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Brummett v. State Appellant's Brief 1 Dckt. 41127

David Brummett #41949
I C C unit, S M U #8
P.O. Box 70010
Boise, Id 83707

In The Supreme Court OF
The State of Idaho

David Brummett / Pro-se
Appellant,

V.

State of Idaho
Respondent.

Case No 41127

Appellate Brief

Comes Now David Brummett Appellant with this appeal of the district courts dismissal of petitioners Post-conviction.

— History of The Case
And Statement of Facts —

1.) Appellant was originally arrested by information on or about the 17th day of June 2007 For Felony burglary and misdemeanor Petit theft.
2.) A preliminary hearing was held the second time on oct 11, 2007 due to malfunction in the recording equipment. (10/29/07 Tr., P.5, Ls.20-25.
3.) Mr. Brummett was bound over to the district court on the charges of burglary and Petit theft (Preliminary Tr., P.16, Ls.6-9.) But the magistrate concluded that, because the state produced no evidence in support of the misdemeanor charge of petit theft, the state would have to "redo" the pleading because the state didn't present Sufficient evidence to support that charge. (Prelim Tr., P.16, L.17 - P.17, L.18)
4.) At the preliminary hearing Brummett's attorney was Mr. Rogers who stated:
"Your Honor, for purposes of today's testimony. I'll Stipulate to the introduction of Mr. Sunada's qualifications and stipulate to those for today only"
(Pg.9 Ls 17-20. Prelim) Court ruled: "... and I'll exclude any testimony of officer Sunada. That way you won't have a problem with it at the district court level." (Prelim Tr., P.15 Ls 10-12)
5.) Before trial Counsel filed a motion to dismiss for lack of speedy trial which was denied because it wasn't filed timely. (9/3/08 R., P.86)

6.) During trial Mr. cooper testified that he found the surveillance video from March 11, 2007. that morning of the trial 9/9/08 Tr., P.178, L.20 - P.179, L.3.)
7.) Upon playing this lately disclosed video from March 11, 2007 9/9/08 Tr., P.259, L.8 - P.260, L.5.) Counsel pointed out the poor quality of this video, and the general difficulty of discerning what, if anything, the person dipicted in this video was doing 9/9/08 Tr., P.260, LS.7-24.)
8.) Counsel objected to the attempt on part of the State to adduce evidence regarding the video tape of March 11, 2007 9/9/08 Tr., P.187, L.25 - P.188, L.21.)
9.) Counsel objected to any testimony regarding the contents of the tape based on hearsay and foundation grounds, as well as objecting under the "best evidence" rule (9/9/08 Tr., P.187, L.25 - P.188, L.5.) But counsel further objected to the admission of the tape itself, as the State had never disclosed that this video tape existed, much less that the State intended to present this tape to the jury (9/9/08 Tr., P. 188, LS.6-20.)
10.) The district court ruled that the loss prevention officers could testify as to their observations as to what they think they saw on the tape without running afoul of hearsay prohibitions or the best evidence rule (9/9/08 Tr., P.190, L 16 - P. 191, L 1.) However, the district court reserved any ruling as to Attorney's objection as to the lack of foundation for admission of the tape (9/9/08 Tr., P. 191, LS.2-10.)
11.) At trial officer Sunada falsely testified as to what Mr. Brummett said. "Mr. Brummett admitted to entering the store with the intent to steal" (9/10/08 Tr., P.315, L.4 - Pg. 316 L.7.) However if you listen to the tape recording of this Mr. Brummett responded "No" when asked if he had the intent to steal (9/10/08 Tr., Pg 320, LS 5-22
12.) Also the booking/arrest sheet said mr. Brummett had $8.50 and not $2.00 like officer Sunada stated at trial (Tr., Pg 311 L N 20.) At the bottom of the booking/Arrest Sheet it states that a copy was served to the prosecutor. The prosecutor stated to the jury: "Now ladyes and gentelmen, there's other evidence to show that defendant had the intent to commit the crime of theft when he went in on this date. What is the other evidence? Well, he had only $2. cash on him. He had $2. (9/10/08 Tr., P. 382. LS 2-6.)
13.) The State rested after the testimony of officer Sunada (9/10/08 Tr., P.325, LS. 10-11.)
14.) Trial counsel then made an oral Idaho criminal Rule 29. Motion for judgment of acquittal on the charge of burglary based upon the lack of evidence of intent. (9/10/08 Tr., Pg. 325, L. 25 - P. 326, L. 1) However, counsel withdrew that motion shortly thereafter. (9/10/08 Tr., P. 327, LS. 11-12.)

15.) Brummett Testified at trial (9/10/08 Tr., P.333, L.19 - P.335, L.10.) He testified that he originally went to Shopko to buy a fuse (9/10/08 Tr., P.340, LS.1-19) Although he admitted that he decided to steal, he didn't make that decision until after he was in the Store and seen the electronics equipment. (9/10/08 Tr., P.341, LS.4-20.)
16.) During cross examination, the State began to question Mr. Brummett about whether he had visited a different Shopko that day. (9/10/08 Tr., P.347, LS.2-13.) The State then questioned Mr. Brummett whether he was the person dipicted on the surveillance videos from the prior dates. (9/10/08 Tr., P.355, L.21 - P.360, L.21.)
17.) Then the jury instructions, "You may not consider evidence of any prior incident or acts of the defendant as evidence that the defendent commited the crimes of which he is accused in this case. Evidence of prior incidents has only been admitted for the limited purposes of establishing intent, plan or preparation, as those concepts may or may not apply to the crimes charged in this case." (Tr., P.373, LS 22 - P.374, LS. 1-3.)
18.) "In crimes such as these of which the defendant is charged in the information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent, it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful." (9/10/08 Tr., P.374, LS.6-14.)
19.) "You can still commit a burglary walking through the front door, while it's open, and anybody can go in. So, the next is instruction No. 10. the manner or method of entry into Shopko is not an essential element to the crime of burglary." (9/10/08 Tr., P.380, LS 3-5. P.380, LS. 16-18.)
20.) Instruction No. 7 "Count 1. Burglary, That on or about the 17th day of June 2007, in the county of Ada, State of Idaho, did enter into a certain building with the <u>intent to commit the crime of theft</u>.
21.) Count II Petit theft, That on or about 17th day of June 2007, did wrongfully take items of merchandise from the owner, Shopko, with the <u>intent to deprive another of property</u>".
22.) After trial the court found Mr. Brummett was subject to the persistent Violator Sentencing enhancement. (9/10/08 Tr., P.410, L.18 - P.416, L.14.) He was Sentenced to 15 years with 5 years fixed, for his conviction of burglary, and one year for petit theft. (11/3/08 Tr., P.436, L.4.)
23.) Mr. Brummett appealed from his judgement of conviction and sentence.

24.) Then on october 6, 2011 he filed a petition for post conviction relief which was dismissed by the district court

25.) This appeal now follows.

ISSUES:

1.) Was counsel ineffective for not objecting or bringing to attention the faulty incorrect identification, based on a blank video surveillance of March 11, 2007, that no one was operating?

2.) Did counsel fail to continue the objections, and raise the issue, of the late disclosure of exculpatory evidence?

3.) Was counsel ineffective by not objecting, bringing to the courts attention, the element, and the foundation, of any video surveillance that no operator was operating the recording device, therefore the recordings was capable of taking the testimony?

4.) Was trial, and appellate counse ineffective for not objecting, bringing to courts attention, the jury instructions? Was it misleading and prejudicial?

5.) Was trial counsel ineffective for not investigating mr. Brummett's case by getting a defense ready for impeachment, on the inconsitency of the statements that was made?

6.) Was counsel ineffective for not objecting, raising, or bringing to courts attention that using this video from march 11th 2007 was prosecutorial misconduct by "prosecutorial overreaching"? or judicial "overreaching"?

7.) Is the combined issues of counsels actions to the said, amounted to complete failure to subject prosecutions case to meaningful adversarial testing that such prejudice is presumed from counsels actions?

8.) Was counsel ineffective for not objecting, raising, or bringing to courts attention the video's poor quality is so substantial as to render the recording as a whole untrustworthy?

ISSUES:

9.) Was counsel ineffective for failing to object, raise, or bring up the faulty in court identification based on an out of court identification through a blank surveillance video, and other supposed video that hasn't been produced, and that no operator was operating?

10.) Was counsel ineffective for not objecting, or raise to the court and on appeal, that there isn't sufficient evidence to establish the prior bad act as a fact?

11.) Was counsel ineffective for not objecting, raising at trial and on appeal that being at Shopko earlier looking for a fuse then leaving is not a prior "bad act" and that counsel's didn't raise issue correctly under IRE 404(b)?

12.) Was counsel ineffective for not questioning, impeaching, or call into question the cd Audio recording when asked if Mr. Brummett had intent to steal before entry, he said "No", when officer lied and said he did?

13.) Should officer Sunada's testimony have been excluded from district court, when at preliminary the judge excluded it from being used in the district court level? And did counsel fail to protect this right?

14.) Was Mr Brummetts due process right violated, and did counsel fail to protect this right by not filing for dismissal, by going back without my waiver and having (2) preliminary hearings, when by federal and State law requires, when in custody (1) preliminary must be done in no more than (14) days

15.) Was counsel ineffective for not filing sooner Speedy trial violation?

16.) Was counsel ineffective for letting officer Sunada and the prosecutor lie as to the amount of money Mr Brummett had and did this at trial increase judgement of intent and prejudice petitioners right to a fair trial by making Mr Brummett look like a lyer on the Stand?

17.) Was Mr. Brummett denied counsel when he motioned the court for a change of attorney?

18.) Did the court error, and did counsel fail to protect Mr. Brummett's right under the "Idaho constitution" Art. (1) sec (7) which states the jury shall consist of no more than (6) in cases of misdemeanors, when he was convicted of petit theft by a jury of (12) that petitioner did not waive that right?

19.) Is counsel ineffective for withdrawing a rule 29 Motion for judgement of aquittal of the burglary conviction for lack of evidence of intent?

20.) Was counsel ineffective for not objecting, Filing for a dismissal, and raising that Mr. Brummett is innocent of burglary, therefore was he convicted under a wrong statute?

21.) Was counsel ineffective for not objecting and letting the court get away with double jeopardy by the convictions and sentence?

22.) Was court and counsel not protecting Mr. Brummetts 14th Amend right to a fair trial and equal protection of the law under shoplifting laws, by charging some people like in my case for just petit theft and others just burglary or as in my case burglary, petit theft and persistent violator?

23.) Did court error by not granting an evidentiary hearing to support claims that counsel was deficient and that he was prejudiced?

24.) Was there error by court by not taking judicial Notice of the underlying criminal record, when one was filed?

25.) Was counsel ineffective on post conviction, For not helping establish a successful post conviction?

26.) Was counsel ineffective for not helping establish a genuine issue of material fact, when one exist?

27.) Was counsel ineffective for not responding to the States answer?

28.) Was counsel ineffective for failing to respond to the courts (20) days Notice of intent to dismiss?

29.) Did the court error by letting malicious prosecution and did counsel fail to

TABLE OF AUTHORITIES:

U.S. constitutional Amendments, 5th, 6th, 14th
U.S. Strickland v. Washington, 466 U.S. 688, 687-88 (1984).
U.S. united States v. cronic
U.S. united States v. Dukes 139 F.3d 469, 473 (5th cir 1998).
U.S. united States v. Powers 75 F.3d 335, 341 (7th cir 1996).
U.S. Giglio v. united States 405 U.S. 150, 92 S.ct 763, 31 LEd 2d 104 (1972).
U.S. Napue v. Illinois 360 U.S. 264, 79 S.ct 1173, 3 LEd 2d 1217 (1959).
U.S. Berger v. united States 295 U.S. 78, 88, 55 S.ct, 629, 633, 79 LEd. 1314, 1321 (1935).
courtroom criminal Evidence Volume (1) (Fourth Edition) § 414 - Videotapes
"Idaho constitution" Art (1) sec (13)
"Idaho constitution", declaration of rights Art (1) Sec (7) "Right to trial by jury"
U.S. In re Winship 397 U.S. 358, 364 (1970)
U.S. Jackson v. Virginia 443 U.S. 591, 307, 316 (1979).
U.S. Brown v. Walker 16 S.ct 644, 161 U.S. 40 LEd 819.
State v. crawford 99 Idaho 87, 577 P.2d. 1135 (1978).
State v. Best 117 Idaho 652, 791 P.2d 33 (ct. App 1992).
State v. Hadley 122 Idaho 728, 731, 838 P.2d. 331, 334 (ct. App 1992).
State v. Breed 111 Idaho 497, 725 P.2d 202.
I.R.E volume (1) 404-(b)
I.R.E 5.1 Preliminary hearings; Also I.C. 19-804
I.C. 19-2132(a) Jury instructions
State v. Nath 137 Idaho 712, 716-17, 52 P.3d 852, 861-62 (2002).
State v. Buckley 131 Idaho 164, 165, 953 P.2d 604, 605 (1998).
State v. crowe 135 Idaho 43, 47, 13 P.3d 1256, 1260 (ct. App. 2000).
State v. Hanson 130 Idaho 842, 844, 949 P.2d. 590, 592 (ct. App. 1997).
State v. Medina 128 Idaho 19, 27, 909 P.2d 637, 645 (ct. App. 1996).
Idaho code 19-4906 (c)
I.R.C.P. 56(e)
Gonzales v. State 120 Idaho 759, 763, 819 P.2d 1159, 1163 (ct. App. 1991).
Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (ct. App. 1988).
Ramirez v. State 113 Idaho 87, 89, 741 P.2d 374, 376 (ct. App. 1987).
Mc coy v. Lyons 120 Idaho 765, 769, 820 P.2d 360, 364 (1991).
oats v. Nissan Motor corp. in u.s.A., 126 Idaho 162, 168, 879 P.2d 1095, 1101 (1994)
G & M Farms v. Funk Irrigation co., 119 Idaho 514, 524, 808 P.2d 851, 861 (1991).
Idaho Ruls Professional conduct rule 1.2 Scope of Representation (a)(c)(d)
Martinez v. Ryan, Director, A.D.O.C. 566 U.S. ___ (2012) No 10-1001.

Arguement

At Brummett's preliminary hearing, the court audio equipment was "malfunctioning" and asked his attorney not to remand back for another preliminary. Counsel did so without permission to do so and was also not on court record that Mr. Brummett agreed to a remand. I.C. 19-804... "once commenced the examination must be completed at (1) one session, unless the magistrate for good cause shown by court order pospones it, or unless the parties stipulate in writing, or upon court record to a continuance to a date certain"... (In part)
The record shows no order for a continuance, a remand is not a process for a continuance and Mr. Brummett never waived these rights, so therefore it's a violation of his due process rights under the 5th, 6th, and 14th Amendments, to the U.S. Constitution.
In preliminary Mr. Brummetts "attorney" statement shows he's not working for Mr. Brummett.; Prelim Tr., P. 16 Ln 17. Mr Rogers: "Yes, your honor. If I could -- We aren't -- I would ask for -- or respectfully argue to the court that we dont have to show probable cause as to the misdemeanor."
This shows ineffectiveness of counsel, to not subjecting the prosecutions case to meaningful adversarial testing, that such prejudice is presumed from counsels actions; (See united states v. cronic)
Also at trial when counsel made an oral Idaho criminal Rule 29. Motion for judgement of aquittal on the charge of burglary based upon lack of evidence to support the charge (9/10/08 Tr., P. 325, L. 25 - P. 326, L. 1) Then withdrawl the motion shortly thereafter. (9/10/08 Tr., P 327, LS. 11-12)
This also supports the ineffectiveness of counsel, to not subject the prosecutions case to meaningful adversarial testing, that its very obvious prejudice is presumed from counsel's retarded actions.

It shows a prejudicial forbearance working with the State prosecutor against Mr. Brummett.
Mr. Brummett not knowing law would and could have represented himself better, by not having 2 prosecuters working against him.
The above clearly shows a violation of both 5th and 14th Amend rights to due process and a right to a fair trial, and the 6th Amend to have adequate legal counsel thats effective.

Mr. Brummett's post conviction counsel was also ineffective. For a whole 2-years, counsel didn't respond to the States answer or

or the courts(20) days notice of summary dismissal. counsel failed to help establish or help explain to me how to establish a genuine issue of material fact.
Mr. Brummett asked counsel to motion the court for leave to amend or supplement and she stated in her letter to me, "that filing additional claim violates States right to due process." Also that "I don't think the judge will grant the motion". See attached letter from attorney dated December 28, 2012 (exhibit 1) Counsel failed to help Mr. Brummett establish a successful petition for post conviction
"[w]here a state requires a prisoner to raise an ineffective-assistance-of-Trial counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances. The first is where the State courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Martinez v. Ryan, Director, A.D.O.C. 566 U.S. ___ (2012) No 10-1001. Petitioner can meet this standard on and when he files his habeas Corpus.
In a post conviction proceeding, a motion for summary disposition is made pursuant to Idaho code 19-4906(c), which is proceedurally equivalent to a motion for summary judgement under I.R.C.P. 56(e). Case law has found that summary dismissal is permited only when the petitioners evidence has raised no genuine issue of material fact, which, if resolved in the petitioner's favor, would entitle the petitioner to requested relief. If there is a materia) factual issue presented, an evidentiary hearing must be conducted. Gonzales v. State 120 Idaho 759, 763, 819 P.2d 1159, 1163 ct. App 1991); Hoover v. State, 114 Idaho 145, 146, 754 P.2d 458, 459 (ct. App 1988); Ramirez v. State 113 Idaho 87, 89, 741 P.2d 374, 376 (ct. App. 1987).

Although Idaho Code does not clarify what a "genuine issue" of fact is, the Idaho appellate courts have provided that Summary judgement must be denied "if the record contains conflicting inferences upon which reasonable minds might reach different conclusions... because all doubts are to be resolved against the moving party." McCoy V. Lyons 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Furthermore, it is not the purpose of a petitioner's arguement during a summary dismissal motion to convince the judge that the issues will be decided in his favor at trial; instead, the petitioner is required to show that there is enough information and sufficient material for a triable issue at the evidentiary hearing. Oats V. Nissan Motor corp. in U.S.A., 126 Idaho 162, 168, 879 P.2d 1095, 1101 (1994) (quoting G&M Farms V. Funk Irrigation Co., 119 Idaho 514, 524, 808 P.2d 851, 861 (1991) ("A triable issue [redacted] exist whenever reasonable minds could disagree as to the material facts or the inferences to be drawn from those facts".) So therefore he should be entitled to an evidentiary hearing to prove counsels deficient preformance and Brummett was prejudiced.

ARGUEMENT:

At Brummett's preliminary hearing, the court stated:

> "Now as to count II, the petit theft, no property has been placed before me. It has been reffered to as items throughout the record here, so I can't find for purposes of submitting the misdemeanor to the District Court..." Tr, P. 16 Lns 17-22

If no evidence was shown at the preliminary hearing, and the court found no just cause to bind the case over for trial, Then the misdemeanor should not have been part of the trial. The court at preliminary went on to state that:

> "...if you want to send someone over to the district court on a misdemeanor, I have to make a finding on the record of what you proved". Tr., P. 17 LS 12-15

Without having any evidence present the state proved nothing. Mere accusation is nothing more than opinion and speculation. They proved nothing.

Furthermore, the "Idaho State constitution", Declaration of Rights States in Article (1) section (7) "Right to trial by jury" that

> "... Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district court, whether such case or action be tried in such inferior court or in the district court, the jury shall consist of not more than six."

In this case, Brummett was tried in violation of the Idaho constitution on a misdemeanor with a twelve(12) men jury. Therefore, on this fact alone, the petit theft conviction should be overturned.

Should officer Sunada been excluded from trial?

At the preliminary hearing Brummett was "defended" by public defender Kevin Rogers who stated:

> "Your Honor, for purposes of today's testimony, I'll stipulate to the introduction of Mr. Sunada's qualifications and stipulate to those for today only." Tr., P.9 Ls 17-20

Brummett's attorney made it perfectly clear to the court that Mr. Sunada's testimony was for the purposes of the preliminary hearing only, and not for the trial court. In addition, that after the examination and cross examination of Sunada by both opposing counsel the court Ruled that:

> "...and I'll exclude any testimony of officer Sunada. That way you won't have a problem with it at the district court level". (Tr., P. 15 Ls. 10-12)

Even after being excluded at the preliminary hearing, officer Sunada was called to testify at Brummett's trial. This was a violation of the preliminary courts ruling and violated Brummett's rights to due process and to a fair trial. Appellant argues that Sunada's illegal perjured testimony was used to negatively influence the jury against him, and therefore the outcome can not be relied upon as fair or just.

This violation is great enough to cause this court to overturn the conviction and remand this case back to the district court.

Was Brummetts right to speedy trial violated?

1.) The Appellants court dates had to be reset and remanded due to the courts audio recording failing to work

2.) In opposition of Brummett's wishes, Attorney Bublitz waived his right to a speedy trial.

3.) Trial was reset for evaluations to take place which were never completed.

The court records show that defense counsel was always unprepared and late. That the court notes that defense counsel's motion to dismiss was not denied on the merits or lack of, but for timeliness. Not only trial counsel was ineffective, Appellate counsel was ineffective for not argueing this issue on appeal. Appellant argues (more in depth for ineffective assistance issue) That it is contrary to the intent of the constitution for him to be in prison for lack of proper defense.

It was not the defendants fault that the courtroom audio was not working properly. If the delays violated his speedy trial rights the case should have been dismissed. It is unconstitutional and prejudicial to hold the defense and the defendant to the rigedness of established guidelines and then be lax and permissive to rules established to keep the State and State prosecutors in order. When delays caused a violation of Brummett's right to speedy trial the case should have been immediatly dismissed. Just like a defense motion for appeal, Post Conviction ect. would be dismissed if filed untimely.

According to an attorney's code of ethics under I.R.P.C. Rule 1.2 Scope of representation (a)(c)(d), an attorney is to abide by clients objectives and wishes.

Yet his trial attorney waived his right anyway.

Because of this, Mr Brummett is due relief.

ARGUEMENT:

At trial video surveillance was presented and loss prevention of Shopko Said that they identified Mr. Brummett and a theft through this March 11th, 2007 video along with other video they claim that can't be found. The video that was brought in from the prosecutor same day of trial, that no one was operating, did not show Mr Brummett, Nor a shoplifting." Also state implied that being at Nampa Shopko earlier "handling merchandise" to imply a attempted theft.

This was a miscarriage of justice which can be said influenced the jury in producing a finding of guilt. This was late disclosue of exculpatory evidence. counsel objected to this but then allowed it in anyway.

Counsel should have objected, brought to courts attention, in order to be effective the following:

"Poor quality and partial unintelligibility do not render tapes inadmissible unless the unintelligible portions are "so substantial as to render the recording as a whole untrustworthy." united States V. Dukes, 139 F.3d 469, 473 (5th cir. 1998); U.S. V Powers, 75 F. 3d 335, 341 (7th cir. 1996). See also courtroom criminal evidence volume 1 (Fourth Edition) §414 Video tapes. "With one exception, a videotape is similar to a motion picture. That exception is that the tape carries aural reproduction as well as visual reproduction. That exception necessitates that the proponent lay an additional element of the foundation. Someone familiar with the speaker's voice must identify the voice. In effect, the proponent must lay two foundations: one to authenticate an oral statement and second to verify the accompanying motion picture. The combined foundation usually includes the following elements: The recording device was capable of taking the testimony; the operator was competent; no changes, additions, or deletions have been made; precautions were taken to safeguard the recording after it was made; the speakers are identified; and the recording is an accurate record of what occurred and what was said. As in the case of still photographs, enhanced videotapes are admissible with proper foundation".

In Brummett's case the elements has not been met. 1. The recording device wasn't capable of taking the testimony. 2. There was no operator operating the video. 3. Therefore the operating self recording video can't be competent, no changes, additions, or deletions have been made and no precautions were taken to safeguard the recording.

Also the March 11th video recording is not an accurate record of what occurred and what was said as to the foundation.
Idaho constitution Art 1 sec 13. "In court identification of a defendant must be suppressed if it is tainted by an out of court identification so suggestive that there is a very substantial likelihood of misidentification. State v. Crawford, 99 Idaho 87, 577 P.2d 1135 (1978). Five factors must be considered to determine the reliability of the identification: (1.) The opportunity of the witness to view the criminal at the time of the crime; (2.) The degree of the witness attention; The accuracy of the witness prior description of the criminal; (4.) The level of certainty demonstrated at the identification; and (5.) The time span between the crime and identification." State v. Best, 117 Idaho 652, 791 P.2d 33 (ct App 1990).
At trial all that was said was, "he had on the same type of clothing thats how they recognized it was the same person", that was seen through the video tapes". None of this was reported to police because the video didn't Show who it was or what occured. So the mentioned above is clearly a Napue violation. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L Ed. 1217 (1959) and Giglio v. united States, 405 U.S. 150, 92 S.Ct 763, 31 L Ed. 2d 104 (1972).
The video also had No Known NeXUS with the Shoplifting at issue and was not an example of a burglary, and video doesn't Show a burglary let alone petit theft. This was serious prejudicial to mr. Brummett's right to a fair trial and constitutes "Prosecutorial and Judicial overreaching". He the prosecutor was trying the case with inadmissible, prejudicial, and irrelevant evidence - That is, committing known error in hopes of 'getting away' with it. Also trial Judge manifestly abused his discretion by letting it in.
The video was inadmissible and lacked a proper foundation to show burglary, or a petit theft "intent". In Berger v. united States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L Ed. 1314, 1321 (1935), the court Stated: (The united States Attorney) may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to, strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful Conviction as it is to use every legitimate means to bring about a just one". Also under U.S. Const Amend 5th, 6th, and 14th "A fundamental error is one that So profoundly distorts the procedings that it produces a manifest injustice, depriving the defendant of the fundamental right to due process" see, State v. Hadley, 122 Idaho 728, 731, 838 P.2d 331, 334 (ct. App. 1992).

It is improper for a prosecutor to misrepresent or mischaracterize the evidence. This is even when the prosecutor is unaware of the fact that he is presenting falsefied or misleading evidence.
Thus in Mr. Brummett's case using perjured testimony, blank video servaillance lately disclosed, the audio recording that is different than officers statement, and the incourt identification that should have been suppressed. Also along with the supposed being at any other Shopko on any prior times, places and supposed actions without any proof.
This is clearly prosecutorial and judicial misconduct and this tainted the trial. With no other evidence to prove burglary, this prejudiced his defense and was discrimination to charge Brummett for burglary on just plain conjecture of a prior burglary, Petit theft, and the current Shoplifting burglary for which he is charged. Thus this conviction of burglary cant rely upon Surmise.
Mr. Brummett doesn't challenge the petit theft for which he is charged. Petitioner can make a showing that he is actually innocent of the burglary conviction and sentence, and thus resulted in a dicision that was based on an unreasonable determination of the facts in light of the evidence presented in the trial.
By the audio recording if asked if he had the intent to steal, he responded "No". (9/10/08 Tr., P.320, LS 5-22. However counsel at trial failed to discredit officer Sonada's statement that, "Mr Brummett admitted to me that he came in with intent to steal" 9/9/08 Tr., P.315, L.4-P.316 L.7.) Also if you listen to the audio recording before reading the miranda right to remain silent, officer stated: "You came in with intent to steal didn't you" "No" Your a theif were charging you for burglary.
This violates the 5th Amend double jeopardy when I only commited Petit theft. Tiple jeopardy by adding the persistent violator charge against Petitioner. Then you throw in the 14th Amend equal Protection of the law. Its also prejudicial trying Petitioner for burglary on top of petit theft and persistent violator enhancement when other people get charged for just Petit theft for Shoplifting.

This is clear 100% prejudice. Especially on the testimony of the identification through a supposed "video's" that were not produced to show that it was reliable identification, that wasn't even reported to police because there was no way to identify who the person was. If there was, it would have been reported to Police as a crime. This was an obvious lie to help the prosecution convict on burglary. Counsel failed to object to this.
Also any prior petit theft convictions don't equal burglary or everyone would be charged.
Thus Brummett's conviction for burglary and persistent violator violates clearly established federal law, as established and as determined by the Supreme court of the united States.
See State v. Medina 128 Idaho 19, 27, 909 P.2d 637, 645 (ct. App. 1996) "The due process clause of the united states constitution precludes conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged". In re winship 397 U.S. 358, 364 (1970); See also Jackson v. Virginia 443 U.S. 307, 316 (1979). Counsel failed to object or motion for judgement of aquittal for lack of element of intent required for burglary. Counsel failed to mention the first part inquiry on 404-(b) "whether there is sufficient evidence to establish the prior "bad act" as a fact.
I admitted to being at Nampa Shopko earlier in the day looking for a fuse is not a bad act. Asking if they had the fuse Mr. Brummett was looking for is not attempted theft. Nor is any video that can't be produced for identification purposes be used as a Prior bad act as a fact. Counsel failed at trial and on appeal to raise this issue, therefore counsel's actions to the said amounted to complete failure to subject prosecutions case to a meaningful adversarial testing, such that prejudice is obviously presumed from counsels actions.

It also meets the Strickland V. Washington two prong test, that the out come would have been different if counsel would have objected, brung to jurys attention, in defending Mr Brummetts fair trial.

The equal protection clause of state and united states constitutions embrace the principle that all person in like circumstance should receive the same benefits... of the law" State V. Breed 111 Idaho 497, 725 P.2d 202.

This Burglary, Persistent violator enhancement conviction, along with (15) years is disproportionate to a petit theft Shoplifting charge and thus obvious prejudice and unequal, charging and sentencing appropriatly to the actual crime of just petit theft).

It's real obvious that the education level in this state ranks the second lowest in the united states. This also shows how stupid and [redacted] incompatent the attorney's are in this state. Either that or their working as a prejudicial forbearance with the prosecutor or court against petitioner.

It's obvious and clear when most of them become prosecutors or judge's and they work and get payed by the state, thats Public defense attorney's, also known as public pretenders, or defender pretenders!

As to the jury instructions: "Intent" how it was read, and since burglary and petit theft have the same intent instruction this was misleading along with the instruction of 404-b evidence of a supposed prior intent instruction.

(A) Instruction No. 9 on Burglary reads as follows: "To prove that the defendant "intended" to commit a theft inside a store -- the state is not required to prove that the defendant actually stole or attempted to steal anything.

The State need only prove that when the defendant entered the Shopko located at meridian, the defendant intended to steal anything inside that defendant might desire to take."
This is wrong, misleading and prejudicial, by saying the State is not required to prove that the defendant actually stole or attempted to steal anything.
"Intent" from statute informing jurors that and act with intent without intending to violate the law, Instructions; did not correctly describe State of mind element of offense and may have led jury to believe that defendant would be guilty even if he did not intentionally or knowingly burglarize. Thus by shifting burden of proof. Jury instructions that "omit" an element of crime lighten prosecution's burden of proof and are impermissible. I.C. 19-2132(a) "An instructional error requires reversal of a judgment of conviction if the instructions misled jury or prejudice defendant". I.C. 19-2132(a).
"Instruction No. 7 count I. Burglary: That on or about the 17th day of June 2007, in the county of Ada, state of Idaho, did enter into a certain building with the intent to commit the crime of theft.
count II Petit theft; That on or about 17th day of June 2007 did wrongfully take items of merchandise from the owner, Shopko, with the intent to deprive another of property." That as stated this is misleading because they are both intent crimes and the burglary should have correctly described the State of mind element before entry into a store. Counsel failed to object, argue, or raise this issue before the courts.
(B.) Tr., P.373, L22-P.374, Ls.1-3): "You may not consider evidence of any prior incident or acts of the defendant as evidence that the defendant commited the crimes of which he is accused in this case. Evidence of prior incidents has only been admitted for the limited purposes of establishing intent, plan or preparation, as those concepts may or may not apply to the crimes charged in this case."

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As stated before there is no evidence to establish the prior bad acts as a fact. Both trial counsel and appellate counsel was ineffective for not asserting this. This was also prejudicial and misled the jury to find Mr. Brummett guilty of burglary.

(C.) (Tr., 374, LS. 6-14.): "In crimes such as these of which the defendant is charged in the information there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent, it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful." This is misleading to jury and very prejudicial to petitioner. Counsel failed to object, raise or bring to attention the "intent" from statute. Informing jurors that an act with intent not know act or conduct is unlawful, or without intending to violate the law. Instructions did not correctly describe State of mind of offense before entry and may have led jury to believe that defendant would be guilty even if not intentionally or knowingly burglarize.

(d.) As stated above it stated: "There must exist a union or joint operation of act or conduct and criminal intent". There was no union or joint operation of act or conduct and criminal intent. counsel was therefore ineffective for not objecting to this.

(e.) (Tr., P. 380 LS. 16-18): "You can still commit a burglary walking through the front door, while it's open, and anybody can go in."

If you read the statute of burglary it states: Entering a closed place with intent to steal or commit a felony. So if the door is open, and not opened by a defendant it's just petit theft. or if a window of a car is rolled down and you reach in without opening the door, it's just theft. This was a misleading instruction, and counsel failed to object or raise this issue.

(T. Tr., P.380 Ls.3-5): "So, the next is instruction No.10 the manner or method of entry into shopko is not an essential element to the crime of burglary."

This instruction was very misleading also. As stated by law. "Jury instructions that "omit" an element of a crime lighten prosecution's burden of proof and are impermissible". I.C. 19-2132(d). That the jury instructions did not correctly state the law in addressing how the jury must be instructed regarding the mental element in burglary. The instructions must inform the jury on all matters of law necessary for the jury's information. "This requires that the instructions include every element of the charged offense that the state is obligated to prove". State v. Nath, 137 Idaho 712, 716-17, 52 P.3d 852, 861-62 (2002); State v. Buckley 131 Idaho 164, 165, 953 P.2d 604, 605 (1998); State v. Crowe 135 Idaho 43, 47, 13 P.3d 1256, 1260 (ct. App. 2000). "An instructional error requires reversal of a judgement of conviction if the instructions misled the jury or prejudiced the defendant". State v. Hanson 130 Idaho 842, 844, 949 P.2d 590, 592 (ct. App. 1997).

As stated counsel should have helped protect petitioners constitutional right to a fair trial, and to have adequate counsel object and challenge issues that have merit, that are not frivolous.
The proper functioning of the adversarial process that the trial cannot be relied on as having a produced as just result." Strickland V. Washington 466 U.S. 688, 687-88 (1984).
The Supreme court provided a two prong test, (1) the attorney was deficient and (2) the deficient conduct undermined the trial process, therefore producing an unjust result.
Also under United States V. Cronic "counsels actions to the said amounted to complete failure to subject Prosecutions case to a meaningful adversarial testing, such that prejudice is presumed from counsel's actions.
(See attached) Preliminary hearing, Pretrial hearings, jury trial transcripts as exhibits and affidavit in support and Statement of facts affidavit in support of statement of facts, that are attached to this Petition as evidence and are issues of meterial facts.

Arguement:

Petitioner argues that his attorney's failed to object, raise, bring to attention by motion, or to fully investigate his case by the excluded testimony of officer Sunada which should have been suppressed along with the in court identification of the loss prevention officers through surveillance videos Not produced.

and the prior said unproduced video, March 11th video that was lately disclosed that was prejudicial and exculpatory. Counsel failed to Motion for dismissal prior to trial or at trial for insufficient evidence on burglary. Counsel only challenged part (#2) of 404-(b) I.R.E, whether the prior "bad acts" are relevant to a material disputed issue concerning the crime charged, other than propensity. Counsel failed to object, raise or bring up, at pretrial, trial and on appeal Part (#1) whether there is sufficient evidence to establish the prior "bad act" as fact. His attorney's was therefore ineffective by failing to suppress, dismiss, and to motion or object, therefore subjecting prosecutions case to a meaningful adversarial testing, which resulted in prejudice.

Conclusion:

There is genuine issues of material facts on whether Petitioner's attorney's was ineffective for the failure's listed above. Therefore this should proceed to a hearing.

Relief:

Mr. Brummett respectively request that this court proceed to an evidentiary hearing to show that his attorney's was ineffective and that he was prejudiced as a result. Or reversal, Aquittal, or any other relief as court may deem as necessary and fit.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 10 day of March 2014, I mailed a true and correct copy of post conviction breif and affidavit via prison mail system for processing to the U.S. Mail system to:

Idaho Attorney General
Criminal law Division
P.O. Box 83720
Boise, Idaho 83720-0010

United States District Court
For The District of Idaho
Clerk of Court
550 West Fort Street
Boise, Idaho 83724

Monica Hopkins
A.C.L.U of Idaho
P.O. Box 1897
Boise, Idaho 83701

Senator, Patti Ann Lodge-chair
P.O. Box 96
Huston, Idaho 83630

House, Richard Wills-chair
P.O. Box 602
Glenns Ferry, Idaho 83623

Ada county commissioners
200 West Front St.
Boise, Idaho 83702

David Brummett #41949
I.C.C unit, F-1-116
P.O.Box 70010
Boise, Idaho 83707

In The Supreme court of
The State of Idaho

David Brummett, Pro-se
Appellant,

V.

State of Idaho
Respondent.

Case No 41127
Dct. No. PC-CV-2011-19332 (Ada)

Affidavit In Support of
Post Conviction Appeal Brief.

STATE OF IDAHO)
county of Ada) ss

After first being duly sworn upon his oath, David Brummett Hereby deposes and says:

1.) I am the affiant in the above entitled matter.

2.) I am currently residing as an incarcerated inmate at the Idaho correctional center (I.C.C) under the care of Warden, Jason Ellis.

3.) I am over the age of eighteen (18) and so therefore competant to testify in these matters.

4.) That the Statement of facts, issues, the exhibit letters, and the brief as a whole is true and correct record of what occured.

5.) That pretrial, Trial, Appellate counsel, and post conviction counsel were all ineffective, for failing to investigate, raise, and object to matters that are fundamental to my defense.

6.) That for the whole 2-years counsel did not do anything to help my case.

7.) That I asked post conviction "attorney" numerous times to amend or suplement issues that I thought needed. That she told me that "we cannot amend your petition a second time because the state has already answered your petition"

8.) That I've asked numerous times to help establish a successful post conviction, with no help.

9.) I had to amend my post-conviction myself because I forgot to have my petition notorized.

Therefore I ask that this honorable court grant relief on my brief of post conviction, and since I claim innocent of burglary, I dont on the petit theft charge. I therefore ask that this court grant any relief as court sees Fit and just.

Further Your Affiant Sayeth Naught.

DATED This 10 day of March, 2014

Signature

SUBSCRIBED AND SWORN To before me this 10TH day of March 2014.

James G. Quinn
Notary Public For Idaho

JAMES G. QUINN
NOTARY PUBLIC
STATE OF IDAHO

commission expires: 9/10/2019

Exhibit #1

would be prohibited by rule 3.1. So, while I cannot file this response on your behalf, you are free to represent yourself, proceed *porpria persona*, and file the response yourself.

Attached to your response is a "declaration" in which you claim Ms. Bublitz told you to accept the State's offer because you were guilty, and that a jury would find you guilty. I cannot file this by itself; on its face, it appears to be an additional claim for post-conviction relief. Without permission from the Court (permission which I believe will not be granted), we cannot amend your petition a second time to assert this additional claim because the State has already "answered" your amended petition. Filing an additional claim violates the State's right to due process of law.

However, your "declaration" can be filed as supportive evidence of an already-made claim. Upon reviewing your amended petition again, I believe I can file your declaration to support your claim that there was a conflict of interest between you and Ms. Bublitz. I don't believe this to be meritorious; however, I am still able to make a good-faith argument supported by law and fact. Therefore, I am going to file your declaration on your behalf.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

KIMBERLY J. SIMMONS
Attorney at Law

KJS:jp

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EXhibit #2

David Brummett #41949
I.C.C unit, B-102
P.O. Box 70010
Boise, Idaho 83707

March 12th, 2013

Kimberly Simmons
200 west Front St. Suite #1107
Boise, Idaho 83702

Re: Case No. CV PC 19332

Dear MS. Simmons,

I'm writting in regards to the letter I sent to you dated Feb 8th, 2013, asking that you file a motion for leave to supplement. Also as to why haven't you filed a response to the States answer and a reply to my letter?

Any help in representing me is as you know greatly appreciated.

cc:

Sincerely,

David Brummett

Exhibit #3

David Brummett #41949
I.C.C unit, B-102
P.O. Box 70010
Boise, Idaho 83707

April 16th, 2013

Kimberly Simmons
200 West Front St. Suite #1107
Boise, Idaho 83702

Re: Case No. CV PC 19332

Dear MS. Simmons,

I'm writting in regards to why you haven't responded to the letters I sent on February 8th, 2013 and March 12th, 2013, requesting that you file a motion for leave to supplement issues in post conviction.
Also as to why have you not filed a response to the states answer to my post conviction?
I would like to know, if ever your going to respond?

Sincerely,
David Brummett

cc:

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