

6-1-2010

Mendiola v. State Appellant's Reply Brief Dckt. 35473

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Mendiola v. State Appellant's Reply Brief Dckt. 35473" (2010). *Idaho Supreme Court Records & Briefs*. 2444.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2444

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 35473
)
 v.)
)
 GIOVANNI M. MENDIOLA,) REPLY BRIEF
)
 Defendant-Appellant.)

COPY

REPLY 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 JOHN T. MITCHELL
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

SARAH E. TOMPKINS
Deputy State Appellate Public Defender
I.S.B. # 7901
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

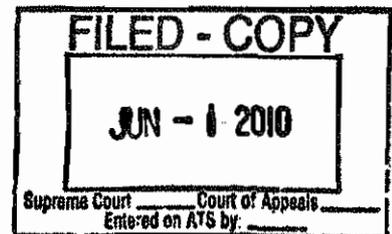


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	2
ARGUMENT.....	3
The District Court Erred When It Denied 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 Claim	3
A. Mr. Mendiola’s Assertion That The District Court Erred When It Failed To Ascertain Whether There Was A Strong Factual Basis To Support His <i>Alford</i> Plea Of Guilty Was Properly Presented In His Post-Conviction Petition	3
B. Mr. Mendiola May Challenge, On Direct Appeal, Whether The District Court’s Credibility Determinations Were Supported By Substantial And Competent Evidence, As The District Court’s Credibility Determinations Are Factual Findings That Are Material To The Underlying Adjudication Of The Legal Merits Of Mr. Mendiola’s Case And Are Reviewable By This Court For Whether These Findings Were Clearly Erroneous	8
C. The District Court Abused Its Discretion When It Denied Mr. Mendiola Relief On His Post-Conviction Claim That His Guilty Plea Was Involuntary In Light Of The State’s Threats To Prosecute Mr. Mendiola’s Sisters And Seek Greater Charges Against Mr. Mendiola’s Brothers Unless He Plead Guilty	10

D. The District Court Abused Its Discretion When It Denied Mr. Mendiola Relief On His Post-Conviction Claim That His Attorney Was Ineffective For Failing To Challenge The Lack Of A Sufficient Factual Basis To Support Mr. Mendiola's *Alford* Plea..... 14

E. The District Court Abused Its Discretion When It Denied Mr. Mendiola Relief On His Post-Conviction Claim That His Attorney Was Ineffective For Failing To Present Critical Mitigating Evidence At Sentencing 18

CONCLUSION22

CERTIFICATE OF MAILING23

TABLE OF AUTHORITIES

Cases

<i>Electrical Wholesale Supply Co. Inc. v. Neilson</i> , 136 Idaho 814, 41 P.3d 242, 250 (2001).....	9
<i>Fowler v. State</i> , 109 Idaho 1002, 712 P.2d 703 (Ct. App. 1985).....	14, 16
<i>Ibarra</i> , 666 P.2d 980, 986-987 (Cal. 1983).....	11, 12
<i>Loveland v. State</i> , 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005).....	19
<i>Mata v. State</i> , 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993).....	11, 12
<i>Matthews v. State</i> , 122 Idaho 801, 839 P.2d 1215 (1992).....	21
<i>Mitchell v. State</i> , 132 Idaho 274, 971 P.2d 727 (1998).....	9
<i>Nellsch v. State</i> , 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).....	4
<i>North Carolina v. Alford</i> , 400 U.S. 25 (Ct. App. 1992).....	4
<i>Odom v. State</i> , 121 Idaho 625, 826 P.2d 1337 (Ct. App. 1992).....	16
<i>People v. Mosby</i> , 92 P.3d 841 (Cal. 2004).....	11
<i>Ricca v. State</i> , 124 Idaho 894, 865 P.2d 985 (Ct. App.1993).....	4
<i>Simons v. State</i> , 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989).....	5, 6
<i>State v. Hanslovan</i> , 147 Idaho 530, 211 P.3d 775 (Ct. App. 2008).....	11, 12
<i>State v. Payne</i> , 146 Idaho 548, 199 P.3d 123 (2008).....	18
<i>State v. Perry</i> , 139 Idaho 520, 81 P.3d 1230 (2003).....	9
<i>State v. Ramirez</i> , 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).....	14, 15
<i>State v. Zichko</i> , 129 Idaho 259, 923 P.2d 966 (1996).....	7, 8
<i>Stuart v. State</i> , 127 Idaho 806, 907 P.2d 783 (1995).....	9
<i>U.S. v. Nuckols</i> , 606 F.2d 566 (5 th Cir. 1979).....	13

Statutes

I.C. § 18-20514
I.C. § 19-49014, 5
I.C. § 19-4901(b).....3
I.C. § 19-4907(a).....18

