12-23-2015

Goldsby v. State Appellant's Brief Dckt. 43144

IN THE SUPREME COURT OF THE STATE OF IDAHO

ANDANTE GOLDSBY, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	NO. 43144 KOOTENAI COUNTY NO. CV 2013-8568 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 KOOTENAI

HONORABLE FRED M GIBLER
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

In a separate underlying criminal case, Adante Goldsby pled guilty to felony DUI. He received a prison sentence, but the district court retained jurisdiction while he participated in a "rider." At the conclusion of the rider, a review hearing was held and a member of the rider staff testified against Mr. Goldsby. Thereafter, the district court relinquished jurisdiction.

Mr. Goldsby contends there were numerous flaws with the staff member's testimony at the rider review hearing, not the least of which was that she testified falsely.

In this case, Mr. Goldsby filed a petition for post-conviction relief asserting multiple claims of ineffective assistance of counsel, all relating to his counsel's performance in conjunction with his rider review hearing. The claim that is relevant to this appeal is that his counsel was ineffective because, despite having in her possession documentary evidence proving the falsity of the rider staff member's testimony, she failed to impeach the staff member with that evidence. This claim, however, was summarily dismissed along with the rest of Mr. Goldsby's petition.

On appeal, Mr. Goldsby contends the district court erred in summarily dismissing this claim. He contends that there is a genuine issue of material fact as to whether counsel was ineffective for failing to impeach the rider staff member with the document already in her possession.

Statement of the Facts and Course of Proceedings

In a separate criminal case, Andante Goldsby pled guilty (pursuant to a plea agreement) to a single count of felony DUI. (R. Ex., pp.10, 12.)[1] He received a unified sentence of six years, with three years fixed, but the district court retained jurisdiction. (R. Ex., p.14.)

During the period of retained jurisdiction ("rider"), the Idaho Department of Correction assigned Mr. Goldsby to the Footprints Therapeutic Community program at North Idaho Correctional Institution ("NICI"). (*See* 41672 APSI, p.8.) According to the addendum to the pre-sentence investigation report, which was prepared by NICI staff, Mr. Goldsby did not present a significant disciplinary problem at NICI. He did not receive any formal disciplinary sanctions over the course of his six-month rider, although he did receive two warnings. (41672 APSI, p.9.) This is not contested.

On the other hand, Mr. Goldsby does dispute the NICI staff's assessment of his progress with his rider programming. It was alleged that he refused to address his

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[1] The record on appeal in this case presently consists of two electronic (.pdf) documents—the Clerk's Record ("CV 13-8568 Goldsby vs State of Idaho") and the exhibits to the Clerk's Record ("CV 13-8568 Goldsby vs State of Idaho Exhibits"). Those electronic documents are cited herein as "R." and "R. Ex.," respectively.

Additionally, contemporaneously herewith, Mr. Goldsby is filing a motion requesting that the Idaho Supreme Court take judicial notice of two documents from his prior direct appeal (Supreme Court No. 41672)—the pre-sentence investigation report and the addendum to the pre-sentence investigation report. Assuming that such motion will be granted, those documents are cited herein. The pre-sentence investigation report is part of an electronic (.pdf) file entitled "Andante Goldscby sealed 41672" in Case No. 41672. That electronic document is cited herein as "41672 PSI." Undersigned counsel's copy of the addendum to the pre-sentence investigation report is part of a 22-page electronic (.pdf) document obtained from (and apparently compiled by) the Supreme Court and entitled "addendum & 2 letters" in Case No. 41672. It includes the Supreme Court's order augmenting the record on appeal in Case No. 41672, the addendum to the pre-sentence investigation report itself, and two letters. That electronic document is cited herein as "41672 APSI."

current addiction issues, tried to divert attention away from his issues by shifting the focus to NICI staff (for example, by accusing a staff member of facilitating a racist comment in a group setting[2] and by complaining that staff was impeding his progress in the program), attempted to manipulate NICI by staff-splitting (*i.e.*, shopping requests and questions around to various staff members until he got the answer he wanted), and participated very little in groups. (*See* 41672 APSI, pp.10, 12; *see also* 41672 APSI, pp.13-14 (Therapeutic Community discharge summary).) It appears that these concerns developed early in Mr. Goldsby's rider and dogged him throughout his time at NICI. Approximately two weeks after he arrived, Amanda Kaschmitter, the facilitator for his Cognitive Self-Change and Relapse Prevention groups (*see* R. Ex., p.16), became convinced that Mr. Goldsby had been dishonest about the circumstances of his DUI case and about his contention that he spent time running sober living houses in Spokane (*see* 41672 APSI, p.19). A month later, this issue came up again, as he was again accused of being dishonest about the circumstances of his DUI offense. (*See* 41672 APSI, p.18.) Throughout this time, Mr. Goldsby repeatedly expressed his concern that he had been incorrectly labeled a liar by Ms. Kaschmitter, and that her perception of him was being adopted by other NICI staff. (*See* 41672 APSI, p.18 (detailing a conversation with another staff member where Mr. Goldsby voiced a concern that Ms. Kaschmitter "was prejudice [sic] toward him, that she called him a liar"), p.19 (detailing a meeting with Deputy Warden Rambo where Mr. Goldsby was

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[2] While NICI's facilitating a racist comment should be offensive and troubling to anyone, given that Mr. Goldsby is African-American (R. Ex., p.17; 41672 PSI, p.2), the specter of racism would be particularly distressing for him. After all, while on a rider, he was completely at the mercy of NICI staff.

"upset that staffs [sic] do not believe him regarding several issues" and indicating the deputy warden confirmed there is evidence that Mr. Goldsby ran a sober living facility but would not allow him to bring the evidence back to NICI staff).)

Additionally, although the addendum to the pre-sentence investigation report and the attached C-Notes contain few details, they make it clear that NICI staff felt Mr. Goldsby was fabricating claims of racial discrimination in an effort to manipulate the staff and/or the program. (*See, e.g.*, 41672 APSI, p.10 ("Other examples include Mr. Goldsby accusing a specific case manager of approving a 'racist' comment, when in actuality that case manager did not approve that Learning Experience."), p.13 ("He currently is not progressing in CSC due to him focusing on staff members for being 'racist' or 'prejudiced' toward him. . . . Mr. Goldsby is at a standstill in his Relapse Prevention Group. He attributes this standstill as being the fault of his group facilitator and accuses her of being 'racist' or 'prejudiced.'"),[3] p.16 ("Mr. Goldsby claims that staff is discriminating against him. When this is addressed and dealt with, he will create another fabrication. Relinquish jurisdiction.").)

Overall, Ms. Kaschmitter had a lot of negative things to say about Mr. Goldsby. (*See, e.g.*, 41672 APSI, p.17 (two negative C-Notes), p.19 (one negative C-Note).) And, while some of the NICI staff parroted the criticisms made by Ms. Kaschmitter (*see, e.g.*, 41672 APSI, pp.13-14 (summarizing Ms. Kaschmitter's assessment of Mr. Goldsby's performance in his CSC and Relapse Prevention groups), p.18 (C-Note reflecting adopted allegations earlier raised by Ms. Kaschmitter)), some had favorable

[3] It later came out that Ms. Kaschmitter was the facilitator of both Mr. Goldsby's Cognitive Self-Change ("CSC") group and his Relapse Prevention group. (R. Ex., p.16.)

