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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,
Plaintiff-Respondent,
v.
LARRY M. SEVERSON,
Defendant-Appellant.

NO. 46343-2018

Elmore County District Court

APPELLANT'S BRIEF



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ELMORE

HONORABLE NANCY BASKIN
District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Procedural History and Statement of Facts	1-4
ISSUE PRESENTED ON APPEAL	6
ARGUMENT	6-8

TABLE OF AUTHORITIES

Cases

Black v. State, 165 Idaho 100, 439 P.3d 1272 (Ct. App. 2019) 6, 7

Charboneau v. State, 140 Idaho 789, 102 P.3d 1108 (2004) 7

DeRushe¹ v. State, 146 Idaho 599, 200 P.3d 1148 (2009) 6, 7

Kelly v. State, 149 Idaho 517, 236 P.3d 1277 (2010) 6

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the denial of Appellant Larry Severson's successive application for post-conviction relief. (R., pp. 134-149.) Relief should be granted because the claims involving newly-discovered evidence raised a genuine issue of material fact surrounding modern sciences' revised understanding of prescription sleep aid drugs Ambien/Zolpidem. These pharmaceutical compounds were central to Mr. Severson's murder trial where the jury was unable to reach a unanimous verdict as to the means of death.

Following Mr. Severson's 2005 jury trial, the U.S. Food and Drug Administration ("FDA") adopted the findings of the scientific community's revised understanding of sleep aid medications; their absorption rate among female patients; and acknowledged the large number of accidental overdose deaths. Such new and compelling evidence presents serious questions regarding the jury's finding of guilt and undermines confidence in the outcome of the trial.

Procedural History and Statement of Facts

The State charged Mr. Severson with poisoning his wife by tampering with her Hydroxycut capsules, inserting Drano into the capsules, and first degree murder — either by causing Mrs. Severson to overdose on Ambien and Unisom, or suffocating her with his hand. Trial R. Vol. 3, pp. 377-378.¹

The case proceeded to trial. The State could not present evidence of a

¹ Mr. Severson has filed a Motion to Augment the Record in this appeal with the records from the underlying criminal case. See Motion to Augment filed March 6, 2019. Furthermore, the Appellant requested numerous scientific peer review publications and FDA guidelines be included in the augmented Record.

definitive cause of death; rather its forensic pathologist concluded that the cause of death was undetermined, and the jury was not asked to return a verdict unanimously agreeing to a means of death. Trial Tr. Vol. 2, p. 1250, ls. 9-10; p. 1378, ls. 13-17; State v. Severson, 147 Idaho 694, 701, 215 P.3d 414, 422 (2009). Following seventeen days of evidence and testimony, the jury returned a verdict of guilty of poisoning and a general verdict of murder. State v. Severson, supra. The district court sentenced Mr. Severson to a term of fixed life. Trial Tr. Vol. 10, pp. 1908-1911. He appealed and the Supreme Court, with Justice W. Jones and Justice pro tem Kidwell dissenting, affirmed the convictions. State v. Severson, supra. The dissent was from the majority's determination that the prosecutorial misconduct in closing argument was not fundamental error.

Mr. Severson then filed a pro se petition for post-conviction relief raising several claims.² In separate decisions issued on June 29, 2012 and July 27, 2012, the district court dismissed the majority of claims, but granted an evidentiary hearing on the issue of whether Petitioner's trial counsel provided ineffective assistance by refusing to permit Mr. Severson to testify in his own defense. Following the evidentiary hearing the district court denied Petitioner's remaining post-conviction relief claim on January 22, 2013.

Mr. Severson appealed the district court's decision denying post-conviction relief. The Court of Appeals reversed the court's order and remanded for further proceedings. Severson v. State, Docket No. 40769 (Ct. App.

² Severson v. State, Elmore County Case No. CV-2009-1408

October 10, 2014). The Idaho Supreme Court reviewed the decision, and on December 23, 2015, the Court vacated the district court's decision and remanded the case for further proceedings. Severson v. State, 159 Idaho 517, 363 P.3d 358 (2015)("Severson II").

The district held an evidentiary hearing on August 16, 2017, and dismissed the First Petition with prejudice on January 23, 2018. Mr. Severson filed a timely Notice of Appeal from that decision on February 9, 2018. Here, the Appellant asserted the district court erred in denying his claim for ineffective assistance of trial counsel, for the cumulative errors of his trial attorney(s), and for ineffective assistance of appellate counsel on direct appeal. The Court of Appeals affirmed the district court's decision to deny Mr. Severson post-conviction relief. At the Appellant's request the case remains pending review before the Idaho Supreme Court Docket No. 45780-2018.

On May 9, 2014, Mr. Severson filed a Verified Successive Petition for Post-Conviction Relief ("First Successive Petition").³ The Second Petition alleged that post-conviction counsel failed to raise issues related to trial counsel's failure to properly object to numerous expert witness' testimony regarding scientific blood tests performed (and reports) in different labs without presenting such testimony from the actual lab technicians who performed such work and analysis; thus violating Mr. Severson's Sixth Amendment right to confront witnesses. First Successive Pet. at 4.

The district court declined to allow Petitioner to file a successive petition for post-conviction relief and dismissed Petitioner's claims on

³ Severson v. State, Elmore County Case No. CV-2014-526

July 3, 2014. Thereafter, Petitioner filed a Motion to Reconsider Order Denying Filing of Successive Post-conviction Relief Petition on July 23, 2014. The district court denied reconsideration on September 18, 2014, and in an unpublished decision, the Idaho Court of Appeals affirmed the district court's order. Severson v. State, Docket No. 42594 (Ct. App. April 11, 2016).

On October 16, 2016, Mr. Severson filed a Motion for Leave to File an I.C. Sec. 19-4901(a) & 19-4908, Successive IRC Application,⁴ without the aid of court appointed counsel, pro se. The Second Successive Petition alleged that Petitioner had discovered new evidence regarding the effect of certain medication on female patients, asserting claims of ineffective assistance of appellate and post-conviction counsel arising from their failure to raise a Sixth Amendment Confrontation Clause claim; prosecutorial misconduct, improper jury instructions, and the cumulative error doctrine. Second Successive Pet. at 5.

The district issued an Order Denying Motion for Appointment of Counsel and Notice of Intent to Dismiss Successive Application for Post-Conviction Relief on December 14, 2016. On February 10, 2017, Petitioner filed a Motion for Leave to Stay Proceedings during the pendency of Severson II, on remand to the district court. On April 18, 2017 the district court entered its Order Dismissing Petition (without prejudice) "declin[ing] to rule in advance on whether Mr. Severson may be permitted to file another petition in the future."⁵

A. Instant post-conviction proceedings

On February 26, 2018, Mr. Severson filed a Motion for Leave to file a Successive (post-conviction proceeding) I.C. 19-4901(a) and 19-4908, pursuant

⁴ Elmore County No. CV-2016-1135

⁵ Severson v. State, Elmore County No. CV-2016-1135, Order Dismissing Petition, the Hon. Jonathan Medema, District Judge presiding.

to Idaho Criminal and Appellate Rules of procedure. (R., pp. 52-88.) Here, Mr. Severson sought relief in the form of a new trial based upon newly discovered evidence not previously presented to the court. The State objected by seizing upon a typographical error, "There is no such thing as I.C.R. 57 or IRC 57." The appellant admits the pleadings were inartfully prepared, but asserts he is not an attorney, and could not proceed without the appointment of counsel. (R., pp. 89-101.)

The district court entered a Notice of Intent to Dismiss Third Successive Petition for Post-Conviction Relief and Deny Motion for Appointment of Counsel. (R., pp. 102-125.) On June 18, 2018, Mr. Severson filed Petitioner's Reply to the Court's Notice of Intent to Dismiss. (R., pp. 126-131.) Absent any advance notice to Mr. Severson, the district court had Mr. Severson transported to the Elmore County Courthouse on July 16, 2018, where the court conducted an evidentiary hearing. (R., pp. 132-133.) Agents of the Elmore County Sheriff declined Mr. Severson's requests that he be permitted to bring his essential legal materials on transport to the district court. Thus, Mr. Severson was unable to fully participate in the hearing or to present substantial documentation in support of his claims, i.e. newly discovered medical understanding of prescription sleep-aid Zolpidem (Ambien brand), Doxylamine (Unisom brand), with nearly 24 published peer review scientific studies have examined the mortality associated with over-prescription of these medications, their understanding of how such drugs metabolize differently among women patients, and the risks and hazards of their use in combination with other medications. Despite these facts the district court insisted Mr. Severson go forward with the evidentiary hearing, without the aid of court appointed counsel or the rudimentary legal documents necessary to advance his claims.

The State did not file a written response to the Petitioner's Reply. (R., p. 132.) Mr. Severson renewed his request that the district court appoint conflict counsel. The court denied appointment of counsel to assist during the fact finding purpose of the evidentiary hearing. (R., pp. 132-133.)

On July 20, 2018, the district court entered its Order Denying Leave to File A Third Successive Petition for Post-Conviction Relief. (R., pp. 134-149.) Following Mr. Severson's Motion to Enter Final Judgment, and request for the petition to be properly docketed with a separate civil case number in accord with I.C. 19-4902; subsequently denied by the court. (R., p. 165.) This appeal follows. (R., pp. 153-155.)

ISSUE PRESENTED ON APPEAL

1. Did the district court err in summarily dismissing Mr. Severson's petition for post-conviction relief because there is an issue of material fact as to whether newly discovered evidence substantially undermines confidence in jury's finding of guilt?

ARGUMENT

Summary dismissal is appropriate only if the petitioner's allegations are clearly disproven by the underlying criminal record, the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); DeRushe v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009); Black v. State, 165 Idaho 100, 439 P.3d 1272, 1276 (Ct. App. 2019), review denied (May 17, 2019). The court must construe all disputed facts in the petitioner's favor and may only summarily dismiss when the facts so construed fail to establish a basis

for relief as a matter of law. DeRushé, at 603; Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). An evidentiary hearing must be conducted when the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief. Charboneau, at 792; Black, 165 Idaho 104, 439 P.3d at 1276 (Ct. App. 2019).

When the jury found Mr. Severson guilty of murdering his wife in 2004, the scientific community and medical practitioners were unaware of the dangers and harmful effects of the sleeping-aid medications Mrs. Severson was over prescribed; the vast numbers of overdose deaths attributed to female patients taking those medications, or that the Food and Drug Administration would issue cautionary warnings and limitations on the prescription of such medicine among female patients.

Mr. Severson established issues of fact regarding the medical community's evolved understanding of the lethality of the sleep-aid drugs that caused the death of Mrs. Severson. This newly discovered evidence was unavailable to the defense at trial because the peer research conducted by Dr. Cahill, of University of California-Ervine wasn't available until 2012; furthermore, the renowned medical expert testimony Mr. Severson introduced in the instant PCR (successive application), Dr. Daniel Kripke, was rebuked by the district court for illogical reasons; e.g. trial defense counsel had argued "Mary possibly died by suffocating or overdosing." Severson I, 147 Idaho at 713. This is hardly a procedural bar to the entire scientific community's renewed understanding of the lethality of zolpidem and doxylamine to female patients; or dispositive to the reality of U.S. FDA regulatory restrictions on the prescription of such medicine to female patients such as Mrs. Severson.

The district court erred in concluding that the record, including the

affidavit(s), letters by Dr. Kripke to Mr. Severson in 2016, did not establish an issue of material fact as to whether Mrs. Severson accidentally died from an unfortunate and tragic accidental overdose. Accordingly, this Court should vacate the order dismissing his petition and remand for further proceedings.

CONCLUSION

For the reasons set forth above, Mr. Severson respectfully requests that this Court reverse the order denying leave to file a third successive petition for post-conviction relief and remand for further proceedings with instruction to appoint Mr. Severson the assistance of conflict free counsel.

DATED this 19th day of June, 2019.



Larry M. Severson
Appellant pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2019, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, upon the following individuals in the manner indicated:

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