9-8-2008

Eby v. State Appellant's Brief Dckt. 36568

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL LEE EBY,

Petitioner/Appellant,

vs.

STATE OF IDAHO,

Respondent/Respondent.

S. Ct. No. 34179

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE JOHN PATRICK LUSTER
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the denial of a motion to set aside an order dismissing a petition for post-conviction relief. Clerk's Record (CR) 163.

B. Procedural History and Statement of Facts.

On January 31, 2002, Appellant Daniel Eby filed a pro se petition for post-conviction relief after a direct appeal resulted in a grant of partial relief. CR 14, *State v. Eby,* 136 Idaho 534, 536, 37 P.3d 625, 627 (2001).

Daniel had been convicted of first degree murder, conspiracy to commit robbery and attempted robbery for offenses occurring when he was 18 years old. In the direct appeal, the Court of Appeals held that his statement to the police, "I've got an attorney" did not invoke his right to counsel so as to require termination of his interrogation, that the admission of hearsay statements by a co-defendant who did not testify at trial was error, but that the error was harmless, that a threats and menaces jury instruction was not warranted, and that the conviction for attempted robbery merged with the conviction for felony murder. *Id.*

Daniel raised two issues in his pro se petition: 1) that he had received ineffective assistance of counsel; and 2) that the prosecutor and/or state had withheld favorable information from the defense. CR 15.

Daniel filed a motion for appointment of counsel concurrently with his petition. CR 28. And, on the same day, the District Court appointed the Kootenai County Public Defender to the case. CR 31.

The state filed its answer to the pro se petition asserting that it failed to state a claim upon

which relief can be granted. CR 35. And, four days later, on February 11, 2002, a notice of substitution of counsel was filed giving notice that the case had now been assigned to conflict counsel Jeffery Smith. CR 37.

On June 27, 2002, Daniel wrote to the District Court stating that Smith had only spoken with him once and would not accept his phone calls or answer his letters. Daniel said that he still had not been informed as to whether a court date had been set on his petition and he wondered if there was a motion or "any type of paper" he could file to get an attorney to actually help him and keep him informed of the status of the case. He also asked the Court to please let him know if a court date had been set or if anything else had happened in the case. Ex. Letter dated 6/27/02.[1]

In response the Court wrote back saying that it understood that new counsel was being assigned and that the judge would review the case in another 30 days to be sure that Daniel's concerns were being addressed. Ex. Letter dated 7/12/02.[2]

On August 12, 2002, six months after Smith had been appointed, the District Court issued its first Notice of Proposed Dismissal pursuant to Idaho Civil Rule of Procedure 40(c) giving Daniel until August 29, 2002, to file a written affidavit setting forth facts to justify retention of the case. A handwritten note on the bottom of the notice says that per John Adams, new counsel was to be forthcoming and that the case would not be dismissed. CR 39.

On September 1, 2002, Daniel again wrote to the Court saying that he still had not heard

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[1] A packet entitled "Exhibits Letters between Plaintiff and Judge Luster & Public Defender" is included in the record on appeal. Because the packet contains no page numbers, the letters will be cited here by date.

[2] Later, the District Court stated, ". . . Mr. Smith basically didn't do anything in the case, and I think he had some problems with the Bar Association." Tr. 19.

if he had been appointed new counsel and was wondering what was happening in the case. Ex. Letter 9/1/02. On September 10, 2002, the Court wrote back to Daniel and stated that there had been a delay in his representation but current arrangements were under way to obtain qualified counsel and asked Daniel to contact the Court again in 30 days if he still had not been contacted by counsel. Ex. Letters 9/10/02.

On October 8, 2002, with no notice of appearance by any new counsel having been filed, the state filed its motion for summary judgment. The state's motion simply stated that it sought summary judgment because "Petitioner has not alleged or shown any prejudice and mere allegations are insufficient for proper Post Conviction filing." CR 41.

On October 11, 2002, Daniel wrote to the Court again saying that he still had not been contacted by counsel. Ex. Letters 10/11/02. The Court responded with a letter telling Daniel that Rolf Kehne had been appointed. Ex. Letters 10/28/02. And, on October 21, 2002, Kehne filed a notice of appearance. CR 42.

For the next six months, nothing was filed in the case. Then on April 30, 2003, the Court filed a second notice of a proposed dismissal for inactivity under Civil Rule 40(c) giving Kehne until May 19, 2003, to file an affidavit setting forth specific facts to justify retention of the case. However, this notice was incorrectly addressed and apparently was not delivered to Kehne. CR 46.

On May 27, 2003, a third notice of proposed dismissal under Rule 40(c) was issued giving Kehne until June 16, 2003, to submit an affidavit justifying retention. CR 48. And, this time, on June 16, 2003, Kehne filed a response setting out work he had already done on the case and proposing a timetable for the remaining work including his intent to file an amended petition

by September 15, 2003, and dispositive motions by October 15, 2003. CR 49. Two days later, the Court issued its order retaining the case. CR 59.

On December 11, 2003, Daniel wrote to Kehne:

> Im writing to see what the status of my case is and if any court dates have been set yet.
>
> I was also wondering if (208) 939-2023 is the only number I can try to call you collect at? The reason I'm asking is because I've been trying to reach you at that number for about 4or5 months during business hours with no luck.
>
> Could you please write and let me know how the case is going and if any court dates have been set.
>
> Thank you for your time.

CR 114 (errors in original).

The record contains no indication of any response to this letter.

The dates for action set out in Kehne's prior response to the notice of proposed dismissal came and went with nothing being filed in the District Court. And, on December 15, 2003, three months after the date upon which Kehne had stated he would file an amended petition, the Court issued its fourth notice of proposed dismissal for inactivity. CR 60.

On January 2, 2004, Kehne filed a response and affidavit in which he stated, "Owing to the press of other cases, Petitioner's counsel has not been able to keep the schedule proposed in the June, 2003, RESPONSE." Kehne set out the work he had completed in the prior six months and set out a new proposed timetable which included filing an amended petition on March 15, 2004. CR 62.

Again, the Court retained the case. CR 71.

By July 12, 2004, Kehne still had not filed anything in the case and the District Court

issued its fifth notice of proposed dismissal for inactivity. CR 72. Kehne responded stating, "Petitioner has largely completed his review, investigation, research and analysis of post-conviction issues, and can file an amended petition shortly." He proposed filing the amended petition on October 4, 2004. CR 74.

In the response, Kehne outlined the issues he intended to raise in the amended petition. These included a claim that trial counsel had been operating under a conflict of interest because they worked in the same office as counsel of a co-defendant; a claim of ineffective assistance of counsel at sentencing in failing to properly litigate the relative culpability of Daniel and the co-defendants; and a claim that Daniel was entitled to resentencing as at the time of sentencing, the District Court did not have the Court of Appeals' holding that the co-defendant's hearsay was inadmissible and that the conviction had to be treated as felony murder and not premeditated murder. CR 74.

Again, the Court retained the case. CR 87.

By February 8, 2005, nothing had been filed in the case. Now, seven months after the last order of retention and two years and four months after Kehne entered his notice of appearance, the District Court issued its sixth notice of proposed dismissal for inactivity. CR 89.

Kehne filed a response stating that he had completed the interviews for his investigation and was "ready to file a Petition." All that was needed was for Kehne to take the petition to Daniel so that Daniel could sign it. Kehne stated that the amended petition would be filed on or before March 4, 2005, or he would file another declaration explaining the delay. CR 92.

March 4, 2005, arrived and nothing was filed. And so, on June 14, 2005, the District Court dismissed the case pursuant to the sixth notice of proposed dismissal filed on February 3,

2005. CR 97.

Unfortunately, the order of dismissal was not served on Daniel. Rather, it was faxed to Kehne. CR 97.[3]

It had now been three years and five months since counsel had been appointed to represent Daniel, yet no amended petition or any other substantive pleading had ever been filed.

On August 9, 2005, Daniel wrote to the Court:

> My name is Daniel Lee Eby #56649 I was wondering if you could tell me the Status of my Post-Conviction **CASE No. Cv02-674** And if any kind of court dates or dead lines have been set in regards to my case. thank you for your time and help.

Ex. Letter dated 8/9/05 (errors in original).

That same day, Daniel wrote to Kehne:

> This is Daniel Lee Eby #56540 Im writing in reguards to my post-conviction and if any court dates or dead lines have been set reguarding my Post-Conviction?
>
> As of today's date I haven't been able to get in contact with you I tried to call your office (208) 939-2023 but that number has been disconnected. It gives you a new number. (208) 376 4006 but as of today I have been unable to get in contact with anybody or even an answering machine.
>
> Could you please get in contact with me some how so that I can find out the status of my Post-Conviction. thank you

CR 118 (errors in original).

Upon finally receiving notice that his case had been dismissed, Daniel wrote to the Court:

> On 8-17-2005 I received a letter back from the clerk of the court stating that my Post-Conviction was Dismissed on June-14-2005

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[3] Three years later, on June 27, 2008, Rolf Kehne was suspended from the practice of law for one year with all but 90 days withheld based in part upon his conduct in this case. After the 90 day actual suspension, Kehne will be required to serve a two year probationary period. See Notice of Suspension/Public Censure, The Advocate, August 2008, pg. 9.

Could you please check and see if Mr. Rolf Kehne has filed any kind of motions reguarding this matter, Like an Appeal or Motion for a rehearing?

I have been unable to get in contact with Mr. Kehne for the last couple of months and today is the first time that I find out that my Post-Conviction was Dismissed on 6-14-2005 I don't understand why I never received notice of this from the court house or my Attorney.

Attached is a motion for a rehearing reguarding the Dismissal of my Post-Conviction Case # CV-2002-0674 And a Notice of Appeal reguarding the dismissal of said Post-Conviction. If Mr. Kehne has filed any of these said Motions could I please receive copies of them, If he has already filed these motions already please disreguard the ones I've enclosed. Thank You.

Ex. Letter dated 8/17/05 (errors in original).

Daniel's Notice of Appeal stated:

Notice is hereby given that DANIEL LEE EBY # 56540, Defendant in the above named case, appeals from the order of Dismissal of STATE Post-Conviction.

Ex. Notice of Appeal dated 8/17/05.

Daniel's Notice for rehearing stated:

Notice is hereby given that DANIEL LEE EBY # 56540 , Defendant is the above named case, Asks for a rehearing on the ORDER OF DISMISSAL/RETENTION OF STATE POST-CONVICTION.

Ex. Notice for Rehearing dated 8/17/05 (errors in original).

Even though these documents were sent to the Court along with a certificate of service, they appear as exhibits on appeal and are not file stamped or entered into the Register of Actions. See Record on Appeal.

About two weeks later, on September 1, 2005, Daniel wrote again to the Court:

To: The Honerable Judge John Patrick Luster,

I sent you a couple of motions on 8-17-05 I was informed by another inmate that I've got to send that kid of stuff to the clerk of the court and that I also have to

send a copy of them to the State I was unaware of this, Could you please direguard the Notice of Appeal as I was informed that I need to file that at the end of all this. as of today I placed a copy of the NOTICE for a rehearing on order of Dismissal/Retention State Post-Conviction and a Copy of the AFFIDAVIT in support for the Motion for rehearing in the mail to the attorney general criminal division and a copy of these to the clerk of the court im sorry for all these mistakes I just don't know what im doing when it comes to law.

Is there any way that I could have a phone hearing reguarding this motion and get a hearing date and time so I can have a chance to prepare to the best of my ability with my lack of knowledge in the law.

I thank you for your time.

CR 98 (errors in original).

This letter was followed five days later, on September 6, 2005, with a pro se notice for a rehearing on order of dismissal/retention and brief in support of review. In the brief, Daniel stated that he was unaware of the pending dismissal of the post-conviction. He also set out specific claims of ineffective assistance of trial counsel and destruction of evidence by the investigating detective. At the end of his brief, Daniel asked for relief in the form of 1) assumption of jurisdiction; 2) reversal of the dismissal of the post conviction and remand for further proceedings; 3) grant of an evidentiary hearing; 4) remand for a new trial; 5) appointment of counsel; and 6) all other appropriate relief. CR 99, 108.

Daniel supported his brief with an affidavit. In the affidavit, he stated:

1. Rolf Kehne Never sent me notice that the court was going to dismiss my Post-Conviction for lack of inactivity.

2. If I would of known the court was going to dismiss my Post-Conviction I would have opposed the dismissal.

3. I spoke to Mr. Rolf Kehne around May 2005 and everything was fine with my Post-Conviction.

4. Mr. Rolf Kehne's Conduct has denied me Due Process of law

CR 107 (errors in original).

On September 16, 2005, Daniel wrote to the clerk of the court asking about the status of his motion, brief, and affidavit. CR 110.

Then, on October 3, 2005, Daniel filed a pro se motion for the appointment of new counsel. In the motion, Daniel cites Kehne's failure to communicate with him or work on the case and his own limited competence in representing himself. CR 111. Daniel attached copies of several letters he had sent to Kehne over the years in attempts to communicate with Kehne and to get Kehne to help him. CR 112-119.

On November 17, 2005, the Court appointed new counsel to represent Daniel. CR 120. And, on December 16, 2005, Daniel wrote to the Court asking whether the Court could tell him the name of his new counsel as no one had yet contacted him. Ex. Letter dated 12/16/05.

On January 17, 2006, Daniel wrote again to the Court, again asking if the Court could tell him the name of his counsel because no one had yet contacted him. Ex. Letter dated 1/17/06. And, again, he wrote on February 9, 2006, still having not been contacted by counsel. Daniel closed that letter: "I'm concerned about possibly being penalized for missing a dead line due to the fact I've yet to be contacted by counsel. Are there any dead lines I should be aware of? I Thank You for Your Time." Ex. Letter dated 2/9/06.

Finally, on March 7, 2006, a notice of substitution of counsel was entered by Linda Payne. CR 121. And, on March 15, 2006, Payne wrote to Daniel telling him that she planned to begin work on his case in April and that it would take "many, many hours to read and digest everything that went on in your case." Ex. Letter dated 3/15/06.

On June 6, 2006, Daniel wrote again to the Court stating that he was worried about a letter he had received from Payne and asking if the Court could inform him as to what sort of time deadlines applied to his case. CR 125. In her letter to Daniel, Payne had written:

> . . .
>
> The status of your case is in abeyance. There is no court date. I spoke with Judge Luster about your case approximately a month ago, and (since I have another murder trial upcoming with him) he is not pushing your case to hearing. He is giving me time to work on the current murder case and yours before he sets a hearing.
>
> When I get time I will read your file and give you an analysis. As I previously said, the strongest issue in your case is that your sentence is grossly disproportionate. I seriously doubt that you would get any less than 10 years. We have plenty of time to adequately deal with your case.

CR 126. (Daniel's concerns were quite justified as the status of his case was not "in abeyance" but rather dismissed at this time and as the question of whether a sentence is excessive is not one which can be successfully raised in a post conviction proceeding.)

On June 14, 2006, one year passed since the dismissal of the post-conviction petition and, presumably, Daniel's time to file a successive post-conviction petition expired.[4]

On July 26, 2006, Daniel wrote to Payne about his concerns:

> . . .
>
> You were appointed to my Case over 4 months ago, Personally I feel my Case is being neglected, In your May-24-2006 letter you wrote and told me the status of my case was in Abeyance. I was not very pleased with that letter, My case was dismissed because of Rule 40(c) because of Mr. Kehne's lack of actived on my Case for 6 months.
>
> . . .

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[4] *See Schwartz v. State,* 145 Idaho 186, 190, 177 P.3d 400, 404 (Ct. App. 2008) (successive petition must be filed within a reasonable amount of time).

> Could you please write and tell me what is going on with my Case I feel like I'm being left in the dark and don't have a clue what is going on.
>
> . . .

Ex. Letter dated 7/26/06 (errors in original).

Payne responded by letter on August 15, 2006. She told Daniel that she had reviewed his files and determined that he had no basis for a claim of ineffective assistance of counsel and so had drafted an amended petition for his signature raising only the issue that his sentence was so excessive as to violate the Eighth Amendment. Payne acknowledged some problems with the petition, writing, "Technically, the Amended Petition is untimely; however, because your prior counsel failed to file any amendment, I believe Judge Luster will permit us to amend the petition, albeit late." She closed her letter by promising to contact Daniel when a hearing date was set so that he could appear by telephone. Ex. Letter dated 8/15/06.

In a second letter a few days later, Payne explained why she refused to raise a claim of ineffective assistance of counsel. In the letter, she stated among other things that ". . . you have the burden of showing by clear and convincing evidence that you would have been found not guilty if your lawyer(s) hadn't screwed up. In your case (just like most defendants), you convicted yourself . . ." Ex. Letter dated 8/22/06 (emphasis original).[5] Payne also told Daniel that "[f]or you to prevail on your ineffective assistance claims, you must show how you would have been found not guilty if the favorable evidence from the police or prosecutor would have

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[5] *Contra Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); (To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. Proof by clear and convincing evidence is not required.).

been provided."[6] And, then she instructed the indigent and imprisoned Daniel to investigate his own claims, including a claim that trial counsel had operated under a conflict of interest telling him that he needed among other things "proof that Mr. Adams told your lawyers to do or not do something in your case to cause you to be found guilty." She concluded, "Unless you provide me with facts (not feelings or thoughts or accusations) that indicate there is some merit to your argument, I will not pursue ineffective assistance of counsel claims." *Id.*

That same day, August 22, 2006, Payne filed an amended petition raising only the issue that Daniel's sentence (a fixed term of 25 years for first degree murder and 15 years for conspiracy to commit robbery) was so "grossly disproportionate, cruel and unusual" as to violate the Eighth Amendment. CR 127.

Payne did file Daniel's pro se affidavit with the amended petition. In the affidavit, Daniel stated that it was his understanding that her petition would supplement but not replace his and that he still wanted to raise the issues that the government withheld favorable evidence and that he had received ineffective assistance of trial counsel. CR 129. She also included a second pro se affidavit in which Daniel stated that there was an actual conflict of interest because his counsel and a co-defendant's counsel worked in the same office and that in the preliminary hearing, a state's detective admitted to destroying a drawing and two or three pages of notes and that there

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[6] *Contra Brady v. Maryland*, 373 U.S. 83, 87 (1963) (Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). (A showing of materiality under *Brady* "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

may have been other evidence destroyed. CR 131.

In response to Payne's amended petition, the state filed a notice of objection and denial "based on the fact that this above captioned case has been dismissed per order of the court entered 6-14-05." CR 133.

Payne responded to this by filing a motion for summary disposition and amended notice of hearing. Payne did not mention the dismissed status of the case in her motion, rather, she argued that because Daniel was only an aider and abettor and not the person who actually performed murder, his sentence, which exceeded that of the co-defendants, violated the Eighth Amendment. CR 134.

Throughout this period, Payne wrote several times to Daniel reassuring him that a hearing date was soon to be set or had been set in the case. She never mentioned that the case had long ago been dismissed. Ex. Letters dated 10/10/06, 12/21/06, 1/30/07, 2/16/07, 2/28/07, 3/26/07.

In the meantime, Payne became frustrated with Daniel. On April 3, 2007, she wrote to him:

> I am not required to do everything that you want me to do. I am required to work within the bounds of the law. I am doing so. I will not rehash what I have previously told you because you don't like the answer.
>
> I do not expect you to understand since you cannot understand that you are guilty of murder. You were foolish to take this matter to trial to begin with because you let the judge hear all of the evidence. A man was beaten to death with a baseball bat by your cohorts, and you did nothing to stop it. In fact, you lured people away and kept them away so the robbery could be committed. This was a horrific crime. You helped hide the body. It is not my fault you were convicted of murder, nor is it my fault that you were given 25 years fixed. Thank your lucky stars you didn't get life without parole.
>
> The ONLY possible issue you have relates to the fixed portion of your sentence. Quite frankly, even if your fixed portion were to be reduced, you wouldn't make

> parole because you refuse to take responsibility for your actions. Grow up and stop whining.
>
> I'm moving to withdraw from your case. You will receive a copy of the motion and notice.

Ex. Letter dated 4/3/07 (emphasis original).

And, on April 9, 2007, Payne filed her motion to withdraw stating that the attorney-client relationship had been irreparably damaged and that Daniel lacked confidence in her so that she could no longer represent him. CR 146.

This same day, inexplicably, Payne apparently finally realized that Daniel's case had long ago been dismissed and decided to file, along with the motion to withdraw, a motion to set aside the dismissal pursuant to Civil Rule 40(c). The motion states:

> . . .
>
> Prior counsel failed to show good cause for retention of this matter pursuant to IRCP 40(c). When counsel is appointed, the party represented has the right to effective assistance of counsel. *Hernandez v. State,* 127 Idaho 685, 905 P.2d 86 (1995). Failure to diligently pursue a claim such that it is dismissed constitutes ineffective assistance of counsel, if the party is prejudiced by the dismissal. *Id.* In this case, Mr. Eby has a viable 8th amendment grossly disproportionate post conviction claim, though Mr. Eby and Ms. Payne disagree on the remainder of the original claims. Dismissal when a viable claim exists constitutes ineffective assistance of counsel.
>
> If this matter remains dismissed, then Mr. Eby will file an ineffective assistance of counsel claim on prior post conviction counsel, and he will likely be appointed counsel to help him on that matter. The 8th amendment claim is a viable one, and it should be heard and decided by the Court. Judicial efficiency and economy constitute good cause and support setting aside the inactivity dismissal.
>
> . . .

CR 148.

Payne never referred to the prior pro se documents Daniel long ago filed in an attempt to

move the Court to reverse its order dismissing the case.

Finally, on April 17, 2007, a hearing was held wherein Payne represented Daniel. Daniel was not present, but participated by telephone. Tr. 2.

The Court elected to hear the motion to set aside the entry of dismissal and the motion for summary disposition prior to Payne's motion to withdraw. Tr. 3.

In her opening statements on the motion, Payne first gave an incorrect recitation of the procedural background of the case stating that there had been just two Rule 40 notices, that Kehne had responded to both, but that the Court had dismissed the case anyway. She then explained to the Court that it was only after she had filed the amended petition that she spoke with the prosecutor who explained to her that the case had long ago been dismissed. She then reiterated her argument that if this case is not reinstated Daniel can filed a new post conviction claiming ineffective assistance on the part of Kehne, and so it would be most efficient to just reinstate this case because there is the viable Eighth Amendment claim. Tr. 4-6.

When the Court questioned Payne regarding its authority to set aside the Rule 40 dismissal, she referred to Rule 60, but made no immediate argument as to what the rule states or how it might apply to the case because she did not have her rule book with her. Tr. 7.

The state argued that the Court was without jurisdiction to reinstate the case pursuant to *Castle v. Hays,* 131 Idaho 373, 957 P.2d 351 (1998). The state asserted that under *Castle,* Daniel was limited to filing either an appeal within 42 days of dismissal or a motion to reconsider within 14 days. Tr. 9.

The state also pointed out that even if Daniel might have a valid claim of ineffective assistance of counsel against Kehne, the time for filing any successive post conviction petition

had long since passed. Tr. 12.

In response, Payne, who had by now secured a copy of Rule 60, pointed out that under Rule 60 she needed to file a motion no later than one year after dismissal, but by her own calculations, she did not do so. "The motion that I filed was way past the one year point, Your Honor, so it seems to me that no matter how you look at it, I didn't file the paperwork timely." Next, Payne stated that since she was appointed in November 2005, she could have filed a timely Rule 60 motion within the first month of her appointment, but she failed to do so. She then offered that *Castle* should not apply to this case because it was a civil case and ". . .this isn't only a civil case, this is a criminal case where my client's liberty and freedom is at issue." Then, apparently ignoring the state's argument that any subsequent post conviction petition would be untimely, Payne argued that if the Court did not reinstate this case, Daniel would have to file an ineffective assistance of counsel on her ". . . and we'll go through this all again, which may be the absolute appropriate way to handle it." Tr. 14-15.

The Court then adjourned for a short recess. When proceedings resumed, Payne finally alerted the Court that Daniel had filed his pro se pleadings seeking reinstatement of the case just a month and a half after the case was dismissed and that her pleadings were "really somewhat duplicative of that motion, and it was timely filed. We are within the six months or within the one year under Rule 60(b)." Tr. 16.

The Court ultimately denied the motion to set aside the entry of dismissal. CR 150. In so doing, the Court reviewed the procedural history of the case. With reference to Daniel's timely pro se motion to set aside the dismissal, the Court stated:

The Court could legally construe that what Mr. Eby filed was a Motion to

Reconsider the court Rule 40(c) dismissal, back on the 16th of September of 2005, based upon the Court's ruling on June 14th of 2005.

Tr. 21.

The Court then held that *Castle* does apply because post-conviction proceedings are governed by the Rules of Civil Procedure and that pursuant to *Castle* relief from a Rule 40(c) dismissal is limited to a motion to reconsider filed within 14 days or a notice of appeal filed within 42 days. Tr. 21-22. With regard to Rule 60(b), the Court stated that it did not know if it was in a position to consider the application under that rule, but that even if it could, it had not received any satisfactory showing to justify setting aside the order of dismissal. Tr. 23.

When Daniel pointed out that he did not get notice of the dismissal of his case until August 19, 2005, the Court said, " . . . I don't dispute that, and I recognize your plight there, but the Rules of Civil Procedure govern the proceeding and my clerk gave notice by fax to [Kehne] . . ." Tr. 25.

This appeal timely followed. CR 154.

III. ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in failing to set aside the order of dismissal?

2. On remand, should new competent counsel be appointed?

IV. ARGUMENT

A. The District Court Erred in Failing to set Aside the Order of Dismissal Pursuant to Daniel's Pro Se Rule 60(b) Motion.

The District Court denied the motion to set aside the order of dismissal because it believed that *Castle v. Hays, supra,* limited the means of seeking relief from a dismissal under IRCP 40(c) to only a motion for reconsideration under IRCP 11(a)(2)(B) filed within 14 days of

the order of dismissal or a notice of appeal filed within 42 days. The Court further found that even if Daniel's pro se motion to set aside the dismissal could be considered as a motion under IRCP 60(b) for relief from a final judgment, that there had not been a satisfactory showing to support a grant of relief.

This determination was erroneous for two reasons. First, *Castle* does not limit relief in this case to only motions under IRCP 11(a)(2)(B) or direct appeal. And, second, Daniel did make a satisfactory showing for a grant of relief under IRCP 60(b).

Castle does not foreclose relief under IRCP 60(b) in this case because *Castle* did not consider the applicability of IRCP 60(b) and does not hold that IRCP 60(b) is without meaning or effect when a case is dismissed under IRCP 40(c).

In *Castle,* the case was dismissed pursuant to IRCP 40(c) and the plaintiff filed a "motion to reinstate" seventy-seven days later. The *Castle* opinion does not set out the reasons offered by plaintiffs to support reinstatement nor does the opinion give any indication as to which civil rule plaintiffs relied upon in making the motion. 131 Idaho at 373-4, 957 P.2d at 352-353. Rather, the opinion states that relief from an IRCP 40(c) dismissal is limited and cites two avenues of relief, a motion to reconsider under IRCP 11(a)(2)(B) and a direct appeal and holds that the motion to reinstate was not timely under either of these rules. The opinion does not state that IRCP 11(a)(2)(B) and direct appeal are the *only* means of relief and the opinion does not state that IRCP 60(b) which governs motions for relief from a final judgment cannot be applied to IRCP 40(c) dismissals. In fact, the opinion does not even mention IRCP 60(b) leaving open only the conclusion that the Court was not considering the application of that rule.

Insofar as the District Court's refusal to set aside the dismissal in this case was premised

on a belief that *Castle* holds that relief from an IRCP 40(c) dismissal is not available under IRCP 60(b), it is erroneous and must be reversed. Daniel's pro se motion was a timely motion for relief from the final order dismissing his case under IRCP 60(b), and as will be discussed below, his motion was supported by sufficient reason and should have been granted. Therefore, he now asks this Court to reverse the District Court order denying him relief and remand the case with instructions to set aside the dismissal and appoint new competent counsel to represent him.

In the alternative, if *Castle* is read to prohibit motions under IRCP 60(b) after a case has been dismissed under IRCP 40(c), then *Castle* conflicts with the civil rules and should be overruled.

IRCP 40(c) provides:

> **(c) Dismissal of Inactive Cases.** In the absence of a showing of good cause for retention, any action, appeal or proceeding, except for guardianships, conservatorships, and probate proceedings, in which no action has been taken or in which the summons has not been issued and served, for a period of six (6) months shall be dismissed. Dismissal pursuant to this rule in the case of appeals shall be with prejudice and as to all other matters such dismissal shall be without prejudice. At least 14 days prior to such dismissal, the clerk shall give notification of the pending dismissal to all attorneys of record, and to any party appearing on that party's own behalf, in the action or proceeding subject to dismissal under this rule.

Dismissal of a case is a final order. *Marshall v. Enns,* 39 Idaho 744, 230 P.46 (1924), *as cited in Castle v. Hays,* 131 Idaho at 374, 957 P.2d at 352.

Rule 60(b) provides:

> **(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, Grounds for Relief From Judgment on Order.** On motion and pursuant to such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in

> time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to: (I) entertain an independent action to relieve a party from a judgment, order or proceeding, or (ii) to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction, and who has failed to appear in said action, or (iii) to set aside a judgment for fraud upon the court.

As the reader can see, Rule 60(b) is not limited by its terms so as to be inapplicable to orders of dismissal under Rule 40(c), and Rule 40(c) does not itself prohibit motions under Rule 60(b). Any such limitation imposed by *Castle* is contrary to the rules as written and is not supported by any other case law.

Indeed; *Castle* includes another obvious error. *Castle* states first that an order of dismissal under Rule 40(c) is a final judgment. Then it states, that a litigant may seek relief from a Rule 40(c) dismissal under IRCP 11(a)(2)(B). However, IRCP 11 (a)(2)(B) applies only to interlocutory orders and orders made after entry of the final judgment, but not to final judgments.

> **(B) Motion for Reconsideration.** A motion for reconsideration of any *interlocutory orders* of the trial court may be made at any time before entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court *made after* entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a),

59(e), 59.1, 60(a), or 60(b).

IRCP 11(a)(2)(B) (emphasis added). This rule, by its own language applies only to interlocutory orders and "any order of the trial court made after entry of final judgment." Thus, it does not apply to final orders dismissing cases.

Castle contradicts the clear language of the rules insofar as it holds that relief from a final order dismissing a case may be obtained via a motion filed under IRCP 11(a)(2)(B) and may not be obtained via a motion filed under IRCP 60(b). This creates a nonsensical situation where litigants and attorneys wishing to contest orders of dismissal must violate the language of not just one, but two rules, IRCP 11 and 60, in order to obtain relief from dismissal. If this Court is inclined to read *Castle* as precluding review of orders of dismissal under Rule 40(c), then *Castle* should now be overruled to avoid the confusing and absurd result of having case law directly contradict the clear language of the civil rules. *See, State v. Bettwieser,* 143 Idaho 482, 586, 149 P.3d 857, 861 (Ct. App. 2006), stating that where the statutory language (in this case, the language of the civil rules) is unambiguous it must be given effect.

In either event, whether this Court holds that *Castle* does not preclude Rule 60(b) motions and remains good law, or whether this Court holds that *Castle* does preclude Rule 60(b) motions and must be overruled, Daniel's pro se motion for relief from dismissal first sent to the trial court on the date he finally received word that his case had been dismissed, and then resent to the clerk of the court less than three weeks later, was timely under Rule 60(b).

In addressing the possibility that a timely Rule 60(b) motion had been made, the District Court stated that, even if *Castle* did not exist and it could consider a Rule 60(b) motion, it had not received a satisfactory showing that it should set aside the dismissal. Even as the Court was

making this statement, it acknowledged that Daniel himself had been blameless in the situation leading to the dismissal of his case:

> The Court: I can certainly pass on Mr. [Kehne's] representation here, that certainly may have been deficient and untimely, but I don't think that sympathy for Mr. Eby's plight really trumps the case holding or application under the Rules of Civil Procedure in this case.
>
> . . .
>
> Daniel Eby: Your Honor, when you're talking about entering an order Notice of Dismissal of my case on August 16th, 2005, it was attached to my brief and I didn't know if it had been dismissed until I got notice from the clerk of your court until August 19th, 2005.
>
> The Court: I made sure to made a record of that, Mr. Eby, and I don't dispute that, and I recognize your plight there, but the Rules of Civil Procedure govern the proceeding, and my clerk gave notice by fax to the attorney [of] record on the day the dismissal was entered, and that was the 14th of June, and that would be the controlling date of the notice.
>
> The fact that your attorney didn't notify you or you didn't get a copy of the proceedings until later, I don't think impacts the application of the rule under the circumstances, because I think it was Mr. [Kehne's] obligation to respond if he felt I should not have dismissed it because he needed to give me some more information, he should have made that application within 14 days or simply filed an appeal after that point, and neither of those things occurred, and I have to run from those dates.
>
> The fact that you didn't [get] notice until later certainly creates some problems for you, but does not change the application for the rules, but I will make sure we made notice of that.

Tr. 23-26.

Earlier, the Court noted that Daniel's first appointed attorney had failed to work on his case, perhaps because the attorney had gotten into trouble with the Bar. Daniel's second attorney allowed the case to be dismissed for inaction through no wrong behavior on Daniel's part. In fact, the state Supreme Court finally suspended Kehne from the practice of law for a year based

upon his action/inaction in this and other cases. And, finally, his third attorney's actions in the case speak for themselves. Payne, who could have filed a timely Rule 60(b) motion or successive post-conviction petition at the time of her appointment, could not even figure out that the case had been dismissed until she had been representing Daniel for 11 months and even then, because she could not figure out the case's status on her own, she had to have the prosecuting attorney explain it to her. She then sent Daniel personally abusive letters which, in addition, contained misinformation about what needed to be proved to establish *Strickland* and *Brady* claims. In short, Daniel had three different appointed attorneys and not one of them managed to meet his or her professional obligations by filing a timely amended petition or other available pleading.

Daniel's post-conviction was dismissed for inactivity only because of the complete failure of appointed counsel to provide competent representation. This is a more than sufficient reason to justify relief from the dismissal. IRCP 60(b)(6). To hold otherwise would be to deny Daniel any sort of due process. Const. Art. I, § 13, U.S. Const. Amend. 5 and 14. "Due process demands an opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Gray v, Netherland,* 518 U.S. 152, 182, 116 S.Ct. 2074, 2090, 135 L.Ed.2d 457, 482 (1996)." *State v. Bettwieser,* 143 Idaho at 588, 149 P.3d at 863. *See also, McGloon v. Gwynn,* 140 Idaho 727, 729, 100 P.3d 621, 623 (2004) ("The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard.").

Daniel's pro se motion for relief from the order dismissing his case was a timely motion under Rule 60(b). Relief should have been granted because, through no fault of his own, Daniel

was denied due process by the repeat failures of appointed counsel to present his case to the District Court in a timely manner. For this reason, he asks this Court to reverse the order dismissing his case and to remand for appointment of new counsel and the filing, at last, of a proper and timely amended petition.

B. Upon Remand, the District Court Should be Ordered to Appoint New Competent Counsel.

Daniel is also requesting that upon remand this Court specifically order that the District Court appoint new competent counsel to represent him. I.C. § 19-4904 authorizes the appointment of counsel to represent indigent post-conviction relief applicants. And, while there is no constitutional right to an attorney in a state post-conviction proceeding so that a petitioner cannot claim ineffective assistance of counsel in such proceedings, *Follinus v. State,* 127 Idaho 894, 902, 908 P.2d 590, 595 (Ct. App. 1995), it seems obvious that the re-appointment of counsel who has been guilty of the gross deficiencies demonstrated by Payne would be a denial of Daniel's right to due process. With Payne in control of his representation, it is impossible to have any confidence that Daniel will be given a meaningful opportunity to be heard. Thus, given Payne's obvious antipathy toward Daniel and her lack of familiarity with basic precepts of constitutional law and post-conviction procedure, different counsel should be appointed upon remand.

IV. CONCLUSION

For the reasons set forth above, Daniel requests that this Court reverse the order denying his motion for relief from the order dismissing his case and further reverse the order dismissing the case. He also requests that this Court order the District Court to appoint new counsel upon

was denied due process by the repeat failures of appointed counsel to present his case to the District Court in a timely manner. For this reason, he asks this Court to reverse the order dismissing his case and to remand for appointment of new counsel and the filing, at last, of a proper and timely amended petition.

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V. CONCLUSION

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remand so that new competent counsel can finally file an amended petition as appropriate.

Respectfully submitted this 5th day of September, 2008.

Dennis Benjamin
Attorney for Daniel Eby

CERTIFICATE OF SERVICE

I, Dennis Benjamin, hereby do certify that on this 8TH day of September, 2008, I deposited in the United States mail, postage prepaid, two true and correct copies of the above brief addressed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

Dennis Benjamin