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Melton v. State Appellant's Reply Brief Dckt. 35855

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. RAYMOND J. MELTON, Defendant-Appellant.	)	NO. 33442 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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STATEMENT OF THE CASE

Nature of the Case

In 2003, Raymond Melton was convicted and sentenced for lewd conduct with a child under the age of sixteen. His sentence was affirmed on direct appeal in 2004.

Also in 2004, Mr. Melton filed a petition for post-conviction relief asserting numerous claims for relief, including certain claims related to his assertion that his minor victim's preliminary hearing testimony and other statements had been coerced and coached by the State. Mr. Melton was appointed counsel and provided an evidentiary hearing; however, his post-conviction counsel failed to offer adequate evidence (such as the testimony of the victim, her mother, or any of the persons who were involved in coercing/coaching her testimony) at the evidentiary hearing to allow Mr. Melton to prevail on his coercion/coaching-related claims.

In 2006, just months after his first post-conviction case was finally resolved, Mr. Melton filed a successive petition for post-conviction relief and again requested the appointment of counsel. In his successive petition, Mr. Melton reiterated his claims regarding the State's coercion/coaching of his victim and asserted that his successive petition was properly filed because his post-conviction counsel had inadequately asserted those claims in his first post-conviction case. He supported his successive petition not only with his own affidavit, but with two letters from his victim stating that she had lied at the behest of the State, and that she had done so because of the harassment and intimidation of the prosecutor and other members of the prosecution team.

Without addressing Mr. Melton's motion for appointment of counsel, the district court summarily dismissed Mr. Melton's successive petition. Mr. Melton then initiated the present appeal.

On Appeal, Mr. Melton contends that the district court erred in two respects: first, the district court erred in failing to grant, or even rule upon, his motion for appointment of counsel before summarily dismissing his successive petition; second, the district court erred in summarily dismissing his successive petition. Mr. Melton contends that these errors necessitate a remand of his case to the district court for appointment of counsel and an evidentiary hearing on his claims.

In response, the State addresses Mr. Melton's second claim first, arguing that summary dismissal of Mr. Melton's successive petition was proper because: (A) the successive petition was barred by the doctrine of *res judicata* (Respondent's Brief, pp.7-11); (B) the successive petition was really a thinly disguised motion for a new trial and, thus, was untimely and without an adequate legal basis (Respondent's Brief, pp.11-13); (C) Mr. Melton had no legal basis to file a successive petition ineffective assistance of post-conviction counsel at an earlier evidentiary hearing is not a "sufficient reason" to file a successive petition under I.C. § 19-4908 (Respondent's Brief, pp.13-17); (D) Mr. Melton's successive petition was untimely because it was not filed within a year of completion of his direct appeal (Respondent's Brief, pp.18-19); and (E) Mr. Melton's petition did not raise a genuine issue of material fact with regard to an issue which, if resolved in his favor, would have entitled him to relief (Respondent's brief, pp.19-23). With regard to Mr. Melton's first claim, the State refers back to its previous arguments about why it believes Mr. Melton's successive petition was meritless and argues that

either "there was no basis for appointment of counsel in his case" and, thus, the failure to rule on the motion prior to summary dismissal was harmless. (Respondent's Brief, pp.23-26.)

The present Reply is necessary to respond briefly to some of the State's arguments.

Statement of Facts and Course of Proceedings

The factual and procedural histories of this case were previously articulated in Mr. Melton's Appellant's Brief and, therefore, need not be repeated herein.

ISSUES

1. Did the district court err in failing to grant, or even rule upon, Mr. Melton's motion for appointment of counsel before summarily dismissing his successive petition for post-conviction relief?

2. Did the district court err in summarily dismissing Mr. Melton's successive petition for post-conviction relief?

ARGUMENT

I.

The District Court Erred In Failing To Carefully Consider, And Grant, Mr. Melton's Motion For Appointment Of Counsel

In his Appellant's Brief, Mr. Melton argued that the district court erred in two respects when it failed to rule on his motion for appointment of counsel (thereby effectively denying that motion) before summarily dismissing his successive petition for post-conviction relief. He argued first that the district court's failure to even rule on his motion for appointment of counsel constituted error under *Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2004). (Appellant's Brief, pp.18-19.) Next, he argued that under *Charboneau* and *Swader v. State*, 143 Idaho 651, 152 P.3d 12 (2007), the effective denial of that motion was erroneous because he had raised the possibility of a valid claim. (Appellant's Brief, pp.19-20.)

In response, the State argues that Mr. Melton's successive petition was meritless and, therefore, "there was no basis for appointment of counsel in his case" and the district court's failure to rule on the motion prior to summary dismissal was harmless. (Respondent's Brief, pp.23-26.)

Because the State's claim that Mr. Melton's successive petition was meritless is thoroughly refuted in Mr. Melton's Appellant's Brief, and in Part II, below, no further reply is necessary.

II.

The District Court Erred In Summarily Dismissing Mr. Melton's Successive Petition For Post-Conviction Relief

As noted, the State offers a host of reasons why it believes that Mr. Melton's successive petition for post-conviction relief was meritless and, thus, was properly summarily dismissed by the district court. Most of the State's arguments are adequately addressed in Mr. Melton's opening brief (*see* Appellant's Brief, pp.21-34); however, some of the State's contentions require additional discussion. That discussion is provided below.

A. The Doctrine Of *Res Judicata* Did Not Bar The Claims Presented In Mr. Melton's Successive Petition For Post-Conviction Relief

In his Appellant's Brief, Mr. Melton, citing I.C. § 19-4908, *Griffin v. State*, 142 Idaho 438, 128 P.3d 975 (Ct. App. 2006), and a number of other cases, argued that there is no *per se* rule against re-litigating previously-considered post-conviction claims, and that such claims can be re-raised in a successive petition for post-conviction relief if there is a "sufficient reason" why those claims were inadequately presented in the first post-conviction case. (Appellant's Brief, pp.24-25 & n.21.) In response, the State argues that Mr. Melton is wrong, and that, in fact, all previously-litigated post-conviction claims are *res judicata*, and thus off-limits for a successive petition for post-conviction relief. (Respondent's Brief, pp.7-11.) This argument, however, is specious.

First, if *res judicata* were to apply to inadequately presented post-conviction claims, a portion of I.C. § 19-4908 ("unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application"), and the cases interpreting that language

holding that a "sufficient reason" includes the ineffective assistance of post-conviction counsel (such as *Griffin*), would be nullified.

Second, although the State finds it compelling that "*Griffin* does not discuss the doctrine of *res judicata*, let alone any exceptions to it," apparently believing that this lack of discussion of *res judicata* is a basis for distinguishing that case from this one, the State overlooks the fact that the reason *Griffin* does not discuss the *res judicata* doctrine is because it is so clearly inapplicable in the present case.

Third, to the extent that the State attempts to distinguish *Griffin* on its facts, that attempt is unpersuasive. It is true that the ineffectiveness of post-conviction counsel complained of in *Griffin* arose prior to an evidentiary hearing, whereas the ineffectiveness complained of in this case arose at the evidentiary hearing. However, that is a distinction without a difference because the *res judicata* doctrine, which holds that "a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose," *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990), makes no distinction between final judgments that come about by means of summary judgment and those that come about following trial. In other words, because a final decision as to the factual contentions of the parties is not a prerequisite to application of the *res judicata* doctrine, *see Duthie v. Lewiston Gun Club*, 104 Idaho 751, 753-54, 663 P.2d 287, 289-90 (1983) ("*[R]es judicata* applies to every matter which might and should have been litigated in the first suit whether or not it was raised in the pleadings."), the State's attempt to say that the *res judicata* applies precisely because Mr. Melton's factual contentions were addressed by the district court finds no basis in the law. The

bottom line is that *res judicata* has been pre-empted by I.C. § 19-4908 in post-conviction cases.

B. Mr. Melton's Successive Petition Was Correctly Styled A Successive Petition For Post-Conviction Relief

Another argument presented by the State is that Mr. Melton's successive petition was really a thinly disguised motion for a new trial and, thus, was untimely and without an adequate legal basis. (Respondent's Brief, pp.11-13.) This, however, is nothing but a "straw man" argument.

The State argues, in wholly conclusory fashion, that the substance of Mr. Melton's successive petition was really a request for a new trial under Idaho Rules of Civil Procedure 59(a) and/or 60(b). (Respondent's Brief, p.11.) After making that bald assertion, the State then offers the myriad of reasons why it believes Mr. Melton's petition would fail under those rules (Respondent's Brief, pp.11-13), not the least of which is that Mr. Melton's claims are not cognizable under either Rule 59(a) or 60(b) (Respodent's Brief, p.12).

The fundamental problem with the State's argument, of course, is that Mr. Melton's successive petition clearly was not brought pursuant to Rules 59(a) or 60(b); it was properly brought pursuant to I.C. § 19-4908. Moreover, the State's attempt to claim otherwise is illogical given that, if we assume that the claims raised in Mr. Melton's successive petition are not cognizable under Rules 59(a) and 60(b), then there is no basis for the State to argue that, despite the styling of Mr. Melton's successive petition, the substance of that petition is really a motion for a new trial.

Although the State has done a fine job job knocking down its "straw man," Mr. Melton asks this Court to disregard that argument entirely, as it has nothing whatsoever to do with this case.

C. Ineffective Assistance Of Post-Conviction Counsel Is A "Sufficient Reason" To File A Successive Petition Under I.C. § 19-4908

The State also attempts to argue that Mr. Melton's successive petition is barred because:

> there are only two instances in which ineffective assistance of prior post-conviction counsel might constitute 'sufficient reason' for permitting the petitioner to file a claim in a successive petition: (1) where a claim raised in the original pro se petition was omitted from the amended petition filed by court-appointed counsel without the petitioner's knowledge or consent, or (2) where the petitioner's unadjudicated claim was lost or forfeited due to counsel's failure to respond to the district court's notice of intent to dismiss . . . .

(Respondent's Brief, p.17 (citation omitted).) This, however, is an overly narrow view of I.C. § 19-4908.

While the State may very well be correct in its assertion that "[n]o case interpreting I.C. § 19-4908 has permitted a petitioner to have a new post-conviction evidentiary hearing based upon a claim that the attorney failed to present enough evidence at the fist post-conviction evidentiary" (Respondent's Brief, p.17), such a lack of published decisions does not mean that I.C. § 19-4908 cannot be read to allow successive petitions based on the ineffective assistance provided at a prior evidentiary hearing. Indeed, section 19-4908 is couched in relatively broad terms, speaking of a "sufficient reason" why a ground for relief was "inadequately raised," I.C. § 19-4908, and the State offers no principled reason why this broad language should be given such an artificially restrictive construction. Moreover, in *Palmer v. Dermitt*, 102 Idaho 591, 596,

635 P.2d 955, 960 (1981), one of the cases relied upon by the State for its argument on this point, the Idaho Supreme Court cited, with approval, to *Sims v. State*, 295 N.W.2d 420, 422-23 (Iowa 1980), a case in which the Iowa Supreme Court implicitly recognized (but considering petitioner's claims on their merits) that ineffective assistance of post-conviction counsel at an evidentiary hearing is a "sufficient reason" for "inadequately raising" an issue and, thus, justifies the filing of a successive petition.[1] Thus, the best interpretation of I.C. § 19-4908 and *Palmer* is that any ineffective assistance of post-conviction counsel—regardless of whether it occurs prior to the evidentiary hearing or at the evidentiary hearing—is a "sufficient reason" justifying a successive petition.

D. Mr. Melton's Successive Petition Was Timely Filed

Another argument raised by the State is that Mr. Melton's successive petition was untimely because it was not filed within a year of completion of his direct appeal. (Respondent's Brief, pp.18-19.) This argument is also without merit.

Although the State cites *Hernandez v. State*, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999), it fails to recognize that that case refutes its argument. In *Hernandez*, the Court of Appeals adopted a "relation-back" doctrine for successive petitions and held "that one year is a reasonable time for an inmate in these circumstances to proceed with a successive post-conviction relief action if the initial action was dismissed due to the ineffective assistance from the attorney representing the inmate in that proceeding." *Hernandez*, 133 Idaho at 794, 992 P.2d at 799. It further held that, because the petitioner had filed his successive petition less than a year after the

[1] Iowa has also adopted the Uniform Post-Conviction Procedure Act. *See* IOWA CODE ANN. §§ 822.1 through .11. Accordingly, Iowa's statute governing successive petitions is virtually identical to Idaho's. *Compare* I.C. § 19-4908 *with* IOWA CODE ANN. § 822.8.

disposition of the appeal of the first post-conviction case, the successive petition was not time-barred. *Id.*; *see also Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007) (holding that successive petitions in non-capital cases must be filed within a "reasonable time" of the petitioner's becoming aware of his claim, and that thirteen months was not reasonable under the facts of that case).

With regard to Mr. Melton's situation, the Remittitur in his first post-conviction appeal was issued on March 22, 2006 (R., p.75), and he filed his successive petition (and the memorandum in support thereof) just over a month later, on April 24, 2006 (R., pp.1-11). Accordingly, his successive petition was filed in a "reasonable time" and was, therefore, timely.

E. Mr. Melton's Successive Petition Raised Genuine Issues Of Material Fact

Finally, the State contends that Mr. Melton's successive petition was properly summarily dismissed because it did not raise a genuine issue of material fact as to an issue which, if resolved in his favor, would have entitled him to relief. (Respondent's Brief, pp.19-23.) This argument, however, because it is based on the State's misinterpretation of applicable standards, and a lot of fanciful speculation, is also without merit.

First, while the State correctly observes that Mr. Melton did not support his successive petition with affidavits from the individuals who could have testified at his evidentiary hearing about the prosecutor's coercion and coaching of C.M.'s testimony (C.M. herself, Tammy Blevins, Alisa Moon, Ron Gear, and Phillip Brown), this is not a deficiency which should have warranted summary dismissal since, when he filed his successive petition, Mr. Melton was in a situation where obtaining those affidavits would

have been virtually impossible. Not only was he incarcerated (R., p.1), but he was also under an order not to have any contact with either C.M. or Ms. Blevins (*Melton I*, Sent. Tr., p.59, Ls.11-16). Moreover, as noted, his motion for appointment of counsel had been ignored by the district court. As the Idaho Supreme Court has recently noted, "[a]n indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court record." *Swader v. State*, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007).

Second, the State asserts that "it must be presumed that prior post-conviction counsel concluded that calling C.M. and her mother [Tammy Blevins] would have been fruitless." (Respondent's Brief, p.21.) However, that argument represents a gross misstatement of the law. In fact, at the summary dismissal stage, all of Mr. Melton's allegations should have been taken as true, and all reasonable inferences should have been drawn in his favor. *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998).

Third, while the State speculates that post-conviction counsel "did not call the alleged witnesses because they would not support" Mr. Melton's claims (Respondent's Brief, p.21), that is precisely the type of inference that the district court was *not* permitted to draw in weighing the summary dismissal question. *See id.* Likewise, while the State opines that "[p]rior post-conviction counsel would have been justified in determining that calling C.M., Tammy Blevins, Alisa Moon, Ron Gear, and Phillip Brown as witnesses at the evidentiary hearing in Melton's prior post-conviction case was irrelevant followings Melton's admission that his daughter's statement . . . was true" (Respondent's Brief, p.22), there is no evidence to support the inference that that was

post-conviction counsel's thought process and, thus, such an inference was impermissible. *See Small*, 132 Idaho at 331, 971 P.2d at 1155.

Fourth, the State is incorrect when it asserts that letters, written by C.M., indicating that her testimony had been coerced and coached, did not support Mr. Melton's claim that his post-conviction counsel had rendered ineffective assistance. (*See* Respondent's Brief, pp.21-22.) Those letters, even if they have not yet been *proven* to have been in post-conviction counsel's possession at the time of Mr. Melton's evidentiary hearing, support Mr. Melton's contention that post-conviction counsel knew or should have known that there was additional evidence out there which, if accepted by the district court, would have provided a basis for post-conviction relief. Thus, those letters, taken in conjunction with Mr. Melton's own sworn statements, are sufficient to raise a genuine issue of material fact as to his post-conviction counsel's ineffectiveness.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Melton respectfully requests that this Court vacate the district court's order summarily dismissing his Successive Petition and remand his case with an instruction that counsel be appointed and that the district court conduct an evidentiary hearing.

DATED this 29th day of April, 2008.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of April, 2008, 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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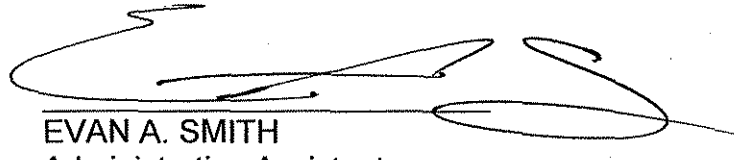

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