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## Earl v. State Appellant's Reply Brief Dckt. 39751

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DUAINE FREDRICK EARL,	)	
	)	No. 39751
Petitioner-Appellant,	)	
	)	Minidoka Co. Case No.
vs.	)	CV-2011-697
	)	
STATE OF IDAHO,	)	
	)	
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 MINIDOKA

HONORABLE JONATHAN P. BRODY DISTRICT JUDGE

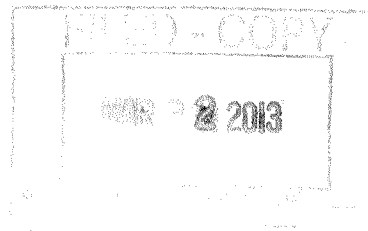
LAWRENCE G. WASDEN Attorney General State of IDAHO

DUAINE FREDRICK EARL 144 W. 100 S. Rupert, Idaho 83350

PAUL R. PANTHER Deputy Attorney General Chief, Criminal LAW Division

NICOLE L. SCHAFER Deputy Attorney General Criminal Law Division P.O. Box 83720 Boise, ID. 83720-0010 (208) 334-4534

Attorneys for Respondent



PROPRIA PERSONA PETITIONER-APPELLANT

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DISTRICT JUDGE

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LAWRENCE G. WASDEN  
Attorney General  
State of IDAHO

DUAINE FREDRICK EARL  
144 W. 100 S.  
Rupert, Idaho 83350

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal LAW Division

NICOLE L. SCHAFER  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, ID. 83720-0010  
(208) 334-4534

Attorneys for  
Respondent

PROPRIA PERSONA  
PETITIONER-APPELLANT

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## STATEMENT OF THE CASE

### Nature of the Case

Duaine Frederick Earl appeals from the district Court's order dismissing his Petition for Post Conviction Relief. Appellant submits this Reply Brief to address the impropriety of the district court and appointed counsel as well as the resulting constitutional deprivations.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in the Appellant's Opening Brief. However they may be expounded upon and repeated briefly in this Reply Brief, but are as well incorporated herein by reference thereto.

## ISSUES

- 1) Did the District Court abuse its discretion by failing to consider recusal and disqualification from hearing the Appellant's Petition because of self-interest, bias or prejudice ?
  
- 2) Did the District Court abuse its discretion by failing to give Petitioner notice of prior employment with the Prosecutor's Office or conduct a hearing concerning objections to the judge's presiding over proceedings ?
  
- 3) Did the District Court violate Appellant's right to access the court when no opportunity was given to object to Judge Brody's hearing the Petition ?
  
- 4) Can appointed Counsel's repeated failures to maintain a proper client-attorney relationship through lack of communication be termed as effective assistance of counsel ?
  
- 5) Did the District Court's presiding over Appellant's Petition unfairly bias and prejudice him and were the proceedings tainted from the onset restricting the Court's ability to conduct the proceedings impartially and fairly ?



## ARGUMENT

### I.

#### The District Court Erred When it Failed to Disqualify Itself Fueling Conflicts of Interest Given to self-Interests Bias and Prejudice.

Mr. Earl argues the district court erred when it failed to disqualify itself from presiding over his Petition. This assertion is based on the fact that Judge Brody was employed by The Minidoka Prosecutor's office as a deputy prosecutor prior to his appointment to the bench and was involved in that capacity in prosecuting this case in opposition to the Appellant. (Appellant's Brief pp. 9-10) This in turn creates a serious conflict of interest supporting recusal. We ask this Court to review this issue as it is ripe for review.

The State's argument does not address this issue. Given the Constitutional Weight of any such assertion, however made, is remarkable. However, no further reply is requested or necessary. Accordingly, Mr. Earl refers this Court back to pages 9-10 of his Appellant's Brief.

### II.

#### The District Court Violated The Appellant's Rights To Access The Courts.

In his Appellant's Brief Mr. Earl argued that prisoners have a constitutional right of access to the courts (Bounds v. Smith, 430 U.S. 817, 821, 97 S.Ct. 1491 (1977) (Appellant's Brief p-8).

Court access must be "adequate, effective and meaningful." *Bounds v. Smith*, *id.* at 822. The higher courts have cited the Due Process Clause, the Equal Protection Clause, the First Amendment and the Privileges and Immunities Clause of Article IV of the U.S. Constitution as the basis for those rights i.e. *Murray v. Giarratano*, 492 U.S. 1' 11 n. 6, 109 S.Ct. 2765 (1989). (Appellant's Brief p-8).

The district court failed to verify that the Petitioner had been informed as to the Court's previous employment with the Prosecutor's Office. In further support of this contention is the fact that the Record, with the exception of court minutes as found at Appellant's Brief p-9, makes no further mention of the Court's prior employment status. This capricious failure placed Mr. Earl in a situation where he was not notified or given an opportunity to file an objection to Judge Brody's presiding over his Petition.

B. The District Court Violated Appellant's Constitutional Right To Access The Courts Guaranteed By The United States And Idaho Constitutions.

The purpose of the right of court access is for vindication of legal rights. Therefore, it should encompass all phases of litigation from beginning to end. As one Court characterized it, court access involves "all the means a defendant or petitioner might require to get a fair hearing from the judiciary...." *Gilmore v. Lynch*, 319 F.Supp. 105, 111 (N.D. Cal. 1970) (emphasis supplied), *aff'd sub nom.*

Meaningful court access "entails not only the drafting of complaints and petitions for relief but also the drafting of responses to motions to dismiss and the drafting of objections to court reports and recommendations" Knop v. Johnson, 977 F.2d 996, 1000 (6th Cir. 1992), cert.denied, 113 S.Ct. 1415 (1993).

As previously asserted in this Reply Brief p-4, there are various Constitutional Amendments together with Article IV. of the United States Constitution the higher courts cite as the basis for rights to access the courts. Therefore, any delay or failure to observe established legal standards governing the courts procedures can be determined to be violative towards a persons ability to properly exercise one's own constitutional right to access the courts.

1) Appellant's Appointed Attorney Failed to Provide Effective Assistance of Counsel.

The attorney appointed to represent the Appellant at his Post-Conviction Proceedings failed to provide effective assistance of counsel where he neglected his obligation to Maintain Communication with him, and furthermore by failing to advise him that or what the Petition lacked in cognizable claims as well as furthering ineffectiveness failing to advise the Petitioner of the fact that he could amend or supplement to his Petition encompassing Constitutional Issues.

The Sixth Amendment guarantees the right to effective assistance of counsel, *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) (Sixth Amendment right to counsel is right to effective assistance of counsel).

Appellant's appointed attorney failed to provide effective assistance by repeated failures to maintain communication & furthering ineffectiveness by neglecting to advise him of Judge Brody's recent years as a former employee with the Minidoka Prosecutor's Office.

The right to effective assistance applies to both retained and appointed counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). The U.S. Supreme Court has established a two-prong test to evaluate ineffective assistance claims. *Strickland v. Washington*, 466 U.S. 668 (1984).

To obtain reversal it must be proven: (1) that counsel's performance fell below an objective standard of reasonableness *Id.* at 687-88. and (2) that counsel's deficient performance prejudiced a person resulting in an unreliable or fundamentally unfair outcome. *Id.* at 687. The need or failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. *Strickland*, 466 U.S. at 697.

2) Appellant's Petition Was Prejudiced From The Onset And Should Be Reversed And Remanded Back To The Lower Court

Due process requires that a judge possess neither actual nor apparent bias. Compare *In re Murchison*, 349 U.S. 133, 136-39 (1955) (due process violated because judge could not free himself from influence of personal knowledge).

If actual or apparent judicial prejudice exists either against or in favor of a party 28 U.S.C. § 144 and § 455 provide assorted mechanisms for the judge's recusal. 28 U.S.C. § 144 (1994) (any district judge shall be disqualified if party to district court proceeding makes and timely files with sufficient affidavit showing personal bias or prejudice); id. § 455(a) (any justice, judge, or magistrate shall disqualify themselves in any proceeding if impartiality might reasonably be questioned).

In this case, evidence that there is a risk of prejudice should be enough. There was no opportunity provided to Appellant for filing an objection or a Motion For Recusal because he was not made aware of the facts until conducting research techniques in analyzing whether or not it would prove to be conducive for & to drafting an appeal brief.

Consequently, the entire process from the beginning, was tainted. Adding an attorney failing his client in more than one instance resulting in deficient and ineffective assistance is supportive in recusal, as well as reversal and remand back to the district court with a different judge and new counsel.

3) In The Interests of justice And Fundamental Fairness Appellant's Claims should Be Given An Opportunity to Be Fairly And Properly Heard.

The Appellant's contentions that the State has violated his constitutional rights as previously argued in Appellant's Brief will be retained and maintained. (Appellant's Brief pp-10-16. The claims are cognizable and can be shaped into a Petition or

1983 action properly.

Accordingly, we ask this court reverse and remand thereby providing this Appellant with the opportunities he should have been exposed to requiring impartiality and fairness.

C. The District Court Violated Appellant's Rights Guaranteed Within The Declaration Of Rights Of The Idaho State Constitution.

All men are by nature free and equal, and possess certain inalienable rights, among which are enjoying and defending life and liberty. i.e. State of Idaho Article I section 1. of the Declaration of Rights.

The Courts of Justice shall be open to every person, and a speedy remedy afforded for every injury of person and right and justice shall be administered without sale, denial, delay or prejudice. i.e. in part, Article I. section 18 Idaho Declaration of Rights.

No person shall be twice put in jeopardy for the same offense nor be compelled in ant criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law. i.e. in part, Article I. section 13. of Idaho State Declaration of Rights.

In this present matter the Appellant is not been provided with the proper tools to defend life and liberty, nor has justice been provided without denial, delay or prejudice, nor has proper due process been observed or provided.

III.

The Appellant Is Entitled To Declaratory Relief And To Correct Any Misrepresentation Made By State Attorney General's Office.

1) Appellant's Criminal offense and subsequent conviction are misrepresented by the attorneys for the respondent. Brief of Respondent p- 1 Statement of facts and course of the proceedings. The fact of the matter is that the Appellant was convicted of statutory rape and pled to the same and not as counsel in opposition depicts.

Rape is characterized as sexual intercourse with a female without her consent. (Black's Law). While statutory rape is described as where the offense is consisting of having sexual intercourse with a person under statutory age.

Whether by omission or intentional, the State misrepresents a fact which tends to cast everything in a truly darkened light.

As well is the misrepresentation that states; Mr. Earl is asserting that he should be granted credit for time served on probation. (Brief of Respondent p-1)

2) On the Contrary, Appellant has made and requests credit for time served in good faith while on parole. Appellant's Brief pp-14 and 18.

IV. CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Earl respectfully requests this Court Reverse and Remand.

DATED this 13 day of March, 2013.

By

Duaine F. Earl  
Duaine F. Earl  
In his Propria Persona

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of March, 2013, I served a correct copy of the foregoing REPLY BRIEF OF APPELLANT, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

Lawrence G. Wasden  
Attorney General  
State of Idaho

Paul R. Panther  
Deputy Attorney General  
Chief, Criminal Law Division

Nicole L. Schafer  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010

By

Duaine F. Earl  
Duaine F. Earl  
PRO-SE  
Petitioner-APPELLANT