UIdaho Law
Digital Commons @ UIdaho Law

Not Reported

Idaho Supreme Court Records & Briefs

2-2-2016

Ellis v. State Respondent's Brief Dckt. 43251

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

Recommended Citation

"Ellis v. State Respondent's Brief Dckt. 43251" (2016). *Not Reported*. 2489.
https://digitalcommons.law.uidaho.edu/not_reported/2489

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK LEE ELLIS,	)	
	)	No. 43251
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
v.	)	CV-2014-9105
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE DEBORAH A. BAIL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

MARK LEE ELLIS
IDOC #65365
I.S.C.C. – Unit J
P. O. Box 70010
Boise, Idaho 83707

PRO SE
PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature Of The Case 1

Statement Of Facts And Course Of Proceedings 1

ISSUE 4

ARGUMENT 5

Ellis Has Failed To Establish That The District Court Erred In Summarily Dismissing His Post-Conviction Petition 5

A. Introduction 5

B. Standard Of Review 5

C. General Legal Standards Governing Post-Conviction Proceedings 6

D. Ellis Has Failed To Show Error Because He Has Failed To Present Any Issue, Much Less Argument And Authority In Support Of An Issue, To Challenge The District Court's Summary Dismissal Of His Claims 8

E. Ellis Has Failed To Show Any Error In The District Court's Summary Dismissal Of His Post-Conviction Claims 9

CONCLUSION 9

CERTIFICATE OF MAILING 10

APPENDICES

TABLE OF AUTHORITIES

CASES **PAGE**

Aeschliman v. State, 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999)..................... 6

Cowger v. State, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999)........................... 6

Drapeau v. State, 103 Idaho 612, 651 P.2d 546 (1982) 6

Edwards v. Conchemco, Inc., 111 Idaho 851, 727 P.2d 1279
(Ct. App. 1986) 6

Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001)..................................... 5

Ferrier v. State, 135 Idaho 797, 25 P.3d 110 (2001) 7

Matthews v. State, 122 Idaho 801, 839 P.2d 1215 (1992).................................... 5

Murray v. State, 156 Idaho 159, 321 P.3d 709 (2014).. 8

Pratt v. State, 134 Idaho 581, 6 P.3d 831 (2000) 7

State v. Bearshield, 104 Idaho 676, 662 P.2d 548 (1983) 6

State v. Hoisington, 104 Idaho 153, 657 P.2d 17 (1983)....................................... 8

State v. Lovelace, 140 Idaho 53, 90 P.3d 278 (2003)... 7

State v. Zichko, 129 Idaho 259, 923 P.3d 966 (1996) 8

Stuart v. State, 118 Idaho 865, 801 P.2d 1216 (1990) 7

Workman v. State, 144 Idaho 518, 164 P.3d 798 (2007).................................. 6, 7

STATUTES

I.C. § 19-4903.. 6

I.C. § 19-4906.. 6, 7

RULES

I.R.C.P. 8 6

STATEMENT OF THE CASE

Nature Of The Case

Mark Lee Ellis appeals from the district court's summary dismissal of his post-conviction petition.

Statement Of Facts And Course Of Proceedings

The following facts and proceedings of Ellis's underlying criminal proceeding are derived from the district court's Notice of Intent to Dismiss:

> Mr. Ellis had been convicted of possession of sexually exploitive material and had been released on parole at the time of the current offense. On March 17, 2010, Ellis was arrested on an agent's warrant. While incarcerated, he instructed a neighbor to remove a methamphetamine pipe, drugs, DVDs and cell phones located in a storage room adjacent to his apartment. However, the neighbor called his parole officer and told him Ellis's request. The parole officer, police and the landlord conducted a search of the storage room and found DVDs, drug paraphernalia, controlled substances and cell phones in the storage room. When a detective looked at the content of the DVD's, he realized they contained child pornography.
>
> Subsequently, Ellis was charged in the current case with ten new counts of possession of sexually exploitive material and a sentencing enhancement for a prior conviction of a registerable sex offense. Each count of possession of a sexually exploitive material carried with it a maximum 10 year prison sentence. The enhancement requires the sitting judge to sentence the defendant to a mandatory minimum of 15 years in prison. Ellis filed a motion to suppress the evidence, which was denied by the district court because Ellis had signed a valid Fourth Amendment waiver as a part of his parole agreement. The Idaho Court of Appeals affirmed the denial of the suppression motion. *State v. Ellis,* 155 Idaho 584, 314 P.3d 639, (Ct. App. 2013), *review denied* (Dec. 23, 2013).
>
> After the Court entered its Order denying Ellis's motion to suppress, Ellis decided to enter into a plea agreement. The plea agreement allowed Ellis to appeal the district court's decision. In the plea agreement, the State agreed to dismiss eight counts of possession of sexually exploitive material and the enhancement

> (with the mandatory minimum) in exchange for Ellis's guilty plea to two counts. The State agreed to cap their sentencing recommendation to a total of five years determinate and ten years indeterminate.
>
> . . . .
>
> [At the plea entry hearing] [t]he Court ensured Ellis had read, understood and completed the Guilty Plea Form. Ellis told the Court he understood that by pleading guilty he was giving up his constitutional right to a trial by jury, to confront and cross-examine witnesses against him and the privilege against self-incrimination. Ellis admitted to downloading the two DVDs containing child pornography. The Court accepted the guilty pleas and found that Ellis understood the nature of the offenses, the consequences of pleading guilty, and that the pleas were freely and voluntarily made.
>
> At the sentencing hearing, the court imposed the sentence agreed upon in the plea bargain.

