10-2-2007

Ridgley v. State Appellant's Brief Dckt. 35823

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEE A. RIDGLEY, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	NO. 33782 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOUNDARY

HONORABLE CHARLES W. HOSACK
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

JUSTIN M. CURTIS
Deputy State Appellate Public Defender
I.S.B. # 6406
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

Lee A. Ridgley appeals from the district court's order summarily dismissing his petition for post-conviction relief. He asserts that he raised a genuine issue of material fact as to whether his attorney in the underlying criminal case was ineffective.

Statement of the Facts and Course of Proceedings

In 2002, Mr. Ridgley pled guilty to lewd conduct with a minor under the age of sixteen. (R., pp.3-4.) He then moved to withdraw his guilty plea, which was denied; the Idaho Court of Appeals affirmed the denial of his motion to withdraw his plea. (R., p.35; 100.) Mr. Ridgley then filed a petition for post-conviction relief. (R., p.3.)

In his petition, Mr. Ridgley asserted that his attorney was ineffective. (R., p.4.) He stated that on February 10, 2002, his wife died due to complications with asthma and that he was arrested on the lewd conduct charge shortly after her death. (R., p.4.) He was emotionally distraught due to his wife's death and was severely depressed. (R., p.4.) Even worse, there was speculation that he would be charged with murder for his wife's death. (R., p.4.) Mr. Ridgley was "in complete emotion shut down and a state of confusion." (R., p.4.) Due to his wife's death, Mr. Ridgley's children were "sheltered by the Idaho Department of Health and Welfare" and he was going through both criminal proceedings and civil child protection proceedings. (R., p.4.)

Mr. Ridgley asserted that his court-appointed attorney spent less than one hour with him before he entered his guilty plea. (R., p.4.) He was never provided with the police report, and his counsel, other than reading the police report, did not contact any

witnesses, did not watch any video or audiotapes, and did not listen to Mr. Ridgley when Mr. Ridgley said that he was not understanding the other attorney's comments. (R., p.4.) Mr. Ridgley told his attorney that he was suffering from depression and did not understand what was transpiring in his cases but his attorney did not discuss any potential defenses he had to the case. (R., p.4.)

Mr. Ridgley acknowledged that he signed a written plea of guilty, but he asserted that he "was in such a state of shock and disbelief of the rush of what was going on, the complete devastation of losing my wife and my family and within a three (3) week period of time entering my guilty plea to the charge, I had expressed complete break down to my attorney and I expressed that I was not mentally well." (R., p.4.) He also asserted that his attorney did not advise him of the potential of having a mental health evaluation or discuss whether or not he would be able to "appreciate the proceedings that were filed against me or be able to assist in my defense." (R., p.4.)

Mr. Ridgley subsequently received a different lawyer, who filed a motion to withdraw his guilty plea. (R., p.5.) Mr. Ridgley asserted that during the hearing on the motion, his counsel admitted that he had not spent more than an hour with him, did not know the names of anyone mentioned in the police report, that he never shared the police report with him, had never watched any videotapes of interviews with the alleged victim, did not listen to the audiotapes, did not conduct any independent investigation, and never discussed the facts of the charge or explain any defenses that Mr. Ridgley might have had. (R., p.5.) Counsel allegedly stated that Mr. Ridgley was under a lot of stress and just wanted the charge to go away, which was the basis of entering into plea negotiations. (R., p.5.)

The State responded and moved for summary dismissal. (R., p.14.) However, the district court also issued a notice of intent to dismiss. (R., p.105.) The court noted that the transcript of the hearing on the motion to withdraw the guilty plea "factually supports some of Petitioner's allegations," there was "nevertheless insufficient evidence that the whole of counsel's representation of Petition was objectively unreasonable, especially in light of Petitioner's indication at the time that he simply the wanted the criminal matter over with. . . ." (R., p.108.) Further, the court held that, even if Mr. Ridgley had established deficient representation, "there is a total lack of evidence that, but for counsel's deficiencies, Petitioner would have insisted on going to trial. Even with all the information Petitioner now has, he does not unequivocally state that he would proceed to trial." (R., p.109.)

Mr. Ridgley submitted a response to the district court's notice of intent to dismiss and supplemented it with affidavits from himself and his post-conviction counsel and with a report from Jonelle Timlin. (R., p.133.) Mr. Ridgley's affidavit stated that he told his attorney that he was under severe depression and that he did not understand the proceedings against him. (R., pp.112-113.) Further the affidavit averred that he told his attorney that he had been seen by Tam Judy, a counselor at the Boundary County Sheriff's Office, due to his depression and suicidal thoughts but that his attorney never spoke to him about receiving a mental health evaluation or about understanding the proceedings against him. (R., p.113.) The affidavit also asserted that Mr. Ridgley was asserting that he wanted to withdraw his plea and proceed to trial. (R., p.114.)

Mr. Ridgley's post-conviction attorney, in his affidavit, asserted that he spoke with the prosecutor's office, who informed him that tapes were available for review along with

the rest of the discovery that was picked up by Mr. Ridgley's initial attorney. The post-conviction attorney also stated that, "had a client told me he was severely depressed and suffered an emotional breakdown and had been seen by a psychologist due to suicidal idealations and had been incarcerated the day after his wife's death . . . I would have been seriously concerned about his mental status, and whether or not he could understand the proceedings against him. . . ." (R., p.118-119.) Even if a client had told him he wanted to plead just to get the case over with, he would have requested an evaluation under I.C. § 18-210 before entering into plea negotiations. (R., p.119.) In addition, he would have reviewed the police reports and tapes to be fully informed before advising a client to plead guilty. (R., p.119.)

The district court was not persuaded. (R., p.152.) The court held that the responses to the notice of intent to dismiss did not rectify the problems with the initial petition. (R., p.154.) The district court then discussed the effect of the Court of Appeals' ruling that Mr. Ridgley had not supplied a just reason to withdraw his guilty plea. (R., p.154.) The district court found that "the grounds and arguments asserted by Ridgley during his appeal were virtual mirror images of the arguments he now states in this action." (R., p.154.) The district court also found that the:

> "only 'new' evidence submitted in support of the petition herein that was not before the criminal trial judge is the Ridgley affidavit and the Hull [post-conviction attorney] affidavit commenting on Ridgley's mental condition and the failure of attorney Williams to advise Ridgley of, or to independently request, a mental health evaluation."

(R., p.155.)

Further, while acknowledging that "the standard for an effective assistance of counsel claim is different than that for a motion to withdraw a guilty plea . . . this Court finds the factual similarities of Ridgley's claims extraordinary. . . ." (R., p.155.)

Mr. Ridgley appealed. (R., p.165.) Mr. Ridgley asserts that the district court erred by summarily dismissing his petition because he raised a genuine issue of material fact as to whether his counsel was ineffective and by dismissing on grounds not set forth in the notice of intent to dismiss.

ISSUES

1. Did the district court err by summarily dismissing Mr. Ridgley's petition for post-conviction relief because he raised a genuine issue of material fact as to whether his attorney was ineffective?

2. Did the district court err by dismissing on grounds not set forth in the notice of intent to dismiss?

ARGUMENT

I.

The District Court Erred By Summarily Dismissing Mr. Ridgley's Petition For Post-Conviction Relief Because He Raised A Genuine Issue Of Material Fact As To Whether His Attorney Was Ineffective

A. Introduction

Mr. Ridgley asserts that, contrary to the district court's conclusions, that he raised a genuine issue of material fact sufficient to defeat *sua sponte* dismissal in this case.

B. The District Court Erred By Summarily Dismissing Mr. Ridgley's Petition For Post-Conviction Relief Because He Raised A Genuine Issue Of Material Fact As To Whether His Attorney Was Ineffective

A petition for post-conviction relief initiates a proceeding that is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991). It is a civil proceeding governed by the UPCPA and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456, 808 P.2d at 375. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995).

However, the petition initiating a post-conviction proceeding differs from the complaint initiating a civil action. A post-conviction petition is required to include more than "a short and plain statement of the claim"; it "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 attached." *Id.*; I.C. § 19-4903. "In other words, the

application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998).

