

8-24-2016

Cuc Phuoc Ho v. State Clerk's Record Dckt. 44415

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CUC PHUOC HO,)
)
 Petitioner/Respondent,) Supreme Court No. 44415
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent/Appellant.)
 _____)

RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Blaine.

HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE

NATHAN D. RIVERA
PO Box 700
Blackfoot, ID 83221

STATE ATTORNEY GENERAL
CRIMINAL APPEALS
P. O. Box 83720
Boise, ID 83720-0010

Attorney for Petitioner/Respondent

Attorney for Respondent/Appellant

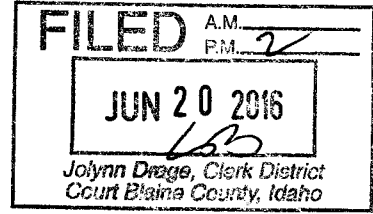
Post Conviction Relief

Date		Judge
6/20/2016	<p>New Case Filed - Post Conviction Relief</p> <p>Subject: Ho, Cuc Phuoc Appearance Nathan D Rivera</p> <p>Other party: State Of Idaho Appearance Jim Thomas</p> <p>Filing: H1c - Post-Conviction Act Proceedings * Paid by: Rivera, Nathan D (attorney for Ho, Cuc Phuoc) Receipt number: 0003892 Dated: 6/20/2016 Amount: \$.00 (Cash) For: Ho, Cuc Phuoc (subject)</p> <p>Filing: L4a - Appeal – Post Conviction Relief Paid by: Rivera, Nathan D (attorney for Ho, Cuc Phuoc) Receipt number: 0003892 Dated: 6/20/2016 Amount: \$.00 (Cash) For: Ho, Cuc Phuoc (subject)</p> <p>Petition for Post Conviction Relief</p> <p>Motion for Expedited Hearing</p> <p>Hearing Scheduled (Hearing Scheduled 06/23/2016 01:30 PM) Petition for Post Conviction Relief</p> <p>Order Granting Expedited Hearing</p>	<p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p>
6/23/2016	<p>Court Minutes</p> <p>Hearing type: Hearing Scheduled</p> <p>Hearing date: 6/23/2016</p> <p>Time: 1:11 pm</p> <p>Courtroom: District Courtroom-judicial Bldg</p> <p>Court reporter: Susan Israel</p> <p>Minutes Clerk: Crystal Rigby</p> <p>Tape Number: DC</p> <p>Party: Cuc Ho, Attorney: Nathan Rivera</p> <p>Party: State Of Idaho, Attorney: Jim Thomas</p> <p>Hearing result for Hearing Scheduled scheduled on 06/23/2016 01:30 PM: District Court Hearing Held</p> <p>Court Reporter: Susan Israel</p> <p>Estimated Number of Transcript Pages for this hearing: Petition for Post Conviction Relief less 100</p>	<p>Robert J. Elgee</p> <p>Robert J. Elgee</p>
6/28/2016	<p>Minute Entry and Scheduling Order</p> <p>Minute Entry and Preliminary Order</p>	<p>Robert J. Elgee</p> <p>Robert J. Elgee</p>
6/29/2016	<p>Hearing Scheduled (Evidentiary 07/28/2016 01:30 PM)</p>	<p>Robert J. Elgee</p>
7/12/2016	<p>Affidavit of Michael Kraynick</p> <p>Evidence in support of post conviction relief</p>	<p>Robert J. Elgee</p> <p>Robert J. Elgee</p>
7/26/2016	<p>Answer to Petition for Post-Conviction Relief</p> <p>Objection to Unverified Petition for Post Conviction and Commingling Separate Criminal Cases into a Single Petition for Post Conviction</p> <p>Motion for Summary Dismissal of Petition for Post Conviction</p> <p>State's Motion to Shorten Time for Notice of Hearing</p> <p>Notice Of Hearing</p> <p>Objection and Motion to Strike and/or Dismiss the State's Answer, Motion for Summary Dismissal, and Motion to Shorten Time</p>	<p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p> <p>Robert J. Elgee</p>

Post Conviction Relief

Date		Judge
7/28/2016	Court Minutes Hearing type: Evidentiary Hearing date: 7/28/2016 Time: 1:00 pm Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: DC Party: Cuc Ho, Attorney: Nathan Rivera Party: State Of Idaho, Attorney: Jim Thomas	Robert J. Elgee
	Case Taken Under Advisement	Robert J. Elgee
	Hearing result for Evidentiary scheduled on 07/28/2016 01:30 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: less 100	Robert J. Elgee
8/1/2016	Findings And Conclusions on Petition for Post-Conviction Relief Judgment	Robert J. Elgee
	STATUS CHANGED: Closed	Robert J. Elgee
	Civil Disposition entered for: State Of Idaho, Other Party; Ho, Cuc Phuoc, Subject. Filing date: 8/1/2016	Robert J. Elgee
8/10/2016	Notice Of Appeal	Robert J. Elgee
	Appealed To The Supreme Court	Robert J. Elgee
	STATUS CHANGED: Inactive	Robert J. Elgee

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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE.

CUC PHUOC HO,)	
	)	CV-2016 -294
Petitioner,)	
	)	PETITION FOR POST
vs.	)	CONVICTION RELIEF
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

The petitioner alleges:

1. Petitioner is not currently detained on this charge by the County, however, Petitioner is currently detained by the Department of Homeland Security in West Valley City, Utah as a direct result of these charges.

2. The cases originated in the District Court of the State of Idaho, in and for the County of Blaine in case numbers : CR-2004-962 and CR-2012-2219. In CR-2004-962, Petitioner was convicted of Distribution of Marijuana, in Violation of I.C. § 37-2732 (a)(1)(b), and Possession of Cocaine, in Violation of I.C. § 37-2732 (c)(1). In CR-2012-2219, Petitioner was convicted of

being in Unlawful Possession of a Firearm, in violation of I.C. 18-3316(1).

3. Petitioner was sentenced in CR-2004-962 on October 4, 2004, and was sentenced to 60 days in jail with a probationary period of 7 years on both charges.

4. In CR-2012-2219, Petitioner was sentenced on April 16, 2013 to a term of 2 years determinate, 2 years indeterminate, and 2 years of supervised probation. The sentence was suspended.

5. Both convictions were entered pursuant to a plea agreement. Petitioner never appealed either conviction, as he was unaware of the numerous errors of prior counsel when recommending he plead guilty to the charge in CR-2012-2219.

6. Petitioner bases his claims for relief on the following:

(a) Petitioner was granted a Withheld Judgement in CR: 2004-962 on October 4, 2004, and his conviction in that case was the basis for his conviction in CR-2012-2219. Petitioner was discharged from probation in May of 2007, and all of the terms and conditions of his conviction were finalized on that date. Prior counsel filed a Motion to Set Aside the Guilty Plea and Dismiss the charge in CR-2004-962 pursuant to 19-2604, but never set the matter for hearing. Petitioner should have been granted a Withheld Judgement at that time, and his case should have been dismissed. However, that Motion was pending with the Court for five (5) years before the charge was filed on May 30, 2012. Had counsel set the matter for hearing, his guilty plea would have been set aside and his case dismissed making him immune from 18-3316 prosecution. But for prior counsel's ineffective assistance, Petitioner would not be in immigration custody without the possibility

of a bond, and a almost certain removal order from the United States. Relief is proper pursuant to Idaho Code 19-4901 (1) (ineffective assistance of counsel).

(b) Petitioner's case in CR-2004-962 was dismissed and his rights were restored prior to his guilty plea in CR-2012-2219, therefore his conviction was improper pursuant to I.C. 18-3316(3). Counsel for the Petitioner filed a renewed Motion to Set Aside Plea and to Enter a Dismissal in CR-2004-962 on May 25, 2012, which was granted on June 14, 2012, restoring Petitioner's Civil Rights. Petitioner was not charged in CR: 2012-2219 Until May 30, 2012, with a guilty plea not being entered until April 15, 2013. Post Conviction is proper pursuant to I.C. 19-4901(4)(5)(6) & (7).

(c) Petitioner was never fully advised of the immigration consequences of pleading guilty to being a Felon in Possession of a Firearm. In addition, Defendant is a native of Vietnam and his first language is Vietnamese. It is unclear if Petitioner fully understood everything being explained to him. Post Conviction Relief is proper pursuant to I.C. 19-4901 (1) (ineffective assistance of counsel).

(d) Due to prior counsel's failure to advise the Petitioner of the full immigration consequences of pleading guilty to being a Felon in Possession of a Firearm, and where counsel had Petitioner continue forward with a guilty plea, even though a Withheld Judgement had been ordered in 2004, after his prior conviction had been dismissed and his civil rights were restored; Petitioner received ineffective assistance of counsel and his guilty plea should be withdrawn pursuant to I.C. 19-4901(1).

8. Petitioner has not filed any habeas corpus petitions, but Petitioner did file a Motion to Withdraw his Guilty Plea and Motion to Dismiss in The District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, pursuant to I.C.R. 33(c) and 48(a)(2), which is currently pending before this court.

9. Petitioner does allege that prior counsel failed to adequately represent him by the following:

(a) Failed to fully inform Petitioner of the severe immigration consequences of pleading guilty to being a Felon in Possession of a Firearm, and that he would lose his 30 year United States Residency, would be considered an aggravated felon in Immigration proceedings making him ineligible for bond, and that he would not be able to plead any form of relief as a result of the conviction and would be deported.

(b) After Petitioner's prior felony conviction had been dismissed, and his civil rights had been restored, Counsel advised the Petitioner to plead guilty to being a Felon in Possession of a Firearm, even though this charge should have been dropped when the Petitioner's previous felony conviction was dismissed.


(c) Prior counsel filed a Motion to Dismiss in October of 2007 pursuant to a Withheld Judgment entered in 2004, after Petitioner was successfully discharged from probation and had completed all the terms and conditions of his conviction, but never set the matter for hearing. As a direct result, Petitioner received a conviction of being Unlawfully in Possession of a Firearm.

10. Petitioner is seeking a withdraw of his guilty plea and dismissal in CR-2012-2219 on

the merits of the case, and a retroactive grant of a Withheld Judgement and Dismissal in CR-2004-962 to October 5, 2007. In the alternative, Petitioner’s guilty plea should be withdrawn due to ineffective assistance of counsel for failing to follow through with the Motion to Dismiss pursuant to the Withheld Judgement, and for failing to adequately advise Petitioner of the severe immigration consequences of pleading guilty to the charge in CR-2012-2219.

