5-15-2017

# Bias v. State Clerk's Record Dckt. 45037

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|---|---|---|
| WILLIAM JACK BIAS | ) | |
| | ) | |
| Plaintiff-Respondent | ) | |
| | ) | SUPREME COURT CASE NO. 45037 |
| VS | ) | MADISON CASE NO. CV-2015-543 |
| | ) | |
| STATE OF IDAHO | ) | |
| | ) | |
| Defendant-Appellant | ) | |
| | ) | |

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CLERK'S RECORD ON APPEAL

Appeal from the District Court of the 7th Judicial District of the State of Idaho, in and for THE COUNTY OF MADISON

GREGORY W. MOELLER
DISTRICT JUDGE

ATTORNEY FOR APPELLANT

Idaho Appellate Public Defender
322 East Front Street, Suite 570
Boise, ID 83702

ATTORNEY FOR RESPONDENT

Idaho Attorney General
700West State Street
Boise, ID 83702

William Jack Bias vs. State of Idaho

Post Conviction Relief

| Date | | Judge |
|---|---|---|
| 8/10/2015 | New Case Filed - Post Conviction Releif | Gregory W Moeller |
| | Filing: H1c - Post-Conviction Act Proceedings * Paid by: Bias, William Jack (plaintiff) Receipt number: 0003611 Dated: 8/10/2015 Amount: $.00 (Cash) For: Bias, William Jack (plaintiff) | Gregory W Moeller |
| 11/20/2015 | Memorandum Decision and Order on Petitioner's Request for Court-Appointed Counsel | Gregory W Moeller |
| | Plaintiff: Bias, William Jack Order Appointing Public Defender Court appointed Joshua A Garner | Gregory W Moeller |
| 12/22/2015 | Answer to Petition for Post Conviction Relief- Sid Brown | Gregory W Moeller |
| | Motion for Preparation of Sentencing Hearing Transcript | Gregory W Moeller |
| | Motion for Preparation of Change of Plea Hearing Transcript- Sid Brown | Gregory W Moeller |
| 12/28/2015 | Order for Preparation of Sentencing Hearing Transcript | Gregory W Moeller |
| | Order for Preparation of Change of Plea hearing Transcript | Gregory W Moeller |
| 2/26/2016 | Transcript Filed | Gregory W Moeller |
| 7/6/2016 | Hearing Scheduled (Evidentiary Hearing 07/25/2016 02:30 PM) | Gregory W Moeller |
| | Motion for Immediate Transport | Gregory W Moeller |
| 7/11/2016 | Order for Transport | Gregory W Moeller |
| 7/25/2016 | Minute Entry<br>Hearing type: Evidentiary Hearing<br>Hearing date: 7/25/2016<br>Time: 2:41 pm<br>Courtroom:<br>Court reporter: Patricia E. Hubbell<br>Minutes Clerk: Angie Wood<br>Tape Number:<br>Party: State of Idaho<br>Party: William Bias, Attorney: Joshua Garner | Gregory W Moeller |
| 8/4/2016 | Memorandum RE: Post-Conviction Relief- Joshua Garner | Gregory W Moeller |
| 8/26/2016 | Stipulation to Reopen | Gregory W Moeller |
| 8/31/2016 | Hearing Scheduled (Evidentiary Hearing 09/19/2016 01:30 PM) | Gregory W Moeller |
| | Notice Of Hearing | Gregory W Moeller |
| 9/13/2016 | Continued (Evidentiary Hearing 09/19/2016 03:00 PM) | Gregory W Moeller |
| 9/15/2016 | Continued (Evidentiary Hearing 09/19/2016 01:30 PM) | Gregory W Moeller |
| 9/19/2016 | Minute Entry<br>Hearing type: Evidentiary Hearing<br>Hearing date: 9/19/2016<br>Time: 1:46 pm<br>Courtroom:<br>Court reporter: Patricia E. Hubbell<br>Minutes Clerk: Angie Wood<br>Tape Number:<br>Party: State of Idaho<br>Party: William Bias, Attorney: Joshua Garner | Gregory W Moeller |
| 1/23/2016 | Hearing Scheduled (Status Conference 11/28/2016 11:00 AM) | Gregory W Moeller |

William Jack Bias vs. State of Idaho

Post Conviction Relief

| Date | | Judge |
|---|---|---|
| 11/28/2016 | Minute Entry<br>Hearing type: Status Conference<br>Hearing date: 11/28/2016<br>Time: 11:42 am<br>Courtroom: Brent J. Moss District Court<br>Court reporter: Patricia E. Hubbell<br>Minutes Clerk: Angie Wood<br>Tape Number: | Gregory W Moeller |
| | Hearing result for Status Conference scheduled on 11/28/2016 11:00 AM: Hearing Held | Gregory W Moeller |
| 12/21/2016 | Motion to Extend Time - Sid Brown | Gregory W Moeller |
| 1/3/2017 | Order on Motion to Extend Time - Sid Brown | Gregory W Moeller |
| 1/11/2017 | Hearing Scheduled (Evidentiary Hearing 01/12/2017 10:30 AM) | Gregory W Moeller |
| 1/12/2017 | Minute Entry<br>Hearing type: Evidentiary Hearing<br>Hearing date: 1/12/2017<br>Time: 10:38 am<br>Courtroom:<br>Court reporter: Patricia E. Hubbell<br>Minutes Clerk: Angie Wood<br>Tape Number:<br>Party: State of Idaho<br>Party: William Bias, Attorney: Joshua Garner | Gregory W Moeller |
| | Minute Entry<br>Hearing type: Pre-Trial<br>Hearing date: 1/12/2017<br>Time: 12:14 pm<br>Courtroom:<br>Court reporter: Patricia E. Hubbell<br>Minutes Clerk: Angie Wood<br>Tape Number: | Gregory W Moeller |
| | Hearing result for Evidentiary Hearing scheduled on 01/12/2017 10:30 AM: Hearing Held | Gregory W Moeller |
| 3/6/2017 | Findings Of Fact And Conclusions Of Law RE: Post-Conviction Relief Claims | Gregory W Moeller |
| 3/11/2017 | Order for Preparation of Transcript Hearings | Gregory W Moeller |
| 4/14/2017 | Final Judgment | Gregory W Moeller |
| | Civil Disposition entered for: State of Idaho, Defendant; Bias, William Jack, Plaintiff. Filing date: 4/14/2017 | Gregory W Moeller |
| 5/17/2017 | Appealed To The Supreme Court | Gregory W Moeller |
| 5/2/2017 | Motion to Withdraw as Attorney of Record - Josh Garner | Gregory W Moeller |
| | Notice Of Hearing - Josh Garner | Gregory W Moeller |
| | Order Granting Motion to Withdraw And Appointment - Josh Garner | Gregory W Moeller |

IN THE DISTRICT COURT OF THE 7th JUDICIAL DISTRICT, IN AND FOR Madison COUNTY, STATE OF IDAHO.

William Jack Bias
(Full Name)

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CR-2012-0002873

PETITION FOR **POST-CONVICTION** RELIEF

CV-15-543

The petitioner alleges:

1. Place of detention if in custody: Madison County Jail

2. Name and location of court which imposed judgment/sentence: Seventh Judicial District Court, Madison County 159 East Main Rexburg, Id. 83440

3. The case number and the offense or offenses for which sentence was imposed:

(a) Case Number. CR-2012-0002873

(b) Offense **Convicted**. D.U.I

4. The date upon which sentence was imposed and the terms of sentence:

(a) Date of sentence. 2/18/2013

(b) Terms of sentence. Unified term of ten years with five determinate.

5. Check whether a finding of guilty was made after a plea:

(a) Of guilty.

5. Check whether a finding of guilty was made after a plea:

(a) Of guilty. Pleaded Guilty

(b) Of not guilty.

6. Did you appeal from the judgment of **conviction** or the imposition of sentence? Judgment of Conviction

7. State concisely all the grounds on which you base your **application** for **post-conviction** relief:

(a) Ineffective assistance of Counsel: I owe Swafford law $2900.00 dollars, Archilald is employed by Swafford law the financial feud between myself and Swafford law created Conflict for me and Archilald.

(b) I changed my plea from Not Guilty to Guilty based on Archilald's reassurance there was a verbal agreement for drug Court. "through Court"

(c) Idaho "Rules of professional conduct for lawyers rule 3'5 States a lawyer shall not influence a judge, Sid Brown called me a two time murderer at sentencing which i am not which violated my right to impartiality.

(d) Never received adequate time to review my P.S.I before sentencing. Archilald advised me to say i had at sentencing also due too the Idaho public defenders flat fee rate Mr Archilald had no incentive too put adequate time into

(e) my Case.

My Civil right to provide me the right too impartiality in Court. Sid Brown influenced the judge into saying my victims were all members of the community of Rexburg. This open ended statement leads me too believe he feels like my victim since he lives in Rexburg.

8. Prior to this motion have you filed with respect to this **conviction**:

(a) Any petitions in state or federal courts for habeas corpus?

(b) Any other petitions, motions or **application** in this or any other court?

Yes

(c) If you answered "yes" to (a) or (b) state with respect to each petition, motion or **application** the nature of each motion or **application** and the name and location of the court in which each was filed.

Filed an appeal - Seventh Judicial District. State of Idaho Madison County. Rexburg Id 83440 (concluded)

9. If your **application** is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

(a)

Waived preliminary without my permission. Did not challenge state's lack of stop and jurisdiction of law enforcement. also refused to file motion to suppress for jurisdiction.

(b)

Mr Archibald has a duty to the court to bring forth any conflict. He failed to do so in this case since I owed his primary law firm $3900, so this was an immediate conflict and polluted my whole case.

(c)

Mr. Archibald failed to disclose P.S.I findings previous to sentencing.

10. (a) Are you seeking leave to proceed in forma pauperis, that is, requesting the proceeding to be at county expense?

Yes, currently a State inmate, no income.

(b) Are you requesting the appointment of counsel to represent you in this **application**?

Yes.

(c) If your answer to either of the above questions was "yes" fill out an

affidavit of indigency in the form required by the trial court.

11. State specifically the relief you seek.
Seeking Sentence modification: with total sentence not to exceed four years, also to have a lawyer represent me for my ineffective assistance of Counsel.

12. This petition may be accompanied by affidavits in support of the petition.

Will Bias
Signature of Petitioner

STATE OF Idaho )
) ss.
COUNTY OF Madison )

I, Bias, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

Will Bias
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 3 day of Aug, 19 2015.

LINDA GIBBS NOTARY PUBLIC STATE OF IDAHO

Notary Public For Madison County
Residing at Rexburg, Idaho

My commission expires: ~~1-14-2021~~
1-14-2021
(month)(day)(year)

LINDA GIBBS NOTARY PUBLIC STATE OF IDAHO

**(b) Filing and Processing.** The petition for **post-conviction** relief shall be filed by the clerk of the court as a separate civil case and be processed under the Idaho Rules of Civil Procedure except as otherwise ordered by the trial court; provided the provisions for discovery in the Idaho Rules of Civil Procedure shall not apply to the proceedings unless and only to the extent

ordered by the trial court.

**(c) Burden of Proof.** The petitioner shall have the burden of proving the petitioner's grounds for relief by a preponderance of the evidence.

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR MADISON COUNTY**

WILLIAM JACK BIAS

Petitioner,

vs.

STATE OF IDAHO,

Respondents.

Case No. CV-2015-543

**MEMORANDUM DECISION AND ORDER ON PETITIONER'S REQUEST FOR COURT-APPOINTED COUNSEL**

## I. INTRODUCTION

William Jack Bias ("Bias") pled guilty to a felony D.U.I. and was sentenced on March 18, 2013 to a unified prison term of ten years, consisting of five years fixed and five years indeterminate.[1] Bias is now seeking post-conviction relief based primarily on claims of ineffective assistance of counsel. He has requested that the Court appoint an attorney to represent him in this matter.[2]

## II. PROCEDURAL HISTORY

Following sentencing, Bias appealed and filed a motion for relief under Idaho Criminal Rule 35. Later, acting *pro se*, he filed motions to withdraw his guilty plea and for the appointment of a new attorney. On June 24, 2013, the Court denied the Rule 35 motion, the motion to withdraw his guilty plea, and the motion for the appointment of new counsel. The motion for appointment of counsel was denied on the grounds it was premature because it appeared from the record that Bias was only asking for the appointment of an attorney to handle a post-conviction relief action that had not yet been filed.

[1] Pursuant to I.R.E. 201(b)(2), and for purposes of this decision only, the Court will take judicial notice of the contents of the file in Madison County Case No. CR-2012-2873. All citations to the record are from that case.
[2] Although Bias requested an attorney, an affidavit of indigency was not submitted with his petition. Nevertheless, the Court will take judicial notice of its earlier determination in the underlying case that Bias qualified for a public defender on June 8, 2015. *See Minute Entry*, June 8, 2015. Bias has been in the custody of the Idaho Department of Corrections since he was sentenced and there is no reason to believe his financial status has improved.

On appeal, the Idaho Court of Appeals disagreed, holding that the Court should have first heard evidence to adjudicate the motion for new counsel. Only then should the Court have taken up the Rule 35 motion and the motion to withdraw guilty plea. *State v. Bias*, 157 Idaho 895, 341 P.3d 1264 (Ct.App. 2014), *review denied*, Feb. 9, 2015. The Court of Appeals concluded: "Because we remand the motion for substitute counsel, we must also vacate the court's decisions on the other motions to permit the district court to decide those motions after Bias is either appointed new counsel, if required, or offered the opportunity to proceed pro se. *Id.* at 900, 1269.

Accordingly, and at Bias's request, the Court appointed new counsel (Joshua Garner) to represent Bias and scheduled a hearing on both the Rule 35 motion and motion to withdraw guilty plea.[3] Following a hearing on August 3, 2015, the Court denied his Rule 35 motion. Bias has not appealed that ruling.[4] The Court later noted that counsel had failed to address Bias's still pending motion to withdraw his guilty plea at the August 3 hearing, although Bias had earlier indicated he may wish to withdraw it. Out of an abundance of caution, the Court scheduled a status conference on October 19, 2015 to determine whether Bias still wished to proceed on his remaining motion. At that hearing, Bias and his attorney informed the Court that he was withdrawing his motion to set aside his guilty plea.[5]

Therefore, notwithstanding the Court of Appeals decision remanding the case to allow Bias to assert his claims of ineffective assistance of counsel, Bias failed to present any such claims on remand. However, on August 7, 2015, Bias filed a *Petition for Post-Conviction Relief* wherein he alleges various claims of ineffective assistance of counsel. Bias has also requested that the Court appoint an attorney to represent him in this action.

## II. DISCUSSION

### A. Petitioner's motion for appointment of post-conviction counsel is granted.

#### (1) Standard of Review

If a petitioner seeking post-conviction relief is unable to pay for legal representation, the trial court may appoint counsel at public expense. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel is discretionary. *Charboneau v. State,* 140 Idaho 789, 792,

[3] *Minute Entry*, June 8, 2015.
[4] *Order Denying Motion*, Aug. 3, 2015.
[5] *Minute Entry*, Oct. 19, 2015.

