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Cooke v. State Appellant's Brief 1 Dckt. 32447

LAW CLERK

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAX RITCHIE COOKE, Petitioner-Appellant,	)	NO. 32447
v.	)	
STATE OF IDAHO, Respondent.	)	APPELLANT'S BRIEF

BRIEF OF APPELLANT

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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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUE PRESENTED ON APPEAL 10

ARGUMENT 11

I. The District Court Erred In Summarily Dismissing Mr. Cooke's Amended Petition For Post-Conviction Relief 11

A. Mr. Cooke Raised A Genuine Issue Of Material Fact Regarding Ms. Cooke's Competence To Testify At Trial And, Thus, Is Entitled To An Evidentiary Hearing On Both Claims That Relate To That Issue 12

1. The District Court Erred By Relying On Its Memory Of Ms. Cooke's Testimony During Mr. Cooke's Underlying Criminal Case 14

2. The District Court Erred By Resolving Factual Issues At The Summary Dismissal Stage 16

3. The District Court Erred By Holding Mr. Cooke To The Incorrect Legal Standard 17

B. Mr. Cooke Raised A Genuine Issue Of Material Fact Regarding His Trial Counsel's Failure To Timely File A Notice Of Appeal And, Thus, Is Entitled To An Evidentiary Hearing On The Claim Related To That Issue 18

C. Mr. Cooke Raised A Genuine Issue Of Material Fact Regarding The Prison Paralegal's Refusal To Timely Notarize And Mail Mr. Cooke's Notice Of Appeal And, Thus, Is Entitled To An Evidentiary Hearing On The Claim Related To That Issue 19

CONCLUSION 21
CERTIFICATE OF MAILING 22

TABLE OF AUTHORITIES

Cases

Coontz v. State, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996) 12

Drapeau v. State, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982) 11

Holmes v. State, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983) 17

Martinez v. State, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995) 20

Matthews v. State, 122 Idaho 801, 839 P.2d 1215 (1992) 14

Peltier v. State, 119 Idaho 454, 808 P.2d 373 (1991) 11

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 19

State v. Hall, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986) 16

Tramel v. State, 92 Idaho 643, 448 P.2d 649 (1968) 11

Statutes

I.C. § 19-4906(b) 12, 17

I.C. § 19-4906(c) 11, 12, 17

I.C. §§ 19-4906, -4907 19

STATEMENT OF THE CASE

Nature of the Case

Max Ritchie Cooke is presently serving sentences for second degree kidnapping, aggravated battery, and assault. In 2004, Mr. Cooke initiated a post-conviction case through which he has raised collateral challenges to the convictions and sentences in his underlying criminal case.

Ultimately, Mr. Cooke's amended petition for post-conviction relief was summarily dismissed by the district court. Mr. Cooke now appeals the district court's order of summary dismissal, contending that he is entitled to an evidentiary hearing on each of the four claims for relief asserted in his amended petition.

Statement of the Facts and Course of Proceedings

In 2003, Max Ritchie Cooke was convicted of one count of second degree kidnapping, one count of aggravated battery, and one count of assault, and received three concurrent prison sentences. (R., pp.11-12; 48.) He remains in the custody of the Idaho Department of Correction. (R., pp.11; 48.)

On October 5, 2004, Mr. Cooke filed a *pro se* petition for post-conviction relief and an attached affidavit of supporting facts. (R., pp.11-20.) The State filed two responsive memoranda, one on November 12, 2004, and one on January 28, 2005. (R., pp.34-38; 39-42.)

On April 6, 2005, the district court issued an order purporting to dismiss Mr. Cooke's petition, but at the same time allowing Mr. Cooke approximately 60 days to file an amended petition.[1] (R., pp.45-46.)

On June 6, 2005, Mr. Cooke, this time through counsel, filed a verified Amended Petition for Post-Conviction Relief. (R., pp.47-52.) In his amended petition, Mr. Cooke asserted four claims for relief:

1) There is new evidence, not previously presented, which requires vacation of Mr. Cooke's conviction. Specifically, there is previously-unpresented evidence indicating that one of the State's key witnesses, the victim of Mr. Cooke's alleged crimes, Alison Cooke, was not competent to have testified at Mr. Cooke's trial due to memory losses suffered as a result of head injuries sustained in a motor vehicle accident.

2) Mr. Cooke's trial counsel was ineffective for failing to: (a) procure the services of a medical expert who could have testified as to Ms. Cooke's incompetence or, at least, impeached her testimony with evidence that she was at substantial risk for having false memories; and (b) adequately cross-examining Ms. Cooke regarding her memory loss.

3) Mr. Cooke's trial counsel was ineffective for failing to timely file a notice of appeal as requested by Mr. Cooke.

4) Mr. Cooke was prevented from timely filing a *pro se* notice of appeal when the prison paralegal misadvised Mr. Cooke as to his filing deadline and refused to notarize or mail Mr. Cooke's notice of appeal.[2]

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[1] It is Mr. Cooke's position that the district court's order, because it specifically contemplated the continuation of the same case, was more akin to a notice of intent to dismiss than an actual order of dismissal. (*See* R., p.45.)

[2] Mr. Cooke apparently abandoned a number of claims, originally made in his initial petition and affidavit, regarding his trial counsel's alleged ineffective assistance. (*Compare* R., pp.16-19 (original affidavit alleging ineffectiveness for failing to: (a) hire an investigator and/or accident reconstructionist; (b) call certain witnesses; (c) communicate with Mr. Cooke or provide Mr. Cooke with discovery materials; and (d) correct certain errors in the presentence investigation report) *with* 47-52 (amended petition asserting only the above-identified claims).) Nevertheless, the claim regarding trial counsel's alleged failure to hire an investigator was argued by the parties and ruled upon by the district court. (*See* Tr. Vol. II, p.2, Ls.13-15 (Mr. Bourne's assertion that "I think there is a claim that he failed to hire an accident reconstructionist"), p.10, L.9 – p.11, L.19 (colloquy between district court and Mr. Cooke's counsel regarding the accident reconstruction report that was actually used at Mr. Cooke's trial), p.12, L.8 - p.14, L.10 (identifying district court's concern that it could not know if the reconstruction report used at trial was inaccurate since Mr. Cooke had failed to obtain a second report in conjunction with his post-conviction case); p.16, L.22 – p.17, L.6 (apparently ruling on claim relating to accident reconstructionist); R., p.86 (denying claim relating to accident reconstructionist because "[t]he Court finds that the petitioner has failed to carry his

(*See* R., pp.47-52.) Mr. Cooke attached to his amended petition four affidavits. (*See generally* R., pp.54-61 (affidavit of Allison Cooke, attaching documents, including a medical report detailing her head injuries and the impact those injuries had on her memory and mental functioning generally,[3] as well as a letter describing the motor vehicle accident which caused those injuries, asserting that, because of her memory problems, she was not competent when she testified at Mr. Cooke's trial), 62-63 (affidavit of Mr. Cooke detailing his conversations with the prison paralegal, and asserting that she refused to notarize his notice of appeal), 64-65 (affidavit of Mr. Cooke detailing his conversations with his trial counsel, and asserting that immediately after being sentenced he specifically requested that a notice of appeal be filed), 66-69 (affidavit of Timothy D. McMillin).)

On July 1, 2005, the State filed a joint response/motion for summary dismissal. (R., pp.71-74.) With regard to Mr. Cooke's two claims relating to Ms. Cook's memory loss, the State asserted that: (a) Ms. Cooke was, in fact, competent and reliable to testify at Mr. Cooke's trial;[4] (b) because they were not contemporaneous with Ms. Cooke's trial testimony, the medical report attached to her affidavit, the letter

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burden to prove that trial counsel was ineffective" for failing to hire an independent accident reconstructionist).)

Notwithstanding the fact that this particular claim was apparently tried by consent of the parties, *see* I.R.C.P. 15(b), Mr. Cooke does not now appeal the summary dismissal of that claim. He concedes that because he only alleged that, "[t]o the best of [his] knowledge" his trial counsel failed to hire an accident reconstructionst (as opposed to a more affirmative statement of fact) (R., p.16), he has failed to raise a genuine issue of material fact. However, this allegation is interesting since it makes it clear that Mr. Cooke was not kept abreast of the status of his case.

[3] That medical report states that Ms. Cooke had received "a severe traumatic brain injury," that she was "disoriented and easily confused," that, "[s]he was not oriented to city, month, day of the month, or year," that she could not perform simple multiplication, that, "[s]he still appears to be in posttraumatic amnesia and has severe deficits with memory," that her "[r]easoning is ... still in the severe range of impairment," that she "is still demonstrating very severe problems with confusion, disorientation and severe memory impairment," that she is not "competent or even appropriate for a police or forensic evaluation or interview at this time," and that "her information will likely be misleading, unreliable, and she is at risk for developing new memories or false memories rather than accurately recalling what happened ..." (R., pp.59-60.)

attached to her affidavit, and the affidavit itself, are not relevant to Ms. Cooke's ability to accurately remember anything at the time she testified; and (c) as far as counsel for the State can personally recall, Ms. Cooke's letter and affidavit are consistent with her trial testimony and Ms. Cooke testified that she could remember some facts, but could not remember others.[5] (R., pp.72-73.) With regard to Mr. Cooke's claim of ineffective assistance of counsel for his attorney's failure to timely file a notice of appeal, the State, relying on an affidavit from Mr. Cooke's trial attorney, refuted Mr. Cook's characterization of the facts and claimed that Mr. Cooke's request for an appeal was made after the 42-day time limit for filing an appeal. (R., pp.73-74; 77-78.) Finally, with regard to Mr. Cooke's claim of denial of access to the courts, the State, relying on an affidavit from Janel Gardner, the prison paralegal, again refuted Mr. Cook's characterization of the facts and claimed that the prison paralegal did not misadvise Mr. Cooke regarding his time limit for filing a notice of appeal. (R., p.74; Affidavit of Janel Gardner, pp.1-2.)[6] The State did not directly dispute, however, Mr. Cooke's contention that the paralegal had refused to notarize and mail his notice of appeal. (*See* Affidavit of Janel Gardner, pp.1-2.)[7]

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[4] The State offered no evidentiary support for this contention.

[5] Because these allegations of fact by Roger Bourne, the prosecutor who evidently called Ms. Cooke to testify against Mr. Cooke, and who also drafted the State's motion for summary dismissal, are not supported by any evidence, such as an affidavit signed by Mr. Bourne, they are not evidence. *Meckling v. Fontes*, 125 Idaho 689, 693, 873 P.2d 1343, 1347 (Ct. App. 1994).

[6] Ms. Gardner's affidavit is attached to a Motion to Augment Record, which is filed contemporaneously herewith.

[7] The paralegal's affidavit admits that she does sometimes "turn inmates away" if they have not scheduled an appointment or if their paperwork is not complete, but it does not state whether she, in fact, turned Mr. Cooke away and, if so, specifically why she did so. (*See* Affidavit of Janel Gardner, p.2.)

On September 28, 2005, the district court held a hearing on the State's motion for summary dismissal. (*See generally* R., pp.83-84; Tr. Vol. II.)[8] With regard to Mr. Cooke's two claims relating to Ms. Cooke's memory loss, Mr. Bourne, arguing for summary dismissal: (a) urged the district court to *remember* Ms. Cooke's testimony, and to find that Ms. Cooke was, in fact, competent when she gave that testimony (Tr. Vol. II, p.3, Ls.8-19); (b) offered *his opinion* that the jury rendered the verdicts that it did because it discounted Ms. Cooke's testimony to a certain degree, thereby indicating, perhaps, that Ms. Cooke was adequately impeached (*See* Tr., p.3, L.20 – p.4, L.4); (c) argued that, "the petitioner hasn't carried *his burden of proving* that there was more that could have been done to cross-examine Allison Cooke about the state of her memory" (Tr., p.4, Ls.5-8 (emphasis added)).

With regard to Mr. Cooke's claim of ineffective assistance of counsel for his attorney's failure to timely file a notice of appeal, Mr. Bourne argued that Mr. Cooke's trial counsel's affidavit was more persuasive than Mr. Cooke's own sworn statements because it was corroborated by the prison paralegal's affidavit.[9] (Tr. Vol. II, p.4, L.15 – p.5, L.9.) He also argued that, assuming Mr. Cooke's counsel had rendered deficient performance by failing to timely file a notice of appeal, Mr. Cooke could not demonstrate any prejudice because he failed to identify what issue might have been appealed and he failed prove that he would have been successful on appeal. (Tr. Vol. II, p.5, L.10 –

[8] There are two separately-bound transcripts in the record in this case. The transcript of an August 16, 2005, hearing is referenced herein as "Tr. Vol. I," and the transcript of the September 28, 2005, hearing is referenced as "Tr. Vol. II."

[9] It is notable that in arguing that the two affidavits (both of which appear to have been drafted by Mr. Bourne himself) corroborate one another, Mr. Bourne discussed his "recollection" of facts which don't appear in either affidavit. (*Compare* Tr. Vol. II, p.4, L.18 – p.5, L.1 (arguing that the paralegal had records showing that Mr. Cooke made certain requests on certain dates and that these dates were consistent with Mr. Cooke's trial attorney's records) *with* R., pp.76-78 (trial counsel's affidavit, which vaguely asserts that

p.6, L.2.) Finally, with regard to Mr. Cooke's claim of denial of access to the courts, Mr. Bourne argued implicitly that the prison paralegal's affidavit was more persuasive than Mr. Cooke's own sworn statements (*See* Tr. Vol. II, p.4, L.17 – p.5, L.1) and expressed *his* opinion of what the true facts are: "I think that the defendant went there [to the prison paralegal] late then asked her to file certain things or mail certain things to the attorney, which she did and it—and it was too late." (Tr. Vol. II, p.5, Ls.2-5.)

After Mr. Bourne concluded his remarks, Mr. Cooke's counsel presented arguments in opposition to summary dismissal and fielded numerous questions posed by the district court. (*See generally* Tr. Vol. II, p.6, L.8 – p.15, L.5.) During that colloquy, the district court made it clear that, based on its memory of Mr. Cooke's underlying criminal case, it disagreed with Mr. Cooke's counsel's characterization of the letter attached to Ms. Cooke's affidavit:

> THE COURT: She never testified to that at the trial. She didn't testify as to whether or not this was an accident, a true accident. The evidence that came out at the trial was is [sic] that, from the investigation, it was apparent to those that investigated this case that Mr. Ritchie [sic], after the vehicle left the road, accelerated. He did not decelerate. There was no braking. It was acceleration demonstrated through that field. So, Ms. Cooke did not testify to that.[10]

(Tr. Vol. II, p.10, Ls.9-17.) Ultimately, the district court granted the State's motion for summary dismissal. (Tr. Vol. II, p.16, L.6 – p.18, L.3.) The district court based its grant of summary dismissal upon two conclusions. First, it found that Mr. Cooke failed to show that Ms. Cooke was incompetent when she testified because "[t]he court can

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Mr. Cooke did not request an appeal until after the 42-day time limit had run) *and* Affidavit of Janel Gardner (saying nothing about the dates when any interactions with Mr. Cooke had occurred).)

[10] Interestingly, the district court's recollection of the underlying criminal case differs markedly from Mr. Bourne's recollection of that case (R., p.73 ("The undersigned's recollection of her testimony is that her letter and affidavit are generally consistent with her testimony.").) Moreover, it demonstrates precisely why Mr. Cooke should receive a new trial: because Ms. Cooke's testimony, which the State used against

certainly take notice of the fact that she—during the course of her direct as well as cross-examination, she was oriented as to time, date, and place. She was responsive to the questions before her. She readily admitted that she had memory lapses during that process." (Tr. Vol. II, p.16, Ls.11-18.) Second, it concluded that the outcome of Mr. Cooke's case would not have been different if he had appealed his conviction. (Tr. Vol. II, p.17, Ls.7-23.)

On October 6, 2005, the district court entered an order memorializing and adding further detail to its grant of the State's motion for summary disposition.[11] (*See generally* R., pp.85-88.) With regard to Ms. Cooke's trial testimony (which, of course, relates to the first and second claims in Mr. Cooke's amended petition), the district court summarily rejected Ms. Cooke's sworn statement in which she asserted that her memory was not intact, and that she did not know what was going on, when she testified at Mr. Cooke's trial. (R., p.86.) It apparently did so based on its memory of Ms. Cooke's trial testimony and its belief, based upon that recollection, that Ms. Cooke was lucid when she testified: "The Court takes notice that when Ms. Cooke testified, she was oriented as to time and place and was able to testify that she remembered

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Mr. Cooke, was markedly different from the facts that Ms. Cooke recalls now that she has more fully recovered from her brain injuries.

[11] As was set forth in some detail in Mr. Cooke's Motion to Remand Case, filed with this Court on August 1, 2006, it is Mr. Cooke's contention that the district court's October 6, 2005 order looks more like a notice of intent to dismiss than an actual order of dismissal because it allowed Mr. Cooke twenty days in which to file an second amended petition for post-conviction relief. (R., p.88.) However, this Court determined that that order is, in fact, a final appealable order. (Order Denying Motion to Remand Case (Sept. 13, 2006).)

This Court's Order Denying Motion to Remand Case holds that, "the Order Dismissing Petition Petition for Post Conviction Relief filed with this Court November 7, 2005, is final." (Order Denying Motion to Remand Case, p.1.) Undersigned counsel presumes that the November 7, 2005, order in question is the same order that the district court issued on October 6, 2005, since the district court has informed undersigned counsel that the October 6, 2005, order was the last document filed in Mr. Cooke's case in the district court, and this Court has provided undersigned counsel with a copy of the October 6, 2005, order which also bears a file stamp from this Court indicating that it was received on November 7, 2005.

certain things and did not remember others. She was responsive to questions and was appropriate in every respect. The jury was informed through her testimony that she had some memory lapses." (R., p.86.) The district court also discounted the medical evidence related to Ms. Cooke's brain injury because that injury and the subsequent medical report preceded Ms. Cooke's trial testimony by five months. (R., p.86.) Ultimately, the district court ruled that Mr. Cooke's claims failed because he failed to prove that Ms. Cooke was incompetent: "The Court is satisfied that Ms. Cooke was competent to testify. The petitioner has not carried his burden to show that trial counsel was ineffective in any respect regarding Ms. Cooke." (R., p.86.)

With regard to Mr. Cooke's trial attorney's failure to timely file a notice of appeal on Mr. Cooke's behalf (which relates to the third claim in Mr. Cooke's amended petition), the district court, after reviewing the evidence proffered by both parties, chose to believe the State's evidence over that which was offered by Mr. Cooke: "After a review of the affidavit of trial counsel and of the prison paralegal, the Court finds that the petitioner did not ask trial counsel to file an appeal until after the appeal time had run." (R., p.87.) The district court also ruled, alternatively, that Mr. Cooke could not prevail as a matter of law because, even if Mr. Cooke's trial counsel had timely been asked to file a notice of appeal, Mr. Cooke failed to even allege prejudice from trial counsel's failure to do so because Mr. Cooke did not point out what issue might have been appealed, much less did he prove that he could have won on appeal:

> Further, the Court finds that the petitioner has not shown that there was any appealable issue. The Court is satisfied that the verdict and the sentence are fully supported by the record. The Court knows of no appealable issue which would likely have been settled in the petitioner's favor. The Court finds that the petitioner has not shown ineffective

> assistance of counsel regarding the appeal and has not shown prejudice to himself from the lack of an appeal.

(R., p.87.)

In its October 6, 2005, order summarily dismissing Mr. Cooke's amended petition, the district court did not even address Mr. Cooke's fourth claim in his amended petition—that he had been denied access to the courts when the prison paralegal refused to notarize Mr. Cooke's notice of appeal. (*See generally* R., pp.85-88.) Rather, after discussing Mr. Cooke's third claim, the district court concluded by dismissing Mr. Cooke's amended petition entirely: "[T]he State's Motion to Dismiss the Amended Petition is granted and the Amended Petition is dismissed. The petitioner has twenty days from September 28, 2005, to file an Amended Petition for Post Conviction Relief." (R., pp.87-88.)

Instead of filing a second amended petition for post-conviction relief, on October 27, 2005, Mr. Cooke filed a Notice of Appeal. (R., pp.89-91.) On appeal, Mr. Cooke contends that the district court erred in summarily dismissing his amended petition for post-conviction relief, and he requests that the order of dismissal be vacated and his case remanded for an evidentiary hearing on each of his four claims.

ISSUE

Did the district err in summarily dismissing Mr. Cooke's amended petition for post-conviction relief?

ARGUMENT

I.

The District Court Erred In Summarily Dismissing Mr. Cooke's Amended Petition For Post-Conviction Relief

A Petition for Post-Conviction Relief is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter,* UPCPA) (I.C. §§ 19-4901 to -4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456, 808 P.2d at 375.

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of post-conviction petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c).[12] In analyzing a post-conviction petition under this standard, the district court need not "accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Martinez*, 126 Idaho at 816-817, 892 P.2d at 491-492. However, if the petitioner presents some shred of evidentiary support for his allegations, the district court must take the petitioner's allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646, 448 P.2d 649, 652 (1968). This is so even if the allegations appear incredible on their face. *Id.* Thus, only after the State controverts the petitioner's allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982). But in doing so, it must

[12] Although this standard is set forth in section 19-4906(c), which deals with motions for summary disposition, it appears to apply to *sua sponte* dismissals as well. *See, e.g., Small*, 132 Idaho at 331, 971 P.2d at 1155 (discussing the standard for summary disposition under section 19-4906 *generally* as being whether a genuine issue of material fact has been presented).

still liberally construe the facts and draw reasonable inferences in favor of the petitioner, *Small*, 132 Idaho at 331, 971 P.2d at 1155. The district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Coontz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996).

If a question of material fact is presented, the district court *must* conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331, 971 P.2d at 1155. If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

In this case, Mr. Cooke asserts that he has presented sufficient evidence to raise a genuine issue of material fact as to each of the four claims raised in his amended petition for post-conviction relief. He contends that the district court, therefore, erred in summarily dismissing his amended petition, and he requests that the district court's order of dismissal be vacated, and that his case be remanded for an evidentiary hearing.

A. Mr. Cooke Raised A Genuine Issue Of Material Fact Regarding Ms. Cooke's Competence To Testify At Trial And, Thus, Is Entitled To An Evidentiary Hearing On Both Claims That Relate To That Issue

The first two claims raised in Mr. Cooke's amended petition (new evidence and ineffective assistance of counsel) involve his contention that the alleged victim in his underlying criminal case, Ms. Cooke, was incompetent to testify or, at the very least, wholly unreliable, based upon her lack of memory of the events to which she testified at Mr. Cooke's trial. (R., pp.49-50.) In support of this claim, Mr. Cooke proffered: (1) a medical report showing that five months prior to Mr. Cooke's trial, Ms. Cooke sustained

severe brain injuries resulting in significant memory impairment and causing her to be highly susceptible to false memories (R., pp.59-60); and (2) an affidavit from Ms. Cooke, with an attached letter, which together discussed her current memory of the night in question and asserted that, given the nature of her injuries and the fact that she does not even remember the trial, she believes that she was in no shape to have testified reliably against Mr. Cooke. (R., pp.54-59.)

In response, the State attacked the medical report and the affidavit as not being contemporaneous with Ms. Cooke's trial testimony and, therefore, "not relevant," and it asserted, without any evidentiary support, that, in fact, Ms. Cooke was competent to testify at trial.[13] Ultimately, the district court relied on its memory of Ms. Cooke's testimony to find that she was, in fact, competent when she testified against Mr. Cooke. (R., p.86; Tr. Vol. II, p.10, Ls.9-17, p.16, Ls.11-18.) Thus, it concluded that Mr. Cooke "has not carried his burden to show" that Ms. Cooke was incompetent or that her testimony was unreliable. (R., p.86; Tr. Vol. II, p.16, Ls.11-18.)

Mr. Cooke contends that the district court erred in at least three respects: (1) by relying on its memory of Ms. Cooke's testimony; (2) by prematurely resolving the factual question of whether Ms. Cooke was competent and gave reliable testimony; and (3) apparently holding Mr. Cooke to the wrong standard by requiring him to prove that Ms. Cooke was incompetent or unreliable *prior* to an evidentiary hearing.

[13] As should be clear from the above statement of facts, rather than putting a transcript or audio tape of Ms. Cooke's testimony before the district court, or even asking the district court to take judicial notice of such a transcript or tape, the prosecutor, Roger Bourne, spoke of Ms. Cooke's testimony based on his memory and urged the district court to rely on its own memory. (R., pp.72-73; Tr. Vol. II, p.3, L.8 - p.4, L.4.)

1. The District Court Erred By Relying On Its Memory Of Ms. Cooke's Testimony During Mr. Cooke's Underlying Criminal Case

Although the district court surely could have considered a transcript or audio tape of Ms. Cooke's trial testimony, the State never proffered such a transcript or tape and, instead, actually requested that the district court to rely on its memory of the trial in Mr. Cooke's underlying criminal case. (Tr. Vol. II, p.3, L.8 – p.4, L.4.) Apparently, the district court acceded to this request since it discussed the trial evidence fairly extensively with Mr. Cooke's counsel (Tr. Vol. II, p.9, L.23 – p.11, L.19, p.13),[14] and then went on to "take notice of the fact" that Ms. Cooke appeared competent to the district court when she testified (R., p.86; Tr. Vol. II, p.16, Ls.13-18), without citing to any transcripts or audio tapes in the underlying case.

In *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992), the Idaho Supreme Court disapproved of just such a practice. In that case the petitioner alleged that he had received ineffective assistance of counsel. *Id.* at 805-807, 839 P.2d at 1219-1221. In summarily dismissing those claims, the district court took "judicial notice of the proceedings which took place before it and determine[d] that the defendant received competent representation at trial. The case was vigorously defended and the issues appropriate for consideration were raised." *Id.* at 807, 839 P.2d at 1221. On appeal, the Idaho Supreme Court vacated the district court's summary dismissal of the petitioner's ineffective assistance claims, holding as follows:

> The "record" relied upon by the district court consisted only of its "judicial notice" of the trial proceedings over which, of course, the trial judge had presided. However, there does not appear to be any statutory provision or case law precedent which elevates the taking of judicial notices to the

[14] Notably, it is clear that Mr. Cooke's counsel had not actually read or heard that evidence since he had to rely on what had been told to him about the trial from his client. (Tr. Vol. II, p.9, Ls.23-25.)

> equivalent level of a court record. On the latter, the court may base a *sua sponte* dismissal, but not where a taking of judicial notice, by recollection is relied upon.
>
> Idaho Rule of Evidence 201 limits the scope of facts which may be judicially noticed to those "not subject to reasonable dispute in that [they] are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." We are not apprised that the facts surrounding the representation of petitioner at the trial and on appeal are generally known in the territorial jurisdiction of the court. Facts may not be judicially noticed simply because they are within the personal recollected knowledge of the judge, if those facts are not also generally known in the jurisdiction.
>
> Additionally, the facts attendant to the trial and in turn the appeal are not capable of accurate and ready determination .... Judicial notice taken of prior reported but not transcribed testimony cannot be allowed because conclusions drawn from that source are incapable of being reviewed by an appellate court.
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> ...
>
> [W]e hold that prior to dismissing a petition for post-conviction relief, the district court is required to obtain that portion of the trial transcript as is necessary to a determination "on the basis of the application, the answer or motion, and the record," that there are no material issues of fact and that the petitioner is not entitled to post-conviction relief. In some case, no transcript will be necessary because the petition may be deficient on its face. In other cases, a partial transcript may be all that is required to satisfy the statute.

Id. at 807-808, 839 P.2d at 1221-1222 (citations and footnotes omitted). This case is no different. In this case, just as in *Matthews*, the district court took notice of what it had observed while presiding over the petitioner's underlying criminal trial. Accordingly, a similar result should obtain—the district court's order of summary dismissal should be vacated and Mr. Cooke's case should be remanded for an evidentiary hearing.

2. The District Court Erred By Resolving Factual Issues At The Summary Dismissal Stage

Even if the district court was correct to have taken notice of its own memory of the goings-on at Mr. Cooke's trial, its summary dismissal of Mr. Cooke's amended petition still turned on: (a) its weighing of its recollection of that testimony against the medical report, prepared five months before trial, indicating that Ms. Cooke's memory was severely impaired and that she was highly susceptible to false memories, and Ms. Cooke's subsequent statements about her memory of the incident in question, and her belief that she was greatly impaired when she testified; and (b) its ultimate factual determination that Ms. Cooke was competent when she testified. (R., p.86; Tr. Vol. II, p.16, Ls.11-21.)

Mr. Cooke contends that this weighing of competing evidence to arrive at a factual conclusion was contrary to the mandate of the UPCPA. As noted above, at the summary dismissal stage, even controverted facts must be liberally construed and all reasonable inferences must be drawn in favor of the petitioner, and, if a genuine issue of fact is raised, the district court must provide the petitioner with an evidentiary hearing. *Small*, 132 Idaho at 331, 971 P.2d at 1155. Thus, where Mr. Cooke proffered evidence which, although not necessarily dispositive as to Ms. Cooke's state of memory at the time of trial, certainly tended to indicate that Ms. Cooke's memory might have been flawed at the time of her testimony such that she was not competent to give such testimony,[15] he at least raised a genuine issue of material fact which required the district

[15] A witness may be deemed incompetent under I.R.E. 601 if she has no memory of the events in question or if her memory is not genuine. *See State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

court to have conducted an evidentiary hearing. *See* I.C. § 19-4906(b), (c); *Small*, 132 Idaho at 331, 971 P.2d at 1155. Because the district court failed to provide such an evidentiary hearing as required under the UPCPA, this Court should vacate the district court's order of summary dismissal and remand Mr. Cooke's case for such a hearing.

3. The District Court Erred By Holding Mr. Cooke To The Incorrect Legal Standard

Although closely related to the argument presented in part I(A)(2)—that the district court was premature in seeking to weigh the evidence and find the facts necessary to fully evaluate Mr. Cooke's amended petition—Mr. Cooke argues separately that the district court further erred by apparently applying the wrong legal standard in dismissing his amended petition. He contends that the district court prematurely required him to *prove* that Ms. Cooke was incompetent, even though the appropriate question at the summary dismissal stage is whether he has presented evidence to raise a genuine issue as to whether Ms. Cooke was incompetent.

In its order granting the State's motion for summary dismissal, the district court seemed to say that Mr. Cooke could only survive summary dismissal if his petition, together with the record, *proved* his claims: "The Court is satisfied that Ms. Cooke was competent to testify. The petitioner has not carried his burden to show that trial counsel was ineffective in any respect regarding Ms. Cooke." (R., p.86.) To the extent that this was the standard applied, the district court violated the UPCPA, which provides that standard for summary dismissal is whether the petitioner has raised a genuine issue of material fact. *Compare* I.C. § 19-4906(c) (articulating the standard for summary dismissal) *with Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983) (holding that the burden on the petitioner at an evidentiary hearing is to prove his allegations by

a preponderance of the evidence). Thus, to the extent that the district court applied the wrong standard, this Court should vacate the order of dismissal and remand Mr. Cooke's case for an evidentiary hearing.

B. Mr. Cooke Raised A Genuine Issue Of Material Fact Regarding His Trial Counsel's Failure To Timely File A Notice Of Appeal And, Thus, Is Entitled To An Evidentiary Hearing On The Claim Related To That Issue

The third claim in Mr. Cooke's amended petition was that his trial counsel provided him with ineffective assistance for failing to timely file a notice of appeal, even though he had specifically requested an appeal on the day he was sentenced. (R., pp.50-51.) However, the district court summarily dismissed this claim on two grounds: first, the district court believed Mr. Cooke's trial counsel over Mr. Cooke and found that Mr. Cooke had not timely requested that an appeal be filed (R., p.87); and second, the district court found that because Mr. Cooke had not said what issue might have been successfully appealed, Mr. Cooke would not have suffered any prejudice even if his trial counsel had rendered a deficient performance by failing to file a notice of appeal which had been timely requested. (R., p.87; Tr. Vol. II, p.17, Ls.7-23.)

Mr. Cooke contends that both of the district court's conclusions were in error. With regard to the district court's factual finding that, contrary to Mr. Cooke's verified amended petition and sworn affidavit (R., p.50, 64-65), he had not, timely requested that his attorney initiate an appeal, the district court's fact-finding was premature. As explained fully in Parts I(A)(2) and (3), above, the relevant inquiry at the summary dismissal stage is whether the petitioner has presented evidence sufficient to raise a genuine issue of material fact. If so, of course, the district court should not seek to resolve that question of fact until after it has provided the petitioner with the statutorily

required evidentiary hearing. I.C. §§ 19-4906, -4907. In this case, Mr. Cooke's verified petition and affidavit did raise such a question of fact. Because Mr. Cooke said one thing and his trial counsel said another, there was a disputed question of fact which necessitated an evidentiary hearing.

With regard to the district court's conclusion that Mr. Cooke's trial counsel could not have rendered ineffective assistance for failing to timely file a notice of appeal unless Mr. Cooke could prove that he would have prevailed on appeal, the district court simply misapprehended the law. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the United States Supreme Court held that deficient performance results if "this particular defendant reasonably demonstrated to counsel that he was interested in appealing," and that under such circumstances *prejudice is presumed* "with no further showing from the defendant of the merits of his underlying claims." *Flores-Ortega*, 528 U.S. at 480, 483-484.

Because the district court's factual finding was premature and because the district court's legal conclusion was incorrect as a matter of law, the district court erred in summarily dismissing Mr. Cooke's claim that his trial counsel failed to timely file a notice of appeal as requested. Accordingly, this Court should vacate the district court's summary dismissal order and remand Mr. Cooke's case for an evidentiary hearing.

C. Mr. Cooke Raised A Genuine Issue Of Material Fact Regarding The Prison Paralegal's Refusal To Timely Notarize And Mail Mr. Cooke's Notice Of Appeal And, Thus, Is Entitled To An Evidentiary Hearing On The Claim Related To That Issue

The fourth claim in Mr. Cooke's amended petition was that he was denied access to the courts when the prison paralegal misadvised him of the date on which his notice of appeal was due, and then proceeded to refuse to notarize or mail Mr. Cooke's *pro se*

notice of appeal. (R., pp.50-51; 62-63.) Although the State refuted the factual allegations presented in Mr. Cooke's verified amended petition and his sworn affidavit (R., p.74; Affidavit of Janel Gardner, pp.1-2; Tr. Vol. II, p.4, L.17 – p.5, L.5),[16] the district court never recognized the factual dispute and, in fact, never even ruled specifically on this particular claim. (*See generally* R., pp.85-88 (district court's summary dismissal order); Tr. Vol. II. (transcript of hearing on State's motion for summary dismissal).)

Because the district court never specifically addressed Mr. Cooke's fourth claim for relief, but nevertheless denied Mr. Cooke's amended petition in its entirety, the district court must be presumed to have dismissed that claim on the grounds set forth in the State's responsive pleading.[17] However, since the arguments proffered by the State amount to nothing more than an attempt to rebut *some* of the evidence offered through Mr. Cooke's verified amended petition and sworn affidavit, they demonstrate the existence of a material question of fact which, as discussed at length above, may only be resolved through an evidentiary hearing.

Because the district court's order of summary dismissal of this particular claim apparently turned on the district court's premature weighing of evidence and resolving a factual dispute, it was in error. Accordingly, this Court should vacate the district court's summary dismissal order and remand Mr. Cooke's case for an evidentiary hearing.

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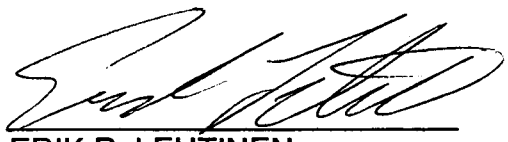
[16] As discussed above in note 7, the State did not offer any evidence to refute Mr. Cooke's allegation that the prison paralegal refused to notarize and mail his notice of appeal. The only argument that the State offered as to this point was Mr. Bourne's personal opinion about the true facts: "I think that the defendant went there late and then asked her to file certain things or mail certain things to the attorney, which she did, and it—and it was too late." (Tr. Vol. II, p.5, Ls.2-5.)

[17] Otherwise, the dismissal would be deemed to be a *sua sponte* dismissal under I.C. § 19-4906(b) for which the district court failed to give adequate prior notice. *Martinez v. State*, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).

CONCLUSION

For the foregoing reasons, Mr. Cooke respectfully requests that this Court vacate the district court's order summarily dismissing Mr. Cooke's amended petition for post-conviction relief, and that it remand his case for an evidentiary hearing as to all four of his claims.

DATED this 11th day of October, 2006.



ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of October, 2006, 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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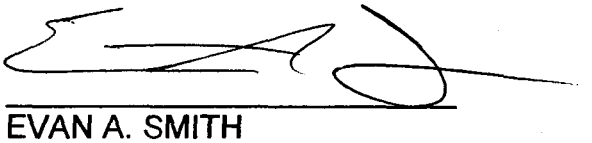

EVAN A. SMITH
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ERL/eas