8-27-2013

Lopez v. State Appellant's Brief Dckt. 40751

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERNESTO GARZA LOPEZ, Petitioner/Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 40751 Case No. CV-2012-2895-C (Canyon County)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE JAMES C. MORFITT
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's judgment dismissing Mr. Ernesto Lopez's successive petition for post-conviction relief without an evidentiary hearing.

B. General Course of Proceedings

1. Underlying criminal and initial post-conviction proceedings

On February 13, 2006, Mr. Lopez pled guilty to felony domestic battery in exchange for the State's agreement to dismiss a second count and the allegation that Mr. Lopez was a persistent violator. CR (40751)[1] p. 9 (Change of Plea Tr. p. 4, ln. 12-17). Based on a previous jail visit with an attorney with the public defender's office, Mr. Lopez believed that he would receive a sentence of between thirty and sixty months. CR (40751) p. 4, 7. During the plea colloquy, the district court did not discuss the potential penalties or the district court's discretion regarding any agreements made as to sentence. CR (40751) p. 9-10 (COP Tr. p. 4, ln. 12-17). As an afterthought, the district court inquired of counsel whether there was any recommendation as to sentence and counsel indicated that both parties were free to argue for whatever sentence they felt was appropriate. *Id.* at p. 10 (COP Tr. p. 7, ln. 21-25). The district court thereafter sentenced Mr. Lopez to a unified term of ten years with a minimum period of confinement of six years. R. (37206) p. 45 (Sentencing Tr. p. 19, ln. 8-15).

On July 10, 2007, Mr. Lopez filed a pro se petition for post-conviction relief. CR

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[1] Contemporaneous with this brief, Mr. Lopez is filing a request that this Court judicially notice the clerk's record and transcripts of the appeal from Mr. Lopez's initial post-conviction relief, Docket Number 37206. Citations to the record will thus be accompanied by their respective docket numbers.

(37206) p. 4. Mr. Lopez raised several claims including that he pled guilty in reliance "on his misguided understanding from his counsel's insistence and assurance, that the matter would be dealt with minimally, and he would receive a minor sentence – that the court would follow the prosecutor's and his recommendation for such." *Id.* at p. 8. The district court granted Mr. Lopez's request for counsel and ordered that appointed counsel "investigate the matters and, if necessary, file an amended petition for post-conviction relief" within 45 days. *Id.* at p. 22-23. The district court then granted counsel's request for additional time to amend the petition so that transcripts could be obtained. *Id.* at p. 28. On November 14, 2007, the district court entered an order indicating the transcripts had been prepared and giving appointed counsel six weeks to amend Mr. Lopez's petition for post-conviction relief. *Id.* at p. 30. Approximately nineteen weeks later, Mr. Lopez submitted a pro se affidavit indicating he had received no communication from his court appointed attorney since July of 2007, counsel would not respond to his correspondence, he was unaware of the status of his case and requested that substitute counsel be appointed. *Id.* at p. 48-53.

On June 17, 2008, appointed counsel filed a motion in which she indicated she would not be amending Mr. Lopez's pro se petition and requested an evidentiary hearing. *Id.* at p. 57. The State then filed an answer to which Mr. Lopez responded pro se on July 23, 2008. *Id.* at p. 60-71. In his response, Mr. Lopez indicated that he had repeatedly requested that appointed counsel amend his petition for post-conviction relief and that she refused to communicate with him. *Id.* at p. 68.

On October 7, 2008, the State moved for summary dismissal. *Id.* at p. 72-73. On October 22, 2008, Mr. Lopez filed a motion again requesting substitute counsel, indicating that

counsel refused to communicate with him, refused to amend his petition, and refused to respond to the State's motion to dismiss. *Id.* at p. 74-79

At a hearing on December 18, 2008, the district court indicated that appointed counsel had notified the district court that she would not amend the petition because she believed that it was not timely filed. Tr. (37206) (Vol. 2) p. 1, ln. 14-20. During the ensuing discussion, the district court revealed that Mr. Lopez's counsel had neglected to use the correct dates or to apply the prisoner mailbox rule in erroneously concluding that Mr. Lopez's petition was untimely. *Id.* at p. 2, ln. 16 - p. 5, ln. 17. The district court indicated that it would not rule on the timeliness issue but that there was "at least a good faith argument that he did file it on a timely basis." *Id.* at p. 5, ln. 20-25. The district court then continued the hearing on the State's motion for summary dismissal and set a briefing schedule to allow counsel to interview Mr. Lopez and respond to the State's motion. *Id.* at p. 6, ln. 20 - p. 8, ln. 25.

Two months later at a hearing on February 20, 2009, appointed counsel had neither responded to the State's motion for summary dismissal nor amended the petition. *See* CR (37206) p. 1-3; Tr. (37206) (Vol. 2) p. 10, ln. 23-25. The parties and district court agreed that Mr. Lopez's petition was timely and the matter was set out to allow counsel another opportunity to consult with Mr. Lopez and to respond to the State's request for dismissal. Tr. (37206) (Vol. 2) p. 10, ln. 13 - p. 11, ln. 19. At a subsequent hearing on April 20, 2009, appointed counsel still had not responded to the State's motion and was permitted to withdraw due to a pending Bar complaint against her filed by Mr. Lopez. *See* CR (37206) p. 1-3; Tr. (37206) (Vol. 2) p. 13, ln. 13-20.

No one appeared on Mr. Lopez's behalf at a hearing on May 29, 2009, and the matter was

continued to explore who would be representing Mr. Lopez based on the unavailability of attorneys willing to accept post-conviction appointments. Tr. (37206) (Vol. 2) p. 18, ln. 16 - p. 19, ln. 20. Another attorney was appointed shortly thereafter but moved to withdraw one month later because he had not been paid by the county public defender and was unsure who would be responsible for his compensation when the public defender was replaced later that month. CR (37206) p. 114-15. On August 4, 2009, the district court reviewed the history of Mr. Lopez's various appointed attorneys, appointed the new county public defender to represent Mr. Lopez and again set the matter out to allow counsel to communicate with Mr. Lopez. Tr. (37206) (Vol. 3), p. 1-4.

The new attorney appointed for Mr. Lopez did not amend his petition or file a written response to the State's motion. *See* CR (37206) p. 3. Instead, approximately six weeks after being appointed, he presented a very brief oral argument in support of Mr. Lopez's pro se petition. Tr. (37206) (Vol. 3), p. 7, ln. 1-22. The district court dismissed Mr. Lopez's petition. CR (37206) p. 149. As to Mr. Lopez's claim that he pled guilty on his misunderstanding that he would receive a minimal sentence, the district court found:

> During the change of plea hearing Counsel for the petitioner stated that there was no sentencing recommendation agreed upon and that each side was free to argue what they feel is appropriate. (Feb.13, 2006 DCRT 5 1 :54-1 :59). During the sentencing hearing, the petitioner denied that there were any agreements with respect to sentencing recommendations. (May 16, 2006 DCRT 4 9:42-10:16). The petitioner's allegation is a conclusory statement that is unsupported by admissible evidence and contradicted by the record.

CR (37206) p. 147.

2. Successive post-conviction proceedings

On March 26, 2012, Mr. Lopez filed a pro se successive petition for post-conviction

relief. CR (40751) p. 2. Mr. Lopez alleged that an attorney with the public defender's office visited him at the jail and advised him that the agreement called for a sentence of thirty months "minimum" and sixty months "maximum." *Id.* at p. 7. Mr. Lopez thereafter spoke with the primary handling attorney by phone and that attorney confirmed Mr. Lopez's understanding. *Id.* Mr. Lopez explained that he entered his plea under the assumption that he would receive the recommended sentence and that the district court did not inform him of the actual minimum and maximum penalties in accepting his plea. *Id.* Mr. Lopez asked the district court to grant post-conviction relief and amend his sentence to a minimum of thirty months to a maximum of sixty months. *Id.* at p. 4.

The district court granted Mr. Lopez's motion for counsel on April 11, 2012, and on April 16, 2012, the district court issued notice of intent to dismiss the petition.[2] CR (40751) p. 29-31, 35. The district court found that the successive petition was barred by the statute of limitations set forth in I.C. § 19-4902(a) because it was not filed within a year of the determination of Mr. Lopez's direct appeal. *Id.* at p. 38-39. The district court also found that Mr. Lopez's challenge to his plea of guilty and ineffective assistance of counsel claims were raised in his initial petition for post-conviction relief and could not be raised in a successive petition. *Id.* at p. 39-41. The district court provided Mr. Lopez twenty days to respond to the notice of intent to dismiss. *Id.* at p. 42.

Approximately twenty-three days later, the district court received a pro se document from Mr. Lopez titled "Motion for Enlargement of Time to Respond to Notice of Intent to Dismiss

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[2] A different district judge was assigned to the successive post-conviction case than had been assigned during the underlying criminal and initial post-conviction relief proceedings.

Application for Post-Conviction Relief" and a supporting affidavit. *Id.* at p. 44-48. In the motion, Mr. Lopez asked for additional time to respond to the notice of intent to dismiss "pro se" as "court appointed counsel's shortcomings has compelled Petitioner to ask this Court for meaningful opportunity to provide legal authority and facts that demonstrate the existence of a genuine factual issue." *Id.* at p. 47-50. In the affidavit, Mr. Lopez indicated that the public defender had not communicated with him regarding the district court's notice of intent to dismiss, that he would request substitute counsel and that equitable concerns dictated that he be allowed an opportunity to respond to the district court's notice. *Id.* at p. 44-45.

The district court acknowledged that the pro se motion for enlargement of time was filed because "appointed counsel had taken no action to address the Court's Notice of Intent to Dismiss." *Id.* at p. 50. The district court nonetheless ordered the pro se motion stricken because Mr. Lopez was represented by counsel at the time it was filed. *Id.* The district court then dismissed Mr. Lopez's petition finding that "it has been thirty-one (31) days since the Court issued its notice of intent to summarily dismiss and no response thereto has been filed." *Id.* Eventually[3], final judgment was entered on behalf of the State. *Id.* at 79-80. This appeal follows.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err by striking Mr. Lopez's pro se motion instead of

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[3] This appeal initially proceeded under Docket Number 40047-2012. On January 16 2013, this Court remanded that case to the district court for entry of final judgment pursuant to I.R.C.P. 58(a) on Mr. Lopez's motion. The district court then entered a Judgment of Dismissal, which did not conform with I.R.C.P. 54(a) and, on January 31, 2013, this Court dismissed the appeal without prejudice. The district court entered a second Judgment of Dismissal on February 4, 2013 from which Mr. Lopez filed a notice of appeal on February 20, 2013. The instant record – Docket Number 40751-2013 – is substantially identical to the Clerk's Record prepared in Docket Number 40047.

addressing his request for new counsel or to proceed pro se and additional time to respond to the court's notice of intent to dismiss?

2. Does the district court's error in failing to provide Mr. Lopez with a meaningful opportunity to respond to the Notice of Intent to dismiss require remand for appointment of counsel and an opportunity to respond to the district court's notice?

IV. ARGUMENT

A. The District Court Erred by Striking Mr. Lopez's Pro Se Motion Instead of Addressing His Requests for New Counsel or to Proceed Pro Se and Additional Time to Respond to the Court's Notice of Intent to Dismiss

In striking Mr. Lopez's pro se motion, the district court did not cite to any legal authority. Idaho Rule of Civil Procedure 12(f) allows a court to "strike from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" on its own initiative. Mr. Lopez's request for additional time to respond to the district court's notice of intent to dismiss cannot be characterized as "redundant, immaterial, impertinent, or scandalous." Rule 11(a) contemplates that a unsigned motion can only be stricken if "a pleading, motion or other paper is not signed . . . promptly after the omission is called to the attention of the pleader or movant."