102 P.3d 1108, 1111 (2004). Notwithstanding the court's discretion, counsel should generally be appointed if the petitioner qualifies financially and "alleges facts to raise the possibility of a valid claim." *Id.* at 793, 102 P.3d at 1112; *Plant v. State,* 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct.App.2006). When determining whether a petitioner has the possibility of a valid claim, "every inference must run in the petitioner's favor." *Charboneau* at 794, 102 P.3d at 1113. Only if all of the claims alleged in the petition are frivolous may the court deny a request for counsel. *Id.* at 792, 102 P.3d at 1111; *Brown v. State,* 135 Idaho 676, 679, 23 P.3d 138, 141 (2001). Conversely, if fact alleged give rise to "the *possibility* of a valid claim, the trial court should appoint counsel in order to give the petitioner an opportunity to work with counsel and properly allege the necessary supporting facts." *Judd v. State*, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009); *Charboneau,* 140 Idaho at 793, 102 P.3d at 1112.

The determinations of whether to appoint counsel and whether a petition is subject to summary dismissal are controlled by different standards, with the threshold of the former being considerably lower than the latter. *Swader v. State*, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007); *Plant,* 143 Idaho at 761, 152 P.3d at 632. Consequently, a district court presented with a request to appoint counsel in a post-conviction action must first address that request before ruling on the substantive merits of the case and errs if it denies a petition on the merits before ruling on the applicant's request for counsel. *See, e.g., Charboneau,* 140 Idaho at 792-94, 102 P.3d at 1111-13; *Fox v. State,* 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct.App.1997); *Swisher v. State,* 129 Idaho 467, 469, 926 P.2d 1314, 1316 (Ct.App.1996). If the court decides that the claims in the petition are frivolous. it should provide sufficient notice regarding the basis for its ruling to enable the petitioner to provide additional facts, if they exist, to demonstrate the existence of a non-frivolous claim. *Swader*, 143 Idaho at 653-54, 152 P.3d at 15-16; *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

**(2) The Petition is not barred by the statute of limitations.**

The Uniform Post-Conviction Procedure Act (I.C. §§ 19-4901, *et seq.*) allows a petition to be filed "at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19–4902(a). The Idaho Court of Appeals has explained:

> The statute of limitations for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal, or from the determination of appeal, or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19–4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman,* 122 Idaho at 628, 836 P.2d at 1089. The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State,* 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct.App.2003).

*State v. Ochieng*, 147 Idaho 621, 624-25, 213 P.3d 406, 409-10 (Ct. App. 2009).

Here, Bias filed his Petition on August 7, 2015, four days after the denial of his Rule 35 motion on remand, but over two years after he was originally sentenced. Nevertheless, this delay was necessitated by Bias's successful appeal of the Court's initial denial of his Rule 35 motion and other motions. Idaho Code § 19-4908 provides that "[a]ll grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application… unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." This is Bias's first petition for post-conviction relief. The law is clear that "[i]neffective assistance of counsel is one of those claims that should be reasonably known immediately upon the completion of the trial and can be raised in a post-conviction petition." *State v. Rhoades,* 120 Idaho 795, 807, 820 P.2d 665, 677 (1991).

It may be debatable whether by dismissing his motion to withdraw his guilty plea, Bias has now waived his right to assert ineffective assistance of counsel claims related to his plea. However, the Court believes that in light of his successful appeal, and notwithstanding apparently dropping the issue on remand, principles of due process require that he has an opportunity to assert those claims in a post-conviction proceeding.[6] Arguably, Bias still has the option to directly bring such claims via a post-conviction proceeding, rather than by first attempting to withdraw his guilty plea. These are issues of sufficient constitutional importance

[6] Bias raised a number of issues on appeal, including the denial of his motion to withdraw his guilty plea. In remanding the case, the Idaho Court of Appeals directed this court to first consider his request for new counsel before ruling on the Rule 35 motion and motion to withdraw his plea. Therefore, by implication, the issue of ineffective assistance of counsel related to his plea remained unadjudicated by the Court until it was withdrawn on October 19, 2015 . Notwithstanding his recent withdrawing of the motion, the Court concludes that Bias was unable to pursue his ineffective assistance of counsel claims until a decision was reached on his appeal on November 6, 2014, and the case was finally remitted to the district court on February 9, 2015. See *Remittitur*, Supreme Court Docket No. 40930, Feb. 9, 2015.

that the Court believes Bias should have an opportunity to address them with the benefit of counsel, before the Court considers dismissing the petition.

**(3) Bias has asserted some facts, which, if established, show the possibility of a valid claim.**

Petitioner bases his petition, in part, on specific instances which he asserts constitute ineffective assistance of counsel. The Idaho Court of Appeals recently summarized the applicable constitutional standard for such claims:

> 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 claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687–88 (1984); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995). To establish a deficiency, the petitioner 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). ... This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State,* 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct.App.1994).

*Brummett v. State*, No. 42466, 2015 WL 3939955, at *4 (Idaho Ct. App. June 29, 2015)

In order to ascertain whether the petition "raises the possibility of a valid claim" for ineffective assistance of counsel, sufficient to warrant appointment of new counsel, the Court should make a thorough analysis of the factual and legal basis for each claim. Accordingly, the Court will consider each of Petitioner's claims with an eye towards the "possibility of a valid claim" standard, rather than the higher standard for summary dismissal. In so doing, the Court has drawn all inferences in favor of the Petitioner. Related claims will be discussed together.

**(a) Conflict of Interest Claims.**[7]

Bias first alleges that his attorney, Jim Archibald ("Archibald"), was ineffective because he had a conflict of interest. Archibald was employed by Swafford Law Offices. Bias alleges that he owed $2,900.00 to Swafford Law Offices. However, he does not specify whether this was a previous debt or a debt directly related to Archibald's work in the case in question. It is

[7] *Petition for Post-Conviction Relief*, ¶ 7(a), August 7, 2015.

worth noting that because Archibald was retained *by Bias*—the Court did not appoint him—Bias would have been aware of any conflict from the beginning.[8]

It is neither unusual nor unethical for an attorney to represent a client who owes his law firm money—in fact, it is very common. Absent other facts, this cannot form the basis for an ineffective assistance of counsel claim. Even if there was somehow a conflict between Archibald and Bias because of money that Bias owed Archibald's law firm, nothing in Bias's claim explains how he was prejudiced by this conflict, other than mere speculation that Archibald may have performed poorly due to the money owed. Bias must show how he was prejudiced by the alleged conflict through specific actions, or inaction, by his attorney *as a result of the alleged debt*. No such facts have been alleged here.

**(b) Ineffective Assistance of Counsel Claims.[9]**

Bias claims that he changed his plea from not guilty to guilty based on Archibald's private assurance that there was an agreement he would be sentenced to Drug Court. However, the record establishes that the plea agreement was not binding on the Court—a fact the Court explained to Bias at his change of plea hearing.[10] This is similar to Bias's fourth claim, wherein he alleges that he did not have adequate time to review the Presentence Report ("PSI") before sentencing, and was advised by Archibald to just tell the Court he had reviewed it. However, Bias told the Court at his sentencing that he had received the PSI and had an opportunity to review it with his attorney.[11] Later, Bias claims that his attorney waived the preliminary hearing without his permission.

Such allegations are difficult to summarily dismiss based solely on the record because they necessarily involve private attorney/client conversations, which are not on-the-record. Therefore, it would be improper for the Court to merely presume Bias's former attorney will deny all these allegations. It is currently unknown to what extent Bias's allegations will be denied; however, even if all allegations are denied, the Court should not be weighing evidence or assessing credibility at this stage. The law is clear that "if facts are alleged giving rise to the possibility of a valid claim, the trial court should appoint counsel in order to give the petitioner

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[8] Archibald is the Madison County Public Defender, but he was not court-appointed—he was retained by Bias.
[9] *Petition for Post-Conviction Relief*, ¶ 7(b) and (d) and ¶ 9(a).
[10] *Minute Entry* and *Audio Transcript*, Feb. 11, 2013.
[11] *Minute Entry* and *Audio Transcript*, March 18, 2013.

an opportunity to work with counsel and properly allege the necessary supporting facts." *Judd*, 148 Idaho at 25, 218 P.3d at 4.

Bias also asserts that Archibald failed to challenge the legality of the stop and the Court's jurisdiction. Nevertheless, he fails to assert why the stop may have been illegal or any legal basis for challenging the Court's jurisdiction. Concerning the latter claims, Bias's application does not explain how Archibald's performance was constitutionally deficient, or how Bias was prejudiced by any alleged deficiency. Failing to challenge jurisdiction is only a basis for ineffective assistance of counsel if there is sufficient reason counsel should have challenged jurisdiction. Similarly, failing to challenge the constitutionality of the stop is only deficient if there is evidence that the stop was somehow improper. If there are facts that should have prompted Archibald to challenge jurisdiction, or the stop, they have not been presented in the Petition.

Nothing in the record shows that Archibald was ineffective or performed deficiently. To assert a viable claim under *Strickland*, Bias must establish; (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Although Bias must establish both prongs of Strickland to survive summary dismissal, he has not asserted any facts to support either prong. *Kelly v. State*, 149 Idaho 517, 522, 236 P.3d 1277, 1282 (2010)).

**(c) Alleged ethical violations by the prosecutor at sentencing.**[12]

Bias also alleges misconduct by the prosecutor at his sentencing, which he claims violated Idaho Rule of Professional Conduct 3.5. These claims concern allegedly improper statements made by the prosecuting attorney which wrongfully: (1) suggested that the judge, as member of the community, was also a victim in the case, and (2) referred to Bias as "a two time murderer." Even if these allegations are factually correct, Rule 3.5 is an ethical rule dealing with impartiality, decorum, and improper influence. Bias misreads the rule, which is clearly intended to prohibit serious criminal acts such as bribery or intimidation, and attempts to apply it to improper argument or hyperbole in a sentencing recommendation. *See* I.R.P.C. 3.5, comment 1. Even if his allegations were true, Bias's claims would be more applicable to a claim of prosecutorial misconduct, which he has not directly asserted. Bias's argument also assumes the Court was actually influenced by the rhetorical hyperbole alleged here. However, Bias cites to

[12] *Petition for Post-Conviction Relief*, ¶ 7(c) and (e).

nothing in the record suggesting that the Court was misled or confused by the prosecutor's alleged statements. Indeed, the record reflects that the Court read the PSI and all attached reports, accurately understood Bias's criminal record, and properly considered the objectives of criminal punishment in Idaho. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). There is nothing here to justify a new sentence.

## III. CONCLUSION

The Court has reviewed the record and has drawn "every inference ...in the petitioner's favor." *Charboneau* at 140 Idaho at 794, 102 P.3d at 1113. Having done so, the Court concludes that the facts alleged by Bias give rise to "the *possibility* of a valid claim" on at least a few of his claims for ineffective assistance of counsel, namely: (1) counsel's alleged assurance there was a verbal agreement with the judge to sentence him to drug court, (2) Petitioner's contention that he had insufficient time to review the PSI and was advised to lie about it by his attorney, and (3) Petitioner's contention that the preliminary hearing was waived without his consent. Although these claims may be inconsistent with the record, they necessarily involve conversations between the Petitioner and his attorney that took place off-the-record. Therefore, the Court cannot summarily dismiss these claims without weighing the evidence and assessing credibility—neither of which the Court can do at this stage of the proceedings.

Inasmuch as Petitioner's ineffective assistance of counsel claims have survived, thereby entitling him to appointed counsel, the Court will not dismiss his remaining claims at this time, although it reserves the right to do so later upon proper notice. *Judd* requires that when counsel is appointed, a petitioner should have "an opportunity to work with counsel and properly allege the necessary supporting facts." *Judd*, 148 Idaho at 24, 218 P.3d at 3. Therefore, Petitioner and his attorney are entitled to an opportunity to either properly plead and substantiate all of his claims, or withdraw them. Accordingly, the Court orders as follows:

1. Joshua Garner of Garner Law Offices is hereby appointed as counsel to represent Petitioner at public expense on his post-conviction relief claims;

2. Garner will have thirty (30) days to amend or supplement Petitioner's *Petition for Post-Conviction Relief*;

3. If requested, copies of the PSI and attached sentencing reports in Madison County Case No. CR-2012-2873 shall be released to Garner and the State of Idaho pursuant to I.C.A.R. 32(g)(2) and I.C.R. 32(h); and

4. Upon the filing of an amended petition or the passage of thirty (30) days, whichever occurs first, the State must file an answer to the petition within thirty (30) days pursuant to I.C. § 19-4906(a).

SO ORDERED THIS 20th day of November, 2015.

Gregory W. Moeller, District Judge

**CERTIFICATE OF SERVICE**

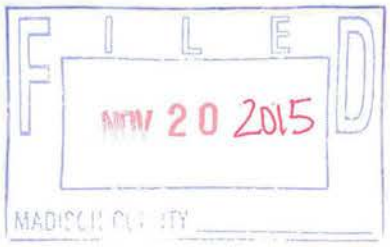
I CERTIFY that on this 20th day of November, 2015, I served a true and correct copy of the foregoing *Memorandum Decision on Petitioner's Request for Post-Conviction Relief* upon the following individuals via U.S. Mail, postage prepaid:

SICIN
William Jack Bias IN 51715
PO Box 8509
Boise ID 32707

Sid Brown
Madison County Prosecuting Attorney
159 East Main Street
P.O. Box 350
Rexburg, Idaho 83440

By: _____
Law Clerk

**S( nth Judicial District Court, State of I'aho**
**In and For the County of Madison**
**159 E. Main**
**Rexburg, Idaho 83440**




WILLIAM JACK BIAS,

Petitioner,

vs.

STATE OF IDAHO,

Respondents.

Case No: CV-2015-0000543

**ORDER APPOINTING PUBLIC DEFENDER**

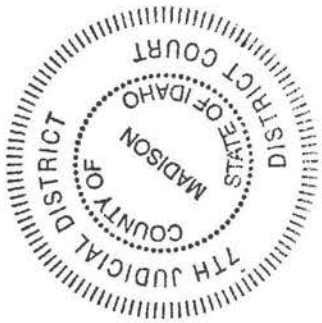
**NOW, THEREFORE, IT IS ORDERED** as required by I.C. § 19-4904 that Attorney

JOSHUA GARNER
PO Box 1014
Rexburg, Idaho 83440
(208) 359-3181

a duly licensed attorney in the State of Idaho, is hereby appointed to represent WILLIAM JACK BIAS, as post-conviction counsel, in all proceedings in the above entitled case.

Date: November 20, 2015

Gregory W. Moeller
Judge



ORIGINAL

SID D. BROWN # 2726
Madison County Prosecuting Attorney

Rob H. Wood, ISB # 8229
Deputy Prosecuting Attorney
159 East Main Street
P. O. Box 350
Rexburg, Idaho 83440
(208) 356-7768



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent, | Case No. CV-2015-0000543<br><br>**ANSWER TO PETITION FOR POST CONVICTION RELIEF** |

COMES NOW, the State of Idaho, by and through the Madison County Prosecuting Attorney, and does hereby answer Petitioner, William Jack Bias' Petition for Post Conviction Relief in the above-entitled action as follows:

I.

