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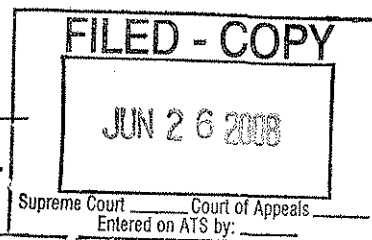
IN THE SUPREME COURT OF THE STATE OF IDAHO

TYSON LEE BUSS,)
)
 Petitioner-Appellant,)
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)

NO. 33180

APPELLANT'S BRIEF

BRIEF OF APPELLANT



APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

HONORABLE
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
PETITIONER-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Tyson Lee Buss appeals from the District Court's order summarily dismissing his petition for post-conviction relief. Mr. Buss asserts that, because he voluntarily dismissed his June 2005 petition for post-conviction relief, and that petition was dismissed without prejudice, the district erred in dismissing his December 2005 petition based upon a finding that Mr. Buss had knowingly, voluntarily, and intelligently waived the claims raised in the June 2005 petition. He further asserts that the district court erred in dismissing the December 2005 petition based upon the application of the doctrine of issue preclusion because the district court failed to follow the procedures mandated by I.C. § 19-4906(b) when it *sua sponte* dismissed on those grounds, and when it relied upon erroneous legal and factual findings in concluding that the doctrine applied. Finally, Mr. Buss asserts that the district court erred in dismissing his claim that his guilty plea was not knowingly, intelligently and voluntarily entered because it was based upon the ineffective assistance of counsel. The district court erred in dismissing this claim because the court failed to follow the procedures mandated by I.C. § 19-4906(b) when it *sua sponte* dismissed the claim for lack of evidence of prejudice.

Statement of the Facts and Course of Proceedings

On December 22, 2003, Tyson Lee Buss entered an *Alford Plea, North Carolina v. Alford*, 400 U.S. 25 (1970), to the charge of voluntary manslaughter with a sentencing enhancement for the use of a deadly weapon. (Ch.Plea Tr., p.4, Ls.17-20.) During that hearing, the State submitted a statement of the facts supporting the plea.

It was about 9:30 on May 25th, 2003, when Dwight Thompson, who was the victim in this matter, was in a car with two other individuals. They were driving on Boulevard Street at this hour when they saw the defendant with another individual. The victim recognized the defendant, and he pulled his car up to an alley on Boulevard Street in Idaho Falls, and 7th Street, got out of his car and approached the defendant.

And the victim in this matter believed that the defendant owed some money, so he approached the defendant and began to inquire about the money. An argument ensued. The victim raised his voice, and there were some statements made to the effect of, pay me the money or you'll have to shoot me. You'll have to shoot me.

The defendant had a High Point 9mm semiautomatic gun. The argument lasted a very brief duration, at which time the defendant raised the firearm and it discharged. The bullet penetrated Mr. Thompson's skin in the mid-abdomen area.

EMTs arrived at the scene and began to administer some lifesaving procedures upon Mr. Thompson. He was transported to the hospital where he was pronounced a short time thereafter dead. There was an autopsy that was ordered and conducted and the bullet retrieved from Mr. Thompson.

The defendant, after shooting Mr. Thompson, ran and was apprehended by law enforcement a short distance from this incident. And a short time after, he was interviewed by law enforcement, where he acknowledged having the gun. He acknowledged shooting the gun and told law enforcement how he came into possession of the gun.

This crime was observed by three neighbors that witnessed the entire event, would testify to the nature of the argument that was transpiring. It was also witnessed by a driver that was passing by at the very moment this occurred, and it was also witnessed by two of the occupants that were with the victim. And all of those individuals would have testified as to those facts, and we would have had the death established through medical testimony.

It did happen in Bonneville County, Your Honor.

(Ch.Plea Tr., p.13, L.14 – p.15, L.8.)

Thereafter:

Buss was sentenced on February 9, 2004. The district court imposed a total sentence of thirty years, with sixteen years fixed.

On June 20, 2005, Buss filed a petition for post conviction relief commencing Bonneville County case no. CV-05-3532. The State filed a motion for summary dismissal in case no. CV-05-3532 on August 16, 2005. and a hearing was held on that motion on October 27, 2005. At the October 27, 2005, hearing, Buss requested that he be allowed to withdraw

his petition for post conviction relief. The court considered Buss's request to be a motion to dismiss and granted the motion.

(R.,p.28.) More specifically, at the October 27, 2005 hearing in Bonneville County case no. CV-05-3532, counsel for Mr. Buss informed the district court that,

I did have a chance to speak with Mr. Buss, I did discuss his petition and the fact that many of the allegations he's alleged have to do with what Mr. Allison said or didn't do, and with his recent passing it would be hard to prove any of those allegations. He has asked me, first of all, to withdraw his petition so he might reconsider and decide if he wants to file it again under new issues or just try a different tack. But in the alternative, if the court is not willing to do that, I'd just like to address some of his allegations.

(Exhibit, Audio recording of October 27, 2005 (*hereinafter*, A.R.)) Counsel then addressed the merits of some of Mr. Buss's claims. (A.R.) The state objected to Mr. Buss's motion to withdraw the petition, and specifically asked the district court to instead summarily dismiss the petition. (A.R.) The district court ultimately dismissed the petition pursuant to Idaho Rule of Civil Procedure 41, stating:

Rule 41 of the Idaho Rules of Civil Procedure talks about voluntary dismissal. 41(a)(1) indicates subject to the provisions of Rule 23 and 73, which aren't applicable here, an action may be dismissed by the plaintiff without order of the court by filing a notice or by stipulation, otherwise, which is paragraph 2, it indicates except as provided in paragraph one of this subdivision of this rule, and action shall be dismissed at the plaintiffs instance...shall not be dismissed save upon order of the court and upon such terms and conditions as it deems proper. No counter-claims have been pleaded and there hasn't been in this case so I don't have to deal with that. So basically it gives me the opportunity to decide whether to accept or reject the motion for dismissal. Mr. Mallard I consider your first request, I think you said you wanted to withdraw the petition was the language you used. I think that's equivalent to a motion to dismiss the petition. The motion's granted. The petition is dismissed.

(A.R.)

In addition to filing a post-conviction action, Mr. Buss appealed his conviction, and the remittitur in that appeal issued on December 28, 2004.¹

On December 12, 2005, the district court received a Petition and Affidavit for Post-Conviction Relief. (See R., p.3.) In that Petition, Mr. Buss asserted, in part, that he received ineffective assistance of counsel and was coerced into a guilty plea when, prior to the entry of Mr. Buss's guilty plea, Mr. Buss's attorney informed him that, "there was no self defense or justification homicide in Idaho" and that Mr. Buss would be found guilty "Because there is no self defense." (R., p.5.) Mr. Buss also asserted that he was factually innocent of the crime. (R., p.9.) As a remedy for these claims, Mr. Buss sought to withdraw his guilty plea. (R., p.6.)

The State filed an answer in which it asserted an affirmative defense of "This Petition should be dismissed, as it is a successive petition, I.C. § 19-4908." (R., p.13.) In addition, the state filed a Motion for Summary Dismissal in which the state asserted that the petition should be dismissed as "the successive petition is barred" and that there were no material issues of fact in the case. (R., p.24.) The State attached a copy of the transcript of Mr. Buss's change of plea hearing to this motion. (R., p.24.)

Specifically, the state asserted that the alleged successive petition should be dismissed because, "petitioner having failed to make any allegation of any ineffectiveness of post-conviction counsel, the current petition should be summarily dismissed." (R., p.24.) In regards to the merits of Mr. Buss's petition, the State asserted that the Change of Plea transcript established that Mr. Buss's guilty plea was made knowingly and voluntarily, and that Mr. Buss was adequately informed of the

¹ Contemporaneously with filing this brief, Mr. Buss has filed a motion asking this Court to take judicial notice of the Notice of Appeal and Remittitur in Supreme Court docket number 30499.

consequences of his plea prior to its entry. (R., p.24.) In addition, the State asserted that, "a good faith assurance of leniency or a mere prediction by a defense counsel to a defendant of the sentence anticipated is no grounds for post conviction relief although the sentence imposed is greater than predicted." (R., p.25 (citing *Walker v. State*, 92 Idaho 517, 520, 446 P.2d 886, 889 (1968).)

At the hearing on the State's motion, counsel for the State reiterated that the petition should be dismissed as an improper successive petition, and that there was no genuine issue of material fact as to whether the plea was knowingly and intelligently made. (Tr., p.4, L.14 – p.6, L.4.) Thereafter the district court questioned how the plea could be knowing or voluntary if Mr. Buss had been incorrectly informed as to whether Idaho recognized either self defense or justifiable homicide. (Tr., p.6, Ls.5-12.) Counsel for the State relied upon the fact that trial counsel "would never have said that." (Tr., p.6, Ls.13-22.) In addition, counsel asserted that the facts articulated in the change of plea transcript and the *Alford* plea itself "might circumvent any issue with regard to self-defense." (Tr., p.6, L.23 – p.7, L.7.)

In addition to discussing the self defense issue, the court informed counsel for the State that there were other issues raised in the petition, "allegations concerning coercion, whether or not he was able to review witness statements, use of drugs, and the fact that he didn't have sufficient time to contact his family to discuss the plea." (Tr., p.7, L.24 – p. 8, L.2.) Recognizing that the State hadn't yet addressed these claims, the court asked the State, "Have you looked at any specific authority relating to any of those allegations?" (Tr., p.8, Ls.3.) Counsel for the State conceded that he hadn't, but noted a case which addressed instances where "allegations can be negated by the transcript

of the sentencing hearing or...the change of plea hearing.” (Tr., p.8, Ls.8-10.) Counsel also conceded that, “The only allegation that is not specifically and directly negated is the one that the Court has concern, and that is with regard to the self-defense issue.” (Tr., p.8, Ls.21-24.)

When addressing the State’s successive petition claim, counsel for Mr. Buss informed the court that Mr. Buss’s petition was not a successive petition, but rather the “replacement of one by the other, particularly where the earlier petition was not dismissed with prejudice.” (Tr., p.9, Ls.7-11.) Counsel also noted that, “it certainly doesn’t mean that Mr. Buss has had his initial petition fully litigated to the satisfaction of his due process rights or the rights under the statute.” (Tr., p.11, Ls.3-6.) The district court questioned whether the prior dismissal was with, or without, prejudice, and recognized that I.C. 19-4908 stated that, “Any ground finally adjudicated may not be a basis for a subsequent application.” (Tr., p.11, L.18 – p.12, L.20.)

In regards to the self-defense claim, counsel for Mr. Buss asserted that “in a motion for summary dismissal, the Court has to construe the facts in the light most favorable to” Mr. Buss. (Tr., p.14, Ls.21-24.) Counsel also recognized that, “ultimately what Mr. Buss will have to prove, that ... he wasn’t advised and that he had a legitimate claim for self-defense in order for a postconviction [sic] relief inadequate, you know, representation.” (Tr., p.15, Ls.20-25.) The district court questioned this asking, “Doesn’t he have to do that at this hearing, also?” (Tr., p.16, Ls.1-2.) Counsel admitted that Mr. Buss hadn’t “fully notif[ied] that these are the reasons that I believe self-defense was available to him.” (Tr., p.16, Ls.20-23.) The district court found this of concern. (Tr., p.16, L.24.)

Turning to the other issues raised in Mr. Buss's petition, his counsel conceded that they were not supported by the transcript, and appeared to waive all claims with the exception of the self-defense claim. (Tr., p.17, Ls.10-21.)

In rebuttal, counsel for the State relied solely on Mr. Buss's petition to assert that "Mr. Buss, fails to set forth any facts whatsoever that would establish that self-defense would even apply to his situation." (Tr., p.19, Ls.6-9.) As a result, counsel claimed that the petition was inadequate as any error by trial counsel would not have been of "material value." (Tr., p.19, Ls.17-19.)

Merely one day after the hearing on the State's motion for summary judgment, the district court summarily dismissed Mr. Buss's petition, articulating its reasoning in its Memorandum Decision Re: Motion for Summary Dismissal. (R., pp.28-45.) As to the successive nature of the petition, the district court found that, "Buss's motion to withdraw his petition and failure to object to the dismissal ordered by this court constitutes a knowing, voluntary and intelligent waiver of Buss's the [sic] claims raised by Buss in his June 20, 2005, petition for post conviction relief." (R., p.32.) Further, the court found that, because the same issues as were raised in that petition were also raised in this case, the current petition was barred by I.C. § 19-4908. (R., p.32.)

In addition, applying the doctrine of issue preclusion, the district court determined that the dismissal of the initial filing was a "final judgment and precludes the issues raised in that petition from being raised in a subsequent petition." (R., pp.32-33.) In so holding, the court reasoned:

At the hearing on the motion for summary dismissal of Buss's June 20, 2005, petition, both parties were allowed to fully argue their positions. After arguing his position, Buss requested that he be allowed to withdraw his petition. The Court deemed the request as a motion to dismiss, which

the Court granted. That decision had a conclusive effect and was subject to appeal. Buss had ample opportunity to appeal that decision, but did not.

(R., p.33.)

In regards to Mr. Buss's claim regarding the existence of self defense in Idaho, the district court found that:

Buss has not provided any facts that support an argument for self defense or justifiable homicide. As a petitioner opposing summary dismissal under § 19-4906, Buss is required to present evidence to support every controverted element of his claim for relief. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). Without any facts supporting self defense or justifiable homicide, Buss has not proved that he was prejudiced by trial counsel's alleged advice (i.e., that he would not have pled guilty).

(R., p.37.)

Mr. Buss timely appealed from the district court's order summarily dismissing his petition for post-conviction relief. (R., pp.1, 45-46, 50.)

ISSUES

1. Did the district court err when it dismissed Mr. Buss's petition for post-conviction relief where the district court determined that the petition was barred by I.C. § 19-4908, but erroneously determined that Mr. Buss had previously knowingly, intelligently, and voluntarily waived the issues raised?
2. Did the district court err when it dismissed, *sua sponte*, and without prior notice, Mr. Buss's post-conviction petition based upon the doctrine of issue preclusion despite the fact that the prior adjudication relied upon by the district court was not a final determination of the merits of Mr. Buss's petition, and was not an appealable order?
3. Did the district court err when it dismissed Mr. Buss's claim that his plea was not knowingly, intelligently, and voluntarily entered in light of his attorney's affirmative misrepresentation of the availability of the affirmative defenses of self-defense or justifiable homicide in Idaho?

