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## Gerardo v. State Respondent's Brief Dckt. 38592

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

FRANK GERARDO	)	
	)	
Petitioner-Appellant,	)	NO. 38592
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

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**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

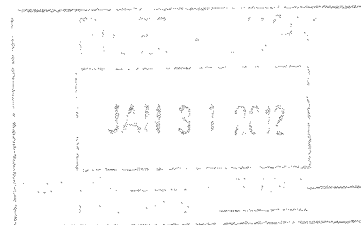
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## STATEMENT OF THE CASE

### Nature of the Case

Frank Gerardo appeals from the district court's order denying his petition for post-conviction relief.

### Statement of Facts and Course of Proceedings

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

On January 24, 2006, three masked men wearing dark clothing, one with a blue bandana, entered the Lotus Garden restaurant brandishing firearms. They demanded money from the owner, Hong Ha, and Ha's daughter, Karen, and threatened to shoot them if they did not comply. When the men realized that Hong's wife was on the telephone with the police in another portion of the restaurant, they fled the building, got into a white Pontiac Grand Prix, and sped away.

The police soon located the automobile, and a high-speed chase ensued during which one or more of the Pontiac's occupants shot at the pursuing officers. The chase ended when the Pontiac's driver lost control and drove into an irrigation canal. The vehicle occupants fled on foot and avoided immediate apprehension. A short time later, however, Keith Ogburn was found lying in a field and was taken into custody. Johnny Gonzalez was arrested after he was discovered hiding in the weeds on the bank of the canal. He was sporting a blue bandana around his neck. About two and one-half hours after the search was initiated, Gerardo was seen walking down a residential street near the crash scene and was also arrested. All three of the men were wearing dark clothing and were cold, muddy and wet from the waist down.

The three men were indicted for burglary, Idaho Code section 18-1401, and attempted robbery, I.C. §§ 18-6501, -306, and the indictment sought an enhancement of their burglary sentences for use of a firearm in the course of that crime, I.C. § 19-2520. The three men were tried together and none of them testified.

....

Gerardo was found to be guilty of both felonies and subject to the sentence enhancement for use of a firearm. The district court imposed a unified sentence of ten years with five years determinate for burglary, a consecutive unified sentence of fifteen years with seven and one-half years determinate for attempted robbery, and a separate, consecutive unified sentence of fifteen years with seven and one-half years determinate for the firearm enhancement. Gerardo subsequently filed a motion to vacate the firearm enhancement, contending that it was illegal because the jury was erroneously instructed regarding the enhancement. The district court denied the motion.

Gerardo appeal[ed], asserting several trial errors and error in the denial of his motion to eliminate the sentence enhancement.

State v. Gerardo, 147 Idaho 22, 24, 205 P.3d 671, 673 (Ct. App. 2009) (footnote omitted). The Idaho Court of Appeals affirmed Gerardo's convictions but vacated "that portion of his sentence imposed as an enhancement for use of a firearm" and remanded the case for entry of an amended judgment. Id. at 31, 205 P.3d at 680. The district court entered an amended judgment on July 8, 2009. (R., p.45.)

Gerardo filed a timely *pro se* petition for post-conviction relief, and affidavits in support thereof, alleging ineffective assistance of trial and appellate counsel. (R., pp.4-12, 15-17.) Following the appointment of post-conviction counsel (R., pp.13-14, 19, 29-30), Gerardo filed an amended petition, and affidavits in support thereof, again alleging ineffective assistance of trial and appellate counsel (R., pp.43-57). Specifically, the amended petition alleged that trial counsel was ineffective for failing to:

- a. Request a limiting jury instruction with regards to the alleged common living address of the Petitioner and the co-defendant Johnny Gonzalez at 21<sup>st</sup> Avenue South in Nampa, Idaho after the Court denied Petitioner's motion in limine to exclude said statements as hearsay.

b. Fully investigate the facts of Petitioner's case by failing to interview prior to trial and call during trial, witness/es, namely Christina Delgado, who would have testified that Petitioner and co-defendant Johnny Gonzalez had separate residences and did not know each other prior to being arrested on the underlying charges when requested by Petitioner to do so.

c. ... [I]ntroduce into [sic] evidence that contradicted the State of Idaho's evidence at trial that Petitioner had the same address as co-defendant Johnny Gonzalez.

(R., p.45.) The amended petition further alleged that appellate counsel was ineffective for failing to:

a. Raise the issue of the trial Court's denial of the Petitioner's motion to sever on appeal.

b. Raise the issue of the trial Court's denial of the motion for mistrial.

(R., pp.45-46.) Finally, the amended petition alleged that Gerardo was "factually innocent" of the criminal charges. (R., p.46.)

The state answered the amended petition (R., pp.58-62) and the case proceeded to an evidentiary hearing (R., pp.89-90; see generally Tr.). The district court took judicial notice of the record and transcript in Gerardo's underlying criminal case (Tr., p.7, L.19 – p.8, L.13, p.33, Ls.8-10) and, at the conclusion of the evidentiary hearing, denied Gerardo's amended petition in its entirety, finding that Gerardo had failed to carry his burden of proof with respect to any of his post-conviction claims (Tr., p.31, L.8 – p.36, L.15; R., pp.91-92). Gerardo timely appeals. (R., pp.93-95, 100-03.)



## ISSUES

Gerardo states the issues on appeal as:

- A. Did the district court err when it dismissed Mr. Gerardo's Petition for Post-Conviction Relief concerning his trial counsel?
- B. Did the district court err when it dismissed Mr. Gerardo's Petition for Post-Conviction Relief concerning his appellate counsel?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Gerardo failed to show error in the denial of his post-conviction petition after an evidentiary hearing?

## ARGUMENT

### Gerardo Has Failed To Show Error In The Denial Of His Post-Conviction Petition

#### A. Introduction

Gerardo challenges the denial of his post-conviction petition, contending he presented sufficient evidence to prove his ineffective assistance of trial and appellate counsel claims. (Appellant's brief, pp.5-9.) Gerardo's arguments fail. The district court correctly applied the law to the facts in concluding that Gerardo failed to establish either deficient performance or resulting prejudice in relation to any of his ineffective assistance of counsel claims.

#### 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). When the district court conducts an evidentiary 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). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-

conviction 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).

C. Gerardo Failed To Prove His Ineffective Assistance Of Trial Counsel Claims

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Schoeger v. State, 148 Idaho 622, 624, 226 P.3d 1269, 1271 (2010); Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); 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 that "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) (citing Strickland, 466 U.S. at 680-81). 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). To establish prejudice, a petitioner must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Schoger, 148 Idaho at 624, 226 P.3d at 1271; 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).

Gerardo raised three ineffective assistance of trial counsel claims, each related to trial counsel's alleged failure to adequately address and/or refute the state's evidence that tended to connect Gerardo with his co-defendant, Johnny Gonzalez. (R., p.45.) Specifically, Gerardo alleged that trial counsel was ineffective for: (1) failing to request a limiting instruction regarding evidence that Gerardo and Gonzalez shared a common address; (2) failing to interview and call as a witness at trial Christina Delgado who, according to Gerardo, would have testified that Gerardo and Gonzalez had separate residences and did not know each other before being arrested on the underlying criminal charges; and (3) failing to introduce evidence that contradicted the state's evidence that Gerardo and Gonzalez had the same address. (R., p.45.) Contrary to Gerardo's arguments on appeal, the district court properly denied relief with respect to each of these allegations because Gerardo failed to carry his burden of proving deficient performance and resulting prejudice as to any of his claims.

Gerardo, Gonzalez and Keith Ogburn were all indicted and tried together for the burglary and attempted robbery of the Lotus Garden restaurant. State v. Gerardo, 147 Idaho 22, 24, 205 P.3d 671, 673 (Ct. App. 2009). Before trial,

Gerardo's attorney moved *in limine* to exclude from evidence testimony that, while being booked into jail, Gonzalez told the booking officer that his address was 207 21st Avenue South, in Nampa – the same address Gerardo had given when he was booked into jail. (#33450 Trial Tr., p.36, L.7 – p.40, L.6.<sup>1</sup>) Gerardo argued that Gonzalez's statement, although admissible as an admission of a party opponent against Gonzalez, was inadmissible hearsay as to Gerardo and should thus be excluded from evidence at trial. (#33450 Trial Tr., p.38, L.22 – p.40, L.6.) The district court denied the motion, ruling that the statement was a non-hearsay admission of a party opponent. (#33450 Trial Tr., p.45, Ls.2-6.) Ultimately, a jailer testified at trial that she booked Gonzalez and Gerardo into jail and that both of them gave the same home address: 207 21st Avenue South, in Nampa. (#33450 Trial Tr., p.662, L.1 – p.663, L.8.)

On appeal, Gerardo argued that the trial court erred in admitting Gonzalez's booking statement, contending as he had below that "Gonzalez's statement was inadmissible hearsay when used against Gerardo." State v. Gerardo, 147 Idaho 22, 25, 205 P.3d 671, 674 (Ct. App. 2009). The Idaho Court of Appeals agreed. Id. The Court acknowledged the evidence would have been admissible for the non-hearsay purpose of establishing a link between Gerardo and Gonzalez, regardless of whether the stated address was their true address. Id. However, because the trial court "never indicated that it was admitting Gonzalez's statement against Gerardo for this limited purpose," the Court of

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<sup>1</sup>Contemporaneously with the filing of this brief, the state is filing a motion requesting the Idaho Supreme Court to take judicial notice of the record and transcript in Gerardo's prior appeal, State v. Gerardo, S.Ct. Docket No. 33450.

Appeals concluded that “Gonzalez’s statement was erroneously admitted at trial against Gerardo for the truth of the matter asserted, i.e., that Gonzalez lived at that address.” Id. Ultimately, however, the Court held the error “was entirely harmless for a number of reasons.” Id. at 27, 205 P.3d at 676. The Court explained:

First, the only probative value of this evidence of a common address was to show a link between Gonzalez and Gerardo, and it would have been admissible if properly proffered for this limited purpose. It had no prejudicial content when considered for the impermissible hearsay purpose – the truth of the address given to the booking officer. The prosecutor actually used the evidence only for the proper purpose, arguing in closing that Gonzalez’s and Gerardo’s statements of a common address established that “these guys all know each other.” Second, Gonzalez’s girlfriend testified that this street address was where she, Gonzalez and Gerardo all lived. Therefore, the erroneously admitted evidence was merely cumulative.

Id.

In his amended post-conviction petition, Gerardo alleged that trial counsel was ineffective for failing to “[r]equest a limiting jury instruction with regards to the alleged common living address of the Petitioner and the co-defendant Johnny Gonzalez ... after the Court denied Petitioner’s motion in limine to exclude said statements as hearsay.” (R., p.45.) Gerardo did not allege that he was prejudiced by the lack of such an instruction (see generally R., pp.43-48 (amended petition), 53-57 (Affidavit of Frank Gerardo)), nor did he present any evidence of prejudice at the post-conviction hearing (see generally Tr.). In fact, the only evidence Gerardo offered in relation to this claim consisted of his own testimony that he asked trial counsel to request a limiting instruction, trial counsel “tried to raise it,” and “the courts weren’t trying to hear it.” (Tr., p.19, L.19 – p.20,

L.2.) Even if believed by the district court, however, this testimony was not sufficient to prove by a preponderance of the evidence any deficiency of trial counsel, much less any resulting prejudice.

As found by the Court of Appeals, the erroneous admission of Gonzalez's statement of his residence address for the truth of the matter asserted – as opposed to for the limited purpose of establishing a link between Gerardo and Gonzalez – “was entirely harmless for a number of reasons,” including that the statement “had no prejudicial content when considered for the impermissible hearsay purpose,” the prosecutor only used the evidence for its permissible purpose of establishing a connection between Gerardo and Gonzalez, and Gonzalez's girlfriend testified that she lived with Gerardo and Gonzalez at the same address. Gerardo, 147 Idaho at 27, 205 P.3d at 676. Because Gerardo did not present evidence that he was actually prejudiced by the lack of a limiting instruction, the Court of Appeals' determination that the erroneous admission of Gonzalez's booking statement for the truth of the matter asserted was harmless is dispositive of and is, in fact, *res judicata* as to the prejudice prong of Gerardo's ineffective assistance of counsel claim. See, e.g., State v. Creech, 132 Idaho 1, 10, 966 P.2d 1, 10 (1998) (citing State v. Beam, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988); State v. Fetterly, 115 Idaho 231, 233, 766 P.2d 701, 703 (1988)) (“[W]hen legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of *res judicata* from raising them again in a post-conviction relief proceeding.”). Even if trial counsel had requested a limiting instruction and such request had been granted, Gerardo failed to carry

his burden of proving a reasonable probability that such would have changed the outcome of the trial. Gerardo has failed to show that the district court erred in denying relief with respect to this claim.

Gerardo has also failed to show error in the denial of relief on his claim that trial counsel was ineffective for failing to interview Christina Delgado and call her as witness at trial. It is well settled that what evidence or testimony an attorney decides should be presented to the jury to best support a defense theory is a tactical decision that ordinarily will not be second-guessed on review. Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348 (1997); State v. Chapman, 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991). Tactical decisions of counsel are presumed competent, which presumption is overcome only upon showing an objective shortcoming such as failure to investigate or ignorance of the law. State v. Kraft, 96 Idaho 901, 905, 539 P.2d 254, 258 (1975). A post-conviction petitioner fails to show deficient performance or prejudice for failure to call a witness where he “has not demonstrated that his defense attorney could have offered exculpatory evidence” through that witness. Milburn v. State, 135 Idaho 701, 710-11, 23 P.3d 775, 784-85 (Ct. App. 2001).

Gerardo alleged in his petition and supporting affidavit that Ms. Delgado would have testified that Gerardo and Gonzalez had separate residences and did not know each other before being arrested on the underlying charges. (R., pp.45, 55.) He testified to the same facts at the evidentiary hearing (Tr., p.15, L.5 – p.16, L.11), but he did not call Ms. Delgado as a witness or otherwise offer any admissible evidence to prove that Ms. Delgado’s testimony would actually



have had any exculpatory value at trial. As found by the district court at the conclusion of the evidentiary hearing:

I did not hear any evidence here from Mr. Gerardo or for that matter from Christina Delgado that she would have been prepared to testify that on the night in question she was with him or that she had such intimate knowledge of him because perhaps they were constantly together for this two-week period of time [immediately preceding the commission of the crimes], that he would not have had an opportunity to have contact with Keith Ogborn [sic] or Johnny Gonzalez. That it would have been impossible for him to have contact with him because he was constantly with her for that period of time. That was not presented here.

And, again, at this hearing ... petitioner has to come forward with that evidence. So it would have been easy enough to bring Christina Delgado here to say what she knew and what she didn't know.

(Tr., p.35, Ls.3-19.) Because Gerardo failed to present any admissible evidence to prove that Ms. Delgado's testimony would have been exculpatory, he failed to prove that trial counsel was ineffective for failing to interview her and call her as a witness. The district court correctly denied relief with respect to this claim.

Finally, Gerardo has failed to show error in the denial of relief on his claim that trial counsel failed to introduce "evidence that contradicted the State of Idaho's evidence at trial that [Gerardo] had the same address as co-defendant Johnny Gonzalez." (R., p.45.) Gerardo failed in his amended petition to identify what evidence he claimed contradicted the state's evidence. (See generally R., pp.43-47.) He asserted in his affidavit that he asked trial counsel to introduce "documentary evidence" which Gerardo claimed was attached to his affidavit as an exhibit (R., p.55), but the attachment, if it exists, is not in the appellate record (see generally R.), nor did Gerardo offer any documents as exhibits at the

evidentiary hearing (see generally Tr.). Having failed to even identify the evidence he claimed trial counsel should have presented to contradict the state's evidence, Gerardo failed to carry his burden of proving deficient performance and resulting prejudice with respect to this claim. Gerardo has failed to show error in the denial of his ineffective assistance of trial counsel claims.

D. Gerardo Failed To Prove His Ineffective Assistance Of Appellate Counsel Claims

The two-prong *Strickland* test for ineffective assistance of trial counsel also applies to claims of ineffective assistance of appellate counsel. Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)). In order to establish ineffective assistance of appellate counsel, a petitioner has the burden of proving that his counsel's representation on appeal was deficient and that the deficiency was prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 730 (1998). Even if a defendant requests that certain issues be raised on appeal, appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Aragon v. State, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988) (citing Jones, 463 U.S. at 751-754). The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, the defendant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000); Schoger v. State, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (citing State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)).

Gerardo alleged his appellate counsel was ineffective for failing to raise as issues on appeal the denial of his motion to sever and the denial of his motion for mistrial. (R., pp.45-46.) The district court denied these claims after the evidentiary hearing, concluding Gerardo failed to carry his burden of establishing either deficient performance or prejudice. (Tr., p.31, L.8 – p.32, L.11.) Gerardo argues on appeal that the district court erred because the evidence showed that “Mr. Gerardo wanted those issues raised” and that, despite Gerardo’s request that appellate counsel raise the issues, counsel “did not do so.” (Appellant’s brief, p.8.) Gerardo has failed to establish any basis for reversal because, as set forth above, the fact that appellate counsel does not raise every non-frivolous issue requested by the defendant does not itself establish ineffective assistance of appellate counsel. Jones, 463 U.S. at 751-53; Aragon, 114 Idaho at 765, 760 P.2d at 1181. In addition, to be entitled to relief on his ineffective assistance of appellate counsel claims, Gerardo had the burden of proving by a preponderance of the evidence that, but for counsel’s failure to raise the requested issues, he would have prevailed on appeal. Smith, 528 U.S. at 285; Schoger, 148 Idaho at 629, 226 P.3d at 1276; Payne, 146 Idaho at 561, 199 P.3d at 136. A review of the record and the applicable law supports the district court’s determination that Gerardo failed to carry his burden.

Gerardo moved in the underlying criminal case to sever his case from that of his co-defendants. (#33450 R., pp.16-18.) The district court denied the motion, ruling that Gerardo would not be unfairly prejudiced by a joint trial. (#33450 R., pp.28-34.) Gerardo alleged that appellate counsel was ineffective

for not pursuing the denial of his motion to sever as an issue on appeal. (R., pp.45, 55.) To prevail on that issue, however, Gerardo would have been required on appeal to “present[] facts demonstrating that unfair prejudice resulted from a joint trial, which denied [him] a fair trial.” State v. Equilior, 137 Idaho 903, 908, 55 P.3d 896, 901 (Ct. App. 2002). Gerardo did not identify any such prejudice in his amended post-conviction petition or supporting affidavit. (See generally R., pp.43-47, 54-56.) He testified at the evidentiary hearing that he specifically instructed appellate counsel to raise the issue (Tr., p.18, L.7 – p.19, L.10), but when asked what facts he had to support an appellate claim relating to the denial of his motion to sever, Gerardo testified only that he was “pretty sure” he had the right to a separate trial and that he felt like he “didn’t have a fair trial” (Tr., p.23, L.23 – p.25, L.22). Gerardo did not identify any actual prejudice, much less present any facts demonstrating that he was actually denied a fair trial. Because Gerardo failed to present any evidence to demonstrate that he would have prevailed on the severance issue had it been raised on appeal, he has failed to show error in the denial of his claim that appellate counsel was ineffective for failing to raise that issue.

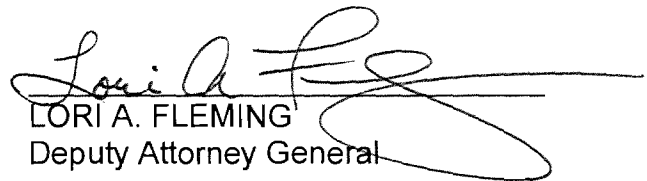
Gerardo has also failed to show error in the denial of his claim that appellate counsel was ineffective for not raising as an issue on appeal the denial of his motion for mistrial. Gerardo failed both in his amended petition and affidavit and at the evidentiary hearing to present any evidence to support his claim. (See generally R., pp.43-47, pp.54-56; Tr., pp.13-20.) When asked on cross-examination what facts he had to support his ineffective assistance of

appellate counsel claim, Gerardo conceded that the “exact facts” he contended would have supported an appellate challenge to the denial of his motion for mistrial were actually raised and considered on appeal and “found to be harmless.” (Tr., p.25, L.23 – p.27, L.23.) Having conceded that the issue he contended should have been raised has “already been resolved on appeal” (Tr., p.27, Ls.21-23), Gerardo failed to carry his burden of establishing either deficient performance or resulting prejudice. Gerardo has failed to show error in the denial of his post-conviction petition.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court’s order denying Gerardo’s petition for post-conviction relief.

DATED this 31<sup>st</sup> day of January 2012.

  
LORI A. FLEMING  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31<sup>st</sup> day of January 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:

STEPHEN D. THOMPSON  
P.O. Box 1707  
Ketchum, ID 83340

  
LORI A. FLEMING  
Deputy Attorney General

LAF/pm

