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Escobedo v. State Appellant's Brief Dckt. 40276

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

OMAR ESCOBEDO,)	
)	NO. 40276
Petitioner-Appellant,)	
)	TWIN FALLS COUNTY
v.)	NO. CV 2012-718
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
_____)	

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

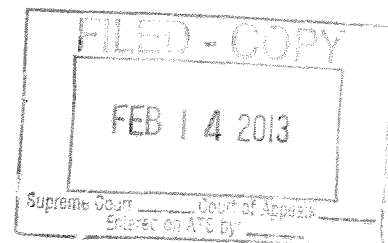
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STATEMENT OF THE CASE

Nature of the Case

Omar Escobedo appeals from the district court's judgment granting the State's motion for summary dismissal of his verified petition for post-conviction relief. He asserts that the district court erred when it summarily dismissed his claim that his appellate attorney was ineffective for either failing to provide him with a copy of the Idaho Court of Appeals' opinion in his case within twenty-one days of its issuance or file a petition for review, thereby depriving him of the opportunity to file a petition for review and exhaust all of his state court remedies on direct appeal, because the claim presented a genuine issue of material fact.

Statement of the Facts and Course of Proceedings

Omar Escobedo filed a verified petition for post-conviction relief (*hereinafter* Petition) following an unsuccessful appeal from his convictions for lewd conduct and sexual abuse of a child under the age of sixteen, for which a sentencing enhancement under Idaho Code § 19-2520G was imposed. (R., pp.5-29.) Mr. Escobedo was found guilty of the criminal charges after a jury trial (R., pp.314-15), and admitted to the facts necessary for the enhancement. (R., pp.315-16.) His convictions were affirmed on appeal in an unpublished opinion of the Idaho Court of Appeals. *State v. Escobedo*, 2011 Unpublished Opinion No. 500 (May 31, 2011) (*hereinafter* Opinion). Both at trial and on appeal Mr. Escobedo was represented by Dan Brown of Fuller Law Offices. (Opinion; R., pp.208-09.)

Mr. Escobedo's Petition and attached affidavit raised a large number of claims, only one of which is relevant on appeal. That claim was set forth as follows:

Counsel finally sent me a copy of the Court of Appeals Opinion, but it was too late to file a Petition for Review, due to the fact my 21 day deadline to file for review or rehearing had expired¹ (Prejudice/Deficient Performance) and this did not allow me to exhaust my State remedies.

(R., p.27.)

The State then filed a motion for summary dismissal of Mr. Escobedo's entire Petition, along with a supporting brief providing argument as to the claims enumerated as 9(a)(1) – (7) and 9(b)(1) – (12).² The State did not address the exhaustion claim in its brief providing reasons for dismissing specified claims. (R., pp.69-83.)

Mr. Escobedo elaborated on the exhaustion claim in his response to the State's motion for summary dismissal, explaining, "Counsel failed to file [a] petition for review and rehearing in appeal. Only after the deadline to file did he mail me the unpublished 2011 opinion no. 500, Docket No. 37050 which has also caused me prejudice" (R., p.130.) In support of this claim, he attached prison mail logs showing that his attorney did not send him any mail within the twenty-one days following issuance of the Opinion on May 31, 2011. (R., p.147 (Mr. Escobedo's prison mail log showing no mail from Dan Brown or Fuller Law Offices between October 8, 2010, and July 6, 2011).)

The district court did not address the exhaustion claim in its order granting the State's motion summarily dismissing all but one³ of the claims identified in the State's

¹ Idaho Appellate Rule 118(a), in relevant part, provides, "Any party to a proceeding aggrieved by opinion or order of the Court of Appeals may physically file a petition for review with the Clerk of the Supreme Court within twenty-one (21) days after the announcement of the opinion or order" I.A.R. 118(a).

² Mr. Escobedo's Petition contains two separate claims labeled as 9(b)(12). (R., p.16.) The State recognized this error, and sought summary dismissal of both claims. (R., p.82.)

³ On one claim, alleging ineffective assistance of counsel with respect to failure to object to the imposition of an unlawful sentence on Count II, the parties stipulated to entry of an amended judgment imposing a lawful sentence. (R., pp.373-74.)

brief in support of its motion for summary dismissal.⁴ (R., pp.341-70.) Mr. Escobedo filed a timely Notice of Appeal from the district court's judgment of dismissal. (R., p.376.)

⁴ Given the sheer number of claims and the fact that appointed post-conviction counsel failed to file an amended petition for post-conviction relief (or a response to the State's motion for summary dismissal, for that matter, leaving Mr. Escobedo to file his own), it is not surprising that the district court failed to address one of the claims.

ISSUE

Did the district court err when it summarily dismissed Mr. Escobedo's exhaustion claim?

ARGUMENT

The District Court Erred When It Summarily Dismissed Mr. Escobedo's Exhaustion Claim

Mr. Escobedo asserts that the district court erred when it summarily dismissed his exhaustion claim because he established a *prima facie* case under both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984), thereby creating a genuine issue of material fact as to the claim. Specifically, Mr. Escobedo provided uncontroverted evidence that his appellate attorney failed to provide him with a copy of the Opinion within twenty-one days of its issuance or file a petition for review, thereby preventing him from exhausting all of his state court remedies on direct appeal.

In order for a state court prisoner to be eligible for federal *habeas corpus* relief, that prisoner generally must have “exhausted the remedies available in the courts of the State” 28 U.S.C. § 2254(b)(1)(A). “A petitioner is deemed to have exhausted state remedies if he makes a fair presentation of his federal claims to the state courts. Fair presentation requires that a state’s highest court has ‘a fair opportunity to consider [an appellant’s constitutional claim] and to correct that asserted constitutional defect.’” *Lounsbury v. Thompson*, 374 F.3d 785, 787 (9th Cir. 2004) (citations omitted) (brackets in original).

The Ninth Circuit has considered what constitutes exhaustion of state court remedies in Idaho. In *Roberts v. Arave*, 847 F.2d 528 (9th Cir. 1988), the petitioner argued that his failure to seek review by the Idaho Supreme Court from an Idaho Court of Appeals opinion did not constitute a failure to exhaust all available state court remedies. He provided three arguments that he had satisfied the exhaustion requirement: (1) appealing to the Idaho Court of Appeals was sufficient “because the

Idaho Supreme Court exercises limited and discretionary jurisdiction”; (2) “the Idaho Supreme Court actually was presented an opportunity to pass upon the merits of his case because he initially appealed the trial court’s denial of post-conviction relief directly to that court” which then assigned the matter to the Idaho Court of Appeals; and (3) because the Idaho Supreme Court had the power to review the decision on its own motion and did not do so. *Roberts*, 847 F.2d at 529-30.

The court disposed of the first two arguments by explaining that they were foreclosed by its recent decision in *McNeeley v. Arave*, 842 F.2d 230 (9th Cir. 1988). *Id.* at 529. Rejecting the third argument, the court explained, “We cannot assume that the Idaho Supreme Court has rejected Roberts’ constitutional claim simply because it has failed to exercise its extraordinary power to review his case on its own motion, with no petition to call attention to the issues subject to exhaustion.” *Id.* at 529-30. It is clear that, in Idaho, a person who fails to file a petition for review with the Idaho Supreme Court following a decision by the Idaho Court of Appeals cannot be said to have satisfied the exhaustion requirement necessary to receive federal *habeas* relief.

The affidavit attached to Mr. Escobedo’s Petition contends that his appellate attorney failed to provide him with a copy of the Idaho Court of Appeals’ opinion within twenty-one days, thereby depriving him of the opportunity to seek review with the Idaho Supreme Court and causing him prejudice. (R., p.27.) In an affidavit attached to his response to the State’s motion for summary dismissal, Mr. Escobedo elaborated on the claim, explaining that his attorney failed to file a petition for review or provide him with a copy of the Opinion within the time required for filing a petition for review. (R., p.130.) Thus, Mr. Escobedo presented a *prima facie* case in support of his exhaustion claim

because it satisfied both prongs – deficient performance and prejudice – required under *Strickland*. As such, the district court erred when it summarily dismissed this claim.

CONCLUSION

For the reasons set forth herein, Mr. Escobedo respectfully requests that this Court vacate the judgment of dismissal with respect to his exhaustion claim, and remand this matter to the district court for an evidentiary hearing on that claim.

DATED this 14th day of February, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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SJH/ns