3-5-2010

Mendiola v. State Respondent's Brief Dckt. 35473

IN THE SUPREME COURT OF THE STATE OF IDAHO

GIOVANNI M. MENDIOLA,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 35473

BRIEF OF RESPONDENT

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

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Nature of the Case

Giovanni M. Mendiola appeals from the denial of his petition for post-conviction relief.

Statement of the Facts and Course of the Proceedings

Mendiola and his gang (including three brothers, a brother-in-law, and three others) were hired by Brendan Butler, a marijuana trafficker in Northern Idaho and Eastern Washington, to rob and kill a rival drug trafficker. (R., vol. II, pp. 245-51.) Mendiola and his gang invaded the home of the rival, tied his and his girlfriend's hands, and ransacked the place stealing eight pounds of marijuana and between $20,000 and $40,000. (R., vol. II, pp. 251-53.) Brendan Butler was dissatisfied because Mendiola failed to kill the rival, and Mendiola was upset because he thought he should have been paid more. (R., vol. II, pp. 253-55.) Mendiola and his gang returned about four months later, ostensibly to finish the job by killing the rival drug trafficker, but instead Mendiola killed Brendan Butler and stole about 56 pounds of marijuana, and expressed anger that Butler had not had any cash. (R., vol. II, pp. 255-61.) Mendiola and the others took Butler's Cadillac back to Seattle, where they stayed in Mendiola's sisters' basement. (R., vol. II, pp. 261-64.)

The state charged Mendiola with conspiracy to commit robbery, robbery, two counts of kidnapping and conspiracy to commit murder in relation to the first incident involving the trafficking competitor and conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit murder, and first-degree

murder for the killing and robbing of Brendan Butler. (R., vol. II, pp. 264-66.) Mendiola pled guilty to one count of second-degree murder pursuant to a plea agreement. (R., vol. II, p. 266.)

Mendiola filed a verified petition for post-conviction relief asserting that he wished relief from his conviction and sentence for second-degree murder. (R., vol. I, pp. 8-11.) The state answered the petition. (R., vol. I, pp. 12-14.) The district court entered a notice of intent to dismiss the petition on the grounds that it was unsupported by admissible evidence. (R., vol. I, pp. 15-17.) After several extensions of time (R., vol. I, pp. 18-48), Mendiola filed an amended petition (R., p. 49). In the amended petition Mendiola alleged that his plea was not freely and voluntarily entered and that the trial court failed to establish that it was freely and voluntarily entered (R., vol. I, pp. 50-53); that the trial court failed to establish a factual basis for the plea when it was entered (R., vol. I, pp. 53-54); and that trial counsel was ineffective because a defense investigator had informed the prosecutor that the crime Mendiola committed was murder, not manslaughter, that counsel failed to challenge the factual basis for the *Alford* plea, and failed to present evidence at sentencing that Mendiola was actually guilty of only manslaughter (R., vol. I, pp. 54-56).

The state answered the amended petition. (R., vol. I, pp. 97-98.) The court denied cross motions for summary disposition and set the matter for a hearing. (R., vol. I, pp. 101-12, 117-42, 149-56.) At the hearing Mendiola called four witnesses and introduced one document (a "kite" by Mendiola) as an exhibit. (Tr., pp. 2-3.) The state's response did not include any witnesses, but did include

exhibits: registers of action from Mendiola's and his co-defendants' criminal cases, a written plea agreement, and an immunity agreement for Justin Miller, a co-defendant. (Tr., pp. 2-3; p. 110, L. 15 – p. 113, L. 14.) In addition, the district court took judicial notice, from the record in the underlying criminal case, of the grand jury transcript, the transcript of the change of plea hearing, the transcript of the sentencing hearing, and the state's trial brief. (Tr., p. 102, L. 24 – p. 110, L. 15.)

After the hearing the judge denied the petition. (R., vol. II, pp. 233-306.) Mendiola filed a timely notice of appeal. (R., vol. II, pp. 307-10.)

ISSUES

Mendiola states the issue on appeal as:

> Did the district court err when denied [sic] Mr. Mendiola's petition for post-conviction relief in light of the numerous erroneous factual findings and legal errors that, cumulatively and individually, demonstrate that the district court failed to properly adjudicate Mr. Mendiola's post-conviction claims?

(Appellant's brief, p. 18.)

The state rephrases the issues as:

1. Are Mendiola's claims that the trial court erred in taking his *Alford* plea of guilty because it allegedly failed to establish on the record that the plea was knowing, intelligent and voluntary and allegedly failed to establish at the time of the plea an adequate factual basis for accepting the plea not proper claims in post-conviction because they could have been raised in the criminal proceedings or on appeal?

2. Has Mendiola failed to show error in the district court's denial of his claims that his plea was not voluntary or that his counsel provided ineffective assistance in failing to challenge the factual basis for the plea?

3. Has Mendiola failed to show error in the district court's denial of his claims that counsel was ineffective in failing to present evidence at sentencing?

ARGUMENT

I.
Mendiola's Claims That The Trial Court Erred In Taking His *Alford* Plea Of Guilty Are Not Proper Claims In Post-Conviction Because They Could Have Been Raised In The Criminal Proceedings Or On Appeal

A. Introduction

Some of the claims in Mendiola's amended petition for post-conviction relief are direct claims of error by the trial court in the criminal proceedings. Specifically, Mendiola claimed that the district court in the underlying criminal case erred in taking his plea because "[a]t the time the guilty plea was entered, the trial court did not properly examine Petitioner to determine if the plea was in fact freely and voluntarily entered" and because the trial court "did not make a proper factual finding to support the entry of the *Alford* plea." (R., vol. I, pp. 50, 53.) The district court rejected the state's argument that these claims were not appropriately raised in post-conviction proceedings because they could have been raised in the criminal proceedings or on appeal.[1] (R., vol. I, pp. 150-53; vol. II, pp. 235-40.) Application of the law to the facts, as shown below, demonstrates that these claims are statutorily barred. Because the district court reached the correct conclusion but should have dismissed these claims as procedurally barred, the state requests this Court to affirm on the correct basis. See State v. Morris, 119 Idaho 448, 450, 807 P.2d 1286, 1288 (Ct. App. 1991) (on appellate review, the lower court's ruling must be upheld if it is capable of being upheld on any theory); State v. Murphy, 129 Idaho 861, 863, 934 P.2d 34, 36 (Ct. App.

[1] The state also asserts that if these matters are reached on the merits that Mendiola has failed to show error by the district court.

1997) (where district court's ruling is correct it may be upheld on alternative basis).

B. Standard Of Review

A trial court's application of law to the facts in post-conviction proceedings is subject to free review. Roberts v. State, 132 Idaho 494, 496, 975 P.2d 782, 784 (1999).

C. Mendiola's Claims Of Trial Court Error In Taking His Guilty Plea Are Not Proper Claims In Post-Conviction Proceedings

The remedy available under the Uniform Post-Conviction Procedure Act ("UPCPA") "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction." I.C. § 19-4901(b). In addition, an "issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings" except under very limited circumstances. I.C. § 19-4901(b). The plain language of these statutory provisions indicates that matters that could and should have been addressed in the criminal case or on direct appeal are not properly brought under the UPCPA. Where, as here, a petitioner asks for relief based exclusively upon a transcript of proceedings in the district court and presents no new or additional evidence, that petitioner is improperly trying to use the UPCPA as a substitute for proceedings in the trial court or on appeal. See Hoffman v. State, 125 Idaho 188, 190-91, 868 P.2d 516, 518-19 (Ct. App. 1994) (refusing to consider issues that should have been raised on direct appeal).

Review of the relevant cases shows that a challenge to a guilty plea based upon matters outside the record of the underlying criminal proceedings is proper in post-conviction proceedings, but that a post-conviction petitioner is not entitled under the UPCPA to a mere review of the record of the proceedings in the criminal case for error. In Nellsch v. State, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992), Nellsch had been sentenced to an indeterminate sentence of 25 years for first-degree kidnapping, but the Idaho Court of Appeals found the sentence illegal, concluding that the minimum sentence was indeterminate life. Id. at 429, 835 P.2d at 664. After he had been re-sentenced to indeterminate life he petitioned in post-conviction proceedings to withdraw his plea. Id. He asserted two grounds for relief: first, that he was unaware that the crime he pled guilty to required a minimum indeterminate life sentence and, second, that his counsel had been ineffective when he entered his guilty plea. Id. at 430, 835 P.2d at 665. As to the first claim, the court agreed that it was proper to pursue in post-conviction proceedings, but concluded that summary dismissal of the claim was proper because, although the minimum term had not been explained on the record at or before the guilty plea was accepted, it was known to Nellsch at the resentencing, and therefore there was no manifest injustice in allowing the plea to stand. Id. at 432, 835 P.2d at 667. Stated the Court:

> Although it is true that Nellsch claimed he was unaware of the minimum sentence at the time he entered his guilty plea, and that he would not have entered the plea if he had been so informed, he has failed to explain why he did not attempt to withdraw his plea prior to the resentencing hearing or why he did not raise this issue on direct appeal from resentencing. Under these circumstances, any failure to inform the petitioner of the minimum term prior to entry of the plea must be viewed as only a technical deficiency.

Id. Thus, although the court looked at the record of the underlying case, it did so only to conclude that it disproved Nellsch's claim. It did not hold that Nellsch was entitled to predicate a claim of error raised in post-conviction proceedings solely upon the record of the underlying criminal case. Nellsch premised his claim on a matter outside the record (his ignorance of the minimum sentence), which the appellate court eventually deemed disproved by the record.

Likewise, in Ricca v. State, 124 Idaho 894, 865 P.2d 985 (Ct. App. 1993), Ricca premised a challenge to his guilty plea on an allegation that the "plea was involuntary because he was under the influence of medication at the time he entered his plea." Id. The Idaho Court of Appeals concluded such claim was not barred because Ricca had failed to make a motion to withdraw the plea in the criminal case. Id. at 896-97, 865 P.2d at 987-88. The court affirmed summary dismissal, however, because Ricca failed to support his claim with any evidence that the sleep aid he claimed he was taking would have had any effect on his ability to enter a plea. Id. at 897, 865 P.2d at 988.[2]

[2] The district court cited several other cases in which the Idaho Court of Appeals addressed post-conviction claims that guilty pleas were involuntary. (R., vol. II, p. 267.) None of these opinions directly addressed whether the claims would be barred by I.C. § 19-4901(b) if the state had asserted it. Odom v. State, 121 Idaho 625, 826 P.2d 1337 (Ct. App. 1992); Amerson v. State, 119 Idaho 994, 812 P.2d 301 (Ct. App. 1991); Simons v. State, 116 Idaho 69, 71, 773 P.2d 1156, 1158 (Ct. App. 1989) (recognizing that the claim might have been barred by I.C. § 19-4901(b) but deciding to address claim on the merits without resolving this issue); Fowler v. State, 109 Idaho 1002, 1003 n.1, 712 P.2d 703, 704 n.1 (Ct. App. 1985) (noting that it was unclear whether Fowler's claim would have been barred as justiciable on appeal but declining to address the issue because the state did not raise it); Schmidt v. State, 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982).

Nellsch's and Ricca's claims should be compared with Mendiola's. Unlike a claim based on what he actually believed at the time he entered his guilty plea, such as made by Nellsch, Mendiola asserted that the *district court erred* by failing to properly examine him. (R., vol. I, p. 50.) Unlike Ricca's claim that he was under the influence of medication that prevented a voluntary plea, Mendiola complains that the *district court erred* by failing to make sure an adequate factual basis was presented before accepting his guilty plea. (R., vol. I, p. 53.) It is clear from the nature of the claims that Mendiola has asserted that he is improperly trying to use his post-conviction petition "as a method of appealing from a judgment of conviction." Dionne v. State, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969).

A post-conviction petition is not a substitute for an appeal or other remedies available in the original criminal proceedings. Mendiola's claims of error by the trial court, based exclusively upon the transcript of the guilty plea hearing, are appellate claims. They should have been dismissed because they are barred by I.C. § 19-4901(b).

II.
Mendiola Has Failed To Show Error In The District Court's Denial Of His Claims That His Plea Was Not Voluntary Or That His Counsel Provided Ineffective Assistance In Failing To Challenge The Factual Basis For The Plea

A. Introduction

In his petition Mendiola did assert claims challenging his guilty plea that were not based solely upon a reading of the underlying record. First, he claimed that his plea was in fact coerced by threats to prosecute Mendiola's family

members. (R., vol. I, pp. 50-53.) Second, he claimed that counsel rendered ineffective assistance for failing to challenge the factual basis for the *Alford* plea. (R., vol. I, pp. 54-55.) Although these claims were properly brought to the trial court, Mendiola has failed to show that denial of these claims was error.

B. Standard Of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969). Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). A trial court's decision that the petitioner has not met his or her burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990); see also I.R.C.P. 52(a).

Mendiola argues that the district court abused its discretion by applying an incorrect legal standard. (Appellant's brief, pp. 28-35.) Because the proper standard of review is not abuse of discretion but is instead one of free review of application of the law to the facts found, whether the district court correctly articulated the applicable legal standard is irrelevant. Application of the law to the facts found shows no error.

C. Mendiola Failed To Prove That His Plea Was Coerced By The Prosecution's Promise To Decline Prosecution Of His Sisters If He Pled Guilty

"A plea of guilty is deemed coerced only where it is improperly induced by ignorance, fear or fraud." State v. Hanslovan, 147 Idaho 530, 537, 211 P.3d 775, 782 (Ct. App. 2008) (citing State v. Spry, 127 Idaho 107, 110, 897 P.2d 1002, 1005 (Ct. App. 1995)). A plea is involuntary if an innocent person would have felt compelled to plead guilty in light of the circumstances. Hanslovan, 147 Idaho at 537, 211 P3d at 782. Where plea negotiations include state promises about not prosecuting loved ones, such negotiations are not coercive in a constitutional sense if the state acts in good faith. Id. at 538, 211 P.3d at 783 (citing Mata v. State, 124 Idaho 588, 594-95, 861 P.2d 1253, 1259-60 (Ct. App. 1993)). The prosecutor acts in good faith when the state declines to prosecute a family member as part of a plea negotiation if that prosecution would have been supported by probable cause. Hanslovan, 147 Idaho at 538 n.8, 211 P3d at 783 n.8; Mata, 1245 Idaho at 595, 861 P.2d at 1260.

Mendiola presented no evidence of bad faith by the prosecution. At the hearing Mendiola called John Adams, the attorney who had represented him in the underlying criminal case. (Tr., p. 5, L. 22 – p. 6, L. 18.) He described plea negotiations that included Mendiola and his brothers who were co-defendants. (Tr., p. 6, L. 19 – p. 8, L. 15.) (Mendiola does not assert on appeal that the prosecution against the brothers was not supported by probable cause.) In addition, the plea negotiations included discussions that Mendiola's sisters might also be charged. (Tr., p. 8, L. 16 – p. 9, L. 1.) Ultimately Mendiola entered an

Alford plea agreement whereby he would plead guilty to a reduced charge of second-degree murder, the other charges in the indictment would be dismissed, the state would recommend a sentence of life with twelve and one-half years fixed, his co-defendants would receive recommendations for riders on reduced charges of being accessories, and the sisters would not be prosecuted. (Tr., p. 10, L. 18 – p. 11, L. 15.) Although there was evidence that Mendiola pled guilty, in part, on reliance on a promise that his sisters would not be prosecuted (see Tr., p. 11, L. 16 – p. 12, L. 8; p. 86, L. 21 – p. 89, L. 2; p. 94, L. 21 – p. 95, L. 6), he presented no evidence that the state negotiated that promise in bad faith because such a prosecution would have been without probable cause.

Mendiola concedes that there is no evidence in the record that charges against his sisters would not have been supported by probable cause, and were therefore made part of the negotiations in bad faith. (Appellant's brief, p. 33 ("the record fails to provide any confirmation, in any way, that the prosecution of Mr. Mendiola's sisters for some unidentified charge could be supported by probable cause").) He argues, however, that it would "defy reason" to make him bear the burden of proving that his plea was involuntary. (Appellant's brief, pp. 33-34.) He cites no authority that the state had the burden to disprove his post-conviction claims (Appellant's brief, pp. 33-34); to the contrary, it is well-established that Mendiola, as a post-conviction petitioner, bore the burden of proving his claims by a preponderance of evidence. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 438, 725 P.2d 135, 143 (1986); Mata v. State, 124 Idaho 588, 591, 861 P.2d 1253, 1256 (Ct. App. 1993) (cited in Appellant's brief, pp. 36-38, for other

propositions but ignored on the burden of proof argument). Because Mendiola by his own admission failed to present any evidence on an element of his claim that his plea was coerced, he has failed to show that the district court erred in denying him relief.[3]

D. Mendiola Failed To Establish That The Court Erred Or That His Attorney Was Deficient In Relation To Establishing A Factual Basis For The Plea

An *Alford* plea may not be withdrawn based upon a claim of actual innocence "in cases where there is some basis *in the record* of factual guilt." State v. Dopp, 124 Idaho 481, 486, 861 P.2d 51, 56 (1993) (emphasis added). "In determining whether a factual basis for a guilty plea exists, we look to the *entire record before the trial judge* at the time the plea was accepted." State v. Ramirez, 122 Idaho 830, 824, 839 P.2d 1244, 1248 (Ct. App. 1992) (emphasis added). Thus, it is proper for a court to look at the transcript of a probable cause hearing for the factual basis of a guilty plea. Fowler v. State, 109 Idaho 1002, 1005, 712 P.2d 703, 706 (Ct. App. 1985) (relying on preliminary hearing transcript and PSI for factual basis for plea where defendant denied intent after entering plea). As noted above, any aspect of Mendiola's claim that may be resolved merely upon the record of the underlying criminal case is not a proper

[3] The district court also found that the plea was not coerced because Mendiola had failed to prove that the actual reason he entered the plea was to protect his family, rather than to gain significant advantage for himself. (R., vol. II, pp. 266-78.) Mendiola's argument on appeal that the court's factual findings in this regard are clearly erroneous because he presented evidence he believes is credible to support his claim (Appellant's brief, pp. 24-28) is specious. State v. Perry, 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003) (credibility determinations are exclusive province of trial court); Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998) (factual finding disturbed only if clearly erroneous).

claim under the UPCPA. Thus, the state will address this claim only in the context that it was raised as a claim of ineffective assistance of counsel.

To show that counsel was ineffective a petitioner must prove both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). A claim that counsel should have made a particular motion is properly rejected on both prongs of this test if the motion would have been denied by the trial court. Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995).

Mendiola failed to show ineffective assistance of counsel in failing to bring a motion to withdraw the guilty plea on the ground of lack of factual basis because such a motion would have been denied. At the guilty plea hearing the trial court inquired of the parties about the factual basis for the plea and both parties referred the court to the transcript of the grand jury proceedings. (R., p. 299 (citing Change of Plea Tr., p. 17, Ls. 14-22).) As found by the district court,

the transcript of the grand jury proceedings, in the record of the underlying criminal case, provided a more-than-sufficient factual basis for the guilty plea. (R., vol. II, pp. 245-64, 282-83, 297-99, 302-03.) Because the grand jury transcript provides a factual basis for the plea and the transcript was in the record before the court, any motion challenging the factual basis for the plea would have failed. Dopp, 124 Idaho at 486, 861 P.2d at 56; Ramirez, 122 Idaho at 824, 839 P.2d at 1248.

Mendiola does not argue that the court was not referred to the grand jury transcript or that the grand jury transcript fails to provide a factual basis for the plea. (Appellant's brief, pp. 20-28.) Mendiola instead contends that because his counsel limited his stipulation, stipulating only that the grand jury transcript provided "probable cause," that the lack of a stipulation to the factual basis somehow invalidates the guilty plea. (Appellant's brief, pp. 22-23.) Mendiola cites no authority for the proposition that a finding of a factual basis for a plea may only be found upon the blessing of the defendant's attorney. On the contrary, the authority cited by Mendiola (Appellant's brief, p. 23) states that a factual basis will be gleaned from "the entire record before the trial judge at the time the plea was accepted." Ramirez, 122 Idaho at 824, 839 P.2d at 1248. Because the grand jury transcript was in the record before the trial judge, and was referenced by both parties as the factual basis for the plea, any challenge to the factual basis grounded upon any limitation in defense counsel's stipulation would have failed.

Mendiola next argues that the trial judge had not read the grand jury transcript before accepting his plea. (Appellant's brief, pp. 23-24.) Again, Mendiola cites no legal authority indicating this fact, even if true, would be a relevant basis for a motion to withdraw the plea, much less that Mendiola would have prevailed on such a motion. See Ramirez, 122 Idaho at 824, 839 P.2d at 1248. ("In determining whether a factual basis for a guilty plea exists, we look to the entire record before the trial judge at the time the plea was accepted."). In Fowler v. State, 109 Idaho 1002, 1005, 712 P.2d 703, 706 (Ct. App. 1985), the Idaho Court of Appeals stated that it was proper to rely on a PSI – clearly not a document made part of the record before the plea was accepted – to, at least in part, establish the factual basis for the plea.

Because Mendiola has supported his appellate arguments with no relevant authority, his claim necessarily fails. I.A.R. 35; State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996); State v. Li, 131 Idaho 126, 129, 952 P.2d 1262, 1265 (Ct. App. 1998). Application of the correct legal standard, which requires review of the entire record before the trial judge, shows that the grand jury transcript provided more than an adequate factual basis for the guilty plea.

III.
Mendiola Has Failed To Show Error In The District Court's Denial Of His Claims That Counsel Was Ineffective In Failing To Present Evidence At Sentencing

Mendiola alleged that his counsel was ineffective for failing to present the testimony of Marco Garcia, an autopsy report, a toxicology report, and unspecified general knowledge that the victim carried a gun, as evidence at sentencing to show that Mendiola was really guilty of manslaughter, not the

murder to which he pled guilty. (R., vol. I, pp. 55-56.) The district court rejected the claim, at least in part, because Mendiola never presented to the court the evidence he believed his counsel deficiently failed to present. (R., vol. II, pp. 304-05.[4])

Mendiola had the burden of proving his claims by a preponderance of evidence. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969). The claim he had to prove was that his counsel's performance was deficient (that failure to present the evidence was because of an objective shortcoming) and that he was prejudiced by that deficiency (a reasonable probability that the sentencing would have come out differently). See Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994); Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988). The district court properly concluded that by failing to submit the evidence counsel supposedly was ineffective in not presenting in sentencing, Mendiola had not proved his claim.

On appeal Mendiola fails to explain how the court *could* have ruled in his favor without seeing the evidence in question. (Appellant's brief, pp. 40-44.) Mendiola's assumption that evidence he never presented would have established facts he claims exist does not meet his burden of *proving* those facts. Without reviewing the evidence it is impossible to ascertain if counsel's performance in not submitting it to the court was objectively unreasonable. Likewise, what

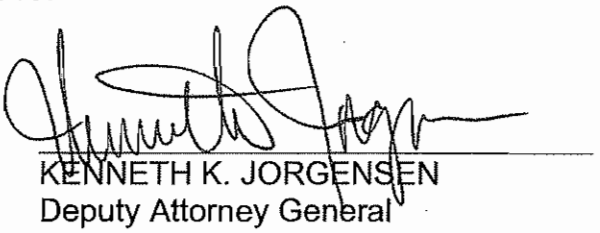
[4] The trial court did reference an affidavit of Marco Garcia that was submitted with the petition but never presented as evidence. (R., vol. II, pp. 304-05.)

prejudice flowed from not having this evidence in sentencing is pure speculation. In short, there was simply no proof. Mendiola has failed to show any error in the district court's conclusion that in the complete absence of evidence Mendiola had not met his burden of proof.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying post-conviction relief.

DATED this 5th day of March 2010.



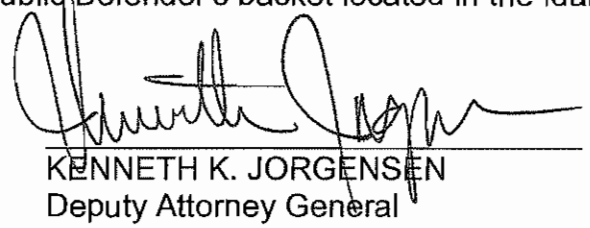
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of March 2010, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



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