11. This Petition is proper pursuant to I.C. § 19-4901 (1)(4)(6) & (7). In addition, Pursuant to I.C. § 19-4901(1)(4)(7) & subsection (b), the 1 year time limit is not at issue given “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.” This contention is supported by the documentation and briefs submitted to this court with Petitioner’s Motion to Withdraw his Guilty Plea, and Motion to Dismiss which is currently pending before this court.

DATED this 20th day of June, 2016.



NATHAN D. RIVERA
Attorney for Petitioner

CERTIFICATE OF SERVICE

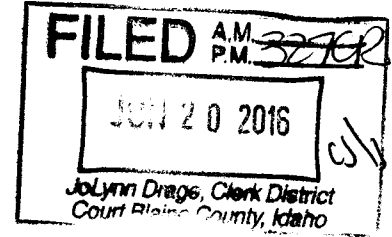
I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 20th day of June, 2016 upon the following:

Mail
 Fax 208-788-5554
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Jim Thomas
Prosecuting Attorney
219 1st. Ave S. Ste 201
Hailey, ID 83333


NATHAN D. RIVERA

DAVID N. PARMENTER, ISB #2441
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 Attorney at Law
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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,)	
)	
Petitioner,	)	Case No. CV- 2016 - 294
)	
vs.	)	ORDER GRANTING EXPEDITED HEARING
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Having reviewed the Motion for Expedited Hearing attached hereto, and finding good cause therefore, the statutory fourteen (14) day notice requirement for Motions is hereby shortened to permit a hearing on Petitioner's Petition for Post Conviction Relief on the 28 day of June, 2016 at the hour of 1:30 AM/PM

DATED this 20 day of June, 2016.

Att. Egan
 District Judge

CERTIFICATE OF SERVICE

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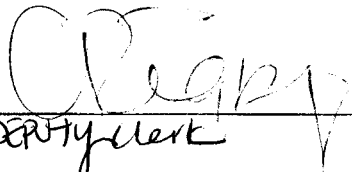
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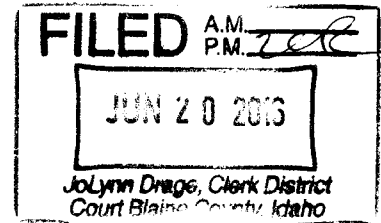
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Clerk-



DEPUTY CLERK

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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,)	
)	
Petitioner,	)	Case No. CV- 2016- 294
)	
vs.	)	MOTION FOR EXPEDITED HEARING
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW the Petitioner, by and through counsel, NATHAN D. RIVERA, and hereby moves this Court for an Order shortening the statutory notice requirement for hearing and allowing an Expedited Hearing on the attached Petition for Post Conviction Relief. Said Motion is based on the fact that Petitioner has been in Immigration custody on account of the conviction at issue since March 11, 2016, without the possibility of bond.


Furthermore, the Petitioner is set for an Immigration hearing to determine removability on July 14th, 2016. Without an order withdrawing Petitioner's guilty plea, the government will most likely be able to establish removability in Petitioner's case, and subject him to a removal order from

the United States. His removal would occur after thirty (30) years as a United States resident on account of a conviction that should never have happened.

In addition, Counsel for the Petitioner has already spoken to the Prosecuting Attorney on a number of occasions prior to the submission of Petitioner's Petition. Despite clear evidence in support of Pctitioner's claim, and despite the Court noting its position at the last hearing; Counsel for the State has refused to stipulate to withdraw Petitioner's guilty plea and dismiss the case, necessitating further litigation, time, and significant expense. As such, this is Petitioner's only recourse to correct a manifest injustice, and time is of the essence.

In addition, based on the circumstances, it would be in the interest of fairness and justice to expedite a hearing in this matter.

DATED this 20th of June, 2016


NATHAN D. RIVERA
Attorney for the Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 20th day of June, 2016 upon the following:

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Jim Thomas
Prosecuting Attorney
219 1st. Ave S. Ste 201
Hailey, ID 83333


NATHAN D. RIVERA

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

COURT MINUTES
CV-2016-0000294

Cuc Phuoc Ho, Plaintiff vs State Of Idaho, Defendant

Hearing type: Hearing Scheduled

Hearing date: 6/23/2016

Time: 1:30 pm

Judge: Robert J. Elgee

Courtroom: District Courtroom-judicial Bldg

Court reporter: Susan Israel

Minutes Clerk: Crystal Rigby

Tape Number: DC

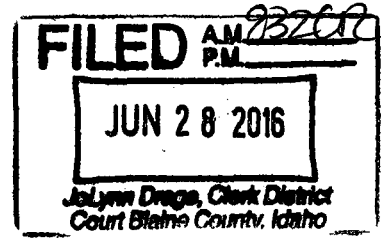
Party: Cuc Ho, Attorney: Nathan Rivera

Party: State Of Idaho, Attorney: Matthew Fredback

Counter #	
1.33	Counsel present.
	Court introduces the case.
	State comments- has 30 days to respond to the petition.
1.34	Mr. Rivera responds.
1.35	State responds.
1.38	Court comments lack of benefit of winning a post-conviction relief case if Mr. Ho is deported.
	Mr. Rivera comments on the facts in the case.
	Court continues.
1.41	Mr. Rivera comments on the deportation process.
	Court comments on plausible reasons why motion to dismiss withheld judgment wasn't set.
	Mr. Rivera responds.
1.45	Court wants to set an expedited process for this case. Mr. Rivera to prepare and order re facts of the dismissal of the withheld judgment, to present to the immigration judge to prevent Mr. Ho from being deported to allow more time to fully examine the facts.
1.52	State needs to do some discovery- checking email, talking to Mr. Kraynick, and notes in the file.
	Mr. Rivera- has requested a copy of the 2004 criminal case.
1.55	Court has Mr. Rivera prepare a scheduling order- discovery to be complete within 21 days of 6/23/16, sets Evidentiary for 7/28/2016 at 1:30p.m.

2.01	Mr. Rivera clarifies.
2.03	Court comments.
	Recess

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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,)	
)	
Petitioner,	)	Case No. CV- 2016-294
)	
vs.	)	MINUTE ENTRY AND
	)	SCHEDULING ORDER
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

This matter having come before the Court on the initial appearance on Petitioner’s Petition for Post Conviction Relief, and the Petitioner having appeared through Counsel, NATHAN D. RIVERA, and the State having appeared through Counsel MATTHEW E. FREEDBACK, Prosecuting Attorney for Blaine County, and the parties having discussed the matter with the Court; NOW THEREFORE IT IS ORDERED:

1. That the parties will complete discovery by 5:00 p.m. on July 21, 2016.
2. That the final hearing in this matter is set for a half day trial on Thursday, July 28, 2016, at 1:30 p.m.

DATED this 27 day of June, 2016.



ROBERT J. ELGEE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 28 day of June, 2016 upon the following:

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Jim Thomas
Prosecuting Attorney
219 1st. Ave S. Ste 201
Hailey, ID 83333

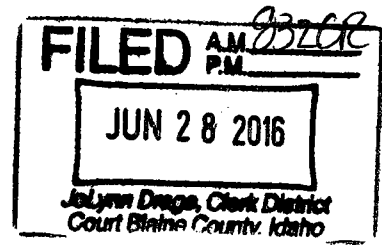
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Clerk-

By: 
Deputy

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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,)	
)	
Petitioner,	)	Case No. CV- 2016-294
)	
vs.	)	MINUTE ENTRY AND
	)	PRELIMINARY ORDER
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

This matter having come before the Court on the initial appearance on Petitioner's Petition for Post Conviction Relief, and the Petitioner having appeared through Counsel, NATHAN D. RIVERA, and the State also having appeared through Counsel MATTHEW E. FREEDBACK, Prosecuting Attorney for Blaine County, and the parties having discussed the matter with the Court, therefore the Court makes the following Preliminary Order:

This matter initially came before this Court on Petitioner's Motion to Withdraw His Guilty Plea and Motion to Dismiss the charge in Case Number CR-2012-2219. Petitioner made his Motion pursuant to the Idaho Criminal Rules 33(c) and 48 (a)(2), and presented documentation, evidence, and argument in support of his Motion. The State argued that the Petitioner's Motion was improper

as the time for appeal had passed, and that this Court no longer had jurisdiction over the matter. The basis for his Petition was founded on the following facts.

Petitioner pleaded guilty to Possession of a Controlled Substance and Distribution of Marijuana in CR-2004-962 on July 26, 2004. This Court entered an Order Withholding Judgement in October 4, 2004. Pctitioner was fully released from probation on recommendation from the probation officer on May 3, 2007. Counsel for the Defendant filed a Motion to Set Aside Plea and to Enter a Dismissal pursuant to I.C. 19-2604 and Expungement on October 5, 2007. Counsel for the Petitioner never set the matter for hearing and the case sat idle for nearly five years until Petitioner was picked up for being in Unlawful Possession of a Firearm on May 30, 2012.

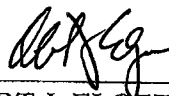
After significant review, this Court ruled that a Petition for Post Conviction Relief would be the proper avenue to request the desired relief. Petitioner subsequently filed his Petition for Post Conviction relief, and the matter is currently pending before this court. Petitioner's contention is principally based on an ineffective assistance of counsel argument since prior counsel failed to set his Motion to Dismiss for hearing, and but for prior counsels actions, the Petitioner would never have been charged with being in Unlawful Possession of a Firearm.

As noted, both actions were instigated before this Court, and after a review of the facts and evidence presented to this point, this Court finds that there have been substantial questions raised by Petitioner's Petition for Post Conviction Relief, and these facts are likely to be established by the evidence. This Court further believes at this time that there is a substantial likelihood that the Petitioner will be granted Post Conviction relief, *although the Court has not heard the states evidence. (AE)*

This matter has been set for a final hearing on July 28, 2016, and this Court will move forward with all due haste to make a prompt and appropriate ruling in this case. This Court would

respectfully request that the Immigration Court not make a ruling on removability as to this charge until final order is issued in this matter.

DATED this 27 day of June, 2016.



ROBERT J. ELGEE
District Judge

CERTIFICATE OF SERVICE

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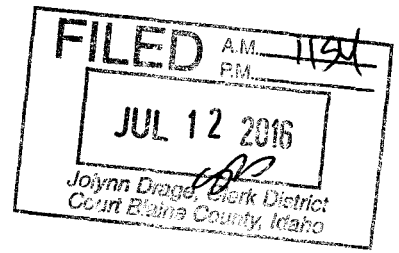
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Clerk-

By: 
Deputy



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

STATE OF IDAHO,

Plaintiff,

vs.

CUC PHUOC HO,

Defendant.

CASE NO.: *2016-294*

AFFIDAVIT OF MICHAEL J. KRAYNICK

AFFIDAVIT OF MICHAEL J. KRAYNICK

STATE OF IDAHO)

: ss.

County of Blaine)

Michael J. Kraynick being first duly sworn on oath, deposes and says:

1. I was the attorney of record for Mr. Cuc Ho in case number CR-2004-962, and case number CR-2012-2219

2. In CR-2004-962, pursuant to a plea agreement I worked out with the state, Mr. Ho plead guilty to Distribution of Marijuana, in Violation of I.C. § 37-2732 (a)(1)(b), and Possession of Cocaine, in Violation of I.C. § 37-2732 (c)(1) on July 26, 2004.

Mr. Ho was sentenced to 60 days in jail on each count with seven (7) years supervised probation, to run concurrently.

3. Mr. Ho requested and was granted a Withheld Judgment in CR-2004-962 on October 4, 2004 by the Blaine County District Court.

AFFIDAVIT OF MICHAEL J. KRAYNICK -

4. On May 3, 2007 probation submitted an Application and Order for Discharge from Probation which was approved by the District Court. Mr. Ho had fully and satisfactorily complied with all of the terms and conditions of his probation, paid all of his fines and costs, and had no further issues or concerns all of which which prompted his early release.

5. Subsequent to the order discharging Mr. Ho from probation, and pursuant to the Withheld Judgment entered in 2004, I had some discussions with the State about stipulating to a the Withheld, but they indicated that they wanted him to complete his probationary term even though he had been discharged from supervised probation.

6. Given that Mr. Ho had been successfully discharged from probation, and had complied with all of the terms and conditions of the Withheld Judgment, I filed a Motion to Set Aside his Plea and Enter a Dismissal Pursuant to I.C. 19-2604 and to expunge his record [to the extent allowed by Idaho law] on October 5, 2007.

7. From my recollection, the practice of the District Court at that time was that if a Withheld Judgment had been ordered, and the Defendant moved to have his case dismissed pursuant to the Withheld, and there were no objections, the Court would typically grant the motion and order the dismissal without further action.

8. Therefore, in my Motion I stated that oral argument was not requested unless the State objected. The state in fact never filed any objection. For that reason I never set the matter for hearing as it was my experience that without an objection the Court would typically enter the dismissal.

9. It is also my recollection that I never had any agreement with the State regarding the motion seeking benefits of the withheld judgment or I would not have filed the Motion to Dismiss after Mr. Ho had been discharged from probation. At that point, having been

AFFIDAVIT OF MICHAEL J. KRAYNICK -

2

successfully discharged from probation, and with all of the terms and conditions of his Withheld being met, there would have been no benefit to delaying the Withheld.

10. I took no further action on the case for the reasons previously stated, and I never followed up on my Motion as I did not have much contact with Mr. Ho at that time, and I had other matters that I was focused on.

11. Roughly five (5) years later, Mr. Ho was apprehended and taken into custody for being a Felon in unlawful possession of a firearm.

12. I immediately filed a Motion to Set Aside Guilty Plea and Enter a Dismissal on May 25, 2012 in CR-2004-962.

13. The State filed charges on May 30, 2012.

14. The District Court granted my Motion to Set Aside and Dismiss Mr. Ho's conviction in CR-2004-962, and restored his civil rights on June 14, 2012. I recall asking the State to agree to have the Motion granted Nunc Pro Tunc to the 2007 Motion, but the State refused desiring to proceed with prosecution instead.

15. I attempted to negotiate with the State to either reduce or dismiss the charge based on the Withheld judgment but the State also refused. My impression was that the State had a problem with Mr. Ho and/or his family and would not budge on the original charge for some reason. The Court would also not grant the motion in such a way that it obviated or vacated the new charge.

9. For that reason I recommended that Mr. Ho plead guilty to the charge because at that time the evidence was not in dispute and we would not prevail at trial.

10. I also recall advising Mr. Ho that I did not believe that he would have any issues with pleading guilty to the charge because he was a refugee, did not have a passport, and Immigration

did not make any contact with Mr. Ho after his 2004 conviction, which was much more serious, or when he was arrested on the gun charge. I believed there must have been a special arrangement for refugees that might preclude his removal. Also, since they did not come after him on the 2004 conviction, and it has been well over 10 years, I advised Mr. Ho that it was unlikely they immigration would take issue with the 2012 charge. Immigration never made any contact with Mr. Ho after charges were filed, or after he completed his sentence and he was released from probation.

11. Following Mr. Ho's conviction in CR-2012-2219, I filed motions for early terminations from probation that were ultimately granted, and my participation in the case ended at that point.

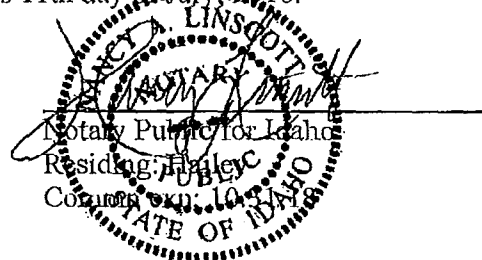
12. Other than occasionally seeing Mr. Ho from time to time at his various places of employment, I had little or no further contact with Mr. Ho from 2014 until now.

FURTHER AFFIANT SAYETH NOT.

Dated this 11th day of July, 2016.

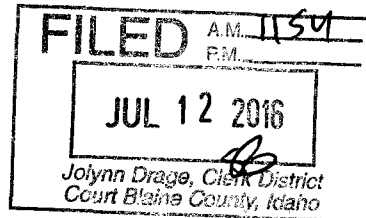
By: MICHAEL J. KRAYNICK 

SUBSCRIBED AND SWORN TO before me this 11th day of July, 2016.



AFFIDAVIT OF MICHAEL J. KRAYNICK -

DAVID N. PARMENTER, ISB #2441
NATHAN D. RIVERA, ISB #8339
Attorney at Law
53 S. Shilling
PO Box 700
Blackfoot, Idaho 83221
(208)785-5618
(208)785-4858- FAX
parlaw@gmail.com




Attorney for Defendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE
MAGISTRATE DIVISION

CUC PHUOC HO,)	
)	
Petitioner,	)	Case No. CV-2016-294
)	
vs.	)	EVIDENCE IN SUPPORT OF
	)	POST CONVICTION RELIEF
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW, CUC PHUOC HO, by and through his attorney, NATHAN D. RIVERA, and hereby submits the following evidence in support of Petitioner's Petition for post conviction relief.

DATED this 12th day of July, 2016.


NATHAN D. RIVERA
Attorney for Petitioner


EVIDENCE IN SUPPORT OF
POST CONVICTION RELIEF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served
on this 12th day of July, 2016 upon the following:

- Mail
- Fax
- Hand Delivery

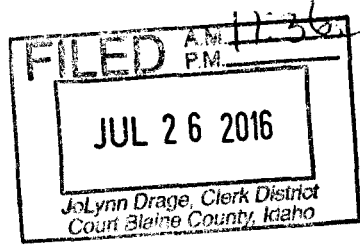
Jim Thomas
Prosecuting Attorney
219 1st. Ave S. Ste 201
Hailey, ID 8333



NATHAN D. RIVERA

ORIGINAL

Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney
201 2nd Avenue South, Suite 100
Hailey, ID 83333
Telephone: (208) 788-5545
Fax: (208) 788-5554



Attorney for Respondent

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

CUC PHUC HO,)	
)	
Petitioner,	)	CV-2016-294
)	
vs.)	
	)	ANSWER TO PETITION
	)	FOR POST-CONVICTION
	)	RELIEF
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Respondent State of Idaho for its answer to Petitioner's Motion for Post-Conviction Relief states and alleges as follows:

ANSWER

1. Respondent cannot admit or deny this allegation at this time and reserves the right to amend this response in paragraph 1 as Respondent does not have sufficient information in which to answer.
2. Respondent admits the allegations of paragraph 2 of the Petition.
3. Respondent admits the allegations of paragraph 3 of the Petition.

4. Respondent admits the allegations of paragraph 4 of the Petition.
5. Respondent admits the allegation of paragraph 5 of the Petition relative to never having appealed the case but denies errors by counsel during the plea stage.
6. Respondent denies the allegations of paragraph 6(a)-6(d) of the Petition.
7. There is no paragraph 7 to respond to.
8. Respondent admits the allegations of paragraph 8 of the Petition.
9. Respondent denies the allegations of paragraph 9 of the Petition.
10. Respondent denies the allegations of paragraph 10 of the Petition.
11. Respondent denies the allegations of paragraph 11 of the Petition.

FIRST AFFIRMATIVE DEFENSE

The Petition and each and every allegation therein fails to state a claim upon which relief can be granted pursuant to the Uniform Post-Conviction Procedure Act, Idaho Code §§ 19-4901 *et seq.*

SECOND AFFIRMATIVE DEFENSE

To the extent Petitioner's claims should have been raised on direct appeal, the claims are procedurally defaulted. Idaho Code § 19-4901(b).

THIRD AFFIRMATIVE DEFENSE

Petitioner has failed to file his petition within the one year statute of limitations and the claims are now time-barred. Idaho Code § 19-4902(a)

FOURTH AFFIRMATIVE DEFENSE

Petitioner's Petition for Post Conviction Relief contains bare and conclusory allegations unsubstantiated by affidavits, record or other admissible evidence, and therefore fails to raise a genuine issue of material fact. Idaho Code § §19-4902(a), 19-4903, and 19-4906.

FIFTH AFFIRMATIVE DEFENSE

Petitioner has waived any right to raise a claim regarding a knowing, voluntary and intelligently waived right during the proceeding that resulted in the conviction or sentence. Idaho Code § 19-4908.

SIXTH AFFIRMATIVE DEFENSE

The petitioner (Cuc Ho) has failed to verify his petition as required. Idaho Code §§19-4901(a) and 19-4903

SEVENTH AFFIRMATIVE DEFENSE

The petitioner is improperly before the court by commingling separate criminal cases into a single post-conviction petition. Idaho Code §19-4901

WHEREFORE, Respondent prays for relief against Petitioner as follows:

That the Petitioner's claims for post-conviction relief be denied and the Petition for Post-Conviction Relief be dismissed in its entirety with prejudice.

Dated this 26th day of July, 2016.

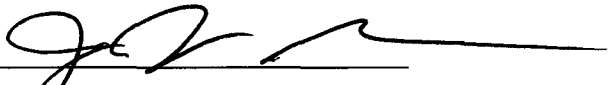


Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney

VERIFICATION OF ANSWER

The Respondent, by and through Jim J. Thomas, being first duly sworn under oath deposes and say:

- 1) I am the attorney for the Respondent in the above-entitled matter.
- 2) That the facts contained in the foregoing Answer to Petitioner's Petition for Post Conviction Relief are true and correct to the best of my information and belief.



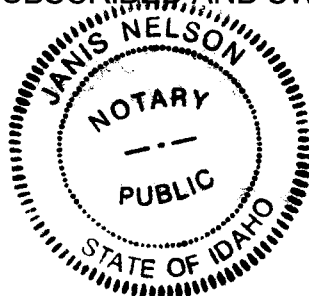
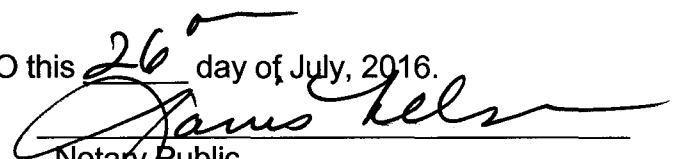
Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney

State of Idaho)
) ss:
County of Blaine)

I hereby certify that on this 26th day of July, 2016, personally appeared before me Jim J. Thomas who, being first duly sworn, declared that he is representing the Respondent in this action, and that the statements contained in the foregoing document are believed to be true to the best of my information and belief.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.

SUBSCRIBED AND SWORN TO this 26th day of July, 2016.

Notary Public
Residing in: Hailey, Idaho
Commission Expires: ~~04/16/15~~ 4/8/2021
State of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 2016, I caused to be served a true and correct copy of the within and foregoing document by the method indicated below, and addressed to each of the following:

Nathan Rivera, Esq.
Attorney at Law
53 S. Shilling
PO Box 700
Blackfoot, ID 83221

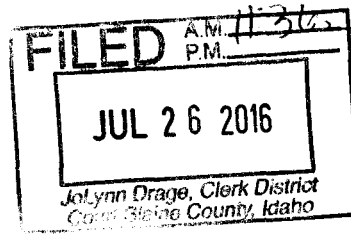
U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Telecopy



Janis Nelson, Legal Secretary

ORIGINAL

Blaine County Prosecuting Attorney
201 2nd Avenue South, Suite 100
Hailey, ID 83333
Telephone: (208) 788-5545
Fax: (208) 788-5554



Attorney for Respondent

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

CUC PHUOC HO,)	
)	
Petitioner,	)	CV-2016-294
)	
vs.)	
)	
	)	OBJECTION TO UNVERIFIED
	)	PETITION FOR POST CONVICTION
	)	AND COMMINGLING SEPARATE
STATE OF IDAHO,	)	CRIMINAL CASES INTO A SINGLE
	)	PETITION FOR POSTCONVICTION
Respondent.)	
_____)	

Respondent State of Idaho hereby OBJECTS to Petitioner’s unverified petition for post-conviction and to commingling multiple criminal cases into one petition for post-conviction. Pursuant to Idaho Code §19-4902, a [post-conviction] proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. According to the referenced statute all facts within the personal knowledge of the applicant must be sworn to affirmatively by the applicant as true and correct. Although in *State v Goodrich*, 103 Idaho 430, the court stated that a lack of verification was not a ground for dismissal it was because the state had not objected prior to the hearing and the court determined that the facts of the case were a matter of record


and thus a lack of verification was not fatal. In the instant case counsel for Petitioner Ho has made a number of assertions and claims that can only be verified by the applicant. Therefore until a verified and sworn application for post-conviction is received Respondent is unable to adequately answer petitioner's claims. The statute allows Respondent thirty (30) days from the receipt of a verified petition to file an Answer with the court. To date the Respondent is still awaiting a verified petition for the proceeding to commence.

Respondent further objects to the petition for post-conviction as filed on the basis that the petition commingles separate and distinct criminal cases separated by at least eight (8) years in time. A petitioner cannot file a single post-conviction action for two separate criminal cases. Idaho Code §19-4901 refers to a conviction (singular) and a proceeding (singular). This is also logically true given the statute of limitation, which would be different for each underlying criminal case, and the prohibition against raising claims in post-conviction that could have been raised on direct appeal in the criminal case. Respondent is unable to adequately respond to each claim other than a broad denial until petitioner narrows down the claims to each case. It will require separate petitions addressing each criminal case independently in order to efficiently and effectively address each claim.

Respondent is filing an abbreviated Answer along with this Motion to Object but reserves the right to amend or augment such response once an actual verified petition is filed and an amended petition is filed specific to a singular criminal case which will allow Respondent to respond to each claim independently.

Oral argument is requested and a motion and order to shorten time has been filed.

Dated this 26th day of July, 2016.



Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 2016, I caused to be served a true and correct copy of the within and foregoing document by the method indicated below, and addressed to each of the following:

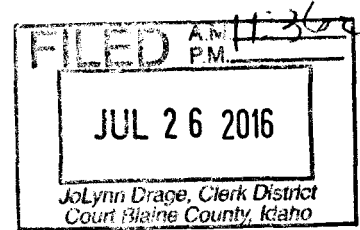
Nathan Rivera, Esq.
Attorney at Law
53 S. Shilling
PO Box 700
Blackfoot, ID 83221

U.S. Mail, Postage Prepaid
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Janis Nelson, Legal Secretary

ORIGINAL



Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney
201 2nd Avenue South, Suite 100
Hailey, ID 83333
Telephone: (208) 788-5545
Fax: (208) 788-5554

Attorney for Respondent

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

CUC PHOUC HO,)	
)	
	)	CV 2016-294
Petitioner,)	
	)	MOTION FOR SUMMARY DISMISSAL
vs.	)	OF PETITION FOR POST
	)	CONVICTION
)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

Respondent State of Idaho moves the Court for its order for summary dismissal of the PETITION FOR POST CONVICTION RELIEF filed in the above-captioned action upon the grounds that, pursuant to Idaho Code §19-4901, *et seq*, the allegations contained in the Petition (a) fail to state a claim upon which relief can be granted (b) such claims were not raised on appeal, (c) Petitioner has failed to file his petition within the one year statute of limitations (d) the claims are bare and conclusory allegations and/or (e) Petitioner knowingly and voluntarily waived a constitutional right during trial and is barred from challenging that waiver on post-conviction (f) the petition has not been verified by the applicant as required

by law and (g) the petition is improperly before the court in that the petition commingles separate criminal cases which is disallowed by Idaho Code §19-4901.

Because Ho's allegations fail as a matter of law, and/or are bare and conclusory and unsubstantiated by fact, he is not entitled to an evidentiary hearing and this Court should summarily dismiss his Petition. Respondent is therefore entitled to summary dismissal pursuant to Idaho Code § 19-4906(c).

Dated this 26th day of July, 2016.



Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 2016, I caused to be served a true and correct copy of the within and foregoing document by the method indicated below, and addressed to each of the following:

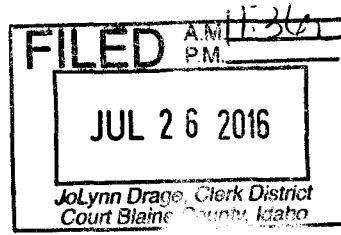
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Janis Nelson, Legal Secretary

ORIGINAL



Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney
219 1st Avenue South, Suite 201
Hailey, Idaho 83333
Telephone: (208) 788-5545
Fax: (208) 788-5554

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHOUC HO,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2016-294

STATE'S MOTION TO SHORTEN TIME
FOR NOTICE OF HEARING

Plaintiff State of Idaho moves the Court pursuant to Rule 45, Idaho Criminal Rules, for its order shortening the time for service of notice of hearing on its Objection to Unverified Petition for Post Conviction and Commingling Separate Criminal Cases Into A Single Petition for Post Conviction filed herein.

Plaintiff State of Idaho will call up its motion to shorten time at the time and place scheduled for hearing on the aforementioned Petition.

DATED this 26^r day of July, 2016.




Jim J. Thomas, ISBN 4415
Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2016, I caused to be served a true and correct copy of the within and foregoing document by the method indicated below, and addressed to each of the following:

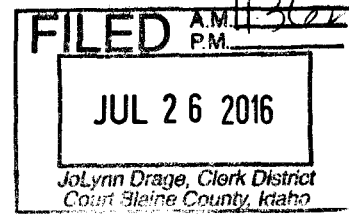
Nathan Rivera, Esq.
Attorney at Law
P.O. Box 700
Blackfoot, Idaho 83221

U.S. Mail, Postage Prepaid
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Janis Nelson, Felony Legal Secretary

ORIGINAL



Jim J. Thomas, ISBN 4415
Blaine County Prosecuting Attorney
201 2nd Avenue S., Suite 100
Hailey, Idaho 83333
Telephone: (208) 788-5545
Fax: (208) 788-5554

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHOUC HO,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.


Case No. CV-2016-294

NOTICE OF HEARING

TO: CLERK OF THE COURT AND THE ABOVE-NAMED PETITIONER

PLEASE TAKE NOTICE that on the 28th day of July, 2016, at the hour of 1:30 p.m., or as soon thereafter as counsel may be heard, Plaintiff State of Idaho will call up its OBJECTION TO Unverified Petition for Post Conviction and Commingling Separate Criminal Cases Into A Single Petition For Post Conviction before the Court in the above-captioned action in the District Courtroom of the Kramer Judicial Building, 201 2nd Avenue S., Hailey, Idaho.

DATED this 26 day of July, 2016.



Jim J. Thomas, ISBN 4415
Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 2016, I caused to be served a true and correct copy of the within and foregoing document by the method indicated below, and addressed to each of the following:

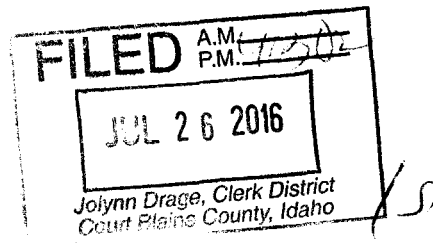
Nathan Rivera, Esq.
Attorney at Law
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- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy



Janis Nelson, Felony Legal Secretary

DAVID N. PARMENTER, ISB #2441
NATHAN D. RIVERA, ISB # 8339
Attorney at Law
53 S. Shilling
PO Box 700
Blackfoot, Idaho 83221
(208) 785-5618
(208) 785-4858 FAX
parlaw@gmail.com



Attorney for Defendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE
MAGISTRATE DIVISION

STATE OF IDAHO,)
)
Plaintiff,)
)
vs.)
)
CUC PHUOC HO,)
)
Defendant.)
_____)

Case No. ~~CR-2012-2219~~ CU - 2016-294
OBJECTION AND MOTION TO STRIKE
AND/OR DISMISS THE STATE'S ANSWER,
MOTION FOR SUMMARY DISMISSAL,
AND MOTION TO SHORTEN TIME.

