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Savage v. State Appellant's Reply Brief Dckt. 46266

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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,	)	
v.	)	**BONNEVILLE COUNTY**
	)	**NO. CV-2017-3096**
STATE OF IDAHO,	)	
	)	**APPELLANT'S**
Respondent.	)	**REPLY BRIEF**
	)	

REPLY 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

The State has made several concessions in this case, but it nevertheless insists that this Court should not grant relief in light of the conceded errors. First, it concedes that trial counsel (Trent Grant) gave Mr. Savage erroneous advice about whether he could be punished for trying to invoke his Fifth Amendment rights in a related civil deposition. However, the State's assertion that this Court should not worry about that error is meritless because it is based on facts which the State has effectively conceded were not actually before the district court (the district court did not grant the motion to take judicial notice of them). Moreover, when Mr. Grant's erroneous advice is actually considered in context, specifically the fact that it came before the preliminary hearing, the prejudice it caused Mr. Savage is clear.

Second, the State concedes the district court's only rationale for refusing to consider Mr. Savage's motion for reconsideration under I.R.C.P. 60(b) was erroneous. Again, the State asks this Court to ignore that error based on an argument that is contrary to the applicable precedent. Moreover, its arguments on the first issue actually only reinforce the conclusion that, if this Court considers the merits of motion for reconsideration in the first instance, that motion should have been granted.

Therefore, for any of the reasons the State has conceded, this Court should remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

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

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. Mr. Grant Gave Erroneous Advice In Multiple Respects, All Of Which Demonstrates Deficient Performance, Though The State Only Concedes One Such Aspect

The State concedes that Mr. Grant gave Mr. Savage erroneous advice in one respect – that the district court could sanction him if he tried to invoke his Fifth Amendment rights in the civil deposition. (Resp. Br., pp.10-11.) That alone is sufficient to demonstrate deficient performance under *Strickland*.[1] However, the State tries to limit the scope of that issue by also arguing that the rest of Mr. Grant's advice was not actually erroneous. The State's arguments in those regards are mistaken.

First, the State argues that this Court should impliedly conclude that Mr. Grant told Mr. Savage he could invoke his Fifth Amendment rights in the civil deposition hearing. (Resp. Br., p.10.) As an initial matter, that is a wholly inappropriate inference to draw at the summary dismissal stage, since the State is the moving party: "On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will . . . liberally construe the facts and reasonable inferences in favor of the non-moving party." *Johnson v. State*, 162 Idaho 213, 217 (2017). In other words, to evaluate whether Mr. Savage, the non-moving party, alleged sufficient facts to support his claim, "the Court draws *all* reasonable inferences in favor of the non-moving party." *Parkinson v. Bevis*, ___ P.3d ___, 2019 WL 4266089, *2 (2019), *not yet final* (emphasis added). Since, as discussed *infra*, there is also a reasonable inference that trial counsel advised Mr. Savage that he could not invoke his Fifth Amendment

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

rights in the deposition,[2] this Court should refuse to consider the State's implication in its review of the summary dismissal order.

And even if the State's proffered inference were a reasonable one (as discussed *infra*, it is not), it still does not support the State's argument to affirm the summary dismissal order. The existence of contradictory inferences only demonstrates a genuine issue of material fact exists on that point, and so, summary dismissal would still be inappropriate. *American Bank v. Wadsworth Golf Const. Co of the Southwest*, 155 Idaho 186, 190 (2013) (quoting *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 516-17 (1991)); *see, e.g.*, *State v. Dunlap*, 155 Idaho 345, 388 (2013) ("Given the conflicting evidence as to whether counsel provided advice in advance of the interview, we hold that Dunlap has demonstrated a genuine issue of material fact as to whether counsel's performance was deficient . . . ."). Basically, despite the fact that the district court, "as the trier of fact, may draw the most probable inferences form the *undisputed* evidence," it cannot cross the line and begin weighing conflicting evidence at the summary dismissal stage. *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 416 (2012) (emphasis added). As such, all accepting the State's proffered inference would do is create conflicting inferences, and to resolve that issue, the district court would have to weigh the inferences against each other. That means an evidentiary hearing to develop those facts is still needed.

At any rate, the State's proposed inference is not actually borne out by the record. *See Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 612 (2014) (explaining that, even if the district court might, at the summary dismissal stage, be properly trying to

[2] In his argument in support of his motion for reconsideration under I.R.C.P. 60(b), Mr. Savage actually alleged he could have alleged that Mr. Grant "specifically told me I could **not** plead the 5th in the civil deposition." (R., p.247 (emphasis from original).) Therefore, even if this Court accepts the State's argument as the most probable inference based on the initial pleadings, doing so would only prove that the district court's refusal to consider Mr. Savage's motion to reconsider based on Mr. Taylor abandoning him was not harmless. (*See* Section II, *infra*).

determine which inference is the most probable, "the record must reasonably support those inferences"). Most notably, in his affidavit, Mr. Grant himself did not state or imply that he told Mr. Savage he could invoke his rights. (*See generally* R., pp.195-204.) In fact, that proposed inference is wholly incompatible with Mr. Grant's assertion that he warned Mr. Savage that he would be sanctioned if he tried to invoke his rights. (*See* R., p.201.) The only reason to punish a person for doing a thing is because he is not actually permitted to do that thing – when doing that thing is not allowed. Therefore, the only reasonable inference to be drawn from Mr. Grant's affidavit is that, by telling Mr. Savage that he would be punished if the tried to invoke his Fifth Amendment rights in the deposition, he was telling Mr. Savage that he could not invoke those rights in the deposition.

The rest of Mr. Grant's affidavit on this point only reinforces that conclusion. He explained that the question Mr. Savage had asked was "*whether* it would be appropriate for him to 'plead the 5th'" at the deposition, that "*perhaps* he could try to assert his constitutional rights against self-incrimination and refuse to answer the questions." (R., p.201.) Mr. Grant's explanation reveals he answered that question in the negative – that Mr. Savage would be forced to answer the questions and that his answers would be admissible in the criminal case. (R., p.201.) The only reasonable inference to be drawn from the answer that his assertion of his rights would not be honored is that Mr. Grant was telling Mr. Savage he could not invoke his rights at the civil deposition. Therefore, this Court should reject the State's proposed inference that Mr. Grant somehow properly advised Mr. Savage on that point. He did not.

Second, the State asserts in a footnote that since the supplemental petition asserts that Mr. Grant's advice – that answers in the deposition could likely be used against Mr. Savage in the criminal case – Mr. Savage cannot show deficient performance on that basis.

(Resp., Br., p.11 n.4.) The State's argument takes that assertion out of context. The context for that assertion was set by the claim in the supplemental petition – that trial counsel failed to effectively advise Mr. Savage about his Fifth Amendment rights. (*See* R., p.180.) The United States Supreme Court is clear that, if the defendant invokes the Fifth Amendment in a civil deposition and is still forced to answer, the answers are not admissible in the criminal case. *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973). Therefore, unless Mr. Taylor were actively arguing against Mr. Savage's interests or had failed to review the controlling case law, the context of the assertion demonstrates it was an assertion that statements made in a deposition without invoking the Fifth Amendment are admissible in the criminal proceeding.[3]

Because trial counsel gave erroneous advice – as demonstrated by clear United States Supreme Court precedent and as conceded by the State on appeal (*see* App. Br., pp.8-12) – Mr. Savage presented at least a genuine issue of material fact on the first prong of the *Strickland* test.

B. Trial Counsel's Erroneous Advice Was Prejudicial Because It Directly Led To The Basis Upon Which Mr. Savage Pled Guilty, And It Effectively Deprived Mr. Savage Of Any Meaningful Opportunity To Engage In The Pretrial Process To Challenge The State's Other Evidence

The State's prejudice argument is flawed in two respects. First, it is improperly based on information which there is no indication the district court considered in ruling on the motion for

[3] If the State is correct in this regard, that would completely undermine its position on the motion for reconsideration. (*See* Section II, *infra*.) There, the State contends that, because Mr. Taylor filed a motion to suppress that actually saved Mr. Savage's claim in this regard, the record shows no complete abandonment of meaningful representation. (Resp. Br., p.19.) However, if Mr. Taylor actually undermined that claim by asserting, wrongly, that Mr. Grant had correctly advised Mr. Savage that any statements at the deposition would be admissible regardless of invoking the Fifth Amendment, that would affirmatively show that Mr. Taylor had utterly failed to provide any *meaningful* representation to Mr. Savage. Therefore, if this Court accepts the State's argument in this regard, that would actually prove the district court's refusal to consider Mr. Savage's motion for reconsideration under I.R.C.P. 60(b) was not harmless.

summary dismissal. Second, it ignores the scope and timing of the deposition as it related to the pretrial processes. For both reasons, this Court should reject the State's argument

To the first point, the State's argument – that the rest of the State's evidence discussed in the presentence report shows a potential secondary consideration Mr. Savage could have taken into account in his decision to plead guilty (Resp. Br., pp.12-14) – is improper because there is no indication those facts were actually before the district court at the time it decided the motion for summary dismissal. While both parties asked the district court to take judicial notice of documents from the underlying record, including the PSI, there is no indication in the record that the district court granted either of these motions. (*See* R., pp.9, 207; *see generally* R.) In fact, the State actually conceded this point in its motion asking the Supreme Court to take judicial notice of those documents. (Motion to Take Judicial Notice (filed 6/20/19), p.2.)

The fact that the parties referenced certain facts in their arguments is not enough to actually put those facts before the district court. After all, the arguments of counsel are not evidence.[4] *State v. Babb*, 136 Idaho 95, 97 (Ct. App. 2001) (in which the State conceded the district court improperly relied on the State's assertions of fact in its brief below because those facts had not ultimately been presented as evidence). Similarly, facts from the underlying criminal case may not be relied on simply because they are in the personal recollected knowledge of the court or the parties. *See Matthews v. State*, 122 Idaho 801, 808 (1992). Therefore, the fact that the parties specifically discussed those facts in their briefs is not sufficient to put those facts before the district court or for the appellate courts to give those facts any weight

[4] In post-conviction, the allegations in the verified petition do constitute evidence because they are the sworn allegations of fact made by the defendant-petitioner. *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993). The prosecutor's motion does not function in the same way.

The Idaho Supreme Court recently made this clear. *See Rome v. State*, 164 Idaho 407 (2018). In that case, the appellant challenged the district court's failure to take judicial notice of certain documents from the underlying criminal case in his post-conviction proceedings. *Id*. at 413. He also argued that the language of the charging document (one of the documents which he claimed should have been judicially noticed) showed that counsel was ineffective for not requesting a lesser-included-offense instruction under the pleading theory. *See id*. at 417. In other words, he argued the specific facts that would have been shown by the charging document. *See id*. The Supreme Court held the district court did not err in denying the motion for judicial notice. *Id*. at 414-16. As a result, it held the record was insufficient to support his claim under the pleading theory because the charging document was not before the district court. *Id*. at 417. In other words, it refused to consider the facts despite them being presented in the briefing because they had not been properly before the district court. *See generally id.*

The same should be true in this case. Although the prosecutor referenced the PSI in his briefing, the fact that his motion for judicial notice was not ultimately granted means those facts were never before the district court. As a result, even though those facts appear in the appellate record (*see* Order Re: Motion to Take Judicial Notice (dated 8/26/19)), they should not be given any weight in evaluating the district court's decision to summarily dismiss Mr. Savage's petition.

However, as noted in Section A, *supra*, the existence of conflicting facts on a point only demonstrates that there is a genuine issue of material fact requiring an evidentiary hearing. *American Bank*, 155 Idaho at 190; *Dunlap*, 155 Idaho at 388. Since Mr. Savage alleged he pled guilty based on the fact that he followed Mr. Grant's erroneous advice and answered the questions at the deposition, which Mr. Grant subsequently told him were sufficient by themselves, to convict him, the fact that there might have been other, secondary considerations

for the guilty plea only creates a genuine issue material fact on this point. As such, Mr. Grant's erroneous advice affected Mr. Savage's decision to plead guilty at the time he did (before the preliminary hearing and any meaningful opportunity to challenge the State's other evidence), and that is the actual consideration for prejudice. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985) *McKeeth v. State*, 140 Idaho 847, 852 (2004). Even if Mr. Savage might ultimately have decided to plead guilty in the face of the State's other evidence after being able to meaningfully evaluate whether there were any motions he could have filed to challenge that evidence, the erroneous advice about the Fifth Amendment prejudiced Mr. Savage by leading him to plead guilty at the initial appearance instead.

In effect, Mr. Grant's advice was prejudicial because it deprived Mr. Savage of any meaningful opportunity to take advantage of the pretrial process, during which he could examine the State's other evidence and potentially challenge it through motions *in limine* or suppression motions. As the United States Supreme Court has recently clarified, prejudice under *Strickland* is shown when "by the denial of the entire judicial proceeding to which [the defendant] had a right." *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1965 (2017). As such, Mr. Savage alleged sufficient facts to establish there was a nexus between trial counsel's error and the decision to plead guilty.

Mr. Savage agreed to waive his preliminary hearing and plead guilty at his initial appearance in the district court as a direct result of him following Mr. Grant's erroneous advice about his Fifth Amendment rights. That is because Mr. Savage, relying on Mr. Grant's erroneous advice, answered the deposition questions so as not to subject himself to the sanctions Mr. Grant said would be forthcoming. That reliance on Mr. Grant's erroneous advice is what made his answers in the deposition admissible in the criminal case. Mr. Grant then advised

Mr. Savage to waive his preliminary hearing and plead guilty because those answers, by themselves, were enough to convict him. This nexus demonstrates the prejudice caused by Mr. Grant's erroneous advice

Not recognizing this connection, and the fact that Mr. Savage did not have a meaningful opportunity to challenge the State's evidence *in limine*, the State also contends that, based on the other evidence the State might have been able to present in this case, there was a disincentive to Mr. Savage to stand on his right to a trial. That argument is improper at the summary judgment stage because, like the State's other argument, it asks this Court to draw inferences from the facts in favor of the moving party. *See Parkinson*, ___ P.3d ___, 2019 WL 4266089; *Johnson*, 162 Idaho at 217. Thus, the inference that there might have been other considerations does not affirmatively disprove Mr. Savage's assertion that, but for Mr. Grant's erroneous advice regarding the deposition, he would not have pled guilty before he even had a meaningful opportunity to review that other evidence to see if it might be contested. (*See* R., pp.17, 19.) Therefore, Mr. Savage has established at least a genuine issue of material fact on that point, and thus, summary dismissal of his petition was improper.

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

As with its argument on the first issue, the State concedes the main point, but maintains that this Court should still affirm the district court's erroneous decision despite that concession. Specifically, the State concedes that the only basis on which the district court refused to consider Mr. Savage's motion to reconsider under I.R.C.P. 60(b) – that it was presented by Mr. Savage

himself, rather than through the attorney he was claiming was not communicating with him – was erroneous. (Resp. Br., pp.18-19.)

A. This Court Should Reject The State's "Right Result, Wrong Theory" Argument On The Merits Of Mr. Savage's Motion For Reconsideration Because It Did Not Raise The Alternative Reasoning Below

The State contends that this Court should evaluate the merits of the motion, and as a result, hold the district court's erroneous refusal to consider the motion was harmless. (Resp. Br., pp.15-21.) It makes this argument mindful of the Supreme Court's decision in *State v. Hoskin*, 165 Idaho 217, __, 443 P.3d 231 (2019)*s*, and of the fact that it did not actually present any argument on the merits of Mr. Savage's motion to reconsider below. (Resp. Br., p.19 & n.6.) It argues this is appropriate based on the idea that it did not have an opportunity to respond to the motion – that this is the "not-uncommon situation where a district court rules on a motion that the other party has not responded to." (Resp. Br., p.19 n.6.) That inference is not supported by the record – the State had some five months in which it could have filed a response to Mr. Savage's motion. (*Compare* R., p.226 (Mr. Savage's motion for reconsideration filed on December 14, 2017), *with* R., p.265 (the order refusing to consider the motion for reconsideration, filed on May 17, 2018).) Therefore, even if there is some sort of equitable exception to *Hoskins* for the case where the district court immediately rules on a party's motion without waiting for a response from the opposing party, it would not apply to this case.

However, *Hoskins* does not leave room that sort of exception in the first place: "This Court has placed a premium on counsel presenting facts and law that it chooses to support its position in the trial court. Our adversarial system of justice demands active and agile counsel at all levels." *Hoskins*, 443 P.3d at 240 (internal citation omitted). Thus, even if the district court moves more quickly than the prosecutor to address a motion, the appellate courts still will not

consider arguments or analyses which were clearly not before the district court in evaluating whether the district court erred.

That conclusion is actually borne out by the fact that the Idaho Supreme Court has held the remedy for errors such as this is to remand them for reconsideration under the proper legal standards. *See, e.g.*, *Montgomery v. Montgomery*, 147 Idaho 1, 6-7 (2009) ("When the discretion exercised by a trial court is affected by an error of law, the role of the appellate court is to note the error made and remand the case for appropriate findings."). That is because such analyses often involve questions of fact. *See Andrus v. State*, 164 Idaho 565, 567 (Ct. App. 2019) ("A determination under I.R.C.P. 60(b) turns largely on questions of fact to be determined by the trial court."). As the *Montgomery* Court explained, the district court is far better situated to resolve those questions of fact than the appellate court is. *See, e.g.*, *Quick v. Crane*, 111 Idaho 759, 770 (1986). Therefore, it would not be proper for this Court to address a factually-based analysis that the district court has not already considered and ruled on. *See Hoskins*, 443 P.3d at 240. Besides, under that remedy, the State might still have the ability[5] to actually raise whatever arguments and present whatever facts it deems appropriate. Of course, Mr. Savage will then have an opportunity to respond in kind. At that point, the district court will have the opportunity to weigh those facts and rule on the merits of the motion in the first instance.

The State is trying to skip all those steps and have this Court decide this matter based on arguments which the district court has not even considered due to its erroneous refusal to take up the motion in the first place. The State contends that is proper because the Court of Appeals conducted that sort of analysis in *Bias v. State*, 159 Idaho 696 (2015). (Resp. Br., p.19.) The

[5] The State's ability to raise such an argument on remand would likely depend on whether it forfeited its opportunity to respond to the motion for reconsideration by failing to file a response during the five months available while the motion was initially pending.

State is mistaken – *Bias* does not mention the concept of "right result, wrong theory" at all. *See generally Bias*, 159 Idaho 696. That is because the district court in *Bias* actually considered the merits of the petitioner's motion under I.R.C.P. 60(b) when it ruled on his motion: "In deciding whether to treat Bias's ambiguous motion under Idaho Rule of Civil Procedure 59(e) or 60(b), the court considered the substance of the motion." *Bias*, 159 Idaho at 701. Therefore, when the Court of Appeals considered the merits of Mr. Bias' motion under I.R.C.P. 60(b), it was directly reviewing the analysis conducted by the district court, and so, did not involve a "right result, wrong theory" analysis. *See also Golub v. Kirk-Scott, Ltd.*, 157 Idaho 996, __, 342 P.3d 893, 896, 899-900 & n.4 (2015) (reviewing the merits of the motion which had actually been argued by the parties in the district court, even though the district court ultimately ruled on procedural grounds instead). Basically, when an issue is actually decided by the district court below, it is properly preserved for appeal, and so, *Hoskins* is not implicated. *See State v. DuValt*, 131 Idaho 550, 553 (1998).

And even if the *Bias* Court were not directly reviewing the analysis the district court conducted, that still would not excuse *Hoskins*' preservation requirements. *State v. Clinton*, 155 Idaho 271, 272 n.1 (2013) (explaining that, when the Supreme Court issues an opinion, it does not go back and try to locate prior decisions which are contrary to the new opinion; rather, it simply expects lower courts to follow the law as announced in the new opinion). Thus, to the extent *Bias* or *Golub* conducted a "right result, wrong theory" analysis on a basis not argued below, the State's reliance on those cases would still be improper in light of *Hoskins*.

Either way, this Court should reject the State's attempt to have it rule on an argument which the State did not present below. Rather, this Court should remand this case so the district

court can make the relevant factual determinations on Mr. Savage's motion for reconsideration under the proper legal standards. (*See* App. Br., p.15.)

B. The District Court's Erroneous Refusal To Consider The Motion For Reconsideration Was Not Harmless

Should this Court do as the State is asking and consider the merits of Mr. Savage's motion for reconsideration in the first instance to determine whether the district court's error was harmless, it should still reject the State's arguments. Mr. Savage's motion for reconsideration was viable, and so, the refusal to consider it affected his substantial rights.

As the Idaho Supreme Court explained in *Eby v. State*, because post-conviction is the exclusive means for a person to raise certain constitutional challenges, cases where the appointed post-conviction attorney abandons the petitioner may affect his substantial rights (although not his Sixth Amendment right to effective counsel). 148 Idaho 731, 737 (2010). For example, post-conviction petitioners have a due process right to notice of, and a meaningful opportunity to respond to, defects in their petitions before they are summarily dismissed. *See* I.C. § 19-4906(b); *Ridgley v. State*, 148 Idaho 671, 676 (2010). When an appointed post-conviction attorney fails to communicate with his client about the alleged defects, he effectively deprives his client of both notice and a meaningful opportunity to respond. That problem is expressly evident in Mr. Savage's case, as he provided evidence of the responses he could have made, had his attorney communicated with him, and those responses actually would have prevented summary dismissal of his petition. (*See* App. Br., pp.16-17; *see generally* Resp. Br. (not contesting Mr. Savage's analysis in that regard).)

Rather, the State's argument that Mr. Savage's motion for reconsideration is meritless is based on the idea that, because Mr. Taylor took some actions on Mr. Savage's behalf, such as

filing the amended petition, he could not be said to have completely abandoned Mr. Savage. That argument is contrary to *Eby*, where the Supreme Court found a complete abandonment despite the fact that post-conviction counsel had, like Mr. Taylor, started off doing what he was supposed to do. *Eby*, 148 Idaho at 733 (noting that trial counsel initially informed the district court that he had actually "conducted a 'review, investigation, and research of post-conviction issues,'" and informed the district court that an amended petition was forthcoming, before he completely abandoned the petitioner). When counsel subsequently failed to take additional actions, it was at that point he completely abandoned his client. *See id.*

Likewise, in *Andrus v. State*, post-conviction counsel took some actions on the petitioner's behalf, such as requesting an extension of time so that he could talk with his client and actually sending him a letter. *Andrus v. State*, 164 Idaho 565, 566 (Ct. App. 2019). However, as the attorney in *Andrus* did nothing after that point (most notably, like Mr. Taylor, failing to respond to the notice of intent to dismiss), the Court of Appeals held the defendant had made a valid claim that the attorney had "completely abandoned" him at that point. *See id.* at 569-70. Thus, the fact that the post-conviction attorney completely abandons his client partway through the proceedings is of no matter in terms of whether the petitioner has a meritorious claim for relief under I.R.C.P. 60(b) in light of that abandonment. After all, he still suffers the same prejudice in either case – dismissal of likely-meritorious claims of constitutional violations on procedural grounds.

The State's reliance on *Devan v. State* is also misplaced. In *Devan*, the evidence clearly showed that the petitioner had actually acknowledged there were "multiple contacts between [himself] and his counsel's office reflecting ongoing communications," and that he had, in fact, met with his post-conviction attorney, at which time, his potential evidence was evaluated.

Devan v. State, 162 Idaho 520, 523 (Ct. App. 2017). Moreover, at the ensuing hearing on the motion for summary dismissal, the post-conviction attorney explained that, after talking with his client, he "was unable to find any meritorious claims." *Id.* As a result, the district court rejected the petitioner's claim that his attorney had abandoned him because "there was communication between counsel and [Devan], specifically there was communication regarding the potential alibi, and that counsel considered this information and determined there was no meritorious claim." *Id.* Based on that factual finding, the district court concluded "there was sufficient communication between the parties and consideration of the issue by counsel that there was not a complete lack of meaningful representation." *Id.*

This case presents the antithesis of *Devan*. Unlike Mr. Devan, who acknowledged various communications between himself and counsel, Mr. Savage alleged there was no contact whatsoever between Mr. Taylor and himself. (R., p.229.) Nothing in the record contradicts that allegation. (*See generally* R.) In fact, because Mr. Taylor did not file a response to the motion for summary dismissal, there was no hearing on that motion, which means, unlike the attorney in *Devan*, Mr. Taylor did not offer any sort of explanation for his failure to respond to that motion. (*See generally* R.) In short, there is nothing to suggest this case is anything like *Devan*.

As such, this is not a claim that expresses disagreement with Mr. Taylor's assessment of the case or that he was ineffective in the way he argued the case. *Compare Devan*, 162 Idaho at 523-24. Rather, this is one of those rare cases where post-conviction counsel completely failed to provide any *meaningful* representation during the critical point in the proceedings. *Compare Eby*, 148 Idaho at 737. Mr. Taylor, like the attorney in *Eby*, started out doing what he was supposed to do (reviewing the case and seeking to amend the petition as needed), but then he, like the attorney in *Eby*, failed to communicate any further with his client, and he did not take

any further action in the case, thereby allowing his client's viable claims to be summarily dismissed. Thus, Mr. Savage's motion for reconsideration had as much merit as the motion in *Eby*.

As such, the district court's refusal to consider Mr. Savage's motion for reconsideration was not harmless. Therefore, this Court should at least reverse the district court's order refusing to consider that motion.

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 refusing to consider his motion for reconsideration and remand this case for further proceedings.

DATED this 16th day of September, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Kylie M. Fourtner
KYLIE M. FOURTNER
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BRD/kmf