

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**

**CHRISTOPHER TOBAN RICHEY,** )  
 )  
 )  
 *Petitioner,* )  
 )  
 )  
 vs. )  
 )  
 )  
 **STATE OF IDAHO,** )  
 )  
 )  
 *Respondent.* )  
 )  
 )  
 \_\_\_\_\_ )

Case No. **CV 2007 4334**

**ORDER DISMISSING PETITION  
FOR POST CONVICTION  
RELIEF AS UNTIMELY**

**I. BACKGROUND AND PROCEDURAL HISTORY.**

On October 25, 2004, Richey was sentenced in the underlying criminal matter, Kootenai County Case No. CRF 2004 1630, for the felony crime of rape. Seven witnesses testified. The pre-sentence investigation recommended prison, and the State specifically recommended a ten-year prison sentence, with two years fixed and eight years indeterminate. Richey was sentenced to a twenty-year prison sentence, with three years fixed plus seventeen years indeterminate, but jurisdiction was retained.

Richey was granted probation at his jurisdictional review hearing, and was ordered in the court's disposition dated April 15, 2005, in term and condition of

probation number 26 to “participate in and complete specialized sex offender therapy as designated by your probation officer.” Richey was also ordered in term and condition of probation number 27 to submit to polygraph testing as required by his probation officer.

Richey continued on probation for over year until a “Report of Probation Violation” was filed on May 26, 2006, alleging (4) different violations of probation. In court for his admit/deny hearing on June 22, 2006, Richey admitted three of the allegations: That he failed to attend a polygraph examination, that he entered into a casino repeatedly without permission, and that he committed adultery with an adult female. Richey denied allegation number two, that he was violating probation by contacting the victim of his rape.

Richey admitted the same three probation violations in his written response with assistance of appointed counsel. An evidentiary hearing was held on August 1, 2006. Richey again admitted the same three probation violations orally in open court. The State withdrew the allegation he denied. The State and Richey’s probation officer argued that he be sent to prison. The Court revoked Richey’s probation and imposed the previously suspended twenty-year prison sentence (three years fixed and seventeen years indeterminate) originally imposed on April 14, 2005, without modification. At no time did Richey file an Idaho Rule of Criminal Procedure 35 motion.

Richey filed an appeal on August 18, 2007. He lost his appeal as the Idaho Court of Appeals on April 27, 2007, issued an unpublished opinion number 425. Remittitur was issued May 21, 2007, and filed in Kootenai County case CRF 2004 1630 on June 18, 2007. In that unpublished opinion the Idaho Court of Appeals wrote: “Richey appeals, contending that the district court abused its discretion in revoking probation and in failing to *sua sponte* reduce his sentence upon revocation of probation.” 2007 Unpublished Opinion No. 425, p. 1. After analysis of case law, the Idaho Court of Appeals then held: “Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion either in revoking probation or in ordering execution of Richey’s original sentence without modification.” *Id.*, p. 2. The Idaho Court of Appeals then concluded: “Therefore, the order revoking probation and directing execution of Richey’s previously suspended sentence is affirmed.” *Id.*

Richey then filed a “Petition and Affidavit for Post-Conviction Relief” in the present case, CV 2007 4334, on June 19, 2007. Most of the Petition surrounds Richey’s claim that he was denied effective assistance of counsel, due to his attorney’s failure to object to the requirement of a psychosexual evaluation prior to sentencing, in light of *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007). The State filed an answer on or about June 28, 2007. Richey filed a reply to the State’s answer on or about July 9, 2007. Richey then submitted an “Amended Petition for Post-Conviction Relief” on or around July 31, 2007. However, the State never

consented to the submission of an amended petition, and the Court has never given Richey leave to amend as set forth in the Idaho Rule of Civil Procedure 15(a). Accordingly, the State argues the proposed amended petition is not properly before the court at this time.

On September 21, 2007, the State of Idaho filed Motion for Summary Disposition and a Brief in Support of Motion for Summary Disposition. On October 9, 2007, Richey requested counsel be appointed, and that request was granted as the Court appointed the Kootenai County Public Defender to represent Richey in this Post-Conviction Relief action. On October 31, 2007, counsel filed a “List of Petitioner’s Claims” on behalf of Richey, and oral argument on the State’s Motion for Summary Disposition was held on October 31, 2007. The State is seeking summary dismissal of Richey’s Petition for Post-Conviction Relief arguing the Petition has stated no genuine issue of material fact and the State is entitled to judgment as a matter of law, that the Petition was not timely filed, and that Richey has forfeited the issues he wishes to raise in his petition. Because the Petition for Post-Conviction Relief was not filed within the statutory period provided in I.C. §19-4902, the Court will discuss the timeliness issue first.

## **II. STANDARD OF REVIEW.**

Idaho Code §19-4906(c) provides that the court may grant a motion for summary disposition of a petition for post-conviction relief when it appears that “there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law.” *Larsen v. May*, 93 Idaho 602, 468 P.2d 866 (1970). Richey has the burden of proving by a preponderance of the evidence the allegations which he contends entitle him to relief. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986). An application for post-conviction relief is subject to summary dismissal if the applicant has not tendered a factual showing, based upon evidence that would be admissible at an evidentiary hearing, to support his claim for relief. *Remington v. State*, 127 Idaho 443, 901 P.2d 1344 (Ct.App.1995). Bare and conclusory allegations, unsubstantiated by any fact, are inadequate to entitle an applicant to an evidentiary hearing. *LaBelle v. State*, 130 Idaho 115, 937 P.2d 427(Ct.App.1997). An application must be supported by written statements from witnesses who are able to give testimony themselves as to the facts within their knowledge or other verifiable information and, failing such a written statement, the application will not raise material issues of fact sufficient to justify an evidentiary hearing. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (Ct.App. 1994).

### **III. ANALYSIS.**

#### **A. Richey’s Petition for Post-Conviction Relief Was Not Filed Within One Year From the Date of Conviction As Required By I.C. §19-4902.**

The State contends that the Petition for Post-Conviction Relief is not timely and therefore should be dismissed as time barred. The statute of limitation for post-conviction action, under I.C. §19-4902, provides that a petition for post-conviction relief “may be filed at any time within one (1) 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.” When a court has retained jurisdiction, 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. *Gonzalez v. State*, 139 Idaho 384, 79 P.3d 743 (Ct.App. 2003). Expanding on the decision in *Lake v. State*, 124 Idaho 259, 858 P.2d 798 (Ct.App. 1993), where the Court of Appeals had held that the time in which to file for post-conviction relief begins to run upon the revocation of probation, and not upon the earlier imposition of judgment, the *Gonzales* court further explained,

Any post-conviction action filed within the limitations period connected to the probation revocation order, but beyond the limitations period measured from the appeal period for the judgment of conviction, *may address only issues that arose from the probation revocation proceeding.*

*Id.* at 386 (emphasis added).

The State argues that each of the seventeen paragraphs Richey authored in his Petition complains about sentencing or his first conditions of probation, or even earlier stages of the proceedings, and that not one of the complaints goes specifically to his probation violation or the court’s imposition of sentence at that point. The State argues the three probation violations to which Richey admitted do not pertain at all to his psychosexual evaluation or treatment. The State argues Richey simply does not complain about any of the conduct of his case that falls within the proper time limits of his petition for post-conviction relief. This Court

agrees for nearly all of Richey's claims. However, the Petition for Post-Conviction Relief alleges in paragraph 7(b): "District Court abused its discretion by failing to sua sponte reduce the previously imposed sentence." Petition for Post-Conviction Relief, p. 2, ¶ 7(b). This is the only claim in Richey's petition that survives the statute of limitation analysis. As shown below, there are other problems with this allegation.

The State asserts that even if this Court were to consider Richey's proposed amended petition, the outcome would not change. The Court has reviewed that Amended Petition and agrees with the State that Richey merely repeats his "erroneous" assertion that he can now complain about his sentence and the order for a psychological evaluation at this late date. Since Richey's petition is untimely as to the issues he alleges, the petition, on that basis alone, must be dismissed without reaching the merits.

As an aside, the Court notes Richey alleges he filed a Rule 35 motion on August 14, 2006, and the district court denied the motion. Amended Petition, p. 2, ¶ 2. The Court has reviewed the file in Kootenai County Case No. CRF 2004 1630, and no such Rule 35 motion was ever filed, let alone ruled upon.

Looking at the chronology of the petition in light of the events in the underlying criminal case, the Petition for Post-Conviction Relief was not timely filed. Although Richey did file his petition within one year of his probation violation in which sentence was imposed on or about August 1, 2006, the position

is still untimely to the extent it raises any issues concerning his conviction, initial sentence, retained jurisdiction, or conditions of probation following the retained jurisdiction, as all of those matters were settled over a year before his probation violation was even initiated.

Because his judgment and conviction in the underlying criminal case occurred on October 24, 2004, Richey's Petition for Post-Conviction Relief filed June 19, 2007, to the extent that it is alleging ineffective assistance of counsel in connection with the plea agreement and judgment of conviction, is not timely and must be dismissed.

#### **B. Law of the Case.**

As mentioned above, the only claim in Richey's Petition for Post-Conviction Relief that is not barred by the statute of limitation of I.C. § 19-2902, is as set forth in paragraph 7(b): "District Court abused its discretion by failing to sua sponte reduce the previously imposed sentence." Petition for Post-Conviction Relief, p. 2, ¶ 7(b). That clearly alleges conduct that occurred at the probation violation hearing held August 1, 2006, when Richey had his probation revoked, original sentence imposed and was sent to prison. That is timely under I.C. § 19-2902. However, that same issue was addressed by the Idaho Court of Appeals and this Court's decision on that issue was affirmed by the Idaho Court of Appeals. As discussed above, Richey lost his appeal as the Idaho Court of Appeals on April 27, 2007, issued an unpublished opinion number 425. In that unpublished opinion the

Idaho Court of Appeals wrote: “Richey appeals, contending that the district court abused its discretion in revoking probation and in failing to *sua sponte* reduce his sentence upon revocation of probation.” 2007 Unpublished Opinion No. 425, p. 1. After analysis of case law, the Idaho Court of Appeals then held: “Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion either in revoking probation or in ordering execution of Richey’s original sentence without modification.” *Id.*, p. 2. The Idaho Court of Appeals then concluded: “Therefore, the order revoking probation and directing execution of Richey’s previously suspended sentence is affirmed.” *Id.*

This Court is now prohibited from re-deciding in Richey’s Post-Conviction Relief claim that same issue that the Idaho Court of Appeals has already decided in Richey’s direct appeal. The law of the case doctrine states that when, upon an appeal, the appellate court, in deciding a case presented, states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout subsequent proceedings, both in the trial court and upon subsequent appeal. *Staurt v. State*, 136 Idaho 490, 36 P.3d 1278 (2001); *Frazier v. Neilsen*, 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Ct.App. 1990). Where an issue was decided upon direct appeal, and a connected issue is raised in a UPCPA petition and the connected issue can be decided by relying upon the prior appellate decision, relitigation of the issue is barred by “law of the case.”

Post-Conviction Practice and Procedure: A Manual for Dealing With Cases Brought

Under Idaho's Uniform Post-Conviction Procedure Act (UPCPA). I.C. § 19-4901, *et seq.*, Third Ed. Revised, 2004, p. 29.

**IV. CONCLUSION AND ORDER.**

For the reasons stated above, the State's Motion for Summary Dismissal is **GRANTED** and the Petition for Post-Conviction Relief is **DISMISSED** as to Richey's allegations of ineffective assistance of counsel in connection with his judgment and conviction because Richey has failed to provide any basis to avoid the time bar of I.C. §19-4902, and due to the law of the case regarding allegations made regarding revocation of probation and imposition of sentence.

**IT IS ORDERED** that Richey's Petition for Post Conviction Relief be and the same hereby is dismissed as untimely.

Dated this 5<sup>th</sup> day of November, 2007.

\_\_\_\_\_  
John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

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

Dennis Reuter

Marty Raap

Clerk of the District Court  
KOOTENAI COUNTY

By \_\_\_\_\_  
Deputy