COMES NOW the Defendant, by and through counsel, NATHAN D. RIVERA, and hereby objects and moves this Court to strike the State's Answer, and the State's Motion for Summary Dismissal. Said Objection is made based on the following facts and circumstances:

1. The State was served with Petitioner's Petition for Post-Conviction Relief on June 20, 2016. Pursuant to I.C. 19-4906, the State had 30 days after docketing of the application, or until, at the latest, July 23, 2016, the date of the first hearing on Petitioner's Petition, to answer the Petition and raise affirmative defenses. The State did not answer the Petition until July 26, 2016

which is prohibited by statute, therefore, the State's Answer is time bared, and must be struck from the record and/or disallowed.

2. The Court gave the State explicit filing deadlines to submit discovery by July 23, 2016. The purpose for this was to prevent unnecessary delay and to expedite the hearing. The State to date has not submitted any evidence to support their position, and filed their Answer, and Motion for Summary Dismissal, not even two days before the final hearing in this matter. The State's actions not only severely prejudices the Petitioner by providing insufficient time to respond, but also does exactly what the court wanted to avoid when it set its scheduling order. For those reasons the State's Answer and Motion for Summary Dismissal should be dismissed and/or struck from the record.

3. Pursuant to IRCP 12(c) the State's Motion for Summary Dismissal is in affect a Motion for Judgement on the Pleadings. As such the State was required to submit their Motion early enough so as not to delay the trial, which they have not done. Therefore their Motion for Summary Dismissal must be dismissed.

4. Pursuant to IRCP 12(I), any defense listed in Rule 12(b)(1)-(7), whether made in a pleading or by motion, and a motion under Rule 12(c) must be heard and decided before trial. The State has not allowed sufficient time to hear the matter before trial and therefore must be denied.

5. Pursuant to IRCP 37(b)(2), for the State's failure to comply with the Court's Scheduling Order, the Court may prohibit the State from supporting designated claims or defenses, or from introducing designated matters in evidence; strike the pleadings in whole or in

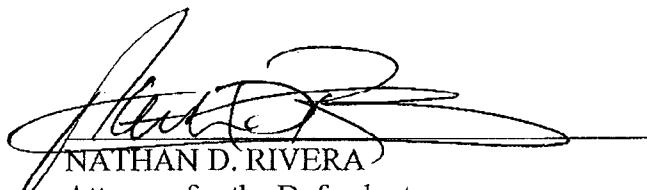
part; render a default judgment against the disobedient party; or treat as contempt of court the failure to obey any order.

Petitioner respectfully requests that the Court prohibit the State from supporting their claims or defenses, or from introducing designated matters in evidence; strike the pleadings in whole and/or render a default judgement against the State in favor of Petitioner.

6. Any Motion made by any party must be set for hearing no sooner than 14 days from the date of any such Motion. The purpose of the rule is to prevent any prejudice to the non-moving party and so as to not cause any unnecessary delays. The State's Answer and subsequent Motions not only will cause unreasonable delay under the circumstances, but will also severely prejudice the Petitioner, as there is insufficient time to properly respond the State's Motion, given that the final hearing is set in less than two days.

Furthermore, the State has been aware of this specific action for more than a Month, and have been aware of the Petitioner's position since May 19, 2016. Counsel for the State noted at the last hearing on June 23, 2016, that the State may be looking at a Motion for Summary Dismissal, yet waited until less than two days before the final hearing to file their Answer and Motions. This not only improper, but acts against the interest of fairness and justice in this matter and therefore should be struck from the record, and/or dismissed.

DATED this 26th of July, 2016

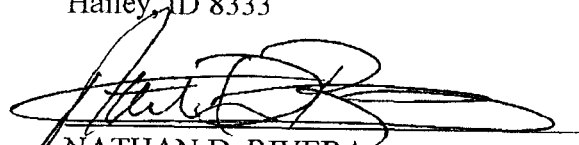

NATHAN D. RIVERA
Attorney for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 26th day of July, 2016 upon the following:

- Mail
- Fax 208-788-5554
- Hand Delivery

Jim Thomas
Prosecuting Attorney
219 1st. Ave S. Ste 201
Hailey, ID 8333


NATHAN D. RIVERA

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

COURT MINUTES
CV-2016-0000294

Cuc Phuoc Ho, Plaintiff vs State Of Idaho, Defendant

Hearing type: Evidentiary

Hearing date: 7/28/2016

Time: 1:00 pm

Judge: Robert J. Elgee

Courtroom: District Courtroom-judicial Bldg

Court reporter: Susan Israel

Minutes Clerk: Crystal Rigby

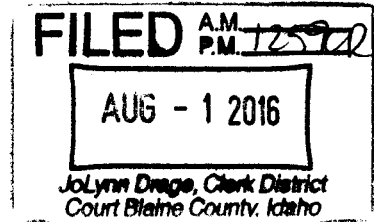
Tape Number: DC

Party: Cuc Ho, Attorney: Nathan Rivera

Party: State Of Idaho, Attorney: Jim Thomas

Counter #	
1.07	Counsel present.
	Court introduces the case, has reviewed the State's filings.
1.09	State addresses the objection to the petition- moving target.
1.13	Court comments- difficult to act on unverified information.
	State continues-reviews information from immigration office.
1.16	Court comments- immigration proceedings are not in the record.
	State-important to know the urgency.
1.19	Court-this post-conviction case involve 2 criminal cases and an immigration case. Reviews Idaho code. Notes how it is impossible to not see ineffective assistance of counsel in CR04-962 caused arrest and conviction of CR12-2219.
1.39	Mr. Rivera comments.
	State- maybe the explanation would help.
	Court- Court of Appeals may need it to be a sworn testimony.
1.41	State responds.
	Mr. Rivera comments, reviews the procedures of immigration court.
2.00	Court- all information provided by Mr. Rivera is under the penalty of perjury.
	State- has no questions.
	Court comments, has reviewed information in the record, and reviewed Idaho code.
2.02	State responds, reviews Mr. Kraynicks affidavit.
	Court-practice of court doesn't work, rules of procedure provide a motion has to be set for hearing.

2.10	State cites case law.
2.17	Court comments on the compounding of errors
2.22	Mr. Rivera comments.
	Court not going to bar State's evidence, overrules verification objection.
	Mr. Rivera responds, presents case law.
2.39	State responds, requests the court take judicial notice of the plea in 2004 case and 2012 case.
	Court makes the transcripts in CR12-2219 part of the record State and Mr. Rivera have no objection.
	Court is not going to consider how much Mr. Ho understands.
2.42	State and Mr. Rivera request to have document in criminal case made an exhibit.
	Court has transcript and documents marked. Takes matter under advisement and will issue a written decision.
2.44	Recess
	Off Record: Court has Transcript 2/11/13 marked – Exh. 1-Admitted; Transcript 6/2/16 marked-Exh. 2- Admitted; Packet of documents-Evidence in Support of Post Conviction Relief- Exh. 3- Admitted.



**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE**

CUC PHUOC HO,

Plaintiff,

vs.

STATE OF IDAHO,

Defendant.

Case No. CV-2016-294

**FINDINGS AND CONCLUSIONS
ON PETITION FOR POST-
CONVICTION RELIEF**

Procedural History

The current case involves a Petition for Post-Conviction Relief filed June 20, 2016. An Evidentiary Hearing was held before the Court on July 28, 2016. Daniel Rivera of Blackfoot, Idaho, represented Petitioner Cuc Ho, and the state of Idaho was represented by Blaine County Prosecuting Attorney Jim Thomas. Mr. Ho is currently detained by immigration authorities without bond and is subject to imminent deportation. He has a hearing set before the immigration judge on August 3, 2016 that might well result in his deportation. Time is of the essence. Previously, this Court denied Mr. Ho's motions, made pursuant to I.C.R. 33 and 48, to withdraw his guilty plea in this case and dismiss the case.

Proceedings in this case involve two other criminal cases, and it is important to understand exactly what happened in each. Those facts are examined more fully below.

Facts

The important facts are gleaned almost entirely from the record of two earlier criminal cases in which Mr. Ho was a defendant, except where indicated. The Court finds the following facts to be true. In the first case, Blaine County case no. CR-04-962, Mr. Ho was charged with and pled guilty to one count of Distribution of Marijuana in violation of Idaho Code § 37-2732(a)(1)(b) and Possession of Cocaine in violation of I.C. 37-2732(c)(1), both felonies. He was sentenced October 4, 2004. Judgment was withheld for a period of seven (7) years pursuant to I.C. § 19-2601(3), and Mr. Ho was placed on probation. No proceedings were ever instituted to revoke his probation, and on May 3, 2007, the Dept. of Corrections filed its own Application and Order for Discharge from Probation. The prosecutor indicated it had no objection at the time the application was submitted to the Court, and the Court entered an Order discharging Mr. Ho from probation on May 3, 2007.

On October 5, 2007, Mr. Ho's counsel Michael Kraynick filed a Motion to Set Aside Plea & to Enter Dismissal Pursuant to I.C. 19-2604 and to [sic] Expungement of Record. In this motion, Mr. Ho requested that the Court *set aside his plea of guilty and the withheld judgment be vacated, and the Court enter an order of dismissal pursuant to I.C. 19-2604*. He further requested the Court expunge all records relating to defendant's arrest. Importantly, for purposes of these proceedings, the last line of the motion recites: **"Oral argument is not requested unless there is an objection from the State of Idaho."** Mr. Kraynick's affidavit filed herein on July 12, 2016, at para. 7 and 8 recites that it is his current recollection that at the time this was presented, if the defendant had been granted a withheld judgment, "and the defendant moved to have his case dismissed pursuant to the withheld judgment, and there were no objections, the Court would typically grant the motion and order the dismissal without further action." For that reason, "I stated that oral argument was not requested unless the State objected. The state in fact never filed any objection."

