8-6-2013

# Grant v. State Appellant's Brief 2 Dckt. 39207

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| WOODROW JOHN GRANT, | ) | |
| | ) | |
| Petitioner-Appellant, | ) | NO. 39207 |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF IDAHO, | ) | APPELLANT'S BRIEF |
| | ) | |
| Respondent. | ) | |
| | ) | |

# BRIEF OF APPELLANT

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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## STATEMENT OF THE CASE

### Nature of the Case

Woodrow Grant appeals from the district court's order summarily dismissing his petition for post-conviction relief. He argues that the district court failed to apply the proper standards when denying him the assistance of post-conviction counsel and summarily dismissing his petition. He contends further that he made sufficient allegations of fact in his verified pleadings to merit both assistance of counsel and an evidentiary hearing on his claims. Based on either argument, he requests this Court vacate the district court's orders and remand the case for further proceedings with the instruction that he be appointed post-conviction counsel and afforded an evidentiary hearing as part of those further proceedings.

### Statement of the Facts and Course of Proceedings

Mr. Grant was incarcerated on three different charges in three separate cases (aggravated battery, possession of methamphetamine, and domestic assault). (R., pp.1-2.) He timely petitioned for post-conviction relief in those cases.[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, as well as an attached 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.) Both of these documents were verified by a notary public. (R., p.7.) The record does not

[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.

indicate that the State ever filed an answer or motion for summary dismissal.[2] (*See generally* R.; *see also* Register of Actions (RoAs).)[3]

The district court 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 adequate facts to state a claim for relief.[4] (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 be different in order to survive summary dismissal. (R., pp.46-47.)

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 verified by a notary public. (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 in several ways: by not

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[2] The State did file a motion to extend the time for filing an answer, which the district court granted. (R., pp.19-22.)

[3] The RoAs appear before the first numbered page in the Clerk's Record.

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

moving for a change of venue or the district court judge's recusal; not presenting mitigating evidence concerning the impact of his mental condition or testimony regarding the improper investigation of the underlying cases; not informing him of his rights, as articulated in *Estrada*[5]; and, not allowing him an opportunity to review the Presentence Investigation Report (*hereinafter*, PSI) or assisting him to object to improperly-included information therein. (R., pp.52-59.)

Second, as to the two cases in which his petition was timely from the judgments, Mr. Grant contended that he did not knowingly, voluntarily, or intelligently enter his guilty pleas because of his attorney's improper assurances that he would receive concurrent sentences and the opportunity to participate in the rider program; and, because 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 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 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,

[5] *Estrada v. State*, 143 Idaho 558, 561 (2006).

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 continued to assert 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.)[6] 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.[7]

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[6] This document appears in the record out of chronological order. It was file-stamped May 27, 2011. (R., p.65.) The district court's order dismissing the petition for post-conviction relief, which appears subsequently in the record, was file-stamped on May 11, 2011. (R., p.86.)

[7] 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 appeal is timely from the final judgment.

Additionally, Mr. Grant's notice of appeal is timely from the order denying his motion to reconsider filed pursuant to I.R.C.P. 59(e) because the time to appeal begins anew when the district court enters such an order. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 603 (1977).

## ISSUES

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.

## ARGUMENT

### I.

### 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

### A. Introduction

Mr. Grant made the necessary showing to require appointment of counsel as he alleged facts supporting some of the elements of his claims for relief. As such, the district court should have appointed counsel to assist him in making a full and complete presentation of evidence to the district court in support of those claims. In light of a recent decision by the United States Supreme Court, this failure to appoint counsel when merited violated Mr. Grant's constitutional right to due process since the post-conviction action was Mr. Grant's first opportunity to present these issues, particularly his claims of ineffective assistance of counsel. The question of whether there is such a due process right has yet to be decided by the United States Supreme Court, and the Idaho precedent to the contrary should be reexamined in light of the new United States Supreme Court precedent.[8]

However, even if no such right is recognized, Mr. Grant still has an Idaho statutory right to counsel in post-conviction proceedings since he alleged facts that could possibly give rise to a valid claim for relief. Therefore, under either rationale, the district court erroneously denied Mr. Grant's numerous requests for the assistance of post-conviction counsel. Accordingly, this Court should vacate the district court's order denying appointment of post-conviction counsel, as well as the order summarily

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[8] *E.g.*, *Freeman v. State*, 131 Idaho 722, 724 (1998) ("There is no statutory or legal right to an attorney in post-conviction proceedings in Idaho.") (citing *Banks v. State*, 128 Idaho 886, 889 (1996) and *Follinus v. State*, 127 Idaho 897, 902 (Ct. App. 1995)).

dismissing the petition, and remand this case for further proceedings with the assistance of counsel.

B. Mr. Grant Had A Due Process Right To An Attorney In The Initial Post-Conviction Proceedings 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.[9] U.S. CONST. amend XIV; *see, e.g., Moore v. Michigan*, 355 U.S. 155, 195 (1957) ("Where the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made."); *In Interest of Kinley*, 108 Idaho 862, 866 (Ct. App. 1985) ("The right to counsel is so basic to our notions of fair trial and due process that denial of the right is never treated as harmless error."); *Pierce v. State*, 2004 Unpublished Opinion No. 24, 1 (Ct. App. March 25, 2004) (recognizing that the Fourteenth Amendment protections include a guarantee of counsel, noting that the Idaho Supreme Court has yet to decide whether that right extends to "discretionary review after an appeal");[10] *see also 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

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[9] The Idaho Constitution should also afford this right as part of the due process rights afforded by Art. I, § 13, as the two clauses are substantially the same. *Compare* U.S. CONST. amend XIV *with* IDAHO CONST. art I, § 13. Although Idaho reserves the right to interpret its constitution as more protective than its federal counterpart, it will consider the federal jurisprudence when interpreting the provisions thereof. *Schevers v. State*, 129 Idaho 573, 577 (1996); *State v. Radford*, 134 Idaho 187, 190 (2000).

[10] As an unpublished opinion, *Pierce* has no authoritative or precedential value. Internal Rules of the Idaho Supreme Court, Rule 15(f). It is cited merely as an example of the analysis the Court of Appeals has used when reviewing the Fourteenth Amendment's due process right to counsel in regard to discretionary review after direct appeal, such as post-conviction petitions in Idaho.

Constitution—and, in particular, in accord with the Due Process Clause."); *Hernandez v. State*, 133 Idaho 794, 799 (Ct. App. 1999) ("[F]ailing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.").

The "initial-review collateral proceeding" (in post-conviction cases, the initial petition heard by the district court) is one such proceeding where deprivation of the assistance of counsel constitutes a deprivation of due process. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) ("[T]he Constitution may require the 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.'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)). This is because the initial-review collateral proceeding serves as the applicant's *only* chance to challenge the effectiveness of his attorney.[11] *Id.* As a result of this aspect of the initial-review

[11] The States have been permitted to establish their own systems in regard to direct appeals and collateral attacks. *See Martinez*, 132 S. Ct. at 1318-19. Idaho has chosen to separate the collateral attack from the direct appeal because the direct appeal record may not contain sufficient evidence to effectively resolve the collateral claims. *See, e.g., State v. Saxton*, 133 Idaho 546, 549 (Ct. App. 2009); *State v. Yakovac*, 145 Idaho 437, 443 (2008). Idaho's system requires that an applicant, who is seeking to challenge his sentence with evidence not in the direct appeal record (*i.e.*, to support an ineffective assistance claim), should make that claim in post-conviction because "[i]f an appellate court were to reach the merits of ineffective assistance issues raised on direct appeal, the absence of any record supporting the claims would generally require a decision adverse to the appellant, which would be *res judicata*." *Saxton*, 133 Idaho at 549; *accord Yakovac*, 145 Idaho at 443.

