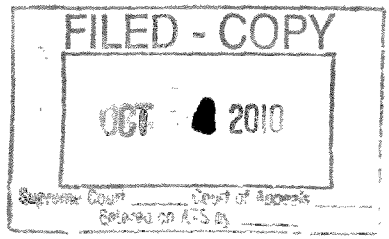
10-4-2010

State v. Flowers Appellant's Reply Brief Dckt. 36036

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	DOCKET NO. 36036
	)	
vs.	)	
	)	
HALTON FLOWERS ,	)	
	)	
Defendant-Appellant.	)	
	)	



SUPPLEMENTAL REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF BANNOCK

The Honorable Peter D. McDermott
District Judge

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ARGUMENT

THE DISTRICT COURT ERRED IN DENYING THE RULE 33 MOTION TO WITHDRAW GUILTY PLEA

The State in its supplemental response brief argues that there is nothing about the Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), nor the adoption of I.C.R. 11(d)(2), which provides any basis for overruling this Court's decision in *Ray v. State*, 133 Idaho 96, 982 P.2d 931 (1999). Actually, both provide a basis.

Most important is the fact that the criminal rule now requires the very thing which *Ray* held was not required, to wit, that the defendant shall be advised of the sex offender registration requirement before pleading guilty to an offense for which registration is required. In short, Appellant asserts for all of the reasons already stated, this Court should now decide in light of *Padilla* and I.C.R. 11(d)(2) that the district court is required to inform the defendant of the sex offender registration requirement in order for his guilty plea to be valid as a matter of due process and/or is a requirement of state law which if violated, entitles a defendant to its withdrawal.

But even if this Court does not agree with the above, it must be remembered that *Ray* was a post conviction case with two holdings. First, it held that the judge's failure to advise the defendant of the sex offender registration requirement did not render his guilty plea involuntary. Second, it held that the defendant did not receive ineffective assistance of counsel when his attorney

also failed to advise him of the sex offender registration requirement because it was a collateral consequence. As to this, *Ray* stated:

> The Sixth Amendment contains no implied duty for an attorney to inform his client of collateral consequences of a guilty plea. *Carter v. State,* 116 Idaho 468, 469, 776 P.2d 830, 831 (Ct.App.1989); *see also* Jones v. State, 118 Idaho 842, 844, 801 P.2d 49, 51 (Ct.App.1990) (holding that failure to inform defendant of the effect an escape conviction would have on a plea agreement was a collateral consequence and did not rise to the constitutional threshold of ineffective assistance of counsel); *Retamoza v. State,* 125 Idaho 792, 796-97, 874 P.2d 603, 607-08 (Ct.App.1994) (holding that counsel's failure to advise a client about the opportunity to request a judicial recommendation against deportation is a matter collateral to the criminal proceeding, to which the Sixth Amendment right to effective assistance of counsel does not extend). Because we hold that sex offender registration is a collateral consequence of a guilty plea, counsel did not render ineffective assistance in not informing Ray, prior to entry of his plea, that he would be required to register as a sex offender.

Id., 133 Idaho at 102, 982 P.2d at 937.

In short, this secondary holding of *Ray* is now abrogated by *Padilla* and the failure of counsel to advise a defendant of the sex offender registration should be a cognizable ineffective assistance of counsel claim.

Significantly, this was the conclusion of a recent Georgia appellate case. While the State quite naturally relies heavily on an immigration advice decision from the Supreme Court of Georgia, *Smith v. State*, __ S.E.2d __, 2010 WL 2557336 (Ga. June 28, 2010), it fails to mention the even more recent decision of the Georgia Court of Appeals which concerns sex offender registration.

In *Taylor v. State*, 304 Ga.App. 878, __ S.E.2d __ (July 8, 2010), the Georgia Court of Appeals held that consideration of the same factors that *Padilla* considered for deportation, results in the conclusion that even if sex offender

registration is a collateral consequence of a guilty plea, the failure to advise a client that his guilty plea will require registration is constitutionally deficient performance.

The Georgia Court of Appeals acknowledged the Georgia Supreme Court's holding in *Smith, supra*, but distinguished it as concerning the failure of a trial court and not counsel, and noted that *Smith* mentioned but did not resolve whether the direct versus indirect consequences distinction should ever be applied in the ineffective assistance of counsel context.

Also unlike *Smith, Taylor* did not mention that requiring advice about sex offender registration in a sex offense case would result in an unrealistic burden of having to determine all of the possible potential important consequences of a plea to a particular defendant. Instead, *Taylor* found that such advice was required under prevailing professional norms and that there was no question that the defendant would be required to register. Our case is the same, Appellant would obviously be required to register given his plea to rape. More importantly, Appellant is not requesting the district court anticipate every possible important consequence, but merely to follow the rule which requires the court to inform the defendant of the sex offender registration requirement where he is pleading guilty to an offense requiring registration.

So to summarize, Appellant asserts that the trial court's failure to advise a defendant of the sex offender registration requirement allows withdrawal of the guilty plea, or in the alternative, counsel's failure to do so is at the very least a cognizable ineffective assistance of counsel claim.

CONCLUSION

For all the reasons stated above and in all of the previous briefing, Mr. Flowers respectfully requests this Court vacate his conviction or reverse the Order denying his Rule 33 motion and remand this matter to the district court for withdrawal of the guilty plea. In the alternative and secondarily, Appellant requests his sentence be vacated and the matter remanded for resentencing before a different judge, or as a further alternative, to reduce his sentence of 15 years with the first 5 years fixed to one which is reasonable under the circumstances.

DATED this 4th day of October, 2010.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2010. I served two true and correct copies of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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( ) U.S. Mail, postage prepaid
(X) Hand Delivered to the Attorney General's mailbox at the Supreme Court

Greg S. Silvey