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Idaho Supreme Court
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By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

MELVIN JEREMY SAVAGE,	)	
	)	**NO. 46266-2018**
Petitioner-Appellant,	)	
	)	**BONNEVILLE COUNTY**
v.	)	**NO. CV-2017-3096**
	)	
STATE OF IDAHO,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE JOEL E. TINGEY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Melvin Savage contends the district court made two different errors in this case. First, he asserts the district court erred by summarily dismissing his claim that his trial attorney was ineffective for giving him incomplete and inaccurate advice about his ability to invoke his Fifth Amendment rights. Second, he contends the district court abused its discretion when it refused to consider his motion for reconsideration, which was based, *inter alia*, on a claim that post-conviction counsel had not been communicating with him or making arguments on his behalf, for the sole reason that Mr. Savage had filed that motion himself, rather than filing it through the absent attorney.

For either reason, this Court should remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

In the underlying criminal case, Mr. Savage was charged with arson for setting fire to a dwelling and with misdemeanor stalking. (*See* R., pp.7-8.) Around the same time that those charges were filed, the alleged victims also initiated a civil suit for damages caused by the fire.[1] (*See* R., pp.17, 60.) Before Mr. Savage was able to have a preliminary hearing in the criminal case, the alleged victims sought to depose him in the civil case. (*See* R., p.17 (alleging the preliminary hearing was scheduled for January 27, 2015); R., p.73 (transcript of the deposition held on January 26, 2015).) Mr. Savage sought advice from Trent Grant, the attorney appointed

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[1] One of the alleged victims is a licensed attorney who had been, and continued to, represent Mr. Savage's wife in their ongoing divorce proceedings. (R., pp.18-19.)

to represent him in the criminal case,[2] as to whether there was any way to stop the deposition because of the risk of self-incrimination. (R., p.16.)

Mr. Grant told Mr. Savage that he could not directly intervene in the civil case, as that was beyond the scope of his appointment. (R., p.196 (Mr. Grant's affidavit provided with the State's motion for summary dismissal of the post-conviction petition).) He also advised Mr. Savage that invoking his rights in the civil proceedings would not do any good, as the district court would likely order him to answer the questions anyway, and that it would order him to pay the costs of obtaining and enforcing that order, or even hold him in contempt. (R., pp.16, 201 (Mr. Grant's affidavit admitting he gave this advice).) Mr. Grant recalled telling Mr. Savage that any statements he made during the deposition would be admissible in the criminal case, and that it would have been Mr. Grant's preference to avoid the deposition if possible. (R., p.201; *but see* R., p.248 (Mr. Savage, in his affidavit in support of his motion for reconsideration of summary dismissal, alleging Mr. Grant had not made either of those statements).)

Based on Mr. Grant's advice that there was no practical benefit to invoking his Fifth Amendment rights, and that he would be punished for doing so, Mr. Savage answered questions during the deposition without invoking his rights.[3] (R., pp.16, 19; *see generally* 73-128.) During the deposition, Mr. Savage answered several questions which asked him to make incriminating statements about his actions on the night of the fire. (*See generally* R., pp.73-128.)

The alleged victim's attorney provided a copy of the transcript of the deposition to the prosecutor in the criminal case, who disclosed it to Mr. Grant. (R., p.16.) Mr. Grant advised

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[2] As part of the civil suit, the alleged victims secured a temporary restraining order (without notice to Mr. Savage) freezing all his assets, which left him unable to hire counsel of choice. (R., p.18; *see* R., p.65-66 (the temporary restraining order, provided as an exhibit to Mr. Savage's initial pleadings).)
[3] Mr. Savage was not represented by counsel during the deposition. (*See* R., p.75.)

Mr. Savage that his statements in the deposition gave the prosecutor all the ammunition he needed to convict Mr. Savage, and so, he should not only waive his preliminary hearing, but he should plead guilty as well. (R., p.17.) Mr. Savage felt "at a loss as to what I could do with no access to my money to hire a decent lawyer who would look out for my constitutional rights, rather than sit by as Trent Grant was doing, and letting it occur . . . . As a result I told Trent Grant to in [sic] March 2015 I would change my plea to guilty." (R., p.19.)

Mr. Savage ultimately pled guilty to both charges and was sentenced to an aggregate sentence of nineteen years, with four years fixed.[4] (R., p.8.) Mr. Savage appealed from the judgment of conviction challenging the length of his sentence, and the Court of Appeals affirmed. *See State v. Savage*, 2016 WL 2595962 (Ct. App. 2016), *unpub.*

Thereafter, Mr. Savage filed a timely petition for post-conviction relief. (R., pp.7-11.) He argued, *inter alia*, that trial counsel was ineffective for not taking action in the civil case to protect his right to be free from self-incrimination in the criminal case. (R., p.21.) The district court granted his motion for appointment of post-conviction counsel, and Mr. Savage was ultimately appointed Dan Taylor as conflict counsel. (*See* R., p.152.) Mr. Taylor filed a motion to supplement the petition in order to clarify his claim regarding his self-incrimination claim. (R., p.159; *see* R., p.209 (order granting that motion).) The only change was to re-word the self-incrimination claim as the failure of Mr. Grant "to effectively advise Petitioner of the application of the 5th Amendment of the U.S. Constitution and Article 1 Section 13 of the Idaho Constitution." (R., p.180.) Otherwise, the supplemental petition simply re-incorporated all Mr. Savage's prior allegations (which were attached as exhibits); it was not accompanied by any

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[4] Pursuant to a motion for leniency, the district court ultimately reduced the indeterminate time by one year. (*See* R., p.8.)

new allegations or arguments. (*See generally* R., pp.158-80.) The only other thing Mr. Taylor did while the petition was pending was to stipulate to an extension of time for the prosecutor to file his motion for summary judgment. (R., p.182; *see generally* R.)

In regard to the self-incrimination claim, the prosecutor argued that, because Mr. Grant had talked with Mr. Savage about his Fifth Amendment rights and there was no indication in Mr. Savage's filings indicating how trial counsel's advice in that regard was wrong, Mr. Savage had not presented a viable claim. (R., p.189.) The prosecutor also argued there was no prejudice because the State had other evidence besides Mr. Savage's statements in the deposition which the prosecutor argued was compelling. (R., p.190.)

Mr. Taylor did not file a response to the motion for summary judgment. (*See generally* R.) The district court subsequently granted that motion. (R., pp.213-20.) In regard to the self-incrimination claim, it did so because it found that claim was disproved by the record showing Mr. Grant had talked with Mr. Savage about his Fifth Amendment rights. (R., p.219.) The district court did not address the propriety of Mr. Grant's advice, nor did it address the State's prejudice argument. (*See generally* R., p.219.) Mr. Taylor filed a one-sentence notice of appeal prior to the final judgment being entered. (R., p.224.)

In the meantime, Mr. Savage filed a *pro se* motion for reconsideration under I.R.C.P. 59(e), 60(b), and 11.2(b). (R., pp.226-37.) He argued, *inter alia*, that Mr. Taylor had failed to effectively communicate with him during the case, and as such, deprived him of a meaningful opportunity to have his post-conviction claims heard. (R., p.229.) For example, Mr. Savage asserted he had not seen a copy of the prosecutor's motion to summarily dismiss his petition until after the district court had ruled on it. (R., p.231.) Mr. Savage explained this failure to communicate was particularly problematic because, had Mr. Taylor discussed the motion for

summary dismissal with him, Mr. Savage could have provided an affidavit refuting several of the specific allegations in Mr. Grant's affidavit. (R., p.232.) Mr. Savage attached an affidavit in which he set forth the responses he could have given. (R., pp.242-50.)

In regard to the self-incrimination claim, Mr. Savage would have contradicted Mr. Grant's assertion that he had told Mr. Savage that statements he made in the deposition could be used in the criminal case. (R., p.248.) Rather, Mr. Savage would have alleged, Mr. Grant's advice had only been to cooperate with the deposition because of the consequences that would result from not cooperating. (R., p.248.) He would have also alleged Mr. Grant "specifically told me I could **not** plead the 5th in the civil deposition, and only explained the severe consequences if I refused to participate in the deposition." (R., p.247 (emphasis from original).) Finally, Mr. Savage would have alleged that, had Mr. Grant actually told him the statements in the deposition could be used in the criminal case, or that Mr. Grant would have preferred to avoid the deposition, he would not have participated in the deposition. (R., p.248.)

The district court refused to consider Mr. Savage's motion for reconsideration for the sole reason that "this Court will not consider any motions or requests not filed through counsel of record." (R., p.265.) The district court entered a final judgment at the same time. (R., p.263.) Mr. Savage filed a *pro se* notice of appeal in the form required by I.A.R. 17 timely from the final judgment and from the order refusing to consider his motion for reconsideration. (R., pp.290-92.)

ISSUES

I. Whether the district court erred when it summarily dismissed Mr. Savage's claim that he only pled guilty as a result of Mr. Grant's inaccurate and incomplete advice about his Fifth Amendment rights.

II. Whether the district court abused its discretion by refusing to consider Mr. Savage's motion for reconsideration because it had not been filed by the attorney who Mr. Savage was alleging had abandoned the representation.

ARGUMENT

I.

The District Court Erred When It Summarily Dismissed Mr. Savage's Claim That He Only Pled Guilty As A Result Of Mr. Grant's Inaccurate And Incomplete Advice About His Fifth Amendment Rights

A. Standard Of Review

The decision of whether to summarily dismiss a petition for post-conviction relief is a question of law which is freely reviewed on appeal. *Muchow v. State*, 142 Idaho 401, 402 (2006).

Post-conviction cases are civil in nature. *Baldwin v. State*, 145 Idaho 148, 153 (2008). In post-conviction cases, a petition may be summarily dismissed only if it does not present a genuine issue of material fact. *Id.*; *see* I.C. § 19-4906(b). In determining whether a genuine issue of material fact exists, "[a] court is required to accept the petitioner's unrebutted allegations as true," though it does not necessarily need to accept the conclusions he draws from those uncontested facts. *Baldwin*, 145 Idaho at 153; *Saykhamchone v. State*, 127 Idaho 319, 321 (1995). However, the courts are still to "liberally construe the facts and reasonable inferences in favor of the non-moving party" at the summary judgment phase.[5] *Nevarez v. State*, 145 Idaho 878, 881 (Ct. App. 2008); *see also Charboneau v. State*, 140 Idaho 789, 792 (2004) ("[I]nferences [are] liberally construed in favor of the petitioner."). When a genuine issue of material fact exists and would, if resolved in the petitioner's favor, entitle the petitioner for relief, the district court must conduct an evidentiary hearing. *Baldwin*, 145 Idaho at 153; *Berg v. State*, 131 Idaho 517, 518 (1998).

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[5] In this case, the State is the moving party. (R., p.205.) Therefore, the facts and reasonable inferences are liberally construed in Mr. Savage's favor. *Charboneau*, 140 Idaho at 792; *Nevarez*, 145 Idaho at 881.

To show a genuine issue of material fact in regard to a claim of ineffective assistance of counsel, the petitioner must allege facts which demonstrate that counsel's performance fell below a reasonable standard and that the petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth v. State*, 140 Idaho 847, 850 (2004). In regard to the second prong of the *Strickland* test, a petitioner shows prejudice when he demonstrates that there is a reasonable probability that the outcome would have been different, or, in other words, he must "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *McKay v. State*, 148 Idaho 567, 570 (2010). In cases where the petitioner alleges ineffective assistance in a case in which he pled guilty, he must show "'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Booth v. State*, 151 Idaho 612, 621 (2011) (quoting *Ridgley v. State*, 148 Idaho 671, 676 (2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))).

B. Mr. Savage's Allegations Established A Genuine Issue Of Material Fact Regarding Whether Mr. Grant Was Ineffective For Giving Him Inaccurate And Incomplete Advice About His Fifth Amendment Rights

The district court's determination that there was no genuine issue of material fact because Mr. Grant had discussed the Fifth Amendment with Mr. Savage is erroneous because an attorney is not just ineffective when he does not consult with his client, but also when he gives inaccurate or incomplete advice to his client. *See, e.g., Booth v. State*, 151 Idaho 612, 620 (2011) ("Given that the information [counsel] provided when advising Booth to plead guilty to first-degree murder was based on a blatantly erroneous reading of the sentencing statutes, the district court did not err in determining that [counsel's] performance fell below an objective standard of reasonableness."). Mr. Grant's advice to Mr. Savage regarding whether he could protect himself in the underlying criminal case by invoking the Fifth Amendment in the related civil deposition

was similarly deficient because it was directly contrary to United States Supreme Court and Idaho precedent in several respects.

For example, Mr. Savage alleged that Mr. Grant told him, if he invoked the Fifth Amendment in the civil deposition, the district court would likely not only require him to answer the deposition questions anyway, but would also make him pay the costs for seeking and enforcing that order. (R., p.16; R., p.201 (trial counsel's affidavit admitting he gave this advice).) First, the district court could not have ordered Mr. Savage to answer the questions in the deposition because the Fifth Amendment "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him in future criminal proceedings."[6] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *accord McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); *State v. Van Komen*, 160 Idaho 534, 538 (2016). "To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation." *Maness v. Meyers*, 419 U.S. 449, 468 (1975). Thus, in cases such as this, "the assertion of a Fifth Amendment privilege has been sustained [*i.e.*, the potential deponent had not been required to answer the questions] when the court could determine from the questions and their context, or from a showing made by the party claiming the privilege, that a reasonable possibility of criminal prosecution existed." *McPherson v. McPherson*, 112 Idaho 402, 405 (Ct. App. 1987).

There was obviously a reasonable possibility of criminal prosecution in Mr. Savage's case since criminal charges had been filed based on the same acts which the civil deposition

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[6] One of the allegations Mr. Savage wanted to make in response to the motion for summary dismissal was that Mr. Grant told him "I could **not** plead the 5th in the civil deposition." (R., p.247 (emphasis from original).) That would have made it clear there was a genuine issue of material fact regarding whether Mr. Grant's advice had been objectively deficient, and thus, the denial of his motion for reconsideration was inappropriate. (*See* Section II(C), *infra*.)

sought to explore. Furthermore, because the questions in the deposition were likely to seek to establish Mr. Savage committed those acts (so as to establish his tort liability), the answers called for by the deposition definitely might have tended to incriminate Mr. Savage. As such, Mr. Grant's advice – that there would be no point to claiming the Fifth Amendment because the district court would just order him to answer – was contrary to the applicable precedent.[7] By giving inaccurate advice about whether Mr. Savage could protect his rights in the criminal case by invoking the Fifth Amendment in the civil deposition, Mr. Grant's performance was objectively unreasonable.

Second, Mr. Grant improperly advised Mr. Savage that the district court could order him to pay the costs of seeking and enforcing that order, or even might hold him in contempt for raising that objection: "'[O]ur cases have established that the State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right to not give incriminating testimony against himself.'" *Van Komen*, 160 Idaho at 540 (quoting *Lefkowitz*, 414 U.S. at 805). Requiring the deponent to pay the costs of the deposition simply for raising Fifth Amendment objection would constitute a substantial penalty for exercising the right and would impermissibly chill the exercise of that right in future cases; certainly, holding him in contempt would. *Cf. North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (holding that imposing a penalty for exercising a constitutional right is "patently unconstitutional"). As such, Mr. Grant's advice that Mr. Savage should not invoke his Fifth Amendment rights in the civil

[7] The fact that Mr. Taylor did not make these arguments in response to the State's motion for summary disposition when one of the State's arguments was there was no explanation as to how Mr. Grant's advice was erroneous (*see* R., p.189), reinforces Mr. Savage's argument that Mr. Taylor abandoned him in this case. (*See* Section II(B), *infra*.)

case because he would be penalized for doing so was also contrary to the controlling precedent, and thus, was objectively deficient.

More importantly though, even if the district court would have overruled Mr. Savage's Fifth Amendment objection, such a ruling would have rendered his answers inadmissible in the criminal case: "[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent case in which he is a defendant. *Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later prosecution*." *Lefkowitz*, 414 U.S. at 78 (emphasis added). Mr. Grant actually attested that he told Mr. Savage the opposite – that "whatever he said while being deposed could likely be used against him in the criminal case."[8] (R., p.201.) As such, Mr. Grant's advice about how an invocation of the Fifth Amendment would affect the criminal case was, at least, incomplete, if not wrong, and thus, was objectively unreasonable.

The prejudicial effect of that objectively-deficient advice is profound. Because of Mr. Grant's erroneous advice that there would be no benefit, and, in fact, would be a penalty, for invoking his Fifth Amendment rights, Mr. Savage did not invoke his rights at the deposition. As a result of Mr. Savage's reliance on that inaccurate advice, Mr. Grant could not file the otherwise-meritorious motion to suppress those answers in the criminal case. Therefore,

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[8] One of the allegations Mr. Savage would have made in response to the motion for summary dismissal was that Mr. Grant had not actually told him his statements could be used in the criminal case. (R., p.248 ("[T]he only legal advice he gave me was to cooperate and only discussed consequences of non-cooperation.").) Therefore, if the information before the district court when it summarily dismissed the petition was not sufficient to establish a genuine issue of material fact, this attempt to contradict Mr. Grant's affidavit on the material facts (what he told Mr. Savage about his Fifth Amendment rights and the impact making statements would have on the criminal case) would demonstrate that Mr. Savage's motion for reconsideration was improperly denied. (*See* Section II(C)).

Mr. Grant's objectively unreasonable advice left Mr. Savage with no choice but to plead guilty rather than exercise his right to a trial. (*See* R., p.19.) Had Mr. Grant given complete and proper advice about Mr. Savage's Fifth Amendment rights, Mr. Savage either would not have made those statements or would have been able to keep them out of the criminal case. *Lefkowitz*, 414 U.S. at 78. In either case, he would not have pled guilty because those statements would not be giving the prosecutor all the evidence needed to convict him. (R., pp.17, 19.)

Because Mr. Savage's allegations established a genuine issue of material fact on both prongs of *Strickland*, this Court should reverse the order summarily dismissing his Fifth Amendment allegation.

II.

The District Court Abused Its Discretion By Refusing To Consider Mr. Savage's Motion For Reconsideration Because It Had Not Been Filed By The Attorney Who Mr. Savage Was Alleging Had Abandoned The Representation

A. Standard Of Review

The decision of whether to grant a motion for reconsideration is reviewed for an abuse of discretion. *Eby v. State*, 148 Idaho 731, 734 (2010). The district court abuses its discretion when: (1) it fails to recognize the issue as one of discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistently with the applicable legal standards, or (4) it reaches its decision without exercising reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018). In this case, the district court's decision was not consistent with the applicable legal standards and was not reached in an exercise of reason.

B. <u>This Case Should Be Remanded So The District Court Can Reconsider Its Decision In Light Of The Court Of Appeals' Recent Decision In *Andrus v. State*</u>

When the appellate courts clarify the applicable legal standards while a case is pending on appeal, the appellate courts usually remand the matter so the district court can reconsider its decision in light of that clarification. *State v. Jeske*, 2019 WL 1088217, *9 (Mar. 8, 2019) (citing *Davis v. Prof'l Bus. Servs., Inc.*, 109 Idaho 810, 818 (1985)), *not yet final*. That rule is applicable in this case because the Court of Appeals recently clarified the legal standards regarding a post-conviction petitioner's claim under Rule 60(b) that post-conviction counsel abandoned the case. *See Andrus v. State*, 164 Idaho 565, ___, 433 P.3d 665, 670 (Ct. App. 2019). Mr. Savage's motion for reconsideration included a claim for relief under Rule 60(b) because Mr. Taylor had effectively abandoned him. (R., p.229.) The district court refused to consider Mr. Savage's motion for reconsideration because it was not filed through Mr. Taylor. (R., p.265.)

However, *Andrus* made it clear that the fact that the petition was filed *pro se* does not justify refusing to consider the motion because the fact that the petitioner has to take up the mantle and do what his post-conviction attorney was appointed to do, but failed to do, actually "further demonstrates the prejudice associated with a lack of meaningful representation." *Id.* Rather, *Andrus* explained, the district court has a duty "to establish[] a record of some meaningful representation on those claims" before denying the Rule 60(b) motion. *Andrus*, 433 P.3d at 670 (holding "the district court abuses its discretion in dismissing the claims on the merits without establishing a record of some meaningful representation on those claims").

The reason the district court has this duty to establish a record of meaningful representation in such cases is due to the nature of post-conviction cases. Post-conviction is "the exclusive means for challenging the validity of a conviction or sentence other than by direct

appeal." *Id.* at 669. In fact, Idaho's courts have made it clear that claims of ineffective assistance should only be brought in post-conviction proceedings because the direct appeal record will usually be inadequate to sufficiently review such claims. *E.g. State v. Hayes*, 138 Idaho 761, 766 (Ct. App. 2003); *State v. Saxton*, 133 Idaho 546, 549 (Ct. App. 1999) (quoting *Carter v. State*, 108 Idaho 788, 791 (1985) (Bakes, J., specially concurring)). As a result, when an appointed post-conviction attorney effectively abandons that representation, potentially-valid constitutional claims could be dismissed without being properly assessed by the courts. *Andrus*, 433 P.3d at 670.

This is particularly problematic in the post-conviction context because petitioners have no outside recourse to remedy such situations. They cannot, for example, raise those issues in a successive petition for post-conviction relief. *Murphy v. State*, 156 Idaho 389, 395 (2014) (explaining ineffective assistance of post-conviction counsel does not justify a successive petition because there is no constitutional or statutory right to counsel in post-conviction cases, and so, there is no corresponding right to effective post-conviction counsel).

Therefore, Idaho provides a mechanism within the post-conviction proceedings to allow petitioners to address such circumstances: "Given the unique status of a post-conviction proceeding, and given the complete absence of any meaningful representation in the only available proceeding for [the petitioner] to advance constitutional challenges to his conviction and sentence, we conclude this case may present the unique and compelling circumstances in which I.R.C.P. 60(b)(6) relief may well be warranted." *Eby*, 148 Idaho at 737; *see Parvin v. State*, 157 Idaho 518, 521 (Ct. App. 2014) (holding *Eby* can read harmoniously with *Murphy*); *accord Andrus*, 433 P.3d at 668-70.

As such, the district court's decision to deny Mr. Savage's Rule 60(b) motion without establishing a record of some meaningful representation by post-conviction counsel is inconsistent with the applicable legal standards. *Andrus*, 433 P.3d at 670. However, since the district court did not have the benefit of *Andrus* when it made that decision (*see* R., p.265), this Court should remand this case so the district court can reconsider its decision in light of the proper legal standards.

C. <u>The District Court's Decision To Deny Mr. Savage's Motion For Reconsideration Was Not Reached Through An Exercise Of Reason, Nor Was It Consistent With The Existing Legal Standards</u>

Even if this Court does not remand this case for reconsideration in light of *Andrus*, it should still conclude that the district court abused its discretion by denying Mr. Savage's Rule 60(b) motion. As noted in Section II(B), *supra*, the Court of Appeals has repeatedly considered the merits of this sort of claim even though the motion was filed *pro se* rather than through appointed counsel. *See, e.g., Devan v. State*, 162 Idaho 520, 522-23 (Ct. App. 2017), *rev. denied*; *Bias v. State*, 159 Idaho 696, 705-06 (Ct. App. 2015); *Eby*, 148 Idaho at 733. Therefore, the district court's basis for denying that motion was not consistent with the applicable legal standards. Moreover, that basis did not constitute an exercise of reason since there is no realistic scenario where the absent attorney, who was already failing to file documents or make arguments on the petitioner's behalf, would actually file such a motion. In fact, it would likely be improper for that attorney to file such a motion, as it would constitute a conflict of interest.

Additionally, Mr. Savage's motion shows that the unique and compelling circumstances required under Rule 60(b)(6) were actually present in his case. He asserted Mr. Taylor was not communicating with him while the case was pending, evidenced by the fact that Mr. Taylor did not file a response to the motion for summary judgment. (R., p.229.) That was particularly

problematic because Mr. Savage asserted he could have refuted several specific allegations in Mr. Grant's affidavit, upon which that motion was based. *Compare Bias*, 157 Idaho at 707 (explaining relief was not merited under Rule 60(b) when the record showed post-conviction counsel had filed a brief in response to the motion for summary dismissal and supported that response with additional affidavits).

For example, had Mr. Taylor communicated with Mr. Savage, he would have alleged that Mr. Grant did not tell him that the statements he made in the deposition could be used in the criminal case. (R., p.248; *compare* R., p.201 (trial counsel's affidavit alleging he gave that advice to Mr. Savage).) Mr. Savage also would have alleged that trial counsel had not told him about the potential that any self-incriminating statements he made in the civil deposition could be used outside the civil case, or that trial counsel's "preference would be to avoid the Deposition." (R., p.248; *compare* R., p.201 (trial counsel's affidavit asserting he advised Mr. Savage on both points).) Both of those allegations would have created genuine issues of fact on the material issue of what, exactly, Mr. Grant's advice was. *See Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 418-19 (2012) (explaining that, where there are conflicting allegations of fact in the record, there is a genuine issue of material fact). As such, those responses would have prevented summary dismissal because "it is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact" at an evidentiary hearing. *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 127 (2009).

Additionally, as noted in Section I(B), *supra*, Mr. Savage would have made additional allegations on the prejudice prong, as he would have asserted, if Mr. Grant had told him that the deposed statements would be admissible in the criminal case and Mr. Grant would have

preferred to avoid the deposition if possible, he would have refused to answer the questions in the deposition. (R., p.248.)

The fact that Mr. Taylor did not file a response to the motion for summary dismissal, especially one which would have prevented the summary dismissal, due to the fact that he was not communicating with Mr. Savage, shows the complete abandonment that justifies relief under Rule 60(b). *Compare Eby*, 148 Idaho at 733 (explaining relief was proper under Rule 60(b) when all post-conviction counsel did was ask for continuances and review the petitioner's *pro se* filings), *with Devan*, 162 Idaho at 523 (explaining relief was not merited when the record showed ongoing communication between the petitioner and post-conviction counsel, in which they discussed whether specific additional evidence could be presented to support the claims). Therefore, even if this Court considers the merits of the order denying Mr. Savage's Rule 60(b) motion, it should reverse that order because it constitutes an abuse of the district court's discretion.

CONCLUSION

Mr. Savage respectfully requests this Court reverse the order summarily dismissing his petition and remand this case for further proceedings. Alternatively, he respectfully requests this Court vacate or reverse the order denying his motion for reconsideration and remand this case for further proceedings.

DATED this 28th day of March, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2019, 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

BRD/eas»