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CLERK OF 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**

**MARTIN A SCHORZMAN,** )  
 )  
 )  
 *Petitioner,* )  
 )  
 vs. )  
 )  
 **STATE OF IDAHO,** )  
 )  
 )  
 *Respondent.* )  
 )  
 \_\_\_\_\_ )

Case No. **CV 2003 3398**

**MEMORANDUM DECISION AND  
ORDER GRANTING SUMMARY  
DISPOSITION**

**I. BACKGROUND AND PROCEDURAL HISTORY.**

MARTIN SCHORZMAN filed a Petition for Post-Conviction relief on May 9, 2003. After retaining an attorney, an Amended Petition for Post-Conviction Relief was filed September 24, 2004. The bases for the amended petition are as follows:

- A. Petitioner was denied his Constitutional Right to Compulsory Process by trial defense counsel’s failure to call William Gadberry. A witness favorable to defense of self defense, a violation of the United States Constitution Sixth Amendment. *Chambers v. Mississippi*, 410 U.S. 284, 302, 92 S.Ct. 1038, 35 L.Ed. 197 (1973). Further that Mr. Gadberry was hindered in his testimony by state actors which resulted in a violation of due process. *U.S. v. [Valenzuela-] Bernal*, 458 U.S. 858, 872 ([1982]).
- B. Whether the petitioner was denied effective assistance of counsel by trial counsels [sic] failure to interview the only witness, William Gadberry, and develop favorable testimony regarding the use of excessive force by Deputy Danish.
- C. Whether the petitioner was denied effective assistance of counsel by trial counsels [sic] failure to advise petitioner or his family of his prior law enforcement employment with victim William Danish.
- D. Whether the petitioner was denied effective assistance of counsel by trial

- counsel's failure to advise the petitioner that he represented William Danish in a prior civil matter.
- E. Whether the actions of a state agent or actor caused William Gadberry to withhold evidence that would have created a reasonable probability of a not guilty verdict as to Mr. Schorzman's guilt.
  - F. Was the cumulative effect of the violations such that the petitioner was denied due process of law.

Amended Petition, p. 2, ¶7. Similar claims are made in paragraph 9 of the Amended Petition.

On March 6, 2001, a jury found Schorzman guilty of the felony crimes of Aggravated Battery on a Peace Officer and Escape. Kootenai County Case No. CRF 2000 11434. The battery occurred February 15, 2000 upon Kootenai County Deputy Sheriff William Danish, and was immediately followed by Schorzman's escape from court hold here at the Kootenai County Courthouse. Schorzman's Judgment and sentence was entered March 7, 2001. The sentencing occurred the day after the jury verdict because Schorzman had already completed a pre-sentence investigation on another charge, and was awaiting sentencing on that charge when the battery and escape occurred.

On April 2, 2001, Schorzman appealed his conviction, claiming there was not substantial competent evidence to support the jury's finding of guilt and ineffective assistance of counsel, and appealing his sentence. Notice of Appeal, p. 2. In an unpublished opinion, the sentence was affirmed by the Court of Appeals on April 17, 2002. *State v. Schorzman*, 138 Idaho 125, 58 P.3d 109 (2002). In that decision, the Court of Appeals did not discuss Schorzman's claims of insufficiency of the evidence or ineffective assistance of counsel. "Although a defendant alleging ineffective assistance of counsel at trial may raise the issue on direct appeal or reserve it for post conviction proceedings, he may not do both." *Parrott v. State*, 117 Idaho 272, 274, 787 P.2d 258, 260 (1990). "If the issue is raised and considered on appeal, it becomes *res judicata*." *Id.* A reading of the Court of Appeals decision in *Schorzman* shows the issue of ineffective assistance of counsel was not "considered" by that court. However, the specially concurring

opinion of Justice Johnson in *Parrott* indicates that if the reason the Court of Appeals failed to consider those issues in the instant case were due to Schorzman or his counsel, *res judicata* may still apply. Idaho Code § 19-4901(b) states the remedy of post conviction relief “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction.” It goes on to state: “Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial 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.*

The Remittitur is dated May 9, 2002 (Exhibit A to “Petitioner’s Brief in Opposition to Respondent’s Motion to Dismiss Post-Conviction Relief”), but not filed in district court until August 7, 2002. The Petition for Post-Conviction Relief filed May 9, 2003, was timely.

