

5-9-2013

# Escobedo v. State Respondent's Brief Dckt. 40276

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

OMAR ESCOBEDO,

)

No. 40276

Petitioner-Appellant,

)

Twin Falls Co. Case No.

vs.

)

CV-2012-718

STATE OF IDAHO,

)

Respondent.

)

)

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS**

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**HONORABLE JOHN K. BUTLER  
District Judge**

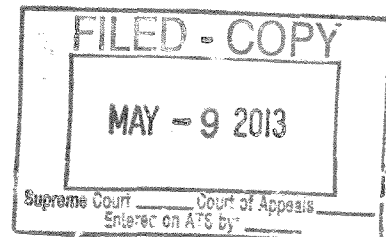
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**LAWRENCE G. WASDEN  
Attorney General  
State of Idaho**

**SPENCER J. HAHN  
Deputy State Appellate  
Public Defender  
3647 Lake Harbor Lane  
Boise, Idaho 83703  
(208) 334-2712**

**PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division**

**NICOLE L. SCHAFER  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534**



**ATTORNEYS FOR  
RESPONDENT**

**ATTORNEY FOR  
PETITIONER-APPELLANT**

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## STATEMENT OF THE CASE

### Nature of the Case

Omar Escobedo appeals from the district court's order summarily dismissing his petition for post-conviction relief.

### Statement of Facts and Course of the Underlying Criminal Proceedings

The facts of the underlying criminal case were set forth by the Idaho Court of Appeals in Escobedo's prior appeal as follows:

According to the state's evidence, while his girlfriend's daughter, A.G., was in third grade, Escobedo came home early one morning during A.G.'s Christmas break from school. He spent the night in her mother's room, and then around 7 a.m., entered her room where she and her six-year-old brother were playing video games. He proceeded to commit an act of manual to genital contact upon her and then rubbed his penis on her arm and stomach. After Escobedo told her not to tell anyone, she did not report this incident to her mother for over a year and did not report the incident to police until March 2005. She indicated on several occasions – including to a detective and the CARES interviewer – that she believed the abuse had occurred the morning on January 1, 2004, based on the fact that it was the latter half of her Christmas break and her mother's indication as to when Escobedo had gotten a new tattoo, which A.G. had noticed on him while the abuse was occurring.

Escobedo was charged by indictment with one count of lewd conduct with a minor under sixteen, Idaho Code § 18-1508, and one count of sexual abuse of a child under sixteen, I.C. § 18-1506, each alleged to have occurred "on or about the 1<sup>st</sup> day of January, 2004." At trial Escobedo presented an alibi defense, contending that he was with friends and family from December 31, 2003, between 5 p.m. and 7 p.m. through the day of January 1. This included testimony from his mother and stepfather that he had come to their home on the night of December 31 at approximately 3:30 a.m. and that they had seen him downstairs at breakfast on the morning of January 1 at approximately 7 a.m.

At trial, Escobedo objected to jury instruction 13C, which mirrored Idaho model jury instruction 208 and stated in relevant

part, "It is alleged that the crime charged was committed 'on or about' a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date." He contended that the instruction did "nothing but confuse the jury," because the jury would already be instructed that the crime must have occurred "on or about" January 1 and it interfered with Escobedo's alibi defense. The trial court disagreed and included the instruction.

The jury found Escobedo guilty of both counts . . .

State v. Escobedo, Unpublished Opinion No. 37050 at \*1-2 (Ct. App. May 31, 2011).

Escobedo argued on appeal that the district court erred in giving jury instruction 13C because it was "misleading and substantially prejudiced" his case and constituted a fatal variance because it effectively altered the nature of the charges contained within the Indictment." Id. at \*2 (footnote omitted). The Idaho Court of Appeals affirmed Escobedo's judgment of conviction after finding the district court did not err in giving jury instruction 13C . Id. at \*6.

#### Statement of Facts and Course of Post-Conviction Proceedings

Escobedo filed a timely *pro se* petition for post-conviction relief alleging 20 separate claims upon which he sought relief. (R., pp.7-16.) He also filed an 11-page "Affidavit In Support Of Petition For Post Conviction Relief" (R., pp.18-28), to which he referred in his petition (R., p.17). The state filed an answer generally denying Escobedo's claims. (R., pp.53-57.) The state also filed a motion for summary disposition (R., pp.69-70) and a brief in support of the motion, addressing each of the claims asserted in Escobedo's petition for post-conviction relief (R., pp.71-83). Although the district court granted Escobedo's motion for

counsel (R., pp.103-105, 109), Escobedo continued to file *pro se* documents, including a reply and affidavit in support of his reply to the state's motion for summary dismissal (R., pp.113-124, 127-140).

