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IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICK LEE O'NEIL,)	
)	NO. 46496-2018
Petitioner-Appellant,)	
v.)	BANNOCK COUNTY
)	NO. CV-2017-5047
STATE OF IDAHO,)	
)	APPELLANT'S
Respondent.)	REPLY BRIEF

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Patrick Lee O'Neil filed, pro se, a petition for post-conviction relief asserting some claims that were untimely from the district court's sentencing decision in his underlying criminal case, and asserting other claims that were timely from the district court's subsequent decision to revoke his probation. After the State filed a motion for summary dismissal, the district court denied Mr. O'Neil's motion for appointment of counsel, finding Mr. O'Neil's allegations are frivolous because the district court determined all the claims are untimely.

Mr. O'Neil appealed, asserting the district court abused its discretion when it denied his motion for appointment of counsel. The district court did not act consistently with the applicable legal standards when it determined Mr. O'Neil's allegations are frivolous for the reason that the petition is untimely, because some of the issues in the petition are related to the probation revocation and are therefore timely. Further, the petition alleges facts raising the possibility of a valid claim.

In its Respondent's Brief, the State argues Mr. O'Neil has not shown error in the denial of his motion for appointment for counsel and the summary dismissal of his petition, because his petition did not show the possibility of a valid claim. (*See* Resp. Br., pp.6-23.) This Reply Brief is necessary to address certain of the State's arguments.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. O'Neil's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court abuse its discretion when it denied Mr. O'Neil's motion for appointment of counsel, because some of the issues in the petition are related to the revocation of probation and are therefore timely?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. O’Neil’s Motion For Appointment Of Counsel, Because Some Of The Issues In The Petition Are Related To The Revocation Of Probation And Are Therefore Timely

A. Introduction

Mr. O’Neil asserts the district court abused its discretion when it denied his motion for appointment of counsel. The district court did not act consistently with the applicable legal standards when it determined all of Mr. O’Neil’s claims are frivolous for the reason that the petition for post-conviction relief is untimely, because some of the issues in the petition are related to the revocation of probation and are therefore timely. Further, the petition alleges facts raising the possibility of a valid claim. Thus, the district court should have granted the motion for appointment of counsel.

B. The District Court Did Not Act Consistently With The Applicable Legal Standards When It Determined Mr. O’Neil’s Allegations Are Frivolous For The Reason That The Petition Is Untimely

The district court did not act consistently with the applicable legal standards when it determined Mr. O’Neil’s allegations are frivolous for the reason that the petition is untimely, because some of the claims are related to the revocation of probation and are therefore timely. Not only are some of the issues in Mr. O’Neil’s petition timely because they relate to the revocation of probation, but also the petition alleges facts raising the possibility of a valid claim.

1. Some Of The Issues Raised In The Petition Relate To The Probation Revocation And Are Therefore Timely

Some of the issues raised in the petition relate to the probation revocation and are therefore timely. Specifically, as discussed in the Appellant’s Brief, the issues regarding

Officer Myler, false testimony, and withholding favorable information relate, in whole or in part, to the probation revocation. (*See* App. Br., pp.13-16.) Thus, the petition is timely with respect to those claims.

After noting that Mr. O’Neil admitted to violating his probation, the State argues, “The alleged misrepresentations by Ms. Myler, as well as the information allegedly ‘withheld’ by the state, are unrelated to the remaining question whether those violations justify revoking probation.” (Resp. Br., p.9.) On Officer Myler’s claim that Mr. O’Neil had a parole violation which he did not have, the State argues, “a parole violation pre-dating the charges and conviction in the underlying criminal case is wholly unrelated and immaterial to the much-later probation violations to which [Mr.] O’Neil admitted and the revocation of his probation based on those probation violations.” (Resp. Br., p.12 (citation omitted).) The State likewise argues Officer Myler’s reference to a non-existent trafficking conviction and withholding of information on UA testing were not relevant or material to the probation revocation issue. (*See* Resp. Br., pp.13-14.) Moreover, according to the State, Mr. O’Neil’s Social Security benefits “were at best tangentially related to the probation violations.” (*See* Resp. Br., pp.14-15.)

For the reasons stated above, the State also argues the allegations of false testimony presented by the prosecutor largely do not relate to the probation violation, and the alleged misrepresentation regarding meetings to establish Social Security benefits was only tangentially related. (*See* Resp. Br., pp.15-16.) Further, the State argues that the withholding favorable information claim “does not concern the revocation of [Mr.] O’Neil’s probation, but is directed to his plea agreement, sentencing, and/or placement in probation.” (*See* Resp. Br., pp.16-17.)

Put otherwise, the State contends that information from before the alleged probation violations are not relevant to a decision to revoke probation. But the State’s argument ignores

Idaho Supreme Court precedent holding a probationer's history and background are actually relevant to a district court's probation revocation decision. For example, in *State v. Chapman*, 111 Idaho 149 (1986), the Idaho Supreme Court observed, "in the process of determining whether an individual's probation should be revoked, the trial court 'necessarily must be permitted to evaluate a broad range of information about the defendant[] *Very little information* about a defendant will be irrelevant to the effort of the law to individualize treatment of convicted persons.'" *Chapman*, 111 Idaho at 153 (quoting *State v. Moore*, 93 Idaho 14, 17 (1969) (alteration and emphasis in original)). The *Chapman* Court also wrote, "Precluding consideration of [the probationer's] conduct prior to his being placed on probation would unwisely skew the trial court's consideration of the necessary facts which the court needs in order to properly individualize its decision *vis-à-vis* him." *Id.*

Later, the Idaho Supreme Court held, "Based upon [a probationer's] history and background and the problems the court viewed him to be having with the alternatives to incarceration, the court was acting within the boundaries of its discretion and within the applicable legal standards when it revoked [the probationer's] probation." *State v. Sanchez*, 149 Idaho 102, 107 (2009). The State's narrow view of what information is relevant to a probation revocation proceeding is contrary to *Chapman* and *Sanchez*.

Thus, the issues regarding Officer Myler, false testimony, and withholding favorable information relate, in whole or in part, to the probation revocation. Despite the State's arguments, the district court's determination that "[t]he Petition in this case did not raise issues related to the revocation of probation but only attacked the underlying conviction," as a factual determination, was clearly erroneous. (*See R.*, p.101.) The issues raised in the petition relating to the probation revocation are timely. *See I.C. § 19-4902(a)*.

2. The Petition Alleges Facts Raising the Possibility Of A Valid Claim

Not only are some of the issues in Mr. O'Neil's petition timely because they relate to the revocation of probation, the petition also alleges facts raising the possibility of a valid claim. As discussed in the Appellant's Brief (App. Br., p.17), the affidavits in support of the issue regarding Officer Myler indicate the officer might have been lying and might have been biased against Mr. O'Neil (*see R.*, pp.7-9, 13-14). Additionally, on the issues of false testimony and withholding favorable information, Mr. O'Neil's petition and the supporting affidavits supplied information that there was no exclusive medical provider for Wood Court, and he was not appropriately medicated in most of his time in Wood Court. (*See R.*, pp.19-21.)

Further, even if those issues are not possibly valid for reasons unrelated to their timeliness, the petition and supporting affidavits nonetheless allege facts raising the possibility of a valid claim that counsel was ineffective for not addressing Officer Myler's lies during her comments or her bias against Mr. O'Neil, or for not addressing the prosecution's use of false testimony or withholding of favorable information. Though Mr. O'Neil did not raise those particular ineffective assistance of counsel claims in his petition, on remand, Mr. O'Neil could have the assistance of appointed counsel in pursuing such potentially valid ineffective assistance of counsel issues. *See Esquivel v. State*, 149 Idaho 255, 257 (Ct. App. 2010).

The State argues, "Even if the Court construes the allegations as 'concerning' the revocation of his probation, so as to be timely, the claims are patently frivolous and do not give rise to the possibility of a valid post-conviction claim." (Resp. Br., p.10.) However, "the threshold showing that is necessary in order to gain appointment of counsel [is] considerably lower than that which is necessary to avoid summary dismissal of a petition." *Judd v. State*, 148

Idaho 22, 24 (Ct. App. 2009). Mr. O’Neil submits that his petition meets that lower threshold showing.

The State also argues that the petition and supporting affidavits do not allege facts raising the possibly valid ineffective assistance of counsel claims discussed above, in part because Mr. O’Neil did not make those specific allegations and he “knows perfectly well how to allege ineffective assistance of counsel.” (*See Resp. Br.*, pp.20-21.) However, Mr. O’Neil’s claims of ineffective assistance of counsel in a previous post-conviction petition were summarily dismissed for not raising a genuine issue of material fact, and his motion for appointment of counsel in that matter was denied because he did not allege facts sufficient to raise the possibility of a valid claim. *See O’Neil v. State*, No. 40120, 2013 WL 6094343 (Idaho Ct. App. Nov. 20, 2013). Thus, the instant case is distinguishable from Mr. O’Neil’s previous petition, because here Mr. O’Neil did allege facts raising possibly valid ineffective assistance of counsel claims. Moreover, the summary dismissal of his prior claims does not suggest that Mr. O’Neil “knows perfectly well how to allege ineffective assistance of counsel,” but rather indicates that he, as a pro se petitioner without legal training, was unable to properly articulate such claims without the assistance of counsel. *See Charboneau v. State*, 140 Idaho 789, 792-93 (2004).

The State next contends that the ineffective assistance of counsel claims are not possibly valid because Mr. O’Neil could not show deficient performance or prejudice. (*See Resp. Br.*, pp.21-23.) As explored in the Appellant’s Brief, Mr. O’Neil submits that the petition and supporting affidavits allege facts raising the possibility of valid ineffective assistance of counsel claims. (*See App. Br.*, p.18.) The petition alleges facts raising the possibility of a valid claim. The district court abused its discretion when it denied Mr. O’Neil’s motion for appointment of counsel.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. O'Neil respectfully requests the Court vacate the order and judgment summarily dismissing his petition for post-conviction relief, reverse the order denying his motion for appointment of counsel, and remand the case to the district court for entry of an order appointing counsel to assist Mr. O'Neil in further post-conviction proceedings.

DATED this 25th day of July, 2019.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas