

11-16-2015

Winn v. State Respondent's Brief Dckt. 42825

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

MELVIN WINN,)	
)	No. 42825
Petitioner-Appellant,)	
	)	Ada Co. Case No.
vs.	)	CV-2013-19093
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
)	

BRIEF OF RESPONDENT

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

HONORABLE JASON D. SCOTT
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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Deputy Attorney General
Chief, Criminal Law Division

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**ATTORNEYS FOR
RESPONDENT**

**PRO SE
PETITIONER-APPELLANT**

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NOV 16 2015

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

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STATEMENT OF THE CASE

Nature of the Case

Melvin Winn, *pro se*,¹ appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Underlying Proceedings

The facts of the underlying case, as outlined by the Court of Appeals in affirming Winn's sentence, are as follows:

In 2008, Melvin Winn's granddaughter (J.H.) reported to her mother that Winn touched her vagina. The mother relayed this information to law enforcement and an officer interviewed Winn. During the interview, Winn asserted that he may have accidentally touched J.H.'s vagina while playing with her. Winn was not prosecuted at that time. In 2011, J.H.'s brother, M.H., reported that he witnessed Winn molesting J.H. Officers again interviewed Winn, who acknowledged the allegations were "possible," but denied any independent recollection due to the use of methamphetamine. Winn requested and was scheduled for a polygraph. During the pre-test interview, Winn revealed to the examiner that he sexually abused J.H. by touching her vagina "on 5 or 6 different occasions." He also admitted to performing oral sex on J.H. "on 2 or 3 different occasions." Winn explained these incidents occurred around December 2008.

A grand jury indicted Winn on one count of lewd conduct with a minor under sixteen with a sentencing enhancement based on a prior conviction for a sexual offense that required registration. Pursuant to a plea agreement, Winn pled guilty to an amended charge of sexual abuse of a minor under sixteen, I.C. § 18-1506, and the state agreed to dismiss the enhancement. The district

¹ Although Winn was originally represented on appeal, the Court granted appellate counsel's motion to withdraw. (8/17/15 Order). Appellate counsel's request to withdraw was made following a review of "all materials in the record" upon which appellate counsel concluded he "was unable to file an appellate brief and comply with the requirements of I.C.R.P. 11(a)(1)." (7/29/15 Affidavit in Support of Motion to Withdraw as Counsel of Record and to Allow Appellant to Process *Pro Se*, p.1.)

court imposed a unified sentence of twenty-five years, with a minimum period of confinement of twelve years.

State v. Winn, 2013 Unpublished Opinion No. 580, pp.1-2 (July 12, 2013).

Winn filed a *pro se* petition for post-conviction relief and a request for the appointment of counsel. (R., pp.4-12.) Through appointed counsel Winn filed an amended petition for post-conviction relief alleging ineffective assistance of counsel for failing to properly investigate his case and encouraging him to plead guilty despite his claim of innocence, as well as asserting his sentence was excessive. (R., pp.38-40).

The court entered a notice of intent to dismiss Winn's petition for post-conviction relief based on its findings that "[t]he amended petition does not set forth a factual basis for concluding that Winn's trial counsel's performance was deficient." (R., pp.43-45.) The court also found that Winn had failed to "establish a reasonable probability that Winn would not have pleaded guilty in the absence of some particular performance deficiency." (R., p.45.) The notice of intent to dismiss gave Winn 20 days to file a response. (Id.)

Winn responded to the court's notice of intent to dismiss wherein he conceded "there [was] not a wealth of information in the petition to support his claim of deficient performance" and focused his argument against summary dismissal on his belief that there was a letter out there Winn had never seen which may have corroborated his claims of innocence. (R., pp.47-50.) The court entered an order dismissing Winn's amended petition for post-conviction relief for his failure to support his claim of ineffective assistance of counsel with admissible evidence. (R., pp.96-100.)

Winn timely appealed from the entry of judgment. (R., pp.101-105.)

ISSUE

Winn's brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4).

The state phrases the issue on appeal as:

Has Winn failed to show that the district court erred in summarily dismissing his post-conviction petition?