After the jury verdict of guilty on both charges, Schorzman admitted to being a persistent violator and subject to the sentence enhancement under I.C. § 19-2514. For Aggravated Battery on a Peace Officer and being a persistent violator, Schorzman was sentenced to a unified term of life in prison with a minimum period of confinement of eleven (11) years. For Escape, he was sentenced to a concurrent determinate term of five (5) years.

The Respondent State of Idaho filed a Motion for Summary Disposition on May 20, 2003, arguing Schorzman had exceeded the one-year statute of limitations under I.C. § 19-2402. That motion was withdrawn at the November 6, 2003 hearing. A status conference was held May 26, 2005, and this case was set for a three-day evidentiary hearing to begin August 15, 2005.

On May 27, 2005, the State of Idaho filed another Motion for Summary Disposition as well as “Respondent’s Brief in Support of Motion for Summary Disposition”. This motion was noticed

for hearing on July 7, 2005. The focus of this motion was on the ineffective assistance of defense counsel claims (the bases set forth in ¶ 7 A and B above, and ¶ 9 A and C) and the claims of conflict of interest by defense counsel (the bases set forth in ¶ 7 C and D above, and ¶ 9 B).

## **II. STANDARDS FOR POST-CONVICTION SUMMARY DISPOSITION.**

The civil nature of post-conviction proceedings and the differences between the pleading and summary judgment standards in ordinary civil actions and post-conviction proceedings are set forth in *Hassett v. State*, 127 Idaho 313, 900 P.2d 221 (Ct. App. 1995):

Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached or the application must state why such supporting evidence is not included with the petition. I.C. §19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

...

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. (Citations omitted). Summary dismissal of a petition for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence, for the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. (Citations omitted).

Idaho Code §19-4906 provides the procedure by which a summary judgment may be entered in a proceeding under the act; however, such a summary disposition must be made only when there are no genuine issues of material fact. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983). An application for post-conviction relief must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct.App. 1998); *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct.App. 1999).

## **III. INADEQUATE REPRESENTATION.**

Both the Sixth Amendment to the United States Constitution and Art. I, §13 of the Idaho

Constitution provide criminal defendants with a right to counsel. This entitlement includes the right to representation by reasonably competent counsel in an adequate fashion. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish that counsel's representation has been ineffective, the applicant must show that the attorney's performance fell below a standard of "competence demanded of attorneys in criminal cases" and that the defendant was prejudiced as a result. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Demonstration of prejudice requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Claims of ineffective assistance of counsel may properly be brought under the Post-Conviction Relief Act. *Aeschliman v. State*, 132 Idaho 397, 403, 972 P.2d 749, 755 (Ct. App. 1999). Again, to succeed in proving a claim of ineffective assistance of counsel the applicant must meet a two-part test. First, the applicant must show that the attorney's conduct was not objectively reasonable. *Id.*, citing *Strickland*, 466 U.S. at 688, 104 S.Ct. 2065; *Aragaoon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). There is a strong presumption that an attorney's assistance fits into the wide range of "professional assistance". *Id.* If the attorney's assistance can be shown to be incompetent, the applicant must also show a reasonable probability that the deficient conduct prejudiced the applicant's case. *Id.*, citing additionally *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

In advancing a post-conviction relief claim, the applicant bears a heavy burden in proving that his attorney's performance was deficient. Because of the distorting effects of hindsight in reconstructing the circumstances of counsel's challenged conduct, there is a strong presumption that counsel's performance was within the wide range of reasonable professional assistance—that is, "sound trial strategy". *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct.App.

1990).

As in any case, trial counsel *could* have spent more time in preparing for trial and in developing his strategy. Such an expenditure of time *may* have led to more effective cross examination of the State's witnesses, to a better explanation of troublesome evidence, to the elimination of inconsistencies in the testimony of defense witnesses, and to discovery of evidence supportive of the defendant's case. However, that is sheer speculation.

*Parrott v. State*, 117 Idaho 272, 276, 787 P.2d 258, 262 (1990).

In his amended petition, Schorzman claims that *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973) and *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440 (1982) support his claim that due process was denied. William Gadberry was a witness to the events for which Schorzman was convicted. On May 10, 2000, the State of Idaho sent a copy of Gadberry's typewritten transcript of his interview with Detective Wendy Carpenter and Agent Terry Morgan dated February 15, 2000. Kootenai Case No. CRF 2000 1143, Second Supplemental Response to Discovery, p. 2, ¶ 5. Schorzman's attorney Mark Jones knew of the existence of Gadberry at trial and knew that he was a witness to all material events. Tr. p. 120, L. 7. Schorzman testified that he knew who Gadberry was, that Schorzman was aware Gadberry was transported from the jail to the court holding facility, and that he was present as all pertinent events occurred. Tr. p. 306, L. 23 – p. 307, L. 14. Even if Schorzman's trial attorney did not know of Gadberry, the fact that Schorzman himself did, eviscerates his post-conviction claim. A petitioner is not entitled to post-conviction relief where the petitioner failed to diligently exercise his right to utilize the due process powers of the state to obtain witnesses in his favor.

*Schwartzmiller v. State*, 108 Idaho 329, 331-33, 699 P.2d 429, 431-33 (Ct.App. 1985). It is the burden of the criminal defendant to request that the witness be subpoenaed. 108 Idaho at 333, 699 P.2d at 433. Gadberry was listed by the State of Idaho as a potential witness (State's Witness List, filed July 20, 2000), and per the certificate of mailing, Schorzman's attorney was

sent a copy of that pleading. An Order to Transport Gadberry for trial prepared by the State and signed by Judge Judd was filed February 21, 2001, ordering him to be transported from the State of Idaho prison to the Kootenai County jail. The State's motion to transport was filed February 5, 2001, a month before trial, and requested Gadberry be transported "for the reason that the defendant is needed as a witness in the above entitled action." State's Motion to Transport, p. 1. Gadberry was not called by either the State or the defense at trial.

Schorzman claims his attorney never interviewed Gadberry. For purposes of this post-conviction action, Schorzman hired an investigator, paid for at public expense, named Ted Pulver. Mr. Pulver filed an affidavit stating: "Mr. Gadberry told me he was never interviewed by anyone for the defense in the Schorzman case." Affidavit of Ted Pulver, p. 1, ¶ 3. An application for post-conviction relief must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct.App. 1998). There is no affidavit by Gadberry, thus, Pulver's statement attributed to Gadberry is not admissible evidence. Overlooking that procedural defect for the moment, the statement of Gadberry to Pulver (Exhibit XX and YY) in 2003 shows that in response to Pulver's compound question, Gadberry stated Schorzman's attorney never talked to Gadberry. But overlooked by Pulver in Pulver's affidavit is the very next question and answer, where, unsolicited, Gadberry admits "I talked to somebody else. I don't know who it was." Exhibit XX and YY, p. 11. Fatal to Pulver's affidavit is the fact that at no time did Pulver ask Mark Jones if Jones or anyone on his or Schorzman's behalf interviewed Gadberry. It is Schorzman's burden to prove these claims, and he has completely failed to do so. Having no statement whatsoever from Schorzman's attorney Mark Jones, Schorzman has failed to prove deficient conduct of his attorney. For reasons discussed below, Schorzman has also failed to prove by a reasonable probability that any deficient conduct prejudiced his case.

*Chambers* is easily distinguishable. In *Chambers* the defense was **prevented** from presenting witnesses in his own defense. *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049. That was due to a common law rule in the Mississippi courts. *Chambers*, 410 U.S. at 295, 93 S.Ct. at 1046. That is completely different from the facts of the present case where Gadberry was not called by either side but could have testified and apparently was readily available to testify.

Citing *Valenzuela-Bernal*, Schorzman claims Gadberry's testimony was hindered by state actors and, thereby, Schorzman's due process rights were violated. In *Valenzuela-Bernal* the defendant was arrested for bringing illegals into the country. *Valenzuela-Bernal*, 458 U.S. at 860-61, 102 S.Ct. at 3443. Two of the three illegals that were with the defendant were deported and one was held as a witness in the case against the defendant. *Id.* The United States Supreme Court held just because a witnesses had been deported did not show that the defendant's Fifth and Sixth Amendment due process rights had been violated. *Bernal*, 458 U.S. at 873, 102 S.Ct. at 3449. A violation of these rights requires some showing that the evidence lost is both material and favorable to the defense. *Id.*

The facts in Schorzman's case do not raise the same questions. In Schorzman's case the witness Gadberry was available. Gadberry was in prison at the time of Schorzman's trial, and nothing in the record in the criminal case indicates he was not transported to the Kootenai County Jail for trial. While Schorzman claims that state actors prevented Gadberry from giving a statement favorable to Schorzman, the defense could have called him as a witness and questioned him as to what he knew and the nature of any coercion used by the state. Attorney Mark Jones' failure to call Gadberry is presumptively a reasonable decision of trial strategy or trial tactics. The decision to call a witness is a strategic decision by trial counsel which will not be second guessed on review by this Court unless Schorzman shows those decisions were made upon the basis of inadequate preparation, ignorance of the relative law, or other shortcomings

capable of objective evaluation. *State v. Roles*, 122 Idaho 138, 145, 832 P.2d 311, 318 (Ct.App 1992); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App. 1989). Schorzman has established none of those elements as Schorzman's investigator apparently never asked Mark Jones why he didn't call Gadberry. Accordingly, all Schorzman is left with is speculation, which will not carry the day when Schorzman has the burden of proof of overcoming these presumptions of effective assistance of counsel on post-conviction relief claims. Schorzman also has to demonstrate that Mark Jones' decision not to call Gadberry contributed to Schorzman's conviction. *Drapeau v. State*, 103 Idaho 612, 615-18, 651 P.2d 546, 549-52 (Ct.App. 1982). For reasons stated in detail below, Schorzman simply cannot establish this, as even Gadberry's more recent statement establishes the elements of both the Aggravated Assault on a Peace Officer and Escape.

Gadberry made a statement to the investigating officers about two and one half hours after Schorzman escaped. Exhibit N to Petition for Post-Conviction Relief. Three years and three months later, on May 7, 2003, Gadberry made another statement to Ted Pulver. Exhibit XX to the Petition for Post-Conviction Relief, and Exhibit YY admitted at the July 7, 2005 hearing. This statement is not in affidavit form by Gadberry. This statement is not a sworn deposition. An application for post-conviction relief must present or be accompanied by **admissible** evidence supporting its allegations, or the application will be subject to dismissal. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct.App. 1998); *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct.App. 1999); *Cootz v. State*, 129 Idaho 360, 363, 924 P.2d 622, 625 (Ct. app. 1996). 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 claims for relief. *Remington v. State*, 127 Idaho 443, 901 P.2d 1244 (Ct.App. 1995).

Additionally, as the state correctly points out, the original Gadberry statement, made just after the incident, is far from exculpatory as to Schorzman. Respondent's Brief in Support of Motion for Summary Judgment, p. 3. The fact that the defense attorney never put Gadberry on the witness stand knowing that he had made the statements contained in Exhibit N, presumptively amounts to nothing but trial strategy. The Phelps, Pulver and Schorzman affidavits fail to offer any evidence to show that the defense counsel's performance was not well within the wide range of reasonable "professional assistance" required by the *Strickland* standard.

Even if the failure to call Gadberry to the stand did amount to incompetent performance, Schorzman has not argued that failure to call Gadberry for his Exhibit N testimony in any way prejudiced Schorzman. Respondent's Brief in Support of Motion for Summary Judgment, p. 3. Pulver's affidavit contains the following unsupported and conclusory statement: "In interviewing William Gadberry, it was my opinion that his testimony would clearly have aided in Mr. Schorzman's defense at trial." Nowhere in Pulver's affidavit does Pulver state "why" he came to that conclusion. Schorzman's counsel at oral argument on the State's Motion for Summary Disposition provided no reasons why Pulver came to that conclusion. Even if Mark Jones were clairvoyant, and knew at the time of trial Gadberry would testify contrary to his Exhibit N statement made two and one half hours after Schorzman's crimes, and knew Gadberry instead would testify consistently with Exhibit XX, a statement that would not be made for more than two years after the trial, there is still no **prejudice** to Schorzman. This is because Exhibit XX becomes impeached by Exhibit N, and Exhibit XX still establishes the crimes for which Schorzman was convicted. This is discussed in detail below.

The standard set in *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976) is that the new information or evidence "will probably produce an acquittal." *Grube v. State*, 134 Idaho 24, 995

P.2d 794 (2000). This Court cannot say that the Gadberry information related in Exhibit XX to Pulver in 2003 would **probably** have produced an acquittal. This Court has difficulty stating that the Gadberry testimony would have made any difference at all. In the trial, Gadberry did not testify. As Schorzman now advocates, a new trial should result, and Gadberry should be allowed to testify. Yet even if he were to testify consistently with what he told Pulver in 2003, his testimony would be completely impeached by Gadberry's own statements made to Wendy Carpenter and Terry Morgan of the Coeur d'Alene Police Department, who investigated the incident two and one half hours after it occurred. The comparison is: No testimony by Gadberry last time versus Gadberry's impeached testimony next time. In making that comparison, this Court cannot find that Gadberry's testimony would **probably** have produced an acquittal.

*Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct.App. 1996) is in many ways similar to the present case. In *Cootz* the Idaho Court of Appeals affirmed the district judge who granted summary dismissal in favor of the State and against the petitioner Cootz. 129 Idaho at 371, 924 P.2d at 633. In that case, affidavits of two witnesses, Joy Davis (Cootz' wife) and Dixie Davis asserted Dixie Davis and Jim Davis, the parents of Joy Davis, lied under oath at Cootz' trial. In the present case, Schorzman has not met the requirement of filing an affidavit of Gadberry or filing other admissible evidence. Even if there were such admissible evidence, Gadberry's testimony would not in probability produce an acquittal. In *Cootz*, the district Court in reviewing the post-conviction relief case, and the Court of Appeals on appellate review of the district court's review, found Joy Davis' affidavit, "even if deemed sufficient to impeach Jim's testimony, would not refute what this Court in Cootz's direct appeal described as overwhelming evidence of guilt." 129 Idaho at 366, 924 P.2d at 628, *citing State v. McConville*, 82 Idaho 47, 51-52, 349 P.2d 114, 116-17 (1960). "Accordingly, Cootz has not established that the introduction of such evidence might produce an acquittal." 129 Idaho at 367, 924 P.2d at 629.

“The district court did not err in its conclusion that the information contained in Joy’s affidavit did not meet the required standard of probably producing an acquittal.”

Just as in *Cootz*, there is “overwhelming evidence of guilt”. The jury obviously did not believe Schorzman’s explanation that Schorzman could not recall any choking as Schorzman “blacked out” only during that portion of the sequence of events. There are inconsistencies in Schorzman’s testimony and Gadberry’s statements. Schorzman testified at trial, and on direct he denied that he ever put the chains around Deputy Danish’s neck. Tr. p. 305, L. 20 – p. 306, L. 14. On cross examination, Schorzman had to admit that he told State investigator Terry Morgan that he “blacked out” and that is why he could remember all other events but could not remember choking Deputy Danish. Tr. p. 308, L. 5 – p. 310, L. 23. This denial and convenient blackout by Schorzman is directly contradicted by Gadberry, who in his “new” version of the facts testified that Schorzman had “...the chain was around Danish’s neck and he fell on the ground.” Exhibit XX an YY, p. 7. The jury considered the overwhelming weight of the evidence that Deputy Danish was choked by a chain at the hands of Schorzman. Deputy Danish testified. Dr. Don J. Schmitt, emergency room physician, treated Deputy Danish just after the incident in question. Dr. Schmitt testified that Deputy Danish sustained a “serious” injury to his neck and that the physical evidence was consistent with being strangled all the way around the neck by a chain. Tr. p. 330, L. 3 – p. 331, L. 22. The jury listened to Schorzman’s testimony, and obviously each juror unanimously found his testimony not credible, while finding the testimony of Deputy Danish and Dr. Schmitt, credible.

To obtain a new trial based on newly discovered evidence, the defendant must prove:

- 1) that the evidence is newly discovered and was unknown to the defendant at the time of trial;
- 2) that the evidence is material, not merely cumulative or impeaching;
- 3) that it will probably produce an acquittal; and
- 4) that failure to learn of the evidence was due to no lack of diligence

on the part of the defendant. *Cootz*, 129 Idaho at 366, 924 P.2d at 628. Factors one and four are problematic for Schorzman. If Gadberry's "new" statements were the "truth", then Schorzman has always known that Gadberry, the only other person (other than Schorzman himself and Deputy Danish) who was present at the time of the events in question, would corroborate Schorzman's version of the "truth". Thus, Schorzman can hardly claim Gadberry's "new" statement was unknown to Schorzman. But the insurmountable problem is Schorzman cannot meet factor number three. There are two reasons Schorzman cannot meet the third factor in *Cootz*. First, Gadberry's "new" testimony is not credible. But foremost, Gadberry's "new" evidence **still establishes the crimes charged.**

Gadberry's claim of coercion is patently incredible. Gadberry claims he was "coerced" into making a statement on February 15, 2000 (Exhibit XX and YY, p. 2), because "what they did promise me was that maybe they ought to charge me for escape also because they told me well I must have been in collusion with Mr. Schorzman, you know." *Id.* p. 3. That "promise" was allegedly made by another deputy who had just arrived at the same time Bill Danish was choking and gagging. *Id.* p. 4. It is hard to imagine an officer rendering aid to another officer who is having difficulty breathing following a strangulation, while simultaneously telling Gadberry he had better lie about what Schorzman had done, especially when that officer had no idea what Gadberry's eyewitness accounts were in the first place. How could that officer tell Gadberry to change his story when the officer hadn't even heard Gadberry's story? Gadberry's claim is further incredible because in neither version of Gadberry's account of the events in question did Gadberry mention that he did anything that could even be considered accomplice or conspiracy liability for Schorzman's escape. Gadberry never escaped, never left the separate cell that he was housed in. Gadberry never assisted Schorzman in any way. Gadberry's claim made in 2003 that Danish kicked Schorzman first is not credible as Gadberry admits he couldn't see

what was going on he said: “I don’t know if he actually kicked him the first time or just tried to move him or what...”. *Id.* p. 7. This problem seeing what was going on due to the vision obstructions is consistent with what he told investigators two and a half hours after the events in question. Exhibit N, p. 4. Even Gadberry realized no one would listen to his changed story: “...it’s gonna be no testimony at all because like I said, I’ve been studying the law and they know what my story is and what it used to be then there’s no point in really telling you anything different.” *Id.* p. 5. Even Schorzman indicates Gadberry has problems with honesty, as Schorzman testified at trial that Gadberry had stolen a motor from him. Tr. p. 307, Ll. 1-3.

But the biggest problem facing Schorzman is, even if Gadberry’s “new” version of the events were credible, his “new” version establishes the elements of both crimes as the jury was instructed in Instruction Numbers 12A, 13 and 14A in Kootenai County Case CRF 2000 1143. Gadberry’s “new” version of the events establishes the aggravated assault, as Gadberry in 2003 claims: “The next thing I know, they’re in this big scuffle and somehow or another when they went down, Martin like grabbed him by the shoulder it seemed like, and the next thing I know is the chain was around Danish’s neck and he fell on the ground.” Exhibit N, p. 7. Gadberry’s “new” version of the events also establishes the escape: “Martin said give me the keys and he got the keys from Bill Danish and then he left.” *Id.* p. 9. “Martin proceeded to loosen his cuff and I thought that’s what he was doing and then all of a sudden he just dropped them off and he did the same thing to his hands and then he just, he bolted out the door.” *Id.* p. 11.

Nothing about Gadberry’s “new” version of the events assists in Schorzman’s claim of self-defense to the Aggravated Battery on a Peace Officer. The jury heard Schorzman’s testimony of the “facts” he felt supported the claim of self-defense. The jury was instructed as to the elements of self-defense. Instruction 12B, 12C and 12E. The jury obviously felt that Schorzman’s testimony created no reasonable doubt that the battery was justifiable. That could

be because the jury did not believe Schorzman's testimony, or it could be that the jury believed Schorzman's testimony but found that it did not meet the legal requirements of self defense. This Court finds that for the reasons set forth above, Gadberry's "new" version of the events are not credible. Gadberry admits in both statements that he had difficulty seeing what happened. Gadberry's "new" version is automatically impeached by the earlier version, and even if a jury accepted Gadberry's claim that the inconsistency is explained by law enforcement coercion, Schorzman's strangling Danish with a chain until Danish collapsed, at a time when Danish was no longer kicking a defenseless Schorzman, does not meet the legal requirement for self defense. In other words, if a jury believed Gadberry's statement that Danish was kicking Schorzman while Schorzman was on the ground in ankle shackles and handcuffs chained to his waist, the moment Schorzman regains his upright posture and Danish is no longer kicking Schorzman, Schorzman no longer has any right of self defense. Exhibit XX, p. 7. But according to Gadberry, once Schorzman stood up, he got his handcuffs around Danish's neck and began strangling Danish, and Danish collapsed to the ground. *Id.* Schorzman has now exceeded the legal requirement for self-defense. According to Gadberry, Danish then tried to apply pepper spray to Schorzman, and Schorzman apparently grabbed the pepper spray from Danish, then Schorzman pushed Danish and got the keys from Danish and left. *Id.* pp. 8-9. Schorzman continued to exceed the legal requirements for self- defense.

#### **IV. CONFLICT OF INTEREST.**

With regard to claims of conflict of interest, a criminal defendant is prejudiced only if that defendant can demonstrate that the attorney actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance. *State v. Wood*, 132 Idaho 88, 98, 967 P.2d 702, 712 (1996). The defendant bears the burden of showing "active

representation of competing interests” in order to establish a conflict of interest implicating the protection of the Sixth Amendment. *Id.*

The only statement Schorzman’s investigator Pulver obtained from Schorzman’s attorney Mark Jones was as follows: “Mark Jones told me he thought he had disclosed his relationship [the Court assumes Pulver was referring to Deputy Danish] to the Schorzman’s [sic].” Affidavit of Pulver, p. 2, ¶ 10. Again, ignoring the admissibility problems, Pulver has not established by a preponderance that Jones did not disclose to Schorzman his relationship to Danish. Schorzman claims Jones did not disclose the relationship to him. For the purposes of this motion for summary disposition only, the Court accepts as true Schorzman’s that Jones did not disclose the prior relationship with Danish. The next questions to be answered are: “Is that a conflict of interest”, and if so, “What is the effect of that failure to disclose?”

The Phelps, Pulver and Schorzman Affidavits and in fact the claims of the Amended Petition for Post-Conviction Relief do not allege that defense counsel **actively** represented a conflicting interest, nor do they allege the **actual** conflict of interest adversely affected his lawyer’s performance. The Amended Petition alleges Mark Jones had “**prior** law enforcement employment with victim William Danish,” and that “he represented William Danish in a **prior** civil matter.” Amended Petition ¶7 (C) and (D). (emphasis added). There is no claim that Mark Jones represented Schorzman and Danish **at the same time**. Thus, there is no violation of Idaho Rule of Professional Conduct 1.7. Not only did Jones represent Danish and Shorzman at different times, but also for entirely different purposes. Thus, Idaho Rule of Professional Conduct 1.9 is not implicated either. Schorzman’s claims based on conflict of interest fail.

The first question “Was there a conflict of interest?” must be answered in the negative, because Jones simply did not “actively represented conflicting interests” that actually existed at the time he represented Schorzman. Even if there were an actual, active, ongoing conflict of

interest, the effect of that conflict had no bearing on the original trial or a new trial for the reasons stated above. Had Gadberry testified consistent with Pulver's 2003 interview, Gadberry's testimony still establishes the elements of the crimes of Aggravated Battery on a Peace Officer and Escape.

The standard to establish conflict of interest set forth in *State v. Wood* is a rigorous standard, which Schorzman cannot meet. Summary disposition for all claims based on conflict of interest is appropriate.

#### **V. CLAIM THAT OTHERS CAUSED GADBERRY TO WITHHOLD EVIDENCE.**

Schorzman claims an issue in his post-conviction relief case is "Whether the actions of a state agent or actor cause William Gadberry to withhold evidence that would have caused a reasonable probability of a not guilty verdict as to Mr. Schorzman's guilt. Amended Petition, p. 2, ¶ 7. E. As stated above, there is no credible evidence as to coercion of Gadberry. Even if such claims were entirely true, the discussion above shows that if Gadberry's statements to Pulver in 2003 came in as evidence, they still establish the crimes charged. Schorzman has completely failed in his burden to establish a reasonable probability of a not guilty verdict.

#### **VI. CONCLUSION AND ORDER.**

Summary disposition for all claims in Schorzman's Petition for Post-Conviction Relief and Amended Petition for Post-Conviction Relief must be granted for several reasons. **First,** Schorzman has failed to establish unprofessional errors by Schorzman's defense attorney Mark Jones. No one on Schorzman's behalf has bothered to interview Jones, Schorzman's defense attorney, to find out if Jones interviewed Gadberry. Gadberry himself recalls being interviewed by someone he cannot now remember. The burden of proving the existence of these facts by

admissible evidence is upon Schorzman. **Second**, Schorzman has provided nothing to indicate that the decision to not call Gadberry was anything other than trial strategy. **Third**, even assuming there were unprofessional errors, Schorzman has failed to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This is similar to the fatal flaw in the new trial standard, set forth as reason five below. **Fourth**, save for perhaps the claim by Schorzman in his Amended Petition for Post-Conviction Relief, ¶ 7 E., that the actions of a state actor caused Gadberry to withhold evidence, all other claims in Schorzman's Petition and Amended Petition could have been raised on his appeal, thus they are forfeited since Schorzman has not raised any "substantial doubt" as to his conviction as required under Idaho Code § 19-4901(b). **Fifth**, none of Schorzman's claims are supported by **admissible** evidence. An application for post-conviction relief must present or be accompanied by **admissible** evidence supporting its allegations, or the application will be subject to dismissal. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct.App. 1998). Schorzman has filed an affidavit which only pertains to the relationship between Jones and Danish. That affidavit is conclusory and speculative. No affidavit has been filed by Gadberry or Jones. Most of the Pulver affidavit is based upon inadmissible evidence and is contradicted by other evidence. **Sixth**, Schorzman has not demonstrated why and how the outcome would probably be different on a new trial. This is true for two reasons: First, Gadberry's changed statement is automatically impeached by his earlier statement, and second, even if Gadberry's changed statement were entirely believed by a new jury, his changed statement establishes the crimes charged and fails to establish self-defense. This is fatal as to all claims, even to Schorzman's claim that the actions of a state actor caused Gadberry to withhold evidence. **Seventh**, Schorzman has not established a conflict of interest, nor has he established that any conflict of interest could have adversely affected his lawyer's performance. At oral argument, counsel for Schorzman asked the Court that Schorzman simply be allowed to have Gadberry testify

at the evidentiary hearing. There is no need for that hearing. Even if everything Gadberry told Pulver in 2003 were absolutely true, and a new trial ordered, the outcome of a trial would not in all probability be any different with Gadberry's testimony.

**IT IS HEREBY ORDERED** summary disposition for all claims in Schorzman's Petition for Post-Conviction Relief and Amended Petition for Post-Conviction Relief is GRANTED.

**IT IS FURTHER ORDERED** the evidentiary hearing scheduled for August 15, 2005, is VACATED due to the granting of summary disposition.

Entered this \_\_\_\_\_ day of July, 2005.

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

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of July, 2005, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Douglas Phelps	509-921-0802	Art Verharen	208-446-1833

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Secretary