GENERAL RESPONSES TO WILLIAM JACK BIAS' POST CONVICTION ALLEGATIONS

All allegations made by William Jack Bias are denied by the State unless specifically admitted herein.

II.

SPECIFIC ANSWERS TO WILLIAM JACK BIAS' POST CONVICTION ALLEGATIONS:

PARAGRAPHS:

1) The Petitioner is currently in the custody of the Idaho Department of Corrections and it is believed that he is presently in one of its facilities in Boise, Idaho;

2) 3) Admitted;

4) Defendant was sentenced on March 18, 2013, to a 10 year maximum and a 5 year minimum determinate sentence;

5) Admitted;

7) The State denies each and every allegation set forth in paragraphs 7 a, b, c, d, and e;

9) The State denies each and every allegation set forth in Paragraph 9 a, b, and c.

FIRST AFFIMATIVE DEFENSE

William Jack Bias' Petition fails to state any grounds upon which relief can be granted. Idaho Code § 19-4901A; I.R.C.P. 12(b)(6)

SECOND AFFIRMATIVE DEFENSE

The allegations set forth in the William Jack Bias' Petition are directly refuted by the record in this case and specifically the hearing where the Defendant plead guilty and the sentencing hearing.

THIRD AFFIRMATIVE DEFENSE

William Jack Bias' Petition for Post Conviction Relief contains bare and conclusory allegations unsubstantiated by affidavits, records 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.

WHEREFORE, Respondent prays for relief as follows:

a) That WILLIAM JACK BIAS' claims for post-conviction relief be denied;

b) That WILLIAM JACK BIAS' claims for post-conviction relief be summarily dismissed;

DATED this 22nd day of December, 2015.

Sid D. Brown
Prosecuting Attorney for Madison County

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22 day of December, 2015 I caused a true and correct copy of the foregoing ANSWER to be placed in the United State mail, postage prepaid to:

Joshua A. Garner
Attorney at Law
P.O. Box 1014
Rexburg, Idaho 83440

Joan L Thurber
Secretary

ORIGINAL

SID D. BROWN # 2726
Madison County Prosecuting Attorney

159 East Main Street
P. O. Box 350
Rexburg, Idaho 83440
(208) 356-7768



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent, | Case No. CV-2015-0000543<br><br>**MOTION FOR PREPARATION OF SENTENCING HEARING TRANSCRIPT** |

COMES NOW, The State of Idaho, by and through Sid D. Brown, Madison County Prosecuting Attorney, and hereby moves the Court for its Order requiring that a transcript of the Sentencing Hearing held on March 18, 2013, in Madison County Case No. CR-2012-0002873, be prepared.

RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

Sid D. Brown, Prosecuting
Attorney for Madison County

ORIGINAL

SID D. BROWN # 2726
Madison County Prosecuting Attorney

159 East Main Street
P. O. Box 350
Rexburg, Idaho 83440
(208) 356-7768


IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

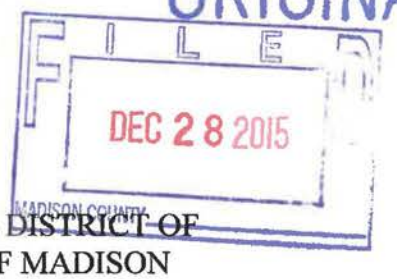
| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent, | Case No. CV-2015-0000543<br><br>**MOTION FOR PREPARATION OF CHANGE OF PLEA HEARING TRANSCRIPT** |

COMES NOW, The State of Idaho, by and through Sid D. Brown, Madison County Prosecuting Attorney, and hereby moves the Court for its Order requiring that a transcript of the Change of Plea Hearing held on February 11, 2013, in Madison County Case No. CR-2012-0002873, be prepared.

RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

Sid D. Brown, Prosecuting
Attorney for Madison County

ORIGINAL




IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent, | Case No. CV-2015-0000543<br><br>**ORDER FOR PREPARATION OF CHANGE OF PLEA ~~OF SENTENCING~~ HEARING TRANSCRIPT** |

IT IS HEREBY ORDERED AND THIS DOES ORDER that a Change of Plea Hearing Transcript in the above entitled case be prepared by the Court Reporter for the parties. The Change of Plea Hearing was held on February 11, 2013.

DATED this 28th day of December, 2015.

Judge


ORDER FOR TRANSPORT

NOTICE OF ENTRY

I HEREBY CERTIFY that a conformed copy of the foregoing ORDER FOR TRANSPCRIPT was this 28 day of December, 2015, mailed to the following parties:

Sid D. Brown
Prosecuting Attorney
for Madison County
133 East Main Street
P. O. Box 350
Rexburg, Idaho 83440

Court Reporter
Patricia Hubbell
Courthouse Box

KIM H. MUIR

By _____
Deputy

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent, | Case No. CV-2015-0000543<br><br>**ORDER FOR PREPARATION OF SENTENCING HEARING TRANSCRIPT** |

IT IS HEREBY ORDERED AND THIS DOES ORDER that a Sentencing Hearing Transcript in the above entitled case be prepared by the Court Reporter for the parties. The Sentencing Hearing was held on March 18, 2013.

DATED this 28th day of December, 2015.

Judge



ORDER FOR TRANSPORT

NOTICE OF ENTRY

I HEREBY CERTIFY that a conformed copy of the foregoing ORDER FOR TRANSPCRIPT was this 28 day of December, 2015, mailed to the following parties:

Sid D. Brown
Prosecuting Attorney
for Madison County
133 East Main Street
P. O. Box 350
Rexburg, Idaho 83440

Court Reporter
Patricia Hubbell
Courthouse Box

KIM H. MUIR

By _____
Deputy

COURT MINUTES

CV-2015-0000543

William Jack Bias vs. State of Idaho

Hearing type: Evidentiary Hearing

Hearing date: 7/25/2016

Time: 2:41 pm

Judge: Gregory W Moeller

Courtroom:

Court reporter: Patricia E. Hubbell

Minutes Clerk: Angie Wood

Tape Number:

Party: State of Idaho

Party: William Bias, Attorney: Joshua Garner

240 J INTRO

COURT REVIEWS CASE TO DATE

PETITIONERS ATTORNEY – W-1 JIM ARCHIBALD – PLACED UNDER OATH

PETITIONER ATTORNEY – W-2 WILLIAM JACK BIAS

313 STATE'S ATTORNEY W-2

TRANSCRIPT SHOWN TO WITNESS

COURT HAS TRANSCRIPT AND IT IS ALREADY PART OF THE RECORD

MR. GARNER ARGUES

MR. WOOD ARGUES

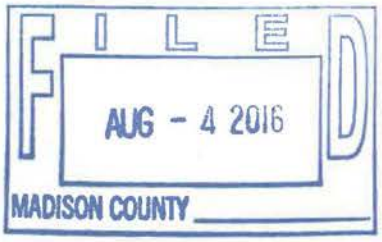
MR. GARNER WILL SUBMIT

COURT TAKES THE MATTER UNDER ADVISEMENT

COURT WILL TAKE JUDICIAL NOTICE OF CRIMINAL FILE

DEFENSE HAS 10 DAYS TO FILE POST MEMORANDUM

TAKEN UNDER ADVISEMENT IN APPROXIMATELY 24 DAYS




Joshua A. Garner
**THE LAW OFFICE OF**
**JOSHUA A. GARNER, PLLC**
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Petitioner

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM J. BIAS,<br><br>Petitioner,<br><br>v.<br><br>STATE OF IDAHO,<br><br>Respondent. | CASE NO.: CV-15-543<br><br>MEMORANDUM RE:<br>POST-CONVICTION RELIEF |

## INTRODUCTION

William Jack Bias ("Bias") filed a Petition for Post-Conviction Relief with this Court on or about August 07, 2015. In his Petition, Bias set forth various grounds for relief; namely, that his attorney of record was ineffective in his assistance as counsel in Bias' criminal matter. At the evidentiary hearing held by this Court on July 25, 2016, the various grounds for relief alleged by Bias were explored through the offering of evidence and witness testimony. At the end of the hearing, Bias' attorney requested additional time to provide a memorandum of law to the Court primarily addressing the possibility of a valid claim on the grounds of Bias' allegation that he requested his attorney file a motion to suppress in his criminal matter. This memorandum addresses the validity of Bias' claim.

## LEGAL STANDARD

In Idaho, to prevail on a claim for ineffective assistance of counsel, Bias has to show that his "attorney's performance was deficient and that the petitioner was prejudiced by the deficiency." *Strickland v. Washington*, 466 U.S. 668 687-88 (1984); *Hasset v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995). In order to prevail on a claim of ineffective assistance of counsel, the claimant must establish that his counsel was deficient in his performance and that this deficiency resulted in prejudice to the claimant. State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989). A claim of ineffective assistance of counsel presents mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail in such an action, the applicant must prove his allegations by a preponderance of the evidence. *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990).

Accordingly, Bias must show, by a preponderance of the evidence, that his attorney's performance in not filing a motion to suppress was deficient and that the filing of such motion caused Bias prejudice.

## MOTION TO SUPPRESS: AUTHORITY AND APPLICATION

Bias argues that he requested a motion to suppress be filed in his criminal case. Bias contends that the law enforcement officer who pulled over his vehicle on September 04, 2012, did not have jurisdiction to perform a stop of his vehicle. According to the probable cause statement, Bias' vehicle was pulled over by Rexburg Police Office Gary Hagen at milepost 334. Extraterritorial authority of police officers is set forth in Idaho Code § 67-2337, and it provides:

> All authority that applies to peace officers when performing their assigned functions and duties within the territorial limits of the respective city or political subdivisions, where they are employed, shall apply to them outside such territorial limits to the same degree and extent only when any one (1) of the following conditions exist:
> (a) A request for law enforcement assistance is made by a law enforcement agency of said jurisdiction.
> (b) The peace officer possesses probable cause to believe a crime is occurring involving a felony or an immediate threat of serious bodily injury or death to any person.
> (c) When a peace officer is in fresh pursuit as defined in and pursuant to chapter 7, title 19, Idaho Code.

(3) Subsection (2) of this section shall not imply that peace officers may routinely perform their law enforcement duties outside their jurisdiction in the course and scope of their employment.

In describing the authority of city police officers to investigate crimes outside their jurisdictional limits, the Idaho Supreme Court has instructed that, "city police officers do not have authority to conduct such activities outside of the city limits, much less outside the State of Idaho." *State v. Dietrich*, 135 Idaho 870, 26 P.3d 53 (App. 2001).

In *State v. Scott*, the magistrate ordered suppression of the evidence when an officer engaged in a traffic stop outside his jurisdictional limit. 150 Idaho 123, (Idaho.App.2010). The district court affirmed. On appeal, the Idaho Court of Appeals reversed the magistrate's decision, concluding that the officer was in "fresh pursuit" of the Defendant, an exception to the jurisdictional limits as outlined in Idaho Code § 67-2337 (c). Although the Court of Appeals reversed the magistrate's decision, the *Scott* case recognizes the argument made by Bias that an officer is constrained by jurisdictional limits which are outlined in Idaho Code § 67-2337. Moreover, unlike the Scott case, the office who conducted the stop on Bias' vehicle was in "fresh pursuit" of the vehicle when conducting the stop.

Idaho Code § 67-2337 provides that peace officers may perform their functions and duties outside of the limits of their respective city or political subdivision at the request of the chief law enforcement officer of another city or political subdivision. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (App.1991). In *Goerig*, Officer Carrington, a police officer with Rathdrum Police Department, had authority to arrest the Defendant because his assistance was requested by the Kootenai County Sheriff. Unlike the Goerig case, the officer who conducted the stop of Bias' vehicle was not responding to a request made by the Madison County Sheriff. Consequently, the officer in Bias cannot rely upon the exception contained in section (a) of Idaho Code § 67-2337.

## CONCLUSION

Based upon the facts of the Bias' case, it is apparent that a suppression motion should have been filed to contest the jurisdictional authority of the arresting officer. At a hearing on suppression, the issues that need to be identified are whether U.S. Highway 20 falls within the

jurisdictional limits of the Rexburg City Police Department. Arguably, milepost 34 is not within the city limits of Rexburg. If Officer Hagen was patrolling outside of his territorial authority, then the stop of Bias was illegal and the evidence seized from the stop should be suppressed and excluded. The Court may conclude, based upon the record, that Bias has been prejudiced by his attorney's failure to file a suppression motion. Therefore, post-conviction relief should be granted in this matter.

DATED THIS 4 day of August, 2016.

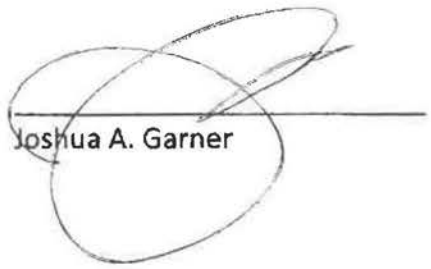
Joshua A. Garner
Attorney for William J. Bias

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4 day of August, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Office of the Prosecuting Attorney
Sid D. Brown
P.O. Box 350
Rexburg, Idaho 83440

[ ] U.S. Mail
[ ] Hand Delivered
[✓] Facsimile to: 356-7839
[ ] Overnight Mail



Joshua A. Garner

ORIGINAL



SID D. BROWN # 2726
Madison County Prosecuting Attorney

Rob H. Wood # 8229
Deputy Prosecuting Attorney
159 East Main Street
P. O. Box 350
Rexburg, Idaho 83440
(208) 356-7768

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

WILLIAM J. BIAS,
Petitioner,
v.
STATE OF IDAHO,
Respondent.

Case No.: CR-2015-0000543

**STIPULATION TO REOPEN**

COMES NOW, Respondent, the State of Idaho, by and through the Madison County Prosecuting Attorney and Petitioner by and through his attorney of record, Joshua A. Garner and by this stipulation hereby move the Court to reopen the Evidentiary Hearing on the Petition for Post-Conviction Relief. The parties believe that additional evidence can be presented that will assist the Court in considering the petition.

RESPECTFULLY SUBMITTED this 25 day of August, 2016.