Counsel for Escobedo appeared at the motion for summary disposition, but Escobedo did not. (R., p.335.) After conducting the hearing, the district court entered an order dismissing Escobedo's petition on all but one claim. (R., pp.341-371.) In its order, the court went through each of Escobedo's 20 individual claims as outlined in his petition for post-conviction relief and ultimately dismissed all but one claim which was set for evidentiary hearing. (R., pp.348-370.) The parties resolved the one remaining claim by stipulation and the district court entered a final judgment. (R., pp.373-374.)

Escobedo timely appealed. (R., pp.376-380.)



## ISSUE

Escobedo states the issue on appeal as:

Did the district court err when it summarily dismissed Mr. Escobedo's exhaustion claim?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Escobedo failed to show error in the summary dismissal of his post-conviction petition?

## ARGUMENT

### Escobedo Has Failed To Establish Error In The Summary Dismissal Of His Post-Conviction Petition

#### A. Introduction

Escobedo challenges the dismissal of his post-conviction petition, arguing that the district court failed to address one of his claims. (Appellant's brief, pp.5-7.) Specifically, Escobedo argues that the district court failed to address an allegation, set forth at page 10 of his 11-page affidavit in support of his post-conviction petition, that

Counsel finally sent me a copy of the Court of Appeals Opinion, but it was to [sic] late to file a Petition for Review, due to the fact my 21 day deadline to file for review or rehearing had expired (Prejudice/Deficient Performance) and this did not allow me to exhaust my State remedies.

(R., p.27.) According to Escobedo, this was a claim that trial counsel was ineffective for failing to timely provide him with a copy of the Court of Appeals' decision in his case. (Appellant's brief, pp.5-7.) The district court apparently did not perceive it as such, as it did not specifically address this "claim" in its order dismissing Escobedo's petition. (See generally R., pp.341-371.) Escobedo now argues that the district court erred and the case must be remanded for consideration of this "claim" by the district court. (Appellant's brief, pp.7-8.) Escobedo's argument is without merit.

Escobedo's petition does not include an "exhaustion claim," nor was the district court required to scour the affidavit in support of Escobedo's petition to divine the "claim" Escobedo now contends should have been addressed.

Because Escobedo did not allege the “claim” in his petition, he cannot complain for the first time on appeal that the district court failed to address it.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Escobedo Should Be Precluded From Arguing For The First Time On Appeal That The District Court Failed To Address A “Claim” Never Alleged By Escobedo In His Petition

An application for post-conviction relief must “specifically set forth the grounds upon which the application is based, and clearly state the relief desired.” I.C. § 19-4903; Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004); Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008). Pursuant to I.C. § 19-4908, “[a]ll grounds for relief must be raised in the original, supplemental, or amended **application**.” Monahan, 145 Idaho at 875, 187 P.3d at 1250 (citing I.C. § 19-4908) (emphasis added); Dunlap, 141 Idaho at 56, 106 P.3d at 382. A ground for relief known to the petitioner but not set forth in the original, supplemental or amended application is waived. I.C. § 19-4908. Lake v. State, 126 Idaho 333, 882 P.2d 988 (Ct. App. 1994).

Escobedo’s *pro se* post-conviction petition specifically set forth twenty separate grounds for relief. (R., pp.8-16.) Nowhere in his *pro se* petition did

Escobedo allege the claim he now asserts the district court failed to address – *i.e.*, that his appellate counsel was ineffective for failing to provide Escobedo with a copy of the opinion issued by the Idaho Court of Appeals in his direct appeal within the timeline necessary to file a petition for review, thereby “preventing him from exhausting all of his state court remedies on direct appeal.” (Appellant’s brief, p.5.) Nor did Escobedo’s post-conviction counsel ever seek or obtain leave of the court to amend Escobedo’s petition to assert such a claim. Because Escobedo did not specifically (or even generally) allege this claim in his post-conviction petition, the claim was waived and the district court necessarily did not err by failing to address it. I.C. § 19-4908; see also Kelly v. State, 149 Idaho 517, 523-24, 236 P.3d 1277, 1283-84 (2010) (“It is clearly established under Idaho law that a cause of action not raised in a party’s pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.”) (citations and internal quotation marks omitted); Cole v. State, 135 Idaho 107, 110-11, 15 P.3d 820, 823-24 (2000) (district court did not err in summarily dismissing post-conviction petition without considering claims neither alleged in the original petition, nor properly before the court in an amended petition filed without leave of the court).

On appeal, even Escobedo does not cite his post-conviction petition as the source of his claim that trial counsel was ineffective for not providing him with a copy of the Court of Appeals’ decision within 21 days of its issuance. (See generally Appellant’s brief.) He points instead to a few lines of text in the affidavit he filed in support of his petition, where he asserted:

Counsel finally sent me a copy of the Court of Appeals Opinion, but it was to [sic] late to file a Petition for Review, due to the fact my 21 day deadline to file for review or rehearing had expired (Prejudice/Deficient Performance) and this did not allow me to exhaust my State remedies.

(R., p.27 (cited in Appellant's brief, p.6).) Escobedo's affidavit was not, however, sufficient to raise the exhaustion of claims issue Escobedo now argues the district court failed to address. Escobedo's only reference to the affidavit in his petition is a single line before his signature stating "[t]his petition may be accompanied by affidavits in support of the petition." (See R., p.17.) Escobedo did not include any specific claim in the actual petition that counsel was ineffective for failing to provide him with a copy of the Court of Appeals decision in his case within the time period for Escobedo to file a petition for review. (See generally R., pp.8-16.) Attaching an affidavit of facts and argument to a petition and requiring the district court to ferret out the "claims" therein does not meet the requirement of I.C. §§ 19-4903 and 19-4908 that all grounds for relief be specifically set forth in the petition itself. Because Escobedo did not allege the "claim" in his petition, the district court was not required to address it. Cole, 135 Idaho at 110-11, 15 P.3d at 823-24. Escobedo has therefore failed to establish the court erred by failing to do so.

Additionally, Escobedo failed to bring any perceived failure by the state to address his exhaustion "claim" to the attention of the state or the court in his objection to the state's motion for summary disposition. (See, R., pp.113-124.) Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own

initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. A claim for post-conviction relief will be subject to summary dismissal if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof. DeRushé v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal is permissible 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. State v. Goodwin, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002). 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).

Idaho Code Sections 19-4906(b) and (c) provide that notice must be given to an applicant prior to summary dismissal of an application for post-conviction relief. The notice procedures contained in I.C. § 19-4906(b) and (c) provide an applicant an opportunity to respond to a motion for summary dismissal and to establish a material issue of fact if one exists. Flores v. State, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). Pursuant to I.C. § 19-4906(c), the district

court may dismiss an applicant's post-conviction claims on the motion of either party. If the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. Martinez v. State, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995).

Escobedo asserts that the district court erred because, he claims, the district court dismissed the petition without addressing his exhaustion "claim." (Appellant's brief, pp.1-3.) If an applicant for post-conviction relief believes the grounds for dismissal alleged by the state in its motion for summary dismissal are insufficient, he or she must object in the court below. Kelly v. State, 149 Idaho 517, 522 n.1, 236 P.3d 1277, 1282 n.1 (2010). It was incumbent upon Escobedo to alert the state and the court that they had overlooked one of his "claims" and he failed to do so.

Ultimately, Escobedo's claim of ineffective assistance by counsel for failure to provide Escobedo with the Court of Appeals' decision within the statutory timeframe for the filing of an appeal is not supported by the record in this case. As framed by Escobedo on appeal, the crux of the allegation in his affidavit filed in support of his post-conviction petition was that appellate counsel was ineffective for failing provide him with a copy of the Idaho Court of Appeals' decision within 21 days, "thereby depriving him of the opportunity to seek review with the Idaho Supreme Court and causing him prejudice." (Appellant's brief, p.6.) To succeed on this claim, Escobedo was required to demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466

U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989).

Although Escobedo asserts on appeal that he presented a *prima facie* case in support of his exhaustion “claim” because it satisfied both prongs of Strickland (Appellant’s brief, pp.6-7), the record belies this assertion. To support his argument that he established a *prima facie* case of ineffectiveness of counsel pursuant to Strickland, Escobedo points to a brief passage in a ten-page, handwritten affidavit supporting his opposition to the state’s motion for summary dismissal of his petition for post-conviction relief. (Appellant’s brief, p.6.) Escobedo’s “claim” is that “his attorney failed to file a petition for review or provide him with a copy of the Opinion within the time required for filing a petition for review.” (Appellant’s brief, p.6 (citing R., p.130).) Escobedo made only a bare allegation of the attorney’s deficiency in his affidavit, and did not list any uncontroverted facts or law that would be considered a factual showing of prejudice. Additionally, Escobedo’s bare allegation is contrary to Exhibit 7 attached to Escobedo’s affidavit in support of his motion opposing summary dismissal which consists of a letter to Escobedo from his attorney and makes it clear Escobedo did not request the filing of a petition for review:

I am in receipt of your correspondence dated October 21, 2011 and, quite frankly, **I am confused by its contents**. As you will recall, I wrote to you on June 6, 2011, and advised you of the time frame in which to file a Petition for Review and requested that you contact me in writing if you wished to proceed. I did not receive any instructions in that regard, and therefore, closed your file. Additionally, there was a comment made by one of your family members that you did not receive a copy of the Opinion and, therefore, I again mailed a copy to you on July 6, 2011.



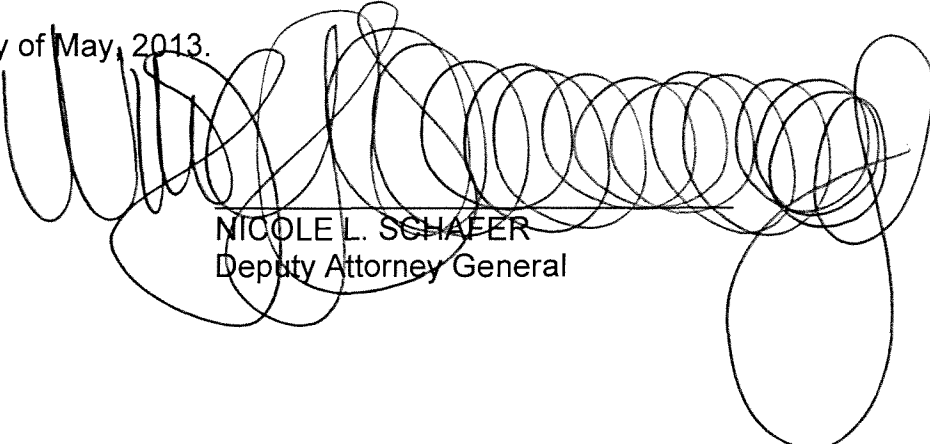
(R., p.160 (emphasis original).)

Review by the Supreme Court is not a foregone conclusion. Escobedo's attorney filed a direct appeal on his behalf, and further review by the Idaho Supreme Court is not something to which a party is entitled as a matter of right. Hernandez v. State, 127 Idaho 690, 905 P.2d 91 (Ct. App. 1995), aff'd. 127 Idaho 685, 905 P.2d 86. Escobedo cannot show that his attorney's performance was deficient. Likewise, because he failed to allege any claim on which he could have prevailed in federal habeas corpus proceedings had he exhausted his remedies in state court, he failed to allege any prejudice. Hernandez v. State, 127 Idaho 685, 905 P.2d 86 (1995). Accordingly, even if the district court erred in dismissing Escobedo's petition without specifically addressing the "claim" regarding appellate counsel's failure to file a petition for review, such error was harmless because Escobedo is unable to establish his attorney's conduct was deficient.

#### CONCLUSION

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

DATED this 9<sup>th</sup> day of May, 2013.



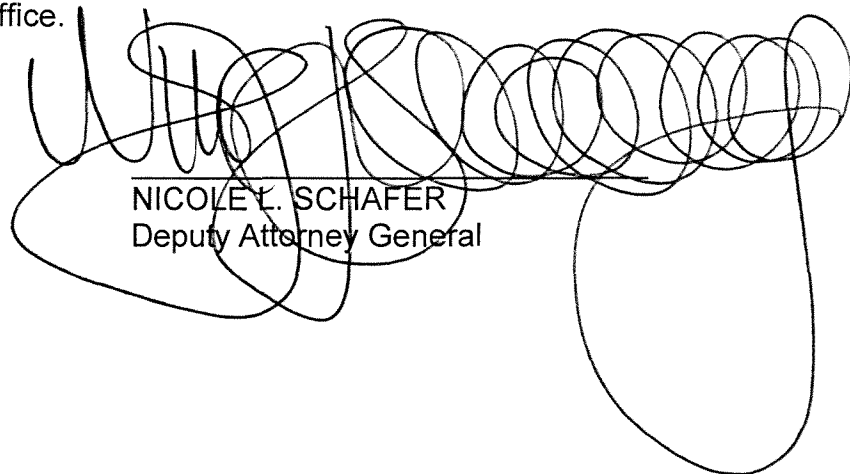
NICOLE L. SCHAEFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9<sup>th</sup> day of May, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm