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# Chippewa v. State Respondent's Brief Dckt. 40527

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL CHIPPEWA,	)	
	)	No. 40527
Petitioner-Appellant,	)	
	)	Bingham Co. Case No.
vs.	)	CV-2012-975
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

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BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BINGHAM

HONORABLE DARREN B. SIMPSON  
District Judge

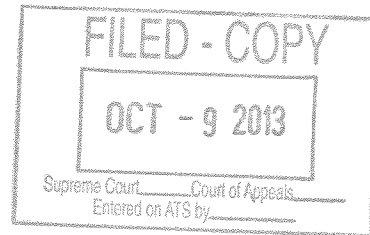
LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division

RUSSELL J. SPENCER  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

ATTORNEYS FOR  
RESPONDENT

SHAWN F. WILKERSON  
Deputy State Appellate  
Public Defender  
3647 Lake Harbor Lane  
Boise, Idaho 83703  
(208) 334-2712



ATTORNEY FOR  
PETITIONER-APPELLANT

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## STATEMENT OF THE CASE

### Nature Of The Case

Daniel Chippewa appeals from the district court's dismissal of his petition for post-conviction relief, arguing that he presented a material issue of fact regarding his claim that he was represented by conflicted counsel during the underlying proceedings.

### Statement Of The Facts And Course Of The Proceedings

The facts, as set forth by the district court, are as follows:

1. In his underlying criminal case, Chippewa was charged with Driving While Under the Influence of Alcohol (having had two prior misdemeanors within the previous ten (10) years). Attorney Cindy Campbell was appointed to represent him.
2. Ms. Campbell moved to withdraw as attorney of record, based upon her prior prosecution of Chippewa and the State's potential use of that prior conviction as a sentencing enhancement. Mc. [sic] Campbell's request to withdraw was granted and attorney Manuel Murdoch was appointed to represent Chippewa in Ms. Campbell's place.
3. Chippewa pleaded guilty to Driving While Under the Influence of Alcohol (having had two prior misdemeanors within the previous ten (10) years), and was sentenced on December 7, 2009 to the Idaho State Board of Correction for a fixed and determinate term six (6) years, together with an indeterminate period of three (3) years (not less than six (6) nor more than nine (9) years) and a fine in the amount of \$1,000.00. His sentence was suspended and he was placed on probation for a period of five (5) years.
4. On July 19, 2010, based upon his admission to violating the terms and conditions of his probation, Chippewa's probation was revoked, his sentence was re-imposed, and he was placed upon retained jurisdiction for a period not to exceed 365 days.

5. Following completion of his period of retained jurisdiction, Chippewa was again placed on probation. He was represented by Ms. Campbell at the review of retained jurisdiction hearing.

6. On April 4, 2011, Chippewa's probation was revoked a second time because of his admitted probation violations, and his sentence was re-imposed.<sup>[1]</sup> He was represented by Ms. Campbell at that revocation hearing.

7. On April 11, 2011, Ms. Campbell moved for relief from the sentence on Chippewa's behalf.

8. On May 10, 2011, this Court amended its *Third Criminal Judgment* with essentially identical language to the *Third Criminal Judgment*.

9. On the same date, this Court entered its *Rule 35 Order* denying Chippewa's Rule 35 Motion.

(R., pp.40-42.)

On May 18, 2012, Chippewa filed a petition for post-conviction relief alleging ineffective assistance of counsel on several theories: that his counsel's prosecution of him several years previously in an unrelated case created a gross conflict of interest during his most recent probation revocation hearing; that his counsel's failure to raise alternative treatment plans resulted in his incarceration; that counsel failed to raise unspecified due process issues regarding his initial conviction; and that counsel failed to file a timely notice of appeal from the revocation of his probation. (R., pp.3-9.) The state moved to dismiss Chippewa's petition on the grounds that it was untimely, raised issues required to be raised on direct appeal, and failed to raise an issue of material fact. (R., pp.31-34.) Finding that the state's motion for summary dismissal was untimely, the district court denied consideration of the state's arguments. (R., p.36; see

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<sup>1</sup> The district court consistently refers to the order ultimately revoking probation and executing the underlying sentence as the "Third Criminal Judgment."

also Tr., p.8, Ls.19-21.) However, Chippewa conceded that his claims which related to his initial judgment, as opposed to his subsequent revocation of probation, were untimely. (R., p.36; see also Tr., p.6, Ls.6-21.)

The district court found that Chippewa's counsel was ineffective for failing to file a notice of appeal timely from the order revoking probation and executing his underlying sentence (the "Third Criminal Judgment") and the order denying his Rule 35 motion, and granted Chippewa relief. (R., pp.48-49.) The district court dismissed the remainder of Chippewa's claims because they were unsubstantiated by the record. (R., pp.44-48.) Chippewa filed a timely notice of appeal. (R., pp.51-53.)



## ISSUE

Chippewa states the issue on appeal as:

Did the district court err when it summarily dismissed Mr. Chippewa's post-conviction claim that he was not represented by conflict free counsel?

(Appellant's brief, p.3.)

The state rephrases the issue as:

Has Chippewa failed to show error in the district court's dismissal of his post-conviction claim that his counsel was conflicted?

## ARGUMENT

### Chippewa Has Failed To Show Error In The District Court's Dismissal Of His Post-Conviction Claim That His Counsel Was Conflicted

#### A. Introduction

In his petition for post-conviction relief, Chippewa raised issues of ineffective assistance of counsel on grounds which included that his counsel was conflicted and that his counsel failed to timely file a notice of appeal. (R., pp.3-9.) The state filed a motion for summary dismissal (R., pp.30-34), but finding that the motion was not timely, the district court denied consideration of the motion (R., p.36; see also Tr., p.8, Ls.19-21). The district court found that Chippewa received ineffective assistance of counsel when his attorney failed to file a timely notice of appeal and granted relief on that claim, but dismissed the rest of Chippewa's claims. (R., pp.38-49.) On appeal, Chippewa argues that the district court erred by dismissing his claim that his counsel was conflicted. (Appellant's brief, pp.4-14.) Application of the correct legal standards to Chippewa's claim, however, shows no error.

#### B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file...." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Chippewa Has Failed To Show An Actual Conflict Of Interest

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the “application must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a

claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

In his petition for post-conviction relief, Chippewa claimed that he received ineffective assistance of counsel because, he alleged, his attorney was conflicted. (R., pp.4-5.) The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45 (1931). The right has been accorded “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” Mickens v. Taylor, 535 U.S. 162, 166 (2002) (quoting United States v. Cronin, 466 U.S. 648 (1984)). It follows from this that assistance which is ineffective in preserving fairness

does not meet the constitutional mandate. Lovelace, 140 Idaho at 60, 90 P.3d at 285 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

Where a petitioner raises a conflict-based ineffective assistance of counsel claim, alleging his counsel's personal interests directly conflicted with counsel's obligation to provide effective representation, he must demonstrate that a conflict of interest actually affected the adequacy of his lawyer's performance. Lovelace, 140 Idaho at 61-62, 90 P.3d at 286-287; see also Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (where defendant alleges a conflict based upon his counsel's simultaneous representation of defendant and the prosecutor's key witness, defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance). Absent such a showing, a defendant is not entitled to reversal of his conviction. Mickens, 535 U.S. at 173-74; Burger v. Kemp, 483 U.S. 776, 785 (1987).

An actual conflict is defined by its effect on counsel, not by whether there is a "mere theoretical division of loyalties." Mickens, 535 U.S. at 171, 172 n.5. "[T]he possibility of conflict is insufficient to impugn a criminal conviction." Dunlap v. State, 141 Idaho 50, 62, 106 P.3d 376, 388 (2004) (citations omitted). An actual conflict will be shown to adversely affect counsel's performance where a link between counsel's deficient performance and the conflict of interest is demonstrated. See Lewis v. Mayle, 391 F.3d 989, 995 (9th Cir. 2004); see also United States v. Burns, 526 F.3d 852, 857 (5th Cir. 2008) (actual conflict adversely affects counsel's performance when "there was some plausible alternative defense strategy that could have been pursued, but was not, because of the actual conflict.").

In this case, Chippewa asserted that his Sixth Amendment right to conflict-free representation was violated because Ms. Campbell, his public defender in his most recent probation revocation hearing, had once prosecuted him in an unrelated case. (R., pp.4-5, 8.) This does not establish an actual conflict. Rather, as the district court correctly noted, “[n]othing in Ms. Campbell’s former prosecution of Chippewa was relevant to the determinations made in the Third Criminal Judgment.” (R., p.45.) Previously, Ms. Campbell prosecuted Chippewa for felony eluding. (R., p.8.) In 2009, Chippewa was charged with driving under the influence. (R., p.40.) Ms. Campbell, now a public defender, was appointed to represent him. (Id.) Understanding that Chippewa’s conviction for felony eluding could be used to enhance his sentence on the DUI (which could theoretically create a conflict of interest), she sought, and was granted, leave to withdraw. (Id.)

The district court imposed a suspended sentence of nine years with three years fixed and placed Chippewa on probation for five years. (R., pp.40-41.) He violated that probation, it was revoked and, after a period of retained jurisdiction, was ultimately reinstated. (R., p.41.) Ms. Campbell represented Chippewa at the review hearing for the retained jurisdiction. (Id.) Chippewa again violated his probation. (Id.) Again Ms. Campbell represented Chippewa at the probation revocation hearing. (Id.) The only questions before the district court at this hearing were whether Chippewa had violated his probation and whether his underlying sentence should be executed. Chippewa admitted the violations and his underlying sentence was executed. (Id.)

The underlying sentence, already imposed by the district court, could not be further enhanced by Chippewa’s prior conviction for felony eluding. Ms. Campbell’s

prior prosecution of Chippewa bore no relation to the questions before the district court, namely, whether probation should be revoked and whether the already imposed sentence should be executed. The district court explained, “[h]aving been granted probation on two prior occasions for his present conviction, and having violated the conditions of his probation both times, the re-imposition of Chippewa’s sentence was a result of his present, rather than past conduct.” (R., p.46.) The district court correctly concluded that Chippewa failed to show that his Sixth Amendment rights were violated by an actual conflict of interest.

On appeal, Chippewa argues that his attorney’s conflict persisted throughout the proceedings below because, Chippewa asserts, “the facts relevant during the original sentencing hearing were also relevant during both the probation disposition and Rule 35 proceedings.” (Appellant’s brief, pp.4-14.) Chippewa, without any evidence supporting his allegations, theorizes that Ms. Campbell would have labored under divided loyalties due to her prior prosecution of Chippewa, but has failed to show an actual conflict. As noted above, while Ms. Campbell’s prior prosecution of Chippewa for felony eluding could be used to enhance his sentence for driving under the influence, that prior prosecution bore no relation to whether Chippewa’s probation should be continued or revoked, or whether to execute the previously imposed sentence. Chippewa’s sentence, with any enhancements for his previous conviction of felony eluding, was already imposed at the prior sentencing hearing. Once Chippewa’s sentence for driving under the influence was imposed, the district court could not retroactively enhance that sentence with the prior conviction. Chippewa has failed to show that his representation by Ms. Campbell was hampered by an actual conflict of interests.

Because Chippewa failed to show that any actual conflict hampered his counsel's ability to effectively represent him, Chippewa has failed to present a *prima facie* case that his Sixth Amendment rights were violated. The district court's order dismissing Chippewa's claim of conflicted counsel should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order granting, in part, Chippewa's petition for post-conviction relief.

DATED this 9th day of October, 2013.



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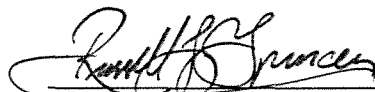
RUSSELL J. SPENCER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of October, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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



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RUSSELL J. SPENCER  
Deputy Attorney General

RJS/pm