things to say. For example, early on, an NICI staff member noted that "Mr. Goldsby completed his portfolio by meeting the time frame eligibility requirements and by demonstrating to a staff member entry-level competency in goal setting, resume and cover letter writing, budgeting, completing an application, and building a resource plan for probation." (41672 APSI, p.19.) A few weeks later, another staff member noted that Mr. Goldsby had "completed the requirements for NICI Food Handlers Card." (41672 APSI, p.19.) A third staff member twice noted that Mr. Goldsby had made gains in his math class. (41672 APSI, pp.16, 18.) A fourth staff member noted that Mr. Goldsby had successfully completed the "Fathers" class, where "[h]e was an attentive student and regularly participated in class discussions." (41672 APSI, p.18.) Finally, a fifth staff member praised Mr. Goldsby's progress in the Thereapeutic Community. This staff member noted that when Mr. Goldsby "first came to the unit, he was uncooperative, very moody, never smiling, and in general a 'downer' for the unit," but that he demonstrated "a slow but steady improvement," changing his attitude and becoming "one of the tier coordinators", and doing "an 'acceptable to good' job as such." (41672 APSI, p.17.)

The district court held a rider review hearing to decide whether to suspend Mr. Goldsby's sentence and place him on probation. (*See generally* R. Ex., pp.15-22.) At that hearing, the State presented the testimony of Ms. Kaschmitter who reiterated her criticisms of Mr. Goldsby. (*See* R. Ex., pp.15-18.) In particular, she accused Mr. Goldsby of misrepresenting the circumstances of his DUI and failing to focus on the relapse that led to that DUI; she accused him of "staff-splitting"; and she accused him of a lack of depth in his work. (*See* R. Ex., pp.16-17.) With regard to the alleged racist

comment, she explained that she had been accused of "allow[ing] somebody else to read a racial comment that they had written in one of their learning experiences," but that she had been cleared of any wrongdoing because she had never seen the learning experience, and had not been the staff member to approve (by initialing) that learning experience.[4] (R. Ex., p.17.) Ms. Kaschmitter was cross-examined by Mr. Goldsby's counsel, who explored her potential bias and how it may have infected all of her assessments of Mr. Goldsby; however, defense counsel never confronted Ms. Kaschmitter with evidence rebutting her claims that: (a) Mr. Goldsby was untruthful about the circumstances of his DUI; (b) Mr. Goldsby was untruthful about his experience running sober living facilities; and (c) she did not sign off on the racial statement contained within another inmate's learning experience. (*See* R. Ex., pp.17-18.)

In light of the addendum to the pre-sentence investigation report and Ms. Kaschmitter's testimony, the district court ultimately relinquished jurisdiction instead of suspending Mr. Goldsby's sentence and placing him on probation.[5] (R. Ex., pp.21-22.)

Thereafter, Mr. Goldsby filed a motion seeking reconsideration of the decision to relinquish jurisdiction. At a hearing on that motion, Mr. Goldsby offered new evidence tending to disprove Ms. Kaschmitter's contention that he had been dishonest about

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[4] Although the precise statement at issue was not identified at the rider review hearing, it later came out that the racial comment in question was the following statement by another inmate: "[W]ho wants a nappy looking guy representing them, not me." (R. Ex., p.61.)

[5] The district court also reduced Mr. Goldsby's sentence from six years with three years fixed, to six years with one and one-half years fixed. (R. Ex., p.22.)

running sober living facilities.[6] (*See* R. Ex., p.27; 41672 APSI, pp.20-22.) He also pointed out that the police reports in Mr. Goldsby's underlying criminal case substantiated his account of his DUI, thus proving that he was not being dishonest in his account of that DUI during his rider.[7] (*See* R. Ex., p.24; 41672 PSI, pp.39-41.) Finally, he testified that his rider performance was far better than was characterized by Ms. Kaschmitter and the other members of the NICI staff. (*See* R. Ex., pp.23-26.)

Nevertheless, the district court declined to reconsider its decision to relinquish jurisdiction. (R. Ex., pp.29-30.) The court noted that, while it appreciated Mr. Goldsby's factual clarifications, Mr. Goldsby had not changed the court's mind as to the proper

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[6] That evidence consists of a letter from Spokane Falls Community College indicating that Mr. Goldsby had taken classes in the Chemical Dependency Professional program (41672 APSI, p.20) and a letter from a Spokane attorney who knew Mr. Goldsby personally and also knew of his efforts to procure rental space for a sober living facility (41672 APSI, pp.21-22).

[7] Ms. Kaschmitter explained the alleged dishonesty as follows:

> He told us that he was there because he had been shot and he was out with his wife and another couple to dinner at the Coeur d'Alene Resort to celebrate being alive and that a waitress had accidentally served him alcohol, and he got pulled over on the way home.
>
> I look into the stories that I'm told in these groups, and I look at PSI's [sic], and it was—according to his PSI he had—a bartender from the Torch had called the cops because he was stumbling out of the bar. And he got in a vehicle and drove away. And according to his PSI, the recording there was that he was the lone occupant in the vehicle. So his stories weren't matching.

(R. Ex., p.16; *see also* 41672 APSI, p.19 (providing a similar summary of Mr. Goldsby's recounting of his DUI, but making it clear that after he had his drink, "he relapsed" and, presumably, continued drinking).) And, while Ms. Kaschmitter's version of events is substantiated by the pre-sentence investigation report (*see* 41672 PSI, p.2), it is at odds with one of the police reports, which repeatedly references a female passenger (*see* 41672 PSI, p.41). In other words, it is clear that Mr. Goldsby was telling the truth and Ms. Kaschmitter's reliance on the pre-sentence investigation report was misplaced because the pre-sentence investigator got the facts wrong.

disposition of the case. (R. Ex., pp.29-30.) In explaining this conclusion, the district court made it clear that it did not find Mr. Goldsby wholly credible. (R. Ex., p.29.)

Thereafter, Mr. Goldsby filed a timely verified petition for post-conviction relief and supporting affidavit. (*See* R., pp.4-10.) Later, Mr. Goldsby's attorney filed an amended verified petition (*see* R., pp.11-15) and a host of exhibits in support of the amended petition (*see* R., pp.13-14, 16; *see generally* R. Ex.; 41672 PSI; 41672 APSI). In his amended petition, Mr. Goldsby asserted six claims of ineffective assistance of counsel—all relating to his counsel's performance at his rider review hearing. (R., pp.12-13.) The only claim relevant to the present appeal is Mr. Goldsby's fourth claim (claim d)—his contention that his counsel was ineffective for, "Failing to impeach the State's witness at the Jurisdictional Review Hearing with evidence that counsel had in her possession." (R., p.13.) Although this claim was left fairly ambiguous in the amended petition, it would later be explained by Mr. Goldsby's counsel.

The State filed an Answer in which it denied all of Mr. Goldsby's claims of ineffective assistance of counsel. (R., pp.18-20.) It also filed a motion and supporting memorandum seeking summary dismissal of the petition in its entirety. (R., pp.21-29, 30.) With regard to claim d, the whole of the State's argument was as follows: "Regarding a failure to impeach, the areas of cross-examination are an area at counsel's discretion. The presumption is that counsel acted appropriately and failure to conduct the examination that, in hindsight, might have been better does not establish ineffectiveness." (R., p.27.)

In response to the State's motion to dismiss, Mr. Goldsby filed a memorandum arguing that summary dismissal was inappropriate. (R., pp.31-40.) With regard to his

claim d, he clarified that the evidence referenced in his petition (which was in the hands of his attorney, but not used to impeach Ms. Kaschmitter) was a written copy of a short letter read by another inmate during "learning experience" and containing the racial comment in question. (R., p.36.) (This letter will be referenced herein as the "Apology & Commitment" letter.) Mr. Goldsby also explained that, although Ms. Kaschmitter claimed not to have signed off on that inmate's letter and, in fact, claimed to have been exonerated in an NICI investigation based on the finding that it did not bear her initials, the written copy in counsel's possession bore the notation "OK," followed by her initials, "AK." (R., p.36.) He also referenced the Apology & Commitment letter, which was contained in Exhibit H of the documents he provided in conjunction with the filing of his amended petition. (*See* R. Ex., p.61.)[8]

