

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAJID KOLESTANI)
AKA NASTARAN KOLESTANI,) **No. 45522**
)
Petitioner-Appellant,) **Twin Falls County Case No.**
) **CV-2015-1134**
v.)
)
STATE OF IDAHO,)
)
Defendant-Respondent.)

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Majid Kolestani, a.k.a. Nataran Kolestani, appeals from the judgment entered upon the district court's order summarily dismissing her petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In August 2008, Kolestani—a transgender woman who, along with her husband, had come to the United States as a refugee from Iran—deliberately shot and killed her husband, apparently after learning “he was leaving.” (R., pp.138, 142-43; 6/1/09 Tr., p.15, L.10 – p.18, L.1; 7/10/09 Tr., p.7, L.18 – p.8, L.1, p.14, L.3 – p.17, L.21.¹) The state charged Kolestani with first-degree murder and a deadly weapon enhancement. (R., pp.250, 294.) Pursuant to a binding Rule 11 plea agreement, Kolestani pled guilty to first-degree murder, the state dismissed the enhancement, the parties stipulated to the imposition of a unified life sentence with 18 years determinate, and Kolestani waived her rights to appeal and to file a Rule 35 motion. (R., pp.250, 294.) The district court accepted the agreement and, on July 10, 2009, imposed the agreed upon sentence. (R., pp.136, 294; see generally 7/10/09 Tr.) Kolestani did not appeal. (R., pp.136, 294.)

Almost six years later, on March 20, 2015, Kolestani filed a *pro se* petition for post-conviction relief. (R., pp.17-47.) At Kolestani's request, the district court appointed

¹ The district court took judicial notice of a number of documents from the underlying criminal case, including the transcripts of Kolestani's June 1, 2009, entry of plea and July 10, 2009, sentencing hearings. (See R., pp.248-89, 294 n.1.) Those transcripts are included in the clerk's record at pages 261-268 and pages 269-278, respectively.

counsel (R., pp. 48-52, 62-63, 73-74), who thereafter filed an amended post-conviction petition (R., pp.135-51). Relevant to this appeal, the amended petition alleged that (1) Kolestani's guilty plea was not knowingly, voluntarily, and intelligently entered because (a) she was ignorant of the immigration consequences of her plea, and (b) her trial counsel advised her she would be immediately deported if she did not plead guilty (hereinafter referred to as the "involuntary guilty plea claim") (R., pp.141-43); and (2) trial counsel rendered ineffective assistance by giving Kolestani "deeply erroneous" advice regarding the deportation consequences she would face if she did not plead guilty (hereafter referred to as the "erroneous deportation advice claim") (R., pp.143-46). The state answered the amended petition and moved for summary dismissal on the bases that the petition was time-barred and otherwise failed to raise a genuine issue of material fact entitling Kolestani to an evidentiary hearing on any of her claims. (R., pp.174-87.)

After conducting a hearing and entertaining additional briefing (R., pp. 195-206, 228-29, 237-47, 290-92), the district court entered an order partially granting and partially denying the state's motion for summary dismissal (R., pp.293-318). The court recognized that Kolestani failed to file her post-conviction petition within the one-year limitation period of I.C. § 19-4902, but it denied the state's motion to summarily dismiss the petition as untimely, finding the allegations in the petition raised a genuine issue of material fact as to whether Kolestani was entitled to equitable tolling. (R., pp.298-304.) The court then addressed the claims in the petition and found all but one of them, including the involuntary guilty plea and erroneous deportation advice claims, lacking in evidentiary support and/or disproved by the record. (R., pp.305-16.) The court therefore granted the state's motion for summary dismissal of those claims. (R., p.317.) The court

deferred ruling on the remaining claim, noting it had granted the parties additional time to submit evidence and argument concerning that claim. (R., p.317.) The court concluded its order by indicating that “[i]f the court allowed Kolestani’s remaining claim to proceed to trial, the question of the applicability of the statute of limitations, and any tolling issues, [would] be determined at trial.” (R., p.317.)

After the court entered its order partially granting the state’s motion for summary dismissal, Kolestani advised the court she no longer wished to pursue her sole remaining claim. (R., pp.330-32, 380; 9/11/17 Tr., p.3, Ls.10-21.) “Based upon that,” the court entered a final judgment dismissing Kolestani’s petition in its entirety. (R., pp.380-82; 9/11/17 Tr., p.3, Ls.23-24.)

Twelve days after the entry of judgment, Kolestani filed a motion for reconsideration, asking the district court to revisit its summary dismissal decision in light of information contained in a report prepared by an immigration attorney. (R., pp.383-85.) The court had granted Kolestani’s request for appointment of the immigration attorney early in the post-conviction proceedings (see R., pp.96-97, 107-09, 383) and, according to post-conviction counsel, the immigration attorney had “submitted his memorandum on the immigration consequences of this matter” (hereafter referred to as “the immigration report”) to post-conviction counsel in December 2016 (R., p.383). However, post-conviction counsel never presented the immigration report as evidence during the summary dismissal proceedings and, as such, the district court did not review or consider that report before it summarily dismissed Kolestani’s involuntary guilty plea and erroneous deportation advice claims in May 2017. (R., p.383; see also 9/11/17 Tr., p.3, L.25 – p.6, L.1.) Kolestani included the immigration report as an exhibit to her

motion for reconsideration (R., pp.386-426) and asked the district court, based on the information in that report, to grant the motion and “allow this matter to move forward to trial” (R., pp.383-85). The district court denied Kolestani’s motion for reconsideration² (R., pp.433-34), and Kolestani timely appealed (R., pp.439-41).

² The state notes the district court judge who ruled on Kolestani’s motion for reconsideration was not the same judge who had earlier presided over the post-conviction proceedings and summarily dismissed Kolestani’s post-conviction claims. (Compare R., pp.293-317 (summary dismissal order entered by then-District Judge G. Richard Bevan with R., pp.433-34 (order denying reconsideration entered by District Judge Ronald J. Wilper).)

ISSUES

Kolestani states the issues on appeal as:

- 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?

(Appellant's brief, p.11.)

The state rephrases the issues as:

1. Has Kolestani failed to show the district court erred in summarily dismissing her involuntary guilty plea and erroneous deportation advice claims because the allegations in Kolestani's petition failed to present a genuine issue of material fact entitling her to an evidentiary hearing on either of those claims?
2. Has Kolestani failed to show the district court abused its discretion in denying her motion for reconsideration?

ARGUMENT

I.

Kolestani Has Failed To Show The District Court Erred In Summarily Dismissing Her Involuntary Guilty Plea And Erroneous Deportation Advice Claims

A. Introduction

Kolestani argues the district court erred in summarily dismissing her involuntary guilty plea and erroneous deportation advice claims, contending the allegations in her petition raised genuine issues of material fact entitling her to an evidentiary hearing on both of those claims. (Appellant’s brief, pp.12-29.) Kolestani’s arguments fail. A review of the record and of the applicable law supports the district court’s determination that Kolestani’s claims were disproved by the record.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. General Legal Standards Governing Post-Conviction Proceedings

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, et seq. A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Moreover, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. Adams v. State, 158 Idaho 530, 536, 348 P.3d 145, 151 (2015); Hayes v. State, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them. Id.

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); DeRushé v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal of a claim for post-conviction relief is

appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the state does not controvert the petitioner's evidence. See Roman, 125 Idaho at 647, 873 P.2d at 901.

D. Kolestani Has Failed To Show The District Court Erred In Summarily Dismissing Her Involuntary Guilty Plea Claim

Kolestani alleged her guilty plea was involuntary, claiming both that she was ignorant of the immigration consequences of her plea and that the plea was coerced through fear because her trial counsel advised her she would be immediately deported if she did not plead guilty. (R., pp.141-43.) The district court summarily dismissed Kolestani's involuntary guilty plea claim, finding the allegations upon which it was based were "disproven by the record." (R., pp.305-08.) Specifically, after reviewing the written plea agreement, the guilty plea questionnaire, and the transcript of the hearing at which Kolestani entered her guilty plea (R., pp.306-07), the district court concluded:

... 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 [defense counsel] told her to plead guilty or she would be deported. The record simply disproves these claims. While Kolestani was in the throes of the 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." As such, the court concludes that the record disproves Kolestani's claims; she in fact entered her plea knowingly, voluntarily and intelligently.

(R., pp.307-08 (footnote and record citations omitted)). Contrary to Kolestani's assertions, a review of the record and of the applicable law supports the district court's ruling.

“The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Lint v. State, 145 Idaho 472, 481, 180 P.3d 511, 520 (Ct. App. 2008) (citing Dunlap v. State, 141 Idaho 50, 60, 106 P.3d 376, 386 (2004)). “For a guilty plea to be valid, the entire record must demonstrate that the plea was entered into in a voluntary, knowing, and intelligent manner.” Workman v. State, 144 Idaho 518, 527, 164 P.3d 798, 807 (2007) (citing State v. Heredia, 144 Idaho 95, 96, 156 P.3d 1193, 1194 (2007)). Determining whether a plea is voluntary involves three inquiries: “(1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial; and (3) whether the defendant understood the consequences of pleading guilty.” Id. (citing State v. Colyer, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976)); accord State v. Umphenour, 160 Idaho 503, 507, 376 P.3d 707, 711 (2016).

Kolestani's involuntary guilty plea claim was premised on her assertions that she was ignorant of the immigration consequences of her plea and believed, based upon the advice of counsel, that she would be immediately deported if she did not plead guilty. As found by the district court, however, Kolestani's allegations did not present a *prima facie* claim that her guilty plea was involuntary because her claims of ignorance and coercion are affirmatively disproved by the underlying criminal record.

Before she pled guilty, Kolestani signed a written Rule 11 plea agreement in which she specifically indicated that her “decision to accept th[e] agreement and to tender a plea of guilty [was] freely and voluntarily made and [was] not the result of force, threats, assurances, promises, or representations other than the representations contained” in the agreement. (R., p.250.) She made similar representations in the guilty plea advisory questionnaire, indicating that aside from the plea agreement, no other promises had been made to her which influenced her decision to plead guilty (R., p.253, ¶16); she was aware that, as a non-citizen, “the entry of a plea or making of factual admissions could ... result in [her] deportation” (R., pp.254-55, ¶30); she had sufficient time to discuss the case with her attorney and was satisfied with her attorney’s representation (R., p.256, ¶¶43, 51); she was entering her plea “freely and voluntarily” because she “commit[ted] the acts alleged in the ... indictment” (R., p.257, ¶¶54-57); she needed no additional time before entering her plea (R., p.257, ¶60); there was no “other matter not covered by [her] answers” to the questions on the guilty plea advisory form “that affect[ed] [her] decision to plead guilty” (R., p.258, ¶63); and she answered the questions on the guilty plea advisory form “truthfully,” understood each question, and completed the form “freely and voluntarily” and “no one ha[d] threatened her to do so” (R., p.258).

Kolestani also swore under oath at the change of plea hearing that she was entering her plea voluntarily. (See generally 6/1/09 Tr.) During that hearing, Kolestani confirmed her intent to plead guilty to first degree murder in exchange for the dismissal of a weapons enhancement and the imposition of a life sentence, with a minimum term of confinement of 18 years. (6/1/09 Tr., p.6, L.3 – p.10, L.4.) Although Kolestani did not speak English, she had the assistance of a Farsi-speaking interpreter “throughout the

case,” including at the change of plea hearing, and she told the court she had “been able to understand the translation from English to Farsi as [she] worked with” the interpreter. (6/1/09 Tr., p.3, Ls.18-22, p.11, Ls.20-23.) She also assured the court she understood that no one, including her attorney, could force her to plead guilty to the charge. (6/1/09 Tr., p.12, Ls.15-19.) As she had in her guilty plea advisory form, Kolestani told the court she was aware and understood there was a potential she would be deported “once [she] ha[d] served time in the penitentiary.” (6/1/09 Tr., p.12, L.24 – p.13, L.8.) She also confirmed that all of the answers she had given to the questions on the guilty plea advisory form were her own and that none of those answers would change if the court were to ask the questions in open court. (6/1/09 Tr., p.13, L.16 – p.15, L.2.) She then pled guilty to the first degree murder charge and told the court she was doing so because she shot her husband with the intent to kill him and after having “thought about it prior to taking the action.” (6/1/09 Tr., p.16, L.6 – p.18, L.1.) Finally, Kolestani assured the court that no one had “pressured [her] or threatened [her] or coerced [her] in any way” and that she was entering her plea of her own free will, after having been provided adequate time to consult with her attorney about her decision. (6/1/09 Tr., p.18, Ls.2-18.)

Kolestani’s answers to the questions asked of her on the guilty plea questionnaire, coupled with her representations during the plea colloquy, directly contradict her post-conviction claims that her plea was involuntary. Although the district court was required to accept Kolestani’s un rebutted allegations as true and to construe all inferences in her favor, Charboneau v. State, 140 Idaho 789, 793-94, 102 P.3d 1108, 1112-13 (2004), it was not required to accept as true Kolestani’s statements that contradicted the record in the underlying criminal case. As found by the district court, “[w]hile Kolestani was in the

throes of 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 (record citation and footnote omitted).) Kolestani cannot show that her factual claims that merely contradict the underlying record create a genuine issue of material fact entitling her to an evidentiary hearing on her involuntary guilty plea claim.

Despite having assured the court in multiple ways and on multiple occasions during the change of plea proceedings that her plea was voluntary and not the result of coercion, Kolestani argues on appeal that the record of the change of plea proceedings “did not actually disprove” her post-conviction claims. (Appellant’s brief, p.16.) In support of this assertion, she points out that the plea agreement itself was “silent on deportation consequences, much less on whether Ms. Kolestani would be immediately deported if she did not plead guilty.” (Appellant’s brief, pp.16-17 (citing R., p.250).) While true, this fact is irrelevant because other portions of the underlying criminal record, including the guilty plea advisory form and the transcript of the plea colloquy, show Kolestani was aware she could be deported *if she pled guilty*. (See R., pp.254-55, ¶30; 6/1/09 Tr., p.12, L.24 – p.13, L.8.) She also expressly disavowed having been “pressured” or “threatened” or “coerced” “in any way” to enter her plea and claimed to have disclosed all matters that affected her decision to plead guilty. (6/1/09 Tr., p.18, Ls.2-15; R., p.258, ¶63.) Although Kolestani correctly notes the trial court never asked her “about her understanding of what would happen if she did not plead guilty” (Appellant’s brief, p.17 (citing R., pp.261-68)), this fact is also irrelevant. Kolestani alleged in her post-conviction that her guilty plea was coerced by the threat of immediate

deportation, and that claim is directly disproven by Kolestani's representations during the change of plea hearing that her plea had not been coerced "in any way." Kolestani has failed to show any basis for reversal of the district court's order summarily dismissing this claim.

E. Kolestani Has Failed To Show The District Court Erred In Summarily Dismissing Her Erroneous Deportation Advice Claim

In addition to alleging her plea was involuntary, Kolestani also alleged in her post-conviction petition that her trial counsel rendered ineffective assistance by giving her "deeply erroneous" advice regarding the deportation consequences of her plea. (R., pp.143-46.) Specifically, Kolestani alleged that counsel advised her she would be immediately deported if she did not accept the plea agreement, advice she claimed both below and on appeal is patently incorrect. (R., pp.143-46; see also Appellant's brief, pp.20-21.) The district court summarily dismissed the claim, finding as it had with respect to Kolestani's involuntary guilty plea claim that the allegation counsel threatened Kolestani with immediate deportation if she did not plead guilty was disproved by the record and, as such, failed to raise a genuine issue of material fact as to the deficient performance prong of Kolestani's ineffective assistance of counsel claim. (R., pp.309-12.) Contrary to Kolestani's assertions, the record and the applicable law support the district court's ruling.

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Bare assertions and speculation, unsupported by specific facts, do

not make out a *prima facie* case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903.

An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999). When the alleged deficiency involves counsel's advice in relation to a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted).

Applying these principles in this case, the district court found Kolestani failed to present a *prima facie* case of deficient performance because the premise of her erroneous deportation advice claim—that counsel advised Kolestani she would be immediately deported if she did not plead guilty—was disproved by the record. Specifically, court reasoned:

Once again, this court concludes that the record belies the statements of fact set forth in Kolestani's verified Amended Petition. As noted above, 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.

The reality is that the Indictment charging Kolestani with First Degree Murder was filed on September 3, 2008 and that she pleaded guilty some nine (9) months later. The court further makes the logical inference from these facts that the plea agreement, a Rule 11 presented to the court and negotiated over time, was not merely “sprung” on Kolestani on the date of the change-of-plea hearing; rather, she had time to fill-out an advisory form, to note that she had “read” the agreement (as it was translated by Dr. Dabestani as noted earlier), and that she understood the agreement. She further noted that a Farsi interpreter was provided to her throughout the process.

The Advisory form was signed June 1, 2009, some eight days before the change-of-plea hearing. It is further noteworthy that Kolestani noted that no other promises had been made to her which influenced her decision to plead guilty. The 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 on the form at that time.

The form also contains Kolestani’s acknowledgement that as a non-citizen of the United States, her plea of guilty could “(1) result in [her] deportation or removal from the United States; (2) preclude [her] from obtaining legal status in the United States; or (3) prevent [her] from obtaining United States citizenship.” Regarding this acknowledgement, Kolestani had the following discussion with Judge Stoker during the change-of-plea hearing:

THE COURT: You have told me, told the Court in this form that you recognize the potential of deportation from this country. Are you aware of that?

THE DEFENDANT: Yes.

THE COURT: This 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?

THE DEFENDANT: Yes.

Based 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. The court further makes the logical inference that, had [defense 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. The claim as raised now is not supported by the record or this court's inferences; therefore, this claim is DISMISSED.

(R., pp.310-12 (footnote and record citations omitted).)

Kolestani challenges the district court's ruling that she failed to present a *prima facie* case of deficient performance on two bases. First, she contends that trial counsel had an obligation under Padilla v. Kentucky, 559 U.S. 356 (2010), to correctly inform Kolestani of the immigration consequences of her plea, and that "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." (Appellant's brief, pp.20-24 (citing, *inter alia*, Padilla, 559 U.S. at 368-69; Murray v. State, 156 Idaho 159, 321 P.3d 709 (2014).) The state agrees with these propositions, generally, but neither of them shows the district court erred. The district court did not dismiss Kolestani's ineffective assistance of counsel claim because it found, regardless of any representation by counsel, that Kolestani was aware of the actual deportation consequences of her plea. Rather, the court found the very premise of Kolestani's claim—that counsel told Kolestani she would be deported if she did not plead guilty—was disproved by the record of the underlying criminal proceedings. (See R., pp.310-12.) Kolestani's attempt to show error by constructing a strawman basis for dismissal never articulated by the district court should be rejected.

Kolestani next argues that, in finding her erroneous deportation advice claim disproved by the record, the district court made inappropriate inferences and did not

construe the facts in her favor. (Appellant’s brief, pp.24-26.) Specifically, Kolestani faults the court for making 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.” (Appellant’s brief, p.24 (quoting R., p.312).) Kolestani acknowledges that, as the trier of fact, the district court was “not constrained to draw inferences” in her favor and was instead “free to arrive at the most probably inferences to be drawn from the *uncontroverted* evidentiary facts.” (Appellant’s brief (quoting Adams v. State, 158 Idaho 530, 536, 348 P.3d 145, 151 (2015)) (emphasis in Appellant’s brief).) She argues, however, that whether trial counsel advised her she would be immediately deported if she did not plead guilty was a disputed evidentiary fact and, as such, the court was required to accept her factual allegations at face value. (Appellant’s brief, pp.24-26.) Kolestani’s argument fails.

Although the district court was not permitted at the summary dismissal stage of the proceedings to weigh conflicting evidence, it was also not required to accept as true any allegations in Kolestani’s post-conviction petition that were affirmatively disproved by the record of the underlying criminal case. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Small v. State, 132 Idaho 327, 333-34, 971 P.2d 1151, 1157-58 (Ct. App. 1998). And in this case, contrary to Kolestani’s assertions, there was no conflicting evidence for the court to weigh. Kolestani alleged her trial counsel told her she would be immediately deported if she did not plead guilty pursuant to the plea agreement. (R., pp.144-46.) While the state disputed this allegation in the sense it denied it was true, the state did not

submit for the court's consideration any conflicting evidence. Instead, the state argued the allegations in the petition were conclusory and disproved by the underlying criminal record. (See R., pp.181-87, 237-47.) The district court ultimately agreed with the latter proposition, finding that Kolestani's post-conviction claim that she was told she would be deported if she did not plead guilty was foreclosed by her assurances during the guilty plea proceedings that "no other promises had been made to her which influenced her decision to plead guilty." (R., p.311.) That the court also made the "logical inference" that Kolestani would have informed the trial court during the guilty plea proceedings that defense counsel advised her she would be deported if she did not plead guilty had such advice actually been given was not "inappropriate" under the applicable legal standards. (See Appellant's brief, pp.24-25.) Kolestani's unqualified assurances during the guilty plea proceedings that she had not been coerced, had disclosed all matters affecting her decision to plead guilty, and had been made no other promises that affected her decision to enter her plea, discussed in more detail in section I, supra, support the court's inference and affirmatively disprove Kolestani's post-conviction claim that her counsel advised her she would be subject to immediate deportation if she did not enter a guilty plea.

Because the underlying criminal record affirmatively disproves the allegation that trial counsel advised Kolestani she would be immediately deported if she did not plead guilty, Kolestani's petition necessarily failed to raise a genuine issue of fact as to either the deficient performance or prejudice prongs of her erroneous deportation advice claim. The district court's order summarily dismissing that claim should therefore be affirmed.

F. If This Court Finds Kolestani's Petition Presented A Genuine Issue A Material Fact As To One Or Both Of Her Post-Conviction Claims, The Proper Remedy Is Remand For An Evidentiary Hearing On Both The Statute Of Limitations Issue And The Substantive Claim(s)

The state moved to summarily dismiss Kolestani's post-conviction petition on the bases that the petition was untimely and that the allegations therein otherwise failed to raise a genuine issue of material fact entitling Kolestani to an evidentiary hearing on any of her claims. (R., pp.178-87.) The district court agreed the petition was untimely but declined to summarily dismiss the petition on that basis, finding the allegations in the petition raised a genuine issue of material fact as to whether Kolestani was entitled to equitable tolling. (R., pp.298-304.) However, because the court ultimately dismissed the claims in the petition on their merits, the court never conducted an evidentiary hearing on the statute of limitations issue. For the reasons set forth above, the state submits the district court correctly dismissed Kolestani's involuntary guilty plea and erroneous deportation advice claims. However, in the event this Court disagrees and finds Kolestani presented a genuine issue of material fact as to one or both of those claims, the state submits the proper remedy is remand to the district court for an evidentiary hearing on the statute of limitations issue, as well as on the substantive claim(s). See, e.g., Hutchins v. State, 100 Idaho 661, 665, 603 P.2d 995, 999 (1979) (general reversal of a judgment leaves the case "standing as it did" prior to the entry of the judgment).

II.

Kolestani Has Failed To Show Any Basis For Reversal Of The District Court's Order Denying Her Motion For Reconsideration

A. Introduction

After the district court entered its judgment finally dismissing Kolestani's post-conviction petition, Kolestani filed a "Motion to Reconsider," asking the court to revisit its summary dismissal order in light of an immigration report Kolestani attached to the motion. (R., pp.383-426.) The district court denied Kolestani's motion for reconsideration without comment. (R., pp.433-34.)

Kolestani now argues the district court abused its discretion by denying her motion for reconsideration. Specifically, she contends that the motion is properly construed as one for relief from judgment pursuant to I.R.C.P. 60(b)(1) and that, by denying the motion "without explaining why Ms. Kolestani's case did not meet the circumstances of Rule 60(b)," the court "did not act consistently with the applicable legal standards or reach its decision by an exercise of reason." (Appellant's brief, p.30.) Assuming, without conceding, that the district court should have treated the motion as a Rule 60(b)(1) motion,³ any error arising from its failure to do so or to explain its reasons for denying the motion is harmless because the allegations in the motion are insufficient, as a matter of law, to entitle Kolestani to relief under the rule.

³ Whether a post-judgment motion should be treated as a Rule 59(e) motion or a Rule 60(b) motion is controlled by the substance of the motion. Vierstra v. Vierstra, 153 Idaho 873, 879, 292 P.3d 264, 270 (2012); Bias v. State, 159 Idaho 696, 706, 365 P.3d 1050, 1060 (Ct. App. 2015). Where the motion is filed within 14 days of the judgment and seeks to correct legal or factual errors occurring before judgment it is properly considered a Rule 59(e) motion. Bias, 159 Idaho at 706, 365 P.3d at 1060. "Conversely, where a motion presents new information or issues for the court to consider, treatment as a motion for relief from judgment under Rule 60(b) is most appropriate." Id. (citations omitted).

B. Standard Of Review

A district court's decision granting or denying an I.R.C.P. 60(b) motion is reviewed for an abuse of discretion. Agrisource, Inc. v. Johnson, 156 Idaho 903, 914, 332 P.3d 815, 826 (2014). "[W]hen the discretion exercised by a trial court is affected by an error of law," the appellate court's role is ordinarily to "note the error and remand the case for additional findings." Eby v. State, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010). Remand is not required, however, if "there is an alternative ground for upholding the district court's decision." Id.; accord Bias v. State, 159 Idaho 696, 706, 365 P.3d 1050, 1060 (Ct. App. 2015). Moreover, even when the trial court has abused its discretion, such "abuse of discretion may be deemed harmless if a substantial right is not affected." State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010); accord I.R.C.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); Golub v. Kirk-Scott, Ltd., 157 Idaho 966, ___, 342 P.3d 893, 900 n.4 (2015) (district court's error, if any, in denying Rule 60(b) motion on grounds it was untimely was harmless where, on its face, motion was without merit).

C. The Allegations In Kolestani's Motion Are Insufficient, As A Matter Of Law, To Entitle Her To Relief Under I.R.C.P. 60(b)(1)

Idaho Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment or order for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the

judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b). “Although the district court has broad discretion in deciding a Rule 60(b) motion, the motion may be granted only upon a showing of unique and compelling circumstances.” Palmer v. Spain, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003) (citing Miller v. Haller, 129 Idaho 345, 348, 924 P.2d 607, 610 (1996)). Moreover, the party seeking relief must also “show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action.” Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994).

Kolestani moved for reconsideration based on an immigration report she possessed, but did not submit to the district court, before the court entered its order summarily dismissing her involuntary guilty plea and erroneous deportation advice claims. (R., pp.383-426; see also 9/11/17 Tr., p.3, L.25 – p.6, L.1.) Although not specifically labeled as such, Kolestani now claims her motion for reconsideration was “a Rule 60(b)(1) motion brought on grounds of excusable neglect” because, according to Kolestani, her post-conviction counsel reasonably believed at the time the court entered its summary dismissal order that the immigration report was part of the record. (Appellant’s brief, p.32.) Accepting Kolestani’s interpretation of the motion as one brought pursuant to I.R.C.P. 60(b)(1), it was Kolestani’s burden to demonstrate in the motion that her neglect in failing to submit the immigration report to the trial court before it summarily dismissed her post-conviction claims was, in fact, excusable. See, e.g., Suits v. Nix, 141 Idaho 706, 708-09, 117 P.3d 120, 122-23 (2005). Kolestani failed to

do so, however, and thus failed as a matter of law to show any entitlement to relief under the rule.

In the motion for reconsideration, Kolestani's attorney represented that the court-appointed immigration attorney had submitted his immigration report on December 13, 2016, almost five months before the district court entered its order summarily dismissing Kolestani's involuntary guilty plea and erroneous deportation advice claims. (R., p.383; see also R., p.293 (summary dismissal order filed on May 25, 2017).) Although Kolestani's attorney noted the district court's summary dismissal decision was made without the benefit of the immigration report, nowhere in the motion did counsel attempt to explain why that was the case. (See generally R., pp.383-85.) As Kolestani points out on appeal, counsel did explain to the district court at a hearing *before judgment was entered* that he "thought that immigration report had become part of the court file" but, "[u]pon review of the file, [he] realized that was [his] error" and the immigration report "had only been sent to [post-conviction counsel] and the prosecution." (9/11/17 Tr., p.4, Ls.11-15.) Counsel did not make any similar representations in the motion to reconsider, however, and thus failed in the motion to allege, much less demonstrate, that his failure to timely submit the immigration report was the result of excusable neglect.

Even if this Court considers post-conviction counsel's pre-judgment representation that he erroneously believed the immigration report was part of the court file at the time the court entered its summary dismissal order, such representation falls far short of demonstrating excusable neglect. When a party files a Rule 60(b)(1) motion for relief from judgment on the grounds of excusable neglect, "[t]he conduct constituting excusable neglect must be that which would be expected of a reasonably prudent person

under the same circumstances.” Suitts, 141 Idaho at 709, 117 P.3d at 123, quoted in Berg v. Kendall, 147 Idaho 571, 577, 212 P.3d 1001, 1007 (2009). Post-conviction counsel’s conduct in merely assuming the immigration report “had become part of the court file” before the court ruled on the state’s motion for summary dismissal, when it was Kolestani’s burden to present admissible evidence supporting her post-conviction claims, was not that of a reasonably prudent person under the same circumstances. Because Kolestani failed to demonstrate any excusable neglect entitling her to relief under I.R.C.P. 60(b)(1), she has failed to show any basis for reversal of the district court’s order denying her motion.

Even if Kolestani could meet her threshold burden of showing excusable neglect, the allegations in her motion were still not sufficient to entitle her to relief under Rule 60(b)(1). As previously noted, in addition to meeting the requirements of I.R.C.P. 60(b), a party seeking relief from a final judgment or order must also “show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action.” Ponderosa Paint Mfg., Inc., 125 Idaho at 317, 870 P.2d at 670. A review of Kolestani’s motion shows she failed to do so.

Kolestani acknowledged in her motion for reconsideration that the district court summarily dismissed her involuntary guilty plea and erroneous deportation advice claims because the premise of those claims—that trial counsel advised Kolestani she would be immediately deported if she did not plead guilty—was disproved by the record. (R., p.384.) However, rather than assailing that determination, Kolestani argued that the court should reconsider its summary dismissal order because the immigration report attached to the motion showed trial counsel was ineffective for having given Kolestani any

immigration advice at all. (See R., p.384 (“According to the report, Petitioner faces the real possibility of remaining in detention indefinitely because of the seriousness of [her] crime. This is a possibility not even disclosed or brought up to Petitioner. The immigration advise [sic], whatever advise [sic] that may have been, was wrong.” (internal citation omitted).) Because Kolestani never alleged in her post-conviction petition that her trial counsel was ineffective for giving her *any* immigration advice, the claim in her motion for reconsideration that the immigration report showed counsel’s unspecified advice was “wrong” was not a claim that, if established, would constitute a meritorious defense to the court’s order dismissing Kolestani’s post-conviction claims. The district court’s order denying Kolestani’s motion for reconsideration should thus be affirmed on this basis. See Ponderosa Paint Mfg., Inc., 125 Idaho at 317-18, 870 P.2d at 670-71 (“It would be pointless to vacate a summary judgment and reopen the proceeding if the party seeking relief has not shown that it can raise genuine factual issues sufficient to defeat the summary judgment motion.”).

On appeal, Kolestani does not contend her motion for reconsideration presented any meritorious grounds for relief under I.R.C.P. 60(b)(1). (See generally Appellant’s brief, pp.29-34.) Instead, she argues that the district court abused its discretion by denying the motion because it did so without explaining the basis for its decision. (Appellant’s brief, pp.32-34.) Relying on Agrisource, Inc. v. Johnson, 156 Idaho 903, 332 P.3d 815 (2014), Kolestani contends the district court’s failure to set forth its reasoning cannot be deemed harmless because the court’s silence leaves this Court “without any basis to understand the district court’s denial of [Ms. Kolestani’s] motion.” (Appellant’s brief, p.34 (quoting Agrisource, 156 Idaho at 914-15, 332 P.3d at 826-27).)

Contrary to Kolestani's assertions, however, Agrisource does not stand for the broad proposition that a district court's failure to set forth its reasons for denying an I.R.C.P. 60(b) motion can never be harmless error.

The district court in Agrisource failed to address why an affidavit submitted in support of the Rule 60(b) motion at issue in that case did not meet Rule 60(b)'s requirements. Agrisource, 156 Idaho at 914-15, 332 P.3d at 826-27. Agrisource argued on appeal that any error in the court's failure to set forth its reasoning was harmless "because most of [the] affidavit was inadmissible." Id. at 915, 332 P.3d at 827. The Idaho Supreme Court rejected Agrisource's harmless error argument, reasoning "[t]he district court never ruled on admissibility, and therefore this Court will not rule on admissibility." Id.

Although the Supreme Court in Agrisource declined to find harmless error in the trial court's failure to explain the basis of its Rule 60(b) denial, it is clear that the Court did so because the evidentiary issue underpinning Agrisource's harmless error argument was never decided by the district court. Id. The Court did not, however, indicate that a trial court's error in not explaining its reasons for denying a Rule 60(b) motion can never be harmless error, nor did the Court expressly or impliedly overrule or disavow prior cases holding such errors harmless. See, e.g., Leasefirst v. Burns, 131 Idaho 158, 163, 953 P.2d 598, 603 (1998) (holding harmless district court's failure to specifically address claim for relief under Rule 60(b)(5) where movants were not entitled to relief under that rule); Tyler v. Keeney, 128 Idaho 524, 528, 915 P.2d 1382, 1386 (Ct. App. 1996) (court's failure to address Rule 60(b)(6) claim harmless where facts asserted did not entitle movant to relief under that rule). In fact, since Agrisource was decided the Idaho

Supreme Court has held a trial court's failure to address the substance of a Rule 60(b)(6) motion harmless where it was clear from the record that the motion was without merit. See Golub v. Kirk-Scott, Ltd., 157 Idaho 966, ___, 342 P.3d 893, 900 n.4 (2015).

Because, for the reasons articulated above, the allegations in Kolestani's motion for reconsideration failed on their face to entitle Kolestani to relief under Rule 60(b)(1), the motion was without merit, and any error by the district court in failing to explain its reasons for denying the motion should therefore be deemed harmless.

CONCLUSION

The state respectfully requests this Court to affirm the judgment and the district court's order denying Kolestani's motion for reconsideration.

DATED this 3rd day of August, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of August, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Lori A. Fleming
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LAF/dd