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# Kesling v. State Appellant's Reply Brief Dckt. 47797

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

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| **SHAWN M. KESLING,** | ) | |
| | ) | **NO. 47797-2020** |
| **Petitioner-Appellant,** | ) | |
| **v.** | ) | **ADA COUNTY NO. CV01-18-4131** |
| | ) | |
| **STATE OF IDAHO,** | ) | **APPELLANT'S** |
| | ) | **REPLY BRIEF** |
| **Respondent.** | ) | |
| | ) | |

**REPLY BRIEF OF APPELLANT**

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

**HONORABLE MICHAEL REARDON**
**District Judge**

**ERIC D. FREDERICKSEN**
**State Appellate Public Defender**
**I.S.B. #6555**

**BRIAN R. DICKSON**
**Deputy State Appellate Public Defender**
**I.S.B. #8701**
**322 E. Front Street, Suite 570**
**Boise, Idaho 83702**
**Phone: (208) 334-2712**
**Fax: (208) 334-2985**
**E-mail: documents@sapd.state.id.us**

**ATTORNEYS FOR**
**PETITIONER-APPELLANT**

**KENNETH K. JORGENSEN**
**Deputy Attorney General**
**Criminal Law Division**
**P.O. Box 83720**
**Boise, Idaho 83720-0010**
**(208) 334-4534**

**ATTORNEY FOR**
**RESPONDENT**

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## STATEMENT OF THE CASE

### Nature of the Case

The main question in this appeal is whether Mr. Kesling's allegations – that a proper investigation would have revealed a factual defense to the only charged conduct alleged, and that his decisionmaking in the plea process would have been different had he known of evidence supporting that defense – if he could prove them true at an evidentiary hearing, would entitle him to relief. If so, summary dismissal of his petition was erroneous.

The State's responses misunderstand or ignore the proper standards for evaluating that question. As such, those arguments should be rejected. Under the proper standard, there was a genuine issue of material fact on both prongs of the test for ineffective assistance of counsel, and so, the district court's decision to summarily dismiss Mr. Kesling's petition should be reversed.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Kesling's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

Whether the district court erred by summarily dismissing Mr. Kesling's petition for post-conviction relief because there was a genuine issue of material fact with regard to his claim of ineffective assistance of counsel.

## ARGUMENT

### The District Court Erred By Summarily Dismissing Mr. Kesling's Petition For Post-Conviction Relief Because There Was A Genuine Issue Of Material Fact With Regard To His Claim Of Ineffective Assistance Of Counsel

#### A. Mr. Kesling Presented Sufficient Allegations To Show A Genuine Issue Of Material Fact Regarding Trial Counsel's Deficient Performance

Mr. Kesling presented facts and allegations which established at least a genuine issue of material fact that his trial counsel provided deficient performance by failing to reasonably investigate the only conduct alleged in the charging document – writing a check against a fictitious checking account (Supp. R., pp.22-24) – because such an investigation would have revealed that the account in question actually did exist and Mr. Kesling had valid checking privileges on that account. As such, the district court erred by summarily dismissing his petition. None of the State's arguments against that conclusion, which are discussed in turn, are consistent with the applicable legal standards and so, this Court should reject those arguments.

##### 1. The State's argument that there is contradictory evidence in the record only reaffirms the conclusion that there was a genuine issue of material fact in this case, and as such, confirms that summary dismissal was improper

The State's primary argument on the deficient performance prong of the analysis highlights facts in the record which the State asserts contradict Mr. Kesling's allegations about the existence of the Bluebird account. (*See* Resp. Br., pp.10-11.) However, in making those arguments, the State fails to recognize that the existence of contradictory evidence actually "establishes the existence of a material issue of disputed fact," which means summary dismissal is improper in the face of such evidence. *Grabicki v. City of Lewiston*, 154 Idaho 686, 690 (2013) (clarifying that the conflict needs to be between evidence upon which a reasonable jury could reasonably return a verdict for either side). The reason summary dismissal is improper in

the face of contradictory evidence is that, at the summary dismissal stage, "a court must review the facts in a light most favorable to the petitioner." *Hairston v. State*, 167 Idaho 462, 465 (2020). This means, for example, that the evidence and reasonable inferences therefrom are to be liberally construed in favor of the non-moving party. *Charboneau v. State*, 144 Idaho 900, 903 (2007). Therefore, under the proper standard the mere existence of contrary evidence cannot justify summary dismissal doing so would not be evaluating the contradictory evidence in the light most favorable to Mr. Kesling.

