

FILED _____

AT _____ O'Clock _____ M
CLERK OF THE DISTRICT COURT

Deputy

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

DENISE RENEE WHITTLE,)
)
 Petitioner,)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

Case No. **CV 2008 9617**

**ORDER DISMISSING PETITION FOR
POST-CONVICTION RELIEF**

I. PROCEDURAL HISTORY AND BACKGROUND.

This matter is before the Court on Petitioner Denise Whittle's (Whittle) Petition for Post-Conviction Relief filed on December 1, 2008, pursuant to I.C. §19-4901, *et seq.* (Uniform Post-Conviction Procedure Act (UPCPA)).

On December 10, 2003, Whittle pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), to her first underlying criminal matter, a felony injury to a child charge, in Kootenai County Case No. CRF 2003 4515. This Court sentenced Whittle on May 10, 2004, to a retained jurisdiction program, a six-month evaluation program in prison to determine whether probation would be appropriate at the end of such program. Following that six-month program in prison, this Court gave Whittle the benefit of probation. Later, while on probation, Whittle stole checks from employers. Her probation was revoked and new charges were filed.

Whittle was charged with, pled guilty to, and was sentenced on fourteen counts of grand theft in Kootenai County Case No. CRF 2006 4017. On May 26, 2006, at the disposition of the probation violation on her older case, and sentencing for the grand

theft charges on the newer case, this Court sent Whittle to prison on both charges in both cases. Whittle now seeks post-conviction relief on *both* of her cases (Petition, p. 1) on the following grounds:

1. Ineffective assistance of counsel as a result of her trial counsel's failure to timely file an appeal of the sentencing hearing in the older case, CRF 2003 4515, (Petition, p. 3, ¶ A), failure of trial counsel to appeal the motion to dismiss hearing (Petition, p. 4, ¶ D), and failure of her trial counsel to file an appeal on the Rule 35 Hearing (Petition, p. 12, ¶ O); (Petition, pp. 3-27, ¶¶ A-NN). Whittle does not specify which of her two cases the motion to dismiss pertains, but a review of the court files in both cases show two motions to dismiss were filed in CRF 2003 4514, both on June 18, 2003, and no motions to dismiss were ever filed in CRF 2006 4017. Whittle does not specify which of her two cases the I.C.R. 35 motion pertained, but a review of the court files in both cases shows an I.C.R. 35 motion was only filed in CRF 2003 4514, which was filed June 7, 2004, and no I.C.R. 35 motion was ever filed in CRF 2006 4017.
2. Judicial Misconduct; (Petition, pp. 28-67, ¶¶ A-II)
3. Prosecutorial Misconduct. (Petition, pp. 68-78, ¶¶ A-C)

While Whittle's Petition purports to involve both cases, the only "Date of Sentence" listed is the May 26, 2006, sentence, which was the sentencing hearing on the "newer" case (Kootenai County Case No. CRF 2006 4017), which was also the probation violation disposition hearing on the "older" case, Kootenai County Case No. CRF 2003 4515. Petition, p. 1.

Immensely complicating the analysis of Whittle's Petition is the fact that there were *two* different appeals filed by Whittle, on two different occasions.

The first appeal, filed on December 17, 2004, Supreme Court Docket No. 31469, obviously only pertained to Kootenai County Criminal Case No. CRF 2003 4515. In that appeal, Whittle appealed from the Retained Jurisdiction Disposition and Notice of Right to Appeal entered by this Court on November 11, 2004. Order Conditionally Dismissing Appeal, dated January 11, 2005, Idaho Supreme Court Docket No. 31469. That appeal was conditionally dismissed on January 11, 2005, because Whittle's Notice of Appeal,

filed December 17, 2004, was not timely filed, given that Whittle appealed from an order dated November 11, 2004. With the 42 day limitation on appeals, Whittle filed a day late. On February 4, 2005, the Idaho Supreme Court dismissed that appeal by Whittle and issued a Remittitur.

More than one year after that first appeal was dismissed, on February 27, 2006, a Complaint was filed in Whittle's newer case (Kootenai County Case No. CRF 2006 4017), which charged fourteen counts of grand theft. Whittle pled guilty to those fourteen counts, and on May 26, 2006, Whittle was sentenced to prison.