Sid D. Brown, Madison County
Prosecuting Attorney

Joshua A. Garner
Attorney for Petitioner

WILLIAM JACK BIAS VS STATE OF IDAHO

POST CONVICTION RELIEF

CV-2015-543

EVIDENTIARY HEARING

SEPTEMBER 19, 2016

1:46

SID BROWN PRESENT ATTORNEY FOR THE STATE OF IDAHO

JOSH GARNER PRESENT FOR DEFENDANT WILLIAM JACK BIAS

WILLIAM JACK BIAS PRESENT AND IN THE COURTROOM

JUDGE GREGORY MOELLER

J INTRO

JOSH FILED FOR ADDITIONAL EVIDENCE TO BE PRESENTED

MR. BROWN INQUIRES ABOUT INAFFECTIVE COUNSEL AND JURISDICTION

WITNESS 1 SWORN IN –CORPORAL WYNN ROBISON FROM RPD

MR BROWN QUESTIONS WITNESS

WITNESS CLARIFIES STOP

MR BROWN INQUIRES

WITNESS CONTINUES

MR BROWN STATES DASH CAM VIDEO WAS MADE AND REQUESTS PLAYING THE VIDEO AND REQUESTS IT TO BE ADMITTED

NO OBJECTION

EXHIBIT 1 DASHCAM VIDEO ADMITTED

J ASKED IF TRANSCRIPT WAS MADE

MR BROWN CLARIFIES WHAT IS SHOWN AND LOCATION AT TIME OF STOP

J ASKS IF HARD COPY IS AVAILABLE

MR BROWN NO HARD COPY

J TAKE SHORT RECESS TO OBTAIN

2:00 COURT HAS HARD COPY IN COURTROOM

MR BROWN MOVES TO HAVE HARD COPY EXHIBIT ADMITTED

NO OBJECTIONS

EXHIBIT 2 ADMITTED AS HARD COPY OF TRAFFIC STOP

MR GARNER -CROSS EXAMINES WITNESS

START VIDEO

COURT REEVIEWS INFORMATION ON DASH CAM LOCATION AND TIMING

MR GARNER -APPROACHES AND MARKS ON EXHIBIT 2

J REVIEWS WHAT HE MARKING

MR GARNER-QUESTIONS WITNESS

J INQUIRES AS TO JURISDICTIN WITH WITNESS

MR GARNER-CLARIFIES JURISDICTIN WITH WITNESS

MR BROWN-CLARIFIES JURISDICTION WITH WITNESS

MR BROWN REFERS TO EXHIBIT 2

J QUESTIONS WITNESS

MR BROWN -NO OTHER QUESTIONS

MR GARNER-NO OTHER QUESTIONS

J WITNESS EXCUSED

J 3:07 NEXT WITNESS CALLED, STEPHEN ZOLLINGER AS REPRESENTATIVE FROM CITY OF REXBURG AND IS SWORN IN

MR BROWN - EXAMINES WITNESS AND REFERS TO EXHIBIT 2

MR GARNER-CROSS-EXAMINES WITNESS

J QUESTIONS WITNESS ON EXHIBIT 2 LOCATION AND JURISDICTION

MR BROWN-NO FURTHER QUESTIONS

MR GARNER-NO FURTHER QUESTIONS

J NO FURTHER WITNESSES

MR BROWN-MAKES STATEMENT

MR GARNER- MAKES STATEMENT

J ASKED IF THERE IS FURTHER EVIDENCE FROM DEFENSE

MR GARNER-RESPONDS

MR BROWN-RESPONDS

3:14

J COURT WILL TAKE MATTER UNDER ADVISEMENT. BOTH PARTIES MAY SUBMIT ADDITIONAL EVIDENCE WITHIN 7 DAYS.

COURT MINUTES

CV-2015-0000543

William Jack Bias vs. State of Idaho

Hearing type: Status Conference

Hearing date: 11/28/2016

Time: 11:42 am

Judge: Gregory W Moeller

Courtroom:

Court reporter: Patricia E. Hubbell

Minutes Clerk: Angie Wood

Tape Number:

Party: State of Idaho, Attorney: Sid Brown

Party: William Bias, Attorney: Joshua Garner

1226 J INTRO

COURT REVIEWS CASE TO DATE

STATE DID NOT HAVE ADEQUATE TIME TO ADDRESS REASONABLE SUSPICION OF THE STOP

STATE WOULD LIKE MORE TIME TO RESPOND

STATE REQUESTS 45 DAYS

MR. GARNER – WOULD REQUEST 14 DAYS AFTER STATE RESPONDS

STATE'S BRIEF JAN 13, 2017

MR. GARNERS BRIEF JAN 27, 2017

SID D. BROWN, ISB # 2726
Madison County Prosecuting Attorney

Rob H. Wood, ISB# 8229
Deputy Prosecuting Attorney
159 East Main Street
P. O. Box 350
Rexburg, Idaho 83440
(208) 356-7768



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

WILLIAM JACK BIAS,

Plaintiff,

vs.

STATE OF IDAHO,

Defendant.

Case No. CV-2015-0000543

**MOTION TO EXTEND TIME**

COMES NOW, the State of Idaho, by and through the Madison County Prosecuting Attorney's Office and hereby moves the Court to extend the time in which it can present evidence in the above entitled case. In a hearing on Monday, November 28, 2016, the Court gave the State until December 22, 2016, to present further evidence in response to Defendant's Petition for Post-Conviction Relief and until the middle of January to file its brief. The State is asking the Court to extend the evidentiary deadline until January 9, 2017, which will be the first regularly scheduled law and motion day since December 19, 2016. The State is not asking for an extension of the briefing deadline so there will be no overall delay to the Defendant because of this request.

RESPECTFULY SUBMITTED this 21st day of December, 2016.

Sid D. Brown, Prosecuting Attorney
for Madison County

NOTICE OF ENTRY

I HEREBY CERTIFY that on this 21 day of December, 2016, a true and correct copy of the foregoing MOTION TO EXTEND TIME was on this date served upon the persons named below, at the address set out below their names, by hand delivery, fax or mailing to them a true and correct copy of said document in a properly addressed envelope in the united States mail, postage prepaid.

Joshua A. Garner
Courthouse box

By: Joan L THURBER

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

WILLIAM JACK BIAS,

Plaintiff,

vs.

STATE OF IDAHO,

Defendant.

Case No. CV-2015-0000543

**ORDER ON MOTION TO EXTEND TIME**

The foregoing Motion having come before the Court and the Court having been fully advised and good cause appearing therefore;

IT IS HEREBY ORDERED that the time in which the State can present evidence in response to Defendant's Petition for Post-Conviction Relief shall be extended to January 9, 2017.

DATED this 31st day of Dec., 2016.

District Judge

7TH JUDICIAL DISTRICT COUNTY OF MADISON STATE OF IDAHO DISTRICT COURT

NOTICE OF ENTRY

I HEREBY CERTIFY that on this 3 day of January, 2019, a true and correct copy of the foregoing ORDER ON MOTION TO EXTEND TIME was on this date served upon the persons named below, at the address set out below their names, by hand delivery, fax or mailing to them a true and correct copy of said document in a properly addressed envelope in the united States mail, postage prepaid.

Sid D. Brown
Madison County Prosecuting Attorney
159 East Main Street
P. O. Box 350
Rexburg, Idaho 83440

Joshua A. Garner
Courthouse box

KIM H. MUIR

By: _____
Deputy

COURT MINUTES

CV-2015-0000543

William Jack Bias vs. State of Idaho

Hearing type: Evidentiary Hearing

Hearing date: 1/12/2017

Time: 10:38 am

Judge: Gregory W Moeller

Courtroom:

Court reporter: Patricia E. Hubbell

Minutes Clerk: Angie Wood

Tape Number:

Party: State of Idaho

Party: William Bias, Attorney: Joshua Garner

1035 J INTRO

STATE WISHES TO PLACE MORE EVIDENCE ON THE RECORD

SA DX W-1 JIM ARCHIBALD

STATES EXHIBIT 10 AND 11 MARKED

STATEX EXHIBIT 10 IDENTIFIED A JAIL ACTIVITY LOG FOR WILLIAM JACK BIAS

STATES EXHIBIT 11 IDENTIFIED AS JAIL ACTIVITY LOG FOR WILLIAM JACK BIAS

STATES EXHIBIT 10 AND 11 ADMITTED WITHOUT OBJECTION

STATES EXHIBIT 12 AND 13 MARKED

STATE EXHIBIT 12 IDENTIFIED AS JAIL ACTIVITY LOG FOR WILLIAM JACK BIAS

STATES EXHIBIT 13 IDENTIFIED AS REPORT CALL SUMMARY FOR BIAS, WILLIAM JACK

STATE MOVES FOR THE ADMISSION OF STATES EXHIBITS 12 AND 13

STATES EXHIBIT 12 AND 13 ADMITTED WITHOUT OBJECTION

STATES EXHIBIT 14 HANDED TO THE WITNESS

STATES EXHIBIT 14 IDENTIFIED AS POLICE REPORT BY WYNN ROBISON

STATES EXHIBIT 14 ADMITTED WITHOUT OBJECTION

MR. ARCHIBALD INQUIRES IF ATTORNEY CLIENT PRIVLEGE HAS BEEN WAIVED

COURT FINDS THERE IS AN IMPLICIT WAIVER DUE TO THE NATURE OF THE CLAIM

MR. BIAS WAIVES ATTORNEY CLIENT PRIVLEGE IN REGARDS TO MR. ARCHIBALD

1109 PA MR. GARNER CROSS EXAMINES MR. ARCHIBALD

COURT INQUIRES OF MR. ARCHIBALD

MR. GARNER CROSS EXAMINES MR. ARCHIBALD

COURT INQUIRES OF MR. ARCHIBALD

1124 SA DX OFFICER WYNN ROBISON

1134 PA CROSS EXAMINES OFFICER WYNN ROBISON

COURT QUESTIONS WITNESS

1148 SA DX W- DETECTIVE CHUCK KUNSAITIS

STATES EXHIBIT 160 AND 17 MARKED

STATS EXHIBIT 16 IDENTIFIED AS TRAINING HISTORY RECORD FROM POST

STATES EXHIBIT 17 CV AS DRUG RECOGNITION EXPERT

STATES MOVES FOR THE ADMISSION OF EXHIBITS 16 AND 17

STATES EXHIBITS 16 AND 17 ADMITTED WITHOUT OBJECTION

COURT TAKES BRIEF RECESS

1220 BACK ON THE RECORD

STATES EXHIBIT – DASH CAM VIDEO PLAY

1243 PA MR. GARNER CROSS EXAMINES

COURT INQUIRES OF WITNESS

1258 SA DX DETECTIVE RICK SCHMITT

MR. BROWN ASKS THAT THE COURT TAKE JUDICIAL NOTICE OF CD OF HEARING WHERE THE DEFENDANT WAIVED HIS PRELIM

STATE REQUESTS THAT BRIEFING SCHEDULE BE CONTINUED 10 DAYS


**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR MADISON COUNTY**

WILLIAM JACK BIAS

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2015-543

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: POST-CONVICTION RELIEF CLAIMS**

## I. INTRODUCTION AND PROCEDURAL HISTORY

William Jack Bias ("Bias") pled guilty to a felony D.U.I. and was sentenced on March 18, 2013 to a unified prison term of ten years, consisting of five years fixed and five years indeterminate.[1] Bias filed his *Petition for Post-Conviction Relief* on August 7, 2015. On November 20, 2015, this court granted his request for court-appointed counsel. After the State filed an answer, the first evidentiary hearing took place on July 25, 2016. This hearing focused primarily on the ineffective assistance of counsel claims raised in Bias's petition.

After the Court had taken the matter under advisement, the parties stipulated to reopen the evidentiary hearing to allow them to present additional evidence on an additional issue concerning whether Bias's trial counsel was ineffective for failing to challenge the legality of the stop and arrest on jurisdictional grounds. The second evidentiary hearing took place on September 19, 2016. At the conclusion of that hearing, Bias's attorney raised additional legal

[1] Pursuant to I.R.E. 201(b)(2), and for purposes of this decision only, the Court will take judicial notice of the contents of the file in Madison County Case No. CR-2012-2873. All citations to the record are from that case, unless otherwise specified.

issues concerning the validity of the stop under the 4th Amendment to the U.S. Constitution as additional grounds for his ineffective assistance of counsel claims.

As the Court was completing its initial findings and conclusions, it became apparent that the new issues raised by Bias may be dispositive. However, the State had not yet had a fair opportunity to respond to those issues. Therefore, the Court permitted the State additional time to respond and permitted them to reopen the evidentiary phase with additional testimony. A third evidentiary hearing took place on January 12, 2017, after which the Court took the matter under advisement.

## II. APPLICABLE LEGAL STANDARDS

### A. Standard of Review on an Application for Post-Conviction Relief

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.App.1992). When considering a post-conviction application, the Court must apply "[a]ll rules and statutes applicable in civil proceedings." I.C. § 19–4907; *Holmes v. State*, 104 Idaho 312, 313, 658 P.2d 983, 984 (Ct.App. 1983). Petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990).

### B. Standards for Evaluating Ineffective Assistance of Counsel Claims

The essence of Petitioner's claim is that he was denied his right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution when his attorney failed to properly represent him in a variety of ways. Such claims must ultimately be evaluated under the standard for ineffective assistance of counsel set forth in the United States Supreme Court case *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984), and adopted by Idaho courts for post-conviction relief cases where the defendant alleges ineffective assistance of counsel. *See, e.g., Crawford v. State*, 160 Idaho 586, ___, 377 P.3d 400, 406 (2016); *Heilman v. State*, 158 Idaho 139, 145, 344 P.3d 919, 925 (Ct.App. 2015).

For a petitioner to successfully show ineffective assistance of counsel under *Strickland*, (1) the defense attorney's performance must have been deficient and (2) the defense attorney's deficient performance must have prejudiced the defense. *Strickland*, 466 U.S. at 687; *accord*

*Crawford*, 160 Idaho at ___, 377 P.3d at 406. To establish a deficiency under the test's first prong, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88; *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice under the second prong of the test, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. In a case in which the petitioner entered a guilty plea, satisfying the second prong requires the petitioner to show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct.App. 2006). The Court must not second-guess tactical or strategic decisions of trial counsel unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct.App.1994); *see also Strickland*, 466 U.S. at 689.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bias has asserted a number of claims, all of which relate to the alleged ineffectiveness of the attorney who represented him up to and including the sentencing phase of his criminal case. The Court will address each allegation in turn. All facts set forth below are from the testimony offered at the three evidentiary hearings, unless otherwise specified.

### A. Conflict of Interest Claim

#### (1) Findings of Fact

During the trial and sentencing phases of his original trial, Bias was represented by the Madison County Public Defender, Jim Archibald ("Archibald"). Bias first alleges that his constitutional right to effective counsel was violated because Archibald had a conflict of interest. The alleged conflict stems from a bill for previous legal services that Bias owed a partner in Archibald's law firm. The Court finds that Bias had earlier retained Ron Swafford to represent him on a prior felony DUI in June of 2012. Swafford was apparently successful in negotiating a plea agreement whereby Bias's felony DUI charge was reduced to a DUI-2nd Offense.[2] Bias has

[2] Madison County Case No. CR-2012-1867.

alleged, without dispute from the State, that he still owed Swafford approximately $2900 when Archibald was appointed to represent him on the new felony DUI case, Madison County Case No. CR-2012-2873, which is the subject matter of this action.

The Court finds that during all times relevant to this issue, Archibald was employed by Swafford Law Offices. Contrary to an errant statement made by this court in its earlier decision,[3] the Court now finds that based on the hearing testimony of both Archibald and Bias, and on the contents of the file in Madison County Case No. CR-2012-2873, Archibald was not retained, but appointed to represent Bias in his role as Madison County Public Defender.[4]

Archibald testified that he was aware that Swafford had represented Bias before, and that Bias owed Swafford money; however, he was unaware of the amount owed. Archibald further testified that he and Bias got along well and the money owed to his partner had no negative impact on the attorney-client relationship.

Bias testified that he believed the debt affected Archibald's performance. Other than this bare assertion, Bias has not supported his position with any evidence, such as billing statements, and has identified no economic incentive for Archibald to perform less diligently in his duty to his client because of the prior debt owed to his law partner. Archibald was being paid for his services by Madison County under his public defender contract, and Archibald knew that he would be compensated for his work. The Court finds that, beyond mere conjecture, there was nothing in Bias's testimony setting forth specific examples of how he was prejudiced by the apparent conflict, either through his attorney's actions or inaction.

**(2) Conclusions of Law**

"The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment." *State v. Lovelace*, 140 Idaho 53, 60, 90 P.3d 278, 285 (2003) (citing *Powell v. Alabama*, 287 U.S. 45, 68 (1932)), *reh'g granted*, 140 Idaho 73, 90 P.3d 298 (2004). However, to establish an impermissible conflict, a criminal defendant must show that the attorney in question is actually representing conflicting interests. *State v. Cook*, 144 Idaho 784, 792, 171 P.3d 1282, 1290 (Ct. App. 2007). A criminal defendant is deemed prejudiced "only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his

[3] Madison County Case No. CV-2015-543, *Memorandum Decision and Order on Petitioner's Request for Court-Appointed Counsel*, n. 8, November 20, 2015.
[4] *Minute Entry*, Oct. 30, 2012; *Order Appointing Public Defender*, Oct. 31, 2012.

lawyer's performance." *Burger v. Kemp*, 483 U.S. 776, 783 (1987) (quoting *Strickland*, 466 U.S. at 692) (internal quotation marks omitted).

"Whenever a trial court knows or reasonably should know that a particular conflict may exist, the trial court has a duty of inquiry." *Lovelace*, 140 Idaho at 60, 90 P.3d at 285. In this case, it is undisputed that the presiding judge was unaware of this issue until after sentencing. The case that Archibald's partner handled for Bias was reduced to a misdemeanor, and Bias never appeared in district court on that matter. More importantly, even if this Court were aware of the prior representation, it had no way of knowing that Bias owed money to Archibald's partner. The Court concludes that in this case it had no duty of inquiry regarding the alleged conflict of interest.

The Court further concludes that the mere fact that Bias owed money to an attorney with Archibald's law firm is insufficient to establish a prejudice or a disqualifying conflict of interest. Indeed, it is neither unusual nor unethical for an attorney to represent a client who owes his law firm money—in fact, it is very common. Bias has failed to establish by a preponderance of the evidence that the $2900 debt allegedly owed to his attorney's partner adversely affected his attorney's performance in any way.

Even if the Court were to find a conflict actually existed, this case would still hinge on whether Bias was actually prejudiced. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). However, nothing in Bias's testimony explains how he was actually prejudiced by this conflict, other than mere suspicion and speculation that Archibald may have performed poorly due to the money owed. In order to prevail, Bias must show by a preponderance of the evidence that he was prejudiced by the alleged conflict through specific actions, or inaction, of his attorney that occurred as a result of the alleged debt. No such facts have been alleged here. Therefore, the Court concludes that Bias has failed to set forth sufficient evidence to establish ineffective assistance of counsel under either prong of *Strickland*.

### B. The Alleged Private Assurance that the Court would Suspend Bias's Sentence and Order Him to Attend Drug Court

#### (1) Findings of Fact

Bias claims that he changed his plea from not guilty to guilty based on Archibald's private assurance that there was an agreement with the Court that he would be sentenced to Drug Court. However, Archibald testified that he made no promise to Bias that he would be placed on probation or allowed to participate in Drug Court. Archibald testified that Bias was made aware that the plea agreement was nonbinding on the State and the Court. Bias testified that Archibald told him at the pretrial conference that a binding Rule 11 plea agreement was unnecessary because a verbal agreement was sufficient.

The Court finds that the terms of the plea agreement were discussed with Bias multiple times during his change of plea hearing. For example, at the commencement of the hearing, the following colloquy occurred:

> THE COURT: Mr. Bias, can you explain to the Court your understanding of the plea agreement?
> THE DEFENDANT: Just that I'm going to plead guilty to the felony DUI and Count 2 [Injury to a Child] will be dismissed.
> THE COURT: Okay, and you understand that the attorneys have made no agreement as to what your recommendations are going to be?
> THE DEFENDANT: I do.
> THE COURT: So since this case carries with it a maximum of ten years, [the Prosecutor] would be within his rights to recommend that. Do you understand?
> THE DEFENDANT: I understand that, I do.
> THE COURT: And do you understand, I'm not saying I would do it, but I would be within my rights to sentence you to that if I thought it was appropriate. Do you understand?
> THE DEFENDANT: I understand that, Your Honor.[5]

Later on, after Bias was placed under oath, he testified in a similar fashion:

> THE COURT: Okay, do you understand the plea agreement?
> THE DEFENDANT: I do, Your Honor.
> THE COURT: I asked you about it before, but you're under oath now. Could you tell me under oath your understanding of the plea agreement?
> THE DEFENDANT: I'm going to plead guilty to the felony DUI and Count 2 will be dismissed.

[5] *Tr.*, at 5:1 – 19 (Change of Plea Hearing, Feb. 11, 2013).

> THE COURT: Okay, and do you understand that both sides will be free to argue at your sentencing and the Court will be free to sentence you up to the maximum. Do you understand?
> THE DEFENDANT: I do.[6]

Furthermore, when later questioned under oath as to whether anyone had promised him that that he would receive "any specific sentence" in exchange for pleading guilty, Bias answered "No, Your Honor."[7] During cross-examination at the first evidentiary hearing in this case, Bias claimed that he "didn't hear" the court say there were no promises as to Drug Court. However, at the beginning of the hearing, after being placed under oath, Bias not only testified that he could hear the Court clearly, but also agreed to inform the court if it "needed to speak up."[8]

Additionally, the Court finds that when it again recited the terms of the plea agreement at the beginning of his sentencing hearing, Bias made no objections.[9]

**(2) Conclusions of Law**

Bias alleged that he only pled guilty to the Felony DUI based on Archibald's private assurance that there was an off-the-record agreement that he would be sentenced to Drug Court. Archibald denied this. The record conclusively establishes that the Court reviewed the terms of the plea agreement with Bias at least three times on the record. The Court has found that Bias agreed under oath that the Court was free to sentence him to up to the maximum prison term allowed (ten years). Despite having multiple opportunities to set forth his alleged expectation that the Court would suspend his sentence and order Drug Court, Bias consistently expressed an understanding of the non-binding nature of the plea agreement.

The Idaho Court of Appeals rejected a similar argument in a post-conviction relief setting where the petitioner's arguments flatly contradicted the record of the underlying proceeding in *Nevarez v. State*, 145 Idaho 878, 884–85, 187 P.3d 1253, 1259–60 (Ct. App. 2008). In *Nevarez*—as in the case at hand—the petitioner's attorney correctly stated the correct terms of the plea agreement on the record,[10] the defendant never objected to the characterization of the plea on the record, the trial court properly advised him of all possible sentencing consequences, and the petitioner stated under oath that there had been no further promises.[11]

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[6] *Id.*, at 11:11–23.
[7] *Id.*, at 12:20–22.
[8] *Id.*, at 8:5–10.
[9] *Id.*, at 20:3–10 (Sentencing, March 18, 2013).
[10] *Tr.*, 4:12 – 5:19.
[11] *Id.*, at 12:20 – 13:4.

The Court concludes that after considering the totality of the circumstances, Bias has failed to establish by a preponderance of the evidence that his attorney deceived him about the terms of the plea agreement. Bias was questioned about the terms of the plea agreement on at least three occasions—twice while under oath—and neither Bias nor his attorney made any mention of a side agreement with the Court that Bias would only be sentenced to probation and required to complete a drug court program. Archibald testified credibly that such a discussion did not happen. Bias's testimony is completely inconsistent with his earlier testimony under oath. Bias has not presented a credible explanation as to why he failed to inform the court about the terms of any secret plea agreement.

Therefore, the Court concludes that Bias's testimony on this issue is not credible and completely contradicts his more contemporary understanding of the agreement in 2013. He has failed to establish by a preponderance of the evidence that the alleged deception by his attorney actually occurred, and that he was prejudiced as a result, as required by *Strickland* and *Plant*.

### C. The Claim of Inadequate Time to Review His PSI

#### (1) Findings of Fact

Bias has also asserted in his petition that he did not have adequate time to review the Presentence Report ("PSI") before sentencing, and was advised by Archibald to just tell the Court he had reviewed it. There was little testimony offered at either evidentiary hearing relevant to this issue. Bias did testify that he did not realize that the PSI recommended a prison sentence until half-way through the sentencing.

The Court finds that Bias testimony is inconsistent with his statements to the Court at the time of sentencing. For example, when asked at the beginning of the sentencing whether he had received a copy of the PSI and had a chance to review it with his attorney, Bias answered in the affirmative.[12] Similarly, after his attorney informed the Court that no corrections to the PSI were necessary, and that he had no objection to the Court relying upon the PSI, Bias told the Court that he still wished to stand by his guilty plea.[13] The Court finds that Bias had an opportunity to ask for additional time if he needed it, but never raised the issue until long after he was sentenced.

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[12] *Id.*, at 20:12–19.
[13] *Id.*, at 20:20–21:6.

**(2) Conclusions of Law**

Bias has asserted that he did not have adequate time to review the PSI before sentencing, and that he was advised by Archibald to just tell the Court he had reviewed it. As noted, there was little testimony offered at the evidentiary hearing on this issue.

The Court concludes that Bias's allegations are not credible because they contradict his comments to the Court at the time of sentencing. Bias told the Court that he had received a copy of the PSI and had reviewed it with his attorney. When offered an opportunity, he made no corrections to the PSI or objections to the Court relying upon the PSI, and he informed the Court that he wished to stand by his guilty plea. At the arraignment and change of plea hearing prior to sentencing, Bias was informed that a ten year prison sentence was a possibility.

The Court further concludes that Bias's assertion that he was unaware of the PSI's recommendation of incarceration until half-way through the hearing is not credible. During the recommendation phase of his sentencing, Archibald responded to the presentence investigator's recommendation that Bias be sentenced to prison and argued instead for a sentence of probation and Drug Court. The Court concludes that it strains credibility for Bias to suggest he reviewed his PSI with his attorney, but failed to discuss the most pertinent part—the sentencing recommendation. Given Bias's extensive criminal record, as set forth in the PSI—which included four prior felonies and a ten year prison term for vehicular manslaughter—the Court finds it patently unbelievable that someone with so much experience in the legal system would have "reviewed" the PSI, yet remained unaware of the investigator's sentencing recommendation.

The Court must conclude that Bias has failed to show by a preponderance of the evidence that his attorney's performance was deficient with regard to reviewing the PSI, or that he was prejudiced in this regard. Therefore, he has failed to establish a claim for ineffective assistance of counsel under either prong of *Strickland*.

**D. The Alleged Waiver of the Preliminary Hearing without His Permission**

**(1) Findings of Fact**

Bias alleged in his petition that his attorneys waived his right to a preliminary hearing without his consent. However, at the evidentiary hearing he merely testified that he "does not remember waiving the preliminary hearing." Archibald testified that his former partner, Larren Covert, met with Bias before the preliminary hearing and then waived it.

The file in the underlying case shows that the preliminary hearing was originally scheduled for September 19, 2012. At that time, Bias was present without counsel, and he requested a continuance so that he could retain counsel. He also waived his right to a speedy preliminary hearing.[14] On October 10, 2012, Bias again appeared pro se for the preliminary hearing, but again requested a continuance. This time he told the magistrate that he wanted to apply for a public defender. The continuance was granted and he was given an application for a public defender.[15] On October 30, 2012, Bias once again appeared without representation for his preliminary hearing because he had not yet completed the public defender application. The magistrate placed Bias under oath and asked questions concerning his indigency. The Court then appointed the public defender, Archibald, and reset the preliminary hearing.[16] The record then shows that the next preliminary hearing was set for November 7, 2012, but was again continued by stipulation.[17]

On November 28, 2012, Bias's preliminary hearing finally took place. The record shows that Bias waived the preliminary hearing and was released on his own recognizance.[18] The Court has listened to the audio recording of that hearing. It confirms that Covert appeared for Archibald, informed the magistrate that he had reviewed that matter with Bias and explained to him what a preliminary hearing was. Covert then told the Court that Bias had agreed to waive the preliminary hearing. Bias was present at the hearing and was then questioned by the magistrate. He confirmed to the magistrate that he agreed to waive the preliminary hearing and understood that this meant he would be bound over to district court. He told the judge that he understood the consequences of waiving his rights and that no one had forced him to waive the preliminary hearing. The magistrate then found that the waiver was voluntary and bound Bias over to district court.[19]

**(2) Conclusions of Law**

Bias alleged in his petition that his attorneys waived his right to a preliminary hearing without his consent. However, he later testified at the evidentiary hearing that he did not remember waiving the preliminary hearing. The question of "[w]hether a waiver has been made

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[14] *Minute Entry*, Sept. 19, 2012.
[15] *Minute Entry*, Oct. 10, 2012.
[16] *Minute Entry*, Oct. 30, 2012; *Order Appointing Public Defender*, Oct. 31, 2012.
[17] *Notice of Hearing*, Oct. 31, 2012; *Stipulation for Continuance*, Nov. 5, 2012; *Order for Continuance*, Nov. 7, 2012.
[18] *Minute Entry*, Nov. 28, 2012.
[19] *Audio Record (Preliminary Hearing)*, Nov. 28, 2012 at 0:20–0:55, 3:00.

knowingly and intelligently is a factual question" for the finder of fact. *State v. Wuthrich*, 112 Idaho 360, 363, 732 P.2d 329, 332 (Ct. App. 1986).

The Court must conclude that Bias's allegation is patently false. The record conclusively establishes that Bias was present in the courtroom when his attorney waived his right to preliminary hearing, and then Bias affirmatively agreed to do so after thorough questioning by the magistrate. The Court must also conclude that Bias made a knowing, intelligent and voluntary waiver of his preliminary hearing. Because Bias's claim is utterly lacking in merit, the Court further concludes that neither prong of *Strickland* has been established by a preponderance of the evidence.

**E. The Failure to File a Motion to Suppress**

**(1) Findings of Fact**

Bias next alleges that Archibald failed to file a motion challenging the legality of the stop and the Court's jurisdiction. At the first evidentiary hearing, Archibald testified that Bias never raised any concerns about the legality of his stop, and that he does not recall any discussion with Bias about filing a motion to suppress. He testified that Bias's main concern was getting help for his alcoholism. Bias testified that he asked Archibald two or three times to file a motion to suppress after the preliminary hearing because he felt that the stop was not legal. However, he claimed that the basis for such a motion was his belief that he was pulled over by the Rexburg Police while driving in Sugar City.