ARGUMENT

I.

The District Court Erred When It Dismissed Mr. Buss's December 2005 Petition For Post-Conviction Relief Because Mr. Buss Had Not Knowingly, Intelligently Or Voluntarily Waived Any Issues Raised In The June 2005 Petition

A. Introduction

Mr. Buss asserts that the district court erred in finding that Idaho Code section 19-4908 barred consideration of the December 2005 petition because Mr. Buss had knowingly, voluntarily, and intelligently waived all claims listed in his June 20, 2005, petition. This is true because it is clear from the audio recording of the hearing in which Mr. Buss moved to dismiss the action that he sought to dismiss the June 2005 petition without prejudice, the district court granted the motion made, and the district court never indicated that it was dismissing the petition with prejudice. Thus, the claims in the June 2005 petition were not waived at all, but rather reserved for subsequent adjudication.

Further, even assuming *Arguendo* that the issues were somehow waived, it is clear from the audio recording of the October 27, 2005, hearing that Mr. Buss's dismissal of the claims in the June 2005, petition were premised upon erroneous legal advice and post-conviction counsel's misunderstanding of the applicable law. Thus, any waiver that did occur was neither knowing, intelligent, nor voluntary.

Because the district court erred in finding that Mr. Buss knowingly, voluntarily, and intelligently waived the claims articulated in his June 20, 2005, petition, the court also erred in dismissing Mr. Buss's December 12, 2005, petition on the grounds that the petition was barred by I.C. § 19-4908.

B. Mr. Buss Did Not Waive The Claims From The June 2005, Petition Because The Audio Recording Of The October 27, 2005, Hearing Establishes That Mr. Buss Sought To Dismiss That Action Without Prejudice, The District Court Granted The Motion Made, And The District Court Never Indicated That It Was Dismissing The Petition With Prejudice

In dismissing the December 2005, petition for post-conviction relief, the district court found that, I.C. § 19-4908 barred consideration of that petition because, "Buss's motion to withdraw his petition and failure to object to the dismissal ordered by this court constitutes a knowing, voluntary and intelligent waiver of Buss's the [sic] claims raised by Buss in his June 20, 2005, petition for post conviction relief." (R., p.32.) However, because the motion made by Mr. Buss was for a dismissal without prejudice and the court granted the motion made, Mr. Buss did not knowingly or intelligently waive any claims raised in the June 2005 petition.

During the October 27, 2005, hearing, when counsel moved to withdraw Mr. Buss's June 2005 petition, counsel informed the court that Mr. Buss was doing so, "so he might reconsider and decide if he wants to file it again under new issues or just try a different tack." (A.R.) Thus, it was clear from counsel's request that Mr. Buss was seeking a dismissal without prejudice so that he could reconsider the proper way to proceed with his claims, which may include refiling the petition. Importantly, when the district court ultimately dismissed the June 2005, petition, the court stated it was granting Mr. Buss's motion, and did not state that the dismissal was with prejudice. (A.R.)

In moving to dismiss his June 2005 petition without prejudice, Mr. Buss was not knowingly, intelligently, or voluntarily waiving any issues in that petition because a dismissal without prejudice does not waive the issues raised. When a post-conviction

petition is dismissed without prejudice, it does not have a "conclusive effect," but rather preserves the interests of the applicant in subsequently raising that issue. In *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), the Court recognized that when a post-conviction proceeding is filed while a direct appeal is pending, "the application may be either dismissed without prejudice or suspended until the appeal is resolved." *Id.* at 426, 745 P.2d at 305. The court also recognized that this would "preserve the interests of the applicant...." *Id.* In other words, the dismissal without prejudice would result in the ability of the petitioner to subsequently raise the post-conviction issues, if necessary, following the completion of the direct appeal. See also *Tucker v. State*, 97 Idaho 4, 14, 539 P.2d 556, 566 (1975) (ordering petition of post-conviction relief dismissed without prejudice because a final judgment of conviction had not yet been entered). In fact, when "a suit is dismissed 'without prejudice,' it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost...." and "A dismissal 'without prejudice' allows a new suit to be brought on the same cause of action." BLACK'S LAW DICTIONARY 1603 (6th Edition 1990); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (noting "'Dismissal ... without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits,' Rule 41(a)(1), and thus does not have a res judicata effect.")

Because it is clear from the audio recording of the October 27, 2005, hearing that Mr. Buss moved to dismiss the June 2005 petition without prejudice, and the district court granted the motion made, but never indicated that it was dismissing the petition with prejudice, the district court erred when it determined that Mr. Buss had knowingly, intelligently and voluntarily waived the claims raised in the June 2005 petition. Thus,

the district court erred when it found that the December 2005 petition was barred on this ground by I.C. § 19-4908.

C. Any Waiver Of Claims That May Have Been Made By Mr. Buss Was Neither Intelligent Nor Voluntary As The Audio Recording Of The October 27, 2005, Hearing Conclusively Establishes That Any Such Waiver Was The Result Of Mr. Buss Receiving Clearly Erroneous Legal Advice

Assuming *Arguendo*, that this Court were to find that a waiver was made by Mr. Buss's dismissal of his June 2005 petition, any such waiver was not knowing and voluntary as it was not an active, knowing choice, but rather was premised upon incorrect legal advice given by post-conviction counsel. Therefore, any waiver made was not a knowing, intelligent, nor voluntary waiver of the claims in the June 2005 petition.

1. In Moving To Withdraw The June 20, 2005, Petition, Post-Conviction Counsel Relied Upon A Material Misunderstanding Of The Law

"I did discuss his petition and the fact that many of the allegations he's alleged have to do with what Mr. Allison said or didn't do, and with his recent passing it would be hard to prove any of those allegations." (A.R.) In subsequently arguing the merits of Mr. Buss's June 2005 petition, counsel noted that Mr. Buss had alleged that Mr. Allison had informed him that, "there is no self-defense or justifiable homicide in Idaho. Again, there is no way to prove or disprove that Mr. Allison told him there was no such defense...with Mr. Allison's passing, there is no way to verify that Mr. Buss was ever told that." (A.R.)

It is clear from counsel's statements at the time Mr. Buss's motion to withdraw his petition was made that counsel for Mr. Buss was under the impression that Mr. Buss could not prove what he was told by Mr. Allison. However, this is simply incorrect.

In a post-conviction action, "The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing." I.C. § 19-4907. Prior to the hearing in which counsel for Mr. Buss moved to withdraw the petition, Mr. Buss had already offered evidence as to what his trial counsel told him prior to the entry of the plea. In the verified petition Mr. Buss stated that "I was told there was no self defense or justifiable homicide in Idaho. I've read the law and know there is now." (Petition filed June 20, 2005, p.3.) "Verification means attestation under oath as to the truth, etc. of the pleadings and is, perforce, a personal ceremony...." *Updegraff v. Adams*, 66 Idaho 795, 799, 169 P. 2d 501, 503 (1946). Accordingly, "[a] verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is in substance an affidavit, and is accorded the same probative force as an affidavit." *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993) (citation omitted). In addition, Mr. Buss stated in his affidavit attached to the petition that, "my attorney Brett Allison, lied to me telling me there was no law for self defense or justifiable homicide." (Petition filed June 20, 2005, Affidavit of Facts In Support of Post Conviction Petition, p.1.)

It is apparent that Mr. Buss's post-conviction counsel was unaware that the record already before the district court was sufficient to prove what trial counsel told Mr. Buss prior to his entry of the guilty plea. Thus, in contrast to counsel's assertions to

the district court, there was an obvious way to prove that Mr. Allison told Mr. Buss that Idaho did not recognize either self-defense or justifiable homicide.

In addition, initial post-conviction counsel incorrectly believed that Mr. Buss had an obligation to "verify" what he was told by Mr. Allison. (A.R. ("with Mr. Allison's passing, there is no way to verify that Mr. Buss was ever told that.") This "presumes that an affidavit from an interested party is not sufficient without additional evidence. However, there is no requirement that an interested party corroborate [his] testimony, and a court does not err by considering an affidavit from an interested party without further corroboration." *Schultz v. Schultz*, 2008 Opinion No. 82 (June 13, 2008) (citing *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 798, 41 P.3d 220, 226 (2001)). Thus, post-conviction counsel erred in believing that Mr. Buss had to verify or corroborate his own statements in his verified petition and affidavit.

Finally, the district court questioned counsel for the State as to whether Idaho's dead man's statute would effect Mr. Buss's claims. In fact, it would not. "The dead man's statute does not apply where, as here, the action is not against the executor or administrator of an estate and the claim does not represent a demand against the estate." *Rowan v. Riley*, 139 Idaho 49, 54, 72 P.3d 889, 894 (2003) (citing I.C. 9-202 and I.R.E. 601(b)).

It is clear from counsel's statements at the October 27, 2005, hearing that counsel for Mr. Buss based the need for the dismissal of the petition on a misunderstanding of the law. It is equally clear that his advice to Mr. Buss, specifically to dismiss the petition, was premised upon this misunderstanding. As a result, Mr. Buss

did not knowingly, intelligently or voluntarily waive the issues in the June 2005 petition. Rather, the dismissal was based upon his post-conviction attorneys ill-founded advice.

The Idaho Supreme Court has recognized that the ineffective assistance of post-conviction counsel can result in an insufficient waiver of a post-conviction issue. See *Palmer v. State*, 102 Idaho 591, 635 P.2d 955 (1981). In *Palmer*, the Idaho Supreme Court recognized:

allegations of ineffective assistance of prior post-conviction counsel, if true, would warrant a finding that the omission in the prior post-conviction proceeding of the allegations now being raised anew by [the petitioner] was not a result of an active, knowing choice made by [the petitioner] through his prior court-appointed attorney, and would therefore provide sufficient reason for permitting the newly asserted allegations to be raised in the instant [successive] petition.

Id. at 596, 635 P.2d at 960.

Because any waiver of issues made by Mr. Buss in voluntarily dismissing his June 2005 petition were the result of his attorney's misunderstanding of the law, they were not the result of an active, knowing choice. Rather, they were a choice borne out of ignorance premised upon the ineffective assistance of post-conviction counsel. As a result, the record on appeal establishes that Mr. Buss asserted grounds for relief which, for sufficient reason, was inadequately raised in the June 2005 petition, justifying the December 2005 petition, even under the strict standards of Idaho Code § 19-4908.

2. Mr. Buss Was Willing To Withdraw The June 2005 Petition Based Upon His Attorney's Belief That Mr. Buss Could Refile A Petition, If That Was Incorrect, Any Waiver Of The Claims Could Not Be A Knowing And Voluntary Waiver

Assuming *Arguendo*, that Mr. Buss did waive the claims in his June 2005 petition by seeking to withdraw that petition without prejudice, any such waiver could not be

knowing or voluntary as it was specifically premised upon counsel's representation that Mr. Buss would be able to refile his post-conviction petition.

During the October 27, 2005, hearing, Mr. Buss's counsel informed the court that Mr. Buss was seeking to withdraw the petition "so he might reconsider and decide if he wants to file it again under new issues or just try a different tack." (A.R.) Thus, it was clear from counsel's statements that, although Mr. Buss was willing to withdraw the June 2005 petition, Mr. Buss agreed to do so premised upon his post-conviction counsel's understanding that Mr. Buss could reconsider the best way to bring his claims, including refiling a post-conviction petition. Thus, any waiver of the claims in the June 2005 petition were not borne from an active and knowing choice, but rather were done without knowledge that the claims would be subsequently precluded as waived. Because any waiver of issues made by Mr. Buss in voluntarily dismissing his June 2005 petition were the result of his belief, based upon a discussion with his post-conviction attorney, that the issues were not, in fact, waived, the waiver cannot be a knowing, intelligent, or voluntary waiver. As a result, the record on appeal establishes that Mr. Buss asserted grounds for relief which for sufficient reason was inadequately raised in the June 2005 petition, justifying the December 2005 petition, even under the strict standards of Idaho Code § 19-4908.

II.

The District Court Erred When It Found That The Issues Raised In Mr. Buss's Post-Conviction Action Were Barred By The Doctrine Of Issue Preclusion

A. Introduction

Despite the fact that the district court dismissed Mr. Buss's petition for post-conviction relief on the grounds that the issues raised in the petition were barred from consideration by the doctrine of issue preclusion, a ground not raised in the State's Motion for Summary Dismissal, the district court did not follow the procedures articulated in I.C. § 19-04906(b). In addition, in holding that the issues were barred by issue preclusion, the district court made, and relied upon, erroneous legal conclusions, as well as clearly erroneous factual findings. As a result of these errors, the district court's conclusion that the doctrine of issue preclusion barred consideration of the issues in the December 2005 petition is incorrect. For each of these reasons, the court's order summarily dismissing Mr. Buss's petition should be vacated, the case remanded to the district court.

B. The District Court Erred When It Found That The Issues Raised In Mr. Buss's Post-Conviction Action Were Barred By The Doctrine Of Issue Preclusion

The district court dismissed Mr. Buss's post-conviction petition, in part, based upon its determination that the dismissal of Mr. Buss's June 20, 2005, petition was a "final judgment and precludes the issues raised in that petition from being raised in a subsequent petition." (R., pp.32-33.) In so holding, the court reasoned:

At the hearing on the motion for summary dismissal of Buss's June 20, 2005, petition, both parties were allowed to fully argue their positions. After arguing his position, Buss requested that he be allowed to withdraw his petition. The Court deemed the request as a motion to dismiss, which

the Court granted. That decision had a conclusive effect and was subject to appeal. Buss had ample opportunity to appeal that decision, but did not.

(R., p.33.)

Initially, Mr. Buss asserts that the district court erred in dismissing his petition on this ground, as the court failed to follow the procedures articulated in I.C. § 19-04906(b) despite the fact that it dismissed the petition on a ground not raised in the State's Motion for Summary Dismissal. In addition, Mr. Buss asserts that, in holding that the issues were barred by issue preclusion, the district court made, and relied upon, erroneous legal conclusions, as well as clearly erroneous factual findings. Finally, the district court misapplied the analysis for issue preclusion.

1. The District Court Erred In Dismissing Mr. Buss's Petition On This Ground, As The Court Failed To Follow The Procedures For *Sua Sponte* Dismissal As Articulated In I.C. § 19-4906(b)
 - a. Where The State Has Filed A Motion For Summary Disposition, But The Court Dismisses The Application On Grounds Different From Those Asserted In The State's Motion, It Does So On Its Own Initiative And The Court Must Follow The Procedures Outlined In Idaho Code Section 19-4906(b)

"Motions for summary disposition pursuant to I.C. § 19-4906 are procedurally equivalent to motions for summary judgment under I.R.C.P. 56(e)...." *Martinez v. State*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995) (citation omitted). In summary judgment proceedings, "if the movant does not challenge an aspect of the nonmovant's case in that party's motion, the nonmovant is not required to address it at the summary judgment stage of the proceedings." *Thomson v. Idaho Insurance Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). This means that, "the

party responding to a summary judgment motion is not required to present evidence on every element of his or her case at that time, but rather must establish a genuine issue of material fact regarding the element or elements *challenged* by the moving party's motion." *Id.* at 530, 887 P.2d at 1037. This is because "when a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party." *Id.* Therefore, "if the moving party fails to challenge an element of the nonmovant's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant." *Id.*

Similar principles apply in post-conviction proceedings, though for a different reason. See *Martinez*, 126 Idaho at 817-18, 892 P.2d 492-93 (applying *Thomson* in post-conviction case). Unlike a typical civil complaint, a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. Thus, the initial burden of establishing a material issue of fact, appears to rest not with the summary dismissal movant, but rather with the petitioner.

However, in a post-conviction action, the party moving for summary dismissal must still challenge specific aspects of the nonmoving party's case. Idaho Code § 19-4906(c), which addresses motions for summary dismissal in post-conviction actions, provides as follows:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with

any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Id. Further, because an application for post-conviction relief is a civil proceeding, the Idaho Rules of Civil Procedure apply. *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995) (citation omitted). Thus, a motion made by the State pursuant to I.C. § 19-4906(c), must comply with the requirements of I.R.C.P. 7(b)(1). *Id.* at 322, 900 P.2d at 798. This rule requires that motions “shall state with particularity the grounds therefore....” I.R.C.P. 7(b)(1). In *Saykhamchone* the Court noted that at a minimum the State’s request for summary dismissal must state “its grounds *with particularity*.” *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798.

The importance of the State complying with I.R.C.P. 7(b)(1) can be found in the fact that, unlike in section 19-4906(b), there is no provision in section 19-4906(c) for the district court to provide notice of an intent to dismiss the petition. *Compare* I.C. § 19-4906(b)&(c). Rather, “the motion itself serves as notice that summary dismissal is being sought.” *State v. Christensen*, 102 Idaho 487, 488, 632 P.2d 676, 677 (1981). Thereafter, the petitioner has the “opportunity to present any evidence he desire[s] by affidavits to counter the state’s motion, and the providing of such an opportunity is the precise reason for the twenty day notice requirement of paragraph (b).” *Id.* In addition, after the State files such a motion, “the like twenty day period of time shall be allowed as under paragraph (b).” *Id.* at 489, 632 p.2d at 678.

Further, when a district court dismisses a post conviction petition on grounds not presented in a State’s motion to dismiss, the petitioner “has no opportunity to convince the district court that he should prevail upon the merits.” *Gibbs v. State*, 103 Idaho 758, 760, 653 P.2d 813, 815 (Ct. App. 1982). For a petitioner to have a chance to argue the

relevant points, it is necessary for the Court itself to comply with the notice requirements. *Id.* Thus, “where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state’s motion, it does so on its own initiative and the court must provide twenty days notice.” *Workman v. State*, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007) (quoting *Gibbs, supra.*) This is because dismissal upon the court’s initiative is subject to the procedures outlined in § 19-4906(b). Those being,

(b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or, direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

Id.

b. The District Court Dismissed, *Sua Sponte*, Mr. Buss’s Petition For Post-Conviction Relief On Grounds Not Raised By The State, But Failed To Provide Mr. Buss With Twenty Days Notice Of Its Intent To Dismiss On Those Grounds

In its Motion for Summary Dismissal, the State asserted as its initial grounds for summary dismissal that the petition was a successive petition which violated I.C. § 19-4908. In total, the State claimed:

Petitioner previously filed a petition in Bonneville County Case # CV-0503532 on essentially the same ground as the present petition. That petition was dismissed on 10/27/05 on the motion of the petitioner at the time of the hearing of the state’s motion for summary dismissal. I.C. § 19-4908 states:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended

application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

In *Baker v. State of Idaho*, 2005 WL 1243348 (Idaho App.), the Idaho Court of Appeals addresses the issue of a successive post-conviction petition, essentially stating that unless the applicant can demonstrate whether the alleged ineffective assistance of post-conviction counsel provided a sufficient reason to bring the successive application. See *Baker*, at pgs. 9 through 10, copy attached. Therefore, petitioner having failed to make any allegation of any ineffectiveness of post-conviction counsel, the current petition should be summarily dismissed.

Therefore the successive petition is barred.

(R., pp.23-24.)

Despite the fact that the doctrine of issue preclusion was never mentioned by the State in the Motion For Summary Dismissal, the district court dismissed Mr. Buss's post-conviction petition, in part, based upon its own application of the doctrine of issue preclusion. (*Compare* R., pp.23-24 and p.32.)

Because the State's claim was only that Mr. Buss's petition was a successive petition in violation of I.C. § 19-4908, the district court's dismissal of the petition upon the grounds of the application of the doctrine of issue preclusion was a dismissal *sua sponte*. However, the district court dismissed Mr. Buss's petition on these grounds under the guise of granting the State's Motion For Summary Dismissal, and did not follow the procedures articulated in I.C. § 19-4906(b), including providing Mr. Buss with notice of its intent to dismiss on these grounds. (*See* R. *generally*, and pp.32-33.) As a result, Mr. Buss had "no opportunity to convince the district court that he should prevail upon the merits." *Gibbs*, 103 Idaho at 760, 653 P.2d at 815. Because, the district court

erred when it dismissed Mr. Buss's petition on grounds for which Mr. Buss was not given notice, the summary dismissal should be vacated and the case remanded to the district court for the issuance of appropriate notice prior to dismissal.

