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Gerardo v. State Appellant's Reply Brief Dckt. 38592

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I. TABLE OF AUTHORITIES

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I. STATEMENT OF THE CASE

A. Nature of the Case

Frank Gerardo appeals from the district court's order dated March 8, 2011; in which the district court denied his petition for post-conviction relief, after hearing. Mr. Gerardo asserts that the district court erred by denying his petition for post-conviction relief.

B. Statement of the Facts & Course of Proceedings

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

II. ISSUES PRESENTED ON APPEAL

- 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?**

III. ARGUMENT

I.

The District Court Erred When It Dismissed Mr. Gerardo's Petition For Post-Conviction Relief

As stated in Mr. Gerardo's opening brief, to prevail on an ineffective assistance of counsel claim in a post-conviction action, one must show that his or her attorney's performance was deficient, and that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish deficiency, the applicant has the

burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Suits v. State*, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.*

A. The District Court erred when it dismissed Mr. Gerardo's claim of ineffective assistance of counsel with regard to his trial counsel.

It is Mr. Gerardo's position that he proved that his trial attorney's performance was below an objective standard of reasonableness in three areas, all concerning his residence and associations with Mr. Johnny Gonzalez, a co-defendant. Further, Mr. Gerardo submits that he showed a reasonable probability that but for the deficient performances, the outcome of his trial would have been different, as had the associations been disproved, there is a reasonable probability that the jury would not have found him guilty.

As stated in his opening brief, Mr. Gerardo's position in his Amended Verified Petition for Post Conviction Relief was that his trial attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

a. failed to request a limiting instruction with regards to the address of Mr. Gerardo and a Mr. Johnny Gonzalez at 21st. Avenue South in Nampa, Idaho after the district court denied a motion in limine to exclude such statements as hearsay;

b. failed to fully investigate the facts of Mr. Gerardo's case by failing to interview prior to trial and call during trial, despite Mr. Gerardo's request, Ms. Christina

Delgado who would have testified that Mr. Gerardo and Mr. Gonzalez had separate residences and did not know each other prior to being arrested on the underlying charge;

c. failed to introduce evidence that contradicted the State's evidence that Mr. Gerardo and co-defendant Mr. Johnny Gonzalez shared the same address. (R., 45.). (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Gerardo supplied evidence via his Amended Verified Petition for Post Conviction Relief as follows: that his charges alleged events alleged to have occurred on or about the night of January 24, 2006; that he was arrested on or about January 25, 2006 and on or about that same day placed in the custody of the Canyon County Jail in the same holding cell with Keith Alan Ogburn, co-defendant; and that prior to January 15, 2006 when he was placed into custody, he had never met Keith Alan Ogburn. (R., 46.). Further, the record before the trial court reflected the Affidavit of Keith Alan Ogburn, in which Mr. Ogburn testified that he had never met Mr. Gerardo prior to being placed into the same holding cell with Mr. Gerardo on or about January 25, 2006, corresponding to Mr. Gerardo's affidavit. (R., 50.), (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Keith Ogburn testified at the February 25, 2011 hearing on post conviction regarding same facts, namely that he had never met Mr. Gerardo before the two of them were arrested and placed into the same holding cell on or about January 25, 2006. (Tr., p. 9, Line 12 - p. 12. Line 10.). In fact, Mr. Ogburn testified in response to the State's cross examination, "I just don't know Mr. Gerardo." (Tr., p. 12, Line 10.).

Mr. Gerardo also testified on his own behalf, confirming the sworn facts stated in his verified amended petition and his affidavit in support, both referenced above. (Tr., p. 13, Line 12 - p. 12. Line 10.).

He testified that he had asked his attorney to request a limiting instruction with regards to the address of Mr. Gerardo and a Mr. Johnny Gonzalez at 21st. Avenue South in Nampa, Idaho. (Tr., p. 19, line 19 – p. 20, line 2.).

The issue regarding failing to request a limiting instruction raises the classic issue of guilt by association. It was Mr. Gerardo's position that the admission of testimony that Mr. Gerardo shared housing with co-defendant Mr. Gonzalez should not have come in. When it did come in for the limited purpose of establishing a link between the Mr. Gerardo and Mr. Gonzalez, failure to limit it with an instruction undercut Mr. Gerardo's position that he did not know the co-defendants, nor was he involved in a crime with them. In short, the failure by his attorney to ask for an instruction limiting the evidence for the purpose for which it was admitted allowed the jury to consider it as evidence of guilt. Stated another way, failure to limit the information with an instruction to the jury allowed the jury to consider the evidence for all purposes, including finding Mr. Gerardo "guilty by association".

Contrary to the Respondent's position that Mr. Gerardo did not present evidence that he was prejudiced, and therefore should be barred by *res judicata* as to the prejudice prong, Mr. Gerardo did present evidence of prejudice through his sworn amended petition, his affidavit, the affidavit of Mr. Ogburn, and the testimony of both himself and Mr. Ogburn.

Further, Mr. Gonzalez's affidavit makes clear that Mr. Gonzalez did not share that same address, and that the first time he met Mr. Gerardo was when he was placed in the same holding tank as Mr. Gerardo. (See Affidavit of Johnny Gonzalez, R., 15 – 16.).

Regarding Mr. Gerardo's contentions that his trial attorney's performance was deficient for failure to investigate the testimony of Christina Delgado, and therefore also failed to present that same evidence, Mr. Gerardo submits that he did provide sufficient evidence to support his claims. Mr. Gerardo testified that his attorney failed to investigate and further to introduce the testimony of Ms. Christina Delgado who would have testified that Mr. Gerardo and Mr. Gonzalez had separate residences and did not know each other prior to being arrested on the underlying charge. (Tr., p. 15, Line 5 – p. 16, Line 11; p. 17, Line 10 – p. 18, Line 6.). Again, this failure was prejudicial especially in light of the district court allowing the evidence regarding a common address. Mr. Gerardo also testified in his petition and his affidavit that Ms. Delgado would have testified that he and Mr. Gonzalez had separate residences and did not know each other. (R., pp. 45, 65.). The failure to pursue and introduce such evidence was prejudicial, as it allowed the jury to accept on face value the evidence of association, and consider that information as evidence of Mr. Gerardo's guilt.

Mr. Gerardo submits that his live testimony, affidavits and verified petition amply demonstrate a reasonable probability that the outcome of his trial would have been different had his attorney not failed to take the necessary steps requested to contradict the state's evidence regarding association.

Therefore, it is Mr. Gerardo's position that the district court erred by denying his claim of ineffective assistance of counsel and thereby his claim for post-conviction relief.

B. The District Court erred when it dismissed Mr. Gerardo's claim of ineffective assistance of counsel with regard to his appellate counsel.

Mr. Gerardo's position in his Amended Verified Petition for Post-conviction Relief was that his appellate attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

a. failed to raise on appeal the issue of the district court's denial of Mr. Gerardo's motion to sever;

b. failed to raise on appeal the issue of the district court's denial of Mr. Gerardo's motion for mistrial. (R., 45-46.); (See also Affidavit of Frank Gerardo, R. 53 - 56.).

It is Mr. Gerardo's position that he demonstrated at this post-conviction hearing, a reasonable probability that, but for his appellate counsel's failures, he would have prevailed on appeal. *See, 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)).

Mr. Gerardo provided evidence via his verified petition and his sworn affidavit regarding the above claims. (R., 45-46.); (See also Affidavit of Frank Gerardo, R. 53 - 56.). Further, he testified at his hearing on his petition for post-conviction relief that he asked his attorney to raise the issue of severance, and the denial of his motion for mistrial, but that his attorney did not raise them. (Tr., p. 18, Line 21 – p. 20, Line 2.).

Mr. Gerardo's position is that his appellate attorney failed to raise the requested issues and was therefore ineffective. Evidence of those omissions was provided to the district court in the form of a verified amended petition, an affidavit, and testimony.

The district court concluded that appellate counsel's representation was competent and that the failure to present the issues amounted to strategy. Mr. Gerardo contends that such a conclusion is in error. The evidence before the district court demonstrated that Mr. Gerardo requested to have those issues raised and that they were important issues he could have prevailed on, due to the evidence that he did not know these men, and that his conviction was based on association. His appellate attorney did not argue these issues. Mr. Gerardo argues that such a failure amounts to ineffective assistance by falling below the objective standards of reasonableness.

Mr. Gerardo further argues that he supplied evidence via his Amended Verified Petition for Post Conviction Relief a factual claim of innocence and therefore prejudice, stating: that his charges alleged events alleged to have occurred on or about the night of January 24, 2006; that he was arrested on or about January 25, 2006 and on or about that same day placed in the custody of the Canyon County Jail in the same holding cell with Keith Alan Ogburn, co-defendant; and that prior to January 15, 2006 when he was placed into custody, he had never met Keith Alan Ogburn. (R., 46.). Further, the record before the trial court reflected the Affidavit of Keith Alan Ogburn, in which Mr. Ogburn testified that he had never met Mr. Gerardo prior to being placed into the same holding cell with Mr. Gerardo on or about January 25, 2006, corresponding to Mr. Gerardo's affidavit. (R., 50.), (See also, Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Keith Ogburn testified at the February 25, 2011 hearing on post conviction to the same facts, namely that he had never met Mr. Gerardo before the two of them were arrested and placed into the same holding cell on or about January 25, 2006. (Tr., p. 9, Line 12 - p. 12. Line 10.). In fact, Mr. Ogburn testified in response to the State's cross examination, "I just don't know Mr. Gerardo." (Tr., p. 12, Line 10.).

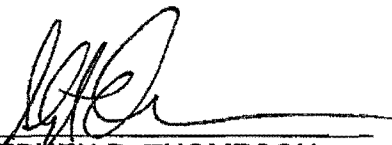
Mr. Gerardo also testified on his own behalf regarding the same facts. (Tr., p. 14, Line 12 - p. 12. Line 10.).

Therefore, Mr. Gerardo contends that he demonstrated a claim of factual innocence that contradicted the evidence submitted by the state through evidence that he did not live with or otherwise know the co-defendants. Because his appellate attorney did not raise the issues of severance and mistrial, he thereby demonstrated a reasonable probability that but for the failure to raise the issues of severance and mistrial, he would have prevailed.

IV. CONCLUSION

It is Mr. Gerardo's position that if his attorneys had performed the requests made by their client, there is a reasonable probability that the outcome of the trial, and subsequently the appeal, would have been different. It is therefore his position that he demonstrated that his attorneys' performance was deficient, and that he was prejudiced by the deficiencies. Based on the above, Mr. Gerardo respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief.


DATED this 3 day of April, 2012.


STEPHEN D. THOMPSON
Conflict Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3 day of April, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

Kenneth K. Jorgensen
Deputy Attorney General
Criminal Division
Post Office Box 83720
Boise, Idaho 83720-0010



STEPHEN D. THOMPSON
Conflict Appellate Public Defender