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# Fortin v. State Appellant's Brief Dckt. 43334

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CODY JAMES FORTIN, )  
 )  
 Petitioner/Appellant, )  
 )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Supreme Court No. 43334-2015  
Ada County District Court  
Case No. CV-PC-2013-08285

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND  
FOR THE COUNTY OF ADA

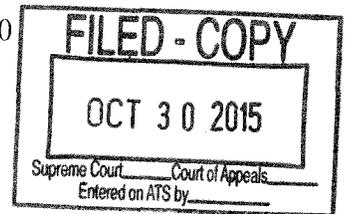
HONORABLE PATRICK H. OWEN  
District Judge

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## II. STATEMENT OF THE CASE

### A. Nature of the Case

Appellant Cody Fortin filed a *pro se* petition for post-conviction relief accompanied by a *pro se* motion for judicial notice of the underlying criminal case and a related case and a motion for appointed counsel. The District Court granted the motion for counsel, but denied the motion for judicial notice. Thereafter, the Court summarily dismissed the petition relying on the records of the underlying cases which it had refused to judicially notice.

The District Court's summary dismissal should be vacated and the case remanded for further proceedings for three reasons: 1) the refusal to take judicial notice of the underlying criminal cases was a violation of the Court's mandatory duty under IRE 201(d) that has prejudiced Mr. Fortin; 2) the refusal to take judicial notice of the underlying criminal cases deprived Mr. Fortin of his state and federal constitutional rights of access to the courts; and 3) with regard to the one claim that can be reviewed given the limited record available on appeal, Mr. Fortin did raise a genuine issue of material fact that trial counsel was ineffective in failing to advise him of the potential consequences of refusing the state's plea offer.

### B. Procedural History and Statement of Facts

On May 7, 2013, Mr. Fortin filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel in Ada County Case CR-FE-2009-19383. Mr. Fortin alleged that trial counsel was ineffective in failing to advise Mr. Fortin about the possible consequences of failing to accept the State's plea offer

which would have settled both this case and the related case for fewer convictions and less prison time than he ultimately received; in failing to file a motion in limine regarding his alleged gang affiliation or in the alternative to move for a mistrial when evidence was presented that he was a gang member; in failing to interview and subpoena Casey Smith resulting in the trial judge refusing to allow counsel to recall her as a witness; in failing to object to admission of evidence of flight; in failing to object to the jury instructions; and in failing to file a Rule 35 motion. He further alleged that appellate counsel was ineffective in failing to federalize some of his issues on appeal and in failing to object to errors in the restitution hearing transcript. R 5-13. Mr. Fortin also filed a motion for appointment of counsel, R 23-24, and a motion for judicial notice of the underlying criminal and a related case and appellate records pursuant to IRE 201. R 26-27.

The State filed an answer and also moved for judicial notice of part of the underlying criminal record. R 28-96. While the State included some of the documents it requested that the court take notice of, it did not include all. For example, the State requested judicial notice of the transcripts of the underlying criminal case, but copies of the transcripts were not included with the State's motion. *Id.* Moreover, the State did not request judicial notice of the clerk's record in the underlying criminal case. R 35.

The State further moved for summary dismissal. R 97-112.

Thereafter, the District Court entered an order granting Mr. Fortin's motion for appointment of counsel. R 121. However, the Court denied the motion to take

judicial notice of the files of the underlying cases. The Court wrote: “Additionally, the Court will deny the motion to take judicial notice of the entire files of both underlying cases, Case Nos. CR-FE-2009-19383 and CR-FE-2009-19475. In the Court’s view, the proper procedure is for the Court to take note of specific matters that are part of the files. These items must be made a part of the record in this case. The Court will take judicial matters (sic) of those items in the underlying files that are made a part of this file.” The Court concluded, “The Court will deny the blanket request for judicial notice.” R 126-127. The Court never ruled at all on the State’s motion for judicial notice. R 2-4.

Counsel filed a memorandum in response to the State’s motion for summary disposition. R 145-150. Counsel argued that Mr. Fortin had raised a genuine issue of material fact as to ineffective assistance of counsel. In particular, when Mr. Fortin was represented by the public defender he was offered a joint resolution of his two pending cases, this case and CR-FE-2009-19475, which would have left his total exposure at seven years fixed and thirteen indeterminate and would have resulted in the dismissal of charges of battery on an officer, and leaving the scene of an accident. R 146. However, after he retained private counsel, that counsel advised him to reject the plea offer and proceed to two separate trials without properly advising him of the potential penalties should he not prevail. R 8-9. Subsequently, Mr. Fortin proceeded to trial in CR-FE-2009-19383 and was convicted and sentenced to 12 years fixed followed by 13 indeterminate for a total of 25 years. Thereafter, he entered a guilty plea in CR-FE-2009-19475 and was

sentenced to five years fixed followed by ten indeterminate to run consecutively to the sentence in CR-FE-2009-19383. Instead of having a sentence of 7 plus 13 for a total of 20 years, Mr. Fortin has a sentence of 17 plus 23 for a total of 40 years. R 146. In addition, he has a conviction for battery on a law enforcement officer, which would have otherwise been dismissed. *Id.* Post-conviction counsel argued that Mr. Fortin had raised a genuine issue of material fact as to whether trial counsel was ineffective in advising him to proceed to trial without properly advising him as to the potential consequences of that decision. R 148-149.

Following a hearing on the State's motion, the District Court dismissed the petition. R 156-171. While the Court had denied Mr. Fortin's motion to take judicial notice of the underlying criminal case, the Court did rely on the record and transcripts of that case in reaching its decision as evidenced by its quotation of parts of the transcript, as well as its reference to other matters that happened in the case which were documented in the clerk's record and transcripts. *Id.*

The Court entered a final judgment. R 172. Mr. Fortin filed a timely notice of appeal. R 173-175.

The District Court appointed SAPD to represent Mr. Fortin on appeal. R 176. And, SAPD in turn transferred this case to present counsel. Notice of substitution of counsel, filed 9/9/15.

Mr. Fortin, through present counsel, filed a motion with the Supreme Court to augment the record on appeal with the record of the underlying criminal case. Motion to augment and suspend the briefing schedule, filed 10/5/15. However, the

Supreme Court denied the motion “for the reason that it does not appear that the District Court took judicial notice of the underlying post-conviction case.” Order denying motion to augment and suspend, entered 10/14/15.

### III. ISSUES PRESENTED ON REVIEW

A. Did the District Court violate its mandatory duty to take judicial notice of the record of the underlying and related criminal cases and thereby prejudice Mr. Fortin?

B. In denying Mr. Fortin’s motion for judicial notice did the District Court deny his state and federal constitutional rights to access to the courts? Art. I, § 18; Fourteenth Amendment.

C. Did Mr. Fortin raise a genuine issue of material fact as to whether his trial counsel was ineffective in failing to advise him of the potential consequences of not accepting the State’s plea offer?

### IV. ARGUMENT

A. The District Court violated its mandatory duty under IRE 201(d) to take judicial notice and thereby prejudiced Mr. Fortin

Idaho Rule of Evidence 201(d) places a mandatory duty on district courts to take judicial notice when a party makes an oral or written request. The District Court violated this duty in this case, and the violation was prejudicial to Mr. Fortin. Therefore, the order of summary dismissal must be vacated.

The Evidence Rule provides:

(d) **When mandatory.** When a party makes an oral or written request that a court take judicial notice of records, exhibits or

transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.

In his *pro se* motion, Mr. Fortin wrote that he:

respectfully moves this Honorable Court, pursuant to Rule 201 of the Idaho Rules of Evidence, to take judicial notice of the entire underlying district court and appellate record in District Court Criminal Case No. CR-FE-2009-19383 and Idaho Court of Appeals Docket No. 38069, as well as the companion case CR-2009-0019475, including all appendices, exhibits, and attachments thereto for the purpose of these proceedings.

R 26.

In its motion for judicial notice, the State requested notice of the following documents:

1. Transcript of Arraignment on 12/04/09 in case number CR-FE-2009-0019383
2. Transcript of Jury Trial in case number CR-FE-2009-0019383
3. Transcript of Sentencing Hearing on 2/04/11 in case number CR-FE-2009-0019383
4. Transcript of Resitution Hearing on 2/04/11 in case number CR-FE-2009-0019383
5. Appellant's Brief, *State v. Fortin*, Docket Number 38069
6. Decision on Appeal, *State v. Fortin*, Docket Number 38069, dated April 30, 2012
7. Register of Actions for case number CR-FE-2009-0019383
8. Register of Actions for case number CR-FE-2009-0019475
9. Petition for Post-Conviction Relief, *Fortin v. State*, CV-PC-2011-

19323

10. Amended Petition for Post-Conviction Relief, *Fortin v. State*, CV-PC-2011-19323

R 35-36.

The State appended hard copies of some of these materials to its motion, but not all. Specifically, none of the transcripts were included. R 37-96.

The District Court denied Mr. Fortin's motion because, even though it identified both cases for which he sought judicial notice, the Court deemed it a blanket request. R 127. The Court simply never ruled on the State's motion. ROA.

The District Court violated its mandatory duty. As to Mr. Fortin's request, he did identify the specific documents and items requested – everything in the underlying case records. And, indeed, that request is consistent with the requirements imposed by the Court of Appeals in *Esquivel v. State*, 149 Idaho 255, 258, 233 P.3d 186, 189, ftnt. 3 (Ct. App. 2010). *Esquivel* holds that no part of the record from the underlying criminal case is a part of the record on appeal unless the district court has taken judicial notice of it. Given that no part of the underlying criminal case is part of the post-conviction record absent judicial notice, and given that all missing parts of the record are presumed to support a district court's ruling, *State v. Wolfe*, 99 Idaho 382, 390, 582 P.2d 728, 736 (1978); *State v. Williams*, 126 Idaho 39, 45, 878 P.2d 213, 219 (Ct. App. 1994), a "blanket request" for the entire record of the criminal case is the only prudent action by a petitioner. Otherwise, a petitioner can never hope for appellate relief if the district court erroneously denies

a post-conviction petition. Anything less than the whole record of the underlying criminal case will be construed to support the ruling of the district court and preclude relief. The District Court in this case, violated its mandatory duty – Mr. Fortin identified all the parts of the underlying criminal case records that he sought judicial notice of and the Court refused to take notice.

Furthermore, the Court also violated its mandatory duty in failing to rule on the State’s request for judicial notice. IRE 201(d).

Reversal is required when a district court violates a mandatory duty. *State v. Tribe*, 123 Idaho 721, 727, 852 P.2d 87, 94 (1992). But, even if a harmless error analysis applies, *Martin & Martin Custom Homes, LLC v. Camas County*, 150 Idaho 508, 248 P.3d 1243 (2011), the error was not harmless in this case.

Without the record from the underlying cases, meaningful appellate review in Mr. Fortin’s case is foreclosed. The underlying case records will be presumed to support the summary dismissal of his petition regardless of any error in that dismissal. *Wolfe, supra*; *Williams, supra*. This is prejudice. *See Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct.App. 1993), and *Ricca v. State*, 124 Idaho 894, 898, 865 P.2d 985, 989 (Ct. App. 1993), holding that the loss of the opportunity to appeal is itself sufficient prejudice to support a claim of ineffective assistance of counsel with a showing of what issues would have been raised on appeal.

For this reason, the District Court’s order of summary dismissal should be vacated and the matter remanded for further proceedings.

However, even if this Court were to require that Mr. Fortin make a showing

of a potentially meritorious issue he could have raised on appeal, the District Court's refusal to take judicial notice was not harmless.

Mr. Fortin alleged that trial counsel was ineffective in failing to provide adequate information regarding the potential consequences of rejecting the plea agreement in this case. The District Court dismissed this claim writing, "Even if the Court is to accept Fortin's conclusory allegations about Crafts' erroneous advice as true, Fortin cannot demonstrate any prejudice because Fortin cannot demonstrate that the Court would have accepted his plea as a binding plea agreement under I.C.R. 11. . . . As a consequence, Fortin cannot demonstrate any prejudice, since the Court would not have been bound to follow the plea agreement." R 163.

A defendant is entitled to effective assistance of counsel in plea negotiations. *See Missouri v. Frye*, 132 S.Ct. 1399, 1405-08 (2012). To establish prejudice, the defendant must show there was a reasonable probability as to three aspects of the plea: 1) the defendant would have accepted the earlier plea offer had he been afforded effective assistance of counsel; 2) neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented; and 3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. *Id.*, 132 S.Ct. at 1409-10. *See also, Lafler v. Cooper*, 132 S.Ct. 1376, 1385 (2012), holding that to show prejudice in giving deficient advice which led to the rejection of a plea agreement, the defendant must show 1) that but for the ineffective advice, there is a reasonable probability

that the plea offer would have been presented to the court; 2) that the court would have accepted its terms; and 3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

While the District Court stated in its memorandum decision on the order for summary dismissal that it would not have accepted a binding Rule 11 plea to run the sentences in the two cases concurrently, the Court did not state that it would have not accepted a non-binding plea. R 163. Thus, Mr. Fortin has raised a genuine issue of material fact as to ineffective assistance of counsel. He has made allegations of deficient performance in failing to advise him of the consequences of rejecting the plea. And, he has made allegations that there is a reasonable probability that absent the deficient performance, the plea would have been presented to the Court, the Court would have accepted the plea, and the outcome would have been different insofar as he would not have been convicted of battery on an officer. Moreover, if the District Court had taken judicial notice as requested, Mr. Fortin likely raised a genuine issue of material fact that even if the Court did not accept a binding plea agreement, it would have, in light of the PSI and other information available to it at sentencing, imposed a sentence closer to that which the State would have recommended – a total term of twenty years (7 fixed, 13 indeterminate) instead of the sentence of twice that amount, a total of forty years (17 fixed, 23 indeterminate). However, without the PSI and the sentencing hearing transcripts in the record, this argument was impossible to make in the District

Court and is now impossible to make on appeal.

Mr. Fortin has shown that the District Court violated its mandatory duty to take judicial notice. A harmless error analysis should not apply, but even if it does, he has shown that the failure of the Court was not harmless. Therefore, this Court should vacate the order of summary dismissal and remand for further proceedings.

B. The District Court denied Mr. Fortin his state and federal constitutional rights to meaningful access to the courts.

Both the state and the federal constitutions guarantee a right of access to the courts. In refusing to take judicial notice, the District Court violated these rights.

Article I, § 18 of the Idaho Constitution states, “Courts of justice shall be open to every person . . . and justice shall be administered without sale, denial, delay or prejudice.” And, this guarantee extends to prisoners challenging their convictions. *State v. Brandt*, 135 Idaho 205, 207, 16 P.3d 302, 304 (Ct. App. 2000).

Likewise, the Fourteenth Amendment makes a similar guarantee. “The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights.”

*Procunier v. Martinez*, 416 U.S. 394, 94 S.Ct. 1800, 1814 (1974).

Thus, prison authorities must assist inmates in the preparation and filing of meaningful legal papers by providing adequate prison law libraries or adequate assistance from those trained in the law. *Bounds v. Smith*, 430 U.S. 817, 824, 97 S.Ct. 1491, 1498 (1977); *Martinez v. State*, 130 Idaho 530, 535, 944 P.2d 127, 132

(Ct. App. 1997). *See also, Evensiosky v. State*, 131 Idaho 189, 191, 30 P.3d 967, 969 (2001). Thus, a court may not refuse to hear a motion or dismiss a motion even when a party contemnor has not purged contempt. *State Dep't of Health & Welfare v. Slane*, 155 Idaho 274, 279, 311 P.3d 286, 291 (2013).

And, of import to this case, the state is required to provide an indigent defendant a record on appeal that is sufficient for adequate appellate review. *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774 (1963); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768 (1963).

Further, the State is required to file with its answer the “record of the proceedings challenged therein or portions thereof which are material.” I.C. § 19-2606(a).

In this case, by denying the request for judicial notice, the District Court denied Mr. Fortin a record on appeal that is sufficient for adequate appellate review. *See, Esquivel, supra*. Without judicial notice of the underlying criminal cases, as evidenced by the denial of Mr. Fortin’s motion to augment in the Supreme Court, Mr. Fortin has no meaningful way to obtain appellate review. This result violates his state and federal constitutional rights of access to the courts. Therefore, the order of summary dismissal must now be vacated.

C. Mr. Fortin did raise a genuine issue of material fact as to his claim of ineffective assistance in failing to properly advise him of the consequences of rejecting the State’s plea offer.

In an abundance of caution, Mr. Fortin submits that he has raised, even without the record from the underlying criminal cases, a genuine issue of material

fact as to the ineffective assistance of counsel in failing to properly advise him regarding the plea offer. He has sufficiently alleged deficient performance in failing to advise him of the consequences of the decision to reject the plea offer and he has sufficiently alleged prejudice, because the pleadings establish that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court; 2) that the court would have accepted its terms; and 3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

*Lafler, supra.*

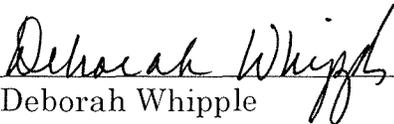
If the District Court had granted the request for judicial notice, Mr. Fortin's case may well have been even stronger as to the prejudice, because the record may show that the District Court, even if not bound by Rule 11, would have imposed a lesser sentence than twice the sentence recommended by the State.

Mr. Fortin submits that this Court does have an adequate record to not only vacate the order of summary dismissal but to also upon remand instruct that the claim of ineffective assistance as to the plea process cannot be summarily dismissed. On the other hand, if this Court determines the record does not, as it exists, support such an instruction on remand, Mr. Fortin submits that this result is further evidence that the failure of the District Court to fulfill its mandatory duty of taking judicial notice was not harmless. He also submits that this result would be further evidence that the District Court denied Mr. Fortin his state and federal constitutional rights to access to the courts.

## V. CONCLUSION

Mr. Fortin respectfully requests that this Court vacate the order of summary dismissal and remand with instructions to take judicial notice of the records, transcripts, and exhibits of the underlying and related criminal cases. He further requests that on remand this Court instruct the District Court that it must hold an evidentiary hearing on any claims for which the judicially noticed items support a genuine issue of material fact as to whether he was denied his state and federal constitutional rights to effective assistance of counsel, to include, but not be limited to his claim that counsel was ineffective in failing to advise him of the potential consequences of refusing the plea agreement.

Submitted this 30<sup>th</sup> day of October, 2015.

  
Deborah Whipple  
Attorney for Cody Fortin

CERTIFICATE OF SERVICE

I CERTIFY that on October 30, 2015, I caused two true and correct copies of the foregoing document to be:

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