IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

John Doe,	)	
	)	
Appellant,	)	
	)	
v.	)	Court of Appeals No. A-12835
	)	
STATE OF ALASKA	)	
	)	
Appellee.	)	

Trial Court Nos. 3PA-11-1885CI
3PA-09-00125CR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT PALMER
HONORABLE VANESSA WHITE

OPENING BRIEF OF APPELLANT

LAW OFFICE OF MICHAEL HOROWITZ
UNDER CONTRACT WITH
THE OFFICE OF PUBLIC ADVOCACY

Michael Horowitz (1005021)
8141 Summit City Road
Kingsley, Michigan 49649
(907) 231-3945

Filed in the Court of Appeals
of the State of Alaska
_____, 2017

MARILYN MAY, CLERK
Appellate Courts

_____
Deputy Clerk

VRA CERTIFICATION AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in the body and footnotes of this document is Century Schoolbook 13 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

AUTHORITIES RELIED UPON

Alaska Constitution, article I, section 7.
Section 7 - Due Process.
No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Constitution, article I, section 11.
Section 11 - Rights of Accused.
In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, amendment V.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment VI.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, amendment XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Rule of Criminal Procedure 35.1(e)

(e) Indigent Applicant.

(1) If the applicant is indigent, filing fees shall be paid under the provisions of AS 09.19 and counsel shall be appointed consistent with AS 18.85.100 to assist the applicant.

(2) Within 60 days of an attorney's appointment on behalf of an indigent applicant, the attorney shall file with the court and serve on the prosecuting attorney

(A) a statement that the litigation will proceed on the claims alleged in the application filed by the applicant; or

(B)an amended application for post-conviction relief; or

(C) certificate that the attorney

(i) does not have a conflict of interest;

(ii) has reviewed the facts of the underlying proceeding or action challenged in the application, and the pertinent law;

(iii) has consulted with the applicant and, if appropriate, with trial counsel; and

(iv) has determined that the claims presented in the application have no arguable merit and that the applicant has no other colorable claims for post-conviction relief.

(3) The certificate described in subparagraph (e)(2)(C) shall include a full description of

(A) the claims the attorney has considered;

(B) the materials the attorney has reviewed;

(C) the investigations the attorney has conducted; and

(D) the reasons why the attorney has concluded that all of the applicant's potential claims have no arguable merit.

Alaska Rule of Criminal Procedure 35.1(f)(2)

(2) If appointed counsel has filed a certificate under (e)(2)(C) of this rule, and it appears to the court that the applicant is not entitled to relief, the court shall indicate to the parties its intention to permit counsel to withdraw and dismiss the application and its reasons for so doing. The applicant and the prosecuting attorney shall be given an opportunity to reply to the proposed withdrawal and dismissal. If the applicant files a response and the court finds that the application does not present a colorable claim, or if the applicant does not file a response, the court shall permit counsel to withdraw and order the application dismissed. If the court finds that the application presents a colorable claim, the court may grant leave to file an amended application or direct that the proceedings otherwise continue.

AS 12.72.010. Scope of post-conviction relief

A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims

(1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;

(2) that the court was without jurisdiction to impose sentence;

(3) that a prior conviction has been set aside and the prior conviction was used as a statutorily required enhancement of the sentence imposed;

(4) that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice; if the person seeks post-conviction DNA testing to support a claim under this paragraph, the person's exclusive method for obtaining that testing is an application under AS 12.73;

(5) that the person's sentence has expired, or the person's probation, parole, or conditional release has been unlawfully revoked, or the person is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error previously available under the common law, statutory law, or other writ, motion, petition, proceeding, or remedy;

(7) that

(A) there has been a significant change in law, whether substantive or procedural, applied in the process leading to the person's conviction or sentence;

(B) the change in the law was not reasonably foreseeable by a judge or a competent attorney;

(C) it is appropriate to retroactively apply the change in law because the change requires observance of procedures without which the likelihood of an accurate conviction is seriously diminished; and
(D) the failure to retroactively apply the change in law would result in a fundamental miscarriage of justice, which is established by demonstrating that, had the changed law been in effect at the time of the applicant's trial, a reasonable trier of fact would have a reasonable doubt as to the guilt of the applicant;
(8) that, after the imposition of sentence, the applicant seeks to withdraw a plea of guilty or nolo contendere in order to correct manifest injustice under the Alaska Rules of Criminal Procedure; or
(9) that the applicant was not afforded effective assistance of counsel at trial or on direct appeal.

AS 12.72.020. Limitations on applications for post-conviction relief
(a) A claim may not be brought under AS 12.72.010 or the Alaska Rules of Criminal Procedure if
(1) the claim is based on the admission or exclusion of evidence at trial or on the ground that the sentence is excessive;
(2) the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction;
(3) the later of the following dates has passed, except that if the applicant claims that the sentence was illegal there is no time limit on the claim:
(A) if the claim relates to a conviction, 18 months after the entry of the judgment of the conviction or, if the conviction was appealed, one year after the court's decision is final under the Alaska Rules of Appellate Procedure;
(B) if the claim relates to a court revocation of probation, 18 months after the entry of the court order revoking probation or, if the order revoking probation was appealed, one year after the court's decision is final under the Alaska Rules of Appellate Procedure;
(4) one year or more has elapsed from the final administrative decision of the Board of Parole or the Department of Corrections that is being collaterally attacked;
(5) the claim was decided on its merits or on procedural grounds in any previous proceeding; or
(6) a previous application for post-conviction relief has been filed under this chapter or under the Alaska Rules of Criminal Procedure.

JURISDICTIONAL STATEMENT

John Doe appeals to this Court from the order dismissing his application for post-conviction relief entered by the Honorable Vanessa White, Superior Court Judge, Third Judicial District at Palmer, Alaska on March 20, 2017. [R. 3] The judgment was distributed on March 21, 2017. [R. 3] The docketing statement for this appeal was filed on April 4, 2017, the statement of points of appeal was filed on April 4, 2017, and a notice of appeal was filed (based on service date) of April 10, 2017.

This merit appeal is brought as a matter of right in accordance with Alaska Appellate Rule 202. This court has jurisdiction over this appeal from a final judgment pursuant to AS 22.07.020.

ISSUES PRESENTED

1. Post-conviction relief counsel filed a "no-merit" certificate. This certificate did not fulfil the requirements of Rule 35.1 to evaluate all potential claims and amend the application if necessary. The certificate was limited to arguing why appellant's pro se application would not ultimately succeed. The superior court should not have accepted counsel's no-merit certificate.

2. The superior court failed to conduct the independent analysis required by Rule 35.1(f)(2).

3. Both post-conviction relief counsel and the superior court applied the wrong standard to appellant's potential claims. Both erroneously analyzed whether the claims would be ultimately successful. The correct standard is whether the claims are frivolous.

4. Both post-conviction relief counsel and the superior court failed to consider all of the claims in appellant's pro se application.

5. Both post-conviction relief counsel and the superior court failed to consider potential claims outside of appellant's application.

6. The deficiencies of the no-merit certificate and superior court's analysis denied appellant due process.

INTRODUCTION

John Doe is appealing the superior court's dismissal of his post-conviction relief application based on appointed counsel's no-merit certificate. He argues that the certificate was deficient and should not have been accepted. There were claims in his application that the no-merit certificate failed to address; there were other claims counsel should have considered adding to an amended application; and the no-merit certificate failed to explain what claims outside of the pro se application, if any, that counsel considered and rejected. He also argues that the superior court failed to undertake an independent analysis. The superior court's analysis of Mr. Doe's claims did not consider any claim outside of the no-merit certificate and too precisely tracked the certificate to be considered a distinct analysis.

STATEMENT OF FACTS

A. THE CRIMINAL CASE

On January 21, 2010, John Doe was convicted by jury of three counts of second-degree sexual abuse of a minor and one count of attempted second-degree sexual abuse of a minor.[1] [R. 339, 528, 553] Judgment was entered by

[1] AS 11.41.436(a)(1) and AS 11.31.100(d)(4). The judgment erroneously indicates that Mr. Doe was convicted of four counts of second-degree sexual

the Honorable Vanessa White, Superior Court Judge, of the Third Judicial District at Palmer on April 26, 2010 and distributed on May 4, 2010. [R. 343-44]

The convictions were based on sexual conduct on two different occasions between Mr. Doe and a C.B., a fifteen-year-old babysitter and family friend.[2] [R. 59, 163, 418] Conviction on Count I was based on one occasion and the convictions in Counts II through IV, which merged for sentencing, were based on the other occasion.[3] [R. 559, 570] Mr. Doe had no prior criminal history.

For Count I, the court sentenced Mr. Doe to 10 years with 5 years suspended and 5 years to serve.[4] For Count II, into which Counts III and IV were merged, the court sentenced Mr. Doe to 15 years with 7 years suspended and 8 years to serve.[5] [R. 570] Two years of Count I and the merged Count II ran concurrently, so the composite sentence was 23 years with 12 years suspended and 11 years to serve.[6] [R. 570]

---

abuse of a minor. *See* indictment [R. 223-225], sentencing [R. 559], verdict forms [Cr. R. 335], and presentence report [Cr. R. 558].

[2] *Doe v. State*, Memorandum Opinion and Judgment No. 6100, 2014 WL 5305987, at *1 (Alaska App. Oct. 15, 2014).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Mr. Doe appealed his conviction and sentence to this Court. Because a case relevant to his sentencing argument was being decided by the Alaska Supreme Court, this Court addressed Mr. Doe's arguments in two separate appeals. In *Doe v. State,* Memorandum Opinion and Judgment No. 5923, 2013 WL 784884 (Alaska App. Feb. 27, 2013), this Court addressed and rejected Mr. Doe's arguments that the trial court erred by allowing hearsay, that there was insufficient evidence to prove that that the offenses happened in Alaska, and that the court abused its discretion by denying a continuance. In *Doe v. State*, Memorandum Opinion and Judgment No. 6100, 2014 WL 5305987 (Alaska App. Oct. 15, 2014), this Court addressed and rejected Mr. Doe's claim that his sentence was excessive. In case number S-15954, Mr. Doe filed a petition for hearing in the supreme court that requested review of his merit appeal, but that petition was denied.

B. <u>THE POST-CONVICTION RELIEF PROCEEDINGS</u>

Post-conviction relief (PCR) counsel was appointed on August 27, 2013. [R. 657] An attorney from Public Defender Agency entered his appearance on September 3, 2013, but withdrew for a conflict on October 21, 2013. [R. 650, 655] The Office of Public Advocacy then requested and received a 365-day extension. [R.633, 635-43] On June 26, 2014, attorney NDS ("PCR counsel")

entered her appearance as an OPA contractor. [R. 632] NDS then requested and received an additional 60 days to file an amended application. [R. 628, 631]

On May 7, 2015, instead of filing an amended application, PCR counsel filed a "Criminal Rule 35.1(e)(2)(C) Certificate and Memorandum," in which she concluded that Mr. Doe's claims had no merit and there were no other claims to raise. [R. 196-216] But Judge White denied the no-merit certificate, explaining in part:

> In this case, NDS has failed to address at least one of Doe's claims individually: his claim that the AS 12.55.125(i) violates the *Apprendi-Blakely* rule. Of equal concern is the fact that NDS's certificate does not explicitly analyze any of Doe's claims of ineffective assistance under the two-prong *Risher* test. NDS's motion does not cite to *any case law* with respect *to any of* Doe's claims, and does not specify whether NDS believes that Doe's claims of ineffective assistance of counsel claims fail under the attorney-competency prong, the prejudice prong, or both. (Emphasis original.)

[R. 188-89] On February 26, 2016, PCR counsel filed an amended certificate and memorandum. [R. 145-179]

On May 24, 2016, Judge White issued a "Notice of Intent to Dismiss Petition for Post-Conviction Relief," in which she largely agreed with and restated PCR counsel's no-merit certificate. [R. 130-42] Mr. Doe then filed a 20-page, single-spaced reply to the certificate and the court's notice. [R. 98-117] Judge White found:

> In substantial part, Doe's reply focuses on claims that his appointed counsel for this PCR also was ineffective and acted unfairly with respect to him. Those allegations are not a basis for maintaining this first Application for Post-Conviction Relief, where the inquiry is limited to the quality of the efforts by his trial court attorney.

[R. 2] On March 20, 2017, the court noted that Mr. Doe had a right to file a separate application for post-conviction relief alleging infectiveness of his PCR counsel and dismissed his application. [R. 3] Mr. Doe now appeals that order.

ARGUMENT

In the superior court PCR proceedings, counsel for Mr. Doe filed a no-merit certificate. The superior court ultimately affirmed this certificate and concluded that Mr. Doe's claims were frivolous. However, both counsel's no-merit certificate and the court's evaluation of Mr. Doe's application were deficient: both failed to address arguments Mr. Doe raised, both failed to analyze any other claims on his behalf, and both applied the wrong standard to his application. The superior court's denial also failed to amount to an independent analysis.

A. POST-CONVICTION RELIEF: CRIMINAL RULE 35.1

Criminal Rule 35.1 sets forth the procedure for post-conviction relief. Rule 35.1(e) sets forth the post-conviction requirements specific to

representation of indigent applicants. Rule 35.1(e)(2) provides that counsel appointed to an indigent applicant shall file:

> (A) a statement that the litigation will proceed on the claims alleged in the application filed by the applicant; or
>
> (B) an amended application for post-conviction relief; or
>
> (C) a certificate that the attorney
>
> > (i) does not have a conflict of interest;
> >
> > (ii) has reviewed the facts of the underlying proceeding or action challenged in the application, and the pertinent law;
> >
> > (iii) has consulted with the applicant and, if appropriate, with trial counsel; and
> >
> > (iv) has determined that the claims presented in the application have no arguable merit and that the applicant has no other colorable claims for post-conviction relief.

Regarding the no-merit certificate allowed by 35.1(e)(2)(c), Rule 35.1(e)(3) provides that:

> The certificate described in subparagraph (e)(2)(C) shall include a full description of:
>
> (A) the claims the attorney has considered;
>
> (B) the materials the attorney has reviewed;
>
> (C) the investigations the attorney has conducted; and
>
> (D) the reasons why the attorney has concluded that all of the applicant's potential claims have no arguable merit.

Criminal Rule 35.1(f)(2) provides additional procedure to be followed when counsel files a no-merit certificate:

> If appointed counsel has filed a certificate under (e)(2)(C) of this rule, and it appears to the court that the applicant is not entitled to relief, the court shall indicate to the parties its intention to permit counsel to withdraw and dismiss the application and its reasons for so doing. The applicant and the prosecuting attorney shall be given an opportunity to reply to the proposed withdrawal and dismissal. If the applicant files a response and the court finds that the application does not present a colorable claim, or if the applicant does not file a response, the court shall permit counsel to withdraw and order the application dismissed. If the court finds that the application presents a colorable claim, the court may grant leave to file an amended application or direct that the proceedings otherwise continue.

B. "NO-MERIT" EXPLAINED

"In general, when an attorney is appointed to represent a client who has filed an application for post-conviction relief, the attorney has a duty to investigate whether there are any non-frivolous grounds to obtain post-conviction relief."[7] "A claim is frivolous [only] if there is no colorable argument that a zealous advocate could advance in support of the claim."[8] "But even

---

[7] *Tazruk v. State*, 67 P.3d 687, 693–94 (Alaska App. 2003) (Coats, C.J., concurring).

[8] *Johnson v. State*, 77 P.3d 11, 13 (Alaska App. 2003).

though the factual basis of a claim for post-conviction relief may be weak or implausible — even so weak or implausible that the claim appears virtually certain to fail — this does not mean that the claim is "frivolous" for purposes of Criminal Rule 35.1(e)(2)(C)."[9]

Counsel must not only assess whether the claims in the petitioner's application are frivolous, but must also determine "that the application cannot be amended to assert one or more colorable claims for relief."[10] And once counsel has made such certification, it then falls to the trial court to "independently assess whether it appears ... that the applicant is not entitled to relief."[11]

This Court has "repeatedly reversed trial court dismissals of post-conviction relief litigation under Criminal Rule 35.1(f)(2) — either because the defendant's attorney failed to provide the trial court with a complete and detailed explanation of the defendant's potential claims, or because the trial court failed to conduct an adequate independent review of the attorney's

---

[9] *Vizcarra-Medina v. State*, 195 P.3d 1095, 1099 (Alaska App. 2008).
[10] *Griffin v. State*, 18 P.3d 71, 75 (Alaska App. 2001).
[11] *Id.*, 18 P.3d at 76.

certificate, or because the court mistakenly concluded that all of the claims described by the attorney were in fact frivolous."[12]

C. STANDARD OF REVIEW

Under *Griffin*, this Court has "a constitutional duty to independently assess the merits of [a] case to ensure that [the applicant] received zealous investigation and presentation of any colorable claims for post-conviction relief."[13] Generally, a grant of summary judgment is reviewed "de novo, affirming if the record presents no genuine issue of material fact and if the movant is entitled to judgment as a matter of law . . . [where the Court] views[s] the facts in the light most favorable to the non-moving party."[14] Otherwise, the Court's evaluation would seem to involve mixed questions of law and fact where the Court would review the superior court's factual findings for clear error, and the legal issues de novo.[15]

---

[12] *Wassilie v. State*, 331 P.3d 1285, 1291 (Alaska App. 2014).

[13] *Duncan v. State*, Memorandum Opinion and Judgment No. 5407, 2008 WL 5025424, at *4 (Alaska App. Nov. 26, 2008).

[14] *Yi v. Yang*, 282 P.3d 340, 344 (Alaska 2012).

[15] *Young v. State*, 374 P.3d 395 (Alaska 2016), reh'g denied (July 19, 2016) (explaining standard review where there are mixed issues of law and fact).

D. CLAIMS ADDRESSED BUT WRONGLY REJECTED BY THE NO MERIT CERTIFICATE

1. "Other-location evidence," jurisdiction, and trial counsel's failure to investigate, call witnesses, and introduce evidence

On the first page of his pro se PCR application alleging ineffective assistance of counsel, Mr. Doe claimed that "The defendants counsel was ineffective because he didn't interview and call all potential witnesses that were provided by the defendant as important. And he failed to track down leads and other important witnesses and documents." [R. 81] He also specified that trial counsel failed to introduce evidence such as emails, bank statements, utilities, airline tickets. [R. 10]

Mr. Doe repeatedly brought up a jurisdictional attack against his criminal case. His argument was that he committed the crime in Wyoming and not Alaska, and thus Alaska did not have jurisdiction. In his PCR filings, he argued that trial counsel was ineffective for failing to investigate or present evidence and witnesses related to this claim. His evidence showed that he relocated to Wyoming in early September, and his argument was that the September assault therefore could not have happened in Alaska.

a. PCR counsel and the superior court undervalued this evidence.

In her no-merit certificate, PCR counsel attacked the significance of this evidence. [R. 165-68] The common deficit attributed to the evidence was that it did not completely exclude Mr. Doe from being in Alaska in late August or early September. [R. 165-68] PCR counsel noted that "The date range for the criminal offenses as charged in the indictment is 'on or about September 2007, at or near Wasilla, Alaska.'" [R. 163] PCR counsel explained that the State's evidence could have established that Mr. Doe was guilty of committing the crime in Alaska before leaving for Wyoming. [R. 163-64] The superior court also only addressed this issue as jurisdictional and "agree[d] with NDS that all of the evidence Doe wished to use at trial would not have proven that he was not in Alaska." [R. 135]

The problem with PCR counsel's analysis on this point is that she only analyzed the evidence as it pertained to jurisdiction and sufficiency of the evidence, and she only viewed that evidence in the light most favorable to the State or to upholding the verdict. Rather than accepting Mr. Doe's characterization of evidence as relevant to challenging jurisdiction, PCR counsel should have determined if there was any "colorable argument that a

zealous advocate could advance" that trial counsel was ineffective for failing to present this evidence.[16]

The strongest of this "other-location" evidence were Matanuska Federal Credit Union statements that showed that Mr. Doe departed the Mat-Su Valley for Wyoming by September 4, 2007. [R. 166] As PCR counsel explained:

> The Matanuska Federal Credit Union statements show that the Does were using their debit card in the Matsu Valley in late August and early September 2007. These records show that they used the card in Meadow Lakes on August 29th and September 1 and at Walmart in Wasilla and Animal
> Food Warehouse in Palmer on or about September 3rd. The bank statements also verify that they left for the lower 48 on approximately September 4th. They purchased gas in GlenAllen [sic] on Sept. 4th, Tok on September 5th, and Beaver Creek, Canada on Sept. 5th.

[R. 165] This evidence plainly showed that Mr. Doe departed for the Lower 48 by September 4. It was definitive and strong evidence of that departure: it tracked Mr. Doe's journey from Meadow Lakes to Glennallen to Tok and into Canada. [R. 44-53]

Granted, this evidence would not have proven a lack of jurisdiction and would not have in itself resulted in a judgment of acquittal (when evaluated in

---

[16] *Johnson*, 77 P.3d at 13.

the light most favorable to the State). But, this evidence had obvious value to an alibi defense ("I wasn't there when she said I was") or as impeachment evidence ("victim, you said this assault occurred in Alaska on a certain date, but Mr. Doe was in Canada or Wyoming on that date"). Additionally, the evidence could have served to better delineate the timeframe at issue and narrow the window for a possible assault in Alaska. Moreover, this clearly relevant evidence would have had at least the minimal function of being *some* evidence for the defense admit, point to, and argue.

The other evidence in this vein tends to establish the same point, but to a lesser degree. Mr. Doe pointed to a potential witness, Dan Morrison, to whom Mr. Doe sold his house, that would have suggested Mr. Doe left Alaska at a certain point (or at least that he would not have had access to his house (where an assault was said to have occurred) at a certain point. [R. 165] Mr. Doe pointed to Mat-Su Borough property records that would have established the same thing. [R. 165] Mr. Doe identified veterinarian certificates for horses to travel through Canada. [R. 166] He identified title information from Wyoming with settlement documents signed on September 12. [R. 166-67] And he identified electricity and gas bills that showed when he closed his accounts. [R. 167-68] (The electricity account information was introduced at trial and later discussed by this Court on appeal.)

While these other items were less definitive than the bank information, this evidence also could have limited the possible window of an Alaska assault, would have tended to corroborate Mr. Doe's defense that he had left Alaska, could have been used to impeach the victim (to the extent she may have asserted conflicting dates if pressed), and at least would have been *some* evidence for the defense to point to.

In a case such as this, where tangible evidence items were at a premium, even more so for the defense, it is obvious that any competent defense attorney would have jumped at the opportunity to claim a piece of evidence, slap his exhibit sticker on it, and then admit it to the jury. Whether this evidence would have carried the day is not the point, and it is not required for this review. Rather, the fact is that the evidence could have been helpful for various reasons. Thus, PCR counsel and the court erred in finding there was no merit to Mr. Doe's claims on this point.

b. PCR counsel and the superior court applied the wrong standard to this claim.

PCR counsel concluded that "Mr. Doe's trial attorney did not provide ineffective assistance of counsel to him by not presenting this evidence because this evidence would not have changed the outcome of the case." [R. 168] The superior court agreed that "this evidence does not show ineffective assistance of counsel because the evidence would not have changed the outcome." [R. 135]

As discussed above, this evidence could have been used in manners that affected the case outcome and both PCR counsel and the superior court undervalued the potential uses of this evidence. But while that analysis is relevant to a discussion of ineffective assistance of counsel under the *Risher* standard, it is premature in a no-merit certificate. The standard that should have applied was whether the claim was frivolous, as opposed to weak or implausible, "even so weak that the claim appears virtually certain to fail."[17]

2. Failure to object to witnesses' presence during other testimony, failure to invoke witness exclusion under Rule 615

In his pro se application, Mr. Doe claimed:

> [Trial counsel] failed to object or ask for Rule 616 to be in effect so the states witnesses were not listening and able to corroborate their stories, because they were almost all present for each other's testimony. Which vilates my rights to impeach witnesses, The mother of CB was thier to hear CB statment so she could match her statments to hers. Also the Officer was one of the last to testify and he was thier for all the statments before his own testimony. They should not have been able to listen to other testimony before they testified themselves.

[R. 83] This claim is really two claims: 1) trial counsel was ineffective for not invoking exclusion under Evidence Rule 615; 2) trial counsel was ineffective

---

[17] *Vizcarra-Medina*, 195 P.3d at 1099.

for failing to object to multiple witnesses' presence during other witnesses' testimony.

In her no-merit certificate, PCR counsel failed to address the claim of ineffectiveness based on failure to invoke witness exclusion under Evidence Rule 615. [R. 174-175] Additionally, PCR counsel only addressed the claim of one witness, the victim's mother T.B., being present during other witnesses' testimony. [R. 174-75] PCR counsel did not address Mr. Doe's claim that "almost all" of the State's witnesses were present for each other's testimony. [R. 83] PCR Counsel titled the relevant section of her brief "5. Mother in courtroom." [R. 174]

Failure to invoke witness exclusion under Evidence Rule 615 could certainly support a claim of ineffectiveness, if it was established that no competent attorney would have failed to invoke the rule and there was no tactical reason to refrain from doing so.[18] Because PCR counsel did not include failure to invoke Evidence Rule 615 in her no-merit certificate, it cannot be determined whether she evaluated this claim and found that it lacked merit.

Failure to object to witnesses' presence could similarly support a claim of ineffectiveness. Because PCR counsel did not address the claim of

---

[18] *See, e.g.*, *State v. Jones*, 759 P.2d 558, 568-570 (Alaska App. 1988).

ineffectiveness for failing to request exclusion of "almost all" of the State's witnesses, it cannot be determined whether she considered this claim and determined that it lacked merit.

The superior court's analysis on this issue tracks PCR's counsel's brief. The court did not address failure to invoke the rule and failure to exclude multiple witnesses. It is therefore impossible to conclude whether the court considered these claims and, if so, found them to lack merit.

Although overlooked by the no-merit certificate, failure to object to C.B.'s mother's presence would *not* have supported a claim of ineffectiveness because C.B.'s mother was *not* excludible under Evidence Rule 615. This is because Rule 615 "does not authorize exclusion of . . . (4) the victim of the alleged crime . . . ." There, "'victim' has the meaning given in AS 12.55.185,"[19] which explicitly includes the parent of a minor victim.[20] The court also failed to identify this flaw with the claim about C.B.'s mother.[21] [R. 139]

---

[19] Alaska R. Evid. 615(4).

[20] AS 12.55.185(19)(B)(ii).

[21] Both the court and PCR counsel also failed to address Mr. Doe's claim that it was ineffective not to exclude "the Officer," but the Alaska Supreme Court previously held that it is not error to allow the State's main officer to remain. *Dickens v. State*, 398 P.2d 1008, 1009 (Alaska 1965).

3. Trial counsel failed to seek referral to the three-judge panel

Mr. Doe argued that trial counsel was ineffective for failing to refer his case to the three-judge panel. [R. 18] In her no-merit certificate, PCR counsel explained that "it would have been unlikely that a motion for such a referral would have been successful . . . ." [R. 177] PCR counsel's standard of review on this point is again incorrect: PCR counsel is to review whether a claim is frivolous, not whether it is unlikely to succeed.[22]

PCR counsel's reasoning on this point was also flawed. To support rejection of this claim, PCR counsel relied on this Court's decision of Mr. Doe's sentence appeal — that the sentencing court was not clearly mistaken in its consideration of Mr. Doe's prospects for rehabilitation — as a definitive assessment of his potential for rehabilitation:

> The Court of Appeals . . . held that "the record reflects that the court expressly considered Doe's lack of criminal history and his potential for rehabilitation. In her sentencing remarks, the judge stated that rehabilitation was an important sentencing factor in Doe's case, but she concluded that Doe's prospects for rehabilitation were diminished by the 'unrealistic sense of entitlement' that let him to focus his allocution on himself rather than the victim."
>
> The appeals court concluded that the judge's sentencing decision was not clearly mistaken- i.e., that it was within the permissible range of reasonable

[22] *Vizcarra-Medina*, 195 P.3d at 1099.

> sentences that might be imposed under these facts. . . .
>
> In order to establish that a case should go to a three-judge panel for sentencing, a defendant must prove by clear and convincing evidence that manifest injustice would result either from a "failure to consider relevant non-statutory mitigating factors" or from the "imposition of sentence within the presumptive range. A.S. 12.55.165. One such relevant non-statutory mitigator is "extraordinary potential for rehabilitation."
>
> However, in light of the Court of Appeals' decision in the case, it is unlikely that a motion for such a referral would have been successful or a denial of such a motion upheld on appeal. Thus, prejudice cannot be proven in this case.

[R. 176-77] Thus, because the trial court rejected Mr. Doe's prospects of rehabilitation based on his poor allocution, Mr. Doe would have been unlikely to have been referred to the three-judge panel.

The problem here is that PCR counsel assumed that Mr. Doe would have given the same allocution had trial counsel sought a referral, had Mr. Doe been prepared for a referral, and had Mr. Doe engaged in the preliminary phases of a three-judge referral (like getting evaluated). Had trial counsel sought a referral to the three-judge panel, it is obvious that he may have prepared Mr. Doe to give an allocution that better supported a claim of extraordinary prospects of rehabilitation. And while this analysis is speculative, it still clearly exposes the deficit in the no-merit certificate's disposal of this claim.

Moreover, PCR counsel erroneously relied on this Court's appellate decision that the sentencing judge was not clearly mistaken as definitive evidence about the success of a referral. [R. 176] But as this Court has repeatedly explained, "clearly mistaken" does not mean other outcomes would have been incompatible.[23] Finding that the sentence was not clearly mistaken in this instance does not exclude the possibility that another judge could have sustainably found that Mr. Doe did have extraordinary prospects for rehabilitation.

Additionally, the no-merit certificate relied on trial counsel's assertion in his affidavit that "I did not believe that it was necessary to ask for a three judge panel for sentencing. Mr. Doe did not ask me to request a three judge panel." [R. 219] But those assertions are an inconclusive and incomplete consideration of the issue. [R. 219] Whether a referral was "necessary" was never at issue, and a client is not required to ask his attorney to undertake competent and zealous representation. Indeed, a criminal defendant's input at trial is routinely limited to deciding 1) what to plead; 2) whether to have a jury

---

[23] *See McClain v. State*, 519 P.2d 811, 813 (Alaska 1974) ("[T]he clearly mistaken test implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record . . . .").

or judge trial; 3) whether to testify; and 4) whether to appeal.[24] Criminal defendants are not required to consider referral to the three-judge panel but criminal attorneys are.

Again, the superior court almost entirely adopted the language of the no-merit certificate:

> On appeal, Doe's appellate attorney argued that this Court did not sufficiently consider Doe's lack of criminal history, his demonstrated remorse, and his potential rehabilitation. The Court of Appeals denied this claim and held "the record reflects that the court expressly considered Doe's Jack of criminal history and his potential for rehabilitation.... The judge also expressly considered Doe's expression of remorse but she did not give them great weight. Instead, the judge found that Doe's 'statements of remorse ... [rang] somewhat hollow,' given the overall tenor of his allocution."

[R. 141] Thus, the superior court's conclusion on this point suffered from the same infirmities as the no-merit certificate.

---

[24] *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983).

E. MR. DOE'S OTHER INEFFECTIVENESS CLAIMS THAT WERE NOT ADDRESSED BY THE NO-MERIT CERTIFICATE OR SUPERIOR COURT

1. Trial counsel failed to file a motion to dismiss the indictment.

In his pro se application, Mr. Doe claimed that trial counsel failed to file a motion to dismiss the indictment. [R. 81] According to Mr. Doe, the indictment was infirm "because [the] State's main witness was not sworn in properly according to Alaska Criminal Rule 6 (u)(3). . . . [t]herefore violating the defendants rights under the Fourteenth Amendment of Due Process." [R. 81]

Trial counsel acknowledged this claim in his affidavit submitted in response to the ineffectiveness claims. He wrote:

> I do not recall that the indictment was deficient. The allegations of the indictment were irrelevant to the defense I presented. That is, I presented the defense that the Alaska courts had no subject matter jurisdiction over Mr. Doe because the sexual assaults, to which he confessed on the telephone, occurred in the State of Wyoming. Thus, if this defense has prevailed, he would have been acquitted.

[R. 218] While "competent counsel does not necessarily have to raise every possible motion on behalf of a client [and] [p]re-trial and trial strategies vary among different competent attorneys," failure to attack an indictment may be incompetent if counsel did not have reason to conclude that refraining from

such attacks would be beneficial to the defendant.[25] Trial counsel's affidavit did not provide a reason why foregoing a challenge on the indictment was in Mr. Doe's best interests. His explanations that he did "not recall that the indictment was deficient" and "the allegations in the indictment were irrelevant to the defense I presented" did not establish a tactical reason why counsel did not file the motion.

Neither PCR counsel nor the superior court addressed this claim. [R. 152-79]

2. Trial counsel failed to keep appointments and to properly prepare for trial.

In his pro se application, Mr. Doe claimed that trial counsel was ineffective because "[h]e failed to keep appointments with the defendant to properly prepa[re] for trial." [R. 83] Attorney-client communication is clearly an ethical obligation[26] and could support a claim of ineffectiveness. Likewise, deficient preparation can support a claim of ineffectiveness, if the claimant provides evidence that the deficiency negatively affected his case.[27] Neither PCR counsel nor the superior court addressed this claim. [R. 130-42; R. 150-

---

[25] *Gaona v. State*, 630 P.2d 534, 538 (Alaska App. 1981).
[26] *See, e.g.*, *In re Cyrus*, 241 P.3d 890, 893 (Alaska 2010).
[27] *Jones*, 759 P.2d at 573–74.

179] Accordingly it is unclear whether PCR counsel considered this claim and concluded that it lacked merit.

3. Trial counsel failed to have objectionable statements redacted.

In his pro se application, Mr. Doe claimed that trial counsel failed to have objectionable statements to a counsellor redacted or limited (specifically that defendant was a victim too and had suicidal tenancies). [R. 82] This claim was not addressed in the no-merit certificate or by the superior court.

4. Trial counsel failed to request a mistrial after voir dire events tainted the pool.

In his pro se application, Mr. Doe claimed that trial counsel was ineffective for failing to request a mistrial based on juror misconduct and venireman statements that tainted the pool. [R. 82] Mr. Doe explained that "one jury member stood up and 'said he did not care where the crime happened' the defendant was guilty then he was removed, but not before planting the seed in all potential jury members." [R. 82] He explained that "another jury member asked the Judge if they found me not guilty in Alaska because of lack of evidence could they still bring charges in the proper State of Jurisdiction." [R. 82] Mr. Doe argued that the judge's response to this question ran the risk of the jury convicting him in Alaska for a Wyoming crime because he was not being prosecuted in Wyoming. [R. 82]

These issues were not addressed in the no-merit certificate or by the superior court.

5. Trial counsel failed to inform witnesses when to be present to give testimony.

In his pro se application, Mr. Doe claimed that trial counsel was ineffective "for not telling subpoenaed witnesses when to show up for court and they were key witnesses for the defense." [R. 17] In support of this claim, he included a letter and notarized affidavit from Rick and Suzanna Early. [R. 37] Richard and Suzanna Early wrote:

> [We] were subpoena[ed] . . . at the request of Sam Westergen, attorney for John Doe. We were subpoena[ed] to appear in court on 1-14-10 to be witnesses for John . . . . We showed up at the Palmer courthouse at approx. 1:20pm on 1-14-10 . . . . We sat down and approx. 5 minutes later, . . . Sam Westergren . . . said we were no suppose[d] to be there were asked to leave. I received a call Friday morning 1-15-10 from Sam Westergren and said court would probably resume on Tuesday 1-19-10. We did not receive no other phone calls from Sam Westergren after Friday morning as to what day or time we should appear. We found out from the local newspaper that the trial resumed on 1-20-10 . . . . We can't appear as witnesses when we did not receive any phone calls . . . as to what day or time to appear.

[R. 37]

PCR counsel did address Mr. Doe wanting to call Richard and Suzanna Early as witnesses, and concluded that their testimony would not have

disproved the State's case. [R. 167] But PCR counsel did not address trial counsel's failure to procure their appearance or the failure to instruct them as to when to appear. Based on their having been subpoenaed and their letter and affidavit, it is not unreasonable to conclude trial counsel wanted them to testify. That trial counsel intended to call them as witnesses was further suggested by his informing them that trial would resume on January 19, 2017. Because the no-merit certificate did not analyze trial counsel's failure to procure these witnesses' testimony, it cannot be determined whether PCR counsel considered and rejected this claim.

Additionally, to the extent that PCR counsel did address these witnesses, she dismissed the claim based on an incorrect standard. PCR counsel concluded that the claim lacked merit because "this information does not disprove the State's case." [R. 167] But Mr. Doe has never had the burden of disproving the State's case.[28] To sustain the claim of no merit, this claim must be frivolous, which again is beyond merely weak or implausible. To conclude that the evidence would not have disproved the State's case does not exclude the evidence assisting Mr. Doe's defense. Phrased differently, concluding that

---

[28] *See, e.g.*, *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Alto*, 589 P.2d 402, 406 & n.16 (Alaska 1979).

the evidence would not have disproved the State's case does not mean that failure to present the evidence did not prejudice Mr. Doe.

6. Counsel failed to object to prosecutor vouching for witness.

In his pro se application, Mr. Doe claimed that trial counsel was ineffective "[f]or not objecting to the DA improper vouching for state witnesses." [R. 17] Mr. Doe identified a record citation for one occurrence: "And, you know, [D's] testimony was credible." [R. 17; 544] Witness vouching, if established, is improper and could warrant reversal.[29] This claim was not addressed in the no-merit certificate or by the superior court.

7. Counsel failed to sufficiently cross-examine witness.

Mr. Doe also claimed that trial counsel was ineffective for failing to adequately cross-examine the complainant. [R. 11-12] According to Mr. Doe, holes in or problems with the complainant's testimony could have cast doubt on the accuracy of her testimony. [R. 11-12] Inconsistencies in her testimony could have supported cross-examination that showed that Mr. Doe was in fact not around when at least one of the assaults was alleged to have occurred. [R. 11-12]

---

[29] *See Darling v. State*, 520 P.2d 793, 794 (Alaska 1974).

Trial counsel apparently did not appreciate the significance of this testimony and failed to draw out the exculpatory conclusions through cross-examination. Deficient cross-examination can support a claim of ineffectiveness, if the claimant presents evidence that the deficient performance negatively impacted his case.[30]

F. PCR COUNSEL FAILED TO EXPLAIN WHAT OTHER CLAIMS, IF ANY, SHE CONSIDERED AND REJECTED.

All of the claims examined and rejected in the no-merit certificate were taken from Mr. Doe's pro se application for post-conviction relief. Rule 35.1(e)(3) provides that "[t]he certificate described in subparagraph (e)(2)(C) shall include a full description of . . . the claims the attorney has considered . . . ." PCR counsel must not only assess whether the claims in the petitioner's application are frivolous, but must also determine "that the application cannot be amended to assert one or more colorable claims for relief."[31] That is, "even though an attorney may rightly conclude that the petitioner's existing application for post-conviction relief fails to allege a single colorable claim, . . . Rule 35.1(e)(2)(A) requires the attorney to file an amended application if there

---

[30] *Jones*, 759 P.2d at 573–74.
[31] *Griffin*, 18 P.3d at 75.

are other claims that can reasonably be argued on the petitioner's behalf."[32] "The attorney has a *duty to investigate* whether there are any non-frivolous grounds to obtain post-conviction relief."[33]

However, as this Court explained in *Griffin*, "if the attorney is permitted to file a certificate containing only the four bare assertions listed in Rule 35.1(e)(2)(B)(i)-(iv) . . . it will be impossible for the trial court to perform the independent assessment required by Rule 35.1(f)(2)."[34] Therefore, "[i]n order for the court to perform its role under Rule 35.1(f)(2) . . . the attorney seeking to withdraw from the case must provide the court with a full explanation of all the claims the attorney has considered and why the attorney has concluded that these claims are frivolous. Only then can the court meaningfully assess and independently evaluate the attorney's assertion that the petitioner has no arguable claim to raise."[35]

Here, while the second section of the no-merit certificate is titled "*Basis For Certifying That Applicant's Claims Have No Arguable Merit And There Are No Other Colorable Claims For Post-Conviction Relief*," PCR counsel did not

---

[32] *Id.*
[33] *Tazruk*, 67 P.3d at 693–94 (Coats, C.J., concurring) (emphasis added).
[34] *Griffin*, 18 P.3d at 77.
[35] *Id.*

explain what claims, if any, she considered and rejected in addition to those raised by Mr. Doe. Rather, the entire no-merit certificate addresses why the claims raised in Mr. Doe's pro se PCR application lacked merit. The superior court should have rejected the no-merit certificate on this basis alone.

G. THE SUPERIOR COURT FAILED TO UNDERTAKE AN INDEPENDENT ANALYSIS.

"Under Criminal Rule 35.1(f)(2), when an indigent petitioner's attorney files a 'no-merit' certificate, the court must independently assess whether 'it appears ... that the applicant is not entitled to relief.'"[36]

On the surface, it looks like the superior court in this case fulfilled that role. The court initially rejected PCR counsel's no-merit certificate because 1) PCR counsel failed to address one of Mr. Doe's arguments; 2) that PCR counsel did not analyze the ineffectiveness claims under the *Risher* standard; 3) PCR counsel did not cite to any law regarding any of the claims; and 4) PCR counsel relied entirely on Mr. Doe's appellate attorney's analysis regarding the *Glass* claim. [R. 188-89] The superior court also noted that PCR counsel's analysis of a claim alleging effectiveness for failing to obtain impeachment material was "troubling." [R. 189]

---

[36] *Griffin,* 18 P.3d at 76.

However, although the December 17, 2015 order denying PCR counsel's no-merit certificate demonstrates that the court critically analyzed the no-merit certificate, it does not demonstrate an independent analysis of Mr. Doe's claims or any other claims he may have been able to raise. The court itself specifically made that distinction: "In general, this order should not be read as suggesting that any of Doe's claims are with, or without merit. The court takes no position on the merit of Doe's claims at this time because counsel's no merit certificate is, in its current rendition, deficient." [R. 189]

After PCR counsel filed her amended no-merit certificate, the superior court issued a "Notice of Intent to Dismiss Petition for Post-Conviction Relief." [R. 130] However, rather than an independent analysis of Mr. Doe's claims, that examination was really just an affirmation of PCR counsel's amended no-merit certificate. The superior court's notice of intent tracked PCR counsel's certificate issue by issue and did not examine any claims or potential claims outside of the no-merit certificate. The superior court listed and discussed the same eight issues in the same order as the certificate:

Issue	**No-Merit Certificate**	**Notice of Intent to Dismiss**
Glass	R. 152-162	R. 133-34
Jurisdiction	R. 162-68	R. 134-35
Prosecutorial misconduct	R. 168-70	R. 136-37
Other abuse evidence	R. 170-74	R. 137-39

Mother in courtroom	R. 174-75	R. 139
Ben Huminski	R. 175	R. 139-40
Three-judge panel	R. 175-77	R. 140-41
AS 12.55.125 ex post facto	R. 177-79	R. 141-42

Within those identical sections, the superior court seems to have repeated the substance of the no-merit certificate and does not appear to have added any analysis. For example, in its discussion of Mr. Doe's jurisdiction claim, the superior court's discussion was limited to the exact items as the no-merit certificate. Both enumerated and discussed eight different pieces of evidence/testimony: 1) testimony from Dan Morrison that he bought Mr. Doe's house; 2) Mat-Su Borough records; 3) Matanuska Electric Association records; 4) Enstar records; 5) Matanuska Federal Credit Union records; 6) veterinarian certificates; 7) Wyoming title information; and 8) testimony from Richard and Susanna Early. [R. 134-35; 165-67]

Because the superior court's dismissal of Mr. Doe's application was based on agreement with the no-merit certificate, rather than the required independent analysis of whether Mr. Doe had any claims, that dismissal should be reversed.

H. OTHER POTENTIAL CLAIMS

Neither PCR counsel nor the superior court examined any claims outside of the pro se filings that Mr. Doe could have brought. At least some issues jump out as at least colorable.

One issue that seems to present an ineffectiveness claim is trial counsel's passivity regarding the State's assertions of "rape shield" protections. As the superior court explained in its Notice of Intent to Dismiss,

> [P]rior to trial, the State filed a Motion for a Protective Order under Rape Shield Law, AS 12. 45. 045. Before the nurse examiner testified at trial, the State moved the Court to preclude any information about C.B.'s prior sexual history and limit any questions about the genital warts. The State requested that the nurse examiner be able to testify that C.B. had an infection, but that neither the State nor Doe could question the nurse about the circumstances surrounding the infection. Doe did not object to the State's request and this Court stated "she can mention that there was an infection. We won't go into, either on direct or on cross, the source of the infection or what that infection might tell her about prior sexual activity or any sexual activity."

[R. 138] Here, the way in which the rape-shield was use allowed the State to present evidence that the complainant had acquired a loathsome disease without specifying that the disease predated Mr. Doe, thus raising the inference that Mr. Doe gave complainant that disease. Although failure to

object to this application of the rape-shield[37] may not have ultimately resulted in a finding of ineffectiveness, the failure to object certainly seems to present a colorable claim of ineffectiveness that should have been addressed in the no-merit certificate and the superior court's independent analysis.

Mr. Doe was also represented by another trial attorney. He was initially represented by LV of the Public Defender Agency and later and more substantially represented by Sam Westergren. [R. 147] His claims of ineffectiveness primarily involve Sam Westergren, to whom this pleading refers to as "trial counsel." However, at least a few occurrences during LVs representation are suspect and may have supported a claim of ineffectiveness.

First, LV filed two pro se motions as attachments to notices of filing. [R. 270-282, 294-315] Mr. Doe was represented by counsel, but wrote his own motions that counsel filed as attachments rather than writing her own motions. One was a motion to dismiss [R. 270-74] and the other was a motion to suppress the *Glass* warrant. [R. 312-15] Mr. Doe also wrote his own replies to the State's oppositions, which were also filed by LV as attachments. [R. 275-81, 294-96] It seems obvious that allowing a defendant to engage in his own

---

[37] Trial counsel did object on another occasion to a different application of the rape-shield. [R. 434]

litigation, rather than writing and filing motions for him could be considered less than minimally competent[38] or "a level of performance that no reasonably competent attorney would provide."[39] Of course, such claims may have ultimately been rejected, but under Rule 35.1(e)(2)(C)(iv), PCR counsel should have examined this claim and explained why it lacked merit.

Second, Mr. Doe filed a motion for advisory counsel which LV opposed. [R. 243-53] In *Thomas v. State*, this Court subsequently explained that "[a]lthough a trial judge is required to give 'due consideration' to a defendant's request for co-counsel status, a defendant who is represented by an attorney has no right to participate as co-counsel."[40] This Court also subsequently concluded that the scope of representation permitted by the Public Defender Agency's enabling statute does not allow for that agency to provide hybrid representation.[41]

As this relates to LV's representation of Mr. Doe, the issue is whether she should have actively opposed his motion (as she did), or if she should have waited for the court to decide Mr. Doe's motion, and then moved to withdraw

---

[38] *Tucker v. State*, 892 P.2d 832, 834 (Alaska App. 1995).

[39] *Jones*, 759 P.2d at 568.

[40] *Thomas v. State*, 382 P.3d 1206, 1208 (Alaska App. 2016).

[41] *Alaska Pub. Def. Agency v. Superior Court, Third Judicial Dist., Anchorage*, 343 P.3d 914, 915 (Alaska App. 2015).

had the motion been granted. The difference is that, as it played out in this case, LV essentially made herself and the Public Defender Agency adverse to Mr. Doe's goal of exercising his right to self-representation.[42]

Again, an ineffectiveness claim based on this issue may have been ultimately unsuccessful. Notwithstanding, PCR counsel should have addressed this claim in her no-merit certificate and the superior court should have addressed the issue in its independent analysis of Mr. Doe's potential claims.

CONCLUSION

In disposing of Mr. Doe's claims, PCR counsel and the superior court failed to fulfil the requirements of Rule 35.1. PCR counsel was obligated to analyze and explain why "the applicant has no other colorable claims for post-conviction relief"[43] and "the reasons why the attorney has concluded that all of the applicant's potential claims have no arguable merit."[44] The trial court was obligated to "independently assess whether it appear[ed] ... that the applicant

---

[42] *See Knix v. State*, 922 P.2d 913, 918 (Alaska App. 1996) (citing *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)).

[43] Alaska R. Crim. P. 35.1(e)(2)(C).

[44] Alaska R. Crim. P. 35.1(e)(3)(D).

is not entitled to relief."[45] But rather than analyze all of Mr. Doe's potential claims, and rather than an independent assessment, PCR counsel and the superior court limited their inquiry and determination to why the claims in Mr. Doe's pro se proceedings were ultimately unlikely to succeed.

The superior court should not have accepted the no-merit certificate. The Criminal Rules and the constitutional rights to due process and representation require that this Court reverse the superior court order dismissing Mr. Doe's application for post-conviction relief.

LAW OFFICE OF MICHAEL HOROWITZ
UNDER CONTRACT WITH THE OFFICE OF PUBLIC ADVOCACY
RICHARD ALLEN, DIRECTOR

_____

MICHAEL HOROWITZ
ALASKA BAR. NO. 1005021

[45] *Griffin*, 18 P.3d at 76.