

6-18-2012

# Delgado v. State Respondent's Brief Dckt. 38663

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

ELUITH DELGADO,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 38663

**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ  
District Judge

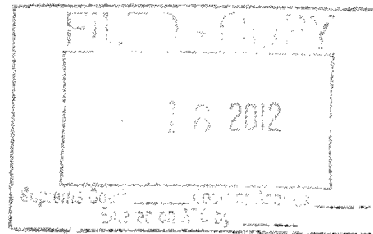
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## STATEMENT OF THE CASE

### Nature of the Case

Eluith Delgado appeals, *pro se*, from the summary dismissal of his petition for post-conviction relief.

### Statement of Facts and Course of the Proceedings

The state charged Delgado with first degree kidnapping and rape. (34689 R., pp. 6, 49-52.) Delgado pled guilty to the kidnapping charge and the state agreed to dismiss the rape charge and not proceed with a habitual offender enhancement. (34689 R., pp. 10, 120-121.) The district court sentenced Delgado to a life sentence with 30 years fixed. (34689 R., pp. 124-126, 129-130.) Delgado's judgment of conviction and sentence were affirmed on appeal. State v. Delgado, Docket No. 34689, 2009 Unpublished Opinion No. 506 (Idaho App., June 19, 2009).

Delgado's trial counsel filed a petition for post-conviction relief alleging the sentence Delgado received was for "conduct to which [Delgado] did not plead," he was sentenced "for a rape charge that had been dismissed," and as a result the "sentence was excessive." (R., pp.1-3.) The petition included a request for "the appointment of counsel." (R., p.3.) The state filed an answer asserting the petition failed to state any grounds upon which relief could be granted, the claims should have been raised on direct appeal, and the petition contained bare and conclusory allegations unsubstantiated by admissible evidence. (R., pp.4-9.) The state sought dismissal of the petition for post-conviction relief. (R., p.6.) The district court filed a notice of intent to dismiss the petition. (R., pp.10-20.) It first

considered and denied Delgado's request for counsel in his post-conviction proceeding finding because Delgado "offered nothing in support of his request for counsel," "as well as taking note of the fact that Mr. Delgado's Petition was filed on his behalf by a licensed attorney," Delgado was not entitled to the appointment of counsel. (R., pp.13-14.) Addressing the claims in the petition for post-conviction relief, the court found "no genuine issue of material fact exists in regard to the Petition for Post Conviction Relief since Mr. Delgado only offered bare and conclusory allegations unsubstantiated by any admissible evidence." (R., p.20.) Delgado's attorney filed a response to the notice of intent to dismiss, alleging generally that the district court made reference to the dismissed rape charge when imposing sentence, but failing to supplement the petition with any admissible evidence. (R., pp.21-24.) The district court dismissed the petition for post-conviction relief finding Delgado's response to the court's notice of intent to dismiss "did not include any additional documents or references to the record in the underlying criminal case." (R., pp.27-31.)

Delgado timely appealed.<sup>1</sup> (R., pp.32-34.)

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<sup>1</sup> The SAPD was originally appointed to represent Delgado in his appeal. (R., pp.39-40.) The SAPD subsequently withdrew from the representation of Delgado based on its position that "[a]fter a thorough review, each of the three attorneys was unable to identify a viable issue for appeal." (Affidavit in Support of Motion For Leave to Withdraw And Motion to Suspend the Briefing Schedule, p. 2.)



## ISSUES

Delgado states the issues on appeal as:

1. PETITIONER'S [sic] CONFLICT OF INTEREST WITH PRIOR COUNSEL ON PETITION FOR POST-CONVICTION RELIEF VIOLATE CONSTITUTIONAL RIGHTS OF PETITIONER
2. PETITIONERS [sic] INABILITY & EXPERIANCE [sic] TO FILE A PETITION FOR POST-CONVICTION RELIEF VIOLATE APPELLANTS [sic] CONSTITUTIONAL RIGHTS
3. DISTRICT COURTS [sic] DENIAL OF APPOINTMNET OF COUNSEL VIOLATE [sic] APPELLANTS [sic] RIGHT TO FILE TO CONFLICT FREE COUNSEL
4. DISTRICT COURT ERRORED [sic] WHEN ACCEPTING APPELLANTS [sic] GUILTY PLEA
5. DISTRICT COURT ERRORED [sic] WHEN USING A DISMISSED CHARGE AGAINST THE APPELLANT AT SENTENCING
6. PETITIONERS [sic] SETNENCE WAS IMPOSED IN DIRECT VIOLATION OF DOUBLE JEOPARDY LAWS
7. PETITIONERS [sic] RIGHT TO COUNSEL ON APPEAL VIOLATED DUE TO COURT ALLOWING COUNSEL TO WITHDRAW

(Appellant's brief, p.1 (capitalization and lack of punctuation original).)

The state rephrases the issue as follows:

1. Has Delgado failed to show error in the district court's denial of post-conviction counsel?
2. Has Delgado failed to show error in the district court's summary dismissal of his petition for post-conviction relief?
3. Has Delgado failed to show error in the denial of counsel on appeal?

## ARGUMENT

### I.

#### Delgado Has Failed To Establish That The District Court Abused Its Discretion By Denying His Bare Request For The Appointment Of Counsel

##### A. Introduction

Delgado asserts on appeal that the court erred in denying the bare request for post-conviction counsel<sup>2</sup> in his petition. (Appellant's brief, p.4.) Because Delgado fails to allege any conflict of interest below and the petition, on its face, did not establish any basis for the appointment of counsel, Delgado's argument fails.

##### B. Standard Of Review

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there

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<sup>2</sup> The petition for post-conviction relief includes the following unsupported request: "Petitioner is requesting the appointment of counsel at this time." (R., p.3.)

appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 “permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, “[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001), quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111.

C. Delgado Has Failed To Show That He Was Entitled To The Appointment Of Post-Conviction Counsel

A denial of counsel may occur “when the defendant’s attorney actively represented conflicting interests.” Mickens v. Taylor, 535 U.S. 162, 166-67 (2002). To prevail under this standard a defendant must demonstrate “that a conflict of interest actually affected the adequacy of [counsel’s] representation.”

Mickens, 535 U.S. at 168 (internal quotations omitted, citing Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980)). Delgado's only allegation of a conflict is his position on appeal that "no way would a [sic] attorney file a petition on himself for ineffective assistance of counsel." (Appellant's brief, p.4.) Delgado did not allege a claim of ineffective assistance of counsel in his petition. Nor did he assert dismissal of counsel or a prima facie claim of a conflict of interest in response to the state's motion or the trial court's notice of intent to dismiss, much less support it with admissible evidence. Because the judge presiding over trial was different than that handling the post-conviction proceedings (see 34689 R., pp. 124-126, 129-130 (judgment of conviction and sentence entered by Judge McDermott); R., pp.11-20 (notice of intent to dismiss issued by Judge Naftz)), it is not clear that the trial judge was aware that Delgado's post-conviction action had been filed by his trial counsel. Delgado has failed to show error in the denial of the appointment of counsel based on a conflict of interest because he has failed to establish any such conflict of interest.

As discussed in Section II of this brief, the frivolous nature of the claims in Delgado's petition for post-conviction relief warrant the denial of the request for counsel. The mere involvement of trial counsel in preparing Delgado's post-conviction pleadings is, under the facts of this case, irrelevant to the district court's denial of the motion to appoint counsel.

II.  
Delgado Has Failed To Establish That The District Court Erred In Summarily  
Dismissing His Petition For Post-Conviction Relief

A. Introduction

The district court provided Delgado with the opportunity to respond to its notice of intent to dismiss and ultimately denied Delgado's petition for post-conviction relief on the basis that "he failed to provide to [the] Court any suitable evidence that he is entitled to post conviction relief on the basis that his sentence was excessive." (R., p.31.) The district court further found:

Mr. Delgado did not point this Court to the record or other evidence to substantiate his claims. Mr. Delgado has again offered bare, conclusory and unverified allegations. As explained previously, the Petitioner must come forward with "affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included." Mr. Delgado has failed to present such evidence or point to the record in the matter and did not explain why such supporting evidence was not included.

(R., p.31.)

On appeal, Delgado reasserts his original claim that his sentence was excessive, arguing the court erred in imposing his sentence for kidnapping based on the underlying facts of the dismissed rape charge. (Appellant's brief, p.8.)