As stated by this Court on the record at hearing on July 28, 2016, it was never this Court's practice to enter *any* order without giving the opposing party an opportunity to object. In Idaho, unlike perhaps the federal courts, motion practice *requires* all motions to be set for hearing. Although some counsel, including Mr. Kraynick, may have attempted to adopt the practice he referred to in his affidavit, this Court took strenuous exception to this practice. It is not now the Court's practice, nor was it ever the Court's duty or obligation, for the Court to

inquire of opposing counsel whether they objected to a particular motion, whether that be two days, two weeks, two months, or two years after any particular motion was filed. In addition, there was no requirement, nor is there now, for the party opposing any particular motion to file a written objection, or to enter a written objection within any particular time frame. The opposing party has always been free under Idaho law to appear at hearing and object. It was always and still is counsel's obligation upon the filing of a motion to set the motion for hearing, appear at hearing, and argue the motion; in lieu of that, counsel could obtain a stipulation, or some sort of written waiver, (even an email), from opposing counsel indicating they had no objection to the motion, or counsel could indicate in writing on the face of the motion that they had contacted opposing counsel, and were authorized to represent to the court that opposing counsel had no objection to the motion. Finally, unless there was some ex-parte order submitted to the clerk at the time any particular motion was filed, it is unlikely a court would ever see the motion.¹

Motions are not brought to the court's attention simply because they are filed. They are brought to the court's attention because they come up for hearing. Even if it were the practice of the courts to accept motions in the manner suggested by Mr. Kraynick, it is not the court's function generally in cases such as this to prepare an order granting the relief requested. The procedure followed by Mr. Kraynick in this case violated the Idaho Rules of Civil and Criminal Procedure, violated the rules against ex-parte communication, and it violated the practice of this Court.²

Mr. Kraynick never set Mr. Ho's Motion to Set Aside Plea & to Enter Dismissal Pursuant to I.C. 19-2604 and to [sic] Expungement of Record for hearing. If he had, it is much more probable than not that it would have been granted. There is nothing in the record to indicate Mr. Ho had any problems on probation, the Court had already granted Mr. Ho a withheld judgment (which is the exception rather than the rule for this Court), and the Court has frequently granted motions of this nature. Although the Court at that time sometimes made defendants wait an additional year or two from the time they were released from probation, in no case the Court can recall would the Court require a defendant to wait more than five (5) years from the sentencing date to be granted such relief, especially if there were no intervening problems or new law violations.

¹ There is no indication in this case any proposed order was ever submitted to the Court.

² It violates the rules against ex-parte communication by the Court because the unstated expectation of counsel is that *the Court* will inquire of opposing counsel whether the pending motion is objected to, and then, if it is, it is also the unstated expectation that *the Court* will then set the proponent's motion for hearing.

On May 25, 2012, over 7 ½ years since his sentencing in Blaine Co. case no. CR-04-962, and over 4 ½ years since Mr. Kraynick filed the Motion to Set Aside Plea & to Enter Dismissal Pursuant to I.C. 19-2604 and to [sic] Expungement of Record, Mr. Ho was charged in a new case, CR-2012-2219, with Unlawful Possession of a Firearm in violation of Idaho Code § 18-3316, alleging Mr. Ho was in unlawful possession of a firearm on May 17, 2012.

Mr. Kraynick appeared and represented Mr. Ho in that case as well. Then, in the old case, (Blaine Co. no. 04-492), rather than notice up his 4 ½ year old motion up for hearing and try to obtain relief *nunc pro tunc*, and/or argue that it was counsel's error in not presenting the old motion for hearing, Mr. Kraynick filed a *new* Motion to Set Aside Guilty Plea & to Enter Dismissal Pursuant to § 19-2604 in case no. 2004-492 on May 25, 2102. This motion, of course, attempted to provide defendant a complete "after the fact" defense to the pending charge of Unlawful Possession of a Firearm. The minutes of 6/11/2012, the date of the hearing, note that "Mr. Kraynick responds about the bad timing with applying for a withheld judgment."³ They further reflect the Court's comment that it was not the Court's responsibility to provide defendant with a complete defense to the pending charge, (of which the Court knew nothing).

The Court granted Mr. Ho's dismissal of his earlier 2004 Blaine County case, and the benefits of his withheld judgment;⁴ however, in view of the pending firearms charge, the Court refused to dismiss the 2004 charge or set aside Mr. Ho's earlier plea of guilty to it. Of course, at that time (June of 2012) because Mr. Ho was currently represented by the same counsel, there was no real discussion about counsel's failure to present the earlier motion for dismissal (filed on October 5, 2007) for hearing at any time over the past 4 ½ years, nor did anyone, least of all Mr. Ho, understand the potential consequences.

Mr. Ho pled guilty to the Unlawful Possession of Firearm charge on February 11, 2013, and he was sentenced on April 15, 2013. A transcript of that hearing is in the record of this post-conviction case as Exhibit 1. It reflects that Mr. Ho attended high school in Vietnam, and he is a Vietnamese immigrant. He has been in the United States for 30 years. He had an interpreter present at the plea hearing. He stated (pg. 16 of transcript) that he understood there could be immigration consequences as a result of his plea, and that a plea could affect his ability to stay in

³ "Bad timing" is a gross understatement.

⁴ An outstanding withheld judgment based on a guilty plea qualifies as a conviction under Idaho law. *United States v. Sharp*, 145 Idaho 403, 407 (2008). But, things are different once the defendant is granted relief under the withheld judgment or the plea is set aside.

the United States, or it could result in his deportation. Mr. Kraynick's affidavit is in the record of this case as well, filed July 12, 2016. In it, at paragraph 10, Mr. Kraynick states that he recalls advising Mr. Ho that he did not believe Mr. Ho would have any issues with pleading guilty to the (firearms) charge because "he was a refugee, did not have a passport, and Immigration did not make any contact with Mr. Ho after his 2004 conviction, which was much more serious, or when he was arrested on the gun charge. I believed there must have been a special arrangement for refugees that might preclude his removal. Also, since they did not come after him on the 2004 conviction, and it has been well over 10 years, I advised Mr. Ho that it was unlikely they [sic] immigration would take issue with the 2012 charge."

According to testimony given at the evidentiary hearing by Mr. Ho's current counsel Mr. Rivera, at the time Mr. Ho was arrested on the firearms charge he was subject to an immigration hold.⁵ No matter when or how that occurred, the evidence now is that Mr. Ho is in the custody of the immigration authorities and is subject to immediate removal. Mr. Rivera asserts the advice Mr. Kraynick gave to Mr. Ho at the time he pled guilty to the firearms charge is wrong in at least three respects. First, the 2004 felony charges are considered aggravated felonies (deportable felonies) and subject Mr. Ho to deportation.⁶ Second, the 2004 conviction is *not* much more serious than the 2012 firearms conviction; of the two, the firearms conviction is the more serious. Third, Mr. Ho has no facts giving rise to an immigration defense of being a "refugee" because he fled from some sort of persecution in his native country and therefore is entitled to asylum. He is simply an immigrant. Mr. Kraynick's "belief" that there must have been a special arrangement for refugees that might preclude his removal was wrong. The Court accepts Mr. Rivera's assertion that because Mr. Ho pled guilty to the firearms charge, he is subject to mandatory detention, he is unable to bond out of custody, and he is unable to apply to "cancel his removal." In short, but for the firearms conviction, Mr. Ho could apply for "cancellation of removal."

⁵ Mr. Rivera, Mr. Ho's current counsel, offered sworn testimony as to Mr. Ho's current position with the immigration authorities. He also testified, contrary to Mr. Kraynick's affidavit, that an immigration "hold" was placed upon Mr. Ho when he was arrested on the firearms charge. The Court has no way to resolve this apparent factual dispute. The court file reflects that Mr. Ho was summonsed in on the 2012 firearms charge; he was not arrested at the time the charge was filed. Mr. Ho was required to serve six (6) days in jail, however, commencing on April 29, 2013. It is entirely possible that immigration authorities placed a "hold" on Mr. Ho when he served these days in jail. It is unknown when Mr. Ho was taken into the physical custody of the immigration authorities.

⁶ Mr. Thomas and Mr. Rivera agree, however, that a decision by the U.S. Supreme Court in *Moncrieffe v. Holder*, 133 S. Ct. 1678 makes it possible for Mr. Ho to escape the immigration consequences of the 2004 conviction.

Accordingly, Mr. Ho asserts that he is entitled to post-conviction relief in this, the firearms case, due to ineffective assistance of counsel.

Unlike the ordinary case, the claim in this case is that the ineffective assistance of counsel occurred in a different case, resulting in a plea and conviction in this case. That is, in his 2004 Distribution of Marijuana and Possession of Cocaine case, counsel filed but failed to set Mr. Ho's motion to set aside his guilty plea for hearing, and failed to present it to the court for determination at any time prior to his arrest in 2012 on the charge of Unlawful Possession of a Firearm. Ho contends that "but for" counsel's deficient performance, he could not even have been charged in the present case, let alone convicted. He contends, in addition, counsel was deficient in advising him of the consequences of a plea of guilty in the 2012 case. He asks this court to vacate his plea of guilty in this case and dismiss this firearms case on the merits, or alternatively, to vacate his plea of guilty and grant him a new trial.⁷

Why this matters under Idaho law

Idaho Code § 18-310, in relevant part, provides:

(1) A sentence of custody to the Idaho state board of correction suspends all the civil rights of the person so sentenced, ...provided that any such person may bring an action for damages or other relief in the courts of this state or have an action brought against such person; and provided further that any such person may lawfully exercise all civil rights that are not political during any period of parole or probation, except the right to ship, transport, possess or receive a firearm, and the right to refuse treatment authorized by the sentencing court.

(2) Upon final discharge, a person convicted of any Idaho felony shall be restored the full rights of citizenship, except that for persons convicted of treason or those offenses enumerated in paragraphs (a) through (ii) of this subsection the right to ship, transport, possess or receive a firearm shall not be restored. As used in this subsection, "final discharge" means satisfactory completion of imprisonment, probation and parole as the case may be.

⁷ All parties recognize that if this Court simply grants Mr. Ho post-conviction relief in the form of withdrawal of his plea, he will still face the underlying charge of Unlawful Possession of a Firearm because his prior conviction was never vacated (his plea of guilty was never set aside in the first case). In order to afford complete relief, it would require this court to retroactively do now (now that the consequences of counsel's deficient performance are fully known) what the Court declined to do at an earlier point, and what Mr. Kraynick should have asked the Court to do back in 2007: set aside Mr. Ho's plea of guilty in the 2004 case. The only other real alternative is to rule that, but for counsel's deficient performance, Mr. Ho would not and could not have been charged in the present case, and to not only set aside Mr. Ho's plea in this case, but dismiss it as well. These are not good choices for this Court.

(emphases added). A subsequent subsection to I.C. 18-310(2) provides that a Delivery conviction is one of the enumerated exceptions: “(cc) Felonious manufacture, delivery or possession with the intent to manufacture or deliver, or possession of a controlled or counterfeit substance (37-2732, Idaho Code);”

In addition, Idaho Code § 18-3316 provides:

(1) A person who previously has been convicted of a felony who purchases, owns, possesses, or has under his custody or control any firearm shall be guilty of a felony and shall be imprisoned in the state prison for a period of time not to exceed five (5) years and by a fine not to exceed five thousand dollars (\$5,000).

(2) For the purpose of subsection (1) of this section, “convicted of a felony” shall include a person who has entered a plea of guilty, nolo contendere or has been found guilty of any of the crimes enumerated in section 18-310, Idaho Code, or to a comparable felony crime in another state, territory, commonwealth, or other jurisdiction of the United States.

(3) Subsection (1) of this section shall not apply to a person whose conviction has been nullified by expungement, pardon, setting aside the conviction or other comparable procedure by the jurisdiction where the felony conviction occurred; or whose civil right to bear arms either specifically or in combination with other civil rights has been restored by any other provision of Idaho law.

Taken together, these two statutes mean that Mr. Ho received his “final discharge” when the Court signed the order submitted by the Dept. of Corrections, terminating his probation, on May 3, 2007. They also mean that that particular procedure did not restore Mr. Ho’s ability to carry or possess a firearm. However, Idaho Code § 18-3316(3) is as clear as can be when it sets forth that Idaho Code § 18-3316(1) does not apply to a person whose *conviction has been nullified by expungement, pardon, or set aside, or nullified by other comparable procedure.*⁸ That means, in short, that there is a substantial likelihood that Mr. Ho could not have been prosecuted at all if Mr. Kraynick had followed through on the motion he filed in 2007 by simply following mandated and well established legal procedure.

⁸ That is, there is a clear distinction in the statutes between a “final discharge” and setting aside a conviction. One leaves a former probationer exposed to criminal liability for possession of a firearm, the other does not.

Other procedural issues

Aside from the procedural difficulties already noted, the state has raised a few others. At hearing, the state challenged Mr. Ho's post-conviction relief petition on the ground that it was not verified. The court noted at hearing that the entire historical proceeding of this case is a matter of record, and that Mr. Ho did not need to verify his petition. *State v. Goodrich*, 103 Idaho 430. Where facts were needed to flesh out Mr. Ho's current status with immigration authorities, evidence was provided by his counsel Mr. Rivera.

The state also argues that Ho's petition is time-barred, and that whatever Mr. Kraynick did or failed to do did not occur at any critical stage of the proceeding where there was a right to counsel. In other words, if there was no right to counsel at the time of the alleged deficient performance, no act or failure of counsel to act can be considered material or prejudicial or significant enough to warrant the relief sought. Finally, the state suggests that Mr. Ho knew that he could face possible immigration consequences by entering a plea to the firearms charge, and that trumps all other considerations.

As to the claim that Mr. Ho's present petition is time-barred, this Court can make the required finding pursuant to I.C. § 19-4901(b) that, on the basis of a substantial factual showing that is evident in the court record, the asserted basis for relief (ineffective assistance of counsel) 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. Of course, we now have the benefit of hindsight, but hindsight reveals a manifest error of counsel that never caused harm until immigration authorities sought to deport Mr. Ho. Mr. Ho never knew of this error at the time he entered his plea, or during the time for an appeal of this case, although his counsel did. The intervention of immigration is a collateral consequence of Mr. Ho's plea, to be sure, but Mr. Ho would never have been subject to prosecution for the charge in the first place if counsel had completed the duty he undertook. Although the error occurred many years ago, the consequences have not been felt until recently. The statute requiring actions to be filed within a certain time limit should not be used to defeat a claim where the harmful effects of ineffective assistance of counsel are completely unknown and are not felt for many years.

The state also argues that if there was no right to counsel at the time of the alleged deficient performance, no act or failure of counsel to act can be considered material or prejudicial or significant enough to warrant the relief sought. First, having a right to counsel or

having counsel present is different than having counsel commit an error at a seemingly minor point in a case that turns out to have enormous consequences. This analysis is more appropriate in determining, just below, whether counsel fell below an objective standard, etc. In addition, as this case demonstrates, there is a tremendous difference between counsel failing to perform a duty he may or may not have been obligated to perform, and undertaking a duty to perform, and performing it incorrectly.⁹ As noted by the Idaho Supreme Court:

Ordinarily, there is no affirmative duty to act, assist, or protect someone else. Such an affirmative duty “arises only when a special relationship exists between the parties....

Even when an affirmative duty generally is not present, a legal duty may arise if “one voluntarily undertakes to perform an act, having no prior duty to do so.” In such case, the duty is to perform the voluntarily-undertaken act in a non-negligent manner.

....

...“Nonfeasance” means the omission of an act which a person ought to do; “misfeasance” is the improper doing of an act which a person might lawfully do; and “malfeasance” is the doing of an act which a person ought not to do at all.

In *Udy v. Custer County*, 136 Idaho 386, 34 P.3d 1069 (2001), this Court explained that “nonfeasance which results in failure to eliminate a preexisting risk is not equivalent to nonfeasance which increases a risk of harm.”

Baccus v. Ameripride Servs., Inc., 145 Idaho 346, 350, 179 P.3d 309, 313 (2008) (internal citations omitted) (emphasis added). This principle, in the Court’s view, covers both instances of deficient conduct by counsel: the failure to properly present Mr. Ho’s motion to set aside his plea and his wrong advice at the time of Mr. Ho’s plea. In other words, although Mr. Ho testified that he knew or was aware that a plea to the firearms charge might have immigration consequences, he was basing his “knowledge” of those, not on *NO* advice, but on incorrect legal advice. This case demonstrates active “misfeasance” by counsel on two occasions.

Post-conviction standard for ineffective assistance of counsel

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924–25, 828 P.2d 1323, 1329–30 (Ct.App.1992). To prevail on an ineffective assistance of counsel

⁹ There are two places here where counsel undertook a duty to perform, which he might not have otherwise had, and he performed it incorrectly. The first is the failure to properly present Mr. Ho’s motion to set aside his plea to the court. The second is the incorrect advice given to Mr. Ho at the time of his plea to the firearms charge.

claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceedings would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177.

Knutsen has also raised a genuine issue of material fact as to whether he was prejudiced by his counsel's failure to investigate and present evidence. We note that the prejudice prong does not require proof that counsel's errors definitely would have altered the outcome of the proceedings. See *Milburn v. State*, 130 Idaho 649, 659, 946 P.2d 71, 81 (Ct.App.1997). Rather, it requires a reasonable probability that, but for counsel's inadequate performance, the outcome would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Milburn*, 130 Idaho at 659, 946 P.2d at 81.

Knutsen v. State, 144 Idaho 433, 443-444 (Ct. App. 2007). Furthermore, a motion to withdraw a guilty plea is governed by I.C.R. 33(c) which provides:

(c) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Finally, as acknowledged by the Court of Appeals, “[t]he stricter “manifest injustice” standard is deemed necessary to prevent an accused from pleading guilty to test the weight of potential punishment and then subsequently attempting to withdraw the plea if the sentence is too severe.” *Nellsch v. State*, 122 Idaho 426, 431, 835 P.2d 661, 666 (Ct. App. 1992) (citation omitted).

Nellsch is a post-conviction case. The Court here recognizes Mr. Ho should not be allowed to withdraw his plea except where necessary to correct “manifest injustice.” The Court finds this to be a case of manifest injustice. Mr. Kraynick had an affirmative duty to present the motion he filed for hearing before the Court, and to do so within a reasonable time. This he failed

to do. This was a proximate, if not the sole and direct cause for Mr. Ho's felony prosecution and his subsequent conviction in 2012 for Unlawful Possession of a Firearm. This was ineffective assistance of counsel; there is no other conclusion that can be drawn. Combined with inaccurate or wrong advice at the time Mr. Ho pled guilty to the firearms charge, these errors have had and are having a profound and devastating effect on Mr. Ho's life.

Conclusions of law

- 1) Mr. Ho's petition for post-conviction relief could not have been presented earlier
- 2) Mr. Kraynick's performance in the 2004 case was deficient when he failed to properly present Mr. Ho's motion to set aside his plea for hearing before the Court at the time it was filed, and for any time in the next 4 ½ years.
- 3) This conduct by counsel falls below an objective standard of reasonableness.
- 4) There is *more than a reasonable probability* in this case that, but for the attorney's deficient performance in the 2004 case, the outcome of the proceedings in the firearms case would have been different.
- 5) Although counsel might not have had a duty to advise Mr. Ho of the immigration or deportation consequences of a plea to the unlawful firearms charge in this case, once undertaken, he had a duty to give such advice correctly. The advice counsel gave was wrong. Although it is difficult to say with any certainty that the outcome of the firearms case would have been different if Mr. Ho had been given correct advice, (because Mr. Ho might have had limited choices on how to proceed with the firearms case at the time of the plea), it is certain that the wrong advice at the time of the plea prevented any inquiry by any other independent counsel into what had occurred in the 2004 case, and prevented any discovery of counsel's prior error in the 2004 case. There was simply no reason at the time of Mr. Ho's plea to the firearms charge for him to suspect he had any problem, or that a problem existed that Mr. Ho should have looked into. Thus, there is a reasonable probability that if Mr. Ho had been given correct legal advice at the time of his plea, the outcome of that process in this case would have been different.
- 6) Mr. Ho should not be allowed to withdraw his plea except where necessary to correct "manifest injustice." The Court finds this to be a case of manifest injustice.
- 7) The Court does not have the authority to allow Mr. Ho to withdraw his plea or set aside his plea of guilty in this case, *and then order this case dismissed*. If it did have that

authority, it would do so, because that is the only way this Court can see to do complete justice.¹⁰ However, the Court also recognizes that if it were to accomplish that result, it would have placed this case in a situation where *defense* counsel's error in a 2004 case was able to preclude a later prosecution for unlawful possession of a firearm—an anomaly to say the least.

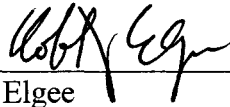
8) Post-conviction relief is proper in this case due to the ineffective assistance of counsel, albeit in a prior case with the same defendant and the same counsel. It is hereby ordered that Mr. Ho's plea of guilty entered on February 11, 2013 to the charge of Unlawful Possession of a Firearm pursuant to Idaho Code § 18-3316 in Blaine County case no. CR-2012-2219 is hereby SET ASIDE AND WITHDRAWN.

9) Mr. Ho's conviction and sentence in Blaine County Case no. CR-2012-2219, entered and filed on the 16th day of April, 2013, is hereby VACATED.

10) A suitable form of judgment will follow.

IT IS SO ORDERED. *1st August*

DATED this ~~30th~~ day of ~~July~~, 2016.



Robert J. Elgee
District Judge

¹⁰ As noted elsewhere in this case, the Court has two bad choices if it were to try to grant complete relief to Mr. Ho for counsel's error. The court could try to go back in the 2004 case NOW and grant Mr. Ho *nunc pro tunc* relief he requested in 2007 when the current charge arose. That would entail setting aside the 2004 conviction that was still in existence when this current charge was filed. If the Court had known in June of 2012, when counsel finally presented a *new motion to set aside Ho's plea in the 2004 case*, what the consequences of Kraynick's failure to act could possibly be now, it would have granted Ho's motion to set aside the 2004 conviction right then and barred the unlawful possession of firearms charge. However, the collateral consequences of counsel's misfeasance was not known or understood at that time. And if the Court NOW possesses that authority still, (to reverse its ruling made in 2007 in the underlying marijuana and cocaine case, and grant, even now, Ho's motion to set aside his plea in that case *nunc pro tunc*, then this Court would do it now. The only reason right now that the Court is not granting post-conviction relief *and ordering a dismissal in this case*, or going backwards into the 2004 case and entering an order *nunc pro tunc* in that case granting Ho's earlier motion to set aside his plea in that case, is because this Court does not believe it has the authority to order either relief.

The Court is writing this on a Saturday, so that it can be entered and filed and distributed on Monday, prior to Mr. Ho's impending immigration hearing on Wednesday, August 3, 2016. Given time constraints, the Court is unable to resolve some of the issues.

CERTIFICATE OF SERVICE

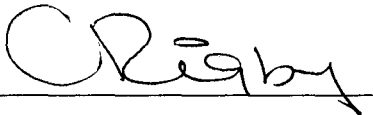
I HEREBY CERTIFY that on this 1 day of August, 2016, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Nathan D. Rivera
53 S. Shilling
P.O. Box 700
Blackfoot, ID 83221
Fax: (208) 785-4858
Email: parlaw@gmail.com

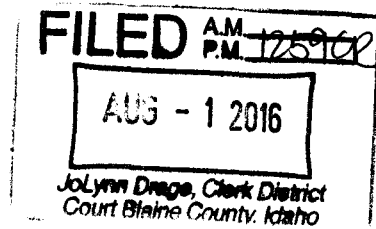
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 Hand Delivered
 Overnight Mail
 FAX
 Email

Jim Thomas, Esq.
Blaine County Prosecuting Attorney
219 1st Ave South, Suite 201
Hailey, ID 83333

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 FAX
 email



Deputy Clerk



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,

Plaintiff,

vs.

STATE OF IDAHO,

Defendant.

Case No. CV-2016-294

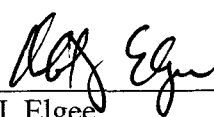
JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

1) Mr. Ho's plea of guilty entered on February 11, 2013 to the charge of Unlawful Possession of a Firearm pursuant to Idaho Code § 18-3316 in Blaine County case no. CR-2012-2219 is hereby SET ASIDE AND WITHDRAWN.

2) Mr. Ho's conviction and sentence in Blaine County Case no. CR-2012-2219, entered and filed on the 16th day of April, 2013, is hereby VACATED.

DATED this ~~30th~~ ^{1st} day of ~~July~~ ^{August}, 2016.



Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1 day of August, 2016, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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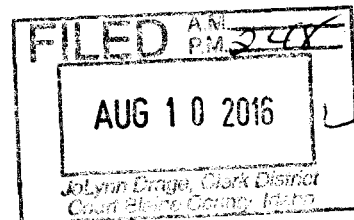
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR BLAINE COUNTY

CUC PHUOC HO,	)	District Court No. CV-2016-294
)	
Petitioner-Respondent,	)	Supreme Court No.
)	
vs.	)	NOTICE OF APPEAL
)	
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	
)	

TO: CUC PHUOC HO, THE ABOVE-NAMED RESPONDENT, NATHAN D. RIVERA, 53 S. SHILLING, P. O. BOX 700, BLACKFOOT, IDAHO 83221, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, State of Idaho, appeals against the above-named respondent to the Idaho Supreme Court from the JUDGMENT, entered in the above-entitled action on the 1st day of August, 2016, the Honorable Robert J. Elgee presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

3. Preliminary statement of the issue on appeal: Whether the district court erred in granting post-conviction relief on an unverified petition and despite several procedural and substantive bars to relief.

4. To undersigned's knowledge, no part of the record has been sealed.

5. The appellant requests the preparation of the following portions of the reporter's transcript:

(a) Petition for post conviction relief hearing held June 23, 2016 (Susan Israel, court reporter; less than 100 pages, estimated).

(b) Evidentiary hearing held on July 28, 2016 (Susan Israel, court reporter; less than 100 pages, estimated).

6. Appellant requests the normal clerk's record pursuant to Rule 28, I.A.R.

7. I certify:

(a) That a copy of this notice of appeal is being served on each reporter of whom a transcript has been requested as named below at the address set out below:

SUSAN ISRAEL
201 2nd Ave. S., Ste. 106
Hailey, ID 83333

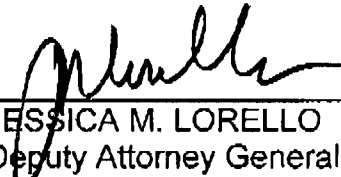
(b) That arrangements have been made with the Blaine County Prosecuting Attorney who will be responsible for paying for the reporter's transcript;

(c) That the appellant is exempt from paying the estimated fee for the preparation of the record because the State of Idaho is the appellant (Idaho Code § 31-3212);

(d) That there is no appellate filing fee since this is an appeal in a post-conviction case (I.A.R. 23(a)(10));

(e) That service is being made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 10th day of August, 2016.



JESSICA M. LORELLO
Deputy Attorney General
Attorney for the Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 10th day of August, 2016, caused a true and correct copy of the foregoing NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

THE HONORABLE ROBERT J. ELGEE
Blaine County District Court
201 2nd Ave. S., Ste. 106
Hailey, ID 83333

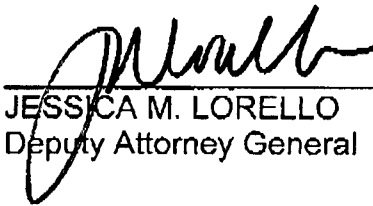
JIM J. THOMAS
Blaine County Prosecuting Attorney
219 1st Ave. S., Ste. 201
Hailey, ID 83333

NATHAN D. RIVERA
53 S. Shilling
P. O. Box 700
Blackfoot, ID 83221

SUSAN ISRAEL
201 2nd Ave. S., Ste. 106
Hailey, ID 83333

HAND DELIVERY

STEPHEN W. KENYON
CLERK OF THE COURT
IDAHO SUPREME COURT
P. O. Box 83720
Boise, ID 83720-0101



JESSICA M. LORELLO
Deputy Attorney General

JML/dd

FILED A.M. 12:59 PM
 AUG - 1 2016
 Jolynn Drage, Clerk District
 Court Blaine County, Idaho

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE**

CUC PHUOC HO,

Plaintiff,

vs.

STATE OF IDAHO,

Defendant.

Case No. CV-2016-294

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

1) Mr. Ho's plea of guilty entered on February 11, 2013 to the charge of Unlawful Possession of a Firearm pursuant to Idaho Code § 18-3316 in Blaine County case no. CR-2012-2219 is hereby SET ASIDE AND WITHDRAWN.

2) Mr. Ho's conviction and sentence in Blaine County Case no. CR-2012-2219, entered and filed on the 16th day of April, 2013, is hereby VACATED.

DATED this 1st August 30th day of July, 2016.

STATE OF IDAHO } ss
 County of Blaine DIS 17

I do hereby certify that the foregoing is a full, true and correct copy of the original thereof on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal this 1st August 2016

JOLYNN DRAGE
 Clerk District Court Deputy

Robert J. Elgee
 Robert J. Elgee
 District Judge

JUDGMENT - 1

CERTIFICATE OF SERVICE

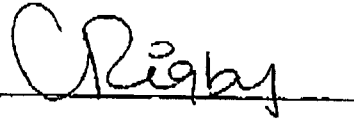
I HEREBY CERTIFY that on this 1 day of August, 2016, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Nathan D. Rivera
53 S. Shilling
P.O. Box 700
Blackfoot, ID 83221
Fax: (208) 785-4858
Email: parlaw@gmail.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX
- Email

Jim Thomas, Esq.
Blaine County Prosecuting Attorney
219 1st Ave South, Suite 201
Hailey, ID 83333

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- FAX
- email



Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,)	
Petitioner/ Respondent,	)	Supreme Court No. 44415
vs.	)	CERTIFICATE OF EXHIBITS
STATE OF IDAHO,)	
Respondent/ Appellant,)	
_____)	

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Blaine, do hereby certify that the following documents will be submitted as exhibits to the Record:

Court's Exhibits

- 1- Transcript 2/11/2013- ADMITTED
- 2- Transcript 6/2/2016-ADMITTED
- 3- Evidence in Support of Post-Conviction-ADMITTED

20 IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this day of Sept., 2016.

Jolynn Drage, Clerk of the Court

By Crystal Rigby
Crystal Rigby, Deputy Clerk



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,)
)
)
Petitioner / Respondent,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent/ Appellant,)
_____)

Supreme Court No. 44415

CLERK'S CERTIFICATE

STATE OF IDAHO)
) ss.
County of Blaine)

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that the above and foregoing Clerk's Record on Appeal was compiled and bound under my direction and is a true, full and correct Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules as well as those requested by the Appellant.

I do further certify that all exhibits offered or admitted in the above-entitled cause and exhibits requested by the Appellant will be duly lodged with the Clerk of the Supreme Court along with the Clerk's Record on Appeal and the Court Reporter's Transcript on Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Hailey, Idaho, this 20 day of Sept., 2016.

JoLynn Drage, Clerk of the Court

By Crystal Rigby
Crystal Rigby, Deputy Clerk



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

CUC PHUOC HO,	)	Supreme Court No. 44415
)	
Petitioner/Respondent,	)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent/Appellant.)	
<hr/>		

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record and Court Reporter's Transcript to each of the Attorneys of Record in this cause as follows:

Nathan D. Rivera	Attorney General's Office
PO Box 700	CRIMINAL APPEALS
Blackfoot, Idaho 83221	P.O. Box 83720
	Boise, Idaho 83720-0010
Attorney for Petitioner/Respondent	Attorney for Respondent/Appellant

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 20 day of Sept., 2016.



JOLYNN DRAGE, Clerk of the Court

By Crystal Rigby
Crystal Rigby, Deputy Clerk