1-5-2016

Gosch v. State Respondent's Brief Dckt. 43266

IN THE SUPREME COURT OF THE STATE OF IDAHO

GRANT WHITELEY GOSCH,	)	
	)	No. 43266
Petitioner-Appellant,	)	
	)	Kootenai Co. Case No.
v.	)	CV-2014-8168
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE FRED M. GIBLER
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

GRANT WHITELEY GOSCH
IDOC #109909
ISCC – Unit K
P. O. Box 70010
Boise, Idaho 83707

PRO SE
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Grant Gosch appeals from the district court's summary dismissal of his post-conviction petition.

Statement Of Facts And Course Of Proceedings

The following underlying facts are derived from the district court's Notice of Intent to Dismiss:[1]

> In case no. CRF-2012-14348, petitioner pled guilty on October 25, 2013 to the felony of domestic battery in violation of Idaho Code § 18-918 pursuant to a binding Rule 11 plea agreement. The agreement bound the court to retain jurisdiction. It also required dismissal of other felony charges in case no. CR-2013-13936. Petitioner appeared for sentencing on December 19, 2013. He was sentenced to incarceration for a period of eight years, with three years determinate and five years indeterminate. Jurisdiction was retained. A jurisdictional review hearing was held on March 31, 2014. Defendant failed to successfully complete the required programming, and relinquishment of jurisdiction was recommended. At the March 31, 2014 hearing, the court again retained jurisdiction. A second jurisdictional review hearing was held on July 23, 2014, again recommending relinquishment for failure to follow rules. Jurisdiction was then relinquished, and the original sentence was imposed.

(St's. Prop. Aug.: Notice of Intent to Dismiss, pp.1-2.)

On October 31, 2014, Gosch filed a petition for post-conviction relief (R., pp.3-7) and an Affidavit of Facts in Support of Post-Conviction Petition (St's.

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[1] On December 31, 2015, the state filed a Motion to Augment the Appellate Record and Statement in Support Thereof, requesting that the Notice of Intent to Dismiss (filed March 4, 2015), and Gosch's Affidavit of Facts in Support of Post-Conviction Petition (filed October 31, 2014) be made part of the appellate record. Citations to those documents will be prefaced by "St's. Prop. Aug."

Prop. Aug.: Affidavit of Facts) presenting the following claims, as denominated by the district court:

> Claim: Affidavit 1: "[M]isrepresentation of counsel – withheld evidence (victim testimony & witness testimony) and material proof of abuse (i.e. photographs of victim's lacerations if any) not provided during the first appearance or pretrial or plea date[.]"
>
> Claim: Affidavit 2: "Charge was a misdemeanor – as told by original counsel and in league with 18-918(3) a simple domestic battery[.]"
>
> Claim: Affidavit 3: "[C]ourt/prosecution error – (withheld judgment) on a[n] Idaho ruling set and representing a true binding agreement not found in subsequent court file."
>
> Claim: Affidavit 4: "Threatened by original counsel to plea and accept terms that conflicted suit I ask to file against state/police on original incarceration 8/12/12[.]"
>
> Claim: Affidavit 5: "False testimony presented by victim conflicted directly with victim's original statement to state asking to not pursue charges."
>
> Claim: Petition ¶ 7a: "The charge was a misdemeanor pursuant to 18-918(3) battery – domestic violence[.]"
>
> Claim: Petition ¶ 7b: "[A]lleged error at time of sentencing. Plea agreement had a withheld judgment stipulation on a ruling[.]"
>
> Claim: Petition ¶ 7c: "[E]vidence withheld from petitioner – witness statement Sandra Appleseth."
>
> Claim: Petition ¶ 9a: "[P]lea not knowingly or voluntarily entered induced by promises not kept. Withheld judgment not kept on ruling."
>
> Claim: Petition ¶ 9b: "[T]he sentence disproportionate [sic] to the offense pursuant to 18-918(3) on first convicted battery charge as told by counsel[.]"
>
> Claim: Petition ¶ 9c: "[F]alse testimony presented by defense and prosecution. Letter written for evidence presented day I pled to change by victim contradicted original statement by said victim."

Claim: Petition ¶ 9 unspecified: "Asked for an appeal at time."

Claim: Petition ¶ 12: "The police/prosecutor withheld favorable info. from defense which pushed petitioner to waive rights to speedy trial.

(St's. Prop. Aug.: Notice of Intent to Dismiss, pp.12-20 (quoting R., pp.4-5; St's. Prop. Aug., Affidavit of Facts, pp.1-2).)

The district court entered a Notice of Intent to Dismiss on March 4, 2015 (St's. Prop. Aug.: Notice of Intent to Dismiss), setting forth its grounds for summarily dismissing Gosch's claims and giving him 20 days to file a reply (id.). After Gosch failed to reply to the district court's Notice of Intent to Dismiss, the court entered an Order Dismissing Petition for Post-Conviction Relief and Judgment. (R., pp.8-12.) Gosch filed a timely Notice of Appeal. (R., pp.13-17.)

ISSUE

Gosch states the issue on appeal as:

> The denial of right to appeal while incarcerated. Access to Rule 35 packet/forms denied at the Kootenai County Public Safety Building[.] Attached Exhibits supporting, dated from May 28, 2014 through August 9, 2014. All requests made before or within proper appeal time frame. See Exhibits 6-13.
>
> The district court erred in summary dismissal of Appellant's Post-Conviction without first conducting an evidentiary hearing into the merits of Appellant's substantiality of underlying IAC claims.

(Appellant's Brief, p.5 (capitalization modified).)

The state rephrases the issue as:

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

ARGUMENT

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

A. Introduction

In the "issues" section of his Appellant's Brief, Gosch presents two "issues": (1) he was denied access to a Rule 35 packet or form while incarcerated in the Kootenai County Jail, and (2) the district court erred by summarily dismissing his post-conviction petition without an evidentiary hearing. (Appellant's Brief, p.5.)

However, the "argument" section of Gosch's Appellant's Brief only relates to his Rule 35 issue. (See id., p.6.) Because Gosch did not present that issue as a post-conviction claim to the district court, he failed to preserve it for appeal and he has waived it. Additionally, Gosch has not presented any argument or authority to show that the district court erred in summarily dismissing his petition; therefore, he has also waived that issue on appeal. In any event, the district court properly summarily dismissed all of Gosch'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 trial 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. Gosch Has Waived Both Of His Issues On Appeal

It is well-settled that issues not raised before the trial court will not be considered for the first time on appeal. State v. Martin, 119 Idaho 577, 579, 808

P.2d 1322, 1324 (1991); State v. Adams, 138 Idaho 624, 628, 67 P.3d 103, 107 (Ct. App. 2003). "No claim, controversy or dispute may be submitted to any court in the state for determination or judgment without filing a complaint or petition as provided in these rules ...." I.R.C.P. 3(a). The pleadings must set forth the claims of the petitioner. I.C. § 19-4903 (petition must "specifically set forth the grounds upon which the application is based"); I.R.C.P. 8(a)(1) (pleading claims in civil action). Claims not asserted in the pleadings may not be considered on appeal as grounds for finding error in the summary dismissal of a petition for post-conviction relief. Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998).

Gosch's first issue on appeal – denial of access to Rule 35 packets or forms at the Kootenai County Public Safety Building – was not presented to the district court as a post-conviction claim. (See R., pp.3-7; St's. Prop. Aug.: Affidavit of Facts, pp.1-2.) Inasmuch as Gosch's appellate argument that he was denied access to Rule 35 packets or forms by staff at the Kootenai County Public Safety Building was never asserted in his post-conviction petition or supporting affidavits, it was never properly raised to the district court and should not be addressed for the first time on appeal.

Additionally, although Gosch alleges in his "issues" section of his Appellant's Brief that "the district court erred in summary dismissal of [his] post-conviction without first conducting an evidentiary hearing into the merits of [his] substantiality of underlying IAC claims[,]" he has not presented argument or authority to support that issue. Given that Gosch has offered no legal authority to

support this claim and no argument as to why the district court's summary dismissal order should be reversed, this Court should decline to consider his claim. See 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. The District Court Correctly Concluded That Gosch Failed To Set Forth Adequate Facts In His Petition And Supporting Affidavits To Raise A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On Any Of His Post-Conviction Claims

Even if Gosch's post-conviction claims are considered on appeal, he has failed to show any error by the district court's summary dismissal of them. In dismissing Gosch's post-conviction petition, the district court thoroughly evaluated all of Gosch's claims and supporting evidence and correctly determined, based upon the applicable legal standards and underlying criminal record, that Gosch 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.8-9; St's. Prop. Aug.: Notice of Intent to Dismiss.) The state adopts as its argument on appeal the district court's analysis, as set forth in both its March 4, 2015 (filing date) Notice Of Intent To Dismiss (St's. Prop. Aug.: Notice of Intent to Dismiss) and its April 17, 2015 (filing date) Order Dismissing Petition for Post-Conviction Relief (R., pp.8-9). 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 orders summarily dismissing Gosch's petition for post-conviction relief.

DATED this 5th day of January, 2016.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of January, 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:

GRANT WHITELEY GOSCH
IDOC #109909
ISCC – UNIT K
P. O. BOX 70010
BOISE, ID 83707

JOHN C. McKINNEY
Deputy Attorney General

JCM/dd

APPENDIX A

STATE OF IDAHO }SS
COUNTY OF KOOTENAI
FILED:

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CLERK DISTRICT COURT
DEPUTY

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

GRANT WHITELEY GOSCH, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2014-8168 NOTICE OF INTENT TO DISMISS

Petitioner Grant Gosch has filed a petition for post-conviction relief and a motion for appointment of counsel.

PRIOR PROCEEDINGS

In case no. CRF-2012-14348, petitioner pled guilty on October 25, 2013 to the felony of domestic battery in violation of Idaho Code § 18-918 pursuant to a binding Rule 11 plea agreement. The agreement bound the court to retain jurisdiction. It also required dismissal of other felony charges in case no. CR-2013-13936. Petitioner appeared for sentencing on December 19, 2013. He was sentenced to incarceration for a period of eight years, with three years determinate and five years indeterminate. Jurisdiction was retained. A

jurisdictional review hearing was held on March 31, 2014. Defendant failed to successfully complete the required programming, and relinquishment of jurisdiction was recommended. At the March 31, 2014 hearing, the court again retained jurisdiction. A second jurisdictional review hearing was held on July 23, 2014, again recommending relinquishment for failure to follow rules. Jurisdiction was then relinquished, and the original sentence was imposed.

MOTION FOR COURT-APPOINTED COUNSEL

There is no constitutional right to counsel in post-conviction actions. *Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987); *Follinus v. State,* 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct.App.1995). Appointment of counsel at public expense in post-conviction cases is governed solely by I.C. § 19-4904. *Quinlan v. Idaho Com'n for Pardons and Parole,* 138 Idaho 726, 730, 69 P.3d 146, 150 (2003). That provision states:

> [I]f the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney *may* be made available to the applicant in the preparation of the application, in the trial court, and on appeal, and paid, on order of the district court, by the county in which the application is filed.

(Emphasis added.) The issue of whether to grant a request for counsel in a post-conviction proceeding is a matter of the court's discretion. *Banks v. State,* 128 Idaho 886, 889, 920 P.2d 905, 908 (1996); *Cowger v. State,* 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct.App.1999); and *Fields v. State,* 135 Idaho 286, 291, 17 P.3d 230, 235 (2000).

The Idaho Supreme Court stated in *Quinlan v. Com'n for Pardons &*

Parole, supra: "I.C. § 19-852 [which requires a finding that a proceeding is frivolous before denying a request for counsel] no longer applies in post-conviction cases." *Id.* 138 Idaho at 730, 69 P.3d at 130. The Idaho Court of Appeals, in *Newman v. State,* 140 Idaho 491, 95 P.3d 642 (Ct.App.2004) interpreted the Idaho Supreme Court's statement in *Quinlan* as "dicta," and held that a denial of a request for counsel must be supported by a finding that the proceeding is frivolous.

Since, as explained below, the petition for post-conviction relief is without merit, this post-conviction proceeding is not one "that a reasonable person with adequate means would be willing to bring at his own expense." *See* I.C. § 19-852(b)(3). Accordingly, the proceeding is frivolous. Therefore, petitioner's motion for appointment of counsel is denied.

PETITION FOR POST-CONVICTION RELIEF

RELIEF REQUESTED

On October 31, 2014, petitioner filed his petition for post-conviction relief, requesting:

> compensation for cost of original counsel paid to ex-wife; compensation for lost wages; sentence reduction / termination / end case.

Petitioner has cited no authority for the following requested relief: "compensation for cost of original counsel paid to ex-wife; compensation for lost wages." Accordingly, petitioner is not entitled to such relief.

POST-CONVICTION RELIEF STANDARDS

A post-conviction remedy is available to anyone who has been convicted of, or sentenced for, a crime and who shows:

> (1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
>
> (2) that the court was without jurisdiction to impose sentence;
>
> (3) that the sentence exceeds the maximum authorized by law;
>
> (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> (5) that his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
>
> (6) subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
>
> (7) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy: may institute, without paying a filing fee, a proceeding under this act to secure relief.

I.C. § 19-4901(a).

An applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; and *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). A court is not required to accept either an applicant's mere conclusory allegations unsupported by admissible evidence, or an applicant's conclusions of law.

Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994); and *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct.App.1986).

Summary dismissal upon a motion to dismiss or at the court's initiative is permissible where the evidence raises no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. *Gonzales v. State,* 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct.App.1991); *Hoover v. State,* 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.App.1988); and *Ramirez v. State,* 113 Idaho 87, 89, 741 P.2d 374, 376. Summary disposition of a post-conviction petition is appropriate only if there exists no genuine issue of material fact which, if resolved in the petitioner's favor, would entitle petitioner to the requested relief. *Nevarez v. State*, 145 Idaho 878, 880, 187 P.3d 1253, 1255 (Ct. App. 2008). If such a factual issue is presented, an evidentiary hearing must be conducted. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *Nevarez v. State*, 145 Idaho 878, 880, 187 P.3d 1253, 1255 (Ct. App. 2008). A "material fact" is one that has "some logical connection with the consequential facts" and, therefore, is determined by its relationship to the legal theories presented by the parties. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008). "In considering summary dismissal of an application for post-conviction relief, the trial court must accept as true verified allegations of fact in the application or in supporting affidavits, no matter how incredible they may appear, unless they have been disproved by other evidence in the record." *Dunlap v. State*, 126 Idaho 901, 909, 894 P.2d 134, 142 (Ct. App. 1995) (citing *Tramel v. State*, 92 Idaho 643, 646, 448 P.2d 649, 652 (1968)). The

court will liberally construe the facts and reasonable inferences in favor of the non-moving party. *State v. Ochieng*, 147 Idaho 621, 624, 213 P.3d 406, 409 (Ct. App. 2009). "[W]hile the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting *Phillips v. State*, 108 Idaho 405, 409, 700 P.2d 27, 31 (1985)). 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. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011). Summary dismissal is appropriate where the record from the criminal action or other evidence conclusively disproves essential elements of the petitioner's claims. *Follinus v. State*, 127 Idaho 897, 900, 908 P.2d 590, 593 (Ct. App. 1995). *See also Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996) ("Allegations are insufficient for the grant of relief when they are clearly disproved by the record or do not justify relief as a matter of law."). A petition which raises only questions of law is suitable for disposition on the pleadings. I.C. § 19-4906(b); *Miller v. State*, 135 Idaho 261, 265, 16 P.3d 937, 941 (Ct. App. 2000). As the trial court, rather than a jury, will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008); *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). That is, the judge in a post-conviction action is

not constrained to draw inferences in favor of the party opposing the motion for summary disposition, but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.* The petitioner must make a prima facie case, on each essential element of the claim upon challenge in a summary disposition proceeding. If the petitioner fails to make a prima facie showing, summary dismissal is appropriate. *Roman v. State,* 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). "To justify a post-conviction evidentiary hearing, the petitioner must make a factual showing based on admissible evidence." *Pizzuto v. State*, 149 Idaho 155, 160, 233 P.3d 86, 91 (2010) (quoting *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999)). The petition must be supported by written statements from competent witnesses or other verifiable information. *Id.* Where petitioner's affidavits are based upon hearsay rather than personal knowledge, summary disposition without an evidentiary hearing is appropriate. *Ivey v. State*, 123 Idaho 77, 844 P.2d 706 (1993).

To prevail on an ineffective assistance of counsel claim, the petitioner must first establish that the attorney's conduct fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Baxter v. State*, 149 Idaho 859, 863, 243 P.3d 675, 679 (Ct. App. 2010). Second, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome would have been different. See *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Baxter,* 149 Idaho at 863, 243 P.3d at 679.

The "benchmark for judging any claim of ineffectiveness must be whether

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

The courts have long adhered to the proposition that tactical or strategic decisions of trial 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).

Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Thomas v. State*, 145 Idaho 765, 769, 185 P.3d 921, 925 (Ct. App. 2008). To prevail on a claim that counsel's performance was deficient for failing to interview witnesses, a petitioner must establish that the inadequacies complained of would have made a difference in the outcome of trial. *Id.* It is not sufficient merely to allege that counsel may have discovered a weakness in the State's case. *Id.* The court will not second-guess trial counsel in the particularities of trial preparation. *Id.*

In a post-conviction proceeding challenging an attorney's failure to pursue

a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted ineffective assistance. *Lint v. State*, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.* at 477-78, 180 P.3d at 516-17.

Although the *Strickland v. Washington* standard has typically been applied to ineffective assistance of counsel occurring at trial or sentencing, its standard is equally applicable to ineffective assistance claims arising out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Mathews*, 13 Idaho 300, 329, 986 P.2d 323, 329 (1999); *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992). The "prejudice" requirement focuses on whether counsel's ineffective performance impacted the outcome of the case. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Satisfaction of the prejudice prong requires a showing that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. *Id.*; *Ridgley v. State*, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010); *Bradley v. State*, 151 Idaho 629, 632, 262 P.3d 272, 275 (Ct. App. 2011). The United States Supreme Court, addressing the issue of counsel's advice prior to a defendant's decision to plead guilty, has stated: [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in

dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? . . . Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts. That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. *McMann v. Richardson,* 397 U.S. 759, 769-70 (1970). *See also Dunlap v. State,* 141 Idaho 50, 60-61, 106 P.3d 376, 386-87 (2004). The Sixth Amendment does not contain an implied duty for counsel to advise a client of the collateral consequences of a guilty plea. *State v. Heredia,* 144 Idaho 95. 97, 156 P.3d 1193, 1195 (2007).

In *Missouri v. Frye,* 566 U.S. ___ (2012), the United States Supreme Court held that the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that have lapsed or are rejected. The *Strickland* standard applies. As a general rule defense counsel has a duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. To show prejudice where a plea offer has lapsed or been rejected, because of counsel's deficient performance, defendant's

must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's cancelling it or the trial court's refusal to accept it, if they had authority to exercise that discretion under state law.

PETITIONER'S CLAIMS

Petitioner makes several claims in support of his request. In an affidavit filed with his petition, petitioner states:

> I seek post conviction relief on the basis of the following:
>
> 1) misrepresentation of counsel - withheld evidence (victim testimony & witness testimony) and material proof of abuse (i.e. photographs of victim's lacerations if any) not provided during the first appearance or pretrial or plea date
>
> 2) Charge was a misdemeanor - as told by original counsel and in league with 18-918(3) a simple domestic battery
>
> 3) court/prosecution error - (withheld judgment) on a[n] Idaho ruling set and representing a true binding agreement not found in subsequent court file.
>
> 4) Threatened by original counsel to plea and accept terms that conflicted suit I ask to file against state/police on original incarceration 8/12/12
>
> 5) False testimony presented by victim conflicted directly with victim's original statement to state asking to not pursue charges.

The petition states:

> 7. State concisely all the grounds on which you base your application for post conviction relief:
>
> (a) The charge was a misdemeanor pursuant to 18-918(3) battery - domestic violence
>
> (b) alleged error at time of sentencing. Plea agreement had a

withheld judgment stipulation on a ruling

(c) evidence withheld from petitioner - witness statement Sandra Appleseth.

9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

(a) plea not knowingly or voluntarily entered induced by promises not kept. Withheld judgment not kept on ruling.

(b) the sentence disproportionate to the offense pursuant to 18-918(3) on first convicted battery charge as told by counsel

(c) false testimony presented by defense and prosecution. Letter written for evidence presented day I pled to change by victim contradicted original statement by said victim.

Asked for an appeal at time.

In section 12 of his petition, petitioner states:

The police/prosecutor withheld favorable info. from defense which pushed petitioner to waive rights to speedy trial.

Claim: Affidavit 1

Petitioner states:

I seek post conviction relief on the basis of the following:

1) misrepresentation of counsel - withheld evidence (victim testimony & witness testimony) and material proof of abuse (i.e. photographs of victim's lacerations if any) not provided during the first appearance or pretrial or plea date

Petitioner has not shown any misrepresentation. Petitioner has not shown the existence of the evidence described. Petitioner has not shown any standard requiring trial counsel to provide the evidence described at the dates described under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel presented any such existing evidence, the outcome would

have been different.

Claim: Affidavit 2

Petitioner states:

I seek post conviction relief on the basis of the following:

. . . .

2) Charge was a misdemeanor - as told by original counsel and in league with 18-918(3) a simple domestic battery

This allegation is contrary to the facts in the record. In defendant's written plea, filed October 5, 2012, defendant stated:

> I am charged with having committed the following crime(s): COUNT 1 - I 18-918(3)(b) {f} Domestic Battery -, I.C. § 18-918(2) punishable by imprisonment in the state prison for a term not to exceed ten (10) years or by a fine not to exceed ten thousand dollars ($10,000) or by both fine and imprisonment.

The Information was subsequently amended in accord with an Idaho Criminal Rule 11(f)(1)(d) plea agreement filed on October 25, 2013 to remove "in the presence of a child." The agreement did not provide for removal of the "traumatic injury" language contained in the Information.

To the extent that petitioner might be making an ineffective assistance claim, petitioner has not provided sufficient facts to show any ineffective assistance. Petitioner has not shown any standard requiring trial counsel to provide the evidence described at the dates described under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel acted differently, the outcome would have been different.

Claim: Affidavit 3

Petitioner states:

I seek post conviction relief on the basis of the following:

. . . .

3) court/prosecution error - (withheld judgment) on a[n] Idaho ruling set and representing a true binding agreement not found in subsequent court file.

Petitioner has set out neither the terms of this alleged agreement nor the facts surrounding its alleged binding nature. The binding Rule 11 agreement called for the court to retain jurisdiction, which was done twice.

To the extent that petitioner is alleging ineffective assistance of counsel in connection with this alleged agreement, Petitioner has not shown any standard requiring trial counsel to act or refrain from acting in any particular way with regard to this alleged agreement under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel acted differently, the outcome would have been different.

Claim: Affidavit 4

I seek post conviction relief on the basis of the following:

. . . .

4) Threatened by original counsel to plea and accept terms that conflicted suit I ask to file against state/police on original incarceration 8/12/12

Petitioner has not set out the facts surrounding this alleged threat, or how it impacted his current sentence. The allegation of a threat is not supported by the record. At petitioner's change of plea hearing on October 25, 2013, he

affirmed that no promises or threats were made to induce him to enter his guilty plea. Petitioner has not shown any standard requiring trial counsel to act or refrain from acting in any particular way with regard to this alleged agreement under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel acted differently, the outcome would have been different.

Claim: Affidavit 5

Petitioner states:

I seek post conviction relief on the basis of the following:

. . . .

5) False testimony presented by victim conflicted directly with victim's original statement to state asking to not pursue charges.

Petitioner states:

Petitioner provides no authority to support this allegation, nor any facts showing the falsity of any testimony. To the extent that petitioner is making an ineffective assistance claim, petitioner has not shown any standard requiring trial counsel to act or refrain from acting in any particular way with regard to this alleged agreement under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel acted differently, the outcome would have been different.

Claim: Petition ¶ 7a

7. State concisely all the grounds on which you base your application for post conviction relief:

(a) The charge was a misdemeanor pursuant to 18-918(3) battery - domestic violence

This claim was addressed in Claim: Affidavit 2, above.

Claim: Petition ¶ 7b

Petitioner states:

> 7. State concisely all the grounds on which you base your application for post conviction relief:
>
> . . . .
>
> (b) alleged error at time of sentencing. Plea agreement had a withheld judgment stipulation on a ruling

The I.C.R. 11(f)(1)(d) plea agreement filed on October 25, 2013 contains no withheld judgment stipulation.

Claim: Petition ¶ 7c

Petitioner states:

> 7. State concisely all the grounds on which you base your application for post conviction relief:
>
> . . . .
>
> (c) evidence withheld from petitioner - witness statement Sandra Appleseth.

Defendant does not set out any facts to support the allegation that any statement by Sandra Appleseth was withheld from him. To the extent that petitioner is making an ineffective assistance claim, petitioner has not shown any standard requiring trial counsel to act or refrain from acting in any particular way under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel acted differently, the outcome would have been different.

Claim: Petition ¶ 9a

Petitioner states:

> 9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:
>
> (a) plea not knowingly or voluntarily entered induced by promises not kept. Withheld judgment not kept on ruling.

The record is contrary to petitioner's allegation. At petitioner's change of plea hearing on October 25, 2013, he affirmed that no promises or threats were made to induce him to enter his guilty plea. The record in the underlying case does not shown that any "withheld judgment" promise was made, and defendant has not shown otherwise.

To the extent that petitioner is making an ineffective assistance claim, petitioner has not shown any standard requiring trial counsel to act or refrain from acting in any particular way under these circumstances. Petitioner has not shown a reasonable probability that, had trial counsel acted differently, the outcome would have been different.

Claim: Petition ¶ 9b

Petitioner states:

> 9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:
>
> . . . .
>
> (b) the sentence disproportionate to the offense pursuant to 18-918(3) on first convicted battery charge as told by counsel

To the extent that petitioner is restating the claim he made, addressed

above in the Claim: Affidavit 2 section, this claim was addressed in that section. To the extent that defendant claims "that the sentence exceeds the maximum authorized by law" pursuant to I.C. § 19-4901(a) defendant's sentence was within statutory limits. To the extent that defendant claims ineffective assistance of counsel for failing to file a Rule 35 motion, defendant has not shown that any standard was violated thereby, or that the filing of such a motion would have made a difference. When a sentence is within the statutory limits, no abuse of discretion will generally be found under Rule 35. *State v. Fuller,* 118 Idaho 962, 801 P.2d 1313 (Ct. App. 1990).

Claim: Petition ¶ 9c

Petitioner states:

> 9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:
>
> . . . .
>
> (c) false testimony presented by defense and prosecution. Letter written for evidence presented day I pled to change by victim contradicted original statement by said victim.

This claim was addressed in the Claim: Affidavit 5 section, above.

Claim: Petition ¶ 9 unspecified

Petitioner states:

> 9. If your application is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:
>
> . . . .

Asked for an appeal at time.

Banuelos v. State, 127 Idaho 860, 864-66, 908 P.2d 162, 166-68 (Ct. App. 1995) held:

> Banuelos next asserts he received ineffective assistance when his counsel allowed him to plead guilty without preserving the right to appeal the trial court's earlier denial of Banuelos's motion to suppress evidence. Under Idaho Criminal Rule 11(a)(2), when a defendant pleads guilty, he or she may, with the approval of the court and the consent of the prosecuting attorney, reserve the right to appeal from a prior adverse ruling of the trial court. Banuelos argues that his counsel should have thus reserved Banuelos's right to appeal the denial of the suppression motion.
>
> We conclude that summary dismissal of this claim was appropriate because Banuelos has not shown that his attorneys' conduct was deficient or unreasonable. Banuelos has presented no evidence of the facts underlying the suppression motion and no record from the criminal proceedings showing the grounds on which the motion was denied. Without such evidence there has been no showing that an appeal of the order denying the motion would have had even arguable merit. Therefore, Banuelos has not made a *prima facie* showing that his attorneys were deficient for failing to attempt to preserve the right to appeal pursuant to I.C.R. 11(a)(2).
>
> . . . .
>
> There exists . . . no . . . obligation of an attorney to take steps to reserve in a plea agreement the right to appeal every adverse ruling theretofore made by the trial court. In the analogous context of a claim that an attorney was deficient for failing to file a motion, we have noted that if the motion was not meritorious and would have been denied, counsel ordinarily would not be deemed deficient for failing to pursue it. *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Huck v. State,* 124 Idaho 155, 158–59, 857 P.2d 634, 637–38 (Ct.App.1993). In our judgment, the same rationale applies to Banuelos's claim that his attorney was deficient because he did not preserve an issue for appeal through use of I.C.R. 11(a)(2) conditional guilty plea. Absent a showing that there existed a meritorious appellate issue to present, an attorney is not deficient for having made no effort to reserve a right to appeal a ruling made prior to a guilty plea.
>
> Thus, in order to prevail on this claim that his counsel did not perform competently, Banuelos was required, at a minimum, to

> present facts indicating that his suppression motion had merit and that there was a reasonable probability that Banuelos would have prevailed on an appeal from the denial of the motion had the issue been preserved. Banuelos presented no evidence whatsoever regarding the merits of his suppression motion. Therefore, he has not raised a factual issue requiring a hearing on this claim of ineffective assistance of counsel.

(Footnote omitted.) Petitioner has not shown there was a meritorious appellate issue to for his trial counsel to present and that there was a reasonable probability that he would have prevailed on an appeal.

Claim: Petition ¶ 12

Petitioner states:

> The police/prosecutor withheld favorable info. from defense which pushed petitioner to waive rights to speedy trial.

A remedy may be provided where a petitioner shows "that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." I.C. § 19-4901(a). Petitioner not explained the nature of this "favorable info," nor the circumstances surrounding this alleged withholding. Petitioner has not explained how such facts, if shown would require "vacation of the conviction or sentence in the interest of justice."

Conclusion

I.C. § 19-4906(b) states:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant

shall be given an opportunity to reply within 20 days to the proposed dismissal.

Based upon the pleadings filed by petitioner, there is no genuine issue of material fact that would entitle him to relief if resolved in his favor. An evidentiary hearing is not justified because petitioner has not tendered a factual showing warranting relief that was based upon admissible evidence. Petitioner has not shown a reasonable probability that the outcome would have been different. He has not presented sufficient admissible evidence or proof of prejudice, but only unsubstantiated claims of wrongdoing. Petitioner's filings do not provide any factual basis for relief. Petitioner does not submit any evidence that would lead to the conclusion that his guilty verdict was marred by non-harmless error. *See Hays v. State,* 132 Idaho 516, 975 P.2d 1181 (Ct.App.1999).

Since the application fails to raise material issues of fact that justify an evidentiary hearing, no purpose would be served by any further proceedings. Accordingly, the court intends to dismiss petitioner's application. Petitioner may reply within 20 days to this proposed dismissal.

ORDER

IT IS THEREFORE ORDERED:

1) Petitioner's motion for appointment of counsel is denied;

2) Notice is hereby given to the parties that the court intends to dismiss petitioner's application for post-conviction relief; and

3) Petitioner may reply within 20 days to this proposed dismissal.

DATED this 27 day of February, 2015.

Fred M Gibler

FRED M. GIBLER, District Judge

I hereby certify a true and correct copy of the foregoing was sent this 4th day of March, 2015 as follows:

Grant Gosch, IDOC no. 109909
Idaho State Correctional Institution
P.O. Box 14
Boise, ID 83707
X Via first class mail

Barry McHugh
Kootenai County Prosecuting Attorney
Dept. PAO, PO Box 9000
Coeur d'Alene, ID 83816-9000
Firm: Kootenai County Prosecutor's Office
___Via interoffice mail
___Via first class mail
___Via FAX: (208) 446-1840
X Via e-mail: bmchugh@kcgov.us

JIM BRANNON, Clerk of Court

By: _____
X Deputy Clerk
___ Secretary for Judge Gibler

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY CLERK OF COURT STATE OF IDAHO

APPENDIX B

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

GRANT WHITELEY GOSCH, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2014-8168 ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF

Petitioner Grant Gosch filed a petition for post-conviction relief and a motion for appointment of counsel. On March 4, 2015, the Court filed a notice of its intent to dismiss Gosch's petition for post-conviction relief, permitting Gosch 20 days to respond to the proposed dismissal. That 20-day time period has expired, and Gosch has not responded.

IT IS THEREFORE ORDERED: Gosch's application for post-conviction relief is dismissed.

DATED this 14 day of April, 2015.

FRED M. GIBLER, District Judge

I hereby certify a true and correct copy of the foregoing was sent this 17 day of April, 2015 as follows:

Grant Gosch, IDOC no. 109909
Idaho State Correctional Institution
P.O. Box 14
Boise, ID 83707
✓ Via first class mail

Barry McHugh
Kootenai County Prosecuting Attorney
Dept. PAO, PO Box 9000
Coeur d'Alene, ID 83816-9000
___Via interoffice mail
___Via first class mail
✓ Via FAX: (208) 446-1840 #5160
___Via e-mail: bmchugh@kcgov.us

JIM BRANNON, Clerk of Court

By: Susan McGrath
✓ Deputy Clerk
___ Secretary for Judge Gibler

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY CLERK OF COURT STATE OF IDAHO