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Brown v. State Appellant's Brief Dckt. 41826

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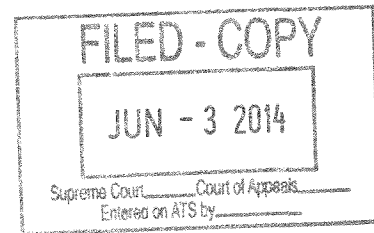
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IN THE SUPREME COURT
OF THE STATE OF IDAHO

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR SHOSHONE COUNTY
CASE NUMBER 2013-507, THE HONORABLE FRED GIBLER PRESIDING

IDAHO STATE SUPREME COURT NUMBER 41826-2014

Lloyd James Brown,
Appellant

VS:

State of Idaho,
Respondent

For The Appellant

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Boise, Idaho
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For The Respondent

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Mr. L. LaMont Anderson
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<u>United States Constitution,</u> <u>Amendment Sixth</u>	PASSIM

1 ISSUES PRESENTED FOR REVIEW

2 1). Was the Petitioner/Appellant denied his right to
3 Appeal the Sentence imposed? (By Counsel's
4 Failure to file such Appeal).

5 2). Was counsel ineffective for advising the Petitioner/
6 Appellant to plead guilty without challenging the
7 evidence against the Petitioner/Appellant?

8 For purpose of brevity, the Appellant/Petitioner will consolidate
9 these issues together as much as possible.

10 STATEMENT OF THE CASE

11 The Petitioner/Appellant was sentenced to a term of incarceration
12 in the amount of 12 years: to wit, 5 years determinate followed by
13 7 years indeterminate.

14 The Petitioner/Appellant asked Counsel to file an Appeal of
15 the sentence imposed.

16 The Petitioner/Appellant, after waiting for a great length of
17 time, and hearing nothing from any Court or Counsel as to the sought
18 after appeal, filed a Petition for Post Conviction Relief.

19 The District Court, filed not one, but two notices of intent
20 to dismiss, to which the Appellant/Petitioner responded. Eventually,
21 the District Court dismissed the Petition without ever appointing
22 Counsel to assist the Petitioner.

23 The Appellant/Petitioner asserts that Counsel should have
24 challenged the evidence against him before advising him to enter
25 into a plea of guilty; and, that Counsel had a duty to file an appeal
26 of the sentence imposed.

27 The Appellant/Petitioner also asserts that Counsel should have
28 been appointed in the Post Conviction matter, and for this appeal.

 The Appellant/Petitioner waived, as part of the plea, the

1 ability to appeal THE CONVICTION. not the sentence imposed.

2 Based upon this, and because there was no appeal filed as
3 to the sentence imposed, Counsel was ineffective for not filing
4 an appeal of the sentence imposed.

5 This does not nullify the plea agreement. As stated, the
6 Petitioner waived his right to appeal the CONVICTION.

7 The Petitioner did not waive his right to file an appeal of
8 the SENTENCE IMPOSED.

9
10 FIRST ISSUE PRESENTED FOR REVIEW

11
12 The Office of the State Attorney General has filed a
13 concession in the case of Ellis V. Smith, CV-06-00240-LMB,
14 as was filed in the United States District Court, in and for the
15 District of Idaho, whereas the State of Idaho has now conceded
16 that the cases of Martinez V. Ryan, 132 S.Ct. 1309, (2012); and
17 Trevino V. Thaler, 133 S.Ct. 1911, (2013) apply to the State of
18 Idaho.

19 Those cases, from the United States Supreme Court, clearly
20 and conclusively state that a substantial claim of ineffective
21 assistance of counsel, (That has been procedurally defaulted),
22 will be heard by the Court, if Counsel in the District Court
23 was ineffective, or no counsel was appointed in the District
24 Court.

25 This is the exact claim before this Court, and the Court was
in error not to allow these claims to be heard.

1 The Petitioner did enter into a plea agreement as to the
2 five year fixed term. But he did not enter into a plea agreement
3 as to the 7 year indeterminate term, and therefore an Appeal of
4 of the 7 year indeterminate term is permissible and should have
5 been undertaken by Counsel.

6 In the case of United States V. Garrett, 402 F.3d 1262,
7 (2005), the Court held,

8 "An attorney's failure to file an appeal in spite of
9 having been instructed to do so is ineffective
assistance of counsel even though the defendant may
have waived his right to appeal in the plea agreement".

10
11 This fits precisely into the facts of this case. It was
12 clearly ineffective assistance of Counsel for Counsel not to file
13 an appeal of the sentence imposed.

14 In the case of United States V. Sandoval-Lopez, 409 F.3d
15 1193, (2005), the Court held as follows:

16 "...an attorney's failure to file an appeal is
17 ineffective assistance where the attorney was informed
18 to file such an appeal, but did not do so because
the plea agreement had specifically waived the right
to file such an appeal".

19 Based upon these cases, and a plethora of others, it is
20 a substantial claim of ineffective assistance of counsel for
21 counsel not to have filed the requested appeal of the sentence
22 imposed.

23 **SECOND ISSUE PRESENTED FOR REVIEW**

24 The Court has misrepresented, or misunderstood the second
25 issue concerning the failure to file a Motion to Suppress the

1 evidence in this case.

2 The Court has stated; in the Amended Notice of Intent to
3 Dismiss, on page 2, at paragraph 3, this Court states:

4 "...At the time the plea was taken Petitioner was
5 informed that if he pled guilty he would give up
any right to seek to suppress the evidence against
him, and Petitioner acknowledged this..."

6 There is absolutely nothing in the context of the plea
7 agreement that states that the Petitioner is waiving or giving
8 up his right to collaterally attack his conviction based upon
9 a claim or claims of Ineffective Assistance of Counsel.

10 It is not known if the Petitioner was given adequate legal
11 advise when he entered into the plea agreement. At the time the
12 plea was entered, the attorney of record informed the Petitioner
13 that he had no standing to challenge the admission of evidence
14 that was taken from his vehicle.

15 This turns out not to be the law of the United States of
16 America under the Fourth Amendment.

17 There is an abundance of case authority that states that it
18 is ineffective assistance of counsel for counsel not to have
19 challenged the evidence against a criminal defendant prior to
20 engaging in plea negotiations. Please see, Moore V. Czerniak,
21 534 F.3d 1128, (9th Cir. 2008), (Counsel's failure to file a
22 Motion to Suppress was ineffective assistance, where Motion, if
23 it had been filed, would have allowed the attorney to bargain for
24 a lighter sentence); Tomlin V. Myers, 30 F. 3d 1235, (9th Cir.
25 1994), (Failure to challenge admission of evidence resulting from
an illegal line-up was ineffective assistance of counsel).

1 The Court seems to think that if the Petitioner is
2 successful in his Post-Conviction Petition, then the State would
3 be free to re-charge the Petitioner, which would include the
4 refiling of the persistent felony offender charge.

5 The Court may be correct. But the problem with the Court's
6 reasoning is this. If the Petitioner is successful, that would
7 mean that he was granted an evidentiary hearing. To be successful
8 at such a hearing, the Petitioner would have to be granted the
9 ability to file a suppression Motion. If that Motion to suppress
10 evidence was granted, there would be no evidence against the
11 Petitioner for the State of Idaho to use to re-file these charges.

12 Out of 100 attorney's, the Petitioner cannot seem to find
13 a single attorney who would not have filed a Motion to Suppress
14 the evidence in this case. How then can the Court make any type
15 of argument that the Petitioner was given the effective assistance
16 of Counsel during the plea process, when the attorney of record
17 did not file such a Motion?

18 How does the attorney of record advise the Petitioner into
19 accepting a plea agreement when the attorney has not even tried
20 to challenge the evidence against the Petitioner?

21 CONCLUSION

22 This case comes down to one simple basic question. One that
23 the Court cannot dismiss as readily as it would seem. That
24 question is: "...Is the Petitioner entitled to the effective
25 Assistance of Counsel during the Plea Bargaining
Process"?

The United States Supreme Court has already answered this

1 question. In the case of Lafler V. Cooper, 132 S.Ct. 1376, (2012)
2 the Court stated as follows:

3 "...The fact that a defendant is guilty does not mean
4 he is not entitled to the effective assistance of
counsel during the plea bargain process".

5 Once more, the Courts have all agreed, it is deficient
6 performance for an attorney to not file a Motion to Suppress.
7 Gentry V. Sevier, 597 F.3d 838, (2010). (Ineffective assistance
8 of Counsel for failing to file a Motion to Suppress, even though
9 the evidence may have been discovered as a result of the
10 inevitable discovery rule).

11 So, the question then becomes, "...was counsel in this case
12 ineffective for advising the Petitioner to accept the plea
13 agreement, when he had not challenged the evidence"? There is
14 only one possible answer.

15 Next, as to the procedural default, this Court is bound by
16 the terms of the cases as cited by the United States Supreme
17 Court. Please see, Martinez V. Ryan, 132 S.Ct. 1309, (2012); and,
Trevino V. Thaler, 133 S.Ct. 1911, (2013).

18 Each of these cases are clear. A State's procedural default
19 rule will not stop a claim from being heard if there is a
20 substantial claim of ineffective assistance of counsel.

21 The Petitioner submits that he has such a "substantial"
22 claim.

23 Furthermore, the time to file for Post Conviction Relief is
24 "tolled" during the time that an appeal is taken. It was the
25 failure of counsel to file such an appeal that resulted in the
untimely filing of the instant Petition, and therefore this Court

1 should allow the claims of the Petitioner to be heard on their
2 merits.

3 Had counsel filed the requested appeal, the Petitioner would
4 have had a date certain as to when he had to file his Post
5 Conviction Petition. But, because counsel did not file such an
6 appeal, the Petitioner has been denied the ability to timely file
7 his Post Conviction Petition.

8 Based upon the facts of this case, the Petitioner should be
9 allowed the ability, (With the assistance of counsel), his claims
10 of ineffective assistance of counsel, and to develop his Motion to
11 suppress the evidence against him.

12 Furthermore, there simply is no provisions in the Laws of the
14 State of Idaho, which allows the State to file a Notice of Intent,
15 the Petitioner answer that Notice, and defeat that Notice of Intent,
16 and then the State file yet another Notice of Intent and have it
17 granted.

18 If this was the proper procedure, then there would never ever
19 be any evidentiary hearings in a Post Conviction Proceeding. If this
20 was the proper procedure, then Counsel would never need to be
21 appointed. The Court/State could just continuously refile the
22 Notice of Intent to Dismiss; a Petitioner could respond, and if he
23 was successful, then the State/Court could just file another Notice
24 of Intent to dismiss. It would be a never ending affair.

25 The Court filed it's Notice of Intent to Dismiss. The
26 Petitioner Responded, and defeated the reasons given by the Court
27 for such Notice. The Court then files yet another Notice. This is
28 irregular, and unfair. No Counsel was ever appointed. Why?

1 From the facts of this case, it is clear that the Petitioner/
2 Appellant was denied the constructive assistance of counsel when
3 Counsel did not file the appeal as requested; the effective
4 assistance of counsel during the plea process when counsel advised
5 the Petitioner/Appellant to enter into a plea of guilty without
6 challenging the evidence against the Petitioner/Appellant; and,
7 when the District Court refused to appoint counsel for appellate
8 purposes in this Appeal.

9 It is for these reasons that this Court should remand this
10 case to the district court for the appointment of counsel and to
11 instruct the district court as to the proper responsibilities of
12 the Court in the protection of the rights of the defendant during
14 the Post Conviction and the appellate process.

15
16 **DECLARATION OF APPELLANT**

17 Comes now, Lloyd J. Brown, the Appellant/Petitioner herein,
18 who does declare, under the penalty of perjury that the information
19 contained herein is true and correct to the best of his knowledge
20 and belief, as prescribed under the United States Code, Title 28,
Section 1746.

21 Lloyd James Brown
Lloyd James Brown, Appellant

5-28-14
Dated

22
23
24 Controlling case of Roe V. Flores-Ortega, 120 S.Ct. 1029, (2000),
25 would demand reversal of this case for counsels' failure to file
26 the appeal, or to consult with the petitioner about the appeal.
27
28

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 30 day of MAY, 2014, I
mailed a copy of this **Opening Brief of Appellant**

for the purposes of filing with the court and of mailing a true and correct copy via
prison mail system for processing to the U.S. mail system to:

Clerk of the Court
Idaho State Supreme Court
Post Office Box 83720
Boise, Idaho
83720-0010

Office of the Att. Gen.
Att: L.LaMont Anderson
Post Office Box 83720
Boise, Idaho
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Lloyd James Brown
Petitioner