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## Eby v. State Respondent's Brief Dckt. 39301

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

DANIEL LEE EBY,	)	
	)	
Petitioner-Appellant,	)	NO. 39301
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

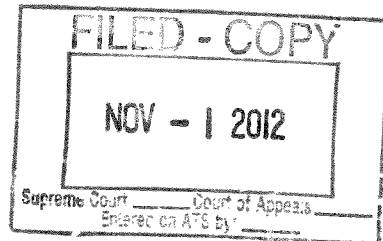
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## STATEMENT OF THE CASE

### Nature of the Case

Daniel Lee Eby appeals from the district court's order denying his petition for post-conviction relief after an evidentiary hearing.

### Statement of Facts and Course of Proceedings

The Idaho Court of Appeals described the facts of the underlying criminal case as follows:

According to the State's evidence, the victim, Mel Evenson, was murdered late in the night of March 25 or early the next morning. On that night, Daniel Eby, Jeremy Schmitz, Cliff Hicks and Evenson were working on cars in a garage belonging to Gerald Smith. Inside the adjacent residence were Smith and several other individuals. While in the garage, Evenson was repeatedly struck in the head with a baseball bat and with a large wrench. His clothing was removed and was then burned in a wood stove in the garage. Evenson's body was wrapped in a tarp and placed in the bed of his own truck. The body was then covered with flattened cardboard boxes, and the truck was abandoned in the countryside.

State v. Eby, 136 Idaho 534, 536, 37 P.3d 625, 627 (Ct. App. 2001).

"It was the prosecution's theory that, on the evening in question, Eby, Schmitz and Hicks believed that Evenson was carrying a substantial amount of narcotics and cash because he had just returned from an out-of-town drug transaction, and the three decided to kill Evenson in order to steal his money and drugs." Id. In statements admitted at the subsequent trial, Eby told detectives that on the night of the murder, he stood guard while Hicks and Schmitz beat Evenson to death, searched his clothes for drugs and money, and then concealed the body. Id. at 539, 37 P.3d at 630.

The state ultimately charged Eby with first degree murder under

alternative theories of felony murder and premeditation, conspiracy to commit robbery, and attempted robbery. Id. at 536, 539, 37 P.3d at 627, 630. A jury found Eby guilty of all charges. Id. at 536, 37 P.3d at 627. The district court imposed a unified life sentence with twenty-five years fixed for first-degree murder, and concurrent lesser sentences for conspiracy to commit robbery and attempted robbery. Id.

On direct appeal, the Idaho Court of Appeals affirmed Eby's convictions for first degree murder and conspiracy to commit robbery, but reversed Eby's conviction for attempted robbery, holding that that offense merged with the conviction for first degree murder under the felony murder theory. Id. at 536-541, 37 P.3d at 627-632.

Eby filed a timely *pro se* petition for post-conviction relief. See Eby v. State, 148 Idaho 731, 733, 228 P.3d 998, 1000 (2010). The district court appointed counsel to represent him on the petition. Id. Over the next several years, Eby's various appointed attorneys failed to amend his petition or otherwise advance Eby's claims. Id. at 733-734, 228 P.3d at 1000-1001. The district court dismissed the petition for inactivity. Id. at 733, 228 P.3d at 1000. The court later denied Eby's I.R.C.P. 60(b) motion for relief from the dismissal order, concluding that I.R.C.P. 60(b) does not apply to I.R.C.P. 40(c) dismissals for inactivity. Id. at 734, 228 P.3d at 1001.

Eby appealed, and the Idaho Supreme Court reversed, holding that I.R.C.P. 60(b) does apply to I.R.C.P. 40(c) dismissals. Id. at 734-738, 228 P.3d at 1001-1005. The Court remanded the case for consideration of whether the

facts presented by Eby constituted grounds for relief in this case. Id. On remand, the district court granted such relief, withdrawing its previously entered dismissal of Eby's post-conviction petition. (R., p.4.)

Through new appointed counsel, Eby filed an amended petition for post-conviction relief with supporting affidavit raising three claims: (1) that he was denied his constitutional right to conflict-free counsel; (2) that there were material facts not previously presented and heard that required a vacating of his conviction in the interest of justice pursuant to I.C. § 19-4901(a)(4); and (3) that his trial counsel was constitutionally ineffective for failing to adequately communicate with him, failing to advise him of his rights, failing to adequately prepare for trial, and for preventing Eby from testifying on his own behalf. (R., pp.6-10; Supp. R.,<sup>1</sup> pp.2-8.) The district court took judicial notice of the underlying criminal case file,<sup>2</sup> ordered that an evidentiary hearing be held, and entertained pre- and post-evidentiary hearing briefing from the parties. (R., pp.13-14, 21-31, 34-48; see 7/5/11 Tr.)

In a memorandum decision, the district court denied Eby's petition for post-conviction relief, concluding that Eby failed to meet his burden to show he

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<sup>1</sup> A Supplemental Clerk's Record with additional documents was prepared after Eby objected to the record. (Supp. R., pp.21-23.)

<sup>2</sup> While the district court took judicial notice of the entire underlying criminal case file, the Idaho Supreme Court has not done the same with regard to this appeal. Missing portions of record are presumed to support decision of trial court. State v. Mowrey, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996).



was entitled to relief. (R., pp.49-59.) Eby timely appealed.<sup>3</sup> (R., pp.60-62.)

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<sup>3</sup> The SAPD was appointed to represent Eby in his appeal. (R., pp.63-65.) However, the SAPD subsequently withdrew from the representation of Eby based on their inability to “find a viable issue for appeal.” (6/7/12 Memorandum In Support of Motion to Withdraw, p. 6; 7/6/12 Order Granting Motion for Leave to Withdraw and to Suspend the Briefing Schedule.) Eby has proceeded in the appeal *pro se*. (See Appellant's brief.)

## ISSUES

Eby states the issues on appeal as:

- A. Did the District Court Error [sic] In Denying Mr. Eby's Conflict of Interest Claim's [sic]?
- B. Did The District Court Error [sic] In Denying Mr. Eby's Ineffective Assistance of Counsel Claim's [sic]?

(Appellant's brief, p.2.)

The state rephrases the issue on appeal as:

Has Eby failed to show error in the district court's denial of his petition for post-conviction relief following an evidentiary hearing?

## ARGUMENT

### Eby Has Failed To Show Error In the District Court's Denial Of His Petition For Post-Conviction Relief Following An Evidentiary Hearing

#### A. Introduction

Eby asserts that the district court erred in denying his petition for post-conviction relief. (See generally, Appellant's brief.) Eby, however, has failed to assign any specific error to the district court and has instead simply repeated his post-conviction claims in his Appellant's brief. (Id.) In any event, the record reveals that Eby failed to meet his burden to show he was entitled to post-conviction relief, and that the district court thus did not err in denying his petition.

#### B. Standard Of Review

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). 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).

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).

C. Eby Is Not Entitled To Post-Conviction Relief

“Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence.” McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); I.C.R. 57(c)).

In this case, the district court held an evidentiary hearing on Eby's post-conviction claims, but concluded that he failed to meet his burden to show he was entitled to relief. (R., pp.49-59; 7/5/11 Tr.) In his statement of issues, Eby asserts that the district court erred in dismissing his post-conviction claims. (Appellant's brief, p.2.) Eby, however, fails to assign any specific error to the district court regarding any of these claims. (See generally, Appellant's brief.) This Court should affirm the district court's denial of Eby's petition on this basis. State v. Walker, 121 Idaho 18, 20, 822 P.2d 537, 539 (Ct. App. 1991) (holding that an appellate court will not search the record for unspecified error nor presume error); see also State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (“When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.”).

In any event, a review of the record reveals that the district court did not err in concluding that Eby failed to meet his burden to show he was entitled to relief on any of his claims.

1. Eby Failed To Show That His Sixth Amendment Right To Conflict-Free Representation Was Violated

The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45 (1931). The right has been accorded “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” Mickens v. Taylor, 535 U.S. 162, 166 (2002) (quoting United States v. Cronin, 466 U.S. 648 (1984)). It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate. State v. Lovelace, 140 Idaho 53, 60, 296, 90 P.3d 278, 285 (2003) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

Where a defendant raises an ineffective assistance of counsel conflict-based claim alleging his counsel’s personal interests directly conflict with counsel’s obligation to provide effective representation, the defendant must demonstrate that a conflict of interest actually affected the adequacy of his lawyer’s performance. Lovelace, 140 Idaho at 61-62, 90 P.3d at 286-287; see also Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (where defendant alleges a conflict based upon his counsel’s simultaneous representation of defendant and the prosecutor’s key witness, defendant must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance). Absent such a showing, a defendant is not entitled to reversal of his conviction. Mickens, 535 U.S. at 173-74; Burger v. Kemp, 483 U.S. 776, 785 (1987).

An actual conflict is defined by its effect on counsel, not by whether there is a “mere theoretical division of loyalties.” Mickens, 535 U.S. at 171, 172 n.5.

"[T]he possibility of conflict is insufficient to impugn a criminal conviction." Dunlap v. State, 141 Idaho 50, 62, 106 P.3d 376, 388 (2004) (citations omitted). An actual conflict will be shown to adversely affect counsel's performance where a link between counsel's deficient performance and the conflict of interest is demonstrated. See Lewis v. Mayle, 391 F.3d 989, 995 (9<sup>th</sup> Cir. 2004); see also United States v. Burns, 526 F.3d 852, 857 (5<sup>th</sup> Cir. 2008) (actual conflict adversely affects counsel's performance when "there was some plausible alternative defense strategy that could have been pursued, but was not, because of the actual conflict.").

Under most circumstances, a conflict of one attorney with an individual is automatically "imputed" to the other attorneys in his or her firm. See State v. Cook, 144 Idaho 784, 792-793, 171 P.3d 1282, 1290-1291 (Ct. App. 2007) (citing Smith v. State, 126 Idaho 106, 110, 878 P.2d 805, 809 (Ct. App. 1994)). Therefore, there is generally a *per se* conflict of interest where attorneys in a single law firm concurrently represent individuals with adverse interests. See Cook, 144 Idaho at 792-793; 171 P.3d at 1290-1291. However, in Cook, the Idaho Court of Appeals held that there is no such *per se* conflict where *different* attorneys within a public defender's office concurrently represent individuals with adverse interests. Id. at 791-794, 171 P.3d at 1289-1292. The Court recognized that "automatically disqualifying a public defender where another attorney in the office has a conflict of interest would significantly hamper the ability to provide legal representation of indigent clients," and that "such concurrent representation by public defenders generally will create no incentive (economic or otherwise) for

diminished advocacy in such cases.” Id. at 794, 171 P.3d at 1292. Instead, such conflict questions should be addressed by trial courts on a case-by-case basis, where the court takes individual situations into consideration to determine whether a defendant’s right to counsel is threatened by competing interests. Id.

In this case, Eby asserted that his Sixth Amendment right to conflict-free representation was violated because he was represented by two deputy attorneys of the Kootenai County Public Defender’s Office, while one of his co-defendants, who made statements to police implicating Eby in the murder, was represented by the Kootenai County Public Defender, who had supervisory authority over the deputies. (R., pp.7-8, 28-29, 34-37.)

However, the district court correctly concluded that Eby failed to show a violation of his Sixth Amendment rights. (R., pp.53-55.) Citing Cook, the district court both recognized that there was no *per se* bar to the Kootenai County Public Defender’s Office’s representation of both Eby and his co-defendant, and conducted an appropriate analysis of the concurrent representation employed in this case. (Id.)

The district court made the unchallenged factual finding that the Kootenai County Public Defender’s Office erected a “Chinese wall”<sup>4</sup> that separated the representations of Eby and his co-defendant. (R., pp.51-52.) When such a “wall” is in place, there is no discussion or exchange of information between attorneys potentially implicated by a conflict. (7/5/11 Tr., p.11, Ls.2-11; p.47, Ls.13-22.)

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<sup>4</sup> At the evidentiary hearing, Eby’s appointed trial attorneys and the Kootenai County Public Defender testified that “Chinese walls” were a common practice of the office at the time of its representation of Eby, but are no longer preferred. (7/5/11 Tr., p.13, L.20 – p.14, L.8; p.25, L.4 – p.26, L.9; p.47, L.7 – p.48, L.7.)

Eby's appointed attorneys testified that there was nothing about the concurrent representation that affected any of the decisions they made representing Eby. (R., pp.51-52.) Eby did not show that the "Chinese wall" was compromised in this particular case, nor did Eby identify any specific adverse effect of the concurrent representation. (R., pp.54-55.)

Because Eby failed to assign specific error to the district court in its rejection of his claim that he was denied conflict-free counsel, this Court should decline to consider this issue on appeal. In any event, the record reveals that the district court properly concluded that Eby failed to show that the Kootenai County Public Defender's Office's concurrent representation of Eby and his co-defendant hampered Eby's counsel's ability to effectively represent him. Eby thus failed to show that his Sixth Amendment rights were violated.

2. Eby Failed To Show That Material Evidence Not Previously Presented Required Vacation Of His Conviction Pursuant To I.C. § 19-4901(a)(4)

A petitioner for post conviction relief may claim, as grounds for relief, "[t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interests of justice." I.C. § 19-4901(a)(4).

In his petition, Eby asserted that there existed such material facts that required a vacating of his conviction, but he did not identify any such facts in either his petition or pre-evidentiary hearing briefing. (R., pp.8, 28-31.) At the evidentiary hearing, Eby shed some light on this claim, testifying that his cousin "alleged [Eby] had a splitting maul, sledge hammer or a pipe wrench and that



[Eby] hit Mr. Evenson with it,” and that this allegation was inconsistent “with the autopsy [which] showed that a baseball bat killed [Evenson.]” (7/5/11 Tr., p.104, Ls.15-18; p.108, Ls.12-20.) In his post-hearing briefing, Eby asserted that “this information was not presented to the jury and in the interests of justice this requires that Mr. Eby’s [p]etition be granted.” (R., pp.37-38.)

In rejecting Eby’s assertion, the district court stated that it was “not persuaded by [Eby’s] testimony that the weapon he was alleged to have used could not have caused the injuries, because Dr. Bernard, the State’s expert at trial, testified that the injuries were all caused by similar weapons.” (R., p.58.) Indeed, Dr. Bernard testified at trial that while “some type of cylindrical object” inflicted the injuries to Evenson’s skull, he could not determine whether the injuries to Evenson’s head and ribs were all inflicted with the same weapon, or even specifically what type of weapon was utilized. (See R., pp.44-46.) The district court continued, “[Eby’s] testimony then, while not previously heard, is not evidence that the jury did not consider at trial.” (R., p.58.)

Further, Eby was convicted under a felony murder theory, which did not require that he directly participated in Evenson’s murder. Eby 136 Idaho at 537-540, 37 P.3d at 628-642 (holding that the admission of inadmissible hearsay statements from Eby’s co-defendant that Eby beat Evenson was harmless because the properly admitted evidence at Eby’s trial “overwhelmingly proves that [Eby] participated in the attempted robbery that culminated in the murder of Evenson”). No evidence or new argument by Eby regarding whether he directly participated in the murder, regardless of how persuasive it was, would require a

vacating of his conviction in the interest of justice where he was ultimately convicted merely of participating in the attempted robbery that culminated in Evenson's murder.

Because Eby failed to assign specific error to the district court in its denial of his I.C. § 19-4901(a)(4) claim, this Court should not consider this claim on appeal. In any event, the record reveals that Eby failed to present evidence of material facts, not previously presented and heard, that requires vacation of his conviction in the interest of justice. Eby has thus failed to show that the district court erred in denying this post-conviction claim.

### 3. Eby Failed To Show Ineffective Assistance Of Trial Counsel

A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)).

"To establish deficient assistance, the burden is on the petitioner to show that his attorney's conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted). To meet this burden "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. "[S]trategic or tactical decisions will not be second-guessed on

appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.” Baldwin, 145 Idaho at 153-54, 177 P.3d at 367-68.

To establish prejudice, a defendant must prove a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. 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).

In his post-conviction petition, Eby raised an ineffective assistance of trial counsel claim that contained several sub-claims: (1) his trial counsel failed to adequately communicate with him; (2) his trial counsel failed to advise him of his rights; (3) his trial counsel failed to adequately prepare for trial; and (4) his trial counsel prevented Eby from testifying on his own behalf. (R., pp.6-10; Supp. R., pp.2-8.) In its response brief, the state argued that each of Eby’s ineffective assistance of counsel sub-claims was either conclusory and unsupported, or disproved by Eby’s written not guilty plea and transcript of the sentencing hearing. (R., pp.23-27.) In reply, Eby did not dispute that his claims were unsupported, but asserted that he would “establish his claims for [post-conviction] relief based upon ineffective assistance of counsel through his [evidentiary hearing] testimony.” (R., pp.29-30.)

At the evidentiary hearing, Eby’s trial attorneys testified that they had limited independent recollection of their representation of Eby. (7/5/11 Tr., p.21, L.24 – p.89, L.11.) However, as summarized by the district court, they also

testified that they had a “regular practice and policy of informing clients of their rights, preparing for trial, explaining legal procedures, and consulting clients with regard to trial and sentencing strategy.” (R., p.57.) The district court specifically found these attorneys’ testimony to be more “substantive and credible” than Eby’s testimony that he “could not remember the proceedings, but he could remember that his attorneys failed to consult with him regarding his rights, the legal procedures, and the strategy at trial and sentencing.” (R., pp.56-57.) Finally, the district court concluded that Eby failed to show how he was prejudiced by any deficiency. (R., p.57.)

In his Appellant’s brief, other than in his statement of issues on appeal, Eby has entirely failed to either assign specific error to the district court in denying his ineffective assistance of trial claim, or even discuss the ineffective assistance of trial counsel claims he raised below. (See generally, Appellant’s brief.) This Court should thus decline to consider this issue. In any event, the record reveals that the district court properly considered and denied Eby’s ineffective assistance of counsel claims.

#### CONCLUSION

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

DATED this 1st day of November 2012



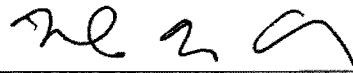
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MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November 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:

DANIEL LEE EBY  
IDOC #56540  
ISCI  
PO Box 14  
Boise, Idaho 38707



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MARK W. OLSON  
Deputy Attorney General

MWO/pm