

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

5-11-2018

Kolestani v. State Appellant's Brief Dckt. 45522

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Kolestani v. State Appellant's Brief Dckt. 45522" (2018). *Not Reported*. 4542.
https://digitalcommons.law.uidaho.edu/not_reported/4542

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAJID KOLESTANI AKA)	
NASTARAN KOLESTANI,)	NO. 45522
Petitioner-Appellant,)	
)	TWIN FALLS COUNTY
v.)	NO. CR 2015-1134
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
<hr/>		

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

HONORABLE G. RICHARD BEVAN
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR
PETITIONER-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
RESPONDENT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	2
ISSUES PRESENTED ON APPEAL	11
ARGUMENT	12
I. The District Court Erred In Summarily Dismissing Ms. Kolestani’s Coerced Guilty Plea Claim, Because She Raised A Genuine Issue Of Material Fact On Whether Her Plea Was Not Knowing, Intelligent, And Voluntary	12
A. Introduction	12
B. Standard Of Review	12
C. Ms. Kolestani Presented A Genuine Issue Of Material Fact As To Whether Her Guilty Plea Was Involuntary Because It Was Coerced Through Ignorance Or Fear	13
II. The District Court Erred In Summarily Dismissing Ms. Kolestani’s Erroneous Advice Claim, Because She Raised A Genuine Issue Of Material Fact On Whether Trial Counsel Gave Her Deeply Erroneous Advice On Deportation Consequences	17
A. Introduction	17
B. Standard Of Review	17
C. Ms. Kolestani Presented A Genuine Issue Of Material Fact As To Whether Trial Counsel’s Representation Was Deficient, Because Trial Counsel’s Erroneous Advice On Deportation Consequences Fell Below An Objective Standard Of Reasonableness.....	19
1. Ms. Kolestani Sufficiently Alleged Constitutional Deficiency By Trial Counsel To Satisfy The First Prong Of <i>Strickland</i>	20

2. The District Court Erred When It Determined Trial Counsel’s Representation Was Not Deficient.....	22
D. Ms. Kolestani Will Be Able To Demonstrate There Is A Genuine Issue Of Material Fact As To Whether She Was Prejudiced By Trial Counsel’s Deficient Performance	26
III. The District Court Abused Its Discretion When It Denied Ms. Kolestani’s Motion for Reconsideration Without Comment, Because The District Court Did Not Act Consistently With The Applicable Legal Standards Or Reach Its Decision By An Exercise Of Reason	29
A. Introduction	29
B. Standard Of Review.....	30
C. The Motion For Reconsideration Is An Idaho Rule of Civil Procedure 60(b) Motion	30
D. The District Court Abused Its Discretion When It Denied The Motion For Reconsideration Without Comment.....	32
CONCLUSION.....	35
CERTIFICATE OF MAILING	36

TABLE OF AUTHORITIES

Cases

<i>Adams v. State</i> , 158 Idaho 530 (2015)	24, 25
<i>Agrisource, Inc. v. Johnson</i> , 156 Idaho 903 (2014).....	30, 32, 33, 34
<i>Aragon v. State</i> , 114 Idaho 758 (1988)	19, 26
<i>Camp v. Jiminez</i> , 107 Idaho 878 (Ct. App. 1984)	6
<i>Charboneau v. State</i> , 144 Idaho 900 (2007).....	12, 18, 26
<i>Davidson v. State</i> , 92 Idaho 104 (1968).....	14
<i>Dawson v. Cheyovich Family Trust</i> , 149 Idaho 375 (2010).....	30, 32
<i>Drennon v. Idaho State Corr. Inst.</i> , 145 Idaho 598 (Ct. App. 2007)	6
<i>Eby v. State</i> , 148 Idaho 731 (2010).....	31
<i>Estrada v. State</i> , 143 Idaho 558 (2006).....	22
<i>Johnson v. Lambros</i> , 143 Idaho 468 (2006)	31
<i>Keserovic v. State</i> , 158 Idaho 234 (Ct. App. 2015)	19, 20, 26, 27
<i>Lee v. United States</i> , 137 S. Ct. 1958 (2017).....	27, 28, 29
<i>Lockard v. State</i> , 92 Idaho 813 (1969).....	14
<i>Mata v. State</i> , 124 Idaho 588 (Ct. App. 1993).....	13, 14, 15, 16
<i>Mitchell v. State</i> , 132 Idaho 274 (1998).....	19
<i>Murray v. State</i> , 121 Idaho 918 (Ct. App. 1992).....	19
<i>Murray v. State</i> , 156 Idaho 159 (2014).....	22, 23, 29
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	20, 21, 26, 27
<i>Pratt v. State</i> , 134 Idaho 581 (2000).....	19
<i>Printcraft Press, Inc., v. Sunnyside Park Utilities, Inc.</i> , 153 Idaho 440 (2012).....	32

<i>Ross v. State</i> , 141 Idaho 670 (Ct. App. 2005)	31
<i>State v. Coyle</i> , 98 Idaho 32 (1976)	13, 14
<i>State v. Hanslovan</i> , 147 Idaho 530 (Ct. App. 2008).....	16
<i>State v. Hedger</i> , 115 Idaho 598 (1989)	30, 34
<i>State v. Nath</i> , 141 Idaho 584 (Ct. App. 2005)	16
<i>Stewart v. Arrington Constr. Co.</i> , 92 Idaho 526 (1968).....	31
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	19
<i>Washington Fed. Sav. & Loan Ass'n v. Transamerica Premier Ins. Co.</i> , 124 Idaho 913 (1993) .	32
<i>West v. State</i> , 123 Idaho 250 (Ct. App. 1993)	17
<i>Workman v. State</i> , 144 Idaho 518 (2007).....	14
 <u>Statutes</u>	
8 U.S.C. § 1101(a)(43)(A).....	21
8 U.S.C. § 1227.....	21
I.C. § 19-4902(a).....	2
I.C. § 19-4903.....	12
I.C. § 19-4906.....	13, 18
 <u>Rules</u>	
I.R.C.P. 1(b).....	31
I.R.C.P. 7(b)(1)(A).....	30, 31
I.R.C.P. 8(a)(1)	12
I.R.C.P. 56(c)	5
I.R.C.P. 59(e)	31
I.R.C.P. 60(b).....	<i>passim</i>

STATEMENT OF THE CASE

Nature of the Case

In her verified amended petition for post-conviction relief, Majid Kolestani aka Nastaran Kolestani asserted she pleaded guilty in the underlying criminal case after her trial counsel told her that, if she did not plead guilty, she would be immediately deported to a country where she would be executed for being a transgender woman. Thus, Ms. Kolestani asserted she did not enter into the plea agreement knowingly, voluntarily or intelligently, because her guilty plea had been coerced. She also asserted, in one of several ineffective assistance of counsel claims, that her trial counsel gave her deeply erroneous advice on deportation law. The district court, after determining the record disproved Ms. Kolestani's claims, granted the State's motion for summary disposition with respect to the above claims.

Ms. Kolestani subsequently filed a motion for reconsideration, requesting the district court reconsider the erroneous advice claim in light of a report from an immigration attorney that Ms. Kolestani faced the real possibility, after serving her sentence, of remaining in detention indefinitely. Ms. Kolestani asserted she was never told about that possibility, and trial counsel's legal advice on immigration consequences was therefore erroneous. However, the district court denied the motion for reconsideration without comment.

On appeal, Ms. Kolestani asserts the district court erred when it summarily dismissed her coerced guilty plea and erroneous advice claims. She also asserts the district court abused its discretion when it denied the motion for reconsideration without comment.

Statement of the Facts and Course of Proceedings

Ms. Kolestani is a transgender woman who came to the United States as a refugee from Iran. (*See R.*, pp.344-46.) Ms. Kolestani wrote in an asylum application that members of the Basij secret police in Iran physically attacked her and threatened her family, and later jailed her for a week. (*See R.*, p.345.) The secret police also arrested and killed her best friend, another transgender person. (*See R.*, p.344.) Ms. Kolestani wrote that she and her husband went from Iran to Turkey to escape persecution, and traveled to the United States after applying for refugee status. (*See R.*, p.346.)

Later, pursuant to a plea agreement, Ms. Kolestani pleaded guilty in Twin Falls County No. CR 2008-9063 to one count of first degree murder, related to the shooting death of her husband. (*See R.*, pp.294, 347.) In July 2009, the trial court imposed a unified sentence of life imprisonment, with eighteen years fixed. (*See R.*, p.294.) Ms. Kolestani did not file an appeal. (*See R.*, p.294.)

In March 2015, Ms. Kolestani filed, pro se, a Petition for Post Conviction Relief. (*See R.*, pp.17-47.) Upon Ms. Kolestani's motion, the district court appointed counsel to represent her. (*See R.*, pp.48-52, 62-63, 73-74.) The district court also granted Ms. Kolestani's motion to appoint an immigration attorney for consultation. (*See R.*, pp.96-97, 107-08.)

Through post-conviction counsel, Ms. Kolestani then filed a verified amended post-conviction petition. (*R.*, pp.135-51.) Ms. Kolestani asserted that, although she did not file her original petition within the time allotted in I.C. § 19-4902(a), equitable tolling applied because she had limited English faculties, there were no legal materials available to her in her native language, Farsi, and the prison paralegals could not provide assistance with translation or access to Farsi materials. (*See R.*, pp.136-41.)

In the verified amended petition, Ms. Kolestani asserted her right to due process had been violated, because she did not enter into her plea agreement knowingly, voluntarily, or intelligently. (*See R.*, pp.141-43.) Specifically, Ms. Kolestani asserted the plea was involuntary because it was coerced, being improperly obtained through ignorance or fear. (*See R.*, pp.141-43.) She asserted she pleaded guilty because she “was afraid of being immediately deported, then executed in a foreign country. (*R.*, p.141.) Ms. Kolestani asserted that “at all times relevant during the litigation,” she “did not speak, read, or comprehend English in any meaningful way.” (*R.*, p.142.) Ms. Kolestani “was completely ignorant as to the law in regards to deportation,” and was unaware that she could not be deported unless she was found guilty or pleaded guilty to the crime charged. (*R.*, p.142.) However, she believed that unless she signed the plea agreement, she would be immediately deported from the United States, “a belief obtained through counsel.” (*R.*, p.142.)

Ms. Kolestani asserted that, when the plea agreement document was presented to her, she was informed that if she did not sign the document, she “would be immediately deported to Afghanistan or Pakistan.” (*R.*, p.143.) Ms. Kolestani asserted that she knew that if she were deported to Afghanistan or Pakistan, she would be executed as a transgender woman under the laws of those countries. (*R.*, p.143.) She thought she only had two options; namely, “take the plea deal and live” or “reject the plea deal and die.” (*R.*, p.143.) Ms. Kolestani’s fear led her to accept the plea deal, despite her not understanding it. (*R.*, p.143.) She asserted, “[t]he fear of being immediately deported to a [country] where Petitioner would be executed coerced Petitioner into pleading guilty. Where coercion is present, a plea cannot be knowing, voluntary or intelligent.” (*R.*, p.143.) Thus, Ms. Kolestani asserted she should be allowed to withdraw her guilty plea. (*R.*, p.143.)

Ms. Kolestani also raised four claims of ineffective assistance of counsel in the verified amended petition. (R., pp.143-48.) Among those claims, she asserted trial counsel “was deeply erroneous in deportation law.” (R., p.144.) She asserted trial counsel informed her she would be immediately deported if she did not accept the plea agreement, due to the nature of the crime. (R., p.145.) However, at that time, “no deportation proceedings had begun. There was no agency requiring the immediate deportation of Petitioner. To be sure, as far as Petitioner has knowledge, no action had been taken at all in regards to deportation.” (R., p.145.) Ms. Kolestani asserted, “[i]t was not reasonable for counsel to give immigration advice to Petitioner that was not actually correct. . . . The advice was deficient because it was wrong.” (R., p.145.)

As for prejudice, Ms. Kolestani asserted, “[w]ithout the fear of being immediately deported, Petitioner would not have pled guilty.” (R., p.145.) Her options were to fight a legal battle in this country with the possibility of being found not guilty of first degree murder, or being deported to her death. (R., pp.145-46.) She asserted, “[w]hile true that the Prosecution could have sought the death penalty, at least the rule of law would provide Petitioner means for a fair trial.” (R., p.146.) She “was prejudiced because, out of fear of immediate deportation, Petitioner capitulated.” (R., p.146.) Alongside the other ineffective assistance of counsel claims, Ms. Kolestani raised a claim of cumulative error. (*See* R., pp.148-49.)

The State filed an answer in response to the verified amended petition. (R., pp.174-77.) The State also filed a Motion for Summary Disposition, asserting “the application fails to raise a genuine issue of material fact as it is not accompanied by any admissible evidence supporting its allegations,” and “the petition is barred by the statute of limitations.” (R., pp.178-80.) The State filed a brief in support of the motion for summary disposition. (R., pp.181-87.)

Ms. Kolestani then filed a verified response to the motion for summary disposition. (R., pp.195-206.) She asserted, “when an issue of law is based on facts that can only be gained through testimony, then it would logically follow that verified statements made by a party are enough to create genuine issues of material fact.” (R., p.202.) Ms. Kolestani also asserted summary disposition was not appropriate, because she “established why equitable tolling applies in this matter” and “also established many genuine issues of material fact.” (R., p.205.)

At a hearing on the motion for summary disposition, the district court ordered the parties to submit supplemental briefing on Idaho Rule of Civil Procedure 56(c). (*See* R., pp.228-29; *see generally* Tr. 04/10/17.) The State contended, “a verified statement is not an affidavit and does not in itself satisfy the requirement that evidence be provided by the petitioner.” (Tr. 04/10/17 p.18, Ls.14-17.)

The State subsequently filed a supplemental memorandum. (R., pp.237-47.) The State reiterated that Ms. Kolestani “has failed to present a genuine issue of material fact which requires a hearing,” and also argued “the record of the underlying case refutes her current claims of an involuntary plea due to coercion or misunderstanding the ramifications of her plea, as well as her claims of ineffective assistance of counsel.” (R., p.238.) The State argued the district court told Ms. Kolestani during the plea colloquy that deportation was “a possibility once you have served time in the penitentiary.” (R., p.241-42; *see* R., p.264.) The State contended the plea, therefore, “was not due to a threat of immediate deportation.” (R., p.242.)

Ms. Kolestani filed a response to the State’s supplemental memorandum. (R., pp.290-92.) She asserted the State’s supplemental memorandum raised arguments that were not included in the original motion for summary disposition. (*See* R., pp.290-91.) Additionally, she asserted she had established many genuine issues of material fact. (R., p.292.) Ms. Kolestani

asserted the district court's statements on the possibility of deportation after serving her time confirmed what she already believed. (R., p.291.) Trial counsel had told her "she would be deported unless she accepted the plea deal. . . . Because Petitioner was agreeing to the plea deal, she could not be deported until she served her time." (R., p.291.)

The district court then issued its Memorandum Decision and Order on Motion for Summary Disposition. (R., pp.293-318.) The district court concluded that the facts supported Ms. Kolestani's claims "sufficiently to proceed to trial on the issue of whether the statute of limitations should be tolled." (R., p.304.) Thus, the district court denied the motion for summary disposition as to the statute of limitations issue. (R., p.305.) And despite the State's consistent contention to the contrary, the district court recognized that "verified statements are sufficient to constitute *evidence* which may create an issue of fact." (R., p.310 n.15 (citing *Drennon v. Idaho State Corr. Inst.*, 145 Idaho 598, 603 (Ct. App. 2007); *Camp v. Jiminez*, 107 Idaho 878, 881 (Ct. App. 1984)).

The district court turned to Ms. Kolestani's due process claim that she did not enter into her plea agreement knowingly, voluntarily, and intelligently. (R., p.305.) The district court determined Ms. Kolestani's claims that she was ignorant of immigration consequences and her trial counsel told her she would be immediately deported if she did not plead guilty were "disproven by the record." (R., p.305.) The district court recognized "that it will be the trier of fact regarding issues ultimately presented at trial. As such, this court may make reasonable inferences from facts that are not in dispute." (R., p.305.) The district court also recognized "that factual assertions which are disproven by the record are insufficient to create an issue of fact requiring trial. Kolestani's claims fail as to the record in this case." (R., p.306.)

According to the district court, the plea agreement Ms. Kolestani signed indicated that her decision to plead guilty was freely and voluntarily made, and was not the result of force, threats, promises or representations other than the representations contained in the plea agreement. (R., p.306; *see* R., p.250.) The district court determined the guilty plea advisory form contained similar certifications (R., p.306; *see* R., p.258), and the trial court further confirmed Ms. Kolestani's written answers during the plea colloquy (*see* R., pp.306-07).

Thus, the district court determined Ms. Kolestani "gave the trial court multiple assurances that her plea was entered knowingly, voluntarily and intelligently, with the advice of counsel. She now changes her testimony before this court, claiming she was ignorant of the process and that [trial counsel] told her to plead guilty or she would be deported." (R., p.307.) The district court determined "the record simply disproves these claims," because at the change of plea hearing, "having had matters discussed with a local interpreter and her counsel . . . she affirmed multiple times that she entered her plea without any coercion or threat, and that she did so 'voluntarily.'" (R., pp.307-08.) The district court therefore determined there was no violation of Ms. Kolestani's due process rights when the trial court accepted her guilty plea in the underlying case. (R., p.308.)

On Ms. Kolestani's ineffective assistance claim that trial counsel had a deeply erroneous understanding of deportation law, the district court determined "the record belies the statements of fact set forth in Kolestani's verified Amended Petition." (R., pp.309-10.) The district court determined Ms. Kolestani "indicated when pleading guilty that she was acting voluntarily, and without any coercion whatsoever. To claim now, some eight years later, that she was acting under the provocation or coercion based on bad advice regarding her immigration status is simply not an inference that this court is willing to make." (R., p.310.) The district court, based

on the timing of the indictment, the plea agreement, and the guilty plea, made the “logical inference” that Ms. Kolestani had time to review and understand the plea agreement. (*See* R., p.310.)

The district court also determined that in the guilty plea advisory form, signed eight days before the change of plea hearing, Ms. Kolestani noted that no other promises had been made to her which influenced her decision to plead guilty. (R., p.311.) The district court wrote, “[t]he promise that she would be deported if she did not plead guilty is certainly one that, were it entitled to weight by this court, should have been noted at the time.” (R., p.311.) The district court further determined that the advisory form contained Ms. Kolestani’s acknowledgment that her plea of guilty could result in her deportation or removal from the United States, and Ms. Kolestani told the trial court at the change of plea hearing that she recognized the potential of deportation once she had served her sentence. (R., p.311.)

In sum, the district court determined that, “[b]ased upon these undisputed facts in the record, the record disproves Kolestani’s assertion that her counsel was deficient under *Strickland* by giving her gravely erroneous advice regarding deportation.” (R., pp.311-12.) The district court also made “the logical inference that, had [trial counsel] erroneously told Kolestani that she would be deported if she did not plead guilty, Kolestani would have brought that to the attention of the court in the forms and/or during the colloquy wherein she had the opportunity to do so.” (R., p.312.)

The district court summarily dismissed the other ineffective of assistance of counsel claims, except for the claim that trial counsel was ineffective for failing to file a motion to suppress, because the district court had given the parties additional time on that issue. (*See* R., pp.312-16.) Because only the motion to suppress issue remained, the district court dismissed

Ms. Kolestani's claim of cumulative error. (*See* R., pp.316-17.) Thus, the district court granted the motion for summary disposition of Ms. Kolestani's claims, except for the claim that trial counsel was ineffective for failing to file a motion to suppress. (R., p.317.)

Ms. Kolestani later informed the district court that she was no longer pursuing the motion to suppress claim. (*See* R., pp.330-32; Tr. 09/11/17 p.3, Ls.10-22.) The district court stated it would enter judgment on behalf of the State on that issue. (*See* Tr. 09/11/17 p.3, Ls.23-24.)

Ms. Kolestani also requested the district court enter the immigration report of the appointed immigration attorney into the record. (R., pp.330-31; *see* R., pp.333-38.) The immigration report discussed how Ms. Kolestani could apply, after serving her sentence, for deferral of removal under the Convention Against Torture. (R., p.335.) The report also noted she faced the real possibility of remaining in detention indefinitely because of the seriousness of her crime, considering how difficult it would be to deport her back to Iran or find a third-party country willing to take her. (R., pp.336-37.) The report concluded Ms. Kolestani "faces the real possibility of being detained indefinitely in the custody of ICE once [her] criminal sentence has concluded." (R., p.338.)

At a pretrial conference, post-conviction counsel explained Ms. Kolestani wanted the immigration report added to the record in anticipation of appealing the district court's decision on the motion for summary disposition. (*See* Tr. 09/11/17, p.4, Ls.6-11.) Counsel told the district court, "I thought that immigration report had become part of the court file. Upon review of the file, I realized that that was my error and [the report] had only been sent to myself and the prosecution." (Tr. 09/11/17, p.4, Ls.11-15.) Because the district court "didn't have access to it," the district court decided not to "formally make it a part of the record nunc pro tunc . . . [I]t will clearly be noted by me at this point that it was filed . . . well after my prior order [on the motion

for summary disposition].” (Tr. 09/11/17, p.5, L.12 – p.6, L.1.) The district court subsequently entered a Judgment dismissing the post-conviction petition with prejudice. (R., pp.381-82.)

Ms. Kolestani then filed a Motion to Reconsider, based on the district court’s statement “that the expert report of the immigration attorney in this matter, was not reviewed when the Court was deciding upon Respondent’s Motion for Summary Judgment.” (R., p.383.) She asserted that, “according to the immigration report, [trial counsel’s] advice on immigration was still incorrect and [trial counsel] should not have given any counsel on the subject of immigration.” (R., p.384.) The immigration report discussed “the serious immigration consequences of the plea of guilty and the future for Petitioner due to that plea. According to the report, Petitioner faces the real possibility of remaining in detention indefinitely.” (R., p.384.) Ms. Kolestani asserted, “[t]his is a possibility not even disclosed or brought up to Petitioner,” and she was given bad advice on immigration. (R., p.384.) Further, Ms. Kolestani asserted, “Petitioner would not have entered a plea agreement if the result of the plea was to be eternally incarcerated. Indeed, with trial being the only possibility of hope, Petitioner would have demanded to move forward if correct counsel had been given.” (R., p.384.)

