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Fagundes v. State Appellant's Reply Brief Dckt. 44374

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ALEXANDER SANTOS)	
FAGUNDES,)	NO. 44374
)	
Petitioner-Appellant,)	
v.)	TWIN FALLS COUNTY
)	NO. CV42-16-1934
STATE OF IDAHO,)	
)	APPELLANT'S
Respondent.)	REPLY BRIEF
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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 TWIN FALLS**

HONORABLE RANDY J. STOKER
District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	2
ISSUE PRESENTED ON APPEAL	3
ARGUMENT	4
The District Court Erred By Denying Mr. Fagundes' Motion For Appointment Of Post-Conviction Counsel	4
CONCLUSION	9
CERTIFICATE OF MAILING	10

TABLE OF AUTHORITIES

Cases

Brown v. State, 135 Idaho 676 (2001).....4, 7

Charboneau v. State, 140 Idaho 789 (2004).....5, 8

Hall v. State, 156 Idaho 125 (Ct. App. 2014).....4, 5, 6, 8

Hayes v. State, 143 Idaho 88 (Ct. App. 2006)8

Mata v. State, 124 Idaho 588 (Ct. App. 1993).....8

Plant v. State, 143 Idaho 758 (Ct. App. 2006)7

State v. Van Komen, 160 Idaho 534 (2016).....5

Swader v. State, 143 Idaho 651 (2007)4, 5, 6, 8

Statutes

I.C. § 19-49045

STATEMENT OF THE CASE

Nature of the Case

Alexander Fagundes contends the district court erred when it denied his motion for post-conviction counsel. He asserts that the district court used the wrong standard in making that decision, as it focused on whether the allegations were “frivolous,” as opposed to whether they presented the possibility of a valid claim.

The State concedes Mr. Fagundes alleged “theoretically a viable claim” in two respects. Nevertheless, it maintains the district court used the proper standard to deny counsel because it impliedly considered whether the allegations identified a potentially-valid claim. Specifically, the State contends that Mr. Fagundes’ allegations are too vague to make out the possibility of valid claims.

The district court’s actual analysis belies the State’s argument about what standard it impliedly used – it actually evaluated the frivolousness of the allegations in their current form, not whether they could be developed, with the assistance of counsel, into a fully-viable claim. The State’s vagueness arguments make that same mistake.

Under the proper standard, as the State’s concessions admit, Mr. Fagundes’ actually alleged *the possibility* of at least one valid claim, and that is all that is needed to justify appointing post-conviction counsel. Therefore, the order denying Mr. Fagundes’ request for appointment of counsel should be reversed and this case should be remanded for further proceedings.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court erred by denying Mr. Fagundes' motion for appointment of post-conviction counsel.

ARGUMENT

The District Court Erred By Denying Mr. Fagundes' Motion For Appointment Of Post-Conviction Counsel

The State first contends that the district court's analysis of the alleged frivolousness of Mr. Fagundes' allegations was appropriate because it impliedly considered whether a person with adequate means would be willing to retain counsel in order to further investigate those allegations, and thus, impliedly considered whether the allegations set forth the possibility of a valid claim. (Resp. Br., pp.5-6.) The district court's actual analysis belies the State's contention.

The district court simply declared, without explanation, that Mr. Fagundes' allegations were "purely conclusory" and the only fact which the district court actually analyzed was Mr. Fagundes' request for relief. (R., pp.15-17.) The mere determination that the allegations are conclusory is not the proper analysis in regard to the question of whether to appoint counsel. Rather, the proper analysis looks at whether the petition "indicat[es] a source of information or basis of knowledge that, with the assistance of counsel, might develop into evidence *that would substantiate the conclusory allegation.*" *Hall v. State*, 156 Idaho 125, 131 (Ct. App. 2014) (emphasis added). Therefore, the district court's unexplained declaration that his claims were conclusory is not a proper basis upon which to deny Mr. Fagundes' request for appointment of counsel.

What that declaration actually shows is that the district court was evaluating whether the allegations, in their current form, are viable or are frivolous. That is precisely what the Idaho Supreme Court has repeatedly told the district courts not to do because "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 a claim.*" *Swader v. State*, 143 Idaho 651, 653-54 (2007) (citing *Brown v. State*, 135 Idaho 676 (2001)) (emphasis added); accord *Charboneau v. State*,

140 Idaho 789, 792-93 (2004). It is for this reason, as the Court of Appeals reiterated in *Hall*, that the district court is required to look at whether the claim has the potential of being developed into a fully-viable claim when deciding whether to appoint counsel, not whether the allegations in the initial, un-counseled petition would survive summary dismissal. *Swader*, 143 Idaho at 653-54; *Hall*, 156 Idaho at 131.

This flaw in the district court's analysis is particularly obvious in regard to the district court's discussion of the requested remedy. The misunderstanding of the available remedy is a perfect demonstration of a *pro se* petitioner's misunderstanding of the essential elements of the claim based on a lack of training in the law. It is also precisely the sort of point that post-conviction counsel could assist the petitioner to correct, and so, perfect an otherwise-fully-viable claim. Under the district court's analysis, however, counsel would not be appointed on that otherwise-fully-viable claim and that otherwise-fully-viable claim would still be summarily dismissed based on simply on the petitioner's misunderstanding of remedy law. That result is inconsistent with I.C. § 19-4904, which provides that counsel "may be made available to the applicant *in the preparation of the application.*" (emphasis added).

Thus, the district court's analysis, which was not on whether the claim presents *the possibility* of a valid claim, but rather, was improperly on whether the claims in their current state are fully-viable, affirmatively demonstrates that it failed to apply the proper standard. The State's desire to infer a proper analysis by looking at the conclusion the district court reached in a vacuum does not change that. *Cf. State v. Van Komen*, 160 Idaho 534, 540 (2016) (explaining that, while the ultimate result could have been reached in a valid way, the district court's actual explanation demonstrated a violation of the defendant's constitutional rights, and so, that

decision had to be vacated). Since the district court applied the wrong standard for evaluating whether to appoint counsel, it committed error. *Swader*, 143 Idaho at 653.

That error is prejudicial, and therefore, is reversible, because Mr. Fagundes actually alleged the possibility of a valid claim. *See id.* at 653-54. In fact, the State concedes that the allegations Mr. Fagundes made – that trial counsel failed to inform him of the consequences of pleading guilty and trial counsel failed to investigate potentially-exculpatory evidence – both present “theoretically a basis for a valid ineffective assistance of counsel claim.” (Resp. Br., pp.7, 8.) In other words, the State has conceded that, with the assistance of counsel, Mr. Fagundes could develop those allegations into fully-viable claims for post-conviction relief. That should, according to *Swader* and *Hall*, be the end of the inquiry and post-conviction counsel should be appointed.

Nevertheless, the State maintains that Mr. Fagundes did not sufficiently articulate enough facts to justify appointment of counsel. (R., pp.7-9.) That vagueness argument, like the district court’s analysis, ignores the proper standard for appointment of post-conviction counsel. Even allegations which are vague in detail, but which indicate a source of information or basis of knowledge that could be developed into evidence are enough to establish *the possibility* of a valid claim. *Hall*, 156 Idaho at 131. “We are not saying that the petitioner must respond with admissible evidence; the assistance of counsel may be necessary to procure that.” *Id.* at 131 n.2 (emphasis omitted). The reason this is the rule is that the standard for appointment of counsel is lower than the standard to survive summary dismissal, and so, counsel should be appointed even if “[t]he investigation by counsel may not produce evidence sufficient to survive a motion to dismiss.” *Swader*, 143 Idaho at 655.

