

10-2-2012

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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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

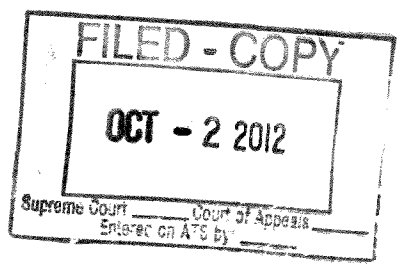
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## STATEMENT OF THE CASE

### 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

The statement of the facts and course of proceedings were previously articulated in Mr. Cobell's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## 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. This Reply Brief addresses the State's response that Mr. Cobell's petition was untimely and an improper successive petition.

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

##### 1. Timeliness

The State asserts that, because Mr. Cobell's successive petition was filed more than one year after the issuance of the remittitur in his direct appeal, it was not a timely petition. The State's argument is flawed for two reasons.

First, the district court did not provide notice that it intended to dismiss on this ground, and thus, Mr. Cobell was not afforded an opportunity to demonstrate whether this petition was timely. The district court articulated a sole basis for dismissing the petition – that a claim of ineffective assistance of post-conviction counsel was not a “sufficient reason” for a petitioner to be able to raise or re-raise claims through successive petitions. (R., pp.27-28.) As set forth in the Appellant's Brief, the district court was incorrect. Thus, Mr. Cobell was not on notice that he needed to address

timeliness in order to survive summary dismissal. And as the State notes, the time period for filing a petition for post-conviction relief can be expanded if the petitioner can make a showing that the limitation period should be tolled. (Respondent's Brief, p.8 (citing *Rhoades v. State*, 148 Idaho 247 (2009)). Mr. Cobell was never afforded the opportunity to address the timeliness of his successive petition, and thus this Court cannot affirm the district court on this alternate basis.

Second, the deadline for the filing of Mr. Cobell's successive petition was not one year from the date of the remittitur in his direct appeal. Rather, and as noted by the State, this Court applies a "reasonable time" standard to determine the timeliness of a successive petition. (Respondent's Brief, pp.7-8. (citing *Charboneau v. State*, 144 Idaho 900, 904 (2007)). The State asserts that, "Cobell does not argue that his claims were not know to him or could reasonable have been known to him in the requisite time-frame for filing his initial post-conviction petition." (Respondent's Brief, p.8.) However, this overlooks the fact that Mr. Cobell asserted that his post-conviction counsel were ineffective; by definition, this claim could not have been raised in the initial post-conviction proceeded; it must be address in a successive petition. And the State has not asserted that Mr. Cobell's successive petition was not filed within a "reasonable time" of the dismissal of his first petition. Thus, the State's argument regarding timeliness fails.

## 2. Successive Petition

The State argues generally that Mr. Cobell's claim was insufficient to withstand summary dismissal, but never actually defends the district court's sole reason for



dismissal. (Respondent's Brief, p.9-12.) Rather, the State miscasts Mr. Cobell's claim into a different one. The State asserts:

Cobell does not assert on appeal that he had insufficient notice that his successive petition for post-conviction relief would be summarily dismissed for failure to show a sufficient reason his claims were not raised in his initial petition, instead he argues he is entitled to relief because the district court misstated the law. (Appellant's brief, pp.8-10.) Cobell's position appears to be all that is required to avoid summary dismissal of a successive petition for post-conviction relief is the mere statement that post-conviction counsel was ineffective. (See Appellant's brief, pp.8-9.)

(Respondent's Brief, p.10.) The State is correct that Mr. Cobell did not assert that he received insufficient notice of the reason that his petition would be dismissed. However, Mr. Cobell was not on notice that his petition would be "summarily dismissed for failure to show a sufficient reason his claims were not raised in his petition," as the State asserts. The district court clearly gave notice for the reason it was dismissing the petition – that *Follinus v. State*, 127 Idaho 897 (Ct. App. 1995), provided that, "there is no right to post-conviction counsel, [and] a petition based on ineffectiveness of post-conviction counsel is without merit." (R., pp.27-28.) The district court could not have been clearer:, "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."

The State then miscasts Mr. Cobell's argument as, "Cobell's position appears to be all that is required to avoid summary dismissal of a successive petition for post-conviction relief is the mere statement that post-conviction counsel was ineffective." (Respondent's Brief, p.10.) This is not Mr. Cobell's position. Rather, Mr. Cobell's position is that the sole basis for the dismissal in this case was error. Mr. Cobell appealed the only adverse ruling that the district court made – that *Follinus* precluded


the filing of a successive petition. Again, the State makes no argument that this is a correct statement of the law. Rather, the State asks this Court to envision a scenario where the district court actually gave a correct reason to dismiss the petition and then argue that, because Mr. Cobell did not assert that that reason was error, his petition was summarily dismissed. What the State is really asking this Court to do is affirm on an alternative theory upon which the district court did not give notice.

Mr. Cobell did not have notice, as the State asserts, that his petition would be dismissed generally for failure to show why his claims were not addressed in the initial petition. The district court noted that Mr. Cobell's **sole reason** for bringing the petition was a claim of ineffective assistance of post-conviction counsel and that his claim failed as a matter of law pursuant to *Follinus*. This was error. The district court did not put Mr. Cobell on notice that his assertion was inadequate to survive summarily dismissal – it held that the allegation itself could never justify such a petition. Because the district court did not put Mr. Cobell on notice that he did not *sufficiently* allege a claim of ineffective assistance of counsel, affirming on this basis would be error because the court never gave Mr. Cobell an opportunity to rebut such a claim. The order summarily dismissing the petition must therefore be reversed.

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 2<sup>nd</sup> day of October, 2012.

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

CERTIFICATE OF MAILING

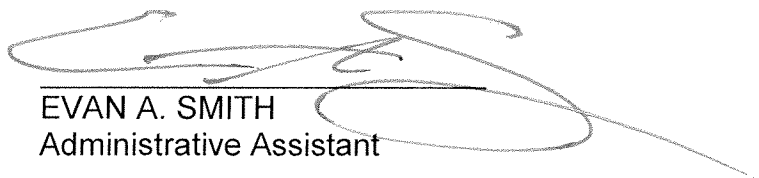
I HEREBY CERTIFY that on this 2<sup>nd</sup> day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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MICHAEL E WETHERELL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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