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Cavanaugh v. State Appellant's Reply Brief Dckt. 37706

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PAUL J. CAVANAUGH,)	
)	
Petitioner-Appellant,)	NO. 37706
)	
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S
)	REPLY BRIEF
Respondent.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER

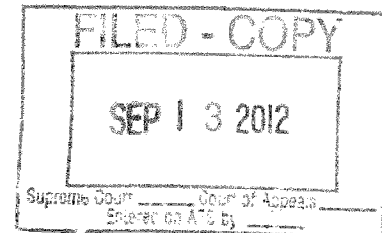
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STATEMENT OF THE CASE

Nature of the Case

Mr. Cavanaugh asserts that the district court erred when it summarily dismissed his post-conviction claim that his attorney was ineffective for failing to prevent a biased juror, R.H., from sitting on the jury that convicted him.

In its Respondent's Brief, the State asserts that Mr. Cavanaugh failed to make a *prima facie* showing that his attorney was ineffective for failing to challenge R.H. for cause or exercise a peremptory challenge that ultimately went unused to strike R.H. from the jury.

This Reply Brief is necessary to demonstrate why the State is incorrect in its assertion that Mr. Cavanaugh failed to make a *prima facie* showing that his attorney was ineffective, thereby requiring that the district court hold an evidentiary hearing on the claim.

Statement of the Facts and Course of Proceedings

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

ISSUE

Did Mr. Cavanaugh make a *prima facie* showing with respect to his claim that his attorney was ineffective for failing to strike juror R.H., such that he was entitled to an evidentiary hearing?

ARGUMENT

Mr. Cavanaugh Made A *Prima Facie* Showing With Respect To His Claim That His Attorney Was Ineffective For Failing To Strike Juror R.H., Such That He Was Entitled To An Evidentiary Hearing

In its Respondent's Brief, the State argues that Mr. Cavanaugh has failed to make a *prima facie* showing that his attorney was ineffective for failing to strike juror R.H. Specifically, the State argues that the record establishes that the juror was not biased against Mr. Cavanaugh, and, therefore, his claim was properly dismissed without an evidentiary hearing. The State's argument centers on the fact that the juror, who admitted that he would give greater weight to the testimony of one of the State's witnesses¹ whom he knew, was nonetheless unbiased because he assured the court "that he could be an impartial juror . . . [and] represented to the trial court, in essence, that he could lay aside any inclination he might have had to give more weight to the testimony of the witness he knew in order to serve as an impartial juror." (Respondent's Brief, p.10.) The State's argument is unpersuasive.

The fact that the juror indicated that he could be fair and impartial is not dispositive given the fact that he indicated specifically *that he would give greater weight to the testimony of the prosecution witness whom he knew*. Nothing the State attempts to do to obfuscate this can change the fact that the witness indicated, without subsequent retraction, that he would give greater weight to one of the State's witnesses.

¹ In a footnote, the State writes, "[i]t should be noted that juror R.H. did not say that the witness he knew was a prosecution witness." (Respondent's Brief, p.9 n.3.) The fatal flaw with the State's claim that it is not clear whether the witness known by the juror was a prosecution or defense witness is that defense counsel had only identified one potential defense witness, Idaho State Police Trooper Rachel Burke (R., p.110), and juror R.H. did not respond affirmatively when the jurors were asked whether they knew anyone in law enforcement. (Respondent's Brief, p.9 n.3 (citing Tr., p.88, L.13 – p.92, L.17).)

The mere fact the juror felt that he would be unbiased and impartial does not change the fact that he would not be unbiased and impartial with respect to the testimony of one of the State's witnesses. Such un rebutted evidence of bias in favor of one of the State's witnesses is certainly sufficient to establish a *prima facie* claim of ineffective assistance of counsel where counsel failed to move to exclude the juror for cause or even exercise all of his peremptory challenges, and certainly sufficient to require that Mr. Cavanaugh receive an evidentiary hearing on the claim.

CONCLUSION

For the reasons set forth herein and in his Appellant's Brief, Mr. Cavanaugh respectfully requests that this Court vacate the district court's order summarily dismissing his post-conviction claim concerning juror R.H., and remand this matter for an evidentiary hearing on that claim.

DATED this 13th day of September, 2012.

A handwritten signature in black ink, appearing to read "Spencer J. Hahn", is written over a horizontal line.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of September, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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SJH/eas