At the second evidentiary hearing, the arresting officer testified about the location of the stop and stated that, based on his training, the stop occurred within the city limits of Rexburg. He submitted video evidence confirming the location of the stop. *State's Exhibit 1*. Rexburg's city attorney, Stephen Zollinger, then testified. Using a county map, Zollinger identified the jurisdictional limits of the arresting officer. *State's Exhibit 2*. Based on the map and the video, he testified that the stop took place within the Rexburg city limits. At the conclusion of the evidentiary hearing, counsel for Bias essentially conceded that there was no merit to their jurisdictional argument.

However, while viewing *Exhibit 1*for the first time during the second evidentiary hearing, Bias's attorney—as well as the Court—noted that the video not only confirmed that Bias's vehicle merely touched, but did not cross the white "fog line," it also showed that certain "clues" indicating a DUI noted in the police reports were less obvious or inconsistent with the dashcam

video. Counsel for the State objected, noting that the purpose of the second evidentiary hearing was only to consider the jurisdictional issue, not other issues related to the legality of the stop.

The Court finds that counsel for the State has correctly recited the agreement of counsel, placed on the record at the beginning of the second evidentiary hearing, to limit the scope of that hearing. However, the Court also finds that in his initial petition, Bias did set forth a claim that his attorney failed to "challenge the proto call [sic] of the stop *and* jurisdiction of law enforcement."[20] It would appear that the legality of the stop had been previously raised Bias, at least generally, long before the second evidentiary hearing.

Officer Wynn Robison testified in his direct examination and under cross examination that a number of factors caused him to stop Bias's vehicle. He noted that the vehicle was traveling 10 to 15 mph under the 65 mph speed limit, had braked hard during a gentle curve of the road, drifted in its lane, and was "driving on top of the white fog line." This testimony was identical to the observations the Officer recorded in his Probable Cause Statement four years earlier.[21] *State's Exhibit 1* appears to confirm the testimony that the vehicle briefly drove on top of— but not past—the white fog line. However, while *Exhibit 1* generally confirms much of the Probable Cause Statement, it also presents a much less convincing basis for finding reasonable suspicion that a DUI was in progress. For example, when Bias stepped on his brakes for no apparent reason, it shows that he only tapped on his brake briefly, rather than "braking hard." It also appears to show that Bias's vehicle was traveling at the same approximate speed as the vehicle in front of it. Furthermore, in its review of the video, the Court could not detect any significant weaving, drifting, or change in speed of Bias's vehicle. Officer Robison conceded that he had observed Bias violate no "rules of the road," but testified that he believed Bias's driving behavior demonstrated several "clues" which, based on his training and experience, were indicative of someone driving under the influence.

During the third evidentiary hearing, Officer Robison testified a second time and clarified that Bias's driving caught his attention before his dashcam came on, when Bias applied his brakes inexplicably a separate time before the events depicted in *Exhibit 1* began. Detective Charles Kunsaitis next testified. He established that he had extensive training in DUI detection and teaches courses in DUI detection to other officers. After viewing *Exhibit 1*, he testified of

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[20] *Petition for Post-Conviction Relief*, 9(a), Aug. 7, 2015 (emphasis added).
[21] *Affidavit of Probable Cause of Sgt. Gary Hagen*, Exhibit A, "Probable Cause Statement," Sept. 5, 2012.

his belief that the combination of clues depicted in the video gave Officer Robison reasonable suspicion to believe the driver of the vehicle was intoxicated. Finally, Detective Richard Schmidt, an officer with specialized training in accident reconstruction, testified that using a stopwatch and satellite imagery, he estimated the speed of Bias's vehicle in *Exhibit 1* to be 54 to 55 miles per hour.

**(2) Conclusions of Law**

Bias initially based his claim for ineffectiveness on his trial counsel's failure to file a motion to suppress on the basis that the arresting officer was acting outside of his jurisdictional boundaries. This argument was based on I.C. § 67–2337, which limits the authority of law enforcement officers to act beyond the territorial limits of the political subdivision where they are employed, unless certain exceptions apply. *See also State v. Dietrich*, 135 Idaho 870, 872, 26 P.3d 53, 55 (Ct. App. 2001). Nevertheless, the Court concludes that the evidence presented at the second evidentiary hearing—including maps, video, and testimony—all established that the alleged crime, the stop, and the arrest all occurred within the jurisdictional boundaries of the City of Rexburg, where the arresting officer was employed. *See State's Exhibits 1 and 2*. Bias's attorney essentially conceded this point at the hearing. Accordingly, the Court concludes that Bias has failed to establish ineffective assistance of counsel, as it pertains to his jurisdictional claim, by a preponderance of the evidence.

Of greater concern to the Court, however, is the new issue which was raised at the conclusion of the second evidentiary hearing. Bias now argues that because *Exhibit 1* shows that the underlying stop of his vehicle violates his rights under the Fourth Amendment to the U.S. Constitution, his trial attorney should have challenged the legality of the stop.

In the landmark case *Terry v. Ohio*, the U.S. Supreme Court held that when detaining a suspect, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." 392 U.S. 1, 21 (1968). Traffic stops are "seizures" under the Fourth Amendment, but such seizures are justified when a police officer has reasonable articulable suspicion that a person has committed, or is about to commit, a crime. *Heien v. N. Carolina*, 135 S. Ct. 530, 536 (2014); *State v. Neal*,

159 Idaho 439, 442, 362 P.3d 514, 517 (2015).[22] It follows that once reasonable suspicion has arisen, it would behoove law enforcement to act promptly to assess the risk and, if necessary, remove the risk from a public highway. "The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *State v. Morgan*, 154 Idaho 109, 112, 294 P.3d 1121, 1124 (2013) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). "Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *State v. Bishop*, 146 Idaho 804, 811, 203 P.3d 1203, 1210 (2009). "The suspicion for the stop must be based upon objective information available to the officer when he decided to make the stop, and cannot be bolstered by evidence gathered following the stop." *Neal*, 159 Idaho at 443, 362 P.3d at 518 (2015) (quoting *State v. Emory*, 119 Idaho 661, 664, 809 P.2d 522, 525 (Ct.App.1991)).

In the context of traffic stops for suspicion of DUI, sometimes an officer observes a "driving pattern" consistent with DUI, and uses this observation to justify the stop. *Id.* "While a driving pattern may give rise to reasonable suspicion of intoxication, the test is whether the driving pattern falls outside 'the broad range of what can be described as normal driving behavior.'" *Id.* (quoting *Emory*, 119 Idaho at 664, 809 P.2d at 525). An officer's assertions about deviations from "normal driving behavior" are "evaluated against the backdrop of everyday driving experience." *Emory*, 119 Idaho at 664, 809 P.2d at 525 (quoted in *Neal*, 159 Idaho at 443, 362 P.3d at 518).

The Idaho Supreme Court has recently held that observing two instances of a vehicle touching, but not crossing, the fog line is not a sufficient driving pattern to arouse reasonable suspicion of DUI and justify a traffic stop.[23] *Neal*, 159 Idaho at 443, 362 P.3d at 518. The Idaho

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[22] While a defendant's Fourth Amendment rights are not violated when an officer performs a traffic stop based on the officer's mistaken, but reasonable, understanding of the law, *Heien*, 135 S. Ct. at 540, the Idaho Supreme Court has implicitly interpreted Idaho law to provide protection against stops justified by mistakes of law, at least in the context of a vehicle touching the highway's fog line. *See Neal*, 159 Idaho at 447, 362 P.3d at 522 ("We hold that driving onto but not across the line marking the right edge of the road does not violate Idaho Code section 49–637 and therefore the officer's stop of Neal was not justified.").

[23] The State argues that it is unfair to apply the *Neal* standard to this case because it is a new standard not in effect in 2012 when Archibald allegedly performed deficiently. The Court agrees that Archibald's performance cannot be found to have been deficient based on a case that was not decided yet. However, the Court's decision is not wholly dependent on *Neal*; the Court based its decision on the totality of the circumstances of which the *Neal* issue was just a part. Citing both the Court of Appeals' 1991 decision in *Emory*, 119 Idaho at 664, 809 P.2d at 525 (Ct.App.1991), as well as the 1998 decision in *Flowers*, 131 Idaho at 209, 953 P.2d at 649, the Supreme Court held that observing a vehicle merely touching a line on a roadway does not constitute reasonable suspicion of DUI. The Court further noted:

Court of Appeals found that a vehicle that exhibited a "delayed response to a traffic signal," in the "early morning hours," driving "within one foot of parked cars on a narrow street," but not weaving or crossing the center dividing line, did not exhibit a driving pattern outside the broad range of normal driving behavior. *Emory*, 119 Idaho at 664, 809 P.2d at 525.

However, the Court of Appeals in *State v. Flowers* held that a magistrate "properly considered the totality of the circumstances," and it upheld the magistrate's conclusion that an officer's multiple observations taken together gave rise to reasonable suspicion of DUI, while any one of the observations alone may have been insufficient. 131 Idaho 205, 209, 953 P.2d 645, 649 (Ct.App.1998). These observations included "[t]he [d]efendant's slow speed, hugging of the fog line, weaving in his lane of travel, crossing the fog line to the width of a tire, and then moving left to touch the center line one or two times, all within a mile or two." *Id.*

The cases cited by the State do not support its position that the officer who stopped Bias's vehicle had reasonable suspicion of DUI. For example, in *State v. Waldie*, 126 Idaho 864, 893 P.2d 811 (Ct. App. 1995), the Court of Appeals upheld the constitutionality of an investigatory stop when the evidence showed that the subject vehicle "var[ied] in speed from thirty-five to fifty miles per hour in a fifty-five mile per hour zone," "shift[ed] from side to side in its own lane," "drove the car off the highway, ... stop[ing] in a field and turned off the lights." *Id.*, 867, 814. Although this driving behavior was found to constitute reasonably suspicious behavior and "not common conduct normally expected of drivers," this Court cannot say that Bias's observed

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The mere touching of lines on roadways does not constitute reasonable suspicion of DUI in other jurisdictions either. *See United States v. Colin*, 314 F.3d 439, 446 (9th Cir.2002) (car's touching the right fog line and the center yellow line each for ten seconds after legitimate lane changes did not give officer reasonable suspicion of driving under the influence); *United States v. Freeman*, 209 F.3d 464, 466–67 (6th Cir. 2000) (a motor home's brief entry into the emergency lane does not constitute probable cause that the driver was intoxicated); *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir.1993), overruled on other grounds by *United States v. Botero–Ospina*, 71 F.3d 783, 786–87 (10th Cir.1995) ("[I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy."); *United States v. Wendfeldt*, 58 F.Supp.3d 1124, 1130 (D.Nev.2014) ("Although Wendfeldt's right tires touched the fog line several times, he was not speeding or driving erratically in any way, and his driving posed no danger to any other motorists."); *United States v. Ochoa*, 4 F.Supp.2d 1007, 1012 (D.Kan.1998) (single drift onto the shoulder did not justify stopping defendant); *State v. Tague*, 676 N.W.2d 197, 205–06 (Iowa 2004) (single incident of crossing left edge line for a brief moment did not meet reasonableness test under the state constitution); *State v. Binette*, 33 S.W.3d 215, 219–20 (Tenn.2000) (occasional drifting from the center of the lane did not amount to reasonable suspicion). Two instances of driving onto the fog line do not create a driving pattern that justifies an investigatory stop of the vehicle for suspicion of DUI.

*Neal*, 159 Idaho at 443–44, 362 P.3d at 518–19.

conduct rose to same level. *Id.* Similarly, in *State v. Atkinson*, 128 Idaho 559, 916 P.2d 1284 (Ct. App. 1996), the Court of Appeals again upheld the validity of a stop when an officer saw a vehicle "twice in two blocks of travel veer to the left and touch or cross over the center line." *Id.*, 561, 1286. Additionally, the vehicle "swerved back across its lane of travel and touched the fog line on the extreme right side of the traffic lane." *Id.* However, such circumstances again seem much more severe than the case at bar. Additionally, crossing the center line is clearly a violation of Idaho law.

Applying these standards to the facts of this case, the Court concludes that even after considering the officer's training and knowledge of normal driving behavior, the totality of the circumstances did not provide him sufficient reasonable suspicion to stop Bias's vehicle for an apparent DUI in progress. *Emory*, 119 Idaho at 664, 809 P.2d at 525. None of the factors cited by the officer, taken individually, would constitute an infraction of Idaho law or a violation of the rules of the road. More importantly, even taken together, the clues identified did not give rise to reasonable suspicion of DUI. The Court concludes that during an approximately 60-second span of time, driving 55 mph in a 65 mph zone at night, lightly tapping the brakes, and briefly touching—but not crossing—the white fog line, do not provide sufficient reasonable suspicion to justify a stop on suspicion of DUI by law enforcement. This is an admittedly very close question for the Court. The Court has only reached this conclusion after many repeated viewings of the dash cam video. *Exhibit 1*. After all of these viewings, and evaluating the evidence "against the backdrop of everyday driving experience," the Court finds that Bias's driving pattern was within the broad range of normal driving behavior. Therefore, it is unable to conclude that Bias's driving was sufficiently suspicious to justify a stop at that point in time.

In so concluding, the Court does not lightly disregard the fact that the arresting officer was ultimately correct in his suspicion that Bias was driving under the influence. However, being right does not cure the constitutional deficiencies in an otherwise improper stop. *Emory*, 119 Idaho at 442, 809 P.2d at 525 ("[T]he suspicion for the stop must be based upon objective information available to the officer when he decided to make the stop, and cannot be bolstered by evidence gathered following the stop.") The Court is further mindful that the arresting officer did not have the benefit of repeated viewings of the dashcam video and that he was highly motivated to get a potentially dangerous driver of the highway. The Court acknowledges the significant practical difference between engaging in its analysis in the comfort of an office

behind a keyboard—with the benefit of hours of research and review of this single narrow question—and the split-second choices an officer in the field must make every day. Nevertheless, the Court must diligently apply the law the same way police officers diligently perform their duties in protecting society.

The Court must further conclude by a preponderance of the evidence—although it is an extremely close question of law and fact—that it was objectively ineffective assistance of counsel for Bias's trial attorney not to file a motion to suppress on these grounds. "Defense counsel's failure to file a motion to suppress will constitute ineffective counsel if the reviewing court determines that the evidence at issue would have been suppressed." *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127, 148 (1997) (citing *Carter v. State*, 108 Idaho 788, 795, 702 P.2d 826, 833 (1985)). The Court is mindful that defense counsel did not have access to the dashcam video prior to trial—just the police report. However, the descriptions in the police report raise the same concerns as the video to a sufficient degree that defense counsel should have challenged the stop or at least investigated further.[24] A motion to suppress would have forced the State to support the constitutionality of the stop with evidence, which would have likely led to the discovery and disclosure of the dashcam video in 2012, rather than in 2016. This error is exacerbated by defense counsel's failure to file a request for discovery, which may have increased the likelihood that the dashcam video would have been discovered.

Therefore, after considering the totality of the defense counsel's actions, the Court concludes that the first prong of *Strickland* has been met. Based on the Court's review of the law and the evidence, Bias has established by a preponderance of the evidence that an objective standard of reasonableness would have required his attorney to file a motion to suppress in this case. Furthermore, because such a motion would have been granted for the reasons set forth above, the Court concludes that there was clearly prejudice to Bias, thereby satisfying the second prong of *Strickland*. The Court has an abiding conviction that, but for these errors, Bias would not have pled guilty and would have insisted on going to trial. *Plant*, 143 Idaho at 762, 152 P.3d at 633 (Ct.App. 2006). Accordingly, the Court concludes that Bias has established grounds for ineffective assistance of counsel by a preponderance of the evidence.

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[24] The police report provided to the defense (*Exhibit 14*), lists the officer's observations, none of which amount to a violation of the law. Under such circumstances, there should have at least been an inquiry as to the existence of a video record of the stop, given than in 2012 it was common for most officers to have dashcams installed in their vehicles.

### F. The Failure to Object to Alleged Prosecutorial Misconduct at Sentencing

#### (1) Findings of Fact

Finally, Bias alleges that his attorney was ineffective for failing to object to allegedly improper statements made by the prosecuting attorney which: (1) wrongfully suggested that the judge, as member of the community, was also a victim in the case, and (2) referred to Bias as "a two time murderer."

Initially, the Court notes that it can find no instance in the record where the prosecutor suggested that the judge was somehow a victim in the case. The closest statement the Court can find in the record is its own statement that "other people in the public" have been put at risk every time Bias drives a vehicle because of his well-established history of drinking and driving.[25] Bias does correctly note that the prosecutor mistakenly argued that in 1998 he was "responsible for the death of two individuals, as I understand it, because of his drinking and driving."[26] However, the Court was aware of this error, and acted quickly to correct the record:

> THE COURT: Now the PSI indicates one person died; Mr. Brown indicates two people died. Which is correct?
> THE DEFENDANT: One person, Your Honor.
> THE COURT: So you killed a passenger in your vehicle because you were drinking and driving?
> THE DEFENDANT: Yes, Your Honor, my best friend.[27]

The Court finds that it was not only aware of the prosecutor's misstatement at the time he made it, but it also allowed Bias an opportunity to set the record straight.

#### (2) Conclusions of Law

Bias alleges that his attorney failed to object to allegedly improper statements made by the prosecutor at his sentencing. The first statement, in which the prosecutor allegedly referred to the judge as a "victim," cannot be located in the transcript. Even assuming it were true, such a comment would clearly be the type of rhetorical hyperbole that would not be taken seriously by any judge except in the most general sense possible. Indeed, all judges as taxpayers and members of the public have at least a remote personal interest in every criminal case, as does the public at large. It is unfathomable that either this Court, or any other court, would be unduly

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[25] *Tr.*, 37:5–11.
[26] *Tr.*, 25:17–19.
[27] *Tr.*, 28:3–10

swayed by such a statement at sentencing. The Court concludes that even if the statement were made and counsel failed to object, this allegation does not satisfy the prejudice prong of *Strickland*, absent any evidence to the contrary.

The misstatement of Bias's criminal record by the prosecutor—wrongfully alleging that two people were killed in Bias's prior vehicular manslaughter case rather than just one—would be a bigger concern for the Court if it had not immediately recognized the misstatement and allowed Bias an opportunity to correct the record.[28] The Court concludes that there was no need for an objection because any error was remedied by the Court *sua sponte*. Therefore, there can be no finding of prejudice under *Strickland* when the Court was clearly not influenced by the error.

Bias further claims that the prosecutor violated Idaho Rule of Professional Conduct 3.5. Rule 3.5 is an ethical rule dealing with impartiality, decorum, and improper influence. Bias misreads the rule, which is clearly intended to prohibit serious criminal acts such as bribery or intimidation, and attempts to apply it to improper argument or hyperbole in a sentencing recommendation. *See* I.R.P.C. 3.5, comment 1. Even if his allegations were true, Bias's claims would be more applicable to a claim of prosecutorial misconduct, which he has not asserted as a basis for relief on appeal. Bias's argument again wrongfully assumes that the Court was actually influenced by the misstatement alleged here. Bias cites to nothing in the record suggesting that the prosecutor's alleged statements actually misled or confused the Court about the actual facts of this case or of Bias's prior record. Indeed, the record reflects that the Court had read the PSI and all attached reports, accurately understood Bias's criminal record, and properly considered the objectives of criminal punishment in Idaho. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). There is nothing here to justify a new sentencing hearing because the Court was not misled.

The Court concludes that Bias has failed to establish grounds for ineffective assistance of counsel by a preponderance of the evidence.

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[28] There is no basis to find that the statement was made in bad faith.

**G. Failure to disclose video evidence of the stop and failure of defense counsel to file a request for discovery.**

Although they have not been properly pled or raised prior to the three evidentiary hearings, additional issues arose during this case which have caused the Court serious concerns. Most notably, the Court was alarmed to learn of (1) the failure of trial counsel to file a request for discovery before having his client plead guilty, and (2) the State's apparent violation of *Brady v. Maryland*, 373 U.S. 83 (1963), due to its failure to disclose obvious exculpatory evidence; i.e, the dashcam video. In order to provide guidance to both sides in an effort to avoid such concerns in the future, the Court will briefly address both issues.

**(1) Findings of Fact**

During the evidentiary hearings, Bias's original attorney, Archibald, testified that he did not file a formal discovery request in this case. He explained that it has been his practice as Madison County Public Defender for many years to simply make an informal request to the Madison County Prosecutor's Office to view the State's evidence, and they normally make an automatic and full disclosure. He testified that he has never had a problem with the Madison County Prosecutor's Office turning over discovery. Additionally, he testified that based on Bias's statements to him that he wanted help for his alcohol problem and did not wish to fight the charge, he felt a formal discovery request and investigation was unnecessary. He explained that he does not ordinarily pursue formal discovery or motions to suppress when a client gives him no reason to do so. He testified that he had never seen *Exhibit 1*.

The uncontested evidence produced at the hearings further established that *Exhibit 1*—the dashcam video—was not disclosed to Bias until the State offered it to establish jurisdiction for the stop during the second evidentiary hearing. The State's attorneys explained that they were simply unaware of its existence until Bias raised the issue of jurisdiction, leading them to discuss the matter with the arresting officer. The arresting officer, Officer Robison, apparently possessed the dashcam video and knew of its existence. However, the police reports did not mention the existence of a dashcam video of the stop.

**(2) Conclusions of Law**

**a. Failure to File a Request Discovery**

Defense counsel has a general duty to "conduct a prompt and thorough pretrial investigation of his or her case." *State v. Perez*, 99 Idaho 181, 184, 579 P.2d 127, 130 (1978).

The law is clear that failing to file a discovery request does not provide automatic grounds for ineffective assistance of counsel; the failure must be accompanied by prejudice to the defendant. *Hoffman v. State*, 153 Idaho 898, 907, 277 P.3d 1050, 1059 (Ct. App. 2012).

The Court of Appeals decided a case with facts similar to those in this case—a defendant claimed his attorney failed to request discovery and did not obtain a video tape of the arrest—in *Russell v. State*, 118 Idaho 65, 68, 794 P.2d 654, 657 (Ct. App. 1990). The Court of Appeals held:

> In the present case, although the public defender admitted that he did not file a request for discovery of materials and information pertinent to the charges against Russell, he did testify at the post-conviction relief hearing that he availed himself of the prosecutor's "open file" policy by reviewing all documents contained in the file. He also testified that he retained the documents which he felt were important. Although it may have been advantageous for the attorney to file a discovery request, it does not appear from the record that he would have uncovered any additional or different information than what he obtained from his review of the prosecutor's file. Furthermore, Russell has not indicated what evidence, other than the video-tape discussed below, would have benefited his case. . . .
>
> Furthermore, our review of the record indicates that the public defender's failure to view the video-tape of the scene was not prejudicial. We have viewed the tape in its entirety, and conclude that the statements made by Officer Myers substantially conform to his reports of the shooting incident prepared shortly after Russell's arrest. Contrary to Russell's contention, . . . .
>
> * * *
>
> Based upon these facts, the public defender testified at the post-conviction relief hearing that-in his estimation-any attempt to show that Russell's arrest was illegal and to suppress the evidence obtained by that arrest would have been futile. Consequently, the district judge found that the public defender's failure to file a suppression motion was not unreasonable. We agree with the district judge's conclusion.

*Id.* at 68–69, 657–58. In *Russell*, unlike the case at hand, it is clear that the defense attorney's failure to view the crime scene video was not prejudicial because the content of the video did not contradict police reports. *Id.* at 68, 657. Here, the Court finds that the video actually would have strengthened Bias's case. The U.S. Supreme Court has addressed this same issue, noting that while defense counsel's judgment is entitled to deference, when the "lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery," he or she places "at risk both the defendant's right to an 'ample opportunity to meet the case of the

prosecution,' and the reliability of the adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (citations omitted).

The case at bar clearly demonstrates the risks associated with failing to conduct thorough pretrial discovery. Even if the Court fully accepts the defense attorney's explanation that he does not typically investigate further or file a motion to suppress when his client expresses a desire to get help, this does not excuse the fact that defense counsel is effectively depriving his client of the ability to make a knowing and intelligent decision to plead guilty, based solely on his client's own analysis of his case as a layman. The Court is concerned about the precedent that would be set by too broadly permitting an attorney with a law degree to completely rely upon his client's lay analysis of his best legal strategy, without the benefit of complete discovery. In order to make a knowing and intelligent decision to plead guilty, the defendant should at least know whether the evidence is sufficient to obtain a conviction. Even if the defendant intends to plead guilty, discovery could allow him greater leverage in negotiating a plea agreement. As Bias's current attorney colorfully put it at oral argument: "trying to negotiate a plea deal without actually seeing the discovery is like bringing a knife to a gun fight." Here, the tenuous justification provided for the stop in the police reports at least required further inquiry and investigation—which the Court concludes would likely have led to the discovery of the dashcam video.

In conclusion, the Court notes that the failure to formally request discovery was not timely asserted as grounds for post-conviction relief; therefore, relief cannot be granted on those grounds. However, had Bias properly asserted such a claim—based on the unique circumstances of this case—it may have justified a finding of ineffective assistance of counsel under *Russell* and *Kimmelman*.

### b. *Brady* Violation

The U.S. Supreme Court, in its landmark *Brady* decision, held that it was a violation a defendant's right to due process when exculpatory evidence is withheld, provided the evidence is material to the determination of guilt or for sentencing purposes. "In the situation where a general request for *Brady* materials is made and when the exculpatory information in the possession of the prosecutor may be unknown to the defense, the reviewing court must look to the whole record and determine whether 'the omitted evidence creates a reasonable doubt that

did not otherwise exist.'" *Grube v. State*, 134 Idaho 24, 27, 995 P.2d 794, 797 (2000) (citing *United States v. Agurs*, 427 U.S. 97, 112, (1976)). "There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 263 (1999)).

"[T]here is 'no constitutional requirement that the prosecutor make a complete and detailed accounting to the defense of all police investigatory work on a case.'" *State v. Horn*, 101 Idaho 192, 195, 610 P.2d 551, 554 (1980) (quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972)). However, "[t]he duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense." *Queen v. State*, 146 Idaho 502, 504, 198 P.3d 731, 733 (Ct. App. 2008). As the Idaho Court of Appeals has explained:

> I.C.R. 16(a) specifies that the prosecution's duty of automatic disclosure under that rule extends to exculpatory evidence and information in the possession or control of the prosecuting attorney's staff and of "any others who have participated in the investigation or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney." Thus, the individual prosecutor's innocence does not obviate the violation.

*State v. Gardner*, 126 Idaho 428, 433, 885 P.2d 1144, 1149 (Ct. App. 1994).

In the case at bar, there was no formal discovery request filed by Bias's attorney. However, even without a discovery request, the Idaho Criminal Rules would have required automatic disclosure of the dashcam video:

> As soon as practicable following the filing of charges against the accused, the prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control, or which thereafter comes into the prosecuting attorney's possession or control, which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment therefor. The prosecuting attorney's obligations under this paragraph extend to material and information in the possession or control of members of prosecuting attorney's staff and of any others who have participated in the investigation or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney.

I.C.R. 16(a).

Therefore, had a claim for relief under *Brady* been properly alleged by Bias, the Court concludes that he would have likely prevailed. The Court would have had to conclude that the undisclosed evidence was: (1) "favorable to the accused," (2) "suppressed by the State, either willfully or inadvertently," and (3) "prejudice ... ensued." *Dunlap*, 141 Idaho at 64, 106 P.3d at 390. Given the Court's ruling that a motion to suppress should have been filed, and would have been granted, all three *Dunlap* criteria for a violation under *Brady* would have been met.

In so concluding, the Court wishes to make clear that there is no evidence that the failure to disclose the dashcam video was an intentional act by the Madison County Prosecuting Attorney's Office. Nevertheless, Officer Robison, as the arresting officer, was clearly part of the investigatory team and he had actual knowledge of the video. There should have been some mention of the video in his police reports or in the evidence logs. Notwithstanding the prosecutor's apparent innocence, knowledge of the dashcam video must be still imputed to the prosecutor's office. *Gardner*, 126 Idaho at 433, 885 P.2d at 1149. It is the Court's hope that by addressing this issue, this case will be instructive to the attorneys and law enforcement officers involved. If this error was not merely a mistake on the part of an individual officer, but rather the result of a systemic failure of the Rexburg Police Department's record-keeping practices, current evidence logging practices should be reviewed to avoid even inadvertent violations of a defendant's rights under *Brady* in the future.

## IV. CONCLUSION

Although most of Bias's claims lacked any merit, the Court is nonetheless left with an abiding conviction that Bias—facing a ten year prison sentence—should have been permitted an opportunity to challenge the legality of his stop and view the dashcam video before deciding to plead guilty. If, after reviewing the video and having the opportunity to discuss with his attorney the weaknesses in the State's case it reveals, he had still wished to plead guilty, that would have been a knowing, intelligent, and voluntary decision to waive his right to challenge the State's evidence and plead guilty. Here, however, notwithstanding the weakness in the evidence supporting reasonable suspicion for a stop as contained in the police report, Bias pled guilty anyway. The failure to challenge the stop on the basis of the tenuous grounds alleged in the police reports alone fell short of the objective standard of reasonableness set forth by *Strickland*, and was a primary reason why the dashcam video was not discovered sooner. Therefore, the first *Strickland* prong has been met.

By so holding, the Court does not wish to second-guess a strategic decision made by an experienced defense attorney. *Howard*, 126 Idaho at 233, 880 P.2d at 263. However, this case clearly illustrates the pitfalls of having a defendant plead guilty without conducting thorough investigation and discovery. If a motion to challenge the legality of the stop had been properly brought, the Court concludes that it would have granted such a motion under the totality of the circumstances. The Court must further conclude that but for counsel's failure to request discovery and challenge the constitutionality of the stop, Bias would not have pled guilty and would have insisted on going to trial. *Plant*, 143 Idaho at 762, 152 P.3d at 633. Therefore, Bias has shown that he was prejudiced by his attorney's actions, and the second *Strickland* prong is also met.

This was not an easy decision for the Court, as the length of this decision attests. Ultimately, it appears that serious mistakes were made by both the State and the defense that have eroded the Court's confidence in the justness of the outcome. Of course, while justice is not always simple, it always requires us to do what is right under the law. Therefore, after careful consideration of the weighty issues presented, and mindful of the important constitutional rights that have been asserted, Bias's petition for post-conviction relief is hereby GRANTED IN PART. Bias's guilty plea shall be WITHDRAWN and this matter REMANDED to District Court for further proceedings consistent with this decision and I.C. § 19–4907(a).

SO ORDERED THIS 3rd day of March, 2017.

Gregory W. Moeller, District Judge

## CERTIFICATE OF SERVICE

I CERTIFY that on this 6th day of March, 2017, I served a true and correct copy of the foregoing *Findings of Fact and Conclusions of Law Re: Post-Conviction Relief Claims* upon the following individuals via U.S. Mail, postage prepaid, or the courthouse box:

William Jack Bias
Madison County Jail

Josh Garner
Attorney for Petitioner
PO Box 1014
Rexburg, ID 83440

Sid Brown
Madison County Prosecuting Attorney
*Courthouse Box*

By: _____
Law Clerk

ORIGINAL



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

STATE OF IDAHO,

Plaintiff,

v.

WILLIAM JACK BIAS,

Defendant.

Case No.: CR-2015-0000543

**ORDER FOR PREPARATION OF TRANSCRIPT HEARINGS**

IT IS HEREBY ORDERED AND THIS DOES ORDER that all the Evidentiary Hearings, and Status Conference Hearing Transcripts in the above entitled case be prepared by the Court Reporter for the parties. The Evidentiary Hearings were held on July 25, 2016, September 19, 2016 and January 12, 2016. The Status Conference Hearing was held on November 28, 2016.

DATED this 11th day of March, 2017.

Judge

NOTICE OF ENTRY

I HEREBY CERTIFY that a conformed copy of the foregoing ORDER FOR TRANSCRIPT was this _____ day of March, 2017, mailed to the following parties:

Sid D. Brown
Prosecuting Attorney
for Madison County
133 East Main Street
P. O. Box 350
Rexburg, Idaho 83440

Joshua A. Garner
Courthouse box

Court Reporter
Courthouse Box

KIM H. MUIR

By_____
Deputy

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON**

| | |
|---|---|
| WILLIAM JACK BIAS<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO<br><br>Respondent. | Case No. CV-2015-0000543<br><br>**FINAL JUDGMENT** |

JUDGMENT IS ENTERED AS FOLLOWS:

1. Bias's petitioner for post-conviction relief is GRANTED IN PART.

2. Bias's guilty plea shall be WITHDRAWN and this matter REMANDED to District Court for further proceedings consistent with this decision and I.C. § 19-4907(a).

Dated this 14th day of April, 2017.

Gregory W. Moeller

Gregory W. Moeller, District Judge

CERTICIATE OF SERVICE

I CERTIFY that on this 14th day of April, 2017, I served a true and correct copy of the foregoing *Final Judgment* upon the following individual via U.S. Mail, postage prepaid, or the courthouse box:

Josh Garner
Attorney for Petitioner
Courthouse Box

Sid Brown
Madison County Prosecuting Attorney
Courthouse Box

By: Angie Wood
Deputy Clerk

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
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Deputy Attorney General
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR MADISON COUNTY

| | |
|---|---|
| WILLIAM JACK BIAS, | District Court Case No. CR-2015-543 |
| Petitioner-Respondent, | Supreme Court No. |
| v. | NOTICE OF APPEAL |
| STATE OF IDAHO, | |
| Defendant-Appellant. | |

TO: WILLIAM JACK BIAS, THE ABOVE-NAMED RESPONDENT, JOSHUA A. GARNER, P. O. BOX 1014, REXBURG, ID 83440 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 FINAL JUDGMENT, entered in the above-entitled action on the 14th day of April, 2017,

the Honorable Gregory W. Moeller presiding. A copy of the judgment being appealed is attached to this notice.

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 by granting post-conviction relief on a claim of ineffective assistance of counsel for not filing a motion to suppress.

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:

The July 25, 2016 evidentiary hearing (Patricia E. Hubbell, court reporter; estimated number of pages unknown).

The September 19, 2016 evidentiary hearing (Patricia E. Hubbell, court reporter; estimated number of pages unknown).

The November 28, 2016 hearing (Patricia E. Hubbell, court reporter; estimated number of pages unknown).

The January 12, 2017 evidentiary hearing (Patricia E. Hubbell, court reporter; estimated number of pages unknown).

6. Appellant requests the normal clerk's record pursuant to Rule 28, I.A.R. Appellant further requests that all briefs or written arguments be included in the record.

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:

PATRICIA HUBBELL
159 E. Main St.
P. O. Box 389
Rexburg, ID 83440

(b) That arrangements have been made with the Madison 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 relief case (I.A.R. 23(a)(1));

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

DATED this 17th day of April, 2017.

KENNETH K. JORGENSEN
Deputy Attorney General
Attorney for the Appellant

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 17th day of April, 2017, 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 GREGORY W. MOELLER
Madison County District Court
159 E. Main St.
P. O. Box 389
Rexburg, ID 83440

SID D. BROWN
Madison County Prosecuting Attorney
P. O. Box 350
Rexburg, ID 83440

JOSHUA A. GARNER
P. O. Box 1014
Rexburg, ID 83440

PATRICIA HUBBELL
159 E. Main St.
P. O. Box 389
Rexburg, ID 83440

HAND DELIVERY

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

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS<br><br>Petitioner-Respondent,<br><br>vs<br><br>STATE OF IDAHO<br><br>Respondent-Appellant. | SUPREME COURT NO. 45037<br>CASE NO. CV-2015-543<br>CLERK'S CERTIFICATE OF APPEAL |

**APPEAL FROM:** ***7th Judicial District Madison County***
**HONORABLE** ***Gregory W. Moeller*** **PRESIDING**
**CASE NO. FROM COURT:** ***CV-2015-543***
**ORDER OF JUDGMENT APPEALED FROM:** ***FINAL JUDGMENT dated April 14, 2017***
**ATTORNEY FOR APPELLANT:** ***Kenneth Jorgensen, Deputy Attorney General, PO Box 83720, Boise, ID 83720***
**ATTORNEY FOR THE RESPONDENT:** ***Josh Garner, PO Box 1014, Rexburg, ID 83440***
**APPEALED BY:** ***State of Idaho***
**APPEALED AGAINST:** ***William Jack Bias***
**NOTICE OF APPEAL FILED:** ***April 17, 2017***
**AMENDED NOTICE OF APPEAL FILED:** ***NA***
**NOTICE OF CROSS-APPEAL FILED:** ***NA***
**AMENDED NOTICE OF CROSS-APPEAL FILED:** ***NA***
**APPELLATE FEE PAID:** ***NO (Exempt)***
**RESPONDENT OR CROSS RESPONDENT'S REQUEST FOR ADDITIONAL RECORD:** ***NA***
**WAS DISTRICT COURT REPORTER'S TRANSCRIPT REQUESTED?:** ***YES***
**IF SO, NAME OF REPORTER and Number of Pages:** ***Dan Williams, Bingham County Courthouse, 501 NorthMaple #310, Blackfoot, ID 83221***

Dated this 18th day of April, 2017

Kim H Muir

BY Gwen Cureton

DEPUTY CLERK

7TH JUDICIAL DISTRICT COUNTY OF MADISON STATE OF IDAHO DISTRICT COURT

FILED - ORIGINAL
APR 18 2017
Supreme Court Court of Appeals

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
P.O. Box 1014
117 East Main
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

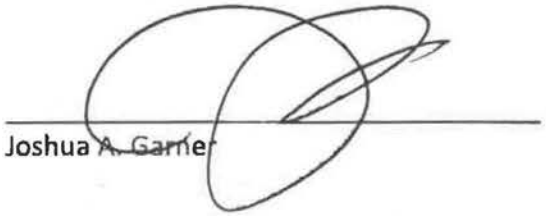
| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF IDAHO,<br><br>Defendant. | CASE NO.: CV-15-543<br><br>MOTION TO WITHDRAW AS ATTORNEY OF RECORD |

PLEASE TAKE NOTICE that the Plaintiff's counsel, JOSHUA A. GARNER, of the firm THE LAW OFFICE OF JOSHUA A. GARNER, PLLC, hereby requests that the Court issue an Order allowing counsel to withdraw as the attorney of record in this matter for the following reasons:

1. Defendant's counsel has filed an appeal of the Court's Final Judgment. Plaintiff requests that this Court allow for the appointment of a public defender to allow for the State Appellate Public Defender to handle Plaintiff's response to Defendant's Appeal.

WHEREFORE, counsel for Plaintiff requests that this Court issue an Order allowing counsel to withdraw from this matter and issue an Order that provides appointment of counsel for Plaintiff.

DATED this 2 day of May, 2017.



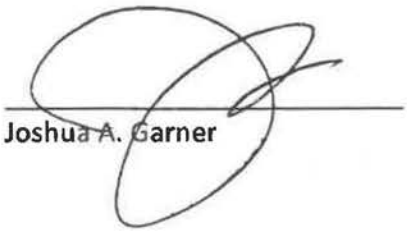
Joshua A. Garner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2 day of May, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Office of the Prosecuting Attorney
Sid Brown

[ ] U.S. Mail
[ ] Hand Delivered
[✓] Facsimile to: 356-7839
[ ] Overnight Mail



Joshua A. Garner

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
P.O. Box 1014
117 East Main
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Plaintiff



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF IDAHO,<br><br>Defendant. | CASE NO.: CV-15-543<br><br>NOTICE OF HEARING |

NOTICE IS HEREBY GIVEN that on Monday, May 15, 2017, at the hour of 11:00 a.m. or as soon thereafter as counsel can be heard, Plaintiff's attorney shall call up for hearing his "MOTION TO WITHDRAW AS ATTORNEY OF RECORD", at the Madison County Courthouse, Rexburg, Idaho.

DATED this 2 day of May, 2017.

Joshua A. Garner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF HEARING was on this date served upon the person or entity named below, at the address or facsimile number set out below his name, by such service as indicated hereafter.

Dated this 2 day of May, 2017.

Joshua A. Garner

Office of the Prosecuting Attorney

[ ] U.S. Mail
[ ] Hand Delivered
[✓] Facsimile to:
[ ] Overnight Mail

Joshua A. Garner
THE LAW OFFICE OF
JOSHUA A. GARNER, PLLC
P.O. Box 1014
Rexburg, ID 83440
Telephone: (208) 359-3181
Facsimile: (208) 359-5914
ISBN: 7420

Attorney for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF IDAHO,<br><br>Defendant. | CASE NO.: CV-15-543<br><br>ORDER GRANTING MOTION TO WITHDRAW AND APPOINTMENT |

This matter having come before this Court pursuant to Plaintiff's motion for withdraw, and after hearing from Plaintiff's counsel, the Defendant, and counsel for Defendant, it is hereby the Order of the Court as follows:

1. That counsel for Plaintiff, Joshua A. Garner, of The Law Office of Joshua A. Garner, PLLC., is hereby allowed to withdraw from this matter. Defendant does qualify for a public defender. The Plaintiff is hereby appointed counsel from the State Appellate Public Defender's Office.

DATED this 2nd day of May, 2017.

District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2 day of May, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

| | |
|---|---|
| Madison County Prosecuting Attorney<br>Courthouse Mailbox | [ ] U.S. Mail<br>[✓] Hand Delivered<br>[ ] Facsimile to:<br>[ ] Overnight Mail |
| The Law Office of Joshua A. Garner, PLLC<br>(Courthouse Mailbox) | [ ] U.S. Mail<br>[✓] Hand Delivered<br>[ ] Facsimile to:<br>[ ] Overnight Mail |
| Idaho Appellate Public Defender<br>3647 Lake Harbor Lane<br>Boise, Idaho 83703 | U.S. Mail<br>~~emailed~~ faxed 208-334-2985 |
| Idaho Supreme Court of Appeals<br>emailed | |

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR MADISON COUNTY

| | | |
|---|---|---|
| WILLIAM JACK BIAS | ) | |
| | ) | |
| Plaintiff-Respondent | ) | SUPREME COURT NO. 45037 |
| | ) | CASE NO. CV-2015-543 |
| VS | ) | CERTIFICATE OF EXHIBITS |
| | ) | |
| STATE OF IDAHO | ) | |
| | ) | |
| Defendant-Appellant | ) | |
| | ) | |

I, Gwen Cureton, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Madison County, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

| | NO. | DESCRIPTION | SENT/RETAINED |
|---|---|---|---|
| States | 1 | DASHCAM Video | Sent |
| | 2 | Hard Copy of DASHCAM | Sent |
| States | 10 | Jail Activity Log | Sent |
| | 11 | Jail Activity Log | Sent |
| | 12 | Jail Activity Log | Sent |
| | 13 | Call Summary | Sent |
| | 14 | Police Arrest Report | Sent |
| | 15 | Audio from Preliminary hearing | Sent |
| | 16 | Idaho peace Officer Standards and Training | Sent |
| | 17 | Chuck Kunsaitis Expert Report | Sent |

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 3 day of October , 2017

KIM H MUIR
CLERK OF THE DISTRICT COURT

By Gwen Cureton

Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | | |
|---|---|---|
| WILLIAM JACK BIAS | ) | |
| | ) | |
| Plaintiff-Respondent | ) | CLERK'S CERTIFICATE |
| | ) | |
| VS | ) | SUPREME COURT NO. 45037 |
| | ) | CASE NO. CV-2015-543 |
| STATE OF IDAHO | ) | |
| | ) | |
| Defendant-Appellant | ) | |

I, Kim H Muir, Clerk of the District Court of the 7th Judicial District of the State of Idaho, in and for the County of Madison, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross Appeal, and any additional documents requested to be included.

I further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record (except for exhibits, which are retained in the possession of the undersigned), as required by Rule 31 of the Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3 day of October, 2017

KIM H MUIR
CLERK OF THE DISTRICT COURT

By Gwen Cureton
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

| | |
|---|---|
| WILLIAM JACK BIAS<br>Plaintiff-Respondent | |
| VS | CERTIFICATE OF SERVICE<br>CASE NO. CV-2015-543<br>SUPREME CT. NO. 45037 |
| STATE OF IDAHO<br>Defendant-Appellant | |

I, Gwen Cureton, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Madison, do hereby certify that I have personally served or mailed, by United States Mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

ATTORNEY FOR APPELLANT
Idaho State Appellate Public Defender
322 East Front Street, Suite 570
Boise, ID 83702

ATTORNEY FOR RESPONDENT
Idaho Attorney General
700 West State Street
Boise, ID 83702

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 3 day of October , 2017

KIM H.MUIR
CLERK OF THE DISTRICT COURT

Gwen Cureton
By Deputy Clerk