Thus, neither Rule 11(a) nor 12(f) provided the district court with authority to strike Mr. Lopez's motion. Nor does there appear to be any Idaho case law addressing the status of motions filed pro se while the litigant is represented. However, other jurisdictions allow courts to treat pro se pleadings filed while a person is represented as a nullity. *In re Barnett*, 73 P.3d 1106, 1110 (Cal. 2003); *Whiting v. State*, 929 So.2d 673, 674-75 (Fla. App. 2006); *People v. Milton*, 820 N.E.2d 1074, 1081 (Ill. App. 2004); *State v. Graddick*, 548 S.E.2d 210, 211 (S.C. 2001).

Nonetheless, requests to discharge counsel and complaints directed towards counsel's

performance are a critical exception to this general rule. *See In re Barnett*, 73 P.3d at 1110 (defendant who chooses professional representation, rather than self-representation, is not entitled to present his or her case personally *except* defendant may make pro se motions regarding representation, including requests for self-representation); *Whiting*, 929 So.2d at 674-75 (pro se pleadings filed by a criminal defendant who is represented by counsel are generally treated as a nullity *unless* they include an unequivocal request to discharge counsel, assert that counsel coerced the defendant into taking certain action, or reflect an adversarial relationship between the defendant and his counsel); *People v. Pondexter*, 573 N.E.2d 339, 345 (Ill. App. 1991) (defendant represented by competent counsel must not be permitted to file pro se motions *except* to afford the right to file pro se motions while represented that are "directed to defendant's attorney's representation"); *Graddick*, 548 S.E.2d at 211 (since there is no right to hybrid representation, substantive documents filed pro se by a person represented by counsel are not accepted *except* "the rule against hybrid representation does not bar pro se motions to relieve counsel"); *Williams v. State*, 946 S.W.2d 886, 892 (Tex. App. 1997) (court may consider pro se brief submitted by represented party when required by "the interests of justice").

On April 11, 2012, the district court granted Mr. Lopez's request for counsel and appointed the public defender "or, if necessary, conflict counsel." CR (40751) p. 29-31. Just five days later, the district court issued notice of intent to dismiss providing twenty days to respond. *Id.* at p. 35. Approximately twenty-three days later, the district court received[4] Mr. Lopez's pro se

[4] It appears from the certificate of service that Mr. Lopez delivered his motion to prison officials for mailing two days earlier, on May 7, 2012. The mailbox rule deems a pro se inmate's document filed as of the date it was submitted to prison authorities for the purpose of mailing to the court for filing. *Munson v. State*, 128 Idaho 639, 641, 917 P.2d 796, 798 (1996); *State v. Johnson*, 152 Idaho 56, 62, 266 P.3d 1161, 1167 (Ct. App. 2011).

document titled "Motion for Enlargement of Time to Respond to Notice of Intent to Dismiss Application for Post-Conviction Relief" and supporting affidavit indicating appointed counsel had not communicated with him regarding the notice of intent to dismiss. *Id.* at p. 44-48. Mr. Lopez asked for additional time to respond to the notice of intent to dismiss "pro se" or that substitute counsel be appointed. *Id.* Thirty-one days after issuing the notice of intent to dismiss, the district court simultaneously struck Mr. Lopez's request for additional time and dismissed the case.

Initially, the county public defender appointed in this case represented Mr. Lopez during the initial post-conviction proceedings. *Compare* CR (37206) p. 120 (Mimura Law) *with* CR (40751) p. 34 (Mimura Law). It thus appears that conflict counsel should have been appointed but that the public defender did not have the opportunity to assign conflict counsel given the proximity of the order appointing counsel and the notice of intent to dismiss. *See* CR (40751) p. 1 (no notice of appearance reflected in Register of Actions). Accordingly, although nominally represented, no attorney had been assigned to Mr. Lopez at the time the district court struck his request for time and dismissed his case.

