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# Caldwell v. State Respondent's Brief Dckt. 42153

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD M. CALDWELL,	)	
	)	No. 42153
Petitioner-Appellant,	)	
	)	Twin Falls Co. Case No.
vs.	)	CV-2011-4299
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

BRIEF OF RESPONDENT

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

HONORABLE G. RICHARD BEVAN, District Judge

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State of Idaho

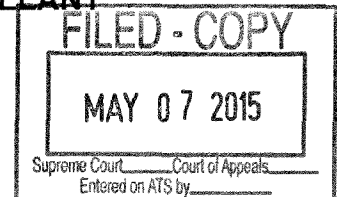
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## STATEMENT OF THE CASE

### Nature Of The Case

Richard Myers Caldwell appeals from the district court's order summarily dismissing, in part, his post-conviction petition; and from the district court's order denying his remaining claims following an evidentiary hearing.

### Statement Of Facts And Course Of Proceedings

In 2010, a jury found Caldwell guilty of two counts of lewd contact with a minor and five counts of sex abuse of a minor.<sup>1</sup> See State v. Caldwell, 2012 Unpublished Opinion No. 523, Docket No. 38515, p.1. (Idaho App., June 21, 2012). The district court imposed concurrent unified sentences of 20 years with three years fixed on each count. See id. Caldwell did not file a direct appeal, but did file an I.C.R. 35 motion for reduction of sentence. See id. The district court denied the motion, and the Idaho Court of Appeals affirmed the district court's decision. Id.

Caldwell then filed a *pro se* post-conviction petition. (R., pp.18-40.) The district court appointed counsel to represent Caldwell on the petition. (R., pp.45-46.) Appointed counsel filed an amended petition alleging that Caldwell's trial counsel was ineffective in numerous respects, including for failing to utilize Dr. Atkins, who had previously treated Caldwell, to testify that Caldwell "did not exhibit pedophilic or criminal sexual tendencies." (R., pp.145-152.) The petition also incorporated by reference portions of Caldwell's original post-conviction petition, which included claims that trial counsel was ineffective or failing to file a

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<sup>1</sup> The jury also acquitted Caldwell of one count of lewd conduct.

direct appeal, and that the conditions of Caldwell's confinement at the Idaho State Correctional Center violated the Eighth Amendment. (R., pp.148, 153-155.) Attached to the petition was a 43-page hand-written supplement in which Caldwell conducted a page-by-page analysis of the jury trial transcript and made several dozen allegations regarding the respective trial tactics of defense counsel and the prosecutor. (R., pp.157-200.)

The district court summarily dismissed four of Caldwell's ineffective assistance of counsel sub-claims, including Caldwell's claim that his trial counsel was ineffective for failing to call Dr. Atkins as a witness. (R., pp.508-510.) The court concluded that such testimony would have been inadmissible at trial, and that Caldwell therefore could not demonstrate deficient performance or prejudice. (R., p.509.) The district court's partial dismissal order did not reference either trial counsel's failure to file a notice of appeal, or the Eighth Amendment claim. (See id.) The district court then conducted an evidentiary hearing on the remaining claims. (Tr., p.22, L.7 – p.159, L.6.) Caldwell and his trial counsel testified at the hearing. (*Id.*) In a subsequent memorandum decision and order, the district court denied Caldwell's remaining claims and dismissed the entire amended petition, but again did not specifically reference the notice of appeal or Eighth Amendment claims. (R., pp.564-583.) Caldwell timely appealed. (R., pp.584-588.)

## ISSUES

Caldwell states the issues on appeal as:

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?

(Appellant's brief, p.8)

The state rephrases the issues on appeal as:

1. Has Caldwell failed to show that the district court erred in summarily dismissing his claim that trial counsel was ineffective for failing to call Dr. Atkins as a witness?
2. Did Caldwell waive any post-conviction claims he failed to support with evidence at the evidentiary hearing?



## ARGUMENT

### I.

#### Caldwell Has Failed To Show That The District Court Erred In Summarily Dismissing His Claim That Trial Counsel Was Ineffective For Failing To Call Dr. Atkins As A Witness

##### A. Introduction

Caldwell contends that the district court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to utilize his doctor to testify that Caldwell “did not exhibit pedophilic or criminal sexual tendencies.” (Appellant’s brief, pp.9-18.) The district court erred in concluding that such evidence would have necessarily been inadmissible at trial. However, Caldwell has still failed to show that the district court erred in summarily dismissing this claim because he failed to allege facts, which if true, demonstrated he was entitled to relief.

##### B. Standard of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

##### C. Caldwell Failed To Raise A Genuine Issue Of Material Fact With Respect To His Claim That His Trial Counsel Was Ineffective For Failing To Call Dr. Atkins As A Witness

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief

initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

In his amended post-conviction petition, Caldwell asserted that his trial counsel was ineffective for failing to utilize Dr. Tom Atkins at trial. (R., p.148.) Caldwell asserted that Dr. Atkins, who previously treated him, would have testified that Caldwell "did not exhibit pedophilic or criminal sexual tendencies." (Id.) The state moved for summary dismissal of this claim on the ground that such evidence would have been inadmissible at trial. (R., p.410.) The district court summarily dismissed this claim on this same ground. (R., p.509.) Neither

the state nor the district court further analyzed the admissibility of the potential testimony or cited any applicable evidentiary rule.<sup>2</sup>

Character evidence is ordinarily inadmissible for the purpose of showing that an individual acted in conformity therewith on any particular occasion. I.R.E. 404(a); State v. Rupp, 118 Idaho 17, 19, 794 P.2d 287, 289 (Ct. App. 1990); State v. Harvey, 142 Idaho 527, 533, 129 P.3d 1276, 1282 (Ct. App. 2006). A criminal defendant may, however, offer evidence of a pertinent character trait, provided the prosecution is afforded an opportunity to rebut the same. I.R.E. 404(a)(1); Rupp, 118 Idaho at 19, 794 P.2d at 289. In State v. Rothwell, 154 Idaho 125, 130-132, 294 P.3d 1137, 1142-1144 (Ct. App. 2013), the Idaho Court of Appeals held, as a matter of first impression, that for the purposes of I.R.E. 404(a)(1), a “defendant’s morality with respect to minors is a pertinent character trait in cases involving sexual misconduct with a minor.” Thus, opinion testimony such as whether Caldwell exhibited “pedophilic or criminal sexual tendencies,”

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<sup>2</sup> On appeal, the state presumes that the court determined that the evidence was inadmissible because it constituted character evidence. However, because Caldwell did not challenge the applicability of this ground for dismissal, it is possible that the court determined that the evidence was inadmissible for some other reason.

may have been admissible in Caldwell's trial, depending on the nature of the testimony in relation to the charges.<sup>3</sup>

However, Caldwell has still failed to show that the district court erred in summarily dismissing this claim, because he waived any argument that the proposed evidence may have been admissible pursuant to I.R.E. 404(a)(1). See State v. Manzanares, 152 Idaho 410, 272 P.3d 382 (2012) (generally, Idaho appellate courts will not consider arguments raised for the first time on appeal.) Despite receiving notice through the state's motion for summary dismissal that the court could dismiss this claim on the ground that the proposed evidence was inadmissible (R., p.410),<sup>4</sup> it does not appear that Caldwell subsequently argued that the evidence was admissible. Caldwell thus deprived the district court of the

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<sup>3</sup> For example, Caldwell would not have been permitted to prove the relevant character trait through testimony of "specific acts of 'nonmolestation,'" but may have been permitted to prove such traits through Dr. Atkins' stated opinion of the trait "based on [his] long-term observation of the defendant's course of consistently normal behavior" towards children. See Rothwell, 154 Idaho at 131-132, 294 P.3d at 1143-1144 (citation omitted). Of course, any such testimony would open the door for the state to introduce evidence to rebut the trait. Because, as discussed below, Caldwell failed to present context or foundation for Dr. Atkins' proposed testimony, the district court not have evaluated, without speculation, whether such evidence was admissible or not under the facts of this case.

<sup>4</sup> In the post-conviction arena, the state's motion for summary dismissal under I.C. § 19-4906(c) and a district court's notice of intent to dismiss under I.C. § 19-4906(b) are alternative ways to accomplish the same ends, that being notice of the particularized bases for summary dismissal and opportunity for the petitioner to respond to those proposed grounds for dismissal. See Franck-Teel v. State, 143 Idaho 664, 668, 152 P.3d 25, 29 (Ct. App. 2006). A district court need not provide the applicant with notice of the court's dismissal if it is in response to a sufficiently specific motion from the State. Saykhamchone v. State, 127 Idaho 319, 321-22, 900 P.2d 795, 797-98 (1995).

opportunity to evaluate any argument that the proposed evidence was admissible pursuant to I.R.E. 404(a)(1), or some other rule.

Additionally, if a district court reaches the correct result by an erroneous theory, this Court will affirm the order upon the correct theory. Murray v. State, 156 Idaho 159, 164, 321 P.3d 709, 714 (2014); see also Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010) (“[b]ecause this Court employs the same standards on appellate review that the trial court applies in considering summary dismissal of a petition for post-conviction relief, if [the petitioner] failed to provide admissible evidence supporting [his] claims, they were properly dismissed”) (citations omitted).

The decision to call a witness falls within the category of trial counsel's strategic or tactical decisions and will generally not be second-guessed. Rodgers v. State, 129 Idaho 720, 724, 932 P.2d 348, 352 (1997). Thus, to prevail on a claim that trial counsel was ineffective in failing to call a specific witness, a petitioner is required to present facts, supported by admissible evidence, to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Strickland v. Washington, 466 U.S. 668, 689 (1984) (citation omitted); see also Aeschliman v. State, 132 Idaho 397, 405, 973 P.2d 749, 757 (Ct. App. 1999) (“in order to succeed on an ineffective assistance of counsel claim based on counsel's failure to procure an expert witness, the accused must assert *facts* that would have been discovered by additional investigation and should offer expert testimony that would have been produced” if the expert had been hired) (emphasis in

original, citation and quotation omitted). Additionally, the petitioner must show that the decision not to call a witness was the result of an objective shortcoming such as inadequate preparation. Campbell v. State, 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997).

Caldwell's amended petition contains no evidence supporting his conclusory assertion that Dr. Atkins would have testified that Caldwell "did not exhibit pedophilic or criminal sexual tendencies." Caldwell did not submit an affidavit from Dr. Atkins or any other evidence demonstrating the foundational basis or context of Dr. Atkins' opinions and/or observations regarding Caldwell's morality with respect to minors. Caldwell also failed to allege facts asserting that trial counsel's decision not to call Dr. Atkins was based upon some objective shortcoming. Caldwell therefore failed to raise a genuine issue of material fact regarding whether his trial counsel was deficient for declining to use such potential evidence, or that he was prejudiced by any deficiency. See Strickland, 466 U.S. at 687-688.

In the alternative, Caldwell failed to raise a genuine issue of material fact regarding this claim because the case he relies on, Rothwell, was not decided until several years after his jury trial. Caldwell thus cannot demonstrate, as a matter of law, that his trial counsel was deficient for failing to utilize Rothwell, in which the Court of Appeals decided the relevant issue as a matter of first impression. See Brown v. United States, 311 F.3d 875, 878 (8<sup>th</sup> Cir. 2002) (holding that counsel's performance was not deficient for failing to predict future developments in the law); Nelson v. Estelle, 642 F.2d 903, 908 (5<sup>th</sup> Cir. 1981)

("[C]ounsel is normally not expected to foresee future new developments in the law...."); Schoger v. State, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010) (observing that only in a very rare case would counsel's performance be deemed ineffective for failing to make an objection that would have been overruled under then-prevailing law).

While the district court incorrectly concluded that the proposed character evidence was necessarily inadmissible, Caldwell has still failed to demonstrate that the district court erred in summarily dismissing his claim that his trial counsel was deficient for failing to utilize Dr. Atkins as a witness. This Court should therefore affirm the district court's order summarily dismissing this claim.

## II.

### Caldwell Waived The Post-Conviction Claims He Failed To Support With Evidence At The Evidentiary Hearing

#### A. Introduction

Caldwell contends that the district court erred by failing to specifically address all of the claims he raised in his petition for post-conviction relief. (Appellant's brief, pp.18-22.) Specifically, Caldwell contends that the district court erred by failing to specifically address his claim that his trial counsel was ineffective for failing to file a notice of appeal, and his claim that his conditions of confinement violated the Eight Amendment. (Id.) Caldwell, however, waived both of these claims by failing to present any evidence to support them during the evidentiary hearing, and by failing to challenge the district court's dismissal order below.

B. Caldwell Waived Each Of The Post-Conviction Claims That The District Court Did Not Specifically Address

Idaho Code § 19–4907(a) directs that a court in a post-conviction action “shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” The purpose of this requirement is to afford an appellate court an adequate basis upon which to review the district court's decision when a petition for post-conviction relief has been denied following an evidentiary hearing. Davis v. State, 116 Idaho 401, 405, 775 P.2d 1243, 1247 (Ct. App. 1989); Maxfield v. State, 108 Idaho 493, 497, 700 P.2d 115, 119 (Ct. App. 1985).

However, when an evidentiary hearing is held in a post-conviction proceeding, claims unsupported by any evidence at the hearing are subject to dismissal. Loveland v. State, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005). This is true even when the petitioner previously submitted affidavits asserting facts, which if true, would have entitled the petitioner to post-conviction relief on those claims. Id. (holding that Loveland's affidavit did not automatically constitute evidence for purposes of an evidentiary hearing); see also State v. Jensen, 126 Idaho 25, 38, 878 P.2d 209, 212 (Ct. App. 1994) (“[F]indings are neither required nor possible where no evidence was presented upon which to base such a finding.”). Further, the absence of express findings and conclusions may be disregarded by the appellate court where the record is clear and yields an obvious answer to the relevant question. Maxfield, 108 Idaho at 497, 700 P.2d at 119.



In this case, Caldwell's amended petition for post-conviction relief appears to have contained claims that his trial counsel was ineffective for failing to file a notice of appeal, and that his conditions of confinement at the Idaho State Correctional Center violated the Eighth Amendment.<sup>5</sup> (R., pp.148, 153-155.) The district court did not specifically reference these claims in its order of partial summary dismissal, or in its order denying Caldwell's remaining claims and dismissing the entire petition after the evidentiary hearing. (See R., pp.508-510, 564-583.)

Caldwell waived these two claims because he did not present evidence to support either of them at the evidentiary hearing. Neither Caldwell nor Caldwell's trial counsel, both of whom testified at the evidentiary hearing, presented any testimony or other evidence regarding the notice of appeal or Eighth Amendment claims. (See Tr., p.22, L.7 – p.159, L.6.) At the conclusion of the hearing, Caldwell declined to present any argument as to either claim. (See id.) Caldwell also declined to present briefing after the evidentiary hearing, despite the district court's invitation to do so, and thus failed to clarify the scope of his amended petition and claims contained within. (R., p.565.) Caldwell therefore waived these claims.

Further, Caldwell also failed to make use of other avenues by which he could have challenged the district court's dismissal order below. See I.R.C.P. 11(a)(2)(B) (governing motions for reconsideration); I.R.C.P. 52(b) (governing

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<sup>5</sup> Caldwell's amended petition did not itself contain these two claims. (R., pp.145-152.) However, the amended petition incorporated certain pages from Caldwell's original petition which did contain these claims. (R., pp.148, 153-155.)

motions to amend judgments or to make additional findings); I.R.C.P. 59(e) (governing motions for relief from judgment). The Idaho Court of Appeals has encouraged the utilization of these rules where petitioners assert procedural errors in post-conviction proceedings, to give the court an opportunity to take prompt corrective actions, or to provide rationale for its decisions that may be evaluated on appeal. See Isaak v. State, 132 Idaho 369, 370 n. 2, 972 P.2d 1097, 1098 n.2 (Ct. App. 1999).

Finally, should this Court find that the district court committed reversible error by failing to specifically address his notice of appeal and Eighth Amendment claims, it should vacate the dismissal order and remand the case with instructions for the court to address each claim based upon the evidence already submitted in the post-conviction proceeding. Caldwell is not entitled to a new evidentiary hearing or a second opportunity to present evidence because he asserts only post-hearing error with respect to these two claims.

By failing to present evidence at the evidentiary hearing, and by failing to pursue available remedies below, Caldwell waived each of his post-conviction claims that the district court did not specifically address.<sup>6</sup> This Court should therefore affirm the district court's denial of Caldwell's petition for post-conviction relief.

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<sup>6</sup> Additionally, Caldwell's Eighth Amendment claim is non-cognizable in a post-conviction proceeding because unconstitutional conditions of confinement is not one of the delineated statutory grounds for post-conviction relief. I.C. § 19-4901; see also Eubank v. State, 130 Idaho 861, 863, 949 P.2d 1068, 1070 (Ct. App. 1987). Such a claim may appropriately be raised in a state habeas petition. I.C. § 19-4203(2)(a).

CONCLUSION

The state respectfully requests that this Court affirm the district court's partial summary dismissal of Caldwell's post-conviction petition, and its order denying Caldwell's remaining post-conviction claims.

DATED this 7th day of May, 2015.


  
\_\_\_\_\_  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BEN P. MCGREEVY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
\_\_\_\_\_  
MARK W. OLSON  
Deputy Attorney General

MWO/vr