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

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

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**BRIEF OF APPELLANT**

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**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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## 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 .....	1
ISSUE PRESENTED ON APPEAL .....	3
ARGUMENT .....	4
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 .....	4
CONCLUSION .....	7
CERTIFICATE OF MAILING .....	8

## TABLE OF AUTHORITIES

### Cases

<i>Brown v. State</i> , 135 Idaho 676 (2001).....	6
<i>Charboneau v. State</i> , 140 Idaho 789 (2004).....	5, 6
<i>Clark v. State</i> , 92 Idaho 827 (1969).....	4
<i>Goodwin v. State</i> , 138 Idaho 269 (Ct. App. 2002).....	4
<i>Heilman v. State</i> , 158 Idaho 139 (Ct. App. 2015) .....	4
<i>Murray v. State</i> , 121 Idaho 918 (Ct. App. 1992).....	4
<i>Quinlan v. Idaho Comm'n for Pardons and Parole</i> , 138 Idaho 726 (2003).....	5
<i>Shackelford v. State</i> , 160 Idaho 317 (2016) .....	5
<i>State v. Bearshield</i> , 104 Idaho 676 (1983) .....	4
<i>State v. Fernandez</i> , No. 42370, 2015 Unpublished Opinion No. 724 (Ct. App. Nov. 19, 2015)....	1
<i>State v. Hass</i> , 114 Idaho 554 (Ct. App. 1988).....	5
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	4
<i>Swader v. State</i> , 143 Idaho 651 (2007) .....	5
<i>Workman v. State</i> , 144 Idaho 518 (2007).....	5

### Statutes

I.C. § 19-852.....	5, 6
I.C. § 19-4904.....	4, 5
I.C. § 19-4906.....	4

### Rules

I.R.C.P. 8(a)(1) .....	4
I.R.C.P. 56 .....	4

Additional Authorities

[https://www.idoc.idaho.gov/ content/prisons/offender\\_search/detail/65081](https://www.idoc.idaho.gov/content/prisons/offender_search/detail/65081) .....7

## 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

In 2014, Mr. Fernandez was convicted of driving under the influence of alcohol. (R., pp.3-4.) Mr. Fernandez appealed, but the Idaho Court of Appeals affirmed his conviction. *See State v. Fernandez*, No. 42370, 2015 Unpublished Opinion No. 724 (Ct. App. Nov. 19, 2015). The court there held that the district court did not abuse its discretion when it granted the State's motion in limine to prevent an expert witness from testifying as to how diabetes, ketoacidosis, and gastro-esophageal reflux disease (GERD) could affect Mr. Fernandez's breath tests. *Id.* at \*2-4. Specifically, it held that Mr. Fernandez did not present sufficient evidence to support his claims regarding the conditions. *Id.* Thus, there was "insufficient evidence presented to sufficiently tie the expert's testimony to the facts of the case." *Id.* at \*2.

On December 27, 2016, Mr. Fernandez filed a timely Petition for Post-Conviction Relief (*hereinafter*, petition), along with a Motion for Appointment of Counsel, and a Request for the Court to Take Judicial Notice of the transcripts and exhibits from the underlying case.<sup>1</sup> (R., pp.3-25.) In his petition, Mr. Fernandez alleged that he received ineffective assistance of counsel because his trial counsel 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.)

On January 13, 2017, the district court issued a Notice of Intent to Dismiss. (R., pp.27-35.) In the notice, the district court denied Mr. Fernandez’s Motion for Appointment of Counsel but granted his Motion to Take Judicial Notice in part. (R., pp.28-30.) Additionally, the district court explained that the petition was subject to dismissal because Mr. Fernandez had provided no facts to support his contentions that he was in a state of ketoacidosis or suffered from GERD. (R., pp.33-35.) Therefore, any expert testimony on those subjects would not be relevant. (R., p.33.)

On March 6, 2017, Mr. Fernandez filed a motion for the appointment of an investigator. (R., pp.44-45.) He also filed an Objection to Notice of Intent to Dismiss and a supporting memorandum. (R., pp.56-64.) In the memorandum, he argued, among other things, that his inability to “secure any evidence” was due to his incarceration, which was why he moved for the appointment of counsel. (R., p.58.) On March 13, 2017, the district court issued its order dismissing Mr. Fernandez’s post-conviction petition. (R., pp.66-71.) It held that Mr. Fernandez still had not made “the required factual showing,” and, “[a]bsent the necessary facts supporting the need for additional expert testimony,” a motion by his trial counsel for additional expert witnesses would have been denied. (R., p.70.) It then dismissed the petition for the reasons set forth in its Notice of Intent to Dismiss. (R., p.71.)

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<sup>1</sup> This Court took judicial notice of the entire direct appeal record *sua sponte*. (R., p.88.)

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

An application for post-conviction relief initiates a proceeding that is civil in nature. *Goodwin v. State*, 138 Idaho 269, 271 (Ct. App. 2002) citing *State v. Bearshield*, 104 Idaho 676, 678 (1983); *Clark v. State*, 92 Idaho 827, 830 (1969); *Murray v. State*, 121 Idaho 918, 92 (Ct. App. 1992)). “Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56.” *Goodwin*, 138 Idaho at 271 (citations omitted). “Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based.” *Id.* Moreover, “[a]n application for post-conviction relief differs from a complaint in an ordinary civil action, however, an application must contain much more than ‘a short and plain statement of the claim’ that would suffice for a complaint under I.R.C.P. 8(a)(1).” *Id.*

Also, “an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application.” *Id.* at 271-72 (citation omitted). “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Id.* at 272. To prevail on an ineffective assistance of counsel claim, an applicant must show that his attorney’s performance was deficient, and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Heilman v. State*, 158 Idaho 139, 145 (Ct. App. 2015).

I.C. § 19-4904 provides that a court-appointed attorney “may be made available” to a petitioner who is unable to pay for an attorney. “A decision to grant or deny a request for

counsel in post-conviction cases is reviewed for an abuse of discretion.” *Shackelford v. State*, 160 Idaho 317, 325 (2016) (citation omitted). In such a review, an appellate court considers “whether the court acted within the boundaries of such discretion, consistent with any legal standards applicable to its specific choices, and whether the court reached its decision through an exercise of reason.” *State v. Hass*, 114 Idaho 554, 558 (Ct. App. 1988). If a petitioner “alleges facts to raise the possibility of a valid claim, the district court should appoint counsel in order to give the petitioner an opportunity with counsel to properly allege the necessary supporting facts.” *Charboneau v. State*, 140 Idaho 789, 793 (2004). This Court further clarified that standard in *Swader v. State*, 143 Idaho 651 (2007). It noted that “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.” *Id.* at 653 (quoting *Quinlan v. Idaho Comm'n for Pardons and Parole*, 138 Idaho 726, 730 (2003)). It then went on to hold,

When considering a motion for appointment of counsel, the trial court must do more than determine whether the petition alleges a valid claim. The court must also consider whether circumstances prevent the petitioner from making a more thorough investigation into the facts. An 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. Likewise, a *pro se* petitioner may be unable to present sufficient facts showing that his or her counsel’s performance was deficient or that such deficiency prejudiced the defense. That showing will often require the assistance of someone trained in the law. Therefore, 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.

*Id.* at 654-55.

In this case, the district court did not act consistently with the legal standards applicable to its specific choices because it applied the incorrect legal standard in deciding Mr. Fernandez’s motion for the appointment of counsel. It cited to this Court’s decision in *Workman v. State*, 144

Idaho 518 (2007), and thus recognized that it had to consider whether Mr. Fernandez’s petition alleged facts showing the possibility of a valid claim. (R., p.29.) It stated, “Therefore, this Court looks to the allegations in the petition to determine if the petitioner has alleged sufficient facts to show the possibility of a valid claim requiring further investigation.” (R., p.29.)

However, the district court did not recognize that I.C. § 19-852 no longer applied in post-conviction cases. (R., pp.29-30.) This is because the section it relied on from *Charboneau* was actually a quote from *Brown v. State*, 135 Idaho 676 (2001), which was decided before *Quinlan* established that I.C. § 19-852 no longer applies in post-conviction cases. (See R., pp.29-30; *Charboneau*, 140 Idaho at 792-93.) Citing the *Brown* quote from *Charboneau*, the district court wrote, “Idaho Code § 19–852(b)(3) sets forth the standard for determining whether or not a post-conviction proceeding is frivolous. It is frivolous if it is ‘not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.’” (R., pp.29-30.) However, the district court did not recognize that *Charboneau* acknowledged that, after *Quinlan*, it was “clear that the standards imposed by I.C. § 19-852 are no longer applicable to the court’s determination of entitlement to counsel in a post-conviction proceeding.” *Charboneau*, 140 Idaho at 793. As such, the district court erroneously applied the frivolousness standard from I.C. § 19-852. (R., p.30.)

Due to this error, the district court did not engage in the analysis *Charboneau* and *Swader* require. Instead, it stated, “The defendant is indigent, however, the Petition in this matter is frivolous because the Petitioner provides no facts or admissible evidence in support of his claims. Given the lack of factual support, the Court can detect no possibility of a valid post-conviction claim.” (R., p.30.) Thus, the district court recognized that, if appointed counsel could do research and present facts to support the claims, it would make a difference. As such, there

was a possibility of a valid claim if additional facts could be gathered by counsel. But the district court did not consider whether Mr. Fernandez's circumstances prevented him from making a more thorough investigation into the facts. Indeed, Mr. Fernandez's circumstances were exactly like those that the Court described in *Swader*. He was incarcerated in the penitentiary and thus could not conduct an investigation into facts that were not in the court record.<sup>2</sup> (R., pp.4, 58.) Therefore, appointed counsel could have assisted him with an investigation to flesh out the necessary facts as well as develop an argument based on those facts that would have supported his claim that his counsel's performance was deficient and prejudiced him.

Mr. Fernandez alleged facts showing the possibility of a valid claim, but his circumstances prevented him from establishing those facts. As such, the district court should have appointed him counsel. However, the district court applied the incorrect legal standard and therefore abused its discretion when it denied Mr. Fernandez's motion for the appointment of counsel.

#### 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 22<sup>nd</sup> day of November, 2017.

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

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<sup>2</sup> Mr. Fernandez was not released until October 11, 2017. See [https://www.idoc.idaho.gov/content/prisons/offender\\_search/detail/65081](https://www.idoc.idaho.gov/content/prisons/offender_search/detail/65081) (last viewed October 24, 2017).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of November, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

THOMAS FERNANDEZ  
3990 TEAL AVE  
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