STATE OF IDAHO )
County of KOOTENAI )ss

FILED_____

AT_____ O'clock _____M
CLERK OF THE DISTRICT COURT

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Deputy

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

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| **JEFFREY ALAN DUWE,** Petitioner, vs. **STATE OF IDAHO,** Respondent. | Case No. **CV 2006 7439** **MEMORANDUM DECISION AND ORDER GRANTING POST-CONVICTION RELIEF** |

Trial of JEFFREY ALAN DUWE's Petition for Post-Conviction Relief.

Michael G. Palmer, Lawyer for JEFFREY ALAN DUWE.

Art Verharen, Lawyer for State of Idaho.

## I. COURSE OF PROCEEDINGS.

### A. Post-Conviction Relief Case.

This action is a request by Jeffrey Alan Duwe for relief pursuant to the Uniform Post-Conviction Procedure Act, Idaho Code § 19-4901, *et seq.,* and I.C.R. 57. Duwe filed his Petition for Post-Conviction Relief on October 5, 2005. Duwe served the State of Idaho through the Kootenai County Prosecuting Attorney. The State of Idaho failed to timely file an answer to the petition. On February 15, 2007, Duwe filed a Motion for Entry of Default and an Affidavit of Michael Palmer in Support of Motion for Entry of Default. On February 20, 2007, this Court entered an Order for Entry of Default against the State of Idaho, pursuant to I.R.C.P. 55(a)(1); *Parsons v. State,* 113 Idaho 421, 745 P.2d 300 (Ct.App. 1987); and *Johnson v. State,* 112 Idaho 1112, 739 P.2d 411 (Ct.App. 1987). On February

22, 2007, the State of Idaho filed its Answer. On February 26, 2007, the State of Idaho filed a Motion for Summary Disposition and a Motion to Set Aside Entry of Default. The Motion to Set Aside Entry of Default was noticed for hearing on March 22, 2007. At that hearing, the Court noted that even though this was not the first time documents had not been properly handled in the Kootenai County Prosecuting Attorney's office, in fact there were multiple instances even in this post-conviction relief case, the Court found excusable neglect and set aside the default. Oral argument on the Motion for Summary Disposition was scheduled for March 27, 2007. At that hearing, the Court granted summary disposition only as to the claim set forth by petitioner in paragraph 8(b) of his petition ("Prosecutorial misconduct which resulted in imposition of sentence and a violation of Petitioner's constitutional rights"), but denied the State of Idaho's Motion for Summary Disposition in all other aspects. Court trial was scheduled for June 11, 2007. At that court trial, Lynn Nelson, Duwe's attorney in the criminal proceedings, testified. Duwe's expert witness, Suzanna Graham was not available on that date, and the trial was continued to July 23, 2007, due to her unavailability. The matter was at issue at the conclusion of trial on July 23, 2007.

**B. Underlying Criminal Case.**

At the June 11, 2007, hearing in this Post-Conviction Relief case, the Court was requested to take judicial notice of Duwe's criminal file, Kootenai County Case No. CRF 2003 3661. That request was granted.

The procedural background of the criminal case (Kootenai County Case No. CRF 2003 3661) is as follows. On September 17, 2003, Duwe was sentenced on two counts of Lewd Conduct With a Minor Under Sixteen, to two concurrent three year fixed sentence and nine years indeterminate for a total of twelve years, and placed on a retained

jurisdiction pursuant to Idaho Code § 19-2601. At the sentencing hearing, Duwe denied he had committed the full extent of the acts testified to by his victim, even though the jury had found him guilty on both counts. Duwe was sentenced and ordered to the retained jurisdiction program with the expressed reason given by the Court at the sentencing hearing, and stated by the Court in its September 17, 2003, Sentencing Disposition order: "IT IS RECOMMENDED THAT YOU TAKE ANY PROGRAMMING AIMED AT RECOGNIZING YOUR RESPONSIBILITY FOR THESE TWO OFFENSES." Sentencing Disposition, p. 2. Following completion of his retained jurisdiction, the State of Idaho Department of Corrections expressed the opinion that Duwe had made sufficient progress in addressing and reducing his denial and defensiveness, and that he deserves a chance to now receive a new psychosexual evaluation (to include a polygraph), as well as treatment in the community. Probation was recommended by the Department of Corrections and their professionals who had observed and evaluated him in the prior months during his retained jurisdiction. On March 8, 2004, Duwe appeared for his scheduled jurisdictional review hearing. This hearing was timely, as the Court's 180 day jurisdiction period expired on March 15, 2004. At that March 8, 2004, hearing, the Court pointed out on the record that it was unwilling to consider probation until such updated psychosexual evaluation and polygraph testing were obtained, and Court continued the hearing to April 14, 2004. The testing was unable to be scheduled until April 29, 2004, so the hearing was again continued to May 6, 2004. Duwe remained in custody of the State of Idaho Department of Corrections the entire time. The test results were presented to the Court at that May 6, 2004 hearing. Based upon those results and the Department of Correction's recommendation, the Court placed Duwe on probation for eight years.

In that criminal case, Duwe appealed this Court's sentencing decision on October

24, 2003. On October 6, 2004, the Idaho Court of Appeals issued an unpublished opinion affirming this Court's sentencing decisions. The State of Idaho did not appeal the decision of this Court placing him on probation after the 180 time limit under Idaho Code § 19-2601(4). However, the State of Idaho in a different case did appeal a similar decision, and on September 23, 2005, the Idaho Supreme Court issued its decision in *State v. Taylor,* 142 Idaho 30, 121 P.3d 961 (2005), holding that "Upon the expiration of the 180-day period of retained jurisdiction, the district court lacked jurisdiction to suspend the Defendant's sentence and place him on probation." 142 Idaho at 32, 121 P.3d at 963. The effect was "He remains committed to the custody of the Idaho Board of Correction." *Id.*

In the present case, on November 21, 2005, the State of Idaho, through the Kootenai County Prosecutor's Office, filed a Motion for Correction of Illegal Sentence pursuant to I.C.R. 35, arguing that under *Taylor,* the Court had lost its jurisdiction to place Duwe on probation. Duwe filed his objection on December 13, 2005. Oral argument was held December 14, 2005. Since Duwe had only filed his brief the day before the hearing, the State of Idaho requested, and was granted opportunity to file a brief in response to Duwe's brief. On December 19, 2005, the State of Idaho filed its Brief in Support of Motion for Illegal sentence. On February 6, 2006, this Court entered its Memorandum Decision and Order Denying I.C.R. 35 Motion for Correction of Illegal Sentence, finding that the Court lacked jurisdiction to grant such relief as it was filed more than 120 days after the date sentence was imposed or sentence was suspended.

On March 13, 2006, the State of Idaho filed its Motion to Rescind Probation, making the same argument that under *Taylor,* the Court lacked jurisdiction when it placed Duwe on probation after the 180 day period had expired under Idaho Code § 19-2601(4). Duwe filed an Objection to State's Motion to Rescind Probation on March 15, 2006, and oral argument

was held on March 20, 2006. On May 12, 2006, this Court issued its Memorandum Decision and Order Granting Plaintiff's Motion to Rescind Probation, finding that the Court lost jurisdiction as of March 15, 2004, that the Court's act of placing Duwe on probation was void and that Duwe remains and has remained at all times committed to the custody of the State of Idaho Board of Correction. Memorandum Decision and Order Granting Plaintiff's Motion to Rescind Probation, p. 4. Duwe appealed that decision on May 19, 2006. On May 22, 2007, Duwe filed a Motion for Credit for Time Served. On May 31, 2007, Duwe filed a Motion for Reconsideration of Order Revoking Probation Pursuant to I.C.R. 35. On June 2, 2007, this Court filed its "Memorandum Decision and Order Denying Defendant's I.C.R. 35 Motion for Leniency, Granting Defendant's Motion for Credit for Time Served, and Notice of Right to Appeal." Duwe was granted credit for time served while he was wrongfully on probation. On July 5, 2006, by separate order, credit was given for 736 days time served. On June 20, 2006, Duwe filed an Amended Notice of Appeal, still appealing this Court's May 12, 2006, Memorandum Decision and Order Granting Plaintiff's Motion to Rescind Probation, but adding additional grounds. Duwe later filed a Motion to Dismiss or Withdraw Appeal before the Idaho Supreme Court. That motion was granted by the Idaho Supreme Court and Duwe's appeal was dismissed on December 1, 2006.

**II. ANALYSIS OF POST-CONVICTION RELIEF CLAIMS.**

Duwe argues he received ineffective assistance of counsel because his attorney failed to take the appropriate action to urge the Court to keep its jurisdiction intact, and as a result, Duwe went to prison. The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Mathews,* 133 Idaho 300, 306, 986 P.2d 323, 329 (1999), *cert. denied,* 528 U.S.

1168, 120 S.Ct. 1190, 145 L.Ed.2d 1095 (2000) (quoting *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-93 (1984)). The test for evaluating whether a criminal defendant has received the effective assistance of counsel is two-pronged and requires the petitioner to establish: (1) counsel's conduct was deficient because it fell outside the wide range of professional norms; and (2) the petitioner was prejudiced as a result of that deficient conduct. *Ray v. State,* 133 Idaho 96, 101, 982 P.2d 931, 936 (1999) (citing *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693). In assessing the reasonableness of attorney performance, counsel is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 329-30 (citing *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695).

Article 1, §13 of the Idaho Constitution assures criminal defendants of "reasonably competent assistance of counsel." *Gibson v. State*, 110 Idaho 631, 635, 718 P.2d 283 (1986). There is a strong presumption that counsel's performance falls within the wide range of professional assistance. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989). Therefore, strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Giles v. State,* 125 Idaho 921, 924, 877 P.2d 365, 368 (1994), *cert. denied,* 513 U.S. 1130, 115 S.Ct. 942, 130 L.Ed.2d 886 (1995). When counsel's decisions are made with ignorance of the applicable law, or other short comings capable of *objective* evaluation, the defendant may very well have been denied effective assistance of counsel. *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975)(emphasis in original).

In this case, Lynn Nelson was Duwe's defense attorney in March, 2004, when the events in question occurred. On June 11, 2007, Lynn Nelson testified that he has been a licensed attorney since 1983, has had experience as a prosecutor in Gooding County, Idaho, has been with the Kootenai County Public Defender's Office since 1996, and has been Chief Deputy Public Defender nearly all that time. He has tried over 100 felony trials, and prosecuted over 25 sex offender cases. At the time he represented Duwe he had over 100 open and active cases. Even with his extensive experience, and his knowledge of Idaho Code § 19-2601(4), Lynn Nelson testified he did not make an objection at the hearing on March 8, 2004, when the Court requested a full disclosure polygraph in Duwe's case, and that he did nothing to preserve the Court's jurisdiction which would expire on March 15, 2004. Nelson testified "I would admit I screwed up." He testified that "Had I been able to anticipate the Supreme Court's ruling in Taylor, I would have pointed out to the Court that it would lose jurisdiction." He testified he did not think such an interpretation would ever happen, given the flexibility that had been given to the 14-day requirement for preliminary hearings. He testified another reason he thought the Idaho Supreme Court would never reach the decision it made in *Taylor* is, when he started back in 1983, the time limit was 120 days, and inmates frequently would not come back to the local jail within the 120 days, or the court would not schedule the hearing within 120 days. Nelson testified he saw district judges exceed that jurisdictional limit often enough that he did not feel he needed to bring the potential violation to the court's attention on this occasion.

At the July 23, 2007, hearing, attorney Suzanna Graham testified on Duwe's behalf as an expert. She testified about her experience as a criminal defense attorney. She expressed the opinion that Lynn Nelson was amiss and did not take the appropriate

legal action before the 180 days was up, and that he did not let the judge know that the jurisdiction time was almost up. She expressed the opinion that Lynn Nelson committed malpractice by his failure to alert the Court to the impending loss of jurisdiction and in not recommending steps to avoid that loss of jurisdiction.

Jeffrey Duwe testified that he was concerned about the 180 time period and asked Lynn Nelson about the time limit numerous times. Duwe testified that on one occasion after the 180 day period expired, Nelson assured him the Court still had jurisdiction.

This Court finds Lynn Nelson provided ineffective assistance of counsel to his client, Jeffrey Duwe. While this Court agrees with Nelson that given the frequent non-compliance with the 180 day time limit due to transportation problems from the Idaho Department of Corrections, the Idaho Supreme Court's decision in *Taylor* was certainly a surprise, **Idaho Code § 19-2601(4) is clear**…the Court looses jurisdiction if it exceeds the time limit, unless it does something to keep that jurisdiction. An example of such action would be to place the defendant on a second retained jurisdiction prior to the expiration of the first 180 day time period. The statute is **clear**, the district court retains jurisdiction for 180 days, and "will remain committed to the board of correction if not affirmatively placed on probation by the court." Given the **clarity** of Idaho Code § 19-2501(4), Nelson should have raised the issue and suggested alternatives. His failure to do so amounts to ineffective assistance of counsel. There is no way such failure was a tactical or strategic decision on Nelson's part. It was a simple but significant omission. Even given the presumption that counsel's assistance was adequate, as stated in *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975), Nelson's decision, really his indecision, was made with ignorance of the applicable law, and his short coming is

capable of *objective* evaluation, accordingly, Duwe has been denied effective assistance of counsel. While Nelson and other Idaho attorneys and judges (including the undersigned) may have likewise been surprised by the Idaho Supreme Court's decision in *Taylor,* the statute is **clear**, and the Idaho Supreme Court noted that clarity in *Taylor.* Thus, while Nelson's decision or indecision may have been duplicated by other attorneys prior to *Taylor,* given the **clarity** of the statute, any other interpretation falls outside "professional norms", and as a result, Duwe has been prejudiced. *Ray v. State,* 133 Idaho 96, 101, 982 P.2d 931, 936 (1999).

Similarly, there are likely few practitioners and judges that would have anticipated the Idaho Supreme Court's decision in *Estrada v. State,* 143 Idaho 558, 149 P.3d 883 (2007), and the far reaching effects it is already having on sex-offender cases, and perhaps all felony criminal cases in which evaluations of any kind are necessary in order for a sentencing judge to make an informed decision on prison as opposed to probation. Even though it was unexpected, the Idaho Supreme Court specifically found "Estrada's attorney was deficient in failing to inform his client of this right" to refuse a psychosexual evaluation under his Fifth Amendment right against self-incrimination. 143 Idaho 558, 564, 149 P.3d 833, 839. This was the Idaho Supreme Court's holding even though they recognized: "While no Idaho Supreme Court or United States Supreme Court case has specifically articulated a Fifth Amendment right against self incrimination as it applies to psychosexual evaluations…" *Id.* If there is ineffective assistance of counsel in a case where the Idaho Supreme Court subsequently breaks new ground not only for the State of Idaho, but for the nation, there certainly is ineffective assistance of counsel in Duwe's case given the **clarity** of Idaho Code § 19-2501(4).

Accordingly, Duwe is entitled to the relief requested. In Kootenai County Case

No. CRF 2003 3661, Duwe's May 8, 2004, Retained Jurisdiction Disposition and Notice of Right to Appeal which suspended his judgment and sentence and placed him on probation must be vacated. Duwe's Sentencing Disposition and Notice of Right to Appeal filed September 17, 2003, which placed Duwe into the retained jurisdiction program is reinstated effective with this opinion, and a new jurisdictional review hearing will be noticed in that matter.

**III. ORDER.**

IT IS HEREBY ORDERED Duwe's Post-Conviction relief is GRANTED, Duwe is entitled to the relief requested.

IT IS FURTHER ORDERED that in Kootenai County Case No. CRF 2003 3661, Duwe's May 8, 2004 Retained Jurisdiction Disposition and Notice of Right to Appeal which suspended his judgment and sentence and placed him on probation is VACATED.

IT IS FURTHER ORDERED that in Kootenai County Case No. CRF 2003 3661, Duwe's Sentencing Disposition and Notice of Right to Appeal filed September 17, 2003, which placed Duwe into the retained jurisdiction program is REINSTATED effective today's date, September 7, 2007, an order to that effect will be filed in that case, and a new jurisdictional review hearing will be noticed in that matter.

Dated this 7th day of October, 2007.

_____
John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the _____ day of October, 2007 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Kootenai Co. Pros. Attorney, Attn. Art Verharen

Michael G. Palmer

Idaho Department of Correction, Records

Idaho Department of Correction, Community Corrections (Probation & Parole)

Lynn Nelson

By _____
Jeanne Clausen, Secretary