ARGUMENT

Winn Has Failed To Show Error In The Summary Dismissal Of His Petition For Post-Conviction Relief

A. Introduction

The district court provided Winn with the opportunity to respond to its notice of intent to dismiss and ultimately dismissed his petition for post-conviction relief on the basis Winn failed to provide admissible evidence in support of his claim. (R., pp.96-100.)

On appeal, Winn appears to reassert the original claim of ineffective assistance of trial counsel put forth in his petition that he would not have pled guilty had his attorney properly investigated his claims of innocence. (Appellant's Brief.) Winn's argument on appeal fails. He has not shown that the district court erred in summarily dismissing his petition for post-conviction relief.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely

review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than “a short and plain statement of the claim” that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 802 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581,

583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 “if the applicant’s evidence raises no genuine issue of material fact” as to each element of petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

D. The Court Should Decline To Consider Winn’s Claim Because It Is Unsupported By Argument And Authority

“When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.” State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Although Winn claims on appeal that the his attorney was ineffective, he has failed to cite any authority in support of his claims and has offered essentially no argument in support of his claim of

ineffective assistance of counsel. (See generally Appellant's Brief.) Accordingly, this Court should decline to consider the merits of his claim.

E. Even If This Court Considers The Merits Of Winn's Claim, Winn Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

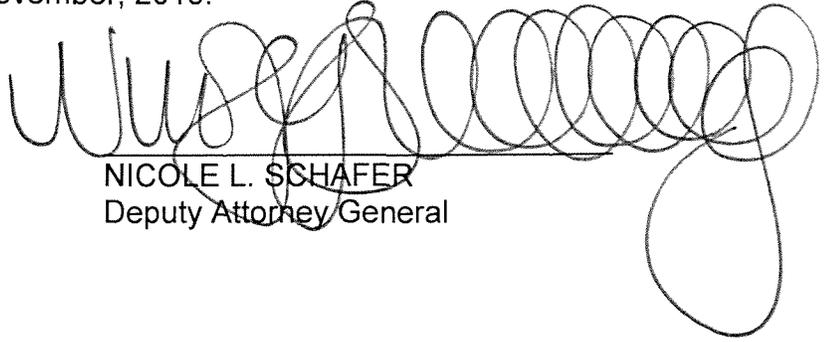
Winn has failed to establish the district court erred in summarily dismissing his petition for post-conviction relief. In both its notice of intent to dismiss and its order dismissing Winn's petition for post-conviction relief, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Winn failed to establish a prima facie case of ineffective assistance of counsel. The state adopts the district court's written opinions as its argument on appeal, copies of which are attached hereto as Appendix A. Winn does not specifically challenge any of the court's findings or legal conclusions (see generally Appellant's Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.

Because Winn has failed to establish any basis for reversing the district court's dismissal of his post-conviction petition or any other basis for relief, the district court's order should be affirmed.

CONCLUSION

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

DATED this 16th day of November, 2015.

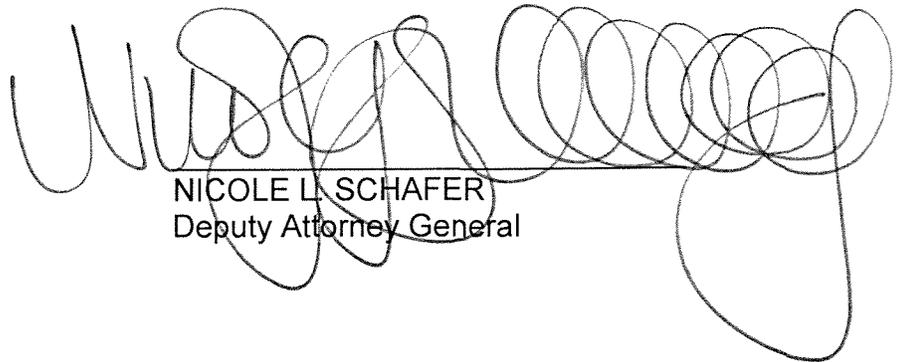


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of November, 2015, I caused two true and correct copies of the foregoing RESPONDENT'S BRIEF to be placed in the United States mail, postage prepaid, addressed to:

MELVIN WINN
Inmate #25792
ISCI Unit 14
P. O. Box 14
Boise, ID 83707



NICOLE L. SCHAFER
Deputy Attorney General

NLS/dd

APPENDIX A

NO. _____
AM 9:21 FILED P.M. _____

JUL 24 2014

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
CHRISTOPHER D. FINCH, Clerk
BERRY ABBOTT
BERRY

MELVIN WINN,	)	Case No. CV-PC-2013-19093
)	
Petitioner,)	
)	
vs.)	
	)	NOTICE OF INTENT TO DISMISS
STATE OF IDAHO,)	
)	
Respondent.)	

On August 21, 2012, Melvin Winn was convicted of sexual abuse of a child under the age of sixteen in violation of I.C. § 18-1506 and sentenced to twenty-five years in prison (twelve years fixed and thirteen years indeterminate). His conviction was based on an *Alford* plea, which he had tried unsuccessfully to withdraw before sentencing. The Idaho Court of Appeals affirmed his conviction and sentence on July 12, 2013, noting Winn's concession in an appeal brief that he had failed to show a just reason for permitting the withdrawal of his *Alford* plea.

Winn filed an application for post-conviction relief on October 24, 2013. The Court granted his motion for appointment of counsel. The Court also gave Winn an opportunity to file an amended petition for post-conviction relief after consulting with his counsel.

Winn's amended petition for post-conviction relief was filed on January 21, 2014. It claims ineffective assistance of trial counsel. Winn says his counsel urged the *Alford* plea despite his claimed innocence. He also says his sentence was harsher than he anticipated. Finally, he suggests his case was not adequately investigated, without describing either the investigation he thinks should have been undertaken or the fruit he thinks it would have borne.



To prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy a two-pronged test. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

First, the petitioner must prove his counsel's performance was deficient. *Id.* "There is a strong presumption that counsel's performance fell 'within the wide range of professional assistance,'" so the petitioner must prove his "'counsel's representation fell below an objective standard of reasonableness.'" *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1998) (quoting *Strickland*, 466 U.S. at 688-89).

Second, the petitioner must prove he was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 687. "Where . . . the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant '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.'" *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

In *Plant*, Rodney Plant filed a petition for post-conviction relief, in which he alleged that his counsel "talked [him] into pleading guilty without thoroughly investigating [his] case." *Id.* at 762, 152 P.3d at 633. The petition did not, however, describe the investigation that should have been done, nor did it describe the helpful information that might have been uncovered. *Id.* The Idaho Court of Appeals therefore held that the petition was "simply too vague to suggest even the possibility of a valid claim." *Id.* Accordingly, it agreed with the district court that appointing counsel to represent Plant was unwarranted. *Id.* The court reached that conclusion even after noting that the legal standard Plant was required to satisfy to obtain appointment of counsel is "considerably lower" than the legal standard he was required to satisfy to avoid his petition's summary dismissal. *Id.* at 761, 152 P.3d at 632.

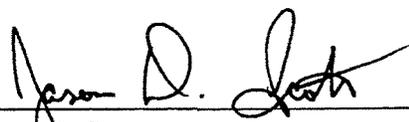
Unlike Plant, Winn has received appointed counsel. Nevertheless, the allegations in Winn's amended petition are not materially better developed than those found in *Plant* to be insufficient to warrant even the appointment of counsel, much less to state a claim that is fit to avoid summary dismissal. The amended petition does not set forth a factual basis for concluding that Winn's trial counsel's performance was deficient. It also does not establish a reasonable probability that Winn would not have pleaded guilty in the absence of some particular performance deficiency, as it does not draw a causal link between any such deficiency and Winn's decision to plead guilty. Instead, the amended petition simply suggests Winn expected a more lenient sentence than he received and, had the sentence been known in advance, would rather have taken his chances at trial.

Having reviewed the amended petition, the rest of the record in this case, and the case file in the underlying criminal case,¹ the Court is satisfied that Winn is not entitled to post-conviction relief and that no purpose would be served by any further proceedings. Accordingly, the Court notifies Winn of its intent to dismiss the amended petition. He is granted 20 days from the date of this notice to reply to the proposed dismissal of this case. After that 20-day period expires, the Court may order the petition dismissed, grant leave to file a further amended petition, or direct that the proceedings otherwise continue.

IT IS SO ORDERED.

Dated this 24th day of July 2014.

- 6



Jason D. Scott
DISTRICT JUDGE

¹ The Court takes judicial notice, under I.R.E. 201, of the case file in the underlying criminal case, Ada County Case No. CR-FE-2011-20637.

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of July 2014, I mailed (served) a true and correct copy of the within instrument to:

Ada County Prosecuting Attorney
Ada County Courthouse

- U.S. Mail, Postage Prepaid
- Interdepartmental Mail
- Electronic Mail
- Facsimile

John C. DeFranco
ELLSWORTH, KALLAS, & DEFRANCO, PLLC
1031 E Park Blvd
Boise, ID 83712

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Electronic Mail
- Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

NO. _____
A.M. _____ P.M. 1:09

NOV 14 2014

CHRISTOPHER D. FROH, Clerk
By: GABRIEL ABBOTT
DEPUTY

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

MELVIN WINN,)	
)	
	)	Case No. CV-PC-2013-19093
Petitioner,)	
vs.	)	ORDER DISMISSING AMENDED
	)	PETITION FOR POST-CONVICTION
STATE OF IDAHO,	)	RELIEF
)	
Respondent.)	
_____)	

On August 21, 2012, Melvin Winn was convicted of sexual abuse of a child under the age of sixteen in violation of I.C. § 18-1506 and sentenced to twenty-five years in prison (twelve years fixed and thirteen years indeterminate). His conviction was based on an *Alford* plea, which he had tried unsuccessfully to withdraw before sentencing. The Idaho Court of Appeals affirmed his conviction and sentence on July 12, 2013, noting Winn's concession in an appeal brief that he had failed to show a just reason for permitting the withdrawal of his *Alford* plea.

Winn filed an application for post-conviction relief on October 24, 2013. The Court granted his motion for appointment of counsel. The Court also gave Winn an opportunity to file an amended petition for post-conviction relief after consulting with his counsel.

Winn's amended petition for post-conviction relief was filed on January 21, 2014. It claims ineffective assistance of trial counsel. In the amended petition, Winn says that his counsel urged the *Alford* plea despite his claimed innocence, that his sentence was harsher than he anticipated, and that his case was not adequately investigated. The amended petition does not,

however, describe either the investigation he thinks should have been undertaken or the fruit he thinks it would have borne.

On July 24, 2014, the Court notified Winn of its intent to dismiss his amended petition for post-conviction relief unless he showed, within twenty days, that there is reason for allowing it to proceed further. The Court's notice identified as deficiencies in Winn's presentation the absence of (i) a factual basis for concluding that Winn's trial counsel's performance was deficient, and (ii) evidence establishing a reasonable probability that Winn would not have proceeded to trial had his trial counsel not performed deficiently.

Winn responded to the notice on August 12, 2014. His response "concedes there is not a wealth of information in the petition to support his claim of deficient performance." (Response to Court's Notice of Intent to Dismiss 2.) It focuses, however, on the notion that Winn's trial counsel failed to investigate the existence of a purported letter authored by the brother of Winn's victim, in which the victim's brother acknowledges inaccuracies in the account he gave law enforcement about having witnessed Winn sexually abusing his victim. In other words, the letter, if it existed, might have discredited a witness who corroborated the victim's assertion that Winn sexually abused her. Although Winn claims to have seen such a letter, he does not offer any sworn testimony concerning it. He simply requests permission to depose the victim's brother to try to confirm the letter's existence and contents.

On September 12, 2014, the State answered the amended petition and filed a brief in support of dismissal pursuant to the Court's notice of intent to dismiss. The State argues there is no evidence the letter ever existed and, in any event, no evidence Winn's counsel performed deficiently in failing to conduct more investigation regarding it. In that latter regard, the State notes that the victim's own testimony supported Winn's guilt, as did Winn's own oral and

written confessions—Winn had confessed to a polygrapher and to his parole officer. Thus, the State argues, the strength of its case would not be meaningfully lessened by any recantation letter written by the victim’s brother, who himself also had sexually abused that same victim.

To prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy a two-pronged test. *E.g., Strickland v. Washington*, 466 U.S. 668, 687 (1984).

First, the petitioner must prove his counsel’s performance was deficient. *Id.* “There is a strong presumption that counsel’s performance fell ‘within the wide range of professional assistance,’” so the petitioner must prove his “‘counsel’s representation fell below an objective standard of reasonableness.’” *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1998) (quoting *Strickland*, 466 U.S. at 688-89).

Second, the petitioner must prove he was prejudiced by his counsel’s deficient performance. *Strickland*, 466 U.S. at 687. “Where . . . the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant ‘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.’” *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Further, the petitioner “is required to make a prima facie case by presenting admissible evidence on each essential element of his or her claims.” *DeRushé v. State*, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009). The petitioner’s obligation to do so is triggered by the filing of a motion for summary dismissal or by the issuance of a notice of intent to dismiss, in which the absence of admissible evidence to support the petitioner’s allegations is brought to the petitioner’s attention. *See id.* at 601-02, 200 P.3d at 1150-51.

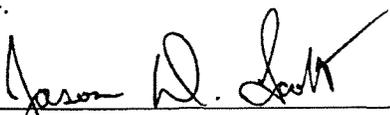
Here, even after having received the notice of intent to dismiss, Winn offers no admissible evidence to support the “letter” theory. He offers no evidence that the letter ever existed, no admissible evidence of its contents, no admissible evidence of his bringing the letter’s supposed existence to his trial counsel’s attention, no admissible evidence that his trial counsel’s alleged failure to investigate amounts to deficient performance under the circumstances, and no admissible evidence that having located the letter would have caused him to proceed to trial rather than enter an *Alford* plea.

The absence of admissible evidence of the letter’s existence and contents might be excused for now, on the theory that Winn is seeking permission to conduct discovery he hopes will generate evidence of that sort. That said, even if permission to conduct discovery were granted, and even if it resulted in evidence of the letter’s existence and contents, Winn still would not be entitled to post-conviction relief because he still would fall short of having presented a *prima facie* case of the elements of his claim. Confirmation of the letter’s existence would not, *ipso facto*, be indicative of deficient performance by his trial counsel, no matter how favorable the letter’s contents might be. There remains no evidence that Winn’s trial counsel performed deficiently by allowing him to proceed with an *Alford* plea under the circumstances. And there remains no evidence that discovering the letter would have changed Winn’s plea decision. No purpose would be served by permitting the requested discovery.

Accordingly,

IT IS ORDERED that Winn’s amended petition for post-conviction relief is dismissed.

Dated this 13th day of November 2014.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of November 2014, I mailed (served) a true and correct copy of the within instrument to:

Jean Fisher
Deputy Ada County Prosecuting Attorney
Ada County Courthouse

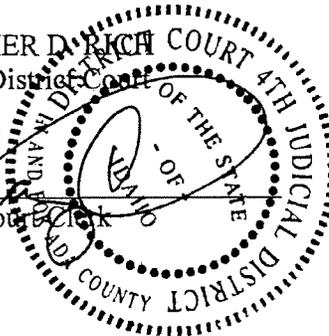
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John C. DeFranco
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Boise, ID 83712

- U.S. Mail, Postage Prepaid
- Interdepartmental Mail
- Electronic Mail
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CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk



NOV 14 2014
FILED 1:09
A.M.

NOV 14 2014

CHRISTOPHER D. FICH, Clerk
By EMERY ABBOTT
DEPUTY

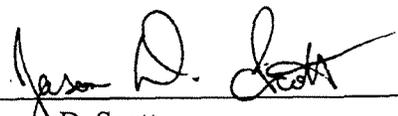
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MELVIN WINN,)	
)	
	)	Case No. CV-PC-2013-19093
Petitioner,)	
)	
vs.)	
	)	JUDGMENT
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

JUDGMENT IS ENTERED AS FOLLOWS:

Petitioner Melvin Winn's petition for post-conviction relief is dismissed with prejudice in its entirety. He is awarded no post-conviction relief.

Dated this 13th day of November 2014.



 Jason D. Scott
 DISTRICT JUDGE

