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# Blackburn v. State Appellant's Brief Dckt. 44184

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

RODNEY GENE BLACKBURN JR,	)	
	)	NO. 44184
Petitioner-Appellant,	)	
	)	CANYON COUNTY NO.
v.	)	CV 2015-11578
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
<hr/>		

**BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON**

**HONORABLE CHRISTOPHER S. NYE**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Rodney Blackburn contends the district court erred when it summarily dismissed his petition for post-conviction relief, as he had alleged at least one genuine issue of material fact in his verified petition. Specifically, he alleged that trial counsel was ineffective for not advising him about the ramifications of not filing an appeal, but rather, erroneously advising him to file a motion for leniency pursuant to I.C.R. 35 (*hereinafter*, Rule 35 motion) instead of pursuing a direct appeal.

Because Mr. Blackburn's allegations establish that trial counsel did not fulfill his duty to consult with him as that duty has been defined by the United States Supreme Court, and because a Rule 35 motion is not an alternative to a direct appeal, Mr. Blackburn's allegations establish at least a genuine issue of material fact that trial counsel's performance was objectively unreasonable. Additionally, since the United States Supreme Court has determined there is a presumption of prejudice when counsel's objectively deficient performance deprives the defendant of an appeal he would have otherwise pursued, Mr. Blackburn's allegations, combined with the fact found by the district court – that Mr. Blackburn "agreed" with counsel's advice – establish a genuine issue of material fact regarding prejudice. As such, summary dismissal of the petition was inappropriate.

Therefore, this Court should vacate the Final Judgment as well as the order summarily dismissing the post-conviction petition, and remand this case for further proceedings.

## Statement of the Facts and Course of Proceedings

In his underlying criminal case, Mr. Blackburn pleaded guilty to violating a no contact order and was sentenced to a unified term of four years, with one year fixed. (R., p.4.) In his subsequent petition for post-conviction relief, he argued, *inter alia*, that “[t]rial counsel coerced Petitioner into foregoing filing a notice of appeal from his conviction and sentence by giving faulty advice to file a Rule 35 instead.” (R., p.7.)

Specifically, Mr. Blackburn alleged trial counsel had not discussed “the ramifications of not filing an appeal” with him, but instead, advised him that “[a]n appeal is not necessary’ and ‘that a Rule 35 would be more appropriate.” (R., p.7.) Additionally, “[t]he petitioner contends why would he not avail[] himself of this right as he had absolutely nothing to lose by appealing and possibl[y] much to gain.” (R., p.7.) “Second petitioner finds fault with trial counsel because the very reason counsel cited for not filing the notice of appeal was the presentation of a Rule 35, of which he did not do.”<sup>1</sup> (R, p.7.)

In providing notice of its intent to summarily dismiss Mr. Blackburn’s petition, the district court found that “Counsel gave his advice as to the best manner to proceed and the Petitioner agreed.” (R., p.49.) Mr. Blackburn did not file a response to the district

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<sup>1</sup> In the interest of full disclosure and accurate understanding of the procedural history of this matter, undersigned counsel notes that, after Mr. Blackburn filed his petition for post-conviction relief, trial counsel filed an untimely, unsupported Rule 35 motion with the district court in the criminal case. (See Online Repository for the underlying case, CR 2015-7210). Undersigned counsel is informed and believes the district court ultimately denied that motion, addressing the merits of the claim when it did so. However, those documents were not made part of the post-conviction record, nor was the matter discussed by the district court or the parties in the post-conviction case. (See *generally* R., Tr.) As such, Mr. Blackburn is not moving to augment the record with them, nor would it be proper to consider them in this appeal.

court's notice of intent to dismiss. (See Tr., p.3, Ls.2-7; see *generally* R.) Pursuant to its notice of intent, the district court summarily dismissed Mr. Blackburn's claim about trial counsel's advice to not file a notice of appeal, concluding: "Petitioner provides no facts to show that counsel's advice not to appeal was deficient due to any of these factors [related to a review of counsel's strategic decisions] or was otherwise not reasonable." (R., p.56.) Furthermore, it concluded: "The fact that every person convicted of a crime may file an appeal does not mean there is a valid basis for appeal in every case. As such, Petitioner has failed to establish a *prima facie* case of ineffective assistance of counsel." (R., p.56.)

Mr. Blackburn filed a notice of appeal timely from the Final Judgment dismissing his petition. (R., pp.60, 62.)

## ISSUE

Whether the district court erred by summarily dismissing Mr. Blackburn's petition for post-conviction relief.



## ARGUMENT

### The District Court Erred By Summarily Dismissing Mr. Blackburn's Petition For Post-Conviction Relief

#### A. Standard Of Review

On appeal from a summary dismissal of a petition for post-conviction relief, the appellate court “reviews the record to determine if issues of material fact exist, which require an evidentiary hearing.” *Downing v. State*, 136 Idaho 367, 370 (Ct. App. 2001); *cf. Baldwin v. State*, 145 Idaho 148, 153 (2008) (holding that a petition for post-conviction relief may be summarily dismissed only if it does not present a genuine issue of material fact). In conducting that review, the appellate court accepts the district court’s factual findings unless they are clearly erroneous, but reviews the district court’s application of the relevant law to those facts *de novo*. *Dunlap v. State*, 141 Idaho 50, 56 (2004).

To show a genuine issue of material fact in regard to a claim of ineffective assistance of counsel,<sup>2</sup> 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 evaluating whether there is a genuine issue of material fact, the courts “liberally construe the facts and reasonable inferences in favor of the non-moving party,” in this case, Mr. Blackburn. *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008); *see also Charboneau v. State*, 140 Idaho

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<sup>2</sup> Defendants have the right to reasonably-effective counsel under the Sixth Amendment of the United States Constitution. *See, e.g., Beasley v. State*, 126 Idaho 356, 359-60 (Ct. App. 1994).

789, 792 (2004) (“[I]nferences [are] liberally construed in favor of the petitioner.”). The allegations in a petitioner’s verified petition alone may establish a genuine issue of material fact. *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993).

B. The District Court’s Analysis In Summarily Dismissing Mr. Blackburn’s Claim About The Advice To Pursue A Rule 35 Motion Instead Of A Direct Appeal Is Contrary To Idaho Supreme Court And United States Supreme Court Precedent

The district court’s determination that Mr. Blackburn’s allegations of fact – that trial counsel did not discuss the ramifications of not appealing, told him that “an appeal was not necessary,” and advised him that a Rule 35 motion was “more appropriate” and so, he should pursue that motion instead (R., p.7) – did not present a genuine issue of material fact is mistaken in regard to both prongs of the *Strickland* analysis.

To the first prong of that analysis, to perform in an objectively-reasonable manner, trial counsel must fulfill his duty to consult with a defendant about a direct appeal once the defendant has reasonably demonstrated an interest in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Mr. Blackburn’s allegations establish that he expressed at least an interest in appealing, otherwise counsel’s advice that a direct appeal is “not necessary” makes no sense. (See R., p.7.) Therefore, trial counsel was duty-bound to consult with Mr. Blackburn about the direct appeal.

The United States Supreme Court has explained: “We employ the term ‘consult’ to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes.” *Id.* at 478. Mr. Blackburn alleged counsel did not discuss the ramifications of not filing an appeal with him. (R., p.7.) That alleged fact alone establishes a genuine issue of material fact in regard to deficient performance because,

if liberally construed in Mr. Blackburn's favor, it demonstrates trial counsel did not fulfill his duty to consult with Mr. Blackburn as that duty has been defined by the United States Supreme Court.

Furthermore, the advice trial counsel gave in his attempt to fulfill that duty was unreasonable on its face as it was contrary to Idaho Supreme Court precedent. The Idaho Supreme Court has clearly held: "Rule 35 does not function as an appeal of the sentence." *State v. Huffman*, 144 Idaho 201, 203 (2007). Rather, the two proceedings serve different purposes. On the one hand, Rule 35 "is a narrow rule" which only allows the defendant to dispute the legality of his sentence, to request leniency in the sentence, or to challenge the calculation of credit for time served. *See id.*; I.C.R. 35(a)-(c). Thus, Rule 35 is designed to allow the district court to review the sentence in light of new or additional information. *See Huffman*, 144 Idaho at 203. In a direct appeal of the sentence, on the other hand, the appellate court only reviews the information that had been before the district court at the time of sentencing. *See, e.g. State v. Oliver*, 144 Idaho 722, 726 (2007). Therefore, a Rule 35 motion is not an alternative to a direct appeal, which means it cannot stand in the stead of a direct appeal. As such, trial counsel's advice to Mr. Blackburn – to pursue a Rule 35 motion *instead of* a direct appeal (R., p.7) – was objectively unreasonable advice.

Since the facts alleged in Mr. Blackburn's verified petition, liberally construed in his favor, establish that trial counsel failed to fulfill his duty to consult with Mr. Blackburn, and gave objectively unreasonable advice in his attempt to do so, Mr. Blackburn's allegations established a genuine issue of material fact under the first prong of *Strickland*.

As to the second prong of *Strickland*, Mr. Blackburn alleged sufficient facts to establish a genuine issue of material fact that counsel's objectively-deficient performance prejudiced him. The United States Supreme Court has held that, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Flores-Ortega*, 528 U.S. at 478. Therefore, a presumption of prejudice exists in this context, meaning all the defendant is required to show in his petition is that he would have filed the appeal. See *Flores-Ortega*, 528 U.S. at 478. The reason that is so is that the "loss [of the opportunity to appeal] is itself sufficient prejudice to support a claim of ineffective assistance of counsel . . ." *Beasley v. State*, 126 Idaho 356, 362 (Ct. App. 1994); cf. *Flores-Ortega*, 528 U.S. at 483.

Mr. Blackburn alleged as much in his verified petition: "The petitioner contends why would he not avail[] himself of this right as he had absolutely nothing to lose by appealing and possibl[y] much to gain." (R., p.7.) Although framed as a rhetorical question, what Mr. Blackburn alleged is, but for the erroneous advice about Rule 35 being a valid alternative to the direct appeal, he would have exercised his right to appeal "as he had absolutely nothing to lose and possibl[y] much to gain." Cf. *Charboneau*, 140 Idaho at 792 ("[I]nferences [are] liberally construed in favor of the petitioner."). Therefore, there was at least a genuine issue of material fact as to prejudice under the standard articulated in *Flores-Ortega*.

The district court, however, did not apply the *Flores-Ortega* standard. Instead, it required Mr. Blackburn to show there was a valid basis for an appeal. (R., p.56 ("The

fact that every person convicted of a crime may file an appeal does not mean that there is a valid basis for an appeal. Petitioner has failed to establish a *prima facie* case of ineffective assistance of counsel.”). The United States Supreme Court has expressly rejected such analysis: “[I]t is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.”<sup>3</sup> *Flores-Ortega*, 528 U.S. at 486 (emphasis from original omitted). Rather, as the Idaho Court of Appeals has explained, “the defendant should not be required to identify the meritorious issues that would have been raised, but should be restored to the status enjoyed immediately following the judgment of conviction when the defendant was entitled to a direct appeal.” *Beasley*, 126 Idaho at 361. Therefore, the district court’s analysis on this issue was improper and should be rejected.

Since Mr. Blackburn’s allegations establish at least a genuine issue of material fact on both prongs of the *Strickland* test, as they have been defined by Idaho and United States Supreme Court precedent, summary dismissal of his claim about counsel’s erroneous advice to forgo his right to an appeal and file a Rule 35 motion instead was inappropriate.

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<sup>3</sup> The Supreme Court made this declaration about the need to have an attorney review the record for appellate issues even though defendant in *Flores-Ortega* had been represented by counsel in the trial court and that attorney had, at least, considered the possibility of an appeal. See *Flores-Ortega*, 528 U.S. at 473.

CONCLUSION

Mr. Blackburn respectfully requests that this Court vacate the Final Judgment as well as the order summarily dismissing his post-conviction petition and remand this case for further proceedings.

DATED this 13<sup>th</sup> day of September, 2016.

\_\_\_\_\_/s/  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13<sup>th</sup> day of September, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

RODNEY GENE BLACKBURN JR  
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CHRISTOPHER S NYE  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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\_\_\_\_\_/s/\_\_\_\_\_  
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Administrative Assistant

BRD/eas