

4-26-2012

# Dursunov v. State Appellant's Reply Brief Dckt. 38885

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ILDAR DURSUNOV,	)	
	)	
Petitioner-Appellant,	)	NO. 38885
	)	
v.	)	
	)	
STATE OF IDAHO,	)	REPLY BRIEF
	)	
Respondent.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

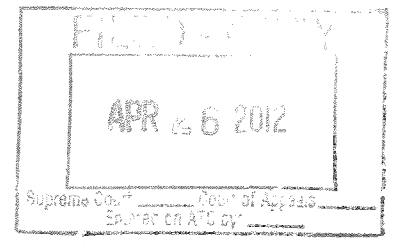
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## STATEMENT OF THE CASE

### Nature of the Case

On appeal, Mr. Dursunov argues that the district court erred when it summarily dismissed his post-conviction claim that he received ineffective assistance of counsel when his attorney failed to advise him that he could have obtained a confidential psychosexual evaluation prior to pleading guilty and participating in a court-ordered psychosexual evaluation.

In response, the State advances two arguments: (1) that Mr. Dursunov's "argument is waived" under *State v. Zichko*, 129 Idaho 259, 263 (1996), because he failed to cite to authority for it, and (2) that the three-factor test for evaluating the prejudicial impact of improperly-admitted psychosexual reports in post-conviction set forth in *Hughes v. State*, 148 Idaho 448 (Ct. App. 2009), either does not apply to his case or, alternatively, has not been satisfied. (Respondent's Brief, pp.8-10.)

This Reply Brief is necessary to respond to the State's *Zichko* argument. With respect to the State's *Hughes* argument, Mr. Dursunov will rely on the argument in his Appellant's Brief in which he explained why the *Hughes* test applied to his case and demonstrated a *prima facie* case of prejudice under the three-factor test. (Appellant's Brief, pp.11-14.)

### Statement of the Facts and Course of Proceedings

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

ISSUE

Is Mr. Dursunov's claim waived under *State v. Zichko*?

## ARGUMENT

### Mr. Dursunov's Claim Is Not Waived Under *State v. Zichko*

In its Respondent's Brief, addressing Mr. Dursunov's post-conviction claim, the State argues, *inter alia*, as follows:

Dursunov has failed to present any authority that an attorney is required, much less able, to prevent a court-ordered psychosexual evaluation in which a defendant voluntarily participates from being disclosed to the district court. Consequently, this argument is waived. See *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (arguments not supported by citations to authority are waived).

(Respondent's Brief, p.8.)

In making his claim that his attorney was ineffective for failing to advise him that he could have a confidential psychosexual evaluation, rather than a court-ordered one,<sup>1</sup> Mr. Dursunov cited to, and distinguished the facts of his case from, *Gonzales v. State*, 151 Idaho 168 (Ct. App. 2011). (Appellant's Brief, pp.10-11.) Appellate counsel submits that citing to authority that can be distinguished satisfies the requirements of Idaho Appellate Rule 35 as interpreted by this Court in *Zichko*.

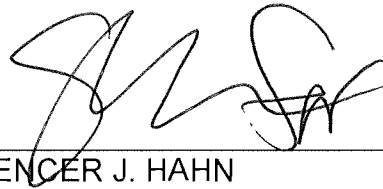
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<sup>1</sup> In making its *Zichko* argument, the State appears to have misinterpreted Mr. Dursunov's claim.

CONCLUSION

For the reasons set forth in his Appellant's Brief and herein, Mr. Dursunov respectfully requests that this Court vacate the district court's order dismissing his post-conviction petition as to the claim raised on appeal, and remand this matter for an evidentiary hearing on that claim.

DATED this 26<sup>th</sup> day of April, 2012.

A handwritten signature in black ink, appearing to read 'S. Hahn', is written over a horizontal line.

SPENCER J. HAHN  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

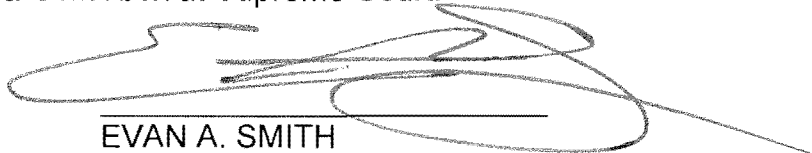
I HEREBY CERTIFY that on this 26<sup>th</sup> day of April, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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