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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

DAVID S. BEGLEY,	)	
	)	NO. 39892
Petitioner-Appellant,	)	
	)	Dist. Ct. No. CV-2011-1607
vs.	)	Canyon County
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE THOMAS J. RYAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

David S. Begley appeals from the summary dismissal of his petition for post-conviction relief.

Statement of Facts and Course of the Proceedings

The relevant facts and course of proceedings of the underlying case were outlined by the district court in its order denying motion for summary disposition and notice of intent to dismiss:

> On June 5, 2008, a Grand Jury indicted Begley on three counts of Lewd Conduct with a Child Under 16 Years of Age in Case Number CR-2008-16840-C. On March 27, 2009, a Status Conference was held and a plea agreement was reached between the State, Begley, and his then attorney Richard L. Harris (hereinafter, Harris). The State agreed to dismiss all charges in CR-2008-16840-C, and thereafter, on March 27, 2009 the State filed a new case, CR-2009-10663-C, against Begley charging him with one count of Felony Injury to a Child, in violation of I.C. § 18.1501(1).
>
> On March 27, 2009, Begley and Harris completed a Guilty Plea Advisory form, which included information regarding Begley's right to be represented by an attorney and that upon request this Court would appoint an attorney to be paid by the county. Begley entered an Alford Plea with this Court. Begley stated he was fully advised of the circumstances of this case. Furthermore, Begley was notified of the maximum and minimum sentence associated with this crime. And finally, this Court informed Begley that it was not bound by any sentencing recommendations offered to the Court.
>
> On March 27, 2009, this Court ordered a Presentence Investigation Report, which included a polygraph report, character reference letters, and a Psychosexual Evaluation.
>
> On June 3, 2009, Begley's counsel filed a Sentencing Memorandum.

> On June 9, 2009, this Court held a sentencing hearing at which time one alleged victim and several character witnesses on behalf of Begley provided testimony. This Court had reviewed the Presentence Investigation Report. This Court found Begley guilty of the offense of Felony Injury to Child, I.C. § 18.1501(1), and sentenced Begley within the law to ten years in the state penitentiary, one year fixed, nine years indeterminate.
>
> On June 15, 2009, this Court entered a Judgment and Commitment that Begley had been convicted upon his plea of guilty to the offense of Injury to Child.
>
> On June 24, 2009, Begley filed a Motion to Correct or Reduce Sentence Pursuant to Rule 35, ICR.
>
> On June 26, 2009, the State filed its objection to Rule 35 Motion and Request for Hearing.
>
> On July 10, 2009, Begley filed a notice of Appeal.
>
> On October 1, 2009, this Court denied Begley's Motion for Reduction of Sentence.
>
> On March 26, 2010, the Court of Appeals of the State of Idaho upheld this Court's judgment and sentence and the order denying Begley's Rule 35 motion.

(R., pp.80-81 (citations to transcript of change of plea hearing omitted).)

Begley then filed a timely *pro se* petition and affidavit for post-conviction relief and a motion and affidavit for the appointment of counsel. (R., pp.2-25.) The district court appointed counsel to assist Begley in his post-conviction relief case. (R., pp.29-31.) The state filed an answer to Begley's initial petition for post-conviction relief requesting Begley's claim be denied and/or dismissed. (R., pp.26-28). Through counsel, Begley filed an amended petition and affidavit in support of post-conviction relief asserting his "guilty plea was not knowingly and voluntarily made because the court failed to determine a factual basis for his Alford plea after [Begley] continued to maintain his innocence" as well as a claim

of ineffective assistance of counsel with nine separate bases. (R., pp.36-48.) The state filed an answer to the amended petition. (R., pp.49-51.) Begley then filed a motion for summary disposition and supporting brief addressing only the voluntary nature of his guilty plea. (R., pp.52-53, 60-76.)

The district court issued an order denying Begley's motion for summary disposition and providing notice of its intent to dismiss. (R., pp.79-86.) Begley responded to the notice of intent to dismiss, again only addressing the voluntary nature of his guilty plea. (R., pp.87-90.) The district court thereafter filed an order of dismissal on the grounds set forth in its notice of intent to dismiss. (R., pp.92-94.)

Begley timely appealed. (R., pp.95-99.)

ISSUES

Begley states the issues on appeal as:

> 1. Did the district court err when it summarily dismissed Mr. Begley's claim that his *Alford* plea was not knowingly, intelligently, and voluntarily made because the record of his plea hearing, at which he maintained his innocence, did not contain a strong factual basis for the charge to which he pled guilty?
>
> 2. Did the district court err when it summarily dismissed another claim raised in Mr. Begley's amended petition for post-conviction relief without providing notice of the reasons for dismissal?

(Appellant's brief, p.3.)

The state rephrases the issues as follows:

1. Has Begley failed to show error in the district court's summary dismissal of his claim that his *Alford* plea was not knowingly, intelligently and voluntarily made?

2. Has Begley failed to establish that he lacked notice of the grounds for summary dismissal of his claim of ineffective assistance of counsel for failing to move to strike information from victims of uncharged crimes from the presentence investigation report?

ARGUMENTS

I.
Begley Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief On The Ground That His *Alford* Plea Was Not Knowingly, Intelligently And Voluntarily Entered

A. Introduction

Begley asserts the "district court erred when it summarily dismissed a claim that his *Alford* plea was not knowingly, intelligently, and voluntarily made because the record of his plea hearing, at which he maintained his innocence, did not contain a strong factual basis for the charge to which he pled guilty." (Appellant's brief, p.4.) Because the record supports the district court's conclusion that Begley's plea was knowingly and voluntarily made in addition to supporting a finding of a strong factual basis for the entry of such a plea, Begley's argument fails.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a

preponderance of the evidence, that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "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 pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a

petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

D. Begley Has Failed To Show Error In The District Court's Determination That Begley Failed To Present A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On The Issue Of The Voluntariness Of His Plea

"Before a trial court accepts a plea of guilty in a felony case, the record must show that the plea has been made knowingly, intelligently and voluntarily, and the validity of a plea is to be determined by considering all the relevant circumstances surrounding the plea as contained in the record." State v. Ramirez, 122 Idaho 830, 833, 839 P.2d 1244, 1247 (Ct. App. 1992) (quoting State v. Carrasco, 117 Idaho 295, 297-98, 787 P.2d 281, 283-84 (1990) (citation omitted). Begley asserts his plea was not knowingly, intelligently and voluntarily entered because he maintained his innocence and the record of the entry of his plea "did not contain a strong factual basis for the charge to which he pleaded guilty." (Appellant's brief, p.4.) Review of the record, which establishes that

Begley entered the plea to avoid a possible conviction on greater charges, shows this claim to be without merit.

When an *Alford* plea is entered,

> an accused may voluntarily consent to the imposition of a prison sentence despite a professed belief in his or her innocence, as long as a factual basis for the plea is demonstrated by the state, and the accused clearly expresses a desire to enter such a plea. In Idaho, there is no general obligation to inquire into the factual basis of a guilty plea. However, such an inquiry should be made if an *Alford* plea is accepted, or if the court receives information before sentencing which raises an obvious doubt as to guilt.

Ramirez, 122 Idaho at 834, 839 P.2d at 1248 (quoting Anderson v. State, 119 Idaho 994, 996, 812 P.2d 301, 303 (Ct. App. 1991). A factual basis need not be proven by reasonable doubt, but it is necessary to determine a strong factual basis exists to ensure the voluntariness of the plea:

> By determining that a strong factual basis for the plea exists, the trial court ensures that the defendant is pleading guilty because he believes that the state could, and more likely than not would, prove the charges against him beyond a reasonable doubt; and thus the defendant is entering the plea knowingly and voluntarily because he believes it to be in his best interests to do so, despite his continued assertion of innocence.

Ramirez, 122 Idaho at 834, 839 P.2d at 1248. Desire to take advantage of a plea agreement is an appropriate basis for entry of an *Alford* plea. See North Carolina v. Alford, 400 U.S. 25, 31 (1970); State v. Jones, 129 Idaho 471, 474, 976 P.2d 1318, 1321 (Ct. App. 1996); State v. Campbell, 123 Idaho 922, 927, 854 P.2d 765, 770 (Ct. App. 1993); Odom v. State, 121 Idaho 625, 626-27, 826 P.2d 1337, 1338-39 (Ct. App. 1992). When determining if the requisite factual basis for the plea exists, an appellate court looks "to the entire record before the

trial judge at the time the plea was accepted." Id. (citing Fowler v. State, 109 Idaho 1002, 1005, 712 P.2d 703, 706 (Ct. App. 1985).)

Begley was originally charged with three counts of lewd conduct with a child. (R., p.80.) As his attorney advised the district court at the change of plea hearing that there had been lengthy plea negotiations to arrive at a plea to a new charge of injury to child:

> Judge, and perhaps I can explain the full ramifications of what has gone on here.
>
> The court is aware that Mr. Begley took a polygraph test back in February and he passed the polygraph with reference to the other charge. Since then I've had considerable amount of communication with [the assigned prosecutor]. I've had conferences with [the elected prosecutor]. I've talked to another prosecutor about this matter on at least a couple of occasions, different prosecutors, and where we're at this afternoon is a compromise by both the state and Mr. Begley.
>
> The compromise is a dismissal of the L and L charge in return for filing this charge and obtaining Mr. Begley's plea to this charge of injury to a child.
>
> The compromise on our part is to accept the filing of this Information and entering a plea to this information. And we are receiving a benefit by doing that of not having to go to trial on the L and L charge with the risk – and we discussed that at length. We have gone back and forth on this with Mr. Begley and Mrs. Begley with reference to entering a plea to this charge this afternoon.
>
> And what we were really doing here is a number of things: One is we are ending this matter with a plea. Number two we are receiving a benefit by not having to go to a jury trial on the L and L and risk conviction and subsequently having to register as a sex offender and the stigmatization that goes along with that in the event that the jury returned a verdict of guilty. And then obviously there's – we eliminate the cost of trial and the accruing costs of further legal proceedings in the matter as we proceed.
>
> So with a compromise on the part of the state and a compromise that we're making, it is our desire this afternoon to

> enter an Alford plea to this charge and take advantage of what the state has done and eliminate the risk of a potential jury verdict that may be adverse and that we avoid that.

(3/27/2009 Tr.[1], p.4, L.16 – p.6, L.4.) Upon inquiry from the court, the state provided additional background regarding Begley's charge in terms of what would happen if Begley were in sex offender treatment for the offense he was about to enter an *Alford* plea to:

> Judge, I think what's going to happen with Mr. Begley is that there is going to be a victim's polygraph, but it's not going to be limited just to these three victims. [Defense counsel] has brought up quite a bit the polygraph that took place with regard to the charged victims. There was another polygraph with one of the uncharged victims which the court ruled could not testify pursuant to 404 (b) that Mr. Begley actually failed. So that's a huge factor as to why the state is asking and pushing so hard for him to attend sex offender treatment as I believe that he would benefit from it, especially given the fact that there are prior uncharged victims. That's a huge part of it. And I think that's what SANE Solutions is going to address. He's going to be facing victim's polygraphs to make sure there aren't additional victims and make sure that we have covered and the treatment covers all the possible victims out there.

(3/27/2009 Tr. p.18, L.24 – p.19, L.16.)

The district court had the benefit of having presided over motion hearings in the original lewd conduct case in addition to having the information as provided by the prosecutor about the existence of additional victims and victims' polygraph examinations as well as Begley's failed polygraph examination in addressing a victim not charged in the original lewd conduct case. All of these factors played a part in the amendment of the charges. That background information gave the

[1] This transcript of the change of plea hearing was made part of the record on appeal with the October 4, 2012 order granting motion to augment the record with "Memorandum in Opposition to Motion for Summary Disposition, with attachments, file-stamped August 5, 2011."

district court a strong factual basis for the entry of a guilty plea to injury to child and led into the following colloquy:

> THE COURT: The Information that's been filed in this case charges the following offense: That the defendant David Begley on or between the first day of January 2007, through May 27, 2007, in the County of Canyon, State of Idaho, did under circumstances likely to produce great bodily harm or death to a child under 18 years of age, specifically T.C., date of birth [redacted] and/or A.H., date of birth [redacted] unlawfully and willfully caused or permit the person or health of the child to be injured while having care or custody of said child.
>
> Now, to that offense do you plead guilty?
>
> [DEFENSE COUNSEL]: Judge, we will enter an Alford plea to that charge.
>
> THE COURT: Well, Mr. Begley, do you plead guilty to this offense on the basis that you feel like the state has sufficient evidence that there's a likelihood they could prove their case at trial?
>
> THE DEFENDANT: No, Your Honor, I don't think they can prove it, but –
>
> THE COURT: Well, here's the situation. My understanding of the case of Alford versus North Carolina, which is a case decided by the United States Supreme Court, it essentially stands for the proposition that a person can plead guilty to a crime even though they don't believe they're guilty but on the basis that they understand that the state's evidence is strong enough that they very well may lose the case at a jury trial.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: So I guess what I'm asking you is – I mean, you've talked to your attorney. And what I heard your attorney say earlier today is that the risk of losing on three charges of lewd and lascivious conduct against children is something that you've weighed in your consideration. Is that fair to say?
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: So is that why you're then pleading guilty to this new charge of injury to children?

THE DEFENDANT: If you're asking the reason why I'm pleading is because of the cost of the jury trial, one. Financially we can't afford it. Two, it's a flip of a coin, their word versus mine. My attorney has advised me of that, that it can go either way. And so I do understand, but that is the reason why I've chosen to follow this path is just financially and I want it to be over with and done. I mean, it's been drug out for a very long time.

THE COURT: Okay. But when you use the phrase it's just a flip of a coin as to what could happen, what I'm hearing you say is that you agree that the jury very well could believe these children that get up and testify.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And if they did, the likelihood is that you would be found guilty by the jury. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And so is that really – that risk, is that why you're pleading guilty to this offense?

THE DEFENDANT: Yes, Your Honor.

(3/27/09 Tr., p.21, L.1 – p.23, L.12.)

The record supports the conclusion that the trial judge made sufficient inquiry to determine there was a factual basis for the charge of injury to child as it replaced the original charges of lewd conduct with a child and that Begley entered his plea knowingly and voluntarily. The record supports the district court's conclusion that "after reviewing all the records in this case, this Court finds that Begley entered his Alford Plea voluntarily, knowingly, and intelligently." (R., p.84.) Begley has thus failed to show the court erred in concluding there

was no genuine issue of material fact and dismissing Begley's claim that he plea was not knowingly, intelligently and voluntarily made.

II.

Begley Has Failed To Establish Reversible Error In The Summary Dismissal Without Requisite Notice In The Court's Notice Of Intent To Dismiss Of His Ineffective Assistance of Counsel Claim For Failing To Strike The Information Regarding Uncharged Victims From Begley's Presentence Investigation Report

A. Introduction

Begley asserts on appeal that "the district court erred when, without providing notice of the reasons for dismissal, it summarily dismissed his claim that his attorney was ineffective for failing to object to, and move to strike from the pre-sentence investigation report, information concerning three other minors who had made unsubstantiated allegations of sexual abuse." (Appellant's brief, pp.13-14.) Because the underlying purpose of the notice requirement was upheld in this matter, any error was harmless and Begley's argument fails.

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. A Review Of The Record Shows That Any Lack Of Notice For The Specific Basis Upon Which The Court Dismissed Begley's Claim That His Counsel Was Ineffective For Failing To Strike The Information Of Three Uncharged Victims From Begley's Presentence Investigation Report Was At Worst Harmless Error

Idaho Code § 19-4906 provides for the summary disposition of an application for post-conviction relief upon motion by a party or on the court's own initiative. Follinus v. State, 127 Idaho 897, 899, 908 P.2d 590, 592 (Ct. App. 1995). "When the court considering the petition for post-conviction relief is contemplating dismissal *sua sponte*, it must notify the parties of its intention to dismiss and must provide its reasons for the potential dismissal." Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993) (citations omitted). When the state files a motion for summary dismissal, setting forth adequate notice of the grounds for dismissal, and the court grants the state's motion for the reasons urged by the state, a post-conviction petitioner receives adequate notice of the grounds for dismissal. Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). The district court cannot, however, "dismiss a claim on a ground not asserted by the state in its motion unless the court gives the twenty-day notice required by Section 19-4906(b)." DeRushé v. State, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009) (citing Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995)). The purpose of the 20-day notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v.

State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Martinez v. State, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).

In his amended petition for post-conviction relief, Begley claimed his counsel was ineffective for failing to represent his interests in the following ways:

> a) Failure to advise me that a psycho-sexual evaluation would be part of the presentence investigation process.
>
> b) Failure to advise me of my rights not to participate in a psycho-sexual evaluation and my right to consult with an attorney prior to the evaluation process.
>
> c) Failure to discuss with me, and prepare me for, the psycho-sexual evaluation process.
>
> d) Prior to changing my plea, counsel failed to advise me what was meant by a minimum of one (1) year sentence in this case.
>
> e) Counsel wrongfully advised me to change my plea from not guilty to guilty.
>
> f) Counsel failed to secure for me a plea agreement that was binding not only upon the State but the Court as well.
>
> g) Counsel failed to request a change of venue due to the tremendous amount of pretrial publicity about my case.
>
> h) Counsel failed to call as witnesses during my sentencing hearing Chip Morgan, polygrapher, and Dr. Johnson, the psycho-sexual evaluator, to present testimony in mitigation.
>
> i) Counsel failed to object to, and move to strike from the presentence investigation report, information about three (3) other minors who had made unsubstantiated allegations of sexual abuse by me.

(R., pp.37-38.) Begley filed a motion for summary disposition that addressed only the voluntary nature of his plea, failing to address any of the remaining allegations of ineffective assistance of counsel. (R., pp.52-53, 60-76.)

The district court filed an order denying Begley's motion for summary dismissal and providing notice of its intent to dismiss Begley's petition for post-conviction relief. The court noted Begley alleged ineffective assistance of counsel on the following grounds:

> Begley was alleged he was told by [defense counsel] he would be placed on probation and that the judge would grant him a withheld judgment; Begley alleged that [defense counsel] did not inform him that the Court would order a psycho-sexual evaluation which would be used during his sentencing hearing; Begley alleged that [defense counsel] did not attempt to seek a change of venue from the Court because of media coverage; and Begley alleged that [defense] counsel failed to adequately represent him by failing to present Chip Morgan who conducted the polygraph test and Dr. Johnson who performed the psycho-sexual evaluation at his sentencing hearing.

(R., p.84.) The court articulated the two prongs of the Strickland[2] test and concluded, "Begley made these claims without any support, and did not brief the issue. The court finds nothing in the record to find counsel's performance fell below an objective standard of reasonableness." (R., p.84.)

Begley filed a response to the court's notice of intent to dismiss again only addressing the issue of the voluntariness of his guilty plea and failing to provide any additional information in support of any of his claims of ineffective assistance of counsel. (See R., pp.87-91.) The court thereafter dismissed Begley's petition for post-conviction relief on the grounds set forth in its notice of intent to dismiss. (R., pp.92-94.)

The court's recitation of Begley's ineffective counsel claims omitted the final allegation in Begley's amended petition for post-conviction relief, namely the

[2] Strickland v. Washington, 104 S.Ct. 2052 (1984).

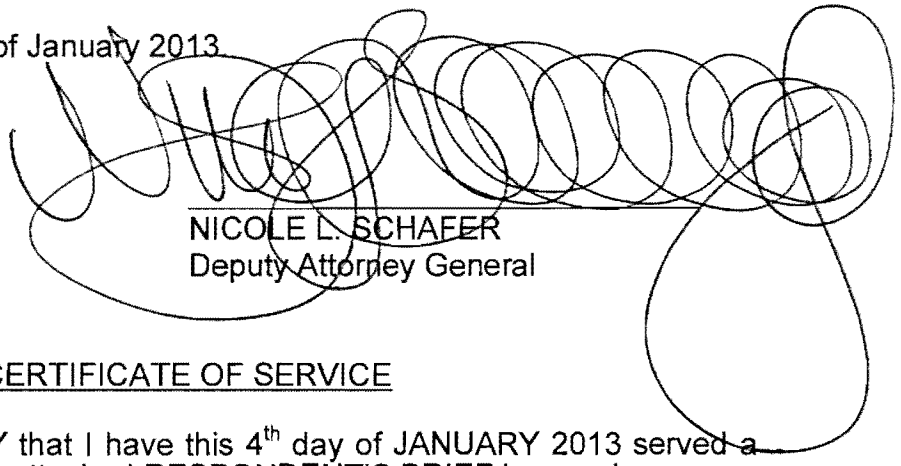
allegation that counsel was ineffective for failing to strike the information of the three uncharged victims from the presentence investigation report. However, Begley's appellate claim he did not understand his last allegation of ineffective assistance of counsel was subject to dismissal is without merit. Read as a whole, the district court gave notice that the entire claim of ineffective assistance of counsel, not just part of it, was subject to summary dismissal for failure to support it with evidence.

Even if there was error, any error of notice is harmless because Begley had an opportunity to respond to the court's determination that his claims of ineffective assistance of counsel were unsupported and Begley failed to avail himself of the opportunity. "The notice procedure is necessary so that the applicant is afforded an opportunity to respond and to establish a material issue of fact if one exists." (Baxter v. State, 149 Idaho 859, 865, 243 P.3d 675, 681 (Ct. App. 2010) (citation omitted). Although Begley filed a response to the court's notice of intent to dismiss, he failed to address the claim of ineffective assistance of counsel at all. Asserting at this stage that he was deprived of sufficient notice that the court was dismissing all of the claim for a failure to support his claims of ineffectiveness of counsel with admissible evidence is disingenuous where Begley had the opportunity to provide additional evidence but completely failed to address the issue of ineffective assistance of counsel in favor of only supporting his argument pertaining to the voluntariness of his guilty plea.

CONCLUSION

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

DATED this 4th day of January 2013.



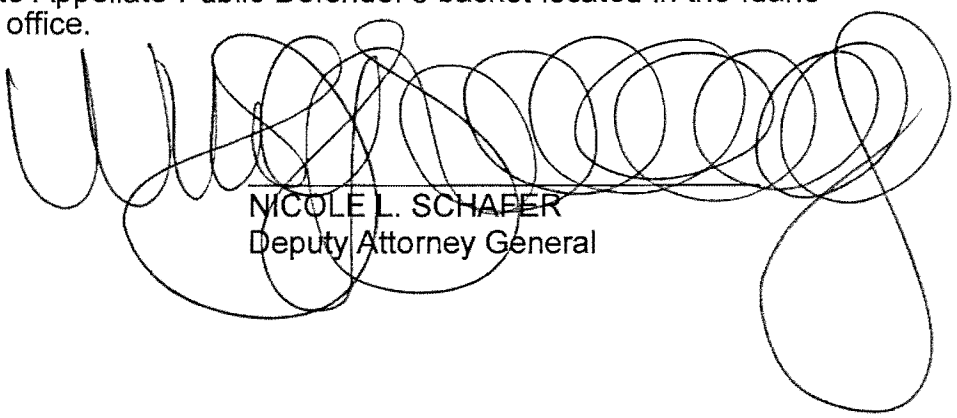
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of JANUARY 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm