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### Fernandez v. State Appellant's Reply Brief Dckt. 45034

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

THOMAS FERNANDEZ,	)	
	)	NO. 45034
Petitioner-Appellant,	)	
v.	)	JEROME COUNTY NO. CV 2016-1090
	)	
STATE OF IDAHO,	)	APPELLANT'S
	)	REPLY BRIEF
Respondent.	)	
_____	)	

\_\_\_\_\_  
**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 JEROME**

\_\_\_\_\_

**HONORABLE JOHN K. BUTLER**  
**District Judge**

\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

Thomas Fernandez appeals from the district court's order summarily dismissing his petition for post-conviction relief. He submits that the district court abused its discretion when it denied his Motion for the Appointment of Counsel.

### Statement of the Facts and Course of Proceedings

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

ISSUE

Did the district court abuse its discretion when it denied Mr. Fernandez's Motion for the Appointment of Counsel because it applied the incorrect legal standard?

## ARGUMENT

### The District Court Abused Its Discretion When It Denied Mr. Fernandez's Motion For The Appointment Of Counsel Because It Applied The Incorrect Legal Standard

In its Respondent's Brief, the State argues that, because "Idaho appellate courts have repeatedly explained that the actual level of alcohol concentration in a subject's blood is irrelevant under the *per se* theory," Mr. Fernandez's petition fails to raise the possibility of a valid claim because "there is no legal basis for pursuing expert witness testimony regarding what is, by definition, legally irrelevant evidence." (Respondent's Brief, pp.5-6.) However, after the State filed its Respondent's Brief, the Idaho Supreme Court issued its opinion in *State v. Austin*, \_\_\_ Idaho \_\_\_, 413 P.3d 778 (2018). *Austin* makes it clear that a defendant's blood alcohol concentration at the time of driving is legally relevant evidence, and the DUI statute does not "mandate an unassailable conclusion not open to defense" when someone is charged under the *per se* theory. *Id.* at 781-82. In other words, breath test results can be challenged in order to present a complete defense.

Mr. Austin wanted to pursue expert testimony to show that his alcohol concentration was not above the legal limit when he drove because it rose between the time he drove and the time he took the breath tests. *Id.* at 779. In this case, Mr. Fernandez wanted to pursue expert testimony to show that his alcohol concentration was not above the legal limit when he drove because his health conditions adversely affected his breath test results. (R., p.67.) The State argues that Mr. Fernandez did not have a right to present a defense with the assistance of expert testimony because a driving under the influence "violation can be shown simply by the results of a test for alcohol concentration . . . ." (Respondent's Brief, p.6 (quoting *State v. Jones*, 160 Idaho 449, 451 (2016).) *Austin*, however, makes it clear that Mr. Fernandez had a right to have an expert testify as to how his health conditions affected his test results because his alcohol

concentration when he was driving was relevant. Therefore, the State's argument on this point fails.

Additionally, while the State agrees that the standard for appointment of counsel on post-conviction has changed, it argues that the district court did not specifically rely on the statute that no longer controls when it denied Mr. Fernandez's motion for the appointment of counsel. (Respondent's Brief, p.7.) But the issue here is not whether the district court specifically relied on the statute that no longer controls but whether the district court abused its discretion when it recognized that Mr. Fernandez had not provided factual support for his claims but did not recognize that *Swader v. State*, 143 Idaho 651, 654-55 (2007) required it to consider whether Mr. Fernandez's circumstances prevented him from providing that factual support before denying his motion for the appointment of counsel. (Appellant's Brief, pp.6-7.)

The State also claims that the district court did not abuse its discretion because "the legal standard of the reasonable person with adequate means still survives." (Respondent's Brief, p.7.) Again, this does not directly respond to the relevant argument. In denying Mr. Fernandez's motion for the appointment of counsel, the district court failed to consider *why* Mr. Fernandez did not provide the sufficient facts to support his claims. (R., pp.29-30.) This was required by *Swader*. And Mr. Fernandez made it clear — in his memorandum in support of his objection to the court's notice of intent to dismiss — that the reason he was not able to present supporting facts was due to his incarceration. He wrote, "Petitioner could not secure any evidence while incarcerated, which was why, he requested counsel." (R., p.58.) Similarly, he stated, "Petitioner is incarcerated and has no means of securing any medical records . . . ," and "Petitioner needs counsel to secure medical experts to testify to the medical state that the Petitioner was in at the time of the breath test based on the evaluation given by law enforcement." (R., pp.63-64.)

Finally, the State argues that, even if the district court applied the wrong standard, this Court should affirm because Mr. Fernandez failed to allege facts showing the possibility of a valid claim. (Respondent's Brief, p.8.) However, this is not supported by the record. Mr. Fernandez alleged that his trial counsel was ineffective because she failed to present evidence that Mr. Fernandez was in a state of ketoacidosis when he was breath-tested. (R., p.17.) He also asserted that his trial counsel failed to question her defense experts thoroughly and thus determine that she needed additional experts to lay foundation—regarding ketoacidosis, the breath-testing machinery, GERD, diabetes, and his medical history—for the testimony of the expert who was ultimately excluded when the district court granted the State's motion in limine. (R., pp.18, 20-21.) Therefore, much like the situation in *Swader*, Mr. Fernandez alleged facts showing the possibility of a valid claim, and a reasonable person in his position would certainly be willing to retain counsel to investigate further and locate the appropriate medical records to support those allegations.

The district court recognized that Mr. Fernandez had not provided the necessary facts to support a valid claim. (R., p.30.) But it did not recognize that *Swader* specifically addressed this situation when discussing the appropriate standard for the appointment of counsel. The *Swader* Court stated, "Swader may have failed to allege facts supporting a valid claim because they do not exist, or because she was unable to conduct an adequate investigation while incarcerated." 143 Idaho at 654-55. In this case, Mr. Fernandez's memorandum in support of his objection to the district court's notice of intent to dismiss makes it clear that he was unable to investigate and collect records because he was incarcerated.

The district court applied an incorrect legal standard when it denied Mr. Fernandez's motion for the appointment of counsel because it did not recognize that I.C. § 19-852 no longer

applies in post-conviction cases, and it denied his motion without considering whether Mr. Fernandez's circumstances prevented him from conducting an adequate investigation into the facts. At the least, the district court, after reviewing Mr. Fernandez's objection to its notice of intent to dismiss, should have entered an order granting the appointment of counsel because his objection made it clear that he could not provide the necessary facts while he was incarcerated. The district court's failure to do so was an abuse of discretion because it was not consistent with the legal standards applicable to its specific choices. The State has failed to prove otherwise.

#### CONCLUSION

Mr. Fernandez respectfully requests that his case be remanded, and he be permitted to proceed with his petition for post-conviction relief with court-appointed counsel.

DATED this 18<sup>th</sup> day of April, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18<sup>th</sup> day of April, 2018, 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:

THOMAS FERNANDEZ  
175 CHASE  
POCATELLO ID 83201

JOHN K BUTLER  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

RPA/eas