On June 28, 2006, Whittle *timely* filed her Notice of Appeal in that case, Kootenai County Case No. CRF 2006 4017. That Notice of Appeal, filed by her attorney, deputy public defender Ed Lawlor, only concerned the Judgment and Conviction and Sentencing Disposition in that newer case, CRF 2006 4017. The sole issue on appeal according to that Notice of Appeal was "Is the sentence imposed excessive." Notice of Appeal, p. 2. That Notice of Appeal did not in any way mention the older case. However, on September 13, 2006, through Whittle's State Appellate Public Defender, Sara Thomas, Whittle filed an "Amended Notice of Appeal". The caption of that Amended Notice of Appeal listed *both* cases. The sole issue of appeal according to the Amended Notice of Appeal, pertained *only* to the *old* case, as that singular issue was: "Did the district court err in revoking probation and ordering into execution the original sentence." Amended Notice of Appeal, p. 2.

The Idaho Court of Appeals decision in that appeal was filed on December 18, 2007, and is reported as *State v. Whittle*, 145 Idaho 49, 175 P.3d 21 (Ct.App. 2007). A review of that decision shows the Idaho Court of Appeals addressed the sentencing decisions in both cases. The Idaho Court of Appeals affirmed this Court's sentencing decision on the injury to child charge in the old case, and on the newer case the

conviction on the grand theft charges was affirmed, but the sentences were modified to a ten year consecutive sentence. 145 Idaho 49, 53-54, 175 P.3d 21, 25-26. On February 11, 2008, a Remittitur was filed in CRF 2003 4515. Obviously a Remittitur should have been filed in CRF 2006 4017 on the same date, but that file does not contain such.

On December 1, 2008, Whittle filed her *pro se* Petition and Affidavit for Post-Conviction Relief, and Motion and Affidavit in Support of Appointment of Counsel. On December 9, 2008, this Court ordered the appointment of the Kootenai County Public Defender to represent Whittle. Conflict Deputy Public Defender Daniel C. Cooper was appointed. On December 12, 2008, the State of Idaho (State) filed Respondent's Answer to Petition for Post-Conviction Relief. On December 30, 2008, this Court ordered Whittle's lawyer to either file an Amended Petition for Post-Conviction Relief, or a written notice of the adoption of the Petition filed on December 1, 2008, and Whittle's lawyer was given until January 30, 2009, to file such. Whittle's appointed counsel failed to submit either an Amended Petition for Post-Conviction Relief to supplement Petitioner's *pro se* Petition, or a written notice of the adoption of the Petition filed on December 1, 2008, by the January 30, 2009, deadline. Five days *after* the deadline had passed, on February 5, 2009, Whittle's counsel filed a Motion to Extend Time for Filing Amended Petition for Post-Conviction Relief. On February 6, 2009, this Court granted Whittle's motion, giving Whittle's counsel until February 20, 2009, to either file an Amended Petition for Post-Conviction Relief, or a written notice of the adoption of the petition filed on December 1, 2008. On February 20, 2009, Whittle's counsel *again* failed to file an Amended Petition for Post-Conviction Relief to supplement Petitioner's *pro se* Petition, and failed to file a written notice of the adoption of the petition filed on December 1, 2008. Instead, Whittle's counsel, on February 20, 2009, filed a Stipulated

Motion to Extend Time for Filing Amended Petition. On February 24, 2009, this Court filed its Amended Order Granting Extension of Time for Filing Amended Petition for Post-Conviction Relief, giving Whittle until February 27, 2009, to either file an Amended Petition for Post-Conviction Relief, or a written notice of the adoption of the Petition filed on December 1, 2008. Whittle's counsel filed nothing. Following which, neither party filed anything, and on August 24, 2009, this Court filed and sent a Notice of Proposed dismissal to both parties and their attorneys. On the last day possible, on September 10, 2009, Whittle's attorney filed a Motion for Retention of Action. On September 11, 2009, this Court filed its Order Retaining, Order Fixing Original Pro Se Petition as Pleading, and Order Scheduling Evidentiary Hearing. Essentially by default, this Court ordered the December 1, 2008, *pro se* Petition will be used. Order Retaining, Order Fixing Original *Pro Se* Petition as Pleading, and Order Scheduling Evidentiary Hearing, p. 2. An evidentiary hearing was scheduled for January 26, 2010. *Id.*

The State made a motion to vacate the evidentiary hearing, which was granted on January 25, 2010, and the evidentiary hearing was re-scheduled for March 10, 2010.

On January 26, 2010, the State filed its Motion for Summary Disposition. The State filed its Brief in Support of State's Motion for Summary Disposition on February 2, 2010. Whittle filed Plaintiff's Brief in Opposition to State's Motion for Summary Disposition on February 18, 2010, and the State filed its Reply Brief in Support of State's Motion for Summary Disposition on February 19, 2010. Oral argument was held on March 9, 2010.

