STATE OF IDAHO)
County of KOOTENAI) ss

FILED 6-7-11

AT 11:00 O'clock A M
CLERK, DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, vs. MICHAEL WILLIAM BRADY Defendant.	Case No. **CRF 2010 3169** **MEMORANDUM DECISION AND ORDER DENYING I.C.R. 35 MOTION AND NOTICE OF RIGHT TO APPEAL**
MICHAEL WILLIAM BRADY, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. **CV 2011 2286** **MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART POST-CONVICTION RELIEF**

I. MEMORANDUM DECISION AND ORDER DENYING I.C.R. 35 MOTION IN CRF 2010 3169, NOTICE OF RIGHT TO APPEAL.

On the morning of his August 2, 2010, jury trial, Michael William Brady (Brady), pled guilty to five felony counts of Lewd Conduct with a Minor Under Sixteen. On September 29, 2010, Brady was sentenced as follows:

> COUNT I - LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, (a felony), Idaho Code § I. C. 18-1508, committed on Oct-Dec. 2009 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of LIFE ( ) years, for a total term not to exceed LIFE ( ) years.
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> COUNT II - LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, (a

felony), Idaho Code § I. C. 18-1508, committed on Oct.-Dec. 2009 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of LIFE ( ) years, for a total term not to exceed LIFE ( ) years.

COUNT III - LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, (a felony), Idaho Code § I. C. 18-1508, committed on Oct-Dec. 2009 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of LIFE ( ) years, for a total term not to exceed LIFE ( ) years.

COUNT IV - LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, (a felony), Idaho Code § I. C. 18-1508, committed on Oct-Dec. 2009 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of LIFE ( ) years, for a total term not to exceed LIFE ( ) years.

COUNT V - LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, (a felony), Idaho Code § I. C. 18-1508, committed on Oct-Dec. 2009 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of LIFE ( ) years, for a total term not to exceed LIFE ( ) years.

THESE SENTENCES RUN CONCURRENT.

The sentences were imposed, Brady was given credit for 223 days time served as of September 29, 2010, and Brady was sent to prison to serve those sentences.

On January 25, 2011, Brady filed the instant I.C.R. 35 Motion requesting that the Court "...reconsider the Judgment and Sentence entered herein September 29, 2010." Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Brady bases this motion "...as a plea for leniency." *Id.* On April 12, 2011, this Court entered an order allowing Brady to participate telephonically. At the April 12, 2011, hearing, Dan Cooper appeared for Brady, and Deputy Kootenai County Prosecuting Attorney Art Verharen appeared for the plaintiff, State of Idaho. Brady was not found at the penitentiary phone numbers given by his attorney, and the hearing was continued to June 1, 2011. At the April 12, 2011, hearing, the hearing on Brady's Rule 35 motion was continued to be heard at the already scheduled June 1, 2011, hearing for Post-Conviction Relief, and Brady's

counsel was instructed to submit an Amended Motion for Reconsideration of Sentence by April 22, 2011.

On April 19, 2011, Brady filed an "Amended Motion for Reconsideration of Sentence Pursuant to I.C.R., Rule 35". That motion was again a "plea for leniency" based on the following reasons:

> 1. The concurrent sentences imposed by the Court on Defendant's conviction for five counts of lewd conduct with a minor child under sixteen years of age of eight (8) years fixed, indeterminate life imprisonment are unduly severe; and
> 2. The sentences identified above were imposed by the Court without full consideration of Defendant's both pre-sentencing and post-sentencing rehabilitative progress, including, in part, evidence of his prior sex-offender treatment and rehabilitative progress.

Amended Motion for Reconsideration of Sentence Pursuant to I.C.R., Rule 35, pp. 1-2.

At the June 1, 2011, hearing, Dan Cooper appeared for Brady, and Deputy Kootenai County Prosecuting Attorney Art Verharen appeared for the plaintiff, State of Idaho. Brady was not present when the hearing began, but was located within the penitentiary and participated telephonically, was administered an oath and testified. Brady testified that he cannot begin his programming in prison because of his parole eligibility date being toward the end of the fixed portion of his sentence. Such testimony actually eviscerates Brady's claim that he should be allowed "leniency" based on his "post-sentencing rehabilitative progress." Brady's other argument was that this Court at sentencing did not consider the fact that, prior to sentencing, Brady was in sex offender treatment. The Court reviewed the minutes from the September 29, 2010, sentencing hearing, and the Court in fact took into consideration the fact that *he committed these offenses while in sex offender treatment in the community.* The factor that Brady now claims the Court failed to consider was one of the most aggravating factors considered by the Court at sentencing.

A motion to modify a sentence "shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; *see State v. Copenhaven,* 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James,* 112 Idaho 239, 242, 731 P.2d 234, 2370 (Ct.App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "...unduly limiting the information considered in deciding a Rule 35 motion"); *State v. Puga,* 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct.App. 1987).

A motion to reduce sentence is a motion for leniency. *State v. Strand,* 137 Idaho 457, 463, 50 P.3d 472, 478 (2002); *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The decision to grant or deny leniency is left to the sound discretion of the court. *Id, Strand; State v. Allbee,* 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct.App. 1989)

> A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. *State v. Arambula,* 97 Idaho 627, 550 P.2d 130 (1976). Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Lopez.* 106 Idaho 447, 680 P.2d 869 (Ct.App. 1984).
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> However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion.

State v. Forde, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987). *See also State v. Adams,* 137 Idaho 275, 278, 47 P.3d 778, 781 (Ct.App. 2002).

For a sentence to be considered "reasonable" at the time of sentencing the court must consider the objectives of sentencing: whether confinement is necessary to accomplish the objective of protection of society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the case. *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct.App. 1982). This requires the court focus on "...the nature of the offense, the character of the offender, and the protection of the public

interest." *State v. Reinke,* 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct.App. 1982).

The sentence imposed on September 29, 2010, was and is an appropriate sentence given Brady's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Brady's crimes. The fact that Brady committed these crimes while he was in sex offender treatment for prior sex offense crimes (a 2004 Rape charge which was amended to Assault and for which Brady was placed on unsupervised probation for one year, followed by a 2005 Rape charge in Bonner County which was amended to Aggravated Assault for which Brady was sent on a retained jurisdiction, jurisdiction was relinquished on that charge and Brady was returned to prison, paroled in 2008, violated that parole within a month, returned to prison and paroled again in May 2009 and arrested for the instant offenses in February 2010) establishes that Brady *cannot* be supervised on probation in the community and that these sentences needed to be imposed. The sentences themselves are not excessive given the gravity of the offenses for which Brady was sentenced. These offenses took place on five different occasions over a three-month period. Brady was having sex with a 14-year-old female who was the daughter of the woman with whom Brady was involved in an intimate relationship. Brady groomed his victim. The offenses came to light when the victim tried committing suicide by cutting her arms. She was hospitalized and is diagnosed with Post Traumatic Stress Disorder. She has been hospitalized fifteen times, is on medication and needs ongoing psychosocial rehabilitation. Brady began having sex with his fourteen-year-old victim in the instant case a scant five months after he was released from prison on his rape charge. Brady offered no remorse for his actions, nor did he voice any concern for his victim in his presentence report, and little remorse at sentencing. To cap it all off, after committing the instant offenses, and while in custody awaiting sentencing, on June 10, 2010, Brady was caught communicating by mail from

jail with a fifteen-year-old female. The letter began: "Hey beautiful, what's up? I hope you don't mind me calling you beautiful or get tired of it. I was really glad to get your letter." The letter ended: "With what you were saying I wonder what you'd do if we met up and you were alone." Presentence report, attachment, pp. 8-9. The letter was intercepted by the mother of that fifteen-year-old female. Brady is clearly unable to change his grooming, predatory and deviant behavior. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Brady and others.

IT IS HEREBY ORDERED that Brady's I.C.R. 35 Motion is **DENIED.**

NOTICE OF RIGHT TO APPEAL

YOU, MICHAEL WILLIAM BRADY, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

II. MEMORANDUM DECISION AND ORDER DENYING POST-CONVICTION RELIEF.

A. Procedural History and Background.

This matter is also before the Court following Petitioner Brady's filing of Petition for Post-Conviction Relief filed on March 17, 2011, pursuant to I.C. §19-4901, *et seq.* (Uniform Post-Conviction Procedure Act (UPCPA)). On August 2, 2010, petitioner Brady pled guilty to the underlying criminal matter, Five Counts Lewd Conduct with a Minor Under Sixteen (CRF 2010 3169), pursuant to I.C. §18-1508. Brady was sentenced on

September 29, 2010. Brady now seeks post-conviction relief for the following reasons:

1. Ineffective assistance of counsel for failure of trial counsel to gather evidence for petitioner's defense.
2. Ineffective assistance of counsel for failure of trial counsel to file appeal according to his statement to petitioner that he would file appeal.
3. Ineffective assistance of counsel for failure of trial counsel to prepare himself and because he was unprepared, instructed petitioner to plead guilty.

Petition for Post-Conviction Relief, p. 2, ¶ 7, p. 3, ¶ 9. On March 17, 2011, Brady also filed a motion for appointment of counsel, and on March 21, 2011, this Court ordered the appointment of the Kootenai County Public Defender as Brady's attorney for this Post-Conviction Relief petition. Brady's appointed counsel failed to submit an Amended Petition for Post-Conviction Relief, supplementing Petitioner's *pro se* Petition on March 17, 2011. On March 29, 2011, the respondent State of Idaho filed "Respondent's Answer to Petition for Post-Conviction Relief" and "Respondent's Motion for Summary Disposition." Counsel for Brady has not filed any responsive brief. Oral argument was held on the Respondent's Motion for Summary Disposition" on June 1, 2011.

B. Standard of Review.

Idaho Code § 19-4906 permits for summary disposition of UPCPA petitions pursuant to a party's motion or upon the court's own initiative. *Chouinard v. State,* 127 Idaho 836, 839, 907 P.2d 813, 816 (Ct.App. 1995); *Martinez v. State,* 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct.App. 1997). Summary dismissal is proper only where "the evidence presents no genuine issues of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief." *Martinez,* 130 Idaho 530, 532, 944 P.2d 127, 129. Where genuine issues of material fact are presented, an evidentiary hearing must be conducted. *Gonzales v. State,* 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct.App. 1991). But, where a petition raises only questions of law, disposition on the pleadings and the record is appropriate. *Daugherty v. State,* 102 Idaho 782, 783, 640

P.2d 1183, 1184 (Ct.App. 1982). "On review of a dismissal of the post-conviction application, without an evidentiary hearing, [reviewing courts] will determine whether a genuine issue of fact exists based on the pleadings, depositions and admission on file, together with any affidavits on file; moreover, the court will liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences to be drawn from the evidence in favor of the non-moving party." *Ricca v. State,* 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct.App. 1993). Likewise, demonstrations of ineffective assistance of counsel "require[s] substantive proof rather than mere dissatisfaction with the outcome of one's trial." *Giles and Write v. State of Idaho,* 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). Allegations in an application for post-conviction relief must be deemed to be true until those allegations are controverted by the state. *King v. State,* 114 Idaho 442, 445, 757 P.2d 705, 708 (Ct.App. 1988).

C. Analysis.

1. The Petition was Timely Filed Pursuant to Idaho Code § 19-4902.

The UPCPA requires applications to be filed within one year from the expiration of the time for general 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). Brady's judgment and sentence was entered by this court on September 29, 2010; therefore, Brady's petition filed on March 17, 2011, is timely.

2. Brady's Petition Fails to Raise Genuine Issues of Material Fact.

The UPCPA permits summary dismissal upon motion by either party where an application raises no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.C. § 19-4906(c). Here, the State argues Brady's Petition contains only conclusory allegations, and "has filed no affidavits or submitted any other evidence, at all, in support of the Petition." Respondent's Motion for Summary

Disposition, p. 2. In order for the Petition to not be dismissed, Petitioner must state *facts* to meet both prongs of the *Strickland v. Washington,* 566 U.S. 668 (1984) analysis ((1) that trial counsel's conduct fell below an objective standard of reasonableness and (2) prejudice resulting from the attorney's deficient performance) so as to withstand a motion for summary dismissal of his ineffective assistance of counsel claim. Brady must submit admissible evidence supporting his allegations or the application will be subject to dismissal. *Small v. State,* 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct.App. 1998). As noted by the State, "when considering summary dismissal, a 'court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law.'" Respondent's Motion for Summary Disposition, p. 1, citing Small, 132 Idaho 327, 221, 971 P.2d 1151, 1155 . That is all Brady has done here is make conclusory allegations in his petition. Brady has filed no affidavit. Brady has submitted no facts to support his conclusory allegations.

Ordinarily, reviewing courts do not address claims of ineffective assistance of counsel on direct appeal because the record on direct appeal is "rarely adequate for review of such claims." *State v. Hayes,* 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct.App. 2003); *State v. Saxton,* 133 Idaho 546, 549, 989 P.2d 288, 291 (Ct.App. 1999). Claims of ineffective assistance are more appropriately presented through post-conviction relief proceedings where an evidentiary record can be developed. *State v. Mitchell,* 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct.App. 1993).

Petitioner Brady alleges three instances of ineffective assistance by his trial counsel. Ironically, Brady prevails on an issue which was not even raised by post-conviction relief counsel in briefing (since none was filed), nor in oral argument.

First, Brady alleges trial counsel's failure to gather evidence prevented Petitioner

from creating an effective defense which fell below an objective standard of reasonableness. Petition and Affidavit for Post-Conviction Relief, p. 3. There is absolutely no showing made as to *what evidence* Brady's trial attorney failed to gather, let alone any showing of any prejudice. Brady's claim for post-conviction relief on this ground must be denied.

Second, Brady argues trial counsel's failure to file an appeal when trial counsel allegedly stated to Brady that counsel would in fact file an appeal on Brady's behalf, falls below an objective standard of reasonableness. *Id.*, p. 3. Brady fails to establish when such conversation allegedly occurred, who was present, and what was said. However, Brady's claim that counsel did not file an appeal when asked would form the factual basis for an evidentiary hearing. *Rica v. State,* 124 Idaho 894, 865 P.2d 985 (Ct. App. 1993). Usually, a petitioner must satisfy a two-part test to show ineffective assistance of counsel: (1) His or her counsel's performance was deficient; and (2) There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Parrott v. State,* 117 Idaho 272, 274, 787 P.2d 258, 260 (1990). However, loss of the opportunity to appeal is itself sufficient prejudice to support a claim of ineffective assistance of counsel based on a failure to appeal as requested. *See Ricca v. State,* 124 Idaho 894, 898, 865 P.2d 985 (Ct. App. 1993). It makes no difference whether or not defendant specified what issues he would have raised on appeal or whether the issues on appeal would be successful. *Id.* In essence, prejudice is presumed under a failure to file an appeal theory.

Although Brady did not support his application with an affidavit alleging his attorney did not file an appeal, as contemplated by I.C. §19-4903, this is not fatal because Brady's

post-conviction relief was verified. *Id.* In compliance with I.C. § 19-4902, it contains Brady's sworn statement that the application's contents are "true and correct." A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is in substance an affidavit, and is accorded the same probative force as an affidavit. *Camp v. Jiminez,* 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984). Therefore, Brady's claim that his attorney did not file an appeal, which was not supported by an affidavit, is valid because the petition itself was verified.

Brady claims the relief he is entitled to is: "Recind [sic] my plea of guilty and either proceed with trial or dismissal." Petition for Post-Conviction Relief, p. 3. That is not the appropriate relief for the alleged failure of trial counsel to file an appeal. The appropriate remedy is to allow Brady an additional 42 days from the date of this order to file an appeal in his criminal case, Kootenai Case CRF 2010 3169. While that remedy is somewhat duplicative (since Brady has 42 days from the date of the filing of this decision within which to file an appeal of his denial of his I.C.R. 35 motion), allowing Brady an additional 42 days to appeal the judgment entered September 29, 2010, is the appropriate remedy. To this extent only, Brady's post-conviction relief is granted.

Third, Brady argues trial counsel's failure to prepare himself and a proper defense lead to trial counsel informing Brady that his only option was to plead guilty and that this lack of preparation fell below an objective standard of reasonableness. *Id.,* p. 3. From a *factual* standpoint, Brady again fails to establish what was said to him by his trial counsel. Brady fails to give any indication as to exactly how his trial counsel was unprepared. Brady pled guilty the morning of the jury trial, as the jury panel was assembled. At that plea change hearing the Court asked Brady to explain *why* he was pleading guilty. According to the court minutes, Brady said he was pleading guilty because he wanted to

take responsibility for what I have done, to get treatment I need to change my behavior, because I had sex with a minor under age 14 years. Brady said not one word about his counsel not being prepared. No motion to continue was made on the morning of trial. From a *legal* standpoint, a defendant must make more than a bare allegation that he would have pleaded differently and gone to trial. *Key v. United States,* 806 F.2d 133, 139 (7th Cir. 1986). The prejudice prong of *Strickland* is not established by a self-serving statement that the petitioner would not have pled guilty, unaccompanied by either a claim of innocence or articulation of a plausible defense. *United States v. LaBonte,* 70 F.3d 1396, 1413 (1st Cir. 1996). Brady has provided neither a claim of innocence or articulation of a plausible defense. Brady's claim for post-conviction relief on this ground must be denied.

D. Conclusion and Order.

Brady's claim of ineffective assistance of counsel for the alleged failure of counsel to file an appeal in his criminal matter must be granted. The appropriate remedy is to allow Brady an additional 42 days from the date of this order to file an appeal in his criminal case, Kootenai Case CRF 2010 3169. All other claims of ineffective assistance of counsel are denied. The relief sought by Brady in being able to withdraw his plea and proceed to a jury trial is denied.

IT IS HEREBY ORDERED Brady's post-conviction relief claim of ineffective assistance of counsel for the alleged failure of counsel to file an appeal in his criminal matter is **GRANTED.** Brady is allowed an additional 42 days from the date of this order to file a Notice of Appeal in his criminal case, Kootenai Case CRF 2010 3169.

IT IS FURTHER ORDERED all other claims by Brady of ineffective assistance of counsel in his post-conviction petition are **DENIED.**

IT IS FURTHER ORDERED the relief sought by Brady in being able to withdraw

his plea and proceed to a jury trial is **DENIED.** The only relief allowed is an additional 42 days from the date of this order to file a Notice of Appeal in his criminal case, Kootenai Case CRF 2010 3169.

DATED this 7th day of June, 2011.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of June, 2011 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Dan Cooper Fax
Prosecuting Attorney - Art Verharen Fax

MICHAEL WILLIAM BRADY
IDOC # 79047 mail

#5314

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445 Fax

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____, Deputy