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Anderson v. State Appellant's Reply Brief Dckt. 43800

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IN THE SUPREME COURT OF THE STATE OF IDAHO

WAYNE D. ANDERSON, II,)	
)	
Plaintiff-Respondent,)	NO. 43800
)	
v.)	CANYON COUNTY NO. CV 2015-3509
)	
STATE OF IDAHO,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

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STATEMENT OF THE CASE

Nature of the Case

On appeal in this post-conviction proceeding, Wayne D. Anderson, II, asserted the district court abused its discretion when it denied his motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend time to prepare an amended petition, because the district court did not recognize his right to self-representation.

In its Respondent's Brief, the State argued Mr. Anderson had not shown the district court abused its discretion when it denied the motions, because he did not show any valid basis for discharging his appointed counsel or further delaying the case. (Resp. Br., pp.5-10.)

This Reply Brief is necessary to address certain of the State's arguments. Contrary to the State's argument that the motions were untimely, Mr. Anderson asserts the motions were timely filed. Further, the State contends any abuse of discretion in denying the motion to dismiss court-appointed counsel was harmless because the district court acted within its discretion in denying the motion to extend time to prepare petition. Despite that argument, Mr. Anderson asserts his substantial rights were prejudiced because he was left unable to exercise his right to self-representation.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Anderson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court abuse its discretion when it denied Mr. Anderson's motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend his time to prepare an amended petition?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Anderson's Motions To Proceed As A Pro Se Litigant, Dismiss Court-Appointed Counsel, And Extend His Time To Prepare An Amended Petition

Mr. Anderson asserts the district court abused its discretion when it denied his motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend his time to prepare an amended petition. The district court did not recognize Mr. Anderson's right to self-representation. Mr. Anderson had a right to proceed pro se. (See *generally* App. Br., pp.9-12.) As a corollary to his right to self-representation, Mr. Anderson had a right to dismiss court-appointed counsel. (See *generally* App. Br., pp.12-14.) The district court abused its discretion when it denied those motions because it did not act consistently with the applicable legal standards.

The district court also abused its discretion when it denied Mr. Anderson's motion to extend his time to prepare an amended petition. (See *generally* App. Br., pp.15-16.) Because Mr. Anderson chose to proceed pro se but was not present at the status conference, he needed a continuance to exercise his right to self-representation, and being left unable to exercise that right meant Mr. Anderson's substantial rights were prejudiced by the denial of the motion.

In the Respondent's Brief, the State argues Mr. Anderson's requests "were untimely," because he did not ask to proceed pro se "until approximately six months after the court granted his motion for appointment of counsel, approximately two and one-half months after the court entered its notice of intent to summarily dismiss the petition, and only after [Mr.] Anderson's appointed counsel requested, and was granted, two extensions of time to respond to the court's notice." (Resp. Br., pp.8-9 (citations

omitted).) The State contends the district court “appropriately considered the late timing of [Mr.] Anderson’s request, and acted within its discretion to prevent further delays.” (Resp. Br., p.9 (citation omitted).)

Contrary to the State’s argument, Mr. Anderson’s motions were timely filed. Mr. Anderson submitted the motions for mailing on October 8, 2015, before the October 10, 2015 deadline set by the district court when it granted post-conviction’s counsel request for a second extension of time to respond to the notice of intent to dismiss. (See R., pp.102-03, 106.) Pursuant to the “mailbox rule,” which provides documents are deemed filed by pro se inmates when the documents are submitted for mailing, the motions were timely filed as of October 8, 2015. See *Munson v. State*, 128 Idaho 639, 643 (1996) (holding “the mailbox rule applies for purposes of *pro se* inmates filing petitions for post-conviction relief”).

Further, considering post-conviction counsel requested both extensions to get “additional time in which to respond to the Court’s Notice of Intent to Dismiss the petition in this matter” (see R., pp.92, 99), Mr. Anderson would have reasonably expected post-conviction counsel to file a response. Thus, even if the October 10, 2015, deadline did not apply, the time for Mr. Anderson to file the motions would not have started to accrue until Mr. Anderson learned post-conviction counsel did not actually intend to file a response to the notice of intent to dismiss. (See *also* Tr., Oct. 19, 2015, p.3, Ls.19-25 (post-conviction counsel informing the district court he had previously advised Mr. Anderson he was not going to file an amended petition, and the witnesses

Mr. Anderson had given him did not change his position).) Under the unique circumstances of this case, Mr. Anderson's motions were timely filed.¹

The State also contends, "even if the district court abused its discretion by failing to permit [Mr.] Anderson to discharge his appointed counsel, such error is harmless because the court, as discussed above, acted well within its discretion in denying [Mr.] Anderson's motion for a continuance." (Resp. Br., p.9.) The State argues, "even if [Mr.] Anderson had the right to discharge his counsel, his post-conviction petition would still have been summarily dismissed after the district court denied the motion to continue the case. Therefore, [Mr.] Anderson cannot demonstrate prejudice." (Resp. Br., p.10.)

Despite the above argument, Mr. Anderson asserts his substantial rights were prejudiced because he was left unable to exercise his right to self-representation. Under the State's argument, the district court abused its discretion by not permitting Mr. Anderson to dismiss court-appointed counsel, but nonetheless properly denied the motion to extend his time to prepare an amended petition (i.e., a motion to allow Mr. Anderson to exercise his right to self-representation after dismissing counsel).

¹ The State additionally argues, "[e]ven in the context of the established constitutional right of self-representation at a criminal trial, a court may consider the timeliness of the request for self-representation in determining whether to grant the request." (Resp. Br., p.8 (citing *State v. Lippert*, 145 Idaho 586, 597 (Ct. App. 2007).)

However, that timeliness standard as articulated by the federal appellate courts generally provides "a demand for self-representation is timely if made before meaningful trial proceedings have begun." *E.g.*, *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986); *accord United States v. Jones*, 938 F.2d 737 (7th Cir. 1991). The United States Court of Appeals for the Second Circuit has held, "[t]he right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial." *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966). Mr. Anderson submits the post-conviction summary disposition stage, as part of the proceedings before a possible evidentiary hearing, is equivalent to the pretrial stage of a criminal case. Thus, even by analogy to the constitutional standard for criminal cases, Mr. Anderson's motions were timely filed.

Further, Mr. Anderson was not present at the status conference where the district court denied the motion to extend time to prepare petition. (R., p.107.) Thus, if the district court abused its discretion when it denied the motion to dismiss court-appointed counsel, the State's argument would mean it was not an abuse of discretion for the district court to deny the motion to extend time to prepare petition even though Mr. Anderson lacked any real representation at the status conference. This Court should reject the State's harmlessness argument because it would create such anomalous situations.

The State has not shown the district court's abuse of discretion in denying the motion to dismiss court-appointed counsel was harmless. The denial of the motion to extend his time to prepare an amended petition meant Mr. Anderson was unable to exercise his right to self-representation and file an amended petition or other response to the notice of intent to dismiss. The surrounding circumstances therefore indicate Mr. Anderson's substantial rights were prejudiced by the denial of his motion to extend time to prepare petition.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Anderson respectfully requests this Court reverse the district court's order and judgment dismissing his post-conviction petition, reverse the district court's order denying his motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend time to prepare an amended petition, and remand the matter to the district court for further proceedings.

DATED this 2nd day of November, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of November, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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INMATE #103343
ISCC
PO BOX 70010
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CHRIS S NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
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BPM/eas