(R., pp.84-87 (internal citations omitted).)

Ellis filed a timely petition for post-conviction relief, presenting the following claims: (1) ineffective assistance of trial counsel for (a) failing to "give an argument on the motion to suppress or call witnesses for [Ellis's] behalf[,]" (b) allowing "an intern to write motions, work on [his] case and negotiate plea agreement[,]" and (c) failing to allow Ellis "to see [his] full discovery, evidence used against [him] or to review [his] pre-sentence investigation[,]" and (2) "[his] plea was not knowingly or voluntarily entered because [he] was unable to review [his] full discovery or pre-sentence investigation." (R., pp.4-5.) Ellis also filed a motion for appointment of counsel, which was denied. (R., pp.16-19, 21.)

The State filed an answer and a motion for summary dismissal. (R., pp.24-67 (including Exhibits).) As summarized by the district court, the state argued that Ellis's affidavit failed to "assert facts giving rise to a valid claim of

ineffective assistance of counsel because he has not shown prejudice" and "that the record belies Ellis's claims that he did not knowingly or competently enter his guilty plea." (R., p.88.)

Ellis filed an affidavit in response to the State's motion for summary dismissal (R., pp.68-77), which, according to the district court, did not "allege any facts to show his attorney was unprepared at the suppression hearing, rather he alleged facts that show he and his attorney disagreed on the presentation of evidence" (R., p.88). The court explained that Ellis's response stated "his plea could not have been competently entered because he was 'scared' and 'just said what [he] thought would make the court happy about the questions asked.'" (Id.)

After reviewing Ellis's affidavit in response to its motion for summary dismissal, the state filed a Renewed Motion for Summary Dismissal (R., pp.78-79), arguing that Ellis's "response adds nothing new to his petition" (id., at 78). The district court issued a Second Order Denying Counsel (R., pp.81-82), finding no possibility that a valid claim exists because "a reasonable person with adequate means would not be willing to retain counsel at his or her own expense to conduct a further investigations into the claims" (id., p.81).

The district court entered a Notice of Intent to Dismiss setting forth its grounds for summarily dismissing Ellis's claims and giving him 20 days to file a response. (R., pp.83-99.) After Ellis filed an affidavit in response to the district court's Notice of Intent to Dismiss (R., pp.100-114), the court entered an Order of Dismissal and a Final Judgment. (R., pp.115-119.) Ellis filed a timely Notice of Appeal. (R., pp.125-128.)

ISSUE

Ellis's Appellant's Brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4).

The state phrases the issue as:

Has Ellis failed to establish that the district court erred in summarily dismissing his post-conviction petition?

ARGUMENT

Ellis Has Failed To Establish That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

A. Introduction

In the opening paragraph of his "Appellant's Brief," Ellis states, "I am resubmitting my two prior briefs presented to the district court as my appellants [sic] brief." (Appellant's Brief, p.1.) Ellis's Appellant's Brief is comprised of copies of (1) his affidavit in response to the district court's Notice of Intent to Dismiss, and (2) his affidavit in response to the state's motion for summary dismissal. (See generally Appellant's Brief.)

Ellis has not presented any issues on appeal, much less argument or authority to show that the district court erred in summarily dismissing his petition. Therefore, Ellis has waived any and all issues on appeal. In any event, the district court properly summarily dismissed all of Ellis's post-conviction claims because his pleadings failed to present a genuine issue of material fact that would entitle him to an evidentiary hearing.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v.

State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 802 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the

claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the district court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

D. Ellis Has Failed To Show Error Because He Has Failed To Present Any Issue, Much Less Argument And Authority In Support Of An Issue, To Challenge The District Court's Summary Dismissal Of His Claims

After the district court issued its Notice of Intent to Dismiss, Ellis filed an affidavit in response. (R., pp.100-115.) The court issued an Order of Dismissal stating that, although Ellis's affidavit "generally rehashes arguments raised in his petition, he did bring up several new facts that warrant brief discussion." (R., p.115.) After analyzing the additional facts, the court concluded:

> Considering his most recent filings, the Petitioner has not asserted any new evidence which creates a genuine issue of material fact regarding his previously raised claims and has not asserted a genuine issue of material fact regarding any new claim for post-conviction relief.

(R., p.118.)

On appeal, Ellis does not assign any specific error to the district court's Notice of Intent to Dismiss or its Order of Dismissal, but instead simply attaches the affidavits he filed in response to those orders to a page entitled "Appellant's Brief." This Court may affirm the district court's summary dismissal of Ellis's petition on the ground that he failed to assign specific error to the district court, and he has failed to present any authority and argument in support of any claim of error. It is well settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983); Murray v. State, 156 Idaho 159, 168, 321 P.3d 709, 718 (2014) (quoting State v. Zichko, 129 Idaho 259, 263, 923 P.3d 966, 970 (1996)) (noting an issue will not be considered if "either authority or argument is lacking" and declining to

consider appellant's claim because he failed to "provide[] a single authority or legal proposition to support his argument").

E. Ellis Has Failed To Show Any Error In The District Court's Summary Dismissal Of His Post-Conviction Claims

Even if Ellis's post-conviction claims are considered on appeal, he has failed to show any error by the district court in summarily dismissing them. In dismissing Ellis's post-conviction petition, the district court thoroughly evaluated all of Ellis's claims and supporting evidence and correctly determined, based upon the applicable legal standards and underlying criminal record, that Ellis failed to set forth adequate facts to raise a genuine issue of material fact entitling him to an evidentiary hearing on any of his post-conviction claims. (See R., pp.83-99, 115-118.) The state adopts as its argument on appeal the district court's analysis, as set forth in both its February 4, 2015 (filing date) Notice Of Intent To Dismiss (R., pp.83-99) and its April 3, 2015 (filing date) Order of Dismissal (R., pp.115-118). For this Court's convenience, copies of the district court's opinions are appended to this brief. (See Appendices A and B.)

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Ellis's petition for post-conviction relief.

DATED this 2nd day of February, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of February, 2016, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

MARK LEE ELLIS
IDOC #65365
ISCC – UNIT J
P. O. BOX 70010
BOISE, ID 83707

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

JCM/dd

APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF

IDAHO, IN AND FOR THE COUNTY OF ADA

NO. ______ FILED
A.M. 11:45 P.M. ______

FEB 04 2015

CHRISTOPHER D. RICH, Clerk
By TARA VILLEREAL
DEPUTY

MARK LEE ELLIS, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No.: CV-PC-2014-09105 NOTICE OF INTENT TO DISMISS

Pursuant to Idaho Code § 19-4906(b), this Court hereby notifies the above parties of its intention to dismiss the application for post-conviction relief in the above-captioned case.

I.

INTRODUCTION

This action is brought by the petitioner Mark Lee Ellis pursuant to the Uniform Post-Conviction Procedure Act, Idaho Code §§ 19-4901 through 19-4911. Pursuant to Idaho Code § 19-4906(b), the Court having considered the application and the record, is satisfied that Ellis is not entitled to post-conviction relief and no purpose would be served by any further proceedings. Ellis will have an opportunity to reply to the proposed dismissal within twenty (20) days as provided by law.

II.

BACKGROUND FACTS

Mr. Ellis had been convicted of possession of sexually exploitive material and had been released on parole at the time of the current offense. On March 17, 2010, Ellis was arrested on an agent's warrant. While incarcerated, he instructed a neighbor to remove a methamphetamine pipe, drugs, DVDs and cell phones located in a storage room adjacent to his apartment. However, the neighbor called his parole officer and told him Ellis's request. The parole officer, police and the landlord conducted a search of the storage room and found DVDs, drug paraphernalia, controlled substances and cell phones in the storage room. When a detective looked at the content of the DVD's, he realized they contained child pornography.

Subsequently, Ellis was charged in the current case with ten new counts of possession of sexually exploitive material and a sentencing enhancement for a prior conviction of a registerable sex offense. Each count of possession of a sexually exploitive material carried with it a maximum 10 year prison sentence. The enhancement requires the sitting judge to sentence the defendant to a mandatory minimum of 15 years in prison. Ellis filed a motion to suppress the evidence, which was denied by the district court because Ellis had signed a valid Fourth Amendment waiver as a part of his parole agreement. The Idaho Court of Appeals affirmed the denial of the suppression motion. *State v. Ellis*, 155 Idaho 584, 314 P.3d 639, (Ct. App. 2013), *review denied* (Dec. 23, 2013).

After the Court entered its Order denying Ellis's motion to suppress, Ellis decided to enter into a plea agreement. The plea agreement allowed Ellis to appeal the district court's decision. In the plea agreement, the State agreed to dismiss eight counts of possession of

sexually exploitive material and the enhancement (with the mandatory minimum) in exchange for Ellis's guilty plea to two counts. The State agreed to cap their sentencing recommendation to a total of five years determinate and ten years indeterminate. At the entry of plea hearing on June 8, 2011, Ellis indicated that he had not reviewed all discovery. At this point, the Court decided to continue the Entry of Plea Hearing.

> THE COURT: . . . [T]he defendant needs to know all the evidence that's against him. He needs to have a full review of the discovery in the case, and to be fully advised of his rights and defenses and the consequences of a guilty plea.
>
> MR. SMITH: Right.
>
> THE COURT: And if that is something that you can accomplish in this time period, fine. But if that's something we need other counsel for, that's also fine. I would be glad to do it with whoever is prepared to proceed.
>
> MR. SMITH: Your Honor, he has a comment for the court. Maybe that would be –
>
> THE COURT: We can set if for 9:30 on Monday, since you are here already, counsel. But, that's what I need, is to – I want to know that he's been fully advised of the discovery, that he has gone over the discovery, and that he is comfortable and understands his rights and his defenses and the consequences of a guilty plea and that he is prepared to go forward at that time.
>
> MR. SMITH: Your Honor, he is telling me that he has been told what's on the DVDs and to his satisfaction he believes that's what is there without actually having to see them.
>
> THE COURT: Okay. Well, I will set it over for Monday at 9:30.
>
> MR. SMITH: Okay.

Tr.16:5-25, 17:1-7. On Monday, June 13, 2011, court reconvened and immediately took up whether the defendant was ready to proceed.

> THE COURT: Well, where are we on this case? I continued this to an additional time because it did seem to me that the defendant needed to have more questions answered.
>
> MR. SMITH: Your Honor, I think the question that caused a little

bit of the problem was whether or not Mr. Ellis had been able to observe or was aware of all of the discovery.

It came down to this crux, that he is willing to admit that he downloaded what he believed to be child pornography, and that the position taken by Mr. – by Curtis [lead counsel], who has the case, is that they couldn't view that child pornography without [breaking] a law, and my client's aware of all of that and has been provided with everything else with discovery, and I think he is willing to admit that he downloaded child pornography.

THE COURT: He downloaded it and burned it to the disc?

MR. SMITH: Correct.

Tr., 18:5-25. The Court determined that the defendant could proceed to the plea colloquy. The Court questioned Ellis on whether he was pleading guilty freely and voluntarily:

Q [by The Court]. Has anyone promised you that I would be easy on you if you would plead guilty?

A [by The Defendant]. No.

Q. Has anybody made any promises to you that I have not heard today?

A. No. No, ma'am. No, Your Honor.

Q. Okay. Has anyone intimidated or threatened you or anyone close to you to make you plead guilty?

A. No.

Q. Has anyone offered you a reward or incentive to plead guilty?

A. No.

Q. Are you pleading guilty even though you think you are not guilty?

A. No.

Tr., 22:9-24. The Court then inquired at length on whether Ellis felt mentally competent to enter his plea. Although Ellis had mental health issues in the past, he stressed he felt competent to enter his plea.

Q. Are you having trouble concentrating?

A. I'm very anxious, but I understand what is going on.

Q. Okay. Do you have any trouble reading and understanding what you are reading?

A. No, ma'am.

Q. Have you had any trouble understanding your attorney?

A. No.

Q. Are you having any problems understanding what's going on today?

A. No.

Q. So you can watch TV and understand what's on?

A. Yes.

Q. You can read and you understand what you are reading?

A. Yes.

Q. Okay. You may feel some level of anxiety, but you can still function?

A. Yes.

Tr., 25:13-25, 26:1-7. The Court ensured Ellis had read, understood and completed the Guilty Plea Form. Tr., 28. Ellis told the Court he understood that by pleading guilty he was giving up his constitutional right to a trial by jury, to confront and cross-examine witnesses against him and the privilege against self-incrimination. Tr., 27:15-20. Ellis admitted to downloading the two DVDs containing child pornography. Tr., 29-30. The Court accepted the guilty pleas and found that Ellis understood the nature of the offenses, the consequences of pleading guilty, and that the pleas were freely and voluntarily made. Tr., 32:8-16.

At the sentencing hearing, the court imposed the sentence agreed upon in the plea bargain.

After Ellis's appeal was denied, he timely filed his petition for post-conviction relief. He alleged his counsel was ineffective and his guilty plea was not knowingly and voluntarily entered

because he had not reviewed discovery or his PSI. His ineffective assistance of counsel claim is based on his attorney not calling witnesses or arguing on his behalf at the suppression hearing, allowing an intern to "write motions, work on my case and negotiate plea agreement," not reviewing the DVDs prior to pleading guilty and not reviewing his PSI.

The State filed a combined answer and brief in support of summary dismissal and the State filed a motion for summary dismissal. The State argues Ellis's affidavit does not assert facts giving rise to a valid claim of ineffective assistance of counsel because he has not shown prejudice. The State also argues that the record belies Ellis's claims that he did not knowingly or competently enter his guilty plea. Ellis filed an affidavit in response to the State's motion. However, Ellis failed to allege any facts to show his attorney was unprepared at the suppression hearing, rather he alleged facts that show he and his attorney disagreed on the presentation of evidence. Ellis stated his plea could not have been competently entered because he was "scared" and "just said what I thought would make the court happy about the questions asked." Aff. of Ellis in Response at 5.

III.

STANDARD OF REVIEW

A petition for post-conviction relief commences a civil, rather than criminal, proceeding, which is governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). The petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d

1216, 1220 (1990); *Schultz v. State*, 153 Idaho 791, 795-796, 291 P.3d 474, 478-479 (Ct.App.2012), *review denied* (Dec. 14, 2012). A petition for post-conviction relief differs from a complaint in an ordinary civil action, however, in that it must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Schultz,* 153 Idaho at 796, 291 P.3d at 479. The petition must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached, or the petition must state why such supporting evidence is not included. I.C. § 19-4903.

"To justify an evidentiary hearing, the petitioner must tender a factual showing based on evidence that would be admissible at the hearing." *Hoffman v. State*, 153 Idaho 898, 903, 277 P.3d 1050, 1055 (Ct.App.2012). "The petitioner must support the petition with written statements from witnesses who are able to give testimony themselves as to facts within their knowledge or otherwise based upon verifiable information." *Id.* When the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing. *Olsen v. State,* 156 Idaho 922, 925, 332 P.3d 834, 837 (Ct.App.2014), *review denied* (Sept. 10, 2014). When a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Id.*

I.C. § 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative, if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of facts, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." When the district court considers summary dismissal, it must construe disputed facts in the petitioner's favor; but the court is not

required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Joyner v. State*, 156 Idaho 223, 226, 322 P.3d 305, 308 (Ct.App.2014). The district court may summarily dismiss claims if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a *prima facie* case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Id.*

IV.

DISCUSSION

A. Involuntary Guilty Plea Claim

Ellis argues he is entitled to post-conviction relief because his guilty plea was not voluntarily entered. Ellis argues his plea was involuntary because he had not reviewed the DVDs in discovery and had not reviewed his PSI. When a plea is entered on the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " *McKeeth v. State*, 140 Idaho 847, 850, 103 P.3d 460, 463 (2004) (quoting *Hill v. Lockhart,* 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208 (1985)). The claims that Ellis failed to review the DVDs and the PSI will be analyzed under the rubric of ineffective assistance of counsel.

B. Ineffective Assistance of Counsel Claims.

Ellis argues counsel was ineffective because counsel did not call certain witnesses or argue at the suppression hearing, utilized an intern, did not review the DVDs with Ellis and did

not review the PSI with Ellis.

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post–Conviction Procedure Act. *Stevens v. State*, 156 Idaho 396, 409, 327 P.3d 372, 385, (Ct.App.2013), *review denied* (July 1, 2014). The Court applies the two-prong *Strickland* test to determine if a defendant has received ineffective assistance of counsel in situations where the petitioner has entered a plea of guilty. *Booth v. State*, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011). To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and the petitioner was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693–94 (1984); *Self v. State,* 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct.App.2007). To establish a deficiency, the petitioner has the burden of showing the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Knutsen v. State,* 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct.App.2007). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different. *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Knutsen,* 144 Idaho at 442, 163 P.3d at 231.

Idaho has long adhered to the proposition that tactical or strategic decisions of counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State,* 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct.App.2011). "Under the *Strickland* standard, counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Murray v. State*, 156 Idaho 159, 165, 321 P.3d 709, 715 (2014)(citing *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d

at 695).

1. Conduct at Suppression Hearing was Not Objectively Unreasonable or Prejudicial.

Ellis argues counsel was objectively unreasonable at the suppression hearing because he did not call Ellis's parole officer as a witness and did not submit oral argument. Under the first prong of the *Strickland* test, Ellis must show that his counsel's performance was deficient. The first prong requires the Court to utilize an "objective standard of reasonableness" in order to determine whether counsel's performance was deficient. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland v. Washington, supra.* As in a trial, at a *suppression hearing*, trial counsel must make tactical decisions: how to impeach the officer, whether to call certain witnesses or admit certain evidence. Our Court of Appeals has had numerous occasions to discuss the type of conduct which constitutes a tactical decision. Cross-examination strategy is a tactical decision. *Cooke v. State*, 149 Idaho 233, 246, 233 P.3d 164, 177 (Ct.App.2010). The decision of what witnesses to call is also a tactical decision *State v. Payne*, 146 Idaho 548, 563, 199 P.3d 123, 138 (2008). Likewise, the decision of what evidence should be introduced at trial is also tactical. *Bagshaw v. State,* 142 Idaho 34, 38, 121 P.3d 965, 969 (Ct.App.2005).

Because the failure to call a witness is a tactical decision, Ellis must show that his lawyer was either unprepared or ignorant of the law when he decided not to call the parole officer in order for the Court to find counsel's performance was objectively unreasonable. Ellis brought to his lawyer's attention that the report of the parole violations, dated March 23, 2010, did not include the DVDs found in the storage room and it was never amended to include the violations found as a result of the search of the storage room. Ellis admitted that he told his counsel this report existed and counsel submitted the report in his Amended Motion to Suppress. Aff. of Ellis

in Response at 2. However, he did not the call the parole officer as a witness to show this was a "rogue" search as argued by Ellis. The evidence presented by Ellis shows that his lawyer was not unprepared because, based on Ellis' own assertions, he told his lawyer his theory and his lawyer approached the presentation of evidence differently. This is the type of tactical decision that defense counsel make, as a matter of law, his counsel's performance was not objectively unreasonable.

Furthermore, Ellis has not shown prejudice: that if his attorney had subpoenaed the parole officer as a witness the result of the suppression hearing would have been different. The Court found Ellis had waived his Fourth Amendment as a part of his parole agreement which was still in effect when law enforcement entered his apartment. The Court of Appeals affirmed the validity of the search . Whether or not the parole agent amended his report to include the violations found as a result of the search is simply irrelevant to the issues in the suppression hearing. The petitioner has failed to show either deficient performance or that he was prejudiced by the approach that his counsel took during the hearing.

Likewise, Ellis has not shown that his attorney's decision to rest on his briefing and not give additional oral argument was objectively unreasonable. After learning the Court had already read his briefing, counsel gave a short argument and rested. Tr.6:18-25, 7:9. Ellis has not provided any evidence of additional argument that should have been given or that a different result would have been achieved if counsel had made additional argument. Ellis has failed to provide any evidence to satisfy either prong of the *Strickland* test and his claim will be summarily dismissed.

2. It is Not Objectively Unreasonable to Allow a Legal Intern to Work on a Case.

Ellis argues his counsel was ineffective by allegedly allowing a legal intern to negotiate his plea deal, write the motion to suppress and otherwise work on his case. To justify an evidentiary hearing, the petitioner must tender a factual showing based on evidence that would be admissible at the hearing. Ellis makes the conclusory allegation that the "motion to suppress could not have been written by a competent attorney." Aff. of Ellis in Response at 4. Ellis's allegations are not supported by any evidence the intern's performance was objectively unreasonable. Presumably, Ellis believed that having an intern work on a case is *prima facie* evidence of ineffective assistance of counsel. However, no case law supports this notion. This claim will be summarily dismissed because it is not supported by any evidence and does not justify relief as a matter of law.

3. Failure to Review DVDs Containing Child Pornography Claim was Not Objectively Unreasonable or Prejudicial

Ellis argues that "he should have been able to review the discovery information" and alleged that he had not reviewed the actual DVDs which formed the basis of each count of possession of exploitive material. At the pretrial conference, held June 8, 2011, Ellis decided to change his plea to guilty. When he informed the Court that he had not reviewed discovery, the Court allowed a one-week continuance to allow Ellis to review discovery. Ellis indicated to the Court that he was willing to enter a plea without viewing the DVDs, however, the Court continued the hearing expressly to give him a chance to review any discovery he wanted to review. At the next hearing, June 13, 2011, the discovery was discussed. His attorney and Ellis had decided not to review the DVDs. He advised that Ellis reviewed all other evidence and still wanted to plead guilty. Tr. at 18. Later, Ellis admitted to downloading a video "that involved

sexual activity of prepubescent males with adult males" (Tr., 29:24-25) and a video that involved "children aged three to older who were being involved in sexual activity with adult males" (Tr., 30:9-11). Since he had downloaded the material himself, it is pretty obvious that he was familiar with it.

In Ellis's responsive affidavit, he alleged he was "scared" and "just said what I thought would make the court happy about the questions asked" when he entered his guilty plea. Aff. of Ellis in Response at 5. Ellis is clearly speaking of the continued hearing that occurred on June 13, 2011. However, the record of the June 8, 2011 hearing contradicts Ellis's allegation that he did not want to plead guilty without reviewing the DVDs. On June 8, 2011, after learning that Ellis had not reviewed the DVDs the Court decided to postpone the guilty plea hearing to allow Ellis time to review all discovery. When the Court was speaking with Counsel and trying to determine a new date, Ellis tried to interrupt the Court so that he could continue on with the guilty plea hearing.

> MR. SMITH: Your Honor, he has a comment for the court. Maybe that would be –
>
> THE COURT: We can set if for 9:30 on Monday, since you are here already, counsel. But, that's what I need, is to – I want to know that he's been fully advised of the discovery, that he has gone over the discovery, and that he is comfortable and understands his rights and his defenses and the consequences of a guilty plea and that he is prepared to go forward at that time.
>
> MR. SMITH: Your Honor, he is telling me that he has been told what's on the DVDs and to his satisfaction he believes that's what is there without actually having to see them.
>
> THE COURT: Okay. Well, I will set it over for Monday at 9:30.
>
> MR. SMITH: Okay.

Tr., 16:16-25, 17:1-7. When the Court considers summary dismissal, it must construe disputed facts in the petitioner's favor; but if the petitioner's allegations are clearly disproven by the

record of the criminal proceedings, it may summarily dismiss the claim. In this case, the record shows that Ellis wanted to plead guilty, despite having not reviewed the DVDs because he believed what was on them.

Even if the Court found that his lawyer's performance was objectively unreasonable because he did not review the DVDs with Ellis prior to Ellis's guilty plea, Ellis has still not come forward with any evidence establishing prejudice. At his plea, he said that he downloaded the material on the DVD's himself. There is nothing in the record that would support the conclusion that if he had reviewed them he would not have accepted the State's plea deal and gone to trial on all of the charges against him. Without any evidence that he would have proceeded to trial had he reviewed all of the discovery, Ellis has failed to show he was prejudiced. Ellis cannot make a *prima facie* case and this claim will be summarily dismissed.

4. Failure to Review PSI was Not Prejudicial

Ellis argues that his attorney's failure to review the PSI with him was ineffective assistance of counsel. The transcript of the hearing shows that the Court asked his counsel if he wanted to make changes or corrections to the presentence report and counsel did so. It is apparent that his attorney did discuss the presentence report with Ellis. Even assuming, for the purpose of this Decision that he failed to do so, he does not point to any errors. He was asked at sentencing if he had comments and he made some. Moreover, the sentence imposed was the sentence contemplated by the plea bargain agreement. To show prejudice, Ellis must show that the outcome of the sentencing hearing would have been different. Other than vague, conclusory assertions, the petitioner has failed to show that even if his assertions were true, he was prejudiced in any fashion.

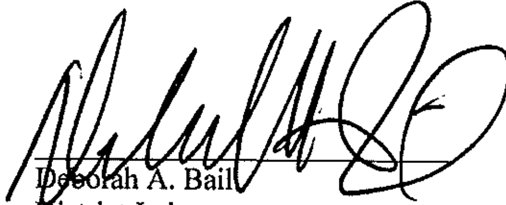
V.

Conclusion

The Court is giving Notice to Ellis of its intent to dismiss his petition for post-conviction relief. A claim that a defendant did not knowingly and voluntarily enter his guilty plea is actually a claim of ineffective assistance of counsel. With regards to Ellis's ineffective assistance of counsel claims, he has failed to allege facts to create a *prima facie* case for ineffective assistance of counsel. First, the attorney's decision to not provide additional oral argument or not call certain witnesses at the suppression hearing is a matter of trial strategy, therefore, Ellis is required to come forward with evidence his attorney was unprepared and he has not. Ellis has also not come forward with any evidence that he was prejudiced by his attorney's conduct at the suppression hearing. Second, even if it is true that an intern worked on Ellis's case, that alone is not ineffective assistance of counsel. Third, the record contradicts Ellis's claim that he did not want to plead guilty without reviewing the DVDs. Furthermore, even if it was objectively unreasonable of his lawyer not to review the DVDs with Ellis, Ellis has not shown he was prejudiced, an essential element of the claim. And finally, even if Ellis did not review the PSI, Ellis has not presented any evidence to indicate that if he had, the result of the sentencing hearing would have been different. Again, without evidence of prejudice, Ellis fails to make a *prima facie* claim for relief. When each essential element of a claim is unsupported by admissible evidence it will be summarily dismissed. Ellis has failed to meet his burden to establish each essential element of his claims for ineffective assistance of counsel and his petition for post-conviction relief will be summarily dismissed.

Ellis has twenty (20) days to respond to this Notice.

Dated this 4th day of February, 2015.



Deborah A. Bail
District Judge

CERTIFICATE OF MAILING

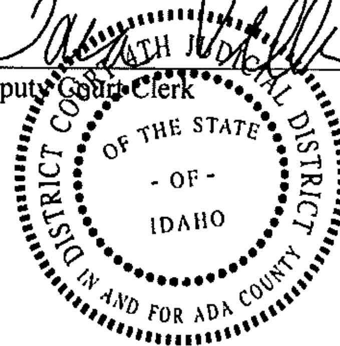
I hereby certify that on this 4th day of February, 2015, I mailed (served) a true and correct copy of the within instrument to:

ADA COUNTY PROSECUTOR
INTER-DEPARTMENTAL MAIL

MARK ELLIS #65365
IMSI
PO BOX 51
BOISE ID 83707

CHRISTOPHER D. RICH
Clerk of the District Court

By: ______________________
Deputy Court Clerk



APPENDIX B

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

NO.____ FILED A.M. 11:40 P.M.____
APR 03 2015
CHRISTOPHER D. RICH, Clerk
By TARA VILLEREAL
DEPUTY

MARK LEE ELLIS, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No.: CV-PC-2014-09105 ORDER OF DISMISSAL

This action has been brought under the Uniform Post Conviction Procedure Act, §§ 19-4901 through 19-4911. The reasons for dismissal were set out in this Court's Notice of Intent to Dismiss filed on February 4, 2015. Ellis submitted a very thorough Response[1] on February 23, 2015. Although he generally rehashes arguments raised in his petition, he did bring up several new facts that warrant brief discussion.

First, Ellis claims he suffers from Asperger's syndrome which caused anxiety and affected his ability to interact with the court during his Guilty Plea Hearing. He states,

> Yes, I understood some of what was going on, but some I did not, especially in open court with all these people. At times I was concentrating intensely on not having a full out panic attack in front of everyone. I should have expressed my concerns about everything I have claimed in this affidavit thouroughly (sic) to the

[1] His Response was notarized.

cc: PA | Ellis

court while I was in front of the Judge. Please understand I could not.

Response, p. 9. The Court notes that Ellis has not made the claim that his guilty plea was not competently entered, only that the Court should have been concerned about his competence. In fact, the Court was. The record of the Guilty Plea Hearing reflects that the Court questioned Ellis extensively on his mental health prior to finding him competent to enter his guilty plea. During the questioning, Ellis engaged in meaningful dialogue with the Court and there is no indication that his anxiety levels were preventing him from expressing any concerns with the Court.

Q. [By the Court]: . . . Now, do you suffer from any mental or psychological disorders that would have a bearing on this case?

A. [By the Defendant]: I suffer from mental illness, but I don't think it would be relevant, no, ma'am.

Q. Well, I noticed in your questionnaire that you said that you previously had been diagnosed with a major depressive disorder.

A. Yes, ma'am.

Q. What did you get Social Security Disability for?

A. Mental health issues that I wrote down.

Q. So you listed as major affective depressive disorder, schizotypal personality disorder, social phobia, panic attacks, and agoraphobia?

A. Yes.

Q. Now, in the past have you received treatment for those conditions?

A. In the – yes.

Q. You say that you are not currently receiving any medication for that?

A. No, I'm not.

Q. Okay. Why is that?

A. The institution is not – they can't treat personality disorders. That's what I was told there.

Q. Is your primary problem personality disorder and agoraphobia?

A. Pretty much, yes, ma'am.

Q. Now, sometimes they treat agoraphobia with antianxiety medications.

A. They won't allow that.

Q. Okay. But you had also at one point suffered from a depressive disorder?

A. I still do.

Q. Are you having trouble concentrating?

A. I'm very anxious, but I understand what is going on.

Q. Okay. Do you have any trouble reading and understanding what you are reading?

A. No, ma'am.

Q. Have you had any trouble understanding your attorney?

A. No.

Q. Are you having any problems understanding what's going on today?

A. No.

Q. So you can watch TV and understand what's on?

A. Yes.

Q. You can read and you understand what you are reading?

A. Yes.

Q. Okay. You may feel some level of anxiety, but you can still function?

A. Yes.

Tr., p. 24-26. The record shows that the Court was aware he was suffering from agoraphobia and panic attacks, but there is no indication Ellis was unable to proceed with entering his guilty plea. Any claim that his anxiety, brought on by Asperger's Syndrome, prevented him from accurately assessing his situation and participating in the Guilty Plea Hearing is belied by the record which shows he engaged in meaningful dialogue with the Court. When a petitioner's claims are belied by the record, they do not create a genuine issue of material fact. The

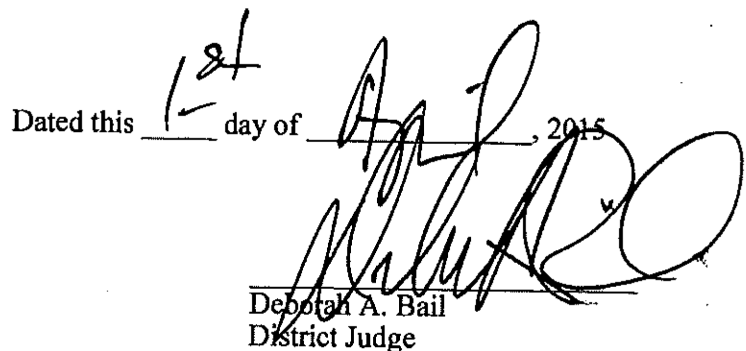
additional facts that he raises in his Response do not create a genuine issue of material fact, nor do they form the basis of a valid claim.

Second, Ellis submitted four letters sent from the paralegal at Mackenzie Law which discussed the Suppression Hearing in the underlying criminal case. The letters do not show counsel was unprepared to give oral argument at the Suppression Hearing. To the contrary, they show counsel was actively preparing for the Suppression Hearing. The letters do not create an issue of material fact as to whether his attorney was unprepared for the Suppression Hearing and do not form the basis for a claim of ineffective assistance of counsel.

Considering his most recent filings, the Petitioner has not asserted any new evidence which creates a genuine issue of material fact regarding his previously raised claims and has not asserted a genuine issue of material fact regarding any new claim for post-conviction relief. As such, pursuant to Idaho Code §§ 19-4906(b), on the basis of the application and the record in the underlying case, it appears that Ellis's application is without merit. The Court is satisfied that Ellis is not entitled to post-conviction relief and that no purpose would be served by any further proceedings. Ellis's application for post-conviction relief is DISMISSED.

IT IS SO ORDERED.

Dated this 1st day of April, 2015



Deborah A. Bail
District Judge