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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

MELVIN JEREMY SAVAGE,	)	
	)	**No. 46266-2018**
Petitioner-Appellant,	)	
	)	**Bonneville County Case No.**
v.	)	**CV-2017-3096**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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 Jeremy Savage appeals from the district court's order summarily dismissing his post-conviction petition, and from the district court's order denying his I.R.C.P. 60(b)(6) motion for relief from judgment.

Statement of Facts and Course of Proceedings

Savage set a fire at the home of his ex-wife's attorney. (#43474 PSI,[1] pp.4-9.) The attorney and her husband, an Idaho Falls police officer, were home at the time the fire was set but escaped unharmed. (Id.) The Idaho State Police had previously installed a surveillance camera near the residence due to recent vandalism committed on the officer's patrol vehicle parked outside. (Id., p.4.) This video, and surveillance video from a nearby gas station, helped identify Savage as the arsonist. (Id.) The attorney whose home was burned had a no-contact order against Savage based upon a telephone harassment charge brought approximately one month earlier. (Id.) While the criminal proceeding was pending, Savage made incriminating statements in a deposition associated with a civil lawsuit brought by the arson victims. (R., pp.15-16, 74-128.)

Pursuant to an agreement with the state, Savage pled guilty to first-degree arson, misdemeanor stalking (amended from felony stalking), and violation of a no-contact order. See State v. Savage, 2016 WL 2595962 at *1 (Idaho App. 2016) (unpublished); (#43474 PSI, p.3). The

[1] Contemporaneous with this brief, the state filed a motion requesting that this Court take judicial notice of the clerk's record, reporter's transcripts, and PSI associated with Savage's direct appeal, Docket No. 43474.

state agreed to dismiss other charges. (See #43474 PSI, p.3.) The district court imposed a unified 19-year sentence with four years fixed for first-degree arson. See Savage, 2016 WL 2595962 at *1. The district court granted, in part, Savage's subsequent I.C.R. 35 motion for reduction of sentence and reduced the indeterminate portion of the first-degree arson sentence by one year. See id. On appeal, the Idaho Court of Appeals rejected Savage's challenge to this sentence. See id. at *1-2.

Savage next filed a *pro se* post-conviction petition and supporting factual declaration. (R., pp.7-22.) Savage raised four claims, including, relevant to this appeal, that his trial counsel was ineffective for failing to stay the pending civil proceeding and associated deposition until the completion of the criminal proceeding. (R., p.21.)

In the petition, Savage alleged that prior to the deposition, he asked his court-appointed counsel in the criminal case whether the deposition could be postponed, or whether he could assert his Fifth Amendment rights and refuse to answer questions at the deposition. (R., pp.16-17.) According to Savage, his appointed counsel informed him that he could "probably not" postpone the deposition, and that if Savage refused to participate or answer questions, the opposing party "would get a Court Order from Judge Watkins that would require [Savage] to answer all of their questions under the penalty of perjury." (R., p.16.) Savage further alleged that as a result of his trial counsel's failure to stay the civil proceeding, he participated in the deposition, made incriminating statements, and ultimately chose to accept the state's plea offer. (R., pp.17-19.)

The district court appointed counsel to represent Savage in the post-conviction proceeding. (R., p.148.) Appointed counsel filed a supplement to Savage's post-conviction petition which

amended and clarified Savage's claims. (R., pp.179-181.) The supplement amended Savage's claim as described above as now asserting that trial counsel was ineffective for failing to "effectively advise [Savage] of the application of the 5th Amendment of the U.S. Constitution and Article I Section 13 of the Idaho Constitution." (R., p.180.)

The state filed a motion for summary dismissal and memorandum in support. (R., pp.184-206.) With respect to Savage's ineffective assistance of counsel/Fifth Amendment claim, the state argued that Savage failed to raise a prima facie case because his petition indicated that trial counsel *did* discuss Savage's Fifth Amendment rights with him, and because implicit in his trial counsel's statements, as reported by Savage, was that Savage *could* assert his right against self-incrimination and refuse to answer questions at the deposition. (R., pp.189-190.) The state also argued that Savage failed to allege facts demonstrating Strickland[2] prejudice. (R., p.190.)

The state supported its motion for summary dismissal with an affidavit from Savage's trial counsel. (R., pp.195-204.) In the affidavit, trial counsel stated that, prior to the deposition, he informed Savage that he had no authority to intervene in the civil proceeding; that he and Savage discussed the possibility of Savage asserting his Fifth Amendment rights at the deposition; and that, if Savage did refuse to the answer the deposition questions, this would likely only delay the deposition, and could result in a court order requiring Savage to participate, which, in turn, could result in imposed costs and fees and a contempt finding. (R., pp.200-201.) Savage did not file a response to the state's motion. The district court granted the motion for summary dismissal,

[2] Strickland v. Washington, 466 U.S. 668 (1984).

concluding that Savage failed to establish a prima facie case with respect to any of his claims. (R., pp.213-221.) Savage timely appealed. (R., pp.224-225.)

Savage, still represented by counsel in the post-conviction proceeding, then filed a *pro se* I.R.C.P. 60(b)(6) motion for relief from judgment.[3] (R., pp.226-251.) In the motion, Savage asserted that his post-conviction counsel abandoned him in the course of the post-conviction proceeding, and that this resulted in "unique and compelling circumstances" which entitled him to relief. (Id. (citing Eby v. State, 148 Idaho 731, 228 P.3d 998 (2010).) In a subsequent order, the district court referenced the fact that Savage had made *pro se* filings, but stated that it would not consider any motions or requests not filed through Savage's counsel of record. (R., pp.297-298.)

[3] Savage also cited other Idaho Rules of Civil Procedure in the motion. (R., pp.226-237.) However, based upon the arguments made in both Savage's motion, and in Savage's Appellant's brief, the state construes the motion as an I.R.C.P. 60(b)(6) motion for relief from judgment. On appeal, Savage has not alleged that the district court erred with respect to any other arguments which may be construed from the motion. (See Appellant's brief, pp.12-17.)

ISSUES

Savage states the issues on appeal as:

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.

(Appellant's brief, p.6.)

The state rephrases the issues on appeal as:

1. Has Savage failed to show that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to effectively advise him of his Fifth Amendment rights?

2. Has Savage failed to show that the district court erred by failing to consider the merits of his I.R.C.P. 60(b)(6) motion for relief from judgment?

ARGUMENT

I.
Savage Has Failed To Show That The District Court Erred By Summarily Dismissing His Claim That His Trial Counsel Was Ineffective For Failing To Effectively Advise Him Of His Fifth Amendment Rights

A. Introduction

Savage contends that the district court erred by summarily dismissing his post-conviction petition. (Appellant's brief, pp.7-12.) Specifically, Savage challenges the district court's summary dismissal of his claim that his trial counsel was ineffective for failing to effectively advise him of his Fifth Amendment rights against self-incrimination as they pertained to his civil case deposition. (Id.) A review of the record appears to reveal that Savage raised a prima facie case, in part, with respect the Strickland deficiency prong of this claim. However, this Court should still affirm the district court's summary dismissal order because Savage failed to allege facts demonstrating Strickland prejudice.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. Savage Has Failed To Demonstrate *Strickland* Prejudice With Respect To the Challenged Claim

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq*. A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Further, allegations contained in a post-conviction petition are insufficient for granting relief when they are clearly disproved by the record of the original proceeding or do not justify relief as a matter of law. Workman, 144 Idaho at 522, 164 P.3d at 802; Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland, 466 U.S. at 687-688; State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989).

An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable …." Id. at 690.

The second Strickland prong requires a petitioner to demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," Strickland, 466 U.S. at 694, which "requires a substantial, not just conceivable, likelihood of a different result," Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (internal quotations and citation omitted). A reviewing court "must consider the totality of the evidence before the judge or jury," Strickland, 466 U.S. at 695, and reweigh that evidence "against the totality of available mitigating evidence," Pinholster, 563 U.S. at 197 (quoting Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

In Hill v. Lockhart, 474 U.S. 52 (1985), the United Supreme Court clarified how the Strickland prejudice prong is to be applied where, as in this case, the defendant entered a plea of guilty. Pursuant to Hill, a petitioner is required to show that as a result of counsel's alleged deficient performance "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." Hill, 474 U.S. at 59; see also United States v. Rodgers, 769 F.2d 1418, 1425 (9th Cir. 1985).

More recently, the United States Supreme Court has reiterated that, "[w]hen a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain…. We instead consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." Lee v. United States, ___ U.S. ___, 137 S.Ct. 1958, 1965 (2017). However, in Lee, the United States Supreme Court also cautioned that "[t]he strong societal interest in finality has special force with respect to convictions based on guilty pleas," and that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." Id. Lee instructs that "[j]udges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id.

In this case, as the state argued in its memorandum in support of its motion for summary dismissal (R., p.189), the only factual allegation in Savage's post-conviction petition relating to the challenged ineffective assistance of trial counsel claim was contained in the following paragraph:

> I asked [counsel] if we could postpone the civil case deposition until the criminal case was over. He told me probably not. I then asked him if I could plead the Fifth (5th) Amendment at the Deposition or if I could refuse to answer their questions, as I had not yet made a plea in the criminal case. [Counsel] advised me that if I refused to answer or participate in the deposition [the opposing party] would get a [Court] Order from Judge Watkins that would require me to answer all of their questions under the penalty of perjury.

(R., p.16 (emphasis omitted).)

Implicit in this response from counsel as reported by Savage is that counsel correctly advised Savage that he *could* assert his Fifth Amendment rights and refuse to participate in the deposition.

Similarly, the district court concluded that this claim was contradicted by the record because Savage's petition stated that his counsel *did* tell him that he could refuse to answer questions in the civil deposition (though that such a refusal could, counsel allegedly stated, result in a court order requiring him to answer). (R., p.219; see also R., p.16 (relevant portion of post-conviction petition).) Therefore, based upon this reasoning as set forth by the state and the district court, Savage failed to allege facts demonstrating deficient performance with respect to at least a portion of this claim.

However, in an affidavit from trial counsel submitted by the state, counsel additionally asserted that he informed Savage, among other things that: (1) there were no guaranteed protections that would preclude his deposition testimony from being used, despite objections, in the criminal case; and (2) should he refuse to participate in the deposition, the opposing party could "probably" obtain a court order requiring participation, and that Savage could be ordered to pay costs and fees associated with obtaining and enforcing such an order, or be held in contempt. (R.,

p.201.) In light of these facts taken together, it appears that Savage alleged facts establishing a prima facie case on the limited issue[4] of whether counsel provided deficient advice with respect to the consequences of asserting the Fifth Amendment privilege at the deposition. See North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (holding that imposing a penalty for exercising a constitutional right is "patently unconstitutional"), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989); State v. Van Komen, 160 Idaho 534, 540, 376 P.3d 738, 744 (2016) ("[O]ur cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977)); United States v. Edgerton, 734 F.2d 913 (2nd Cir. 1983) (holding that taxpayer could not be held in civil contempt for failing to answer, on Fifth Amendment grounds, the court's questions regarding certain tax records); United States v. Jones, 703 F.2d 1983 (10th Cir. 1983).

However, Savage is still not entitled to relief, and this Court must still affirm the district court's summary dismissal order, because, as the state asserted in its motion for summary dismissal, Savage failed to allege facts demonstrating Strickland prejudice from any deficient performance. Specifically, Savage failed to allege facts demonstrating that he would not have accepted the state's plea offer absent the alleged deficient performance in light of: the lack of an

[4] In his affidavit, Savage's trial counsel also made the assertion, which Savage did not dispute, that he correctly informed Savage that "whatever he said while being deposed could likely be used again him in the criminal case." (R., p.201.) Therefore, Savage has not alleged facts demonstrating his trial counsel's advice was deficient with respect to the deposition's impact on the criminal proceeding.

asserted factual nexus between the plea agreement and counsel's allegedly deficient advice, the strength of the state's case even absent the incriminating statements made at the deposition, and the nature of the plea agreement which provided Savage a motive to resolve the case.

Savage did not allege a factual nexus between his trial counsel's advice with respect to the Fifth Amendment and his decision to participate in the deposition and ultimately accept the state's plea offer. Instead, Savage's argument and factual allegations were centered around his pre-amendment post-conviction claim that his trial counsel was ineffective for failing to intervene in the civil case and file a motion to stay that proceeding. (R., pp.15-17, 21 ("But for [counsel's] errors in failing to file a motion to stay the civil court deposition and other proceedings[,] I appeared at the deposition and answered all of the questions," and "[a]t my meeting [after the deposition] with [trial counsel and the prosecutor], [trial counsel] explained that this Transcript from the Jan. 26, 2015 Deposition, was all the evidence need[ed] to prosecute me on the criminal charges, so I better plead out and hope that the Court has mercy on me").) While trial counsel's subsequently submitted affidavit provided additional facts regarding counsel's alleged statements to Savage about the consequences he could face if he exercised his Fifth Amendment rights, Savage did not respond either to the state's motion to dismiss or that affidavit, and thus never submitted facts alleging that those statements prompted his decision to participate in the deposition and ultimately plead guilty.

Likewise, a review of the facts of the case known to the state prior to the entry of Savage's guilty pleas demonstrates that the incriminating statements Savage made at the deposition ultimately would have had little or no impact on the state's ability to prove the charged crimes and,

thus, would not have impacted plea negotiations or Savage's willingness to accept the state's plea offer. Prior to the arson, the Idaho State Police installed a surveillance camera near the victims' residence due to vandalism committed against the resident's patrol vehicle parked outside. (#43474 PSI, p.4.) After the fire (which was discovered by the occupants as they awoke at the residence at 1:00 a.m. on December 15, 2014), officers located a gas can and a lighter on the sidewalk near the residence. (Id.) During the investigation, officers learned that Savage was the subject of a no-contact order protecting one of the residence's occupants, Savage's ex-wife's attorney. (#43474 PSI, pp.4-5.) When officers reviewed the video surveillance footage, they observed a vehicle driving by the victims' residence at about 12:40 a.m., approximately 20 minutes before the fire was discovered. (#43474 PSI, p.4.) Savage's ex-wife observed the video and identified the vehicle as belonging to Savage. (Id.) Officers also obtained surveillance video from a gas station showing Savage filling a gas can at approximately 12:18 a.m. the morning of the fire. (Id.) The gas can in the video matched the description of the gas can found at the scene of the arson; and Savage's vehicle as observed in the gas station video matched the vehicle observed in the residence surveillance video. (Id.) After the fire, Savage traveled to Colorado, where he was arrested late at night on the same date as the arson. (Id.) After he was arrested, Savage was transported to the hospital to be treated for significant burns to his face and hands. (Id.; see also #43474 PSI, pp.40-70 (police reports describing these events).)

Savage chose to take advantage of a plea offer from the state which resulted in the dismissal of charges against him for telephone harassment and a second charge of violation of a no-contact order. (#43474 PSI, p.3; #43474 3/24/15 Tr., p.4, L.7 – p.19, L.6.) The state also agreed not to

file additional charges arising out of the various known incidents (except that the city could pursue charges related to damage to city property). (#43474 PSI, p.3; #43474 3/24/15 Tr., p.4, L.7 – p.9, L.5.) Savage thus had a disincentive to assert his right to a jury trial, particularly in light of the strength of the state's case even absent the deposition admissions. The fact that Savage ultimately received a sentence (a unified 19-year sentence with four years fixed for first-degree arson, later reduced by one indeterminate year, see Savage, 2016 WL 2595962 at *1) significantly higher than the sentence he recommended (a unified seven or eight years with two years fixed (#43474 5/7/15 Tr., pp.70-71)) presented a motive to now attempt to forgo the plea agreement and challenge the conviction.

In light of these circumstances and the contemporaneous evidence available in the record, Savage failed to allege facts demonstrating that he would have forgone the plea agreement and decided to go to trial absent any deficient advice from his trial counsel with respect to his Fifth Amendment rights and the civil case deposition. This Court must therefore affirm the district court's summary dismissal order.

II.
Savage Has Failed To Show That The District Court Erred By Failing To Consider The Merits Of His I.R.C.P. 60(b)(6) Motion For Relief From Judgment

A. Introduction

Savage contends that the district court erred by declining to consider the merits of his *pro se* I.R.C.P. 60(b)(6) motion. (Appellant's brief, pp.12-15.) He requests that this Court remand the case so the district court can rule on the motion, or, in the alternative, that this Court conclude that Savage has demonstrated he is entitled to I.R.C.P. 60(b)(6) relief. (Appellant's brief, pp.12-17.)

The state acknowledges that an I.R.C.P. 60(b)(6) motion based upon alleged abandonment of post-conviction counsel is the type of motion a district court must consider even when filed *pro se* by a represented defendant. However, a review of Savage's motion and the circumstances of this case reveal that Savage cannot demonstrate the unique and compelling circumstances that would entitle him to relief under I.R.C.P. 60(b)(6). Therefore, this Court must affirm the district court's denial of the motion. In the alternative, the district court's decision not to consider the merits of the motion is harmless.

B. Standard Of Review

A district court's decision granting or denying an I.R.C.P. 60(b) motion is reviewed for an abuse of discretion. Agrisource, Inc. v. Johnson, 156 Idaho 903, 914, 332 P.3d 815, 826 (2014). "[W]hen the discretion exercised by a trial court is affected by an error of law," the appellate court's role is ordinarily to "note the error and remand the case for additional findings." Eby, 148 Idaho at 737, 228 P.3d at 1004. Remand is not required, however, if "there is an alternative ground for upholding the district court's decision." Id.; accord Bias v. State, 159 Idaho 696, 706, 365 P.3d 1050, 1060 (Ct. App. 2015).

C. Savage Cannot Show He Is Entitled To Relief Under I.R.C.P. 60(b)(6)

Idaho Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment or order for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated

> intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b). "Although the district court has broad discretion in deciding a Rule 60(b) motion, the motion may be granted only upon a showing of unique and compelling circumstances." Palmer v. Spain, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003) (citing Miller v. Haller, 129 Idaho 345, 348, 924 P.2d 607, 610 (1996)).

In Eby, 148 Idaho at 732-738, 228 P.3d at 999-1005, the Idaho Supreme Court held that, in "rare instances," relief from judgment pursuant to I.R.C.P. 60(b)(6) may be available based upon an attorney's abandonment of his client in a prost-conviction proceeding, where the record reflects a "complete absence of meaningful representation." The district court dismissed Eby's petition for inactivity after none of Eby's appointed post-conviction attorneys filed an amended petition or any other substantive filings over the course of several years. Eby, 148 Idaho at 732-733, 228 P.3d at 999-1000. The court then denied Eby's I.R.C.P. 60(b) motion for relief from judgment. Id. at 734, 228 P.3d at 1001. The Idaho Supreme Court remanded the case after concluding that I.R.CP. 60(b)(6) relief may have been available to Eby under the circumstances of that case. Id. at 736-738, 228 P.3d at 1003-1005. The Court reiterated that there is no right to the *effective* assistance of post-conviction counsel, but that given the unique status of a post-conviction proceeding, the "complete absence of meaningful representation" may present the "unique and compelling circumstances" in which I.R.C.P. 60(b) relief may be warranted. Id.

In Andrus v. State, 164 Idaho 565, ___, 433 P.3d 665, 666-667 (Ct. App. 2019), Andrus' post-conviction counsel filed no motions, documents, amendments, or pleadings in Andrus' case, aside from a motion for extension of time to file an amended petition. The district court summarily dismissed Andrus' petition on the record before it. Id. The district court then denied Andrus' subsequent I.R.C.P. 60(b)(6) motion on the ground that, unlike in Eby, Andrus' post-conviction petition was dismissed on its merits, on the record before the district court. Id. at ___, 433 P.3d at 669. Further, the court concluded that Andrus failed to show that there were any theoretical amendments to the petition or additional facts or arguments that would have prevented summary dismissal. Id.

The Court of Appeals reversed the denial order. Id. at ___, 433 P.3d at 667-670. The Court reasoned that because a post-conviction petitioner has a statutory right to the appointment of counsel when he has raised the possibility of a valid claim, a district court does not actually address the merits of such claims unless the petitioner had *some* assistance from appointed counsel in developing or presenting his claims. Id. at ___, 433 P.3d at 669-680. Further, the Court held that Andrus was not required to show that any attorney assistance would have prevented summary dismissal. Id. at ___, 433 P.3d at 670. The Court also cautioned that while a petitioner does not need to establish "years of shocking or disgraceful neglect" as occurred in Eby to avail himself of I.R.C.P. 60(b)(6) relief, such relief should not become "the rule instead of the exception," or become available where counsel "performs some duties such that the claims have been reviewed or counsel participates by pleading or appearance." Id. at ___, 433 P.3d at 669.

In this case, after his post-conviction petition was summarily dismissed, Savage filed an I.R.C.P. 60(b)(6) motion requesting relief from judgment based upon alleged abandonment by his post-conviction counsel. (R., pp.226-237.) Specifically, Savage asserted that his post-conviction counsel failed to communicate with him or provide him with copies of filings from the post-conviction proceeding, and that this prevented Savage from responding to the state's motion for summary dismissal and his trial counsel's affidavit. (R., pp.229-233.) Savage also submitted a declaration asserting additional facts in support of his post-conviction claims. (R., pp.242-251.) Savage asserted that he would have provided these facts to his post-conviction counsel had he been aware of the state's motion for summary dismissal. (R., pp.232-233.) The district court declined to consider the merits of the motion, stating that it would not consider any motions or requests not filed through Savage's counsel of record. (R., pp.297-298.)

The state agrees with Savage's contention made on appeal (Appellant's brief, pp.13-15), that an I.R.C.P. 60(b)(6) motion alleging counsel abandonment is the type of motion concerning an individual's relationship with his attorney[5] that a court must consider when filed by a *pro se* individual. Indeed, it is likely that most or all I.R.C.P. 60(b)(6) motions (including those resulting in controlling appellate decisions such as Eby and Andrus), alleging a "complete absence of

[5] In State v. Meyers, 164 Idaho 620, ___ n.2, 434 P.3d 224, 229 n.2 (2019), for example, the Idaho Supreme Court noted that while judges generally should not permit or consider communications made to the judge outside the presence of attorneys of record, a defendant's attempted communication concerning a request for the appointment of new counsel or an intention to represent himself would be an appropriate matter for a clerk to bring to the judge's attention, and a matter that should then be brought to the attention of the parties to provide an opportunity to respond.

meaningful representation" were initiated by *pro se* individuals still technically represented by their appointed post-conviction counsel.

However, Savage still cannot show he is entitled to relief, because his I.R.C.P. 60(b)(6) motion did not allege a complete absence of post-conviction representation, nor does the record support such a finding. In Bias, 159 Idaho at 705-707, 365 P.3d at 1059-1061, where the district court erred by failing to recognize Bias's post-dismissal motion as being raised pursuant to I.R.C.P. 60(b), the Idaho Court of Appeals utilized the "right result wrong theory"[6] principle to consider the merits of the motion.

Savage's appointed post-conviction counsel (unlike many appointed post-conviction attorneys), filed a supplement to Savage's *pro se* petition which amended and clarified Savage's claims. (R., pp.179-181.) This amendment was particularly effective with respect to the ineffective assistance of trial counsel claim Savage challenges in this appeal. Appointed counsel transformed a claim that plainly had no merit (that trial counsel was ineffective for failing to move to stay the civil proceeding, a case in which, as trial counsel explained in his affidavit, he had no

[6] The state recognizes that in State v. Hoskins, ____ P.3d ____, 2019 WL 2462693 (Idaho 2019), the Idaho Supreme Court held that the "right result, wrong-theory rule" does not require it to consider an Respondent's unpreserved argument for affirming a district court order. The Court reasoned, in part, that where one party did not have adequate opportunity or motive to respond in the lower court to an argument raised for the first time on appeal, then it would be improper for the appellate court to resolve the case on that issue. Hoskins, 2019 WL 2462693. The present case presents the not-uncommon situation where a district court rules on a motion that the other party has not responded to. The state submits that the "right result, wrong-theory rule" may apply in such circumstances where a motion fails as a matter of law as presented to the lower court, particularly where, as in this case, the *appellant* raised the relevant appellate issue below. Or, in the alternative, as discussed below, the appellate court should consider whether the motion was meritorious on its face in the context of a harmless error analysis.

authority to intervene in), into a claim that the state has now acknowledged raised a prima facie case of deficient counsel performance (that trial counsel was ineffective for advising Savage that he potentially faced penalties should he assert his Fifth Amendment rights against self-incrimination at the civil deposition). (Compare R., p.21 with R., p.180.) Under these circumstances, Savage cannot show the "unique and compelling circumstances" of a "complete absence of meaningful representation" that would entitle him to I.R.C.P. 60(b)(6) relief. See Devan v. State, 162 Idaho 520, 522-524, 399 P.3d 847, 849-851 (Ct. App. 2017) (holding that Devan failed to demonstrate "complete absence of meaningful representation" even where counsel failed to file a response to the state's motion to dismiss, and declining to read Eby to "open the door to challenge the effectiveness of post-conviction counsel by virtue of a Rule (60)(b) motion.").

Finally, even when the trial court has abused its discretion, such "abuse of discretion may be deemed harmless if a substantial right is not affected." State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010); accord I.R.C.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); Golub v. Kirk-Scott, Ltd., 157 Idaho 966, ___, 342 P.3d 893, 900 n.4 (2015) (the district court's error, if any, in denying Rule 60(b) motion on grounds it was untimely was harmless where, on its face, motion was without merit). In this case, in the alternative, any district court error for failing to consider the merits of Savage's I.R.C.P. 60(b) claim was harmless because, for all of the reasons discussed above, the motion was meritless on its face.

Savage's dissatisfaction with his post-conviction counsel's performance does not constitute the unique and compelling circumstances required before a court may grant relief

pursuant to I.R.C.P. 60(b)(6). This Court should reject Savage's invitation to expand the scope of I.R.C.P. 60(b)(6) to such cases. Because Savage cannot show he is entitled to I.R.C.P. 60(b)(6) relief, this Court should affirm the district court's denial of his I.R.C.P. 60(b)(6) motion.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Savage's post-conviction petition, and the district court's order denying Savage's I.R.C.P. 60(b) motion for relief from judgment.

DATED this 20th day of June, 2019.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of June, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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