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Evans v. State Appellant's Brief 2 Dckt. 40300

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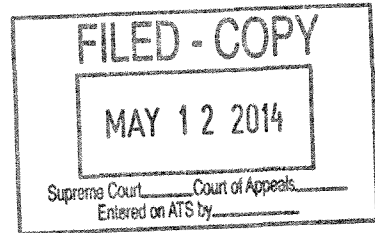
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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

TROY LANE EVANS,)	
)	NO. 40300
Petitioner-Appellant,)	
)	ADA COUNTY NO. CV 2011-18655
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	IN SUPPORT OF
Respondent.)	PETITION FOR REVIEW
_____)	

STATEMENT OF THE CASE

Nature of the Case

Troy Evans asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Unpublished Opinion No. 411 (Ct. App. Mar. 11, 2014) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed the order dismissing his petition for post-conviction relief, did not apply the proper standard of review. Specifically, it applied the standard of review for a denial of post-conviction relief following an evidentiary hearing to its review of the district court's decision to summarily dismiss the petition for post-conviction relief. The result is that the Court of Appeals

committed the same error it had identified in the district court's analysis. Therefore, the Court of Appeals' decision is in direct conflict with both this Court's precedent and its own precedent. As such, particularly since the Court of Appeals found that the district court had, or at least, likely had, erred in its analysis, this Court should exercise its review authority in this case.

On review, this Court should reverse the district court's erroneous order summarily dismissing the petition for post-conviction relief, since Mr. Evans was deprived of the effective assistance of counsel by a conflict of interest with counsel. Mr. Evans's attorney also represented his wife, who was also facing criminal charges related to the events underlying the charges against Mr. Evans. Trial counsel negotiated a plea bargain in which Mr. Evans would plead guilty to a felony and in exchange, the State would dismiss other charges against him and reduce the charge against his wife to a misdemeanor. According to Mr. Evans, counsel then told him to "come up with a better story" in order that the plea might be accepted and the agreement put into effect. It is not clear whether that advice was in Mr. Evans' best interest, or just his wife's, particularly in light of Mr. Evans's allegations that he was entering an *Alford* plea,¹ and that counsel had inadequately investigated the charges against Mr. Evans, particularly in regard to facts that would, if true, would directly contradict a material element of several of the charged offenses. As a result, this demonstrates that there was an actual conflict of interest in counsel's representation of Mr. Evans, and that justifies post-conviction relief. Therefore, this Court should reverse

¹ Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), a defendant may enter a plea of guilty while still asserting factual innocence or lack of memory as to the facts of the offense. See *Shogar v. State*, 148 Idaho 622, 629 n.4 (2009).

the district court's order summarily dismissing Mr. Evans's petition and remand this case for an evidentiary hearing.

Statement of the Facts & Course of Proceedings

Mr. Evans was charged with seven counts of sexually-related conduct. (Presentence Investigation Report (*hereinafter*, PSI), pp.72-74.)² Charges 1, 2, and 4 alleged that Mr. Evans sexually battered C.S., who was alleged to have been sixteen or seventeen when the contact occurred.³ (PSI, p.73.) C.S. testified to the grand jury that she was sixteen or seventeen during the relevant time. (See, e.g., Tr., Vol.4, p.22, Ls.13-15.) However, there were indications in the police reports that C.S. may have been eighteen at the time some of the charged conduct was alleged to have occurred. (PSI, p.92.)

² The district court took judicial notice of the PSI, as well as the transcript of the grand jury hearing, and the audio recordings of the entry of plea and sentencing hearings from the underlying criminal case. (R., pp.81-82.) The Idaho Supreme ordered the record be augmented with those items. (Order Granting Motion to Augment and to Suspend the Briefing Schedule, entered February 26, 2013.) The PSI was provided in the electronic PDF file "EvansPSI." Included in this file is the PSI report as well as all the documents attached thereto (police reports, etc.).

Additionally, with the three augmented transcripts, there are six independently bound and paginated volumes containing the transcripts in this appellate record. To avoid confusion, "Vol.1" will refer to the volume containing the transcript from the status conference held on March 1, 2012. "Vol.2" will refer to the volume containing the transcript from the hearing held on April 4, 26, 2012. "Vol.3" will refer to the volume containing the transcript of the motions hearing held on July 19, 2012. "Vol.4" will refer to the volume containing the transcript from grand jury hearing held on December 15 and 29, 2009, provided in the PDF document "EvansGJTrans." "Vol.5" will refer to the volume containing the transcript from the change of plea hearing held on June 2, 2010. "Vol.6" will refer to the volume containing the transcript from the sentencing hearing held on August 18, 2010.

³ Counts 3 and 6 alleged that Mr. Evans willfully committed misdemeanor indecent exposure. (PSI, pp.72-74.) Count 5 alleged that Mr. Evans possessed material sexually exploiting a child under the age of eighteen. (PSI, pp.72, 74.) Count 7 alleged that Mr. Evans sexually abused a person under the age of sixteen, N.E., by masturbating within N.E.'s view. (PSI, pp.72, 74.)

Subsequently, Mr. Evans's wife was charged with witness intimidation for making calls to C.S. (R., p.116.) Mr. Evans and his wife were represented by the same attorney. (See, e.g., R., p.117.) According to Mr. Evans, his attorney did not investigate the inconsistencies regarding C.S.'s age, nor did she file a motion to dismiss in that regard when he asked her to do so. (R., pp.6-7, 66.) Ultimately, Mr. Evans was offered a plea deal whereby he would plead guilty to count 7 (sexual abuse of a minor, N.E.), the State would dismiss the remaining charges, and it would also reduce his wife's charge to a misdemeanor. (See R., p.119; Tr., Vol.5, p.1, L.14 - p.3, L.7.) Both Mr. Evans's plea and his wife's plea were contingent on Mr. Evans entering his guilty plea. (R., p.119.)

At the change of plea hearing, the district court asked Mr. Evans to set forth a factual basis for his plea. (Tr., Vol.5, p.9, Ls.22-23.) Mr. Evans responded, stating that he had masturbated in his room, unaware that N.E. could see him through the open door. (Tr., Vol.5, p.9, L.24 - p.11, L.16.) The prosecutor expressed concern that this assertion did not actually admit a crime, and the district court agreed. (Tr., Vol.5, p.11, Ls.17-25.) The district court granted Mr. Evans a short recess to consult with counsel. (Tr., Vol.5, p.12, Ls.24-25.) According to Mr. Evans, during that recess, his attorney told him "to come up with a better story to tell the Court" (R., p.72.) Mr. Evans returned and told the district court he was aware that the door was open, that N.E. was in the other room, and that there was a reasonable possibility N.E. would see him, although he did not remember N.E. actually watching him.⁴ (Tr., Vol.5, p.13,

⁴ Mr. Evans subsequently alleged that this constituted an *Alford* plea (*i.e.*, that he believed he was innocent, but also that he believed the State had sufficient evidence to win a conviction against him). (R., p.6.) That allegation supported his claim that there

L.21 - p.15, L.5.) The district court accepted his guilty plea based on that assertion. (Tr., Vol.5, p.17, Ls.1-6.)

The district court ultimately imposed a unified sentence of fifteen years, with five years fixed, and retained jurisdiction. (R., p.102.) Mr. Evans successfully completed that period of retained jurisdiction and was placed on probation. (R., p.102.) Later, after Mr. Evans admitted to violating the terms of his probation, the district court revoked his probation and ordered his prison sentence into execution. (R., pp.102-03.) Mr. Evans did not file a direct appeal. (R., p.103.)

However, Mr. Evans did file a timely petition for post-conviction relief. (R., pp.5-7.) He alleged, among other things, that his attorney provided ineffective assistance by representing both him and his wife, since doing so created a conflict of interest, and by not adequately investigating the charges regarding C.S. (R., pp.6-7, 66-67, 71-72.) He alleged that, had his attorney properly investigated the charges relating to C.S. (Counts 1, 2, and 4), "Petitioner would no[t] have entered his guilty plea but instead would have gone to trial." (R., pp.6-7.) He added, in a subsequent affidavit that, had counsel proceeded effectively and investigated the evidence regarding C.S.'s age, he "would have proceeded differently in this case." (R., p.72.) In regard to the dual representation claim, Mr. Evans asserted that he felt the plea was coerced and not knowing, intelligent, or voluntary as a result of counsel's pressure to enter that plea. (R., pp.67, 72.) The State simply denied those allegations, but did not offer evidence to refute those allegations. (See R., pp.32-35.) It also moved for summary dismissal of the claims.

was an actual conflict of interest in his attorney's representation of him. (See, e.g., R., pp.66-67.) The State specifically denied the assertion that the plea was an *Alford* plea. (R., p.33.)

(R., pp.46-48.) The district court appointed Mr. Evans counsel. (R., p.55.) Thereafter, the parties filed amended pleadings, which essentially restated the parties' positions on the issues already raised. (See R., pp.65-73, 83-94.)

Ultimately, the district court granted the State's motion for summary dismissal. (R., p.122.) In regard to the inadequate investigation claim, the district court determined that Mr. Evans had not sufficiently alleged what evidence counsel would have uncovered with more investigation. (R., pp.108-09.) It also ruled that he had not sufficiently articulated the prejudice caused him by the alleged deficient performance. (R., pp.109-10.) In addition, it pointed out that he had responded on his guilty plea questionnaire that there was nothing he had requested his attorney to do that had not been done, nor were there witnesses he felt his attorney should have investigated. (R., p.110.) As such, it determined Mr. Evans had not made a sufficient showing to survive summary dismissal on the claim of inadequate investigation. (R., p.112.) In regard to the dual representation claim, the district court ruled that Mr. Evans "has not shown, by a preponderance of the evidence, such actual conflict of interest existed" (R., pp.119-20.) Mr. Evans filed a timely notice of appeal from the judgment entered by the district court. (R., pp.124-26.)

On appeal, Mr. Evans made two arguments in regard to the ineffective assistance provided by trial counsel: 1) there was an actual conflict of interest created by the dual representation of Mr. Evans and his wife; and 2) trial counsel did not conduct an adequate investigation of the charges against Mr. Evans. The Court of Appeals held that the district court had, or at least, likely had, erred in two ways: 1) to the extent it required Mr. Evans to "prove" his claims at the summary dismissal stage in

the proceedings, the district court had applied the wrong standard (Opinion, p.7 n.1); and 2) to the extent it resolved a question of fact as to the conflict of interest issue that was created by conflicting evidence in the record, the district court erred in summarily dismissing the petition (Opinion, p.9). However, the Court of Appeals held the district court's order summarily dismissing Mr. Evans's petition on the conflict of interest issue was nevertheless correct because Mr. Evans had not presented evidence of an actual conflict of interest at the summary dismissal stage. (Opinion, pp.9-10.) Specifically, it held:

Evans argues that the post-conviction court should have inferred from his reticence to offer a factual basis for his plea that Evans did not believe he was guilty, that he involuntarily pleaded guilty in order to reduce his wife's criminal liability, and that this would not have occurred if Evans and his wife had separate counsel. We disagree. . . . Here, other inferences are permissible. For example, Evans's reticence may have been caused by his wish to avoid admitting that he engaged in sexually inappropriate behavior with a minor, or his reticence may have been an attempt to minimize his culpability in order to receive a lenient sentence.

Evans did not present any evidence that an actual conflict affected defense counsel's representation as required by *Guzman*, 126 Idaho at 371.⁵ Accordingly, the district court did not err when it dismissed his claim.

(Opinion, p.10.)

Mr. Evans filed a timely petition for review.

⁵ *State v. Guzman*, 126 Idaho 368, 371 (Ct. App. 1994) (holding that the defendants had not presented sufficient evidence at the post-conviction evidentiary hearing to prove their allegation of actual conflict in the representation of counsel).

ISSUES

1. Whether the Idaho Court of Appeals' Opinion is in conflict with precedent because it applied the standard for reviewing the denial of post-conviction relief after an evidentiary hearing standard in its review of the district court's decision to summarily dismiss the petition.
2. Whether the district court erred by summarily dismissing Mr. Evans's claim that his defense counsel provided ineffective assistance by representing both Mr. Evans and his wife.
3. Whether the district court erred by summarily dismissing Mr. Evans's claim that his defense counsel provided ineffective assistance by not conducting an adequate investigation of the charges filed against Mr. Evans.

ARGUMENT

I.

The Idaho Court Of Appeals' Opinion Is In Conflict With Precedent Because It Applied The Standard For Reviewing The Denial Of Post-Conviction Relief After An Evidentiary Hearing Standard In Its Review Of The District Court's Decision To Summarily Dismiss The Petition

A. Standard For Evaluating Petitions For Review

The Idaho Appellate Rules provide that petitions for review may be granted only “when there are special and important reasons” for doing so but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered. Rule 118(b) provides some factors which must be considered in evaluating any petition for review, including:

- 1) Whether the Court of Appeals’ decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;
- 2) Whether the Court of Appeals’ decision is inconsistent with its own prior decisions; and
- 3) Whether the Court of Appeals’ actions are so unusual as to call for the Supreme Court’s exercise of its supervisory authority.

I.A.R. 118(b). In this case, Mr. Evans contends that there are special and important reasons for review to be granted. The Court of Appeals applied the wrong standard of review to the decision to summarily dismiss Mr. Evans’s petition for post-conviction relief, and so, its decision is directly contrary to both this Court’s precedent and its own precedent. See I.A.R. 118(b)(2)-(3). Furthermore, it made that error after specifically pointing out that the district court had, or least, potentially had, made that exact same

error. As such, the Court of Appeals' decision is so unusual as to call for this Court to exercise its review authority in this case. See I.A.R. 118(b)(4).

B. The Court Of Appeals Applied The Wrong Standard Of Review When It Reviewed The District Court's Decision To Summarily Dismiss The Petition For Post-Conviction Relief

At the summary dismissal stage in post-conviction proceedings, this Court has made it abundantly clear that the defendant need only demonstrate that a genuine issue of material fact exists in order to survive summary dismissal and merit an evidentiary hearing. *Baldwin v. State*, 145 Idaho 148, 153 (2008); *Charboneau v. State*, 140 Idaho 789, 792 (2004); *Saykhamchone v. State*, 127 Idaho 319, 321 (1995); see I.C. § 19-4906(b). In determining whether a genuine issue of material fact exists, “[a] court is required to accept the petitioner’s unrebutted allegations as true”⁶ *Baldwin*, 145 Idaho at 153; *Saykhamchone*, 127 Idaho at 321. Facts set forth in a verified pleading carry the same weight as facts set forth in an affidavit. *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993); see also *Kelly v. State*, 149 Idaho 517, 521 (2010). At the summary judgment phase, “inferences [are] liberally construed in favor of the petitioner.” *Charboneau*, 140 Idaho at 792; accord. *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008). When a genuine issue of material fact exists which would, if resolved in the petitioner’s favor, entitle the petitioner for relief, the district court must conduct an

⁶ Where, as in this case, the State does provide an answer that denies the allegations (R., pp.33, 83), its denials do not affirmatively disprove the claims. Rather, they only create genuine issues of material fact in regard to those claims, specifically, whether or not the petitioner’s claims are factually accurate. Because a genuine issue of material fact exists in such cases, summary dismissal is inappropriate. *Baldwin*, 145 Idaho at 153.

evidentiary hearing. *Baldwin*, 145 Idaho at 153; *Berg v. State*, 131 Idaho 517, 518 (1998).

The Court of Appeals actually recognized that the district court's failure to apply the proper standard at the summary dismissal stage of the proceedings did or would constitute error:

At various points, the trial court discussed the standard applied at summary dismissal and the standard applied after an evidentiary hearing. In deciding [to summarily dismiss the conflict of interest claim], the post-conviction court held that "The Petitioner has not shown, by a preponderance of the evidence, such actual conflict of interest existed so the Petitioner's motion for summary disposition on allegation 9(e) is denied." *To the extent the trial court applied an incorrect standard, it erred.*

(Opinion, p.7 n.1 (quoting R., pp.119-20) (emphasis added).) And yet, despite actually recognizing that error results from applying the standard for evidentiary hearings at the summary dismissal stage, the Court of Appeals promptly committed that same error itself. (See Opinion, pp.9-10.)

Specifically, the Court of Appeals decided that there were other plausible explanations for Mr. Evans's "reticence to offer a factual basis for his plea," upon which Mr. Evans had partially premised his claim that there was an actual conflict in this case. (Opinion, p.10.) These alternative explanations were thought up by the Court of Appeals itself. The State below did not articulate any such alternative explanations, nor did it offer specific refutations of Mr. Evans's allegations. (See *generally* R., pp.32-35, 83-94.) The district court also did not articulate any such alternative explanations for Mr. Evans's conduct. (See *generally* R., pp.102-20.) And yet, under the proper standard of review, when determining whether there is a material fact, courts are "required to accept the petitioner's un rebutted allegations as true" *Baldwin*, 145

Idaho at 153 (emphasis added); *Saykhamchone*, 127 Idaho at 321. Additionally, courts are required to *liberally* construe inferences in Mr. Evans's favor in this case. *Charboneau*, 140 Idaho at 792; *Nevarez*, 145 Idaho at 881. By relying on these alternative explanations, the Court of Appeals decidedly did *not* accept Mr. Evans's un rebutted allegations as *true*, nor did it *liberally* construe the inferences in *Mr. Evans's favor*. Thus, the Court of Appeals' reliance on the potential alternative explanations it thought up on its own does not justify affirming the district court's order in this case.

That is especially true since all those alternative explanations do *is demonstrate that there is a genuine issue of material fact* – whether there is a conflict, as Mr. Evans swears in his verified pleadings. Besides, none of the Court of Appeals' alternative explanations account for trial counsel's statement that Mr. Evans needed to “come up with a better story” (R., p.72), and so none of those alternative explanations are all that plausible anyway. In fact, given Mr. Evans's allegation that he had entered an *Alford* plea (see R., p.6), when all the facts are *liberally construed in Mr. Evans's favor*, as required by precedent, Mr. Evans's explanation – that his difficulty in entering the plea was the result of him not believing he was actually guilty – is actually the most plausible explanation of all the facts in the record. As such, relying on those alternative explanations to affirm the summary dismissal of Mr. Evan's petition only further demonstrates the Court of Appeals' erroneous application of the standards governing review in this case.

Furthermore, the Court of Appeals concluded that Mr. Evans “*did not present any evidence* that an actual conflict affected defense counsel's representation as required by *Guzman*, 126 Idaho at 371.” (Opinion, p.10 (emphasis added).) There are two

problems with this assertion. First, it is clearly erroneous. Mr. Evans's petitions and affidavits were notarized. (R., pp.8, 68, 73.) Therefore, those verified pleadings carry the same weight as affidavits, and thus, the facts alleged therein constitute evidence. *Mata*, 124 Idaho at 593; *see also Kelly*, 149 Idaho at 521 (holding that the pleadings must be verified as to the facts within the petitioner's own knowledge, and so, concluding that, "[o]n review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on *the pleadings*, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party").

Specifically, Mr. Evans alleged that he felt duressed by counsel's urgings for him to make a sufficient offer of proof so that the plea would be accepted. (R., pp.66-67, 72.) Since this plea agreement would benefit one of counsel's other clients (causing the felony charge against Ms. Evans to be reduced to a misdemeanor), counsel's urgings for Mr. Evans to "come up with a better story" demonstrates that counsel was trying to secure the deal. However, Mr. Evans's allegations also indicate that the plea agreement may not have been in his best interests, and as such, counsel would not be providing adequate representation to Mr. Evans based on her representation of Ms. Evans. After all, Mr. Evans was pleading guilty to a felony offense that he did not believe he was guilty of committing. Additionally, the only benefit to him was the dismissal of other charges which, given the other evidence in the record that counsel had not adequately investigated at that point, should have been dismissed any way for failure to charge an offense. All of those facts were set forth in Mr. Evans's verified

pleadings and affidavits. (See R., pp.5-8, 65-68, 70-73.) As a result, they all constitute evidence of an actual conflict of interest in counsel's representation of Mr. Evans. *Kelly*, 149 Idaho at 521; *Mata*, 124 Idaho at 593. Thus, the Court of Appeals' holding that Mr. Evans had failed to present evidence of an actual conflict of interest in his petition is clearly erroneous.

Second, *Guzman* is distinguishable in regard to the applicable standard of review because the defendant in *Guzman* had an evidentiary hearing. *Guzman*, 126 Idaho at 371 (“*At the hearing for post-conviction relief, both defendants testified . . .*”) (emphasis added). The standard of review is different depending on whether the appellate court is reviewing a district court's order denying post-conviction relief after an evidentiary hearing or whether it is reviewing the district court's order summarily dismissing a post-conviction petition. When considering a decision summarily dismissing a petition, “[i]f genuine issues of material fact exist that would entitle the applicant to relief, if resolved in the applicant's favor, summary disposition is improper.” *Baldwin*, 145 Idaho at 153. In such a review, the facts and inferences are to be liberally construed in favor of the petitioner. *Charboneau*, 140 Idaho at 792. On the other hand, the petitioner must ultimately prove his allegations by a preponderance of the evidence at an evidentiary hearing. *State v. Shackelford*, 150 Idaho 355, 380 (2010); *Nguyen v. State*, 121 Idaho 257, 258 (Ct. App. 1992). In reviewing a decision made after such an evidentiary hearing, “the evidence must be ‘viewed most favorably to the trial court's findings.’” *McKeeth v. State*, 140 Idaho 847, 849 (2004) (quoting *State v. Matthews*, 133 Idaho 300, 304 (1999)). Since this is a case of summary dismissal, not of denial following an evidentiary hearing, the Court of Appeals plainly applied the wrong standard of review

by relying on *Guzman*. In so doing, it made exactly the same mistake it noted that the district court had (or potentially had) made. (*Compare* Opinion, pp.9-10; *with* Opinion, p.7 n.1.) As such, the Court of Appeals' affirmation of the district court's order summarily dismissing Mr. Evans's petition for post-conviction relief is in conflict with precedent.

Given the Court of Appeals' misapplication of the appropriate standards, this Court should exercise its review authority in this case.

II.

The District Court Erred By Summarily Dismissing Mr. Evans's Claim That His Defense Counsel Provided Ineffective Assistance By Representing Both Mr. Evans And His Wife

A. Introduction

Mr. Evans contends that his attorney provided ineffective assistance by representing him even though there was an actual conflict in that representation. Specifically, the conflict existed because trial counsel was also representing Mr. Evans's wife, whose interests were at odds with Mr. Evans'. When an attorney represents co-defendants and their interests become conflicting, continued representation of both defendants constitutes deficient performance. Mr. Evans contends that such a situation emerged in this case, when the plea deals offered to both defendants were contingent on Mr. Evans pleading guilty to a felony, while his wife would have her charges reduced to a misdemeanor. The problem became evident when Mr. Evans was unable to articulate a factual basis for his plea and his attorney pressured him to come up with a better story for the district court. Since these facts, when liberally construed in Mr. Evans's favor, would entitle him to relief, summary dismissal was inappropriate.

Therefore, this Court should reverse the district court's erroneous order summarily dismissing Mr. Evans's petition and remand this case for an evidentiary hearing.

B. Standard Of Review

The proper standard for reviewing a claim at the summary dismissal stage of the post-conviction proceedings is set forth in Section I, *supra*. To show a genuine issue of material fact in regard to a claim of ineffective assistance of counsel, the petitioner must allege facts which demonstrate that counsel's performance fell below a reasonable standard and that the petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth*, 140 Idaho at 850. Joint representation of a co-defendant may, but will not always, constitute ineffective assistance.⁷ *Giles v. State*, 125 Idaho 921, 923 (1993); *Guzman*, 126 Idaho at 371. Additionally, if the petitioner demonstrates an actual conflict of interest in counsel's representation of the petitioner, then prejudice is presumed.⁸ *Guzman*, 126 Idaho at 371.

⁷ Generally, when no objection to the dual representation is raised before the trial court, the trial court is entitled to assume that no conflict exists or that the defendant knowingly accepted the risk of such a conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *State v. Severson*, 147 Idaho 694, 703 (2009); *Guzman*, 126 Idaho at 371. This allows the district courts to rely on the good faith and judgment of counsel in such situations. *Cuyler*, 446 U.S. at 346-47. However, that presumption may be overcome if the petitioner makes a particularized showing of an actual conflict. See *State v. Koch*, 116 Idaho 571, 574 (Ct. App. 1989).

⁸ If prejudice is not presumed, then the general standards for determining whether there is prejudice would apply. Under the general standards, a petitioner shows prejudice when he demonstrates that there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 694; *McKay v. State*, 148 Idaho 567, 570 (2010). In cases where the petitioner alleges ineffective assistance during the plea bargain and agreement stage of his case, he must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Booth v. State*, 151 Idaho 612, 621 (2011) (quoting

Actual conflicts arise when counsel “actively represented conflicting interests.” *Guzman*, 126 Idaho at 371 (quoting *State v. Koch*, 116 Idaho 571, 574 (Ct. App. 1989)). Thus, in order to show an actual conflict, the petitioner must demonstrate that the lawyer’s representation of one client will be directly adverse to the interests of another client, or that there is a significant risk that the representation of a client will materially limit her ability to fulfill her responsibilities to another client. See, e.g., *State v. Wood*, 132 Idaho 88, 98 (1998) (citing I.R.P.C. 1.7).

C. The Plea Agreement, Which Benefits Mr. Evans’s Wife At His Expense, Created An Actual Conflict In Their Interests; Thus, Counsel’s Dual Representation Of Both Mr. Evans And His Wife Constitutes A Basis For Post-Conviction Relief

As an initial matter, and as the Court of Appeals indicated (Opinion, p.7 n.1), the district court prematurely applied the preponderance of the evidence standard to this issue when it considered the state’s motion for summary dismissal. (See R., pp.119-20.) At the summary disposition stage, all the petitioner is required to show is a genuine issue of material fact because the question is whether or not an evidentiary hearing needs to be held, not whether the claims have been proven. See *Baldwin*, 145 Idaho at 153. It is at that subsequent evidentiary hearing that he is required to prove his claims by a preponderance of the evidence. See, e.g., *Nguyen*, 121 Idaho at 258 (“*In a post-conviction relief hearing*, the petitioner has the burden of proving the allegations which entitle him to relief by a preponderance of the evidence.” (Emphasis added)). Therefore, the district court’s decision, based on the application of an improper standard, should be reversed.

Ridgley v. State, 148 Idaho 671, 676 (2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

As to the merits of Mr. Evans's claim regarding dual representation, Mr. Evans had the "right to representation free from conflicts of interest."⁹ *Koch*, 116 Idaho at 574; see also *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Cuyler*, 446 U.S. at 345. Specifically, Mr. Evans contends that an actual conflict is evident in his case. The plea offer provided that Mr. Evans would plead guilty to sexual battery of a minor and, in exchange, the State would dismiss the remaining charges against him *and* would reduce the charges against his wife to a misdemeanor. (R., p.119; see Tr., Vol.5, p.1, L.16 - p.3, L.6.) In fact, both pleas were contingent on Mr. Evans accepting this deal. (R., p.119.) Such situations, while not automatically fatal to a plea, do still need to be considered in regard to post-conviction claims. *McNeeley v. State*, 111 Idaho 200, 203 (Ct. App. 1986). That is because one attorney could potentially resolve the case in all the jointly-represented clients' best interests.

However, the facts alleged by Mr. Evans demonstrate that it is not clear whether this plea was in his best interest, and thus, there is a question of material fact as to whether Mr. Evans received adequate assistance of counsel. The plea deal counsel negotiated in this case is obviously in Ms. Evans's best interests, since the felony charge against her would be reduced to a misdemeanor, based only on Mr. Evans admitting to a felony offense, not her own admission of guilt.

On the other hand, Mr. Evans was required to enter a guilty plea to felony charge for which he did not believe he was guilty. Mr. Evans alleged that he entered an *Alford* plea, which indicating that he believed he was not guilty of the offense, but also that he

⁹ The Sixth and Fourteenth Amendments to the United States Constitution promise the right to counsel during a criminal prosecution. U.S. CONST. amends. VI, XIV. The Idaho Constitution provides similar assurances. IDAHO CONST. art. 1, § 13.

believed the State had enough evidence to secure a conviction. (R., p.6.) That allegation is supported by the record (particularly when the facts are construed liberally in Mr. Evans's favor). At the change of plea hearing, Mr. Evans then attempted to set forth a factual basis for this plea. (Tr., Vol.5, p.9, L.22 - p.10, L.16.) He said that he was masturbating in the bedroom and his daughter looked in and saw him without his knowledge. (Tr., Vol.5, p.9, L.22 - p.10, L.2.) The prosecutor expressed concern that Mr. Evans's statements did not set forth a factual basis for the crime charged, as the statute did not extend to cover unintentional exposure, and the district court agreed. (Tr., Vol.4, p.11, Ls.19-25.) It granted a short recess for Mr. Evans to discuss the matter with his attorney. (Tr., Vol.4, p.12, Ls.18-25.) Mr. Evans asserted that, during that recess, he was pressured into entering into this plea agreement by counsel's instruction to "come up with a better story."¹⁰ (R., p.72.) As such, the evidence indicates that Mr. Evans did not believe he was guilty of the charge to which the agreement required him to plead guilty.

Additionally, Mr. Evans received little benefit, since his plea resulted in the dismissal of charges which probably should have been dismissed any way, because the evidence (which, as will be discussed in detail *infra*, counsel had not yet adequately investigated) potentially disproved one of the material elements of several of those charges. Instead, counsel had to urge Mr. Evans to "come up with a better story" in order to try and preserve the plea deal, which only benefitted one of her two clients. As

¹⁰ The State did not allege that there was evidence which specifically refuted these allegations. (See *generally* pp.32-35, 83-94.) Additionally, as the Court of Appeals pointed out, the record does not actually contradict these allegations. (Opinion, p.9.)

a result, liberally construing the evidence in Mr. Evans's favor, there is a genuine issue of material fact as to whether Mr. Evans received conflict-free assistance of counsel.

Liberally construing these facts shows deficient performance by the attorney (representing Mr. Evans despite an actual conflict of interests). Because the actual conflict appears to have affected the representation, prejudice is presumed. See, e.g., *Guzman*, 126 Idaho at 371. Thus, Mr. Evans alleged a genuine issue of material fact on his claim of ineffective assistance of counsel. See *Strickland*, 466 U.S. at 687; *McKeeth*, 140 Idaho at 850. Therefore, summary dismissal was inappropriate, and the district court's order to that effect was erroneous; an evidentiary hearing on this claim is needed. *Baldwin*, 145 Idaho at 153; *Berg*, 131 Idaho at 518.

III.

The District Court Erred By Summarily Dismissing Mr. Evans's Claim That His Defense Counsel Provided Ineffective Assistance By Not Conducting An Adequate Investigation Of The Charges Filed Against Mr. Evans

A. Introduction

Mr. Evans contends that his attorney provided ineffective assistance by not adequately investigating the charges filed against him. Specifically, he contends that counsel failed to investigate indications in the police report that undermined elements of three of the charges levied against Mr. Evans; nor did trial counsel file any pretrial motions challenging those charges. Rather, counsel negotiated the problematic plea deal discussed *supra* while those potentially-improper charges were still pending. Mr. Evans alleged that, had counsel engaged in an adequate investigation, he would have proceeded differently, rejected the plea deal, and insisted on a trial. Therefore, as

the facts alleged, construed liberally in Mr. Evans's favor, would have entitled him to relief, summary dismissal was inappropriate.

B. Mr. Evans's Trial Attorney Provided Ineffective Assistance By Not Conducting An Adequate Investigation Of The Charges In His Case

Counsel has a duty to conduct a reasonable, prompt, and thorough investigation. *Mitchell v. State*, 132 Idaho 274, 280 (1998). To show that counsel has conducted an unreasonable investigation, the petitioner needs to show what information the reasonable investigation would have revealed. *Id.* The courts are to consider not only the evidence known to counsel, but also whether that "known evidence would lead a reasonable attorney to investigate further." *Murphy v. State*, 143 Idaho 139, 146 (Ct. App. 2006). "Moreover, counsel is bound to make reasonable efforts to obtain and review material that the prosecution will probably rely on as evidence." *Id.*

In this case, the police reports indicated that, while C.S. had made claims of inappropriate conduct by Mr. Evans, there was evidence which indicated that those claims may not be criminal because C.S. would have been eighteen at the time of the conduct. (PSI, p.92.) C.S.'s account of the events was based, in part, on the homes in which all the parties were living (*i.e.*, a certain action happened when they lived at a certain home). (See, e.g., PSI, p.86 ("[C.S.] said when they [were] at the Siltstone residence, she came home and found [Mr. Evans] watching a porn movie and masturbating.")) However, officers cross-checked C.S.'s story with Mr. and Ms. Evans's lease information, and the dates gathered from the leases suggested

C.S. would have been eighteen during at least some of the relevant time.¹¹ (PSI, p.92.) Mr. Evans pointed out that those reports differed from the testimony C.S. offered during the grand jury proceedings.¹² (R., pp.6-7.) Since the three charges ultimately filed in regard to C.S. each alleged that she was sixteen or seventeen years old, a reasonable attorney would have conducted a further investigation based on the indications in the police report that C.S. was, in fact, eighteen during the relevant time frame. See *Murphy*, 143 Idaho at 146. Yet, according to Mr. Evans's verified allegations, counsel did not follow up on this information. (R., pp.6-7, 66, 71-72.) Additionally, he alleged that he requested counsel to file a motion to dismiss those charges based on the fact that, if C.S. was eighteen at the time of the conduct, the State could not prove one of

¹¹ This information was subsequently corroborated by C.S.'s brother, D.A., who testified that C.S. talked with him about the allegations, and, by his calculation based on C.S.'s allegations, C.S. would have been eighteen at the time of the contacts. (Tr., Vol.6, p.22, L.23 - p.23, L.6.) Furthermore, D.A. said he asked C.S. what the point of the allegations was, and she responded that "I never really liked [Mr. Evans], and I just wanted to do away with him." (Tr., Vol.6, p.22, Ls.11-16.) However, the district court attempted to use this information to justify its decision to summarily dismiss Mr. Evans's claim: "if counsel had not interviewed the victims of the dismissed counts, counsel would not have known to call the witness she called at sentencing." (R., p.112.) D.A.'s testimony indicated that the conversation with C.S. did not take place until *after* Mr. Evans entered his guilty plea on June 2, 2010. (See Tr., Vol.6, p.17, L.24 - p.18, L.3 (Counsel asked D.A., "In the last few weeks, I believe leading up to the last time Mr. Evans was in court on August 4, [2010,] did you have an opportunity to have a conversation with [C.S.]?" D.A. indicated that was correct.) As such, the district court's conclusion that calling D.A. indicated an adequate investigation by trial counsel is clearly erroneous.

Nothing about counsel's calling D.A. at the sentencing hearing indicates that she conducted an adequate investigation *before* Mr. Evans entered his guilty plea. Therefore, Mr. Evans's allegations of fact remain uncontradicted, to be accepted as true at the summary dismissal phase. *Baldwin*, 145 Idaho at 153. At most, there is a genuine issue of material fact as to whether counsel conducted these interviews before the guilty plea, and that still requires an evidentiary hearing. *Id.* Therefore, the district court's order summarily dismissing this claim was in error.

¹² For example, C.S. testified to the grand jury that she was still sixteen during the first contact, rather than nearly eighteen, as the police reports indicated. (*Compare* Tr., Vol.4, p.22, Ls.13-15; *with* PSI, p.92.)

the material elements of those charges, but counsel did not do so.¹³ (R., pp.71-72.) Therefore, the evidence, construed liberally in Mr. Evans's favor, indicates that counsel provided deficient performance by not following up on the legitimate concern that three of the charges levied against him were improper, and thus, counsel's performance was deficient. See *Mitchell*, 132 Idaho at 280; *Murphy*, 143 Idaho at 146.

Mr. Evans also alleged that, had counsel performed this investigation and filed the appropriate motions, "Petitioner would have no[t] entered his guilty plea but instead would have gone to trial." (R., p.7.) Mr. Evans subsequently affirmed that had counsel conducted an adequate investigation, "I would have proceeded differently in this case."¹⁴ (R., p.72.) Those verified allegations demonstrate the prejudice required under *Strickland* – there is a reasonable probability that Mr. Evans would not have pled guilty at the time he did. *Strickland*, 466 U.S. at 694; *Booth*, 151 Idaho at 621; *McKay*, 148 Idaho at 570. Therefore, because Mr. Evans alleged facts which demonstrate his attorney provided deficient performance and that he was prejudiced by that deficient performance, the district court's order summarily dismissing his petition was erroneous.

The district court pointed to the answers in Mr. Evans's guilty plea questionnaire to justify its decision to summarily dismiss this claim. (R., p.110.) However, that

¹³ The failure to file a pre-trial motion may also constitute ineffective assistance if it can be determined that, if pursued, the motion would likely have been successful. See *State v. Hairston*, 133 Idaho 496, 512 (1999).

¹⁴ Post-conviction counsel indicated that Mr. Evans preferred to rely on the statements in the amended affidavit, as they "flushed [sic] out [the issue] better." (Tr., Vol.2, p.2, Ls.11-15.) The district court asked if this meant that Mr. Evans was withdrawing his original statement and substituting the initial statement with the one from the amended petition, and counsel affirmed that was so. (Tr., Vol.2, p.2, Ls.16-19.) Based on this discussion, it is evident that, by asserting, "I would have proceeded differently in this case," Mr. Evans was referring to his initial assertion that he would not have pled guilty, had counsel conducted an adequate investigation, since he was only trying to flesh the issue out, rather than make a new or different assertion. (See Tr., Vol.2, p.2, Ls.11-15.)

information does not definitively disprove Mr. Evans's verified allegations. Rather, all it does is create a genuine issue of material fact – whether or not Mr. Evans's attorney did perform an adequate investigation. It is entirely possible that Mr. Evans did not learn of his attorney's deficient performance in this regard until after he had filled out the questionnaire and entered his guilty plea. In that case, neither statement would be false, but there would still be an issue which, if true, would entitle Mr. Evans to post-conviction relief. The critical point is that, at the summary dismissal stage, the facts are to be liberally construed in favor of the petitioner. *Charboneau*, 140 Idaho at 792. To construe these facts in Mr. Evans's favor means that the allegations in the petition would be viewed as correct. *See id.* If the allegations are correct, Mr. Evans would be entitled to relief, and therefore, an evidentiary hearing was necessary. *Baldwin*, 145 Idaho at 153. Since the guilty plea questionnaire at most creates a genuine issue of material fact, summary dismissal was inappropriate. *Id.*

CONCLUSION

Mr. Evans respectfully requests that this Court exercise its review authority in this case. On review, Mr. Evans respectfully requests this Court reverse the district court's order summarily dismissing his petition for post-conviction relief and remand the case for an evidentiary hearing.

DATED this 12th day of May, 2014.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

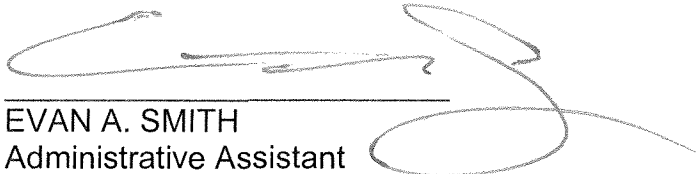
I HEREBY CERTIFY that on this 12th day of May, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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