Moreover, the pro se pleading struck by the district court requested additional time to respond to the district court's notice of intent to dismiss because counsel had failed to do so. In reversing based on a trial judge's refusal to consider the defendant's pro se motion to dismiss his public defender, the Florida appellate court aptly explained the difficulty in refusing to consider such pro se requests:

> In the first place, if the claim is that the appointed lawyer is not doing the lawyer's assigned job, one might wonder how that failure would ever come to light and be appropriately remedied if the person who is suffering from this inadequacy is not permitted to do so. Simply ignoring a pretrial assertion of ineffectiveness of counsel means that the claim is left to be taken up in post conviction relief

> proceedings. . . . The supposed rule that all pro se filings by represented defendants are a nullity thus makes no sense, at least in the circumstance of ineffective assistance of counsel, and may lead to a manifest injustice. It will almost surely result in a frequent squandering of public resources on wasted trials that have to be repeated.

Graves v. State, 642 So.2d 142, 144 (Fla. App. 1994). This reasoning is equally applicable in the post-conviction context where refusal to address the litigant's complaint against counsel leaves the issue to be litigated in future successive petitions challenging post-conviction counsel's assistance. Here, the district court's decision to strike the motion to proceed pro se rather than address the request has necessitated the instant appeal and/or another successive petition for post-conviction relief alleging post-conviction counsel's ineffective assistance for failing to respond to the notice. Public resources and Mr. Lopez's substantial rights would have been better served by simply addressing the pro se request and having the action heard on its merits.

Further, the district court's refusal to consider Mr. Lopez's request created a manifest injustice. Mr. Lopez asked for additional time to respond to the district court's notice of intent to dismiss, either pro se or with new counsel, because his attorney had not responded within the deadline set by the district court. The district court refused to consider the request because it was not made by the attorney and then dismissed the action because the attorney failed to respond to said notice. Such an outcome was profoundly unfair.

Nor are the concerns underlying the rule prohibiting pro se filing while represented applicable in this circumstance. When counsel and client both file pleadings and motions, it may be difficult to discern exactly what issues and arguments are before the court. Additionally, the rule prohibiting such hybrid representation prevents confusion and delay. *See Pondexter*, 573 N.E.2d at 345 ("a defendant, when represented by competent counsel, must not be permitted to

proceed unfettered, to file a stream of pro se motions, especially when the result is a substantial delay of defendant's trial.) However, these concerns regarding delay and confusion are simply inapplicable when the pro se motion requests to discharge or replace counsel.

> Aside from the obvious problem with limiting nonperforming lawyer claims to being filed by only the allegedly nonperforming lawyers, there is simply no good reason to adopt such a rule. There is absolutely no reason to believe that the machinery of justice will become fouled by the filing of ineffective assistance of counsel claims by represented defendants. Those that present no basis for any action by the court can be safely rejected. The court has ample powers to treat any abuses of filing by overly litigious defendants.

Graves, 642 So.2d at 144.

This case illustrates the problem of limiting nonperforming lawyer claims to being filed by only the allegedly nonperforming lawyers. Unlike those cases in which a stream of pro se motions are filed in addition to counsel's motions and pleadings, Mr. Lopez asked for additional time to respond to the notice of intent to dismiss because his attorney had not timely done so. The only documents in the record are those issued by the district court and filed by Mr. Lopez or the State.

Although the district court appointed counsel to represent Mr. Lopez, no attorney had appeared in the case or timely responded to the district court's notice of intent to dismiss. In such circumstances, the district court was obligated to address Mr. Lopez's motion for additional time to respond either pro se or through substitute counsel. Therefore, this case must be remanded for appointment of counsel and an opportunity to respond to the notice of intent to dismiss.

B. The District Court's Error in Striking the Motion Affected His Substantial Rights and Requires Remand for Appointment of Counsel and an Opportunity to Respond to the District Court's Notice

Pursuant to I.C. § 19–4906(b), the district court may sua sponte dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the

ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. *See also Buss v. State*, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). The notice procedure is necessary so that the applicant is afforded an opportunity to respond and to establish a material issue of fact if one exists. *Baxter v. State*, 149 Idaho 859, 865, 243 P.3d 675, 681 (Ct. App. 2010); *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). However, even if notice was deficient, this Court can affirm where an applicant responds to a notice of intent to dismiss and fails to provide sufficient evidence to support a claim. *Ridgley v. State,* 148 Idaho 671, 676, 227 P.3d 925, 930 (2010); *Baxter v. State*, 149 Idaho at 865, 243 P.3d at 681.

Here, the district court refused to acknowledge Mr. Lopez's request for additional time to respond to the district court's notice and, thus, he was not provided with a meaningful opportunity to address the grounds set forth in the court's notice. Moreover, the district court's dismissal cannot be affirmed on the theory that Mr. Lopez's petition was entirely frivolous and, thus, appointment of counsel (or the opportunity to respond to the notice on intent to dismiss) was unnecessary. Although the decision to grant or deny a request for a court-appointed attorney lies within the discretion of the district court, "'[a]t a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition.'" *Melton v. State*, 148 Idaho 339, 341, 223 P.3d 281, 283 (2009), *citing Charboneau v. State*, 140 Idaho 789, 794, 102 P.3d 1108, 1113 (2004). In determining whether to appoint counsel, trial courts should bear in mind that applications and affidavits filed by pro se applicants will often be conclusory and incomplete because they may not know the essential elements of a claim. *Swader v. State,* 143 Idaho 651, 653, 152 P.3d 12, 15 (2007); *Judd v. State,* 148 Idaho 22, 24, 218 P.3d 1,

3 (Ct. App. 2009). Consequently, if the applicant alleges facts that give rise to the *possibility* of a valid claim, the trial 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 792-93, 102 P.3d at 1111-12; *Judd*, 148 Idaho at 24, 218 P.3d at 3.

Here, the district court indicated it intended to dismiss Mr. Lopez's successive petition because it was untimely and because his claims for relief had been addressed in initial post-conviction relief proceedings. The district court applied the incorrect standard in determining whether the successive petition was timely and application of the correct standard establishes that Mr. Lopez's successive petition was likely filed within a reasonable time. Additionally, there is a possibility that facts exist which would have supported a claim that Mr. Lopez's claims were inadequately presented during initial post-conviction relief proceedings due to ineffective assistance of post-conviction counsel and appointment of counsel could have assisted him in conducting an investigation into facts not in the record. Accordingly, the case must be remanded for appointment of counsel and an opportunity to respond to the district court's notice.

1. Timeliness

Applying I.C. § 19-4902(a), the district court concluded:

> The decision of the Idaho Court of Appeals affirming the denial of Petitioner's Rule 35 motion became final upon the issuance of the Remittitur on September 13, 2007 . . . There were no proceedings following the appeal within the meaning of I.C. § 19-4902(a). Thus, Petitioner's time for filing a petition for post-conviction relief predicated upon claims arising from the Petitioner's change of plea in the underlying criminal case was one (1) year from the date the decision of the Idaho Court of Appeals became final; or, on or about October 4, 2008. Petitioner's time to file a Petition for Post-Conviction Relief challenging the change of plea expired long before his successive Petition was filed on March 26, 2012.

R. (40751) p. 39.

The statute relied on by the district court – I.C. § 19-4902(a) – governs the time to file an initial post-conviction action. As to Mr. Lopez's initial post-conviction petition, the district court and parties agreed that it was timely filed. Tr. (37206) (Vol. 2) p. 10, ln. 13 - p. 11, ln. 19. "If an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if '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.'" *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008), *citing* I.C. § 19–4908; *see also Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). The Idaho Court of Appeals explained:

> The legislature has seen fit to not include a limitation period contained in I.C. § 19-4908 and, as [the Court of Appeals has] previously held, the limitation period of I.C. § 19-4902 is not renewed after the determination of an appeal in a post-conviction relief action. However, when a second or successive application is summarily dismissed because of the alleged ineffectiveness of the initial post-conviction counsel, application of the relation-back doctrine may be appropriate. *Mellinger v. State*, 113 Idaho 31, 740 P.2d 73 (Ct. App. 1987) (Burnett, J., concurring). This is so because failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process. *See Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996).

Hernandez v. State, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). "The trial court's analysis of 'sufficient reason' permitting the filing of a successive petition must necessarily include an analysis of whether the claims being made were asserted within a reasonable period of time. In determining what a reasonable time is for filing a successive petition, [this Court] will simply consider it on a case-by-case basis, as has been done in capital cases." *Charboneau*, 144 Idaho at 905, 174 P.3d at 875.

The district court dismissed Mr. Lopez's initial post-conviction action on November 23,

2009 and Mr. Lopez appealed. CR (37206) p. 149, 151. According to the district court, the Court of Appeals' opinion affirming the dismissal became final in June 2011. CR (40751) p. 37-38, 41. Mr. Lopez filed the successive petition less than a year later, on March 26, 2012. In *Hernandez*, the Court concluded that one year was a reasonable time for an inmate to proceed with a successive post-conviction relief action if the initial action was dismissed due to ineffective assistance from the attorney representing the inmate in that proceeding. In *Charboneau,* the Court concluded that thirteen months after becoming aware of the allegations was unreasonable.

Accordingly, whether Mr. Lopez initiated his successive petition within a "reasonable" time depends on the facts and circumstances of his case. Because the district court failed to identify the correct legal standard pertaining to the timeliness of the successive petition in its notice of intent to dismiss and failed to provide Mr. Lopez with an adequate opportunity to respond, Mr. Lopez was denied the opportunity to describe the particular circumstances he encountered. Further, given that the successive petition was filed less than one year after the initial proceedings became final, it is probable that he filed within a reasonable time frame. The case must therefore be remanded for appointment of counsel and to provide an opportunity to explain that his successive petition was filed within a reasonable time.

2. Facts possibly exist which would have supported a claim that Mr. Lopez's claims were inadequately presented during initial post-conviction relief proceedings due to ineffective assistance of counsel of post-conviction counsel

In dismissing Mr. Lopez's successive petition, the district court concluded that "Petitioner's claims for relief in the instant case were previously raised and fully adjudicated in the 2007 PCR Petition and that I.C. § 19-4908 bars Petitioner's 2012 Petition." CR (40751) p. 41. However, a ground for post-conviction relief may be raised in a successive petition if the court

finds "sufficient reason" explaining why the ground "was not asserted *or was inadequately raised* in the original, supplemental, or amended application." I.C. § 19-4908 (emphasis added). This statute "does not prohibit successive petitions for postconviction relief in every case, but rather, only prohibits successive petitions in those cases where the petitioner 'knowingly, voluntarily and intelligently' waived the grounds for which he now seeks relief, or offers no 'sufficient reason' for the omission of those grounds" in the initial post-conviction action. *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981). Deficient representation by counsel in an initial post-conviction proceeding, that causes a claim to be inadequately presented to the court, constitutes a "sufficient reason" to allow assertion of the same claim in a subsequent post-conviction petition pursuant to I.C. § 19-4908. *See Palmer*, 102 Idaho at 595-96, 635 P.2d at 959-60; *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); *Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006); *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005); *Hernandez v. State*, 133 Idaho 794, 798-800, 992 P.2d 789, 793-95 (Ct. App. 1999); *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987).

Even before delving into the merits of Mr. Lopez's successive petition, there is reason to question whether he received effective assistance of counsel during initial post-conviction relief proceedings. The first attorney appointed to represent Mr. Lopez refused to communicate with him, to amend his petition or respond to the State's summary dismissal motion because of her mistaken impression the initial petition was untimely. The district court eventually outlined the correct legal standards and pertinent dates for counsel and the State thereafter agreed the petition was timely. Nonetheless, despite two set overs to provide opportunity to meet with Mr. Lopez and respond to the State's motion, counsel still did not amend the petition or respond to the

State's request for dismissal before being allowed to withdraw due to a conflict of interest. After a delay related to the unavailability of conflict attorneys, an attorney was appointed who then was permitted to withdraw before undertaking any significant work on Mr. Lopez's behalf when the public defender contract changed hands. The last attorney appointed for Mr. Lopez did not amend his petition or file a written response to the State's motion and, instead, presented a very brief oral argument in support of Mr. Lopez's pro se petition approximately six weeks after being appointed.

Moreover, the successive petition includes information that raises the possibility that Mr. Lopez's claims were dismissed due to ineffective assistance of counsel during the initial post-conviction relief proceedings. In a supporting affidavit, Mr. Lopez explained that before the change of plea hearing, an attorney named Megan visited him at the jail and told him that the prosecutor "had offered a plea agreement sentence of (30) months minimum and sixty (60) months maximum sentence." CR (40751) p. 7. Mr. Lopez further alleged that he entered his guilty plea believing he would receive a sentence of between thirty and sixty months and that the district court neither informed him of the actual potential penalties nor asked Mr. Lopez about the sentencing recommendation. *Id.*

The transcript of the change of plea hearing reveals a relatively brief plea colloquy in which the district court did not address the potential penalties. At the very least, the record must show that a defendant understands the possible maximum penalty which would be imposed as a consequence of pleading guilty. *State v. Colyer*, 98 Idaho 32, 36, 557 P.2d 626, 630 (1976). It appears that the district court did not comply with Idaho Criminal Rule 11 or the requirements of due process in accepting Mr. Lopez's plea. It is thus possible that post-conviction counsel should

have amended the post-conviction relief petition to include a challenge to the validity of the guilty plea, a claim of ineffective assistance of trial counsel for failing to file an appeal from the plea or a claim of ineffective assistance of appellate counsel for failing to raise the issue on direct appeal.

Moreover, the district court did not discuss whether it would be bound by any recommendations made by either party and only briefly inquired of counsel regarding sentencing recommendations. After setting the date for sentencing, the following exchange occurred:

District Court:	And at this time the defendant will be remanded to the custody of the Canyon County Sheriff. One thing I did not – I will ask if there was any sentencing recommendation agreed upon?
Defense Counsel:	It's open. Each side is free to argue what they feel is appropriate.
District Court:	The record will so show, and the defendant will be remanded.

p. 7, ln. 21-25.

The transcript corroborates Mr. Lopez's allegations that the district court did not inform him of the potential penalties or the district court's discretion with respect to the sentencing recommendations during the change of plea hearing. Although the district court belatedly asked counsel whether there was any agreement regarding sentencing recommendations, it did not inquire of Mr. Lopez's understanding. Further, Mr. Lopez would not have necessarily understood the brief reference to a "sentencing recommendation" being "open."

Although Mr. Lopez acknowledged that he understood there were no agreements as to the sentencing recommendations at the sentencing hearing, that acknowledgment does not speak to Mr. Lopez's understanding at the time of the change of plea hearing. Moreover, the district court did not address the possible penalties during the sentencing hearing and, thus, the first indication

that Mr. Lopez faced more than five years could have come when the State asked the district court to impose a five year fixed sentence followed by an indeterminate term of five years. Although Mr. Lopez's counsel asked for a three year determinate term, he did not request any particular indeterminate term and did not request that the district court impose the sentence Mr. Lopez understood would be recommended.

Further, the successive petition includes details regarding Mr. Lopez's understanding beyond the conclusory allegation in the initial post-conviction relief petition, which simply alleged he believed he would receive a minimal sentence. Particularly considering the circumstances surrounding Mr. Lopez's representation, it is certainly possible that post-conviction counsel failed to adequately communicate with Mr. Lopez and, thus, failed to provide additional specific information that could have prevented the district court from dismissing the allegations as "conclusory."

The record establishes that Mr. Lopez could possibly demonstrate sufficient reason for inadequately presenting his ineffective assistance of counsel's claims during initial post-conviction relief proceedings and, thus, that he could litigate those claims in successive proceedings. Accordingly, the district court's error in striking his pro se motion affected his substantial rights and the case must be remanded for appointment of counsel and an opportunity to respond to the district court's notice of intent to dismiss.

V. CONCLUSION

Mr. Lopez respectfully asks this Court to reverse the district court's judgment dismissing his post-conviction claims and to remand this case for appointment of counsel and an opportunity to respond to the district court's notice of intent to dismiss.

Respectfully submitted this 27 day of August, 2013.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Robyn Fyffe
Attorney for Ernesto Garza Lopez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of August, 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.

Robyn Fyffe