Delgado's arguments on appeal fail. He has not shown that the district court erred in summarily dismissing his post-conviction relief petition.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary

dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

D. Delgado Has Waived Consideration Of Claims Not Raised In His Petition For Post-Conviction Relief

Delgado raises two claims for the first time on appeal. He now asserts his “inability [and] experance [sic] to file a petition for post-conviction relief violated” his constitutional rights. (Appellant’s brief, p.5 (original capitalization altered).) Delgado also alleges for the first time on appeal that the district court “erred [sic] when accepting [his] guilty plea.” (Appellant’s brief, p.7.)

It is a fundamental tenet of appellate law that a claim not raised before the district court will not be considered on appeal. State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Because these issues were not asserted in Delgado’s petition for post-conviction relief, they are not properly before this Court on appeal.

E. Delgado Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

Delgado has failed to establish the district court erred in summarily dismissing his petition for post-conviction relief. In both its notice of intent to dismiss and its order dismissing Delgado’s petition for post-conviction relief, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Delgado failed to establish a genuine issue of material fact on either of his claims. The state adopts the district court’s written opinion as its argument on appeal, a copy of which is attached hereto as Appendix A. Delgado does not specifically challenge any of the court’s findings or legal conclusions (see generally Appellant’s Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.



III.

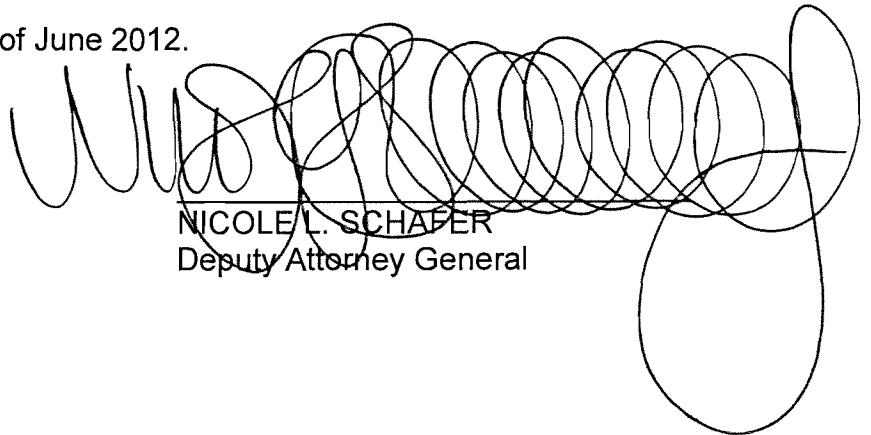
Delgado Has Failed To Establish A Violation Of His Rights Based On A Denial Of Counsel On Appeal

In addition to his assertion that the district court erred in imposing an excessive sentence and failing to provide him with conflict-free counsel, Delgado alleges this Court violated his right to counsel on appeal by allowing his appointed counsel to withdraw. (Appellant's brief, p.10.) Delgado offered essentially no argument and his claim is unsupported by legal authority. (see generally, Appellant's brief, p.10.) "When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered." State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Accordingly, this Court should decline to consider the merits Delgado's claim that this Court erred in allowing the SAPD to withdraw from his representation.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Delgado's petition for post-conviction relief.

DATED this 18<sup>th</sup> day of June 2012.

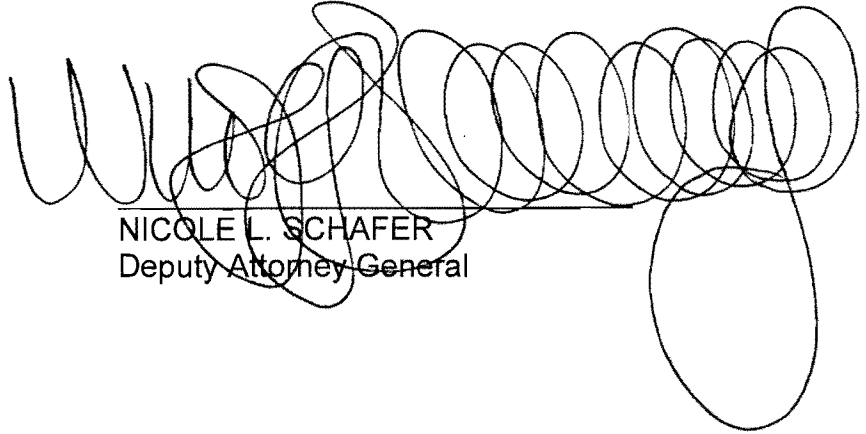


NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18<sup>th</sup> day of June 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

