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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TROY LANE EVANS,)	
)	
Petitioner-Appellant,)	NO. 40300
)	
v.)	ADA COUNTY NO. CV 2011-18655
)	
STATE OF IDAHO,)	REPLY BRIEF
)	
Respondent.)	
_____)	

REPLY 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

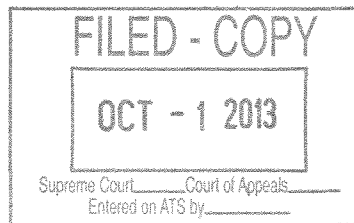
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STATEMENT OF THE CASE

Nature of the Case

Troy Evans appeals the district court's order summarily dismissing his petition for post-conviction relief. As an initial matter, he argued that the district court applied the wrong standard when entering that order, holding him to a preponderance of the evidence standard at the summary dismissal phase. The State does not address this issue in its Respondent's Brief. Because the district court's consideration of the evidence was based on an incorrect evidentiary standard, its determination that the case should be summarily dismissed is irreparably tainted. As such, this Court should, at a minimum, remand this case so that the district court can evaluate Mr. Evans's petition under the proper standard.

However, Mr. Evans did present sufficient information to demonstrate two genuine issues of material fact. First, he presented sufficient evidence to demonstrate a genuine issue of material fact regarding his attorney's conflict of interest. The State's argument, which focuses on the benefit Mr. Evans did receive, does nothing more than demonstrate the genuine issue of material fact in regard to the conflict of interest claim – whether the attorney's actions were objectively unreasonable, in light of the fact that she negotiated a plea agreement for Mr. Evans which, while providing him with some benefit, did require him to plead to a felony so that a better deal could be secured for counsel's other client, Mr. Evans's wife. As such, the decision to summarily dismiss that claim, even when considered under the proper standard, was erroneous.

The same is true for Mr. Evans's allegation that his attorney insufficiently investigated the charges against him. The State's arguments only demonstrate that the

issue is one of fact – whether the attorney sufficiently investigated the offenses. Therefore, the decision to summarily dismiss that claim was also erroneous. As a result, this Court should instruct on remand that this case proceed to an evidentiary hearing.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Evans's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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's Claim That His Defense Counsel Provided Ineffective Assistance By Representing Both Mr. Evans And His Co-Defendant

A. The District Court's Erroneous Application Of The Wrong Evidentiary Standard Means That Its Decision To Summarily Dismiss The Petition Was Erroneous

The fact that the district court applied the wrong standard when it dismissed Mr. Evans's petition means that the decision was erroneous and should be vacated. (App. Br., p.9.) This is error because the district court essentially skipped one of the decision points that exist when a post-conviction petition is filed *pro se*. Those decision points are (1) whether counsel should be appointed to assist the petitioner; (2) whether the claim should be summarily dismissed; (3) whether the petitioner proved his claim by a preponderance of the evidence. See I.C. § 19-4901, *et seq.*; *Charboneau v. State*, 140 Idaho 789, 792-93 (2004)). Each has its own, separate level of proof which is necessary to pass that decision point and move to the next. For example, at the third decision point, the petitioner must prove his claim by a preponderance of the evidence. See, *e.g.*, *Pizzuto v. State*, 149 Idaho 155, 159-60 (2010). However, to justify holding the evidentiary hearing in that regard, the petitioner must make a showing that there is a genuine issue of material fact. *Id.*; *Baldwin v. State*, 145 Idaho 148, 153 (2008). That standard is less than the preponderance of the evidence standard required to secure relief at an evidentiary hearing. *Baldwin*, 145 Idaho at 153.

By applying the wrong standard, by essentially skipping the second decision point, the district court's consideration of the petition was tainted, and thus, its ultimate

conclusion about the sufficiency of that evidence was erroneous and should be reversed. *Compare Charboneau*, 140 Idaho at 793 (holding that, where the district court skipped the first decision point, it committed reversible error). The State does not address this issue at all. (See *generally* Resp. Br.) Therefore, the district court's decision to summarily dismiss the petition based on an evaluation under the wrong evidentiary standard should be vacated and this case remanded for an evaluation under the proper standard. Under that proper standard, Mr. Evans did present sufficient evidence to merit an evidentiary hearing.

B. The State's Responses In Regard To Mr. Evans's Claim That His Attorney Had A Conflict Of Interest Only Demonstrates That There Is A Genuine Issue Of Material Fact

Mr. Evans argues that his attorney had a conflict of interest by representing both him and his wife. He points to the fact the fact his attorney negotiated a plea deal whereby Mr. Evans would plead guilty to a felony and the charge against his wife would be reduced to a misdemeanor as evidence of the actual conflict – that his attorney was not representing Mr. Evans's best interests, but was using Mr. Evans to get a better deal for her other client, Mr. Evans's wife. (See App. Br., pp.9-12.) If that allegation, which is supported by the evidence in the record (namely, the plea agreement), were true, Mr. Evans would be entitled to relief. That is the proper standard at the summary judgment decision point: "On review, the task of this Court 'is to determine whether the appellant has alleged facts in his petition that **if true**, would entitle him to relief.'"¹

¹ Basically, at the summary judgment decision point, the courts are to accept the allegations as true, which makes sense, because the petitioner is the "non-moving party" and under the civil rules, the evidence is supposed to be considered in the light

Baldwin, 145 Idaho at 153 (quoting *Charboneau*, 140 Idaho at 792) (emphasis added). As such, he has presented a genuine issue of material fact and summary dismissal is inappropriate. The State's response – that the record suggests counsel performed adequately – does not negate that conclusion. (See Resp. Br., pp.6-10.) All it does is argue the merits of the genuine issue of material fact – whether Mr. Evans's attorney performed deficiently. At the summary dismissal stage, it does not matter, as the State believes, what other facts exist in the record that may (or may not) tend to disprove the claim. (See Resp. Br., pp.6-10.) Considering the evidence as the State does fails to adhere to the principle that the evidence is to be liberally construed in the light *most favorable* to the non-moving party, Mr. Evans, which means to treat his allegations *as if they were true*. *Chandler*, 147 Idaho at 768; *Baldwin*, 145 Idaho at 153 *Charboneau*, 140 Idaho at 792. Since there is a genuine issue of material fact in this case, the district court erred by summarily dismissing Mr. Evans's petition for post-conviction relief.

To demonstrate a genuine issue of material fact in regard to a claim of ineffective assistance of counsel, the petitioner must allege facts which, if true, show that his attorney performed in an objectively unreasonable manner and that he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth v. State*, 140 Idaho 847, 850 (2004). Representing a client while having an actual conflict of interest is objectively unreasonable. See, e.g., *Giles v. State*, 125 Idaho 921, 923 (1993); *State v. Guzman*, 126 Idaho 368, 371 (Ct. App. 1994). Doing so also prejudices the client. See, e.g., *Guzman*, 126 Idaho at 371.

most favorable to the non-moving party. *Chandler v. Hayden*, 147 Idaho 765, 768 (2009); see I.C.R.P. 56.

The evidence Mr. Evans has offered (set forth in his verified pleadings (which count as evidence, *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993) (recognizing that the petitioner's verified statements function as affidavits, and thus, are evidence to be considered at the summary dismissal stage))), if true, demonstrates that his attorney had an actual conflict by not representing his best interests, but using him to get a better deal for her other client, Mr. Evans's wife. In that case, he would be entitled to relief for ineffective assistance of counsel, based on an actual conflict. See *Strickland*, 466 U.S. at 687; see, e.g., *Giles*, 125 Idaho at 923; *Guzman*, 126 Idaho at 371. The fact that there is evidence in the record which could potentially be contrary to Mr. Evans's claim, does not, as the State believes, change that conclusion. The State's only response is based on the idea that, if the agreement maintains some benefit to Mr. Evans, the performance was not unreasonable. (See Resp. Br., pp.6-10.) However, viewing the evidence in that light fails to consider Mr. Evans's evidence in the light most favorable to him, **as if it were true**, which is the proper standard at this point in the post-conviction proceedings. See *Chandler*, 147 Idaho at 768; *Baldwin*, 145 Idaho at 153; *Charboneau*, 140 Idaho at 792. Therefore, this Court should vacate the district court's erroneous decision to summarily dismiss Mr. Evans's petition, since he has alleged a genuine issue of material fact.

C. The State's Responses In Regard To Mr. Evans's Claim That His Attorney Insufficiently Investigated The Charges In His Case Only Demonstrates That There Is A Genuine Issue Of Material Fact

As with its arguments in regard to the conflict of interest issue discussed *supra*, the State's arguments do not show that there is no genuine issue of material fact in regard to the sufficiency of counsel's investigation. As before, the State ignores the

proper standard of appellate review, which is, if the claims, supported by some evidence, are viewed in the light most favorable to Mr. Evans, as if they were true, then summary dismissal is inappropriate. *Chandler*, 147 Idaho at 768; *Baldwin*, 145 Idaho at 153; *Charboneau*, 140 Idaho at 792. When counsel does not conduct an investigation, despite being in possession of information that would lead a reasonable attorney to investigate, as counsel is alleged to have done here, that performance is deficient. *Murphy v. State*, 143 Idaho 139, 146 (Ct. App. 2006). Mr. Evans alleged that counsel did not follow up on the fact that there were deficiencies in C.S.'s story, such as to bring the basis of several of the charges into question. (R., pp.6-7, 71-72.) There is nothing in the record to suggest that counsel was aware of those problems when she negotiated the plea agreement, and so, it does not disprove Mr. Evans's allegation that counsel did not sufficiently investigate those charges. In any case, the evidence at the summary dismissal stage is to be "liberally construed in favor of the petitioner." *Charboneau*, 140 Idaho at 792. Thus, viewed in the light most favorable to Mr. Evans, those allegations, if true, show deficient performance. *Murphy*, 143 Idaho at 146.

The fact that those charges were ultimately dismissed does not, as the State believes, undermine those allegations. (See Resp. Br., pp.10-12.) And even if the State were correct, and the fact that the charges were dismissed suggests that counsel's performance may not have been deficient, all that potential interpretation of the evidence does is demonstrate that a genuine issue of material fact exists in this case: whether counsel conducted a satisfactory investigation. Therefore, if Mr. Evans's allegation – that counsel did not investigate those discrepancies, as a

reasonable attorney would have done² – is true, counsel’s performance was deficient. *See Murphy*, 143 Idaho at 146.

Mr. Evans also alleged that, had his attorney performed sufficiently, he would not have pled guilty at that point in the proceedings. (See R., pp.7, 72.) Where there is a reasonable probability that the petitioner would not have pled guilty *at the time he did*, but for counsel’s deficient performance, that demonstrates prejudice. *Booth v. State*, 151 Idaho 612, 621 (2011). This does not mean, as the State mistakenly believes, that Mr. Evans had to “provide evidence sufficient to establish that a motion to dismiss the challenged counts would have been successful.” (Resp. Br., pp.11-12.) In fact, as the Court of Appeals recently pointed out, a genuine issue of fact may exist “as to whether a motion to suppress would have been successful and, therefore, whether counsel was ineffective for failing to file such a motion.” *Hoffman v. State*, 153 Idaho 898, 906 (Ct. App. 2012) (discussing *Lint v. State*, 145 Idaho 472, 480 (Ct. App. 2008)). That same logic is applicable in this case: there is a genuine issue of material fact about whether a motion to dismiss would have been successful, and therefore, there is a genuine issue of material fact as to whether counsel was ineffective for not investigating and pursuing such a motion. *Compare Hoffman*, 153 Idaho at 906.

Certainly, it is not outside the realm of possibility that the district court could have denied Mr. Evans’s motion to dismiss and then accept his guilty plea to the same plea

² This situation is akin to the decision in *Knutsen v. State*, 144 Idaho 433, 443 (Ct. App. 2007), where the Court noted that part of counsel’s job is to present mitigating evidence at sentencing. Just as there is no rational reason to not present mitigating evidence, there is no rational reason for an attorney to not try and increase her position, either for future plea bargaining or for trial, by having some of the charges dismissed because they fail to allege a crime.

deal at some later point in the proceedings, but that does not really matter in this case. See *Booth*, 151 Idaho at 621. All the evidence has to demonstrate in order to show prejudice is that Mr. Evans would not have entered his guilty plea *at the point in time that he did*. *Id.* Since the evidence shows that, had counsel sufficiently investigated C.S.'s claims, Mr. Evans would not have accepted the plea deal *at the time he did*, Mr. Evans has sufficiently alleged prejudice from counsel's deficient performance. See *id.* In any event, to infer otherwise fails to "liberally construe [the inferences] in favor of the petitioner," as the Supreme Court requires. *Charboneau*, 140 Idaho at 792. Therefore, if Mr. Evans's allegations are true, he would be entitled to relief for ineffective assistance of counsel for failing to adequately investigate the case. See *Strickland*, 466 U.S. at 687; *McKeeth*, 140 Idaho at 850.

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 1st day of October, 2013.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of October, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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E-MAILED BRIEF

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