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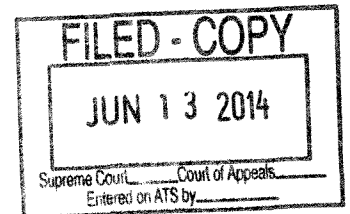
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IN THE SUPREME COURT OF THE STATE OF IDAHO

WOODROW JOHN GRANT,)	
)	NO. 39207
Plaintiff-Appellant,)	
)	BANNOCK COUNTY NO. CV 2011-759
v.)	
)	
STATE OF IDAHO ,)	APPELLANT'S BRIEF
)	IN SUPPORT OF
Respondent.)	PETITION FOR REVIEW
_____)	



STATEMENT OF THE CASE

Nature of the Case

Woodrow Grant asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 34 (Ct. App. Apr. 25, 2014) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed the orders summarily dismissing his petition for relief without appointment of counsel, decided an issue of first impression in Idaho by holding that, even in light of recent United States Supreme Court decisions, there is no constitutional right to counsel in post conviction. That decision is also inconsistent with those recent decisions from the United States Supreme Court, which suggest that

there is a right to counsel in post conviction where the post conviction process is the first practical opportunity for a defendant to challenge the ineffectiveness of trial counsel.

Additionally, this Court should grant review because the Court of Appeals' decision to affirm the summary dismissal of Mr. Grant's petition without appointing counsel under Idaho's statutory framework was inconsistent with Idaho Supreme Court and Idaho Court of Appeals precedent. Notably, the Court of Appeals determined that the district court applied the wrong standard as it addressed Mr. Grant's request for an attorney. However, the majority decided to affirm the district court's decision denying counsel and summarily dismissing Mr. Grant's post conviction petition based on its own reweighing of Mr. Grant's allegations. In so doing, the majority fell victim to the same error it had found in the district court's analysis – it applied the wrong standard. Specifically, it did not review Mr. Grant's allegations in the light most favorable to him (*i.e.*, considering the allegations as if they were true), but instead, determined that they were disproved or not otherwise supported in the record. Judge Lansing dissented on that point, and, applying the proper standard, opined that Mr. Grant had alleged the possibility of valid claims. As a result, Judge Lansing would have vacated the district court's orders and remanded the case for further proceedings with the assistance of counsel.

On review, this Court should vacate the district court's decisions denying counsel and summarily dismissing the petition and remand this case for further proceedings with the assistance of appointed counsel.

Statement of the Facts & Course of Proceedings

Mr. Grant was incarcerated on three different convictions in three separate cases (aggravated battery, possession of methamphetamine, and domestic assault). (R., pp.1-2.) He timely petitioned for post-conviction relief with regard to each case.¹ He alleged that his attorney had been deficient in multiple aspects of his representation at the trial level. (R., pp.2-4.) Mr. Grant set forth the facts supporting his allegations in his petition and attached an affidavit in support. (R., pp.2-7.) In addition, he filed a motion and affidavit in support of appointment of post-conviction counsel. (R., pp.9-11.) These documents were notarized. (R., pp.7, 11.) The record does not indicate that the State ever filed an answer or motion for summary dismissal. (*See generally* R.)

The district court subsequently issued a notice of intent to dismiss the post-conviction petition. (R., pp.23-49.) In that notice, it also denied Mr. Grant's request for the assistance of post-conviction counsel because, it asserted, he did not allege facts raising the possibility of a valid claim. (R., p.27.) It then articulated its reasons for dismissing his various claims. (R., pp.28-49.) The most prevalent of its rationales was that Mr. Grant had not presented any evidence other than his own allegations, which the district court described as conclusory, unsupported, or unsubstantiated. (R., pp.31, 37, 38, 39, 41, 43, 44, 46, 47, 48.) It also reasoned that Mr. Grant had not proven his allegations by a preponderance of the evidence, or otherwise produced sufficient or

¹ In regard to the aggravated battery charge, Mr. Grant had originally been placed on probation following a successful period of retained jurisdiction. (R., p.1.) That probation was subsequently revoked. (R., p.1.) Therefore, in regard to that case, his petition for post-conviction relief is only timely from the order revoking probation. In the other two cases, the petition was timely from the judgments of conviction. (*See* R., p.1.)

adequate facts to state a claim for relief.² (R., pp.37, 39, 40, 41, 48.) Along those same lines, the district court indicated that Mr. Grant needed to present facts which demonstrated the outcome of his case “*would have been different* but for his attorney’s unprofessional errors,” in order to survive summary dismissal. (See, e.g., R., pp.47; see also R., pp.95, 96, 106.)

Mr. Grant filed a motion to amend the petition and a response to the district court’s notice of intent to dismiss. (R., pp.50-60.) As before, his assertions were notarized. (R., p.60.) He alleged additional, more-specific facts that supported his various claims. (R., pp.52-60.) Those clarifications revealed that Mr. Grant was making two overarching arguments. First, he contended that his trial attorney had provided deficient and prejudicial performance. Specifically, he alleged his attorney had not moved for a change of venue or the district court judge’s recusal, had not presented mitigating evidence concerning the impact of his mental condition, had not elicited testimony regarding the improper investigation of the underlying cases, had not informed him of his rights, pursuant to *Estrada v. State*, 143 Idaho 558, 561 (2006), and had not allowed him an opportunity to review the Presentence Investigation Report (*hereinafter*, PSI) or assisted him to object to information improperly included therein. (R., pp.52-59.)

Second, as to the two cases in which his petition was timely from the judgments of conviction, Mr. Grant contended his pleas were invalid. Specifically, he alleged: (1) he did not knowingly, voluntarily, or intelligently enter his guilty pleas because of his

² As a result of this perspective, the district court apparently did not regard the facts Mr. Grant alleged in his verified pleadings and affidavits as evidence that it could consider, or, at least, did not accept those factual allegations as true. (See *generally*, R., pp.23-49.)

attorney's improper assurances that he would receive concurrent sentences and the opportunity to participate in the rider program; and, (2) he was incompetent at the time he entered the plea due to a severe depressive episode caused by his bi-polar disorder. (R., pp.56-58.) Along with his response to the notice of intent to dismiss, Mr. Grant also renewed his request for appointment of post-conviction counsel. (R., p.59.) As part of that request he asserted that, in addition to the facts he had already alleged to be true, there was existing evidence he was unable to collect or present to the district court due to his incarceration, but which he claimed would provide additional support for his allegations. (See R., p.59.)

Nevertheless, the district court summarily dismissed Mr. Grant's petition for post-conviction relief. It asserted that Mr. Grant's response to the Notice of Intent to Dismiss "did not include any additional documents or affidavits." (R., p.86.) Again, as it went through Mr. Grant's specific allegations, the district court reasoned that he had not presented any evidence other than his own allegations, which it still considered to be conclusory, unsupported, or unsubstantiated. (R., pp.86, 90, 92, 95, 96, 98, 100, 101, 102, 103, 104, 105, 106.) It also continued to assert that Mr. Grant had not proven his allegations by a preponderance of the evidence, or otherwise produced sufficient or adequate facts to state a claim for relief. (R., pp.98, 100, 104.) Additionally, it decided that Mr. Grant needed to present facts which demonstrated "the outcome of his case would have been different" in order to survive summary dismissal. (R., p.106; see *also* R., pp.95, 96.) It also denied Mr. Grant's renewed motion for post-conviction counsel for the same reason it had before. (R., p.90.)

Mr. Grant subsequently filed a motion for reconsideration of the order dismissing his petition pursuant to I.R.C.P. 59(e) and 60(b). (R., pp.65-85.) Again, the document was verified by a notary public. (R., p.85.) In that motion, Mr. Grant alleged additional facts which supported several of his claims. (See R., pp.69-84.) Three months later, the district court determined that Mr. Grant had simply reiterated his prior allegations and that he did not argue that the district court had made any errors of law or fact in its initial decision, and so, it denied that motion. (R., p.115.) Mr. Grant filed a notice of appeal which is timely as to all the district court's decisions.³

On appeal, Mr. Grant argued that, in light of recent United States Supreme Court decisions, Idaho should recognize a due process right to counsel in post conviction. He also argued that, under Idaho's post conviction statutes, the district court's decision to summarily dismiss his petition without appointing counsel was erroneous because it applied the wrong standards in reaching that decision. The Court of Appeals held that there was no constitutional right to counsel in initial-review collateral proceedings, since there has been no express ruling to that effect from the United States Supreme Court. (Opinion, pp.2-3.) Reviewing the decision to deny counsel under Idaho's post conviction statutes, the Court of Appeals determined that the district court had, in fact, applied the wrong standards in reaching its decision to deny Mr. Grant counsel and summarily dismissing his petition for relief. Specifically, the Court of Appeals found that

³ The final judgment dismissing Mr. Grant's petition for post-conviction relief conforming with the requirements from the Idaho Rules of Civil Procedure was entered on June 13, 2013, in response to the Idaho Supreme Court's order on that same date. I.A.R. 17(e)(2) allows that a notice of appeal filed prior to the entry of an appealable order will become valid upon the filing of the appealable judgment. *Weller v. State*, 146 Idaho 652, 653-54 (Ct. App. 2008). Therefore, Mr. Grant's September 21, 2011, notice of appeal is timely from the final judgment.

the district court improperly required Mr. Grant to present evidence proving his claims by a propensity of the evidence, rather than viewing those allegations in the light most favorable to Mr. Grant (*i.e.*, considering them as if they were true). (Opinion, p.6 n.4.) However, the Court of Appeals split on the proper result following its determination of error in that regard.

The majority decided that it could independently review Mr. Grant's allegations and affirm the order denying counsel and summarily dismissing the petition based the majority's own assessment of the validity of Mr. Grant's allegations. (See Opinion, pp.3-11.) To that end, it found that the record either disproved Mr. Grant's allegations (*see, e.g.*, Opinion, pp.7, 10), or that those allegations were otherwise insufficiently articulated to present potentially viable claims (*see, e.g.*, Opinion, pp.6-11). Judge Lansing dissented, finding that the allegations made by Mr. Grant, if accepted as true, raised the possibility of valid claims. (Opinion, pp.11-14, Lansing, J., dissenting in part.) As such, Judge Lansing would have vacated the decision denying Mr. Grant counsel and remanded the case for further proceedings with the assistance of counsel. (Opinion, p.14, Lansing, J., dissenting in part.)

Mr. Grant filed a timely petition for review from the Court of Appeals' Opinion.

ISSUES

1. Whether the Idaho Court of Appeals' Opinion affirming the summary dismissal of Mr. Grant's petition for post conviction relief without the appointment of counsel decides an issue of substance not yet addressed by the Idaho Supreme Court in a manner that is inconsistent with recent decisions from the United States Supreme Court.
2. Whether the majority opinion affirming the denial of Mr. Grant's motion for appointment of counsel and summarily dismissing his petition for relief under Idaho's statutory framework was inconsistent with Idaho Supreme Court and Idaho Court of Appeals precedent.
3. Whether the district court erred by not appointing Mr. Grant counsel under Idaho's statutory framework.
4. 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.

ARGUMENT

I.

The Idaho Court Of Appeals' Opinion Affirming The Summary Dismissal Of Mr. Grant's Petition For Post Conviction Relief Without The Appointment Of Counsel Decides An Issue Of Substance Not Yet Addressed By The Idaho Supreme Court In A Manner That Is Inconsistent With Recent Decisions From The United States Supreme Court

A. Standard For Evaluating Petitions For Review

The Idaho Appellate Rules provide that petitions for review may be granted only “when there are special and important reasons” for doing so but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered. Rule 118(b) provides some factors which must be considered in evaluating any petition for review, including:

- 1) Whether the Court of Appeals has decided a question of substance not yet decided by the Idaho Supreme Court;
- 2) Whether the Court of Appeals' decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;
- 3) Whether the Court of Appeals' decision is inconsistent with its own prior decisions;

I.A.R. 118(b). In regard to the argument that there is a due process right to counsel during initial-review collateral proceedings, Mr. Grant contends that there are special and important reasons for review to be granted. First, the Court of Appeals has decided a question of substance not yet decided by the Idaho Supreme Court – whether, in light of recent United States Supreme Court decisions, there is a due process right to counsel in post conviction. See I.A.R. 118(b)(1). Second, the Court of Appeals' decision in that regard is inconsistent with those recent United States Supreme Court

decisions. See I.A.R. 118(b)(2). For those reasons, this Court should exercise its review authority in this case.

B. Idaho Should Recognize A Constitutional Right To Counsel In Initial-Review Collateral Challenges To The Effectiveness Of Trial Counsel Under The State And Federal Constitutions

As part of its promise of due process, the Fourteenth Amendment provides a right to counsel in certain situations. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”) Mr. Grant contends that one such situation arises during initial-review collateral proceedings, such as when a petitioner raises a claim of ineffective assistance of counsel for the first time in post conviction in Idaho. In fact, the United States Supreme Court recently suggested that there is a constitutional right to that effect:

Coleman had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because “in [these] cases, . . . state collateral review is the first place a prisoner can present a challenge to his conviction.” As *Coleman* noted, this makes the initial-review collateral proceeding a prisoner’s “one and only appeal” as to an ineffective-assistance claim, and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings.

Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (quoting *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)).

However, the United States Supreme Court decided not to answer that question in *Martinez* because, “[w]hile petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal

habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." *Id.* at 1313. The Supreme Court concluded that, as a matter of equity, the federal courts could not procedurally default such claims. See *generally id.* As a result, the United States Supreme Court reversed that decision dismissing the *habeas* petition and remanded the case for a determination on the substantive issues raised: whether Mr. Martinez's post conviction counsel had been ineffective and whether his underlying claim (ineffective assistance of trial counsel) was substantial. *Id.* at 1320-21.

Nevertheless, it discussed the reasons why there may need to be a right to counsel in initial-review collateral proceedings which challenge the effectiveness of trial counsel for the first time. As the United States Supreme Court explained, there is a violation of the petitioner's Fourteenth Amendment rights when he is left without the assistance of counsel during his "one and only appeal." *Id.* at 1315 (citing *Douglas v. California*, 372 U.S. 353 (1963)). The Supreme Court pointed out that "[w]here . . . the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* As such, "[w]ithout the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim." *Id.*

For example, the Supreme Court explained that during such a "first-tier" proceeding, *pro se* petitioners "are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing

their claim of error.” *Id.* at 1317 (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)). Furthermore, the Supreme Court recognized that “[c]laims of ineffective assistance at trial often require investigative work and an understanding of trial strategy,” implying that applicants for post-conviction relief often could not engage in that necessary investigation, but appointed counsel could.⁴ *Id.* As such, the United States Supreme Court concluded:

When the issue [of ineffective assistance of counsel] cannot be raised on direct review, . . . a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *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. (citing *Halbert*, 545 U.S. at 619) (emphasis added). Based on all this language, it appears as though, given the chance, the United States Supreme Court will hold that the applicant has a constitutional right to the assistance of counsel during the initial-review collateral proceeding, particularly if that collateral proceeding is separate from the direct appeal. See *id.* at 1315-17. In fact, in his dissent, Justice Scalia pointed out that the practical effect of the *Martinez* ruling and actually establishing a constitutional

⁴ Mr. Grant specifically alleged that this was so in his case: “Because of [Mr.] Grant’s status as an incarcerated individual, it is almost impossible for him to present evidence [as the district court is requiring].” (R., p.59.) Specifically, Mr. Grant asserted that he “I. [Is f]airly ignorant of the law and evidentiary requirements[;] II. Cannot go and collect paperwork and testimony in person[;] III. Is unsure of what evidence this Court would consider important and pertinent[;] IV. And is unable to properly write up a response that is adequate and up to the high standards this Court is accustomed to.” (R., p.59.) As such, according to the United States Supreme Court, he “likely **needs** an effective attorney.” *Martinez*, 132 S. Ct. at 1317 (emphasis added).

rule requiring appointment of counsel in collateral-review proceedings is, for all intents and purposes, the same.⁵ *Martinez*, 132 S. Ct. at 1321-22, 1327 (Scalia, J., dissenting).

It is true that *Martinez* was addressing a state system where there was a categorical bar to raising challenges to the effectiveness of trial counsel during the direct appeal process, and it is also true that Idaho does not employ such a system. However, the United States Supreme Court has determined that the rule from *Martinez* applies to states with systems like Idaho's: "a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systematic operation, denies a meaningful opportunity to do so is a distinction without difference." *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). Since, "as a matter of its structure, design, and operation," Idaho's judicial system "does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal," the rule and analysis from *Martinez* applies against Idaho's post conviction system.⁶

⁵ State courts have also recognized that *Martinez*, in effect, has recognized a right to counsel in initial-review collateral proceedings. For example, the Pennsylvania Supreme Court pointed out: "In short, this new equitable rule in practice can be just as coercive as the recognition of a new right. . . ." *Commonwealth v. Holmes*, 79 A.3d 562, 583-84 (Pa. 2013). Similarly, the New Jersey Superior Court noted: "Although choosing not to decide the issue, the United States Supreme Court explained the rationale for finding a constitutional right to counsel in 'initial-review collateral proceedings.'" *State v. Quixal*, 70 A.3d 749, 754-55 (N.J. Super. Ct. App. Div. 2013).

⁶ In fact, the federal courts for the District of Idaho have consistently been applying the rule from *Martinez* in cases arising out of Idaho convictions. See, e.g., *Eby v. Blades*, 2014 WL 1379656, p.9 (D. Idaho Apr. 8, 2014) (unpublished) (Magistrate Judge Williams presiding); *Veenstra v. Smith*, 2014 WL 1270626, p.11 (D. Idaho Mar. 26, 2014) (unpublished) (Chief Judge Winmill presiding); *Gable v. Wengler*, 2013 WL 4097711, p.8 (D. Idaho Aug. 13, 2013) (unpublished) (Magistrate Judge Bush presiding); *Tellez-Vasquez v. Smith*, 2013 WL 4039462, p.3 (D. Idaho Aug. 7, 2013) (unpublished) (Magistrate Judge Dale presiding), *vacated*; *Horozny v. Smith*, 2013 WL 3776372, p.2 (D. Idaho Jul. 16, 2013) (unpublished) (District Judge Lodge presiding).

See, e.g., *Matthews v. State*, 122 Idaho 801, 806 (1992) (“[A] petition for post-conviction relief is the preferred forum for bringing claims of ineffective assistance of counsel.”); see also *State v. Yakovac*, 145 Idaho 437, 443 (2008) (noting that, if a defendant pursues a claim of ineffective assistance in the direct appeal, he cannot then bring the same claim in post-conviction); *State v. Saxton*, 133 Idaho 546, 549 (Ct. App. 1999) (reaffirming that “it is usually inappropriate to raise ineffective assistance of counsel claims on a direct appeal from the judgment of conviction,” explaining that, “claims of ineffective assistance regularly raise issues on which no evidence was presented at the defendant’s trial. . . . the trial record on direct appeal is rarely adequate for review of such claims.”).

Additionally, the Supreme Court pointed out that recognition of such a right would only constitute an exception to the general rule that there is no constitutional right to counsel. See *Coleman*, 501 U.S. at 755 (identifying the general rule arising from the decisions in *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Finley v. Pennsylvania*, 481 U.S. 551 (1987)). To that point, the Idaho Supreme Court has recently relied on *Finley* to conclude that “there is no Sixth Amendment Right to counsel in a collateral attack upon a conviction.”⁷ *Murphy v. State*, ___ Idaho ___, 2014 WL 712695, pp.5-6 (Feb. 25, 2014), *not yet final*; see also *Follinus v. State*, 127 Idaho 897, 902-03 (Ct. App.

⁷ This Court has repeatedly recognized the general rule from *Finley* – that there is no constitutional right to counsel in post conviction. Mr. Grant is not asking the Court to overrule that interpretation of *Finley*. Rather, he is asking that this Court recognize an exception to *Finley* based on the language in *Martinez*. To the extent that this Court determines recognizing an exception to *Finley* because there is a constitutional right to counsel in the initial-review collateral proceedings based on the language in *Martinez* requires overruling its own precedent, it should do so, since the language in *Martinez* demonstrates why such precedent would be manifestly wrong, unjust, or unwise. See *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592-93 (2006) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990)).

1995). However, the decision in *Murphy* does not appear to have taken *Martinez* into account. See generally *Murphy*, 2014 WL 712695. Therefore, the issue of whether there is an exception to the general rule in *Finley* is an issue of first impression in Idaho.

In fact, given the discussion in *Martinez* about the reasons that a petitioner raising claims of ineffective assistance of counsel for the first time in initial-review collateral proceedings needs the assistance of counsel, the conclusion that there is no right to counsel in such cases is erroneous, at least insofar as the due process clause would allow a right to counsel in such situations. Basically, the decision in *Martinez* suggests that, while a post conviction system such as the one Idaho employs is permissible and based on sound reasoning, employing such a system also has consequences for the state implementing it. See *Martinez*, 132 S. Ct. at 1318 (“By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file [or effectively pursue] such claims.”) Of important note here is the Supreme Court’s implication that a claim of ineffective assistance of trial counsel would traditionally be presented at a time when the defendant has a constitutional right to counsel. See *Martinez*, 132 S. Ct. at 1318. The logical conclusion is that the constitutional protection of the right to counsel cannot be avoided by the procedural expedient of requiring the claim to be brought by a different process. Compare *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (not allowing the State to circumvent a constitutional protection (double jeopardy) by a mere procedural mechanism (charging two crimes instead of one based on meaningless distinctions)).

Idaho should answer the Supreme Court's open question and decide whether there is a due process right to counsel in initial-review collateral proceedings. After all, the federal district court in the District of Idaho have already recognized that Idaho's post-conviction procedures fall within the scope of the *Martinez* holding based on the decision in *Trevino*, and so, have begun deciding the merits of ineffective assistance of counsel claims in the place of Idaho's courts. (See footnote 5, *supra*, page 13.)

Therefore, for the reasons discussed by the United States Supreme Court in *Martinez* and *Trevino*, this Court should recognize the due process right to counsel during initial-review collateral proceedings. As a result, it should reverse the district court's decision denying Mr. Grant the assistance of counsel on his petition for post-conviction relief and remand this case for further proceedings with instructions that the district court appoint counsel to assist Mr. Grant.

II.

The Majority Opinion Affirming The Denial Of Mr. Grant's Motion For Appointment Of Counsel And Summarily Dismissing His Petition For Relief Under Idaho's Statutory Framework Was Inconsistent With Idaho Supreme Court And Idaho Court Of Appeals Precedent

Should this Court decide that there is no constitutional right to post-conviction counsel in Idaho, it should still grant review because the Court of Appeals' Opinion affirming the denial of counsel under Idaho's post conviction statute is inconsistent with Idaho Supreme Court and Idaho Court of Appeals precedent. See I.A.R. 118(2)-(3).

The Court of Appeals found that the district court had applied the wrong standard in its decisions to deny counsel and summarily dismiss the petition:

The district court, throughout its notice of intent to dismiss, which the district court cited as the basis for denial of the appointment of counsel,

repeatedly found Grant failed to present any admissible evidence and presented only bare, conclusory allegations. We note that verified pleadings, with respect to facts within a petitioner's personal knowledge, are admissible evidence. These types of allegations by a petitioner differ from allegations that address facts outside the personal knowledge of a petitioner or those based on pure speculation. Furthermore, when requesting appointed counsel, a petitioner does not need to support his or her claims with admissible evidence. Indeed, one of the important functions of counsel may be to assist in finding and presenting admissible evidence. The petitioner need only *allege* facts which raise the possibility of a valid claim. The district court's order demonstrates it failed to make this distinction when addressing Grant's claims.

(Opinion, p.6 n.4 (emphasis in original) (internal citations omitted).)

As Judge Lansing pointed out, the proper response to the district court's error was to remand the case for the district court for appointment of counsel and consideration of the claims under the proper standards. (Opinion, pp.11-12, Lansing, J., dissenting in part.) However, the majority rejected that remedy, instead, affirming the order summarily dismissing the petition without appointment of counsel based on its own review of the allegations in light of the record. That decision is problematic on several levels. For example, the Idaho Supreme Court has held that "it is essential that the petitioner be given adequate notice of the claimed defects [in his allegations] so *he has an opportunity to respond . . .*" *Brown v. State*, 135 Idaho 676, 679 (2001), *superceded by statute as stated in Charboneau v. State (hereinafter, Charboneau I)*, 140 Idaho 789, 793 (2004) (noting that the statute requires the opportunity to respond as well). Since Mr. Grant does not have an opportunity to respond to the majority's reassessment of his allegations, the majority's opinion runs afoul of this requirement. However, the most evident problem with the majority's decision is that, in reweighing the claims, the majority fell victim to the same error the district court did – it applied the wrong standard.

In properly reviewing a request for appointment of post conviction counsel, “a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true.” *State v. Saykhamchone*, 127 Idaho 319, 321 (1995). As this Court reaffirmed, “the task of this Court ‘is to determine whether the appellant has alleged facts in his petition that **if true**, would entitle him to relief.’”⁸ See, e.g., *State v. Baldwin*, 145 Idaho 148, 153 (2007) (quoting *Charboneau v. State*, 140 Idaho 789, 792 (2004) (*hereinafter*, *Charboneau I*) (emphasis added)).⁹

The error in the majority’s review in this case is clearly evidenced by its decision that “Grant’s claim of ineffective assistance *is disproved* by his guilty plea advisory forms.”¹⁰ (Opinion, p.7 (discussing Mr. Grant’s allegation that his attorney failed to

⁸ The requirement that the reviewing court consider Mr. Grant’s allegations as true is particularly applicable in this case since the State did not file an answer, and so Mr. Grant’s allegations are un rebutted. (See generally R.; see also RoAs.) “A court is *required* to accept the petitioner’s un rebutted allegations as true” *State v. Baldwin*, 145 Idaho 148, 153 (2007) (emphasis added).

⁹ Mr. Grant recognizes that the Court was reviewing a decision to summarily dismiss a petition for relief in *Saykhamchone* and *Baldwin*, and not the decision to deny a motion for post conviction counsel. However, the standards regarding construing evidence in the petitioner’s favor applies to reviews of denials of request for counsel because, as this Court indicated in *Charboneau I*, the standard for demonstrating the possibility of a valid claim (meriting appointment of counsel) is less stringent than demonstrating a genuine issue of material fact (meriting an evidentiary hearing). See *Charboneau I*, 140 Idaho at 792-93 (quoting *Brown*, 135 Idaho at 679). Presumably, for this reason, this Court quoted the standard regarding construing evidence from *Saykhamchone* in the section of the *Charboneau I* opinion which addressed the denial of the petitioner’s motion for counsel. *Id.* at 793 (quoting *Saykhamchone*, 127 Idaho at 321).

¹⁰ While the “disproved by the record” standard may be applicable during summary dismissal proceedings, see, e.g., *McKay v. State*, 148 Idaho 567, 570 (2009), it is only really applicable when the court is assessing allegations regarding a fact which cannot be disputed, not when assessing two statements for their veracity.

For example, where a petitioner alleged that he did not enter a knowing, intelligent, and voluntary plea when he pled guilty to murder because he did not know that the victim had not died, but, in fact, he had only pled guilty to aggravated battery,

advise him as required by *Estrada*) (emphasis added); see also Opinion, p.10 (making a similar determination regarding Mr. Grant's claim that his attorney made inappropriate promises about his guilty plea.) The fact that the Court of Appeals concluded that Mr. Grant's claim was disproved *ipso facto* means that it did not evaluate the allegation as if it were true or in the light most favorable to him. In fact, as the majority itself had just noted: "The petitioner need only *allege* facts which raise the possibility of a valid claim." (Opinion, p.6 n.4 (emphasis in original).) Mr. Grant did exactly that – he alleged that his attorney had not advised him of his rights under *Estrada*, and he alleged that his attorney made impermissible promises about his guilty plea and the sentence he could expect to receive. If Mr. Grant is correct, if those allegations are true regardless of what other evidence may contradict that, (*i.e.*, that the allegations are considered as if they are true and the other evidence considered to be erroneous), Mr. Grant would be entitled to relief on each point. Therefore, Mr. Grant alleged *the*

then the petitioner's allegation would be clearly disproved by the record, such as the documents from the change of plea hearing and the judgment of conviction. The fact that he pled guilty to aggravated battery cannot be disproved by any assertion to the contrary that the petitioner subsequently makes.

However, the "disproved by the record" standard is not applicable when the court is evaluating the veracity of two inconsistent statements. The fact that the two statements are inconsistent does not inherently demonstrate that one is true and the other is not. That determination is necessarily dependent on an examination of the declarant's explanations for the inconsistency between the two statements (which, in post conviction, occurs at an evidentiary hearing). In that case, the presence of the two contradictory statements simply creates a genuine issue of material fact as to which of the two statements is true.

As a result, the "disproved by the record" standard does not apply to demonstrate that the statements Mr. Grant made in support of his petition are definitively false for the sole reason that he made contradictory statements at the guilty plea hearing. Such a holding would be equivalent to disregarding a witness's recantation of her testimony simply because she offered the contradictory (and now-recanted) testimony at trial.

possibility of valid claims, and, as such, was entitled to the assistance of counsel. (See Opinion, pp.13-14, Lansing, J., dissenting in part.)

The same is true regarding Mr. Grant's allegations that defense counsel was ineffective for not presenting mitigating evidence at sentencing. (See Opinion, pp.8-9 (affirming the denial of counsel and summary dismissal of that allegation because the presentation of evidence is left to counsel's strategic discretion). There are two flaws in that reasoning: first, it presumes that the decision to not present that evidence was actually strategic, and not an oversight by defense counsel. Second, even if the decision were strategic, that decision could still constitute ineffective assistance of counsel if it were the product of ignorance of the law, insufficient preparation, or other such factors. As Judge Lansing reminded the majority, review of the decision to deny counsel does not require the petitioner to prove his claims, since part of the point of having counsel is developing the claims. (Opinion, p.13, Lansing, J., dissenting in part.) Therefore, Judge Lansing correctly pointed out that the majority's reliance on the "sound trial strategy" rationale for summarily dismissing the claim was prematurely applied, since, with assistance of counsel, Mr. Grant could have identified and provided additional evidence showing that counsel's decisions were not sound trial strategy. (Opinion, p.13, Lansing, J., dissenting in part.) Therefore, Mr. Grant alleged the possibility of a valid claim in that regard as well.

Because the majority, like the district court before it, failed to apply the proper standard of review, this Court should exercise its review authority.

III.

The District Court Erred By Not Appointing Mr. Grant Counsel Under Idaho's Statutory Framework

A. Introduction

Idaho law permits appointment of post-conviction counsel if the petitioner demonstrates the possibility of a valid post-conviction claim. I.C. § 19-4904; *Charboneau I*, 140 Idaho at 792-93. Since the facts Mr. Grant alleged demonstrated the possibility of valid post conviction claims, this Court should reverse the district court's order denying appointment of post-conviction counsel, as well as the order summarily dismissing the petition, and remand this case for further proceedings with the assistance of counsel.

B. Applicable Legal Standards

The elements of his claims of ineffective assistance of trial counsel are two-fold: counsel's performance was objectively unreasonable (*i.e.*, deficient); and there is a reasonable probability that the outcome would have been different but for those errors (*i.e.*, prejudicial). *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Estrada*, 143 Idaho at 561. An applicant for post-conviction relief is entitled to appointment of counsel if he "alleges facts showing the possibility of a valid claim." *Swader v. State*, 143 Idaho 651, 654 (2007); *see also Charboneau I*, 140 Idaho at 793. Allegations of fact contained in the verified pleadings are properly considered as evidence in support of the petition. *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993); *see also Loveland v. State*, 141 Idaho 933, 936 (Ct. App. 2005).

For each of his claims, Mr. Grant alleged facts in his verified petition which show at least the possibility of a valid claim, in that his assertions of fact support at least one, if not both of the elements under *Strickland*. (See R., pp.1-8, 50-64.) Therefore, he should have had counsel appointed during the post-conviction proceedings.

C. Mr. Grant Alleged Facts Which Demonstrate The Possibility Of A Valid Claim That His Attorney Provided Ineffective Assistance By Failing To Advise Him Of His Right To Remain Silent During The Psychological Evaluation Per The Idaho Supreme Court's Decision In *Estrada*

The Idaho Supreme Court has held that counsel's performance is objectively deficient if counsel fails to advise a defendant of his right to remain silent during a presentence psychological evaluation. *Estrada*, 143 Idaho at 564; *Murray v. State*, 156 Idaho 159, 167 (2014) (reaffirming that counsel is deficient if he fails to advise his client regarding the client's rights under *Estrada*). This right to silence is well-established in precedent and applies in regard to all psychological evaluations occurring before sentencing. *Vavold v. State*, 148 Idaho 44, 46 (2009); *State v. Lankford*, 116 Idaho 860, 871 (1989). This is because, unlike a routine presentence investigation, which relies heavily on information already available through public records, a psychological evaluation delves into more personal areas of the defendant's life, and thereby, presents a greater risk of self-incrimination. *Estrada*, 143 Idaho at 562. Therefore, if counsel failed to inform Mr. Grant of his right to remain silent during the psychological evaluations conducted prior to his sentencing, that performance was deficient. *Id.* at 564.

Mr. Grant alleged in his verified pleadings that his attorney did not advise him about his *Estrada* rights in regard to the psychological evaluation conducted as part of

the presentence investigation. (R., pp.3, 6, 54.) Mr. Grant also alleged that information obtained during this interview was used against him at his sentencing hearing. (R., p.54.) Since the facts articulated in the verified pleadings were within Mr. Grant's personal knowledge, they constitute evidence that the district court could consider. *Mata*, 124 Idaho at 593. As such, Mr. Grant alleged facts which demonstrate a possibly valid claim – that his attorney's performance was deficient and prejudiced him. Therefore, because he alleged facts which show the possibility of a valid claim in this regard, counsel should have been appointed and the decision to deny him counsel was in error.

The district court denied Mr. Grant's request for an attorney on this issue based on its review of a guilty plea questionnaire filled out by Mr. Grant. (R., p.98 (citing "Guilty Plea Questionnaire Form, Idaho Criminal Rules Appendix A, April 22, 2010, 2").¹¹ Mr. Grant's answers in those questionnaires do not, however, justify the district court's decision to deny Mr. Grant post-conviction counsel. All Mr. Grant had to do was present facts which showed the *possibility* of a valid claim.

To that end, those allegations are to be considered in the light most favorable to Mr. Grant (*i.e.*, as if they were true, regardless of what other information may be in the record). See *Baldwin*, 145 Idaho at 153; *Charboneau I*, 140 Idaho at 792. While the

¹¹ By referring to that questionnaire, the district court impliedly took judicial notice of that document. However, Mr. Grant filled out separate questionnaires in CR-2009-19445-FE and CR-19451, both of which bear the date "April 22, 2010." As the Court of Appeals noted, these questionnaires were not included in the appellate record. (Opinion, p.7 n.5.) In his appellant's brief, Mr. Grant indicated that he was intending to file a motion asking this Court for an order taking judicial notice of those documents. (App. Br., p.16 n.16.) However, due to an oversight, appellate counsel failed to file that motion. Appellate counsel apologizes for that error and has filed that motion contemporaneously with this brief.

questionnaire does remind the defendant that he still retains some right to remain silent (see Augmentation – Guilty Plea Questionnaire, p.2), that reminder does not disprove the allegation or mean that the claim is meritless. The Kentucky Supreme Court has articulated this concept best:

[W]hile the representation of a defendant, his attorney, and the prosecutor at a *Boykin* hearing,^[12] as well as any findings by the judge accepting the plea, “constitute a formidable barrier in any subsequent collateral proceedings,” **that barrier is not insurmountable** if there is proof that the representations “were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

Fraser v. Commonwealth, 59 S.W.3d 448, 457 (Ky. 2001) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74-75 (1977)) (emphasis added); *cf. Murray*, 156 Idaho at 167. In *Murray*, this Court determined that, while the petitioner had shown deficient performance by his attorney, he had failed to show prejudice in light of his answers on the guilty plea questionnaire. *Murray*, 156 Idaho at 167-68. That decision does not mean, however, that a petitioner could not ever show prejudice in light of such statements. See *Fraser*, 59 S.W.3d at 457. As such, Mr. Grant’s allegation that his attorney had not adequately advised him regarding his rights under *Estrada*, which this Court has held does constitute deficient performance, raises *the possibility* of a valid claim.

Therefore, and for all the reasons articulated in the Appellant’s Brief, which are incorporated herein by reference thereto (App. Br., pp.15-21), Mr. Grant’s verified allegations make out the possibility of a valid claim under *Estrada*. Thus, the decision to deny Mr. Grant the assistance of counsel was erroneous.

¹² *Boykin v. Alabama*, 395 U.S. 238, 246-47 (1969).

D. Mr. Grant Alleged Facts Which Present A Possible Valid Claim That His Attorney Provided Ineffective Assistance By Not Reviewing The PSI With Mr. Grant Or Assisting Him To Object To Erroneous Or Unreliable Information Contained In The PSI

The information included in PSIs must be reliable; otherwise, it is inappropriate for the district court to consider it at sentencing. I.C.R. 32(e)(1). Information included in a PSI may be presumed reliable if the defendant is afforded an opportunity to challenge, explain, or rebut that information. *State v. Rodriguez*, 132 Idaho 261, 263 (1998). Mr. Grant alleged in his response to the district court's notice of intent to dismiss his claim that he had been deprived of that opportunity 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. (R., p.56.) Such a failure is objectively unreasonable performance by an attorney, particularly because erroneously-included or unreliable information in a PSI can haunt a defendant in numerous future proceedings. *See Rodriguez*, 132 Idaho at 262 n.1. As a result, those allegations also demonstrate the prejudice of counsel's ineffective performance. *See id.*

Therefore, since the verified and unrefuted facts Mr. Grant alleged presented a possible valid claim for post-conviction relief, counsel should have been appointed and the decision to deny him counsel was in error.

E. Mr. Grant Alleged Facts Which Demonstrate A Possible Valid Claim Of Ineffective Assistance Of Counsel That His Attorney Provided Ineffective Assistance By Not Presenting Certain Mitigating Evidence

In regard to Mr. Grant's claim that his attorney provided ineffective assistance by not presenting certain mitigating evidence at sentencing, the district court noted in its notice of intent to dismiss that Mr. Grant had not identified what mitigating evidence his

attorney had purportedly failed to present, and so he had not sufficiently supported his claim. (R., pp.38-39.)

However, in his response to that notice of intent to dismiss, Mr. Grant did identify the evidence to which he was referring. (R., pp.52-53, 56-59.) 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. (R., pp.58-59.) In addition, he explained that there were several mental health examination reports which would demonstrate that he should have been considered for mental health court, or that would otherwise have provided the district court with a more complete perspective of his mental health issues.¹³ (R., pp.52-53, 56-57.) The failure to present mitigating evidence constitutes deficient performance by trial counsel. *Knutsen v. State*, 144 Idaho 433, 443 (Ct. App. 2007) (determining that the petitioner "raised a genuine issue of material fact as to whether he was prejudiced by his counsel's failure to investigate *and present* [mitigating] evidence") (emphasis added). Additionally, strongly implied in Mr. Grant's assertions is the idea that, had the district court been presented with this evidence, there is a reasonable possibility that Mr. Grant would have received

¹³ In a clear demonstration of the Catch-22 to which the district court subjected Mr. Grant in regard to sufficiently articulating his claims, the district court found that Mr. Grant had presented no evidence to support his own allegations as to whether he might have been accepted into the mental health court program (R., p.96), but would not give him counsel to help investigate the viability of that claim by obtaining the necessary evidence (which Mr. Grant alleged existed, but was unattainable by him due to his incarceration). (See, e.g., R., p.53.) In essence, in order to get counsel appointed, the district court required Mr. Grant to provide evidence that it was not possible for him to get without the assistance of counsel.

a more lenient sentence. (See R., pp.52-53, 56-59.) Regardless, because the verified and unrefuted facts Mr. Grant alleged demonstrate the possibility of a valid claim for post-conviction relief, counsel should have been appointed and the decision to deny him counsel was in error.

Furthermore, the idea that Mr. Grant's answers on the guilty plea questionnaire conclusively disprove these allegations (see R., p.102), is illogical, since the actions which are alleged to be deficient occurred after Mr. Grant had filled out the questionnaires. (See R., pp.58-59.) Mr. Grant could not have known or complained of the deficient performance at the sentencing hearing at the time he filled out the guilty plea questionnaire at the change of plea hearing. Thus, the district court's use of the guilty plea questionnaire in evaluating this claim (see R., p.99) was erroneous. At any rate, the claim is still potentially valid despite any information in the answers to the guilty plea questionnaire to the contrary. See *Fraser*, 59 S.W.3d at 457. Since Mr. Grant alleged facts demonstrating the possibility of a valid claim in this regard, the district court erred by not appointing him an attorney.

F. Mr. Grant Alleged Facts Which Demonstrate The Possibility Of A Valid Claim That His Attorney Provided Ineffective Assistance By Failing To Move For A Change Of Venue Or Disqualification Of The Presiding Judge

Mr. Grant asserted that his attorney should have moved for a change of venue or to disqualify the presiding judge because of specific prejudicial circumstances. For example, Mr. Grant alleged that the victim's mother may have been able to influence the investigation based on her position within the police department and that the presiding judge may have had a bias against Mr. Grant based upon the judge's past representation of Mr. Grant's brother. (See R., p.52) The district court dismissed that

claim because it determined that the decision of whether to request a change of venue or judicial recusal was a tactical decision left to the discretion of trial counsel and, according to the district court, there was no evidence in the record which would establish the basis for such a claim. (R., pp.35-36.)

In regard to its decision that the claim was not viable in post conviction, the district court cited *State v. Carter*, 103 Idaho 917, 923 (1982) (*hereinafter, Carter I*). However, the decision in *Carter I* was abrogated when a new trial was granted pursuant to a successful post-conviction action. See *Carter v. State*, 108 Idaho 788 (1985) (*hereinafter, Carter II*). In *Carter II*, the Supreme Court explained its decision in *Carter I* regarding the propriety of the challenge to counsel's failure to move to change venue:

[T]he alleged deficiencies fell into the area of strategic and tactical choices and that the record was "devoid of any indication that such choices were a result of inadequate preparation or ignorance of counsel. Absent such evidence" we held "it must be presumed that defense counsel's actions were not [ineffective]." However, and of crucial importance to the present proceeding, we went on to state that, "If evidence to the contrary is available outside the record, it may be presented only by way of a petition for post-conviction relief" This is precisely what appellant has done in the present case. Thus, it would be anomalous for us to hold, after directing appellant that the proper way to pursue his claim was through a petition for post-conviction relief, that post conviction relief is now barred

Id. at 792 (quoting *Carter I*, 103 Idaho at 923). Therefore, while the decision of whether or not to request a change of venue is a tactical decision that will usually not be reviewed in post-conviction, see, e.g., *State v. Fee*, 124 Idaho 170, 175 (Ct. App. 1993), *Carter II* provides that challenges to such decisions may appropriately be raised in post conviction, if backed by sufficient evidence. *Carter II*, 108 Idaho at 792.

In regard to its determination that there was no evidence supporting Mr. Grant's allegations of bias, the district court cited to *Small v. State*, 132 Idaho 327, 333 (Ct. App.

1998). (R., p.36.) However, in *Small*, the applicant had failed to point to any specific evidence “which might reveal the district court’s bias.” *Small*, 132 Idaho at 333. Thus, there was no evidence which would demonstrate that the attorney had been objectively unreasonable by not requesting the judge’s recusal. See *id.* In this case, however, Mr. Grant has pointed to specific evidence which might reveal bias on the part of the district court, and so, Mr. Grant articulated *the possibility* of a valid claim, and thus, should have at least had the aid of an attorney to fully investigate and pursue that argument in post-conviction. See *Martinez*, 132 U.S. at 1317; *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

As such, Mr. Grant alleged facts which, if true, demonstrate that the decision to not request a change of venue was objectively unreasonable. (See R., p.52.) Those allegations also imply the argument that the decision to not challenge venue caused prejudice to Mr. Grant through the loss of due process and a neutral magistrate. Therefore, Mr. Grant alleged facts which demonstrate the possibility of a valid claim. Compare *Carter II*, 108 Idaho at 792. As a result, counsel should have been appointed, and the decision to deny that request was in error.

G. Mr. Grant Alleged Facts Which Demonstrate The Possibility Of A Valid Claim That His Attorney Provided Ineffective Assistance By Inducing His Guilty Plea With The Assurance That Jurisdiction Would Be Retained While He Participated In The Rider Program

If an attorney provides his client with advice which goes beyond the range of competence demanded of attorneys during the plea process, that advice may deprive the plea of the requisite voluntariness. *Nevarez v. State*, 145 Idaho 878, 884 (Ct. App. 2008). To prove prejudice, the applicant must demonstrate a reasonable probability

that, absent the deficient advice, he would have insisted on proceeding to trial. *Id.* Initially, Mr. Grant failed to articulate the “false assurances” which would demonstrate the deficient advice he claimed occurred. (R., pp.7, 44-45.)

However, in his response to the district court’s notice of intent to dismiss, he clarified his claim, alleging in his verified amended pleadings that his attorney told him the district court had agreed in a meeting in chambers to impose concurrent sentences that would not exceed a unified term of ten years with four years fixed, and also that trial counsel told him he could expect a period of retained jurisdiction. (R., p.57.) Mr. Grant also stated in his verified amended pleadings that, but for those assurances, there was “a strong likelihood” that he would have insisted on proceeding to trial. (R., p.58.) If true, those allegations present the possibility of a valid claim. *See Nevarez*, 145 Idaho at 884. Therefore, counsel should have been appointed and the decision to deny him counsel was in error.

H. Mr. Grant Alleged Facts Which Demonstrate A Possible Viable Claim That He Was Incompetent To Enter A Knowing, Voluntary, And Intelligent Guilty Plea

In post-conviction actions where the petitioner is claiming a guilty plea is invalid because he was not competent when it was entered, the petitioner must “present admissible evidence showing that there is a reasonable probability that he was incompetent at the time he entered his plea” in order to succeed on a claim of incompetence. *Ridgley v. State*, 148 Idaho 671, 678 (2009). To demonstrate incompetence, an applicant must show that he lacked “the capacity to [(1)] understand the proceedings against him and (2) assist in his defense.” *Id.* (quoting *State v. Powers*, 96 Idaho 833, 842 (1975) (citing *Dusky v. U.S.*, 362 U.S. 402 (1960))).

Mr. Grant alleged that he was incompetent due to his mental health issues. (R., pp.5, 56-57.) He also informed the district court that various medical records would support his allegations but, due to his incarceration, he was unable to provide them to the district court.¹⁴ (R., p.57.) These alleged facts demonstrate the possibility of a valid claim that his plea was not knowing, intelligent, and voluntary. As such, counsel should have been appointed and the decision to deny him counsel was in error.

As with Mr. Grant's allegations in terms of his *Estrada* rights (see Section III(B), *supra*), the district court attempted to justify its actions based on the form guilty plea questionnaire. (R., p.102.) However, as explained *supra*, that information does not demonstrate that Mr. Grant failed to allege facts showing the possibility of a valid claim. See *Fraser*, 59 S.W.3d at 457. Since Mr. Grant alleged facts which gave rise to the possibility of valid claims, he should have been appointed counsel.

Ultimately, since the facts Mr. Grant alleged in his verified pleadings show the possibility of multiple viable post-conviction claims, the district court's decision to deny Mr. Grant the assistance of post-conviction counsel was erroneous. As such, this Court should vacate the district court's order denying the appointment of counsel, as well as the order summarily dismissing the petition, and remand this case for further proceedings with the assistance of counsel.

¹⁴ As the Idaho Supreme Court noted, such offers of proof could be considered to corroborate the applicant's statements if they spoke to the applicant's incompetency during the relevant period of time (the change of plea hearing). *Ridgley*, 148 Idaho at 678. It is also one of the reasons that the United States Supreme Court has identified as revealing why such petitioners "likely need" the assistance of post-conviction counsel. *Martinez*, 132 S. Ct. at 1317; *Charboneau I*, 140 Idaho at 792-93.

IV.

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

A. Introduction

In addition to its failure to provide post-conviction counsel when it was merited, the district court also applied the wrong standards when it summarily dismissed Mr. Grant's petition for post-conviction relief. In a continuing theme, the district court did not recognize that the facts set forth in Mr. Grant's verified statements and pleadings, as well as the attached affidavits in support of his petition, constituted evidence that the district court needed to consider when determining whether Mr. Grant had pled a genuine issues of material fact. It also failed to realize that when these statements of fact went unrefuted by the State (which never filed an answer in this case), it was required to accept those statements of fact as true for purposes of summary disposition. Additionally, those facts and the reasonable inferences therefrom had to be construed in the light most favorable to the non-moving party (*i.e.*, Mr. Grant). A proper application of these standards also shows that Mr. Grant presented several genuine issues of material fact which, if true, would entitle him to relief. As such, summary dismissal was improper and this case should be remanded for an evidentiary hearing.

B. The District Court Failed To Apply The Proper Standards Or Recognize What Evidence It Could Consider, And So Erred In Summarily Dismissing Mr. Grant's Petition For Post-Conviction Relief

The district court committed reversible error by failing to recognize the evidence available for its consideration (the facts Mr. Grant himself alleged to be true) or giving that evidence its proper weight (presumed true, as they were undisputed). See *Mata*,

124 Idaho at 593; *Baldwin*, 145 Idaho at 153. Therefore, its repeated assertions that there was no admissible evidence supporting Mr. Grant's claims demonstrates error, affecting the whole decision. (See, e.g., R., pp.31, 37, 38.) As such, its determinations on all the specific issues are tainted beyond reconciliation and this Court should remand this case for a proper determination under the proper standards. See, e.g., *Charboneau v. State*, 144 Idaho 900 (2007) (*hereinafter, Charboneau II*).

In terms of summary dismissal in post-conviction actions, the Idaho Supreme Court has clarified that only “[w]hen the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without an evidentiary hearing.” *Charboneau II*, 144 Idaho at 903. Therefore, if the alleged facts, if assumed to be true, would support the claim, summary dismissal is inappropriate. *Id.* Among the facts that the district court may consider, according to the Idaho Supreme Court, are verified facts within the personal knowledge of the applicant set forth in “affidavits, records or other evidence.” *Id.*; *Mata*, 124 Idaho at 593. According to the Court of Appeals, “[a] verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is in substance an affidavit, and is accorded the same probative force as an affidavit.” *Mata*, 124 Idaho at 593. As such, the allegations in the verified filings alone can provide evidence “sufficient to raise a factual issue requiring an evidentiary hearing.” *Charboneau II*, 144 Idaho at 903. Thus, the verified pleadings alone can provide the *prima facie* showing to overcome summary dismissal. *Id.*

Nevertheless, the district court failed to apply those rules and determined that most of Mr. Grant's allegations were not supported by sufficient evidence, instead

determining that his allegations were bare, regardless of the fact that they were set forth in verified pleadings and affidavits. (See, e.g., R., pp.37, 38, 39, 41, 43, 44, 46, 47, 86, 90, 91, 92, 95, 96, 98, 101, 102, 103, 104, 105, 106.) The fact that the allegations were bare does not mean that the district court was free to ignore them – the question it had to consider was whether those allegations, bare though they may have been, *if presumed to be true*,¹⁵ would entitle Mr. Grant to relief. *Charboneau II*, 144 Idaho at 903; *Baldwin*, 145 Idaho at 153. Mr. Grant's allegations met that standard, and so he should have been afforded an evidentiary hearing.

For example, in regard to Mr. Grant's claim regarding his *Estrada* rights, the district court stated: "However, Mr. Grant has presented no admissible evidence to demonstrate his counsel failed to advise him properly regarding his rights to his participation in the psychological examination. Instead the Petitioner has only set forth unsubstantiated and *unverified* claims, which provide no relief under the Uniform Post Conviction Procedure Act." (R., p.98 (emphasis added).) This reasoning is clearly erroneous because Mr. Grant alleged in his pleadings that his attorney did not advise him about his *Estrada* rights.¹⁶ (R., pp.3, 6.) Those petitions and affidavits were verified. (R., pp.7, 60.) As such, those allegations constituted admissible, verified

¹⁵ To presume a claim to be true means that the claim is considered to be accurate, even if other evidence might suggest otherwise. Where, as here, the district court summarily dismisses a claim based on potentially contradictory evidence, it has erroneously applied the presumption of accuracy to the other evidence, not to the claim being evaluated. Practically speaking, all the potentially contradictory evidence does in the face of an appropriately-applied presumption is create a genuine issue of material fact. If a genuine issue of material fact exists, an evidentiary hearing is a necessity. See, e.g., *Baldwin*, 145 Idaho at 157. Therefore, when the presumption is accurately applied, the district court erred in summarily dismissing Mr. Grant's petition.

¹⁶ A factual finding is clearly erroneous when it is not supported by substantial and competent evidence in the record. *Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003).

evidence supporting his claim for relief. *Mata*, 124 Idaho at 593. Furthermore, the district court's decision to summarily dismiss because "Mr. Grant has presented no admissible evidence to demonstrate his counsel failed to advise him properly regarding his rights prior to his participation in the psychological examination," and because "the Petitioner has set forth unsubstantiated and unverified claims, which can provide no relief under the Uniform Post Conviction Act" (R., p.98), is directly contrary to established precedent, which provides that the verified petitions alone may be the basis for relief under the Uniform Post Conviction Procedure Act.¹⁷ *Charboneau II*, 144 Idaho at 903; *Baldwin*, 145 Idaho at 153; *Mata*, 124 Idaho at 593. The only evidence, presented in a verified petition, was that Mr. Grant's attorney failed to advise Mr. Grant of his *Estrada* rights. *Estrada* makes it clear that, if true, that claim would entitle Mr. Grant to relief. *See also Murray*, 156 Idaho at 167. Therefore, presuming the claim to be true (particularly as it was un rebutted by the State), the district court erred in summarily dismissing the petition. *Charboneau II*, 144 Idaho at 903; *Baldwin*, 145 Idaho at 153.

As another example, the district court stated that "Mr. Grant also submitted the Petitioner's Response to Court's Notice of Intent to Dismiss, which did not include any additional documents or affidavits." (R., p.86.) This is another clearly erroneous determination, since the Petitioner's Response to Court's Notice of Intent to Dismiss

¹⁷ The undue limitation of information that may be properly considered (*i.e.*, the district court's refusal to consider the facts set forth in Mr. Grant's verified filings because they were just his assertions) constitutes an abuse of discretion by the district court. *Cf. State v. Izaguirre*, 145 Idaho 820, 824 (2008). As the district court has unduly limited its consideration of the evidence before it, it has abused its discretion in this manner, further justifying remanding this case for further proceedings. *See id.*

was notarized. (R., p.60.) As such, it was essentially an affidavit. *Mata*, 124 Idaho at 593. Critically, this assertion by the district court came before it began discussing any of Mr. Grant's individual claims, which indicates that the erroneous rationale was applied to all the ensuing subsections. As a result of numerous misapplications of the *Mata* standard, both generally and to specific claims, the district court's errors significantly undermined the entire decision.

Even when the district court did accept the evidence Mr. Grant presented, it did not give it the appropriate weight. If the allegations are unrefuted, they must be accepted as true for purposes of summary disposition. *Baldwin*, 145 Idaho at 153. The State did not file an answer in this case. (See *generally* R.) As such, Mr. Grant's allegations were never refuted. Therefore, at least for purposes of summary disposition, Mr. Grant's factual allegations had to be accepted as true. *Baldwin*, 145 Idaho at 153. Furthermore, in summary disposition proceedings, the facts and all reasonable inferences therefrom are to be construed in the light most favorable to the nonmoving party. *Charboneau II*, 144 Idaho at 903. However, the district court reviewed the evidence in the light *least* favorable to Mr. Grant, determining that the evidence was insufficient or that Mr. Grant had failed to prove the allegations. (See, e.g., R., pp.39, 40, 41, 48, 98, 100, 104) At the summary judgment phase, a petitioner is not required to prove his claim; rather, the petitioner is required to show that claim exists which, if he can prove it at a subsequent evidentiary hearing,¹⁸ would entitle him to relief.

¹⁸ If the petitioner is required to prove his claim in his initial pleadings, then there is never a reason to hold an evidentiary hearing. That result would have serious due process implications, as doing away with evidentiary hearings altogether would likely deprive the petitioner of a *meaningful* opportunity to be heard. It would also run afoul of

Charboneau II, 144 Idaho at 903. If Mr. Grant's uncontested allegations are properly accepted as true, then Mr. Grant has sufficiently proved his allegations so as to merit an evidentiary hearing. See *Baldwin*, 145 Idaho at 153; *Charboneau II*, 144 Idaho at 903. Again, by not following this precedent, the district court erred in such a way as to undermine its entire decision.

If *Mata*, *Baldwin*, and *Charboneau II* are properly applied in this case, it is clear that Mr. Grant's verified pleadings and affidavits present several genuine issues of material fact in regard to some, if not all, of his claims. Those genuine issues of material fact require an evidentiary hearing to sort out. See *Franck-Teel v. State*, 143 Idaho 664, 667-68 (Ct. App. 2007).

C. The District Court Failed To Apply The Appropriate Standards Regarding The Prejudice Prong Of The Strickland Test When It Summarily Dismissed Mr. Grant's Petition For Post-Conviction Relief

In wrapping up its discussion of the individual claims, the district court stated "the Petitioner still failed to demonstrate prejudice, as he offered no compelling argument that the outcome of his case would have been different but for his attorney's errors." (R., p.106.) This statement imputes the erroneous standard to all of Mr. Grant's claims. In addition, the district court's additional requirement of a "compelling argument" is also erroneous at the summary judgment proceedings, as Mr. Grant need only demonstrate that, if true, his factual allegations would support his claims. *Baldwin*, 145 Idaho at 153. The determination of whether the argument is compelling (*i.e.*, proven to a sufficiency of the evidence) is one appropriately left until after the evidentiary hearing,

the statutory procedure governing post-conviction, which provides for a hearing when the petitioner establishes a genuine issue of material fact. I.C. §§ 19-4906(b) & -4907.

after Mr. Grant has had the full opportunity to make a compelling argument based on all the evidence, for which he needed the assistance of counsel. See *Charboneau II*, 144 Idaho at 903. As such, this is yet another clear demonstration of the district court's erroneous actions in this case: the district court misinterpreted the prejudice prong of *Strickland* in its analysis of Mr. Grant's allegations.

To demonstrate prejudice, the applicant need only demonstrate that "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (emphasis added). However, the district court required that Mr. Grant demonstrate that the outcome "*would have been different* but for his attorney's unprofessional errors."¹⁹ (See, e.g., R., pp.47; see also R., pp.95, 96, 106.) The district court's requirement that Mr. Grant demonstrate that the outcome would have been different placed a far more onerous burden on him than the one actually levied by the law: *Strickland* only requires the applicant to demonstrate the *possibility* that the outcome might change, whereas, under the district court's standard, Mr. Grant would have to prove the outcome would actually have changed. *Strickland*, 466 U.S. at 694. Therefore, to meet that burden, Mr. Grant needed only to undermine confidence in the outcome (*i.e.*, make it less

¹⁹ To this same end, the district court was requiring Mr. Grant to prove his allegations by a preponderance of the evidence. (See, e.g., R., pp.37, 39) That burden is premature since demonstrating a reasonable probability of a different result establishes the genuine issue of material fact justifying a hearing. See *Baldwin*, 145 Idaho at 153. It is at that subsequent evidentiary hearing that he is required to prove his claims by a preponderance of the evidence. See, e.g., *Nguyen v. State*, 121 Idaho 257, 258 (Ct. App. 1992) ("*In a post-conviction relief hearing*, the petitioner has the burden of proving the allegations which entitle him to relief by a preponderance of the evidence." (emphasis added)).

certain as the result), not affirmatively prove an alternative outcome would have come to pass. See *Strickland*, 466 U.S. at 694.

If *Baldwin* and *Strickland* are properly applied in this case, it is clear that Mr. Grant's verified pleadings and affidavits present sufficient allegations of prejudice in regard to some, if not all, of his claims. As such, the failure to comply with those standards demonstrates the need to vacate the summary dismissal order and remand the case for an evidentiary hearing.

D. In Regard To Several Of Mr. Grant's Specific Allegations, He Alleged Facts Which, If True, Would Entitle Him To Post-Conviction Relief, And Thus, Summary Dismissal Of His Claims Was In Error

As discussed in Section III, *supra*, Mr. Grant alleged facts demonstrating the possibility of several valid claims. In regard to some of them, his verified pleadings also alleged sufficient facts that demonstrate genuine issues of material fact, which should have entitled him to an evidentiary hearing on those issues. However, on others, the record does not contain sufficient facts to make that assertion, usually because the prejudice caused by trial counsel's errors, while implied, was not actually articulated.²⁰ However, they should remain viable issues on remand, since presumably, given the assistance of counsel, Mr. Grant could file an amended petition articulating that prejudice and presenting genuine issues of material fact in regard to those claims.

²⁰ Issues in this situation include, but are not limited to, Mr. Grant's claim that his attorney was ineffective for not reviewing the PSI with him or assisting him to object to erroneous or unreliable information therein (see Section III(D), *supra*), Mr. Grant's claim that his attorney was ineffective for not presenting certain, articulated, mitigating evidence (see Section III(E), *supra*), and Mr. Grant's claim that his attorney was ineffective for failing to move for a change of venue or recusal of the district court judge (see Section III(F), *supra*).

However, as there are some issues in which Mr. Grant did allege, at least, genuine issues of material fact, the district court's decision to summarily dismiss the petition was erroneous and should be reversed.

1. Mr. Grant Alleged Facts That, If Accepted As True, Would Entitle Him To Relief Because His Attorney Was Ineffective For Failing To Advise Him Of His Right To Remain Silent During The Presentence Investigations, Per The Idaho Supreme Court's Decision In *Estrada*

As explained in Section III(C), *supra*, Mr. Grant alleged facts in his verified pleadings sufficient to demonstrate that his attorney's performance was deficient, failing to inform him of his right to remain silent during the psychological examinations. (R., pp.3, 6, 54.) Mr. Grant also alleged that information obtained during this interview was used against him at his sentencing hearing. (R., p.54.) As such, those verified facts and reasonable inferences, presumed true and liberally construed in Mr. Grant's favor, would entitle him to relief for the ineffective assistance of counsel. See *Strickland*, 466 U.S. at 694; *Estrada*, 143 Idaho at 561. Therefore, summary denial on that claim was inappropriate and it should be remanded for an evidentiary hearing. See *Charboneau II*, 144 Idaho at 903.

2. Mr. Grant Alleged Facts That, If Accepted As True, Would Entitle Him To Relief Because His Attorney Was Ineffective By Inducing Him To Plead Guilty Based On False Assurances Regarding His Potential Sentence

As explained in Section III(G), *supra*, Mr. Grant alleged facts in his verified pleadings sufficient to demonstrate that his attorney provided deficient representation by inducing him to plead guilty based on false assurances as to the potential overall length of his sentence and his initial participation in the rider program. (R., p.57.) As such, this robbed his guilty plea of the necessary voluntariness. See *Nevarez*, 145 Idaho at 884.

He also alleged facts sufficient to demonstrate that he was prejudiced by this deficient performance, as he asserted in his verified response to the notice of intent to dismiss that there was “a strong likelihood” that he would have insisted on proceeding to trial. (R., p.58.) Since Mr. Grant need only undermine confidence in the outcome (in this case, the decision to plead guilty) to show prejudice, that verified allegation is sufficient to meet the requirement from *Strickland*. See *Strickland*, 466 U.S. at 694. As such, those verified facts and reasonable inferences, presumed true and liberally construed in Mr. Grant’s favor, present a genuine issue of material fact. Therefore, summary denial on that claim was inappropriate and it should be remanded for an evidentiary hearing.

3. Mr. Grant Alleged Facts That, If Accepted As True, Would Entitle Him To Relief Because His Guilty Plea Was Not Knowingly, Intelligently, And Voluntarily Entered

As explained in Section III(H), *supra*, Mr. Grant alleged facts in his verified pleadings sufficient to demonstrate that he did not knowingly, intelligently, or voluntarily enter his guilty plea based on the fact that he was suffering a severe depressive episode associated with his mental health conditions. As such, those verified facts and reasonable inferences, presumed true and liberally construed in Mr. Grant’s favor, would entitle him to relief. See *Ridgley*, 148 Idaho at 678. Therefore, they present a genuine issue of material fact, and thus, summary dismissal on that claim was inappropriate and it should be remanded for an evidentiary hearing.

CONCLUSION

Mr. Grant respectfully requests that this Court exercise its review authority in this case. On review, he respectfully requests that this Court reverse the order denying him the assistance of counsel, vacate the order summarily dismissing his post-conviction petition, and remand this case for further proceedings. Additionally, because the district court erroneously summarily dismissed at least some of his claims, he respectfully requests this Court instruct that an evidentiary hearing be among the future proceedings.

DATED this 13th day of June, 2014.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of June, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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ROBERT C NAFTZ
DISTRICT COURT JUDGE
E-MAILED BRIEF

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