7-2-2013

# Navarro v. State Appellant's Brief Dckt. 40469

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| HECTOR NAVARRO,<br><br>Petitioner-Appellant,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent. | ) | S. Ct. No. 40469<br>Canyon Co. Case CV-2009-4225 |

# OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE RENAE J. HOFF
Presiding Judge


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### A. Nature of the Case

This is an appeal from the district court's judgment denying Mr. Hector Navarro's petition for post-conviction relief following an evidentiary hearing.

### B. General Course of Proceedings

#### 1. Underlying criminal proceedings

In November 1995, Mr. Navarro's thirteen year old cousin discovered she was pregnant and accused Mr. Navarro of raping her while he was staying with the family the previous summer at the age of eighteen. Pre-Sentence Report ("PSI")[1] p. 1-2. On February 14, 1996, the state accused Mr. Navarro of committing lewd and lascivious conduct with the cousin. R. (34865)[2] p. 5-6. On August 20, 1996, the state accused the cousin's father – the brother of Mr. Navarro's mother – of committing lewd and lascivious conduct with the cousin from 1989 to 1996. Tr. (40469) p. 52, p. 22 - p. 53, ln. 25. The case against the father was dismissed at the preliminary hearing. *Id.* at p. 54, ln. 4-13.

In November 1999, DNA testing revealed that Mr. Navarro "cannot be excluded of the biological father" of the cousin's child and the "probability of paternity is 99.99% as compared to an untested, *unrelated* man of Hispanic population." Exhibit 2; Tr. (40469) p. 72, ln. 9-19. An arrest warrant was finally served on Mr. Navarro and, on May 15, 2007, he appeared in court. R.

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[1] The PSI prepared in the underlying criminal case is an exhibit in this appeal. R. (40469) 109.

[2] This Court, like the district court, judicially notice the record and transcripts from the underlying criminal case. Order Re Judicial Notice, 7/2/2013. Citations in this brief will be accompanied by their respective docket numbers.

(34865) p. 53. On September 28, 2007, Mr. Navarro pled guilty to lewd conduct in exchange for the state's recommendation that it would stand silent at sentencing other than to recommend that the sentence imposed run concurrent with a term of confinement Mr. Navarro was then serving in Texas. Tr. (34865) p. 4, ln. 18 - p. 5, ln. 8. Trial counsel informed the district court that the factual basis for the plea was that "the alleged victim says that it occurred, and then there was a child [born] and DNA testing that's 99.9 percent matched to my client." *Id.* at p. 14, ln. 3-9. Mr. Navarro acknowledged that he had reviewed the DNA testing and that it was his DNA. *Id.* at p. 14, ln. 10-17. The district court advised Mr. Navarro if he pled guilty, he would be telling the court that he engaged in lewd conduct with a thirteen year old. *Id.* at p. 14, ln. 19-23. The district court inquired "is that what you did" to which Mr. Navarro responded "Yes, Ma'am." *Id.* at ln. 23-24. The following exchange then occurred:

District Court: Were you engaging in that contact to have sexual gratification for yourself?
Mr. Navarro: No, ma'am.
District Court: Did you not have any sexual desire when you engaged in these acts upon this thirteen-year-old?
Mr. Navarro: Not really.
District Court: If you didn't have sexual desire, why did you do it?
Mr. Navarro: I can't answer that.
District Court: Well, was it to appeal to her sexual desires?
Mr. Navarro: I don't think so.
District Court: Well, I can't accept your plea of guilty if you don't admit that. Do you understand that?
Mr. Navarro: Yes, ma'am.
District Court: Do you need more time to think about it?
Mr. Navarro: No, ma'am.
District Court: Well, were you appealing or your sexual desires or hers?
Mr. Navarro: Mine.
District Court: And are you just saying that to go forward or is there truth in that?
Mr. Navarro: No. There's truth in it.
District Court: Why did you deny at first when I asked you?
Mr. Navarro: I don't know.

*Id.* at p. 15, ln. 6 - p. 16, ln. 14.

The district court accepted Mr. Navarro's plea and later sentenced him to a unified term of twenty-five years with a minimum period of confinement of twelve and one half years, concurrent with his Texas sentence. *Id.* at p. 16, ln. 19-22; p. 26, ln. 20-25.

**2. Post-conviction proceedings**

Following his sentencing hearing, Mr. Navarro discovered the cousin's father (his uncle) had been accused of sexual contact with the same alleged victim during the same period. Tr. (40469) p. 26, ln. 19 - p. 27, ln. 10. On April 14, 2009, Mr. Navarro filed a pro se petition for post-conviction relief and counsel was appointed to represent him. R. (40469) p. 5-15, 53. The state filed a motion for summary disposition and, in opposition, Mr. Navarro argued he had presented an issue of fact as to whether the prosecuting attorney's failure to disclose that the alleged victim had accused her father of the same offense during the same time frame violated due process under *Brady v. Maryland*, 373 U.S. 83 (1963). R. 70. Mr. Navarro also contended that he received ineffective assistance of counsel due to counsel's failure to discover the same accusation. R. 70-71. At the hearing on the state's motion, Mr. Navarro clarified that he was withdrawing the claims presented in the pro se petition, which were not addressed in his opposition to summary disposition. R. 77; Tr. (40469) p. 14, ln. 22 - p. 15, ln. 15. The district court then set an evidentiary hearing to address those claims. Tr. (40469) p. 16, ln. 16-22.

At the evidentiary hearing, the district court took "judicial notice of the underlying criminal file . . . and its contents, and I'm taking judicial notice of the change of plea and sentencing transcripts." Tr. (40469) p. 21, p. 11-14. The district court also took judicial notice of portions of the file relating to criminal charges against the cousin's father, including the

criminal complaint. *Id.* at p. 21, ln. 14 - p. 22, ln. 6; p. 52, ln. 22 - p. 53, ln. 4. Mr. Navarro testified that he pled guilty even though he is innocent because his attorney told him there would be no way to win at trial. *Id.* at p. 26, ln. 4-18. Mr. Navarro testified that he discovered that his cousin had accused her father while in prison following his sentencing. *Id.* at p. 26, ln. 19 - p. 15. Mr. Navarro testified that he has a identical twin who lived in the area in 1996. *Id.* at p. 28, ln. 22 - p. 29, ln. 25. Mr. Navarro testified that if he had known that somebody else had been charged with lewd conduct and that his brother would carry his DNA, he would have taken the case to trial. *Id.* at p. 31, ln. 2-9.

The attorney who handled Mr. Navarro's prosecution testified that she had been unaware of the criminal case against the cousin's father at the time. *Id.* at p. 55, ln. 13-16. She agreed that the case involved the same victim and that it involved a continuing course of conduct between 1989 and 1996. *Id.* at p. 53, ln. 18-25. The prosecutor thus testified that had she been aware of the case, she would have disclosed it in discovery as impeachment evidence. *Id.* at p. 55, ln. 17 - p. 56, ln. 1. Trial counsel testified that he did not recall being aware of the accusation against the cousin's father and that he would have expected the state to disclose such an accusation in discovery as material and potentially exculpatory. *Id.* at p. 69, ln. 13 - p. 70, ln. 17. Trial counsel did not recall whether Mr. Navarro had a twin brother but agreed the discovery indicated that there was. *Id.* at p. 70, ln. 23-25.

As to Mr. Navarro's *Brady* claim, the district court found:

> in looking at the record as a whole, as I am required to do – and I cite [*United States v. Agurs*, 427 U.S. 97 (1976)] I look at what evidence was omitted and does that omitted evidence create a reasonable doubt that would not otherwise be there. If no reasonable doubt about guilty, whether or not the additional evidence is considered, then there's no justification for a new trial.

> And I conclude that the evidence in this case that the defendant is relying on was not material and, in relation to the victim, was impeaching.
>
> The defendant has therefore failed to meet his burden on the *Brady* violation.

Tr. (40469) p. 94, ln. 4-24. With respect to Mr. Navarro's claim of ineffective assistance of counsel, the district court noted trial counsel testified that additional DNA testing can be a double edged sword and that Mr. Navarro shared "half a blood line" with the cousin's father. Tr. (40469) p. 95, ln. 9-19. The district court also found that trial counsel's advice to plead guilty was competent in light of the DNA test. Tr. (40469) p. 96, ln. 1-9. The district court concluded that Mr. Navarro failed to show that he was prejudiced by counsel's failure to discover the case against the cousin's father because he admitted guilt during the course of his change of plea. Tr. (40469) p. 97, ln. 1-12. The district court denied post-conviction relief. This appeal follows.

## III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in denying Mr. Navarro's petition for post-conviction relief because he established that the prosecutor's failure to disclose the case against the cousin's father violated due process?

2. Did the district court err in denying Mr. Navarro's petition for post-conviction relief because he established that he received ineffective assistance of counsel?

## IV. ARGUMENT

### A. Pertinent Legal Standards

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Mendiola v. State*, 150 Idaho 345, 348, 247 P.3d 210, 213 (Ct. App. 2010). An applicant is entitled to post-conviction relief when

he proves his allegations by a preponderance of the evidence. I.C. § 19–4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990); *Mendiola*, 150 Idaho at 348, 247 P.3d at 213. When reviewing a decision denying post-conviction relief after an evidentiary hearing, this Court will disturb the lower court's factual findings if they are clearly erroneous and exercises free review of the district court's application of the relevant law to the facts. *Mendiola*, 150 Idaho at 348, 247 P.3d at 213.

### B. The District Court Erred in Denying Mr. Navarro's Petition for Post-Conviction Relief Because He Established That the Prosecutor's Failure to Disclose the Case Against the Cousin's Father Violated Due Process

The state failed to disclose to Mr. Navarro that the same alleged victim of his crime had accused her father – a person with whom he shared a bloodline – of having sexual contact with her during the same time frame. In addition to the impeaching nature of this evidence, the existence of Mr. Navarro's uncle as an alternate perpetration places the DNA test's conclusion regarding the probability of paternity with respect to another "unrelated" male in a completely different light. In light of the significance of the withheld evidence and the limited benefits Mr. Navarro derived from the plea offer, there is no reasonable probability that if the evidence had been disclosed to the defense, Mr. Navarro would have insisted on going to trial. Accordingly, the district court erred in denying Mr. Navarro's petition for post-conviction relief.

The prosecution's suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *State v. Gardner*, 126 Idaho 428, 432, 885 P.2d 1144, 1148 (Ct. App. 1994). The duty to disclose applies even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Gardner*, 126 Idaho at 432, 885 P.2d at 1148. Moreover, the rule encompasses evidence unknown

to the prosecutor and, thus, the individual prosecutor must learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police, in order to comply with *Brady*. *Strickler*, 527 U.S. at 280-81; *see also Agurs*, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor"). Due process does not require the prosecution to disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004); *Roeder v. State*, 144 Idaho 415, 418, 162 P.3d 794, 797 (Ct. App. 2007).

Evidence is material for purposes of the prosecutor's duty to disclose if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Strickler*, 527 U.S. at 280; *see also Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995). On a *Brady* challenge to a guilty plea, the test of materiality ( i.e., prejudice) is whether there is a reasonable probability that, but for the state's failure to produce the information, the defendant would not have entered the plea but instead would have insisted on going to trial. *Roeder*, 144 Idaho at 418, 162 P.3d at 797; *Gardner*, 126 Idaho at 436, 885 P.2d at 1152. The *Roeder* Court explained the inquiry as follows:

> We employ an objective assessment, based in part on the persuasiveness of the withheld information, as to whether the particular defendant and his counsel would have insisted on going to trial. *Gardner*, 126 Idaho at 436, 885 P.2d at 1152. This inquiry is similar to the prejudice analysis in an ineffective assistance of counsel claim where the defendant's chances of success at trial—in the absence of counsel's errors—"is a factor a court may use when determining the plausibility of the defendant's claim that those errors played a significant role in the decision to plead guilty." *See McKeeth v. State*, 140 Idaho 847, 852, 103 P.3d 460, 465 (2004) (emphasis in original); *Gardner*, 126 Idaho at 436 n. 9, 885 P.2d at 1152 n. 9.

*Roeder*, 144 Idaho at 418-19, 162 P.3d at 797-98.

The Court thus evaluated "whether a reasonable defendant in [the petitioner's] position, after obtaining the withheld information, would be convinced that an acquittal (or a conviction for a lesser offense) was a realistic possibility which ought not be foreclosed by a guilty plea." *Id.* at 419, 162 P.3d at 798. The Court also held that "any benefit derived by [the petitioner] from the guilty plea is a significant factor inasmuch as a plea may be heavily motivated by reduced exposure to additional charges and criminal penalties." *Id.*

Here, in exchange for Mr. Navarro's plea, the state did no more than agree to recommend the sentence be concurrent with Texas and to stand silent. Because Mr. Navarro only derived a limited benefit from the plea agreement, he need show that the withheld evidence held less significance than in a case where the defendant derived significant benefit by way of reduced or dismissed charges and favorable sentencing recommendations.

Further, absent knowledge regarding the accusation against the father, Mr. Navarro faced his cousin's accusation and seemingly irrefutable proof that he fathered her child. The accusation against the father weakens both pieces of the state's evidence. First, as the young cousin who had moved out of state, Mr. Navarro was a far safer target on whom to pin the pregnancy than the father. Second, the DNA test's conclusion specifically compared Mr. Navarro to unrelated males of Hispanic origin. Thus, the possibility that Mr. Navarro's uncle fathered the child places significant doubt on the DNA's conclusion of 99.9% probability of paternity. A reasonable defendant in Mr. Navarro's position would have been convinced that an acquittal was a realistic possibility that should not have been foreclosed by a guilty plea.

In light of the limited benefit Mr. Navarro derived from the plea agreement and evidentiary significance of the withheld evidence both as impeachment and exculpatory evidence,

there is a reasonable probability that if the evidence had been disclosed to the defense, Mr. Navarro would have insisted on going to trial. The district court therefore erred in denying Mr. Navarro's petition for post-conviction relief.

### C. The District Court Erred in Denying Mr. Navarro's Petition for Post-Conviction Relief Because He Established That He Received Ineffective Assistance of Counsel

The right of a criminal defendant to counsel during trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, (1963); *Milburn v. State*, 130 Idaho 649, 652, 946 P.2d 71, 74 (Ct. App. 1997). Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *Padilla v. Kentucky*, 559 U.S. 356, ___, 130 S.Ct. 1473, 1480-81 (2010). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007); *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). A defendant claiming ineffective assistance of counsel will prevail if he shows that (1) counsel's performance was deficient and, that (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

A defendant meets the deficiency prong when counsel's performance falls below an objective standard of reasonableness. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As a general matter, this Court will not attempt to second-guess counsel's strategic and tactical choices. *State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). Nonetheless, this rule does not apply to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or

other shortcomings capable of objective evaluation. *Id.* The prejudice prong is met when the defendant shows there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Mitchell,* 132 Idaho at 277, 971 P.2d at 730.

The longstanding test for determining the validity of a guilty plea in the context of a ineffective assistance of counsel claim is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Hoffman v. State*, 153 Idaho 898, 905, 277 P.3d 1050, 1057 (Ct. App. 2012). The inquiry involving counsel's advice to plead guilty often turns upon the likelihood that discovery of an overlooked defense or exculpatory evidence would have led counsel to change his or her recommendation as to the plea or changed counsel's prediction as to the outcome of a trial. *Hill*, 474 U.S. at 59–60; *Hoffman,* 153 Idaho at 905, 277 P.3d at 1057. A post-conviction petitioner can obtain relief by demonstrating that a decision to not plead guilty would have been rational under the circumstances. *Padilla,*__ U.S. at __, 130 S.Ct. at 1485; *Hoffman,* 153 Idaho at 905, 277 P.3d at 1057.

Even if the state was not obliged to disclose that Mr. Navarro's alleged victim accused her father, trial counsel had a duty to discover that information, especially considering trial counsel's testimony that he had access to the father's old criminal case. *See* Tr. (40469) p. 79, ln. 10-20. The district court found that trial counsel's advice to plead guilty was competent in light of the DNA test. However, as discussed above, the existence of Mr. Navarro's uncle as an alternate perpetrator places the DNA test's conclusion regarding the probability of paternity with respect to another "unrelated" male in a completely different light. Had counsel discovered the information

at issue, he could have made an intelligent choice as to whether to secure further DNA testing or simply argued the jury should disregard the DNA test's results since it only applied to "unrelated" males and did not address the probability of Mr. Navarro's uncle being the father.

As also noted above, the accusation against the father also would have seriously undermined the cousin's credibility. As a teen frightened of and wanting to protect her father, Mr. Navarro made a far safer target on whom to pin the pregnancy. With the ability to undermine the DNA test's conclusion and the cousin's credibility, it would have been rational for Mr. Navarro to reject the state's offer and take the matter to trial.

The district court concluded that Mr. Navarro failed to show that he was prejudiced by counsel's failure to discover the case against the cousin's father because he admitted guilt during the course of his change of plea. Tr. (40469) p. 97, ln. 1-12. Initially, the question is whether it would have been rational for the defendant to have taken the case to trial, not whether he admitted guilt. Additionally, Mr. Navarro had difficulty meeting the elements of the crime during the plea colloquy and his responses are consistent with an innocent individual admitting guilt to derive a benefit from the plea bargain when he sees no realistic chance of prevailing at trial.

Trial counsel had an obligation to discover the accusation against the alleged victim's father. Further, the additional information significantly altered Mr. Navarro's chances of prevailing at trial and it would have been rational for him to maintain his not guilty plea and put the state to its burden of proof. Because Mr. Navarro established that his guilty plea was not a voluntary and intelligent choice among the alternative courses of action, the district court erred in denying his petition for post-conviction relief.

## V. CONCLUSION

Mr. Navarro respectfully asks this Court to reverse the district court's judgment denying his post-conviction claims and to remand this case for further proceedings.

Respectfully submitted this 2 day of July, 2013.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Robyn Fyffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of July, 2013, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.

Robyn Fyffe