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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD MYERS CALDWELL, )	)	NO. 42153
Petitioner-Appellant, )	)	
v. )	)	TWIN FALLS COUNTY
STATE OF IDAHO, )	)	NO. CV 2011-4299
Respondent. )	)	APPELLANT'S BRIEF
_____ )	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

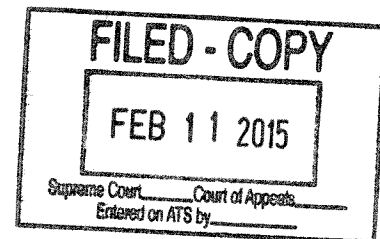
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## STATEMENT OF THE CASE

### Nature of the Case

Richard Myers Caldwell appeals from the district court's Findings of Fact and Conclusions of Law and Judgment dismissing his petition for post-conviction relief. Mr. Caldwell asserts that the district court erred when it summarily dismissed his claim that trial counsel was ineffective for failing to interview and call a witness. He also asserts that the district court erred when it did not address his claim that trial counsel was ineffective for failing to file or consult with him about an appeal, or his claim that his Eighth Amendment rights had been violated.

### Statement of the Facts and Course of Proceedings

Following a jury trial, Mr. Caldwell was convicted of two counts of lewd conduct with a minor child under the age of sixteen, felony, in violation of Idaho Code § 18-1508, and five counts of sexual abuse of a minor child under the age of sixteen, felony, in violation of I.C. § 18-1506. (R., p.566.) He was acquitted of one count of lewd conduct. (R., p.566.) The district court, for each count, imposed a concurrent unified sentence of twenty years, with three years fixed. (R., p.566.)

Trial counsel did not file an appeal from the judgment of conviction and sentences, but Mr. Caldwell filed, *pro se*, an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for the reduction of his sentences. (See R., pp.124, 567.) The district court denied the Rule 35 motion, and in Mr. Caldwell's appeal from the denial of the Rule 35 motion, the Idaho Court of Appeals affirmed the decision of the district court. (R., pp.139-42; see R., pp. 124, 567.)

Meanwhile, Mr. Caldwell filed a timely Petition and Affidavit for Post Conviction Relief. (R., pp.18-40.) The various grounds for relief in the post-conviction petition and supporting affidavit included claims of ineffective assistance of counsel, prosecutorial misconduct, and violations of Mr. Caldwell's Eighth Amendment rights. (R., pp.20-21.) Mr. Caldwell also filed a Motion and Affidavit in Support for Appointment of Counsel. (R., pp.41-44.) The district court then appointed counsel to represent Mr. Caldwell in his post-conviction proceeding. (R., pp.45-46.)

The district court ordered Mr. Caldwell's post-conviction counsel to file an Amended Application for Post-Conviction Relief. Upon the district court's order (R., pp.110-11), Mr. Caldwell subsequently filed a verified Amended Petition for Post-Conviction Relief. (R., pp.145-52.) He raised the "[i]neffective assistance of counsel in violation of petitioner's rights as set forth in the 6<sup>th</sup> Amendment to the United States Constitution" as a ground for relief in the amended petition. (R., p.146.) Mr. Caldwell's assertions in support of the ineffective assistance of counsel included assertion (a): "See attached pages numbered 3, 4, 6 and 7 which are incorporated by this reference as though fully set forth herein." (R., p.148.) "Page 6," part of the excerpts from the original petition, featured the assertion that "Defense counsel never filed an appeal after the trial and the sentencing. Defense Counsel never informed the defendant of his rights to file an Appeal and never consulted with defendant to see if he wanted to file the Appeal." (R., p.155.)

The ineffective assistance of counsel claims in the amended petition also included the assertions that Mr. Caldwell's trial counsel (b) failed to adequately represent him at trial, (c) failed to interview and call as a witness Dr. Tom Atkins, who



would have rendered an opinion that Mr. Caldwell did not exhibit pedophilic or criminal sexual tendencies, (d) failed to review with Mr. Caldwell prior to trial discovery materials and documents received from the prosecutor, (e) failed to review the recorded CARES interviews of the alleged victims, (f) assured Mr. Caldwell that he would retain a private investigator, (g) failed to move for the dismissal of the prosecution on the basis of a “corpus delecti” argument, (h) failed to request the removal of two separate jurors, (i) failed to correct the presentence report (PSI), and (j) met with Mr. Caldwell prior to trial for a total of three hours or less. (R., pp.148-51.)

With respect to the assertion that trial counsel failed to interview Dr. Atkins and call him as a witness, the excerpts from the original petition attached to the amended petition averred that Dr. Atkins was one of three psychiatrists who had documented Mr. Caldwell’s Posttraumatic Stress Disorder. (R., pp.156-57.) According to Mr. Caldwell, trial counsel “did not want to use any character witnesses for defendant when there [were] many who offered to testify,” which “had devastating effects on the outcome of the Trial.” (R., p.157.)

The excerpts from the original petition further contained the assertion that Mr. Caldwell’s “8<sup>th</sup> Amendment Rights to the Constitution of the United States have clearly been violated while the defendant has been incarcerated by the Idaho Department of Corrections. The defendant will suffer physically and emotionally for the rest of his life because of the permanent damage that has been done.” (R., pp.153-

54.)<sup>1</sup> Additionally, the excerpts included allegations of prosecutorial misconduct. (R., p.153.)

The State then filed a Respondent's Answer to Amended Petition for Post-Conviction Relief. (R., pp.395-399.) In the answer, the State denied Mr. Caldwell's asserted grounds for post-conviction relief from the amended petition, including "any and all allegations of ineffective assistance of counsel." (R., p.396.) The State denied that the failure to call Dr. Atkins at trial constituted ineffective assistance of counsel because "Dr. Atkins would not have been allowed at trial to render an opinion that the defendant 'did not exhibit pedophilic or criminal sexual tendencies.' Such evidence would not have been admissible at trial . . . ." (R., p.397.)

The State subsequently filed a Respondent's Motion for Summary Dismissal, requesting the summary dismissal of Mr. Caldwell's post-conviction petition "on the general basis that, in light of the pleadings, answers, admissions, and the record of the underlying criminal case, the petition fails to raise a genuine issue of material fact." (R., pp.404-05.) The State argued that "Richard Caldwell's ineffective assistance of counsel claims fail to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice." (R., p.405.) In the accompanying Respondent's Brief in Support of Motion for Summary Dismissal (R., pp.406-13), the State similarly contended that none of Mr. Caldwell's ineffective assistance of counsel claims "meet the *Strickland* standard two-prong analysis." (R., p.409.)

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<sup>1</sup> The affidavit filed in support of the original petition asserted that the Eighth Amendment violations included being forced to live in unhealthy and unsanitary living conditions, and not getting proper medical treatment after suffering multiple strokes. (R., pp.36-37.)

The State specifically argued that the ineffective assistance of counsel claim on trial counsel's failure to introduce Dr. Atkins at trial was without merit, because "[t]he Idaho Rules of Evidence prohibit such testimony at trial. This allegation should be summarily dismissed." (R., p.410.) However, the State's answer, motion for summary dismissal, and brief in support did not specifically address Mr. Caldwell's claim that trial counsel was ineffective because he failed to file an appeal or consult with Mr. Caldwell about filing an appeal, nor did they specifically address Mr. Caldwell's Eighth Amendment claim. (See R., pp. 395-399, 404-13.)

At the hearing on the motion for summary dismissal, the district court dismissed some of the claims addressed in the State's motion for summary dismissal, including the claim that trial counsel was ineffective for failing to interview or call as a witness Dr. Atkins. (Tr., Jan. 7, 2013, p.22, L.11 – p.27, L.16.) The district court ruled that Dr. Atkins' testimony was inadmissible, "and, therefore, the prejudice prong is again insufficiently satisfied, and that allegation is dismissed." (Tr., Jan. 7, 2013, p.24, Ls.4-8.) In its subsequent Order Granting Partial Dismissal of Amended Post Conviction Relief Petition, the district court ultimately determined that the claims "involving defense counsel's preparation and the amount of time spent with the petitioner in advance of trial including reviewing discovery, CARES report, and the PSI after trial shall be litigated at a hearing for post conviction relief." (R., pp.508-09.) The district court did not specifically address the failure to file/consult about an appeal claim, or the Eighth Amendment claim. (See Tr., Jan. 7, 2013, p.22, L.11 – p.28, L.11; R., pp.508-09.)

The district court then held a court trial on the three ineffective of assistance claims identified in the order: trial counsel's failure to properly review discovery material

prior to trial with Mr. Caldwell, how much time in preparation trial counsel spent with Mr. Caldwell prior to trial, and trial counsel's failure to note objections in the PSI. (Tr., Jan. 27, 2014, p.26, L.23 – p.27, L.14.) The district court heard testimony from Mr. Caldwell (Tr., Jan. 27, 2014, p.30, L.13 – p.91, L.9), and from trial counsel (Tr., Jan. 27, 2014, p.92, L.10 – p.145, L.18).

At the close of his testimony, Mr. Caldwell mentioned that his prosecutorial misconduct claims had not been addressed in the district court's order. (Tr., Jan. 27, 2014, p.89, Ls.4-13.) He then asked the district court to consider the prosecutorial misconduct claims. (Tr., Jan. 27, 2014, p.146, Ls.4-20.) The State requested that the district court dismiss the prosecutorial misconduct claims under Idaho Rule of Civil Procedure 41(b). (Tr., Jan. 27, 2014, p.154, L.13 – p.155, L.8.) Mr. Caldwell stated he was opposing the State's request and that he would prefer the district court handle the claims as part of the summary dismissal motion. (Tr., Jan. 27, 2014, p.155, Ls.18-24.) The district court indicated that it could instead rule on the prosecutorial misconduct claims as part of its findings of fact and conclusions of law. (Tr., Jan. 27, 2014, p.156, L.21 – p.157, L.1.) During the court trial, Mr. Caldwell's post-conviction counsel did not present any evidence regarding the failure to file/consult about an appeal claim or the Eighth Amendment claim, and the district court did not specifically address those claims. (See, e.g., Tr., Jan. 27, 2014, p.27, L.15 – p.28, L.2; p.146, L.1 – p.147, L.14.)

The district court then issued its Findings of Fact and Conclusions of Law. (R., pp.564-81.) The district court granted the State's request to dismiss the prosecutorial misconduct claims. (R., pp.574-75.) Additionally, the district court determined that Mr. Caldwell had not established deficient performance with respect to

the ineffective assistance of counsel claims that trial counsel failed to adequately prepare, properly review discovery, or correct the PSI. (R., pp.578-80.) Thus, the district court dismissed with prejudice the post-conviction petition and denied Mr. Caldwell's request for post-conviction relief. (R., pp.580, 582-83.) However, the district court did not specifically address the failure to file/consult about an appeal claim, or the Eighth Amendment claim, in its findings of fact and conclusions of law. (See R., pp.564-81.)

Mr. Caldwell filed a Notice of Appeal timely from the district court's Findings of Fact and Conclusions of Law and Judgment dismissing with prejudice his post-conviction petition. (R., pp.584-88.)

## ISSUES

1. Did the district court err when it summarily dismissed Mr. Caldwell's claim that trial counsel was ineffective for failing to interview Dr. Atkins and call him as a witness, because the district court improperly ruled that Dr. Atkins' testimony was inadmissible?
2. Did the district court err when it dismissed Mr. Caldwell's petition, because it did not address the claim that trial counsel was ineffective for failing to file or consult with him about an appeal, or the claim that his Eighth Amendment rights had been violated?

## ARGUMENT

### I.

#### The District Court Erred When It Summarily Dismissed Mr. Caldwell's Claim That Trial Counsel Was Ineffective For Failing To Interview Dr. Atkins And Call Him As A Witness, Because The District Court Improperly Ruled That Dr. Atkins' Testimony Was Inadmissible

##### A. Introduction

Mr. Caldwell asserts that the district court erred by summarily dismissing his claim that trial counsel was ineffective for failing to interview Dr. Atkins and call him as a witness, because the district court improperly ruled that Dr. Atkins' testimony was inadmissible. Dr. Atkins' testimony was actually admissible under Idaho Rule of Evidence 404(a)(1). Mr. Caldwell raised a genuine issue of material fact as to whether trial counsel performed deficiently by failing to interview Dr. Atkins and call him as a witness, and as to whether he was prejudiced by trial counsel's deficient performance. Thus, Mr. Caldwell is entitled to an evidentiary hearing on this claim.

##### B. Standard Of Review And Applicable Law

"An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature." *Charboneau v. State*, 144 Idaho 900, 903 (2007). Like any other civil plaintiff, a petitioner for post-conviction relief must prove by a preponderance of the evidence the factual allegations upon which the application for post-conviction relief is based. *Id.* However, unlike a complaint in a normal civil action, "an application for post-conviction relief must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included." *Id.* (citing I.C. § 19-4903).

“Summary disposition of a petition for post-conviction relief is appropriate if the applicant’s evidence raises no genuine issue of material fact.” *Id.* (citing I.C. § 19-4906(b) & (c)). “A material fact has some logical connection with the consequential facts, and therefore is determined by its relationship to the legal theories presented by the parties. If such a factual issue is presented, an evidentiary hearing must be conducted.” *State v. Yakovac*, 145 Idaho 437, 444 (2008) (internal quotation marks, citation, and alteration omitted).

On review of a summary dismissal of a post-conviction petition, an appellate court “will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” *Charboneau*, 144 Idaho at 903. “A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Id.* “When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing.” *Id.* Alleged facts would not entitle the applicant to relief when “(1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” *Id.*

The appellate court exercises free review over questions of law. *Rhoades v. State*, 148 Idaho 247, 250 (2009). Determination of the proper legal standard is a question of law. *State v. LePage*, 138 Idaho 803, 807 (Ct. App. 2003).



C. The District Court Improperly Ruled That Dr. Atkins' Testimony Was Inadmissible, Because His Testimony Was Admissible Under Idaho Rule Of Evidence 404(a)(1)

Mr. Caldwell asserts that the district court improperly ruled that Dr. Atkins' testimony was inadmissible. Dr. Atkins' testimony was actually admissible under Idaho Rule of Evidence 404(a)(1).

A claim of ineffective assistance of counsel may properly be brought under the UPCPA. *Barcella v. State*, 148 Idaho 469, 477 (Ct. App. 2009). "Claims for ineffective assistance of counsel are reviewed utilizing the two-prong test set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Yakovac*, 145 Idaho at 444. "To prevail on such a claim, the applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different." *Id.*

To establish a deficiency, the petitioner must show that the attorney's performance fell below an objective standard of reasonableness. *McKay v. State*, 148 Idaho 567, 571 (2010). "When evaluating an ineffective assistance of counsel claim," an appellate court "does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review." *Yakovac*, 145 Idaho at 444. "There is a strong presumption that counsel's performance fell within the wide range of professional assistance." *Id.* (internal quotation marks omitted).

To establish prejudice, the petitioner must show a reasonable probability that the outcome of the trial would have been different but for the attorney's deficient performance. *McKay*, 148 Idaho at 571. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," which "requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1388, 1403 (2011) (internal quotation marks omitted).

In the amended post-conviction petition, Mr. Caldwell asserted that trial counsel had been ineffective because he "failed to interview and call as a witness Dr. Tom Atkins." (R., p.148.) "Dr. Atkins was counseling petitioner prior to the trial in this action and would have rendered an opinion, if called as a witness at trial, that petitioner did not exhibit pedophilic or criminal sexual tendencies." (R., p.148.) Further, in the excerpts from the original petition attached to the amended petition, Mr. Caldwell asserted that Dr. Atkins was one of three psychiatrists who had documented his Posttraumatic Stress Disorder. (R., pp.155-56.) According to Mr. Caldwell, trial counsel "did not want to use any character witnesses for defendant when there [were] many who offered to testify," which "had devastating effects on the outcome of the Trial." (R., p.156.)

At the summary dismissal motion hearing, the district court made the following ruling on this claim:

Second allegation, as to this witness who is going to testify that he had no pedophilic tendencies, I'm not sure how you get that evidence in. I've researched that in my own right. Character evidence that he never molested my kid, so therefore, he didn't molest this kid, I think, is inadmissible, which is essentially what this is trying to get at. So had it even been offered, I don't think it would have been admitted and, therefore, the prejudice prong is again insufficiently satisfied, and that allegation is dismissed.

(Tr., Jan. 7, 2013, p.23, L.22 – p.24, L.8.) Similarly, in the order granting the partial summary dismissal, the district court dismissed this claim because, “Such evidence is not admissible.” (R., p.509.)

The district court improperly ruled that Dr. Atkins’ testimony was inadmissible, because such testimony is actually admissible under Rule 404(a)(1). In a recent case involving a lewd conduct with a minor under sixteen charge, the Idaho Court of Appeals held that, “Because character traits relating to a defendant’s sexual morality with children are pertinent, or relevant, in this type of case, such evidence is admissible under I.R.E. 404(a)(1).” *State v. Rothwell*, 154 Idaho 125, 131 (Ct. App. 2013), *rev. denied* (2013).<sup>2</sup>

Generally, evidence of a person’s character or a trait of character is not admissible for the purpose of proving that the person acted in conformity with the character or trait on a particular occasion. I.R.E. 404(a). However, “Evidence of a pertinent trait of the accused’s character offered by an accused, or by the prosecution to rebut the same,” is admissible. I.R.E. 404(a)(1). The *Rothwell* Court explained that, “In this context, the word ‘pertinent’ is generally synonymous with ‘relevant.’ Thus, a pertinent character trait is one that is relevant to the crime charged by making any material fact more or less probable.” *Rothwell*, 154 Idaho at 130.

The *Rothwell* Court concluded that the majority rule, which provides that traits relating to a defendant’s sexual morality with children are pertinent in cases involving sexual misconduct with a minor, was correct. *Id.* at 131. Further, it is correct to elicit

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<sup>2</sup> The Idaho Court of Appeals issued the *Rothwell* opinion on January 4, 2013. *Rothwell*, 154 Idaho 125. The district court here held the hearing on the motion for summary dismissal on January 7, 2013. (Tr., Jan. 7, 2013, p.4, Ls.1-4.)

such testimony in the form of opinion or reputation evidence, because “Idaho Rule of Evidence 405(a) specifies that in every case where a person’s character or character trait is admissible, that character or trait may be proved ‘by testimony as to reputation or by testimony in the form of an opinion.’” *Id.* (quoting I.R.E. 405(a)).

The *Rothwell* Court’s holding shows that the district court here improperly ruled that Dr. Atkins’ testimony was inadmissible. The potential testimony that Mr. Caldwell “did not exhibit pedophilic or criminal sexual tendencies” (R., p.148), was evidence of traits relating to Mr. Caldwell’s sexual morality with children, and therefore pertinent in this case. *See Rothwell*, 154 Idaho at 131. Thus, Dr. Atkins’ testimony was admissible under Rule 404(a)(1). *See id.* Further, Dr. Atkins “would have rendered an opinion” as to Mr. Caldwell’s character, which is a correct method to introduce character evidence. *See id.*; I.R.E. 405(a). The district court therefore improperly ruled that Dr. Atkins’ testimony was inadmissible.

D. Mr. Caldwell Raised A Genuine Issue Of Material Fact As To Whether Trial Counsel Performed Deficiently, And As To Whether He Was Prejudiced By The Deficient Performance

Mr. Caldwell asserts that he raised a genuine issue of material fact as to whether trial counsel performed deficiently by failing to interview Dr. Atkins and call him as a witness, and as to whether he was prejudiced by trial counsel’s deficient performance. The district court summarily dismissed the claim that trial counsel was ineffective for failing to interview Dr. Atkins and call him as a witness solely on the basis that Mr. Caldwell failed to sufficiently show prejudice, based entirely on its improper ruling that Dr. Atkins’ testimony was inadmissible. (See Tr., Jan. 7, 2013, p.23, L.22 – p.24, L.8; R., p.509.) However, Mr. Caldwell actually raised a genuine issue of material fact

as to whether trial counsel performed deficiently, and as to whether he was prejudiced by the deficient performance. Thus, Mr. Caldwell is entitled to an evidentiary hearing on this claim.

As explained above, to prevail on an ineffective assistance of counsel claim in a post-conviction proceeding, the petitioner must establish both deficient performance and prejudice. *Yakovac*, 145 Idaho at 444. If a petitioner's ineffective assistance of counsel claim raises a genuine issue of material fact as to both deficient performance and prejudice, the district court must conduct an evidentiary hearing. *See id.*

As a preliminary matter, Mr. Caldwell provided the substance of Dr. Atkins' potential testimony. "An ineffective assistance claim based on counsel's failure to present evidence cannot satisfy the deficient performance or resulting prejudice prongs without providing the substance of the potential testimony or other admissible evidence of facts counsel should have discovered and presented." *Knutsen v. State*, 144 Idaho 433, 442 (Ct. App. 2007). In the verified amended petition, Mr. Caldwell asserted that "Dr. Atkins was counseling petitioner prior to the trial in this action and would have rendered an opinion, if called as a witness at trial, that petitioner did not exhibit pedophilic or criminal sexual tendencies." (R., p.148.) Thus, Mr. Caldwell provided the substance of the potential testimony. *See Knutsen*, 144 Idaho at 442.

Mr. Caldwell raised a genuine issue of material fact as to whether trial counsel performed deficiently by failing to interview Dr. Atkins and call him as a witness. To establish a deficiency, the petitioner must show that the attorney's performance fell below an objective standard of reasonableness. *McKay*, 148 Idaho at 571. The State's theory of the case was that Mr. Caldwell was leading a double life and sexually

exploiting the underage complaining witnesses. (See, e.g., R., pp.373-74 (Trial Tr., p.679, L.21 – p.681, L.25).)<sup>3</sup> The State argued that Mr. Caldwell was dishonest and “really good at keeping up these appearances for a long time.” (E.g., R., p.380 (Trial Tr., p.706, Ls.1-7).) Mr. Caldwell’s main defense was that the evidence did not prove his guilt beyond a reasonable doubt. (See, e.g., R., p.387 (Trial Tr., p.733, L.21 – p.735, L.4).) He emphasized that the case involved little to no physical evidence (see, e.g., R., p.382 (Trial Tr., p.712, Ls.12-23)), and that the witnesses and their stories were flawed (see, e.g., R., p.387 (Trial Tr., p.733, Ls.14-21)).

Trial counsel performed deficiently because Dr. Atkins’ testimony would have been relevant to Mr. Caldwell’s defense that the evidence did not prove his guilt beyond a reasonable doubt. Dr. Atkins’ testimony would have shown that Mr. Caldwell did not have criminal sexual tendencies, as opposed to his merely “keeping up these appearances” as the State argued. There is nothing in the record to explain why trial counsel did not pursue such potentially exculpatory and obtainable testimony, which “raises a material question regarding the vigor and competence of his counsel’s representation.” See *Knutsen*, 144 Idaho at 443.

Mr. Caldwell also raised a genuine issue of material fact as to whether he was prejudiced by trial counsel’s deficient performance in failing to interview Dr. Atkins and call him as a witness. The prejudice prong requires a reasonable probability that the outcome of the trial would have been different but for the attorney’s deficient performance. *McKay*, 148 Idaho at 571. A reasonable probability is a probability

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<sup>3</sup> Mr. Caldwell attached the trial transcript from the underlying criminal case, Twin Falls County No. CR 2009-10599, to his amended petition. (R., pp.148, 201-391.)

sufficient to undermine confidence in the outcome, which requires a substantial likelihood of a different result. *Pinholster*, \_\_\_ U.S. \_\_\_, 131 S. Ct. at 1403.

Trial counsel's deficient performance here prejudiced Mr. Caldwell. In the excerpts from the original petition attached to the amended petition, Mr. Caldwell asserted that trial counsel's failure to call character witnesses like Dr. Atkins "had devastating effects on the outcome of the Trial." (See R., pp.155-56.) Indeed, Dr. Atkins' testimony, by calling into question the State's theory of the case, would have helped establish reasonable doubt as to whether Mr. Caldwell committed the acts of which he was accused. The fact that the jury acquitted Mr. Caldwell of one of the three lewd conduct charges (R., p.566), indicates that the jury did not fully believe the State's witnesses or entirely adopt the State's theory of the case. It is likely that Dr. Atkins' testimony would have further undermined the State's theory of the case, prompting the jury to acquit Mr. Caldwell on some or all of the other charges. Thus, there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's failure to interview Dr. Atkins and call him as a witness. See *McKay*, 148 Idaho at 571.

In sum, Mr. Caldwell raised a genuine issue of material fact as to whether trial counsel performed deficiently by failing to interview Dr. Atkins and call him as a witness, and as to whether he was prejudiced by trial counsel's deficient performance. Thus, Mr. Caldwell is entitled to an evidentiary hearing on this claim. See *Yakovac*, 145 Idaho at 444.

The district court erred by summarily dismissing Mr. Caldwell's claim that trial counsel was ineffective for failing to interview Dr. Atkins and call him as a witness,

because the district court improperly ruled that Dr. Atkins' testimony was inadmissible. Dr. Atkins' testimony was actually admissible under Idaho Rule of Evidence 404(a)(1). Mr. Caldwell raised a genuine issue of material fact as to whether trial counsel performed deficiently by failing to interview Dr. Atkins and call him as a witness, and as to whether he was prejudiced by trial counsel's deficient performance. Thus, the summary dismissal of this claim should be reversed and the claim should be remanded to the district court for an evidentiary hearing. See *Yakovac*, 145 Idaho at 444; *Knutsen*, 144 Idaho at 444.

## II.

### The District Court Erred When It Dismissed Mr. Caldwell's Petition, Because It Did Not Address The Claim That Trial Counsel Was Ineffective For Failing To File Or Consult With Him About An Appeal, Or The Claim That His Eighth Amendment Rights Had Been Violated

#### A. Introduction

Mr. Caldwell asserts that the district court erred when it dismissed his petition for post-conviction relief, because the district court did not address the claim that trial counsel was ineffective for failing to file or consult with him about an appeal, or the claim that his Eighth Amendment rights had been violated.

#### B. Standard Of Review

As discussed above, a petitioner for post-conviction relief must prove by a preponderance of the evidence the factual allegations upon which the application for post-conviction relief is based. *Charboneau*, 144 Idaho at 903. "Where the district court conducts an evidentiary hearing in a post-conviction proceeding, the court's findings of fact will not be disturbed on appeal unless clearly erroneous." *Estrada v. State*, 143



Idaho 558, 561 (2006). “The reviewing court, however, exercises free and independent review of the district court’s application of law.” *Id.*

C. The District Court Did Not Address The Claims That Mr. Caldwell’s Trial Counsel Was Ineffective For Failing To File An Appeal, Or That His Eighth Amendment Rights Had Been Violated

Mr. Caldwell asserts that the district court did not address his claim that trial counsel was ineffective for failing to file or consult with him about an appeal, or his claim that his Eighth Amendment rights had been violated.

The UPCPA provides that, where a district court conducts an evidentiary hearing in a post-conviction proceeding, “The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” I.C. § 19-4907(a).

An ineffective assistance of counsel claim based on trial counsel’s failure to file an appeal or consult with the defendant about an appeal may be properly raised in a post-conviction proceeding. See *Roe v. Flores-Ortega*, 528 U.S. 470, 477-80, 484 (2000); *Gosch v. State*, 154 Idaho 71, 74 (Ct. App. 2012).<sup>4</sup> In the excerpts from the

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<sup>4</sup> The *Strickland* test applies to claims “that counsel was constitutionally ineffective for failing to file a notice of appeal.” *Flores-Ortega*, 528 U.S. at 477. “[A] defendant who proves that he or she was denied an appeal because counsel did not file an appeal as requested states a meritorious claim for ineffective assistance of counsel because the loss of the right to appeal is sufficient prejudice, in and of itself, to support such claim.” *Gosch*, 154 Idaho at 74.

If a defendant does not instruct counsel to file or not file an appeal, “the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal.” *Flores-Ortega*, 528 U.S. at 478. If counsel has consulted with the defendant, counsel “performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions with respect to an appeal.” *Id.*

In contrast, if counsel has not consulted with the defendant, “counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . , or

original petition attached to the amended petition, Mr. Caldwell asserted, "Defense counsel never filed an appeal after the trial and the sentencing. Defense Counsel never informed the defendant of his rights to file an Appeal and never consulted with defendant to see if he wanted to file the Appeal." (R., p.155.) The excerpts ended with this request for relief: "The defendant prays that you will allow him an Appeal and Post Conviction relief because the defense counsel failed on all the above issues and did not file an appeal for the defendant." (R., p.156.)

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment." U.S. Const. amend. VIII. Eighth Amendment cruel and unusual punishment issues may be raised in post-conviction proceedings, at least with respect to the present conditions of the petitioner's incarceration. *Whitehawk v. State*, 116 Idaho 831, 833 (Ct. App. 1989). In the excerpts from the original petition attached to the amended petition, Mr. Caldwell asserted, "The defendant[']s 8<sup>th</sup> Amendment Rights to the Constitution of the United States have clearly been violated while the defendant has been incarcerated by the Idaho Department of Corrections. The defendant will suffer physically and emotionally for the rest of his life because of the permanent damage that has been done." (R., pp.153-54.) Mr. Caldwell also asserted that the "acts of cruel and unusual punishment" were being investigated by the U.S. Attorney's Office and the FBI. (R., p.154.)<sup>5</sup>

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(2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484.

<sup>5</sup> As discussed above, the affidavit filed in support of the original petition contained additional factual allegations regarding the violations of Mr. Caldwell's Eighth

Although Mr. Caldwell raised the above two claims in the excerpts from the original petition attached to the amended petition, the district court did not address those claims in its findings of fact and conclusions of law. (See R., pp.564-81.) However, Mr. Caldwell, through his post-conviction counsel, admittedly did not present any evidence at the court trial on the failure to file/consult about an appeal claim or on the Eighth Amendment claim. (See, e.g., Tr., Jan. 27, 2014, p.27, L.15 – p.28, L.2; p.146, L.1 – p.147, L.14.) That may indicate that Mr. Caldwell's post-conviction counsel inadvertently waived or forfeited those claims. See *Loveland v. State*, 141 Idaho 933, 936 (Ct. App. 2005) (“Because Loveland declined to present any evidence that his counsel ignored his request to file a direct appeal, we conclude that the district court did not err in dismissing his application.”).<sup>6</sup>

Mr. Caldwell asserts that the district court erred when it dismissed his post-conviction petition, because it did not address his claim that trial counsel was ineffective for failing to file or consult with him about an appeal, or his claim that his Eighth Amendment rights had been violated. After an evidentiary hearing, a district court “shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” I.C. § 19-4907(a). But following the court trial in this case, the district court did not address the above two issues. (See R., pp.564-81.) Thus, the district court’s findings of fact and conclusions of law and judgment dismissing his

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Amendment rights, including allegations of unsanitary living conditions and improper medical treatment. (R., pp.36-37.)

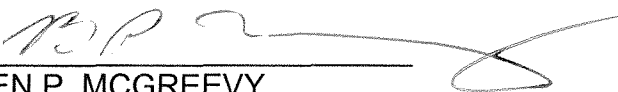
<sup>6</sup> *Loveland* may be distinguishable from the instant case because the petitioner in that case asserted that the district court erroneously found that he failed to present any evidence to prove his ineffective assistance of counsel claim, *Loveland*, 141 Idaho at 935, while Mr. Caldwell instead asserts that the district court erred when it did not address some of his claims.

petition for post-conviction relief should be vacated, and Mr. Caldwell's case should be remanded to the district court for consideration of the claim that trial counsel was ineffective for failing to file or consult with him about an appeal, and the claim that his Eighth Amendment rights had been violated. See I.C. § 19-4907(a).

CONCLUSION

For the above reasons, Mr. Caldwell respectfully requests that this Court reverse the district court's order granting partial summary dismissal with respect to the claim that trial counsel was ineffective for failing to interview Dr. Atkins and call him as a witness, and remand the claim to the district court for an evidentiary hearing. Mr. Caldwell also respectfully requests that this Court vacate the district court's findings of fact and conclusions of law and judgment, and remand his case to the district court for consideration of the claim that trial counsel was ineffective for failing to file or consult with him about an appeal, and the claim that his Eighth Amendment rights had been violated.

DATED this 11<sup>th</sup> day of February, 2015.

  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11<sup>th</sup> day of February, 2015, 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:

RICHARD MYERS CALDWELL  
35 N 100 W  
BRIGHAM CITY UT 84302

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DISTRICT COURT JUDGE  
E-MAILED BRIEF

DAVID W. HALEY  
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BPM/eas