Nevertheless, that is exactly what the State asks this Court to do by arguing it should affirm the dismissal because there is some evidence which might tend to contradict Mr. Kesling's evidence. (*See* Resp. Br., p.10.) Specifically, Mr. Kesling supported his allegation that a reasonable investigation would have revealed account -0075 existed and he had valid checking privileges on that account by presenting the affidavit of Lowell Mix Jr., who explained that Harland Clarke had received verified requests from American Express/Bluebird requesting they print checks on that account -0075 personalized for Mr. Kesling. (Supp. R., p.196.) Moreover, Harland Clarke's attached records demonstrate that the checkbooks they prepared would have included check number 1136, the check at issue in the charge to which Mr. Kesling pled. (*See* Supp. R., pp.198-202 (three verified orders for checks on account -0075 with start numbers of 1101, 1201, and 1301); R., p.23 (setting forth the charge in the relevant charge, Count I).) Additionally, Mr. Kesling presented a copy of the statement from his Bluebird account, which shows there was all sorts of activity on Mr. Kesling's Bluebird account in June 2015, including an "Unauthorized Check Fee" on the date check number 1136 was passed. (*Compare* R., pp.85-88, *with* R., p.23.)

The State argued that, contrary to those assertions, the record contained the statements of two American Express employees, "Samantha" and "Paula," who apparently told the officer that American Express has no records associated with account -0075 and there was no activity on Mr. Kesling's Bluebird account at the time the checks were written. (Resp. Br., p.10.) However, under the proper standards, those two hearsay statements by people with no identified last names or job descriptions, such that there is no way to effectively judge the reliability of their hearsay statements, did not affirmatively disprove Mr. Kesling's evidence. At best, those unreliable hearsays statements contradicted the affidavit and other evidence which Mr. Kesling presented in support of those allegations, thereby demonstrating there was, in fact, a genuine issue of fact with regard to the existence of the checking account.

As such, under the proper standards, the State's own argument based on those hearsay statements actually, affirmatively demonstrates the district court erred by summarily dismissing Mr. Kesling's petition in the face of a genuine issue of material fact.

2. Contrary to the State's assertions, the fact that trial counsel knew about this potential avenue of investigation and still failed to conduct a reasonable investigation into it demonstrates that he provided deficient performance

The State's next argument also runs contrary to the applicable legal standards. Specifically, the State contended that, because trial counsel knew of Mr. Kesling's claim that the account actually existed when he advised Mr. Kesling to accept a plea which would waive all legal and factual defenses, there can be no deficient performance for failing to investigate that potential plea further. (Resp. Br., pp.10-11.) That is wholly improper because it puts the cart before the horse – trial counsel could not effectively advise Mr. Kesling to accept any sort of plea deal without having first conducted a reasonable investigation into the relevant facts. As both the Idaho Supreme Court and the American Bar Association have long and expressly

recognized, the reasonableness of a trial attorney's investigation of a case is going to be guided by what his client tells him. *Mitchell v. State*, 132 Idaho 274, 279-80 (1998) (quoting AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION (2d ed. 1982)). Therefore, the fact that trial counsel knew about Mr. Kesling's assertions about the existence of the account and yet, recommended Mr. Kesling plead without conducting a reasonable investigation into those specific assertions only reinforces the conclusion that trial counsel's performance was objectively deficient.

To that point, the State mistakenly contends that counsel's failure to investigate this potential factual defense was not deficient because, it contends counsel would have still recommended a guilty plea per *State v. Bishop*, 89 Idaho 416 (1965), based on Mr. Kesling's admissions to entering fictitious pre-authorization codes. (Resp. Br., pp.20-24.) Again, the State's argument runs directly contrary to the applicable standards, which make it clear that:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues leading to facts relevant to the merits of the case* and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. <u>The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty</u>.

