopardy are guaranteed under Amendment V of the United States Constitution and Article I § 13 of the Idaho Constitution. Petitioner's rights were violated by the second prosecution and conviction under these circumstances. Therefore, Petitioner's conviction is illegal and should be set aside by the court.

DATED this 18th day of November, 2015.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.



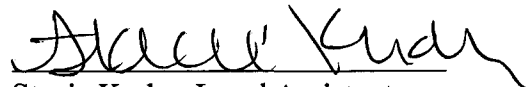
Joseph L. Ellsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of November, 2015, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street, Suite 3191
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709


Stacie Krahn, Legal Assistant

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

NO _____ FILED _____
A.M. _____ P.M. 444

NOV 20 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,)	
	)	OBJECTION TO MOTION FOR
vs.	)	SUMMARY DISPOSITION AND
	)	COUNTER MOTION FOR SUMMARY
STATE OF IDAHO,	)	DISPOSITION ON COUNTS V - VI.
)	
Respondent.)	

COMES NOW the Petitioner, Terry Lee Ash, by and through his attorney of record, Joseph L. Ellsworth, of the firm Ellsworth, Kallas & DeFranco, PLLC, and hereby submits this Objection to State's Motion for Summary Dismissal. The Petitioner also moves for summary judgment on Counts V and VI based upon the pleadings herein, namely the affidavit of Jeanne Howe and the transcript of the proceedings on the motion for mistrial.

The original Verified Pro Se Petition for Post-Conviction Relief ("Pro Se Petition") raised five claims. The court has now granted leave to amended petition with two supplemental claims for relief. The court has now set the matter for hearing on summary judgment on December 18, 2015.

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PROCEDURAL BACKGROUND

On February 9, 2015 the Petitioner filed his Pro Se Petition. He subsequently filed an Affidavit of Facts in Support of Post-Conviction Relief (“Petitioner’s Affidavit”) on March 6. On June 30, 2015, Petitioner’s Counsel filed a Notice of Intent to Proceed on Pro Se Petition. Based on information only later available to Counsel, on October 8 Counsel filed a Motion for Leave to Amend Petition for Post-Conviction Relief (“Motion to Amend”), a Proposed Amended Petition for Post-Conviction Relief (“Proposed Amended Petition”), and the aforementioned Memorandum in Support. Attached as Exhibit 1 to the Motion to Amend was a partial transcript of the first trial. Said partial transcript included the Court’s discussion of prosecutorial misconduct in knowingly eliciting testimony which commented upon the Defendant’s post-arrest silence, which resulted in a mistrial.

The court granted leave to amend the Petition on November 10, 2015.

The Petitioner wishes to preserve his right to hearing on all claims and has not authorized Counsel to abandon them. However, the briefing in this opposition will focus primarily on the newly filed claims of ineffective assistance of counsel and double jeopardy as set forth in the amended petition.

GENERAL STANDARD OF REVIEW IN POST CONVICTION

A post-conviction relief petition initiates a civil proceeding, not a criminal one. *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969). Like most civil plaintiffs, the post-conviction applicant must prove by a preponderance of evidence the allegations upon which relief is requested. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

An application for post-conviction relief differs from a complaint in an ordinary civil action. *Fairchild v. State*, 128 Idaho 311, 315, 912 P.2d 679, 683 (Ct. App. 1996). The post-conviction application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a) (1). *Id.* Rather, an application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903; *Fairchild*, 128 Idaho at 315, 912 P.2d at 683. Otherwise, the application is subject to summary dismissal. *Id.*

Summary dismissal is also appropriate if the applicant's evidence raises no genuine issue of material fact. I.C. § 19-4906(b), (c); *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007). The court will determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Id.* The court will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Id.* The court must accept the petitioner's un rebutted allegations as true, but need not accept the petitioner's conclusions. *Id.* When the alleged facts, even if true, would not entitle the applicant to relief, the court may dismiss without an evidentiary hearing. *Id.* Allegations in the petition are insufficient for the granting of relief when they are clearly disproved by the record of the original proceedings, or do not justify relief as a matter of law. *Id.*

Conclusory allegations, unsubstantiated by fact, are inadequate to entitle a petitioner to an evidentiary hearing. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Summary disposition is appropriate when the petitioner fails to make a prima facie showing of

any essential element of his claim. *Schultz v. State*, 153 Idaho 791, 796, 291 P.3d 474, 479 (Ct. App. 2012). Where a Petitioner's affidavit is based upon hearsay and not personal knowledge, summary disposition is appropriate. *Ivey v. State*, 123 Idaho 77, 844 P.2d 706 (1993).

The right to counsel in criminal actions brought by the state is guaranteed by the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Idaho State Constitution. *State v. Tucker*, 97 Idaho 4, 7, 539 P.2d 556, 559 (1975). This right to counsel is a right to more than the mere presence of a lawyer at trial; it is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674, 691-92 (1984); *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992); *Aragon v. State*, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). It means that an accused is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate. *Tucker*, 97 Idaho at 8, 539 P.2d at 560.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). To warrant reversal on grounds of ineffective assistance of counsel, a criminal defendant must first show that counsel's performance was objectively deficient and, second, that the deficiency prejudiced the defendant's case. *Strickland*, 466 U.S. at 687. Under the first prong of the *Strickland* analysis, "the defendant bears the burden of proof in showing that 'counsel's performance fell below an objective standard of reasonableness.'" *Aragon*, 114 Idaho at 762, 760 P.2d at 1178 (emphasis omitted) quoting *Strickland*, 466 U.S. at 688. There is a presumption that trial counsel was competent "and that trial tactics were based on sound legal strategy." *State v. Porter*, 130 Idaho 772, 792, 948 P.2d 127, 147 (1997). Trial counsel's tactical decisions cannot justify relief "unless the decision is shown to have resulted from inadequate preparation,

ignorance of the relevant law or other shortcomings capable of objective review.” *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). Under the second prong, the defendant must show a reasonable probability that the outcome of trial would be different but for counsel's deficient performance. *State v. Row*, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, citing *Strickland*, 466 U.S. at 694.

STANDARD OF REVIEW ON FIFTH AND SIXTH CLAIM FOR RELIEF.

Prosecutorial misconduct may also be brought in an action for post-conviction relief. See generally *DeRushe v. State*, 146 Idaho 599, 601-02, 200 P.3d 1148, 1150-51 (2009); *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004). Prosecutorial misconduct is “[a] prosecutor’s improper or illegal act (or failure to act), [especially] involving an attempt to persuade the jury to wrongly convict a defendant...” *Black’s Law Dictionary* 1342 (Bryan A. Garner ed., 9th ed., West 2009). Prosecutorial misconduct need not involve knowing intent to do wrong; a more apt description might be “prosecutorial error.” Sandra Uribe, Esq., A Primer on Alleging Prosecutorial Misconduct on Appeal, [http://www.capcentral.org/resources/criminal / primer_da_misconduct.aspx](http://www.capcentral.org/resources/criminal/primer_da_misconduct.aspx) (accessed September 15, 2015). *People v. Hill*, 17 Cal. 4th, 800, 855, 952 P.2d 672, note 1. A prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. U.S.*, 295 U.S. 78, 88, , 55 S.Ct. 629, 79 L.Ed. 1314, 1321 (1935); *Hill*, 17 Cal. 4th at 820, 952 P.2d 673.

Accordingly, when an objection to prosecutorial misconduct is not raised at trial, the misconduct will serve as a basis for setting aside a conviction only when the “conduct is

sufficiently egregious to result in fundamental error.” *State v. Severson*, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009), quoting *Porter*, 130 Idaho at 785, 948 at 140. Misconduct will be regarded as fundamental error when it “goes to the foundation or basis of a defendant's rights or ... to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.” *Severson*, 147 Idaho at 716, 215 P.3d at 436, citing *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989) (quoting *State v. Garcia*, 46 N.M. 302, 128 P.2d 459, 462 (1942)).

ARGUMENT

The State seeks dismissal on grounds that Petitioner failed to identify on what basis or legal theory the motion should have been made and asserting how this theory would have changed the outcome of the case. Brief in Support ¶ F (Oct. 16, 2015).

The Petitioner disagrees. The Petitioner asserts grounds of double jeopardy for the theory under which the objection to a second trial should have been made. This theory, if successful, would have changed the outcome of the case by averting the conviction at a second trial. *Id.* at 2.

The State’s contention that Petitioner has failed to state a claim is at odds with the United States and Idaho Constitutions. U.S. Const. amends. V and XIV; Idaho Const. art. I. § 13. If prosecutorial misconduct is the basis for a mistrial, a second trial may well be illegal under the law. This is precisely such a case.

The claim is neither bare nor conclusory, but is fully supported by the record. The Prosecution in the first trial engaged in deliberate misconduct. The affidavit of Jeanne Howe plainly establishes an improper and intentional strategy of hamstringing the defendant from testifying in his own defense by commenting on his post arrest silence. Although her actions

may not have been malicious, that is not relevant to any determination in this case. The question is whether her strategy was intentional and improper and material in depriving the defendant of a fundamental right, here the right to remain silent and to testify at trial. The existing records supports the trial courts finding:

[The District Court]:

I have some other difficulties with the State's affidavit.

I understand that the State had a strategy where if it elicited testimony from the officer about post-arrest silence that it would box the defendant into making a more difficult decision about whether to testify to a set of facts that is different than the defendant's statements to the officer prior to his arrest. I understand that strategy.

There are two fundamental difficulties with that strategy. First, the State is not permitted to anticipate testimony by the defendant. The defendant has the right not to testify. It is entirely improper for the State to begin in its case in chief to try to impeach testimony which has not yet occurred no matter how well founded the State's belief is that that will eventually happen. That is improper.

Secondly, the State's theory of admissibility is that, as I understand it from the affidavit, that the post-arrest silence could be used to impeach the anticipated testimony of the defendant.

Now, even if the State could do that, which I've already explained it cannot, the difficulty is that the prohibition against eliciting silence post arrest goes not only to the prohibition when used for an inference of guilt, but it is equally applicable in an attempt to impeach the defendant with his trial testimony. Both of these things are prohibited. Tr. pp. 15 -16.

The district court has already ruled that this was "fundamental error." Tr., p. 14, l. 15.


The Defense was compelled to move for a mistrial, and governing law prohibits a second trial. It was a gross error for trial counsel not to seek dismissal of the second prosecution.

CONCLUSION

The Petitioner does not abandon his original pro se Post-Conviction Relief claims. As to the two new claims, summary judgment should be granted in favor of the Petitioner. In the alternative the court should set the matter for evidentiary hearing.

DATED this 10th day of November, 2015.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.




Joseph L. Ellsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of November, 2015, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street, Suite 3191
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709



Stacie Krahn, Legal Assistant

01/20/15
11:52 AM
11/20/15
11:52 AM

NO. _____
A.M. _____ FILED PM 4:44

NOV 20 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

ATTORNEY FOR PETITIONER

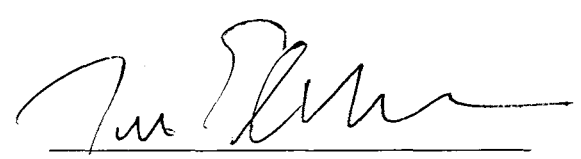
**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TERRY LEE ASH,)	
)	
Petitioner,	)	Case No.: CV-PC-2015-2064
)	
vs.	)	NOTICE OF HEARING
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

TO: ADA COUNTY PROSECUTING ATTORNEY

PLEASE TAKE NOTICE that the Petitioner, by and through attorney of record, will call on for hearing the Counter Motion for Summary Disposition on Counts V - VI, on **Friday, December 18, 2015 at 9:30 a.m.**, at the Ada County Courthouse, 200 West Front Street, Boise, Idaho, in front of the Honorable Judge Patrick Owens.

DATED this 18th day of November, 2015.



Joseph L. Ellsworth
Attorney for Petitioner

NOTICE OF HEARING

ORIGINAL
000164

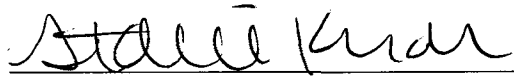
SV

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2015, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

US Mail
 Hand Delivery
 Facsimile: 287-7709



Stacie Krahn, Legal Assistant

FILED: 12/22, 2015 at 8:30
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

TERRY LEE ASH,
Petitioner,
vs.
STATE OF IDAHO,
Respondent,

CASE NO. CVPC15-02064
NOTICE OF RESETTING OF
SUMMARY DISPOSITION
HEARING

You are hereby notified that the **Motion for Summary Disposition Hearing**, is reset to
January 5, 2016 at 4:00 pm. The Petitioner will be transported for the hearing.

Dated: December 22, 2015

Christopher D. Rich
Clerk of the District Court

Inga Johnson, Deputy Clerk

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 22 day of Dec, 2015, I caused a true and
correct copy of the above and foregoing instrument to be mailed, postage prepaid, to:

Shelley Akamatsu, Ada County Prosecutor
Interdepartmental Mail

Joe Ellsworth
Attorney at Law
FAX- 345-8945

Christopher D. Rich
By: _____
Inga Johnson
Deputy Clerk

DEC 22 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

TERRY LEE ASH
Petitioner,
vs.
STATE OF IDAHO,
Respondent.

Case No. CVPC15-02064

ORDER TO TRANSPORT

It appearing that the above-named Petitioner is in the custody of the Idaho Board of Correction, and that it is necessary that he be brought before this Court on **January 5, 2016** at the hour of **4:00 PM**.

IT IS THEREFORE ORDERED That the Ada County Sheriff bring the Petitioner from the Penitentiary to the Court at said time and on said date;

IT IS FURTHER ORDERED That immediately following said Court appearance the Sheriff return said Petitioner to the custody of the Idaho State Penitentiary;

IT IS FURTHER ORDERED That the Idaho State Board of Correction release the said Petitioner to the Ada County Sheriff for the purpose of the aforementioned appearance and retake him into custody from the Sheriff upon his return to the Penitentiary.

IT IS FURTHER ORDERED That the Clerk of this Court serve a copy hereof upon the Idaho Board of Correction forthwith and certify to the same.

Dated: 12/22/15

Patrick H. Owen
Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

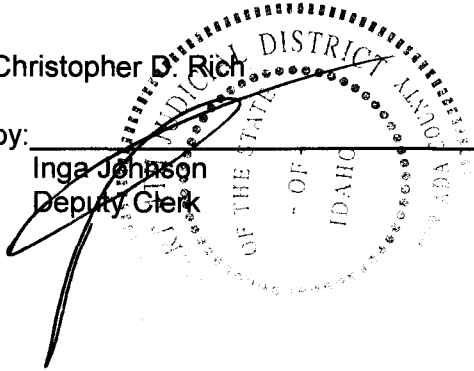
I HEREBY CERTIFY that copies of the foregoing document were sent to:

Central Records
FAXed to 327-7444

Ada County Jail
FAXed to 577-3409

Dated: 12/22/15

Christopher D. Rich
by: *Inga Johnson*
Inga Johnson
Deputy Clerk



Order to Transport

<u>Time</u>	<u>Speaker</u>	<u>Note</u>
<u>03:40:25 PM</u>		Ash v State CVPC15-02064 Summary Disposition Hearing. Pet. in Custody
<u>03:41:23 PM</u>	Counsel	Ellsworth/ Akamatsu
<u>03:41:23 PM</u>	Ct	Calls case and reviews status.
<u>04:17:50 PM</u>	Ct	Notes met with counsel in chambers- discussed procedural issues. Discussed main issues in case. State asking additional time to brief. Ellsworth has no obj. Counsel to stipulate to new briefing schedule and then contact clerk to reset on calendar quickly.
<u>04:22:29 PM</u>	Ellsworth	concur with recitation.
<u>04:22:45 PM</u>	Akamatsu	concur with recitation.
<u>04:23:17 PM</u>		end.

copy
3/18/16

NO. 1047
FILED
A.M. P.M.

FEB 05 2016

CHRISTOPHER D. RICH, Clerk
By ALESIA BUTTS
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shelley W. Akamatsu
Deputy Prosecuting Attorney
200 West Front Street, Suite 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

TERRY LEE ASH,)
)
Petitioner,)
)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent.)

Case No. CV PC 2015-002064

**SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY DISPOSITION OF
CLAIMS 6 AND 7**

COMES NOW, the State of Idaho, by and through Shelley W. Akamatsu, Deputy Prosecuting Attorney and does hereby provide this supplemental brief in support of the state's motion for summary disposition of Ash's petition for post-conviction relief pursuant to Idaho Code § 19-4906(c).

I. Factual and Procedural History

Respondent incorporates by reference the factual and procedural history recited in its initial brief in support of its motion for summary disposition dated October 19, 2015. In addition to his original five claims, Ash alleged in his amended petition: 6) his attorney as ineffective for failing to move to dismiss the case on the grounds of double jeopardy; 7) the prosecutor in his first trial committed prosecutorial misconduct;

AB

II.

Applicable Legal Standards

A. General Standards

Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact. I.C. § 19-4906(b), (c). 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.* Claim are also subject to dismissal if they are forfeited when a petitioner failed to raise an issue that he could have raised on direct appeal. Idaho Code 19-4901(b).

B. Legal Standards for Ineffective Assistance of Trial Counsel

To prevail on an ineffective assistance of counsel claim, the petitioner must prove two necessary components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel incompetent and was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984) *Cited in Workman v. State*, 144 Idaho 518, 525, 164 P.3d 798, 805 (2007)

C. Legal Standards for Double Jeopardy and Prosecutorial Misconduct

A defendant's motion for mistrial removes any bar by the double jeopardy clause of the Fifth and Fourteenth Amendments to retrial. *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) *cited in State v. Fairchild*, 121 Idaho 960 (Ct.App. 1992) An exception to bar exists when the defendant's motion is based on prosecutorial misconduct which was intended to provoke the defendant into moving for a mistrial. *Id.*; *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). The court ruling on the motion is to make a finding of fact "inferring the existence or nonexistence of intent from objective facts and circumstances." *Id.*; *Kennedy*, 456 U.S. at 675, 102 S.Ct. at 2089.

III.

Analysis

A. Ineffective Assistance - Double Jeopardy

Ash claims he received ineffective assistance of counsel because his attorney failed to move for dismissal of the case prior to the second trial on the basis of double jeopardy. A defendant's motion for mistrial removes any bar by the double jeopardy clause unless the motion is based on prosecutorial misconduct which was intended to provoke the defendant into moving for a mistrial.

The court must dismiss this claim as it is bare and conclusory. Ash has failed to articulate or identify *what* objective facts support his claim the prosecutor's actions were intended to provoke the defendant into moving for a mistrial. Ash has failed to identify *what* motive or *why* the prosecutor would have wanted Ash to request *and receive* a mistrial. There are no objective

facts or circumstances in the record that would support a finding the prosecutor asked an improper question in order to “goad” the defense into moving for a mistrial. The court considered the affidavit of the prosecutor, Ms. Howe, which stated her purpose in eliciting the testimony was to “preempt” the defendant from testifying differently. Ms. Howe’s sworn intention was that the trial would continue beyond her case in chief and the defense case. There are no objective facts or circumstances in the record that in any way suggest Ms. Howe’s conduct was intended to provoke a mistrial. There are no facts suggesting she wanted more time to review evidence, or conduct further testing, was waiting for certified priors to arrive or that a delay of the trial would in any way benefit the State. There were, in fact, no continuances ever requested by the prosecution in the case; only the defense.

B. Prosecutorial Misconduct

Ash has claimed he should be granted post-conviction relief because the prosecutor committed prosecutorial misconduct which resulted in a mistrial. Ash has forfeited this claim because it could have been raised on his direct appeal. Idaho Code 19-4901(b). Post-conviction petitions are not substitutes for appeals. It is well established that applicants for post-conviction relief are not allowed to raise issues in post-conviction proceedings that could have been raised on direct appeal unless the issues were not known and could not reasonably have been known during the direct appeal. I.C. § 19-4901(b); *Hollon v. State*, 132 Idaho 573, 581, 76 P.2d 927, 935 (1999); *Rodgers v. State*, 129 Idaho 720, 932 P.2d 348 (1997).

Idaho Code section 19-4901(b) states:

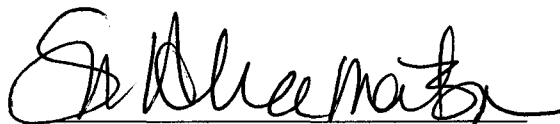
(b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings unless it appears to the court, on the basis of

a substantial factual showing by affidavit, disposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. I.C. § 19-4901(b).

The court must dismiss this claim because Ash's claim of prosecutorial misconduct was known to him long before his appeal. *Raudebaugh v. State*, 135 Idaho 602, 606, 21 P.3d 924, 928 (2001).

WHEREFORE the Respondent requests that this court grant its Motion for Summary Disposition of the Amended Petition.

DATED this 4 day of February, 2016.

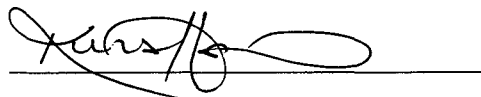


Shelley W. Akamatsu
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of February 2016, I caused a true and correct copy of the foregoing to be placed in the United States mail, postage prepaid, addressed to:

Joe Ellsworth
1031 E. Park Blvd.
Boise, Idaho 83712



Dwen
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3/21

NO _____ FILED _____
 AM _____ P.M. _____

MAR 18 2016

CHRISTOPHER D. RICH, Clerk
 By SANTIAGO BARRIOS
 DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
 ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
 1031 E. Park Blvd.
 Boise, ID 83712
 Phone: (208) 336-1843
 Fax: (208) 345-8945

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,	)	Case No. CV-PC-2015-2064
)	
Petitioner,)	
	)	MEMORANDUM IN REPLY TO
vs.	)	MOTION FOR SUMMARY
	)	DISPOSITION OF CLAIMS 6 AND 7
STATE OF IDAHO,)	
)	
Respondent.)	

COMES NOW the Petitioner, Terry Lee Ash, by and through his attorney of record, Joseph L. Ellsworth, of the firm Ellsworth, Kallas & DeFranco, PLLC, and hereby submits this Memorandum in Reply to the State's Motion for Summary Disposition of Claims Six (6) and Seven (7).

BACKGROUND

On September 4, 2011, Terry Lee Ash, the Petitioner, was arrested for driving under the influence. His first trial ended in a mistrial on his motion on March 12, 2012. His second trial ended in conviction on June 12 of that year. During his investigation of the case, Counsel obtained a Transcript (Excerpt) of the March 12 proceedings (hereinafter, "Excerpt"), attached

hereto as Exhibit 1 and by this reference made a part hereof. Said Excerpt forms the basis of the Amended Petition for Post-Conviction Relief.

The Excerpt reveals that mistrial came at the Defense's motion, when, on direct examination of the arresting officer, the Prosecution committed fundamental error in the testimony it sought to elicit. Excerpt at 16:16 – 17:2. Specifically, the Prosecutor's questioning of the arresting officer, Deputy Lim of the Ada County Sheriff's Office, elicited comment upon the Petitioner/Defendant's right to remain silent. *Id.* at 16:16 – 17:2. The Court found such questioning to be fundamental error from which mistrial followed. *Id.*

As discussed *infra*, owing to the intentional conduct of the Prosecution, the Second Trial should have been barred by double jeopardy. The Amended Petition therefore raises issues of Ineffective Assistance of Counsel and Prosecutorial Misconduct arising from the Second Trial going forward when double jeopardy should have prevented it.

The State seeks summary dismissal of these two claims. As to ineffective assistance, the State argues that the Petition was not accompanied by facts in support. As to prosecutorial misconduct, the State argues that this claim is barred here because it was not raised on appeal. As will be shown below, the State is mistaken as to both claims.

ARGUMENT

A post-conviction relief petition initiates a civil proceeding, not a criminal one. *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969). Like most civil plaintiffs, the post-conviction applicant must prove by a preponderance of evidence the allegations upon which relief is requested. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

An application for post-conviction relief differs from a complaint in an ordinary civil action. *Fairchild v. State*, 128 Idaho 311, 315, 912 P.2d 679, 683 (Ct. App. 1996). The post-

conviction application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a) (1). *Id.* Rather, an application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903; *Fairchild*, 128 Idaho at 315, 912 P.2d at 683. Otherwise, the application is subject to summary dismissal. *Id.*

The right to counsel in criminal actions brought by the state is guaranteed by the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Idaho State Constitution. *State v. Tucker*, 97 Idaho 4, 7, 539 P.2d 556, 559 (1975). This right to counsel is a right to more than the mere presence of a lawyer at trial; it is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674, 691-92 (1984); *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992); *Aragon v. State*, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). It means that an accused is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate. *Tucker*, 97 Idaho at 8, 539 P.2d at 560.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). To warrant reversal on grounds of ineffective assistance of counsel, a criminal defendant must first show that counsel's performance was objectively deficient and, second, that the deficiency prejudiced the defendant's case. *Strickland*, 466 U.S. at 687. Under the first prong of the *Strickland* analysis, "the defendant bears the burden of proof in showing that 'counsel's performance fell below an objective standard of reasonableness.'" *Aragon*, 114 Idaho at 762, 760

P.2d at 1178 (emphasis omitted) quoting *Strickland*, 466 U.S. at 688. There is a presumption that trial counsel was competent “and that trial tactics were based on sound legal strategy.” *State v. Porter*, 130 Idaho 772, 792, 948 P.2d 127, 147 (1997). Trial counsel's tactical decisions cannot justify relief “unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.” *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). Under the second prong, the defendant must show a reasonable probability that the outcome of trial would be different but for counsel's deficient performance. *State v. Row*, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, citing *Strickland*, 466 U.S. at 694.

Prosecutorial misconduct may also be brought in an action for post-conviction relief. See generally *DeRushe v. State*, 146 Idaho 599, 601-02, 200 P.3d 1148, 1150-51 (2009); *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004). Prosecutorial misconduct is “[a] prosecutor’s improper or illegal act (or failure to act), [especially] involving an attempt to persuade the jury to wrongly convict a defendant...” *Black’s Law Dictionary* 1342 (Bryan A. Garner ed., 9th ed., West 2009). Prosecutorial misconduct need not involve knowing intent to do wrong; a more apt description might be “prosecutorial error.” Sandra Uribe, Esq., A Primer on Alleging Prosecutorial Misconduct on Appeal, http://www.capcentral.org/resources/criminal/primer_da_misconduct.aspx (accessed September 15, 2015). *People v. Hill*, 17 Cal. 4th, 800, 855, 952 P.2d 672, note 1. A prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. U.S.*,

295 U.S. 78, 88, , 55 S.Ct. 629, 79 L.Ed. 1314, 1321 (1935); *Hill*, 17 Cal. 4th at 820, 952 P.2d 673.

Accordingly, when an objection to prosecutorial misconduct is not raised at trial, the misconduct will serve as a basis for setting aside a conviction only when the “conduct is sufficiently egregious to result in fundamental error.” *State v. Severson*, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009), quoting *Porter*, 130 Idaho at 785, 948 at 140. Misconduct will be regarded as fundamental error when it “goes to the foundation or basis of a defendant's rights or ... to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.” *Severson*, 147 Idaho at 716, 215 P.3d at 436, citing *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989) (quoting *State v. Garcia*, 46 N.M. 302, 128 P.2d 459, 462 (1942)). But even when prosecutorial misconduct produces fundamental error, the conviction will not be reversed when that error is harmless. *Severson*, 147 Idaho at 716, 215 P.3d at 436. Under the harmless error doctrine, a conviction will stand if the Court is convinced beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred. *Id.*

A. The Second Trial Should Have Been Barred by Double Jeopardy

The Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 13 of the Idaho Constitution prohibit a criminal defendant from twice being placed in jeopardy for the same offense. U.S. Const. amends. V, XIV; Idaho Const. art. 1, § 13. Although the general rule is that a defendant's motion for mistrial removes the double jeopardy bar to retrial, a narrow exception exists. *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416 (1982); *State v. Fairchild*, 121 Idaho 960, 963, 829 P.2d 550, 553 (Ct. App.

1992). When the defendant's motion is based on prosecutorial misconduct which was intended to provoke the defendant into moving for a mistrial, the double jeopardy protection applies. *Kennedy*, 456 U.S. at 673; *Fairchild*, 121 Idaho at 963, 829 P.2d at 553; *U.S. v. Dinitz*, 424 U.S. 600, 611 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976). The court ruling on the motion is to make a finding of fact "inferring the existence or nonexistence of intent from objective facts and circumstances." *Kennedy*, 456 U.S. at 675; *Fairchild*, 121 at 963, 829 P.2d at 553.

Nonetheless, historically the Supreme Court has embraced a flexible rule that requires courts to consider the circumstances surrounding the conclusion of the first trial before prohibiting retrial. Cynthia C. Person, *Prosecutorial Misconduct and Double Jeopardy: Should States Broaden Double Jeopardy Protection in Light of Oregon v. Kennedy?*, 37 Wayne L. Rev. 1699, 1703 (1991) citing *U.S. v. Jorn*, 400 US 470, 480, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). In doing so, the Court has explained that ignoring the surrounding circumstances "would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." Person, 37 Wayne L. Rev. at 1703, citing *Jorn* at 483-484. The Court has developed rules predicated upon who requests the mistrial, balancing the defendant's right to have his trial completed by the first tribunal against society's interest in vindicating justice. Person, 37 Wayne L. Rev. at 1703.

States traditionally have had freedom to grant greater protections to criminal defendants than the U.S. Constitution requires. "[T]he concept of federalism assumes the power, and duty, of independence in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly." *Pool v. Superior Court In & For Pima Cnty.*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984), citing *State v. Kennedy*, 295 Or. at 268-272, 666 P.

2d at 1322-24. Indeed, based on this premise, both Oregon and Arizona have gone beyond the Supreme Court's guidance in double jeopardy protections.

On remand of *Kennedy*, the Oregon Supreme Court held that retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. When this occurs, it is clear that the burden of a second trial is not attributable to the defendant's preference for a new trial over completing the trial infected by an error. Rather, it results from the state's readiness, though perhaps not calculated intent, to force the defendant to such a choice.

Kennedy, 295 Or. at 276, 666 P.2d at 1326.

In *Pool*,

jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows⁹ to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool, 139 Ariz. at 108-09, 677 P.2d at 271-72.

In the case at Bar, the first trial court found that the State's direct exam of Det. Lim was part of a strategy to inquire into the Defendant's post-arrest silence. Excerpt at 15:5-11. A "strategy" is a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result. *Random House Webster's Unabridged Dictionary*, 1880, 2nd ed. Random House 2001. That is, strategy involves intent. According to the Court, the Prosecutor's action was planned and deliberate, so therefore it was intentional. As the Court pointed out, such an inquiry into

post-arrest silence is fundamental error, Excerpt at 16: 16-18. Thus, the Court correctly granted Defendant's motion for mistrial. *Id.* at 16:23 – 17:2.

The Court's finding of prosecutorial intent to venture into fundamental error is tantamount to a finding of intent to provoke a mistrial. To find that the first does not necessarily imply the second is to presume that the Defense would not object, when in fact Defense Counsel promptly did exactly that. Further, it is to suggest that there is room for fundamental error which would not necessitate a mistrial; in fact the Court found that fundamental error left no choice but to declare mistrial.

Thus, as here, when the Prosecutor provoked motion for mistrial by intentionally ventured into fundamental error, and which should have and did provoke the mistrial motion, and said motion was granted, the consequence must be no different than had the Prosecutor's *explicit* intent been to directly provoke the same motion.

B. Ineffective of Assistance of Counsel

A motion to dismiss on grounds of double jeopardy is grounded in the U.S. and Idaho Constitutions and should be well known to every criminal defense lawyer. Failure to make such a motion when there are grounds to do so is manifestly deficient performance.

Here, the Petitioner/Defendant was brought to second trial on an identical charge as the first trial. The first trial ended when the Prosecution's deliberate conduct, as found by that Court, provoked the Defense motion for mistrial. There was at least a reasonable chance of success based on *Kennedy*, *Fairchild*, and *Pool*; see *supra*. Thus, the same trial counsel was objectively deficient in failing to raise the double jeopardy bar.

The Petitioner was prejudiced by the second trial moving forward to conviction. Had counsel made a proper motion to dismiss on double jeopardy grounds, and had that motion been granted, there would have been no conviction at all. Given the likelihood of success of such a motion, there can be no confidence in the second trial's outcome, and thus the Petitioner was prejudiced by counsel's failure to so move.

The State avers that Petitioner's claim of Ineffective Assistance must be dismissed as bare and conclusory; that it fails to identify what objective facts support his claim that prosecutor's actions were intended to provoke defendant into moving for mistrial.

The State's assertion is simply incorrect. As stated in the Amended Petition, and accompanied by an excerpt of the transcript of the first trial, the court found that the State's direct exam of Det. Lim was part of a strategy to inquire into the Defendant's post-arrest silence. Excerpt at 15:5-11. A "strategy" is a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result. *Random House Webster's Unabridged Dictionary*, 1880, 2nd ed. Random House 2001. That is, strategy involves intent. Prosecutor's action was planned and deliberate. As the Court pointed out, such an inquiry into post-arrest silence is fundamental error, Excerpt at 16: 16-18. The Court correctly granted the Court granted Defendant's motion for mistrial. *Id.* at 16:23 – 17:2.

C. Prosecutorial Misconduct

The fundamental error at issue here is not the inquiry into post-arrest silence, since this was addressed in the first trial. When the court declared a mistrial, that error was corrected. What concerns us here is *act* of moving forward with the *second* trial. For it is the second trial which violated double jeopardy protection. In merely bringing the second trial, the Prosecution

engaged in a fresh, fundamental violation. Such an error was not harmless since without it, there would have been no second trial and hence no conviction.

Prosecutorial intent, as discussed supra, is not necessary to a finding of misconduct or to a finding of fundamental error. All that matters is that the Prosecution erred in bringing the second trial, and that this error went to the Petitioner's fundamental, foundational right against double jeopardy.

Since proceeding with the second trial was the fundamental error of violating the Petitioner's double jeopardy protection, the resulting conviction must be overturned.

The State seeks dismissal of this Cause of Action on grounds that it could have been raised on appeal but was not. The misconduct alleged here pertains to a fundamental right – that of the Petitioner's Fifth Amendment protection against double jeopardy. This right would certainly have been foundational to his defense since it would have prevented the second trial from taking place. Thus, under *Severson*, the issue need not have been brought on direct appeal.

In addition, the prosecutorial misconduct alleged here will not be found in the trial record, and thus could not have been brought on appeal. The misconduct alleged here does not lie in the conduct of the trial itself, but in *the decision to bring the second action*. A prosecution's decision to bring an action is outside the scope of the trial record; prior to this decision being made and implemented, there is no such record. Thus, the State's premise that the matter could have been brought on direct appeal is invalid.

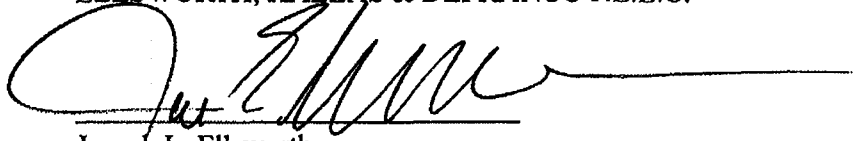
CONCLUSION

The Prosecution in the Petitioner's second trial engaged in intentional conduct which resulted in fundamental error, which provoked his successful motion for mistrial. As such, it was

ineffective assistance for Defense Counsel to fail to raise this as a bar to retrial. It was likewise prosecutorial misconduct to bring this second trial. Thus, the Petitioner's criminal conviction must be overturned.

DATED this 18th day of March, 2016.

ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.



Joseph L. Ellsworth
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of March, 2016, a true and correct copy of the foregoing document was served upon counsel as follows:

Ada County Prosecuting Attorney
200 W. Front Street, Suite 3191
Boise, Idaho 83702

U.S. Mail
 Hand Delivery
 Facsimile: 287-7709

Petitioner
Terry Ash

U.S. Mail

Stacie Krahn, Legal Assistant

COPIED
1/10/14
ST 312-8011

NO. 11-30 FILED
A.M. _____ P.M. _____

MAR 24 2016

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

JAN M. BENNETTS
Ada County Prosecuting Attorney

Shelley W. Akamatsu
Deputy Prosecuting Attorney
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

TERRY LEE ASH,)
)
Petitioner,)
vs.)
)
THE STATE OF IDAHO,)
)
Respondent,)
_____)

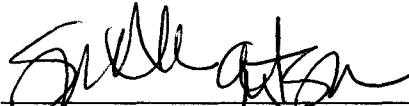
Case No. CV-PC-2015-02064

NOTICE OF HEARING

TO: TERRY LEE ASH and Joseph Ellsworth, you will please take notice that on the 25th day of April, 2016, at the hour of 3:00 p.m. of said day, or as soon thereafter as counsel can be heard, the State will address this Honorable Court regarding the State's Motion for Summary Judgment filed in the above-entitled action.

DATED this 23 day of March 2016.

JAN M. BENNETTS
Ada County Prosecuting Attorney



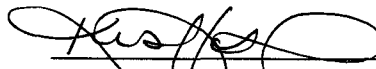
Shelley W. Akamatsu
Deputy Prosecuting Attorney

PH

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 24th day of March, 2016, a true and correct copy of the foregoing Notice of Hearing was served to: **Joseph Ellsworth** in the manner noted below:

- 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 email:*
- By faxing copies of the same to said attorney(s) at the facsimile number: 345-8945*



Legal Assistant

Time	Speaker	Note
02:24:22 PM		Ash v State CVPC15-02064 Motion for Summary Disposition - Petitioner not present
02:25:34 PM	Counsel	Akamatsu/ Ellsworth
02:25:34 PM	Ct	Calls case and reviews
02:25:34 PM	Ellsworth	Responds, clarifies what is noticed for hearing
02:25:34 PM	Ct	Admits State's Exhibits 1-4 for purposes of this hearing.
02:25:34 PM	Akamatsu	Argues Motion w/ int by court
02:25:34 PM	Ellsworth	Argues w/ int by court (Ct Admits Petitioners Exhibits 1,2 attached to amended petition)
02:25:34 PM	Akamatsu	Argues further
02:25:34 PM	Ct	Takes under advisment
02:25:34 PM		End
02:25:34 PM		MINUTE ENTRY: After the hearing, the clerk noticed that the Record Button was not pushed.
02:25:34 PM		

JUN 02 2016

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

TERRY LEE ASH,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2015-2064

ORDER GRANTING THE STATE'S
MOTION TO
SUMMARILY DISMISS THE PETITION

On February 9, 2015, the Petitioner, Terry Lee Ash ("Ash"), filed a Verified Petition for Post-Conviction Relief, *pro se*, alleging, ineffective assistance of trial counsel, ineffective assistance of appellate counsel and prosecutorial misconduct. As explained below, the Court has determined the State's motion for summary disposition should be granted.¹

Background and Prior Proceedings

In Case No. CR-FE-2011-13777, Ash was charged with Operating a Motor Vehicle While Under the Influence Of Alcohol (One Felony Conviction Within Fifteen years), Felony, I.C. §§ 18-8004, 8005(9), with a persistent violator enhancement pursuant to I.C. § 19-2514.

¹ The Court takes judicial notice of some of the contents of Ada County Case No. CR-FE-2011-13777, including the Pre-Sentence Investigation Report, the I.C. § 18-211 evaluation by Dr. Sombke and the attachments to the State's October 19, 2015, Motion for Summary Disposition, including: a transcript of the first jury trial proceedings and a transcript of a October 17, 2012, sentencing hearing, both attached as Exhibit 1, a transcript of a pretrial hearing marked as Exhibit 2, a transcript of an August 22, 2012, sentencing hearing, attached as State's Exhibit 3, a Memorandum Decision and Order RE: Defendant's Rule 35 Motion, attached as State's Exhibit 4 and a transcript of an excerpt of the first jury trial proceedings. Copies of each of the above have been lodged in this file.

1 On March 12, 2012, Ash's jury trial began. During direct examination of Ada County

2 Deputy Sheriff, Paul Lim, the Deputy Prosecutor asked:

3 Q: Now, after he performed those FSTs and you arrested him, did he say anything
4 about drinking any more alcohol besides the one beer?

5 A: He decided not to say anything more after that.

6 Amended Petition for PCR, Ex. 1 and State's Exhibit 4, Trial Transcript excerpt ["First Trial Tr.

7 ____"], pg. 1:10-13. Defense counsel objected and moved for a mistrial for violation of the

8 privilege against self-incrimination. After a hearing on March 13, 2012, the court granted the

9 mistrial, finding:

10 First of all, if the intention was to elicit post-arrest statements, part of the
11 foundation would have to be that Miranda rights were given and waived. The
12 State is not allowed to elicit testimony about post-arrest statements in the absence
13 of Miranda. This is not a Miranda situation from the question because no
14 foundation was made for that.

15 ***

16 I understand that the State had a strategy where if it elicited testimony from the
17 officer about post-arrest silence that it would box the defendant into making a
18 more difficult decision about whether to testify to a set of facts that is different
19 than the defendant's statements to the officer prior to his arrest. I understand that
20 strategy.

21 There are two fundamental difficulties with that strategy. First, the State is not
22 permitted to anticipate testimony by the defendant. The defendant has the right
23 not to testify. It is entirely improper for the State to [bring] in its case in chief to
24 try to impeach testimony which has not yet occurred no matter how well founded
25 the State's belief is that that will eventually happen. That is improper.

26 Secondly, the State's theory of admissibility is that, as I understand it from the
affidavit, that the post-arrest silence could be used to impeach the anticipated
testimony of the defendant.

Now, even if the State could do that, which I've already explained it cannot, the
difficulty is that the prohibition against eliciting silence post arrest goes not only
to the prohibition when used for an inference of guilty, but it is equally applicable
in an attempt to impeach the defendant with his trial testimony. Both of those
things are prohibited.

Now, because the inquiry into post-arrest silence is regarded as fundamental error,
I don't have any option at this point. I'm unable to weigh, as the State has asked
that I do, in terms of attempting to calculate whether this has the prohibitive effect

1 on this jury because I'm not able to do that. Fundamental error is fundamental error.

2 The inquiry into the defendant's post-arrest statements that elicited the testimony
3 that can be fairly construed – be construed, rather – as comment on the
4 defendant's post-arrest silence requires the Court to grant the defendant's motion
5 for mistrial.

6 First Trial Tr. pg. 13:19-17:2.

7 On June 11, 2012, Ash's second trial commenced. On June 12, 2012, Ash was found
8 guilty by a jury of Operating a Motor Vehicle While Under the Influence of Alcohol, I.C. § 18-
9 8004. Ash then admitted the allegation that he had a prior felony DUI conviction within fifteen
10 (15) years. Ash also admitted that he was a persistent violator of the law pursuant to I.C. § 19-
11 2514. The court entered its Judgment of Conviction on October 25, 2012, sentencing Ash to an
12 aggregate term of Life, with a minimum period of confinement of fifteen (15) years.

13 On December 24, 2012, Ash filed a Rule 35 Motion, which this Court denied on May 29,
14 2013. Ash also filed a *pro se* Notice of Appeal on November 20, 2012, with an Amended Notice
15 of Appeal filed on February 8, 2013. On January 27, 2014, the Court of Appeals affirmed the
16 district court's Judgment of Conviction and Sentence and the order denying the Rule 35 motion,
17 with a Remittitur issued on February 10, 2014.

18 On February 9, 2015, Ash filed this petition, alleging, ineffective assistance of trial
19 counsel, ineffective assistance of appellate counsel and prosecutorial misconduct. Ash requested
20 appointment of counsel. The Court appointed counsel and issued a scheduling order. The State
21 moved for summary disposition on October 19, 2015.

22 On November 20, 2015, Ash filed an Amended Petition for post conviction relief, adding
23 the Sixth and Seventh Causes of action alleging double jeopardy violations for permitting a
24 second trial. On that same date, Ash also filed an objection to the State's summary disposition

25 **ORDER GRANTING THE STATE'S MOTION TO SUMMARILY DISMISS THE PETITION –**
26 **PAGE 3**

000191

1 motion and moved for summary judgment as to Counts [Six] and [Seven]². Ash supported his
2 objection and motion with a memorandum and affidavit. The Court allowed additional briefing
3 to occur. On February 5, 2016, the State filed a supplemental brief addressing claims Six and
4 Seven. On March 18, 2016, Ash filed a Memorandum in reply, addressing only claims Six and
5 Seven.

6 On April 25, 2016, the Court held a hearing on both Parties' Motions to Dismiss. Joseph
7 L. Ellsworth of Ellsworth, Kallas & DeFranco, appeared and argued for Ash. Deputy Ada
8 County Prosecuting Attorney Shelley K. Akamatsu appeared and argued for the State. The Court
9 took the matters under advisement.

10 **Discussion and Analysis**

11 Idaho Code, §19-4906 authorizes summary disposition of a petition for post-conviction
12 relief, either pursuant to motion of a party or upon the court's own initiative.
13

14 The court may grant a motion by either party for summary disposition of the
15 application when it appears from the pleadings, depositions, answers to
16 interrogatories, and admissions and agreements of fact, together with any
affidavits submitted, that there is no genuine issue of material fact and the moving
party is entitled to judgment as a matter of law.

17 I.C. § 19-4906(c). "Summary dismissal of a petition pursuant to I.C. § 19-4906 is the procedural
18 equivalent of summary judgment under Idaho Rule of Civil Procedure 56." *Arellano v. State*, 158
19 Idaho 708, 351 P.3d 636, 638 (Ct. App. 2015).

20 A claim for post-conviction relief will be subject to summary dismissal if the
21 petitioner has not presented evidence making a prima facie case as to each
22 essential element of the claims upon which the petitioner bears the burden of
proof.

23
24 ² Ash mistakenly identified these as Counts V-VI in the caption of his November 20, 2015 Objection to Motion for
25 Summary Disposition and Counter Motion for Summary Disposition on Counts V-VI [sic].

1 *Id.*

2 When considering summary dismissal, the district court must construe disputed
3 facts in the petitioner's favor, but the court is not required to accept either the
4 petitioner's mere conclusory allegations, unsupported by admissible evidence, or
5 the petitioner's conclusions of law. Moreover, the district court, as the trier of fact,
is not constrained to draw inferences in favor of the party opposing the motion for
summary disposition; rather, the district court is free to arrive at the most probable
inferences to be drawn from uncontroverted evidence.

6 *Lynch v. State*, No. 42299, 2015 WL 6604290, at *1 (Idaho Ct. App. Oct. 30, 2015) (internal
7 citations omitted).

8 Claims may be summarily dismissed if the petitioner's allegations are clearly
9 disproven by the record of the criminal proceedings, if the petitioner has not
10 presented evidence making a prima facie case as to each essential element of the
claims, or if the petitioner's allegations do not justify relief as a matter of law.

11 *Id.* at 2.

12 An application for post-conviction relief is in the nature of a civil proceeding, entirely
13 distinct from the underlying criminal proceeding. *Ferrier v. State*, 135 Idaho 797, 798, 25 P.3d
14 110, 111 (2001). An application for post-conviction relief differs from a complaint in an
15 ordinary civil action, however, because an application must contain much more than “a short and
16 plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1).

17 *Hernandez v. State*, 133 Idaho 794, 797, 992 P.2d 789, 792 (Ct. App. 1999). The application
18 must present or be accompanied by admissible evidence supporting its allegations, or the
19 application will be subject to dismissal. *Id.*

20
21 To sustain his burden of proof, a post-conviction petitioner must support his allegations
22 with competent, admissible evidence. *Curless v. State*, 146 Idaho 95, 99, 190 P.3d 914, 918 (Ct.
23 App. 2008); *Hall v. State*, 126 Idaho 449, 453, 885 P.2d 1165, 1169 (Ct. App. 1994); *Roman v.*
24 *State*, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994). Thus, the question is whether the

1 application, affidavits and other evidence supporting the application allege facts which, if true,
2 would entitle the applicant to relief. *Berg v. State*, 131 Idaho 517, 960 P.2d 738, 740 (1998).

3 Ash essentially raises three claims, ineffective assistance of trial counsel (including the
4 Rule 35 motion), ineffective assistance of appellate counsel and prosecutorial misconduct.

5 1. Ineffective Assistance of Trial Counsel Claims

6 In order to succeed on a claim of “actual ineffective assistance of counsel,” Ash must
7 meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Mitchell v.*
8 *State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). Ash must demonstrate (1) counsel’s
9 performance fell below an objective standard of reasonableness, and (2) there is a reasonable
10 probability that, but for counsel’s errors, the result would have been different. *Strickland*, 466
11 U.S. at 687-88, 692; *Mitchell*, 132 Idaho at 277, 971 P.2d at 730. In order to survive summary
12 dismissal of a petition for post-conviction relief based on a claim of ineffective assistance of
13 counsel, the petitioner must establish by a preponderance of the evidence: (1) a material issue of
14 fact exists as to whether counsel’s performance was deficient; and (2) a material issue of fact
15 exists as to whether the deficiency prejudiced petitioner’s case. *See Raudebaugh v. State*, 135
16 Idaho 602, 21 P.3d 924, 926 (2001); *Pratt v. State*, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)
17 (citing *Berg v. State*, 131 Idaho 517, 518-19, 960 P.2d 738, 739-40 (1998)).

18
19 When evaluating an ineffective assistance of counsel claim, a court does not second-
20 guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-
21 conviction relief unless the decision is shown to have resulted from inadequate preparation,
22 ignorance of the relevant law or other shortcomings capable of objective review. *Pratt v. State*,
23 134 Idaho 581, 584, 6 P.3d 831, 834 (2000). “There is a strong presumption that counsel’s
24

1 performance fell within the wide range of professional assistance.” *State v. Hairston*, 133 Idaho
2 496, 511, 988 P.2d 1170, 1185 (1999) (internal quotations omitted) (quoting *Aragon v. State*, 114
3 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). “To establish prejudice, the applicant must show a
4 reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial
5 would have been different.” *Gilpin-Grubb v. State*, 138 Idaho 76, 81, 57 P.3d 787, 792 (2002)
6 (quoting *Jakoski v. State*, 136 Idaho 280, 282, 32 P.3d 672, 674 (Ct. App. 2001)). “The
7 likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*,
8 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693); see also *Cullen v. Pinholster*, __ U.S. __,
9 131 S.Ct. 1388, 1403 (2011) (“highly deferential” look at counsel’s performance).

10 “[R]easonable probability is a probability sufficient to undermine confidence in the
11 outcome.” *Id.* As the United States Supreme Court wrote in *Strickland*: “[i]n making this
12 determination [referring to the prejudice prong], a court hearing an ineffectiveness claim must
13 consider the totality of the evidence before the judge or jury.” 466 U.S. at 696. As the United
14 States Supreme Court observed, judicial scrutiny of trial counsel’s performance must be highly
15 deferential because it is too easy for a court examining trial counsel’s defense after that defense
16 has proven to be unsuccessful to conclude that a particular act or omission was unreasonable. *Cf.*
17 *Engle v. Isaac*, 456 U.S. 107, 133-134, (1982).

18
19 Thus, a court deciding an actual ineffectiveness claim must judge the
20 reasonableness of counsel’s challenged conduct on the facts of the particular case,
21 viewed as of the time of counsel’s conduct. A convicted defendant making a
22 claim of ineffective assistance must identify the acts or omissions of counsel that
23 are alleged *not* to have been the result of reasonable professional judgment. The
24 court must then determine whether, in light of all the circumstances, the identified
25 acts or omissions were outside the wide range of professionally competent
26 assistance. In making that determination, the court should keep in mind that
counsel’s function, as elaborated in prevailing professional norms, is to make the
adversarial testing process work in the particular case. At the same time, the court

1 should recognize that counsel is strongly presumed to have rendered adequate
2 assistance and made all significant decisions in the exercise of reasonable
3 professional judgment.

4 *Strickland*, 466 U.S. at 690-691.

5 a. Pre-trial investigation

6 Determining whether an attorney's preparation falls below a level of reasonable
7 performance constitutes a question of law, but is essentially premised upon the circumstances
8 surrounding the attorney's investigation. *Thomas v. State*, 145 Idaho 765, 769, 185 P.3d 921, 925
9 (Ct.App.2008). To prevail on a claim that counsel's performance was deficient for failing to
10 interview or call certain witnesses, a petitioner must establish that the inadequacies complained
11 of would have made a difference in the outcome of trial. *Id.* It is not sufficient merely to allege
12 that counsel may have discovered a weakness in the State's case. *Id.* We will not second-guess
13 trial counsel in the particularities of trial preparation. *Id.*

14 It is not enough to allege that a witness would have testified to certain events, or
15 would have rebutted certain statements made at trial, without providing through
16 affidavit, nonhearsay evidence of the substance of the witnesses' testimony. *Hall*
17 *v. State*, 126 Idaho 449, 453, 885 P.2d 1165, 1169 (Ct.App.1994). Thomas does
18 not offer affidavits from any of these witnesses regarding what they would have
19 testified to. Instead, Thomas summarily asserts that the testimony of these
20 witnesses would have explained that he "was recently let out on parole, and [he]
21 had everything to gain." Without admissible evidence of what any of these
22 witnesses would have said, Thomas's claim that his counsel was ineffective for
23 failing to call them does not pass either prong of the *Strickland* test.

24 *Thomas*, 145 Idaho at 770, 185 P.3d at 926.

25 To justify an evidentiary hearing in a post-conviction relief proceeding, it is
26 incumbent on the applicant to tender written statements from potential witnesses
who are able to give testimony themselves as to facts within their knowledge.
Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct.App.1982). It is not
enough to simply allege that an expert should have been secured without
providing, through affidavits, evidence of the substance of the expert's testimony.
Hall v. State, 126 Idaho 449, 453, 885 P.2d 1165, 1169 (Ct.App.1994). Absent an

1 affidavit from the expert explaining what he or she would have testified to, or
2 some other verifiable information about what the substance of the expert's
testimony would have been, an applicant fails to raise a genuine issue of material
fact. *See generally Drapeau*, 103 Idaho at 617, 651 P.2d at 551.

3 *Self v. State*, 145 Idaho 578, 581, 181 P.3d 504, 507 (Ct. App. 2007).

4 Ash asserts his trial attorney failed to interview two women "Sherry and Nicole" who
5 were camping with Ash prior to Ash crashing his car, two unidentified dairy workers and a
6 fisherman he talked to after the crash. In addition, Ash argues trial counsel failed to contact
7 David Shuffman who could testify as to the date of the sale of the car and testify to the condition
8 of the car prior to Ash purchasing the car. However, Ash does not attach any affidavits of these
9 potential witnesses detailing what they would have testified to at trial, but merely speculates as to
10 their testimony. Furthermore, although Ash did include an affidavit of David Shuffman,
11 Shuffman's affidavit does not include testimony of any of the allegations contained in Ash's
12 Petition that Ash asserted Shuffman would testify to.

13
14 At the time of the hearing, Ash's Counsel informed the Court there were no new
15 significant witnesses. The Court is not required to accept mere conclusory allegations,
16 unsupported by admissible evidence, or a petitioner's conclusions of law. *Roman v. State*, 125
17 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715
18 P.2d 369, 372 (Ct.App.1986). Ash has not established a material fact exists that his case was
19 prejudiced by his trial counsel's performance. Therefore, this claim fails.
20

21 b. Mental Health Evaluation

22 At a hearing on February 6, 2012, trial counsel for Ash requested an evaluation pursuant
23 to Idaho Code § 18-211. The Court entered an order for this examination of February 6, 2012,
24 directing the Idaho Department of Health and Welfare to designate a psychologist or psychiatrist
25

1 to conduct the examination. The examination was done by Chad Sombke, Ph.D. Dr. Sombke
2 concluded in his evaluation that "Ash has the capacity to understand the proceedings against him
3 and he also has the capacity to assist in his own defense." Psychological Evaluation at p. 6. On
4 March 6, 2012 the Court conducted a hearing to review Dr. Sombke's evaluation. Ash did not
5 have any objections or request any further evaluation.

6 Now, in his *pro se* Petition, Ash argues the evaluation was merely a perfunctory
7 examination that failed to include important details regarding Ash's overall mental condition.
8 Ash did not explain or provide evidence as to what a further exam would have shown and how
9 that would have changed the outcome of the sentencing. Furthermore, Ash asserts his counsel
10 failed to secure necessary health records that would have allowed the court to properly assess
11 Ash's mental competency, but Ash again failed to provide such records. Ash has failed to
12 demonstrate that such records, investigation or independent evaluation would have changed the
13 outcome of Ash's case.
14

15 Similarly, as to Cootz's complaint that counsel failed to obtain medical treatment
16 records on his toe injury, or expert testimony as to the limitations caused by such
an injury, Cootz has not shown that such evidence exists.

17 *Cootz v. State*, 129 Idaho 360, 371, 924 P.2d 622, 633 (Ct. App. 1996). Thus, this claim fails.

18 c. Rule 35 Motion

19 In Ash's Petition, Ash asserts counsel for his Rule 35 motion failed to obtain medical
20 records, contact family and friends for mitigation purposes and amend the Rule 35 motion to
21 include all the necessary information to present to the court.
22

23 A claim of failing to amend a Rule 35 motion is similar to a claim of failure to file a Rule
24 35 motion. "A claim of ineffective assistance of counsel, based upon counsel's alleged failure to
25

1 timely file a Rule 35 motion, may properly be brought under the post-conviction procedure act.”

2 *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995).

3 Ash must show “his attorney's performance was deficient, and that he was prejudiced
4 thereby.” *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). Ash must
5 demonstrate counsel performed ineffectively in filing and supporting the Rule 35 motion.
6 Deficiency is shown by demonstrating the “attorney's representation fell below an objective
7 standard of reasonableness” and prejudice is established by showing “a reasonable probability
8 that, but for his attorney's inadequate performance, the outcome of his proceeding before the trial
9 court would have been different.” *Id.* The court may also “consider the probability of success of
10 the motion in question in determining whether the attorney's inactivity constituted incompetent
11 performance.” *Id.*

12
13 Ash does not include any medical records to support his allegation or conclusions. As
14 discussed above, without more than just conclusory and bare statements, there is not sufficient
15 evidence before the court as to what medical records Ash’s counsel could have presented for the
16 Rule 35 motion, but did not.

17 Similarly, as to Cootz's complaint that counsel failed to obtain medical treatment
18 records on his toe injury, or expert testimony as to the limitations caused by such
19 an injury, Cootz has not shown that such evidence exists.

20 *Cootz v. State*, 129 Idaho 360, 371, 924 P.2d 622, 633 (Ct. App. 1996).

21 In his Petition, Ash does include the affidavits of David J. Shuffman, Dawn Anne Peer
22 and Patti Kincheloe, who testify to the hard life Ash has had and are character witnesses to Ash.
23 These affidavits were not included in the original Rule 35 motion.

1 Even if Ash's counsel had contacted the friends and family of Ash for mitigation
2 purposes, the outcome of the sentence would not have changed. Ash is unable to show he was
3 prejudiced by his attorney's representation and this claim fails.

4 d. Objection to or Dismissal of Second Trial

5 Ash asserts trial counsel was ineffective for failing to object or move to dismiss the
6 second trial based on the grounds of double jeopardy.

7 "Jeopardy attaches when a jury is sworn." *State v. Pugsley*, 128 Idaho 168, 173, 911 P.2d
8 761, 766 (Ct. App. 1995). "[T]he double jeopardy clause protects against repeated convictions
9 and prosecutions for the same crime." *State v. Manley*, 142 Idaho 338, 344, 127 P.3d 954, 960
10 (2005). "A criminal defendant may be retried if the first trial was prematurely terminated by the
11 district court, without the defendant's consent, due to 'manifest necessity.'" *Manley*, 142 Idaho at
12 344, 127 P.3d at 960 (quoting *United States v. Perez*, 9 Wheat. 579, 22 U.S. 579, 6 L.Ed. 165
13 (1824)). Manifest necessity is defined as:

14
15 *The basic rule is that criminal actions may be terminated by a mistrial without*
16 *double jeopardy consequences if there is a sufficiently compelling reason to do*
17 *so, some procedural error or other problem obstructing a full and fair adjudication*
18 *of the case which is serious enough to outweigh the interest of the defendant in*
19 *obtaining a final resolution of the charges against him-what is commonly termed*
20 *a "manifest necessity" or "legal necessity." The courts have generally declined to*
21 *lay out any bright-line rule as to what constitutes "manifest necessity," but have*
22 *based their decisions on the facts of each case, looking to such factors as whether*
the problem could be adequately resolved by any less drastic alternative action;
whether it would necessarily have led to a reversal on appeal if the trial had
continued and the defendant had been convicted; whether it reflected bad faith or
oppressive conduct on the part of the prosecution; whether or not it had been
declared in the interest of the defendant; and whether and to what extent the
defendant would be prejudiced by a second trial.

23 *State v. Stevens*, 126 Idaho 822, 826-27, 892 P.2d 889, 893-94 (1995) (quoting John E.
24 Theuman, Annotation, *Former Jeopardy as Bar to Retrial of Criminal Defendant After Original*

1 *Court's Sua Sponte Declaration of a Mistrial—State Cases*, 40 A.L.R.4th 741 (1985) (emphasis
2 in original)).

3 In making the manifest necessity determination, a district court ought to obtain
4 sufficient information to enable it to consider alternatives to a mistrial and give
5 counsel a timely and meaningful opportunity to be heard on the subject.

6 *State v. Manley*, 142 Idaho 338, 345, 127 P.3d 954, 961 (2005)

7 In addition, a defendant may waive double jeopardy when he moves for mistrial. *See*,
8 *State v. Pugsley*, 128 Idaho 168, 173, 911 P.2d 761, 766 (Ct. App. 1995). However, such a
9 waiver does not occur “if the motion was induced by prosecutorial or judicial conduct designed
10 specifically to provoke the defendant into calling for a mistrial.” *Id.* Specific intent must be
11 found. *See, State v. Fairchild*, 121 Idaho 960, 963-64, 829 P.2d 550, 553-54 (Ct. App. 1992)
12 (distinguished on other grounds by *State v. Wilson*, 142 Idaho 431, 436, 128 P.3d 968, 973 (Ct.
13 App. 2006)). “A mere showing of prejudice is not sufficient.” *State v. Sharp*, 104 Idaho 691,
14 694, 662 P.2d 1135, 1138 (1983) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 673 102 S.Ct.
15 2083, 2088, 72 L.Ed.2d 416 (1982)) (*Sharp* disapproved on other grounds by *State v. Alanis*, 109
16 Idaho 884, 712 P.2d 585 (1985)). “Negligence, even if gross, is insufficient to constitute intent to
17 provoke a mistrial.” *Pugsley*, 128 Idaho at 174, 911 P.2d at 767.

18 The facts leading to the motion for mistrial include the following: during direct
19 examination the State asked the arresting officer “Q. Now, after he performed those FSTs and
20 you arrested him, did he say anything about drinking any more alcohol besides the one beer? A.
21 He decided not to say anything more after that.” Trial Transcript, pg. 1:10-13. Defense counsel
22 objected immediately, a side bar was held and a recess taken thereafter. The Court then heard
23 argument and took the matter under advisement.
24

1 Once the motion was made, the court continued with the trial until a hearing was held on
2 the matter the next day, allowing both sides time to respond to the motion prior to the hearing. In
3 the State's response the prosecutor asserted her purpose in eliciting the improper testimony was
4 to preempt the defendant from testifying differently than what he told the officer, because she
5 speculated that the defendant, if he testified, might provide a different account than the account
6 he provided to the arresting officer.

7 The Court granted Defendant's motion for a mistrial, based on *State v. Ellington*, 151
8 Idaho 53, 253 P.3d 727 (2011). "A prosecutor may not use evidence of post-arrest, post-*Miranda*
9 silence for either impeachment, or as substantive evidence of guilt in the State's case-in-chief."
10 *State v. Ellington*, 151 Idaho 53, 60, 253 P.3d 727, 734 (2011) (citations omitted). It is
11 fundamental error to attempt to use such silence in this way. *See, State v. Wolverton*, 120 Idaho
12 559, 562, 817 P.2d 1083, 1086 (Ct. App. 1991). Therefore, it was a manifest necessity for the
13 court to grant a mistrial. The defendant was the party who moved for mistrial, however, it was
14 based on the misconduct of the prosecutor. Therefore, in order for the defendant to be able to
15 claim double jeopardy, the prosecutor must have intended to provoke the defendant into moving
16 for mistrial.
17

18 In its ruling, the Court indicated its understanding that the State's inquiry about post-
19 arrest silence was to influence the defendant's decision about testifying to different facts than
20 stated by the officer. In this sense, the State's attorney certainly acted intentionally. However,
21 there is nothing in the record that the State intended thereby to "provoke the defendant into
22 calling for a mistrial . . ." Rather, it appears the deputy prosecutor acted upon an inadequate
23 understanding of the law. Therefore, double jeopardy did not attach to Defendant's case and was
24

1 not a bar to subsequent prosecution. *See, State v. Fairchild*, 121 Idaho 960, 963-64, 829 P.2d
2 550, 553-54 (Ct. App. 1992) (distinguished on other grounds by *State v. Wilson*, 142 Idaho 431,
3 436, 128 P.3d 968, 973 (Ct. App. 2006)).

4 Even if Ash's trial counsel had objected or moved to dismiss the second trial, the end
5 result would have been the same. Double jeopardy did not attach.

6 2. Prosecutorial Misconduct Claims

7 a. Double Jeopardy

8 Ash asserts there was deliberate misconduct by the prosecutor in moving forward with
9 the second trial, based on the double jeopardy argument. However, as determined above, double
10 jeopardy did not attach and the prosecutor did not commit a fundamental violation by moving
11 forward with the second trial.

12
13 In addition, Ash did not include this issue in his appeal, even though it was known to Ash
14 prior to the filing of an appeal.

15 Post-conviction petitions are not substitutes for appeals. It is well established that
16 applicants for post-conviction relief are not allowed to raise issues in post-
17 conviction proceedings that could have been raised on direct appeal unless the
18 issues were not known and could not reasonably have been known during the
19 direct appeal. I.C. § 19-4901(b); *Hollon v. State*, 132 Idaho 573, 581, 976 P.2d
20 927, 935 (1999); *Rodgers v. State*, 129 Idaho 720, 932 P.2d 348 (1997). Idaho
21 Code section 19-4901(b) states:

22 (b) This remedy is not a substitute for nor does it affect any remedy incident
23 to the proceedings in the trial court, or of an appeal from the sentence or
24 conviction. Any issue which could have been raised on direct appeal, but
25 was not, is forfeited and may not be considered in post conviction
26 proceedings unless it appears to the court, on the basis of a substantial
factual showing by affidavit, disposition or otherwise, that the asserted basis
for relief raises a substantial doubt about the reliability of the finding of
guilt and could not, in the exercise of due diligence, have been presented
earlier.

I.C. § 19-4901(b).

1 *Raudebaugh v. State*, 135 Idaho 602, 606, 21 P.3d 924, 928 (2001) (distinguished on other
2 grounds by *Murphy v. State*, 143 Idaho 139, 139 P.3d 741 (Ct. App. 2006).

3 Ash cites to *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009) for support of his
4 Petition; however, that case involved a direct appeal, not a post-conviction petition. The sections
5 quoted by Ash are not applicable to his petition. Ash knew of the prosecutorial misconduct prior
6 to any time to file an appeal, yet did not include it in his direct appeal. Ash's claim fails.

7 b. Jail Call

8 On May 11, 2012, the prosecutor found a call³ made from Ash while in jail to a friend in
9 which he discussed the facts of the case. The prosecutor provided a copy of the phone call to
10 Ash's counsel at 10:30 a.m. on May 11, 2012. Ash's trial was scheduled to begin on May 14,
11 2012. On May 14, 2012 Ash's counsel objected to the use of the phone call as untimely
12 disclosed. The prosecutor indicated the call would only be used during cross examination of the
13 defendant or during rebuttal. The Court denied the motion to exclude the call, but granted a
14 continuance of the trial. At the trial, which began on June 11, 2012, the State published the jail
15 call in its case in chief. Ash argues it was prosecutor misconduct to publish the phone call in the
16 State's case in chief. The Court does not agree. Ash was not prejudiced because of the timing of
17 the disclosure because the trial was continued from May 11 to June 11. Due to the continuance,
18 the State was no longer bound by its agreement not to use the call in its case in chief during the
19 trial that was scheduled to begin on May 14.
20

21 The State argues it is required to prove Ash's alcohol level of impairment while he was
22 driving. The State presented an expert to testify about Ash's level of impairment while driving
23

24 _____
25 ³ Neither party details what the call said.

1 before the crash. During cross-examination, Ash's counsel continually asked questions about
2 consumption of alcohol occurring after the crash. The State argues it was necessary to present the
3 jail call evidence in its case-in-chief in order to support the DUI charge.

4 In addition, this is a claim that was known to Ash prior to and during the direct appeal,
5 yet Ash did raise this issue. Thus, Ash may not now raise this issue.⁴

6 Post-conviction petitions are not substitutes for appeals. It is well established that
7 applicants for post-conviction relief are not allowed to raise issues in post-
8 conviction proceedings that could have been raised on direct appeal unless the
9 issues were not known and could not reasonably have been known during the
10 direct appeal.

11 *Raudebaugh v. State*, 135 Idaho 602, 606, 21 P.3d 924, 928 (2001).

12 3. Ineffective assistance of appellate counsel

13 Post-conviction claims of ineffective assistance of appellate counsel are also subject to
14 the *Strickland* standards. *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007).

15 Ash must show "appellate counsel's performance was deficient and caused prejudice in the
16 outcome of the appeal." *Id.* "The relevant inquiry on the prejudice prong in relation to appellate
17 counsel is whether there is a reasonable possibility that, but for counsel's errors, the petitioner
18 would have prevailed on appeal." *Stevens v. State*, 156 Idaho 396, 411, 327 P.3d 372, 387 (Ct.
19 App. 2013), review denied (July 1, 2014).

20 Ash asserts appellate counsel was ineffective for failing to include the issue of the jail
21 call in the direct appeal.

22 The Supreme Court has stated that appellate counsel has no constitutional
23 obligation to raise every nonfrivolous issue requested by an appellant. *Jones v.*
24 *Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987, 993-94
(1983). Rather, appellate counsel is expected to use his or her professional
25 training to examine the record and sort out weaker arguments in favor of central

26 ⁴ Ash has appropriately raised this issue in his ineffective assistance of appellate counsel claim.

and key issues. *Id.* at 751–52, 103 S.Ct. at 3312–13, 77 L.Ed.2d at 993–94.
Indeed, raising every colorable issue in an appeal may bury the promising issues,
resulting in a disservice to the goal of effective advocacy. *Id.* at 754, 103 S.Ct. at
3314, 77 L.Ed.2d at 995.

Daniels v. State, 156 Idaho 327, 325 P.3d 668, 671-72 (Ct. App. 2014), review denied (June 5,
2014). “[O]nly when ignored issues are clearly stronger than those presented, will the
presumption of effective assistance of counsel be overcome.” *Id.* (citing *Mintun v. State*, 144
Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (citing *Robbins*, 528 U.S. at 288, 120 S.Ct. at
765–66, 145 L.Ed.2d at 781–82)).

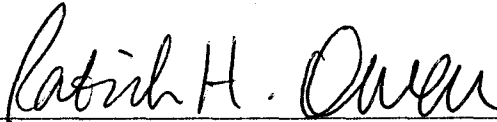
Based on the above analysis discussing the jail call, the Court concludes that this ignored
issue would not have changed the outcome of the appeal.

Conclusion

After reviewing the evidence and pleadings before it, the Court finds as a matter of law,
that Ash is entitled to none of the post-conviction relief requested. *Repp v. State*, 136 Idaho 262,
32 P.3d 156, 157-58 (Ct. App. 2001). Having reviewed the Petition and any evidence in a light
most favorable to Ash, the Court finds it is satisfied Ash is not entitled to post-conviction relief.
Therefore, the Court dismisses Ash’s Petition.

IT IS SO ORDERED.

Dated this 27 day of May 2016.


Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 2 day of ^{June} ~~May~~, 2016 I caused a true and correct copy of the foregoing ORDER GRANTING THE STATE'S MOTION TO SUMMARILY DISMISS THE PETITION to be served by the method indicated below, and addressed to the following:

Shelley Akamatsu
Ada County Prosecutor
Interdepartmental Mail

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

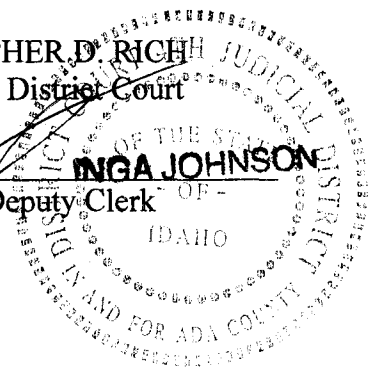
Joseph L. Ellsworth
Ellsworth, Kallas & DeFranco PLLC
1031 E. Park Blvd.
Boise, ID 83712

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: _____

INGA JOHNSON
Deputy Clerk



FILED: 6/13, 2016 at 9:10
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

TERRY LEE ASH,
Plaintiff,
vs.
STATE OF IDAHO,
Defendant,

CASE NO. CVPC15-02064
JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

This case is hereby dismissed .

IT IS SO ORDERED.

June 13, 2016

Date

Patrick H. Owen

Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that copies of the foregoing document were sent to:

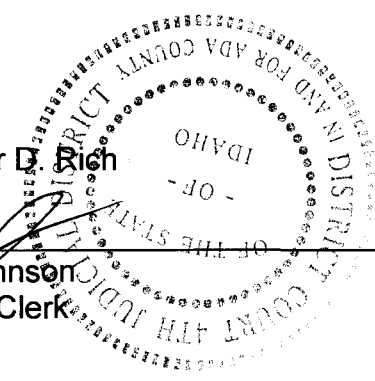
Shelley Akamatsu
Ada County Prosecutor
Interdepartmental Mail

John DeFranco
Attorney at Law
1031 E Park Blvd
Boise Id 83712

Dated: 6/13/16

Christopher D. Rich

by: _____
Inga Johnson
Deputy Clerk



Judgment

JUN 22 2016

CHRISTOPHER D. RICH, Clerk
By SARAH TAYLOR
DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

Attorney for Petitioner

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

TERRY LEE ASH,)	
)	
Petitioner-Appellant	)	Case No. CV PC 15 02064
vs.)	
	)	NOTICE OF APPEAL
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

TO: THE RESPONDENT- ADA COUNTY PROSECUTING ATTORNEY, AND
THE CLERK OF THE ABOVE ENTITLED COURT; IDAHO ATTORNEY GENERAL;
COURT REPORTER.

1. The above named Appellant, appeals against the State of Idaho to the
Idaho Supreme Court from the Judgment entered by the District Court of June 14, 2016.

1. NOTICE OF APPEAL 1

2

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgments described in paragraph one (1) above are appealable pursuant to I.A.R. 11(a)

(1). This is not an expedited appeal pursuant to I.A.R. 12.2.

3. A preliminary statement of the issue(s) on appeal:

-Did the district court err in summarily dismissing Petitioner's claims for post conviction relief set forth in the original and amended petition for relief?

-Did the district court err in refusing grant summary dismissal for Petitioner on Claims VI and VII of the amended petition for relief?

4. Has an order entered sealing any portion of the record? No.

5. Is a reporter's transcript requested? Yes. The Appellant does request the preparation of a transcript of the following proceedings in this matters:

-Oral Arguments on hearing on Motions to Dismiss, held April 25, 2016.

6. The appellant requests that the clerk's record contain those documents automatically included as set out in I.A.R. 28 (b), prepared in the above-entitled case in hard copy and electronic form.

7. The appellant does not request the addition of any other record or exhibit.

8. I certify:

(a) That a copy of this Notice of Appeal has been served on the following court

reporters: Kasey Redelich, Fourth District Court.

(b) That the Appellant is exempt from paying the estimated transcript fee

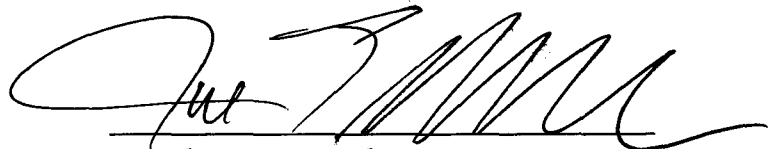
because he is indigent. Counsel for the Appellant is court appointed conflict counsel for the Ada County Public Defender.

(c) That the Appellant is exempt from paying the estimated fee for Preparation of the clerk's record because he is indigent.

(d) That the Appellant is exempt from paying the filing fee because he is indigent.

(e) That service has been made upon all parties required to be served pursuant to I.A.R. 25.

Dated this 21st day June, 2016.



Joseph L. Ellsworth
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that on the 7/24 day of June, 2015, I served a true and correct copy of the within and foregoing document by the method indicated below an addressed to the following:


Ada County Prosecuting Attorney
200 W. Front Street
Boise, Idaho 83702

Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720

Clerk of the Court
Ada County Court

Court Reporter: Kasey Redelich

- U.S. Mail
- Overnight Mail
- Facsimile
- Hand delivered



Joseph L. Ellsworth

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A.M. _____ FILED 3 P.M. _____

JUL 05 2016

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,)
)
Petitioner,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)
_____)


Case No.: CV PC 2015 02064

MOTION FOR APPOINTMENT
OF STATE APPELLATE
PUBLIC DEFENDER

COMES NOW the Petitioner, by and through counsel of record, and hereby moves the Court to enter an Order appointing the Idaho State Appellate Public Defender as Attorney of Record on appeal in the above-entitled case.

Petitioner moves the Court on the basis that the Petitioner is indigent, and is currently represented by conflict counsel for the Ada County Public Defender.

DATED this 5th day of July 2016.


Joseph L. Ellsworth
Attorney for Petitioner

ORIGINAL

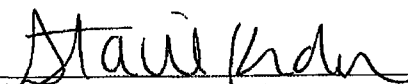
W

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July 2016, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

US Mail
 Hand Delivery
 Facsimile: 287-7709



Stacie Krahn, Legal Assistant

NO. _____
A.M. 9:00 FILED _____
P.M. _____

JOSEPH L. ELLSWORTH, ISB #3702
ELLSWORTH, KALLAS, & DEFRANCO, P.L.L.C.
1031 E. Park Blvd.
Boise, ID 83712
Phone: (208) 336-1843
Fax: (208) 345-8945

JUL 15 2016
CHRISTOPHER D. RICH, Clerk
By IMBA JOHNSON
DEPUTY


ATTORNEY FOR PETITIONER

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

TERRY LEE ASH,)	
)	
Petitioner,	)	Case No.: CV PC 2015 02064
)	
vs.	)	ORDER FOR APPOINTMENT
	)	OF STATE APPELLATE
STATE OF IDAHO,	)	PUBLIC DEFENDER
)	
Respondent.)	
_____)	

Upon motion of the Petitioner, the Court hereby finds the Petitioner indigent and appoints the State Appellate Public Defender to represent the Petitioner/Appellant on appeal in the above-entitled case.

DATED this 12 day of July 2016.



Fourth District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of July 2016, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Ada County Prosecuting Attorney
200 W. Front Street, Ste. 3191
Boise, Idaho 83702

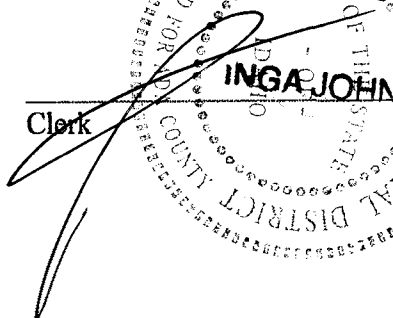
Interdepartmental Mail
 Hand Delivery
 Facsimile: 287-7709

Idaho State Appellate Public Defender
P.O. Box 2816
Boise ID 83701

Interdepartmental Mail
 US Mail
 Facsimile: 334-2985

Joseph L. Ellsworth
Ellsworth, Kallas, Talboy & DeFranco
1031 E. Park Blvd.
Boise, Idaho 83712

US Mail
 Hand Delivery
 Facsimile: 345-8945


Clerk

CHRISTOPHER D. RICH
INGA JOHNSON
CLERK OF THE DISTRICT JUDICIAL DISTRICT AND COUNTY CLERK OF THE STATE OF IDAHO

AUG 03 2016

CHRISTOPHER D. RICH, Clerk
By SUZANNE SIMON
DEPUTY

TO: CLERK OF THE COURT IDAHO SUPREME COURT
451 WEST STATE STREET, BOISE, IDAHO 83702

TERRY LEE ASH,)	
)	
)	
Petitioner-Appellant,	)	Supreme Court
	)	Docket No. 44295
vs.)	
)	
	)	Case No. CV-PC-2015-02064
STATE OF IDAHO,)	
)	
	)	NOTICE OF TRANSCRIPT
	)	LODGING
Respondent.)	
)	

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on August 3, 2016, I lodged transcript(s) of the following hearing(s):

Hearing: April 25, 2016; a total of 23 pgs,

for the above-referenced appeal with the District Court Clerk of the County of Ada in the Fourth Judicial District.

Kasey A. Redlich
Kasey A. Redlich,
Certified Court Reporter

8/3/16
Date

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

TERRY LEE ASH,

Petitioner-Appellant,
vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 44295

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:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

I FURTHER CERTIFY, that the following documents will be submitted as CONFIDENTIAL EXHIBITS to the Record:

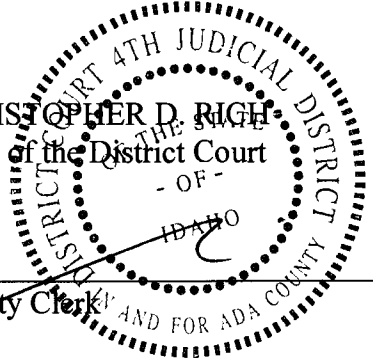
1. Presentence Investigation Report.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Jury Trial Transcript (Excerpt), March 12th, 2012; March 13th, 2012; March 21, 2012, Boise, ID, filed September 08, 2015.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 3rd day of August, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court
- OF -
IDAHO
By _____
Deputy Clerk



CERTIFICATE OF EXHIBITS

000218

EXHIBIT LIST

Patrick H. Owen/ Inga Johnson
Judge Clerk

DATE: April 25, 2016

DISPOSITION: Motion for Summary Disposition
CASE NO. CVPC15-02064

Terry Lee Ash	Joe Ellsworth
	Attorney at Law

Petitioner

Respondent(s)

vs.

State of Idaho	Shelley Akamatsu
	Deputy Ada County Prosecutor

Defendant

Attorney(s)

BY	NO.	DESCRIPTION	STATUS
St	1	Appeal Transcript	Adm
St	2	Appeal Transcript	Adm
St	3	Appeal Transcript	Adm
St	4	Memorandum Decision and Order on Rule 35	Adm
Pet	1	Transcript Excerpt	Adm
Pet	2	Judgment	Adm

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
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TERRY LEE ASH,

Petitioner-Appellant,
vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 44295

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

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WARDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

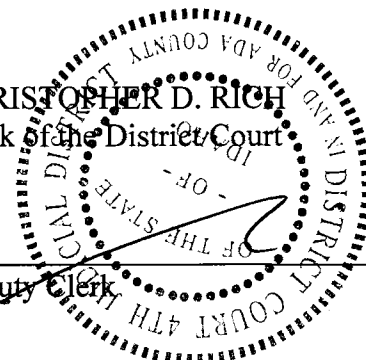
AUG 03 2016

Date of Service: _____

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk



000220

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

TERRY LEE ASH,

Petitioner-Appellant,
vs.

STATE OF IDAHO,

Respondent.

Supreme Court Case No. 44295

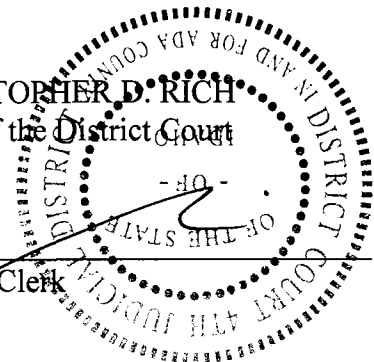
CERTIFICATE TO RECORD

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 22nd day of June 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk



CERTIFICATE TO RECORD

000221