

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

5-24-2021

Hallam v. State Appellant's Brief Dckt. 48137

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Hallam v. State Appellant's Brief Dckt. 48137" (2021). *Not Reported*. 6959.
https://digitalcommons.law.uidaho.edu/not_reported/6959

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

SABINA A. HALLAM,)	
)	NO. 48137-2020
Petitioner-Appellant,)	
)	OWYHEE COUNTY NO. CV37-18-17
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
<hr/>		

BRIEF OF APPELLANT

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

HONORABLE THOMAS W. WHITNEY
District Judge

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

JENNY C. SWINFORD
Deputy State Appellate Public Defender
I.S.B. #9263
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**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL.....	7
ARGUMENT.....	8
The District Court Erred When It Summarily Dismissed Ms. Hallam’s Petition For Post-Conviction Relief	8
A. Introduction	8
B. Post-Conviction Jurisprudence & Standards Of Review	8
C. The District Court Erred When It Summarily Dismissed Ms. Hallam’s Breach Of Plea Claim Because There Were Genuine Issues Of Material Fact On Deficiency And Prejudice.....	10
CONCLUSION.....	16
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases

<i>Baker v. United States</i> , 781 F.2d 85 (6th Cir. 1986).....	15
<i>Boman v. State</i> , 129 Idaho 520 (Ct. App. 1996).....	14
<i>Charboneau v. State</i> , 144 Idaho 900 (2007).....	9, 10
<i>Dunlap v. State</i> , 126 Idaho 901 (Ct. App. 1995)	9
<i>Goodwin v. State</i> , 138 Idaho 269 (Ct. App. 2002).....	10
<i>Grube v. State</i> , 134 Idaho 24 (2000).....	8
<i>Hayes v. State</i> , 143 Idaho 88 (Ct. App. 2006)	13, 14
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	9
<i>Lint v. State</i> , 145 Idaho 472 (Ct. App. 2008).....	14
<i>McKeeth v. State</i> , 140 Idaho 847 (2004).....	9
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970).....	9
<i>Muchow v. State</i> , 142 Idaho 401 (2006).....	10
<i>Pratt v. State</i> , 134 Idaho 581 (2000).....	10
<i>State v. Acuna</i> , 154 Idaho 139 (Ct. App. 2013).....	13
<i>State v. Banuelos</i> , 124 Idaho 569 (Ct. App. 1993)	15
<i>State v. Dunlap</i> , 155 Idaho 345 (2013)	8
<i>State v. Hallam</i> , Nos. 43035 & 43737, 2017 WL 491174 (Ct. App. Feb. 7, 2017).....	2
<i>State v. Hargis</i> , 126 Idaho 727 (Ct. App. 1995)	12
<i>State v. Nienburg</i> , 153 Idaho 491 (Ct. App. 2012)	12, 15
<i>State v. Rutherford</i> , 107 Idaho 910 (Ct. App. 1985).....	15
<i>State v. Schultz</i> , 148 Idaho 884 (Ct. App. 2008).....	12

State v. Shafer, 144 Idaho 370 (Ct. App. 2007)..... 12

Strickland v. Washington, 466 U.S. 668 (1984)9

Vavold v. State, 148 Idaho 44 (2009).....9

Statutes

I.C. § 19-49038

I.C. § 19-4906(b), (c)9

I.C. § 19-5304(9).....5, 12

Rules

I.C.R. 11(f)(2)15

I.R.C.P. 8(a)(1)8

Constitutional Provisions

U.S. CONST. amend. VI9

STATEMENT OF THE CASE

Nature of the Case

Sabina Hallam appeals from the district court's judgment denying her post-conviction petition. She argues that the district court erred by summarily dismissing her petition because one of her ineffective assistance of counsel claims for a breach of the plea agreement presented genuine issues of material fact on deficient performance and prejudice. In fact, the district court accepted Ms. Hallam's allegations on deficiency as true, but failed to conduct any prejudice analysis. If properly examined, Ms. Hallam met her burden to survive summary dismissal on her breach of plea claim. Accordingly, Ms. Hallam respectfully submits that the Court should vacate the district court's judgment, reverse its summary dismissal order, and remand this case for an evidentiary hearing on this claim.

Statement of Facts and Course of Proceedings

In the underlying criminal case, the State charged Ms. Hallam with five counts of grand theft. (R. Vol. I,¹ p.192.) Pursuant to a plea agreement, she pled guilty to one count, and the other four counts were dismissed. (R. Vol. I, p.192.) The guilty plea advisory form indicated that Ms. Hallam was aware that she "may be required" to pay restitution, but the form was silent on the restitution terms. (R. Vol. I, pp.62–68.)

At the change of plea hearing, neither the parties nor the district court recited the terms of the plea agreement. (R. Vol. I, pp.112–120.) However, during the plea colloquy, the district court asked Ms. Hallam if she understood that "restitution could be awarded on everything," (R. Vol. I, p.113 (Tr., p.2, Ls.15–16)), and that "restitution could be awarded on all the cases, even the ones

being dismissed, (R. Vol. I, p.115 (Tr., p.4, Ls.10–11)), and Ms. Hallam said yes to both questions, (R. Vol. I, pp.113, 115 (Tr., p.2, L.18, p.4, L.12)).

At sentencing, the prosecutor stated that “our negotiations” were that Ms. Hallam would pay restitution on “all matters whether charged or uncharged or dismissed otherwise.” (R. Vol. I, p.128 (Tr., p.7, Ls.12–21).) Ms. Hallam’s counsel did not refute the prosecutor’s statement. (R. Vol. I, p.128 (Tr., p.7, L.25).)

The district court held a “contested” restitution hearing. (R. Vol. I, p.193.) Later, in the district court’s memorandum decision and order on restitution, it noted that Ms. Hallam never objected to “full” restitution as including the dismissed counts. (R. Vol. I, p.78.) Ms. Hallam’s objections pertained to the amount only. (R. Vol. I, p.78.) The district court also noted that the sentencing judge had stated in its order dismissing the other counts that Ms. Hallam “would be ‘responsible for all restitution attributable to such offenses.’” (R. Vol. I, p.78; *see also* R. Vol. I, p.140.) In light of these facts, the district court opined, “The only reasonable inference based upon this language as [sic] that the defendant had agreed to make reasonable restitution as to all counts.” (R. Vol. I, p.78 n.1.) After reviewing the evidence from the restitution hearing, the district court ordered Ms. Hallam to pay \$30,787.00 in restitution. (R. Vol. I, p.83.)

Ms. Hallam appealed and, among other issues, challenged the sufficiency of the evidence for the restitution amount. (R. Vol. I, p.193; *see also* R. Vol. I, pp.72–76.) The Court of Appeals affirmed the district court’s judgment of conviction and sentence and its restitution order. (R. Vol. I, pp.69–76, 193.) *See also State v. Hallam*, Nos. 43035 & 43737, 2017 WL 491174 (Ct. App. Feb. 7, 2017).

¹ The clerk’s record has been divided into two volumes on appeal. The first volume contains 201 pages. The second volume contains eleven pages, and the second volume’s pagination begins with page 202.

Ms. Hallam filed a verified pro se petition for post-conviction relief. (R. Vol. I, pp.7–11.) She raised five claims relating to the district court’s restitution order. (R. Vol. I, pp.7–11.) Relevant here, she claimed: “(a)” her plea agreement “was not honored” and her attorney “refus[ed] . . . to state this in court.” (R. Vol. I, p.7.) She also claimed: “(b)” her plea agreement “was \$1,700” for the charge that she pled guilty to, and the additional restitution “jumped to \$31,689” because of the four dismissed charges. (R. Vol. I, pp.7–8.) She also stated, “My attorney failed to mention . . . that the restitution is not what was agreed on plea.” (R. Vol. I, p.9.)

The State answered. (R. Vol. I, pp.12–15.) The district court appointed counsel to represent Ms. Hallam. (R. Vol. I, pp.24–25.) Later, the State moved for summary dismissal, arguing Ms. Hallam failed to raise a genuine issue of material fact or her claims were bare and conclusory. (R. Vol. I, pp.52–53.)

Ms. Hallam responded in opposition. (R. Vol. I, pp.54–59, 60–61.) Ms. Hallam included her guilty plea advisory form, the Court of Appeals’ opinion from the direct appeal, and the district court’s memorandum decision and order on restitution. (R. Vol. I, pp.60–84.)

The district court held a hearing on the State’s motion for summary dismissal. (R. Vol. I, pp.85–86; *see* Tr., p.1, L.1–p.14, L.14.) After brief argument by the parties, the district court requested supplemental briefing on the prejudice prong and, specifically, whether Ms. Hallam would not have pled guilty, but would have insisted on going to trial, if not for her trial counsel’s deficiency. (Tr., p.9, Ls.9–15, p.13, L.16–p.14, L.9.)

Ms. Hallam filed a supplemental brief and a declaration in support. (R. Vol. I, pp.89–90, 93–99.) Her declaration stated: (1) “At no point did my lawyer, the prosecutor, or the court advise me that I would have to pay restitution in excess of one thousand five hundred dollars

(\$1,500.00)”; (2) “At the time I pled guilty, I was told by my lawyer that I would only be liable for restitution on a single count”; and (3) “I would not have pled guilty if I had known I would be held accountable for restitution on all of the dismissed counts.” (R. Vol. I, p.89.)

The State responded. (R. Vol. I, pp.102–11.) The State asserted that Ms. Hallam was “fully informed” at the entry of plea, sentencing, and restitution hearings and through the trial court’s restitution decision that she would pay restitution on all counts. (R. Vol. I, pp.102–04, 105.) The State argued, since Ms. Hallam was told about restitution on all counts, her counsel was not deficient and the record refuted her claim that she would not have pled guilty if she had known about the restitution on all counts. (R. Vol. I, pp.104–11.) The State included transcripts of the change of plea and sentencing hearings, as well as the trial court’s order dismissing the remaining four counts. (R. Vol. I, pp.112–40.)

The district court held a short status conference and took the State’s motion under advisement. (R. Vol. I, pp.146–47; Tr., p.15, L.1–p.19, L.23.)

About a month later, the district court issued an order granting the State’s motion for summary dismissal. (R. Vol. I, pp.192–200.) The district court also took judicial notice of the transcripts of the change of plea and sentencing hearings, the guilty plea advisory form, and the district court’s memorandum decision and order on restitution. (R. Vol. I, pp.148–49.) In its decision, the district court quoted Ms. Hallam’s first two claims from her petition:

(a) my agreement to a plea deal that was not honored and refusal of my attorney to state this in Court;

(b) original 5 charges are \$10,300 for restitution, 4 charges were dismissed, yet after plea deal restitution jumped to \$31,689 (plea agreement was \$1,700) court cost are on 4 dismissed cases. . . .

(R. Vol. I, p.193.) “In these claims [A and B],” the district court summarized, “Ms. Hallam alleges that the restitution award entered by the Court greatly exceeded what was agreed upon by

the parties in plea negotiations.” (R. Vol. I, p.196.) On deficient performance, the district court ruled:

Here, Ms. Hallam has alleged that her trial counsel failed to alert the Court that her plea deal was not honored and that trial counsel affirmatively advised her that that she would only be liable for restitution on the single count to which she pled guilty. Those allegations remain uncontroverted on the record currently before the Court. The guilty plea advisory form is silent as to the amount of restitution that could be ordered, and there is no written plea agreement before the Court. Additionally, the State has not produced any evidence to controvert those allegations.

“In considering summary dismissal of an application for post-conviction relief, the trial court must accept as true verified allegations of fact in the application or in supporting affidavits, no matter how incredible they may appear, unless they have been disproved by other evidence in the record.” . . . Applying that standard to the evidence in this case, this Court is bound to accept Ms. Hallam’s allegations as true.

Those allegations create a question of fact as to whether trial counsel’s performance fell below an objective standard of reasonableness. Evaluating the conduct at issue from counsel’s perspective at the time Ms. Hallam changed her plea, it could be objectively deficient to advise Ms. Hallam that she would only be liable for restitution on a single count when there was no binding plea agreement between the parties and the Court and when the Court could lawfully impose restitution for any economic loss which the victim actually suffered as a result of Ms. Hallam’s conduct.² This Court is not deciding that trial counsel’s performance was deficient during the plea process. Rather, this Court finds that under the standards articulated by our state’s appellate courts, Ms. Hallam has created a genuine issue of material fact worthy of an evidentiary hearing on the first prong of the *Strickland* test.

(R. Vol. I, pp.197–98 (citation omitted).) Although the district court found deficient performance, the district court determined that Ms. Hallam was not prejudiced. (R. Vol. I, pp.198–99.) The district court focused on whether Ms. Hallam would have pled guilty but for her counsel’s errors. (R. Vol. I, p.198.) The district court discussed that the trial court had told Ms. Hallam twice “that she could be liable for restitution on all counts, even though being

² As discussed below, unless consented to by the parties, the district court cannot order restitution for dismissed charges. I.C. § 19-5304(9).

dismissed,” and she indicated that she understood, and she still pled guilty. (R. Vol. I, p.198.)

The district court reasoned:

A petitioner’s claims may be summarily dismissed if the allegations are plainly disproven by the record. . . . The record in this case conclusively establishes that Ms. Hallam fully understood that she could be liable for restitution on all counts prior to entering her plea of guilty. The record demonstrates that the Court made Ms. Hallam aware that she could be liable for restitution on all counts on at least two occasions. At either of those points during the change of plea hearing Ms. Hallam could have halted the proceeding to speak with counsel or simply elected not to plead guilty and proceed to trial. This plainly disproves Ms. Hallam’s allegation that she would not have pled guilty had she been aware that she could be liable for restitution on all five counts. Because the record establishes that Ms. Hallam fully understood that she could be liable for restitution and still pled guilty, Ms. Hallam has failed to allege a genuine issue of material fact that she was prejudiced by trial counsel’s deficiency. Even assuming that Ms. Hallam could demonstrate at an evidentiary hearing that her trial counsel was deficient, there is no question that she was not prejudiced by that deficiency.

(R. Vol. I, p.199 (citation omitted). In conclusion, the district court dismissed “claims A and B . . . as a matter of law.” (R., Vol. I, p.199.) The district court also rejected Ms. Hallam’s remaining claims, which are not pursued here. (R. Vol. I, pp.199–200.)

On the same day, the district court entered a judgment denying Ms. Hallam’s petition with prejudice. (R. Vol. II, p.202.) Ms. Hallam timely appealed. (R. Vol. II, pp.204–06.)

ISSUE

Did the district court err when it summarily dismissed Ms. Hallam's petition for post-conviction relief?

ARGUMENT

The District Court Erred When It Summarily Dismissed Ms. Hallam's Petition For Post-Conviction Relief

A. Introduction

Ms. Hallam argues that the district court erred by summarily dismissing her claim that her counsel failed to object when the trial court went beyond the plea agreement terms and ordered her to pay restitution for the dismissed charges. In dismissing this breach of plea claim, the district court found that Ms. Hallam's allegations were uncontroverted and that she established genuine issues of material fact on deficiency, but the district court did not analyze the prejudice prong. Instead, the district court only conducted a prejudice analysis on Ms. Hallam's related claim that her guilty plea was not knowing, voluntary, and intelligent. Because the district court failed to examine prejudice on the breach of plea claim, and Ms. Hallam established genuine issues of material fact on both *Strickland* prongs, the district court erred by summarily dismissing this claim. As such, she respectfully requests that the Court vacate the district court's judgment, reverse its order granting summarily dismissal on this claim, and remand this case for an evidentiary hearing.

B. Post-Conviction Jurisprudence & Standards Of Review

A petition for post-conviction relief is civil in nature. *State v. Dunlap*, 155 Idaho 345, 361 (2013).

Like a plaintiff in a civil action, the applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Grube v. State*, 134 Idaho 24 (2000). Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must

include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

Charboneau v. State, 144 Idaho 900, 903 (2007).

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. “[T]he right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the petitioner must generally show that (1) his attorney’s performance did not meet “an objective standard of reasonableness,” and (2) his attorney’s deficient performance prejudiced him. *Id.* at 687–88. “Although *Strickland* concerned an allegation of ineffective assistance in a sentencing proceeding, the same standard applies equally to claims arising from the plea process.” *McKeeth v. State*, 140 Idaho 847, 850 (2004) (citing *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)).

The district court can summarily dismiss or grant a petition for post-conviction relief if “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” I.C. § 19-4906(b), (c). “In considering summary dismissal of an application for post-conviction relief, the trial court must accept as true verified allegations of fact in the application or in supporting affidavits, no matter how incredible they may appear, unless they have been disproved by other evidence in the record.” *Dunlap v. State*, 126 Idaho 901, 909 (Ct. App. 1995). The district court is “required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Charboneau*, 144 Idaho at 903. Any disputed facts are construed in favor of the non-moving party, and “all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Vavold v. State*, 148 Idaho 44, 45 (2009).

A petition for post-conviction relief based on a claim of ineffective assistance of counsel will “survive a motion for summary dismissal if the petitioner establishes: (1) a material issue of fact exists as to whether counsel’s performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced petitioner’s case.” *Pratt v. State*, 134 Idaho 581, 583 (2000). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2002).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.

Charboneau, 144 Idaho at 903. Because the evaluation of a motion for summary disposition does not involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court reviews a district court’s summary dismissal order de novo. *Muchow v. State*, 142 Idaho 401, 402–03 (2006).

C. The District Court Erred When It Summarily Dismissed Ms. Hallam’s Breach Of Plea Claim Because There Were Genuine Issues Of Material Fact On Deficiency And Prejudice

As recognized by the district court, Ms. Hallam raised two claims related to her plea agreement and restitution. (R. Vol. I, pp.196–97.) One claim pertained to her trial counsel’s advice on the restitution terms of the plea agreement, but the other pertained to her counsel’s failure to object when the trial court and the prosecution did not follow the agreement. (R., Vol. I, p.197.) On this latter claim, the district court failed to conduct any prejudice analysis, despite its determination that Ms. Hallam’s counsel was deficient. (See R. Vol. I, pp.198–99.) The district court also misunderstood the relevant restitution standards, which skewed its *Strickland* analysis for both claims. Because Mr. Hallam actually established genuine issues of material fact

on deficiency and prejudice for her breach of plea claim, she met her burden to survive summary dismissal. She maintains that an evidentiary hearing is necessary to resolve these factual disputes.

First, on deficient performance, Ms. Hallam met her burden to show that her counsel's failure to object and inform the trial court of the plea agreement's restitution terms was objectively unreasonable. Ms. Hallam averred that her plea agreement's restitution term was that she would pay \$1,700 for the one grand theft charge that she pled guilty to. (R. Vol. I, pp.7-8.) The district court found that Ms. Hallam's allegations on the restitution terms of the plea agreement remained "uncontroverted on the record" before it. (R. Vol. I, p.197.) The district court recognized that the guilty plea advisory form was silent on the restitution amount "that could be ordered," and there was no written plea agreement provided to the district court. (R. Vol. I, p.197.) The district court also noted that the State did not produce any evidence "to controvert those allegations," such as the written agreement or an affidavit from the prosecution on the agreement's terms. (R. Vol. I, p.197.) Accepting Ms. Hallam's allegations as true, the district court determined that Ms. Hallam met her burden to show that her counsel was deficient in advising her "that she would only be liable for restitution on a single count when there was no binding plea agreement between the parties and the Court and when the Court could lawfully impose restitution for any economic loss which the victim actually suffered as a result of Ms. Hallam's conduct." (R. Vol. I, pp.197-98.)

Although the district court incorrectly believed that Ms. Hallam could be liable to pay for *any* economic loss, the district court still identified genuine issues of fact on deficient performance that were material to Ms. Hallam's breach of plea claim. The district court seemed to believe that, without an express agreement, the default for restitution was that the trial court

could “lawfully impose” restitution for any counts, even the dismissed ones. (R. Vol. I, pp.197–98.) This is simply not the law. “The court may, with the consent of the parties, order restitution to victims, and/or any other person or entity, for economic loss or injury for crimes which are not adjudicated or are not before the court.” I.C. § 19-5304(9). “Thus, when a defendant has been charged with multiple crimes and pleads guilty to part of the charges in exchange for dismissal of the remainder, restitution is not ordinarily awardable for loss or injury actually and proximately caused only by the offenses for which the charges were dismissed.” *State v. Nienburg*, 153 Idaho 491, 495 (Ct. App. 2012); *accord State v. Schultz*, 148 Idaho 884, 886 (Ct. App. 2008); *State v. Shafer*, 144 Idaho 370, 372 (Ct. App. 2007); *State v. Hargis*, 126 Idaho 727, 730 (Ct. App. 1995). Thus, the restitution default was that the trial court could only impose restitution for the single grand theft charge that Ms. Hallam pled guilty to, unless the parties agreed otherwise. If there was “no binding plea agreement” on restitution at all, as found uncontroverted by the district court, or even if there was an express term for \$1,700 in restitution on the pled-to charge, the restitution default would apply: there was no agreement on the dismissed counts, and Ms. Hallam “would only be liable for restitution on a single count” (R. Vol. I, pp.197–98.) Either way, Ms. Hallam’s counsel performed deficiently. Her counsel’s failure to object to the trial court’s interpretation of the plea agreement that Ms. Hallam *was* liable for restitution for the dismissed counts at the change of plea hearing, or at any other time, was objectively unreasonable.³ Taking Ms. Hallam’s allegations as true, and without any contrary evidence from the State, (R., Vol. I, p.197), Ms. Hallam met her burden to establish genuine issues of material

³ This means that trial counsel was not necessarily deficient in advising Ms. Hallam that she would only have to pay restitution on the one count. Taking Ms. Hallam’s allegations as true, counsel was correct in this advice. The deficiency, therefore, was in counsel’s failure to correct the trial court in its recitation of the plea agreement terms.

fact on deficient performance for ineffective assistance of counsel on a breach of plea claim. *See, e.g., State v. Acuna*, 154 Idaho 139, 142 (Ct. App. 2013) (“the state breached the plea agreement by seeking restitution that the prosecutor had purported to waive in the plea agreement”); *see cf. Hayes v. State*, 143 Idaho 88, 93 (Ct. App. 2006) (“[A] defense attorney’s failure to either inform his client of the risk of a restitution order as a consequence of a contemplated guilty plea or to object to the State’s request for restitution at or after sentencing when the defendant was not previously informed of that consequence, may constitute deficient performance.”).

Second, on prejudice, Ms. Hallam met her burden to show that her counsel’s failure to object to the breach of plea prejudiced her. On this prong, the district court erred by only examining prejudice on one of the two claims. (R. Vol. I, pp.198–99.) The district court determined, despite counsel’s deficiencies, Ms. Hallam did not meet her burden to show that she would not have pled guilty but for her counsel’s error. (R. Vol. I, pp.198–99.) By relying on the change of plea transcript and guilty plea advisory form, the district court reasoned, “The record in this case conclusively establishes that Ms. Hallam fully understood that she could be liable for restitution on all counts prior to entering her plea of guilty.” (R. Vol. I, p.199.) The district court continued, “This plainly disproves Ms. Hallam’s allegation that she would not have pled guilty had she been aware that she could be liable for restitution on all five counts.” (R. Vol. I, p.199.) This analysis, however, also suffers from the same flawed premise as the deficiency analysis—that the trial court could lawfully impose restitution on all counts, even the dismissed ones. Under this faulty framework, even if the agreement was silent, Ms. Hallam was nonetheless informed of the lawful restitution consequences of her guilty plea, so she failed to show her plea was invalid. But, applying correct restitution standards, the trial court’s informing Ms. Hallam of those actually unlawful consequences, based on Ms. Hallam’s uncontroverted allegations, was

modification of the plea agreement and resulted in a breach. This demands a separate prejudice analysis than for an invalid guilty plea.

For a breach of plea claim, the inquiry is whether counsel's objection on this basis would have been sustained.

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

Lint v. State, 145 Idaho 472, 477–78 (Ct. App. 2008). For example, in *Hayes*, the Court of Appeals held that the petitioner made “a prima facie showing of prejudice from counsel's failure to object on the appropriate ground when the State requested restitution at the sentencing hearing.” 143 Idaho at 93–94. There, the petitioner alleged that he was not informed “of the prospect of restitution” before his guilty plea, and the Court of Appeals reasoned, if that were true, “an objection by counsel to the restitution request should have been sustained.” *Id.* at 94. The petitioner's counsel had “objected to the *amount* of the State's restitution request” and argued an inability to pay, “but counsel did not object that [the petitioner] was not subject to restitution at all because he had not been advised of this direct consequence of his guilty plea.” *Id.* “Thus,” the Court of Appeals concluded, “if [the petitioner's] evidence proves this deficient performance, then his prejudice may be established by the fact the restitution order was entered.” *Id.*

Here, if Ms. Hallam's allegations are taken as true, she made a prima facie showing of prejudice in her counsel's failure to object to the breach of the plea agreement. In other words, but for her counsel's inactivity in pursuing that objection, the trial court would not have ordered

her to pay restitution for the dismissed counts. *See id.* Therefore, Ms. Hallam met her burden to establish genuine issues of material fact on prejudice for ineffective assistance of counsel on a breach of plea claim.

In summary, Ms. Hallam alleged that her counsel failed to inform the trial court about the restitution terms of her plea agreement and failed to object when the trial court did not follow those terms. (R. Vol. I, pp.7–8, 9.) Without any evidence to the contrary, the district court accepted Ms. Hallam’s allegations as true. Yet, the district court did not properly analyze her breach of plea claim. On deficiency, Ms. Hallam’s allegations established genuine issues of a material fact on the restitution terms of the plea agreement and whether it was accurately stated on the record.⁴ On prejudice, these allegations established genuine issues of material fact on whether Ms. Hallam would have been ordered to pay restitution on the dismissed counts but for her counsel’s error. The district court did not address the prejudice prong of this claim at all and misunderstood the restitution standards on the deficiency prong. Due to the genuine issues of material fact, Ms. Hallam met her burden to survive summarily dismissal. The district court should have held an evidentiary hearing on this breach of plea claim.

⁴ *See Nienburg*, 153 Idaho at 496 (“When a plea is offered pursuant to a plea agreement, “the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered.” I.C.R. 11(f)(2). Full disclosure of the plea agreement on the record is necessary because, among other reasons, “[i]t is impossible for a trial judge to properly administer a plea agreement if it consists of secret terms known only to the parties.” *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986). If a plea agreement has not been reduced to writing, ‘it is incumbent upon the attorneys to state the agreement in its entirety on the record, and in a clear and coherent manner.’ *State v. Banuelos*, 124 Idaho 569, 575 (Ct. App. 1993); *State v. Rutherford*, 107 Idaho 910, 914 (Ct. App. 1985).”).

CONCLUSION

Ms. Hallam respectfully requests this Court vacate the district court's judgment, reverse its order granting the State's motion for summary dismissal on her breach of plea claim, and remand this case for an evidentiary hearing on this claim.

DATED this 24th day of May, 2021.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2021, I caused a true and correct copy of the foregoing APPELLANT'S 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

JCS/eas