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IN THE SUPREME COURT OF THE STATE OF IDAHO

KIRK JULLIARD GOSCH,)
)
 Petitioner-Appellant,) DOCKET NO. 38791
)
 v.)
)
 STATE OF IDAHO,) APPELLANT'S BRIEF
)
 Respondent.)
 _____)

COPY

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 BENJAMIN R. SIMPSON
District Judge

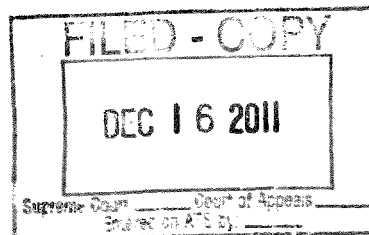
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STATEMENT OF THE CASE

Nature of the Case

Kirk Gosch filed a timely post-conviction petition in which he alleged that he received ineffective assistance of trial counsel because his counsel provided erroneous advice as to the potential consequences of filing a notice of appeal, which led him to abandon his appellate rights. Upon being permitted to amend this petition, he was granted an evidentiary hearing on this claim. At the evidentiary hearing, both Mr. Gosch and the State fully litigated a second theory of ineffective assistance of counsel based upon the evidence adduced at this hearing: that Mr. Gosch received ineffective assistance of trial counsel because he asked his attorney to file an appeal in his underlying criminal case, but no notice of appeal was ever filed. The State did not object to the express presentation of this additional theory at the evidentiary hearing.

The district court litigated this un-pled claim, and held that Mr. Gosch had not established ineffective assistance of counsel because he was agitated at the time he made the request for an appeal and because Mr. Gosch did not subsequently meet with counsel on the issue of an appeal at counsel's request. Mr. Gosch timely appeals from the district court's order dismissing his petition for post-conviction relief and asserts that the district court's ruling in his case is contrary to clearly established legal precedent. Once the defendant requests an appeal following a criminal conviction, trial counsel must file a notice of appeal. Neither trial counsel nor the district court is allowed to evaluate the reasonableness of the defendant's request for an appeal, nor to condition that right on additional consultation. Because the district court applied an incorrect legal standard to uncontroverted evidentiary facts, Mr. Gosch asks that this Court reverse the

district court's order dismissing his post-conviction petition and remand this case with instructions to the trial court to re-enter Mr. Gosch's judgment of conviction in his criminal case so that he may timely appeal from that judgment.

Statement of the Facts and Course of Proceedings

Kirk Gosch filed a post-conviction petition in 2007 timely from his judgment of conviction and sentence for felony possession and manufacturing of a controlled substance charges. (R., p.1.) Within his initial petition, Mr. Gosch alleged that he had received ineffective assistance of counsel, that the State had improperly withheld exculpatory evidence, that the State had breached a contract with Mr. Gosch, and that other due process violations occurred in his case. (R., p.2.) Mr. Gosch attached a statement of facts and an affidavit in support of his petition. (R., pp.5-14.) In his sworn recitation of the facts, Mr. Gosch elaborated on the claims raised in his petition. (R., pp.5-11.)

The State filed an answer to this petition denying various factual allegations made by Mr. Gosch, and asserting as a defense that Mr. Gosch's petition failed to state a claim upon which relief could be granted. (R., pp.15-16.) Mr. Gosch thereafter responded to this answer and asked the district court to grant an evidentiary hearing on his claims. (R., pp.17-18.)

The district court appointed Mr. Gosch counsel to assist him in his post-conviction proceedings. (R., p.21.) Thereafter, counsel filed an amended petition for post-conviction relief upon a stipulation from the parties. (Stipulation to Permit Plaintiff

to File an Amended Petition, filed on April 14, 2008, Augment; ¹ R., pp.22-24.) The sole claim alleged within this petition was ineffective assistance of trial counsel. (R., p.23.)

In the affidavit in support of this amended petition, Mr. Gosch averred that he was acquitted of a cocaine-related charge at trial, but convicted of marijuana related charges, and that his trial counsel had told him not to pursue an appeal on his marijuana conviction because this would permit the State to re-file the charge upon which he was acquitted by a jury. (R., pp.41-42.²) He further stated that, upon questioning his counsel as to this representation, he was informed by trial counsel that counsel had researched this issue and was again told that the law would permit the prosecutor to re-file charges for which he had been factually acquitted by a jury if he appealed his other convictions. (R., pp.41-42.) Mr. Gosch averred that, based upon this erroneous advice, he did not pursue an appeal from his conviction and that he would have appealed his conviction had he not been so advised. (R., pp.41-42.)

In an amended answer, the State again claimed that Mr. Gosch had failed to state a claim upon which relief could be granted. (R., pp.26-27.) The State also moved the district court for summary disposition, claiming that Mr. Gosch had failed to allege a

¹ Numerous documents have been augmented into the record on appeal pursuant to Mr. Gosch's motion to augment that was partially granted by the Idaho Supreme Court. (See Amended Order entered by the Idaho Supreme Court on October 12, 2011.) Because there are multiple documents in this case that are captioned in the same or similar manner, unless the document is contained within the clerk's record on appeal, all such filings are cited to herein in accordance with both the document title and the date of the filing in order to prevent confusion within the record.

² Although Mr. Gosch's affidavit in support of his amended post-conviction petition is reflected in the clerk's record as being filed on September 15, 2009, the record in this case indicates that this same affidavit was filed multiple times with the district court, and was initially filed with the court on March 6, 2008. (See Affidavit in Support of Amended Petition for Post-Conviction Relief, filed with the district court on March 6, 2008; Augment.)

claim upon which relief could be granted. (R., 35.) In its motion in support of summary disposition, the State argued that Mr. Gosch had not provided evidence – outside of his affidavit – to sustain his allegation of ineffective assistance and that his affidavit should be disregarded because it was a “self-serving, subjective statement[.]” (R., p.32.) The State also claimed that Mr. Gosch failed to provide a legal analysis as to either prong of the *Strickland*³ test for ineffective assistance of counsel. (R., pp.32-33.)

Following this motion, the district court provided Mr. Gosch 60 days in which to file an amended post-conviction petition. (R., p.39.) Thereafter, Mr. Gosch filed another amended post-conviction petition. (R., pp.44-47.) As in his earlier petition, he alleged ineffective assistance of trial counsel based upon trial counsel’s erroneous advice, claiming that reliance on this advice led him not to file a notice of appeal. (R., pp.44-47.) However, Mr. Gosch added to his petition a statement of various grounds upon which he asserted that he would have wished to appeal. (R., pp.45-46.)

Following this filing, the district court entered a memorandum opinion, purportedly on the State’s second amended motion for summary disposition.⁴ (R.,

³ See *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴ A review of the register of actions for this case reveals that the State did not file a second amended motion for summary disposition with the district court following Mr. Gosch’s second amended post-conviction petition. (R., p.a.) Additionally, the minutes for the status conference immediately preceding the district court’s order likewise reveals that the State did not make such a motion at this hearing. (Minutes of June 23, 2010 status hearing, Augment.) In fact, the minutes indicate that the State’s position was that the district court needed to set a “trial date” for an evidentiary hearing on Mr. Gosch’s claim. (Minutes of June 23, 2010 status hearing, Augment.) This Court may also wish to note that Mr. Gosch requested a transcript of this hearing, which was denied by the Idaho Supreme Court based upon an objection from the State. (See Amended Order, entered by the Idaho Supreme Court on October 12, 2011.) In light of this, it is unclear why the district court captioned its order as one responding to a second amended motion for summary disposition, as no such motion appears to have been made.

pp.48-53.) In this order, the district court noted that, although not per se required, it would be "helpful" for Mr. Gosch to note any non-frivolous grounds for appeal in support of his allegation of ineffective assistance of trial counsel based upon his counsel providing erroneous advice as to the consequences of filing an appeal. (R., pp.50-51.)

The district court, in this order, also correctly held that it was error for counsel to have provided the advice alleged by Mr. Gosch in his petition. (R., pp.52-53.) However, the district court apparently believed that Mr. Gosch also had to prove non-frivolous grounds for an appeal to meet the prejudice prong of his claim of ineffective assistance of counsel. (R., pp.52-53.) Given this belief, the district court held that a determination as to "whether the petitioner had non-frivolous grounds for appeal must be addressed," prior to the court making any disposition of Mr. Gosch's claim. (R., p.53.) The district court thereafter provided Mr. Gosch leave to file another amended petition in order to show non-frivolous grounds for an appeal from his underlying criminal case. (R., p.53.)

Mr. Gosch then filed a third amended post-conviction petition. (R., pp.55-58.) This petition detailed several grounds upon which Mr. Gosch would have wished to appeal his conviction following his trial, and noted that he had attempted to file an interlocutory appeal on at least one of these grounds in the underlying criminal case. (R., pp.55-58.) He further noted that he had an appeal, as of right, from this conviction under the Idaho appellate rules. (R., p.57.)

Pursuant to the pre-trial order entered by the district court, Mr. Gosch submitted additional exhibits in support of his claims. (R., pp.59-97.) First, Mr. Gosch attached the district court's order from his underlying criminal case in which the court denied his

request for an interlocutory appeal from the court's order denying his motion to suppress and from the order denying his motion to enforce a prior plea agreement between Mr. Gosch and the State. (R., pp.66-69.) Second, Mr. Gosch attached as an exhibit the district court's memorandum opinion denying his motion to suppress from his underlying criminal case. (R., pp.70-79.) Finally, Mr. Gosch provided, as an exhibit, his underlying criminal judgment of conviction and sentence. (R., pp.80-86.) Mr. Gosch also attached the Idaho Court of Appeals case of *Beasley v. State*, 126 Idaho 356 (Ct. App. 1994), as legal support for his post-conviction claim. (R., pp.87-97.)

An evidentiary hearing was held on Mr. Gosch's post-conviction petition. At this hearing, Mr. Gosch testified that, following his conviction, he had wanted his attorney to file an appeal and had informed his trial counsel of his desire to appeal. (Tr., p.10, L.16 – p.12, L.13; p.19, Ls.12-14.) He specifically testified that, immediately following the verdict being read, he turned to his trial counsel and unequivocally stated that he wanted an appeal. (Tr., p.14, Ls.1-9.) Mr. Gosch also presented testimony in which he alleged that his trial counsel had given him erroneous advice regarding the possible result of any appeal – i.e. that his factual acquittal of the cocaine charge could be retried if he succeeded in his appeal. (Tr., p.15, L.7 – p.16, L.16.) During his testimony, Mr. Gosch also noted several of the specific issues that he wanted to appeal in his underlying criminal case. (Tr., p.10, L.19 – p.16, L.16.) On cross-examination, Mr. Gosch admitted that he did not meet or speak to his attorney following his sentencing and that the only time he spoke with his attorney about filing an appeal in his criminal case was immediately following the verdict. (Tr., p.21, L.7 – p.22, L.20.) Mr. Gosch testified that he did not speak to his trial counsel further regarding filing an

appeal in his criminal case because he assumed that his attorney would follow his directive to file an appeal. (Tr., p.25, Ls.6-13.)

Mr. Gosch's testimony that he had asked his trial counsel to file an appeal in his criminal case was fully corroborated by his trial counsel in her testimony at the evidentiary hearing. (Tr., p.35, L.25 – p.36, L.21.) In his counsel's own words, Mr. Gosch had informed her, following the reading of the verdict, that he "wanted to appeal everything." (Tr., p.36, Ls.6-21.) At the time the verdict was read, trial counsel described Mr. Gosch as being shocked and confused. (Tr., p.34, L.24 – p.35, L.1.) Trial counsel testified that she asked Mr. Gosch to come in to her office at a later time to discuss an appeal, but Mr. Gosch did not make an appointment to come in and meet with her. (Tr., p.36, L.6 – p.38, L.15.)

Trial counsel did deny that she had ever told Mr. Gosch that he should not appeal in his criminal case because he could be retried following an appeal on the charge for which he had been acquitted. (Tr., p.40, L.9 – p.41, L.10.) Counsel further testified that she would not give such advice because she did not think it was accurate in light of double jeopardy principles. (Tr., p.40, L.9 – p.41, L.10.)

On cross-examination, trial counsel reiterated that Mr. Gosch had asked her to file an appeal on everything in his criminal case following the jury verdict, and that she failed to do so. (Tr., p.44, Ls.2-19.) She also noted various rulings in the underlying criminal case that may have formed the basis for issues on appeal. (Tr., p.43, L.9 – p.44, L.1.)

Additionally, an investigator who worked with Mr. Gosch's trial counsel also testified that he recalled a discussion, following the verdict, regarding a possible appeal,

although the investigator did not recall the specific substance of any such conversation. (Tr., p.49, L.13 – p.50, L.18.) The investigator denied, however, that Mr. Gosch's trial counsel had told him that he should not file an appeal because he could be re-tried on the cocaine charge. (Tr., p.51, Ls.18-22.)

At the close of evidence, Mr. Gosch clarified that there were actually two issues at stake in his petition with regard to the failure of his trial counsel to file an appeal: first, whether Mr. Gosch had expressed to his counsel that he wanted an appeal and one was not filed and, second, whether an appeal was not filed because trial counsel provided erroneous advice. (Tr., p.55, Ls.17-22.) Mr. Gosch noted as to the first issue that the evidence was uncontroverted that he had asked his counsel to file an appeal in his underlying criminal case and that was not done. (Tr., p.54, L.6 – p.55, L.16.) He further noted that there were evidentiary rulings in his criminal case that gave rise to potential issues on appeal. (Tr., p.54, L.6 – p.55, L.16.) Mr. Gosch argued that both issues provided a basis for the district court to provide the relief requested of re-entering his criminal judgment of conviction and sentence so as to permit him to file an appeal. (Tr., p.56, Ls.2-9.)

The State made no objection to the district court deciding the un-pled issue of whether Mr. Gosch's trial counsel was ineffective for failing to file a notice of appeal upon his request. (Tr., p.57, L.1 – p.60, L.20.) In fact, the State actually litigated this issue at the evidentiary hearing by presenting argument that Mr. Gosch's request for an appeal wasn't binding since he didn't later meet with his trial counsel and that he had not shown prejudice since he hadn't demonstrated that he would have prevailed on appeal regarding the potential appellate issues. (Tr., p.57, L.19 – p.60, L.20.)

The district court also issued a ruling on the record at the evidentiary hearing as to both issues that Mr. Gosch expressly raised through argument at the hearing. As to his assertion that his trial counsel provided erroneous advice regarding the potential consequences of an appeal, the district court made an adverse credibility determination against Mr. Gosch and found that his counsel had not made the statements that he alleged. (Tr., p.65, Ls.6-20.)

Regarding Mr. Gosch's allegation of ineffective assistance of counsel for the failure to file an appeal despite his request, the district court made a factual finding that Mr. Gosch had asked that an appeal be filed immediately following the jury's verdict in his underlying criminal case. (Tr., p.62, L.24 – p.63, L.3.) The court also found that Mr. Gosch appeared to be shocked and confused at that time. (Tr., p.63, Ls.3-5.) Because Mr. Gosch did not "follow up" after making this request, the district court found that his trial counsel was not required to file an appeal. (Tr., p.65, L.21 – p.66, L.16.)

Following this hearing, the district court entered its findings of fact and conclusions of law regarding the claim of ineffective assistance of counsel in Mr. Gosch's post-conviction petition. The court found that Mr. Gosch had asked his attorneys to "appeal everything" immediately following the jury verdict in his underlying criminal case. (R., p.105.) The district court characterized Mr. Gosch's mental disposition at the time of making this statement as one of "stress and confusion." (R., p.105.) Although asked by his attorneys to come back at a different time to discuss whether to appeal, Mr. Gosch – according to the court's findings – did not meet again with his attorneys regarding this issue and his attorneys were unsuccessful in trying to reach him. (R., p.106.) Additionally, while the district court did not include this finding

under the rubric of a factual finding, the court appears to have found that trial counsel did not tell Mr. Gosch that he could be retried on the charges upon which he was acquitted if he filed an appeal from his remaining convictions. (R., p.110.)

Turning to the relevant conclusions of law, the district court distinguished other cases which deemed prejudice to be shown by loss of the right to appeal itself because the court deemed Mr. Gosch's request for an appeal to his trial counsel to be somehow "unclear." (R., pp.107-109.) Additionally, the district court appears to have held that, because trial counsel asked Mr. Gosch to contact her to discuss a potential appeal further, Mr. Gosch somehow forfeited his expressly invoked right to appeal when he did not meet with counsel on this issue following his request. (R., pp.108-109.) Although never expressly articulated by the district court, the court presumably found, based upon these legal conclusions, that Mr. Gosch had not demonstrated deficient performance.

In a separate order, the district court entered a judgment of dismissal in Mr. Gosch's case. (R., p.112.) Mr. Gosch filed a timely notice of appeal from the district court's order dismissing his petition for post-conviction relief following an evidentiary hearing.⁵ (R., p.114.)

⁵ Although the notice of appeal initially lists the order being appealed from as, "the Order Denying Motion to Reconsider Sentence entered in the above entitled matter on May 3, 2011," a review of this notice makes it apparent that the order being appealed from is the district court's order dismissing Mr. Gosch's amended petition for post-conviction relief. (R., pp.114-116.)

ISSUE

Did the district court err when it dismissed Mr. Gosch's petition for post-conviction relief?

ARGUMENT

The District Court Erred When It Dismissed Mr. Gosch's Petition For Post-Conviction Relief

A. Introduction

During the evidentiary hearing in this case, both parties litigated the question of whether Mr. Gosch received ineffective assistance of counsel when he told his trial counsel, following the jury verdict in the underlying criminal case, that Mr. Gosch wanted to "appeal everything," but his trial counsel failed to take the necessary steps to file an appeal. At the evidentiary hearing, Mr. Gosch made it clear that this was a separate claim for post-conviction relief before the district court and the State never objected to the presentation of this additional issue. The district court also expressly decided this issue, finding that Mr. Gosch's request could be disregarded by his trial counsel due to the fact that Mr. Gosch appeared "shocked and confused" by the jury verdict and because Mr. Gosch did not attend subsequent meetings with his counsel.

As a preliminary matter, Mr. Gosch asserts that the issue of whether he received ineffective assistance of counsel based upon counsel's failure to file an appeal despite his request for an appeal was tried by consent of the parties, and actually decided by the district court, and therefore is properly before this Court on appellate review.

Regarding the court's disposition on this claim, Mr. Gosch asserts that the district court applied the incorrect legal standards to the undisputed facts in this case – including the factual findings made by the district court. The evidence in this case shows that Mr. Gosch told his trial counsel that he wanted to appeal everything immediately following the jury's verdict in his underlying criminal case, that counsel was

aware of this request, and that trial counsel failed to abide by it. Under the pertinent legal standards, this constitutes ineffective assistance of counsel entitling Mr. Gosch to the sole relief he requested in his post-conviction petition: for the court to re-enter his judgment of conviction so as to permit him to appeal in his underlying criminal case.

B. Standard Of Review And General Legal Standards For Post-Conviction Actions

“An application for post-conviction relief initiates a proceeding that is civil in nature.” *Mata v. State*, 124 Idaho 588, 591 (Ct. App. 1993). As with any other civil litigant, a petitioner in a post-conviction proceeding must establish the factual allegations upon which a claim for relief is based by a preponderance of the evidence. *Id.*

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700 (1999), *citing* I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 67 (Ct. App. 1990). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.* The credibility of the witnesses, relative weight of the evidence, and the inferences to be drawn therefrom are matters solely within the province of the trial court. *Monahan v. State*, 145 Idaho 872, 874 (Ct. App. 2008). However, this Court reviews *de novo* whether the district court correctly applied the pertinent legal standards to the facts as found. *Dunlap v. State*, 141 Idaho 50, 56 (2004).

- C. The District Court Erred When It Dismissed Mr. Gosch's Petition For Post-Conviction Relief Because Mr. Gosch Demonstrated, By Uncontroverted Evidence, That He Received Ineffective Assistance Of Counsel Based Upon Trial Counsel's Failure To File A Notice Of Appeal In His Underlying Criminal Case Despite Mr. Gosch's Unequivocal Request That Counsel Do So
1. The Issue Of Whether Mr. Gosch's Trial Counsel Was Ineffective For Failing To File A Notice Of Appeal In Mr. Gosch's Underlying Criminal Case Was Tried By Consent Of The Parties, Despite Not Being Formally Pled In His Post-Conviction Petitions

Although it does not appear to be raised in his amended petition for post-conviction relief, Mr. Gosch submits that the issue of whether his trial counsel was ineffective for failing to file a notice of appeal despite his request for an appeal was tried by consent of the parties, and is therefore properly before this Court.

An application for post-conviction relief must set forth the grounds upon which the application is based, and the general rule is that all grounds for relief must be pled either in the original, supplemental, or amended application. *Monahan*, 145 Idaho at 875. However, because these actions are civil in nature, petitions for post-conviction relief are also governed by the Idaho Rules of Civil Procedure. *Id.*

Among the rules of procedure applicable in post-conviction proceedings is I.R.C.P. 15(b). *See, e.g., Dunlap*, 141 Idaho at 57. This rule provides in part that, “[w]hen issues not raised by the parties are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” *See* I.R.C.P. 15(b). The purpose of this rule is to allow, “cases to be decided on the merits, rather than upon technical pleading requirements.” *Monahan*, 145 Idaho at 875. Given this, in some cases, there may be trial by consent of an issue that was not formally pled.

The district court has discretion to determine whether the parties have consented to the trial of the un-pled issue. *Monahan*, 145 Idaho at 875. Implied consent is not established merely because evidence relevant to an un-pled issue was introduced without objection. *Id.* Rather, it must appear that the parties understood the evidence to be aimed at the issue omitted from the pleadings. *Id.*

Evidence militating against a finding of trial by consent includes a showing under the record that the opposing party objected to the litigation of the un-pled issue or the district court rules that the issue could not be raised. *Id.* at 875-877. “[W]hen a theory is fully tried by the parties, I.R.C.P 15(b) allows the court to base its decision on a theory not pleaded and ‘deem the pleadings amended accordingly[.]’” *Dunlap*, 141 Idaho at 57 (quoting *Paterson v. State*, 128 Idaho 494, 502 (1996)).

Here, the issue of whether Mr. Gosch’s trial counsel was ineffective for failing to file a notice of appeal was fully, expressly, and independently litigated by all of the parties in this case, and was separately adjudicated by the district court. Mr. Gosch made clear that, based upon the evidence adduced at the evidentiary hearing, this was a separate issue upon which he was basing his claim for post-conviction relief. (Tr., p.55, L.17 – p.56, L.9.) Evidence was presented regarding this issue, and Mr. Gosch argued the merits of this claim at the evidentiary hearing. (See Tr., *generally.*) Counsel for the State did not object to the court’s consideration of this issue; and, in fact, the State argued the merits of this issue at the evidentiary hearing as well. (Tr., p.57, L.19 – p.60, L.20.) Therefore, this theory was fully tried by the parties.

And this issue was actually decided by the district court as well. In fact, the issue of whether Mr. Gosch’s trial counsel was ineffective for failing to file a notice of appeal

as requested by Mr. Gosch formed almost the entirety of the district court's findings of fact and conclusions of law in support of the judgment of dismissal in this case. (R., pp.105-110.) Under the pertinent legal standards for trial by consent of un-pled issues under I.R.C.P. 15(b), Mr. Gosch's claim of ineffective assistance of counsel based upon the failure of trial counsel to file his requested notice of appeal was properly decided by the district court and is properly before this Court on appeal.

2. Mr. Gosch Established Ineffective Assistance Of His Trial Counsel In Failing To File A Notice Of Appeal In His Underlying Criminal Case Despite His Unequivocal Request That Trial Counsel File An Appeal

A claim of ineffective assistance of trial counsel in violation of a petitioner's rights under the Sixth Amendment of the United States Constitution may be properly brought in a petition seeking post-conviction relief. See, e.g., *Beasley v. State*, 126 Idaho 356, 359 (Ct. App. 1994). An assertion of ineffective assistance of counsel is measured by the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* Under this test, the defendant must establish: first, that counsel tendered deficient performance, meaning that counsel's performance fell below an objective standard of reasonableness; and, second, that this deficiency prejudiced the defendant. *Id.* The defendant's right to effective assistance of counsel extends to all critical stages, including a direct appeal. *Id.* at 359-360. The well-established test from *Strickland* applies to claims, "that counsel was constitutionally ineffective for failing to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

"The decision whether to prosecute an appeal rests with the defendant." *Mata*, 124 Idaho at 593. Idaho courts have repeatedly recognized that, "where a criminal defendant advises his attorney of his desire to appeal, and the attorney fails to take the

necessary steps to file an appeal, such a defendant has been denied his constitutional right to the effective assistance of counsel at a critical stage.” *Flores v. State*, 104 Idaho 191, 194-195 (Ct. App. 1983). Additionally, the United States Supreme Court has, “long held that a lawyer who disregards specific instructions to file a notice of appeal acts in a manner that is professionally unreasonable.” *Roe*, 528 U.S. at 477.

Moreover, where trial counsel is presented with a request to file an appeal, and fails to do so, prejudice is also presumed for purposes of a claim of ineffective assistance of trial counsel. *Roe*, 528 U.S. at 483-484; *Beasley*, 126 Idaho at 360-362. In other words, the prejudice prong is satisfied by a showing of the loss of the opportunity to appeal itself – no additional showing of prejudice, such as the probability of success on appeal, is required. See, e.g., *Hernandez v. State*, 127 Idaho 690, 691 (Ct. App. 1995); *Beasley*, 126 Idaho at 362; *Mata*, 124 Idaho at 593; *Ricca v. State*, 124 Idaho 894, 898 (Ct. App. 1993).

The district court grafted additional requirements onto these standards - requiring that the defendant assure his counsel that he really, truly does want an appeal or permitting defense counsel to condition the filing of an appeal on the defendant attending additional meetings with counsel despite the client’s assertion of his right to an appeal. (R., pp.106-110.) However, these additional requirements are without support in the case law.

As a preliminary matter, the district court’s reliance on *Sanders v. State*⁶ to support its disposition is misplaced. The court highlighted and looked entirely to one sentence in *Sanders* – which did not come from the Court of Appeals as part of its

⁶ *Sanders v. State*, 117 Idaho 939 (Ct. App. 1990).

actual ruling but was rather a block quote of the underlying ruling that was challenged on appeal – that indicated that counsel cannot be held ineffective for failing to follow a request for an appeal that was not, “fully and fairly communicated.” (R., p.108.) See also *Sanders*, 117 Idaho at 940-941. The district court’s reliance on this case was erroneous for three reasons. First, as was noted, the block quote cited to by the district court in this case was from the ruling being challenged on appeal in *Sanders*, and was **not** part of the Court of Appeals’ holding. *Sanders*, 117 Idaho at 940-941.

Second, to the extent that the district court’s conclusions were relevant to the holding in *Sanders*, the district court in this case failed to look to the context in which the highlighted statement from *Sanders* was made. The trial court’s ruling in *Sanders* was not made in the context of an expressed desire for an appeal that was heard by trial counsel, but was thereafter second-guessed and disregarded. Instead, the trial court’s ruling in *Sanders* was based upon the factual finding by that court that, if the defendant had made any request for an appeal, **it was not audible or otherwise heard by trial counsel**. *Sanders*, 117 Idaho at 941. Thus, even the trial court’s rationale in *Sanders* would not extend to the case where trial counsel was fully aware that the request for an appeal was made, but where counsel did not follow through with this request.

Finally, the *Sanders* opinion is predicated on evidence that is the opposite of that presented in this case. The *Sanders* court’s ruling was limited solely to the factual question of whether the evidence showed that the petitioner had communicated to his attorney the desire to pursue his appeal. *Sanders*, 117 Idaho at 940. The evidence presented in the *Sanders* case showed that the petitioner’s trial counsel **denied** any recollection that he had been told to file an appeal by the petitioner, and there was

further evidence adduced that tended to corroborate that no request for an appeal was made. *Id.* The actual holding in *Sanders* is that there was sufficient evidence to support the trial court's finding that the petitioner had never communicated his desire to appeal to his attorney. *Id.* at 941.

Here, in contrast, the evidence is entirely undisputed that: (1) Mr. Gosch told his trial counsel, following the jury verdict, to "appeal everything"; (2) trial counsel was very aware of this request; and (3) trial counsel did not abide by this request and file a notice of appeal.

The proper legal standard governing Mr. Gosch's claim of ineffective assistance of counsel is clear: **"Where a criminal defendant advises his or her attorney of a desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his or her constitutional right to the effective assistance of counsel at a critical stage in the proceedings."** *Beasley*, 126 Idaho at 360 (emphasis added). Moreover, regardless of trial counsel's assessment of the propriety of filing an appeal or the reasonableness of defendant's request, "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe*, 528 U.S. at 477.

Nothing in this standard permits the court or trial counsel to question the propriety of the defendant's request for an appeal, nor does this legal standard allow for trial counsel to condition the filing of an appeal on additional consultation. In fact, the added requirements grafted on to Mr. Gosch's claim by the trial court are contrary to the law in that they contravene the clear legal rule that the "decision whether to prosecute

an appeal rests with the defendant.” *Mata*, 124 Idaho at 593; *see also Roe*, 528 U.S. at 479. To require that a defendant first convince his attorney of the genuineness of his or her request for an appeal, or to require a defendant to meet a mandatory consultation schedule - despite a prior unequivocal request for an appeal - before the appeal will be filed, contravenes this clear rule.

The evidence in this case on this issue is straight-forward and without any dispute. Mr. Gosch and his trial counsel both agree that he informed trial counsel in unequivocal terms following the jury verdict that Mr. Gosch wanted to appeal everything in his criminal case. (Tr., p.12, Ls.9-13; p.14, Ls.1-9; p.19, Ls.12-14; p.22, Ls.6-11; p.35, L.25 – p.36, L.21; p.37, Ls.2-5; p.44, Ls.2-7.) It is equally undisputed that counsel failed to do so. (Tr., p.44, Ls.18-19.) The district court also entered findings of fact consistent with this evidence – i.e. that Mr. Gosch had told his trial counsel to “appeal everything” following the jury verdict in his case. (R., pp.105-106.) Under these circumstances, Mr. Gosch has established the constitutional ineffectiveness of his trial counsel in failing to abide by his expressed desire to appeal from his criminal conviction.

Additionally, the additional pre-conditions applied by the district court to the right to an appeal would disregard clear dictates from the U.S. Supreme Court regarding the necessity of following the defendant’s stated desire for an appeal. The *Roe* Court noted that “a defendant who instructs his counsel to file a requested appeal reasonably relies upon counsel to file the necessary notice.” *Roe*, 528 U.S. at 477. This rationale mirrors exactly the testimony provided by Mr. Gosch as to why he did not reiterate multiple times his initial request for an appeal. As Mr. Gosch explained, when asked if he had contacted his trial counsel on a subsequent occasion to request an appeal:

I never contacted her, because I assumed she was filing my appeal. I didn't feel that it was my responsibility to contact her once I already contacted her prior to this and I already told her verbally and face to face that I wanted her to file my appeal. I figured it was already taken care of.

(Tr., p.25, Ls.8-13) (emphasis added).

Mr. Gosch was entitled to the assurance that, upon informing his trial counsel that he wanted an appeal, his wishes would be followed. And, as has been noted, the U.S. Supreme Court has already held that such reliance is inherently reasonable in light of counsel's obligation to comply with such a request. *Roe*, 528 U.S. at 477.

Additionally, to the extent that the district court's ruling in this case permits trial counsel and the courts to second-guess a defendant's unequivocal request to file a notice of appeal, this also contravenes U.S. Supreme Court case law. "Counsel's failure to [file a requested appeal] **cannot be considered a strategic decision**; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Roe*, 528 U.S. at 477.

Under the applicable legal standards for an assertion of ineffective assistance of trial counsel for the failure to file an appeal despite a request from the defendant to do so, Mr. Gosch had established the ineffective assistance of his trial counsel as to this claim. Accordingly, the district court erred when the court dismissed his post-conviction petition and failed to vacate and re-enter Mr. Gosch's underlying criminal judgment of conviction and sentence so as to permit him to file an appeal. *C.F. Flores*, 104 Idaho at 195.

CONCLUSION

Mr. Gosch respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief and remand this case with instructions for the district court to vacate and re-enter Mr. Gosch's judgment of conviction in his underlying criminal case so as to permit him to file a notice of appeal.

DATED this 16th day of December, 2011.

A handwritten signature in black ink, appearing to read 'S. E. Tompkins', written over a horizontal line.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of December, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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