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Nichols v. State Appellant's Reply Brief Dckt. 40798

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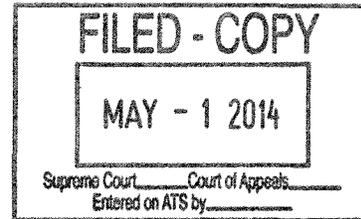
IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court Docket No. 407989-2013
Ada County No. 2012-19714 40798

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF ADA
STATE OF IDAHO
The Honorable Judge Moody Presiding

Ray M. Nichols,
Appellant

VS:



State of Idaho,
Respondent

REPLY . BRIEF OF APPELLANT

1 SPECIFIC OBJECTIONS TO RESPONSE OF THE STATE

2 First of all, the State of Idaho sought from this Court, and
3 was granted, three extensions of time to file the Responsive Brief.
4 The State lead this Court, and the Appellant, to believe that such
5 extensions of time were necessary so that, "...they could perform
6 an investigation of the facts of the Petition for Post Conviction
7 Relief and the appeal filed herein".

8 So, after waiting for a period of 120 days, (After the Brief
9 of Appellant was filed), the State of Idaho then files a 2 page
10 argument in opposition to the Appeal filed.

11 The Appellant would ask the State of Idaho, where is the
12 part of the Responsive Brief that needed an additional 120 days to
14 investigate? The reasons given to this Court by the Respondent for
15 those extensions of time were false and used for no purpose but to
16 delay this case.

17 Secondly, the State of Idaho on page 6 of the Response, states,

18 "...Nichols has cited to no authority for his proposition
19 that a challenge to the legality of a sentence implicates
 a Courts' subject matter jurisdiction".

20 If the State of Idaho would have simply read the Brief that
21 was filed, it would have clearly seen that Nichols is alleging that
22 he has been sentenced to a term of imprisonment that is not
23 authorized by statute, and because of that the District Court did
24 not have subject matter jurisdiction to enter into such a sentencing
25 Order. That is the argument in this case. It is not that the sentence
26 is illegal, it is that the sentence is not authorized for the Court
27 to even impose, and therefore there is no subject matter jurisdiction
28 for the Court to have acted.

1 And, in the face of the Statement of the Respondent, the
2 Opening Brief of Appellant is simply full of authority in support
3 of the position that if a Court enters into any judgment or order
4 that is not authorized by Statute, then it has entered such without
5 Subject Matter Jurisdiction to do so.

6 The argument of the State that the Petition for Post Conviction
7 Relief is not timely is not correct, and that goes to the heart of
8 this case, and the error of the District Court in denying the Petition.

9 Under the Idaho Code, §19-4902, (a) a Petition for Post
10 Conviction Relief may be filed at any time within one, (1) year of
11 the expiration of the time for an appeal or from the determination
12 of proceedings following an appeal, which ever is later.

14 In 2013 the Petitioner filed a Motion to Correct an illegal
15 sentence under Idaho Criminal Court Rule 35. A criminal Rule 35
16 Motion does qualify as, "...or from the determination of proceedings
17 following an appeal", pursuant to §19-4902, (a).

18 Therefore, the Petitioner had one year from the denial of the
19 Rule 35 Motion, (Or the appeal thereof), in which to file for Post
20 Conviction Relief.

21 The instant Petition for Post Conviction Relief was therefore
22 timely filed because it was filed within one year of the time the
23 District Court denied the Rule 35 Motion.

24 In further support of this argument, at no time was the Rule
25 35 Motion denied as untimely, and therefore it is very clear that
26 the Petitioner did have one, (1) year from that denial, or the
27 denial of the appeal thereof, to file his Petition for Post
28 Conviction Relief.

1 Third, there are simply a "stack" of unanswered issues which
2 were litigated to this Court that the State of Idaho did not even
3 attempt to answer.

4 It was the State District Court Judge who informed the
5 Petitioner during the Rule 35 hearing, that these claims should be
6 brought before the Court in a Post Conviction Petition.

