10-23-2009

Baxter v. State Appellant's Brief Dckt. 36299

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH JACKSON BAXTER,

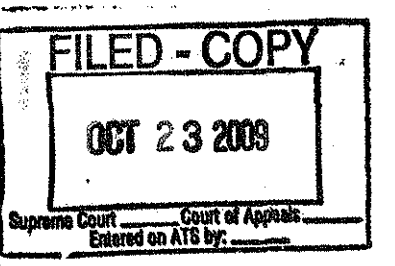
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

S. Ct. No. 36299



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Twin Falls

HONORABLE RANDY J. STOKER
District Judge

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A. Nature of the Case

This is an appeal from the district court's order summarily dismissing in part Joseph Baxter's petition for post-conviction relief without an evidentiary hearing and denying the remainder of Mr. Baxter's petition for post-conviction relief following an evidentiary hearing.

B. General Course of Proceedings

1. Underlying criminal proceedings

On August 31, 2005, while serving time in the Twin Falls Criminal Justice Facility, Mr. Baxter was charged by Complaint with injuring jails in violation of Idaho Code § 18-7018 and a persistent violator enhancement pursuant to Idaho Code § 19-2514. Case No. 32668, R. 7-8.[1] These charges arose following an incident in which Mr. Baxter removed a telephone from the wall in his jail cell. Subsequently, on December 6, 2005, a one day jury trial was held and Mr. Baxter was found guilty of both injuring jails and the persistent violator enhancement. Case No. 32668, R. 40-41. On December 15, 2005, the district court sentenced Mr. Baxter to a unified term of six years, with one year determinate, to be served consecutively to the sentence Mr. Baxter was serving at the time these charges arose. Case No. 32668, R. 43-48. Mr. Baxter appealed his sentence but the Court of Appeals affirmed the judgment of conviction and sentence in an unpublished opinion. *State v. Joseph Jackson Baxter*, Docket No. 32668 (filed January 3, 2007) (unpublished opinion).

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[1] Mr. Baxter has filed a Motion for Judicial Notice contemporaneously herewith asking this Court to take judicial notice of the files, records, and transcripts in *State v. Joseph Jackson Baxter*, Docket No. 32668.

2. Post-Conviction Proceedings

On March 11, 2008, Mr. Baxter filed a petition and affidavit for post-conviction relief alleging, among other things; that Idaho Code § 18-7018 is unconstitutional, that his trial counsel was ineffective in failing to argue that he did not injure the jail, and that appellate counsel was ineffective in failing to raise any issue other than imposition of an excessive sentence. R. 9-59. Upon request, Mr. Baxter was then appointed post-conviction counsel. R. 64. The State filed an answer to Mr. Baxter's petition for post-conviction relief and a motion for summary dismissal responding to most of Mr. Baxter's claims for relief. R. 65-87. The following day the district court filed a notice of intent to dismiss within twenty days. R. 88-92. The notice specifically stated that "[t]his Court adopts the State's briefing as its Findings and Conclusions in this case" and advised Mr. Baxter that "the Petition for Post Conviction Relief shall be dismissed with prejudice *for the reasons set forth in the State's brief*" unless Mr. Baxter responds accordingly. (Emphasis in original.) R. 90.

With the assistance of appointed counsel, Mr. Baxter submitted a response brief and supporting affidavit arguing, *inter alia*, that Mr. Baxter received ineffective assistance of trial and appellate counsel because the injured telephone was not owned by the jail. R. 93-100. The district court then issued an order summarily dismissing the majority of Mr. Baxter's claims for relief and granting an evidentiary hearing upon the issues of whether the jail owned the phone and whether trial and appellate counsel were ineffective for failing to argue that Mr. Baxter's actions did not fall within the injuring jails statute. R. 101-03. In its order summarily dismissing most of Mr. Baxter's claims, the district court articulated specific reasons some claims for relief were dismissed and then stated "[t]he balance of Plaintiff's claims for relief, except [those to be

addressed at the evidentiary hearing] are dismissed with prejudice for the reason that they are either duplicative of other issues in this case, are not supported by assertions of admissible evidence, are procedurally defaulted because not raised on direct appeal, or because they represent mere conclusory assertions not supported by the record or other evidence." R. 102.

An evidentiary hearing was then held on February 3, 2009. Evidentiary Hearing Transcript ("EH Tr.") p.4. The only two witnesses called at the evidentiary hearing were those called by the Petitioner; Mr. Ken Jackman, Operations Director for FSH Communications, LLC, and Mr. Baxter himself. *See generally*, EH TR. Mr. Jackman, who did not testify at Mr. Baxter's trial, testified that the phone at issue was owned by FSH Communications but that the Twin Falls County Jail was billed $325.67 for the cost of replacing the damaged phone. EH Tr. p.7, lns. 14-15 & Petitioner's Ex. 1. Mr. Baxter then testified that he did damage the phone but did not injure the wall of his jail cell. EH Tr. p.13, lns. 19-24.

The district court subsequently denied Mr. Baxter's remaining claims for relief in a written order. R. 105-13. Mr. Baxter then filed a motion for reconsideration along with a supporting affidavit, arguing that the Twin Falls County Jail still had not paid FSH Communications for the repairs for the phone and therefore the district court's findings were in error and should be vacated. R. 114-20. The district court amended its prior factual findings but ultimately denied Mr. Baxter's motion for reconsideration. R. 135-37. Mr. Boylan timely appealed. R. 121-124.

III. ISSUES PRESENTED ON APPEAL

A. Did the district court err when it summarily dismissed Mr. Baxter's claim that Idaho Code § 18-7018 is unconstitutional because it did so on grounds different from those previously

asserted by the district court and the State?

B. Did the district court err when it concluded Mr. Baxter received effective assistance of trial counsel even though it was objectively unreasonable that trial counsel failed to argue the jail had not been injured?

C. Did the district court err when it concluded Mr. Baxter received effective assistance of counsel on direct appeal even though it was objectively unreasonable that appellate counsel failed to not challenge the sufficiency of the evidence?

IV. ARGUMENT

A. *The District Court Erred in Summarily Dismissing Mr. Baxter's Claim Alleging that Idaho Code § 18-7018 was Unconstitutional on Grounds Different from Those Previously Asserted by the State or Adopted by the District Court.*

A petition for post-conviction relief initiates a civil proceeding in which the petitioner is required to prove his allegations by a preponderance of the evidence. *McKeeth v. State*, 140 Idaho 847, 849, 103 P.3d 460, 462 (2004); *Loveland v. State,* 141 Idaho 933, 935, 120 P.3d 751, 753 (Ct. App. 2005). Once filed, either party or even the court *sua sponte* is permitted to seek summary disposition of the petition. Summary dismissal is authorized under Idaho Code § 19-4906 and is the procedural equivalent of summary judgment under I.R.C.P. 56. Specifically, sections (b) and (c) of Idaho Code § 19-4906 provide in pertinent part:

> (b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. . .
>
> (c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to

> interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The reason for the 20 day notice requirement in subsection (b) is so that the petitioner will have an opportunity to respond to the court's concerns. *Sua sponte* dismissals without the 20 day notice are not allowed. *Saykhamchone v. State,* 127 Idaho 319, 900 P.2d 795 (1995). Further, when summary dismissal is sought by the state, the state is required to provide notice in its motion of the specific grounds therefore. *Id.*

In *Saykhamchone,* the state filed an answer to a petition for post-conviction relief and in the answer's prayer for relief asked the court to dismiss without further hearings. The Supreme Court held this document was not sufficient to give Saykhamchone notice of the grounds upon which dismissal was being sought. The Supreme Court stated that "at a minimum the state's prayer for relief in the Answer was deficient for not stating its grounds *with particularity,* and for not stating that it was the state's *motion* for summary disposition under I.C. § 19-4906(c)." *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798 (emphasis in original). Therefore, summary dismissal without 20 days notice from the district court as to the reasons for dismissal was error.

Similarly, "if the State moves to dismiss a petition under Idaho Code § 19-4906(c), the court cannot dismiss a claim on a ground not asserted by the State in its motion unless the court gives the twenty-day notice required by Section 19-4906(b)." *DeRushe v. State*, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009) (citing *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798). However if a "district court summarily dismisses a post-conviction application relying in part on the same grounds presented by the state in its motion for summary dismissal, the notice requirement has been met." *Buss v. State*, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App.

2009) (citing *Workman v. State*, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007)). In order for the state's motion for summary dismissal to sufficiently satisfy the notice requirement under these circumstances the "overlap between the reasoning in the district court's decision and the state's motion to dismiss must be substantial." *Id.*

In this case, the State moved for summary disposition. R. 70-87. The district court then adopted the State's briefing as its findings and conclusions, thereby giving Mr. Baxter twenty days notice based upon the reasons set forth by the State. However, the district court then summarily dismissed Mr. Baxter's claim that Idaho Code § 18-7018 is unconstitutional on grounds that were not raised by the State. As a result, the state's motion and the district court's notice of intent to dismiss did not meet the requirements prescribed in *Saykhamchone, DeRushe*, and *Buss*.

In his *pro se* brief Mr. Baxter unequivocally stated that "ISSUE TWO" included whether "the statute the petitioner convicted [sic] under Unconstitutional?" Brief in Support, p.4. R. 18. Though not grammatically perfect, Mr. Baxter nevertheless set forth a claim for relief premised upon the unconstitutionality of the statute for which he was found guilty. Mr. Baxter then set forth his reasoning in support of this claim. Brief in Support, p.11. R. 25.

In response to Mr. Baxter's argument, the State combined Mr. Baxter's constitutional argument with another claim for relief and asserted:

> In allegations four and five, the defendant asserts I.C. § 18-7018 is unconstitutionally "broad;" and therefore, "the District Court lacked jurisdiction to put the petitioner on trial, and sentence him, and charge him with a felony [because the case should] have been tried as a misdemeanor." The defendant merely asserts his allegations in a conclusory fashion. The defendant has failed to sustain his burden of providing affidavits, records, or other evidence supporting these allegations. Therefore, the defendant's allegations in number four and five

must be summarily dismissed.

Motion for Summary Disposition, p.8. (Internal citations omitted.) R. 77. Then, as noted above, the district court issued its notice of intent to dismiss, stating "[t]his Court adopts the State's briefing as its Findings and Conclusions in this case" and therefore "the Petition for Post Conviction Relief shall be dismissed with prejudice *for the reasons set forth in the State's brief* . . ." Notice of Intent to Dismiss Post Conviction Petition, p.3. R. 90.

In response to the district court's notice of intent to dismiss, Mr. Baxter filed a Response Brief. Mr. Baxter did not specifically respond to the State's argument that his constitutional challenge to the statute at issue was conclusory. Nevertheless, the district court summarily dismissed Mr. Baxter's constitutional argument on grounds not previously asserted by the State or adopted by the district court. Instead the district court reasoned, "Plaintiff's claims for relief relating to the unconstitutionality of the statute are dismissed with prejudice for the reason that this issue should have been raised on direct appeal." Order Dismissing Portion of Petition and Directing Hearing, p.2. R. 102. This *sua sponte* dismissal without prior notice was in error.

Because proper notice was not given, the order summarily dismissing Mr. Baxter's claim that Idaho Code § 18-7018 is unconstitutional should be reversed and the matter remanded for further proceedings on those issues.

B. The District Court Erred in Finding that Trial Counsel Did not Provide Ineffective Assistance of Counsel by Failing to Argue that Mr. Baxter Did Not Injure the Jail.

In his *pro se* petition for post-conviction relief Mr. Baxter alleged that his trial counsel was ineffective in multiple respects. One of those allegations, which was clarified in his response to the district court's notice of intent to dismiss, was that trial counsel failed to

investigate and argue that the phone admittedly damaged by Mr. Baxter was not owned by the Twin Falls County Jail. Presumably based upon Mr. Baxter's response brief and supporting affidavit, the district court granted an evidentiary hearing on whether Mr. Baxter "received ineffective assistance of both trial and appellate counsel relating to his assertions that the damaged telephone is not owned by the jail, and hence not within the proscription of the statute under which he was convicted." Order Dismissing Portion of Petition and Directing Hearing, p.2. R. 102. The district court continued, stating it was "limiting the evidentiary hearing to issues involving ownership of the phone and whether or not counsel properly argued that the conduct of Mr. Baxter fell within the Statute under which he was convicted." Order Dismissing Portion of Petition and Directing Hearing, p.3. R. 103. As noted above, an evidentiary hearing was held and the district court thereafter denied Mr. Baxter's remaining claims for relief.

When reviewing a decision denying post-conviction relief after an evidentiary hearing, the appellate court will not uphold the lower court's factual findings if they are clearly erroneous. *McKeeth v. State*, 140 Idaho 847, 849, 103 P.3d 460, 462 (2004); *Loveland v. State,* 141 Idaho 933, 936, 120 P.3d 751, 754 (Ct. App. 2005). Nonetheless, the appellate court exercises free review of the district court's application of the relevant law to the facts. *McKeeth,* 140 Idaho at 849, 103 P.3d at 46; *Loveland,* 141 Idaho at 936, 120 P.3d at 754.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007); *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). A defendant claiming ineffective assistance of counsel will prevail if he shows that (1) counsel's performance was deficient, and that (2) counsel's deficient performance prejudiced the

defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant meets the deficiency prong when counsel's performance falls below an objective standard of reasonableness. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). The prejudice prong is met when the defendant shows that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Mitchell*, 132 Idaho at 277, 971 P.2d at 730.

As a general matter, this Court will not attempt to second-guess counsel's strategic and tactical choices. *State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). This rule does not apply, however, to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.*

In this case, it is undisputed that the wall of the jail itself was not damaged. Order Dismissing Post Conviction Petition, p.3. R. 107. As the district court found, "[t]here was no evidence presented at trial that the wall of the jail cell itself was damaged. Rather, the phone was removed from the wall and wires for the phone were sticking out of the wall." *Id.* At the evidentiary hearing, the district court found that:

> Baxter presented evidence from another FSH employee who did not testify at trial. This employee confirmed that the phone in question was owned by FSH not the jail, that the phone was destroyed and that the Twin Falls Jail was billed $325.67 for the cost of replacing the telephone and for the necessary labor to install the new phone. This evidence of ownership of the phone had not been presented at trial. The employee further testified that there was a sharing agreement between FSH and the jail for monies generated from the phone's usage by jail inmates. No testimony was presented concerning any agreement between FSH and the jail from repairing damaged phones.

Order Dismissing Post Conviction Petition, pp.3-4. R. 107-08.

Still, the district court held that Mr. Baxter's trial counsel was not ineffective because

according to its interpretation of Idaho Code § 18-7018, a "person is guilty of the felony of injury to jail if he or she injures any *part of a* public jail where that portion of the damaged property is integral to the operation of the jail." Order Dismissing Post Conviction Petition, p.7. (Emphasis in original.) R. 111. The district court determined the phone in this case satisfied its newly created *integral part of the jail* requirement. *Id.* Accordingly, the district court concluded trial counsel's performance was not deficient for failing to argue that the jail was not actually injured. The district court's analysis and conclusion are incorrect.

During the first session of the Idaho territorial legislature, the original injuring jails statute was enacted, proscribing that:

> If any person shall, willfully and intentionally, break down, pull down or otherwise destroy, injure, in whole or in part, any public jail or other place of confinement, every person so offending shall, on conviction, be fined in any sum not exceeding ten thousand dollars, nor less than the value of the said jail or other place of confinement so destroyed or of such injury as may have been done thereto by such unlawful act, and be imprisoned in the territorial prison for any term not exceeding five years, nor less than one year.

Cr. and P. 1864, § 147. Though no legislative history remains from this legislative session, a plain and ordinary reading of the statute conveys the intent behind the new law – that damage done to the structure of any public jail is a serious crime. Surely in 1864 legislators did not envision this statute encompassing damage to a telephone let alone a telephone not owned by the public jail.[2]

This statute remained essentially unchanged until 1932 when it was amended and

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[2] "The telephone was invented in March of 1876. The famous incident in which Alexander Graham Bell spilled acid on himself and called out to his assistant, Watson, not realizing his voice was being carried over the telephone was on March 10." *At http://wiki.answers.com/Q/When_was_the_telephone_invented* (last visited Oct. 23, 2009).

recodified as Section 17-4312:

> Every person who wilfully and intentionally breaks down, pulls down or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding $10,000, and by imprisonment in the state prison not exceeding five years.

Besides recodification in 1972 to its present section (I.C. § 18-7018), the injuring jails statute has remained the same in language since 1932 and in intent since 1864.

Furthermore, the reported cases involving convictions under Idaho's injuring jails statute concern damage done to the structure of the jail itself. *See State v. Yancey*, 47 Idaho 1, 272 P. 495, (1928) (metal ceiling pried down in successful escape attempt); *State v. Wilson*, 51 Idaho 659, 9 P.2d 487 (1932) (cutting hole in holding tank and cutting through two iron bars in unsuccessful escape attempt); *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1971) (broken window). Interestingly, in *State v. Ash*, the appellant requested a rehearing by the Supreme Court for clarification of what constitutes a jail. In denying the appellant's request for rehearing the Supreme Court stated:

> When we used the term "jail" in the opinion, we used the term in its generally accepted meaning: "A building designated by law, or regularly used for the confinement of persons held in lawful custody." Black's Law Dictionary, rev. 4th ed. 1968, p. 968. A jail is more than a row of cells standing alone; in addition to cells, a complete public jail must, of necessity, also have hallways, access routes to the cells, a roof, walls, windows, and doors.

State v. Ash, 94 Idaho 542, 547, 493 P.2d 701, 706 (1971).

California has a similar statute concerning damaging public jails.[3] Interpreting that

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[3] California Penal Code Section 4600 reads in pertinent part:

> Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any jail, prison, or any public property in any jail or prison, is punishable by a fine not exceeding ten thousand dollars ($10,000), and by imprisonment

statute the California Court of Appeals has also adopted a "common usage" definition for the terms used, citing the same Black's Law Dictionary cited by the *Ash* Court. *People v. Upchurch*, 143 Cal.Rptr. 113, 114 (Cal. Ct. App. 1978). The California Court of Appeals also stated:

> Under [a common usage interpretation], the statute would apply to damage done to the grounds, and structure (including fixtures) of a prison, but not to furniture or equipment such as a television set. Damage to state-owned furniture or equipment located in a prison would be punishable as malicious mischief, a misdemeanor (Pen. Code § 594) but not as the felony offense of destroying or damaging the prison itself.

Id.[4]

In this case, it is undisputed that the phone was not state owned equipment. Nor is the phone a fixture[5] or part of the structure of a jail as described by the *Ash* Court. Moreover, the plain meaning of the statute and the common usage of the terms therein conflicts with the rationale of the district court in this case. Though the district court found the phone to be "integral to the operation of the jail," this does not support a finding that damaging the phone is the equivalent of injuring a public jail as set forth in Idaho Code § 18-7018. Moreover, the district court acknowledged that there was no evidence presented during the trial that the wall of

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> in the state prison, except that where the damage or injury to any city, city and county, or county jail property or prison property is determined to be four hundred dollars ($400) or less, that person is guilty of a misdemeanor.

[4] California case law is particularly significant because Idaho largely adopted the California penal code when it became a Territory. *People v. Ah Choy*, 1 Idaho 317 (Idaho Terr. 1870) ("The laws of this territory are conceded to be copies from the laws in force in California; that being so, the supreme court of Idaho may very properly, in construing its laws, follow the decisions of the supreme court in California.").

[5] A fixture is defined as "personal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home." Black's Law Dictionary 7th ed. 1999, p.654.

Mr. Baxter's cell was damaged.

As a result, trial counsel was deficient because he never argued in a Rule 29 motion or to the jury that Mr. Baxter did not injure the jail as contemplated by the statute for which he was on trial. *See* Ex. A, p.60 & Ex. B, pp.82-83. Though common sense alone suggests the argument, had trial counsel done basic legal research, as required by *Strickland*, he would have known the injuring jails statute required proof of damage to the jail grounds, structure, or perhaps a state owned fixture. But unexplainably, trial counsel's level of competence and advocacy fell below the constitutionally acceptable threshold when he failed to argue that Mr. Baxter did not injure a public jail.

The deficiency of trial counsel resulted in Mr. Baxter being convicted of a crime he did not commit while also being found to be a persistent violator. The prejudice is therefore self-evident.

C. *The District Court Erred when it Concluded Mr. Baxter did not Receive Ineffective Assistance of Counsel on Direct Appeal Because it was Objectively Unreasonable for Appellate Counsel to Not Challenge the Sufficiency of the Evidence.*

Pursuant to Idaho Code Section 19-852, a criminal defendant is guaranteed the right to effective assistance of counsel during any appeal. *See Hernandez v. State,* 127 Idaho 685, 687, 905 P.2d 86, 88 (1995). Further, the Due Process Clause of the Fourteenth Amendment requires states to ensure that an indigent appellant receive effective assistance of counsel on his first appeal of right from a judgment of conviction. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985); *Aragon v. State,* 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988). To that end, appellate counsel is required to make a conscientious examination of the case and file a brief in support of the *best* arguments to be made. *Jakoski v. State,* 136 Idaho 280, 285, 32 P.3d 672, 677 (Ct. App. 2001);

LaBelle v. State, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App.1997).

Here, the only issue appellate counsel raised was that the district court abused its discretion by imposing an excessive sentence. Appellant's Brief, Ex. C. It can safely be said that, absent extraordinary circumstances, *any* appellate argument has a better chance of success than a challenge to a sentence that falls within statutory limits. This is particularly true given the one year fixed sentence as in this case. In order to show that the sentence imposed was unreasonable, and thus an abuse of the court's discretion, the defendant must show that the sentence, in light of the governing criteria, is excessive under *any* reasonable view of the facts. *State v. Al-Kotrani*, 141 Idaho 66, 70, 106 P.3d 392, 396 (2005). Such challenges are rarely successful. *See Al-Kotrani*, 141 Idaho at 71, 106 P.3d at 397; *State v. Calley*, 140 Idaho 663, 666, 99 P.3d 616, 619 (2004); *State v. Jeppesen*,138 Idaho 71, 76, 57 P.3d 782, 787 (2002); *State v. Strand*, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002); *State v. Trevino*, 132 Idaho 888, 897, 980 P.2d 552, 561 (1999). Conversely, when an appellant challenges the sufficiency of the evidence at trial, this Court must determine, based upon its independent consideration of the evidence, whether there was substantial and competent evidence to support the verdict. *State v. Hollon*, 136 Idaho 499, 501, 36 P.3d 1287, 1289 (Ct. App. 2001).

The Due Process Clause of the United States Constitution precludes conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970).

> In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). In the case where a properly instructed jury has convicted even though no rational trier of fact could have found guilt beyond a reasonable doubt, that conviction cannot constitutionally stand. *Jackson*, 443 U.S., pg. 318. Besides, as is the case here, a criminal defendant need not even move for a judgment of acquittal in order to preserve for appeal the issue of whether there was sufficient evidence before the jury to support a guilty verdict. *State v. Faught*, 127 Idaho 873, 877, 908 P.2d 566, 570 (1995); *State v. Ashley*, 126 Idaho 694, 696, 889 P.2d 723, 725 (Ct. App. 1994).

Accordingly, challenging the sufficiency of evidence generally has a better chance of success on appeal than an argument that the district court abused its discretion by imposing an excessive sentence. It was objectively unreasonable for appellate counsel to conclude that a challenge to Mr. Baxter's sentence, instead of challenging whether there was sufficient proof to uphold a criminal conviction, was the best argument to be made.

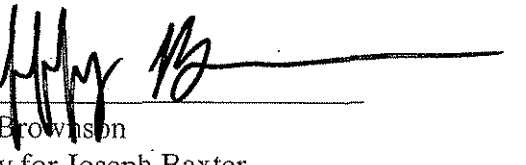
Moreover, had appellate counsel raised the sufficiency of evidence issue, the result of Mr. Baxter's appeal would have been different. As explained above in Section C, Mr. Baxter was convicted for a crime he did not commit. The phone was not owned by the jail. There was no evidence presented that the wall of his jail cell was damaged. Mr. Baxter's damaging a phone owned by FSH Communications is not the sort of conduct contemplated by the statute Mr. Baxter was convicted under. There could be no strategic or tactical reason to forgo Mr. Baxter's sufficiency of evidence argument for the sake of focusing the Court's attention on his sentencing challenge. By failing to challenge the sufficiency of the evidence as an issue on direct appeal, appellate counsel deprived Mr. Baxter of his only opportunity to have an independent court consider the validity of the evidence and his conviction.

Mr. Baxter should not have been convicted for this crime. Accordingly, there is a reasonable probability that if appellate counsel had challenged the sufficiency of evidence on appeal, the result would have been different. Mr. Baxter therefore proved that he was prejudiced by appellate counsel's deficient performance.

V. CONCLUSION

Mr. Baxter respectfully asks this Court to reverse the district court's orders denying his petition for post-conviction relief and to vacate the judgment of conviction and afford Mr. Baxter a new trial with counsel or alternatively to remand for further post-conviction proceedings.

Respectfully submitted this 23. day of October, 2009.



Jeffrey Brownson
Attorney for Joseph Baxter

CERTIFICATE OF SERVICE

I CERTIFY that on October 23, 2009, I caused a true and correct copy of the foregoing document to be

__X__ mailed

____ hand delivered

____ faxed

to: Idaho Attorney General Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010

Jeffrey Brownson