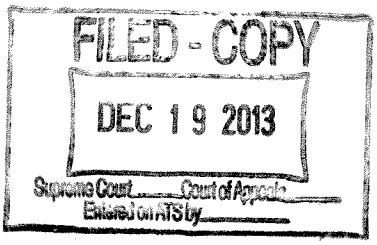
12-19-2013

Nelson v. State Appellant's Brief Dckt. 40661

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY J. NELSON, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 40661 CV-PC-2011-2996 (Ada County) (Consolidated with No.40828 CV-PC-2012-12194)



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE LYNN G. NORTON,
District Judge

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A. *Nature of the Case*

This is a consolidated appeal. Docket No. 40661 is the appeal from the summary dismissal of Gregory J. Nelson's I.C. § 19-4902(b) petition for DNA testing. Docket No. 40828 is the appeal from the district court's denial of his successive petition for post-conviction relief based upon facts first discovered during the proceedings in No. 40661. Relief should be granted in the first case because the court abused its discretion in failing to order the appropriate DNA testing. Relief should be granted in the second case because the court erred in denying Mr. Nelson's motion for appointment of counsel.

B. *Course of Proceedings*

Mr. Nelson was charged with kidnaping in the first degree and lewd conduct with a child under the age of sixteen, violations of Idaho Code Sections 18-4501 and 18-1508. *State v. Nelson*, 131 Idaho 210, 953 P.2d 650 (Ct. App. 1998). Mr. Nelson pled not guilty to the charges.

At the trial, K.M. testified that she went to Mr. Nelson's trailer to do some cleaning for him. She claimed that while at the trailer Mr. Nelson held a pillow over her head when she refused to remove her shirt, made her remove her clothing, rubbed baby oil on her genital-anal areas, and sexually molested her by touching his penis to her anal and/or genital area. K.M. then cleaned herself with a small towel or "rag" and got dressed. Mr. Nelson dropped her off a block away from her house. K.M. contacted a neighbor, who contacted her family and the police. She was taken to the hospital for an examination and sexual assault testing. The following day she was examined and interviewed by CARES personnel. *See generally, State v. Nelson, supra.*

The jury found Mr. Nelson guilty on both counts. *Id.* The district court, the Honorable Daniel T. Eismann presiding, sentenced him to a determinate life term of imprisonment for each offense and ordered that the terms be served concurrently. *Id.* On direct appeal, the Court of Appeals upheld the conviction and sentence. *State v. Nelson, supra.*

On December 1, 1999, Mr. Nelson timely filed his first application for post-conviction relief in which he raised numerous issues, including the denial of effective assistance of counsel. The district court denied relief and dismissed the petition with prejudice. The decision was affirmed on appeal. *See Nelson v. State*, No. 27266. A successive petition was filed in 2003. It too was dismissed and that dismissal affirmed on appeal. *See Nelson v. State*, No. 30771.

According to the district court, Mr. Nelson has filed two other post-conviction petitions prior to the cases at bar. Both were denied and neither were appealed. R (40828) 76.

In 2011, Mr. Nelson subsequently filed a post-conviction petition seeking DNA testing and later filed a successive petition based upon facts discovered during the proceedings on the DNA proceedings. Both petitions were summarily dismissed. The facts pertaining to the issues on appeal will be discussed in detail below.

III. ISSUES PRESENTED ON APPEAL

A. In No. 40661: Did the District Court err in not ordering additional DNA testing when the YSTR testing did not identify Mr. Nelson as the source of the male DNA but also did not exclude him?

B. In No. 40828: Did the Court err in failing to grant Mr. Nelson's motion for appointment of counsel, especially given the absence of advance notice of the reasons for the court's denial?

IV. ARGUMENT

A. *The District Court Erred in Denying Mr. Nelson's Request for Additional DNA Testing in No. 40661*

1. Statement of Facts

On February 3, 2011, Mr. Nelson filed a Petition for the Performance of Forensic Deoxyribonucleic Acid (DNA) Testing, pursuant to I.C. § 19-4902(b). R (40661) 7. He specifically asked for forensic DNA testing on the materials within the rape kit (State's Exhibit 2 at the criminal trial) and K.M's underwear (State's Exhibit 6). *Id.* Mr. Nelson asked that the DNA profiles found during that analysis "be compared with the known DNA of Gregory Joseph Nelson." R (40661) 45.

