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Wagner v. State Appellant's Brief 1 Dckt. 41677

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD JOSEPH WAGNER, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	NO. 41677 ADA COUNTY NO. CV 2012-5009 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF THE CASE

Nature of the Case

Richard Wagner asks the Idaho Court of Appeals to withdraw its opinion, 2015 Unpublished Opinion No. 391 (Ct. App. Mar. 4, 2015) (*hereinafter*, Opinion), and rehear this case. He submits that the Opinion, which affirmed the order summarily dismissing his petition for post conviction relief, was based on a rationale that had not been presented to or decided by the district court. As a result, the decision to affirm the summary dismissal on that basis violated the notice requirements in the post conviction statutes, and thus, the due process protections of the state and federal constitutions.

Therefore, this Court should rehear this case and decide whether summary dismissal was appropriate based on the issues of which Mr. Wagner had the requisite notice and the opportunity to address in the district court. On rehearing, this Court should reverse the order summarily dismissing the petition, vacate the judgment in this case, and remand the case for an evidentiary hearing because Mr. Wagner did present sufficient facts to establish a genuine issue of material fact.

Statement of the Facts & Course of Proceedings

In the underlying criminal case, Mr. Wagner pled guilty, pursuant to a plea agreement, to one count of lewd conduct, and in exchange, the State dismissed two other counts, as well as the Information Part II alleging a prior sexually-based conviction, and the State also agreed to recommend a unified sentence of thirty years, with ten years fixed. (R., p.65; Supp. R., pp.77-79; Supp. Tr., p.4, Ls.12-20.)[1] Prior to the entry of this plea, the State had filed a motion to introduce evidence of Mr. Wagner's previous convictions as evidence of a common plan or scheme pursuant to I.R.E. 404(b) at trial. (Supp. R., pp.56-60; *see also* R., pp.65-66; Tr., Vol.2, p.6, L.15 - p.7, L.20.) The district court ultimately imposed a unified sentence of thirty years, with eight

[1] The district court took judicial notice of "the entire underlying criminal file" from the underlying criminal case. (R., p.52.) That documents from that file were provided in independently bound and paginated volumes. To avoid confusion, reference to the record or transcripts from that file will be identified as "Supp." Additionally, the transcripts from hearings in the post conviction case are contained in two independently bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcript of the status conference held on June 17, 2013. "Vol.2" will refer to the volume containing the transcript of the hearing on the State's motion for summary dismissal held on July 17, 2013.

years fixed. (R., p.66.) Mr. Wagner did not appeal from the judgment of conviction. (R., p.5.)

However, Mr. Wagner did file a timely *pro se* petition for post conviction relief, alleging, *inter alia*, that his trial counsel had "failed to argue to keep his prior record out of court records." (R., pp.5-6.) The district court appointed counsel, who clarified that this was a claim alleging that Mr. Wagner's guilty plea was not knowing, intelligent, and voluntary because trial counsel had provided ineffective assistance of counsel. (R., p.57.) Specifically, post conviction counsel clarified that the ineffective assistance was that trial counsel inaccurately told Mr. Wagner that he would lose at trial because of his prior record, and, if he went to trial, he would be sentenced to life in prison. Based on those assertions by counsel, Mr. Wagner pled guilty despite believing in his factual innocence. (Tr., Vol.1, p.6, L.15 - p.7, L.20; R., pp.73-74.)

The State filed an answer denying Mr. Wagner's allegations. (R., pp.26-28.) It also moved for summary dismissal of this claim because "[t]he defendant's prior criminal history is always relevant at sentencing and it is not for counsel of record to try and 'keep it out.'" (R., pp.34-35.) It renewed that motion after counsel had been appointed to represent Mr. Wagner. (R., pp.41, 47-48.) The State's motion was discussed during two subsequent hearings. (*See generally* Tr., Vols.1-2.) The State did not add any other arguments in support of its request for summary judgment in either its renewed motion or at the hearings. (*See, e.g.,* Tr. Vol.1, p.6, Ls.18-21.) The district court took the arguments under advisement and subsequently filed a notice of intent to summarily dismiss the petition. (Tr., Vol.2, p.9, L.20; R., pp.65-72.)

The district court decided that summary dismissal was appropriate because the answers Mr. Wagner gave during the plea colloquy and in the guilty plea questionnaire were evidence which disproved his claim of ineffective assistance of counsel. (R., pp.69-70.) The district court stated, "[s]ince this Court is the trier of fact, it is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, it is free to arrive at the most probable inferences to be drawn from uncontroverted evidence." (R., p.71.) Based on this reasoning, it considered Mr. Wagner's claims in light of his answers in the guilty plea colloquy and questionnaire. (R., pp.69-70.) For example, "[h]is assertion now that he was 'factually innocent' is directly contradicted by the record." (R., p.70.) In reaching those conclusions, the district court essentially weighed the evidence presented in Mr. Wagner's affidavit against the evidence presented in the guilty plea colloquy and questionnaire, and made a credibility determination in favor of Mr. Wagner's statements in the plea colloquy. (*See* R., pp.69-71.) The district court also determined that Mr. Wagner had not presented a valid claim for relief in regard to counsel's advice about his prior record because "it is neither a trial counsel's obligation nor counsel's responsibility to hide a prior record from a sentencing court." (R., p.69.)

In response to the notice of intent to dismiss, Mr. Wagner filed an affidavit in which he alleged that counsel had told him that, if he did not answer the questions in the plea colloquy and on the guilty plea questionnaire "correctly," the district court would not accept his guilty plea, although he did note that his trial attorney did not advise him to lie in his responses. (R., p.74.)

Nevertheless, the district court summarily dismissed Mr. Wagner's petition because it was based on "bare and conclusory statements that were addressed in the Court's Notice of Intent to Dismiss. The petitioner has failed to introduce any new evidence to support his allegations." (R., pp.76-77; R., p.86.) Mr. Wagner timely appealed from that decision. (R., pp.78-79.)

This case was assigned to the Court of Appeals, which issued an unpublished opinion affirming the order summarily dismissing Mr. Wagner's petition for post conviction release. *Wagner v. State*, 2015 Unpublished Opinion No. 391 (Ct. App. Mar. 4, 2015). The Court of Appeals noted that a petition for post conviction relief could be dismissed if the petition did not show that "'a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.*, at p.6 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). Given that observation, the Court of Appeals determined that Mr. Wagner had failed to show prejudice as required by *Padilla* because "[t]aking all of these facts into consideration and balancing them against the evidence presented by [Mr.] Wagner--[Mr.] Wagner's contention that he would have asked to go to trial but for defense counsel's deficient performance--we are *not* persuaded that rejecting the plea bargain he ultimately accepted would have been rational under the circumstances." *Id.* at p.7 (emphasis from original). As a result, the Court of Appeals held: "[Mr.] Wagner did not make a prima facie showing of prejudice, and because there was no genuine issue of material fact, the State was entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the district court summarily dismissing [Mr.] Wagner's petition for post-conviction relief." *Id.*

Mr. Wagner filed a timely petition for rehearing.

ISSUES

1. Whether the Idaho Court of Appeals' Opinion affirmed the district court's order summarily dismissing Mr. Wagner's petition for post conviction relief on a basis for which Mr. Wagner did not have notice or an opportunity to respond.

2. Whether the district court erred by summarily dismissing Mr. Wagner's petition for post conviction relief even though he presented evidence sufficient to raise a genuine issue of material fact.

ARGUMENT

I.

The Idaho Court Of Appeals' Opinion Affirmed The District Court's Order Summarily Dismissing Mr. Wagner's Petition For Post Conviction Relief On A Basis For Which Mr. Wagner Did Not Have Notice Or An Opportunity To Respond

The statutes governing post conviction proceedings allow for summary dismissal of a petition for relief only if it does not present a genuine issue of material fact. I.C. § 19-4906(b). However, that statute also provides that:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. **The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal.** In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or, direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

Id. (emphasis added). As a result, "[a] petitioner is entitled to notice of the trial court's contemplated grounds for dismissal and an opportunity to respond before a petition for post-conviction relief is dismissed. Failure to provide such notice and opportunity to be heard may result in reversal of a summary dismissal of a petition for post-conviction relief." *Ridgley v. State*, 148 Idaho 671, 676 (2010) (citing I.C. § 19-4906(b)); *cf. Saykhamchone v. State*, 127 Idaho 319, 321 (1995). The reason that reversal of the order summarily dismissing the petition is the proper remedy is that the failure to provide notice and the opportunity to be heard constitutes a violation of the constitutional rights to due process. *See* U.S. CONST. amend.XIV; IDAHO CONST. art. I, § 13.

Notice may be provided by the State in a motion for summarily dismissal or by the district court in a notice of intent to dismiss. *See Workman v. State*, 144 Idaho 518, 524 (2007) In either case, that notice must be sufficiently particular as to the basis for summary dismissal, both in terms of the facts and legal analysis, "so as to enable the applicant to supplement the application with the necessary additional facts, if they exist." *Crabtree v. State*, 144 Idaho 489, 494 (Ct. App. 2006).

In this case, the State filed a motion to summarily dismiss Mr. Wagner's petition for post conviction relief, which it renewed after Mr. Wagner was appointed post conviction counsel. (R., pp.29-36, 47-48.) Hearings were held at which time the State's motion was discussed. (*See generally* Tr., Vols.1-2.) All the State argued was that summary judgment was appropriate because Mr. Wagner's claims were disproved by the record or additional evidence submitted by the State (namely, an affidavit from trial counsel). (R., pp.34-36.) The district court also issued its own notice of intent to dismiss. (R., pp.64-72.) In that notice, the district court only determined that summary judgment was appropriate because Mr. Wagner's claims of deficient performance were either disproved by the record or consisted of only bare and conclusory allegations. (R., pp.68-71.)

At no time during those proceedings was Mr. Wagner informed that his petition could be summarily dismissed because his verified allegation of prejudice was insufficient for the specific reason he had not presented sufficient evidence to show that it would have been rational for him to reject the plea agreement, nor was he given the opportunity to develop the record to disprove such an assertion. (*See generally* R., pp.29-36, 47-48, 64-72; Tr. Vols.1-2.) As such, the decision to affirm the summary

judgment on that basis violates the notice requirement because Mr. Wagner was not informed of the specific legal analysis or facts upon which the summary judgment was validated, nor was he given the meaningful opportunity to respond to that legal analysis and those facts.

Furthermore, the appeal is not the appropriate venue to resolve this issue. As has long been the case, "[n]ew issues cannot be framed in this court, nor can new or additional evidence be presented on appeal." *Morrow v. Wm. Berklund Forest Products Co.*, 81 Idaho 428, 443 (1959) (opinion of the Court on the respondent's petition for rehearing). Resolution of such issues "must await an appropriate setting wherein the issues are framed, the facts disclosed and supported by the record, and all parties protected in their right to litigate the question." *Saviers v. Richey*, 96 Idaho 413, 417 (1974). Thus, this new issue is not appropriately decided on appeal; rather, the case should be remanded and the issue first addressed by the district court after the parties are able to fully litigate the issue.

In fact, the Idaho Supreme Court has refused to rule on an issue not raised in the district court when reviewing a decision to summarily dismissed a petition for post conviction relief. *Pizzuto v. State*, 146 Idaho 720, 730-31 (2008). Specifically, the Court held:

> If we relied upon the affidavit to hold that the district court erred, we would be deciding the appeal on an issue not raised or argued by Pizzuto. *See, Sprinkler Irr. Co., Inc. v. John Deere Ins. Co., Inc.,* 139 Idaho 691, 85 P.3d 667 (2004) (where the plaintiff did not argue to the trial court that its verified complaint provided sufficient material facts to counter the defendant's motion for summary judgment, this Court would not consider that argument on appeal).

Pizzuto, 146 Idaho at 730-31.

While *Pizzuto* was applying this rule against the petitioner for failing to argue the issue below, the same rule should be applied when the State does not argue, or the district court does not rule on, a particular issue. Enforcing disparate procedural rules between the accused and State violates the protections of the Due Process Clause. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 474 n.6 (1973) ("This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial."). In this case, forcing defendant-petitioners to raise issues before the district court, but allowing the State to argue issues not preserved for appeal, or worse, allowing the appellate court to decide a factual issue *sua sponte* without any argument from either party, allows for nonreciprocal benefits to the State that interferes with the defendant-petitioner's ability to secure a fair review of alleged errors in the trial court proceedings.

Furthermore, the Court of Appeal's determination – that it was "*not* persuaded that rejecting the plea bargain he ultimately accepted would have been rational under the circumstances." Opinion, p.7 (emphasis from original) – constitutes an improper weighing of the evidence during summary dismissal proceedings. *See, e.g., Vanderford Co., Inc., v. Knudson*, 150 Idaho 664, 674 (2011) ("judging credibility is not appropriate during summary judgment proceedings where no evidentiary hearing has been held."); *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 419 (2012) (quoting *Argyle v. Slemaker*, 107 Idaho 668, 670 (Ct. App. 1984)) ("credibility determinations 'should not be made on summary judgment . . . .'"). This is particularly true at the appellate level because, as the Idaho Supreme Court has held:

> In determining whether substantial evidence exists, this Court may not weigh the evidence, attempt to judge the credibility of witnesses, or compare its factual findings with those of the jury. Instead, this Court must review the evidence as a whole, drawing all inferences in the light most favorable to the non-moving party **and viewing the facts as if the moving party had admitted the truth of all the non-moving party's evidence**. The Court will not examine any conflicting evidence presented by the moving party to refute the non-moving party's claims. Whether there was sufficient evidence to create an issue of fact for the jury is a pure question of law over which this Court exercises free review.

Coombs v. Curnow, 148 Idaho 129, 136-37 (2009) (emphasis added) (internal citations and quotations omitted). Rather, if there are such questions, "[b]ecause appellate review on this issue is more limited, **we remand to the district court** to weigh the evidence in the first instance . . . ." *Soria v. Sierra Pacific Airlines, Inc.*, 111 Idaho 594, 610 (1986) (emphasis added) (internal quotations omitted). Thus, the weighing of the reasonableness of Mr. Wagner's assertion that he would not have pled guilty is not an appropriate part of the appellate review.

Applying the limited standard of review in this case, liberally construing facts in favor of Mr. Wagner, shows there is a reasonable probability that Mr. Wagner would not have pled guilty at the time he did so, and that is enough to establish a genuine issue of material fact on the issue of prejudice. *See Booth v. State*, 151 Idaho 612, 621 (2011) (to sufficiently allege prejudice so as to withstand a claim for summary judgment, the petitioner need only 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.") (emphasis added) (internal quotations omitted). Construing all the facts in Mr. Wagner's favor, it is reasonable that he would not have plead guilty so that he could pursue a challenge to the State's notice of intent to present evidence pursuant to I.R.E. 404(b).

After all, the question is not whether Mr. Wagner would still ultimately have sought trial. *See Booth*, 151 Idaho at 621. Rather, the question is whether, had counsel performed sufficiently and challenged the inappropriate propensity evidence under I.R.E. 404(b), would Mr. Wagner have accepted this plea offer at the time he did so? As the Court of Appeals has pointed out, a genuine issue of fact may exist "as to whether a motion to suppress would have been successful and, therefore, whether counsel was ineffective for failing to file such a motion." *Hoffman v. State*, 153 Idaho 898, 906 (Ct. App. 2012) (discussing *Lint v. State*, 145 Idaho 472, 480 (Ct. App. 2008)). Thus, the issue in this case is whether it would have been reasonable for Mr. Wagner to reject the plea offer on the table so that counsel could raise a viable pretrial challenge to the State's proposed use of improper propensity evidence. That would have been a reasonable decision for Mr. Wagner to make.

As such, even if this issue is properly resolved on appeal, it should have been resolved in Mr. Wagner's favor. His verified affidavit presented a reasonable probability that he would have rationally rejected the plea offer and demanded to continue toward trial, and thus, presented a genuine issue of material fact that counsel's deficient performance prejudiced him.

Therefore, this Court should withdraw the Opinion in this case since that opinion was based on an issue which was not raised before the district court and Mr. Wagner was not given the required notice and opportunity to respond to that potential ground for summary dismissal.

II.

The District Court Erred By Summarily Dismissing Mr. Wagner's Petition For Post Conviction Relief Even Though He Presented Evidence Sufficient To Raise A Genuine Issue Of Material Fact

A. Introduction

As to the rationales for summary dismissal for which Mr. Wagner did have notice and the opportunity to be heard, summary dismissal was inappropriate on those grounds, as Mr. Wagner presented sufficient evidence to raise a genuine issue of material fact. In determining whether a genuine issue of material fact exists, "[a] court is required to accept the petitioner's unrebutted allegations as true . . . ."[2] *Baldwin v. State*, 145 Idaho 148, 153 (2007); *Saykhamchone v. State*, 127 Idaho 319, 321 (1995). Additionally, during the summary judgment phase, the courts "liberally construe the facts and reasonable inferences in favor of the non-moving party."[3] *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008); *see also Charboneau v. State*, 140 Idaho 789, 792 (2004) ("[I]nferences [are] liberally construed in favor of the petitioner."). When a genuine issue of material fact exists and would, if resolved in the petitioner's favor, entitle the petitioner for relief, the district court must conduct an evidentiary hearing. *Baldwin*, 145 Idaho at 153; *Berg v. State*, 131 Idaho 517, 518 (1998).

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[2] Where, as in this case, the State files an answer that denies the allegations in the verified petition (R., pp.26-28), those denials do not affirmatively disprove the allegations. Rather, they only create genuine issues of material fact in regard to those issues, specifically, whether or not the petitioner's allegations are factually accurate. Because a genuine issue of material fact exists in such cases, summary dismissal is inappropriate. *Baldwin*, 145 Idaho at 153.

[3] In this case, the State is the moving party. (R., pp.29-36.) Therefore, the facts and reasonable inferences are liberally construed in Mr. Wagner's favor. *Charboneau*, 140 Idaho at 792; *Nevarez*, 145 Idaho at 881.

To show a genuine issue of material fact in regard to a claim of ineffective assistance of counsel, the petitioner must allege facts which demonstrate that counsel's performance fell below a reasonable standard and that the petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth v. State*, 140 Idaho 847, 850 (2004). In regard to the second prong of the *Strickland* test, a petitioner shows prejudice when he demonstrates that there is a reasonable probability that the outcome would have been different, or, in other words, he must undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *McKay v. State*, 148 Idaho 567, 570 (2010). In cases where, as here, the petitioner alleges ineffective assistance relating to his decision to accept a plea offer, he must show "'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.'" *Booth*, 151 Idaho at 621 (quoting *Ridgley*, 148 Idaho at 676 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))). This means that he has to show a reasonable probability that he would have rejected this plea offer to purse a trial, which would include pretrial motions in limine (such as a challenge to a notice of intent to present evidence pursuant to I.R.E. 404(b)).

Furthermore, in order to be a valid guilty plea, the plea must be made knowingly, intelligently, and voluntarily. I.C.R. 11; *see, e.g., State v. Heredia*, 144 Idaho 95, 97 (2007) ("Manifest injustice occurs if this standard requiring a voluntary, knowing, and intelligent waiver is not met."). If a defendant enters a plea without adequate knowledge of the potential penalties to which his plea will subject him, it is not a knowing, intelligent, and voluntary plea. *State v. Shook*, 144 Idaho 858, 859-60 (Ct. App. 2007).

B. Mr. Wagner Presented A Genuine Issue Of Material Fact That His Trial Attorney Was Ineffective For Not Challenging The Admissibility Of His Prior Record At Trial

1. Mr. Wagner's Claim That His Trial Attorney Was Ineffective For Not Challenging The Admissibility Of His Prior Record At Trial Was Not Waived By Post Conviction Counsel

In the initial appellate briefing in this case, the State contended that this Court cannot consider Mr. Wagner's claim – that his attorney was ineffective for not fighting against the State's request to present the facts underlying two prior convictions at trial – because post conviction counsel purportedly waived the claim below. (Resp. Br., pp.10-11.) The Opinion notes that "It is not apparent from the record that [Mr.] Wagner actually waived the ineffective assistance of counsel claim concerning the plea bargaining process. Moreover, the district court did not treat the claim as waived; it addressed the merits in its notice of intent to dismiss." Opinion, p.5 n.4. However, the Court of Appeals did not actually decide that issue, as it found the merits of the claim dispositive. *Id.*

Post conviction counsel did not waive this issue below. Rather, he was explaining that there were several different ways that the claim, as articulated in Mr. Wagner's *pro se* petition, could be interpreted. As such, post conviction counsel was directing the district court to the proper interpretation of the claim Mr. Wagner wanted to pursue and only conceding that the alternate interpretations did not constitute bases for relief. Post conviction counsel did not concede the argument that Mr. Wagner intended to pursue. In fact, he reiterated the request for an evidentiary hearing on that claim in his brief and at the summary disposition hearing. (R., p.57; Tr., Vol.2, p.7,

Ls.15-20.) The fact that post conviction counsel continued to request an evidentiary hearing on this claim affirmatively demonstrates that he was not conceding the issue.

To that point, post conviction counsel noted in his memorandum in support of Mr. Wagner's petition that "Petitioner's pleading [on this issue] is confusing." (R., p.56.) In his *pro se* petition, Mr. Wagner claimed, "Counsel did not fight to keep 13 [year] old evidence out of court. . . . Counsel failed to argue to keep prior record out of court records." (R., pp.5-6.) In the affidavit accompanying the *pro se* petition, Mr. Wagner added, "My attorney . . . did not argue to keep a 13 year old felony conviction from being used against me. Further he allowed the prosecuting attorney to rely solely upon my criminal record for a conviction rather than any evidence in the present case." (R., p.9.) Because the thrust of Mr. Wagner's claim was unclear, post conviction counsel sought to clarify the claim.

As such, post conviction counsel explained that the claim Mr. Wagner intended to pursue was that he "was led to believe his history would be admitted at trial, the jury would convict him because of his [criminal] history, and he would suffer a far worse fate than what was contemplated by the plea agreement. The Petitioner pled this in his petition as: Trial Counsel having failed to keep the information 'out' as he should have." (R., p.56.) Post conviction counsel maintained, "Petitioner asks this court to deny the State's request to dismiss and allow the matter to go to evidentiary hearing." (R., pp.56-57.)

Post conviction counsel provided an additional explanation of his clarification of the issue at the summary dismissal hearing:

> With regard to the prior history -- the prior history from the state of New York,[4] I explained to my client that it probably wouldn't come in in [sic] trial unless it were 404(b) evidence and it were somehow attached to be a common scheme or plan.
>
> I certainly conceded in my memorandum that the Court absolutely would consider that type of information at sentencing. It's absolutely appropriate for the court to consider at sentencing. And I'm certain that [the prosecutor] would have and did both highlight his criminal history as an aggravating feature at sentencing in this particular case.
>
> But I think the way I explained it in terms of interpreting the *pro se* petition that's been filed before Your Honor was that [trial counsel] said that you [Mr. Wagner] would be facing a much worse outcome and that you can't take the case to trial because of your prior history. And I think what my client heard was: I won't [take] the case to trial, and you need to plead guilty and accept this offer.
>
> At least that's the way he has explained it to me. I realize that, in and of itself isn't grounds for ineffective assistance of counsel. But that's certainly the way Mr. Wagner would want anyone reading his affidavit and petition to appreciate the nature of the allegation that he's making.
>
> I also brought up the issue of voluntariness, intelligence, and knowing making a plea. I think Mr. Wagner believes he was duped into pleading guilty, and he would want this Court to deny the State's request to dismiss and allow him to proceed to an evidentiary hearing.

(Tr., Vol.2, p.6, L.15 - p.7, L.20.) As such, post conviction counsel framed the argument Mr. Wagner was pursuing as an allegation that the prior history would not have been admissible at trial and trial counsel was ineffective for not arguing that point. (R., p.56.) Post conviction counsel also argued that there was a basis for trial counsel to have made that argument: "I explained to my client that [the prior record] probably wouldn't come in in [sic] trial unless it were 404(b) evidence and it were somehow attached to be a common scheme or plan." (Tr., Vol.2, p.6, Ls.16-19.) On that claim, post conviction counsel maintained that Mr. Wagner should receive an evidentiary hearing. (R., p.57; Tr., Vol.2, p.7, Ls.15-20.)

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[4] Only one of the prior convictions was from New York; the second was from Virginia. (*See, e.g.,* R., pp.65-66.)

Looking at post conviction counsel's entire argument, it becomes clear that post conviction counsel's concessions only relate to potential interpretations of the claim that Mr. Wagner was not, in fact, pursuing. For example, post conviction counsel explained that Mr. Wagner was not arguing that trial counsel was ineffective for not keeping the prior convictions out of the sentencing proceedings. (R., p.56; Tr., Vol.2, p.6, Ls.20-23.) In fact, Mr. Wagner alleged as much in the affidavit he filed after the district court issued its notice of intent to summarily dismiss his petition: "2. My Trial Counsel told me my prior record would cause me to lose at jury trial. 3. I only plead [sic] guilty because Trial Counsel told me I would lose at jury trial. . . . 6. I would have asked the case be tried to a jury, but Trial Counsel advised me I would lose because of my prior record." (R., pp.73-74.) Therefore, he "conceded" the prior convictions were appropriately considered during the sentencing phase of the proceedings. (Tr., Vol.2, p.6, Ls.20-22.) Similarly, post conviction counsel explained that Mr. Wagner was not arguing that trial counsel forced him to plead guilty by saying that he would not try the case, since post conviction counsel believed that such a claim would not constitute ineffective assistance of counsel.[5] (Tr., Vol.2, p.7, Ls.2-11.)

[5] Post conviction counsel was mistaken in that assertion. The defendant has the right to decide whether or not to take a case to trial. *See, e.g., State v. Swan*, 108 Idaho 963, 965-66 (Ct. App. 1985) (holding that trial counsel cannot waive the right to a trial, the defendant must do that personally). Certainly, counsel may offer advice in that regard, but ultimately, the decision belongs to the defendant. *See id.* Therefore, trial counsel's refusal to try to the case despite the defendant's wishes would constitute ineffective assistance of counsel. However, as the State points out, post conviction counsel conceded that particular argument – that counsel forced him to plead guilty by saying he would not try the case. Therefore, were Mr. Wagner attempting to pursue that particular claim on appeal, the State's argument would be well taken. But since Mr. Wagner is not pursuing that particular claim, the State's argument – that this Court cannot consider the merits of Mr. Wagner's claim because post conviction counsel conceded the point – is mistaken.

On appeal, Mr. Wagner continues to pursue the issue post conviction counsel raised: his trial attorney's performance was objectively unreasonable because trial counsel did not fight to keep Mr. Wagner's criminal record from being declared admissible at trial, even though Idaho Supreme Court precedent on point reveals that he would have been successful. Since that argument was never waived, it is properly raised on appeal. As such, this Court should consider the merits of that claim.

2. Counsel's Failure To Challenge The Admissibility Of Mr. Wagner's Prior Record For Trial Purposes Was Objectively Unreasonable And Prejudicial

Mr. Wagner contends that his plea was not knowing, intelligent, and voluntary because his counsel provided him with erroneous information during the plea bargaining process. For example, according to Mr. Wagner's affidavit, "[m]y Trial Counsel told me my prior criminal record would cause me to lose at trial."[6] (R., p.73.) That advice was objectively unreasonable since the Idaho Supreme Court has limited the scope of common scheme or plan evidence to only those cases where "the commission of two or more crimes *so related to each other* that proof of one tends to establish the other." *State v. Grist*, 147 Idaho 49, 54-55 (2009) (emphasis from original) (quoting *State v. Pizzuto*, 119 Idaho 742, 750-51 (1991), *overruled on other grounds by State v. Card*, 121 Idaho 425 (1991)).[7] This means that there must be "'evidence of a

[6] The record supports Mr. Wagner's allegation in this regard, as it demonstrates that his concern – that his prior record could be introduced as evidence at trial – was legitimate. The State had filed a motion to allow them to present that evidence to the jury under I.R.E. 404(b) as evidence of a common scheme or plan. (Supp. R., pp.56-60.) Therefore, Mr. Wagner's allegation – that trial counsel told him this evidence would cause him to lose at trial – is an assertion that trial counsel told Mr. Wagner that his prior record would be admitted at trial.

[7] The Idaho Supreme Court recently reaffirmed *Grist* on this point. *State v. Joy*, 155 Idaho 1, 9 (2013).

common scheme or plan **beyond the bare fact that' the defendant has committed the same kind of misconduct in the past.**" *State v. Joy*, 155 Idaho 1, 9 (2013) (quoting *State v. Johnson*, 148 Idaho 664, 668 (2010)) (emphasis added).

This means that, "at a minimum, there must be evidence of a common scheme or plan beyond the bare fact that sexual misconduct has occurred with children in the past." *Johnson*, 148 Idaho at 668. Thus, the Idaho Supreme Court held in *Johnson*, for example, that the fact that the victims were similar in age, the defendant had a similar relationship to the victims, and the touching was similar in nature **was not sufficient** to establish that the evidence was relevant to some non-propensity purpose. *Id.* at 669.

This case is indistinguishable from *Johnson* in that regard. The evidence from Mr. Wagner's prior criminal record that the State sought to admit was that Mr. Wagner had similar contact with an unrelated victim fourteen years previous in a different state. (Supp. R., pp.57-58.) Furthermore, as the State pointed out in the initial appellate briefing, Mr. Wagner's prior convictions dealt with acts that "appeared to be an almost impulsive manner." (Resp. Br., p.12; *see also* Resp. Br., p.12 (referring to "[Mr.] Wagner's previous conviction for impulsively molesting [a child]").) When a person acts impulsively, they are acting on "[a] sudden urge or inclination that prompts **an unplanned action**." BLACK'S LAW DICTIONARY, 344 (3rd pocket ed. 2006) (emphasis added). Thus, impulsive actions are, by definition, **not** part of some preconceived plan or scheme. *See id.* As a result, the only thing relating those prior incidents to the present offense is the bare fact that Mr. Wagner had committed the same kind of misconduct in the past. That fact is not sufficient to make the prior convictions admissible under I.R.E. 404(b). *See, e.g., Johnson*, 148 Idaho at 669.

As such, the two events were not related to each other in a way that the proof of one would tend to establish the other, and so, it is precisely the type of propensity evidence that the Idaho Supreme Court had held to be inadmissible in *Grist* and *Joy*. Therefore, counsel's advice – that Mr. Wagner should take the plea because he would lose at trial based on the evidence of his past record – was objectively unreasonable; Mr. Wagner's prior record was not admissible at trial.

Nevertheless, the district court summarily dismissed Mr. Wagner's claim in this regard. It did so because it determined that Mr. Wagner's prior record was appropriately admitted before the **sentencing** judge. (Tr., Vol.2, p.6, L.20 - p.7, L.1; R., p.69.) However, that analysis is irrelevant to Mr. Wagner's complaint regarding what trial counsel told him he could expect "**at trial**." (R., p.73 (emphasis added). Therefore, the district court's conclusions about the propriety of admitting Mr. Wagner's prior record **at sentencing** is irrelevant to the issue Mr. Wagner presented in his petition. As such, the district court's rationale does not justify its decision to summarily dismiss Mr. Wagner's petition. Therefore, Mr. Wagner presented sufficient facts to create a genuine issue of material fact as to whether trial counsel's advice in this regard fell below a reasonable standard of performance.

C. Mr. Wagner Raised A Genuine Issue Of Material Fact That His Trial Attorney Made An Erroneous Assertion Regarding The Sentence He Would Receive If He Did Not Plead Guilty

Mr. Wagner also contended that he was not adequately informed about the potential punishments during his consideration of whether to accept the plea deal. Specifically, he alleged that "Trial Counsel told me I would be sentenced to life in prison if I lost at trial." (R., p.73.) As that statement appears in a verified affidavit and is an

assertion of fact within Mr. Wagner's personal knowledge, it is evidence which the district court was required to consider in its summary dismissal calculus. *See, e.g., Baldwin v. State*, 145 Idaho 148, 155 (2007).

In *Baldwin*, the Idaho Supreme Court explained, "Baldwin presents **his own affidavit** describing his version of the interaction [in question]. Baldwin's affidavit sets forth facts that would be admissible at trial. Thus, because Baldwin's Petition and Affidavit present facts that would entitle Baldwin to relief, if he were able to prove them at a hearing, the district court erred when it summarily dismissed the petition." *Id.* (emphasis added). Like the petitioner in *Baldwin*, Mr. Wagner alleged facts in his own affidavit that demonstrated his attorney performed deficiently. Therefore, just as in *Baldwin*, because Mr. Wagner's petition and affidavit present admissible facts that would entitle him to relief, if he were able to prove them at a hearing, the district court erred when it summarily dismissed the petition.

Additionally, while a life sentence may have been a potential penalty with the sentencing enhancement still on the table (*see* Supp. R., pp.51-52 (the State's motion for leave to file information, part II, based on Mr. Wagner's prior record)), a life sentence was not required (certainly, a fixed life sentence was not required). (*See, e.g.,* Supp. Tr., p.10, Ls.18-20 (the district court informing Mr. Wagner that the "maximum **possible** penalty" was life in prison) (emphasis added).) As such, counsel's representation that Mr. Wagner "**would be** sentenced to life in prison" was erroneous. (R., p.73 (emphasis added).) At the summary dismissal stage, the district court is required to construe the facts in the light most favorable to the defendant. *Charboneau v. State*, 140 Idaho 789, 793 (2004) (quoting *Saykahmchone v. State*, 127 Idaho 319, 321 (1995)). Applying that

rule in this case means that, at the summary dismissal stage, the district court was required to consider the claim as though Mr. Wagner was correct, and trial counsel told him that he **would be** sentenced to a life term. That phrasing – "would be" – indicates that the life term was more than a mere possibility, but rather, was definitely the sentence that would have been imposed if he did not plead guilty. Thus, by telling Mr. Wagner he "would be" sentenced to a life term if he did not plead guilty, trial counsel was promising a particular sentence would result from Mr. Wagner's choice on the plea agreement.

When a promise that a particular sentence will result is made to the defendant and that promise induces him to plead guilty, the defendant is entitled to relief. *See Puckett v. United States*, 556 U.S. 129, 137 (2009); *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *State v. Gomez*, 153 Idaho 253, 256 (2012) (adopting the rationale from *Puckett* and applying it to plea agreements and promises made therein). Therefore, as in *Baldwin*, Mr. Wagner's affidavit created, at least, a genuine issue of material fact that his attorney performed in an objectively unreasonable manner by telling him that he "would be" sentenced to life in prison if he did not accept the plea offer.

D. Mr. Wagner Raised A Genuine Issue Of Material Fact That He Was Prejudiced By Trial Counsel's Deficient Performance

Mr. Wagner also alleged that he was prejudiced by counsel's objectively unreasonable performance. Besides the manifest injustice and due process violation caused by his plea being entered without the necessary voluntariness, *see, e.g., Heredia*, 144 Idaho at 97, Mr. Wagner was also prejudiced because, but for counsel's

advice about his potential trial, the potential sentence, and the offered plea deal, he would have demanded a jury trial. (R., p.74.) He felt "duped" into pleading guilty. (R., p.57.) That allegation establishes a reasonable probability that, but for counsel's errors, Mr. Wagner would not have pleaded guilty when he did, but rather, would have insisted on going to trial. *Compare Booth v. State*, 151 Idaho 612, 621 (2011). That allegation is uncontradicted in the record. (*See generally* R.) Therefore, that allegation in Mr. Wagner's affidavit is sufficient for Mr. Wagner's petition to create a genuine issue of material fact as to the second prong of the *Strickland* test. *See Baldwin*, 145 Idaho at 155 (holding that a defendant's affidavit alone is sufficient to create a genuine issue of material fact). Since he has alleged facts demonstrating objectively unreasonable performance and prejudice, Mr. Wagner petition created at least one genuine issue of material fact, and, therefore, he was entitled to an evidentiary hearing in this matter.

The fact that there was evidence in the guilty plea colloquy and questionnaire which potentially contradicted some of Mr. Wagner's allegations does not change the conclusion that Mr. Wagner was entitled to an evidentiary hearing. The Idaho Supreme Court has repeatedly held that, at the summary dismissal stage of post conviction proceedings, the district court is required to not just construe, but liberally construe, all the inferences in favor of the non-moving party. *See, e.g., Dunlap v. State*, 155 Idaho 345, 361 (2013); *Charboneau*, 140 Idaho at 792; *Saykhamchone*, 127 Idaho at 321. However, "the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary facts." *State v. Yakovac*, 145 Idaho 437, 444 (2008).

In this case, the district court misapplied this rule. It relied on evidence emerging from Mr. Wagner's answers in the guilty plea colloquy and questionnaire as the

uncontroverted evidence from which it could draw reasonable inferences to undermine Mr. Wagner's claims. (R., pp.69-71.) However, Mr. Wagner challenged the reliability of his answers in the guilty plea colloquy and questionnaire by asserting in his affidavit that he was trying to give the "correct" (as opposed to the "accurate") answers. (R., pp.73-74.) Mr. Wagner alleged that the reason his answers were inaccurate was because, in discussing the matter with counsel, counsel told him that if he did not give the "correct" answer, his plea would be rejected. (R., p.74.) And, as the Idaho Supreme Court held in *Baldwin*, Mr. Wagner's verified allegation of fact alone is sufficient to establish a genuine issue of material fact on that issue. *See Baldwin*, 145 Idaho at 155. Therefore, the evidence from the guilty plea colloquy and questionnaire was disputed.

As a result, the district court was not free to draw any inference from that evidence; it was required to construe it in the light most favorable to Mr. Wagner. *See, e.g., Dunlap*, 155 Idaho at 361. Furthermore, by using the disputed responses in the guilty plea colloquy and questionnaire as a basis to summarily dismiss Mr. Wagner's petition, the district court was essentially making a credibility determination that those answers were more reliable than Mr. Wagner's statement under oath in his affidavit. The Idaho Supreme Court has made it clear that "judging credibility is not appropriate during summary judgment proceedings where no evidentiary hearing has been held." *Vanderford Co., Inc., v. Knudson*, 150 Idaho 664, 674 (2011). This rule holds true "even when the court will serve as trier of fact, credibility determinations 'should not be made on summary judgment . . . .'" *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 419 (2012) (quoting *Argyle v. Slemaker*, 107 Idaho 668, 670 (Ct. App. 1984)). Therefore, the district court's determination that, since it was the trier of fact, it could

make those determinations at the summary judgment stage of the proceedings (*see* R., p.71), was clearly wrong.[8] As a result, its reliance on the contested answers in the plea colloquy and questionnaire as a viable basis to summarily dismiss Mr. Wagner's petition was erroneous and should be reversed.

Applying the proper standards in this case, it is clear that Mr. Wagner's petition sets forth a genuine issue of material fact as to whether trial counsel provided ineffective assistance as Mr. Wagner decided whether to exercise his constitutional right to a jury trial or to accept the pending plea offer, and so, rendered his plea not knowingly, intelligently, and voluntarily. Therefore, the decision to summarily dismiss his petition was erroneous.

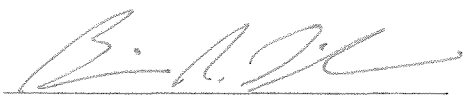
[8] The district court's determination that Mr. Wagner presented no new evidence after the district court entered is notice of intent to summarily dismiss the petition is also clearly wrong because Mr. Wagner filed an affidavit making new or additional allegations in support of his petition, including the allegation that the answers in the plea colloquy and questionnaire were not accurate, after the notice of intent was filed. (R., pp.64-72 (the notice of intent to summarily dismiss filed on July 31, 2013); R., pp.73-74 (Mr. Wagner's affidavit filed on August 19, 2013).)

CONCLUSION

Mr. Wagner respectfully requests that this Court grant the petition for rehearing, withdraw the Opinion in this case, and determine whether the district court properly summarily dismissed his petition for post conviction relief based on the grounds for which he had appropriate notice and the opportunity to be heard.

On rehearing, Mr. Wagner respectfully requests that this Court reverse the order summarily dismissing his petition, vacate the final judgment, and remand this case for an evidentiary hearing because the facts, when liberally viewed in the light most favorable to him, establish a genuine issue of material fact.

DATED this 21st day of April, 2015.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of April, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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