The district court, by this time with a different presiding judge, entered an Order Denying Motion to Reconsider. (*See* R., pp.433-34.) The order stated, “Petitioner timely filed a *Motion to Reconsider* on 09/25/2017, requesting the court to reconsider the *Judgment* in this case which was entered on 09/13/2017. The Motion to Reconsider is denied.” (R., p.433.)

Ms. Kolestani filed a Notice of Appeal timely from the district court’s Judgment. (R., pp.439-41; *see* R., pp.455-62 (Amended Notice of Appeal).)

ISSUES

- I. Did the district court err in summarily dismissing Ms. Kolestani's coerced guilty plea claim, because she raised a genuine issue of material fact on whether her plea was not knowing, intelligent, and voluntary?
- II. Did the district court err in summarily dismissing Ms. Kolestani's erroneous advice claim, because she raised a genuine issue of material fact on whether trial counsel gave her deeply erroneous advice on deportation consequences?
- III. Did the district court abuse its discretion when it denied Ms. Kolestani's motion for reconsideration without comment, because the district court did not act consistently with the applicable legal standards or reach its decision by an exercise of reason?

ARGUMENT

I.

The District Court Erred In Summarily Dismissing Ms. Kolestani's Coerced Guilty Plea Claim, Because She Raised A Genuine Issue Of Material Fact On Whether Her Plea Was Not Knowing, Intelligent, And Voluntary

A. Introduction

Ms. Kolestani asserts the district court erred in summarily dismissing her coerced guilty plea claim, because she raised a genuine issue of material fact on whether her plea was not knowing, intelligent, and voluntary. The district court determined the record disproved Ms. Kolestani's claim, and she entered her plea knowingly, voluntarily, and intelligently. (R., p.308.) However, Ms. Kolestani actually presented a genuine issue of material fact as to whether her plea was involuntary because it was coerced through ignorance or fear.

B. Standard Of Review

As the Idaho Supreme Court has held, “[a]n application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature.” *Charboneau v. State*, 144 Idaho 900, 903 (2007). “Like a plaintiff in a civil action, the applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based.” *Id.* “Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than a ‘short and plain statement of the claim’ that would suffice for a complaint under I.R.C.P. 8(a)(1).” *Id.* “Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant.” *Id.* (citing I.C. § 19-4903). “The application must include affidavits, records, or

other evidence supporting its allegations, or must state why such supporting evidence is not included.” *Id.*

“Summary disposition of a petition for post-conviction relief is appropriate if the applicant’s evidence raises no genuine issue of material fact.” *Id.* (citing I.C. § 19-4906(b) & (c)).) The *Charboneau* Court held, “[o]n 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 and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” *Id.* “A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Id.* “When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing.” *Id.* “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.*

C. Ms. Kolestani Presented A Genuine Issue Of Material Fact As To Whether Her Guilty Plea Was Involuntary Because It Was Coerced Through Ignorance Or Fear

Ms. Kolestani asserts she presented a genuine issue of material fact as to whether her guilty plea was involuntary because it was coerced through ignorance or fear. The UPCPA allows for the assertion of a constitutional challenge to a conviction by contending that the plea was not knowing and voluntary. *See Mata v. State*, 124 Idaho 588, 593-594 (Ct. App. 1993).

The right to due process guaranteed by the United States and Idaho Constitutions requires that, for a guilty plea to be valid, it must be made voluntarily, knowingly and intelligently. *See State v. Coyle*, 98 Idaho 32 (1976); *Mata*, 124 Idaho at 593. “[T]he entire record must

demonstrate that the plea was entered into in a voluntary, knowing, and intelligent manner.” *Workman v. State*, 144 Idaho 518, 527 (2007). Whether a plea is voluntary and understood entails inquiry into whether: (1) the defendant’s plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) the defendant knowingly and intelligently waived his rights to a jury trial; and (3) the defendant understood the consequences of pleading guilty. *Id.* (citing *Coyler*, 98 Idaho at 34). “In determining whether a guilty plea meets constitutional standards, the court must review all of the circumstances surrounding entry of the plea.” *Mata*, 124 Idaho at 594.

As the Idaho Court of Appeals held in *Mata*, “[w]hen reviewing an allegation that a guilty plea has been coerced we look to the totality of the circumstances to determine if the plea was improperly obtained through ignorance, fear or fraud.” *Id.* (citing *Lockard v. State*, 92 Idaho 813, 815 (1969)). “If an innocent person would have felt compelled to plead guilty in like circumstances, it can properly be said that the plea was involuntary.” *Id.* (citing *Lockard*, 92 Idaho at 815; *Davidson v. State*, 92 Idaho 104, 105 (1968)).

Ms. Kolestani submits that she raised a genuine issue of material fact on whether, under the totality of the circumstances here, her guilty plea was improperly obtained through ignorance or fear. In the verified amended petition, Ms. Kolestani asserted that, at all relevant times, she did not speak, read, or comprehend English in any meaningful way, and did not have any education on the deportation laws of the United States. (R., p.142.) “In regards to the issues surrounding deportation, Petitioner was solely reliant upon counsel. Petitioner was completely ignorant as to the law in regards to deportation.” (R., p.142.) She was unaware she could not be deported unless she was found guilty or pled guilty to the crime charged, and believed that unless she signed the plea agreement, she would be immediately deported from the United States.

(R., p.142.) Ms. Kolestani asserted, “[a]lthough this belief was ignorant, this was a belief obtained through counsel.” (R., p.142.) As will be explored in more detail in Part II below, Ms. Kolestani asserted her trial counsel erroneously advised her that if she did not take the plea deal, she would be immediately deported. (See R., p.145.) Thus, Ms. Kolestani raised a genuine issue of material fact as to whether her guilty plea was improperly obtained through ignorance.

Ms. Kolestani also raised a genuine issue of material fact as to whether her guilty plea was improperly obtained through fear. In the verified amended petition, she asserted that when she was presented with the plea agreement, she was informed that if she did not sign the document, she would be immediately deported to Afghanistan or Pakistan. (R., p.143.) At the time, Ms. Kolestani knew that the laws of Afghanistan or Pakistan would require her execution as a transgender woman. (R., p.143.) Thus, Ms. Kolestani believed that if she were deported, she would be executed. (R., p.143.) She also asserted that when she requested time to look at the document or speak with her brother about the plea agreement, she was told she did not have time to think about it, the prosecution needed an answer that day, and the offer would be withdrawn if not accepted. (R., p.143.) Ms. Kolestani thought that her options were to “take the plea deal and live,” or “reject the plea deal and die.” (R., p.143.) “Fearing that deportation was imminent,” Ms. Kolestani therefore accepted the plea deal without understanding it. (R., p.143.) Ms. Kolestani raised a genuine issue of material fact as to whether her guilty plea was improperly obtained through fear.

In light of the above facts asserted by Ms. Kolestani, she presented a genuine issue of material fact as to whether her guilty plea was involuntary because it was coerced through ignorance or fear. *See Mata*, 124 Idaho at 594. Admittedly, Idaho’s appellate courts have

commonly found that a plea was not coerced where the State was not the party employing the alleged coercion against the defendant. *See, e.g., State v. Hanslovan*, 147 Idaho 530, 538 (Ct. App. 2008) (holding there was no coercion where the defendant pleaded guilty out of concern for his girlfriend's ability to receive a more lenient sentencing recommendation); *State v. Nath*, 141 Idaho 584, 586 (Ct. App. 2005) (no coercion where pleading guilty was the defendant's only option to be released to take care of his wife and mother); *Mata*, 124 Idaho at 594-95 (no coercion where the State offered a tied plea agreement where the defendant's wife would be released if he pleaded guilty; the anxiety and pressure generated by the defendant's family situation was not impermissible coercion).

However, the present case does not involve mere "external family pressures," as seen in cases like *Hanslovan*, *Nath*, and *Mata*. *Cf. Hanslovan*, 147 Idaho at 537-38. Rather, Ms. Kolestani, because of trial counsel's erroneous advice, believed that if she did not plead guilty, she would be immediately deported and then executed. (*See R.*, pp.142-43.) Accepting Ms. Kolestani's assertions as true, an innocent person would have felt compelled to plead guilty in like circumstances. *See Mata*, 124 Idaho at 594. Ms. Kolestani therefore raised a genuine issue of material fact as to whether her guilty plea was coerced by being improperly obtained through ignorance or fear.

The district court determined the record disproved Ms. Kolestani's factual assertions on this claim, based on the plea agreement, Ms. Kolestani's certifications in the guilty plea advisory form, and her answers in the plea colloquy. (*See R.*, pp.306-08.) But the record did not actually disprove Ms. Kolestani's assertions. For example, the plea agreement signed by Ms. Kolestani included the provision that her decision to accept the agreement was "not the result of force, threats, assurances, promises or representations other than the representations contained in this

Memorandum.” (See R., p.250.) However, the plea agreement is silent on deportation consequences, much less on whether Ms. Kolestani would be immediately deported if she did not plead guilty. (See R., p.250.) Further, while the trial court during the plea colloquy inquired into whether Ms. Kolestani had been threatened or coerced into entering the guilty plea (see R., p.266), the district court did not ask about her understanding of what would happen if she did not plead guilty (see generally R., pp.261-68). The record did not actually disprove Ms. Kolestani’s assertions on whether her plea was not knowing, intelligent, and voluntary.

The district court erred in summarily dismissing Ms. Kolestani’s coerced guilty plea claim, because she raised a genuine issue of material fact on whether her plea was not knowing, intelligent, and voluntary. She presented a genuine issue of material fact as to whether her plea was involuntary because it was coerced through ignorance or fear. Thus, the district court’s order summarily dismissing the petitioner for post-conviction relief should be vacated with respect to the coerced guilty plea claim, and the case should be remanded to the district court for an evidentiary hearing. See *West v. State*, 123 Idaho 250, 252 (Ct. App. 1993).

II.

The District Court Erred In Summarily Dismissing Ms. Kolestani’s Erroneous Advice Claim, Because She Raised A Genuine Issue Of Material Fact On Whether Trial Counsel Gave Her Deeply Erroneous Advice On Deportation Consequences

A. Introduction

Ms. Kolestani asserts the district court erred in summarily dismissing her erroneous advice claim of ineffective assistance of counsel, because she raised a genuine issue of material fact on whether trial counsel gave her deeply erroneous advice on deportation consequences. The district court determined the record disproved Ms. Kolestani’s assertion that trial counsel

was deficient, and her claim was not supported by the record or the district court's inferences. (R., pp.311-12.) However, Ms. Kolestani presented a genuine issue of material fact as to whether trial counsel's representation, namely the erroneous advice that Ms. Kolestani would be immediately deported if she did not plead guilty, was deficient because it fell below an objective standard of reasonableness. Further, Ms. Kolestani will be able to demonstrate there is a genuine issue of material fact as to whether she was prejudiced by trial counsel's deficient performance.

B. Standard Of Review

As discussed above, “[s]ummary disposition of a petition for post-conviction relief is appropriate if the applicant’s evidence raises no genuine issue of material fact.” *Charboneau*, 144 Idaho at 903 (citing I.C. § 19-4906(b) & (c)). On review of a dismissal of a post-conviction relief application without an evidentiary hearing, an appellate court “will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” *Id.* “A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Id.* “When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing.” *Id.* “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.*

C. Ms. Kolestani Presented A Genuine Issue Of Material Fact As To Whether Trial Counsel's Representation Was Deficient, Because Trial Counsel's Erroneous Advice On Deportation Consequences Fell Below An Objective Standard Of Reasonableness

Ms. Kolestani asserts she presented a genuine issue of material fact as to whether trial counsel's representation was deficient. Construing the facts in Ms. Kolestani's favor, trial counsel's erroneous advice that Ms. Kolestani would be immediately deported if she did not plead guilty was deficient because it fell below an objective standard of reasonableness.

A claim of ineffective assistance of counsel may properly be brought under the UPCPA. *Murray v. State*, 121 Idaho 918, 924 (Ct. App. 1992). The Idaho Supreme Court has held, "[i]n reviewing claims for ineffective assistance of counsel the Court utilizes the two-prong test set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Mitchell v. State*, 132 Idaho 274, 277 (1998). The *Strickland* test "requires the petitioner to establish: (1) counsel's conduct was deficient because it fell outside the wide range of professional norms; and (2) the petitioner was prejudiced as a result of that deficient conduct." *Pratt v. State*, 134 Idaho 581, 584 (2000).

To establish deficient performance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760 (1988). "Where, as here, the petitioner was convicted upon a guilty plea, to satisfy the prejudice element, the petitioner must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial." *Keserovic v. State*, 158 Idaho 234, 239 (Ct. App. 2015).

"In assessing the reasonableness of attorney performance, counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Pratt*, 134 Idaho at 584 (internal quotation marks omitted). "In addition, strategic and tactical decisions will not be second guessed or serve as a basis for post-

conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.” *Id.*

1. Ms. Kolestani Sufficiently Alleged Constitutional Deficiency By Trial Counsel To Satisfy The First Prong Of *Strickland*

Ms. Kolestani asserts she sufficiently alleged constitutional deficiency by trial counsel, through trial counsel’s erroneous advice on deportation consequences, to satisfy the first prong of *Strickland*. As the Idaho Court of Appeals observed in *Keserovic*, “[i]n *Padilla v. Kentucky*, [559 U.S. 356 (2010)], the United States Supreme Court determined the standard of representation required when a guilty plea could have potential immigration consequences.” *Keserovic*, 158 Idaho at 239. In *Padilla*, the petitioner, a lawful permanent resident, asserted his counsel failed to advise him of the deportation consequences before he entered his guilty plea to charges that made his deportation virtually mandatory. *Padilla*, 559 U.S. at 359.

The *Padilla* Court held, “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to [the petitioner’s] claim.” *Id.* at 366. The Court then held, “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Id.* at 369. The petitioner’s counsel “could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute,” but instead “provided him false assurance that his conviction would not result in his removal from this country.” *Id.* at 368. The *Padilla* Court held, “[t]his is not a hard case in which to find deficiency: The consequences of [the petitioner’s] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” *Id.* at 368-69.

The *Padilla* Court, “[a]ccepting his allegations as true,” held the petitioner “has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*.” *Id.* at 369. The Court also noted, “to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Id.* at 372. The *Padilla* Court remanded the case for a determination on whether the petitioner could satisfy the second prong of *Strickland*, prejudice. *Id.* at 369, 374-75.

Here, accepting her allegations as true, Ms. Kolestani has likewise sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Under the *Padilla* rubric, this was a situation where the immigration consequences were clear. United States immigration law provides that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. § 1227(a)(2)(A)(iii). “Aggravated felony” is defined as including “murder” 8 U.S.C. § 1101(a)(43)(A). United States immigration law provides that aliens shall be removed “if the alien is within one or more of the following classes of deportable aliens,” and does not provide that an alien merely charged with an aggravated felony such as murder is deportable, *see* 8 U.S.C. § 1227(a).

Thus, the consequences of Ms. Kolestani’s plea could be easily determined from reading the removal statute, and there was no possibility she could be deported for the charged crime before being convicted. Construing the facts in Ms. Kolestani’s favor, trial counsel’s advice that Ms. Kolestani would be immediately deported if she did not plead guilty (*see* R., pp.144-46) was incorrect. Trial counsel’s failure to correctly advise Ms. Kolestani on deportation consequences would therefore constitute deficient performance. *See Padilla*, 559 U.S. at 369.

2. The District Court Erred When It Determined Trial Counsel's Representation Was Not Deficient

Ms. Kolestani asserts the district court erred when it determined trial counsel's representation was not deficient. The district court determined "the record disproves Kolestani's assertion that her counsel was deficient under Strickland by giving her gravely erroneous advice regarding deportation," based on Ms. Kolestani's certifications in the guilty plea advisory form and her answers in the plea colloquy. (*See R.*, pp.310-12.) However, conduct by the prosecution or the trial court to inform Ms. Kolestani of the immigration consequences did not eliminate trial counsel's obligation to inform her of the consequences. A recent Idaho Supreme Court decision, *Murray v. State*, 156 Idaho 159 (2014), helps illustrate why. In *Murray*, the district court determined that the petitioner's counsel did not advise the petitioner of his right to remain silent at a domestic violence evaluation, as required by *Estrada v. State*, 143 Idaho 558 (2006), nor did counsel discuss the consequences of waiving that right. *Murray*, 156 Idaho at 166. However, the trial court had advised the petitioner of those rights in a guilty plea advisory form, and the petitioner had indicated he understood those rights. *Id.*

On appeal, the Idaho Supreme Court held the district court erred when it determined that because the trial court had informed the petitioner of his *Estrada* rights, his counsel was not required to do so again. *Id.* The *Murray* Court held, "[t]his was an error because the district court's actions in informing [the petitioner] of his *Estrada* rights do not affect the Court's analysis under the deficiency prong of *Strickland*," because "the district court's conduct in informing [the petitioner] of his *Estrada* rights did not eliminate [counsel's] obligation to inform [the petitioner] of his rights." *Id.* at 166-67. The Idaho Supreme Court in *Estrada* had held that an attorney was deficient in failing to inform his client of his Fifth Amendment right against self-incrimination, and the petitioner's counsel in *Murray* similarly failed to inform the petitioner of

that right. *Id.* at 167. Thus, the *Murray* Court held that counsel, “in failing to apprise [the petitioner] of his *Estrada* rights, was objectively deficient, despite the district court’s efforts to inform [the petitioner] of his *Estrada* rights and the consequences of waiving his rights.” *Id.*

Just as the petitioner’s counsel in *Murray* had an obligation under *Estrada* to inform the petitioner of his Fifth Amendment rights, trial counsel in this case had an obligation under *Padilla* to inform Ms. Kolestani of the immigration consequences. Thus, by analogy to *Murray*, the prosecution and trial court’s conduct does “not affect the Court’s analysis under the deficiency prong of *Strickland*,” because that conduct did not eliminate trial counsel’s obligation to inform Ms. Kolestani of the deportation consequences. *See Murray*, 156 Idaho at 166-67.

Further, the conduct by the prosecutor or the trial court did not squarely address trial counsel’s erroneous advice to Ms. Kolestani. Neither the advisory form nor the trial court during the plea colloquy discussed Ms. Kolestani’s understanding of whether she would be deported if she did not plead guilty. The advisory form asked if she was “aware that if you are not a citizen of the United States, the entry of a plea or making of factual admissions could: (1) result in your deportation or removal from the United States” (R., pp.254-55.) During the plea colloquy, the trial court asked Ms. Kolestani, “[y]ou have told me, told the Court in this form that you recognize the potential of deportation from this country. Are you aware of that?” (R., p.264.) The trial court then asked, “[t]his Court has nothing to do with the issue of deportation. I just want to make you aware, because of your status, that that is a possibility once you have served time in the penitentiary. Do you understand that?” (R., p.264.)

While Ms. Kolestani indicated she understood the advisory form (*see R.*, p.254), and answered (through an interpreter) in the affirmative to the trial court’s questions at the plea colloquy (*see R.*, p.264), the advisory form or the trial court never asked her about her being

deported if she did not plead guilty. Thus, as Ms. Kolestani asserted before the district court, the trial court's statements really confirmed "what the Petitioner already believed. Because Petitioner was agreeing to the plea deal, she could not be deported until she served her time." (*See R.*, p.291.)

Additionally, the district court did not construe the facts in Ms. Kolestani's favor. Rather, the district court inappropriately made the "logical inference that, had [trial counsel] erroneously told Kolestani that she would be deported if she did not plead guilty, Kolestani would have brought that to the attention of the court in the forms and/or during the colloquy wherein she had the opportunity to do so." (*See R.*, p.312.) The district court apparently made that inference based on its recognition that "it will be the trier of fact regarding issues ultimately presented at trial . . . [and] may make reasonable inferences from facts that are not in dispute." (*See R.*, p.305.)

However, as the Idaho Supreme Court explained in *Adams v. State*, 158 Idaho 530 (2015), a case cited by the district court (*see R.*, pp.305-06), "[w]here the evidentiary facts are *not disputed* and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Adams*, 158 Idaho at 536 (emphasis added) (internal quotation marks omitted). The *Adams* Court also held "the trial judge is not constrained to draw inferences in favor of the party opposing a summary judgment motion. Instead, the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary facts." *Id.* (emphasis added) (internal quotation marks omitted).

The district court's inference that Ms. Kolestani would have brought trial counsel's deeply erroneous advice to the attention of the trial court was inappropriate under the above

standard, because the district court drew that inference from facts in dispute. Specifically, the State disputed whether trial counsel had ever advised Ms. Kolestani she would be immediately deported if she did not plead guilty. In the brief in support of the motion for summary disposition, the State argued the contents of the verified amended petition “are simply allegations with absolutely no factual or evidentiary support, and as such do not meet the threshold requirements to support [her] application.” (R., p.185.)

Similarly, at the hearing on the motion for summary disposition, the State argued Ms. Kolestani “offers no evidence other than mere allegations stated by the petitioner without support on four different issues. The first being that she was threatened by her attorneys that she would be deported and potentially executed if she didn’t plead guilty.” (Tr. 04/10/17 p.7, Ls.11-18.) According to the State, “what evidence there is in the record regarding that question was taken up during the entry of plea and during the sentencing wherein the petitioner was asked whether the plea of guilty was voluntary and whether there were threats made and the response was it was voluntary and there were no threats made.” (Tr. 04/10/17 p.9, Ls.4-11.) Later, in its supplemental memorandum the State argued Ms. Kolestani’s “plea was not due to a threat of immediate deportation” (R., p.242.)

Because the State disputed whether trial counsel had advised Ms. Kolestani she would be immediately deported if she did not plead guilty, it was inappropriate for the district court to make its logical inference. Under the standard from *Adams*, the district court did not have “uncontroverted evidentiary facts” from which to draw its inference based on trial counsel’s erroneous advice. *See Adams*, 158 Idaho at 536. Instead, the district court should have “liberally construe[d] the facts and reasonable inferences in favor of the non-moving party.” *See*

Charboneau, 144 Idaho at 903. The district court erred when it determined trial counsel's representation was not deficient.

In short, Ms. Kolestani presented a genuine issue of material fact as to whether trial counsel's representation was deficient. Construing the facts in Ms. Kolestani's favor, trial counsel did not meet the obligation to give correct advice on deportation consequences. *See Padilla*, 559 U.S. at 369. Trial counsel's erroneous advice that Ms. Kolestani would be immediately deported if she did not plead guilty was deficient because it fell below an objective standard of reasonableness. *See Aragon*, 114 Idaho at 760. Thus, the district court erred by summarily dismissing the erroneous advice claim of ineffective assistance of counsel.

The district court did not specifically address whether Ms. Kolestani was prejudiced by the deficiency. (*See R.*, pp.309-13.) Because a genuine issue of material fact existed as to deficient performance, and the district court did not address prejudice, the erroneous advice claim should be remanded to the district court for an evidentiary hearing. *See also Keserovic*, 158 Idaho at 239 ("If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues."). Alternatively, under *Padilla*, this issue should be remanded to the district court for further proceedings on whether Ms. Kolestani can demonstrate there is a genuine issue of material fact on prejudice. *See Padilla*, 559 U.S. at 374-75.

D. Ms. Kolestani Will Be Able To Demonstrate There Is A Genuine Issue Of Material Fact As To Whether She Was Prejudiced By Trial Counsel's Deficient Performance

Ms. Kolestani asserts that, on remand, she will be able to demonstrate there is a genuine issue of material fact as to whether she was prejudiced by trial counsel's deficient performance. As discussed above, to establish prejudice Ms. Kolestani must show "that there is a reasonable

probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial." *Keserovic*, 158 Idaho at 235.

The *Padilla* Court held that, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372. More recently, the United States Supreme Court had clarified that the crucial inquiry is whether "it would be irrational for a defendant in [the petitioner's] position to reject the plea offer in favor of trial." *See Lee v. United States*, 137 S. Ct. 1958, 1968 (2017). The *Lee* Court explained that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* at 1967.

The petitioner's counsel in *Lee* had erroneously advised the petitioner that pleading guilty to a drug charge would not lead to deportation, but the crime was an aggravated felony and the petitioner later learned he would be deported after serving his sentence. *See id.* at 1963. On appeal, the Court wrote that, "[b]ut for his attorney's incompetence, [the petitioner] would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost certainly.*" *Id.* at 1968. The *Lee* Court concluded, "[i]f deportation were the 'determinative issue' for an issue in plea discussions . . . if that individual had strong connections to this country and no other . . . and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that 'almost' could make all the difference." *Id.* at 1968-69. "Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time." *Id.* at 1969. Thus, the Court held, "[n]ot everyone in [the petitioner's]

position would make the choice to reject the plea. But we cannot say it would be irrational to do so.” *Id.* The *Lee* Court held the petitioner had demonstrated prejudice. *Id.*

Here, Ms. Kolestani asserted in the verified amended petition that she “had nothing to lose, but everything to gain by going to trial. Without the fear of being immediately deported, Petitioner would not have pled guilty.” (R., p.145.) Her “options were to fight a legal battle in this county with the possibility of being found not guilty of first degree murder, or being deported to [her] death.” (R., pp.145-46.) Even if the prosecution here had sought the death penalty, “[l]ooking at the cost and benefits, Petitioner had the same cost of going to trial as pleading guilty. However, Petitioner’s possible benefit of trial was freedom and being found not guilty.” (R., p.146.) Additionally, as Ms. Kolestani asserted in the response to the State’s supplemental memorandum, at the time of the plea, she could not read or write English. (R., p.291.)

Under these circumstances, it cannot be said that it would be irrational for a defendant in Ms. Kolestani’s position to reject the plea offer in favor of trial. Like the petitioner in *Lee*, deportation was the determinative issue for Ms. Kolestani. While Ms. Kolestani did not necessarily have strong connections to this country, she was highly concerned that deportation would lead to her execution. (*See* R., pp.145-46.) The consequences of taking a chance at trial in the United States, even if the death penalty were on the table, were not markedly harsher than pleading. Thus, under these circumstances it cannot be said it would be irrational for someone in Ms. Kolestani’s position to reject the plea. *See Lee*, 137 S. Ct. at 1969.

Although the guilty plea advisory form and the trial court during the plea colloquy discussed the deportation consequences if Ms. Kolestani pleaded guilty, “[t]here has been no suggestion here that the sentencing judge’s statements at the plea colloquy cured any prejudice

from the erroneous advice of [Ms. Kolestani's] counsel.” *See Lee*, 137 S. Ct. at 1968 n.4. As examined above, the advisory form and plea colloquy failed to mention the deportation consequences if Ms. Kolestani did not plead guilty. Thus, the conduct of the prosecutor and district court did not ensure that she was properly apprised of, and understood, the deportation consequences if she did not plead guilty. *Cf. Murray*, 156 Idaho at 167-68 (holding the petitioner was not prejudiced by counsel's failure to advise him of his *Estrada* rights, because “the district court ensured that [the petitioner] was properly apprised of, and understood, his *Estrada* rights”). Accordingly, Ms. Kolestani asserts she will be able to demonstrate there is a genuine issue of material fact as to whether she was prejudiced by trial counsel's deficient performance.

Ms. Kolestani presented a genuine issue of material fact as to whether trial counsel's representation, by not meeting the obligation to give correct advice on deportation consequences, fell below an objective standard of reasonableness. Thus, the district court erred in determining that trial counsel's representation of Ms. Kolestani was not deficient. Also, Ms. Kolestani will be able to demonstrate there is a genuine issue of material fact as to whether she was prejudiced by trial counsel's deficiency.

III.

The District Court Abused Its Discretion When It Denied Ms. Kolestani's Motion for Reconsideration Without Comment, Because The District Court Did Not Act Consistently With The Applicable Legal Standards Or Reach Its Decision By An Exercise Of Reason

A. Introduction

Ms. Kolestani asserts the district court abused its discretion when it denied her motion for reconsideration without comment, because the district court did not act consistently with the

applicable legal standards or reach its decision by an exercise of reason. The motion for reconsideration is an Idaho Rule of Civil Procedure 60(b) motion. The district court denied the motion for reconsideration without explaining why Ms. Kolestani's case did not meet the circumstances of Rule 60(b). (*See R.*, p.433.) Thus, the district court's silence was an abuse of discretion.

B. Standard Of Review

“A district court's decision to grant or deny a I.R.C.P. 60(b) motion is within the district court's discretion.” *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 914 (2014). When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry into whether the trial court (1) rightly perceived the issue as one of discretion, (2) acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices, and (3) reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989). Further, “[a] determination under Rule 60(b) turns largely on questions of fact to be determined by the trial. Those factual findings will be upheld unless they are clearly erroneous.” *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380 (2010). “If the trial court applies the facts in a logical matter to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion.” *Id.* (internal quotation marks omitted).

C. The Motion For Reconsideration Is An Idaho Rule of Civil Procedure 60(b) Motion

As a preliminary matter, Ms. Kolestani asserts the motion for reconsideration is an Idaho Rule of Civil Procedure 60(b) motion. Ms. Kolestani did not specify which rule authorized the motion for reconsideration. *Cf.* I.R.C.P. 7(b)(1)(A) (providing that a motion must “state with

particularity the grounds for the relief sought including the number of the applicable civil rule, if any”). However, the Idaho Rules of Civil Procedure “should be construed and administered to secure the just, speedy and inexpensive determination of every action and pleading.” I.R.C.P. 1(b). Thus, although the motion for reconsideration technically does not comply with Rule 7(b)(1)(A), this Court should look to the substance of the motion when deciding what it is. *See, e.g., Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 532 (1968) (“Substance governs, not form.”).

Typically, “[a] motion to reconsider a dismissal order properly should be treated as a motion to alter or amend a judgment under I.R.C.P. 59(e) if the motion was timely filed,” meaning filed within fourteen days after the entry of the “judgment.” *See Ross v. State*, 141 Idaho 670, 671 (Ct. App. 2005). But “a party is not permitted to present new evidence with motions made pursuant to I.R.C.P. 59(e).” *Johnson v. Lambros*, 143 Idaho 468, 471 (2006). Here, the immigration attorney’s report, presented in support of the motion for reconsideration, was not considered by the district court when it ruled on the motion for summary disposition. (*See* Tr. 09/11/17, p.5, L.12 – p.6, L.1.) Thus, because Ms. Kolestani offered “new evidence” in support of the motion for reconsideration, it cannot properly be considered a Rule 59(e) motion.

However, motions to reconsider in post-conviction proceedings are also cognizable as Idaho Rule of Civil Procedure 60(b) motions. *See Eby v. State*, 148 Idaho 731 (2010); *Ross*, 141 Idaho at 672. Rule 60(b) provides that, “[o]n motion and just terms, the court may relieve a party or its legal representation from a final judgment, order, or proceeding,” for reasons including “mistake, inadvertence, surprise, or excusable neglect.” I.R.C.P. 60(b)(1). When exercising its discretion regarding a Rule 60(b)(1) motion brought on the basis of excusable neglect, the court must examine whether the litigant engaged in conduct which, although

constituting neglect, was nevertheless excusable because a reasonably prudent person might have done the same thing under the circumstances. *Washington Fed. Sav. & Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 915 (1993).

Ms. Kolestani submits that the motion for reconsideration is a Rule 60(b) motion. The motion for reconsideration asserted the district court's "decision to dismiss was made without the memorandum of the immigration [attorney]." (R., p.384.) At the previous status conference, Ms. Kolestani's post-conviction counsel explained he thought the immigration report had become part of the court file, but later realized the report had only been sent to Ms. Kolestani and the State. (*See* Tr. 09/11/17, p.4, Ls.11-15.) Thus, while post-conviction counsel's actions may have constituted neglect, they were excusable because a reasonably prudent person under the circumstances might have made the same assumption. *See Washington Fed. Sav. & Loan Ass'n*, 124 Idaho at 915. Thus, the motion for reconsideration is a Rule 60(b) motion, or more specifically, a Rule 60(b)(1) motion brought on grounds of excusable neglect.

D. The District Court Abused Its Discretion When It Denied The Motion For Reconsideration Without Comment

Ms. Kolestani asserts the district court abused its discretion when it denied the motion for reconsideration without comment. The Idaho Supreme Court has held, "[w]hen a district court fails to explain why a case does not meet I.R.C.P. 60(b)'s circumstances, the court abuses its discretion." *Agrisource*, 156 Idaho at 914 (citing *Printcraft Press, Inc., v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 450 (2012)). "A district court's silence, even if assumed to be an unsupported denial, is still an abuse of discretion." *Id.* (citing *Dawson*, 149 Idaho at 380). As the *Agrisource* Court put it, "[a] district court's silence leaves this Court without an adequate

basis upon which to understand the premise behind the district court's determination." *Id.* (internal quotation marks omitted).

In *Agrisource*, a breach of contract claim involving an agricultural commodities company and its former employee, the former employee had filed a Rule 60(b) motion to reconsider the district court's grant of summary judgment in the company's favor. *See id.* at 905-06. On appeal, the former employee asserted the district court abused its discretion when it denied the motion to reconsider, because the court did not consider a first affidavit and ignored a second affidavit.¹ *See id.* at 914. The Idaho Supreme Court held the district court acted within its discretion with respect to the first affidavit, because the testimony therein did not meet Rule 60(b)(2) as newly discovered evidence and the former employee did not show unique and compelling circumstances under Rule 60(b)(6). *See id.*

However, the district court mentioned the second affidavit "only in its fact section." *Id.* While the district court's decision discussed the first affidavit "in the context of I.R.C.P. 60(b)(2), 60(b)(3), and (60)(b)(6)," it did not discuss why the second affidavit "fails to meet Rule 60(b)'s requirements." *Id.* Because the district court did not otherwise mention the second affidavit or its attachments, the *Agrisource* Court was left "without any basis to understand the district court's denial of [the former employee's] motion. Thus, the district court abused its discretion." *Id.* at 915. The Court also rejected the company's argument that any error was harmless because most of the second affidavit was inadmissible, reasoning, "[t]he district court never ruled on admissibility, and therefore this Court will not rule on admissibility." *Id.* The *Agrisource* Court vacated the district court's denial of Rule 60(b) relief

¹ The *Agrisource* Court referred to the first affidavit as "Harris's affidavit," and the second affidavit as "Johnson's third affidavit." *See Agrisource*, 156 Idaho at 914.

and remanded the case for the district court to review the second affidavit and decide how it may impact the request for Rule 60(b) relief. *Id.*

Here, the district court did not explain why the motion for reconsideration did not meet the circumstances of Rule 60(b), nor did it explain why it denied the motion on any other grounds. Rather, the district court's order simply read: "Petitioner timely filed a *Motion to Reconsider* on 09/25/2017, requesting the court to reconsider the *Judgment* in this case which was entered on 09/13/2017. The Motion to Reconsider is denied." (R., p.433.) Thus, the district court failed "to explain why a case does not meet I.R.C.P. 60(b)'s circumstances," leaving this Court "without any basis to understand the district court's denial of [Ms. Kolestani's] motion." *See Agrisource*, 156 Idaho at 914-15. Like the district court's silence in *Agrisource*, the district court silence here was an abuse discretion. *See id.* at 915. The district court did not act consistently with the applicable legal standards or reach its decision by an exercise of reason. *See Hedger*, 115 Idaho at 600.

The district court abused its discretion when it denied Ms. Kolestani's motion for reconsideration without comment. The district court's order denying the motion for reconsideration should be vacated, and the matter should be remanded to the district court for further proceedings on the motion. *See Agrisource*, 156 Idaho at 915.

CONCLUSION

For the above reasons, Ms. Kolestani respectfully requests that this Court vacate the district court's summary disposition order as to her coerced guilty plea claim, and remand the matter to the district court for an evidentiary hearing.

Ms. Kolestani also respectfully requests that this Court vacate the district court's summary disposition order as to her erroneous advice ineffective assistance of counsel claim, and remand the matter to the district court for an evidentiary hearing, or alternatively remand the matter to the district court for further proceedings to determine if Ms. Kolestani raised a genuine issue of material fact as to whether trial counsel's deficient performance prejudiced her case.

Further, Ms. Kolestani respectfully requests that this Court vacate the district court's order denying the motion for reconsideration, and remand the matter to the district court for further proceedings on the motion.

DATED this 11th day of May, 2018.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of May, 2018, 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:

MAJID KOLESTANI
INMATE #93501
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

G RICHARD BEVAN
DISTRICT COURT JUDGE
E-MAILED BRIEF

KURT H SCHWAB
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas