2-11-2009

State v. Ochieng Appellant's Reply Brief Dckt. 34755

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. COLLINS OCHIENG, Defendant-Appellant.	)	NO. 34755 REPLY BRIEF

REPLY BRIEF OF APPELLANT

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

HONORABLE DAVID C. NYE
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 34755
	)	
v.	)	
	)	
COLLINS OCHIENG,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

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STATEMENT OF THE CASE

Nature of the Case

On May 29, 2007, Mr. Ochieng filed a Motion for Obtaining an Order Modifying the Original Conviction and Sentence and a Motion for Appointment of Counsel. The district court treated the motion to modify the conviction and sentence as both a motion to reduce his sentence under Idaho Criminal Rule 35, and a petition for post-conviction relief brought pursuant to the Uniform Post-Conviction Procedures Action, § 19-4901 *et seq.* In a single order, the district court denied the Motion for Appointment of Counsel and held the motion to modify the conviction and sentence as untimely under both avenues of relief.

On appeal, Mr. Ochieng contends, in part, that the district court erred in failing to rule on his motion for appointment of counsel prior to summarily dismissing his petition. This Reply Brief is filed to clarify the proper standard for appointment of counsel in a post-conviction action and its proper application in this case.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Ochieng's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Has the State incorrectly asserted that Mr. Ochieng's motion for the appointment of counsel was properly denied because on the face of the petition, the petition appeared "time-barred" and was thus "frivolous" pursuant to Idaho Code section 19-852?

ARGUMENT

Because Idaho Code Section 19-852 Does Not Apply In Post-Conviction Proceedings, And Because A Petitioner Is Not Required To Anticipate Possible Affirmative Defenses And Negate Them Even Before The Affirmative Defense Has Been Pleaded, The State Is Incorrect In Its Assertions That Mr. Ochieng's Motion For The Appointment Of Counsel Was Properly Dismissed Because The Petition Appeared Frivolous

A. Introduction

In the Respondent's Brief, the State has relied upon Idaho Code section 19-852's *frivolousness* standard and cases applying that standard to assert that the district court properly denied Mr. Ochieng's Motion for the Appointment of Counsel. However, the Idaho Supreme Court has recognized that section 19-852 does not apply to post-conviction proceedings. In addition, the State asks this Court to find that a district court need not appoint counsel to *pro se* petitioners when, on the face of the petition, the petition appears to have been filed outside of the time limitations articulated in I.C. § 19-4902. Because meeting the time limit articulated in I.C. § 19-4902 is not an element of a claim for post-conviction relief, but rather is a response to the State's affirmative defense that the claim is time barred, it is not necessary for a post-conviction petitioner to include allegations about tolling in the petition. Thus, counsel should not be denied for failure to plead such facts. Finally, when the proper standard for the appointment of counsel in post-conviction actions is applied to the facts of this case, it is apparent that the district court erred in denying Mr. Ochieng's Motion for the Appointment of Counsel.

B. Because Idaho Code Section 19-852 Does Not Apply In Post-Conviction Proceedings, And Because A Petitioner Is Not Required To Anticipate Possible Affirmative Defenses And Negate Them Even Before The Affirmative Defense Has Been Pleaded, The State Is Incorrect In Its Assertions That Mr. Ochieng's Motion For The Appointment Of Counsel Was Properly Dismissed Because The Petition Was Frivolous

In addition to the substantive ineffective assistance of counsel claims raised in his Motion For Obtaining An Order Modifying The Original Conviction and Sentence, Mr. Ochieng informed the district court that following sentencing he was "whisked to an INS holding facility," and subject to "continued detention by INS." (R., p.62.) He further explained that English was not his first language. (R., p.64.) In his Motion For Appointment of Counsel, Mr. Ochieng informed the court that he had no legal background, that he had been "locked up for a long time as a result of this case," and that he could not afford private counsel. (R., p.70.) Finally, in his Motion for Notice of Hearing, Mr. Ochieng asked for a "writ requiring, the Denver field District Director Department of Homeland Security to release the defendant from its custody to the custody of the State of Idaho for the said hearing." (R., p.77.) Thus, at the time the district court denied Mr. Ochieng's motion to appoint counsel it knew that Mr. Ochieng was asserting ineffective assistance of counsel, was in the custody of the federal government, was being housed in Denver, Colorado, was not a native English speaker, and had no legal training or experience.

1. The State Has Incorrectly Relied Upon The Frivolousness Standard Because Idaho Code Section 19-852 Does Not Apply In Post-Conviction Proceedings

Relying, upon Idaho Code § 19-852 and cases decided pursuant to that statute, the State has asserted on appeal that the district court properly denied Mr. Ochieng's

Motion for Appointment of Counsel because his petition for post conviction relief appeared time-barred, and was thus frivolous. (Respondent's Brief, pp.10-11.) As is discussed below, the State has relied upon an outdated legal analysis and has incorrectly focused upon the ultimate merits of the petition, as opposed to the proper question of whether there is the *possibility* of a valid claim *such that the claim should be investigated by counsel.* Furthermore, when the proper legal analysis is applied, it is apparent that the district court committed reversible error when it denied Mr. Ochieng's motion for the appointment of counsel.

As the Idaho Supreme Court recognized in 2003 and again in 2007, "'I.C. § 19-852 no longer applies in post-conviction cases and appointment of counsel in those cases is governed only by I.C. § 19-4904.'" *Swader v. State*, 143 Idaho 651, 653, 152 P.23d 12, 14 (2007) (quoting *Quinlan v. Idaho Comm'n for Pardons and Parole*, 138 Idaho 726, 730, 69 P.3d 146, 150 (2003). Thus, the State's reliance upon the frivolousness standard articulated in I.C. § 19-852 is misplaced.

The proper legal standard for appointment of counsel does not focus on whether the petitioner will ultimately prevail on his claims, bur rather addresses whether there is the *possibility* of a valid claim *such that the claim should be investigated by counsel. See Swader*, 143 Idaho at 655, 152 P.3d at 16. Although the "investigation by counsel may not produce evidence sufficient to survive a motion to dismiss," this is not controlling as "the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards." *Id.* Thus, the State's application of a frivolousness standard has incorrectly focused on the ultimate merits of Mr. Ochieng's petition, as opposed to the need for investigation of his claims.

2. Because A Petitioner Is Not Required To Anticipate Possible Affirmative Defenses And Negate Them Even Before The Affirmative Defense Has Been Pleaded, The State Is Incorrect In Its Assertions That Mr. Ochieng's Motion For The Appointment Of Counsel Was Properly Dismissed Because The Petition Appeared Frivolous

In claiming that Mr. Ocheing's petition was "frivolous," the State's focus on the alleged violation of the statute of limitations has incorrectly placed the proverbial cart before the horse. The State asks this Court to hold that a petitioner can be denied counsel and the post-conviction action dismissed if, based upon the face of the petition, the petition appears "time-barred." (Respondent's Brief, pp.10-11.) However, an assertion of facts supporting a claim of tolling of the statute of limitations "is not an element of a claim for post-conviction relief; it is a response to the State's affirmative defense that the claim is time barred." *Anderson v. State*, 133 Idaho 788, 792, 992 P.2d 783, 787 (1999). Thus, it is not necessary for a post-conviction petitioner to include allegations about tolling in the petition. *Id.* "To hold otherwise would require inmates, who are untrained in the law and are generally acting without the benefit of counsel in the preparation of their applications, to anticipate possible affirmative defenses and negate them even before the affirmative defense has been pleaded." *Id.*

Because a petitioner need not anticipate the affirmative defenses that may or may not be asserted in his case and, thus, need not negate the affirmative defense of a violation of the statute of limitation in the initial petition, a petitioner should not be denied counsel and his petition dismissed for failure to do these things. Demanding such action on the part of a *pro se* petitioner would require him not only to anticipate possible defenses, but also to know what the essential elements of a tolling claim are. Idaho's appellate courts have recognized that this is an unreasonable burden to place on *pro se*

petitioners. *Anderson*, 133 Idaho at 792, 992 P.2d at 787; *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). Thus, the denial of counsel and a dismissal based upon a finding that the petition appears to be "time-barred" is premature and reversible error.

3. Application Of The Legal Analysis Applicable To Requests For The Appointment Of Counsel Shows That The District Court Committed Reversible Error When It Failed To Appoint Counsel For Mr. Ochieng

In the present case, the application of the legal analysis applicable to requests for the appointment of counsel shows that the district court committed reversible error when it failed to appoint counsel for Mr. Ochieng. As the Idaho Supreme Court has repeatedly recognized, when considering whether to appoint counsel in a post-conviction case,

> the trial court 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, 140 Idaho at 792, 102 P.3d at 1111; *see also Swader*, 143 Idaho at 653, 152 P.3d at 15 (stating "In *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001), we noted that a *pro se* petitioner may fail to allege sufficient facts to state a claim for post-conviction relief simply because he or she does not know the essential elements of the claim."). In addition, the trial courts must consider "whether circumstances prevent the petitioner from making a more thorough investigation into the facts," such as when the petitioner is incarcerated, and whether presentation of a claim will "require the assistance of someone trained in the law," such as when a petitioner must show "that his or her counsel's performance was deficient or that such deficiency prejudiced the

defense." *Swader*, 143 Idaho at 655, 152 P.3d at 16. Thus, "the trial court should appoint counsel if the petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel *to conduct a further investigation into the claim.*" *Swader*, 143 Idaho at 655, 152 P.3d at 16 (emphasis added).

Mr. Ochieng alleged facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into his claims. Mr. Ochieng's specific claims, and argument in support of this assertion can be found in the Appellant's Brief at pp.4-6, 21-24, which is incorporated herein by reference thereto. In addition, it should be noted that Mr. Ochieng raised a number of ineffective assistance of counsel claims. These claims "require the assistance of someone trained in the law," as Mr. Ochieng must show "that his or her counsel's performance was deficient [and] that such deficiency prejudiced the defense." *Swader*, 143 Idaho at 655, 152 P.3d at 16.

Finally, even if Mr. Ochieng was required to anticipate the Court or State's assertion of the affirmative defense of violation of the statute of limitations, Mr. Ochieng alleged sufficient facts to raise the possibility of a valid tolling argument. Although Mr. Ochieng's petition was filed outside of the time limitations articulated in I.C. § 19-4902, even the State has acknowledged that this time limitation can be tolled under certain circumstances. (*See* Respondent's Brief, pp.8.) For example, the constitutional right of access to the courts is violated "when a prisoner is housed in an out-of-state facility without either legal reference materials of the state of conviction or reasonable alternative means of access...." *Martinez v. State*, 130 Idaho 530, 536, 944 P.2d 127,

133 (Ct. App. 1997). In his various pleadings, Mr. Ocheing alleged that following sentencing he was "whisked to an INS holding facility," and subject to "continued detention by INS," (R., p.62) and that he was being held in Denver, Colorado (R., p.77). He further explained that English was not his first language. (R., p.64.) In his Motion For Appointment of Counsel, Mr. Ochieng informed the court that he had no legal background, that he had been "locked up for a long time as a result of this case," and that he could not afford private counsel. (R., p.70.) Thus, at the time the district court denied Mr. Ochieng's motion to appoint counsel it knew that Mr. Ochieng was asserting ineffective assistance of counsel, was in the custody of the federal government, was being housed in Denver, Colorado, was not a native English speaker, and had no legal training or experience. These facts are sufficient to raise the possibility of a valid tolling claim "such that a reasonable person with adequate means would be willing to retain counsel *to conduct a further investigation into the claim.*" *Swader*, 143 Idaho at 655, 152 P.3d at 16 (emphasis added).

CONCLUSION

Mr. Ochieng respectfully requests that this Court vacate the district court's order summarily dismissing his petition for post-conviction relief, and remand this case to the district court with an order that the motion to modify the conviction and sentence be properly treated as a post-conviction petition, and that counsel be appointed to represent Mr. Ochieng.

DATED this 11th day of February, 2009.

SARA B. THOMAS
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of February, 2009, 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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