The United States Supreme Court explained that such a system is not only permissible, but is based on sound reasoning. *Martinez*, 132 S. Ct. at 1318. But the Supreme Court also pointed out that such a system has consequences for the state implementing it. *Id.* For instance, employing such a system reduces the State's ability to foreclose claims through procedural bars. *See id.* As such, the *Coleman* Court's rationale, that the Constitution may require the States to provide counsel in certain collateral attacks to a conviction, would apply to not only the initial proceedings on the direct appeal, but the initial-review collateral proceeding created in Idaho's post-conviction system as well. *See Martinez*, 132 S. Ct. at 1315, 1317.

collateral proceeding, those proceedings may constitute an exception from the holdings in *Finley v. Pennsylvania,* 481 U.S. 551 (1987), and *Murray v. Giarratano*, 492 U.S. 1 (1989), which, according to the Court in *Coleman*, established a general rule that there is no right to counsel in such collateral proceedings. *Coleman*, 501 U.S. at 755. The Supreme Court recently reaffirmed that this question remains unresolved:

> [*Coleman*] left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. . . . *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. This is not the case, however, to resolve whether that exception exists as a constitutional matter.

*Martinez*, 132 S. Ct. at 1315 (quoting *Coleman*, 501 U.S. at 755).

The reason the United States Supreme Court did not completely resolve that question is simple: that particular question was not presented on appeal. *Martinez*, 132 S. Ct. at 1315. Rather, the question before the Court in that case was whether ineffective assistance of counsel in a post-conviction proceeding may provide cause for a procedural default in a federal habeas proceeding. *Id.* In that case, the Ninth Circuit had determined that the applicant did not have a right to counsel in the initial-review collateral proceeding, and thus, his initial post-conviction attorney's failure to raise the claim of ineffective assistance of trial counsel did not prevent a procedural default of the habeas proceedings because that claim had not been raised in the initial post-conviction proceeding. *Id.* at 1313-15. The United States Supreme Court reversed that decision and remanded for a determination on the substantive issues raised: whether

Mr. Martinez's initial-review collateral proceeding counsel had been ineffective and whether his underlying claim (ineffective assistance of trial counsel) was substantial. *Id.* at 1320-21.

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)). 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."[12] *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.* Therefore, counsel needs to be appointed in such situations. *See id.*

The Supreme Court also 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

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[12] This language is particularly applicable to Idaho. In Idaho, post-conviction is undisputedly the first designated proceeding for the applicant to raise a claim of ineffective assistance. *See, e.g., Saxton*, 133 Idaho at 549; *Yakovac*, 145 Idaho at 443; *see also Trevino v. Thaler*, 113 S. Ct. 1911 (May 28, 2013) (clarifying that where the procedures set up by the state, while not requiring claims of ineffective assistance to be made in post-conviction, would make it "highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trail counsel on direct appeal, our holding in *Martinez* applies" and the post-conviction is considered the first designated proceeding to raise ineffective assistance of counsel claims). Therefore, it is the equivalent of his direct appeal in that regard, and therefore, the *pro se* applicant needs the assistance of counsel to effectively prosecute his claims. *See Martinez*, 132 S. Ct. at 1311-12.

investigation, but appointed counsel could.[13] *Id.* The Supreme Court even addressed this issue in terms of the system that Idaho employs for resolving ineffective assistance claims:

> 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.* (internal citations omitted; emphasis added); *Halbert*, 545 U.S. at 619. Based on all this language, it appears as though, given the chance, the United States Supreme Court will hold that, during the initial-review collateral proceeding, particularly if it is separate from the direct appeal, the applicant has a right to the assistance of counsel.[14] *See id.* at 1315-17.

However, the Supreme Court did express some concerns with making a ruling as to a potential constitutional right in this regard: doing so would deprive the states of the flexibility they currently enjoy in addressing post-conviction claims. *See id.* at 1319-20. Therefore, the Court gave the States the chance to "elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a

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[13] 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).

[14] In fact, in his dissent, Justice Scalia pointed out that the practical effect of the *Martinez* ruling and actually establishing a constitutional rule requiring appointment of counsel in collateral-review proceedings is, for all intents and purposes, the same. *Martinez*, 132 S. Ct. at 1321-22, 1327 (Scalia, J., dissenting).

defense on the merits in [such] proceedings." *Id.* at 1320. The Supreme Court concluded: "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." *Id.* at 1320. Therefore, Idaho's choice is to provide effective counsel in the initial-review collateral proceedings and allow its courts to decide these cases based on Idaho law, or to continue procedurally barring such claims and cede the authority to decide the merits of claims of ineffective assistance of trial counsel to the federal courts.[15] *See id* at 1319-20.

As such, Idaho should recognize the wisdom inherent in the *Martinez* ruling: that in order to efficiently resolve ineffective assistance of counsel claims, counsel needs to be appointed in the initial-review proceedings as part of the constitutional guarantees of due process. Because Idaho has separated such proceedings from the direct appeal process, that means counsel needs to be appointed for the initial proceedings before the district court. Therefore, this Court should recognize the existence of the right, under either the Fourteenth Amendment or Article I, § 13 of the Idaho Constitution. As such, the denial of post-conviction counsel during the initial-review collateral proceeding followed by the subsequent procedural bar of his claims – namely summary dismissal for the alleged failure to articulate sufficient facts to support the claims for relief (*see* R., pp.86-107) – means that the district court violated Mr. Grant's constitutional rights in

[15] In a special concurrence, Judge Burnett pointed out that Idaho, through the Post-Conviction Procedure Act, had sought to avoid outside interference from the federal courts on these issues. *Melligner v. State*, 113 Idaho 31, 35 (Ct. App. 1987) (Burnett, J., specially concurring).

this regard. *See Martinez*, 132 S. Ct. at 1315-21. Thus, because the district court violated Mr. Grant's right to due process in this manner, this Court should vacate 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.

C. Alternatively, Mr. Grant Has A Statutory Right To Post-Conviction Counsel Under The Facts Of This Case, And Mr. Grant's Allegations Met The Statutory Standard For Appointment Of Counsel

Should this Court decide that there is no constitutional right to post-conviction counsel in Idaho, *see, e.g.*, *Follinus*, 127 Idaho at 902 (relying on *Finley*, 481 U.S. 551 for the assertion that "there is no Sixth Amendment Right to counsel in a collateral attack upon a conviction"), it should still vacate the district court's decisions to deny Mr. Grant the assistance of post-conviction counsel and remand for further proceedings. Idaho law permits appointment of post-conviction counsel if the petitioner demonstrates the potential of a valid post-conviction claim. I.C. § 19-4904; *Charboneau v. State*, 140 Idaho 789, 792-93 (2004) (hereinafter, *Charboneau I*). Therefore, since Mr. Grant has demonstrated the potential of a valid post-conviction claim, this Court should vacate 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.

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. Mr. Grant's assertions of facts in his verified pleadings and affidavits meet that standard. (*See* R., pp.1-8, 50-64.) As those allegations were verified, in that the documents in which they appear were

notarized, they constitute evidentiary facts which may be considered by the district court in support of the applicant's petition for relief. *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993); *Loveland v. State*, 141 Idaho 933, 936 (Ct. App. 2005).

Along with his initial petition, Mr. Grant included his motion for appointment of counsel and the accompanying affidavit in support of the motion. (R., pp.10-11.) He renewed that request in his amended pleadings, informing the district court that he required the assistance of counsel to collect the necessary additional evidence to prove his allegations and present it in the form to which the district court was accustomed. (R., p.59.) Under the current standard, Mr. Grant only needed to allege facts that show "the *possibility* of a valid claim" in order to merit the appointment of counsel. *Swader*, 143 Idaho at 654 (emphasis added); *Charboneau I*, 140 Idaho at 793.

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.*, prejudice). *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Estrada*, 143 Idaho at 561. For each of his claims (which will be discussed in detail *infra*), Mr. Grant alleged facts 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. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

1. 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 determined that counsel's performance is objectively insufficient if it fails to include informing a defendant of his right to remain silent during a presentence psychological evaluation. *Estrada*, 143 Idaho at 564. This privilege is well-established in precedent and applies in regard to all psychological evaluations occurring before sentencing or earlier in the judicial process. *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 that he might make an incriminating statement during that evaluation. *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 a 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.) As part of his verified pleadings, it constitutes 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 in this regard. *Strickland*, 466 U.S. at 694; *Estrada*, 143 Idaho at 561. 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. *See Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

The district court impliedly took judicial notice 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").[16] 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. *Estrada* makes it clear that *defense counsel* is required to consult with his client as to the right to remain silent. *Estrada*, 143 Idaho at 564. Therefore, Mr. Grant's verified allegation that his attorney did not consult with him about these rights raised the *possibility* of a valid claim, and therefore, counsel should have been appointed and the district court's decision to the contrary is erroneous. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

And while the 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 relieve defense counsel of the obligation to consult with the defendant about those rights. *See Estrada*, 143 Idaho at 564. In fact, if the district court's perspective were correct and the guilty plea questionnaire satisfactorily informed the defendant of the specific rights protected by *Estrada*, it would render the *Estrada* decision pointless, as defense attorneys could simply rely on that questionnaire to fulfill their obligation to their client. As such, it would significantly erode the protections afforded against self-

[16] Mr. Grant filled out separate questionnaires in CR-2009-19445-FE and CR-19451, both of which bear the date "April 22, 2010." However, as they contain the same information as they relate to the claims on post-conviction, Mr. Grant has filed a motion requesting this Court take judicial notice of both questionnaires contemporaneously with this brief.

incrimination during the presentence phase of the judicial process. Therefore, the information in the form guilty plea questionnaire does not disprove the facts alleged by Mr. Grant. The decision to deny him an attorney is thus, still erroneous. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

Furthermore, *Estrada* dealt with a very specific matter – whether the defendant was advised by counsel as to his right to remain silent during psychological evaluations. *Estrada*, 143 Idaho at 562. That protection does not extend to normal presentence investigations, however. *See, e.g., Hughes v. State*, 148 Idaho 448, 461 (Ct. App. 2009) (explaining the distinction the *Estrada* Court drew in this regard). As such, the generic assertion that the defendant may retain his right to remain silent in unspecified future proceedings contained in the form questionnaire to which the district court referred does not actually provide the protection necessary under *Estrada*. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

In fact, the questionnaire that Mr. Grant filled out has a very specific question in regard to *Estrada*: "Has your attorney advised you that you have a constitutional right not to submit to a court ordered *psychosexual* evaluation for purposes of sentencing?" (Augmentation – Guilty Plea Questionnaire, p.6 (emphasis added).) Mr. Grant was not being required to submit to a *psychosexual* examination, nor had he been charged with a crime that would even raise the question of whether a *psychosexual* examination was required. (*See* Augmentation – Guilty Plea Questionnaire, p.1 (the two questionnaires indicated that they were related to charges for possession of methamphetamine and domestic battery).) Pursuant to the concept of *expressio unius est exlusio alterius*, the use of this particular item excludes other, though-similar, items from inclusion in the statement. *See St. Alphonsus Diversified Care, Inc. v. MRI Assoc., LLP*, 148 Idaho

479, 487 (2009); *State v. Gardiner*, 127 Idaho 156, 165-66 (Ct. App. 1995) (pursuant to this concept, statute listing potential victims under the restitution framework did not include parties not specifically named in the list). Therefore, all the guilty plea questionnaire actually informed Mr. Grant of, in regard to *Estrada*, was that he did not have to participate in a *psychosexual* evaluation; it did not provide him with information regarding his constitutional rights regarding participation in a psychological evaluation, which is different from a psychosexual evaluation. *Compare* I.C. § 19-2524 (identifying and authorizing psychological evaluations) *with* I.C. § 18-8316 (identifying and authorizing psychosexual evaluations). Therefore, even if the guilty plea questionnaire is properly considered, it does not contradict Mr. Grant's claim that his attorney was ineffective for failing to consult with him regarding his right to remain silent during a *psychological* evaluation. *See Estrada*, 143 Idaho at 562

However, even if that distinction is disregarded, the questionnaires still do not actually disprove Mr. Grant's allegation that his attorney failed to advise him pursuant to *Estrada*. As a practical matter, there is no reason for counsel to fully advise his client about the right to remain silent during a court-ordered psychological evaluation until after the district court actually orders such an evaluation. Counsel may be able to guess whether the district court is likely to order such an evaluation, but until it is ordered, counsel will not be fully informed of the situation (whether there will be an evaluation, who will conduct it, etc.). As such, until the evaluation is actually ordered, counsel will be unable to fully advise his client as to whether or not the client should invoke his rights at the court-ordered hearing. "[T]he decision to be made regarding the proposed psychiatric evaluation is 'literally a life or death matter' and is 'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, *of*

*the particular psychiatrist's biases and predilections*, and of possible alternative strategies at the sentencing hearing.'" *Estelle v. Smith*, 451 U.S. 454, 471 (1981) (quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979)) (emphasis added).[17] As the United States Supreme Court pointed out, counsel's advice in this regard hinges, in part, on counsel knowing who will perform the evaluation, which is a fact that will not be known until the district court orders the evaluation be performed. Since the district court does not order such an evaluation until after the plea is entered and accepted, counsel's *Estrada* obligation cannot practically be fulfilled before the entry of plea. Therefore, the answers to the guilty plea questionnaire cannot *conclusively* disprove Mr. Grant's claim that his attorney did not meet his obligation under *Estrada*. Counsel had the opportunity after the plea was entered and after Mr. Grant indicated that he was pleased with counsel's performance to fail to meet his obligation under *Estrada*. It would be at that point that Mr. Grant would become displeased with counsel's ineffective performance. As such, the answers in his guilty plea questionnaire and his allegation of ineffective assistance of counsel in this regard are not mutually exclusive.

Rather, Mr. Grant would not have known, nor would he have had a reason to know, that his attorney's performance had been deficient until *after* he filled out the guilty plea questionnaire and entered his plea of guilty. The Kentucky Court of Appeals has articulated this concept best:

> While a defendant's representations [during the entry of a guilty plea] constitute a formidable barrier in any subsequent proceeding, that barrier is not insurmountable. A defendant's statements at the guilty plea hearing concerning his relationship with counsel must be evaluated in light of what the defendant knew or should have known and do not necessarily preclude him from subsequently raising issues of ineffective assistance.

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[17] The Idaho Supreme Court has held that "[t]he analsyis in *Estelle* [] is instructive." *Estrada* 143 Idaho at 562.

*Johnson v. Commonwealth*, Not Reported in S.W.3d, 2003 WL 1786719, *6 (Ky. Ct. App. 2003) (internal citations omitted).[18] The Tenth Circuit Court of Appeals has also addressed similar situations and decided that the sequence of events in such claims is important, determining that the petitioners' challenges to the voluntariness of their pleas could not be supported by allegations that counsel had performed deficiently *after* the plea was entered. *United States v. Kerns*, 53 Fed.Appx. 863, 865-66 (10th Cir. 2002); *United States v. Ellis*, 132 Fed.Apps. 209, 211 (10th Cir. 2005); *United States v. Lamson*, 132 Fed.Appx. 213, 215 (10th Cir. 2005). Therefore, since Mr. Grant could not have known or complained of the deficient performance at the guilty plea hearing, the district court's use of the guilty plea questionnaire against this claim (*see* R., p.99) was erroneous. Accordingly, Mr. Grant has alleged facts demonstrating *the possibility* of a valid claim (which is true even if the answers to the guilty plea questionnaire are taken into consideration), and therefore, should have been appointed counsel. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

As an additional result, even if the guilty plea questionnaire does tend to disprove Mr. Grant's allegations, denying Mr. Grant assistance of counsel was still inappropriate. The conflict between the questionnaire and the allegations would only create a genuine issue of material fact (whether or not sufficient consultation was given in regard to Mr. Grant's *Estrada* rights before the psychological examination was conducted). As such, there was still the potential that counsel could have assisted Mr. Grant to perfect

[18] In Kentucky, unpublished appellate decisions entered after January 1, 2003, are not binding precedent, but "may be cited for consideration by the court if there is no published decision that would adequately address the issue before the court," provided a copy of the entire unpublished decision is provided to the court and counsel. KY ST RCP Rule 76.28(4)(c). Therefore, as there does not appear to be a published opinion on this point, the decision in *Johnson v. Commonwealth* is appended to this brief.

that claim and overcome the implications to the contrary, if any, in the guilty plea questionnaire. Therefore, the district court's decision to deny Mr. Grant the assistance of counsel was erroneous because nothing in the record indicates that Mr. Grant has failed to allege facts which revealed a possible valid claim for post-conviction relief. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

2. 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. Rule 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. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

3. 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, the district court properly 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.[19] (R., pp.52-53, 56-57.) Strongly implied in these assertions is that, had the district court been presented with this evidence, Mr. Grant would have received a more lenient sentence. (*See* R., pp.52-53, 56-59.)

[19] In a clear demonstration of the Catch-22 to which the district court subjected Mr. Grant in regard to sufficiently articulating his claims, it found that he 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, the district court required him to provide it with evidence that it was not possible for him to get.

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. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

Furthermore, as discussed in Section I(C)(1), *supra*, the idea that Mr. Grant's answers on the guilty plea questionnaire conclusively disprove these allegations is illogical, since the actions which are alleged deficient occurred at the sentencing hearing. (*See* R., pp.58-59.) As such, any information in the answers to the guilty plea questionnaire is irrelevant to this claim. *See Johnson*, Not Reported in S.W.3d, 2003 WL 1786719, *6. Mr. Grant could not have known or complained of the deficient performance at the guilty plea hearing, and thus, the district court's use of the guilty plea questionnaire against this claim (*see* R., p.99) was erroneous. 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. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

4. 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 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 representation of Mr. Grant's brother.[20] (*See* R., p.52)

The district court dismissed that claim because it determined that decision 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.) To support its decision, the district court cited *State v. Carter*, 103 Idaho 917, 923 (1982) (*hereinafter, Carter I*). The decision in *Carter I* was vacated when a new trial was granted pursuant to a successful post-conviction action. *See Carter v. State*, 108 Idaho 788 (1985) (*hereinafter, Carter II*). The Supreme Court held, in regard to the decision to pursue a change of venue in post-conviction, that the critical aspect of its determination on the direct appeal (*Carter I*) was that it informed Mr. Carter that the proper forum to challenge such a decision by his attorney was in post-conviction, where he could present new evidence that was simply not available in the direct appeal record. *Carter II*, 108 Idaho at 792. The Court stated: "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 . . . .'" *Id.* As Mr. Carter proceeded to follow that instruction, barring the challenge in light of that additional evidence, would be improper. *Id.* Therefore, if Mr. Grant had evidence with which to supplement the record and

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[20] The district court cited to *Small v. State*, 132 Idaho 327, 333 (Ct. App. 1998), to support its actions in this regard. (R., p.36.) In that case, however, the applicant 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 should have at least had the aid of an attorney to fully investigate and prosecute that argument in post-conviction. *See Martinez*, 132 U.S. at 1317; *Swader,* 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

demonstrate the inadequacy of counsel's consideration of the question of venue, that is a viable issue on post-conviction. *See id.*

Mr. Grant alleged facts that cause serious pause in regard to his trial attorney's decision to not pursue a change of venue. (*See* R., p.52) If true, they establish the objective unreasonableness of Mr. Grant's attorney's decision to not request a change of venue. *See Strickland*, 466 U.S. at 694; *Carter II*, 108 Idaho at 792. 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.[21] Therefore, because Mr. Grant alleged facts which demonstrate the possibility of a valid claim, counsel should have been appointed and the decision to deny him counsel was in error. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

5. 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

[21] Mr. Grant recognizes that, usually, the decision of whether or not to request a change of venue is a tactical decision that will not be reviewed in post-conviction. *See, e.g., State v. Fee*, 124 Idaho 170, 175 (Ct. App. 1993). However, *Carter II* still provides that challenges to such decisions are appropriately raised in post-conviction and, with sufficient evidence, may be viable. *Carter II*, 108 Idaho at 792 (quoting *Carter I*, 103 Idaho at 923) (holding that "the 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]") (emphasis added).

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 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 also 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 at least a genuine issue of material fact as to the objective unreasonableness of that advice, as well as the prejudice arising from that erroneous advice. *Nevarez*, 145 Idaho at 884.

As such, the verified and unrefuted facts alleged by Mr. Grant demonstrate a possible viable claim for relief. Therefore, counsel should have been appointed and the decision to deny him counsel was in error. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

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

Mr. Grant alleged that his mental health issues made him incompetent to enter a guilty plea. (R., pp.5, 56-57.) In post-conviction actions, the applicant 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 from examinations would support his allegations, but due to his incarceration, he was unable to provide them to the district court.[22] (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. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

As with Mr. Grant's allegations in terms of his *Estrada* rights (*see* Section I(C)(1), *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, at most, established a genuine issue of material fact requiring an evidentiary hearing. It does not demonstrate that Mr. Grant had failed to allege facts showing the possibility of a valid claim, and therefore, he should have been appointed counsel. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793.

Therefore, since the facts Mr. Grant alleged, which 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. *Swader*, 143 Idaho at 654; *Charboneau I*, 140 Idaho at 793. Whether as a result of his constitutional rights to due

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[22] 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 Suprmee Court has identified as revealing why such petitioners "likely need" the assistance of post-conviction counsel. *Martinez*, 132 S. Ct. at 1317.

process or pursuant to the governing state statute, Mr. Grant was entitled to the assistance of post-conviction counsel. Therefore, 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.

II.

## 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 laws and standards when it summarily dismissed Mr. Grant's petition for post-conviction relief. In a continuing theme, it did not recognize that the statements of fact set forth in Mr. Grant's verified statement and pleadings, as well as the attached affidavit in support of his petition, constituted evidence it 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 apparently never filed an answer in this case), it had 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

As a preliminary matter, 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 v. State*, 145 Idaho 148, 153 (2008). 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*). The district court consistently failed to act in accordance with these standards. This is true despite the fact that, while previewing its discussion of each of Mr. Grant's claims, it recognized that it need not accept applicant's allegations unsupported by *admissible* evidence. (R., p.31 (quoting *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2003)). However, it also needed to realize that Mr. Grant's verified allegations constituted admissible evidence. *Mata*, 124 Idaho at 593. Therefore, its constant assertions that there was no admissible evidence supporting Mr. Grant's claims demonstrates error, affecting the whole process. (*See, e.g.,* R., pp.31, 37, 38, 39, 41, 43, 44, 46, 47, 48, 86, 90, 92, 95, 96, 98, 100, 101, 102, 103, 104, 105, 106.)

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.* And

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 held that most of Mr. Grant's allegations were not supported by such evidence, regardless of the fact that they were set forth in verified pleadings and affidavits, but determined rather that his allegations were bare. (*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 they 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*,[23] would entitle Mr. Grant to relief. *Charboneau II*, 144 Idaho at 903; *Baldwin*, 145 Idaho

[23] To presume a claim to be true means that it is considered to be accurate, even if other evidence might suggest otherwise. Where, as here, the district court summarily dismisses a claim because of potentially contradictory evidence, it has erroneously applied the presumption of accuracy to the other evidence, not to the claim.

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.

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. (R., pp.3, 6.) Those petitions and affidavits were verified. (R., pp.7, 60.) As such, those allegations constituted admissible, verified 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.[24] *Charboneau II,* 144 Idaho at 903; *Baldwin*, 145 Idaho at 153; *Mata*, 124 Idaho at 593. The only evidence, presented in a verified

[24] 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.*

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. Therefore, presuming the claim to be true (particularly as it was unrebutted 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 was verified by a notary public. (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 process. Therefore, this case should be remanded for a proper determination in regard to summary disposition.

However, the district court's failure to apply established precedential standards did not stop there. Even when it did accept the evidence Mr. Grant presented, it did not give it the appropriate weight. *See Baldwin*, 145 Idaho at 153 (recognizing that if the allegations are unrefuted, they must be accepted as true for purposes of summary disposition). 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, those facts and all

reasonable inferences are to be construed in favor of the nonmoving party.[25] *Charboneau II*, 144 Idaho at 903. Rather than apply these standards, the district court made impermissible determinations that the evidence was insufficient or that Mr. Grant had failed to prove the allegation. (*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 a potential claim that, if he can prove it at an evidentiary hearing,[26] would entitle him to relief. *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 the entire process. Therefore, this case should be remanded for a proper determination in regard to summary judgment.

If *Mata*, *Baldwin*, *Charboneau II*, and *Strickland* 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). As such, the failure to comply with those standards

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[25] In this case, summary dismissal proceedings were initiated by the district court, *sua sponte*, as the State did not file a motion for summary dismissal. (*See generally*, R.) As such, the party to be favored would be Mr. Grant, as he was the only party who would be adversely affected by the summary dismissal. *See Charboneau II,* 144 Idaho at 903.

[26] If the petitioner is required to prove his claim in his initial pleadings, then there is never a reason to hold an evidentiary hearing, a result which 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, not to mention, run afoul of 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.

alone demonstrates the need to vacate the summary dismissal order and remand the case for an evidentiary hearing.

C. The District Court Failed To Apply The Appropriate Laws And Standards When It Summarily Dismissed Mr. Grant's Petition For Post-Conviction Relief

In order to avoid summary dismissal, the defendant need only demonstrate that a genuine issue of material fact exists. I.C. § 19-4906(c); *Charboneau II*, 144 Idaho at 903. In making such determinations, the district court is to construe the facts and reasonable inferences in favor of the non-moving party. *Charboneau II,* 144 Idaho at 903. In order to establish a genuine issue of material fact in regard to an ineffective assistance claim, the applicant need only present facts which would demonstrate that counsel's performance was objectively unreasonable and there is a reasonable probability that the outcome would have been different (*i.e.*, prejudiced him). *Strickland*, 466 U.S at 694; *Estrada*, 143 Idaho at 561. Therefore, where the applicant has set forth verified facts which the district court may consider, and indeed must accept as true if they are unrefuted, which establish that his attorney's performance was objectively unreasonable and prejudiced him, summary judgment was inappropriate.

In addition to its failure to properly consider the verified petitions, discussed *supra*, the district court also misinterpreted the prejudice prong of *Strickland.* 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."[27] (*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 places a far more onerous burden on him than the one actually levied by the law: under the district court's standard, Mr. Grant would have to have proven there was no alternative but a different, favorable outcome, whereas *Strickland* only requires the applicant to demonstrate the *possibility* that a different outcome may have resulted. *Strickland*, 466 U.S. at 694; *cf. Day*, ___ P.3d ___, 2013 Opinion No.6, p.8 (Ct. App. January 24, 2013) (discussing a similar standard regarding prejudice in terms of fundamental error, "[that standard] does not require Day to make such an affirmative showing. Rather, as Day asserts, [it] requires that Day must demonstrate there is a *reasonable possibility* that the error affected the outcome of the trial") (emphasis in original). Therefore, to meet that burden, Mr. Grant needed only to undermine confidence in the outcome (*i.e.*, make it less certain as the result), not affirmatively prove an alternative outcome would have come to pass. *See Strickland*, 466 U.S. at 694.

If *Mata*, *Baldwin*, *Charboneau II*, and *Strickland* 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.[28] Those genuine issues

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[27] 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)).

[28] 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

of material fact require an evidentiary hearing to sort out. *See Franck-Teel*, 143 Idaho at 667-68. As such, the failure to comply with those standards alone 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 I(C), *supra*, Mr. Grant alleged facts demonstrating the possibility of several valid claims. In regard to some of them, his *pro se* pleadings also alleged sufficient facts that, at least, 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.[29] However, they should remain viable issues on remand, since presumably,

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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, 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.

[29] Issues in this situation include, but are not limited to, Mr. Grant's claim that his attorney was ineffective for failing to advise him of his *Estrada* rights (*see* Section I(C)(1), *supra*), 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 I(C)(2), *supra*), Mr. Grant's claim that his attorney was ineffective for not presenting certain, articulated, mitigating evidence (*see* Section I(C)(3), *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 I(C)(4), *supra*).

given the assistance of counsel, Mr. Grant to could file an amended petition articulating that prejudice and presenting genuine issues of material fact in regard to those claims.

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 I(C)(1), *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 I(C)(5), *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, 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.

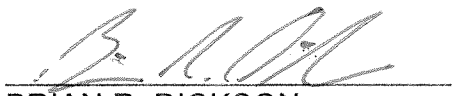
3. Mr. Grant Alleged Facts That, If Accepted As True, Would Entitle Him To Relief Because His Guilty Plea Was Not Knowingly, Intelligently, And Voluntarily Entered

As explained in Section I(C)(6), *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, summary dismissal on that claim was inappropriate and it should be remanded for an evidentiary hearing. *See Charboneau II,* 144 Idaho at 903.

## CONCLUSION

Because the district court erroneously denied his request for the assistance of post-conviction counsel, Mr. Grant respectfully requests that this Court vacate the order denying him the assistance of counsel, as well as the order summarily dismissing his post-conviction petition, and remand this case for further proceedings. Additionally, because the district court erroneously summarily dismissed those claims, he respectfully requests this Court instruct that an evidentiary hearing be among those future proceedings.

DATED this 6th day of August, 2013.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of August, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

WOODROW JOHN GRANT
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ISCI
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ROBERT C NAFTZ
DISTRICT COURT JUDGE
E-MAILED BRIEF

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EVAN A. SMITH
Administrative Assistant

BRD/eas

# ADDENDUM

Pursuant to I.A.R. 35(f), the following pages contain a copy of the decision in *Johnson v. Commonwealth*, Not Reported in S.W.3d, 2003 WL 1786719, *6 (Ky. Ct. App. 2003).

2003 WL 1786719
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

Corey L. JOHNSON, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

No. 2002-CA-000384-MR. | March 28, 2003.

Appeal from Jefferson Circuit Court, Indictment Nos. 99-CR-001999 and 99-CR-002220; Ann O'Malley Shake, Judge.

**Attorneys and Law Firms**

Corey L. Johnson, pro se, LaGrange, KY, for appellant.

Albert B. Chandler, II, Attorney General, Louis F. Mathias, Jr., Assistant Attorney General, Frankfort, KY, for appellee.

Before HUDDLESTON, PAISLEY and TACKETT, Judges.

**Opinion**

***OPINION***

HUDDLESTON, Judge.

***1** Corey L. Johnson appeals from a Jefferson Circuit Court opinion and order which denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside or correct his thirteen-year sentence for assault, escape, resisting arrest, tampering with physical evidence and being a persistent felony offender.

On the morning of August 14, 1999, at approximately 4:27 a.m., Jefferson County Deputy Sheriff William Hutchison stopped Johnson on Interstate 65 allegedly for speeding and recklessly driving his motorcycle at approximately 110 m.p.h. During the encounter, a struggle ensued after Deputy Hutchison allegedly put one handcuff on Johnson while placing him under arrest. In the struggle, Johnson hit Deputy Hutchison in the face several times causing injuries to his face including several lacerations, bruising, swelling and a fractured nose. Johnson left the scene on his motorcycle, and Deputy Hutchison was taken semi-conscious to the hospital emergency room for treatment. Later in the day at approximately 3:30 p.m., the police went to a motel on a report of a hit and run involving a motorcycle and discovered Johnson's motorcycle with blood on it, the license plate removed, and a bloody shirt in the motel lobby. Two days later, Johnson turned himself in to the police and was treated for injuries to his left hand.

On August 17, 1999, a grand jury indicted Johnson in Case No. 99-CR-001999 for assault in the first degree (Assault I),[1] escape in the first degree (Escape I),[2] resisting arrest,[3] and being a persistent felony offender in the second degree (PFO II) .[4] On September 13, 1999, another grand jury returned a second indictment in Case No. 99-CR-002220 charging Johnson with assault in the third degree (Assault III)[5] and tampering with physical evidence[6] involving the same incident with Deputy Hutchison. The two indictments were consolidated for further proceedings.

On September 12, 2000, Johnson entered a guilty plea pursuant to *North Carolina v. Alford*[7] and a plea agreement with the Commonwealth to an amended charge of assault in the second degree (Assault II),[8] Escape I, Resisting Arrest, Tampering with Physical Evidence, and PFO II. Under the plea agreement the Commonwealth moved to dismiss the count of Assault III and recommended sentences of ten years on both the Assault II and Escape I offenses enhanced to thirteen years for being a PFO II, five years for Tampering with Physical Evidence enhanced to ten years for being a PFO II, and twelve months for Resisting Arrest, all to run concurrently for a total sentence of thirteen years.[9] Johnson waived preparation of a presentence investigation report and the circuit court immediately sentenced him to serve thirteen years consistent with the Commonwealth's recommendation.

On May 1, 2001, Johnson filed a *pro se* motion to vacate pursuant to RCr 11.42 based on ineffective assistance of counsel, lack of evidence and double jeopardy. He also filed associated motions for an evidentiary hearing and appointment of counsel. On May 7, 2001, the circuit court granted the motion to appoint counsel. On October 18, 2001, counsel filed a supplement to the RCr 11.42 motion alleging ineffective assistance for counsel's failure adequately to advise Johnson of a possible extreme emotional disturbance defense. On February 2, 2002, the circuit court rendered an opinion and signed an order denying the motion without a hearing stating that the guilty plea colloquy established that

Johnson had not been prejudiced by counsel's representation. This appeal followed.

*2 Johnson raises numerous issues involving his guilty plea, most of which are based on a charge of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was fundamentally unfair. [10] Where an appellant challenges a guilty plea based on ineffective counsel, he must show *both* that counsel made serious errors outside the wide range of professionally competent assistance [11] and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but rather would have insisted on going to trial. [12] The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. [13] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. [14] Both the performance and prejudice prongs of the ineffective assistance of counsel standard are mixed questions of law and fact. [15] While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to *de novo* review on appeal. [16]

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to a judgment of conviction entered against them. A movant is not automatically entitled to an evidentiary hearing on the motion. [17] However, an evidentiary hearing is required on an RCr 11.42 motion where the issues raised in the motion are not refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. [18] "A judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." [19]

Johnson attacks his escape conviction on numerous grounds. First, he alleges that his plea to this offense was based on his understanding that he was pleading guilty to escape in the second degree, [20] not escape in the first degree. While in one instance during the guilty plea hearing the trial judge did mistakenly refer to the charge as escape in the second degree, in all other instances, which were numerous, he correctly referred to it as escape in the first degree. Also, the Commonwealth's Offer on a Plea of Guilty document signed by Johnson clearly lists the offense as Escape I. Johnson's claim that he thought he was pleading guilty to escape in the second degree is unreasonable and clearly refuted by the record.

Johnson asserts that counsel was ineffective for not advising him that certain evidence concerning the events of the incident was inadmissible hearsay and failing to move to suppress such evidence prior to trial. This issue is based on Johnson's misunderstanding of legal procedure. The offensive so-called "hearsay evidence" is Johnson's characterization of "testimony" by Detective Jeffrey Whobrey, who investigated the case. Johnson states that counsel should have moved to suppress "testimony" by Detective Whobrey concerning statements made to him by Deputy Hutchison and other witnesses because the statements were inadmissible investigative hearsay. He further concludes that without Detective Whobrey's alleged hearsay testimony, the Commonwealth would have been unable to prove an element of escape, that being he was in custody prior to fleeing the scene.

*3 This argument apparently is derived from statements made by the prosecutor at the guilty plea hearing during which he stated that the prosecution would present evidence that Johnson struck Deputy Hutchison just after the deputy had placed one of the two handcuffs on Johnson while making an arrest. The prosecutor also stated that Detective Whobrey would testify for the Commonwealth at trial. The prosecutor did not state that Detective Whobrey's testimony would be based on hearsay statements. The prosecutor mentioned that Detective Whobrey would testify that Deputy Hutchison's handcuffs were never recovered. Moreover, the prosecutor said Deputy Hutchison would testify that Johnson attacked him while he was arresting him. In conclusion, there was sufficient evidence other than any hearsay statements made to Detective Whobrey to support the escape charge and Johnson has not established that the detective would have even attempted to testify at trial as to hearsay statements made to him. Consequently, defense counsel was not deficient in failing to move to suppress any alleged hearsay statements to Detective Whobrey prior to trial or not advising Johnson that such statements were inadmissible.

Johnson also contends that defense counsel was ineffective for allowing him to plead guilty to tampering with physical

evidence because the indictment with respect to that offense had been improperly informally amended. He states that the indictment was originally based on his having fled the scene on his motorcycle, which had blood on it, but that the prosecutor stated at the guilty plea hearing that he would seek a conviction based on Johnson's removal from the scene of his blood-stained shirt and Deputy Hutchison's handcuffs. [21] This argument is without merit.

First, there is nothing in the record to support Johnson's assertion that the indictment was based solely on the removal of the motorcycle. The indictment charged Johnson with:

> Tampering with Physical Evidence when, believing that an official proceeding may be pending or instituted against him, he destroyed, mutilated, concealed, removed or altered the physical evidence which he believed was about to be produced or used in such official proceeding, with the intent to impair its veracity or availability in an official proceeding.

The indictment did not limit or restrict this count to the motorcycle. Even so, the prosecution notified the defense shortly after arraignment through discovery of its intent to offer evidence on the handcuffs and bloody shirt at trial. An indictment may be amended at any time to conform to the proof at trial provided that no additional or different offense is charged and the substantial rights of the defendant are not prejudiced by undue surprise. [22] The Commonwealth obtained an order from the court requiring Johnson to provide a blood sample for, *inter alia,* comparison with the bloodstains on the shirt recovered from the motel. Johnson did not deny having fought with and injuring Deputy Hutchison, but rather raised a justification defense. As a result, utilization of evidence concerning the handcuffs and bloody shirt to establish the offense of tampering with physical evidence would not have constituted an improper constructive amendment of the indictment. [23] Defense counsel was not deficient for advising Johnson to plead guilty to tampering with physical evidence based on the evidence proffered by the Commonwealth.

*4 Johnson challenges the guilty plea by alleging that counsel erroneously told him that he would receive less than the maximum sentence on all the offenses. He asserts that counsel's faulty performance is evidenced by the fact that he received the maximum sentence on the tampering with physical evidence charge. While Johnson did receive the maximum sentence for the tampering with physical evidence offense, he received less than the maximum sentence on the Assault II and Escape I offenses, which carried sentence up to twenty years as enhanced by the PFO II offense. Moreover, the sentences for all the offenses involving Deputy Hutchison were run concurrently, rather than consecutively, so Johnson did not receive the maximum sentence. Even assuming counsel told Johnson he would receive less than the maximum sentence on all the charges, counsel was not deficient because this advice was not erroneous.

Johnson also attacks his guilty plea to the Assault II offense based on his contention that counsel failed to investigate the extent of Deputy Hutchison's injuries, failed to advise him of the potential defense of extreme emotional disturbance, and failed to advise him of and challenge the indictments on double jeopardy grounds. With respect to the officer's injuries, Johnson objects to the Commonwealth's characterization of Deputy Hutchison's injuries as "broken bones" in describing the evidence during the guilty plea hearing in support of the assault charge. He notes that the medical records refer to the deputy's nose injury as "comminuted bone fracture." While the extent of injury is a factor differentiating Assault I (requiring serious physical injury) and Assault II (requiring physical injury), Johnson has not shown that this issue renders his guilty plea suspect. The Commonwealth stated that if the case had gone to trial, it could produce testimony from a medical expert that Deputy Hutchison's injuries constituted serious physical injury. The record indicates that defense counsel employed and received an opinion from a medical expert, but the exact content of that opinion is not revealed. Nevertheless, Deputy Hutchison clearly suffered physical injury. Deputy Hutchison's statements and the nature of his injuries also suggest that he was hit in the face with an instrument, presumably the handcuffs. Given the location and extent of the injuries, the handcuffs arguably would have constituted a "dangerous instrument." [24] There was sufficient evidence of the elements for Assault II. Accordingly, Johnson has not shown counsel's performance was deficient or that he suffered actual prejudice in that there was a reasonable probability he would not have been convicted of Assault II at trial.

Johnson asserts that counsel was ineffective for failing to inform him that he could not be convicted of both Assault I and Assault III under the prohibition against double jeopardy. He states counsel should have sought to dismiss one of

the assault counts on double jeopardy grounds. The double jeopardy clause of the Fifth Amendment of the United States Constitution states that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Section 13 of the Kentucky Constitution contains a similar provision. Double jeopardy prohibits: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[25] This case implicates the multiple punishments aspect of the double jeopardy protection involving multiple prosecutions within the same proceeding. In this type of situation, if double jeopardy applies to multiple offenses, the proper procedure is to tailor the instructions to require alternative findings of guilt, rather than dismissal of a charge prior to trial.[26] The double jeopardy clause does not preclude multiple convictions, only judgments imposing multiple punishments.[27] Thus, Johnson's assertion that counsel was ineffective for not seeking dismissal of one of the assault charges prior to trial is incorrect.

*5 In addition, Johnson's claim that double jeopardy would preclude punishment for both Assault I and Assault II appears to be erroneous. In *Commonwealth v. Burge,*[28] the Kentucky Supreme Court adopted the "same elements" test enunciated in *Blockburger v. United States,*[29] for determining when a single act or transaction may violate two distinct statutory provisions for purposes of double jeopardy. Under this test, "[d]ouble jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.' "[30] The Kentucky Supreme Court has stated the *Blockburger* analysis is the exclusive test for determining double jeopardy involving multiple statutes.[31] It focuses on the statutory elements and the indictment rather than the entire conduct of the defendant.[32] The *Blockburger* analysis requires proof of an additional fact or element for each offense not necessary to establish the other offense.[33]

In the current case, Johnson was indicted for Assault I under KRS 508.010, which involves intentionally causing serious physical injury to another person by mean of a deadly weapon or a dangerous instrument, and for Assault III under KRS 508.025(a)(1), which involves intentionally causing physical injury to a peace officer. In addition, Assault II under KRS 508.020(1)(b) involves intentionally causing physical injury to another person by means of a deadly weapon or dangerous instrument. Applying the same elements test, intentional Assault I or Assault II requires proof of use of a deadly weapon or dangerous instrument not necessary to establish Assault III. Similarly, intentional Assault III requires proof that the victim be a peace officer, which is not necessary to prove Assault I or Assault II. Accordingly, intentional assault of a peace officer would not constitute a lesser included offense of either Assault I or Assault II and punishment for Assault III and either Assault I or Assault II would not be barred by double jeopardy.[34] Assault II was intended to punish and prevent injurious behavior directed at law enforcement personnel, while Assault I and Assault II require use of a deadly weapon or dangerous instrument. The former targets a specific type of victim and the latter target an instrumentality. Thus, Johnson's counsel would not have been deficient for failing to advise him about a double jeopardy defense.

Even if a double jeopardy defense was available, Johnson has not shown that he suffered actual prejudice by counsel's failure to advise him of it. Under the plea agreement, Johnson pled guilty to the amended charge of Assault II and the Commonwealth moved to dismiss the Assault III charge. As stated earlier, there was sufficient evidence to submit instructions on Assault I, Assault II, and Assault III to the jury. While the issue of the extent of Deputy Hutchison's injuries was disputed, the evidence supporting Assault II was very strong. Therefore, there is not a reasonable probability that had he gone to trial, Johnson would have been acquitted of Assault II and his decision whether to plead guilty would have been different based on any double jeopardy bar.

***6** Finally, Johnson contends counsel was ineffective for failing to advise him of a possible extreme emotional disturbance defense. In his affidavit accompanying the supplemental RCr 11.42 motion, Johnson alleges Deputy Hutchison made a racial comment and suggested he could afford such a nice motorcycle because he was a drug dealer. He states that the officer "without warning" sprayed him with Mace several times and then knocked him off his motorcycle. Johnson continues:

> By way of reaction to this unexpected attack and acting solely by instinct and in fear of my personal safety and wellbeing, I pushed Hutchinson [sic] away from me while attempting to block any more [M]ace being shot in my face. At this point Deputy Hutchinson [sic] plainly stated "Oh, we got us a nigger that likes to resist arrest ... well I got something for you bitch." Hutchinson [sic] then struck

> affiant with a left hook thereby beginning a brief struggle wherein affiant was forced to protect himself from what was obviously a dangerous and volitable [sic] situation. Affiant, acting in fear of his own safety, if not his very life, broke away from the Deputy, picked up his motorcycle and left the scene, leaving Hutchinson [sic] still on the ground constantly spraying [M]ace and cursing me.

Extreme emotional disturbance has been defined as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes."[35] Extreme emotional disturbance requires provocation with a "triggering event" that is sudden and uninterrupted,[36] and involves viewing the circumstances subjectively from the defendant's point of view.[37] "Evidence of mere 'hurt' or 'anger' is insufficient to prove extreme emotional disturbance.[38] The existence of extreme emotional disturbance serves to mitigate punishment rather than provide total exoneration, and generally must be proven by the defendant.[39] Under KRS 508.040(1), extreme emotional disturbance is available as a defense to prosecution for an intentional assault in the first, second or fourth degree, but not assault in the third degree.[40] Conviction for assault under extreme emotional disturbance reduces the classification and resulting range of punishment for offenses that otherwise would constitute Assault I (Class B felony) and Assault II (Class C felony) to one to five years commensurate with a Class D felony.[41]

In the current case, Johnson asserts that defense counsel never advised him of the availability of an extreme emotional disturbance defense and that he would have decided to go to trial rather than plead guilty had he been so advised. The circuit court denied the RCr 11.42 motion and an evidentiary hearing primarily based on the guilty plea colloquy in which Johnson stated that he was satisfied with counsel's advice. While a defendant's representations at a *Boyken*[42] hearing constitute a formidable barrier in any subsequent proceeding, that barrier is not insurmountable.[43] A defendant's statements at the guilty plea hearing concerning his relationship with counsel must be evaluated in light of what the defendant knew or should have known and do not necessarily preclude him from subsequently raising issues of ineffective assistance. Representations in response to general questions do not conclusively refute specific allegations of ineffective assistance of counsel sufficient to justify denial of a hearing.[44] The availability of an extreme emotional disturbance defense was not specifically discussed at the *Boyken* hearing and neither Johnson's representations during that hearing nor anything else in the record clearly refute his claim that counsel did not advise him of that defense.

*7 The circuit court also found that Johnson failed to establish he was prejudiced by counsel's representation, but it did not specifically analyze his extreme emotion disturbance claim. Instead, the court merely stated that Johnson received a sentence less severe than he could have received had he gone to trial. While the potential sentence facing a defendant is relevant, it is not the sole factor and must be balanced with other considerations relevant to a defendant's decision whether to go to trial or plead guilty. As the court stated in *Hill v. Lockhart,*[45] "where he [the defendant] alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial ."

Johnson has alleged sufficient facts to support an extreme emotional disturbance defense. Johnson and Deputy Hutchison were the only witnesses to the incident. Although the Commonwealth indicated it would call a medical expert and the investigative officer as witnesses at trial, the exact content of their testimony is not revealed. The current record contains insufficient information to evaluate the viability of an extreme emotional disturbance defense. Additionally, Johnson would have been subject to a maximum sentence of ten years on a conviction for either Assault I or Assault II under Extreme Emotional Disturbance as enhanced by the PFO II, which is less than the thirteen years he received under the guilty plea. As a result, we cannot say the record clearly refutes Johnson's claim of actual prejudice provided he was not advised or aware of an extreme emotional disturbance defense. Consequently, an evidentiary hearing is necessary to provide further information on counsel's performance, *i.e.,* whether he discussed a potential extreme emotional disturbance defense with Johnson and counsel's handling of this issue, and any actual prejudice should defense counsel's performance be deemed deficient. The circuit court's order denying Johnson's RCr 11.42 motion must be vacated with respect to his claim of ineffective assistance of counsel concerning a potential extreme emotional disturbance defense, and this case must be remanded for an evidentiary hearing on and reconsideration by the court of that issue.

The order denying Johnson' RCr 11.42 motion is affirmed in part and vacated in part, and this case is remanded to Jefferson Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

Footnotes

1 Ky.Rev.Stat. (KRS) 508.010 (Class B felony).

2 KRS 532.020 (Class C felony).

3 KRS 520.090 (Class A misdemeanor).

4 KRS 532.080.

5 KRS 508.025 (Class D felony).

6 KRS 524.100 (Class D felony).

7 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). A defendant pleading guilty under *Alford* declines to admit his guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction.

8 KRS 508.020 (Class C felony).

9 As part of the plea agreement, Johnson also plead guilty to an unrelated offense of obtaining a controlled substance by fraud or deceit in Case No. 00-CR-001313 with a recommended sentence by the Commonwealth of one year to be served consecutively to the thirteen year sentence under Case No. 99-CR-001999 and No. 99-CR-002220 for a total sentence of fourteen years.

10 *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth,* Ky., 702 S .W.2d 37 (1985); *Foley v. Commonwealth,* Ky., 17 S.W.3d 878, 884 (2000).

11 *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); *Phon v. Commonwealth,* Ky.App., 51 S.W.3d 456, 459 (2000).

12 *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 360, 370, 88 L.Ed.2d 203 (1985); *Russell v. Commonwealth,* Ky.App., 992 S.W .2d 871 (1999).

13 *Strickland, supra,* n. 10, 466 U.S. at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey,* Ky., 998 S.W.2d 460, 463 (1999).

14 *Harper v. Commonwealth,* 978 S.W.2d at 311, 315 (1998); Russell, *supra,* n. 12, 992 S.W.2d at 875.

15 *Strickland, supra,* no. 10, 466 U.S. at 698, 104 S.Ct. at 2070; *Groseclose v. Bell,* 130 F.3d 1161, 1164 (6th Cir.1997).

16 *See McQueen v. Scroggy,* 99 F.3d 1302, 1310-1311 (6th Cir.1996); *Groseclose, id.,* 130 F.3d. at 1164.

17 *Harper, supra,* n. 14, 978 S.W.2d at 314; *Wilson v. Commonwealth,* Ky., 975 S.W.2d 901, 904 (1998).

18 *Fraser v. Commonwealth,* Ky., 59 S.W.3d 448 (2001); *Haight v. Commonwealth,* Ky., 41 S.W.3d 436, 442 (2001).

19 *Fraser, id.,* 59 S.W.3d at 453.

20 KRS 520.030.

21 Johnson implies that removal of the motorcycle no longer provided evidentiary support for the tampering charge because test results allegedly indicated only his blood was on it. The record does not contain the test results or the reason why the prosecution did not mention the motorcycle at the hearing.

22 *See Schambon v. Commonwealth,* Ky., 821 S.W.2d 804, 809-10 (1991); *Anderson v. Commonwealth,* Ky., 63 S.W.3d 135, 140-41 (2001); RCr 6.16. *See also United States v. Prince,* 214 F.3d 740, 756-59 (6th Cir.2000) (discussing difference between amendment, constructive amendment, and variance with indictment).

23 *See, e.g., Washington v. Commonwealth,* Ky.App., 6 S.W.3d 384 (1999) (harmless error analysis applies to amendment of indictment); *cf. Wolfrecht v. Commonwealth,* Ky., 955 S.W.2d 533 (1997) (amendment to indictment changing named principals in murder from defendants to unknown persons held to be illegal).

24 A dangerous instrument is any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article or substance which, under the circumstances in which it is used, ... is readily capable of causing death or serious physical injury. KRS 500.080(3).

25 *United States v. Ursery,* 518 U.S. 267, 271-74, 116 S.Ct. 2135, 2139-40, 135 L.Ed.2d 549 (1996); *Hourigan v. Commonwealth,* Ky., 962 S.W.2d 860, 862 (1998).

26 *See Commonwealth v. Black,* Ky., 907 S.W.2d 762 (1995).

27 *See Carter v. Commonwealth,* Ky., 782 S.W.2d 597, 601 (1989); *Walden v. Commonwealth,* Ky., 805 S.W.2d 102, 106-07 (1991), *overruled on other grounds by Commonwealth v. Burge,* Ky., 947 S.W.2d 805 (1996), *cert. denied sub. nom., Effinger v. Kentuck* y, 522 U.S. 971, 118 S.Ct. 422, 139 L.Ed.2d 323 (1997).

28 *Supra,* n. 27.

29 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

30 *Burge, supra,* n. 27, 947 S.W.2d at 811 (*quoting Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932)).

31 *See Taylor v. Commonwealth,* Ky., 995 S.W.2d 355, 358 (1999); *Barth v. Commonwealth,* Ky., 80 S.W.3d 390, 399 (2001). *But see also* KRS 505.020 (codifying *Blockburger* analysis).

32 *Id.*

33 *Burge, supra,* n. 27, 947 S.W.2d at 809.

34 *See, e.g., State v. Dunbar,* 37 Conn.App. 338, 656 A.2d 672 (1995). We note that Assault III can also be established by proof the defendant recklessly with a deadly weapon or dangerous instrument caused physical injury to a peace officer. KRS 508.025(a)(1). Double jeopardy would bar punishment under this prong of the offense and either Assault I or Assault II because it does not require proof of a fact not contained in the latter offenses. *See also* KRS 505.020(2)(d) (extent of injury not differentiating element).

35 *McClellan v. Commonwealth,* Ky., 715 S.W.2d 464, 468 69 (1986). *See also Holbrook v. Commonwealth,* Ky., 813 S.W.2d 811, 815 (1991), *overruled on other grounds by Elliott v. Commonwealth,* Ky., 976 S.W.2d 416 (1998).

36 *Springer v. Commonwealth,* Ky., 998 S.W.2d 439, 452 (1999); *Foster v. Commonwealth,* Ky., 827 S.W.2d 670 (1991); *Baze v. Commonwealth,* Ky., 965 S.W.2d 817, 823 (1997).

37 *Spears v. Commonwealth,* Ky., 30 S.W.3d 152, 155 (2000); *Fields v. Commonwealth,* Ky., 44 S.W.3d 355, 358 (2001); *Gall v.. Commonwealth,* Ky., 607 S.W.2d 97, 108 (1980); KRS 507.020(1)(a).

38 *Talbott v. Commonwealth,* Ky. 968 S.W.2d 76, 85 (1998) (*citing Thompson v. Commonwealth,* Ky., 862 S.W.2d 871 (1993)).

39 *See Engler v. Commonwealth,* Ky., 627 S.W.2d 582, 583 (1982).

40 *See also Wyatt v. Commonwealth,* Ky.App., 738 S.W.2d 832 (1987).

41 KRS 508.040(2)(a).

42 *Boyken v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 224 (1969).

43 *Fraser, supra,* n. 18, 59 S.W.3d at 457.

44 *See, e.g., Fraser, supra; Myers v. Commonwealth,* Ky., 42 S .W.3d 594 (2001)(hearing ordered on allegation attorney advised him that sentence under plea agreement was illegal and would be reduced at a later date).

45 474 U.S. at 59, 106 S.Ct. at 371.

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