

2-25-2015

# Gomez v. State Appellant's Reply Brief Dckt. 41344

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

OSCAR GOMEZ,

APPELLANT,

-VS-

STATE OF IDAHO,

RESPONDENT.

No. 41344

Canyon County Case No.

CV-2008-5680

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT  
OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF  
CANYON

HONORABLE JUNEAL KERRICK,  
District Judge

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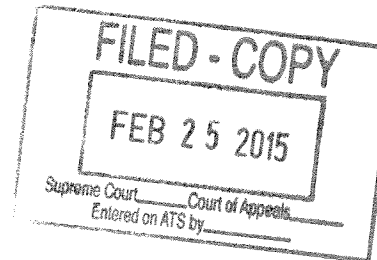


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## STATEMENT OF THE CASE

Petitioner Plead guilty, via Plea bargain, to a charge of second degree murder, on October 23, 2007, to a term of indeterminate life, with the first twenty-five (25) Years Fixed.

Petitioner filed a timely appeal and motion for a Rule 35, both were denied, via Remittitur, Idaho's Court of Appeals Jan. 15, 2008.

Petitioner then filed a Petition for Post-Conviction Relief, on May 27, 2008, which was dismissed on June 26, 2013.

Petitioner then filed a Petition / Notice of Appeal to which [he] filed his Brief, Answer to by the State on Feb. 4, 2015, which now the Appellant Reply's to herein.

## ARGUMENT

A. The State contends that: "Gomez failed to preserve the Post-conviction Claims he raises on Appeal!"

B. The State contends that, "Gomez abandoned them in a stipulation entered with the State (R., pp. 66-67, 72-73; 4/13/11 Tr., p. 1, L. 24 - p. 2, L. 23.) The district court expressly confirmed the terms of the stipulation with Gomez's counsel at an April 2011 status hearing;" (R. Br. p. 6.) which goes on to state that, Gomez had agreed to abandon all his Post-conviction issues, except the two articulated.

Gomez's counsel told that to the judge outside Gomez's presence.

Gomez never agreed to abandon any of his issues, the man (Gomez) may not read, speak or understand English, but he is not stupid.

The issue presented as #1. in [his] appeal, that [he] was lied to, tricked and coerced into pleading guilty, is proven by the record. Not even a moron would abandon that issue.

At the end of the meeting at the prison, that Gomez had with his Post-conviction counsel, Gomez believed that two issues would be taken up at the evidentiary hearing, then there would be another hearing, of a different type,

at a later date and time.

Gomez alleges that his attorney was ineffective in his representation of [him]. [he] does not know if the attorney took advantage of [his] inability to understand english, or if the interpreter at the meeting at the Prison (R. Br. P. 6) did a poor job of explaining to him what the attorney was saying to him.

Due to Gomez's lack of skill in the english language, it is impossible for him to know.

What he does know, is that he never agreed to abandon any of his issues.

Especially [he] would never-ever agreed to abandon the issues that he was, tricked/coerced into pleading guilty, or that the procecutor violated the plea agreement, and that his own attorney detrimentally violated the plea agreement.

The State, states that: "It was Gomez's burden to adequately raise these claims before the district court and obtain an adverse ruling." & "Gomez failed to preserve these claims for consideration on appeal."

However, the State fails to consider the totality of the circumstances, it was not Gomez who abandoned these issues, it was counsel who abandoned Gomez.

Gomez cannot be made to suffer, for counsel's inadequacies.

Gomez should be excused from any procedural

default, caused by counsel.

The Supreme Court has found in, Kimmelman v. Morrison,  
477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986);

"[T]he Constitution constrains our ability to allocate as we see fit the cost of ineffective assistance. The Sixth Amendment mandates that the State [or the government] bears the risk of constitutionally deficient assistance of counsel."

This shows cause for procedural default, this court can and rightly should consider the three (3) issues in Gomez's appeal.

Even the Ninth Circuit Court has ruled on an issue that mirrors, issue No. 2 of Gomez's appeal and establishes cause for procedural default; as cited in: (App. Br. P. 12.)

The tenth circuit has long established law concerning these circumstances; Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988);

"Ineffective assistance claims may be properly brought for the first time ~~in~~ in collateral proceedings, which constitutes "cause" for procedural default."

Therefore, if the court finds that Gomez's attorney was ineffective, by failing to raise a "dead bang winner." And that in itself shows cause for procedural default; U.S. v. Cook, 45 F.3d 388 (10th Cir. 1995);

"Appellate counsel's failure to raise a dead-bang winner, constitutes ineffective assistance and establishes "cause for failure to raise error."

Gomez reports that the prosecutor asking for "not less" than 25-years, instead of the "not more" than 25-years stipulated



in the Plea agreement is a dead-bang winner, as it shows that Mr. Gomez was tricked into signing the Plea agreement.

Another dead-bang winner, is seen as ineffective assistance, when defence counsel ask the court to impose a sentence 5-years in excess, of what the Plea agreement called for.

This was without any doubt ineffective assistance, as it was at that point, defence counsel began advocating for the state, leaving Gomez without counsel during sentencing. In fact counsel ask the court to impose more time, then the prosecutor did.

Which means the prosecution's second chair was Gomez's attorney. This is automatically ineffective assistance of counsel; U.S. V. Croniz, 104 S. Ct. (1984);

"Trial is unfair if the accused is denied counsel at a critical stage of the trial."

The moment counsel had the intent to ask for 5 years more than the Plea agreement called for, she became an advocate of the state and, left Gomez without counsel.

Both issues #2. + #3. in the appellant's Brief, Prove issue #1. in the appellant's Brief.

Herein is proven that there is cause for procedural default and, that this court has the jurisdiction to hear the issues presented on appeal.

CONCLUSION

Gomez has shown cause for procedural default, the state has failed to disprove those claims presented on appeal, Appellant ask that this court reverse the district court's dismissal of Gomez's Post-Conviction, Further remand this case back to the district court, with instruction to allow Gomez to expand his Post-Conviction, to include issues 1 thru. 3 in his Appellant's Brief.

Dated: 2 / 20 / 15

X Oscar Gomez  
OSCAR GOMEZ

CERTIFICATE OF SERVICE

I Hereby Certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2015,  
I caused two true and correct copies of the foregoing  
APPELLANT'S REPLY BRIEF to be placed in the U.S. mail, postage  
prepaid, addressed to:

Mark W. Olson  
Deputy Attorney General  
P.O. Box 83720  
Boise, Idaho, 83720-0010

X Oscar Gomez  
Oscar Gomez