2. In Holding That Mr. Buss's Claims Were Barred By The Doctrine Of Issue Preclusion, The District Court Made, And Relied Upon, Clearly Erroneous Factual Findings And Erroneous Legal Conclusions

a. The District Court Made A Clearly Erroneous Finding That Mr. Buss Argued The Merits Of The Issues In The June 20, 2005 Petition Before Moving To Withdraw The Petition

The district court made a clearly erroneous factual finding when it found that during the October 27, 2005, hearing "After arguing his position, Buss requested that he be allowed to withdraw his petition." (R., p.32.) In fact, counsel for Mr. Buss moved to withdraw the petition before arguing his positions on the State's motion for summary dismissal. (A.R.) In addition, counsel specifically requested that the district court *first* consider whether to grant the motion to withdraw the petition, and only adjudicate the merits of the State's motion "in the alternative, if the Court is not willing to do that." (A.R.) Thereafter, the district court reconfirmed, "Mr. Mallard, I consider your *first request*, I think you said you wanted to withdraw the petition, which was the language you used, I think that's equivalent to a motion to dismiss the petition. The motion's granted." (A.R. (emphasis added).) Thus, the district court's finding that it was only after counsel for Mr. Buss had argued his positions on the merits of the State's motion that the motion to withdraw the petition was made, is clearly erroneous.

b. The District Court Reached A Clearly Erroneous Legal Conclusion When It Determined That The Dismissal Of The June 20, 2005, Order Was Appealable, And A Clearly Erroneous Factual Finding When It Found That Mr. Buss Had An Opportunity To Appeal That Dismissal

In addition, and more problematically, the district court made a clearly erroneous factual finding and reached an erroneous legal conclusion when it found that the prior dismissal “was subject to appeal. Buss had ample opportunity to appeal that decision, but did not.” (R., p.33.) In fact, although the district court orally dismissed the pending petition during the October 27, 2005, hearing, the district court never entered a written order dismissing the petition. (See R. CV-05-3532 (not containing a written order dismissing the petition despite the fact that the order augmenting this record into the current record on appeal augmented with the “entire district court file in Bonneville County Case No.CV-05-3532.”).²

The Idaho Appellate Rules provide:

All appeals permitted or authorized by these rules, except as provided in Rule 12, shall be taken and made in the manner and within the time limits as follows: (a) Appeals From The District Court. Any appeal as a matter of right from the district court may be made only by physically filing a notice appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil or criminal action.”

I.A.R. 14. Thus, an appeal can only be properly filed after the district court issues a written order bearing a “filing stamp.” *Id.* Further, Idaho Appellate Rule 11 defines the appealable judgments and orders in a civil action. I.A.R. 11(a). That rule does not make oral rulings appealable. I.A.R. 11(a). Finally, an appeal filed after an oral

² It should also be noted that appellate counsel checked the Idaho Repository website on June 16, 2008, and the Register of Actions in CV-05-3532 does not contain an entry for a written order following the October 27, 2005, hearing.

pronouncement, but before a written order is entered is “premature,” “defective,” and does not vest jurisdiction in the appellate court. See I.A.R. 17(e)(2); *Meridian Bowling Lanes v. Meridian Athletic Association, Inc.*, 105 Idaho 509, 511, 670 P.2d 1294, 1296 (1983); *State v. Gissel*, 105 Idaho 287, 290, 668 P.2d 1018, 1021 (Ct. App. 1983).

Following the district court’s verbal dismissal of the June 20, 2005, petition, the district court did not enter a written order. (See generally R. CV-05-3532.) Thus, there was no appealable order entered following the dismissal, and any Notice of Appeal filed would have been “premature,” “defective,” and would not have vested the Idaho Supreme Court with jurisdiction to hear the appeal. See I.A.R. 11(a), 14; *Meridian Athletic Association, Inc.*, 105 Idaho at 511, 670 P.2d at 1296; *Gissel*, 105 Idaho at 290, 668 P.2d at 1021. As a result, the district court’s legal conclusion that the verbal order “was subject to appeal,” is erroneous, and the factual finding that “Buss had ample opportunity to appeal that decision, but did not,” was clearly erroneous. (R., p.33.)

c. The District Court’s Legal Conclusion That The Verbal Dismissal Of The June 20, 2005, Petition “Had A Conclusive Effect,” Was Erroneous

The district court found that the verbal dismissal of the June 20, 2005, petition “had a conclusive effect....” (See R., p.33.) Mr. Buss asserts that the district court’s legal conclusion was in error as the district court ordered the prior dismissal, but did not specifically state that it was made with prejudice, which resulted in a dismissal without prejudice.

Because the dismissal of the June 20, 2005, petition was ordered by the district court pursuant to Idaho Rule of Civil Procedure 41, and over the objection of the

defendant, i.e. the State, it could only have been completed pursuant to Idaho Rule of Civil Procedure 41(a)(2). (A.R.) According to that rule, "unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." I.A.R. 41(a)(2). In addition, "the purpose of this rule is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced." *Jones v. Berezay*, 120 Idaho 332, 336, 815 P.2d 1072, 1076 (1991). Further, if an order of dismissal does not specify otherwise, the dismissal is without prejudice. *Id.* at 335, 815 P.2d at 1075.

As was argued in section I(B), *supra*, which is incorporated herein by reference thereto, when a post-conviction petition is dismissed without prejudice, it does not have a "conclusive effect," but rather preserves the interests of the applicant in subsequently raising that issue. See *Parsons*, 113 Idaho at 426, 745 P.2d at 305; BLACK'S LAW DICTIONARY 1603 (6th Edition 1990) (stating that when "a suit is dismissed 'without prejudice,' it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost...." and "A dismissal 'without prejudice' allows a new suit to be brought on the same cause of action.")

Further, because the district court did not specifically state that the dismissal was *with prejudice*, and *order of dismissal*, even if it had been done in writing, was not "conclusive," as it was likely not even an appealable order under Idaho law. Idaho Appellate Rule 11(a) defines appealable orders in civil actions. The only possible subsection of that rule which could apply to an order dismissing an action pursuant to I.R.C.P. 41 is subsection (a)(1), which allows an appeal of "Judgments, orders and decrees which are final...." I.A.R. 11(a)(1). However, because the dismissal in the present case was done without prejudice, pursuant to I.R.C.P. 41(a)(2), the order is

likely not a final one as it is not a final determination of the merits of the claims. *Cf. Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073 (9th Cir. 1994) (refusing to find appellate jurisdiction where claims were dismissed pursuant to a stipulation, and without prejudice to subsequently pursue them should the appellant prevail on other issues on appeal, because the stipulation rendered the lower court's decision non-final).

Because the district court did not specifically dismiss the June 20, 2005 petition with prejudice, the district court erred in holding that the verbal dismissal was "conclusive."

d. As A Result Of The District Court's Legal And Factual Errors, The District Court Misapplied The Analysis For Issue Preclusion

A dismissal without prejudice usually does not result in issue preclusion. *Rodriguez v. Department of Correction*, 136 Idaho 90, 94, 29 P.3d 401, 405 (2001) (citing *Easter Idaho Agric. Credit Ass'n v. Neibaur*, 133 Idaho 402, 408, 987 P.2d 314, 320 (1999)). However, "a final judgment 'includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.'" *Id.* (quoting *Restatement (Second) of Judgments* § 13 (1982)). The factors to consider in determining whether a prior adjudication is sufficiently firm are: a. whether the prior decision was "avowedly tentative;" b. whether the parties were fully heard; c. whether the court supported its decision with a reasoned opinion; and d. whether the decision was subject to appeal. *Id.*

Although the district court essentially applied this legal analysis in finding that the doctrine of issue preclusion barred consideration of the issues in Mr. Buss's December

2005 petition, because the district court was applying incorrect facts and legal conclusions, the district court reached a faulty conclusion.

The proper application of the facts to the legal standard show that the doctrine of issue preclusion does not apply to the issues raised in Mr. Buss's December 2005 petition. As was noted above, the dismissal of the June 2005 petition was done without prejudice. Thus, the prior adjudication was not "sufficiently firm." Rather, it was not a final determination of the merits of the claims. In addition, because the district court's oral order was neither reduced to writing, nor a final determination of the merits of Mr. Buss's claims, there was no appealable order such that the decision was "subject to appeal." Finally, because the district court dismissed Mr. Buss's claims, and did not rule on the merits of the claims, the court's decision was not supported with a "reasoned opinion" on those claims. As a result of these infirmities, the district court's conclusion that the doctrine of issue preclusion barred consideration of the claims in Mr. Buss's December 2005 petition was erroneous, and the order summarily dismissing Mr. Buss's petition on these grounds should be vacated and the case remanded to the district court for further proceedings.

III.

The District Court Erred When It Dismissed Mr. Buss's Claim That His Plea Was Not Knowingly, Intelligently, And Voluntarily Entered In Light Of His Attorney's Affirmative Misrepresentation Of The Availability Of The Affirmative Defenses Of Self Defense Or Justifiable Homicide In Idaho

A. Introduction

The district court dismissed Mr. Buss's petition on grounds not asserted by the State in its motion for summary dismissal. Therefore, the district court was required to

comply with the notice requirements of I.C. § 19-4906(b). Because the district court dismissed Mr. Buss's claim that his plea was not knowingly, intelligently and voluntarily entered in light of his attorney's affirmative misrepresentation of the availability of the affirmative defenses of self-defense and justifiable homicide a mere day after notifying Mr. Buss's counsel of the allegation that the record lacked any evidence of prejudice, this Court should vacate the order dismissing Mr. Buss's petition, and remand this case to the district court for the issuance of proper notice, such that Mr. Buss has the opportunity to present any additional evidence he has to support his claim.

B. The District Court Erred When It Dismissed Mr. Buss's Claim That His Plea Was Not Knowingly, Intelligently, And Voluntarily Entered In Light Of His Attorney's Affirmative Misrepresentation Of The Availability Of The Affirmative Defenses Of Self Defense Or Justifiable Homicide In Idaho

In his petition for post-conviction relief, Mr. Buss asserted that his attorney in the criminal action rendered ineffective assistance of counsel when he instructed Mr. Buss that "there was no self defense or justifiable homicide in Idaho. This is how I was coerced into a plea bargain." (R., p.5.) As a remedy, Mr. Buss sought to withdraw his plea, and go to trial on the original charge. (R., p.6.)

In the State's Motion for Summary Dismissal, the State did not specifically address this claim, but did assert generally that there were no material issues of fact. (R., p.24.) "The record readily establishes that [the district court] explained to the petitioner the consequences of pleading guilty, and established that the Petitioner's guilty plea was made knowingly and voluntarily." (R., p.24.) In support of this argument, the State attached a copy of the referenced change of plea transcript and quoted the facts of *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995),

though not any legal holding or analysis from the case. Thereafter, and in total, the State asserted:

The record renders it abundantly clear that petitioner was advised of the consequences of pleading guilty before entering his plea. He cannot now meritoriously claim that he received ineffective assistance of counsel with regard to his guilty plea. Furthermore, even if his trial counsel failed to properly advise petitioner of the consequences of the guilty plea, petitioner cannot show actual prejudice since [the district court] advised him of the consequences thereby precluding any finding that the second prong of the two-prong *Strickland* test could be met. *See infra*.

Furthermore, a good faith assurance of leniency or a mere prediction by a defense counsel to a defendant of the sentence anticipated is no grounds for post conviction relief although the sentence imposed is greater than predicted. *Walker v. State*, 92 Idaho 517, 520, 446 P.2d 886, 889 (1968).

Therefore, no genuine issue of material fact exists and the State is entitled to judgment as a matter of law.

(R., pp.24-25.)

In sum, the State's Motion for Summary Dismissal argued that Mr. Buss's plea of guilty was knowingly and voluntarily entered because Mr. Buss knew the consequences of pleading guilty. However, the State's motion did not address, in any way, Mr. Buss's assertion that he didn't know he had options other than the guilty plea, i.e. a self defense claim or a justifiable homicide claim. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (holding that the standard for a valid guilty plea "was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."); *see also Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (recognizing that a plea may be involuntary when based upon "ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats....").

At the hearing on the State's motion, and in regards to the merits of Mr. Buss's claims, counsel for the state initially simply asserted:

With regard to the second prong, that is that there is no genuine issue of material fact raised, simply...the petitioner entered a knowing and intelligent guilty plea made under Alford, of course in the underlying case. And the record substantiates that the plea was entered knowingly and voluntarily. And, therefore, there is no basis for his allegations insofar as the substantive aspects of the matter are concerned.

(Tr., p.5, L.21 – p.6, L.4.) Following this argument, the district court proceeded to pointedly question the prosecutor about how the plea could have been knowingly and voluntarily entered if Mr. Buss had been told that there was no defense of self defense or justifiable homicide in Idaho. (Tr., p.6, Ls.5-12.) In response, the prosecutor asserted that, Mr. Buss' trial counsel "would never have said that." (Tr., p.6, Ls.13-22.) He also reasserted his claim that the facts articulated in the change of plea hearing transcript, and the fact that "it was agreed by all that the defendant could be convicted if the matter was presented to a jury," "might circumvent any issue with regard to self-defense." (Tr., p.6, L.23 – p.7, L.7.) However, counsel for the State also conceded that, "The only allegation that is not specifically and directly negated is the one that the Court has concern, and that is with regard to the self-defense issue." (Tr., p.8, Ls.21-24.)

In response to the State's motion for summary dismissal, counsel for Mr. Buss first addressed the State's claim regarding the successive nature of Mr. Buss's petition. (Tr., p.9, L.7 – p.13, L.11.) Counsel then addressed the State's claim that the change of plea hearing transcript contradicted Mr. Buss's claims. (Tr., p.13, Ls.12-21.)

Thereafter, the district court expanded the grounds for the State's motion for summary dismissal finding, "Well, I think, and [the prosecutor] may not have used that language, but I construed that to be the substance of his argument, that there are no facts supporting the self-defense claim." (Tr., p.13, Ls.22-25.) Counsel for Mr. Buss pointed out to the district court that:

In a motion for summary dismissal, the Court has to construe the facts in the light most favorable to the nonmoving party. So Mr. Buss has raised the issue that he didn't believe he was fully advised and so ... it's going to be up to you how you construe the facts raised in the Alford plea, Your Honor, whether or not you believe that Mr. Buss' claims can withstand, viewed in the light most favorable to him, whether he should have a full trial on these facts rather than a summary dismissal.

I agree. We have the burden of proof in proving he was advised ultimately in a trial of facts. But in a motion for summary dismissal, I think the burden is the State's to say, under these facts, we believe that Mr. Buss' claims can't survive even that scrutiny.

(Tr., p.14, L.21 – p.15, L.12.) Counsel also recognized that, "I agree that is ultimately what Mr. Buss will have to prove, that first ... he wasn't advised and that he had a legitimate claim for self-defense in order for a postconviction relief inadequate, you know, representation." (Tr., p.15, Ls.18-25.) The district court questioned this asking, "Doesn't he have to do that at this hearing, also?" (Tr., p.16, Ls.1-2.) Counsel admitted that Mr. Buss hadn't "fully notif[ied] that these are the reasons that I believe self-defense was available to him." (Tr., p.16, Ls.20-23.) The district court found this of concern. (Tr., p.16, L.24.)

Turning to the other issues raised in Mr. Buss's petition, his counsel conceded that the change of plea transcript didn't support Mr. Buss's claims, and agreed with the prosecutor that "the other ones are pretty covered by the transcript..." (Tr., p.17, Ls.10-23.)

In rebuttal, counsel for the State relied solely on Mr. Buss's petition to assert, for the first time, that "Mr. Buss, fails to set forth any facts whatsoever that would establish that self-defense would even apply to his situation." (Tr., p.19, Ls.6-9.) The State also now claimed that, as a result, the petition was inadequate as any error by trial counsel would not have been of "material value." (Tr., p.19, Ls.17-19.)

Merely one day after the hearing on the State's motion for summary judgment, the district court summarily dismissed Mr. Buss's petition, articulating its reasoning in its Memorandum Decision Re: Motion for Summary Dismissal. (R.,pp.28-45.) Under the guise of granting the State's motion for summary dismissal, the district court dismissed Mr. Buss's claim finding that:

Buss has not provided any facts that support an argument for self defense or justifiable homicide. As a petitioner opposing summary dismissal under § 19-4906, Buss is required to present evidence to support every controverted element of his claim for relief. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). Without any facts supporting self defense or justifiable homicide, Buss has not proved that he was prejudiced by trial counsel's alleged advice (i.e., that he would not have pled guilty).

(R., p.37.)

Mr. Buss asserts that the district court erred in summarily dismissing his claim that his plea was not knowingly and voluntarily entered because trial counsel in the underlying criminal action rendered ineffective assistance when he improperly informed Mr. Buss that Idaho law did not recognize the defenses of self-defense or justifiable homicide. The district court erred when it *sua sponte* dismissed this claim for lack of evidence without following the procedures outlined in I.C. § 19-4906(b), including providing Mr. Buss with twenty days notice of the alleged defect in his petition.

As was more fully argued in section II(B)(1)(a), *supra*, which is incorporated herein by reference thereto, "where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide twenty days notice." *Workman v. State*, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007) (quoting *Gibbs, supra*.)

In the case at bar, the State sought summary dismissal upon the ground that the change of plea transcript contradicted Mr. Buss's claims, but subsequently conceded that this was not true of Mr. Buss's claim regarding his attorneys erroneous advice on the defense of self defense. (See R., pp.24-25, Tr., p.8, Ls.21-24.) In contrast, the district court expanded what the State had actually asserted. "Well, I think, and [the prosecutor] may not have used that language, but I construed that to be the substance of his argument, that there are no facts supporting the self-defense claim." (Tr., p.13, Ls.22-25.) Simply put, an assertion that a claim is precluded because it is contradicted by a record which shows Mr. Buss understood the consequences of pleading guilty is not the same as an assertion that the record contains no evidence to support a claim that Mr. Buss was ignorant of alternative courses of action open to him. While one questions whether he was aware what would happen after he pled guilty, the other questions whether he knew what he could do instead of pleading guilty. While one questions whether he understood the possible penalties he was facing, the other questions whether he was adequately informed whether he should be subject to a penalty at all. Thus, the district court dismissed Mr. Buss's petition on grounds other than that asserted by the State.

In addition, the district court did not give Mr. Buss twenty day's notice prior to dismissing the petition on the grounds first discussed at the hearing on the State's motion for summary judgment. It was during the hearing that counsel for Mr. Buss was informed that the district court was construing the State's motion to allege insufficient evidence of prejudice. (See Tr., p.13, Ls.22-25.) It was also during this same hearing that the State specifically made this claim for the first time. (See Tr., p.19, Ls.2-19.)

Nevertheless, the district court entered the order dismissing Mr. Buss's claims a mere day after the hearing. (Tr., p.4, Ls.1-2 (hearing held on April 6, 2006); R., p.45 (Order filed April 7, 2006).) As a result, Mr. Buss did not have the "opportunity to present any evidence he desire[s] by affidavits to counter the state's motion...." *Christensen*, 102 Idaho at 489, 632 p.2d at 678.

It should be noted that the record does contain some evidence to support Mr. Buss's allegation that he was prejudiced by his trial counsel's advice, i.e. that he would not have pled guilty in the absence of counsel's deficient performance. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (finding that "in order to satisfy the 'prejudice' requirement, the defendant must show that 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."). According to the facts put on the record in support of Mr. Buss's change of plea, the victim in the underlying criminal action approached Mr. Buss, believing that Mr. Buss owed him money. (Ch. Plea Tr., p.13, Ls.23-25.) When the argument ensued, "The victim raised his voice, and there were some statements made to the effect of, pay me the money or you'll have to shoot me. You'll have to shoot me." (Ch. Plea Tr., p.14, Ls.1-4.) The reasonable inference from these facts is that the victim in the underlying criminal action was the aggressor, and that Mr. Buss was threatened with the options of either paying the victim the money allegedly owed, or shooting the victim in order to avoid the negative consequences of not paying. See *State v. Yakovac*, 145 Idaho 437, 180 P.3d 476 (2008) (holding that in ruling on a motion for summary dismissal in post-conviction actions a district court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Id.* at 444, 180 P.3d at 483.) If the district


court did not find this evidence sufficient to warrant an evidentiary hearing, the district court should have notified Mr. Buss of this fact so that he could supplement his petition with further facts to support his allegation that he, in fact, had a self-defense or justifiable homicide claim.

Because the district court dismissed Mr. Buss's petition on grounds not asserted by the State in its motion for summary dismissal, the district court was required to comply with the notice requirements of I.C. § 19-4906(b). The district court, therefore, erred when it dismissed Mr. Buss's a mere day after notifying Mr. Buss's counsel of the allegation that the record lacked any evidence of prejudice. As a result, this court should vacate the order dismissing Mr. Buss's petition, and remand this case to the district court for the issuance of proper notice, such that Mr. Buss has the opportunity to present any additional evidence he has to support his claim.

CONCLUSION

Based upon the claims and argument above, Mr. Buss respectfully requests that this Court vacate the district court's order summarily dismissing his post-conviction action and remand this case to the district court for further proceedings.

DATED this 26th day of June, 2008.



SARA B. THOMAS
Chief, Appellate Unit

CERTIFICATE OF MAILING

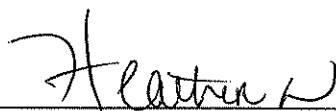
I HEREBY CERTIFY that on this 26th day of June, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TYSON L BUSS
INMATE # 72783
ISCI
PO BOX 14
BOISE IDAHO 83707

GREGORY S ANDERSON
BONNEVILLE COUNTY DISTRICT COURT
605 N CAPITAL AVENUE
IDAHO FALLS ID 83402

JOHN L STOSICH
BONNEVILLE COUNTY PUBLIC DEFENDERS
605 N CAPITAL AVE
IDAHO FALLS ID 83402

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720 0010
Hand deliver to Attorney General's mailbox at Supreme Court



HEATHER R. CRAWFORD
Administrative Assistant

SBT/hrc