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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN JOSEPH DELLING,)	
)	No. 43037
Petitioner-Appellant,)	
)	Ada Co. Case No.
v.)	CV-2013-9145
)	
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 DEBORAH A. BAIL
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

John Joseph Delling appeals from the district court's order summarily dismissing his post-conviction petition.

Statement Of Facts And Course Of Proceedings

The procedural history of the underlying criminal case leading to Delling's convictions and sentences for two counts of second degree murder was set forth by the Idaho Supreme Court as follows:

Delling was initially charged with two counts of first-degree murder for the deaths of David Boss and Brad Morse. These counts were later amended to second-degree murder. Shortly after being charged, Delling's counsel motioned for a mental health evaluation to determine whether Delling was fit to proceed and able to aid in his own defense. An examination was ordered by the district court under I.C. § 18-211. On February 27, 2008, Delling was found to lack fitness to proceed, and the district court issued an order of commitment pursuant to I.C. § 18-212. After nearly a year, the district court found that Delling's mental state had improved and that he would be capable of aiding in his own defense.

Before trial, Delling's counsel filed a notice of an intent to produce psychological evidence to show that Delling was incapable of forming the required mens rea. The State responded by filing a motion to allow mental health experts access to Delling in order to conduct an evaluation under I.C. § 18-207(4)(c). Delling objected, arguing that such mandated access would violate his right to remain silent and be free from self-incrimination.

Delling's motion also asked the district court to declare I.C. § 18-207, the legislative abrogation of mental condition as a defense, unconstitutional on its face and as applied. More specifically, the motion argued that the statute violates the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and Article 1, Sections 2, 7, and 13 of the Idaho Constitution. The district court denied the motion, holding that "[s]imply because Idaho does not recognize an insanity defense does not mean that mentally ill offenders are

deprived of any right recognized under either the United States Constitution or the Idaho Constitution.”

Delling agreed to enter a conditional plea of guilty to second-degree murder, preserving the right to appeal the decision on his motion to declare I.C. § 18-207 unconstitutional, in both cases, in exchange for the prosecutor’s recommendation of concurrent sentences. Upon pleading guilty, Delling was sentenced to determinate life for the second-degree murder of Brad Morse, set to run concurrently with his determinate life sentence for pleading guilty to the second-degree murder of David Boss.

State v. Delling, 152 Idaho 122, 124, 267 P.3d 709, 711 (2011). The Idaho Supreme Court affirmed Delling’s convictions and sentences. Delling, 151 Idaho 122, 267 P.3d 709. Delling filed a petition for writ of certiorari with the United States Supreme Court, which was denied. Delling v. Idaho, 133 S.Ct. 504 (2012).

On November 25, 2013, Delling filed, through appointed counsel, a timely petition for post-conviction relief, presenting two claims of ineffective assistance of trial counsel. (R., pp.3-8 (excluding exhibits), 19-20.) On December 19, 2013, the state filed its State’s Response to Petitioner’s Post-Conviction Relief and State’s Motion to Dismiss, seeking summary dismissal of Delling’s post-conviction petition. (R., pp.27-32.) Delling did not respond to the state’s motion to dismiss, and on February 4, 2015, the district court entered an Order Granting States [sic] Motion to Dismiss and Dismissing Petition for Post-Conviction Relief. (R., pp.35-48.) The following day, the court entered a Judgment dismissing

Delling's post-conviction claims with prejudice. (R., p.49.) Delling timely appealed.¹ (R., pp.50-52.)

¹ The State Appellate Public Defender ("SAPD") was originally appointed to represent Delling in his appeal. (R., p.55.) The Idaho Supreme Court subsequently permitted the SAPD to withdraw from the case after the SAPD failed to identify a meritorious issue for review. (Affidavit in Support of Motion For Leave to Withdraw And Motion to Suspend the Briefing Schedule, p. 2; 11/6/15 Order Granting Motion.)

ISSUES

Delling states the issues on appeal as:

1. Did the failure of the district court to provide a psychiatric professional to interview and observe John Delling at the time of the plea bargain violate John Dellings constitutional right of due process, equal protection, American Disabilities Act. States unconstitutional act of forced medication.
2. Did the Ada County Public Defenders, Alan Trimming, Gus Cahil [sic], fail to provide a constitutionally adequate representation because they failed to provide a psychiatric professional to conduct an [sic] psychiatric evaluation to refute the states third evaluation, since the first and second evaluations found John Delling to be incompetent, violating Dellings constitutional rights.
3. Did the Court abuse its discretion [sic] and error, when it found by clear and convincing evidence that John Delling was competent, since John Delling had been found incompetent twice to stand trial, yet only competent once. States own record proves Dellings competency, changes by the hour, day, week, which would make it impossible to ensure of his competence at the time he signed his plea, violating Dellings constitutional rights.
4. Did the State, Court, violate Dellings constitutional rights by convicting a [sic] incompetent defendant. John Delling was found incompetent twice, yet the court failed to rule on the two incompetent, showing prejudice in ruling on the one competent finding. Appellant challenges the third evaluation, as the state did change Dellings medication, using extremely heavy drugs to gain the alleged competent evaluation. No toxicology on Dellings blood, the state in effect got Delling drunk, to gain a conviction.
5. Did the State of Idaho violate John Dellings constitutional rights when they permitted [sic], coerced, caused Delling to waive his right to a trial and sign a plea agreement, denied 6th Amendment right to counsel, who is competent.
6. Did the Idaho Supreme Court violate Dellings 6th Amendment right to counsel when they provided counsel who refused to visit Delling or even obtain counsel who would argue the Delling case before the court?

7. Did the Idaho Supreme Court violate John Dellings constitutional and federally protected rights when they failed to Faretta John Delling, prior to pro se.
8. Did the Idaho Supreme Court violate John Dellings constitutional rights by hearing John Dellings case, to uphold Dellings conviction, when the Idaho Supreme Court Chief Justice, Gov. CL Otter, others, admit that Ada County Public Defenders provide a sub-standard, constitutionally inadequate defense, NLADA, ACLU, ABA, CJC etc. –
9. Did the Idaho Supreme Court violate clearly established federal law, constitutional law, rule of law, by knowingly permitting [sic] a defendant that has been found incompetent by the state twice, to represent himself.
10. Did the state violate Dellings constitutional rights when they knowingly failed to conduct a competency hearing immediatly [sic] prior to Delling signing a plea, when he requested the hearing by telling his counsel just prior to signing and again, now before the Idaho Supreme Court prior to proceeding pro se.

(Appellant's Brief, pp.2-3 (capitalization modified; punctuation verbatim; underscore original).)

The state rephrases the issue on appeal as:

Has Delling failed to preserve the issues raised on appeal; even if the summary dismissal of the claims presented in Delling's petition is deemed challenged on appeal, has he failed to show error?

ARGUMENT

Delling Has Failed To Preserve The Issues Raised On Appeal; Even If The Summary Dismissal Of The Claims Presented In Delling's Petition Is Deemed Challenged On Appeal, He Has Failed To Show Error

A. Introduction

Delling contends the district court erred by granting the state's motion to summarily dismiss his post-conviction petition. (See generally Appellant's Brief.) Delling's argument fails because he failed to preserve the post-conviction claims he raises on appeal. Further, even if this Court determines that the claims Delling presented in his post-conviction petition are raised on appeal, he has failed to show any error in their summary dismissal.

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 district 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. Delling Failed To Preserve The Issues He Raises On Appeal

It is well settled that issues not raised below will generally not be considered for the first time on appeal. State v. Averett, 142 Idaho 879, 888-89, 136 P.3d 350, 359-60 (Ct. App. 2006); State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). It is also well settled “that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error.” State v. Huntsman, 146 Idaho 580, 585, 199 P.3d 155, 160 (Ct. App. 2008); State v. Grube, 126 Idaho 377, 387, 883 P.2d 1069, 1079 (1994) (citing State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946

(1993); Dunlick, Inc. v. Utah-Idaho Concrete Pipe Co., 77 Idaho 499, 502, 295 P.2d 700, 702 (1956)).

Delling presented two claims in his post-conviction petition, described by the district court as follows:

In Delling's application for post-conviction relief, he alleged two claims of ineffective assistance of counsel based on counsel advising Delling to enter into a plea bargain with the State in Ada County Case No. CR-FE-2007-0000663, which contemplated a resolution in Latah County Case No. CR-FE-2007-0001625. First, Delling claimed he should not have been advised to plead guilty because the risk of the death penalty was illusory given his mental state, therefore he did not benefit from the plea bargain. Instead, counsel should have advised Delling to take the case to trial so there would be a "better" record for attacking the constitutionality of Idaho Code §18-207. Second, Delling claimed trial counsel should not have advised him to plead guilty because counsel knew Delling was seriously mentally ill at the time the plea was entered.

(R., p.36; see R., pp.2-3.)

Delling presents ten issues on appeal – none of which challenge the summary dismissal of the two post-conviction claims he presented to the district court. (Compare Appellant's Brief, pp.2-3 (see pp.4-5, supra) with R., pp.2-3, 36.) Because the district court did not consider any of the ten claims (or issues) Delling presents on appeal, he has failed to preserve them for appeal.

It was Delling's burden to adequately raise these claims before the district court and to obtain an adverse ruling. Huntsman, 146 Idaho at 586, 199 P.3d at 161; State v. Barnes, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999) (quoting Fisher, 123 Idaho at 485, 849, P.2d at 946); State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988); State v. Amerson, 129 Idaho 395, 401, 925 P.2d 399, 405 (Ct. App. 1996). Because the district court never addressed the post-conviction

claims Delling now attempts to raise on appeal, and because these claims were never properly before the district court to address, Delling failed to preserve these claims for consideration on appeal. This Court must therefore affirm the district court.

E. Even If The Summary Dismissal Of The Claims Presented In Delling's Petition Is Deemed Challenged On Appeal, He Has Failed To Show Error

Even if Delling is deemed to be challenging the summary dismissal of one or both of the claims presented in his post-conviction petition, has he failed to demonstrate any error in such dismissal.

In granting the state's motion to summarily dismiss Delling's post-conviction petition, the district court thoroughly evaluated his two claims and supporting evidence and correctly determined, based upon the applicable legal standards and underlying criminal record, that Delling failed to set forth adequate facts to raise a genuine issue of material fact entitling him to an evidentiary hearing on any of his post-conviction claims. (R., pp.35-48.) The state adopts as its argument on appeal the district court's analysis, as set forth in its February 4, 2015 (filing date) Order Granting States [sic] Motion to Dismiss and Dismissing Petition for Post-Conviction Relief. (Id.) For this Court's convenience, a copy of the district court's opinion is appended to this brief. (See Appendix A, attached.)

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Delling's post-conviction claims.

DATED this 9th day of February, 2016.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2016, 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:

JOHN JOSEPH DELLING
IDOC #93454
I.S.C.I.
P.O. BOX 14
BOISE, ID 83707

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd

APPENDIX A

NO. _____
A.M. 11:05 P.M. _____

FEB 04 2015

CHRISTOPHER D. RICH, Clerk
By TARA VILLERREAL
DEPUTY

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

JOHN JOSEPH DELLING,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

) Case No.: CV-PC-2013-09145
) ORDER GRANTING STATES MOTION
) TO DISMISS AND DISMISSING
) PETITION FOR POST-CONVICTION
) RELIEF
)
)
)
)

I.

INTRODUCTION

This action is brought pursuant to the Uniform Post-Conviction Procedure Act, Idaho Code §§ 19-4901 through 19-4911. After considering the State's Response to Petitioner's Post-Conviction Relief and State's Motion to Dismiss filed December 19, 2013, the Court finds Delling, represented by counsel, was put on notice of the deficiencies in his application for post-conviction relief. See *Workman v. State*, 144 Idaho 518, 524-525, 164 P.3d 798, 804-805 (2007). Despite ample opportunity to respond to the State's motion to dismiss, Delling has not

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done so. Pursuant to Idaho Code § 19-4906(c), the Court having considered the application and the record, is satisfied that Delling is not entitled to post-conviction relief and no purpose would be served by any further proceedings.

II.

FACTUAL & PROCEDURAL BACKGROUND

On November 25, 2013, Petitioner John Delling timely filed his verified application for post-conviction relief. Delling is represented by counsel. In Delling's application for post-conviction relief, he alleged two claims of ineffective assistance of counsel based on counsel advising Delling to enter into a plea bargain with the State in Ada County Case No. CR-FE-2007-0000663, which contemplated a resolution in Latah County Case No. CR-FE-2007-0001625. First, Delling claimed he should not have been advised to plead guilty because the risk of the death penalty was illusory given his mental state, therefore he did not benefit from the plea bargain. Instead, counsel should have advised Delling to take the case to trial so there would be a "better" record for attacking the constitutionality of Idaho Code §18-207. Second, Delling claimed trial counsel should not have advised him to plead guilty because counsel knew Delling was seriously mentally ill at the time the plea was entered.

On December 19, 2013, the State filed its Response to Petitioner's Post-Conviction Relief and State's Motion to Dismiss. The State put Delling on notice that his petition only included bare assertions and conclusory statements, not the required admissible evidence necessary to support his petition for post-conviction relief. State's Motion to Dismiss at 5. The State put Delling on notice that he must introduce admissible evidence to support both prongs of the

Strickland standard in order to make a *prima facie* claim for ineffective assistance of counsel.

State's Motion to Dismiss at 3.

The Petitioner has not supported his claims with admissible evidence. He has made bare assertions and conclusory statements. In his first claim, Delling alleges that it was ineffective assistance of counsel for trial counsel to advise Delling to plead guilty due to Delling's mental illness. Delling asserts that if the matter had gone to trial, he would have had the trial record to support his claim that Idaho's repeal of the insanity defense was unconstitutional. He does not claim how the trial record would have assisted him in that regard and he does not support his claim that he was too mentally ill to plead guilty. The record does show that Judge Bail extensively considered the question of Delling's competence before accepting the plea. Since Delling does not support this assertion with admissible evidence, his first claim should be dismissed.

Delling's second claim is a restatement of the first claim i.e. that trial counsel rendered ineffective assistance by advising Delling to plead guilty when he knew that Delling was mentally ill. Delling does not assert what evidence existed to prove that Delling was too mentally ill to plead guilty. This claim should also be dismissed.

The record clearly shows that the Court found Delling to be competent after a hearing on the competency question. There is no evidence indicating Delling's guilty plea was not knowingly, voluntarily and intelligently made.

State's Motion to Dismiss at 5.

Delling, represented by counsel, has not responded to the State's motion. The State's motion to dismiss is currently before the court.

III.

STANDARD OF REVIEW

A petition for post-conviction relief commences a civil, rather than criminal, proceeding,

which is governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008). See also *Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). The petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); *Schultz v. State*, 153 Idaho 791, 795-796, 291 P.3d 474, 478-479 (Ct. App. 2012), review denied (Dec. 14, 2012). A petition for post-conviction relief differs from a complaint in an ordinary civil action, however, in that it must contain more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Schultz*, 153 Idaho at 796, 291 P.3d at 479. The petition must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached, or the petition must state why such supporting evidence is not included. I.C. § 19-4903. In other words, the petition must present or be accompanied by admissible evidence supporting its allegations, or it will be subject to dismissal. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

I.C. § 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative, if “it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of facts, 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.” I.C. § 19-4906(c). When considering summary dismissal, the district court must construe disputed facts in the petitioner’s favor, but the court is not required to accept either the petitioner’s mere conclusory allegations, unsupported by admissible evidence, or the petitioner’s conclusions of law. *Payne*, 146 Idaho at

561, 199 P.3d at 136; *Roman*, 125 Idaho at 647, 873 P.2d at 901. Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a *prima facie* case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010).

IV.

DISCUSSION

Delling claimed his counsel was ineffective by advising him to enter into the plea bargain whereby the Ada County murder and Latah County murder would be consolidated, Delling would plead guilty to both which would result in a life sentence, while preserving his right to appeal the constitutionality of § 1.C. 18-207. Although Delling's competence to stand trial was initially an issue in front of the court, substantial time and resources were spent rehabilitating Delling so that he was competent to stand trial.

In *Premo v. Moore*, ___ U.S. ___, 131 S.Ct. 733, 178 L.Ed.2d 649, (2011), The Supreme Court of the United States underscored the importance of applying the *Strickland* standard to ineffective assistance of counsel claims in the context of plea bargains. "[T]he *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id.*, 131 S.Ct. at 741 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693–94 (1984)).

The “*Strickland* standard” requires a petitioner, in order to make a claim for ineffective assistance of counsel, to show that the attorney’s performance was deficient and the petitioner was prejudiced by the deficiency. *Strickland* at 687–88, 104 S.Ct. at 2064–65, 80 L.Ed.2d at 693–94; *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct.App.2007). To establish a deficiency, the petitioner has the burden of showing the attorney’s representation fell below an objective standard of reasonableness. *State v. Dunlap*, 155 Idaho 345, 383, 313 P.3d 1, 39 (2013). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the proceeding would have been different. *Id.*

In regards to the first element, deficient performance, there is a strong presumption that counsel’s performance fell within the wide range of acceptable professional assistance. *State v. Shackelford*, 150 Idaho 355, 383, 247 P.3d 582, 610 (2010); *State v. Hairston*, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999). A difference of opinion regarding tactics is not proof of ineffective assistance of counsel because “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Thus, the petitioner must present evidence that his attorney’s tactical or strategic decisions were based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Stevens v. State*, ___ Idaho ___, 327 P.3d 372, 386, (Idaho App.2013)

It should go without saying that the absence of evidence cannot overcome the “strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.” *Burt v. Titlow*, ___, U.S. ___, 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013) (Holding uncontested allegation that counsel did not retrieve file from previous defense counsel before advising defendant to withdraw his plea was not evidence counsel was unprepared)(citing

Strickland 466 U.S. at 689, 104 S.Ct. 2052).

To establish *Strickland* prejudice is an equally difficult obstacle to overcome. A defendant must “show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, at 694, 104 S.Ct. 2052. *A reasonable probability* is a probability sufficient to undermine confidence in the outcome. *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557, 575 (2011) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698) (emphasis added). “To undermine confidence in the outcome requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Id.* (quoting *Harrington v. Richter*, ___ U.S. ___, ___, 131 S.Ct. 770, 791, 178 L.Ed.2d 624, 645–46 (2011)) (emphasis added).

In the context of pleas a defendant must show that there is a substantial likelihood that he would not have pleaded guilty and have insisted on going to trial, but for counsel's advice. *Pinholster*, ___ U.S. ___, 131 S.Ct. at 1403, 179 L.Ed.2d at 575; *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985). A petitioner must do more than make the conclusory allegation that he would have insisted on a trial, but for the alleged error. “To obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). See also *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1387, 182 L.Ed.2d 398 (2012) (“Prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.”)

Negotiating an advantageous plea bargain is an art. “Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful

strategic choices in balancing opportunities and risks.” *Premo v. Moore*, ___ U.S. ___, 131 S.Ct. at 739-40. In Delling’s case, the State offered to reduce the first degree murder charge to murder in the second degree. The State also agreed to dismiss the firearm enhancement and grand theft charge. Most importantly, if Delling agreed to plead guilty, he would reserve his right to challenge the constitutionality of the abolition of Idaho’s insanity defense and I.C. § 18-207. The prosecuting attorney in Latah County, where Delling was charged with the first degree murder of Mr. Boss, agreed to reduce the charge to murder in the second degree and run the sentence concurrently with this case in the event Delling plead guilty there. In Latah County, the defendant still faced the risk that the State would seek the death penalty. By accepting the plea bargain, Delling extinguished this risk. Advising Delling whether or not to accept the negotiated deal was a matter of strategy, balancing the opportunities and risks. With these considerations in mind, the Court turns to Delling’s ineffective assistance of counsel claims.

Delling speculates that if he had not plead guilty and gone to trial he may have had a better record to challenge the constitutionality of the lack of insanity defense in Idaho and I.C. § 18-207. Thus, his counsel’s advice to enter the plea deal was objectively unreasonable. Certainly, a particular strategy may have been to take the matter to trial and eventually attempt to challenge the constitutionality of the abolition of the insanity defense in Idaho. However, simply because post-conviction counsel would have tried the case differently than trial counsel does not mean that trial counsel’s advice was objectively unreasonable to fulfill the performance prong of the *Strickland* test. If counsel’s advice had been for Delling to reject the plea bargain, go to trial and appeal the matter of the insanity defense to the Supreme Court of the United States; and ultimately *certiorari* was still denied, Delling might now be arguing counsel was ineffective for advising him to pursue that route.

Delling makes the conclusory allegation that trial counsel's strategy was ineffective. In such cases the petitioner must come forward with evidence trial counsel was either ignorant of relevant law or unprepared. He has not. To the contrary, the record reflects trial counsel was well versed in the constitutionality of the insanity defense on a national scale. Memorandum (filed April 1, 2009). Furthermore, the record reflects trial counsel was intimately knowledgeable about the minute details of Delling's case. Delling's competence had been extensively evaluated and rehabilitated. Petitioner's Exhibit A, a portion of the transcript discussing Delling's mental state, does not create a material issue of fact. After the Court found Delling competent to stand trial, the court specifically recognized Delling had a chronic mental illness, but found that with treatment and medication he was able to understand the significance of the legal proceedings and meaningfully assist in his defense. Trial counsel competently responded to the State's motion to introduce I.R. E. 404(b) evidence. Finally, trial counsel pursued a motion to suppress statements given to police after Delling was initially arrested. Delling has not come forward with any salient facts trial counsel should have known or any objective evidence counsel was unprepared. Simply speculating that Delling would not have received the death penalty, therefore he had nothing to lose by going to trial is not objective evidence counsel was unprepared or ignorant of relevant law.

After a defendant is subjected to the cold, hard realities of life in prison he most certainly questions, "What if . . .?" However, to make a claim for post-conviction relief requires the petitioner to present admissible evidence that his attorney's conduct fell below an objective level of competence. The State has pointed out this glaring deficiency in Delling's petition, yet Delling has failed to come forward with evidence to support his claim. As such, his first claim for post-conviction relief, that his attorney should have advised Delling to proceed with trial so

that he would have a better record to appeal Idaho's abolition of the insanity defense is dismissed.

Second, Delling argued his attorney knew Delling was incompetent to enter his guilty plea, yet advised him to enter it anyway. To support his claim, Delling offers the verified statement in his petition, "Trial counsel had reservations about his client's ability to assist him with strategy," to support his position that counsel knew he was incompetent to proceed to enter his guilty plea. It is unclear how petitioner has knowledge that trial counsel had reservations, however, even assuming Delling believed he acted in a way that should have given trial counsel reservations, Delling fails to create a material issue of fact. The record contradicts Delling's allegation. While it is true that the Court accepts as true petitioner's claims, the Court does not accept petitioner's claims that are contradicted by the record.

There are three instances in which the record directly contradicts Petitioner's claim that counsel advised him to plead guilty although counsel knew Delling was incompetent to enter his guilty plea.

First, in the underlying criminal case, there is an extensive portion of the record devoted exclusively to whether Delling was competent to stand trial. The court ordered a competency evaluation to be performed per I.C. § 18-211 in February of 2008. Delling was committed to the Idaho Department of Health and Welfare where he received treatment with the goal of establishing his ability to understand the nature of the legal proceedings and meaningfully assist in his defense. It was necessary to extend the commitment, and roughly one year later, on February 19, 2009, the Court found him competent to proceed. In the Court's findings of facts to support its competency determination, the Court found that although Delling suffered from a chronic mental health condition, when he was medicated he was able to understand the

significance of the legal proceedings, his rights and defenses and Delling was able to assist his legal team in his defense. Delling was competent to proceed as long as he continued taking his medications and participating in treatment. Delling has not introduced any evidence to suggest he was not medicated or participating in treatment when he entered the plea bargain.

Second, the record of the guilty plea hearing for Case No. CR FE-2007-663 contradicts Delling's claim that counsel believed Delling was not competent to enter his plea. The Court specifically inquired of trial counsel whether he had any reservations with Delling proceeding to enter his guilty plea. During the plea colloquy the following exchange occurred:

The Court: Have you been able to meet with your client and advise him fully as to his rights and defenses?

[Trial Counsel]: I have, Judge.

The Court: Did you talk to him about the consequences of pleading guilty?

[Trial Counsel]: Yes, ma'am, I have.

THE COURT: **Are there any problems with him entering a guilty plea today, as far as you are aware?**

[TRIAL COUNSEL]: **No, ma'am, there is not, Judge.**

THE COURT: Has he had any difficulty understanding what you have advised him about his rights and defenses?

[TRIAL COUNSEL]: Judge, to my knowledge, he has not.

Tr. 308:6-21 (emphasis added).

Finally, the record contradicts that counsel was concerned about Delling's mental state when he entered a guilty plea to the murder charge in CR FE-2007-1625, on August 3, 2009. After Delling entered the plea in the Ada County case, the Latah County murder case was transferred to Ada County and charged as murder in the second degree. Delling was arraigned and entered a plea of guilty on August 3, 2009. Prior to Delling entering his plea, trial counsel was again given the opportunity to express any reservations he harbored about Delling's

competence.

The Court: Have you reviewed this case with your client?

[Trial Counsel]: We have, Judge.

The Court: Have you advised him fully of his rights and defenses?

[Trial Counsel]: Yes, ma'am, we have.

The Court: Is he aware of the consequences of pleading guilty?

Trial Counsel: He is, Your Honor.

The Court: **Is there any reason at all why we should not proceed at this time**

Trial Counsel: **No, Your Honor, none known to him.**

Tr. 573: 14-25, 574:1.

The record shows Delling was competent after February 19, 2009. There is no indication Delling did not understand the magnitude of the judicial proceedings or was unable to assist his trial counsel with his defense. Furthermore, the record shows that Delling's attorney did not harbor reservations about Delling's competence. The only evidence to support that Delling's attorney believed Delling was incompetent to proceed is the lone verified statement that his attorney had "reservations" about his ability to assist with the defense. Petitioner's allegations which are contradicted by the record do not create a material issue of fact. When viewed against the record, Delling's verified statement does not create a material issue of fact as to whether trial counsel had reservations about Delling's competence. Thus, Delling has failed to make a *prima facie* case his attorney's conduct fell below an objective standard of reasonableness required by *Strickland*.

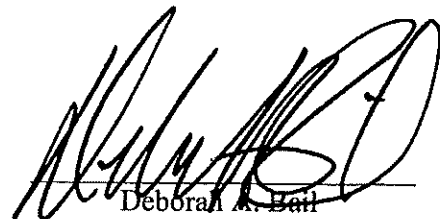
V.

CONCLUSION

It appears from the record there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Notice of the reasons for summary dismissal were succinctly stated by the State in the State's Response to Petitioner's Post-Conviction Relief and State's Motion to Dismiss filed December 19, 2013. Where the dismissal is based upon the grounds offered by the State, additional notice is unnecessary. *Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). When a trial court summarily dismisses an application for post-conviction relief based *in part* on the arguments presented by the State, this is sufficient to meet the notice requirements. *Id.* The State has put Delling on notice that both claims are not supported by admissible evidence, rather are bare and conclusory statements, contradicted by the record. Delling has had ample time to respond and has not. Delling has failed to offer admissible evidence to establish the performance prong of the *Strickland* test. Thus, Delling has not presented evidence making a *prima facie* case as to each essential element of his ineffective assistance of counsel claims. Pursuant to Idaho Code § 19-4906(c), this Court hereby GRANTS the State's motion to dismiss. Petitioner's application for post-conviction relief is DISMISSED.

It is so ordered.

Dated this 4th day of February 2015


Deborah A. Ball
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of February, 2015, I mailed (served) a true and correct copy of the within instrument to:

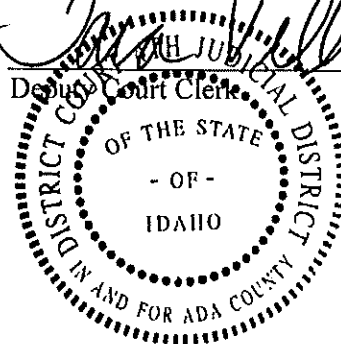
ADA COUNTY PROSECUTOR
INTER-DEPARTMENTAL MAIL

JOHN DEFRANCO
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BOISE ID 83712

CHRISTOPHER D. RICH
Clerk of the District Court

By: 

Deputy Court Clerk



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