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IN THE SUPREME COURT OF THE STATE OF IDAHO

KATHERINE SMITH,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

NO. 37524

APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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District Judge

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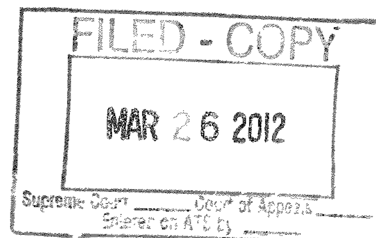

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STATEMENT OF THE CASE

Nature of the Case

Katherine Smith appeals from the district court's Finding of Fact, Conclusions of Law and Order wherein the district court denied Ms. Smith post-conviction relief. Ms. Smith appeals the district court's order summarily dismissing her claim that she received ineffective assistance of counsel, resulting in her plea being not knowingly, voluntarily, and intelligently entered. As a result, she asks this Court to reverse the district court's order summarily dismissing this case and remand the matter for further proceedings.

Statement of the Facts and Course of Proceedings

Ms. Smith filed a timely Petition for Post-Conviction relief. (R., pp.4-7.) She asserted several claims, including ineffective assistance of counsel.[1] (R., pp.4-7.) Relevant to this appeal, Ms. Smith asserted that due to her attorney's deficient performance, she entered into an unknowing, unintelligent, and involuntary plea at the arraignment. (R., pp.16-18.) Ms. Smith seeks to withdraw her guilty plea and proceed forward to trial; wherein, she contends she has good defenses to the charges. (R., pp.6, 24.) Ms. Smith contends she is innocent. (Tr., p.144, Ls.20-23, p.144, Ls.12-17.)

Ms. Smith asserted that her attorney accepted a retainer months before the State filed charges. (R., p.16.) At the time of retaining her attorney, she provided him checks, cash receipts, register receipts, and other evidence to assist her defense. (R., p.16.)

---

[1] Although Ms. Smith raised several claims in her petition, counsel is only addressing the claim relevant to the issue being raised in this appeal.

Ms. Smith contends that the trial attorney failed to properly review the evidence she provided prior to making false promises and coercing her into a plea agreement. (R., pp.16, 25.)

Ms. Smith contends that her attorney promised probation and insured her that the State would not prosecute her daughter and husband. (R., pp.16, 18.) Specifically, Ms. Smith claimed, "Mr. Martens made the false promise of three (3) years probation with a withheld judgment. At no time did Mr. Martens say that this was his opinion. He stated it as a fact to Mr. and Mrs. Smith." (R., p.18.) In an attempt to clarify her claim to the state bar, Ms. Smith asserted, "At no time have I claimed he forced me to do anything. What I said is that if I had been properly informed, with the truth, I would not have proceeded the way he wanted." (R., p.42.)

Ms. Smith also filed a copy of her state bar complaint. (R., pp.20-28.) In her complaint, she asserted that her attorney told her at a hearing that he had a deal worked out. (R., p.23.) According to Ms. Smith, if she pled guilty to three of the charges, she would receive three years probation. (R., p.23.) The State agreed to dismiss the remaining seven counts and have her immediately released from jail on her own recognizance. (R., p.23.) Ms. Smith also stated that when she told her attorney that she did not understand, he told her that he would tell her how to respond to the court's questions. (R., p.23.) Ms. Smith recalled that during the hearing, because she did not understand why she was pleading to certain offenses that she had proof of her innocence, she stopped the judge and asked questions of her trial attorney. (R., p.23; Tr.04/02/2004, p.12, Ls.10-20.) Her attorney's response was that it was not relevant and that she would not go home today if she objected to the plea. (R., p.23.)

In a written response to the state bar, the trial attorney stated:

> I was of the opinion that she would receive no jail time, the Judge would give her probation and time served leaving her on probation for three years fixed and five indeterminate. Sentencing was open, so I could only give Mrs. Smith my opinion and what I believed her sentence would be. I did qualify my opinion to Mrs. Smith. I explained to her that everything depended on the pre-sentence investigation, so it was important that the report come back good.

(R., p.35.) Ms. Smith takes issue with the trial attorney's qualification that his advice to her was presented to her as only an opinion. (R., pp.42-43.)

The State filed a Notice of Intent to Dismiss Petition for Post-Conviction Relief (R., pp.157-160) and an Amended Notice (R., pp.161-164). The district court conducted a hearing on the State's motion for summary dismissal on May 29, 2009. (R., pp.175-182.) After hearing argument, the district court dismissed all but one of Ms. Smith's claims. (R., pp.183-184.) Ms. Smith's claim on appeal that her plea was not knowingly, intelligently, and voluntarily entered due to ineffective assistance of counsel was summarily dismissed by the court. (R., pp.183-184.)

The district court conducted a hearing on the one remaining claim involving whether Ms. Smith received ineffective assistance of counsel when her attorney allegedly instructed her to leave the sentencing hearing. (R., pp.191-195.) The district court filed findings of fact and conclusions of law. (R., pp.198-206.) Pursuant to the prisoner mailbox rule, Ms. Smith filed a timely Notice of Appeal. (R., pp.207-210, 228.)

ISSUE

Did the district court err when it summarily dismissed Ms. Smith's claim that her plea was not entered knowingly, intelligently, or voluntarily because it was the result of ineffective assistance of counsel?

ARGUMENT

The District Court Erred When It Summarily Dismissed Ms. Smith's Claim That Her Plea Was Not Entered Knowingly, Intelligently, Or Voluntarily Because It Was The Result Of Ineffective Assistance Of Counsel

A. Introduction

Ms. Smith asserts that the district court erred when it summarily dismissed her claim of ineffective assistance of counsel resulting in her unknowing, unintelligent, and involuntary plea. Ms. Smith presented a genuine issue of material fact as to whether she received ineffective assistance of counsel. Ms. Smith respectfully requests that the district court's order summarily dismissing her ineffective assistance of counsel claim involving her guilty plea be vacated, and this case remanded to the district court for an evidentiary hearing.

B. Applicable Legal Standards

1. Summary Dismissal Standards

An application for post-conviction relief is civil in nature. *Gilpin-Grubb v. State*, 138 Idaho 76, 79-80 (2002). An application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

The court may summarily dismiss a petition for relief when the court is satisfied the applicant is not entitled to relief and no purpose would be served by further proceedings. I.C. § 19-4906(b). In considering summary dismissal in a case where evidentiary facts are not disputed, summary dismissal may be appropriate, despite the

possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between the inferences. *See State v. Yakovac*, 145 Idaho 437, 444 (2008) (addressing the case where State did not file a response to petition) (citing *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519 (1982) (addressing the case with stipulated facts)). However, where the facts are disputed, a court is required to accept the petitioner's unrebutted factual allegations as true, but need not accept the petitioner's conclusions. *Charboneau v. State*, 144 Idaho 900, 903 (2007).

Summary disposition on the pleadings and record is not proper if there exists a material issue of fact. I.C. § 19-4906. When genuine issues of material fact exist that would entitle the applicant to relief, if resolved in the applicant's favor, summary disposition is improper and an evidentiary hearing must be conducted. *Baldwin v. State*, 145 Idaho 148, 153 (2008).

When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, the reviewing court applies the same standard as that applied by the district court. *Ridgley v. State*, 148 Idaho 671, 675 (2010). Therefore, on review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file and liberally construes the facts and reasonable inferences in favor of the non-moving party. *Charboneau*, 144 Idaho 903 (citation omitted). The lower court's legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716 (1997).

2. Ineffective Assistance Of Counsel Standards

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right to counsel, which includes the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Further, the Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. *Id.* at 685.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Sixth Amendment "relies ... on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* In light of the Sixth Amendment's reliance upon the legal profession's standards, the Idaho Supreme Court has stated that the starting point of evaluating criminal defense counsel's conduct is the American Bar Association, Standards for Criminal Justice, The Defense Function. *Mitchell v. State*, 132 Idaho 274, 279 (1998).

In addition to proving deficient performance, in most instances a defendant also must prove that he was prejudiced. "The defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* However, a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. As was recognized by Justice O'Conner, the author of the *Strickland* opinion, in her concurring opinion in *Williams v. Taylor*, 529 U.S. 362 (2000),

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ··· the result of the proceeding would have been different."

Id. at 405-06 (O'Connor, J. concurring) (quoting *Strickland*, 466 U.S. at 696).

Despite the general rule, a presumption of prejudice arises in certain instances. This presumption applies when there is a complete denial of counsel during a critical stage of the proceedings, when circumstances are such that the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial, and when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *See e.g., United States v. Cronic*, 466 U.S. 648, 659 (1984).

C. The District Court Erred When It Summarily Dismissed Ms. Smith's Claim That Her Plea Was Not Entered Knowingly, Intelligently, Or Voluntarily Because It Was The Result Of Ineffective Assistance Of Counsel

Ms. Smith asserted that her plea was not knowingly, intelligently, or voluntarily entered because it was the product of her attorney's failure to investigate, failure to pursue defenses to the charge, threats of family member's prosecution, and untrue promises about the plea bargain. (R., pp.4-7, 16-18, 23, 25, 42.) The district court

dismissed this claim after the hearing on the State's motion to dismiss. (R., pp.183-184.) The court determined that even if the attorney improperly advised Ms. Smith about the potential consequences of her plea, the district court judge was so complete and thorough at the change of plea hearing, Ms. Smith could never prove a claim that her plea was not knowingly, intelligently or voluntarily entered. (Tr.05/29/2009, p.83, L.10 – p.82, L.7.)

Ms. Smith submits that the district court erred when it relied upon the records of the taking of her guilty plea, to the exclusion of other evidence regarding the circumstances of the entry of the plea, to determine that the plea was knowingly, intelligently, and voluntarily entered. When all the evidence is considered, Ms. Smith did offer sufficient evidence to establish a genuine issue of material fact as to whether her plea was knowingly, intelligently and voluntarily entered such that she is entitled to an evidentiary hearing on this claim.

The United States Supreme Court has recognized that, "It is elementary that a coerced plea is open to collateral attack." *Fontaine v. United States*, 411 U.S. 213, 215 (1973). This is true even when a petitioner bases his claims on things that occurred prior to the taking of the plea and informed the court, at the time the plea was entered, that it was "given voluntarily and knowingly, that he understood the nature of the charge and the consequences of the plea, and that he was in fact guilty." *Id.* at 213-214. Although the objective of following Idaho Criminal Rule 11 procedures is to flush out and resolve issues regarding the plea, "like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an

opportunity to prove the allegations" of coercion. *Cf. Id.* at 215 (addressing Federal Rule of Criminal Procedure 11).

Although the record of guilty plea proceedings is relevant to a subsequent claim that the plea was not entered knowingly, intelligently, or voluntarily, "the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable." *Blackledge v. Allison*, 431 U.S. 63, 74 (U.S.N.C. 1977). In administering the writ of habeas corpus:

> federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

Id. at 75. This Court sees the "Uniform Post Conviction Procedure Act as an expansion of the Writ of Habeas Corpus and not as a denial of the same." *See Dionne v. State*, 93 Idaho 235, 237 (1969). In addressing post conviction claims regarding the nature of a plea, this Court has not adopted a per se rule limiting review to the record of the proceedings at which the plea was taken, to the exclusion of additional evidence of what led to the entry of the plea. *See McKeeth v. State*, 140 Idaho 847 (2004) (considering evidence outside of the written plea agreement to determine whether plea was entered as the result of ineffective assistance of counsel).

In limiting its consideration of whether Ms. Smith entered a knowing, intelligent, and voluntary plea to the record of the taking of the plea, to the exclusion of other evidence in the post conviction record regarding the circumstances of the entry of the plea, the district court erred.

The United States Supreme Court has acknowledged that a claim that a guilty plea is invalid because it was not knowingly, intelligently, or voluntarily entered into may be raised in a post-conviction petition. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

> Where, as here, a defendant is represented by counsel during the plea process and enters her plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). As we explained in *Tollett v. Henderson,* 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" *Id.,* at 267, 93 S.Ct., at 1608.

Hill v. Lockhart, 474 U.S. 52, 56-57 (1985).

Taking Ms. Smith's factual allegations as true, the advice counsel gave to Ms. Smith regarding entering a plea was not within the range of competence demanded of attorneys in a criminal case. Ms. Smith asserted that her attorney told her that if "she did not plead guilty and do exactly as he instructed, that Mr. Smith [her husband at the time] and her daughter were going to be charged with various charges." (R., p.16.) The prosecutor does not dispute that this threat could have been made by the attorney. (R., p.148.) The State argues that the threat could not undermine a guilty plea because it could be a matter of the attorney's opinion or a matter of "simple truth." (R., p.148.) However, threats that one daughter and/or husband will be going to jail certainly does raise a question of whether the plea was voluntarily entered into. Threats of harm to a family member certainly could undermine whether a plea was voluntarily entered into and this issue should have proceeded forward to an evidentiary hearing.

Ms. Smith also asserted that her attorney made false promises about the plea bargain. (R., p.18.) She alleged that he told her that she would receive three years probation with a withheld judgment. (R., p.18.) In further elaboration to the bar association, Ms. Smith explained that:

> Jared Martens told me that he had a deal worked out because this was the best that I could hope for. The deal was told to me as follows = I would be released on O.R., they would drop 7 of the 10 if I would plead to the remaining 3, no jail time and three years probation. I told Jared Martens that I did not understand and he told me that he would tell me how to answer. At some point[,] I stopped the judge and tried to ask Jared Martens why he had me pleading guilty to charges that I have proof of and he told me "that isn't relevant now, just do as I told you or you won't go home today."

(R., p.23 (emphasis added).) In review of the change of plea hearing transcript, Ms. Smith did in fact try to stop the hearing. (Tr.04/02/2004, p.12, Ls.15-23.) She discussed the matter with her attorney and when questioning resumed, she answered accordingly. (Tr.04/02/2004, p.12, Ls.18-23.) Ms. Smith had already been informed that she had better do as the attorney said or her family members would be prosecuted. (R., p.16.)

Ms. Smith also indicated that her attorney promised her a withheld judgment and three years probation. (R., pp.16, 23.) The attorney's opinion of the plea bargain is interesting. (R., p.35.) In a formal response to the State Bar Association, he claims that he thought, "she would receive no jail time, the Judge would give her probation and time served leaving her on probation for three years fixed and five indeterminate." (R., p.35.) First, Ms. Smith has presented a genuine issue of fact because she believed that her attorney had a deal worked out, not as the attorney recalls that his "deal" offer was only an opinion of the possible consequences. Second, the attorney's recitation of his

opinion is an illogical impossibility. There is no such thing as probation for "three years fixed and five indeterminate." While certainly an underlying sentence of eight years is possible, there is no such thing as a fixed and indeterminate probation. While, certainly there may be a typographical error, it only further supports Ms. Smith's version of the facts and that at a minimum she presented a material issue of fact that her plea was not knowingly, intelligently, or voluntarily entered. Moreover, the attorney's belief that the result of the presentence investigation could change everything would be consistent with either Ms. Smith's allegations and/or the attorney's denial of improper advice.

Ms. Smith also alleged that her attorney failed to properly advise her to plead guilty because he did not review her discovery and determine whether or not she had any legal defenses to the charges. (R., pp.25-26.) While the attorney claimed that he reviewed the documents she provided approximately one year before she pled guilty, he did not indicate whether he re-reviewed it, considered it in light of the State's discovery, and considered Ms. Smith's defenses prior to suggesting that she plead guilty to the charge. (R., pp.35, 38.) Essentially, the attorney's billing records reveal that he may have reviewed the evidence on May 15, 2003, and nearly a year later reviewed the State's evidence on March 17, 2004. (R., p.38.) It is highly questionable if the attorney would remember all of the potential defenses from a case delivered to him a year prior and keep that information mentally assessable when evaluating a case that a defendant had full attentions of fighting. (R., p.38.)

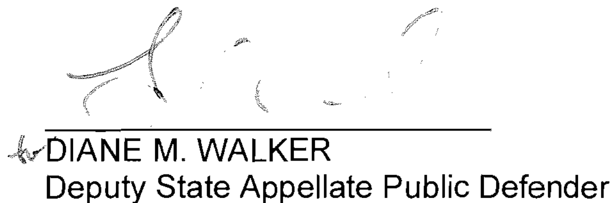
Ms. Smith asserted that she was coerced by the attorney to plead guilty, she had been given false promises about a plea bargain, had been threaten with family member's prosecution, and instructed to say what the attorney wanted her to say.

Taking the unrebutted factual assertions of Ms. Smith as true, as a result of counsel's ineffective assistance of counsel in this case, counsel's advice to plead guilty was not within the range of competence demanded of attorneys in criminal cases. As a result, Ms. Smith's plea was not knowingly, intelligently, or voluntarily entered. Thus, there is a genuine issue of material fact which, if resolved in Ms. Smith's favor, would entitle Ms. Smith to relief such that the district court erred when it summarily dismissed this claim.

CONCLUSION

Ms. Smith respectfully requests that the district court's order summarily dismissing her claim be reversed and the matter remanded for further proceedings.

DATED this 26th day of March, 2012.



DIANE M. WALKER
Deputy State Appellate Public Defender

<u>CERTIFICATE OF MAILING</u>

I HEREBY CERTIFY that on this 26th day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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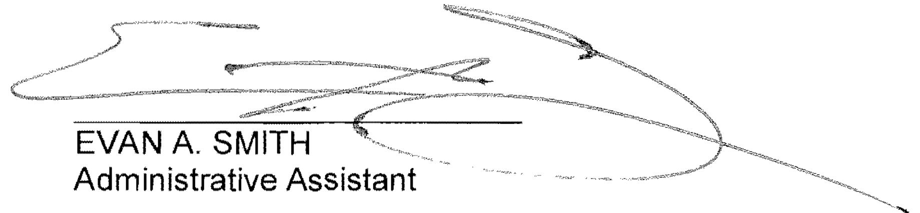

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DMW/tmf