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IN THE SUPREME COURT OF THE STATE OF IDAHO

PAUL J. CAVANAUGH,	)	
Petitioner-Appellant,	)	NO. 37706
v.	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
Respondent.	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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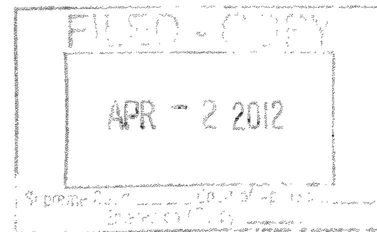

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STATEMENT OF THE CASE

Nature of the Case

Paul J. Cavanaugh appeals from the district court's order summarily dismissing his petition for post-conviction relief. Mr. Cavanaugh asserts that the district court erred when it concluded that there was not a disputed issue of material fact with respect to his allegation that he received ineffective assistance of counsel in *voir dire*.

Statement of the Facts and Course of Proceedings

Following a jury trial, Paul J. Cavanaugh was found guilty of vehicular manslaughter and leaving the scene of an injury accident. Mr. Cavanaugh was sentenced to a unified sentence of fifteen years, with eight years fixed, for the vehicular manslaughter charge and a concurrent fixed sentence of five years for the leaving the scene of an injury accident charge. *State v. Cavanaugh*, Docket No. 37705 (Ct. App. October 26, 2011) (unpublished) (*hereinafter, Cavanaugh I*). Mr. Cavanaugh has twice lost on direct appeal, first from the denial of a motion for new trial on a claim of newly discovered evidence, and then on direct appeal from the conviction itself.[1] *State v. Cavanaugh*, Docket No. 33657 (Ct. App. February 10, 2009) (unpublished); *Cavanaugh I*.

Following *Cavanaugh I*, Mr. Cavanaugh filed a verified petition for post-conviction relief, supported by nearly two hundred pages of exhibits, asserting a dozen claims of

[1] His direct appeal from the judgment of conviction in *Cavanaugh I* occurred several years after trial, and resulted from the district court granting his request for post-conviction relief in the form of a restoration of his right to appeal after his trial counsel failed to file a notice of appeal despite Mr. Cavanaugh's request. (R., pp.325-27.)

ineffective assistance of counsel.[2] (R., pp.4-60.) Among those claims was one challenging his attorney's failure to exclude several jurors, including juror R.H..[3] (R., pp.36-38.)

With respect to juror R.H., Mr. Cavanaugh emphasized juror R.H.'s colloquy with the court concerning his familiarity with the victim and at least one witness. (R., pp.36-37.) That colloquy is as follows:

> THE COURT: And do you know something about this case or have you read something about this case?
>
> A. I did. Where I work is just a short distance on this particular road from the event. Yes. My daughter worked with Sara [the victim]. I know one of the individuals they intend on calling as a witness. Do I think that I could judge fairly? Yes. But I don't know. I – what I've heard here by the prosecuting attorney and the defense attorney already today has changed my vision of what I believed happened so ....
>
> THE COURT: Knowing – or having heard about this case, do you feel that you could set aside what you've heard about this case and decide the case based solely upon the evidence that's presented during the course of this trial?
>
> A. I believe that I could.
>
> THE COURT: *And with regard to the individuals that you know of who may be a witness in this case or witnesses, do you feel that you would give that person or persons greater weight than you would someone else? Or lesser weight? Either one.*
>
> A. *I – it would – I would say greater weight.* Yes. Probably.
>
> THE COURT: Would this knowledge prevent you from acting with impartiality in this case.
>
> A. I don't believe so. Like I said, I – what I – the knowledge that I had until today has already been changed by what I have seen here.

---

[2] Although Mr. Cavanaugh's petition for post-conviction relief raised at least a dozen issues, he appeals only from the denial of his *voir dire* claim.
[3] On appeal, Mr. Cavanaugh only challenges the district court's dismissal of the claim as to R.H..

> THE COURT: Any other questions that you would have responded yes to?
>
> A. No.
>
> THE COURT: Thank you very much.
>
> A. Well, only that one question that I do – *I do know personally one of the individuals that you intend on calling* and my daughter worked with Sara at Stoneridge Resort. I did not know Sara. I work with people who did know her. All right. And this happened close to where I work.
>
> THE COURT: Thank you very much for providing us with that information.

(R., pp.119-20 (ellipsis in original) (emphases added).)

Defense counsel did not move to strike juror R.H. for cause (*See* R., pp.119-20), and he did not exercise all of his peremptory challenges, and juror R.H. was seated as a member of the jury. (R., p.132.) In his petition, Mr. Cavanaugh argued that there was no good reason to explain his attorney's failure to "pre-empt the most prejudiced juror mentioned." (R., p.37.)

In addition to filing an Answer (R., pp.223-43), the State filed a Motion for Summary Dismissal as to all claims except Mr. Cavanaugh's claim that his attorney was ineffective in failing to file a notice of appeal from the judgment of conviction. (R., pp.251-70.)

The district court then issued an Order Finding Ineffective Assistance of Trial Counsel and Order Permitting Filing of Appeal along with an Order Granting Summary Dismissal of Remaining Claims. (R., pp.325-332.) In summarily dismissing his remaining claims, the district court announced,

> To survive the State's motion, Mr. Cavanaugh must establish that there are material issues of fact which preclude the granting of the motion for summary dismissal. There has been no showing that his lawyers' actions

> fell below an objective standard of reasonableness. There has been an inadequate showing that the conduct of his lawyers so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The petition and other documents submitted by Mr. Cavanaugh, together with his argument at the hearing, failed to show that his trial counsel were ineffective before trial, during trial, and/or at sentencing, and that there is a reasonable probability that but for the conduct of his counsel, the outcome of the trial would have been different.

(R., p.332.)

Mr. Cavanaugh filed a Notice of Appeal timely from the district court's Order Granting Summary Dismissal of Remaining Claims. (R., p.334.)

ISSUE

Did the district court err when it summarily dismissed Mr. Cavanaugh's post-conviction claim?

ARGUMENT

The District Court Erred When It Dismissed Mr. Cavanaugh's Post-Conviction Claim

A. Introduction

The district court erred when it summarily dismissed Mr. Cavanaugh's claim that he received ineffective assistance of counsel when his attorney failed to exercise his final peremptory challenge to exclude juror R.H. He contends that the district court erred in finding, at the summary judgment stage, that failing to do so did not constitute deficient performance, and when it found that, assuming it was deficient, there was no prejudice shown.

B. Standards Of Review

1. Summary Dismissal

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 post-conviction 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 case where State did not file a response to petition) (citing *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519 (1982) (addressing 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 it 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 a material issue of fact exists. I.C. § 19-4906. When genuine issues of material fact exist that, if resolved in the applicant's favor, would entitle the applicant to relief, summary disposition is improper and an evidentiary hearing must be held. *Baldwin v. State*, 145 Idaho 148, 153 (2008). At the summary dismissal stage the petitioner need only present *prima facie* evidence of both prongs. *McKay v. State*, 148 Idaho 567, 571 (2010).

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 at 903 (citation omitted). The lower court's legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716 (1997).

2. <u>Ineffective Assistance Of Counsel</u>

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 its 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's 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).

C. <u>The District Court Erred When It Summarily Dismissed Mr. Cavanaugh's Post-Conviction Claim</u>

In its order summarily dismissing all but one of Mr. Cavanaugh's claims,[4] the district court, addressing them generally, wrote:

> To survive the State's motion, Mr. Cavanaugh must establish that there are material issues of fact which preclude the granting of the motion for summary dismissal. There has been no showing that his lawyers' actions fell below an objective standard of reasonableness. There has been an inadequate showing that the conduct of his lawyers so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The petition and other documents submitted by Mr. Cavanaugh, together with his argument at the hearing, failed to show that his trial counsel were ineffective before trial, during trial, and/or at sentencing, and that there is a reasonable probability that but for the conduct of his counsel, the outcome of the trial would have been different.

(R., p.332.)

[4] As noted above, the district court did grant Mr. Cavanaugh's claim concerning his attorney's failure to file a notice of appeal.

With respect to claims of ineffective assistance of counsel in decisions made during jury selection, this Court has held that such claims will not be second guessed unless a petitioner demonstrates that such a decision was "made upon the basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *State v. Elisondo*, 97 Idaho 425, 427 (1976) (internal quotation marks and footnote omitted).

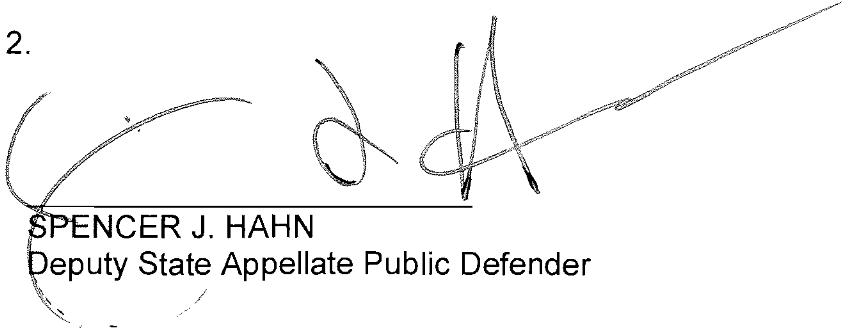
Mr. Cavanaugh presented unrebutted evidence that his attorney failed to strike a juror who admitted that he would be biased in favor of one of the witnesses. That juror ended up serving on the jury that convicted him. (R., pp.119-20,132.) This certainly represented a *prima facie* case for his claim of ineffective assistance of counsel that entitled Mr. Cavanaugh to a hearing on the issue. *See McKay v. State*, 148 Idaho 567, 571 (2010) (to survive summary dismissal motion, petitioner need only make a *prima facie* showing as to claim).

At an evidentiary hearing, Mr. Cavanaugh's former attorney could be examined to determine what reason he had for failing to exercise his final peremptory challenge to strike juror R.H. His testimony could then be evaluated to determine whether his reason represented a "shortcoming[] capable of objective evaluation." Because Mr. Cavanaugh made a *prima facie* showing of ineffective assistance of counsel, the district court erred when it summarily dismissed his post-conviction claim.

CONCLUSION

For the reasons set forth herein, Mr. Cavanaugh respectfully requests that this Court vacate the district court's order dismissing his post-conviction petition as to the claim raised in this appeal, and remand this matter for an evidentiary hearing on that claim.

DATED this 2nd day of April, 2012.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of April, 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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