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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

WOODROW JOHN GRANT,)	
)	No. 39207
Petitioner-Appellant,)	
)	Bannock Co. Case No.
vs.)	CV-2011-759
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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District Judge

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FILED - COPY

OCT 30 2013

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

ATTORNEY FOR
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STATEMENT OF THE CASE

Nature of the Case

Woodrow John Grant appeals from the summary dismissal of his petition for post-conviction relief.

Statement of Facts and Course of the Proceedings

The underlying facts of Grant's case have been previously outlined by the Idaho Supreme Court:

In 2006, Woodrow John Grant pleaded guilty to aggravated battery; he successfully completed a period of retained jurisdiction and was placed on probation. In 2009, Grant was charged with possession of methamphetamine, domestic battery, aggravated assault, and unlawful possession of a firearm. Grant's appointed counsel moved to withdraw, stating that Grant had reneged on an agreed-upon plea bargain and that communications between them had broken down. The district court denied the motion. Later, Grant pled guilty to possession of a controlled substance and domestic battery, and admitted to violating the terms of his probation. The district court considered a letter and live testimony from the victim of Grant's domestic battery, in which the victim expressed her opinions on Grant's crime, character, and the sentence that would be proper for him. Thereafter, the district court sentenced Grant to five years fixed and five years indeterminate for domestic battery, to be served concurrently with a sentence of two years fixed and three years indeterminate for possession of methamphetamine. The district court also revoked Grant's probation and executed his previously suspended sentence of four years fixed and six years indeterminate. The two new sentences were to be served consecutively to the reinstated 2006 sentence. Therefore, Grant was sentenced to a total of nine years fixed and eleven years indeterminate – far less than the thirty-two year maximum combined sentence for his three crimes. Grant requested leniency in three I.C.R. 35 motions, which the district court denied.

State v. Grant, 154 Idaho 281, ___, 297 P.3d 244, 245 (2013). Grant's judgments of conviction and sentence were affirmed on appeal. Id. at ___, 297 P.3d at 251.

Grant filed a *pro se* petition and affidavit for post-conviction relief asserting twelve separate claims of ineffective assistance of counsel, that there was new evidence not previously presented, his guilty plea was induced, his guilty plea was involuntary because of mental incompetence, and his sentence was excessive. (R., pp.1-8.) Grant also filed a motion and affidavit in support for the appointment of post-conviction counsel. (R., pp.9-12.) The district court filed a notice of intent to dismiss Grant's petition for post-conviction relief, wherein it denied Grant's motion for the appointment of counsel because it found his claims were frivolous and failed to allege facts raising the possibility of a valid claim. (R., pp.23-49.) Grant filed a response to the court's notice of intent to dismiss, making the same arguments he asserted in his petition, with additional factual assertions, but failing to support his claims with any additional documents or affidavits. (R., pp.51-60.) At the same time, Grant filed a motion to amend his petition to include "underlying criminal records including, but not limited to, the county jail's records during defendant's stay there, the psych-evaluation, and the past and current medical records including mental health files." (R., p.50.) The court thereafter entered an order dismissing Grant's petition for post-conviction relief finding Grant's claims were without merit. (R., pp.86-107.)

Grant timely appealed. (R., pp.117-121.)

ISSUES

Grant states the issues on appeal as:

1. Whether the district court erred when it declined to appoint counsel in Mr. Grant's post-conviction action, even though he had made the necessary showing to merit appointment of counsel.
2. Whether the district court erred when it summarily dismissed Mr. Grant's petition for post-conviction relief without properly considering the undisputed factual allegations he made in his verified petition and affidavit in support of that petition.

(Appellant's brief, p.5.)

The state rephrases the issue as follows:

Has Grant failed to show error in the district court's denial of post-conviction counsel?

ARGUMENT

I.

Grant Has Failed To Establish That The District Court Abused Its Discretion By Denying His Request For The Appointment Of Counsel

A. Introduction

Grant challenges the summary dismissal of his successive post-conviction petition and the denial of his request for counsel, contending the claims in his petition, considered either alone or in combination with his response to the district court's notice of intent to dismiss, raised genuine issues of material fact entitling him to an evidentiary hearing or, at a minimum, raised the possibility of a valid claim entitling him to the appointment of post-conviction counsel. (Appellant's brief, pp.6-27. Grant's arguments fail. Application of the law to the facts supports the district court's determination that Grant's pleadings failed to establish even the possibility of a valid post-conviction claim. Grant has therefore failed to show error in either the denial of his request for counsel or the dismissal of his petition for post-conviction relief.¹

