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

<b>ROBERT WESLEY WARDEN,</b>	)	
	)	<b>NO. 47831-2020</b>
<b>Petitioner-Appellant,</b>	)	
	)	<b>IDAHO COUNTY</b>
<b>v.</b>	)	<b>NO. CV25-19-16</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

\_\_\_\_\_  
**REPLY BRIEF OF APPELLANT**  
\_\_\_\_\_

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

\_\_\_\_\_  
**HONORABLE GREG FITZMAURICE**  
**District Judge**  
\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

The district court erred in summarily dismissing Mr. Warden's petition for post-conviction relief because he raised a genuine issue of material fact as to whether he received ineffective assistance of counsel. Mr. Warden argued in his Appellant's Brief that his trial counsel rendered ineffective assistance when he failed to challenge, in his motion to suppress, whether the stop of Mr. Warden's vehicle was supported by reasonable suspicion. (*See* Appellant's Br., pp.5-8.) The State argues in its Respondent's Brief that the Court should reject Mr. Warden's argument because he failed to provide an adequate record to support his petition in the district court, and fails to provide an adequate record on appeal. (Respondent's Br., p.5.) The State also argues the district court was correct to summarily dismiss Mr. Warden's petition because "[a] motion to suppress on the grounds set out in Warden's petition would certainly have been denied." (Respondent's Br., p.4.) The State is wrong on both fronts. Mr. Warden submits this Reply Brief to explain why the record was and is sufficient, and to show that a motion to suppress challenging reasonable suspicion should have been granted.

### Statement of Facts and Course of Proceedings

Mr. Warden include a statement of facts and course of proceedings in his opening brief, which he relies on and incorporates herein. (*See* Appellant's Br., pp.1-2.)

## ISSUE

Did the district court err in summarily dismissing Mr. Warden's claim that he received ineffective assistance of counsel when his attorney failed to challenge whether the stop of his vehicle was supported by reasonable suspicion?

## ARGUMENT

### The District Court Erred In Summarily Dismissing Mr. Warden's Claim That He Received Ineffective Assistance Of Counsel When His Attorney Failed To Challenge Whether The Stop Of His Vehicle Was Supported By Reasonable Suspicion

A. Mr. Warden Provided An Adequate Record To Support His Petition In The District Court And Provides An Adequate Record To This Court On Appeal

The State contends this Court should affirm because Mr. Warden failed to provide to the district court, or to this Court on appeal, the motion to suppress and accompanying briefing filed in the underlying criminal case. (Respondent's Br., p.7.) The State is incorrect. The district court had an adequate record to consider Mr. Warden's ineffective assistance of counsel claim, and Mr. Warden has provided an adequate record to this Court on appeal.

The State cites *Fortin v. State*, 160 Idaho 437 (Ct. App. 2016), in support of its argument that this Court should affirm because Mr. Warden failed to submit his motion to suppress and accompanying briefing to the district court. (Respondent's Br., p.7.) In *Fortin*, the petitioner argued the district court denied him access to the courts by refusing to take judicial notice of certain documents. 160 Idaho at 444. In rejecting this claim, the Court of Appeals noted that, "[u]pon filing his petition, [the petitioner] had the opportunity to develop a record sufficient to support his post-conviction claims by requesting the district court take judicial notice of specific documents or items within the desired case files." *Id.* The Court found no error in the district court's denial of the petitioner's request for judicial notice on account of its lack of specificity. *Id.* The Court explained "it was [the petitioner's] own failure . . . which caused his inability to establish the desired record both for purposes below and on appeal," and thus held his access to the courts was not unduly restricted. *Id.*

The holding in *Fortin* has no bearing on this case, as Mr. Warden does not contend he was denied access to the courts and raises no issue with respect to the district court's order admitting certain exhibits. (*See R.*, pp.177-78.) Significantly, the *Fortin* Court recognized that the Uniform Post-Conviction Procedure Act provides that "if a post-conviction petition is not accompanied by the record of the proceedings challenged therein, *the state* shall file with its answer the record or portions thereof that are material to the questions raised in the application." 160 Idaho at 444 (quotation marks omitted, emphasis added); *see also* I.C. 19-4906(a). Thus, in the context of post-conviction, it is *not* the petitioner's burden to file with the district court the material portions of the record; rather, the burden falls on the State. *See id.* This Court should thus decline the State's request to "reject" Mr. Warden's appeal. (*See* Respondent's Br., p.7.)

Moreover, it is undisputed in this case that the motion to suppress filed by Mr. Warden's trial counsel did not challenge whether Deputy AuGello had reasonable suspicion to stop Mr. Warden's vehicle. The district court noted at the hearing on the State's motion for summary dismissal that defense counsel "only briefly addressed the stop" at the suppression hearing, and said "the majority of [the] hearing addressed the aggravated assault charge against Warden . . . ." (*R.*, p.184.) The district court considered the transcript of the suppression hearing, which was filed in the district court and is contained in the record on appeal. (*See R.*, pp.177-78; *Exs.*, pp.130-83.) The State did not object to the adequacy of the record in the district court and did not feel it necessary to provide the district court with a copy of the motion to suppress and briefing thereon. The district court considered Mr. Warden's claim of ineffective assistance of counsel on its merits, and its decision must be reviewed by this Court on its merits.

Mr. Warden has also provided an adequate record to this Court on appeal. Idaho Appellate Rule 28(c) provides that "[a]ny party may request any written document filed or

lodged with the district court . . . to be included in the clerk's . . . record . . . ." A party may move to augment the record, pursuant to Idaho Appellate Rule 30(a), with any documents that were presented to the district court, but are not contained in the record on appeal. Here, it would not be proper for the record on appeal to include the motion to suppress and accompanying briefing as these documents were not filed with, lodged with, or considered by the district court. While this Court will not presume any error in the absence of an adequate record in appeal, *see Wilson v. State*, 133 Idaho 874, 878 (Ct. App. 2000), there is an adequate record in his case, and thus no presumption can be made with respect to Mr. Warden's ineffective assistance of counsel claim based on the state of the record.

B. A Motion To Suppress Challenging Whether The Stop Of Mr. Warden's Vehicle Was Supported By Reasonable Suspicion Should Have Been Granted

The State asserts Mr. Warden's argument on appeal fails on the merits because "[a] motion to suppress on the grounds set out in Warden's petition would certainly have been denied." (Respondent's Br., p.4.) In the State's view, Mr. Warden's "attempt to cast doubt on Deputy AuGello's stated reason for initially turning around to follow him is . . . without merit." (Respondent's Br., p.10.) And, in the State's view, even if there was doubt regarding Deputy AuGello's reason for turning around and following Mr. Warden, that doubt does not affect Deputy AuGello's testimony that he observed Mr. Warden crossing the center line after he turned around. (*Id.*) The State is incorrect, and its motion for summary dismissal should have been denied.

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court . . . will liberally construe the facts and reasonable inferences in favor of the non-moving party." *Rhoades v. State*, 148 Idaho 247, 250 (2009). The underlying facts alleged

by the petitioner “must be regarded as true.” *Id.* (quotation marks omitted). Regarding the facts alleged by Mr. Warden as true, and construing all reasonable inferences in his favor, the district court would have granted a motion to suppress in the underlying criminal case if Mr. Warden’s trial counsel has challenged whether the stop of Mr. Warden’s vehicle was supported by reasonable suspicion.

Mr. Warden argued in the district court that “[a]side from *not knowing where the event occurred*, Deputy AuGello testified to things he saw that he could not have seen, given the speeds of the vehicles, the lighting available, and the placement of the fog line in the curve of the road. (R., p.72.) Deputy AuGello stopped Mr. Warden at approximately 10:30 p.m., after the moon had set, somewhere between mile marker 72 and 73 on Highway 12. (R., pp.66-67.) There is no lighting along Highway 12 from mile marker 71 to mile marker 74. (R., p.67.) Deputy AuGello said he observed Mr. Warden, driving in the opposite direction on Highway 12, and saw in his side mirror that “he had drifted across the fog line after he passed me.” (R., p.64.) He testified that he stopped Mr. Warden at mile marker 72, which is in the middle of an “S” curve that makes visibility difficult even in broad daylight. (R., p.68.) At the time Deputy AuGello claimed to observe Mr. Warden, their vehicles were separated from each other at a combined speed of 90 to 100 miles per hour. (R., p.72.)

Mr. Warden argued Deputy AuGello’s description of the events leading up to the traffic stop were “inherently unreliable.” (R., p.73.) He argued that, if his trial counsel had challenged Deputy AuGello’s statements regarding his initial observations of Mr. Warden, the district court would have found him to be not credible. The district court would have discounted Deputy AuGello’s testimony because he could not have seen what he testified to seeing, at the time and location he testified to seeing it. Construing all reasonable inferences in Mr. Warden’s favor, the

district court would also have not credited Deputy AuGello's testimony that he observed Mr. Warden crossing the centerline after making the U-turn, "with no location or estimated measurement," and in the absence of any video evidence. (R., pp.74, 76, n.1.) The district court thus erred in summarily dismissing Mr. Warden's claim of ineffective assistance of counsel and its decision should be reversed.

### CONCLUSION

For the reasons stated above, as well as those set forth in his Appellant's Brief, Mr. Warden respectfully requests that this Court vacate the judgment dismissing his petition for post-conviction relief, and remand this case to the district court for further proceedings.

DATED this 19<sup>th</sup> day of May, 2021.

/s/ Andrea W. Reynolds  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19<sup>th</sup> day of May, 2021, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

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

AWR/eas