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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

ALBERT RAY MOORE, )  
Petitioner-Appellant, ) NO. 39523  
vs. )  
STATE OF IDAHO, )  
Respondent. )

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE MICHAEL R. MCLAUGHLIN**  
District Judge

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## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case.....	1
Statement Of The Facts And Course Of The Proceedings .....	1
ISSUE.....	3
ARGUMENT .....	4
The District Court Properly Concluded Moore Had Failed To Present Admissible Evidence Establishing A <i>Prima Facie</i> Claim Of Ineffective Assistance Of Counsel .....	4
A.    Introduction .....	4
B.    Standard Of Review .....	5
C.    Moore Failed To Present Admissible Evidence To Establish A <i>Prima Facie</i> Claim Of Ineffective Assistance Of Counsel .....	5
CONCLUSION.....	7
CERTIFICATE OF MAILING .....	8

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aeschliman v. State</u> , 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999) .....	5
<u>Edwards v. Conchemco, Inc.</u> , 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986) .....	5
<u>Matthews v. State</u> , 122 Idaho 801, 839 P.2d 1215 (1992) .....	5
<u>Pratt v. State</u> , 134 Idaho 581, 6 P.3d 831 (2000).....	5
<u>State v. Charboneau</u> , 116 Idaho 129, 774 P.2d 299 (1989).....	6
<u>State v. Lovelace</u> , 140 Idaho 53, 90 P.3d 278 (2003) .....	5
<u>State v. Moore</u> , 148 Idaho 887, 231 P.3d 532 (2010) .....	passim
<u>State v. Moore</u> , 152 Idaho 203, 268 P.3d 471 (Ct. App. 2012) .....	2
<u>State v. Schmoll</u> , 144 Idaho 800, 172 P.3d 555 (Ct. App. 2007).....	6, 7
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984) .....	6
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007) .....	5
 <u>STATUTES</u>	
I.C. § 18-8004 .....	6
I.C. § 18-8005 .....	6
I.C. § 19-4906 .....	5

## STATEMENT OF THE CASE

### Nature Of The Case

Albert Ray Moore appeals from the summary dismissal of his petition for post-conviction relief.

### Statement Of The Facts And Course Of The Proceedings

Moore was convicted of one count of felony DUI in each of two separate cases. State v. Moore, 148 Idaho 887, 231 P.3d 532 (2010). In both cases Moore asserted that his prior conviction in North Dakota could not be used to enhance the charges to felonies. Id. at 890-91, 231 P.3d at 535-36. He proceeded to trial in one case and was convicted and then pled guilty in the other preserving his claim that the North Dakota conviction could not be used to enhance the charges against him. Id.

On appeal, the Idaho Court of Appeals addressed Moore's challenges to the use of his North Dakota conviction for enhancement. Specifically, the court first rejected Moore's argument that the state had failed to demonstrate the conviction's constitutional validity, holding that once the state had presented evidence establishing the judgment of conviction it was Moore's burden of presenting evidence of a constitutional invalidity. Id. at 894-95, 231 P.3d at 539-40. Because Moore presented no such evidence his claim failed. Id. at 895-96, 231 P.3d at 540-51. The court next rejected Moore's argument that the conviction was not based on a substantially conforming foreign conviction as required by law. Id. at 896-99, 231 P.3d at 541-44. The court ultimately reversed the conviction obtained at trial due to trial error in the admission of

evidence, and remanded the other case for consideration of whether the appellate decision allowed Moore to withdraw his guilty plea under the plea agreement. Id. at 891-94, 231 P.3d at 536-39.

After remand the district court concluded that Moore did not have the right under his plea agreement to withdraw his guilty plea based on the outcome of his appeal, and that conclusion was affirmed on appeal. State v. Moore, 152 Idaho 203, 268 P.3d 471 (Ct. App. 2012).

Moore filed the present post-conviction action challenging his conviction in the guilty plea case. (R., pp. 5-8.<sup>1</sup>) Moore alleged that his counsel was ineffective for failing to present the transcript of his guilty plea in North Dakota to support his motion to dismiss on the basis that the North Dakota conviction could not be used for enhancement. (R., pp. 67-72; see also R., pp. 96-106 (copy of transcript counsel allegedly should have used in motion to dismiss).) The state answered (R., pp. 108-11), and moved for summary dismissal (R., pp. 114-20).

The district court granted the state's motion and summarily dismissed the petition. (R., pp. 167-70, 172, 184.) Moore appealed from the dismissal. (R., pp. 175-76.)

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<sup>1</sup> The only case numbers cited in Moore's petition correspond with the case numbers of the felony DUI in which he pled guilty. (Compare R., p. 5 with #36033 R., pp. 26, 34, 56, 135, 144, 147.)

## ISSUE

Moore states the issue on appeal as:

Did the district court err in summarily dismissing claims 1, 2, 3, 5, and 6 of ineffective assistance of counsel given that Mr. Moore raised a genuine issue of material fact as to whether prior counsel rendered ineffective assistance of counsel in failing to investigate and present evidence that he did not have a prior DUI conviction in North Dakota?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Moore failed to show that he submitted admissible evidence sufficient to establish a *prima facie* claim of ineffective assistance of counsel?

## ARGUMENT

### The District Court Properly Concluded Moore Had Failed To Present Admissible Evidence Establishing A *Prima Facie* Claim Of Ineffective Assistance Of Counsel

#### A. Introduction

Moore essentially submitted a transcript of the guilty plea that resulted in his North Dakota conviction and claimed that transcript showed his counsel had been ineffective in challenging the North Dakota conviction as an enhancer. (See R., pp. 67-106, 122-28.) The district court concluded the transcript was irrelevant to the question of whether the North Dakota conviction was statutorily eligible for enhancement. (R., pp. 168-69.) The court further concluded that the transcript did not establish that the North Dakota conviction had been obtained in derogation of the right to counsel. (R., p. 169.) Therefore, Moore failed to establish either element of a claim of ineffective assistance of counsel. (R., pp. 168-69.)

Moore argues that he presented a viable claim that “[c]ounsel did not investigate and present evidence regarding the North Dakota conviction even though the factual basis for the North Dakota conviction would not amount to the factual basis for a crime in Idaho.” (Appellant’s brief, p. 12.) He points out that the Court of Appeals noted in his appeal that he had not claimed his conduct giving rise to the North Dakota conviction would not be a crime in Idaho and postulates that, had he made such a claim and supported it with the guilty plea transcript, his case would have come out differently. (Appellant’s brief, pp. 15-16 (citing Moore, 148 Idaho at 898 n.13, 231 P.3d at 543 n.13).) Moore’s argument fails because whether his guilty plea established facts sufficient to support a

conviction in Idaho is not the applicable legal standard. Counsel's performance was not ineffective, and Moore was not prejudiced, for failing to present evidence to support an irrelevant legal argument.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Moore Failed To Present Admissible Evidence To Establish A *Prima Facie* Claim Of Ineffective Assistance Of Counsel

"To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. In order to establish a *prima facie*

claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989).

At the time of Moore's crime, DUI was elevated to a felony if the defendant had "two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, or any substantially conforming foreign criminal violation, or any combination thereof, within ten (10) years ...." I.C. § 18-8005(5).<sup>2</sup>

For the purpose of subsections (4), (5) and (7) of [section 18-8005] and the provisions of section 18-8004C, Idaho Code, a substantially conforming foreign criminal violation exists when a person has pled guilty to or has been found guilty of a violation of any federal law or law of another state, or any valid county, city, or town ordinance of another state *substantially conforming to the provisions of section 18-8004, Idaho Code. The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court.*

I.C. § 18-8005(8) (emphasis added). This statute requires a comparison of the "elements of the statutes, and not the specific conduct giving rise to the prior violation." State v. Schmoll, 144 Idaho 800, 803, 172 P.3d 555, 558 (Ct. App. 2007). See also Moore, 148 Idaho at 897, 231 P.3d at 542 (legislature "expressly provided that the focus of the comparison should be on the elements of the statute and not the specific conduct giving rise to the prior violation").

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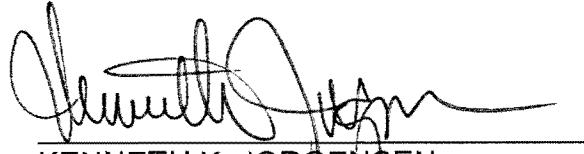
<sup>2</sup> All citations are to the statutory provision in effect in September 2006, when Moore committed this crime.

The express purpose of presenting the transcript of the North Dakota guilty plea, as acknowledged by Moore, would have been to show that "the factual basis for the North Dakota conviction would not amount to the factual basis for the crime in Idaho." (Appellant's brief, p. 12.) However, the factual basis of the foreign conviction is not relevant under the legal standard that reviews only the elements of the statute. Moore, 148 Idaho at 897-98, 231 P.3d at 542-43 (North Dakota statute substantially conforming even though North Dakota courts have interpreted scope of actual physical control more broadly than Idaho courts); Schmoll, 144 Idaho at 804-05, 172 P.3d at 559-60 (rejecting argument that foreign criminal violation is not substantially conforming if the conduct that violated the foreign statute would not have violated the Idaho statute). Because the evidence is not relevant, Moore's claim that his counsel was ineffective for failing to produce it in support of the motion to dismiss is without merit.

#### CONCLUSION

The state respectfully requests this Court to affirm the district court's order summarily dismissing Moore's petition for post-conviction relief.

DATED this 28th day of December, 2012.



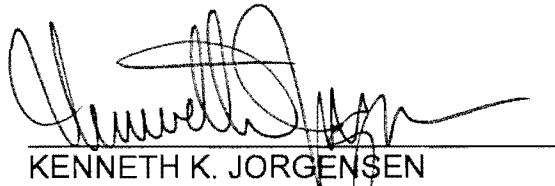
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KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of December, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE  
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KENNETH K. JORGENSEN  
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KKJ/pm