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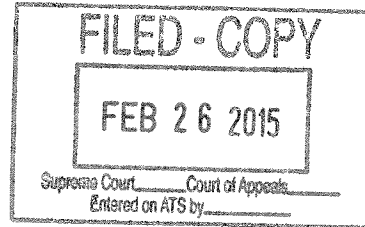
IN THE SUPREME COURT OF THE STATE OF IDAHO

ANDY GENE GALLEGOS,)
)
 Appellant,)
)
 vs.)
)
STATE OF IDAHO,)
)
 Respondent.)
_____)

Case No. 42009-2014

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District
for Cassia County.
The Honorable Michael R. Crabtree, District Judge presiding.



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STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the summary dismissal of a pro se successive petition for post-conviction, and Judgment. (R. pp.83-90.) The order of dismissal should be reversed because the petition raised a genuine issue of material fact - specifically whether trial counsel was ineffective for failing to request an in camera proceeding regarding a potential trial witness who had information that proved Mr. Gallegos innocence at trial, and that Appellate Attorney's were constitutionally ineffective in representing him on the direct appeal of the judgment and sentence, all contrary to well established Federal Law and United States Supreme Court decisions.

B. Procedural History and Statement of Facts

Appellant, Andy Gene Gallegos, was charged with two counts of sexual abuse of a minor under the age of sixteen years in Cassia County case CR-2007-3989. Mr. Gallegos was found guilty after trial, and he admitted to being a persistent violator. On April 1, 2008, the trial court sentenced Mr. Gallegos to a Unified term of imprisonment of thirty years with ten years determinate in Count I; and a unified term of imprisonment of twenty-five years with ten years determinate in Count II, with both Count I and II to run concurrently with each other.

On appeal, the only issue raised was whether the district court abused its discretion when it imposed upon Mr. Gallegos a unified sentence of thirty years, with ten years fixed, by failing to recognize that the court had the discretion to consider the polygraph results and in light of the fact that petitioner was deemed a low risk to re-offend. And, the Court of Appeals affirmed in an unpublished decision. State v. Gallegos, No.613, Unpublished Opinion filed September 18, 2009.

Mr. Gallegos subsequently timely filed a pro se petition for post-conviction relief, Cassia County case CV-2010-757, which the district court summarily dismissed and issued a judgment on September 28, 2012. This was appealed to the Idaho Supreme Court Dkt. No. 40481-2012 and latter was dismissed based upon appointed appellate counsel's advise that Mr. Gallegos dismiss the matter and file a successive petition for post-conviction relief.

Mr. Gallegos then on December 20, 2013, filed a successive petition for post-conviction relief. (R., pp. 3-7), and First Affidavit of Petitioner which set forth all of the three federal claims which he was presenting with exhibits (R., pp. 24-40.)

The state filed an Answer, and within it requested the district court to deny the claims presented therein and summarily dismiss the petition. (R., pp. 52.) Mr. Gallegos filed a timely objection to the Answer to Successive Petition for Post Conviction Relief in where he specifically pointed out that the state had failed to comply with the mandates of I.C. 19-4906(a) for they had failed to submit portions of the underlying criminal record in order to support their affirmative defenses, and it was improper to seek summarily dismissal with the Answer they filed for it was not requested in a properly supported Motion to Dismiss pursuant to I.C. 19-4906(c). (R., pp. 53-58.)

As a result, the district court issued a Notice of Intent to Dismiss Post-Conviction Application based solely upon Claim One contained within the petition regarding prior post-conviction counsel's ineffectiveness, and disregarded any of the other Claims contained in the Successive Petition for Post-Conviction Relief. (R. pp. 71-75.)

Mr. Gallegos filed a pro se timely Reply to the district court's Notice of Intent to Dismiss Post-Conviction Application. Of importance Gallegos pointed out to the district court that he was presenting federal claims which violated his Constitutional Rights based upon well decided U.S. Supreme Court decisions, and that the district court only addressed Claim One in its Notice and failed to recognize and address the other two (2) cognizable claims presented in his Petition and First Affidavit of Petitioner with Exhibits. (R., pp. 76-82.)

In response the district court issued its Order Dismissing Post-Conviction Application in where it first addressed Mr. Gallegos's Motion to Take Judicial Notice of Underlying Records that he had filed with the court when he submitted his Successive Petition for Post-Conviction Relief. (See R., pp. 11-13.) In addition Gallegos also had relied upon the underlying criminal records and previous post-conviction relief records in submitting his "Supporting Facts" to all three Claims he presented in this Post-Conviction Relief (R., pp. 26-40.)

Secondly, the district court held that Mr. Gallegos's successive petition was barred by Idaho Code 19-4908 and the Idaho Supreme Court's most recent ruling in Murphy v. State, No. 40483, 2014 WL 712695, at *6 (Idaho Feb. 25, 2014) (R., pp. 85-87).

This appeal timely followed. (R., pp.91-94.)

ISSUES PRESENTED FOR REVIEW

Did the district court err in summarily dismissing the successive petition post-conviction relief given that the pleadings and supporting materials established a genuine issue of material facts as to whether trial counsel was ineffective in failing to request an in camera proceeding with Dr. Pilling's

patient inquiring into her knowledge of anything related to Petitioner's case; Petitioner's Appellate Attorney's were constitutionally ineffective in representing him in his appeal of the judgment and sentence; and, the district court abused its discretion contrary to this Court's holding in taking judicial notice of the underlying criminal records in the post-conviction relief proceedings?

ARGUMENT

A. The Petition Raised Genuine Issues of Material Facts and Should Not Have Been Summarily Dismissed

1. Standard of Review

As set out in Nevarez v. State, 145 Idaho 878, 880-81, 187 P.3d 1253, 1255-56 (Ct.App. 2008):

A post-conviction relief action is a civil proceeding in which the applicant bears the burden to prove the allegations upon which the request for relief is based. An order for summary disposition of a post-conviction relief action under I.C. 19-4906(c) is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. Therefore, summary dismissal of a post-conviction application is appropriate only if there exists no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief. If a genuine factual issue is presented an evidentiary hearing must be conducted. On review of a summary dismissal, we must examine the record to determine whether the trial court correctly found that there existed no genuine issue of material fact and that the State was entitled to judgment as a matter of law. We liberally construe the facts and reasonable inferences in favor of the non-moving party. However, we do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence.

Id. citations omitted.

2. **The District Court Erred in Concluding Counsel Was Not Ineffective in failing to request an in camera proceeding with Dr. Pilling's patient inquiring into her knowledge of anything related to Mr. Gallegos's case.**

This claim presents an issue of "newly Discovered Evidence", and a claim

of ineffective assistance of Counsel during trial, on appeal, and in the first Post Conviction proceeding.

The Petitioner has filed a Second or successive Petition for Post Conviction Relief in the District Court.

The District Court, after several long Months of attempting to have the case dismissed, finally entered an Order dismissing the Petition, and the Petitioner filed a timely Notice of Appeal, whereas this Brief follows.

It is the position of the Petitioner/Appellant that the District Court erred when it dismissed the Successive Petition, without an evidentiary hearing, because the Petitioner did in fact raise a material issue of fact before the District Court, and this fact alone should have prevented the case from being dismissed.

The issue presented herein is whether or not the District Court erred when it refused to conclude that Trial Counsel was ineffective for not moving the Trial Court to hold an "In Camera" hearing with Dr. Phillings Patient.

The Petitioner submitted a sworn affidavit which did in fact disclose that the Patient of Dr. Pillings was in possession of information which would show that the victim of the alleged crime had in fact fabricated the entire crime so that the, "...Defendant would have to move from the home, and the Victim would not have to obey such harsh and severe rules at the home".

This goes to the truth of the State's case. It goes to the direct evidence that was used to convict the Petitioner. It goes to the fundamental fairness of the judicial process in the State of Idaho.

It would have been very easy for the Court to have found that this was a material issue of fact presented in the Petition and entered an Order for an evidentiary hearing.

More to the point, the District Court erred when it dismissed the Petition

because the only way the District Court, in the successive Petition for Post Conviction Relief can make the decision that Counsel was not ineffective during Trial when Counsel did not seek an "in camera hearing" was to actually hold such a hearing to determine as to the evidence that would have been presented to the Court in such a hearing. There is simply no other way for the Court to make a just and fair determination of those facts.

It is based upon this that the Petitioner asks this Court to find that the Court abused its' discretion when it dismissed the Petition for Post Conviction Relief, (Successive Petition), and when the Court ruled that Trial Counsel was not Ineffective in not Moving the Court for such an "in Camera Hearing".

The purpose of an "In Camera" hearing is to protect the identify of the person giving testimony during such a hearing. Such a hearing is to be conducted when and if there is an invocation of a clear privilege, such as the Attorney Client. Doctor patient, or husband wife, (Marital), and or the Clergy privilege.

In this case the District Court erred when it held that there was no need to find that Counsel was ineffective for not seeking such a hearing, because the Doctor involved, Dr. Pillings, had invoked the Patient Doctor privilege. This is a non-sensical argument. It is for the times when such a privilege is invoked that a Court should in fact hold such a hearing. To protect the identity of such persons.

When the District Court denied the Successive Petition for Post Conviction Relief, and based its' dismissal on the above facts, it denied to the Petitioner the ability to present a complete defense. It denied to the Petitioner his right to the effective assistance of counsel during Trial, and on direct appeal.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the

right to present the Defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecutions' witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of Due Process of Law under the Sixth Amendment to the United States Constitution." Washington V. State of Texas, 388 U.S. 14, 18 L.Ed.2d 1029, 87 S.Ct. 1920, (1967); In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, (1948).

In the case before this Court it is well settled that the Petitioner had a Constitutional right, under the Sixth Amendment to the United States Constitution to present a defense to the charges against himself. This would clearly include the right to call witnesses.

Because the information learned by the Petitioner was disclosed during the communication between Doctor and Patient, the Doctor at issue, (Not the Patient), moved to have the information not disclosed under the Idaho Rules of Evidence, Rule 503. This Motion was granted by the Court.

The error occurred when the District Court went one step more, and entered an Order which denied to the Petitioner the right to present a complete defense. This was done when the Court refused the request to have the witness give the sought after testimony to the Court, in a sealed, in camera hearing.

This violates the Due Process Clause of the United States Constitution, and has denied to the Petitioner his right to present his defense.

In the case of Chambers V. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038, (1973), the United States Supreme Court stated as follows:

"..The right of an accused in a criminal Trial to Due Process is, in essence, the right to a fair opportunity to defend against the

State's accusations. The rights to confront and to cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to Due Process of Law".

It is based upon the fact that the Court refused to allow an in camera hearing to allow the testimony to be heard, (whether or not under seal), that the Petitioner has been denied his rights under the Sixth Amendment to the United States Constitution to present a defense.

Furthermore, because the Court stated that counsel was not ineffective for not requesting the "in camera" hearing, when the Court itself does not know what would have been learned at such a hearing, that the Court also erred in dismissing the Petition for Post Conviction Relief. (Successive Petition).

The District Court may not place an opinion into the record, and dismiss the Petition for Post Conviction Relief, stating that counsel was not ineffective for seeking such a hearing, when the Court simply does not know what the witness at the hearing would have testified to. In doing this action, the District Court has abused its' discretion. It has clearly placed itself into a position of defense counsel. The Court did not question defense Counsel as to why he did, or did not perform any individual action.

The District Court may not place into an opinion, and use that opinion to dismiss this case, as to whether or not appellate Counsel was ineffective for not litigating a claim of ineffective assistance of Counsel during Trial, on direct appeal, when the Court has no evidence of any type before it that shows why such a claim was not litigated.

This is nothing more or less than the Court "vouching" for the different attorneys in this case. The Court is simply stating that a criminal defendant in the State of Idaho does not EVER have the right to litigate claims of appellate

counsel being ineffective for not litigating claims of ineffective assistance of Trial Counsel during the direct appeal process.

What the Court is actually stating is that in Idaho, in the direct appeal process, the Office of the state Appellate Defender will not raise claims of Trial Counsel being Ineffective.

This means that these claims, (Of trial counsel being ineffective), MUST be raised in a Petition for Post Conviction Relief, where the District Court in this case has ruled, "...there is not right to the effective assistance of counsel in Post Conviction Petitions".

What this comes down to is this. In the State of Idaho, a criminal appeal is "Bi-furcated" into two parts. In one part are the claim that the Offie of the State Appellate Defender will raise. In the second part are the more serious claims of ineffective assistance of Counsel during Trail. These claims must be presented in the Post Conviction Process, where there is no right to counsel.

This means that the right to have the assistance of Counsel in the first direct appeal, in the criminal case, has been denied to the Petitioner. He has not been provided with the right to have the assistance of counsel during the Direct Appeal process to raise claims of ineffective assistance of Counsel during the Trial Court process.

This factual scenario has been presented to the United States District Court in several case, namely, CV-06-00240-LMB, in a pleading filed by the Idaho State Attorney General, on January 9th, 2014, whereas the State Attorney general's Office stated as follows:

"...ineffective assistance of counsel claims can be raised during Post Conviction proceedings, and in Idaho Post Conviction Petitioners have a Statutory right to the effective assistance of Counsel during Post Conviction Proceedings".

This is in direct contradiction as to what the District Court Ordered in this case, and it would seem that one of the two cases needs to be corrected.

Under the Idaho Code, Section 19-852, it is clear that there is a statutory right to the appointment of counsel during Post Conviction Proceedings.

Because the Court, in this case, ordered there was no such right, it is clear that there has been an abuse of discretion.

Because of the procedural format in the State of Idaho, (That the office of the State Appellate Defender will not raise claims of ineffective assistance of trial counsel), during the direct appeal, criminal defendants are not being allowed to have the right to have the effective assistance of counsel during the entire direct appeal process.

During times when counsel should be assisting the Petitioner, such as during the entire direct appeal process, including claims of ineffective assistance of Trial counsel, the Petitioner was denied this right. This violates the holding Evitts V. Lucy, 469 U.S. 392, 83 L.Ed. 2d 821, 105 S.Ct. 830, (1985), where the United States Supreme Court clearly held that the right to the effective assistance of Counsel must be given to all individuals equally, the same as those who can afford to hire such an attorney to represent him during an appeal.

In short, Idaho is simply allowing defendants who can afford to hire counsel, the ability to have claims of ineffective assistance of Counsel during Trial, to be presented on direct appeal, but if you can not afford counsel, and have the Office of the State Appellate Defender appointed because of your poverty, then any claims of ineffective assistance of counsel during trial will not be brought forward on direct appeal. Instead, because of being poor, these claims will have to be brought before the Court without the assistance of counsel, and if you are incarcerated in the Idaho State department of Corrections, then without any

type of case authority, and without any ability to conduct either general or specific research into issues. (This is not allowed per the Policy of the Idaho State Department of Corrections).

This is the procedural nightmare that the Petitioner in this case has been up against. He has been denied his right to present a complete defense, because he is poor and could not afford to hire counsel for his Appeal. And, as a result of that poverty, he had to bring his issues of ineffective assistance of Trial Counsel, and ineffective assistance of Appellate Counsel, before the District Court by way of the Uniform Post Conviction Act where the District Court simply denied to the Petitioner any form of relief, and stated, "...you do not have the right to have the assistance of counsel to assist you in Post Conviction proceedings,....", so... it is this action that has denied to the Petitioner Due Process of Law under the Constitution of the United States, Amendment Six.

It violates the fundamental principles of Due Process of law for the State District Court to have ordered the case dismissed, and hold that there was no material issues of fact in dispute, when in fact had counsel been appointed to assist the Petitioner, counsel could have filed the proper argument as to the ineffective assistance of counsel claim that would have shown how, or during what procedure the testimony of Dr. Pilling could have been garnered and given to the Court.

But because there was no counsel given to the Petitioner, he has been denied the ability to effectively present, research, and argue the claims of the Successive Post Conviction Petition, and coupled with the fact that he was denied the ability to bring forward these claims during the direct appeal process, the Petitioner has been harmed. He has been denied the right to have a full and fair appellate process, with the assistance of counsel to help him.

CONCLUSION

Therefore, appellant respectfully requests that this court [what court should do].

I am requesting that this Court find that the District Court erred when it dismissed the Petition for Post Conviction Relief; that I was entitled to have the assistance of Counsel during that process, and that I should have had the assistance of counsel to bring claims in the direct appeal process, as to any type of claim regarding the effectiveness of Trial Counsel.

Furthermore, it is a denial of Due Process of Law for the State of Idaho to have all claims of Trial Counsel's ineffectiveness be brought in a Post Conviction Petition, and then deny to the Petitioner the right to have Counsel to assist him in litigating these claims.

Based upon the facts of this case, it is clear that the Petitioner has been denied the right to present a defense under the Sixth Amendment to the United States Constitution, and this case should be remanded.

Respectfully submitted this 24 day of FEBRUARY, 2015.

Andy Gallegos
Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 24 day of FEBURARY, 2015, I mailed a true and correct copy of the APPELLANT'S BRIEF via prison mail system for processing to the United States mail system, postage prepaid, addressed to:

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