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Chacon v. State Appellant's Brief Dckt. 38612

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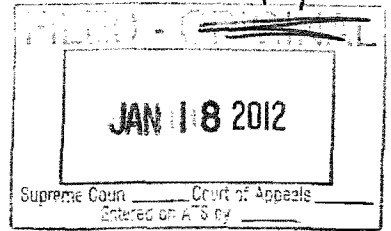
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IN THE SUPREME COURT OF THE STATE OF IDAHO

MAXIMO CHACON,
Petitioner-Appellant,
v.
STATE OF IDAHO,
Respondent.

No. 38612

APPELLANT'S BRIEF



BRIEF OF APPELLANT

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

HONORABLE MICHAEL CRABTREE
District Judge

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I. TABLE OF AUTHORITIES

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I. STATEMENT OF THE CASE

A. Nature of the Case

Maximo Chacon appeals from the district court's Findings of Fact and Conclusions of Law dated January 19, 2011 (R., 58-68); in which the district court denied his petition for post-conviction relief, after hearing. Mr. Chacon asserts that the district court erred by denying his petition for post-conviction relief.

B. Statement of the Facts & Course of Proceedings

On June 26, 2009, Mr. Chacon filed a petition for post-conviction relief along with a supporting affidavit, alleging ineffective assistance of counsel regarding the performance of both his trial level and appellate level attorneys. (R., 1-10).

Mr. Chacon's position in his Petition for Post Conviction Relief was that his trial attorney, Mr. Rockne Lammers, was ineffective such that he received ineffective assistance of counsel because his attorney:

- a. denied Mr. Chacon's constitutional right to a fair jury trial by not requesting and reviewing all discovery materials prior to trial;
- b. denied Mr. Chacon's constitutional right to a fair jury trial by failing to provide Mr. Chacon with copies of all discovery materials prior to trial;
- c. failed to communicate with Mr. Chacon during trial preparation, visiting Mr. Chacon once after Mr. Chacon bonded out, and one telephone call;
- d. failing to follow Mr. Chacon's instructions in attempting to reach a plea negotiation in the case;
- c. failed to investigate and introduce evidence that which was favorable to Mr. Chacon on the issue of guilt or innocence, including but not limited to evidence

regarding a confidential informant, thereby denying him due process. (R., 3.); (See also Affidavit of Maximo Chacon, R. 7-8.).

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

- a. failed to inform Mr. Chacon the ramifications of proceeding pro se;
- b. failed failed to inform Mr. Chacon that by raising ineffective assistance of counsel on a direct appeal, it may therefore include ont only the grounds for ineffectgive assistance of counsel raised by Petitioner on direct appeal, but also act as a bar to raising other potential claims of ineffective assistance of counsel as well. (R., 3.); (See also Affidavit of Maximo Chacon, R. 9.).

An evidentiary hearing was conducted on December 10, 2010. Mr. Lammers, and Mr. Fuller appeared as witnesses. (R., 55-57.).

Mr. Chacon also testified on his own behalf. (R., 55-57.). His testimony supported the sworn facts stated in his verified amended petiton and his affidavit in support, both referenced above. (Tr., p. 79, Line 3 - p. 93. Line 2.).

The district court by Findings of Fact and Conclusions of Law dated January 19, 2011 (R., 58-68), denied Mr. Chacon's petition for post-conviction relief.

Mr. Chacon timely filed his appeal. (R., 76-78.).

II. ISSUES PRESENTED ON APPEAL

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

III. ARGUMENT

I.

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

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Pursuant to Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999), *citing* I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App.1990). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.*, *citing* *Young v. State*, 115 Idaho 52, 54, 764 P.2d 129, 131 (Ct. App.1988).

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. Chacon's claim of ineffective assistance of counsel with regard to his trial counsel.

Mr. Chacon's position in his Petition for Post Conviction Relief was that his trial attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

- a. denied Mr. Chacon's constitutional right to a fair jury trial by not requesting and reviewing all discovery materials prior to trial;
- b. denied Mr. Chacon's constitutional right to a fair jury trial by failing to provide Mr. Chacon with copies of all discovery materials prior to trial;
- c. failed to communicate with Mr. Chacon during trial preparation, visiting Mr. Chacon once after Mr. Chacon bonded out, and one telephone call;
- d. failing to follow Mr. Chacon's instructions in attempting to reach a plea negotiation in the case;
- c. failed to investigate and introduce evidence that which was favorable to Mr. Chacon on the issue of guilt or innocence, including but not limited to evidence regarding a confidential informant, thereby denying him due process. (R., 3.), (See also Affidavit of Maximo Chacon, R. 7-8.).

Mr. Chacon presented evidence in the form of his affidavit (R., 7-9).

Moreover, he testified to those facts at hearing. He began his testimony stating that he attempted to fire his attorney on the day of trial because he felt Mr. Lammers was unprepared. (Tr., p. 79, Lines 6 - 14.). He stated that he did not have contact with his attorney, and that he called him, but could never reach him to see him, despite being available to while working in Jerome. In the end, he ended up meeting with him once. (Tr., p. 79, Lines 15-24.). He asked for but did not receive copies of the tapes in evidence. (Tr., p. 80, Lines 3-13.). Although they discussed a critical letter, he never saw it prior to trial. (Tr., p. 80, Lines 17-25). He asked for but did not receive handwriting expert help to help him show that the purported letter was not his. (Tr., p. 81, Line 3 - p. 82, Line 25.). He also testified that had he had more time to prepare with Mr. Lammers, he would have been able to address the issue of the confidential informant. (Tr., p. 23, Line 1 - p. 87. Line 7.).

Mr. Lammers also testified at hearing. (Tr., p. 5, Line 1 - p. 38. Line 25.). Mr. Lammers admitted that he was not as prepared as he would like to have been in numerous places in his testimony. (See, eg., Tr., p. 7, Line 4 - p. 22, Line 15).

Mr. Lammers also admitted he did not provide Mr. Chacon with the tapes in evidence. (Tr., p. 11, Line 13 - p. 12, Line 4.). He also admitted that he did not ask for an instruction regarding Ms. Terry Fox, a confidential informant, nor attack her testimony to bring out evidence regarding her addictions and her credibility. (Tr. p. 22, Line 16 - p. 24, Line 16.). Mr. Lammers further admitted that he did not pursue requiring corroborative evidence regarding her testimony which may even have kept her

testimony, which he agreed was critical, out of the trial. (Tr., p. 30, Line 5 - p. 31, Line 4.).

It is Mr. Chacon's position that live testimony, affidavits and 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. The evidence before the court demonstrated that if Mr. Lammers had taken time to prepare with Mr. Chacon and go over the evidence with him, there is a reasonable probability the result at trial would have been different.

Further, the failure to attack the testimony of the confidential informant demonstrates a reasonable probability that the trial result would have been different if the credibility of the evidence was attacked or kept out. Moreover, if time had been taken and Mr. Lammers had followed Mr. Chacon's wishes with regard to plea negotiations, it is Mr. Chacon's position that a reasonable probability existed of a more favorable plea agreement, thereby more favorably resolving his legal matter. Therefore, Mr. Chacon argues that he demonstrated that his attorney's performance fell below an objective standard of reasonableness and a reasonable probability that the results would have been different had the failures not occurred.

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

Mr. Chacon's position in his 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 inform Mr. Chacon the ramifications of proceeding pro se;

b. failed failed to inform Mr. Chacon that by raising ineffective assistance of counsel on a direct appeal, it may therefore include only the grounds for ineffective assistance of counsel raised by Petitioner on direct appeal, but also act as a bar to raising other potential claims of ineffective assistance of counsel as well. (R., 3.); (See also Affidavit of Maximo Chacon, R. 9.).

Mr. Chacon testified that he fired Greg Fuller because he lacked communication with him, having not talked to him after paying Mr. Fuller's retainer despite many attempts. (Tr., p. 88, Line 22 - p. 90, Line 25.). As a result, he did not receive advice concerning proceeding pro se, or the risks of pursuing claims of ineffective assistance of counsel on direct appeal.

Mr. Fuller admitted in his testimony that he did not discuss with Mr. Chacon what needed to be addressed on appeal so he would preserve his rights if he represented himself. (Tr., p. 67 Line 22 - p. 68, Line 25.).

Mr. Chacon's position is that his appellate attorney failed to communicate with him or advise him. Evidence of those omissions was provided to the district court. He therefore argues that he presented sufficient evidence to demonstrate that his attorney's performance fell below an objective standard of reasonableness, and a reasonable probability of a different result if such failures had not occurred.

Therefore, Mr. Chacon demonstrated prejudice caused by the failings of his attorneys. He argues 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.

V. CONCLUSION

Based on the above, Mr. Chacon respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief.

DATED this 16 day of January, 2012.



STEPHEN D. THOMPSON
Conflict Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17 day of January, 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
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Post Office Box 83720
Boise, Idaho 83720-0010



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