

3-11-2016

## Green v. State Appellant's Brief Dckt. 43750

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

### Recommended Citation

"Green v. State Appellant's Brief Dckt. 43750" (2016). *Idaho Supreme Court Records & Briefs*. 5853.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/5853](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/5853)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>ALESHA ANN GREEN,</b>	)	
	)	<b>NO. 43750</b>
<b>Petitioner-Appellant,</b>	)	
	)	<b>ADA COUNTY NO. CV 2015-11223</b>
<b>v.</b>	)	
	)	
<b>STATE OF IDAHO,</b>	)	<b>APPELLANT’S BRIEF</b>
	)	
<b>Respondent.</b>	)	

---

**BRIEF OF APPELLANT**

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

**HONORABLE MELISSA MOODY**  
District Judge

**SARA B. THOMAS**  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**BEN P. MCGREEVY**  
Deputy State Appellate Public Defender  
I.S.B. #8712  
P.O. Box 2816  
Boise, ID 83701  
(208) 334-2712

**ATTORNEYS FOR  
PETITIONER-APPELLANT**

**ATTORNEY FOR  
RESPONDENT**

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUE PRESENTED ON APPEAL .....	6
ARGUMENT.....	7
The District Court Erred When It Addressed The Potential Conflict Of Interest In Ms. Green’s Case, Because It Did Not Adequately Inquire Into Whether The Circumstances Demonstrated A Significant Likelihood Of Prejudice .....	7
A. Introduction.....	7
B. Standard Of Review And Applicable Law .....	7
C. The District Court Did Not Adequately Inquire Into Whether The Circumstances Of Ms. Green’s Case Demonstrated A Significant Likelihood Of Prejudice .....	8
CONCLUSION .....	13
CERTIFICATE OF MAILING .....	14

## TABLE OF AUTHORITIES

### Cases

<i>Charboneau v. State</i> , 140 Idaho 789 (2004) .....	7, 9, 12
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980) .....	9
<i>Murphy v. State</i> , 156 Idaho 389 (2014) .....	8
<i>Rios-Lopez v. State</i> , 144 Idaho 340 (Ct. App. 2007) .....	8
<i>State v. Cook</i> , 144 Idaho 784 (Ct. App. 2007) .....	10, 12
<i>State v. Green</i> , No. 42452, 2015 Unpublished Opinion No. 506 (Idaho Ct. App. May 28, 2015) .....	1
<i>State v. Hedger</i> , 115 Idaho 598 (1989) .....	8
<i>State v. Lovelace</i> , 140 Idaho 53 (2003) .....	9
<i>State v. Nath</i> , 137 Idaho 712 (2002) .....	8
<i>State v. Severson</i> , 147 Idaho 694 (2009) .....	9, 10, 12
<i>Wood v. Georgia</i> , 450 U.S. 261 (1981) .....	9

### Statutes

I.C. § 19-4904 .....	7
----------------------	---

### Rules

Idaho R. Prof. Conduct 1.10 .....	10
Idaho R. Prof. Conduct 1.7 .....	9, 10

## STATEMENT OF THE CASE

### Nature of the Case

Alesha Ann Green appeals from the Judgment dismissing her Amended Petition for Post-Conviction Relief. On appeal, Ms. Green asserts the district court erred when it addressed the potential conflict of interest in her case, because it did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice. Ms. Green's trial counsel in the underlying criminal case and her post-conviction counsel worked for the same public defender's office, and Ms. Green's post-conviction petition raised ineffective assistance of counsel claims against trial counsel. The district court recognized there was a potential conflict of interest, but it did not adequately inquire into whether the circumstances of Ms. Green's case demonstrated a significant likelihood of prejudice.

### Statement of the Facts and Course of Proceedings

In Ada County No. CR 2012-6591, Ms. Green was convicted by a jury of two counts of felony trafficking in methamphetamine. (See R., p.29.) At the trial, an attorney from the Ada County Public Defender's Office represented Ms. Green. (See R., p.49.) The district court imposed a unified sentence of twelve years, with five years fixed, on the first count, and a concurrent unified sentence of twelve years, with three years fixed, on the second count. (R., p.29.) At the sentencing hearing, another attorney from the Ada County Public Defender's Office represented Ms. Green. (See R., pp.154-55 (sentencing hearing transcript).) Ms. Green appealed, and the Idaho Court of Appeals affirmed her sentence in an unpublished opinion. *State v. Green*, No. 42452, 2015 Unpublished Opinion No. 506 (Idaho Ct. App. May 28, 2015).

Ms. Green filed, *pro se*, a Petition and Affidavit for Post Conviction Relief. (R., pp.4-8.) The petition raised the following grounds for relief: “(a) Ineffective [counsel]”; “(b) Mishandling of evidence. Lack of evidence”; and “(c) Untrue testimony of detectives.” (R., p.5.) Regarding the ineffective assistance of counsel claim, Ms. Green asserted her trial counsel failed to get any of her witnesses on her behalf, did not show up for the sentencing hearing, failed to thoroughly research and present evidence that could have helped her prove her innocence, and did not properly interrogate witnesses, i.e., on mishandling of evidence and perjured testimony of witnesses. (R., p.6.)

Ms. Green also filed a Motion and Affidavit in Support for Appointment of Counsel. (R., pp.17-20.) The district court granted the motion and appointed the Ada County Public Defender to represent Ms. Green in the post-conviction proceeding. (R., pp.21-22.) The order granting the motion for appointment of counsel stated that “[b]ecause the petition for post-conviction relief . . . includes an allegation of ineffective assistance of trial counsel, the Ada County Public Defender may choose to appoint conflict counsel.” (R., p.21.)

A third attorney from the Ada County Public Defender was assigned to Ms. Green’s case as post-conviction counsel. (See R., p.23.) The district court then set a status conference. (R., pp.25-26.) The district court’s order setting the status conference noted “[a]s of the date of this order, no notice of appearance has been entered by conflict counsel for petitioner.” (R., p.25.)

At the status conference, the following exchange occurred between the district court and post-conviction counsel:

[THE COURT:] And, [post-conviction counsel], are you appearing on behalf of petitioner?

[POST-CONVICTION COUNSEL:] I am, Your Honor.

THE COURT: All right. So you have not actually sent that out for conflict counsel? And I assume that's because you were not the trial attorney.

[POST-CONVICTION COUNSEL:] That's what my boss tells me, Your Honor.

THE COURT: All right.

(Tr., p.6, Ls.6-15.)

The district court later inquired at the status conference:

[THE COURT:] [Post-conviction counsel], have you discussed with Ms. Green that you, as a member of the Ada County Public Defender's Office, are representing her in this action?

[POST-CONVICTION COUNSEL:] I have, Your Honor. I had [a] chance to visit her last week.

(Tr., p.8, Ls.17-22.) Post-conviction counsel then discussed his review of the case so far and how much additional time he would need to prepare an amended post-conviction petition. (See Tr., p.8, L.23 – p.9, L.24.) The district court gave post-conviction counsel seven weeks to file an amended petition. (Tr., p.9, L.25 – p.10, L.11.)

Ms. Green, through post-conviction counsel, then filed an Amended Petition for Post-Conviction Relief. (R., pp.29-32.) The amended petition raised the following grounds for relief: "(a) Ineffective assistance of counsel"; "(b) Mishandling of evidence and lack thereof"; "(c) Untrue testimony of detectives"; and "(d) Failure to convey plea deal from State." (R., p.30.) Regarding the ineffective assistance of counsel claim, Ms. Green asserted counsel failed to get any of her witnesses on her behalf, did not

show up for the sentencing hearing, failed to thoroughly research and present evidence that could have helped her prove her innocence, did not properly interrogate witnesses, i.e., on mishandling of evidence and perjured testimony of witnesses, and failed to fully explain the new offer from the State. (R., p.30.)

The State filed an Answer to the amended petition. (R., pp.35-36.) The State also filed a Motion for Summary Disposition and Exhibits, arguing the amended petition raised no genuine issue of material fact. (R., pp.37-38.) As an exhibit, the State attached the transcript of Ms. Green's jury trial and sentencing hearing. (R., pp.39-162 (State's Ex. 1).)

In its Brief in Support of Motion for Summary Disposition, the State argued Ms. Green's claims were bare and conclusory. (R., pp.163-70.) On the claim that Ms. Green's trial counsel was ineffective for not appearing at her sentencing hearing, the State argued Ms. Green did not articulate specifically why the second attorney who appeared at the hearing performed deficiently, the record contradicted her claim of prejudice because Ms. Green indicated at the hearing she was comfortable with going forward with the second attorney, and the Idaho Court of Appeals had affirmed her sentences. (R., pp.166-67.) Regarding the claim that Ms. Green's counsel was ineffective for failing to get any witnesses or evidence contrary to the State's charges, the State contended Ms. Green did not identify what evidence or which witnesses counsel failed to present, did not articulate how or why the evidence or testimony would have affected the outcome of her trial, and did not provide the district court with a copy of the security footage or show any resulting prejudice from the failure to present the footage. (R., pp.167-68.)



On the claim that Ms. Green's counsel was ineffective for not properly interrogating witnesses, the State argued Ms. Green did not identify which witnesses were not questioned properly or what questions counsel should have asked, and she did not articulate how or why the evidence or testimony would have affected the outcome of her trial. (R., p.168.) With respect to the claim that Ms. Green's counsel was ineffective for failing to fully explain a new plea offer from the State, the State argued Ms. Green did not identify what new offer was not fully explained, and she did not articulate how or why the failure to explain the new offer would have affected the outcome of her trial. (R., p.169.) Thus, the State requested the district court grant its motion for summary disposition. (R., p.169.)

The district court subsequently issued a Notice of Intent to Dismiss. (R., pp.173-75.) In the notice, the district court gave notice of "its intent to dismiss the . . . amended petition for post-conviction relief for the reasons set forth in Respondent's . . . motion for summary disposition." (R., p.173.) The district court granted Ms. Green twenty days to reply to the proposed dismissal of the post-conviction action. (R., p.174.) However, Ms. Green did not file a reply. (See R., pp.2-3 (register of actions).) The district court then issued a Judgment dismissing the amended petition. (R., pp.176-77.)

Ms. Green filed a Notice of Appeal timely from the district court's Judgment. (R., pp.178-80.)

## ISSUE

Did the district court err when it addressed the potential conflict of interest in Ms. Green's case, because it did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice?

## ARGUMENT

### The District Court Erred When It Addressed The Potential Conflict Of Interest In Ms. Green's Case, Because It Did Not Adequately Inquire Into Whether The Circumstances Demonstrated A Significant Likelihood Of Prejudice

#### A. Introduction

Ms. Green asserts the district court erred when it addressed the potential conflict of interest in her case, because it did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice. The district court recognized there was a potential conflict of interest because Ms. Green's trial counsel and post-conviction counsel both worked for the same office and Ms. Green's petition raised ineffective assistance of counsel claims against trial counsel. However, the district court did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice, because it did not ask post-conviction counsel questions such as whether his office had set up effective measures to prevent communication of confidential client information between lawyers employed on behalf of individual defendants.

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

If a post-conviction petitioner is unable to pay court costs and expenses of representation, "these costs and expenses, and a court-appointed attorney may be made available to the applicant in the preparation of the application, in the trial court . . . and paid, on order of the district court." I.C. § 19-4904. The Idaho Supreme Court has held "[t]he decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court." *Charboneau v. State*, 140 Idaho 789, 792 (2004). At

least in the context of criminal cases, the appointment of substitute counsel (on grounds of, for example, a conflict of interest) is likewise reviewed for an abuse of discretion.<sup>1</sup> See *State v. Nath*, 137 Idaho 712, 715 (2002).

The Idaho Supreme Court has held there is no constitutional or statutory right to counsel in post-conviction proceedings. *Murphy v. State*, 156 Idaho 389, 394-95 (2014). However, the Idaho Court of Appeals before *Murphy* held that, while a post-conviction petitioner did not have a constitutionally protected right to counsel, the petitioner “had an interest in securing assistance to adequately present his claims.” See *Rios-Lopez v. State*, 144 Idaho 340, 342 (Ct. App. 2007) (discussing this interest in the context of procedural due process).

C. The District Court Did Not Adequately Inquire Into Whether The Circumstances Of Ms. Green’s Case Demonstrated A Significant Likelihood Of Prejudice

Ms. Green asserts the district court erred when it addressed the potential conflict of interest in her case, because the district court did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice.

Ms. Green submits her interest in securing assistance to adequately present her post-conviction claims extends to an interest in having conflict-free post-conviction counsel. Under the statutory standard for the appointment of post-conviction counsel, if a petitioner alleges facts that raise the possibility of a valid claim, the district court

---

<sup>1</sup> When a district court’s discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted with the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the district court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

should appoint counsel to give the petitioner an opportunity to work with counsel and “properly allege the necessary supporting facts.” See *Charboneau*, 140 Idaho at 793. The opportunity for the petitioner to work with post-conviction counsel and properly allege the necessary supporting facts for the petitioner’s possibly-valid claims would be negated if counsel had a conflict of interest limiting counsel’s ability to represent the petitioner.

The right to conflict-free counsel in criminal cases “derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment.” See *State v. Lovelace*, 140 Idaho 53, 60 (2003). “Whenever a trial court knows or reasonably should know that a particular conflict may exist, the trial court has a duty of inquiry.” *Id.* (citing *Wood v. Georgia*, 450 U.S. 261, 272-73 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980)). Ms. Green does not assert the constitutional right to conflict-free counsel in criminal cases applies to post-conviction proceedings such as the instant case. But by analogy to the constitutional standard, and to preserve the petitioner’s opportunity to work with post-conviction counsel, see *Charboneau*, 140 Idaho at 793, a district court should inquire into potential conflicts of interest in post-conviction matters.

The Idaho Supreme Court has held “[t]o determine whether an actual conflict of interest exists, Idaho Courts look to the standards set forth in the Idaho Rules of Professional Conduct.” *State v. Severson*, 147 Idaho 694, 705 (2009). The Idaho Rules of Professional Conduct provide that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” Idaho R. Prof. Conduct 1.7(a). A concurrent conflict of interest exists if “there is a significant risk that the representation

of one or more client will be materially limited . . . by the personal interests of the lawyer . . . .” Idaho R. Prof. Conduct 1.7(a)(2). The comments for Rule 1.7 state “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” Idaho R. Prof. Conduct 1.7 cmt. 10.

Generally, under Rule 1.10, a lawyer’s concurrent conflicts of interest are imputed to his or her entire firm. Idaho R. Prof. Conduct 1.10(a). As an exception to the general rule, if the conflict is based on the lawyer’s personal interest, the conflict will be imputed to the lawyer’s entire firm if it “present[s] a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” See Idaho R. Prof. Conduct 1.10(a)(1).

Additionally, Idaho’s appellate courts have held there is no *per se* rule imputing one public defender’s conflict of interest to the public defender’s entire office. *Severson*, 147 Idaho at 706; *State v. Cook*, 144 Idaho 784, 794 (Ct. App. 2007). Rather, the preferred approach is “to analyze whether one public defender’s conflict should be imputed to the entire office on a case-by-case basis.” *Severson*, 147 Idaho at 706 (citing *Cook*, 144 Idaho at 794). The relevant inquiry is “whether the circumstances demonstrate a potential conflict of interest *and* a significant likelihood of prejudice.” *Id.* (internal quotation marks omitted) (emphasis in original). “If so, there is a presumption that both an actual conflict of interest and actual prejudice will arise.” *Id.* (internal quotation marks omitted).

Here, the district court did not adequately inquire into whether the circumstances of Ms. Green's case demonstrated a significant likelihood of prejudice. The district court recognized there was a potential conflict of interest. Ms. Green's trial counsel and post-conviction counsel both worked for the Ada County Public Defender's Office. (See, e.g., R., pp.23, 49.) Ms. Green's post-conviction petition raised ineffective assistance of counsel claims against trial counsel. (R., pp.5-6.) Thus, the district court's order granting the motion for appointment of counsel provided that "[b]ecause the petition for post-conviction relief . . . includes an allegation of ineffective assistance of trial counsel, the Ada County Public Defender may choose to appoint conflict counsel." (R., p.21.) The district further acknowledged the existence of a potential conflict by mentioning conflict counsel in the order setting the status conference. (See R., p.25.)

But even though it recognized the potential conflict, the district court did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice. At the status conference, the district court simply asked post-conviction counsel: "So you have not actually sent that out for conflict counsel? And I assume that's because you were not the trial attorney." (Tr., p.6, Ls.9-12.) The district court then accepted post-conviction counsel's answer: "That's what my boss tells me, Your Honor." (See Tr., p.6, Ls.13-15.) The only other question on the potential conflict came when the district court asked post-conviction counsel if he had discussed with Ms. Green that he was representing her while working for the Ada County Public Defender's Office, and post-conviction counsel answered in the affirmative. (See Tr., p.8, Ls.17-22.)

Thus, the district court conducted nothing more than a superficial inquiry into whether the circumstances demonstrated a significant likelihood of prejudice. For example, the district court did not inquire into “whether [the] office has set up effective measures to prevent communication of confidential client information between lawyers employed on behalf of individual defendants.” See *Severson*, 147 Idaho at 707 (quoting *Cook*, 144 Idaho at 794 n.8) (internal quotation marks omitted). Without asking such deeper questions that would allow the district court to take the individual situations of Ms. Green and her counsel into consideration, see *Cook*, 144 Idaho at 794, the district court did not adequately inquire into whether the circumstances demonstrated a significant likelihood of prejudice.

The district court did not adequately inquire into whether the circumstances of Ms. Green’s case demonstrated a significant likelihood of prejudice. Because the district court erred when it addressed the potential conflict of interest, the judgment dismissing Ms. Green’s amended post-conviction petition should be vacated and the matter should be remanded to the district court for a proper conflict determination. If the district court determines there is a conflict of interest imputed to post-conviction counsel, Ms. Green should receive conflict-free counsel to preserve her opportunity to work with counsel and properly allege the necessary supporting facts for her post-conviction claims. See *Charboneau*, 140 Idaho at 793.



CONCLUSION

For the above reasons, Ms. Green respectfully requests this Court vacate the judgment dismissing her amended post-conviction petition and remand her case to the district court for further proceedings.

DATED this 11<sup>th</sup> day of March, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11<sup>th</sup> day of March, 2016, 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:

ALESHA ANN GREEN  
INMATE #107140  
EBCWC  
2366 E OLD PENITENTIARY ROAD  
BOISE ID 83712

MELISSA MOODY  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

RANSOM J BAILEY  
ADA COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas