NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARL THOMPSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13634 Trial Court No. 4FA-18-02504 CI SUMMARY DISPOSITION No. 0199 — July 14, 2021

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Paul R. Lyle and Brent E. Bennett, Judges.

Appearances: Carl K. Thompson, *in propria persona*, Kenai, Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Carl K. Thompson, representing himself, appeals the conversion of his petition for a writ of habeas corpus to an application for post-conviction relief, and the subsequent summary dismissal of that application. For the reasons explained in this decision, we affirm the judgment of the superior court.

The following facts are drawn from our decision in Thompson's case on direct appeal.[1] In 1986, Thompson killed his former wife by stabbing her twenty-nine times. After wrapping her body in chains, a bedspread, and a tent fly, Thompson dumped her body in a water-filled gravel pit. Following a jury trial, Thompson was convicted of one count of first-degree murder and one count of tampering with physical evidence.[2] He was sentenced to 99 years for the murder conviction and to a consecutive 5 years for the tampering with evidence conviction.

Thompson appealed, claiming (among other things) that the troopers should have advised him of his *Miranda* rights, that his statement to the troopers investigating the murder had not been voluntary, and that his sentence was excessive. This Court affirmed Thompson's convictions but remanded the case and instructed the superior court to order the sentences to be served concurrently.[3]

After the superior court amended Thompson's sentence, Thompson began a series of collateral challenges to his convictions in state and federal courts. Thompson's current challenge began in 2018, when he filed a petition for a writ of habeas corpus under Alaska Civil Rule 86 and AS 12.75.010 in the superior court.

Thompson alleged two general justifications for a writ, both of which were based on his allegation that a "fraud upon the court" had occurred before and during trial. First, Thompson generally alleged that a fraud upon the court had occurred: (1) when the prosecutor had opposed Thompson's motion to suppress the statement Thompson had given to the state troopers, (2) when the prosecutor failed to take corrective action when a trooper made (according to Thompson) false statements in an affidavit that the

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1 *Thompson v. State*, 768 P.2d 127, 128 (Alaska App. 1989).

2 Former AS 11.41.100 (1986) and AS 11.56.610, respectively.

3 *Thompson*, 768 P.2d at 134.

prosecutor used as part of the State's opposition to that motion to suppress, and (3) when (according to Thompson) the prosecutor allowed a witness to commit perjury in her grand jury testimony and in her trial testimony. Second, Thompson generally alleged a "fraud upon the court" had occurred because his trial attorneys and his first post-conviction relief attorney were so incompetent that he was essentially not represented.

After reviewing Thompson's pleading, the superior court determined that Thompson was asserting claims in his habeas petition that could have been raised in an application for post-conviction relief under Alaska Criminal Rule 35.1.[4] The court also rejected Thompson's argument that post-conviction relief was an inappropriate vehicle to resolve the alleged jurisdictional defects in the conviction, noting that paragraphs (a)(2) and (a)(6) of Alaska Criminal Rule 35.1 specifically permit such challenges. Consequently, the superior court converted the petition for habeas into an application for post-conviction relief.[5]

After his habeas petition was converted, Thompson filed an amended application for post-conviction relief, where he for the most part repeated the allegations he had made in his habeas petition. After allowing oral argument, the superior court ultimately dismissed the application on its pleadings, finding that Thompson's allegations were barred by one or more of the provisions of AS 12.72.020.[6] We agree.

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[4] *See* Alaska R. Civ. P. 86(m).

[5] *See Fisher v. State*, 315 P.3d 686, 688 (Alaska App. 2013).

[6] *See* AS 12.72.020(a)(1)-(3), (5)-(6) (explaining that a claim for post-conviction relief may not be brought if "the claim is based on the admission or exclusion of evidence at trial," "the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction," more than one year has passed since the court's decision on appeal was final, "the claim was decided on its merits or on procedural grounds in any previous proceeding," or "a previous application for post-conviction relief has been filed under [AS 12.72] or under the Alaska Rules of Criminal Procedure").

The allegations Thompson raised in his habeas action involved claims that he was wrongfully convicted because the prosecutor committed misconduct regarding testimony and statements from certain witnesses, because the trial court made evidentiary errors or erroneous rulings, or because his attorneys provided ineffective assistance. All of these claims could have been raised during the criminal trial, in the direct appeal from that trial, or in Thompson's prior post-conviction relief applications.[7]

Furthermore, the superior court properly determined that the evidence Thompson was presenting was not "newly discovered." The evidence Thompson presented was a partial transcript of a deposition taken from one of his trial attorneys in 2000, and a number of affidavits from 1995 and 1998. The record shows that Thompson was aware of this evidence long before he filed his habeas petition in 2018.

We therefore agree that the superior court properly dismissed Thompson's application.

Accordingly, the judgment of the superior court is AFFIRMED.

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[7] *See* Alaska R. Crim. P. 35.1(a); *see also* AS 12.72.010(1), (2), (6), and (9) (permitting a person to institute a proceeding for post-conviction relief if "the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state[,]" "the court was without jurisdiction to impose sentence," or "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," or "the applicant was not afforded effective assistance of counsel at trial or on direct appeal").

In the Court of Appeals of the State of Alaska

Carl K. Thompson,
Appellant,

v.

State of Alaska,
Appellee.

Trial Court Case No. **4FA-18-02504CI**

Court of Appeals No. **A-13634**

Order

Petition For Rehearing

Date of Order: **8/6/2021**

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges

On consideration of the Petition For Rehearing filed by Carl Thompson on 7/22/2021,

IT IS ORDERED: The Petition for Rehearing is **DENIED.**

Entered at the direction of the Court.

Clerk of the Appellate Courts

Julie Kentch, Deputy Clerk

cc: Judge Lyle
Judge Bennett
Clerk of Court - Fairbanks
Publishers (Summary Disposition No. 0199, 7/14/2021)

Distribution:

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Thompson, Carl K.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CARL K. THOMPSON,

Petitioner,

v.

DEAN R. WILLIAMS,

Respondent.

Case No. 4FA-18-02504CI

ORDER GRANTING MOTION TO DISMISS
(Case Motion #7)

I. INTRODUCTION

A. Contemporary Procedural History

On August 27, 2018, Applicant Carl K. Thompson filed a writ of habeas corpus, seeking relief from his 1987 conviction and sentencing for first-degree murder and tampering with evidence (4FA-86-02644CR). In his application, Mr. Thompson's grounds for relief rested upon "'fraud upon the trial court,' committed by the Fairbanks DA and [Mr. Thompson's] defense attorney," which Mr. Thompson claims voided the court's jurisdiction over his trial.[1] In addition, Mr. Thompson claims that his "postconviction counsel was ineffective in 1996-2003," and that "newly discovered evidence" establishes his "actual/factual innocence."[2] On August 30, 2018, the court issued an Order Converting Case to Petition for Post-Conviction Relief, citing Civil Rule 86(m), which converted Mr. Thompson's writ of habeas corpus into a petition for post-conviction relief.

[1] In the Matter of the Application Habeas Corpus Relief of: Carl Thompson 4, Aug. 27, 2018.
[2] *Id.*

On October 3, 2018, Mr. Thompson filed an Amended Application for Post-Conviction Relief, and on April 10, 2019, the Respondent filed State's Motion to Dismiss Defendant's Amended Application for Post-Conviction Relief. On September 26, 2019, the court held a motion hearing, where Applicant and Respondent (represented by the State) presented their arguments for and against dismissal of Mr. Thompson's petition as well as the merits of Mr. Thompson's parallel application for post-conviction relief (4FA-18-01380CI). For the following reasons, this court finds it necessary to dismiss Mr. Thompson's petition for post-conviction relief.

B. Prior Procedural History

In 2007, the Alaska Court of Appeals provided a short history of Mr. Thompson's appeal and requests for relief from his conviction for the murder of Dixie Thompson:

> *A short history of Thompson's cases*
>
> A brief summary of the history of Thompson's cases is helpful. Thompson was convicted of first-degree murder for killing his ex-wife, Dixie Gutman, and convicted of tampering with physical evidence for disposing of her body. We affirmed Thompson's conviction in Thompson v. State, but we remanded for resentencing because we concluded that the superior court was clearly mistaken when it imposed the sentence on tampering with physical evidence consecutively.
>
> After the superior court amended Thompson's sentence, Thompson filed a petition for writ of habeas corpus in federal court arguing, as he had in his state appeal, that his confession had been obtained in violation of his Miranda rights. Thompson's claim was ultimately rejected by the United States District Court and the 9th Circuit Court of Appeals, and the United States Supreme Court ultimately rejected Thompson's petition for a writ of certiorari in 1999.
>
> While Thompson's federal habeas litigation was pending, Thompson filed an application for post-conviction relief in superior court on June 7, 1996. Thompson raised three main points. First, he argued that the voluntariness of his confession should be reconsidered due to newly discovered evidence. On this issue, he relied in part on the August 1995 affidavit of Lisa Huffaker, his girlfriend at the time of the offense. Thompson claimed that Huffaker had put a dose of Mepergan in his sandwich and that drug caused him to become confused. He argued that the evidence of the tainted sandwich was newly discovered evidence which the court should reconsider on the question whether his confession was voluntary. We rejected Thompson's claim, and concluded that Judge Steinkruger properly dismissed Thompson's application because he had not

met the stringent standard for granting a new trial on the basis of newly discovered evidence. We also rejected Thompson's second claim, that his counsel had been ineffective. However, we remanded the case to the superior court because we concluded that Thompson pleaded a prima facie case that he was denied his right to testify at trial.

In December of 1998, Thompson filed a motion for a new trial under Alaska Criminal Rule 33. In July of 1999, Judge Steinkruger summarily dismissed the Rule 33 motion. In June of 1999, Thompson filed a motion for reduction of sentence, as well as a motion for appointment of counsel. Judge Steinkruger denied both of these motions in July of 1999. We affirmed the trial court's decisions.

In proceedings following remand from Thompson's appeal of the denial of his first application for post-conviction relief to resolve the issue on his right to testify, Thompson attempted to amend his application to include four additional claims: (1) that his attorneys had been ineffective for not preparing him to testify or explaining the advantages and disadvantages of testifying; (2) that he was deprived of his right to choose whether to go to trial or plead no contest to a lesser charge; (3) that he received ineffective assistance of counsel regarding whether he should go to trial or plead no contest to a lesser charge; and (4) that he received ineffective assistance of counsel regarding one of his attorney's understanding of Alaska's first-degree murder statute. Superior Court Judge Neisje J. Steinkruger dismissed the new claims Thompson attempted to raise, and Superior Court Judge Charles Cranston concluded that Thompson had not been denied the right to testify. We affirmed the superior court in all respects.[3]

II. ANALYSIS

A. The Conversion of Mr. Thompson's Habeas Petition into a Petition for Post-Conviction Relief and the Applicability of AS 12.72 Standards

In his most recent supporting memorandum (Plaintiff's Verified Memorandum of Points and Authorities in Support of Application for Postconviction Relief) and in his Plaintiff's Verified Response in Opposition to Defendant's Motion to Dismiss Application for Post-Conviction Relief, Mr. Thompson argues that the standards for writs of habeas corpus should apply to his application. The Court of Appeals of Alaska has found that the rights provided under Alaska's post-conviction relief regime are more extensive than—and in fact have superseded—

[3] Thompson v. State, No. A-9663, 2007 WL 3121599, at *1 (Alaska Ct. App. Oct. 24, 2007) (citations omitted).

those provided by traditional habeas corpus actions.[4] This court is cognizant, however, that Mr. Thompson has raised issues which have broad constitutional concerns, namely the common law right of habeas corpus in instances where original jurisdiction is void: it remains unclear whether applying AS 12.72 standards is constitutionally appropriate in those cases. Mr. Thompson's argument in this regard, however, is flawed. While Mr. Thompson is correct that both lack of jurisdiction or a fraud upon the court *may* render a trial court's judgement "void," Mr. Thompson is incorrect in his conclusion that a trial court is stripped of jurisdiction when a fraud has been committed upon the court. This court rejects Mr. Thompson's claim that the trial court's jurisdiction was void. The court will therefore address Mr. Thompson's application under Alaska's post-conviction relief statute, AS 12.72,[5] which is the appropriate analytical framework following the court's issuance of the Order Converting Case to Petition for Post-Conviction Relief.

B. Mr. Thompson's Application for Post-Conviction Relief is Barred under AS 12.72

Under the regime established by AS 12.72, there are six statutory bars to applications for post-conviction relief. Five of those bars apply to Mr. Thompson's current PCR:

i. Alaska Statute 12.72.020(a)(1): the claim is based upon the admission or exclusion of evidence at trial or on the ground that the sentence is excessive.

Mr. Thompson spends much of his supporting memorandum decrying the prejudice that he suffered as a result of certain testimony and evidence being offered and admitted at trial. Mr.

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[4] *See* Grinols v. State, 10 P.3d 600, 623 (Alaska Ct. App. 2000) ("We uphold the constitutionality of Civil Rule 86(m), the rule which states that post-conviction relief supersedes habeas corpus as the procedural method for collaterally attacking a criminal conviction.").

[5] ALASKA STAT. 12.72 (2018) ("Post-Conviction Relief Procedures for Persons convicted of Criminal Offenses").

Thompson's allegations of "fraud upon the court" stem from what he contends was improper admittance of certain testimony and evidence. Issues with the admittance or exclusion of testimony and evidence should be properly raised either at trial or on appeal. AS 12.72.020(a)(1), therefore, expressly bars Mr. Thompson's claim.

ii. Alaska Statute 12.72.020(a)(2): the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in conviction.

At trial, Thompson moved to suppress his statement to troopers arguing that they failed to give him *Miranda* warnings before talking to him and that his statement was not voluntary. Judge Hodges denied the motion. On appeal, Mr. Thompson argued that Judge Hodges erred in failing to suppress his statement taken by the police.[6] The Alaska Court of Appeals ruled that the police were not required to give Mr. Thompson *Miranda* warnings,[7] and further found that Mr. Thompson's confession was voluntary.[8] Mr. Thompson also filed a federal writ of habeas corpus which was ultimately denied by the federal court.[9] Issues within Mr. Thompson's claim have been extensively reviewed by both state and federal courts of appeal. AS 12.72.020(a)(2), therefore, expressly bars Mr. Thompson's claim.

iii. Alaska Statute 12.72.020(a)(3)(A): more than one year has passed since the court's decision on appeal was final.

Mr. Thompson has filed an appeal on his conviction, filed multiple post-conviction relief applications, appealed the decision on those post-conviction relief applications, and appealed

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[6] *See* Thompson v. State, 768 P.2d 127, 129 (Alaska App. 1989) ("Thompson argues that it was reversible error for the trial court to refuse to instruct the jury on a defense of diminished capacity based on intoxication.").
[7] *See id.* at 131 ("[I]t seems clear that Thompson was not in custody and that the police were not required to give Thompson *Miranda* warnings.").
[8] *See id.* at 132 ("We conclude that Thompson's confession was voluntary.").
[9] *See* Thompson v. Keohane, 145 F.3d 1341 (9th Cir. 1998), cert. denied, 525 U.S. 1158 (1999) ("Accordingly, the district court's denial of Thompson's petition is AFFIRMED.").

multiple issues to the federal courts. All decisions emanating from the courts have denied Mr. Thompson's attempts to overturn or nullify his conviction. Mr. Thompson's last appeal on any matter related to his conviction ended on August 18, 2010. More than a year has passed since the court finalized its decision on that appeal. AS 12.72.020(a)(3)(A), therefore, expressly bars Mr. Thompson's claim.

iv. Alaska Statute 12.72.020(a)(5): the claim was decided on its merits or on procedural grounds in any previous proceeding.

In this post-conviction relief matter, Mr. Thompson's complaint includes a myriad of complaints, but principle among them, and the issue which undergirds his claim, is that the court should have granted his motion to suppress his confession. Mr. Thompson directly appealed this issue.[10] Mr. Thompson also sought federal habeas relief as described above. Mr. Thompson also filed a PCR raising the voluntariness of his confession, claiming that newly discovered evidence related to his confession should cause the court to reconsider the question of whether his confession was voluntary—that PCR (4FA-96-01284CI) was dismissed. Mr. Thompson appealed the judge's order dismissing that PCR, and the Alaska Court of Appeals denied his appeal as it related to the issues surrounding his confession.[11] There, the court found that Judge Steinkruger did not err in dismissing his application on the grounds that the claim was raised in a direct appeal, that the claim was decided on its merits in any previous proceeding, and that it was precluded on the grounds of res judicata and collateral estoppel.[12] Additional claims of ineffective assistance of counsel associated with litigating his confession, which the superior

[10] *See* Thompson v. State, 768 P.2d 127, 129 (Alaska App. 1989) ("[W]e conclude that Judge Hodges did not abuse his discretion in determining that, on direct examination, the state could introduce only the part of the statement where Thompson admitted killing his former wife.").
[11] *See* Thompson v. State, No. A-6653 (Alaska App. Oct. 14, 1998) ("Thompson appeals the superior court's dismissal of his post-conviction relief application.").
[12] *See id.* at 2 ("Judge Steinkruger did not err in dismissing Thompson's application on this ground.").

court dismissed, were denied.[13] The issues raised by Mr. Thompson's current claim have been previously decided on their merits. AS 12.72.020(a)(5), therefore, expressly bars Mr. Thompson's claim.

v. Alaska Statute 12.72.020(a)(6): a previous application for post-conviction relief has been filed under this chapter or under the Alaska Rules of Criminal Procedure.

Mr. Thompson has filed and extensively litigated two prior PCRs (4FA-96-01284CI and 4FA-04-02090CI). While Alaska law provides for subsequent PCR filings when counsel was ineffective for a previous PCR application,[14] the court is not convinced that Mr. Thompson's allegations regarding ineffective assistance of counsel for his previous PCR satisfies his burden of clear and convincing evidence: Mr. Thompson's allegations of ineffective assistance stem from his flawed understanding of "void" judgements and his insistence that he was prejudiced for his counsel's failure to pursue arguments based on his flawed understanding. AS 12.72.020(a)(6), therefore, expressly bars Mr. Thompson's claim.

III. CONCLUSION

Mr. Thompson's application for post-conviction relief is barred by statute. Therefore, the State of Alaska's Motion to Dismiss Application for Post-Conviction Relief is HEREBY GRANTED.

DATED this 26 of February, 2020 at Fairbanks, Alaska.

Brent Bennett

BRENT E. BENNETT
Superior Court Judge

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[13] *See id.* at 3–4 ("We accordingly conclude, as to this claim of ineffective assistance of counsel, the Judge Steinkruger did not err in dismissing his application for post-conviction relief.").

[14] *See* Grinols v. State, 10 P.3d 600, 624 (Alaska App. 2000) (allowing for subsequent PCR applications).

I certify that on 2/27/2020
copies of this form were sent to:
C. Thompson
R. St. John
CLERK: LA

In the Supreme Court of the State of Alaska

Carl K. Thompson,
Petitioner,

v.

State of Alaska,
Respondent.

Supreme Court No. **S-18164**

Order
Petition for Hearing

Date of Order: **10/19/2021**

Court of Appeals No. **A-13634**
Trial Court Case No. **4FA-18-02504CI**

Before: Winfree, Chief Justice, Maassen, Carney, Borghesan, and Henderson, Justices

On consideration of the Petition for Hearing filed on **8/19/2021**, and the Response filed on **10/7/2021**,

IT IS ORDERED:

The Petition for Hearing is **DENIED**.

Entered at the direction of the court.

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

cc: Court of Appeals Judges
Trial Court Clerk

Distribution:

Mail:
Thompson, Carl K.

Email:
Ringsmuth, Eric

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CARL THOMPSON,

Plaintiff(s),

vs.

STATE OF ALASKA,

Defendant(s).

Case No. 4FA-04-2090 CI

MEMORANDUM OPINION AND ORDER

I. Background and Procedural History

Carl Thompson was convicted of murder in the first degree for the 1986 killing of his ex-wife, and he was convicted of tampering with physical evidence by disposing of her body. Thompson v. State, 13 P.3d 276, 277 (Alaska App. 2000). The Alaska Court of Appeals affirmed his conviction on direct appeal in Thompson v. State, 768 P.2d 127 (Alaska App. 1989). He is currently serving a 99-year sentence. See Thompson, 768 P.2d at 133-34 (sentence for evidence tampering should run concurrently with murder sentence).

A. Federal habeas corpus proceedings

Thompson petitioned the federal district court for a writ of habeas corpus. Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 462, 133 L. Ed. 2d 383 (1995); Thompson v. Keohane, 34 F.3d 1073 (Table), 1994 WL 424289 (9th Cir. 1994) (unpublished). The petition was denied and he appealed to the Ninth Circuit Court of Appeals. Id. He argued that his confession should have been suppressed because he was in custody without being informed of his *Miranda* rights and because his confession was involuntary. Id. The Ninth Circuit decided that the state court's

determination was correct that Thompson had not been in custody. Id. After reviewing *de novo* the entire transcript of Thompson's interrogation by police, the Ninth Circuit further concluded that Thompson's will was not overcome by psychological pressure rendering his confession involuntary. Id. Thompson appealed and the United States Supreme Court granted certiorari. Thompson v. Keohane, 513 U.S. 1126, 115 S. Ct. 933, 130 L. Ed. 2d 879 (1995).

The United States Supreme Court vacated the Ninth Circuit's decision regarding *Miranda* warnings because a presumption of correctness had been applied to the state court decision finding that Thompson was not in custody for *Miranda* purposes. Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 462, 133 L. Ed. 2d 383 (1995). The case was remanded for consideration of this issue without the presumption. Thompson, 116 S. Ct. at 462, 467. Notably, the Supreme Court observed that Thompson had been unsuccessful in asserting the involuntariness of his confession on both direct and habeas review, and he had not included that issue in his petition to the Supreme Court. Thompson, 116 S. Ct. at 462 n.2.

On remand to the United States District Court, Thompson's petition for habeas corpus was again denied. See Thompson v. Keohane, 145 F.3d 1341 (Table), 1998 WL 230928 (9th Cir. 1998) (unpublished). Although Thompson raised the issue of the voluntariness of his confession on remand in the district court, he did not raise the issue on appeal to the Ninth Circuit. Thompson, 1998 WL 230928 (9th Cir. 1998). The Ninth Circuit concluded that Thompson was not in custody for *Miranda* purposes and affirmed the district court's denial of Thompson's petition. Id. The United States Supreme Court denied certiorari. Thompson v. Keohane, 525 U.S. 1158, 119 S. Ct. 1066, 143 L. Ed. 2d 70 (1999).

B. State Post-Conviction Relief Proceedings

In 1996, while the federal habeas action and appeals were pending, Thompson filed an action in state court for post-conviction relief (PCR). Thompson v. State, 1998 WL 720481, at *1 (Alaska App. 1998) (unpublished). His original PCR application was filed pro se, but attorney Marcia Holland of the Public Defender Agency subsequently supplemented the application. Thompson, 1998 WL 720481, at *1 n.4. Thompson again raised the issue of the voluntariness of his confession, asserting newly discovered evidence. Thompson, 1998 WL 720481, at *1. The Alaska Court of Appeals affirmed the trial court's dismissal of Thompson's PCR application on this ground. Thompson, 1998 WL 720481, at *1 - *2. Thompson alleged that his trial counsel was ineffective for seven reasons: (1) for failing to argue in the motion to suppress his confession that the troopers made "guarantees" and "promises" not to arrest Thompson; (2) for waiving Thompson's voluntariness hearing; (3) for not fully researching relevant case law regarding the motion to suppress; (4) for not refiling a motion to suppress evidence seized from Thompson's home; (5) for not informing Thompson that the benchmark sentencing range for second-degree murder is 20-30 years, when the state offered a plea bargain for second-degree murder; (6) for not informing the trial court that the victim's brother was seen taking notes on prosecution witnesses' testimony and relaying the information to another witness; and (7) did not advise Thompson that he had a right to testify in his own behalf. Thompson, 1998 WL 720481, at *2. The Alaska Court of Appeals affirmed the superior court's order dismissing Thompson's PCR application except for the claim that Thompson was denied the right to testify. Thompson, 1998 WL 720481, at *5. The case was remanded with instructions to give Thompson an opportunity to amend his application with respect to the right to testify. Thompson, 1998 WL 720481, at *6.

In 1998 and 1999, Thompson also requested a new trial and a reduced sentence and the appointment of counsel for seeking a reduced sentence. Thompson v. State, 13 P.2d 276, 278 (Alaska App. 2000). The superior court denied his requests and the Alaska Court of Appeals affirmed. Id. at 278-79.

In October 2003, the Alaska Court of Appeals affirmed the superior court's decisions on remand of Thompson's PCR case. Thompson v. State, 2003 WL 22405385, at *10 (Alaska App. 2003). On remand, Thompson amended his application to include four new claims in addition to the claim that his right to testify had been violated. Thompson, 2003 WL 22405385, at *1. He claimed that (1) his attorneys had been ineffective by not preparing him to testify or explaining to him the advantages and disadvantages of testifying; (2) he was deprived of his right to choose whether to go to trial or plead to a lesser charge; (3) his attorneys were ineffective regarding whether he should go to trial or plead to a lesser charge; and (4) he received ineffective assistance of counsel regarding one of his attorney's understanding of Alaska's first-degree murder statute. Id. Thompson attached to his amended application, affidavits and depositions of his trial counsel, Dick Madson, John Burris, and Charla Duke. Id. The superior court dismissed the new claims, and after an evidentiary hearing, determined that Thompson's right to testify was not violated. Thompson, 2003 WL 22405385, at *1 - *9. The Alaska Court of Appeals affirmed the decisions of the superior court. Thompson, 2003 WL 22405385, at *10. Notably, the Court of Appeals affirmed the superior court's finding that Thompson did not adequately explain why the alleged new evidence he asserted in support of his new claims was unavailable earlier or why it took him more than a decade to provide the evidence to the court. Id.

C. *Thompson's current claims in his 2004 PCR application*

Thompson's current PCR claims are layered claims based on the claim that his counsel for the first PCR application was ineffective.[1] He has included in the record 2004 affidavits from both his Alaska trial counsel, Dick Madson, and his PCR counsel, Marcia Holland. Thompson claims that his PCR counsel was ineffective, because she failed to obtain an affidavit from Mr. Madson that supported two ineffectiveness claims against Mr. Madson. The ineffectiveness claims against Mr. Madson are: (1) his failure to request a voluntariness hearing at which Thompson could have testified; and (2) his failure to inform Thompson of the *Page* benchmark sentencing range for second degree murder when Thompson was deciding whether to go to trial on a first-degree murder charge or plea to second-degree murder.

II. Summary of Arguments

A. *State's Arguments for Dismissal*

First, the State argues that Thompson is attempting to relitigate his claim that his confession was involuntary. The State contends that the issue of the voluntariness of his confession is barred by *res judicata* and AS 12.72.020(a)(5).

Second, the State argues that Thompson had no constitutional right to testify at an evidentiary hearing, which Thompson claims Mr. Madson should have requested. The State contends that since there was no requirement that such a hearing be held, there could be no right to testify at such a hearing. The State also points out that this is a claim that could have been raised sooner, and Thompson has shown no reason for delay.

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[1] Thompson's PCR application is pro se. His current claims are distilled by this court from the PCR application and attachments, the parties briefs regarding the state's motion to dismiss, and counsel's 2004 affidavits.

Third, the State argues that Thompson has not shown that his trial counsel was ineffective by failing to inform him specifically about the benchmark sentencing in the *Page* case. The State contends that Madson's advice to Thompson was accurate for the facts of Thompson's case. The State asserts that Thompson's decision about whether or not to accept the state's plea offer was not prejudiced by learning from Madson that he could be sentenced to 99 years for second-degree murder, because the state's refusal to agree to a sentence cap indicated the prosecutor would seek the maximum 99-year term.

Fourth, the State contends that since Thompson cannot show that Madson was ineffective, there is no basis for finding that PCR counsel's omissions prejudiced Thompson's first PCR action.

B. Thompson's Arguments in Opposition

Thompson argues that his PCR counsel was ineffective for failing to obtain affidavits supporting his claim that his trial counsel was ineffective for failing to request a hearing to allow Thompson to testify about facts that would allegedly show his confession was involuntary. Because the current PCR application claims ineffectiveness of his PCR counsel, Thompson asserts that the current PCR application is not barred by *res judicata* or AS 12.72.

Thompson contends that if Mr. Madsen had informed him that a second-degree murder plea could result in a sentence less than 99 years, Thompson would have accepted the plea bargain. He argues that his PCR counsel was ineffective by not obtaining an affidavit from Mr. Madson specifically addressing this issue.

Thompson asserts that under Grinols, he has stated a *prima facie* case for claims that his PCR counsel was ineffective.

C. Note regarding parties arguments

Thompson is pro se, and the State may misinterpret some of his arguments. Because this is Thompson's second PCR application, and he is claiming ineffectiveness of PCR counsel, the correct legal framework for analyzing Thompson's claims is contained in Grinols v. State, 10 P.3d 600 (Alaska App. 2000) *aff'd,* Grinols v. State, 74 P.3d 889 (Alaska 2003).

III. Alaska Law re: Layered Ineffective Assistance Claims

A. Standard for motion to dismiss PCR application

The State's motion to dismiss an application for post-conviction relief is equivalent to a Civil Rule 12(c) motion for judgment on the pleadings. State v. Jones, 759 P.2d 558, 565 (Alaska App. 1988). When determining the facial sufficiency of an application for post-conviction relief, the court must accept as true all factual allegations in the application and determine whether, if proven, the allegations would entitle the applicant to relief. Hampel v. State, 911 P.2d 517, 524 (Alaska App. 1996); See Lott v. State, 836 P.2d 371, 377 n.5 (Alaska App. 1992), citing Jones, 759 P.2d at 565-66.

B. General Standard for Ineffective Assistance of Counsel

The test for reviewing claims of ineffective assistance of counsel is the two-pronged test set forth in Risher v. State, 523 P.2d 421 (Alaska 1974). First, a finding must be made that counsel's performance did not fall within the range of competence displayed by counsel of ordinary training and skill in criminal law. Risher v. State, 523 P.2d 421, 424, 425 (Alaska 1974). The standard is one of minimal competence; effective assistance of counsel does not require error-free representation. State v. Jones, 759 P.2d 558, 568 (Alaska App. 1988). The PCR petitioner claiming ineffective assistance of counsel has the burden of rebutting a strong presumption of competence. Tall v. State, 25 P.3d 704, 708 (Alaska App. 2001); Bangs v. State,

911 P.2d 1067, 1069 (Alaska App. 1996); Jones, 759 P.2d at 570. Part of the presumption of competence is the presumption that trial counsel's actions were motivated by sound tactical considerations. Jones, 759 P.2d at 569. If it appears that counsel's actions were undertaken for tactical or strategic reasons, and not out of ignorance or conflict of interest, the actions will be presumed reasonable, even if in hindsight the tactic appears to have been mistaken or unproductive. Id. An applicant for PCR must show, not that his trial counsel could have done things better, but that no competent attorney would have done things so badly. Tucker, 892 P.2d 832, 835 (Alaska App. 1995).

In the second prong, there must be a showing that the lack of competency contributed to the conviction. Risher, 523 P.2d at 424-25. Conduct or omissions by counsel that did not contribute to a conviction by their failure to aid in the defense cannot constitute deprivation of assistance of counsel. Risher, 523 P.2d at 425. In this second prong, the applicant must show that there is a reasonable probability that, but for counsel's errors and omissions, the result of the proceeding would have been different. Jones, 759 P.2d 558, 568 (Alaska App. 1988), quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2054, 2068, 80 L. Ed. 2d 674 (1984).

C. Standard to show ineffectiveness of PCR counsel under *Grinols*

When a PCR applicant claims ineffectiveness of his counsel for his first PCR petition, the applicant must do more than prove that PCR counsel failed to competently raise a colorable legal issue. Grinols v. State, 10 P.3d 600, 619 (Alaska App. 2000), *aff'd by* Grinols v. State, 74 P.3d 889 (Alaska 2003). The applicant must prove four things. Id.

First, the applicant must establish his own diligence in raising the claim of ineffective representation and the issues that he argues were not properly raised by his first PCR counsel. See Grinols, 10 P.3d at 619. Second, the applicant must establish the incompetence of counsel

for his first PCR application. Id. Third, the applicant must establish that the omitted issue is meritorious and that he likely would have been successful litigating the omitted issue. Id. Fourth, the applicant must show that if the omitted issues had been resolved in his favor, there was a reasonable possibility that the outcome of his original trial court proceedings would have been different. Grinols, 10 P.3d at 620. Each of these four elements must be examined in relation to Thompson's current PCR application.

1. Diligence of Applicant

Thompson filed the current PCR application in a timely fashion following the Alaska Supreme Court's refusal to hear his appeal of the Alaska Court of Appeals 2003 decision regarding his first PCR petition. The State contends that Thompson could have raised issues regarding his trial counsel sooner, but the State does not challenge Thompson's diligence in raising the issues of ineffectiveness of counsel for his first PCR application. Therefore, for purposes of deciding the State's motion to dismiss, Thompson has established his own diligence.

2. Incompetence of PCR Counsel

As discussed above with respect to the standard for an ineffectiveness of counsel PCR claim, the applicant must rebut the presumption of his attorney's competence. The applicant "must prove that [the PCR] attorney's failure to recognize the omitted issue, or the attorney's failure to pursue it, constituted a level of representation below the acceptable minimum of skill expected of criminal law practitioners." Grinols, 10 P.3d at 619. The Alaska Court of Appeals has described the applicant's burden in proving incompetence of his PCR counsel:

> It is the defendant's burden to negate the possibility that the attorney chose for valid tactical reasons not to raise the issue, or to argue it in a different way. And if the omitted issue rests on facts within the defendant's knowledge, the defendant must show that they apprised the attorney of the operative facts. In particular, when a defendant asserts that their post-conviction relief attorney inexcusably

> failed to pursue arguments that the defendant's trial attorney was incompetent, this assertion will be defeated by evidence that the defendant was aware of the possible attacks on their trial attorney's performance when the first post-conviction relief action was litigated but failed to mention these potential claims to their post-conviction relief attorney.

Grinols, 10 P.3d at 619.

Thompson contends that PCR counsel, Ms. Holland, failed to adequately pursue claims of ineffectiveness of trial counsel with respect to (1) the voluntariness hearing and (2) plea bargain advice. Her failure to pursue these claims consisted of failing to obtain an affidavit from trial counsel, Mr. Madson that specifically and accurately addressed both of these claims. Ms. Holland states in her affidavit, dated September 20, 2004, that she had no tactical reason for not ensuring that Mr. Madson accurately addressed his failure to request a voluntariness hearing by showing him a transcript of the relevant omnibus hearing.[2] Ms. Holland also states in her affidavit that she had no tactical reason for failing to ask Mr. Madson to specifically address his failure to inform Thompson of the benchmark sentencing range for second-degree murder during discussions with Thompson about whether Thompson should accept the state's offer of a plea bargain.[3]

For purposes of considering the motion to dismiss, this court must treat all factual allegations in the application as true. Hampel v. State, 911 P.2d 517, 524 (Alaska App. 1996). The application includes the affidavit of Ms. Holland stating that she did not have a tactical reason for failing to ensure that Mr. Madson's affidavit specifically addressed Thompson's PCR claims. Therefore, Thompson has stated a claim, sufficient to avoid dismissal at this stage, that his PCR attorney was incompetent with respect to the issues of the voluntariness hearing and the information about the benchmark sentencing range.

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[2] Aff. Marcia Holland ¶¶ 3-9 (Sept. 20, 2004).
[3] Aff. Marcia Holland ¶¶ 10-13.

3. Incompetence of Trial Counsel: Whether issues omitted from PCR application alleging trial counsel's incompetence are meritorious

If the applicant establishes the incompetence of his PCR attorney in bringing claims of ineffectiveness of his trial counsel, he can raise claims against his trial attorney that would normally be barred by *res judicata* or AS 12.72.020(a)(6). Grinols, 10 P.3d at 620. In order to show prejudice from the incompetence of his PCR counsel, Thompson must prove the ineffectiveness of his trial counsel. Therefore, at this stage, *res judicata* does not apply to Thompson's claims against his trial counsel and the State's argument in this regard must be rejected.

The ultimate issue in a second PCR action remains the fairness of the original trial court proceedings. Id. When an applicant brings a "layered claim" that his PCR attorney incompetently failed to prove the incompetence of his trial counsel, the applicant must prove the incompetence of both PCR and trial counsel. Grinols, 10 P.3d at 620. Thompson claims that if Ms. Holland had more thoroughly prepared an affidavit from Mr. Madson addressing all of the claims in Thompson's first PCR application, his original PCR claim of ineffective representation in trial court proceedings would not have been dismissed. Thompson claims that Mr. Madson was incompetent by (1) failing to request a voluntariness hearing and (2) failing to inform Thompson of the benchmark sentence for second degree murder when discussing the state's offer of a pea bargain with Thompson.

a. Voluntariness Hearing

Mr. Madson states in his affidavit, dated May 17, 2004, that after Thompson provided him with a transcript of the omnibus hearing, Mr. Madson realized that his waiver of an evidentiary hearing on voluntariness of the confession was not a tactical decision and that the

omission of a hearing rendered his assistance to Thompson ineffective.[4] Mr. Madson asserts that he had independent evidence in the form of testimony by Ms. Lisa Greer (Thompson's girlfriend) about Thompson's state of mind when he returned to her house after the interrogation.[5] Mr. Madson states that, given the legal standard of "totality of the circumstances" for considering the voluntariness of a confession, an evidentiary hearing, in which Thompson could have testified, would have created a more complete record for consideration on direct appeal and in federal habeas corpus proceedings and appeals.[6] Mr. Madson asserts that Thompson's confession was involuntary due to psychological coercion, and Thompson could have testified about his state of mind during the interrogation.[7] Thompson apparently would have testified about his subjective belief that police interrogators were offering him a reduced charge in exchange for his confession.[8]

The issue of the voluntariness of a confession is a mixed question of fact and law. E.g., Beavers v. State 998 P.2d 1040, 1044 (Alaska 2000); Jones v. State, 65 P.3d 903, 906 (Alaska App. 2003). A trial court must determine the facts surrounding the confession, and from these facts infer the mental state of the defendant, before finally applying the legal standard. See Beavers, 998 P.2d at 1044. In determining whether a confession is the product of improper police conduct, the "totality of the circumstances" surrounding the confession must be considered. Beavers, 998 P.2d at 1044-48; Jones, 65 P.3d at 906-909. Relevant criteria for considering the totality of the circumstances includes (1) age, mentality, and prior criminal experience; (2) length, intensity, and frequency of interrogation; (3) the existence of physical

[4] Aff. #1 Dick Madson ¶ 3-4 (May 17, 2004) [PCR Exh. #1].
[5] Aff. #1 Dick Madson ¶ 4.
[6] Aff. #1 Dick Madson ¶¶ 5-7.
[7] Aff. #1 Dick Madson ¶¶ 4-5.
[8] Aff. Carl Thompson ¶¶ 3,4,9 (May 15, 1996).

deprivation or mistreatment; and (4) the existence of threat or inducement. Id.; Thompson, 768 P.2d at 131. These criteria were considered in Thompson's direct appeal. Thompson, 768 P.2d at 131, quoting Sprague v. State, 590 P.2d 410, 414 (Alaska 1979). Thompson's testimony was unnecessary for consideration of these criteria. After examining the transcript of the interrogation, the Court of Appeals noted that one of the interrogators warned Thompson that if he did not say anything, the district attorney might conclude that Thompson had committed first-degree murder, while Thompson's story might reveal he was only guilty of a lesser charge like negligent homicide. Thompson, 768 P.2d at 131. Any inducements or threats during Thompson's interrogation were apparent from the transcript, but the Alaska Court of Appeals determined that Thompson's confession was voluntary. Thompson, 768 P.2d at 131-132. In *habeas corpus* proceedings, the federal district court and the Ninth Circuit similarly examined the interrogation transcript and reached the same conclusion. Thompson, 34 F.3d 1073, 1994 WL 424289 (9th Cir. 1994).

Because a specific act or omission is rarely judged *per se* incompetent, an attorney's error is evaluated in terms of the reasonableness of the attorney's decision on the facts of the case when viewed as of the time of the attorney's decision. Jones, 759 P.2d at 569. At the time of the omnibus hearing, there appeared to be no issues of fact to resolve in an evidentiary hearing. Additionally, there is no merit in Thompson's argument that his attorney was required to request a hearing on the voluntariness of his confession, simply on the basis of Thompson's constitutional right to testify at trial. Under Criminal rule 42(e)(3), the trial court did not need to hold an evidentiary hearing if there are no issues of fact. Alaska R. Crim. P. 42(e)(3). It was reasonable for Mr. Madson to waive a hearing that would have served no discernable purpose as there has never been an allegation that the transcript was not an accurate record.

Nonetheless, Mr. Madson's broad statement in his 2004 affidavit that he had no tactical reason to waive a voluntariness hearing during the omnibus hearing may be minimally sufficient to state the element of incompetence for a claim of ineffectiveness of counsel.

b. Sentencing information in relation to state's plea offer

Thompson asserts that if he had been informed about the benchmark sentencing range stated in *Page*[9] for second-degree murder, he would have accepted the state's offer to drop the first-degree murder charge and the evidence tampering charge in exchange for his plea to second-degree murder. In Page v. State, 657 P.2d 850 (Alaska App. 1983), the Court of Appeals established a benchmark sentence of twenty to thirty years for the "typical" second-degree murder case. Page, 657 P.2d at 855. Nonetheless, the Court of Appeals found that a 99-year sentence for the particular defendant in *Page*, who like Thompson had stabbed his victim several times, was justified. Page, 657 P.2d at 855. With the benefit of hindsight after his conviction for first-degree murder, Thompson understandably wishes he had accepted the state's offer of second-degree murder with the possibility, however slight, of a sentence less than 99 years.[10]

Mr. Madson's Affidavit #2, dated May 14, 2004, is attached to Thompson's current PCR application and addresses this issue.[11] Mr. Madson reiterates that he told Thompson about the state's offer as soon as he knew about it and informed Thompson of the minimum and maximum sentences he could face for first-degree murder and second-degree murder.[12] Mr. Madson also told Thompson that the state refused to agree to any ceiling on the sentence if Thompson pleaded

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[9] Page v. State, 657 P.2d 850 (Alaska App. 1983).

[10] If Thompson had been sentenced to 99 years after pleading to second-degree murder, however, he may have then concluded he should have gone to trial on first-degree murder.

[11] Aff. #2 Dick Madson ¶ 2 (May 14, 2004) [PCR Exh. #3].

[12] Aff. #2 Dick Madson ¶ 2 (May 14, 2004) [PCR Exh. #3].

to second-degree murder.[13] He told Thompson that, in his opinion, Thompson had a chance at trial of being convicted of only manslaughter.[14] Mr. Madson acknowledged in his 2000 deposition that he did not mention *Page* or the benchmark sentence.[15]

In his 2004 affidavit, Mr. Madson states that if Thompson had known he faced only a thirty year sentence for second-degree murder, he would likely have accepted the state's offer.[16] Read literally, this statement is probably true. But any implication from Madson's statement that Thompson could not have been legally sentenced to more than thirty years is incorrect. During Thompson's sentencing, the trial court observed that Thompson stabbed his ex-wife 29 times and then took measures to dispose of her body. Thompson v. State, 768 P.2d at 133. The trial court described the murder as a "worst offense." Thompson v. State, 768 P.2d at 133. Thompson was sentenced to the maximum 99 years for first-degree murder. If Thompson had plead to second-degree murder, it is highly unlikely that the trial court would have found this to be a "typical" case of second-degree murder justifying no more than a thirty-year sentence within a possible range of five to 99 years. Since the trial court found the case to be a "worst offense" for first-degree murder, the court likely would have characterized the offense as a "worst offense" for second-degree murder. Furthermore, the trial court found it difficult to believe Thompson's claim that he initially acted in self-defense. Thompson, 768 P.2d at 133.

In 2000, Mr. Madson testified at his deposition that Thompson's case was a "bad case, factually, because of the number of stab wounds."[17] Mr. Madson, who had many years of

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[13] Aff. #2 Dick Madson ¶ 2.
[14] Aff. #2 Dick Madson ¶ 2.
[15] Aff. #2 Dick Madson ¶ 5.
[16] Aff. #2 Dick Madson ¶ 9.
[17] Depo. Dick Madson at 19 (Feb. 3, 2000). Mr. Madson's evaluation of the case is supported by the Page case itself, where Page's youth and previous lack crimes involving injury to persons suggested he was not a worst offender, but Page's actions in stabbing his victim a number of times, among other things resulted in the trial court's

experience in criminal defense, believed that the state's refusal to agree to a sentencing ceiling reflected the prosecutor's intention to seek the maximum 99-year sentence if Thompson pleaded to second-degree murder.[18] In Mr. Madson's deposition, he indicated he believed jurors were more likely to view Thompson's offense as second-degree murder, rather than first-degree murder. Mr. Madson's deposition indicates he made a reasonable evaluation of the case and the type of sentence Thompson would face if he pleaded to second-degree murder.

Effective assistance of counsel does not require error-free representation. State v. Jones, 759 P.2d 558, 568, 572 (Alaska App. 1988). The legal presumption is one of competence, and Thompson ultimately has the burden to rebut that presumption. See Tall v. State, 25 P.3d 704, 708 (Alaska App. 2001).

Mr. Madson states in his 2004 affidavit that he did not make a tactical decision to omit a discussion of the *Page* benchmark when informing Mr. Thompson of the State's plea offer, rather he "simply neglected to mention it."[19] But the reasonableness of counsel's challenged conduct must be viewed as of the time of counsel's conduct. Jones, 759 P.2d at 569. Thompson's case involved aggravating facts, like the number of stab wounds and his disposal of the victim's body. It was not a "typical" case.

Nonetheless, when factual allegations are treated as true for purposes of the motion to dismiss, Mr. Madson's statement that his failure to discuss benchmark sentencing under *Page* was not a tactical decision could be considered minimally adequate to state a claim with respect to the first prong of the test for ineffective assistance of counsel.

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conclusion the he was a worst offender for whom a 99-year sentence was justified in the second-degree murder case. Page, 657 P.2d at 854.

[18] Depo. Dick Madson at 19, 77-79.

[19] Aff. #2 Dick Madson ¶ 8.

4. Prejudice from Incompetence of PCR and Trial Counsel: Reasonable Possibility of Different Outcome in Trial Court Proceedings

The applicant must prove that the failure of the PCR attorney prevented him from establishing a prejudicial error by trial counsel. Grinols, 10 P.3d at 620. The Alaska Court of Appeals explained the applicant's burden in Grinols:

> It is not enough for the [applicant] to prove that the first post-conviction relief proceedings should have gone differently. The [applicant] must also prove that the flaw in the prior post-conviction relief proceeding prevented the [applicant] from establishing a demonstrable and prejudicial flaw in the original trial court proceedings.

Grinols, 10 P.3d at 620. For a PCR claim that PCR counsel was ineffective, the applicant must still establish that, if trial counsel had acted competently, there is a reasonable possibility that the outcome of the original trial court proceedings would have been different. Grinols, 10 P.3d at 620.

a. Voluntariness hearing

In this fourth step under Grinols, Thompson must establish that there is a reasonable possibility that either the trial court or an appellate court would have reached a different decision if a voluntariness hearing had been held. See Grinols, 10 P.3d at 620. Thompson argues that a voluntariness hearing would have allowed him to testify about his frame of mind resulting from the alleged psychological pressures placed on him by police during interrogation. Thompson asserts that he believed police had promised to charge him with something less than first-degree murder in exchange for his confession.[20] Mr. Madson states in his 2004 affidavit that given the standard of "totality of the circumstances" for considering the voluntariness of a confession, an

[20] Aff. Thompson (May 15, 1996).

evidentiary hearing would have created a more complete record for consideration on direct appeal and in federal habeas corpus proceedings and appeals.[21]

A transcript of the taped interrogation was available and factors such as age and criminal experience were part of the record without Thompson's testimony. The Alaska Court of Appeals expressly considered Thompson's age, prior criminal experience, the length of interrogation, and the existence of threat or inducement. Thompson, 768 P.2d at 131-132. The Court of Appeals noted that one of the troopers warned Thompson that if he did not say anything, the district attorney might conclude that Thompson had committed murder in the first-degree. Thompson, 768 P.2d at 131. The police told Thompson that his account of the incident might show that lesser charges like negligent homicide were appropriate. Statements by police that could have been interpreted by Thompson as either threats or "deals" would have been apparent in the transcript. Thompson, 768 P.2d at 131. The Court of Appeals concluded that the statements police made to Thompson to encourage him to talk were not improper and were not such as to overbear Thompson's will to resist or to bring about a confession not freely self-determined. Thompson, 768 P.2d at 132. Both the Federal District Court and the Ninth Circuit independently evaluated the entire transcript of the interrogation and similarly concluded that the police tactics, including psychological pressure, did not overbear Thompson's will. Thompson v. Keohane, 34 F.3d 1073 (table), 1994 WL 424289 (9th Cir. 1994), *vacated and remanded on other grounds in* Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 462 n.2, 133 L. Ed. 2d 383 (1995).

Given that a transcript of the entire two-hour interrogation was available in total to be reviewed by the original trial court and courts on direct appeal and in habeas corpus actions, an evidentiary hearing would have added little, if anything, to the evidence of the "totality of the

[21] Aff. #1 Dick Madson ¶¶ 5-7.

circumstances" surrounding the confession. See Thompson, 768 P.2d at 131-132; Thompson v. Keohane, 34 F.3d 1073 (table), 1994 WL 424289 (9th Cir. 1994). Thompson's subjective view that police were offering him a deal would not have changed the state and federal courts' conclusions. The transcript showed what transpired during the interrogation. Courts do not rely solely on the self-serving subjective testimony of the defendant to determine the defendant's mental state for purposes of a voluntariness finding. See Van Cleve v. State, 649 P.2d 972, 976 (Alaska App. 1982). A defendant's mental state is inferred from the totality of the circumstances. Beavers, 998 P.2d at 1044. Therefore, even if Mr. Madson had requested a hearing on the voluntariness of Thompson's confession, the hearing would not have created a reasonable possibility of suppression of the confession. Since a hearing on the voluntariness of his confession would not have changed the decisions of the trial, appeals, and post-conviction courts, there is no indication that Mr. Madson's failure to request a hearing prejudiced the outcome at trial.

Therefore, even when Thompson's PCR allegations are treated as true, he has not met the prejudice prong for stating a claim for ineffectiveness of trial counsel based on counsel's failure to request an evidentiary hearing on the voluntariness of Thompson's confession. Since Thompson could not succeed on the claim against trial counsel, the outcome of his first PCR application would not have been different on this issue even if his PCR counsel had ensured that Mr. Madson's affidavit specifically addressed his failure to request a voluntariness hearing.

b. Information provided by counsel regarding possible sentence if Thompson accepted states plea offer

Even if PCR counsel, Ms. Holland, had obtained an affidavit from Mr. Madson like his May 14, 2004, affidavit, this would not have proven incompetence on the part of Mr. Madson

regarding the *Page* benchmark. Mr. Madson states in his 2004 affidavit that it is possible that if Thompson had believed he faced only a thirty-year sentence, he would have accepted the state's offer of a second-degree murder plea.[22] Although this is probably literally true,[23] it would not have been a realistic picture of the case for Thompson. Court opinions in Thompson's case as well as other cases point to a probable second-degree murder sentence much higher that the thirty-year benchmark term for a typical case. This clearly was not a typical case under the *Page* opinion. A discussion of the benchmark sentencing range for second-degree murder actually could have misled Thompson to forego his right to a trial while still at risk of a 99-year sentence for second-degree murder.

For purposes of comparison, it should be noted that Criminal Rule 11(c)(3)(i) requires the court, before accepting a plea of guilty or nolo contendere, to advise the defendant of the mandatory minimum and the statutory maximum prison term applicable to the charge. Wiley v. State, 822 P.2d 940, 942 (Alaska App. 1991); Alaska R. Crim. P. 11(c)(3)(i). Thus, in order for a defendant to legally give up his right to trial, his knowledge of the possible sentence he faces is required to be the minimum and maximum possible sentences under Alaska statutes. Mr. Madson explained not only the minimum and maximum sentences for first and second degree murder, but informed Thompson that because the state refused to agree to a sentencing cap, he expected the prosecutor to seek the maximum sentence for second-degree murder before the trial court. Mr. Madson also opined that a jury was more likely to find Thompson guilty of second-degree murder rather than first-degree murder.

Thompson argues that his case is like Garay v. State, 53 P.3d 626 (Alaska App. 2002). In Garay, the defendant sought to withdraw his plea to a reduced charge after learning that his trial

[22] Aff. #2 Dick Madson ¶ 9.

[23] Given a choice between a 30-year term and a 99-year term, anyone would choose 30 years.

attorney had neglected to read or inform the defendant of evidence in his favor that could have been useful at trial. Garay, 53 P.3d at 628. In determining whether the defendant had been prejudiced by his counsel's omission, the Alaska Court of Appeals explained that the issue is whether there is a reasonable possibility that this information would have *affected* Garay's decision to accept or reject the plea bargain, and not whether Garay would have won the trial. Garay, 53 P.3d at 628.

In order to show that trial counsel was ineffective by encouraging him to reject the plea bargain and go to trial, Thompson must show that but for his counsel's advice, there is a reasonable possibility that he would have accepted the plea bargain. Magana v. Hofbauer, 263 F.3d 542, 547, 550 (6th Cir. 2001). In other words, Thompson must show that if Mr. Madson had informed him about the *Page* benchmark sentence for second-degree murder, Thompson would have accepted the state's plea bargain even though Mr. Madson also told him that the state would probably seek a 99-year sentence. Mr. Thompson makes just such a claim. Thus, if his PCR counsel, Ms. Holland, had obtained an affidavit like Mr. Madson's 2004 affidavit on this issue, it could have been legally sufficient to avoid dismissal.

Therefore, when factual allegations in the PCR application and attachments are treated as true, Thompson has stated a claim for ineffective PCR counsel for failing to ensure that Mr. Madson's affidavit addressed the benchmark sentencing issue. An evidentiary hearing on this matter will be scheduled.

If Thompson successfully proves his claim, the remedy on this issue is not reversal of his conviction. The appropriate remedy is an opportunity to accept the state's original offer, which would not preclude the state from seeking the maximum 99-year sentence for second-degree murder. See Magana v. Hofbauer, 263 F.3d 542, 553 (6th Cir. 2001).

IV. Conclusion

Because Thompson is bringing a layered PCR claim for ineffective assistance of counsel, the four prongs described in Grinols v. State, 10 P.3d 600, 619-20 (Alaska App. 2000), must be applied to determine whether Thompson's second PCR application has stated a claim for ineffectiveness of his PCR counsel for failure to adequately pursue his claim for ineffective assistance of trial counsel in his first PCR application.

Therefore, IT IS HEREBY ORDERED:

1. The State's motion to dismiss is GRANTED with respect to Thompson's PCR claim of ineffective assistance of PCR counsel on the issue of trial counsel's failure to request a hearing on the voluntariness of his confession.

2. The State's motion to dismiss is DENIED with respect to Thompson's PCR claim of ineffective assistance of PCR counsel on the issue of trial counsel's failure to inform Thompson of the *Page* benchmark range for second-degree murder when he was deciding whether to accept the state's plea bargain.

3. A scheduling hearing for an evidentiary hearing will be held January 5, 2006, at 3:45 p.m. Mr. Thompson and the state shall be prepared to advise the court who why will be calling as witnesses, the availability of the witnesses for the next eight months, and the amount of trial time needed for the evidentiary hearing.

Dated this 15 day of November 2005, at Fairbanks, Alaska.

Thompson, AA. McLaughlin

Niesje J. Steinkruger
Superior Court Judge

11/16/05

NOTICE

Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding precedent for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARL K. THOMPSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-9663 Trial Court No. 4FA-04-2090 CI MEMORANDUM OPINION AND JUDGMENT No. 5265 — October 24, 2007

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Neisje J. Steinkruger, Judge.

Appearances: Carl Thompson, in propria persona, Seward, for the Appellant. Michael Sean McLaughlin, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for the Appellee.

Before: Coats, Chief Judge, Stewart, Judge, and Andrews, Senior Superior Court Judge.*
[Mannheimer, Judge, not participating.]

STEWART, Judge.

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* Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

Carl Thompson appeals the superior court's dismissal of Thompson's second application for post-conviction relief. Thompson claims that his attorney in his first application for post-conviction relief provided ineffective assistance of counsel.[1]

We agree with the superior court that Thompson failed to allege a prima facie claim for relief.

A short history of Thompson's cases

A brief summary of the history of Thompson's cases is helpful. Thompson was convicted of first-degree murder for killing his ex-wife, Dixie Gutman, and convicted of tampering with physical evidence for disposing of her body. We affirmed Thompson's conviction in *Thompson v. State*,[2] but we remanded for resentencing because we concluded that the superior court was clearly mistaken when it imposed the sentence on tampering with physical evidence consecutively.[3]

After the superior court amended Thompson's sentence, Thompson filed a petition for writ of habeas corpus in federal court arguing, as he had in his state appeal, that his confession had been obtained in violation of his *Miranda* rights. Thompson's claim was ultimately rejected by the United States District Court and the 9th Circuit

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[1] *See Grinols v. State*, 74 P.3d 889, 895, 896 (Alaska 2003) (holding that a defendant could present a claim of ineffective post-conviction counsel in a second post-conviction relief application although a second application is barred by statute).

[2] 768 P.2d 127 (Alaska App. 1989).

[3] *Id.*, at 133-34.

Court of Appeals, and the United States Supreme Court ultimately rejected Thompson's petition for a writ of certiorari in 1999.[4]

While Thompson' s federal habeas litigation was pending, Thompson filed an application for post-conviction relief in superior court on June 7, 1996.[5] Thompson raised three main points. First, he argued that the voluntariness of his confession should be reconsidered due to newly discovered evidence.[6] On this issue, he relied in part on the August 1995 affidavit of Lisa Huffaker, his girlfriend at the time of the offense.[7] Thompson claimed that Huffaker had put a dose of Mepergan in his sandwich and that drug caused him to become confused.[8] He argued that the evidence of the tainted sandwich was newly discovered evidence which the court should reconsider on the question whether his confession was voluntary.[9] We rejected Thompson's claim,[10] and concluded that Judge Steinkruger properly dismissed Thompson's application because he had not met the stringent standard for granting a new trial on the basis of newly discovered evidence.[11] We also rejected Thompson's second claim, that his counsel had

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[4] *Thompson v. Keohane*, 34 F.3d 1073 (9th Cir. 1994), *vacated by* 513 U.S. 1126, 115 S. Ct. 933, 130 L. Ed. 2d 879 (1995), *on remand at* 145 F.3d 1341 (9th Cir. 1998), *cert. denied*, 525 U.S. 1158, 119 S. Ct. 1066, 143 L. Ed. 2d 70 (1999).

[5] *Thompson v. State*, 13 P.3d 276, 277 (Alaska App. 2000).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 277-78.

been ineffective.[12] However, we remanded the case to the superior court because we concluded that Thompson pleaded a prima facie case that he was denied his right to testify at trial.[13]

In December of 1998, Thompson filed a motion for a new trial under Alaska Criminal Rule 33. In July of 1999, Judge Steinkruger summarily dismissed the Rule 33 motion. In June of 1999, Thompson filed a motion for reduction of sentence, as well as a motion for appointment of counsel. Judge Steinkruger denied both of these motions in July of 1999. We affirmed the trial court's decisions.[14]

In proceedings following remand from Thompson's appeal of the denial of his first application for post-conviction relief to resolve the issue on his right to testify, Thompson attempted to amend his application to include four additional claims: (1) that his attorneys had been ineffective for not preparing him to testify or explaining the advantages and disadvantages of testifying; (2) that he was deprived of his right to choose whether to go to trial or plead no contest to a lesser charge; (3) that he received ineffective assistance of counsel regarding whether he should go to trial or plead no contest to a lesser charge; and (4) that he received ineffective assistance of counsel regarding one of his attorney's understanding of Alaska's first-degree murder statute.[15] Superior Court Judge Neisje J. Steinkruger dismissed the new claims Thompson attempted to raise,[16] and

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[12] *Id.* at 278.

[13] *Id.*

[14] *Id.*

[15] *Thompson v. State*, Alaska App. Memorandum Opinion and Judgment No. 4780 at 3 (Oct. 22, 2003), 2003 WL 22405385 at *1.

[16] *Id.* at 4, 2003 WL 22405385 at *1.

Superior Court Judge Charles Cranston concluded that Thompson had not been denied the right to testify.[17] We affirmed the superior court in all respects.[18]

The issues in this case

Thompson filed this second application in 2004. Normally, AS 12.82.020(a)(6) bars a second application. However, in *Grinols v. State*,[19] we ruled that in spite of that statutory bar, the due process clause of the Alaska Constitution permitted a defendant to pursue a second application on the grounds that the attorney representing the applicant in the first application provided ineffective assistance of counsel when litigating the first application.[20]

We held that the defendant must do more than show that his or her post-conviction relief attorney failed to raise or competently argue a colorable claim. The defendant must also prove (1) that the defendant was diligent in raising the ineffective counsel claim, (2) that the prior post-conviction relief attorney was incompetent, (3) that the underlying claim was meritorious, and (4) that there is a reasonable possibility that the outcome of the defendant's original trial court proceedings would have been different but for counsel's incompetence.[21]

The first issue we address is the superior court's rejection of Thompson's claim that his trial attorney incompetently failed to advise Thompson of the 20- to 30-

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[17] *Id.* at 4, 2003 WL 22405385 at *2.

[18] *Id.* at 20, 2003 WL 22405385 at *10.

[19] 10 P.3d 600 (Alaska App. 2000).

[20] *Id.* at 619-20.

[21] *Id.*

year benchmark sentencing range for second-degree murder that this court announced in *Page v. State*[22] when the trial attorney told Thompson of the State's offer for Thompson to plead to second-degree murder with no agreement on a sentence. Thompson would have to plead and prove that his post-conviction relief attorney incompetently failed to raise this issue in his first application.

An applicant must rebut the presumption that trial counsel's tactical actions were competent.[23] In Thompson's case, his trial attorney's discussion of the potential second-degree murder plea agreement without a discussion of the *Page* benchmark was not incompetent. The benchmark only reflects the starting point for a first felony offender who committed a typical second-degree murder.[24] Thompson's trial attorney recognized that Thompson's case was a "bad case factually" and that, objectively, it was an atypical case. Gutman was stabbed twenty-nine times, her body was wrapped in chains and dumped in a water-filled gravel pit.[25] At sentencing, Superior Court Judge Jay Hodges found that Thompson's conduct established a worst offense for *first-degree* murder.[26] Thompson did not plead facts that rebutted the presumption that his trial attorney competently advised him of the issues involved in the second-degree murder plea offer. Therefore, his *Grinols* claim based on this assertion fails.

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[22] 657 P.2d 850, 855 (Alaska App. 1983).

[23] *See Tall v. State*, 25 P.3d 704, 708 (Alaska App. 2001).

[24] *See Page*, 657 P.2d at 855.

[25] *Thompson v. State*, Alaska App. Memorandum Opinion and Judgment No. 3897 at 2 (Oct. 14, 1998), 1998 WL 720481 at *1.

[26] *See Thompson*, 768 P.2d 127 at 133.

Next, Thompson claims that his trial attorney incompetently failed to advise him of his right to testify at an evidentiary hearing (that never took place) regarding his claim that his statements in his prearrest interview with the police were involuntary. Thompson does not cite pertinent authority for this claim, and it appears to be an attempt to re-litigate his involuntariness claim. Thompson litigated the voluntariness of his admissions in both state and federal court.[27] Because this claim could have been raised previously, it is barred.[28]

Thompson also attempts to reassert an involuntariness claim regarding his admissions, this time asserting that his admissions to the troopers were in exchange for protection from the Hell's Angels. But Thompson is again attempting to relitigate his involutariness claim. In one of our previous cases regarding Thompson, we rejected his claim that he could relitigate his involuntariness claim based on purported newly discovered evidence that his girlfriend adulterated his sandwich with a drug.[29] We held that the claim was barred by the statute of limitations on post-conviction relief applications and was also barred by res judicata or collateral estoppel.[30] The same analysis applies to Thompson's present attempt to relitigate the voluntariness question based on his Hell's Angels claim.

Thompson's brief also contains arguments that are not derived from a claim of ineffective assistance by his attorney in the litigation of the first post-conviction relief

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[27] *See Thompson*, 768 P.2d at 130-32; *Thompson*, 34 F.3d 1073 (9th Cir. 1994), 1994 WL 424289 at *1 (Table of Unreported Opinions).

[28] *See* AS 12.72.020(a)(2), (a)(5).

[29] *See Thompson*, Alaska App. Memorandum Opinion and Judgment No. 3897 at 3-5, (Oct. 14, 1998), 1998 WL 720481 at *1-2.

[30] *Id.*

application. These claims are not permitted by the statutory bar in AS 12.72.020. Although we suggested in *Grinols* that the due process clause of the Alaska Constitution would require some avenue of relief "where a constitutional violation has probably resulted in the conviction of one who is actually innocent,"[31] the issues Thompson attempts to argue that are outside the scope of a claim of ineffective assistance by his first post-conviction relief attorney cannot be so categorized.

Conclusion

The judgment of the superior court is AFFIRMED.

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[31] *Grinols*, 10 P.3d at 615.

In the Court of Appeals of the State of Alaska

Carl K. Thompson,	)	
	)	Court of Appeals No. **A-09663**
Appellant,	)	
v.	)	**Order**
	)	Petition for Rehearing
State of Alaska,	)	
	)	
Appellee.	)	Date of Order: **11/15/07**
	)	

Trial Court Case # **4FA-04-02090CI**

Before: Coats, Chief Judge, Stewart, Judge, and Andrews, Senior Superior Court Judge.
[Mannheimer, Judge, not participating]

On consideration of the Petition for Rehearing filed on **11/2/07**,

IT IS ORDERED:

The Petition for Rehearing is **DENIED**.

Entered by the direction of the court.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

cc: Court of Appeals Judges
Judge Steinkruger
Regional Appeals Clerk - Fairbanks
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Eloy AZ 85231

In the Supreme Court of the State of Alaska

Carl K Thompson,

Petitioner,

v.

State of Alaska,

Respondent.

Supreme Court No. **S-12933**

Order
Petition for Hearing

Date of Order: **2/22/08**

Court of Appeals Case # **A-09663**
Trial Court Case # **4FA-04-02090CI**

Before: Fabe, Chief Justice, Matthews, Eastaugh, Carpeneti, and Winfree, Justices.

On consideration of the Petition for Hearing filed on **11/30/07**, and the response filed on **1/8/08**,

IT IS ORDERED:

The Petition for Hearing is **DENIED**.

Entered by the direction of the court.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

cc: Supreme Court Justices
Court of Appeals Judges
Judge Steinkruger
Regional Appeals Clerk - Fairbanks

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