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Brink v. State Respondent's Brief Dckt. 38455

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COPY

DONALD SHANE BRINK)	
)	
Petitioner-Appellant,)	NO. 38455
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

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

HONORABLE RANDY J. STOKER
District Judge

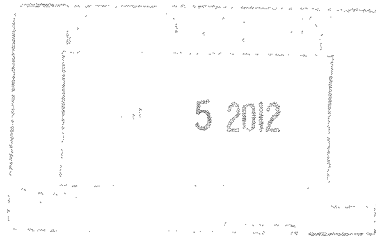
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STATEMENT OF THE CASE

Nature Of The Case

Donald Shane Brink appeals from the district court's order summarily dismissing his amended petition for post-conviction relief.

Statement Of Facts And Course Of The Underlying Criminal Proceedings

The facts of the underlying criminal case were set forth by the Idaho Court of Appeals in Brink's prior appeal:

Brink left his van, with personal property stored inside, at the home of an acquaintance. His van was broken into and some of his personal property was stolen. Soon thereafter, his van also disappeared. He inquired of the occupants of the home, and they indicated that Brent Lillevold had taken his van. In the ensuing days, Brink issued profanity-laced threats of death or serious injury against Lillevold on several occasions. Brink was seen sawing off the barrel of a shotgun and working with the stock and trigger assembly. He later hid a sawed-off shotgun behind the washing machine at the home where his van was stolen. Brink became obsessed with getting his van back and stated to several people his intention to exact revenge on Lillevold.

On May 29, 2005, Brink drove to the acquaintance's home where his van was stolen. He heard the voices of Lillevold's girlfriend and another acquaintance in a room and reasoned that Lillevold was also present. He retrieved the shotgun from behind the washer and entered the room. Brink threatened Lillevold and demanded that Lillevold retrieve his van. When Brink later demanded to be taken to his van, an argument ensued between Brink, Lillevold, and Lillevold's girlfriend regarding gas money. Lillevold's girlfriend rummaged through her purse and appeared to try to give the purse to Lillevold. Brink fired the shotgun and the round struck Lillevold in the chest, killing him almost instantly. Brink was charged with first degree murder with an enhancement for using a deadly weapon, I.C. §§ 18-4001 to -03, 19-2520, and being a persistent violator, I.C. § 19-2514.

Prior to trial, despite being represented by court-appointed counsel, Brink filed a number of pro se motions. These included a motion to correct pre-trial constitutional deprivations, two motions to

disqualify counsel for cause, a motion for appointment of qualified counsel outside of the public defender's office, and a motion for mandatory and prohibitory injunctive relief and show cause hearing. Brink also sent several ex parte letters to the district judge and court clerk regarding his motions and also complaining about his conditions of confinement. The district court held hearings on Brink's motions regarding counsel, which Brink later withdrew. The district court declined to rule on the other pro se motions, reasoning that Brink's complaints regarding, among other things, conditions of confinement, limitations of his freedom at the jail, constitutional deprivations and limited access to legal materials, were civil matters which would be properly addressed through an application for a writ of habeas corpus. The district court additionally instructed Brink that, in order to avoid confusion, it would not consider any additional pro se motions so long as he was represented by counsel. Brink, through his counsel, filed a motion to exclude from evidence videotape and photographs of the crime scene that depicted the body of the victim, as well as photographs taken at the autopsy. The district court denied Brink's motion, concluding that the videotape and photographs were relevant evidence and that their probative value was not substantially outweighed by unfair prejudice.

A jury found Brink guilty of first degree murder with an enhancement for using a deadly weapon as well as being a persistent violator. Brink filed a motion for a new trial, which the district court denied after a hearing. The district court sentenced Brink to a unified term of life imprisonment plus thirty years, with a minimum period of confinement of thirty years.

State v. Brink, Docket No. 34391, 2008 Unpublished Opinion No. 702, pp.1-2 (Idaho App., November 7, 2008) (review denied).

In that appeal, Brink "challeng[ed] the district court's denial of his motion to suppress the videotape and photographs depicting the victim's body." Id. at 3. Brink argued that "the playing during opening statements of the videotape, which was not later admitted into evidence, violated his Sixth Amendment right of confrontation and that the prosecutor committed misconduct in using the videotape and photographs in his opening statement and closing argument and

during the course of trial.” Id. Brink also argued that “his constitutional rights were violated when the district court refused to accept additional pro se filings while he was represented by counsel and when it failed to dismiss the criminal complaint against him as a remedy for his alleged constitutional deprivations in the conditions of his confinement.” Id.

The Idaho Court of Appeals held that “[t]he videotape and photographs of the crime scene, including images of the victim’s body, were relevant and their probative value was not substantially outweighed by their prejudicial effect.” Id. at 12. In discussing the relevance of this evidence, the Court of Appeals noted that:

At trial, Brink relied on self-defense and justifiable homicide as the foundation of his defense. Thus, in addition to proving corpus delicti of the crime, the evidence is relevant if it had any tendency to prove or disprove Brink's state of mind regarding his need to defend himself. Trial counsel for Brink and the state spent considerable time presenting evidence at trial regarding whether the victim was coming at Brink at the time the shot was fired. Blood splattering, bleeding patterns, the position of the body with floor measurements for perspective, and the size of the wound were all relevant considerations in this determination.

Id. at 5.

The Court of appeals also held that: (1) “[t]he use of the videotape in opening statement, which was not later admitted into evidence, did not violate Brink's Sixth Amendment rights to confrontation, cross-examination, and assistance of counsel;” (2) “[t]he prosecutor's use of the relevant and admissible videotape and photographs of the crime scene, including images of the victim's body, in his opening statement and closing argument and throughout the course of trial was not intended to inflame the passions of the jury and did not constitute

misconduct;" and (3) "[t]he district court's refusal to accept additional pro se filings while Brink was actively represented by counsel, and its failure to dismiss the criminal complaint as a remedy for alleged constitutional deprivations in the conditions of his confinement, limitations of his freedom at the jail, and limited access to legal materials, did not violate any of Brink's constitutional rights." Id. at 12.

Statement Of Facts And Course Of Post-Conviction Proceedings

On January 11, 2010, Brink filed a pro se petition for post-conviction relief. (R., pp.6-10.) Counsel was appointed for Brink and the state filed a motion for summary disposition alleging that the petition was untimely. (R., pp.552, 562-63.) The district court issued its own notice of intent to dismiss on the same grounds. (R., pp.566-67.) Thereafter, Brink filed documentation showing that his petition had been timely filed pursuant to the "mailbox rule." (R., pp.569-71, 585-93.) The district court found that Brink's filing was timely, withdrew its notice to dismiss and denied the state's motion. (R., pp.602-04.)

The state filed a second motion for summary disposition. (R., pp.610-12.) Brink then filed a motion to proceed pro se. (R., pp.614-18.) Following a telephonic hearing, the district court granted Brink's motion to represent himself and directed Brink to file an amended petition for post-conviction relief. (R., pp.675-77.) Brink filed an amended petition for post-conviction relief. (R., pp.693-721.) The state filed an answer and a third motion for summary disposition. (R., pp.796-816.) Following a hearing on the state's motion for

summary dismissal, the district court granted the state's motion and summarily dismissed the petition. (R., pp.891-914.)

The district court appointed counsel to represent Brink and Brink timely appealed. (R., pp.927-33.) Brink's counsel filed a motion to withdraw and Brink filed a motion to proceed pro se. (Motion to Withdraw as Counsel of Record and to Allow Appellant to Proceed Pro Se, filed September 19, 2011; Motion to Proceed Pro Se and Affidavit in Support, filed September 22, 2011). The Idaho Supreme Court granted the motion to withdraw and allowed Brink to proceed pro se on appeal. (Order Granting Motion to Withdraw as Counsel of Record and Allow Appellant to Proceed Pro Se, dated October 24, 2011.)

ISSUES

Brink states the issues on appeal as:

ISSUE ONE

WAS THE DISTRICT COURT'S DISMISSAL OF MY PETITION FOR POST-CONVICTION RELIEF, AND WITHOUT EVIDENTIARY HEARINGS, AND GRANTING OF THE STATES [sic] THIRD MOTION FOR SUMMARY DISPOSITION, FUNDAMENTAL ERROR, PLAIN ERROR, AND/OR A COMPLETE DENIAL OF FAIR DUE PROCESSES AND A VIOLATION OF CONSTITUTIONAL STANDARDS?

ISSUE TWO

WAS I DENIED AN AFFIRMATIVE DEFENSE, A FAIR TRIAL, DUE PROCESS OF LAW, EQUAL PROTECTION OF LAW, AND/OR ACCESS TO EXCULPATORY EVIDENTIARY PROCESSES THAT ARE NECESSARY FOR PRESENTING SUCH A DEFENSE, WHICH CREATED FUNDAMENTAL AND CONSTITUTIONAL ERROR, IN PART DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AND/or DEPRIVATION OF MY RIGHT TO APPEAR AND DEFEND IN PERSON OR MYSELF?

(Appellant's brief, p.ii.)

The state rephrases the issue on appeal as:

Has Brink failed to establish that the district court erred when it summarily dismissed his amended petition for post-conviction relief?

ARGUMENT

Brink Has Failed To Establish That The District Court Erred When It Summarily Dismissed His Amended Petition For Post-Conviction Relief

A. Introduction

Brink claims “that the cumulative effect of the prejudices beset by the states [sic] misconduct, and the failure of counsel to object, present, or protect my defense, resulted in a complete denial of a fair trial, due processes, and protections of the constitution’s [sic].” (Appellant’s brief, p.52.) Brink further claims that “[a]t the very least, disputed material facts existed, of the court’s assessment, and therefore an evidentiary hearing and non-conflict counsel should have been appointed, to present the full case at hearing should have been forthcoming.” (Appellant’s brief, p.53.) Review of these claims demonstrates that Brink has shown no error in the summary dismissal of his petition because all of his claims were properly dismissed as waived or resolved in the criminal proceedings, without a factual basis, or both.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner’s favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court’s application of the law. Id. However, the court is not required to accept either the applicant’s mere conclusory allegations,

unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. Brink Has Failed To Show Error In The Summary Dismissal Of His Claims Because They Were Either Barred Or Because He Failed To Present Any Factual Basis For The Claims

The remedy available under the Uniform Post-Conviction Procedure Act ("UPCPA") "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction." I.C. § 19-4901(b). In addition, an "issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings" except under very limited circumstances. I.C. § 19-4901(b). The plain language of these statutory provisions indicates that matters that could and should have been addressed in the criminal case or on direct appeal are not properly brought under the UPCPA. See Hoffman v. State, 125 Idaho 188, 190-91, 868 P.2d 516, 518-19 (Ct. App. 1994) (refusing to consider issues that should have been raised on direct appeal). Thus, all issues that were¹ or could have been addressed in the underlying criminal case are waived and cannot be asserted in post-conviction proceedings.

Even if not barred, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which

¹ Issues actually decided in the criminal case are also barred by principles of res judicata. See State v. Rhoades, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000); Gubler v. Brydon, 125 Idaho 107, 110, 867 P.2d 981, 984 (1994).

the applicant bears the burden of proof.” Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). The factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct. App. 1982); Stone v. State, 108 Idaho 822, 824, 702 P.2d 860, 862 (Ct. App. 1985). To show ineffective assistance of counsel a claimant must prove both that counsel’s performance was objectively deficient and that prejudice arose from the deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994); Cunningham v. State, 117 Idaho 428, 432, 788 P.2d 243, 247 (Ct. App. 1990).

Application of these legal standards to Brink’s claims shows that the district court properly dismissed Brink’s petition. On appeal, Brink contends that:

In order for me to obtain relief, I must show that had my attorney’s [sic] set forth objections to the prosecutorial misconduct, jury instructions, Miranda violation, changing of the grand jury testimony, and objected to the denial of access to the court I was suffering from; as well as investigating the case and investigating my theory of a defense, interviewed all the witnesses without threats and intimidation, investigated the thefts, threats, and actions against me and my family, and obtained expert witnesses to show conclusively where I and Lillevold were positioned at the time of the attack against me, and developed the evidence at the crime scene that pointed to an attack, and simply investigated the actual and real residence of the intruder thieves [sic], and defended me with an affirmative defense, along with proper jury instructions defining pursuant to law and right, what a real affirmative defense is, and at the least, shifting the burden of proof without causing prejudice and deprivation of exculpatory evidence and denial of due processes to me, the verdict would have been different.

(Appellant’s brief, pp.28-29.) Brink argues that “presentation of the above defenses and preparation and investigation as was requested by me provided to

the record and brought on appeal, the Appeal Court might have vacated” and that “[w]ith sufficient allegations in the application the district court was required to hold a hearing on all the claims.” (Appellant’s brief, p.29.)

These arguments, as well as Brink’s claims in his amended petition for post conviction relief, were all sufficiently addressed in the post-conviction proceedings and the district court correctly found that “summary dismissal is appropriate in this case because Brink raises no genuine issue of material fact which, if resolved in the applicant’s favor, would entitle him to the requested relief.” (R., p.910.)

In Brink’s amended petition for post-conviction relief, he asserted five main “issues”² or claims. (R., pp.699-720.) Brink’s first claim was that the district court denied him of his right to assert an affirmative defense of justifiable homicide or self-defense by improperly instructing the jury. (R., p.699.) Brink’s allegation of improper jury instructions and the other issues raised in this portion of his petition should have been raised on direct appeal and are procedurally barred pursuant to I.C. § 19-4901. See Cootz v. State, 129 Idaho 360, 364, 924 P.2d 622, 626 (Ct. App. 1996) (holding that “the sufficiency of the information and the correctness of the jury instructions are issues which could have been raised on direct appeal, but were not, and are, therefore, forfeited and not to be considered in post-conviction proceedings.”).

Furthermore, the record is clear that Brink was not prevented from asserting an affirmative defense of justifiable homicide or self-defense.

² Brink also set forth numerous sub-issues that will not be repeated here.

“Throughout his criminal case [Brink] asserted, and continues to assert, that he shot the victim in either self defense or because he was justified in doing so to protect his children who were not present at the scene.” (R., p.898.) Brink also asserted that “he was entitled to shoot the victim because the victim had stolen his property” and “he had the right to shoot the victim because he was retrieving his property” from the victim. (R., p.898.) As the district court found, “Brink not only presented these defenses through a number of witnesses at trial, but he also testified extensively as to these defenses.”³ (R., p.898.)

Brink has failed to allege facts showing that his trial counsel was ineffective in presenting these defenses or that trial counsel should have objected to the jury instructions that were given. Brink has also failed to allege facts showing that appellate counsel should have raised these issues on appeal. There is no evidence in the record that the jury was improperly instructed and Brink was not prevented from presenting the affirmative defenses of justifiable homicide and self-defense. (See generally #34391 Trial Tr., p.2, L.1 - p.1018, L.25; see also R., pp.387-88, 405-09.) Therefore, Brink’s claims under “Issue One” were properly dismissed by the district court.

Brink’s second claim was that he was prejudiced and he was denied a fair trial through the improper statements made by the prosecutor to the jury during opening and closing arguments and that his trial counsel and appellate counsel

³ The Idaho Court of Appeals discussed the fact that “[a]t trial, Brink relied on self-defense and justifiable homicide as the foundation of his defense.” State v. Brink, Docket No. 34391, 2008 Unpublished Opinion No. 702, p.5 (Idaho App., November 7, 2008)

were ineffective for failing to object and for failing to raise this issue on direct appeal. (R., p.703.) Although this claim is phrased in terms of ineffective assistance of counsel, Brink's argument focused on his allegation that the prosecutor engaged in misconduct by "misinforming the jury as to the law" and by "misconstruing the facts." (R., p.706.) Brink also alleged that the prosecutor withheld evidence that the victim did not live in the house where Brink shot and killed the victim. (R., pp.705-07.)

Brink's allegations regarding prosecutorial misconduct raise issues that could have been raised on direct appeal. To the extent that any of Brink's allegations of prosecutorial misconduct were not presented due to ineffective assistance of counsel, the allegations are not supported by the record and Brink has failed to allege facts that would establish prejudice. The district court "reviewed the entire trial transcript" and found that "there was no prosecutorial misconduct in the criminal trial." (R., p.901.) The Court of Appeals also found that there was no prosecutorial misconduct with respect to the claims Brink brought on direct appeal. State v. Brink, Docket No. 34391, 2008 Unpublished Opinion No. 702, pp.7-10 (Idaho App., November 7, 2008). Therefore, Brink's claims under "Issue Two" were properly dismissed by the district court.

Brink's third claim was "a constitutional challenge to the way Idaho presents its [sic] jury instruction to consideration of lesser included offenses, which in all instances dictates that the jury must first consider the severest degree or the elements of the crime as charged before it may consider what is

considered lesser included offenses.” (R., p.708). This claim should have been brought on direct appeal and is procedurally barred.

Furthermore, I.C. § 19-2132(c) specifically provides that "the court shall instruct the jury that it may not consider the lesser included offense unless it has first considered each of the greater offenses within which it is included, and has concluded in its deliberations that the defendant is not guilty of each of such greater offenses." "The propriety of [I.C. § 19-2132(c)] has been recognized in Idaho." (R., p.902 (citing State v. Miller, 131 Idaho 288 (Ct. App. 1997); State v. Hudson, 129 Idaho 478 (Ct. App. 1996))).

As the district court noted, "[t]he party challenging the constitutionality of a statute must overcome a strong presumption of validity." (R., p.902 (citing State v. Hart, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001); State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998))). Brink has provided no authority in support of this argument that this statute violates any provision of either the federal constitution or the Idaho constitution. Therefore, Brink's claims under "Issue Three" were properly dismissed by the district court.

Brink's fourth claim was that he was "denied expert witnesses, either by denial of an unconstitutional [sic] process of the trial court, due to ineffective assistance of the trail [sic] counsel or proceeding counsel, or denial of access to the court, prohibition of petitioner's first amendment right to assert an affirmative defense, and/or denied presentation of witnesses to establish evidence necesassaary [sic] for affirmative defense, justifiable homicide defense, or denied compulsory processes to complete and present any defense." (R., p.710

(capitalization altered).) Brink argued that if he had a forensic expert at trial, he “could have proven the distance [between Brink and the victim at the time of the shooting] through forensic evidence and pattern of blood, ballistics, and brought witnesses to clearly in all regards show residential statues [sic], theft of property, through proper investigations” (R., p.713.) The only issue regarding this claim that is not procedurally barred is Brink’s allegation that his trial counsel was ineffective because there was no defense expert witness testimony regarding forensic evidence, ballistics, or blood evidence.

“In determining whether an attorney's failure to pursue a motion in the underlying criminal action constitutes ineffective assistance of counsel, this Court may consider whether the motion would have been successful.” Cooke v. State, 149 Idaho 233, 246, 233 P.3d 164, 177 (Ct. App. 2010) (citing Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995); Huck v. State, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993)). “If this Court determines that the motion, if pursued, would not have been granted by the trial court, then generally counsel will not be found deficient for failing to pursue it and the petitioner could not have been prejudiced by the lack of pursuit.” Id.

Here, the district court rejected Brink’s argument that his counsel was ineffective for not obtaining a forensics expert and found that “Brink has not alleged facts that show he was actually prejudiced by his counsel not presenting this [expert] testimony [regarding forensic evidence] during trial.” (R., p.904.) Trial counsel filed a motion for a forensic expert, but that motion was never

noticed for hearing.⁴ (R., p.904; #34391 R., pp.216-17) Post trial counsel also filed a motion for a forensic expert, but the motion was denied because “the appointment of an expert would serve no legitimate purpose in this case.” (R., p.904; 34391 R., pp.466-67, 474-86.)

Brink has failed to explain how expert testimony would have helped him establish an affirmative defense in light of the other evidence at trial and his conclusory assertion regarding ineffective assistance of counsel regarding use of an expert is without merit because he has failed to establish prejudice. As stated by the district court, even “[a]ssuming that trial counsel should have pursued [the motion for a forensic expert], Brink has failed to establish the benefit that such expert testimony would have provided” and “Brink has made no proffer in his post conviction case as to what an expert would have testified to.” (R., p.904.)

Brink also failed to establish that he was somehow denied the opportunity to present witness testimony. The district court correctly found that “[t]o the extent that these witnesses would have offered some testimony to support Brink's defense in this case,” the evidence would have been cumulative. (R., p.906.) In addition, Brink “failed to establish a reasonable probability that any of the proposed evidence would have affected the outcome of this case.” (R., p.906.) Therefore, Brink's claims under “Issue Four” were properly dismissed by the district court.

Brink's final claim was that he “was denied ineffective [sic] assistance of

⁴ Trial counsel also filed a motion for a private investigator. (#34391 R., pp.188-92, 205.) That motion was granted by the district court. (#34391 R., p.207.)

trial counsel and/or ineffective [sic] assistance of appellate counsel” based on numerous allegations regarding trial counsel’s performance at trial and the “failure of Appellate counsel to raise all fo [sic] Petitioner’s issues on appeal.” (R., pp.716-17 (capitalization altered).) This claim likewise is without merit.

“This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation.” State v. Pentico, 151 Idaho 906, 914, 265 P.3d 519, 527 (Ct. App. 2011). As such, the reviewing court “evaluate[s] an attorney’s performance at the time of the alleged error, not in hindsight, and presume[s] that trial counsel was competent and that trial tactics were based on sound legal strategy.” Id. “Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel.” Cooke, 149 Idaho at 246, 233 P.3d at 177 (citing Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994)).

Many of the issues Brinks raises under this claim could have been addressed on direct appeal and are procedurally barred. Any issues that are not barred were sufficiently addressed by the district court. As the district court noted, Brink’s allegations regarding ineffective assistance of counsel were conclusory and “not supported by fact.” (R., p.908.) The district court had already “reviewed the entire trial transcript” and found that Brink’s claims of ineffective assistance of trial counsel and appellate counsel were meritless. (R., pp.901, 908-09.) Brink’s allegations in his amended petition for post-conviction

relief and on appeal all involve bare assertions and speculation. These allegations are not supported by any specific facts from the record that would make out a prima facie case for ineffective assistance of counsel.


Furthermore, “[e]ven accepting Brink's allegations of ineffective assistance of trial and appellate counsel as true,” the district court found “that Brink failed to allege facts that satisfy the actual prejudice prong of Strickland” because he “has not made the required showing of a reasonable probability that, but for his trial or appellate counsel's deficient performance, the outcome of his trial would have been different.” (R., p.909.) Brink has failed to show any objective deficiency or prejudice arising from his trial counsel's strategic decisions or his appellate counsel's alleged failure to raise all of the issues Brink wanted to raise on appeal. Therefore, Brink's claims under “Issue Five” were properly dismissed by the district court.

Review of the record shows that Brink's claims for post-conviction relief were properly dismissed as either barred because they were or should have been asserted in his criminal case, or because Brink failed to present evidence showing a prima facie claim for post-conviction relief.

CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of Brink's amended petition for post-conviction relief.


DATED this 25th day of July 2012.


JASON M. GRAY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of July 2012, 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:

DONALD SHANE BRINK
IDOC #18964
ICC Unit E
PO Box 70010
Boise, ID 83707


JASON M. GRAY
Deputy Attorney General

JMG/pm