¹ A post-conviction claim is properly dismissed if the petitioner fails to present evidence sufficient to show a material issue of fact on which relief can be granted. Workman v. State, 144 Idaho 518, 522-23, 164 P.3d 798, 802-03 (2007). Because this is a higher burden than demonstrating the possibility of a valid claim necessitating the appointment of counsel, Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), Melton v. State, 148 Idaho 339, 345, 223 P.3d 281, 287 (2009), the remainder of this section of the Respondent's brief will focus on the "possibility of a valid claim" standard on the assumption that if Grant did not show entitlement to counsel the dismissal of his claims is proper, but that if he did show entitlement to counsel then dismissal without the opportunity of counsel to appear was error.

B. Standard Of Review

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 "permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be

expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, “[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001) (quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111).

C. Grant Has Failed To Show That He Was Entitled To The Appointment Of Post-Conviction Counsel

Grant asserts on appeal that the district court erred by denying his motion for appointment of counsel because he “made the necessary showing to require appointment of counsel as he alleged facts supporting some of the elements of his claims for relief.” (Appellant’s brief, p.6.) Grant also argues the court violated his constitutional right to due process by failing to appoint post-conviction counsel because “the post-conviction action was [his] first opportunity to present these issues, particularly his claims of ineffective assistance of counsel.” (Appellant’s brief, p.6.) Grant’s arguments are unfounded.

1. Grant Does Not Have A Constitutional Right To The Appointment Of Counsel In A Post-Conviction Proceeding

Idaho law does not grant a post-conviction petitioner an absolute right to counsel. Rather, counsel may be denied for frivolous claims. I.C. § 19-4904; Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. Grant asserts on appeal that the district court erred by applying Idaho law in denying the

appointment of post-conviction counsel because he had a due process right to be represented by counsel “since the post-conviction action was Mr. Grant’s first opportunity to present these issues, particularly his claims of ineffective assistance of counsel.” (Appellant’s brief, p.6.) Although he concedes “[t]he question of whether there is such a due process right has yet to be decided by the United States Supreme Court,” Grant urges this Court to find Idaho law regarding the appointment of counsel unconstitutional because he has an absolute constitutional right to post-conviction counsel. (See generally, Appellant’s brief, pp.6-13.) Grant relies on the United States Supreme Court case Martinez v. Ryan, 132 S.Ct. 1309 (2012), for his contention that there should be a due process right to counsel in state post-conviction cases although he recognizes the Court “did not completely resolve that question.” (See generally, Appellant’s brief, pp.7-13.) Grant’s reliance on Martinez is misplaced and his request for remand on this basis should be rejected.

At issue in Martinez was “whether a federal habeas court may excuse a procedural default of an ineffective-assistance of counsel claim when the claim was not properly presented in state court due to an attorney’s errors in an initial-review collateral proceeding.” 132 S.Ct. at 1313. In resolving this issue, the Court held, “Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Martinez, 132

S.Ct. at 1320. Martinez clearly has no relevance here not only because this is not a federal habeas proceeding, but also because Martinez has no application in Idaho since, unlike the Arizona law at issue in Martinez, Idaho does not categorically bar defendants from raising ineffective assistance of counsel claims on direct appeal, see Smith v. State, 146 Idaho 822, 834, 203 P.3d 1221, 1233 (2009).

Grant has failed to establish the district court erred by applying Idaho law to his request for post-conviction counsel.

2. The District Court Correctly Denied Grant's Request For Counsel Under Idaho Law

Grant next asserts that even if this Court declines to find an absolute constitutional right to post-conviction counsel, the district court still erred in denying his request for the appointment of counsel under Idaho law because he "demonstrated the potential of a valid post-conviction claim." (Appellant's brief, p.13.) Grant has failed to show any basis for the reversal of the order denying his request for counsel because, as the district court correctly concluded, the allegations in Grant's petition for post-conviction failed to raise even the possibility of a valid claim.

In analyzing Grant's request for the appointment of post-conviction counsel, the court cited the correct legal standard (see R., pp.24-27) before concluding Grant's allegations were frivolous and Grant failed to allege facts raising the possibility of a valid claim (R., p.27). The court specifically stated:

Based on the following findings, the Court hereby DENIES the Petitioner's Motion for Appointment of counsel, as the

allegations made by the Petitioner are frivolous for the reasons stated herein. Furthermore, this Court finds the Petitioner did not allege facts raising even the possibility of a valid claim. Therefore, the appointment of counsel is not required.

(R., p.27 (capitalization original).) Grant has failed to show he presented a viable claim of post-conviction relief, and has therefore failed to show error in the denial of his request for counsel.

3. Grant Has Failed To Establish A *Prima Facie* Case That His Counsel Was Ineffective For Failing To Advise Him Of His Right To Remain Silent During The Psychosexual Evaluation

In order to establish a *prima facie* claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

A post-conviction petitioner may demonstrate that his counsel was ineffective where counsel failed to inform him of his right to silence in relation to a psychosexual evaluation prepared for sentencing and the petitioner was

prejudiced. Estrada v. State, 143 Idaho 558, 564-565, 149 P.3d 833, 839-840 (2006). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994). If the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

Grant asserts his counsel failed to “advise, attend, or protect [his] interests during the psych-evaluation.” (R., p.3.) Further, Grant claims he “alleged facts [in his petition for post-conviction relief] which demonstrated a possibly valid claim that his attorney’s performance was deficient” in failing to “advise him about his *Estrada* rights in regard to the psychological evaluation conducted as a part of the presentence investigation.” (Appellant’s brief, p.15 (citation omitted).) The facts alleged by Grant in his petition were simply that he was not made aware that he “was not obligated to provide information that would be used against him.” (R., p.3.) The allegation that he was not advised of his rights, without more, does not show deficient performance or resulting prejudice. Although Grant asserted in his response to the district court’s notice of intent to dismiss his petition for post-conviction relief that he was never informed that he was not required to participate in the psychological evaluation (R., p.54), Grant

“presented no admissible evidence to demonstrate his counsel failed to advise him properly regarding his rights prior to his participation in the psychological examination.” (R.,p. 98.) Additionally, the district court found upon review of Grant’s guilty plea questionnaire that Grant understood his right to remain silent, his right to refuse to provide incriminating information, and that his attorney “had advised him that he had ‘a constitutional right not to submit to a court ordered psychosexual evaluation for purposes of sentencing.’” (R., p.98.)

Finally, Grant does not even claim that being fully informed would have changed his choices in relation to his participation in the evaluation. The district court did not err in concluding that Grant’s claims were disproved by the record and conclusory and therefore Grant failed to set forth the possibility of a valid claim of ineffective assistance of counsel regarding the issue of failing to advise of his rights as they related to his submission to the psychological examination.

4. Grant Has Not Shown The District Court Erred In Dismissing His Claim Of Ineffective Assistance Of Counsel For Failing To Protect Grant’s Interests As Relating To His PSI

Grant asserted in his petition for post-conviction relief that his counsel failed to “advise, attend, or protect [his] interests during the Pre-Sentence Investigation.” (R., p.3.) Grant claims he was deprived of the opportunity to challenge, explain, or rebut the information in his PSI because his “attorney had failed to review the PSI with him or to assist him in challenging erroneously-included or otherwise unreliable information contained therein.” (Appellant’s brief, p.21.) Grant takes the position on appeal that such failure was objectively

unreasonable and the allegation of such demonstrates the prejudice of counsel's performance. (Id.)

Nowhere in Grant's petition for post-conviction relief, accompanying affidavit, or response to the court's notice does he assert what erroneous information was contained within his PSI or used against him at sentencing. Grant's unsupported statement that counsel deprived him of the right to challenge erroneous information alone is insufficient to establish deficient performance or resulting prejudice. Because this claim is frivolous, the district court did not err by denying counsel.

5. Grant Has Not Made a *Prima Facie* Case For The Claim Of Ineffective Assistance Of Counsel For Failure To Provide Mitigating Evidence At Sentencing

In his petition for post-conviction relief, Grant alleged his counsel "failed to provide the sentencing court with mitigating evidence and evidence conflicting the victim's allegations despite such evidence being available[.]" (R., p.3.) In his accompanying affidavit, Grant asserted his victim had a "history of self-abuse" and had "threatened to blame [him] for injuries that were self-inflicted." (R., p.5.) Further, Grant stated the victim had "behavioral problems" and "brushes with the law" that had been "covered up." (Id.) Grant support these blanket statements with no admissible evidence. Grant claims he identified the evidence he believed trial counsel failed to offer in mitigation at his sentencing in his response to the district court's notice of intent to dismiss his petition for post-conviction relief:

Specifically, he alleged that there were two witnesses, one of whom would have contradicted the victim's version of events and who would have testified as to the overall inadequacies of the

investigation, and another who would have testified that the police had “lost’ testimony” or other evidence that should have been presented to the district court.

(Appellant’s brief, p.22 (citation omitted).) In his response to the district court’s notice of intent to dismiss his petition for post-conviction relief, Grant also included his attorney’s failure to provide “mental health record from public and private institutions” as evidence of ineffective assistance of counsel for not providing adequate mitigation information to the sentencing court. (R., p.55.)

To prevail on his claims that trial counsel was ineffective, a petitioner is required to present facts, supported by admissible evidence, to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Strickland v. Washington, 466 U.S. 668, 689 (1984). An ineffective assistance claim based on counsel’s failure to present evidence cannot satisfy the deficient performance or resulting prejudice prongs without providing the substance of the potential testimony or other admissible evidence of facts counsel should have discovered and presented. Knutsen v. State, 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007). To show deficient performance, a defendant must “overcome the strong presumption that counsel’s performance was adequate by demonstrating that counsel’s representation did not meet objective standards of competence.” Vick v. State, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct. App. 1998) (internal quotation omitted). Indeed, it is well established that appellate courts “will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation.” State v. Chapman, 120 Idaho

466, 469-470, 816 P.2d 1023, 1026-27 (Ct. App. 1991) (citing State v. Larkin, 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981); State v. Elisondo, 97 Idaho 425, 426, 546 P.2d 380, 381 (1976)).

Here, Grant is asking this Court to second-guess his trial counsel's strategy at sentencing on the basis of *lack* of evidence. However, he has failed to meet his affirmative duty to show, through the presentation of evidence, that his trial counsel's alleged decision to not present certain witnesses or the results of mental health evaluations for sentencing was because of inadequate preparation, ignorance of the relevant law, of any other objective shortcoming. That Grant currently believes that the better approach at sentencing would have been to argue that his victim's version of events was not true does not establish a non-frivolous claim of objective deficiency of trial counsel at sentencing.

Additionally, Grant failed to assert any prejudice, only claiming on appeal that it is "strongly implied" in his claims of ineffective assistance of counsel that "had the district court been presented with this evidence, Mr. Grant would have received a more lenient sentence." (R., p.22 (citation omitted).) Grant has failed to establish a potentially viable claim of deficient performance or resulting prejudice through his unsupported statements that trial counsel should have provided mitigating evidence at sentencing.

6. Grant Has Not Established The Possibility Of A Valid Claim That His Attorney Was Ineffective For Failing to Move For A Change Of Venue Or To Disqualify The Presiding Judge

In his petition for post-conviction relief, Grant made the unsupported allegation that his trial counsel failed to move for a change of venue "even when

counsel was informed that the victim's mother was a secretary of the local police chief." (R., p.2.) Additionally, Grant asserted the sitting trial judge should have been disqualified because of a potential bias. (Id.) These claims were not supported by any admissible evidence, only more unsupported factual claims, in Grant's response to the district court's notice of intent to dismiss his petition for post-conviction relief. (See R., p.52.)

Additionally, Grant has failed to even allege any prejudice. He does not allege any basis upon which a motion for a change of venue or to disqualify the trial judge would have been granted. Grant is not entitled to a presumption of prejudice as he seems to assert on appeal. (See, Appellant's brief, p.25 ("Those allegations also imply the argument that the decision not to challenge venue cause prejudice to Mr. Grant through the loss of due process and a neutral magistrate.").)

Grant failed to raise a potentially viable claim that a motion for change of venue or disqualification of the trial judge would have been granted. Because Grant failed to raise a non-frivolous claim that counsel was ineffective for failing to file a motion for change of venue or to disqualify the judge, the district court properly dismissed his claim without a hearing.

7. Grant Failed To Establish A Potentially Viable Claim That His Guilty Plea Was Not Knowingly And Voluntarily Entered

"Before a trial court accepts a plea of guilty in a felony case, the record must show that the plea has been made knowingly, intelligently and voluntarily, and the validity of a plea is to be determined by considering all the relevant

circumstances surrounding the plea as contained in the record.” State v. Ramirez, 122 Idaho 830, 833, 839 P.2d 1244, 1247 (Ct. App. 1992) (quoting State v. Carrasco, 117 Idaho 295, 297-98, 787 P.2d 281, 283-84 (1990) (citation omitted).

In his petition for post-conviction relief, Grant asserted his guilty plea “was not knowingly/voluntarily entered as it was induced by promises not kept” as well as because Grant was “mentally incompetent due to being bi-polar.” (R., p.2.) Grant claimed, without the support of admissible evidence, that his trial counsel “made false assurances of what the plea bargain would accomplish and what kind of sentence [he] could expect.” (R., p.4.) Grant also claimed his attorney “should have been cognizant of [his] bi-polar mood swings and recognized depression driven behaviors such as giving up and not appealing the sentence and conviction.” (Id.) This claim is unsupported by any admissible evidence. Review of the record, which establishes that Grant entered the plea to avoid a possible conviction on greater charges and significantly longer incarceration, shows this claim to be without merit.

Grant was originally charged with possession of methamphetamine, domestic battery, aggravated assault, and unlawful possession of a firearm as well as facing a probation violation for an earlier conviction. He ultimately pled guilty to possession of a controlled substance and domestic battery, and admitted to violating the terms of his probation. “Grant was sentenced to a total of nine years fixed and eleven years indeterminate – far less than the thirty-two

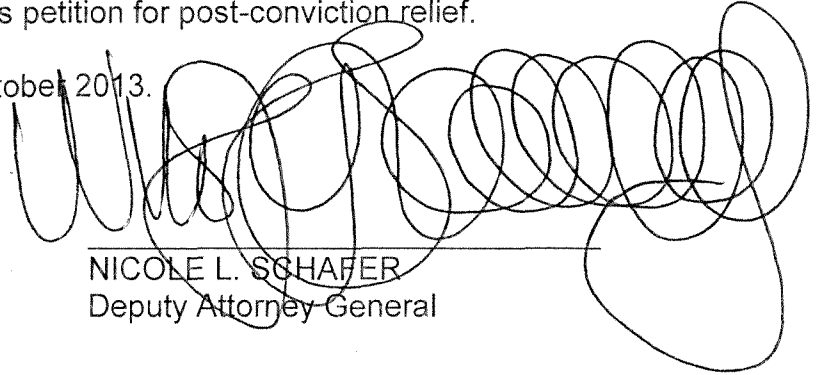
year maximum combined sentence for his three crimes.” Grant, 154 Idaho at ____, 297 P.3d at 251.

Additionally, Grant claims he was unable to enter a knowing, voluntary, and intelligent plea because of his “mental health issues.” (R., pp.26-27.) Grant did not support his claim that he involuntarily pled guilty because of mental health issues. Although he moved for the admission of “past and current medical records including mental health files,” such motion was made subsequent to the 20 days provided in the notice of intent to dismiss his petition for post-conviction relief and only requested the court review such materials although no such documents were provided to the court. (R., p.50) Grant offered nothing more than his own conclusory statements and personal opinions as to his mental deficiencies and therefore failed to provide any admissible evidence that he was incompetent at the time he entered his guilty plea. These bare assertions alone are insufficient to make a potentially viable case in light of the existing record.

CONCLUSION

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

DATED this 30th day of October 2013.



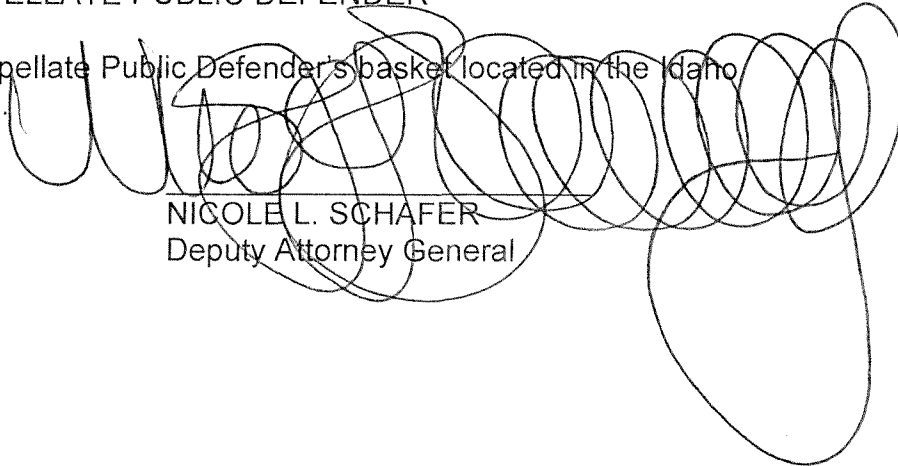
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of October, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm