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## Evans v. State Respondent's Brief Dckt. 40300

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TROY LANE EVANS	)	
	)	No. 40300
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2011-18655
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

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**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

HONORABLE LYNN G. NORTON  
District Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

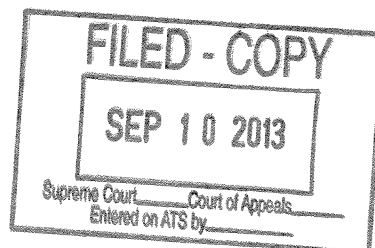
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## STATEMENT OF THE CASE

### Nature of the Case

Troy Lane Evans 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 granting respondent's motion for summary dismissal and denying petitioner's motion for summary disposition:

On August 18, 2010, Petitioner, Troy Lane Evans, entered a guilty plea and was sentenced to five (5) years determinate, followed by ten (10) years indeterminate, with the Court retaining jurisdiction for 365 days for Count VII of an Amended Indictment, Sexual Abuse of a Minor Under Sixteen Years of Age, a felony. Mr. Evans successfully completed the retained jurisdiction program and the sentence was suspended with the Petitioner placed on probation by an order entered January 27, 2011. The Petitioner then admitted violating his probation and the original sentence was imposed by Order Revoking Probation, Judgment of Conviction and Order of Commitment, entered on September 15, 2011. The term of confinement in the September 15, 2011 order was corrected to match the August 18, 2010 order in a corrected judgment entered April 18, 2012, *nunc pro tunc* September 15, 2011. The Petitioner requested reconsideration of the sentence under Idaho Criminal Rule 35 which was denied in an order entered January 5, 2012.

The Petitioner did not file an appeal in this matter.

(R., pp.102-103.)

Evans filed a timely *pro se* petition for post-conviction relief and affidavit.

(R., pp.5-8.) The state filed an answer to Evan's *pro se* petition for post-conviction relief (R., pp.32-37) as well as a motion for summary dismissal (R., pp.46-49). The district court later appointed counsel to assist Evans in his post-

conviction relief case (R., p.55), who filed an amended petition for relief asserting five separate bases of ineffectiveness of counsel including trial counsel's failure to investigate the charges against Evans and a conflict of counsel in the dual representation of Evans and his co-defendant wife leading to his alleged involuntary guilty plea (R., pp.65-69). The state filed an answer to Evans' amended petition for post-conviction (R., pp.83-86) and a motion for summary dismissal of the amended petition (R., pp.87-94). Evans filed a cross-motion for summary disposition of two of his claims of ineffective assistance of counsel. (R., pp.95-97; see also R., pp.98-101.)

One of Evans' claims of ineffective assistance of counsel included an allegation that he was incorrectly advised of the terms of the plea agreement. (R., p.1-3.) Following the correction of a clerical error in Evans' judgment of conviction, this claim was withdrawn. (Id.) Additional claims of ineffective assistance of counsel asserting a conflict of interest and inadequate preparation by counsel were dismissed by written order following a hearing wherein the court found Evans had failed to establish trial counsel's performance was deficient or any resulting prejudice. (R., pp.102-122.)

Evans timely appealed. (R., pp.122-127.)

## ISSUE

Evans states the issues on appeal as:

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

(Appellant's brief, p.6.)

The state rephrases the issue as follows:

Has Evans failed to show error in the district court's summary dismissal of his petition for post-conviction relief?



## ARGUMENT

### Evans Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

#### A. Introduction

Evans contends the district court erred in summarily dismissing his petition for post-conviction relief. (Appellant's brief, pp. 2-16.) Evans addresses only two of the claims of ineffective assistance originally asserted in his amended petition for post-conviction relief. Evans first contends the district court erred in concluding the entry of his plea was not the result of dual representation amounting to a conflict of interest. (Appellant's brief, pp.7-12.) Evans' second contention is that the district court erred in summarily dismissing his assertion trial counsel failed to conduct an adequate investigation of the charges against him. (Appellant's brief, pp.12-16.)

Because Evans failed to present evidence establishing *prima facie* claims of deficient performance or resulting prejudice, his assertions of error fail.

#### 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 un rebutted 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. Evans Has Failed To Show Error In The Summary Dismissal Of His Claim That The Dual Representation By Counsel Of He And His Co-Defendant Wife Constituted Ineffective Assistance Of Counsel

Evans claimed his trial counsel was ineffective for failing to “adequately separate her representation of [Evans] and his wife by negotiating [Evans’] wife’s plea resolution to be contingent on [Evans’] guilty plea.” (R., p.67.) The district court summarily dismissed this claim, finding Evans’ had failed to present evidence establishing an actual conflict of interest. (R., pp.119-120.) On appeal, Evans argues there was an actual conflict of interest in the dual representation of himself and his co-defendant wife where “the plea deals offered to both defendants were contingent on Mr. Evans pleading to a felony, while hi co-

defendant would have her charges reduced to a misdemeanor.” (Appellant’s brief, p.7.) Because this assertion of actual conflict is belied by the record and applicable case law, Evans’ argument fails.

“Joint representation of defendants is not per se ineffective assistance of counsel.” State v. Hairston, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999) (citation omitted). Rather, a defendant seeking relief based on an alleged conflict of interest, to which she did not object at trial, must demonstrate that counsel “actively represented conflicting interests” and that the conflict of interest actually affected the adequacy of the lawyer’s performance. Hairston, 133 Idaho at 511, 988 P.2d at 1185; see also Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (where defendant alleges a conflict based upon his counsel’s simultaneous representation of defendant and the prosecutor’s key witness, defendant must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance); State v. Severson, 147 Idaho 694, 703, 215 P.3d 414, 423 (2009) (“Whether a trial court’s failure to adequately inquiry, but the defendant did not object to the conflict at trial, the defendant’s conviction will only be reversed if he or she can prove that an actual conflict of interest adversely affected his lawyer’s performance.”) An actual conflict is defined by its effect on counsel, not by whether there is a “mere theoretical division of loyalties.” Mickens v. Taylor, 535 U.S. 162, 171, 172 n.5 (2002). “[T]he possibility of conflict is insufficient to impugn a criminal conviction.” Dunlap v. State, 141 Idaho 50, 62, 106 P.3d 376, 388 (2004) (citations omitted). Absent a showing of actual conflict, a defendant

is not entitled to reversal of her conviction. Mickens, 535 U.S. at 173-74; Burger v. Kemp, 483 U.S. 776, 785 (1987).

As the district court concluded in granting summary dismissal of Evans' petition for post-conviction relief, Evans "was represented by counsel he and his wife retained." (R., p.117.) That Evans was aware of the dual representation was "obvious" based on the fact that "they all appeared in court simultaneously." (Id.) Evans asserts on appeal "an actual conflict is evident in his case" because both he and his co-defendant wife's "pleas were contingent on [him] accepting this deal." (Appellant's brief, pp.10-11.) This assertion is not supported by the record.

At the change of plea hearing, counsel for Evans explained the nature of the plea negotiations with the state:

MS. DODGE: Sherry [sic] Dodge representing both Troy and Sadena.

THE COURT: And I understand we're going to be doing a change of plea today; is that right?

MS. DODGE: That's right, on Troy. And on Sadena, once we enter the plea with Troy, then that's going to be remand [sic] for plea and sentencing to magistrate.

THE COURT: A plea agreement on Troy?

MS DODGE: Yes.

THE COURT: Can one of you put it on the record?

MS. DODGE: Judge, the offer in this case is that Mr. Evans will be pleading guilty to, I believe, it's Count 7, which is sexual abuse of a minor under 16. Mr. Evans agrees to waive Estrada for PSI and SANE evaluation. The state will be recommending a 5 plus 10 for unified sentence of 15. It will recommend probation if the psychosexual returns as low risk and a good candidate for

community-based treatment. If probation is granted, the state will be asking for local incarceration with a maximum of 1 year. Obviously, he will follow through with the SANE treatment as recommended in the evaluation. Suspend all fines, and the facts can be considered and argued at sentencing, and all victims may read the PSI and submit the victim-impact statement, and then the no contact with minors.

(6/2/2010 Tr., p.1, L.12 – p.2, L.15.) The negotiations ultimately reduced the seven counts of felony sex offenses to one count of sexual abuse of a minor with a possible probation recommendation by the state.

Evans argues on appeal that he and his wife's pleas "hinged on his entry of that plea" to the one count of sex abuse which would "indicate that [his] interests were at odds with his wife's, and that counsel was no longer able to fulfill all her responsibilities to [him]." (Appellant's brief, pp.11-12.) Contrary to Evans' argument, the record does not support a factual claim that his wife's benefit of the plea bargain was contingent on the entry of his plea. (See, R., pp.118-119.) Further, had Evans' co-defendant wife's negotiated resolution been contingent on Evans' plea, that alone does not constitute a conflict of interest that actually affected trial counsel's performance. See State v. Hanslovan, 147 Idaho 530, 537-538, 211 P.3d 775, 783 (Ct. App. 2008) (although joint plea agreements are not favored, they are not improper).

What the record does show is that Evans was charged with multiple felonies carrying lengthy possible terms of incarceration but due to the negotiations engaged in between his counsel and the state, he was given the opportunity of a potential probation sentence for one felony conviction while his co-defendant wife would only face a misdemeanor charge. This does not

establish the active representation of conflicting interests, nor does it establish a conflict of interest actually affected the adequacy of Evans' lawyer's performance. Just the opposite, it appears Evans received a beneficial resolution through the representation of he and his wife by trial counsel.

Because Evans failed to meet his burden of showing an actual conflict of interest, much less that trial counsel's performance was adversely affected by an actual conflict of interest, he has failed to show error in the summary dismissal of his conflict of interest claim.

E. Evans Has Failed To Show Error In The Summary Dismissal Of His Claim That Counsel Was Ineffective For Failing To Adequately Investigate The Claims Against Him

In his amended petition for post-conviction relief, Evans asserted his trial counsel "failed to investigate discrepancies between the grand jury transcript and the police reports, investigate the appropriate statute of limitations, and file an appropriate Motion to Dismiss Indictment." (R., p.66.) On appeal, Evans asserts had trial counsel followed through "on the legitimate concern that three of the charges levied against him were improper," he would have gone to trial instead of pleading guilty. (Appellant's brief, p.15.) The district court held that because the challenged charges were dismissed as part of the plea agreement, Evans had failed to present a *prima facie* claim of ineffective assistance of counsel. (R., pp.111-112.) Evans has failed to demonstrate error in the district court's analysis.

In order to prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting

prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). The United States Supreme Court has recently reiterated:

Surmounting Strickland's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve.

Harrington v. Richter, 131 S.Ct. 770, 788 (2011) (citations and quotations omitted).

As the court discussed in summarily dismissing Evans' petition for post-conviction relief, the charges of concern were dismissed pursuant to plea negotiations. (R., p.111.) The court concluded there was no showing of deficient performance or prejudice in getting the charges dismissed through plea negotiations as opposed to through the filing of a motion to dismiss. (R., p.112) Moreover, Evans failed to provide evidence sufficient to establish that a motion to

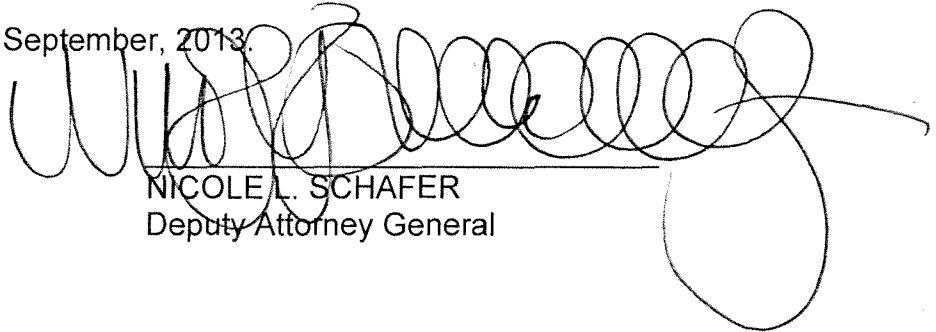


dismiss the challenged counts would have been successful. (Id.) Both of these conclusions are supported by the record and the law. Evans failed to carry his burden of establishing either deficient performance or resulting prejudice. Therefore, he has also failed to show error in the denial of his post-conviction petition.

CONCLUSION

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

DATED this 10<sup>th</sup> day of September, 2013.



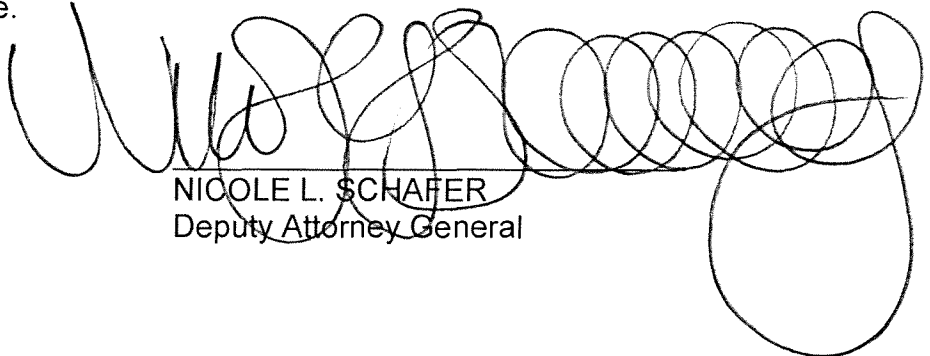
NICOLE L. SCHAFFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10<sup>th</sup> day of September 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

BRIAN R. DICKSON  
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. SCHAFFER  
Deputy Attorney General

NLS/pm