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## Devan v. State Appellant's Brief Dckt. 43508

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

EVIN CHRISTOPHER DEVAN,	)	
	)	NO. 43508
Petitioner-Appellant,	)	
	)	CANYON COUNTY NO. CV 2015-1285
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
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**BRIEF OF APPELLANT**

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

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**HONORABLE CHRIS S. NYE**  
District Judge

---

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## STATEMENT OF THE CASE

### Nature of the Case

After being convicted of conspiracy to commit burglary, burglary, and misdemeanor trespass in a separate criminal case, Evin Christopher Devan filed a petition for post-conviction relief. Mr. Devan was appointed counsel, but counsel did not file a response to the State's motion for summary dismissal nor an amended petition. As a result, the district court summarily dismissed Mr. Devan's petition. Mr. Devan filed a Notice of Appeal timely from the order dismissing his petition and subsequently filed an I.R.C.P. 60(b) motion. The district court later denied that motion.

On appeal, Mr. Devan challenges the denial of the I.R.C.P. 60(b) motion. He submits that the district court abused its discretion when it denied the motion because there was a complete absence of meaningful representation by his post-conviction counsel, and the district court denied the motion based on an improper analysis.

### Statement of the Facts and Course of Proceedings

After a jury trial, Mr. Devan was convicted of conspiracy to commit burglary, burglary, and misdemeanor trespass. (R., p.41.) Mr. Devan appealed, and the Court of Appeals affirmed his conviction. (R., p.41.) Mr. Devan then filed a timely petition for post-conviction relief on February 13, 2015. (R., pp.4-7.) In his petition, Mr. Devan argued that his trial counsel was ineffective for failing to "secure witnesses," "failure to object," and "failing to investigate defence (sic)." (R., p.6.) He also asserted there was new evidence. (R., p.5.) Mr. Devan requested the appointment of counsel, and Randall Grove, from the Canyon County Public Defender's office, was appointed on

February 25, 2015. (R, pp.9-11, 20-21, 38; Augmentation, p.45.)<sup>1</sup> However, on March 24, 2015, the Canyon County Public Defender's office filed a Notice of Conflict of Interest and Assignment of Conflict Counsel; Michael Nelson was subsequently appointed as counsel for Mr. Devan. (Augmentation, p.45.)

Meanwhile, on February 26, 2015, the State filed a motion for summary dismissal in which it argued that Mr. Devan's petition contained no facts or evidence to support his claims. (R., pp.31-35.) Mr. Nelson never filed a response to the motion or an amended petition. (Augmentation, p.48.) Instead, at the hearing on the motion, which was held on July 10, 2015, Mr. Nelson said that he had met with Mr. Devan and discussed filing an amended petition with him, but he could not find any meritorious claims, so he was not contesting the State's motion. (7/10/15 Tr., p.5, Ls.17-25.) The district court found that Mr. Devan "alleged no facts to support his petition" and that there was "no factual basis on which to determine the existence of a genuine issue of material fact." (R., pp.43-44.) As such, the district court granted the State's motion for summary dismissal on July 11, 2015. (R., pp.44.) Mr. Devan filed a Notice of Appeal that was timely from the district court's order and final judgment. (R., pp.48-50.) The State Appellate Public Defender's Office was appointed on August 25, 2015. (R., pp.63-64.)

Subsequently, relying largely on *Eby v. State*, 148 Idaho 731 (2010), and acting pro se, Mr. Devan filed a Motion and Memorandum for Relief from Judgment or Order (*hereinafter*, Rule 60(b) motion), in which he argued that he was entitled to relief from the order dismissing his post-conviction petition under Idaho Rule of Civil Procedure

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<sup>1</sup> All citations to the "Augmentation" refer to the documents referenced in the June 30, 2016 Order Granting Motion to Augment and to Suspend the Briefing Schedule.

60(b), as there was a “complete absence of meaningful representation” by Mr. Nelson.<sup>2</sup> (Augmentation, pp.1-6.) He argued that if his claims had been presented, the State’s motion for summary judgment would not have been granted. (Augmentation, p.1.) Mr. Devan attached several documents to the motion; they included letters from him to Mr. Nelson’s paralegal, a letter from the paralegal to Mr. Devan, and a prison mail log.<sup>3</sup> (Augmentation, pp.8-26.)

