

5-29-2012

## Cobell v. State Appellant's Brief Dckt. 39321

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

EUGENE RAY COBELL,	)	
	)	
Petitioner-Appellant,	)	DOCKET NO. 39321
	)	
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

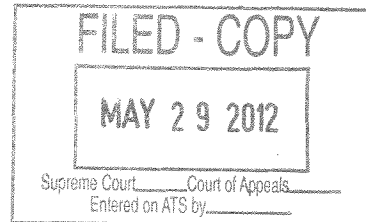
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## STATEMENT OF THE CASE

### Nature of the Case

Eugene Ray Cobell appeals from the district court's order summarily dismissing his successive petition for post-conviction relief. The district court dismissed the petition, on the ground that Mr. Cobell's claim of ineffective assistance of prior post-conviction counsel was not a proper basis upon which to file a successive petition for post-conviction relief. The district court erred.

### Statement of the Facts and Course of Proceedings

Mr. Cobell was charged and convicted of rape and forcible penetration with a foreign object.<sup>1</sup> (R., p.22.) On June 5, 2008, the district court imposed concurrent sentences of life, with ten years determinate, on each charge. (R., p.22.) Mr. Cobell unsuccessfully appealed. (R., p.22.) He then filed a petition for post-conviction relief, which was dismissed on June 18, 2010. (R., p.23.) No appeal was taken from that dismissal. (R., p.23.)

On July 28, 2011, Mr. Cobell filed a successive petition for post-conviction relief. (R., p.3.) He asserted that his first petition was dismissed due to inadvertent omission of key claims and issues, including a claim of actual innocence. (R., p.4.) He further claimed that, due to a medical issue, he was incapable of committing the alleged crime, and this issue raised a "question of ineffective counsel to investigate, expose, and

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<sup>1</sup> The record of the district court proceedings in Mr. Cobell's criminal case and his first post-conviction proceeding were never made part of the record in this case and the district court did not take judicial notice of such records. Accordingly, the procedural history cited in this brief comes from the State's Brief on Objection to Second Petition for Post Conviction Relief and Motion to Dismiss.

present this issue, and opens a gateway to other claims of legal malpractice by trial attorney.” (R., p.8.) He also asserted that his petition alleged prosecutorial misconduct at both the trial and sentencing. (R., pp.9-10.) He specifically asserted that a successive petition could be used to “correct the manifest injustice of denial of ability to effectively file the first U.P.C.P.A.” (R., p.15.) He concluded that he was trying to assert issues that he was not given a fair opportunity to present in his initial post-conviction. (R., p.18.)

The State filed a brief which objected to the petition and moved to dismiss. (R., p.22.) The State asserted that Mr. Cobell’s successive petition had not alleged any reason why grounds for relief were not raised in the first petition, and “to the extent Cobell’s first petition challenged the validity of the district court’s judgment the instant petition is barred by I.C. § 19-4908.” (R., p.26.)

The district court then issued a notice of intent to summarily dismiss the successive petition. (R., p.27.) The district court concluded, “the petitioner’s sole argument that his claims were not adequately raised in his initial post conviction petition is that his post-conviction counsel was ineffective. However, because there is no right to post-conviction counsel, a petition based on ineffectiveness of post-conviction counsel is without merit.” (R., pp.27-28.) Further, “[b]ecause the petitioner has not made any showing why the [sic] his claims were not previously raised, the Court cannot consider this petition.” (R., p.28.)

Mr. Cobell responded to the court’s notice, but the district court summarily dismissed the petition for the reasons set forth in the notice of intent to dismiss. (R., pp.29; 32.) Mr. Cobell appealed. (R., p.34.) Because a claim of ineffective assistance

of prior post-conviction is a proper basis upon which to file a successive petition for post-conviction relief, he asserts that the district court erred by summarily dismissing his petition.

## ISSUE

Did the district court err by summarily dismissing Mr. Cobell's successive petition for post-conviction relief?



## ARGUMENT

### The District Court Erred By Summarily Dismissing Mr. Cobell's Successive Petition For Post-Conviction Relief

#### A. Introduction

In this case, the district court identified a sole basis for the summary dismissal of Mr. Cobell's successive petition for post-conviction relief: that a claim of ineffective assistance of prior post-conviction counsel was not a proper basis upon which to file a successive petition. Because both the Idaho Supreme Court and Court of Appeals have held to the contrary, the district court erred.

#### B. The District Court Erred By Summarily Dismissing Mr. Cobell's Successive Petition For Post-Conviction Relief

##### 1. Summary Dismissal Standard And Standard Of Review

A petition for post-conviction relief initiates a proceeding that is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter*, UPCPA) (I.C. §§ 19-4901 to -4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). However, the petition initiating post-conviction proceeding differs from the complaint initiating a civil action. A post-conviction petition is required to include more than "a short and plain statement of the claim"; it "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 attached.” *Id.*; I.C. § 19-4903. “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Small v. State*, 132 Idaho 327, 331(Ct. App. 1998).

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c).<sup>2</sup> In analyzing a post-conviction petition under this standard, the district court need not “accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Martinez*, 126 Idaho at 816-17. However, if the petitioner presents evidentiary support for his allegations, the district court must take the petitioner’s allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646 (1968). This is so even if the allegations appear incredible on their face. *Id.* Thus, only after the State controverts the petitioner’s allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612 (Ct. App. 1982). But in doing so, it must still liberally construe the facts and draw reasonable inferences in favor of the petitioner. *Small*, 132 Idaho at 331.

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331. If there is no

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<sup>2</sup> Although this standard is set forth in section 19-4906(b), which deals with motions for summary disposition, it appears to apply to *sua sponte* dismissals as well. See, e.g., *Small*, 132 Idaho at 331 (discussing the standard for summary disposition under section 19-4906 generally as being whether a genuine issue of material fact has been presented).

question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

Because evaluation of a motion for summary disposition will never involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court will review a district court's summary dismissal order *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03 (2006).

## 2. Mr. Cobell's Claim Was Properly Presented In A Successive Petition

The UPCPA provides that, generally, only one petition for post-conviction relief is allowed. I.C. § 19-4908. There is an exception, however, for situations in which there is "a ground for relief asserted [in a successive petition] which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." *Id.* Idaho's appellate courts have consistently held that the ineffective assistance of post-conviction counsel is just such a "sufficient reason" for the petitioner to raise or re-raise claims through successive petitions for post-conviction relief. Indeed, on the issue of inadequately-raised claims, the Court of Appeals recently held as follows:

A successive petition for post-conviction relief may be summarily dismissed if the grounds for relief were finally adjudicated or waived in the previous post-conviction proceeding. I.C. § 19-4908. *Such grounds may be re-litigated, however, if the petitioner shows sufficient reason why they were inadequately presented in the original case. Id. Therefore, although a claim of ineffective post-conviction counsel, standing alone, is not grounds for post-conviction relief, an allegation that a claim was not adequately presented in the first post-conviction action due to the deficiency of prior post-conviction counsel, if true, provides sufficient reason to permit the claims to be presented again in a subsequent petition.*

*Griffin v. State*, 142 Idaho 438, 441 (Ct. App. 2006) (emphasis added). In *Griffin*, the district court had summarily dismissed the petitioner's successive petition on the following basis: "It does not appear that any new issues have been presented. . . . [T]his Court hereby notifies the above parties of its intention to dismiss the application for post-conviction relief . . . because it is a successive application raising issues already adjudicated which is not permitted." *Griffin*, 142 Idaho at 440. Under these circumstances (and in light of the standard articulated above), the Court of Appeals held that the district "court's notice of intent to dismiss was insufficient or erroneous because the court did not give proper consideration to Griffin's allegation that his first post-conviction action was dismissed due to the ineffective assistance of post-conviction counsel," and it vacated the district court's dismissal order and remanded the case. *Id.* at 441-42.

Thus, it is clear that a claim of ineffective assistance of post-conviction counsel can present a sufficient reason to file a successive petition. The Idaho Supreme Court agrees. *See, e.g., Palmer v. McDermitt*, 102 Idaho 591, 596 (1981) ("[I]neffective assistance of prior post-conviction counsel, if true, would warrant a finding that the omission in the prior post-conviction proceeding of the allegations now being raised anew by [the petitioner] was not a result of an active, knowing choice made by [the petitioner] through his prior court-appointed attorney, and would therefore provide sufficient reason for permitting the newly asserted allegations to be raised in the instant petition.").

In its notice of intent to dismiss, the district court articulated only one basis for dismissal. (R., p.27.) The district court concluded, "the petitioner's sole argument that

his claims were not adequately raised in his initial post conviction petition is that his post-conviction counsel was ineffective. However, because there is no right to post-conviction counsel, a petition based on ineffectiveness of post-conviction counsel is without merit.” (R., pp.27-28.) Further, “[b]ecause the petitioner has not made any showing why the [sic] his claims were not previously raised, the Court cannot consider this petition.” (R., p.28.) The district court cited *Follinus v. State*, 127 Idaho 897 (Ct. App. 1995), for this proposition. *Follinus* is inapplicable.

In *Follinus*, the defendant filed a petition for post-conviction relief, asserting that his trial counsel was ineffective. *Id.* at 899. The district court summarily dismissed his petition and he appealed. *Id.* During the appeal, the defendant asserted that his post-conviction counsel was ineffective. *Id.* The Court of Appeals concluded, “because there is no constitutional right to an attorney in state post-conviction proceedings ‘a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.’” *Id.* at 902 (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)). As such, “a denial of effective representation does not merit a remedy on appeal where there is no right to counsel.” *Id.* at 903.

The district court misapplied *Follinus*. *Follinus* applies where a petitioner seeks relief due to the alleged ineffective assistance of post-conviction counsel. This is a separate issue from whether the alleged ineffective of post-conviction counsel can justify a successive petition, which *Griffin* discussed: “

although a claim of ineffective post-conviction counsel, standing alone, is not grounds for post-conviction relief, an allegation that a claim was not adequately presented in the first post-conviction action due to the deficiency of prior post-conviction counsel, if true, provides sufficient reason to permit the claims to be presented again in a subsequent petition.

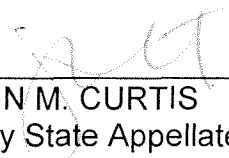
*Griffin*, 142 Idaho at 441.

The law is clear that the ineffective assistance of post-conviction is just such a “sufficient reason” for the petitioner to raise or re-raise claims through successive petitions for post-conviction relief. Because the district court erred by concluding that an allegation of effective assistance of post-conviction counsel was not a sufficient reason to raise claims in a successive petition, this case must be remanded for further proceedings.

#### CONCLUSION

Mr. Cobell requests that the district court’s order summarily dismissing his petition for post-conviction relief be reversed and his case remanded for further proceedings.

DATED this 29<sup>th</sup> day of May, 2012.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29<sup>th</sup> day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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