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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

TYSON LEE BUSS,
Petitioner-Appellant,
vs.
STATE OF IDAHO,
Respondent.

NO. 33180

FILED - COPY
SEP 17 2008
Supreme Court Court of Appeals
Entered on ATS by:

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature Of The Case

Tyson Lee Buss appeals from the summary dismissal of his petition for post conviction relief.

Statement Of Facts And Course Of Underlying Criminal Proceedings

Buss shot and killed an unarmed man in a dispute over a \$150.00 drug debt. (#30499 Sent. Tr., p.69, Ls.11-19; #30499 PSI, pp.1-2.) The circumstances leading to the killing were as follows: A lady named Shelly paid \$150.00 dollars for Buss to get her some methamphetamine. (#30499 Sent. Tr., p.69, Ls.11-13.) Shelly told a friend, a forty-year-old man named Dwight Thompson, that Buss had not delivered the methamphetamine or returned the money. (#30499 Sent. Tr., p.69, Ls.14-19.) Mr. Thompson later observed Buss walking along Boulevard Street in Idaho Falls and confronted him about the money:

Mr. Thompson approached the Defendant [Buss] that night about some money that was owed to a friend. This took place on Boulevard at 9:45.

Mr. Thompson saw him walking on the street, he stopped his car, he got out. We don't know what was actually said, but we know it happened very quickly. The gun came out and at that point witnesses would have testified that Mr. Thompson made some remarks such as, "What's the gun doing out, what are you going to have to do, where's the money, shoot me." The whole event lasted 90 seconds or less.

(#30499 Sent. Tr., p.49, Ls.10-21.¹) Buss was charged with murder in the first degree, enhanced for his use of a deadly weapon to commit the crime. (#30499 R., pp.22-23.)

Pursuant to a plea agreement, Buss entered an Alford plea to an amended charge of voluntary manslaughter also enhanced for his use of a deadly weapon to commit the crime. (#30499 R., pp.28-29; 35-39.) Buss received a unified thirty-year sentence with sixteen years fixed. (#30499 R., pp.48-51.)

Course Of Post-Conviction Proceedings

Shortly after he was sentenced, Buss filed a petition for post-conviction relief. (#33180 R., p.28.) The state moved for summary dismissal and a hearing was held. (#33180 R., p.28.) At the hearing on the state's motion, Buss requested he be allowed to withdraw his petition. (#33180 R., p.28; Exhibit, Audio Recording of 10/27/05 Hr'g.) The court heard argument on the motion but also considered Buss's request to withdraw his petition. (Audio Recording of 10/27/05 Hr'g.) Construing the request as a motion to dismiss and, citing Idaho Rule of Civil Procedure 41, the district court granted the motion without ruling on the substance of the petition. (#33180 R., p.28; Audio Recording of 10/27/05 Hr'g.)

Seven months later, Buss filed another petition for post-conviction relief. (#33180 R., pp.3-10.) In that petition Buss's sole claim was ineffective assistance of counsel. (#33180 R., p.4.) In support of that claim Buss made the following

¹ As observed by the district court, Buss was 5'7" and 170 pounds and the forty-year-old Mr. Thompson was 5'11" and 175 pounds. (#30499 Sent. Tr., p.69, Ls.20-22.)

assertions: 1) "I [Buss] asked for any and all witness statements which I never received along with much more of my discovery"; 2) "During the time of plea agreement I was on drugs & Brent Allison [Buss's attorney] wouldn't give me a sufficient amount of time to think about my Plea agreement or talk to my family"; 3) "Brent Allison told me there was no self defense or justifiable homicide in Idaho. This is how I was coerced into a plea bargain"; and 4) "I told Brent that I wasn't guilty of this crime! He told me it doesn't matter. Its what you can prove I told him I wouldn't plead guilty. He said they would find me guilty if I took it to trial because there is no self defense. Then told me to plead Alford that it means, I'm not admitting guilty, but they would find me guilty. I know that there is self defense now & I think I was miss represented." (#33180 R., p.5-6 (spelling and grammar as in original).)

The state moved to dismiss Buss's petition, and a hearing was held on the motion. (#33180 R., pp.23-27.) At that hearing, the state first argued that Buss's second petition was a successive petition improperly before the court a second time. (4/06/06 Tr., p.5, Ls.1-20.) The prosecutor also argued the record affirmatively disproved all of Buss's ineffective assistance of counsel arguments except for the assertion that his attorney told Buss that self-defense was not applicable in Idaho: "So basically, those responses made under oath [at the change of plea hearing] do, in fact, negate those allegations. The only allegation that is it not specifically and directly negated is the one that the Court has concern, and that is with regard to the self-defense issue." (4/06/06 Tr., p.8, Ls.20-24.)

With regard to the self-defense issue, the state asserted Buss had not presented facts that supported a claim of ineffective assistance of counsel because he failed to allege that he was prejudiced by counsel's actions. (4/06/06 Tr., p.19, Ls.2-21.) The district court, viewing the facts in the light most favorable to the nonmoving party, assumed Buss had been incorrectly advised that self-defense was not applicable in Idaho. (4/06/06 Tr., p.16, Ls.11-16.) The district court focused on the prejudice prong of Strickland -- whether the attorney's wrongful advice prejudiced Buss:

I've kind of come to the conclusion that for the purposes of this hearing, I'm going to assume he was wrongfully advised. That may not be the end result, but I'm going to do that.

The question then becomes, assuming he was wrongly advised, has he addressed whether or not he had a legitimate self-defense argument?

(4/06/06 Tr., p.16, Ls.13-19.)

In response to the district court's questioning of whether Buss provided facts supporting prejudice -- whether self-defense was even an issue -- Buss's counsel responded:

MR. STOSICH: And I would have to say to the Court that he hasn't done that [stated facts supporting self-defense] to fully notify that these are the reasons that I believe self-defense was available to him.

THE COURT: That's my concern.

MR. STOSICH: I think that that's true under the petition.

(4/06/06 Tr., p.16, Ls.13-19.) The district court took the matter under advisement and issued a written order summarily dismissing Buss's petition. (4/06/06 Tr., p.19, Ls.22-25; #33180 R., pp.28-43.)

In a memorandum decision, the district court granted the state's motion for summary dismissal on three independent bases: 1) that the second post-conviction petition was an improper successive petition (#33180 R., pp.30-32); 2) Buss's second petition was barred by the doctrine of issue preclusion (#33180 R., pp.32-33); and 3) that "even if Buss's claims concerning [ineffective assistance of] trial counsel are true, he has failed to establish that, but for trial counsel's deficient performance, there is a reasonable probability that Buss would not have pled guilty to the crimes charged" (#33180 R., p.33).

Buss filed a timely appeal. (#33180 R., pp.47-50.)

ISSUES

Buss states the issues on appeal as:

1. Did the district court err when it dismissed Mr. Buss's petition for post-conviction relief where the district court determined that the petition was barred by I.C. § 19-4908, but erroneously determined that Mr. Buss had previously knowingly, intelligently, and voluntarily waived the issues raised?
2. Did the district court err when it dismissed, *sua sponte*, and without prior notice, Mr. Buss's post-conviction petition based upon the doctrine of issue preclusion despite the fact that the prior adjudication relied upon by the district court was not a final determination of the merits of Mr. Buss's petition, and was not an appealable order?
3. Did the district court err when it dismissed Mr. Buss's claim that his plea was not knowingly, intelligently, and voluntarily entered in light of his attorney's affirmative misrepresentation of the availability of the affirmative defenses of self-defense or justifiable homicide in Idaho.

(Appellant's Brief, p. 9.)

The state rephrases the issues as:

1. Should this Court reject Buss's claim that notice was inadequate where Buss has shown no prejudice or surprise from the alleged lack of notice and had the opportunity to address any deficiencies in his petition at a hearing where the deficiencies were addressed?
2. The district court ultimately granted the state's motion for summary dismissal on the basis that the petition did not set forth facts supporting a theory of self-defense and therefore failed to show how his counsel's deficient performance prejudiced him. It is incontrovertible that Buss's petition does not set forth facts supporting a theory of self-defense and Buss conceded this at the hearing and presented no additional facts supporting such a theory. Has Buss, therefore, failed to show from the record that the district court erred in summarily dismissing his petition?

ARGUMENT

The Record Supports The District Court's Order Of Summary Dismissal On The Merits Of Buss's Petition

A. Introduction

Buss claims the district court erred for three reasons. First, Buss claims the court erred when it dismissed his second petition as being successive. (Appellant's Brief, pp.10-17.) Second, Buss claims the district court erred when it found the issues raised in Buss's second petition were barred by the doctrine of issue preclusion. (Appellant's Brief, pp.18-29.) Third, Buss claims the district court erred when it "dismissed Mr. Buss's claim that his plea was not knowingly, intelligently, and voluntarily entered in light of his attorney's affirmative misrepresentation of the availability of the affirmative defenses of self defense or justifiable homicide in Idaho." (Appellant's Brief, p.29 (capitalization removed).)