*Murphy v. State*, 143 Idaho 139, 146 (Ct. App. 2006) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, § 4–4.1 (3d ed.1993)) (italics from *Murphy*; underline added). Since defense counsel still has a duty to investigate relevant facts despite knowing his client had made admissions to the *charged* conduct, he definitely has a duty to investigate relevant facts despite knowing his client had made admissions to facts which might constitute guilt under a different, *as-yet-uncharged* theory. *See id.*

Undoubtedly, the existence of a factual defense to the only conduct charged is a "fact relevant to the merits of the case." Therefore, the fact that *Bishop* might have justified an alternative line of prosecution, that does not mean trial counsel was not still ineffective for advising Mr. Kesling to plead guilty without reasonably investigating the facts relevant to the only theory of prosecution actually being pursued against his client.

3. This Court should reject the State's request to create an exception to the rule that appellate courts will not consider facts which were not before the district court at the time it made the decision at issue on appeal

Finally, the State takes issue, baselessly, with the fact that Mr. Kesling noted this Court should not consider information which was not before the district court when ruling on the motion for summary dismissal. (Resp. Br., p.19; *see* App. Br., p.24 n.10.) Mr. Kesling's point in that regard is taken directly from opinions from both the Idaho Supreme Court and the Idaho Court of Appeals, which have made it clear that the appellate review will only consider that information which was before the district court at the time it ruled on the motion being challenged on appeal. *State v. Charlson*, 160 Idaho 610 (2016); *State v. Smith*, 162 Idaho 878 (Ct. App. 2017); *cf. State v. Hoskins*, 165 Idaho 217, 225-26 (2019) (explaining that, to affirm the district court's decision on a different theory than the district court used, the alternative basis must have actually been argued to the district court during its consideration of the motion at issue).

As such, the State is effectively asking this Court to carve out an exception to that rule and allow it to consider information presented in the context of a motion for reconsideration which might be considered detrimental to his position on the original motion in its review of the ruling on the original motion. The State cites no case law justifying such an exception. (*See*

*generally* Resp. Br.) As such, this Court should reject the State's request to create such an exception out of whole cloth. *State v. Zichko*, 129 Idaho 259, 263 (1996).

a. The law does not support the State's request to create such an exception

The State's failure to cite any case law in support of its proposed exception is unsurprising because the case law does not actually support such an exception. In fact, the Idaho Supreme Court recently rejected essentially the same argument in *Beck v. Elmore County Magistrate Court, et al.*, ___ Idaho ___, slip opinion p.17 (June 24, 2021). In that case, the petitioner sought a writ of prohibition for, *inter alia*, issuing an arrest warrant for failure to pay fines and fess without first conducting an ability-to-pay analysis. *Id*. One of the State's arguments on that issue was that, by entering a guilty plea to the associated contempt charge, the petitioner had admitted her failure to pay was willful. *Id*. Thus, the State contended, she was foreclosed from asserting error based on the magistrate's failure to find willfulness when it had initially issued the arrest warrant. *Id*. The Supreme Court rejected the State's argument in that regard, explaining "[t]he constitutionality of the warrant of attachment must have been based solely upon the evidence before the magistrate at the time it was issued, not evidence obtained after her eventual arrest." *Id*. In other words, the fact that the petitioner herself had presented the subsequent information which may have been detrimental to her position on the initial decision, that information was "immaterial" to the evaluation of whether the initial decision was proper. *Id*.

The same is true here. The fact that Mr. Kesling, like the petitioner in *Beck*, might have subsequently presented additional information which might be said to be detrimental to his position on the initial summary judgment decision cannot influence the propriety of the district

court's initial decision, based on the information it had at that time. *See id*. As such, this Court should reject the State's exception in this context, just as it did in *Beck*.

That conclusion is particularly appropriate because motions for reconsideration, such as Mr. Kesling's motion for reconsideration under I.R.C.P. 59(e) and 60(b) (Supp. R., p.215), are distinct legal entities from the original decision on the underlying motion, and as such, the appellate review of the decisions on such motions are factually and legally distinct from appellate review of the underlying decision. *See, e.g., State v. Huffman*, 144 Idaho 201, 203 (2007). Essentially, the two lines of appellate analysis are: (1) did the district court properly apply the legal standards in ruling on the motion for summary dismissal based on the information it had when it made that ruling; and (2) did the district court properly apply the legal standards in ruling on the motion for reconsideration based on the information it had when it made that ruling.

