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AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**GARY LEE PAYNE,**

*Petitioner,*

vs.

**STATE OF IDAHO,**

*Respondent.*

Case No. **CV 2009 10767**

**ORDER GRANTING  
RESPONDENT'S MOTION TO  
DISMISS IN PART, DENYING IN  
PART**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

This matter is before the Court following Petitioner's, Gary Lee Payne's (Payne), filing of a Petition for Post-Conviction Relief on December 28, 2009, pursuant to I.C. §19-4901, *et seq.* (Uniform Post-Conviction Procedure Act (UPCPA)). Payne pled guilty to the underlying criminal matter, fraud and grand theft (CRF 2006 4173) on October 9, 2007, but was not sentenced until November 18, 2008 because of Payne's failure to appear at the originally scheduled sentencing date, December 17, 2007.

Payne filed his Post-Conviction Petition *pro se* on December 28, 2009. He sought appointment of counsel on the same date. On January 5, 2010, this Court appointed the Kootenai County Public Defender. Payne now seeks post-conviction relief on the following grounds:

1. Ineffective assistance of counsel;
2. Incorrect information being provided to the Court by the Pre-Sentence Investigation (PSI); and
3. Petitioner's plea not having been voluntarily entered because it was induced by broken promises.

Petition for Post-Conviction Relief, p. 2. The State filed its Motion for Summary Disposition on January 13, 2010. On March 1, 2010, Paul Szott appeared via Notice of Attorney Assignment Change. Mr. Szott's motion to continue hearing on the State's Motion for Summary Disposition and extending the time-period within which to reply to the State's Brief was granted on March 9, 2010. Payne's Response to Respondent's Motion for Summary Judgment was filed on April 29, 2010. Oral argument was held on May 18, 2010.

## **II. STANDARD OF REVIEW.**

Idaho Code § 19-4906 permits for summary disposition of UPCA petitions pursuant to a party's motion or upon the court's own initiative. *Chouinard v. State*, 127 Idaho 836, 839, 907 P.2d 813, 816 (Ct.App. 1995); *Martinez v. State*, 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct.App. 1997). Summary dismissal is proper only where "the evidence presents no genuine issues of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief." *Martinez*, 130 Idaho 530, 532, 944 P.2d 127, 129. Where genuine issues of material fact are presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct.App. 1991). But, where a petition raises only questions of law, disposition on the pleadings and the record is appropriate. *Daugherty v. State*, 102 Idaho 782, 783, 640 P.2d 1183, 1184 (Ct.App. 1982). "On review of a dismissal of the post-conviction application, without an evidentiary hearing, [reviewing courts] will determine whether a genuine issue of fact exists based on the pleadings, depositions and admission on file, together with any affidavits on file; moreover, the court will liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences to be drawn from the evidence in favor of the non-moving party." *Ricca v. State*, 124 Idaho

894, 896, 865 P.2d 985, 987 (Ct.App. 1993). Allegations in an application for post-conviction relief must be deemed to be true until those allegations are controverted by the state. *King v. State*, 114 Idaho 442, 445, 757 P.2d 705, 708 (Ct.App. 1988).

### **III. ANALYSIS.**

The UPCPA permits summary dismissal upon motion by either party where an application raises no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.C. § 19-4906(c). Here, the State argues that Payne's only issue on appeal to the Idaho Supreme Court was whether the District Court erred in denying his Idaho Criminal Rule 35 motion to reduce his sentence. Respondent's Motion for Summary Disposition, p. 2. The State claims Payne cannot now raise the issues related to ineffective assistance of counsel he lists in his Petition because the UPCPA does not permit petitioners to raise issues which could have been raised on direct appeal, such issues are forfeited. *Id.*, citing *Murphy v. State*, 143 Idaho 139, 139 P.3d 741 (Ct.App. 2006). The State is correct as to Payne's claims of "Incorrect information given to the Court by Pre-Sentence report" and "Petitioner's plea was not knowingly entered because it was induced by promises that were not kept." Those claims *must* be dismissed as they could have been raised on appeal. However, the State is mistaken because ineffective assistance of counsel claims are not covered by the concept that the UPCPA does not permit issues raised which could have been raised on direct appeal. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

The State also argues Payne has not set forth genuine issues of material fact because his Petition and Affidavit "provide us with conclusory allegations and fail to provide material facts which would form the basis for the claims that Petitioner sets out." *Id.*, p. 3. Finally, the State argues Payne has not properly set forth allegations in his

affidavits, records, evidence, etc. “that his counsel’s decisions resulted from any shortcomings capable of objective review” or “how he was prejudiced by that attorney’s deficient performance.” *Id.*, pp. 8-9.

Payne responds his Petition alleges his trial counsel’s performance fell below an objective standard of reasonableness as evidenced by counsel’s: failure to present evidence at sentencing; failure to object to errors in Payne’s prior criminal history; failure to request a continuance to adequately prepare for sentencing; and failure to advise Payne of the ramifications of his entering a guilty plea. Response to Motion for Summary Judgment, p. 1. Payne states his Petition itself and his sworn affidavit present admissible evidence supporting the allegations he makes. *Id.*, 2-3.

Mr. Payne’s sentence was based in part by [sic] alleged extensive criminal history. An accurate record of Mr. Payne’s criminal history, therefore, is essential to a fair and just sentence. Mr. Payne has personal knowledge of these deficiencies as sworn to by affidavit.

*Id.*, p. 4. However, Payne fails to state how his prior criminal history was inaccurate or how the outcome would have been different. Payne also concedes the only issue raised on direct appeal was the denial of his Rule 35 motion, but asks the Court to grant him leave to amend his Petition to include a claim of ineffective assistance of his appellate counsel. *Id.* However, Payne has not filed a *motion* on that issue. Thus, it is not before this Court.

Ordinarily, reviewing courts do not address claims of ineffective assistance of counsel on direct appeal because the record on direct appeal is “rarely adequate for review of such claims.” *State v. Hayes*, 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct.App. 2003); *State v. Saxton*, 133 Idaho 546, 549, 989 P.2d 288, 291 (Ct.App. 1999). Claims of ineffective assistance are more appropriately presented through post-conviction relief proceedings where an evidentiary record can be developed. *State v. Mitchell*, 124 Idaho

374, 376, 859 P.2d 972, 974 (Ct.App. 1993).

To warrant reversal on grounds of ineffective assistance of counsel, a criminal defendant must first show that counsel's performance was objectively deficient and, second, that the deficiency prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064.(1984) Under the first prong of the *Strickland* analysis, it is the defendant's burden to show that his counsel's performance fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 762, 760 P.2d 1174, 1178 (1988) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). The appellate court presumes that trial counsel was competent and that trial tactics were based on sound legal strategy. *State v. Porter*, 130 Idaho 772, 792, 948 P.2d 127, 147 (1997). Trial counsel's tactical decisions will not justify relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). Under the second prong, the defendant must show a reasonable probability that the outcome of trial would have been different but for his counsel's deficient performance. *State v. Row*, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068.

In *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct.App. 1995), the Court of Appeals recognized "when the attorney's deficiency is a failure to file an appeal as requested by the client, the loss of the opportunity to appeal is itself sufficient prejudice to meet the second prong of the *Strickland* test." 127 Idaho 690, 691, 905 P.2d 91, 92 (citing *Beasley v. State*, 126 Idaho 356, 883 P.2d 714 (Ct.App. 1994). In *Beasley*, the Court of Appeals wrote:

On post-conviction then, the defendant should not be required to identify the meritorious issues that would have been raised, but should be restored to the status enjoyed immediately following the judgment of conviction when the defendant was entitled to a direct appeal.

126 Idaho 356, 361, 883 P.2d 714, 719. “A defendant denied an appeal because his lawyer did not file an appeal as requested should not be given an additional hurdle to clear just because his rights were violated at some earlier stage in the proceedings.” *Id.* The Court of Appeals’ rationale in this matter may possibly also extend to a defendant seeking post-conviction relief for the ineffective assistance of counsel by appellate counsel.

At this juncture, it is likely that Payne has raised sufficient issues of material fact to defeat the State’s motion for summary disposition and proceed to an evidentiary hearing. On review of a motion for summary disposition, this Court liberally construes the facts in favor of the party opposing the motion, together with all reasonable inferences to be drawn from the evidence in favor of the non-moving party.” *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct.App. 1993). And all allegations in an application for post-conviction relief must be deemed to be true until those allegations are controverted by the state. *King v. State*, 114 Idaho 442, 445, 757 P.2d 705, 708 (Ct.App. 1988). Payne has provided the Court with no “facts” as to broken promises, no “facts” as to what of his prior record was inaccurate. While Payne has alleged little in the way of any “facts” as to his claims of ineffective assistance of counsel, he has raised enough to survive summary dismissal on that singular issue.

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### **III. CONCLUSION AND ORDER.**

Payne’s claims of “Incorrect information given to the Court by Pre-Sentence

report” and “Petitioner’s plea was not knowingly entered because it was induced by promises that were not kept” are dismissed, as they are matters that could have been raised on direct appeal. As an alternative ground, those claims must be dismissed as Payne has set forth no facts that would support those claims.

Payne’s claim of ineffective assistance of counsel claims are not covered by the concept that the UPCPA does not permit issues raised which could have been raised on direct appeal. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

The issue of Payne’s request in his brief to grant him leave to amend his Petition to include a claim of ineffective assistance of his appellate counsel, is not before the Court as no motion has been made.

IT IS HEREBY ORDERED Respondent’s Motion to Dismiss Payne’s claims of “Incorrect information given to the Court by Pre-Sentence report” and “Petitioner’s plea was not knowingly entered because it was induced by promises that were not kept” is GRANTED and those claims are dismissed, as they are matters that could have been raised on direct appeal; alternatively, those claims are dismissed as Payne has set forth no facts that would support those claims.

IT IS FURTHER ORDERED Respondent’s Motion to Dismiss Payne’s claim of ineffective assistance of counsel claims is DENIED, as those claims are not covered by the concept that the UPCPA does not permit issues raised which could have been raised on direct appeal. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Entered this 21<sup>ST</sup> day of May, 2010.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of May, 2010, a true copy of the foregoing was mailed

postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer  
Donna Gardner/Marty Raap

Fax #  
446-1833

| Lawyer  
Paul Szott

Fax #  
446-1701

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Jeanne Clausen, Deputy Clerk