Because there was no adjudication of the merits of Buss's first petition and no dismissal with prejudice, the state agrees Buss's present petition is not procedurally barred as a successive petition or per the doctrine of issue preclusion. Nevertheless, the district court properly dismissed Buss's petition on the merits because his petition did not set forth facts showing how the claimed deficient performance -- allegedly misinforming Buss on the law -- resulted in prejudice. Furthermore, Buss was provided adequate notice of this deficiency in the state's motion and to the extent that he was not, that claim is not preserved because he proceeded to hearing.

B. Standard Of Review

On appeal from a summary dismissal of a petition, the appellate court reviews the record to determine if an issue of material fact exists, in which case an evidentiary hearing is required. Wilson v. State, 133 Idaho 874, 877-78, 993 P.2d 1205, 1208-09 (Ct. App. 2000). "The issue on appeal from a dismissal is whether the petition alleges facts which, if true, would entitle the petitioner to relief." Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992). The court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. Buss's Claim That He Received Inadequate Notice Of The Grounds For Summary Dismissal Is Without Merit

Idaho Code § 19-4906 authorizes a district court to summarily dismiss a post-conviction petition upon motion by a party or on the court's own initiative. Workman v. State, 144 Idaho 518, ---, 164 P.3d 798, 803 (2007). When a court dismisses an application *sua sponte*, the court is required by Idaho Code § 19-4906(b) to give the petitioner notice of the reasons for its contemplated dismissal and a 20-day opportunity to respond. Workman, 144 Idaho at ---, 164 P.3d at 803; Saykhamchone v. State, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993). However, where the state files a motion for summary disposition pursuant to Idaho Code § 19-4906(c), there is no 20-day notice requirement because "the motion itself serves as notice that summary dismissal is being sought." Workman, 144 Idaho at ---, 164 P.3d at 804 (quoting

Saykhamchone, 127 Idaho at 322, 900 P.2d at 798). As long as the state's motion puts the petitioner on notice of the basis for the state's request that the petition be summarily dismissed, the district court is not required to hold an evidentiary hearing or provide the petitioner with advance notice before dismissing the petition pursuant to the state's motion. Workman, 144 Idaho at ---, 164 P.3d at 804.

Buss claims the district court "sua sponte dismissed [his] claim for lack of evidence" (Appellant's Brief, p.34.) The state's motion failed to notify him that his petition did not articulate facts supporting prejudice, i.e., facts that would have supported a claim of self-defense. (Appellant's Brief, p.34.) This claim is not supported by the record.

Buss's petition claimed ineffective assistance of counsel. (#33180 R., pp.3-10.) Buss's claims of ineffective assistance of counsel fit into two categories: 1) the entry of the plea, and 2) Buss's claim that his attorney misinformed him of the law of self-defense in Idaho. The brief filed in support of the state's motion for summary dismissal identified two independent bases for dismissing Buss's petition. First, the state identified what it believed to be the successive nature of the petition. Next, the state argued that there was "no evidentiary basis to support [Buss's] claims." (#33180 R., p.23.) In support of this claim, the state cited Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1999) -- a post-conviction case in which the petitioner failed to articulate an evidentiary basis for ineffective assistance of counsel. Consequently, although state's motion primarily focused on the successive nature of the petition and the fact that the plea colloquy affirmatively disproved Buss's claims regarding the entry of the plea, the motion also made clear

that Buss failed to meet his burden of setting forth fact supporting his claim of ineffective assistance of counsel -- deficient performance and prejudice.

D. Even If The State's Motion Was Not Sufficient, Buss Failed To Preserve His Notice Claim By Proceeding To A Hearing On The Motion

Even if this Court determines that the state's motion did not put Buss on notice of the reason for dismissal, Buss's failure to challenge the adequacy of the notice in the district court, despite the opportunity to do so, constitutes a waiver of his claim that he received inadequate notice.

It is a well-established principle of appellate law that, absent fundamental error, the failure to raise an issue before the trial court waives that issue for purposes of appeal. State v. McAway, 127 Idaho 54, 60, 896 P.2d 962, 968 (1995); State v. Martin, 119 Idaho 577, 808 P.2d 1322 (1991). In this case, Buss, represented by counsel, proceeded through the post-conviction process, which included a hearing on the state's motion, without ever objecting to the adequacy of the notice provided by the state's motion. If Buss's counsel was confused or unclear about the bases of the very motion upon which the hearing was held he could have notified the state and the court of that fact either in a response to the state's motion or at the motion hearing itself. A review of the record shows he did neither. Rather, counsel chose to proceed on the notice he was provided.

At the hearing the court incontrovertibly heard argument on the very issue of which he claims he was not provided notice. A review of the record shows that defense counsel understood the deficiency and that the court believed that Buss had not met his burden:

THE COURT: Well, I think, and he may not have used that language, but I construed that to be the substance of his argument, that there are no facts supporting the self-defense claim.

MR. STOSICH: And the state may very well get a court in a trial to agree with that, but apparently Mr. Buss believes that notwithstanding the articulation of the facts in the Alford plea and any discussions he may have had with defense counsel, he didn't believe that he was adequately advised of the self-defense angle. And self-defense, as the court knows, particularly in review of the Idaho Criminal Jury Instructions, knows that self-defense is a term of art, not just a vague theory that can be assumed we know the elements of. In fact, it's the state who has to provide evidence that self-defense was not a defense and that certainly wasn't -- under the jury instruction, and that certainly wasn't done in the Alford plea. So I --

THE COURT: Don't we have a different situation when we're talking about postconviction relief? Doesn't the burden of persuasion, as well as producing evidence, fall upon the petitioner in this case?

MR. STOSICH: Oh, absolutely. But in a motion for summary dismissal, the Court has to construe the facts in the light most favorable to the nonmoving party. So Mr. Buss has raised the issue that he didn't believe he was fully advised and so even -- I mean, it's going to be up to how you construe the facts raised in the Alford plea, Your Honor, whether or not you believe that Mr. Buss' claims can withstand, viewed in the light most favorable to him, whether he should have a full trial on these facts rather than a summary dismissal.

I agree. We have the burden of proof in proving he was advised ultimately in a trial of facts. But in a motion for summary dismissal, I think the burden is the State's to say, under these facts, we believe that Mr. Buss' claims can't survive even that scrutiny.

THE COURT: Would you agree with me that there are really two issues here? One, what he was advised, and, two, whether there was a legitimate basis for the self-defense claim? You kind of mixed those in your discussion here.

MR. STOSICH: Yeah, you know, that's a real elemental issue. Yes, I agree with what you're saying, Your Honor. I agree that is ultimately what Mr. Buss will have to prove, that first he was advised -- or he wasn't advised -- thanks -- he wasn't advised and

that he had a legitimate claim for self-defense in order for a postconviction relief inadequate, you know, representation.

THE COURT: Doesn't he have to do that at this hearing, also?

MR. STOSICH: Well --

THE COURT: Doesn't he have to address both issues?

MR. STOSICH: Yes. *I think in order -- I think he's done that in his petition, however, by saying that Mr. Allison did not advise him.*

THE COURT: Okay. That's the first issue.

MR. STOSICH: Okay, Yes.

THE COURT: Remember I separated them. And at this point, based on my question with Mr. Bevilacqua, I've kind of come to the conclusion that for the purposes of this hearing, I'm going to assume he was wrongfully advised. *That may not be the end result, but I'm going to do that.*

The question then becomes, assuming he was wrongfully advised, has he addressed whether or not he had a legitimate self-defense argument?

MR. STOSICH: And I would have to say to the Court that he hasn't done that to fully notify that these are the reasons that I believe self-defense was available to him.

THE COURT: That's my concern.

MR. STOSICH: I think that that's true under the petition.

THE COURT: All right. *Did you want to address any of the other five issues?*

(4/06/06 Tr., p.13, L.22 - p.17, L.3.)

This questioning between the court and defense counsel establishes two important points. First, the evidentiary issue was raised in the state's motion for summary dismissal (4/06/06 Tr., p.13, Ls.22-25) and, second, the deficiency of Buss's petition was addressed by the court and counsel at the hearing (4/06/06 Tr.,

p.13, L.22 - p.17, L.3). Significantly, at no time during this exchange did Buss's counsel inform the court that Buss did not have notice of this claim or request the opportunity to present additional evidence in support of the claim. Not only does this suggest that the notice argument has not been preserved, see Mann v. Cracchiolo, 38 Cal.3d 18, 27, 210 Cal. Rptr. 762, 765 (Cal. 1985) ("It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion." (citations omitted)); Low v. Henry, 221 S.W.3d 609, 617-19 (Tx. 2007) (to preserve objection based upon lack of notice party must "bring the lack of adequate notice to the attention of the trial court at the hearing, object to the hearing going forward, and/or move for a continuance"),² but it also conclusively shows that there was no surprise or prejudice.

Indeed, at no time during the hearing did Buss request additional time to submit evidence or otherwise indicate that there was a basis for his conclusory assertion that he would have claimed self-defense. It is clear from the record that Buss's attorney understood that the court was concerned with the lack of facts in his petition regarding self-defense. Buss's counsel concedes that the petition does not allege facts that support prejudice. Nevertheless, despite this confession, there was no assertion that a factual basis existed or that Buss could allege supporting facts if

² The state acknowledges the waiver arguments were rejected by the Court of Appeals in DeRushe v. State, 2007 Unpublished Op. No. 708, *4 (Idaho App., December 12, 2007) and Anderson v. State, 2007 WL 3227294, *3 (Idaho App., Nov. 2, 2007), relying on Franck-Teel v. State, 143 Idaho 664, 152 P.3d 25 (Ct. App. 2007). However, the Supreme Court has recently granted the state's requests for a review of DeRushe and Anderson.

given the opportunity to amend the petition. Consequently, there is no merit for Buss's claim.

E. Buss Has Failed To Meet His Burden Of Presenting Facts In His Petition Showing The Claimed Deficient Performance Prejudiced Him

Buss apparently claims that even if he received sufficient notice the district court erred by dismissing his petition for not providing facts that support his claim of ineffective assistance of counsel. (Appellant's Brief, p.36.) In an attempt to get around his petition's deficiencies, Buss claims "the record does contain some evidence to support Mr. Buss's allegation that he was prejudiced by his trial counsel's advice, *i.e.* that he would not have pled guilty in the absence of counsel's deficient performance." (Appellant's Brief, p.36.) Buss's argument misses the mark.

In order to survive summary dismissal, a post-conviction petitioner must present evidence in support of his petition sufficient to make "a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999). The lower court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). "If the applicant fails to present evidence establishing an essential element

on which he or she bears the burden of proof, summary dismissal is appropriate.” Mata v. State, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993).

Thus, here, were the claim is ineffective assistance of counsel, per Strickland v. Washington, 466 U.S. 668, 687 (1984), Buss had a burden at the district court level of showing both that his attorney's performance fell below a standard of “competence demanded of attorneys in criminal cases” *and* that the defendant was prejudiced as a result. Demonstration of prejudice requires a showing of “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. When applying the prejudice prong to a case involving the entry of a guilty plea, the petitioner must also show that counsel's deficient performance “affected the outcome of the plea process” in that “the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985). That is, a defendant must show that the subject matter of the mistake constituted “an important part of his decision to plead guilty.” McKeeth v. State, 140 Idaho 847, 851, 103 P.3d 460, 464 (2004); Hayes v. State, 143 Idaho 88, 93, 137 P.3d 475, 480 (Ct. App. 2006). A petitioner's mere self-serving assertion that he would not have pleaded guilty absent the mistake need not be accepted by the trial court sitting as a fact finder. Id. Buss failed to carry his burden in this case.

As noted above, Buss conceded to the district court that his petition was deficient with regard to Strckland's second prong:

THE COURT: Remember I separated them [Strickland's two prongs]. And at this point, based on my question with Mr.

Bevilacqua, I've kind of come to the conclusion that for the purposes of this hearing, I'm going to assume he was wrongfully advised. That may not be the end result, but I'm going to do that.

The question then becomes, assuming he was wrongfully advised, has he addressed whether or not he had a legitimate self-defense argument?

MR. STOSICH: And I would have to say to the Court that he hasn't done that to fully notify that these are the reasons that I believe self-defense was available to him.

THE COURT: That's my concern.

MR. STOSICH: I think that that's true under the petition.

(4/06/06 Tr., p.16, L.11 - p.17, L.1.) The district court concluded Buss failed to meet his burden: "Buss has not provided any facts that support an argument for self defense or justifiable homicide" and consequently, "Buss has not proved that he was prejudiced by trial counsel's alleged advice (i.e., that he would not have pled guilty)." (#33180 R., p.37.) Buss cannot point to anywhere in the record where he submitted to the district court facts that supported a claim of self-defense. Consequently, Buss has not met his burden of showing the district court ruled erroneously on the matter.

Buss attempts to minimize his petition's deficiency by arguing that "the record does contain some evidence to support Mr. Buss's allegation that he was prejudiced by his trial counsel's advice." (Appellant's Brief, p.36.) Buss misses the point. It was his burden of submitting facts supporting a claim of self-defense in his petition. His ability to identify facts now is inconsequential to whether he met his burden of submitting a petition that could withstand summary dismissal.

Nevertheless, even if this Court considered the facts Buss identifies now, those facts would still have fallen short of meeting Buss's burden of submitting facts

supporting a claim of self-defense. The sole basis for Buss's argument is the state's offer of proof at the change of plea hearing where the prosecutor gave the following testimony:

And the victim in this matter believed that the defendant owed some money, so he approached the defendant and began to inquire about the money. An argument ensued. The victim raised his voice, and there were some statements made to the effect of, pay me the money or you'll have to shoot me. You'll have to shoot me.

The defendant had a High Point 9mm semiautomatic gun. The argument lasted a very brief duration, at which time the defendant raised the firearm and it discharged. The bullet penetrated Mr. Thompson's skin in the mid-abdomen area.

(#30499 12/22/03 Ch. Plea Tr., p.13, L.23 - p.14, L.9.) Contrary to Buss's assertions, this offer of proof is insufficient in overcoming Buss's burden of establishing a basis for self-defense. Pursuant to statute, homicide is justifiable when "resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person." Idaho Code § 18-4009. Appellate courts have made clear, however, that self-defense requires the defendant show he "subjectively" believed he was in "imminent danger of great bodily harm" based on the circumstances. State v. Turner, 136 Idaho 629, 634, 38 P.3d 1285, 1290 (Ct. App. 2001). Here, an argument over money and a statement "you'll have to shoot me" do not meet that standard.

In Turner, the defendant argued the court erred in not giving a jury instruction on self-defense.³ The defendant was involved in an argument with the victim after

³ A defendant is entitled to have the jury instructed on every defense or theory of defense having any support in the evidence. State v. Hansen, 133 Idaho 323, 328, 986 P.2d 346, 351 (Ct. App. 1999).

the victim came into the defendant's home. Id. at 634, 38 P.3d at 1290. The defendant, who was in a wheelchair, went to his bedroom and assembled a gun. Id. The defendant returned to the living room where the defendant was sitting on the couch. Id. He told the victim, "Now who you calling a fucking liar." Id. The victim said something to the effect of, "You better get me before I get you." Id. Following that statement the defendant shot the victim. Id. The district court concluded, based on these facts, that there was insufficient evidence to support a theory of self-defense, and therefore, that the district court was not required to give a self-defense jury instruction. Id. The appellate court upheld that determination. Id.


Buss, just like the defendant in Turner, was the one holding a hand gun. Just as in Turner, a fight preceded the showing of the gun by the perpetrator to the victim. Mr. Thompson and the defendant in Turner made similar responsive statements -- "You'll have to shoot me" compared with "You better get me before I get you." In neither case was there any indication that the defendant was in imminent danger of great bodily harm. Thus, here, just as in Turner, there is no factual support for a theory of self-defense. Accordingly, even if the court were to consider these facts, facts never submitted to the district court or alleged in Buss's petition, they are facts insufficient to establish a claim of self-defense and, therefore, insufficient to establish prejudice.

In sum, Buss failed to meet his burden of submitting, to the district court, a petition that set forth facts supporting a claim of ineffective assistance of counsel. Further, even if this Court were to consider the facts submitted for the first time on appeal, those facts fail to meet Buss's burden of showing prejudice.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order of summary dismissal.

DATED this 17th day of September 2008.



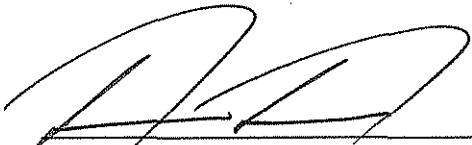
Fa DANIEL W. BOWER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of September 2008, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARA B. THOMAS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



Fa DANIEL W. BOWER
Deputy Attorney General

DB/pm