1-5-2017

Cook v. State Appellant's Brief Dckt. 44229

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEREMY J. COOK,	)	
	)	**NO. 44229**
Petitioner-Appellant,	)	
	)	**CANYON COUNTY NO. CV 2015-8455**
v.	)	
	)	
STATE OF IDAHO,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

_____

HONORABLE CHRISTOPHER S. NYE
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Jeremy Cook contends the district court erred when it denied his Motion for Reconsideration of the order summarily dismissing his post-conviction petition. In that motion, Mr. Cook alleged one of his appointed post-conviction attorneys had been completely absent in representing him. He asserts the district court erred by analyzing that motion under I.R.C.P. 59(e) (*hereinafter*, Rule 59(e)) when it should have been considered under Rule 60(b). Because of that error, this Court should vacate the order denying Mr. Cook's Motion for Reconsideration and remand this case for further proceedings. This is true even if this Court considers the merits of Mr. Cook's claims under Rule 60(b) rather than just remanding the case for the district court to make findings under the proper rule, since the record shows Mr. Cook has valid claims for relief under Rule 60(b).

Statement of the Facts and Course of Proceedings

In the underlying criminal case, Mr. Cook was charged with felony driving under the influence (DUI). (R., p.40.) The charges arose when an officer saw a motorcyclist driving in an allegedly-reckless manner outside the Rodeo Bar (accelerating, jumping the curb, and riding on the back tire only, for example). (Exhibits, p.39 (police reports

attached to the Presentence Investigation Report (*hereinafter*, PSI)).)[1] The motorcyclist fled when the officer attempted to initiate a traffic stop. (Exhibits, p.39.) The officer noted the motorcyclist was wearing black sunglasses, gloves, and a dark sweatshirt with lettering on it. (Exhibits, p.39.) The officer also observed the motorcycle did not have a rear license plate. (Exhibits, p.39.) When the motorcyclist pulled into the backyard of a home, the pursuing officer drove away from the home in an effort to flank the suspect. (Exhibits, pp.39, 41.)

Meanwhile, a second officer approached the home and encountered one of the residents, Nathan Ames, who was driving up on his own motorcycle. (Exhibits, p.41.) At that point, the second officer saw a second man in a dark sweatshirt with lettering and jeans come out of a shop on the property. (Exhibits, p.41.) Despite the officer's instructions, the second man ran. (Exhibits, p.41.) However, the officer stayed to talk with Mr. Ames, who said he expected someone to have been in his shop and that one of several motorcycles in and around the shop – one whose engine felt hot to the officer – belonged to Mr. Cook. (Exhibits, p.41.)

Shortly thereafter, the officer who had initially pursued the motorcycle saw a man running toward him from the direction of the home. (Exhibit, p.39.) Believing the running man was wearing the same sweatshirt the motorcyclist had been, the officer

[1] The PSI from the underlying criminal case was incorporated into the post-conviction record via the State's Answer and the appellate record via the Idaho Supreme Court's order taking judicial notice of the record prepared for a direct appeal in the underlying

arrested the running man. (Exhibits, p.39.) He also reported that the running man, who was ultimately identified as Mr. Cook, had a pair of sunglasses and a pair of gloves in his hand at the time.[2] (Exhibits, p.40.) A subsequent breath test indicated Mr. Cook had a blood alcohol concentration (BAC) of .113. (Exhibits, p.42.)

Pursuant to a plea agreement, Mr. Cook pled guilty to felony DUI. (*See* R., pp.44-55.) The district court imposed and executed a sentence with a unified term of ten years, with four years fixed, on Mr. Cook. (R., pp.56-57.) Mr. Cook challenged his sentence as being excessive, as well as the denial of his subsequent motion for leniency, on direct appeal, but the Court of Appeals affirmed the district court's orders in an unpublished decision. *State v. Cook*, 2016 Unpublished Opinion No.372 (Ct. App. 2016).

Mr. Cook also filed a *pro se* petition for post-conviction relief timely from the judgment of conviction. (R., pp.5-10.) In his verified petition, Mr. Cook made several allegations that his trial counsel, Jeffery Nona,[3] had been ineffective, including that Mr.

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case. (R., pp.37, 232.) A copy of the PSI is provided in the PDF document "Cook PSI & exhibits #44229" (*hereinafter*, "Exhibits").

[2] In a subsequent, *pro se* motion for leniency pursuant to I.C.R. 35, Mr. Cook argued that the description of the suspect's clothing did not match his, and noted that no gloves or sunglasses were in his property at the jail. (R., pp.59-60.)

[3] Mr. Cook has been represented by several different attorneys during this case. Relevant to this appeal are his trial counsel in the underlying criminal case, Jeffery Nona, his initial post-conviction counsel, Randall Grove, who withdrew due to a conflict prior to summary dismissal, his conflict post-conviction counsel, Michael Nelson, who represented Mr. Cook during the summary dismissal process, and his substitute post-conviction counsel, Steve Carpenter, who handled the Motion for Reconsideration.

Nona "refused to examine evidence; and refused to speak or listen to witnesses of petitioner" (R., p.7), "refused to investigate the case and proffered no defense strategy at all" (R., p.8), and "hid favorable evidence from the petitioner that would have shown the petitioner not guilty of the charge of D.U.I." (R., p.9 (emphasis from original).) In his affidavit in support of the petition, Mr. Cook further alleged that Mr. Nona "refused to even speak to my witnesses about this case that would prove my innocence." (R., p.14.) He also attested, in regard to the plea process, Mr. Nona "told me to agree with everything the judge said." (R., p.13.) The district court appointed counsel to represent Mr. Cook in the post-conviction proceedings. (R., pp.21-22, 89.)

The State filed a motion for summary dismissal, arguing that Mr. Cook's petition only presented bare and conclusory allegations rather than sufficient argument or evidence to establish a genuine issue of material fact on any of his claims. (R., pp.101 09.) The district court subsequently filed a Notice of Intent to Dismiss the petition which grouped and addressed Mr. Cook's various claims. (R., pp.118-25; *see also* 2/8/16 Tr., p.5, Ls.7-15 (the prosecutor incorporating the "more in depth" justifications for dismissal articulated in the Notice of Intent to Dismiss into the State's motion for summary dismissal "for failure to support the petition as alleged").) For example, in regard to Mr. Cook's allegations that Mr. Nona had failed to investigate the case and speak to witnesses, the district court explained Mr. Cook had not identified the theory of defense Mr. Nona should have pursued, the witnesses he should have consulted, or the evidence those witnesses would have provided. (R., pp.122-23.) The

district court also indicated that Mr. Cook's answers in the guilty plea questionnaire disproved his allegations in that regard. (R., pp.123-24.) However, it did not address Mr. Cook's allegation that his attorney told him to just agree with everything the judge said as it related to the plea process. (*See generally*, R., pp.118-25.)

Subsequently, Mr. Cook's initial post-conviction attorney, Mr. Grove, moved to withdraw from the case, asserting a conflict had arisen between himself and Mr. Cook in regard to how to proceed with this case. (R., pp.127-28.) Mr. Cook also filed a *pro se* motion requesting appointment of conflict counsel. (R., pp.129-32.) Mr. Cook filed two sworn statements with his motion, one from his father, Robert Cook, and one from his friend, Nathan Ames, revealing the evidence he was requesting be filed, but which Mr. Grove was refusing to file, in support of his petition. (*See* R., pp.134-45.)

Mr. Ames' statement, which was initially made in support of a bar complaint against trial counsel, asserted that Mr. Nona was supposed to have interviewed Mr. Ames, as Mr. Ames could refute certain points of evidence in the case. (R., p.144.) For example, Mr. Ames asserted he could refute the assertion that "I told the police that [Mr. Cook] was in fact driving." (R., p.144.)

Robert Cook's affidavit made various assertions, including that Mr. Cook's motorcycle had a rear license plate, and that there were witnesses who could testify that Mr. Cook had not have been driving the motorcycle the police had been pursuing, as he had been working on a motorcycle at Mr. Ames' house at the time. (R., p.140.)

The district court appointed conflict counsel, Mr. Nelson. (R., p.153-55.) Mr. Nelson filed a motion to extend the time to file information in support of the petition, in which he stated Mr. Cook had several affidavits he wanted Mr. Nelson to review and file, "and Counsel needs an additional week to submit the information to the court." (R., p.156.) The district court granted that motion. (R., p.158.) However, Mr. Nelson ultimately failed to file any additional information. (*See generally* R.) Instead, at a status conference, Mr. Nelson represented that the affidavits Mr. Cook wanted filed "would be affidavits containing hearsay. I just spoke to his previous lawyer. I know that I then filed a motion for additional time. Upon my research, I didn't see any additional information" to file in support of the petition. (2/8/16 Tr., p.4, Ls.20-25.) Because no additional information was filed, the district court summarily dismissed Mr. Cook's petition for the reasons articulated in the Notice of Intent to Dismiss. (2/8/16 Tr., p.5, Ls.3-17; R., pp.162-70.) Immediately thereafter, it issued the Final Judgment. (R., p.172.)

That same day, Mr. Cook filed a *pro se* notice requesting an extension of time to file a motion for reconsideration. (R., pp.174-79.) In that motion, he made several allegations regarding Mr. Nelson, including that Mr. Nelson had not been communicating with him or his potential witnesses during the post-conviction process. (*See* R., pp.174-79.) The district court did not rule on that motion. (*See generally* R.)

Approximately one month later, Mr. Carpenter substituted in as counsel for Mr. Cook. (R., p.191.) Four days later, Mr. Carpenter filed a "Motion for

Reconsideration," requesting the district court reconsider "its Order of Dismissal" because, *inter alia*, Mr. Nelson had not presented evidence in support of Mr. Cook's petition, and had not, upon Mr. Cook's request, filed a motion for reconsideration in accordance with I.R.C.P. 11(a)(2)(B). (R., pp.194-99.) In his affidavit in support of the Motion for Reconsideration, Mr. Cook alleged that Mr. Nelson had not been communicating with him during the post-conviction proceedings. (R., p.198.) He also attested he had left a voicemail at Mr. Nelson's office after the hearing on the State's motion to dismiss, but before the written order had been entered and "instruct[ed] him to file a motion for reconsideration within the time allowed by statute." (R., p.198.) The motion to reconsider was also supported by an affidavit from Louannie Stambaugh (Mr. Cook's sister (R., p.180)), as well as a second round of affidavits from Robert Cook and Mr. Ames.[4] (4/21/16 Tr., p.8, Ls.11-13.)

Mr. Ames stated in his affidavit that he had met Mr. Cook at the Sportsman pub on the evening in question, and that, when Mr. Cook left, Mr. Ames thought it was to go back to Mr. Ames' house, which was not far away, as Mr. Cook had left his truck there. (Aug. p.4.) Mr. Ames left the pub twenty minutes later and met the officers who were at his home. (Aug. p.4.) He stated Mr. Cook then came out of his shop, as if headed toward the restroom. (Aug. p.4.) Mr. Ames asserted that, to his knowledge, Mr. Cook

[4] The affidavit from Ms. Stambaugh appears in the record at R., p.180. The affidavits of Mr. Ames and Robert Cook have been subsequently augmented to the appellate record. (*See* Aug. pp.4-58-17; Order Granting in Part and Denying in Part the Renewed Motion to Augment, dated January 5, 2017.)

had never been to the Rodeo Bar because it was not the type of bar they enjoyed patronizing. (Aug. p.4.) He also asserted that, despite approaching Mr. Nona about this case, Mr. Nona did not interview him because "none of that was necessary" "we will just let this case resolve itself." (Aug. p.4.)

Robert Cook's affidavit also asserted, *inter alia*, that his son had never been to the Rodeo Bar, again due to the bar's atmosphere. (Aug. p.10.) He stated that Mr. Nona had given him the impression that he had talked with Mr. Ames, but he later learned this was not the case. (Aug. pp.10-11.) He reaffirmed that his son's motorcycle had a rear license plate. (Aug. p.13.) He also stated that there had not been gloves or sunglasses in his son's property when he picked that property up from the jail. (Aug. p.14.)

The district court held a hearing on Mr. Cook's Motion for Reconsideration. At that hearing, Mr. Carpenter argued Mr. Cook had identified various pieces of evidence – about his whereabouts at the relevant time, the description of the motorcycle, the clothing he was wearing, and the items in his possession – which, if they had been presented in support of his petition for post-conviction relief, would have established genuine issues of material fact concerning his claim of ineffective assistance of trial counsel. (4/21/16 Tr., p.4, L.19 - p.5, L.1.) Mr. Carpenter also asserted, due to Mr. Nelson's failure to present that additional information in support of the petition, Mr. Cook's petition had been improperly summarily dismissed. (4/21/16 Tr., p.5, Ls.2-6.) Additionally, Mr. Carpenter noted Mr. Ames and Robert Cook, among others, were

present at the hearing and were prepared to give additional testimony in support of the motion for reconsideration. (4/21/16 Tr., p.8, Ls.11-19.)

The district court refused to allow Mr. Cook to present the testimony of his witnesses. (4/21/16 Tr., p.8, Ls.21-22.) Instead, it concluded, "This is a motion to reconsider a motion to amend pleadings under [Rule] 59." (4/21/16 Tr., p.8, Ls.23-24.) It proceeded to deny that motion, finding no errors of law or fact surrounding the decision to summarily dismiss the petition. (4/21/16 Tr., p.10, Ls.8-11.) In its written order, the district court also concluded, "Petitioner has failed to sufficiently support his Motion for Reconsideration." (R., p.209.) Mr. Cook filed a notice of appeal timely from the order denying his Motion for Reconsideration. (R., pp.211-13.)

ISSUE

Whether the district court analyzed Mr. Cook's Motion for Reconsideration under the wrong standard, and so, erroneously denied that motion.

ARGUMENT

The District Court Analyzed Mr. Cook's Motion For Reconsideration Under The Wrong Standard, And So, Erroneously Denied That Motion

A. Standard Of Review

The Idaho Rules of Civil Procedure provide for several different types of motions for reconsideration. For example, a motion for reconsideration can be a motion to alter or amend the judgment under Rule 59(e), or a motion for relief from a final judgment, order, or proceeding under Rule 60(b). *See Eby v. State*, 148 Idaho 731, 737 (2010); *Bias v. State*, 159 Idaho 696, 706 (Ct. App. 2015), *rev. denied*; *cf. Straub v. Smith*, 145 Idaho 65, 71 (2007) (explaining the difference between motions to reconsider under Rule 59 and Rule 11(a)(2)(B)). Each such motion raises different questions under different analytical frameworks and so, the district court needs to consider the motion under the appropriate provision. *See, e.g., Bias*, 159 Idaho at 706.

The question regarding which of these provisions controls the analysis in a particular case is a question of law. *See Eby*, 148 Idaho at 737 (explaining that, when the district court erred by not analyzing the petitioner's claims under Rule 60(b), that demonstrated the "discretion exercised by a trial court is affected by an error of law"). Therefore, whether the district court evaluated a motion for reconsideration under the proper provision is a question the appellate courts review *de novo*. *See, e.g., Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 80 (2012) ("The Court reviews questions of law *de novo*.").

B. Mr. Cook's Motion For Reconsideration Should Have Been Evaluated Under Rule 60(b)

The Court of Appeals has identified two indicators which inform the determination of which provision controls a given motion for reconsideration: (1) the time in which the motion was filed, and (2) the substance of the motion. *Bias*, 159 Idaho at 706. Thus:

> A motion is most appropriately considered a motion to alter or amend a judgment pursuant to Rule 59(e) when it is filed within fourteen days of the entry of judgment and is premised solely upon information that was before the court at the time judgment was rendered. Conversely, where a motion presents new information or issues for the court to consider, treatment as a motion for relief from the judgment under Rule 60(b) is most appropriate.

Id. (internal citations omitted). In Mr. Cook's case, both indicators reveal his motion should have been analyzed under Rule 60(b), which means the district court erred by analyzing his motion under Rule 59(e).

In regard to the first *Bias* indicator, Mr. Cook's motion was filed one month after the entry of the Final Judgment was entered. (R., pp.172, 194.) Rule 59(e) motions must be filed and served no later than fourteen days after the entry of judgment. I.R.C.P. 59(e). If such a motion "'was not filed within fourteen days of the entry of judgment, the court has no power to grant the requested relief.'" *Ross v. State*, 141 Idaho 670, 672 (Ct. App. 2005) (quoting *Hamilton v. Rybar*, 111 Idaho 396, 397 (1986)). Motions filed under Rule 60(b), on the other hand, need only be filed within a reasonable time after the entry of judgment. I.R.C.P. 60(c)(1). In fact, for certain types of Rule 60(b) motions, the rule expressly allows for up to six months to file the motion. *Id*. Since Mr. Cook's motion was filed a month after the Final Judgment, it was filed

outside the timeframe for Rule 59(e). However, it was filed well within the timeframe for Rule 60(b). Therefore, under the first *Bias* indicator, Mr. Cook's motion was properly analyzed under Rule 60(b), not Rule 59(e).

In regard to the second *Bias* indicator, Mr. Cook's motion for reconsideration was supported by new evidence, which was offered to support a new claim that Mr. Nelson had been completely absent in his representation of Mr. Cook.[5] (*See* R., p.195.) As the Idaho Supreme Court has held, "under Rule 59(e), a movant is not entitled to offer additional evidence beyond that introduced at trial."[6] *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 245 (1993). However, under Rule 60(b), a moving party is allowed to present new information or issues which had not been before the district court at the time it entered judgment. *Id*. (quoting *Marcher v. Butler*, 113 Idaho 867, 870 (1988)); *Bias*, 159 Idaho at 706. Claims that counsel was ineffective, by their nature, will usually not have been before the district court previously. *See, e.g., State v. Pentico*, 151 Idaho 906, 913 (Ct. App. 2011) (acknowledging that the usual record of proceedings before a district court "is rarely adequate for review of such claims" of

[5] Claims that a post-conviction attorney was completely absent in his representation of the petitioner have, at times, been referred to in shorthand, though imprecisely, as claims of ineffective assistance of post-conviction counsel. *See, e.g., Bias*, 159 Idaho at 706.

[6] Given that the analysis under Rule 59(e) is limited to the information already in the record, the district court's statement in its written order denying Mr. Cook's motion under Rule 59 – that "Petitioner has failed *to sufficiently support* his Motion for Reconsideration" (R., p.209 (emphasis added)) – is inappropriate. No further support for such a motion was required, or indeed, permitted, under the analysis the district

ineffective assistance of counsel); *Sparks v. State*, 140 Idaho 292, 295-96 (Ct. App. 2004) (explaining that, to make out a claim of ineffective assistance of counsel, a defendant will need a forum "where an evidentiary record can be developed").

Since Mr. Cook's motion for reconsideration presented several new affidavits to present evidence in support of his new claim that his attorney, Mr. Nelson, was completely absent in his representation, his motion for reconsideration is properly analyzed under Rule 60(b), not Rule 59(e). If fact, the Idaho Supreme Court has acknowledged as much: "Given the unique status of a post-conviction proceeding, and given the complete absence of meaningful representation in the only available proceeding for [the petitioner] to advance constitutional challenges to his conviction and sentence, we conclude that this case may present the 'unique and compelling circumstances' in which I.R.C.P. 60(b)(6) relief may well be warranted."[7]

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court was using. Thus, even if Rule 59(e) were the controlling provision in this case, the district court still erred in its analysis of Mr. Cook's motion under that provision.

[7] A claim that post-conviction counsel was "ineffective" by being absent in his representation is properly raised under Rule 60(b) even though, in *Murphy v. State*, 156 Idaho 389, 391 (2014), the Idaho Supreme Court held there is no right to counsel in post-conviction cases. *See Eby v. State*, 148 Idaho 731, 737 (2010) (acknowledging prior cases holding there is no right to post-conviction counsel before granting relief under Rule 60(b) anyway); *Parvin v. State*, 157 Idaho 518, 521 (Ct. App. 2014) (detailing why the decision in *Murphy* does not foreclose the relief recognized in *Eby*), *rev. denied*.

In fact, the United States Supreme Court has recently pointed out that the constitutional question of whether a prisoner has a right to counsel in collateral proceedings remains open. *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991)). The *Martinez* Court also suggested there may, in fact, be a right to counsel when post-conviction is the first opportunity for a defendant to raise claims of ineffective assistance of trial counsel,

Eby v. State, 148 Idaho 731, 737 (2010). Thus, the second *Bias* indicator also reveals Mr. Cook's motion should have been analyzed under Rule 60(b).

Since both the *Bias* indicators reveal Mr. Cook's motion for reconsideration should have been analyzed under Rule 60(b), the district court erred by analyzing Mr. Cook's motion under Rule 59(e).

C. Remedy

There appear to be two different approaches to determining whether to grant relief upon finding the district court erred in its analysis of a motion for reconsideration *vis-à-vis* Rule 60(b). *Compare Eby*, 148 Idaho at 737; *with Bias*, 159 Idaho at 706. While Mr. Cook maintains the *Eby* approach is more appropriate, he is entailed to relief under either approach.

1. The *Eby* Approach: Vacate And Remand So The District Court Can Evaluate The Claims Under The Proper Standard

In *Eby*, the Idaho Supreme Court found the district court erred by not analyzing the petitioner's claims under Rule 60(b). *Eby*, 148 Idaho at 737. It proceeded to vacate the erroneous order denying relief and to remand the case so the district court could

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since "a collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective assistance claim," and, "To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney." *Id*. at 1317; *compare Eby*, 148 Idaho at 737 (echoing the concerns about the lack of meaningful representation in post-conviction proceedings, the defendant's only opportunity to advance certain constitutional challenges to his

consider the claim under the appropriate provision. *Eby*, 148 Idaho at 737. The reason it did so is that Rule 60(b) "is a matter of discretion for the district court," and:

> This Court has held that when the discretion exercised by a trial court is affected by an error of law, our role is to note the error made and remand the case for appropriate findings. In this case, unless there is an alternative ground for upholding the district court's decision, this matter must be remanded to the district court for that court to exercise its discretion in determining whether [the petitioner] is entitled to relief.

Id. (internal quotation omitted); *compare Southern Idaho Production Credit Ass'n v. Gneiting*, 109 Idaho 493, 495 (1985) (explaining that, even though the moving party's case for relief under Rule 60(b) was, in the Court's opinion, "doubtful in the extreme," the improper denial of Rule 60(b) relief in that case would still be reversed because "it is the policy in Idaho that relief is favored in doubtful cases. It is further the policy of this Court to prefer adjudication upon merits rather than adjudication upon default") (internal citation omitted).[8] Since the district court erred by not analyzing Mr. Cook's motion under Rule 60(b), the proper remedy under *Eby* is to vacate the erroneous order denying that motion and remand this case so that the district court can make findings under Rule 60(b).

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conviction and sentence); *see also Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (applying *Martinez* to a post-conviction system similar to Idaho's).

[8] The *Gneiting* Court "restrict[ed] the precedential value of this opinion to its facts and circumstances." *Gneiting*, 109 Idaho at 494. As such, *Gneiting* does not dictate the result in other, similar cases. However, its process of analysis still remains a useful example of how to analyze the facts and law in this context. *See, e.g., Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (explaining even "consideration of [an] unpublished opinion, not as binding precedent but as an example, was appropriate").

2. The *Bias* Approach: Evaluate Whether There Is Merit To The Claims Under Rule 60(b) Before Remanding

In *Bias*, the Court of Appeals found the district court erred by considering a motion for reconsideration under Rule 59(e) instead of Rule 60(b). *Bias*, 159 Idaho at 706. However, unlike *Eby*, the *Bias* Court examined whether the petitioner's claims actually had merit under Rule 60(b) before deciding whether to grant relief. *Bias*, 159 Idaho at 706-07; *see also Reeves v. Wisenor*, 102 Idaho 271, 272 (1981) (refusing to remand a case under Rule 60(b) due to a notice violation because "no real justiciable controversy," no meritorious defense to summary dismissal, had been shown by the moving party). Because the *Bias* Court concluded the claims in that case did not have merit, it held that was an alternative legal theory upon which it could affirm the district court's otherwise-erroneous order denying the motion for reconsideration. *Bias*, 159 Idaho at 706-07. If that is, in fact, the proper analysis, this Court should still vacate the order denying Mr. Cook's motion for reconsideration because his claims have merit under Rule 60(b) in several respects. First, Mr. Cook's allegation that Mr. Nelson failed to file additional evidence in support of the petition is a viable claim under Rule 60(b)(6). Second, Mr. Cook's allegation that Mr. Nelson failed to file a viable motion to reconsider under Rule 11(a)(2)(B)[9] at Mr. Cook's request is a viable claim under Rule 60(b)(1).

[9] Although Mr. Cook specifically contended Mr. Nelson should have filed a motion for reconsideration pursuant to Rule 11(a)(2)(B) (R., p.195), since the Final Judgment issued immediately after the summary dismissal order (*see* R., pp.162, 72), such a motion would have needed to be brought under Rule 59(e) instead of Rule 11(a)(2)(B).

The first claim, viable under Rule 60(b)(6), is based on Mr. Nelson's failure to file anything in response to the pending summary dismissal motion. That claim is almost identical to the claim which the Idaho Supreme Court found to have merit in *Eby*. In *Eby*, counsel was appointed after the petitioner filed a *pro se* petition. *Eby*, 148 Idaho at 733. Initially-appointed counsel filed no additional information in support of the petition, and eventually, the case was transferred to another attorney. *Id*. The new attorney represented, in response to several notices of pending summary dismissal issued over the course of several years, that he "conducted a 'review, investigation, research and analysis of post-conviction issues' and assured the court he would file an amended petition." *Id*. However, the new attorney never actually filed anything in support of the petition. *Id*. The petition was summarily dismissed as a result. *Id*. That, the Idaho Supreme Court explained, was sufficient to make out a claim "in which I.R.C.P. 60(b) relief may well be warranted" (*i.e.*, the claim had merit under Rule 60(b)). *Id*. at 737.

Like in *Eby*, the district court appointed counsel to represent Mr. Cook on his *pro se* motion and petition. (R., p.89) Like in *Eby*, that initial attorney, Mr. Grove, did not file anything in support of the petition, and the case was eventually transferred to a new attorney. (*See* R., p.155; *see generally* R.) Like in *Eby*, the new attorney, Mr. Nelson, told the court that he was investigating potential issues and intended to file documents

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Straub, 145 Idaho at 71 (noting the difference between the two rules). That distinction does not, however, deprive Mr. Cook's claim of merit. *See id*. (considering the merits of the motion in question under Rule 59(e) even though the motion had specifically invoked Rule 11(a)(2)(B)).

in support of Mr. Cook's petition. (R., p.156.) Like in *Eby*, the issue of summary dismissal had been pending for a while, as the prosecutor noted it had been "noticed up a couple different times prior to the extension" to allow Mr. Nelson to act. (2/8/16 Tr., p.5, Ls.10-11.) Like in *Eby*, Mr. Nelson never actually filed anything in support of Mr. Cook's petition. (*See* 2/8/16 Tr., p.4, Ls.20-25; *see generally* R.) Like in *Eby*, the petition was summarily dismissed as a result. (*See* 2/8/16 Tr., p.5, Ls.3-17.) Therefore, Mr. Cook's claim had the same merit under Rule 60(b) as did the claim in *Eby*.

In fact, the record shows there was new information Mr. Nelson could have presented in support of Mr. Cook's petition. As substitute counsel, Mr. Carpenter demonstrated, it was possible to secure appropriate affidavits which specifically addressed the district court's concerns with the initial petition: what theory of defense trial counsel should have pursed, who the witnesses he should have interviewed were, and what their testimony would have been. (*Compare* R., pp.122-23 (the district court articulating its concerns); *with* Aug. pp.4-5, 8-17 (affidavits of Mr. Ames and Robert Cook which speak to those concerns).) That further demonstrates that Mr. Cook's first claim has merit under Rule 60(b).

The second claim, viable under Rule 60(b)(1), is based on Mr. Nelson's failure to file a motion for reconsideration of the order summarily dismissing the petition at Mr. Cook's request. Rule 60(b)(1) allows a party to claim relief from a judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect, provided the moving party also "plead[s] facts which, if established, would constitute a defense to the action."

Meyers v. Hansen, 148 Idaho 283, 289 (2009) (internal quotation omitted); *cf. Baldwin v. State*, 145 Idaho 148, 153 (2008) (explaining a post-conviction petition need only show a genuine issue of material fact – that, with all the facts and inferences in the record considered in the light most favorable to the petitioner, he would be entitled to relief – to survive summary dismissal). Counsel's failure to reasonably act to prevent improper default judgment constitutes excusable neglect under Rule 60(b)(1). *See, e.g., Jonsson v. Oxborrow*, 141 Idaho 635, 638-39 (2005) (finding excusable neglect when the party reasonably relied on an agent to find him an attorney to respond to a lawsuit, but the agent failed to do so, resulting in default judgment against the party); *compare Gneiting*, 109 Idaho at 494 (explaining that, where counsel failed to respond reasonably to pending default judgment, the Supreme Court would not "visit the sins of the attorney upon the head of his clients," and thus, found the moving party had shown excusable neglect under Rule 60(b)(1)).

The alleged facts, if established, would show Mr. Cook timely instructed, and thus, reasonably relied on, his attorney, Mr. Nelson, to file a motion for reconsideration of the order summarily dismissing his petition. (*See* R., p.198.) Therefore, Mr. Cook would have a meritorious claim under Rule 60(b)(1) if the facts, if established, would also show the requested motion for reconsideration would have had merit.

The facts show Mr. Cook would have had a meritorious claim under Rule 59(e). One of the arguments a party can make under Rule 59(e) is to alert the district court to a fact in the record which was apparently omitted in the decision, but which, if taken into

account, could change the district court's conclusions. *Straub*, 145 Idaho at 71 (explaining that such a claim "specified a sufficient basis for the [Rule 59(e)] motion and relief sought"). The facts in the record – namely, the sworn statements of Nathan Ames and Robert Cook which were filed with Mr. Cook's motion for appointment of conflict counsel and after the district court issued its Notice of Intent To Dismiss – do precisely that.

Mr. Ames' sworn statement revealed that trial counsel was supposed to have interviewed Mr. Ames, but had not. (R., p.144.) It also revealed that, had Mr. Ames been interviewed by trial counsel, he could have provided information refuting certain evidentiary points, such as, that he, Mr. Ames, had told officers Mr. Cook had not been riding the motorcycle the police had been pursuing. (R., p.144.) Furthermore, Robert Cook attested there were witnesses who could have testified that Mr. Cook had not been at the Rodeo Bar, as he had been working on a motorcycle at Mr. Ames' house. (R., p.140.) Together, viewed in the light most favorable to Mr. Cook, those two statements reveal that Nathan Ames was a potential witness with knowledge of potentially-exculpatory information that was relevant to an alibi defense, and that trial counsel was aware of, but did not interview, Mr. Ames. Additionally, Robert Cook's affidavit reveals he could have provided additional testimony supporting that theory of defense, as he could testify that Mr. Cook's motorcycle had a rear license plate. (R., p.140; *compare* Exhibits, p.39 (the initially-pursuing officer describing the suspect motorcycle as not having a rear license plate).) As such, those sworn statements

provided precisely the information which the district court had said was missing from the original petition: the identity of the potential witnesses, the nature of their testimony, and the defense theory their testimony would support. (*See* R., pp.122-23.)

Therefore, viewed in the light most favorable to Mr. Cook, those sworn statements show a genuine issue of material fact on the underlying question – whether trial counsel was ineffective for not interviewing known witnesses about potentially-exculpatory information. *Compare Milburn v. State*, 130 Idaho 649, 654 (Ct. App. 1997) (holding that where there is "no explanation why such potentially exculpatory and easily obtainable information was not pursued" by trial counsel, particularly when that information could disprove one of the components of the State's case, allegations of ineffective assistance of counsel for a failure to interview potential witnesses raise genuine issues of material fact). Therefore, the facts, if established, would show a defense to summary dismissal, meaning a Rule 59(e) motion would have had merit. Since a Rule 59(e) motion would have had merit, Mr. Cook's second claim had merit under Rule 60(b)(1).

Since Mr. Cook's Rule 60(b) motion has merit in regard to either of those claims, even under the *Bias* remedy framework, this Court should grant relief because the district court erroneously denied Mr. Cook's Motion for Reconsideration.

CONCLUSION

Mr. Cook respectfully requests this Court vacate the order denying his Motion for Reconsideration and remand this case for further proceedings.

DATED this 5th day of January, 2017.

_____/S/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of January, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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CHRISTOPHER S NYE
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_____/S/_____
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BRD/mc