Mr. Devan also attached a supporting affidavit and supplemental affidavit. (Augmentation, pp.27-31.) Those included a timeline of the post-conviction case and facts regarding the affidavit of Mr. Devan’s alibi witness, Lauren Jones, (*hereinafter*, Jones affidavit). In his affidavit, Mr. Jones said that he was present when the burglary was committed, but Mr. Devan was not present. (Augmentation, pp.33-35.)

Mr. Devan’s supporting affidavit detailed his attempts to communicate with Mr. Nelson and his paralegal about the status and strategy of his case. (Augmentation, pp.27-31). He explained that on March 25, 2015, he received a letter from Mr. Nelson’s paralegal, so he called Mr. Nelson’s office, requested to speak with Mr. Nelson regarding amending the petition,<sup>4</sup> and asked to be kept “informed of all the movements” in the case. (Augmentation, p.28.) He said that he was not told at that point that the State had already filed a motion for summary dismissal. (Augmentation, p.28.)

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<sup>2</sup> This appeal was suspended pending the decision on the motion. (See February 17, 2016, Order Granting Motion to Suspend the Appellate Proceedings.)

<sup>3</sup> In its order denying the motion, the district court said it did not rely on the facts contained in Mr. Devan’s motion and some of the attached documents because they were not properly authenticated. (Augmentation, p.48, n.4.)

<sup>4</sup> His affidavit referred to the petition as a “complaint.” (Augmentation, p.28.)

Additionally, he said that on April 16, 2015, he sent the Jones affidavit and transcripts from the trial to Mr. Nelson's paralegal.<sup>5</sup> (Augmentation, p.28.) He also said that on April 21, 2015, he received a draft amended petition that did not contain the amendments he had requested. (Augmentation, p.28.) Therefore, he said that on or about May 14, 2015, he sent a letter to both Mr. Nelson and his paralegal, which requested specific corrections and additions. (Augmentation, p.28.) He also said that he sent a letter to the district court because he did not know what was going on with his case. (Augmentation, p.28.) He explained that he made "additional repeated calls" to Mr. Nelson and his paralegal, but Mr. Nelson did not answer, and his paralegal said that she did not know what was going on with his case. (Augmentation, p.28.)

He said that on or about June 17, 2015, he received the "exact same draft" of the proposed amended petition from Mr. Nelson as he had received in April. (Augmentation, p.28.) Mr. Devan said that he then met with Mr. Nelson and his paralegal on June 18, 2015, and showed them the affidavit from Lauren Jones. (Augmentation, p.28.) He also said that he expressed concern that the State would file a motion for summary dismissal, but even then was not told that the State had already done so. (Augmentation, p.28.)

On February 10, 2016, the State filed an objection to Mr. Devan's Rule 60(b) motion. (Augmentation, pp.37-39.) The State argued that relief was not justified as *Eby* was distinguishable from Mr. Devan's case because there was some communication between Mr. Devan and Mr. Nelson, and the proper procedure for a complaint such as

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<sup>5</sup> Mr. Devan's affidavit did not specifically identify the affidavit he sent as the one from Lauren Jones. At this point, however, there were no other relevant affidavits to send to Mr. Nelson.



Mr. Devan's would be a malpractice suit, not a Rule 60(b) motion. (Augmentation, pp.37-39.)

New counsel, Shane Darrington, was appointed for Mr. Devan, and a declaration in support of the Rule 60(b) motion was filed. (Augmentation, pp.40-43.) That declaration focused on the Jones affidavit. (Augmentation, pp.40-43.) It asserted that the affidavit was mailed to Mr. Nelson in April of 2015, but no amended petition supported by the affidavit was ever filed. (Augmentation, pp.41.) As such, Mr. Devan asked the district court to set aside the order dismissing his petition and allow him to amend the petition to include the evidence in the Jones affidavit. (Augmentation, p.42.)

On May 4, 2016, the district court held a hearing at which Mr. Darrington clarified that Mr. Devan was seeking relief under I.R.C.P. 60(b)(6). (5/4/16 Tr., p.4, Ls.17-24.) Relying on *Eby*, he asserted that there were unique and compelling circumstances, which justified relief. (5/4/16 Tr., p.5, L.1 – p.10, L.19.) Specifically, he argued that there was a “complete absence of meaningful representation” because, among other things, Mr. Nelson admitted to the district court, at the hearing on the motion for summary dismissal, that he could not find any meritorious issues. (5/4/16 Tr., p.13, Ls.3-16.) The State argued that there was meaningful representation and, whether it was malpractice or not, Mr. Nelson made a legal decision to not contest the motion for summary dismissal. (5/4/16 Tr., p.11, L.11 – p.12, L.9.)

The district court denied Mr. Devan's Rule 60(b) motion. (Augmentation, pp.45-50.) It noted that, as in *Eby*, “there was nothing filed by defense counsel, including any response to the State's motion for Summary Dismissal.” (Augmentation, p.48.) However, it found that Mr. Devan's case was distinguishable from *Eby* because

Mr. Devan's affidavit described "multiple contacts," which included a meeting between Mr. Devan and Mr. Nelson where the affidavit was discussed. (Augmentation, p.48.) Thus, the district court found that there was "communication regarding the potential alibi, and that counsel considered this information and determined that there was no meritorious claim." (Augmentation, p.48.) Therefore, it held there was not a complete lack of meaningful representation. (Augmentation, p.48.)

Additionally, it held that "even if there had been a lack of meaningful representation," Mr. Devan had to "show, plead, or present evidence of facts which, if established, would constitute a meritorious claim in the action." (Augmentation, p.48.) It stated that, in order to be considered a meritorious post-conviction claim, "the claim would have to raise a genuine issue of material fact such that an evidentiary hearing is warranted." (Augmentation, p.49.) It said Mr. Devan alleged his meritorious claim was "contained within the affidavit of Lauren Jones," who said he was present when the crimes Mr. Devan was convicted of were committed, but Mr. Devan was not present. (Augmentation, p.49.) The district court went on to analyze the contents of the affidavit and review the facts and witness testimony from the trial. (Augmentation, pp.49-50.) Finally, the district court said that, "[g]iven the amount and weight of the evidence, Mr. Jones's affidavit that there were two 'Evins,' one present during the night at times other than when the crimes were being committed, and the other present while the crimes were committed, was not reasonably likely to alter the decision of the jury." (Augmentation, p.50.) Therefore, the district court held that "there was no genuine issue of material fact such that an evidentiary hearing was warranted," and there was not a "meritorious claim for which Petitioner is entitled to relief." (Augmentation, p.50.)

ISSUE

Did the district court abuse its discretion when it denied Mr. Devan's I.R.C.P. 60(b) motion?

## ARGUMENT

### The District Court Abused Its Discretion When It Denied Mr. Devan's I.R.C.P. 60(b) Motion

#### A. Introduction

The district court abused its discretion when it denied Mr. Devan's I.R.C.P. 60(b) motion because there was a complete absence of meaningful representation by his post-conviction counsel, and the district court performed an impermissible credibility determination of Mr. Devan's evidence establishing a meritorious defense.

The district court performed a two-part analysis of Mr. Devan's I.R.C.P. 60(b) motion, first analyzing whether Mr. Devan had met the requirements for relief under the rule, and then analyzing whether Mr. Devan had presented evidence of facts which, if true, would constitute a meritorious defense to the action—in this case, the state's motion to dismiss Mr. Devan's original post-conviction claim. See *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 317 (Ct. App. 1994) (a party seeking relief from judgment under rule 60(b) must meet the requirements of the rule and also “show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action” (citing *Reeves v. Wisenor*, 102 Idaho 271, 272 (1981); *Hearst Corp. v. Keller*, 100 Idaho 10, 12 (1979))).

#### B. Standard Of Review

“A trial court's decision whether to grant relief pursuant to I.R.C.P. 60(b) is reviewed for abuse of discretion. The decision will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its

determination through an exercise of reason.” *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380 (2010) (citations omitted). For a district court to be found to have acted within its discretion when determining a Rule 60(b) motion, it must apply “the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases...” *Id.*

C. The District Court Abused Its Discretion When It Denied Mr. Devan’s I.R.C.P. 60(b) Motion Based On Its Conclusion That Mr. Devan Had Meaningful Representation Of Post-Conviction Counsel Even Though Counsel Did Not Respond To The State’s Motion For Summary Dismissal And Failed To Inform Mr. Devan That The State Had Filed A Motion To Dismiss His Post-Conviction Claim

The district court denied Mr. Devan’s Rule 60(b) motion, finding that he had not met the requirement of showing unique and compelling circumstances in the form of an absence of meaningful representation. (Augmentation, p.48.) The court focused on the fact that there was some communication between Mr. Devan and his post-conviction counsel, Mr. Nelson. (Augmentation, p.48.) This conclusion was an abuse of discretion because it misapplied *Eby v. State*, 148 Idaho 731 (2010). The district court found that the communication between Mr. Nelson and Mr. Devan meant that there was no complete absence of meaningful representation, as had been found in *Eby*. (Augmentation, p.48.) In fact, Mr. Nelson never filed a response to the State’s motion for summary dismissal, never filed an amended petition, and never even told Mr. Devan that a motion for summary dismissal had been filed. Mr. Devan had an affidavit in his possession that, had it been submitted with an amended petition, would almost certainly have overcome summary dismissal. But because Mr. Nelson failed at even the most basic communication—telling Mr. Devan that the State had filed a motion to dismiss his

claim—Mr. Devan was denied, by his own counsel, any opportunity to defend against that motion.

District courts may grant a Rule 60(b) motion when there are “unique and compelling circumstances” justifying relief. *Miller v. Haller*, 129 Idaho 345, 349 (1996) (citations omitted). The Court in *Eby* held that “the complete absence of meaningful representation” in a post-conviction proceeding may present such unique and compelling circumstances. *Eby*, 148 Idaho at 736-37.

The affidavit submitted by Mr. Devan details the problems he experienced with his counsel. (Augmentation, p.28.) That affidavit made it clear that not only did Mr. Nelson not file a response to the State’s motion for summary dismissal, but he never even told Mr. Devan that the motion had been filed. (Augmentation, p.28.) As a result, Mr. Devan lost the only opportunity he had to present a meritorious issue. Had Mr. Nelson filed an amended petition with the Jones affidavit—or at least told Mr. Devan that the motion had been filed, so that Mr. Devan could have tried to fire Mr. Nelson and file an amended petition himself—he could have presented a genuine issue of material fact.

In its order denying Mr. Devan’s Rule 60(b) motion, the district court focused on the fact that there was some communication between Mr. Nelson and Mr. Devan. (Augmentation, p.48.) As such, it found that this case was distinguishable from *Eby*. (Augmentation, p.48.) It said, “[T]he Court finds that there was communication between counsel and Petitioner, specifically there was communication regarding the potential alibi, and that counsel considered this information and determined that there was no meritorious claim.” (Augmentation, p.48.) Therefore, it held that “there was not a

complete lack of meaningful representation.” (Augmentation, p.48.) However, the fact that there was communication is not the issue. The issue is whether Mr. Nelson’s representation of Mr. Devan was meaningful in any way.

In *Eby*, one of the several issues on appeal was whether neglect by post-conviction counsel could provide grounds for relief under I.R.C.P. 60(b)(6) and, if so, whether the district court abused its discretion when it denied Mr. Eby’s motion. *Id.* at 736. The district court had appointed a public defender to represent Mr. Eby upon his timely filing of a pro se motion for post-conviction relief and request for court-appointed counsel. *Id.* at 733. When a conflict arose, another attorney was substituted to represent Mr. Eby. *Id.* After that attorney failed to file any documents for six months, and the district court threatened dismissal for inactivity, another attorney, Mr. Kehne, was appointed for Mr. Eby. *Id.*

Mr. Kehne represented Mr. Eby for approximately three years. *Id.* As the Idaho Supreme Court found, “[d]uring this time, Mr. Kehne filed no amendments to Eby’s pro se petition nor any response to the State’s motion for summary dismissal.” *Id.* While it is unclear from the facts whether Mr. Kehne met with Mr. Eby during that time, it is clear that Mr. Kehne did work on the case, filing four responses to the notices of dismissal and requests for retention. *Id.* As the Court noted, “[t]hese responses did indicate that Mr. Kehne had conducted a ‘review, investigation, research and analysis of post-conviction issues.’” *Id.* Ultimately, however, Mr. Kehne failed to file an amended petition on Mr. Eby’s behalf. *Id.* Under these circumstances, in which Mr. Kehne had worked on Mr. Eby’s case but had not filed an amended petition nor a response to the State’s motion for summary dismissal, and without discussing the extent of

communication between Mr. Kehne and Mr. Eby at all, the Idaho Supreme Court found that there had been a “complete absence of meaningful representation.” *Id.* at 736-37. Emphasizing the “unique status of a post-conviction proceeding,” the Court concluded that Mr. Eby’s case “may present the ‘unique and compelling circumstances’ in which I.R.C.P. 60(b)(6) relief may well be warranted.” *Id.* at 737.

In this case, the district court misapplied *Eby* by finding that communication between Mr. Nelson and Mr. Devan called for a different result than *Eby*. *Eby* is not about communication. It is about meaningful representation. Here, Mr. Nelson’s representation was not meaningful because he did nothing to advance his client’s case even though his client had given him a document that would almost certainly have prevented summary judgment. Just as in *Eby*, Mr. Nelson failed to file a response to the State’s motion, and he failed to file an amended petition. Instead, he neglected to tell his client that the State’s motion had even been filed and went to the hearing on the motion and told the district court that there were no meritorious issues. (Augmentation, p.28; 7/10/15 Tr., p.5, Ls.17-25.)

United States Supreme Court precedent also supports the conclusion that, in this scenario, Mr. Nelson’s representation was not meaningful. In *Anders v. California*, 386 U.S. 738, 742 (1967), appointed counsel on appeal wrote a letter to the court saying that he would not file a brief because he thought there was “no merit to the appeal.” The Court said, “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of active advocate in behalf of his client, as opposed to that of amicus curiae.” *Id.* at 744.



*Anders* pertained to a direct appeal, but the Court's language bears on this case, especially in light of more recent United States Supreme Court opinions. Those opinions emphasize the importance of a defendant's rights to a full and fair opportunity to bring ineffective assistance of trial counsel claims on post-conviction, as such a "collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012); see also *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Thus, much like *Eby*, these cases hold that when ineffective assistance of post-conviction counsel essentially bars a defendant's ability to raise ineffective assistance of trial counsel claims, there is an exception to the rule that defendants are typically bound by their attorney's actions.

Similar to the situation here, in *Martinez*, the petitioner's post-conviction counsel "did not raise the ineffective-assistance claim in the first collateral proceeding, and, indeed, filed a statement that, after reviewing the case, she found no meritorious claims helpful to petitioner." 132 S. Ct. at 1313. As such, the Court said, "To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in [*Coleman v. Thompson*, 501 U.S. 772 (1991)] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id.* The court noted that where a post-conviction proceeding is the first opportunity to raise a claim of ineffective assistance at trial, the proceeding is "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317.

*Martinez* came out of Arizona where ineffective assistance of counsel claims cannot be made on direct appeal but must be raised in a post-conviction proceeding.

*Id.* at 131. However, the following year, in *Trevino*, the Court held that the same rule applies to states, such as Idaho, that do not require defendants to raise such a claim on post-conviction but make it “virtually impossible” for appellate counsel to do so because the trial record often does not contain information which would support the claim. 133 S. Ct. at 1918 (2013) (quoting *Robinson v. State*, 16 S.W.3d 808, 810-811 (2000)). Idaho has a similar court structure. See *Veenstra v. Smith*, 2014 WL 1270626, at \*11 (D. Idaho Mar. 26, 2014).

Here, Mr. Nelson’s inaction, and his failure to communicate with Mr. Devan about the State’s filing the motion for summary dismissal was actually worse for Mr. Devan than having no counsel at all. The nature of Mr. Devan’s I.R.C.P. 60(b) motion, and his affidavits, show that he had educated himself on the post-conviction process, knew that an amended petition would be necessary, and was well aware that the State would file a motion for summary dismissal based on his initial petition.<sup>6</sup> (Augmentation, pp.1-6, 27-31.) Indeed, these documents indicate that, had he ever been informed as to the status of his case, he would have been able to file an amended petition himself. But Mr. Devan never had that opportunity because Mr. Nelson never told him about the impending summary dismissal. Thus, there may have been communication, but it was meaningless. The crucial information—that the State had filed a motion, and there was an upcoming hearing—was never communicated by Mr. Nelson. This is a unique and compelling circumstance because, as a result of Mr. Nelson’s representation, Mr. Devan lost his only opportunity to raise challenges to his conviction.

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<sup>6</sup> He acknowledged that he had to “set forth his allegations” in his post-conviction petition “in a cursory fashion due to delay in acquiring new evidence in an admissible form.” (Augmentation, p.3.)

Therefore, this case is indistinguishable from *Eby* in all relevant aspects, and the only communication that would have actually helped Mr. Devan never occurred. The district court stated that “[t]he fact that counsel disagreed with Petitioner about the validity of various arguments or the value of the evidence and declined to proceed with the claims does not mean there was no meaningful representation.” (Augmentation, p.48.) That is simply not true.

Mr. Nelson’s inaction sabotaged Mr. Devan’s only opportunity to overcome summary dismissal. Had he been properly informed, Mr. Devan could have elected to proceed pro se. *Martinez* and *Trevino* make it clear that “[a] prisoner’s inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel.” *Martinez*, 132 S. Ct. at 1317. Here, the district court abused its discretion because it misapplied *Eby* and held that communication by post-conviction counsel, no matter how meaningless that communication was, established that there was meaningful representation. Nothing in *Eby* suggests that this is the standard.

D. The District Court Abused Its Discretion When It Held That The Jones Affidavit Did Not Raise A Genuine Issue Of Material Fact

As the district court noted, the standard to succeed on a 60(b) motion is that the Petitioner must “show, plead, or present evidence of facts, which, if established, would constitute a meritorious claim in the action.” *Ponderosa Paint*, 125 Idaho at 317; Augmentation, p.48. The court went on to say, “For a claim to be considered meritorious in the context of a post-conviction action sufficient to warrant setting aside the judgment, the claim would have to raise a genuine issue of material fact such that an evidentiary hearing is warranted.” (Augmentation, p.49.) Mr. Devan did show and

present evidence justifying an evidentiary hearing. The Jones affidavit shows the testimony of a witness who stated Mr. Devan was not present at the burglary. The affidavit is from a witness present at the scene who stated that Mr. Devan was not present at the scene. The allegations in the Jones affidavit, if found true by a fact-finder at an evidentiary hearing, would support Mr. Devan's initial claims that his trial counsel failed to secure witnesses and investigate a defense. Therefore, the affidavit raised a genuine issue of material fact as to the motion to dismiss those claims.

The district court abused its discretion when, instead of relying on the presence of the affidavit, it analyzed the *credibility* of the statements made in the affidavit. (Augmentation, pp.49-50.) That should have been the role of a fact-finder at an evidentiary hearing, not the district court evaluating the Rule 60(b) motion.

Here, the district court did not simply determine whether, if true, the affidavit raised issues material to the motion to dismiss, it actually analyzed whether the affidavit was true and whether it would suffice to exonerate Mr. Devan on the burglary charge. (Augmentation, pp.49-50.) That was well beyond the scope of the question before the district court and a misapplication of the law regarding Rule 60(b) analyses. See *Ponderosa Paint*, 125 Idaho at 317. The question before the court was only this: Did Mr. Devan show evidence of facts that, if established, would raise an issue of material fact such that his post-conviction claim of ineffective assistance of trial counsel should not have been summarily dismissed? The Jones affidavit did just that.

CONCLUSION

Mr. Devan respectfully requests that this Court vacate the district court's order denying his Rule 60(b) motion and remand the case for further proceedings.

DATED this 11<sup>th</sup> day of October, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11<sup>th</sup> day of October, 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:

EVIN CHRISTOPHER DEVAN  
INMATE #103006  
IMSI  
PO BOX 51  
BOISE ID 83707

CHRIS S NYE  
DISTRICT COURT JUDGE  
E-MAILED BREIF

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

\_\_\_\_\_/s/  
EVAN A. SMITH  
Administrative Assistant

RPA/eas