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State v. McDay Respondent's Brief Dckt. 45595

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In the Supreme Court of the State of Idaho

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| | | |
|-----------------------------|---|---------------------------------|
| STATE OF IDAHO POLICE (BCI) |) | SUPREME COURT DOCKET No: |
| Respondent. |) | 45595/ CR-05-7362 & |
| |) | 45596/ CR-09-6228 |
| Vs. |) | |
| |) | APPELLANT RESPONSE TO |
| |) | |
| James McDay |) | RESPONDENT'S BRIEF |
| |) | |
| |) | |
| |) | |
| |) | |
| |) | |
| Appellant. |) | |

COMES NOW THE APPELLANT JAMES E. MCDAY, and submits this Response to Respondent's brief. If it pleases the Court the Appellant's RESPONSE TO ORDER CONDITIONALLY DISMISSING APPEAL and audio recording of the Dec. 15, 2016 appearance before Judge Stow. And Sept. 20, 2017 appearance before Judge Watson will demonstrate the inaccuracies and alternative facts presented throughout Attorney Rambo's Respondent Brief section Relevant Facts and Procedural Background.

With regard to Atty. Rambo's comment about judicial economy, a lot of time, effort and cost could have been spared if this matter had been handled in the interest of justice from the onset when the Appellant originally contacted (BCI) back on August 29, 2016. By this date (BCI) and the District Court had in their possession or access to all the information and exhibit evidence the Supreme Court now reviews.

Although the Appellant did not have the privilege of law school he does understand and respect the rule of law. And would also like to make the reviewers of this Petition aware during Atty. Rambo's phone appearance Sept. 20, 2017 I did voice my concern to Atty. Rambo and Judge Watson there appeared to be, no law or legislation that addressed this matter at that time. The Appellant also found from researching prior to the preceding Sept. 20, 2017. The Idaho Relief Act as well as post-conviction relief legislation these two pieces of law seem to only be specific to felony convictions, much like many of the state codes presented in Atty. Rambo's Standard of Review. To my knowledge only recently from Atty. Rambo's ex-parte communication dated June 7, 2018 has our law makers addressed minor crime non-felony conviction relief updated as of July 1, 2018. Now the Appellant would like to address each point of inaccurate, misleading, and alternative facts presented within the Respondent's Brief.

In the Supreme Court of the State of Idaho

The Appellant would like to point out the Respondent has failed to respond to the Appellant's Statement of Case and the question raised presented in the **Brief for Petition for Judicial Review page 3 of 17 para. 3.** of unlawful false arrest in CR-09-6228. The Respondent continues to ignore the evidence illustrating a.) CR-09-6228 was an improper unlawful arrest and search, willful and reckless with obvious malicious intent demonstrated on pages 12, 13, 14 of 17, in the Appellant's **Brief for Petition for Judicial Review.** b.) CR-05-7362 was a non-conviction and c.) The declaratory determination made pursuant to Idaho Code 67-3004(10) was made on the basis of a false record only (BCI) an Executive Administrative Entity maintains alone. This record has been demonstrated to continue, causing Disparate Impact on employment opportunity in the form of background check failures for employment in the Appellant's education field. With no consideration to the affidavit and evidence documents provided with the initial request for modification/removal of nonfederal Idaho arrest data-Criminal History Record submitted to (BCI) in August 2016.

Regarding Atty. Rambo's statement, "Instead of seeking judicial review under a new civil case proceeding the Appellant appealed under the two previous criminal case numbers." Please refer to the fourth paragraph page 2 of 5 of the **Amended Notice of Appeal Affidavit Complaint Statement** filed Jan 22, 2018. Regarding Atty. Rambo's Relevant Facts and Procedural Background, Atty. Rambo is in error with the facts she is presenting to the reviewers of this matter. The Appellant would refer the reviewers to the Appellant's **Response to Order Conditionally Dismissing Consolidated Appeal** filed Jan 16, 2018. All complaint requests were denied investigation or even consideration by the District Court Chief Clerk Mr. Brannon as well by Judge Mitchell with no explanation on April 23, 2018.

Described and illustrated by Appellant in the filed **Response to Order Conditionally Dismissing Consolidated Appeal No. 45595 and 45596 Jan 16, 2018:**

Statements in error, sentence four of Respondent's brief, section Nature of Case described in Appellant's **Amended Notice of Appeal Affidavit Complaint Statement 45596-2017 (45596-2017) filed Jan 22, 2018 page 2 of 5 para.3 & 4 .**

Statements in error in the Respondent's brief, section **Relevant Facts and Procedural Background.** Sentence four illustrated on page 17 of 49 in the **Response to Order Conditionally Dismissing Consolidated Appeal No. 45595 and 45596 filed Jan 16, 2018.**

Sentence five, Nov.4, 2016 the Kootenai County Prosecutor did file an objection to the Oct 24, 2016 Appeal. However the Appellant was assigned and heard as follows; assigned to Honorable Clark A. Peterson Nov. 30, 2016 at 3:00PM for Hearing on **Motion to Appeal and Expunge CR-09-6228.** At that time Judge Peterson accepted the Appellant's Withdrawal of Plea, Dismissed and Sealed CR-09-6228.

Assigned Honorable Judge James D. Stow Dec. 15, 2016 at 10:00AM for Acquittal of CR-05-7362 and CR-09-6228. At that time Judge Stow only denied the Appellant's Motion for Judgement of Acquittal of both CR-05-7362 and CR-09-6228 dated Dec. 7, 2016.

In the Supreme Court of the State of Idaho

CR-05-7362 was already sealed previously by Judge Stow in 2010. The Respondent's statement of events surrounding Judge Stow's Denial of CR-05-7352 in 2010 is in error, **illustrated in Response to Order Conditionally Dismissing Consolidated Appeal No. 45595 and 45596 filed Jan 16, 2018 page 22 of 49.**

On Dec. 15, 2016 the Appellant verbally requested of Judge Stow to forward the matter to the State Court of Appeal in both cases upon denial of Acquittals. The Appellant requested again in a drafted Motion to have these two matters forwarded to the appropriate jurisdictional court on March 1, 2017, understanding (BCI) was an executive administrative entity governed by executive administrative rule, superseding Kootenai County District Court authority. **Illustrated in Response to, Order Conditionally Dismissing Consolidated Appeal No. 45595 and 45596 filed Jan 16, 2018 page 32 of 49.**

Sentence ten-misleading: On May 5, 2017 Prosecutor Tinkey with the Kootenai County Prosecutor's Office did not file a responsive brief. She filed 1.) a Motion to Clarify Standing of Respondent, 2.) with a Motion to Extend Time for Briefing related to Judge Mitchell being assigned this matter Jan. 2017.

Sentence fourteen is in error: and led to the **complaint filed with the Supreme Court Clerk dated Jan. 26, 2018.**

Attorney Rambo appeared by phone, and is confused about which Judge presided that day. Appellant's complaint was made out of concern due to Judge Mitchell's signature appearing on the Sept. 27, 2017 Decision Order when he was not present. The appellant would discover from a Bailiff Jan 4, 2018 Judge Mitchell was in Boise for a Senior Magistrates Conference at the scheduled appearance time Sept. 20, 2017. And retired Judge Barry Watson actually presided Sept. 20, 2017. Further concerns arose as a result of a swap of both, Attorney Altig for Rambo, and Judge Watson for Mitchell, a rotation implemented and notice sent two days prior to the proceeding. Appellant was only notified of the attorney swap, not of the Judge swap by mail Sept. 18, 2017. All filed records related to the matter had not been supplied for review to either (BCI) counsel or Judge Watson from either's counterpart.

In conclusion, the 4th amendment applies to CR-09-6228 and the 14th amendment section 1 of the Constitution are applicable in both cases presented in this matter. On June 08, 2018 I received an ex-parte communication from Attorney Rambo (attached) not presented to the Clerk of the Supreme Court being a party in this matter now as reviewer. Explaining that "In March of this year, the Idaho legislature amended the expungement statute to include dismissal as a means of obtaining the expungement of criminal records", and that "The new law will take effect on July 1, 2018."

With respect to the Supreme Court reviewers, due to attorney Rambo's failure to address the question raised of unlawful arrest surrounding CR-09-6228, and considering the fact shared

In the Supreme Court of the State of Idaho

about new expungement statute effective July 1, 2018, the Appellant requests the Court to compel (BCI) to implement the information disclosed regarding expungement post-dated June 8, 2018 and immediately rectify these two criminal history records as is apparently within their means.

CERTIFICATE OF SERVICE

I certify that on the 10th day of July 2018 I mailed a copy true and correct to all parties listed below:

The Idaho State Police (BCI) Attorney Cheryl Rambo 700 S. Stratford Dr. Meridian, Idaho 83642
By email

The Clerk of the Idaho Supreme Court of Appeals By email

Signed James E. McDay

Dated 7-10-2018



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

June 7, 2018

James McDay
1124 N. 16th Street
Coeur d'Alene, ID 83814

re: Idaho Supreme Court Appeal, Docket No. 45595

Dear Mr. McDay,

In March of this year, the Idaho legislature amended the expungement statute to include dismissals as a means of obtaining the expungement of criminal records. The new law will take effect on July 1, 2018. Attached is a copy of the relevant change to the law for your review.

It appears that because your Idaho charges were dismissed, you may qualify to have your Idaho criminal charges expunged from the Bureau of Criminal Identification (BCI) records. This applies only to Idaho criminal records. Idaho courts and BCI do not have the legal authority to expunge any criminal records you may have from another state. You may have to seek expungement in those states where you have a criminal history record, if any exist. I highly recommend that you seek legal advice in that state, before proceeding on this course of action. You will need to obtain a new expungement form, via the Internet after July 1, 2018, or by writing to BCI to obtain one, in order to reapply for the expungement of your Idaho criminal history records (after July 1, 2018).

Please find the enclosed agreement to dismiss your appeal. After you sign, return to me by mail or by fax or email.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl Rambo".

Cheryl Rambo
Deputy Attorney General
Idaho State Police
Bureau of Criminal Identification

**(10) Any person who was arrested or served a criminal summons and who subsequently was not charged by indictment or information within one (1) year of the arrest or summons and any person who was acquitted of all offenses arising from an arrest or criminal summons, or who has had all charges dismissed, may have the fingerprint and criminal history record taken in connection with the incident expunged pursuant to the person's written request directed to the department and may have the official court file thereof sealed. This provision shall not apply to any dismissal granted pursuant to section 19-2604(1), Idaho Code.
Approved March 26, 2018**

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|----------------------|---|-------------------------------------|
| STATE OF IDAHO, |) | STIPULATION TO DISMISS APPEAL |
| |) | |
| Plaintiff/Respondent |) | |
| |) | Supreme Court Docket No. 45595-2017 |
| v. |) | Kootenai County No. CR-2005-7362 |
| |) | |
| JAMES E. MCDAY, |) | Kootenai County No. CR-2009-6228 |
| |) | |
| Defendant/Appellant. |) | |
| _____ |) | |

COMES NOW, the Respondent, State of Idaho, Idaho State Police, Bureau of Criminal Identification, by and through its attorney, Cheryl Rambo and the Appellant, James E. McDay and hereby agree to dismiss the appeal now before the Court. Pursuant to I.A.R. 33, the parties shall bear their own costs and attorney fees.

Date: _____

Date: _____

James E. Mc Day, *pro se*
Appellant

Cheryl Rambo
Deputy Attorney General
Idaho State Police
Bureau of Criminal Identification