Mr. Nelson did not request counsel when he filed the petition. However, on March 3, 2011, the court held a status conference and told Mr. Nelson that while "I know, in the past, you've not had good success with attorneys representing you . . . I think you need the assistance of counsel." T (3/3/2011), pg. 11, ln. 14 - pg. 12, ln. 12.[1] Mr. Nelson acquiesced, "All right." *Id.* The court then appointed the Ada County Public Defenders Office to represent him. *Id*, pg. 14-17. Later, attorney Joseph L. Ellsworth, of the firm Ellsworth, Kallis & DeFranco, PLLC, signed and filed a Stipulation Regarding Sealing, Transportation and DNA testing of Trial Evidence in Case No. CR-FE-00-00002180. The stipulation provided for the sealing of the rape kit, the transportation of the rape kit and underwear to the Idaho State Forensic Lab and the inventory of the contents of the rape kit. R (40661) 63. On July 8, 2011, a Stipulation Regarding Payment for Testing was filed. R (40661) 73. The court, accepting the stipulations, ordered that

[1] Mr. Nelson recalls the Court's comment being that he had not had "good luck with attorneys," not "good success."

the exhibits be transported to the state laboratory and that testing be conducted at the state's expense. R (40661) 67-68; 74.) On August 3, 2011, Attorney Teresa A. Martin filed a Notice of Substitution of Counsel. R (40661) 75.

On February 2, 2012[2], the court held a review hearing to determine who was to pay for the testing. The question of payment was raised by Deputy Attorney General Stephanie Altig, who was present at the hearing. Ms. Altig's client was the Idaho State Police forensic lab. T (2/2/12), pg. 12, ln. 8-11. She stated that:

> Our position is that the statute says that tests shall be performed by – emphasis in that way – and paid for by. Our lab does not perform the kind of DNA test that is at issue here. Don't have the facility for it. Don't have the equipment. Don't have the personnel. And don't have the money.

T (2/2/12) pg. 12-18. In support of ISP's position, Ms. Altig asked Cynthia Cunnington to address the court. Ms. Cunnington, who stated she was the "DNA supervisor and technical lead" for the ISP Forensic Services Lab, was not sworn as a witness before she answered the questions put to her by Ms. Altig. T (2/2/12) pg. 16, ln. 1-25. Ms. Cunnington told the court that "the DNA testing that we do in the laboratory is referred to as STR testing," but that her understanding was that "[t]he testing being requested in this case is . . . YSTR testing" which is "testing specific for males." T (2/2/12) pg. 17, ln. 4-25. As will become important later, Ms. Cunnington did not say who requested YSTR testing, or why it was the appropriate test in these circumstances, or that STR testing was inappropriate or not feasible.

Ms. Cunnington alerted the court that the YSTR testing results could not be used to conduct a CODIS search for suspects because that database "only contains STR profiles. It does

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[2] The correct date for the hearing appears on page 3 of the official transcript, the 2013 date on page 4 is a typographical error. R (40661) 3 (Register of Actions).

not contain YSTR profiles." T (2/2/12) pg. 19, ln. 17-20. However, "YSTR is still a comparative test," so a "known profile from the males associated with the case" could be "compared to any YSTR profile that may be obtained in the evidence in this case." T (2/2/12) pg. 20, ln. 5-12. After the hearing, the court ordered that the "Idaho State Police investigators shall have the DNA testing (YSTR) required by Idaho Code 19-4902" performed. R (40661) 82.

The state filed an Answer to the DNA petition where it admitted: 1) that the underwear and rape kit had been admitted into evidence at the criminal trial; 2) that DNA testing was not done on those items "because the type of DNA testing required was not available;" 3) that identity was an issue at the trial; 4) that the court had maintained custody of the exhibits until they were released for DNA testing; and 5) that the DNA testing had the potential to provide evidence on the issue of identity. However, it asked that the petition be dismissed because the "DNA testing has been completed as requested by Petitioner and the defendant has not been excluded as a donor of the evidence found on the victim's underwear and/or rape kit." R (40661) 90-91.

Mr. Nelson then filed *pro se* a Certified Notice of Discharge for Cause Re: Representation by Teresa A. Martin, attorney at law. R (40661) 93. Mr. Nelson attached to the Notice a letter from him to Attorney Martin discharging her. Mr. Nelson cited Ms. Martin to Idaho Rule of Professional Code 1.16(d). R (40661) 94. The letter detailed the reasons Mr. Nelson had for discharging Attorney Martin, which included the following:

1. That he had informed Ms. Martin that he wanted a "full CODIS STR" DNA analysis completed. R (40661) 95.

2. That he was not consulted regarding the type of DNA analysis to be done. R (40661) 96.

3. That it was likely that the YSTR testing would result in inconclusive results because of the small amount of DNA found, the imprecise nature of the test and because the trailer where the offense was alleged to have occurred belonged to Mr. Nelson's father prior to his death. Thus, there would be epithelial cells from his father present in normal household dust which could be the source of the cells tested. *Id.*

4. That had he been consulted that he would have "demanded that the lab utilize the PowerPlus®Y amplification kit, combined with the Mini-Filer kit, to amplify the minute quantities of Y-DNA produced from the vaginal and anal swabs[.]" R (40661) 97.

In addition, Mr. Nelson stated that Ms. Martin had "led him to believe that DNA testing was being performed on the wooden toothpicks [when] it was not." R (40661) 95.[3]

The state also filed a Motion for Summary Dismissal on the basis that the YSTR DNA test results did not exclude Mr. Nelson as a source of the male DNA found on anal swabs. Thus, the results of the YSTR DNA testing did not show that Mr. Nelson was more probably than not innocent. R (40661) 180. The state attached to its motion a copy of the YSTR DNA analysis. (The report is in the Clerk's Record on appeal in No. 40661 as a Confidential Exhibit.)

The court held a hearing on July 5, 2012. It began by asking Mr. Nelson to talk about the reasons he had previously noted for the discharge of Ms. Martin. Mr. Nelson stated that some of the issues, such as not getting certain documents from her, had been resolved. At the same time

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[3] As will become important in No. 40828, during the stipulated inventory of the rape kit, it was noted that item Q-13 consisted of two wooden toothpicks and dried secretions from fingernail scrapings. R (40661) 148; 208. However, in the inventory done at the time of the criminal trial, Q-13 was inventoried as a "Use [sic] swab for dried secretions or genital swabbings." R (40661) 139; *see also* 151 (single sheet of transcribed testimony of FBI expert Frederick Whitehurst at pg 679, ln. 23-24). Q-13 was not YDNA tested. Rather, it appears that Items Q-7 (vaginal swabs) and Q-9 (anal swabs) were tested.

other issues, such as getting the toothpicks tested,[4] had not been addressed.[5] The court then asked Mr. Nelson: "Do you want me to ask the public defender to find a substitute counsel for you and you can start again with a new counsel, or do you want to go ahead in these proceedings with Ms. Martin?" To which Mr. Nelson said "I think it would be best of substitute counsel would be appointed." T (7/5/12) pg. 35, ln. 6-15. The option of proceeding *pro se* was not offered to Mr. Nelson. T (7/5/2012) pg. 37, ln. 17 -pg. 38, ln. 2.

The court denied the Certified Notice of Discharge in a written order. It then gave Ms. Martin 30 days to serve opposing affidavits and a brief in response to the state's Motion for Summary Dismissal. R (40661) 197-98; 200.

Mr. Nelson then filed several *pro se* pleadings in opposition to the state's motion for summary judgment. In his First Affidavit Mr. Nelson reiterated his opposition to YSTR testing because he believed the results would be inconclusive. R (40661) 215. In his Second Affidavit he stated that:

> When I drafted my petition for DNA testing in 2011, I contemplated STR DNA identification analysis . . . I requested items to be DNA tested and to 'be compared with the known DNA of Gregory Joseph Nelson.' I was referring to CODIS STR DNA identification analysis result from a DNA sample correctional officials obtained from me pursuant to the Idaho DNA Database Act of 1996 . . . At the time I drafted my petition for DNA testing, I knew of no other DNA test, but for

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[4] The transcript reads that Mr. Nelson wanted to have "tooth, PEX DNA testing." T (7/5/2012) pg. 21, ln. 9-10. As noted above, Mr. Nelson stated in a pleading that he wanted to have the "toothpicks" tested. R (40661) 95.

[5] The Supreme Court recently suspended Ms. Martin from the practice of law, but withheld the suspension. She was found to be in violation of the I.R.P.C. in five cases. "Four of those client matters involved post-conviction relief claims . . . . In each of those matters, [she] failed to abide by the clients' objectives regarding their representation, did not diligently pursue their objectives and failed to reasonably communicate with the clients about the status of their post-conviction proceedings." The Advocate, Vol. 56, No. 8., August 2013, pg. 17.

> STR (short tandem repeat) DNA identification analysis. On Thursday, February 2, 2012, Y-STR DNA testing was ordered by Judge Williamson. At the time, I did not know what Y-STR DNA testing was.

R (40661) 230.

On September 5, 2012, the court *sua sponte* filed an Order Barring Petitioner from Filing Documents. R (40661) 236. It said, "The Petitioner requested court-appointed counsel to represent him in this case, and was appointed. The Petitioner continues to file matters *pro se.* The Petitioner can either represent himself *pro se* or be represented by appointed counsel, but he cannot do both." *Id.*

On September 6, 2012, the court told Mr. Nelson in open court that he was not to file any other *pro se* pleadings, but that he could file a motion to proceed *pro se.* T (9/6/2012) pg. 7, ln. 9-20. Mr. Nelson informed the court that he wished to proceed through Ms. Martin. *Id.*, pg. 7, ln. 25 - pg. 8, ln. 14. The court did however acknowledge that Mr. Nelson had filed a new *pro se* successive post-conviction alleging newly discovered evidence. *Id.*, pg. 10, ln. 13-25. The court stayed proceedings in that case (No. 40828) pending decision in this case. *Id.*, pg. 10, ln. 13 - pg. 11, ln. 18.

On November 1, 2012, Ms. Martin filed a one-page response to the state's motion. The argument stated, in its entirety, "Petitioner contends that the DNA testing conducted was insufficient to comply with Idaho Code § 19-4902(b) as the Y STR analysis cannot be linked to a specific individual." R (40661) 253. At the hearing on the state's motion, counsel argued that:

> [T]he problem [Mr. Nelson] has is that DNA testing was done to indicate whether or not the DNA was his. They have a sample from him. They have a sample from the rape kit, and he was asking that that be tested to determine whether or not it was Mr. Nelson.

> The YSTR testing that was done was just done on an exclusionary basis. . . .
>
> He didn't get to decide what testing was done. The state lab decided what testing was done. He believes that had proper testing been done, it would have shown he was probably than not that he's innocent. But he contends that his post-conviction is not done at this point; that testing should have been done that would show that he is not the person who provided that; as opposed to he cannot be excluded among the hundreds of thousands of other males who could not be excluded.

T (12/6/2012) pg. 4, ln. 12 - pg. 5, ln. 7. Counsel asked that the motion be denied and the case be continued for further testing. *Id*, pg. 5, ln. 15.

The court granted the state's motion to dismiss. It found that while the testing had the scientific potential to produce noncumulative evidence, it also found that, due to the results of the YSTR testing, Mr. Nelson had not met his burden of proving he was more probably than not innocent. *Id.*, pg. 7, ln. 12 - pg. 8, ln. 2. It also denied Mr. Nelson's request for STR DNA testing by concluding that "I do not find that additional testing is required in this case." *Id*, pg. 7, ln. 20-22. The court explained the basis for the denial of additional testing in its written decision:

> The Court has considered Mr. Nelson's First Affidavit requesting CODIS STR DNA testing. The Petitioner also filed his Second Affidavit explaining why he feels that Y-STR was an inadequate test, explaining why he feels a "STR DNA identification analysis" should have been conducted . . . . Beyond laying the foundation for the evidence presented in Exhibits A and B to his Objection, this affidavit contains inadmissible hearsay, information outside the Petitioner's personal knowledge, and the Petitioner's legal conclusions and, therefore, are not considered further. . . . Therefore, hearsay statements and the Petitioner's factual and legal conclusions related to CODIS STR DNA testing in the First and Second Affidavits do not present a genuine issue of material fact that the Petitioner was not the one who committed these offenses.
>
> . . . .
>
> The Court has also considered all the admissible evidence presented by the Petitioner, and finds no need for continued testing of these items because he has

not shown the result would be substantially different from or not cumulative to other items in the "rape kit."

R (40661) 266-67.

A Judgment was entered and a timely Notice of Appeal was filed. R (40661) 269, 271.

2. Why Relief Should be Granted

The YSTR test results in this case did not exclude Mr. Nelson. Consequently, Mr. Nelson and every male in his paternal line, as well as others, are potential contributors of the cells tested. Confidential Exhibit, pg. 6. A closer look at the report shows that, regarding Item 1 (the vaginal swabs), only 4 of the 16 genetic makers used for comparison were present. Thus, Mr. Nelson's known YSTR profile matched only 4 of the 16 possible markers. Confidential Exhibit, pg. 4. As to Item 2 (the anal swabs) only 8 of the 16 markers were found. Thus, Mr. Nelson's profile (Item 3) only matched half of the 16 markers. (Of course, the absence of any one marker between the samples would exclude him.)

Since Mr. Nelson was neither excluded from the group of contributors, nor identified as the contributor, he asked for additional testing to be done. The type of additional testing requested was STR testing on the remaining cells from the vaginal and anal swabs and STR testing of the toothpick and material in Q-13. The court denied the request noting only that the "hearsay statements and the Petitioner's factual and legal conclusions related to CODIS STR DNA testing in the First and Second Affidavits do not present a genuine issue of material fact that the Petitioner was not the one who committed these offenses." R (40661) 266.

The court erred in dismissing the petition without further testing. Consequently, the order dismissing the petition should be vacated and the matter remanded for additional DNA testing.

"When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, [this Court will] apply the same standard as that applied by the district court." *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). Here, the standard for when DNA testing must be ordered is found in I.C. § 19-4902(e):

> (e) The trial court shall allow the testing under reasonable conditions designed to protect the state's interests in the integrity of the evidence and the testing process upon a determination that:
>
> > (1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and
> >
> > (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

Under subsection (e), Mr. Nelson was entitled to further testing. The method of DNA testing requested by Mr. Nelson, STR testing, is likely to produce admissible results, as it is commonly admitted in both civil and criminal trials in Idaho. It also has the scientific potential to produce new noncumulative evidence that would show that it was more probable than not that Mr. Nelson is innocent. STR evidence has the scientific potential to exclude Mr. Nelson as the contributor of the DNA found on Items 1 and 2. Further, as explained by Cynthia Cunnington, STR evidence can be compared to other STR profiles found in CODIS. T (2/2/12) pg. 19-24. Thus, a match could be found from the DNA profiles found in that nationwide database. Finally, the state admitted that Mr. Nelson had presented a *prima facie* case that identity was an issue at the trial which resulted in his conviction and the evidence has been subject to a sufficient chain of custody. R (40661) 263, ft. 15.

Mr. Nelson was entitled to STR DNA testing under subsection (e) above. The court however focused on the irrelevant observation that Mr. Nelson's pleadings had not created a "genuine issue of material fact that the Petitioner was not the one who committed these offense." R (40661) 266-67. Of course, the purpose of the STR DNA testing is to produce the evidence to show Mr. Nelson is actually innocent. The DNA testing statute does not require him to make a prima facie showing of actual innocence prior to the testing. This was an abuse of discretion on the part of the court because it failed to identify the correct legal standard and then apply it. *See Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 450, 283 P.3d 757, 767 (2012) (Court abused its discretion when it failed to identify and apply correct legal standard).

In light of the above, this Court should hold that the district court erred in dismissing the DNA petition before additional STR testing could be conducted. It should then vacate the order and remand for further proceedings.

B. *The District Court Erred in Denying Mr. Nelson's Request for Counsel in No. 40828*

1. Statement of Facts

Mr. Nelson filed the above-mentioned *pro se* successive petition for post-conviction relief on July 10, 2012. He alleged that there was evidence which was discovered during the proceedings in No. 40661. R (40828) 6.

In particular, he noted that there was evidence that the rape kit had been "tampered with/destroyed/reconstructed/altered, and/or there was perjured testimony/subornation to perjury and falsified documents about it," in violation of "Article I, section 13 to the Idaho Constitution; the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." *Id.* The petition alleged, as has been noted above, that an inventory of the contents of the rape kit was

conducted in No. 40661, pursuant to the stipulation of the parties. R (40828) 7. A copy of that inventory (called a "Forensic Biology Report") dated June 28, 2011, and signed by Cynthia Cunnington, was attached as an Exhibit to the petition. The inventory describes Item Q-13 as "A glue-sealed white envelope containing two wooden toothpicks." R (40828) 24. A pre-trial inventory of the rape kit by the FBI described the contents of the rape kit to be "[a] white envelope labeled 'Step 1 - Special Evidence (if applicable) use swab for dried secretions or genital swabbings'" The inventory also states, "I marked this Q-13-40328002S YB and initialed and dated it. Envelope sealed." R (40828) 8, 38. Mr. Nelson alleged the FBI forensic scientist Frederick Whitehurst and a nurse testified at the trial that Q-13 contained "genital swabbings" and not toothpicks *Id.*, pg. 11. Mr. Nelson also alleged that the lab notes of Forensic Scientist Ann Bradley indicated that she opened Q-13 prior to trial and found the envelope contained a "external genital swab." R (40828) 105. He wrote: "Cynthia Cunnington's inventory of Q13, the step 1 special evidence envelope of State's Exhibit 2, the rape kit, finding 'two wooden toothpicks' . . . is not consistent with Ann Bradley's February 11, 1994, inventory. . . . where Ann Bradley found 'external genital swab(s)' . . . and is NOT consistent with the sworn trial testimony of Frederick Whitehurst and Nurse Debi Drake[.]" R (40828) 105; see also 108 and 114 (Ann Bradley's notes). In addition, the testing results from Sorenson Forensic notes "Q13 . . . special evidence . . . dried secretions . . . fingernail . . ., a white envelope, gum seal marked M." Confidential Exhibit (40661) pg. 25 (internal quotation marks omitted).

There is also a discrepancy between the various descriptions of Q-11. The Sorenson Forensic notes say "Q11 . . . pubic hair combings," which would be consistent with Frederick Whitehurst's testimony at trial. R (40828) 17, 25; Confidential Exhibit (40661) pg. 25 (internal

quotation marks omitted). However, the June 28, 2011, inventory reports the contents of Q-11 as "moist genital swabs." R (40828) 17, 24.

Finally, Mr. Nelson alleged that State's Exhibit 6, K.M.'s underwear, was tampered with because the descriptions of the exhibit do not match in that some witnesses at trial did not mention the exhibit had a cutting from the crotch while other inventories did mention a cutting. R (40828) 20.

As noted above, the court stayed the proceedings in this case until the resolution of No. 40661. R (40828) 74. The court lifted the stay on December 13, 2012, and gave its Notice of Intent to Dismiss Pro Se Petitioner's Successive Motion for Post-Conviction Relief. R (40828) 76. The basis for the court's proposed dismissal was three-fold: 1) "the Petitioner litigated the issue of the alteration of the 'rape kit' in his underlying appeal[6];" 2) "[a]lthough the contents of the 'rape kit' are described differently within Respondent's Exhibit 1 [in No. 40661], the Petitioner has not established facts not previously presented and heard by the differing description of the item during the new test;" and 3) [w]hile the Petitioner did not raise the same issue on appeal as to the underwear, he had the opportunity to raise the issue on appeal and also in the First or Second Petition for Post-Conviction Relief, but did not." R (40828) 76.

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[6] This statement is incorrect. As Mr. Nelson noted, "[t]he direct appeal of HCR 21080 did not involve rape kit tampering per se, nor was it factually available. Rather the issue on direct appeal was limited to a claimed 'break' in the chain of custody of the rape kit; the complete factual predicate forming the factual issues presented in the instant case, were not completely known to me, and were not available, until I actually received the inventory of the rape kit on June 28, 2012." R (20828) 88. Mr. Nelson's statement regarding the issue on appeal is confirmed by a review of the Court of Appeals' framing of the chain of custody issue: "He argues that the necessary foundation for this evidence was lacking because two Boise police officers gave inconsistent testimony regarding the chain of custody after the police took possession of the kit." *State v. Nelson*, 131 Idaho at 216, 953 P.2d at 656.

Mr. Nelson asked for appointment of counsel on January 3, 2013. R (40821) 81. Mr. Nelson wrote therein that "[t]he response to the Court's Notice of Intent to Dismiss, and the causes presented in this case, will require legal research, and other research that will likely be beyond the capability of this *pro se* petitioner to handle without the aid of competent counsel." R (40828) 14. Mr. Nelson filed an affidavit in support of his motion noting that he was housed at the Idaho Maximum Security Institution and that he did not have the resources needed to conduct meaningful legal research, in particular "case law research is non-existent." R (40828) 83.

The court denied the motion for appointment of counsel finding as follows:

> [T]his is a successive appeal which does not have the possibility of rising to the level of a valid claim of newly discovered evidence. The Court has considered Mr. Nelson's conclusory statements that there is more than mislabeling of items in the rape kit, but considers that statements conclusory and unsupported by the evidence since the evidence before the court is that different examiners called the items by different names. Mr. Nelson's statements of what others have said is hearsay and not admissible evidence. . . . Defendant's Exhibit C to the affidavit is evidence previously known and considered by this court.[7] Even considering the standards for appointment of counsel . . . this court finds this successive petition frivolous.

R (40628) 116-117.

The court then dismissed the petition. R (40628) 119-123.

A Judgment was entered and a timely Notice of Appeal was filed. R (40628) 125. Mr. Nelson did not seek the appointment of appellate counsel in No. 40828. Current counsel is appointed in No. 40661 and represents Mr. Nelson *pro bono* in No. 40828.

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[7] Exhibit C was the lab notes made by Ann Bradley which Mr. Nelson argues show that Item Q-13 in the rape kit was identified as "external genital swab" prior to trial. R (20828) 88, 93

2. Why Relief Should be Granted

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19–4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: 1) whether the lower court correctly perceived the issue as one of discretion; 2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and 3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989); *Cowger v. State*, 132 Idaho 681, 683-84, 978 P.2d 241, 243-44 (Ct. App. 1999).

In determining whether to appoint counsel pursuant to Section 19–4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Charboneau v. State*. In its analysis, the district court should consider that applications filed by a *pro se* applicant may be conclusory and incomplete. *See id.*, at 792–93, 102 P.3d at 1111–12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Thus, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

Here the court abused its discretion because it did not act within the boundaries of its discretion as it did not apply the *Charboneau* test for the appointment of counsel. The court did not look to see if Mr. Nelson alleged facts that raise the possibility of a valid claim. Instead, it weighed Mr. Nelson's allegations and supporting document (which, if believed, clearly show that the items in Q-13 were described as genital swabs at the time of trial, but were discovered to be toothpicks when the stipulated inventory for the DNA case was performed by Cynthia Cunnington) and weighed that against the "evidence that different examiners called the items by different names." R (40661) 116-117.[8]

The *Charboneau* inquiry is not whether there might be counter-evidence to Mr. Nelson's allegations. Instead, the court should have determined whether there were allegations of a cause of action at all. Had it done so, the court would have seen that Mr. Nelson's allegations regarding the rape kit lead to the possibility of several valid claims. The state's witnesses testifying at trial regarding evidence which are not now in the rape kit could lead to evidence showing that they testified falsely about that evidence at trial. This in turn could lead to a due process claim under *Napue v. Illinois*, 360 U.S. 264 (1959). "A defendant establishes a *Napue* violation upon showing: (1) the testimony was false; (2) the prosecutor knew or should have known it was false and (3) the testimony was material." *State v. Wheeler*, 149 Idaho 364, 368, 233 P.3d 1286, 1290 (Ct. App. 2010). At the same time, if the state's witnesses testified falsely, that fact could lead to a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* and its

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[8] This "evidence" comes from a letter attached to Ms. Martin's Objection to Respondent's Motion for Summary Dismissal. R (40661) 253. Ironically, the court considered this unsworn hearsay to be evidence against Mr. Nelson when at the same time it refused to consider "Mr. Nelson's statements of what others have said [as] hearsay and not admissible evidence." R (20828) 117.

progency require a prosecutor to disclose any material, exculpatory or impeaching evidence in the possession of the law enforcement team, even if the prosecutor is personally unaware of the evidence. *State v. Gardner*, 126 Idaho 428, 433, 885 P.2d 1144, 1149 (Ct. App. 1994). And, the evidence of the destruction of evidence within the rape kit could lead to a claim under *Youngblood v. Arizona*, 488 U.S. 51 (1988). "In *Youngblood*, the Supreme Court determined that, if the content of the lost evidence is unknown, and the item is of only potentially exculpatory value, a due process violation will be established . . . if the defendant shows that the government acted in bad faith." *State v. Casselman*, 141 Idaho 592, 595, 114 P.3d 150, 153 (Ct. App. 2005). Thus, the court here failed to properly analyze Mr. Nelson's allegations in the context of his request for appointment of counsel.

For these reasons, the court's conclusion that the case "did not have the possibility of rising to the possibility of a valid claim of newly discovered evidence" is not germane. Mr. Nelson did not seek relief under I.C. § 19-4901(a)(4) because of the existence of newly discovered material facts. He alleged facts supporting a claim under subsection (a)(1) because "the conviction . . . was in violation of the constitution of the United States or the constitution or laws of this state."

Finally, the fact that "Mr. Nelson's statements of what others have said is hearsay and not admissible evidence" is irrelevant to the question of whether counsel should be appointed. If the hearsay and not admissible evidence raise the possibility of a valid claim, counsel should be appointed so he or she can see if admissible evidence can be developed to prove the factual allegations.

This Court should reverse the district court's denial of counsel, vacate the order dismissing the case and remand for further proceedings.

Alternatively, even if this Court were to agree with the district court that the petition was frivolous on the record before it, the district court still erred in denying the motion because it did not give prior notice of its determination so that Mr. Nelson would have a chance to respond.[9] The Supreme Court observed in *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001), *superceded on other grounds by statute as noted in Charboneau v. State*, *supra,* that:

> It is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond and to give the trial court an adequate basis for deciding the need for counsel based upon the merits of the claims. If the court decides that the claims in the petition are frivolous, the court should provide sufficient information regarding the basis for its ruling to enable the petitioner to supplement the request with the necessary additional facts, if they exist. Although the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where, as here, he has alleged facts supporting some elements of a valid claim.

135 Idaho at 679, 23 P.3d at 141.

Thus, under *Brown*, even if a court decides that the claims in the petition are frivolous, it should provide sufficient notice regarding the basis for its ruling to enable the petitioner to provide additional facts, if they exist, to demonstrate the existence of a non-frivolous claim. *See also Swader v. State*, 143 Idaho 651, 653-54, 152 P.3d 12, 15-16 (2007); *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. The court here did not give advance notice to Mr. Nelson of its reasons to deny counsel or a meaningful opportunity to respond.

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[9] In this regard, it is important to note that the reasons the court gave for denying the motion for appointment of counsel were not the same three reasons it gave in its Notice of Intent to Dismiss.

V. CONCLUSION

For all the reasons set forth above, Gregory Nelson asks that this Court vacate the decision granting the Respondent's Motion for Summary Disposition in No. 40661 and remand for STR DNA testing. In 40828, Mr. Nelson asks that the court's *sua sponte* motion to dismiss be vacated, the order denying his motion for counsel be reversed and the matter remanded for further proceedings.

Respectfully submitted this 19th day of December, 2013.

Dennis Benjamin
Attorney for Gregory Nelson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6TH day of December, 2013, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

Dennis Benjamin