Rules

I.A.R. 35(b)(6)7, 8
I.R.C.P. 52(a)9

STATEMENT OF THE CASE

Nature of the Case

In response to Mr. Mendiola's assertions on appeal in support of his claim that the district court erred when it dismissed his post-conviction petition, the State has claimed that: (1) one of Mr. Mendiola's claims was not properly justiciable in post-conviction proceedings because it could have been raised on direct appeal; (2) Mr. Mendiola failed to establish by a preponderance of the evidence that his guilty plea was coerced; and (3) Mr. Mendiola failed to establish by a preponderance of the evidence his post-conviction claims of ineffective assistance of counsel. This Reply Brief is necessary to address the State's contentions.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Mendiola's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it denied 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?

ARGUMENT

The District Court Erred When It Denied 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

A. Mr. Mendiola's Assertion That The District Court Erred When It Failed To Ascertain Whether There Was A Strong Factual Basis To Support His *Alford* Plea Of Guilty Was Properly Presented In His Post-Conviction Petition

The State has suggested on appeal that Mr. Mendiola's post-conviction claims regarding the failure of the district court to ascertain a factual basis in support of his *Alford*¹ plea were procedurally barred and, therefore, the district court did not err in dismissing Mr. Mendiola's post-conviction petition with regard to this issue. (Respondent's Brief, pp.5-9.) This argument is made in reliance upon I.C. § 19-4901(b), which provides in pertinent part that any issue that could have been raised in direct appeal, but was not, is generally forfeited in post-conviction. I.C. § 19-4901(b) (*see also* Respondent's Brief, pp.5-9.) While acknowledging the case law that has repeatedly found that a challenge to the validity of a guilty plea is cognizable in post-conviction, the State nevertheless urges this Court to find that, in Mr. Mendiola's case, a different set of rules should apply.

What is not acknowledged in the Respondent's Brief is clear and dispositive language from the case law cited by the State that governs exactly the type of challenge that Mr. Mendiola raised in his post-conviction petition with regard to the validity of his *Alford* plea. A defendant may raise a challenge to the validity of his or her guilty plea for the first time in a petition for post-conviction relief because these claims are a request,

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

“to cure fundamental errors occurring at the trial which affect either the jurisdiction of the court or the validity of the judgment, *even though these errors could have been raised on appeal.*” *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App.1993) (quoting *Maxfield v. State*, 108 Idaho 493, 499, 700 P.2d 115, 121 (Ct. App. 1985)) (emphasis added). As further noted by the Idaho Court of Appeals in *Nellsch v. State*, a defendant’s failure to appeal from a judgment of conviction and sentence based upon alleged deficiencies in the taking of his or her plea, “does not bar these claims from being heard on a petition for post-conviction relief.” *Nellsch v. State*, 122 Idaho 426, 430, 835 P.2d 661, 665 (Ct. App. 1992).

The sum and substance of the State’s procedural argument is that Mr. Mendiola’s claims regarding the failure to establish a factual basis for his plea could have been raised through a direct appeal, and therefore his case is distinguishable from the numerous cases that have deemed such a claim to be cognizable in post-conviction. However, the very cases relied upon by the State expressly provide that such claims are cognizable even if the assertion could have been raised on appeal. Given this, the State’s contention is without support in law.

Further, the district court elaborated on additional reasons, beyond the fact that case law established the justiciability of Mr. Mendiola’s claims, for granting an evidentiary hearing on the issue of whether a factual basis was established for Mr. Mendiola’s *Alford* plea. First, the district court noted that, if I.C. § 19-4901 was interpreted in the way advocated by the State, both before the district court and now on appeal, many claims (such as ineffective assistance of counsel) would not be reviewable at all through post conviction, and that this was clearly not what was

intended by the legislature. (R., pp.151-152.) Moreover, the district court found that it was possible that Mr. Mendiola could be better able to develop his claims in post-conviction through presentation of his trial counsel's testimony or other evidence. (R., p.152.) Finally, the district court determined that an evidentiary hearing was appropriate on this issue in light of concerns for judicial economy and prevention of collateral proceedings with regard to this issue. (R., pp.152-153.)

It is also worth noting that the State has asserted in a parenthetical that the Idaho Court of Appeals in *Simons v. State* suggested that a claim in post-conviction regarding the lack of a factual basis in support of a plea "might have been barred by I.C. § 19-4901(b)." (Respondent's Brief, p.8 n.2.) However, upon review of the portion of the opinion from which the State cites this language, it is apparent that the *Simons* Court was referring to a different issue than the question of whether the district court erred when it failed to establish the factual basis for the defendant's plea. See *Simons v. State*, 116 Idaho 69, 71, 773 P.2d 1156, 1158 (Ct. App. 1989).

The defendant in *Simons* raised three issues for appellate review regarding her post-conviction petition: (1) whether she was charged under the wrong statute and should have been charged with vehicular manslaughter rather than voluntary manslaughter; (2) whether her guilty plea to voluntary manslaughter was supported by an adequate factual basis; and (3) whether her sentence was excessive and should have been reduced. *Simons*, 116 Idaho at 70-71, 773 P.2d at 1157-1158. And the *Simons* Court addressed each of these issues in the order presented. The portion of the *Simons* Opinion cited to by the State was specific to the first issue – whether the defendant in *Simons* should have been charged with vehicular manslaughter rather than

voluntary manslaughter. *Id.* at 71, 773 P.2d at 1158. But there is no such language, or indication of a similar concern, regarding the claim in *Simons* that the district court erred in failing to ascertain the factual basis for the defendant's plea. *Id.* at 76, 773 P.2d at 1163.²

Finally, the State's assertion that Mr. Mendiola's claim regarding the district court's failure to establish a factual basis for his *Alford* plea was entirely dependant on matters contained within the underlying criminal proceedings is inaccurate, as the State ignores the testimony that was presented by Mr. Mendiola's trial counsel, John Adams, in support of this claim. (Tr., p.36, L.22 – p.37, L.9.) The State, in seeking summary disposition on this claim, asserted that "Petitioner's counsel stipulated that the transcript of the grand jury proceeding established probable cause for the charge to which the petitioner was pleading guilty," and then extrapolated this stipulation to extend to the factual basis for the plea itself. (R., p.124.) It was only through the evidentiary hearing held regarding Mr. Mendiola's post-conviction petition that Mr. Mendiola was able to expand the record so that his attorney could clarify, through his testimony, that the stipulation made at Mr. Mendiola's change-of-plea hearing was much more limited than the State claimed. When asked specifically whether he had stipulated to the factual basis for the plea, Mr. Adams responded:

² This Court may also wish to note that, as one of the reasons provided in support of entertaining the merits of the defendant's claim regarding being charged under the wrong statute, the *Simons* Court cited favorably to considerations that the district court was motivated to entertain the claim out of concerns of administrative efficiency and avoidance of collateral proceedings. *Simons*, 116 Idaho at 71, 773 P.2d at 1158. These grounds are very similar to those cited to by the district court in favor of granting an evidentiary hearing on Mr. Mendiola's post-conviction petition. (R., pp.151-153.)

That's incorrect. I stipulated that the grand jury transcript provided probable cause for the filing of an Amended Information or an Amended Indictment. I never stipulated to a factual basis.

Tr., p.37, Ls.6-9.)

To the extent that the parties disputed whether trial counsel at the change of plea hearing had actually conceded that the grand jury transcript formed the factual basis for Mr. Mendiola's *Alford* plea, the testimony provided by Mr. Adams, which was only made in accordance with the evidentiary hearing on Mr. Mendiola's post-conviction petition, provided material evidence on this issue outside of the record in the underlying criminal proceedings that could not have been presented on direct appeal. In light of this, the State's claim that Mr. Mendiola's post-conviction petition did not present new or additional evidence regarding his challenge to the validity of his *Alford* plea is belied by the record of the proceedings in this case. (See Respondent's Brief, p.6.)

The State has further asserted, albeit within a footnote in its Respondent's Brief, that, should this Court entertain the merits of Mr. Mendiola's claims regarding the district court's failure to ascertain a factual basis in support of his *Alford* plea, "Mendiola has failed to show error by the district court." (Respondent's Brief, p.5 n.1.) However, the State provides no analysis or authority in support of this blanket assertion. The Respondent's contentions on appeal must be supported with the reasons in support of the contentions and citation to "the authorities, statutes and parts of the transcript and record relied upon" in order to be properly presented on appeal. See I.A.R. 35(b)(6); see also *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). The State has failed to provide any argument or authority to support its claim.

B. Mr. Mendiola May Challenge, On Direct Appeal, Whether The District Court's Credibility Determinations Were Supported By Substantial And Competent Evidence, As The District Court's Credibility Determinations Are Factual Findings That Are Material To The Underlying Adjudication Of The Legal Merits Of Mr. Mendiola's Case And Are Reviewable By This Court For Whether These Findings Were Clearly Erroneous

Mr. Mendiola has also challenged some of the district court's credibility determinations as being clearly erroneous in light of the absence of any evidence to support these factual findings. (Appellant's Brief, pp.24-28.) The State's sole response to this claim is contained within a footnote, in which the State characterizes Mr. Mendiola's argument as "specious," and cites to two cases, but does not set forth any analysis specific to the substance of Mr. Mendiola's claims. (Respondent's Brief, p.13 n.3.)

As has been noted, the State's arguments on appeal must be supported with the reasons in support of the contentions and citation to "the authorities, statutes and parts of the transcript and record relied upon" in order to be properly presented on appeal. See I.A.R. 35(b)(6); see also *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). While the State has cited to case law in its footnote, the State has not provided any argumentation or analysis as to how it is that these cases are pertinent to this Court's resolution of the issues on appeal or how these cases would support the bald claim that Mr. Mendiola's arguments are "specious." (Respondent's Brief, p.13 n.3.)

In addition, the State's reliance on *State v. Perry* is misplaced, as this case only stands for the proposition that determinations of credibility are to be made by the initial fact-finder in a criminal case, and that an appellate court cannot conduct its own *de novo* reweighing of credibility. See *State v. Perry*, 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003). In other words, a party on appeal may not request that an appellate court

make its own credibility determinations as a substitute for the determinations already made by the jury.³

However, this does not mean that credibility determinations made by the district court as part of its fact-finding process in adjudicating a post-conviction petition are entirely insulated from any appellate review. In a civil proceeding that is tried to the district court, where the district court makes an express finding of credibility and then applies that factual finding to its legal conclusions, this constitutes a factual finding that is reviewable on appeal for whether the determination is clearly erroneous. *Stuart v. State*, 127 Idaho 806, 813, 907 P.2d 783, 790 (1995); see also *Electrical Wholesale Supply Co. Inc. v. Neilson*, 136 Idaho 814, 41 P.3d 242, 250 (2001) (appellate court generally does not second-guess the trial court's credibility determinations "unless they are unsupported by the evidence in the record," and reviewing the district court's credibility determination for whether it was supported by substantial and competent evidence); I.R.C.P. 52(a). While this Court gives deference to such credibility determinations, these findings are not exempt from appellate review and may be disregarded when the credibility determination is not supported by the evidence in the record. *Id.*

Mr. Mendiola has challenged the district court's credibility determinations, which were relied on throughout the district court's legal conclusions in this case, as being without support in the evidence. He has not requested that this Court itself make new

³ The other case cited by the State, *Mitchell v. State*, is relied upon merely for the premise that factual findings are reviewed for whether the finding is clearly erroneous. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); (see also Respondent's Brief, p.13 n.3). This is identical to the standard articulated and argued in Mr. Mendiola's Appellant's Brief. (Appellant's Brief, pp.20-21, 24-28.)

credibility determinations to supplant those of the district court, but merely seeks review of whether the credibility determinations made by the district court were supported by substantial and competent evidence. Pertinent case law establishes that this is a proper challenge to the district court's underlying findings regarding credibility, and the State has presented this Court with no reasoned analysis to refute Mr. Mendiola's claims.

C. The District Court Abused Its Discretion When It Denied Mr. Mendiola Relief On His Post-Conviction Claim That His Guilty Plea Was Involuntary In Light Of The State's Threats To Prosecute Mr. Mendiola's Sisters And Seek Greater Charges Against Mr. Mendiola's Brothers Unless He Pleaded Guilty

In response to Mr. Mendiola's assertion that his guilty plea was involuntary, as it was predicated entirely on the State's threat to prosecute his sisters, brothers, and brother-in-law, the State focuses its entire argument on only one factor of the overall considerations regarding whether the package plea deal was proper: whether the threatened prosecution of Mr. Mendiola's family members was brought in good faith. However, the analysis of whether a plea was entered voluntarily does not rest on any one factor and there are additional standards that govern the entry of such pleas that were not met in Mr. Mendiola's case. Additionally, the State's arguments regarding whether the State could have presented charges in good faith against Mr. Mendiola's sisters are erroneous.

From the State's analysis, it would appear that the State believes that the existence of bad faith of the prosecution is an essential element of Mr. Mendiola's claim that his guilty plea was coerced due to the fact that it was the product of the State's threat to prosecute all of Mr. Mendiola's brothers and sisters if he did not so plead.

(Respondent's Brief, p.13.) It is not an element. Whether there was a good faith basis to support the charges threatened against third parties is merely one factor that has bearing on the overall determination of the voluntariness of a package plea agreement. *In re Ibarra*, 666 P.2d 980, 986-987 (Cal. 1983) (overruled on other grounds by *People v. Mosby*, 92 P.3d 841 (Cal. 2004)). The analysis of whether a package plea agreement resulted in a guilty plea that was coerced and therefore not voluntary is not subject to bright-line rules, but rather turns on the specific facts and circumstances of a particular case. *State v. Hanslovan*, 147 Idaho 530, 537, 211 P.3d 775, 782 (Ct. App. 2008); *Mata v. State*, 124 Idaho 588, 594, 861 P.2d 1253, 1259 (Ct. App. 1993); *Ibarra*, 666 P.2d at 986.

In particular, the proper enquiry is whether “an innocent person would have felt compelled to plead guilty” in light of the circumstances that induced the plea. *Id.* As has previously been argued in Mr. Mendiola’s Appellant’s Brief, he has met this standard by a preponderance of the evidence. (Appellant’s Brief, pp.28-34, 36-38.) Of particular note is the fact that the State’s threatened prosecution in this case was not merely of one member of Mr. Mendiola’s immediate family, but of an entire generation of his immediate family – both of his brothers, both of his sisters, and his former brother-in-law. (R., p.60 at Tr., p.5, L.21 – p.7, L.20.) This fact alone separates Mr. Mendiola’s case from those cases in Idaho that have found package plea agreements to be non-coercive. Given the depth and breadth of the outside force that was brought to bear on Mr. Mendiola, he has established by a preponderance of the evidence under the record in this case that in light of these circumstances, an innocent person likely would have felt compelled to plead guilty.

What is further especially troubling, and would on its own justify permitting Mr. Mendiola to withdraw his plea, is the fact that the district court failed to take any special care in exploring the potential coercive impact of the threatened prosecutions on Mr. Mendiola's decision to plead guilty, despite being aware of the package plea agreement. A central requirement with regard to package plea agreements, given the "inherent dangers related to such third-party negotiations," is that the district court at the change-of-plea hearing use special care and employ close scrutiny to the details of such agreements and the potential coercive impact upon the defendant. See *Mata v. State*, 124 Idaho 588, 594-595, 861 P.2d 1253, 1259-1260 (Ct. App. 1993); see also *State v. Hanslovan*, 147 Idaho 530, 540, 211 P.3d 775, 785 (Ct. App. 2008) (J. Schwartzman, *concurring*).

The coercive forces that may be at work in package plea agreement cases require unique care because such cases often bring into play pressures upon a defendant which are not related to the case, such as the desire to spare a family member from threatened prosecution or otherwise secure to another more lenient treatment. See *Ibarra*, 666 P.2d at 986. "The voluntariness of a plea bargain which contemplates special concessions to another – especially a sibling or a loved one – bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates." *Id.* at 987. As has been noted in the Appellant's Brief, and is undisputed by the State on appeal, this requisite searching enquiry never occurred. (Appellant's Brief, pp.30-32, 36-37.)

The good faith of the threatened prosecution of family members or other third persons is certainly a condition precedent to a finding that a package plea deal is not

coercive. See *U.S. v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979). This is because, in absence of probable cause to believe that the third party has committed a crime, offering to forego prosecution of that person as a concession to the defendant “constitutes a species of fraud.” *Id.* As such, a guilty plea that is induced by the promise not to charge a third party, where there is no good faith basis to bring such a charge, invalidates a guilty plea outright. *Id.*

In this case, Mr. Mendiola did dispute the good faith basis for the threatened charges against Mr. Mendiola's sisters. With regard to the State's argument that the threatened prosecutions of Mr. Mendiola's brothers were made in good faith, Mr. Mendiola noted that no indictments were ever obtained against his sisters, who were part of the package plea deal in Mr. Mendiola's case. (R., pp.122, 132, 134, 173-174, 176.)

The State, in turn, made no effort before the district court to refute Mr. Mendiola's assertions that the threatened prosecution of his sisters was not made in good faith – the State's sole argument was that there was probable cause to support charges against his brothers and brother-in-law. (R., p.122.) This Court may also wish to note that, in order for there to have been any good faith basis to charge Mr. Mendiola's sisters as accessories after the fact of his alleged offense, the State would have to have a basis to establish that his sisters knew that a felony had been committed and either willfully concealed information from the police or harbored and protected their brother from the law. See I.C. § 18-205. By the district court's own findings, the only evidence relating to Mr. Mendiola's sisters was that the alleged victim's car was driven to their residence and Mr. Mendiola stayed with his sisters briefly following his alleged crime.

(R., pp.268-269.) Nothing in this evidence supports any probable cause to believe that Mr. Mendiola's sisters had any pertinent knowledge of the offense he was alleged to have committed, nor that they willfully concealed any information or intended to harbor their brother from the police.

Under the totality of the circumstances in this case, Mr. Mendiola has demonstrated by a preponderance of the evidence that his guilty plea was coerced – i.e. that an innocent person would have felt compelled to plead guilty in like circumstances – and therefore his plea was invalid.

D. The District Court Abused Its Discretion When It Denied Mr. Mendiola Relief On His Post-Conviction Claim That His Attorney Was Ineffective For Failing To Challenge The Lack Of A Sufficient Factual Basis To Support Mr. Mendiola's Alford Plea

In response to Mr. Mendiola's assertion that the district court erred in denying Mr. Mendiola post-conviction relief based upon his assertion that his trial counsel was ineffective for failing to challenge the lack of a factual basis to support his *Alford* plea, the State asserts that the grand jury transcript, which was not reviewed by the district court at the time of accepting Mr. Mendiola's plea, provided the factual basis. In making this claim, the State relies primarily on two cases to sustain its position: *State v. Ramirez*, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992) and *Fowler v. State*, 109 Idaho 1002, 712 P.2d 703 (Ct. App. 1985). (Respondent's Brief, pp.13-16.) However, a review of these cases reveals that they do not, in fact, support the State's contentions on appeal.

From the outset, the State repeatedly cites to one particular passage in *Ramirez*, but apparently fails to give effect to the second portion of the passage cited.

(Respondent's Brief, pp.13, 15, 16.) The State quotes the following language from *Ramirez* in support of its claim that the district court could rely on a grand jury transcript that was not reviewed by the court at the time of taking an *Alford* plea of guilty to find a factual basis in support of such a plea: "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." *Ramirez*, 122 Idaho at 834, 839 P.2d at 1248. The critical language in this passage, however, is found in the last clause of the sentence. This Court looks to, "the entire record before the trial judge *at the time the plea was accepted.*" *Id.* By its very terms, this limits review of the information in support of a guilty plea to that which is actually considered by the district court at the time of taking the plea.

This point is made more clear by the very next sentences in the paragraph from which the State has lifted the quoted language from *Ramirez*. The *Ramirez* Court continues:

In this case the trial judge who accepted Ramirez's plea was not the same judge who presided over the preliminary hearing, and there is no indication that the trial judge obtained or reviewed a transcript of the preliminary hearing. However, *based solely on the information ascertained by the trial judge at the change of plea hearing*, we conclude that the judge did ascertain that there was a strong factual basis for the plea, and that Ramirez did enter his plea knowingly and voluntarily.

Ramirez, 122 Idaho at 834, 839 P.2d at 1248. By its very terms, and as has previously been noted in the Appellant's Brief, the *Ramirez* Opinion actually supports Mr. Mendiola's argument that the factual basis in support of an *Alford* plea can only be determined by that evidence that was ascertained by the district court as the basis in support of the *Alford* plea at the time the plea was taken. (Appellant's Brief, pp.34-35.)

The second case primarily relied upon by the State, *Fowler*, likewise does not provide support for the State's position and, in fact, supports Mr. Mendiola's contentions in this case. From the outset, it does not appear from the case in *Fowler* that the defendant entered an *Alford* plea to the underlying offense. *Fowler*, 109 Idaho at 1003, 712 P.2d 704. This alone makes the holding in *Fowler* inapposite, as it is generally only in the context of an *Alford* plea that the district court is required to establish a factual basis for the plea at the time the plea is taken. See *Ramirez*, 122 Idaho at 834, 839 P.2d at 1248; *Odom v. State*, 121 Idaho 625, 627, 826 P.2d 1337, 1339 (Ct. App. 1992).

While the *Fowler* Court did look to information contained within the defendant's presentence investigation report, generated after the defendant entered his guilty plea, to support the factual basis for the defendant's plea, the *Fowler* Court did so because it was confronted with a different type of challenge than that raised by Mr. Mendiola. The defendant in *Fowler* contended that "the statement in his presentence report concerning his lack of intent to steal from the restaurant created a duty of the district court – at the time of sentencing – to inquire into the factual basis for the plea." *Fowler*, 109 Idaho at 1005, 712 P.2d at 706 (emphasis added).

This challenge was rooted in a separate line of authority for when the duty to establish a factual basis for a plea may be triggered: that being where, after a plea is entered but before sentence is imposed, a trial court receives information raising an obvious doubt as to whether the defendant is in fact guilty. *Id.* (quoting *Schmidt v. State*, 103 Idaho 340, 345, 647 P.2d 796, 801 (Ct. App. 1982)). And the standards for such a challenge mirror those for when the challenge is appropriately raised for the

failure to establish a factual basis at the time of taking a plea – the *Fowler* Court limited its review of the record to only that information that was before the district court at the time of sentencing. *Id.* Because the defendant in *Fowler* asserted that the information contained in his presentence investigation report raised an obvious doubt as to his guilt *at the time of sentencing*, and because the district court had reviewed that information at the time of sentencing, the *Fowler* Court included these materials in its review of whether the district court had a sufficient factual basis to support the defendant's plea. *Id.*

One further clarification is also necessary on this point. In its Respondent's Brief, the State asserts, *inter alia*, that Mr. Mendiola has not argued that the grand jury transcript fails to provide a factual basis for his *Alford* plea. (Respondent's Brief, p.15.) In fact, Mr. Mendiola makes a lengthy challenge to the district court's finding that the grand jury proceedings could be used to establish the factual basis for his guilty plea. (Appellant's Brief, pp.21-24, 34-35.) Mr. Mendiola has asserted that the district court's finding that it could use the grand jury transcripts to establish the factual basis for his plea was erroneous because: (1) he had never stipulated that the grand jury transcript provided a factual basis to support his plea, contrary to the finding of the district court; and (2) this transcript was not actually reviewed by the district court at the time Mr. Mendiola's plea was taken. (Appellant's Brief, pp.21-24, 24-25.) As such, Mr. Mendiola has asserted that the district court erred when it used the grand jury transcripts to establish the factual basis for his *Alford* plea.

Here, the district court admitted at the time Mr. Mendiola had entered his guilty plea that it had never reviewed the contents of the grand jury transcripts at the time the

district court accepted Mr. Mendiola's *Alford* plea. As such, this information was not part of the factual basis that was actually ascertained by the district court at the time of accepting Mr. Mendiola's plea. There is no other evidence or basis proffered in the record in support of Mr. Mendiola's *Alford* plea. Given this, Mr. Mendiola has established, by a preponderance of the evidence, that his attorney was ineffective for failing to challenge the absence of a factual basis in support of his plea.

E. The District Court Abused Its Discretion When It Denied Mr. Mendiola Relief On His Post-Conviction Claim That His Attorney Was Ineffective For Failing To Present Critical Mitigating Evidence At Sentencing

The State further asserts, with regard to Mr. Mendiola's post-conviction claim that his trial counsel was ineffective for failing to present certain pieces of mitigating evidence, that Mr. Mendiola, "never presented to the court the evidence he believed his counsel deficiently failed to present." (Respondent's Brief, p.17.) The evidence claimed to have been absent included the autopsy report and toxicology report performed on the alleged victim, as well as evidence that indicated that the alleged victim was known to carry a gun.

However, these very materials were presented to the district court in conjunction with Mr. Mendiola's post-conviction petition. A post-conviction petition must present, or be accompanied by, admissible evidence in support of the petitioner's claims. See *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (emphasis added). The evidence that may be presented in support of a post-conviction petition can include affidavits, depositions, oral testimony, or other evidence. I.C. § 19-4907(a).

Mr. Mendiola acknowledges the Idaho Court of Appeals' holding in *Loveland v. State* that not all pieces of documentary evidence tendered in support of a post-

conviction petition are automatically entered into evidence at an evidentiary hearing on that petition. *Loveland v. State*, 141 Idaho 933, 936, 120 P.3d 751,754 (Ct. App. 2005). However, the facts in Mr. Mendiola's case are materially distinguishable from those in *Loveland*, and therefore, under the record in this case, the evidence at issue should be deemed to have been incorporated into the evidence.

The defendant in *Loveland* had contended that his trial counsel was ineffective for failing to abide by the defendant's request that counsel file a notice of appeal. *Id.* at 935, 120 P.3d at 753. Mr. Loveland initially provided an affidavit in support of his claims in which he asserted that he had personally requested that his counsel file a notice of appeal, but that counsel failed to do so. *Id.* At the evidentiary hearing, when asked if the defendant would be presenting any evidence, the defendant indicated that he was relying solely on the underlying criminal record and two transcripts of proceedings. *Id.* The defendant then went a step further and disavowed any other evidence, stating, "And I don't intend to rely upon any other facts other than what are in those transcripts, Judge." *Id.* It was within this factual context that the *Loveland* Court concluded that the defendant had declined to present any evidence in support of his post-conviction claims. *Id.*

Here, Mr. Mendiola made no such disavowal, and both he and the State incorporated the evidence presented in conjunction with Mr. Mendiola's post-conviction petition into their arguments after the evidentiary hearing in this case. Mr. Mendiola accompanied his post-conviction petition with admissible evidence that was attached to his post-conviction petition and also incorporated those materials into his petition by reference. (R., p.56.) These materials were further discussed during the testimony of

Mr. Mendiola's trial counsel at the evidentiary hearing. (Tr., p.19, L.12 – p.20, L.11; p.32, L.20 – p.33, L.9.) In addition, Mr. Mendiola also incorporated these materials into his briefing and argument after the evidentiary hearing regarding the issue of whether his trial counsel rendered deficient performance in failing to present these pieces of evidence to the district court at sentencing. (R., pp.180, 231.) This evidence was also discussed by the State in its post-evidentiary hearing briefing. (R., p.215.) As such, it was clear that the parties contemplated that the exhibits provided in support of Mr. Mendiola's post-conviction petition would be incorporated as evidence even after an evidentiary hearing was granted.

Mr. Mendiola presented in his post-conviction petition, as evidence, the sworn affidavit of Mr. Garcia. (R., pp.82-84.) Mr. Garcia was present at the day that Mr. Butler was killed, and heard Mr. Butler and Mr. Mendiola arguing. (R., p.83.) He further averred that Mr. Mendiola had stated that Mr. Butler had pulled a gun, and that, "In the past, I had seen Brendan [Butler] with a gun." (R., p.84.) Therefore, Mr. Mendiola did present evidence to the district court in support of his post-conviction petition that Mr. Butler was known to carry a gun in the past.

Mr. Mendiola also presented the autopsy report and the toxicology report performed on Mr. Butler as evidence in support of his post-conviction claims. (R., pp.85-95.) This autopsy report showed that Mr. Butler was on no less than three opioids – hydrocodone, hydromorphone, and oxycodone - and also under the influence of marijuana at the time of his death. (R., p.85.) The toxicology report provides similar findings. (R., p.95.) As such, the State's assertion that Mr. Mendiola never presented this evidence to the district court is affirmatively refuted by the record.

Moreover, the district court's disregard of the information presented in Mr. Garcia's affidavit tendered as evidence in support of Mr. Mendiola's petition for post-conviction relief was based partly upon the district court's action that was clearly improper – the district court taking judicial notice of its own memory of Mr. Garcia's statements at his own sentencing hearing when no transcript of these statements was ever produced. *See Matthews v. State*, 122 Idaho 801, 807-808, 839 P.2d 1215, 1221-1222 (1992).

As previously noted in Mr. Mendiola's Appellant's Brief, trial counsel conceded that it was deficient performance, and further was not a strategic decision, for counsel to fail to present this evidence at sentencing. (Tr., p.20, Ls.16-20; p.32, L.20 – p.33, L.9) (*see also* Appellant's Brief, pp.40-42.) Further, Mr. Mendiola has established a reasonable probability that, but for counsel's admittedly deficient performance, the district court would have struck a different balance at sentencing, as the district court at sentencing was obviously quite concerned with the lack of evidence bearing on "the extent of malice" that accompanied the alleged killing. (R., p.73 at Tr., at Tr., p.25, L.1 – p.27, L.2; *see also* Appellant's Brief, pp.42-44.)

It is also worth noting that, at the time of sentencing, the district court was under the erroneous belief that, "this wasn't a situation where someone under the influence of drugs suddenly freaked out and that's why this ensued." (R., p.73 at Tr., p.26, Ls.18-20.) Had the mitigating evidence of Mr. Garcia's statements regarding the sudden fight between Mr. Butler and Mr. Mendiola been presented to the district court, along with the autopsy and toxicology evidence showing that Mr. Butler had, in fact, been under the

influence of four separate controlled substances at the time, the district court would have been made aware that this case quite likely presented just such a scenario.

In sum, Mr. Mendiola's post-conviction petition was accompanied by admissible evidence in support of his claims regarding the failure of trial counsel to present mitigating evidence at sentencing. This evidence was expressly incorporated into the arguments of the parties following the evidentiary hearing in this case. The State's contention to the contrary is erroneous.

CONCLUSION

Mr. Mendiola respectfully requests that this Court vacate the district court's order denying post-conviction relief and remand this case for further proceedings

DATED this 1st day of June, 2010.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

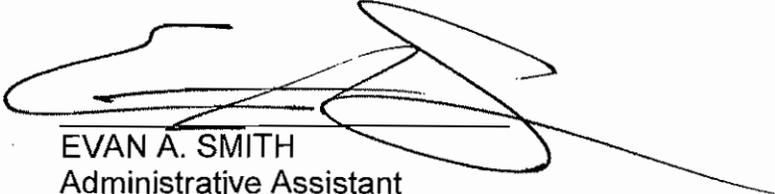
I HEREBY CERTIFY that on this 1st day of June, 2010, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

GIOVANNI M MENDIOLA
INMATE # 71876
ICC
PO BOX 70010
BOISE ID 83707

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

ANDREW PARNES
ATTORNEY AT LAW
160 2ND ST E
PO BOX 5988
KETCHUM ID 83340

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
P.O. BOX 83720
BOISE, ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Administrative Assistant

SET/eas