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c).[1] In analyzing a post-conviction petition under this standard, the district court need not "accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Martinez*, 126 Idaho at 816-17, 892 P.2d at 491-492. However, if the petitioner presents any evidentiary support for his allegations, the district court must take the petitioner's allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646, 448 P.2d 649, 652 (1968). This is so even if the allegations appear incredible on their face. *Id.* Thus, only after the State controverts the petitioner's allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982). But in doing so, it must still liberally construe the facts and draw reasonable inferences in favor of the petitioner, *Small*, 132 Idaho at 331, 971 P.2d at 1155.

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331, 971 P.2d at 1155.

[1] Although this standard is set forth in section 19-4906(c), which deals with motions for summary disposition, it appears to apply to *sua sponte* dismissals under section 19-4906(b) as well. *See, e.g., Small*, 132 Idaho at 331, 971 P.2d at 1155 (discussing the standard for summary disposition under section 19-4906 *generally* as being whether a genuine issue of material fact has been presented).

If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*. I.C. § 19-4906(c).

If the district court orders dismissal *sua sponte*, it must first give the petitioner twenty days' notice and allow the petitioner to respond to the notice. I.C. § 19-4906(b). The purpose of this requirement is to give the petitioner an opportunity to challenge the decision before it is finalized. *Baruth v. Gardner*, 110 Idaho 156, 159-160, 715 P.2d 369, 371-372 (Ct. App. 1986). Thus, this requirement is strict; it makes no difference whether the petitioner's claims are meritorious or not. *Cherniwchan v. State*, 99 Idaho 128, 129-30, 578 P.2d 244, 245-246 (1978). Moreover, vague notice of the district court's intent to dismiss is insufficient. The district court must be specific as to the basis for the intended dismissal so as to provide the petitioner with a *meaningful* opportunity to respond. *Banks v. State*, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993). If the district court fails to give the petitioner the required notice and opportunity to respond, or if the district court's notice is impermissibly vague, the petition must be reinstated. *Peltier*, 119 Idaho at 456-457, 458, 808 P.2d at 375-376, 377 (failure to give any notice); *Banks*, 123 Idaho at 954, 855 P.2d at 39 (notice was impermissibly vague).

In its notice of intent to dismiss, the district court identified only two reasons for its intent to dismiss: 1) that "the Court cannot find on this record that counsel's representation of Petitioner was objectively unreasonable;" and 2) "even assuming deficient representation, there is a total lack of evidence that, but for counsel's alleged deficiencies, Petitioner would have insisted on going to trial." (R., p.109.)

The standard for evaluation of ineffective assistance claims was recently summarized in *State v. McKeeth*, 140 Idaho 847, 850, 103 P.3d 460, 463 (2004):

> The test for determining whether a defendant has received effective assistance of counsel is the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Mathews*, 133 Idaho 300, 306, 986 P.2d 323, 329 (1999). The first prong of the *Strickland* test requires the defendant to show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. The second prong requires the defendant to "show that the deficient performance prejudiced the defense." *Id.* In determining whether a defendant was deprived of reasonably competent assistance of counsel as guaranteed by the Idaho Constitution, article 1, section 13, Idaho courts employ the same two-part test. *Mathews*, 133 Idaho at 306, 986 P.2d at 329; *Aragon v. State*, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988).

Id.

This test has been specifically applied in cases such as this one: where the petitioner claims that his counsel was ineffective for giving bad legal advice and thereby inducing the petitioner to plead guilty. *See generally McKeeth.*

As to the first prong of the *Strickland* test, the Idaho courts have held that the attorney's performance is deficient if it "falls 'outside the wide range of professional norms.'" *McKeeth*, 140 Idaho at 850, 103 P.3d at 463 (quoting *Mathews*, 133 Idaho at 306, 986 P.2d at 329). As to the second prong of the *Strickland* test, a petitioner is prejudiced if his "counsel's deficient performance 'affected the outcome of the plea process.'" *McKeeth*, 140 Idaho at 851, 103 P.3d at 464 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). He need not show that he would have prevailed at trial. *McKeeth*, 140 Idaho at 852, 103 P.3d at 465.

In this case, in the notice of intent to dismiss, the district court held, "the Court cannot find on this record that counsel's representation of Petitioner was objectively unreasonable." (R., p.109.) This is an incorrect standard. At the summary dismissal stage, Mr. Ridgley is not required to prove that he is entitled to post-conviction relief;

rather, he need only raise a genuine issue of material fact. I.C. § 19-4906. In this case, he raised such an issue.

Mr. Ridgley's complaints against his trial attorney are summarized above, and even the district court admitted that many of his allegations were supported by evidence in the record, stating:

> the transcript of the hearing on Petitioner's motion to withdraw his plea factually supports some of Petitioner's allegations, e.g., that counsel spent approximately one hour personally with Petitioner prior to entry of the guilty plea, that counsel did not provide Petitioner with a copy of the police report, and that counsel did not review the audio and video tapes of the interview of the alleged victim.

(R., p.108.) Based on this statement alone, Mr. Ridgley should have survived summary dismissal - he made specific allegations of how his counsel was deficient and these allegations were supported by the record. However, the district court found this evidence to be "insufficient that the whole of counsel's representation of Petitioner was objectively reasonable, especially in light of Petitioner's indication that he simply wanted the criminal matter over with. . . ." and then focused on the attorney's testimony in the underlying criminal case wherein he testified that Mr. Ridgley was aware of the benefits of the plea bargain and that he was adequately advised. (R., p.108.) However, the district court was improperly weighing the evidence – balancing Mr. Ridgley's evidence against the testimony of his attorney, and concluding that is could not find the attorney's representation unreasonable.

Further, the other alleged inadequacies addressed by the district court were remedied by Mr. Ridgley's response to the notice of intent to dismiss. The court noted that there was no evidence that any tapes were actually available for review. (R., p.109.) In his affidavit, Mr. Ridgley's post-conviction attorney asserted that he

spoke with the prosecutor's office, who informed him that tapes were in fact available for review. (R., p.118.) The district court also noted that there was no evidence that Mr. Ridgley told his attorney that he was severely depressed and did not understand the proceedings; Mr. Ridgley's affidavit specifically asserted that he told his counsel these things. (R., pp.109; 112-113.)

Mr. Ridgley specifically alleged how counsel was ineffective, and, even according to the district court, these allegations were supported by the record. While the district court may have believed that counsel's representation as a whole was sufficient, the district court was applying the wrong standard – the only requirement necessary to defeat summary dismissal is that the petitioner raise a genuine issue of material fact, and by supplying specific, supported, allegations of deficient performance, Mr. Ridgley presented evidence to overcome a *sua sponte* dismissal. The district court improperly dismissed Mr. Ridgley's petition on this basis.

Also, the district court concluded that, "even assuming deficient representation, there is a total lack of evidence that, but for counsel's deficiencies, Petitioner would have insisted on going to trial." (R., p.109.) This assertion is specifically rebutted in Mr. Ridgley's affidavit in response to the notice of intent to dismiss. In the affidavit, Mr. Ridgley repeatedly says that it was his intent to go to trial, stating, "[i]f I am successful in my Post Conviction Relief, I will go to trial as I am not guilty of the allegations charged against me by the State." (R., p.113.) Later in the affidavit, he avers, "I am not guilty of the charged offenses and intend to fully go to trial should this court grant my post conviction for relief" and that, "[i]t is not my intent to negotiate any of the charges which would result in me pleading guilty." (R., p.114.) Mr. Ridgley

specifically asserted that he was not guilty of the charge and would insist on taking the case to trial.

In the ordering dismissing the petition for post-conviction relief, the district court also relied heavily on the fact that Mr. Ridgley had filed a motion to withdraw his plea in the underlying criminal case and that the Court of Appeals affirmed the denial of this motion.[2] (R., p.154.) The court noted that the "grounds and arguments asserted by Ridgley during the appeal were virtual mirror images of the arguments he now states in this action." (R., p.154.) The court acknowledged that the "standard for ineffective assistance of counsel . . . is different than that for a motion to withdraw a guilty plea, but nonetheless this Court finds the factual similarities of Ridgley's claims extraordinary, particularly on those issues where the evidence before this Court is no different than the evidence before the criminal trial judge." (R., p.155.) The Court of Appeals' Opinion affirming the denial of Mr. Ridgley's motion is in the record in this case. (R., pp.100-104.)

Based on the findings made by the trial court in the motion to withdraw the plea, which was affirmed on appeal, the district court held that, "this Court cannot find that the attorney . . . failed to offer an objectively reasonable level of representation." (R., p.156.) Further, the court noted that the allegations of depression and confusion were not presented to the court in the motion to withdraw the guilty plea in the underlying criminal case, where Mr. Ridgley was represented by the same attorney who represented him in the instant action. (R., p.155-157.)

[2] Mr. Ridgley also asserts that it was error for the district court to be considering the motion to withdraw the guilty plea at all, and this claim is addressed in Issue II.

Post-conviction relief is available where "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." I.C. § 19-4901(a)(4) (emphasis added). A post-conviction action is not a substitute for and does not supplant a direct appeal from the conviction or sentence. I.C. § 19-4901(b); *Paradis v. State,* 110 Idaho 534, 537, 716 P.2d 1306, 1309. Therefore, "[a] convicted defendant may not simply relitigate the same factual questions in his application, in virtually the same factual context already presented in a direct appeal." *Whitehawk v. State,* 116 Idaho 831, 833, 780 P.2d 153, 155 (1989).

While in this case Mr. Ridgley is relying on many of the same facts set forth in his motion to withdraw his guilty plea, he is not simply relitigating previous-heard issues. As the district court itself noted, the "standard for ineffective assistance of counsel . . . is different than that for a motion to withdraw a guilty plea. . . ." (R., p.155.) The district court was correct in this regard; a motion to withdraw a guilty plea invokes the discretion of the district court and will not be reversed on appeal absent an abuse of that discretion. *State v. Acevedo*, 131 Idaho 513, 516, 960 P.2d 196, 199 (Ct. App. 1998). A petition for post-conviction relief is not left to the district court's discretion; if a defendant raises a genuine issue of material fact, the district court is required to conduct an evidentiary hearing. On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and liberally construes the facts and reasonable inferences in favor of the non-moving party. *LaBelle v. State,* 130 Idaho 115, 118, 937 P.2d 427, 430 (Ct. App. 1997). The abuse of discretion standard does not apply.

Therefore, in the instant case, as opposed to the motion to withdraw the plea, the facts and inferences are construed in favor of Mr. Ridgley. Therefore, it was inappropriate for the district court to hold that, since many of the facts surrounding Mr. Ridgley's representation were presented to the trial court and resolved against him, that the facts could be resolved against him in the instant case particularly where a vastly different standard of review applied in the previous case. Furthermore, the issue in the motion to withdraw the guilty plea was whether Mr. Ridgley was adequately informed of the nature of the charge against him; the issue in this case is whether Mr. Ridgley's attorney rendered ineffective assistance by failing to adequately review the file and discuss Mr. Ridgley's options with him.

The district court also largely discounted the claim that Mr. Ridgley was suffering from severe depression and did not understand the proceedings because Mr. Hull, who represented Mr. Ridgley in both the instant case and in the motion to withdraw the guilty plea, did not raise the issue in the motion to withdraw the guilty plea. (R., p.157.) The court noted that Mr. Hull did not request a mental health evaluation at the time of the motion to withdraw a guilty plea. (R., p.157.)

Here again, the district court is resolving inferences against Mr. Ridgley when it should be resolving them in his favor. The district court's concerns illustrate that Mr. Ridgley perhaps had another claim of ineffective assistance for counsel's representation during the motion to withdraw a guilty plea, but they do not supply a reason to draw inferences against him. Mr. Ridgley provided new information to the district court, both in his and Mr. Hull's affidavits, and the Timlin report attached to Mr. Hull's supplemental affidavit.

II.

The District Court Erred By Sua Sponte Dismissing The Petition On Grounds Not Set Forth In The Notice Of Intent To Dismiss

A. Introduction

Because the notice of intent to dismiss did not address any issues relating to Mr. Ridgley's motion to withdraw his guilty plea, he asserts that it was improper for the district court to rely on that motion in *sua sponte* dismissing the petition.

B. The District Court Erred By *Sua Sponte* Dismissing The Petition On Grounds Not Set Forth In The Notice Of Intent To Dismiss

The district court may not summarily dismiss a petition for post-conviction relief without first providing an applicant with adequate notice of its reasons for dismissal. *Downing v. State,* 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999). The district court must identify with particularity why an applicant's evidence or legal theories are considered deficient. *Id.* at 864, 979 P.2d at 1222. The district court must give notice of any deficiency in the applicant's evidence or any legal analysis that he needs to address in order to avoid dismissal of his petition. *Martinez v. State,* 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995). The district court may only dismiss a petition based on the rational articulated in the notice provided. *Id.* at 817-818, 892 P.2d at 492-93. "The statutory duty to specify the reasons for the proposed dismissal under I.C. § 19- 4906(b) rests solely with the district court and it is the district court alone who is responsible for drafting the notice of intent to dismiss." *Crabtree v. State*, 144 Idaho 489, ___, 163 P.3d 1201, 1206 (Ct. App. 2006) (citing *Downing v. State,* 132 Idaho 861, 864, 979 P.2d 1219, 1222 (Ct. App. 1999)). "The state's motion to dismiss cannot . . .

be invoked by the state to cure any deficiencies in the district court's notice of intent issued pursuant to I.C. § 19-4906(b)." *Id.*

In the ordering dismissing the petition for post-conviction relief, the district court relied heavily on the fact that Mr. Ridgley had filed a motion to withdraw his plea in the underlying criminal case and that the Court of Appeals affirmed the denial of this motion. (R., p.154.) The court noted that the "grounds and arguments asserted by Ridgley during the appeal were virtual mirror images of the arguments he now states in this action." (R., p.154.) The court acknowledged that the "standard for ineffective assistance of counsel . . . is different than that for a motion to withdraw a guilty plea, but nonetheless this Court finds the factual similarities of Ridgley's claims extraordinary, particularly on those issues where the evidence before this Court is no different than the evidence before the criminal trial judge." (R., p.155.)

The district court's notice of intent to dismiss omits any mention of Mr. Ridgley's motion to withdraw his plea. As such, Mr. Ridgley was never put on notice that he had to persuade the district court that his current action was different or that the district court's or Court of Appeals' findings should not be used against him. Mr. Ridgley was put on notice *only* that the district court believed that he had failed to present sufficient evidence that counsel's performance was deficient or that he had been prejudiced. Therefore, it was improper for the district court to analogize the instant case to his motion in the criminal case.

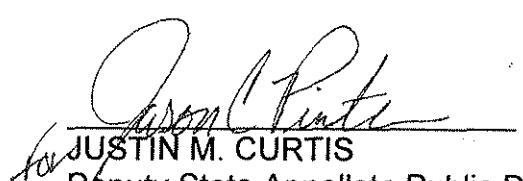
Mr. Ridgley acknowledges that the State's motion for summary dismissal did assert that his current claims were foreclosed by the motion to withdraw the guilty plea. (R., pp.19-21.) However, the district court never addressed the State's motion, it wAs

proceeding solely upon the notice of intent to dismiss, and the "state's motion to dismiss cannot . . . be invoked by the state to cure any deficiencies in the district court's notice of intent issued pursuant to I.C. § 19-4906(b)." *Crabtree v. State*, 144 Idaho 489, ___, 163 P.3d 1201, 1206 (Ct. App. 2006). Therefore, the State may not rely on the motion for summary dismissal; the focus is solely on the notice of intent to dismiss, which does not address the motion to withdraw the guilty plea at all. The district court's order must therefore be reversed.

CONCLUSION

Mr. Ridgley respectfully requests that the district court's order dismissing his petition for post-conviction relief be reversed and his case remanded for further proceedings.

DATED this 2nd day of October, 2007.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

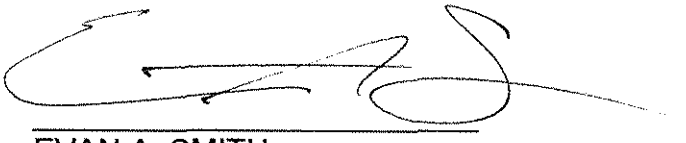
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of October, 2007, 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:

LEE A RIDGLEY
INMATE # 68781
ISCI
PO BOX 14
BOISE ID 83707

CHARLES W HOSACK
DISTRICT COURT JUDGE
KOOTENAI COUNTY DISTRICT COURT
PO BOX 9000
COEUR D'ALENE ID 83816-9000

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



EVAN A. SMITH
Legal Secretary

JMC/eas