Using the proper analysis, Mr. Fagundes raised *the possibility* of a valid claim in regard to counsel's failure to investigate potentially-exculpatory evidence. In fact, the State's argument actually acknowledges the part of that potential claim which post-conviction counsel could help Mr. Fagundes develop: "Sleeping in a car is not a defense to DUI without a showing that [Mr.] Fagundes was not in the driver's position and the motor not running." (Resp. Br., p.8.) As such, the State's argument concedes the allegations establish *the possibility* of a valid claim. The rest of the State's arguments – about whether the other witnesses could have actually established either of those facts (*see* Resp. Br., p.8) – is irrelevant to the question of whether post-conviction counsel should have been appointed. *Brown*, 135 Idaho at 679 ("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.") Therefore, under *Swader* and *Hall*, counsel should have been appointed because Mr. Fagundes' allegations raise *the possibility* of a valid claim.

State v. Plant does not, contrary to the State's belief, demonstrate otherwise. In that case, the allegation was too vague because "it does not identify any type of investigation that should have been done nor suggest the existence of any information or evidence helpful to the defense that a more thorough investigation might have uncovered." *Plant v. State*, 143 Idaho 758, 762 (Ct. App. 2006). Mr. Fagundes, on the other hand, specifically identified the type of investigation that should have been done – interview the witnesses, such as the arresting officer who made the statement that Mr. Fagundes was asleep in the car. (R., pp.9-10.) His allegation that he was asleep (R., p.10) also suggests, as the State's argument actually acknowledges, the evidence helpful to the defense which might have been uncovered in that investigation – evidence that Mr. Fagundes was not "in actual physical control" of the car when the officers

found him. (*See* Resp. Br., p.8.) Therefore, Mr. Fagundes' petition, unlike the petition in *Plant*, provides sufficiently-detailed allegations which justify the appointment of counsel under *Swader* and *Hall*.

These same conclusions exist in regard to the State's argument about Mr. Fagundes' allegation that trial counsel failed to advise him of the potential consequences of pleading guilty. Again, the State concedes the allegations Mr. Fagundes made presents the possibility of a valid claim in this regard, but it still contends that the allegations are too vague to justify appointment of counsel. (Resp. Br., p.7.) In making that argument, the State disregards the facts Mr. Fagundes alleged which were based on his personal knowledge. *See Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993) (reaffirming that such allegations alone can allow a claim to survive analysis under the higher standard for summary dismissal).

If Mr. Fagundes' recollection of what trial counsel did or did not tell him is accurate (remembering that the inferences from the facts are to be liberally construed in Mr. Fagundes' favor at this point in the process, *Charboneau*, 140 Idaho at 792) and trial counsel did not advise him of the consequences of pleading guilty, Mr. Fagundes would be entitled to post-conviction relief. *See, e.g. Hayes v. State*, 143 Idaho 88 (Ct. App. 2006). To the extent any allegations of additional details might be necessary to survive a motion for summary dismissal, that is precisely the sort of development of a potentially-viable claim that post-conviction counsel is to be appointed to assist with. *See Swader*, 143 Idaho at 655; *Hall*, 156 Idaho at 131. Therefore, the State has, again, failed to appreciate the proper standard for evaluating whether post-conviction counsel should have been appointed, and instead, focused improperly on whether the allegations, in their current form, could withstand summary dismissal.

Under the proper standard, since Mr. Fagundes alleged what the State has conceded to be *the possibility* of two valid claims, post-conviction counsel should have been appointed. Therefore, the district court's erroneous use of the frivolousness standard to justify denying Mr. Fagundes' motion to appoint counsel is reversible error.

CONCLUSION

Mr. Fagundes respectfully requests this Court vacate the order summarily dismissing his petition for post-conviction relief, reverse the order denying his motion for appointment of counsel, and remand this case for further proceedings.

DATED this 15th day of May, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of May, 2017, 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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DISTRICT COURT JUDGE
E-MAILED BRIEF

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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas