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Evans v. State Appellant's Brief 1 Dckt. 40300

IN THE SUPREME COURT OF THE STATE OF IDAHO

TROY LANE EVANS, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	NO. 40300 ADA COUNTY NO. CV 2011-18655 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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STATEMENT OF THE CASE

Nature of the Case

Troy Evans appeals the district court's decision to summarily dismiss his petition for post-conviction relief. He claims that he alleged sufficient facts to demonstrate a viable claim of ineffective assistance of counsel, and therefore, was entitled to an evidentiary hearing. First, he asserts that, because his defense counsel represented both Mr. Evans and his wife, who was also facing criminal charges stemming from the same events, and trial counsel negotiated a plea bargain to his wife's benefit at his expense, his attorney had a conflict of interest. Second, Mr. Evans contends that trial counsel was ineffective because she failed to conduct a sufficient investigation in regard to several charges, which he claims would have revealed evidence and testimony which would directly contradict a material element of several of the charged offenses. Therefore, this Court should reverse the district court's order summarily dismissing Mr. Evans's petition and remand for an evidentiary hearing.

Statement of the Facts and Course of Proceedings

Mr. Evans was charged with seven counts of sexually-related conduct. (Presentence Investigation Report (*hereinafter*, PSI), pp.72-74.)[1] Charges 1, 2, and 4

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[1] 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. (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" and page numbers correspond to that document. 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 case. 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

addressed claims that Mr. Evans had sexually battered C.S., who was alleged to have been sixteen or seventeen when the contact occurred.[2] (PSI, p.73.) C.S. had 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, the police reports indicated that officers had cross-checked C.S.'s story, and the evidence they reviewed (the dates on the leases signed by Mr. Evans and his wife) indicated that C.S. was actually eighteen during at least some of the relevant time.[3] (PSI, p.92.)

Subsequently, Mr. Evans's wife was charged with witness intimidation for making calls to C.S. (R., p.116.) They were represented by the same attorney. (*See, e.g.,* R., p.117.) Mr. Evans alleged that 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.), and the State would dismiss the remaining charges, and it would also reduce his wife's charge to a

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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.

[2] Counts 3 and 6 alleged that Mr. Evans had 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 had sexually abused a person under the age of sixteen, N.E., by masturbating within N.E.'s view. (PSI, p.72, 74.)

[3] 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.").)

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.) During that recess, Mr. Evans alleged his counsel 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. (Tr., Vol.5, p.13, 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.)

At the sentencing hearing, the defense presented a witness, C.S.'s brother, D.A. D.A. testified that he/she had confronted C.S., pointing out that C.S. would have been eighteen years old during the time C.S. said the conduct occurred. (Tr., Vol.6, p.22, L.23 - p.23, L.4.) Like the indication in the police report, D.A.'s conclusions about C.S.'s age were based on the locations at which C.S. alleged the conduct to have occurred. (*Compare* Tr., Vol.6, p.22, L.23 - p.23, L.4 *with* PSI, p.92.) D.A. also testified that C.S. told him/her that the point of making those allegations was that "I never really liked [Mr. Evans], and I just wanted to do away with him." (Tr., Vol.6, p.22, Ls.13-16.)

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.) After Mr. Evans admitted to violating the terms of his probation, the district court revoked his probation. (R., p.102-03.) Mr. Evans did not file a direct appeal in this matter. (R., p.103.)

However, Mr. Evans did file a 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, even though doing so created a conflict of interest, and by not sufficiently investigating the charges filed with regard to C.S. (R., pp.6-7, 66-67, 71-72.) He alleged that, had his attorney properly investigated charges 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 denied those allegations and moved for summary dismissal of the claims. (R., pp.32-35, 46-48, 83-94.)

The district court granted the State's motion for summary dismissal. (R., p.122.) In regard to the insufficient 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 held that he had not sufficiently

articulated the prejudice caused him by the alleged defective 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 this claim. (R., p.112.) In regard to the dual representation claim, the district court determined 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.)

ISSUES

1. Whether the district court erred by summarily dismissing Mr. Evans' claim that his defense counsel provided ineffective assistance by representing both Mr. Evans and his co-defendant.

2. Whether the district court erred by summarily dismissing Mr. Evans' claim that his defense counsel provided ineffective assistance by not conducting a sufficient investigation of the charges filed against Mr. Evans.

ARGUMENT

I.

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

A. Introduction

Mr. Evans contends that his attorney provided ineffective assistance by representing him even though there was an actual conflict in that representation because trial counsel was also representing his wife, whose interests were at odds with Mr. Evans's. 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 to a felony, while his co-defendant 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

Post-conviction cases are civil in nature. *Baldwin v. State*, 145 Idaho 148, 153 (2008). In post-conviction cases, a petition may be summarily dismissed only if it does not present a genuine issue of material fact. *Id.*; *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 . . . ."[4] *Baldwin*, 145 Idaho at 153; *Saykhamchone v. State*, 127 Idaho 319, 321 (1995). 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). At the summary judgment phase, the courts "liberally construe the facts and reasonable inferences in favor of the non-moving party."[5] *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008); *see also Charboneau v. State*, 140 Idaho 789, 792 (2004) ("[I]nferences [are] liberally construed in favor of the petitioner."). When a genuine issue of material fact exists and would, if resolved in the petitioner's favor, entitle the petitioner for relief, the district court must conduct an evidentiary hearing. *Baldwin*, 145 Idaho at 153; *Berg v. State*, 131 Idaho 517, 518 (1998).

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 v. State*, 140 Idaho 847, 850 (2004). In regard to the second prong of the *Strickland* test, a petitioner shows prejudice when he demonstrates that there is a

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[4] 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 creates genuine issues of material fact in regard to those issues, 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.

[5] In this case, the State is the moving party. (R., pp.46-49, 87-94.) Therefore, the facts and reasonable inferences are liberally construed in Mr. Evans's favor. *Charboneau*, 140 Idaho at 792; *Nevarez*, 145 Idaho at 881.

reasonable probability that the outcome would have been different, or, in other words, he must undermine confidence in the outcome. *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 *Ridgley v. State*, 148 Idaho 671, 676 (2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))).

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, 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 v. State*, 121 Idaho 257, 258 (Ct. App. 1992) ("*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.

As to the merits of Mr. Evans's claim regarding dual representation, one of the aspects of the constitutional guarantee to counsel is the "right to representation free

from conflicts of interest."[6] *State v. Koch*, 116 Idaho 571, 574 (Ct. App. 1989); *see also Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980). Joint representation of a co-defendant may, but will not always, constitute ineffective assistance. *Giles v. State*, 125 Idaho 921, 923 (1993); *State v. Guzman*, 126 Idaho 368, 371 (Ct. App. 1994). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate an actual conflict of interest adversely affected his lawyer's performance."[7] *Cuyler*, 446 U.S. at 348; *State v. Severson*, 147 Idaho 694, 703 (2009). Actual conflicts arise when counsel "'actively represented conflicting interests.'" *Guzman*, 126 Idaho at 371 (quoting *Koch*, 116 Idaho at 574). Basically, an actual conflict exists when the lawyer's representation of one client will be directly adverse to the interests of another client, or where there is a significant risk that the representation of a client will materially limit her ability to fulfill her responsibilities to another client. I.R.P.C. 1.7. And, when the petitioner demonstrates that such a situation adversely affected counsel's representation of him in this manner, prejudice is presumed. *Guzman*, 126 Idaho at 371.

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

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[6] 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.

[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*, 446 U.S. at 347; *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 Koch*, 116 Idaho at 574.

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). At the district court's request, 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.) In his affidavit, Mr. Evans asserted that, during that recess, his attorney told him to "come up with a better story to tell the Court." (R., p.72.) As such, Mr. Evans asserted that he felt pressured into entering into this plea agreement. (R., p.72.)

Since the courts must accept Mr. Evans's unrebutted, verified factual allegations as true, and it must also construe the facts and reasonable inferences from those facts in favor of Mr. Evans, summary judgment was inappropriate. *See Charboneau*, 140 Idaho at 792; *Nevarez*, 145 Idaho at 881. Mr. Evans's struggle to articulate a factual basis for the plea, combined with counsel's subsequent statement to come up with a better story, indicates that Mr. Evans was pleading guilty to crime which he did not believe he had committed. (*See also* R., p.6 (indicating that Mr. Evans believed he

entered an *Alford* plea)[8]; R., p.33 (the State denying that Mr. Evans actually entered his plea pursuant to *Alford*).) When combined with the fact that both pleas hinged on his entry of that plea, the facts, liberally construed in Mr. Evans's favor, indicate that Mr. Evans's interests were at odds with his wife's, and that counsel was no longer able to fulfill all her responsibilities to Mr. Evans. These facts would entitle Mr. Evans to relief because they show deficient performance by the attorney (representing Mr. Evans despite an actual conflict of interests) and because the actual conflict appears to have affected the representation, prejudice is presumed. *See, e.g., Guzman*, 126 Idaho at 371. 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.

II.

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

A. Introduction

Mr. Evans contends that his attorney provided ineffective assistance by not sufficiently 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 any pretrial motions challenging those charges in that regard. Rather, counsel negotiated the problematic

[8] 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).

plea deal discussed *supra* while those potentially-improper charges were still pending. Mr. Evans alleged that, had counsel engaged in a sufficient investigation in this regard, 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. An evidentiary hearing was required. Therefore, this Court should reverse the district court's erroneous order summarily dismissing Mr. Evans's petition and remand for an evidentiary hearing.

B. Mr. Evans's Trial Attorney Provided Ineffective Assistance By Not Conducting A Sufficient 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.) Specifically, 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.[9] (PSI, p.92.) Mr. Evans pointed out that those reports differed from the testimony C.S. offered during the grand jury proceedings.[10] (R., pp.6-7.) Since the three charges ultimately filed in regard to C.S. each alleged that he/she was sixteen or seventeen years old, a reasonable attorney would have conducted a further investigation based on the indications in the police report. *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

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[9] 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.21, 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 a sufficient investigation by trial counsel is clearly erroneous. Nothing about counsel's calling D.A. at the sentencing hearing indicates that she conducted a sufficient 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.

[10] For example, C.S. testified to the grand jury that he/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.)

motion to dismiss those charges on this basis, but counsel did not do so.[11] (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 a sufficient investigation, "I would have proceeded differently in this case."[12] (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.

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[11] 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).

[12] 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 a sufficient 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.)

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 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 a sufficient 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, an evidentiary hearing was necessary. *Baldwin*, 145 Idaho at 153. Therefore, since the guilty plea questionnaire at most creates a genuine issue of material fact, summary dismissal was inappropriate. *Id.*

CONCLUSION

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 18th day of June, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of June, 2013, 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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DISTRICT JUDGE
ELMORE COUNTY DISTRICT COURT
150 S 4TH E, STE 5
MOUNTAIN HOME ID 83647

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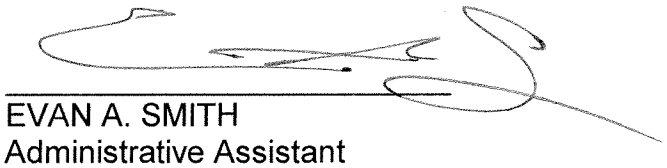

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BRD/eas