In other words, had the district court properly ruled on the original motion, there would have been no motion to reconsider, and so, the propriety of the initial decision must be based on the information known to the district court at the time it decided that motion. *Compare State v. Garcia-Rodriguez*, 162 Idaho 271, 275 (2017) (holding the district court's actual decision was improper based on the arguments forwarded in the district court even though the State's alternative argument presented for the first time on appeal was likely legally correct). In effect, crossing the streams of those two analyses, as the State would have this Court do, would mean this Court would no longer be evaluating whether the district court properly applied the law to the facts in originally deciding the motion. Rather, it would be improperly analyzing the propriety of district court's decision based on some hypothetical alternative set of facts in the first instance.

In fact, a motion under I.R.C.P. 59(e) does not even allow for the presentation of additional evidence in support of the motion; such motions are "premised solely upon information that was before the court at the time judgment was rendered." *Bias v. State*, 159 Idaho 696, 706 (Ct. App. 2015). As such, it would be improper to consider the new information about the Bluebird agreement, either below or on appeal, under I.R.C.P. 59(e) because it could not have been considered by the district court in ruling on that motion in the first place.

Similarly, a motion to reconsider under I.R.C.P. 60(b) does not allow the presentation of new evidence unless the moving party also shows there was some mistake, surprise, or excusable neglect which prevented the party from providing that additional information for the court's consideration in making the initial decision. *Bias*, 159 Idaho at 706; *accord Ross v. State*, 141 Idaho 670, 672 (Ct. App. 2005). Therefore, the appellate review of the decision on a motion to reconsider under I.R.C.P. 60(b) is distinctly different from appellate review of the underlying decision itself since it has to consider whether the district court properly considered the new information in the first place. *See id.*

And even if that new information were properly considered under I.R.C.P. 60(b), that rule "cannot be a disguised substitute for a timely appeal." *Ross*, 141 Idaho at 672 (internal quotation omitted). As a result, an appeal from the motion to reconsider cannot allow evaluation of the propriety of the original decision. *Compare Huffman*, 144 Idaho at 203 ("[B]ecause Huffman only appeals the denial of his Rule 35 motion, his request to change the standard of review for an appeal of a sentence is not properly before this Court."). Considering the propriety of the original decision the underlying motion on appeal in light of the information only presented with the motion to reconsider does essentially the same thing, and would improperly transform the motion for reconsideration into an appeal of the original decision.

As such, there is no legal basis for the exception which the State would like this Court to craft. Rather, this Court should adhere to the rule announced and applied consistently in cases like *Smith* and *Charlson* and evaluate the propriety of the district court's decision to summarily dismiss the petition based on the information known at the time it summarily dismissed the petition.

b. Even if this Court created such an exception, the information which the State would have this Court consider does not change the conclusion that trial counsel performed deficiently by not investigating facts relevant to the only charged conduct against Mr. Kesling

Even if this Court were to create the State's exception and consider the terms of the Bluebird agreement in reviewing the propriety of the decision to summarily dismiss the petition, the State has completely ignored the other reasons as to why the terms of the Bluebird agreement do not change the analysis on the merits. (*See generally* Resp. Br.) As such, it has waived those issues, and this Court should refuse to affirm in light of them. *See Zichko*129 Idaho at 263.

First, the terms of Bluebird's agreement with Mr. Kesling have little, if anything, to do with whether trial counsel's performance was objectively deficient for failing to investigate whether the Bluebird account itself existed. Thus, even if the terms of the Bluebird agreement were properly included in the analysis on appeal, it would not change the relevant conclusion – that summary dismissal was improper because Mr. Kesling showed a genuine issue of fact as to counsel's failure to investigate the existence of a defense to the only charged conduct – in any meaningful way.

Additionally, the terms of agreement between Bluebird and Mr. Kesling do not actually demonstrate, as the State contends, that Mr. Kesling would have pled guilty based on uncharged conduct relating to the fictitious pre-authorization codes even if trial counsel had reasonably

investigated the only charged conduct against him. (*See* Resp. Br., pp.23-24.) That is because the terms of the Bluebird agreement with respect to the pre-authorization codes do not affect the analysis of the negotiability of the check as between Mr. Kesling and the payee, and therefore, do not demonstrate that the fictitious code would constitute forgery of a check.

