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Ouedraogo v. State Appellant's Brief 1 Dckt. 41547

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MAROFF OUEDRAOGO,)	
)	NO. 41547
Petitioner-Appellant,)	
)	ADA COUNTY NO. CV 2013-6251
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	

BRIEF OF APPELLANT

COPY

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

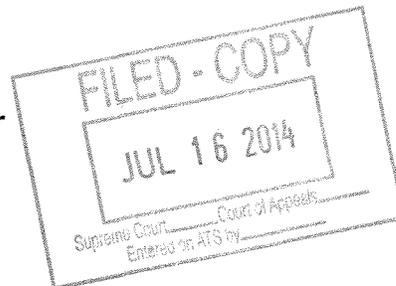
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	4
ARGUMENT.....	5
The District Court Erred In Summarily Dismissing Mr. Ouedraogo's Petition For Post-Conviction Relief As He Provided Undisputed Evidence Demonstrating That His Trial Counsel Affirmatively Misadvised Him About The Immigration Consequences Of His Guilty Plea And That, But For This Misadvice, He Would Not Have Pled Guilty.....	5
A. Introduction.....	5
B. Standards Of Review	5
C. Mr. Ouedraogo Provided Undisputed Evidence That His Trial Counsel Performed Deficiently By Affirmatively Misadvising Him Of The Immigration Consequences Of His Guilty Plea	7
D. Mr. Ouedraogo Provided Undisputed Evidence That He Was Prejudiced By His Trial Counsel's Deficient Performance As, But For His Trial Counsel's Misadvice, He Would Not Have Pled Guilty And Would Have Taken His Case To Trial.....	9
CONCLUSION	10
CERTIFICATE OF MAILING	11

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	7
<i>Aragon v. State</i> , 114 Idaho 758 (1988)	6
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	6
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	2, 7, 8
<i>Ricca v. State</i> , 124 Idaho 894 (Ct. App. 1993).....	7
<i>Ridgley v. State</i> , 148 Idaho 671(2010).....	6
<i>State v. Yakovac</i> , 145 Idaho 437 (2008)	5, 6, 7
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	6
<i>Thomas v. State</i> , 185 P.3d 921 (Ct. App. 2008).....	6

Statutes

I.C. § 19-4906(b).....	1, 10
------------------------	-------

Additional Authorities

<i>Black's Law Dictionary</i> , 991 (7th Ed.1999).....	6
--	---

STATEMENT OF THE CASE

Nature of the Case

Maroff Ouedraogo appeals from the district court's Final Judgment dismissing his petition for post-conviction relief. Mr. Ouedraogo asserts that he provided undisputed evidence that his trial counsel affirmatively misadvised him as to the immigration consequences of his guilty plea; thus, the district court erred in summarily dismissing his post-conviction petition.

Statement of the Facts and Course of Proceedings

Mr. Ouedraogo pled guilty to possession of a controlled substance with the intent to deliver, and he filed a timely petition for post-conviction relief alleging that his guilty plea was not knowingly, intelligently, and voluntarily entered into, and that his trial counsel was ineffective in affirmatively misadvising him about the immigration consequences of his guilty plea. (R., pp.3-11.) He further asserted that he would not have pled guilty had he known that his conviction for his drug offense subjected him to automatic deportation. *Id.* Mr. Ouedraogo verified his petition; however, the affidavit in support referenced in his petition was not attached. *Id.* At the time he filed his petition for post-conviction relief, Mr. Ouedraogo was in the custody of Immigration and Customs Enforcement and was awaiting deportation. *Id.*

The district court filed a notice of its intent to dismiss the petition pursuant to I.C. § 19-4906(b). (R., pp.22-29.) The court noted that the petition was not accompanied by the referenced affidavit and failed to allege how trial counsel affirmatively misadvised Mr. Ouedraogo about the immigration consequences of his

guilty plea; thus, the court found that the petition failed to establish a genuine issue of material fact that trial counsel performed deficiently. (R., pp.26-27.) The district court further stated that, “[w]hile not a basis for this notice of intent to dismiss,” the court had listened to the audio recording of the entry of plea hearing and concluded it “believes that it accurately advised the petitioner prior to taking his plea that the conviction could result in deportation or prevent him from obtaining United States citizenship if he were not a citizen.” (R., pp.27-28.) Relying upon *Padilla v. Kentucky*, 559 U.S. 356 (2010), the court indicated its belief that such advice would likely cure any deficiency in trial counsel’s advise. (R., p.28.) The court provided Mr. Ouedraogo 20 days to supply “an amended petition or further supporting affidavit reciting specifically what advice he was given by his trial counsel concerning the immigration consequences of his plea and why he believes it was incorrect.” (R., p.28 (emphasis in original).)

In response, Mr. Ouedraogo filed an affidavit in support of his post-conviction petition. (R., pp.32-36.) In his affidavit, Mr. Ouedraogo swore that his trial counsel “stated I would have to plead guilty and then have an immigration attorney fight to keep me from being deported.” (R., p.33.) He further swore that he “was very surprised in my first appearance in immigration court when I was told that I could not ask for any type of relief from deportation,” that he “did not understand these consequences when I pleaded guilty,” and that “I am informed now that the conviction prevents me from any further relief from deportation because I cannot be granted Cancellation of Removal because of the type of conviction I had.” (R., p.34.) Mr. Ouedraogo alleged that his attorney did not inform him of these consequences and, had she done so, he would not

have pled guilty and would have taken his case to trial. (R., p.34.) Mr. Ouedraogo asked that he be allowed to withdraw his guilty plea. (R., p.35.)

The district court entered an order dismissing Mr. Ouedraogo's petition. (R., pp.40-48.) The district court appears to have believed that Mr. Ouedraogo abandoned his claim that his trial counsel affirmatively misadvised him of the immigration consequences of his guilty plea, and that he now argues that his trial counsel's advice did not go far enough. (R., p.45.) The court refused to address what it believed was a new claim. (R., p.45.) The court further found that Mr. Ouedraogo's claim that his trial counsel told him that he would have to plead guilty and then fight to keep from being deported was "equivalent to advice informing petitioner that his conviction would render him 'presumptively deportable,'" and was thus adequate advice pursuant to the United States Supreme Court's holding in *Padilla*. (R., p.46.) The court, therefore, concluded that Mr. Ouedraogo failed to establish a *prima facie* case that his trial counsel's performance was deficient. (R., p.46.) Further, although the court had previously stated that it was not a basis for the court's notice of intent to dismiss (R., pp.27-28), the court found that Mr. Ouedraogo could not establish that he was prejudiced by any deficient performance "given the combined weight of the warnings given by counsel and the warnings given by this court." (R., p.47.)

Mr. Ouedraogo filed a timely Notice of Appeal from the district court's Final Judgment dismissing the petition. (R., pp.49-54.)

ISSUE

Did the district court err in summarily dismissing Mr. Ouedraogo's petition for post-conviction relief as he provided undisputed evidence demonstrating that his trial counsel affirmatively misadvised him about the immigration consequences of his guilty plea and that, but for this misadvice, he would not have pled guilty?

ARGUMENT

The District Court Erred In Summarily Dismissing Mr. Ouedraogo's Petition For Post-Conviction Relief As He Provided Undisputed Evidence Demonstrating That His Trial Counsel Affirmatively Misadvised Him About The Immigration Consequences Of His Guilty Plea And That, But For This Misadvice, He Would Not Have Pled Guilty

A. Introduction

Mr. Ouedraogo provided an affidavit stating that his trial counsel told him that, if he pled guilty to possession of a controlled substance with the intent to deliver, he could fight to keep from being deported. In other words, trial counsel told him that a conviction for possession of a controlled substance with the intent to manufacture or deliver would not result in automatic deportation. However, Mr. Ouedraogo's conviction mandates his deportation; thus, Mr. Ouedraogo could not actually fight to stay in the United States as his counsel had assured him that he could. Therefore, Mr. Ouedraogo provided undisputed evidence that his trial counsel affirmatively misadvised him about the consequences of his guilty plea. Furthermore, Mr. Ouedraogo provided undisputed evidence that, but for his counsel's misadvice, he would not have pled guilty and would have taken his case to trial. Therefore, the district court erred in summarily dismissing his petition for post-conviction relief.

B. Standards Of Review

A post-conviction petition initiates a proceeding that is civil, rather than criminal, in nature, and like the plaintiff in a civil action, the applicant must prove his or her allegations upon which the requests for relief are based by a preponderance of the evidence. *State v. Yakovac*, 145 Idaho 437, 443 (2008). However, unlike a plaintiff in other civil cases, the original post-conviction petition must allege more than merely "a

short and plain statement of the claim.” *Id.* at 443-444. The application must present or be accompanied by admissible evidence supporting the allegations contained therein, or else the post-conviction petition may be subject to dismissal. *Id.* In addition, the post-conviction petition must set forth with specificity the legal grounds upon which the application is based. *Ridgley v. State*, 148 Idaho 671, 675 (2010).

A claim of ineffective assistance of counsel may properly be brought through post-conviction proceedings. *Thomas v. State*, 185 P.3d 921 (Ct. App. 2008). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel’s performance was constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760 (1988). Where a defendant shows that his counsel was deficient, prejudice is shown if there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, at 694; *Aragon* at 760. Where counsel’s deficient performance leads to guilty plea, “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.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

A district court may summarily dismiss a post-conviction petition only where the petition and evidence supporting the petition fail to raise a genuine issue of material fact that, if resolved in the petitioner’s favor, would entitle him or her to the relief requested. *Yakovac*, 145 Idaho at 444. “A material fact has ‘some logical connection with the consequential facts[,]’ *Black’s Law Dictionary*, 991 (7th Ed.1999), and therefore is determined by its relationship to the legal theories presented by the parties.” *Id.* On

review of a dismissal of a post-conviction relief application without an evidentiary hearing, the appellate court must determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896 (Ct. App. 1993). The United States Supreme Court has defined the standard for whether there exists a genuine issue of material fact as whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved in favor of either party.” *Id.* at 250. If a genuine factual issue is presented, an evidentiary hearing must be conducted. *Yakovac*, 145 Idaho at 444.

C. Mr. Ouedraogo Provided Undisputed Evidence That His Trial Counsel Performed Deficiently By Affirmatively Misadvising Him Of The Immigration Consequences Of His Guilty Plea

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that trial counsel who affirmatively misadvised the defendant that his drug conviction would not result in deportation performed deficiently. *Id.* at 368-369. The Court noted, “[t]he consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.” *Id.* at 369.

Mr. Ouedraogo verified that his trial counsel affirmatively misadvised him as to the immigration consequences of his guilty plea. (R., pp.3-11.) In response to the district court notice of intent to dismiss requiring Mr. Ouedraogo to explain exactly what his trial counsel told him (R., pp.28-29), Mr. Ouedraogo provided an affidavit in which he

swore that trial counsel “stated I would have to plead guilty and then have an immigration attorney fight to keep me from being deported” (R., p.33). It was not until after Mr. Ouedraogo was taken into custody by Immigration and Customs Enforcement and brought before a judge that he learned that he was not eligible for any type of relief from deportation. (R., p.34.) Thus, trial counsel affirmatively and falsely told Mr. Ouedraogo that there was a possibility that he would not be deported if he pled guilty to his drug offense, where in fact, as noted by the *Padilla* Court, “his deportation was presumptively mandatory.” *Padilla*, 559 U.S. at 369.

The district court erroneously concluded that Mr. Ouedraogo had abandoned his claim that his trial counsel affirmatively misadvised him, and made a new claim that the advice did not go far enough. (R., pp.45-46.) Mr. Ouedraogo presented undisputed evidence in the form of his sworn affidavit that trial counsel informed him that he would “have to plead guilty and then have an immigration attorney fight to keep [him] from being deported.” (R., p.33.) He also presented undisputed evidence in the form of his sworn affidavit that this advice was false – he was not eligible for any relief from deportation. (R., p.34.) Mr. Ouedraogo did not abandon this claim; rather, he provided the court with the specific information the court requested, i.e., “specifically what advice he was given by his trial counsel concerning the immigration consequences of his plea and why he believes it was incorrect.” (R., p.28 (emphasis in original).) The district court’s conclusion that Mr. Ouedraogo failed to provide evidence that his trial counsel performed deficiently is erroneous.

D. Mr. Ouedraogo Provided Undisputed Evidence That He Was Prejudiced By His Trial Counsel's Deficient Performance As, But For His Trial Counsel's Misadvice, He Would Not Have Pled Guilty And Would Have Taken His Case To Trial

Mr. Ouedraogo provided undisputed evidence that he pled guilty based upon his belief that he would actually have an opportunity to “fight to keep ... from being deported,” that this belief was based upon the affirmative misrepresentation of his trial counsel, and that he would not have pled guilty had trial counsel not given him this false advice. (R., pp.33-34.) As such, he has presented a *prima facie* case that he was prejudiced by his trial counsel's deficient performance and summary dismissal was inappropriate.

Despite the fact that the district court affirmatively told Mr. Ouedraogo that it was not a basis for its notice of intent to dismiss (R., pp.27-28), the district court dismissed Mr. Ouedraogo's petition based in part on the court's belief that it had adequately warned Mr. Ouedraogo about the immigration consequences of his guilty plea during the entry of plea hearing, and that “given the combined weight of the warnings given by counsel and the warnings given by this Court,” Mr. Ouedraogo was not prejudiced by any deficient performance (R., pp.46-47). During the entry of plea hearing, the district court asked Mr. Ouedraogo if he understood that if he is not a citizen of the United States his guilty plea “may” result in deportation or other immigration consequences. (Audio recording of the change of plea hearing held on May 31, 2012.) Rather than correcting defense counsel's misrepresentation, the district court's warning actually re-enforced the misrepresentation. By informing Mr. Ouedraogo that he “may” be subject to deportation (rather than telling him that he “shall” be subject to deportation), the district court's warning implied that Mr. Ouedraogo “may not” be subject to deportation,

just as his trial counsel implied by informing him that he could “fight” to remain in the country. However, the undisputed evidence demonstrates that Mr. Ouedraogo was subject to mandatory deportation due to his guilty plea. Therefore, the district court’s finding that any deficient performance was not prejudicial is in error.

CONCLUSION

Mr. Ouedraogo respectfully requests that this Court vacate the district court’s Order for Dismissal Pursuant to I.C. § 19-4906(b) and its Final Judgment, and remand this case to the district court for further proceedings.

DATED this 16th day of July, 2014.

A handwritten signature in black ink, appearing to read "JP", is written over a horizontal line.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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1630 ROSSI STREET
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