

5-14-2013

# Gonzales v. State Appellant's Reply Brief Dckt. 39517

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTOPHER GONZALES  
Christopher Gonzales, )  
Appellant, )  
v. )  
State of Idaho, )  
Respondent, )

DOCKET NO. 39517-2012

APPELLANT'S CROSS-BRIEF

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

John K. Butler  
DISTRICT JUDGE

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Respondent

Appellant

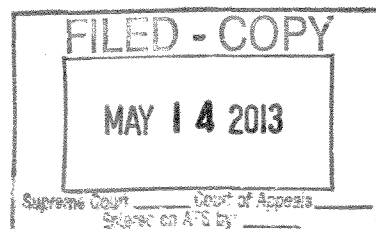


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## Statement Of Case

### Nature Of Case

Mr. Gonzales appeals from the District Court's dismissal with prejudice of his post-conviction petition for ineffective assistance of counsel.

### Statement Of Case

On September 26, 2008, a jury returned a Guilty Verdict to the charges of Attempted Strangulation, Aggravated Battery, Second Degree Kidnapping, and two counts of misdemeanor Domestic Battery and misdemeanor Battery.

On December 15, 2008, the court imposed the following sentences. 15 years, with 6 years fixed for Attempted Strangulation, 20 years, with 6 years fixed for Aggravated Battery, 25 years, with 6 years fixed for Second Degree Kidnapping, and 20 years, with 6 years fixed for each Aggravated Assault. All sentences were ran concurrent.

Mr. Gonzales filed a timely petition for post-conviction relief which was predicated on his trial counsels ineffective assistance, claiming; 1) failure to discuss the law and the facts of the case with him, including failing to discuss and object to a handwritten note allegedly written by Mr. Gonzales which was admitted as Exhibit 102 at trial and not objected to by counsel; 2) failure to call witnesses on his behalf at trial; 3) failing under Estrada, to advise him of his Fifth Amendment right to remain silent at his pre-sentence interview, mental health evaluation, and substance abuse evaluation.

On October 5, 2011, the district court dismissed with prejudice Mr. Gonzales' post-conviction petition. This appeal follows.

### Issues

Mr. Gonzales stated the issue on appeal as follows;

Was Counsel's Representation Deficient By Legal Standards  
And Was That Deficiency Prejudicial?

The State rephrased the issue on appeal as:

Has Gonzales Failed To Establish The District Court Erred  
In Denying His Post-Conviction Claims And Dismissing His  
Petition For Post-Conviction Relief?

### Argument

Has Gonzales failed to establish that the district court erred in denying his post-conviction claims and dismissing his petition for post-conviction relief?

On appeal Mr. Gonzales claims that trial counsel was ineffective/inadequate because they allowed exhibit 102 (handwritten note to Lisa Moore, allegedly to have been written by Mr. Gonzales to her) to be admitted into evidence, without objection.

From the record, the district court; by it's own words, supports Mr. Gonzales' claim of ineffective or inadequate assistance of counsel. (Tr. p.49, ln. 19-21)(Dictum)(...I think that exhibit A was prejudicial to the defendant, based on all the evidence presented in the trial.)

The only physical evidence presented at trial was states exhibit 102 of which the court spoke of. (Tr. p.44, ln.18-21)(Dictum) (...certainly the testimony of Lisa Moore does not lay the foundation for the admissibility of it? There was no foundation laid to establish that it was something written by the defendant.)

Clearly, these strong opinions by the district court cannot be ignored, nor can the district court's statements be construed as not constituting error. The erroneous admission of hearsay evidence was not harmless where the evidence was admitted for the truth of the content and its use was not limited to impeachment. State v Hansen, 133 Idaho 323, 986 P.2d 346 (Ct.App. 1999)

Mr. Gonzales did not testify at trial. Therefore, exhibit 102 was admitted solely to bolster the testimony of Lisa Moore. The failure of Mr. Gonzales' trial counsel to object to the admittance of exhibit 102 cannot withstand the "strong presumption that counsel's performance was within the wide range of reasonable professional assistance." Davis v State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App. 1989)

There is no authority in this state that requires a motion to strike or an objection before a trial court may exclude or not consider evidence offered by a party. Absent plain or fundamental error, some form of objection is ordinarily necessary, however, to preserve the right to challenge on appeal the admission or consideration of evidence. Helca Mining Co. v Star-Morning Mining Co., 122 Idaho 778, 839 P.2d 1192 (1992)

Because counsel failed to make a simple objection to the admission of exhibit 102 at trial, not only was Mr. Gonzales prejudiced by its admission, (See Appellant's Brief Exhibits A and B) but counsels performance was inadequate.

The appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v Agurs, 427 U.S., at 104, 112-113, 96 S.Ct., at 2397, 2401-2402, and in the test for materiality of testimony made available to the defense by government deportation of a witness, United States v Valensuela-Bernal, at 872-874, 102 S.Ct. at 3449-3450.

Under Strickland, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (citing Strickland, 466 U.S. 668 at 694 [19], 104 S.Ct. 2052 at 2068)

The district court relied heavily on the testimony of Mr. Taylor and Mrs. Gosnell, defendant's counsel to dismiss Mr. Gonzales' petition for post-conviction relief. Mr. Taylor testified (Respondent's Brief Exhibit A, p.8) that;(In one of the meetings the week before trial, Taylor came across a letter in the petitioner's handwriting. The letter was addressed to the victim and essentially made the states case.)

Mrs. Gosnell also testified (Respondent's Brief Exhibit A, p.11) that; (she was the one that discovered the letter,

that the letter referenced acts which occurred on February 13, 2008). Both counsel's for Mr. Gonzales claimed discovery of the incriminating statements allegedly written by Mr. Gonzales, but are unable to produce them either to the court or the defendant, Mr. Gonzales.

Pursuant to Idaho Rules of Evidence, Rule 201, the court is requested to take judicial notice of the fact that February 13, 2008 is the day that all of the alleged felonies occurred. All other crimes being charged on the 12th and 16th of February, are essentially misdemeanors. If it were not for the admission of Exhibit 102 to bolster the credibility of Lisa Moore's testimony, Mr. Gonzales would not have been convicted of the more serious crimes allegedly occurring on February 13, 2008.

Counsels for the defendant ignored the alibi witness' statements made by Cindy Cox, the defendant's mother and Cheyenne Zimmerman, the defendant's sister; claiming that there were gaps in the timeline and that they believed them to be unreliable,

Mrs. Cox's and Mrs. Zimmerman's testimony at the defendant's post conviction hearing was exactly the same as given to the police and that would have been testified to at trial. Mrs. Cox testified that on February 13, 2008, the defendant was present at her home when she left the house at 8:45 a.m.. That the defendant was there when she returned home again at around 11:30 a.m. until approximately 3 p.m. when she next left to pick her daughter up from school. Shortly after 5 p.m., the defendant, Cindy Cox and Cheyenne were present at Mrs. Cox's house in Kimberly Idaho.

The state asserts that Mrs. Cox, one of Mr. Gonzales' alibi witnesses is "bias in favor of the petitioner and that they could not account for the whereabouts of the petitioner for the entire day of February 13." (Respondent's Brief, p.16)

According to Lisa Moore's own testimony regarding the events that happened on February 13, she testified that; (Tr. p.284,



ln. 3-25) she answered the door around 5 p.m. when her friend, Laura, came by. (verbatim) (So a little after five she got off and came over, and I opened up the door and she asked if everything was fine.)

Lisa Moore did not scream for help, nor did she signal to her friend that she needed help. She did not even try to escape, she simply went about getting ready for work. Upon arriving at work she did not call the police and file a report nor did she tell her friends and co-workers that she had been held captive.

Had Mr. Gonzales' counsel put on his alibi witnesses, Lisa Moore's testimony would have had less credibility with the jury if not for counsel's unprofessional determination on guilt based on evidence not in exhibit. This is also true of Exhibit 102 being admitted into evidence to bolster Lisa Moore's testimony.

Defense counsel has performed inadequately in the instant case because it did not try to put on a defense to the charges when witnesses that could refute the testimony of Lisa Moore were not presented based on a letter, other than the handwritten note, Exhibit 102, which counsel felt made the states case in chief.

The fact that the letter relied upon by counsel has never been produced in support of defense counsels claim, nor was it part of the state's discovery or presented at trial, its presumption of existence is highly questionable.

Because of counsel's lack of preparation for trial, Mr. Gonzales was found guilty of Attempted Strangulation, Aggravated Battery, Kidnapping and Domestic Battery, all of which allegedly occurred on February 13, 2008 at or about the same time that Mr. Gonzales claims to have been in Kimberly, Idaho. For alibi testimony to raise a triable issue of fact as to either prong of Strickland the testimony would have to establish that the petitioner's whereabouts at the time the crime was committed. Cunningham v State, 117 Idaho 428, 433, 788 P.2d 243(Ct.App.1990)

Clearly, Mr. Gonzales cannot be in two places at once. Two people, Cindy Cox and Cheyenne Zimmerman, can place Mr. Gonzales in Kimberly, Idaho at or around 5 p.m., the same time that Lisa Moore claims that Mr. Gonzales was in Jerome, Idaho.

Conclusion

Mr. Gonzales believes that he has established that defense counsels performance has fallen below the objectionable standard in **Strickland**, thus making the outcome of the trial unreliable.

The defendant moves this court for its Order adjudging ineffective assistance of counsel and request remand for new trial.

Dated this 7th day of May 2013.

  
Christopher Gonzales

Certificate of Mailing

I hereby state that a true and correct copy of APPELLANT'S CROSS-BRIEF was mailed to:

Dated this \_\_\_\_ day of May 2013.

  
Christopher Gonzales

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U.S. Mail  
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