First, as Mr. Kesling pointed out in his Appellant's Brief, the terms of the Bluebird agreement would constitute parol evidence, since they are not actually included in the instrument passing between Mr. Kesling and the payee. (App. Br., pp.23-24.) Therefore, they are not properly considered in assessing the negotiability of the otherwise-unambiguous check. *See Porcello v. Estate of Porcello*, 167 Idaho 412, __, 470 P.3d 1221, 1234 (2020) (holding that the Court would not look to parol evidence to evaluate the negotiability of an otherwise-unambiguous document), *reh'g denied*. The State does not so much as mention the concept of parol evidence in its brief, much less try to explain how that rule would not apply in this context. (*See generally* Resp. Br.)

Nor could the State actually make such an argument under the applicable standards. The check in this case is an unconditional promise to pay a specified amount of money, signed by the drafter and payable on demand to the order of the payee. (*See* Supp. R., p.328 (a copy of the check).) The language of the check does not expressly refer to any other agreement or provision governing the payability of the check on demand. (*See generally* Supp. R., p.328.) While the check does remind the drafter to get a pre-authorization code, there is nothing in the language on the check which declares the check would not be valid without such a code. (*See generally* Supp. R., p.328.) Additionally, while the check does inform the payee that it can confirm the pre-authorization code, there is nothing about that language which *requires* the payee to do so before the check would become payable. (*See generally* Supp. R., p.328.) As such, the language

of the check is unambiguous in terms of presenting it as a negotiable instrument. *See* I.C. § 28-3-104(1). Therefore, there is no basis upon which the terms of Mr. Kesling's agreement with Bluebird would be relevant to the analysis in this case. *See Porcello*, 470 P.3d at 1234.

Moreover, even considering that parol evidence, the other evidence submitted in this case demonstrates that an invalid pre-authorization code does not actually affect the check's negotiability even under the terms of the agreement. While the terms of the agreement do say that Bluebird will not honor a check without a valid preauthorization code (Supp. R., p.256), the other evidence in the record expressly shows that American Express has, in fact, honored Bluebird checks in Mr. Kesling's case without valid pre-authorization codes *and* has waived the associated fees on his account. (Supp. R., p.25 (the police officer's report noting that two of the seven checks with fictious preauthorization codes had been paid out); R., p.88 (statement from Mr. Kesling's Bluebird account showing numerous "unauthorized check fees," including one on the date of the check to which he pled guilty, in the amount of "$0.00").) Since that evidence, which the State does not mention (*see generally* Resp. Br.; *compare* App. Br., p.25), demonstrates that the pre-authorization code is a waivable provision of the agreement, a fictitious code cannot be said to make the check non-negotiable as to the payee, and thus, would not be a forgery. As such, even considering that evidence, it still does not change the ultimate conclusion that counsel's performance in advising the guilty plea based on uncharged conduct without conducting a reasonable investigation into the charged conduct was objectively deficient.

4. Under the proper standards, Mr. Kesling presented sufficient evidence and allegations to demonstrate a genuine issue of material fact with regard to trial counsel's deficient performance, and so, summary dismissal was improper

Under the proper standards, a jury could reasonably rely on the allegations and facts Mr. Kesling has provided to conclude that trial counsel would have discovered a factual defense

to the only charged conduct in this case had he conducted a reasonable investigation. As such, there is, at least, a genuine issue of material fact with respect to whether trial counsel's performance was deficient. That is particularly true since the allegedly-contradictory evidence upon which the State tries to rely actually demonstrates the disputed issue of fact in this regard. For all those reasons, the district court erred by summarily dismissing Mr. Kesling's petition in light of that genuine issue of material fact.

B. Mr. Kesling Presented Sufficient Allegations To Show A Genuine Issue Of Material Fact Regarding The Impact Trial Counsel's Deficient Performance Had On His State Of Mind In Pleading Guilty, And Thus, That It Prejudiced Him

As the United States Supreme Court and Idaho Supreme Court have both made clear, the focus of the prejudice analysis in the guilty plea context is how the deficient performance affected the defendant's decisionmaking in that plea process: "As this Court has previously noted, the focus is 'on the defendant's state of mind when choosing to plead guilty,' and there is no requirement that the Court speculate as to the potential sentence" that would follow a hypothetical trial. *Booth v. State*, 151 Idaho 612, 622 (2011) (quoting *McKeeth v. State*, 140 Idaho 847, 853 (2004)); *accord Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958 (2017) (reaffirming the proper analysis "focuses on a defendant's decisionmaking"). Mr. Kesling presented sufficient evidence to establish at least a genuine issue of material fact that trial counsel's failure to reasonably investigate a factual defense to the only charged conduct affected his state of mind when he chose to plead guilty to that charged conduct. As such, there was at least a genuine issue of material fact that the deficient performance prejudiced him, and as such, summary dismissal was improper.

The fundamental flaw in the State's attempt to rely on what trial counsel might have hypothetically advised as justifying summary dismissal on the prejudice prong (*see* Resp.

Br., pp.20-24)[1] is that it blatantly ignores the fact that the defendant controls whether or not to go to trial or to plead, not counsel. *See, e.g., McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500, 1508-09 (2018). As such, a defendant can reject or override counsel's advice in that regard, even if counsel's advice might be considered reasonable. *See id.* at 1512. As such, a petitioner can still show prejudice if his decisionmaking to accept or reject counsel's advice was affected by counsel's deficient performance. *See, e.g., Booth*, 151 Idaho at 622; *McKeeth*, 140 Idaho at 853. That is, in fact, why the United States Supreme Court made it clear that "the inquiry we prescribed in *Hill v. Lockhart* focuses on *a defendant's* decisionmaking . . . ," not his attorney's, *Lee*, 137 S. Ct. at 1966 (emphasis added), even though the *Hill* Court had mentioned whether counsel's advice to plead guilty would have been different in light of a proper investigation into potentially-exculpatory information in its prejudice analysis. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Furthermore, as the Idaho Supreme Court has explained, "The question regarding [the petitioner's] strategy is not whether it could or should have worked as intended. Instead, the question is whether—even if misguided—it plausibly *could* have been [the petitioner's] strategy." *McKeeth*, 140 Idaho at 853 (emphasis from original). Thus, prejudice will exist *even though* a plea deal might be considered the petitioner's best option in light of the evidence against him and potential defenses, or lack thereof, available to him, as well as the other benefits the plea provided him. *Booth*, 151 Idaho at 622 n.9. Prejudice will also exist if the defendant would have rejected a guilty plea and sought to negotiate a different plea regardless of whether

[1] The State actually made these arguments in the section of its brief discussing deficient performance and cross-applied them in the section discussing prejudice. (Resp. Br., p.25.) Of course, as discussed in Section A(2) *supra*, such arguments about alternate bases of guilt have nothing to do with whether counsel properly investigated the existence of the Bluebird account, and so, are not actually relevant to the deficient performance analysis either.

the State might have hypothetically agreed to an alternative deal *because* what the prosecutor might have done "has no bearing on the voluntariness of [the petitioner's] plea due to being mislead [sic] by his counsel." *McKeeth*, 140 Idaho at 853; *accord Rodriguez-Penton v. United States*, 905 F.3d 481, 488 (6th Cir. 2018) (joining five other circuits in recognizing that, under the United States Supreme Court's decision in *Lee*, a petitioner can show prejudice simply by showing, but for counsel's deficient performance, he would have rejected this plea deal and sought to negotiate a different plea deal).

As such, the State's arguments, which focus on what trial counsel might or might not have done had he performed properly, rather than on the way his failure to act properly actually affected Mr. Kesling's evaluation of his options when he accepted this particular plea deal, "demonstrate a fundamental misunderstanding of the law as it relates to the prejudice prong of the *Strickland* test," because "they do not address [the petitioner's] state of mind when pleading guilty or how his state of mind was affected by [counsel's] erroneous advice." *Booth*, 151 Idaho at 622; *compare State v. Garcia*, 166 Idaho 661, 674-75 (2020) (explaining that an error cannot be deemed harmless simply because there might be other evidence, even overwhelming evidence, of the guilt; if the error still had a non-minimal impact on the outcome within the fabric of the case, it cannot be a harmless error). As such, this Court should reject the State's arguments in that regard.

Under the proper standard, trial counsel's deficient performance was prejudicial because, as in *Booth* and *McKeeth*, it actually did affect Mr. Kesling's state of mind in evaluating and accepting this particular plea deal. Specifically, the deficient performance gave him a significantly different understanding of what his chances at trial were. Due to counsel's deficient performance, Mr. Kesling was told he had no basis to present a defense, and so, "it did not

matter" whether he admitted the charged conduct or some other conduct. (Supp. R., pp.7-8.) However, if Mr. Kesling had the evidence to prove a factual defense to the only charged conduct, it would have been eminently reasonable for him to have rejected this plea agreement and gone to trial on that factual defense to the only charged conduct. *Compare McKeeth*, 140 Idaho at 853 (finding prejudice where the defendant would have only been deciding whether to go to trial on three charges instead of six, had counsel performed properly). Since the was evidence indicating the deficient performance actually impacted Mr. Kesling's decisionmaking with regard to accepting this plea, there was at least a genuine issue of fact on the prejudice prong, and thus, summary dismissal was improper.

That remains true even if it were likely his counsel would have still advised Mr. Kesling plead guilty based on the uncharged conduct after uncovering the factual defense tot eh charged conduct. As noted *supra*, it would be reasonable in that situation for Mr. Kesling, armed with evidence of a factual defense, to reject that advice and demand a trial against the only charged conduct. Therefore, the deficient performance was still prejudicial under *Lee*, *Booth*, and *McKeeth* even if trial counsel would have inevitably continued to recommend a guilty plea on an uncharged basis because trial counsel's deficiently performance still actually affected Mr. Kesling's state of mind in accepting this particular plea deal.

Of course, the State's arguments in that regard completely ignore the possibility that trial counsel might have advised Mr. Kesling to go forward on the factual defense to the only charged conduct if he had discovered the evidence supporting that defense. After all, as Mr. Kesling alleged, trial counsel's advice was that "it did not matter" upon which conduct he based his plea. (Supp. R., p.7.) The only way that the basis of the plea "would not matter" is if there was no defense to either basis. Thus, it is entirely plausible that, armed with a factual defense to the

only charged basis, trial counsel would no longer have felt "it did not matter" to which conduct Mr. Kesling admitted.

That is particularly true since a defense attorney is not required to do the prosecutor's work and highlight the weaknesses in the State's case or offer alternative bases to convict his client to the prosecutor ahead of trial. As such, the reasonable assumption (remembering that, at summary dismissal stage, all reasonable inferences are to be run in Mr. Kesling's favor) is that trial counsel would have advised Mr. Kesling to reject this particular plea deal and pursue the factual defense unless and until the State recognized the alternative basis to prosecute *and* was actually allowed to amend the charge at whatever late time it brought that motion. The reasonable advice to Mr. Kesling would be that, if that scenario played out,[2] then it might be worthwhile to negotiate a plea to that amended charge, but unless and until the prosecutor was allowed to pursue that alternative path, there was no reason for defense counsel to preemptively highlight it when there was a factual defense to the only charged conduct pending. Certainly, there is a genuine issue of fact on that material point, which means summary dismissal was still inappropriate.

Regardless, as this discussion of hypotheticals demonstrates, there is at least a genuine issue of material fact trial counsel's failure to reasonably investigate and find the factual defense to the charged conduct affected Mr. Kesling's state of mind and understanding of his situation as he approached this particular plea deal, and that is all that is required to show prejudice under

[2] Of course, since amending to charge a different factual basis for the offense would change the nature of the offense to a basis on which Mr. Kesling was not actually bound over, the State may not have been allowed to amend the information at all. *See, e.g., State v. Colwell*, 124 Idaho 560, 566 (Ct. App. 1993) (explaining that, while the rules allowing amendments to the information are liberal, "any amendment which charges the accused with a crime of greater degree *or a different nature* than that for which the accused was bound over for trial by the committing magistrate is barred by the Idaho Constitution") (emphasis from original).

*Lee*, *Booth*, and *McKeeth*. In other words, Mr. Kesling's allegations, which indicate he would have demanded a trial had counsel conducted a proper investigation and discovered the evidence to prove his factual defense to the only conduct charged against him (*see* Supp. R., p.8), were sufficient to establish at least a genuine issue of material fact on the prejudice prong *regardless* of what the State believes trial counsel might have still advised per *Bishop*. As such, the district court's decision to summarily dismiss his petition in that regard should be reversed.

## CONCLUSION

Mr. Kesling respectfully requests this Court vacate the final judgment in this case, reverse the order summarily dismissing his petition for post-conviction, and remand this case for an evidentiary hearing.

DATED this 6th day of July, 2021.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2021, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas