10-28-2016

Eddington v. State Appellant's Brief Dckt. 44353

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

RONALD EDDINGTON, Petitioner/Appellant, -vs- STATE OF IDAHO, Respondent.	)	**Case No. CV PC 15 16861**

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County

Hon. Lynn Norton, District Judge

ELLEN N. SMITH
SMITH HORRAS, P.A.
5561 N. GLENWOOD ST.
BOISE, ID 83714

ATTORNEY FOR APPELLANT

LAWRENCE WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY FOR RESPONDENT

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

RONALD EDDINGTON, Petitioner/Appellant, -vs- STATE OF IDAHO, Respondent.	)	**Case No. CV PC 15 16861**

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County

---

Hon. Lynn Norton, District Judge

ELLEN N. SMITH
SMITH HORRAS, P.A.
5561 N. GLENWOOD ST.
BOISE, ID 83714

ATTORNEY FOR APPELLANT

LAWRENCE WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY FOR RESPONDENT

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS 2

II. TABLE OF AUTHORITIES 3-7

III. STATEMENT OF THE CASE 7

IV. ISSUES ON APPEAL 10

V. STANDARD OF REVIEW 10

VI. ARGUMENT 13

A. The District Court erred in granting summary dismissal of Mr. Eddington's claims of Ineffective Assistance of Counsel Cited in his Petition for Post-Conviction Relief. 13

B. The District Court Should Have Granted Mr. Eddington the Relief He Was Seeking Pursuant to a Summary Disposition Under I.C. § 19-4906(c). 48

C. The District Court abused its discretion in failing to grant an evidentiary hearing on the claims cited in Mr. Eddington's Petition for Post-Conviction Relief. 49

VII. CONCLUSION 49

II. TABLE OF AUTHORITIES

Statutes

Idaho Code, §19-4907	.....	10
Idaho Code, §19-4906(c)	.....	11
Idaho Code §12-121	.....	50

Rules

I.C.R. 57(b)	.....	10
I.R.C.P. 56	.....	10
IRCP 1.7	.....	15
I.A.R. 41	.....	50

Cases

Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)	.....	10
Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)	.....	10, 11, 12
Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004)	.....	10, 29
State v. Payne, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008)	.....	11
Ridgley v. State, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010).	.....	11
Rhoades v. State, 148 Idaho 247, 220 P.3d 1066 (2009)	.....	11
Ricca v. State, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993)	.....	11
Small v. State, 132 Idaho 327, 330, 971 P.2d 1151, 1154 (Ct.App.1998)	.....	11

Nevarez v. State, 145 Idaho 878, 881, 187 P.3d 1253, 1256 (Ct. App. 2008) 12

Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct. App. 1982) 12, 48

Blickenstaff v. Clegg, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004) 12

Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) 12

Sheahan v. State, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct.App. 2008) 12

Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010) 12, 49

DeRushé v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) 49

Cooper v. State, 96 Idaho 542, 531 P.2d 1187 (1975) 12

Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994) 12

Hoffman v. State, 277 P.3d 1050, 1058 (Ct. App. 2012) 13

Strickland v. Washington, 466 U.S. 668, 669 (1984) 13, 14, 16, 23, 28, 29

Barcella v. State, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009) 13

Gonzales v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011) 13

Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir.1985) (per curiam), cert. denied, 475 U.S. 1050, 106 S.Ct. 1273, 89 L.Ed.2d 581 (1986) 14

Martin v. Rose,744 F.2d 1245, 1249 (6th Cir.1984) 14

Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982) 14

Sparks v. State, 92 P.3d 542, 548, 140 Idaho 292, 298 (Idaho App. 2004) 15, 17, 22

Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) 16, 23

Chippewa v. State, 156 Idaho 915, 921, 332 P.3d 827, 833 (2014) 16

Mickens v. Taylor, 535 U.S. 162, 171 (2002) 22

Daniels v. United States, 54 F.3d 290, 295 (7th Cir.1995) 16

Murray v. State, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct.App. 1992) 22

State v. Pentico, 265 P.3d 519, 151 Idaho 906 (Idaho App. 2011) 20

State v. Hayes, 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct.App.2003) 22

State v. Mitchell, 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct.App.1993) 22

State v. Skunkcap, 157 Idaho 221, 237, 335 P.3d 561, 577 (2014) 22

Wood v. Georgia, 450 U.S. 261, 272-73 [101 S.Ct. 1097, 1103-04, 67 L.Ed.2d 220, 230-31] [(1981)] 22

Powell v. Alabama, 287 U.S. 45, 66-68, 53 S.Ct. 55, 63-64, 77 L.Ed. 158, 169-170 (1932) 22

State v. Lovelace, 140 Idaho 53, 60, 90 P.3d 278, 285 (2003) 23

Holloway v.Arkansas, 435 U.S. 475, 488, 98 S.Ct. 1173, 1179, 55 L.Ed.2d 426, ... 16, 23

437 (1978)

United States v. Sutton, 794 F.2d 1415, 1419 (9th Cir.1986) 23

State v. Gardner, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct.App.1994) 24

State v. Detweiler, 115 Idaho 443, 446, 767 P.2d 286, 289 (Ct.App.1989); 24

Brooks v. State, 108 Idaho 855, 857, 702 P.2d 893, 895 (Ct.App.1985) 24

State v. Huffman, 137 Idaho 866, 55 P.3d 879 (Ct. App. 2002). 24

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 1469 (1970) 24

Mendiola v. State, CV 2004 8005 24

Hall v. U.S., 371 F.3d 969, 974 (7th Cir. 2004) 24

Julian v. Bartley, 495 F.3d 487, 495 (7th Cir. 2007) 27

Paradis v. State, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986) 48

King v. State, 114 Idaho 442, 446, 757 P.2d 705, 709 (Ct.App.1988) 48

III. STATEMENT OF THE CASE

A. On or about August 12, 2013, Mr. Eddington was charged as follows in Ada County Case No. CR-FE-2013-10953:

COUNT 1: 18-4503 Kidnapping-Second Degree
COUNT 2: 18-1401 Burglary
COUNT 3: 18-905 (a) Assault-Aggravated With a Deadly Weapon
COUNT 4: 19-2520 Enhancement—Use of Deadly Weapon in Commission of a Felony.

B. The Court initially appointed the Ada County Public Defender's Office to represent Mr. Eddington. R. 9.

C. On or about August 20, 2013, Mr. Chad Gulstrom, a private attorney, substituted in as Mr. Eddington's counsel. Id.

D. On or about September 19, 2013, Mr. Eddington entered not guilty pleas to all the charges. Id.

E. On or about October 16, 2013, Mr. Michael Bartlett (hereinafter "Trial Counsel" or "Mr. Bartlett") substituted in as counsel for Mr. Eddington. Id.

F. On or about October 21, 2013, a felony criminal complaint was filed against Ms. Diana Eddington (hereinafter "Diana"), Mr. Eddington's mother, alleging she had committed the crime of witness intimidation in violation of I.C. 18-2604(3). Id.

J. Mr. Bartlett then began to represent Diana, as well as Mr. Eddington, and entered an appearance in Diana's case on November 12, 2013. R. 10.

M. On or about December 9, 2013, the Ada County Deputy Prosecutor, Ms. Whitney Faulkner, emailed Mr. Bartlett with a proposed plea offer to resolve Mr. Eddington's case. Id.

Q. On December 17, 2013, Mr. Bartlett accepted the plea on Mr. Eddington's behalf. Id.

R. Shortly thereafter, on or about December 20, 2013, Mr. Dinger, an Ada County Deputy Prosecutor, agreed to dismiss all charges against Diana. R. 15.

S. Notably, however, Mr. Dinger refused to dismiss Diana's case until such time as Mr. Eddington plead guilty in this underlying criminal matter. Id.

U. On December 20, 2013 Mr. Dinger sent an email referencing the scheduling of the continued preliminary hearing regarding Diana's case. In this email, Mr. Dinger states "We had contemplated the 17th—**the day after her son pleads guilty in district court**." Id.; R.136.

V. On January 16, 2014, a Change of Plea Hearing was held in Mr. Eddington's case. R. 10.

W. At Diana's January 17th, 2013 continued preliminary hearing (the day after Mr. Eddington's change of plea hearing), Ms. Faulkner had taken over the prosecution of Diana's case, replacing Mr. Dinger. R. 15.

X. At that time, Ms. Faulkner changed "the deal" to dismiss Diana's charges after Mr. Eddington plead guilty. R. 15-16.

Y. Instead, contrary to the agreement Ms. Faulkner's colleague, Mr. Dinger, had made with Mr. Bartlett, Ms. Faulkner then insisted that Diana's dismissal would only go into effect after Mr. Eddington was actually sentenced. R. 16.

AA. On March 13, 2014, Mr. Eddington was sentenced to the custody of the Idaho Department of Correction for ten (10) years fixed, followed by twelve (12) years indeterminate, for Kidnapping in the Second-Degree and five (5) years fixed for Aggravated Assault to run concurrently. R. 11.

BB. The dismissal of Diana's felony charge finally occurred on March 18th, 2014, the day after the filing of Mr. Eddington's Judgment and Commitment pleading. R. 16.

CC. On April 22, 2014, Mr. Greg Silvey filed a Notice of Appeal to the Idaho Supreme Court on behalf of Mr. Eddington.

DD. On July 11, 2014, Mr. Silvey also filed an Idaho Criminal Rule 35 Motion on behalf of Mr. Eddington.

EE. On August 20, 2014, the Court denied Mr. Eddington's Rule 35 Motion. See Exhibit B.

FF. On or about October 6, 2014, Mr. Eddington's appeal to the Idaho Supreme Court was dismissed.

GG. On September 30, 2015, Mr. Eddington filed his Verified Petition for Post-Conviction Relief.

HH. On November 24, 2015, Mr. Eddington filed his Motion to Disqualify State's Handling Attorney (Ms. Faulkner) on the basis she would be a material witness in the case.

II. On December 7, 2015, the State filed its Answer to Mr. Eddington's Verified Petition for Post-Conviction Relief.

JJ. On December 10, 2015, the State filed its Objection in Opposition of Petitioner's Motion for Disqualification of the State's Handling Attorney.

KK. On January 8, 2016, the State filed its Motion for Summary Dismissal of the Verified Petition for Post-Conviction Relief.

LL. Petitioner filed its objection and Response to the State's Motion for Summary Dismissal on January 20, 2016.

MM. On June 22, 2016, the Court filed its Memorandum Decision and Order Granting Summary Dismissal as well as the Final Judgment in this matter.

NN. On July 25, 2016, Mr. Eddington filed his Notice of Appeal.

IV. ISSUES ON APPEAL

A. The District Court erred in granting summary dismissal of Mr. Eddington's claims of Ineffective Assistance of Counsel Cited in his Petition for Post-Conviction Relief.

B. The District Court Should Have Granted Mr. Eddington the Relief He Was Seeking Pursuant to a Summary Disposition Under I.C. § 19-4906(c).

C. The District Court abused its discretion in failing to grant an evidentiary hearing on the claims cited in Mr. Eddington's Petition for Post-Conviction Relief.

V. STANDARD OF REVIEW

Post-conviction proceedings are special proceedings and civil in nature. I.C.R. 57(b); Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002).

In addition, an application for post-conviction relief differs from a complaint in an ordinary civil action. Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). The application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). State v. Payne, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); Goodwin, 138 Idaho at 271, 61 P.3d at 628. The application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records, or other evidence supporting its allegations must be attached or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903.

On appeal from an order of summary dismissal, the Supreme Court applies the same standard utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. Ridgley v. State, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). On review of dismissal of a post-conviction relief application without an evidentiary hearing, the Court determines whether a genuine issue of material fact

exists based on the pleadings, depositions, and admissions, together with any affidavits on file. Rhoades v. State, 148 Idaho 247, 220 P.3d 1066 (2009); Ricca v. State, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

Notably, summary dismissal of a petition for post-conviction relief pursuant to I.C. §19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Id.; See also Small v. State, 132 Idaho 327, 330, 971 P.2d 1151, 1154 (Ct.App.1998). A dismissal of a post-conviction relief application without an evidentiary hearing is only proper when there is no genuine issue of material fact based on the pleadings, depositions and admissions together with any affidavits on file. Id. at 331, 971 P.2d at 1155 (emphasis added).

In other words, to withstand a motion for summary dismissal, an applicant for post-conviction relief must present his supporting facts in the form of admissible and competent evidence. Nevarez v. State, 145 Idaho 878, 881, 187 P.3d 1253, 1256 (Ct. App. 2008). That is, an application must be supported by written statements from witnesses who are able to give testimony themselves as to facts within their knowledge, or must be based upon otherwise verifiable information. Id.; Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct. App. 1982). A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. Blickenstaff v. Clegg, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004); Nevarez, 145 Idaho at 881, 187 P.3d at 1256.

However, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may **not** be summarily dismissed. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Sheahan v. State, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct.App. 2008). Consequently, if a

genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. Goodwin, 138 Idaho at 272, 61 P.3d at 629.

Just as in civil summary judgment motions pursuant to I.R.C.P. 56, all inferences must be liberally construed in favor of the nonmoving party. Id. Claims may only be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); DeRushé v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Notably, when a trial court considers a motion for summary dismissal, uncontroverted allegations of fact contained in a verified application for post-conviction relief are deemed to be true. Cooper v. State, 96 Idaho 542, 531 P.2d 1187 (1975); See also Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Moreover, summary "dismissal" is not the only option provided pursuant to the UPCPA. The Court has the ability to grant a defendant summary disposition in his favor, as well. In particular, pursuant to I.C. §19-4906(c)(emphasis added):

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Accordingly, Mr. Eddington respectfully requests that the District Court's dismissal of his UPCPA Petition be overturned and he be granted the relief he requested in his Petition for Post-Conviction Relief. R. 55.

VI. ARGUMENT

A. The District Court erred in granting summary dismissal of Mr. Eddington's claims of Ineffective Assistance of Counsel Cited in his Petition for Post-Conviction Relief.

Mr. Eddington filed his Verified Motion for Post-Conviction Relief on September 30, 2015 (hereinafter "PCRM"). R. 6-219. The PCRM was sworn document consisting of fifty (50) pages of testimony along with attached exhibits in excess of one hundred and fifty (150) pages. R. 6 –219. Some of the exhibits were affidavits also containing sworn testimony. See R. 222-228; R. 153-158; R. 159; R. 160-161; R. 162.

In this matter, Mr. Bartlett's action and/or inaction constituted ineffective assistance under the Strickland Test. Hoffman v. State, 277 P.3d 1050, 1058 (Ct. App. 2012). In Strickland, the United States Supreme Court stated that the Sixth Amendment accorded criminal defendants a right to counsel rendering "reasonably effective assistance given the totality of the circumstances." Strickland v. Washington, 466 U.S. 668, 669 (1984).

The Strickland Test requires that a post-conviction relief case for ineffective assistance of counsel to satisfy two prongs: (1) Mr. Eddington must show that the attorney's performance was deficient, and (2) the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687–88 (1984). A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. Barcella v. State, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009).

To establish a deficiency, Mr. Eddington has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. Gonzales v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011). To establish prejudice, Mr. Eddington must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different. Id.

The strategic decisions of trial counsel will be objectively evaluated if such decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings. Id. Importantly, "certain defense strategies or decisions may be `so ill chosen' as to render counsel's overall representation constitutionally defective." Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir.1985) (per curiam), cert. denied, 475 U.S. 1050, 106 S.Ct. 1273, 89 L.Ed.2d 581 (1986) (citations omitted). See also Martin v. Rose,744 F.2d 1245, 1249 (6th Cir.1984); Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982).

In the present case, summary dismissal of Mr. Eddinton's PCRM was improper because, if true, the sworn allegations and admissible evidence presented in Mr. Eddington's PCRM would undoubtedly entitle Mr. Eddington to the relief he has requested. In his PCRM, Mr. Eddington listed eight (8) different ways, collectively and/or individually, that caused him to be deprived of ineffective assistance of counsel. Mr. Eddington supported each of these allegations by detailed, admissible evidence and extensive sworn testimony submitted with the PCRM by Mr. Eddington and his witnesses. See R. 6- R. 219.

1. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because Mr. Bartlett Entered into an Actual Conflict of Interest by Representing Diana Eddington ("Diana"), Mr. Eddington's Mother, in Related Criminal Actions Without Obtaining Written and/or Informed Consent.

In its Memorandum Decsision and Order Granting Summary Dismissal (hereinafter "Dismissal"), the Trial Court stated that there are no "questions of fact as to whether there was any conflict caused by Mr. Bartlett representing Petitioner and Petitioner's mother, or whether the dismissal of charges against Petitioner's mother was conditioned on Petitioner pleading guilty to the charges against him." R. 340-341. This factual finding is clearly erroneous in light of the sworn testimony and evidence present in Mr. Eddington's PCRM. R. 9-11; 14-19; 21-25. As noted in the Court's Dismissal, the State of Idaho provided no evidence in support of its

position. R. 331. Rather, the State merely presented biased and unsupported argument. See Record in its entirety.

Mr. Eddington presented clear evidence that Mr. Bartlett had an actual and concurrent conflict of interest in representing both Mr. Eddington and his mother, Diana Eddington in substantially related criminal cases. R. 222-228; R. 13-R. 22. Neither Mr. Eddington nor Diana Eddington waived their 6th Amendment right to have right to conflict-free counsel. Id.

Although an ethical violation does not, in and of itself, automatically result in a finding of "ineffective assistance of counsel," it is instructive to review the Idaho Rules of Professional Conduct to understand the definition of a "conflict of interest" in the context of legal representation. The Idaho Rules of Professional Conduct set forth the definition of a conflict of interest. Pursuant to IRCP 1.7 (emphasis added):

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; **or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.**

Pursuant to Idaho law, if a defendant shows that his counsel actively represented conflicting interests, there is a high probability of prejudice arising from multiple concurrent representation. Sparks v. State, 92 P.3d 542, 548, 140 Idaho 292, 298 (Idaho App. 2004). In a nutshell, the Idaho Court of Appeals has held that the second prong of the Strickland test demonstrating prejudice is **presumed** in such conflict of interest cases. Id. To establish a violation of the Sixth Amendment of the United States Constitution, a defendant must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

To demonstrate an "actual conflict," a defendant must first show that his counsel actively represented conflicting interests and second, that the conflict adversely affected his counsel's performance. Cuyler, 446 U.S. at 350; Chippewa v. State, 156 Idaho 915, 921, 332 P.3d 827, 833 (2014). See Mickens v. Taylor, 535 U.S. 162, 171 (2002) (Actual conflict is defined by its effect on counsel, not by whether there is a "mere theoretical division of loyalties").

To establish an adverse effect, the petition must: (1) identify a plausible alternative defense strategy or tactic; (2) show that the alternative strategy or tactic was objectively reasonable; and (3) show that defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict. Chippewa, 156 Idaho at 919-22, 332 P.3d at 831-34. Although not binding authority, it is certainly instructive that in the 7th Circuit, "a defendant can establish ineffective assistance of counsel by showing that his attorney pressured him to plead guilty because of the attorney's conflict of interest." Daniels v. United States, 54 F.3d 290, 295 (7th Cir.1995).

Notably, the United States Supreme Court has stated:

> [I]n a case of joint representation of conflicting interests the evil-it bears repeating-is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to indentify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." Holloway v. Arkansas, supra, 435 U.S., at 490 -491.

For the same reasons as cited above, it would typically be futile to attempt to determine precisely how counsel's conduct would have been different had he not been under conflicting

duties. For that reason, a petitioner need only demonstrate that a conflict of interest actually affected the adequacy of his lawyer's performance. Sparks v. State, 140 Idaho at 296.

Mr. Bartlett began to represent Mr. Eddington on or about October 16, 2013. R. 9. Notably, Mr. Eddington's parents, Ronald and Diana Eddington were paying for Mr. Bartlett's attorney's fees for Mr. Eddington and signed the retainer agreement as "guarantors." Id.

On or about October 21, 2013, just five (5) days later, a felony criminal complaint was filed against Ms. Diana Eddington (hereinafter "Diana"), Mr. Eddington's mother, alleging she had committed the crime of witness intimidation in violation of I.C. 18-2604(3). Id. Diana's felony charge was the result of Diana sending an email on or about September 18, 2013 to Diana's ex-daughter-in-law, Ms. Carrie Eddington (hereinafter "Carrie"), the "victim" in Mr. Eddington's pending case. Id. Diana's email to Carrie discussed Diana's concern for Mr. Eddington's current well-being, his mental health, and the future of their family as it related to the pending criminal charges against Mr. Eddington. Id.

Diana was booked into the Ada County Jail as a result of this charge on November 1, 2013. R. 10. Mr. Bartlett then offered to represent Diana and informed her that the charges against her were unfounded. R. 10; R. 222-228. Mr. Bartlett stated he would do "whatever he could" to get the charges against Diana dismissed. Id. Mr. Bartlett then began to represent Diana at that time, as well as Mr. Eddington, and entered an appearance in Diana's case on November 12, 2013. R.10. Mr. Bartlett failed to obtain informed consent (either verbally or in writing) from either Mr. Eddington and/or his mother, despite the clear conflict of interest as a result of Mr. Bartlett representing both parties in concurrent, related criminal cases. R. 14-15; R. 224; R. 139.

In fact, Mr. Bartlett failed to even discuss the conflict of interest at all with either Mr. Eddington or Diana. R. 9; R. 222-228. Mr. Bartlett did, however, obtain written consent from

Mr. Eddington's parents to access the retainer they had paid for Mr. Eddington's defense in order to pay for Diana's representation as well. Id.; R. 14-15; R. 224; R. 139.

On or about December 20, 2013, less than two (2) months after she was charged, the State of Idaho offered to entirely dismiss Diana's felony charge. However, the dismissal was not offered free and indepenent from Mr. Eddington's case. Rather, the evidence demonstrates that the State would only dismiss her charge if, and only if, Mr. Eddington would plead guilty and be sentenced in his related case. R. 14-19; R. 222-228; R. 136. This "package deal" is very clear evidence that Mr. Bartlett was actively representing actual conflicting interests without a waiver.

It is extremely notable that neither Mr. Bartlett nor the State of Idaho presented any evidence whatsoever denying or refuting the allegations in Mr. Eddington's Petition. If Mr. Eddington's and his witnesses' sworn statements were not true, why did the State fail to provide affidavits or any other admissible evidence to the contrary? Nevertheless, the State provided no evidence denying Mr. Eddington's claims—there was no affidavit provided by Mr. Bartlett, no affidavit provided by either prosecutors on the related criminal cases or anyone else.

Mr. Bartlett prioritized Diana's case over Mr. Eddington's case as demonstrated from the sworn evidence and testimony set forth in Mr. Eddington's PCRM. R. 15-19; R. 224-228. Mr. Bartlett advised Diana that she could not testify on Mr. Eddington's behalf while the charge against her was pending because it could affect her case. Id. Mr. Bartlett further refused to submit Diana's letter of support for Mr. Eddington to the Court because he stated it could affect Diana's pending charge. R. 16; R. 137; R. 225-226.

The State of Idaho refused to dismiss Diana's charge until AFTER Mr. Eddington was sentenced. R. 16-19. The conflict of interest in this matter put Mr. Bartlett in the difficult position of choosing one client over another—and he chose Diana, rather than Mr. Eddington.

Id.; R. 225-226. The dismissal of Diana's charge finally occurred on March 18th, 2014, the day after the filing of Mr. Eddington's Judgment and Commitment pleading. Id.

Both the State of Idaho and Mr. Bartlett was using the felony charge against Diana as leverage during the plea negotiations and sentencing in Mr. Eddington's underlying criminal matter. Mr. Bartlett knew the plea offer for Mr. Eddington was very bad indeed and even admitted to the prosecutor that he was "a pushover" for accepting such a plea on behalf of his client. R. 312.

Further, Mr. Bartlett informed Mr. Eddington during one of his visits that "your mom's charges will be dropped as soon as you plead out." R. 17. He also implied that the fate of Diana's case was up to him. Id. Neither the State nor Mr. Bartlett provided any evidence denying this fact.

This "package" plea deal should have immediately alerted Mr. Bartlett to his ethical duties and an obvious conflict of interest. However, Mr. Bartlett did nothing to inform either of his clients that there was a conflict of interest in representing both of them or, more importantly, that Mr. Eddington's defense would have to suffer because Mr. Bartlett would not let Diana make any statements to the Court, written or otherwise, to support her son. R. 16-18; R. 222-228; R. 137; Mr. Bartlett demonstrated his divided loyalties between Diana and Mr. Eddington by permitting the prosecution to use the threat of pursuing a felony charge against Diana to impose improper pressure on Mr. Eddington to plead guilty. Id.

Being pressured by Mr. Bartlett, Mr. Eddington felt obligated, out of concern for his elderly, diabetic mother, to accept whatever plea deal the prosecution offered in order to protect Diana. Mr. Bartlett's divided loyalties and conflict of interest interfered with his putting forth a defense for Mr. Eddington at his sentencing in an effort to avoid jeopardizing the dismissal of

Diana's case. R. 25-27.

A further instance of Mr. Bartlett's divided loyalties occurred when Mr. Bartlett refused to submit Diana's letter of support for her son to the Court, despite this letter having important information about Mr. Eddington's life history. R. 16; R. 224-227. Mr. Bartlett chose to remove this letter from the Court's consideration out of concern that Diana's statements could potentially be used against her or jeopardize the dismissal of her case. Id. Yet, Mr. Bartlett chose to ignore the prejudicial effect created by failing to have Mr. Eddington's own mother provide supportive information to the Court. Id. Mr. Bartlett's actions in this regard clearly adversely affected his representation of Mr. Eddington.

Diana would have testified regarding Mr. Eddington's close relationships with his children, the many life challenges Mr. Eddington was able to overcome, and his overall good character. R. 20; R. 222-228. She could have further discussed Mr. Eddington's career of helping people and never being in trouble with the law. Mr. Eddington had NO criminal history. Diana would have been an extremely strong advocate for Mr. Eddington at his sentencing and would have done so if not for Mr. Bartlett's prohibition. Id.

Mr. Bartlett strongly pushed Mr. Eddington to take the very first plea offer made by Ms. Faulkner, despite this offer being highly unfavorable and requiring Mr. Eddington to plead guilty to the most serious of his charges with no sentencing recommendations. R. 23-25.

Mr. Bartlett's lack of performance in cross-examining witnesses and failure to correct inaccurate testimony was just one more way Mr. Barlett protected his agreement with the prosecution regarding the dismissal of Diana's case. During the course of the sentencing hearing, Mr. Bartlett objected a total of seven (7) times. Of those objections, four (4) applied directly to the prosecution's mention of Diana Eddington's case. R. 32-44. The other objections were to minor issues, not relevant to the case (e.g., issues such as whether Mr. Eddington could move to MN to work as a nurse). R. 43. No doubt, an

"actual conflict of interest" occurs when a Trial Counsel sacrifices one client's best interests to give another client their best case scenario—dismissal of a felony criminal case.

Mr. Bartlett had an actual conflict of interest representing both Mr. Eddington and Diana in their related criminal cases because Mr. Bartlett's representation of Diana materially limited his duties to Mr. Eddington. Specifically, Mr. Bartlett refused to permit Diana present testimony or evidence at Mr. Eddington's sentencing hearing. This is undisputed. Mr. Bartlett refused to permit Diana, Mr. Eddington's own mother, to even provide a letter to the sentencing judge to plead for mercy for her son. Again, this is undisputed.

Accordingly, if all Mr. Eddington's allegations supported by his sworn testimony and evidence presented in his PCRM were true, Mr. Eddington would be entitled to relief. Therefore, the Trial Court erred in dismissing Mr. Eddington's PCRM.

2. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because the Trial Court failed to inquire into Mr. Bartlett's Conflict of Interest After It Knew or Reasonably Should Have Known Mr. Bartlett had a Conflict Representing Both Mr. Eddington and Diana in Related Criminal Cases.

The Trial Court summarily dismissed this claim without much analysis. Rather, the Trial Court simply stated it should have been brought on direct appeal of this matter and was now waived. R. 336-337. However, pursuant to the Uniform Post-Conviction Procedure Act (in pertinent part):

> Any person who has been convicted of, or sentenced for, a crime and who claims that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state . . . may institute, without paying a filing fee, a proceeding under this act to secure relief. Idaho Code §19-4901(a)(1).

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. Murray v. State, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30

(Ct.App. 1992). The Idaho Court of Appeals in State v. Pentico stated: "Ordinarily we do not address claims of ineffective assistance of counsel on direct appeal because the record is rarely adequate for review of such claims." State v. Pentico, 265 P.3d 519, 151 Idaho 906 (Idaho App. 2011) citing Sparks v. State, 140 Idaho 292, 296, 92 P.3d 542, 546 (Ct.App.2004); State v. Hayes, 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct.App.2003). They are more appropriately presented through post-conviction relief proceedings where an evidentiary record can be developed. State v. Mitchell, 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct.App.1993). An affirmative duty of inquiry arises when the court "knows or reasonably should know that a particular conflict may exist." State v. Skunkcap, 157 Idaho 221, 237, 335 P.3d 561, 577 (2014).

As stated in Mr. Eddington's Petition and supported by factual evidence therein, both the Idaho Constitution and the United States Constitution specifically require that a defendant be provided with effective assistance of counsel. To that end, every defendant specifically has the right to be represented by conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 272-73 [101 S.Ct. 1097, 1103-04, 67 L.Ed.2d 220, 230-31] [(1981)]. In fact, the right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45, 66-68, 53 S.Ct. 55, 63-64, 77 L.Ed. 158, 169-170 (1932). This right has been accorded not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Mickens v. Taylor, 535 U.S. 162, 166, 122 S.Ct. 1237, 1240, 152 L.Ed.2d 291, 300 (2002). It follows from this that assistance, which is ineffective in preserving fairness, does not meet the constitutional mandate. See Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984).

In order to ensure that a defendant receives conflict-free counsel, a trial court has an affirmative duty to inquire into a potential conflict whenever it "knows or reasonably should know

that a particular conflict may exist." State v. Lovelace, 140 Idaho 53, 60, 90 P.3d 278, 285 (2003); See also State v. Severson, 147 Idaho at 703; State v. Lovelace, 140 Idaho 53, 60, 90 P.3d 278, 285 (2003); see also Cuyler v. Sullivan, 446 U.S. 335, 347, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333, 345-46 (1980). "A trial court's failure to conduct an inquiry, under certain circumstances, will serve as a basis for reversing a defendant's conviction." State v. Severson, 147 Idaho at 703; Holloway v.Arkansas, 435 U.S. 475, 488, 98 S.Ct. 1173, 1179, 55 L.Ed.2d 426, 437 (1978); Cuyler, 446 U.S. at 346-47, 100 S.Ct. at 1717-18, 64 L.Ed.2d at 345.

Neverthelss, when a trial court fails to make a proper inquiry, but the defendant did not object to the conflict, the defendant's conviction will only be reversed if he can prove that an actual conflict of interest adversely affected his attorney's performance. State v. Severson, 147 Idaho at 703; Cuyler, 446 U.S. at 348, 100 S.Ct. at 1718, 64 L.Ed.2d at 346; see also United States v. Sutton, 794 F.2d 1415, 1419 (9th Cir.1986). The defendant need not, however, show prejudice in order to obtain relief. State v. Severson, 147 Idaho at 703; Cuyler, 446 U.S. at 349-50, 100 S.Ct. at 1719, 64 L.Ed.2d at 347.

The evidence supporting this claim is contained within the Court's record in Mr. Eddington's underlying criminal case, as well as transcripts for hearings in the matter (specified in detail in Mr. Eddington's Petition on pages 14-17, along with the Court's file and transcripts in the underlying criminal matter). R. 20-22.

Again, the State presented no evidence whatseover disputing Mr. Eddington's claim, but made the unsupported and incorrect conclusory statement that the trial Court did not actually have the duty to inquire because "there was no conflict." R. 276. This is clearly an erroneous conclusion. As described in full detail above, there can be no doubt that Mr. Bartlett had a

significant and predjudicial conflict of interest in representing both Mr. Eddington and Diana concurrently in substantially related criminal cases.

3. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because Mr. Bartlett Imposed Improper Pressure and Failed to Fully Advise Mr. Eddington of the Potential Direct Consequences of his Plea Deal.

In order for a guilty plea to be in compliance with constitutional due process standards, it must be entered voluntarily, knowingly, and intelligently. State v. Gardner, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct.App.1994); State v. Detweiler, 115 Idaho 443, 446, 767 P.2d 286, 289 (Ct.App.1989); Brooks v. State, 108 Idaho 855, 857, 702 P.2d 893, 895 (Ct.App.1985). Compliance with these standards turns upon whether: (1) the plea was voluntary in the sense that the defendant understood the nature of the charges and was not coerced; (2) the defendant knowingly and intelligently waived his rights to a jury trial, to confront adverse witnesses, and to avoid self-incrimination; and (3) the defendant understood the consequences of pleading guilty. State v. Huffman, 137 Idaho 866, 55 P.3d 879 (Ct. App. 2002).

"The voluntariness of a plea can be determined only be considering all of the relevant circumstances surrounding it." Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 1469 (1970). Because of the unusual circumstances of this case, in particular because the plea agreement was a "package deal," this Court believes that defendant and the state should be given an opportunity to present evidence on both of these issues at a post conviction hearing. Mendiola v. State, CV 2004 8005; Hall v. U.S., 371 F.3d 969, 974 (7th Cir. 2004).

Instead of protecting his client's rights, Mr. Bartlett pressured Mr. Eddington into accepting a highly unfavorable plea deal with no sentencing recommendations from the prosecution. R. 223-226. Further, as indicated previously, Mr. Bartlett's advice to Mr. Eddington

was seriously compromised by a conflict of interest resulting from representing both Mr. Eddington and Diana Eddington, his mother, in related cases. R. 222-228.

On or about December 9, 2013, Ms. Faulkner, emailed Mr. Bartlett with a proposed plea offer to resolve Mr. Eddington's case. R. 10. Ms. Faulker gave Mr. Bartlett a deadline of December 13, 2013 to respond to the offer or it would be revoked. R. 10. However, Mr. Bartlett did not even discuss the plea offer with Mr. Eddington until December 16th, 2013, three days after Ms. Faulkner's stated deadline for accepting the plea. R. 23. The evidence shows that Mr. Bartlett simply did not respond to Ms. Faulkner in a timely manner, prompting Ms. Faulker to ask Mr. Bartlett if he was "alive." R. 85.

While attempting to convince Mr. Eddington to accept the first and only plea offer from the prosecution at the very last minute, Mr. Bartlett alluded to Diana Eddington's charges being dropped if Mr. Eddington pled guilty. R. 18; R. 23; R.27. Mr. Eddington was extremely concerned about his mother's charge being pursued as suggested by Mr. Bartlett if Mr. Eddington did not plead guilty. Mr. Eddington felt like he had no other choice but to reluctantly go along with Mr. Bartlett's advice. R. 25.

Further, it is reasonable to believe that a defense attorney would thoroughly investigate his client's case before advising his client to accept an unfavorable plea. R. 23. Yet, Mr. Bartlett strongly advised Mr. Eddington to take the plea without thoroughly investigating the case or consulting with Mr. Eddington regarding possible defenses to the charges. Id.; R. 28; R. 44.

In particular, Mr. Bartlett did not listen to the audio police interviews with Carrie, the victim in the case. R. 44-45. When asked about whether he had listened to all audio taped police interviews, Mr. Bartlett responded by saying that Mr. Eddington and his family "could not afford" to have him do so. Id. As indicated throughout this Petition, however, the information

obtained from these audio recordings would have been well-worth the additional expense. Id. At no time did Mr. Eddington tell Mr. Bartlett that he could not afford for Mr. Bartlett to do a thorough investigation of his case. Id. He would have gladly paid the additional expense so that Mr. Bartlett would be prepared to defend Mr. Eddington at his sentencing. Id.

Mr. Eddington specifically expressed to Mr. Bartlett that he did not agree with pleading guilty to Kidnapping in the Second-Degree. R. 24. Mr. Bartlett responded by claiming that Mr. Eddington "was guilty" of Kidnapping and that he could show Mr. Eddington in the law how the charges fit his actions. Id. Mr. Bartlett exhibited frustration with Mr. Eddington's questioning of the agreement and actually informed Mr. Eddington that he would be accepting the plea. Id.

Mr. Bartlett was so highly motivated to ensure that Mr. Eddington accepted the plea, that he neglected to advise Mr. Eddington of the full potential consequences of accepting the deal. R. 24-25. Instead, Mr. Bartlett minimized the severity of the possible penalties by informing Mr. Eddington and Mr. Eddington's family that Ms. Faulkner's intent was to request a unified sentence of "up to 10 years in prison." Id.; R. 225; R. 157.

Mr. Bartlett further told Mr. Eddington that the prosecutor was "way overreaching" and that Mr. Eddington should not worry about getting that type of sentence, grossly mischaracterizing Mr. Eddington's potential exposure. R. 25. In fact, Mr. Bartlett told Mr. Eddington that he "could very well get probation from this judge." Id. [A "gross mischaracterization" of the likely outcome provides a "strong indication of constitutionally deficient performance." Julian v. Bartley, 495 F.3d 487, 495 (7th Cir. 2007)].

Mr. Bartlett also minimized the terms relating to a "no contact order" between Mr. Eddington and his minor children for an undisclosed amount of time. R. 26. Mr. Bartlett dismissed Mr. Eddington's concerns by stating that he could easily have this order revised after

he completed his sentence. Id. At that time, on or about January 14, 2014, the night before the plea hearing, Mr. Eddington once again expressed concern to Mr. Bartlett regarding the advisability of the plea deal and questioned whether it was in his best interest to accept it. Id.

Mr. Bartlett then became extremely angry with Mr. Eddington and told him that he could go ahead and call his parents to ask them for an additional $20,000 for his defense payable to Mr. Bartlett. R. 26-27. Mr. Bartlett told Mr. Eddington that he "needed to take responsibility for what he did and just sign the plea agreement." Id. Mr. Bartlett then directed Mr. Eddington to act appropriately at the hearing and to tell the judge exactly what Mr. Bartlett told him to say. Id. Mr. Eddington was once again surprised that defense counsel was so invested in Mr. Eddington accepting the plea. Id.

Mr. Eddington felt trapped. R. 27. Mr. Eddington was frightened that if he did not act as Mr. Bartlett directed, both he and his mother would end up going to trial, causing financial ruin for his parents and risking his mother's incarceration. Id. Further, with the plea hearing scheduled for the next day, Mr. Eddington believed that he had no option other than to acquiesce to his attorney's demands. Id.

Had Mr. Bartlett complied with his responsibility to fully inform/explain to his client the potential consequences of his plea (and not apply improper pressure), Mr. Eddington would have rejected the offer to plead guilty to Kidnapping in the Second-Degree and Aggravated Assault. Id. In light of the circumstances in this matter, it is Mr. Eddington's belief that Mr. Bartlett convinced Mr. Eddington to accept a plea that was not in his best interest so that Ms. Faulkner would dismiss Diana's felony charge. Id.

The Trial Court stated that Mr. Eddington cannot now say he was coerced in pleading guilty because she asked him if he was coerced and he said "no." R. 342-343. However, not

only the prosecutor but Mr. Eddington's very own attorney, Mr. Bartlett, was coercing Mr. Eddington and threatening him with his mother's imprisonment and financial ruin if Mr. Eddington did not plead guilty. Due to Mr. Bartlett's conflict of interest in representing both Mr. Eddington and Mr. Eddington's mother, Mr. Bartlett was in the Courtroom pressuring Mr. Eddington at the time of his plea. It is reasonable that Mr. Eddington would not admit to the coercion when the very perpetrator unduly pressuring Mr. Eddington is sitting with him as his attorney.

4. There Are Genuine Issues of Material Fact as to Whether Mr. Eddington Was Deprived of Effective Assistance of Counsel Due to His Trial Counsel's Objectively Deficient Performance at Mr. Eddington's Sentencing.

As stated above, the Strickland Test to demonstrate ineffective assistance of counsel requires that two prongs be satisfied: (1) Mr. Eddington must show that his Mr. Bartlett's performance was deficient, and (2) the deficient performance prejudiced Mr. Eddington. Strickland v. Washington, 466 U.S. 668, 687–88 (1984). To establish such a deficiency, the petitioner has the burden of showing that Mr. Bartlett's representation fell below an objective standard of reasonableness. Gonzales v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011). To establish prejudice, the petitioner must show a reasonable probability that, but for Mr. Bartlett's deficient performance, the outcome of the proceeding would have been different. Id.

The Supreme Court has specifically said that the "prejudice prong" requires the petitioner to show only a "reasonable probability" of a different result. The petitioner does not have to prove that his lawyer's errors "more likely than not" alter the outcome. Strickland v. Washington, 466 U.S. 668, 700 104 S.C. 2052, 2067, 80 L. Ed. 2D 674, 697(1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Dunlap V, 155 Idaho at 383, 313 P.3d at 39 (quoting Cullen, 563 U.S. at ___, 131 S.Ct. at 1403).

Notably, strategic and tactical decisions of a trial attorney will not serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel "unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." Pratt v. State, 134 Idaho 581, 584, 6 P.3d 831, 834 (2000) (emphasis added). To this end, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, " and counsel's conduct must be evaluated "from counsel's perspective at the time." Strickland, 466 U.S. at 689.

In his verified Petition, Mr. Eddington produced sworn evidence to support his claims that Mr. Bartlett failed to provide effective assistance of counsel and prejudiced Mr. Eddington in the following ways (other than the claims specifically discussed above): 1) by refusing to permit favorable witnesses to testify on Mr. Eddington's behalf at the sentencing hearing or present sufficient mitigating evidence of Mr. Eddington's longstanding mental health challenges; 2) by failing to cross-examine all but one of the State's witnesses at the sentencing hearing to correct and/or object to irrelevant and/or inaccurate testimony at the sentencing hearing; 3) by failing to adequately familiarize himself with the facts of the case; 4) by presenting a closing argument at sentencing that depicted Mr. Eddington in a negative light and 5) by failing to request a referral to place Mr. Eddington in mental health court for which he was qualified. Collectively, Mr. Bartlett's decisions in this matter clearly and objectively result not from tactical strategies but rather from inadequate preparation, ignorance of the relevant law and his conflict of interest.

Each and every one of Mr. Eddington's claims were specifically detailed with supporting evidence, along with Mr. Eddington's own sworn testimony in his verified Petition, the evidence

contained within the underlying criminal case (including transcripts of hearing), and sworn Affidavits and attached Exhibits submitted with his Petition. R. 6-228.

Again, the State submitted no evidence whatsoever in support of their position. The State did not submit an affidavit from Mr. Bartlett indicating it was his "legal strategy" when he pressured Mr. Eddington to take an unfavorable plea deal so that Diana's case would be dismissed after Mr. Eddington plead guilty. Mr. Bartlett did not swear under oath that it was his "legal strategy" to not review all the evidence in the case, permit favorable witnesses to testify on Mr. Eddington's behalf at his sentencing.

The State provided no evidence or testimony to suggest that Mr. Bartlett failed to correct inaccurate testimony at Mr. Eddington's sentencing because it was his "legal strategy." Id.; see also Petition pps. 28-29. In its Motion, the State further failed to articulate how Mr. Bartlett's failure to review the police tapes in Mr. Eddington's underlying criminal matter was an objectively reasonable "legal strategy." See sworn Petition, pps. 38-40 and Affidavits filed in support of the Petition. Clearly, there are genuine issues of material fact as to whether Mr. Eddington was provide with effective assistance of counsel under the circumstances.

5. Based Upon His Conflict of Interest, Mr. Barlett Refused to Permit Willing and Favorable Witnesses to Testify on Mr. Eddington's Behalf at the Sentencing Hearing.

To Mr. Eddington's surprise, disappointment and dismay, Mr. Bartlett failed to call any witnesses in support of Mr. Eddington at Mr. Eddington's sentencing hearing. R. 28-32. Notably, at the hearing for Mr. Bartlett's change of plea on January 16, 2014, Mr. Bartlett specifically indicated he intended to present evidence on Mr. Eddington's behalf. R. 94. Mr. Eddington relied on Mr. Bartlett's representation to the Court and believed his counsel was fully

preparing to present a strong argument and mitigating evidence on Mr. Eddington's behalf at his sentencing hearing.

Mr. Bartlett specifically told Mr. Eddington that the prosecution planned to attack Mr. Eddington's character at the sentencing. R. 28. Mr. Bartlett further indicated that the prosecution saw Mr. Eddington as "public enemy number one." R. 28. There was no doubt Mr. Bartlett was fully aware that it would be the prosecution's tactic to put on testimony and present evidence to show Mr. Eddington in the most negative light possible. With that understanding, there can be no objectively reasonable or logical strategy that would entail Mr. Bartlett calling NO witnesses to testify in support of Mr. Eddington.

In light of the concerning facts Mr. Bartlett expressed about the prosecution's intentions, Mr. Eddington and his family diligently worked on providing a list of favorable and willing witnesses to Mr. Bartlett for mitigation evidence at Mr. Eddington's sentencing. R. 28-32; R. 147-152; R. 158; R. 225-227. Mr. Eddington and his wife, Tracy Eddington, each provided names and contact information of favorable witnesses for Mr. Eddington to Mr. Bartlett well in advance of his sentencing. Id.; R. 160-161.

This list of witnesses provided to Mr. Bartlett who were willing to testify on Mr. Eddington's behalf included:

A. Dr. Tracy Eddington, Mr. Eddington's current wife, who would have testified as to Mr. Eddington's notable absence of manipulative, aggressive, or abusive behavior during their marriage. Further, Dr. Eddington would have testified as to Mr. Eddington's progressively declining mental health over the previous six months and her insistence that he begin counseling. Dr. Eddington was also in a unique position of being able to refute many of the inaccuracies presented by the prosecution. However, Mr.

Bartlett declined to call her to testify, telling Dr. Eddington that the prosecutor thought she "was a silly little woman who was being controlled and manipulated by her husband." R. 30.

B. Tore Beal-Gwartney, Mr. Eddington's family law attorney, who would have testified as to Mr. Eddington's child custody issues, provided accurate information regarding the contempt charge filed against Carrie and described Carrie's documented parental alienation attempts. R. 30; R. 147-152.

C. Roxie Davidson, Mr. Eddington's first ex-wife, who would have testified that Mr. Eddington was never violent, controlling, or abusive. R. 30.

D. Ronald and Diana Eddington, Mr. Eddington's parents, who would have testified about Mr. Eddington's childhood and adult history which was free from any form of violence or legal difficulty, his alcoholism and subsequent treatment/recovery, and their concerns regarding the gradual changes in his mental health over the previous several months. R. 30.

E. Kathleen Eddington, Mr. Eddington's daughter, who would have testified that Mr. Eddington was a loving, involved father who was never violent or abusive to anyone. R. 30.

F. Brian Davis, Mr. Eddington's co-worker from Legacy Hospice, who would have testified to Mr. Eddington's compassion and empathy as a hospice nurse, as well as his general good character. R. 31.

G. Coleen Cline, Mr. Eddington's co-worker from Legacy Hospice, who would also have testified to Mr. Eddington's value as a co-worker, his empathy with his

patients, and his ability to interact compassionately with his patients and their families. R. 31.

H. Dr. Jeanine Stone, Mr. Eddington's treating physician, who would have testified to Mr. Eddington's diagnosed mental illnesses of depression and anxiety, his history of working with her to medically manage the symptoms of those disorders, and his use of Ambien and Trazadone to treat his persistent insomnia. R. 31.

After being provided with this list, Mr. Bartlett did nothing to secure the testimony of any of these witnesses for Mr. Eddington's sentencing hearing. R. 28-32. Mr. Bartlett submitted some letters in support of Mr. Eddington, but refused to call any witnesses to testify. Id. There is no evidence that Mr. Bartlett sent out any requests, notices or subpoenas to make certain the witnesses he intended to call to testify on Mr. Eddington's behalf would be present at the sentencing hearing. Id.

At the sentencing hearing, the prosecution presented literally hours of aggravating evidence in the form of testimony including the victim, her family members, and the investigating officer. Mr. Bartlett's lack of preparation and planning for Mr. Eddington's sentencing was clearly evident when Mr. Bartlett finally told Mr. Eddington at the actual time of his sentencing that Mr. Bartlett had decided that he was not going to call any witnesses at all. R. 28-29. It is objectively reasonable that Mr. Bartlett should have called mitigation/character witnesses on Mr. Eddington's behalf at his sentencing under the circumstances in this case. There is no discernible legal strategy that would have been served by calling NO witnesses on Mr. Eddington's behalf. Mr. Bartlett's blatant disregard for Mr. Eddington's sentence exposure and his lack of effort to call even one favorable witness in support of Mr. Eddington caused obvious prejudice to his client.

Mr. Bartlett's failure to call witnesses that supported Mr. Eddington at his sentencing hearing resulted in the Judge listening to nearly three (3) hours of provably inaccurate testimony against Mr. Eddington without any mitigating testimonial evidence. R. 32-36. Mr. Bartlett's error in this regard was significantly prejudicial to Mr. Eddington and resulted in a longer prison sentence than warranted.

B. Mr. Bartlett Failed to Present Reasonable Mitigating Evidence of Mr. Eddington's Longstanding Mental Health Challenges

Mr. Bartlett knew all about Mr. Eddington's extensive history of mental health and substance addiction issues. However, Mr. Bartlett barely even mentioned Mr. Eddington's long history of severe depression along with periods of suicidal ideation. R. 31-33. This was very important mitigating evidence that should have been highlighted by Mr. Bartlett but was not. When a client is facing over 25 years in prison, it would be objectively reasonable to call an expert witness to discuss the client's extensive and lengthy mental health history.

An effective attorney would have been prepared to provide the Court with testimony that assisted the Court in understanding the significance of Mr. Eddington's mental illness. However, Mr. Bartlett failed to emphasize that Mr. Eddington was severely depressed and that his primary motivation for his actions was to commit suicide. Id. Further, Mr. Bartlett neglected to inform that Court that Depression is highly treatable, with a treatment success rate above 80% (National Institute of Health). Considering Mr. Eddington's amenability to treatment, as determined by Dr. Johnston, this information was highly relevant and should have been presented to the Court. R. 48. There is a substantial likelihood that the Judge's sentencing decision would have been positively influenced by a better understanding of the significance of Mr. Eddington's mental illness, along with it's high treatment success rate. There is no reasonable "strategy" as to why Mr. Bartlett failed in this regard.

C. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because Mr. Bartlett Failing to Adequately Familiarize Himself with the Facts of the Case.

Mr. Eddington asserts that due to Mr. Bartlett's actual conflict of interest, Mr. Bartlett chose not to properly familiar himself with the facts of the case and discovery obtained from the prosecution. R.43-49. Although Mr. Bartlett did manage to charge fees to Mr. Eddington in excess of $20,000 while only working for five (5) months to arrive at the highly unfavorable plea agreement, Mr. Bartlett was not sufficiently prepared at the sentencing hearing. R. 44-49.

Mr. Bartlett, despite informing Mr. Eddington that he intended to do so, failed to meet with the victim or otherwise investigate this case in a thorough manner. Id. Although Mr. Bartlett had access to the audios of police interviews which were much more detailed and comprehensive than the brief written summaries, he chose not to listen to them. R. 44. When Mr. Eddington asked Mr. Bartlett about whether he had listened to all audio taped police interviews, Mr. Bartlett responded by saying that Mr. Eddington and his family "could not afford" to have him do so. R. 44. As indicated throughout this brief, however, the information obtained from these audio recordings would have been well-worth the additional expense. Id.

At no time did Mr. Eddington tell Mr. Bartlett to do less than a thorough job on reviewing the evidence on Mr. Eddington's case. Id. It is unclear why Mr. Bartlett took it upon himself to assume that Mr. Eddington would not have enough money to pay Mr. Bartlett for thorough preparation and review of the evidence. Id. This is Mr. Eddington's life. He, and/or his family would have happily paid for Mr. Bartlett's time in reviewing the evidence and being prepared for Mr. Eddington's sentencing. R. 44-45.

Had Mr. Bartlett listened to these audios, he would have discovered statements that were supportive of his client, yet blatantly and conspicuously excluded from the written police

interview summaries. R. 45. The audio tapes of police interviews contained important and relevant information that indicated the victim's compassionate feelings toward Mr. Eddington, her concern for his well-being, and her understanding that Mr. Eddington's actions resulted from a mental health crisis. R. 45-48.

During her initial interview with the police, Ms. Eddington asked several times "What is going to happen to Ron?" R. 45-46. She further stated "I hope he gets help. I want him to get help. That's what I want." Carrie also stated, "His wife is pregnant. I feel terrible. I feel bad for her. I feel bad for him. I hope this will help him." Id. Carrie also told officers "He's a good person." The officer told Carrie that ultimately they wanted to get him some help, "not to punish him." Carrie then said, "I know, that's the only reason why I let my Dad call the police." Id.

Carrie further stated that Mr. Eddington was in a "dark place, a dark ugly place." Id. Carrie made other such statements indictating that she understood Mr. Eddington's actions resulted from a mental health crisis. Carrie told the police officer, "I tried to get him to leave the gun here because I was worried about him leaving and killing himself." R. 45.

During Carrie's interview with Detective Dixon and the Victim/Witness Coordinator, she continued to express a desire for Mr. Eddington to receive help. The Victim/Witness Coordinator specifically asked Ms. Eddington what she would like to see happen to Mr. Eddington. She responded "I just want for Ron to get better. I want him to be there for the kids. I want him to be the dad that he was meant to be." R. 46; See also Exhibit W to Petition, time stamp 1:22:00-1:23:15. As stated earlier, during her initial interview with Officer Ford, Carrie also denied that Mr. Eddington ever physically or emotionally abused her. Further, she denied that he ever threatened her with physical harm. Id.

Corporal Ford and Detective Dixon conveniently left the above information out of their reports and, instead, only included information that supported the prosecution's case. R. 46-47.

However, due to Mr. Bartlett's negligence and lack of investment in protecting his client's rights, he was unaware of these omissions. Id. Had Mr. Bartlett listened to the full interviews instead of relying on the brief written reports, he would have known of Ms. Eddington's concern and could have shared that with the court to clarify the victim's expectations of the court proceedings. Id.

Clearly, knowing the victim's true feelings regarding the case would have allowed him to negotiate a more favorable plea deal for his client and/or request a referral to Mental Health Court. R. 46-47; R. 51. Further, had Mr. Bartlett fully reviewed the audio tapes, he would also have become aware that Ms. Eddington told the police that Mr. Eddington **never abused or threatened her**. R. 46. This was obviously highly important evidence that should have been brought to the Court's attention by Mr. Bartlett.

However, as Mr. Bartlett refused to even listen to the audio tapes because it would allegedly cost Mr. Eddington's family too much money, he was not prepared to discuss these inconsistencies at the Sentencing Hearing. R. 44-45. Mr. Bartlett was ill prepared causing Mr. Eddington to not be provided with effective assistance of counsel.

Similarly, Mr. Bartlett also neglected to obtain and review the 2011 custody deposition that clearly described Mr. and Ms. Eddington's failed reconciliation attempt and Mr. Eddington's legitimate access to Ms. Eddington's house during that time. R. 47-48.

Further, considering the significant role mental health factors played in Mr. Eddington's actions, as well as the significant prison term he was facing, it can be reasonably surmised that an attorney invested in his client's case would have fully prepared himself by researching his client's mental health issues and using this information to mitigate his client's actions. Yet, a review of Mr. Bartlett's billing invoices indicated that he did no such thing. R. 182-198.

C. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because Mr. Bartlett Failed to Cross-Examine All But One of the State's witnesses at the Sentencing Hearing and Failed to Correct and/or Object to Inaccurate Testimony at the Sentencing Hearing.

At Mr. Eddington's sentencing hearing, Mr. Bartlett was ill-prepared for the hearing and failed to cross-examine the State's witnesses (with the exception of Dr. Johnson), even to correct clearly inaccurate testimony. Throughout the hearing, in a clear effort to compensate for Mr. Eddington's lack of any criminal history, the prosecution attempted to demonstrate that Mr. Eddington's actions on August 9th, 2013, related to a pattern of escalating violence. The reality is that Mr. Eddington's actions were a one-time anomaly resulting directly from a mental health crisis. R. 32-34.

Mr. Bartlett's obvious passivity and failure to cross-examine witnesses only served to bolster the prosecution's inaccurate theory. R. 33. Had defense counsel actually investigated the evidence in the case and been prepared for the hearing, he would have objected to the multiple instances of inaccurate witness testimony. R. 33; R. 44-48. Mr. Bartlett should have fully refuted the prosecutor's theory by presenting factual evidence to prove, incontrovertibly, that this pattern of escalating violence never existed. Id. This was not a "legal strategy" on Mr. Bartlett's part. Rather, it was simply a result of Mr. Bartlett being unprepared and his failure to familiarize himself with the facts of the case due to his actual conflict of interest.

To support the prosecution's theory, Carrie Eddington read a long, fictitious victim statement accusing Mr. Eddington of physically and emotionally abusing her, sending threatening and harassing emails, being "obsessed with" and "dependent upon her", bullying her through the courts, and driving by her house. R. 33. These accusations were provably inaccurate,

yet Mr. Bartlett did not even politely cross-examine Carrie under oath to correct her misstatements. R. 33-35.

Had Mr. Bartlett been prepared to represent his client's interests, he would have presented concrete evidence in the form of cell phone records, email records, and audio police report interviews to dispute the victim's false claims during cross-examination. R. 33. However, and contrary to the prosecution's theory, Carrie stated very clearly in her interview with Officer Ford that Mr. Eddington was never physically or emotionally abusive toward her. She also indicated that Mr. Eddington never threatened her with violence. R. 33-34.

Mr. Bartlett failed to correct this unfair characterization and to allow it to stand as fact was a significant error on his part. Judge Norton was obviously influenced by the prosecutor's remarks. Judge Norton stated "I am concerned for the safety of your children, and I'm concerned for the safety of the other children as they mature into teenagers because communication issues with teenagers are rampant." R. 39. Judge Norton undoubtedly used this improper characterization as partial justification for her harsh sentence, as well as justification for including the minor children in her no contact order.

Ms. Faulkner's closing argument also referenced Carrie's false claims regarding Mr. Eddington "calling her, texting her, e-mailing her daily" and indicated that this corroborated that Mr. Eddington was "obsessed and dependent on the victim." R. 41. This statement, like so many of Ms. Faulkner claims, is provably false but Mr. Bartlett did not step in to correct this falsehood.

During Carrie Eddington's initial police interview, Officer Ford asked her if Mr. Eddington had ever been physically abusive toward her. Carrie responded by saying "no." R. 28; See also Exibit V to Petition. Ms. Eddington also specifically denied being verbally abused or threatened with physical harm. See Exhibit V to Petition time stamp 07:25-8:10.

In an interview with Detective Dixon, he informed Carrie that the prosecution would be searching Mr. Eddington's phone for threatening texts and emails. R. 34. He asked her if most of the e-mails were about custody and whether there were any threats of violence. DeeDee Belue, the victim's mother responded by saying that the only "threats" consisted of taking Ms. Eddington back to court to get more time with their children. R. 34. Ms. Eddington added that there "were no physical threats." R. 34; See also Exhibit W to Petition, time stamp 1:05:50; See also Exhibit V to Petition, time stamp 7:25-8:10.

Mr. Eddington's phone and email records would have proven that he did not call or text Ms. Eddington excessively. R. 34. In fact, his phone records for the three months prior to August 9th, 2013 indicated Mr. Eddington rarely called/texted Carrie. R. 34. Mr. Eddington specifically asked Mr. Bartlett to obtain a copy of these records to present as evidence but Mr. Bartlett failed to do so. Id. Failure to obtain this vital information is just another reasonable step Mr. Bartlett failed to do in representing Mr. Eddington. It cannot be considered a reasonable strategy to fail to present evidence that would directly contradict aggravating testimony presented by the prosecution.

In addition, at the sentencing, during the testimony of Clarence Belue, Carrie's father, the prosecutor walked Mr. Belue through the events of August 9, 2013 regarding his involvement. When it came time for Mr. Bartlett to cross-examine, he simply stood up and thanked Mr. Belue for his testimony. R. 34. Mr. Belue testified that Carrie refused to allow him to call the police out of fear that Mr. Eddington would come back and kill her. R. 34. Again, had defense counsel actually listened to the police tapes, he would have been aware that Carrie had stated that she only allowed her father to call the police because she hoped it would result in **Mr. Eddington getting the help he needed**. R. 34; See also Exhibit V to Petition, time stamp 13:58. This other, more sympathetic, motivation of Carrie for calling the police was conveniently omitted from Mr. Belue's testimony (as well as the written police reports). Mr. Bartlett's failure to cross-examine

Mr. Belue allowed this more frightening motivation to stand as fact, thus wrongfully prejudicing the judge against Mr. Eddington. R. 34-35.

Dr. Michael Johnston, the court-appointed neuropsychologist, testified as to Mr. Eddington's mental health diagnoses and his risk to re-offend at the sentencing. R. 35. Nevertheless, despite Mr. Eddington's primary motive in his criminal actions being to commit suicide, Mr. Bartlett did not cross examine Dr. Johnston as to Mr. Eddington's mental health issues as they related to Mr. Eddington's actions. Id. Mr. Bartlett also neglected to ask Dr. Johnston for confirmation that Mr. Eddington's suicidal fantasies, irrational thinking, and self-destructive behavior are common symptoms of depressed individuals trying to cope with overwhelming emotional pain. Id. Mr. Bartlett also failed to cross-examine Dr. Johnston regarding the treatment success rate for depression. According to the National Institute of Health, the success rate is over 80%. Id. This was definitely information worth sharing with the court.

More concerning, however, is that there were no questions regarding, or objections to, the fact that Dr. Johnston was given inaccurate and incomplete evidence on which to base his risk-assessment. Specifically, in Dr. Johnston's report, it references using collateral information from police reports to supplement the Spousal Assault Risk Assessment (SARA). Based on the objective results of the SARA, Mr. Eddington was considered to be within the Low to Moderate risk range of re-offending. Id.

In order to more conclusively determine Mr. Eddington's risk level, Dr. Johnston used clinical judgment based on collateral information. R. 35-37. As indicated earlier, the written police reports were extremely brief and included inaccurate information from the victim while excluding any information sympathetic to the defense. R. 34-35. In his report, Dr. Johnston stated "collateral information indicated the examinee had taken manipulative steps to gain access

to his victim's (ex-wife) home, specifically asking his children to provide the garage door code." R. 35-37. This was proven inaccurate through the 2011 custody deposition. Carrie, herself, had given Mr. Eddington the code when they were trying to reconcile. R. 36; R. 171-172. Mr. Bartlett should have brought this fact to light—Mr. Eddington did not manipulate the children to get the code. Id. The Court certainly considered this as significant aggravating evidence. However, it was not true—Mr. Bartlett could prove it with Carrie's own sworn testimony, but Mr. Bartlett chose not to.

Dr. Johnston also states on page 19 of his report "Collateral information indicated the victim (ex-wife) described the examinee as displaying obsessive behavior, attempting to communicate with her on a daily basis, at times multiple times per day, coupled with reportedly becoming frustrated if the victim did not reciprocate." R. 36. This information is also provably false by reviewing Mr. Eddington's phone and email records, but again, in spite of Mr. Eddington's requests to Mr. Bartlett to obtain such records, Mr. Bartlett refused to do so. Id. Mr. Bartlett did not question this statement or cross-examine Dr. Johnston on this issue. Id.

Dr. Johnston also considered a neighbor's statement that he observed Mr. Eddington drive by the victim's house on numerous occasions. R. 36. However, Mr. Eddington had valid reasons to be in that neighborhood that had absolutely nothing to do with "stalking" Ms. Eddington. R. 36-37. When the children were in Mr. Eddington's custody, he would pick up his daughter from the bus stop which was located down the street from Ms. Eddington's home. Id. Mr. Eddington had to drive by her home to pick up his daughter. Id. Also, Mr. Eddington's son attended an elementary school which was located directly behind Ms. Eddington's house and would at times have to drive by her house to pick him up. Id. Mr. Bartlett did nothing to explain this situation to

the Court, and, instead let the statement go unchallenged with the suggestion that Mr. Eddington was somehow "stalking" Carrie when he was just picking up his children. Id.

Unbeknownst to him, Dr. Johnston based his risk assessment on provably false and incomplete collateral information. R. 37. Had Mr. Bartlett provided effective assistance of counsel by highlighting the false information, Dr. Johnston would have likely assigned Mr. Eddington a Low risk level. Id. Mr. Bartlett's failure to object to the false testimony and provide accurate evidence to Dr. Johnston further supports his deficiencies as counsel.

Notably, Mr. Eddington's Moderate risk to re-offend was referenced repeatedly by Judge Norton and was obviously a significant factor in her sentencing determination. In Sentencing Tr. (Exhibit I) at pg. 101, lines 8-11: Judge Norton states "When I look at a Moderate risk of re-offense I have to look at it in terms of a Moderate risk related to that level of escalation and potential danger to the community." Had Mr. Bartlett thoroughly cross-examined Dr. Johnston or previously corrected the inaccurate collateral information, Dr. Johnston would likely have reached the more accurate conclusion that Mr. Eddington was a Low risk to re-offend, thus influencing Judge Norton's sentencing decision in a manner more sympathetic to Mr. Eddington. It is reasonable to conclude that the sentence imposed by Judge Norton would have been different had she known the risk assessment outcome weighed heavily toward a Low risk to re-offend without the false collateral information. Mr. Bartlett's lack of corrections allowed this falsified, inflammatory information to stand as fact and cause prejudice against his client.

Mr. Bartlett, as was his pattern throughout the sentencing hearing, failed to object to the prosecutor's inaccurate, damaging, and unsubstantiated statements. R. 38-43. With minimal effort, Mr. Bartlett should have presented Mr. Eddington's phone and email records as evidence

and eliminated the inflammatory accusation of Mr. Eddington's "obsession and dependency" issues from the Court's consideration. R. 41.

Mr. Bartlett failed to object to or to cross-examine Detective Dixon to demonstrate the inaccuracy of Detective Dixon's overtly inflammatory testimony. R. 41-42. Instead, he allowed this inaccurate, prejudicial information to be used against his client both during the testimony and again during the prosecutor's closing argument. Id. It is more than reasonably probable that had Mr. Bartlett acted in his client's best interests and corrected provably inaccurate testimony, Mr. Eddington would have received a more lenient sentence.

D. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because Mr. Bartlett Presented a Closing Argument at Sentencing that Depicted Mr. Eddington in a Negative Light.

Mr. Bartlett's utter lack of preparation was also demonstrated during his closing argument. Mr. Bartlett's final argument was neither well-prepared, written down, nor even well-thought out. R. 48. Mr. Bartlett simply stood up and spontaneously rambled through a meek, tentative, and often damaging to his client, closing argument. Id. Conspicuously absent from Mr. Bartlett's closing argument, however, was a presentation of the multiple relevant mitigating circumstances which would have been advantageous for the judge to consider. R. 119-123.

Specifically, Mr. Eddington asserts that the following circumstances should have been presented and emphasized: Mr. Eddington's lack of any criminal record whatsoever, the unusual circumstances of the situation (Mr. Eddington was suffering from severe depression, suicidal thoughts, and extreme stress), Mr. Eddington's significant remorse for his actions (Mr. Eddington fully cooperated with police, confessed to his criminal behavior and accepted responsibility for his actions by pleading guilty), and Mr. Eddington's addiction issues (Dr.

Johnston diagnosed Mr. Eddington with substance abuse issues based on his excessive use of Trazedone and Ambien, as well as his history of alcoholism). R. 48-49.

While these factors do not reduce Mr. Eddington's responsibility for his actions or have any bearing on his admission of guilt, they do support leniency in sentencing. Id. Mr. Bartlett's failure to be prepared and argue these factors contributed to Mr. Eddington's facing a much harsher sentence than the facts of the case warranted. Throughout the entire sentencing hearing, it was obvious that Mr. Bartlett, despite the significant prison sentence faced by his client, was utterly unprepared and completely disinterested in protecting Mr. Eddington's rights. R. 49.

Assuming these undisputed allegations are true, Mr. Eddington should have received the relief he sought in his PCRM. Accordingly, an evidentiary hearing was warranted and summary dismissal of the case was in error.

5. Mr. Eddington Was Deprived of Effective Assistance of Counsel Because Mr. Bartlett Failed to Request a Referral to Place Mr. Eddington in Mental Health Court for Which He Was Qualified.

Despite the blatantly obvious mental illness component of Mr. Eddington's actions in his underlying criminal case, defense counsel failed to request a referral to Ada County Mental Health Court. R. 52-55. Mr. Eddington's primary motivation the night of his crime was to commit suicide. R. 52. Prior to his crime, Mr. Eddington had suffered from chronic, severe depression, suicidal thoughts, and alcoholism for years. Id.

Mr. Eddington completed treatment for his alcoholism through the Walker Center in 2007 and had remained sober since that time. Id. Despite working with Dr. Jeanine Stone, his physician, to find an appropriate medication for his severe depression, insomnia, and intense anxiety, Mr. Eddington's mental health continued to decline. R. 52-53. Beginning in the spring

of 2013, Mr. Eddington tried to deal with his emotional pain of his severe depression and anxiety by repeatedly fantasizing about suicide and finally decided to take his own life. R. 53. In this irrational state, Mr. Eddington included his ex-wife in his suicidal fantasies. Id. Prior to this latest, and most severe, depressive episode, Mr. Eddington had never been violent in any way, nor did he have any sort of criminal record. Id.

According to the Idaho Mental Health Court website:

> Mental Health Court participants include felons who are severely and persistently mentally ill. Their diagnoses include bipolar disorder, schizophrenia, schizoaffective disorder, and severe, chronic depression, sometimes with psychosis. Not all mentally ill felony offenders qualify for Mental Health Court. Registered sex offenders are not eligible. Participants must reside in Ada County and be capable of complying with program requirements.

From reviewing the Ada County Mental Health Court referral information and checklist, Mr. Eddington would have been a strong candidate for such a referral. R. 163; R.53; R. 219. In an email response to Tracy Eddington, (Mr. Eddington's current wife), Kelly Jennings, the Ada County Mental Health Court Coordinator, stated: "Typically, defense attorneys request that a judge refer someone for Mental Health Court evaluation." R. 219.

Clearly, from Ms. Jennings' statement, defense attorneys should be knowledgeable of this option and request a referral when it is in the best interest of their client. Nevertheless, knowing about Mr. Eddington's extensive and well-documented history of mental illness and substance abuse, Mr. Bartlett failed to pursue this extremely appropriate option for his client. A quick review of Mr. Bartlett's billing invoices confirmed that he never researched mental illness, its impact on behavior, or the availability of alternative sentencing options for individual's suffering from severe mental health issues. R. 182-198.

Not only was the Ada County Mental Health Court a viable and reasonable option in this

case, but it would have provided Mr. Eddington the intensive mental health treatment that Mr. Eddington so desperately needed and still needs. Clearly failing to even request such a referral under the circumstances of this case is ineffective assistance of counsel resulting in prejudice to Mr. Eddington. Further, had Mr. Bartlett appropriately listened to the victim's original police statement, Mr. Bartlett would have heard her repeatedly state that she wanted Mr. Eddington to get help.

By referring Mr. Eddington to Mental Health Court, the victim's wishes could have been respected and the Mr. Eddington could have been held accountable for his actions while receiving the treatment he needed. It should be noted that Mr. Eddington has now served over three years of his sentence with exemplary behavior. R. 54. He has received no disciplinary reports, works as a peer tutor helping other inmates earn their GEDs, and has been described by correctional officers as respectful of authority, trustworthy, and cooperative. R. 54. He has also been working diligently to better understand his own mental health issues and how to manage them effectively. R. 54.

Mr. Eddington's support system, which was maligned by the prosecution during his sentencing hearing, has remained strong and consistent. R. 54. Mr. Eddington's wife and young daughter visit him twice weekly and his parents visit monthly. Id. There is no question that, upon his release, Mr. Eddington will seek out and actively participate in the appropriate mental health services for his diagnoses. With treatment, he will have the support necessary to return to being a stable, productive member of society. Id.

B. The District Court Should Have Granted Mr. Eddington the Relief He Was Seeking Pursuant to a Summary Disposition Under I.C. § 19-4906(c).

Notably, summary "dismissal" is not the only option provided pursuant to the UPCPA. Summary disposition of the case may also be granted in a defendant's favor. In particular, pursuant to I.C. §19-4906(c)(emphasis added):

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

In this case, the State of Idaho provided no evidence whatsoever in support its position. See Record in its entirety. In his Response Brief to State's Motion for Summary Dismissal and because the State of Idaho produced no evidence to controvert any of Mr. Eddington's claims, Mr. Eddington requested that the Court grant Mr. Eddington summary disposition in his favor. R. 12. In other words, it is Mr. Eddington's position that he should have been provided the relief he was requesting without an evidentiary hearing because the facts and evidence are clearly in his favor.

C. The District Court abused its discretion in failing to grant an evidentiary hearing on the claims cited in Mr. Eddington's Petition for Post-Conviction Relief.

A post-conviction evidentiary hearing is proper when the petitioner has made a factual showing based on admissible evidence. Paradis v. State, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986) (quoting Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct.App.1982)). The application must be supported by written statements from competent witnesses or other verifiable information. Id. Unsubstantiated and conclusory allegations are insufficient to entitle a petitioner an evidentiary hearing. King v. State, 114 Idaho 442, 446, 757 P.2d 705, 709 (Ct.App.1988).

As discussed above, summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the relief requested. If such a factual issue is presented, an evidentiary hearing **must** be conducted. Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); DeRushév. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (emphasis added). Id.

VII. CONCLUSION

Based upon the arguments set forth above, as Mr. Eddington provided more than enough unrebutted and admissible evidence in support of his claims, Mr. Eddington should be granted summary disposition of his PCRM in his favor. Mr. Eddington should thereafter be permitted to either participate in Mental Health Court or have his sentence vacated so that he may have a fair sentencing.

In the alternative, the case should be remanded so that Mr. Eddington can have the evidentiary hearing that he is entitled to pursuant to the law.

Mr. Eddington would request his attorney's fees and costs be paid because the defense of this appeal is frivolous, unreasonable and without foundation pursuant to Idaho Appellate Rule 41 and I.C. § 12-121. The State of Idaho provided no evidence whatsoever in support of its position. The State put forth no affidavits, no declarations, no verified documentation that disputed the vast evidence provided by Mr. Eddington. See Record in its entirety. Mr. Eddington clearly provided more than enough admissible evidence and non-conclusory allegations, if true, would undoubtedly have provided Mr. Eddington the relief he sought in this matter. Denying that Mr. Eddington an evidentiary hearing was unreasonable and contrary to the law. The State of Idaho has acted frivolously and unreasonably in preventing Mr. Eddington to be able to present his full case at an evidentiary hearing.

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

SMITH HORRAS P.A.

Ellen N. Smith, of the Firm
Attorneys for Appellant, Ronald Eddington

ELLEN N. SMITH, ISB #5992
SMITH HORRAS, P.A.
5561 N. GLENWOOD STREET
P.O. BOX 140857
BOISE, ID 83714
TELEPHONE: (208) 697-5555
FACSIMILE: (800) 881-6219

Attorneys for Appellant,
Ronald Eddington