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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|------------------------|
| HAROLD S. GRIST, |) | |
| |) | |
| Petitioner-Appellant, |) | S.Ct. No. 41409-2013 |
| |) | |
| vs. |) | D.Ct. No. CV-2012-1249 |
| |) | (Nez Perce County) |
| STATE OF IDAHO, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Second
Judicial District of the State of Idaho
In and For the County of Nez Perce

HONORABLE CARL B. KERRICK
Presiding Judge

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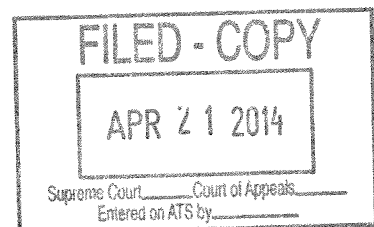


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II. STATEMENT OF THE CASE

A. Nature of the Case

Harold Grist, Jr. is appealing from the district court's partial summary dismissal and denial after evidentiary hearing of his petition for post-conviction relief. R 172-174.

The order of partial summary dismissal should be reversed because the district court summarily dismissed Mr. Grist's claims regarding juror bias on grounds not noted by the state in its motion and briefing in support of summary judgment without giving Mr. Grist independent 20-day notice of its intent to dismiss. I.C. § 19-4906(b). *Buss v. State*, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). Moreover, the court incorrectly concluded that the due process issue could have been raised in direct appeal and then applied an incorrect standard of review. *United States v. Keating*, 147 F.3d 895, 901-02 (9th Cir. 1998).

Additionally, the district court summarily dismissed Mr. Grist's claim of ineffective assistance of counsel in failing to file a meritorious Rule 35 motion on grounds not cited by the state in either its motion or briefing in support of summary dismissal without giving independent 20-day notice. Therefore, the order of partial summary dismissal should be reversed as to this claim and remanded for further proceedings. I.C. § 19-4906(b). *Buss, supra*.

Lastly, the order dismissing Mr. Grist's claims relative to the unconstitutional use of a psychosexual evaluation obtained in violation of the Fifth and Sixth Amendments should be reversed because the district court erred in not analyzing the claim as both an ineffective assistance of counsel claim and as an independent Fifth Amendment violation subject to the constitutional harmless error standard of *Chapman v. California*, 366 U.S. 18, 87 S.Ct. 824 (1967). *DeRushé v. State*, 146 Idaho 599, 604, 200 P.3d 1148, 1153 (2008).

B. Procedural History and Statement of Facts

As set out in *State v. Grist*, 152 Idaho 768, 275 P.3d 12 (Ct. App. 2012), in 2005, Mr. Grist was charged with seven counts of lewd conduct, I.C. § 18-1508, one count of sexual abuse, I.C. § 18-1506(1)(b), and two counts of sexual battery of a minor, I.C. § 18-1508A. In 2006, a jury found Mr. Grist guilty. However, the Idaho Supreme Court vacated the judgment of conviction and remanded for a new trial. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009). On retrial, the jury again convicted and Mr. Grist again appealed. *Grist*, 152 Idaho 786, 275 P.3d 12. In that appeal, the Court of Appeals affirmed the conviction but held that Mr. Grist's due process rights were violated when the district court imposed a longer determinate sentence after the retrial. Rather than remanding for resentencing, the Court of Appeals itself modified Mr. Grist's sentence. *Id.*

Of relevance to this case, a psychosexual evaluation was prepared for sentencing after the first trial. Tr. 5/10/13 p. 8, ln. 11 - p. 10, ln. 15. That evaluation was not updated after the second trial, but was relied upon by the district court in imposing the sentence after that trial. Tr. 5/10/13 p. 15, ln. 8-22.

Following the 2012 direct appeal, Mr. Grist filed a timely *pro se* petition for post-conviction relief. R 13-19. Mr. Grist's petition raised four claims, three of which are relevant to this appeal:

1. Violation of the constitutional right to due process because Juror Hendrickson knew Mr. Grist prior to trial and was a co-worker with the complaining witness's mother (Mr. Grist's ex-partner);
2. Violation of the right to due process because the district court relied upon an outdated

psychosexual evaluation which was obtained in violation of Mr. Grist's Fifth Amendment right against self-incrimination and his Sixth Amendment right to effective assistance of counsel; and

3. Ineffective assistance of trial counsel in failing to file a meritable Rule 35 motion.

R 14-19.

The state never filed an answer, but did file a motion for summary dismissal. R 30-31.

The motion stated only that the petition should be dismissed "as it presents no genuine issue of material fact and the Respondent is entitled to judgment as a matter of law pursuant to Idaho Code § 19-4906(c)." R 30.

The state also filed a brief in support of its motion. R 32-42. With regard to Mr. Grist's claim that his right to due process had been violated by Juror Hendrickson's participation, the state argued, "There was no due process violation because there was no bias against petitioner."

R 35. The state wrote:

Petitioner's assertion that he was prejudiced by Mr. Hendrickson is without merit. Mr. Hendrickson was merely an acquaintance and did not have familial relationship or relationship of control over Petitioner or Ms. Offins; he was merely an acquaintance from work and had no personal relationship with either party. In addition, he affirmed that there would be nothing to prevent him from being impartial or unfair (sic) to the parties. Because Mr. Hendrickson affirmed that he could be fair, the court will not refute his opinion. Therefore, contrary to Petitioner's assertions, Mr. Hendrickson's presence on the jury did not bias or harm the impartiality of the proceedings.

R 37.

The state's brief did not address Mr. Grist's claim of violation of his Fifth Amendment rights in use of the psychosexual evaluation at sentencing. R 32-42.

With regard to claims of ineffective assistance of counsel in not objecting to the use of the unconstitutionally obtained PSE, the state argued that counsel had acted in a reasonable

manner and that the record demonstrated no prejudice from use of the PSE. R 38-40.

The state did not make any argument about Mr. Grist's claim of ineffective assistance in failing to file a meritable Rule 35 motion. R 32-42.

Mr. Grist, through counsel, filed a reply to the state's motion and brief. R 52-57.

Following a hearing, the district court granted in part and denied in part the state's motion. R 66-76.

The court granted summary dismissal of Mr. Grist's claim that his right to due process was violated by the presence of Mr. Hendrickson on the jury. The court cited two reasons for summary dismissal: 1) that the issue should have been raised on direct appeal and was not; and 2) that "this is not an issue for which there is a substantial factual showing that the Petitioner's assertions raise a substantial doubt about the reliability of the finding of guilt in this case." R 70.

The district court denied the state's motion with regard to claims about the improper use of the psychosexual evaluation from the first trial in the sentencing of the second trial. The court set an evidentiary hearing to address whether counsel in the first trial advised Mr. Grist of his Fifth Amendment rights prior to participation in the PSE and whether counsel in the second trial adequately advised Mr. Grist regarding his rights pertaining to the use of the PSE in sentencing after the second trial. R 72-73.

The district court summarily dismissed Mr. Grist's claim that counsel was ineffective in not filing a meritable Rule 35 motion on the grounds that "there is no evidence presented that a meritable Rule 35 motion would have changed the outcome of this case." R 74.

In the court's order, the court *sua sponte* took judicial notice of the underlying criminal case. R 67, fnt. 1. Later, the court issued a separate order for admission of trial transcripts. R

100-101.

At the evidentiary hearing, counsel from the first trial testified that he did not advise Mr. Grist of his Fifth Amendment rights prior to his participation in the court ordered PSE. Tr. 5/10/13, p. 8, ln. 11-23. Counsel from the second trial testified that Mr. Grist declined to participate in a second PSE and that he could not recall making any objection or having any discussion with Mr. Grist regarding the use of the first PSE in the second sentencing hearing. Tr. 5/10/13, p. 15, ln. 11 - p. 16, ln. 1. Mr. Grist testified that counsel in the second sentencing hearing did not object to the use of the PSE prepared after the first trial without advisement of his Fifth Amendment rights. Tr. 5/10/13, p. 20, ln. 2-4.

Following the hearing, Mr. Grist filed a brief in support of his petition wherein he again argued that there was both a Fifth Amendment violation of the right against self-incrimination and a Sixth Amendment violation of the right to effective assistance of counsel. R 104.

Thereafter, the district court entered an order denying post-conviction relief. R 155-170. In its order, the court stated that the sole issue before it was whether Mr. Grist had received ineffective assistance of counsel when counsel failed to object to the use of the 2006 PSE at sentencing following the second trial in 2009. R 158-159. The court concluded that counsel rendered deficient performance, but further concluded that Mr. Grist had not established that but for counsel's deficient performance the outcome of the criminal case would have been different. R 168. Therefore, post-conviction relief was denied. *Id.*

After much delay, a final judgment in appropriate form was entered. See this Court's Order to Reinstate Appellate Proceedings, entered March 14, 2014.

This appeal timely follows. R 172-174.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in summarily dismissing Mr. Grist's claim that he was denied due process by the presence of Mr. Hendrickson on the jury on grounds not asserted in the state's motion and brief for summary judgment without giving Mr. Grist 20-days notice and an opportunity to respond as required by I.C. § 19-4906(b)?

2. Did the district court err in summarily dismissing Mr. Grist's claim that he was denied due process by the presence of Mr. Hendrickson on the jury on the basis that the claim should have been raised on direct appeal and that he had not shown a substantial doubt about the reliability of the finding of guilt when the claim could not have been raised on direct appeal and when the proper standard is whether the state can show beyond a reasonable doubt that extrinsic evidence did not contribute to the jury's verdict?

3. Did the district court err in summarily dismissing Mr. Grist's claim that counsel was ineffective in failing to file a meritable Rule 35 motion without proper notice per I.C. § 19-4906?

4. Did the district court err in failing to address Mr. Grist's stand alone Fifth Amendment claim relating to the improper use of the PSE at the second sentencing and should relief be granted on the Fifth Amendment claim because the state has not shown beyond a reasonable doubt that the consideration of the PSE did not affect the sentence imposed?

III. ARGUMENT

A. The District Court Erred in Summarily Dismissing Mr. Grist's Due Process Claim Without Proper Notice

The district court dismissed Mr. Grist's claim for post-conviction relief based on the denial of due process by the presence of Mr. Hendrickson on the jury on grounds other than the

grounds set out in the state's motion for summary disposition. Therefore, the dismissal was *sua sponte* and without proper notice. The appropriate remedy is reversal of the order of dismissal and remand for further proceedings.

The applicable law is set out in *Buss v. State, supra*:

Pursuant to I.C. § 19-4906(b), the district court may *sua sponte* dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The reason that subsection (b), but not section (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Id.* Idaho Rules of Civil Procedure 7(b)(1) requires that the grounds of a motion be stated with 'particularity.' *See DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009) (reiterating the requirement of reasonable particularity in post-conviction cases.) If the state's motion fails to give such notice of the grounds for dismissal, the court may grant summary dismissal only if the court first gives the applicant the requisite twenty-day notice of intent to dismiss and the ground therefore pursuant to I.C. § 19-4906(b). *See Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798. Similarly, where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide the twenty-day notice.

147 Idaho at 517, 211 P.3d at 126 (footnotes omitted). *See also, Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) ("Thus, where a trial court dismissed a claim based upon grounds other than those offered – by the State's motion for summary dismissal, and accompanying memoranda -- the defendant seeking post-conviction relief must be provided with a 20-day notice period.")

With regard to Mr. Grist's due process claim, the state's brief argued for summary dismissal because "Mr. Hendrickson's presence on the jury did not bias or harm the impartiality

of the proceedings.” The district court dismissed the claim because the issue should have been raised on direct appeal and was not and “this is not an issue for which there is a substantial factual showing that the Petitioner’s assertions raise a substantial doubt about the reliability of the finding of guilt in this case.” R 70.

Because the district court dismissed on grounds different than those set out by the state in its motion and brief without giving independent 20-day notice, the order of summary dismissal should be reversed and the case remanded for further proceedings on this claim.

B. The District Court Further Erred in Dismissing the Due Process Claim Based Upon the Wrong Standard

The district court not only summarily dismissed Mr. Grist’s due process claim without proper notice; the court also dismissed the claim based upon the wrong standards. The district court dismissed the claim because it concluded that the claim should have been raised on direct appeal and because it concluded that Mr. Grist had failed to raise a substantial doubt about the reliability of the finding of guilt. Both these conclusions are contrary to the applicable law.

Mr. Grist’s claim that his due process rights had been violated by Mr. Henderickson’s presence on the jury could only be proven if he could establish that Mr. Henderickson influenced the jury through introduction of extraneous prejudicial information. *See* IRE 606(b). To obtain a new trial based upon juror misconduct, “the defendant must present clear and convincing evidence that the misconduct has occurred.” *State v. Strange*, 147 Idaho 686, 689, 214 P.3d 672, 675 (Ct. App. 2009). Because evidentiary proof is required, this is a claim that is appropriately raised in a petition for post-conviction relief. *Campbell v. State*, 130 Idaho 546, 549-550, 944 P.2d 143, 146-147 (Ct. App. 1997).

Furthermore, the proper legal standard for determining prejudice in cases wherein jurors have been exposed to extraneous information or other improper influences is “whether the information reasonably could have produced prejudice, when evaluated in light of all the events and the evidence at trial.” *Roll v. City of Middleton*, 115 Idaho 833, 837, 771 P.2d 54, 58 (Ct. App. 1989).

The appropriate standard is more fully discussed in *United States v. Keating, supra*. There the Ninth Circuit noted that if a juror communicated information to the other jurors based on his/her prior knowledge of the defendant, the juror was in effect testifying against the defendant in violation of his Sixth Amendment rights. Thus, the defendant is entitled to a new trial if there is a reasonable possibility that the communication could have affected the verdict. The inquiry is objective; the court need not ascertain whether the extrinsic evidence actually influenced any specific juror. The government bears the burden of showing beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.

In this case, the district court incorrectly concluded that Mr. Grist’s claim that his due process rights were violated by Mr. Henderickson’s presence on the jury could not be heard in post-conviction proceedings and further applied an incorrect legal standard in determining that even if the claim could be heard it lacked merit. On this basis also, the order of summary dismissal should be reversed.

C. The District Court Erred in Summarily Dismissing Mr. Grist’s Claim of Ineffective Assistance of Counsel in Failing to File a Meritable Rule 35 Motion Without Proper Notice

As set out above, a district court errs when it summarily dismisses a claim on grounds not noted by the state in its motion or briefing for summary dismissal without giving its own 20-day

notice. I.C. § 19-4906(b); *Buss, supra*. In this case, the state did not offer any reasons why Mr. Grist's ineffective assistance of counsel claim relative to the Rule 35 motion should be summarily dismissed. However, the district court dismissed because "there is no evidence presented that a meritable Rule 35 motion would have changed the outcome of this case." R 74. Again, this was a dismissal without proper notice. That portion of the order of summary dismissal should be reversed and the matter remanded for further proceedings.

D. The District Court Erred in Failing to Address Mr. Grist's Stand Alone Fifth Amendment Claim Relating to the Improper Use of the PSE at the Second Sentencing

Mr. Grist's petition raised this claim:

Petitioner's right to due process was violated by the court allowing and using an outdated psychosexual evaluation that was ordered and prepared in violation of the Petitioner's 5th and 6th Amendment rights as found under the U.S. Constitution.

R 15.

This claim clearly raised violations of both the Fifth Amendment and the Sixth Amendment. However, in denying the claim, the court only analyzed the claim as a Sixth Amendment claim: "The sole issue before this Court is whether counsel was ineffective at sentencing for failing to object to the court's review of the 2006 psychosexual examination." R 168. In failing to address the separate Fifth Amendment claim, the district court erred and reversal of the denial of relief is required. *See DeRushé v. State, supra*, holding that the district court erred in analyzing the petitioner's claim of a Fifth Amendment violation as only a Sixth Amendment ineffective assistance of counsel claim, vacating the denial of relief, and remanding for further proceedings.

In analyzing Mr. Grist's Sixth Amendment claim, the district court did find that counsel

was deficient in failing to object to the district court's consideration of the PSE at the second sentencing hearing because the PSE was obtained without advisement of Mr. Grist's Fifth Amendment rights. R 168. Implicit in this conclusion is the conclusion that an objection to the use of the PSE would have been sustained because use of the PSE would violate the Fifth Amendment.

The district court then looked to see if, in accord with *Strickland's* requirements, Mr. Grist had established prejudice. R 168. The court looked to *Hughes v. State*, 148 Idaho 448, 224 P.3d 515 (Ct. App. 2009), and determined that "the Petitioner must also establish that but for counsel's deficient performance, the outcome of the criminal case would be different. In this case, the burden is on the Petitioner to establish that the sentence imposed would have been different." R 168. The court then concluded that Mr. Grist had not carried this burden. *Id.*

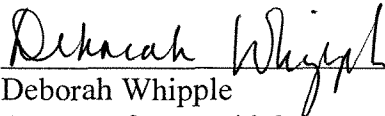
However, when a claim is raised as a direct violation of a constitutional right once the petitioner establishes the violation, the burden shifts to the state to demonstrate that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 366 U.S. 18, 23-24, 87 S.Ct. 824, 828 (1967), "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *See also, State v. Darbin*, 109 Idaho 516, 522, 708 P.2d 921, 927 (Ct. App. 1985); *Rossignol v. State*, 152 Idaho 700, 271 P.3d 1 (Ct. App. 2012).

In this case Mr. Grist pled both a Fifth Amendment and a Sixth Amendment violation. The district court erred in not considering the Fifth Amendment violation. As in *DeRushé*, the order denying post-conviction relief should be vacated and the matter remanded for further proceedings.

V. CONCLUSION

For the reasons set forth above, Mr. Grist asks that this Court reverse the order of partial summary dismissal and the order denying post-conviction relief and remand with directions for further proceedings in the district court.

Respectfully submitted this 21st day of April, 2014.



Deborah Whipple
Attorney for Harold Grist

CERTIFICATE OF SERVICE

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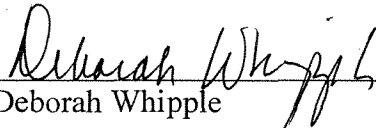
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