ELUITH DELGADO  
IDOC # 29023  
ISCI Unit #14  
P.O. Box 14  
Boise, Id 83707



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm

# APPENDIX A

2011 FEB 17 10 47  
*[Handwritten signature]*

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

ELUITH DELGADO,	)	
	)	<b>Case No. CV-2010-4104-PC</b>
Petitioner,	)	
	)	
vs.	)	<b>ORDER DISMISSING</b>
	)	<b>PETITION FOR POST</b>
STATE OF IDAHO,	)	<b>CONVICTION RELIEF</b>
	)	
Respondent.	)	
_____	)	

This case comes before this Court on a Petition for Post Conviction Relief filed by Eluith Delgado (“the Petitioner” or “Mr. Delgado”). On November 10, 2010, pursuant to Idaho Code (“IC”) §19-4906 this Court issued a Notice of Intent to Dismiss (“Notice”) Mr. Delgado’s petition, indicating its intent to dismiss each of the claims raised and providing Mr. Delgado the 20 days required by statute to submit a reply appropriately addressing his arguments and providing satisfactory evidence that he is entitled to post conviction relief.

On November 30, 2010, this Court granted the Petitioner’s request for additional time to respond to the Notice of Intent to Dismiss. On December 27, 2010, counsel for Mr. Delgado filed a Response to Notice of Intent to Dismiss, wherein counsel asserted “that the sentencing court imposed an excessive sentence.” (Resp. to Notice of Intent to Dismiss, Dec. 27, 2010, 3.) Such response did not include any additional documents or references to the record in the underlying criminal case.

Further background on this matter was set out in detail in the Notice and is incorporated herein by reference.<sup>1</sup>

### ISSUE

1. Whether to grant the Petition for Post Conviction Relief.

### STANDARD OF REVIEW

In *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007), the Idaho Supreme Court set forth this thorough and clear statement of the legal standard that applies to a petition for post conviction relief:

An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Stuart v. State*, 136 Idaho 490, 495, 36 P.3d 1278, 1282 (2001). Like a plaintiff in a civil action, the applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Grube v. State*, 134 Idaho 24, 995 P.2d 794 (2000). Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

Summary disposition of a petition for post-conviction relief is appropriate if the applicant’s evidence raises no genuine issue of material fact. I.C. § 19-4906(b), (c). On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Gilpin-Grubb v. State*, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002), citing *LaBelle v. State*, 130 Idaho 115, 118, 937 P.2d 427, 430 (Ct.App.1997). A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions. *Ferrier v. State*, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001). When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may

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<sup>1</sup> The Notice also contains a thorough analysis of the Post-Conviction Relief statute and is not repeated in detail here.

dismiss the application without holding an evidentiary hearing. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990), citing Cooper-v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law. *Id.*

“On appeal from a summary disposition, [the Court of Appeals] exercises free review.

*Yon v. State*, 124 Idaho 821, 822, 864 P.2d 659, 660 (Ct.App.1993); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.App.1988).” *Abbott v. State*, 129 Idaho 381, 382, 924 P.2d 1225, 1228 (Idaho Ct.App. 1996).

#### DISCUSSION

In his Response to Notice of Intent to Dismiss, the Petitioner argues relief is warranted on the basis “that the sentencing court imposed an excessive sentence.” (Resp. to Notice of Intent to Dismiss at 3.) Based on that assertion, the Petitioner argues his sentence was “unreasonable” and thereby “requests that the sentence herein be reduced . . . .” (*Id.* at 1, 3.) Specifically, the Petitioner “asserts that the sentence was excessive in that the Court sentenced the Petitioner as if he had plead [sic] to all charges. For example, the Court made reference to the charge of rape. This charge had been dismissed and the Petitioner did not plead to that crime.” (*Id.*)

- a. **The Petitioner has failed to present evidence in support of his assertion that his sentence was excessive and therefore unreasonable.**

In his initial Petition for Post Conviction Relief, Mr. Delgado asserted the following grounds for relief:

- “a) [T]he sentence imposed was for conduct to which the Defendant did not plead.

- b) That the sentencing Judge sentenced the Defendant for a rape charge that had been dismissed.
- c) That as a result of the aforementioned the Defendant's sentence was excessive."

(Pet. for Post Conviction Relief, Sept. 29, 2010, 2.) This Court addressed those claims within its Notice of Intent to Dismiss, finding such claims did not merit post conviction relief because "no genuine issue of material fact exists ... since Mr. Delgado only offered bare and conclusory allegations unsubstantiated by any admissible evidence. Mr. Delgado failed to substantiate his claims with the requisite affidavits, records or other evidence." (Notice at 11.) The Petitioner was subsequently instructed to submit a reply "appropriately addressing his arguments in support of post conviction relief, as well as satisfactorily indicating the reasons he is entitled to such relief. . . ." (*Id.*) The Petitioner was informed that unless he "allege[d] facts sufficient to raise the possibility of a valid claim, rather than bare, conclusory allegations," his Petition would be dismissed. (*Id.*)

In his Response, Mr. Delgado does not add to his previous claims. Rather than submit any affidavits or supplementary documents, or point to the record, the Petitioner merely repeats the allegations asserted in his initial Petition for Post Conviction Relief. For example, Mr. Delgado reargues his previous claim that his sentence was excessive and thereby unreasonable because he was "sentenced ... as if he had" pled to "all charges," including a rape charge the Petitioner asserts had been dismissed prior to the entry of a plea. (Resp. to Notice of Intent to Dismiss at 3.) Mr. Delgado additionally quoted portions of two Idaho cases in support of his argument that "an excessive sentence" is "unreasonable." (*Id.* at 1.) However, while Mr. Delgado argued that


“excessive” sentences may be deemed “unreasonable” under certain circumstances, he failed to provide to this Court any suitable evidence that he is entitled to post conviction relief on the basis that his sentence was excessive. Mr. Delgado did not point this Court to the record or other evidence to substantiate his claims. Mr. Delgado has again offered bare, conclusory and unverified allegations. As explained previously, the Petitioner must come forward with “affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included.” Mr. Delgado has failed to present such evidence or point to the record in the matter and did not explain why such supporting evidence was not included. Thus, the Petitioner has not proven his allegations by a preponderance of the evidence as required by the statutes governing post conviction proceedings, and this claim cannot merit the requested relief. *See Baxter v. State*, 149 Idaho 859, 243 P.3d 675, 681 (Idaho Ct.App. 2010).

**CONCLUSION**

Based on the foregoing, as well as the reasoning set forth in the Notice of Intent to Dismiss, this Court hereby **DISMISSES** the Petition for Post Conviction Relief.

**IT IS SO ORDERED.**

DATED this   1   day of February, 2011.

  
**ROBERT C. NAFTZ**  
**DISTRICT JUDGE**

**Copies to:**

Mark L. Hiedeman  
John C. Souza



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 DELOACH

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

ELUITH DELGADO,	)	
	)	<b>Case No. CV-2010-4104-PC</b>
Petitioner,	)	
	)	
vs.	)	<b>NOTICE OF INTENT</b>
	)	<b>TO DISMISS</b>
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

This case comes before this Court on a Petition for Post Conviction Relief filed by Eluith Delgado (“the Petitioner” or “Mr. Delgado”). Mr. Delgado did not attach any supporting memorandum or affidavit. The State did not respond. The Petitioner additionally requested the appointment of counsel.

**FACTUAL AND PROCEDURAL BACKGROUND**

The Petitioner pled guilty to one count Kidnapping in the First Degree, Idaho Code (“IC”) § 18-4502, and was sentenced on September 10, 2007, to a 30-year determinate period of incarceration. That sentence was amended on September 18, 2007, to include an indeterminate life sentence. (Pet. for Post Conviction Relief, Sept. 29, 2010, 1-2.)

This Court has carefully reviewed the Petition for Post Conviction Relief. Based upon the following discussion, this Court hereby gives the Petitioner notice of its intent to DISMISS the Petition for Post Conviction Relief.

**Notice of Intent to Dismiss**  
*Re: Petition for Post Conviction Relief*  
 Case No. CV-2010-4104-PC

## ISSUES

1. Whether to grant the request to appoint counsel.
2. Whether to grant the Petition for Post Conviction Relief.

## DISCUSSION

### 1. Request for Counsel

#### a. Standard of Review

A request for appointment of counsel in a post conviction proceeding is governed by IC §19-4904<sup>1</sup>, which provides that a court-appointed attorney may be made available to an applicant who is unable to pay the costs of representation. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Id.* (citing *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Idaho Ct.App.1997)). When a district court is presented with a request for appointed counsel, the court will address that request before ruling on the substantive issues in the case. *Id.*

Pursuant to IC §19-4904, the court “should determine if the petitioner is able to afford counsel and whether this is a situation in which counsel should be appointed to assist the petitioner.” *Id.* at 793, 102 P.3d at 1112. In making that analysis, the court considers the typical problems with *pro se* pleadings, *i.e.*, that such pleadings are often conclusory and incomplete and

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<sup>1</sup> § 19-4904. Inability to pay costs.

If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney may be made available to the applicant in the preparation of the application, in the trial court, and on appeal, and paid, on order of the district court, by the county in which the application is filed.

that facts sufficient to state a claim may not be alleged because the *pro se* petitioner does not know what such claims may be. *Id.* (citing *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001)). However, the court must examine the record to determine “whether the facts are such that they justify the appointment of counsel.” *Id.* at 794, 102 P.3d at 1113. In doing so, every inference must run in the petitioner’s favor where the petitioner is unrepresented and cannot be expected to know how to allege the necessary facts. *Id.* At a minimum, the court “must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition.” *Id.*

If, after examining a petitioner’s claims, the court determines that such claims are frivolous, “it is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond.” *Id.* at 793, 102 P.3d at 1112; *see also Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Idaho Ct.App. 2004). If the petitioner alleges facts to raise the possibility of a valid claim, the court should appoint counsel in order to give the petitioner an opportunity, working with counsel, to properly allege the necessary supporting facts. *Id.*; *see also Newman*, 140 Idaho at 493, 95 P.3d at 644 (Although the petitioner is not entitled to have counsel appointed in order to search the record for possible non-frivolous claims, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where he has alleged facts supporting some elements of a valid claim.). The court “should provide sufficient information regarding the basis for its ruling to enable the petitioner to supplement the request with the necessary additional facts, if they exist.” *Id.*

Thus, a determination regarding a request for the appointment of counsel and a  
**Notice of Intent to Dismiss**  
*Re: Petition for Post Conviction Relief*  
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determination regarding whether a petition for post conviction relief is subject to summary dismissal are governed by “quite different standards, with the threshold showing that is necessary in order to gain appointment of counsel being considerably lower than that which is necessary to avoid summary dismissal of a petition.” *Judd v. State*, 148 Idaho 22, 218 P.3d 1, 2 (Idaho Ct.App. 2009). As such, “a district court presented with a request for appointed counsel in a post-conviction action must address that request before ruling on the substantive issues in the case and errs if it denies a petition on the merits before ruling on the applicant’s request for counsel.” *Id.* However,

an order that simultaneously dismisses a post-conviction action and denies a motion for appointment of counsel will be upheld on appeal if the petitioner received notice of the fatal deficiencies of the petition and if, when the standard governing a motion for appointment of counsel is correctly applied, the request for counsel would properly be denied - that is, when the petitioner did not allege facts raising even the possibility of a valid claim.

*Id.* at 4.

**b. Analysis**

The Petitioner did not offer any specific facts as to the basis of his request for the appointment of counsel. Instead, Mr. Delgado simply stated: “Petitioner is requesting the appointment of counsel at this time.” (Pet. for Post Conviction Relief at 3.) The Petitioner failed to even offer general contentions regarding his inability to represent himself. Furthermore, the Petition for Post Conviction Relief was filed by “John C. Souza, Attorney for Petitioner.”

As the Petitioner has offered nothing in support of his request for counsel, this Court cannot assess the merits of his claim and therefore must deem Mr. Delgado’s motion to be



frivolous on its face. Consequently, after taking every inference in the Petitioner's favor and carefully considering the request for counsel, including whether this case appears to be one in which counsel should be appointed to assist the Petitioner, as well taking note of the fact that Mr. Delgado's Petition was filed on his behalf by a licensed attorney, this Court must DENY the request for appointment of counsel.

2. **Petition for Post Conviction Relief**

a. **Standard of Review**

A petition for post conviction relief is governed by the Uniform Post Conviction Procedure Act ("UPCPA"), IC §§ 19-4901 – 19-4911. Such a petition initiates a proceeding that is civil in nature. *State v. Gilpin-Grubb*, 138 Idaho 76, 79, 57 P.3d 787, 790 (2002); *State v. LePage*, 138 Idaho 803, 806, 69 P.3d 1064, 1067 (Idaho Ct.App. 2003). Under IC § 19-4901(a), a person who is convicted of or sentenced for a crime may institute a proceeding to secure relief based on a claim that the conviction was in violation of the state or federal constitutions or the laws of Idaho, or that "there exists evidence of material facts, not previously presented and heard, that requires the vacation of the conviction or sentence in the interests of justice," among other grounds.

Pursuant to IC § 19-4901(b), a petition for post conviction relief is not a substitute for appeal. A petitioner is not allowed to raise any issue that could have been raised on a direct appeal, but was not so raised, unless those issues were not known and could not have reasonably been known at the time of the appeal. *Raudebaugh v. State*, 135 Idaho 602, 603, 21 P.3d 924,

925 (2001). Similarly, a post conviction petitioner may not re-litigate the same issues that were already presented in a direct appeal. *Gilpin-Grubb*, 138 Idaho at 81, 57 P.3d at 792.

IC § 19-4902(a)<sup>2</sup> establishes the time limits for the filing of a petition for post conviction relief, requiring that “[a]n application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later.” That section of the code also requires that “[f]acts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.”

IC § 19-4903<sup>3</sup> further demands that a petitioner state and identify in the application for post conviction relief the grounds upon which the application is based, the specific relief requested, all previous proceedings in the case and the facts that are within the personal

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<sup>2</sup> **19-4902. Commencement of proceedings--Verification--Filing--Service--DNA testing**

(a) A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The supreme court may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the prosecuting attorney.

<sup>3</sup> **§ 19-4903. Application--Contents**

The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 19-4902. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations, and discussion of authorities are unnecessary.

**Notice of Intent to Dismiss**

*Re: Petition for Post Conviction Relief*

Case No. CV-2010-4104-PC

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knowledge of the petitioner. That section also requires that a petitioner attach affidavits, records and other evidence supporting the allegations, or recite why such evidence is not attached to the application. IC § 19-4903 has been interpreted to require that an application “must present or be accompanied by admissible evidence supporting its allegations, or the application shall be subject to dismissal,” *i.e.*, the application must contain more facts than the “short and plain statement of the claim” that is required of the usual civil complaint by Rule 8(a)(1) of the Idaho Rules of Civil Procedure (“IRCP”). *Goodwin v. State*, 138 Idaho 269, 271-72, 61 P.2d 626, 628-29 (Idaho Ct.App. 2003).

IC § 19-4906(b) permits a court to dismiss the action if the court is satisfied, based on the record, that the petitioner is not entitled to relief and no purpose would be served by any further proceedings. That section also requires that the court, as a prerequisite to dismissal, give the petitioner notice of intent to dismiss and provide twenty days during which the petitioner may respond. However, under IC § 19-4906(c)<sup>4</sup> the court may summarily dispose of the petition upon the motion of either of the parties when, based on the record, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. No notice of intent to dismiss is required for a summary disposition under that section. *Saykhamchone v. State*, 127 Idaho 319, 321-22, 900 P.2d 795, 797-98 (1995). Summary dismissal under either section is the procedural equivalent of a motion for summary judgment. *Ramirez v. State*, 113 Idaho 87, 741

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<sup>4</sup> IC § 19-4906(c). The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

P.2d 374 (Ct. App. 1987); *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct.App. 1994). Thus, in determining whether to summarily dismiss, a court must view the facts in a light most favorable to the petitioner and determine whether those facts would entitle the petitioner to relief if accepted as true. *Ferrier v. State*, 135 Idaho 797, 798, 25 P.3d 110, 111 (2001); *Goodwin*, 138 Idaho at 272, 61 P.2d at 629; *LePage*, 138 Idaho at 806, 69 P.3d at 1067. If the court finds that the accepted facts entitle the petitioner to relief, the court must conduct an evidentiary hearing. *LePage*, 138 Idaho at 806-07, 69 P.3d at 1067-68.

Summary dismissal of an application may be appropriate, even if the State does not controvert the petitioner's facts, because "the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." *Goodwin*, 138 Idaho at 272, 61 P.2d at 629; *LePage*, 138 Idaho at 807, 69 P.3d at 1068. Further, a petition is "subject to summary dismissal if the petitioner has not presented evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." *Raudebaugh*, 135 Idaho at 604, 21 P.2d at 926.

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct.App.1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.App.1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct.App.1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct.App.1986).



*Franck-Teel v. State*, 143 Idaho 664, 667-68, 152 P.3d 25, 28-29 (Idaho Ct.App. 2007). The court in that case further explained the procedure for summary dismissal when the state has not provided notice of the grounds for dismissal.

[I]f the state's motion fails to give notice of the grounds, the court may grant summary dismissal only if the court first gives the applicant twenty days' notice of intent to dismiss and the grounds therefore, pursuant to Section 19-4906(b). *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct.App.1996). This procedure is necessary so that the applicant is afforded an opportunity to respond and to establish a material issue of fact. *Id.*

*Id.* at 668, 152 P.3d at 29. "On appeal from a summary disposition, [the Court of Appeals] exercises free review. *Yon v. State*, 124 Idaho 821, 822, 864 P.2d 659, 660 (Ct.App.1993); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.App.1988)." *Abbott v. State*, 129 Idaho 381, 382, 924 P.2d 1225, 1228 (Idaho Ct.App. 1996).

**b. Analysis**

Mr. Delgado sets forth the following three grounds in support of his Petition for Post Conviction Relief:

- a) That the sentence imposed was for conduct to which the Defendant did not plead.
- b) That the sentencing Judge sentenced the Defendant for a rape charge that had been dismissed.
- c) That as a result of the aforementioned the Defendant's sentence was excessive.

(Pet. for Post Conviction Relief at 2.) The Petitioner offered no argument in support of these allegations and did not point to the underlying record. The Petitioner further failed to provide this Court with any affidavits or a supporting brief.

As set forth in detail previously, the applicant in a post conviction proceeding must prove the allegations upon which the request for relief is based by a preponderance of the evidence. Therefore, an application for post conviction relief must be verified with respect to facts within the personal knowledge of the applicant and affidavits, records or other evidence supporting its allegations must be attached or the application must state why such supporting evidence is not included with the application. IDAHO CODE ANN. § 19-4903 (2009). This “court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Downing v. State*, 132 Idaho 861, 861, 979 P.2d 1219, 1219 (Idaho Ct.App. 1999) (internal citations omitted).

Mr. Delgado did not offer any affidavits or any other evidence or point to the record in the underlying case in support of his application. In fact, the Petitioner did not even offer any specifics or argument regarding his three grounds in support of post conviction relief. Mr. Delgado did not state why such supporting evidence was not included with his application. As such, the Petitioner’s contentions are no more than conclusory allegations, which this Court is not required to accept. Therefore, as Mr. Delgado has only offered bare and conclusory allegations unsubstantiated by any admissible evidence, he has not satisfied his burden pursuant to the statutes governing post conviction proceedings, and his claim must be dismissed.

#### CONCLUSION

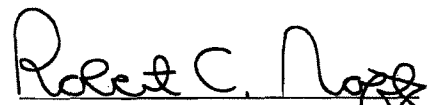
This Court DENIES the Petitioner’s request for the appointment of counsel because this Court finds the Petitioner’s claims are without merit.

Furthermore, no genuine issue of material fact exists in regard to the Petition for Post Conviction Relief since Mr. Delgado only offered bare and conclusory allegations unsubstantiated by any admissible evidence. Mr. Delgado failed to substantiate his claims with the requisite affidavits, records or other evidence. As such, these claims cannot merit post conviction relief.

Therefore, based on the foregoing and in accordance with Idaho Code § 19-4906, this Court hereby indicates its intention to dismiss the Petitioner's request for post conviction relief. The Petitioner must submit a suitable reply, appropriately addressing his arguments in support of post conviction relief, as well as satisfactorily indicating the reasons he is entitled to such relief, within twenty (20) days from the date of the entry of this Notice of Intent to Dismiss. If, after submitting additional information, the Petitioner alleges *facts* sufficient to raise the possibility of a valid claim, rather than bare, conclusory allegations, this Court will again consider whether the claims merit an evidentiary hearing. However, if the Petitioner fails to reply within the allotted time frame, this matter will be dismissed without further action of this Court.

**IT IS SO ORDERED.**

DATED this 8 day of November, 2010.

  
ROBERT C. NAZZARI  
DISTRICT JUDGE

**Copies to:**

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