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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL CHIPPEWA,	)	
	)	NO. 40527
Petitioner-Appellant,	)	
	)	BINGHAM COUNTY NO. CV 2012-975
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
_____	)	

BRIEF OF APPELLANT

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

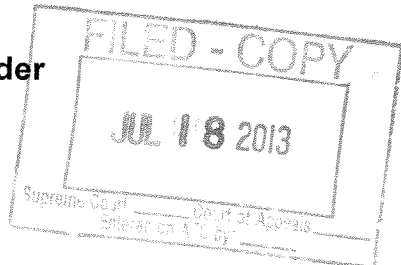
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## STATEMENT OF THE CASE

### Nature of the Case

Daniel Chippewa appeals from the District Court's order summarily dismissing his petition for post-conviction relief. On appeal, Mr. Chippewa argues that the district court erred when it summarily dismissed his post-conviction action without providing him an evidentiary hearing on his claim that he was represented by conflicted counsel.

### Statement of the Facts and Course of Proceedings

In the underlying criminal action, Mr. Chippewa was charged with driving under the influence of alcohol (*hereinafter*, DUI) and a felony enhancement. (R., p.40.) Mr. Chippewa was appointed trial counsel to represent him in that matter. (R., p.40.) After trial counsel was appointed, she moved to withdraw as attorney of record based on a conflict arising from her prior prosecution of Mr. Chippewa and the potential that the State would use the conviction from that case as the basis for a sentencing enhancement. (R., p.40.) The district court appointed new counsel. (R., p.40.) Mr. Chippewa pleaded guilty to the felony DUI. (R., p.40.) Thereafter, the district court imposed a unified sentence of nine years, with six years fixed, and placed him on probation. (R., pp.40-41.)

After a period of probation, Mr. Chippewa admitted that he violated the terms of his probation. (R., p.41.) Mr. Chippewa's probation was revoked and the criminal court retained jurisdiction. (R., p.41.) Upon review of Mr. Chippewa's period of probation (*hereinafter*, rider), the district court suspended the sentence and placed Mr. Chippewa on probation. (R., p.41.) The attorney who previously withdrew as counsel due to the

conflict represented Mr. Chippewa at the rider review hearing and throughout the remainder of the criminal proceedings. (R., p.41.)

After a second period of probation, Mr. Chippewa admitted that he violated the terms of his probation. (R., p.41.) The district court revoked probation and executed Mr. Chippewa's prison sentence. (R., p.41.) Mr. Chippewa also filed an Idaho Rule 35 (*hereinafter*, Rule 35) motion requesting leniency, which was denied by the district court. (R., pp.41-42.)

Mr. Chippewa filed a *pro se* petition and affidavit for post-conviction relief, wherein he claimed that the district court did not consider a probation plan, and that he was denied due process during the probation violation process. (R., pp.4-5.) Mr. Chippewa also claimed he received ineffective assistance of counsel because a conflict of interest existed between him and his trial counsel. (R., pp.4-5.) Mr. Chippewa also claimed that his trial counsel was ineffective for failing to appeal from the order revoking probation and the order denying his Rule 35 motion. (R., pp.8-9.)

The State filed motion for summary dismissal and a hearing was held on that motion. (R., pp.31-37.) At that hearing, it was determined that the State's motion for summary judgment was not filed in a timely manner. (Tr., p.8, Ls.19-21.) As such, the only facts considered by the district court were those contained in Mr. Chippewa's petition. (R., p.39.) Thereafter, the district court entered an order granting Mr. Chippewa post-conviction relief as to one claim: trial counsel's failure to file an appeal from the order revoking probation and the order denying the Rule 35 motion. (R., pp.38-49.) However, the district court summarily dismissed the remainder of his claims. (R., pp.38-49.) Mr. Chippewa timely appealed. (R., pp.51-54.)

## ISSUE

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



## ARGUMENT

### The District Court Erred When It Summarily Dismissed Mr. Chippewa's Post-Conviction Claim That He Was Not Represented By Conflict Free Counsel

#### A. Introduction

Mr. Chippewa alleged that he was denied effective assistance of counsel because his trial counsel formerly prosecuted him on a charge and the resulting conviction was used as a charging enhancement in the criminal action at issue. Additionally, Mr. Chippewa alleged that a conflict existed as he could not communicate with his trial counsel about trial strategy. The district court found that there was not a conflict as trial counsel's former prosecution of Mr. Chippewa was not relevant to the district court's disposition of his probation violations and his Rule 35 motion, as the prior conviction used as a charging enhancement was only relevant during the initial guilt and sentencing proceedings. Mr. Chippewa argues that the conflict persisted throughout the criminal action as the facts relevant during the original sentencing hearing were also relevant during both the probation disposition and Rule 35 proceedings.

#### B. Standard Of Review On Appeal

In this case, the district court summarily dismissed Mr. Chippewa's post-conviction claim. Because evaluation of a motion for summary disposition will never involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, this Court must review a district court's summary dismissal order *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03 (2006).

C. The District Court Erred When It Summarily Dismissed Mr. Chippewa's Post-Conviction Claim That He Was Not Represented By Conflict Free Counsel

A petition for post-conviction relief initiates a proceeding which is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter*, UPCPA), I.C. §§ 19-4901 to -4911, and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). However, the petition initiating a post-conviction proceeding differs from the complaint initiating a civil action. A post-conviction petition is required to include more than "a short and plain statement of the claim"; it "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached." *Id.*; I.C. § 19-4903. "In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Small v. State*, 132 Idaho 327, 331 (Ct. App. 1998).

Just as Idaho Rule of Civil Procedure 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of post-conviction petitions where there are no genuine issues as to any material facts and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c). "On review of a dismissal of a post-conviction application without an evidentiary hearing, [the court] must determine whether there are genuine issues of material fact." *Jones v. State*, 125 Idaho 294, 295 (Ct. App. 1994). An appellate court will "determine whether a genuine issue of fact

exists based on the pleadings, depositions and admissions on file, together with any affidavits.” *Id.* “Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Vavold v. State*, 148 Idaho 44, 45 (2009). The district court need not accept the petitioner’s allegations which are clearly disproved by the record. *Coontz v. State*, 129 Idaho 360, 368 (Ct. App. 1996). However, if a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331.

In this case, Mr. Chippewa has alleged a post-conviction claim based on a theory of ineffective assistance of counsel. The United States Constitution “guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.” *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). One such provision is the right to the assistance of counsel (U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.”)), which has been interpreted as the right to the *effective* assistance of counsel. *Strickland*, 466 U.S. at 685-86. “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.” *State v. Cook*, 144 Idaho 784, 791 (Ct. App. 2007). As such, ineffective assistance of counsel claims can be based on an alleged attorney-client conflict of interest. *Beasley v. State*, 126 Idaho 356, 363-363 (Ct. App. 1994).

Generally, there is a two-pronged test for determining whether an attorney has rendered ineffective assistance in contravention of a criminal defendant’s right to

counsel. The threshold inquiry is whether counsel's performance was "deficient," *i.e.*, whether it "fell below an objective standard of reasonableness," as judged "under prevailing professional norms." *Id.* at 687-91. However, the Idaho Court of Appeals has held that under circumstances where trial counsel is operating under an actual conflict of interest, "the *Strickland* prejudice standard need not be met, but a petitioner still must demonstrate that the conflict adversely affected his lawyer's performance." *Nevarez v. State*, 145 Idaho 878, 885 (Ct. App. 2008).

In this case, Mr. Chippewa set forth, and the district court relied on, the following facts to as the basis for his conflict-based ineffective assistance of counsel claim:

Presumptive prejudice: counsel was [previously the] prosecutor in my case, she asked to withdraw, did so, but [then was] assigned again at the sentencing stage, creating [a] gross conflict of interest, against [my] objection.

I objected to [trial counsel] being my counsel due to gross conflict of interest, her refusal to work with me, or raise any of my issues at sentencing. She was previously a prosecutor in my case, and prosecuted me for felony eluding, which was used against me in the new charges for misdemeanor [eluding allegations] in the probation violation on this new charge and sentence, which is very prejudicial to my best interests and due process.

I assert that I objected to the appointment of the conflicted counsel.

(R., p.45.)

Since the State failed file an answer to the petition, failed to file a timely motion for summary judgment, and failed to appear at the hearing on its motion for summary judgment (R., pp.37-39), the only facts in the record pertaining to Mr. Chippewa's conflict claims are those contained in his petition. Since the district court summarily dismissed this claim and the State moved for summary judgment, the foregoing facts must be construed in a light most favorable for Mr. Chippewa. *Vavold*, 148 Idaho at 45.

The district court initially addressed this issue by acknowledging that trial counsel was appointed to represent Mr. Chippewa, made the conflict known and was excused from the case. (R., p.45.) The district court then noted that the same attorney represented Mr. Chippewa after he completed his rider and throughout the remainder of the trial proceedings. (R., p.45.) However, the district court concluded that no conflict existed because the issues relevant to the final probation violation disposition, whether Mr. Chippewa had violated his probation and whether his probation should be revoked, were unrelated to the trial counsel's former prosecution of Mr. Chippewa. (R., p.45.)

The district court then addressed trial counsel's representation of Mr. Chippewa during the Rule 35 proceedings and concluded that his "prior conviction played a minor role, if any, in the denial of [Mr. Chippewa's] Rule 35 motion." (R., p.46.) The district court reasoned that the execution of his sentence was a result of his present conduct and that trial counsel's role in attempting to reduce his sentence "did not present a conflict of interest." (R., p.46.)

The district court erred in holding that trial counsel's conflict only existing during the initial guilt and sentencing proceedings. The Idaho Rules of Professional Reasonability set forth the basic rules governing conflicts of interest. *State v. Wood*, 132 Idaho 88, 98 (1998). The relevant rule 1.7 states in part:

(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

. . .

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client . . . .

I.R.P.R. 1.7.

Other than the foregoing rule, Mr. Chippewa is not aware of any controlling authority which addresses the question at issue. However, there is persuasive authority which can be used to provide guidance. In *United States v. Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989), Ziegenhagen was appointed a defense attorney that, twenty years earlier, was a prosecutor that appeared at a sentencing hearing and recommended the sentence imposed against Ziegenhagen in an unrelated matter. *Id.* at 938. That earlier conviction was a predicate conviction for a sentencing enhancement in the case for which trial counsel represented Ziegenhagen. *Id.* Prior to sentencing in the new case, Ziegenhagen's trial counsel realized his involvement in the older case. *Id.* at 939. Trial counsel discussed the possibility of a conflict with Ziegenhagen and the current prosecutor. *Id.* The prosecutor did not think there was a conflict and Ziegenhagen remained silent as to the issue. *Id.* The district court then applied the sentencing enhancement, and Ziegenhagen appealed. *Id.* at

On appeal, trial counsel continued to represent Ziegenhagen and, all after all of the briefing was filed, Ziegenhagen filed a *pro se* motion requesting the appointment of new counsel based on an alleged conflict of interest stemming from trial counsel's former role as Ziegenhagen's prosecutor. *Id.* The Tenth Circuit employed the following rationale in resolving this issue:

In this case, the prosecutorial role that Ziegenhagen's counsel took in the earlier convictions was substantial enough to represent an actual conflict of interest. Although he was not the prosecuting attorney of record, he appeared at the sentencing hearing to recommend the length of sentence in the convictions for burglary and robbery, the convictions used to enhance Ziegenhagen's present sentence.

This former representation amounted to an actual conflict of interest and we have been given notice of it. Despite the fact that Ziegenhagen had been convicted by a jury of the present offense, that does not mean

that [trial counsel] could not decide his defense strategy either at sentencing or on appeal on the basis of the conflict. Needless to say, there may be countless ways in which the conflict could have hindered a fair trial, the sentencing hearing or even this appeal. We cannot say that there was nothing another attorney could have argued based on the record to more zealously advocate on this defendant's behalf. Thus, we presume Ziegenhagen was prejudiced by Hanson's representation.

*Id.* at 940-941 (citations omitted).

The facts of this case are substantially similar to those in *Ziegenhagen*. Here, as in *Ziegenhagen*, trial counsel previously prosecuted Mr. Chippewa in a prior action, the conviction used as the basis for an enhancement in the current criminal action. In *Ziegenhagen*, the Tenth Circuit concluded that such a role constituted an actual conflict of interest. However, a finding that a conflict exists in Mr. Chippewa's case is more compelling than in *Ziegenhagen* because trial counsel in this case was the prosecuting attorney of record (R., p.44), while in *Ziegenhagen* trial counsel only appeared at the sentencing hearing to make the sentencing recommendation. *Ziegenhagen*, 890 at 940-941.

Mr. Chippewa recognizes that in *Ziegenhagen* trial counsel represented Ziegenhagen during the initial guilt phase and sentencing phases, while in this case trial counsel represented Mr. Chippewa during probation revocation proceedings. Although Mr. Chippewa agrees that the difference between the procedural postures of the two cases does attenuate that conflict, that attenuation is very minimal and alone does not warrant summary dismissal, and an evidentiary hearing on this matter should have been held.

Since trial counsel was conflicted for the purposes of the guilt and sentencing phases in this matter, that conflict persisted throughout the remainder of the

proceedings because the inquiries which must be addressed by the district court during sentencing are substantially similar to those inquiries which must be addressed by the court when determining whether to revoke probation or reduce a sentence after revoking probation. While the district court correctly determined that it should inquire into the question of whether Mr. Chippewa's recent behavior on probation was promoting his rehabilitation and societal protection, every time a district court revokes probation it must also consider whether it should exercise its inherent Rule 35 power to reduce the length of the defendant's sentence. *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003). This in turn requires the district court to consider events which occurred before and after the original judgment. *State v. Hanington*, 148 Idaho 26, 28 (Ct. App. 2009). In fact, the Court of Appeals has presumed that a district court will consider such events. *State v. Adams*, 115 Idaho 1053, 1055-56 (Ct. App. 1989). As such, in order for trial counsel to effectively strategize about the appropriate mitigating factors to present to the court at the probation disposition hearing, trial counsel had to evaluate whether there were mitigating circumstances surrounding the prior offenses used to enhance Mr. Chippewa's DUI from a misdemeanor to a felony. One of those offenses happened to be one that trial counsel acted as prosecutor. Therefore, trial counsel was put in a position of potentially advocating against a prior conviction she procured for her former client, the State. This is a conflict as there was a significant risk that trial counsel's representations of Mr. Chippewa would be limited by trial counsel's responsibilities to her former client, the State. I.R.P.R. 1.7. Additionally, trial counsel was put into a position where she would have to consider undermining her own work when she previously procured Mr. Chippewa's conviction.



Further support for Mr. Chippewa's position that the nature of the original offense is important when determining the length of a sentence executed after a period of probation can be found in *State v. Warren*, 123 Idaho 20 (Ct. App.1992). In that case, Mr. Warren was convicted of aggravated battery in 1988 and placed on probation. *Id.* at 21. Mr. Warren's probation was then revoked and the district court retained jurisdiction for 180 days. *Id.* After completing the period of retained jurisdiction, Mr. Warren was placed on another period of probation, which was ultimately revoked. *Id.* The district court then *sua sponte* reduced the length of Mr. Warren's sentence. *Id.* Mr. Warren then appealed and alleged that the district court should have further reduced the length of his sentence. *Id.* In support of that position, Mr. Warren argued that his probation violation was trivial. *Id.* The Court of Appeals addressed that argument stating, "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit off his victim's ear." *Id.* According to the Court of Appeals, the nature of the underlying offense and other pre-probationary circumstances must be analyzed when a district court executes a sentence after a period of probation.

The foregoing analysis is equally applicable to the role trial counsel played in her representation of Mr. Chippewa during the Rule 35 proceedings as the same factors were directly at issue. *State v. Arazia*, 109 Idaho 188, 189 (Ct. App. 1985); *see also State v. Yarbrough*, 106 Idaho 545 (Ct. App. 1984)). Even the district court recognized that the conflict might have played a minor role during the Rule 35 proceedings. (R., p.46.) However, as in *Warren, supra*, the nature of the original offense played a

pivotal role in the analysis of whether Mr. Warren's sentence should have been reduced. In fact, the Court of Appeals refused to address Mr. Warren's sentencing claim on appeal because he failed to provide the Court of Appeals with an appellate record of the original sentencing proceedings. *Warren*, 123 Idaho 21. As such, trial counsel's conflict was present and relevant to the issues related to her representations of Mr. Chippewa during the Rule 35 proceedings because the circumstances surrounding the nature of the original offense were directly at issue.

Additionally, Mr. Chippewa's claim that a conflict existed was broad enough to include a conflict based on a breakdown of attorney client communication. In his petition, Mr. Chippewa alleged that, due to a gross conflict of interest, trial counsel refused to work with him and develop trial strategies for the probation disposition. (R., p.8.) Mr. Chippewa alleged additional facts supporting this conflict as trial counsel was asked and refused to provide him with discovery related to his probation violations. (R., p.9.) A conflict can be found in the event "the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth Amendment right would be violated but for substitution." *State v. Lippert*, 145 Idaho 586, 596 (Ct. App. 2007). Here, there was a genuine issue of material fact as to the existence of a conflict based on a breakdown in attorney client communications, as trial counsel refused to work with Mr. Chippewa and denied him access to the discovery related to his probation violations. (R., p.8.) As such, Mr. Chippewa was provided ineffective assistance of counsel as his attorney refused to work with him or provide him with the materials he needed to mount a defense to the alleged probation violations. Therefore, summary

dismissal of this claim was inappropriate as Mr. Chippewa alleged an issue of material fact and this claim should have been further developed at an evidentiary hearing.

The next question in the analysis is whether trial counsel's conflict actually affected her performance. *Nevarez*, 145 Idaho at 885. Mr. Chippewa informed trial counsel that he did not want her representing him due to the conflicts in this case. (R., pp.8, 45.) Trial counsel's failure to inform the district court about these conflicts constituted deficient performance as that action would have triggered the trial court's duty to inquire into the conflicts and Mr. Chippewa lost his ability to present facts to the district court during said inquiry. *Lippert*, 145 Idaho at 594. Since trial counsel was operating under an actual conflict, her performance was also deficient as it was contrary to I.R.P.R. 1.7 which requires informed consent from Mr. Chippewa to proceed as counsel. There is no question about waiver in this matter as Mr. Chippewa alleged that he requested new counsel. (R., pp.4-9.)

In sum, Mr. Chippewa established uncontroverted facts to support his ineffective assistance of counsel claims based on two conflicts of interest. Therefore, the district court erred when it summarily dismissed these claims as they should have been further developed at an evidentiary hearing.

#### CONCLUSION

Mr. Chippewa respectfully requests that this case be remanded for further proceedings.

DATED this 18<sup>th</sup> day of July, 2013.

  
SHAWN F. WILKERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

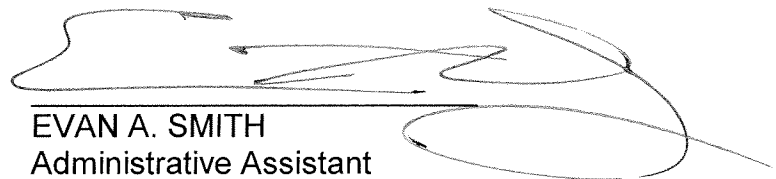
I HEREBY CERTIFY that on this 18<sup>th</sup> day of July, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DANIEL CHIPPEWA  
INMATE #47690  
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PO BOX 70010  
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DARREN B SIMPSON  
DISTRICT COURT JUDGE  
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