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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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 by analyzing his motion for reconsideration of the order summarily dismissing his petition for post-conviction relief under the wrong standard. The district court evaluated that motion under I.R.C.P. 59(e) (*hereinafter*, Rule 59(e)) instead of, as the merits of the motion reveal was appropriate, I.R.C.P. 60(b) (*hereinafter*, Rule 60(b)).

The State makes several responses, none of which are persuasive. Under the proper standards, the State's arguments are either irrelevant to the issues on appeal or are meritless given the facts of this case. Rather, the proper analysis reveals the district court used the wrong standard to assess Mr. Cook's motion for reconsideration, and this case should be remanded for further proceedings as a result of that error.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Cook's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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

The State's arguments in this case fail to recognize or give effect to the proper standards of review on appeal. As a result, its arguments are either irrelevant given, or meritless under, the proper analysis.

For example, the State contends the district court did not err by using Rule 59(e) to evaluate Mr. Cook's motion for reconsideration. (*See* Resp. Br., pp.11-12 (arguing that the second factor identified in *Bias v. State*, 159 Idaho 696, 706 (Ct. App. 2015), indicates Rule 59(e) was the appropriate standard).) According to the State, because Mr. Nelson (the post-conviction attorney whose performance is at issue) told the district court he did not intend to file additional affidavits in support of the post-conviction petition, Mr. Cook did not present "new" information by bringing his motion for reconsideration based on Mr. Nelson's failure to respond to the pending summary dismissal. (*See* Resp. Br., pp.10-11.) That argument is belied by *Bias* itself.

In *Bias*, the Court of Appeals held that a motion for reconsideration which, just like Mr. Cook's motion, "contained new information via allegations of ineffective assistance of post-conviction counsel" was properly considered under Rule 60(b), and thus, the district court erred by using Rule 59(e) to evaluate that motion. *Bias*, 159 Idaho at 706. The reason for that result is that a claim about the sufficiently of counsel's representation is a distinctly different issue from the underlying claim counsel should have made. *See, e.g., State v. Pentico*, 151 Idaho 906, 913 (Ct. App. 2011); *Sparks v. State*, 140 Idaho 292, 295-96 (Ct. App. 2004). As such, just because the district court was aware that Mr. Nelson was not going to file a response to the pending

summary dismissal, that does not mean the district court was, *ipso facto*, also aware of the claim that Mr. Nelson had not provided any meaningful representation.

The record also belies the State's argument in this regard, as it reveals that, at no point prior to the motion for reconsideration did Mr. Cook make any allegations or present facts to demonstrate that Mr. Nelson had failed to provide any meaningful representation. (*See generally* R.) In fact, it was not until he filed that motion that the copies of the affidavits which Mr. Nelson could have, but failed to, obtain and file in support of the petition were presented to the district court. (*See* Aug., pp.4-5, 8-17.) Therefore, under the applicable legal standards, Mr. Cook's claim that Mr. Nelson failed to provide meaningful representation because Mr. Nelson failed to respond to the pending summary dismissal presented a new issue based on new information (the new affidavits). As such, both of the *Bias* factors indicate Mr. Cook's motion for reconsideration was not a Rule 59(e) motion, but rather, was a Rule 60(b) motion.[1] *See Bias*, 159 Idaho at 706. Thus, the State's argument to the contrary – that the district court properly evaluated Mr. Cook's motion under Rule 59(e) – is wholly inconsistent with both the facts of this case and the relevant law, and so, should be rejected.

Likewise, the State's arguments as to the proper remedy for that error do not comport with the proper standards. Specifically, the State's arguments fail to account for the Idaho Supreme Court's decision in *Eby v. State*, in which the Supreme Court explained that, when the district court considers a motion for reconsideration under the wrong standard, that should be the end of the inquiry; such a case needs to be remanded so the district court can make the necessary factual findings under the proper standard. *Eby v. State*, 148 Idaho 731, 737 (2010). The State offers no argument on this point. (*See generally* Resp. Br.)

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[1] The State conceded that the first *Bias* factor – the time of the filing – indicated the motion was not a Rule 59(e) motion. (Resp. Br., pp.11-12.)

Rather, the State relies only on the Court of Appeals' subsequent decision in *Bias* for its remedy analysis, thus simply asserting this Court should assess whether Mr. Cook's claims actually have merit under Rule 60(b) before remanding it. (*See* Resp. Br., p.14.) However, the Supreme Court has made it clear that "when there is a conflict between our decisions on an issue of law and those of the Court of Appeals," "we simply expect lower courts, including the Court of Appeals, to follow decisions of this Court." *State v. Clinton*, 155 Idaho 271, 272 n.1 (2013). That means *Eby*, not *Bias*, controls the remedy analysis in this case, and the State's arguments which, though based on *Bias*, are contrary to *Eby* should be rejected. Under *Eby*, this case should be remanded because the district court considered the motion for reconsideration under the wrong standard.

Even if this Court concludes *Bias*'s approach to the remedy analysis is correct, the State's arguments about the merits of Mr. Cook's claims under Rule 60(b) still fail to recognize and apply the proper standards. For example, the first basis on which Mr. Cook's allegations were viable under Rule 60(b) is his allegation that Mr. Nelson did not provide any meaningful representation of Mr. Cook. *See Eby*, 148 Idaho at 737 (holding that where there is "a complete absence of meaningful representation" by post-conviction counsel, that is a viable claim for relief under Rule 60(b)(6)). The State contends that, because Mr. Nelson had some communication with Mr. Cook, Mr. Nelson stated he performed research on the issues in this case, and Mr. Nelson filed generic procedural motions, there was not "a *complete absence* of meaningful representation." (Resp. Br., p.16 (emphasis from original).) However, that argument was effectively rejected by the Idaho Supreme Court in *Eby*.

Just as Mr. Nelson did, the attorney in *Eby* submitted "filings with the district court [which] were four responses to the notices of proposed dismissal and requests for retention.

These responses did indicate that [the attorney] had conducted a 'review, investigation, research and analysis of post-conviction issues.'" *Eby*, 148 Idaho at 733. Following the logic of the State's argument, those facts would be enough to foreclose relief under Rule 60(b)(6). (*See* Resp. Br., pp.12, 15-16.) And yet, the *Eby* Court reached the opposite conclusion, holding that, even with those facts, the record still showed "the complete absence of meaningful representation." *Id*. at 737.

Thus, the State's focus on whether there was "a complete absence" of any attorney-like activities was effectively rejected by the *Eby* Court. Rather, the *Eby* Court's analysis reveals the proper focus is on whether there was any "*meaningful* representation." *Eby*, 148 Idaho at 737 (emphasis added). There was nothing *meaningful* in the *Eby* attorney's filing of generic motions for continuation or his assertion that he had reviewed and researched the allegations in the petition because that attorney still failed to file any sort of response to the pending notice of summary dismissal. *See id*. As a result, relief under Rule 60(b)(6) was appropriate. *Id.*

Similarly, there was nothing *meaningful* about Mr. Nelson's filing of the generic motion for continuance, his communication with Mr. Cook, or his assertion that he had researched the potential issues in this case because Mr. Nelson still failed to make any response to the pending notice of, and motion for, summary dismissal. That is particularly evident in this case since Mr. Cook also presented evidence which demonstrated there was a response Mr. Nelson could have made in that regard – he could have, as Mr. Cook's subsequent attorney did, obtained and filed copies of appropriate affidavits supporting the claims in the petition. When there is no explanation for why counsel did not pursue potentially-exculpatory and easily-obtainable information, the petitioner "raises a serious question regarding the vigor and competence of [the] representation of [the petitioner]." *See Milburn v. State*, 130 Idaho 649, 654 (1997). Based on

that, Mr. Cook, just like the petitioner in *Eby*, alleged a viable claim for relief under Rule 60(b)(6). As such, the State's arguments, which are contrary to that clear Idaho Supreme Court precedent directly on point, should be rejected, and this case should be remanded even under the *Bias* framework.

The same conclusion exists in regard to the second basis on which Mr. Cook's motion was viable under Rule 60(6): that the judgment should be set aside because, due to Mr. Cook's excusable neglect (his reliance on Mr. Nelson), Mr. Cook did not file an otherwise-viable motion to reconsider the judgment under I.R.C.P. 11(a)(2)(b) (*hereinafter,* Rule 11(a)(2)(b)) within fourteen days of the judgment.[2] The State's first contention – that this issue was not raised to the district court – is belied by the record. (*See* Resp. Br., p.17.) Through the Rule 60(b) motion and Mr. Cook's affidavit in support thereof, Mr. Cook expressly requested relief on the basis that he had requested Mr. Nelson file a viable a motion to reconsider the judgment within the statutorily-authorized period, but Mr. Nelson failed to do so. (R., pp.195, 198.) Thus, that issue was before the district court. The fact that the district court did not evaluate Mr. Cook's allegations for mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1) does not change that conclusion. (*See* Resp. Br., p.17 (arguing the district court did not have the opportunity to rule on this issue).) Rather, it is only further evidence of the district court's error in deciding to analyze the whole motion under Rule 59(e) instead of Rule 60(b).

The State's second contention, which goes to the merits of the Rule 60(b)(1) analysis, is similarly flawed. First, the State improperly focuses on Mr. Nelson as the source of the neglect.

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[2] Rule 11(a)(2) has since been renumbered as I.R.C.P. 11.2(b) (*hereinafter,* Rule 11.2(b)). Additionally, as noted in the Appellant's Brief, due to the timing of the final judgment, the requested motion to reconsider the judgment may have needed to be brought under Rule 59(e) instead of Rule 11(a)(2)(b). (*See* App. Br., p.17 n.9.) However, that concern does not change the conclusion that Mr. Nelson's failure to file the requested motion helps establish the basis for a viable claim under Rule 60(b)(1).

(*See, e.g.,* Resp. Br., p.17 ("[Mr.] Cook has also failed to show that refusal to file a reconsideration motion here would have been neglect, as opposed to a reasonable strategic decision.").) The excusable neglect to which Rule 60(b)(1) is referring is *Mr. Cook's* neglect in not filing the motion to reconsider the judgment within the allowed time.[3] *See* Rule 60(b)(1). The point of this rule is that, while a party is usually bound by his attorney's actions, when the failure to make an otherwise-viable action is due to the attorney's unreasonable performance, the consequences of the attorney's unreasonable failure will not be enforced against the attorney's client. *See, e.g., Jonsson v. Oxborrow*, 141 Idaho 635, 638-39 (2005) (holding that the party's failure to answer the complaint, which led to a default judgment, was due to excusable neglect under Rule 60(b)(1) because the party had reasonably relied on an agent to find him an attorney to respond to that complaint, but the agent failed to do so); *compare Southern Idaho Production Credit Ass'n v. Gneiting*, 109 Idaho 493, 494 (1985) (explaining that a party's failure to respond to a motion for default judgment constituted excusable neglect under Rule 60(b)(1) because the fault for failing to respond lay with counsel, not the party, and the Supreme Court would not "visit the sins of the attorney upon the head of his clients").[4]

The reasoning behind that point is that is that the courts should opt to resolve such matters on their merits. *Suitts v. Nix*, 141 Idaho 706, 709 (2005) ("Because judgments by default

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[3] Even if the proper analysis focused on Mr. Nelson's decision to not file the requested motion, there is no strategic reason for an attorney to not file a viable motion to reconsider the judgment since such a motion is the means by which a party can ensure the district court's decision was based on the proper law and facts. *See Agrisource, Inc. v. Johnson*, 156 Idaho 903, 913 (2014). As discussed *infra*, the district court's decision to summarily dismiss Mr. Cook's petition does not appear to have taken all the relevant facts and law into account. Therefore, there was no strategic basis for Mr. Nelson to have not filed the requested motion to ensure the district court took all the relevant facts and law into account.

[4] As in the Appellant's Brief, due to the language in the *Gneiting* Opinion, that case is only provided as an example of how a learned court has analyzed the facts and law in the Rule 60(b)(1) context, not as controlling precedent dictating a result in Mr. Cook's case. (*See* App. Br., p.16 n.8.)

are not favored, a trial court should grant relief [under Rule 60(b)] in doubtful cases in order to decide the case on the merits."); *cf. Eby*, 148 Idaho at 737 (acknowledging that particular need to resolve these sort of claims on their merits since post-conviction is the "only available proceeding for [the petitioner] to advance [certain] constitutional challenges to his conviction and sentence"). Therefore, the State's arguments as to why Mr. Nelson may have decided not to file the requested motion are ultimately irrelevant to the proper analysis under Rule 60(b)(1). Rather, the proper analysis looks at whether Mr. Cook was acting as a reasonably prudent person would in the same circumstances, and thus, his failure to file that otherwise-viable motion within the time allowed due to his reliance on his attorney, who failed to file that requested motion, constituted excusable neglect.

To the underlying premise in that regard, the State contends the requested motion to reconsider the judgment would not have been viable because the State questioned the credibility of the allegations upon which the requested motion would have been based (the affidavits filed with Mr. Cook's *pro se* motion for conflict counsel). Specifically, the State focuses on whether those allegations would have actually shown trial counsel, Mr. Nona, was ineffective for not investigating the potential alibi defense based on a concern that the allegations in those affidavits would not actually establish an alibi defense. (*See* Resp. Br., pp.17-18.) In making that argument, the State again fails to appreciate the proper analysis.

Rule 60(b)(1) only requires the moving party to "plead facts which, if established, would constitute a defense to the action." *Meyers v. Hansen*, 148 Idaho 283, 289 (2009) (internal quotation omitted). Since "the action" which the requested motion was to have addressed is the order for summary dismissal, the proper analysis looks at whether the alleged facts would constitute a defense to summary dismissal. *See id*. To establish a defense to summary dismissal,

the petitioner need only show the existence of a genuine issue of material fact, meaning he shows that, with all the facts considered in the light most favorable to the him, he would be entitled to relief. *Baldwin v. State*, 145 Idaho 148, 153 (2008). As such, the State's argument about the credibility of the allegations in the affidavits is irrelevant because that argument fails to consider the facts in the light most favorable to the petitioner; viewed in the light most favorable to Mr. Cook, those allegations are considered to be both credible and accurate. *See, e.g., Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993) (holding that, when the evidence is construed liberally in the petitioner's favor "as required on a review of a summary dismissal," the allegations of the petitioner alone may establish a sufficient basis to survive summary dismissal).

The alleged facts would, if true, entitle Mr. Cook to post-conviction relief. One of the bases for the order of summary dismissal was that Mr. Cook had not identified the witness or the testimony trial counsel should have investigated. (R., pp.122-23.) However, the affidavits Mr. Cook attached to his *pro se* motion for conflict counsel, which the district court evidently did not consider in its summary dismissal analysis, not only identified a relevant witness who may have had knowledge relevant to a potential alibi defense, but alleged that trial counsel was aware of that potential witnesses and did not interview him. (*See* R., pp.134-35, 144 (alleging (1) per Robert Cook, there was a potential alibi defense – that Mr. Cook was at Mr. Ames' house working on his motorcycle at the time, and (2) per Mr. Ames, that trial counsel was supposed to have interviewed Mr. Ames as a potential witness, but trial counsel did not do so).) Therefore, that information, if considered, would have eliminated the potential basis for summary dismissal. As a result, the requested motion to reconsider the judgment would have allowed Mr. Cook to ensure the summary dismissal decision was made on a proper understanding of the facts and relevant law, and under that proper understanding, there was a genuine issue of material fact.

That means the facts Mr. Cook pled in his Rule 60(b) motion, if established, would show a defense to the order for summary dismissal, and so, his Rule 60(b) motion was viable under Rule 60(b)(1). Put another way, this shows the disadvantage caused by Mr. Nelson's failure to file the requested motion (*see* Resp. Br., p.19 (claiming that failure to act caused no disadvantage to Mr. Cook)) – Mr. Cook's petition for post-conviction relief was dismissed based on an apparent misunderstanding of what the facts in the record actually showed, and Mr. Nelson's failure to file the requested motion deprived Mr. Cook of his opportunity to bring that issue to the district court's attention. *See Agrisource*, 156 Idaho at 913 (discussing the reason such motions to reconsider the judgment are allowed under Rule 11(a)(2)(b), as well as the difference between such motions and motions brought under Rule 60(b)).

Finally, the State contends that "it is farfetched that [the allegations in the affidavits which would have underlaid the requested motion] would have affected the notice of dismissal." (Resp. Br., p.18.) However, that argument also fails to appreciate the entirety of the proper analysis in this regard. The analysis in this context is looking for *the possibility* that there was a defense to the summary dismissal order which the district court did not get to, but should have been able to, consider; the question is not whether the defendant has proved that summary dismissal was ultimately erroneous. *See Meyers*, 148 Idaho at 289 (requiring only that the moving "plead facts which, *if established*, would constitute a defense to the action" to show his motion would be viable under Rule 60(b)) (emphasis added). It is for this reason that, even though, in the Supreme Court's opinion, the moving party's case for relief under Rule 60(b) was "doubtful in the extreme," the *Gneiting* Court still granted relief under Rule 60(b)(1). *Gneiting*, 109 Idaho at 495; *accord Suitts*, 141 Idaho at 709 ("Because judgments by default are not

favored, a trial court should grant relief in doubtful cases in order to decide the case on the merits.").

Thus, under the proper standards and analysis, the district court erred in evaluating Mr. Cook's motion for reconsideration under Rule 59(e) instead of Rule 60(b), and this Court should remand this case in light of that error, even under the *Bias* framework.

CONCLUSION

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

DATED this 23rd day of May, 2017.

_________/s/_________________
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of May, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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CHRISTOPHER S NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_________/s/_________________
EVAN A. SMITH
Administrative Assistant

BRD/eas