At the conclusion of oral argument, the Court gave the parties an additional day to file simultaneous briefing on the issue of whether Whittle had timely filed her petition, given that the Notice of Appeal in Kootenai County Case No. CRF 2006 4017, also included Kootenai County Case No. CRF 2003 4515, and due to the fact that the

decision by the Idaho Court of Appeals in Kootenai County Case No. CRF 2006 4017 was not issued until December 18, 2007. Thus, if this case that is presently before this Court on Whittle's Post-Conviction Relief Petition (Kootenai County Case No. CRF 2003 4515), was part of the appeal in Kootenai County Case No. CRF 2006 4017, then Whittle's Petition for Post-Conviction Relief would arguably be timely even as to Whittle's older case.

However, the issue of timeliness depends on what issues Whittle raises in her post-conviction case, and what issues were raised in each of her two prior appeals. As we shall see, Whittle's post-convictions claims must be dismissed, but for reasons different than either the State or Whittle have argued.

II. STANDARD OF REVIEW.

Idaho Code § 19-4906 permits for summary disposition of UPCA 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). 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).

III. ANALYSIS.

A. Whittle’s Petition Was Timely Filed Pursuant to Idaho Code § 19-4902, Equitable Tolling Has No Application and is Moot.

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). Here, the State argues Whittle has in no way met this deadline, having filed her Petition nearly three years beyond the date the Remittitur was filed by the Supreme Court. The State focuses on the Remitter filed on February 4, 2005, in Whittle’s *first* appeal. The State notes the Supreme Court:

...indicated on January 13th, 2005 that it would dismiss Whittle’s appeal [of the jurisdictional review hearing held on November 8, 2004, at which she was placed on probation] for being filed one day late. The appeal was in fact dismissed on January 25, 2005, and the remittitur was entered on February 4, 2005.

Brief in Support of State’s Motion for Summary Disposition, p. 2. In response, Whittle argues for equitable tolling of the one-year filing deadline. Plaintiff’s Brief in Opposition to State’s Motion for Summary Disposition, p. 2. Whittle argues:

...she did not learn of her counsel’s failure to timely file her appeal in CR 03-4515 until she was appointed appellate counsel in CR 06-4017 and had the opportunity to speak with him in January of 2008. It is further expected that Whittle will testify that she never learned from her attorney, Ann Taylor nor any other representative of the Kootenai County Public Defender’s Office that her appeal in CR 03-4515 had been dismissed because it was untimely filed.

Id., p. 3. The State argues Whittle does not meet the requirements for a grant of equitable tolling as set forth in *Sayas v. State*, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct.App. 2003), and *Isaak v. State*, 132 Idaho 369, 370 n.1, 972 P.2d 1097, 1098 n. 1 (Ct.App. 1999). Reply Brief in Support of State’s Motion for Summary Disposition, pp. 2-3. And, as the State notes, *Evensiosky v. State*, 136 Idaho 189, 30 P.3d 967 (2001) clearly states:

There is no discovery exception in I.C. § 19-4902, and the facts of this case do not warrant application of a discovery exception. I.C. §19-4902 expressly limits a party’s time to bring a claim for post-conviction review to one year. Further, Evensiosky discovered the basis for his claim in mid-May of 1997. This was well before his time for filing a post-conviction review petition expired on July 3, 1997.

136 Idaho 189, 191, 30 P.3d 967, 969. Indeed, in *Sayas* the Court of Appeals held:

In Idaho, equitable tolling of the statute of limitations for filing a post-conviction relief petition has been recognized: (1) where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials; (2) and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from pursuing challenges to his conviction.

139 Idaho 957, 960, 88 P.3d 776, 779. In the present case there is no allegation by Whittle that she was either outside the state of Idaho on an Idaho conviction and without access to counsel or Idaho legal materials or that she was suffering from a mental disease or the effects of psychotropic medications. Whittle simply states Idaho should adopt a “discovery” rule and that her petition was filed within one year of her having actual knowledge (or “discovery”) of the fact that her initial appeal had been dismissed. Plaintiff’s Brief in Opposition to State’s Motion for Summary Disposition, p. 3.

Not only was Whittle not “outside the state of Idaho on an Idaho conviction and without access to counsel or Idaho legal materials” and “not suffering from a mental disease or the effects of psychotropic medications”, *Whittle was not even in custody at*

the time her appeal was dismissed by the Idaho Court of Appeals on January 11, 2005, *she was in Idaho on probation*. Recall that Whittle was sentenced in CRF 2003 4515 on May 10, 2004, was sent on a retained jurisdiction by this Court, and on November 8, 2004, following that period of retained jurisdiction, due to her favorable performance in that six month prison program, this Court placed Whittle on probation. In her present Post-Conviction Petition, Whittle claims ineffective assistance of counsel as a result of her trial counsel's failure to timely file an appeal of her sentence in CRF 2003 4515. Plaintiff's Brief in Opposition to State's Motion for Summary Disposition, pp. 2-4. Whittle claims she did not find out about the fact that this appeal was not timely filed until her State Appellate Public Defender in her new case, Kootenai County Case No. CRF 2006 4017, told her about that fact in January, 2008. *Id.* At that time Whittle was in prison. This Court has been cited no authority, nor can the Court find any authority on its own, supporting Whittle's claim for equitable tolling based on the defendant being incarcerated *when the defendant hears the news* that her appeal is dismissed, as opposed to the situations where tolling is allowed when an appeal is dismissed while they are in custody *as a result of their being in custody*, due to a lack of legal resources or language problems.

The failure to timely file a petition is a basis for dismissal of the petition. *Evensiosky*, 136 Idaho 189, 190-91, 30 P.3d 967-69. Here, in her *second* appeal, Whittle appealed her sentences for felony injury to a child and grand theft in a consolidated appeal to the Idaho Court of Appeals. The judgment of conviction and the sentence for the injury to child charge was affirmed; the judgment of conviction for the grand theft charges was upheld, but the sentences were modified by the Court of Appeals. Whittle's cases were not remanded to the District Court to modify the grand theft sentences. The Court of Appeals modified the grand theft sentences on their own

because the Court of Appeals found the “seventy-year period of parole is, in our view, clearly excessive.” *State v. Whittle*, 145 Idaho 49, 53, 175 P.3d 211, 215 (Ct.App. 2007).

The Court of Appeals’ decision was dated December 18, 2007. The Remittitur was filed February 11, 2008. Thus, Whittle’s Post-Conviction Petition filed December 1, 2008, was timely because it was filed before December 18, 2008. As a result, equitable tolling is a moot issue.

B. Whittle’s Petition Raises a 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 that, even if the petition had been timely filed, Whittle’s ineffective assistance of counsel argument must fail because although Whittle’s counsel filed her appeal in CR 2003 4515 one day late, “Whittle has failed to produce admissible evidence for a *prima facie* case that either prong of the Strickland test- objectively deficient performance and resulting prejudice to Whittle- can be proven here.” Brief in Support of State’s Motion for Summary Disposition, pp. 6-7. [It appears Whittle and the State previously agreed the only issue to be argued at any evidentiary hearing would be the failure of Whittle’s counsel to timely file an appeal following Whittle’s return from her retained jurisdiction. See Brief in Support of Motion for Summary Disposition, p. 2.]

Whittle argues in Idaho, prejudice is presumed when an appeal is filed untimely and, here, Whittle sought an appeal, the appeal was filed on day late, and “Counsel’s failure to timely file an appeal is objectively deficient performance and a claimant need not allege prejudice to go forward on a claim of ineffective assistance of counsel.”

Plaintiff's Brief in Opposition to State's Motion for Summary Disposition, p. 4. In response, the State claims:

There is no analysis whatsoever of why this alleged failing to file a timely appeal would be an objective instance of deficient performance, nor is there any analysis offered as to why this failing resulted in fundamental prejudice to Whittle.

...

Whittle has failed to establish a *prima facie* case that her attorney erred in this regard and has failed to even allege a genuine issue of material fact that would entitle her to a hearing on her petition.

Reply Brief in Support of State's Motion for Summary Disposition, pp. 4-5. In sum, the State is arguing Whittle has not alleged facts to meet both prongs of a *Strickland* 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 her ineffective assistance of counsel claim.

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).

To warrant reversal on grounds of ineffective assistance of counsel, a criminal defendant must first show that counsel's performance was objectively deficient and, second, that the deficiency prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Under the first prong of the *Strickland* analysis, it is the defendant's burden to show that his counsel's performance fell below

an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 762, 760 P.2d 1174, 1178 (1988) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). The appellate court presumes that trial counsel was competent and that trial tactics were based on sound legal strategy. *State v. Porter*, 130 Idaho 772, 792, 948 P.2d 127, 147 (1997). Trial counsel's tactical decisions will not justify relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). Under the second prong, the defendant must show a reasonable probability that the outcome of trial would have been different but for his counsel's deficient performance. *State v. Row*, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068.

In *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct.App. 1995), the Court of Appeals recognized "when the attorney's deficiency is a failure to file an appeal as requested by the client, the loss of the opportunity to appeal is itself sufficient prejudice to meet the second prong of the *Strickland* test." 127 Idaho 690, 691, 905 P.2d 91, 92 (citing *Beasley v. State*, 126 Idaho 356, 883 P.2d 714 (Ct.App. 1994)). In *Beasley*, the Court of Appeals wrote:

On post-conviction then, the defendant should not be required to identify the meritorious issues that would have been raised, but should be restored to the status enjoyed immediately following the judgment of conviction when the defendant was entitled to a direct appeal.

126 Idaho 356, 361, 883 P.2d 714, 719. "A defendant denied an appeal because his lawyer did not file an appeal as requested should not be given an additional hurdle to clear just because his rights were violated at some earlier stage in the proceedings." *Id.* The Court of Appeals' rationale in this matter should also extend to a defendant's being

denied an appeal because of an untimely filed appeal. What remains here is whether or not Whittle requested an appeal. This likely amounts to a material issue of fact. On this issue, the Court must take Whittle's allegations as true until controverted by the State.

For purposes of considering a summary dismissal motion, an applicant's uncontroverted factual allegations contained in an application for post-conviction relief and supporting affidavits are deemed to be true.

Hayes v. State, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct.App. 2008). Here, although the State argues Whittle can show no evidence of her allegation that she requested an appeal, neither can the State controvert her allegation and provide evidence that she did not do so.

C. Whittle's Post-Conviction Relief Petition Must be Dismissed Due to Whittle's Prior Appeal in Both Cases.

However, Whittle's claims are barred for a reason other than the passage of time. Neither Whittle nor the State discussed the impact of the prior appeals on Whittle's Post-Conviction Relief Petition. That issue is dispositive.

If a defendant is appealing a decision made upon revocation of probation, the time for filing a post-conviction petition runs from the revocation of probation, not the earlier imposition of judgment. *Lake v. State*, 124 Idaho 259, 858 P.2d 798 (Ct.App. 1993). Revocation of probation does not extend the time in which to file a UPCPA petition attacking the underlying conviction. *Gonzalez v. State*, 139 Idaho 384, 386, 79 P.3d 743, 745 (Ct.App. 2003). Implicit in *Gonzalez* and *Lake* is the concept that the time for filing a post-conviction application challenging a judgment of conviction or sentence does not start anew from the entry of a probation revocation order.

Whittle was sentenced in the old case on May 10, 2004. More than two years later, on May 26, 2006, Whittle was sentenced in the new case and had her probation revoked in the old case. Thus, using either of these beginning periods for the statute of

limitations, Whittle's filing of this post-conviction relief case on December 18, 2007, would be untimely. However, Whittle filed her appeal to the Idaho appellate courts.

At first blush, that appeal, since the Amended Notice of Appeal concerned both cases, and since the opinion issued by the Court of Appeals addressed the sentencing decision in both cases, is what keeps Whittle's Post-Conviction Petition alive. However, it is because of that appeal that Whittle's Post-Conviction Petition gets whipsawed.

First, any issue in Whittle's post-conviction petition that was previously litigated on appeal cannot be re-litigated in a UPCPA proceeding. *Whitehawk v. State*, 116 Idaho 831, 780 P.2d 153 (Ct.App. 1989); *Paridis v. State*, 110 Idaho 534, 716 P.2d 1306 (1986); *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988); *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988); *Banuelos v. State*, 127 Idaho 860, 908 P.2d 162 (Ct.App. 1995); *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct.App. 1996).

Second, any issue in Whittle's Post-Conviction Petition that was *not* previously litigated on appeal but could have been raised on appeal, is *forfeited*. I.C. § 19-4901(b). Such issues that could have been raised on appeal but were not are forfeited and cannot be considered in post-conviction proceedings *unless* it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief *raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier*. *Id.* Whittle has made no showing by any method as to how her asserted basis for relief "raises substantial doubt about the finding of guilt", let alone "could not, in the exercise of due diligence, been presented earlier."

As mentioned above, Whittle's claims in her Post-Conviction Petition are grouped into three categories:

1. Ineffective assistance of counsel as a result of her trial counsel's failure to timely file an appeal of the sentencing hearing in the older case, CRF 2003 4515, (Petition, p. 3, ¶ A), failure of trial counsel to appeal the motion to dismiss hearing (Petition, p. 4, ¶ D), and failure of her trial counsel to file an appeal on the Rule 35 Hearing (Petition, p. 12, ¶ O); (Petition, pp. 3-27, ¶¶ A-NN). Whittle does not specify which of her two cases the motion to dismiss pertains, but a review of the court files in both cases show two motions to dismiss were filed in CRF 2003 4514, both on June 18, 2003, and no motions to dismiss were ever filed in CRF 2006 4017. Whittle does not specify which of her two cases the I.C.R. 35 motion pertained, but a review of the court files in both cases shows an I.C.R. 35 motion was only filed in CRF 2003 4514, which was filed June 7, 2004, and no I.C.R. 35 motion was ever filed in CRF 2006 4017.

2. Judicial Misconduct; (Petition, pp. 28-67, ¶¶ A-II)

3. Prosecutorial Misconduct. (Petition, pp. 68-78, ¶¶ A-C)

Whittle has completely failed to make any showing by any method as to her asserted basis for "relief raises substantial doubt about the finding of guilt." It would be impossible for Whittle to make such a showing. The "finding of guilt" in both cases was made by Whittle's guilty pleas. Whittle pled guilty to felony injury to child and two years later Whittle pled guilty to fourteen counts of grand theft. Regarding the above three issues given by Whittle in her post-conviction petition, none raise any substantial doubt as to her finding of guilt. **First**, regarding her ineffective assistance of counsel claims, most relate to sentencing (the I.C.R. 35 issues relate to sentencing). Sentencing was determined on appeal, and thus, as shown above, simply cannot be re-litigated in this post-conviction proceeding. *Whitehawk, Paridis, Beam, Fetterly, Banuelos, and Fairchild*. As to the decision on the motion to dismiss in CRF 2003 4514, Whittle has made no showing by any method as to how her asserted basis for relief raises substantial doubt about the finding of guilt. **Second**, a review of the judicial misconduct claims show Whittle's agitation is with the Court's sentencing decisions. Again, sentencing was determined on appeal, and thus, as shown above, simply cannot be re-litigated in this post-conviction proceeding. *Whitehawk, Paridis, Beam, Fetterly,*

Banuelos, and Fairchild. To the extent Whittle's claims of judicial misconduct do not relate to sentencing issues, Whittle has made no showing by any method as to how her asserted basis for relief raises substantial doubt about the finding of guilt. **Third**, a review of Whittle's prosecutorial misconduct claims also focus around sentencing, and those claims cannot be re-litigated in this post-conviction proceeding. *Whitehawk, Paridis, Beam, Fetterly, Banuelos, and Fairchild.* To the extent Whittle's claims of prosecutorial misconduct do not relate to sentencing issues, Whittle has made no showing by any method as to how her asserted basis for relief raises substantial doubt about the finding of guilt.

For these reasons, Whittle's petition for post-conviction relief must be dismissed because: 1) the claims raised in her Petition which have been raised in her second appeal are barred under *Whitehawk, Paridis, Beam, Fetterly, Banuelos, and Fairchild*, and 2) as to all claims raised in her Petition which were not raised in her second appeal, Whittle has not made a showing as to how her asserted basis for relief raises substantial doubt about her finding of guilt.

III. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED Whittle's Petition for Post-Conviction Relief is timely, and has demonstrated a genuine issue of material fact; and the State's Motion for Summary Dismissal is DENIED on the basis set forth in that Motion for Summary Dismissal.

IT IS FURTHER ORDERED that Whittle's Petition for Post-Conviction Relief is DIMISSED, because: 1) the claims raised in her Petition which have been raised in her second appeal are barred under *Whitehawk, Paridis, Beam, Fetterly, Banuelos, and Fairchild*, and 2) as to all claims raised in her Petition which were not raised in her

second appeal, Whittle has not made a showing as to how her asserted basis for relief raises substantial doubt about her finding of guilt.

IT IS FURTHER ORDERED the evidentiary hearing scheduled for April 27, 2010, is VACATED.

Dated this 19th day of March, 2010.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of March, 2010, a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Daniel C. Cooper

Marty Raap

Clerk of the District Court
KOOTENAI COUNTY

By

Deputy