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IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT T. ELBERLEY,)

Plaintiff-Appellant,)

v.)

STATE OF IDAHO,)

Respondent.)

NO. 39944

Ada Co. CV-PC-2011-02568

APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE LYNN G. NORTON
District Judge**

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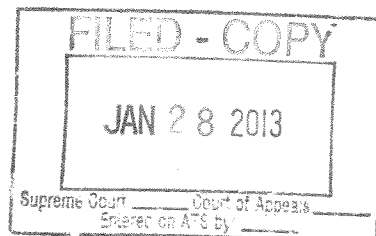


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STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals from the summary dismissal of his petition for post conviction relief.

Statement of the Facts and Course of Proceedings

Mr. Eberley was originally charged with four counts of robbery alleged to have occurred on or about February 6 and/or 7th, 2009. No succinct statement of facts appear in our record, but basically, the allegations were that Mr. Eberley and two co-defendants used physical force to rob four victims, who were 17 year old males, while the victims were in their car near Kuna Cave in rural Ada County. (R. p. 20.) The suspects then fled the scene in their own vehicle and were ultimately stopped by a deputy on Swan Falls Road North of Kuna Cave Road. (R. p. 20.)

Mr. Eberley admitted at the change of plea hearing that he held one of the victims (Joel) down on the ground. (R. p. 56). He said that he put his boot on his back one time (and also told him to stay on the ground) with the intention that he or someone else would take personal property from him. (*Id.*) According to Mr. Eberley, Joel then volunteered to give him four dollars, but Mr. Eberley threw it back down and said he didn't want it, but one of the co-defendants came over and took the money. (R. p. 56-57.)

As explained in the Decision and Order [sic] State's Motion for Summary Dismissal (hereinafter Decision), in the underlying criminal case, Mr. Eberley pled guilty to Robbery and was sentenced to life in prison with the first 20 years fixed.

(R. p. 141.) He filed a Rule 35 motion which was denied and a direct appeal in which his sentence was affirmed. (*Id.*)

He then timely brought a pro se petition for post conviction relief. (R. p. 141.) Conflict counsel was appointed who did not file anything but a notice of appearance in the case. (R. p. 39, 42.) The state filed an answer and a motion for summary dismissal, both of which had the transcripts of the change of plea hearing and sentencing attached. (R. p. 44-75; 76-126.)

A hearing on the state's motion for summary dismissal was held after which the court entered its Decision dismissing the petition as well as a separate order of dismissal. (R. p. 141-148; 149.)

Mr. Eberley filed pro se an untimely notice of appeal which was later dismissed by the Idaho Supreme Court. (R. p. 150, 169.) Mr. Eberley then filed an I.R.C.P. 60(b) motion. (R. p. 167.) New counsel was appointed (R. p. 182.) At a hearing, the parties agreed that former appointed counsel had failed to file the requested appeal and that the correct remedy was to re-issue the order summarily dismissing the petition so that it could be appealed. (Tr. 4/19/2012, p. 1-2.)

The court re-issued the order of summary dismissal, and also entered a judgment. (R. p. 193, 194.) A timely notice of appeal was then filed. (R. p. 196.)

ISSUE

Whether the district court erred when it summarily denied the post conviction relief petition.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED THE POST-CONVICTION RELIEF PETITION

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id.*

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

C. The Claims and the Court's Rulings

Appellant's claims and the court's rulings thereon will be detailed below. The primary claims are intertwined and arise from the sentencing, the relevant portions which will first be described.

At sentencing, the state asked for a life sentence with 25 years fixed. One of the stated reasons for such a significant sentence was an allegation that Mr. Eberley hit the victim (Joel) in the back of the head with a rock. (R. p. 66.) The

prosecutor stated that the four victims all said that Joel was hit on the back of the head with a rock and it is only Mr. Eberley who disputes that. (R. p. 66.)

However, the state ignored the physical evidence which disputed that Joel was hit in the head by a rock. The police report of a detective, which was not given to Mr. Eberley until after he pled guilty, provided as follows:

[Victim] told me that the suspect had a rock in his hand and that he struck the victim on the head. I saw that [victim] had long hair, and asked him to show me the location of the strike on his head. I looked at the scalp and verified the location of the strike by touching the victim's head. He told me that he felt a bump on his head. I felt the victim's head and felt no bump. I looked closely at the scalp around the area indentified as the strike point and was not able to see any abrasions or other marks. Neither did I observe [any] swelling or redness to the area. I photographed the area that [victim] said was the spot he got hit.

R. p. 21.

A second major aggravating factor supporting the prosecutor's sentence recommendation was an allegation that Mr. Eberley told Joel when he was down on the ground to pull his pants down and I'm going to rape you. (R. p. 66.)

Defense counsel made only brief comments at sentencing, but did argue that while Mr. Eberley took responsibility and pled guilty to robbery, he denies he hit anyone with a rock. (R. p. 69.) Defense counsel requested a sentence of five years fixed because he opined that the state of Nevada is going to revoke his parole and get him after he serves his time in Idaho. (R. p. 69.)

During Mr. Eberley's allocution, the court asked him whether he was denying that he threatened to rape Joel, to which he explained that what happened is when the victims were coming down into the cave (apparently prior to the robbery, which happened after the victims left the cave and were in their

car), he was joking around with them. He told the whole group when they were coming down the ladder that he would rape them, he did not later tell Joel that when he was on the ground. According to Mr. Eberley, the victims came down into the cave and they all laughed and joked about it and they stood around the fire with the defendants and smoked a bowl of marijuana. (R. p. 70.)

The court then stated that it had the benefit of reading all three of the PSIs and statements of all the defendants in the case, and they are all consistent in saying that the threat of rape was when Joel was on the ground. The court then said that based on all the PSIs, this crime wouldn't have happened but for Mr. Eberley and that he was the instigator and the other two went along with it and the court believed they actually prevented him from going further in his threats. (R. p. 71.)

The court said that the prosecutor did a good job of arguing and that it agreed with what he said, but imposed a life term with 20 years, as opposed to the requested 25 years, because Mr. Eberley had accepted responsibility by pleading guilty. (R. p. 71.)

The court later brought Mr. Eberley back into the courtroom because it had considered the information from the other PSIs that he had not had an opportunity to read. (R. p. 72.) The court then said it would give them about a five minute recess to read the statements from the other defendants. (R. p. 72.) After court reconvened, the court expressly said that it was from reading all the PSIs that it believed Mr. Eberley was the most culpable of the three. The court then did an addendum to the PSI and added the co-defendants versions of the

events. (R. p. 72.) The court asked Mr. Eberley whether he had anything to say, and defense counsel objected on general principle to the court considering the self serving statements made by other co-defendants. (R. p. 72.)

Mr. Eberley then proceeded with a rambling and disjointed statement where he tried to explain that the co-defendants had switched the whole thing around. He stated that the co-defendants had been friends for life and had apparently been working on their story because the things they are saying he did was really what they did. (R. p. 73.) In response to the court's comment that they were in custody and separate, Mr. Eberley explained that they are in the same tier (MCU) and get to talk to each other. (R. p. 73.)

In response to Mr. Eberley's repeated statement that things did not happen as the co-defendants' stated, the court said that it was focusing on the threat to rape the boy. (R. p. 73.) Mr. Eberley stated:

See, and that's what makes me upset is because the codefendant know that when they were coming down the ladder, that's when I said that. And as a matter of fact, if you would have talked to my sister, who is a stand-up member of the community, she would have told you that's when that was said.

R. p. 73-74.

The court reaffirmed its sentence of life with 20 years fixed. (R. p. 74.)

Appellant/Petitioner's claims, as well as the court's rulings thereon, were described in the district court's decision.

The first claim was that the court erred in not giving him a opportunity to review the co-defendants' PSI statements until after he was sentenced.

1. The court erred in allowing Eberley to read co defendant's PSI after he was sentenced. The court realized immediately after

oral sentencing, that the court had the benefit of all three co defendant's PSI's and that Eberley did not have that benefit. The court thereafter obtained permission from the co defendants to include their statements in Eberley's PSI. The court made an addendum and added the statements. The court returned Eberley to the court room to allow him to read the statements and to respond to them. Following that, the court confirmed the same sentence. Petitioner was given the right to review and rebut the codefendant's statements about the crime.

Petitioner now argues that he should have had more opportunity to review the codefendant statements and to respond to them. Petitioner has not shown how he would now respond, if different than what he responded to at sentencing. Petitioner also had the opportunity to provide the court with a more thorough response in his Rule 35 motion, had he chose to do so. Petitioner has not provided the court with facts that would indicate the sentence should change. At sentencing the court provided him with the opportunity to respond. The court did not err. *Jones v. State*, 125 Idaho 294, 296 (Id.Ct.App.1994); *State v. Chapman*, 120 Idaho 466, 471 (Ct.App.1991).

The court grants the State's motion for summary dismissal on this claim.

Decision, p. 6 (bold in the original). (R. p. 145-146.)

The second claim was a multipart ineffective assistance of counsel claim:

a. Petitioner claims he was coerced into entering a guilty plea. He states his attorney told him he could get a sentence of five plus five and later told him he could get a sentence of three plus seven and that Idaho would send him back to Nevada on his parole hold. The plea agreement entered on the record was that the state would dismiss three counts of robbery and Eberley would plead guilty to the remaining count. The dismissal of the three counts was binding on the state. There was no agreement as to sentencing. Eberley stated the plea agreement was acceptable to him. The court asked Eberley if any other promises had been made to him beyond the plea agreement and he answered "no". Eberley is now making an inconsistent statement. Either he did not tell the truth at entry of plea or he is not telling the truth in his petition. Eberley can not create a material question of fact by contradicting himself. To do so, would allow a petitioner to manipulate the facts to create an issue. At entry of plea, Eberley told the court that no other promises have

been made. The court does not find a material question of fact on this issue.

The court grants the State's motion to dismiss on this claim.

b. Petitioner's claim that a misdemeanor charge of possession of a controlled substance was not dismissed. Petitioner was never charged with this crime. The court grants the State's motion for summary dismissal on this issue.

c. Petitioner's claim that he was not provided a complete copy of discovery. Eberley claims his attorney failed to provide him with transcripts of his jail phone calls. There is no evidence that such transcripts exist. Furthermore, Eberley would have personal knowledge of his own phone conversations. Eberley has failed to raise a material question of fact that his counsel was deficient and that he was prejudiced by not being provided with transcripts of his own phone conversations. The court grants the State's motion for summary dismissal as to this claim.

d. Petitioner claims his attorney failed to file his requested motion to withdraw his plea of guilty. Petitioner claims he wanted his attorney to move to withdraw his guilty plea so he could confront the lies that were told in his co-defendants PSI and to prove that he did not hit anyone in the back of the head. It is not known what he is claiming to be lies told by his codefendants. He wants to prove he did not hit anyone in the back of the head. Eberley read the PSI. He was aware that one of the juvenile victims claimed Eberley hit him in the head with a rock. He knew this before sentencing and he had the opportunity to address it. In his guilty plea he admitted to telling the juvenile victim to stay on the ground and he put his boot on his back and he did that with the intent to take personal property from the victim by fear. Eberley provided a factual basis for his plea to robbery. Eberley has not provided a factual basis that had his attorney made the requested motion that there is a reasonable probability the motion would have been granted, and therefore he has failed to raise a material question of fact on this issue. The court grants the State's motion for summary dismissal as to this claim.

Decision, p. 6-8 (bold in the original). (R. p. 146-148.)

The third claim was that the state withheld discovery:

3. The State withheld discovery. The state agrees that certain items of discovery were not provided until after Eberley had entered

his guilty plea. Specifically Eberley claims he did not receive a copy of Exhibit 3 attached to his petition. The exhibit is a report prepared by Detective Barker. It is also attached to the PSI. The report would not change the outcome in this case. The report largely inculpatates Eberley in the commission of the robbery. The exculpatory information is the detective's observation that he did not witness any physical evidence that the victim was hit in the head with a rock. The court had the benefit of reading the report for sentencing purposes. Eberley's guilty plea and the acceptance of his plea were not based on the allegation that Eberley struck the victim with a rock. Eberley provided information establishing a factual basis that he committed the robbery. Eberley had the benefit of Detective Barker's report at sentencing. Eberley has failed to raise a genuine issue of material fact that this lack of discovery would change the outcome in this case.

BASED upon the foregoing analysis, the State's Motion for Summary Dismissal of Petition for Post-Conviction Relief is granted.

Decision, p. 8 (bold in the original). (R. p. 148)

C. The Court Erred in Summarily Denying the Petition

Appellant asserts that the district court erred when it summarily dismissed the petition for post conviction relief. While the court's rulings will be discussed below, first are a few relevant points which were added at the hearing on the motion to dismiss the instant petition for post conviction relief.

As counsel explained, after the sentencing, Mr. Eberley had been taken back to jail and then was brought back to court. He had just been sentenced to 20 years to life. He was still somewhat in a state of shock. While he had an opportunity to read the statements of the co-defendants, he didn't have an opportunity to investigate in order to rebut those statements. (Tr. 5/12/2011, p. 11.)

Counsel went on by arguing that he should have had a continuance in order to investigate and prove that those statements were lies. He did not see those statements prior, and had he seen them, he would have taken it to trial to show they were false and self serving statements by the co-defendants. Even though he had admitted to the robbery, those statements influenced the sentence. (Tr. 5/12/2011, p. 12.)

As to his allegation that his attorney had promised that he would get a sentence of five years fixed plus five years indeterminate, as counsel explained at the hearing, while he told the court that he was not relying on any other promises at the change of plea hearing, his attorney told him to say that. Thus, an evidentiary hearing is required to determine what counsel had said and what Mr. Eberley had been promised or understood. (Tr. 5/12/2011, p. 13.)

Now to the court's rulings. First, regarding the failure of the attorney to bring a motion to withdraw guilty plea, the court ruled that Mr. Eberley failed to show a reasonable probability that the motion would have been granted. While the court does not specify what standard it was using, Mr. Eberley asserts that since he requested his attorney move to withdraw his guilty plea when he heard the prosecutor asking for 25 to life, the standard is for a motion to withdraw guilty plea before sentence is imposed. (R. p. 14.) This means the more lenient just reason standard applies rather than the manifest injustice standard normally encountered with this type of issue. As explained by the Court of Appeals in *State v. Acevedo*, 131 Idaho 513 (Ct. App. 1998):

A motion to withdraw a guilty plea is governed by Rule 33(c) of the Idaho Rules of Criminal Procedure. Pursuant to Rule 33(c), a

motion to withdraw a guilty plea generally "may be made only before sentence is imposed" However, the right to withdraw a guilty plea before sentencing is not absolute; a defendant must demonstrate a "just reason" for withdrawing the plea. Once a defendant meets this burden, the state can avoid the granting of the motion by demonstrating that it will be prejudiced by the plea withdrawal. Even if the state will suffer no prejudice from a defendant's plea withdrawal, a motion to withdraw may still be denied if the defendant fails to present and support a plausible reason for granting the withdrawal. In either situation, the defendant has the burden of proving that the plea should be withdrawn. We review the denial of a motion to withdraw a guilty plea under an abuse of discretion standard.

Id. p. 516.

As applied to our case, Appellant asserts that there is a just reason that would allow withdrawal of his guilty plea had such a motion been brought before sentence was imposed. As shown above, prior to the sentence being imposed, when the state made its sentencing argument, Mr. Eberley learned that it would not be requesting a sentence anywhere near the five year sentence that his attorney was requesting (and had assured him he would receive), but was requesting a life sentence with 25 years fixed, based in part on its claim that Mr. Eberley hit Joel in the head with a rock. At the time he pled guilty, Mr. Eberley had not been given the proof to dispute this claim, which was the police report which seriously challenged the veracity of that claim since it was inconsistent with the physical evidence.

Also at sentencing, Mr. Eberley learned that the state was requesting such a significant sentence because of the allegations that he had threatened to rape Joel. Prior to the sentence being imposed, he also learned that the court

based its belief that he was the most culpable defendant on the statements of the co-defendants in their PSIs which he had never seen.

Accordingly, had Mr. Eberley's attorney brought a motion to withdraw guilty plea prior to the imposition of sentence, Mr. Eberley's desire to go to trial so that he could confront the undisclosed co-defendant statements being used against him would constitute a just reason.¹ His desire to go to trial would also be based on his desire to confront on cross examination the allegations of him hitting Joel with a rock because it was contrary to the physical evidence, and he was not aware of the existence of the police report showing this until after he pled guilty.

While these points of contention may not have changed whether or not Mr. Eberley was guilty of robbery, they were certainly relevant to the sentence that would be imposed for it, and the prosecutor and court considered them to be aggravators. Thus, a desire to be able to challenge the statements at trial (that he was unable to meaningfully challenge at sentencing) in an effort to receive a shorter sentence is a legitimate reason to go to trial and a just reason to allow withdrawal of the guilty plea.

Additionally, had counsel moved to withdraw the guilty plea, Mr. Eberley could have further explained that he had actually been promised a five year sentence by the attorney but was told by the attorney not to admit this to the judge at his change of plea hearing.

¹ His attorney did not contemporaneously object to the court's use of these statements, counsel stood silent and let the court use them against Mr. Eberley, and only objected after the court conceded error.

Finally, had counsel moved to withdraw the guilty plea prior the sentence being imposed based on the court's reliance on the undisclosed statements of the co-defendants, even if the court denied the motion, the court would have been alerted to its error prior to sentence being imposed. Had this happened, at the very least the court would have allowed him to see the co-defendants statements prior the sentence being imposed, and may have allowed a continuance in order for Mr. Eberley to attempt to refute them, rather than the five minutes he received. As he tried to explain, his sister, who was present at the sentencing but apparently not when he was returned to court, had valuable information about when he made the rape comment. (R. p. 69-70.)

So in our situation, the post conviction claim does not actually require that the motion to withdraw guilty plea be granted, because if it was merely made, it would have at least prevented the court from sentencing Mr. Eberley based on undisclosed statements which blamed him. Had the motion simply been made then appropriate argument could have been made and perhaps evidence produced (the sister) before sentence was imposed, rather than Mr. Eberley himself being left with the unrewarding task of trying to convince a court to change an already imposed sentence.

Another claim in the post conviction was that the court erred in only allowing Mr. Eberley to read the co-defendants' PSI statements after sentence was imposed. However, since the analysis of this issue is contained in the analysis above, Appellant will not unnecessarily repeat it but will simply incorporate it for this claim. Appellant will add, however, that the cases which the

district court cites to support its ruling does nothing of the sort. The district court cites to *Jones v. State*, 125 Idaho 294 (Ct. App. 1994), but that case concerned a claim that the district court failed to investigate whether the PSI had been reviewed by the defendant. Our case concerns the district court relying on information not contained in the report or available to the defendant and only giving him an opportunity to do so after it was too late.

The second case the court cites is *State v. Chapman*, 120 Idaho 466 (Ct. App. 1991), which stated:

Provided that a defendant is afforded a full opportunity to present favorable evidence and to explain and rebut adverse evidence, and a reasonable opportunity to examine all of the materials contained in the PSI, the defendant and the court can be assured of the reliability and the fairness of the conclusions presented therein.

Id., p. 471 (internal citations omitted).

This case does not help the court because it did not give the defendant a reasonable opportunity to examine all the materials it relied on. Rather, the court only gave him an opportunity after it had made up its mind and after he was sentenced and when he did not have his witness available.

The court also attempted to justify the procedure used when after the sentence was confirmed, it commented that the statements of the victims support the version of facts that they (the court and the prosecutor) think exist. (R. p. 74.) However, this ignores the court's earlier statement that it was statements of the co-defendants that led it to believe that he was the most culpable of the three defendants. (R. p. 72.) Furthermore, it ignores that a claim made by all of the victims was disproved by the physical evidence, to wit, the rock strike. In other

words, just because the victims all claim something claim it does not make it true. In short, the procedure used with the PSI does not give any sort of assurance of reliability or fairness.

Next, the claim regarding the state's withholding of discovery (the police report regarding the lack of physical evidence of a rock strike) is inextricably intertwined with the claim regarding the motion to withdraw guilty plea. Accordingly, it will not be independently discussed but that argument incorporated herein.

The court also dismissed Mr. Eberley's claim that his attorney failed to provide him with the transcripts of his recorded jail phone calls. The court misses the point when it simply ruled that there were no transcripts and in any event, Mr. Eberley knew what was in them. As explained in the pro se petition, Mr. Eberley said that he repeatedly requested the transcripts of his jail phone calls and that his attorney said that Mr. Eberley would have to pay to have them prepared (even though he was indigent). (R. p. 9.) Nor did he want them to learn what was in them, because he said what was in them. While the purpose of the transcripts is somewhat unclear, it appears Mr. Eberley wanted them for a pre-post conviction attack on his attorney because they showed he embarrassed his attorney in a phone call, after which his attorney did nothing but coerce him into pleading guilty. (R. p. 13.)

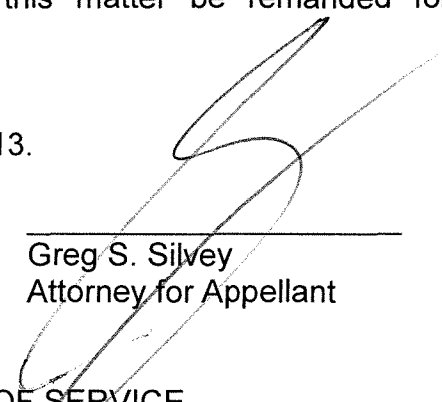
Finally, the court summarily dismissed his complaint that a misdemeanor charge was not dismissed, ruling that he had never been charged with one. But this is not correct, he was charged with a misdemeanor possession of a

controlled substance in an amended complaint. (R. p. 18.) While the state answered that they did not present it to the grand jury, not further being charged is not the same as having a charge dismissed.

CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's summary denial of the post conviction petition be reversed and that this matter be remanded for an evidentiary hearing.

DATED this 28th day of January, 2013.



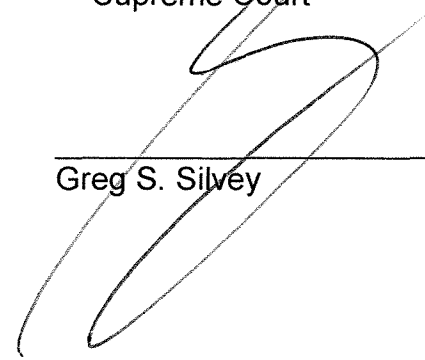
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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