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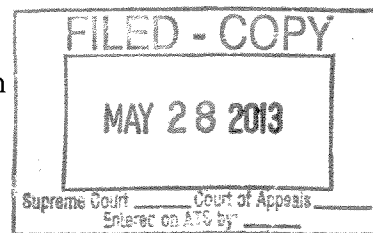
IN THE SUPREME COURT OF THE STATE OF IDAHO

CLYDE OWEN DIXEY, JR.,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

S. Ct. No. 40323
Bingham Co. Case CV-2011-2688

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Seventh
Judicial District of the State of Idaho
In and For the County of Bingham



HONORABLE DARREN B. SIMPSON
Presiding Judge

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TABLE OF CONTENTS

I. Table of Authorities ii

II. Statement of the Case 1

 A. Nature of the Case 1

 B. General Course of Proceedings 1

 1. Underlying criminal proceedings 1

 2. Post-conviction proceedings 3

III. Issue Presented on Appeal 6

IV. Argument 7

 A. Applicable Standard 8

 B. Mr. Dixey Presented an Issue of Fact as to Whether Post-Conviction Counsel’s Ineffective Assistance Presented Sufficient Reason Justifying a Successive Petition 10

 1. Mr. Dixey’s claim that trial counsel should have corroborated that he did not own the pickup and that the pickup’s owner matched the perpetrator’s description was not addressed in the initial post-conviction proceedings 11

 2. Mr. Dixey presented an issue of fact concerning whether post-conviction counsel’s ineffective assistance presented sufficient reason justifying raising the pickup ownership issues in a successive petition 19

 3. Counsel did not waive Mr. Dixey’s claim regarding the pickup ownership issues by neglecting to artfully argue the issue 16

 C. The District Court Did Not Address Whether There was an Issue of Fact as to Whether Trial Counsel was Ineffective for Failing to Develop and Present the Ownership Issues With the Pickup to the Jury and This Court Cannot Affirm the Dismissal on That Basis 18

V. Conclusion 19

I. TABLE OF AUTHORITIES

FEDERAL CASES

<i>Gideon v. Wainwright</i> , 372 U.S. 335	9
<i>Strickland v. Washington</i> , 466 U.S. 668	9

STATE CASES

<i>Abbott v. State</i> , 129 Idaho 381, 924 P.2d 1225	10
<i>Aragon v. State</i> , 114 Idaho 758, 760 P.2d 1174	9
<i>Baker v. State</i> , 142 Idaho 411, 128 P.3d 948	10
<i>Buss v. State</i> , 147 Idaho 514, 211 P.3d 123	19
<i>Charboneau v. State</i> , 140 Idaho 789, 102 P.3d 1108	14
<i>Franck-Teel v. State</i> , 143 Idaho 664, 152 P.3d 25	17
<i>Goodwin v. State</i> , 138 Idaho 269, 61 P. 3d 626	8, 9
<i>Griffin v. State</i> , 142 Idaho 438, 128 P.3d 975	10
<i>Hernandez v. State</i> , 133 Idaho 794, 992 P.2d 789	10
<i>Kelly v. State</i> , 149 Idaho 517, 236 P.3d 1277	19
<i>Martinez v. State</i> , 143 Idaho 789, 152 P.3d 1237	9
<i>Mellinger v. State</i> , 113 Idaho 31, 740 P.2d 73	10
<i>Milburn v. State</i> , 130 Idaho 649, 946 P.2d 71	9
<i>Mitchell v. State</i> , 132 Idaho 274, 971 P.2d 727	9
<i>Murray v. State</i> , 121 Idaho 918, 828 P.2d 1323	9
<i>Palmer v. Dermitt</i> , 102 Idaho 591, 635 P.2d 955	10
<i>Ricca v. State</i> , 124 Idaho 894, 865 P.2d 985	9

<i>Saykhamchone v. State</i> , 127 Idaho 319, 900 P.2d 795	19
<i>Schwartz v. State</i> , 145 Idaho 186, 177 P.3d 400	10
<i>Sparks v. State</i> , 140 Idaho 292, 92 P.3d 542	8
<i>State v. Elison</i> , 135 Idaho 546, 21 P.3d 483	9
<i>State v. LePage</i> , 138 Idaho 803, 69 P.3d 1064	8
<i>Wolfe v. State</i> , 113 Idaho 337, 743 P.2d 990	10

STATE STATUTES

I.C. § 19-4906	18, 19
I.C. § 19-4908	6, 10, 18

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's judgment dismissing Mr. Clyde Owen Dixey's successive petition for post-conviction relief without an evidentiary hearing.

B. General Course of Proceedings

1. Underlying criminal proceedings

The state accused Mr. Dixey of two counts of burglary – one for allegedly entering a building at Ogden's Tires in Blackfoot with the intent to commit theft on September 29, 2006 and another for entering a building at Ogden's Tires on November 17, 2006. *State v. Dixey*, Bingham County Case No. CR-2006-11126,¹ Jury Trial Transcript (Trial Tr.), p. 66, ln. 25 - p. 67, ln. 21. At trial, an Ogden's employee testified that one afternoon in late September 2006, he was driving a vehicle behind the business on his way to throw out junk tires when he observed a primer grey, 1970s Chevy pickup by a warehouse. Trial Tr. p. 73, ln. 1-21; p. 87, ln. 11-16; p. 89, ln. 1-5. The employee testified that he observed an "older Native American" from 25 to 30 yards away throwing a tire into the pickup. *Id.* at p. 73, ln. 22 - p. 74, ln. 6. The employee asked the person what he was doing and, instead of answer, the person dropped a tire, got in his truck and left. *Id.* at p. 74, ln. 7-14. The employee recorded the truck's license plate number and later provided it to police. *Id.* at p. 75, ln. 8-20.

The employee testified that during a mid afternoon in November, he was going out back

¹ Contemporaneous with this brief, Mr. Dixey is filing a motion to augment the instant appellate record with various documents from his initial petition for post-conviction relief, *Dixey v. State*, Bingham County Case No. CV-2008-2750, and the underlying criminal case, *State v. Dixey*, Bingham County Case No. CR-2006-11126, which were relied on by the district court in dismissing the case.

for a cigarette with another employee when he observed the truck pull up to another building. *Id.* at p. 76, ln. 3-13; p. 87, ln. 17-20. The employee testified that a Native American individual “had just stepped out the door of the warehouse back towards” the same pickup he had observed in September and he went in to notify the store’s owner that the “same guy” was back. *Id.* at p. 76, ln. 5-19; p. 83, ln. 10-19. The employee identified Mr. Dixey as the person at the tire store in September and November based on his “long ponytail hair and build.” *Id.* at p. 77, ln. 11 - p. 78, ln. 6.

Another Ogden Tire employee testified that he had gone out the back door of the store when he observed Mr. Dixey by a primer grey pickup parked near a warehouse. *Id.* at p. 94, ln. 7-21. The employee asked what Mr. Dixey was doing and he replied that he wanted to trade some tires. *Id.* at p. 94, ln. 21-25; p. 95, ln. 18-21. On the employee’s instruction, Mr. Dixey pulled the pickup around to the front of the store. *Id.* at p. 95, ln. 18-21; p. 106, ln. 5-9. The owner went outside and observed that the tires in Mr. Dixey’s pickup did not belong to his store. *Id.* at p. 106, ln. 12-17. Mr. Dixey exited the pickup and asked the owner if he would like to purchase some tires. *Id.* at p. 5-7. The owner turned to the first employee and asked whether Mr. Dixey was the “same guy” and Mr. Dixey left. *Id.* at p. 107, ln. 9-25.

Mr. Dixey testified in his defense and explained that he went to Lew Schwab Tires in November 2006 to inquire about trading in some tires. Les Schawb did not have the size he needed and suggested going to Odgen’s Tires. *Id.* at p. 118, ln. 17 - p. 119, ln. 1. Mr. Dixey then went to Ogden’s Tires and inquired about a trade in. *Id.* at p. 119, ln. 1-25. The owner of Odgen Tires’ responded to Mr. Dixey’s inquiry by yelling that they do not trade in tires and asking where Mr. Dixey got the tires. *Id.* at p. 120, ln. 25 - p. 3. Mr. Dixey concluded Odgen’s was not

amenable to trading the tires and left. *Id.* at p. 121, ln. 3-14. Mr. Dixey testified that he did not go to Ogden's Tires in September 2006 and was not using the primer grey pickup at that time and, instead, began using it mid-October. *Id.* at p. 121, ln. 18 - p. 122, ln. 17; p. 124, ln. 3-8. Mr. Dixey testified that he did not enter the warehouse and did not have any intent to steal when he was at Odgen's Tires in November, 2006. *Id.* at p. 119, ln. 14-16; p. 122, ln. 22 - p. 123, ln. 2.

The jury found Mr. Dixey guilty of both burglary counts and the district court sentenced Mr. Dixey to concurrent unified terms of eight years with minimum periods of confinement of four years. R. 97-98. The sentences were initially suspended and then imposed after a probation violation and relinquishment recommendation following a period of retained jurisdiction. *Id.* at 98.

2. Post-conviction proceedings

On November 18, 2008, Mr. Dixey filed a pro se petition for post-conviction relief in which he hand-wrote his claims on a pre-printed form. CV-2008-2750, Petition for Post-Conviction Relief. Mr. Dixey described various difficulties with his trial attorney, including her derogatory treatment toward him and her failure to vigorously defend his case. *Id.* at p. 1-4, Unnumbered Affidavit. Mr. Dixey wrote that he "did not know that [he] could file this petition [himself until] by chance [he] called appellate [sic] court in Boise" to inquire about the status of his case. *Id.* at p. 4. Counsel was appointed to represent Mr. Dixey in post-conviction proceedings and Mr. Dixey explained to the attorney that trial counsel failed to investigate and present evidence demonstrating that he did not own or drive the primer-grey pickup until October 2006 and that the pickup's previous owner matched the description of the Native American seen at Odgen's Tire in September 2006. R. 5-7.

Despite being informed that trial counsel failed to develop this critical defense, post-conviction counsel failed to investigate the claim or include it in his amended petition. R. 7; *see also* R. 45-46. Instead, counsel simply alleged that Mr. Dixey “does not feel his attorney asked him adequate questions on the stand to allow him to adequately present his side of the story while testifying.” CV-2008-2750, Second Amended Post-Conviction Petition, p. 5. Post-conviction counsel noted that trial counsel cut off Mr. Dixey during direct examination and instructed him to only answer the questions asked. CV-2008-2750, Response to Motion for Summary Disposition, p. 4. Post-conviction counsel alleged that this conduct prevented Mr. Dixey from explaining to the jury that he was not in Blackfoot during September 2006 as he had just been placed on misdemeanor probation and was starting school at Idaho State University. *Id.* Post-conviction counsel failed to further explain the ownership issues with the primer grey pickup in question, including that the pickup’s owner fit the description of the perpetrator. *See id.*

The district court dismissed Mr. Dixey’s ineffective assistance of counsel claim concerning the failure to adequately question him on the stand. The district court noted that during Mr. Dixey’s direct examination, trial counsel inquired whether he owned the primer grey pickup in September 2006. CV-2008-2750, Order Granting in Part Summary Disposition, p. 22. Mr. Dixey responded that he did not believe so and that around that time he was “doing court in Pocatello,” at which point trial counsel interrupted and instructed him to only answer the questions presented. *Id.* The district court concluded that trial counsel’s conduct in preventing Mr. Dixey from elaborating on his misdemeanor matters in Pocatello in front of the jury was reasonable. *Id.*

Mr. Dixey thereafter filed a successive petition for post-conviction relief alleging that

post-conviction counsel inadequately presented his claim that trial counsel was ineffective for failing to investigate and call potential defense witnesses. R. 5. Mr. Dixey explained that he informed trial counsel of an “alibi” – specifically that he did not purchase the primer grey truck at issue until late October 2006 and that the previous owner of the vehicle closely resembled Mr. Dixey. R. 5-6. Thus, while the petition references an “alibi,” Mr. Dixey was clearly describing trial counsel’s failure to develop the prior owner of the vehicle as an alternate perpetrator and to corroborate Mr. Dixey’s testimony that he did not own the vehicle in question when it was seen at Odgen’s Tires in late September 2006. *See* R. 5-7

Mr. Dixey supported his successive petition with a neighbor’s affidavit, who averred that he knew that the primer grey pickup was owned by Margaret Crumbley in September 2006 and that her son, Michael, used the pickup on a regular basis during that time. R. 21. The neighbor further averred that in mid-October 2006, he informed Mr. Dixey that the Crumbleys wished to sell the vehicle and that he observed Mr. Dixey with that pickup after October 26, 2006. Mr. Dixey included the affidavit of the individual who accompanied him to the Crumbley’s to purchase the pickup on October 26, 2006. R. 17.

Mr. Dixey also attached a print-out from the Department of Transportation showing a photograph of Michael Crumley with long, dark hair and indicating he was five feet eleven inches in height. R. 19. The neighbor’s affidavit also alleged that Michael Crumbley was a six foot husky man in his late forty’s with long dark brown hair that he sometimes wore in a ponytail. R. 21. Police reports attached to the successive petition describe the September 2006 suspect as a stocky, six-foot tall Native American with a long ponytail and that the pickup was registered to Margaret Crumbley. R. 31-33.

In the verified successive petition, Mr. Dixey alleged that he informed post-conviction counsel how trial counsel failed to present the issues surrounding the prior ownership of the pickup. R. 6-7; *see also* R. 43-44. Post-conviction counsel nevertheless failed to allege that Mr. Dixey received ineffective assistance of counsel due to trial counsel's failure to call witnesses corroborating that Mr. Dixey did not own the pickup at issue during the relevant time frame and that the pickup's owner met the description of the suspect at Odgen's Tire in September 2006. R. 7. Mr. Dixey argued that post-conviction counsel's failure to include this claim after being informed of its factual basis was ineffective and, thus, he had presented sufficient reason to bring the claim in a successive petition pursuant to I.C. § 19-4908. R. 45-46.

The state moved to summarily dismiss Mr. Dixey's successive petition. R. At the hearing on the state's motion, the district court expressed concern that no materials had been filed in response to the summary judgment motion. Tr. p. 3, ln. 23-25. Post-conviction counsel declined the state and district court's offer to provide additional time and represented that he was prepared to proceed. *Id.* at p. 4, ln. 23 - p. 7, ln. 8. With respect to the "alibi" claim, counsel argued that there was an issue of material fact precluding dismissal although he admitted he did not "know all the details there." *Id.* at p. 5, ln. 13-19; p. 17, ln. 13-15. Counsel then waived the remainder of the claims Mr. Dixey raised in his successive petition. *Id.* at p. 17, ln. 23 - p. 21, ln. 10; *see also* R. p. 96. The district court dismissed Mr. Dixey's petition, finding that he failed to present sufficient reason justifying a successive post-conviction action. R. 103. This appeal follows.

III. ISSUE PRESENTED ON APPEAL

Did the district court err in summarily dismissing Mr. Dixey's successive petition for post-

conviction relief because he presented an issue of material fact as to whether post-conviction counseled was ineffective for failing to present and support his claim that trial counsel should have corroborated that Mr. Dixey did not own the pickup and that the pickup's owner fit the description of the perpetrator of the September 2006 incident?

IV. ARGUMENT

The District Court Erred in Summarily Dismissing Mr. Dixey's Successive Petition for Post-Conviction Relief Because He Presented an Issue of Material Fact as to Whether Post-Conviction Counsel was Ineffective for Failing to Present and Support His Claim That Trial Counsel Should Have Corroborated That Mr. Dixey Did Not Own the Pickup and Presented Evidence That the Pickup's Owner Fit the Description of the Perpetrator of the September 2006 Incident

At trial, Mr. Dixey testified that he did not own the pickup in question in September 2006 and was not at Odgen's Tires on September 29, 2006. Trial counsel failed to present available evidence corroborating that Mr. Dixey did not own the pickup until late October and identifying the pickup's previous driver as an individual matching the description of the September 2006 suspect. Providing the jury with an alternate perpetrator would have significantly bolstered Mr. Dixey's explanation that he was not at the tire store in September and, in November, he was simply trying to trade in some tires. Particularly because the tire store employee observed the September suspect from a distance of twenty-five to thirty yards, there is a reasonable probability that the jury would not have returned guilty verdicts if it had heard evidence concerning the pickup ownership issues.

As alleged in his successive post-conviction petition, Mr. Dixey informed the attorney appointed to represent him in the first post-conviction action that he did not own the pickup in question until late October 2006 and that the person who was using that pickup during September

matched the description of the person seen at Odgen's Tire on September 2006. Post-conviction counsel nonetheless, failed to include or support this claim and, instead, only argued that trial counsel should have allowed Mr. Dixey to explain that he was not in Blackfoot during September because he was on misdemeanor probation and attending school.

The materials presented by Mr. Dixey prior to the appointment of counsel present issues of material fact as to whether trial counsel provided ineffective assistance with respect to the pickup ownership evidence and whether post-conviction counsel was ineffective for not including and supporting this claim after Mr. Dixey informed him of its basis. Although counsel appointed to represent Mr. Dixey in this action failed to effectively or accurately argue this claim to the district court, he did not waive it. Accordingly, the district court erred in summarily dismissing Mr. Dixey's successive petition and the case should be remanded for an evidentiary hearing.

A. Applicable Standard

An application for post-conviction relief initiates a proceeding which is civil in nature. *Sparks v. State*, 140 Idaho 292, 295, 92 P.3d 542, 545 (Ct. App. 2004). Summary dismissal of a post-conviction action, either upon motion of the court or the state, 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 him to the requested relief. *Goodwin v. State*, 138 Idaho 269, 272, 61 P. 3d 626, 629 (Ct. App. 2002). If such a factual issue is presented, an evidentiary hearing must be conducted. *Sparks*, 140 Idaho at 295, 92 P.3d at 545.

On review of a dismissal of a post-conviction relief action without an evidentiary hearing, the appellate court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. *State v. LePage*, 138 Idaho 803,

807, 69 P.3d 1064, 1068 (Ct. App. 2003). Moreover, the appellate court liberally construes the facts and reasonable inferences in favor of the non-moving party. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629; *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

The right of a criminal defendant to counsel during trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, (1963); *Milburn v. State*, 130 Idaho 649, 652, 946 P.2d 71, 74 (Ct. App. 1997). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007); *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). A defendant claiming ineffective assistance of counsel will prevail if he shows that (1) counsel's performance was deficient and, that (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A defendant meets the deficiency prong when counsel's performance falls below an objective standard of reasonableness. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As a general matter, this Court will not attempt to second-guess counsel's strategic and tactical choices. *State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). Nonetheless, this rule does not apply to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* The prejudice prong is met when the defendant shows there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177; *Mitchell*, 132 Idaho at 277, 971 P.2d at 730.

B. Mr. Dixey Presented an Issue of Fact as to Whether Post-Conviction Counsel's Ineffective Assistance Presented Sufficient Reason Justifying a Successive Petition

A ground for post-conviction relief may be raised in a successive petition if the court finds “sufficient reason” explaining why the ground “was not asserted or was inadequately raised in the original, supplemental, or amended application.” I.C. § 19-4908. This statute “does not prohibit successive petitions for postconviction relief in every case, but rather, only prohibits successive petitions in those cases where the petitioner ‘knowingly, voluntarily and intelligently’ waived the grounds for which he now seeks relief, or offers no ‘sufficient reason’ for the omission of those grounds” in the initial post-conviction action. *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981). Several Idaho cases have noted that deficient representation by counsel in an initial post-conviction proceeding, that causes a claim to be inadequately presented to the court, constitutes a “sufficient reason” to allow assertion of the same claim in a subsequent post-conviction petition pursuant to I.C. § 19-4908. *See Palmer*, 102 Idaho at 595-96, 635 P.2d at 959-60; *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); *Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006); *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005); *Hernandez v. State*, 133 Idaho 794, 798-800, 992 P.2d 789, 793-95 (Ct. App. 1999); *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). This construction of the statute is necessary because “failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.” *See Schwartz*, 145 Idaho at 189, 177 P.3d at 403, *citing Hernandez*, 133 Idaho at 799, 992 P.2d at 794; *see also Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996); *Mellinger v. State*, 113 Idaho 31, 35, 740 P.2d 73, 77 (Ct. App. 1987) (Burnett, J.,

concurring).

The district court dismissed Mr. Dixey's successive petition because it found his "alibi defense" had been raised in his original petition and concluded he "waived his ineffective assistance of post-conviction counsel claim with regard to ownership of the grey truck." R. 106 However, the specific issue raised in the successive petition – that trial counsel should have presented evidence regarding the pickup's previous owner – was not addressed in the initial proceedings. Further, Mr. Dixey argued that he should be allowed to litigate trial counsel's failure to raise the pickup ownership issues in a successive petition because post-conviction counsel's "failure to act on the witness information provided by Mr. Dixey" was ineffective and resulted in the dismissal of his initial petition. R. 46; *see also* R. 5-7. The district court failed to address or acknowledge this argument in concluding that Mr. Dixey had not presented sufficient reason to justify a successive petition. Finally, Mr. Dixey's pro se pleadings establish an issue of fact as to whether post-conviction counsel provided ineffective assistance by failing to develop and support Mr. Dixey's claim that trial counsel should have corroborated that Mr. Dixey did not own the pickup during September and that the pickup's owner matched the perpetrator's description. Accordingly, the district court erred in dismissing Mr. Dixey's successive petition and this Court should remand the case for further proceedings.

- 1. Mr. Dixey's claim that trial counsel should have corroborated that he did not own the pickup and that the pickup's owner matched the perpetrator's description was not addressed in the initial post-conviction proceedings**

In dismissing Mr. Dixey's petition for failing to present sufficient reason justifying a successive post-conviction action, the district court noted that Mr. Dixey did not include an alibi defense in his original pro se petition for post-conviction relief. R. 103. The district court then

concluded that the issue had been “vaguely” raised in his second amended petition by alleging trial counsel did not ask “him adequate question while he was on the stand to allow him to adequately present his side of the story while testifying.” *Id.* The district court noted that Mr. Dixey responded to the State’s motion for summary disposition by alleging that trial counsel “cut him off” during his testimony, which prevented him from explaining “to the jury that he wasn't in Blackfoot during the incident on September 29, 2006. R. 103-04, *citing Dixey v. State*, Bingham County Case No. CV -2008-2750, Petitioner's Affidavit in Support of Petitioner's Response to Respondent's Third Motion for Summary Disposition. *Id.* Mr. Dixey wanted to testify “that he had just been placed on misdemeanor probation and was starting school at I.S.U. [and] “didn't have time to run around Blackfoot to be accused of stealing. *Id.* at 104. The district court thus concluded that Mr. Dixey's “alibi evidence was presented in his original post-conviction petition [and] it did not rise to the level of evidence which negated Dixey's ability to be present in at Ogden's Tire Center on September 26, 2006.” *Id.*

However, the portion of Mr. Dixey’s successive petition discussing an “alibi” does not allege that trial counsel should have allowed him to explain to the jury that he was busy between misdemeanor probation and school. Rather, the “alibi” portion of Mr. Dixey’s successive petition alleges that trial counsel failed to investigate and present evidence corroborating that he did not own or drive the primer-grey pickup until October 2006 and establishing that the pickup’s previous owner matched the description on the Native American with a ponytail seen at Odgen’s Tire in September 2006. R. 5-7.

The issues Mr. Dixey raised in the successive petition concerning the pickup’s previous owner were not presented during Mr. Dixey’s initial post-conviction action. The district court’s

discussion of the related issue concerning Mr. Dixey's direct examination and trial counsel's conduct in preventing him from testifying about court and school activities is only relevant to illustrate post-conviction counsel's ineffective assistance in failing to present the ownership issues and to corroborate Mr. Dixey's allegation he informed trial counsel that he did not own the pickup during September 2006.

2. Mr. Dixey presented an issue of fact concerning whether post-conviction counsel's ineffective assistance presented sufficient reason justifying raising the pickup ownership issues in a successive petition

In his successive petition, Mr. Dixey asserted that he informed post-conviction counsel that trial counsel did not investigate the witnesses provided by Mr. Dixey that could have corroborated the timing of his purchase of the pickup and the physical appearance of the pickup's previous driver. R. 6-7. Mr. Dixey argued that "once provided with the witness information from Mr. Dixey, Post conviction counsel had a duty to investigate and elicit witness statements to prepare a successful petition for post-conviction relief." R. 46. Mr. Dixey argued that post-conviction counsel's "failure to act on the witness information provided by Mr. Dixey" was ineffective and resulted in the dismissal of his initial petition. *Id.*

Without any discussion of the foregoing explanation, the district court reasoned: "As for the ownership of the grey truck, Dixey did not raise that issue in his original petition. In his Successive Petition, Dixey has neither shown, nor attempted to explain, why he did not argue or present evidence, in his original petition for post-conviction relief, of the ownership issue." R. 106; *see also* R. 105 (Mr. Dixey offered "no explanation for why this information was not available to him . . . when he filed his original, pro se post-conviction petition . . . when, together with his appointed attorney, he filed his amended petition and an affidavit; . . . when he and his

attorney filed his seconded amended petition and affidavit; or. . . when he and his attorney responded to the State's motion for summary disposition and filed an affidavit”).

Initially, that Mr. Dixey did not describe the pickup ownership issues in his initial pro se petition does little to support waiver of the issue. Trial courts:

should keep in mind that petitions and affidavits filed by a pro se petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the pro se petitioner simply does not know what are the essential elements of a claim.

Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) (internal citation omitted).

The short, hand-written petition, in which Mr. Dixey wrote that he “did not know that [he] could file this petition [himself until] by chance [he] called appellate [sic] court in Boise,” evidences that Mr. Dixey had very little knowledge concerning post-conviction actions. R. 4. As an unrepresented inmate, Mr. Dixey could not “be expected to know how to properly allege the necessary facts.” *Charboneau*, 140 Idaho at 794, 102 P.3d at 1113. Appointment of post-conviction counsel should have given Mr. Dixey “an opportunity with counsel to properly allege the necessary supporting facts.” *Id.* at 793, 102 P.3d at 1112. Mr. Dixey provided his post-conviction attorney with the information necessary to properly develop his claim by informing him of its factual basis and providing him witness information. Counsel performed ineffectively by not including the claim in the amended petitions.

Moreover, the district court’s finding that Mr. Dixey did not attempt to explain why he did not argue or present evidence concerning the pickup ownership issues in his original petition for post-conviction relief is clearly erroneous. Mr. Dixey’s successive petition and his brief in support detail that he provided the omitted information, including the identify of witnesses, to his

post-conviction attorney and that post-conviction counsel ineffectively failed to investigate this information or allege it in either of the amended petitions. The district court erred in failing to address these arguments.

The district court also erred in failing to recognize that Mr. Dixey's allegations concerning post-conviction counsel's ineffective assistance presented an issue of fact regarding whether the pickup ownership issues were not raised in the original petition for sufficient reason. Mr. Dixey supported the successive petition with affidavits of witnesses he alleged trial and post-conviction counsel should have investigated and that could have corroborated when he purchased the pickup. Mr. Dixey supported his allegation that the pickup's previous owner matched the description of the September 2006 suspect with an Idaho Transportation Department photo and description, affidavit and police reports. Providing the jury with such a description was particularly critical in light of the store employee's testimony that he observed the September suspect from a distance of 25-30 yards and that his identifying features were that he had a long-pony tail and was Native America. *See* Trial Tr. p. 73, ln. 22 - p. 74, ln. 6 p. 77, ln. 11 - p. 78, ln. 6. Evidence regarding the pickup ownerships issues would have substantially supported Mr. Dixey's defense and did not run the same risk as informing the jury that Mr. Dixey was busy on misdemeanor probation. There is an issue of fact regarding whether post-conviction counsel was ineffective for failing to develop the pickup ownership issues and, instead, focusing on the allegation that Mr. Dixey should have been able to tell the jury about his court and school activities.

After Mr. Dixey filed a rough and incomplete pro se petition for post-conviction relief, counsel was appointed to represent Mr. Dixey during his initial post-conviction action. Mr. Dixey informed post-conviction counsel that trial counsel failed to corroborate that he did not own the

pickup in question during September 2006 and failed to present evidence that the pickup's previous owner matched the description of the suspect. Post-conviction counsel nevertheless failed to develop or present this claim by speaking with witnesses or including the information in either of the amended petitions for post-conviction relief. Mr. Dixey thus presented an issue of fact justifying an evidentiary hearing as to whether post-conviction counsel's ineffective assistance presents sufficient reason to permit litigating the claim in a successive petition.

3. Counsel did not waive Mr. Dixey's claim regarding the pickup ownership issues by neglecting to artfully argue the issue

The part of Mr. Dixey's successive petition that refers to an "alibi" clearly describes trial counsel's failure to develop the prior owner of the vehicle as an alternate perpetrator and to corroborate Mr. Dixey's testimony that he did not own the vehicle in question when it was seen at Odgen's Tires in late September 2006. Nevertheless, in addressing the "alibi" during oral argument on the state's summary dismissal motion, successive post-conviction counsel indicated he did not understand the basis or details of the defense but that there was nonetheless an issue of fact precluding summary judgment. Successive post-conviction counsel argued that there was an issue of material fact precluding dismissal because if Mr. Dixey had an alibi, and was sitting in jail or in a courthouse at the time of the offense, that would be easily verifiable. Tr. p. 15, ln. 5-10. The district court inquired: "is that what he's saying no is he was in jail?" to which counsel responded:

well, he didn't say that. He said he had court. And so I don't know if Mr. Dixey – in his petition for post-conviction relief, he's saying that he had an alibi. And so it's unclear to me as to if he was in court, in jail, what was going on in Mr. Dixey's life at that time. But I think that there's an issue of fact there.

Tr. p. 15, ln. 13-19.

The district court inquired regarding Mr. Dixey's duty to inform trial counsel of an alibi and counsel neglected to note that Mr. Dixey alleged he informed both trial counsel and post-conviction counsel of the pickup ownership issues (R. 3). Counsel instead argued that although he did not "know all the details there" an issue of fact remained. Tr. p. 17, ln. 13-15. Counsel then waived the remainder of the claims Mr. Dixey raised in his successive petition. *Id.* at p. 17, ln. 23 - p. 21, ln. 10; *see also* R. p. 96.

Post-conviction counsel is permitted to waive claims on behalf of his client during oral argument. *Franck-Teel v. State*, 143 Idaho 664, 670, 152 P.3d 25, 31 (Ct. App. 2006). Thus, Mr. Dixey is bound by his counsel's waiver of the claims other than the "alibi" and must re-litigate those in a second successive post-conviction action.²

Conversely, while counsel's comments with respect to the "alibi" reflect a misunderstanding of that claim, he expressly argued that it should be not dismissed. The claim is clearly described and supported in the pro se materials and the pickup ownership issues were addressed – albeit erroneously – by the district court. Thus, Mr. Dixey's ineffective assistance of counsel claim due to trial counsel's failure to corroborate that he did not own the pickup in September 2006 and that the pickup's previous owner matched the description of the perpetrator was not waived by post-conviction counsel and is properly before this Court.

² Mr. Dixey informed undersigned counsel that he did not consent to the waiver of the remaining claims in his successive petition. Mr. Dixey's counsel in the underlying proceedings neither filed an affidavit, letter nor amended petition setting forth a knowing waiver of those claims. Additionally, Mr. Dixey was not transported for the hearing on the State's motion for summary dismissal. Thus, none of the precautionary measures noted in *Franck-Teel* to prevent the need for successive petitions were taken in this case. *See Franck-Teel v. State*, 143 Idaho at 670 n.1 & 2, 152 P.3d at 31 n.1 & 2.

C. The District Court Did Not Address Whether There was an Issue of Fact as to Whether Trial Counsel was Ineffective for Failing to Develop and Present the Ownership Issues With the Pickup to the Jury and This Court Cannot Affirm the Dismissal on That Basis

In seeking summary disposition, the state argued the successive petition was untimely and the claims raised in the successive petition had been waived because they were not addressed in the initial post-conviction proceedings. R. 79-80. The state then withdrew its timeliness argument and the district court dismissed the action based solely on its conclusion the successive petition was not justified under I.C. § 19-4908. R. 95-97. Thus, even if this Court were to conclude that Mr. Dixey had not established an issue of material fact as to trial counsel's effectiveness for failure to present evidence with respect to the pickup ownership issues,³ it could not affirm the dismissal on that basis.

Pursuant to I.C. § 19-4906(b), the district court may sua sponte dismiss an applicant's

³ In arguing this Court cannot affirm on a basis other than that relied on by the district court in this case, Mr. Dixey does not suggest that the record in this case falls short of establishing an issue of material fact regarding trial counsel's effective assistance. To the contrary, Mr. Dixey provided affidavits of witnesses who had personal knowledge that he did not begin driving the primer grey pickup until late October 2006. Mr. Dixey's allegation that he informed trial counsel of these issues is corroborated by the trial transcript in which trial counsel questions Mr. Dixey about when he began driving the pickup. *See* Trial Tr. p. 121, ln. 18 - p. 122, ln. 17; p. 124, ln. 3-8. It was unreasonable not to present further, available evidence corroborating the timing of Mr. Dixey's purchase of the pickup. Similarly, Mr. Dixey supported his allegation that the pickup's previous owner matched the description of the September 2006 suspect with an Idaho Transportation Department photo and description, affidavit and police reports. The store employee testified that he observed the September suspect from a distance of 25-30 yard and that his identifying features were that he had a long-pony tail and was Native America. Trial Tr. p. 73, ln. 22 - p. 74, ln. 6; p. 77, ln. 11 - p. 78, ln. 6. The prior owner's physical description was easily ascertainable and there was no sound reason to not present this evidence to the jury. Further, such evidence would have strongly supported Mr. Dixey's testimony that he did not own the pickup in September 2006 and, in November, simply wanted to trade tires. Thus, Mr. Dixey presented an issue of fact that had trial counsel presented evidence regarding the pickup ownership issues, the outcome of the trial would have been different.

post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19–4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); *Buss v. State*; 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). The reason that subsection (b), but not subsection (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Id.* Although a post-conviction petitioner cannot challenge the sufficiency of any notice for the first time on appeal, he may assert that the statute’s motion gave him no notice. *Kelly v. State*, 149 Idaho 517, 522, 236 P.3d 1277, 1282 (2010).

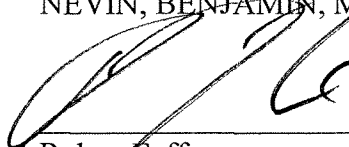
Here, the state’s motion did not raise and the district court did not address whether Mr. Dixey presented an issue of material fact regarding his claim that he received ineffective assistance of counsel with respect to failure to present evidence concerning the pickup ownership issues. Thus, even if this Court were to conclude such an issue of fact did not exist, the proper course would be to remand and provide Mr. Dixey with an opportunity to respond and further support his claim.

V. CONCLUSION

Mr. Dixey respectfully asks this Court to reverse the district court’s judgment dismissing his post-conviction claims and to remand this case for further proceedings.

Respectfully submitted this 28 day of May, 2013.

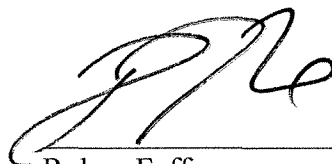
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP



Robyn Fyffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of May, 2013, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.



Robyn Fyffe