The district court did not hold a hearing on the State's motion for summary dismissal. Instead, it issued an order dismissing Mr. Goldsby's petition *in toto*. With regard to claim d, the court's rationale for dismissing the claim was as follows: "Petitioner has failed to show any standard requiring trial counsel to impeach in the manner petitioner describes. In addition, petitioner has not shown a reasonable probability that, had trial counsel presented such impeachment evidence, the outcome would have been different."[9] (R., p.49.)

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[8] In the copy of the Apology & Commitment letter presently in the record on appeal, the notation, "OK AK" is faint and very difficult to read. (*See* R. Ex.,p.61.) Accordingly, Mr. Goldsby is filing a motion to substitute a more legible copy of that letter for that which is presently in the record.

[9] The district court used virtually identical generic language with regard to four of Mr. Goldsby's six claims of ineffective assistance of counsel. (*See* R., pp.46-50.)

After the district court entered a written judgment in favor of the State (*see* R., p.53), Mr. Goldsby filed a timely notice of appeal (R., pp.55-57).

ISSUE

Did Mr. Goldsby raise a genuine issue of material fact as to whether his defense counsel rendered ineffective assistance of counsel in failing to impeach a State's witness with evidence disproving her testimony, such that it was error for the district court to have summarily dismissed this claim?

ARGUMENT

Mr. Goldsby Presented A Genuine Issue Of Material Fact As To Whether His Defense Counsel Rendered Ineffective Assistance Of Counsel In Failing To Impeach A State's Witness With Evidence Disproving Her Testimony, Such That It Was Error For The District Court To Have Summarily Dismissed This Claim

A. Introduction

In order to survive summary dismissal, a post-conviction petitioner must present evidence sufficient to raise a genuine issue of material fact which, if resolved in his favor, would entitle him to post-conviction relief. Here, because Mr. Goldsby has alleged that he received ineffective assistance of counsel at his rider review hearing when his counsel failed to impeach at witness (Ms. Kaschmitter) with certain documentary evidence (a copy of the Apology & Commitment letter) which appears to disprove her testimony, in order for him to survive summary dismissal, he was obligated to present sufficient evidence to raise genuine issues of material fact as to two elements—whether counsel's performance was deficient in failing to impeach the witness, and whether that deficient performance prejudiced Mr. Goldsby's defense. Mr. Goldsby has done so.

B. Applicable Legal Standards

The United States Constitution "guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). One such provision is the right to the assistance of counsel, U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the

assistance of counsel for his defense."), which has been interpreted as the right to the *effective* assistance of counsel. *Strickland*, 466 U.S. at 685-86.

There is a two-pronged test for determining whether an attorney has rendered ineffective assistance in contravention of a defendant's Sixth Amendment right to counsel. The threshold inquiry is whether counsel's performance was "deficient," *i.e.*, whether it "fell below an objective standard of reasonableness," as judged "under prevailing professional norms." *Id.* at 687-91. Assuming there has been deficient performance, the next inquiry is whether that deficient performance prejudiced the defendant. *Id.* at 687, 691-96. In order to establish "prejudice," it need not be shown "that counsel's deficient conduct more likely than not altered the outcome in the case" since the "result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 693-94. Instead, it need only be shown "that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In Idaho, claims of ineffective assistance of counsel are most appropriately raised through a petition for post-conviction relief. *See Sparks v. State*, 140 Idaho 292, 295-96 (Ct. App. 2004); *see also* I.C. § 19-4901(a) (identifying the bases upon which post-conviction relief may be sought). A petition for post-conviction telief is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456 (1991). It is a civil proceeding governed by the Uniform Post- Conviction Procedure Act (*hereinafter,* UPCPA) (I.C. §§ 19-4901 to -4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. 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 (Ct. App. 1995). However, the petition initiating 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 (Ct. App. 1998).

Just as Idaho Rule of Civil Procedure 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).[10] 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. However, if the petitioner presents some 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 (1968). This is so even if the allegations appear incredible on their face.

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

Id. Thus, only after the State controverts the petitioner's allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612, 615 (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.[11]

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. 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*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

Because evaluation of a motion for summary disposition will never involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court will review a district court's summary dismissal order *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03 (2006).

C. Mr. Goldsby Raised A Genuine Issue Of Material Fact Regarding Whether His Counsel Rendered Deficient Performance In Failing To Impeach Ms. Kaschmitter's Testimony With The Apology & Commitment Letter

As discussed above, Ms. Kaschmitter testified unflatteringly of Mr. Goldsby's performance on his rider. Among the testimony she gave was an explanation of her role in the racial statement made by another inmate in a group setting:

> Q. Do you recall any sort of inquiry or investigation regarding racial comments made by you against Mr. Goldsby?
>
> A. I never made a racial comment towards Mr. Goldsby. There was one major event that really came out that he stated in a concern form, I think it was, for a program manager or deputy warden that I allowed somebody else to read a racial comment that they had written in one of their learning experiences in front of the entire family. And *ultimately what*

[11] The district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Coontz v. State*, 129 Idaho 360, 368 (Ct. App. 1996).

> *came out of that were the initials of the staff that actually approved that learning experience were not even mine. I had never seen the learning experience*. And he was—he was informed of that by our deputy warden that *it was not me that had anything to do with that learning experience*.

(R. Ex., p.17 (emphasis added).)

As it turned out though, Mr. Goldsby's counsel had in her possession a written copy of the Apology & Commitment letter containing the racial statement at issue, and bearing the notation, "OK," followed by what appear to be Ms. Kaschmitter's initials, "AK." (*See* R., pp.13, 36; R. Ex., p.61.) Thus, counsel had at her disposal documentary evidence which appeared to directly contradict Ms. Kaschmitter's claim that her initials were not on the Apology & Commitment letter, and that she had never seen that letter. Counsel could have used this letter to not only impeach Ms. Kaschmitter's testimony on the subject of whether she had facilitated an offensive, racist statement, but also her credibility generally. The former objective was important because, as noted above, NICI staff were highly critical of what they perceived to be Mr. Goldsby's baselessly accusing them of racial discrimination. (*See, e.g.*, 41672 APSI, p.16.) And the latter objective was important because much of the criticism leveled at Mr. Goldsby during his rider was derived from Ms. Kaschmitter and, thus, its believability came down to her credibility.

Further, there is no evidence in the record to suggest that counsel's failure to attempt to impeach Ms. Kaschmitter's testimony was some sort of strategic or tactical decision on the part of counsel. (*See* R. Ex., pp.1-2 (affidavit of counsel making no mention of her failure to impeach Ms. Kaschmitter with the Apology & Commitment letter).) And the reasonable inference is that this was *not* a strategic decision on the part of counsel. At the rider review hearing, defense counsel went after Ms. Kaschmitter, attempting to undermine her credibility on multiple fronts. Counsel

raised the inference that Ms. Kaschmitter was biased against Mr. Goldsby because he had accused her of racism (*see* R. Ex., p.17); she suggested that Ms. Kaschmitter had reached a snap decision about Mr. Goldsby's veracity (*see* R. Ex., p.18 (questioning the fact that Ms. Kaschmitter wrote that in the C-Notes that Mr. Goldsby had to be "watched carefully" even though he had only been at NICI for about two weeks); and she implied that Ms. Kaschmitter was testifying against Mr. Goldsby because she had a particular problem with him (*see* R. Ex., p.18 (eliciting testimony that Ms. Kaschmitter had never written a positive C-Note about Mr. Goldsby and questioning why Ms. Kaschmitter was testifying instead of Mr. Goldsby's counselor)). In light of this aggressive questioning, there could no legitimate strategy to failing to impeach Ms. Kaschmitter's testimony with the notation at the bottom of the Apology & Commitment letter, which appears to directly contradict her testimony.

In light of the foregoing, Mr. Goldsby submits that his counsel rendered deficient performance by failing to use the Apology & Commitment letter to impeach Ms. Kaschmitter's rider review hearing testimony.

D. Mr. Goldsby Raised A Genuine Issue Of Material Fact Regarding Whether His Counsel's Deficient Performance In Failing To Impeach Ms. Kaschmitter's Testimony With The Apology & Commitment Letter Prejudiced His Defense

Just as he raised a genuine issue of material fact as to whether his counsel's performance was deficient, so too did he raise a genuine issue of material fact as to whether that deficient performance prejudiced his defense. Had his counsel impeached Ms. Kaschmitter's rider review hearing testimony with the Apology & Commitment letter, there is a reasonable possibility that he would have received probation—either at the rider review hearing or in response to his Idaho Criminal Rule 35 ("Rule 35") motion.

As noted above, the addendum to the pre-sentence investigation report and the attached C-Notes portray Mr. Goldsby's rider as a mixed bag. They indicate Mr. Goldsby was not a significant disciplinary problem for NICI staff, and that he had some successes in his programming; however, they also reveal he was heavily criticized for dishonesty, manipulation, and apathy. Nevertheless, the district court was considering placing Mr. Goldsby on probation. (*See* R. Ex., p.22 ("The report comes back recommending that I relinquish jurisdiction. The hearing had been continued from July 11. The parties were going to look into mental health court. At that time I'd indicated that, if mental health court didn't work out, one thing I was considering was placing him on probation with an additional period of local incarceration.").)

Of course, that is not ultimately what happened. After Ms. Kaschmitter testified at the rescheduled rider review hearing, the district court relinquished jurisdiction instead of suspending Mr. Goldsby's sentence and placing him on probation. Thus, Ms. Kaschmitter's scathing criticism of Mr. Goldsby may have been the difference-maker. But even if her testimony was not the single most important factor leading the district court to relinquish jurisdiction, her comments generally must have weighed very heavily against Mr. Goldsby. Not only did Ms. Kaschmitter testify against Mr. Goldsby, but, as the facilitator of his CSC and Relapse Prevention groups, she was also the driving force behind many of the most critical comments about him in the addendum to the pre-sentence investigation report and the attached C-Notes. In light of the inordinate influence Ms. Kaschmitter had, there is at least a reasonable possibility that undermining her credibility generally (by showing her to have testified falsely that she

did not sign off on the Apology & Commitment letter) would have persuaded the district court to give Mr. Goldsby a chance at probation.

Further, since the bases for Ms. Kaschmitter's belief that Mr. Goldsby was dishonest have since been undermined through the presentation of new evidence in support of Mr. Goldsby's Rule 35 motion, impeaching Ms. Kaschmitter's apparently-false testimony about not having facilitated a racial statement by another inmate would have had a cumulative effect in diminishing the value of her assessment of Mr. Goldsby, thus making. Thus, even if Ms. Kaschmitter's impeachment did not sufficiently undermine her criticism of Mr. Goldsby so as to warrant probation at the rider review hearing, when considered alongside the evidence presented with the Rule 35 motion, there is a reasonable probability the outcome of that motion would have been different.

CONCLUSION

For the foregoing reasons, Mr. Goldsby respectfully requests that this Court vacate the district court's judgment and its order summarily dismissing his petition, and that it remand this case to the district court for an evidentiary hearing on Mr. Goldsby's claim that his counsel was ineffective for failing to impeach Ms. Kaschmitter with the inmate essay

DATED this 23rd day of December, 2015.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of December, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
E-MAILED BRIEF

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ERL/eas