7 It was Post Conviction Counsel that failed to act as the
8 District Court ordered that Counsel to so act.

9 The Appellant tried to combine the Appeal from the Rule 35
10 Denial, and the instant Appeal. He was denied this request. Now,
11 after the Appellant made such a request, now the State of Idaho
12 would try to impose a Res Judicata argument upon the Appeal. That
14 is not the act of a member of the bar and an Officer of this Court
15 in seeking Justice. Not at all.

16 The State of Idaho should not be trying to compel the
17 Appellant to serve a sentence of life without any possibility of
18 parole or release, when the State knows full well that it is an
19 unjust sentence. It is not authorized by law. It is an illegal
20 sentence. It is not contained within the sentencing frame-work of
21 the Unified Sentencing Act. It just does not exist.

22 A sentence of life without parole is reserved for the most
23 terrible crimes in the State of Idaho. It is the second most severe
24 punishment that can be imposed in the State of Idaho. One that if
25 imposed for the crime of first degree murder, must have a jury
26 weigh the aggravating factors before the imposition of it as a
27 sentence. It is a default sentence for the death penalty. So, how can
28 it be imposed for a crime that is not death penalty eligible?

1 for the crime of Robbery is five, (5) years, and it is depicted
2 for in the statute itself.

3 At the time of the imposition of the sentence, the Court
4 entered an Order which sentenced the Appellant to a term of
5 "Fixed" life. This is also called a "Determinate" life sentence,
6 or "life without the possibility of parole".

7 The Appellant does not argue that the Court could not have
8 imposed a sentence of "Life" for the crime of Robbery. The entire
9 argument is based upon the belief that the Court did not have the
10 Jurisdiction to have "fixed" the Life sentence.

11 The ability to "fix" or to make "Determinate" any part
12 of a sentence is contained within the Unified Sentencing Act,
13 which is codified at §19-2513.

14 Under the Unified Sentencing Act, the Determinate portion
15 of a criminal sentence is considered to be the minimum term,
16 during which the criminal defendant is not eligible for parole
17 or any type of sentence reduction for "Good-time".

18 However, not all criminal Statutes are able to have the
19 minimum or determinate terms entered by the Court. Some criminal
20 Statutes carry within them a pre-set minimum term. Robbery is
21 one of those criminal Statutes.

22 When a Court is sentencing a criminal defendant under the
23 Unified sentencing act for a crime that carries a pre-set
24 minimum term in the statute itself, the sentencing Court must
25 use the second paragraph of the Unified Sentencing Act, which
is located at §19-2513.

1 §19-2513. Unified Sentence, (Second Paragraph) States:

2 If the offense carries a mandatory minimum penalty
3 as provided by Statute, the Court SHALL specify a
4 minimum period of confinement consistent with such
5 Statute.....

6 This paragraph of the Unified Sentencing Act uses the
7 word SHALL to command a Court in what it must do. In this case a
8 Court shall specify a minimum period of confinement consistent
9 with such Statute.

10 The Statute in question is Robbery, and it carries within
11 the Statute a five, (5) year minimum period of confinement.

12 Because the Statute carries within it a minimum period of
13 confinement, the Court must specify a minimum period, (or fixed
14 term), which is consistent with the minimum period of confinement
15 specified in the Statute. In this case it is five, (5), years.

16 So, when the Court ordered the Appellant to be sentenced
17 to a term of life, and then ordered that the entire term of life
18 be made fixed or determinate, the Court violated the Unified
19 Sentencing Act's second paragraph.

20 Not all criminal Statutes in the State of Idaho carry a
21 minimum term within the statutes themselves. For instance, the
22 crime of Aggravated Battery is punishable by a term of
23 imprisonment of fifteen (15), years. There is no mention of a
24 minimum period of confinement mentioned in the statute, and for
25 this reason it is the first paragraph of the Unified Sentencing
Act that a Court must use when imposing a sentence for the crime
of Aggravated Battery, and the Court can fix any or all of the
term.

1 But, because the crime of Robbery, (For which the Appellant
2 was sentenced), carries within the Statute a minimum period of
3 Confinement, the Unified Sentencing Act mandates that the set
4 minimum period of confinement, (Fixed term), be consistent with
5 the minimum term as set by the statute. Please see, §19-2513,
6 second paragraph.

7 Merriam-Webster's Collegiate Dictionary, the Eleventh
8 Edition, explains the term Consistent as follows:

9 **Consistent:** Free from variation; Tending to be true and
10 close to the meaning of an item; Showing
11 steady conformity.

12 However, that is not really important because we all know
13 what consistent means. In this case consistent means that the
14 Court at the time the sentence was pronounced should have entered
15 a fixed term that was in some way consistent to the five, (5),
16 year minimum term as was set by statute. It is clear and it is
17 not even remotely disputable that a term of fixed life is not
18 consistent with a five, (5) year term.

19 In the State of Idaho, when a criminal Statute carries
20 within the Statute a minimum term, then, under the Unified
21 Sentencing Act, Paragraph 2, the Court SHALL order the Fixed
22 term to be consistent with the minimum term as stated in the
23 Statute. This leaves the Court the complete discretion to order
24 a maximum term as the court feels to be just and fair for that
25 particular case, but this shall be ordered as the indeterminate
term, and not "Fixed".

1 In light of these plain facts, it is absolutely clear that
2 when the Court imposed a sentence of "Fixed Life", (Life without
3 the possibility of Parole), upon the Petitioner, the Court lacked
4 the ability to impose such a sentence. The Court Lacked Subject
5 matter Jurisdiction.

6 The Court of Appeals of the State of Idaho, in the case of
7 State V. Peterson, 148 Idaho 610, 226 P.3d 552, (2010), Staed as
8 follows:

9 "...Subject matter jurisdiction can be raised
10 by any party at any time, and can not be waived"

11 This was also the Holding of the Idaho State Supreme Court
12 in the case of State V. Lute, 252 P.3d 1255, (2011), where the
13 Court held as follows:

14 "...Judgments and Orders made without subject
15 matter jurisdiction are void, and are subject to
16 collateral attack.....subject matter jurisdiction
17 can never be waived or consented to, and a Court
18 has a sua sponte duty to ensure that it has subject
19 matter jurisdiction".

20 This above holding was cited in Lute, *Supra*, based upon
21 the holding of State V. Urrabazo, 244 P.3d 1244, 1248-1249, (1996).

22 The subject matter jurisdiction to impose any particular
23 sentence in a criminal case, is contained within the Statute it's
24 self. The crime for which the Petitioner stands convicted of,
25 Robbery, is punishable by a sentence of five years, (5), to an
indeterminate life. No where in the Statute does it speak in
terms of a "Fixed Life" term being able to be imposed.

1 "Legislative intent must first be determined from the plain
2 meaning of the words used, and, if the plain meaning is direct
3 and certain, and it is unambiguous, the Statute speaks for
4 itself". Crist V. Segna, 622 P.2d 1028, (1981).

5 "It is well established that a Court must give meaning and
6 effect to all Statutory provisions". Montana Contractors Assn.
7 V. Department of Highways, 715 P.2d 1056, (1986).

8 The intent of the Legislature when it passed the Unified
9 Sentencing Act is clear and unambiguous. The Statute speaks for
10 itself. In the second paragraph of the Unified Sentencing Act,
11 it is stated,

12 §19-2513, (Second Paragraph)

13 If the offense carries a mandatory minimum
14 penalty as provided by Statute, the Court shall
specify a minimum period of confinement
consistent with such statute.

15 The only thing this Court need to look to is whether or
16 not the Appellant is convicted of an offense which Statute
17 carries a minimum period of confinement within that Statute, and
18 if the Appellant has been given a minimum period of confinement
19 which is not consistent with that Statute then his sentence is
20 illegal and is subject to correction at any time.

21 The Appellant is convicted of the offense of Robbery, in
22 the Statute for the punishment of the crime of Robbery, there is
23 a minimum penalty provided for in that Statute. It is a five,(5),
24 year period.

25 Because the Appellant was given a minimum period of
confinement of "Fixed Life", his sentence is illegal, as it is

1 not "consistent" with the minimum period of confinement was
2 the legislature depicted for in the punishment for Robbery; and
3 as is provided for in the second paragraph of the Unified
4 Sentencing Act for such crimes that carry a minimum period in
5 the statute.

6 Because the Court did not follow the statutory commands
7 as depicted for by the Legislature of the State of Idaho, the
8 Court has denied to the Appellant Due Process of Law under the
9 United states Constitution, Amendment Fourteen.

10 "The failure of a State to follow it's own statutory
11 commands may implicate a liberty interest protected by the
12 Fourteenth Amendments Due Process Clause". Fetterly V. Paskett,
13 997 F.2d 1295, (9th Cir. 1993); Ballard V. Estelle, 937 F.2d
14 453, (9th Cir. 1991); Lambright V. Stewart, 167 F.3d 477, (9th
15 Cir. 1999).

16 Paraprased, "a State's failure to follow it's own laws,
17 violates the Fourteenth Amendments Due Process Clause" Hicks V.
Oklahoma, 447 U.S. 343, 65 l.Ed.2d 175, (1979).

18 In this case, the State of Idaho failed to follow the
19 clear and mandatory language of the Unified Sentencing Act, at
20 the second paragraph, and when it failed to follow those mandates
21 it denied to the Appellant Due Process of Law by imposing a
22 sentence that is not authorized by law, and is illegal.

23 The District Court, when it dismissed the Petition for
24 Post Conviction Relief, also erred and denied to the Appellant
25 the ability to correct this issue.

Furthermore, the Appellant raised a valid claim of

1 Ineffective Assistance of Counsel, in that Counsel should have
2 known the difference between a sentence of Life, and a sentence
3 of Life Without Parole, or a "Fixed Life" term.

4 A valid claim of ineffective assistance of counsel can be
5 used as a "gateway" to over-come a procedure bar to having such
6 claims heard by a reviewing court. Please see, Martinez V. Ryan,
7 132 S.Ct. 1309, 182 L.Ed.2d 272, (2012), Thompson V. Coleman,
8 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed. 2d 640, ().

9 And, finally, it was the Court who imposed the Sentence upon
10 the Petitioner who has violated Due Process of Law when the Court
11 first, at the arraignment, and at the initial appearance, who
12 informed the Petitioner that the maximum possible sentence that
13 he was facing, was a term of life; and then this same Court, who
14 at the time of the imposition of the sentence, stated, "...I'll
15 go one better, (when the State sought a sentence of 20 to life),
16 then imposed a sentence of "determiante life", which is a term of
17 "Fixed Life" or life without the possibility of Parole.

18 This action in and of it self violates the fundamental
19 principles of Due Process of Law, and fundamental fairness upon
20 which our country was founded, and violates the Sixth Amendment
21 to the United States Constitution.

22 The Order of this Court, which stated that this case would be
23 dismissed within 20 days, if the Petitioner did not show cause
24 as to why it should not be dismissed, seems to over-look the fact
25 that there is no time limitations in which to challenge the

1 Subject Matter Jurisdiction of the Court.

2 The District Court, appointed Counsel to assist the
3 Appellant in the Post Conviction Petition. The Court also ordered
4 that Counsel to file an Amended Petition, and to respond to the
5 Court's Notice of Intent to Dismiss.

6 That Counsel, Randall Barnum, refused to comply with the
7 Order of the Court, and instead rendered ineffective assistance
8 of Counsel when he refused to litigate to the District Court
9 the issues raised in the Petition for Post Conviction Relief,
10 such as are listed herein:

- 11 a). That the Sentencing Court lacked subject matter
jurisdiction to impose a fixed life sentence
for the crime of robbery;
- 12 b). Trial Counsel was ineffective for not properly
investigating this case prior to Trial;
- 13 c). Trial Counsel was ineffective for not
14 challenging the photo-line up of suspects,
15 when I was the only individual shown to
the witnesses;
- 16 d). Trial Counsel was ineffective for not pursuing
17 any form of plea bargain with the State;
- 18 e). Denial of Due Process of Law when the Court,
19 at my Arraignment, informed me that I faced a
sentence of LIFE. Not a sentence of Fixed Life,
which is clearly more than a Life sentence.

20 I asked Mr. Barnum, who was appointed to represent me in
21 the Post Conviction case, about these claims, and he informed me
22 that, "...claims of ineffective assistance of counsel can not be
23 filed outside of any timelimitations, and that the case of
24 Martinez V. Ryan, 132 S.Ct.1309, (2012), did not make an
25 exception to the holding of Thompson V. Coleman, 501 U.S. 722,
(), no matter what I had read. I also raised these claims:

- 1 f). I believe that my Trial Counsel was ineffective for
2 not informing me that I faced a FIXED LIFE term,
and not just an indeterminate life term.
- 3 g). I believe that I was denied my right to the
4 effective assistance of counsel during the direct
5 appeal process, because appellate counsel did not
6 speak to me regarding the issues or mistakes made
7 during trial, or what issues I wanted to raise in
8 the direct appeal.
- 9 h). I believe that Appellate Counsel was ineffective
10 for not raising on direct appeal, a claim of trial
11 counsel being ineffective.
- 12 i). I believe that Appellate Counsel was ineffective
13 for not seeking a Petition for Rehearing in the
14 Idaho State Supreme Court.
- 15 j). I believe that Appellate Counsel was ineffective
16 for not informing the Petitioner of the fact that
17 a decision had been reached by the Idaho State
18 Court of Appeals, which would have started the
19 time limit for filing a Petition For Post Conviction
20 Relief, and or a Federal Petition For a Writ of
21 Habeas Corpus.
- 22 k). I believe that Counsel was ineffective for not
23 filing a Motion for a sentence reduction under
24 Idaho Criminal Court Rule 35.
- 25 l). I believe that Counsel was ineffective for not
making a challenge on appeal, to the length of my
sentence.
- m). I have been denied Due Process of Law because I
was never given a copy of the discovery material
in my case, which prevented me from making a
decision as to going to trial, trying to make a
plea agreement; furthermore, the action of not
giving me a copy of my discovery material has also
prevented me from researching issues to be raised
on appeal.

23 Mr. Barnum did not believe that there was any type of
24 merit to these claims nor would he argue them for me. The
25 Court made it clear that she expected a claim to be raised

1 against Mr. Barnum for being Ineffective in this case because
2 he had not filed any type of documents to assist the Appellant.

3 The Appellant also now raises two additional claims as
4 follows:

5 aa). That Post Conviction Counsel, Randall Barnum,
6 Was Ineffective for not performing ANY Court
ordered responses, nor investigating this case;

7 bb). That the Appellant was denied the effective
8 assistance of counsel when the Office of the
State Appellate Defender refused to litigate
this case on appeal.

9 CONCLUSION

10 Pending before this Court is a sister case under number
11 40830, which raises the exact same issue as presented to the
12 Court in this case.

13 The Appellant believes that it was error for this Court
14 to not consolidate the cases together into one appeal as the
15 Office of the State Appellate defender does not have a competent
16 argument on appeal, and the Appellant pro-se certainly does.

17 The Office of the State Attorney General has now made a
18 concession that the cases of Martinez V. Ryan, 132 S.Ct. 1309,
19 (2012); and Trevino V. Thaler, 133 S.Ct. 1911, (2013), apply to
the State of Idaho.

20 Based upon these two cases, there is an exception to the
21 procedural time bar for claims of ineffective assistance of
22 Counsel, and it was error for the district court, and for Mr.
23 Barnum not to have recognized this exception and litigated the
24 claims of ineffective assistance of counsel to the Court.

