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Cadue v. State Appellant's Brief Dckt. 41001

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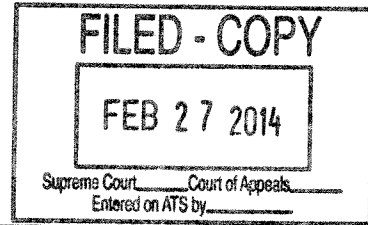
IN THE SUPREME COURT OF THE STATE OF IDAHO

PERRY W. CADUE,
Plaintiff-Appellant,

vs.

STATE OF IDAHO,
Respondent.

) DOCKET NO.41001-2014
)
) Twin Falls Co.Case No.
) 2013-1072
)
)
)
)
)



APPELLANT'S BRIEF

Appeal from The District Court Of The Fifth Judicial
District Of The State Of Idaho, In and For The
County Of Twin Falls

HONORABLE RANDY J. STOKER
District Judge

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NATURE OF THE CASE

Petitioner, Perry W. Cadue, ("Cadue") filed a Second Post-Conviction Petition on March 14,2013. Cadue was previously convicted of Aggravated battery, by a jury in Twin Falls, Case CR-2008-11107 and sentenced thereon on November 24. 2009. That Conviction and Sentence was affirmed on Appeal. Cadue filed his first post conviction petition in February 2012. The District Court dismissed that petition on the States, Motion for Summary Disposition on July 23,2012. That case was Appealed and Affirmed with 2014 unpublished opinion No.352, filed: February 6,2014. In Cadue's, Second Petition for Post-Conviction Relief, he raises (19) claims all involving claimed misconduct of his trial counsel, his appellate counsel and ineffective assistance of his previous post-conviction. The District Court files a Order Denying Appointment of Counsel and Notice of Intent to Dismiss Post-Conviction Petition. Cadue files Motion to Reconsider. The District Court submits final Judgment Dated April 12,2013.

STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

The facts, Cadue disputes and procedure are described in the Second Petition for Post-Conviction Relief and Memorandum in Support. Filed March 14,2013. With exhibit's (a)through(k).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1.) DID THE DISTRICT COURT IMPROPERLY DECIDE IN DENYING, CADUE APPOINTMENT OF COUNSEL.

2.) DID THE DISTRICT COURT IMPROPERLY DECIDE IN DISMISSING CADUE'S SECOND PETITION FOR POST CONVICTION RELIEF.

ARGUMENT

1.) DID DISTRICT COURT IMPROPERLY DECIDE IN DENYING, CADUE APPOINTMENT OF COUNSEL.

Cadue files a second petition for post-conviction relief with the district court, because of the ineffectiveness of his two (2) court appointed attorneys for his first petition for post-conviction relief. And that being the first attorney was a conflict because counselor Tim Williams, was named in the first petition for post-conviction relief. But before he was conflicted off he allowed the State too file summary dismissal, statement of facts brief in support of motion for summary disposition of petition for post-conviction relief and request for judicial notice. Which was never objected to any of these

motions. Cadues does not have the education to defend himself or the books and case law too support a argument. Cadue did presented claims with evidence showing ineffective assistance of his court appointed attorneys and other documents supporting his claims. And under. Bounds V. Smith, 430 U.S. 817,824,828 (1977) prisoners have fundamental constitutional right to adequate, effective and meaningful access to courts to challenge violations of constitutional rights. And in Lewis v. Casey, 518 U.S. 343 (1996) its states counsel will be provided. If it meets the two prong test 1.) is if the claims are not frivolous, 2.) whether the petition alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf. Cadue meets both prongs. Therefore the District Court was incorrect in denying appointment of counsel to Cadue.

ARGUMENT

2.) DID THE DISTRICT COURT IMPROPERLY DECIDE IN DISMISSING, CADUE'S SECOND PETITION FOR POST CONVICTION RELIEF.

Indeed, when a petitioner files a second successive petition for post conviction relief the burden is on the Court to determine whether the petitioner lacks sufficient reason for

failing to raise the issues of the second petition in the previous petition. This the Court must do before it can dismiss the petition as successive.

The Idaho Supreme Court in the case of Palmer vs. McDermitt, 102 Idaho 591,635,P2d.955 (Idaho 1981), Justice McFadden, stated:

However, the language of I.C. § 19-4908 does not prohibit successive petitions for post conviction relief in every case, but rather, only prohibits successive petitions in those cases where the petitioner "knowingly, voluntarily, and intelligently" waived the grounds for which he now seeks relief, or offers no "sufficient reason" for the omission of those grounds in his "original, supplemental or amended petition." Thus, it is necessary that the trial court find the failure to include newly asserted grounds for relief in the prior post conviction relief proceeding was without sufficient reason before the application may be summarily dismissed on the ground of waiver. Other jurisdictions have also arrived at the same interpretation with respect to similar statutory provisions relating to successive petitions for post conviction relief and the doctrine of waiver. See, e.g., People vs. Hubbard, 184 Colo 243, 519 P2d 945 (1974); Rogers vs. Warden, Nevada State Prison, 86 Nev 359, 468 P2d 993 (1970)...

102 Idaho at 593-4, 635 P2d at 957-8

The manner and amount of showing required under Idaho Code § 19-4908 upon the filing of a Second Petition for Post Conviction Relief is not adequately defined. The showing changes from Court to Court and District to District. However, the only sure manner of making a sufficient showing is to be able to meet the "cause and prejudice" standard set forth below. However, the standard set forth here should be understood under Palmer as being a lesser standard than the "cause and prejudice" standard.

The standard under Idaho Code § 19-4908 is "sufficient reason" which is ambiguous and vague.

Cause then includes such factors as ineffective assistance of counsel, interference by state officials, a new rule of law which applies retroactively, etc. Cause is something outside of the control of the petitioner without which the state procedural rule would have been obeyed.

To show prejudice the petitioner must demonstrate that but for the procedural default it is probable that the outcome of the cause would have been different.

The United States Supreme Court in the case of Murray vs. Carrier, 477 U.S. 478, 106 Sct 2639, 91 LEd2d 397 (1986), Justice O'Connor stated:

The habeas petitioner must show not merely that the errors at trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.... Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied "fundamental fairness" at trial.

477 U.S.at 494, 106 SCT at 2648

Cadue, does meet the "Cause and Prejudice Standard".

Cadue files his first Petition for Post Conviction Relief, stating several claims, and has more claims, but waits until he appointed counsel too help him perfect and amend his Petition.

Cadue knows that he, lacks the legal knowledge in the law, and upon other inmates assistance Cadue, gets his Petition filed.

Then Cadue, relied on Bounds v. Smith, 403 U.S. 817,824,828(1977) prisoners have a fundamental constitutional right to adequate, effective and meaningful access to courts to challenge violations of constitutional rights, also see: Lewis v. Casey, 518 U.S.343(1996). So an inmate relies on his counsel, once he has filed his petition, by amending and perfecting his pleadings in the petition. and in Cadue's first petition for post conviction relief, counsel was appointed. and counsel was Tim Williams, but there is a conflict. Mr.

Williams, was named in the Petition has ineffective assistance, that is, when Mr. Williams, was appointed to represent Cadue, on his Motion for New Trial. After three (3) months of trying to make contact with Mr. Williams by letter and phone. Cadue finally gets the District Court to intervene, telling the Court of the problem. The Court appoints new counsel Mark J. Guerry, the District Court also expedites the proceedings.

So what has happened the first ninety (90) days that the case was in Tim Williams, hands was just setting idle. But the State had filed a Motion for Summary Dismissal, Statements of Facts, Brief in Support of Motion for Summary Disposition of Petition for Post Conviction Relief, and Request for Judicial Notice. No response or objection by Tim Williams, for Cadue, on any of the States Motions... So now attorney Mark Guerry, gets appointed to represent Cadue. The State, has full advantage and the District Court allows it. Mark Guerry, gets a continuance but only for thirty (30) days. Now he has got to perform a miracle. And that would be comply with the District Courts pre-trial procedural order pursuant to Idaho Rule Of Criminal Procedure 16-Felony case only, entertain the Discovery, doing interrogators, admissions, depositions, making affidavits in form of there testimony, gather documents and etc., file subpoena's. And then analysis Cadue's claims perfect the Petition, amend it and then present valid argument... But counsel never amends the Petition. He does file a Memorandum of Facts

and Law, on July 20,2012. Three (3) days before the Court Scheduled Hearing for July 23,2012. The Court Rules state, that all motions and responses must be filed fourteenth (14) days before a Hearing.


Mr. Guerry, only talk with Cadue, one (1) time, before the hearing, and that is the only Attorney that ever talked with Cadue. And Counsel only talked with Cadue Thirty (30) minutes by phone, never talked about amending the petition or doing the discovery for Cadue. Tells Cadue he will talk to him at the Hearing, and that was all Mr. Guerry said. Counsel never asks for another continuances. Cadue, does meet the Palmer standard and the Cause and Prejudice standard. Cadue, wants this Honorable Court too know that every attorney appointed to Cadue, was ineffective. Please see: Martinez v. Ryan, 566 U.S. 1, Trevino v. Thaler, No.11-10189, the Court held that " a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if the [States] initial-review collateral proceeding there was no counsel / or counsel in that proceeding was ineffective. The Judge, put the pre-trial order in, the first petition it is not like he did not have a say in the proceedings. But the real question is, counsel never protected Cadue's due process and that is ineffective assistance. There is relief to be had and Cadue, prays this Honorable Court will make things right. Cadue's counsel was ineffective and Cadue's second petition

has standing on all his claims, and they never got heard or developed and for those reasons stated.

CONCLUSION

In consideration of the forgoing, Cadue, requests an Order from this Honorable Court to remand this Petition back to the District Court, based on violations of his rights to the effective assistance of counsel and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. And have a evidentiary hearing on these issues, with appointed counsel to represent Cadue's claims in a full and fair hearing.

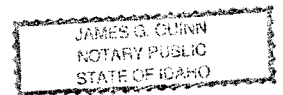
DATED This 25 day of February 2014.

 25 Feb 2014

Perry W. Cadue / Appellant

Sworn and Subscribed this 25TH day of
February 2014

James G. Quinn
commission expires: 9/10/2019



CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 25 day of February 2014. I mailed a true and correct copy of the "Appeal Brief" via the U.S. Mail System to:



26 Feb 14

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