

1-15-2009

Baxter v. State Respondent's Brief Dckt. 36299

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JOSEPH JACKSON BAXTER,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 36299

FILED - COPY
JAN 15 2010
Supreme Court Court of Appeals
Entered on ATS by:

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature Of The Case

Joseph Jackson Baxter appeals from the district court's order summarily dismissing in part his petition for post-conviction relief and denying the remainder of the petition following an evidentiary hearing.

Statement Of The Facts And Course Of The Proceedings

A jury found Baxter guilty of injury to jails with an enhancement for being a persistent violator. (#32668 R., pp. 40-41.) Baxter received a six year unified sentence comprised of one year fixed and five years indeterminate. (#32668 R., pp. 43-48.) Baxter's sentence was affirmed by the Court of Appeals in an unpublished opinion. State v. Baxter, Unpublished Opinion No. 306 (January 3, 2007).

Baxter timely filed a *pro se* petition for post-conviction relief supported by affidavits and a brief. (R., pp. 9-59.) The court appointed counsel to represent Baxter in the post-conviction proceedings. (R., p. 64.) The state subsequently filed an answer to the petition as well as a separate motion for summary dismissal. (R., pp. 65-69, 70-87.) The district court filed a notice of intent to dismiss Baxter's petition. (R., pp. 88-92.) Counsel for Baxter filed a response to the court's notice of intent to dismiss. (R., pp. 93-100.) The district court issued an order summarily dismissing a portion of Baxter's petition and setting the remaining claims for evidentiary hearing. (R., pp. 101-113.) Following a limited evidentiary hearing, the court issued an order dismissing the balance of Baxter's

petition for post-conviction relief. (R., pp. 105-113.) Baxter filed a motion to reconsider (R., pp. 118-120), which the district court denied. (R., pp. 135-137.)

Baxter timely appeals the dismissal of his petition for post-conviction relief. (R., pp. 121-124.)

ISSUES

Baxter states the issues on appeal as follows:

1. 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?
2. 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?
3. Did the district court err when it concluded that Mr. Baxter received effective assistance of counsel on direct appeal even though it was objectively unreasonable that appellate counsel failed to not [sic] challenge the sufficiency of the evidence?

(Appellant's brief, pp. 3-4.)

The state rephrases the issues as follows:

1. Has Baxter failed to establish reversible error in the summary dismissal of his claim, challenging the constitutionality of the charging statute, on grounds other than those asserted by the state in its motion and adopted by the court in its notice of intent to dismiss?
2. Has Baxter failed to show that either trial or appellate counsel performed in an objectively unreasonable manner or that he suffered any prejudice as a result of their actions?

ARGUMENT

I.

Baxter Has Failed To Establish Reversible Error In The Summary Dismissal Of His Claim, Challenging The Constitutionality Of The Charging Statute, On Grounds Different Than Those Asserted By The State In Its Motion And Adopted By The Court In Its Notice Of Intent To Dismiss

A. Introduction

In his *pro se* brief in support of petition for post conviction relief, Baxter asserted as his second claim for relief that the injury to jails statute was unconstitutional. (R., p. 25 (“Is the statute the petitioner was convicted under Unconstitutional?”).) In the state’s motion for summary disposition, it combined the constitutional claim with Baxter’s claim of a jurisdictional defect and requested the court summarily dismiss such allegations because “[t]he 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.” (R., p. 77.)

The district court then issued a notice of intent to dismiss Baxter’s post-conviction relief petition after “adopt[ing] the State’s briefing as its Findings and Conclusions in this case” and concluding that Baxter failed to state any genuine issues of material fact, thereby failing to allege any grounds for post-conviction relief. (R., p. 90.)

Counsel for Baxter filed a response to the district court’s notice of intent to dismiss. (R., pp. 93-97.) This response addressed a majority of the issues listed in the state’s motion for summary disposition, but failed to respond to the

proposed basis for dismissal of his claim that the statute was unconstitutional.
(R., pp. 95-96.)

The district court thereafter dismissed the majority of the claims in Baxter's petition, including his claim that the statute was unconstitutional, ruling:

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.

(R., pp. 101-102.)

On appeal, Baxter contends that he is entitled to reinstatement of his claim challenging the constitutionality of the charging statute, not because the claim is meritorious, but solely because the district court *sua sponte* dismissed the claim without providing him the 20-day notice required by I.C. § 19-4906(b). (Appellant's brief, p. 7.) The state agrees with Baxter that the district court dismissed his claim on a basis not asserted by the state in its motion for summary disposition or adopted by the court in its notice of intent to dismiss. The state does not agree, however, that reversal of the district court's order and reinstatement of the claim is appropriate. Rather, any discrepancy between the proposed basis for dismissal and the ground ultimately relied upon by the district court in dismissing Baxter's post-conviction claim is harmless because the claim fails as a matter of law and there is no additional evidence Baxter could have presented in support of his claim to establish he was entitled to relief.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact

exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. A Review Of The Record Shows That Any Lack Of Notice For The Specific Basis Upon Which The Court Dismissed Baxter's Claim That The Injury To Jails Statute Was Unconstitutional Was At Worst Harmless Error

Idaho Code § 19-4906 provides for the summary disposition of an application for post-conviction relief upon motion by a party or on the court's own initiative. Follinus v. State, 127 Idaho 897, 899, 908 P.2d 590, 592 (Ct. App. 1995). "When the court considering the petition for post-conviction relief is contemplating dismissal *sua sponte*, it must notify the parties of its intention to dismiss and must provide its reasons for the potential dismissal." Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993) (citations omitted). When the state files a motion for summary dismissal, setting forth adequate notice of the grounds for dismissal, and the court grants the state's motion for the reasons urged by the state, a post-conviction petitioner receives adequate notice of the grounds for dismissal. Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). The district court cannot, however, "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)." DeRushé v. State, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009) (citing Saykhamchone v. State, 127 Idaho 319, 322, 900

P.2d 795, 798 (1995)). The purpose of the 20-day notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Martinez v. State, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).

The district court dismissed Baxter's constitutional claim on a basis other than that proposed by the state and adopted by the court in its notice of intent to dismiss without providing the requisite 20-day notice. Any error in the lack of notice is harmless, however, because Baxter's constitutionality claim ultimately fails as a matter of law, and no legal authority or evidence Baxter could have presented would have overcome summary dismissal of his claim. See I.R.C.P. 61. ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); Gomez v. State, 120 Idaho 632, 634, 818 P.2d 336 (Ct. App. 1991) (applying harmless error analysis in post-conviction case).

The meaning and effect of a statute, including the statute's constitutionality, is a question of law, State v. Hart, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Baxter argued in his brief in support of his petition for post-conviction relief that the injury to jails statute was vague, alleging that it was "to [sic] broad" and that "[t]he state cannot be trusted to decide who gets charged [sic] and who does not." (R., p. 25.) Baxter's claim is meritless.

In determining whether a statute, such as I.C. § 18-7018 is void for vagueness, the court must consider (1) whether the statute “gives notice to those who are subject to it,” and (2) whether the statute “contains guidelines and imposes sufficient discretion on those who must enforce the ordinance.” State v. Hellickson, 135 Idaho 742, 745, 24 P.3d 59, 62 (2001) (citations omitted). “For a facial vagueness challenge to be successful, the complainant must demonstrate that the law is impermissibly vague in all of its applications. State v. Casano, 140 Idaho 461, 464, 95 P.3d 79, 82 (2004). The starting place in determining if a statute is or is not unconstitutionally vague is to look at the defendant’s conduct in question.

Because a defendant ‘who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others ... [a] court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.’ The reason for the suggested analytical starting point is readily apparent, for if a statute is not unconstitutionally vague as applied to the defendant’s conduct, it necessarily is not unconstitutional on its face.

State v. Laramore, 145 Idaho 428, 431, 179 P.3d 1084, 1087 (Ct. App. 2007) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982)). Because Baxter’s claim is a legal claim involving a determination of whether the statute clearly applied to his conduct, Baxter has not been prejudiced by the court’s failure to grant additional time to investigate or submit additional evidence.

I.C. § 18-7018 provides that

[e]very 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.

The plain language of the statute is clear and provides sufficient notice to law enforcement that if someone commits a wilful and intentional act of causing damage to a jail, they can be held accountable through this statute. Baxter himself admits to the wilful and intentional act of causing damage to the phone located on the wall in the jail.¹ (Tr., p. 13, Ls. 19-24.) There is sufficient notice in the statute itself to provide guidance to law enforcement regarding what is a chargeable offense under the statute.

Baxter's claim that the injury to jails statute is unconstitutional fails as a matter of law. Any error by the district court in dismissing the claim for a reason other than that proposed by the state and adopted by the court in its notice of intent to dismiss was harmless because there was nothing Baxter could have provided to the court in the form of affidavits, records, or other evidence that would have had any effect on the ultimate legal question of the constitutionality of the statute. As such, the order of the district court summarily dismissing Baxter's post-conviction claim challenging the constitutionality of the injury to jails statute should be affirmed.

¹ Baxter's examples in support of his position that the statute is unconstitutional ("If a man pukes o [sic] the floor, he could technically be charged with a felony. If he wears paint off the table sitting in the same spot for an extended period of time. If he tears his jump suit, wears out his underwear, soils his sheets due to sickness, or unwittingly [sic] does any mark on any wall in complete ignorance of the scuff mark he made, he could be charged with a felony." (R., p. 25)) are not only comprised of unintentional or involuntary behavior, but are irrelevant to the ultimate inquiry since the statute has been shown to be valid as applied to his own conduct.

II.

The District Court Correctly Concluded Baxter Failed To Establish Ineffective Assistance Of Either Trial Or Appellate Counsel

A. Introduction

Baxter contends the district court erred in denying his petition for post-conviction relief because, he argues, he established at the evidentiary hearing that counsel was ineffective for failing to investigate and argue that the phone he damaged in the jail was in fact not owned by the jail itself. (Appellant's brief, pp. 7-8.) Furthermore, Baxter asserts the district court erred in determining that appellate counsel was not ineffective for failing to raise an insufficiency of the evidence claim on direct appeal. Baxter's claims fail. The district court correctly concluded Baxter is not entitled to post-conviction relief on the issue of ineffective assistance of trial or appellate counsel.

B. Standard Of Review

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); I.C.R. 57(c). Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998); Gabourie v. State, 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994).

A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Furthermore, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. Standards Governing Claims Of Ineffective Assistance Of Counsel

It is well-settled that in order to establish ineffective assistance of counsel, a petitioner must provide admissible evidence that his counsel's performance was deficient and that the alleged deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Richman v. State, 138 Idaho 190, 192, 59 P.3d 995, 997 (Ct. App. 2002) ("To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency." (citations omitted)). To establish deficient performance, the petitioner must demonstrate counsel's performance fell below an objective standard of reasonableness, Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986), and overcome the "strong presumption that counsel's performance was within the wide range of reasonable professional assistance." Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989).

A reviewing court evaluates counsel's performance at the time of the alleged error, not in hindsight, and presumes "trial counsel was competent and that trial tactics were based on sound legal strategy." State v. Porter, 130 Idaho 772, 791-92, 948 P.2d 127, 146-47 (1997). Trial counsel's strategic and tactical decisions will not be second-guessed on review or serve as a basis for post-conviction relief under a claim of ineffective counsel unless the UPCPA petitioner has shown that the decision resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review. Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994); Cunningham v. State, 117 Idaho 428, 430-31, 788 P.2d 243, 245-46 (Ct. App. 1990). "Trial counsel's decision of which witnesses to call is encompassed in that aspect of trial counsel's role denominated 'trial tactics' or 'strategic choices.'" Campbell v. State, 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997) (citing State v. Larkin, 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981)). "It is not enough for an applicant to show that his counsel's performance might have been better and might have contributed to the conviction. Rather, the applicant must show actual unreasonable performance by trial counsel and actual prejudice." Milburn v. State, 135 Idaho 701, 706, 23 P.3d 775, 780 (Ct. App. 2000) (citing Estes v. State, 111 Idaho 430, 434, 725 P.2d 135, 139 (1986)). "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

To establish prejudice, the petitioner must show a reasonable probability that, but for trial counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999); Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

The foregoing standards also apply to claims of ineffective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 730 (1998). The relevant inquiry on the prejudice prong is whether there is a reasonable probability that, but for counsel's errors, Baxter would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000).

D. The District Court Correctly Applied The Law To The Facts When It Dismissed Baxter's Petition After An Evidentiary Hearing

Baxter asserts the district court erred in denying post-conviction relief because, he argues,

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.

(Appellant's Brief, p.13.) Baxter's claim fails because, as concluded by the district court, Baxter failed to prove both deficient performance and resulting prejudice. (R., p. 112.)

The district court set an evidentiary hearing on the limited “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.” (R., p. 103.) The only testimony presented at the evidentiary hearing (in addition to Baxter himself briefly taking the stand) was that of an employee of the company that provided the phones to the jail. (See Tr.,² pp. 4-12.) Baxter’s argument at the evidentiary hearing, and on appeal, is that because the jail leased the phones that were located in the facility for use by the inmates from a phone company, the phone Baxter pulled off the wall was not the property of the jail, thereby making the statute he was charged under inapplicable to Baxter’s crime. (Tr., p. 15, L. 15 – p. 16, L. 12; Appellant’s brief, p. 12.) Because Baxter’s trial counsel failed to investigate this point and raise it at trial, the argument continues, he was ineffective. (Appellant’s brief, p. 13.) The district court properly rejected Baxter’s argument.

After hearing the evidence presented at the evidentiary hearing, the district court determined that the evidence of phone ownership was available for trial even though Baxter’s attorney did not present it to the jury. (R., p. 110.) However, Baxter failed to present any evidence relating to trial counsel’s investigation of such evidence or the basis of trial counsel’s determination not to elicit the testimony at trial. (R., p. 110.) As such, the district court properly determined that there was insufficient evidence to find that trial counsel’s

² There are two transcripts associated with this appeal. The transcript of the June 30, 2008 status conference is not cited to in this brief. The February 3, 2009 evidentiary hearing is and is referred to simply as “Tr.”

decision resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review.

The district court further found that the phone destroyed by Baxter was "part of a public jail" as the "portion of the damaged property [was] integral to the operation of the jail" and, as such, Baxter's actions constituted an injury to jail for purposes of the statute under which Baxter was convicted. (R., p. 111 (emphasis original).) I.C. § 18-7018 provides that "[e]very person who willfully and intentionally breaks down, pulls down or otherwise destroys or injures any public jail or other place of confinement" is guilty of the offense of injuring jails. The language of the statute itself does not include as an element ownership of injured or damaged property. It does not even require that the damage occur in "a jail," extending the coverage of the statute to "other place[s] of confinement." Here, Baxter pulled a phone off of the wall requiring a new phone be installed to repair the damage. The phone was provided for use by inmates and was located on a wall of the jail where he was confined. (See Tr., p. 9, Ls. 1-9.)

The plain language of the statute supports the district court's ultimate conclusion that "[g]iven this interpretation of the statute Baxter would not have prevailed on this argument regardless of whether or not his trial counsel had raised this argument." (R., p. 111.) The court held that

[t]he jury could not have been instructed on this theory and trial counsel would not have been permitted to argue this theory. Thus, even if trial counsel had elicited testimony from the FSH witness that the phone was owned by FSH there is no reasonable probability that the outcome of the trial would have been different.

(R., p. 112.) The district court properly determined that Baxter failed to establish either deficient performance or any resulting prejudice.

E. Baxter Failed to Establish Ineffective Assistance of Appellate Counsel

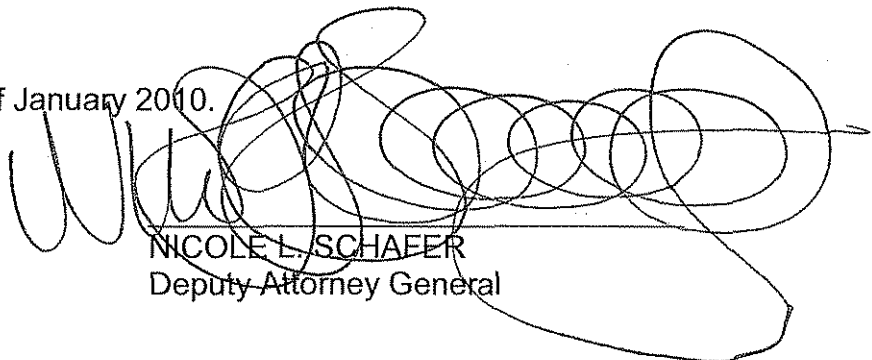
Baxter asserts that appellate counsel was ineffective in only making a sentencing argument on direct appeal. (Appellant's brief, p. 14.) Baxter argues that the more successful claim would have been to challenge the sufficiency of the evidence at trial, especially in light of the information elicited at the evidentiary hearing regarding the ownership of the telephone Baxter destroyed. (Appellant's brief, p. 15.)

The relevant inquiry on the prejudice prong is whether there is a reasonable probability that, but for counsel's errors, Baxter would have prevailed on appeal. As the district court determined, such an argument would have been unsuccessful under the court's view that the phone destroyed by Baxter was a part of the jail sufficient to warrant a charge of injury to jails. As such, Baxter has failed to establish that he was prejudiced by appellate counsel's failure to pursue a claim alleging insufficiency of the evidence at trial.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing in part Baxter's petition for post-conviction relief and dismissing his ineffective assistance of counsel claims following an evidentiary hearing.

DATED this 15th day of January 2010.

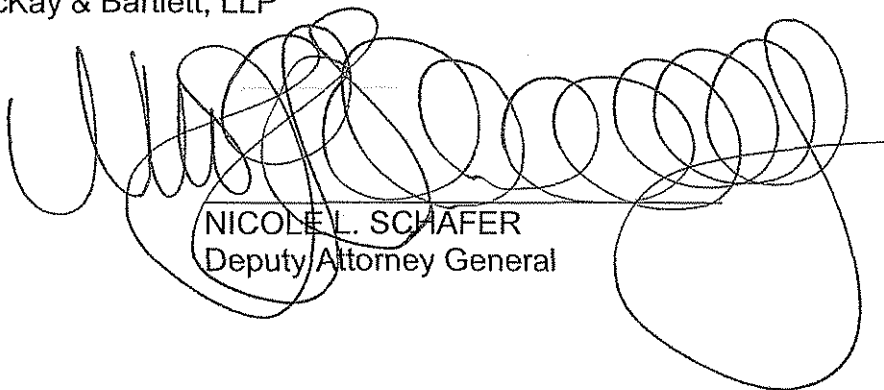


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of January 2010, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JEFFREY E. BROWNSON
Nevin, Benjamin, McKay & Bartlett, LLP
PO Box 2772
Boise, ID 83701



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm